

Submissions on Civil Liability Reform

The Independent Contractors and Businesses Association of British Columbia
and
The British Columbia Construction Association

October 2002

Introduction:

The following submissions are made on behalf of the British Columbia Construction Association and the Independent Contractors and Businesses Association of British Columbia.

The BCCA represents approximately 1700 companies, including general contractors, manufacturers, suppliers and allied services, who are primarily involved in the institutional, commercial and industrial construction sectors.

The ICBA represents approximately 600 companies in the open shop construction industry. Member companies of the ICBA employ several thousand workers in all trades and capacities.

Executive Summary:

The specific recommendations of the ICBA and BCCA are as follows:

I. Limitation Period:

1. The Ultimate Limitation Period should be reduced to 10 years.

2. The Ultimate Limitation Period should begin to run when the breach of duty, breach of contract or events giving rise to the cause of action occur, rather than when the right to bring the action arises or accrues.
3. The Limitation Act should clearly allow defendants who have been sued before the end of the Ultimate Limitation Period to join other parties to the action.
4. No actions for damages to persons or property should be excluded from the Ultimate Limitation Period.

II. Joint and Several Liability

In actions arising out of a contractual or commercial relationship, defendants should be subject only to several liability unless they expressly contract to accept joint liability. We recommend, in particular, that:

- a. joint liability should not be imposed when defendants have a contract with the plaintiff which relates to the subject matter of the plaintiff's claim; and
- b. even when defendants have no contract with the plaintiff, joint liability should not be imposed if the defendants have a commercial relationship with the plaintiff or liability arises out of contracts between the defendants and third parties who in turn who have contracts with the plaintiff which relate to the subject matter of the plaintiff's claim.

III. Class Actions

No change should be made to the class action cost rules.

IV. Vicarious Liability for Intentional Torts

The ICBA and BCCA endorse the recommendations made by the Coalition of British Columbia Business in their October 2002 submissions to the Ministry of Attorney General of British Columbia.

V. Delegations of Statutory Duty

The doctrine of non-delegable duty as it applies to the Crown should not be reformed.

The public has a reasonable expectation that the government will assume liability for the proper performance of its responsibilities. The government can offset its liability in this area by requiring parties delegated responsibilities to provide an indemnity for the work performed on its behalf.

VI. Structured Damages

Legislation should be adopted to give the courts the power to impose structured damage awards. The courts should also be given the power to periodically review the structured damage awards imposed.

I. Reforming Limitation Periods

1. *Summary of the ICBA and BCCA Recommendations:*

- a. The Ultimate Limitation Period should be reduced to 10 years.
- b. The Ultimate Limitation Period should begin to run when the breach of duty, breach of contract or events giving rise to the cause of action occur, rather than when the right to bring the action arises or accrues.
- c. The Limitation Act should clearly allow defendants who have been sued before the end of the Ultimate Limitation Period to join other parties to the action.
- d. No actions for damages to persons or property should be excluded from the Ultimate Limitation Period.

2. *What is a Limitation Period?*

A limitation period establishes a time limit for bringing a claim. Once a limitation period has expired, the claim is extinguished, and the plaintiff may no longer sue. Many statutes establish limitation periods for various causes of action, but the most important statute is the *Limitation Act*.¹ It establishes limitation periods of two, six, and ten years depending on the cause of action. It also establishes an ultimate limitation period (“ULP”) of 30 years. The general purpose of limitation periods is to provide finality to legal disputes and to protect potential defendants from having to defend against stale claims.

3. *The Purposes Served in having a Limitation Period:*

Every modern legal system recognizes the importance of allowing a plaintiff to pursue a meritorious claim and secure a just remedy. But an equally important component of a modern legal system is a rule that limits the time in which an action may be brought. Limitation periods

¹ R.S.B.C. 1996, Chapter 266.

advance a number of purposes which are important to defendants and the administration of justice, including:

- a. lending a measure of certainty and finality to potential defendants, who would otherwise remain liable for an unlimited period of time;
- b. preventing ‘stale claims’ from being brought – claims which are difficult to adjudicate because, with the passing of time, documents may have been lost or destroyed, witnesses may have moved, died or become incapacitated, witnesses’ memories may be less reliable and legal principles and standards may have changed;
- c. reducing the expense of maintaining and storing records and documents that might be relevant to a future action;
- d. sparing potential defendants from having to carry liability insurance for an indefinite period of time;
- e. reducing the burden on the judicial system and advancing the interests of justice by reducing the likelihood of cases having to be decided on the basis of incomplete and unreliable evidence.

The three most significant issues regarding limitation periods are: (1) what should be the ultimate limitation period (“ULP”), (2) when should the ULP start to run and (3) to what extent should there be special treatment for specific causes of action?

4. Issues Regarding Limitation Periods

(1) What Should be the Ultimate Limitation Period?

The ULP sets an absolute time limit on bringing a claim. There is an exception to the ULP for causes of action set out in s. 3(4) of the *Limitation Act* that are not subject to any limitation periods. The current ULP is 30 years.

