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Apportionment of Liability and the Intentional Torts: The Time is Right for Change

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I. *Introduction*

In a tort action based solely on the Defendant's wrongful intentional conduct, both parties have been, until recently, at a decided disadvantage. There could be no apportionment of liability between the Plaintiff and Defendant. Fault concepts were seen in absolute terms. Either the Defendant was totally liable for the damages or he was not liable at all. Principles of apportionment of liability generally were not seen as applicable to the intentional torts. Thus, a Plaintiff's contributory fault was irrelevant in determining the Defendant's liability. Likewise, provocation was not a 'defence' and did not, in all jurisdictions, always reduce compensatory damages. Similarly for a Plaintiff the spectre was total success or total failure. The defences of consent and self-defence were absolute with no loss-sharing. Thus, the law had developed a simple proposition: either a Plaintiff or Defendant, but never both, were liable for injuries sustained.

Although this proposition was simple, it was also simplistic. Recently it has been challenged in the Courts in *Bell Canada v. Cope (Sarnia) Ltd.*¹ and suggestions of changing attitudes have been given in other decisions. In addition, proposals for legislative reform have emanated from a variety of sources that call for apportionment in the intentional torts based on current concepts of fault and fairness.

The purpose of this brief comment is to examine attitudes towards apportionment of liability in the context of the intentional torts and to examine the advisability or lack thereof for change. The first section will deal with a brief historical perspective of apportionment in negligence law and the changes that were effected thereto. Since many of these changes are appropriate to apportionment in the intentional torts they will, hopefully, "set the scene" for the second section that deals with the major thesis of this comment — namely,

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1. (1981), 15 C.C.L.T. 190 (Ont. C.A.); aff.g. (1980), 11 C.C.L.T. 170 (Ont. (H.C.)).

that apportionment principles should also be applicable to the intentional torts and, indeed, might now be so.

II. *Apportionment and Negligence*

The common law approach to liability in negligence initially was an all-or-nothing approach. Fault was seen as a black and white issue and if the Plaintiff, however slightly, had negligently caused or contributed to his own injuries then the Defendant escaped liability. Lord Blackburn stated that “The rule of law is that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls.”² The origins for this rule might be found in the classical but now discredited legal tradition that individuals were considered capable of protecting themselves from injury and the law didn’t exist to protect those who failed to protect themselves. Or perhaps the rule can be explained by reference to developing legal concepts of ‘fault’ and ‘causation’ that were not yet fully matured. Whatever the reason for it, the patent inequity of this rule of law was recognized by the Courts and severely criticized. In 1923 Mr. Justice Mignault stated:

If I may say so, the doctrine of the civil law, in force in the province of Québec and also adopted in admiralty matters, is much more equitable, for where there is common fault the liability of each party is measured by his degree of culpability.³

He was content, however, to leave the inequities “for the consideration of the law-maker, for the Courts are obliged to apply the law however harsh it may seem”.⁴ The Courts, recognizing that inequities existed, made some indirect attempts to effect change. The doctrine of “last clear chance” apparently was a judicial attempt to reduce the harsh common law effect of a Plaintiff’s contributory negligence and, although it “usually worked rough justice”,⁵ the doctrine was not without difficulties in application and numerous exceptions to it were developed. Occasionally the Courts would give partial relief from the harsh effects of the rule to a Plaintiff who had contributed to his own injuries by refusing to award costs to a successful Defendant. For instance, in *Black v.*

2. *Cayzer, Irvine & Co. v. Canon Company*, (1884) 9 A.C. 873 at 881 (H.L.).

3. *Grand Trunk Pacific Railway Co. v. F. J. Earl*, [1923] S.C.R. 397 at 408.

4. *Id.*

5. Williams, Glanville L., *Joint Torts and Contributory Negligence* (London: Stevens and Sons Ltd., 1951) at 224.

City of Calgary Walsh, J. noted that:

It is because of what I consider the injustice of the law in this regard that I withhold its costs from the successful defendant so that it may not entirely escape liability for what I have held to be its negligence.⁶

Thus, it would appear that even the common law was not 'without fault' in the treatment afforded liability but, fortunately, legislative reform was forthcoming.

