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The readers of the Revay Report, in responding to a recent survey, selected delay analysis as their number one interest. We have discussed delay analysis in past issues more than once, last time in Number 2 of Volume 13 (June

1994). Nevertheless the request is understandable considering the rapid evolution of available techniques and more importantly the judicial treatment of this topic. No wonder there is no generally accepted technique today. It has often been said that delay analysis is an art and not a science. If this statement is true of delay analysis in general, then it is doubly so with respect to concurrent delay analysis. In this article we are trying to chart a possible course for future development.

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Concurrent Delay: A Modest Proposal

R.B. Reynolds and S.G. Revay

1. INTRODUCTION

Concurrent delay is experienced on a project when two or more separate delay events occur during the same time period and each, independently, affects the completion date. Delays may occur as a result of the actions, or inaction, on the part of the owner, the contractor, subcontractors, or the designer, and when delays do occur claims for both extra time and additional compensation arise. Not infrequently such claims are resisted based upon allegations of concurrent delay, either a concurrent delay by the claimant or a concurrent delay by another project participant, which arguably deprives the claimant of the ability to establish causation.

Most of the literature dealing with concurrent delay comes from the United States and the majority of it is based on judgments in the area of federal contracting. Generally, viewed from the perspective of the owner-general contractor relationship, the following principles can be derived from the U.S. caselaw:

- if an excusable (e.g. a force majeure event) or a compensable delay occurs concurrently with a non-excusable delay, the delay is treated as excusable;
- if an excusable delay occurs concurrently with a compensable delay, the delay will be treated as excusable but non-compensable.

Normally, non-excusable delay arises as a result of an event within the contractor's control. Examples of non-excusable delays include late performance by subcontractors, untimely performance by suppliers,

faulty workmanship, strikes caused by the contractor, etc. (see: T.J. Trauner, *Construction Delays* (Kingston, MA: R.S. Means Company, Inc., 1990) at p. 4).

Recent U.S. caselaw continues to demonstrate an emphasis on the critical path analysis approach to treatment of delay. (See, for example, *Williams Enterprises Inc. v. Strait Manufacturing and Welding Inc.*, 728 F. Supp. 12 (D.D.C. 1990); *Wilner v. United States*, 23 Cl. Ct. 241 (1991); *PCL Construction Services Inc. v. United States*, 47 Fed. Cl. 745 (2000).) This method, of course, provides fertile ground for the assertion of concurrent delay defences.

To understand the underlying rationale for the principles derived from U.S. caselaw, it is important to recognize that, as noted above, the defence of concurrent delay arises where the claimant which is contending that certain actions or omissions on the part of the defendant gave rise to compensable delay, is met with either the argument that the claimant itself is responsible for either an excusable or non-excusable concurrent delay, or the argument that another party involved in the project was involved in an excusable or non-excusable concurrent delay. In essence, the defendant takes the position that, although it (i.e. the defendant) may have delayed completion of the project, the fact that there was a concurrent delay elsewhere on the project, affecting the critical path, means that the claimant would have suffered the same damages even if the defendant had not delayed the project, and that, therefore, the claimant cannot prove that the defendant caused its damages.

The inequitable aspect of the concurrent delay defence is that, where accepted, it results in a wrongdoer avoiding the consequences of its acts. In the paradigm situation, an innocent claimant can be met with two or more wrongdoers arguing that the claimant must bear its own loss due to its inability to establish that any one of the defendants was the proximate cause of the claimant's damage. Interestingly, although the defence of concurrent delay is widely used by the leading claims consultants in Canada, the Canadian jurisprudence dealing with construction disputes provides no direct assistance in respect of how to address this significant defence.

Importantly, the general concept of concurrent delay has been recognized by Canadian courts. For example, in *Continental Breweries Inc. v. 707517 Ontario Ltd. (C.O.B. Northern Algonquin Brewing Co.)*, [1993] O.J. No. 2395 (Ont. Ct. (Gen. Div.)) Northern, as owner, entered into an agreement with Continental Breweries Inc. ("CBI"), as contractor, to construct a brewing facility. The completion of the brewery was delayed and the facility did not "come on stream with a completed brewing facility" for one year past the completion date contemplated in the original agreement. As a result, CBI commenced an action against Northern to recover for work and materials supplied and for delay. Northern counterclaimed for lost profits as a result of the delay. After assessing all the evidence in respect of the delay, Davidson J. found that CBI bore primary responsibility for the delay, in that the initial schedules drawn up were never met because of its use of inadequate forces, lack of detailed drawings, late ordering of material, general lack of experience in projects of that magnitude and complexity, cash flow problems, and inability to organize the fundamental installation of the necessary connected and interdependent elements of the project. Justice Davidson also found that Northern was partly responsible for the delay, since it requested changes for labelling design, obtaining sufficient labelling information, and changed filters which, in turn, delayed CBI. In this respect, Davidson J. found that, to a limited degree, the delay was attributable to Northern; however, the totality of the delay attributable to Northern was only 12 weeks since a delay of twelve weeks was due to the labelling design and getting sufficient label design information and the changed filter caused an additional six week delay, but that it was concurrent with the 12 week delay of the label change. Therefore, Davidson J. attributed 80% of the delay to CBI and 20% to Northern. Justice Davidson also allowed Northern's counterclaim for lost profit but

reduced this amount by 20% to represent the amount of delay which was attributable to Northern.

Also, in *Foundation Co. of Canada v. United Grain Growers Ltd. (1996)*, 25 C.L.R. (2d) 1 (B.C.S.C.), var'd (1997), 33 C.L.R. (2d) 159 (C.A.), United Grain Growers Ltd. ("United Grain Growers") entered into a contract with Foundation Co. of Canada ("Foundation Co.") for a renovation of its grain terminal. CWMM was United Grain Growers's engineer. Foundation Co. subcontracted the sheet metal work to Crosstown Metal Industries Ltd. ("Crosstown Metal"). The construction was delayed. Foundation Co. sued United Grain Growers and CWMM for damages for breach of contract and negligent misrepresentation and advanced a claim for extras. Crosstown Metal sued Foundation Co. for damages for breach of contract, however, most of these claims were referable to the acts and omissions of United Grain Growers and CWMM, from which Foundation Co. claimed contribution and indemnity. United Grain Growers counterclaimed against Foundation Co. for economic losses caused by Foundation Co.'s delay. At trial, Brenner J. considered each portion of the project which the parties alleged resulted in delay and found that Foundation Co. was delayed by the acts and omissions of United Grain Growers and/or CWMM for a period of three months past completion. Justice Brenner also found that Foundation Co. established that there were other delays which were the responsibility of United Grain Growers and/or CWMM which likely delayed Foundation Co., but that these delays were concurrent, and therefore would not extend the 3-month entitlement of Foundation Co. With respect to Crosstown Metal, Brenner J. found that Foundation Co. contributed to the delays experienced by Crosstown Metal. Thus, in assessing the extent to which Crosstown Metal was entitled to indemnity, Brenner J., apportioned responsibility for the delays for which Crosstown Metal was entitled to compensation at 75% for CWMM and United Grain Growers and 25% for Foundation Co.

