LAW REFORM COMMISSION OF SASKATCHEWAN DISCUSSION PAPER

# THE INSOLIDUM DOCTRINE AND CONTRIBUTORY NEGLIGENCE

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

The Commissioners are:

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**The Law Reform Commission Act:**

**"The Commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomolies, repeal of obsolete and unnecessary enactments, reduction in the number of seperate enactments and generally the simplification and modernization of the law."**

## I. Introduction

An accident victim's harm is often caused by the joint or concurrent acts of several wrongdoers. The court may apportion responsibility for the injury between potential defendants, and in cases in which the plaintiff's own conduct contributed to the injury, may also attribute part of the responsibility for the injury to the plaintiff. Ordinarily, each defendant is expected to contribute to payment of damages in proportion to his or her degree of fault. The legal rule that allows apportionment of fault, and thus ultimately of monetary damages, was created by *The Contributory Negligence Act*. Prior to adoption of contribution legislation in Canada and the United States during the 1920's, a plaintiff could recover damages for all injuries sustained from any one of the defendants, and the selected defendant had no right to demand that other potential defendants share the burden.

*The Contributory Negligence Act* was intended to make the law fairer to defendants in negligence actions. But legislators were careful to insure that the contribution rules would not deprive an injured party of the right to collect all damages awarded against joint or concurrent wrongdoers in the event that some of them are unable or unwilling to pay. Under *The Contributory Negligence Act*, all potential defendants are "jointly and severally liable" to the injured party. The legislation does not alter the common law rule that damages in negligence and other torts are deemed to be *in solidum* , the indivisible result the joint or concurrent acts of the wrongdoers. In the result, if one defendant does not pay a share of the damages in proportion to his or her degree of fault, the others must make good the difference. The plaintiff can still pursue legal remedies to collect the whole of the damages from any or all defendants. However, *The Contributory Negligence Act*, unlike the common law, allows a defendant who has paid excess damages to demand contribution from the other defendants. Thus the legislation establishes the principle that fault should be apportioned while protecting the plaintiff by making the question of who ultimately pays a matter for the wrongdoers to settle between themselves. .

Preservation of the plaintiff's right to collect the whole of a damage award from any or all of the defendants was controversial when contribution legislation was adopted. During the 1980's, when escalating insurance costs led some observers to declare a "liability insurance crisis", debate about the doctrine was renewed. The insurance industry argued that it is unfair to saddle an insured defendant (and thus also the insurer) with responsibility to pay a full damage award when an uninsured co-defendant is insolvent or judgement proof. The contribution rules were lumped by critics with the problem of escalating damage awards against insured defendants as examples the "deep pockets syndrome" that was alleged to be a major source of increasing liability insurance

premiums. With return of secure profit margins for the industry , the rate of increase in insurance has slowed, though remaining a cause for some concern. The controversy about the contribution rules became less intense. Nevertheless, the insurance industry still argues that the contribution rules are inherently biased, and continues to press for reform.

Not surprisingly, the controversy has generated a considerable literature about the contribution rules. The Commission has reviewed the arguments presented by both opponents and supporters of the contribution rules as a first step toward formulating formal recommendations for retention, modification, or abolition of the existing regime. This background paper is intended to provide a basis for public comment and discussion of the contribution rules. It sets out the issues and summarizes the positions taken by supporters and critics of the present law. In order to focus discussion, the paper sets out a tentative proposal and defends it. Informed comment is, in our opinion, furthered by offering a concrete proposal for discussion.

The Commission has tentatively concluded that the basic principle of the existing contribution rules is sound. We begin with the premise that the 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 a 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.

We have not, however, concluded that there is no case to be made for reform of the contribution rules. *The Contributory Negligence Act* has not been changed in substance since it was adopted more than fifty years ago. When it was adopted, it broke new ground and its effects could not all be anticipated. We are convinced that the contribution rules, though sound in principle, are flawed in detail. In particular, the formula for sharing responsibility for a short-fall between solvent defendants can produce unfair results. The *Act* allows a defendant who has paid all the damages awarded to the plaintiff to claim contribution from co-defendants, but only the extent of the proportion of fault assigned. Consider for example a case in which a defendant who is 50% at fault is insolvent, and each of the other defendants 25% at fault. The plaintiff may use legally-sanctioned

collection remedies to collect 100% of a judgement from one of the solvent defendants. The other solvent defendant is required to compensate the first, but only to 25% of the value of the judgement, leaving the defendant who has paid the judgement responsible for 75%. In our view, it would be fairer to reapportion fault between the solvent defendants in cases such as these. Ultimate liability should not depend on the method the plaintiff uses to collect damages.

