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"Minor Defendants" – Law Commission proposal

Thank you for your email of 22 June, requesting comments from the New Zealand Law Society on the provision for relief for minor defendants, recommended in the Law Commission's Report on *Liability of Multiple Defendants*.[1]

The Law Society agrees with the Law Commission's recommendation to retain joint and several liability as the rule for allocating loss among multiple defendants, but is of the view that the concept of a "minor defendant" is misconceived and should not be adopted.

If the proposal for relief for minor defendants is to be adopted, the Law Society has a number of concerns regarding its suggested implementation, as outlined below.

Minor Defendant Concept

The Law Society has previously expressed concerns about the introduction of the concept of a minor defendant.

In its submission on the Law Commission's 2012 Issues Paper, *Review of Joint and Several Liability* (IP32), the Law Society responded as follows to the question, "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?":[2]

> *By definition, a defendant can only be liable for damage for which causation is proved. As a matter of law, the parties who are liable must have caused the loss and the loss must have been reasonably foreseeable. As between plaintiff and defendant, the result is completely fair. The principle behind joint and several liability is that a defendant's responsibility for harm is not diminished by the fact that another person's tortious conduct also contributed to it. Any potential unfairness is mitigated by a defendant's ability to apply for contributions from other responsible parties, or to join other defendants to the action, and the court's ability to make an appropriate apportionment.*

1 NZLC R132, 24 June 2014.

2 Submission dated 21 February 2013, at [2], available at http://www.lawsociety.org.nz/__data/assets/pdf_file/0005/84425/l-LC-Joint-and-Several-Liability-210213.pdf.

Concerns about implementation

We understand the Government has directed the Ministry to carry out further work regarding the Law Commission's recommendations that:

- the courts have discretion to relieve a minor defendant from the full effects of joint and several liability if the result would otherwise be unduly harsh/unjust; and
- the costs of the uncollected shares of insolvent or missing liable defendants be proportionally shared among the remaining defendants.

The Ministry notes that the provision for relief for a minor defendant is a novel idea that could have a significant impact on litigation, and that the proposal was not subject to public consultation. The Ministry has therefore asked for the Law Society's views on:

- how the process for a minor defendant to obtain relief would work in practice;
- the possibility of this process further prolonging and complicating litigation; and
- the possibility that the problem that needs to be addressed is not with joint and several liability rules but with tort law instead (suggesting that perhaps New Zealand courts take an expansive approach to tort liability and find defendants liable where liability would not be imposed in comparable jurisdictions).

Process for minor defendant obtaining relief

The proposed two stage process (set out at subsection 4 of the Law Commission's indicative draft) of (a) minor defendant status hearing/s, possibly pre-trial, followed by (b) an application for relief at any time up to 12 months after judgment, seems unnecessarily cumbersome and likely to result in increased costs. Subsection (3) contemplates a pre-trial application to be declared a "minor defendant", but it is difficult to see how a court could ever safely assess a defendant's relative responsibility on affidavit evidence alone and at such an early stage.

No clear standard is proposed which is to be applied by the court on a pre-trial application (such as a summary judgment type standard), nor is it clear how a plaintiff would be in a position to produce evidence of defendants' responsibility relative to other defendants. (For example, in a leaky building matter, the plaintiff may have incomplete information about the defendants' various roles and responsibilities during construction which may have occurred long before the plaintiff even bought the property.)

Rather than a separate application to be accorded minor defendant status, a better process might be that defendants serve a notice on the other parties, claiming minor defendant status in conjunction with their pleadings, with the issues being considered at the hearing once all the evidence is in. This would be comparable to the Third Party notice process under the Law Reform Act 1936. The plaintiff would still be at somewhat of a disadvantage in terms of adducing evidence to contradict a claim by a particular defendant that it had only "minor and limited responsibility for the plaintiff's loss", but the court could at least make a finding based on the evidence including cross-examination evidence.

Other practical concerns include:

- Presumably a defendant seeking relief as a "minor defendant" under subsection (4) would have to notify the other parties of that defendant's intention to do so. There is currently no provision for notice.
- If the application for relief is made and dealt with after the main trial, this may require the judgment to be stayed. There is nothing in the proposed relief provision as to the effect of an application for relief on enforcement of judgments.

