**APPORTIONMENT AND ATTRIBUTION OF LIABILITY: SOME INTERESTING ISSUES IN CANADIAN LAW**

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INTRODUCTION

All Canadian Common Law provinces have adopted legislation relating to contributory negligence and contribution between tortfeasors. As is the case in other Common Law jurisdictions, the principle objective of these legislative provisions was to repeal the common law’s refusal to apportion liability between negligent plaintiffs and defendants, as well as to allow negligent defendants to seek contribution from each other, where multiple defendants were jointly or severally liable to plaintiffs. Despite the fact that some provinces enacted two statutes to accomplish these objectives, while others passed only one, for the most part there are fairly few differences in these legislative provisions.[[1]](#footnote-1) There are, however, some. Additionally, the brief statutes left a number of questions unanswered. This paper will examine some of these matters.

LIABILITY OF SEVERAL, CONCURRENT WRONGDOERS: JOINT AND SEVERAL OR PROPORTIONATE?

In all provinces, the liability of concurrent, several wrongdoers to a non- contributorily negligent plaintiff is joint and several. Each defendant can be sued for the full amount of the plaintiff’s damages, notwithstanding that its negligent conduct was not a sufficient cause of the plaintiff’s injury, and irrespective of its degree of fault in contributing to the injuries. This ensures that the plaintiff will recover all of its losses, leaving the risk of the inability of one or more of the defendants to pay their fair share of the damages to fall on the shoulders of the solvent defendants.

The principal argument in favour of joint and several liability is that since each wrongdoer “caused” the injury, each should be fully liable for it, as would be the case if only one wrongdoer caused it. There is a difference, of course, between the case where a single wrongdoer’s negligence was sufficient in and of itself to cause the injury and the case where a defendant was merely one of several necessary but not sufficient factors (and perhaps a small factor, at least from the perspective of fault) which contributed to the plaintiff’s injury. Placing responsibility for compensating a plaintiff in full for injuries caused by a single wrongdoer is fair. Placing the responsibility for paying in full, however, onto the shoulders of a concurrent wrongdoer whose faulty behaviour was not a sufficient cause of the plaintiff’s injury , leaving it to that defendant to try and collect the shares of the other wrongdoers from them is arguably unfair. It also encourages plaintiffs to search for deep pocket defendants, such as governments or companies, to try to attribute some minor degree of fault to that party, in order to recover 100% of their damages from them. Nevertheless, the compensation, loss distribution and loss shifting goals of contemporary tort law have clearly trumped issues of fairness to defendants and joint and several liability rather than proportionate liability is the rule in all Canadian provinces. This applies not only to plaintiffs who have suffered personal injuries, but to cases of property damage and purely economic losses as well.

Courts in British Columbia have held that based on an interpretation of the provisions of their legislation, proportionate liability and not joint and several liability should be applied in cases of contributorily negligent plaintiffs.[[2]](#footnote-2) I think this interpretation of the legislation is correct.

Interpretation aside, is this a fair approach? Should the fact that a plaintiff was contributorily negligent deprive it of its joint and several judgment against the concurrent wrongdoers? In the other common law provinces it does not. The Supreme Court of Canada has stated that unless the legislation so requires it would be wrong to deny a contributorily negligent plaintiff the advantages of the joint and several judgment.[[3]](#footnote-3)

In my view, the proportionate liability approach in cases of contributorily negligent plaintiffs is preferable if one takes the fault based view of tort law seriously. Where the plaintiff’s fault has contributed with the fault of the other *wrongdoers* in causing its injury, there is no moral basis to treat the plaintiff’s obligation to contribute to the injuries any differently than the others. The only distinction between the parties is that the plaintiff was the one who unfortunately was injured. The only reason to retain the joint and several judgment even in the case of contributorily negligent plaintiffs is to allow as much of the loss to be shifted to the insured defendants as possible. Since that seems to accord with the contemporary views of what tort law is all about explains why the joint and several judgment method is retained. If that however is the explanation for tort law, one wonders why jurisdictions would even retain contributory negligence as a defence at all, or more to the point, why jurisdictions interested in loss shifting and loss distribution would not abandon fault based tort law in favour of no fault schemes, full stop.

ALLOCATION OF UNCOLLECTABLE DAMAGES

Canadian legislation places responsibility for the payment of the plaintiff’s damages upon the defendants found liable, but allows the defendants to seek contribution for their proportionate shares from the others. What, however, if one or more of these defendants cannot satisfy the judgments obtained against them? Who bears this loss?

