Law Reform Commission of Saskatchewan

Contributory Fault and Apportionment Among Wrongdoers

Consultation Report

August 2020

YOUR COMMENTS AND OPINIONS ARE WELCOME.

The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission* (proclaimed in force in November 1973) and began functioning in February 1974.

The Commission is incorporated by an Act of the Saskatchewan Legislature. Commissioners are appointed by Order in Council. The Commission's recommendations are independent and are submitted to the Minister of Justice and Attorney General of Saskatchewan for consideration. Projects are initiated by the Commission in response to suggestions from the public and the legal community, or at the request of the Minister of Justice and Attorney General. After preliminary research, the Commission usually issues a background or consultation paper to facilitate consultation. Tentative Proposals may be issued if the legal issues involved in a project are complex. Upon completion of a project, the Commission's recommendations are formally submitted to the Minister of Justice and Attorney General as final proposals.

At present, the Commission is funded by grants from the Law Foundation of Saskatchewan and the Ministry of Justice.

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Table of Contents

Call for Responses

The Law Reform Commission of Saskatchewan is interested in your response to this consultation report. Your comments and opinions on the topic are welcome and are an important part of the Commission's deliberation on recommendations for law reform. Please allow the following questions to guide you in your response:

1. How should a plaintiff's contribution to the harm they have suffered be reflected in the amount of compensation a plaintiff is entitled to?
2. In what types of legal actions should a plaintiff's contributory fault reduce their compensation?
3. How should liability for harm be allocated among multiple parties that have contributed to that same harm?
4. In what types of legal actions should one defendant be able to seek contribution from other defendants who have contributed to the same harm?
5. How should liability be re-allocated when one or more parties are unable to pay their share?
6. Are there any other issues surrounding contributory fault or apportionment among wrongdoers that the Commission should consider?

How to Respond

Responses may be sent by December 31, 2020

By email - director@lawreformcommission.sk.ca

By fax - (306) 966-5900

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Responses may also be provided online, via the survey posted on the Commission's website at: http://lawreformcommission.sk.ca/consultations/.

I. Introduction

[1] In Saskatchewan, *The Contributory Negligence Act*[1] (the "*CNA*") provides for apportionment of a degree of liability to a plaintiff determined to have contributed to their injury, and also allows for a defendant to seek contribution from others who also contributed to the plaintiff's injury. The *CNA* has been in force for over seventy years, and there have been calls for its reform throughout its history. Most recently, Chief Justice Richards of the Saskatchewan Court of Appeal has stated:

> [T]he law concerning the apportionment of loss among wrongdoers is an area where legislative intervention would be appropriate…The advisability of legislative action is reflected in the work of the Uniform Law Conference, culminating in the 1985 *Uniform Contributory Fault Act* (*Proceedings of the Sixty-Sixth Annual Meeting of the Uniform Law Conference of Canada* (Calgary, 1984) at 32 and 98–102). Law reform commissions have also called for reform…
>
> Both litigants and the larger community would profit from the kind of policy-driven analysis that the legislative process would bring to a consideration of the numerous issues at play both with respect to the reach of the *Act* and with respect to broader questions about how to appropriately apportion fault among multiple wrongdoers.[2]

[2] Professor John Kleefeld, in a 2015 article providing a comprehensive review and discussion of the history and scope of the *CNA,* similarly suggested "the Act, while having done yeoman service over the last seventy years, is suffering from infirmities."[3] Professor Kleefeld also observed:

> Saskatchewan has both the potential and the pedigree to be a law reform leader in this area. It was 35 years ago that the Commissioners to the Uniform Law Conference of Canada sat down in Saskatoon to consider the first annotated draft of the UCFA--to this day, the most comprehensive effort at crafting a modern legislative scheme for this area of law. Saskatchewan remains one of the few provinces that have legislatively abolished both the judgment-bar rule and the release-bar rule, the effect in Saskatchewan being limited only by a restrictive interpretation given to the Act forty years ago in the Cherneskey case, and one that the Court of Appeal has suggested is ripe for change. Saskatchewan is also the only province to have enacted a scheme for reallocating uncollectable amounts from defendants, a model that the Manitoba Commissioners followed when recommending their own variation on this enactment.[4]

[1] RSS 1978, c C-31.
[2] *Sound Stage Entertainment Inc v Burns*, 2019 SKCA 18 [*Sound Stage*].
[3] Kleefeld, John C, "The Contributory Negligence Act at Seventy" (2015) 78 Sask L Rev 31 at 111.
[4] *Ibid.* at 123 – 124.

[3] The Law Reform Commission decided to study this issue in 2019 following the release of the decision in *Sound Stage Entertainment Inc v Burns*.[5] This report focusses primarily on sections 2 and 3 of the Act, and asks questions related to the scope of the applicability of the defence of contributory negligence, and the scope of the rule allowing wrongdoers to seek contribution from other concurrent wrongdoers.

[4] This report will be used as the basis for the Commission's consultations with a variety of stakeholders on reform of *The Contributory Negligence Act* and the areas of contributory fault and apportionment among wrongdoers more broadly. The Commission is interested in your views on how the law in this area should be reformed and invites you to share your views by either submitting written comments, completing the online survey, or participating in a public consultation event. Responses received during consultation will be an important factor in the Commission's decisions on recommendations for reform of this area of law.

[5] *Sound Stage, supra* note 2.

II. Background

[5] Contributory negligence legislation was enacted across Canada and much of the Commonwealth to alter two common law tort rules: (1) the contributory negligence rule, and (2) the no contribution among tortfeasors rule. At common law, a plaintiff found to be contributorily negligent was prohibited from recovering damages from any tortfeasor; in other words, contributory negligence was a complete defence to a negligence action. In addition, the common law prohibited tortfeasors from seeking contribution from other tortfeasors in respect of the same injury; each tortfeasor was responsible for the entire loss and plaintiffs could seek the entirety of their damages from one out of multiple tortfeasors who contributed to the loss. Both of these rules were perceived to result in unfairness to both plaintiffs and defendants.

[6] The contributory negligence rule stems from the 1809 English decision in *Butterfield v Forrester*.[6] In *Butterfield,* the plaintiff was injured after a horse he was riding at dusk struck a pole had been placed across the road by the defendant. The jury was instructed that if they were satisfied that the plaintiff had failed to use ordinary care to avoid the obstruction, then the plaintiff should not be entitled to recover damages and they should find in favour of the defendant. The jury subsequently found in favour of the defendant and an appeal from the decision was dismissed. Application of the contributory negligence rule often led to harsh results, and judges at times expressed their dissatisfaction with the rule.[7]

[7] Tort liability for a single harm is indivisible at common law, and therefore a plaintiff whose injury is caused by multiple tortfeasors has the right to recover damages for the entire injury from any of the tortfeasors. The no contribution among tortfeasors rule is said to have originated in the 1799 English case of *Merryweather v Nixan*[8] and the rule prevents

[6] (1809), 103 ER 926 (KB) [*Butterfield*].

[7] Kleefeld, *supra* note 3 at 39.

[8] (1799), 8 T.R. 186, 101 E.R. 1337. The Supreme Court of Canada in *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltc*, [1997] 3 SCR 1210 at para 101 commented as follows on the *Merryweather v Nixan* decision:

> A final question concerns the availability of contribution — that is, the right of a tortfeasor who pays more than its share of the plaintiff's damages to recover the excess amount paid from other tortfeasors. It is often stated that at common law there was no contribution between tortfeasors, citing *Merryweather v Nixam* (1799), 8 T.R. 186, 101 E.R. 1337. It may also be noted that in *Sparrows Point v. Greater Vancouver Water District*, 1951 CanLII 32 (SCC), [1951] S.C.R. 396, Rand J. (at p. 412), in concurring reasons, after holding that provincial contributory negligence legislation could not apply, stated that as a result of the application of common law admiralty principles, there could be no contribution. However, the arguments in favour of and against contribution between tortfeasors appear not to have been considered. Commentators have

the tortfeasor who is sued by the plaintiff for the entirety of the damages from seeking contribution from concurrent tortfeasors.

[8] Professor Kleefeld suggests that the trigger for reform of the law of contributory negligence in Canada was the 1923 Supreme Court of Canada decision in *Grand Trunk Pacific Railway Company v Earl*.[9] In this case, the plaintiff was injured after being hit by a train while attempting to cycle across a railway crossing. While both the plaintiff and the railway were at fault to some degree in causing the accident, the plaintiff was ultimately unsuccessful as he was determined to have had the last clear chance of avoiding the accident. Justice Duff stated that the case was one which "sometimes causes one to turn a rather wistful eye to jurisdictions in which…the burden of the loss can be equitably distributed."[10] Justice Anglin expressed his preference for the civil law which allowed damages to be apportioned, stating:

> [T]he present case illustrates the harshness of the rule by which, where there is common fault contributing to cause injury to a plaintiff, he is deprived of all redress and the defendant entirely relieved, although the culpability of the former may be comparatively slight and that of the latter distinctly gross. The doctrine of the civil law that in such circumstances the damages should be divided in proportion to the degree of culpability commends itself to my judgment as much more equitable.[11]

[9] Ontario was the first Canadian common law jurisdiction to enact legislation to modify the contributory negligence and no contribution among tortfeasors common law rules in 1924.[12] The legislation modified the law by allowing for apportionment of damages between a plaintiff and a defendant where the plaintiff was found to have been contributorily negligent. The 1924 legislation was replaced by the *Negligence Act* in 1930 which maintained the abolishment of the contributory negligence rule and added new provisions providing for contribution among tortfeasors.[13] This legislation is still in force. All common law provinces and territories subsequently introduced legislation modifying the common law rules of contributory negligence.

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questioned whether the common law rule against contribution was absolute, particularly in cases where the tort committed was not intentional, and there was no malicious motivation: see e.g. G. Williams, *Joint Torts and Contributory Negligence* (1951), at pp. 83-84, and see also *Eliminating Outmoded Common Law Defences in Maritime Torts*, *supra*, at pp. 5-6. Again, under the Quebec *Civil Code*, contribution is available to a tortfeasor who has paid more than its share of the liability (art. 1536): Baudouin, *Les obligations*, *supra*, at para. 881. Like the contributory negligence bar, the idea that there can be no contribution between tortfeasors is anachronistic and not in keeping with modern notions of fairness.

[9] [1923] SCR 397.

[10] *Ibid* at 398.

[11] *Ibid* at 406.

[12] *Contributory Negligence Act,* 1924, c 32.

[13] *Negligence Act*, RSO 1990, c N.1.

[10] The Uniform Law Conference of Canada (ULCC) has also been active in the area of contributory negligence. In 1924, the ULCC drafted the *Uniform Contributory Negligence Act*. In 1935 this Act was amended to allow for contribution among tortfeasors. In 1984 the ULCC adopted a new *Uniform Contributory Fault Act*,[14] which has not been implemented in any Canadian common law jurisdiction. The *Uniform Contributory Fault Act* is reproduced in Appendix C.

[11] Saskatchewan's contributory negligence legislation, *The Contributory Negligence Act,* ("*CNA"*) was introduced and came into effect in 1944. The *CNA* displaces the common law by providing that contributory negligence is not a complete defence and instead should result in a reduction to a plaintiff's damages award and by allowing apportionment among tortfeasors. Similar legislation was enacted across Canada around the same time that Saskatchewan enacted the *CNA*. Section 2 of the *CNA* removes the common law contributory negligence rule and provides as follows:

> *Where by the fault of two or more persons damage or loss is caused to one of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault.*

Section 3 of the *CNA* removes the no contribution among tortfeasors rule:

> *Joint tortfeasors are jointly and severally liable to the person suffering damage, but as between themselves they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.*

[12] *The Contributory Negligence Act* is reproduced in Appendix A. Appendix B contains a chart detailing the amendments to the Act since its enactment.

[14] Uniform Law Conference of Canada, *Uniform Contributory Negligence Act*, online: <https://www.ulcc.ca/en/uniform-acts-new-order/older-uniform-acts/647-contributory-fault-act/1405-uniform-contributory-fault-act> [*UCFA*].

III. Contributory Negligence as a Defence

[13] This section of the report considers whether the basis of apportionment should be on the basis of moral blameworthiness or causal relevancy, the last clear chance doctrine, and whether contributory negligence should be a defence to claims based in intentional torts, breach of fiduciary duty, vicarious liability, strict liability torts, breach of statutory duty, and breach of contract.

1. Basis of Apportionment

[14] Whether apportionment between a plaintiff and a defendant or between defendants should be determined on the basis of relative blameworthiness and/or on the basis of causation is a matter of some debate. Professor Linden suggests that most Canadian common law courts appear to apportion on the basis of comparative blameworthiness, and not on the basis of causation.[15] Causation is thus treated as a threshold issue to establish liability, but is not relevant to the degree of liability that each party will bear.[16] This approach differs from that taken in England and Australia, where courts have interpreted the relevant legislation to require apportionment to be based on a consideration of both blameworthiness and causation.[17]

[15] In Professor Williams' view "apportionment should not be on the basis of causation (if such a process is logically possible) but should be on the basis of fault."[18] Professor Klar has similarly suggested that differences in views on the basis of apportionment are "no more than semantics" as it is "not possible to speak of one person's negligence being a greater or lesser cause of another's injury except in terms of it being more or less 'blameworthy' in the circumstances."[19] In Professor Klar's view, determining "degrees of causation" is "meaningless."[20]

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[15] Allen M. Linden et al, *Canadian Tort Law*, 11th ed (Toronto- LexisNexis Canada Inc, 2018) at 469.
[16] Manitoba Law Reform Commission, *Contributory Fault: The Tortfeasors and Contributory Negligence Act* (Report #128, September 2013) at 10 [MLRC Report].
[17] *Ibid* at 10.
[18] Glanville L. Williams, *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-Law Dominions* (London: Stevens & Sons, 1951) at 157.
[19] Lewis N. Klar, "Contributory Negligence and Contribution Between Tortfeasors" in Lewis Klar, ed, Studies in Canadian Tort Law (Toronto: Butterworths, 1977) 145 at 156-57.
[20] *Ibid.*

[16] In Saskatchewan, *The Contributory Negligence Act* states that apportionment is to be determined based on "the degree in which each person was at fault"[21], which suggests apportionment is to be determined on the basis of comparative blameworthiness.

[17] In its 2013 report, the Manitoba Law Reform Commission recommended that Manitoba's legislation require apportionment to "be based on the relative blameworthiness and causal relevance of the person's conduct, as the court finds just and reasonable."[22] The recommendation was made based on a need for a flexible approach to apportionment and to promote fairness and justice between the parties.[23]

[18] Professor Kleefeld does not support the recommendation of the Manitoba Law Reform Commission:

> I understand the Commission's purpose here, which is to address the kinds of concerns that have been raised with respect to intentional torts and strict liability. I also understand that the "just and equitable" phraseology is used in the English legislation, both in the apportionment statute and the contribution statute. Along with the phrase "responsibility for the damage," which also appears in both statutes, this has been interpreted as allowing for apportionment based on causation; hence the term "causal relevance." But the weight of opinion, both academic and jurisprudential, is that this is not the proper form of apportionment. Indeed, were we to introduce it, I would be concerned that it could re-open the "last clear chance" or "ultimate negligence" doors that law reformers have tried so hard to close.[24]

[19] Goudkamp and Klar have also argued against the implementation of the recommendation of the Manitoba Law Reform Commission, stating:

> How can it seriously be suggested that a concept that apparently has no content and which is largely ignored even in jurisdictions that have formally embraced it should be accepted? A concept which is empty and quietly overlooked adds needlessly to the size of the law. The criterion is at best a mere surplusage. At worst it is an unwelcome distraction which provokes barren disputes and which increases the already considerable uncertainty that afflicts the process of apportioning damages for contributory negligence…. Most fundamentally…the difficulty with the concept of causal potency is that it is simply confused. It calls on the court to do something that is impossible.[25]

[21] Sections 2 and 3 contain the same language.
[22] MLRC Report, *supra* note 16 at 12.
[23] *Ibid* at 11.
[24] Kleefeld, *supra* note 3 at 117 – 118.
[25] James Goudkamp & Lewis Klar, "Apportionment of Damages for Contributory Negligence: The Causal Potency Criterion, (2016) 53 Alta L Rev 849 at 861 – 861.

[20] Given the arguments that have been made against implementing the recommendation of the Manitoba Law Reform Commission's recommendation to require apportionment to be based on relative blameworthiness and the causal relevant of the person's conduct, the Commission is tentatively recommending that Saskatchewan's legislation not be amended in the manner suggested by the Manitoba Law Reform Commission.

The Commission is tentatively recommending that there be no change to the basis of apportionment in Saskatchewan and that apportionment continue to be determined on the basis of comparative blameworthiness.

