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JOINT LIABILITY & SEVERAL LIABILITY

SHOW ME THE PRINCIPLE
BUT HOLD THE METAPHYSICS

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**JOINT LIABILITY & SEVERAL LIABILITY:
SHOW ME THE PRINCIPLE,
BUT HOLD THE METAPHYSICS*¹**

Introduction

I will summarize this lecture in a few words. It is about joint liability and several liability.² Joint liability is a very simple concept. It means two or more wrongdoers are liable for the same injury.³ Joint liability occurs in two ways. (1) The conduct or deemed conduct of each of the wrongdoers is a legal cause of the injured person's damages. (2) A person is vicariously liable for damages resulting from the actionable conduct of some other wrongdoer. The two categories may overlap. The person who is vicariously liable might also have acted wrongly in a way that is also a cause of the damages. Several liability is a bit more complex. It means proportional liability. Where it exists, it means that in situations involving two or more wrongdoers who have caused the same injury, the limit of liability of each wrongdoer is some percentage of that injury which represents that wrongdoer's share (however share is defined) of the injury.⁴ The rest of this lecture is just detail.⁵

Liability by itself is meaningless. There has to be liability for something. What is that something? It is the something that has brought at least some of you here, today. Damages. Compensation. Money. Money for your clients. Money for you. Ultimately that's the detail that underlies this lecture. It is the detail that underlies this conference.

* David Cheifetz; Bennett Best Burn LLP; Toronto Canada. **This paper was first presented in April 2006 at the Canadian Bar Association conference mentioned on the title page. Citations to cases will have been updated where required. Some text has been added. It will usually be in bold.**

¹ This is just in case there any judges in the audience. Many judges prefer not listen to whatever it is that the judge thinks is "metaphysics"; even more so if the judge think it is "academic" metaphysics as opposed to merely lawyer's metaphysics. A litigant is on the way to victory if the judge believes the opposing theory of law is "scholastic" or "metaphysical". See, for example, *CCR Fishing Ltd. v. British Reserve Insurance Co.*, [1990] 1 S.C.R. 814 at p. 823, 69 D.L.R. (4th) 112; *Snell v. Farrell*, [1990] 2 S.C.R. 311 at p. 328, 72 D.L.R. (4th) 289; *School Division of Assiniboine South No. 3 v. Hoffer*, [1971] 4 W.W.R. 746, 21 D.L.R. (3d) 608 at para. 19, leave to appeal to S.C.C. refused 40 D.L.R. (3d) 480n; and, *Overseas Tankship (UK) Ltd v. Morts Dock & Engineering Co Ltd. (The Wagon Mound) (No 1)*, [1961] A.C. 388 at 419 (H.L.).

² It isn't true that I've been writing about aspects of this subject for more than 30 years. It just feels that way to me and, I suspect, to too many others. The truth is that I wrote about it for about 6 years (1975-80); ignored it for more than 20 years (1981-2001); and I'd hazard that there are judges in this province who'd prefer that I had kept ignoring it for the past 5 (2002-06).

³ This does not mean they each have to be liable for all of the injury – just that they are liable for the same portion of the injury. A limit on the total amount recoverable does not necessarily affect what goes on below the limit.

⁴ Proportional liability is not the same as a mere limit on liability. There could be, for example, statutory limits on liability that are greater than a particular wrongdoer's share of those limits.

⁵ I have contributed a few pages to the body of scholarship on joint liability, several liability, and their consequences. See, for example, *Apportionment of Fault in Tort* (Canada Law Book, 1981), "Allocating Financial Responsibility Among Solvent Concurrent Wrongdoers" (2004), 28 Adv. Q. 137 and its postscripts in volumes 28 and 29 of the *Advocates' Quarterly*. The seminal analyses of the subject are G. Williams, *Joint Obligations* (London, Butterworths, 1949) and G. Williams, *Joint Torts and Contributory Negligence* (London, Stevens & Sons Ltd., 1951).

There is one sure reason why joint liability should matter to most of you here. I'm assuming most of you are in private practice, so I'm also assuming you're here because you think you'll hear something financially useful.⁶ I hope you will. On the other hand, if you're here for education, then I suggest you go next door to the lecture that's running concurrently with mine. I admit that I'd be there, too, if I could have found a way to be in both places simultaneously. Unfortunately, Einstein stated that that isn't possible and that's one of his postulates that Quantum Theory has yet to disprove.

Joint liability tends to increase the chance your client will get paid. That should increase the chance you'll get paid, too; perhaps what you believe you're worth. The need to be aware of the difference between joint liability and several liability is more important than it used to be, even outside of British Columbia (and maybe Nova Scotia). Once upon a time, potential several liability situations were rare; most commonly encountered in actions governed by workers' compensation legislation or as the result of settlements. There are now more instances of several liability as a result of statute. I discuss this later in the lecture.

There are some historical, technical, meanings for the terms joint liability, joint and several liability, and several liability. I will explain them and I will tell you to remember, but then ignore, the technical meanings because they won't usually matter to your daily practices.

Some of you act primarily for plaintiffs; others primarily for defendants; some swing from both sides. Regardless, it's important to remember that, more often than not, the difference between joint and several liability does not (or should not) matter to plaintiffs' counsel. It matters only (1) where injury has been caused (in an actionable legal sense) by more than one wrongdoer, or the compensable damages that result from that injury might be collected from more than one person even if there is only one wrongdoer who committed the act(s) which are a legal cause of the injury, *or* (2) where the value of the compensable claims exceeds the assets of any one of the target defendants.

Either the target defendant(s) – and by this I mean the persons the injured person is legally able to succeed against – each have enough money to pay what the injured person's case is actually worth, or collectively they do, or they don't.⁷ If they do, collectively or individually, plaintiffs' counsel doesn't care how the defendants divide the amount to be paid amongst themselves, whether their liability to the plaintiff is joint or several. If any one of the target defendants has enough money, the plaintiff and plaintiff's counsel will collect from the easiest defendant to collect from. If individually the target defendants don't have enough money but collectively they do, plaintiff and counsel still don't care: they'll collect from each until the total they've recovered is the full amount of the settlement or the judgment, subject to the prohibition against double satisfaction if there are separate judgments against the concurrent wrongdoers. The prohibition against

⁶ Since CLE isn't mandatory in Ontario, except for those with specialist certificates who want to maintain them.

⁷ In other words, "show me the money"; the catchphrase paraphrased for part of the title of this lecture.

double satisfaction is well-known and straight-forward. The awards in the multiple judgments against different persons for the same injury are not cumulative in the sense that the injured person is able to collect twice for the same injury. So, if P has a judgment against X for \$10,000 and Y for \$20,000 for the same injury, the most P can recover is \$20,000 in total.⁸ For example, if P collects \$10,000 from X, the most P can collect from Y is \$10,000. If P collects \$7,500 for X, then P can collect up to \$12,500 from Y.

If any of you are involved in a situation where what we now call several liability limits the amount you can collect from any of the settling wrongdoers or the defendants who have been held liable,⁹ you'll collect the balance from one or more of the others. That's all plaintiffs' counsel generally needs to know about joint liability and several liability.

Defendants' counsel need to know a bit more about the concepts because they have to worry about having their clients paying more than their clients' share, and their clients' rights to recover that excess. I discuss those issues, briefly, under the heading "Reimbursement Rights".¹⁰

I will try to keep this lecture as jargon-free as possible. There are three reasons. First, it will make this lecture easier to follow. That's also why there are pictures. I might not refer them, but there will be pictures. Second, decreasing the amount of jargon should increase the likelihood no one in the audience will fall asleep and start snoring. Pictures might help there, too. Third, there might be a judge or two in the audience.¹¹

Joint Liability & Several Liability – Importance

In this part of this paper, I deal primarily with issues between the injured person and the alleged wrongdoers, although aspects of the discussion are relevant to reimbursement rights among the wrongdoers.

Joint liability and several liability are concepts that are relevant only in cases where there may be more than one person liable for the same injury. The only reason an injured person cares about joint liability is a concern that the value of the compensable injury exceeds the financial assets of any one of the wrongdoers who may be successfully sued. That is, if you are certain that you have a "can't lose" case against one wrongdoer who has a deep enough pocket, you don't care whether there are others, except to the extent that having more than one paying wrongdoer might increase the likelihood of a

⁸ See *Treaty Group Inc. v. Drake International Inc.*, 2005 CanLII 45406 at para. 6-9 (Ont. S.C.J.) affd 2007 ONCA 450 (C.A.) and *Olsen v. Poirier* (1978), 21 O.R. (2d) 642 (H.C.J.), affirmed (1980) 28 O.R. (2d) 744 (C.A.); *Cuttell v. Bentz*, [1985] 6 W.W.R. 193, 65 B.C.L.R. 273 (B.C.C.A.); *Reaney v. National Trust Co.*, [1964] 1 O.R. 461, 42 D.L.R. (2d) 703 (H.C.J.)

⁹ Where there are limits due to some pre or post incident agreement or, for cases subject to British Columbia or Nova Scotia law, where the injured person is all at fault.

¹⁰ Reimbursement rights because that's what contribution or indemnity are about – obtaining reimbursement of some or all of an amount paid to another.

¹¹ This is not necessarily connected to the second reason.

speedier settlement: precisely because there are more paying pockets, so each pocket pays less.

The concepts are relevant to those from whom compensation is or may be sought by the injured person: wrongdoers and those vicariously liable for injury caused by wrongdoers. The target defendants or wrongdoers will not want to have to bear the entire compensable cost of the injury. To the extent permitted by law, they will want to force others who the injured person might have successfully claimed from, but did not, to also pay for the injury. They will, sometimes, be able to obtain reimbursement. Sometimes, though, they will not.

Where there is joint liability, the target wrongdoers or defendants cannot force the injured person to sue any person that the injured person has not sued, absent some sort of enforceable agreement that provides otherwise. In *Parkland (County) No. 31 v. Stetar*, Dickson J. stated:

It is fundamental, however, to tort law that a plaintiff can proceed against any one of a number of joint or several tort-feasors; there is no duty upon him to sue all those whom he believes contributed to his hurt. He may elect to recover the full amount of his damage from a tort-feasor only partly to blame ... however, even in those cases in which for some reason the right to contribution does not exist, the victim retains the right of full recovery from the tort-feasor whom he has sued.¹²

So, it is a consequence of what we now call joint liability to the injured person that it is not a defence that someone else may also be, or might also have been, liable for the injury. Similarly, absent an enforceable agreement that provides otherwise, it is not a defence that the injury was also caused by somebody who the injured person cannot sue or chooses not to sue; whether the immunity is because of statute,¹³ or agreement between injured person and “immune” wrongdoer;¹⁴ or because the wrongdoer is bankrupt; or even if it is simply a case where, for whatever reason the injured person has chosen not to sue some of the persons who might be sued and held liable. Whether the incident(s) occurred inside or outside of Canada and even if a Canadian court has jurisdiction over at least one of the potential defendants, there may be others not subject to the jurisdiction of a Canadian court unless they attorn. And they may not.

Issues involving joint liability and several liability may exist no matter the legal basis of the relationship said to create the liability. Joint liability and several liability may exist in all of the areas of law that may support claims for compensation for injury: tort, contract, fiduciary and trust, and, to the extent it is still a separate area, equity. In all

¹² [1975] 2 S.C.R. 884 at p. 899.

¹³ *Parkland (County) No. 31 v. Stetar*, [1975] 2 S.C.R. 884 (W2 who was at fault and would have been held also liable was sued by P after expiration of limitation period, P’s action against W2 dismissed); *Horvath v. Thring*, 2005 BCCA 127 (CanLII) (W2 at fault but immune by statute; no provisions similar to those in workers’ compensation statutes precluding recovery of W2’s “share” from W1).

¹⁴ *PDC 3 Limited Partnership v. Bregman + Hamann Architects* (2001), 52 O.R. (3d) 533, [2001] O.J. No. 422 (QL) (C.A.), reversing 49 O.R. (3d) 722 (S.C.J.). (W2 liability limited under pre-incident contract with injured person).

categories, the starting common law premise is what we now call joint liability. Persons subject to the same common law (I include equity when I use “common law” without qualification) obligation in respect of the same injury have always been jointly liable to the injured person unless there was a valid agreement to the contrary. Absent a valid agreement to the contrary, people party to the same contractual obligation or subject to the same trust or fiduciary obligation are jointly liable where the breach results in the same injury.¹⁵ In most respects, that is also true, and has always been true, in tort. Persons subject to liability in tort for the same injury have always had the type of liability we now describe as joint liability. Those of you who have a background in maritime law know why this is. Much of English tort law has its roots in historical maritime law. There, liability for injury caused by more than one person was always “joint and several”, as we know use this phrase, absent a valid agreement to the contrary.

Some History, Some Terminology

First, I generally use “wrong” in this paper rather than “tort”. The reason for this is that joint liability and several liability concepts extend beyond tort. I use “wrong” to mean conduct that law will redress by means of an award of monetary damages.¹⁶ However, for the most part when I use “wrong” I am using it to mean conduct that is at least actionable in tort, even if it might also be actionable as some other category of civil wrong.

Second, the term “concurrent wrongdoer” refers to the situation where there is more than person whose actionable conduct has caused the same injury.¹⁷ There is a limited temporal aspect to law’s use of the term “concurrent” in the context of causation. It does not mean “contemporaneous” or “simultaneous”. It means only that the conduct occurred *before* the occurrence of the injury sought to be attributed to the conduct.¹⁸ How can there be causative conduct for some injury which conduct occurs after the injury has already occurred? There can’t, of course, in the understanding of reality and time upon which Canadian jurisprudence is based. This understanding is, ultimately, the principled foundation for the manner in which we assess damages in claims arising out of successive, overlapping, injury to the same person or object. The point is that what has already been caused, and still exists, cannot be caused again.

¹⁵ And, equally liable as between themselves unless there is something about the circumstances that entitles one of the co-obligees to receive a higher amount of contribution, or to pay a lower amount of contribution. See, for example, G. H.L. Fridman, *Restitution* (2d) (Toronto, Carswell, 1992) at pp. 230-243 and G. Williams, *Joint Obligations*.

¹⁶ I am paraphrasing the classic textbook definition of tort: “A tort is a civil wrong, other than a breach of contract, which the law will redress by an award of damages.” See, Klar, *Tort Law* (3d) at p. 1.

¹⁷ Williams, *Joint Torts*, pp. 1, 16; Reeves v. Arsenault (1995), 136 Nfld. & P.E.I.R. 91 at para. 15, 423 A.P.R. 91, 423 A.P.R. 91 (P.E.I. S.C.).