Only one province has a legislative solution to equitably redistribute the uncollectable amount among the solvent concurrent wrongdoers. In Saskatchewan, the legislation provides that if the contribution of one of the persons at fault cannot be collected, that person’s share shall be redistributed to all those found at fault, in the proportion to the degree in which they have been respectively found to have been at fault.[[4]](#footnote-4) According to the Manitoba Law Reform Commission’s Report, citing a speech by the Minister sponsoring the bill, this includes the contributorily negligent plaintiff.[[5]](#footnote-5) This approach of including the contributorily negligent plaintiff in the sharing of the uncollectable amount was rejected by the Manitoba Law Reform Commission and is not a feature of the legislation in any of the other provinces. The Commission did agree, however, with the Saskatchewan approach of equitably dividing the uncollectable amount between all the defendants.

In my view, if one accepts the approach that even contributorily negligent plaintiffs should be able to collect all of their damages minus a reduction corresponding to their degree of fault from any of the defendants who can pay, then consistent with this view, the plaintiff should bear no responsibility for the uncollectable amount. On the other hand, if one accepts the view that all persons whose negligence contributed to the injuries should bear some responsibility for the payment of the injuries, including responsibility for the uncollectable amount, including the wrongdoing plaintiff in that group seems fair.

SEEKING CONTRIBUTION FROM THOSE NOT FOUND LIABLE TO PLAINTIFFS

Perhaps the most challenging issues to resolve when dealing with contribution between wrongdoers arise with respect to contribution from those wrongdoers whose fault did contribute to the plaintiff’s injuries but who for some reason were never found liable to the plaintiff. Their non-liability, despite their fault, can arise for a variety of reasons. They might never have been sued; they might have settled before their liability could have been determined; they might have had a “special defence” which despite their faulty conduct prevented them from being found liable.

Canadian legislation describes the obligation to contribute in one of two ways. In some provinces, the legislation provides that contribution may be recovered “from any other tortfeasor who is, or would, if sued, have been liable in respect of the same damage.”[[6]](#footnote-6) In other provinces, the legislation imposes the contribution obligation on persons “who are found at fault or negligent.”[[7]](#footnote-7)

The Canadian case law has established that if a defendant has been sued and has been found not liable because, although at fault, a “special defence” prevented the action from succeeding, that defendant is not obligated to contribute to the plaintiff’s damages. In one case, a contractual clause which limited the defendant’s liability to the plaintiff to defects in the construction of a project which appeared within one year from the time of the project’s completion, immunized the defendant’s liability to contribute to damages for defects appearing after one year.[[8]](#footnote-8) In another case, the victim’s failure to give timely notice of an accident to a defendant municipality which resulted in dismissal of the action immunized the non-liable defendant from its obligation to contribute.[[9]](#footnote-9)

It has been argued, however, that in order for a non-liable defendant to be relieved of its obligation to contribute to the plaintiff’s damages, the special defence must be one which prevented the defendant from ever having been found liable.[[10]](#footnote-10) Thus, for example, it has been held that the expiration of a limitation period which prevented a successful action being brought would not extinguish that defendant’s obligation to contribute, if it was at fault and the contribution claim was made in due time.[[11]](#footnote-11) Canadian case law on this point is however not uniform. A recent Alberta Court of Appeal case, for example, held that a defendant who cannot be held directly liable to the victim of the tort should not be held indirectly liable by having to contribute to that person’s damages *via* a claim for contribution.[[12]](#footnote-12) The resolution of this type of dispute often depends on the specific provisions of the relevant legislation, including Limitation of Action provisions.

A settlement and release of a claim does not prevent a claim for contribution being made against the settling party.[[13]](#footnote-13)

The same issues relating to contribution claims brought against non-liable parties arise in cases where the defendants have never been sued but could no longer be successfully sued at the time the contribution claim is made, although they could have been successfully sued before. There are a number of Canadian cases on this point as well.[[14]](#footnote-14)

CONTRIBUTORY NEGLIGENCE ISSUES

1. How is the liability apportioned between the contributorily negligent plaintiff and the negligent defendant?

In Canada, apportionment of liability between a contributorily negligent plaintiff and a negligent defendant is determined by considering the relative degrees of fault or blameworthiness of the parties. In other words, the courts ask the following question: which of the parties departed more significantly from the standard of care expected from that person? In answering this question, the courts approach the matter using the same methodology for determining the degrees of negligence for both plaintiff and defendant. For example, although the test is an “objective” one, courts can consider subjective characteristics, such as age, disability, and special skills or expertise, as well as factors such as statutory standards, generally approved practise, cost/benefit analysis inherent in formulas such as “the Learned Hand” formula, and so on.

