

CIVIL LIABILITY REVIEW

Response to Ministry of Attorney General

Union of British Columbia Municipalities
Municipal Insurance Association of British Columbia



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INTRODUCTION

This is the submission of the Union of B.C. Municipalities ("UBCM") and the Municipal Insurance Association of BC ("MIABC"). It is made on behalf of all the members of each organization.

UBCM is a non-profit association of all municipalities and regional districts in British Columbia. It has been in operation for 97 years and its membership includes all 182 municipalities and regional districts in British Columbia. Through its members, UBCM represents 100% of B.C. residents on issues of concern to local government.

MIABC was formed in 1988 as a Reciprocal Insurance Exchange within the meaning of the *Financial Institutions Act*. MIABC's membership includes 154 local governments comprising approximately 50% of the population of BC. Its 16-member board of directors is composed of elected and appointed officials from every region of the province.

Both UBCM and MIABC are very concerned with the alarming trend of expanded civil liability, particularly the ever-increasing levels of awards for property damage and related economic loss. Not only are the number, complexity and quantum of these claims increasing at an unacceptable rate, but also the negative impacts these claims are having on the availability of affordable risk management tools, such as insurance, and the financial ability of local governments to continue to provide the range of services they are expected to provide, is now placing an unsustainable burden on B.C.'s population. Without reforms of the nature now being considered this situation will continue to deteriorate with dire consequences for the ability of local government to continue to regulate areas of activity which are in critical need of regulation or to discharge the mandate which has been given to local governments.

UBCM has been proactive in recommending law reform in this area for nearly two decades, ever since the expansion of liability of local governments for a broad range of activities became apparent. In that time frame, UBCM has closely monitored the impact of expanded liability on its membership and is now even more resolved to advocate significant reform.

MIABC is particularly well positioned to assess the impact of expanded civil liability on local governments. MIABC has had 14 years' experience in claims handling for 154 of B.C.'s local governments. In that time they have seen claims for property damage and economic loss increase by more than 1000%, with the upward trend in the past five years being almost 500%. If allowed to continue, this increase in liability for property damage and economic loss claims will make many local governments entirely uninsurable and increase the trend towards withdrawal of local government services which are exposed to this type of claim. This is particularly so in the building regulation area.

The accompanying graphs summarize these trends with respect to liability for economic loss/property damage claims in the building regulation sphere and the attendant cost of defence fees for building regulation claims.



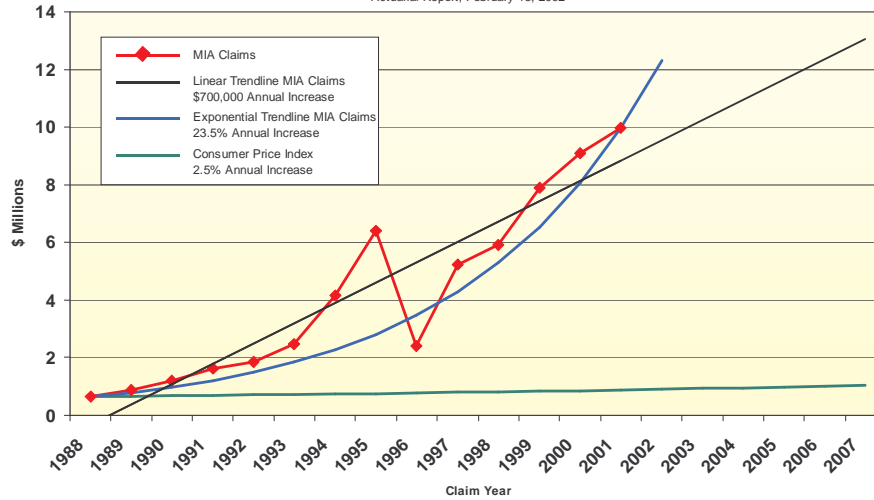
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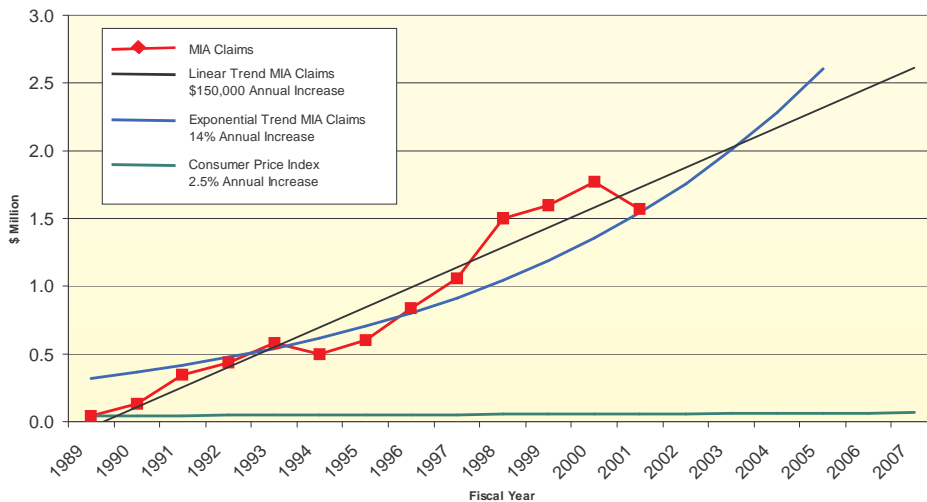
Liability for Economic Loss/Property Damage Building Regulation Claim Costs

Actuarial Report, February 15, 2002



Defence Fees for Building Regulation Claims

MIA Claims Data, December 31, 2001



It is UBCM's and MIABC's submission that of the areas identified by the Attorney General for possible reform, the law pertaining to joint and several liability, non-delegable duty and vicarious liability must be changed and the ultimate limitation period should be markedly reduced. UBCM's and MIABC's analysis and reasoning for these conclusions is outlined below.

EXECUTIVE SUMMARY

In response to the Attorney General's initiative for reform of the law pertaining to civil liability, the Union of B.C. Municipalities and the Municipal Insurance Association of B.C. strongly urge the Attorney General to reform the law in four key areas to reduce the alarming impact of increased civil liability for local governments and to obviate the need to severely curtail the services local government offer and to reduce the significant impact on BC's local government taxpayers.

The four areas recommended for reform by UBCM and MIABC are the following:

Joint and Several Liability

The principle which has governed UBCM and MIABC in the development of its recommendation on joint and several liability is simple: in a modern society individuals and organizations, including governments, should be responsible for the consequences of their own acts and omissions, but it is unfair and unreasonable to make them responsible for the acts and omissions of others over whom they have no control.

It is the submission of UBCM and MIABC that joint and several liability no longer represents a fair and reasonable application of the law in apportioning responsibility for a plaintiff's loss. It imposes on local governments, and others, an unfair and unacceptably high share of damage awards based solely on the perception of a local government as a "deep pocket defendant", without regard to the degree of fault attributable to the conduct of local government.

The consequences of the profound changes in the legal and economic landscape which have occurred since the inception of joint and several liability cannot support its retention as a feature of a modern civil liability system. Joint and several liability is a product of an "all or nothing" recovery system underpinned by the idea that allocating and assigning degrees of responsibility would be too taxing for the Courts, where the plaintiff's loss could not be immediately and readily assigned to individual defendants. In fact, the British Columbia *Negligence Act* has long required the Courts to allocate percentages of responsibility with the default position of equal allocation where it is factually impossible to otherwise assign liability.

The B.C. *Negligence Act* also provides that defendants are severally liable where a plaintiff is contributorily negligent. Having adopted a rule that links liability for damages with fault where the plaintiff has contributed to the loss, it is inconsistent to retain joint and several liability simply because the plaintiff has not contributed to the loss. This imposes on a defendant a degree of liability for payment of damages which is out of all proportion to his or her fault.

Various arguments have been advanced in support of the retention of joint and several liability, but all are inconsistent with the overriding principle that individuals and organizations should be responsible for their conduct, not the conduct of others.

Variations of pure joint and several liability have been proposed, but if responsible parties are only to be responsible for their own contribution to the plaintiff's loss, only pure several liability makes any rational sense. Any other system, such as joint and several liability with reallocation or joint and several liability

only when a threshold percentage of comparative responsibility is reached, would still impose on a "deep pocket defendant" responsibility for parties for whom they had no control and for whose wrongful acts they cannot be held directly responsible.

The question has been asked how might the interests of a plaintiff be protected if joint and several liability is abolished. The abolition of joint and several liability and the reduction of the ultimate limitation period to 10 years should have the effect of improving the insurance market. If insurance is reasonably available there is no principled reason why the market should not compel professionals and other participants in industry and commerce to carry insurance. Insurance is the primary and most appropriate risk management tool for any party, and ready access to the insurance market should obviate the need for compulsory coverage.

Ultimate Limitation Period

UBCM and MIABC endorse the recommendations of the British Columbia Law Institute made in July of 2002 reducing the ultimate limitation period from 30 years to 10 years, except in some specific circumstances including cases of fraud, fraudulent breach of trust, or wilful concealment of facts; the repeal of the special ultimate limitation period of six years for medical practitioners, hospitals and hospital employees; and the commencement of the running of time of prescribed limitation periods from the date of an act or omission that constitutes a breach of duty.

