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REVIEW OF JOINT AND SEVERAL LIABILITY




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REVIEW OF JOINT AND SEVERAL LIABILITY

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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Call for submissions

Submissions or comments (formal or informal) on this Issues Paper should be sent by **31 January 2013** to:

**Law Commission,
PO Box 2590,
Wellington 6011, DX SP 23534**

or by email to jsl@lawcom.govt.nz

The Law Commission asks for any submissions or comments on this Issues Paper on the review of joint and several liability. The submission can be set out in any format but it is helpful to specify the number of the question you are discussing.

Submitters are invited to focus on any of the questions, particularly in areas that especially concern them, or about which they have particular views. It is certainly not expected that each submitter will answer every question.

Alternatively, submitters may like to make a comment about the review of joint and several liability that is not in response to a question in the paper and this is also welcomed.

The Commissioner responsible for this reference is Dr Wayne Mapp.

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Foreword

One of the most difficult issues in our civil law is how to deal with situations where two or more defendants are held liable to a plaintiff for the same damage. The present rule governing this situation is commonly referred to as the rule of “joint and several liability”.

This rule is of considerable importance in the day to day operation of our civil law. It impacts particularly on the construction sector and the leaky buildings crisis which the country has had to grapple with for some years now, business and professional services (particularly in the context of the financial crises which have had to be faced), and local government (which is often seen as the defendant of “last resort”). Of course, the rule applies across all areas of civil liability, particularly in tort, not just in these high profile areas.

Under joint and several liability each defendant is held liable for the whole of the damage regardless of how many other defendants are also liable (which often means a race to the deepest pocket); whereas under proportionate liability each defendant is responsible for his or her or its relative level of fault, which is a regime of comparative responsibility.

This rule has been the subject of legal and parliamentary interest over the last quarter of a century, not just in New Zealand but in other common law jurisdictions too. As recently as 1998 this Commission recommended that the rule of joint and several liability be retained, but we were particularly asked to look at the issue again in a broad way in light of the construction and financial crises of the last decade.

This Issues Paper sets out the rules, how they have come about, what their effects are, and what the possibilities are for adjustment. We seek input from the various industry sectors and from the public at large before formulating our Final Report to the administration of the day, on legal issues that are of fundamental importance within our present civil justice system.



Grant Hammond
President

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Chapter 1

Introduction to the review

INTRODUCTION

- 1.1 In 2011 the Minister Responsible for the Law Commission referred a request to the Law Commission that it conduct a review of joint and several liability. Joint and several liability is the legal rule that currently applies when two or more defendants are held liable to a plaintiff for the same loss or damage. The Reference arose after discussions at Cabinet level and anticipated that the Commission's review would be a broad one and consider issues and include input from the range of sectors affected by civil liability issues. These include but are not limited to the construction sector, business and professional services, local government and any other potential parties to complex litigation that may involve more than one defendant. The terms of reference for the Review are attached as an appendix to this paper.
- 1.2 Joint and several liability is most often compared or contrasted with an alternative rule usually called "proportionate liability". The difference in the two liability rules can be stated quite simply:
- under joint and several liability each defendant held liable for the same damage is liable for the whole of that damage, regardless of how many other defendants are also liable for the damage (but may seek contributions from the other defendants); whereas
 - under proportionate liability each liable defendant is liable only for the proportion of the loss or damage that a court determines is just, taking into account each defendant's relative level of fault or comparative responsibility.
- 1.3 There are nuances to these broad propositions. Joint and several liability will only arise if the wrong-doing by each defendant caused or contributed to the same damage. Otherwise, the concurrent defendants may be separately liable for distinct losses; or they may be liable on a different basis, either in

contract, tort or equity depending on the nature of the relationship between the plaintiff and each defendant.

- 1.4 The two regimes do envisage different approaches as to who should bear the cost of determining who caused the loss, and also who bears the risk of a defendant not paying. On the first point, joint and several liability requires liable defendants to apply in Court for contribution from other defendants if they wish to achieve fair apportionment between defendants. In contrast proportionate liability requires the plaintiff to claim and prove a percentage or share of their loss from each defendant, who may of course contest both their liability and the appropriate share. In addition, in joint and several liability the defendants bear the risk of the insolvency or absence of any defendants. In proportionate liability the share allocated to an insolvent or absent defendant cannot be recovered by the plaintiff unless there is a further rule to re-allocate uncollectable shares. In joint and several liability this loss can simply be recovered from other solvent defendants.
- 1.5 Joint and several liability therefore provides an indirect path to proportionate liability, provided all defendants are available and able to pay. When a plaintiff claims against one defendant only, that defendant may join other potential defendants. In practice the Court determines the proportion of the damages to be incurred by each defendant. Usually a defendant is also able to claim from other defendants who have contributed to the damage after judgment is issued.¹ Each defendant may be liable to other liable defendants as the Court finds just and equitable “having regard to the extent of that person's responsibility for the damage”.² It is only when not all of the defendants are able to pay that joint and several liability will result in a defendant bearing the share of the loss apportioned to other defendants.
- 1.6 In short, there are two propositions. In joint and several liability it is sufficient for the claimant to identify one or more parties who are responsible for the same loss. They will be able to recover the full amount of the damages from any one of them, though they cannot secure more than the total assessed. The defendant can then claim a proportionate share from all other liable defendants who have contributed to the damage. In proportionate liability the plaintiff has to identify all the defendants and claim a proportionate share from each of them.

1 Unless the plaintiff's claim lies purely in contract. Contribution between tortfeasors has been permitted since 1936, see Chapter 2; and equitable contribution can be sought by one defendant against another in appropriate circumstances.

2 Law Reform Act 1936, s 17(2)

BACKGROUND TO THIS REVIEW

- 1.7 This issue has been the subject of discussion and reports over the last 20 years. It has been considered previously by this Commission, in a preliminary paper released in 1992³ and a final report released in 1998.⁴ At that stage, the Commission recommended that the rule of joint and several liability be retained.
- 1.8 The rule has also been considered by other law reform bodies, including the Law Reform Commission of New South Wales in 1999; and in 2011 the Law Commission of Ontario⁵.
- 1.9 These other reports came to the same conclusion. The New South Wales Law Commission stated:⁶
- While some arguments in favour of proportionate liability are based chiefly on the need to provide justice to solvent wrongdoers in situations where other wrongdoers are not amenable to judgment, at present a move from the system of solidary liability with contribution is not justified as there is no clear indication that the introduction of proportionate liability will achieve the desired results or even be generally beneficial.
- 1.10 These reports did not settle the issue. One specific reason in New Zealand was the leaky building crisis.
- 1.11 The leaky building crisis arises from failures of buildings due to leakage and rotting timber, especially in the structural framing timber. The majority of the buildings affected, both commercial and residential, were built in the decade 1994 to 2004, when building styles changed to monolithic clad buildings, with untreated timber framing, which became permitted under the Building Code after 1994. The problems became known as leaky building syndrome. The causes were various, including poor certification, design faults, construction deficiencies and material deficiencies, particularly relating to the monolithic cladding and the use of untreated timber framing. Thousands of leaky building cases have been investigated and/or litigated since 2004, with a substantial number of cases still in progress.⁷ By the nature of the subject matter and the issues, most involve multiple defendants.
- 1.12 The continuing nature of the crisis and the exposure of typically small construction firms to multiple claims means that a significant number of

3 Law Commission *Apportionment of Civil Liability* (NZLC PP19, 1992).

4 Law Commission *Apportionment of Civil Liability* (NZLC R47, 1998).

5 New South Wales Law Reform Commission *Contribution between Parties Liable for the Same Damage* (Report 89, 1999); Law Commission of Ontario *Joint and Several Liability under the Ontario Business Corporations Act* (2011).

6 At [2.71].

7 The Weathertight Homes Resolution Service, which services the specialist tribunal set up for such claims, recently reported that it had 1705 cases outstanding, at varying stages: www.dbh.govt.nz/ws-claims.

defendants have become insolvent. Practices such as use of single development companies by developers or builders have further added to pressure on the solvent defendants that do remain – in particular local authorities responsible for building inspection and certification. This major crisis, with the significant potential for uncollectable shares to fall on solvent defendants, has inevitably raised again whether joint and several liability operates as the fairest, most efficient or workable liability rule.

- 1.13 The other major source of potential loss and liability over the past decade is the financial crisis. This crisis was particularly concentrated in the finance company sector, with over 60 companies failing between 2006 and 2010. The losses have occurred to both bond and debenture holders and to holders of equity. The bond and debenture losses are estimated to be over \$3 billion.
- 1.14 Potential liability typically arises from the reliance by investors on statements and information not only from the managers or promoters of failed investments but also from any of the entity's professional advisers. Potential solvent defendants include any external accountants, auditors, legal advisors, any trustee or statutory supervisor, plus any guarantors, insurers or underwriters that investors may rely on. There has been considerable interest in proportionate liability from such parties.
- 1.15 The cost and availability of indemnity insurance has been a further factor in stimulating interest in proportionate liability as a means of providing greater certainty in assessing risk. In Australia issues arising from the uncertainty of indemnity insurance were a major factor in all states agreeing to shift from joint and several liability to proportionate liability for economic loss.

WHO BEARS THE RISK?

- 1.16 As noted above, the issue primarily turns on who is the most appropriate party to bear the risk of non-recovery. Should it be the plaintiff, in which case a proportionate model of liability will be a fairer or efficient method of allocating risk? Should it be the liable defendants, in which case joint and several liability will be an efficient way of allocating risk?
- 1.17 These questions will form the heart of this paper.

CER CONSIDERATIONS

- 1.18 One of the key issues for New Zealand in any law reform is whether or not the laws of New Zealand and Australia should be aligned as a result of the Closer Economic Relations Trade Agreement (CER). Under CER it is envisaged that the two nations will work to harmonise their commercial law.

The process has received greater emphasis over the last three years with the establishment in August 2009 of the Trans-Tasman Outcomes Framework.⁸

- 1.19 This harmonisation objective will be more easily achieved when the underlying economic circumstances of the two countries are very similar, and also where there is substantial Trans-Tasman activity in the field. In these cases it is desirable that the legal framework in both countries should be sufficiently similar to enable the efficient operation of a market, especially for those companies operating on both sides of the Tasman.

STRUCTURE OF THIS PAPER

- 1.20 This paper is intended to raise issues for discussion and encourage submissions. In the paper we describe some options that could be selected to amend or replace the existing rule of joint and several liability. We also describe how the current rule works. We have not indicated any preference for the status quo or for another option, though we have set out some common arguments for and against different models. We expect there to be divergent views on joint and several liability and the other possibilities. We look forward to drawing on these views in our consideration of submissions.
- 1.21 **Chapter 1** of the paper comprises this Introduction.
- 1.22 In **Chapter 2** we describe the rule of joint and several liability. The chapter notes the important connection between principles of causation and the rule. It then describes how the rule operates in practice. The chapter finishes with some historical background on the rule and some aspects of how the liability rules function in tort, equity and contract.
- 1.23 In **Chapter 3** we describe and discuss the main alternatives to joint and several liability: proportionate liability; “hybrids” that combine elements of joint and several and proportionate liability; statutory schemes that cap liability; or contracting out. Discussion of the relative merits of the alternatives is left till Chapter 9.
- 1.24 **Chapter 4** summarises the Law Commission’s conclusions from its previous review, in the 1990s. The 1990s Review had wider terms of reference than the current Reference. We include the Commission’s recommendation to retain joint and several liability, plus the suggested amendments to the laws of contribution and contributory negligence.
- 1.25 In **Chapter 5** we examine the major liability events or crises that have reignited or sustained debate over joint and several liability and whether it should be replaced by a new rule. We cover the leaky homes crisis in New Zealand and global financial crises, especially their impacts in New Zealand. We note similar events in Australia, which we discuss in Chapter 6.

8 Productivity Commissions of Australia and New Zealand *Strengthening Economic Relations Between Australia And New Zealand. A Joint Study* (Issues Paper, 2012) at 5 and 6.

- 1.26 **Chapter 6** details relevant developments in Australian jurisdictions over the past decade. These include the introduction of proportionate liability as the liability rule that applies in negligence and analogous cases. We also consider what weight New Zealand should give to CER when deciding whether to adopt a new liability regime.
- 1.27 **Chapter 7** reviews how joint and several liability has been dealt with in other jurisdictions. Our review includes the United Kingdom, Canada and the United States. The review shows that there is clearly no international consensus. Joint and several liability remains the rule or dominant rule in the United Kingdom and Canada, whereas individual states in the United States have adopted a bewildering variety of approaches, from complete retention, through to many variations and to complete replacement of joint and several liability.
- 1.28 In **Chapter 8** we summarise economic arguments that have been raised regarding the relative economic efficiency of joint and several liability and proportionate liability. We concentrate on New Zealand commentary, plus some interesting inputs from Australia and the United States. Our tentative conclusion is that neither rule emerges as a clear “winner” in terms of efficiency, though the enquiry confirms the importance of dealing with known issues such as “deep pockets”.
- 1.29 In **Chapter 9** we examine the relative advantages and disadvantages of joint and several liability and the main alternatives. We do not favour any particular option at this stage. We note however that a move to proportionate liability, especially in the building sector, could be justified only if adequate consumer and plaintiff protection is available, for instance a compulsory or comprehensive home warranty scheme. However, it is also our preliminary view that any changes to liability rules should be general and not limited to particular sectors.

Chapter 2

The current law

INTRODUCTION

- 2.1 The rule of joint and several liability is central to the common law conception of civil liability. The rule provides that two or more persons who have caused a particular loss will each be liable for the full extent of the loss. This means that the injured party can recover full compensation from any of the persons who have caused the harm, though they cannot recover more than the full amount awarded by the Court.
- 2.2 The law surrounding the apportionment of civil liability has previously been examined by the Law Commission.⁹ However, debate about the merits of the rule and its application in practice have continued since the earlier review, particularly as a result of the leaky building crisis. This debate has not yet lead to legislative change, though the law has continued to develop through the Courts and some of the earlier concerns of the Commission have been judicially resolved.¹⁰ The rule of joint and several liability remains the principal liability rule, as was the position in 1998.

LIABILITY IN CIVIL PROCEEDINGS

- 2.3 At the most basic level, civil proceedings are concerned with righting wrongs and determining costs between different parties. Thus, in a claim for a breach of contract, the Court will generally seek to put the wronged party in the same position they would have been had the terms of the contract been performed.¹¹ In a tort claim, the Court will seek to put the injured party in the same position they would have been in had the harm not occurred.¹²

9 See above at [1.7].

10 See the discussion below at [2.20] in relation to contractual claims.

11 John Burrows, Jeremy Finn, and Stephen Todd *Law of Contract in New Zealand* (4th ed, Lexis Nexis, Wellington, 2012) at [21.2.1] – [21.1.1(a)].

12 John Smillie “Remedies” in Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [25.2.01].

- 2.4 Joint and several liability will apply where more than one party is in breach of obligations imposed through tort, equity or contract and these breaches together cause the same loss or damage.¹³ The rule arises out of the common law approach to causation and liability. The law meets its overriding concern to correct harm and compensate injured parties by requiring the party or parties who have caused the injury to fully compensate the injured party.
- 2.5 Joint and several liability will apply in negligence if more than one defendant has breached the same or different duties of care that they owe to the plaintiff, and each breach of duty is a proximate cause of the loss suffered. If on the other hand, the defendants commit multiple breaches, but these cause separate, distinguishable items of loss or damage, each defendant will be liable for the separate damage they have caused and joint and several liability will not apply. Where there is one *indivisible loss* and each breach of duty is found to have caused that loss, then each defendant will be liable for the full loss. For example, in the case of *Thompson v London County Council*¹⁴ the first defendant excavated near the plaintiff's property, while the second left a water main turned on. The combined excavation and flooding caused the plaintiff's house to subside. As the loss was caused by both negligent actions and could not be separately apportioned, the defendants were held to be jointly and severally liable.
- 2.6 Civil liability is fundamentally concerned not with punishing defendants, but rather with compensating the injured plaintiff.¹⁵ Joint and several liability can be seen as a corollary of this principle because the plaintiff's loss determines the compensation payable, not the relative level of the defendant's wrongdoing compared to that of other defendants.

THE OPERATION OF THE RULE OF JOINT AND SEVERAL LIABILITY

- 2.7 The joint and several liability rule gives rise to two major issues where there are multiple defendants. The first is the nature of the loss: whether the actions or omissions of the defendants give rise to a single indivisible loss, or whether the loss is separate or separable. As indicated above, the answer to this question determines whether joint or several liability will apply in a given case, or not.
- 2.8 The second issue is the apportionment of the loss between the defendants. The rule of joint and several liability operates as between the plaintiff and the defendants, but further, distinct rules of apportionment operate between the defendants.

13 Parties in contract may however agree in their contract the extent to which they will be liable to one another, for breaches; and if applicable how liability may be apportioned among multiple parties.

14 *Thompson v London County Council* [1899] 1 QB 480.

