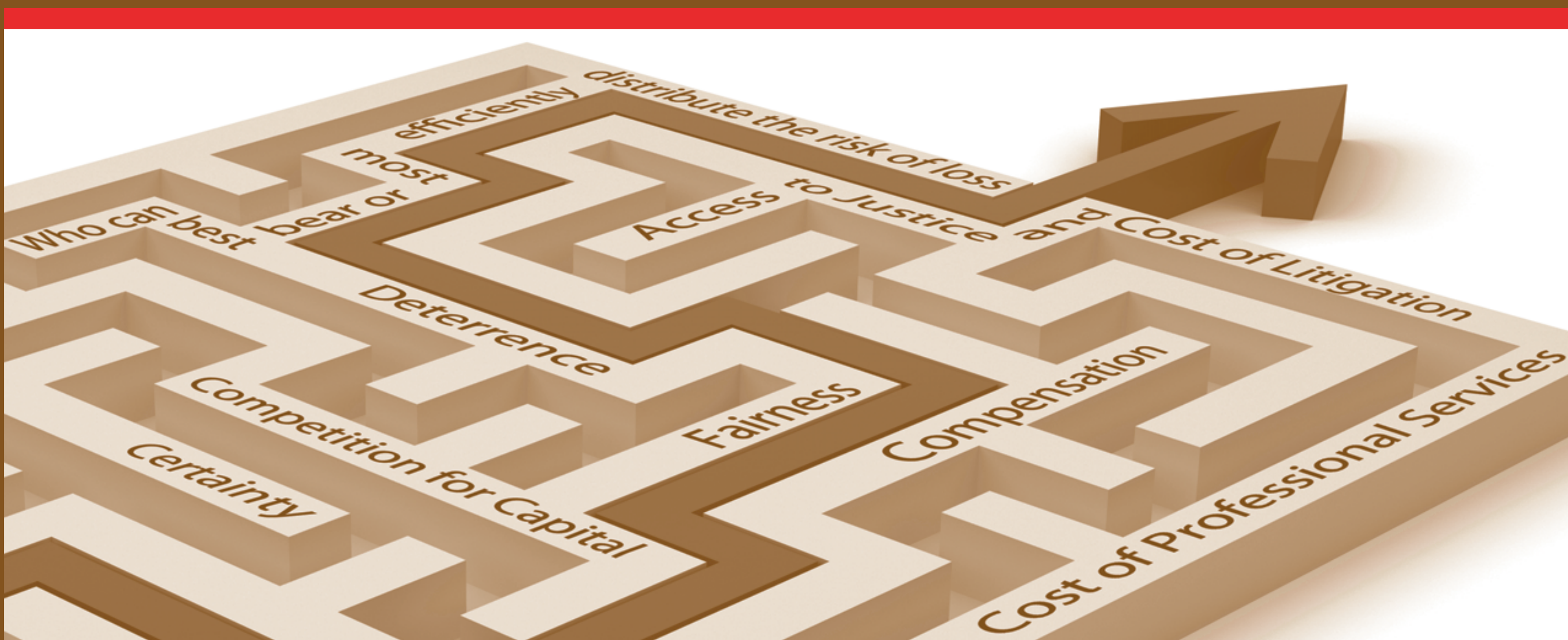
Joint and Several Liability Under the Ontario *Business Corporations Act*

FINAL REPORT

February 2011



LAW COMMISSION OF ONTARIO
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ABOUT THE LAW COMMISSION OF ONTARIO

The Law Commission of Ontario (LCO) was created by an Agreement among the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, Osgoode Hall Law School and the Law Society of Upper Canada, all of whom provide funding for the LCO, and the Law Deans of Ontario's law schools. It is located at Osgoode Hall Law School, York University.

The mandate of the LCO is to recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility; improve the administration of justice through the clarification and simplification of the law; consider the use of technology to enhance access to justice; stimulate critical legal debate; and study areas that are underserved by other research. The LCO is independent of government and selects projects that are of interest to and reflective of the diverse communities in Ontario. It has committed to engage in multi-disciplinary research and analysis and make holistic recommendations as well as to collaborate with other bodies and consult with affected groups and the public more generally.

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FOREWORD

The issue of joint and several liability in tort law has long been controversial and perhaps particularly so in the context of its application to professional advisors to corporations. As this Report indicates, many jurisdictions, including Ontario, have considered this question with varying results. In 1988, the Law Commission of Ontario's predecessor, the Ontario Law Reform Commission, addressed the question of "contribution among wrongdoers". Since then several jurisdictions have changed the application of joint and several liability in limited contexts to other forms of liability, such as proportionate liability and capped liability, including Ontario under the *Securities Act*. Other jurisdictions have retained joint and several liability.

With this background in mind, the Law Commission of Ontario undertook to review the application of joint and several liability in the very narrow context of the Ontario *Business Corporations Act* where it has remained a live issue. We are aware that there are those who believe this project should have addressed joint and several liability in tort law more generally; however, we concluded that a more clearly defined project was more appropriate at this time.

The LCO Board of Governors approved undertaking a review of "Joint and Several Liability under the Ontario *Business Corporations Act*" on February 5, 2009. While most LCO projects are completed "in house", the head of project in this case has been Professor Poonam Puri, in her capacity as a Scholar in Residence under the Osgoode Hall Law School/LCO Scholar in Residence Program.

Following consultations with those interested in this issue from various perspectives, consideration of the approaches taken in other jurisdictions, a comparison between Ontario and other jurisdictions and other ways in which professional advisors may limit their liability, the LCO has concluded that change to the current regime of joint and several liability under the OBCA is not warranted. The Board of Governors approved this Final Report on February 3, 2011.

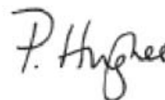

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TABLE OF CONTENTS

EXECUTIVE SUMMARY 1

I. INTRODUCTION 2
- A. The Ontario Business Corporations Act 2
- B. Purpose of Report 5
- C. The Consultation Process 6

II. OVERVIEW OF JOINT AND SEVERAL LIABILITY 7

III. MODELS FOR REFORM 9
- A. Proportionate Liability 9
- B. Legislative Cap on Liability 10
- C. Hybrid 10
- D. Contractual Limitations on Liability 11

IV. LEGISLATIVE AND OTHER DEVELOPMENTS 12
- A. Canadian Statutory Reform 12
- B. Previous Consideration of Joint and Several Liability in Canada 15
- C. Other Jurisdictions 16

V. POLICY CONSIDERATIONS 19
- A. Who can best bear or most efficiently distribute the risk of loss 19
- B. Compensation 19
- C. Deterrence 20
- D. Fairness 20
- E. Access to Justice and Cost of Litigation 21
- F. Cost of Professional Services 21
- G. Certainty 21
- H. Competition for Capital 21

VI. ADVANTAGES AND DISADVANTAGES OF JOINT AND SEVERAL LIABILITY 22
- A. Reform to Proportionate Liability and Legislative Caps 22
- B. Maintaining the *Status Quo:* Joint and Several Liability 26

VII. ANALYSIS 31

VIII. RECOMMENDATION 37

ENDNOTES 38

APPENDIX A: LIST OF ACRONYMS 40

APPENDIX B: ORGANIZATIONS AND INDIVIDUALS PROVIDING INPUT 41

EXECUTIVE SUMMARY

Ontario's *Business Corporations Act* contains corporate law rules that govern the relationship between the corporation and its directors, officers, shareholders and stakeholders. Legal claims involving these parties take place in a system of joint and several liability: any one co-defendant is liable to pay the whole of a plaintiff's loss and the risk of a co-defendant's insolvency, unavailability or inability to pay falls on the co-defendants. Some jurisdictions have implemented a proportionate liability regime: co-defendants are only liable for the portion of their loss for which they were found to be at fault. Other jurisdictions use statutory limits ("caps") on damages, often in conjunction with proportionate liability.

The purpose of this Report is to analyze whether the system of joint and several liability that operates for claims relating to OBCA corporations should be reformed to some version of proportionate liability and/or a statutory cap on damages.

The LCO considered the issue of liability reform by reviewing key policies and rationales underlying the tort system, including compensation, deterrence and fairness, and also addressed joint and several liability and alternatives in the broader context of proof of the substantive elements of tort law and professional negligence.

The study also considered the key advantages and disadvantages of different forms of liability, including joint and several liability, and alternatives, including proportionate liability, capped liability and contractual limitations.

The LCO notes that many professional advisors to all types of OBCA corporations use contractual caps to limit their liability vis-à-vis the corporation. The will of private parties in this context should generally be given effect through the fundamental principles of common law. The LCO also notes that professional advisors to OBCA corporations have the ability to contractually cap their liability vis-à-vis the corporation and the shareholders if all the shareholders expressly consent in writing to the liability cap, and that this option is most practical for non-offering OBCA corporations.

The LCO also notes that professional advisors who have been concerned about rising third-party insurance premiums and coverage limitations have negotiated larger retentions or deductibles with their insurers and have pursued self-insurance for certain layers of risk and liability exposure where it is more cost-effective to do so. In addition, a growing body of literature highlights the ability of novel market-based mechanisms, such as financial statement insurance and catastrophic bond securitization, to deal with audit failure.

After reviewing and analyzing arguments for retention of the *status quo* of joint and several liability, reform to a system of proportionate liability and/or statutory caps, as well as market based mechanisms that professionals can use for addressing liability concerns, the LCO recommends that the provisions of joint and several liability should continue to operate for OBCA corporations. The LCO reaches this conclusion on the basis that (i) the common law tests for professional negligence sufficiently address concerns about excessive or unfair liability; (ii) the available evidence on the specific deleterious effects of joint and several liability on insurance premiums, insurance coverage, pricing of audit services, and entry into the professions does not justify a change; and (iii) trends in other jurisdictions toward proportionate liability, particularly the United States, do not provide a sufficient grounding for reform, particularly in light of the more litigious environment in the United States.

I. INTRODUCTION

The Board of Governors approved this project on February 5, 2009 and work commenced in July 2009. The project considers the advisability of applying the principle of joint and several liability to professional advisors to corporations under the Ontario *Business Corporations Act* ("OBCA").[1]

A. The *Ontario Business Corporations Act*

In Canada, individuals may incorporate a business under the federal business law statute or one of a number of provincial/territorial statutes. Ontario's *Business Corporations Act* contains corporate law rules and duties that govern the relationship between the corporation, directors, officers, its shareholders and its stakeholders. A corporation can be incorporated under the OBCA but its operations may or may not be physically located in Ontario. Nonetheless, the OBCA will be the governing statute for corporate law matters for those businesses incorporated under it. Some corporate law rules are mandatory while others are default rules that can be opted out of by the parties.

Corporations can be classified as private or public. A private corporation, also known as a closely held corporation or a non-offering corporation, has few shareholders, each with a relatively significant economic interest. The shares of closely held corporations generally have restrictions on their transfer of ownership. In contrast, a public corporation, also known as a widely held corporation or an offering corporation, has many shareholders, each of whom has a relatively small economic stake in the corporation. Shares of public corporations are freely-tradeable and often trade on stock exchanges.[2]

Certain corporate law rules are mandatory for both private and public companies. Directors of both private and public companies must present the company's financial statements to the auditors before each annual meeting of shareholders.[3]

However, some rules that are mandatory for public companies are simply default rules for private companies and can be opted out of by shareholders. For example, a non-offering OBCA corporation can be exempted from the requirements to appoint an auditor if *all* of the shareholders consent in writing to such an exemption.[4] The differential treatment of public and private companies recognizes that (i) auditors serve a valuable purpose in verifying a company's financial statements but that it comes with a significant cost; and that (ii) where the shareholders *unanimously* decide to forgo an audit because the cost exceeds the benefit, the law should facilitate that outcome. The differing rule also recognizes that it would be extremely difficult, if not impossible, to obtain unanimous consent of shareholders to forgo the appointment of an auditor for most public companies and that benefit of audited financial statements exceeds the costs, particularly in the context of protecting retail investors and maintaining the integrity of the capital markets.