Professor Goudkamp has argued that applying the same factors to determine the standard of care required of both defendants and plaintiffs (the “transferability thesis”) is incorrect and should be rejected.[[15]](#footnote-15) He offers the following reasons. First, he argues that contributorily negligent plaintiffs are negligent because they have failed to take reasonable care to protect themselves, rather than having breached a duty which is owed to someone else. Goudkamp sees the negligence of plaintiffs as being “pure omissions”, and since tort law generally does not hold individuals liable for pure omissions, different rules ought to be applied to the plaintiffs’ and defendants’ alleged negligent acts. With respect to Goudkamp, I reject this analysis. A plaintiff who unreasonably walks into the path of a speeding car is no more guilty of an “omission” than the driver who fails to observe the speed limit. I have always found the distinction between omissions and positive breaches of duties a meaningless one, since in all cases the question is whether there has been a positive duty of care which has been breached in some way. Goudkamp’s real point, I believe, is that plaintiffs should not have a duty to take reasonable care to protect themselves, and therefore failing to take reasonable care is an omission. This is tantamount to a a total rejection of the defence of contributory negligence.

Goundkamp’s second reason is similar. He argues that since the plaintiff’s negligence does not expose others to a risk of harm, but only risks his or her own safety, it ought to be treated differently than the defendant’s conduct which endangers the safety of others. Referring to a point made by Professor Cane, “this is the difference between selfishness and foolishness”. My objection to this reason is as before. Does this imply that there should be no defence of contributory negligence at all unless the plaintiff’s negligence risks the safety of others? Or does it merely mean that the *degree of negligence* attributed to the plaintiff should be less than the *degree of negligence* attributed to the defendant? If it is the latter, I would agree with the point, but note that this is a legitimate factor in determining degrees of fault under orthodox tort law and probably explains why in many cases ( eg failure to wear a seat belt), the apportionment of liability is generally much higher for defendants than it is for plaintiffs.[[16]](#footnote-16)

Although it has been argued that determining degrees of fault takes into consideration two factors – “moral blameworthiness” and “causative potency”,[[17]](#footnote-17) this is an argument which I reject, at least in so far as Canadian tort law is concerned, for the following reasons. First, the legislative provisions clearly spell out how liability is to be apportioned. For example, the Alberta *Contributory Negligence Act[[18]](#footnote-18)* states that each person’s liability is to be “in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally”. [underlining added]. The Act does not speak in terms of “causative potency”, but in terms of “degrees of fault”.

Second, if there was any question about how this provision should be interpreted, the courts have unequivocally answered it. In *Heller v Martens*,[[19]](#footnote-19) for example, Fruman J.A. canvassed this issue and concluded that the comparative blameworthiness approach was the correct one for a variety of reasons. In determining comparative blameworthiness, Fruman J.A. suggested that the following factors are relevant: the nature of the duty owed by the defendant, the number of acts of fault committed by each party, the timing of the negligent acts, the nature of the misconduct and the extent to which statutory breach was involved.[[20]](#footnote-20) In a British Columbia Court of Appeal judgment, *Ottosen v Kasper*,[[21]](#footnote-21) Lambert J.A. rejected the argument that the assessment of liability considers matters of causation. As stated by the Justice: “The words used are fault. The question that affects apportionment , therefore, is the weight of fault that should be attributed to each of the parties, not the weight of causation”. [underlining added]

Finally, as a conceptual matter, it is my position that it is illogical to speak of “degrees of causal potency”. A negligent act was either a necessary, contributing cause of an injury or it was not. There cannot be “greater” or “lesser” causes. Who, for example, is a greater “cause” in injuring a passenger who failed to wear a seat belt – the negligent driver of the car or the negligent passenger? Let us assume that due care on the part of either would have completely prevented the passenger’s injury, even had the other party still been negligent. I would argue that both causes are equally important, although it is arguable that negligent driving is a greater “fault” than is failing to put on one’s seat belt. Thus, courts will apportion more liability to the negligent driver; not because that person’s negligence was more responsible for the injury, but because the driver’s behaviour was more negligent.

1. To which actions does the defence of contributory negligence apply?

A second issue which arises with respect to the defence of contributory negligence is the extent of its application. Is the defence only available in actions for negligence, or can it apply to other tort actions, such as the intentional torts or torts based on strict liability? If it is applicable only in negligence actions, is it available in all negligence actions? Can it apply to actions outside of tort, such as breach of contract claims?

To answer these questions one must look to the legislative provisions themselves, and to the jurisprudence applying these provisions. In addition, in assessing the judicial response, we should consider the policies which are sought to be achieved by the defence.

