DAMAGE CAUSED BY SEVERAL PARTIES - TORTFEASORS AND CONTRIBUTION

- Philip Davenport

1. Introduction

Litigation in the construction industry frequently involves many parties and many claims for contribution. The following four recent cases exemplify some of the pitfalls.

The first case concerns a plaintiff (P) and three defendants (D1, D2, and D3). P and D1 engaged in the arbitration and settled their differences. P then sued D2 and D3 who immediately joined D1 to recover from D1 a contribution to the damages which D2 and D3 might be liable to pay P. D1 unsuccessfully argued that as D1 had settled with P, D1 could not have any further liability to contribute towards P's damages.

The second and third cases canvass the question of whether, when P, D1 and D2 are equally to blame, each should contribute one third of the total. The correct answer appears to be that P contributes 50% and D1 and D2 contribute 25% each.

The fourth case concerns the situation where D1's liability to P arises from breach of a statutory duty and D2's liability to D1 arises from a breach of contract. Because D1 failed to adequately plead the claim, D1 was unable to recover any contribution from D2.

This article includes comments on law reform.

2. The Ramyel case

The case of *Ramyel Pty Ltd v Hassell & Partners Pty Ltd* (NSW Supreme Court, Giles J, 1 September 1989) does not establish any new principles but applies existing principles of law. The owner engaged the contractor to construct residential units at Byron Bay. Two crib walls forming part of the construction work collapsed. The builder commenced arbitration proceedings against the owner claiming $480,000 allegedly owing under the contract. The owner counterclaimed for $1.4m damages allegedly suffered as a consequence of the builder's negligent, careless and unskilful work and for liquidated damages for delay.

The owner and the builder settled their differences and the deed of settlement provided that the owner would pay the builder $225,000. It also provided that neither party would institute proceedings against the other arising out of the execution of the works. This is known as a 'covenant not to sue'.

The owner then sued the architect and the engineer in tort. When a plaintiff claims that the same damage was caused by the independent negligent acts of several persons, those persons are called 'concurrent tortfeasors'. The architect and the engineer raised as a preliminary argument that the owner had recovered damages from the builder and could not recover against the architect and the engineer in respect of the same damage.

Giles J discussed the equitable doctrine that a claimant is precluded from double satisfaction, but he came to the conclusion that the evidence did not show that the owner had by the deed of settlement received satisfaction of the owner's claim in respect of the collapse of the crib walls. He pointed out that it may be that by the deed of settlement the owner did no more than rid himself of the builder's claim without receiving satisfaction of the owner's own claim.

It was not disputed that the owner had claimed against the builder, at least in part, in tort. The builder was therefore a concurrent tortfeasor. Giles J examined the question of whether a covenant not to sue one concurrent tortfeasor has the effect of precluding a subsequent claim against other concurrent tortfeasors. Giles J came to the conclusion that in respect of concurrent tortfeasors there are separate causes of action against each and hence judgment against one concurrent tortfeasor does not affect the causes of action against other concurrent tortfeasors. Giles J said:

> It is of no consequence that instead of judgment there is a covenant not to sue. The question is whether there is satisfaction in the eyes of equity and that means, in my view, that regard must be had to substance rather than to form, and that it must be decided as a question of fact whether or not the owner would recover double satisfaction, in whole or in part, if it recovered in these proceedings against the architect or engineer. That the deed may have been so framed as to embody a covenant not to sue on the part of the owner, as distinct from a release, will not be conclusive.

The result was that the owner's action against the architect and the engineer could be pursued. The engineer joined the builder to recover an indemnity or contribution pursuant to S5 of the Law Reform (Miscellaneous Provisions) Act 1946, which provides that, where damage is suffered by any person as a result of a tort, any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage.

The builder argued that as a result of the deed of settlement between the builder and the owner, the builder could not be a tortfeasor liable, or who would if sued have been liable. Giles J said that 'if sued' means 'if sued at any time'. The compromise of the arbitration proceedings did not mean that the builder if sued to judgment would not have been liable. Giles J said:

> ... the compromise neither established nor disproved the liability of the builder as tortfeasor, and it remains open to the engineer to establish that the builder would have been liable to the owner if sued before the compromise was effected.

If the arbitration had not been settled but an award had been made in favour of the builder exonerating the builder in respect of the owner's claim, then it seems that the builder would have been protected against a claim by the engineer or the architect for a contribution to the damages which the engineer or architect might be found liable to pay the owner (*Hood v Commonwealth*) (1968) VR 619).