2. Last Clear Chance Doctrine

[20] Prior to the legislative abolishment of the contributory negligence rule, the last clear chance doctrine was developed by courts to allow a contributorily negligent plaintiff to recover if the defendant had the last clear chance to avoid the accident. The doctrine was an attempt to mitigate unfairness resulting from the contributory negligence rule:

> Its origins were noble. In a time when even the slightest act of negligence would bar a plaintiff from any recovery, it allowed courts to compensate when it could be found that, in spite of the plaintiff's negligence, the defendant had the *last clear chance* to avoid the accident.[26]

[21] Contributory negligence legislation across Canada varies to some degree in its treatment of the doctrine. The doctrine is explicitly abolished in the BC,[27] PEI,[28] and Alberta contributory negligence legislation.[29] The doctrine is also abolished in the *Uniform Contributory Fault Act*.[30] The doctrine is not mentioned in the NS, NB, MB and ON, contributory negligence legislation, and it has occasionally been applied by lower courts in those jurisdictions.[31]

[26] *Wickberg v Patterson,* [1997] 4 WWR (AB CA) at para 19 [*Wickberg*].
[27] *Negligence Act*, RSBC 1996, c 333, s 8.
[28] *Contributory Negligence Act*, RSPEI 1988, c C-21, s 4.
[29] *Contributory Negligence Act,* RSA 2000, c C-27, s 3.1.
[30] Section 3 of the *UCFA, supra* note 14 provides as follows: "This Act applies where damage is caused or contributed to by the act or omission of a person notwithstanding that another person had the opportunity of avoiding the consequences of that act or omission and failed to do so."
[31] Allen Linden, Lewis Klar & Bruce Feldthusen, *Canadian Tort Law- Cases, Notes and Materials*, 15th ed (Toronto-LexisNexis Canada Inc, 2018) at n 6 p 489. See also *Wickberg, supra* note 26 at para 25.

[22] While the question of whether the doctrine remains applicable in certain jurisdictions in Canada, including Saskatchewan, is unclear, it is clear that the doctrine is not looked upon favourably:

> The doctrine of last clear chance has lived long past its indicated demise. It has been attacked repeatedly by scholars and judges, but stubbornly refuses to die...Even today, "last clear chance" may appear to survive in some provinces, or be applied by lower courts despite the pleas from the appellate bodies. However, it can be safely said that the better view and the one enjoying the most appellate court support is that the "last clear chance" has been abolished in Canada.[32]

[23] The doctrine has been described as the "dandelion of causation analysis" since it "continues to survive in spite of the efforts to choke it out by courts, law reform bodies, and respected academics."[33]

[24] In Saskatchewan, the relevant provisions of the *CNA* are sections 5 and 6:

> 5 Where the trial is before a judge with a jury the judge shall not submit to the jury any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof unless in his opinion there is evidence upon which the jury could reasonably find that the act or omission of the latter was clearly subsequent to and severable from the act or omission of the former so as not to be substantially contemporaneous with it.
>
> 6 Where the trial is before a judge without a jury the judge shall not take into consideration any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof unless he is satisfied by the evidence that the act or omission of the latter was clearly subsequent to and severable from the act or omission of the former so as not to be substantially contemporaneous therewith.

[25] These provisions are unclear but have been interpreted by some as retaining the doctrine of last clear chance.[34] As pointed out by the Manitoba Law Reform Commission, these provisions seem to "imply that a judge *may* consider or submit to a jury a question as to whether one of the parties could have avoided the consequence of the other's fault, if the judge is satisfied that the acts are severable."[35] The Alberta Law Reform Institute concluded that these provisions appeared "to have been inserted as a compromise short

[32] Allen M. Linden et al, *supra* note 15 at 467 – 468.
[33] *Wickberg, supra* note 26 at para 18.
[34] *Ibid* at para 22.
[35] MLRC Report, *supra* note 16 at 30.

of abolition of the rule".[36] Similar provisions exist in Newfoundland,[37] the Northwest Territories,[38] and the Yukon.[39]

[26] The Saskatchewan Court of Appeal most recently discussed the last clear chance doctrine in *Anderson v Braun*,[40] in response to the appellant's argument that s. 6 of the *CNA* allows courts to apply the last clear chance doctrine. In response to this argument, the Court stated:

> The last clear chance doctrine, or ultimate negligence doctrine, evolved because at common law contributory negligence of the plaintiff absolved the defendant from liability. The courts developed the doctrine to ameliorate this hardship, placing liability on the defendant notwithstanding the plaintiff's negligence on the basis that the defendant's ultimate negligence caused the loss. This is essentially a search for which of the two parties, the plaintiff or defendant, was guilty of the greater negligence. The last clear chance doctrine pertains to the determination of causation and not apportionment. However, even with that limit, the doctrine has been the subject of much academic criticism…There is some question whether it survives given the provisions of apportionment legislation in the various provinces.
>
> This doctrine has also been the subject of comment in *Vigoren v Nystuen*, 2006 SKCA 47 (CanLII), 266 DLR (4th) 634. This Court, at paragraph 79, observed that Canadian cases have firmly rejected the notion of strict causation to allocate liability and have been loath to apply the last clear chance doctrine.[41]

[27] The Court ultimately declined to decide whether the doctrine still exists in Saskatchewan:

> However, I need not determine whether that doctrine still applies in Saskatchewan. As a first point, s. 6 of the *CNA* does not purport to deal with causation but rather with apportionment of fault. Second, by applying the "but for" test and determining there were multiple causes for the loss, the trial judge firmly rejected any "ultimate negligence" on Mr. Peszko's part….
>
> I am not satisfied that an application of s. 6 could, in any event, reduce the share of fault of a concurrent tortfeasor to zero as submitted by Mr. Anderson. This would, as part of the fault analysis, negate the causation determination entirely. In short, even if Mr. Peszko's acts or omissions were clearly subsequent to and severable from those of

[36] Institute for Law Research and Reform of Alberta, *Concurrent Contributory Negligence and Wrongdoers* (Report No 31, 1979) at 14 [ALRI Report].
[37] *Contributory Negligence Act,* RSNL 1990, c C-33, ss 5 – 6.
[38] *Contributory Negligence Act*, RSNWT 1988, c C-18, s 6.
[39] *Contributory Negligence Act,* RWY 2002, c 42, s 5.
[40] 2017 SKCA 93
[41] *Ibid* at paras 74 – 75.

> Mr. Anderson's so as not to be substantially contemporaneous therewith, the degree to which Mr. Anderson's fault would be ameliorated by virtue of s. 6 was a factual matter for the trial judge to determine. Such an allocation is entitled to deference.[42]

[28] The last clear chance doctrine is explicitly abolished in s 3.1 of Alberta's *Contributory Negligence Act*[43] which provides:

> This Act applies if damage is caused or contributed to by the act or omission of a person, whether or not another person had the opportunity of avoiding the consequences of that act or omission and failed to do so.

[29] Prior to the introduction of section 3.1 in 2000, Alberta's legislation contained provisions similar to sections 5 and 6 of the *CNA.* In *Wickberg v Patterson*,[44] the Alberta Court of Appeal urged the government to act on the Alberta Law Reform Institute's recommendation to repeal the doctrine.[45] In arriving at its decision, the Court of Appeal stated:

> Against this background of many challenges to the necessity for last clear chance, but without clear direction from the Supreme Court of Canada or this court, it is necessary to look at the rationale for it.
>
> One possibility is that it has a role to play in determining causation which is, after all, the reason it was created. But as Professor Klar says at p. 371 of his text, *Tort Law, supra*:
>
> > Whether a party's negligent conduct should be described as proximate or remote in view of the intervening act of negligence of a subsequent party cannot be resolved on the basis of who had the last clear chance to avoid the injury.
> >
> > If a party's conduct has not been the factual and proximate cause of the injuries, that party is not negligent. If the party's conduct meets the two tests, the party is negligent and the degree of fault must be determined. Unfortunately last clear chance has become confused with the analysis for remoteness referred to earlier. But it has nothing to add to modern causation analysis.
>
> The second possibility is that it is useful in determining causation because it is a technique by which comparative fault can be ascertained. But as Professor Klar says, *supra*, at p. 372:

[42] *Ibid* at paras 76 – 82.
[43] RSA 2000, c C-27.
[44] *Wickberg, supra* note 26. ALRI repeated its 1979 recommendation to repeal the last clear chance rule in 1997; Institute for Law Research and Reform of Alberta, *Last Clear Chance Rule*, (Report No 75, 1997).
[45] *Ibid* at para 32.

> > If last clear chance is looked at as a rule of comparative fault, it is clearly inconsistent with apportionment legislation. It is no longer necessary to use the rule to avoid the stalemate solution of the earlier common law. Notions of comparative fault leading to an all or nothing approach are inconsistent with apportionment laws.
>
> In conclusion, it is clear that last clear chance is an anachronism. It is no longer helpful or necessary in the causation analysis. Unfortunately its continued existence in ss. 6 and 7 of the *Contributory Negligence Act* is a trap. Professor Caswell, *supra*, has summarized it this way, at p. 131:
>
> > ... the rule lingers on as a potential pitfall for the unwary in any fact situation involving successive acts of negligence of the plaintiff and defendant and ... it may still subvert the purpose served by apportionment legislation, namely fixing liability according to degrees of fault.
>
> I cannot read ss. 6 or 7 as attempts by the Legislature to undermine the purpose of the statute, which manifestly is to divide fault among all tort-feasors. The sections should only be invoked in those cases where the distance between accident and alleged fault is so great in time and circumstance that it could be said that the fault is too remote from the injury for liability. But that is a test to be applied in all cases of negligence, so the sections add nothing to the general law. Meanwhile, the duty of a judge is, in every case where the tort-feasor's negligence is not too remote but where another tort-feasor has contributed to the injury, to divide liability.[46]

[30] Appellate courts in other jurisdictions have also opined that with the enactment of contributory negligence legislation, the doctrine is no longer necessary or applicable. The New Brunswick Court of Appeal, for instance, has stated:

> [I]t is time to clearly say that the doctrine of last clear chance or ultimate negligence or last opportunity has no application in New Brunswick. There is no justification, with apportionment legislation, for retaining a rule that was designed to ameliorate the harshness of the common law that defeated a plaintiff's claim if he or she was partly at fault.[47]

[31] Similarly, the British Columbia Court of Appeal has stated "the doctrine is extinct and occupies no place in the law of torts in this jurisdiction."[48]

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[46] *Ibid* at pars 27 – 31.

[47] *Fillier v. Whittom* (1995), 171 NBR (2d) 92 (CA) at 111. See also *R.A. Beamish Stores Co. v F.W. Argue Ltd.* (1966), 57 DLR (2d) 691 (Ont CA)) wherein Laskin J.A., as he then was, states that the legislation "dispenses with any need to look hard over one's shoulder for the doctrine of ultimate negligence or the "last opportunity" rule.

[48] *Dyke v British Columbia Amateur Softball Assn,* 2008 BCCA 3 at para 27.

[32] The last clear chance doctrine is not specifically mentioned in Manitoba's legislation. However, in 2013, the Manitoba Law Reform Commission recommended that the doctrine be explicitly abolished in Manitoba's legislation, stating that while it is "certainly arguable that the last clear chance rule no longer exists in Manitoba", the doctrine should be clearly abolished in legislation in "the interests of certainty".[49]

[33] In addition to the Alberta Law Reform Institute and the Manitoba Law Reform Commission, the Ontario Law Reform Commission[50] and the Uniform Law Conference of Canada[51] have also recommended the doctrine be abolished.

[34] Clarifying the uncertainty in the law surrounding whether the last chance doctrine is applicable in Saskatchewan would not prevent a court from finding that a defendant's negligence was not a proximate (or reasonably foreseeable) cause of the accident. As Professor Klar states:

> It is clear, however, that where a party's conduct has not been a factual and proximate cause of the injuries in question, it is by definition not contributory and hence not relevant to the issue of apportionment. Thus, if the rule of last clear chance is seen as a rule of proximate causation, it is already provided for in the legislation and by the application of causation principles… If last clear chance is looked at as a rule of comparative fault, it is clearly inconsistent with apportionment legislation.[52]

Should the last clear chance doctrine be explicitly abolished by statute?

3. Scope of Contributory Negligence

[35] Prior to the enactment of contributory negligence legislation, the contributory negligence rule prevented plaintiffs who negligently contributed to their own loss from recovering damages from negligent defendants. Contributory negligence legislation amended the common law by providing that an injured person's negligence is no longer a complete defence to a negligence claim, and instead only reduces the amount of damages they are

[49] MLRC Report, *supra* note 16 at 32.
[50] Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory* Negligence (1988) at 259 [OLRC Report].
[51] The *UCFA, supra* note 14 at s 3 provides: "This Act applies where damage is caused or contributed to by the act or omission of a person notwithstanding that another person had the opportunity of avoiding the consequences of that act or omission and failed to do so."
[52] Lewis N. Klar, Tort Law, 5th ed (Toronto- Thomson Reuters Limited, 2012) at 541 – 542.

able to recover to the extent they were found to have contributed to their own injury. The relevant section of the *CNA* is section 2, which provides:

> 2(1) Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault, but 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.
>
> (2) Nothing in subsection (1) operates so as to render any person liable for any damage or loss to which his fault has not contributed.

[36] While this section of the *CNA* does not specifically refer to negligence, instead referring to "fault", the application of this section is limited to negligence claims as a result of the *Chernesky* decision, in which Brownridge J.A. stated: "In my view the tort referred to in our Act is the tort of negligence and the tortfeasor referred to is one who is, or may have been, negligent."[53]

[37] According to Professor Linden, Saskatchewan appears to be out of step with most common law jurisdictions in Canada:

> Contributory negligence legislation has been held to be applicable not only in negligence actions, but also in trespass cases, battery, fraud actions, negligent statement, defamation, pursuant to provincial legislation regarding fatal accidents, and even lawsuits founded on contract. There does exist limited case law holding that apportionment legislation applies only to negligence actions; although these cases are clearly in the minority.[54]

[38] Professor Klar has made a similar observation about contributory negligence legislation:

> To restrict the contributory negligence defence to actions in negligence and exclude it from other tort actions which are based on a defendant's negligent conduct would be to place too narrow an interpretation on the legislation, and has rightly been resisted.[55]

[39] The *Uniform Contributory Fault Act* is less restrictive of the types of claims in which contributory negligence can be raised as a defence. Section 5(1) of the *UCFA* provides that the "liability for damages of a person whose fault contributed to the damage is reduced

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[53] *Chernesky v Armadale Publishers* (1974), 53 DLR (3d) 79 (Sask CA) [*Chernesky*]. Note that the issue in *Chernesky* was the scope of the no contribution among tortfeasors rule. This case will be discussed in greater detail in the apportionment among wrongdoers section.

[54] Allen M. Linden et al, *supra* note 15 at 466.

[55] Klar, *supra* note 52 at 535.

by an amount of the damages proportionate to the degree to which the fault of the person suffering the damage contributed to the damage." Fault is defined broadly as:

> an act or omission that constitutes:
>
> (a) a tort,
>
> (b) a breach of a statutory duty that creates a liability for damages,
>
> (c) a breach of a duty of care arising from a contract that creates a liability for damages, or
>
> (d) a failure of a person to take reasonable care of his own person, property or economic interest,
>
> whether or not it is intentional.

[40] This section discusses whether the principle contained in section 2 of the *CNA* – that damages be apportioned between injured parties who contribute to their own injury and wrongdoers – should be extended beyond the realm of negligence to claims grounded in intentional torts, breaches of fiduciary duty, vicarious liability, strict liability, breach of statutory duty, and breach of contract.

(i) Intentional Torts

[41] Intentional torts result from an intentional and wrongful act committed by a tortfeasor. The tortfeasor may or may not have intended harm to occur as a result of their wrongful act, but the act must have been intentional, or in some cases, negligent. Intentional torts include torts such as: battery, assault, false imprisonment, intentional infliction of mental suffering, deceit, fraud, trespass, and conversion.

[42] Contributory negligence has been held to be applicable to a variety of intentional torts in several common law jurisdictions in Canada. In British Columbia, courts have interpreted "fault" in British Columbia's contributory negligence legislation to include intentional torts such as assault and slander.[56] The Ontario Court of Appeal has held that Ontario's legislation applies to trespass, and that fault incorporates "all intentional wrongdoing" and "other types of substandard conduct."[57]

[43] The Alberta Court of Appeal has, however, held that contributory negligence is not applicable to the tort of deceit. [58] The British Columbia Supreme Court has held that

[56] *Logeman v Rossa*, 2006 BCSC 692; *Brown v Cole* (1995), 14 BCLR (3d) 53 (CA).
[57] *Bell Canada v Cope (Sarnia) Ltd.* (1980), 119 DLR (3d) 254 (Ont CA) at 255 approving the statement of Linden J. in 11 CCLT 170 at 180. Note that the Ontario legislation refers to "fault or neglect".
[58] *Kelemen v El-Homeira,* 1999 ABCA 315 at para 26, leave to appeal dismissed (2000), 271 AR 398 (note) (SCC).

contributory negligence does not apply to fraud.[59] Courts across Canada have varied in determining whether contributory negligence applies to the tort of battery when there has been provocation.[60]

[44] Apportioning some degree of fault to a plaintiff in an intentional tort case can be difficult as "the exercise always amounts to suggesting the victim of an intentional act is responsible for his or her own damage, even though that damage was the result intended by the defendant."[61] This difficulty is more pronounced in cases where the defendant has deliberately and intentionally injured the plaintiff.