Canadian provinces utilize similar, but slightly different, wordings in providing for the defence. Some statutes predicate the defence of contributory negligence where by the parties are at “fault”.[[22]](#footnote-22) Ontario provides that the defence is applicable in actions founded upon “fault or negligence”. Manitoba speaks only of “negligence”.[[23]](#footnote-23) Thus, in most provinces it has been held that the defence is applicable to all tort actions based on “fault” or in Ontario, “fault or negligence”. This includes not only the cause of action in negligence, but to other tort actions where fault or negligence is the basis of the defendant’s liability, such as negligent forms of trespass, and even a nuisance claim. In Manitoba the defence has been restricted to negligence claims.[[24]](#footnote-24)

The extension of the defence of contributory negligence to cases of a defendant’s intentional wrongdoing is controversial. It is arguable that statutes which use the word “negligence” have implicitly eliminated intentional wrongdoings from the scope of the defence. “Fault”, however, can include intentional torts. Should the courts apply contributory negligence as a defence in cases of intentional wrongdoing as a matter of judicial policy?[[25]](#footnote-25) Some courts have applied it;[[26]](#footnote-26) other judges have been more reluctant.[[27]](#footnote-27) I have argued that since provocation is an accepted partial defence in cases of intentional torts, other forms of wrongdoing should be considered as contributory negligence in the appropriate case. [[28]](#footnote-28) The Manitoba Law Reform Commission Report reviewed several of the cases dealing with contributory negligence as a defence in cases of intentional torts, including assault, slander, fraud, and concluded that “the law of apportionment for contributory negligence should be allowed to develop beyond its original restricted purpose” and courts should be allowed to consider it in intentional tort cases. The Report noted that this was also the recommendation of other Canadian law reform bodies which considered this matter.[[29]](#footnote-29)

An interesting issue in Canadian law concerning the applicability of contributory negligence arises in the negligent statement cases. It is now clear that the basis of the “special relationship” which creates a presumptive duty of care in negligent statement cases is “foreseeable and reasonable reliance” on the defendant’s statement by the plaintiff.[[30]](#footnote-30) The question as to the applicability of contributory negligence to negligent statement cases thus arises, once a duty of care and breach are established. Can a plaintiff who has “reasonably relied” on the representation for the purpose of duty, be said to have been contributorily negligent for unreasonably acting upon the representation for the purpose of the defence? Although I have argued that this would be contradictory, and despite the fact that some judgments have agreed with this position, the strong weight of Canadian authority is to recognize the defence. It is held that there can be reasonable reliance for the purpose of duty, but a plaintiff can be negligent for not having taking more care before acting upon the advice.[[31]](#footnote-31)

As with the discussion concerning whether contributorily negligent plaintiffs ought to be limited to proportionate judgments against the other wrongdoers and whether they ought to be required to have their awards reduced if some of the payments from others are uncollectable, how one resolves the issue of the extension of contributory negligence to intentional or other torts depends on one’s “policy” preferences for tort law. If one views tort law as a tool of “corrective” justice which reflects the morality of interactions, extending contributory negligence beyond its original boundaries is justifiable. If, however, one views tort law as a compensation scheme for victims of wrongdoing , by transferring the loss to the better loss distributor, extending contributory negligent can be seen as regressive.[[32]](#footnote-32)

1. Last clear chance rule

Prior to the introduction of apportionment legislation, the courts were able to avoid the contributory negligence bar by finding that despite the plaintiff’s negligence, the defendant had “the last clear chance” to avoid the accident.[[33]](#footnote-33) If this were the case, the plaintiff would receive all of its damages. Thus “all or nothing” prevailed.

With apportionment, the issue arises as to the fate of last clear chance. Canadian legislative provisions approach the matter in one of three ways. Some provincial acts make no mention of it.[[34]](#footnote-34) Some have explicitly abolished it.[[35]](#footnote-35) Some have maintained it in a modified form.[[36]](#footnote-36)

I have argued that the wording of contributory negligence statutes has implicitly abolished the last clear chance rule and that no reference to it in the statute is really necessary. For example, the Alberta *Contributory Negligence Act*  states that “Nothing in this section [the one which provides for apportionment] operates to render a person liable for damage or loss to which the person’s fault has not contributed”. Thus, where a person’s negligent act was not a factual or proximate cause of the injury because, for example, the other person’s negligent act was a *novus actus interveniens* which severed the chain of causation between the former’s negligent act and the injury, it did not legally contribute to the injury and would not satisfy the requirement for being contributory negligence. This *can* happen where the acts of negligence are clearly severable and where one act of negligence was not within the reasonably foreseeable risk of harm set into motion by the other. This, however, is a difficult call for a judge to make, especially where the spirit of the legislation is to apportion wherever possible.