Since the Courts were not prepared to effect changes in the acknowledged inequitable rule that different degrees of fault between a Plaintiff and Defendant was not possible, the legislators took up the gauntlet thrown by the Courts. In a reaction that was perhaps uncharacteristic, Canada proved to be in the forefront of positive common law reform. Adopting the then recently revised Admiralty rule of proportionate division of liability, Ontario in 1924 became the first common law jurisdiction to apply apportionment legislation to causes of action arising other than at sea.⁷ Three other provinces quickly followed with legislation⁸ that is remarkably similar in wording and effect. Essentially the apportionment provisions in these latter three provinces provided as follows:

Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault:

Provided that:

- (a) If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally, and
- (b) Nothing in this section shall operate so as to render any person liable for any loss or damage to which his fault has not contributed.⁹

The Ontario legislation was slightly different in that apportionment was not based exclusively on "fault" concepts as in British Columbia, New Brunswick and Nova Scotia but rather referred to the concepts of contributory "fault or negligence" as if negligence was not totally encompassed by the word "fault". The initial

6. (1915), 24 D.L.R. 55 at 60 (Alta. S.C.).

7. The Contributory Negligence Act, Stats. Ont. 1924, C. 32.

8. Stats. B.C. 1925, C. 8; Stats. N.S. 1926, C. 3; Stats. N.B. 1927, C. 143.

9. Stats. B.C. 1925, C. 8 S. 2.

legislation has remained largely unchanged so that today in seven of the nine common law Provinces¹⁰ the apportionment legislation refers exclusively to “fault” as being the basis for apportionment. In Ontario the present apportionment legislation continues to refer to “fault or negligence” as the basis for apportionment¹¹ while Manitoba alone curiously refers to “negligence” as the sole basis for apportionment.¹²

While this difference in wording in the extant apportionment legislation might seem relatively insignificant, the concept of “fault” is of fundamental importance as to whether apportionment is available to the intentional torts since the Courts have looked to the interpretation of “fault” in concluding whether it includes actions other than negligence. Clearly the Courts have stated that the legislation provides apportionment in negligence actions whatever the wording employed. Equally clearly, the Manitoba legislation cannot apply to intentionally caused torts since apportionment is stated as possible only in a negligence action.¹³ What has been also clear, until recently, is that the Courts were not prepared to hold that the apportionment legislation applied to anything other than a negligence action.

III. *Apportionment and the Intentional Torts*¹⁴

(i) *Preliminary Treatment in the Courts:*

In the context of the intentional torts the issue of apportionment

10. British Columbia, Alberta, Saskatchewan, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland.

11. Negligence Act, R.S.O. 1970, C. 296, s. 4 that states:

In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

12. Tortfeasors and Contributory Negligence Act, R.S.M. 1970, C. T 90, S. 4(1) states:

Contributory negligence by a plaintiff is not a bar to the recovery of damages by him and in any action for damages that is founded upon the negligence of the defendant, if negligence is found on the part of the plaintiff which contributed to the damages, the court shall apportion the damages in proportion to the degree of negligence found against the plaintiff and defendant respectively.

13. *Id.* it must be noted, however, that where the intentional tort has been committed negligently the legislation might well be appropriate. For further discussion refer *infra* s.III(ii)(b).

14. The term “intentional torts” is a misnomer since it can include liability for negligent acts that happen to cause direct damage. Nor is the term without difficulty

becomes important to a Defendant who wants to raise the conduct of the Plaintiff as a defence. The conduct of a Plaintiff who has consented or has acted so as to cause the Defendant to react in self-defence is relevant since the Plaintiff's conduct in these cases totally relieve the Defendants from liability. Why then should the contributory fault of the Plaintiff not also be a defence available to a Defendant to at least reduce the damages payable to represent a fair distribution between the Plaintiff and Defendant of the contributing causes of the damage?

In Canada one of the major stumbling blocks has been a series of cases culminating in the decision in *Hollebone v. Barnard*.¹⁵ The Plaintiff was struck by a golf ball hit by the Defendant. The jury found that the Plaintiff was contributorily negligent in failing to maintain a proper lookout and that the Defendant was also equally negligent. The difficulty for the Defendant who wanted to use the Plaintiff's own negligence to apportion the damages arose from the fact that the Plaintiff had pleaded the case in trespass to the person rather than in negligence. Using the uniquely Canadian anomaly of *Cook v. Lewis*¹⁶ the court found that the case was properly one involving the direct application of force and thus an intentional tort rather than a negligence action. The issue then facing the Court was whether the apportionment provisions contained in the Negligence Act¹⁷ applied to the trespass to the person action before the court. The relevant section of the Act relied on by the Defendant stated that:

In any action for damages which is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff which contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.¹⁸

because there is no unanimity as to what torts, if any, constitute the intentional torts nor is there consensus that torts other than negligence fit neatly into one or more separate categories such as the "intentional torts". The term, however, is used colloquially and in that sense is also employed herein to include assault and battery (trespass to the person), false imprisonment, intentional infliction of mental suffering, etc. The vagueness of this description is acknowledged and intended.