15 Stephen Todd "General Introduction" in *The Law of Torts in New Zealand* at [1.2.01].

- 2.9 To take an example, in building disputes there may be claims for defective design, poor workmanship, faulty materials and negligent council inspections, all of which contribute to structural failures within the building.
- 2.10 The first question is whether there is a single loss. A defendant who has contributed to the overall problems in the completed building will be liable jointly and severally with other defendants who have also contributed to overall problems. However, a defendant who has caused a separately identifiable loss but has not contributed to the overall problems will be liable only for the directly attributable loss. An example would be a subcontractor who fails to properly secure the dining room window flashings, leading to a specific area of water damage, but which has no effect on the main rot problem that affects floors and walls at the other end of the house.
- 2.11 It is only if the loss is all of the same character, or the actions of each defendant all contributed to the overall loss, that the defendants will be jointly and severally liable. If this is the case and one defendant is unable to pay, the remaining defendants will together pay the full amount. For example, if the building supply company has become insolvent, the architect, the builder, and the council will each be liable for the full amount, even though the materials used were a relevant factor in causing the loss.
- 2.12 The second question is apportionment as between the defendants. Under the current law, this is not the concern of the plaintiff. If a plaintiff claims against one defendant only and that defendant considers that there are further liable parties, the defendant can either join these parties to the proceeding or make a separate claim for contribution after judgment is issued in the initial claim. The plaintiff must demonstrate that any defendant it seeks judgment against has caused the plaintiff's loss, but the plaintiff is not required to explore the relative level of each defendant's contribution or fault compared to other potentially liable parties. Indeed, the plaintiff may choose to sue only one defendant, and leave it to that defendant to decide whether they look to anyone else for contribution.
- 2.13 The joint and several liability regime protects plaintiffs by providing that each person who has caused the loss is liable to fully compensate for the loss. If the plaintiff is unable to recover from one defendant, they can still recover the full amount from other defendants. The principled basis for this rule is the common law approach to causation: Each of the defendants has relevantly caused a single, indivisible loss suffered by the plaintiff, so each should be liable for that loss. The common law has held that the injured party should not bear the risk of absent or insolvent defendants. Instead, the Courts have allocated that risk to the parties found to have caused the plaintiff's loss.

HISTORY OF THE RULE

- 2.14 The joint and several liability rule arises from common law, dating back hundreds of years.¹⁶ Initially the common law provided two sets of rules, one for defendants who were jointly liable and one for defendants who were severally liable.
- 2.15 The case of *Merryweather v Nixan*¹⁷ established that there could be no contribution between tortfeasors. This meant that the plaintiff could sue one jointly liable defendant for the full amount, and that defendant would be unable to join other persons who contributed to the loss or seek contribution after the judgement was executed.
- 2.16 The common law position also provided that *several* concurrent tortfeasors (that is multiple defendants in tort who committed different wrongs contributing to the same loss) were not able to be joined in a single action. Conversely, *joint* tortfeasors who participated in the same wrongful act could be sued in a single action. In the case of joint tortfeasors, judgment against one joint defendant discharged all others, even if the plaintiff could not successfully execute the judgment.¹⁸ The effect was that several concurrent tortfeasors had to be sued separately until the plaintiff had recovered the loss, while joint tortfeasors had to be sued together at the outset or the plaintiff would risk being unable to recover fully if the first tortfeasor sued could not pay the full amount.
- 2.17 The principle became both a *joint* and *several* liability regime in response to the injustices caused by these different rules. Changes were primarily achieved through the Law Reform Act 1936, which brought the rule into its modern form some 130 years after *Merryweather* was decided. The High Court Rules, (Rule 74 of the High Court Rules, now Rule 4.3, and Rule 138 of the District Court Rules, now DCR 3.33.3) have also since amended the common law position so that a single action can be brought against defendants who are either jointly or severally liable.
- 2.18 In its modern form, the joint and several rule does not prevent defendants from apportioning their responsibility among each other. If a plaintiff chooses to claim from only one of several defendants, the defendant can join the other persons who have contributed to the loss so that they will be allocated their share of the loss. The effect of the law reform was to bring the position of joint tortfeasors into line with the rules applicable for joint trustees, tenant's direction and insurers.

16 See for instance *Smithson v Garth* (1691) 3 Lev 324; 83 R 711.

17 *Merryweather v Nixan* (1799) 8 TR 186; 101 ER 1337.

18 *Brinsmead v Harrison* (1871) L R 7 CP 547.

- 2.19 In addition to the liability of the defendants it may also be the case that the plaintiff's own actions or omissions may have contributed to the loss which the plaintiff has suffered. In a tort claim, the Contributory Negligence Act 1947 allows for the plaintiff's level of fault to be taken into account in assessing the damage suffered and the level to which the plaintiff should be compensated. Similar rules have developed separately for claims in equity.

JOINT AND SEVERAL LIABILITY UNDER CONTRACT

- 2.20 In the Preliminary Paper published in 1992, the Commission noted some problems with the operation of the rule of joint and several liability in claims founded in contract. The two specific issues relevant to joint and several liability were first that the Contributory Negligence Act 1947 does not apply to contractual claims. The second was that a defendant liable for breach of contract is not entitled to seek contribution from other defendants, as would be possible for defendants in tort or equity.
- 2.21 The Contributory Negligence Act 1947 does not explicitly cover contractual claims. This means that in contractual claims, liability is not reduced when the plaintiff's own actions caused the loss. The difficulties arising from this were exacerbated by the decision of the Court of Appeal in *McLaren Maycroft & Co v Fletcher Development Co Ltd*,¹⁹ which held that concurrent liability in contract and tort is unavailable. Thus, once a party was held liable in contract, they cannot be liable in tort and by necessary implication the provisions of the Contributory Negligence Act are not applicable. This case has now been rejected. In *Price Waterhouse v Kwan* Tipping J firmly stated:²⁰

The decision of this Court in *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 (CA) might be thought to have some lingering effect precluding concurrent liability in tort and contract in New Zealand. That decision can now, however, safely be regarded as having been overtaken by later developments. It can no longer be taken as representing the law of New Zealand.

- 2.22 The developments in the case law mean that concerns canvassed in the Preliminary Paper of 1992 are not as substantial as they once were. However, in that paper, the Commission noted that simply overturning *McLaren Maycroft* would not be sufficient, as it "would be unsatisfactory merely to apply the provisions of the Contributory Negligence Act 1947 to claims in contract." Instead, the Commission considered that a more careful or principled approach was required, with legislative provision for contributory negligence rules to be extended to contract cases.

19 *McLaren Maycroft Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100.

20 *Price Waterhouse v Kwan* [2000] 3 NZLR 39 at [17].

- 2.23 The second issue was contributions between defendants in contract claims. Section 17 of the Law Reform Act 1936 is limited to providing for contributions from joint tortfeasors. As with the contributory negligence rules, the decision of *McLaren Maycroft* was seen to reinforce the restriction. Because a party to a contract could not also be liable in tort for the same damage, if a defendant was found liable for damages in contract, section 17 could not apply and contributions would be unavailable. The decision to overrule *McLaren Maycroft* means that co-contractors who are also liable in tort may now be pursued for contributions. Not every breach of contract will also lead to tortious liability, but this is not such a significant issue after *Mouat v Clark Boyce*,²¹ the effect of which has been that most professional duties are both contractual and tortious.
- 2.24 The Commission noted in 1992 that more thoroughgoing reform would be required to resolve the problems. In the Preliminary Paper, the Commission expressed the view that the desirable result should be that liable defendants who are subject to joint and several liability should be able to plead contributory negligence where relevant and/or seek contribution from other liable defendants, regardless of the cause(s) of action pleaded or the basis of the judgment against each defendant. The removal of the ban on concurrent liability has moved us closer, but not all the way to, that result.

THE CURRENT POSITION

- 2.25 In summary, the current position in New Zealand law is:
- (a) As a general rule, joint and several liability applies in cases with multiple defendants who have together caused indivisible loss;
 - (b) Contribution and contributory negligence are available in cases pleaded in tort or equity, including cases pleaded concurrently in contract and either tort or equity; but
 - (c) Contribution and contributory negligence are unavailable in cases brought solely in contract and that do not involve joint wrongdoing or common obligations.
- 2.26 Whether joint and several liability should remain the rule is of course the question that this review sets out to answer.

²¹ *Mouat v Clark Boyce* [1992] 2 NZLR 559.

Questions

- Q1 In what ways, if any, does joint and several liability work well at present?
- Q2 Under joint and several liability each defendant is liable for all the damage they are found to have caused, even if other defendants are also responsible. Is this fair?
- Q3 Joint and several liability only applies where the defendants are liable for the same loss or damage. How do you think this “same damage” requirement should be applied in practice?
- Q4 Joint and several liability is intended to ensure that the plaintiff is fully compensated for their loss, even if one defendant is missing or insolvent. Is this goal achieved in practice?
- Q5 Should plaintiffs be able to recover the full amount of their loss without claiming from all possible defendants who contributed to the damage? If so, why? If not, why not?
- Q6 How effectively does apportionment operate in practice? Does apportioning responsibility between several liable defendants do justice between defendants?

Chapter 3

Alternatives to joint and several liability

INTRODUCTION

- 3.1 In this chapter, we set out the alternatives that could be adopted if it was decided that New Zealand should move away from joint and several liability (either universally or in a particular sector). At this stage we describe each of the various options and provide examples where relevant of where particular options have been adopted. In Chapter 9 we discuss the arguments for and against each.
- 3.2 The different liability options considered are:
- (a) proportionate liability;
 - (b) various hybrids, involving combinations of elements from two or more of the options (including the status quo);
 - (c) capping liability; and
 - (d) contracting out.
- 3.3 There are other alternatives that we do not discuss except in passing. The law regarding duty and liability in negligence for economic loss could be modified. Some classes of professionals could be permitted to incorporate, to better protect themselves from liability. The measures recommended by the Law Commission in 1998 and summarised in Chapter 4 could be adopted. These options lie beyond the terms of this review. We concentrate on the joint and several liability rule, alternatives and possible modifications.

PROPORTIONATE LIABILITY

- 3.4 The most commonly raised alternative to joint and several liability is often called “proportionate liability”.²²
- 3.5 Under proportionate liability each co-defendant who is held liable for causing the plaintiff’s loss is made liable only for their proportionate share of that loss, based on their level of fault or causal contribution compared to other defendants. Each defendant must pay the proportion or percentage of the damages that a Court determines equates to that defendant’s just and equitable share of responsibility for the loss.
- 3.6 Proportionate liability therefore rejects the common law principle that once a defendant has been found to have wrongfully caused a plaintiff’s loss, that defendant is then liable to compensate the plaintiff for all the reasonably foreseeable losses – regardless of whether some other defendant has also caused or contributed to the loss occurring. Proportionate liability requires a Court to examine and discover each defendant’s relative share of responsibility and order each defendant to pay only that share.

Example 1: Simple proportionate liability

- In a dispute over a faulty retaining wall the Court finds for the plaintiff and awards her \$100,000 damages, the full cost of removing and replacing the faulty wall. There are three defendants and the Court holds them all to have caused or contributed to the faulty wall being built but to differing degrees. The Court holds the Builder D1 50% liable, the Engineer/designer D2 30% liable and the District Council D3 that certified the work 20% liable.
- P can collect \$50,000 from D1, \$30,000 from D2 and \$20,000 from D3.

- 3.7 The justification most commonly advanced for proportionate liability is that defendants will still be held liable, to the extent of their fault, but will not be made to pay for other defendants who may have had far greater responsibility for the plaintiff’s loss. It is argued that this system avoids unfairness to defendants.
- 3.8 As Example 1 shows, under proportionate liability plaintiffs can still be awarded damages for the full amount of the loss they have suffered. The difference is that to achieve full recovery of their loss plaintiffs must collect the shares from each of the defendants. The plaintiff cannot rely, as under joint and several liability, on any one defendant having to make good the total loss.

²² It is also known as “several liability”, but to avoid confusion with “joint and several liability” we will use the phrase “proportionate liability” throughout the Issues Paper.

- 3.9 There will be situations where the plaintiff cannot recover fully, in practice. If one or more of the defendants cannot or will not pay, the plaintiff will be faced with an “uncollectable share”.

Example 2: Absent or insolvent defendants

- P has been paid \$20,000 by D3 but has had no luck with D1 or D2. The Builder has had trouble with other jobs and falling business, and has been declared bankrupt. The Engineer has left for a new job in Belarus and cannot be contacted.
- P’s recovery will most likely be limited to the \$20,000 already paid by D3, plus anything she may eventually get from D1’s bankrupt estate.

- 3.10 Proportionate liability will mean that plaintiffs will need to investigate carefully and include all possible defendants who may be liable for some substantial part of their losses. In terms of fairness, a Court would not be able to award damages against a potential defendant if they were not a party to the action. However, the Court can still reduce the share of liability of defendants who are before the Court to take into account the share of responsibility of a wrongdoer who is not a party.

Example 3: Judgment for less than 100%

- In the original action over the faulty retaining wall, P did not sue the Engineer because he was a family friend and she assumed that he had done a good job. However, at trial D1 argues successfully that he should not be liable for what should be the Engineer’s share in the damage because the engineer provided plans that were unclear and did not properly check the work being done.
- P is awarded damages against D1 and D3 but not the Engineer because he is not a defendant. Her maximum recovery will be \$70,000 unless she is able to bring a further action against the Engineer.

Proportionate liability in practice

- 3.11 Proportionate liability has been adopted in a number of jurisdictions, either in a “pure” form such as we have just described or with some modifications or restrictions.²³ There are jurisdictions where proportionate liability is or is becoming the standard rule for allocation of negligence liability, as has become the case in most Australian states.

²³ See ch 6 for our discussion of the Australian experience; ch 7 for Canada, United Kingdom and United States.

In other places a proportionate liability rule has been used for a particular industry or class of defendants.²⁴

- 3.12 Proportionate liability has also been used in combination with other measures limiting the liability of usually a particular category of defendants. For example, in some jurisdictions auditors have been permitted to incorporate with some form of limited liability, or a statutory capping of liability has been allowed alongside proportionate liability.²⁵
- 3.13 Proportionate liability has also been considered but not implemented for either general or specific application, several times. The Law Commission recommended against it, in 1998.²⁶ Most recently, a report to the Department of Building and Housing prepared by Buddle Findlay and the Sapere Research Group (*Sapere Report*) recommended against moving to proportionate liability for the building and construction industry.²⁷ The Sapere Report concluded that even if proportionate liability were to be adopted (which the Report did not recommend, for other reasons) it would be “essential” to have a system of compulsory home warranty insurance to deal with what would otherwise be unacceptable unfairness to consumer homeowners.²⁸ And in Canada the Law Commission of Ontario has recently recommended against moving to proportionate liability for Ontario-registered business corporations, despite proportionate liability already applying in some circumstances, under particular Ontario or federal statutes.²⁹

HYBRIDS

- 3.14 There are advantages and problems with both joint and several liability and proportionate liability. Neither system is objectively a clear winner.³⁰ This has been recognised in a number of jurisdictions, and various “hybrids” have been proposed or adopted in an effort to reach a “fair” or at least acceptable compromise.
- 3.15 The hybrids typically involve joint and several liability applying in some situations and proportionate liability in others, often with limitations or restrictions on the “pure” operation of one or other scheme in an effort

24 For building industry in Australia prior to 2000 see [6.1] below; for corporations issuing securities in Ontario, see generally Law Commission of Ontario *Joint and Several Liability under the Ontario Business Corporations Act* (2011).

25 See below at [5.29] and following.

26 See ch 4 at [4.7].

27 Buddle Findlay and Sapere Research Group *Review of the application of joint and several liability to the building and construction sector: Final report to the Department of building and Housing* (Department of Building and Housing, Wellington, 2011) [*Sapere Report*].

28 At [12.4].

29 Law Commission of Ontario above n 24 at 1 and 37.

30 See ch 9 for analysis of the advantages and disadvantages of each rule.

to lessen the perceived unfairness on either plaintiffs or some defendants. For instance, solvent, insured defendants who have not been held to be the principal wrongdoers may be relieved of joint and several liability.

- 3.16 While hybrid approaches can come in many forms, two types are most frequently cited. The first can be called the “major/minor” or “peripheral wrongdoer” hybrid.³¹ The essential features are that “major” or “main” wrongdoers continue to be jointly and severally liable, while “minor” or “peripheral wrongdoers” are proportionately liable. The legislation would designate a threshold, for example providing that a defendant who is less than say 20 % at fault is a “minor” or “peripheral” wrongdoer.³² The minor defendant will not be liable to pay the entire amount of a damages award if all other liable defendants go missing, or if they are the only one with funds. Of course, the percentage threshold (or other determining factor) between major and minor responsibility must inevitably be somewhat arbitrary and a matter for debate. We will discuss this issue further in Chapter 9.
- 3.17 The second hybrid approach can be called the “plaintiff at fault” or “contributory negligence” hybrid. Under this regime, where the plaintiff is blameless the liable defendants will be jointly and severally liable. However, if the plaintiff is also at fault and the Court therefore holds that the plaintiff has been contributorily negligent, proportionate liability will apply. This retains the fundamental idea of joint and several liability that a *blameless* plaintiff can look to any defendant who has caused the loss to make it good and should not be made to bear the risk of a liable defendant’s insolvency or absence. However it recognises that this rationale arguably should not apply where the plaintiff is also at fault.
- 3.18 There is more than one possible variant for this approach. At its simplest, pure proportionate liability applies if the plaintiff is held contributorily negligent, or perhaps if her level of negligence is held to be higher than a low threshold – perhaps 10 % of the fault. This means that the negligent plaintiff bears the risk of an absent defendant.

Example 4: Simple proportionate liability if plaintiff is partly at fault

- Under the original “faulty retaining wall” scenario if P failed to advise D1 of an underground spring running near the property and P is accordingly judged to be 15% contributorily negligent, D1’s share of liability is judged to be 35% and the others’ shares are unchanged from Example 1:

31 The Law Commission of Ontario refers to this option as “proportionate liability for a peripheral wrongdoer”, above n 24 at 9.