Non Delegable Duty and Vicarious Liability

UBCM and MIABC advocate the abolition of liability for delegated responsibilities only where it can be demonstrated that local government has acted responsibly and with due diligence in delegating a duty to a third party. Similarly, UBCM and MIABC advocate the abolition of vicarious liability for the intentional misconduct of its employees. The imposition of vicarious liability for intentional wrongdoing is diametrically opposed to the core social value of individual responsibility, and it is repugnant to hold local governments responsible for intentional misconduct by employees that would not, under any circumstances, be condoned or accepted by local government as an employer.

Conclusion

With these reforms, UBCM and MIABC are confident that the alarming trend towards increased liability, and the impacts that would otherwise occur on the provision of local government services and on taxpayers, will be curtailed.



I. JOINT AND SEVERAL LIABILITY

1. Should the law of joint and several liability be legislatively modified or abolished?

It is the submission of the Union of British Columbia Municipalities and the Municipal Insurance Association of British Columbia that joint and several liability no longer represents a fair and reasonable application of the law in apportioning responsibility for a plaintiff’s loss. It imposes on local governments, and others, an unfair and unacceptably high share of damage awards based solely on the perception of a local government as a “deep pocket defendant”, without regard to the degree of fault attributable to the conduct of local government. The concept should be abolished.

A. Joint and Several Liability Defined

Traditionally the law has drawn a distinction among three types of liability for which a defendant may be responsible to a plaintiff: “joint”, “several” and “joint and several”. “Joint” liability captures the circumstances in which defendants are jointly responsible for a single tort. “Several” liability describes the situation in which defendants, acting independently, cause different damage to the plaintiff. “Joint and Several” liability arises where defendants, acting independently, cause the same “indivisible” damage to one plaintiff.

It is the legal consequences of this distinction which give rise to the present debate. A defendant, when severally liable, bears responsibility only for such damage as is apportioned against him or her, but when held to be joint and severally liable, a defendant is wholly liable for the plaintiff’s damages even when adjudged to be only proportionately at fault. The distinction rests on whether the loss or damage caused by Defendant 1 (D-1) is the same or different from that caused by Defendant 2 (D-2). A classic summary of the law of joint and several liability is found in *Dingle v. Associated Newspapers Ltd.*¹:

“Where injury has been done to the plaintiff and the injury is indivisible, any tort-feasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tort-feasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tort-feasors or not.”

The question of divisibility of loss or damage among defendants, that is, whether the loss caused by the various defendants is the same or not, is a question of fact.²

Invariably, support for the retention of joint and several liability rests on the notion that fairness demands that a plaintiff be fully compensated for his or her loss. Joint and several liability itself, however, dates to a time when the common law imposed black and white rules on a claimant’s recovery.

Where a plaintiff contributed to his or her own loss in any measure at all, recovery was precluded in its entirety. Where a plaintiff was wholly without fault, joint and several liability ensured full compensation. The relative fault of each tort-feasor was irrelevant to this approach in that each was responsible for the entire loss.

In order to ameliorate the harshness of this rule in situations in which a plaintiff, who contributed to his or her own loss in a minor way, was precluded from recovering from tort-feasors bearing substantially the whole of the responsibility for the loss, the law developed the notion of comparative negligence. The law progressed to allow an assessment of the comparative fault of the plaintiff and defendants and permit a negligent plaintiff to recover a percentage of its loss. In other words, a plaintiff who contributed to his or her own loss could recover from others who caused the loss in proportion to their individual degrees of fault. Supporters of joint and several liability argue that the rationale underlying joint and several liability remains intact notwithstanding comparative negligence: the innocent plaintiff has the right to recover his or her total damages from any one tort-feasor. That bald assertion however, offers no principled explanation as to why the retention of joint and several liability naturally follows. This raises two questions:

1. Do the historical purposes underpinning joint and several liability retain their legitimacy in 2002 and serve British Columbians into the future and beyond?
2. With the now established advancement of the law from an “all or nothing” negligence system to a comparative negligence system, should a tort-feasor ever be compelled to contribute a share of damages that is disproportionate to his or her degree of causal fault?

For the last twenty years there has been an ongoing debate in several jurisdictions over the question of whether joint and several liability should be retained, abandoned or modified.³ The issue has been considered by a number of Law Reform Commissions worldwide and has been the subject of broad academic debate and legislative reform. Arguments for and against the retention of the principle raise questions of legal theory and commercial reality. At the heart of the debate is the tension between the desire to protect the interests of injured persons and the need to deal fairly with multiple defendants when one or more is insolvent or otherwise unavailable to respond to the loss. However, in the end, the decision whether to abolish, modify or maintain joint and several liability is a policy decision which is driven in part by legal analysis but which cannot be wholly governed by it.

The consequences of the profound changes in the legal and economic landscape which have occurred since the inception of joint and several liability cannot support its retention as a feature of a modern civil liability system. There are multiple reasons why this is so.

B. Indivisibility of Damage

Fundamental to the concept of joint and several liability is an analysis which focuses on the indivisibility of the damage or injury suffered by the plaintiff.⁴ According to this approach, the indivisible nature of the injury, and not the inability to apportion negligence, prevents the apportionment of the loss among tort-feasors. For example D-1, an architect is negligent in the supervision of construction of a building and is 20% responsible for the loss; D-2, the contractor is negligent in its construction and is 70% responsible for the loss and D-3, the municipality is negligent in its inspection of the construction and is 10% responsible for the loss. The plaintiff, however, has a failed building. It is the injury to the structure that is argued to be

indivisible and therefore justifies the imposition of joint and several liability in that each of the architect, contractor and municipality are responsible for 100% of the indivisible injury. This reasoning echoes the rationale behind the now abandoned contributory negligence rule: where the plaintiff's own negligence was a proximate cause of the entire loss, recovery from other tort-feasors was precluded. That rule has been abrogated in most jurisdictions, including British Columbia in a favour of a rule that focuses on the proportionate fault of tort-feasors in circumstances in which the plaintiff has been contributorily negligent. Judicial interpretation of the British Columbia *Negligence Act* has served to sever joint and several liability in these circumstances such that where the plaintiff contributes to his or her loss, damages are reduced by the amount of such contribution but each defendant is responsible for his or her proportionate share of the damages based on the degree to which he or she is at fault. The loss or damage is no longer seen as indivisible in these circumstances.

The issue is therefore whether joint and several liability should be retained where the plaintiff has played no role in the loss. It is submitted that the focus on the indivisibility of the injury no longer answers that inquiry; if it ever did. Joint and several liability was a product of an "all-or-nothing" recovery system underpinned by the idea that allocating and assigning degrees of responsibility would be too taxing for the courts where the loss could not be immediately and readily assigned to one individual defendant.⁵ In fact, the British Columbia *Negligence Act* has long since required the Courts to allocate percentages of responsibility with a default position of equal allocation where it is factually impossible to otherwise assign liability. Where a plaintiff is contributorily negligent the assignment of liability among the plaintiff and the defendants is routinely undertaken by the courts. What would historically be considered as "indivisible" damage is likewise routinely "divided" by linking the degree of liability of a party to its proportionate responsibility for payment of damages. Assume a plaintiff is 30% at fault and each of two defendants are 30% and 40% at fault, respectively. Damages are proven at \$100.00. The plaintiff's claim is reduced by \$30.00, and the two defendants are required to pay \$30.00 and \$40.00 respectively - amounts proportionate to and reflective of their degrees of responsibility. In such circumstances it is not that the damage is "indivisible", but rather that the proportionate allocation of fault becomes the mechanism by which "division" of the damages is governed.

British Columbia has for some time had a modified form of proportionate liability as set out in the *Negligence Act* arising in part from statutory reform of the common law and by judicial interpretation. The *Negligence Act* provides, in part:

"Apportionment of Liability for Damage

1. Where, by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault, except that
 - (a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and
 - (b) nothing in this section shall operate so as to render a person liable for damage or loss to which his fault has not contributed.

2. The awarding of damage or loss in every action to which section 1 applies shall be governed by the following provisions:
 - (a) As between the 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.”

It was originally understood that under the *Negligence Act* each defendant would be jointly and severally liable for the plaintiff’s loss. Compensation, it was assumed, would be calculated by reducing the plaintiff’s compensation by the amount attributable to the plaintiff’s contributory negligence but each defendant would be jointly and severally liable for the reduced amount, subject to rights of contribution from others according to their respective degrees of fault. Judicial interpretation altered that understanding.

In the 1983 decision of *Leischner et al. v. West Kootenay Power and Light Company Limited*⁶, the British Columbia Supreme Court held that where a plaintiff is found to be contributorily negligent, each defendant is responsible for that portion of the loss which corresponds to his or her degree of fault. The British Columbia Court of Appeal decision in *Cominco Limited v. Canadian General Electric Company Limited*³⁷ confirmed that the legislation provided for proportionate liability if a plaintiff is contributorily negligent.

