

Joint, Several and Concurrent Liability: What's the Difference?

Neil C. Carfra

ncarfra@carlaw.ca

and

Eliza Bates-Smith

ebates-smith@carlaw.ca

Carfra & Lawton

Victoria, B.C.

www.carlaw.ca

One often hears the term ‘joint tortfeasors’ in relation to claims involving multiple defendants. In our experience, the term is loosely applied to two distinct types of civil liability: ‘several concurrent tortfeasors’ and ‘true joint tortfeasors’. Indeed, there has been much litigation on the legal result of the distinction. The purpose of this article is to explain the distinction and to highlight why it matters.

A ‘tortfeasor’ is a person who commits a civil wrong (a tort), either intentionally or negligently. The most common type of joint tortfeasor relationship occurs when the independent fault of two or more persons combine to produce the same damage to someone else. If, for example, an innocent pedestrian is injured by an intoxicated driver who was over-served in a commercial host establishment, both the driver and the bar are negligent because their independent acts resulted in the plaintiff’s injuries. They are several concurrent tortfeasors.

What about the other? When two or more persons act together in furtherance of a common design or plan, during the course of which a tort is committed, they are “true” joint tortfeasors. By way of illustration, in one British Columbia case¹, the plaintiffs claimed damages against three defendants as a result of arson that destroyed a shed and a barn on their farm. The judge found that two of the defendants acted jointly in planning and setting the fire. The third was not involved in planning the incident, but he was aware that the other two intended to burn something down. He drove them to the farm, although he tried, without success, to dissuade them. After the two got out of the vehicle, he drove around and eventually returned to pick them up as they ran away from the fire. The three discussed the matter and agreed to keep it secret. After reviewing the authorities, the judge concluded that a person “who knowingly assists or encourages another to commit a tort, or one who is merely present as a conspirator in the wrong that is done, is, in law, a joint tortfeasor.” Consequently, all three were held liable to the

¹ *Bains v. Hofs* (1992), 76 B.C.L.R. (2d) 98 (S.C.)

plaintiffs. The third fellow was unable to escape liability because he did not disassociate himself with the wrong that was being done or do anything to stop the other two once the plan was underway.

In another example where the dissociation argument failed², a group of teenagers decided to visit a construction site. Their common purpose was to engage in minor vandalism. There was a tank of diesel fuel on the site. Two of the group released the fuel on the ground and, along with two others, made several attempts to ignite the fuel. Not all of the four participated in all of the attempts. Finally, one of them succeeded. The judge concluded the teens did not intend to cause damage beyond burning the fuel, however, the fire spread and the damage ended up being extensive. The teens, other than the one who ignited the fuel, attempted to argue that they had dissociated themselves from the common plan of attempting to light the fuel before the one succeeded in doing so. The judge noted that even in criminal law, a party to an offence cannot legally disengage from a common enterprise voluntarily entered into simply by changing that party's mind and not telling any other party about it. Accordingly, the judge rejected the so-called "private repentance" of the defendants. They were liable as true joint tortfeasors since they failed to disengage or even to tell the other defendant they no longer wished to set fire to the fuel.

The tort committed does not have to be the result of a concerted action to cause the specific harm. In one New Brunswick case³, three defendants broke into an ice arena with the common intention of stealing. While inside, one of them negligently caused a fire to break out in the building. The trial judge found that the defendant had lit matches in order to see if there was anything worth stealing and that this was in direct furtherance of the common purpose. Therefore, it mattered not that only one of the defendants was responsible for starting the fire, all three were jointly and severally liable to an equal extent as true joint tortfeasors for the negligent acts of one done in connection with the common enterprise. The Court of Appeal upheld these findings.

The reason why the distinction between the two types of joint tortfeasor is often blurred may be because both result in joint and several liability to a plaintiff by operation of statutes like British Columbia's *Negligence Act*. The effect of these statutes is that each joint tortfeasor is liable to the plaintiff for the whole of the loss and thus the plaintiff can collect from the one with the deepest or easiest pockets. That person can then look to his or her co-tortfeasors for contribution and indemnify in the degree to which they are respectively found to have been at fault.

What is the practical significance between these types of joint tortfeasors? There are several from a claims management perspective:

- The ability to settle one defendant out and obtain a release while still permitting the plaintiff to continue against the other tortfeasors is limited in some provinces.

² *Raywalt Construction Co. v. Bencic*, 2005 ABQB 989

³ *Newcastle (Town) v. Mattatall* (1988), 52 D.L.R. (4th) 356 (N.B.C.A.)

For true joint tortfeasors in British Columbia, New Brunswick, and Newfoundland, a release of any one of them operates as a release of them all. Conversely, a release of a several concurrent tortfeasor has no legal bearing on a plaintiff's right to continue a claim against the other defendants.

- Release of a several concurrent tortfeasor may entitle the remaining joint tortfeasors to deduct from the plaintiff's claim what the settling party paid.
- In British Columbia, for example, the *Rules of Court* provide that "if several defendants are sued jointly, a plaintiff may not make an offer to settle except jointly to all defendants, and a defendant may not make an offer to settle except jointly with all other defendants."⁴ The Court of Appeal has ruled that this applies only to cases involving true joint tortfeasors, not several concurrent tortfeasors⁵. Clearly, one must know which type of joint relationship is involved in the case when deciding on whether or not to issue a formal offer to settle.

Conclusion

The legal distinction between several concurrent tortfeasors and true joint tortfeasors has a direct bearing on settlement opportunities and liability exposures in multiple defendant lawsuits.

⁴ Rule 37(31).

⁵ *Browne v. Lowe* (2002), 97 B.C.L.R. (3d) 246 (C.A.)