A report published in July of 2002 by the British Columbia Law Institute, entitled “The Ultimate Limitation Period: Updating the Limitation Act,” points out a number of problems with the 30-year ULP. Quite simply, it is extremely difficult to bring or defend an action regarding events that occurred 30 years ago. Witnesses die or cannot be located, memories fade, and records are lost. The British Columbia Law Institute recommends lowering the 30-year ULP to 10 years. Alberta has already done this, and Ontario has instituted a 15-year ULP.

The current upper limitation period of 30 years is not fair or reasonable and should be reduced. It imposes an impossible burden on defendants to maintain records, locate witnesses, and reconstruct events that occurred many years ago. It must also be remembered that the ULP only fixes the date before which an action must be commenced. It is not uncommon for the trial of an action to be held several years after the commencement of the action.

In addition to being unfair to defendants, a 30-year ULP does a disservice to the administration of justice. Justice is not advanced when judges are required to adjudicate civil disputes on the basis of evidence that is now incomplete and unreliable because it involves events which occurred more than 30 years previously.

For the reasons set out in the July, 2002 Report of the British Columbia Law Institute, we support reducing the ultimate limitation period to 10 years. A 10-year upper limitation period is much more manageable for contractors who are trying to assess their potential liability and expenses for completed work and plan for the future.

Reducing the ULP to 10 years does not, however, address all of the problems. It is also important to clearly define the date on which the ULP begins to run.

(2) *When should the ULP should begin to run?*

The general rule is that a limitation period begins to run when the right to bring an action first arises. The time at which an action first arises depends upon the nature of the cause of

action. For example, a cause of action in negligence generally does not arise until actual damage has occurred. A cause of action for breach of contract first arises when the contract is breached.

The commencement of the limitation period is further postponed by specific rules in the *Limitation Act*. For example, time does not run in an action for fraud until the plaintiff becomes fully aware of the fraud. Time does not run in an action by a minor until he or she reaches the age of majority. Most importantly, time does not run in various actions, including damage to property, personal injury and professional negligence, until the plaintiff knows the identity of the defendant and there are facts within the plaintiff's means of knowledge that objectively indicate to the plaintiff that he or she has a cause of action against the defendant. This last type of postponement is known as the principle of "discoverability".

The advantage of postponing the running of time until the plaintiff discovers or ought to have discovered the cause of action is that it protects plaintiffs who reasonably have no knowledge of the potential cause of action, and it eliminates incentives for defendants to conceal negligence. The disadvantage, of course, is that it exposes potential defendants to claims based on events which occurred many years earlier.

The ICBA and BCCA recommend that the ULP should begin to run not when the cause of action accrues or is discoverable but *when the events giving rise to the cause of action occur*.

The Ultimate Limitation Period in British Columbia is currently triggered when the cause of action first arises or accrues, rather than when the breach, or events giving rise to liability occur. We believe that the essential purpose served by an ULP will be undermined if it continues to start when the cause of action accrues.

The date when the cause of action "accrues" cannot be precisely defined, and may involve facts and circumstances known only to the Plaintiff. If there is no clear event which starts the ULP, the expiry of the ULP will be vague and uncertain. It would be better to set the running time of the ULP at a precise time when the breach of duty, breach of contract, or events giving rise to the cause of action occurred.

The start time of the ULP is very important to the construction industry. Buildings are typically in use for many decades and they require regular repair and maintenance.. If buildings are not properly maintained, problems may occur many years after the completion of construction. Under the current ULP, time does not begin to run until the plaintiff experiences problems with the building.. If this start time is continued, defendant contractors would continue to be exposed to litigation for an indefinite period of time even with a 10-year ULP. This would not allow contractors to plan or organize their affairs.

6. *Problems with the Accrual System*

a. *Expense:*

The potential for uncertainty in an ULP that works on an accrual system places an inordinate financial burden on contractors. Records and other evidence have to be maintained for longer periods of time, and the cost of storage can be considerable. Contractors and other members of the industry must also maintain insurance coverage for longer periods, and in most cases, it will be difficult if not impossible to secure coverage several years into retirement. Contractors would therefore be burdened with greater expenses and continue to be liable at a time in their lives when they are at the greatest disadvantage financially.

b. *Defending Stale Actions:*

When a lawsuit is launched long after the event in question, the action is more difficult to defend: crucial evidence may have been lost or destroyed; witnesses are not easily located, and may be incapacitated or deceased; and their memories will be less reliable. Under these circumstances, defendant contractors are at an obvious disadvantage. In a 1986 report on "Limitations," the Alberta Institute of Law Research noted that:

By the time that 10 years have passed after the occurrence of the events on which a claim is based, we believe that the evidence of the true facts will have so deteriorated that it will not be sufficiently complete and reliable to support a fair judicial decision.²

Litigation in the construction industry is often factually complex with the outcome depending upon a precise understanding of the facts.