The appeal in *Leischner* was heard by a five member panel of the British Columbia Court of Appeal which confirmed the decision of the trial judge and the position of the Court of Appeal in *Cominco* as to the proper application of the *Negligence Act*. The Court of Appeal also decided, in *Wells v. McBrine*⁸, that following from the earlier decisions, when a plaintiff is contributorily negligent, apportionment of liability should be made among all those found to have been at fault, whether or not they are parties to the action. Although not binding on non-parties in the sense that a judgment cannot be entered against them, adjudication of a claim requires that all potential wrongdoers be identified and degree of fault attributed to them.

Section 4 of the *Negligence Act* currently retains joint and several liability in circumstances in which the plaintiff plays no role in the loss supported by rights of contribution:

- “(1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.
- (2) Except as provided in section 5 if 2 or more persons are found at fault
 - (a) they are jointly and severally liable to the person suffering the damage or loss, and
 - (b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.”

Under the scheme of the *Act* whether joint and several liability or proportionate liability is applied turns entirely on the role of plaintiff. If the plaintiff is “innocent” the former principle is applied; if the plaintiff contributed to his or her own loss on the other hand, a different result ensues and liability is apportioned. In the context of this legislative scheme, the argument that joint and several liability is justified because the loss is “indivisible” cannot be sustained because the effect of Sections 1 and 2 mandates that the courts determine the comparative responsibility for the injury and hold a defendant liable only for that fraction of the damages which correspond to his or her percentage of fault. Courts in this Province have discharged this mandate for many years.

Having adopted a rule that links liability for damages with fault where the plaintiff has contributed to the loss, it is inconsistent to retain joint and several liability where the plaintiff has not done so, thereby imposing on a defendant a degree of liability for payment of damages which is out of all proportion to his or her fault.

Arguments in favour of retention of joint and several liability cannot rest on “indivisibility” of damage because the *Negligence Act*, by its operation, routinely requires such division to be undertaken. The question is whether joint and several liability should be maintained under some other principle.

C. The Plaintiff’s Corrective Justice Claim

The introduction of proportionate liability in circumstances in which the plaintiff is contributorily negligent balanced the severity of the rule which precluded recovery by a plaintiff who had contributed at all to his or her own loss, with fairness to defendants who could not logically be said to be 100% liable in respect of a loss because the plaintiff bore some degree of responsibility. Where the plaintiff has not contributed to his or her own loss, however, it is argued that the plaintiff has a prior and independent corrective justice claim against a defendant who is individually fully responsible for the plaintiff’s injury.⁹ The substance of the plaintiff’s corrective justice claim is the right to obtain full compensation from any defendant whose tortious conduct was an actual and proximate cause of the loss. In so doing the fundamental purpose of the tort system is said to be met: the person who causes the plaintiff’s loss is obliged to restore the plaintiff as nearly as possible to his or her pre-injury state. The defendant’s right to contribution from his or her co-defendants is said to be subsidiary to the plaintiff’s right to full recovery.

It has been broadly argued that the innocent plaintiff’s corrective justice claim necessarily trumps the interests of the defendant. The gist of the argument is that the equities favour a blameless plaintiff over a partially responsible defendant in terms of who ought to shoulder the burden of the whole of the loss. It is implicit in this assertion that the interests of the innocent plaintiff in assuring full recovery must always be paramount under our tort system. The Canadian tort system, however does not go so far as that. While compensation for the plaintiff is undeniably a key purpose of the tort system it is not the only goal of the system and its paramourcy is not absolute.

When judgment is obtained by an innocent plaintiff against a sole and insolvent defendant the plaintiff must live with that result. There is no community safety net which functions to compensate plaintiffs where recovery is otherwise unavailable. In that sense, the interests of the innocent plaintiff have not been ultimately defined by the community as being paramount. The innocent plaintiff bears the risk that his or her claim for damages may not be recoverable. This outcome has not been seen by society as being so overwhelmingly unfair that it has resulted in a public compensation scheme or “tort trust” for general tort claims to be accessed when recovery from the defendant is impossible or incomplete. It is only when there are at least two defendants found liable for the loss, one of whom is solvent and one of whom is not, that

joint and several liability functions to insulate an innocent plaintiff by shifting the risk created by the insolvency of one defendant to the other defendant in its entirety based on the “indivisibility” of the loss and without reference to the degree of fault of either defendant.

In the context of a legislative scheme which sanctions proportionate liability where the plaintiff has contributed to his or her loss, it is arguable that where the plaintiff has not so contributed, his or her corrective justice interest is nonetheless satisfied vis a vis a particular defendant, when he or she is compensated by the full extent to which that defendant is responsible for the loss. As the plaintiff bears the risk of insolvency when there is only one defendant, the alleged unfairness of expecting the plaintiff to likewise bear the risk where there are two defendants, is not immediately clear. The solvent of the two defendants will always be required to fully compensate the plaintiff in an amount proportionate to his or her fault. While the shifting of the burden of insolvency in this way represents a fundamental shift in policy, it cannot be characterized as radical as the law already accepts that full and complete compensation is not always achieved by a plaintiff.¹⁰

Furthermore, British Columbia has introduced general mandatory mediation regulations (Notice to Mediate Regulation BC Reg 4/2001) giving any party to a lawsuit the right to take the matter outside the court process for resolution. In reality, only a small percentage of cases reach the courtroom. By far the majority of disputes are settled by alternate means including negotiated and mediated settlements. It is inherent in the settlement process that compromises are made by each of the participating parties such that few, if any, plaintiffs approach the process with an actual expectation of full recovery. It could be argued that the objective (of full compensation) is different than the practical outcome of mediation or settlement (less than full compensation). However, given the large percentage of actions in which the plaintiff obtains less than full recovery, it must be the case that a “fair” recovery is not necessarily a “full” recovery. To the extent that joint and several liability is justified because it supports the “full recovery” rationale it is out of step with the practical reality of dispute resolution in British Columbia.

In addition, while the description of the plaintiff as “innocent” at first blush invites the sympathy of the law, it is a relative term. It must be acknowledged that there will be truly innocent claimants. However, there will also be situations in which plaintiffs fail to take appropriate measures in their own self interest when such opportunities are available and instead rely on the protection offered by the tort system. What is suggested here is that conduct falling short of contributory negligence may nonetheless be conduct which impacts the plaintiff’s and consequently, the defendants’ exposure. Where, for instance, a private citizen purchases a defective property without adequately investigating in advance of the purchase, he or she has not acted tortiously in the sense of breaching a legal duty to be careful in his or her own interest. However, it is difficult to reconcile the failure to exercise such care with a right at the end of the day to be fully compensated by a partially responsible defendant. Put another way, it was never contemplated that from the perspective of the plaintiff, reliance on joint and several liability would itself become a risk management strategy. This is particularly so when a plaintiff chooses to proceed with a transaction for business or economic reasons, knowing that certain of the parties may be unable or unlikely to meet their obligations. For instance, in choosing the lowest bid in a construction setting, an owner may be fully aware of the questionable financial status of a contractor but willingly accepts that risk. Or an owner enters a contract with a limited company without obtaining meaningful guarantees or proof of appropriate insurance. When, in either case, problems result with the completed project there is no supportable rationale for transferring risks the plaintiff was prepared to accept at the outset of the project to the solvent co-defendants of the insolvent contractor. This is particularly so when the solvent co-defendants are minor or lesser contributors to the loss.

In other words, where the plaintiff can manage and control a risk of insolvency, the choice not to do so should not entitle the plaintiff to benefit from the application of joint and several liability by forcing one defendant to act as the insurer of others over whom they have no control. In that sense, many plaintiffs should not be considered vulnerable in the way the term “innocent” imports.¹¹

Finally, the notion of the paramountcy of full compensation for the plaintiff glosses over the fact that in the broader scheme the plaintiff does not have the only claim to innocence. Where a marginally responsible local government defendant is held jointly and severally liable for the entire loss as a “deep pocket” defendant, that loss is borne ultimately by residents and taxpayers who are completely innocent and uninvolved in the action. This is dramatically demonstrated in the case of local governments facing liability claims for which insurance is unavailable and in respect of which large contingencies are beyond the scope of the municipal budget. In such circumstances, full compensation for the plaintiff rests directly on assessments levied against individual taxpayers or increased taxation to support municipal borrowing. The superiority of a plaintiff’s right to full recovery loses its potency when its price is a significant and unexpected per capita tax assessment particularly in small communities. This is particularly so when it is considered that in addition to the goal of protecting innocent plaintiffs, joint and several liability was applied to punish wrongdoers. In the context of claims in which local governments bear only peripheral responsibility joint and several liability permits the “true” wrongdoer to escape punishment by permitting the pursuit of the “deep pocket” defendant. However, where a local government is uninsured or a claim is beyond existing coverage, it does not have a deep pocket. It only has access, via taxation or assessments, to the pockets of individual taxpayers.