There have been some questionable judgments. Particularly difficult are those cases where plaintiffs have been negligent in failing to avoid vehicles negligently parked on the side of the roads, or failing to avoid other clearly visible hazards. In *Lawrence v Prince Rupert (City,)[[37]](#footnote-37)* for example, the plaintiff tripped over a pole that had been left unattended on the sidewalk by the defendant. The trial judge found that both parties had been negligent, but that the defendant’s conduct was not an effective cause of the accident, since the plaintiff had ample opportunity to avoid tripping over the pole.[[38]](#footnote-38) The majority of the British Columbia Court of Appeal agreed. In fact, the majority would have held that the defendant’s conduct in leaving the pole without a barricade was not even negligent, since the risk of anyone tripping over it was small, the pole was clearly visible, and there was ample opportunity for pedestrians to avoid it. Since the trial judge’s finding that there was negligence was not appealed, the Court of Appeal went on to consider the causation issue. It held that the risk of the plaintiff tripping over the pole, despite the fact that she had seen it and knew it was there, was not an unreasonable risk, and hence the negligent act was not an effective cause of the accident.[[39]](#footnote-39)

The judgment of the dissenting judge, Esson J.A., presents a thorough review of the jurisprudential and statutory history of “last clear” chance in Canadian provinces, along with extensive reference to academic commentary on this matter. According to Justice Esson, having found negligence on the part of both parties, the court was obliged by the legislation to apportion liability between them. The fact that the plaintiff might have avoided the pole had she been more attentive constituted her negligence, but did not absolve the defendant from its liability for having negligently left the pole there in the first place.[[40]](#footnote-40)

British Columbia judgments following  *Lawrence* are consistent with Justice Esson’s dissent. In *Skinner v Guo,[[41]](#footnote-41)* the plaintiff’s vehicle struck the defendant’s vehicle which was parked alongside the highway. The defendant ‘s vehicle had hit a dead coyote which was lying alongside the highway. The defendant’s vehicle did not have its emergency flashers or indicator light activated. The plaintiff had seen the vehicle but did not realize that it was stationary until it was too late to have avoided it. The trial judge, although finding that the defendant’s actions in reference to his stationary vehicle were unlawful and negligent, held that this negligence was not the “proximate” cause of the collision, as the plaintiff had ample opportunity to see and avoid the vehicle.

The British Columbia Court of Appeal reversed the trial judgment. Unfortunately, however, as in *Lawrence*, the legal analysis employed by the Court in coming to this conclusion was somewhat confusing. The Court, for example, rejected the trial judge’s use of the term “proximate” cause, insisting that this case was about factual cause. In fact, the trial judge was correct. There was no question that both parties’ negligence had factually contributed to the accident. The only issue was whether the defendant’s negligent act was a legal or proximate cause of the accident. Did it create a reasonably foreseeable risk? If it did, it was an effective or proximate cause of the injury, and the fact that the plaintiff had the “last clear chance” to avoid the collision is no defence. In reversing the trial judgment, the Court of Appeal was effectively deciding that the defendant’s negligence was a proximate cause of the collision, along with the plaintiff’s negligence.

In *Dyke v British Columbia Amateur Softball Assn.[[42]](#footnote-42)* the plaintiff was a scorekeeper at an amateur baseball game. She was struck in the head with a foul ball. She would have been safe from such risks had she been standing in the dugout, but the dugout had been flooded. She alleged that the defendant was negligent in not having provided her with an alternative safer place to stand. The trial judge disagreed and held that the defendant had provided alternate safe places and was not negligent. The trial judge went on, however, to hold that even if the defendant had been negligent the plaintiff made the decision to stand in an unsafe place and failed to keep a lookout for foul balls. This broke the chain of causation, resulting in the plaintiff’s negligence being fully responsible for the incident. The trial judge also seemed to apply what amounts to a “last clear chance” approach in fully exonerating the defendant.[[43]](#footnote-43)

The Court of Appeal affirmed the trial judgment’s result, but made it clear that it only did so based on the standard of care issue. There was no negligence. In dealing with “last clear chance”, Donald J.A. was unequivocal: “I wish to say in the strongest terms that the doctrine is extinct and occupies no place in the law of torts in this jurisdiction”. “Drawing a clear line between the defendant’s and the plaintiff’s negligent acts gives expression to a linear form of thinking and compartmentalizes causes according to the timing of events. What the legislation requires is a lateral analysis that examines the weave of causal factors that brought about the loss. So the appropriate image is of a web, rather than a chain where it is said that the linkage is broken by the plaintiff’s own negligence”. [[44]](#footnote-44) Esson J.A.’s dissenting judgment in *Lawrence* was quoted and approved.