32 The percentage of fault would be determined by the Courts, though this is inevitably an inexact assessment because liability does not come in tidy percentage figures.

- If D1 is bankrupt P will end by bearing 50% of the total loss or \$50,000 out of \$100,000, rather than the \$15,000 share that her negligence would deliver if all defendants could pay.

- 3.19 A variant to address the arguable unfairness to the plaintiff of this result is to require proportionate reallocation of the absent wrongdoer's share among all the remaining (solvent) liable parties, including the contributorily negligent plaintiff. This means the plaintiff may still recover most of the absent defendant's share, less a further proportionate deduction for their own fault. The effect on the other defendants will depend on how many of them remain and the level of the plaintiff's fault – but will still be better than having to pay up to 100 % of damages.

Example 5: reallocation of absent wrongdoer's share amongst those remaining

- Using the allocation outlined in paragraph 3.18 above:
- P is contributorily negligent to the extent of \$15,000 (out of loss of \$100,000).
- D1 is liable for \$35,000 but cannot pay.
- D2 and D3 have already paid P \$30,000 and \$20,000 respectively, as ordered.
- To re-allocate D1's unpaid share proportionately, D2 must pay $(\$30,000/\$65,000) \times \$35,000 = \$16,154$, D3 must pay $(\$20,000/\$65,000) \times \$35,000 = \$10,770$ – and P must bear the remaining $(\$15,000/\$65,000) \times \$35,000 =$ a further \$8,076 of unrecoverable loss.

- 3.20 The defendants are still worse off than their assessed share of fault might suggest – but are not potentially liable for 100 % of the damages.

CAPPING

- 3.21 Some jurisdictions have adopted the approach of imposing caps on the maximum potential liability of certain categories of defendants, or for certain kinds of losses. This can be achieved by statute or through a regime supported by statute.³³ Such a cap is frequently argued to be appropriate for situations where business advisers and other professionals (such as accountants, auditors, lawyers, engineers and architects) could potentially face a catastrophic liability as a result of a corporate collapse. The argument follows that placing some maximum on liability for corporate advisers in such cases is necessary to encourage suitably qualified people to enter or remain in

³³ Caps can of course also be voluntarily agreed between contracting parties. Contractual limitations are discussed in the following section.

the sector, and prevent liability insurance becoming unaffordable or unobtainable. The theory is that it will prevent damage to business confidence and protect a country's economic infrastructure.

- 3.22 An obvious question with any cap is, at what level? A cap could be set at a single high level for all participants in a sector, for instance, auditors. Or it could have several tiers, based on size of operation (for instance large, medium or small engagements) or other criteria. Alternatively the cap could be set as a multiple of fees charged for a particular engagement. Once again, there is no obvious approach to setting a cap, so any level must in the end be somewhat arbitrary. Nonetheless, a cap should take into account the interests of potential plaintiffs to be compensated for wrongdoing as well as the perceived risks to an industry or economy from professionals' liability for potentially catastrophic risks.
- 3.23 Any cap would need to remain at a sufficiently high level to encourage professionals to take adequate precautions to avoid negligence. Professional advisers would still be required to manage their own behaviour, including through professional indemnity insurance for negligence risks. And, realistically, if investors or other consumers are asked to accept some cap on liability, then professionals and professional firms should expect to be required to provide some transparency of their earnings, operations and risks, so that the justification and reasonableness of any cap can be evaluated.
- 3.24 Statutory caps can never be a complete alternative to either the status quo joint or several liability rule or to a rule of proportionate liability put in its place. Statutory caps would necessarily sit on top of a primary liability rule, and most likely would operate in limited circumstances and in respect of particular causes of action, defendants or both.
- 3.25 The most directly relevant example for New Zealand of statutory caps in action is the Australian professions. In response to a perceived crisis in professional indemnity insurance brought on in part by the collapse of the HIH Insurance Group the Australian Federal Government legislated in 2003 to confirm and expand capping arrangements that were already in place in several states. State and federal legislation permits professional bodies to have limitation of liability schemes approved, in return for compulsory professional indemnity cover by those wishing to have liability capped, promotion of sound professional standards by the professional body and increased reporting requirements on those covered.³⁴

34 Treasury Legislation Amendment (Professional Standards) Act 2004 (Cth); Professional Standards Act 1994 (New South Wales) Professional Standards Regulation 2009 (New South Wales); Professional Standards Act 2004 (Qld) Professional Standards Regulation 2007 (Qld); Australia Professional Standards Act 2004 (SA) Professional Standards Regulations 2006 (SA); Professional Standards Act 2003 (Vic) Professional Standards Regulations 2007 (Vic); Professional Standards Act 1997 (WA) Professional Standards Regulations 1998 (WA) Professional Standards Act 2005 (Tas); Professional Standards Act 2004 (NT) Professional Standards Regulations (NT).

- 3.26 The caps introduced by the scheme can come down to quite low levels. The scheme put in place by one of the two main accounting professional bodies and covering accountants carrying out audit engagements provides a cap of \$1 million for engagements with fees up to \$100,000 and a cap of 10 times the reasonable fee above \$100,000, up to a maximum liability of \$75 million.³⁵
- 3.27 The Australian framework is not limited to auditors or accountants. Other professions including solicitors, engineers and surveyors have approved schemes in at least some states.

CONTRACTING OUT

- 3.28 It is a normal feature of commercial and consumer contracts for one or both sides of a bargain to seek to limit or exclude their liability to the other party using an express term of the contract. These efforts are usually contained in exclusion or limitation clauses, and can, if worded clearly enough, provide for limitation or exclusion of liability in tort, including negligence, as well as under the contract itself.³⁶
- 3.29 It is likely that many parties who are concerned at the prospect of joint and several liability if a contract goes wrong will protect themselves through the contract. They could perhaps even agree that any liability between the parties will be determined proportionately, not jointly and severally. More likely, parties will seek to limit liability to a maximum, for instance the value of the consideration in the contract or some multiple, or to direct but not consequential losses.
- 3.30 It will not always be straightforward or possible to contract out of liability in particular cases. First, a relatively wide range of statutes prohibit contracting out of various statutory obligations. The Consumer Guarantees Act 1993, Fair Trading Act 1986, Building Act 2004 and Companies Act 1993 all contain important express or implied prohibitions on contracting out. The statutory warranties included in the Building Act 2004 mean that builders of residential homes covered by that Act cannot contract out of their most significant obligations to clients and subsequent building owners.³⁷ The prohibition on contracting out of liability under section 9 of the Fair Trading Act for false or misleading conduct in trade is likely to leave professional advisers with potential for statute-based liability, even if they exclude or limit their liability in contract, for instance for misstatement. These well-known prohibitions are policy choices that Parliament has already made, and are beyond the scope of this review.

35 See New South Wales Attorney General and Justice Department “Institute of Chartered Accountants in Australia (NSW) Scheme Summary” < www.lawlink.nsw.gov.au > .

36 *DHL International (New Zealand) Ltd v Richmond Ltd* [1993] 3 NZLR 10 (CA) at 18.

37 Sections 396 to 399.

- 3.31 There are some areas where the ability to limit liability by contract is uncertain. For instance, section 61 of the Securities Act 1978 prohibits issuing companies “indemnifying” their directors, employees or auditors against liability, for instance for their negligence, except for some very limited situations prescribed in the Act. It is not clear whether this provision prohibits companies relieving their auditor of liability at all and to any extent. An alternative reading is that a company and auditor may agree as required by the Act that the auditor remains liable for any fault; but that should any such liability occur it will be proportionate not joint and several; or will be capped at some level; or some combination of these options. The argument is that the prohibition against indemnity does not exclude the parties defining and limiting how liability will be applied. If parties are free to define and limit liability by contract in this situation they would have at least a partial answer to concerns about uncertain or excessive liability.³⁸ But, given the uncertainty of the law, some clarification or reform of the law would most likely be necessary to facilitate such contracting out.
- 3.32 Apart from statutory limitations and uncertainty, the other practical limit to using contracts to address liability issues is that any effect will normally be limited to the contracting parties. The parties can agree to limit their liability to each other in various ways – but any limitation will not apply to a non-party who may nevertheless be able to bring a successful claim in tort (for example negligence) or in equity.
- 3.33 This means that contracting out will normally be limited to arrangements covering liability between the contracting parties. It is possible to conceive of statutory assistance to enable contractual limitations to have effect against third or non-parties. But it would be very difficult to conceive of contractually-imposed limitations having effect against non-parties without at least obtaining their consent. In this sense, the United Kingdom Companies Act provision allowing auditors to limit liability by contract is a recognition of this necessity. Of course, professional advisers can and frequently do issue disclaimers of responsibility to third parties. Disclaimers in the auditor’s report attached to publicly available financial reports for a company are a common example. Such disclaimers are usually aimed at denying responsibility to third parties and thereby precluding liability arising, rather than limiting liability should it arise. Nevertheless, disclaimers are another tool that professional advisers and others may employ to restrict and control their future liabilities to both contracting parties and third parties.

38 The Law Commission of Ontario, above n 24 at 17, has pointed to changes enacted in the United Kingdom, where under UK Companies Act 2006 auditors may limit their liability with company clients, subject to approval of shareholders (to address tort liability). In return, auditors are subject to the risk of an additional criminal penalty and other procedural requirements, making the UK provision something between a statutory cap regime and straight contractual limitation.

EXCEPTIONS TO ALL ALTERNATIVES

- 3.34 All of the above alternatives could be made subject to exceptions for certain kinds of wrongdoing. One possibility is an exception making restrictions on liability inapplicable where the defendant is held liable for intentional wrongdoing. Such an exception could be framed generally by applying proportionate liability to all liability in negligence and equivalent claims in contract or equity. Or an exception could be particular, to provide that proportionate liability is the general rule but that joint and several liability still applies to particular intentional tortious or equitable wrongdoing. For instance, an exception could operate so that where a defendant is held to have acted fraudulently or committed the tort of deceit, their liability will be joint and several not proportionate; and/or any cap on liability that would otherwise apply will be ineffective. The justification is that a defendant who has acted intentionally, dishonestly and/or outrageously does not warrant any moderation of their liability, rather the normal common law concern to provide for full compensation of the plaintiff, plus considerations of deterrence, win out.

Questions

- Q7 Which, of joint and several liability and proportionate liability, do you consider fairer? Why?
- Q8 If a system of proportionate liability were introduced, what if any additional measure do you think would be needed to protect plaintiffs, for instance against uncollectable shares?
- Q9 Which if any of the hybrids or other alternatives to straight joint and several liability or straight proportionate liability do you prefer? Why?
- Q10 If the “peripheral wrongdoer” model is used, do you think it is necessary to include a threshold test or definition in legislation? If you support a statutory threshold, what threshold would you prefer? How should this be applied in practice?
- Q11 If the “plaintiff at fault” model is used, should there be a threshold level for contributory negligence by the plaintiff, before proportionate liability applies? If so, what level do you consider appropriate?
- Q12 Overall, which of the options for reform or the status quo do you prefer? Why?

Chapter 4

What we said last time

INTRODUCTION

- 4.1 In the early 1990s, the Law Commission selected the law relating to the apportionment of civil liability as an area that deserved attention. The primary reasons for this were that there had been significant statutory reform in this area in England and Wales,³⁹ and in this Commission's own work on statutes of limitations and company law⁴⁰ the consultative activity revealed considerable concern about some of the present rules concerning multiple liability disputes.
- 4.2 The work culminated in the release of a Preliminary Paper in March 1992.⁴¹ As explained below, the Law Commission recommended that there be no change to the joint and several liability structure of our civil law. Rather, changes to address specific concerns with the existing system were proposed, and a draft Bill was attached.
- 4.3 Subsequent to the release of the Preliminary Paper, consideration was given in Australia to the same issues. Despite suggestions as early as in 1994 that a complete movement away from joint and several liability to proportionate liability was possible,⁴² legislation had still not been enacted by 1997 (although specific reforms relating to the building industry, including the shift to proportionate liability in that sector only, had occurred in Victoria, New South Wales, South Australia, and the Northern Territory).⁴³

39 Civil Liability (Contribution) Act 1979 (UK).

40 Law Commission *The Limitation Act 1950: A Discussion Paper* (NZLC PP3, 1987); *Limitation Defences in Civil Proceedings* (NZLC R6, 1998); *Company Law: A Discussion Paper* (NZLC PP5, 1987), *Company Law: Reform and Restatement* (NZLC R9, 1989); *Company Law Reform: Transition and Revision* (NZLC R16, 1990).

41 Above n 3.

42 See the discussion in the report *Apportionment of Liability*, above n 4 at [2].

43 Building Act 1993 (VIC); Environmental Planning and Assessment Amendment Act 1997 (NSW); Developments Act 1993 (SA); Building Act 1993 (NT).

The Law Commission pressed on and released a Final Report in May 1998,⁴⁴ which subject to one relatively minor change carried forward the draft Bill attached to the Preliminary Paper.

WHAT WAS RECOMMENDED

- 4.4 The four main areas the Law Commission addressed in the Preliminary Paper, and then Final Report, were:⁴⁵
- Whether concurrent defendants should be liable jointly and severally, or just severally (i.e. proportionately liable);
 - Whether there should be an extension of rights of contribution between defendants;
 - How the problem of the uncollectable contribution might be addressed; and
 - Whether there should be an extension of the concept of apportioning damages to reflect the plaintiff's fault.

Joint and several liability as opposed to several liability

- 4.5 As highlighted earlier in this chapter, the Law Commission recommended in the Preliminary Paper that joint and several liability be retained. It was acknowledged that there were arguments in favour of doing away with the rule. The reasons were the perceived unfairness of a relatively minor wrongdoer being left to bear a major, or even the total, liability share; that it would remove the need for complicated rules concerning apportionment of liability *between* defendants; and that joint and several liability may fail to adequately take into account the plaintiff's contributory negligence. However the Commission ultimately concluded that:⁴⁶

The factor which weighs with us most heavily at present is the effect on plaintiffs which abrogation of the rule would have. We stress a number of times in this paper the commitment of the common law to the objective of fully compensating a plaintiff for all loss which has been suffered. Joint and several liability is one means of achieving this: any risk of an absent or insolvent defendant must be borne by a co-defendant (if there is one). If there is only one defendant and he or she is insolvent the plaintiff fails to recover. But if there are two defendants, the plaintiff can recover from either and, if D2 is insolvent, D1, not the plaintiff, bears the burden. Although it recognises the contrary arguments, the Law Commission has yet to be persuaded to recommend any departure from this position.

- 4.6 Therefore, the following was proposed as section 6 of the attached Bill:

44 Above n 4.

45 At [90].

46 At [168].

Concurrent wrongdoers are jointly and severally liable for the whole of the damages payable to a wronged person in respect of a loss.

- 4.7 The Law Commission's position was unchanged in the Final Report.⁴⁷ The Commission did not consider that a "compromise scheme" was possible. A discretionary approach where the courts could reduce the amount of a defendant's liability "in such manner and for such reasons as they considered just" would be too uncertain, and fundamental changes in the law should not be made to "placate a particular interest group".⁴⁸

Extension of rights of contribution between defendants

- 4.8 For defendants in contractual claims, the consequences flowing from joint and several liability are exacerbated by the rules governing contributions.⁴⁹ At present, contribution is restricted to defendants in tort and equity. Subject to any right to equitable contribution,⁵⁰ a defendant sued in contract will be unable to claim contribution from other defendants, whether the other defendants are liable in contract, tort, or equity. Similarly, a defendant sued in tort will be unable to claim contribution from others who would be liable for the same damage under contract.
- 4.9 In the Preliminary Paper, the Commission noted the unfairness of this rule and recommended that the right to contribution among defendants be extended whatever the basis of civil liability, as had already been enacted in England and Wales in the Civil Liability (Contribution) Act 1978.⁵¹ This recommendation was carried through to the Final Report, although the draft provision that would accomplish this was amended for clarity.⁵²

The problem of uncollectable contribution

- 4.10 Our earlier preliminary paper also considered what should be done when a co-defendant is missing, insolvent or otherwise "judgment proof". A consequence of the joint and several rule is that the co-defendant's share of the judgment is borne by the other co-defendants.
- 4.11 In the Preliminary Paper, the Commission proposed that a concurrent wrongdoer, on finding that a co-defendant was unable to pay their share of the judgment, should be able to return to court within one year and have

47 At [6]-[9].

48 At [10].

49 Law Reform Act 1936, s 17.

50 As to which, see *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11.

51 *Apportionment of Civil Liability* (1992), above n 3 at [175].

52 The Commission accepted the criticism of the New South Wales Law Commission that the provision in the draft Bill needed clarifying. *Apportionment of Civil Liability* (1998), above n 4 at [13]. See New South Wales Law Commission *Contribution Between Persons Liable for the Same Damage* (Discussion Paper 38, 1997).

that share redistributed in proportion to the original allocations.⁵³ Where the plaintiff was not at fault, this redistribution would be between the remaining defendants. However, where the plaintiff was partially at fault, they too would become a party for the purpose of the redistribution.

- 4.12 In the Final Report, the Law Commission reconsidered its position with respect to this last point.⁵⁴ It was stated that:⁵⁵

Such a proposal, it can be argued, runs completely contrary to the reasons we have advanced in support of solidary liability [joint and several liability]. If the correct view is that D1 is liable to P for all of P's loss, and questions of contribution among defendants are irrelevant to that liability, why should P's net entitlement be diminished because D1 cannot collect the share of P's entitlement that should be contributed by another defendant?