Some rules are mandatory for public corporations but not required at all for private corporations. In addition to presenting financial statements to the shareholders, noted above, public corporations must file financial statements as required under the Ontario *Securities Act* ("OSA").[5] An offering corporation must also create an audit committee[6] and appoint an auditor to examine the company's financial statements.[7] Offering corporations

also have a duty to solicit proxies[8] and to distribute management information circulars,[9] require at least three directors[10] and are subject to compulsory acquisition rules.[11] Offering corporations have further disclosure requirements under the OSA, as described in this Report.

Under the OBCA, directors are responsible for managing and supervising the business affairs of the corporation.[12] They owe a statutory duty of care and fiduciary duty to the corporation: they must act honestly and in good faith with the best interests of the corporation in mind.[13] The fiduciary duty has been interpreted by the courts, including the Supreme Court of Canada, to include duties to consider the interests of a range of stakeholders, including creditors, employees and customers.[14]

Directors must also comply with the OBCA, its Regulations, the Articles and bylaws of the corporation and any unanimous shareholder agreements.[15] Directors may also be personally liable under federal or other provincial statutes, such as the *Income Tax Act* or *Employment Standards Act*, *2000*. While the statutory duties and personal liability of directors are mandatory and cannot be opted out of,[16] a corporation may indemnify a director or officer against costs, charges and expenses in certain circumstances[17] and also purchase insurance for them.[18]

Shareholders of an OBCA corporation also have rights against the corporation. They have the right to elect the directors,[19] approve bylaws,[20] formally appoint the auditor[21] and review the corporation's financial statements.[22] Shareholders also have the right to approve fundamental changes to the corporation, such as amendments to the Articles of Incorporation, statutory amalgamations and sale of all or substantially all the assets of the firm.[23] A fundamental concept of Canadian corporate law is shareholder limited liability. While directors and officers are personally liable for a breach of their duties, as noted above, a shareholder is not financially responsible for more than his or her investment in the corporation.[24]

Shareholders can be classified in different ways. Retail shareholders or retail investors can be defined as individuals who buy and sell shares of companies directly, for their own account. Retail shareholders are presumed to be financially unsophisticated, with limited financial savvy, few financial resources and less incentive to perform extensive due diligence on their holdings because the stakes they hold in public companies are relatively small. These limitations mean that retail investors tend to be less engaged with and have less say in corporate affairs of public companies. Ontario securities law, which governs public companies, contains numerous provisions designed to protect the retail investor.

In contrast to retail investors, institutional investors are large, more sophisticated investors including pension funds, life insurance companies, mutual funds, hedge funds and private equity funds. They may be investing on their own account or for individuals. Institutional investors tend to have significant and diversified investments, large financial resources, sophistication and financial acumen, and complex ownership and investment strategies. Securities law statutes often contain carve-outs that acknowledge the sophistication of such investors and their ability to better protect themselves.

Aside from shareholders, the corporation may contain a diverse array of stakeholders who have an interest in the affairs and well being of the corporation. These stakeholders include creditors, employees and customers. Depending on the nature of the business or characteristic of the individual stakeholder, they may be more or less sophisticated and have more or fewer resources, with corresponding effects on their bargaining power and ability to negotiate contracts, and hence the need for regulation to protect them. Creditors such as financial institutions will tend to be more sophisticated, with large amounts of resources and bargaining power, while trade creditors could have less of both. Employees are likely on the lower level of sophistication, though they may potentially be backed by more powerful trade unions. Customers in the context of consumer products would likely tend to be on the lower end of sophistication and bargaining power vis-à-vis the corporation, though a customer in a business-to-business transaction may be quite sophisticated and have a significant amount of bargaining power. Hence the need for regulation to protect vulnerable parties would vary depending on the stakeholder and business in question.

Aside from shareholders, the corporation may contain a diverse array of stakeholders [who] include creditors, employees and customers [and who] may be more or less sophisticated and have more or fewer resources, with corresponding effects on their bargaining power and ability to negotiate contracts….

Corporations, their directors and officers rely on professional advisors to assist in carrying on the business and affairs of the corporation and helping to fulfill the corporation's regulatory requirements. Auditors are engaged to audit financial statements and prepare audit reports, lawyers advise on the array of legal and regulatory issues, and other professionals, such as engineers, actuaries or geologists, may be used as required by the nature of the company.

As a public policy matter, we want to ensure that corporations comply with the law. We use a range of market and non-market mechanisms to attempt to ensure compliance with the law. One market mechanism that is commonly cited as achieving compliance is reputation. A company's reputation in the market has potential effects on its profitability, giving incentive for a corporation to ensure a good public image; this is fostered by a reputation for compliance with the law. Another market mechanism is proper executive compensation: managers of a company should act in the best interest of the company, and their compensation should be balanced to ensure that their own interests do not unduly influence their corporate decision making.

Non-market mechanisms, particularly legal mechanisms, attempt to ensure compliance by creating fiduciary duties on directors and officers, along with the threat of private enforcement by aggrieved stakeholders. In the context of the public company, the active securities regulator provides further incentive to comply with the law.

Professional advisors such as auditors, lawyers, engineers and actuaries face similar incentives and pressures. Reputation, for example, operates in the same way for an auditing firm as it does for a corporation. Legal and quasi-legal rules created by professional regulatory bodies contribute to the pressure to comply with professional standards and legal requirements, as does the threat of private litigation.

Focusing on private litigation in the context of an OBCA corporation, there are many potential plaintiffs, causes of action and defendants. Plaintiffs can include the corporation, its directors and officers, individual shareholders, creditors, employees and other stakeholders. Causes of action can be found in contract (for example, for a breach of contract) or tort (for example, negligent misrepresentation). Defendants could include the

corporation, its directors and officers and, critically, the corporation's professional advisors. Where there are multiple defendants to one action that are found to be at fault, the principle of joint and several liability currently applies, such that the plaintiff(s) may seek the full amount of the damages from any one of the co-defendants, with such defendant then having an opportunity to seek contribution from the co-defendants. This rule causes particular concern when one of the co-defendants, such as the corporation, becomes insolvent or otherwise unavailable, leaving one or all of the other co-defendants responsible to pay the plaintiff the full amount of the damages.

B. Purpose of Report

The purpose of this report is to analyze whether the provision of joint and several liability that operate for claims relating to OBCA corporations should be reformed to some version of proportionate liability and/or a statutory cap on damages. The focus of this report is specifically with respect to private litigation in the context of OBCA corporations and not about tort reform more broadly. However, analysis of issues arising from the broader context of the liability of joint tortfeasors and tort law and policy contributed to the LCO's analysis, conclusions and recommendations.

[W]ho is in the best position to bear or distribute the loss, who has the best information about the wrongdoing, and who is able to avoid the loss at least cost?

The LCO considered the issue of liability reform by reviewing key policies and rationales underlying the tort system, including compensation, deterrence and fairness, and also addressed joint and several liability and alternatives in the broader context of proof of the substantive elements of tort law and professional negligence.

The report also considered the key advantages and disadvantages of different forms of liability, including joint and several liability and alternatives including proportionate liability, capped liability and contractual limitations.

The LCO received arguments advanced by those in favour of the current system as well as proponents of reform including:

- rising insurance costs and caps on insurance coverage;
- the concern of catastrophic loss, potentially causing the ruin of an auditing firm and exacerbating the current concentration of audit firms;
- the deep pockets syndrome; and
- rising costs of professional services and losing qualified people from entering the professions.

The significant difference between joint and several liability, on the one hand, and proportionate liability or statutory caps on the other hand, concerns the allocation of risk. The former puts the risk of insolvent or unavailable co-defendant on the other co-defendants, while the latter transfers the risk to the plaintiff.

Since tort law is a social, economic and political institution, the public policy analysis should center on who should bear the burden of an insolvent, financially limited or unavailable defendant: the plaintiff or the other co-defendants. Relevant questions to be asked include: who is in the best position to bear or distribute the loss, who has the best information about the wrongdoing, and who is able to avoid the loss at least cost?

C. The Consultation Process

On October 28, 2009, the LCO, supported by the Hennick Centre for Business and Law, held a half-day roundtable discussion to review the joint and several liability scheme for professionals under the OBCA. A short Background Paper had been prepared as background for the Roundtable. Specifically, the LCO sought feedback on whether the current rule of joint and several liability under the OBCA should be modified to bring it in greater alignment with the OSA, the *Canada Business Corporations Act* ("CBCA")[25] and trends in other jurisdictions.

The Roundtable panelists and participants consisted of a diverse range of professionals who represented the interests of various stakeholders, including corporate lawyers, accountants, litigators (plaintiff-side and defendant-side) and consultants. The Roundtable began with an overview of the amendments to and experience with the CBCA and the OSA and generated discussion on various industry perspectives.

The views expressed in the roundtable were taken into account in preparing the Consultation Paper released in May 2010.[26] The Consultation Paper was posted on the LCO website and distributed widely, including to the Roundtable participants. The Consultation Paper provided background, asked 16 specific questions, outlined options for reform and asked for feedback. Comments were encouraged until June 30, 2010, but were also accepted beyond this date. The LCO received a total of 17 submissions from various stakeholders, ranging from those adamantly opposing reform to those stressing an urgent need to move toward a proportionate liability regime. (See Appendix B for a list of individuals and organizations who participated in the Roundtable and/or made submissions.)

On the whole, submissions from the legal community, including the Ontario Bar Association (OBA) and the Ontario Trial Lawyers Association (OTLA), favour the *status quo*. In contrast, members of the auditing profession and other professional groups, including the Institute of Chartered Accountants of Ontario (ICAO) and the Canadian Public Accountability Board (CPAB), stress the need to reform the current joint and several liability regime which they claim, among other effects, threatens the future of the auditing profession.

The submissions informed the analysis, conclusions and recommendation to retain the application of joint and several liability under the OBCA in the LCO's Final Report.

II. OVERVIEW OF JOINT AND SEVERAL LIABILITY

Joint and several liability provides for a plaintiff to recover the entire claim for damages from one of several negligent defendants. The authority for this remedy is set out in section 1 of the Ontario *Negligence Act* which reads:

> **Extent of liability, remedy over**
>
> 1. 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. [27]

Where three different defendants are found to have caused a plaintiff's loss, the plaintiff is entitled to seek full payment (100%) from any one of the defendants. The defendant who fully satisfies the judgment has a right of contribution from the other liable parties based on the extent of their responsibility for the plaintiff's loss.

For example, a court may find defendants 1 (D1), 2 (D2) and 3 (D3) responsible for 70%, 20%, and 10% of the plaintiff's $100,000 loss, respectively. The plaintiff may seek to recover 100% of the loss from D2, who may then seek contribution from D1 and D3 for their 70% and 10% shares of the loss. If D1 and/or D3 is unable to compensate D2 for the amount each owes for whatever reason, such as insolvency or unavailability, D2 will bear the full $100,000 loss. The plaintiff will be fully compensated for $100,000, and it is the responsibility of the defendants to apportion the loss fairly between them.

