City of Richmond

Report to Council

To:	Richmond City Council	**Date:**	September 16, 2002
From:	A.L. (Rick) Bortolussi Manager, Building Approvals Department	**File:**	-
Re:	**Ministry of Attorney General Civil Liability Review - Consultation Paper**		

Staff Recommendation

That, in response to the Civil Liability Review consultation paper; the Attorney General be advised of the City of Richmond's position on the issue of joint and several liability reform.

A.L. (Rick) Bortolussi
Manager, Building Approvals Department

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Staff Report

Origin

The Attorney General announced that he would be initiating a review of the current law of civil liability.

Findings Of Fact

The purpose of the Attorney General's paper is to outline several areas in which changes to the law are proposed and to elicit views of British Columbians on the proposed areas of reform. One of the areas concern ***"joint and several liability"***. Attached as "Appendix A" is an extract from the Civil Liability Review – Consultation Paper which addresses joint and several liability.

The two *Commissions of Inquiry into the Quality of Condominium Construction in BC* undertaken by Dave Barrett in 1998 and 2000, recommended that the Municipal Act be modified to remove the joint and several liability of a municipality while retaining proportionate liability. The previous Attorney Generals did not feel that such action be undertaken.

The City of Richmond was the only municipality to make a presentation to the two commissions. Subsequent to each commission, correspondence was sent to the respective Minister expressing the City's views and in particular concern regarding joint and several liability. The position presented was to replace joint and several liability with proportionate liability. This also supported the same recommendation contained in the two Commissions of Inquiry.

Financial Impact

The issue of joint and several liability has potentially the greatest financial impact for Richmond with regard to building related claims. Currently the Municipal Insurance Association does not provide insurance coverage for water penetration claims or terrorist attacks. Should a water penetration claim be made and the City is found as little as one percent responsible, the City could pay 100% of the damages if the other parties are unable to pay. This is the situation in the Riverwest condominium case in Delta.

Conclusion

The City can take a proactive measure in communicating to the Attorney General providing input on the proposed area of reform regarding joint and several liability.

A.L. (Rick) Bortolussi
Manager, Building Approvals Department

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2. Joint and Several Liability

Legal problems arise when harm is caused by two or more persons. Principles of apportionment of responsibility are required. There is a general sense that responsibility should be proportionate to the degree each contribute to the whole damage.

In British Columbia, the *Negligence Act* imposes several (or individual) liability where the wrongful acts of two or more persons cause damage to a plaintiff and it has been shown that the plaintiff contributed in some measure to his or her own injury. Individual defendants are responsible for a portion of the damage award equal to their degree of fault. If it is not possible to establish different degrees of fault, liability must be apportioned equally.

Where the plaintiff has not contributed to his or her own injury, all defendants are jointly and severally liable for the full amount of the plaintiff's loss, regardless of their respective degrees of fault. If one defendant seeks an indemnity from another defendant, the *Negligence Act* provides that the Court must determine their respective degrees of fault for the plaintiff's damages.

The potential for unfairness arises where one or more of the wrongdoers is insolvent. Under the joint and several liability rules, the burden of any financial shortfall falls on the solvent defendants rather than the plaintiff. In many cases, only one of a number of defendants may be solvent, or insured. As a consequence, the total financial burden can be assumed by a defendant whose contribution to the damage was minor.

There are competing interests at stake. On the one hand, the law has traditionally given substantial protection to the innocent plaintiff, who risks under-compensation in the absence of the joint and several liability rules. On the other hand, "deep-pocket" defendants face enormous liabilities, and rising insurance premiums, to pay entire damage awards that are out of proportion to their degree of fault.

In light of the increasing criticisms directed at joint and several liability, a number of jurisdictions have considered or implemented reforms to mitigate the impact on defendants.

(a) Canada

In 1998, the Standing Senate Committee on Banking, Trade and Commerce released its report entitled *Joint and Several Liability and Professional Defendants.* The Committee's Inquiry into the law of joint and several liability was motivated by concerns expressed by the Canadian Institute of Chartered Accountants that auditors were facing a "liability crisis" that could largely be attributed to the doctrine of joint and several liability. The Committee recommended the implementation of a modified proportionate liability regime to apply only to economic losses arising from any error, omission, statement or misstatement in financial statements issued under federal financial legislation. This recommendation encompassed claims against any persons who might be involved in the preparation of financial statements such as accountants, appraisers, lawyers and corporate directors. The Committee suggested that the principle of joint and several liability in this area be modified rather than abolished entirely, by maintaining joint and several liability in claims where fraud or dishonesty is involved, or where there is financial loss by an unsophisticated plaintiff.

In response to the recommendations of the Committee, the federal government enacted legislation to modify joint and several liability for economic loss. Under the new law if any of the defendants cannot pay their share of the award, the other defendants pay an additional amount in proportion to their degree of fault. The maximum additional amount payable, however, cannot exceed fifty percent of the amount originally awarded against that defendant.