## II. The *In Solidum* Doctrine

In the United States, the legal rule discussed in this paper is almost invariably referred to as the principle of "joint and several liability under contributory negligence legislation". In fact, this is a misnomer, and on occasion, a source of confusion. The substantive foundation of the rule that allows a plaintiff in tort to collect all damages awarded from any of the co-defendants is a common law principle that antedates contributory negligence legislation, the *in solidum* doctrine.

The *in solidum* doctrine rests on the principle that damages caused by concurrent or collaborative acts are indivisible. But for the actions of each of the tortfeasors, the injury to the plaintiff would not have occurred or would at least have been different. In the result, when two or more persons are held to have caused injury though their concurrent or collaborative acts of negligence, the injured party can collect the whole amount of damages awarded from any one of the tortfeasors Because the damage is indivisible, the inability of one defendant to pay a share should not relieve the co-defendants as a group of their collective responsibility to make good the whole of the injured party's loss. The plaintiff collects the damages from the defendants who are best able to pay or who have assets that can most easily be reached by the methods available in law to judgement creditors. If one of the defendants is insolvent, the others must make good the difference.[1]

Because the Saskatchewan *Contributory Negligence Act* provides, like its counterparts in other provinces, that "[w]here two or more persons are at fault, they shall be jointly and severally liable to the person suffering damage . . ."[2], some commentators appear to assume that the *in solidum* rule was created by contributory negligence legislation. In fact, the *in solidum* doctrine is distinct from joint

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[1]For a summary discussion of the doctrine and its origins, see Fleming, *The Law of Torts* (6th), p. 232 ff.

[2]s. 3(2)

and severable liability.

Defendants who are jointly liable for a plaintiff's loss or damage are individually responsible for fully compensating the plaintiff. At common law, joint liability in tort arose only certain clearly-defined circumstances. According to Glanville Williams:

> Two or more tortfeasors are joint tortfeasors (a) where one is the principal of or vicariously responsible for the other, or (b) where a duty imposed jointly upon them is not performed, or (c) where there is a concerted action between them to a common end. Except in the case of nonfeasance in breach of a joint duty, parties cannot be joint tortfeasors unless they have mentally combined together for some purpose.[3]

All tortfeasors who were not jointly liable at common law were severally liable, and the latter class likely included most co-defendants in negligence actions. If joint liability had been the basis for the *in solidum* doctrine, it application at common law would have been narrow, and contributory negligence legislation would have extended it considerably by deeming all co-defendant tortfeasors to be both jointly and severally liable. It is important, therefore to recognize that severally liable tortfeasors were usually liable *in solidum* at common law. The doctrine is was not extended by the legislation..[4]

The *in solidum* doctrine rests on the substantive principle that where a person is at fault with others for an indivisible or inseparable loss suffered by another party, each person at fault will be liable for the whole amount of the injured party's loss. As a matter of fact, parties who were joint tortfeasors at common law almost always contribute to a single, indivisible injury, and are thus liable *in solidum*. But this result follows from the nature of the harm done by the tortfeasors rather than from their status as joint tortfeasors. Several tortfeasors at common law may also be concurrently responsible for a single, indivisible injury:

> Where tortfeasors are not joint they must necessarily be "several," "separate," or "independent." Several (i.e. separate or independent) tortfeasors are of two kinds: several tortfeasors whose acts combine to produce the same damage, and several tortfeasors whose

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[3]G. Williams, *Joint Torts and Contributory Negligence*, 224.

[4]Converting all tort liability to joint and several liability has essentially procedural purposes, and gave plaintiffs greater flexibility in framing their actions. Whether the distinction is still useful is open to question (see the Commission's *Report on Joint and Several Liability*), but this question hass no relevance in the present context.

acts cause different damage.[5]

The first kind of severally liable tortfeasors are liable *in solidum*. Williams explains that "[p]arties are not concurrent tortfeasors, whether joint or several, when there is no concerted action and their acts cause different items of damage. In such a case there is no solidary obligation"[6] Generally, those who were liable *in solidum* at common law continue to be liable *in solidum* under contributory negligence legislation, while those who were not liable at common law are not liable *in solidum* under the legislation.[7]