A further issue with the two stage process as suggested by the Law Commission is the requirement that no application for relief be made unless the minor defendant(s) is/are the "only remaining party or parties available to meet the judgment sum or an unpaid part of the judgment sum." For this to be determined would require evidence as to the solvency of the non-minor defendants, which generally nobody but the relevant defendant is in a position to provide. There would need to be discovery on the issue of solvency and presumably expert evidence and cross-examination on solvency issues, which as noted below would add significantly to the cost and complexity of litigation. There is also a timing issue: if solvency is determined before trial, circumstances can change by the time the judgment comes to be enforced.

Risk of the proposed process further prolonging and complicating litigation

The proposal would add significantly to the cost and complexity of litigation, especially for plaintiffs, and how long it takes. Litigation is already very slow, complex and expensive. This is especially so for plaintiffs in multi-defendant matters. It should be noted that plaintiffs in multi-defendant matters are effectively required to run several cases at once. There will usually be common issues (for example, in a leaky building case, the defects and damage and scope of repair and to some extent quantum will be common issues), but a plaintiff faced with suing multiple defendants has the onus of proving that each defendant is separately liable and has caused loss.

That is not to say the litigation is not expensive for defendants too (which it is); but defendants only have to focus on the question of their own liability. Defendants can also share the costs of common issues (including defects etc and affirmative defences such as contributory negligence). It is common for one defendant to take the lead on contributory negligence allegations, while another defendant concentrates on quantum, for example. Given the already high cost of litigation for plaintiffs in multiple defendant cases, the law should be slow to impose further costs in the absence of a clear and pressing case for reform. The Law Society does not consider that there is such a case.

The prospect of a plaintiff losing up to 50% of its compensation whenever there is a so-called "minor defendant" also increases significantly plaintiffs' litigation risk and uncertainty of outcome.

All of the above concerns may be magnified in cases other than the relatively "simple" case posed by the Law Commission. For example, a case could involve a set of defendants, D1 to D5, all of whom are potentially liable under joint and several liability for 60%, 70% or 80% of the plaintiff's loss, and then a second set of defendants, D6 and D7, who are all potentially liable under joint and several liability for the remaining 20% of the loss. Just as D1 may be a minor defendant, so too may be D6 (or D2 or D7). Presumably the minor defendant regime is meant to apply equally to D1 as to D6 (although the meaning of "plaintiff's loss" in subsection (1) is a little ambiguous – it is unclear whether it means the plaintiff's *whole* loss). If so the plaintiff will then face minor defendant applications on several fronts, notwithstanding that D6 may be perfectly capable of bearing 20% of the loss irrespective of D7's presumed insolvency. Much more complex circumstances can be imagined.

The allowance of 12 months, which is also subject to any further enlargement of time that the court may grant in subsection (4), seems inordinately long and could well lead to delay in the payment of judgment sums otherwise due and owing.

The 12 month period in subsection (4) may also undermine the security of payments received in satisfaction of damages awards. If A gets a judgment which it chooses to recover against B and B pays, relying on B's rights of contribution, if any, only to find 12 months later that those rights are worthless because the other defendants have become insolvent; can B then apply for relief and recover some of the damages back from A? There seems no reason why not, under the relief provisions proposed. But what if A has spent the money or otherwise changed his, her or its position in the meantime? It is no answer to this concern simply to say that it may be taken into account in the court's discretion. Successful plaintiffs should be entitled to move on with some certainty.

Tort Liability Rules

The Ministry has asked whether the New Zealand courts take a relatively expansive approach to tort liability rules. The Law Society is not aware of a widely held perception that the New Zealand courts apply a different (lower or higher) standard of care than do courts in other jurisdictions, except perhaps in respect of the negligence liability of public authorities for defective commercial buildings.

Conclusion

Introduction of the proposed "minor defendant" regime would be a fundamental change and would add further delay, cost, complexity and uncertainty. The Law Society does not consider the perceived benefits would outweigh the substantial procedural complexity and uncertainty of the proposed regime.

These comments have been prepared with the assistance of the Law Society's Civil Litigation and Tribunals Committee. If you wish to discuss them, or have any questions, please do not hesitate to contact the committee's convenor Andrew Beck, via the committee secretary Jo Holland (04 463 2967, jo.holland@lawsociety.org.nz).

Yours sincerely

Chris Moore
President