D. Access to “Deep Pocket” Defendants

In a 1998 publication entitled, “Report on the Economics of Joint and Several Liability Versus Proportionate Liability” for the Victorian (Australia) Attorney-General’s Law Reform Advisory Council, the author, Megan Richardson, endorsed the view that the economic effects of expanding liability can take two forms: it can influence investment in loss prevention to affect the accident rate and it can influence the provision of insurance for losses not prevented. Prevention and insurance were said to be the only important economic consequences of any legal or regulatory policy in this area. The defendant who bears liability as the “deep pocket” becomes the insurer for the other defendants and effectively for the plaintiff. This situation, in turn, drives the cost of goods and services generally. The report observes, at page 5, that:

“The efficiency of liability insurance as a risk or broader cost spreading device - and the possible impact that the burden of insurance costs might have for optimal deterrence - is essential in any economic consideration of joint and several versus proportionate liability.”

The concern is that joint and several liability forces insured parties (such as local governments and design professionals) to provide inefficient insurance to plaintiffs. The inefficiency arises, when compared to first party insurance, in the difficulty in calculating third party costs which affects “enterprise costs” and the cost and availability of goods and services. The report by Richardson confirmed the existence of empirical support for the claims of increased insurance costs for certain professional groups throughout the 1980s and 1990s. It also confirmed that there is evidence, at least in relation to claims against auditors, that the profession reacted to increased costs and restricted availability of insurance by limiting or qualifying their advice and refusing to provide services for clients perceived to raise unacceptable risks. According to the report, what was not clear and was difficult to assess, is the precise amount of insurance costs, net of

recoveries, that are attributable to joint and several liability. The report concluded, at page 15, that “on the current evidence it is therefore difficult to conclude that proportionate liability would necessarily result in net benefits in insurance terms.”

It is submitted that the modern justification for retaining joint and several liability and the resistance to shifting the risk of loss from the defendant to the plaintiff is the availability and use of liability insurance. Joint and several liability permits access to a system of loss distribution which is perceived to be of lesser social impact in distributing the loss across the community than would imposition of the loss on plaintiffs, or indirectly through the plaintiff and onto social programs.¹²

It has been argued (although not universally endorsed) that incidents of individual ruin have a broad and costly effect on society and that insurance provides the means for losses to be absorbed with a minimum of harm. The gist of the argument is that since defendants are generally insured, the opportunity to distribute the plaintiff’s loss through the application of joint and several liability justifies its retention.

It is submitted, however, that this argument is misconceived in that the basis for recovery in tort is liability based on causative fault, not the presence or absence of liability insurance. There is an inherent inconsistency in determining liability based on fault but determining responsibility to pay based on insurance or the availability of a “deep pocket”. If the argument is that loss distribution arising from tortious conduct is best addressed through an insurance scheme, it follows that such a scheme should be made transparent, be based on social policy choices and be broadly applicable. It ought not be the inadvertent consequence of the risk management strategies of private individuals and public bodies in paying for and obtaining liability insurance.

To the extent that rights of contribution and indemnity purport to balance joint and several liability, such rights are illusory and hollow as between an insured and an uninsured defendant. Therefore the burden of the uninsured defendant’s proportionate liability becomes that of the insured defendant in circumstances in which the extent of the increased risk to the insurer cannot be calculated.

In any event, not all conduct of a defendant will be insured and the justification for joint and several liability based on loss distribution for insurance immediately fails in that instance.

The expansion of tort recovery generally can be linked to the increased availability of liability insurance. If the net effect of the tort system was simply to shift a particular loss between individuals it would serve little purpose: few defendants would have sufficient resources to meet the plaintiff’s loss and the impoverishment of both plaintiff and defendant would not achieve any legitimate social objective. The presence of liability insurance as a backstop in most tort actions has encouraged an increased emphasis on ensuring full compensation to the plaintiff in that a “deep pocket” defendant is perceived to be available and able to broadly distribute costs.

If liability insurance is jeopardized or no longer available, the driving force behind the central argument for retaining joint and several liability cannot be maintained. The presence of a “deep pocket”, represented by an insured defendant, permits the focus on the claim of an innocent plaintiff. Without a viable source of compensation it makes no sense to shift the loss from plaintiff to defendant at all. Joint and several liability permits the situation in which a defendant, whose comparative fault falls below 100% to be called upon to meet 100% of the plaintiff’s claim solely on the basis of ability to pay. Abuse is said to be controlled

because the common law requires that a party be a legal cause of the harm before liability attaches. However, joint and several liability has the effect of channeling claims to deep pockets which may have contributed to the harm in only a peripheral or minor way.

The effect of joint and several liability on the availability of liability insurance has been the subject of considerable academic discussion. Richardson observed that while there is empirical evidence of claims of increasing insurance costs over the last two decades, the role of joint and several liability in driving costs is difficult to isolate and assess.¹³ It is asserted by some that it has not been demonstrated that liability insurance would become more readily available and affordable under a proportionate liability scheme. What can be demonstrated is liability insurance for local governments in British Columbia has become less available and more expensive because of joint and several liability and that proportionate liability would relieve the growing pressure on cost and availability.

It will be observed that while proportionate liability has been available for over a decade with respect to claims in which a plaintiff is contributorily negligent, the majority of substantial claims against local governments are in relation to building regulation. In construction cases a plaintiff is only rarely found to have been contributorily negligent so in respect of most building regulation claims against local governments, joint and several liability remains intact. It is in that context that the availability and cost of liability insurance has been dramatically affected.

In order to identify the relationship between joint and several liability and the increasing cost of decreasing liability coverage for local governments, the whole issue must be placed in the context of the expanding scope of recovery for economic loss.

One of the most significant changes in the law over the past twenty-five years has been the progression towards expanded liability for economic loss generally, and specifically with respect to the liability of local governments. If there is one area of municipal liability which is of major concern at the present time, it is the exposure of local governments to claims related to construction. During this time there have been significant changes in the area of regulatory liability in the construction industry, particularly the liability of plan checkers and building inspectors for the cost of remedying inherent defects and structures. Only two decades ago the state of the law was such that local government authorities involved in building regulation activities were immune from liability. They were either protected by Crown immunity legislation or the common law itself found no duty owed by them to ultimate users of the projects for which they approved plans or provided building inspection services. This attitude toward Crown exemption from liability in this area went through substantial change in England in the early to mid 1970's and that law was imported into Canada in the mid 1980's with the decision of the Supreme Court of Canada in *Kamloops v. Nielsen* (1984), 8 C.L.R. 1. Since then there has been a broad based undermining of local government in this area.

In the *Kamloops* case the Court reasoned that plan checkers and building inspectors owed a duty to subsequent users and owners of projects they had been involved in, reasoning that all subsequent users and owners were of a class who ought to have been in the contemplation of the regulators at the time of plan checking or building inspection. The regulator's function was to protect the public health and safety and in carrying out plan checking or building inspection activities they would have been taken to have known that if they did not do their job properly, subsequent users or owners of projects could suffer harm. That, according to the Court, was sufficient to impose a common law duty on the regulators.

Prior to *Kamloops v. Nielsen*, Canadian courts had been hesitant to adopt this view for fear of exposing local governments to indeterminate liability to an indeterminate class for an indeterminate length of time. The Court in *Kamloops* rejected the “flood gates” argument. However, since that decision there has been a marked increase in the claims against building regulators, plan checkers and building inspectors in a variety of situations, including the recent leaky condominium claims.

Before *Kamloops v. Nielsen* the Supreme Court of Canada had been clear that economic loss was unrecoverable for the tort of negligence and that the only exception to a rule of non-recovery for pure economic loss was negligent misrepresentation. The *Kamloops* decision heralded a series of decisions expanding the scope of government liability, with the result that the liability of local governments for negligent building inspection and plan checking is now well entrenched in Canadian jurisprudence. This is so notwithstanding the rejection of this approach to municipal liability by the House of Lords in England and that Court’s disapproval of its earlier decisions which formed the basis of the Canadian position.

These changes have resulted in a marked increase in claims brought against local governments in relation to the regulation of construction activities within their boundaries. Importantly, standard form liability insurance coverage did not extend to afford protection to local governments for the liability incurred in this area. Standard form policies only extended to cover claims arising out of property damage or bodily injury and not claims for pure economic loss. Managing the risk imposed by the change in the law in this area required local governments to seek a broader form of coverage or a new form of coverage to meet the demands of the changing liability landscape.

Following the *Kamloops v. Nielsen* decision amendments to the *Municipal Act* (as it then was) created exemptions for employees of local governments from any liability for their plan checking or building inspection activities and second, protected local governments themselves from any liability for their plan checking activities if in the course of discharging those activities the authority relied on a “Letter of Assurance” delivered by a qualified architect or engineer. In the result local governments remain broadly exposed to claims relating to their building inspection activities and historically to their plan checking activities.

It is clear from these developments in the law that the exposure of local governments to liability in 2002 bears little resemblance to the level of exposure in 1970 - 1980 with respect to the same functions. This is important in that arguments in support of the retention of joint and several liability in other Commonwealth jurisdictions, particularly England, include the assertion that the courts have been cautious and conservative in developing liability for pure economic loss in negligence in light of the knowledge that joint and several liability applies. The UK Department of Trade and Industry, “Feasibility Investigation of Joint and Several Liability” goes so far as to state, at page 33, that:

“...through the overruling of *Anns* by *Murphy v. Brentwood DC* we have seen the virtual removal of liability in the tort of negligence for economic loss in construction cases. To remove joint and several liability would not only tend to undermine the imposition of duties of care where they have been found but might, indeed, have the effect - contrary to the defendants’ interests - of freeing the courts to develop the tort of negligence less conservatively.”¹⁴

The Canadian experience simply does not accord with this assertion. Joint and several liability has not functioned to limit the nature of the duties owed by local governments, the range of persons to whom such duties are owed or the type of damages recoverable in this jurisdiction. To the contrary, the expansion of such duties in respect of economic loss has had the consequence of exposing local governments to a broader range of claims and therefore to joint and several liability in a greater range of circumstances.