Contributory negligence legislation was not designed to modify or abolish the *in solidum* doctrine. The primary purpose of the legislation was to allow to courts to take into account a plaintiff's own contribution to his or her injury. In order to do so, it instructs the courts to determine the degree of fault of each of the parties. A rule permitting the defendants to make claims for contribution from one another was perhaps an obvious extension of the principle of contribution. In any event, it was included in Canadian, though not most American, contributory negligence legislation. It does not appear that legislators contemplated reducing the right of an injured party to collect full damages except to the extent that the damages were self-inflicted.[8] Nevertheless, the notion of apportionment of fault called the *in solidum* doctrine into question after contributory negligence legislation was adopted in Canada and the United States in the 1920's and 30's.[9] In some jurisdictions in the United States, the courts held that apportionment of liability is incompatible with the *in solidum* doctrine, and therefore abolished it; others upheld the doctrine on the ground that it

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[5]*Ibid.*, 1.

[6]*Ibid.*, 20.

[7]Distinguishing between concurrent and non-concurrent tortfeasors is a problem for the trier of fact who must determine "whether several tortfeasors are or are not concurrently liable, and therefore the question whether the damages can be divided, or apportioned, is one of fact. It appears that no clear test as to when damages will be considered divisible has been developed by either the courts or academic commentators in Britain, Canada, or the United States." (Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers* . . . ,p.8.

[8]An extensive review of the rationale of contributory negligence legislation is provided in a leading American decision: *American Motorcycle Association v. Superior Court of the State of California for the County of Los Angeles*, 20 Cal. 3rd 578.

[9]See for example *Laubach v. Morgan*, 588 P. 2nd 1071 (Okla., 1978)

is compatible with the intention of the legislators.[10]

The notion that the *in solidum* doctrine is incompatible with the principle of apportionment inevitably gained some currency in Canada, but here legislators appear to have anticipated this issue. The Saskatchewan *Contributory Negligence Act*, like all other Canadian legislation except the British Columbia *Negligence Act*, deals directly with the rights of co-defendants by making provision for claims between them. The Saskatchewan *Act* provides that:

> 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. . . .
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> 3. (2) Where two or more persons are at fault . . . in the absence of 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.[11]

By defining the defendants' rights, Canadian legislators also limited them and thus clearly preserved the *in solidum* doctrine. The plaintiff can still look to any or all of the defendants to pay the damages awarded by the court; apportionment of fault between defendants affects only the claims the defendants can make on one another.

The policy of the Saskatchewan *Contributory Negligence Act*, like most of its Canadian counterparts, removes the uncertainty that supported rejection of *in solidum* liability in the American courts. Drafters of the Canadian legislation clearly recognized the implications of apportioning fault. At common law, there was no contribution between tortfeasors. If one defendant was compelled to pay the whole of the damages by the plaintiff, there was no right to seek contribution from other defendants[12]. This rule was clearly unfair, amounting to unjust enrichment of defendants who avoided paying damages only because the plaintiff was able to levy execution against another. The drafters of the Canadian legislation took advantage of apportionment of fault to introduce contribution between tortfeasors. Allowing contribution between defendants ameliorated the effect of both joint

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[10] *American Motorcycle Association v. Superior Court of the State of California*, above.

[11] s. 3(2)

[12] The basis for the common law rule was the notion of *ex turpi causa non oritur actio*. However, contribution was allowed in contract because of the consensual nature of the obligation.

liability and *in solidum* liability. Thus Canadian contributory negligence legislation made *in solidum* liability less harsh for defendants..[13]

The contribution provision also operates as what the British Columbia Law Reform Commission called a "short-fall allocation rule". It prescribes the legal effect of the inability or failure of a defendant to pay his or her share of a damage award. The legislation deals with the short-fall as a matter to be sorted out between the defendants. The clear policy of the legislation is to preserve the plaintiff's right to collect the whole of the damages from any or all of the defendants. The remedy of a defendant who is required to pay more than his or her share of the award is against the co-defendants, not the plaintiff.

Contribution between defendants in tort was a radical notion when it was first introduced. It is perhaps not surprising, then, that unreformed contributory negligence legislation provides only a rudimentary short-fall allocation rule. It may not always prevent the unjust enrichment it was designed to avoid. Consider a case in which each of three defendants is held to be 25% at fault, and the plaintiff is also found to be 25% at fault. Assume damages are assessed at $100,000, and the award reduced due to the plaintiff's contributory negligence to $75,000. The plaintiff collects the whole $75,000 from one of the defendants, who presumably has ample insurance coverage. One of the defendants is uninsured and insolvent.

