

Joint, several and joint and several liability

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Where two or more persons are liable to another, they may be jointly liable, severally liable or jointly and severally liable. This note explains the concepts of joint, several, and joint and several liability in contract and tort.

Practical Law Dispute Resolution

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Contract and trust obligations

Where more than one person takes on an obligation under a contract or trust, their liability may be:

- Joint.
- Several.
- Joint and several.

In each case, a party who pays more than its fair share of a shared obligation may have a claim for contribution against the others. For more information see *Contribution*.

Where more than one party has assumed liability under a contract for the same obligation, the contract will usually state the nature of the liability of those parties. The contract will also often deal with the liability of successors in title to the original parties.

Where a contract is silent as to the nature of the parties' respective liability, the scope and nature of that liability will be a matter of construction. In general, if two or more people contract together that they, or any one of them, will do something, then, in the absence of any express provision to the contrary, there is a presumption in favour of **joint** liability. (For the effect of that, see *Effect of joint liability*.) However, that presumption can be rebutted, by clear and specific words of severance (*White v Tyndall* [1888] 13 App Cas 263).

For further information, see *Podcast, Shared obligations, joint, several and joint and several liability: issues for litigators*.

Effect of joint liability in contract

Joint liability under a contract or trust deed arises when two or more persons jointly promise to do the same thing for another person. There is one obligation. If parties have joint liability, then they are each fully liable for the performance of the relevant obligation. Performance by one discharges the other. Joint liability is unusual in that generally it does not survive the death of a joint promisor. For more information see *Death of contracting parties*.

Effect of several liability in contract

Several liability (the word several is an archaic word for separate) arises when two or more persons make separate promises to another. Common examples of contracts with several liability are syndicated loan agreements and insurance contracts with multiple insurers. With several liability, each party is liable only for its own specified obligations. If a party is unable to satisfy his obligation, the responsibility does not pass to other parties. For further discussion of how this can affect claims and what claimants can do when they see a potential gap in recovery, see *Article, Joining up the dots on liability* (www.practicallaw.com/5-386-8793). For an example of a clause creating several liability for separate parts of an obligation see, Clause 2 in *Standard clause, Co-obligors (joint and several liability)*. (www.practicallaw.com/0-107-3811)

Effect of joint and several liability in contract

Joint and several liability arises in contract when two or more persons jointly promise to do the same thing and also severally make separate promises to do the same thing. Joint and several liability is thus a hybrid of joint liability and several liability. In the case of joint and several liability:

- The parties are jointly and severally liable to the claimant. The claimant may enforce the relevant contractual obligation, in full, against either of the jointly liable parties.
- The claimant has better rights of enforcement on the death of a co-obligor compared to where liability is joint (see *Death of contracting parties*).

For an example of how joint and several liability can arise in the company context, see *Legal update, Loans to directors: joint and several liability* (www.practicallaw.com/6-204-1114). See also the decision in *AIB Group (UK) plc v Martin and Gold* [2001] UKHL 63 which provides a good example of an agreement to be jointly and severally liable having unintended consequences for the paying parties. (See further, *Legal update, Meaning of a joint and several liability clause in a mortgage* (www.practicallaw.com/5-101-6347)).

Illustrations of joint, several, and joint and several liability in contract

If A and B jointly agree to pay X £1,000

X is entitled to £1000 and may claim the whole amount from either A or B. There is only one obligation. Payment of £1000 by A will discharge the liability of both A and B.

If A and B severally agree to pay X £1,000

X is entitled to £1,000 from A and a further £1,000 from B. There are in effect two separate contracts: one between A and X, and one between B and X. If A pays £1,000, B will still owe £1,000. The liability of A and B is cumulative; payment by A will not extinguish B's liability. (Note, however, that occasionally several liability is not cumulative. This can occur in a property context where an original tenant and later an assignee separately covenant with the landlord to pay the rent. The landlord is only entitled to the rent once.)

If A and B jointly and severally agree to pay X £1,000

X is entitled to £1,000 and may claim the whole amount from either A or B. The nature of a joint and several obligation is that:

- (1) A and B jointly promise to pay X £1,000.
- (2) A promises that X will be paid £1,000 by either A or B.
- (3) B promises that X will be paid £1,000 by either A or B.