The submission of the OTLA notes that:

> As a policy statement, our legislators have long recognized that, as between an innocent victim and one or more wrongdoers, the innocent victim should not be the one to suffer, if a wrongdoer is unable to pay his or her proportionate share of a damage award.[28]

Several submissions, including those of The Advocates Society and the British Columbia Investment Management Corporation (bcIMC), noted that joint and several liability is liability *in solidum* ("for the whole"). They stressed the need to recognize: (a) the single loss suffered by the plaintiff, as a result of (b) the joint wrongdoing of concurrent wrongdoers, the result of which is full liability for any wrongdoer, with a right to contribution from the other liable parties. It is important to note that the harm may not have occurred "but for" the concurrent wrongdoing of all liable parties.[29]

The bcIMC states that:

> It should not be the responsibility of those harmed as a result of corporate wrongdoing to have to seek out all those responsible in order to obtain full compensation. The burden should rest on those found responsible to pursue indemnification from each other.[30]

"In many cases, the Plaintiff is not in a position to know who contributed to their loss, and the Defendants are in a better position to have the necessary information and make this judgment."
David Debenham

David Debenham, a legal and accounting commentator, describes the implications of joint and several liability in the context of professional advisors as follows:

> The Plaintiff is not required to find and sue all the parties who caused or contributed to his damage in order to obtain full recovery. This is particularly important in an era where limitation periods are typically two (2) years or less and, in some cases, short as seven (7) days. In many cases, the Plaintiff is not in a position to know who contributed to their loss, and the Defendants are in a better position to have the necessary information and make this judgment. In the case of the auditor, it is their responsibility to know how the faulty financial information was produced, and who was responsible for the misstatement, so the auditor is in a better position than the user of the financial information to detect the source of the erroneous information and add them as parties to the lawsuit, and they have a longer time than the Plaintiff does to start a lawsuit against other tortfeasors. Solidary liability gives Defendants, who usually have better information regarding who contributed to the loss, a motivation to add all responsible parties to the lawsuit before limitation periods expire. [31]

Debenham's comments highlight that joint and several liability is efficient, promotes access to justice and reflects the underlying reality of who has the best access to information in relation to wrongdoing.

Further, it is important to note that joint and several liability only begins to operate once a wrongdoing has been proven by the plaintiff. A plaintiff must prove the substantive elements of the tort against a defendant in order for damages to be sought against that particular defendant. A finding of liability must come before any apportionment of degrees of fault between defendants. Thus, because fault is distributed only among co-defendants found liable according to the common law requirements of the tort, blameless co-defendants are absolved of any accusations of wrongdoing before fault is distributed.

III. MODELS FOR REFORM

This part of the report briefly reviews proportionate liability, caps and contractual limitations of liability.

A. Proportionate Liability

The systems of proportionate liability are described in detail below.

1. Full Proportionate Liability

A system of full proportionate liability limits the liability of each co-defendant to the proportion of the loss for which he or she was found to be responsible. Per the above example (in which D1 is responsible for 70% of loss, D2 for 20% and D3 for 10%), under this system D2 will only be responsible for $20,000 of the $100,000 judgment: equal to 20% of his or her share of the liability. Likewise, D1 and D3 will be responsible for $70,000 and $10,000, respectively. If D1 and D3 are insolvent, unavailable or otherwise unable to pay, the plaintiff will only recover $20,000 from D2.

2. Proportionate Liability where Plaintiff is Contributorily Negligent

This variation of proportionate liability would retain joint and several liability when involving a blameless plaintiff, but would abolish or modify the rule where the plaintiff contributed to his or her loss. Per the first example, suppose the plaintiff (P) contributed to 20% of his or her $100,000 loss, while D1, D2 and D3 were responsible for 50%, 20% and 10%, respectively. If D1 and D3 remain unavailable, P and D2 will each be responsible for their $20,000 shares. The plaintiff will remain responsible for the $60,000 shortfall as a result of the absent co-defendants' non-payment.

3. Proportionate Liability where Plaintiff is Contributorily Negligent with a Proportionate Reallocation of an Insolvent, Financially Limited or Unavailable Defendant's Share

The plaintiff and remaining co-defendants share the risk of a defendant's non-payment in this variation of proportionate liability. The plaintiff and co-defendants are responsible for any shortfall in proportion to their respective degrees of fault. Using the numbers in the previous example, with a shortfall of $50,000 from an absent D1 and $10,000 from an absent D3, P and D2 must account for the missing $60,000. P and D2 had equally-apportioned liability, and will thus be responsible for half of each shortfall, or $25,000 and $5,000 from each non-paying defendant. The burden is shared between the plaintiff and remaining defendants.

4. Proportionate Liability with a Peripheral Wrongdoer

Under this approach, a defendant will be proportionately liable only if his or her share of the liability falls below a specified percentage, above which liability would be joint and several. Using the above numbers, if the threshold amount of liability is set at 25%, D2 and D3 would only be responsible for 20% and 10% of the compensation, respectively, regardless of whether they are the only available or named defendants, while D1 is potentially liable for 100% if it is the only available or named defendant.

While this system favours defendants responsible for a relatively small portion of the loss, the determination of the proper threshold amount between joint and several liability and proportionate liability is somewhat arbitrary.

5. Proportionate Liability with a Reallocation of Some or All of an Insolvent or Unavailable Defendant's Share

This variant provides for reallocating the liability of a non-paying defendant among the remaining defendants in proportion to their respective degrees of fault. The plaintiff's contributory negligence does not impact the application of this reallocation, and joint and several liability would continue to apply in cases of fraud or where laws were knowingly violated.

6. Court Discretion

Similar to the fraud exception in the variant above, a final modified approach to proportionate liability may be to give the courts discretion to apply various forms of liability depending upon the facts and circumstances of the case. For example, despite operating in a joint and several liability system, if a particular co-defendant's share of the fault was relatively minor the court would have discretion to limit that defendant's liability to some appropriate portion. As discussed below, while the CBCA uses proportionate liability, there is residual court discretion in some instances.

B. Legislative Cap on Liability

Liability concerns for professionals could be addressed by introducing a cap on the amount of damages available for claims for economic loss in connection with certain types of work. Such a cap could be implemented independent of any reform to the broader liability scheme. This cap could operate in a number of ways, including:

- a single monetary amount;
- a percentage or multiplier of the fee charged by the professional; and
- a percentage of damages awarded.

The cap could be modified by or entirely limited to certain kinds of work. For example, audit professionals drafting an audit report could be capped differently from professional engineers performing a geological survey.

The OSA framework for secondary market misrepresentations contains a statutory cap on liability based on a percentage of a company's market value or the professional's earnings over the time period. For example, Australia has a fixed statutory liability cap of $75 million AUD. These caps are further discussed in detail in Part IV of this Report.

C. Hybrid

A number of jurisdictions provide a hybrid system of proportionate liability and caps on damages. Co-defendants are liable for their portion of the damages, but the maximum total amount payable by each co-defendant is capped to a certain statutory limit.

D. Contractual Limitations on Liability

Parties may also contract to accept limitations on liability. A contractual limitation may have the parties agree that, in the case of loss, there would be a cap on damages to the amount of fees paid.

Private parties are generally free to agree to a contractual cap on liability. However, legislation governing certain professions or professional conduct rules may prohibit some professionals from limiting their liability in certain circumstances. For example, in Canada, corporate law statues provide that directors and officers cannot contract out of their statutory duties, including the duty to exercise care, and related liabilities. Similarly, the *Solicitors Act*[32] says lawyers cannot contractually limit their liability.[33] Such a restriction does not exist in Canadian legislation governing audit professionals. The LCO further understands that audit professionals routinely cap their liability in their engagement letters.

It is important to note that contractual liability caps only potentially address the issue of damage claims above the cap for causes of action based on breach of contract. Caps on damages agreed to by contract do not prevent causes of action based in tort. Parties not privy to the contract with the co-defendant, including shareholders, creditors or consumers, as the case may be, could pursue a cause of action in tort and related damages, even in the face of a contractual cap.

The United Kingdom has adopted a novel approach whereby shareholders may approve a contractual liability cap between an auditor and its client company. This is discussed in further detail in Part IV of this Report.

IV. LEGISLATIVE AND OTHER DEVELOPMENTS

This part of the report reviews recent legislative developments in Canada as well as other reports and commissions in Canada that have considered the issue of liability. Trends in other jurisdictions are also discussed.

A. Canadian Statutory Reform

1. Canada Business Corporations Act

The 2001 amendments to the CBCA that came into force on November 24, 2002 changed the regime of joint and several liability among co-defendants to a modified proportionate liability regime with respect to certain financial information of a CBCA corporation. Under the CBCA, subject to some qualifications, a defendant who is found responsible for a financial loss that arises out of an error, omission or misstatement in financial information that is required by the CBCA is liable to the plaintiff only for the portion of damages corresponding to the defendant's degree of responsibility for the loss.[34]

The proportionate liability scheme in the CBCA is limited in several ways. First, the 2001 amendments apply only to misconduct in relation to the CBCA, and accordingly not to securities law breaches.[35] Secondly, joint and several liability continues to apply in cases of fraud.[36] Third, in situations where one of the defendants (such as the issuer company) is insolvent, financially limited or unavailable, there is a provision for the court to apportion that defendant's liability to the other co-defendants up to a cap equal to 50% of the amount originally awarded against the co-defendant.[37]

In addition, certain plaintiffs are specifically excluded from the proportionate liability regime, including Crown corporations, certain charitable organizations, unsecured trade creditors in respect of goods and services that the creditor provided to the corporation and individual plaintiffs whose investment is less than $20,000.[38] The rationale is that these individuals or organizations may not or do not have the wherewithal to make well-reasoned risk assessments or investment decisions or may suffer unduly from financial loss. Such plaintiffs can continue to collect under the joint and several liability scheme.

Finally, there is residual court discretion: courts have the option to award joint and several liability where it is just and reasonable to do so.[39]

A large number of submissions were critical of the CBCA provisions. The submission of the OTLA, for example, observed that the changes implemented by the 2001 amendments are "highly technical," narrow in scope and application, complicated and confusing. The CBCA reforms in the OTLA's view create uncertainty for litigants and seem, in some cases, arbitrary.[40]

Several submissions asked whether the 2001 CBCA amendments have in fact addressed any of the ills identified when the amendments were drafted. The OTLA states:

> [I]t is imperative, before any recommendation can be made, that an analysis be completed of the specific impact and force of the 2001 amendments. Whatever the experience has been, it cannot be ignored if similar, or related proposals are being considered for the Ontario model. [41]

It is unknown what practical effects the CBCA amendments have had in their eight years of operation. There has been no judicial consideration of, or direct judicial reference to, the CBCA amendments, and the LCO found no studies demonstrating a reversal of the "liability crisis" identified in the years following the amendments.

The bcIMC has publicly called for the CBCA to abolish its proportionate liability regime, "believing that the corporate statute should codify the best (i.e. strongest) corporate governance practices so that they become mandatory for federal corporations."[42]

2. Ontario Securities Act

A public company has two important duties under the OSA. First, when it "goes public", the company must prepare and file a prospectus. A prospectus is a disclosure document that must contain full, true and plain disclosure of all "material facts" and provide information that investors would want to see and that would reasonably be expected to have a significant effect on the value of the securities. Second, the company must make continuous and periodic disclosures to the market. The company must periodically release financial statements and other documents that affect its financial position and make disclosure of any material changes.