c. Changes in the law

There is the further difficulty that the court's understanding of the proper legal standard will evolve over time. A previous submission on tort reform in British Columbia noted that:

Where a court does not examine a service until 25 or 30 years after an event, there is every possibility that the court will be applying standards based on wholly different states of knowledge and skill and will not be in a position to make reasonable allowances for the situation which existed at the time the service was originally rendered.

d. Economic Reasons

The risks that contractors bear in an open-ended liability scheme create undue economic burdens for the industry as a whole. To offset risk, contractors have to pay the extra costs of maintaining insurance and records for longer periods of time. These costs are duplicated at various levels of the construction industry. Ultimately, the costs are passed along to clients and customers in the form of higher fees or transaction costs which reduce overall economic activity in the industry.

Under the current 30 year ULP, which begins when the cause of action accrues, a number of contractors are unable to obtain liability insurance at all. If the ULP were lowered, and the commencement date began to run at the date of breach, more contractors, particularly roofing contractors, would be in a position to obtain insurance, which in turn, would ensure that successful plaintiffs would be able to recover any damages awarded.

² At page 157.

e. Complications in Future Litigation

A further detrimental effect of having time begin at the point an action accrues (instead of when the event occurs) is that it can be time consuming and expensive for parties to try to determine precisely when damage actually occurred.

In the construction industry, where a variety of materials are used, this is a crucial issue. Some problems develop slowly and in the absence of a proper repair and maintenance program may go undetected for many years. In these cases, it would be almost impossible to determine precisely when the damage occurred. It is therefore of little use to contractors to speak of a limitation period that begins when damage actually occurs, as opposed to when the work was completed.

f. Trend is to move away from the accrual system

The authors of the British Columbia Law Institute's 2002 Report, cited above, point out that the "modern trend in limitation legislation is to move away from a single accrual rule in defining the running of time." The report notes that a "focal point" of reform has been a setting aside of the accrual rule in cases where damage forms an essential element of the cause of action.

In a number of jurisdictions, throughout the common law world and in Canada, including Alberta and Ontario, the accrual rule has been set aside in favour of the time at which the original breach of duty occurred.

g. Advantages to a run-time that begins with a breach of duty

- i. There would be greater certainty about the precise length of the liability period.
- ii. It would be less expensive to maintain records and insurance for a possible future action and it avoids the cost of litigating to determine the precise point in time when damage 'occurred'.

- iii. Contractors would not be at risk of having to defend ‘stale’ claims – ones for which adequate defense evidence is no longer readily available.

h. Possible disadvantage

A possible disadvantage to abandoning the accrual system would be that some actions could be barred even before the time at which damage occurs. The B.C. Law Institute report, cited above, however, notes that it is widely agreed that the vast majority of actions for damage to property or to persons is brought within 10 years of the date on which a duty was breached.

In other words, the cases in which an action is barred before damage is discoverable will be small in number. We believe the advantages to be gained by the majority of potential defendants clearly outweighs the potential disadvantage to be suffered by a small number of potential plaintiffs.

i. A response to opponents of this view

There are opponents to this position who argue that it is unfair for plaintiffs to bear the cost for negligent actions simply because damage did not occur within the time limit. But this view assumes that plaintiffs should be subject to no risk arising from the conduct of defendants. Such a view is contrary to the very policy underlying limitation acts. At some point meritorious claims must be barred to avoid stale claims and protect unsuspecting defendants. Clearly a solution requires compromises on the part of both plaintiffs and defendants.

There exists an alternative solution for many plaintiffs whose claims would be precluded by the operation of a shorter ULP. Parties in commercial or contractual relationships could contract for extended protection. For example, when owners engage the services of builders, they could negotiate for an extended warranty of the work. If an

owner successfully negotiated a twenty-year assignable warranty, the warranty would continue to be enforceable more than 10 years after the completion of the building even if the ULP was 10 years. This kind of warranty would provide a more equitable and efficient solution. It would allow the parties to assess their respective risks, consider their respective costs, and negotiate a fair price for extending protection for a longer period. Parties in a commercial or contractual relationship should be encouraged to establish their respective rights by agreement.

The argument in favour of maintaining the accrual system of limitation is one that is supported by groups advocating primarily on behalf of future plaintiffs, such as the Trial Lawyers Association of British Columbia in its letter dated September 12, 2002. But the argument we advance is supported in carefully reasoned reports by the British Columbia Law Institute, as well as by other similarly neutral bodies in Alberta, Ontario, England and other common law jurisdictions. We take this to be evidence of the fact that a change in the running time of the ULP (in favour of a limit which begins with the breach of duty) is a more balanced and equitable mandate for reform based on the rights and interests of both potential plaintiffs and defendants.

(3) *Should some actions be excluded from the ULP?*

The current Ultimate Limitation Period does not apply to specific causes of action set out in s. 3(4) of the *Limitation Act*. Most of the causes of action which are exempt from the ULP, involve the current status of a person or the current title or legal interest of a person in property.