At common law, the defendant who paid the damages had no recourse against the other

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[13]This analysis applies to all Canadian contributory negligence legislation except the British Columbia the *Negligence Act*. The B.C. *Act* provides for the apportionment of liability among concurrent tortfeasors as in the other provinces. However, plaintiffs who are contributorily negligent are only allowed to recover an amount for damages from each concurrent tortfeasor separately. The concurrent tortfeasors are liable to the plaintiff only for the portion of damages for which they are responsible. In the event that one of them is insolvent or judgment proof, the contributorily negligent plaintiff bears the entire burden of the insolvency. This is provided for in subsection 2(c) which states:

> as between each person who has sustained damage or loss and each person who is liable to make good the damage or loss, the person sustaining the damage or loss shall be entitled to recover from that other person the percentage of the damage or loss sustained as corresponds to the degree of fault of that other person.

The courts have interpreted this provision to mean that the concurrent tortfeasors are not liable in solidum for damage or loss to a contributorily negligent plaintiff. See British Columbia Law Reform Commission, *Report on Shared Liability.*

solvent defendant. Under the present law, the defendant who paid the damages can look to the other solvent defendant for contribution, but only *in proportion to the fault assessed*, that is $25,000. While this is clearly more equitable that the common law, one defendant still bears the entire burden of the short-fall created by the insolvency, even though there is another with the ability to pay.

## III. Should the in solidum doctrine be retained?

The controversy about the *in solidum* doctrine generated when contributory negligence legislation was adopted took on renewed vigour in the 1980's, fueled by the emerging "liability insurance crisis". The insurance industry, driven by a rapidly increasing ratio of claims to revenues identified the *in solidum* doctrine as one of a number of problems that generate uncertainty and higher claims. It was suggested that it is inherently unfair to expose an insured co-defendant to the risk of becoming responsible for 100% of an award even when only 1% at fault. If the defendant 99% at fault is insolvent, the provision in contributory negligence legislation allowing the insured party to pursue the other defendant is of little practical value.

The liability insurance crisis was felt most acutely by insurers of professionals, municipal corporations, and other public bodies. These are the potential defendants who are also most likely to be affected by the *in solidum* doctrine. If, for example, a building collapses, the architect, the builder, the sub-contractors and the municipal building inspector may be named as defendants. The architect likely carries professional liability insurance, and the municipality will inevitably be insured. Because builders and sub-contractors are often small businesses with frequent cash-flow problems, they are less likely to be adequately insured, and more likely to be forced into insolvency if a major project flounders[14].

In the United States, the *in solidum* doctrine was abolished or curtailed in several states during the 1980's.[15] In Canada, the influential *Slater Report* on the liability insurance crisis

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[14]Because automobile insurance is mandatory in most jurisdictions, *in solidum* liability has never been a significant issue in this context. Any role for it has been further decreased by no-fault automobile insurance.

[15]e.g. California and Florida.

recommended that the *in solidum* doctrine should be re-examined.[16] Both American legislators and the Slater Commission were driven by concern about the future of the liability insurance industry. However, the critics could provide little direct or compelling evidence that the doctrine actually has much effect on the cost of insurance. The doctrine has been as strongly defended as it has been attacked. The Ontario, Alberta and British Columbia law reform Commissions and the Uniform Law Conference of Canada have all recommended retention of the doctrine. The Ontario[17] and Alberta[18] Law Reform Commissions and Uniformity Commissioners[19] argue that the plaintiff should continue to be entitled to collect the whole of damages awarded even if one or more of the defendants are insolvent or judgement proof by looking to the other defendants. The British Columbia Law Reform Commission[20] would retain the doctrine, but share the burden of an insolvent defendant between the plaintiff and defendants rather than among the defendants alone.

Although the economics of insurance lie beneath the surface of the debate, arguments for an against the *in solidum* doctrine are often couched in terms of simple fairness. Opponents suggest that it is inherently unfair to compel a defendant who may be only 1% at fault to pay 100% of damages because other defendants will not or cannot contribute. Even if the defendant who pays has the "deep pockets" of an insurance company, the result is deemed to be unfair by the critics of the doctrine. Why should the insurer (and ultimately its customers) be forced to bear the entire burden because of the insolvency of a co-defendant? Moreover, there is a certain caprice in the aide the doctrine affords plaintiffs. If there is only one defendant and he or she is insolvent, the plaintiff bears the burden of the insolvency. *In solidum* liability is only of use to the plaintiff if there happens to be a defendant with deep pockets or adequate insurance..

