LOOKING FOR REFORM IN ALL THE WRONG PLACES

By Richard Halpern
Partner
Thomson Rogers

I have read the article "Disjointed – A Look at Joint and Several Liability" published in the Q2-2014 MSA Quarterly Outlook Report. The author is the "Insurance Bureau of Canada", but no single author takes "credit" for the article. The article continues on what I see as a repeating theme[1] from the insurance industry to push ill-considered reforms aimed at issues primarily of concern to the insurance industry, without due regard to the wider public interest or to the longer term consequences. With this article, the IBC continues to look for reform in all the wrong places.

With due respect to the IBC, the article fails to articulate a sustainable principle for its proposed reforms; shows a fundamental misunderstanding of the rule and its rationale; lacks data in support of its position; and, neglects important policy issues that demand that the rule be maintained.

I begin by taking issue with the intentionally provocative use of the phrase "1% rule". This represents a deliberate attempt to distract any sensible consideration of the rule, a tactic commonly used by groups seeking to satisfy their self-centered interests. There are no examples of parties who have paid 100% of a judgment after only 1% liability has been attributed to them.

More importantly, referring to joint and several liability as the 1% rule betrays an ignorance of the principles of concurrent liability underlying the rule. One needs to recognize that severally liable wrongdoers are the "but-for" causes of the entirety of the injured person's loss, even though they may share liability with another wrongdoer.

Supporters of reform to the joint and several liability rules would argue that a "deep pockets" potential defendant can turn an economically worthless case into a viable case worth pursuing. This is particularly so because the deep pockets party will end up paying more than their proportionate share of liability. While superficially this might seem to some advocates of reform as inappropriate or unfair, a better understanding of the rule should help these advocates appreciate that the rule is indeed fair and equitable, based on a foundation of very sound principles. To fairly consider the issues, one needs to look at the matter in as objective a fashion as possible, without pushing for the interests of a particular constituency.

[1] Really beginning with the mess that is auto insurance in this province starting in 1990.

The law of joint and several liability has been carefully reviewed by a number of Law Commissions in Canada and Internationally in recent years.[2] These detailed analyses have often occurred in response to particular interest groups seeking to reform the law to alter the application of the legal rules in favour of the interested group. After careful analysis by these impartial Commissions, calls for reform to the law of joint and several liability have been largely rejected. Most recently (2013), the Manitoba Law Reform Commission[3] provided a thorough analysis of the history and principles underlying the current law of joint and several liability and concluded that there was no compelling reason for reform.[4]

As stated above, the misleading term "1% rule" betrays fundamental ignorance of the applicable principles. Joint and several liability is concerned with harm caused by more than one wrongdoer. The long-standing common law rule is that where a single injury to the plaintiff is caused by more than one wrongdoer the injury is "indivisible".[5] The acts of the multiple wrongdoers in this sense are concurrent in that all the wrongful acts, taken together, "caused" the injury. At common law, where the totality of the harm was caused by multiple defendants, the plaintiff could recover all of the loss from any one of the defendants. This is because the wrongful acts of each of the defendants caused the entire injury.

In the case of two wrongdoers, "together" they have caused a single loss to the plaintiff. That means that the plaintiff has established that "but for" the wrongful act of each, the injury would not have occurred. The notion of concurrent liability[6] means that each of the wrongdoers was the cause of the entire injury. This is the fundamental concept that is vital to a complete understanding of the principles that support the current law of joint and several liability and that argue against any change to the law.

The fact that liability is "concurrent" means that it is utterly misleading to characterize the law of joint and several liability as the "1% rule". Calling it the 1% rule is an inappropriate attempt to connote some notion of unfairness. It does not matter what percentage of liability is attributed to a concurrent wrongdoer, but only that the wrongful act of that wrongdoer actually caused the entirety of the injury. On this basis it can be seen that fairness demands that any one concurrent wrongdoer ought to be responsible to

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[2] Manitoba Law Reform Commission 2013; Ontario Law Commission 2011; Ontario Law Reform Commission 1988; Law Reform Commission of Saskatchewan 1998; the Standing Senate Committee on Banking, Trade and Commerce 1998; Civil Liability Review by the Attorney General of British Columbia 2002; Victorian (Australia) Attorney General's Law Reform Advisory Council 1998; New Zealand Law Commission 1998; New South Wales Law Reform Commission 1999; Law Commission (UK) 1996.