For example, an action for possession of land, if the person entitled to possession has been dispossessed as a result of trespass, may be brought at any time. An action for a declaration about the title to property, including both personal and real property, may be brought at any time. A declaration as to personal status can be brought at any time.

The rationale for these exceptions is clear. They do not involve claims for damages. The plaintiffs are seeking only to obtain a declaration from the court of an existing property right or

status. These causes of action are not subject to the Ultimate Limitation Period because they involve a determination of the current rights and interests of parties rather than a claims for damages arising out of events that occurred years ago.

The one exception to this general pattern, is the exclusion of a cause of action based on sexual assault. It is not clear why this cause of action is exempt from the ULP.

We believe that the upper limitation period should apply to all actions other than those involving minors, persons under a disability or involving personal status or rights or interests in property. If some actions are excluded, legislation must be carefully drafted to ensure that the exceptions are of limited scope and carefully defined.

The ULP does affect general contractors and sub-contractors differently. Since an owner contracts only with the general contractor, the general contractor is currently liable in contract for its own faulty work and the faulty work of its sub-contractors. The general contractor can, however, claim over against a sub-contractor for any damages arising from its work.

Any change to the ULP must therefore be carefully drafted to protect the interests of both general contractors and subcontractors. It would not be fair to general contractors if a claim was brought just within the 10-year limitation period, and the general contractor was unable to bring third party proceedings against a sub-contractor because more than 10 years had elapsed.

Section 4 of the *Limitation Act* expressly allows defendants to bring third party proceedings and to join additional defendants after the expiry of the limitation period if the action was commenced before the expiry of the limitation period. The new ULP should continue to be subject to s. 4 of the *Limitation Act* so that the actual wrongdoer may be brought into the proceedings that have already been commenced within the time limit.

II. Joint and Several Liability

1. *Summary of the ICBA and BCCA recommendations:*

In actions arising out of a contractual or commercial relationship defendants should be subject only to several liability unless they expressly contract to accept joint liability. We recommend, in particular, that:

- a. joint liability should not be imposed when defendants have a contract with the plaintiff which relates to the subject matter of the plaintiff's claim; and
- b. even when defendants have no contract with the plaintiff, joint liability should not be imposed if the defendants have a commercial relationship with the plaintiff or liability arises out of contracts between the defendants and third parties who in turn who have contracts with the plaintiff which relate to the subject matter of the plaintiff's claim.

2. *What is Joint and Several Liability?*

Whenever more than one defendant to an action is found liable there is an issue about how to apportion the liability among the defendants.

Under the current law, the two options are "several" liability, and "joint and several" liability. Several liability means that each defendant is liable only to the extent that it was actually responsible for the loss. Joint and several liability means that each defendant is liable to the plaintiff for all the damages, but may recoup any payment beyond its share from the other defendants.

The *Negligence Act* provides that the general rule in cases of negligence is that defendants are joint and severally liable. The exception is where the plaintiff contributed to the loss through his or her own negligence; in that case, liability is divided among the plaintiff and the defendants, and the defendants are only severally liable to the extent they were at fault.

The difference between the two systems is best illustrated with an example. Suppose the plaintiff obtains a judgment against defendant A and defendant B for \$100,000 for damages arising from negligent conduct. A is found 70% at fault and B 30% at fault. Under several liability, B pays only its share of the liability to the plaintiff, which is \$30,000 and A pays its share or \$70,000. Under joint and several liability, the plaintiff could collect all \$100,000 from B, even though it was only 30% at fault. B would then have a right to pursue A for \$70,000.

If both A and B are solvent, and have sufficient assets to pay their share of the damage award, the only difference between several liability and joint and several liability is that in the case of several liability the plaintiff is put to the inconvenience of collecting from each defendant, while under joint and several liability the most financially able defendants typically have to collect from the other defendants.

The situation is very different, however, if one or more of the defendants has insufficient assets to satisfy its share of the liability. In the case of several liability, it is the plaintiff who will bear the loss, because the plaintiff will be unable to recover the share of the damages ordered against the insolvent defendant. In the case of joint and several liability, it will be the solvent defendants who bear the loss because they will have to make up the share of the liability of the insolvent defendant. Returning to the example above, if A has no assets, B's liability continues to be \$30,000 if liability is several. If, however, liability is joint and several, B will ultimately pay the whole of the damage award since it will be unable to recover from A its share of the liability of \$70,000.

As this example shows, both several liability and joint and several liability have potentially unfair results where there is an insolvent defendant, and the choice of a system of liability largely amounts to a choice about who bears the risk of an unfair result: plaintiffs or defendants?

The consultation paper published in April of 2002 by the British Columbia Ministry of Attorney General presents various reform alternatives that have been proposed in Canada, and

adopted in Australia and the United States. The paper invites members of the public making submissions in this area to recommend when joint and several liability should apply.