The lack of a definitive approach to the defence of concurrent delay in the Canadian jurisprudence on construction law represents a troublesome conundrum. Justice Wallace, in his decision on a motion for judgment, in *Pacific Coast Construction Co. Ltd. v. Greater Vancouver Regional Hospital District (1986)*, 23 C.L.R. 35 (B.C. S.C.), highlighted the context within which the concurrency debate normally arises when he stated, in part:

I find that the contractor is entitled to claim the delay costs incurred by it as a result of the three week owner-

caused delay. However, the calculation of such impact costs is a very complex exercise and can only be accomplished, if at all, at a trial of the issue. Evidence is before me of the time within which a reasonable contractor could complete the contract, and this is compared to the actual completion time. To reach any proper conclusion as to the costs from the delay one would be required to analyse the contractor's progress and determine to what extent the different causative factors, such as contractor-caused delays, unavoidable delays and owner-caused delay contributed to the overall delay experienced by the contractor. It would also be necessary to evaluate the validity of the contractor's original contract schedule and the "reasonable contractor" schedule.

However, Wallace J. did not undertake the analysis described above, because he was of the view that such an exercise could not be undertaken on a motion for judgment. Unfortunately, there is a dearth of Canadian caselaw which directly grapples with the issue of the defence of concurrent delay in terms of conducting the kind of analysis described by Wallace J. and determining the resulting apportionment of responsibility for concurrent delay.

In order to appreciate the context within which expert claims consultants analyse the issues of concurrent delay, it is useful to consider the various analytical approaches available.

2. ANALYTICAL APPROACHES TO SOLVING THE CONCURRENCY DILEMMA

From the claims consultant's perspective, there is a number of analytical approaches available to establish the basis for a delay claim.

i. The Snapshot Method

In complex claims, simplifying considerations must be adopted by dividing the project into windows of time, where each window must be analyzed independently.

Scheduling is a dynamic process. For a schedule to be meaningful and acceptable for valid delay analysis it must be kept current and must reflect both the delays or gains as they occur and the then governing planning (e.g. sequencing and resource loading) of the contractor [see *Fortec Constructors v. U.S.* 760 F.2d 1268 (Fed. Cir. 1985)]. Schedules which are not kept current (i.e. periodically updated to faithfully reflect the actual status of the project at various intervals) are not considered a valid medium for delay analysis.

Because the snapshot analysis focuses on specific periods of the project and always measures gains or delays against the then current critical path, it is considered a superior technique for the purpose intended, assuming of course that the window periods selected are of sufficiently short duration to properly capture any significant shifting of the critical path and that the progress at the end of the period represents real progress as opposed to desired (i.e. invalid) progress.

The word "snapshot" describing this technique underscores the need for relying only on factual as opposed to fictional data.

The schedule run at the end of the window period (i.e. the snapshot schedule) must therefore give effect to the actual progress achieved as well as to the delays (extended activity duration) and gains (reduction in the activity duration) experienced by the project during the window period. Based on these revisions to activity duration and the progress actually achieved, the revised project completion date is recalculated applying the original planning (i.e. the logic used for the schedule in force at the beginning of the window period) to the part of the schedule covering the work to be performed beyond the end of the window period, including the unprogressed activities or the remaining portions of those activities which have been partially progressed during the window period.

The completion date projected by this snapshot schedule, if compared to the completion date projected by the unprogressed schedule (the schedule as planned at the beginning of the window period), indicates the overall delays or gains resulting from the achieved progress or lack thereof.

Although the snapshot schedule is, at times, used as the as-planned schedule for the next window period, more often than not the schedule is revised by changing the sequencing of activities or introducing other accelerating measures, thereby probably shifting the critical path. Most of the time the projected completion date of this "revised" or "updated" schedule is different (usually brought back) from that of the snapshot schedule. Because of the acceleration which might have been introduced by subsequent updates, the measure of the total project, which has to be determined to assess responsibility for the causes giving rise to delays and/or to determine the degree of entitlement to acceleration cost, is the cumulative total of the delays or gains determined for each snapshot. Allocation of liability for the delays will, of course, have to be carried out independently for

each window. (This determination can be based on common sense, the "dominant cause" or "collapsed as-built schedule" analysis, as described hereinafter.)

Perhaps the most authoritative opinion on the snapshot method was rendered by the Armed Services Board of Contract Appeals, in *Gulf Contracting, Inc.*, ASBCA Nos. 195, et al., 89-Z BCA (explained in Number 2, Volume 13 of The Revay Report).

ii. The Dominant Cause Approach

The line of reasoning used by the court in *Williams, supra*, is very similar to the principle favoured by the English courts, where it is called the "dominant cause approach". According to this approach the plaintiff may recover its damages if it can establish that the delay for which the defendant must assume responsibility is the overriding or the "dominant" cause of the loss suffered. Which cause is dominant is a question of fact which is not solved by mere order of occurrence, but is to be decided by applying common sense standards. For example, if progress on a section of the work was suspended on a Monday because an essential piece of equipment supplied by the owner would not arrive for another ten days, then without other delays it is safe to assume that the cost of the suspension should be paid to the contractor by the owner. Now, if on Wednesday a heavy rain storm caused flooding, thereby preventing work on the entire site for a number of days, is the contractor still entitled to compensation for all of its damages? Pursuant to the "dominant cause approach" it would be entitled to all of its extended duration costs relating to the section of work suspended, but not to the cost resulting from the flooding to the other parts of the work.

There is a long line of English decisions which follow the dominant cause approach, starting with *Leyland Shipping Co. Ltd. v. Norwich Union Fire Insurance Society Ltd.*, [1918] A.C. 350 (H.L.) and continuing through *Galoo Limited v. Bright Grahame Murray*, [1995] 1 All E.R. 16 (C.A.). All of these English cases and arguably also the *Williams* case represent relatively straightforward problems suitable for "common sense" determination. Unfortunately, this is not always the case. On projects that sustain multiple overlapping changes or delays with long durations (including concurrent delays), as may be the case, for example, on many process or power plants, neither the dominant cause approach nor other common sense approaches may suffice because of all the assumptions that must be made regarding remaining durations of activities being affected not even taking into

account the possible relocation of the critical path.

iii. Collapsed As-Built Schedule Method

The collapsed as-built schedule method, also known as the "but for" method, has, in recent years, been gaining considerable popularity primarily because of its simplicity. Under this method one takes the as-built schedule, identifies the impact of delays caused by one or more party(ies) (usually the defendant(s)), and then removes those impacts from the as-built schedule. The remaining duration allegedly represents the schedule within which the claimant could have completed the project "but for" the faults (acts or omissions) of the defendant. Although this apparent simplicity carries inherent dangers with it (i.e. the method can be abused easily), it may nevertheless provide a vehicle for the application of contributory negligence principles to delay analysis, as discussed below.