15. [1954] 2 D.L.R. 278, [1954] O.R. 236 (Ont. H.C.) (hereinafter referred to as *Hollebone*).

16. [1951] S.C.R. 830, [1952] 1 D.L.R. 1 (hereinafter referred to as *Cook v. Lewis*).

17. R.S.O. 1950 C. 252.

18. *Id.*, s. 4.

The Defendant argued that the trespass action was one founded upon "fault" if not negligence and, accordingly, apportionment should prevail. The Plaintiff's argument was that "fault" as used in the Act did not encompass trespass actions and that therefore the Plaintiff's contributory negligence was only relevant if it was a common-law defence which it was not.

In examining the word "fault" the Court rejected the authorities that suggested that "fault" included trespass to the person. Among these authorities was the statement by Sidney Smith J.A. that he was "of opinion therefore that trespass to the person, like trespass to a ship, must be deemed to be "fault" within the provisions of the Contributory Negligence Act and whether such trespass was the result of negligence or wilfulness."¹⁹ The Supreme Court of Canada had itself left Mr. Justice Smith's statement an open issue when Mr. Justice Estey stated "there can be no question but that the word "fault" includes negligence, but whether it is a somewhat wider term as used in the British Columbia Act, in my view it is not necessary here to determine."²⁰ In *Hollebone* Mr. Justice Wells stated at p. 283, "if there were no authority on the matter in Ontario, the reasoning of Sidney Smith J.A., which was left open in the Supreme Court of Canada, would commend itself to me." His examination of the Ontario authorities, however, convinced him that a restrictive view of the word "fault" should be taken. He was largely influenced by three decisions of Riddell J. made in 1925²¹ immediately after the passage of the first apportionment legislation. Typical of Riddell J.'s restrictive view are the following statements:

The statute was intended simply for the relief of a plaintiff who would have failed in obtaining any damages at all under the existing law, it being proven that he was guilty of contributory negligence. That that was the whole object of the statute I have no doubt, and it should not be extended.²²

and

I think that statute was intended in ease of the plaintiff who was found guilty of contributory negligence, and not of the defendant.²³

19. *Yule v. Parmley and Parmley*, [1945] 2 D.L.R. 316 at 330 (B.C. C.A.). It should be noted that Sidney Smith J.A. was dissenting in part.

20. *Parmley and Parmley v. Yule*, [1945] S.C.R. 635 at 650.

21. *Walker v. Forbes*, [1925] 2 D.L.R. 725 (Ont. H.C.); *Farber v. T.T.C.*, [1925] 2 D.L.R. 729 (Ont. H.C.); *Mondor v. Luchini*, [1925] 2 D.L.R. 746 (Ont. H.C.).

22. *Supra*, note 21, *Farber v. T.T.C.* at 731-732.

23. *Supra*, note 21, *Mondor v. Luchini* at 747.

In *Hollebone*, Wells J. felt that he was bound by the Ontario restrictive view and reluctantly concluded “that the words ‘fault’ and ‘negligence’ in the Ontario statutes are synonymous and simply mean negligence, and should not receive any wider meaning than that which is included in the word ‘negligence’”.²⁴ Accordingly, since the Defendant had committed a trespass to the person, even though not intentionally, the Court found him totally liable for the damages since the contributory negligence of the Plaintiff was not a defence available to the Defendant.

The decision in *Hollebone* is a curious one that appears to be based on a slavish reliance on precedence and on the fiction of the presumed intention of the Legislation. By limiting apportionment to actions of negligence and none other it extended the influence of the old writ system that had been eliminated to address the evil of the ‘proper cause of action’. It expanded the effect of *Cook v. Lewis* and allowed an injustice to be encouraged by the Courts. Both parties were an effective and equal cause of the damages. This fact was acknowledged by the Court but it forced one party to pay for damages contributed to by another. The decision ignored the fact that the ‘intentional’ tort of trespass to the person could be committed intentionally or negligently. Perhaps the decision might have been appropriate if the Defendant had intentionally struck the Plaintiff but he did not. The Defendant was negligent. So was the Plaintiff. Both were to blame. On a reasonable interpretation of the legislation the Court could have apportioned the damages but it refused to do so. Thus, all that a negligent Plaintiff would have to do to make his own negligence irrelevant was to properly frame his action in trespass rather than in negligence, the only difference being that trespass involves direct damage whereas negligence does not necessarily require directness. Although the *Hollebone* decision has been criticized, it has been followed in a number of subsequent decisions²⁵ and ensured that apportionment was limited to negligence actions until very recently.