[45] The Alberta Law Reform Institute recommended in its 1979 report that the defence of contributory negligence not be limited to negligence, stating:

> When the defence of contributory negligence is regarded as one founded upon achieving fairness as between plaintiff and defendant and not one which merely corrects a defect of the common law for the advantage of a plaintiff, it ceases to be relevant to inquire whether at common law the plaintiff's own failure of care was either a complete defence or no defence at all. Consequently we think that there is no reason to confine the partial defence of contributory negligence to actions which are framed in negligence…If the broader rationale for the defence of contributory negligence, to achieve fairness between plaintiff and defendant, is accepted, the defence cannot be restricted to certain categories of torts.[62]

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[59] *United Services Funds (Trustees) v Richardson Greenshields of Canada Ltd.* (1988), 22 BCLR (2d) 322 (BC SC), per Southin J:

> But I cannot see how that concept [contributory negligence] arises in fraud. Once the plaintiff knows of the fraud, he must mitigate his loss but, until he knows of it, in my view, no issue of reasonable care or anything resembling it arises at law.
>
> And, in my opinion, a good thing, too. There may be greater dangers to civilized society than endemic dishonesty. But I can think of nothing which will contribute to dishonesty more than a rule of law which requires us all to be on perpetual guard against rogues lest we be faced with a defence of "Ha, ha, your own fault, I fool you". Such a defence should not be countenanced from a rogue.

[60] Cases holding that provocation is "fault" include *McCluskey v Metrotown Hotel Inc*, [1994] BCJ No 459 (QL); *Norman v Kipps*, [1994] BCJ 97; *Berntt v Vancouver (City),* [1997] 4 WWR 505 (BCSC) at paras 162-65, reversed on other grounds, 1999 BCCA 345. Other courts have held to the contrary; e.g.: *Wilson v Bobbie,* 2006 ABQB 22 at para 25:

> In my view provocation itself is not a "fault" within the meaning of the *Act*. There is no crime of "provocation" in the *Criminal Code*. There is no tort of "provocation". The original purpose of the *Act* was to reverse the common law rule that if the plaintiff was contributorily negligent even to the smallest degree, the claim would fail. This rule would not have operated merely because the plaintiff had in some way annoyed or aggravated the defendant, leading to the assault, because provocation was not recognized as a tort. The true issue is whether the original assault by the Plaintiff is "fault". Clearly an assault is a tort, and usually a crime. Where the provocation is itself a tort, then the provocation would be "fault".

[61] *Wilson v Bobbie, Ibid* at para 20.

[62] ALRI Report, *supra* note 36 at 14.

[46] The Ontario Law Reform Commission similarly recommended in 1988 that "all torts of negligence and strict liability, as well as intentional torts, should be included within the scope of the proposed legislation governing apportionment in cases of contributory fault."[63]

[47] The Manitoba Law Reform Commission is also of the view that apportionment for contributory negligence should be allowed to develop further from its original purpose:

> An 'all or nothing' approach should be rejected. Principles of fairness should allow courts to consider the standard of conduct of both parties, and the causal relevance of such conduct, when determining the appropriate apportionment in intentional tort cases.
>
> In cases involving intentional torts such as battery and deceit, the blameworthiness and causal relevance of a defendant's conduct may be significant, and a plaintiff's contribution to the damage may be minimal in comparison. This is a decision that the courts are well able to make on the facts of each case, and the Act should provide them the latitude to do so.[64]

Accordingly, the Manitoba Law Reform Commission recommended that the Act "provide for apportionment of damages for contributory fault in respect of intentional torts and torts that are crimes as well as those that are framed in negligence."

[48] Professor Kleefeld supports the Manitoba Law Reform Commission's recommendation and has suggested that while some may find this recommendation "too radical", such an approach had already been implemented in Saskatchewan in *The Environmental Management and Protection Act*[65] which provided that for the purposes of apportioning liability under a section creating a civil action for discharge into the environment, the *CNA* applied for the purposes of apportioning liability.[66]

[49] Professor Klar has also suggested that contributory negligence should be available for all intentional torts, stating:

> [T]he intentional torts do not necessarily involve morally reprehensible conduct on the part of defendants, since a well-intentioned defendant can be liable for an intentional tort. Where the defendant acts with the intention to cause harm to the plaintiff, the case for apportionment is more difficult. There has been great reluctance to accept the contributory negligence defence in this type of case. However, even here contributory negligence ought to be an option…. There may be situations in which the wrongdoing of

[63] OLRC Report, *supra* note 50 at 275.
[64] MLRC Report, *supra* note 16 at 38.
[65] SS 2002, c E-10.21, s 15(8). This Act has since been repealed and replaced with *The Environmental Management and Protection Act, 2010*, SS 2010, c E-10.22, and the section referred to by Professor Kleefeld (s. 15 which created a civil cause of action for discharges into the environment) is not included in the new legislation.
[66] Kleefeld, *supra* note 3 at 117.

> the defendant is so serious, and that of the plaintiff so trivial in comparison, that the court will choose not to apportion. This, however, ought to be a choice which is available.[67]

Should Saskatchewan's legislation provide for apportionment of damages for contributory fault for intentional torts? Why or Why Not?

(ii) Breach of Fiduciary Duty

[50] The Alberta Law Reform Institute was of the view in 1979 that the liability between trustees and beneficiaries was adequately covered by the law of trust and thus did not recommend that contributory negligence be a defence to breach of trust.[68] The Alberta Law Reform Institute did, however, conclude that contribution among tortfeasors should apply to breaches of trust.[69] The *Uniform Contributory Fault Act* does not include breach of trust in its definition of fault and thus contributory negligence is not applicable.

[51] The Ontario Law Reform Commission considered this issue and also declined to recommend that apportionment legislation extend to breach of fiduciary duty and breach of trust, for the following reasons:

> [T]he Commission is not convinced that a *statutory* extension of the doctrine is desirable, at least at this time. For one thing, it may be argued forcefully that the essence of a fiduciary, and especially a trust, relationship is that the beneficiary should be entitled to rely entirely on the fiduciary, and that the beneficiary should not be penalized for failing to take independent steps to protect her own interests or to check that the fiduciary is doing her duty. While the notions of fault or negligence pertain to the duty to take reasonable care, the duty of a fiduciary is, as we have said, considerably higher. There is a danger, then, that the introduction of contributory fault will subvert or dilute this stricter duty.
>
> Moreover, the law in this area is fluid and developing; for this reason, we are of the opinion that further time is needed to examine more fully whether contributory fault is an appropriate principle to be imported into the many different contexts in which a fiduciary obligation is imposed. Such an examination can and, in our view, should be undertaken by the courts. It will be recalled that a similar type of approach has been proposed by the Commission with respect to breaches of contract.

[67] Klar, *supra* note 52 at 537 – 538.
[68] ALRI Report, *supra* note 36 at 25.
[69] The UK apportionment legislation provides for this: contributory negligence is not a defence to a breach of fiduciary duty, but the legislation allows tortfeasors to seek contribution in breach of fiduciary duty claims.

> Accordingly, the Commission recommends that the proposed apportionment legislation should not be extended to breach of fiduciary duty, including breach of trust. Rather the issue of the applicability of apportionment in this context should be left to be determined by the courts on a case by case basis.[70]

[52] Courts in British Columbia[71] and Manitoba[72] have held that their province's respective contributory negligence legislation does not apply to breaches of fiduciary duty.

[53] The remedies available for breach of fiduciary duty are, however, discretionary. The Ontario Court of Appeal has held that "plaintiffs should not be able to recover higher damage awards merely because their claim is characterized as breach of fiduciary duty, as opposed to breach of contract of tort."[73]

[54] The New Zealand Court of Appeal has held that contributory negligence can apply to reduce a plaintiff's award of damages for breach of fiduciary duty. In *Day v Mead*, Cooke P. stated:

> Compensation or damages in equity were traditionally said to aim at restoration or restitution, whereas common law tort damages are intended to compensate for harm done; but in many cases, the present being one, that is a difference without a distinction. There is, however, the more significant historical difference that Courts of equity were regarded as having wider discretions than common law Courts. Equitable relief was said to be always discretionary. Its grant or refusal was influenced by ideas expressed in sundry maxims. He who seeks equity must do equity. He who seeks equity must come with clean hands. Delay defeats equity. These are merely examples. Further, relief could be granted on terms or conditions.
>
> Whether or not there are reported cases in which compensation for breach of a fiduciary obligation has been assessed on the footing that the plaintiff should accept some share of the responsibility, there appears to be no solid reason for denying jurisdiction to follow that obviously just course, especially now that law and equity have mingled or are interacting. It is an opportunity for equity to show that it has not petrified and to live up to the spirit of its maxims. Moreover, assuming that the Contributory Negligence Act does not itself apply, it is nevertheless helpful as an analogy, on the principle to which we in New Zealand are increasingly giving weight that the evolution of Judge-made law may be influenced by

[70] OLRC Report, *supra* note 50 at 251.
[71] *United Services Funds (Trustees of) v Richardson Greenshields of Canada Ltd* (1988) 48 DLR (4th) 98 (BC SC).
[72] *Vita Health Co (1985) Ltd v Toronto-Dominion Bank* (1994), 118 DLR (4th) 289 (CA); leave to appeal to SCC refused, [1994] SCCA No 457.
[73] *Martin v Goldfarb* (1998), 163 DLR (4th) 639 at para 34 adopting the reasoning of Lederman J (31 BLR (2d) 265); leave to appeal to SCC refused, [1998] SCCA No 516.

> the ideas of the legislature as reflected in contemporary statutes and by other current trends.[74]

[55] In *Canson Enterprises Ltd v Boughton & Co*,[75] La Forest J agreed with the above reasoning of Cooke P. in *Day v Mead*. McLachlin J concurred with the result but on the basis that while a plaintiff in a breach of fiduciary claims is not "required to act in as reasonable and prudent a manner as might be required in negligence or contract, losses stemming from the plaintiff's unreasonable actions will be barred."[76]

[56] The Supreme Court discussed the *Canson* decision in *Hodgkinson v Simms*[77] and explained:

> *Canson* held that a court exercising equitable jurisdiction is not precluded from considering the principles of remoteness, causation, and intervening act where necessary to reach a just and fair result. *Canson* does not, however, signal a retreat from the principle of full restitution; rather it recognizes the fact that a breach of a fiduciary duty can take a variety of forms, and as such a variety of remedial considerations may be appropriate.
>
> Put another way, equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour. On the contrary, where the common law has developed a measured and just principle in response to a particular kind of wrong, equity is flexible enough to borrow from the common law. As I noted in *Canson*, at pp. 587-88, this approach is in accordance with the fusion of law and equity that occurred near the turn of the century under the auspices of the old *Judicature Acts*; see also *M. (K.) v. M. (H.)*, *supra*, at p. 61. Thus, properly understood *Canson* stands for the proposition that courts should strive to treat similar wrongs similarly, regardless of the particular cause or causes of action that may have been pleaded. As I stated in *Canson*, at p. 581:
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> > . . . barring different policy considerations underlying one action or the other, I see no reason why the same basic claim, whether framed in terms of a common law action or an equitable remedy, should give rise to different levels of redress.

[74] [1987] 2 NZLR 443 (CA) at 451.
[75] [1991] 3 SCR 534. Justice La Forest wrote on behalf Sopinka, Gonthier and Cory JJ. Justice McLachlin (concurring in the result) wrote on behalf of Lamer C.J. and L'Heureux-Dubé J. Stevenson J dissented, and Wilson J heard the appeal but did not take part in the decision.
[76] *Ibid* at 553.
[77] [1994] 3 SCR 377.

> In other words, the courts should look to the harm suffered from the breach of the given duty, and apply the appropriate remedy.[78]

[57] More recently, the Manitoba Law Reform Commission has taken the same position as the Ontario Law Reform Commission and has declined to recommend apportionment legislation rendering contributory negligence applicable to breaches of fiduciary duty, stating:

> In the Commission's opinion, it is consistent with principles of fairness to take the fault of the plaintiff into consideration as a relevant factor in appropriate cases of breach of fiduciary duty. However, the courts' equitable jurisdiction currently provides the flexibility to achieve justice and fairness in all of the circumstances, and the Commission does not recommend statutory intervention. Equitable doctrines are being applied satisfactorily by the courts, and should be allowed to continue to develop.[79]

[58] In order to confirm the desirability of a continual evolution of the law and equitable principles in relation to breaches of fiduciary duty, the Commission recommended a provision stating that nothing in the legislation should be interpreted as affecting an equitable remedy.[80]

Should Saskatchewan's legislation provide for apportionment of damages for contributory fault for breaches of fiduciary duty? Why or Why Not?

(iii) Vicarious Liability

[59] The law is unclear as to whether a defendant can claim contributory negligence against parties for which the plaintiff is vicariously liable. The Manitoba Law Reform Commission has observed: "On general principle it would seem that the contributory negligence of a plaintiff would include acts and omissions of those for whom the plaintiff is vicarious liable – for example, the plaintiff's employees and agents."[81] The Saskatchewan Court of Appeal has suggested that "there are compelling arguments that vicarious liability is a tort to which *The Contributory Negligence Act*" applies.[82] The Supreme Court of Canada has

[78] *Ibid* at 444.
[79] MLRC Report, *supra* note 16 at 43.
[80] *Ibid* at 44.
[81] *Ibid* at 40.
[82] *DB v Parkland School Division No 63 Saskatchewan,* 2004 SKCA 113 at para 16 [*Parkland*].

commented that whether "fault" in British Columbia includes vicarious liability is an open question and that parties "may be more or less vicariously liable for an offence".[83]

[60] The Manitoba Law Reform Commission recommended that Manitoba's legislation be clear on this point and provide that contributory fault include "fault for which the person is vicariously responsible."[84]

[61] Professor Kleefeld agreed with the recommendation of the Manitoba Law Reform Commission. In his view, while the *CNA* is capable of being interpreted to allow apportionment in vicarious liability claims, it would be a better solution to expand the definition of fault to include fault for which a person is vicariously responsible.[85]

Should Saskatchewan's legislation provide for apportionment of damages for contributory fault for claims based in vicarious liability? Why or Why Not?

[83] In *Blackwater v Plint*, 2005 SCC 58, the Court stated as follows at paras 67 and 69:

> It remains an open question whether the term "fault" in the *Negligence Act* includes vicarious liability. Fault has been held not to include intentional torts and torts other than negligence: e.g., *Chernesky v. Armadale Publishers Ltd.*, [1974] 6 W.W.R. 162 (Sask. C.A.); *Funnell v. C.P.R.*, 1964 CanLII 315 (ON SC), [1964] 2 O.R. 325 (H.C.). Other cases hold the contrary: *Bell Canada v. Cope (Sarnia) Ltd.* (1980), 11 C.C.L.T. 170 (Ont. H.C.); *Gerling Global General Insurance Co. v. Siskind, Cromarty, Ivey & Dowler* (2004), 12 C.C.L.I. (4th) 278 (Ont. S.C.J.). However, it is not necessary to resolve this dispute. If vicarious liability amounts to "fault" under the *Negligence Act*, the trial judge's conclusion that Canada was 75 percent at fault would amount to a finding that fault could be apportioned, with the result that s. 1(2) would not apply to impose an equal allocation. On the other hand, if vicarious liability is not "fault" under the Act, then the Act does not apply. In this case, liability may be assigned at common law, with the same result.
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> This raises the question of whether unequal apportionment of responsibility is appropriate in cases of vicarious liability. The conflicting views on whether vicarious liability attributes any fault or blame on the wrongdoer are summarized in *Bluebird Cabs Ltd. v. Guardian Insurance Co. of Canada* (1999), 1999 BCCA 195 (CanLII), 173 D.L.R. (4th) 318 (B.C.C.A.), at paras. 13-14. The most compelling view is that while vicarious liability is a no-fault offence in the sense that the employer need not have participated in or even have authorized the employee's particular act of wrongdoing, in another sense it implies fault. As D. N. Husak states, "no defendant who is held vicariously liable is selected randomly; the principles used to identify this defendant are not arbitrary. Vicarious liability is imposed on someone who was in a position to have supervised and thus to have prevented the occurrence of the harm": "Varieties of Strict Liability" (1995), 8 *Can. J.L. & Jur.* 189, at p. 215. It follows that the degree of fault may vary depending on the level of supervision. Parties may be more or less vicariously liable for an offence, depending on their level of supervision and direct contact.

[84] MLRC Report, *supra* note 16 at 41.

[85] Kleefeld, *supra* note 3 at 122.

(iv) Strict Liability Torts

[62] Strict liability torts are torts that impose liability on the tortfeasor in the absence of fault (ie. the tortfeasor does not need to have been negligent or to have had a tortious intent).

[63] The Ontario Law Reform Commission recommended that apportionment for contributory fault be applicable in strict liability torts where the plaintiff contributes to their own loss through unreasonable conduct,[86] with the exception of actions for conversion, detinue, and injury to a reversionary interest, which were actions for which the Commission recommended should be studied in a future project.

[64] The Supreme Court of Canada held in *Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce* that contributory negligence was not applicable to the strict liability tort of conversion.[87] Writing for the majority, Justice Iacobucci stated "it seems as a matter of principle that contributory negligence would not be available in the context of a strict liability tort. If the contributory negligence approach is to be introduced…such a change would be more appropriate for the legislative branch to make."[88]

[65] The Manitoba Law Reform Commission has recommended that apportionment for contributory fault be applicable to strict liability torts. The Commission stated it agreed with the reasoning of Borins JA (in dissent) of the Ontario Court of Appeal in *Cowles v Balac*:

> In my view, the application of a principle akin to comparative negligence to strict liability would not defeat or frustrate the rationale that led to the development of the principle of strict liability. Plaintiffs will continue to be relieved of proof of a defendant's negligence. The defendant's liability for keeping a dangerous animal will remain strict. A plaintiff's recovery will be reduced only to the extent that his or her lack of reasonable care contributed to the cause of his or her [page719] injuries. In a case where the evidence demonstrates that the plaintiffs' "own act" was the sole cause of his or her damages, although the defendant remains strictly liable for the damages, the plaintiff will obtain no recovery.
>
> Although it may appear to be doctrinally counterintuitive to apply comparative negligence principles where a defendant's liability is strict and not dependant on negligence, in my view functional and fairness considerations strongly suggest that comparative negligence principles are appropriate where a plaintiff's misconduct or want of care is a contributing

[86] OLRC Report, *supra* note 50 at 234.
[87] *Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce*, [1996] 3 SCR 727 at para 32.
[88] *Ibid* at para 35. The Supreme Court made a similar statement in *Teva Canada Ltd v TD Canada Trust*, 2017 SCC 51 at para 3: "Conversion is a strict liability tort. As a result, a bank may be held liable whether or not it was negligent. Any alleged contributory negligence on the part of the drawer is, as a result, also irrelevant."