Misrepresentations in prospectus disclosure potentially expose a company and its advisors to public enforcement by regulators and private litigation. In the context of prospectus misrepresentation, a plaintiff could pursue a common law cause of action or base his/her claim on the statutory liability regime for prospectus misrepresentations. The rule of joint and several liability operates for common law claims as well as claims for prospectus misrepresentations under the statutory civil liability provisions in the *Securities Act*.[43]

Misrepresentations in continuous disclosure also expose a company and its professional advisors to public and private enforcement, but until 2005 plaintiffs could only base their claim in the common law, as there was no statutory cause of action for continuous disclosure violations. On December 31, 2005, the *Securities Act* (Ontario) was amended to create new statutory causes of action in favour of the "secondary market" against directors, officers and experts for misrepresentation and failure to comply with disclosure obligations.[44]

The statutory provisions were a compromise between plaintiffs' interests and defendants' interests. They provide plaintiffs with a statutory cause of action that is easier to establish than the common law cause of action of misrepresentation which requires proof of reliance on the misrepresentation. In contrast, the statutory cause of action does not require the plaintiff to prove reliance on the negligent misrepresentation. However, the statutory provisions also limit the damages that will be paid out once the statutory cause of action is proven, providing some benefit to defendants, as compared to the common law which provides for joint and several liability. The damages are limited in three ways under the statutory provisions, as discussed below.[45]

First, the damages must be calculated in accordance with the formulae set out in the *Securities Act*.

Second, the court is required to fix the proportionate share of those damages payable by each defendant found liable, recovery against each defendant being limited to its respective share of the total damages assessed for all plaintiffs.

Third, the amount payable by each particular defendant found liable may be further limited, provided that they did not have knowledge of the misrepresentation or fail to make timely disclosure of a material change, to various liability limits specific to each category of defendant.

The legislative caps are as follows. A company's liability may not exceed the greater of $1 million and 5% of its market capitalization. The liability of an individual (other than an expert), such as a director or officer, is limited to the greater of $25,000 and 50% of his or her total compensation from the company and its affiliates during the preceding 12 months (including the value of any options, pensions benefits and stock appreciation rights granted during that period).[46]

An expert's liability is limited to the greater of $1 million and the fees earned by the expert from the company and its affiliates during the preceding 12 months.[47]

The liability limits and proportionate liability provisions in the OSA do not apply to a defendant (other than a company) if the plaintiff proves that the defendant knowingly authorized, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure of a material change. In such cases, defendants are jointly and severally liable for the full amount of damages assessed in the action.[48]

Both the written submissions received and the comments of participants at the Roundtable suggested that practical effects of the reforms to the OSA were modest.

The submission of The Advocates Society states that the statutory secondary market liability amendment is a modest and incomplete remedy for investors harmed by misconduct of others in the secondary market.[49] It notes that there has been little litigation under these amendments made six years ago.

> There is simply no case to be made that there have been massive increases in the liability of auditors, directors and/or officers to public shareholders and/or other third parties who rely upon financial statements provided by their corporations as a result of these OSA amendments and/or similar legislative amendments in other provinces.[50]

The Advocates Society submission also notes that the OSA amendments provided for a new substantive right for investors while also providing for proportionate liability as opposed to joint and several liability.

> [I]n the consultation paper, there is no reference to any corresponding statutory rights and remedies to the OBCA shareholders and other corporate stakeholders being offered by the proponents of change to those introduced in the aforementioned OSA amendments. Instead, the Consultation Paper appears only to raise the prospect of limits to be placed on existing OBCA shareholders' and other stakeholders' rights.[51]

Siskinds' submission agrees that the statutory secondary market regime is "an incomplete remedy for investors harmed by misconduct because of the pro-defendant barriers embedded in the statutory scheme."[52] Siskinds also notes that the experience with these provisions has been rather uneventful. It states:

> When Part XXIII.1 was enacted, advocates for the business community, principally major Bay Street law firms, warned of dire consequences and the likelihood of an avalanche of securities class actions. Those consequences have simply not materialized. Indeed, since Part XXIII.1 was called into force on December 31, 2005, there have been filed, to our knowledge, approximately 17 class actions seeking to assert claims under Part XXIII.1. That amounts to approximately 4 class actions per year. To our knowledge, an auditing firm was named as a defendant in only one of those actions, and ultimately agreed to settle the claims asserted against it for $500,000.[53]

B. Previous Consideration of Joint and Several Liability in Canada

Reform of joint and several liability has been examined several times in recent Canadian history and reform to proportionate liability has been rejected a majority of the time.

In 1979 the Alberta Law Reform Commission recommended retention of joint and several liability.[54] The Uniform Law Conference of Canada came to the same conclusion in 1985,[55] as did the British Columbia Law Reform Commission in 1986[56] and the Ontario Law Reform Commission in 1988.[57] Concerned by the possibility of a "liability crisis", the 1986 *Slater Report* recommended that joint and several liability should be re-examined, but often noted the lack of data to support claims of a crisis.[58]

"[T]he law of negligence must ultimately be judged as a social and economic institution."

The Law Reform Commission of Saskatchewan

The legal environment has changed significantly since the 1980s. The Law Reform Commission of Saskatchewan[59] and the Standing Senate Committee on Banking, Trade and Commerce[60] performed the most recent examinations of the matter in 1998. The Senate Committee recommended that joint and several liability be replaced by modified proportionate liability in the CBCA and other federal statutes. The Committee recommended that joint and several liability be retained in cases involving unsophisticated plaintiffs, the definition of which would be determined by the plaintiff's net wealth. The Saskatchewan Law Reform Commission, on the other hand, recommended that joint and several liability be retained, though with amendments to Saskatchewan's negligence statute to bring it into uniformity with other provincial liability statutes.

As noted by The Law Reform Commission of Saskatchewan in 1998:

> The Commission has tentatively concluded that the basic principle of the existing contribution rules is sound. We begin with the premise that the law of negligence must ultimately be judged as a social and economic institution. In our view, the economic and social costs of shifting the burden of an insolvent co-defendant onto injured parties is less acceptable than shifting it onto co-defendants who are able to assume full responsibility for the harm they contributed to. Neither approach can be regarded as entirely fair in the abstract. But, as a matter of policy, a choice must be made. We believe that the choice we tentatively recommend minimizes social and economic costs. We have also tried to gauge the impact of the present law in practice. Our conclusion that costs are more efficiently apportioned by protecting plaintiffs against short-falls in collection of damages could not stand if there was persuasive evidence that the present law leads to unacceptably high insurance costs. Our review of studies of the impact of the contribution rules on insurance costs does not suggest that the rules result in significantly higher liability insurance premiums.[61]

C. Other Jurisdictions

This part reviews the developments in other jurisdictions which are moving towards a system of proportionate liability, or otherwise away from joint and several liability.

1. United States

A modified form of proportionate liability (proportionate capped liability) was adopted at the federal level in the U.S. with the passage of the *Private Securities Litigation Reform Act of 1995*.[62] The Act retains joint and several liability for defendants who knowingly violate securities laws and in relation to claims made by small investors.[63] A small investor is defined as a plaintiff whose net worth is $200,000 or less and whose share of the damage award is equal to at least 10% of his or her net worth.[64] For all other claims, proportionate liability replaces joint and several liability.

Where a defendant is insolvent or otherwise unavailable and a plaintiff is unable to collect the defendant's share, each of the remaining defendants is further liable for the uncollected shares provided that the additional liability is not more than 50% of the remaining defendant's proportionate share.[65] The Act also contains a contribution right which allows any person required to contribute more than his or her proportionate share to proceed against other persons who bear responsibility.[66]

Much of the impetus for reforming the joint and several liability regime came from a perceived insurance crisis. Municipal governments, in particular, were targeted as "deep pocket" defendants with relatively minor degrees of fault, and argued that joint and several liability was the root cause of higher taxes and service reductions.[67] The majority of states in the United States have modified the rule of joint and several liability in favour of some form of proportionate liability. Some states have adopted full proportionate liability in all circumstances. Others apply full proportionate liability but exclude cases involving intentional torts or strict liability. Some jurisdictions have instituted proportionate liability where the defendant's fault falls below a specified percentage, while others apply proportionate liability if the plaintiff is contributorily negligent or where the plaintiff's fault exceeds a specified degree.[68]

2. United Kingdom

The issue of professional liability has been given extensive consideration in the United Kingdom, stimulated by an increase in the number of negligence claims against auditors and the increasing costs of indemnity insurance. A number of major reports and documents have been produced in recent years.

- The Likierman Report,[69] published in 1989, examined the liability problems associated with three professions, namely, auditors, the construction profession and other surveyors.
- The second report was issued following an investigation by the Common Law Team of the Law Commission entitled "Feasibility Investigation of Joint and Several Liability", published in 1996. The objective of this investigation was to determine whether a full Law Commission project on the issue of joint and several liability should be undertaken.

- The third report was a consultative document issued by the Department of Trade and Industry in December 2003 entitled "Director and Auditor Liability: a consultative document". This document, which was part of the process in reforming corporate law in the U.K., sought the opinions of interested parties on auditor and director liability.

The topic of professional liability was also considered by the Company Law Review Steering Group (the "Steering Group"), which was established by the government and charged with investigating how company law should be reformed. The Steering Group produced a final report in 2001, "Modern Company Law For a Competitive Economy", wherein it considered and specifically rejected proportionate liability as a matter of principle because it was seen to leave innocent parties bearing some of the loss they incurred.

The UK *Companies Act 2006* allows auditors to limit their liability by contract with their company clients, subject to shareholder approval (to address the tort liability) and subject to "such amount as is fair and reasonable in all the circumstances".[70] These reforms, however, were counterbalanced by the following provisions: (1) a new criminal offence introduced for an auditor who "knowingly or recklessly" includes any matter which is misleading, false or deceptive in the audit report or who omits information which results in the audit report being misleading, false or deceptive;[71] (2) auditors may be required to disclose their terms of appointment – e.g. engagement letter;[72] (3) the audit report must be signed by a named partner – the senior statutory auditor;[73] (4) in the case where the auditor ceases to act for a named company, he or she must file a statement on the circumstances connected with his or her departure with the appropriate audit authority.[74]

3. Australia

In the wake of the corporate scandals in 2002, Australia introduced the *Corporate Law Economic Reform Project (Audit Reform and Corporate Disclosure) Act 2004* (Cth) (CLERP 9), which expanded the duties imposed on auditors and thereby increased auditors' potential exposure to greater claims of negligence by third parties. CLERP 9 became effective in July 2004, amidst a professional indemnity insurance crisis and ongoing debate about the introduction of a statutory cap to auditor liability. A solution was sought to balance the claims for greater auditor accountability against the threat of auditors leaving the profession because of an increasing risk of litigation and exposure to liability.

In response, the Australian government introduced two measures in CLERP 9 to mitigate auditor liability: (1) proportionate liability for pure economic loss arising from misleading or deceptive conduct; and (2) a framework allowing for auditors to incorporate and thereby limit their liability through the corporate structure. The Government also legislated to allow for a national approach to a statutory cap for auditor liability through *the Treasury Legislation Amendment (Professional Standards) Act 2004*. The legislation limits losses between $1 million and $20 million AUD based on the fee for the service. The absolute maximum cap on liability is $75 million AUD.

4. European Union

[P]rofessional bodies and associations [in the European Commission's consultations on this issue] … recognized a general consensus that the unlimited liability that could result from a joint and several liability approach produces undesirable distorting effects in the capital market, generating an expectation gap due to the 'deep pocket syndrome'.

On January 18, 2007, the European Commission launched a public consultation on the issue of auditor liability and invited stakeholders from across Europe to provide their views on four possible options for reforming auditor liability: (1) fixed monetary cap at the European level; (2) a cap based on the size of the audited company; (3) a cap based on a multiple of the audit fees; (4) a principle of proportionate liability implemented either by (a) having Member States change their laws to allow courts to award damages only for the portion of loss corresponding to auditor's degree of fault (proportionate liability by statute); or (b) having Member States allow proportionate solutions between the company and its auditors to be negotiated and enshrined in contractual arrangements (proportionate liability by contract).