(ii) *Reasons for and Against Apportionment in the Intentional Torts.*

Before turning to recent decisions that challenge *Hollebone* some

24. *Supra*, note 15 at 286.

25. See *Standard International Corporation et al. v. Morgan et al.*, [1967] 1 O.R. 328 (S.C.); *Acker v. Acker* (1973), 2 O.R. (2d) 270 (Co. Ct.); *Chesnesky v.*

analysis of the various justifications for or against extension of apportionment principles to the intentional torts is appropriate.

(a) Is there anything inherent in the conduct of Defendant that should prevent apportionment? It must be remembered that many of the intentional torts can only be committed by intentional conduct of the Defendant. In many instances this will include a definite intent to harm the Plaintiff although this is not necessary. Certainly the common law had a particular abhorrence for acts done by a Defendant with intent to injure. As well as branding many of these acts crimes, the law imposed absolute liability on the wrongdoing Defendant. The rationalization for this was articulated by Glanville Williams in his classic work on contributory negligence thusly:

This exclusion of the defence in cases of intentional wrongdoing rests partly on ideas of policy; it is a penal provision aimed at repressing conduct flagrantly wrongful. Also, it is a result of the ordinary human feeling that the defendant's wrongful intention so outweighs the plaintiff's wrongful negligence as to efface it altogether.²⁶

Not everyone, however, agrees that a Defendant should necessarily pay for the totality of damages where there is intent to injure. The following example is representative:

The first question is whether contributory fault should be a defence available in all tort actions. We see no reason to exclude any torts. The courts assess fault and the degree to which the fault of each person contributes to the damage; and if the wrong-doer intentionally committed the wrong he will get short shrift on a plea that the injured party did not take active enough steps to avoid the wrongful act. On the other hand, there may be a case, e.g., a fight entered into deliberately by both persons, in which an apportionment would be the only fair adjudication.²⁷

In most instances of intentional harm, clearly, apportionment will be inappropriate. That should surely not mean, however, that it is inappropriate to all cases and that Courts must never consider the circumstances including the Plaintiff's conduct.

If the Defendant acted intentionally but with no intent to produce the resulting injuries then it might not be inappropriate in some cases to consider the Plaintiff's conduct and apportion the damages accordingly. In *Bettel v. Yim*²⁸ the 15 year old Plaintiff threw a

Armdale Publishers Ltd. et al., [1974] 6 W.W.R. 162 (Sask. C.A.).

26. *Supra*, note 5 at 198.

27. 1979 Proceedings, Uniform Law Conference of Canada, at 105.

28. (1978), 5 C.C.L.T. 66 (Ont. Co. Ct.).

lighted match into the Defendant's store causing a fire. The Defendant's subsequent intentional shaking of the Plaintiff resulted in an unintended nose injury for which the Plaintiff sued. In his annotation to the case, Lewis Klar makes the following comment:

This issue of contributory negligence as a defence in an intentional tort was not raised in the instant case. The point however is an interesting one. It has been held that contributory negligence is not a defence to intentional torts — *Hollebone v. Barnard*, [1954] O.R. 236, [1954] 2 D.L.R. 278. The issue however has scarcely been raised since 1954 and with the increased popularity of apportionment as a method of ensuring fairness it might be argued that the matter ought to be rethought. In the instant case, for example, one might suggest that the unreasonable conduct of the plaintiff contributed to his eventual injuries and that he should have been responsible for part of these damages. Again the argument is a moralistic one. Should an intentional wrongdoer be relieved of any part of the consequences brought about by his wrongdoing? I would again submit that there is nothing necessarily reprehensible about the conduct of an intentional tortfeasor and that in the appropriate circumstance contributory negligence ought to be considered. This case might have been a good example where apportionment would have been the appropriate device.²⁹

