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# Liability Briefing

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## ***Net contribution clauses***

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It is sometimes said that a consultant might be only 30% responsible for a claimant's loss and yet have to pay 100% of the damages. Does this really happen? If so, can anything be done about it? This *Briefing* provides the answers.

### **'Joint and several liability'**

Say, as an example, a claimant engages a consultant and a contractor and the consultant has a duty to inspect the workmanship of the contractor. If loss or damage is suffered by the claimant as a result of the contractor's bad workmanship and it is held that the consultant negligently failed to notify this bad workmanship, liability can be apportioned between them (under the Civil Liability (Contribution) Act 1978). But if, say, the contractor is not worth suing, the consultant has to pay the whole loss.

This rule that a defendant to whom a percentage has been apportioned has to pay all the damages where co-defendants are unable to pay their share is generally (perhaps misleadingly) known as that of 'joint and several liability' (although legally the concept of joint and several liability is now largely obsolete in relation to claims for contribution).

### **In fact, the contractor and consultant is each 100% liable to the claimant ...**

In fact, each party is separately liable to the claimant to the full extent for loss and damage that results from its breach of duty. In short, there are two causes of the loss or damage in question; with the consultant being liable for one cause (in the example above, negligent site inspection) and the contractor being liable for the other (the bad workmanship).

### **... but they can claim contribution from each other**

However, the claimant is not entitled to recover more than 100% of its damages. Thus, if it is paid 100% of the damages by the consultant, it cannot then seek to

recover the same or any amount from the contractor, even though the contractor is liable.

Further, the consultant and contractor can make a claim against each other for contribution under the 1978 Act, so that, if the consultant does pay 100% of the damages to the claimant, it can seek a contribution from the contractor. The court can take into account such factors as degree of fault and extent of causation, but only insofar as these are relevant to the claim for contribution. The liability of the consultant and contractor to the claimant remains the same.

What often happens is that the claimant sues both the consultant and contractor and the court apportions liability between them. However, such apportionment can only take place on the footing that the consultant and contractor are each 100% liable to the claimant. In practice, the claimant normally assumes that the consultant and contractor will each pay the amount that has been apportioned to them. However, it is perfectly open to the claimant, if it wishes, to enforce payment of any amount, up to the full amount, from either party, subject only to not being entitled to recover more than the full amount overall. If either party does not pay its apportioned amount for any reason (insolvency or anything else), the claimant will obviously exercise its right to enforce payment of the full amount from the other party.

### **The right to claim contribution may not be sufficient**

This is one reason why the right to claim contribution under the 1978 Act from another party liable in respect of the same damage may not be sufficient. If the contractor cannot pay its apportioned share, the consultant will have to pay the full amount. All this is really saying is that ***the right to claim contribution, as with the right to claim anything else, is only as good as the financial standing of the person against whom one is making the claim.***

Thus, as explained in the example above of bad workmanship by the contractor and negligent site inspection by the consultant, if say 30% is apportioned to the consultant and 70% apportioned to the contractor but the contractor cannot pay because it is insolvent, the consultant will have to pay the full amount. This does not mean that, as a result of the contractor's insolvency, the consultant's liability to the claimant increases from 30% to 100%. The consultant is 100% liable to the claimant anyway. The effect of the contractor's insolvency is that the consultant cannot make good its right to recover a 70% contribution from the contractor.

There are other potential limitations of a claim under the 1978 Act:

1. The consultant can only claim contribution from the contractor if the contractor is also *liable to the claimant*. It may be that, while the contractor, as well as the consultant, may have been responsible for the loss or damage in question, the contractor is not liable to the claimant, because, for example, there is no contract between the claimant and the contractor. This can arise where the consultant's liability to the claimant arises out of a collateral warranty given by the consultant, but the contractor has not given a warranty.