In identifying the overarching preferred trends in limiting liability, the European Commission found that the preferred approach for the audit profession was to limit auditors' liability by capping, whereas the respondents from other professions favoured the implementation of proportionate liability. Those respondents who preferred a hybrid approach considered that proportionate liability was an appropriate mechanism for avoiding plaintiffs using the audit firms as a way to compensate any financial deficiencies of the audited company, but, at the same time, believe that it is not enough to prevent an audit firm disappearing due to a possible catastrophic claim. It was thought that a cap would provide additional protection for audit firms in the case of such claims.

While the European Commission's public consultations focused primarily on auditor liability, the concerns and potential solutions are transferable to other professions. As the report noted, professional bodies and associations welcomed the consultations and recognized a general consensus that the unlimited liability that could result from a joint and several liability approach produces undesirable distorting effects in the capital market, generating an expectation gap due to the "deep pocket syndrome".

V. POLICY CONSIDERATIONS

There are several policy factors that must be balanced in assessing the current liability regime and options for reform. As noted in the introduction to this Report, this is fundamentally a determination of who should bear the risk of loss and what the role of the legal system should be in this debate.

A. Who can best bear or most efficiently distribute the risk of loss

An insolvent, unavailable or otherwise non-paying co-defendant introduces potential loss for parties to the litigation. The risk of loss shifts from the defendant to the plaintiff as a liability regime abandons joint and several liability for proportionate and/or statutorily capped liability. In a joint and several liability regime, the plaintiff will always be fully compensated if at least one liable co-defendant is capable of paying. If one co-defendant is incapable of paying, the remaining co-defendants must pay more than was found by the court to be their share of fault. Thus because the plaintiff will be compensated (assuming at least the solvent and available defendant), the risk of loss lies purely with the co-defendants. Strict proportionate liability regimes introduce the possibility that the plaintiff will not be compensated due to the non-payment by a co-defendant. In this case, the risk of loss shifts entirely to the plaintiff. Modified proportionate liability systems can include provisions for loss sharing between the plaintiff and co-defendants.

[A] critical policy issue between joint and several liability and proportionate liability schemes is the distribution of the risk of loss. This issue must recognize the presence and potential uses of insurance by parties to offset the risk of loss.

This issue is whether the risk of insolvent co-defendants should be borne fully by other co-defendants, such as the corporations, directors, officers, auditors, lawyers, engineers and other professional advisors, as it is with joint and several liability. Or, whether potential plaintiffs such as retail investors, institutional investors and other stakeholders should bear all or some of the risk of an insolvent co-defendant, as occurs with proportionate liability and caps on liability.

Therefore a critical policy issue between joint and several liability and proportionate liability schemes is the distribution of the risk of loss. This issue must recognize the presence and potential uses of insurance by parties to offset the risk of loss.

B. Compensation

One of the primary aims of civil litigation is to compensate plaintiffs for harm or loss incurred by them on account of wrongdoing by others. At common law, tort damages are meant to provide compensation for the tort victim's loss and put him/her back in the position he/she would have been in had the tort not occurred. When a wrongdoer causes harm, damage or loss, the aim of awarding damages is to require the defendant to pay for everything necessary to make the plaintiff whole. This purpose must be kept in mind when assessing various options for reform. Moreover, the objective of compensation must be read in relation to other policy goals such as fairness, as discussed below.

C. Deterrence

Deterrence is traditionally seen as the primary policy goal of public enforcement and the criminal law, while the private law focuses on compensation (returning an injured party to his or her previous position) as well as deterrence. Deterrence involves deterring a particular wrongdoer from engaging in further misconduct and inflicting further loss (specific deterrence) and also deterring professionals more generally from engaging in misconduct (general deterrence).

Deterring individuals/organizations from misconduct, or put in another way, inducing law abiding behaviour, is one of the main policy rationales of civil liability.

Civil liability or private enforcement acts to create strong incentives for professionals such as auditors, directors and lawyers, to fulfill their statutory or contractual duties to corporations and other stakeholders.

For deterrence to be effective, the threat of liability must be credible and substantial. Where litigation risk is diminished, financially negligible or lower than the expected return from acquiescence to, or active involvement in, say, earnings management, then the threat is diminished.

Civil liability or private enforcement acts to create strong incentives for professionals such as auditors, directors and lawyers, to fulfill their statutory or contractual duties to corporations and other stakeholders.

D. Fairness

As with deterrence, there are two ways to view the issue of fairness when discussing professional liability: (1) fairness to the plaintiff; and (2) fairness to the defendant. Whether the focus is on the plaintiff or the defendant will heavily influence the type of regime that is considered preferable for reform.

One of the central arguments in favour of joint and several liability is based on fairness to the plaintiff. If two or more persons are the cause of an economic or financial loss suffered by another, they should be liable for the full extent of those consequences. In other words, it would be unfair to a plaintiff to shift to the plaintiff the risk of a defendant's inability to pay damages. That risk ought to be borne by the defendant(s) because they have caused the financial or economic loss.

Alternatively, the principal argument in favour of proportionate liability is also based on fairness; however, the focus shifts to fairness to the defendant. It is argued that it is unfair for a defendant, whose degree of fault is minor when compared to that of other defendants, to have to fully compensate a plaintiff should the other defendants be insolvent or otherwise unavailable. In theory, the less blameworthy defendants can recover contribution from the more blameworthy defendants; however, in practice the former, particularly where they are insured professionals, are left to bear the majority share of liability when other defendants are insolvent or unavailable.

E. Access to Justice and Cost of Litigation

Cost is another factor for consideration. One aspect of cost is the cost of the justice system and cost of litigation. Some liability regimes may increase the overall costs of litigation if there is a need for multiple or protracted proceedings. Different types of liability regimes may result in increased litigation costs at different stages of the proceedings and to different parties.

F. Cost of Professional Services

Some liability regimes may increase the overall costs of litigation if there is a need for multiple or protracted proceedings.

Rising costs may have an impact on the pricing of professional services. Consistent with traditional business principles, the presence of increased costs at some stage of the firm's finances (such as insurance premiums) may, in turn, be passed on to the consumer.

G. Certainty

All parties desire certainty, but for differing reasons. Investors and other stakeholders who have been harmed by the corporation, directors and officers and professional advisors desire the certainty of knowing that they will be fully compensated for their loss. Conversely, professional firms and insurance companies have an economic incentive to be certain as to the extent of their liability exposure, allowing them to more effectively plan their affairs. A statutory cap on liability provides for the greatest certainty with respect to the quantum of damages that a potential defendant may be responsible for, while neither joint and several liability nor proportionate liability provides for much certainty of the quantum of potential liability.

H. Competition for Capital

Another policy consideration concerns the potential transfer of capital to other jurisdictions that allow for less onerous systems of liability or conversely more protective systems of liability. Professionals, firms, corporations and investors may be keenly aware of the liability system used by a particular jurisdiction, and may move business to another jurisdiction based on their own economic incentives.

VI. ADVANTAGES AND DISADVANTAGES OF JOINT AND SEVERAL LIABILITY

In the broad framework of the policy factors above, this part of the report presents the arguments for reform to proportionate liability and statutory caps on damages, as well as the arguments for maintaining the *status quo*.

A. Reform to Proportionate Liability and Legislative Caps

Many arguments are made for reform away from joint and several liability to some variant of proportionate liability and/or statutory caps. Submissions supporting reform of Ontario's joint and several liability system came primarily from the audit and engineering professions. Seven key arguments are set out below.

1. Fairness

Just as proponents of joint and several liability frame their arguments around fairness, supporters of liability reform likewise stress the inherent unfairness of the joint and several liability system with respect to the defendant.

Stakeholders, particularly from the audit industry, argue it is unfair to make defendants liable for one hundred percent of a plaintiff's loss.

Just as proponents of joint and several liability frame their arguments around fairness, supporters of liability reform likewise stress the inherent unfairness of the joint and several liability system with respect to the defendant. It is argued that it is unfair for a defendant, whose degree of fault is minor when compared to that of other defendants, to have to fully compensate a plaintiff should the other defendants be insolvent or unavailable. The ICAO stressed that auditors should only be liable for what they actually did or did not do:

> The audit profession accepts that it should be responsible for its fair share of a loss to the extent it is responsible for the loss. However, we are strongly of the view that it should only be responsible for what it did or did not do, rather than for the acts or omissions of others. In the context of joint and several liability, the burden of satisfying judgments and settlements falls on those who can pay. The profession is not and should not be seen as the guarantor of issuers whose financial statements it audits, or of other parties who are unable or unavailable to pay their share of the losses.[75]

In theory, the less blameworthy defendants can recover contribution from the more blameworthy defendants; however, in practice the former, particularly where they are insured professionals, are left to bear the majority share of liability when other defendants are insolvent or unavailable.

Fairness arguments formed the bulk of concerns expressed in one submission,[76] were explicitly identified as one of the advantages of a proportionate liability system by the ICAO,[77] and remain prevalent in the background of several others.[78]

A proportionate liability regime would ensure that defendants are not liable for more than their individual share of the fault, as determined during court proceedings. Stakeholders argue that this is inherently more fair to defendants, particularly specific groups of professionals who regularly only play a small role in the proceedings but, for reasons such

as the availability of insurance or the non-availability of other co-defendants, are liable for more than their "fair share" of the damages.

2. Deep Pocket Syndrome

A second argument for reform away from the current regime concerns strategic litigation. Proponents of proportionate liability contend that joint and several liability encourages plaintiffs to unfairly *target* defendants who are known or perceived to be insured or solvent. These "deep pocket" defendants may be able to fully compensate a plaintiff – far beyond that which is owed by them– in the event of a co-defendant's insolvency.

For example, the accounting industry argues that, because auditors are known to be insured, plaintiffs seek them out as defendants. The same can be said for lawyers and other professionals. Given that plaintiffs decide when, where and whom to sue, it is argued that plaintiffs will sue persons they believe afford the best opportunity for recovery.

The [Institute of Chartered Accountants of Ontario] suggests that auditors are uniquely situated: compared to other professions, whose work product passes directly to another party, auditors' works are widely disseminated among numerous parties, increasing their exposure to liability.

This unfair targeting was identified as a particular problem in submissions by Richard Hardingham and the Association of Municipalities of Ontario (AMO). Mr. Hardingham notes that fraud committed by a CFO or CEO may be very difficult to detect and even beyond an auditor's means of control, thus it would be unfair for the auditor to face increased liability and the potential for 100% payment.[79] Moreover, this risk puts increased pressure on "deep pocket" defendants such as auditors, other professionals or municipalities to avoid protracted, expensive litigation by settling for amounts that may be excessive. The ICAO suggests that auditors are uniquely situated: compared to other professions, whose work product passes directly to another party, auditors' works are widely disseminated among numerous parties, increasing their exposure to liability.[80]

It is argued that proportionate liability would prevent these well-placed defendants from being unfairly targeted for undue compensation by aggrieved plaintiffs.

3. Rising Costs of Litigation, Insurance and Damage Awards

Opponents of the joint and several liability regime are concerned about the rising costs of litigation, insurance and damage awards.

The current system involves two sets of proceedings: one to determine the liability for the loss and one to establish the measure of contribution among co-defendants. The argument is that with proportionate liability, both issues would be settled in one trial, potentially saving time and money.