3. Law Reform

A case such as this lends support to the contention that, when there are several concurrent tortfeasors, the contribution payable by each should be limited to the percentage of the responsibility for which the court determines that each is liable. Instead of the engineer being liable to the owner for 100% of the damage which the owner suffered as a consequence of the collapse (and having to seek a contribution from the builder under the Law Reform (Miscellaneous Provisions) Act) the argument is that the engineer should only be liable to the owner for such proportion of the owner's loss as represents the percentage responsibility of the engineer for the collapse. The owner (not the engineer) would have to sue the builder for the proportion of the loss that represents the percentage responsibility of the builder for the collapse. There are many statutory precedents for the individual assessment of the fault of each party (see *Fitzgerald v Lane* (1988) 2 All ER 961 at p 968, *Barisic v Devenport* (1978) 2 NSWLR III at p 151 and The American Tort Process by J G Fleming, Clarendon Press, Oxford, 1988 at pp 90 to 93.

As the law stands, if there are two concurrent tortfeasors, an engineer and a builder, and both to some extent negligently contributed to the same damage, the owner can sue one or both.

The owner can recover 100% of the owner's damage from either or both the engineer and the builder, even though the engineer's negligence may have made a very minor contribution to the damage and the builder is 90% responsible. If the owner sues only the engineer, the law leaves it to the engineer to sue the builder for a contribution and if the builder is insolvent, the engineer will be left with liability for 100% of the damage. Each concurrent tortfeasor bears the risk that it may be impossible to get a contribution from another tortfeasor. Those arguing for reform of the law claim that the present law is too solicitous of the interests of the plaintiff and that that risk should be transferred from the concurrent tortfeasor to the plaintiff. The consequence would be that, if one tortfeasor was 90% responsible for the damage and that tortfeasor had no assets to meet a judgment, the owner would only recover from the other tortfeasor 10% of the value of the damage. The owner rather than the other tortfeasor would bear the risk of insolvency by one tortfeasor.

Since professionals such as engineers and architects are more frequently in the role of tortfeasor rather than plaintiff, they are in the forefront of those calling for reform of the law. In theory at least, reform would appear to reduce the risk for professional indemnity insurers and could lead to a reduction in premiums.

The *Ramyel* case also illustrates the difficulty of settling a case where there are concurrent tortfeasors. In that case, the builder could only obtain a complete release against further liability for the collapse, if the owner had agreed in the deed that the owner had received full compensation for the collapse and would not attempt to sue anyone else to recover damages arising out of the collapse.

Without such promises, the builder would have to obtain separate releases from each concurrent tortfeasor.

Few of the problems arising from contribution between concurrent tortfeasors reach the courts. For example, a construction authority was faced with a claim in tort by a subcontractor based on allegedly misleading engineering design advice. The construction authority claimed that the builder, the architect and the engineering consultant were concurrent tortfeasors and should contribute to a settlement. All parties, except the engineering consultant, were prepared to engage in alternative dispute resolution proceedings (ADR) in an endeavour to avoid the enormous legal costs which would have been involved in an action with 5 separate parties and numerous claims and cross claims. All agreed that legal costs would far exceed the amount in dispute.

However, the engineering consultant stood firm, denied any liability and refused to participate in ADR. Eventually, to avoid further legal costs, all the other parties agreed on a settlement and various levels of contribution. The construction authority contributed to the settlement the amount which would, in the opinion of the construction authority, have been a reasonable contribution by the engineering consultant.

To avoid the possibility of a recurrence of the situation, the construction authority directed that no more work be given to that engineering consultant.

Several years later, the engineering consultant agreed with the construction authority to pay the amount which the construction authority had previously assessed as a reasonable contribution by the engineering consultant and the engineering consultant agreed that in future the engineering consultant would participate in ADR. The engineering consultant was then allowed to tender for further work with the construction authority.

Had the law been reformed so that each of the builder, the construction authority, the architect and the engineering consultant could only be liable to the plaintiff for a percentage of the plaintiff's total damage, the builder, the construction authority and the architect could have each separately settled with the plaintiff and left the plaintiff to sue the engineering consultant alone.

As the law stands, it was only necessary for the plaintiff to sue one of the concurrent tortfeasors and the plaintiff could have recovered from that tortfeasor 100% of the plaintiff's damages. In fact the plaintiff had commenced a Supreme Court action against the construction authority alone. This served to minimize legal costs for the plaintiff, but left the construction authority with the prospect of joining three other parties for a contribution under the Law Reform (Miscellaneous Provisions) Act.

In August 1989, the NSW Attorney General's Department published an Issues Paper 'Tort Liability in New South Wales' and invited public submissions, amongst other things, on reform of the law in the area of joint and several liability in tort and contribution between tortfeasors.