Broadly speaking, there is a spectrum of possibilities, with pure several liability at one end, and pure joint and several liability at the other. The options in between permit reallocation in the event of a defendant's insolvency, or provide that a defendant is only jointly and severally liable if its fault exceeds a certain percentage. Another possibility is to abolish joint and several liability where the plaintiff's claim arises out of a commercial or contractual relationship or where the claim involves the construction industry (as was done in Australia).

This issue is of great importance to anyone who might become a defendant in a multi-party tort action, which is not uncommon in the construction industry. For example, if a building is defective, the plaintiff will likely pursue every contractor who worked on the project, however small its role. Under joint and several liability, those contractors with assets will potentially be responsible for the entire damage claim.

Although contractors would generally benefit from a change in the legislation from joint and several liability to several liability alone, the interests of both potential plaintiffs and defendants must be balanced. With this in view, the ICBA and the BCCA propose the following legislative changes:

- i) if the defendant has a contractual or commercial relationship with the plaintiff that relates to the principal subject matter of the dispute, the defendant can only be held severally liable.
- ii) if the defendant has no contractual or commercial relationship with the plaintiff relating to the principal subject matter of the dispute, the defendant may be held jointly and severally liable.

3. *Advantages to this approach*

Reform of this nature would serve two purposes. First, in multi-party tort actions, joint liability would be imposed on those defendants in a contractual relationship with the plaintiff who had opportunity in advance to put their minds to the question of whether they should in effect guarantee the payment of a damage award made against another defendant, unless those defendants expressly agreed to provide this guarantee. Second, it lends parties – such as contractors and other construction industry participants – the freedom of specifically negotiating an appropriate form of liability insurance.

Under the current law, all members of the industry are expected to bear an enormous and often unnecessary expense – precisely because the present law on joint and several liability places every contractor and sub-contractor in the role of an insurer to every other party involved in a project. It would be far more efficient, and more equitable, if joint and several liability did not apply in cases with multiple defendants when the plaintiff has a contractual relationship with the defendants, because, in these cases, each party is in a position to expressly negotiate and contract for a guarantee of payment and to obtain the necessary insurance.

Some form of consensual limitation of liability through contract would also spare litigants – both plaintiffs and defendants – the enormous costs of lengthy litigation to determine the precise extent of each party's tortious liability. A good illustration of this point is the British Columbia Supreme Court case of *JJM Construction Ltd. v. Sandspit Harbour Society*.³ The plaintiff, an experienced general contractor, entered into a contract with the defendant, Sandspit Harbour Society, for the construction of a breakwater. The contract price was considerable. The second defendant, Westmar Consultants Inc., was the owner's engineer and had participated in the preparation of the contract documents. Westmar had no contract with the plaintiff. The project was unsuccessful. The plaintiff brought suit. The amount in dispute was approximate \$5,000,000. The action alleged a breach of contract by the owner and negligent misstatement on the part of both the owner and the engineer. After a trial of forty-five days, the action was dismissed on all claims.

³ [2000] B.C.C.A. 76.

The engineer in this case paid legal bills of roughly \$730,000. The property owner's legal bill was \$486,000, and the plaintiff-contractor's legal bill was \$685,000. Madame Justice Southin of the British Columbia Court of Appeal had the following to say about the case:

...it is not only the parties who pay [for the cost of litigation]. I have mentioned the length of these trials [i.e., referring to another, similar case], but much judicial time was expended before they ever reached trial. They were so complicated they had to be managed by a judge.

Judicial stipends, incidental allowances, and ultimately pensions, come out of the Federal Treasury. From the Provincial Treasury comes the cost of the support staff and the maintenance of the physical plant in which the proceedings occur.

Founded not on an analysis of what happened on each day of these two cases, but on experience with trials over more than forty-five years, I estimate that if in these cases the only cause of action open to the plaintiffs had been on their respective contracts, each of these trials might have taken ten days. [...] Whoever the parties were, I should think their respective legal bills would not have exceeded 25% of what they were.⁴

4. *Consistency with the Current Trend Toward Reform*

The concept of consensual liability is consistent with the current trend across the common law world of modifying joint and several liability in commercial or contractual areas. A recent recommendation by the Canadian Senate resulted in new federal legislation that limits the application of joint and several liability in the financial services field for negligence resulting in economic loss.⁵ Legislation in New South Wales sets out limitations on the liability of professionals in situations not involving death or personal injury, breach of trust, or fraud and

⁴ Paragraphs 11-13.

⁵ See the Standing Senate Committee on Banking, Trade and Commerce's report entitled: *Joint and Several Liability and Professional Defendants* (1998).

dishonesty.⁶ Elsewhere in Australia, a number of jurisdictions have adopted legislation abolishing joint and several liability in actions relating to defective building construction.⁷

The general trend, in other words, is to distinguish between negligence causing injury outside of a commercial or contractual relationship and negligence arising in the context of a commercial and contractual relationship. In the former case, it is obviously crucial that the plaintiff's right to be made whole, as far as this is possible through monetary compensation, should take precedence over the equity of holding a single defendant liable for a sum in damages which may exceed that party's proportion of liability. But in cases where damages arise out of a commercial relationship, the plaintiff's right to compensation should not trump a defendant's right not to be burdened with excessive liability.