The changed legal environment created by the interplay of the expanded scope of recovery for economic loss and the principle of joint and several liability have affected the ability of local governments to manage risks through liability insurance. While the evidence of the impact of joint and several liability on the availability, extent and cost of insurance may be uncertain in other jurisdictions, with respect to local governments in British Columbia the impact is clear and very troublesome.

As a result of increased liability in the 1980s many private insurers chose to abandon local government insurance because liability risks were too difficult to predict. The Municipal Insurance Association of British Columbia began operations in 1988, four years after *Kamloops v. Neilsen* and the expansion of local government exposure to economic loss claims in a direct response to that development. Since then, liability for economic loss versus the total annual liability of 154 local governments has increased from 33 % in 1988 to 63% in 2001, which increase includes liability imposed by joint and several liability.

In August 2001 the British Columbia Supreme Court found the Defendant Delta 20% responsible for more than \$3 million in costs incurred in repairing a four storey stucco/wood frame “leaking condominium” in Delta. Delta’s exposure was joint and several with the developer, builder and designer of the project, thus increasing the percentage of the City’s exposure to 70% of the loss (one defendant had settled with the plaintiff). The British Columbia Court of Appeal dismissed Delta’s appeal on September 17, 2002.¹⁵

Delta is not unique; MIABC received 195 water penetration claims to December 31, 2001. The claims are moving slowly, the results are unpredictable and the ultimate cost is uncertain. Several years of insurance premiums and premium increases are funding existing losses, but MIABC’s reinsurance costs increased 24% in 2001 and by 94% in 2002.

Three months after the trial decision in the Delta case, MIABC’s reinsurers declined to insure water penetration claims after January 1, 2002 and MIABC was forced to withdraw coverage. The move by the reinsurer can be attributed to large losses via joint and several liability and its resistance to continuing to assume an unknown risk. Economic loss claims for construction defects place the local government regulator in a pool of frequently impecunious defendants giving rise to an unpredictable exposure for joint and several liability.

This issue has been amplified by the move on the part of a major insurer of architects and engineers to likewise exclude coverage for water penetration claims. Those professionals have likewise faced the consequences of the expansion of tort recovery to economic loss. Since the 1995 Supreme Court of Canada decision in *Winnipeg Condominium Corporation v. Bird Construction Co. Ltd.*¹⁶ subsequent purchasers and owners have been permitted recovery for the cost of remedying inherent defects in buildings they own or occupy. This had an immediate, direct impact on all participants in the industry, including builders, trades and design professionals. They are now potentially liable to all subsequent purchasers and users of their work product for the cost of remedying inherent defects which are manifested during the life of the structure they built or designed, provided the defect presented a substantial danger to human health and safety. This

was a substantial change in the law and has led to significant increases in claims against industry participants, most recently with respect to alleged building envelope deficiencies.

Winnipeg Condominium made claims possible that would have been barred by the law prior to 1995. The decision of the key insurer results in less overall insurance being available with respect to a given claim as annual Errors and Omissions policies covering architects and engineers continue to expire each month. At that point local government becomes the only remaining “deep pocket” defendant, so perceived because of its ability to raise funds even when liability insurance may not be available. This has resulted in threats to exclude local government from settlement pools, pursue it to trial and expose it to joint and several liability if the local government defendant does not contribute to settlement in an amount substantially above its own proportionate liability.

Insurer rating problems arise in this context as the extent of the loss is unknown until the claim is closed and prior year claim reserves are proven inadequate. Most reinsurers will not deal with local government liability at all.

Left unchallenged, the impact of joint and several liability will logically lead local governments to avoid activities giving rise to such unpredictable liability and reduce the ambit of their regulatory role. For example, MIABC currently recommends to its members that local governments not adopt new inspection duties and that they cease providing inspections of any complex building already monitored by architects and engineers.

From the perspective of local government and taxpayers, the paramountcy of the plaintiff’s corrective justice claim, which has historically supported the imposition of joint and several liability, cannot be practically maintained in the current legal and economic environment. With the increased cost of liability insurance and the decrease in available coverage, it follows that government defendants will increasingly face the burden of meeting the corrective justice claim of the plaintiff on their own, particularly in the construction context. This is so because the unique ability of government to tax citizens identifies government as a “deep pocket” unlike any other. Notwithstanding its rights to contribution where a government defendant is, in fact, called upon to pay the full amount of a plaintiff’s loss, the pursuit of other defendants is illusory when the party is insolvent. Similarly, where the party is uninsured or under-insured, it is unlikely that any government body will pursue the personal assets of a professional or other industry participant. It is not the role of government to subsidize or insure the professional or business practices of others by default. However, if nothing is done, the application of joint and several liability will lead to that outcome. MIABC members and non-MIABC members face the prospect that without reform of joint and several liability, which forms the greatest portion of the reinsurer’s risk in construction claims, withdrawal of some or all of the remaining cover, regardless of premium increases, is entirely possible.

The argument that joint and several liability supported by rights of contribution leads to a more efficient system of loss distribution relies directly on the availability of insurance as the loss distribution mechanism. The argument is that *vis a vis* the plaintiff, who may be unable to insure on a first party basis for the particular risk, it makes economic sense that a defendant covered by liability insurance is better able to bear the loss as it is, in turn, broadly distributed among policy holders. The argument works, however, only when insurance can actually be purchased by defendants. The evidence is that the pressure exerted by the application of joint and several liability is affecting the availability and cost of liability insurance to local governments. This effectively undermines the loss distribution rationale cited in support of its continued

retention. Joint and several liability requires a local government, who is often a minor contributor to the loss on a comparative basis, to become the inadvertent insurer of other defendants, and more indirectly, the insurer of the plaintiff. When local government itself is without liability coverage either because it is unaffordable or does not extend to the claim, it is the taxpayer who is called upon to satisfy the plaintiff's claim to full compensation.

It can be reasonably considered, in light of the demonstrated negative impact joint and several liability has on the cost and availability of reinsurance to local government, that proportionate liability would introduce the measure of predictability that insurers and reinsurers require to appropriately rate the risks faced by local government. That can only ease the pressures to which insurers have recently reacted by withdrawing coverage and increasing premiums. An improvement in the availability of insurance is, on a loss distribution analysis, also in the interests of plaintiffs.

Assume the case of a multi-unit condominium project in a community of approximately 1100 taxpayers in which the plaintiffs seek damages in excess of \$3.5 million in an action commenced after December 2001. The nature of the claim means it is excluded under the liability policies held by both the local government and the design professionals. This exposure exists in a Fraser Valley community today. The developer, general contractor and sub-trades may have commercial general liability policies subject to such exclusions as the policies may contain. The application of joint and several liability could lead to one of these outcomes:

1. The plaintiff fails to prove its case against the local government, but succeeds against the design professional, developer, contractor and trades. The design professional is uninsured as are the other participants by the operation of exclusion clauses in their respective CGL policies governing work product and workmanship. The development company was incorporated for the purpose of the specific project and has no assets. The general contractor and trades have assets far below the amount of the damages awarded. Joint and several liability is of no assistance unless the strata council is prepared to pursue the design professional and contractors personally. Each may have taken steps to protect their personal assets. If they have not, the price of the plaintiff's recovery is at the risk of the business and personal ruin of one professional and several business owners where their assets are insufficient to satisfy a \$3.5 million judgment. All are employers; or
2. The plaintiff succeeds against all defendants, including the local government. The local government is found to be 20% at fault in relation to the performance of its building inspection function. As above, the design professional is uninsured as are the other project participants. The plaintiffs seek \$3.5 million in compensation from the municipality relying on the principle of joint and several liability. The local government is uninsured for the loss. To pay the judgment the local government passes the cost to local taxpayers at a per capita rate of \$3,164.00. The plaintiffs' recovery is at the price of personal (after tax) contributions by individual taxpayers of a small community.

Consider the outcome if insurers of local governments and design professionals reinstated coverage based on the certainty offered by a proportionate liability regime:

3. The plaintiff succeeds in its claim against all defendants. The local government is held to be 20% at fault. The design professional is 20% at fault. The contractor is 30% at fault, the developer 15% and the subtrades are collectively 15% at fault. The plaintiff is assured recovery of 40% of its loss based on the liability coverage available to the local government and the design professional in direct
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proportion to their respective degrees of fault. The developer, general contractor and subtrades are uninsured. Consider that in purchasing units from the developer owners understood that the developer's liability was limited and uninsured. Consider that prior to purchasing, unit owners knew recovery against the contractor in the event of loss was unlikely.