4. The Fitzgerald Case

The problem of how to assess damages where the plaintiff (P) and each defendant (D1 and D2) is one third

to blame for the accident has troubled courts for some time. In *Nathan and James v Vos* (1970) SASR 455 two youths were struggling with each other on the footpath and they both fell on the road into the path of a car. The South Australian Supreme Court (In Banco) held that each of the youths and the driver being one third to blame, the verdict in favour of each youth against the driver should be two thirds of the damages which the youth suffered. That decision may not now be good law.

In England in *Fitzgerald v Lane* (1988) 2 All ER 961 a pedestrian disobeyed a traffic light on a pelican crossing and was hit by two cars. The trial judge found each of the parties (P, D1 and D2) equally to blame and awarded P two thirds of his damages against each of D1 and D2. The consequence would have been that each of D1 and D2 would be liable to contribute one third. The Court of Appeal, (1987) QB 781 decided that P should only recover 50% of his damages and that D1 and D2 were each liable to contribute 25% only.

That decision was severely criticized by J G Fleming in an article in (1988) 104 Law Quarterly Review at p 6. On appeal to the House of Lords, the decision of the Court of Appeal was upheld, but on the basis that P was 50% to blame for his injuries. The House of Lords placed considerable emphasis on the NSW Court of Appeal's decision in *Barisic v Devenport* (1978) 2 NSWLR III.

In the Court of Appeal in the *Fitzgerald* case, Slade LJ used the logic that, if P had sued only D1, then each being equally to blame, P must recover 50%. He argued that because P sued two defendants, P should not recover against D1 two thirds of his damages instead of 50%. It must be remembered that where there are concurrent tortfeasors, judgment for the same amount is entered against both. It is then that any contribution between D1 and D2 is decided. While there is some logic in the argument of Slade LJ, it is not the correct approach.

The House of Lords held that the trial judge in the *Fitzgerald* case had misdirected himself in thinking in tripartite terms and that the correct approach was:

1. determine whether P has established liability against one or other or all the defendants;
2. assess P's total damage;
3. determine whether the defendant or the defendants (the onus being on them) have established that P contributed to P's damage;
4. if so, decide to what extent it is just and equitable to reduce damages for P;
5. when all these decisions have been made, apportion the contribution between the defendants.

Lord Ackner said:

> Apportionment of Liability in a case of contributory negligence between plaintiff and the defendants must be kept separate from apportionment of contribution between the defendants inter se. Although the defendants are each liable to the plaintiff for the whole amount for which he has obtained judgment, the proportions in which, as between themselves, the defendants must meet the plaintiff's claim do not have any direct relationship to the extent to which the total damages have been reduced by the contributory negligence, although the facts in any given case may justify the proportions being the same.

The legislation under consideration in the *Fitzgerald* case used the same words as those considered in NSW in *Barisic v Devenport* (see above) but there are differences in the wording of legislation in other states which differences would affect aspects of the application of *Barisic* or *Fitzgerald.*

5. The Andriolo Case

In *Andriolo v G & G Constructions & Ors* (1989) Aust. Torts Reports 80-235 Miles J in the ACT Supreme Court considered the situation where the plaintiff's contributory negligence was greater as against one defendant (D1) than the other defendant (D2). The plaintiff (P) sued D1 and D2 for personal injuries suffered when the plaintiff slipped on a scaffolding plank on a building site. D2 was the head building contractor and D1 was the bricklaying subcontractor. P was a director and an employee of D1.

Miles J found that both D1 and D2 had breached a regulation under the Scaffolding and Lifts Act requiring any person who carries out building work to take all measures to provide safe scaffolding and safe means of access. The plank on which P slipped was placed by some unknown person so that one end rested on the ground and the other on the scaffolding. P slipped while walking down the plank. Miles J held that it became part of the scaffolding and being narrow, on a slope and without handrails, it represented an unsafe means of access.

Although Miles J found that D1 and D2 had breached the regulation, he did not find that either was negligent. There was no evidence that the plank was put in position by anyone for whom either defendant was vicariously liable and Miles J did not consider that the risk of injury presented by the plank was so great that its very presence indicated negligence on the part of either defendant.

In the ACT, a defendant liable for breach of a statutory duty may claim apportionment by reason of the plaintiff's failure to take reasonable care for the plaintiff's own safety. The principles applicable to apportionment between parties are no different to those discussed above in the case of concurrent tortfeasors. It is otherwise in NSW (see *Barisic v Devenport* (1978) 2 NSWLR at p 151).