5. *Disadvantages of this Proposal*

There is a common argument advanced in favour of imposing joint and several liability for damages resulting from negligence. Since each defendant has caused damage to the plaintiff, each defendant should be liable for the full sum. The mere existence of other wrong-doers should not affect the plaintiff's right to recover.⁸

Our response to this argument is that while it makes sense in the context of personal injury it makes very little sense in the context of a contractual or commercial relationship. When parties share a contractual relationship relating to the incident, the plaintiff was in a position to negotiate an acceptable degree of risk at the outset. In other words, the plaintiffs in these circumstances had a full opportunity to negotiate a price for a guarantee that each defendant will pay the damages awards against any other defendant.

⁶ The *Professional Standards Act* (1994).

⁷ See, for example, the New South Wales Law Reform Commission's *Report 89 (1999) Contributions Between Persons Liable for Same Damage*.

⁸ This argument is noted in the New South Wales Law Reform Commission's report cited above, and the American Law Institute's *Restatement of the Law of Torts* (2000).

International Consensus

A number of law reform commissions in the common law world have endorsed the shift to consensual limitations on joint and several liability, including the Australia's Victorian Attorney-General's Law Reform Advisory Council,⁹ and the Common Law Team of the English Law Commission.¹⁰ The notion of moving toward consensual limitations on liability has also been entertained by academics and judges. For instance, one legal commentator has suggested that duties of care owed to third parties can be contained by "non-contractual disclaimers (of which the plaintiff had notice) limiting liability."¹¹ In the case cited above, Madame Justice Southin of the British Columbia Court of Appeal recommended that:

[T]he Legislature ought to enact that architects and engineers owe no duty of care in tort to persons other than their clients, and owners letting contracts for the construction of works owe no duty of care either to the general contractor or the subcontractor. I am speaking only of a duty of care as a foundation for an action of negligent misstatement causing economic loss. [...] It would also be a good thing if the Legislature disposed of the doctrine of concurrent liability in contract and tort.¹²

Conclusion

We believe that where plaintiffs are free to contract for an indemnity or guarantee, they should bear the responsibility of seeking one. If, in a commercial relationship, the risk of joint liability can only arise as a result of an express contractual agreement, parties would be in a better position to choose for themselves whether insurance is necessary and if so at what price. Plaintiffs could protect their interests, and the economics of indemnity and insurance would be much more efficiently managed by the construction industry and other businesses generally.

⁹ See M. Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability*, Victorian Attorney-General's Law Reform Advisory Council, Expert Report 3, 1998, at paragraph 4.1-4.4.

¹⁰ See the Commission's report entitled *Feasibility Investigation of Joint and Several Liability* (Department of Trade and Industry, HMSO, London, 1996) at paragraphs 5.10-5.26.

¹¹ A. Burrows, "Should One Reform Joint and Several Liability?" in N. J. Mullany and A. M. Linden (ed), *Torts Tomorrow: A Tribute to John Fleming* (LBC Information Services, Sydney, 1988) 102 at 117.

¹² See note 3, above.

III. Class Action Law Reform

British Columbia has legislation permitting class actions. The rationale for class actions is to give access to justice to plaintiffs in cases where a powerful defendant has caused a relatively small harm to a large group of plaintiffs. No single plaintiff is likely to have the resources or economic incentive to bring a claim, but if the plaintiffs band together as a class, they can. The disadvantage of class actions is, of course, a larger number of lawsuits with increased exposure of potential defendants.

Under the current rules class action plaintiffs cannot be liable for defendants' costs but defendants can be required to assist the plaintiffs with some of their costs.

The Attorney General of British Columbia has asked for recommendations as to whether reform would be appropriate on the issue of costs against plaintiffs, to protect defendants against unreasonable cost burdens without making class actions inaccessible to plaintiffs.

Recommendations of the ICBA and the BCCA:

This issue is not of great significance to contractors, since they are not usually the subject of class actions. The project-based work of contractors does not lend itself to class action proceedings which requires a common issue between the defendant and all of the plaintiffs.

In general, however, if a representative plaintiff could be liable for the defendant's costs, it would be very difficult to locate a representative plaintiff who would be willing to assume this risk and bring a claim on behalf of the class. There is no evidence of any abuse of the class action legislation in British Columbia, or of frivolous claims being brought. There is therefore no reason to change the cost rules in a way that would necessarily discourage meritorious claims.

IV. Vicarious Liability for Intentional Wrongs

We endorse the recommendations made by the Coalition of British Columbia Business in their October 2002 submissions Ministry of Attorney General of British Columbia.

V. Non-Delegable Duty

Summary of the ICBA and BCCA Recommendation:

The doctrine of non-delegable duty as it applies to the Crown should not be reformed.