> factor to his or her damages. Of course, each case will depend on its own facts. While it may be said that a defendant's liability should not be diluted when a loss occurs that strict liability is intended to prevent, there will be cases where a plaintiff's misconduct is so clearly a contributory factor, or the contributory factor, that it will seem, to many, to be more unfair to ignore it than to consider it.[89]

[66] The Commission noted that applying contributory fault to strict liability torts will be "problematic if apportionment is based solely on the comparative blameworthiness of the parties" since in some cases, a defendant can be liable for a strict liability tort without being at fault. The Commission was of the view this difficulty could be overcome, however, if apportionment is based both on relative blameworthiness and the causal relevance of both parties' conduct.[90]

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Should Saskatchewan's legislation provide for apportionment of damages for contributory fault for strict liability claims? Why or Why Not?

(v) Breach of Statutory Duty

[67] While a breach of a statutory duty may be evidence of negligence and be used to determine the applicable standard of care in a negligence claim, such breaches do not on their own amount to negligence or give rise to a cause of action. Some statutes do, however, expressly create a right of action in the event of a breach.

[68] The Ontario Law Reform Commission recommended that Ontario follow the approach taken in the *Uniform Contributory Fault Act* and allow apportionment for breaches of statutory duties that create a liability for damages, stating "in such cases, in the absence of a contrary intention in the legislation, there seems no reason to exclude apportionment." [91]

[69] The Manitoba Law Reform Commission reviewed Manitoba statutes that create a right of action and concluded that Manitoba's contributory negligence legislation should not include a provision for apportionment for breaches of statutory duties for the following reason:

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[89] (2006), 273 DLR (4th) 597 (Ont CA) at paras 217 – 218, leave to appeal to SCC refused, 2006 SCCA No 496. The majority of the Ontario Court of Appeal found it unnecessary to determine whether contributory negligence applies to strict liability torts as the trial judge had not found it necessary to decide the issue.

[90] MLRC Report, *supra* note 16 at 40.

[91] OLRC Report, *supra* note 50 at 249.

> Statutes creating rights of action do not occur frequently in the statute book. In some cases, the legislation creating the right has addressed the issue, and creates a right of apportionment for contributory negligence and among those liable to pay damages. In other cases, the statute creates a comprehensive scheme based on specific objectives. For example, the recently enacted *Franchises Act* regulates a specific type of business relationship. In recognition of the imbalance of power inherent in the franchise relationship, the Act includes provisions that attempt to ensure that full information is provided to prospective franchisees and that franchisees receive a measure of protection throughout the franchise relationship. A right of action in damages is provided for franchisees in certain circumstances. In the Commission's view, the application of apportionment principles is more appropriately dealt with within that scheme, rather than in other legislation of general application.[92]

The Commission recommended that the government review statutes creating a cause of action to determine whether they are consistent with the general principles of apportionment outlined in the Commission's report.

[70] Professor Kleefeld agreed with this recommendation, noting that the *EMPA, 2002* model (since repealed, but which incorporated the *CNA* into a section creating a civil action for discharge of a substance) was commendable.[93]

Should Saskatchewan's legislation provide for apportionment of damages for contributory fault for claims based on a breach of statutory duty? Why or Why Not?

(vi) Breach of Contract

[71] In Saskatchewan, *The Contributory Negligence Act* was held to not apply to breaches of contract in *Husky Oil Operations v Oster*.[94] In this case, Husky had sued a welder for his role in the explosion and destruction of a large water tank. The Court found that the welder had not exercised due care and that a Husky employee had allowed the welder to begin welding despite knowing that gas was present. Justice Hughes stated that the *CNA* was "of course, without an applicability in the case of breach of contract",[95] and that

[92] MLRC Report, *supra* note 16 at 54 – 55.
[93] *Kleefeld, supra* note 3 at 123.
[94] (1978), 87 DLR (3d) 86 (SK QB).
[95] *Ibid* at 91.

"either of the doors [contract or tort] are open to me".[96] Justice Hughes held that apportioning fault would allow "equity to be done"[97] and then apportioned liability as 60% to Oster and 40% to Husky as a "fair division of liability considering the role of each party and the responsibility assumed by each of them."[98] Professor Kleefeld has discussed this decision and commented:

> This case seems to have been correctly decided but, as a matter of law; that is, there was no need to invoke equity. Husky's "duty" pleading was broad enough to encompass both tort and contract. Furthermore, as Hughes J. himself noted, there was by then ample authority for the proposition that professionals like engineers and architects could be concurrently liable in contract and tort, and there was no good reason to apply a different approach to welders. If an "equitable" argument existed, it was that those who contracted with professionals or tradesmen should not escape the consequences of their own failure to take reasonable care by suing in contract instead of tort.[99]

[72] The Ontario[100] and New Brunswick Courts of Appeal[101] have held that under the common law, liability may be apportioned for a breach of a contract where there is concurrent

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[96] *Ibid* at 92.
[97] *Ibid*.
[98] *Ibid*.
[99] Kleefeld, *supra* note 3 at 92.
[100] *Dominion Chain Co Ltd v Eastern Construction Co Ltd* (1976) 12 OR (2d) 201 (CA), aff'd *Giffels Associates Ltd v Eastern Construction Do*, [1978] 2 SCR 1346. The Supreme Court did not find it necessary to determine whether s. 2(1) of *The Negligence Act* was broad enough to include contractual liability "when other provisions of the Act, like ss. 3 and 9, clearly do not." Laskin CJ went on to state as follows at 1354:

> I incline, however, to the view advanced by counsel for the respondent in this respect. I think it is difficult to see how a contract basis for contribution can be read into one provision of a statute which has interrelated provisions dominated by a reference to tortfeasors.

In *Smith v McInnis*, [1978] 2 SCR 1357 the majority found it unnecessary to address the applicability of the *Tortfeasors Act* and the *Contributory Negligence Act* in a claim against a solicitor, however Pigeon and Beetz JJ in dissent addressed this issue, stating at 1377:

> Even assuming the *Contributory Negligence Act* is inapplicable to contractual liability, it does not seem to me that this means that there is no basis for the apportionment of liability. The reason for which at common law there could be no apportionment in actions founded on negligence was that any contributory negligence was a complete defence. It never was so in contract as far as I have been able to ascertain.

[101] *Doiron v Caisse Populaire D'Inkerman Ltee* (1985) 17 DLR (4th) 660 (CA). The Court stated:

> Contribution is now consistent with the prevailing theories of both the law and the market-place. And it meets our sense of fairness. In many situations, the fairest approach is to apply the now ordinary rules of contributory negligence…We are not dealing here with intentional breaches of duty which may, at least in some instances, give rise to different considerations. Parties simply do not contemplate what should be done when losses arise from a breach of contract flowing from negligent behaviour that is contributed to

liability in negligence. In Ontario, courts have held that apportionment should be the same in contract or tort in cases where concurrent actions are available in contract and tort on the basis of the principle that "where a man is part author of his own injury he cannot call upon the other party to compensate him in full".[102]

[73] In Manitoba, the Court of Appeal has applied apportionment to claims of breaches of a duty of care arising from a contract.[103] In *Caners v Eli Lilly Canada Inc,* the Court of Appeal held that Manitoba's apportionment legislation does not apply to breaches of contract as the legislation refers only to "fault",[104] and that apportionment is unavailable for a breach of warranty where no concurrent action is available in tort.[105]

[74] The British Columbia Court of Appeal has apportioned liability under the *Negligence Act* for breach of contract where there is concurrent tort liability. In *Crown West Steel Fabricators v Capri Insurance Services Ltd*, liability was apportioned by the Court under the *Negligence Act*, with the majority concluding:

> For many years, trial courts in British Columbia have generally held that the provisions of the *Negligence Act* extend to cover the liability of the parties in contract concurrently with their liability in negligence. In my view, it is preferable to adopt that generally accepted

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by negligent behaviour on the other side. The courts must do it for them….As in torts, the application of the principle of contributory negligence in contract will depend on all the circumstances.

[102] *Tompkins Hardware Ltd v North Western Flying Services Ltd* (1982), 139 DLR (3d) 329 (Ont HCJ) per Saunders, J at 340:

> The principle that where a man is part author of his own injury he cannot call upon the other party to compensate him in full, has long been recognized as applying in cases of tort: see *Nance v. B.C. Electric R. Co.,* (UK JCPC), [1951] 3 D.L.R. 705 at p. 711, [1951] A.C. 601 at p. 611, 2 W.W.R. (N.S.) 665. I see no reason why it should not equally be applicable in cases of contract. This was the substance of the *obiter* of Prowse J. A. in the *Canadian Western Natural Gas Co. Ltd.* case, *supra,* at p. 158 Alta. L.R., p. 240 C.C.L.T. I have been unable to find any authority that says otherwise and, in my opinion, it makes sense. The plaintiff is under an obligation to mitigate his damages and, if Mosbeck had left the aircraft at Western, his action might have been described as anticipatory mitigation. Mosbeck, by negligently taking the aircraft up, created the situation where the damage occurred because of the inadequate shock cords installed by the defendant. In such circumstances, there should, in my opinion, be apportionment whether the action be brought in contract or in tort.

See also *Ribic v Weinstein* (1982), 140 DLR (3d) 258 (Ont HCJ) aff'd (1984),47 OR (2s) 126 (CA); *The Treaty Group Inc* v *Drake* (2005), 15 BLR (4th) 83 (Ont SC), aff'd 2007 ONCA 450.

[103] *Fuerst v St Adolphe Coop Parc Inc*, [1990] 3 WWR 466, leave to appeal to SCC refused, [1990] SCCA N0 226. At para 25 the Court of Appeal stated:

> In my view, however, when the liability of the defendant is founded upon his breach of a duty of care, as in this case, the plaintiff's contributory negligence is a factor to be taken into account whether the duty arises in tort or in contract. Where a breach of contract is also a tort, the disparate consequences of the plaintiff's own contribution to his loss, depending on whether his claim is pleaded in contract or in tort, point out the unreasonableness of any other conclusion

[104] *Caners v Eli Lilly Canada Inc*, [1996] WWR 381 at paras 25 – 57.

[105] *Ibid*.

> position and apportion damages under the *Act*, at least where there is concurrent liability in tort and contract.[106]

Newbury JA concurred in the result but would have preferred to extend the common law:

> I am not inclined to apply the *Negligence Act* in cases of contract, for the reasons given by La Forest JA (as he then was) in *Doiron v Caisse Populaire D'Inkerman Ltee*…At the same time, this case at bar seems to be an appropriate one for the common law to extend the concept of contributory fault to breach of contract as a logical consequence of the growth of concurrency between contract and negligence…the common law should in my opinion apply apportionment to avoid the unfairness of saddling this defendant with the entire burden of damages to which the plaintiff also contributed.[107]

[75] While the majority in in *Seaboard Life Insurance v Bank of Montreal* found it unnecessary to decide whether contributory fault should apply to contracts creating a duty of care, Southin JA in dissent expressed a preference for the development of the common law, stating:

> I consider it wrong to twist a statute of the Legislature to fill a gap in the common law. If a gap requires to be filled, the court should do so in a forthright manner. Since the common law was able to develop, and indeed overdevelop some might say, a doctrine of contributory negligence in cases of tort, I see no reason why it should not develop an analogous doctrine for the law of contract.[108]

[76] In England and Wales, the *Law Reform (Contributory Negligence) Act 1945* defines fault as: "negligence, breach of statutory duty or other act or omission which gives rise to liability in tort or would, apart from this Act, give rise to the defence of contributory negligence." The Court of Appeal has held that the Act can only apply where the defendant's liability in contract is the same as his or her liability in negligence independent of the existence of any contract,[109] and does not apply where the defendant's liability arises from breaching a contractual obligation which creates a duty of care.

Recommendations of Law Reform Agencies

[77] The Alberta Law Reform Institute recommended in its 1979 report that contributory negligence should be available only when the contract imposes a duty of care and there has been a breach of that duty, stating:

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[106] *Crown West Steel Fabricators v Capri Insurance Services Ltd*, 2002 BCCA 417 at para 21.
[107] *Ibid* at para 34.
[108] *Seaboard Life Insurance v Bank of Montreal*, 2002 BCCA 192 at paras 124-125.
[109] *Forsikringsaktieselskapet Vesta v Butcher*, [1988] 2 All ER 43 (CA).

> As the trend appears to be toward greater concurrent liability, there will be more cases in which different damages awards will be made depending upon whether the contributorily negligent plaintiff sues in contract or in tort. We believe that anomalies can be prevented by providing for apportionment of liability in cases in which there has been a breach of contract which imposes a duty of care.[110]

[78] The Alberta Law Reform Institute's recommendation to limit contributory negligence in breach of contract cases to those cases based on a breach of a contractual duty of care as opposed to any other breach of contract was based on a review of breach of contract cases in which contributory negligence had been applied, which led the Institute to conclude:

> [T]he cases in which the Contributory Negligence Act has been held applicable to a contract are exceptional and appear to be confined to those cases in which the defendant owed a duty of care. The vast majority of cases deny its relevance to contract….the scarcity of authority for the application of the Contributory Negligence Act to breaches of contract emphasizes the number which reject such an argument implicitly…[111]

[79] The Uniform Contributory Fault Act takes the approach recommended by the Alberta Law Reform Institute: "Fault" is defined to include "a breach of a duty of care arising from a contract that creates a liability for damages." An earlier, and ultimately rejected, draft version of the Uniform Act had defined fault to include any breach of contract creating a liability in damages.[112]

[80] The Ontario Law Reform Commission considered whether contributory negligence should be applicable to all breaches of contract or be limited to certain types of breaches of contract. The Commission was of the view that unless there was a very strong case that reform was needed, extending apportionment to all breaches of contract would be "somewhat rash" given the limited scope of the Uniform Act and hesitation expressed by other law reform bodies.[113] The Commission ultimately concluded that in addition to breaches of contract where there is concurrent liability in tort, contributory negligence should also be extended to breaches of contract resulting in personal injury or property damage, subject to any express or implied agreement to the contrary.[114] The Commission's reasoning regarding breaches of contract resulting in personal injury or property damage was as follows:

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[110] ALRI Report, *supra* note 36 at 16.
[111] *Ibid* at 23.
[112] Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983) at 28, and *Proceedings of the Sixty-Fourth Annual Meeting* (1982), Appendix J at 162.
[113] OLRC Report, *supra* note 50 at 245.
[114] OLRC Report, *supra* note 50 at 248-9.

> [A]pportionment should apply at least to cases of physical damage caused under the present law by breach of warranty of the supplier of a product. A case can also be made for including other breaches of contract that cause physical damage. There seems to be no good reason to exclude apportionment in the case of a breach of warranty by a supplier of services, or, indeed, any breach of contract, that causes personal injury or property damage. These are not the types of case…in which the contract breaker profits at the expense of the innocent party.[115]

[81] The Commission decided not to recommend that apportionment should apply in all breaches of contract, concluding:

> There is a strong argument for including all breaches of contract in the legislation and leaving it to the courts to exclude apportionment in the appropriate cases. Further there is the danger of inhibiting the development of the power of apportionment at common law, a power asserted by some recent Ontario cases. On the other hand, the inclusion of all contracts may attract criticism…and it may seem a weak response to say, with respect to legislation on its face positively requiring apportionment, that the courts can be expected not to apportion in improper cases.[116]

The Commission also recommended that the legislation should provide that nothing in the Act shall remove any of the court's power of apportionment under the common law.[117]

[82] The Law Reform Commission of British Columbia recommended in its 1986 report that BC's legislation follow the approach taken in the Uniform Contributory Fault Act and define fault to include a breach of a duty of care arising from a contract that creates a liability for damages, stating:

> Whether contributory fault should apply in all contractual contexts…proved to be a contentious issue. The position adopted by the Uniform Law Conference of Canada was in response to the perception that contributory fault concepts in contract were dealt with by a number of common law doctrines and that extending the law in this respect would have an unsatisfactory impact on the common law.[118]

[83] The Law Commission (UK) studied this issue in 1993.[119] In its consultation paper, the Commission suggested that contributory negligence should be applicable to all breaches of contract unless expressly or impliedly excluded by the contract. Most respondents

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[115] *Ibid* at 246.
[116] *Ibid* at 248.
[117] *Ibid* at 249.
[118] Law Reform Commission of British Columbia, *Report on Shared Liability* (Report No 88, 1986) at 33 [BCLRC Report].
[119] UK Law Commission, *Contributory Negligence as a Defence in Contract* (Report No 219, 1993) available online: <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/02/LC.-219-CONTRIBUTORY-NEGLIGENCE-AS-A-DEFENCE-IN-CONTRACT.pdf>.

agreed with this suggestion, however some respondents expressed concerns about applying apportionment to breaches of contract.[120] These concerns led the Commission to amend its recommendation to limit the application of contributory negligence to breach of contract to cases where the defendant is liable for breach of a contractual duty of care.[121] The Commission explained its recommendation to not reform the law so as to make contributory negligence to all breaches of contract as follows:

> We have rejected the possibility of apportionment where there is liability for breach of a strict contractual obligation for reasons both of principle and pragmatism. The reason of principle relates to a consideration of the position before the plaintiff is aware, or must be taken to be aware, of the defendant's breach of contract. If the defendant commits himself to a strict obligation regardless of fault, the plaintiff should not have to take precautions against the possibility that a breach might occur…The rules of mitigation, although not a perfect substitute for apportionment, mean that the plaintiff is not entitled to act unreasonably once he is aware of his loss or of the defendant's breach….
>
> …[C]omments of respondents to the consultation paper, have convinced us that apportionment in cases involving breach of a strict duty would be undesirable in practice. This is because, in order to apportion the plaintiff's damages, it would be necessary to consider the quality of the defendant's conduct, which is, at present, irrelevant. This would increase the number of issues which have to be determined, and would lead to undesirable complexity….
>
> We are opposed to any reform which would result in a substantial increase in uncertainty in contract, because this would make settlements more difficult to achieve, payments into court harder to assess, and trials longer and more expensive….
>
> An increase in uncertainty would also…be particularly detrimental to the interests of consumers, the protection of whom require a simple and clear regime. Apportionment would also be contrary to legal and social policy where Parliament has deliberately imposed on the defendant a strict contractual obligation in order to protect consumers and other potentially vulnerable contractors.[122]

[84] The Commission was, however, of the view that contributory negligence should be available when the claim is based on a breach of a contractual duty to take reasonable care or exercise reasonable skill:

> Where a duty of reasonable care is classified as tortious or contractual does not affect the content of that duty, and it is not, in our view, desirable that the availability of apportionment should depend upon how the duty is classified. Furthermore, where the

[120] *Ibid* at 10.
[121] *Ibid* at 11.
[122] *Ibid* at 28 – 29.