2. The contractor might not be liable to the claimant where the liability for the loss or damage in question is excluded under the terms of the contract between the claimant and contractor. An example of this occurred in the case of *Co-operative Retail Services Ltd v Taylor Young Partnership*. There the consultants on a building project were sued by the owner of the works for damage caused by a fire which was caused by defective workmanship not discovered by the consultants. The consultants claimed contribution from the builders. The court held that, under the terms of the JCT contract between the owners and the builders (particularly the terms requiring the owners and builders to be jointly insured against damage caused by fire) liability of the builders to the owners for this sort of damage was excluded. The consultants could not, therefore, claim contribution from the builders.

3. Also, the consultant will not be able to claim contribution from the contractor unless the contractor is liable in respect of *the same loss or damage* as the consultant. The courts have recently construed the expression quite narrowly. Thus, while for all practical purposes the losses suffered by the claimant due to the breach of duty of the consultant may seem to be the same as those due to the breach of duty of the contractor, if it is not technically the same loss or damage, the claim for contribution will fail.

#### **A net contribution clause aims to deal with these kind of problems ...**

Thus it is not really correct to say that a person who is only 30% responsible for a claimant's loss may have to pay 100% of the loss. In fact, it is not possible under English law to be only 30% responsible, because as yet there is no concept of proportionate liability. That would require a change to the law.

However, it is possible to have only 30% of the liability apportioned to one in contribution proceedings but still to have to pay 100% to the claimant if the party to whom the other 70% is apportioned cannot pay; or to be in a situation where only 30% would be apportioned to one but it is not possible to bring contribution proceedings. This problem can be addressed in one's contract. ***In the UK construction industry, contractual provisions limiting liability to the amount that would be apportioned to one in contribution proceedings are known as 'net contribution clauses'.***

The purpose of a net contribution clause in a contract therefore is to overcome the kinds of difficulties described above for the party seeking to rely on a right to contribution. Under a net contribution clause, a number of assumptions are made, in particular that any third party responsible for the same loss or damage is:

- (i) also contractually liable to the other party to the contract, and
- (ii) has paid its fair share to the other party – ie the share that would be apportioned to it under the 1978 Act.

Thus, in a contract between the consultant and the claimant, the effect of a net contribution clause is that the contractor would be deemed to be contractually liable to the claimant and to have paid to the claimant the proportion of the

damages that would be apportioned to the contractor on an apportionment between the consultant and contractor under the 1978 Act, leaving the consultant only having to pay the balance.

Net contribution clauses are now to be found in most of the standard forms of appointment and collateral warranties. Sample clauses suitable for use in a variety of situations, together with some notes, can also be found at CIC's website <http://www.cic.org.uk/liability>

### **... but it has problems of its own**

There are potential problems, however, with net contribution clauses. The wording varies, and ***each clause must be considered on its merits***. There is very little guidance at the moment on how they would be treated by the courts. In any given case, the court is likely to be concerned about how it determines the amount that would be apportioned to a party which is not before the court. Also, the effect of a net contribution clause is to limit the liability of the party relying on it, by the amount that would be apportioned to the third party. This means that it would be open to challenge under the Unfair Contract Terms Act 1977.

### **Allocation of risk**

***It is a question of who bears the risk, for example, of one of the parties not being worth suing.*** Under common law the risk that the consultant or the contractor will not be worth suing lies with the other party. Under proportionate liability – for example where there is a net contribution clause – the risk is transferred to the claimant. Proponents of proportionate liability argue that it is reasonable for the claimant to take on the risk, especially when it has engaged the parties, or the bargaining power of the parties is disproportionate. In particular, they argue that it is unfair for a party who may be only 30% liable (on a proportionate liability basis) to have to pay 100% of the damages. On the other hand, it is argued that both parties (the consultant and contractor, in the example) are in breach of contract, and the claimant is innocent.

As a risk management tool, therefore, consultants often seek to include a net contribution clause in their appointments or collateral warranties. An alternative risk management tool is to agree a cap on the consultant's liability. Caps are discussed in the Briefing 'Managing liability through financial caps' published by the CIC in February 2004 (also available at <http://www.cic.org.uk/liability>).

**This *Liability Briefing* is for general guidance only and legal advice should be sought to cover any particular situation.**

This *Liability Briefing* is available at [www.cic.org.uk/liability](http://www.cic.org.uk/liability).

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