In the first scenario the plaintiff is not fully compensated because the joint and several liability of the design professional is substantially meaningless without the underpinning of liability insurance. The assets of the defendants may cover a portion of the judgment but are unlikely to reach a level of full compensation. The under compensation of the plaintiff in these circumstances is acceptable under the current law and no further recourse is provided for the plaintiff's benefit. The outcome for the design professional and contractors pursued by the plaintiff is bleak.

In the second scenario, the plaintiff is fully compensated, not from the "deep pocket" of the local government but from the individual pockets of a small community of taxpayers, either directly or indirectly. The same group of taxpayers may face further exposure with respect to other water penetration claims.

In the third scenario, the plaintiff is compensated by the local government and design professional to the full extent of the proportionate liability of each. No claim is made against the business or personal assets of the design professional who continues to employ others and avoids bankruptcy. No assessment is levied against individual taxpayers who are free to spend their after tax earnings in the marketplace. The plaintiff bears the risk of non-recovery or incomplete recovery from the remaining parties, just as it would if the latter were the only defendants or the only defendants against whom judgment was given.

These scenarios suggest that in the current legal and insurance environments the full compensation of the plaintiff by a defendant who is only partially at fault comes at a social cost that was not contemplated when joint and several liability became part of British Columbia law.

E. Other Rationales for Retention: Deterrence and "Gate-keeping"

A further argument in favour of the retention of joint and several liability as an appropriate way of allocating the risk of insolvency is the contention that by imposing full liability the defendant assumes the role of "gatekeeper", a function which is argued to promote efficient deterrence. The notion is that facing the prospect of having to bear the risk of another defendant's insolvency, the gatekeeper function promotes compliance with required standards of conduct by others. The expanded liability of the "gatekeeper", it is argued, plays a policing role with respect to reducing the risks associated with sub-optimal conduct by absent or insolvent wrong-doers. It is further argued to lead to more efficient activity levels by those carrying out the gate-keeping function by avoiding involvement with others who pose a particular risk and may result in better information for public markets.¹⁷

This argument is generally made with respect to the liability of accountants (as auditors) or corporate solicitors who are considered to be uniquely positioned to identify fraudulent transactions for which they have provided auditing services or legal opinions. It is suggested that the spectre of joint and several liability may also cause these parties to act more efficiently in their approach to high risk clients than they were required to do when insurance costs were lower.

This justification for the retention of joint and several liability is problematic in several respects. To the extent it lends itself to the auditor/solicitor example in the context of the review of corporate transactions it is far less clear how the “gatekeeper” role applies in other contexts involving other kinds of defendants. For instance, in the construction context it is not immediately apparent how or why a local government with a limited inspection mandate (generally comprised of eight or ten site visits for specific purposes) can effectively police the conduct of a general contractor, sub-trades or design professionals with respect to whether or not those parties meet the standards of care imposed upon them in constructing the project. The local government has no control over the group selected by the owner to execute the work and has no role in vetting the appropriateness of those choices. Yet the inappropriateness of the owner’s choices may negatively impact the local government and the community because of joint and several liability. In that sense, the relationship is starkly different from the situation in which an auditor may decline to act for a “risky” client thereby sending a signal to capital markets as to the potential risks posed by a particular company.

Furthermore, with respect to its own conduct, there is no body of evidence of which either UBCM or MIABC is aware demonstrating that in delivering public services, local government delivers optimal services to its citizens because of joint and several liability. Government is elected to deliver the services identified as important to taxpayers within prevailing budgetary constraints. The driving force in doing the job properly and in developing appropriate risk management strategies is surely the accountability imposed by the ballot box demanding that local government meet its publicly imposed mandate.

It is submitted that the role of joint and several liability as a deterrent cannot be sufficiently isolated to be meaningfully assessed so as to justify its retention. There is no evidence that joint and several liability plays any role in positively influencing the quality of local government services. There is no evidence that if full proportionality were introduced tomorrow that the quality of services provided by local governments would deteriorate or be influenced in any way.

The retention of joint and several liability may, however, have the undesired effect of limiting the range of services local governments are prepared to undertake for the public benefit given the continuing tension between budgetary pressures and open-ended liability. Put another way, there is no sound basis for concluding that exposure to tort liability should be permitted to impact the allocation of public funds by local governments. It is submitted that such a result has the effect of elevating the plaintiff’s corrective justice rights above the public good.

Finally, the deterrence argument is of little force when the conduct of the primary wrongdoer remains unaffected. Joint and several liability imposes no consequences on the defendant who bears primary responsibility for the plaintiff’s loss but who happens to be insolvent. In the sense that one of the objectives of the tort system is deterrence of negligent conduct, that objective cannot be met when it is not translated into financial consequences for the primary wrongdoer. If all defendants are solvent it is accepted that the deterrence objective is met by the requirement that each pay for his or her proportionate share of the plaintiff’s loss (currently accomplished by rights of contribution). That being so, it is difficult to see how, when one defendant is insolvent, increasing the burden on lesser or marginal but insured defendants can be supported by a deterrence rationale at all.

F. Changed Legal Environment

It is important to recognize that in all common law jurisdictions until approximately the mid-1950s a plaintiff lost his or her claim in negligence completely if he or she contributed in any way to the loss suffered. Contributory negligence on the part of a plaintiff was a complete bar to recovery.¹⁸ The “Inquiry into the Law of Joint and Several Liability” prepared for the Attorney General of Australia in 1994 describes the context in this way at page 4:

“The course of development of the liability of concurrent tort feasons has been as haphazard as that of liability in negligence generally. In the early years of this century, the liability of multiple defendants was determined by common law principles alone, unaffected by any statutory provisions. At that time, there was a substantial difference between joint tort feasons and several concurrent tort feasons. Joint tort feasons - that is, two or more who have to some extent acted in concert - might be sued either separately or together, but if one were sued separately, a settlement of the action with that one or judgment against him or her, barred further proceedings against the others, even though the judgment were not satisfied or the settlement agreement not carried out. If, on the other hand, a number of people brought about the plaintiff’s loss by their separate acts of negligence, the common law generally considered only the last of those wrongdoers to be liable, and denied that one the right to claim contribution from others whom might have been involved. As Professor Fleming observes (*The Law of Torts*) (8th ed. 1992) p. 220), this view was largely attributable to “the traditional preoccupation [of the common law] with finding a *sole* responsible cause”. That preoccupation finds further expression in the common law rule that, if the plaintiff’s loss had been brought about even in part, by his or her own failure to exercise reasonable care, that contributory negligence was a complete bar to recovery.”

By mid-century there was a move away from the contributory negligence defence such that a plaintiff who contributed to his or her own loss was precluded only from recovering that portion of the damages attributable to his or her own fault but not from proceeding against the defendants for the balance. As discussed above, that concept has been advanced in this jurisdiction through judicial consideration of legislative reform such that full proportionate liability is the rule in British Columbia where the plaintiff has been contributorily negligent. Where the plaintiff is without fault, joint and several liability has been retained but in the context of a broadly expanded scope of duties and recoverable damages.

A critical issue is whether the concept of joint and several liability can be sustained as a fair principle in the context of significantly expanded duties in tort. The discussion above concerning the role of liability insurance outlines the broad expansion of tort law duties faced by local governments in the wake of the seminal decision of *Kamloops v. Nielsen* in 1984 and the extension of recovery for economic loss endorsed by the Supreme Court of Canada in decisions following *Anns v. Merton*. Both of these developments post-date the entrenchment of joint and several liability.

In addition, concurrent liability in contract and tort was not recognized in Canada until recent years. Prior to that development, a professional faced liability in contract arising from a breach of the contractual relationship between the professional and his or her client. That relationship was itself subject to such terms as were agreed between the parties governing the nature and scope of the services to be provided. Concurrent

liability resulted in professional liability claims being framed in tort as well as contract with the effect that only where a contract specifically precludes recovery will a contract defence trump a tort claim. No such protection is possible where the professional is held to owe a duty to a third party. With respect to local government the impact of concurrently liability is less the issue than the imposition of tort duties previously precluded by the concept of Crown immunity. All of this was unknown to the law when joint and several liability was initially imposed.

Furthermore, it has only been in recent legal history that any legal interest, beyond personal injury, has grounded a claim in tort at all. It has been argued that if proportionate liability is sound in principle, there is no basis upon which to exempt personal injury but include property damage and economic loss. However, that argument ignores the historical treatment of personal injury as representing the invasion of the most valued of legal rights: that of bodily integrity. It is unlikely that a plaintiff will have had the opportunity to insure for accidental injury to himself or herself, and will likely be without compensation unless the operation of the law maximizes the opportunity for recovery from those at fault. Quite apart from the priority given the interference with bodily integrity by the law, there are no compelling arguments from an insurance perspective to support the need for proportionate liability in that area. Insurance is available at a reasonable cost with respect to personal injury liability. It is submitted that no inconsistency arises by retaining joint and several liability in respect of personal injury. An inconsistency would arise in failing to recognize the inherent and qualitative difference between a claim for personal injury damages and a claim for preservation of property or economic interests. The latter are on a different and lower scale than the former and are more readily insured or otherwise managed by plaintiffs. Not all losses have an equal claim to the sympathy or protection of the law.¹⁹

It must also be recognized that the economic setting in which joint and several liability currently operates has changed significantly. Not only is economic loss recoverable but it is recoverable in respect of large and complex transactions and activities never contemplated in the past. Coupled with recent procedural changes permitting the advancement of class action lawsuits, and the particular focus on “deep pocket” defendants in the context of such actions, the potential impact of joint and several liability is striking.