Supporters of the *in solidum* doctrine point to the fact that the plaintiff has suffered loss as a result of the actions of all the defendants. There is shared responsibility even if all were not equally negligent. The plaintiff ought to be able to look to the defendants collectively for compensation for his or her injury. The *in solidum* doctrine deliberately and justifiably favours compensation of the

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[16]Ontario Ministry of Financial Institutions, *Final Report of the Ontario Task Force on Insurance*, 1986.

[17]*Report on Contribution Among Wrongdoers and Contributory Negligence*, 1988.

[18]*Contributory Negligence and Concurrent Wrongdoers*, 1979.

[19]Uniform Law Conference of Canada, *Consolidation of Uniform Acts* (April 1985, 7A-1).

[20]*Report on Shared Liability*, 1989.

injured party rather than protection of the wrong-doers against the possibility that one of their number will not pay a fair share of the damages. If this means that on occasion a defendant with deep pockets must pay the share of another wrong-doer, that is more acceptable that leaving an injured party without proper compensation.

In the abstract, both arguments are equally compelling, and equally flawed. The issue cannot be resolved without considering the context in which the *in solidum* doctrine operates. That context is provided by the tort system and the insurance industry. Tort law has evolved as a method of shifting loss that occurs as a result accident and malfeasance. Liability insurance operates as a means of spreading the costs assigned by tort law. Both must be judged in terms of the results they produce: Is loss ultimately shifted and shared in a manner that is socially acceptable and economically sustainable? From this point of view, the principle argument in favour of *in solidum* liability is that, by increasing an injured party's chance of actual recovery of loss by shifting responsibility to those defendants who are best able to pay, losses are shifted in a way that minimizes the social cost.

From a broad perspective, this argument is compelling. If an individual plaintiff is unable to collect full damages because one of the co-defendants is insolvent, the effect can be devastating. An injury to the plaintiff's business way threaten his or her livelihood; a victim of serious personal injury may need the damage award to meet living expenses. In both cases, costs will be passed on to the community if a business fails or an injured party requires social assistance. If a short-fall in damage collection from an impecunious defendant remains the responsibility of co-defendants who are insured, the loss is spread by insurance, avoiding individual catastrophe. The result may be reflected in generally higher insurance premiums, but the overall social and economic cost is minimized.

It is no answer to the case made above to suggest that not all plaintiffs are equally deserving or that some of them may be over-compensated by the tort system. If that is the case, the fault lies in the way in which damages are assessed, not in the *in solidum* doctrine. A more pertinent criticism focuses on the way in which the *in solidum* doctrine spreads loss. The plaintiff is relieved, perhaps to the benefit of the community, but the loss is spread to insureds, not the community at large. As a matter policy, this result is not necessary objectionable. Apportionment of loss is difficult in a complex society. Negligence law, coupled with liability insurance, no-fault insurance, and social security programs, are an inevitably imperfect system. The mix can be changed, and each component can be refined, but there is no available substitute that would guarantee perfect justice. Nevertheless, if the *in solidum* doctrine jeopardizes liability insurance, the way in which it spreads losses would not acceptable. The doctrine could have this effect directly, by increasing insurance pay-outs to unsustainable levels, or indirectly, by distorting the behaviour potential plaintiffs and defendants in

ways that affect the role of liability insurance. The Ontario Law Reform Commission identified four main criticisms of the *in solidum* doctrine from the perspective of insurance[21]. Whatever the merits of the doctrine from a broad perspective, it would be difficult to argue for retention if these criticisms can be answered.

The first criticism outlined by the Ontario Commission is that the *in solidum* doctrine (along with the procedural aspects of joint and severable liability) allows and encourages plaintiffs to join insured defendants that are only marginally liable or not liable at all in the hope that a sympathetic judge will find fault, even where there is none, to protect plaintiffs. The second criticism also focuses on the effect of the doctrine on the behaviour of litigants. It is argued that the possibility of being found liable and being required to pay damages encourages a deep pocket defendant to settle for an amount in excess of the amount that his or her proportionate share of liability would warrant in order to avoid being forced to satisfy the entire judgment in the event that concurrent tortfeasors are insolvent. These arguments suggest that the *in solidum* doctrine cannot be treated in isolation from other factors that drive up the size of settlements and judgements. On this view, the doctrine is a significant element of the "deep pockets" syndrome even if it accounts directly for only a relatively small increase in insurance pay-outs.