3. THE GENERAL CANADIAN RULE OF ASSESSING DAMAGES

In considering the legitimacy of and the treatment to be accorded to the defence of concurrent delay from a Canadian perspective, it is also useful to review the legal context within which such a defence functions, i.e. as a bar to the recovery of damages. Generally, Canadian courts have adopted the principle that where a court determines that the plaintiff has suffered a loss the court must do "the best it can" to ascertain its damages.

In this respect, S.M. Waddams in *The Law of Damages*, looseleaf ed. (Toronto: Canada Law Book Inc., 1942+) writes, at 13.10 to 13.30, as follows:

The general burden of proof lies upon the plaintiff to establish the case and to prove the loss for which compensation is claimed. In many cases the loss claimed by the plaintiff depends on uncertainties; these are of two kinds: first, imperfect knowledge of facts that could theoretically be known and secondly, the uncertainty of attempting to estimate the position of the plaintiff would have occupied in hypothetical circumstances, that is to say, supposing that the wrong complained of had not been done.

American law has had considerable difficulty with this second type of uncertainty. The courts have used the requirement of certainty to inhibit or set aside what they consider to be excessive jury awards, with rigorous standards laid down in many cases.

The consequence that, where recovery is thought to be justified, the courts must strive to reconcile the results desired with prior restrictive holdings.

In Anglo-Canadian law, on the other hand, perhaps because of the decline in use of the jury, the courts have consistently held that *if the plaintiff establishes that a loss has probably been suffered, the difficulty of determining the amount of it can never excuse the wrongdoer from paying damages. If the amount is difficult to estimate, the tribunal must simply do its best on the material available*, though of course if the plaintiff has not adduced enough evidence that might have been expected to be adduced if the claim were sound, the omission will tell against the plaintiff. In *Ratcliffe v. Evans*, Bowen L.J. said:

As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.

This principle was applied by the Supreme Court of Canada in *Wood v. Grand Valley R. Co.* (1915), 51 S.C.R. 283. In *Wood* the Supreme Court of Canada, referring to the decision of *Chaplin v. Hicks*, [1911] 2 K.B. 786, stated, at page 289, as follows:

It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned judges that such an impossibility can not "relieve the wrongdoer of the necessity of paying damages for his breach of contract" and that on the other hand *the tribunal to estimate them whether jury or judge must under such circumstances do "the best it can" and its conclusion will not be set aside even if the amount of the verdict is a matter of guess work.* [Emphasis added].

This issue was again considered by the Supreme Court of Canada in *Penvidic Contracting Co. v. International Nickel Co. of Canada*, [1976] 1 S.C.R. 267. There, Penvidic entered into a contract with International Nickel to lay track and do the top ballasting on a railroad constructed by International Nickel. International Nickel did not complete its preliminary work of

preparing the site by providing a railway connection. Penvidic had to revise its method of construction, and as a result, suffered increased expenses and delay. The evidence proved that International Nickel breached its contract with Penvidic and that damages resulted. Penvidic estimated its damages by leading evidence as to the costs of the extra ballasting on an additional sum-per-ton basis rather than by ascertaining items of expense from its records. The trial judge adopted this method to assess damages. On appeal, the Supreme Court of Canada cited the decision of *Wood v. Grand Valley Railway Company*, *supra*, for the proposition that the court must do "the best it can" to ascertain the damages and found that under the circumstances, the plaintiff was entitled to the damages which the trial judge properly assessed.

Another example of the court doing "the best it can" is found in the decision of *Potter Station Power Co. v. Inco Ltd.* (1998), 43 C.L.R. (2d) 53 (Ont. Ct. (Gen. Div.)). Bluebird Construction (Potter Station was the successor of Bluebird Construction) entered into a contract with Inco. During the course of Bluebird's contract a number of problems arose, including interference and delay. As a result, Bluebird claimed against Inco for damages, including, impact costs, head office overhead/administration, and loss of productivity. In assessing Bluebird's impact and loss of productivity costs, Rosenberg J., wrote, at page 61, as follows:

I find that with the number of problems involved it would be impossible to calculate the impact and loss of productivity attributable to each problem. When a part is delayed the impact and loss of productivity cannot be determined. The best that can be done is to estimate the total impact of all of the problems and extras on productivity and efficiency.

Justice Rosenberg further wrote, at page 65, as follows:

Inco took the position that for each FWI claimed there should be included the amount for loss of productivity and impact. This may be appropriate if there were a few changes and delays in the contract, but with hundreds of such changes there is no practical way to so allocate. If a piece of equipment is originally due June 1st and then Inco advises that it is now expected June 15th and later advises that it is expected July 1st and so on from time to time, it is not possible for Bluebird to say, when there are hundreds of such incidents, that this particular incident caused us X dollars as a result of the impact and loss of productivity.

The only practical way of measuring the overall impact and loss of productivity is in the way that Ms. Tardif has done, and that is to attribute the extra hours spent beyond those estimated (subject to proof that the estimates are reasonable) to loss of productivity and impact.

Rosenberg J. held, at page 71, that: "although it cannot be precisely measured, the best estimate that I can make is that Inco is not responsible for 40% of the delay in the project because of the late start, strikes, etc."

Applying the authorities set out above to the problem of concurrent delay, an argument may be advanced that, in cases where it is difficult to assess damages, including issues of concurrency, if the plaintiff proves that the defendant is a wrongdoer and materially contributed to the delay and the plaintiff suffered damages, the court is obligated to do "the best it can" to assess these damages. Of course, it must be recognized that the decisions cited above do not deal specifically with the issue of concurrent delay, yet one is left with the sense that, in relatively complex fact situations, where issues of concurrency were likely involved to some degree, Canadian courts have tended to allocate responsibility on a broad brush approach.

4. APPORTIONMENT OF LIABILITY

The concept of apportionment of liability may provide a more direct approach to address the concurrent delay defence.

One tool for allocating the responsibility for delay which is available to the courts of certain of the common law provinces is contained in legislation addressing the apportionment of liability in negligence.

