

European Society of Construction Law

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Allocation and durability of liability

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Allocation and duration of liability

One of the features of construction which differentiates it from other manufacturing processes is the number and variety of parties involved and the time-scale, both of the duration of the project and the life of the building or facility.

For example, there will typically be professionals of different disciplines, engineers, architects, quantity surveyors, also contractors, sub-contractors of various kinds and suppliers.

The duration of many larger projects is measured in years and the intention of the parties may be that the building will last for many decades or centuries.

Allocation and duration of liability

The purpose of this presentation is to highlight features of the common law systems in relation to:

- Allocation
Joint and several liability – Richard Bailey
- Duration
Limitation and contractual provision – Anthony Lavers

Joint and several liability – Common Law

Joint Liability

Several Liability

Joint and Several Liability

Joint and several liability – Common Law

Effect of joint and several liability

The parties are jointly and severally liable to the claimant. The claimant may enforce the relevant contractual obligation, in full, against either of the jointly liable parties.

The claimant has better rights of enforcement on the death of a co-obligor compared to where liability is joint.

Joint and several liability – Common Law

Joint and Several Liability in Tort

Defendants are jointly liable to the Claimant

The Claimant can recover the whole loss from just one Defendant

Between Defendants the liabilities are several

Joint and several liability – Common Law

Criticisms of joint and several Liability

- It has led to cases where a minor party pays for the whole of the loss
- Wealthy parties with little responsibility being brought into proceedings with potential liability
- If insured professionals were only liable for a proper proportion of overall liability this would encourage early settlement

Joint and several liability – Common Law

- *Civil Liabilities (Contribution) Act 1978*
- *Net Contribution clauses what are they and how do they change the normal presumption on liability*

The Consultant's liability to the Client under this [agreement OR deed] shall be limited to the proportion of the Client's loss and damage that it would be just and equitable to require the Consultant to pay, having regard to the extent of the Consultant's responsibility for that loss and damage, on the assumptions that the Key Consultants have:

- a) entered into an agreement with the Client containing a term no less onerous than clause [OBLIGATION TO EXERCISE REASONABLE SKILL, CARE AND DILIGENCE]; and*
- b) paid to the Client the proportion of the Client's loss and damage that it would be just and equitable to require them to pay, having regard to the extent of their responsibility for that loss and damage.*

Post-script on Joint and Several Liability

Legislation in Australia has abolished joint and several liability for construction projects to which it applies, so that maximum liability of a participant will be restricted to what the tribunal allocates based on his or her involvement in the project.

The Latham Report in the UK in 1994 proposed the abolition of joint and several liability and its replacement with 'proportionate liability' similar to the Australian model. This has not happened.

Duration of liability

Contract

- Time bars under contract
eg. as under FIDIC Clause 20.1
Typically bars contractor claims for extension of time
additional payment
May be time-bars on employer claims against contractor.
In general these are rigorously enforced by English courts.
- Defects liability period
Defects to be notified during this period typically 12
months from completion of works
Contractor has duty but also right to remedy defects

Duration of liability

Statute

Limitation Act 1980 (as amended)

Latent Damage Act 1986

Basic liability in contract	6 years from breach of contract
Liability where contract is executed as a deed	12 years from breach of contract
Basic liability in tort	6 years from occurrence of damage
Alternative latent damage period	3 years from discovery of damage
Final 'long-step' period	15 years from last possible act of negligence
Fraudulent concealment	Unlimited

Post-script on duration of liability

- The English courts, unlike those in some jurisdictions, will allow the parties to modify the statutory limitation period by contractual agreement, producing either a longer or a shorter duration of liability.
- Legislation in Australia has adopted a ten year statutory limitation period commencing at the issue of the occupancy permit, based on the French model. The Australian courts have had difficulty in interpreting this in relation to the British model they inherited.