¹⁸ See, Williams, *Joint Torts* at p. 2, cited and approved in *Economy Foods & Hardware Ltd. v. Klassen*, 2001 MBCA 16 at para. 16, (2001) 196 D.L.R. (4th) 413, [2001] M.J. No. 47 (QL), 2001 CarswellMan 36 (C.A.) affirming [1999] 11 W.W.R. 433 (Man. Q.B.). The point made by Williams, and approved in *Economy Foods*, was merely that the multiple tortious causative events may be successive, they do not have to be contemporaneous, so long as the events precede the injury. Williams and *Economy Foods* were not addressing the principled basis for global assessment.

The meaning of “joint liability” now differs from what the term once meant. When we discuss how much an injured person may recover from concurrent wrongdoers, “joint liability” now means the same as “joint and several liability”. Where there is still any difference at all in the meaning of the terms, it is only in certain consequences of settling with or suing fewer than all of the concurrent wrongdoers.¹⁹ What joint liability now describes is the injured person’s legal entitlement to collect the person’s recoverable damages from any of the concurrent wrongdoers, until the total collected is the full amount of the judgment. The injured person does not have to sue all of the wrongdoers to recover all of the recoverable damages. The injured person needs to sue only the wrongdoer(s) who have sufficient assets. That the injured person might need to sue more than one of the wrongdoers to collect the full amount, because none of the wrongdoers individually have sufficient insurance or other assets does not alter the consequences of joint liability. This “extent of liability” meaning is not the (original) common law meaning. The common law terms for what we now call joint liability are liability *in solidum* or solidary liability.²⁰

“Joint liability” and “joint and several liability” now have meanings different from their original meanings. In most common law jurisdictions, the terms now refer only to the extent of a wrongdoer’s liability. The original meanings were procedural. The terms described two categories of concurrent wrongdoer who had caused the same injury: those wrongdoers who could be sued in one action and those who could not but had to be sued separately. Wrongdoers who could be sued in one action were wrongdoers who had joint liability; or, because they could be sued in one action, they had joint liability. It is a chicken and egg dilemma which no longer matters except to those writing about legal history. Wrongdoers who had to be sued in separate actions were wrongdoers who had several liability. However, neither of joint liability nor several liability defined the extent of the concurrent wrongdoers’ liability. Each of the concurrent wrongdoers, whether they were suable jointly (that is, in one action) or had to be sued in separate actions (severally), was liable for all of the injury that the wrongdoer had caused, even if another of the wrongdoers was also liable for that injury. This is what was called liability *in solidum* and is what we now call both “joint liability” and “joint and several liability”. There were some other procedural differences relating to the consequences of judgments against or settlements with fewer than all or the tortfeasors.²¹

In [historical] common law, the *only* differences between joint liability, joint and several liability, and several liability were: (1) defendants [persons] who were subject to

¹⁹ There is no difference in Ontario and some of the other provinces. It may be that some have not abolished all of the settlement or judgment related consequences.

²⁰ See, for example, Ontario Law Reform Commission, *Report on Contribution between Wrongdoers and Contributory Negligence* (1988), c. 3, at p. 31-33. The key portions are quoted in my Postscript 2: The Retreat Continues (2005), 29 Adv. Q. 276 at 291-92, which is probably easier to find than the OLRC Report. OLRC at p. 31: “Since each concurrent wrong doer is liable for the entire injury, each is said to be liable in solidum.” “An alternative name for concurrent wrongdoers is the civilian term, ‘solidary’ wrongdoers, indicating that each is liable in full for the damage collectively done”: Williams, *Joint Torts*, at p. 1.

²¹ Don’t just take my word for it: see the OLRC Report at p. 32. Most of the procedural consequences have been abolished in most of the Canadian common law jurisdictions. However, since that is not true across the board, a careful lawyer will check.

joint liability or joint and several liability could be sued in one action; (2) defendants who were subject to several liability, only, had to be sued in separate actions; (3) where there was only joint liability, the mere fact of a judgment against or a settlement with any of the concurrent wrongdoers (regardless of collection) released all of the rest, even those who were not sued or were not part of the settlement; (4) where there was also several liability (with or without joint liability) then the mere fact of judgment against or settlement with some did not release the others. Legislation has eliminated those draconian consequences of joint liability in most but not all of the provinces and territories. The Ontario example is the *Courts of Justice Act*,²² s. 139(1): “Where two or more persons are jointly liable in respect of the same cause of action, a judgment against or release of one of them does not preclude judgment against any other in the same or a separate proceeding.”²³

In any event, now in common law Canada, except for certain procedural consequences after judgment or settlement in some jurisdictions, joint liability means the same as joint and several liability and both terms mean the same as liability *in solidum*. Both “joint liability” and “joint and several liability” mean that any wrongdoer who may be held liable to a plaintiff for the same injury may be sued for the whole amount of the plaintiff’s injury, regardless of whether other wrongdoers may also be liable.

Alternate liability is neither joint liability nor several liability. Alternate liability means that one of X or Y, but not both, may be held liable for the injury. Where the liability is alternate, the injured person has to elect against whom the injured person wants judgment before taking judgment.²⁴ I am not going to say anything more about alternate liability.

So, in the phrase “joint and several liability,” “and several” adds nothing. And, just to add to the fun, in the phrase “joint and several liability” “several liability” does *not* mean what “several liability” means when used by itself. “Several liability”, when used by itself, means “proportionate liability”. From this point on, I will use only “joint liability” to mean both “joint liability” and “joint and several liability”. Those with older ears who wish to hear “joint and several liability” may, in Captain Jean-Luc Picard’s words “make it so”.

²² R.S.O. 1990, c. C.43.

²³ See *Treaty Group Inc. v. Drake International Inc.*, 2005 CanLII 45406 at para. 3-11 (Ont. S.C.J) for a recent case reviewing Ontario (and common) law applicable to the right of the injured person to sue and succeed against concurrent wrongdoers separately. *Treaty* emphasizes that what the injured person cannot have is double recovery (satisfaction.). *Treaty* is also interesting for the attempt by the defendant in the later action to stand both common law and the *Courts of Justice Act* on their heads by arguing that the effect of s. 139 was to permit the successive actions *only* where the concurrent wrongdoers were *joint wrongdoers*. That argument was correctly rejected.

²⁴ Williston and Rolls, *The Law of Civil Procedure* (Toronto, Butterworths, 1970) at pp. 248-49. Citations to case law, as needed, are easily found in the texts dealing with civil procedure for the appropriate province or territory. The citations are usually collected at the discussion of the repeal or amendment of the common law rules dealing with the affect of settlement or judgment on the liability of joint wrongdoers. For Ontario, see any text dealing with s. 139 of the *Courts of Justice Act*.

Two Types of Joint Liability

The type of liability that we describe as joint liability will result from two distinct propositions of law. Both rules may apply to the same situation. In each case, the result is the same: two or more persons are each liable for all of an injured person's compensable injury.

Joint Liability Resulting From Concurrent Causation, Except Sometimes In British Columbia and Nova Scotia

Where the conduct of each of two or more wrongdoers is a cause of all of the compensable injury, each of the wrongdoers is jointly liable to the injured person for the entire injury. This type of joint liability exists whether the actors are joint wrongdoers or (merely) concurrent wrongdoers whose conduct caused the same injury. This is a common law principle. There are now statutes in each of the common law provinces and territories that, in sometimes somewhat different language, codify this principle.²⁵ The relevant statutory provisions have been interpreted to mean that the same injury caused by the actionable conduct of two or more persons results in joint liability to the injured person for that injury.²⁶ The statutes are now old enough that it is likely that all of the

²⁵ The legislation, by making all concurrent tortfeasors jointly liable, has not converted those who were not joint tortfeasors at common law into joint tortfeasors: see, *Apportionment* at p. 8, and, more recently, *Reeves v. Arsenal* (1995), 136 Nfld. & P.E.I.R. 91, 423 A.P.R. 91, 423 A.P.R. 91 (P.E.I. S.C.) and *Tucker (Guardian of) v. Asleson* (1993), 102 D.L.R. (4th) 518; [1993] 6 W.W.R. 45, 1993 CanLII 2782 (B.C.C.A.). This fact will only be important where there is something about that follows from the status as joint tortfeasor, rather than mere concurrent tortfeasor, relevant to the issues in the action. This could be an issue in jurisdictions where the procedural settlement or judgment consequences have not been abolished. Apart from that, it is not at all unusual to read judgments in which concurrent tortfeasors who are not joint tortfeasors are mistakenly called joint tortfeasors. This is usually irrelevant. However, it is also common to find cases in which concurrent tortfeasors are described as joint tortfeasors, even though they were not, and where whether they were was not one of the issues in the case. Sometimes this does not matter. However, there are other times in which, if the judge really thought the concurrent tortfeasors were joint tortfeasors, the judgment should have been the exact opposite of what it was. In *Tucker*, Southin J.A. noted that the result would have been different had the concurrent tortfeasors been joint tortfeasors because, at the time, B.C. had not abolished the different settlement-related consequences.

²⁶ Except, currently, in British Columbia and Nova Scotia in cases to which their apportionment statutes apply and the injured person is also at fault. In those cases, the effect of the legislation is that the concurrent wrongdoers are only severally (proportionately) liable: *Wells v. McBrine*, [1989] 2 W.W.R. 695; 33 B.C.L.R. (2d) 86, 47 C.C.L.T. 94 (B.C. C.A.), leave to appeal to S.C.C. refused (1989), 49 C.C.L.T. xxxi (S.C.C.). The British Columbia statute is the *Negligence Act*, R.S.B.C. 1996, c. 333. A number of the common law provinces and territories (perhaps all other than Ontario) have the same or sufficiently similar provisions in their apportionment statutes. However, to my knowledge, only Nova Scotia has taken the B.C. route: see, *Lunenburg County District School Board v. Piercey* (1998), 167 N.S.R. (2d) 68, 41 C.C.L.T. (2d) 60 at para. 65, 1998 CanLII 3265 (N.S.C.A.): "In view of my conclusion that ... that no contributory negligence should be found on the part of the ... [plaintiff] Piercey ... the appellant Board is not entitled to the advantages provided in s. 3 of the *Contributory Negligence Act*, Ch. 95, R.S.N.S. 1989, and accordingly would not be entitled to limit its responsibility to Mr. Piercey to 59%."; and *Inglis Ltd. v. South Shore Sales & Service Ltd.* (1979), 31 N.S.R. (2d) 541, 11 C.P.C. 127 at p. 131 (C.A.). Alberta has explicitly rejected the B.C.-style argument: see, *Campbell Estate v. Calgary Power Ltd.*, [1988] A.J. No. 855, [1989] 1 W.W.R. 36, 62 Alta. L.R. (2d) 253 (C.A.). I could not find any cases discussing the issue for the other provinces that have this type of statute in the time I was prepared to spend. The argument has been rejected in Ontario because the *Negligence Act*, R.S.O. 1990, c. N.1 has different wording: *Martin v.*

legislators involved in their enactment are dead. So, there's little risk of hurting the feelings of any of these people by pointing out that the legislation adds nothing whatsoever to the extent of liability that the wrongdoers to whom it applies already had. And, in British Columbia and Nova Scotia, the legislation has restricted the extent of the liability of the concurrent wrongdoers in cases where the injured person is injured by the conduct of more than one wrongdoer and is also at fault. These wrongdoers are only proportionally (severally) liable, not jointly liable.

Which concurrent wrongdoers are joint wrongdoers? What is the difference between joint wrongdoers and all other wrongdoers whose conduct causes the same injury?²⁷ Both types are concurrent wrongdoer.²⁸ There are joint wrongdoers where the concurrent wrongdoers have a pre-existing joint obligation to the injured person or, absent that joint obligation, act for a common *unlawful* purpose.²⁹ “Concurrent tortfeasors [wrongdoers] are regarded as “joint” when there is concurrence not only in the causal sequence leading to the single damage, but also in some common enterprise; they are 'several' or 'independent' when the concurrence is exclusively in the realm of causation. The former are responsible for the same tort [wrong], the latter only for the same damage.”³⁰ I have inserted “wrongdoers” and “wrong” in square brackets because the explanation is generally applicable to all wrongs, not just torts. Older descriptions of the commonality feature are of “a concerted purpose to a common end”;³¹ and, that the joint wrongdoers have “mentally combined together for some purpose”.³² The common purpose course of action must be wrongful, in itself, for the subsequent wrongful act of one of the parties to be imputed to the others. If the common purpose is lawful, and one

Listowel Memorial Hospital (2000), 51 O.R. (3d) 384, 192 D.L.R. (4th) 250, 138 O.A.C. 77 (C.A.); *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, 183 D.L.R. (4th) 193 (S.C.C.), reversing (1998), 38 O.R. (3d) 384, 158 D.L.R. (4th) 147, [1998] O.J. No. 1126 (QL) (C.A.), reversing [1994] O.J. No. 1714 (QL) and [1995] O.J. No. 231 (QL), 18 C.L.R. (2d) 67 and 82 (Gen. Div.).

²⁷ One can get into very fine disputes about the meaning of same injury, or same damage, or same damages where apportionment issues arise, particularly in the context of contribution claims. In the Ontario, the statute reference is to the same “damages”. There is a distinction between “damage” – the injury sustained – and “damages” – the amount of compensation the injured person is awarded for the injury. That distinction is rarely relevant as between injured person and wrongdoer. It may be relevant as between wrongdoers seeking contribution from one another, with sometimes hard to follow results. The phrasing in other common law jurisdictions tends to use “damage” not “damages”. That difference has been noted in same decisions: see, for example *Reeves v. Arsenault*, para. 14. I don't propose to discuss the consequences of that distinction beyond mentioning that it may result in a finding that contribution is not available under the apportionment statutes whose prerequisite is the existence of the same injury.

²⁸ *Apportionment* at pp. 5-6.

²⁹ Williams, *Joint Obligations*, at p.1. See, *inter alia*, *Tucker (Guardian of) v. Asleson* (1993), 102 D.L.R. (4th) 518; [1993] 6 W.W.R. 45, 1993 CanLII 2782 at para. 107-108 (B.C.C.A.)

³⁰ Klar, *Tort Law* (3d), at pp. 487-91.

³¹ *Apportionment* at pp 5-6; *The 'Koursk'*, [1924] P. 140 at 156 (C.A.), *Thomson v Lambert*, [1938] S.C.R. 253 (accepting the definition *Koursk*); *Cook v. Lewis*, [1951] S.C.R. 830; *Keough v. Henderson Branch No. 215 of the Royal Canadian Legion* (1978), 91 D.L.R. (3d) 507, [1978] 6 W.W.R. 335 (Man. C.A.), varying 80 D.L.R. (3d) 326 (Man. Q.B.) and *Lewis Klar, Annotation*, 7 C.C.L.T. 146 (1978) at pp. 147- 48 and 1 C.C.L.T. 331 (1976) at p. 332.