> defendant undertakes only a contractual duty of reasonable care, he has not (in contrast to the case where he has accepted a strict contractual obligation) guaranteed to produce a particular outcome. Thus it is unfair to assume that he has undertaken to compensate the plaintiff even where the plaintiff has contributed to his own loss…the rules on causation, remoteness and mitigation do not provide an adequate substitute for apportionment and can be unfair to either defendant or plaintiff. This is because they either produce 'all or nothing' results, or do not have the flexibility of apportionment on the basis of what the court thinks just and equitable, given the agreed allocation of risks….
>
> [T]he concern that the availability of the defence of contributory negligence in relation to contractual duties of care might lead to the imposition of a general duty on a plaintiff to supervise the performance of the defendant's obligations under the contract is misplaced and should not be an obstacle to reform.[123]

[85] The Commission recommended that courts apportion responsibility for contributory negligence in breach of contractual duty of care cases in the same manner as responsibility is apportioned in negligence cases in the UK – on the basis of causation and blameworthiness.[124] The Commission was also of the view that parties should be able to expressly or by implication contract out of these rules, as where "the parties have agreed that one of them should bear the entire risk of loss, it is not unfair for that party to do so."[125]

[86] Some commentators have challenged the Commission's proposals as being "'largely cosmetic' for the reason that, in practice, very few cases will involve a contractual obligation to take care in the absence of a corresponding duty in torts,"[126] and have argued that apportionment should be applicable for breaches of all contractual provisions.[127]

[87] All jurisdictions in Australia have amended their apportionment legislation to apply to a breach of a contractual duty of care that is concurrent with a duty of care in tort.[128] These amendments were made to implement recommendations made by the Standing Committee of Attorneys General in response to the *Astley v Austrust Ltd* decision in which the High Court held that contributory negligence did not apply to breach of contract.[129]

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[123] *Ibid* at 30 – 33.
[124] *Ibid* at 36.
[125] *Ibid* at 37.
[126] Thomas Foxton, "Share and Share Alike: Contributory Negligence and Contractual Claims" (2017) Oxford U Undergraduate LJ 21 at 31 citing, Andrew Burrows, *Remedies for Torts and Breach of Contract* (3d ed) (Oxford University Press, 2004) 143.
[127] Foxton, *Ibid* at 33 – 34.
[128] MLRC Report, *supra* note 16 at 48.
[129] [1999] HCA 6.

[88] The New Zealand Law Commission recommended in 2012 that apportionment for contributory negligence and between concurrent wrongdoers be available for "loss or damage, whatever the legal basis of liability, whether tort, breach of contract, breach of trust, or otherwise."[130] The Commission recommended the following provision be included to address contributory negligence in breach of contract claims:

> (a) a wronged person who does or fails to do anything in justified reliance on a contract, a rule of law, or an enactment does not fail to act with due regard for that person's own interest; and
>
> (b) the reliance by a wronged person on a contract does not cease to be justified by reason only of a failure by that person to take any precaution against default by the wrongdoer in the performance of an obligation under the contract before the wronged person knows that such default has occurred.[131]

[89] The Commission explained that this provision was necessary to make it clear that:

> [A] party to a contract is entitled until becoming aware of a breach to assume that the other party will duly perform that party's obligation. The words chosen are intended to preserve the wronged party's election to hold the other party to that party's performance...The reference to default in performance would not include an anticipatory repudiation.[132]

[90] The Commission also recommended that the provision requiring damages to be reduced for contributory fault would be subject to any express term of the contract to the contrary.[133]

[91] The Manitoba Law Reform Commission recommended in its 2013 report that apportionment for contributory fault be available for any breach of contract creating a liability for damages.[134] The Commission's reasoning was as follows:

> In cases where the plaintiff's conduct is clearly unreasonable and contributes to the damage suffered, apportionment may be appropriate and consistent with the fundamental purpose of promoting fairness between the parties. The Commission is not persuaded that the consequences of this recommendation would be an unacceptable uncertainty in the law…the current 'all or nothing' approach does not necessarily invite certainty. Courts are regularly required to interpret the actions of parties to a contract

[130] New Zealand Law Commission, *Apportionment of Civil Liability* (Report No 47, 1998) at 16 available online: <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R47_0.pdf> [NZ Report].
[131] *Ibid* at 22.
[132] *Ibid* at 23.
[133] *Ibid* at 24.
[134] MLRC Report, *supra* note 16 at 53.

> and determine the consequences, but in many cases do not have the flexibility to take into account all of the relevant circumstances.
>
> …As in cases of strict liability and intentional torts, apportionment for contributory negligence may frequently not be appropriate in a case of a strict breach of a contractual term. The starting point of any analysis is that parties to a contract are entitled to rely on the terms of the agreement and are obligated to carry out their part of the bargain. The terms of the contract and the intentions of the parties should prevail.
>
> …Similarly, a party should be entitled to rely on an implied warranty that a product is reasonably fit for its intended purpose, without further inspection. However, apportionment may be appropriate if the plaintiff's actions, in addition to the defendant's fault in breach a strict contractual term, were unreasonable in the circumstances and contributed to his or her loss. This assessment must be made within the context of the entire circumstances, and in particular the contractual obligations undertaken by the parties.[135]

[92] In 2017, the Scottish Law Commission released its *Discussion Paper on Remedies for Breach of Contract*[136] and asked whether contributory negligence should be a defence for all breach of contract claims.[137] The majority of those consulted were in support of contributory negligence being a defence for all contractual claims for damages. As a result, the Commission recommended extending the definition of fault in the 1945 Act to include breach of contract by either party in its 2018 report.[138] The Commission explained the impact of this change as follows:

> Thus the defence will arise under section 1(1) of the 1945 Act where the pursuer in a claim of damages for breach of contract suffers loss partly through its own fault (which may or may not be a breach of contract or other legal wrong), and partly through the breach of contract by the other party. The damages recoverable in respect of the breach will be reduced to the extent the court considers just and equitable having regard to the pursuer's share in the responsibility for the loss.

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[135] MLRC Report, *supra* note 16 at 53-55.

[136] Scottish Law Commission, *Discussion Paper on Remedies for Breach of* Contract (2017). Available online <https://www.scotlawcom.gov.uk/files/3114/9968/2972/Discussion_Paper_on_Remedies_for_Breach_of_Contract_DP_No_163.pdf> [Scottish 2017 Report].

[137] The Scottish Law Commission had previously examined this question in 1988 (recommending contributory negligence be a defence where the defendant owed a contractual duty of care) and 1999 (recommending contributory negligence be a defence to all contractual claims).

[138] Scottish, Law Commission, *Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses* (Report No 252, 2018). Available online: <https://www.scotlawcom.gov.uk/files/1115/2222/5222/Report_on_Review_of_Contract_Law_-_Formation_Interpretation_Remedies_for_Breach_and_Penalty_Clauses_Report_No_252.pdf> [Scottish 2018 Report].

> …Suppose C purchases a new car from D (a reputable dealer), stipulating that the vehicle is to be supplied with winter tyres. It arrives without them, but C does not notice this. Shortly thereafter C has a catastrophic accident in the car due to losing traction on black ice. C's damages from D for breach of contract may be reduced by the omission to check that the right tyres had been fitted before driving that day, even though neither a breach of contract nor negligence by C (the tyres were roadworthy in normal conditions and there was no reason to suspect black ice). The question of how much C's damages should be reduced would depend on the court's assessment of the relative weight of C's contribution to his own misfortune. There might be no reduction at all if the court decided that in all the circumstances C's behaviour was not unreasonable and that accordingly D should be fully liable. The negligence or otherwise of D's breach is irrelevant.[139]

[93] The Scottish Law Commission also recommended that the new contributory negligence rule for breach of contract be subject to contrary terms in the contract.[140]

[94] The following chart summarizes the recommendations of various law reform agencies discussed above on the issue of whether damages should be apportioned for contributory fault in breach of contract claims:

Organization	All breaches of contract	Breaches of contractual provisions creating a duty of care
ALRI (1979)	No	Yes
ULCC (1984)	No	Yes
OLRC (1988)	No	Yes; and also breaches of contract resulting in personal injury or property damage
BCLRC (1986)	No	Yes
UK (1993)	No	Yes
Australia (by legislation)	No	Yes
NZLC (2012)	Yes	Yes
MLRC (2013)	Yes	Yes
Scotland (2018)	Yes	Yes

[139] 2018 Scottish Report, *supra* note 138 at 115 – 116.
[140] *Ibid* at 117.

While recognizing that parties may agree to apportion liability pursuant to the terms of a contract, should Saskatchewan's legislation provide for apportionment of damages for contributory fault for (i) any breaches of contract or (ii) breaches of duties of care created by contract? Why or Why Not?

IV. Apportionment and Contribution Among Wrongdoers

[95] This section of the consultation report discusses several issues relating to how damages should be apportioned among wrongdoers, and how uncollectable contributions should be reallocated between parties.

1. Joint and Several Liability

[96] At common law, tortfeasors who contribute to an indivisible loss ("concurrent tortfeasors") are each liable to the injured person for the entire amount of the damages suffered. In other words, if A and B are both found to be equally responsible for the injured person's loss, A and B are jointly and severally liable and the injured person can seek 100% of their damages from either A or B. The rationale for joint and several liability is essentially that the concurrent tortfeasors caused the injury and the injury cannot be divided. Joint and several liability is provided for in the *CNA* (with a modification in the case of an uncollectable contribution, discussed below).

[97] As discussed earlier in this paper, at common law, there was no ability for a tortfeasor to seek contribution from concurrent tortfeasors. Thus, in the example given above, if the injured person sought 100% of their damages from A, A was unable to then claim 50% of the damages from B. Contributory negligence legislation across Canada has, however, displaced this rule to allow A to seek contribution from B.

[98] The alternative to joint and several liability is proportionate liability, in which each tortfeasor is liable to the injured party only to the extent of their degree of fault. In the example given above, A would only be required to compensate the injured person for 50% of their damages.

[99] Essentially, the central difference between the two liability regimes is whether the injured party or the concurrent tortfeasors should absorb the risk of non-recovery from one or more of the other tortfeasors. A further distinction between the two regimes is which party bears the burden of determining who caused the loss. A proportionate liability regime requires the plaintiff to identify each potentially responsible defendant and seek a proportionate share from each. In contrast, under a joint and several liability regime, the plaintiff need only claim against one potentially responsible defendant. The result is that proportionate liability tends to increase the complexity of legal proceedings.[141]

[100] There has been much discussion of the preferability of a joint and several liability regime as compared to a proportionate liability regime over the past several decades in Canada, the UK, the US, Australia, and New Zealand, in response to the "emerging 'liability insurance crisis.'"[142] The New Zealand Law Commission recently noted:

> The consistent view of various Law Commissions who have examined the question of the appropriate liability regime is that joint and several liability meets the legitimate expectations of plaintiffs who have been harmed by the actions of liable defendants. Any shift away from the joint and several liability regime will transfer part of the risk to the plaintiff….
>
> Any case for proportionate liability would need to be strong enough to outweigh the current benefits to plaintiffs under joint and several liability that would be lost. A convincing case for proportionate liability would need to demonstrate that a switch would better support industry or commerce by being more economically efficient. If such a benefit were demonstrated this might justify a change, even if it involved transferring some risks to plaintiffs. However… the economic evidence to support proportionate liability is lacking. Nor have we been able to locate any empirical evidence to show that proportionate liability may achieve economic efficiencies. From the limited evidence available, moving to proportionate liability is likely to cause economic disbenefits.[143]

[101] While recommending that New Zealand maintain joint and several liability, the New Zealand Commission did, however, recommend that the legislation be amended to allow a court to grant relief to "minor defendants" who had only a minor and limited responsibility for the plaintiff's loss if requiring that defendant to pay the full or part of an unpaid amount owed by another defendant would be unduly harsh or unjust.[144] The Commission recommended that there be a limit to the relief granted to a minor

[141] NZ Report, *supra* note 130 at 23.
[142] Law Reform Commission of Saskatchewan, *The in solidum Doctrine and Contributory Negligence* (1997) at 8 [LRCS Report].
[143] *Ibid* at 20 – 21.
[144] NZ Report, *supra* note 130 at 39.

defendant, and suggested that relief should not result in the plaintiff recovering less than 50% of the judgment damages.[145]

[102] Australia has transitioned away from joint and several liability to a proportionate liability regime for property and economic losses.[146] Several states in the United States also have implemented proportionate liability.

[103] In Saskatchewan, joint and several liability and contribution among tortfeasors are both provided for in s. 3(2) of the *CNA* which provides:

> Subject to section 3.1 [apportionment of uncollectable contribution], if two or more persons are found at fault, they shall be jointly and severally liable to the person suffering damage or loss, but as between themselves, in the absence of a contract, express or implied, they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.

[104] Joint and several liability also applies where a plaintiff has been found contributorily negligent (as will be discussed below, s 3.1 modifies this to a degree where there are uncollectable contributions). In *Housen v Nikolaisen*[147] sections 2 and 3 of the *CNA* were described as follows:

> Section 2 of *The Contributory Negligence Act, supra*, reduces the damages for which one or more defendants may be liable by the degree of fault attributed to a plaintiff. Section 3 provides that where two or more defendants are at fault, they are jointly and severally liable to the plaintiff for the damages attributed to them, irrespective of whether or not that plaintiff is also at fault.

[105] The Alberta Court of Appeal has also held that Alberta's contributory negligence legislation, which contains similar provisions to Saskatchewan's, provides for joint and several liability for contributorily negligent plaintiffs.[148] Ontario's contributory negligence legislation containing similar provisions to those in Saskatchewan[149] has been interpreted by the Supreme Court as providing for joint and several liability where a plaintiff has been found contributorily negligent.[150]

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[145] *Ibid* at 38.
[146] New Zealand Law Commission, *Liability of Multiple Defendants* (Report R132, 24 June 2014) [New Zealand Report] at 19.
[147] (1997), 161 Sask R 241 (QB), reversed in part on other grounds 2000 SKCA 12, trial judgment restored 2002 SCC 33.
[148] *Campbell Estate v. Calgary Power Ltd.* (1988), 1 WWR 36 (AB CA).
[149] *Negligence Act,* RSO, c N.1., ss 1, 3.
[150] *Ingles v Tutkaluk Construction Ltd*, 2000 SCC 12 at paras 58 – 59.

[106] This is not the case, however, in every jurisdiction in Canada. Nova Scotia's *Contributory Negligence Act*[151] has been interpreted as imposing proportionate liability where a plaintiff is determined to have been contributorily negligent.[152]

[107] Similarly, in British Columbia, joint and several liability applies only where a plaintiff is not found to have been contributorily negligent.[153] The Law Reform Commission of British Columbia has recommended that this be amended so that joint and several liability applies to contributorily negligent plaintiffs.[154]

[108] The New Zealand Law Commission considered the option of imposing proportionate liability where a plaintiff has been contributorily negligent, but ultimately decided it was not in favour of this regime for the following reasons:

> Failure to adequately protect one's own position is different from carelessness that causes loss to another. Between the negligent plaintiff and the negligent defendant, the negligent defendant will generally be considered the more culpable party. Importantly, the plaintiff has not breached a legal duty to the defendant(s) – unlike the defendant(s) to the plaintiff. The plaintiff's "share" of the loss will already have been considered by the court in assessing the total damages, ensuring that no defendant will be liable for damage attributable to the plaintiff. In contrast, allowing proportionate liability in this situation involves a significant double discount. The plaintiff must give up any proportion of the damages attributed to their own fault. In addition, the plaintiff is at risk for the whole of any uncollected share. There is no principled basis for such a risk allocation. The plaintiff cannot be conceptualised as just another defendant – the interest of plaintiff and defendant are fundamentally opposed…

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[151] RSNS, 1989, c 95. The relevant provisions are found in sections 3 and 4:

> 3 (1) Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but 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.
>
> (2) Nothing in this Section operates so as to render any person liable for any damage or loss to which his fault has not contributed.
>
> 4 Where damage or loss has been caused by the fault of two or more persons, the court shall determine the degree to which each person was at fault.