The ICAO recently conducted a survey of just over 1,700 small to mid-sized firms and sole practitioners. Among the findings, 73% of respondents stated that they have faced a moderate to significant increase in liability insurance costs over the last five years, while 64% of respondents said they are being deterred from taking on assurance engagements. Fifty-eight percent said that the liability crisis is creating difficulty for clients to access assurance services.[81]

The ICAO makes the argument that "[t]he current system of joint and several liability

makes audit firms in Canada today the de facto insurers of our capital markets."[82] The ICAO estimates that the number of suits claiming damages of over $100 million filed in the last 10 years in Canada is 12 and that the estimated number of those suits claiming damages of over $1 billion is 3.[83] The ICAO expresses the concern that lawsuits in such large quantums "[have] the potential to do serious damage to the audit industry or to cause the failure of an audit firm."[84]

The ICAO also indicates that the dollar value of "incurred claims" against five of the biggest six audit firms in Canada increased from $190.96 million, as at December 1995, to $673.11 million as at December 2005. Incurred claims are not the total of damages sought but instead reflect the amounts firms must set aside in anticipation of prospective case settlements, plus amounts paid up to that point and related defence costs. They also highlight that the trend line for the dollar value of amounts actually paid by those audit firms was even "more ominous": the amounts paid out increased from $12.65 million as at December 1995 to $298.67 million as at December 2005.[85]

The argument is that these rising litigation costs are making it more difficult for audit firms to access insurance. Moreover, the difficulty in quantifying expected loss makes some insurance companies unwilling to engage with auditing firms. Proportionate liability would introduce a solution:

> Bringing this problem under control through proportionate liability will see insurance companies re-enter the market, which would enable them to 'price' that risk and create a source of recovery for shareholders.[86]

The ICAO argues that while all firms carry insurance, none is able to insure against the sort of "catastrophic exposure which can arise from joint and several liability."[87] A further submission on behalf of the ICAO and the large accounting firms states that "in the past twenty five years, no insurance market has developed to provide the large audit firms with catastrophic loss insurance for professional liability". The result is that "each of the large global accounting firm networks has had to form a captive insurer" to create self-insurance "with layers of reinsurance at certain upper levels when available and supplied at commercially reasonable rates". Consequently, it is "virtually certain" that an audit firm facing catastrophic loss that required reinsurance "would no longer have access to the reinsurance markets....".[88]

4. Competitiveness

Opponents of joint and several liability often point to the system's alleged negative effects on Canadian competitiveness.

Mr. Hardingham posits that by introducing some form of a proportionate system, the costs of liability insurance would decrease and more insurers would enter the market due to a reduced risk of catastrophic damage claims against audit firms, making Ontario a more attractive market for auditors and accountants.[89]

The ICAO also notes that Canada must remain competitive with other jurisdictions, particularly the jurisdictions in the United States that have abandoned joint and several liability.[90]

The Association of Municipalities of Ontario identifies another negative externality of joint and several liability : municipalities are having to delay or otherwise cut back services to limit exposure to liability.

5. Provision of Services

Supporters of liability reform frequently argue that joint and several liability is responsible for reducing the amount of talent entering and remaining within the professions. This is due to the exposure to liability created by joint and several liability that discourages entry into the profession or subsequent retention. Data are presented to support these fears. For example, in 2001 there were 400 public company audit firms in Canada. In 2008, that number had been reduced to 230.[91] While this argument is generally made in relation to the audit profession, the Ontario Society of Professional Engineers fears that the burden of indeterminate liability is squeezing engineering firms out of the marketplace.[92] The argument is that a move to proportionate liability would increase the supply of talent by reducing risk and attracting young professionals.

Concerned about the effects of this loss on the public, the ICAO argues that:

> Firms, both large and small, are being driven out of the audit and assurance services market because of skyrocketing insurance costs and exposure to disproportionate liability. Access to vital audit and assurance services for enterprises of all sizes is becoming more expensive or unavailable, and as a result, companies cannot access investment capital needed to grow and create jobs.[93]

Thus the reduction in the number of auditing professionals does not just harm the auditing industry, but prevents companies from accessing professional audit services. Moreover, joint and several liability actively inhibits the quality of auditing services provided to members of the public:

> We do not believe that joint and several liability enhances audit quality. On the contrary, we believe that it, in fact, inhibits audit quality. In this regard, the public interest is best served by a competitive environment of high-calibre professionals as auditors, combined with a willingness of audit firms to audit Ontario corporations. Joint and several liability works against the needs of capital markets to the detriment of the public at large.[94]

Similarly, the deterrence effects presumed to be inherently higher in a system of joint and several liability do nothing to heighten the quality of work performed by auditors. Auditing professionals are already in a highly regulated industry, and further deterrence is unnecessary.[95]

The AMO identifies another negative externality of joint and several liability: municipalities are having to delay or otherwise cut back services to limit exposure to liability.[96]

6. Statutory Caps on Liability

A statutory cap on liability is frequently advocated together with proportionate liability because proportionate liability on its own does not protect against catastrophic loss: "[a]fter all, when faced with a multi-billion dollar lawsuit, a 20 per cent liability apportionment will still be more than enough to destroy an audit firm."[97]

It is argued that a cap would limit exposure to risk, increasing certainty for insurers to predict their potential exposure, reduce costs for professionals and clients, and alleviate some concerns about presumed unfairness inherent in joint and several liability.[98]

The ICAO would prefer to see a statutory cap based on a formula, but has in the interim suggested a cap of $75 million, similar to that in Australia.[99]

7. Contractual Limitations on Liability

The ICAO argued that contractual limitations are not as effective as statutory caps because a) third parties to the contract will still be able to sue in tort, and b) many jurisdictions, such as the U.S. Securities and Exchange Commission, consider non-statutory contractual limitations an interference of auditor independence.[100]

B. Maintaining the *Status Quo:* Joint and Several Liability

There are seven key rationales and arguments for maintaining the joint and several liability scheme, as discussed below.

1. Fairness and Compensation

Proponents of maintaining the joint and several liability regime argue that if two or more persons are the cause of a financial or economic loss suffered by another, it is fair that they should be liable for the full extent of those consequences.

The first argument in favour of maintaining joint and several liability is that it is the most fair. Interestingly, the concept of fairness forms the central argument for proponents as well as opponents of the joint and several liability regime. Proponents of maintaining the joint and several liability regime argue that if two or more persons are the cause of a financial or economic loss suffered by another, it is fair that they should be liable for the full extent of those consequences.

In other words, it would be unfair to shift to the plaintiff the risk of a co-defendant's inability to pay damages. That risk ought to be borne by the other defendant(s) because they have caused the financial or economic loss. Conversely, it would not be fair to require a plaintiff to seek individual recovery from each defendant in a lawsuit based on the proportion of which the court determined they were at fault. In the words of William Sasso:

> [Full compensation to injured persons] is a goal that the OLRC regarded as just. Abolition of the rule would mean that injured persons, including those who are completely innocent, would remain undercompensated for their losses. In the view of the OLRC, and in our view, the burden of justifying change clearly lies with those who propose reforms that would give rise to such a result.[101]

It should be noted that some submissions were further concerned with the "fairness" debate in and of itself, and whether it is a truly appropriate policy measure in this context. One submission noted that discussions of fairness "to" a plaintiff or defendant in their respective capacities as opposing parties are unhelpful, and one must look to the fairness of the system as a whole.[102]

2. Common Law Protections

The second argument for maintaining the joint and several liability regime is that the common law has sufficient safeguards that prevent defendants from being exposed to enormous and undue liability. Common law principles of tort law, particularly as expressed in *Hercules*,[103] ensure that plaintiffs must prove that each defendant owed him or her a duty of care, which in turn will require determinations of proximity and foreseeability. Even if a *prima facie* duty of care is established, policy considerations protecting the interests of

defendants may convince a court to refuse a finding of liability against any particular co-defendant. Thus, supporters of joint and several liability argue that the common law protects defendants:

> [Professionals]...are not responsible for a plaintiff's losses unless there is the triumvirate of foreseeability, proximity and no persuasive public policy reason to negate the duty of care. This triple layer of protection...provides all the protection needed to avoid inequitable or undue exposure to liability. There is no need to turn to the complex and difficult to understand provisions in the CBCA.[104]

A further argument recognizes that this common law test is an onerous challenge for the plaintiff to meet. As a result, there are some concerns that since the duty of care analysis post-*Hercules* already limits a party's liability, further statutory reforms limiting liability will place defendants in an unfairly advantageous position relative to a plaintiff.[105] If changes are made to the liability system, changes should also be made to the common law in order to keep the system fair and balanced for both plaintiffs and defendants. Otherwise, having to meet both an onerous standard and facing the potential of incomplete recovery, the system would be "stacked" against the plaintiff. This argument is not strictly against reform towards proportionate liability, but recognizes that earlier reforms of liability systems, particularly under the OSA, involved a balancing of benefits received by both plaintiffs as well as defendants.

> *"[Professionals]…are not responsible for a plaintiff's losses unless there is the triumvirate of forseeability, proximity and no persuasive public policy reason to negate the duty of care."*
>
> Ontario Trial Lawyers Association

3. Deterrence and Risk

The third argument in favour of joint and several liability is that it acts as a deterrent for misconduct by professionals. Knowing that they will be held fully accountable, the argument is that professional advisors are more likely to implement measures to avoid liability.

It has been suggested that replacing joint and several liability with a proportionate liability regime might adversely affect the risk management behaviour of potential defendants. If defendants are only liable for a known portion of a total damages award, the future incentive to develop, adhere to and improve professional standards may decline. The submission of the bcIMC in particular argues that proportionate liability is less effective for purposes of accountability and corporate governance (and thus, deterrence of wrongdoing) than the joint and several liability alternative.[106]

Similarly, caps on liability create greater certainty for firms and professionals. This certainty allows parties to incorporate maximum potential liability into their business plan. Thus, by ensuring perfect information, caps potentially eliminate risk from future liability, and as a result professionals have less incentive to develop and maintain the highest professional standards.

4. Simplicity

The fourth argument in favour of joint and several liability is its simplicity. Proponents of joint and several liability argue that it is less complex than an alternate system of proportionate liability or a capped hybrid system of liability. Under joint and several liability, a plaintiff can pursue a legal action without worrying about how to apportion fault

at the trial stage. Full compensation is ensured and the legal arguments may focus purely on establishing liability for each co-defendant. Apportionment of fault is an *ex-post-facto* exercise performed in order for co-defendants to compensate each other, if necessary.

The argument is that a proportionate liability system would introduce unnecessary complexity into Ontario's legal system. Lawsuits would be lengthened and made more complex as plaintiffs would search to add more parties than may be necessary to serve their goal of obtaining full recovery.[107]

5. Lack of Evidence

The fifth argument in favour of the joint and several liability scheme is the lack of empirical evidence or data indicating that a change in this context would be beneficial overall. Several submissions highlighted this issue. The "lack of evidence" argument can further be divided into three groups: i) rising insurance costs, ii) potentially catastrophic damage awards, and iii) effects on the profession.

Available data fail to support…claims (for example, that a party found 1% at fault has been held liable for 100% of damages) or to substantiate that joint and several liability is primarily responsible for increasing costs or instances of patently unfair damage awards.

The first concern relating to lack of evidence is about rising insurance premiums and insurance coverage. Arguments have been presented that rising insurance costs are having deleterious effects on professionals, clients and markets in general; in some cases businesses are not undergoing audits due to the underlying costs.[108] The most extreme form of this argument is that of an "insurance crisis": a situation in which, because of the disproportionate costs for auditors, insurance is not available in sufficient amounts.

As several submissions pointed out no substantial evidence has been presented demonstrating these effects.[109] While the ICAO mentions surveys of auditors that allegedly demonstrate the effects, such anecdotal studies may not be persuasive evidence demonstrating a clear need for reform:

> [T]he lack of data supporting a claim must be very concerning to anyone seeking to implement a new protocol or procedure. Anecdotal evidence is inherently unreliable, and, unfortunately, contaminated with bias because it can only ever truly relate to the small picture, rather than the big picture.[110]

The second concern is about the rising costs of damage awards and/or settlements. These arguments can be ones of steadily increasing costs, or simply of the potential for "catastrophic loss" as a result of joint and several liability. A related claim is that a party 1% at fault can be found liable for 100% of the plaintiff's damages.