If the Defendant's conduct was negligent this still might result in his commission of an intentional tort because of the anachronistic rule in *Cook v. Lewis* that established the concept of negligent trespass. Indeed, this was the Defendant's conduct in *Hollebone* and it could not reasonably be said that the Defendant's conduct there was any more reprehensible than the Plaintiff's since the Jury found both parties equally negligent for essentially the same reasons. Why then should the conduct of the Plaintiff receive different and unequal treatment when compared to the Defendant's conduct? Simply because the damage was 'direct' is surely irrelevant to the nature of the conduct being examined. To prohibit apportionment in cases involving negligent trespass is to extend the scope of *Cook v. Lewis* and give the Plaintiff more than a mere procedural advantage. Any lay person would surely cry out 'foul' and the Courts, too, should not be blinded to abundantly clear unfairness. By refusing to recognize more than one cause of the damage and by restrictively looking at the form of action rather than the nature of the conduct the Courts succeed in frustrating an equitable application of

29. *Id.*, at 69.

apportionment principles.

(b) Is there anything contained in the current legislation that prevents apportionment in the intentional torts? None of the Canadian statutes specifically prohibit apportionment in the intentional torts. The Manitoba legislation³⁰ requires apportionment in actions “founded upon the negligence of the defendant” and since tort actions based on the intentional conduct of the Defendant are not within this concept then presumably the Plaintiff’s contributory negligence is not relevant to apportionment unless it arises out of common law principles. There would be nothing, however, in the Manitoba statute to prevent apportionment to cases of negligent trespass since in such instances the Defendant can frequently prove the absence of intention but not of negligence. Thus, in such a case the only basis for the action is the negligence of the Defendant. Granted, it could be argued that the negligent trespass case is “founded” on the nature of the Plaintiff’s injury (i.e., a result of a direct application of force) rather than on the nature of the Defendant’s conduct (i.e., intentional or negligent) but this leads to an unnecessary and unfortunate interpretation of the legislation.

All of the other Provinces’ statutes base apportionment on “fault” or “fault or negligence”. *Hollebone* interprets the word “fault” as being limited to what was intended by the legislators when they passed the apportionment Acts. This legal fiction of the intention of the legislators focuses exclusively on the elimination of the common law principle that a negligent Defendant could escape liability completely if the Plaintiff had contributed to his injury. Clearly the act was intended to benefit Plaintiffs who were otherwise faced with the “all or nothing” rule. But if the Acts can be reasonably interpreted to achieve fairness in other areas what is there to prevent this? Legislation frequently achieves results that could not have been intended by its makers. It is the words that are ‘cast in stone’ not the intentions. As stated by one study:

When the defence of contributory negligence is regarded as one founded upon achieving fairness as between plaintiff and defendant and not one which merely corrects a defect of the common law for the advantage of a plaintiff, it ceases to be relevant to inquire whether at common law the plaintiff’s own failure of care was either a complete defence or no defence at all. Consequently we think that there is no reason to confine the

30. *Supra*, note 12.

partial defence of contributory negligence to actions which are framed in negligence. . . . We would suggest that the difficulty in ascertaining the scope of the defence of contributory negligence has stemmed from a conflict between treating the relevant statute as one intended solely to correct a defect in the common law for the advantage of the plaintiff and as one intended to achieve fairness between a plaintiff and a defendant. If the broader rationale for the defence of contributory negligence, to achieve fairness between plaintiff and defendant, is accepted, the defence cannot be restricted to certain categories of torts.³¹

If the Courts can achieve two different results depending on their interpretation of legislation — one that will result in equal treatment of the parties and full consideration of all the circumstances and one that results in patent unfairness and blindness to the facts — why should the latter choice be the one that prevails?

(c) Is there anything in the common law that prevents apportionment in the intentional torts? The following conclusions that there might be common law principles preventing apportionment in the intentional torts must be prefaced with the obvious comment that the current legislation can change prior common law and make any discussion thereof irrelevant.

It is fairly clear that contributory negligence of a Plaintiff was not a defence open to a Defendant in an action involving intended injury, if not all the intentional torts. As stated by Wells J in *Hollebone* at p. 286, “I am not aware that a plea of contributory negligence was ever a defence to an action of trespass and no authorities to show that it has been cited to me nor have I been able to find any”. Thus, any basis for consideration of a Plaintiff’s contributory negligence in the intentional torts must come from the legislation and interpretations thereof since there is no judicial precedent therefor.

In the common law, however, there is the concept that some of the intentional torts such as battery are actionable *per se*. The reasons for this *per se* concept are perhaps historical and based on the societal and moralistic perception of the need for the protection of personal and proprietary interests whereby the very nature of the offence gave rise to a presumption of damage. Whether such

31. Report No. 31; Contributory Negligence and Concurrent Wrongdoers, University of Alberta Institute of Law Research and Reform at 14.