The Commission therefore concluded that "no part of an uncollectable contribution should be allocated to P."⁵⁶

Extension of the apportionment of damages to reflect the plaintiff's fault

- 4.13 The Preliminary Paper also considered the rules around contributory negligence. The issue at hand was whether, in light of the proposals to extend contribution between defendants to all bases of liability, the circumstances in which fault by the plaintiff can be taken into account should similarly be extended. In other words, should the contributory negligence rules apply to contractual claims where the plaintiff was partially at fault? Should the provisions addressing fault by the plaintiff in contractual claims be brought in line with tort⁵⁷ and equity,⁵⁸ or is it justified to have a separate rule for contractual claims?
- 4.14 In the Preliminary Paper, the Commission decided that contributory negligence should be available for contract, and it was commented that "[t]he question whether the plaintiff's action or inaction has been contributory to the loss and the exact apportionment of that responsibility will be matters for the court to decide on the facts of the case".⁵⁹
- 4.15 It was considered that this would be sufficiently broad to take into account situations where, for example, the terms of the contract are such that the plaintiff is entitled to rely entirely on the defendant's performance and in such cases "there can be no question of reducing the plaintiff's damages

53 Above n 3 at [180]-[187].

54 Above n 4 at [11].

55 At [11].

56 At [12].

57 See the Contributory Negligence Act 1947.

58 Established in *Day v Mead* [1987] 2 NZLR 443.

59 *Apportionment of Civil Liability* (1992) above n 3 at [191].

for any failure to monitor the performance of the defendant or anticipate default”.⁶⁰ This was carried forward into the Final Report.⁶¹

Questions

- Q13 Should contributory negligence operate as a partial defence for all claims, regardless of whether the defendant is liable in contract, tort, or equity?
- Q14 Should defendants be able to recover contributions from all other potentially liable parties regardless of whether the defendant is liable in contract, tort, or equity?
- Q15 Should the rules relating to contributory negligence and contributions be the same whether the claim is based in contract, tort, or equity?

⁶⁰ At [193].

⁶¹ Subject to one minor amendment, relating to the reliance by a promisee on a promisor’s contract, recommended by a submitter. *Apportionment of Civil Liability* (1998) above n 4 at [14].

Chapter 5

What has happened

INTRODUCTION

- 5.1 The current legal rule regarding the liability of multiple wrongdoers for the same damage is joint and several liability. This is in keeping with the recommendation of the Law Commission in 1998. The Commission's recommendations to have contribution and contributory negligence rules apply in contract cases as well as torts and equity have not been taken up at this stage. However, as we pointed out in Chapter 2, the subsequent allowance of concurrent liability in tort and contract has lessened the significance of the remaining differences in treatment. The overall result is that the normal liability rule in New Zealand is joint and several liability, with defendants generally able to seek contribution from each other and to plead contributory negligence where appropriate.
- 5.2 Despite this relatively settled position, debate has continued over the merits or otherwise of joint and several liability, and whether an alternative such as proportionate liability should replace the existing rule.
- 5.3 This continuing debate has been fuelled by several major liability phenomena that have occurred over the last decade and a half, especially:
- the leaky homes crisis, which has created thousands of potential or actual plaintiffs seeking redress, most often from multiple defendants;
 - a series of interlinked financial crises, which arguably have increased the chances of professional advisers (such as auditors) being pursued in the aftermath of a corporate collapse;
 - similar or related issues especially in Australia, leading to state and federal governments introducing changes that have moved the liability rules substantially towards proportionate liability, plus other initiatives to limit liability of professionals, including caps on liability.
- 5.4 We deal with what has happened in Australia and what this might mean for New Zealand in Chapter 6. In this Chapter we review the other crises and note how they have influenced the debate on joint and several liability and the possible alternatives.

- 5.5 It is important to remember that any changes that might result from the present review will have no effect on losses that have already occurred. Any liability still to be determined as a result of either leaky homes or finance company collapses must be dealt with under the legal rules applying at the time of the alleged wrong and the resulting damage. The relevant rule will be joint and several liability in all “same damage” cases that have already arisen. Our interest in these events is what they can tell us about the operation of joint and several liability, or how proportionate liability or some other option might work in its place.

LEAKY HOMES

- 5.6 The leaky homes crisis developed rapidly at the end of the 1990s and had become a major liability crisis by the start of the new century. It is still today a major legal, community and public policy issue. Successive governments have put in place special legislative apparatus to deal with the sheer volume of cases and litigants. This has required several amendments to try to improve its performance. More recently the Government introduced settlement and assistance options through which central and local government and homeowners would each bear portions of the rectification costs to fix leaky homes.⁶²
- 5.7 The “leaky homes crisis” or “leaky home syndrome” describe the emergence from the late 1990s of significant weathertightness problems in recently constructed buildings, on a scale not seen before. The majority of affected buildings were constructed in the decade from 1994 to 2004. From about the start of this period there was a rapid move to new building styles and techniques, particularly widespread use of so-called “Mediterranean” styles with flat roofs and/or no overhanging eaves; use of monolithic cladding on residential and commercial buildings; and the use of kiln-dried but otherwise untreated timber for framing and other structural work. The combination of leaks and untreated timber meant that structures rotted and failed in large numbers. Necessary remedial work could range from fixing of isolated leaks in lightly affected buildings, to targeted replacement of rotten or failing sections, to full re-cladding of buildings plus rectification of most or all underlying structures. The damage for individual homeowner plaintiffs faced with a full recladding can exceed \$300,000.⁶³ Multi-unit residential buildings also failed in significant numbers. Although repair costs per unit in such developments are typically somewhat lower than for standalone homes, the complications of multiple plaintiffs and the combined potential liability have made multi-unit cases very difficult and expensive for all parties.

62 See generally: Weathertight Homes Resolution Services Act 2002; Weathertight Homes Resolution Services Act 2006; Weathertight Homes Resolution Services (Financial Assistance Package) Amendment Act 2011.

63 Price Waterhouse Coopers *Weathertightness – Estimating the Cost* (Department of Building and Housing, Wellington 2009), Appendix E.

- 5.8 The leaky homes crisis is a pertinent example of problems or “wrongs” having multiple contributing causes. The phenomenon of buildings developing weathertightness and related problems in such large numbers results from a basket of contributing factors. Not all factors will be relevant for each leaky building, but any or all of the following *may* be involved (this list is not exhaustive):
- Builders being permitted and increasingly using untreated timber for framing; and some uses for which it was never intended or permitted, for example, balconies extending beyond the building profile;
 - Increased compartmentalisation of building processes, with greater reliance on less experienced or lower skilled labour-only contractors for key tasks, for instance roofing;
 - Introduction of new products and building systems, especially various brands and systems of monolithic cladding;
 - Possible issues with fitness for purpose of some products, especially but not solely when used inconsistently with manufacturers’ specifications or sound building practice;
 - Variable or questionable skill levels, especially with new products requiring correct design and/or use to achieve weathertightness;
 - Transitional problems while industry and regulators adapted to a new performance-based building code and approach;
 - Unevenness in standards of inspection and inspection practice, whether by territorial authorities or by private certifiers who were permitted under the Building Industry Act 1991.

Leaky homes and joint and several liability

- 5.9 The complexity of even a single residential home build means that for every damage and potential plaintiff there can be multiple potential defendants, all of whom may be proved to have contributed to or caused a latent defect that has led to a weathertightness failure.
- 5.10 Defendants in leaky homes claims will not necessarily all be equally responsible for all the loss suffered by the homeowner. For instance sub-contractors who have carried out only a single or limited task on only one part of a building may be able to show that they have contributed to or caused an isolated and distinct item of damage, not the overall weathertightness problem. However, if a defendant is held liable for causing overall indivisible weathertightness damage and structural failure, joint and several liability exposes them to meeting the full cost of the damages awarded if other defendants are unavailable. Given the protracted nature of the crisis, significant numbers of defendants are insolvent and cannot or do not pay. Industry participants and bodies argue that this makes joint and several liability unfair to solvent defendants and that proportionate liability is the

necessary remedy. The leaky homes crisis did not create this argued unfairness to solvent defendants, but it has served to cast the issue in strong relief due to the numbers of plaintiffs and defendants affected.

- 5.11 Different categories of building industry participants may be more or less affected by exposure to joint and several liability. Builders, building sub-trades, architects, engineers, and territorial authorities have all argued that they are unfairly exposed to disproportionate liability.⁶⁴ In particular, some argue that joint and several liability is unfair because it does not reflect the fact that in any given case, some defendants may be more blameworthy and others may have a lesser degree of responsibility for the damage caused. Our consultations with industry participants confirm similar views.
- 5.12 It is difficult to obtain reliable data on how liability and costs for leaky homes are borne by affected parties in practice, because many or even the majority of cases are settled out of court or are dealt with privately.⁶⁵ However, costings carried out by Price Waterhouse Coopers for the Department of Building and Housing in 2009 tend to confirm that actual costs are not being borne in proportion to adjudicated allocations. In particular, the high proportion of defendants or potential defendants who are insolvent or no longer exist has meant that territorial authorities face an increasing and disproportionate share of costs compared to their relative level of fault.⁶⁶
- 5.13 These costings point out another major issue. The analysis confirms that over two thirds of all costs continue to fall on homeowners.⁶⁷ This is because it is thought that the majority of weathertightness problems remain unknown, unrecognised or at least untreated. Unrecognised weathertightness issues may eventually lead to structural failure, which is likely to be far more expensive to repair and to be borne by the owner because the 10 year limitation period for claims will have expired.
- 5.14 Homeowners who do seek redress are unlikely to agree that the system is actually delivering the common law goal of full compensation for the harm suffered. The unavailability of costs in the specialist Weathertight Homes Tribunal and the expense of the alternative High Court route means that plaintiffs will typically suffer significant unrecoverable losses even if their claim is successful. In addition, plaintiffs who settle will commonly bear a portion of the loss.

64 See for example the summary of submissions on the Building Act review, included in the Sapere Report.

65 *Weathertightness – Estimating the Cost* above n 63 at 61.

66 At 62. The report found that territorial authorities' share of damages actually paid in completed residential cases averaged around 45 %, despite their typical contribution being adjudicated and ordered at 20 – 30 %.

67 At 65. The authors estimate territorial authorities bear 25 %, third parties including builders 4 % and government 2 %.

- 5.15 Insofar as the cost burden on homeowners arises from unrecognised and untreated weathertightness failures that fall outside the adjudication system, these costs cannot inform the assessment of the relative fairness of the joint and several system of liability. These costs do not bear directly on whether joint and several liability for damages awarded in Court are efficient or “fair” to defendants, especially solvent defendants. Equally, any changes to the liability rule are unlikely to have any significant effect on who bears the costs for unrecognised weathertightness issues and plaintiffs’ unrecoverable costs. The fairness of the liability regime to homeowner plaintiffs nevertheless remains a key issue. As pointed out by our previous reports,⁶⁸ if joint and several liability were replaced by proportionate liability the risk and cost of absent or insolvent defendants would be borne by the plaintiff, and the common law objective of fully compensating the plaintiff would be lost. Proportionate liability would mean that defendants would not be required to pay more than their “fair share” (i.e. their proportionate share of the total loss), but at the cost of significant unfairness or injustice to plaintiffs. This is a key consideration that must be addressed before any conclusions can be reached about the desirability of keeping or changing the present liability regime.

Alternative protection for plaintiffs: a warranty system?

- 5.16 In 2011, the Department of Building and Housing commissioned the Sapere Report. This report considered the issue of relative fairness between defendants, and overall fairness for the plaintiff homeowners. The report noted that changing from joint and several liability to proportionate liability transfers the “cost and unfairness of uncollectable shares” (from defendants to the plaintiff) without addressing the issue.⁶⁹ The authors concluded that proportionate liability could not be considered as a viable option without mandatory home warranty insurance.⁷⁰ They also concluded that even if such a scheme were in place consumers/homeowners would be worse off because of the additional burdens of having to join defendants, prove a case against each and later pursue payment.⁷¹ The Report recommended against a change to proportionate liability in the building sector for these reasons. It also doubted if proportionate liability was feasible given the difficulty and cost with establishing a satisfactory warranty scheme.⁷²

⁶⁸ See ch 4 above.

⁶⁹ At [12.7.3].

⁷⁰ At [12.4].

⁷¹ At [12.7.1].

⁷² At [12.7.3].

- 5.17 The Australian experience tends to confirm that achieving a satisfactory warranty scheme will be difficult and most likely impossible without strong government support. Australian states have had state-mandated builders' warranty insurance schemes of various types since the 1970s. Such schemes have moved from industry-provided and market-based schemes to state-provided and run schemes, particularly since 2000.⁷³ The principal driver for the change has been insurers abandoning the market because it is perceived as unprofitable or too risky. From a plaintiff's perspective the schemes often remain unattractive because of a high hurdle for eligibility. All but one of the state schemes is now "last resort", with cover only if the builder is dead, insolvent or missing. Homeowners therefore have to pursue the defendant and incur possibly unrecoverable costs before being able to claim under the warranty.
- 5.18 New Zealand's insurance market does not necessarily share the same features as Australia's. However, the recent history of leaky homes in New Zealand must be a factor disinclining insurers from participating in a home warranty scheme in New Zealand. In this environment we suspect that a warranty scheme could only be achieved with at least a government guarantee and most probably direct government provision of the machinery.

Commercial buildings

- 5.19 At the time of writing, the Supreme Court had just released its decision in the case of *Body Corporate 207624 v North Shore City Council (Spencer on Byron)*.⁷⁴ This decision holds that territorial authorities owe a duty of care in their inspection role to owners of premises, both original and subsequent, regardless of the type or intended use of the premises.⁷⁵ This means that owners of commercial buildings may sue territorial authorities for alleged breaches of this duty that have caused damage, so long as they commence any action within the 10 year limitation period applying under the Building Act 1991. The Court confirmed that this decision is limited for the time being to events and proceedings under the Building Act 1991, which was the applicable statutory regime in the case. The Court indicated that it is likely that similar considerations and liability will arise for buildings and work covered by the Building Act 2004, but reserved its position on that for a relevant case.⁷⁶

⁷³ See discussion below in ch 6.

⁷⁴ [2012] NZSC 83.

⁷⁵ At [22], [55], [215] to [218]; W Young J dissenting, at [226].

⁷⁶ At [217].

- 5.20 Up until *Spencer on Byron* the leaky building crisis had essentially been seen as an issue relating to residential homes and apartments, at least so far as territorial authorities providing building inspection services were concerned. The Supreme Court had previously decided in the *Sunset Terraces* case that territorial authorities could be liable in negligence even where residences were not necessarily owner-occupied and were in large residential apartment blocks.⁷⁷ But decisions at lower levels had held that territorial authorities performing inspections did not owe duties to owners of buildings that were not homes but rather were commercial premises.⁷⁸ The Supreme Court has now held that these earlier cases erred when they sought to draw a dividing line for duty of care purposes between commercial and residential buildings.⁷⁹
- 5.21 It can be expected that the liabilities of territorial authorities for leaky buildings will increase as a result of *Spencer on Byron*. The class of commercial buildings whose owners may sue over allegedly negligent inspection services is not restricted, except by the 10 year limitation period. It may be that the limitation issue will significantly restrict the number of historical claims, but only time will tell. In terms of new claims, territorial authorities will no doubt plan and work on the assumption that the rule now applied to 1991 Act cases will be confirmed for situations governed by the current Act.
- 5.22 Whether the likely increased liability of territorial authorities will have a flow-on effect of increasingly disproportionate liability is an open question. Territorial authorities remain natural deep pockets and it is easy to predict the unavailability of at least some potential defendants in major commercial building cases, whether from use of project-specific corporate structures, insolvency or other reasons. However, larger commercial projects may also involve larger commercial construction companies, so that territorial authorities will not necessarily be the last defendant left standing. We simply do not know at this point what the indirect effects may be on apportionment of liability among defendants in commercial building disputes.
- 5.23 One reaction to *Spencer on Byron* may be that it provides further justification for proportionate liability due to the risk or likelihood of further disproportionate liability, to be borne by local government and therefore ratepayers. We think that it is too soon to make such predictions. Even if that is what occurs there is still the issue of whether it would be just to transfer the cost of uncollectable shares to owners of commercial buildings? The Supreme Court has expressly chosen not to distinguish between residential and commercial building owners in terms of duty of care. This implies that steps to redress any impact from proportionate liability on plaintiffs, such as

77 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 (*Sunset Terraces*).

78 *Te Mata Properties Ltd v Hastings District Council* [2008] NZCA 446, [2009] 1 NZLR 460; *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] NZCA 374, [2009] 3 NZLR 786.

79 *Spencer on Byron*, at [181].

a guarantee scheme for residential home owners, would be just as important but probably even more difficult to achieve, for commercial owners.

- 5.24 We will be interested to hear from submitters whether and how they think the liability landscape is affected by *Spencer on Byron*, and what if anything they think should be done in response.

Summary on leaky buildings

- 5.25 It is clear that a switch to proportionate liability for the building industry, while advocated by some in the industry, remains highly problematic in terms of building owner or plaintiff interests. Our consultations so far with the industry and others nevertheless confirm that such a change is still seen by many as necessary to reduce perceived burdens on the building industry. On the other hand, it could also be argued that a “one off” crisis such as leaky buildings does not provide the best context for analysing or adjusting rules of liability generally, given that even such a major event turns on its own facts including the range of contributing causes referred to in this chapter. In any event, removing or amending the rule of joint and several liability could only occur prospectively and would not affect existing claims.
- 5.26 Some also argue that proportionate liability might lead to more efficient incentives on industry participants.⁸⁰ The debate is clearly not over, and the advantages and disadvantages of the competing rules are examined further in Chapter 9.