2. If so, what type of legislative solution is preferable? Should one of the five tracks set out in the Restatement be adopted? Why would one of these models be preferred over the others?

It is submitted that the fair reform of joint and several liability should be undertaken globally and not restricted to a particular industry, activity or profession. The underlying policy issues cut broadly across professional and commercial lines such that to leave joint and several liability intact with respect to some defendants but not others is inherently unfair. As one of the forces identified as driving reform is a need to consider a re-balancing of the interests of the affected parties in order to ensure fair and equitable treatment for all, a system which favours some but excludes others necessarily falls short of that goal. If joint and several liability is manifestly unfair, and it is submitted that it is, then its operation is unfair for all defendants who are required to pay as damages an amount which exceeds their proportional share of fault for the plaintiff’s loss.

It is further submitted, however, that the reform of joint and several liability should recognize the qualitative difference in the value placed on bodily integrity over economic and property loss by society. The argument that to be supported on an analytical basis, reform of joint and several liability should not take into account the nature of the cause of action simply fails to recognize that the law and the community have always been particularly concerned with the compensation of a citizen who suffers physical harm as the result of another's negligence. In that context, the plaintiff's corrective justice right to full compensation is supportable. The fact that the law now permits recovery for economic loss does not mean that economic interests have acquired the same value as the right to non-interference with bodily integrity. The two are fundamentally different and different treatment logically follows where the plaintiff has played no role in his or her own loss.

Furthermore, there is no evidence that exposure to joint and several liability has impacted the cost or availability of personal injury coverage. It continues to be a risk underwritten by liability insurers at reasonable rates owing to the predictability of losses established through actuarial experience and the capping of damages for pain and suffering by the Supreme Court of Canada.

It is submitted that reform of joint and several liability as it pertains to property damage and economic loss claims is critical as the status quo threatens to destroy itself: the loss distribution rationale cited in support of retaining joint and several liability has led to the intentional targeting of "deep pocket" defendants leading, in turn, to the erosion of available insurance. With the loss of coverage the opportunity for the plaintiff to recover is limited or incomplete except in the case of local or other governments where the pocket is perceived to be even deeper through access to individual taxpayers.

The departure point for reform of joint and several liability for property damage and economic loss is the *Negligence Act* as presently in force. As noted, the *Act* already takes reform beyond the approaches of many jurisdictions in providing for full proportionate liability where the plaintiff is contributorily negligent. That provision has been in place for over a dozen years and does not appear to have elicited a negative public response. The Report on Shared Liability prepared by the Law Reform Commission of British Columbia in 1986 observed that a working paper on the issue in 1985 failed to garner a significant response notwithstanding its wide circulation. The call in the Law Reform Commission Report itself for a repeal of the statutory interpretation reached by the Court of Appeal in the *Cominco* decision has not spurred legislative change in the intervening sixteen years.

It is submitted that vis a vis the contributorily negligent plaintiff the law should not be disturbed: the plaintiff who contributes to his or her own loss bears the risk of a defendant's insolvency and no issue of contribution arises. A defendant is not compelled to contribute a share of damages that is disproportionate to his or her degree of causal fault.

The critical question is whether that principle should be extended to include circumstances in which the plaintiff has not contributed to his or her loss. Should the plaintiff's conduct alone justify compelling a defendant to bear all or a portion of the loss caused by another party?

In considering this issue reference is made to the five tracks of reform set out in the *Restatement of the Law of Torts: Apportionment of Liability (2000)* summarized in the Ministry's Consultation Paper:

Track A: Pure Joint and Several Liability

For the reasons set out above it is submitted that the retention of joint and several liability cannot be justified in the present legal and economic environment.

Track B: Pure Several Liability

Pure several liability reflects the strongly held Canadian value of individual responsibility. It is entirely consistent with that core value that defendants be required to pay the full amount of the damages attributable to their causal fault. The notion that when more than one defendant, acting independently but contributing to the plaintiff's loss to in varying degrees, is each responsible for the whole of the loss, is a concept which depends on the idea that damage is "indivisible" and cannot be apportioned. In that sense, the principle of joint and several liability rests on the absence of a system of proportionate liability. That may have made sense at a time when, in fact, the law declined to compare the proportionate liability of the parties: the plaintiff was innocent or not. If not, no recovery was possible; if so, complete recovery was possible and the defendant named by the plaintiff was wholly responsible with no recourse to contribution from other responsible parties.

However, the modern experience in British Columbia is that damages are divisible and proportionate liability provides the mechanism by which such division is accomplished. It follows that if degrees of fault can be attributed to individual defendants, (with a default position of equal apportionment) then the practical mechanism exists to apportion the plaintiff's damages among them. It is, after all, a number that is subject to division - several defendants may have contributed to a single loss, for instance a failed building, but the court must quantify the damage at the end of the day.

Proportionate liability is consistent with the principle of individual responsibility, is analytically defensible and is required to reverse the negative impact on defendants of being compelled to make good the loss arising from the fault of others.

Track C: Joint and Several Liability with Reallocation

Joint and several liability is retained with reallocation of the uncollectible portion of the plaintiff's damages among all parties including the plaintiff.

This option still results in solvent defendants bearing a portion of the loss attributable to others.

Track D: Hybrid Liability Based on Threshold Percentage of Comparative Responsibility

Joint and several liability is retained where the assigned percentage of the defendant's fault exceeds a prescribed threshold. Where fault is assessed at below the threshold, liability is proportionate.

Track D introduces the concept of a legislative threshold which is essentially arbitrary and easily manipulated. Solvent defendants above the threshold still bear responsibility for the fault of others.

Track E: Hybrid Liability Based on the Type of Damage

Defendant remains jointly and severally liable for pecuniary damages (in Canadian terminology) but is proportionately liable for non-pecuniary losses).

Track E has limited relevance to the Canadian legal setting and responds to American concerns with large jury awards for non-pecuniary damages.

It is the position of MIA and UBCM that any proposed reform which retains a requirement that a defendant is responsible for damages in excess of his or her proportionate share of fault is fundamentally flawed. It is intertwined with the notion that the plaintiff's claim for compensation must always be paramount where there is more than one defendant, only one of whom is solvent, notwithstanding that the law accepts the plaintiff must bear the loss where the only defendant, or for that matter all of the defendants, cannot pay. The paramountcy of the plaintiff's claim is underpinned by the notion of the indivisibility of damage and inability to apportion fault, both of which are outmoded concepts in modern British Columbia. Coupled with the demonstrable impact on the ability of local governments to obtain liability coverage in high risk areas, and hence to manage risk generally and ensure municipal budgets are not undermined by liability exposure there are sound legal and practical reasons for endorsing full proportionate liability.

Other methods of reform:

One option raised in various commentaries on tort reform is a statutory cap on recovery of property damage and pure economic loss. The argument is that a liability cap would stabilize individual awards making risks more predictable and therefore encourage insurers to provide coverage. Joint and several liability would remain intact, but a solvent defendant would only be required to cover the loss of an insolvent defendant to the limit of the cap. Counter-arguments include the disadvantage to the plaintiff in settlement negotiations as the upper limit is always known.

Another, perhaps more fundamental problem arises from the broad range of recovery for economic loss. If the cap was set at a high enough level to cover the majority of claims and in practical terms only limit recovery on the largest claims, then by and large defendants would remain jointly and severally liable for the plaintiff's loss in most cases.

Furthermore, with respect to personal injury claims, the limit on non-pecuniary damages introduced by the Supreme Court of Canada makes sense in limiting a loss which is not independently calculable: pain and suffering does not easily lend itself to quantification and the law accepts there is a limit to which monetary damages can compensate a plaintiff for that aspect of his or her loss. On the other hand, property damages and economic loss claims are subject to quantification and the capping of recovery may have the effect of limiting a completely legitimate and provable claim.

Capping does not address the fundamental question raised by the inequity of compelling one defendant to bear the portion of a loss attributable to another.

3. How might the interests of the plaintiff be protected if joint and several liability is abolished or modified?

Proportionate liability should positively influence all concerned parties in the conduct of their affairs to look with increased care at the management of economic risks without joint and several liability available as the ultimate risk management strategy. Coupled with the likelihood that liability insurance will be more readily available in a proportionate liability regime, the interests of the plaintiff should be adequately attended to.