32. *Supra*, note 15 at 286.

concepts are of much relevance today can certainly be challenged the fact remains that they are still part of our law. The *per se* concept would not realistically prevent apportionment. In the absence of any substantive damages a Plaintiff will normally not commence an action because the damages awarded will be nominal only and the action might be dismissed as frivolous or costs will be awarded against the successful Plaintiff. In a successful *per se* action the Plaintiff normally will be entitled to nominal damages and actual damages. Apportionment does not reduce the entitlement of a Plaintiff to either type of damage but it does reduce the quantum entitlement. Since a Plaintiff's conduct under apportionment legislation does not constitute an absolute defence, the *per se* concepts intrinsically attached to those few applicable torts are not affected. If a Court felt compelled to leave the *per se* concept completely intact there would be nothing preventing an untouched award of nominal damages together with an apportioned award of actual damages.

In awarding damages there has been a lot of judicial concern and confusion surrounding the principle that the Plaintiff should receive adequate and complete compensation for the injuries sustained. Especially in the area of the effect of provocation on a damage award is this confusion most obvious. In England, *Lane v. Holloway*³³ sets forth the proposition that "when considering what damages a plaintiff is entitled to as compensation for physical injury, the fact that the plaintiff may have behaved badly is irrelevant."³⁴ The case is further authority for the rule that provocation can only be taken into account to reduce punitive or exemplary damages but not compensatory damages. In Canada there has been no uniform acceptance or rejection of the *Lane v. Holloway* principles. While most Courts appear to have embraced the principle,³⁵ a few reject it making statements such as the following:

Canadian Courts have had no difficulty in lumping the damages together and subtracting a portion, or percentage where they have found provocation to be a mitigating factor. A clear basis for this can be found in the fact that in provoking an assault and battery, the Plaintiff can be considered to have contributed to his

33. [1968] 1 Q.B. 379 (C.A.).

34. *Id.*, at 392.

35. See *Check v. Andrews Hotel Co. Ltd.*, (1974), 56 D.L.R. (3d) 364 (Man. C.A.); *Landry v. Patterson* (1978), 93 D.L.R. (3d) 345 (Ont. C.A.)

own damages. He is, in this respect, part of their cause . . .³⁶

The relevancy of the foregoing discussion on provocation to apportionment in the intentional torts depends on whether the Courts will view provoking conduct as a contributing cause of the damages. If provocation by a Plaintiff is considered to be a contributing cause to the damages then in those jurisdictions that have followed *Lane v. Holloway* there might well be a conflict if apportionment is also available. The conflict is that provocation cannot reduce compensatory damages but apportionment can. Which rule of law should prevail?

The issue is far from an academic one. In a subsequent decision the English Court of Appeal that decided *Lane v. Holloway* stated that the *Lane* case was one “where the conduct of the injured man was trivial”³⁷ and made the following comments on the *Lane* principles:

I do not think they can or should be applied where the injured man, by his own conduct, can fairly be regarded as partly responsible for the damage he suffered. So far as general principle is concerned, I would like to repeat what I said in the later case of *Gray v. Burr* [1971] 2 All E.R. 949 at 957:

In an action for assault, in awarding damages, the judge or jury can take into account, not only circumstances which go to aggravate damages, but also those which go to mitigate them.³⁸

This possible conflict between the two rules of law should, it is submitted, be resolved in favour of apportionment principles. Since apportionment is concerned with a fair and equitable distribution of liability amongst the respective causes of the damages, then, if the Plaintiff’s provocation can be reasonably said to be one of the contributing causes, this should be taken into account to apportion the award the Plaintiff receives. Otherwise he is reaping the benefit of his own wrongdoing at the expense of the Defendant.

If, on the other hand, the provocation cannot reasonably be said to be a contributing cause then apportionment would be inapplicable and the Courts could continue to apply their varied rules on the effect of provocation. Whether the conduct of the Plaintiff amounts to ‘mere provocation’ or ‘causal provocation’ would have to be a

36. *Mason v. Sears and Cruikshank*, March 26, 1979 C.H. 26808 (N.S. Co. Ct.) (Unreported).

37. *Murphy v. Culhane*, [1976] 3 All E.R. 533 (C.A.) at 535.

38. *Id.*

decision left to the discretion of the trier of fact since causation is a matter of fact.