³² Williams, *Joint Torts*, at p. 1.

of the parties commits a wrong in furtherance of the purpose, the wrongful act will not be imputed to the other parties merely by reason of the common purpose.³³

Wrongdoers who do not have the required common purpose and whose conduct causes *different* injury are not concurrent wrongdoers.³⁴ These wrongdoers are liable only for the separate (different) injury each causes, even if the injuries are to the same person. The distinction between wrongdoers causing the same injury and wrongdoers causing separate injury to one person is entirely a question of fact, depending on whether the judge is able to divide the injury into separate injuries.³⁵

Joint Liability Resulting From The Relationship Between The Wrongdoers.

There are two categories of relationship that will produce joint liability. The same relationship may fit in both categories.

Joint wrongdoers have joint liability. As discussed, wrongdoers whose conduct has a common purpose may be joint wrongdoers. Where the common purpose is tortious, the wrongdoers are joint tortfeasors. Where wrongdoers are joint tortfeasors, the conduct of any one wrongdoer may be the conduct of all. This sort of joint liability is direct liability because each of the wrongdoers is deemed to have committed the actionable conduct.³⁶ You will all be familiar with common examples of joint tortfeasors of this type. The examples are more common where the tort is an intentional tort rather than one based in negligence. When a group of people set out to assault another, and do, all who were part of the group are joint tortfeasors, even those who did not actually commit the assault. Some of the group may argue that their involvement was not sufficient. Whether it was is a question of fact, determined by looking at the whole sequence of events.³⁷

Negligent conduct can also produce joint tortfeasors where the common purpose is tortious. For example, in *Raywalt Construction Co. v. Bencic*,³⁸ a group of teenagers decided to visit a construction site. Their common purpose was to at least cause some

³³ *Keough v. Henderson Branch No. 215*; *Brown v. Cole*, [1996] 2 W.W.R. 567 (B.C.C.A.) and *I.C.B.C. v. Vancouver (City)* (2000), 182 D.L.R. (4th) 366 (B.C.C.A.) reversing (1997) 38 C.C.L.T. (2d) 271 (B.C.S.C.). See the discussion in Klar, *Tort Law* (3d) at p. 489, note 193. However, that should not prevent, in the appropriate case, the imposition of vicarious liability whether based on a finding of an agency relationship or vicarious liability based the current rationale for vicarious liability in Canadian jurisprudence.

³⁴ They could be described as concurrent wrongdoers causing separate damage if it happens that their misconduct overlaps in (was concurrent in) time, but nothing would follow in law from that description. It would be better to not describe them as concurrent tortfeasors to avoid any confusion with concurrent tortfeasors whose conduct causes the same injury.

³⁵ See, *Mizzi v. Hopkins* (2003), 64 O.R. (3d) 365, 2003 CanLII 52145 (C.A.); *Alderson v. Callaghan* (1998), 40 O.R. (3d) 136, 21 C.P.C. (4th) 224 (C.A.); *O'Neil v. Van Horne* (2002), 59 O.R. (3d) 384, [2002] O.J. No. 1528 (QL) (C.A.); *Reeves v. Arsenault* (1995), 136 Nfld. & P.E.I.R. 91, 423 A.P.R. 91, 423 A.P.R. 91 (P.E.I. S.C.); Klar, *Tort Law* (3d) at 487-491.

³⁶ Vicarious liability is discussed in Klar, *Tort Law* (3d) at pp. 579-597. See, also, G. Williams, *Joint Torts*, and P.S. Atiyah, *Vicarious Liability in the Law of Torts* (London, Butterworths, 1967).

³⁷ *Martin v. Martin*, [1996] N.B.J. No. 83 (Q.L.), 1996 CarswellNB 239 (C.A.) reversing (1995) 159 N.B.R. (2d) 81. See the discussion in Klar, *Tort Law* (3d) at p. 489, note 193.

³⁸ 2005 ABQB 989, 2005 CarswellAlta 1991 (Alta. Q.B.)

mischief and indulge in some minor vandalism. There was a tank of diesel fuel on the site. Two of the group released diesel from the tank onto the ground. Four of the group, including the initial two, apparently made a number of unsuccessful efforts to light the diesel. All of the four did not participate in all of the efforts. Diesel is not easy to ignite. Finally, B, who was not one of the two who had released the fuel, succeeded. The teens did not intend to cause damage beyond burning the fuel. However, their plans went astray because the fire got out of control. The damage was extensive. The cost to repair the property damage and clean up the site was almost \$390,000.

The teens other than B attempted to argue that they had quit the common plan of attempting to light the fuel before B succeeded. There should be no mystery as to why that attempt was made. If it had been accepted, they would not have been liable for the damage that resulted from the fire. The trial judge rejected the argument. He did not accept their evidence that they had quit the plan. The judge found they were joint tortfeasors with B in respect of the damage caused by the fire.³⁹

If each of the wrongdoers has acted in a manner found sufficient to be held a legal cause of the injury, it is not relevant to the question of each wrongdoer's own liability whether the wrongdoer is a joint tortfeasor or merely concurrent tortfeasor. In *Economy Foods v. Klassen*, the fire started caused damage to a shopping mall. The fire started because W1, a tenant, left a candle burning in the washroom of W1's unit. The fire spread beyond the tenant's unit (was not contained) because W2, who had renovated W1's unit, failed to install sprinklers in the washroom. Had the sprinklers been installed, the fire would have been contained and the damage would have been less. The court held that both W1 and W2 were responsible for all of the damage, subject to apportionment as between them; not because W1 and W2 were joint wrongdoers, but because the conduct of each was a cause of the damage claimed by the plaintiffs.⁴⁰

In addition, persons who are part of a relationship that is subject to vicarious liability relationship are also jointly liable. That is, where X is vicariously liable for injury caused by the conduct of Y, X and Y are jointly liable. This type of joint liability is not direct liability. Joint liability which is the result of vicarious liability is not based on the premise that the conduct of both X and Y caused the injury. X's liability is not based on misconduct by X. Rather, it is based on the premise that there is something about the relationship between X and Y that requires the conclusion that X should also be liable for actionable injury caused by the misconduct of Y, even if X hasn't acted in an improper

³⁹ 2005 ABQB 989 at para. 334-64. The reasons are long. The trial judge reviews many, I suspect most, of the cases one should look at if the need arises.

⁴⁰ The mall owner and other tenants sued just the tenant W1. W1 third partyed W2 the renovator. W1 and W2 moved to determine whether W1's liability to the plaintiffs was limited to just the damage which would have occurred in any event even if the sprinklers had been installed (i.e., if the fire had been contained) or all of the damage. The decision was all. It was not open to W1 to limit its liability to the plaintiffs to just the damage which would have occurred in any event. The reason given by the Manitoba Court of Appeal was that the conduct of both W1 and W2 was a but-for cause of the additional damage. The result is correct as between W1 and the plaintiffs. The decision should not, be understood to mean that W2's conduct would have been found to be a cause of the "contained damage" had W2 been sued by the plaintiffs. The Court of Appeal did not suggest that and that result would be inconsistent with principle.

manner. So, in this case, X has not committed an act that is wrong. Nonetheless, X is held liable for certain consequences of Y's misconduct.⁴¹

As persons in a vicarious liability relationship have joint liability, the common law called them joint tortfeasors where the liability arose out of tort.⁴² It may be important to understand, in each case, why the concurrent wrongdoers are characterized as joint wrongdoers in a particular case. For example, where the concurrent wrongdoers are joint tortfeasors because the tort involves a common purpose, the general rule was (and still is) that each of the wrongdoers is liable for all of the damages that any of them is liable for. However, there are now exceptions in Canada. Consider the situation where the actionable conduct of some, but not all, of the joint tortfeasors merits the imposition of punitive damages. Each of the other "common purpose" joint tortfeasors – those who did not actually commit the conduct that justifies the punitive damages award – will *not* be liable for punitive damages merely because one or more of the others is liable for punitive damages. The rationale that the conduct of any one "common purpose" joint tortfeasor is deemed to be the conduct of all is not imported into punitive damages jurisprudence.⁴³

Similarly, Canadian jurisprudence no longer recognizes vicarious liability for punitive damages. Under current Canada theory, the joint liability which results only from vicarious liability is not based in any way whatsoever on the imputation of the wrongful conduct to the person who did not commit the impugned act but is nonetheless held liable for certain consequences of that act.⁴⁴ Therefore, in Canada (currently, the situation may not be the same elsewhere) those who are only vicariously liable with another will not be liable for the punitive damages that the other might be liable for.⁴⁵

Several (Proportional) Liability

"Several liability" is the term that describes the extent of liability a wrongdoer has in the situation where the same injury is caused by the misconduct of two or more wrongdoers but each wrongdoer is not liable for the entire injury. Instead, each wrongdoer is liable for only that wrongdoer's "proportion" (share) of the injury. That proportion is determined by some formula under which the court decides what each wrongdoer's portion of the injury should be. That portion represents the limit of the wrongdoer's liability to the injured person. The proportions have to add up to 100% of all of the fault if the injured person is not at fault, or 100% including the injured person if the injured person is also at fault.

⁴¹ *Bazely v Curry* [1999] 2 S.C.R. 534, 174 D.L.R. (4th) 45, [1999] 8 W.W.R. 197; *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570, 174 D.L.R. (4th) 71, [1999] 9 W.W.R. 1 (S.C.C.)

⁴² A joint tort also occurs where one person is vicariously liable for the tort committed by another: see, generally, Klar, *Tort Law* (3d) at pp. 579-97.

⁴³ See below in the discussion under the Punitive Damages heading.

⁴⁴ *Bazely, Jacobi, Harroun v. Turiff* (2000), 50 O.R. (3d) 634, 190 D.L.R. (4th) 39 (Ont.C.A.); *Bluebird Cabs Ltd. v. Guardian Insurance Co. of Canada* 1999 BCCA 195, 173 D.L.R. (4th) 318, 66 B.C.L.R. (3d) 86 (B.C.C.A.)

⁴⁵ See below in the discussion under the Punitive Damages heading.

“Several liability” is a synonym for proportional liability. Under proportional (or proportionate – the terms are synonyms) liability each wrongdoer’s extent of liability is limited, based on some formula for assessing the extent that each should bear responsibility for the injured person’s injury. Broadly, there are two approaches for determining the extent of that liability: (1) in the amount the judge considers just or equitable, in accordance with the extent of the wrongdoer’s responsibility; or (2) the portion that corresponds to the wrongdoer’s degree of fault

Several liability, in its modern meaning of proportional liability for the damages resulting from the same injury, does not exist in Canadian obligations’ law except as a result of statute or some relevant pre or post incident agreement of the parties. Statutory examples, other than statutes such as the British Columbia *Negligence Act* and the *Nova Scotia Contributory Negligence Act* which have been interpreted to create proportional liability where the injured person is also at fault, are provisions such as those found in the various provincial workers’ compensation statutes that, where they apply, prevent employees injured in the course of employment from recovering from wrongdoers who may be sued the “shares” of at fault employers or employees who cannot be sued, leaving the wrongdoers responsible only for the remainder.⁴⁶ Another example is some aspects of the liability of “non-protected” defendants in actions arising out of motor vehicle accidents in Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, s. 267.7(1), dealing with what the statute calls (incorrectly) “Joint and several liability with other tortfeasors” as a result of which only the non-protected class are made liable for a portion of the damages.⁴⁷

Agreement examples include: (1) an enforceable pre-incident agreement between injured person and wrongdoer that limits the injured person’s recovery from the wrongdoer to some portion of the injured person’s damages;⁴⁸ and (2) a post-incident settlement between the injured person and one or more of the concurrent wrongdoers, but not all of them, that results in the injured person claiming against the remaining (non-settling) wrongdoers for only each of those wrongdoer’s individual “shares” of the remainder of the injured person’s damages.⁴⁹

A Few More Words About Causation

In *Athey v. Leonati*,⁵⁰ the Supreme Court of Canada said that events may have more than one legal cause. However, before there may be a legal cause, there has to be

⁴⁶ For example, in Ontario, the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A, ss. 29(2), 29(3) and 29(4). This a partial form of proportional liability (class proportional liability?) as the wrongdoers who may be sued are still jointly liable for the balance.

⁴⁷ Again, this is partial several liability only as between protected and non-protected defendants as classes. The non-protected defendants are still jointly liable to the plaintiffs for the amounts for the loss for which they may be held liable. The “other tortfeasors” are, of course, the “protected” defendants.

⁴⁸ *PDC 3 Limited Partnership v. Bregman + Hamann Architects* (2001), 52 O.R. (3d) 533, [2001] O.J. No. 422 (QL) (C.A.), reversing 49 O.R. (3d) 722 (S.C.J.).

⁴⁹ What has recently been called a “Perringer” settlement. See *J. M. v. Bradley* (2004), 240 D.L.R. (4th) 435, 2004 CanLII 8541, reversing 2003 CarswellOnt 6052 (C.A.) and *Amoco Canada Petroleum Co. v. Propak Systems Ltd.* (2001), 200 D.L.R. (4th) 667, 4 C.P.C. (5th) 20 (Alta. C.A.).

⁵⁰ *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, [1997] 1 W.W.R. 97. **The Supreme Court of Canada's newest, leading, case on causation is Resurface Corp. v. Hanke, 2007 SCC 7. The law is reviewed in my article available at <http://www.bbburn.com/articles/resurface_status.pdf>.**

historical cause. That is because a legal cause is nothing more than an historical event to which the law attaches legal responsibility for the consequences that flow from the event.⁵¹ Historical cause is what is often called “cause-in-fact”.

The problem with this statement in *Athey* is that Major J. wrote that that there is “frequently” more than one historical cause.⁵² The statement is wrong. There is always more than one historical cause to an event, except perhaps for the Big Bang – an issue of metaphysics also beyond the scope of this paper. One of the judge’s judicial tasks is to decide whether any one or more of those events is a legal cause. But the judge does not have to go back to the Big Bang each time; or as far back as the first amoeba to crawl out of the primordial soup; or the last time the Chicago Cubs won the World Series; or even the last time the Maple Leafs won the Stanley Cup, in the process of sorting out the historical events which may be a legal cause. Lewis Klar explains the situation succinctly.

[T]here are literally countless causes or events which must have occurred in order for the plaintiff’s injury to have happened and it would be preposterous to suggest that each ought to be investigated as a source of responsibility and compensation for the victim. . . .