Legislation establishing joint and several liability amongst multiple tortfeasors and allowing apportionment of liability in negligence has been introduced in all of the Canadian common law jurisdictions (see: *Negligence Act*, R.S.O. 1990, c. N-1; *Contributory Negligence Act*, R.S.N.B. 1973, c. C-19; *Contributory Negligence Act*, R.S.Y. 1986, c.32; *The Tortfeasors and Contributory Negligence Act*, R.S.M. 1987 c. T90; *Negligence Act*, R.S.B.C. 1996, c.333; *Contributory Negligence Act*, R.S.A. 1970, c. C-23; *Contributory Negligence Act*, R.S.N. 1990, c. C-33; *Contributory Negligence Act*, R.S.N.W.T. 1988, c. C-18; *Contributory Negligence Act*, R.S.N.W.T. 1988, c. C-18, as duplicated by the *Nunavut Act*, S.C. 1993, c. 28, as amended; *Contributory Negligence Act*, R.S.N.S. 1989, c.95 and the *Tortfeasors Act*, R.S.N.S. 1989, c. 471; *Contributory Negligence Act*, R.S.P.E.I. 1988, c. C-1; and *The Contributory Negligence Act*, R.S.S. 1978, c. C-31). This legis-

lation allows the courts to apportion liability between plaintiffs which are contributory and tortfeasors, as well as between joint tortfeasors (which remain jointly and severally liable to the plaintiff despite any apportionment of liability as between them by the court). (Such legislation is hereinafter referred to as "contributory negligence legislation")

Pitch and Snyder point out that "notwithstanding the similarity of this legislation, its application by the courts to contract actions has varied from province to province": see H.D. Pitch & R.M. Snyder, *Damages for Breach of Contract*, 2nd ed. (looseleaf) (Toronto: Carswell, 1989+), at 953(b). The technical restriction on the application of this legislation to negligence still exists in Alberta, Manitoba, New Brunswick, Newfoundland, Ontario, Prince Edward Island and Saskatchewan. On the other hand, the courts of British Columbia and Nova Scotia have relied on negligence legislation in respect of contract claims (see: Pitch & Snyder, *Damages for Breach of Contract*, supra, at 953(b)(i) to (viii)). However, given the general approach of Canadian common law courts to the application of the principles contained in contributory negligence legislation to contractual situations, the distinction as to the direct applicability of the legislation is of diminished significance.

For example, with relation to apportionment between a claimant and a defendant in contract, in the New Brunswick Court of Appeal case of *Coopers & Lybrand v. H.E. Kane Agencies Ltd.* (1985), 17 D.L.R. (4TH) 695, Coopers, an accountancy firm, was Kane's auditor and conducted an annual audit of Kane. In its action, Kane alleged that Coopers failed to exercise reasonable care, skill, and competence, or alternatively, that it was negligent in the performance of its duties to Kane since Coopers failed to detect a system that Charles Kane, the principal of Kane, devised which resulted in excessive credit being extended to one of Kane's customers. The customer subsequently went into receivership and Kane was unable to recover part of its debt. The Court of Appeal agreed with the trial court that Coopers did not meet the standard of care and skill called for in the circumstances. The Court of Appeal also found that the bad business judgment of Charles Kane was a proximate cause of Kane's loss, however, this conclusion did not provide Coopers with a complete defence. With respect to apportionment, Stratton, J.A. delivering the judgment of the court, found, at page 708, as follows:

... I am satisfied that the duty of Coopers & Lybrand arose from their contract of engagement. Whether one accepts the argument that at

common law damages could be apportioned in actions in contract as well as in actions of tort and that the Contributory Negligence Act, R.S.N.B. 1973, c. C-19, should be applied by analogy, or adopts the theory of the reasonable expectations of the parties, or the notion of reliance that was either qualified or unreasonable, or simply that in fairness and to do justice the damages ought to be apportioned, I do not think that in the circumstances of this case the trial judge erred in concluding that the actions of the company president, Harold Kane, and of Charles Kane, its employee, contributed to the company's loss. Nor am I able to say that the apportionment of the degrees of fault of each party is wrong.

Also, see *Doiron v. Caisse Populaire D'Inkerman Ltee.* (1985), 17 D.L.R. (4th) 660 (N.B. C.A.) for an excellent consideration of this entire area of the law by Justice La Forest.

The problem of apportionment between a claimant and a defendant in contract was also addressed in *Tompkins Hardware Ltd. v. North Western Flying Services Ltd. et al.* (1982), 139 D.L.R. (3d) 329 (Ont. H.C.J.). There, the plaintiff took its aircraft to the defendant for maintenance and change-over from floats to skis. The existing shock cords were replaced with new cords. An aeronautical engineer employed by the defendant inspected the work and certified the aircraft as airworthy. After picking up the aircraft from the defendant, the plaintiff's pilot took off for his camp. He encountered problems controlling the aircraft and made his own temporary repairs by attaching "tie downs" to the landing gear. During a flight the next day the pilot was forced to make an emergency landing which resulted in extensive damage to the aircraft. The plaintiff sued the defendant in both contract and tort. Justice Saunders found that the defendant failed to perform its obligations to the plaintiff in a workmanlike manner and also that the pilot was negligent since it was unreasonable for him not to have left the aircraft with the defendant after the first incident when he encountered problems controlling the aircraft. The plaintiff argued that even if its pilot was negligent, such negligence did not reduce the defendant's liability in contract. In this respect, Saunders J. found, at pages 340-341, as follows:

The principle that where a man is part author of his own injury he cannot call upon the other party to compensate him in full, has long been recognized as applying in cases of tort: see *Nance v. B.C. Electric R. Co.*, [1951] 3 D.L.R. 705 at p. 711, [1951] A.C. 601 at p. 611, 2 W.W.R. (N.S.) 665. I see no

reason why it should not equally be applicable in cases of contract. ... Mosbeck [the pilot], by negligently taking the aircraft up, created the situation where the damage occurred because of the inadequate shock cords installed by the defendant. In such circumstances, there should, in my opinion, be apportionment whether the action be brought in contract or in tort.

In apportioning, Saunders J. did not hold that the *Negligence Act* applied but rather that "the principles set out in s. 2 of the *Negligence Act* seem appropriate to apply to a claim in contract even though the statute itself does not apply" (page 341).

The decision of Saunders J. in *Tompkins* was followed by Grange J. in *Ribic v. Weinstein* (1982), 140 D.L.R. (3d) 258 (Ont. H.C.J.). Also, in *Cosyns v. Smith et al.* (1983), 41 O.R. (2d) 488 (C.A.), the Court of Appeal, in obiter, commented on the reasoning of Saunders J. in *Tompkins* and adopted by Grange J. in *Ribic* as follows:

I am satisfied that, in the present case, the duty of the defendants arose from the contract. It is not necessary to decide whether a duty also arose under the law of torts. In any event, I do not think that it is necessary for this court to pronounce on the attractive conclusion reached by Saunders J. and adopted by Grange J. I say this because of the conclusion which I have reached on the second issue, i.e., the legal validity of the finding of contributory negligence made against the plaintiff in this case. [The Court of Appeal found that the plaintiff was not negligent].