[152] See *Inglis Ltd v South Shore Sales & Service Ltd* (1979), 31 NSR (2d) 541 (NS CA); *Lunenberg (County) District School Board v Piercey*, 1998 NSCA 50 at para 64; *Teed v Amero*, 2001 NSSC 97; *Merrick v Guilbeault*, 2009 NSSC 60; and *Perrin v Blake*, 2016 NSSC 88.

[153] See *Leischner v West Kootenay Power & Light Co* (1986), 24 DLR (4th) 641 (BC CA); Cominco Ltd v CGE (1984), 4 DLR (4th) 186 (BC CA).

[154] BCLRC Report, *supra* note 118.

> This reform would also impose very high stakes for the finding that a plaintiff is contributorily negligent, which could influence litigation and settlement behaviour…[155]

[109] The Law Reform Commission of Saskatchewan studied this issue in 1997 and concluded that joint and several liability should be retained.[156] The Commission stated:

> [T]he law of negligence must ultimately be judged as a social and economic institution. In our view, the economic and social costs of shifting the burden of an insolvent co-defendant onto injured parties is less acceptable than shifting it onto co-defendants who are able to assume full responsibility for the harm they contributed to. Neither approach can be regarded as entirely fair in the abstract. But as a matter of policy, a choice must be made. We believe that the choice we tentatively recommend minimizes social and economic costs. We have also tried to gauge the impact of the present law in practice. Our conclusion that costs are more efficiently apportioned by protecting plaintiffs against short-falls in collection of damages could not stand if there was persuasive evidence that the present law leads to unacceptably high insurance costs. Our review of the studies of the impact of the contribution rules on insurance costs does not suggest that the rules result in significantly higher liability insurance premiums.[157]

[110] The Alberta Law Reform Institute,[158] the Ontario Law Reform Commission,[159] the Law Commission of Ontario,[160] and the Manitoba Law Reform Commission[161] have each recommended that joint and several liability be maintained.

[111] In a recent article discussing the drift away from joint and several liability and towards proportionate liability in certain circumstances in some jurisdictions, Kit Barker and Jenny Steele state they "are unable to discern any good, generalizable ethical argument in favour of a proportionate liability rule". They go on to state:

> [W]e firmly reject the idea – which is alarmingly widespread amongst proponents of reform – that proportionate liability is another manifestation or natural extension of the ethics of "sharing" that is to be found in modern comparative (contributory) negligence doctrine. Although these two doctrines share some legal concepts and techniques (splitting, sharing, and comparing, for example), they engage in very different distributive exercises, so that comparison between them are potentially very misleading. Acceptance of the one certainly does not ethically dictate acceptance of the other. Despite the

[155] NZ Report, *supra* note 130 at 58.
[156] LRCS Report, *supra* note 142.
[157] *Ibid* at 2.
[158] ALRI Report, *supra* note 36.
[159] OLRC Report, *supra* note 50.
[160] Law Commission of Ontario, *Joint and Several Liability Under the Ontario Business Corporations Act* (February, 2011) [LCO Report].
[161] MLRC Report, *supra* note 16 at 23.

> language of ethics, the real pressures to adopt proportionate liability have, we argue, been pragmatic. Although these pressures are politically real, the arguments supporting them are weak – few are backed by any real empirical evidence; most are capable of cutting both ways; and none is easily generalizable beyond the particular context in which it has been generated.[162]

[112] The Commission is not aware of any significant developments since its 1997 conclusion that joint and several liability be retained that would suggest Saskatchewan should move towards proportionate liability.

The Commission is tentatively recommending there be no change to joint and several liability as contained in s 3(2) of the *CNA*.

2. Contribution Among Wrongdoers

(i) Scope of the Right of Contribution

[113] Under the common law, joint tortfeasors are unable to seek contribution from other joint and several tortfeasors. Section 3(2) of the *CNA* abolishes the common law rule preventing tortfeasors from seeking contribution from other concurrent tortfeasors:

> Subject to section 3.1, if two or more persons are found at *fault*, they shall be jointly and severally liable to the person suffering damage or loss, but as between themselves, in the absence of a contract, express or implied, they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at *fault*.

[114] In 1974, the Saskatchewan Court of Appeal interpreted "fault" in s 3(2) of the *CNA* as referring to negligence in *Chernesky (Cherneskey) v Armadale Publishers Ltd*.[163] In *Chernesky*, the defendant publisher was sued in defamation and sought to third party the writers of the allegedly defamatory publication. The Court of Appeal held that the *CNA* applied solely to the tort of negligence and was thus inapplicable to the defamation claim, stating: "in Saskatchewan, the common-law rule that there is no right to contribution or

[162] Kit Barker, Jenny Steele, "Drifting towards Proportionate Liability: Ethics and Pragmatics" (2015) 74 Cambridge LJ 49 at 51.
[163] *Chernesky*, *supra* note 53.

indemnity between joint tortfeasors still applies except in negligence where the rule has been changed by statute."[164]

[115] In 2004, the Court of Appeal noted that while there were "strong arguments to be made that *Chernesky* has been overtaken by the development in the law", it was not necessary in the case before it to decide whether *Chernesky* remained good law.[165]

[116] The *Chernesky* decision continues to apply in Saskatchewan. For instance, in *Thompson v Kletzel,*[166] a defendant (a Crown prosecutor) in an action for malicious prosecution (an intentional tort) and negligence sought to third party the plaintiff's defence counsel on the basis of negligent misrepresentation. The Court applied *Chernesky* and held that the *CNA* did not permit the defendant alleged to have committed an intentional tort to claim contribution against an alleged negligent tortfeasor.[167]

[117] In *Case v Rotelick*, the defendant accountants sought leave to issue a third party claim for contribution against another group of accountants on the basis of negligence and breach of contract between the proposed third party defendants and the plaintiff. The defendants were granted leave to issue the claim for contribution so long as the claim would be limited to negligence and/or negligent misrepresentation.[168]

[118] The Saskatchewan Court of Appeal (sitting as a panel of five) recently revisited the scope of section 3(2) in *Sound Stage Entertainment Inc v Burns*.[169] In *Sound Stage*, the defendants were sued in negligence and sought to add a third party intentional tortfeasor. The majority held that section 3 of the Act is applicable only to negligence, after conducting an extensive review of the history of the section:

> As indicated, the best interpretation of s. 3 of the *Act* is that it applies only to negligence. I reach this conclusion because consideration of the facially broad wording of the section, with its reference to "fault", is only part of the analysis demanded by the interpretational approach endorsed in *Rizzo & Rizzo Shoes (Re)*. "Fault" must be read in its full statutory context and with reference to its legislative object and the relevant legislative history. When this is done, it becomes readily apparent that s. 3 does not apply to tortious or fault-based actions other than negligence.

[164] *Ibid* at 167.
[165] *Parkland, supra* note 82 at para 16.
[166] 2018 SKQB 80. Leave to appeal from this decision has been granted (*Rodgers v Thompson,* 2018 SKCA 33).
[167] *Ibid* at para 26, wherein the Court stated: "I am satisfied that this Court remains bound by the reasoning in *Chernesky*. It follows that this conclusion, alone, justifies the dismissal of Rodgers' application, with respect to both the proposed third party proceedings and the proposed amendment."
[168] *Ibid* at para 54.
[169] *Sound Stage, supra* note 2.

> The relevant statutory context includes, perhaps most significantly, the long title of the *Act*. It specifies that the *Act* is concerned with negligence. As explained above, the object of s. 3 and its legislative history also indicate that it is aimed at negligence. The work of the Uniform Law Conference directly underpinning s. 3 makes this particularly clear. A focus on negligence to the expense of other sorts of fault was also evident in the Assembly when the *Act* was enacted. Some of the amendments made to the *Act* since 1944, and some of the ministerial comments made in connection with those amendments, might have muddied the waters somewhat. However, they have not done so to the extent of somehow justifying an interpretation of s. 3 that would expand its reach beyond what the Legislature originally intended.
>
> I might also add that one other, and somewhat larger, consideration makes me hesitant about reading "fault" in s. 3 as reaching beyond negligence. It is this. If fault is construed in this broader way, what are its limits? Does it extend to all intentional torts, breaches of fiduciary obligations, some or all kinds of breach of contract, breaches of statutory duties, and so forth? All of these sorts of actions, after all, involve fault. Simply put, this is a classic slippery slope and, in the absence of some principled way of determining where to stop sliding, I believe the Court should be reluctant to step onto it.[170]

[119] Jackson JA dissented, noting that "the prevailing view in common law Canada is that *fault in apportionment* legislation includes intentional acts as well as negligent acts,"[171] and "allowing third party claims among tortfeasors permits all of the issues regarding liability and apportionment to be determined in one trial."[172] Jackson JA concluded as follows:

> In this case, it must be pointed out that it is not the intentional tortfeasor who seeks contribution from the negligent tortfeasor, but it is the other way around. Thus, the historical doctrinal basis for resisting this third party application does not apply. Furthermore, it is not the intentional tortfeasor that resists being joined, as he did not appear on the third party application, but rather it is the plaintiffs. This serves to highlight further the unfairness that can arise if the *Act* is construed as applying to negligence only.
>
> Every law reform commission in Canada that has studied the issue of contributory negligence has called for the reform of the negligence Acts…This Court can add its voice to those reports, but we should not leave these defendants without recourse to a remedy, if one is available to them.
>
> Finally, I would note that earlier case law taking the same restrictive view as *Chernesky…* has been overtaken in Ontario… I would not ground the dismissal of the appeal before us

[170] *Ibid* at paras 78 – 80.
[171] *Ibid* at para 99.
[172] *Ibid* at para 105.

> on *Chernesky*. Instead, with much respect for those who hold a contrary view, this appeal should be decided on the basis of the interpretation of the *Act* as influenced by the evolving view of *fault* as reflected in the balance of the common law jurisdictions in Canada.[173]

[120] Several other Canadian jurisdictions have taken a broader view of the scope of the contribution provisions in their respective statutes. For instance, in British Columbia, the word "fault" in the *Negligence Act* has been held to include intentional torts on the basis that it should be given its ordinary meaning.[174]

[121] Ontario's *Negligence Act* refers to "fault or neglect" in its contributory negligence and contribution provisions. Beginning with the *Bell Canada v Cope* decision from the Ontario Court of Appeal in 1980,[175] Ontario courts have interpreted fault as including intentional wrongdoing.[176]

[122] The Nova Scotia Court of Appeal has held that Nova Scotia's contributory negligence legislation requires the court to apportion "negligence liability among the parties responsible whether in tort or contract."[177] Contribution among joint tortfeasors has been applied to assault and battery in Nova Scotia.[178]

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[173] *Ibid* at paras 109 – 113.

[174] *Brown v Cole*, [1996] 2 WWR 567 (BC CA) (CanLii). In this case the British Columbia Court of Appeal was referred to the *Chernesky* decision and stated as follows at paras 19 – 20):

> I have already referred to *Chernesky v. Armadale Publications Ltd.*, and the fact that the Saskatchewan Court of Appeal has held that the word "fault" in its contributory negligence legislation relates to negligence only and not to intentional torts.
>
> In this jurisdiction the opposite view as to the breadth of the word "fault" in the *Negligence Act* is found in *Anderson and G.W. Anderson Holdings Ltd. v. Stevens et al.* (1981), 29 B.C.L.R. 355. In that case Macfarlane, J. (now J.A.) held that "fault" in section 4 of the British Columbia *Negligence Act* included intentional torts. In *Anderson* the claim was in fraud. Macfarlane, J., after an extensive review of the case law, concluded that the word "fault" should be accorded its ordinary meaning rather than treating it as synonymous with negligence. With respect to the contrary view held by the Saskatchewan Court of Appeal, I am of the opinion that the word "fault" in the British Columbia Negligence Act goes beyond negligence and includes intentional torts.

[175] *Bell Canada v COPE (Sarnia) Ltd* (1981), 119 DLR (3d) 254 (Ont CA).

[176] *Sound Stage, supra* note 2 at para 71 citing: *Rabideau v Maddocks* (1992), 1992 CanLII 7622 (ON SC), 12 OR (3d) 83 (Ct J (Gen Div)); *Harland v Fancsali* (1993), 1993 CanLII 8457 (ON SC), 102 DLR (4th) 577 (Ont Ct J (Gen Div)) at 592; *Alpha Tire Corp. v South China Industries (Canada) Inc.*, [2000] OJ No 212 (QL) (Sup Ct J) at paras 29–30; *Pet Valu Inc. v Thomas*, 2004 CanLII 23785 (Ont Sup Ct J) at para 18; *Tschekalin v Sault Ste. Marie Police Services Board*, 2004 CanLII 1843 (Ont Sup Ct J) at para 105; *J.K. v Ontario*, 2017 ONCA 902 at para 31, 22 CPC (8th) 306; *Canadian Transit Company v City of Windsor*, 2018 ONSC 3812 at para 77, 77 MPLR (5th) 303.

[177] *A.C.A. Cooperative Assn Ltd v Associated Freezers of Canada Inc* (1992), 93 DLR (4th) 559 (NSSC (AD)) at 585.

[178] *Merrick v Guilbeault*, 2009 NSSC 60.

[123] Whether "fault" includes intentional torts in Alberta is unsettled.[179] The Alberta Court of Appeal has also taken a narrower interpretation of "fault" in Alberta's *Contributory Negligence Act* in a case where the breach of two different contracts by two different parties contributed to the same loss. In *Petersen Pontiac Buick (Alta) Ltd v Campbell*,[180] the Court of Appeal held apportionment could not be granted under the legislation, but that equal apportionment could be arrived at under either contract law principles, or by using the equitable principle of unjust enrichment.[181]

Recommendations of Law Reform Agencies

[124] Law reform agencies have recommended the right of contribution be expanded. The Alberta Law Reform Institute based its recommendations on contribution on the principle that wrongdoers should be treated fairly, and "in the absence of a compelling reason to the contrary, fairness requires that a burden which the law imposes on two parties should

[179] Several of the Alberta cases on this point are discussed in *Sound Stage, supra* note 2 at pars 68 – 69:

> In *Kelemen v El-Homeira*, 1999 ABCA 315 at para 26, 250 AR 67, leave to appeal dismissed (2000), 271 AR 398 (note) (SCC), the Court stated: "Further, contributory negligence is not applicable in the deceit action". There was no discussion of the apportionment legislation. See also: *Village on the Park (Re)*, 2009 ABQB 497 at para 189, [2009] 12 WWR 509. In *Lafrentz v M & L Leasing*, 2000 ABQB 714, [2001] 1 WWR 629, Perras J. wrote that "[t]he Alberta *Joint Tortfeasors Act* and the *Contributory Negligence Act* have been held to relate only to negligence actions" (footnote omitted, at para 28). In *Goertzen v Sandstra*, 2005 ABQB 623, the *Contributory Negligence Act (AB)* was held not to be applicable to the apportionment of damages between the defendants and the future defendants "as it is concerned with the contributory negligence of a plaintiff, which is not the case here" (at para 83). The formula contained in the statute was used, anyway, on the basis that it was a just and equitable method of determining liability.
>
> On the other side of the coin, some Alberta cases have apportioned damages between defendants whose wrongs were intentional. For example, in *Fletcher v Hand* (1994), 1994 CanLII 8997 (AB QB), 156 AR 142 (QB), Mason J. relied on *Anderson* to find "fault" includes intentional and negligent wrongs, and apportioned liability between a defendant who was liable based on an intentional tort and defendants who were liable for negligence torts (negligent misrepresentation). See also: *R v Rumsey* (1984), 1984 CanLII 2942 (FC), 12 DLR (4th) 44 (WL) (Fed Ct (TD)) at para 15; *Raywalt Construction Co. Ltd. v Bencic*, 2005 ABQB 989 at para 366, [2006] 8 WWR 440; *Sloan v Black Sea Homes Corporation*, 2007 ABPC 231 at paras 21–22 (exception for fraud); *Lepine v Sherwood Park Dodge Chrysler Jeep Ltd.*, 2018 ABPC 12 at paras 134–170 [*Lepine*]. In *Freyberg v Fletcher Challenge Oil and Gas Inc.*, 2007 ABQB 353 at para 161, [2007] 10 WWR 133, Kent J. acknowledged that the statute applied where damage was caused negligently or intentionally because both involved some level of "fault" on behalf of the tortfeasor, but stated the same could not be said for strict liability offences.