[A] two car collision occurs. There are thousands of causal factors which could be considered — the fact that the cars were built, that they were sold, that the drivers were born, that they were licensed to drive, that roads were built, and so on.⁵³

John Fleming wrote (this is the passage misstated in *Athey* as Major J. changed “every” to “frequently”):

[e]very event or occurrence is the result of many conditions that are jointly sufficient to produce it. This complex set of conditions includes all antecedents, active or passive, creative or receptive, which were factors actually involved in producing the consequence. In particular, it embraces both “causes” and what are commonly called mere causal “conditions”; for that distinction, whatever its value in the context of the later inquiry into “proximate” cause, does not correspond to any functional difference as regards the de facto relation between antecedents and their consequents.⁵⁴

This is crucial. It is the reason why consequences (from now on, I’ll usually call the consequences “injury”) may have more than one legal cause. And, if injury may have more than one legal cause, there may be more than one person whose conduct is a legal cause of injury.

⁵¹ My recent articles in the *Advocates Quarterly* – D. Cheifetz, *The Snell Inference and Material Contribution: Defining The Indefinable And Hunting The Causative Snark* (2005), 30 *Adv. Q.* 1 and D. Cheifetz, *Materially Increasing The Risk Of Injury As Factual Cause of Injury: Fairchild v. Glenhaven Funeral Services Ltd. In Canada* (2004), 29 *Adv. Q.* 253 contain not overly metaphysical discussions of historical (factual) causation in Canadian law.

⁵² Major J. misquoted the passage from Fleming’s treatise on torts, changing “every” to “frequently”. See, D. Cheifetz and V. Black, *Material Contribution And Quantum Uncertainty: Hanke v. Resurfice Corp.* (2006), 43 *Can. Bus. L. J.* 145 at 165-66. Vaughan Black spotted this error in the course of our preparation of that article. He and I are not aware of it having been mentioned, before, in written scholarship.

⁵³ Lewis Klar, *Tort Law*, 3rd ed. (Toronto: Carswell, 2003), at p. 391 and note 18.

⁵⁴ J.G. Fleming, *The Law of Torts*, 8th ed. (Sydney, LBC, 1992), p. 193 (emphasis added).



Indivisible Injury, Divisible Injury

A wrongdoer may be held liable only for injury the wrongdoer caused, or injury caused by someone for whom the wrongdoer is vicariously liable that results in damages for which there is vicarious liability. A wrongdoer is not liable for damages for injury not caused in either manner. Absent some agreement or statute, wrongdoers may be held liable only for damages for injury they cause or for which they are vicariously liable. Otherwise, there is no liability.

Some injury is divisible. Some injury is not. It is not the case that if W1 causes P some injury, W1 is liable for all other injury (for the consequences of injury) sustained by P even if the other injury is not caused by W1. Where the injury is indivisible, if the wrongdoer causes any part of an indivisible injury, the wrongdoer is a cause of all of it. Put another way: in deciding if there may be liability for all of the injury, it is sufficient for factual causation if the wrongdoer's conduct is a part of the cause of all of the injury. However, a defendant may not be found to be the cause of all of the injury **merely** on the basis that the defendant's conduct is a cause of a divisible part of the injury.^{55 55A}

The Ontario Law Reform Commission stated almost 20 years ago: "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. Fleming states that 'whether injury is susceptible to apportionment seems to depend on pragmatic rather than theoretical considerations'".⁵⁶ Nothing has changed since then. There is still no clear test. In *Athey*, Major J. wrote:⁵⁷

Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule. The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes ... Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.

In the present case, there is a single indivisible injury, the disc herniation, so division is neither possible nor appropriate. The disc herniation and its consequences are one injury,

⁵⁵ *Mizzi v. Hopkins, Alderson v. Callaghan, Viridian Inc. v. Dresser Canada Inc.*, [1999] A.J. No. 633 at para. 26, [2000] 2 W.W.R. 389, (Alta. Q.B.); *Reeves v. Arsenault; E.D.G. v. Hammer*, [2003] 2 S.C.R. 459, 2003 SCC 52 (CanLII), 230 D.L.R. (4th) 554, [2003] 11 W.W.R. 244 (S.C.C.) affirming 2001 BCCA 226 (CanLII), 197 D.L.R. (4th) 454, 4 C.C.L.T. (3d) 204 (B.C.C.A.), affirming (1998), 53 B.C.L.R. (3d) 89, [1998] B.C.J. No. 992 (QL) (B.C.S.C.). **55A Resurface may affect this. What if conduct increased the risk of the other divisible part?**

⁵⁶ OLCRC Report at p. 8-9. I have added the italicization of "damages". It is clear from the context that the OLCRC meant "damage" in the sense of "injury" and not "damages" in the sense of the compensation awarded for injury.

⁵⁷ *Athey*, para. 24 –25. "Caused" and "or contributed" in the last sentence both mean "caused". Either something is a cause of something else or it is not. Any preceding circumstance which sufficiently "contributes" to the coming into existence of a consequence is a cause of the consequence, or it is not relevant at all to the consequence. The literature is extensive. I have collected useful references for the lawyer interested in a not-too-metaphysical look at the issues in *Snark*. A far better look at the concepts is contained in Allan Beever, "Cause-In-Fact: Two Steps out of the Mire" (2001), 51 U.T.L.J. 327.

and any defendant found to have negligently caused or contributed to the injury will be fully liable for it.

For present purposes, the key proposition in the first quoted paragraph is that wrongdoers are not liable for the injury the wrongdoers do not cause.⁵⁸ The key proposition in the second quoted paragraph is that wrongdoers are “fully liable” (read jointly liable) for all of the injury they do cause by their wrongful conduct, absent any applicable defence.⁵⁹

In practice, this might mean that a subsequent wrongdoer might, in fact, be paying for pre-existing disability. If so, this would be because existence of pre-existing disability was not established at trial on an adequate evidentiary basis. It does not mean that the subsequent wrongdoer has been held liable to pay for pre-existing disability that the evidence showed the wrongdoer did not cause. It means nothing more than that the subsequent wrongdoer was not able to adequately establish the existence of the pre-existing disability.⁶⁰ In *Dillingham Constructions Pty. Ltd. v. Steel Mains Pty. Ltd.*,⁶¹ Barlow CJ wrote:

The subsequent tortfeasor is not in any sense liable for the injury which the first tortfeasor caused or for its consequences, though if he is unable in point of proof to establish the pre-existing disability of the injured person the damages he may be required to pay will not be diminished by reason of the pre-existing condition of the injured person. But even in that case there is in truth no identity between the 'damage' or any part of it respectively caused by the two separate torts.

Successive Incidents, Global Assessments

The Canadian approach to damages assessment in claims arising out of multiple, successive incidents is called global assessment. It is based on the assumption that each of the incidents caused separate, divisible, injury. Global damage assessments in successive incident situations do not invoke joint liability.⁶² Rather, they are premised on the assumption that joint liability does not apply because a probable finding can be made as to which incident caused what injury. That assumption is central to the global assessment approach. Under this approach, courts assess the losses from the earlier incident as if the action for this incident had been tried immediately before the next relevant incident occurred.⁶³ Under global assessment, whatever amount is assessed, and whatever injury is the basis for the assessment, by definition cannot have been caused by

⁵⁸ Leaving aside vicarious liability or contractual assumption or any other doctrine making a person liable for injury the person did not cause.

⁵⁹ Subject to reduction of the amount recoverable where the injured person is held also responsible for the injury and that responsibility triggers some doctrine that reduces the damages recoverable for the injury by reference to the extent of that responsibility; in simpler terms, some doctrine of contributory responsibility (fault, negligence).

⁶⁰ *Reeves v. Arsenault*, at para. 23, citing and quoting from *Dillingham Constructions Pty. Ltd. v. Steel Mains Pty. Ltd.*, [1975] HCA 23, (1975) 132 C.L.R. 323 (Aust H.C.).

⁶¹ [1975] HCA 23 at para. 11, (1975) 132 C.L.R. 323 (Aust H.C.)

⁶² The global assessment approach is sometimes called the “devaluation principle” on account of the use of “devaluation” in the description of the process in *Baker v. Willoughby*.

⁶³ Klar, *Tort Law* (3d), at p. 412, text associated with notes 108-111. Klar uses “tort” rather than incident.

the later incident. It should be obvious that this approach is premised on the assumption that it advances the interests of justice to make the assumption that the injuries can be divided among the successive incidents. One possible justification for this approach, at least so long as the assumption is not too much of a legal fiction, is that it simplifies the issues of damages assessment. It makes the issue of which incident is responsible for what injury essentially a question of fact. It provides the trier-of-fact (judge or jury) a formula that is easy to use. It is easy to use in the sense that the formula is not complicated. The trier-of-fact may have to sort through complicated evidence and make difficult decisions regarding what happened, but once the decisions are made the application of the global assessment formula to the evidence is straightforward.

A two incident example shows how global assessment works. The judge determines the value of all of the injuries without regard to the number of incidents. Assume that is \$100,000. The judge then determines the value of the injury as it existed immediately prior to the second incident. Assume that is \$60,000. The balance, \$40,000 balance is the value of the injury caused by the second incident.⁶⁴ This is not apportionment of an indivisible injury; nor is it apportionment of legal responsibility for an indivisible injury. It is a finding that certain injuries were the result of only the first incident and others only the second.⁶⁵ It should be self-evident that this approach is valid if and only if we treat the injury as divisible.

A good, recent example of global assessment is *Gorman v. Falardeau*⁶⁶ where the plaintiff had 3 accidents each separated by a number of years. Applying global assessment principles, the trial judge first determined the value of the non-pecuniary damages without regard to which incident caused what injury. That value was \$120,000. The trial judge then determined the value of the non-pecuniary damages arising from the first incident, on the assumption the trial had occurred immediately before the second incident. The trial judge held that value was \$70,000. That assessment required the judge to determine what the injured person's condition was immediately before the second incident, so that gave the judge the baseline for determining the non-pecuniary damages from the second. The value of these damages was determined by assuming the trial of the second incident occurred immediately before the third. That value was \$20,000. The amount left, \$30,000, was the non-pecuniary damages caused by the third incident.

As global assessment is the applicable approach in Canadian tort law for damages assessment in actions involving successive incidents, Canadian tort law proceeds on the basis that it is always a question of fact as to whether the injury is or is not divisible. This is an issue of evidence; one of separating the consequences of the successive incidents and not one of principle. The separation can either be done appropriately (whatever that means for law) or it cannot. If it cannot be done, there will be joint liability, provided that

⁶⁴ See, for example, *Gorman v Falardeau*, 2005 CanLII 18837, 254 D.L.R. (4th) 347, 23 C.C.L.I. (4th) 167 (Ont. C.A.) affirming 2002 CarswellOnt 2091 (Ont. S.C.J.). An earlier, oft-cited Ontario case is *Hicks v. Cooper* (1973), 1 O.R. (2d) 221 (Ont. C.A.).

⁶⁵ *Athey*, para. 24.

⁶⁶ 2005 CanLII 18837, 254 D.L.R. (4th) 347, 23 C.C.L.I. (4th) 167 (Ont. C.A.) affirming 2002 CarswellOnt 2091 (Ont. S.C.J.).

it is otherwise open to find the wrongdoers liable. If it can be done, there will not be joint liability. Again, from *Athey*:

Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule. The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes ... Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.⁶⁷

Bourque v. Wells,⁶⁸ if it was meant to be an application of joint liability, is an aberration perhaps explained by the following facts. (1) The plaintiff settled her claims arising out of the first incident on the eve of trial. (2) The plaintiff tried to maximize her second incident damages by arguing that she should be treated as a “thin-skull” plaintiff so that all of what she was still claiming would be compensable in the trial of second incident and paid by the second incident defendants. The much larger part of the claim in the second action was her pecuniary damages. The trial judge and 2 of the 3 members of the New Brunswick Court of Appeal did not bite. The majority of the Court of Appeal held that the pecuniary damage was caused by both incidents but the non-pecuniary damages just the second incident. The trial judge had held that the non-pecuniary damages were also caused by both accidents. The trial judge had apportioned 40% of the damage to the first accident. The Court of Appeal affirmed that apportionment. The end result was that the plaintiff’s damages award was increased by about only \$13,200 representing the balance of the non-pecuniary damages assessment. The plaintiff did not get the balance of the pecuniary damages claim. The amount in issue was about \$120,000 – the other 60% of the pecuniary damages that would have been attributed to the second incident if it was the sole legal cause of the pecuniary damage claims. The dissenting judge held that the plaintiff was a thin-skull plaintiff and was entitled to all of the pecuniary damages.

Bourque is better understood as an unusual combination of standard damages assessment of future loss of income taking into account negative and positive contingencies, but using ambiguous language, and global assessment.⁶⁹ This is clearer if we first imagine that the reason B left work was not a later tortious event but some event that was not actionable. Whatever pain B had from the accident did not render her unable to work. It was only after the later event that she left work, never to return again. In this example, the only principled basis upon which to allocate any portion of the loss of income to the earlier actionable accident would be to conclude that it had created a substantial possibility that B would have left work permanently after the date of the later event, even if the later event had not occurred. If that substantial possibility was 40% - that is, there was a 60% chance she would not have left work – B would have been entitled to 40% of the value of the loss of income assessment. She would not get the

⁶⁷ *Athey*, para 24.

⁶⁸ (1991), 82 D.L.R. (4th) 574, 118 N.B.R. (2d) 394, 296 A.P.R. 394 (N.B.C.A.), leave to appeal refused (1992), 87 D.L.R. (4th) vii (S.C.C.)

⁶⁹ The only other explanation is that the attribution to the first accident amounted to a loss-of-chance award, but an award on that basis would have been an error in law.

balance. Now let's revert to the Bourque situation where the later event is actionable. The second incident converted the possibility that she would not work again into a certainty. She had left work before the trial of the actions. The courts accepted that she would never work again. We can say that the second action converted possibility into certainty. But, that does not mean that the first accident did not create the possibility that the second converted into certainty. What had occurred is not undone. So, the second accident did not "destroy" or "eliminate" whatever the value was of the damages arising from the first accident as they existed immediately before the second. On the Bourque evidence, that remains 40% of the value of pecuniary damages claim.