Available data fail to support these claims (for example, that a party found 1% at fault has been held liable for 100% of damages) or to substantiate that joint and several liability is primarily responsible for increasing costs or instances of patently unfair damage awards.

Siskinds LLP's submission noted that one particular case of empirical evidence being presented by the accounting profession (reproduced in part above) did not, in fact, point to "catastrophic loss", and no evidence was forwarded to explain how any losses were potentially inflated as a result of joint and several liability.[111] Moreover, it is unclear what numbers in the data pertained to auditors in particular. The ICAO itself concedes that it "does not have a figure for the total amount of damages claimed in all actions that include auditors, as this kind of information is not always made public."[112]

The OBA's submission points out that auditors pointed to an "insurance crisis" emerging from the principles in *Hedley Byrne*, long before the decision in *Hercules* that shifted the debate to joint and several liability.[113]

The OBA also shows that statistics showing a decline in the number of accounting firms in Ontario do not seem to take into account factors such as the recent economic slump or the effects of notable accounting scandals.[114] The OTLA notes:

> No one has pointed to a single case, reported, settled or otherwise, where an accountant or auditor, who is 1% responsible for a loss, ended up paying 100% of the claim or anything even close to 100% of the claim…Such a scenario, in the words of commentator David Debenham, is 'an urban legend.'[115]

The third concern relates to arguments about the current liability system discouraging young individuals from entering the accounting profession, the pricing of audit services and the impact of the liability scheme on competitiveness.

These claims take on two general forms: (i) massive increased personal risk under joint and several liability deters individuals either from entering or continuing their chosen profession, and (ii) joint and several liability has deterrent effects on the national and international markets, as a result of which Ontario-based firms suffer a distinct competitive disadvantage relative to other Canadian or international jurisdictions.[116]

US jurisdictions that have implemented proportionate liability schemes have opted for stricter liability rules and increased government regulation of auditors to counterbalance the move from a joint and several scheme.

Submissions from parties such as the OBA noted the absence of empirical evidence that auditing firms are locating elsewhere, that domestic businesses are not undergoing audits due to their costs or that insurance premiums are skyrocketing.

> It is alleged that this phenomenon is the result, in some measure, because of unrestricted joint & several liability. There was no evidence to support this statement. Even if the statement is true, there was no evidence that the move out of audit functions by mid and small accounting firms was due to unrestricted joint & several liability, as opposed to other factors such as the post September 2008 economic slump or changes in the audit/accounting world after the Enron/Arthur Anderson fiasco.[117]

Referencing David Debenham, the OTLA adds:

> [T]here is no empirical evidence to support these arguments – firstly, in that the cost of audit engagements has been decreasing, not increasing, as a result of computerization and increased competitiveness of the audit market. Secondly, he observes that there is no evidence that the cost of malpractice insurance is being passed on to clients.[118]

6. Competitiveness and Comparisons with Other Jurisdictions

Several of the submissions note the inappropriateness of comparing the current joint and several liability provisions of the OBCA to foreign jurisdictions, particularly the US, which have instituted proportionate liability schemes. As several stakeholders have noted, there are fundamental differences between many jurisdictions that have instituted proportionate liability and the Canadian experience. US jurisdictions that have implemented proportionate liability schemes have opted for stricter liability rules and increased government regulation of auditors to counterbalance the move from a joint and several scheme.

Several characteristics of the American litigation model point to a more suitable climate for a proportionate liability system. As the OTLA argues, there are at least five differences between the Canadian and American litigation models that highlight some of the reasons why proportionate liability systems are more amenable to American jurisdictions. First, punitive damages tend to be much higher in the US relative to Canada. Second, costs sanctions are part of the law of Canada but not the US in the vast majority of cases involving auditors. Third, in the US, unsuccessful plaintiffs often incur no costs as opposed to Canada. Fourth, the current regulatory environment is less aggressive towards auditors in Canada than in the US. Fifth, class action law suits against auditors are far less common in Canada. These differences, far from an exhaustive list, suggest that the implementation of joint and several liability in Ontario could have consequences significantly different from those experienced in the United States.[119]

7. Statutory Caps are Inappropriate

Despite their potential benefits for certainty, the argument is that caps would diminish deterrence effect; reduce incentive to settle; be unfair to plaintiffs and also to defendants who might remain liable for their full amount, if under the cap; introduce more bureaucracy to frequently monitor and review the caps; and would be arbitrary.[120] In sum, statutorily capped liability reform would address the problems caused by exposure to catastrophic loss, but would not necessarily be fair. The residual unfairness was particularly highlighted in Wayne Gray's submission.[121] Liability caps are not truly a way of increasing certainty, as supporters of reform contend, but a way of limiting legal liability. Certainty could also be achieved by an extremely high statutorily fixed damage amount, one that would be applied in all contexts whether actual damages are higher or lower, yet insurance would remain expensive and limited.[122]

VII. ANALYSIS

The LCO notes that many professional advisors to OBCA corporations use contractual caps to limit their liability vis-à-vis the corporation. The LCO recognizes that in this context the will of private parties should generally be given effect through the fundamental principles of contract law. Contractual limitations on professional liability provide a reasonable and negotiated balance between the professional's engagement and the level of risk that a professional can reasonably be expected to bear. Limiting liability by contract also affords some certainty to parties as to the upper limit of the professional's risk of exposure. On the other hand, there is a risk that contractual limitations may undermine the credibility of a professional's opinion and create a perception that professional services rendered under the protection of limitation clauses are of lesser quality than those that are not. Concerns may also arise in respect of contractual limitations when a professional is sued by shareholders or other stakeholders who are not parties to the contract.

Contractual limitations on professional liability provide a reasonable and negotiated balance between the professional's engagement and the level of risk that a professional can reasonably be expected to bear.

On this issue, the LCO notes that professional advisors to OBCA corporations can contractually cap their liability vis-à-vis the corporation *and shareholders* if all the shareholders expressly consent in writing to the liability cap. As discussed in the Introduction to this Report, many corporate law rules that are mandatory for offering corporations are optional or default for non-offering corporations. For example, the requirement to appoint an auditor can be opted out of in non-offering OBCA corporations if the shareholders unanimously consent to it. On the same basis, the shareholders of a non-offering corporation, who are few in number and who have a relatively significant economic stake in the corporation, may consent to a contractual cap on the liability for professional advisors who are engaged by the corporation. This unanimous shareholder consent would then prevent claims for damages beyond the agreed-to cap. The LCO recognizes that obtaining unanimous shareholder consent is not practically feasible in the context of offering OBCA corporations because of the large number of widely-disbursed shareholders. Nonetheless, the LCO does not suggest that the approval of a contractual cap by a simple (or super) majority of shareholder votes should bind the entire class of shareholders in a public (or private) company. As such, the LCO is not in favour of the relatively new UK model, discussed in earlier parts of the Report.

The LCO further notes that professional advisors concerned about rising third-party insurance premiums or coverage limitations have reasonably addressed their concerns through the market, for example, by negotiating large retentions or deductibles with their insurers and/or by pursuing self-insurance for certain layers of risk and liability exposure where it is more cost-effective to do so.

The LCO believes the issue at hand is fundamentally about the distribution of risk.

In the context of OBCA corporations, should the risk of an insolvent co-defendant be borne entirely by other co-defendants, such as the corporation, directors, officers, auditors, lawyers, engineers and other professional advisors? Or, should potential plaintiffs such as retail investors, institutional investors and other stakeholders such as employees or customers bear all or part of the risk of an insolvent co-defendant?

The legal rule should allow for the risk of loss to be distributed fairly and efficiently. Policy arguments on these grounds should examine, for example, who can best bear the loss, who can best distribute the loss by way of third party insurance or self-insurance, and who was in the best position to avoid the loss.

To mitigate the exposure to risk, professional advisors routinely utilize various forms of insurance. Many professional advisors use some sort of third party professional liability insurance, also called malpractice insurance or errors and omissions insurance.[123] This insures the professional advisor up to a certain cap. Professional advisors may be responsible for a certain amount before the third party insurance coverage kicks in. This can be in the form of a deductible or self-insured retention.

In contrast to the complex insurance options and possibilities available for defendant auditors and other professional advisors, it is uncertain what reasonable options would be available to potential plaintiffs, particularly retail investors and unsophisticated consumers and employees, to insure themselves against the risk of a co-defendant's insolvency or otherwise distribute the loss.

Audit firms are increasingly making use of self-insurance, which is a broad term for the general practice of setting aside funds to be used should losses occur.[124] This form of self-insurance can be operationalized in two ways: first, by the use of "captives", or affiliates created, funded and utilized by enterprises in order to offset the risk of loss; second, by the use of risk-retention pools, formed by members who contribute premiums and receive typical insurance benefits.[125] The cost of insurance coverage is not fixed or static, but varies according to many external circumstances, including but not limited to litigation exposure.

In contrast to the complex insurance options and possibilities available for defendant auditors and other professional advisors, it is uncertain what reasonable options would be available to potential plaintiffs, particularly retail investors and unsophisticated consumers and employees, to insure themselves against the risk of a co-defendant's insolvency or otherwise distribute the loss. They would likely have to absorb the loss personally.

In contrast, a professional firm that ends up bearing the risk of a co-defendant's insolvency in a joint and several liability scheme can distribute the risk through some form of insurance and distribute the cost of the premium or self-insurance through changes to pricing to their clients.

As a result, professional advisors are generally in a better position to bear or distribute the risk than potential plaintiffs, such as retail investors or other stakeholders such as employees and customers. Professional advisors will no doubt continue to exercise prudent business practices to mitigate the risk of loss. The cost of third party insurance or self-insurance, as the case may be, can be reasonably distributed through changes in pricing of services to clients.

Finally, the LCO also notes that a growing body of literature addresses novel market-based mechanisms for dealing with audit failure, particularly financial statement insurance and catastrophic bond securitization. These mechanisms could reasonably address some of the concerns of professional advisors about excessive exposure to liability.[126] Financial statement insurance would require significant structural changes in public accounting, but is generally simple as used in private market mergers and acquisitions transactions:

> ...[A] seller represents that its financial statements fairly present financial condition and results in conformity with GAAP; an insurer engages an auditor to review the statements and backs the representation with insurance.[127]

Instead of engaging an auditor backed by insurance, issuers would buy insurance from an insurer, who must pay for covered losses.[128]

Catastrophic bond securitization (also known as insurance-based securitization) would involve the transfer of liabilities to a special purpose entity that, in turn, attracts investors who enjoy a return on investment in accordance with the risk of default.[129]

Professional advisors can benefit by continuing to look to emerging risk management techniques in order to counter the concerns of exposure to litigation risk.

Novel mechanisms, particularly catastrophic bond securitization, distribute risk away from insurance companies and audit professionals. The use of these tools represents several distinct advantages over reform of joint and several liability. First, by distributing risk away from professionals and insurance companies, they reduce pressure on those parties emerging from the threat of catastrophic loss. While catastrophic loss remains a hypothetical possibility, insurance against such an event should be easier to obtain when the risk of loss is distributed among a larger number of actors, particularly investors of the catastrophic bonds.

Novel mechanisms, particularly catastrophic bond securitization, distribute risk away from insurance companies and audit professionals. The use of these tools represents several distinct advantages over reform of joint and several liability.

As the Report indicates, our assessment of joint and several liability under the OBCA persuades us that the positive ramifications of its application outweigh what may be viewed as its less desirable ramifications. The common law tests for professional negligence sufficiently address concerns about excessive or unfair liability; there are insufficient public data on the specific deleterious effects of joint and several liability on insurance premiums, insurance coverage, pricing of audit services, and entry into the professions; and trends in other jurisdictions toward proportionate liability, particularly the United States, do not provide a sufficient grounding for reform, particularly in light of the more litigious environment in the US.