[180] 2013 ABCA 251.
[181] *Ibid* at 51 – 54.

not be borne wholly by one of them."[182] The Institute recommended that contribution should be available to intentional tortfeasors (including if the tort is also a crime).[183]

[125] The Institute also recommended that contribution be available for breach of contract for the following reasons:

> Our principal reason is based upon our formulation of the basis for contribution. One who breaks a contract is as much a wrongdoer as one who does not adhere to a general standard of conduct imposed by law. Fairness requires that a burden which the law imposes upon two parties should not be borne by one of them, and it makes no difference for this purpose that the obligation is imposed by contract rather than tort law.
>
> An additional reason is that the border between tort and contract is hazy, indistinct and poorly defined…it is difficult to deny that the movement of the common law is toward a more generalized law of obligation or liability. As a consequence of recognizing this and of recognizing that the law always has been a seamless web, we have concluded that contribution should not be limited to the kinds of wrongs which are classified as torts but should extend to those classified as breaches of contracts. Statutes should take account of the hazy borders between tort and contract and should not compel courts to engage in the difficult and virtually impossible task of delineating between the two.[184]

This recommendation confirmed the common law which allows one contracting party to seek contribution from another party to the same contract where both parties have breached that contract, but expanded the common law to allow contribution in situations where the same damage flowed from a tort and a breach of a contract, or breaches of two independent contracts.[185]

[126] While the Institute also tentatively concluded that contribution be available for breaches of trust, it was of the opinion that such a provision should be contained in *The Trustee Act* and that further consultation was needed prior to making a final recommendation.[186]

[127] The Institute's recommendation to expand the right to contribution was included in the *Uniform Contributory Fault Act,* which extends the right to contribution to intentional torts, and breaches of contract and breaches of statutory duties that create a liability for damages.[187]

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[182] ALRI Report, *supra* note 36 at 36.
[183] *Ibid* at 40.
[184] *Ibid* at 41-42.
[185] *Ibid* at 51.
[186] *Ibid* at 52.
[187] Section 7 of the *Uniform Contributory Fault Act, supra* note 14 provides that a concurrent wrongdoer is entitled to contribution from the other concurrent wrongdoers. The *UCFA* defines "concurrent wrongdoers" in s 1 as:

[128] The Ontario Law Reform Commission recommended that the right of contribution should be available to wrongdoers who cause a single loss "irrespective of the nature of the legal obligation that gives rise to their liability in damages, and of the form of the relief that the wrongdoer has been required to provide to the injured party."[188] The Commission explained its reasoning as follows:

> [S]tatutory reform is both desirable and necessary. Even if there already exists a right to contribution among concurrent wrongdoers who are not tortfeasors, the state of doctrinal development is, at best, uncertain. The virtual absence of any cases in which a court has applied general restitutionary principles to give relief is likely to mean that the law in this rather difficult and technical area will evolve slowly and piecemeal. Moreover, it is highly probable that anomalies will emerge respecting the statutory rights available to concurrent tortfeasors, those rights previously recommended by the Commission for contribution among trustees, and the common law and equitable rights of other wrongdoers. The alarmingly large number of recent cases in which our courts have experienced difficulties in their application of restitutionary principles provides cogent evidence against the view that legislatures should abstain in this area….Accordingly, the Commission, like law reform bodies in England, South Australia, Victoria, New Zealand, and Hong Kong, has decided to recommend that there should be a right to contribution not only among all concurrent tortfeasors, as previously recommended, but among all concurrent wrongdoers, whatever the legal nature of their liability to the injured person.[189]

[129] The Law Reform Commission of British Columbia, in contrast, recommended that contribution outside of negligence be limited to breaches of duties of care arising from contracts creating a liability for damages.[190]

[130] The Manitoba Law Reform Commission has also recommended that the right to contribution be expanded, stating:

> [T]here is no principled reason to restrict the right to contribution to tortfeasors, and…the right should be extended to wrongdoers responsible for the same damage on any ground

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(a) two or more persons whose wrongful acts contribute to the same damage suffered by another, and any other person liable for the wrongful act of those persons; or

(b) a person whose wrongful act causes damage suffered by another and a person liable for the wrongful act.

A "wrongful act" is defined in s 1 as an act or omission that constitutes:

(a) a tort,

(b) a breach of contract or statutory duty that creates a liability for damages, or

(c) a failure of a person to take reasonable care of his own person, property or economic interest, whether or not it is intentional.

[188] OLRC Report, *supra* note 50 at 82.

[189] *Ibid* at 73-74.

[190] BCLRC Report, *supra* note 118.

> of liability. The extension of the right to different grounds of liability, with different assessments of damages and varying underlying principles, may complicate the work of the courts. However, the common thread is that the acts or omissions of the wrongdoers must cause the same harm. Given the complexity of many current court cases with multiple defendants and overlapping grounds of liability, there is no reason to believe that extending the right to contribution in the interests of achieving fairness between defendants will be a significant additional burden.[191]

The Commission expressed a preference for the "simple and inclusive" approach in the United Kingdom (discussed below) as compared to the approach taken in the *Uniform Contributory Fault Act*, and made the following recommendation: "Any person liable in respect of any damage suffered by another person should have a right to recover contribution from any person liable in respect of the same damage."[192]

[131] Other international law reform bodies in the United Kingdom,[193] Scotland,[194] New Zealand,[195] New South Wales,[196] Victoria,[197] and Hong Kong[198] have similarly recommended that contribution should be available to any wrongdoer liable for the same damage to the plaintiff on any grounds.

[132] The United Kingdom Law Commission recommended that rights of contribution should not be limited to claims arising out of tort and should be "widened to cover breaches of contract, breaches of trust and other breaches of duty as well."[199] The Commission was of the view that this recommendation would close the gap where there are no rights of contribution at common law" and give courts greater flexibility to prevent unjust

[191] MLRC Report, *supra* note 16 at 59.
[192] *Ibid* at 59-60.
[193] Law Commission (UK), Law of Contract: Report on Contribution (Report No 79, 1977) at para 33 [UK Report].
[194] Scottish Law Commission, *Report on Civil Liability: Contribution* (Report No 115, 1988) at paras 3.1-3.5, recommending that: "Statutory rights of relief should be available in all cases where loss is suffered as a result of a delict, breach of contract, breach of trust or breach of any other obligation giving rise to a liability in damages."
[195] NZ Report, *supra* note 150 recommending at 16 that New Zealand adopt a draft Act including the following provision: "This Act applies to any loss or damage if the person who suffered it, or anyone representing that person's estate or dependants, is entitled to recover compensation from some other person in respect of that loss or damage, whatever the legal basis of liability, whether tort, breach of contract, breach of trust, or otherwise."
[196] New South Wales Law Reform Commission, Contribution between persons liable for the same damage (Report No 89, 1999) at paras 3.7-3.29 [New South Wales Report].
[197] Victoria, Chief Justice's Law Reform Committee, Contribution (1979) at para 5.
[198] Law Reform Commission of Hong Kong, Report on the Law Relating to Contribution Between Wrongdoers (Topic 5) (1983) at para 5.3, in which the Commission expressed its agreement with the approach taken in the UK in the *Civil Liability (Contribution) Act 1978*, stating: "We are in complete agreement with this extension of the right of contribution. The present restriction of the right to contribution to tortfeasors cannot be justified on any policy grounds, and is merely an accident of legal history."
[199] UK Report, *supra* note 91 at para 33.

results.[200] The Commission's recommendations were followed and implemented in the *Civil Liability (Contribution) Act 1978*, which provides, in part, as follows:

> 1(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly within him or otherwise).
>
> 6(1) A person is liable in respect of any damage for the purposes of this act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise).

[133] The *Wrongs Act 1958* in Victoria, Australia includes similar wording to the *Civil Liability (Contribution) Act 1978*.[201]

(ii) Limits on the Right to Contribution

[134] The Alberta Law Reform Institute recommended that contribution for breaches of contract should not override the terms of a contract in the event the contract contains limitation periods and upper limits of liability.[202]

[135] The Ontario Law Reform Commission recommended that its proposed *Contribution and Comparative Fault Act* supersede any right of contribution (as distinct from a right of indemnity) arising in statute or by any other means, including common law and equity, with a few specific exceptions.[203] The first exception would apply if, after reviewing all statutes providing for contribution, the government decided those specific statutes should supersede the proposed *Contribution and Comparative Fault Act*.[204] The second and third exceptions related to the contribution provisions previously proposed by the Commission to be included in trustee legislation and the *Workers' Compensation Act*. The Commission also recommended that express and implied contractual provisions relating to contribution should supersede its proposed *Contribution and Comparative Fault Act*, and that the Act should contain a provision stating that "no person should be entitled to

[200] *Ibid.*
[201] Section 23B
[202] ALRI Report, *supra* note 36 at 50 – 51.
[203] OLRC Report, *supra* note 50 at 78.
[204] *Ibid* at 79.

claim contribution from a person who is entitled to be indemnified by the claimant for the damages in respect of which contribution is sought."[205]

[136] The Manitoba Law Reform Commission similarly recommended that the right to contribution "should be subject to any existing contract between the person suffering the damage or the person claiming contribution and the person from whom contribution is claimed."[206]

[137] Law reform agencies in the United Kingdom, Scotland, New Zealand, New South Wales, South Australia, and Hong Kong have also recommended that contractual provisions pertaining to contribution should supersede statutory contribution provisions.[207]

[138] The following chart summarizes the recommendations of various law reform agencies discussed above on the issue of whether, and how far, the scope of the right of contribution should be extended:

Organization	Expanded right of contribution	Subject to contractual provisions
ALRI (1979)	Yes – intentional torts, breach of contract	Yes
ULCC (1984)	Yes – intentional torts, breach of contract, breaches of statutory duties that create a liability for damages	Not mentioned specifically
OLRC (1988)	Yes – on any ground of liability	Yes
BCLRC (1986)	Yes - but only for breaches of duties of care arising from contracts	yes
UK (1993)	Yes – breach of contract, breach of trust, and other breaches of duty	Yes
Australia (NSW and Vic)	Yes – on any ground of liability	Yes
NZLC (2012)	Yes – on any ground of liability	Yes
MLRC (2013)	Yes –on any ground of liability	Yes
Scotland (2018)	Yes –on any ground of liability	Yes

Should Saskatchewan's legislation provide for an expanded right of contribution among wrongdoers? If so, how broad should the expansion be, and should it be subject to contractual provisions that address contribution?

[205] *Ibid*.
[206] MLRC Report, *supra* note 16 at 72.
[207] *Ibid* at 71.

3. Apportionment of Uncollectable Contributions.

[139] Prior to 2004, the *CNA* did not contain any specific apportionment provisions to deal with uncollectable contributions. As a result, a defendant who sought contribution from other defendants also found to be liable for the plaintiff's injury bore the risk of one of the defendants being unable to pay their contribution. For example, if a plaintiff sued A, and A (40% liable) then sought contribution from other defendants B (30% liable) and C (30% liable) but was unable to collect from B, A would ultimately end up being responsible for 70% of the plaintiff's damages.

[140] In its 1997 report, the Law Reform Commission of Saskatchewan recommended Saskatchewan's legislation be amended to include section 9 of the *Uniform Contributory Fault Act*, which provides as follows:

> Where the court is satisfied that the contribution of a concurrent wrongdoer cannot be collected, the court may, on or after giving judgment for contribution, make an order that it considers necessary to apportion the contribution that cannot be collected among the other concurrent wrongdoers, proportionate to the degrees to which their wrongful acts contributed to the damage.

[141] This section allocates any uncollectable contribution equally between all concurrent wrongdoers. The Commission made this recommendation after rejecting an approach that would require a contributorily negligent plaintiff to share the liability of an uncollectable contribution, stating:

> In our opinion, the practical effect of this reallocation scheme is unclear. It may, for example, make the degree of fault of an insolvent or absent wrongdoer a new area of litigation. The uncertainty that could result might outweigh the occasional benefit it offers concurrent wrongdoers. The Ontario Law Reform Commission rejected reallocation to the plaintiff on the ground that the injured party's negligence is qualitatively different than the defendants' negligence: "The conduct of the injured person has endangered herself only, while the wrongdoer's conduct has jeopardized the safety of others". In addition, it has been suggested that the percentage fault attributed to the plaintiff is often merely a conventional figure, a 1/3 reduction for failure to wear a seat belt, for example. Using such a figure for purposes of reallocation is problematic.[208]

[208] LRCS Report, *supra* note 142 at 15.

[142] Apportioning an uncollectable contribution among wrongdoers in a share proportionate to their degree of liability has also been suggested by the Alberta Law Reform Institute,[209] the Ontario Law Reform Commission,[210] and the British Columbia Law Reform Commission.[211] The New Zealand Law Commission also recommended a similar type of reform.[212] The *Uniform Contributory Fault Act* also provides for apportionment of uncollectable contributions among concurrent wrongdoers in section 9:

> Where the court is satisfied that the contribution of a concurrent wrongdoer cannot be collected, the court may, on or after giving judgment for contribution, make an order that it considers necessary to apportion the contribution that cannot be collected among the other concurrent wrongdoers, proportionate to the degrees to which their wrongful acts contributed to the damage.

[143] The British Columbia Law Reform Commission's recommendation differed in one key aspect from the law reform agencies mentioned above: the BCLRC recommended that a contributorily negligent plaintiff be considered a concurrent wrongdoer for the purposes of allocation of uncollectable contributions.

[144] In 2004, s 3.1 was added to the *CNA* to determine how uncollectable contributions are apportioned. This section requires a contributorily negligent plaintiff to bear a portion of an uncollectable contribution:

> (1) In this section, "other persons found at fault" means:
>
> (a) the person suffering the damage or loss if that person has been found to be at fault; and
>
> (b) the other persons found to be at fault from whom the contribution can be collected.
>
> (2) If the court is satisfied that the contribution of a person found at fault cannot be collected, the court shall, after determining the degree in which each person is at fault, make an order apportioning the contribution that cannot be collected among the other persons found at fault, proportionate to the degrees in which they have been respectively found to have been at fault.
>
> (3) This section applies only to damages or losses caused or contributed to by a person's acts or omissions that take place on or after January 1, 2005.

[209] ALRI Report, *supra* note 36 at 84-86.
[210] OLRC Report, *supra* note 50 at 48
[211] BCLRC Report*, supra* note 118
[212] NZ Report, *supra* note 150 at 43.

[145] The New Zealand Law Commission studied apportionment of liability and initially proposed a solution similar to s. 3.1 of the *CNA* in which a contributorily negligent plaintiff would bear a proportionate share of the irrecoverable portion alongside the other defendants. However, in its final report on the topic the Commission altered its proposal for reform, stating:

> Such a proposal, it can be argued, runs completely contrary to the reasons we have advanced in support of solidary liability. If the correct view is that D1 is liable to P for all of P's loss, and questions of contribution among defendants are irrelevant to that liability, why should P's net entitlement be diminished because D1 cannot collect the share of P's entitlement that should be contributed by another defendant? It now seems to us that, once it is accepted that any reduction in P's claim is to be calculated by treating the concurrent wrongdoers as a group, then any rationale for allocating part of an uncollected share to P evaporates. The Commission's view now, therefore , is that no part of an uncollectable contribution should be allocated to P.[213]

[146] The Manitoba Law Reform Commission considered this issue, reached a similar conclusion to that of the New Zealand Law Reform Commission, and recommended in 2013 that Manitoba's legislation be amended to allow uncollectable contributions to be reallocated only among defendants and stated:

> It would be inconsistent with the principles underlying joint and shared liability to reduce a plaintiff's entitlement because one defendant cannot collect from another and to require the plaintiff to engage in additional court proceedings relating to contribution among the defendants. The Act should not require the plaintiff to share the risk that a defendant's share of damages will be uncollectable.[214]

[147] Professor Kleefeld has offered the following observations on s 3.1 of the *CNA:*

> Why did the government choose this method for s. 3.1? One factor suggested by the Minister's speech was the "exception of British Columbia" where "plaintiffs found to have contributed to their own loss are not entitled to the benefits of joint and several liability." However, this sounds like a kind of moral opprobrium or policy towards plaintiffs for having been contributorily negligent, rather than an interpretation of BC's Negligence Act that even the Supreme Court of Canada had by then framed in obiter dicta as just a "possible" interpretation. Moreover, it ignored the negative reaction to the BC

[213] NZ Report, *supra* note 130 at paras 11 – 12.
[214] MLRC Report, *supra* note 16 at 24 – 25.

> government's 2002 civil liability review, in which the Attorney General had proposed eliminating joint and several liability. Minister Quennell also referred to proportionate forms of liability in the US and Australia, though as I have noted, at least some of those measures were driven by differences in the regimes with respect to contribution rights. Another influence may have been Parliament's 2001 amendments to the Canada Business Corporations Art which introduced a modified proportionate liability regime for negligent provision of financial information--including reallocation of uncollectable damages among other defendants, but capped at 50 per cent of what a defendant was originally ordered to pay. However, these amendments were narrow in scope, were of benefit almost exclusively to accountants, and could hardly form the basis for a general reform of contributory negligence legislation.
>
> It is hard not to conclude that s. 3.1 was a means of buying peace from certain interest groups at the expense of a diffuse group of stakeholders-- those who in some way contribute to their own loss. However, the enacted version unjustifiably violates the compensation principle…[215]

Should Saskatchewan amend the legislation to no longer allocate an uncollectable contribution to a contributorily negligent plaintiff?

[215] Kleefeld, *supra* note 3 at 104 – 105.