THE IMPACT OF FINANCIAL CRISES

- 5.27 The last decade has seen several serious, unexpected financial shocks. These include:
- Major corporate collapses in the United States after accounting “irregularities” – including Enron in 2001 and WorldCom in 2002;
 - The collapse of Arthur Andersen, previously one of the World “Big Five” accounting and audit firms, as a direct result;
 - Collapses of New Zealand finance companies, beginning in 2006 and continuing through and beyond 2010. A recent count shows 66 failures with deposits at risk of over \$8.7 billion; not including non-finance company collapses such as Bluechip. Estimated losses are over \$3 billion.⁸¹
 - A global financial crisis, beginning in the United States in 2007 when various financial products began to fail with disastrous consequences. This

80 The Productivity Commission has for instance argued that joint and several liability provides inefficient incentives on in particular territorial authorities, making them unduly risk-averse: *Housing Affordability Inquiry* above n 80 at 160 - 161. This issue is discussed further in Chapter 8.

81 Interest.co.nz “Deep Freeze List” (August 2012) < www.interest.co.nz > .

has led to the collapse of some major investment banks and governments resorting to bail outs for banks and insurance companies. In New Zealand, the Government has guaranteed retail deposits including those held by finance companies.⁸² More recently risks of sovereign debt defaults by several Eurozone countries have emerged, potentially putting the future of the Euro in question.

- 5.28 A universal feature of these events is large numbers of depositors and investors being unable to reclaim their investment or deposit from the finance entity with which they contracted. Unless they can benefit from a government rescue, guarantee or other intervention, investors who have suffered loss become potential plaintiffs looking for a solvent defendant.
- 5.29 The auditors of failed entities and, for finance companies, the corporate trustees are potential defendants and sometimes the only defendants with funds available to meet a claim. The question is whether these crises have increased the potential liability of auditors and others to such an extent that some sort of limitation on their liability is justified, whether by proportionate liability, caps on liability or some other method.
- 5.30 Investors and shareholders in New Zealand have sometimes successfully pursued accountants or auditors in some cases, and failed in other such attempts.⁸³ The existing requirements to show that a duty of care is owed to a plaintiff third party *and* that the auditor has breached the relevant standard of care are likely to continue to restrict cases where auditors may be held liable to a wide class of plaintiffs. On this basis, it may be that the existing law is sufficient to protect auditors against arguably disproportionate or catastrophic losses, because auditors can protect themselves by taking reasonable care. The absence so far of clearly disproportionate awards provides some confirmation for this inference.
- 5.31 Concern nevertheless persists in the industry. Practitioners continue to suggest that even the prospect of such liability discourages individual auditors or firms from entering or staying in the field. It is argued that mid-level firms may be deterred from taking on larger audits, professional indemnity insurance becomes too expensive or unobtainable; and auditors may refuse to undertake the riskiest assignments.
- 5.32 As we discuss in Chapter 6, developments elsewhere are relevant. Auditors and some other professional advisers in Australian states now enjoy statutorily sanctioned schemes that cap their liability. Auditors covered by such a scheme have their liability capped at \$1,000,000 for smaller assignment, or at ten times the fees earned for large assignments, with a

82 Crown Retail Deposit Guarantee Scheme Act 2009.

83 *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553; *Allison v KPMG Peat Marwick* - [2000] 1 NZLR 560; but see *Boyd Knight v Purdue* [1999] 2 NZLR 278 (CA). It is realistic to expect but difficult to substantiate that other proceedings or potential proceedings have been settled.

maximum cap of \$75 million. As part of the scheme, each participant must have professional indemnity insurance up to the level of the cap, or have sufficient proven assets to meet claims. We invite submissions as to whether New Zealand should allow similar arrangements; and if so, whether the Australian limitations are reasonable.

- 5.33 The scope of any cap would also need to be determined. Even if limitations on liability are considered necessary to mitigate the most severe effects of liability for financial collapse, some exceptions to these caps may be appropriate. For reasons of principle and efficiency we consider that that any cap on liability should not be available in cases of deliberate misfeasance such as fraud. There is however a secondary issue as to whether or how often professional advisers are likely to be liable for losses in the “catastrophic” range, in the absence of deliberate misfeasance.

SUMMARY

- 5.34 The major liability events of the last decade have helped keep reform of joint and several liability a live issue. This is understandable. It is clear that some defendants in leaky homes cases, particularly territorial authorities, end up bearing a disproportionate burden because other defendants are insolvent, have disappeared or no longer exist. Similarly the effect on Arthur Andersen of being brought down by the catastrophic collapse of their client is obvious, even if the wounds could be classed as self-inflicted.
- 5.35 These phenomena are not enough by themselves to make a case for change. Any change to rules for apportionment of liability can only be justified if it deals efficiently and fairly with negative effects as well as bringing the perceived benefits. The principal options all face significant hurdles in this respect.
- 5.36 Our analysis of the relative advantages and disadvantages of the status quo and the alternatives is set out in Chapter 9.

Questions

- Q16 Do you consider that leaky homes claims have exposed problems in the operation of the rule of joint and several liability? If so, what are they?
- Q17 Which of joint and several liability or proportionate liability do you think would produce fairer outcomes in leaky building cases? Why?
- Q18 Do you consider that the joint and several rule has adequately protected homeowners' interests in leaky homes cases?
- Q19 Could a change to proportionate liability be limited to a specific sector?
- Q20 If New Zealand were to shift to a system of proportionate liability in the construction sector, would a compulsory builders' warranty scheme be necessary to protect the interests of the homeowner? If so, how should this be funded and run?
- Q21 In the wake of the global financial crisis, do you consider that auditors and other professional advisers should be able to cap their liability, as in Australia? If so, how should a liability cap operate? What classes of defendant should receive the benefit of liability caps?

Chapter 6

The Australian experience and Closer Economic Relations

SHIFTING TO PROPORTIONATE LIABILITY

- 6.1 The issue of allocation of liability was the subject of extensive debate in Australia through the 1980s and 1990s. This resulted in the introduction of proportionate liability for the construction sector in some states. Subsequently, a perceived insurance crisis emerged, generally traced back to the collapse in 2001 of HIH Insurance, a major general, professional indemnity and public liability insurer.⁸⁴
- 6.2 By 2003 it was agreed that State Governments and the Federal Government would enact legislation to shift from joint and several liability to proportionate liability for economic loss claims founded on lack of reasonable care. Each of the states enacted legislation to bring about this shift in the liability regime. However, there were differences between each state's legislation.
- 6.3 In 2009 it was agreed that the differing proportionate regimes would be harmonised, so that identical regimes would prevail throughout Australia.

⁸⁴ See generally Hon Justice Owen *The Failure of HIH Insurance: Vol 1A Corporate Collapse and its Lessons* (HIH Royal Commission, Sydney 2003).

This effort is continuing, but recent indications are that significant differences remain between states and interested stakeholders about the extent and even the effectiveness of proportionate liability regimes.⁸⁵

- 6.4 This chapter will examine why and how Australia has made the shift from joint and several liability to proportionate liability. It will also examine whether or not CER makes it desirable that New Zealand should also make such a shift. This requires determining the extent to which there are trans-Tasman markets for the sectors that have incurred large scale losses and whether the two different liability regimes lead to inefficiencies or inhibit trans-Tasman trade and market integration.
- 6.5 Calls for Australia to shift from joint and several liability to proportionate liability began in the 1980s, but it was not until the 1990s that state laws began to change. In 1993, the state of Victoria mandated by statute that the building industry would be governed by a proportionate liability regime, rather than joint and several liability.⁸⁶ This was followed by New South Wales in 1997.⁸⁷ Similar regimes were also introduced in South Australia and Northern Territory. These moves addressed concerns of perceived unfairness to defendants, especially those who were or considered themselves to be only minimally at fault. Increased unfairness to plaintiffs was addressed through existing or updated builders' warranty insurance requirements, in each State.⁸⁸

85 Standing Committee on Law and Justice "Tort Law – Proportionate Liability" (Officer's Paper, Canberra 2012) at 2 and 3. Major issues remaining include whether proportionate liability should be broadly defined to include all wrongs resulting from a lack of reasonable care, or more narrowly to include only claims in negligence or closely akin to negligence; whether contracting parties should be permitted to contract out; and whether to return to joint and several liability in "consumer" cases as is currently the case in Queensland and Australia Capital Territories. The paper notes that Australia is the only common law jurisdiction to attempt to move so far to proportionate liability and there is therefore no legislative or practical experience to draw on. The paper also notes that it is unclear whether proportionate liability actually helps to keep professional indemnity insurance costs down, as it was intended to do. Applicability of proportionate liability to arbitrations is also problematic.

86 Building Act 1993 (VIC) ss131, 132.

87 Environmental Planning and Assessment Act 1979 (NSW), s 109ZJ.

88 Builder's warranty insurance schemes remain problematic, however. Insurers progressively withdrew from the market after the insurance crisis and State governments have had to replace or underwrite market-provided insurance – egg New South Wales in 2009 and Victoria in 2010. And whether current "last resort" schemes provide adequate or appropriate cover remains hotly contested. See Legislative Council: Standing Committee on Finance and Public Administration, Parliament of Victoria "Inquiry into Builders Warranty Insurance: Final Report" (2010) Ch 2 - 4.

- 6.6 In 1995 New South Wales considered a report produced by Professor Davis recommending that proportionate liability become the rule for all economic loss arising from negligence.⁸⁹ The prime reason for the recommendation was the concern among professional groups, notably accountants and auditors, that joint and several liability had the effect of increasing the cost of liability insurance. It remains an open question however whether the operation of joint and several liability was actually to blame; or if it was other factors such as corporate collapses, worsening claims records and higher costs due to external factors such as terrorism and natural disaster that drove up insurance costs.
- 6.7 This shift in the liability regime was not universally endorsed. In March 1999, the New South Wales Law Reform Commission recommended against proportionate liability. They considered that problems with joint and several liability only occur in a “very limited range of situations ... which must involve a finding of liability against a deep pocket or insured defendant in circumstances where there are other defendants and at least some of who are not amenable to recovery by the plaintiff”.⁹⁰
- 6.8 The movement in favour of proportionate liability was ultimately successful, and in 2003 the Commonwealth and State Attorneys-General agreed that they would implement legislation effecting this change. Proportionate liability would apply where there was economic loss, in cases akin to negligence. For most states, this meant extending or replacing the proportionate liability regime that had already been established for the building industry to other circumstances where there was economic loss (though not all economic loss was necessarily included). The Commonwealth and State laws were implemented in 2002 and 2003.
- 6.9 Personal injury was specifically excluded because of the greater importance of plaintiff protection in these cases. The review panel chaired by Justice Ipp noted that under proportionate liability, since the plaintiffs bear the risk of one defendant’s insolvency, a person who is mentally or physically harmed by two people may be worse off than a person who is harmed by one.⁹¹ These arguments were not seen as relevant in cases of economic loss. Instead questions of indemnity insurance cover and the role of professional lobby groups were seen as influential in promoting the shift to proportionate liability.⁹²

89 JLR Davis *Inquiry into the Law of Joint and Several Liability: Report of Stage Two* (Commonwealth and New South Wales Attorney-Generals, 1995).

90 New South Wales Law Reform Commission *Contribution between Parties Liable for the Same Damage* (Report 89, 1999) at 45.

91 D A Ipp and others *Final Report of the Review of the Law of Negligence* (Commonwealth of Australia, 2002) at [12.18].

92 B McDonald, *Proportionate Liability in Australia, the devil in the detail*, (University of Sydney Law School Legal Studies Research Paper 06/25, 2006) at 4.

- 6.10 Though there was a general intent that the law would be uniform as between different states, this has not yet been achieved. In 2009, Professor Davis provided further advice on the best way to achieve national uniformity.⁹³ There were four key changes recommended. The first was that courts be required to take into account all those liable, whether or not the parties to litigation, as provided for in Queensland's legislation. The second is that agreements between defendants to contribute should be recognised, as per Northern Territory, Tasmania and Western Australia. Third, that parties should not be allowed to contract out, and fourth, that proportionate liability would also apply to disputes before arbitration, as well as those in the courts. Professor Davis's recommendations have not been universally accepted. Debate continues over contracting out and applicability to arbitration as well as other significant issues.

LESSONS FROM THE AUSTRALIAN EXPERIENCE

- 6.11 There has been substantial commentary on how the legislation has been applied since its enactment nearly 10 years ago.⁹⁴ There appears to be a tentative conclusion that the proportionate system has caused a "considerable increase in the complexity and cost of litigation and made settlement by way of an effective offer of compromise or negotiation and mediation more difficult".⁹⁵
- 6.12 However it could be argued that the problems of complexity arise irrespective of which liability regime applies. The Australian concern about complex litigation is also reflected in New Zealand's experience with leaky buildings cases. These have become well known for the complexity of proceedings and for defendants or plaintiffs joining all conceivable wrongdoers. Obviously, this is happening under the existing joint and several liability regime.
- 6.13 It is therefore probable that either system of liability will result in complicated proceedings whenever the underlying factual situation is complex and there are multiple possible defendants. In circumstances where loss has been caused by many concurrent wrongdoers, there will inevitably be incentives to join them all, because other parties will be seeking to minimise their own liability. The key issue is whether it is the claimant or the defendants who have the incentive to join as many potentially liable parties as possible. This decision is

93 JLR Davis, *Proportionate Liability: Proposals to Achieve National Uniformity*. (Unpublished paper, 2009). Professor Davis's paper was an analysis of the Report of Anthony Horan from 2007, A Horan *Proportionate Liability: Toward National Consistency* (Report for National Justice CEOs, 2007).

94 See for example D Levin "Proportionate Liability: the Australian Experience – Parts 1, 2 and 3" (2011) 9-11 *BuildLaw*; O Hayford "Proportionate Liability – its impact on contractual risk allocation" (2010) 26 *BCL* 11; B McDonald, above n 92; D Jones "Proportionate Liability – Reform or Regression?" (2007) *ICLR* 62.

95 Levin, Part 1 above n 94 at [12]; see also Part 2 at [11].

dependent on which side of the dispute bears the risk of meeting the liability of unjoined parties.

- 6.14 From this perspective the two different liability regimes simply shift the burden of risk between the available parties, and it is unlikely that one will result in more or less complex proceedings. It should also be noted that under either a joint and several regime or a proportionate regime, it is intended that defendants will ultimately only bear their proportionate level of liability. The difference is only apparent if one or more liable defendants is unavailable to pay their allocated share of the loss.
- 6.15 This is the factor which distinguishes the two liability regimes. From the point of view of the plaintiff, the advantage of joint and several liability is that they can recover the entire loss whether or not a particular defendant is absent or insolvent. Conversely, from the perspective of the defendant this is its very disadvantage. We would therefore expect defendants to favour proportionate liability and plaintiffs to favour retaining joint and several liability.

CER CONSIDERATIONS

- 6.16 The Australian decision to shift to proportionate liability for economic loss has particular significance for New Zealand, not simply because Australia has a similar legal system and is our neighbouring jurisdiction, but also because of CER. The initial agreement in 1982 established a free trade area, particularly in goods, between the two nations. The full completion of free trade in goods was accelerated in 1988, so that by 1990 tariffs and quotas between the two markets had been eliminated. CER was always intended to go beyond trade in goods and services, and cover the full range of economic activity. In particular, competition law has been harmonised, which has facilitated the establishment of firms that can readily operate across both jurisdictions. This has been especially noticeable in certain market sectors, such as the manufacture, distribution and sale of foodstuffs, and a wide range of manufactured goods.
- 6.17 Over the three decades since the signing of the agreement there has been a greatly increased integration of the two economies. In some market areas the two economies act almost as one, and the law mirrors and facilitates this process. In other areas this process is much less noticeable, and the two jurisdictions operate independently. This is particularly the case in the small and medium enterprise (SME) sector, where goods and services are consumed in local markets.
- 6.18 In determining whether or not CER should be a key factor in assessing the case for change, it is necessary to examine the characteristics of the market in these sectors that would be most affected by such a change. The two areas that are most frequently cited as most likely to be affected by a shift to proportionate liability are the construction industry and the finance and professional services industries.

- 6.19 The major impetus in New Zealand for a reconsideration of the joint and several liability regime has been the construction industry, as a result of the leaky home crisis. In Australia, in the states of Victoria and New South Wales, a shift to proportionate liability in the building industry occurred some years before the general shift to proportionate liability. The building and construction industry in New Zealand has some specific features that differ from Australia. The small scale of building firms in New Zealand is a particular feature of the industry. Most of the firms, especially in the residential sector, are entirely focussed on the domestic market, usually within their own region. Nearly 80 % of building contractors are small firms employing no more than 5 staff. Firms build as few as one or two houses per year, and only 23 % of houses are built by “large” firms who build more than 30 houses a year.⁹⁶ Similarly the architectural and design sector has many small firms. However, building products supply firms are larger, and often operate on a trans-Tasman basis.
- 6.20 Different sectors of the construction industry will have different incentives to take into account CER considerations. The desire for proportionate liability largely has its origins in the perceived unfairness that building construction and design firms will incur liability for losses caused by other parties from whom they cannot recover. Typically they have in mind the absent or insolvent developer. In these cases the liability regime in Australia has been cited as a more desirable model for New Zealand because it is seen as a fairer solution by the industry, irrespective of CER considerations.
- 6.21 Firms operating on both sides of the Tasman currently have to operate under two different legal regimes for liability. Larger firms, whether in construction of the buildings or in manufacturing of building supplies, could benefit from a common liability regime in the two jurisdictions. This could be expected to lower legal and administrative costs for such firms, since they would be able to incorporate the advantages of a single liability regime common to both markets into their costing models. However, this benefit may be hard to quantify in practice, and in any case it will not be available until Australia achieves harmonisation of the various proportionate liability regimes.
- 6.22 The professional services sector is the second major industry category that would be affected. This sector includes accounting, finance, legal service, and other professional services. Parts of this sector are increasingly dominated by multinational firms with a strong presence on both sides of the Tasman. The banking system in New Zealand is particularly dominated by firms that are predominantly Australian owned and domiciled, although New Zealand subsidiaries may operate more or less autonomously. In Australia, the professional services sector was seen as the principal beneficiary of a shift to proportionate liability across all Australian states. The move to proportionate liability was accompanied by a limit or capping of liability for auditors and

96 I C Page and J Fung “Cost efficiencies of standardised new housing” (Building Research Association of New Zealand Study Report 247, 2011) at 6.

other professional advisers. The combined effect of proportionate liability and a maximum limit of liability were intended to provide greater certainty for professionals, especially for the availability and cost of indemnity insurance.