(d) Is there anything inherent in the conduct or situation of the Plaintiff that should prevent apportionment? The fact that the Plaintiff has suffered damages is, by itself, no reason to deny apportionment since proportionate division of liability is already imposed on an injured Plaintiff in negligence actions. Thus there appears to be nothing intrinsic in the injury that prevents the principles of proportionate liability.

When the Plaintiff's conduct is examined there appears to be nothing inherent in that which would deny apportionment. Since apportionment of damages is concerned with causal conduct only, then if the Plaintiff has contributed to his own injuries, why should the Defendant pay for damages beyond his proportionate responsibility? The *Hollebone* case could lead to the ludicrous situation where the Plaintiff had contributorily caused 90% of his own injuries and the Defendant contributorily caused 10% and yet the Defendant would have to pay 100% because the injury arose from a direct application of force. Could it be said that in such a situation the plaintiff is deserving of such treatment or that the Defendant's conduct was much more reprehensible than the Plaintiff's? To require payment of all the damages by the Defendant is to punish the Defendant for no just cause. It has long been a "common law principle that a person cannot derive any advantage from his own wrong"³⁹ and yet there is exactly what is achieved by denying apportionment in the intentional torts.

(iii) *Recent Treatment in the Courts*

Recently Courts have taken a second look at apportionment in cases involving actions other than negligence and appear ready to expand the scope of the legislation. For example, Chief Justice MacKeigan has acknowledged that fault concepts are not confined exclusively to negligence and can apply to actions involving breach of contract. In concluding that the Nova Scotia Contributory Negligence Act⁴⁰ applies to a breach of contract action he states "I have little doubt that the Nova Scotia Act applies where loss is caused by any 'fault'; the word 'tort' does not appear".⁴¹ *A fortiori* the

39. *Ginty v. Belmont Building Supplies, Ltd.*, [1959] 1 All E.R. 414 (Q.B.C.) at 424.

40. R.S.N.S. 1967 c. 54.

41. *Speed and Speed Ltd. v. Finance America Realty Ltd.*, (1979), 12 C.C.L.T. 4

apportionment legislation would also apply to an intentional tort action if the Plaintiff's conduct can be considered to be "fault".

By far the most important case that addresses this issue directly vis à vis the intentional torts is *Bell Canada v. Cope (Sarnia) Ltd.*⁴² The Defendants were sued for both trespass and negligence for damages caused by them in the destruction of a live telephone cable. The Defendants had been induced to act as they did by the negligence of the Plaintiff and the Court found the proper split of responsibility would be two-thirds against the Plaintiff and one-third against the Defendant.

It is interesting to note that Linden J. in his trial decision⁴³ found that the Defendant acted negligently in proceeding with the excavation work without a "locate slip" that would have assisted in proper location of the cable. Perhaps more importantly, he also found that the Defendant had acted both intentionally and negligently in cutting into a concrete pipe without confirming the contents thereof. Thus, we have a situation where the Defendant's conduct is intentional and negligent. The Court could have apportioned liability without any difficulty because one of the actions was a negligence action and as stated in *Hollebone* the Act was intended to apportion a Plaintiff's contributory negligence in such a case. Mr. Justice Linden, however, was not content to ignore the rule decided by *Hollebone* and turned to the trespass action to see whether apportionment could be made in a case that was based on trespass as well as negligence. Examining the Ontario apportionment legislation⁴⁴ he stated that:

Fault and negligence, as these words are used in the statute are not the same thing. Fault certainly includes negligence, but it is much broader than that. Fault incorporates all intentional wrongdoing, as well as other types of substandard conduct. In this case, both intentional and negligent wrongdoing were satisfactorily proved.⁴⁵

In coming to this conclusion that is contrary to the decision in *Hollebone*, Linden J. cited with approval the authorities that were rejected in the prior case. Relying partly on the Sidney Smith J.A. statement quoted earlier,⁴⁶ Linden J. concludes that the word

(N.S. S.C. A.D.) at 25.

42. *Supra*, note 1.

43. (1980), 11 C.C.L.T. 170 (Ont. H.C.) (hereinafter referred to as *Bell Canada*).

44. *Supra*, note 11.

45. *Supra*, note 43 at 180.

46. *Supra*, note 19.

