Concurrent wrongdoer

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The term 'concurrent wrongdoer', a description rarely used in regular speech is strictly defined in law. Where two or more parties are responsible for damage to another party, the injured party can recover the loss against any or all the parties responsible, where the parties who caused the damage will be each considered a 'concurrent wrongdoer'. The Civil Liability Act 1961 (the Act) sets out in law that two or more persons will be concurrent wrongdoers '… when both or all are wrongdoers and are responsible to a third person … for the same damage …'[1] The Act further states that '…concurrent wrongdoers are each liable for the whole of the damage in respect of which they are concurrent wrongdoers'.[2] Most importantly, this part of the Act imposes a joint and several liability for all damage upon each of the concurrent wrongdoers. This liability, often referred to as the '1 per cent rule', has the potential to impose 100% of the cost of damage upon any one concurrent wrongdoer, who in all practicality may have only been responsible for 1% of the cause of action.

How has the Act been relied upon in a construction dispute?

The question of defining the 'same damage', was addressed by the courts in the1974 case of Lynch v Beale,[3] while demonstrating how the Act operates in a construction dispute. Lynch owned a hotel in Middleton, County Cork, in which defects from past construction works became apparent. Lynch made a claim for loss and injury for the defects against the architect, the building contractor, and a sub-contractor. The defects resulted from foundation failure in a corner of the building and the failure of pre-stressed concrete beams at first-floor level.

The defendants argued that the two failures were distinct and separate where any liability if found '… should be limited to the actual loss resulting from the particular wrong committed by any defendant'.[4] The High Court disagreed, finding that as the damage being claimed was the same against each defendant then each defendant was a 'concurrent wrongdoer'. It was determined that one third of the liability, arising from the defects that had arisen, should be apportioned to the architect with the remaining two-thirds apportioned to the building contractor and the sub-contractor. However, as all the defendants were defined as concurrent wrongdoers under the Act, the hotel owner had an entitlement to claim the full sum of damage from any one of the defendants.

What is the rationale of the Act?

The High Court judgment in Lynch v Beale confirmed that the rationale of the Act is focused on the damage that has been caused, and not necessarily the role of each defendant in giving rise to the damage. In addition, the rationale seeks to ensure that the claimant who has suffered damage is not left with the liability for rectification, should one or more of the defendants not have the means to meet the apportionment of liability. This position was reiterated in the later 1996 case of Iarnrod Eireann (Irish Rail) v Ireland.[5] The Supreme Court stated that '… between defendants, it is provided that there can be an apportionment of blame but if a deficiency has to be made up, in the payment of damages, it is better it should be made up by someone in default than that a totally innocent part should suffer anew'.[6] The application of this rationale means that in the current more adverse economic conditions there is an increased exposure for co-defendants who have means, or who hold and declare significant insurance cover. A claimant will naturally look to the defendant, regardless of causation, who has the most capacity to meet the cost of rectifying damage.

Is this rationale fair?

The only recourse for a co-defendant who has been singly, and successfully, pursued for damages is for them to then pursue the other co-defendants, or concurrent wrongdoers, for recovery. This necessitates a following action and associated cost, which may prove to be fruitless if the other concurrent wrongdoers do not have the assets to pay or are insolvent. This means that even if you have a marginal role in the damage that has occurred, that as the architect you are likely to be considered a 'good mark' for recovery, as evidenced by your insurance cover, and you can expect to be co-joined in proceedings. Even where you assert that you have no liability a claimant may initiate proceedings in the hope that you will make a later contribution to settlement. While the proceedings against you may be frivolous or vexatious, they will demand attention, resource, and cost, apart from the potential negative impact upon your Professional Indemnity Insurance (PII).

In the last recession, construction professionals holding PII were regular defendants in actions for recovery of loss where contractors, subsequently becoming insolvent, were the primary cause of the loss. Many in the construction industry believe the provisions of the Act are unfair in creating a joint and several liability for all concurrent wrongdoers. However, in Iarnrod Eireann (Irish Rail) v Ireland,[7] the court stated that '… the alternative would be that an innocent injured plaintiff would be partially or wholly without remedy depending on the means of each of the concurrent wrongdoers. Therefore, this well-established rule is necessary to protect and enhance a Plaintiff's entitlement and ability to recover awarded damages to the full extent'.[8] The courts adding that '… the possibility that one of a number of defendants may be insolvent was an unfortunate aspect of litigation that the risk should fall on other, solvent defendants who were concurrent wrongdoers rather than on the plaintiff seemed to the court to be a solution that was in harmony with the core principles underlying civil liberty'.[9] Thus, while this may appear to be unfair, the rationale behind the rule is firmly grounded in public policy and unlikely to change.