I suggest that settlement of the first incident action created a dilemma that the judges saw but do not mention in their reasons. Most of the pecuniary damages claim (about \$176,000) was for loss of income. The judges knew about the fact of the settlement. We are not told what they knew about the details but the double satisfaction rule would have prevented B from recovering for loss for which she had been paid in the settlement. The reasons do not suggest that the first action settlement included a provision under which B would reimburse the settling defendants on some basis if awarded more than a certain amount for some claims in the second action. So, we have to assume that the second action was tried on the basis that the judges assumed that B would get to keep whatever amount she was awarded. And, we should assume that the trial judge and the majority in the Court of Appeal thought that the plaintiff had settled the first action for too little but were not prepared to let her make this up in the second action. If they applied global assessment, they would have had to choose between the first and second accidents as the cause of the damages the plaintiff was claiming. If they chose the first, she would get nothing more. She had settled that action. If they chose the second, she would get everything. The majority of the judges were not prepared to permit either result.

Global Assessment – Keeping Things Simple

As I have explained, global assessment is applied in a manner that presumes joint liability *does not* exist for the injuries or losses whose value is being determined. On the whole, the global assessment approach simplifies the process of damages assessment in successive incident situations. More often than not, global assessment eliminates what might otherwise be difficult conceptual issues. This may be restated in a manner some judges might enjoy: it provides a common sense rather than metaphysical approach to damages assessment in successive incident situations.

The key distinctions between global assessment situations and joint liability situations invoke temporal and causation questions. Joint liability may have concurrent causation; that is, the injury for which the damages are awarded was caused by two or more legal causes. Where global assessment applies, each of the incidents is assumed to have caused legally separate (divisible) injury. The temporal aspect is this: where global assessment applies, the earlier causative event (not the consequences – just the event) is treated as if it was finished by the time the later causative event occurred. The general premise of joint liability based on causation is either that (1) the independent (separate)

misconduct of the wrongdoers W1 and W2 combined to be the cause of the injury or (2) the independent misconduct of W1 and W2 would be a cause if the other had not occurred.⁷⁰

Personal Injury Claims

Vehicle accidents provide a clear example of the temporal aspect of global assessment situations. In the first example, we have two or more incidents occurring sufficiently close together in time that we cannot separate the injury consequences of the incidents. The incidents, then, are treated as concurrent causes. This is easy to imagine. Two vehicles collide. People in the vehicles are seriously injured. A few moments later, before anyone has had any opportunity to determine the extent of the injuries (and of course before any of the people recover from their serious injuries) another vehicle becomes involved in some manner significant enough to also injure the occupants of the vehicles involved in the original accident. At trial, the evidence is that the forces from either the initial accident or the later individually or collectively were sufficient to cause all of the physical injuries sustained by the vehicle occupants. That both events were independently sufficient does not mean that neither is *the* cause; nor does it mean that only one or the other is *the* cause. Rather, both events are *a* cause.⁷¹ There will be a finding that all of those at fault for the two impacts (and who may be held liable for that fault) are jointly liable.

Now imagine the same people involved in two incidents sufficiently separated by time that we have reliable evidence as to the state of their health (their injuries) as a result of the first incident, as it was immediately before the second incident. This is the global assessment situation. Global assessment is a consequence of the interaction of two of the rules governing damages assessment (in tort) that, together, make up the restoration principle.

The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's injury.⁷²

In short: (1) the injured person is to be put back in the position the person was before the actionable event occurred (the "original position" - the position the person probably was in before the incident and likely would have continued to be in (likely

⁷⁰ Justice does not permit W1 and W2 to both escape liability in this situation. Neither of W1 nor W1 is permitted to argue that his or her misconduct did not make a difference because the injury would have occurred in any event. Since neither is permitted to escape liability by arguing their conduct cannot be a cause, the conduct of both has to be deemed a cause. You likely know this type of situation as the *Cook v. Lewis* principle.

⁷¹ *Athey*.

⁷² *Athey*, para. 32. See, also, *Blackwater v. Plint*, [2005] 3 S.C.R. 3 at para. 74, 2005 SCC 58: "... at law a plaintiff is entitled only to be compensated for loss caused by the actionable wrong" citing *Athey*.

means possibility not probability)⁷³ if the incident had not occurred and (2) the corollary that the injured person is not to be put in a better position because the injury occurred than if the injury had not occurred. This is the restoration principle that Major J. in *Athey* described as the basic principle of tort law.⁷⁴

The restoration principle has two branches. The first is that the plaintiff should not be left in a worse position than she would have been in had the defendant not acted wrongly; the second, that the plaintiff should not be put in a better position than she would have been in had the defendant not acted wrongly. ... The plaintiff's claims will be negated if they are inconsistent with the second branch of the restoration principle, the defendant's if they are incompatible with the first.⁷⁵

A good, recent, judicial discussion of the difference between joint liability and global assessment exists in the Alberta Court of Appeal's decision in *Leoppky v. McWilliams*.⁷⁶ Three paragraphs nicely outline the issues.⁷⁷

[21] In stark contrast, the damages alleged against the McWilliamses in Leoppky's statement of claim cannot be the same as the damages for which Krakner might be responsible, as alleged in the third party notice. Rather, the damages in the McWilliamses' claim must relate to the plaintiff's damages arising out of the 1996 motor vehicle accident as opposed to the damages arising from the Krakner accident. The damages alleged in the 1996 action cannot be the same as the damages for which Krakner can be liable.

[22] It is a fine distinction. A superficial review of the pleadings may suggest that the damage caused by both accidents is the same because Leoppky claimed damages for dystonia in both the 1995 and 1996 actions. Common sense, however, dictates that Krakner and the McWilliamses cannot be liable for the same damage, although they might be liable for different aspects of Leoppky's dystonia condition. For example, Krakner might be liable for certain injuries, including the genesis of Leoppky's dystonia. If so, the McWilliamses could not be responsible for causing the dystonia *per se*, but they could be liable for aggravating the dystonia and increasing Leoppky's suffering.

[23] This distinction is frequently drawn in aggravated injury cases. The defendant must take the plaintiff as he finds him, but does not need to pay for the original injury. Leoppky may have suffered dystonia related injuries in both the 1995 and 1996 collisions, but Krakner and the McWilliamses cannot be liable for the same dystonia damages. Since the plaintiff is not claiming for damage caused by the Krakner accident in the 1996 action, the McWilliamses cannot be liable for any losses caused by Krakner.

⁷³ Probability is not required because the likelihood of future hypotheticals is determined on a possibility not probability basis – *Athey* at para. 27, *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, 16 D.L.R.(4th) 1, *Snark*, at pp 62-65.

⁷⁴ *Athey v. Leonati*, [1996] 3 S.C.R. 485 at 427, para. 32. **Also Blackwater v. Plint, para 74, citing Athey.**

⁷⁵ Allan Beever, "Cause-In-Fact: Two Steps out of the Mire" (2001), 51 U.T.L.J. 327 at the text associated with fn 66. I highly recommend the Beever article to those interested in cause-in-fact issues.

⁷⁶ 2001 ABCA 197 at para. 2, 20-26 (CanLII), 202 D.L.R. (4th) 260, [2001] 9 W.W.R. 281 (C.A.).

⁷⁷ *Leoppky*, 2001 ABCA 197, para. 21-23.

However, in practice, you will find cases in which there was a finding of some jointly caused injury, despite what logic and case law say about sequential multiple incident cases not creating overlapping injury and joint liability because, in theory later incidents cannot cause injuries already caused by the earlier incident. The explanation is that the judge (or jury) concluded that the evidence did not permit a meaningful finding of separate injury.

I emphasize that it is very possible to have the problem of inability to differentiate amongst the some or all of the consequences of the multiple incidents even when the incidents are separated by a measurable amount of time. All that is needed is inadequate evidence as to the condition of the injured person before any of the later incidents. *E.D.G. v Hammer* – and probably most cases involving multiple sexual assaults – will present this problem to some extent. The problem could occur in any other successive incident situation. However, at least there it is less likely that the information gap will exist, if only because the injured person likely will have obtained medical treatment if there was any injury of any significance; or, if the damage is to property, that adequate evidence exists as to the condition of the property at various times before and after the various incidents.

In practice, so long as all of the defendants held liable have sufficient assets to pay their allocation, it does not matter whether the allocation is their “share” of a joint liability or their portion, alone, of a global assessment. That means that what may look like joint liability in a global assessment situation is not. An example is the recent Ontario decision in *Gorman v. Falardeau*.⁷⁸ There were three accidents over a number of years. The plaintiff sued the alleged wrongdoers in each incident. The plaintiff claimed damages for personal injury, past and future loss of income and medical expenses. The actions were tried together. At trial, liability for past and future loss of income and future care was assigned solely to the first incident defendants. However, general non-pecuniary damages awards were made against the defendants in each of the three actions. The defendants in the first incident appealed.

In *Gorman*, the Ontario Court of Appeal summarized the appellants’ argument on damages this way. “The appellants argue that the trial judge erred in globally assessing damages and concluding that they were responsible for only 58.33% of the general damages but then holding them solely responsible for all past and future income losses and all future care costs.”⁷⁹ The mathematical result of adding up the non-pecuniary general damages awards in the three actions is that the first incident defendants were liable for 58.33% of the general damages. However, the trial judge did not find that all three incidents caused the same injuries and then assign 58.33% of the value of the injuries as the damages payable by the first incident defendants. Rather, the trial judge decided that the global value of all of the injuries for which non-pecuniary damages were awardable was \$120,000, without regard to liability and without regard to which incident caused what injury. The trial judge then considered the evidence regarding what injury

⁷⁸ 2005 CanLII 18837, 254 D.L.R. (4th) 347, 23 C.C.L.I. (4th) 167 (Ont. C.A.) affirming 2002 CarswellOnt 2091 (Ont. S.C.J.).

⁷⁹ *Gorman*, 2005 CanLII 18837 at para 37.

was caused by each of the three incidents and concluded that the value of the first injury was \$70,000; the second injury \$20,000; and, the third injury \$30,000. (70 divided by 120 is 58.33). The trial judge had instructed himself properly, stating: “I am of the view that the assessment of the Plaintiff’s injuries must be made at certain points in time in order to determine his condition for the purpose of apportioning damages between MVAs #1, 2, and 3.”⁸⁰

An important consequence of the global assessment approach is that there is an injury and damages allocation attributed *solely* to each of the successive incidents. There is the potential for a shortfall in what the plaintiff is able to recover, even if one or more of all of the defendants have sufficient assets to pay the entire assessment or even if, collectively, all of the defendants have sufficient assets. This is because joint liability “between” the incidents does not exist. The plaintiff has to look to the defendants in each incident for satisfaction. They either have sufficient assets or they do not. So, global assessment will not matter at all to the injured person if at least one of the defendants in each of the incidents, or the defendants collectively in each of the incidents, have sufficient assets to pay the allocation to that incident. It will matter if there could be a shortfall. This problem of a potential shortfall in recovery would be probably be less likely if the damages were held to have been caused jointly by all of the incidents. Successive incident claims probably occur more frequently in actions arising out of motor vehicle accidents than from any other source. In Canada, there is usually some form of liability insurance (or equivalent) available to pay the injured person’s claims.⁸¹ It is worth considering to what extent the judicial choice of global assessment was influenced by the fact that there was usually enough insurance available that, ultimately, it usually did not matter to the injured person which incident paid what amount.

Despite what I have said above, you will see cases involving successive incidents in which the judge has found or seems to have found that the injuries, or some portion of the injuries, were caused by more than one of the successive incidents. I have mentioned one, *Bourque v. Wells*, although I think there is a better explanation for that result. The circumstances that tend to increase the likelihood of a joint liability finding in successive incident situations seem to involve gaps in the evidence which, for whatever reason, lead the trier-of-fact to conclude that it is not practicable to make a valid conclusion as to P’s condition, and the compensable consequences of P’s condition, as of the time immediately before the later incident. I emphasize that it is very possible to have the problem of inability to differentiate amongst the some or all of the consequences of the successive incidents even when the incidents are separated by a measurable amount of time. All that is needed is inadequate evidence as to the condition of the injured person before any of the later incidents. Most cases involving multiple, successive, sexual assaults over an extended period of time will likely present this problem to some extent.⁸² The problem could occur in any other successive-incident situation. However, at least

⁸⁰ *Gorman*, 2002 CarswellOnt 2091 at para. 78 (Ont. S.C.J.).

⁸¹ Once upon a time, it was also likely that if there was insurance there would be enough insurance.

⁸² For example, *E.D.G. v. Hammer*, [2003] 2 S.C.R. 459, 2003 SCC 52 (CanLII), 230 D.L.R. (4th) 554, [2003] 11 W.W.R. 244 (S.C.C.) affirming 2001 BCCA 226 (CanLII), 197 D.L.R. (4th) 454, 4 C.C.L.T. (3d) 204 (B.C.C.A.), affirming (1998), 53 B.C.L.R. (3d) 89, [1998] B.C.J. No. 992 (QL) (B.C.S.C.).

there it is less likely that the evidence gap will exist, if only because the injured person likely will have obtained medical treatment if there was any injury of any significance; or the damaged property examined or seen in a way that produces usable evidence as to its condition.

In *Tort Law* (3d), Lewis Klar lists 7 rules that will, usually, tell you how to handle successive incident cases.⁸³ Ken Cooper-Stephenson's *Personal Injury Damages In Canada* (2d)⁸⁴ has a complete variation-by-variation breakdown of the successive incident complications. Both texts are always worth consulting if you are unsure.

There are recent plaintiffs' awards in England that, in my view, seem to be "nudge-nudge wink-wink" divisions of indivisible personal (physical or psychological) injury and the damages resulting from the injury, so as to produce an award that is less than it would have been if based on the entire injury.⁸⁵ This occurred notwithstanding that (or perhaps because) England, like common law Canada, uses joint liability not proportional (several) liability. These cases arise out of circumstances where the judges wanted to award the plaintiffs something for the injury but the judges (seemingly) could not justify holding the defendant(s) liable for all of the damages resulting from the injury, and also could not reduce the awards based on contributory fault.⁸⁶ Whether those cases will have any effect in Canada remains to be seen.⁸⁷

Property Damage Claims

Now, a few words about claims based on property damage. For the most part, the relevant principles applicable to assessment of damages in claims based on property damage are the same as those for damages assessment for personal injury where

⁸³ At p. 414

⁸⁴ (Carswell, Toronto, 1996)

⁸⁵ Some other commentators are more persuaded by the medical evidence.