In our opinion, however, there is very little compelling evidence that the *in solidum* doctrine has the effects ascribed to it by the critics. We agree with the Ontario Law Reform Commission that there is no Canadian evidence to support the suggestion that judges and juries favour plaintiffs at the expense of marginally liable or innocent defendants. Juries in the United States have escalated damage awards in the last twenty years. The Slater Report noted that insurers in Canada regard this trend as one that will inevitably spread to Canada, but admitted that it cannot explain the rising claims ratio in Canada that infected the insurance industry in the 1980's. [22] Jury trails in civil actions are rare in Canada. The judiciary takes exception to the charge that it has a pro-plaintiff bias. Consider, for example, the response of Mr. Justice Montgomery, an Ontario High Court judge, to such claims:

> I rise not to the defence of the tort system, though it has my support, but to the absolute integrity of the Bench of this Province. I do not share the view (that 'the system strains the integrity of our judges') ..., nor do any of my fellow jurists with whom I have discussed the

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[21] Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers* . . . pp. 36 - 38.

[22] *Final Report of the Ontario Task Force on Insurance*, p. 12.

issue. Our task is to apply the law to the facts no matter how harsh the results may be.[23]

The argument that defendants have a strong incentive to accept inordinately high settlements because of the *in solidum* doctrine has also been challenged by the Ontario Law Reform Commission. It argues that there is an equally strong incentive for the plaintiff to accept a lower settlement when the defendant is only marginally liable in order to avoid a finding that the defendant is not liable at all, and thereby avoid the possibility of a judgment that is unenforceable because the other defendants are insolvent.

The third criticism identified by the Ontario Law Reform Commission is the argument that the higher claims against insureds and the uncertainty produced by the rule leads to an increase in premiums. Deep pocket defendants need not only insure for their own negligence but also for the negligence of unknown insolvent concurrent tortfeasors. The range of possible outcomes is more difficult to predict and adds to the cost of the premium. This argument, like the first two, attributes increased insurance costs to escalating damage awards, but, unlike them, suggests that higher pay-outs as a result of *in solidum* liability make a direct and significant contribution to the cost of insurance.

Once again, there is very little hard evidence to support the criticism of the doctrine. In fact, it does not necessarily follow that *in solidum* liability has any negative effect on insurance costs. Any increase in claims may be offset by the deterrence effect of the *in solidum* doctrine, which arguably encourages a reduction in risk-taking, resulting in a reduction of the frequency of claims. Empirical evidence is scanty. Only two studies have attempted to gauge the effect of *in solidum* liability on premiums and claims. A New York committee on liability insurance reported that 9% of claims paid in the city of New York were "attributable to joint and several liability".[24] The committee regarded this as a significant contribution to insurance costs, but critics regard it as modest and note that in any event the committee did not give any indication of the way in which it was arrived at. A Florida legislative committee compared insurance rates in jurisdictions that abolished *in solidum* liability with rates in jurisdictions that have retained the doctrine. They found that rates have tended rise more

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[23] Canadian Bar Association - Ontario, *Submission to the Minister of Financial Institutions in Response to the Report of the Ontario Task Force on Insurance*, (Ontario: Canadian Bar Association - Ontario, 1986), p. 29.

[24] Governor's Committee on Liability Insurance, *Insuring Our Future*, 1986.

rapidly in jurisdictions that have abolished *in solidum* liability[25].

The fourth criticism discussed by the Ontario Law Reform Commission is the suggestion that spreading the risk to concurrent tortfeasors is inefficient because it shifts loss, through insurance, to society as a whole. It is argued that it would be economically more efficient to abolish *in solidum* liability, thus forcing plaintiffs to self-insure to protect against the possibility of an insolvent tortfeasor. This would shift the burden onto those who engage in activities that entail the risk , making it possible to reduce premiums for other classes of insureds.