(b) Australia

At least four Australian states have enacted legislation abolishing joint and several liability in actions involving defective building construction and replaced it with a scheme of proportionate liability. These legislative reforms appear to primarily reflect concerns expressed by professionals and local governments regarding their liability exposure. An important component of this legislative solution to the problem of the "deep-pocket syndrome" is that the statutes also include compulsory insurance requirements for practitioners in the construction industry.

(c) United States

The greatest reform of joint and several liability has taken place in the U.S. as part of the "tort law reform" of the 1980's and 1990's. "Tort" law includes all civil wrongs not based on contract. In response to what was perceived as an upward (and irrational) creep in tort damage awards, and a resulting insurance crisis, a majority of state legislatures modified or altogether abolished joint and several liability.

While solutions to the plight of the deep pocket defendant vary from state to state, most states have adopted a middle road between pure joint and several liability and pure proportionate liability.

As a result of the radical overhaul of the law in this area over the past 20 years, the American Law Institute recently issued a revised version of the *Restatement of the Law of Torts: Apportionment of Liability* (2000), which contains a useful framework. While taking no position on the relative merits of joint and several liability, proportionate liability or some combination of the two, the *Restatement* presents the following five tracks:

Track A: Pure Joint and Several Liability

Track A re-states the traditional rule that if the independent tortious conduct of two or more persons is a legal cause of an indivisible injury, each person is jointly and severally liable for recoverable damages caused by the tortious conduct. Pure joint and several liability remains the rule in a handful of U.S. states.

Track B: Pure Several Liability

At the other end of the spectrum is the rule of pure proportionate liability, where each defendant is severally liable for his or her comparative share of the plaintiff's damages assigned to that defendant by the trier of fact. Under a rule of pure proportionate liability, it is the plaintiff who must bear the burden of an uncollectible award of damages against one defendant.

Track C: Joint and Several Liability With Reallocation

Track C retains the concept of joint and several liability, but permits reallocation of the uncollectible portion of a judgment among all parties, including the plaintiff. In other words, all parties share the risk of a defendant's insolvency. A similar result may be obtained by starting with rules of several liability, then reapportioning in the event of insolvency. Examples of jurisdictions where this model has been adopted include Minnesota and Connecticut. The *Restatement* describes this track as "theoretically the most appealing".

Track D: Hybrid Liability Based on Threshold Percentage of Comparative Responsibility

This Track applies the rule of joint and several liability where the assigned percentage of a defendant's fault exceeds a prescribed limit. Where the defendant's fault is less than the prescribed limit, liability is proportionate. This solution to the problem of joint and several liability has been adopted by a number of states, although there is some divergence with respect to the threshold percentage of fault required to trigger joint and several liability. For example, Florida

has set a threshold of 10%, which increases with the damage award. In contrast, in Texas joint and several liability is only imposed where the assigned fault exceeds 50%.

Track E: Hybrid Liability Based on the Type of Damage
The final Track is also a hybrid liability, dependent not on the defendant's degree of fault but rather on the type of injury suffered by the plaintiff. The defendant remains jointly and severally liable for the economic-damages portion of the award (objectively verifiable monetary losses), but only proportionately liable for the non-economic damages. (To use the terminology of Canadian law, this Track draws a distinction between pecuniary and non-pecuniary losses). This approach has been adopted in California and New York.

There are some distinctions between the U.S. and Canadian legal systems that should be kept in mind in seeking guidance from U.S. tort law reform.

For example, an important area of concern in the U.S. has been with large jury awards for non-pecuniary damages (referred to as "non-economic damages" in the U.S.). This is less of a concern in Canada, given that the Supreme Court of Canada has imposed a judicial "cap" on non-pecuniary damage awards. Some legislation adopted in U.S. states (e.g. Track E - proportionate liability for non-economic damages) may be of less relevance in Canada, given the judicial limits on non-pecuniary awards.

The reforms in other jurisdictions demonstrate that there are many options to consider between pure joint and several liability and pure several liability. Some critics of joint and several liability have suggested that a balance can be achieved between the fairness interests of plaintiffs and "deep pocket" defendants by drawing a distinction between personal injury and economic loss. Joint and several liability could be retained for personal injury claims, for example, and abolished or modified for pure economic loss claims. The question becomes: when should joint and several liability apply?

There are a variety of reform possibilities in the area of joint and several liability. It would be of assistance to government in considering legislative responses to receive input on the following questions:

- Should the law of joint and several liability be legislatively modified or abolished?
- If so, what type of legislative solution is preferable? Should one of the five tracks set out in the *Restatement* be adopted? Why would one of these models be preferred over the others?
- How might the interests of the plaintiff be protected if joint and several liability is abolished or modified?
- Who should be required to obtain and maintain insurance and for what types of actions?
- What alternatives are there to compulsory insurance?
- What do you see as the outcome of the trend toward limited, and possible unavailable, insurance?