⁸⁶ An alternative explanation for these cases is a sleight-of-hand use of probabilistic causation; that is, causation based on liability for "causing" some percentage of the injury. I recommend A. Porat & A. Stein, "Indeterminate Causation and Apportionment of Damages: An Essay on Holtby, Allen and Fairchild" (2003), 23 O.J.L.S. 667, to those interested in reading about the dance. The appeal in another case that could involve this issue, *Barker v Saint Gobain Pipelines Plc*, [2004] EWCA Civ 545 is scheduled for argument this year in the House of Lords. *Barker* is significant for a number of reasons, including that it specifically rejected proportionate causation. The seminal Canadian articles in legal jurisprudence on "probabilistic causation" are John G. Fleming "Probabilistic Causation in Tort Law" (1989), 68 Can. Bar Rev. 661 and Fleming, "Probabilistic Causation in Tort Law: A Postscript" (1991), 70 Can. Bar. Rev. 136. A recent article is J. Cassels and C. Jones, "Rethinking Ends and Means in Mass Tort: Probabilistic Causation and Risk-Based Mass Tort Claims after *Fairchild v. Glenhaven Funeral Services*" (2004), 82 Can. Bar. Rev. 597.

⁸⁷ *E.D.G. v. Hammer* could be seen as a Canadian example. The trial judge held that some of the plaintiff's injuries were not caused by the wrongful acts of the defendant but by other events. The trial judge, however, did not attempt to divide the injuries into compensable and non-compensable. Rather, the trial judge held that the defendant was a cause of 90% of the total injury: see [1998] B.C.J. No. 992 at para. 56-57. However, it is more probable that what the trial judge meant was that the conditions which the evidence identified as not having been caused at all by the defendant could be identified and separated out and should be held to have been the cause of 10% of the damages which flowed from the plaintiff's injuries.

successive incidents are involved. However, there may be a difference in loss of revenue (profit or income) claims based on the property damage.

In a property damage case, if W1's conduct damages one part of the building and W2's another, with no overlap in the work required to repair the building damage, and there is no injury (expense) other than the cost of repair, then again W1 and W2 did not cause the same injury (the same damage). In these cases, the injury suffered by P is divisible.

But, what if there are successive incidents (not temporally concurrent incidents) and the work required for the repair of the building damage overlaps? Or the nature of the building damage is such that the downtime period – the loss of revenue period – that would have resulted from the earlier incident overlaps with the period that would have resulted from the later incident and the later incident occurs before the repairs have begun? We have three variations. (1) Both repair periods are equivalent in length. Just the first accident incident pays. The second incident did not cause additional damage.⁸⁸ (2) The time required for the repairs for the later incident damage *is less than* that required for the first incident repairs. The first incident still pays. The later incident did not cause additional damage.⁸⁹ (3) The time required for the later incident repairs *is more than* the time required for the first incident repairs. This is an example of the later incident causing additional damage and poses no problem of principle in respect of the extra repair period. The extra repair period is a consequence of only the second incident. However, the original repair period is attributable only to the first incident.⁹⁰

The case law reason why only the first incident pays for the loss of income attributable to the entire repair period that would have resulted from the first incident, and the second incident is ignored in respect of that period, is the Supreme Court of Canada decision in *Sunrise Co. v. (The) "Lake Winnipeg"*. In *Sunrise*, the vessel K was damaged due to the fault of the master of the vessel W. On the way to dry-dock, K was damaged again. The second event was not a culpable incident in any way; that is, it was no one's fault. The repair period for just the damage from the first incident damage would have been 14 days. The repair period for just the damage from second incident damage would have been 14 days. By a 5-2 majority, the Supreme Court of Canada held that the owner of vessel K could recover the entire 27 days' of loss of revenue from the owner of the vessel W. The majority's rationale was that there was "no causal link between the second incident and the loss of profit suffered by the owners of the Kalliopi L, such damage being merely coincidental."⁹¹ In essence, the majority held that the loss of revenue had,

⁸⁸ *Sunrise Co. v. (The) "Lake Winnipeg"*, [1991] 1 S.C.R. 3, 77 D.L.R. (4th) 701. The majority held that "the nature of the second casualty, whether tortious or otherwise, was irrelevant in any determination as to profit-earning capacity." (headnote)

⁸⁹ *Sunrise*.

⁹⁰ *Sunrise*.

⁹¹ *Sunrise*, para. 33 – the penultimate paragraph – of the majority reasons.

for legal purposes, already occurred before the later event.⁹² That has to be the meaning. Otherwise, the statement that there was no causal link makes no sense.

Does *Sunrise* mean that property damage claims involving successive incidents are handled the same way personal injury claims? The second incident in *Sunrise* was not caused by a wrongdoer but the majority in *Sunrise* held that “the nature of the second casualty, whether tortious or otherwise, was irrelevant in any determination as to profit-earning capacity.” (headnote) On the surface, that seems to make *Sunrise* law for property damage incidents the same as that which we reviewed in relation to personal injury claims. But, is it? Not quite. It is where the later incident is a culpable event; that is, where the later incident is someone’s fault. However, it is not where the later incident is a non-culpable event that has nothing to do with the initial incident (so that it cannot be considered as a compensable contingency resulting from the initial incident).

Let us go back to personal injury principles. So far, we’ve been dealing only with successive incidents all of which were culpable. What does current Canadian personal injury law say about the situation where the later incident *is not* a culpable event and has the effect of reducing loss due to the earlier incident? It holds that the later incident reduces the damages recoverable by the injured person.⁹³ It is not ignored. Go back to *Athey*. The Supreme Court dealt with subsequent non-culpable events under the heading “Independent Intervening Events” and approved the jurisprudence that holds the damages are reduced.⁹⁴ *Athey*’s explanation was that, otherwise, the plaintiff would be over-compensated. The subsequent event was not related to the earlier tort and thus was part of the plaintiff’s original position. Therefore, the restoration principle required that it be taken into account and the damages reduced.⁹⁵

At least for situations where the later event is not a culpable event, the result in *Sunrise* is inconsistent with the law as later stated in *Athey* (*Sunrise* is not mentioned in *Athey*⁹⁶), unless there is something which, in principle, means the statements in *Athey* do not apply to claims for loss of revenue as a result of property damage. This paper is not the place to discuss that issue.⁹⁷ The result in *Sunrise* has been criticized as inconsistent with principle.⁹⁸

⁹² The dissenting SCC judges held that 13 days of downtime were caused only by the first incident and 14 caused jointly both incidents, so S should received 20.5 days, by analogy to apportionment under apportionment statutes.

⁹³ See Klar, *Tort Law* (3d) at p. 410 and, of course, *Athey*, at para. 31-36.

⁹⁴ *Athey*, paragraphs 31. The leading Canadian case is *Penner v. Mitchell* (1978), 89 D.L.R. (3d) 343, 6 C.C.L.T. 132 (Alta. C.A.).

⁹⁵ *Athey*, paragraphs 32-33.

⁹⁶ Although 4 of the 7 judge panel in *Athey* sat on *Sunrise*.

⁹⁷ The thesis seems to be that all losses from property damage may be considered as occurring immediately upon the event that causes the property damage; therefore subsequent events are irrelevant to the assessment of the loss arising from the earlier event. See, Klar, *Tort Law* (3d) at p. 410, note 105, summarizing the argument – made by others, not Prof. Klar.

⁹⁸ The majority and minority conclusions in *Sunrise* are inconsistent with the law as set out in *Athey* and offend the restoration principle. See the discussion in Klar, *Tort Law* (3d) at pp. 410-11 and Beaver, “Cause-in-Fact”.

Global Assessments - Complexities & Making Things More Complex

There will be some repetition in this part for those reading the paper. Some of it is here to make this part easier to follow. For the rest, I apologize. At some point we say “I’ve done all I’m going to do.”

What I do in this part of the paper is look at some of the more complicated problems that arise out of successive incident claims. Some of what I discuss is perhaps theoretically possible but will not happen in practice because the global assessment approach will result in a conclusion that the consequence belongs to one and only one of the incidents.

First, let’s remind ourselves what global assessment means. The judge determines the injuries caused by the first incident by assessing the value of the injury caused in the first incident as if the trial of that incident occurred immediately before the later incident. So, the judge looks at P’s condition immediately as it was before the later incident and assesses the legally compensable consequences of that condition on the facts as they existed as that time. Whatever P already had at that point cannot have been caused by a later incident.⁹⁹

Let’s look at personal injury (physical, psychological, cost of medical care, loss of income) claims first.

If, in a personal injury case, W1’s misconduct causes a scar on P’s buttocks and W2’s misconduct a scar on P’s nose, and there is no overlapping injury, then W1 and W2 did not cause the same injury.

Assume a personal injury case, in which P alleges continuing psychological trauma because of the physical injuries resulting from two or more incidents or continuing loss of income due to the injuries sustained in both incidents. In order for this allegation to make sense, the factual basis must be that each incident, in itself, caused injury sufficient to cause the loss. May there be a finding that both incidents are legal causes of the trauma or the loss of income? If there is, is that necessarily a finding of indivisible injury so that the defendants from both incidents may be held jointly liable for the loss flowing from that injury? The current Canadian answer is no. If the injury or loss in issue was probably caused by the first incident, then it could not have been “caused again” in the later incident. The later incident defendants are liable only for additional loss, if any.¹⁰⁰ The problem we are looking at is how to handle the situation where the effects of a later culpable incident may be seen as “overtaking” the effects of an earlier culpable incident.

⁹⁹ Based on western conception of time and until somebody invents a workable time travel machine.

¹⁰⁰ Generally, Klar, *Tort Law* (3d) at pp. 410-15.

I will use an example based on an English case which some of you may remember from law school: *Baker v. Willoughby*.¹⁰¹ B's leg was injured in the first incident as a result of the negligence of W. The result was permanent injury. The result of the injury would have been permanent life-long pain, loss of income etc. However, before the trial of B's action against W, B was shot in the leg in a robbery. As a result, the leg was amputated. How would that affect the assessment of B's damages against W? The short Canadian answer is that any injury caused by the earlier incident is not also caused by the later incident; that is, the same injury cannot be caused twice. So, had B also sued the robber, the robber would not have been also liable for the loss caused by W. However, and this is a very important however, W's extent of liability is not reduced by the subsequent event. W's liability is assessed on the basis of the likely consequences of B's condition as it was at the time of trial. That is, B's damages are assessed as if the trial of the action against W had occurred immediately before the later incident. The rationale is to avoid injustice to B.¹⁰²

The dilemma in the *Baker* situation is this. The later incident would have caused the same injury, and in a broad sense the same continuing losses after the second incident, as the first incident if the first incident had not occurred. By continuing loss, I mean all of the loss that occurred after the date of the second incident and would have been considered a consequence of the first incident if the second had not occurred. Assume B sues both wrongdoers. The court will have 3 options to choose from when deciding which of the defendants should be liable for the compensable continuing loss. (1) It could hold both defendants jointly liable. (2) It could hold D1 liable only for the losses that occurred up to the 2nd incident but nothing after. D2 would be liable for the subsequent losses. (3) It could D2 liable only for any increase in the continuing loss as a result of D2's misconduct, if any, with D1 liable for all the rest.¹⁰³ The third approach is global assessment.

Assume P is injured in an accident the fault of W1. Some time later, P is injured in a second incident the fault of W2. Assume, also, the first incident is not in any legal sense a cause of the second incident. The second incident aggravates the injuries sustained by P in the first incident for some defined period. The injuries sustained by P in the first incident are not a cause of the second incident. The other side of the proposition that a wrongdoer is liable only for the injury the wrongdoer caused is that W1 is not liable for the aggravation and W2 is not liable for the initial injuries. W2 and W1 do not have joint liability for any of the injuries described in this paragraph. They have not caused the same injury.¹⁰⁴

However, let's assume that, as a result of the first incident P is no longer able to work. Assume, too, that the injury P sustained in the second incident would also have

¹⁰¹ [1970] A.C. 467 (H.L.). A recent Ontario decision reviewing the principles is *Gorman v. Falardeau* 2005 CanLII 18837, 254 D.L.R. (4th) 347, 23 C.C.L.I. (4th) 167 (Ont. C.A.) affirming 2002 CarswellOnt 2091 (Ont. S.C.J.).

¹⁰² Klar, *Tort Law* (3d) at pp. 411-12.

¹⁰³ This paragraph is a paraphrase of the principle (iv) paragraph in Klar, *Tort Law* (3d) at 414-45.

¹⁰⁴ See, for example, *Leopky v. McWilliams*, 2001 ABCA 197 at para. 2, 20-26 (CanLII), 202 D.L.R. (4th) 260; [2001] 9 W.W.R. 281 (C.A.).

rendered P unable to ever work again if P had been fit for work. What then? Decisions such as *Baker v. Willoughby* and the more *Gorman v. Falardeau* tell us that the loss of income loss relates only to the first incident. But what about permanent pain and suffering from both incidents? Or psychosis? If the health professionals are prepared to testify that the psychological trauma, or the pain, is caused by both incidents, and that they are not able to allocate any part of the injury just to one incident rather than the other, then we have the same (probably to some extent indivisible psychological) injury.¹⁰⁵ Otherwise, there is separate injury and it is “simply” a matter of the judge making the proper findings of fact.

Whether the injury is divisible is a question of fact. Once a finding is made that the injury is divisible, it is “merely” a matter of deciding what the evidence shows as to which incident caused injury or loss that has already occurred as of the date of trial. The result may be arbitrary, but if so it is no less arbitrary than assuming the injury or loss is caused by more than one incident and then allocating portions of the loss to each of the incidents.

Now, what about future consequences? There may be some (legally) inevitable consequences. There may be some probable consequences. And, there may be some consequences whose likelihood is merely a possibility; that is, less than 50%. As discussed, whatever injury or loss P had already sustained before the later incident, or would inevitably have sustained or would have probably sustained even if it had not yet been sustained, cannot be legally caused again. That loss is attributed to the earlier incident. That leaves just (1) new injury and (2) future possible loss whose likelihood is less than probable (less than 50%). Remember that future loss awards are based on possibility, not probability. *Athey* states:

Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood ... if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation ...¹⁰⁶

The new injury situation does not present a problem of principle. Aggravation of old injury is compensable new injury. If the facts permit a conclusion that the later incident has increased the possibility of some future problem stemming from the initial incident, that increase may be a compensable new injury. It is certainly compensable if the future contingency is a probability. It should be compensable, in accordance with the possibility, even if the contingency is less than a probability. This is because we are now dealing with damages assessment and not liability, so the issue is no longer the probability of some injury (that was decided in the injured person's favour at the liability

¹⁰⁵ Which seems to be what the trial judge did with 90% of the consequences in *EDG v Hammer*: see para. 56-57. The Supreme Court said this was a question of fact and there was no palpable error (and implicitly then no legal error), so it was not a finding with which it could interfere.