Similarly, in *Wells Construction Ltd. v. Thomas Fuller Construction Company (1958) Ltd.* (1986), 22 C.L.R. 144 (Nfld. S.C.) Thomas Fuller contracted with Her Majesty in the Right of Canada for the construction of buildings. In turn, Thomas Fuller subcontracted the excavation and backfill, rock removal, clearing and grubbing, site grading, and some drilling to Wells. Wells began to experience financial difficulties which it attributed to the lack of payment of invoices rendered to Thomas Fuller for work completed. As a result, Wells withdrew its workers and informed Thomas Fuller that it would return to the site, but only after its progress invoices were paid. The issues were not resolved and Thomas Fuller completed the work under the subcontract. Wells commenced an action to recover from Thomas Fuller and the bonding company the balance due for labour, materials, equipment, and services rendered under the subcontract. Thomas Fuller counterclaimed. Part of Thomas Fuller's counterclaim was based

on the damages suffered as a result of having to complete the backfill work, which Wells argued should be apportioned. With respect to this portion of the counterclaim, Woolridge J. agreed with the decision of *Saunders J. of Tompkins Hardware, supra*, holding that the principles set out in Section 2 of *The Contributory Negligence Act*, R.S.N. 1970, c.61 are appropriate to apply to a claim in contract. As a result, Woolridge J. found that Thomas Fuller was 80% liable, and Wells 20% liable, for the costs of the backfill.

Also, in *Convert-A-Wall Ltd. v. Brampton Hydro-Electric Commission* (1988), 65 O.R. (2d) 385 (Div. Ct.), *Convert-A-Wall* (the "Contractor") contracted with Brampton for the construction of additions and modifications to offices and warehouse property of Brampton. There were delays in the progress of the work which the Contractor attributed to Brampton and Brampton's architect (the "Architect"). As a result, the work was behind schedule. Liens were also registered and the amounts claimed were held back by Brampton. The Contractor began to experience a cash-flow problem and Brampton continued to hold back the amount of the claims for lien of which it had notice. The situation steadily deteriorated until Brampton terminated the contract. The court found that the only default by the Contractor was failure to complete in a timely fashion. Brampton was responsible for some of the delay to the Contractor and the trial judge awarded the Contractor damages for those delays. The trial judge also found that Brampton was entitled to completion costs. The trial judge found that the delays caused by the owner, at least in part, led to the Contractor's default, however, the trial judge found that the Contractor had the responsibility of performing the contract in accordance with its terms and that a reasonable contractor would have anticipated the financial problems and the possibility of delay. The trial judge essentially apportioned the completion costs between the Contractor and Brampton by awarding the Contractor damages arising as a result of the delay and Brampton some of its completion costs. On Appeal, *Saunders J.*, stated, at page 393, as follows:

The recovery of completion costs is akin to damages. Those costs compensate an owner for an expense which he would not have otherwise incurred. If an owner is partly responsible for the incurring of the expense, then it is appropriate to apportion the liability in the same manner as is done in a tort action.

...

The apportionment of liability cannot be a precise calculation. In effect, the

learned trial judge apportioned liability by disallowing the costs to the Owner of architectural and legal services although he did not express his reasons in those terms. The result of his decision was that the completion costs were borne by the Contractor and the Owner in a proportion of approximately 77:23.

Further, in *Dartmouth (City) v. Acres Consulting Ltd.* (1995), 138 N.S.R. (2d) 163 (S.C.), the City engaged Acres to prepare the designs and specifications for the construction of ramps and floating docks for the Dartmouth cross harbour ferry terminals. The City also contracted with McAlpine as general contractor. McAlpine subcontracted with Semper to supply labour, materials, and equipment for the installation of the roofing. In turn, Semper subcontracted to Connor to install and supply the roofing in accordance with the plans and specifications. Construction was completed; however, about five years later water was detected leaking from the ceiling of one of the ramps. The City investigated the cause of the leaks and discovered that the roof had experienced rot and concluded that extensive repairs were required. The City commenced an action to recover the costs of these repairs. The evidence showed the presence of considerable water and moisture within the sandwich construction of the roof which led to the rotting of the wood and vapour barrier in the roof. Justice Grant canvassed several different causes which led to the roof damage and found that McAlpine and Connor failed to follow the specifications. As a result, Grant J. found that Acres was not negligent and not liable. Justice Grant did not canvass the law of apportionment as it applies to claims arising in tort and contract, but, in any event, apportioned the damages in the following manner: 20 % to the City (10% for accepting changes of materials and 10% for work done by City workers); and 80% to McAlpine (20% for negligence in respect of carpentry work and 60% for negligence in respect of the roofing). Justice Grant also found that the City was to be indemnified by its consulting engineer for 10% of the damages for accepting the changes in the roof materials. Further, McAlpine was to receive indemnity from Connor for the 60% of the damages resulting from the roofing negligence as Connor had performed the work.

Clearly, where available, the principles contained in the *Coopers & Lybrand, Tompkins Hardware, and Convert-A-Wall* cases contribute an element of flexibility into the analysis of shared responsibility for damages in contract, including, in the view of the authors, delay damages, par-

ticularly in circumstances where the claimant has contributed to the delay.

Such an approach is to be compared with that contained in U.S. cases such as *Coath & Goss, Inc., A Corporation v. The United States*, 101 Ct. Cl. 702 (1944), and *Blinderman Construction Co., Inc. v. The United States*, 695 F.2d 552 (U.S.C.A., 1982), pursuant to which apportionment is only allowable where there is proof of a clear allocation of the delay and expense attributable to each party.

Again, however, it does not appear that the issue of the defence of concurrent delay has been specifically addressed by the court in the cited Canadian jurisprudence on apportionment. In other words, where concurrent delay clearly occurs, and the defence is squarely raised, apportionment, as it has been applied in the construction context to date, does not directly address the basic causation issue inherent in the defence.

Importantly, the Supreme Court of Canada in *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 can be referenced (by analogy) in this context. *Athey v. Leonati* deals with personal injury; however, Justice Lee considered the principles set out in *Athey v. Leonati* in the context of concurrent delay in *The City of Edmonton v. Lovat Tunnel Equipment Inc.* (2000), 3 C.C.L.T. (3d) 78 (Alta. Q.B.).

In his decision, Justice Lee, responding to an argument submitted by the City of Edmonton that the "collapsed as-built schedule" delay analysis presented by its scheduling expert was in accordance with the test adopted by the Supreme Court of Canada in *Athey v. Leonati*, had this to say:

[520] The court in *Athey v. Leonati* confirmed that causation is established when the plaintiff proves on a balance of probabilities that the defendant has caused or contributed to the injury. Generally, a "but for" test is employed for causation, pursuant to which the plaintiff must establish that the injury complained of would not have occurred but for the negligence of the defendant.

[521] Under various circumstances, the Courts will recognize that causation may be established where the defendant's negligence materially contributed to the occurrence of the injury. Where there are numerous factors contributing to the injury, the defendant will be liable for all of the injuries caused or materially contributed to by his or her negligence.

