



Posted on: August 25, 2016

## **“DEEP POCKET” STANLEY CUP RIOT DEFENDANT PAYS: JOINT AND SEVERAL LIABILITY REVISITED**

### **Richards Buell Sutton Insurance Newsletter**

By: RBS

Plaintiffs often name more than one defendant in the hope that someone’s insurer will be the “deep pockets” they need to cover their damages. But when will one defendant have to pay for damage caused by another? This is a practical question for insurers faced with assessing indemnity exposure and settlement demands when another defendant is not insured, does not have funds to pay a plaintiff’s damages or cannot be identified or found by the plaintiff.

A recent decision of the BC Supreme Court, [I.C.B.C. v. Stanley Cup Rioters](#), 2016 BCSC 1108, helpfully clarifies the situations when one defendant will have to pay for damage it did not cause.

#### **The Facts**

The “Stanley Cup” riot that took place in Vancouver on June 15, 2011 is well known. ICBC sued 82 individuals it alleged participated in the riot and damaged ICBC-insured vehicles (the “ICBC Vehicles”). The case went to trial against 10 of these individuals who the court called the “Active Defendants”.

ICBC asked the court to require each of the Active Defendants to pay all damages caused to the ICBC Vehicles whether or not they took active steps in destroying those vehicles.

#### **The Ruling**

The court examined the situations in which there are multiple defendants. The analysis clarifies when one defendant can expect to pay the whole of the plaintiff’s damages by explaining when defendants will be:

- “joint tortfeasors”: one defendant can be required to pay for all the damages;
- “several concurrent tortfeasors”: again, one defendant can be required to pay for all the damages; and
- “several non-concurrent tortfeasors”: each defendant is only responsible for the damage they caused, so a “deep pockets” defendant does not need to pay for damage caused by others.





### Joint Tortfeasors

Joint tortfeasors are jointly liable – that is, each one is responsible for all of the plaintiff’s damages. Two or more persons will be joint tortfeasors where:

1. One is the principal or otherwise vicariously liable for the other. This comes up where an employee does something which injures a plaintiff. Their employer is “vicariously liable” for the employee’s actions. As a result, the (typically insured) employer will be required to pay for any damages caused by the employee;
2. A duty imposed jointly upon the defendants is not performed. This situation is very rare and unlikely to come up for most insurers;
3. There is “concerted action” between the defendants “to a common end”. This comes up when two people plan together to commit a tort, help each other in carrying it out (physically, financially or otherwise) and at least one of them actually carries it out. The example of this third situation in this case is where ICBC Vehicles were flipped over. The Active Defendants who participated in flipping over an ICBC Vehicle were responsible for the destruction of that vehicle, even though other people also participated in the flipping, because they had a concerted action or common design. This case is also an example of the fact that one defendant can be responsible for damage caused by persons not sued by the plaintiff. ICBC did not sue many of the people involved in flipping the ICBC Vehicles. Yet the Active Defendants who ICBC did sue were still responsible for the damage caused by their absent co-participants; and
4. One induces the other to do something which causes damage. In this situation, one defendant can be responsible for all the damage to a plaintiff, even if that defendant did not actively participate in the injury. However, these cases are extremely rare.

### Several Concurrent Tortfeasors

There will be “several concurrent tortfeasors” when there are two or more defendants whose actions combine to produce a single result. This can occur when:

1. Two or more causes are necessary to produce the damage; or
2. Either (or any) of the causes is sufficient to cause the damage.

Concurrent tortfeasors are jointly and severally liable. This means that each defendant is responsible for all of the plaintiff’s damages, including damage caused by people who the plaintiff did not sue.

The flipped ICBC Vehicles are also an example of liability for several concurrent tortfeasors, under the





second situation. Any one person's participation in flipping the ICBC Vehicles was enough to destroy that vehicle, once it was flipped over. As a result each Active Defendant who participated in flipping an ICBC Vehicle was responsible for all of the damage to that vehicle, even though other people (many of whom ICBC did not sue) also participated in the flipping.

#### Several Tortfeasors Causing Different Damage

Another situation occurs where a number of tortfeasors each cause damage, but the damage caused by each is divisible. An example from this case is the damage to a 2003 Acura MDX. This vehicle was declared a total loss because every window and panel was damaged.

One of the Active Defendants smashed the windshield but did not damage other parts of the Acura. The court found that he was responsible for the damage to the windshield only, not for destroying the vehicle as a whole. ICBC had not sued the other people who participated in damaging the Acura, so it was left without recovery for the rest of the damage to that vehicle.

#### **Practical Considerations for Insurers**

Insurers handling litigation files are always aware of their insured's exposures. Part of this entails knowing whether other defendants have funds from insurance or other sources to satisfy judgment. It also entails knowing if there are persons responsible for the damages sought from their insured that are not party to the proceedings. Finally, it entails knowing whether the damage claim against the insured is divisible or not. His knowledge will better allow the assessment of the indemnity exposure and the potential avoidance of being caught as the "deep pockets" defendant who pays the whole of the damage though others are partly responsible for it.