These are joint and separate obligations. However, the obligations are not cumulative and X is entitled to £1,000 in total, not £2,000. Payment of £1,000 by A will discharge the liability of both A and B. Despite the separate promises, some of the technical rules on the discharge of joint contractors also apply to joint and several contractors (*see below*).

If A and B jointly and severally agree to pay X £1,000 each

X is entitled to £2,000 and may claim the whole of it from either A or B. In these circumstances:

- (1) A and B jointly promise to pay X £2,000.
- (2) A promises that X will be paid £1,000 by A and 1,000 by B.
- (3) B promises that X will be paid £1,000 by A and 1,000 by B.

Death of contracting parties

Save for one exception, if one **jointly liable** contracting party dies, his obligation ceases and the whole obligation passes to the surviving jointly liable party or parties, and not to the dead party's personal representatives. However, when the last surviving joint contractor dies, the obligation passes to his personal representative because once there is a single obligor, the obligation necessarily becomes several (*Calder v Rutherford (1882) 3 Brod and Bing 302*).

The exception to the rule that personal representatives of joint contractors or obligors are not liable arises in connection with partnership. Though partners are jointly liable for partnership debts, the estate of a deceased partner is also severally liable, subject to the prior payment of his separate debts (for more information on the basis of liability of partners, see *Practice note, Practical tips and traps in partnership and LLP litigation* (www.practicallaw.com/6-566-4905) .)

If a **jointly and severally liable** contracting party dies, joint liability ends and his several liability will pass to his personal representatives. For some practical implications of this, see *Ask, What happens if a property is charged and one of the co-owners (holding as tenants in common) dies?* (www.practicallaw.com/6-518-2129) .

Discharge of liability

There are a number of complex rules that affect the discharge of jointly liable contracting parties and, somewhat illogically, some of these also apply to jointly and severally liable contracting parties.

The general principle is that the release of one joint or joint and several contractor will release the others. However, whether this is the case, will depend on the exact formulation and expression of the relevant release. The release may be construed as expressly or implicitly preserving claims against other jointly or jointly and severally liable parties.

Generally, the position is different in relation to parties who are severally liable. Each party is liable only for its share and cannot be held liable for the share of any other co-obligor. The release of one does not discharge the other. It is a question of interpretation of their contract whether each has done what it (severally) contracted to do. However, in cases where co-obligors have assumed separate obligations to do the same thing, there is conflicting authority in relation to whether this may be construed as a promise by each, severally, to perform so far as the other does not. The decision in *Deanplan Ltd v Mahmoud [1993] Ch 151* appears to suggest that the release of one co-obligor may result in the release of the others. However, the opposite conclusion was reached in *Sun Life Assurance Society Plc v Tantofex (Engineers) Ltd [1999] LandTR 568 (Ch D)*. In order to protect its position a beneficiary should consider reserving the right to sue the remaining co-obligors in the settlement agreement.

For further information, see *Podcast, Shared obligations, joint, several and joint and several liability: issues for litigators*.

Landlord and tenant

The *Landlord and Tenant (Covenants) Act 1995* (the 1995 Act) effectively abolishes privity of contract in relation to covenants in most leases entered into on or after 1 January 1996. The 1995 Act contains provisions which define the parties bound by leasehold covenants upon assignment of the lease. *Section 13* provides that:

- Where, "in consequence of" the 1995 Act, two or more persons are bound by the same covenant, then their liability will be joint and several.

- Where, "by virtue of" the 1995 Act, two or more persons are jointly and severally liable and one of those persons is released from the covenant, "the release does not extend to any other of those persons." This is subject to *section 24(2)* which deals with the release (principally) of guarantors.

The *Civil Liability (Contribution) Act 1978* (see further below) will apply as regards one person seeking a contribution from another where they are jointly and severally liable by virtue of the 1995 Act.