The *Athey v. Leonati* decision (written by Justice Major), and its forbears, provide authoritative Canadian support for the

“material contribution” approach to the apportionment of damages in negligence, as well, it is contended, in contract.

Justice Major, in addressing apportionment, in *Athey v. Leonati* makes a very clear differentiation between tortious and non-tortious causes, noting that:

Apportionment between tortious causes is expressly permitted by provincial negligence statutes and is consistent with the general principles of tort law. The plaintiff is still fully compensated and is placed in the position he or she would have been in but for the negligence of the defendants. Each defendant remains fully liable to the plaintiff for the injury, since each was a cause of the injury. The legislation simply permits defendants to seek contribution and indemnity from one another, according to the degree of responsibility for the injury.

In the present case, the suggested apportionment is between tortious and non-tortious causes. Apportionment between tortious and non-tortious causes is contrary to the principles of tort law, because the defendant would escape full liability even though he or she caused or contributed to the plaintiff's entire injuries. The plaintiff would not be adequately compensated, since the plaintiff would not be placed in the position he or she would have been in absent the defendant's negligence.

In the following excerpt, Justice Major sets out some of the general principles to be considered:

Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).

The general, but not conclusive, test for causation is the “but for” test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsely v. MacLaren*, [1972] S.C.R. 441.

The “but for” test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence “materially contributed” to the occurrence of the injury: *Myers v. Peel County Board of Education*; [1981] 2 S.C.R. 21, *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.); *McGhee v. National Coal Board*, *supra*. A contributing factor is

material if it falls outside the de minimis range: *Bonnington Castings, Ltd. v. Wardlaw*, *supra*; see also *R. v. Pinsky* (1988), 30, B.C.L.R. (2d) 114 (B.C.C.A.), aff'd [1989] 2 S.C.R. 979...

[...]

To understand these cases, and to see why they are not applicable to the present situation, one need only consider first principles. The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the “original position”). However, the plaintiff is not to be placed in a position **better** than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the “original position” would have been. It is the difference between these positions, the “original position” and the “injured position”, which is the plaintiff's loss.

The last paragraph, cited above, is clearly in accord with the approach set out by Justice Wallace in the *Pacific Coast Construction Co. Ltd.* case.

In the result, the Supreme Court did apportion between tortious and non-tortious causes in *Athey v. Leonati*.

The Supreme Court of Canada also adopted the “material contribution” test, discussed in *Athey v. Leonati*, in its recent decision of *Walker Estate v. York Finch General Hospital*, [2001] S.C.J. No. 24. In *Walker Estate*, three plaintiffs, Osborne, “M”, and Walker, contracted HIV from blood and blood products supplied by the Canadian Red Cross Society (“Red Cross”). The plaintiffs claimed that the Red Cross was negligent in its procedures used to screen blood donors. Osborne and “M” were successful at trial; however, the trial judge found that Walker could not prove causation. The Ontario Court of Appeal agreed with the trial judge's decision with respect to Osborne and “M”, but reversed the trial judge's decision with respect to Walker finding that if the trial judge applied the correct causal analysis he would have found the necessary causal link. In dismissing the appeal of the Red Cross, the Supreme Court of Canada stated as follows, at paras. 87 and 88:

With respect to negligent donor screening, the plaintiffs must establish the duty of care and the standard of care owed to them by the C.R.C.S. [the Red Cross]. The plaintiffs must also prove that the C.R.C.S. caused their injuries. The unique difficulties in proving causation make this area of negligence atypical. The general test for causation in cases where a

single cause can be attributed to a harm is the “but-for” test. However, the but-for test is unworkable in some situations, particularly where multiple independent causes may bring about a single harm.

In cases of negligent donor screening, it may be difficult or impossible to prove hypothetically what the donor would have done had he or she been properly screened by the C.R.C.S. The added element of donor conduct in these cases means that the but-for test could operate unfairly, highlighting the possibility of leaving legitimate plaintiffs uncompensated. Thus, the question in cases of negligent donor screening should not be whether the C.R.C.S.'s conduct was a necessary condition for the plaintiffs' injuries using the “but-for” test, but whether that conduct was a sufficient condition. *The proper test for causation in cases of negligent donor screening is whether the defendant's negligence “materially contributed” to the occurrence of the injury. In the present case, it is clear that it did. “A contributing factor is material if it falls outside the de minimis range”* (see *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 15). As such, the plaintiff retains the burden of proving that the failure of the C.R.C.S. to screen donors with tainted blood materially contributed to Walker contracting HIV from the tainted blood. [Emphasis added.]

In situations where there are concurrent delays (whether all such delays are non-excusable or some are non-excusable and one or more are excusable), notwithstanding causation concerns, it would appear equitable to apportion damages amongst the wrongdoers which have materially contributed to the delay, and the consequent damages. For example, in a situation of pure concurrent delay, such that two or more parties have delayed in performing their obligations in respect of the same time period and the innocent plaintiff is unable to prove which party is causally responsible, it would appear clearly inequitable to allow the wrongdoers to escape liability and have the innocent claimant incur the entire damage. Rather, in appropriate circumstances, the courts could apply the principles enunciated in the relevant contributory negligence legislation, whether directly or by analogy, and apportion the damages (perhaps equally) amongst the wrongdoers. (In cases where both the claimant and the defendant(s) have contributed to the delay, it is inequitable for either the claimant or the defendant(s) to incur all of the damages. In such a case, it may be

equitable for the court to apportion the damages (perhaps equally).)

As contended above, the paradigm situation in terms of the inequity inherent in the concurrent delay defence arises where at the same time there is an innocent plaintiff and two or more other project participants in delay. Here, the law of tort, and, in particular, the concept of "material contribution," is also relevant. A.M. Linden in *Canadian Tort Law*, 6th ed. (Toronto: Butterworths Canada Ltd., 1997) writes, at pages 109-110, as follows:

The "but for" test ran into stormy sailing where two or more defendants combined to cause loss. If the injury would have transpired if either cause alone had been operating, neither party might be a cause under the "but for" test. Suppose A and B negligently light fires at different places and the fires spread to engulf the plaintiff's house. A and B might argue that the fire would have resulted without their negligence. Consequently, a blinkered court might hold that neither of the defendants, although both negligent, was the cause of the loss, because it would have occurred in any event.

This just could not be tolerated and, happily, the courts have handled this situation with common sense. They devised the substantial factor test, which holds that if the acts of two people are both substantial factors in bringing about the result, then liability is imposed on both on the theory that both "materially contributed to the occurrence." Consequently, in *Lambton v. Mellish*, two merry-go-round operators were sued for nuisance as a result of the maddening noise made by their organs. Injunctions were granted against them individually, because according to Mr. Justice Chitty:

If the acts of two persons, each being aware of what the other is going, amounted in the aggregate to what is an actionable wrong, each is amenable to the remedy against the aggregate cause of complaint. The defendants here are both responsible for the noise as a whole so far as it constitutes a nuisance affecting the Plaintiff, and each must be restrained in respect of his own share in making the noise.