- 6.23 A common trans-Tasman liability regime could bring further benefits for the sector. In theory the trans-Tasman market for liability insurance could further reduce or help hold costs down since insurance companies would not have to account for different liability regimes in their pricing models. Transaction costs should reduce as a result of the efficiency gains derived from only having to factor in a single pricing model on both sides of the Tasman. This last point assumes that New Zealand and Australia can operate efficiently as a single market or insurance pool for professional indemnity and/or public liability insurance. This may not be the case: it may be that the two markets are sufficiently distinct due to characteristics unrelated to the liability regime, and it may therefore be difficult to derive any saving from a common liability rule.
- 6.24 Thus far there has not been a significant amount of work done in this area by government officials charged with developing trans-Tasman outcomes. In August 2009 Prime Ministers Rudd and Key announced the trans-Tasman Outcomes Framework. This included a commitment to outcomes in a range of areas of business law. The area covers insolvency law, financial reporting policy, financial services policy, competition policy, business reporting, corporation law, personal property securities law, intellectual property law and consumer policy. Since then additional elements have been added, including a single patent examination process, announced in February 2011 by Prime Ministers Key and Gillard. Whilst these areas could include consideration of liability regimes affecting them, this does not appear to have been the subject of specific consideration by officials as part of the development of CER.
- 6.25 Harmonisation of business law between Australia and New Zealand is generally regarded as desirable, unless there are clear reasons within either jurisdiction that it is not an appropriate solution. The arguments for or against proportionate liability have not previously taken into account CER objectives. Instead, the advantages and disadvantages of different liability regimes have been analysed purely from a domestic standpoint,⁹⁷ without determining whether CER considerations should lead to harmonisation of the law. In Australia at least, differences in legislation and policy still persist between states as well.

⁹⁷ The Sapere Report refers to the Australian position, but does not consider the issues from a CER perspective.

- 6.26 In our view, CER is a relevant consideration for this review, and we welcome submissions that address the desirability of harmonising the law on liability among multiple defendants. Harmonisation would mean that New Zealand would shift to a proportionate liability regime, given that Australia, both in the Commonwealth and the states, made the shift to proportionate liability in 2003, and are working to further harmonise the law to remove inconsistencies between states. In the event that it was considered desirable to shift to a proportionate liability regime, it would be sensible that the New Zealand law be as close as possible to the Australian law, including the reforms that have been recently proposed.

Questions

- Q22 How relevant is the Australian experience for reform of liability rules in New Zealand? To what extent do the reasons and conditions that led to this change in Australia in 2003 also apply in New Zealand?
- Q23 How important is it that there be one liability regime applying across Australia and New Zealand?
- Q24 What weight should the Commission give CER when considering whether to recommend changes to New Zealand's liability rules?
- Q25 Given that the different Australian states have not yet harmonised their liability regimes, if New Zealand decides to adopt proportionate liability, how should we draw on the Australian experience?

Chapter 7

Other jurisdictions

INTRODUCTION

7.1 In the previous chapter we discussed how Australia had dealt with reforms to joint and several liability. We now move on to briefly discuss the approach that other comparable jurisdictions have taken. In particular, we have considered the law in the following countries:

- (a) United Kingdom;
- (b) Canada; and
- (c) United States of America.

UNITED KINGDOM

Statutory reforms

7.2 Around the time that the New Zealand Law Commission was undertaking the apportionment of liability project, the United Kingdom Law Commission released a consultation document regarding joint and several liability.⁹⁸ The Commission reached the conclusion that there were “convincing arguments of principle against replacing joint and several liability by *full* proportionate liability”.⁹⁹ Further, the Commission noted that:¹⁰⁰

If there were an overwhelming case in terms of economic efficiency, or the overall public interest, for sacrificing sound principle, we would consider the form of modified proportionate liability which excludes consumers and reallocates some of the uncollected share up to 50 per cent of each defendant’s share (exemplified by the US reform of securities legislation) to be the most pragmatic way of reforming joint and several liability. But we regard the policy objections to joint and several liability to be, at best, insufficiently convincing to merit a departure from principle...

98 United Kingdom Law Commission *Feasibility Investigation of Joint and Several Liability* (1996).

99 At [7.1] (emphasis in the original).

100 At [7.4].

- 7.3 The United Kingdom Law Commission stated that they did not believe that a full project on joint and several liability should be undertaken,¹⁰¹ although they suggested other possible solutions to the plight of professional defendants be looked at, such as reforming s 310 of the Companies Act 1985 to allow auditors to limit their liability and/or statutory caps.¹⁰²
- 7.4 This is a convenient point to note that the issue of “deep pockets” is more relevant to professional defendants in the United Kingdom, rather than in the building and construction sector. This is because, with respect to the latter, a local authority’s duty of care is more limited than in New Zealand, and they are generally not liable if a building, when finished, is defective in quality or causes pure economic loss.¹⁰³
- 7.5 In respect of one subset of professional defendants, namely directors and auditors, the United Kingdom Department of Trade and Industry released a consultative document in December 2003 about their liability.¹⁰⁴ In it, it was noted that, since the *Feasibility Investigation of Joint and Several Liability*, the Government had also “rejected the arguments developed by the major accountancy firms for fundamental reform of the principle of joint and several liability.”¹⁰⁵
- 7.6 However, the United Kingdom Government had invited the Company Law Review to consider the issue further, and brought forward the Limited Liability Partnerships Act 2000. The Company Law Review, though, also rejected proposals for proportionate liability, as it would shift the burden from the at fault auditor to the innocent plaintiff.
- 7.7 The Department of Trade and Industry commented that the Government did not believe it right to consider the adoption of proportionate liability solely in respect of the audit industry, and that it would need to be part of major reform of the law of negligence.¹⁰⁶ As such, it was outside the scope of this consultative exercise. Instead, reform of s 310 of the Companies Act 1985, so as to allow auditors to limit their liability by contract, was floated.¹⁰⁷ Such

101 At [7.5].

102 At [7.6].

103 *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL). The Judicial Committee of the Privy Council declined to overturn the New Zealand Court of Appeal’s refusal to follow *Murphy* in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC), a decision which has recently been confirmed by the New Zealand Supreme Court in *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC 158, [2011] 2 NZLR 289 and further developed in *Body Corporate 207624 v North Shore City Council (Spencer on Byron)*, above n 70.

104 Department of Trade and Industry (UK) *Director and Auditor Liability: A Consultative Document* (December 2003).

105 At [6.6].

106 At [6.7].

107 At [6.8] – [6.12].

reform was effected by sections 532 to 538A of the Companies Act 2006 (UK), albeit subject to conditions.¹⁰⁸

Developments in case law

- 7.8 For a short period in 2006 it appeared that the United Kingdom Courts would replace joint and several liability with proportionate liability for a narrow and rare type of personal injury case. The House of Lords applied a tightly confined exception to joint and several liability in the case of *Barker v Corus UK Ltd*,¹⁰⁹ based on their approach to causation and how they analysed loss, on the particular facts. The plaintiff was the widow of a mesothelioma victim. Mesothelioma is a fatal disease caused by inhalation of asbestos fibre, and can be contracted through a single exposure. The victim had been exposed to asbestos by two employers and also when self-employed. The House of Lords held that the defendant employer was liable on the basis of having materially increased the risk of harm, but was liable on a proportionate basis rather than jointly and severally, because the exposure was a separate source of increased risk rather than an indivisible cause of a single injury.
- 7.9 This limited adoption of proportionate liability did not last. Joint and several liability was immediately restored by statute as the rule for mesothelioma cases by section 3 of the Compensation Act 2006 (UK). The rejection by Parliament of proportionate liability was apparently a direct result of public discontent with the restriction on compensation that proportionate liability would lead to for the families of mesothelioma victims.

CANADA

- 7.10 The rule of joint and several liability was considered a number of times in Canada between 1979 and 1998, both at federal and state level, and both generally and as it applies to specific sectors.¹¹⁰
- 7.11 It would be fair to say that the overwhelming outcomes of these various reviews were that joint and several liability should be retained, although there have also been some sector specific reforms. For example, the Canadian

108 The prohibition in New Zealand on auditors limiting their liability, as found in s 204 of the Companies Act 1955, was removed by s 33 Companies Amendment Act 1993, and was not re-enacted in the Companies Act 1993.

109 *Barker v Corus* [2006] UKHL 20, [2006] 2 AC 572.

110 See Alberta Law Reform Commission *Contributory Negligence and Concurrent Wrongdoers* (1977), Uniform Law Conference of Canada *Consolidation of Uniform Acts* (1985), British Columbia Law Reform Commission *Report on Shared Liability* (1988), Ontario Law Reform Commission *Report on Contribution Among Wrongdoers* (1988), Ontario Ministry of Financial Institutions *Final Report of the Ontario Task Force on Insurance* (1986), Law Reform Commission of Saskatchewan *The "In Solidum" Doctrine and Contributory Negligence* (1998) and Standing Senate Committee on Banking, Trade and Commerce *Joint and Several Liability and Professional Defendants* (1998).

Business Corporations Act 1985 was amended in 2001 to provide a modified proportionate liability regime for certain forms of misconduct under that Act.

- 7.12 Two provinces, British Columbia and Saskatchewan, have also made reforms to the rule of joint and several liability in cases where there is contributory negligence on the part of the plaintiff. In the rest of the common law provinces, joint and several remains the general rule for negligence.
- 7.13 The Negligence Act 1996 (British Columbia) provides as follows:

Apportionment of liability for damages

- (1) If by the fault of 2 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 to which each person was at fault.
- (2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.
- (3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

- 7.14 The result of this provision is that there is proportionate liability where the plaintiff is found to have contributed to the loss. Joint and several liability remains under the common law where the plaintiff is not at fault.

- 7.15 Similarly, in Saskatchewan, the Contributory Negligence Act (Chapter 31 of the Revised Statutes, 1978), provides that:

Apportionment of damage or loss

- 2(1) 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.
- (2) Nothing in subsection (1) operates so as to render any person liable for any damage or loss to which his fault has not contributed.

- 7.16 As in British Columbia, the Saskatchewan modification only applies if the plaintiff contributed to the loss through his or her own negligence. In 2004 this legislation was amended to provide for the apportionment of uncollectable contributions:

Apportionment of uncollectable contribution

3.1(1) In this section, "other persons found at fault" means:

- (a) the person suffering the damage or loss if that person has been found to be at fault; and
- (b) the other persons found to be at fault from whom the contribution can be collected.

- (2) If the court is satisfied that the contribution of a person found at fault cannot be collected, the court shall, after determining the degree in which each person is at fault, make an order apportioning the contribution that cannot be collected among the other persons found at fault, proportionate to the degrees in which they have been respectively found to have been at fault.
- (3) This section applies only to damages or losses caused or contributed to by a person's acts or omissions that take place on or after January 1, 2005.

7.17 This change introduces proportionality to allocation of uncollectable shares. Since these provisions came into effect the defendants, and in cases of contributory negligence the plaintiff, share the risk of an insolvent defendant in accordance with their contribution to the wrong. The risk is not borne wholly by a negligent plaintiff (as in British Columbia) or each defendant jointly and severally (as under pure joint and several liability). The following example illustrates how this might operate in practice:

Example:

- The loss is quantified at \$7000. The plaintiff is found to be 10% at fault, D1 is 30% at fault and D2 is 60% at fault. Therefore D1 is liable to the plaintiff for \$2100 and D2 is liable to pay \$4200 (the sum being equal to \$6300, or 90% of the total loss).
- If D1 becomes insolvent, the uncollectable contribution is \$2100. In accordance with their proportion of wrongdoing, D2 will be required to pay an additional \$1800 while the plaintiff will bear the remaining \$300 of unrecoverable loss.
- If D2 becomes insolvent, the uncollectable contribution is \$4200. In accordance with their proportion of wrongdoing, D1 will be required to pay an additional \$3150 while the plaintiff will bear the remaining \$1050 of unrecoverable loss.

7.18 In 2002, the Attorney General for British Columbia undertook a review of civil liability. This recommended that the rule of joint and several liability be abolished entirely. This recommendation was not well received by the public, and no changes were made. The Law Society of British Columbia commented that:¹¹¹

It is not clear that it is in the public interest to change the system to make innocent plaintiffs bear the risk of a defendant's insolvency. In the absence of evidence that the current law is not operating well, it is difficult to postulate on possible alternatives for reform. If government's concern is with a particular industry (for example, insolvent defendants in the construction industry) consideration could instead be given to legislative changes in the industry concerned, rather than re-writing the law of negligence as a whole. For example, it may make more sense for government to consider requirements for performance bonds or mandatory minimum insurance, rather than embarking on a general revision to the law of joint and several liability.

111 Law Society of British Columbia "Access to justice at stake in government's civil liability reforms" *Benchers' Bulletin* No. 4 (2002) < www.lawsociety.bc.ca > .

- 7.19 Overall it appears that Canada, like the United Kingdom, is adopting a cautious approach to reform. This position contrasts sharply with their neighbours, the United States of America, which is discussed in more detail below.

UNITED STATES

- 7.20 In the past three decades, there has been a marked trend within in the United States away from joint and several liability and toward some form of proportionate liability. The *Restatement on Torts – Apportionment*, noted that by 1999 the majority of states (33 out of 50) had modified the common law and equitable positions on joint and several liability and contributions by multiple tortfeasors, but in widely varying ways.¹¹² Subsequently, a further 11 states have adopted reform, with some completely eliminating joint and several liability.¹¹³
- 7.21 Commentators have identified several factors contributing to reform. Those favouring reform point to the need to curb the influence of plaintiff-friendly juries in civil trials, particularly in claims for personal injury where a defendant who is only peripherally at fault may be left with considerable liability.¹¹⁴ Those who are more critical suggest that the burden on defendants is overstated, and lobbying by the insurance industry is the critical factor.¹¹⁵ The strong personal injury focus makes the particular rationales for reforms in the United States of little direct relevance to New Zealand conditions. However, it is instructive and valuable to look at the United States experience of reform of the rule of joint and several liability because of the range of possible reform models adopted in the different states.
- 7.22 Six jurisdictions retain joint and several liability, while the remaining have adopted one or more of the following elements of reform:
- (a) Limit joint and several liability to objectively quantifiable loss. For example under this approach compensation for personal injury on a joint and several basis is only available for medical bills, lost wages, and other quantifiable loss but not for the intangible elements of the loss such as pain and suffering.
 - (b) Limit joint and several liability to defendants who are “substantially” responsible for the loss. Thresholds for determining when a party is

112 American Law Institute *Restatement of the Law: Torts – Apportionment of Liability* (San Francisco, California, 1999) at § 17 and following tables.

113 See Sonia Di Valerio (ed) “Comparative/Contributory Negligence and Joint and Several Liability: a state by state summary” (July 2009) American Bar Association . In 2011, Pennsylvania and Oklahoma have also abolished the rule.

114 See for example the discussion in G N Meros Jr “Toward a More Just and Predictable Civil Justice System” (1997) Fla St UL Rev.

115 See for example Frank J Vandall “A Critique of the Restatement of Torts (Third), Apportionment as it Affects Joint and Several Liability” 49 Emory LJ 565.

substantially responsible vary across different states, from as low as 15 % through to 30 % or higher. Some states modify the idea of joint and several liability as between defendants to one of joint liability for the principle defendant only. Under this model, only a wrongdoer who is liable for more than 50 % of the damage (or in some jurisdictions, more than 60 %), may be required to compensate for the full loss.

- (c) Preclude joint and several liability for most forms of negligence, but retain for intentional torts. Some jurisdictions retain joint and several liability for particular forms of negligence that are considered to be more egregious, such as environmental harms or driving while intoxicated.
 - (d) Limit joint and several liability if there is contributory negligence on the part of the plaintiff. This applies to varying levels. In some states, contributory negligence precludes all recovery. In some states straight proportional recovery applies in cases involving contributory negligence. Some states have adopted the different approach of comparing the plaintiff's liability with each individual defendant, and allowing the plaintiff to recover (on a joint and several basis) from a particular defendant only if that defendant's wrongdoing was greater than the plaintiff's wrongdoing.
 - (e) Impose a proportional cap on joint and several liability, beyond which the plaintiff bears the risk of loss. The proportional cap varies between different states, for example a more defendant-friendly proportional cap would provide that no defendant will be liable for more than 1.5 times the loss attributable to that defendant. A plaintiff-friendly cap could be 3 times the loss attributable.
 - (f) Allow joint and several liability up to 50 % of the total damage, so that the plaintiff recovers at least 50 % of the loss but bears the remaining risk of a defendant who is insolvent or otherwise judgment proof.
- 7.23 Many states combine elements of the reforms listed above in different ways, while others adopt one element only. For example, South Dakota's rule is enviably brief, providing that "any party who is allocated less than 50 per cent of the total fault allocated to all parties may not be jointly liable for more than twice the per cent of the fault allocated to that party."¹¹⁶
- 7.24 Most recently, Pennsylvania has passed the Fair Share Act 2011, eliminating joint and several liability for negligence (but not intentional torts), with exceptions for defendants who are more than 60 % liable; environmental damage cases; and defendants causing damage as a result of driving while intoxicated.