Sale of real property

Condition 1.2 of both the Standard Conditions of Sale (5th edition) and the Standard Commercial Property Conditions (2nd edition) state that "if there is more than one seller or more than one buyer, the obligations which they undertake can be enforced against them all jointly or against each individually". This would need clarification and expansion where, for example, there were many sellers each selling a different property. For further discussion of these terms, see *Practice notes, The Standard Commercial Property Conditions* (www.practicallaw.com/2-107-3787), and *The Standard Conditions of Sale* (www.practicallaw.com/0-380-9517).

Boilerplate clause and drafting note for co-obligors under a contract

Practical Law Commercial have produced a *Standard clause, Joint and several liability* (www.practicallaw.com/0-107-3811), with integrated drafting notes, that provides for the liability of parties who are co-obligors under a contract.

Tortious liability

Where damage is caused by *torts* (www.practicallaw.com/6-107-7397) committed by two or more tortfeasors, the tortfeasors may be one of the following:

- Joint tortfeasors.
- Several tortfeasors causing the same damage (often also referred to as "concurrent tortfeasors").
- Several tortfeasors causing different damage.

Joint tortfeasors and concurrent tortfeasors

Joint tortfeasors are jointly liable to a claimant for a tort which they both commit or for the commission of which they are both responsible.

A good test of whether tortfeasors are joint tortfeasors is to examine whether the cause of action against each is the same (*Brunsdon v Humphrey* [1884] 14 QBD 141). Does the same evidence support an action against each? If so, then the tortfeasors are joint tortfeasors. By contrast, if tortfeasors are each separately responsible for a separate tort and the separate torts combine to produce the same damage, they will not be joint tortfeasors but several (or concurrent) tortfeasors causing the same damage.

Examples of joint tortfeasors are:

- An agent who commits a tort on behalf of his principal and the principal himself.
- An employee who commits a tort in the course of his employment and his employer.
- A company director and the company itself if the director is sufficiently bound up in the company's acts to make him personally liable.
- Persons acting in concert to commit a tort, including a situation where one defendant was instigated by the other to commit the tort or when their respective shares in the commission of the tort are done in furtherance of a common design (see *Sea Shepherd UK v Fish & Fish Ltd* [2015] UKSC 10, considered in *Legal update, Supreme Court considers accessory liability in tort* (www.practicallaw.com/6-603-0045)).

Several liability in tort

Where two or more tortfeasors cause different damage to the same person, that person has a separate cause of action against each tortfeasor. Those causes of action are entirely distinct from each other. The claimant can only recover from each tortfeasor damages relating to the damage for which he is responsible.

Joint and several liability in tort

Joint and several liability is a hybrid of joint liability and several liability. It is most relevant to tort claims, particularly negligence cases. With respect to the claimant, the defendants are jointly liable (joint tortfeasors or several/concurrent tortfeasors responsible for the same damage), but as between the defendants themselves, the liabilities are several. This means that if the claimant pursues one party, and receives payment in full, that party can then pursue the other defendant or defendants for a contribution to his share of the liability (see *further below*).

Discharge of liability

The release of one joint tortfeasor from liability, whether by way of seal or accord and satisfaction (full and final settlement), releases all the others. Note that this is not the case with severally liable tortfeasors. This principle also applies in the context of employee competition litigation (see *Vanden Recycling Ltd v Tumulty and others* [2015] EWHC 3616, considered in *Legal update, Employee competition: settlement with one defendant prevents tort claim continuing against other joint defendants* (High Court) (www.practicallaw.com/5-621-3267)).

Contribution

Debt claims

Where the parties are severally (separately) liable for a specific portion of a **debt**, one person who pays his or her own portion has no legal right to contribution from the others.

Where the parties are jointly liable (as a unit) for the payment of a debt, a party who pays in excess of his or her share has a restitutionary right to contribution for the amount of his or her overpayment. This is because as between the co-debtors, it is fair that neither should pay more than their fair share. This could, of course be displaced by evidence to suggest that, in a particular case, some other division would be fair, or by agreement between the debtors.

If the parties are jointly and severally liable for a debt, both as a unit and as individuals, any party who pays in excess of his or her proportionate share can seek contribution.