In another case, *Corey v. Havener*, the plaintiff, in a horse and wagon, was passed by two motorists driving at a high rate of speed, one on each side. The horse took fright and the plaintiff was injured. Although the defendants

acted independently, judgment was given against both of them for the full amount of the plaintiff's damages because "if each contributed to the injury, that is enough to bind both." A similar case is *Arneil v. Paterson*, where two dogs were held responsible for the entire damage "because each dog did in the eye of the law occasion the whole of the injury of which the pursuers complain." Thus, if the concurrent negligence of two people combined to kill someone, each would be equally responsible for the death. A group of polluters may be jointly liable though the harm caused by each cannot be determined.

Importantly, it may be possible to arbitrarily apportion degrees of fault amongst the wrongdoers. Potentially, this is extremely significant dealing with the concurrent delay defence. Specifically, all contributory negligence legislation provides that if it is not possible to establish degrees of fault, then the court must apportion liability equally. For example, Section 1(1) of the *Contributory Negligence Act*, R.S.N.B. 1973, c.C-19, as amended, provides 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 is in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

As discussed above, in jurisdictions where the courts have determined that contributory negligence legislation does not apply to contractual claims the authorities nevertheless exist to support the proposition that the principles set out in the contributory negligence legislation can be applied to allow apportionment in contract. Accordingly, the presumption of equal apportionment of liability may be available to overcome the causation hurdle inherent in the concurrent delay defence.

5. CONCURRENT LIABILITY IN TORT AND CONTRACT

Another important principle which introduces flexibility into the assessment of responsibility for damages, and may be seen as enhancing access to contributory negligence legislation, is the principle of concurrent liability in contract and tort.

As stated above, some Canadian courts have declined to apply contributory negligence legislation to claims arising in contract. As an alternative, some courts have

elected to apply contributory negligence principles to apportion damages amongst wrongdoers (see: *Tompkins, supra*, and *Ribic v. Weinstein et al., supra*). Importantly, however, in provinces where the courts are unlikely to apply contributory negligence legislation directly to contract claims, the courts have nevertheless, in certain instances, arrived at the same result by holding the defendant liable to the claimant concurrently in tort and in contract (see: *Husky Oil Operations Ltd. v. Oster* (1978), 87 D.L.R. (3d) 86 (Sask. Q.B.); *Canadian Western Natural Gas Co. v. Pathfinder Surveys Ltd.* (1980), 12 Alta. L.R. (2d) 135, 12 C.C.L.T. 211 (C.A.); and *Dominion Chain Co. Ltd. v. Eastern Construction Co. Ltd.* (1976), 12 O.R. (2d) 210 (C.A.), aff'd [1978] 2 S.C.R. 1346 in which the Ontario Court of Appeal found that the *Ontario Negligence Act* does not apply to actions in contract, but allowed contribution on the basis that the plaintiff sued in both tort and contract).

The leading case on the doctrine of concurrent liability in contract and tort is the Supreme Court of Canada decision in *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147. The principal issue on appeal in *Central Trust v. Rafuse* was whether a solicitor was liable to a client in tort and contract for damages caused by a failure to meet the requisite standard of care in the performance of services for which the solicitor was retained. The Court canvassed the law with respect to concurrent liability in tort and contract and rejected the requirement set out in *J. Nunes Diamonds Ltd. v. Dom. Elec. Protection Co.*, [1972] S.C.R. 769, that tort liability must arise independent of contract, holding that the common law duty of care is not confined to relationships which arise apart from contract. The effect of the decision was reduced, however, as the Court further stated, at page 206, as follows:

A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any legal consequence.

In *BG Checo International Ltd. v. British Columbia (Hydro and Power Authority)*, [1993] 1 S.C.R. 12, Hydro contracted with Checo to erect transmission towers and string transmission lines on a right of way. The tender documents also provided that Checo was to satisfy itself of the site conditions and that others would clear the

right of way. Hydro contracted the clearing work to another party and, to Hydro's knowledge, the work was done inadequately. In fact, no further clearing was done which resulted in Checo having difficulties and increased costs. Checo sued Hydro seeking damages for negligent misrepresentation, or, in the alternative, breach of contract. The contract contained an exclusion clause which limited Hydro's liability for the clearing of the right of way. The Court followed its decision of *Central Trust v. Rafuse*, *supra*, and held at pages 26-27, as follows:

In our view, the general rule emerging from this Court's decision in *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147, is that where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort. This limitation on the general rule of concurrency arises because it is always open to parties to limit or waive the duties which the common law would impose on them for negligence. This principle is of great importance in preserving a sphere of individual liberty and commercial flexibility.

Therefore, the general rule which emerges from the decisions of *Central Trust v. Rafuse* and *BG Checo*, is that a party may sue in both tort and contract unless the contract limits or regulates the party's right to sue in tort.

To the extent that the defendant is liable in negligence, recourse to contributory negligence legislation and caselaw should be available in all of the common law jurisdictions.

Unfortunately, the utility of the concurrent liability argument may be limited by the doctrine of pure economic loss as developed by the Supreme Court of Canada in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85; *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; and *Martel Building Ltd. v. Canada*, [2000] S.C.J. No. 60.

The Supreme Court of Canada adopted the test set out in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) in *Kamloops City v. Nielsen*, [1984] 2 S.C.R. 2 to determine whether pure economic loss is recoverable. The Supreme Court of Canada has also adopted the category approach of Professor Feldthusen who sets out the following categories of exclu-

sions to the non-recoverability of pure economic loss doctrine:

- the independent liability of statutory public authorities;
- negligent misrepresentation;
- negligent performance of a service;
- negligent supply of shoddy goods or structures;
- relational economic loss.

However, the Supreme Court of Canada has not restricted recovery to cases falling within these categories of exclusions and has applied the *Anns* test to determine novel cases of pure economic loss which fall outside of these categories.

In the construction context, where a plaintiff claims for delay both in contract and tort, the plaintiff might be able to argue that its claim falls within the categories of negligent misrepresentation or negligent performance of a service. For example, where a general contractor negligently represents that it will complete the project by a particular date, and fails to do so, the owner will be able to argue that it can recover for pure economic loss on the basis of negligent misrepresentation. A more difficult problem arises where the reason for the delay is not a negligent representation as to the completion date, but where the defendant was negligent in performing its obligations.

Professor Feldthusen in *Economic Negligence*, 4th ed. (Toronto: Carswell, 2000) sets out the test to determine if a defendant will be held liable for economic loss for negligently performing a service, at page 120, as follows:

There is a general agreement among the courts in all common law jurisdictions that the defendant will be held liable for the plaintiff's economic loss if: (1) the defendant voluntarily undertakes to perform a specific service for the plaintiff's benefit; (2) the plaintiff relies on the defendant to perform the undertaking; and (3) the negligent performance of the service injures the plaintiff.