What is 'Non-Delegable Duty'?

Governments and private parties often contract with third parties for the performance of some of their legal duties. The doctrine of non-delegable duty prevents a party from shielding itself from liability by transferring or delegating legal duties or obligations to a third party. Under the legal doctrine, the government or private party remains liable for the actions of its delegates.

In some cases, the non-delegable duty principle imposes liability on private parties for the tortious acts of their delegates, usually contractors hired by them. More commonly, the duty imposes liability on government for damages resulting from the negligent performance of statutory duties delegated by government to others. As such, amendments to the principle of non-delegable duty is principally of interest to government rather than to the private sector. To the extent that reforms may shield to government from the acts of its delegates, and in particular its contractors, the ICBA and the BCCA are opposed to any reform.

Why We Opposed Amendment To This Principle

We oppose amendment to this principle because there are important public policy reasons, in addition to good practical reasons, in favour of its preservation.

In two recent cases originating in British Columbia, the Supreme Court of Canada advanced a number of important policy reasons for holding the government liable for a non-delegable statutory duty. We endorse these reasons and draw upon them in support of our position.

*Lewis (Guardian ad litem of) v. British Columbia*¹³ and *Mochinski v. Trendline Industries Ltd.*¹⁴ both concerned highway accidents caused by debris (in one case a fallen bolder, in the other case a large block of ice) that obstructed the highway. The court found that the accidents were caused by the negligence of the company hired by the Ministry of Transportation and Highways to perform highway maintenance.

The Supreme Court of Canada in these cases advanced two policy reasons for holding the government directly liable for the contractor's negligence.

First, the doctrine of non-delegable duty should apply to the government because it would be a reasonable expectation of users of the highways that government had taken reasonable care in the building and maintenance of the highway. As Justice Cory explained:

In my view, the particular vulnerability of the travelling public should be a significant factor in reaching the conclusion that the respondent cannot escape liability for negligent repair work by delegating it to an independent contractor. The vast majority of highway travelers are in no position to assess the extent or nature of the construction and maintenance work which should be done, the competence of those undertaking the work or the financial responsibility of any independent contractor performing the work. Their lack of knowledge and very natural tendency to rely upon the Ministry in these matters indicate the potential vulnerability of highway travelers when maintenance work is done negligently. They should be entitled to rely upon and to look to the [Ministry] as the

¹³ [1997] 3 S.C.R. 1145

¹⁴ [1997] 3 S.C.R. 1176

entity responsible for taking reasonable care in carrying out the repairs and maintenance of the roads.¹⁵

The government also has greater financial resources than any of the contractors to whom it delegates its duties. This raises an issue noted by legal scholar A.S. Atiyah, cited in the judgment: “[legislation] is unlikely to confer powers on bodies which are financially incapable of meeting any liability for negligence, but a local authority or a government department may well employ a small contractor who is incapable of doing so.”¹⁶

The second class of arguments relates to general policy considerations. Often the government will engage several contractors to perform a task – for instance, repairing a long stretch of road. Cory J. asks “why should a person, injured on the road as a result of the negligence of an independent contractor, have to seek out the identity of the contractor responsible in order to bring an action and trust to luck that that contractor is financially responsible?”¹⁷

There is also the fact that the government is often the only party overseeing an entire delegated project. In the case of highway maintenance, this degree of control is a function of the fact that the government is often the *only customer* of the road construction industry. This places the government in the unique position of requiring contractors to accept some form of indemnity for its liability. For Cory J., this presented the best solution to the government’s liability concerns:

The majority of the Court of Appeal expressed the concern that if the Crown is found liable in this case, the result will be to constitute the Crown as an insurer for every failure of maintenance on the highways. This concern cannot be sustained. It cannot be forgotten that before the Crown can be found liable for the actions either of its own employees or of an independent contractor, a court must determine that there has been negligence. In those circumstances, the Crown is certainly not an insurer. Nor is it unreasonable to

¹⁵ Paragraph 33.

¹⁶ *Vicarious Liability in the Law of Torts* (London, Butterworths: 1967) at 358.

expect that the Crown will take appropriate care in the performance of its work and will be responsible for the damages flowing from negligently performed work, whether undertaken by its employees or its contractor. The Crown can always stipulate whatever form of indemnification for negligently performed work that it requires from an independent contractor as a condition of entering into the contract for repair or maintenance. Indeed, the pertinent statutes may always be amended so as to absolve the respondent from any liability in the performance of construction, repairs or maintenance of highways. For all these policy reasons, the Crown should be responsible for the negligent acts of its independent contractors.¹⁸

Conclusion

The reasoning advanced here to support the principle that the government should be liable for faulty road maintenance applies just as effectively to other areas in which the government frequently delegates its responsibilities. Anytime the government is in the position of delegating some task to an independent contractor, it is also in the position to ask for an indemnity for that party's negligent actions. The public can only reasonably expect the government to assume responsibility for the powers and duties we delegate to it. The government's responsibility to fulfill its duties safely and correctly is inextricably tied to those duties. To create a law that shielded government from liability would be to give the government a right to act without the concomitant responsibility to act properly.