Jane Stapleton, who has reviewed the efficiency argument, notes that advocates of abolition focus on the efficiency of liability insurance rather than insurance in general: "If liability is to be imposed based on insurance availability and insurability whose insurability is to be focused on since there is both first party and third party liability available?" When comparing first party and third party insurance, it is necessary to compare the same amounts of protection, and measure the impact of alternatives on society as a whole, not just to the liability insurance industry. Stapleton argues that this has not been done by advocates of abolition of *in solidum* liability. She concludes that the case has not been made that shifting short-fall in damages back onto plaintiffs is efficient from a broad social and economic point of view.[26]

At the root of all four criticisms outlined above is the conjecture that *in solidum* liability is part of the problem that led to the liability insurance crisis of the 1980's. The crisis was very real. In Canada, claims exceeded revenues in 1985, and nearly equalled them in 1986[27]. The situation has since improved, due to higher premiums and stable interest rates, but if the root cause of the problems of the 1980's was excessive awards penalizing deep-pocket defendants, the crisis has become at best a chronic problem that could flare up again if market conditions change. Certainly, any measure, including abolition of *in solidum* liability, that reduced the costs of the insurance industry would make some contribution to keeping premiums within viable limits. However, it is apparent in retrospect that the industry exaggerated the extent to which increased damage awards were responsible for the crisis. Even the pro-industry *Slater Report* identified the immediate cause of the crisis of the 1980's in the high interest rates that preceded the crisis. Liability insurers relied on high rates of return on

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[25]Florida Senate Committee on Commerce, *A Review of Historical Analysis- Current Perspectives of the Doctrine of Joint and Several Liability*, 1986.

[26] Jane Stapleton,"Tort, Insurance and Ideology" (1995) 58, Modern Law Review, 820.

[27]*Final Report of the Ontario Task Force on Insurance*, p. 12.

investments to compensate for low premiums designed to increase market share. When interest rates fell, stiff increases in premiums were inevitably necessary.[28] In our opinion, abolition of *in solidum* liability is the wrong answer to the wrong problem.

## IV. Should *in solidum* liability be reformed?

Several modifications of *in solidum* liability short of abolition have been proposed and implemented in the United States. Some as subject to the same criticisms as abolition. These include exclusion of non-economic loss [29], abolition with respect to public bodies or certain professionals[30], and denial of *in solidum* recovery of damages if the plaintiff's fault exceeds a defined limit, usually 50%.[31] These proposed reforms will not be commented on further here.

Other proposals raise new issues. The British Columbia Law Reform Commission, following the lead of the American *Uniform Comparative Fault Act*[32] proposes sharing the liability of insolvent and other judgement proof defendants between all of the remaining parties, including the plaintiff. the *Uniform Comparative fault Act* states:

> 2(d) Upon motion made before or within [one year] after judgement is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgement.

Several states have adopted or modified and adapted this provision. In the example given above in which each of three defendants and the plaintiff were held to be 25% at fault and one of the

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[28]Ibid., p. 12.

[29]E.g. California Civil Code, 1431.1

[30]E.g. West Virginia Civil Code, 55-7B-9 abolishes *in solidum* liability in medical malpractice suits.

[31]E.g. Illinois Revised Statutes, c. 110.

[32]National Conference of Commissioners on Uniform Law, Vol. 12, s.2(d) (1987).

defendants is insolvent, a $75,000 award would be reallocated so that each solvent defendant and the defendant would absorb 1/3 of the $25,000 shortfall. Thus the plaintiff would collect $66,667, and each defendant would pay $33,334.

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"[33]. 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.

It is, however, widely accepted that some form of reallocation is desirable to do equity between defendants. All four law reform agencies that have examined *in solidum* liability concluded that the present scheme of contribution between defendants is potentially unfair because it does not reallocate responsibility between solvent defendants when a co-defendant is unable to contribute. In 1979, the Alberta Commission proposed that defendants should be able to shift the burden of an insolvent or judgment proof co-defendant among themselves in proportion to their respective degrees of fault. The Alberta proposals was adopted in substance in the *Uniform Contributory Fault Act*[34] in 1984, which was in turn endorsed by the Ontario Commission. Section 9 of the Uniform Contributory Fault Act provides that

> 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.

In the example given above, the plaintiff would collect the full $75,000 award and each of the solvent defendants would pay $37,500. In our opinion, the Saskatchewan *Contributory Negligence Act* should be amended to incorporate the uniform provision.

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[33]Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers* . . . p. 46.

[34]Uniform Law Conference of Canada, *Consolidation of Uniform Acts* (April 1985, 7A-1).