V. Consultation Questions

1. Should the last clear chance doctrine be explicitly abolished by statute?
2. Should Saskatchewan's legislation provide for apportionment of damages for contributory fault for intentional torts? Why or Why Not?
3. Should Saskatchewan's legislation provide for apportionment of damages for contributory fault for breaches of fiduciary duty? Why or Why Not?
4. Should Saskatchewan's legislation provide for apportionment of damages for contributory fault for claims based in vicarious liability? Why or Why Not?
5. Should Saskatchewan's legislation provide for apportionment of damages for contributory fault for strict liability claims? Why or Why Not?
6. Should Saskatchewan's legislation provide for apportionment of damages for contributory fault for claims based on a breach of statutory duty? Why or Why Not?
7. While recognizing that parties may agree to apportion liability pursuant to the terms of a contract, should Saskatchewan's legislation provide for apportionment of damages for contributory fault for (i) any breaches of contract or (ii) breaches of duties of care created by contract? Why or Why Not?
8. Should Saskatchewan's legislation provide for an expanded right of contribution among wrongdoers? If so, how broad should the expansion be?
9. Should Saskatchewan amend the legislation to no longer allocate an uncollectable contribution to a contributorily negligent plaintiff?

Appendix A

The Contributory Negligence Act

being

Chapter C-31 of *The Revised Statutes of Saskatchewan, 1978* (effective February 26, 1979) as amended by the *Statutes of Saskatchewan*, 1983, c.82; 1984-85-86, c.47 and 54; 1992, c.24; 2004, c.L-16.1 and 37; and 2016, c.28.

Table of Contents

CHAPTER C-31

An Act to make Uniform the Law respecting Liability in Actions for Damages for Negligence where more than one Party is at Fault

Short title

1 This Act may be cited as *The Contributory Negligence Act*.

Apportionment of damage or loss

2(1) Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault, but 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.

(2) Nothing in subsection (1) operates so as to render any person liable for any damage or loss to which his fault has not contributed.

R.S.S. 1978, c.C-31, s.2.

Degree of fault

3(1) Where damage or loss has been caused by the fault of two or more persons, the court shall determine the degree in which each person was at fault.

(2) Subject to section 3.1, if two or more persons are found at fault, they shall be jointly and severally liable to the person suffering damage or loss, but as between themselves, in the absence of a contract, express or implied, they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.

R.S.S. 1978, c.C-31, s.3; 1992, c.24, s.3; 2004, c.37, s.3.

Apportionment of uncollectable contribution

3.1(1) In this section, **"other persons found at fault"** means:

(a) the person suffering the damage or loss if that person has been found to be at fault; and

(b) the other persons found to be at fault from whom the contribution can be collected.

(2) If the court is satisfied that the contribution of a person found at fault cannot be collected, the court shall, after determining the degree in which each person is at fault, make an order apportioning the contribution that cannot be collected among the other persons found at fault, proportionate to the degrees in which they have been respectively found to have been at fault.

(3) This section applies only to damages or losses caused or contributed to by a person's acts or omissions that take place on or after January 1, 2005.

2004, c.37, s.4.

Questions of fact

4 In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.

R.S.S. 1978, c.C-31, s.4.

Restriction on submissions to jury

5 Where the trial is before a judge with a jury the judge shall not submit to the jury any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof unless in his opinion there is evidence upon which the jury could reasonably find that the act or omission of the latter was clearly subsequent to and severable from the act or omission of the former so as not to be substantially contemporaneous with it.

R.S.S. 1978, c.C-31, s.5.

Judge without a jury

6 Where the trial is before a judge without a jury the judge shall not take into consideration any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof unless he is satisfied by the evidence that the act or omission of the latter was clearly subsequent to and severable from the act or omission of the former so as not to be substantially contemporaneous therewith.

R.S.S. 1978, c.C-31, s.6.

Adding party defendant

7 When it appears that a person not a party to an action is or may be wholly or partly responsible for the damages claimed, he may be added as a party defendant or may be made a third party to the action, upon such terms as are deemed just.

R.S.S. 1978, c.C-31, s.7.

Abolition of merger rule

7.1(1) Where two or more persons are jointly and severally liable with respect to the same loss or damage, a judgment, discontinuance, settlement or release with respect to one of them does not preclude judgment against any other in the same or a separate action.

(2) Where a person who has suffered loss or damage brings two or more actions with respect to the loss or damage, the person is not entitled to costs in any of the actions except the first action in which judgment is obtained, unless the court is of the opinion that there were reasonable grounds for bringing more than one action.

(3) Subject to subsection (4), this section applies to all actions, whether commenced before or after the coming into force of this section.

(4) This section does not apply to actions:

(a) in which judgment has been given before the coming into force of this section; or

(b) that have been settled before the coming into force of this section.

1992, c.24, s.4.

8 Repealed. 1984-85-86, c.54, s.2.

9 Repealed. 1984-85-86, c.47, s.3.

Recovery as between tortfeasors

10 A tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering the damage, and thereafter commencing or continuing action against the other tortfeasor, and in such event the tortfeasor who settled the damage shall satisfy the court that the amount of the settlement was reasonable, and if the court finds that the amount of the settlement was excessive it may fix the amount at which the claim should have been settled.

R.S.S. 1978, c.C-31, s.10; 2016, c28, s.7.

11 Repealed. 2004, c.L-16.1, s.44.

Apportionment of liability for costs

12 Unless the judge otherwise directs, the liability for costs of the parties to every action shall be in the same proportion as their respective liability to make good the damage or loss, and where as between two persons, one is entitled to a judgment for an excess of damage or loss and the other to a judgment for an excess of costs there shall be a set-off of the respective amounts and judgment shall be given accordingly.

R.S.S. 1978, c.C-31, s.12.

Application to the Crown

13 This Act applies to actions by and against the Crown, and Her Majesty is bound thereby and has the benefit thereof.

R.S.S. 1978, c.C-31, s.13.

Construction of Act

14 This Act shall be so interpreted and construed as to effect its general purpose of making uniform the law of the provinces that enact it.

R.S.S. 1978, c.C-31, s.14.

Appendix B

The Contributory Negligence Act History

Provision	Dates in Force	Wording & History
2 – apportionment of damage or loss	1944 - current	(1) Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault, but 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 (2) Nothing in subsection (1) operates so as to render any person liable for any damage or loss to which his fault has not contributed
3 – degree of fault	1944 - current	(1) Where damage or loss has been caused by the fault of two or more persons, the court shall determine the degree in which each person was at fault. (2) Subject to section 3.1, if two or more persons are found at fault, they shall be jointly and severally liable to the person suffering damage or loss, but as between themselves, in the absence of a contract, express or implied, they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.
3.1 – apportionment of uncollectable contribution	2004 - current	(1) In this section, "other persons found at fault" means: (a) the person suffering the damage or loss if that person has been found to be at fault; and (b) the other persons found to be at fault from whom the contribution can be collected. (2) if the court is satisfied that the contribution of a person found at fault cannot be collected, the court shall, after determining the degree in which each person is at fault, make an order apportioning the contribution that cannot be collected among the other persons found at fault, proportionate to the degrees in which they have been respectively found to have been at fault. (3) This section applies only to damages or losses caused or contributed to by a person's acts or omissions that take place on or after January 1, 2005. S 3.1 added in 2004 by s. 4 of *The Contributory Negligence Act*, SS 2004 c 37
4 – questions of fact	1944 - current	In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.
5 – restriction on submissions to jury	1944 - current	Where the trial is before a judge with a jury the judge shall not submit to the jury any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof unless in his opinion there is evidence upon which the jury could reasonably find that the act or omission of the latter was clearly subsequent to and severable from the act or omission of the former so as not to be substantially contemporaneous with it.
6 – judge without a jury	1944 - current	Where the trial is before a judge without a jury the judge shall not take into consideration any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof unless he is satisfied by the evidence that the act or omission of the latter was clearly subsequent to and severable from the act or omission of the former so as not to be substantially contemporaneous therewith.

7 – adding party defendant	1944 - current	When it appears that a person not a party to an action is or m ay be wholly or partly responsible for the damages claimed, he may be added as a party defendant or may be made a third party to the action, upon such terms as are deemed just.
7.1 – abolition of merger rule	1992 - current	(1) Where two or more persons are jointly and severally liable with respect to the same loss or damage, a judgment, discontinuance, settlement or release with respect to one of them does not preclude judgment against any other in the same or a separate action. (2) Where a person who has suffered loss or damage brings two or more actions with respect to the loss or damage, the person is not entitled to costs in any of the actions except the first action in which judgment is obtained, unless the court is of the opinion that there were reasonable grounds for bringing more than one action. (3) Subject to subsection (4), this section applies to all actions, whether commenced before or after the coming into force of this section. (4) This section does not apply to actions: (a) in which judgment has been given before the coming into force of this section; or (b) that have been settled before the coming into force of this section. • S 7.1 added in 1992 by s 4 of *The Contributory Negligence Amendment Act*, SS 1992 c 24
8 – contribution where plaintiff is a passenger	1944 - 1984	*Where no cause of action exists against the owner or driver of a motor vehicle by reason of subsection (2) of section 178 of The Vehicles Act, no damages or contribution or indemnity shall be recoverable from any person for the portion of the damage or loss caused by the negligence of the owner or driver and the portion of the damage or loss so caused by the negligence of the owner or driver shall be determined although the owner or driver is not a party to the action.* Repealed 1984-85-86, c 52, s 2
9 – contribution where plaintiff is spouse of negligent person	1944 - 1984	*In an action founded upon negligence and brought for damage or loss resulting from bodily injury to or the death of a married person, where one of the persons found to be negligence is the spouse of the married person, no damages, contribution or indemnity shall be recoverable for the portion of damage or loss caused by the negligence of the spouse, and the portion of the loss or damage so caused by the negligence of the spouse shall be determined although the spouse is not a party to the action.* Repealed 1984-85-86, c 47, s 3
10 – recovery as between tortfeasors	1957 - current	A tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damages as a result of a tort by settling with the person suffering the damage, and thereafter commencing or continuing action against the other tortfeasor, and in such event the tortfeasor who settled the damage shall satisfy the court that the amount of the settlement was reasonable, and if the court finds that the amount of the settlement was excessive it may fix the amount at which the claim should have been settled. Added in 1957 as s 9a by *An Act to amend The Contributory Negligence Act*, SS 1957 c 30 s 1
11 – limitation of actions	1957 - 2004	*Where an action is commenced against a tort feasor or where a tort feasor settled with a person who has suffered damage as a result of a tort, within the period of limitation prescribed for the commencement of actions by any relevant statute, no proceedings for contribution or indemnity against another tort feasor shall be defeated by the operation of any statute limiting the time for the commencement of action against that tort feasor if:*

		a. *such proceedings are commenced within one year of the date of the judgment in the action or the settlement, as the case may be; and* b. *there has been compliance with any statute requiring notice of claim against the tort feasor* Added in 1957 as s 9b by *An Act to amend The Contributory Negligence Act*, SS 1957 c 30 s 1 Repealed in 2004 by s 44 of *The Limitations Act,* SS 2004, c L-16.1.
12 – apportionment of liability for costs	1949 - current	Unless the judge otherwise directs, the liability for costs of the parties to every action shall be in the same proportion as their respective liability to make good the damage or loss, and where as between two persons, one is entitled to a judgment for an excess of damage or loss and the other to a judgment for an excess of costs there shall be a set-off of the respective amounts and judgment shall be given accordingly. Added in 1949 as s 9a by *An Act to amend The Contributory Negligence Act, 1944,* c 32 s 1
13 – application to the Crown	1952 - current	This Act applies to actions by and against the Crown, and Her Majesty is bound thereby and has the benefit thereof. Added in 1952 as s 9b by *An Act to amend The Contributory Negligence Act, 1944* c 39 s 1
14 – Construction of Act	1944 - current	This Act shall be so interpreted and construed as to effect its general purpose of making uniform the law of the provinces that enact it.

Appendix C

Uniform Contributory Fault Act

Interpretation

1 In this Act,

"concurrent wrongdoers" means

(a) two or more persons whose wrongful acts contribute to the same damage suffered by another, and any other person liable for the wrongful act of any of those persons; or

(b) a person whose wrongful act causes damage suffered by another and a person liable for the wrongful act;

"damage" includes economic loss;

"fault" means an act or omission that constitutes

(a) a tort,

(b) a breach of a statutory duty that creates a liability for damages,

(c) a breach of duty of care arising from a contract that creates a liability for damages, or

(d) a failure of a person to take reasonable care of his own person, property or economic interest, whether or not it is intentional.

"release" includes a settlement or any other agreement limiting the liability of a person for damages, either in whole or in part,

"wrongful act" means an act or omission that constitutes

(a) a tort,

(b) a breach of contract or statutory duty that creates a liability for damages, or

(c) a failure of a person to take reasonable care of his own person, property or economic interest, whether or not it is intentional;

General

Act binds Crown

2 Her Majesty is bound by this Act.

Last clear chance

3 This Act applies where damage is caused or contributed to by the act or omission of a person notwithstanding that another person had the opportunity of avoiding the consequences of that act or omission and failed to do so.

Questions of fact

4 In every action, (a) the fault or the wrongful act, if any; (b) the degree to which the fault or wrongful act of a person contributed to damage; and (c) the amount of damages, are questions for the trier of fact.

Contributory Fault

Reduction of liability

> 5(1) Where the fault of two or more persons contributes to damage suffered by one or more of them, the liability for damages of a person whose fault contributed to the damage is reduced by an amount of the damages proportionate to the degree to which the fault of the person suffering the damage contributed to the damage.

Claim by 3rd person

> (2) Where a person, other than a person referred to in subsection (1), makes a claim arising from the damage suffered by a person referred to in subsection (1), the liability for damages of a person whose fault contributed to the damage is reduced by an amount of the damages proportionate to the degree to which the fault of the person who suffered the damage from which the claim arose contributed to the damage.

Equal contribution

(3) If the degrees to which the fault of persons contributed to damage cannot be determined in relation to each other, those persons shall be deemed to have contributed equally in relation to each other.

Concurrent Wrongdoers

Liability joint and several

> 6 The liability of concurrent wrongdoers for damages is joint and several. Contribution between concurrent wrongdoers
>
> 7 Subject to sections 8 to 14, a concurrent wrongdoer is entitled to contribution from the other concurrent wrongdoers.

Amount

> 8(1) The amount of contribution to which a concurrent wrongdoer is entitled from another concurrent wrongdoer is that amount of the total liability for damages of all concurrent wrongdoers that is proportionate to the degree to which the wrongful act of the other concurrent wrongdoer contributed to the damage.

Equal contribution

> (2) If the degrees to which the wrongful acts of persons contributed to damage cannot be determined in relation to each other, those persons shall be deemed to have contributed equally in relation to each other.

Apportionment of uncollectible contribution

9 Where the court is satisfied that the contribution of a concurrent wrongdoer cannot be collected, the court may, on or after giving judgment for contribution, make an order that it considers necessary to apportion the contribution that cannot be collected among the other concurrent wrongdoers, proportionate to the degrees to which their wrongful acts contributed to the damage.

Indemnity

10 No person is entitled to contribution under this Act from a person who is entitled to be indemnified by him for the damages for which the contribution is sought.

Reduction of liability when statutory exceptions

11 Where a concurrent wrongdoer is exempt from liability for damages under the (Workers' Compensation Act), the liability for damages of the concurrent wrongdoers who are not exempt is reduced by an amount of the damages proportionate to the degree to which the wrongful acts of the concurrent wrongdoers who are exempt contributed to the damage, and there shall be no contribution between those concurrent wrongdoers who are exempt and those who are not exempt.

(NOTE: Any other statute that exempts a concurrent wrongdoer from liability for damages can also be inserted.)

12(1) This section applies where a person suffering damage enters into a release with a concurrent wrongdoer, whether before or after the damage is suffered.

Reduction of liability when partial release

(2) Where the person suffering the damage does not release all concurrent wrongdoers, the liability for damages of those concurrent wrongdoers who are not released is reduced by an amount of the damages proportionate to the degree to which the wrongful acts of the concurrent wrongdoers who are released contributed to the damage, and there shall be no contribution between those concurrent wrongdoers who are released and those who are not released.

Contribution when full release

(3) Where all concurrent wrongdoers are released, a person who gives consideration for the release, whether he is a concurrent wrongdoer or not, is entitled to contribution in accordance with this Act from any other concurrent wrongdoer based on the lesser of

(a) the value of the consideration actually given for the release; and

(b) the value of the consideration that in all the circumstances it would have been reasonable to give for the release.

Effect of holding of no liability

13 In proceedings against a person for contribution under this Act, the fact that the person has been held not liable for damages in an action brought by or on behalf of the person who suffered the damage is conclusive proof in favour of the person from whom contribution is sought as to any issue that has been determined on its merit in the action.

Execution between concurrent wrongdoers

14 Unless the person suffering the damage has been fully compensated or the court otherwise orders, a concurrent wrongdoer shall not issue execution on a judgment for contribution from another concurrent wrongdoer until

(a) he satisfies that amount of the total damages that is proportionate to the degree to which his wrongful act contributed to the damage; and

(b) the court makes provision for the payment into court of the proceeds of the execution to the credit of those persons that the court may order.

Releases and judgments

15 An action against one or more concurrent wrongdoers is not barred by

(a) a release of any other concurrent wrongdoer; or

(b) a judgment against any other concurrent wrongdoer, and may be continued notwithstanding the release or judgment.

Previous judgment binding in second action

16(1) Where a judgment determines the total liability for damages of concurrent wrongdoers in an action against one or more of them, the person suffering the damage is not entitled to have the total liability determined in a higher amount by a judgment in the same or any other action against any other concurrent wrongdoer.

Costs

(2) Except in an action first taken against a concurrent wrongdoer, the persons suffering damage is not entitled to costs in an action taken against any other concurrent wrongdoer unless the court is of the opinion that there were reasonable grounds for bringing more than one action.