116 South Dakota CL 15-8-15.1.

- 7.25 Reform in the United States has been gradual. For example, Oklahoma first restricted joint and several liability in the 1970s and 1980s so that it did not apply in cases of contributory negligence.¹¹⁷ In 2004, reforms provided that joint and several liability only applied if the defendant is more than 50 % responsible or for intentional or recklessly caused damage. In 2009 the intentional and reckless damage exceptions were removed. Only in 2011 did Oklahoma shift to full proportional responsibility.¹¹⁸

CONCLUSION

- 7.26 The experience of other common law countries shows that there is no consensus in the best way to approach joint and several liability. Each jurisdiction examined is attempting to find the most equitable and efficient balance of burdens between the defendant and plaintiff, in light of the law of causation and the broader social context.

Questions

- Q26 Are any of the liability models used in other jurisdictions discussed in this chapter preferable to the current system of joint and several liability in New Zealand? If so, why? And if not, why not?

117 See *Anderson v O'Donohue* 677 P 2d 648 (Okla 1983) and *Laubach v Morgan* 588 P 2d 1071 (Okla 1978).

118 The current legislative provision is contained in Title 23: Damages, § 15.

Chapter 8

Economic arguments

INTRODUCTION

- 8.1 Much of the discussion and debate over the relative merits of joint and several versus proportionate liability is phrased in terms of “fairness”. It is often asserted that proportionate liability should be adopted because it would be fairer to multiple defendants in that they would each only face their proportionate share of the plaintiff’s loss. By contrast, in its 1992 and 1998 Reports the Law Commission rejected proportionate liability because of its unjust effect on plaintiffs, in that it would frequently lead to their being unable to recover all of their loss. The various hybrid possibilities, for instance a rule that allows proportionate liability for the so-called peripheral wrongdoer, can be seen as attempts to achieve some balance between the interests of defendants and plaintiff, to achieve a result that is relatively fair.
- 8.2 There is an alternative approach to analysing the merits of the two liability rules. This alternative concentrates on discovering not which rule would be “fairest” but rather which rule is likely to produce economic efficiency; that is, an optimal allocation of economic resources in society. This approach applies an economics or law and economics framework and insights to compare the likely effects or incentives that each rule would produce. The efficient rule in the context of civil liability of multiple defendants for negligence will be one which produces due care at the lowest overall cost. An efficient rule does this by providing the necessary incentives to encourage defendants and plaintiffs to act in their own best interests and in ways that will achieve optimal (lowest) costs. The economics approach assumes that participants in a system are rational and will be strongly influenced by whatever incentives the system supplies as they pursue their own best interests.
- 8.3 This Chapter summarises how the economic analysis of the liability rule alternatives has developed over the past twenty or so years. There have been relevant contributions from Australia and the United States as well as New Zealand. The analysis suggests that in the current state of knowledge neither joint and several liability nor proportionate liability is so demonstrably preferable that it should be preferred purely on the grounds that it would

achieve better or more efficient results overall. But the analysis is useful to help examine how either rule may encourage different behaviours and therefore whether any undesirable behaviours should be controlled for.

ANALYSIS IN NEW ZEALAND

- 8.4 The Law Commission recognised the relevance of economic arguments when it conducted its 1990s Review. Two New Zealand economists were commissioned to provide analysis to the Law Commission. Professors Blyth and Sharp reported to the Commission in 1995, and later published a slightly less technical version of their findings.¹¹⁹
- 8.5 The authors approached their task by hypothesizing a “market for care”. Potential plaintiffs are consumers demanding services, including a satisfactory level of care in their delivery. Potential defendants supply services including the required care. The varying standards of care imposed under the law of negligence are presumed to be efficient for the purposes of analysis. Based on these parameters the authors develop hypothetical supply and demand curves and analyse which liability rule produces the lowest total costs in a range of situations including no missing defendants; with the likelihood of missing defendants; with or without a “deep pocket” such as an insurer or a territorial authority in a building case. The total costs being measured are the costs of precaution or cost of taking care, plus the sum of the possible loss if there is breach and damage.
- 8.6 The study found, with important qualifications, that proportionate liability and joint and several liability are broadly equivalent in terms of efficiency in many expected situations. The authors found that proportionate liability is likely to be efficient:¹²⁰

Proportionate liability coupled with contributory negligence, provided damages are correctly assessed and allocated according to relative fault, provides the incentive necessary for overall cost minimisation.

However joint and several liability will often be efficient.¹²¹

In the absence of uncollectible shares or deep pockets it is not clear *a priori* that there are important efficiency arguments in favour of proportionate liability vis-à-vis [joint and several] liability with contribution. In reaching this conclusion we have assumed that courts develop and apply rules that approximate cost-minimising standards of precaution.

Even where there is a strong possibility of uncollectable shares, joint and several liability and proportionate liability may be similar in terms of relative

119 C A Blyth and B M H Sharp “Solidary and Proportionate Liability: an Economic Analysis” (Unpublished paper, 1995); C A Blyth and B M H Sharp “The Rules of Liability and the Economics of Care” (1996) 26 VUWLR at 91.

120 Blyth and Sharp “The Rules of Liability and the Economics of Care”, above n 119 at 107.

121 Blyth and Sharp “Solidary and Proportionate Liability” above n 119 at 30.

efficiency depending on the subsidiary rule that determines how or if the uncollected share is redistributed. The authors noted that proportionate liability with the ability to redistribute uncollected shares to other defendants is similar in terms of efficiency to joint and several liability with contribution. They also pointed out that both are consistent with the courts' dominant concern with compensating the plaintiff – the plaintiff is fully compensated subject to any fault on their part, which is dealt with as contributory negligence.¹²²

- 8.7 The one situation where the authors find joint and several liability less efficient is where there is a deep pocket. They conclude that: “[joint and several] liability applied to an industry with deep pockets does not provide the incentives that produce an efficient outcome.”¹²³ The authors reason that other potential defendants will lower their standards to inefficient levels because there is less risk that they rather than the deep pocket will face a claim. Plaintiffs may also reduce their level of care, and the deep pocket may create inefficiencies by taking unnecessary care or by withdrawing services.
- 8.8 The authors therefore prefer proportionate liability over joint and several liability and characterise the latter as effectively insurance for plaintiffs against missing negligent defendants. They recognise that any reform must address the common law concern to compensate the injured party. Their proposed solution is that plaintiffs insure themselves against missing, negligent defendants. They speculate that this “may well be” less expensive than the cost of joint and several liability once additional precautionary costs encouraged by the risk of missing defendants are taken into account.¹²⁴ They also acknowledge as a potential alternative to adopting proportionate liability that it may be possible to address circumstances in some industries that have led to deep pockets.¹²⁵
- 8.9 The authors' final comment is instructive. They say that proportionate liability's principal advantage, which means it contributes to economic efficiency, is that each defendant's liability for damage is measured by and does not exceed “his or her personal responsibility” – liability is based on degree of fault, “i.e. the extent to which the actual level of care departs from the economically optimal level.”¹²⁶ At first glance this appears a very attractive proposition – defendants must pay for “what they are responsible for”, and no more. There are two obvious counter-arguments however. First, the proposition runs counter to the orthodox view of causation and liability, where the defendant is liable for all the damage they have caused the plaintiff.

122 Blyth and Sharp “Solidary and Proportionate Liability” above n 119 at 30.

123 Blyth and Sharp “The Rules of Liability and the Economics of Care”, above n 119 at 107.

124 Blyth and Sharp “Solidary and Proportionate Liability” above n 119 at 31.

125 Blyth and Sharp “The Rules of Liability and the Economics of Care”, above n 119 at 108.

126 Blyth and Sharp “Solidary and Proportionate Liability” above n 119 at 31; Blyth and Sharp “The Rules of Liability and the Economics of Care”, above n 119 at 108.

On a simple “but for” analysis if a defendant has caused a particular harm they are liable for all of it because they are responsible for all of it. By implication, the authors may be suggesting that damages be moved from compensating for all damage caused, to punishing the assessed level of fault in each case. This would be a truly revolutionary change in legal principle.

- 8.10 Secondly, even if the “only what the defendant is responsible for” measure is just another way of saying “their just and equitable share of the damage done, based on their actions” this outcome is an assessment not a measurement. It is unlikely, in practice, that what they are held liable for is the amount or proportion by which their level of care fell short. There is no regular or predictable link between defendants’ wrongful actions (fault) and the harms that actually occur. Given the uncertainty of assessment and the unpredictability of harm it is doubtful that the prospect of proportionate liability for failure to take care provides any better or more efficient incentive to take due care.

- 8.11 The economic case made for proportionate liability plus insurance did not persuade the Law Commission in 1998. The Commission said:¹²⁷

The Commission accepts the authors’ conclusion ... that the imposition of liability upon “deeper pockets” creates economic inefficiencies because they then adopt excessive levels of care... We are not, however persuaded by the further conclusion that, where there is a “deep pocket”, the adoption of a proportionate liability rule would be economically beneficial because it would have the effect of increasing the care undertaken by the claimant. We think this is an unproven assumption. Can it really be suggested that a result of proportionate liability would be second-guessing of auditors by creditors or shareholders present or potential of a company?

- 8.12 A more recent contribution in New Zealand has contested a number of Blyth and Sharp’s conclusions. In 2004 in a review of the relevant law and economics literature David Goddard QC and Liesle Theron concluded that there is no clear case for adopting proportionate liability in place of joint and several liability.¹²⁸ They concluded that the two rules create similar incentives to take care, with neither being more or less efficient. A particular system of proportionate responsibility constructed for a particular industry or set of circumstances may provide some efficiencies, but the potential is unclear. It is likely that a particular system of joint and several liability tailored for a particular case could produce similar results, but perhaps less often or in fewer circumstances. The authors suggested that the best approach would be to allow potential defendants to limit their liability by contract or disclaimers.¹²⁹

127 *Apportionment of Civil Liability* (1998), above n 4 at [4].

128 D Goddard and L Theron *Joint and several Liability: Literature Review* (Ministry of Economic Development, Draft Memorandum, 2004).

129 A more detailed summary of Goddard and Theron’s analysis is provided in the Sapere Report, Appendix 7, 134 to 135.

- 8.13 Goddard and Theron suggest that Blyth and Sharp's analysis overlooked an accepted law and economics conclusion or assumption that incentives to take care and expected care levels are not affected by errors by courts in assessing damages, unless the errors are very large and that the same is true regarding uncertainty as to quantum of damages. Effects are felt however where courts err when setting the standard of care, or there is uncertainty as to the required standard.¹³⁰
- 8.14 In terms of the risk of absent defendants, Goddard and Theron conclude that "both liability rules create incentives for parties to take the same level of care, if liability is fault-based (i.e. not strict liability) and the Court sets an efficient standard of care where the cost of precaution plus expected harm is minimised overall, for each injurer".¹³¹ While this conclusion might seem counter-intuitive, Goddard and Theron explain it in the step change that exists for most potential defendants between sufficient care and no liability, and lack of care and liability. The incentive to avoid liability is strong and should be sufficient for most potential defendants. Other commentators have pointed out that the costs or efforts required by a potential defendant to avoid liability are identical, whether or not there is risk of insolvent co-defendants or there is a deep pocket.¹³² Goddard and Theron do agree that the presence of additional factors, such as solvent potential defendants who are risk averse and who expect that others may be insolvent, may lead to excessive increase in precaution.¹³³
- 8.15 This last point has been echoed recently regarding the New Zealand housing sector. In its report on housing affordability in New Zealand the Productivity Commission has noted that territorial authorities, as deep pockets, may have strong incentives to become risk-averse and indulge in excessive care in the shape of over-regulation and over-inspection to avoid disproportionate liability as seen in leaky homes cases.¹³⁴
- 8.16 There is therefore reasonable consensus in New Zealand that the combination of joint and several liability and a deep pocket is one situation that may lead to inefficiency. It is also the case, however, that the analysis predicts that this result is not inevitable, and inefficiencies from deep pockets can be controlled in other ways. Possibilities include encouraging deep pockets to be risk neutral rather than risk-averse. Actual methods would depend on the particular case, but ensuring clear information in advance about the required standard of care, for instance by a territorial authority with inspection responsibilities, could encourage efficient levels of care not

130 See Sapere Report at 134.

131 Goddard and Theron, above n 128 at [9], quoted in the Sapere Report at 135.

132 M Richardson "Report on the Economics of Joint and Several Liability versus Proportionate Liability" (Victorian Attorney-General's Law Reform Council, Expert Report 3, Melbourne, 1998).

133 Goddard and Theron, above n 128 at 135.

134 *Housing Affordability Inquiry* above n 80 at [9.6].

only from the inspector/regulator but also from other participants. Others would not be inclined to be careless and let the regulator/inspector take up the slack if it is clear that the regulator will most likely have taken care and not be liable.

OTHER CONTRIBUTIONS

- 8.17 Consideration of the efficiency of liability rules began in the United States in the early 1980s, starting with some of the founders of the law and economics school. Two writers who have written extensively since 1990, Lewis Kornhauser and Richard Revesz have produced conclusions that match the New Zealand trend; that there is no clear “winner”, in efficiency terms.¹³⁵ The authors have studied the operation of the liability rules in a range of situations and examined their efficiency both where matters go to trial and where cases are settled. Not surprisingly joint and several liability sets a higher price on wrongdoing, but this is not necessarily less efficient than proportionate liability given the likely higher deterrent effect. As the Sapere Report notes, the degree to which one liability rule is more effective than the other will be specific to an industry, case or jurisdiction.¹³⁶
- 8.18 An important point, applicable to virtually all of the analysis and economic argument emerges from an Australian contribution from Megan Richardson.¹³⁷ All of the contributors are working from an identified base of economic theory, and applying it to actual or potential conditions to predict how the two liability rules may perform or produce more or less efficient results, in reality. Professor Richardson has moved from theory to reality and attempted to look for empirical data to test whether predicted effects actually occur. The presence of a perceived insurance crisis in Australia in the 1990s and the shift to proportionate liability in the construction industry provided opportunities to study whether joint and several liability did lead to higher or unaffordable insurance costs and whether proportionate liability made any difference. Her research suggested that although insurance companies indicated that joint and several liability may have led to increased premiums in the order of 20 to 30 %, uncertainties in the evidence made it difficult to conclude that proportionate liability would lead to net benefits in insurance costs.¹³⁸
- 8.19 One reason that led Richardson to infer a lack of net benefits in insurance terms is what she calls the “Gatekeeper” effect. Professionals and other potential deep pockets who face potentially higher costs under joint and several liability, including through increased insurance costs, may naturally

135 L Kornhauser and R Revesz “Joint and Several Liability” in P Newman (ed) *The New Palgrave Dictionary of Economics and the Law* (Palgrave MacMillan, London, 1998).

136 Sapere Report, at 136.

137 M Richardson, above n 132.

138 At [2.10].

tend to act as the “cops on the beat”, to discourage and prevent primary wrongdoers from causing harm and liability. Richardson argues that the Gatekeeper function may be efficient, because it reduces the risk of inefficient deterrence, and may lead to more efficient activity levels. For instance, a major firm auditor who refuses to take on an audit of a particularly risky client may actually be exercising the most efficient level of precaution.¹³⁹

- 8.20 Professor Richardson’s discussion of the Gatekeeper effect is itself theoretical, because the data does not exist to examine it empirically. Her work nevertheless adds to the consensus, that there is no clear case for proportionate liability, and certainly not as a rule that will be efficient in all situations.

SUMMARY

- 8.21 The economic arguments demonstrate that particular situations where deep pockets may emerge deserve to be examined carefully. The arguments do not go so far to suggest that proportionate liability is the only or even the obvious answer in such cases, however. Nor in the Law Commission’s view do they suggest a need or justification for the adoption of a more universal of proportionate liability, on efficiency grounds.

Questions

- Q27 To what extent should a liability rule balance fairness or justice concerns with economic efficiency? How can the best balance be achieved? If there must be a trade-off between fairness and efficiency, which should be preferred?
- Q28 Do you think it is true that some categories of defendants in New Zealand tend to become “deep pockets”? Which defendants are particularly affected? Do you think this is a problem? Why or why not?
- Q29 Do you favour using proportionate liability to deal with the issues of “deep pockets”? Are there other options to prevent “deep pockets” bearing disproportionate liability? Are there other ways to prevent “deep pockets” becoming risk averse?