These judgments illustrate difficulties which courts can have in separating out the elements of the negligence action, especially where the argument is based on the lack of a reasonably foreseeable risk of harm. Without going into this issue here, I will make the following observations. The lack of reasonably foreseeable harm can be a determinative factor in deciding that there was no duty of care, that if there was a duty there was no negligence, or if there was negligence, the harm caused was too remote. Although there is a difference between these three propositions, courts sometimes fail to see it. Thus we have similar factual disputes being resolved in different ways. In my view, what was the “last clear chance rule” is now extinct. We have apportionment – not all or nothing. But there can be cases where despite a party’s negligence, the type of harm caused was not reasonably foreseeable. Thus the harm is too remote, or to put it in another words, the negligence is not an effective or proximate cause of the injury. Only one party’s negligence caused the injury, and there is no apportionment since only that person is liable for it.

CONCLUSION

Canadian legislation dealing with apportionment and attribution of liability is working well. Common law rules barring contributorily negligent plaintiffs from recovering any damages and preventing concurrent tortfeasors from claiming contribution from each other have been abolished and replaced by apportionment. This is not to say that there are no difficulties with the legislative provisions. But for the most part they are minor and have been sensibly dealt with by the courts or by legislative amendments..

There are important policy issues at stake in how we apportion liability between wrongdoers which relate to the purposes of modern tort law. Liability insurance has made defendants better loss bearers and loss distributors than uninsured plaintiffs. Contributory negligence works, in many cases, for the benefit of defendants’ liability insurers, thus prompting some to argue against the extension of contributory negligence. Similarly, requiring all defendants, even those who are only slightly at fault, to bear the full responsibility to pay the damages reflects this loss shifting/distribution purpose of tort law, as does excluding negligent plaintiffs from the responsibility for sharing the losses equitably with the other wrongdoers.

On the other side of the debate, however, is the fact that fault based compensation regimes are about fault, corrective justice, and the morality of interactions. Neglecting a plaintiff’s fault and its responsibility to share equitably in the losses is inconsistent with this view of tort law. Thus, as in other areas of tort law, this tension between tort law as a system of loss distribution or a vehicle for corrective justice, plays itself out in the principles which relate to apportionment and attribution of liability.

