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Media Briefing

Liability of Multiple Defendants (NZLC R132, 2014)

In its Report, *Liability of Multiple Defendants* (NZLC R132), which was tabled in the House of Representatives on 24 June 2014, the Law Commission recommends that the existing rule of “joint and several liability” be retained, with some modifications.

Background

The rule of joint and several liability provides that where two or more defendants are held liable in a civil claim for the same indivisible loss or harm, they are each fully liable to pay the total damages awarded to the claimant for that loss – although the claimant can never recover more than 100 per cent of the damages.

The Commission was asked by the Government to consider the joint and several liability rule, in part because of concerns arising out of the leaky homes crisis. The crisis has produced many cases where some liable defendants cannot pay, and other defendants must therefore pay more. The ability of claimants to recover their losses has been maximised by the joint and several liability rule, but there were questions of fairness and efficiency that needed to be considered.

The Commission’s review has included, but not been restricted to, specific sectors such as the building sector. The Report is the result of a broad consideration of all areas, as well as focus on particular issues or sectors when relevant.

The Law Commission’s recommendations:

1. The Law Commission recommends that joint and several liability remain the rule for allocating liability where more than one defendant is found liable for a loss, because joint and several liability is the most effective way to ensure that parties who are wronged will be fairly compensated. Alternatives, particularly proportionate liability, do not offer sufficient benefits to make up for the significant negative impact on claimants if alternative allocation rules were introduced.
2. Modifications should, however, be made to allow some flexibility where circumstances could otherwise produce a harsh or unfair result. In particular:
 - Courts should have discretion to grant relief to a truly “minor defendant” (who the Court agrees has a very low share of responsibility for the relevant harm done) – as long as the claimant will still receive an effective remedy.

- If one liable defendant is forced to pay for the share of liability that an absent or insolvent defendant has not paid (in addition to their “own” share), they should be able to apply for supplementary contribution, to distribute the cost of the uncollectable share proportionately among all the available, solvent liable parties.
3. Local authority building consent authorities should have their future liabilities capped, to provide some protection from their exposure as potential “deep pocket” defendants. The initial caps proposed are \$300,000 for liabilities from standalone dwellings; and \$150,000 for each unit in a multi-unit development, and with an overall cap of \$3 million for each multi-unit development. Only new liabilities should be capped – no retrospectivity.
 4. The Building Act should be clarified to clearly state the limits of responsibility for building consent authorities for the new class of commercial consents, as it already does for other new consent types.
 5. The Ministry of Business, Innovation and Employment should continue to develop proposals, for implementation if proved feasible, for a comprehensive residential building guarantee scheme or schemes.
 6. Auditors that carry out the largest and most complex audits should be able to have their maximum liability capped. A capping scheme or schemes on similar terms to those in Australia is justified and necessary to allow fair competition by NZ auditors with Australian firms for audit services in this trans-Tasman market. The proposed caps are: \$2.5 million per event, for firms whose large audit activity is less than \$10 million per year; \$25 million per event for those with activity between \$10 and \$20 million; and \$80 million for those with activity over \$20 million. Schemes would be developed and run by accredited professional bodies, subject to approval and monitoring by the Financial Markets Authority.

The joint and several liability rule

Joint and several liability is the current law in New Zealand for cases involving more than one liable defendant. The rule gives effect to the common law principle that wronged parties should be compensated by the person(s) who caused the harm.

Under joint and several liability, if several defendants are found liable for the same damage or harm to a claimant, all of them are individually liable to the claimant for the whole of the damage. This is so even though individual defendants may have done different wrongful acts and may be found to bear differing levels of responsibility for the overall damage. Unless a defendant can prove that they caused or contributed to only one identifiable part of the overall harm, the defendants are each liable for the all the damages awarded to the claimant, because they have each been found to have caused or contributed to the indivisible damage.

A claimant can demand payment for all the damages from any liable defendant or defendants. This protects claimants by maximising their chances of being fully compensated. The result is not unfair to liable defendants because the Court can make contribution orders among the defendants. These orders distribute costs in proportion to the level of fault or responsibility of each defendant as determined by the Court. However, this proportionate outcome can be distorted or lost if there are insolvent or missing defendants, who leave unpaid or “uncollectable shares”.

Under joint and several liability, the cost of meeting an uncollectable share falls on the remaining solvent defendants. This can mean that a liable defendant with perhaps only a minor contribution may nevertheless have to pay up to the whole of the claimant’s damages.

Under joint and several liability, costs can sometimes fall disproportionately or heavily on a defendant. But the rule at least ensures that the costs are only borne by parties who have been held to be at fault. An innocent claimant should not have to share the cost of liability – and defendants can claim contributory negligence against a claimant who may have been partly responsible for their own loss.

What is proportionate liability?

Proportionate liability schemes can vary in detail. However, under most proportionate liability schemes, if there are several liable defendants, the Court determines each defendant’s share of fault. Each defendant is liable to pay their share of the damages in proportion to their share of fault, but no more. If all defendants pay as ordered, the claimant recovers in full. If not, then all the risk and cost of the uncollectable shares falls on the claimant.