Damages claims

Any person liable to another whether in tort, contract, breach of trust or otherwise may now recover a contribution from any other person liable in respect of the **same damage**, regardless of the basis of the latter's liability (*section 1(1)* and *section 6(1)* of the *Civil Liability (Contribution) Act 1978* (the CLCA 1978)).

However, for the purposes of the CLCA 1978, "liability" means liability which has been or could be established in an action brought in England and Wales. A foreign judgment gives no right to seek contribution from others liable in respect of the same damage. Note that:

- Liability under the CLCA 1978 can arise out of two separate contracts. For example, where different construction professionals, each employed under a separate contract, are in breach of contract and cause the same damage to the owner of a building.
- A contract breaker and a tortfeasor can also be jointly and severally liable to the claimant for the same damage and can claim contribution from each other.
- A restitutionary tracing claim may fall within the scope of the CLCA 1978 (see *City Index Ltd and others v Gawler and others* [2007] EWCA Civ 1382, discussed in *Legal update, Knowing receipt within scope of Civil Liability (Contribution) Act 1978* (www.practicallaw.com/1-380-1605)).
- In *Royal Brompton Hospital NHS Trust v Hammond (No 3)* [2002] UKHL 14 it was held that the words "liable in respect of the same damage" should receive their ordinary and natural meaning. In that case, a developer sued a firm of architects for negligently issuing extension certificates to contractors after building work was delayed. The architects were unable to claim a contribution from the contractors. It was held that the contractors were responsible for delayed construction "per se", whereas the architects (by issuing the extension certificates) had caused the developer to lose the opportunity to sue the contractors for liquidated damages in respect of that delay. The loss of opportunity was not the same damage as the delay. *Mouchel Ltd v Van Oord (UK) Ltd* [2011] EWHC 72 (TCC) is a useful case on the question of "same damage". The case also illustrates how the CLCA 1978 may operate after a bilateral settlement agreement. (See *Legal update, Third party's liability for contribution after settlement*.)

The amount of contribution awarded under the CLCA 1978 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". The courts have regard to considerations of relative causative potency and comparative blameworthiness. See how the court considered what was just and equitable in *Mouchel Ltd v Van Oord (UK) Ltd* [2011] EWHC 72 (TCC) considered in *Legal update, Third party's liability for contribution after settlement*. Another useful example is *Furmedge and others v Chester -Le -Street District Council* [2011] EWHC 1226 (QB). In some cases, the parties may have regulated this issue by means of a net contribution clause.

It is possible for parties to contractually agree, for example, by including a "net contribution clause" in a contract, to split what might otherwise have been joint liability into separate contributions, limiting the liability of each to their own separate share. Net contribution clauses are not uncommon in contracts relating to construction projects where more than one party may be responsible for the same loss. For further discussion, see *PLC Construction Practice note, Net contribution: what is a net contribution clause?* (www.practicallaw.com/6-376-4243)

In *Mouchel*, the High Court confirmed that a third party can be liable for a proportion of the costs of the main action (in addition to a proportion of the damages), in contribution proceedings under the CLCA 1978. However, it does not automatically follow that the liability for costs will be calculated in the same proportion as the damages. The court also confirmed that a defendant seeking a contribution from a third party cannot claim a contribution under the CLCA 1978 for its own costs of defending the main action because those costs do not fall within the scope of the CLCA 1978. For more information, see *Legal update, How to apportion costs following contribution proceedings (High Court)*.

See further, *Practice note, Contributory negligence and contribution*.

Under section 10 of the *Limitation Act 1980*, no action to recover a contribution can be brought more than two years after the date when the right to a contribution accrues. The right to a contribution accrues when the defendant is held liable by a judgment or award in respect of the damage, or when he agrees to make a payment in compensation for that damage. The period may be extended where the person seeking contribution is under a disability or is the victim of a fraud, concealment or mistake.

For further information, see *Podcast, Shared obligations, joint, several and joint and several liability: issues for litigators*.

Joinder of parties

Section 3 of the Civil Liability (Contribution) Act 1978 provides that judgment recovered against any person liable in respect of **any debt or damage** is not a bar to an action, or to the continuance of an action, against any other person jointly liable in respect of the same damage. It is thought that "judgment" in this context may include a consent order, with the result that a settlement with A (contained in a consent order) will not bar a further claim against a jointly or jointly and severally liable party. Note, however, that section 3 applies only to "judgments" and does not appear to extend to agreements to settle which are not reflected in a court order.