139 At [2.10] and [2.12].

Chapter 9

The case for change

JOINT AND SEVERAL AND PROPORTIONATE LIABILITY

- 9.1 When assessing the case for change it is appropriate to weigh the relative merits of each option. In doing so, we need to look beyond our local jurisdiction and consider the way in which different liability models operate overseas. It is also important to consider whether harmonisation with Australia is desirable in this area. CER may provide an argument for change even if the options are otherwise finely balanced, because harmonisation can assist in achieving macro-economic advantages.
- 9.2 The current system is geared toward protecting the plaintiff. The principal advantage of joint and several liability is that the party who has been injured does not bear the risk of absent or insolvent defendants. This protection rests on the idea that the parties who have actually caused the harm are each fully responsible for the loss, irrespective of their respective contribution to the total loss relative to each other. Because of this, each defendant should bear the risk of the absent or insolvent defendants, even if the result is that they become liable for the consequences of someone else's actions as well as their own. The status quo therefore has an element of consumer protection, and is regarded in common law terms as "just".
- 9.3 This has been particularly evident in the leaky homes crisis. The claimants are making claims because they own a damaged home. Even where the claimant was the original owner when the house was built, they are unlikely to have had professional skills in contracting for building services. They were not therefore in the position to determine the relevant skills and capabilities of the numerous professional, trade and business providers that collectively go to build houses. It is the people who were contracted by the owner, plus any negligent regulator or inspector, who have individually or collectively caused the loss. Joint and several liability has provided the homeowner with the best opportunity to recover their loss.
- 9.4 The contra argument is that contractors or regulators, who bear joint and several liability for losses that they have not themselves directly caused, may become risk averse. This can increase costs, or reduce the prospects of innovation. It has been argued that one of the reasons that New Zealand has

high building costs is that large scale builders, especially from Australia, will not enter the market when faced with increased and unpredictable costs for builders stemming from the joint and several liability regime. It has also been suggested that joint and several liability gives territorial authorities strong incentives to be risk averse, and may contribute to higher than necessary housing costs.¹⁴⁰

- 9.5 Our overall conclusion at this stage is that there are not compelling efficiency grounds for proportionate liability. Joint and several liability and proportionate liability are equally efficient systems of allocating the total loss. It is certainly true that the two different systems lead to advantages for either the plaintiff or defendant and therefore significant differences in perceived fairness to one or the other. However, available economic analysis does not show that one system is superior to the other. Instead the choice between the two systems must be based on an overall assessment of who should bear the risks of absent or insolvent defendants.
- 9.6 One qualification needs to be added to this analysis. This broad equivalency in economic effects presumes that the relevant system of joint and several liability allows liable defendants to seek contributions from other liable defendants. As we have discussed, that is generally the case in New Zealand but not in every case because neither contribution nor a contributory negligence defence are available in pure contract cases. Should joint and several liability eventually be retained in some or all circumstances, then perhaps it might be argued that it would be useful to consider bringing contract cases into line with other causes of action, by allowing contract defendants to seek contribution and plead contributory negligence where appropriate.
- 9.7 In the case of joint and several liability, the risk lies with the defendants. The plaintiff has the theoretical certainty that they will be compensated for their loss, provided there is at least one defendant who can be brought to judgment and can cover the full cost. Such a defendant has to bear the loss caused by missing or insolvent defendants.
- 9.8 In the case of proportionate liability, the risk lies with the plaintiff, since each defendant will only be liable for the proportion of loss allocated to them, according to their comparative responsibility. In the event of a missing or insolvent defendant, this loss will be borne by the plaintiff.
- 9.9 Both systems lead to complex litigation, since this is a function of the number of parties who have potentially caused the loss. In joint and several liability, defendants have the incentive to join as many other defendants as possible in order to share the loss. In proportionate liability it is the plaintiff who has this incentive. They need to join as many defendants as possible in order to ensure as much of the loss as possible will be covered by the various defendants in the proportion they contributed to the loss.

140 *Housing Affordability Inquiry* above n 80 at 161.

OTHER LIABILITY OPTIONS

- 9.10 The choices for reform are not limited to either joint and several liability and proportionate liability. Modifications to the existing system of joint and several liability are possible, as are modified or partial proportionate liability, or proportionate liability in some circumstances only.
- 9.11 The options include limiting joint and several liability to principal liable defendants. In this case a minor or peripheral defendant will only be liable for their proportionate share of the loss. As noted in Chapter 3, the percentage threshold between a “major” and a “minor” liable defendant will inevitably be arbitrary. This could also lead to further complexity of litigation as various defendants seek to demonstrate that they are in the minor category. But such a system may address one of the most commonly repeated complaints from, for instance, the construction sector – that a sub-contractor or someone else who bears only a small or minimal proportion of overall responsibility for a given damage can end by being forced to pay the full cost.
- 9.12 A further modification would be to apply the principle of contributory negligence to determine whether joint or several liability or proportionate liability should apply. In circumstances where the plaintiff had contributed to the loss, the liability would be determined on a proportionate basis. Where there was no fault on the part of the plaintiff then joint and several liability would continue to apply. As noted in Chapter 3, this would continue to recognise that the blameless plaintiff should not have to bear the risk of the absent or insolvent defendant. Again it might be necessary to have a threshold test of contributory negligence before this principle should apply. It may not be reasonable that a plaintiff should lose the protection of joint and several liability when their negligence had only made a small contribution to the loss.
- 9.13 Both these modifications were considered by the Law Commission during its last review. In its Final Report the Commission did not recommend modification to the joint and several regime in the case where the plaintiff’s contributory negligence had contributed to the loss.
- 9.14 Any modification to the existing regime will introduce new levels of complexity into a liability system that already results in complex litigation. The advantages of the reform for either the plaintiff or the defendant will have to outweigh the disadvantages of increased complexity that modifications to the joint and several liability regime will inevitably cause, while also achieving a result that is as fair as possible.

ISSUES IN THE BUILDING SECTOR

- 9.15 A possible shift to proportionate liability raises the issue of the protection of the consumer interests. In the case of the building sector, the building owners are consumers who are making claims against the suppliers and regulators of building services. Since proportionate liability results in plaintiff homeowners bearing the risk of absent or insolvent defendants, it is necessary

to have a system which ensures that defects are remedied in the event that the wrongdoer is absent or insolvent.

- 9.16 The approach in Australia has been to have compulsory builders warranty insurance. These schemes are administered at the state level. Builders are required to be insured, so that in the event that the builder fails to remedy a defect, the homeowner can claim against the policy. When the schemes were first developed in the 1970s there was a wide variety of cover. Over time the schemes have evolved, and the cover has become more similar in most state schemes. Initially most schemes were undertaken by private insurers, but since the financial crisis private companies have exited the market and the schemes are now underwritten or run by state government agencies. The insurers vacated the market because the market was not sufficiently profitable, and arguably because the firms feared or suffered reputational damage in the event of disputes. Since this was a sector where the insured did not choose the insurer, disputes were more common than in other insurance markets. Disputes may also be more likely today than under earlier schemes because all but one of state schemes since the financial crisis now provide only a “last resort” warranty, when the builder is dead, insolvent or unable to be found.¹⁴¹ The same factors that have seen insurers vacate the builders warranty market in Australia are likely to disincline insurers to become involved in a New Zealand warranty scheme. It is also doubtful whether New Zealand consumers would regard “last resort” cover as fair or adequate, given the Australian experience.
- 9.17 It is the view of the Law Commission at this stage that a shift from joint and several liability to proportionate liability can only be justified if there is adequate protection of the plaintiffs’ or the consumer interest.
- 9.18 This has particular significance given the background of the leaky building crisis. The building industry through industry bodies and the territorial local authorities have been the principal proponents for a change from joint and several liability to proportionate liability. They have been of the view that it is unfair that a defendant, who may have only contributed to a minor extent should incur liability for the absent or insolvent co-defendant. There is less direct evidence of the views of building owners, but we infer that they are more likely to consider that anyone who has actually caused their loss should be responsible for compensating them for it. We are interested in receiving submissions and comments about the operation of the joint and several liability rule from persons who have experience as plaintiffs in claims involving multiple defendants, as well as from defendants who have been subject to the rule.

141 The Queensland scheme is the exception “first resort” scheme, in that it allows complainants to seek dispute resolution assistance from the relevant state agency, with cover still available if the builder cannot or does not pay for assessed damage.

- 9.19 There has been some recognition in discussions about the operation of joint and several liability of the importance of consumer protection. Local Government New Zealand has proposed that there should be a compulsory building warranty scheme. This is seen as one of the necessary elements, along with the new regulatory regime that is being introduced to improve building quality. However, the experience of the Australian states shows that an effective warranty scheme will either have to be provided by government, or have a government guarantee. How or if such a scheme could work in the commercial building sector, after *Spencer on Byron*, is a further issue that would need to be resolved.
- 9.20 The Law Commission's present view in respect of at least the residential sector of the building industry is therefore that a shift from joint and several liability to proportionate liability would have to be accompanied by the establishment of a compulsory building warranty scheme that would provide cover in the event that the builder failed to rectify defects. There would need to be a clear indication from Government that a compulsory warranty scheme would be established as an element of any changes to the liability regime that weaken the ability of homeowners to recover fully from defendants. It is likely that the two propositions of a change in liability regime and the introduction of a builders warranty scheme would need to be introduced as a package to ensure continuity of consumer protection. The package should also detail how the interests of commercial building owners would be addressed.

OTHER SECTORS

- 9.21 We also note that there are other reforms that could limit liability in certain sectors, such as the caps imposed for the finance and audit sectors in Australia. These industry schemes are arguably of more significance than the change in the liability regime, since they provide certainty on the total amount at risk. Such certainty is of considerable importance to insurers, and therefore to the insured, in determining the level of premiums.

CONCLUSION

- 9.22 The Commission does not consider that a shift from joint and several liability to proportionate liability could be limited to the building sector. In Australia the shift to proportionate liability first occurred in the building industry in the states of New South Wales and Victoria. However, this was later extended to all negligence/lack of reasonable care actions claiming economic loss or property damage. We consider that if New Zealand were to make such a shift then it should also be applied universally, to the same range of potential actions. This would have the advantage of harmonising New Zealand law with that of Australia.

The insurance experience in Australia for determining risk and recent litigation history concerning proportionate liability may then be usefully applied in New Zealand where appropriate.¹⁴²

- 9.23 An additional advantage of a comprehensive shift from joint and several liability to proportionate liability may be simplicity. All those affected should only have to deal with a single system for allocating liability when there are multiple defendants.¹⁴³ This advantage, however would still apply if New Zealand retained joint and several liability. The only people who would have to deal with the complexity of two liability allocation systems are those who operate on both sides of the Tasman. This is a factor to be taken into account in considering which liability system is most appropriate for New Zealand.
- 9.24 In the end, the decision on whether to reform the liability rules for multiple defendants must be based on an overall assessment. Key considerations will include the appropriate allocation of the risk for absent defendants and whether and how each system or rule deals with known difficulties such as the deep pockets issue. An essential test is which rule or combination of measures is most likely to produce results that are efficient, and fair to and between the parties. We expect that submissions in response to this paper will help us address these issues.

Questions

- Q30 Overall, do you think that joint and several liability is a fair system?
- Q31 Overall, do you think that proportionate liability is a fair system?
- Q32 What, if anything, could be done to improve the fairness or efficiency of outcomes under joint and several liability (either to the plaintiff, the defendant, or overall)?
- Q33 If proportionate liability were to replace joint and several liability, what if any adjustments would you consider necessary to ensure fair outcomes?
- Q34 How do you think the interests of plaintiffs and defendants should be balanced in a fair system of apportioning liability? How important is avoiding disproportionate burden on some defendants, compared to ensuring that plaintiffs receive an effective remedy?

142 But it must be noted that the exact extent or coverage of the proportionate liability regime, beyond pure negligence actions, is one of the key issues still to be harmonised between Australian states. If New Zealand were to adopt proportionate liability regime then it will be important to engage with Australian state and federal authorities on the preferred outcome of harmonisation.

143 However, Australian experience shows that at least for a transitional period there could be added complexity, as parties seek Court rulings on whether proportionate liability extends to a given case, e.g. arguments over whether alleged co-defendants are liable for the same or distinct damage.

- Q35 What, if any other changes do you think are necessary or desirable to improve our liability rules? Why?
- Q36 Overall, do you think that New Zealand should retain joint and several liability or shift to proportionate liability or adopt a hybrid option? Why?

Appendix 1

TERMS OF REFERENCE

Review of the Joint and Several Liability Rule

The Government has asked the Law Commission to review the application of the joint and several liability rule in New Zealand.

Where two or more parties are liable for the same loss or damage to another party, because of separate wrongful acts, the joint and several liability rule holds both or all of the wrongdoers 100 % liable for the loss caused . The party who suffered the loss can claim against one wrongdoer to recover the whole of the loss. That defendant can then seek contribution from any other wrongdoers.

The Law Commission will consider whether the rule should be retained, replaced or amended, either generally, or in relation to particular professions or industries, including the building and construction industry, auditors and accountants.

The Commission will consider the key advantages and disadvantages of different forms of liability, including:

- joint and several liability;
- proportionate liability;
- liability capped by statute; and
- contractual limitations on liability.

Appendix 2

LIST OF QUESTIONS

- Q1 In what ways, if any, does joint and several liability work well at present?
- Q2 Under joint and several liability each defendant is liable for all the damage they are found to have caused, even if other defendants are also responsible. Is this fair?
- Q3 Joint and several liability only applies where the defendants are liable for the same loss or damage. How do you think this “same damage” requirement should be applied in practice?
- Q4 Joint and several liability is intended to ensure that the plaintiff is fully compensated for their loss, even if one defendant is missing or insolvent. Is this goal achieved in practice?
- Q5 Should plaintiffs be able to recover the full amount of their loss without claiming from all possible defendants who contributed to the damage? If so, why? If not, why not?
- Q6 How effectively does apportionment operate in practice? Does apportioning responsibility between several liable defendants do justice between defendants?
- Q7 Which, of joint and several liability and proportionate liability, do you consider fairer? Why?
- Q8 If a system of proportionate liability were introduced, what if any additional measure do you think would be needed to protect plaintiffs, for instance against uncollectable shares?
- Q9 Which if any of the hybrids or other alternatives to straight joint and several liability or straight proportionate liability do you prefer? Why?
- Q10 If the “peripheral wrongdoer” model is used, do you think it is necessary to include a threshold test or definition in legislation? If you support a statutory threshold, what threshold would you prefer? How should this be applied in practice?

- Q11 If the “plaintiff at fault” model is used, should there be a threshold level for contributory negligence by the plaintiff, before proportionate liability applies? If so, what level do you consider appropriate?
- Q12 Overall, which of the options for reform or the status quo do you prefer? Why?
- Q13 Should contributory negligence operate as a partial defence for all claims, regardless of whether the defendant is liable in contract, tort, or equity?
- Q14 Should defendants be able to recover contributions from all other potentially liable parties regardless of whether the defendant is liable in contract, tort, or equity?
- Q15 Should the rules relating to contributory negligence and contributions be the same whether the claim is based in contract, tort, or equity?
- Q16 Do you consider that leaky homes claims have exposed problems in the operation of the rule of joint and several liability? If so, what are they?
- Q17 Which of joint and several liability or proportionate liability do you think would produce fairer outcomes in leaky building cases? Why?
- Q18 Do you consider that the joint and several rule has adequately protected homeowners’ interests in leaky homes cases?
- Q19 Could a change to proportionate liability be limited to a specific sector?
- Q20 If New Zealand were to shift to a system of proportionate liability in the construction sector, would a compulsory builders’ warranty scheme be necessary to protect the interests of the homeowner? If so, how should this be funded and run?
- Q21 In the wake of the global financial crisis, do you consider that auditors and other professional advisers should be able to cap their liability, as in Australia? If so, how should a liability cap operate? What classes of defendant should receive the benefit of liability caps?
- Q22 How relevant is the Australian experience for reform of liability rules in New Zealand? To what extent do the reasons and conditions that led to this change in Australia in 2003 also apply in New Zealand?
- Q23 How important is it that there be one liability regime applying across Australia and New Zealand?
- Q24 What weight should the Commission give CER when considering whether to recommend changes to New Zealand’s liability rules?
- Q25 Given that the different Australian states have not yet harmonised their liability regimes, if New Zealand decides to adopt proportionate liability, how should we draw on the Australian experience?

- Q26 Are any of the liability models used in other jurisdictions discussed in this chapter preferable to the current system of joint and several liability in New Zealand? If so, why? And if not, why not?
- Q27 To what extent should a liability rule balance fairness or justice concerns with economic efficiency? How can the best balance be achieved? If there must be a trade-off between fairness and efficiency, which should be preferred?
- Q28 Do you think it is true that some categories of defendants in New Zealand tend to become “deep pockets”? Which defendants are particularly affected? Do you think this is a problem? Why or why not?
- Q29 Do you favour using proportionate liability to deal with the issues of “deep pockets”? Are there other options to prevent “deep pockets” bearing disproportionate liability? Are there other ways to prevent “deep pockets” becoming risk averse?
- Q30 Overall, do you think that joint and several liability is a fair system?
- Q31 Overall, do you think that proportionate liability is a fair system?
- Q32 What, if anything, could be done to improve the fairness or efficiency of outcomes under joint and several liability (either to the plaintiff, the defendant, or overall)?
- Q33 If proportionate liability were to replace joint and several liability, what if any adjustments would you consider necessary to ensure fair outcomes?
- Q34 How do you think the interests of plaintiffs and defendants should be balanced in a fair system of apportioning liability? How important is avoiding disproportionate burden on some defendants, compared to ensuring that plaintiffs receive an effective remedy?
- Q35 What, if any other changes do you think are necessary or desirable to improve our liability rules? Why?
- Q36 Overall, do you think that New Zealand should retain joint and several liability or shift to proportionate liability or adopt a hybrid option? Why?