Thus, in the construction context, where plaintiff contracts with a defendant to perform a service, if the defendant is found concurrently liable in contract and tort, it is contended that the category of negligent performance of a service would apply and the plaintiff should be able to recover for pure economic loss.

Where a delay claim is made by an owner against a subcontractor the courts may arrive at a different conclusion. In this respect, Professor Feldthusen, in *Economic Negligence*, writes, at pages 136-137, as follows:

Unlike the other services cases the owner will, at least in theory, have an adequate legal remedy already under the main contract with the general contractor. For this reason and other reasons, the case in favour of a direct action against the subcontractor is not compelling. On the other hand, provided the relevant obligation breached in the subcontract is identical to the obligation specified in the main contract, there is little harm in recognizing the direct suit. The general contractor may be regarded as a mere conduit of obligations, and the two contracts in effect collapsed into one between the owner and the subcontractor.

It must be noted, however, that while Professor Feldthusen writes that the general contractor may be regarded as a conduit, the British Columbia Supreme Court dismissed an owner's claim against subcontractors with which it did not have privity of contract. In *Status Electrical Corp. v. University of British Columbia*, [2000] B.C.J. No. 2569, the University counterclaimed against several of the general contractor's subcontractors alleging that the University suffered delay damages as a result of the subcontractors' negligence. On application, Sigurdson J. dismissed the University's counterclaims finding that this was not the type of situation in which a new category of recoverable pure economic loss should be created, nor should one of the current categories be expanded.

However, *Status Electrical* is not a case of concurrent liability in contract and tort. Further, it is curious that Sigurdson J. stated that it was not seriously suggested that the facts brought the claims within one of recognized categories. Following the test for negligent performance of a service illustrated by Professor Feldthusen, set out above, it would appear that it may have been possible to argue that the subcontractor negligently performed a service, since the subcontractors voluntarily undertook to perform a service which directly benefited the University, the University relied on the subcontractors, and the University suffered loss.

Nevertheless, the doctrine of pure economic loss must be recognized as a possible limiting factor to advancing a claim in negligence.

6. SUMMARY

Concurrent delay arises where two separate delay events occur during the same time period and both, independently, affect the completion date. As a result, both parties causing the delay may argue that the claimant cannot meet the "but for" test and prove the proximate causation which

has been traditionally a condition precedent to compensation. Such a conclusion bars an innocent claimant from recovery, a result, which on its face, appears to be unjust. Even where the claimant has materially contributed to the delay, it appears inequitable to allow a wrongdoer to escape responsibility through the occurrence of a fortuitous event.

In Canadian common law jurisdictions where the courts have found that contributory negligence legislation applies to breach of contract claims, the claimant not only has an argument that the court must do the "best it can" to determine the apportionment of damages between the wrongdoers, but, as well, the court, if satisfied that the defendant has "materially contributed" to the delay, may rely upon such legislation to overcome the impediment to compensation represented by the principle of several liability and to apportion liability (and damages). If the court is unable to determine the appropriate apportionment, then, arguably, the court may apportion the damages equally.

In Canadian common law jurisdictions where the courts have found that contributory negligence legislation does not apply to breach of contract claims, the claimant may nevertheless argue that the court must do the "best it can" to determine the damages, and the claimant may also argue that the court, so long as it is satisfied that the defendant has "materially contributed" to the delay, should, by analogy, apply contributory negligence principles and apportion liability (and damages) accordingly, or that the defendant(s) are concurrently liable in negligence, giving rise to the apportionment powers provided by the contributory negligence legislation.

Normally, it is only after the court is satisfied that causation has been established that it will turn to an assessment of the damages suffered, the issue as to whether the claimant is contributorily responsible, and a potential apportionment as between the wrongdoers. Accordingly, in

the context of delay analysis, in considering the approaches available to a claims consultant, it appears that the collapsed-as-built schedule method may be the most appropriate vehicle for assessing damages. Importantly, a court must be persuaded that, as between two or more wrongdoers, responsibility must be allocated so that the innocent party is made whole. If the claimant is not an "innocent party"; then the claimant must share the responsibility with the wrongdoers.

In essence, the solution to the conundrum of the concurrent delay defence is for the court to accept that, in circumstances of concurrent delay(s), each person guilty of non-excusable delay has "materially contributed" to the critical path delay and is liable for an apportioned amount of the damages suffered, whether specific amounts of damages can be attributed to separate causes or not.

In a legal environment which clearly involves the convergence of contract and tort theories, it should be open to the court to embrace the tools of contributory negligence legislation and the related caselaw in order to overcome the hurdle of the restrictive approach to causation which is inherent in the concurrent delay defence.

The fundamental challenge posed by the concurrent delay defence itself was clearly articulated, in obiter, by McLachlin J. (as she then was), of the Supreme Court of Canada, (dissenting) in *Sunrise Co. v. Lake Winnipeg (The)*, [1991] 1 S.C.R. 3, where she stated:

... Moreover, it can be argued that applying strict logic, adoption of this approach might result in the defendant's recovering nothing in the case where its ship is damaged by two consecutive tortfeasors and the time required to effect both sets of repairs was the same.

The following example illustrates this conclusion. Assume that the ship was damaged in two separate and unrelated tortious collisions, and that the

repair of the damage caused by each requires 10 days to complete. The ship is then taken out of service for 10 days and both repairs are performed concurrently. From the perspective of the first tortfeasor the fact that the ship had to be taken out of service for 10 days to repair the damage caused by the second tortfeasor would serve to bar the recovery of damages for the losses suffered during the detention. The second tortfeasor could obviously make precisely the same assertion and argue that it should not be held liable for the detention as the requirement to repair the damage caused by the first tortfeasor meant that the ship would not have been "a profit-earning machine" during the repair period even in the absence of the damage caused by the second tortfeasor. In short, where there are two operative causes of the detention, it can be argued by the parties respectively responsible for each that to the extent the detention was caused by the others' act, it is not responsible. This would serve to bar the owner from recovering any detention losses caused by concurrent repairs due to two separate incidents that the owner, by default, would end up bearing the loss.

This result would appear, *ab initio*, an incorrect one and particularly unfair when all the damage was tortiously caused. To avoid such result, it is necessary to introduce a factor other than pure causation. What is required is a rule that says (a) that one of the two causes of the concurrent loss is responsible (e.g., the "first in time" rule) or (b) that the concurrent delay should be apportioned between the two causes of the concurrent loss.

Here, Chief Justice McLachlin identified the need for a solution to the conundrum of the concurrent delay defence, and, with respect, advanced a modest proposal which we have endeavoured to further.

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