1. Common Law Protections are Sufficient

The LCO is of the view that the Canadian common law provides for multiple layers of protection for defendants in the context of claims of professional negligence to ensure that they are not unfairly saddled with liability. Before the issue of joint and several liability arises, a plaintiff must pass a number of legal tests, including establishing that each defendant owed him or her a duty of care and that each defendant caused the harm to the plaintiff.

The Supreme Court of Canada addressed the issue of the professional advisor’s duty of care in the context of a negligence claim in *Hercules Management Ltd. v. Ernst & Young*.[130] In the case, Ernst & Young was hired to provide audit services for the plaintiff firms and their shareholders. Eventually, shareholders and investors of the firms brought an action against Ernst & Young for losses allegedly suffered as a result of audit reports filed in three specific years. The auditor brought a motion for summary judgment against the plaintiffs, alleging, among other things, that they did not owe the individual plaintiffs any duty of care. The motion was granted against four of the plaintiffs. The plaintiffs’ subsequent appeals, including to the Supreme Court, were ultimately dismissed. While the defendants did owe the plaintiff class a *prima facie* duty of care, on the facts of the case the Supreme Court refused to find that the defendants owed the plaintiffs a duty of

care. While the plaintiffs were sufficiently close to the defendants that the defendants could have foreseen reliance on their audit reports, the Supreme Court held that the use of the audit reports by the plaintiff class was not consistent with the purpose for which they were prepared. The *prima facie* duty of care was overturned by policy considerations.

More generally, a plaintiff alleging negligent misrepresentation by a defendant must prove, among other things, that the defendant owed a duty of care to the plaintiff. The Supreme Court in *Hercules* applied a two-stage test from *Kamloops* to determine whether a duty of care is owed to a plaintiff in this context.[131] The test reads as follows.

> (1) Is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,
>
> (2) Are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?[132]

…Canadian courts will not impose a duty of care on an auditor on public policy grounds where the plaintiff did not reasonably rely on an auditor's report or used it for an improper purpose.

Part one of the test requires establishing that the defendant owed the plaintiff a *prima facie* duty of care. In this analysis, the plaintiffs must demonstrate a sufficiently close relationship (or "proximity") with the defendant. This relationship must be one in which the defendant could have foreseen that carelessness could cause damage to the plaintiff ("foreseeability").

If the *prima facie* duty of care is not established, then the plaintiff's cause of action fails. If the *prima facie* duty of care is established, it must then be further scrutinized and weighed against the second part of the test which involves public policy considerations to limit liability.

Public policy considerations weigh the benefits gained by imposing liability against the negative effects. The policy considerations are pragmatic – open-ended and unpredictable liability would give rise to socially undesirable consequences, including increasing costs of insurance and litigation, reduced availability of audit services and potentially decreased vigilance by third parties.[133] Therefore, Canadian courts will not impose a duty of care on an auditor on public policy grounds where the plaintiff did not reasonably rely on an auditor's report or used it for an improper purpose.[134] If the *prima facie* duty of care is negated by the public policy analysis, then a claim of professional negligence by the plaintiff fails as against that defendant.

In *Hercules*, the Supreme Court concluded that auditors can reasonably foresee reliance on their reports by many different people, including shareholders, creditors and other investors.[135] But importantly, Mr. Justice La Forest added that "in the general run of auditors' cases, concerns over indeterminate liability will serve to negate a *prima facie* duty of care."[136] The Supreme Court was clearly concerned about indeterminate liability stemming from reliance on auditors' reports, and used part 2 of the duty of care test above —the policy-based analysis — to effectively judicially limit auditor liability against a large group of shareholders.

In addition to proving the duty of care, the plaintiff must also establish causation. The plaintiff must prove that a defendant's actions caused his or her loss. The test that is used

by Canadian courts is the "but for" test: that "but for" the defendant's actions the loss would not have occurred, or the loss would have been very different. The "but for" test is also used in situations where there is more than one defendant and is the common law basis for *in solidum* liability. Each co-defendant is liable for the whole damage award because the injury could not have occurred without the participation of each wrongdoer.[137]

Thus, the common law framework prevents plaintiffs from seeking out truly blameless defendant parties. Plaintiffs must prove, among other things, that each co-defendant caused the damage in fact and that a duty of care existed (that the parties were in a close relationship and that the damage to the plaintiff was foreseeable by the co-defendant). As noted above, public policy considerations may then outweigh the imposition of a *prima facie* duty of care, if it exists. These steps make it unlikely that a "one percent at fault" co-defendant would ever be held liable for one hundred percent of a plaintiff's damages.

…[C[laims of a "crisis" have been forwarded since the 1980s with almost no change in rhetoric. Rising liability and insurance costs could potentially be a cyclical issue that professionals and insurance companies must deal with, but there is little to suggest that a crisis has been on the horizon for three consecutive decades.

2. Lack of Data to Support Reform

There are simply not enough public data on the specific negative impact of joint and several liability on insurance premiums, insurance coverage, pricing of audit services and entry into the professions to recommend making a major change to tort liability in this context.

While supporters of reform to the current joint and several liability regime make numerous anecdotal claims as to joint and several liability regime's ineffectiveness, the LCO has neither found nor been made aware of sufficient empirical evidence and data of a "liability" crisis to justify reform of the joint and several liability system at this time.

Similarly, the LCO has neither located any judgments or settlements exposing a defendant at fault for 1% of a plaintiff's losses to liability at or near 100%, nor have any been brought to our attention.

While there are data on rising litigation exposure, they do not establish that joint and several liability is responsible, or that proportionate liability is necessarily the answer. The LCO has not located any concrete studies that isolate joint and several liability in Ontario as the cause of rising insurance costs, increasing liability, a reduction in the number of firms willing to perform high-risk audits, or any of the other myriad woes presumed to be the fault of joint and several liability. The arguments presented are anecdotal in nature and mirror those submitted to other Canadian bodies that have studied this topic. Anecdotal evidence may be useful in certain contexts, but on its own is not enough to sustain reform.

As noted in earlier parts of the report, reform of joint and several liability has been examined several times in recent Canadian history and reform to proportionate liability has been rejected in most cases. The LCO examined the previous reports and noted that a majority of the arguments received by previous Commissions in favour of reform of joint and several liability mirror those the LCO received.

While the LCO understands that the reasons that will be advanced for reform will not vary greatly over time, several of the critical arguments that have been made are time- and context-sensitive. First, claims of a "crisis" have been forwarded since the 1980s with almost no change in rhetoric. Rising liability and insurance costs could potentially be a cyclical *issue* that professionals and insurance companies must deal with, but there is

little to suggest that a *crisis* has been on the horizon for three consecutive decades. The Slater Report noted that, in Canada, claims exceeded revenues in 1985 and nearly equalled them in 1986.[138] However, the cause of the 1980s crisis was identified by the Slater Report as inflated interest rates that, when lowered, subsequently necessitated large increases in premiums.[139] The LCO's position is that professional advisors and insurance companies can adequately adjust their business and risk management practices to cope with cost changes. Without specific data to the contrary, joint and several liability, a legal principle in place for many decades, cannot be seen as the cause of periodic crises. Second, the Senate Committee was concerned that the then-new *Hercules* decision would provide inadequate protection for auditors, other professionals and deep-pocket defendants. As described above, the LCO is of the view that the common law provides adequate protection for marginally liable co-defendants. The passage of time and the LCO's examination of post-*Hercules* case law does not reveal insurmountable problems for co-defendants.

3. Trends in Other Jurisdictions Insufficient Basis to Justify Reform

While trends in other jurisdictions, particularly those in the United States, are commonly used to highlight the need for change in Canada, caution must be exercised in using changes in other jurisdictions as the basis for reform.

It should be noted that similar arguments were levied against Canadian banking regulators prior to the recent global financial crisis. Canada's relatively conservative banking rules were denounced as uncompetitive with the realities of modern, "hands-off" banking regulation. Banking reforms in other jurisdictions led to increased risk-taking in the banking sector, which then lead to the financial crisis. Canada's conservative banking regulations were then hailed as having prevented the same high level of losses seen in risk-taking jurisdictions.

The LCO is of the view that there are significant differences between the Canadian and US litigation contexts that underscore why proportionate liability and/or statutory caps are more suitable in the United States than in Canada. For example, punitive damages tend to be much higher in the US relative to Canada, such that the level of litigation exposure is much higher in the US than in Canada. As well, cost sanctions are part of the law of Canada but not the US, having more of a deterrent effect on frivolous litigation. In addition, class actions law suits against auditors are far less common in Canada than in the US. These differences, far from an exhaustive list, suggest that the implementation of joint and several liability in Ontario could have consequences significantly different from those experienced in the United States.[140] However, even if it is assumed that the United States represents a proper comparator group, we are not aware of any data to substantiate the competitive advantage that results from proportionate liability.

VIII. RECOMMENDATION

As our analysis indicates, the LCO is not satisfied that substituting another regime of liability for that of joint and several liability under the OBCA is warranted. Furthermore, there already exist mechanisms, such as contractual caps and self-insurance, and potential mechanisms such as contractual caps relevant to shareholder claims, financial statement insurance and catastrophic bond securitization that can address at least some of the concerns raised about the application of joint and several liability to professional advisors.

The LCO therefore recommends that:

The principle of joint and several liability continue to operate for offering OBCA corporations.

ENDNOTES

1. *Ontario Business Corporation Act,* R.S.O. 1990, c. B.16 [OBCA].
2. OBCA, note 1, s.1(1), definition of "offering corporation".
3. OBCA, note 1, s.154(1).
4. OBCA, note 1, ss. 148, 149(1).
5. OBCA, note 1, ss. 154(1)(b), 156; *Securities Act* (Ontario), R.S.O. 1990, c. S.5 [OSA]
6. OBCA, note 1, s.158(1).
7. OBCA, note 1, s. 149(1).
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104. OTLA Submission, note 28 at 20-21.
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106. See generally, bcIMC Submission, note 29.
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113. OBA Submission, note 105 at 7.
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117. OBA Submission, note 105 at 7.
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121. Wayne Gray Submission at 3 (on file with the LCO).
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125. Cunningham, note 122 at 27.
126. See generally, Cunningham, note 122.
127. Cunningham, note 122 at 34.
128. Cunningham, note 122 at 35.
129. Cunningham, note 122 at 38.
130. *Hercules,* note 103.
131. *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2 ["Kamloops"].
132. *Hercules,* note 103 at para. 20.
133. *Hercules*, note 103, at paras. 33-35.
134. OBA Submission, note 105 at 6; *Hercules*, note 103 at para. 37.
135. *Hercules*, note 103 at para. 32.
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137. For a more detailed analysis of this area, see, e.g., *Snell v. Farrell*, [1990] 2 S.C.R. 311; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333.
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APPENDIX A

LIST OF ACRONYMS

AMO – Association of Municipalities of Ontario
bcIMC – British Columbia Investment Management Corporation
CBCA – *Canada Business Corporations Act*
CPAB – Canadian Public Accountability Board
ICAO – Institute of Chartered Accountants of Ontario
LCO – Law Commission of Ontario
OBA – Ontario Bar Association
OBCA – Ontario *Business Corporations Act*
OSA – Ontario *Securities Act*
OSPE – Ontario Society for Professional Engineers
OTLA – Ontario Trial Lawyers' Association
PSLRA – *Private Securities Litigation Reform Act of 1995*

APPENDIX B

ORGANIZATIONS AND INDIVIDUALS PROVIDING INPUT

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