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What measures can be taken to reduce exposure?

Given that the principles of concurrent wrongdoing are set out within the Civil Liability Act 1961, being legislation that is unlikely to be amended, the primary measure to seek protection is through contract, or your professional appointment. Protection can be sought through the incorporation of a Net Contribution Clause (NCC) within your appointment. Although the clause wording will differ in each instance according to the drafting, the clause will seek to limit your liability to a loss to the extent that the loss is attributable to you only. In short, an NCC clause states that you are only responsible for the portion of loss that you have caused and not the loss caused by anyone else. An NCC, to protect you from joint and several liability with others, has never been considered by an Irish court, but could be in the future. In the UK, an NCC having been upheld by the courts has 'saved the day' for consultants.[10] Until an Irish court considers an NCC, the inclusion of the clause should at least strengthen your hand in any future dispute where you face the claim of being a concurrent wrongdoer.

Are there any other developments that may limit liability?

At the end of March 2023, the government made an important announcement on consultant liability, to assist in reducing barriers to delivering infrastructure and construction projects. Under the planned €165 billion future investment under the National Development Plan (NDP), the government introduced a mechanism for liability caps in the conditions of engagement for consultants. Introducing the caps, Minister Donohoe stated 'I'm pleased to announce the introduction of caps on liability in public works contracts and the standard conditions of engagement for consultants, following consultation with a range of stakeholders. This follows on from a series of measures introduced by my department over the last eighteen months to address the challenges that the construction industry has faced over the last two years in terms of material price inflation, supply chain disruption, and the reduced availability of professional indemnity insurance'.[11]

On 31 March 2023, the Office for Government Procurement published amended standard Conditions of Engagement, including a new sub-clause 2.17, titled 'Limit of Liability'. The clause limits, or places a cap, on the liability of a consultant to an ascertained sum, to be then included in the Contract Particulars at Schedule A. If no sum is determined, the default liability cap is set at €1,500,000. In addition, a new Guidance Note (GN 1.6.4) has been published that '… provides guidance on how to arrive at an appropriate amount at which to cap the liability of a consultant under or in connection with a contract formed using the standard Conditions of Engagement'.[12] The liability amount is to be calculated using a risk matrix to assist the employer to identify and score the likelihood of loss occurring. The Guidance Note recognises the cost of PII and is an important commercial factor in bidding for work. The note acknowledges the difficulties of continuing unlimited liability for consultants, advising that '… it can be difficult to estimate the extent of potential liabilities, which in turn may lead to an unquantified level of financial exposure'. [13]

Conclusion

This capping of consultant liability in public works contracts, which is also to be applicable to contracting bodies, is an important development for the construction industry in providing greater certainty to what is presently an uncertain and open-ended situation. The liability cap offers the opportunity for architects to mirror their liability, notwithstanding the usual exclusions for which unlimited liability will continue to apply, in their professional indemnity insurance. The potential to mirror liability to insurance will be subject to a reasonable calculation for liability that does not result in excessive requirements that in turn become expensive to insure, particularly for small- to medium-size practices.

There is already an increasing trend for the incorporation of limiting liability provisions, including NCC provisions, in the private sector. The new standardised liability cap provisions in the Public Works Contracts appointment, in aligning more closely with private sector appointment provisions, should be cautiously welcomed. The rebalancing of the risk of inadvertently being found to be a concurrent wrongdoer – thus encouraging a greater level competition by reducing barriers to involvement while continuing the protection for employer bodies – is a significant and positive step for the construction industry.

Notes

1 Civil Liability Act 1961, Part III, Concurrent fault, Chapter 1 at Section 11.-(1).
2 n1. at Section 12.-(1).
3 *Lynch v Beale, Patrick J. Murphy Ltd. and O'Regan Precast Limited* [1965] WJSC-HC 4859 (Unreported, High Court, 23 November 1974).
4 Ibid.
5 *Iarnrod Eireann (Irish Rail) v Ireland* [1996] 2 ILRM 500.
6 Ibid.
7 Ibid.
8 Ibid.
9 Ibid.
10 *West v Ian Finlay and Associates* [2014] EWCA Civ 316.
11 Department of Public Expenditure, National Development Plan, Delivery and Reform, 21 March 2023.
12 Guidance Note GN 1.6.4, Liability Caps, Application in the standard Conditions of Engagement COE1 and COE2, 31 March 2023.
13 Ibid.