1. A useful and recent overview of the provincial statutes can be found in the Manitoba Law Reform Commission’s Report on “Contributory Fault: The Tortfeasors and Contributory Negligence Act”, April 2013. This Report was very helpful to me in my preparation of this paper. [↑](#footnote-ref-1)
2. See *Leischner v West Kootenay Power & Light Co* [1986] 3 W.W.R 97 (B.C.C.A.), *Cominco Ltd. v C.G.E. Co.* (1983) 4 D.L.R. (4th) 186 (BCCA), and *Wells v McBrine* [1989] 2 WWR 695 (BCCA). There are similar holdings in Nova Scotia. [↑](#footnote-ref-2)
3. See *Ingles v Tutkaluk Construction* [2000] 1 SCR 298. [↑](#footnote-ref-3)
4. Contributory Negligence Act, RSS 1978, c. C-31, s. 3.1 (2). [↑](#footnote-ref-4)
5. See page 22 of the Report. [↑](#footnote-ref-5)
6. This is the wording in Alberta, Manitoba, New Brunswick, and Nov Scotia. [↑](#footnote-ref-6)
7. This is the wording in Ontario, British Columbia, Saskatchewan, Prince Edward Island, and Newfoundland. [↑](#footnote-ref-7)
8. *Dominion Chain Co. v Eastern Const. Co.* (1978) 84 DLR (3d) 344 (SCC). [↑](#footnote-ref-8)
9. *Parkland v Stetar* [1975] 2 SCR 884. [↑](#footnote-ref-9)
10. This is the argument of scholars like Cheifetz and Kutner and has judicial support in Canada. See Klar, *Tort Law*, 5th ed., p. 578. [↑](#footnote-ref-10)
11. See for example *The Owners, Strata Plan v Scott Management Ltd. 2010 BCCA 192* Citred by the Manitoba Law Reform Commission Report at p. 70, n. 67. [↑](#footnote-ref-11)
12. See *Howalta Electrical Services v CDI Career Development Institutes* 2011 ABCA 234, and more recently *Arcelormittal Tubular Products v Fluor Canada Ltd.,* 2013 ABCA 279. It should also be noted that the Supreme Court of Canada in *R v Imperial Tobacco* 2011 SCC 42 stated that “direct liability” to the plaintiff is a prerequisite to a claim for contribution being made against a party, although the issue in the case did not concern a special defence but a substantive point of tort law. [↑](#footnote-ref-12)
13. There are a number of Canadian cases on this point. See Klar, *Tort Law*, 5th ed. at 579. [↑](#footnote-ref-13)
14. See Klar, *Tort Law*, 5th ed. at 580. [↑](#footnote-ref-14)
15. See Goudkamp, “Rethinking Contributory Negligence”, Chapter 11, Chambers, Nyers, Pitel eds. *Challenging Orthodoxy in Tort Law* (Hart Publishing 2013). [↑](#footnote-ref-15)
16. Goudkamp’s third distinction is that while plaintiffs can be found contributorily negligent even if they intentionally injure themselves, it is unclear whether defendants who commit intentional torts can be liable in negligence. The relevance of this is ( I think) that courts may not be comparing apples to apples in apportioning liability and thus different principles should be applied to the parties in the apportionment decision. In Canada, I would argue that intentional wrongdoers can be perceived as negligent, since it is obviously unreasonable to commit an intentional act of wrongdoing. This would be represented in the apportionment decision. [↑](#footnote-ref-16)
17. This is also argued by Goudkamp. [↑](#footnote-ref-17)
18. R.S.A. 2000, c. C-27, s. 1(1). [↑](#footnote-ref-18)
19. (2002) 213 D.L.R. (4th) 124 (Alta.C.A.) [↑](#footnote-ref-19)
20. Other cases affirming this approach are *Chae v Min* [2005] 9 W.W.R. 10 (Alta.C.A.) and *Aberdeen v Langley (Township)* 2007 BCSC 993, reversed in part 2008 CarswellBC 2235 (CA). [↑](#footnote-ref-20)
21. (1986) 37 C.C.L.T. 270 . [↑](#footnote-ref-21)
22. Alberta, British Columbia, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, and Saskatchewan. [↑](#footnote-ref-22)
23. Note that Manitoba specifically provides that damages shall be apportioned in proportion “to the degree of negligence”. [↑](#footnote-ref-23)
24. The Manitoba Report recommended an extension of the defence to “intentional torts and torts that are crimes as well as those that are framed in negligence.” [↑](#footnote-ref-24)
25. Goudkamp, above, has argued that “policy” reasons can negate the defence of contributory negligence, even where the plaintiff has been negligent and this negligence has contributed to his or her loss. One example of this is the case of defendant’s breach of statutory, where contributory negligence has been rejected, so as not to undercut the statutory duty. This would not occur under Canadian law, which does not recognize the tort of breach of statutory duty. Other examples of this approach are offered by Goudkamp. It is an interesting argument although I am not persuaded that there is as Goudkamp suggests a “third stage” to determining whether the defence should succeed. An alternate explanation to the examples offered by Goudkamp to support his thesis is that in determining whether a plaintiff has been negligent courts legitimately take into consideration the relative positions of the parties in contributing to the incident, the ages of the parties, their skills etc. In other words, I would suggest that whether negligence on the part of either plaintiff or defendant is found in not a neutral question, devoid of policy considerations. Thus “policy” concerns are an inherent part of determining the existence and degree of negligence. [↑](#footnote-ref-25)
26. See for example *Berntt v Vancouver (City)* [1997] 4 W.W.R. 505 (BCSC); *Gillen v Noel* (1984) 50 N.B.R. (2d) 379 (Q.B.). [↑](#footnote-ref-26)
27. See for example Slatter J. in *Wilson v Bobbie* [2006] 8 W.W.R. 80 (Alta.Q.B.). [↑](#footnote-ref-27)
28. Goudkamp argues, correctly in my view, that provocation and contributory negligence are different, “separate from each other”. In my text, *Tort Law*, 5th ed., at 153 I suggest that “provocation operates as a type of contributory negligence, mitigating, though not eliminating, the plaintiff’s damages.” Goudkamp rejects this analogy by pointing out that the two operate differently; e.g. a defendant who claims that the claimant provoked him might be able to successfully use the defence even if the claimant’s provocative act was not unreasonable. Although I agree that provocative acts may not qualify as unreasonable acts ( although I think this would be a very rare case), I analogized provocation to contributory negligence in order to bolster my argument that the courts are already willing to reduce a plaintiff’s damages even in intentional torts because of provocation and thus extending this to unreasonable acts of plaintiffs is justifiable. Canadian courts now generally favour the approach that provocation reduces all of the plaintiff’s damages, not merely punitive damages, thus bringing the defence of provocation and the defence of contributory negligence even closer together. [↑](#footnote-ref-28)
