

Apportionment between professionals

One of the first questions you ask when defending a claim against a professional is whether there is another party who may bear some responsibility for the claimant's losses. A key issue to consider in this context is the likely apportionment of liability between the party you represent and any co-defendant or potential third party defendant. The potential percentage contribution of an additional party has an impact upon the whole conduct of the defence. This newsletter looks at the factors which a court will take into account when apportioning liability.

In the majority of cases the basis for a claim for contribution or indemnity is the Civil Liability Contribution Act 1978.

It should always be remembered that it is a prerequisite of a contribution claim that the party from whom you are seeking a contribution must be liable to the claimant for the "same damage" in respect of which your party is being pursued. We recently used this point to our client's advantage and successfully argued that a contribution claim could not be brought against him.

In *Shepherd (Part 20 Claimant) v KS Tan & Co (A Firm) (Part 20 Defendant) (2006) LTL 18/4/006* we acted for KS Tan & Co, a firm of accountants. The firm had advised the directors of two companies in the 10 days before they went into insolvent liquidation. The liquidator of the companies subsequently pursued the directors for wrongful trading, misfeasance and in respect of transactions which he alleged were at an undervalue. The directors sought a contribution under the Contribution Act from the firm. We obtained summary judgment on behalf of the firm in respect of the wrongful trading and transactions at an undervalue elements of the claim on the basis that these claims could only be brought by the liquidator and as Tan owed no duties to the liquidator a contribution claim could not be brought against him. We also succeeded in reducing the claims which the directors were seeking a contribution for in respect of the misfeasance allegation on the grounds that the loss suffered by the companies allegedly caused by the directors was not the same damage as it was alleged had been caused by Tan.

Key principles

The overarching principle as set out in the Act is that the amount of any party's contribution

shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question

What aspects does the court consider when deciding what the extent of a person's responsibility for the damage? *Madden v Quirk* established that the two main considerations are

- blameworthiness of the conduct; and
- causative potency, or the extent to which the conduct has caused the damage

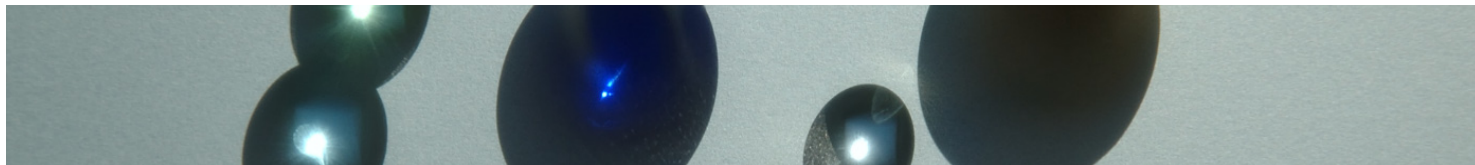
Hickman v Blake Laphorn and David Fisher: A recent practical example

This case dealt with the liability of a solicitor and a barrister arising out of the conduct of a personal injury claim. The claimant Mr Hickman had suffered a serious head injury in a car accident. On the morning of the trial on liability Mr Hickman was made an offer in settlement from the MIB in the sum of £70,000. He was advised to accept the offer and followed that advice. He later brought a claim against both the solicitor and barrister who had advised in relation to his claim.

The court held that the advice to settle was negligent as the lawyers had failed to take into account the real possibility that Mr Hickman would not be able to work in the future. Liability was apportioned two thirds to the barrister and one third to the solicitor. The reasons behind this split included

- The barrister was the senior member of the team.
 - a. He had the conduct of the case
 - b. He had the greater seniority and experience
 - c. He took the leading role in valuing the case
 - d. He gave the advice on settlement.
- The solicitor was the second in the legal team
 - a. She had the greater knowledge of the case, in particular Mr Hickman and the medical reports
 - b. Her duty was to intervene if she considered that the barrister's advice was wrong.

It would seem that the solicitor's breach was one of omission rather than commission. The barrister's conduct had the greatest impact on outcome and he therefore paid the larger contribution.



Brian Warwicker Partnership v Hok International Ltd: The role of non-causative factors

The Court of Appeal in this case re-examined the role that non-causative factors should play in apportioning liability on a just and equitable basis.

The claimant, a firm of engineering consultants were seeking a contribution from HOK, an architectural practice. The claim related to the development of a retail and leisure centre. The developer had brought a claim against the engineers arising from the design of the entrances which had led to excess cold air entering the building.

The issue in question in the case was whether the trial judge had been correct to take into consideration factors which he considered had not been causative of any loss in apportioning liability.

The Court of Appeal confirmed that a Judge is entitled to consider non-causative factors. The most important consideration when determining a just and reasonable outcome was the extent of a person's causative responsibility for the damage however other elements were relevant. In this case the trial judge found serious shortcomings in the overall performance of HOK and therefore held that they should pay 40% of the damages, despite the fact that the engineers were primarily responsible for the design of the doors.

The Court however did make the point that the role of non-causative factors should be limited and it was only appropriate to take them into account where there was a close connection between these factors and the conduct which did give rise to the liability.

The case confirms that the court can look at the Defendant's overall conduct in determining the extent of liability. However it should be remembered that the Defendant must still have committed some breach which has caused some loss. If a Defendant has acted in a way particularly disapproved of by Court, he may have to contribute a greater share than the analysis of causative potency would warrant.

Barker v Corus: joint and several liability

The law of joint and several liability means that even where more than one party is at fault, a single party can be held responsible for the whole loss suffered. That party should be able to bring a contribution claim against the other parties at fault, but it is

at his expense and if any other party is insolvent the solvent contributor is left to pay a larger share of the damages than he was responsible for.

Corus represents a departure from this position. The House of Lords apportioned damages on a proportionate basis despite the fact that a co-defendant was insolvent with the result that the claimant was not compensated for the whole of his loss.

The Lords characterised the case as an exception which followed on from the exceptional case of Fairchild. Both cases arose from claimants who had been wrongfully exposed to asbestos and who had contracted mesothelioma as a result. The nature of the disease is such that it can be caused by inhaling one asbestos fibre. Where a person has been negligently exposed by more than one employer it is therefore impossible to ascertain which exposure caused the disease. It is also true however that the longer the exposure the more likely it is that a person will contract it. It is not however a divisible injury which is partly caused by one period of exposure and made worse by another.

In Fairchild the court held that each employer who had negligently exposed the claimant could be held liable for the claimant's damage even though he may not have caused it on the basis that he materially contributed to the risk of causing the damage. Because the employer's liability was based on how he had contributed to the risk of harm, the court felt it fair that he should only have to pay in proportion to the contribution he made to the risk of the harm occurring. Each employer therefore was only liable for a proportion of the damages on the basis of the time he exposed the claimant to the risk of harm.

As matters stand, this case is confined to the particular facts of the case which arise from the difficulty in establishing which employer actually caused the harm. It remains to be seen whether the courts will be prepared to apply the principle more widely that each party should only be held liable for a proportionate share of the damages.



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