¹⁰⁶ *Athey*, para. 27.

stage), but the future possibility of the occurrence of the particular injury being valued. Similarly, if the later incident has decreased the possibility (probability or something less) of whatever recovery was optimal before the later incident occurred, then that decrease should be compensable new injury. All of this assumes, of course, that there is sufficient evidence to allow conclusions on the future consequences which are something more than speculation.

Is there anything left? Is there be some other sort of future possibility (contingency) that has to be regarded as caused by both the earlier and later incidents. Even if the facts permit this analysis, the answer seems to be “no”.

I will attempt to explain this in another way that, I hope, will help to clarify. First of all, as of the trial, the evidence must allow a conclusion that the later incident has either (a) made some amount of relevant difference to what P’s condition would have been if the later incident had not occurred or (b) there is a substantial possibility that the affects of the later incident will, at some point in the future, begin to make a relevant amount of difference to P’s condition. All of you, here, understand this as the so-called “crumbling skull” principle. The later incident isn’t responsible for what would probably would have happened to P in any event; or, as *Athey* puts it, what was inherent in P’s original position – original position meaning P’s condition and all of its probably consequences immediately before the later incident. *Athey* states:

The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage ... Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award ... This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.¹⁰⁷

The problems attributed to the later incident will fall into one or more of 3 categories: (1) temporary exacerbation of existing injuries; (2) entirely new injuries unrelated in any way to the old injuries; and (3) new injuries that are in some relevant way connected to the old injuries, beyond mere temporary exacerbation. The third category divides into (a) permanent exacerbation of old injuries and (b) new injuries that are alleged to be the result of pre-existing conditions and the trauma from the second incident. In the 3(b) category, we are dealing only with new injuries which are *not* either a probable or inevitable future consequence of the old conditions; that is, we are dealing with injuries which were only a possibility as result of a the earlier incident. For convenience, I will call all injury within (3) overlapping injury.¹⁰⁸

¹⁰⁷ *Athey*, para. 35. (Internal citations omitted)

¹⁰⁸ In *E.D.G. v. Hammer* the trial judge, at para 56-57, used overlapping to describe indivisible injury.

The combination of the successive incidents may make the future consequence at least a probability where it was not, before. In that case, the second incident is a clearly a cause of the future consequence. However, that cannot under current principle, and should not in any event, result in the first incident no longer being a cause. The point is that the if consequence was compensable consequence of the first incident before the second then it must still be after the second.¹⁰⁹ All that has happened is that there is now another cause; a cause that makes the occurrence of the consequence a legal certainty. So this should be a case of seems to be divisible injury whose consequences the court will have to apportion by some appropriate formula. Again, principle provides the formula once the judge decides what the value of the consequence (the injury) is. That value is based on the assumption the consequence manifests. Before the later incident, the compensable value was the discounted value based on the likelihood of the consequence manifesting. That should still be the value of the damages allocated to the first incident. After the second incident, the likelihood is higher. The difference should be the value of the damages allocated to the later incident. (It may be that this description shows that what we have is indivisible injury with divisible consequences. That is a moot point if the description does not affect the result.)

Alternatively, the second incident may just increase the likelihood of the occurrence of the future consequence beyond what the likelihood was after the earlier incident, without making the likelihood at least a probability. Is this increase compensable injury? If it could be, then the increase would be compensable under the analysis I've outlined so long as the difference is substantial enough to be considered relevant; that is, it is substantial enough to be viewed as having made a difference. However, it seems to me that under current law, an increase in the likelihood of a future personal injury consequence, which increase does not make that consequence probable, is not compensable. It is tantamount to a loss of chance claim.¹¹⁰

Assuming that there is evidence that allows a meaningful conclusion that the likelihood of some future loss has been increased from possibility to probability, does that mean we have separate divisible injury or indivisible injury with joint liability?. In principle, the better answer seems to be that we have divisible injury, rather than indivisible injury with joint liability subject to apportionment, but I am not sure that it matters in the end result (at least so long as the "correct" defendant has assets.) Where the issue arises, I suggest that, for practical reasons (which may include implicit recognition of collectability issues), judges are more likely to treat future consequences as having

¹⁰⁹ Non-culpable subsequent events can reduce the value of the first injury. Death is a good example. Anything inherent in the injured person's pre-incident situation is the broader principle. We use the "crumbling skull" as the jargon description.

¹¹⁰ This is the form of loss of chance argument that *Athey* specifically stated it neither approved nor disapproved: see para. 37-38. However, Canadian tort law currently does not permit loss of chance theories, however disguised, in most tort claims. Klar, *Tort Law* (3d) at 404-405. There is a medical malpractice loss-of-chance causation case on its way to the Supreme Court of Canada: *Fisch v. St-Cyr*, [2005] R.J.Q. 1994 (C.A.), leave to appeal allowed 2006 CanLII 4736 (S.C.C.) (February 16, 2006). Those interested in the area may know that the House of Lords recently dealt with the issue and again rejected loss-of-chance theory outside of the narrow areas where it is currently permitted: *Gregg v Scott*, [2005] UKHL 2.

been caused by the successive incidents (and allow for apportionment between the defendants held liable) where the evidence at all allows the approach.

The explanation for this (beyond judgment collectability issues) has to lie in our approach to the assessment of future losses. There, as I have explained, the “likelihood” precondition is possibility not probability. If the future consequence is only a possibility, what we mean is that it is also possible that it may not occur. That was the situation before the later incident. It is still the situation after the later incident. It is compensable in accordance with the possibility that it may not occur. That the numerical values we assign to the possibilities may have changed does not alter the core fact: there is still no certainty. But future possibilities are not compensated merely because they are possibilities. The possibility has to be a significant possibility. Either the possibility is significant or it is not. It may be that it is not practicable for law to attempt to value the increase in the likelihood of the consequence for damages assessment purposes, even if statistical theory permits a statistically valid conclusion as to the increase in the likelihood of the future consequence.

In any event, if each of the successive incidents could be seen, separately, to be a cause of the same future significant possibility that is less than a certainty, then that possibility will be treated as indivisible injury caused by both events. All of you are very familiar with the leading case that says that there may be joint liability for indivisible injury if W1 (the first incident wrongdoer) is also capable of being held liable: *Athey*.¹¹¹

Missing Wrongdoers

At least in Ontario, missing wrongdoer situations – by missing, I mean a situation where, for some reason, one of the wrongdoers who caused the injury is not a party, in some relevant sense, to the injured person’s action – can complicate the meaning and application of joint liability and several liability rules. Where joint liability to the injured person governs, there may be apportionment issues as between injured person and wrongdoers or as between wrongdoers if, for some reason, one or more of the concurrent wrongdoers is not a party to the action in some relevant capacity. Those issues may not arise if the missing wrongdoers were once parties to the action in some relevant capacity. Whether the issues will arise as between injured person and wrongdoers and affect the injured person’s claim may depend on whether the injury is one for which the injured person is also at fault.

There is, now, a trilogy of Ontario cases that holds that, where the Ontario *Negligence Act* applies and at least where the missing wrongdoers were never parties to the action at all, the judge is to pretend that the missing wrongdoers do not exist and apportion all of the fault only between the parties to the action. It is probable that this rule

¹¹¹ However, sometimes W1’s conduct won’t be a legal cause even if W1’s conduct (the first incident) was an historical cause. This is where issues of the foreseeability of the second incident may come into play. Causation is not a sufficient condition of liability. There has to be a legal duty not to cause injury. And, even if there is a legal duty not to cause injury, there may be some types of injury that are not compensable, for various reasons, even if there is a duty, breach of the duty, and damage resulting from that breach. Aspects of those issues are common to all areas of obligation law.

was meant to apply only as between injured person and wrongdoers if and only if the wrongdoers' liability for damages (if held liable) is joint.¹¹² It was probably not intended to apply as between injured person and wrongdoers where the damages liability is proportional (several) and, similarly, not between wrongdoers where contribution liability is proportional. I am not going to discuss this area of the law beyond what I have just written. It is extremely messy.¹¹³

Mass Torts

Joint liability may be a Damoclean sword over the target defendants' heads in mass tort litigation. No matter the underlying theory, holding all members of an industry, or large segments of an industry, liable for some injury which was probably caused, in fact, by some member of the industry but probably not all members, and only possibly but not probably any of the members sued, is a flavour of joint liability.¹¹⁴ The potency of the weapon has resulted in the statutory elimination, in the United States, of joint liability for some claims. That process has started in Australia.

Punitive Damages

Punitive damages may not be awarded against a defendant whose liability is based only on vicarious liability, nor against a joint wrongdoer who has not actually committed the conduct which is the basis for the punitive damages award.¹¹⁵ An award of punitive

¹¹² There are a number of reasons for this, including that, otherwise, the injured person's damages will be reduced by more than the injured person's "true" degree of fault unless the injured person sues all of the wrongdoers. That, of course, is exactly what joint liability means the injured does not have to do. A brief example will show one of the problems. Assume the injury is equally the fault of P, W1 and W2. If P sues W1 and W2, P's recovery is reduced by one-third. What happens if, for whatever reason, P sues only W1. If they are still equally at fault, does this mean P's reduction is now one-half?

¹¹³ Those who must can read all about it in a trilogy of articles I wrote for the Advocates' Quarterly. "Allocating Financial Responsibility among Solvent Concurrent Wrongdoers" (2004), 28 Adv. Q. 137; Postscript: The Retreat Begins (2004), 28 Adv. Q. 389; and Postscript 2: The Retreat Continues (2005), 29 Adv. Q. 276. The Ontario approach seems to have been rejected by the Alberta Court of Appeal in *Amoco Canada Petroleum Co. v. Propak Systems Ltd.* (2001), 200 D.L.R. (4th) 667, 4 C.P.C. (5th) 20 (Alta. C.A.). At para 20, that court wrote about section 2(1) of Alberta's *Contributory Negligence Act*, R.S.A. 2000, c. C-27: "The effect of this provision is to compel the court to determine the degrees of fault of all contributors to the plaintiffs' damage, whether or not they currently are or ever have been parties to the action. In effect, this provision acts as a safeguard to establish the proportionate share of each defendant's liability, whether settling or non-settling." However in *Sitko v. Hartum*, 2004 ABQB 854 (CanLII) the trial judge seems to have concluded the Ontario "missing tortfeasor" approach would apply in Alberta, too.

¹¹⁴ I refer readers to the recent article by J. Cassels and C. Jones, "Rethinking Ends and Means in Mass Tort: Probabilistic Causation and Risk-Based Mass Tort Claims after *Fairchild v. Glenhaven Funeral Services*" (2004), 82 Can. Bar. Rev. 597.

¹¹⁵ The cases include: *Gauthier v. Beaumont*, [1998] 2 S.C.R. 3 at para. 108-110 per Gonthier J., 162 D.L.R. (4th) 1 (S.C.C.); *Béliveau St-Jacques v. Fédération des employés et employés de services publics inc.*, [1996] 2 S.C.R. 345 at para. 64-65 per L'Heureux-Dubé J dissenting on other grounds, 136 D.L.R. (4th) 129 (S.C.C.); *L. (H.) v. Canada (Attorney General)*, 2001 SKQB 233 at para 78 (CanLII), [2001] 7 W.W.R. 722, 208 Sask. R. 183 (Sask Q.B.); *A. (M.) v. Canada (Attorney General)*, [2001] S.J. No. 686 at para. 125-149, [2002] 5 W.W.R. 686, 212 Sask. R. 241 (Sask Q.B.); *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (2000), 46 O.R. (3d) 760 at para. 22-23 (C.A.), reversed on other grounds [2001] 2 S.C.R. 983, 2001 SCC 59; *K. (W.) v. Pornbacher*, [1998] 3 W.W.R. 149, 34 C.C.L.T. (2d) 174 at p. 200-201 (B.C.S.C.); *J.-*

damages based on some notion of joint liability is inconsistent with the current basis for punitive damages in Canadian jurisprudence. Joint liability is based either on the conduct of each of the concurrent wrongdoers causing the compensable injury or some relationship between wrongdoer and another person (other than causation of the injury) which makes the latter liable for injury caused by the wrongdoer. The trend of modern Canadian jurisprudence in the common law jurisdictions and Québec is to hold that punitive damages may be awarded only against wrongdoers who have, in fact, acted in a manner that permits and merits the imposition of punitive damages.

The other basis for imposing joint liability regardless of who commits the impugned act – the joint wrong – is also not applicable as the basis for punitive damage liability. Punitive damages are not awarded to compensate for injury but to punish sufficiently wrongful conduct.¹¹⁶ Therefore, if there is to be an award of punitive damages against two or more defendants, there will have to be finding that the conduct of each, separately, justifies the punishment of each defendant. In *Whiten*, the Supreme Court of Canada stated: “Punitive damages target not loss, but conduct ... The defendant's wrong must then be considered directly and separately in order to assess its severity and, accordingly, the appropriate degree of punishment. The other forms of damages look to the loss of the plaintiff, but punitive damages refer essentially to the degree of culpability of the defendant's action.”¹¹⁷

In *Townsvie Properties Ltd. v. Sun Construction and Equipment Co.*, W1 had a contract to build on P's land. W2 was a contractor. W2 entered on the instructions of W1 to excavate for construction. The entry was lawful initially but later became trespass for reasons W2 did not know about and had no reason to know about. W2 reasonably relied on W1's instructions at all times. Under applicable law, the fact that the entry later became trespass made all of the entry trespass *ab initio*. The trial judge awarded punitive damages against both W1 and W2. The conduct upon which the punitive damages award was based was by W1, only. The Ontario Court of Appeal set aside the punitive damages award against W2. It held that liability for punitive damages is several, only; that is, the mere fact that the defendants were joint tortfeasors was not sufficient for both to be liable for the punitive damages if one was. The Court stated that the trial judge, in awarding punitive damages against each of the wrongdoers, “erred in failing to consider the evidence against each of these defendants separately.”¹¹⁸ If we consider W1 and W2 involved in a joint venture, or consider them principal and agent, they were common law joint tortfeasors. *Townsvie* has to be understood to mean that the Court of Appeal was

P.B. v. Jacob and Region 1 Hospital Corporation (1997), 192 N.B.R. (2d) 256 at para. 39-40 (N.B.Q.B.); *G.B.R. v. Hollett* (1996), 139 D.L.R. (4th) 260 (N.S.C.A.); *Peeters v. The Queen*, [1994] 1 F.C. 562, 108 D.L.R. (4th) 471 (F.C.A.); *Domenicantonio v. Finnigan* (1986), 74 N.B.R. (2d) 271 at para. 311 (N.B.Q.B.); *Kaur v. Moore Estate*, 2003 CarswellOnt 1536 (S.C.J.); *Townsvie Properties Ltd. v. Sun Construction and Equipment Co.* (1974), 7 O.R. (2d) 666; 56 D.L.R. (3d) 330 (C.A.) varying 2 O.R. (2d) 213, 42 D.L.R. (3d) 353 (H.C.J.). See, also, S. M. Waddams, *The Law of Damages* (Canada Law Book: Aurora, 1999 Looseleaf) paras. 11.420 – 11.425.