Despite the provisions of section 3, in most cases, it will be preferable for all potential defendants to be joined in the same proceedings (see further below).

Contract claims

In the case of **joint debts**, the general common law rule was that all the joint debtors had to be made parties to the action (*Norbury, Natzio and Co Ltd v Griffiths [1918] 2 KB 369*).

The common law rule was largely superseded by CPR 19.2(2) which provides that the court might order the joinder of another party if desirable and the only sanction may be as to costs. The court may order a person to be added as a new party if either:

- It is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings.
- There is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

(CPR 19.2(2)).

Further, the general rule did not apply to actions in the County Court nor to a joint debtor who was:

- An undischarged bankrupt (section 345(4), *Insolvency Act 1986*).
- Outside the jurisdiction (section 8, *Civil Procedure Act 1833*).
- Protected by the *Limitation Act 1980*.
- An undisclosed sleeping partner (*Ex p. Hodgkinson [1815] 19 Ves 291,294*).
- An active partner where the defendant sued held himself out as being the sole contracting party (*Baldney v Ritchie [1816] 1 Stark 338*).

However, it is advisable to always sue all joint promisors unless the case falls under any of the above categories in order to avoid certain risks including:

- Facing liability for the costs of adding a new party to the proceedings.

- Accidentally discharging the other joint promisor if a settlement is reached with the first.
- The court refusing to order the addition of a party if, for example, permission is sought late in the proceedings and it threatened to delay the trial.

In the case of **joint and several debts**, or claims for **damages**, the claimant can choose whether to sue any of the other contracting parties, or all of them. Again, however, the court may direct that a party be added to an action under CPR 19, especially if there are contribution claims.

All joint creditors should be parties to proceedings (*Jell v Douglas* [1821] 4 B and Ald 374 and *Thompson v Hakevill* [1865] 19 CBNS 713). If one is unwilling to join, the others should offer him an indemnity as to costs and, if he still refuses, join him as co-defendant (*Cullen v Knowles* [1898] 2 QB 380 and *Burnside v Harrison Marks Productions Ltd* [1968] 1 WLR 782).

Tort claims

Similarly, a tortfeasor who has settled with the claimant can still seek a contribution from others liable in respect of the same damage. He can also have a contribution sought from him if the claimant has reserved his right to claim against other tortfeasors and there is no bar on such actions.

Nevertheless, where possible, successive actions against joint tortfeasors (and contractors) and those jointly and severally liable should be avoided. A claimant may be refused costs of separate actions unless the court is persuaded that he was justified in bringing the separate actions. A second action in respect of the same issues can be held to be an **abuse of process**. In order to maintain rights against other parties and avoid arguments about double recovery, claimants and their advisers should take care to reserve such rights in settlements that do not involve all tortfeasors.

Where there is one event that gives rise to **separate causes of action** against different defendants for **separate damages**, it is also sensible to bring one set of proceedings including all the different causes of action. Although successive actions against different defendants are possible, again, the courts generally discourage multiplicity of actions. There is much to be said for making all likely candidates defendants to the one action.

It should also be noted that damages are also meant to be compensatory and a claimant cannot recover more than the amount of his loss (*Jameson v Central Electricity Generating Board* [1999] 2 WLR 141). For more information see *Practice note, Damages in tort: an overview* (www.practicallaw.com/7-535-0565) and *Practice note, Damages for breach of contract: an overview* (www.practicallaw.com/6-533-8545).

Settlement

For further discussion of the issues which must be addressed when concluding settlements in respect of joint or joint and several liability, see *Practice note, Settlement: an overview. Implications of joint, several and joint and several liability* (www.practicallaw.com/4-381-9717) and *Podcast, Shared obligations, joint, several and joint and several liability: issues for litigators*. For information on settling claims against partnerships, see *Practice note, Practical tips and traps in partnership and LLP litigation* (www.practicallaw.com/6-566-4905).