¹⁷ Paragraph 35.

¹⁸ Paragraph 37.

VI. Structured Damage Awards

Summary of the ICBA and BCCA Recommendations:

Legislation should be adopted to give the courts the power to impose structured damage awards. The courts should also be given the power to periodically review the structured damage awards imposed.

What are Structured Damage Awards?

When a court finds in favour of an injured plaintiff and awards damages, the damages are paid as a lump sum. The other alternative is a structured damage award, where damages are payable in installments, or as an indefinite amount on an ongoing basis. Such awards permit the compensation to be tailored more precisely to the plaintiff's actual needs, avoid the problems of overcompensation and under-compensation that can result from lump sums, and have tax benefits for plaintiffs. For these reasons, parties to personal injury actions frequently negotiate structured settlements.

Courts, however, do not have the power to award structured damages awards in the absence of the parties' agreement.

Recommendations of ICBA and BCCA:

This issue is of primary significance to those involved in personal injury actions, but could be of some assistance to contractors and other members of the construction industry in some circumstances. Members of the ICBA and the BCCA would, on the whole, benefit if the courts were given the power to impose structured damages awards.

Structured settlements are desirable in themselves because, as one commentator explains, "they enable the plaintiff to recover considerably more than could reasonably be expected from

self-investment of a lump sum; [and] they enable defendants to provide such generous settlements at a cost less than they would pay in lump sum form.”¹⁹ Tax consequences of structured settlements to the plaintiff are also preferable, because while compensation for personal injury or death is not taxable, income from the investment of those sums would be. The same sum invested by the defendant would not be taxable to the plaintiff and, therefore, in an award structured this way the plaintiff and the defendant can share the tax savings.

Structured damages awards also avoid the problem of correctly estimating the life-expectancy of the plaintiff-victim. The defendant is spared the expense of an over-estimate, but also of the cost of introducing evidence at trial on the issue life-expectancy. The plaintiff is spared the concern over whether provision from the award will fall short of his or her actual life-span.

Disadvantages Considered

One drawback to structured settlements is that victims may sometimes need to spend significant unforeseen sums in the early years after their injury, and presumably a lump sum would enable them to cope with this more easily. Another drawback is that a lump sum prudently invested, coupled with a measure of good fortune, can also sometimes “ensure better protection against high rates of inflation than will the most favourably indexed structures available today.”²⁰

These disadvantages can be addressed by giving courts wide discretion in choosing to award structured settlements, and possibly also the power to review them after they have been awarded.

Typical Concerns about Court Ordered Structured Settlements

¹⁹ Bruce Feldthusen, “Mandatory Structured Judgments.” 1988, 1 C.I.L.R. 1.

²⁰ Feldthusen at 6.

Plaintiffs are often opposed to a structured judgment because in many jurisdictions courts will not award a ‘gross-up’ for future care awards. Defendants are reluctant to submit to structured judgments because courts usually value lost earning capacity without taking into account the taxes that victims would have had to pay had they continued to earn money as income. But, clearly, both of these concerns can easily be addressed by providing for them in legislation giving courts the power to make structured settlements.

In recent years the courts have signaled the need for some form of structured damage award. Most poignantly, Justice Dickson, as he then was, in the landmark case on damage awards in personal injury, *Andrews v. Grand & Toy*,²¹ had the following to say:

The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure in time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once and for all award.

The lump sum award presents problems of great importance. It is subject to inflation; it is subject to fluctuation on investment; income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and extensive care and long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in light of the continuing needs of the injured person and the cost of meeting those needs.²²

²¹ [1978] 2 S.C.R. 229.

²² At 260.

We agree with Justice Dickson and believe that legislation should include some mechanism for period review of any court-imposed settlement.

One commentator has addressed the further concern that if the court were given the power to award structured settlements, parties might become less likely to attempt to arrive at a structured settlement. In Leanne Todd's view,

There is no worry that structured judgments would kill off the use of structured settlements, quite the reverse, the loss of control by the parties resulting from litigation in addition to the resulting expenses would encourage parties to settle out of court and use structures were appropriate because even if one party wanted a structure and the case was appropriate for structure, they could force the matter to court and achieve there what they could not in negotiated settlement.²³

Conclusion

The evidence of judges and legal commentators is that reform on this point is long overdue. Legislation giving judges the discretion to award structured settlements would reduce the costs of litigation, it would address a number of financial problems with lump-sum settlements, and it could easily be crafted to accommodate the concern that settlements be reviewable after the fact. The advantages to be gained by change in this area seem to far outweigh the disadvantages.

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²³ "Structured Settlements and Structured Judgments: Do They Work and Do We Want Them?" *The Dalhousie Law Journal* 1989 Vol. 12, 445 at 474.