Miles J found that a case of contributory negligence was made out against P. P was a director of D1 and Miles J said that therefore the extent of P's contribution may appear to be greater against D1 than against D2 over whom P had no control. Miles J decided that P's damages should be reduced by 20% for contributory negligence but that the reduction should apply against the defendants as a whole.

Following the NSW Court of Appeal decision in *Barisic v Devenport* (see above), he decided that there could not be a different deduction as against D1 compared to that against D2.

D1 and D2 were each liable to the plaintiff for 80% of the plaintiff's damages. Each of D1 and D2 was entitled to an equal contribution from the other towards the 80%. *Fitzgerald v Lane* was not referred to in the judgment. Miles J said:

> Under sec. 12 of the Law Reform (Miscellaneous Provisions) Ordinance 1955 the amount of the contribution recoverable by one defendant tortfeasor liable to the plaintiff from another tortfeasor liable to the plaintiff in respect of the same damage is such as is found by the court to be just and equitable, having regard to the extent of the responsibility for the damage on the part of the tortfeasor from whom contribution is claimed.

In *Barisic v Devenport*, it was decided that it is only after the share to be borne by the plaintiff, if any, for his contributory negligence, on the one hand, and by the defendants, on the other, has been established that it becomes appropriate to apportion the defendants' share between them.

In *Barisic* at p 153 Samuels JA said that the conduct of the defendants as 'one unit', i.e. their combined conduct, must be considered against the conduct of the plaintiff to assess the deduction for the plaintiff's contributory negligence. He said:

> In my judgment, it is impossible satisfactorily to assess the extent to which the conduct of an artificial unit fell below some strictly fictitious combined standard of care.

In *Fitzgerald*, at p 970 Lord Ackner said:

> I should add that in reaching my decision, I have derived considerable assistance from the judgment of Samuels JA ...

If the legislature has imposed a scheme which Samuels JA finds 'impossible to assess', it is surely time for legislative reform.

6. The T.A.L. case

In *T.A.L. Structural Engineers Pty Ltd v Vaughan* (1989) VR 545 the Full Court of the Supreme Court of Victoria considered a claim by an injured worker (P) against the head contractor D1 for breach of S.9 of the Scaffolding Act which required D1 to ensure that the scaffolding was maintained in an efficient state and used by P. The court found D1 liable. D1 had a contract with D2 to supply scaffolding in accordance with legal requirements. D1 claimed that D2 was liable to indemnify D1 or contribute to D1's liability to P. D1 lost the case and it is instructive to see why.

At p 555 of the judgment, Kaye J points out that D1 made two significant omissions from its statement of claim. D1 failed to plead that it was an express or implied term of the agreement between D1 and D2 that D2 would indemnify D1 against damage which D1 might suffer as a consequence of D2 failing to provide the degree of scaffolding required by law. D1 also failed to claim damages from D2 for breach of D2's contract.

The court held that D2 was not in breach of the Scaffolding Act because P was not an employee of D2 and D2 was not in occupation or control of the site. D2 was simply supplier of the scaffolding under contract to D1. Therefore, D2 was not under a statutory or tortious duty to ensure that the scaffolding was maintained in an efficient state and used by P. D2's liability, if any, had to arise from D2's contract with D1. The Court held that it was 'settled law' that liability under S24 of the Wrongs Act 1958 of Victoria to make contribution to damages cannot arise out of a breach of contract.

Under the Civil Liability (Contribution) Act 1978 in England this gap has been closed. D1 in the *T.A.L.* case made an application to amend the pleadings to include a claim based on the contract, but the Court of Appeal refused leave to amend.

7. Conclusion

In the area of multiple parties and contribution there are many pitfalls and potential areas for unfairness. Lawyers frequently argue that some unfairness is the price to be paid for certainty in the law. However, in this area of law there is not such a degree of certainty that it could be said to justify maintenance of statutes which can be unfair.

Appeals for law reform based on academic arguments and individual instances of injustice rarely receive quick attention. J G Fleming in 'The American Tort Process', Clarendon Press, Oxford, 1988 at p 92 points out that what brought about reform in this area of the law in California was the impact on taxpayers, as a result of local government bodies being sued for road hazards, which may have contributed only a minor share in respect of accidents by under-insured drivers.

Imagine a road accident where 1% of the blame could be laid on a council or road authority. That defendant, if found negligent even to that extent, would have a judgment against it for 100% of the plaintiff's damages. With a limit on what can be recovered under third party motor vehicle insurance, there may come a time in Australia when plaintiffs will become so innovative that reform in this area of tort law will become an economic necessity for Governments.