¹¹⁶ *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18 (CanLII), 209 D.L.R. (4th) 257, reversing (1999), 42 O.R. (3d) 641, 170 D.L.R. (4th) 280 (C.A.), varying (1996), 132 D.L.R. (4th) 568, 47 C.P.C. (3d) 229, [1996] O.J. No. 227 (QL) (S.C.J.)

¹¹⁷ *Whiten*, [2002] 1 S.C.R. 595 at para. 157.

¹¹⁸ (1974), 7 O.R. (2d) 666 at 669 (C.A.)

not prepared to apply the principle that the conduct of one joint tortfeasor is deemed to be the conduct of all in punitive damages claims.

In theory, *Townsvie* could be seen as a case where the joint purpose of at least one of the joint ventures (W2) should not be seen as tortious because W2 did not know and had no reason to know that its entry was trespass. Imputing W1's conduct to W2 would be a misuse of agency law. However, whatever room there might be to distinguish *Townsvie* was eliminated in a subsequent case. *Townsvie* was applied in *Kaur v. Moore Estate*.¹¹⁹ The trial judge stated:

An award of punitive damages should be specific to the blameworthiness and circumstances of the individual defendant. Because the purpose of punitive damages is to punish a particular person and not to compensate the plaintiff, the rule of joint and several liability under s. 1 of the *Negligence Act*, R.S.O. 1990, c. N.1 does not apply: *Townsvie Properties Ltd. v. Sun Construction & Equipment Co.* (1974), 7 O.R. (2d) 666 (Ont. C.A.); Waddams, *The Law of Damages*, 2d ed., Canada Law Book, 11.410. Therefore I shall assess the punitive damages against the defendants separately.

Unlike *Townsvie*, *Kaur* was a case where the common purpose of the joint wrongdoers was wrongful (tortious) – at least the tort of intentional interference with contractual relations. The Ontario Law Reform Commission, *Report On Exemplary Damages (1991)*, at pp. 57-59 states that punitive damages liability should be several not joint.

Aggravated Damages

There should be joint liability for aggravated damages in the appropriate case, since aggravated damages are considered compensatory damages. Aggravated “are an augmentation of general damages to compensate for aggravated injury.”¹²⁰

Settlements, Joint Liability, Several Liability

As mentioned, it was once very important to know whether or not the concurrent wrongdoers were joint wrongdoers because judgment against any one, or settlement with any one, released all of the rest even if the judgment or settlement was not satisfied. That rule has been abolished by statute in most of the common law provinces.

It is possible that the injured person will settle with one or more of the concurrent wrongdoers under the terms of a settlement that has the effect of making the wrongdoers who have not settled proportionally liable, only. In this sort of settlement, the injured person who wants to continue the action against the wrongdoers who have not settled agrees to limit the claim against each of the remaining non-settling wrongdoers to that

¹¹⁹ 2003 CarswellOnt 1536 at para. 130 (S.C.J.)

¹²⁰ *T.W.N.A. v. Canada (Ministry of Indian Affairs)* (2003), 235 D.L.R. (4th) 13, [2004] 3 W.W.R. 11, 2003 BCCA 670 at para. 100-102 (CanLII) (B.C.C.A.); *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at 263, 1992 CanLII 65 (S.C.C.), *Whiten v. Pilot Insurance Co.*, at para. 157; *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 at p. 1098-99, 1989 CanLII 93 (S.C.C.); and, *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 188-189, 1995 CanLII 59 (S.C.C.).

wrongdoer's share. In this way, that wrongdoer does not have and will not need the right to contribution, from any of the settling wrongdoers, for any amount the wrongdoer is held liable to pay the injured person.¹²¹ Therefore, the settling wrongdoers will be able to extricate themselves from the action completely.¹²²

Reimbursement Rights Among Wrongdoers

I like alliteration. Reimbursement rights might have puzzled some of you. You wouldn't have been if I'd used contribution or indemnity rights.

Joint liability and proportional liability issues are relevant to contribution or indemnity questions because a contribution or indemnity claimant W1 neither needs nor is entitled to contribution or indemnity from W2 if W1 paid P only W1's share of P's damages, absent a contract granting the W1 contribution or indemnity for payments that represent W1's "share" of P's damages.

Contribution and indemnity both refer to a right that concurrent wrongdoer W1 has to recover from W2 (another concurrent wrongdoer) some portion (contribution) or all (indemnity) of an amount paid to P (an injured person) by W1 to compensate P for injury for which both W1 and W2 could have been liable to P. I do not intend to go into the arcane details of this right.¹²³ I will use contribution to mean both contribution and indemnity, unless the context indicates otherwise. I will discuss, briefly, how joint liability and several liability fit in. The categorization of the cause of action – tort, contract, trust, fiduciary obligation etc. affects the answers.

Tort, and any other cause of action, where the contribution formula is based on the contribution defendant's extent of fault

In Ontario, British Columbia, Saskatchewan, Prince Edward Island, Newfoundland and Labrador, and the 3 territories, the extent of contribution liability where contribution is available under statute, is determined by reference to the contribution defendant's degree of fault (fault or negligence in Ontario.) (In practice, all of the common law provinces and territories use the degree of fault approach, even though the statutory wording is different.) In these jurisdictions, contribution liability is several (proportional) unless the wrongdoers have an enforceable agreement amongst themselves that it will be joint.¹²⁴ I have never heard of a case that had such an

¹²¹ Unless the wrongdoer has an indemnity agreement

¹²² Some Canadian judges have recently started calling this sort of settlement a "Perringer" settlement after the name of an earlier American action in "Perringer" was the name of one of the parties. See, *Bradley, Amoco*. This sort of settlement existed in Canada before the Perringer action. We just didn't bother with the label.

¹²³ For details see my text *Apportionment* and my recent article "Allocating".

¹²⁴ "Allocating"; *Renaissance Leisure Group Inc. v. Frazer*, [2004] O.J. No. 3486 (QL), 242 D.L.R. (4th) 229; 189 O.A.C. 288, 2004 CanLII 21044 varying [2001] O.J. No. 866 (QL), 197 D.L.R. (4th) 336 (C.A.); and *Bradley*. For example, the Ontario formula in the *Negligence Act*, R.S.O. 1990, c. N.1, s. 1 is (I have italicized the contribution portion):

agreement. There is no reason why such an agreement should always be unenforceable (against public policy) as a general rule; however, there will be instances where it probably would be.¹²⁵

That contribution liability is proportional means that the contribution defendant's (W2, W3, etc.) maximum exposure to the contribution claimant (W1) is the amount that corresponds to the contribution defendant's share of fault (W2's share where W1 and W2 are the wrongdoers at fault), no matter how the calculation is done to determine the contribution defendant's share of fault. Assume that W1 paid the injured person. Assume, also, that W1 paid more than W1's share so that there is a contribution right for the excess. Assume that W1 paid the full value of P's injuries or at least paid more than W1's "share". W1 has to pay more than W1's share or W1 is not entitled to any contribution. The result of several liability for contribution, where there were more than two wrongdoers, will always be that W1 has still paid out more than W1's share after W1 recovers from W2. The excess is W3's share, etc. where there are three or more concurrent wrongdoers. W1 will have to chase and collect from all of the other wrongdoers at fault before W1 will have recovered all of the excess amount paid by W1.

Assume three wrongdoers, W1, W2 and W3 all of whom are equally at fault. Absent enforceable agreement, the most W1 may recover from W2 is an amount calculated by reference to W2's one-third share of the fault and the assessed amount of P's damages. W1 does not recover one-half of the payment from W2 on the basis that W1 and W2 were equally at fault.¹²⁶

Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, *in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.*

Compare this to the contribution formulae in the other form of statute used in Canada – based on English wording. For example, the Alberta *Tortfeasors Act*, R.S.A. 2000, c. T-5, ss 3(2) and 3(3) provide:

(2) In any proceedings for contribution under this section, the amount of the contribution recoverable from any person shall be an amount that the court finds to be just and equitable having regard to the extent of that person's responsibility for the damage.

(3) The court has power

- (a) to exempt any person from liability to make contribution, or
- (b) to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

¹²⁵ For example, an agreement among intentional tortfeasors to share, on an equal basis, their liability for damages should the injured person (or his or her estate) sue them.

¹²⁶ It isn't necessary to interpret the legislation this way. See "Allocating" at pp 198-204.

The result should be the same for reimbursement (contribution) rights amongst concurrent wrongdoers who have caused the same damage through breach of independent (separate) contracts with the injured person.¹²⁷

Contribution rights where the reimbursement amount is the amount the court considers just and equitable

In Alberta, Manitoba, Nova Scotia and New Brunswick, the statutory contribution formula provides that the amount payable by the contribution defendant to the contribution claimant is the amount the court considers just and equitable, having regard to the contribution defendant's extent of responsibility.¹²⁸ Outside of Canada, the "just and equitable ... extent of responsibility" formulation has been interpreted to permit contribution awards greater than the contribution defendant's degree of fault; that is, the amount is not limited to the amount of the wrongdoer's fault. The result is that the amount that W2 may be ordered to pay to W1 may be more than the amount that (strictly) corresponds to W2's share of the fault.¹²⁹ In these jurisdictions, it does not make sense to define the extent of exposure to reimburse using terms such as joint liability or several liability, or proportional liability. None of the terms provide useful direction to what the contribution award ought to be.

That interpretation has not been used in Canada, to my knowledge. Instead, where the issue has been considered at all, the result is a decision that "extent of responsibility" means the same as "fault".¹³⁰

¹²⁷ "Allocating" at pp. 162-163 (text associated with note 51) and Appendix A, note 4, E.J. Weinrib, "Contribution in a Contractual Setting" (1976), 54 Can. Bar Rev 338 and the OLRC Report, at pp. 65-82, particularly at pp. 68-74.

¹²⁸ the *Tort-Feasors Act*, R.S.A. 1980, c. T-6; the *Tortfeasors and Contributory Negligence Act*, R.S.M. 1987, c. T90; the *Tortfeasors Act*, R.S.N.S. 1989, c. 471; the *Tortfeasors Act*, R.S.N.B. 1973, c. T-8. The legislation also always provides that the amount of reimbursement may be anywhere from 0% to 100%. Nonetheless, the practice is to apportion as if the legislation provides that the apportionment is to be done on the basis of comparative fault and limited to the reimbursement defendant's fault-based share. See, for example, *C.S. (Next friend of) v. Boy Scouts of Canada*, 2004 ABQB 137 at para. 12 (CanLII), [2004] 5 W.W.R. 282 (Alta Q.B.). It is an interesting aside that each of Alberta, Nova Scotia and New Brunswick also have the other form of statute that contains a provision for contribution on the degree of fault basis.

¹²⁹ This form of apportionment statute permits adjustments based on factors that have nothing to do with fault. Assume wrongdoers, W1, W2 etc. Their degrees of fault will not necessarily determine the amount of reimbursement W1 will be awarded. W1 with statutory liability, and held liable without fault, may or may not get indemnity from at fault W2. In cases of three or more wrongdoers, the impecuniosity of W3 may result in W2 paying more contribution to W1 than W2 would have paid if W3 had the assets to pay W3's share. In the impecuniosity example, the rationale is that it is not equitable as between W1 and W2 that W1 bearing the share of the impecunious wrongdoer alone: see, *Dubai Aluminium Co. v. Salaam*, [2002] H.L.J. No. 48, [2002] UKHL 48 (H.L.). Adjusting the amount of contribution payable for reasons that have nothing to do with fault is permitted under the Ontario form: *Renaissance; Allocating* at pp. 328-34.

¹³⁰ See, for example, *C.S. (Next friend of) v. Boy Scouts of Canada*, 2004 ABQB 137 at para. 12 (CanLII), [2004] 5 W.W.R. 282 (Alta Q.B.)

Identification

There may be incidents in which the injured person P is also held to be responsible for P's injury. This may be because the injured person's own conduct was a cause of the injury; or, it may be because conduct of another person which conduct is a cause of the injury is imputed to P. The doctrine permitting the imputation of conduct to P is called "identification". In either case, P's damages are reduced by the degree of fault assigned to P.

Where it applies, identification in effect transforms the liability "share" of a concurrent wrongdoer into the injured person's contributory fault. Where identification exists as between P and any of the concurrent wrongdoers, contribution reimbursement is not available from those wrongdoers in respect of their shares because P can never recover those shares from any of the other wrongdoers. For example, where the only wrongdoers are W1 and W2, and P is identified with W2, that means that W1 does not need contribution from W2. P cannot recover from W2's share from W1, so P cannot recover more than W1's share.¹³¹ However, where there are three or more wrongdoers, contribution may be needed if there are two or more wrongdoers with whom P is not identified.

Joint Obligations

The section heading answers all questions. The extent of the reimbursement obligation is always to share equally, absent an enforceable agreement or other law altering that presumption.¹³² So, where the obligation to the injured person is a joint obligation (one contract, one debt, the same trust or fiduciary obligation), the starting premise is always that the payment to the injured person will be shared equally among the concurrent wrongdoers. For example, assume there are 3 wrongdoers and W1 paid the whole amount. W1 is entitled to one-half of the payment from W2. W1 does not have to chase W3 and recover 1/3 from each of W2 and W3. If there are 4 wrongdoers, the allocation is 25% each.

Conclusion & Just Desserts

I begin the end of this lecture by repeating something I said at the start. There is one sure reason why joint liability should matter to those of you who are in private practice. Joint liability tends to increase the chance your client will get paid. For the rest of you? Professors, other teachers, and judges need to get the law right. I hope that something I have said assists. One of the hallmarks of the microchip age is that we squeeze more information into less space and less time. That does not mean more useful information. Quantity and quality are not synonyms. The acronym is GIGO. I trust the lecture has been something more than that.

¹³¹ Examples include *Graham Construction & Engineering Ltd. v. Mont St. Joseph Home Inc.*, 2004 SKQB 511 (CanLII) and *Inglis Ltd. v. South Shore Sales Ltd.* (1979), 31 N.S.R. (2d) 541, 11 C.P.C. 127. See, *Apportionment* at pp. 212-22, "Allocating" at p. 173 and p. 188 (at text associated with note 138).

¹³² see, generally, Fridman, *Restitution* (2d) at pp. 230-243 and Williams, *Joint Obligations*.