29. The Report also recommended that contributory negligence be extended to strict liability torts. Traditionally, fault of the plaintiff was not a defence in strict liability torts. In a recent case, *Cowles v Balac* (2006) 83 OR (3d) 660 (OntCA), which involved strict liability for injuries caused by dangerous animals, the dissenting judge, Borins J.A., held that it should apply in the appropriate case. This is a more complicated question, since the elements of these strict liability torts, might already implicitly include the question of the plaintiff’s negligence. See Klar, *Tort Law*, 5th ed., at 668-669. [↑](#footnote-ref-29)
30. This is an interesting area in Canadian tort law. The duty of care in negligence actions in Canada has two stages broken down into three elements. Stage one is comprised of “foreseeable harm” and “proximity”. Stage two considers “residual policy concerns” to negate the *prima facie* duty created if stage one is satisfied. Negligent statement cases have been squeezed into this framework. Thus, even if a “special relationship” is found, the duty can be negated by policy concerns, such as indeterminate liability. [↑](#footnote-ref-30)
31. See, for example, *Grand Restaurants of Can. Ltd. v Toronto* (1981) 123 D.L.R. (3d) 349 at 367 (Ont.H.C.) affirmed (1982), 140 D.L.R. (3d) 191 (Ont.C.A.), and Klar,  *Tort Law*, 5th ed., at 258. This was also the finding in *S Maclise Enterprises v Union Securities* 2009 ABCA 424. There is also the issue of the plaintiff’s failure to mitigate damages caused by a breach but this is a question separate from the defence of contributory negligence. [↑](#footnote-ref-31)
32. The Manitoba Law Reform Commission Report’s recommendations to extend contributory negligence beyond negligent actions was criticized by Professor Phil Osborne in comments he forwarded to the Commission. As stated by Professor Osborne, “there is a different perspective. It is based in the premise that in practice tort law is not a corrective justice system it is a tort/insurance system which distributes accident losses broadly within the community. ….The paper fails to recognize the mythology of tort law as a corrective justice system. It is a distributive system which operates very harshly against negligent plaintiffs without laying a hand on the typical defendant. Some would suggest that this is immensely *unfair*. One Australian study suggested that 30% of personal injury cases involved some reduction in the award is made for CN leaving plaintiffs undercompensated…. From this perspective the scope and application of CN should be *narrowed* not broadened. One option is to recommend that damages in cases of personal injury claims be reduced only if the plaintiff is guilty of gross negligence or reckless conduct.” The Manitoba Report also considered the extension of contributory negligence to non-tort actions, such as breach of fiduciary duty and breach of contract. It recommended that it not be extended to breach of fiduciary duty, but that it should be extended to breach of contract that creates a liability for damages. The Report contains an extensive discussion on this topic. In a recent Alberta Court of Appeal decision,  *Arcelormittal Tubular Products v Fluor* 2013 ABCA 279 (CanLII) it was held that contribution between tortfeasors, pursuant to the *Tortfeasors Act*, does not allow contribution between a person liable for breach of contract and a tortfeasor. [↑](#footnote-ref-32)
33. See Klar, *Tort Law*, 5th ed. at 540 – 543 for this discussion. The rule was sometimes referred to as “ultimate negligence” or “last opportunity”. [↑](#footnote-ref-33)
34. The legislation of Nova Scotia, New Brunswick, Manitoba and Ontario. [↑](#footnote-ref-34)
35. The legislation of British Columbia, Prince Edward Island, and Alberta. The B.C. Act, for example, states “This Act applies to all cases where damage is caused or contributed to by the act of a person even if another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so”. [↑](#footnote-ref-35)
36. The legislation of Saskatchewan, Newfoundland, the Northwest Territories and the Yukon. The Saskatchewan Act, s.6, for example, states: “Where the trial is before a judge without a jury the judge shall not take into consideration any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof unless he is satisfied by the evidence that the act or omission of the latter was clearly subsequent and severable from the act or omission of the former so as not to be substantially contemporaneous with it”. A similar provision applies to cases tried by judge and jury. [↑](#footnote-ref-36)
37. [2005] B.C.J. No. 2522 (B.C.C.A.). [↑](#footnote-ref-37)
38. The trial judge commented that despite the repeal of “last clear chance” in British Columbia, the defendant’s negligence still had to be a cause of the accident. [↑](#footnote-ref-38)
39. The majority judgment is somewhat ambiguously worded in terms of legal analysis. Its conclusion that there was no negligence in the first place dominates its view of the case, with the result that that remoteness and standard of care issues became one in the same. [↑](#footnote-ref-39)
40. In fact, the dissenting judge would have ascribed 75% of the liability to the defendant, and only 25% to the plaintiff. [↑](#footnote-ref-40)
41. (2010) 321 D.L.R. (4th) 272 (BCCA), leave to appeal to Supreme Court of Canada refused 2011 CarswellBC 140. [↑](#footnote-ref-41)
42. (2008) 54 C.C.L.T. (3d) 142 (B.C.C.A). [↑](#footnote-ref-42)
43. This point is made by Donald J.A. in the Court of Appeal judgment. Referring to the trial judgment in *Lawrence,* above, Donald J.A,. stated that it was “debateable” whether last clear chance was applied there. But, “there can be no doubt” it was applied by the trial judge in this case. [↑](#footnote-ref-43)
44. Para. 28. [↑](#footnote-ref-44)