Joint and several liability: the future

Criticisms of the existing law

The supporters of joint and several liability argue that it protects claimants from being undercompensated if one defendant cannot pay his or her share of liability. It also means that the claimant need not spend time and cost on the division of the defendants' liability. The defendants can litigate this between themselves.

However, there are criticisms of joint and several liability such as the following:

- It has led to cases in which a party with a very minor part of the responsibility unfairly bears the burden of paying damages to the claimant.
- Defendants who are wealthy, or who are insured, are brought into actions, even where they have little, if any, potential liability. They might not be defendants if liability were proportionate rather than joint or several. This is having a major impact on the professional indemnity market.
- If insured professionals were only liable for a proper proportion of the overall liability, this would encourage the earlier settlement of cases rather than cases being fought to trial for full recovery.

Reform suggestions

Several organisations, particularly those representing insurers, have been lobbying, without success, for a bill to change the law on joint and several liability. See, for example, the 2004 report of the Association of Consulting Engineers, *Professional Indemnity Insurance and Joint and Several Liability in the Construction Industry: the case for reform*.

Suggestions for reform have included:

- Introduce proportionate liability.
- Consider a statutory capping regime on insurance claims to alleviate problems of disproportionate liability. Insureds would have to permit caps on claims, which should be high enough to cover most claims.

The law appeared to be moving in the direction of replacing joint and several liability with proportionate liability in cases concerning negligence claims against employers and their insurers from claimants with mesothelioma, an asbestos-related illness. In *Barker v Corus (UK) plc (formerly Saint Gobain Pipelines plc) and other appeals*, [2006] UKHL 20 the House of Lords introduced the concept of proportionate damages in exceptional circumstances for the victims of mesothelioma where more than one employer exposed the claimant to the risk of contracting the illness. Lord Hoffmann pointed out that the justification for joint and several liability in cases where the claimant satisfies the "but for" test is that:

"if you caused harm, there is no reason why liability should be reduced because someone else also caused the same harm".

However, he continued:

"But when liability is exceptionally imposed because you **may** have caused harm, the same considerations do not apply and fairness suggests that if more than one person may have been responsible, liability should be divided according to the probability that one or other caused the harm."

For more information, see *Legal update, House of Lords introduces the concept of proportionate damages* (www.practicallaw.com/2-202-3975).

The government, however, reacted to this decision by enacting the *Compensation Act 2006* which states that employers who negligently exposed individuals with mesothelioma to asbestos will be jointly and severally liable. This means that a claimant will be able to recover full compensation from any relevant employer (and its insurers). It is then open for that employer (and its insurer) to seek a contribution to the damages awarded from other negligent employers. For further information, see *Legal update, Compensation Act 2006* (www.practicallaw.com/3-205-5447). In a majority decision, the Supreme Court has also held that an insurer, upon payment to the insured employer, has a right to contribution against the insured itself in respect of any period of uninsured exposure (see *Zurich Insurance PLC UK Branch v International Energy Group Limited* [2015] UKSC 33, considered in *Legal update, Mesothelioma: employer liability insurance and the rule of proportionate recovery (Supreme Court)* (www.practicallaw.com/7-613-8465)).

Resource information

Resource ID: 1-200-4741

Products: Data Protection, Family, IP&IT, Local Government, PLC UK Commercial, PLC UK Construction, PLC UK Corporate, PLC UK Dispute Resolution, PLC UK Employment, PLC UK Environment, PLC UK Finance, PLC UK Financial Services, PLC UK Law Department, PLC UK Pensions, PLC UK Private Client, PLC UK Property, PLC UK Public Sector, PLC UK Share Schemes & Incentives, PLC UK Tax, Public Law

This resource is maintained, meaning that we monitor developments on a regular basis and update it as soon as possible.

Resource history

Vanden Recycling Ltd v Tumulty and others [2015] EWHC 3616

The section, , has been amended to include this decision.

Zurich Insurance PLC UK Branch v International Energy Group Limited [2015] UKSC 33

The section, , has been amended to include this decision.

Sea Shepherd UK v Fish & Fish Ltd [2015] UKSC 10

The section, , has been updated to include this decision.

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