“fault” includes trespass actions. He states:

The gist of the trespass action today is fault; if it can be established by the defendant that there was no negligence and no intentional interference then the action will fail because no fault exists. Consequently, trespass is based on fault and is no longer a strict liability cause of action. . . . I find, therefore, that a trespass action comes within the opening words of s. 4 of the Negligence Act.⁴⁷

Mr. Justice Linden also rejected the authorities that were accepted in *Hollebone* that suggested that the legislation was intended to be limited only to those cases where contributory negligence would have been an absolute defence prior to the legislation. Without stating reasons, and labelling the reliance thereon as “erroneous”, he concluded that those “cases have no relevance at all in the interpretation of the meaning of the words “fault or negligence” in this context.”⁴⁸

Turning to the *Hollebone* decision itself, Linden J. found that *Bell Canada* was distinguishable since it involved both trespass and negligence actions whereas *Hollebone* was based exclusively on trespass.⁴⁹ Linden J. also pointed out that *Hollebone* was the decision of a trial judge and, therefore, not strictly binding on him.

Linden J.’s decision was appealed to the Ontario court of Appeal⁵⁰ and Brooke J.A. gave a very brief oral judgment dismissing the appeal. Although the appeal decision adds little but concurrence to Linden J.’s decision, it does represent the first Canadian Appellate decision that is unanimous in allowing apportionment in an action involving trespass. Perhaps even more significantly, the Ontario Court of Appeal cited with approval Linden J.’s conclusion that the word “fault” was a much broader concept than just negligence and included all intentional wrongdoing.

The problem with the *Bell Canada* decisions is that not all of the questions relating to apportionment in the intentional torts have been answered. Both Courts placed some weight on the fact that the *Bell Canada* case involved both intentional and negligent conduct by the Defendant and that the Plaintiff had sued for both trespass and negligence. Indeed, this was the stated distinguishing feature between *Bell Canada* and *Hollebone*. It might not be safe to

47. *Supra*, note 43 at 180.

48. *Supra*, note 43 at 183.

49. *Supra*, note 43 at 182.

50. *Supra*, note 1.

conclude, therefore, that, if the Plaintiff in *Bell Canada* had sued only in trespass or if the Defendant's conduct had been intentional only, that the same conclusions would have been reached. In light of Linden J.'s conclusions that trespass is based on fault and that the word 'fault' in the apportionment legislation includes all intentional wrongdoing, it is hard to imagine that the Court would not have allowed apportionment even if the *Bell Canada* case exclusively involved intentional conduct, a trespass action or any of the intentional torts.

The *Bell Canada* decision is, of course, distinguishable in other jurisdictions since the apportionment legislation in Ontario is unique being based on the words "fault or negligence." However, the conclusions that there can be no liability in trespass without fault and that the word "fault" means more than negligence and includes intentional conduct would now appear to be extremely persuasive and equally applicable to those jurisdictions that base apportionment on "fault" alone.

IV. Conclusion

Certainly the *Bell Canada* case is a step in the right direction towards resolving a few of the many difficulties facing apportionment principles generally. Questions in addition to the scope of *Bell Canada*, however, remain. Does apportionment only apply when the Plaintiff's conduct is contributorily negligent? Can a Plaintiff who has consented obtain any apportionment from a Defendant? Can apportionment be made in actions, other than tort, that include fault such as breach of contract, breach of trust? What is the relationship of provocation and apportionment? Can a Plaintiff who is faced with the defence of self-defence ever obtain apportionment? What if the defendant has acted on the grounds of reasonable mistake not induced by the Plaintiff?

If the Courts are slow in applying and expanding the *Bell Canada* principles to other situations some changes will likely occur through legislative reform. Significant revisions have been recommended⁵¹ and are under consideration.⁵² The sole apparent reason for wanting

51. *Supra*, note 31.

52. *Supra*, note 27. Although it is believed that the 1980 Conference of Commissioners on Uniformity of Legislation in Canada recommended a Uniform Apportionment Act that includes apportionment for the intentional torts, this has not been confirmed. The proceedings of the Conference were not available as of the date of the writing of this comment in July 1981.

any change at all in the application of apportionment principles is a reason that is difficult to explain — fairness. Perhaps it is simply intuitional if one concludes that *Hollebone* achieves an unfair result and *Bell Canada* achieves fairness. Hopefully it is more-concern that a court can ignore the facts of the case; concern that a court looks at one parties' conduct only; concern that a court would let a party benefit from his own "wrong"; concern that the parties have not been given fair and equal treatment. Fairness must be this and more. If apportionment in the intentional torts can achieve an equal and reasonable treatment of the parties, a full consideration of the contributory causes and an equitable distribution of proportionate responsibility then fairness, whether intuitional or otherwise, will have been achieved. *Bell Canada* starts this process. It will be interesting to see where it ends.