4. Who should be required to obtain and maintain insurance and for what types of actions?

To the extent that mandatory insurance has been resisted by certain professional bodies, resistance is largely driven by the combined effect of a 30 year ultimate limitation period and joint and several liability. Insurance premiums for certain coverage is reportedly beyond the reach of most small architectural firms, for instance, so making insurance compulsory in the current liability climate would not ease the affordability issue. Furthermore, it is the current liability climate which has contributed to the withdrawal of coverage. Making insurance mandatory does not mean it will be available. In the “Feasibility Investigation of Joint and Several Liability” by the U.K. Department of Trade and Industry support for mandatory insurance was expressed in this way at page 33:

“If more potential defendants were insured against legal liability, the burden of joint and several liability would fall less heavily on professional defendants, since any one wrongdoer who paid the whole of the judgment to the plaintiff could be assured that his contribution claim against the others would be met in full. The existing joint and several liability doctrine, with its advantages to plaintiffs, could then be retained without incurring the criticism that it operates harshly for defendants, who would, after recovering contribution, only ever pay their adjudicated share of a plaintiff’s loss.”

Implicit in this statement is the assumption that liability coverage is available for purchase in the market place, for the risks faced by the purchaser. That is not an assumption that can be presently made with respect to local governments, architects or engineers in British Columbia. Compulsory insurance must be supported by the reduction of the ultimate limitation period to reduce the exposure of an insured to an inventory of dated claims, and the abrogation of joint and several liability to bring predictability to the rating process. In short, unless insurers are given some comfort that they can properly assess risks, making insurance mandatory will not make it available.

The abolition of joint and several liability and the reduction of the ultimate limitation period to 10 years should have the effect of improving the insurance market. If insurance is reasonably available there is no principled reason why the market should not compel professionals and other participants in industry and commerce to carry insurance. Insurance is the primary and most appropriate risk management tool for any party, and ready access to the insurance market should obviate the need for compulsory coverage.

5. What alternatives are there to compulsory insurance?

UBCM and MIABC do not see a need for a compulsory insurance scheme. The requirement to carry adequate insurance coverage should be market driven and reasonably available in a tort-reform system. Theoretically a “tort trust”, publically funded might be seen as some as an alternative, but it is not a scheme which is advocated by UBCM or MIABC.

6. What do you see as the outcome of the trend toward limited, and possibly unavailable insurance?

With reference to local government, the outcome of limited or unavailable insurance is the pressure of managing uninsured and unpredictable risks within the confines of budgetary constraints and in the face of joint and several liability. Unquantifiable risks will influence local government decision making in several ways: cut backs in services pertaining to high risk activities, in particular, building inspection; allocation of public funds to cover liability risks in lieu of the provision of services; increased taxes to offset the costs of borrowing to cover liability costs; imposition of per capita assessments on tax payers; settlement of claims at levels forced by the threat of uninsured trial costs and the prospect of being the only “deep pocket” remaining at the time of trial.

Limited and possibly unavailable insurance, in cases in which neither local nor provincial government is a party, sharply impacts the plaintiff’s prospects for recovery. The proposed tort reforms should considerably lessen that risk.

7. Conclusion

The need for reform of joint and several liability has been succinctly described in this way:

“One of the great strengths of the common law is its ability to adapt to a changing legal environment. Its flexibility allows courts to weave from ancient doctrines new rules to resolve problems as they arise in an increasingly complex society. Occasionally the court’s handiwork becomes so entangled in confused definitions and internal inconsistencies, and travels so far from a doctrine’s original rationale, that it cries out for reform. Such is the case with joint and several liability.”²⁰

It is submitted that there is a pressing need for such reform in British Columbia and that reform should be guided by the principles of reason and fairness in order that an appropriate balance of risk and responsibility is restored to the law of civil liability. It has been put well by Andrew Rogers, formerly the Chief Judge of the Commercial Division of the Supreme Court of New South Wales:

“Law reform should truly be looking at the law with a clean sheet and be prepared to entertain the ideas of reform without resort to the burden of proof. Surely in law reform as in other forms of quasi-judicial activity the criteria should be what is right and fair.”²¹



II. ULTIMATE LIMITATION PERIOD

In July 2002, the British Columbia Law Institute presented a report entitled “*The Ultimate Limitation Period: Updating the Limitation Act*”. MIA and UBCM endorse and adopt the reasoning and recommendations contained in the report on revisions to Section 8 of the *Limitation Act* summarized at page 33 of that publication. In particular, MIA and UBCM support the Institute’s recommendations that:

1. The 30 year ultimate limitation period of general application be reduced to 10 years;
2. The *Limitation Act* provide a special ultimate limitation period of 30 years applicable to cases of fraud, fraudulent breach of trust or wilful concealment of facts material to the claim;
3. The provisions of the *Limitation Act* which provide a special ultimate limitation period of 6 years for medical practitioners, hospitals and hospital employees, be repealed; and
4. The *Limitation Act* be amended to provide that the commencement of the running of time under the ultimate limitation period is from the date an act or omission that constitutes a breach of duty occurs, where the plaintiff’s action is based on the breach of duty, whether that duty arises under a contract, statute or the general law.

III. NON-DELEGABLE DUTY and VICARIOUS LIABILITY

As stated by the Supreme Court of Canada, vicarious liability is not a distinct tort, but rather a theory that holds one person responsible for the misconduct of another because of the relationship between them. The most common example of such a relationship is that of employer and employee, although the “categories of relationships that attract vicarious liability are neither exhaustively defined nor closed.” Generally, the aim of tort law is to hold wrongdoers accountable for the harm flowing from their wrongful acts. By contrast, vicarious liability is a form of strict, or no-fault liability.

It is submitted that the expansion of vicarious liability as identified in the Attorney-General’s Consultation Paper is a trend that particularly affects local government for several reasons:

1. Local governments are large scale employers;
2. Local governments are not insured for intentional acts and/or intentional damage by employees;
3. In the absence of insurance, local governments are required to defend and fund claims, for which they bear no direct fault, from public funds.

It is further submitted that the legal approach established by the Supreme Court of Canada is fraught with difficulty in practical application and open to broad ranging and conflicting interpretations by lower courts. Vicarious liability is in essence, a policy choice.

It is the position of MIA and UBCM that the imposition of vicarious liability for intentional wrongdoing is diametrically opposed to the core social value of individual responsibility, and that it is repugnant to hold local governments responsible for intentional misconduct by employees that would not, under any

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circumstances, be condoned or accepted by local government as an employer. Local government, in providing public services, becomes the involuntary insurer of risks which the insurance industry itself declines to underwrite.

It is likewise the position of MIA and UBCM that where there is no fault attributable to the due diligence of local government in selecting independent contractors to deliver government services, the doctrine of non-delegable duty should not be retained.



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C. End Notes

1. [1961] 2 Q.B. 162, 188.
 2. See discussion generally in: Department of Trade and Industry (U.K.) “Feasibility Investigations of Joint and Several Liability” (HMSO), 1995.
 3. Common-law and American positions are discussed generally in “Feasibility Investigation of Joint and Several Liability”, *supra*, beginning at p.50.
 4. See, for example, the arguments made by Michael Tilbury in “Fairness Indeed?: A Reply to Andrew Rogers” (2000), TLJ Lexis 1.
 5. See discussion by The Honourable W.Z. Estey, Q.C. in “Proportionate Liability and Canadian Auditors.” Brief Prepared for Legal Liability Task Force, Canadian Institute of Chartered Accountants, 1996, beginning at p.11.
 6. 45 B.C.L.R. 204.
 7. 50 B.C.L.R. 145.
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8. 54 D.L.R. (4th) 708.
9. Michael Tilbury, for example, discusses the notion of the plaintiff's corrective justice rights in "Fairness Indeed?: A Reply to Andrew Rogers." *supra*, Note #5. See also Richard Wright. "The Logic and Fairness of Joint and Several Liability" 23 Memphis State University Law Review 45 at p.62.
10. The Honourable W.Z. Estey, Q.C. discusses this "Proportionate Liability and Canadian Auditors", *supra*, Note #6 at p.15.
11. The concern of the law to give plaintiffs an incentive to take action themselves to avoid the risk of loss is discussed by Jane Stapleton in "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence." (1995), 111 Law Quarterly Review, 301 at 305.
12. Richardson, Megan. "Report on the Economics of Joint and Several Liability Versus Proportionate Liability" Expert Report 3, Melbourne, Victoria: Law Reform Advisory Council, 1998 at p.21.
13. Richardson, *supra*, Note #13 at p.13.
14. See also comments made by Andrew Burrows in "Should One Reform Joint and Several Liability?" in Torts Tomorrow (1998) edited by Nicholas J. Mullany and The Honourable Justice Allen M. Linden, LBC Information Services at p.102.
15. *Strata Plan NW 3341 v. Canlan Ice Sports Corp.* 93 B.C.L.R. (3d) 136.
16. [1999] 1 S.C.R. 85.
17. Richardson, *supra*, Note #13 at p.16.
18. See discussion by Alison Manzer in "A Proposal to Amend Professional Liability Under Federal Statutes." (1998) 17 National Banking Law Review 1 at p.10.
19. This point was conceded in the Department of Trade and Industry U.K. "Feasibility Investigation of Joint and Several Liability" (HMSO) (1995) at p.16.
20. Senator Larry Pressler and Keven B. Schieffer, "Joint and Several Liability" A Case for Reform" (1988) 64 Denver University Law Review 651 at p.652.
21. Andrew Rogers, "Fairness or Joint and Several Liability" (2000) 8 Torts Law Journal 107 at p.112.