[3] Manitoba Law Reform Commission, Contributory Fault: The Tortfeasors and Contributory Negligence Act, Report #128, September 2013.

[4] MLRC page 14.

[5] MLRC p. 2.

[6] At common law, liability *in solidum*.

ensure that the injury party is fully compensated. That wrongdoer is responsible for the entirety of the loss. It would be fundamentally unfair to require the innocent injured party to bear some of the loss for one impecunious defendant, when there is another defendant who actually caused the loss. Each defendant was the cause of the whole injury.

The notion asserted in the IBC article that joint and several liability encourages frivolous law suits or drives up assessments is entirely without foundation. If one appreciates that wrongdoers are concurrently liable for the entirety of the loss and that payment does not have to be made except where there is liability, there is nothing frivolous about the concept. Where a party to a lawsuit contributes to a settlement of the case it is inevitably an acknowledgment of the risk of being found liable.

The IBC article also makes reference to rising liability premiums, but there is not a shred of support for the proposition that the application of joint and several liability has contributed to that development in any material way. In fact the article inappropriately conflates 'liability generally' with 'joint and several liability'. In referencing the 25% of payments due to the application of joint and several liability the article has failed to set out the amounts alleged to be over and above the several liability of the municipality. In any event, concurrent liability makes that largely irrelevant.

The article uses the case of *Deering v. Scucog* (2010) ONSC 5502 as an illustration of the allegedly adverse consequences of the joint and several principles. It is, in reality, an illustration of how well joint and several liability works. The article fails to point out the following:

1. This was not a 1% case, in fact the municipalities were held to be 60% responsible;
2. This accident would not have happened at all if the municipalities had met the standard of care;
3. In very comprehensive reasons, Mr. Justice Howden found the condition of the roadway where the collision occurred "an accident waiting to happen";[7]
4. Even witnesses called by the municipalities in defence of the case conceded that the circumstances encountered by the driver would have been "not just a startling experience, but also a terrifying one for an ordinary driver";[8]
5. That the solution to the danger involved inexpensive alternatives;[9]
6. That the road condition provided an unreasonable risk of harm to motorists using ordinary care;[10] and
7. That the municipalities knew or reasonably should have known of the danger for a whole host of reasons.[11]

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[7] See paragraph 251 of the reasons of Justice Howden.
[8] See paragraph 253.
[9] See paragraph 256.
[10] See paragraph 263.
[11] See paragraph 278.

Further, the comments attributed to Frank Cowan Company about the *Deering* case are absurd. For example Cowan is quoted as saying "if a reasonable assessment of 25% liability on the municipalities had been made in a non-joint and several liability scenario, the cost would have been $6 million…" The fact is that the judge attributed 60% liability to the municipalities which, by our measure of justice, is in fact the only "reasonable assessment" of liability. To randomly suggest a different liability split is simply a non sequitur and makes absolutely no sense. If the municipalities were not negligent they would not have had to pay, but that was simply not the finding made by the court.

The assertion that municipalities, in particular, are in need of relief from joint and several liability because it is "inequitable" is entirely unfounded on any principled, or even economic, basis. It is a bald statement not based on any reliable foundation or data. On the contrary, it is inequitable to relieve a wrongdoer from accountability for their negligence when the injury would never have occurred but for their wrongdoing. Likewise, the argument for shifting liability costs away from liable parties defies logic. That proposal results in shifting liability to the injured party. As between a wrongdoer and the innocent party, simple common sense tells us that the burden of loss must shift to a wrongdoer. That is a fundamental principle of our system of compensation.

Finally, just as reform to joint and several liability is not appropriate for auditors, having been rejected by the Ontario Law Commission, and not appropriate for municipalities, as it is no longer part of the plans of the government, there ought to be no change to the law as it affects any other wrongdoer. Joint and several liability is based on sound principles of law and is good public policy and there is no reliable data or principle that would suggest otherwise. Looking for reform? -- Start looking in the right places.