THE ILLUSION OF PROPORTIONATE LIABILITY: THE CASE OF THE INCORPORATED OWNERS OF ALBERT HOUSE

The recent decision of the Hong Kong Court of Appeal in *Aberdeen Winner Investments Company Limited v the Incorporated Owners of Albert House*[1] places a centuries-old common law principle of liability under the microscope of public scrutiny.[2] This is the principle that makes each of jointly liable defendants answerable for the full amount of the plaintiff's damages.

The facts involved the collapse and fall, in 1994, of a concrete canopy and fish tank from a 3rd floor restaurant in Albert House, in Aberdeen, killing one pedestrian and injuring eight others. In 1999, judgment was entered in negligence and/or nuisance on behalf of the estate of the deceased victim and the injured parties on the basis of joint and several liability against five defendants, including: (1) the Incorporated Owners of Albert House (the 1st defendant in the present action, hereinafter "the Owners"); (2) the restaurant, New Best (in liquidation) and its director (the restaurant and director treated as one entity); (3) the management company managing Albert House; (4) the original developer of Albert House ("Aberdeen", the plaintiff in the present action, and an owner of some of the units in Albert House); and (5) the contractor who carried out the renovation works for the restaurant some years earlier including the construction of the fish tank (the 2nd defendant in the present action).[3]

The trial judge went on to apportion liability as between the various defendants under s 4(1) of the Civil Liability (Contribution) Ordinance (Cap 377) as follows:

New Best Restaurant and its director:	50 per cent
Incorporated Owners:	15 per cent
Management Company:	15 per cent
Aberdeen (the original developer):	15 per cent
Contractor:	5 per cent

1 CACV 42/2004 & CACV 236/2004.

2 *See* "Court Orders Owners to Pay Landlord $23 Million; But Many are Too Old to Afford the $200,000 Per Flat Required," *South China Morning Post* (hereinafter "SCMP"), 9 Nov 2004, p 1; "Suit Over Death Angers Flat Owners; Government Urged to Offer Incentives for Maintenance after Court Orders 136 to Pay $25 Million," SCMP, 10 Nov 2004, p 3; "Aid Fund for Aberdeen Flat Owners a Last Resort; Home Affairs Chief to Exhaust Legal Channels over $25 Million Burden," SCMP, 13 Nov 2004, p 3.

3 *Tse Lai Yin & Others v Incorporated Owners of Albert House* (1999) HCPI 828 of 1997. In this decision, Suffiad J found the Incorporated Owners liable despite having appointed a building management company, because the Owners' duty was a "non-delegable" one.

A total sum of HK$33,257,886.25 plus interest and costs was assessed as payable, of which, by 2002, Aberdeen had paid HK$32,728, 942.46 inclusive of interest, a sum that greatly exceeded its apportioned liability of 15 per cent. By 2002, the Owners had paid HK$5,458,631.34, being 15 per cent of the judgment entered plus interest. The management company had also made an interim payment of HK$1,566,666.67.

At the time of the hearing of the instant proceedings, the restaurant and the management company were in liquidation, and the director of the restaurant was adjudged bankrupt (and in 2004, the contractor was also made bankrupt). The writ in the present proceedings was issued in 2003 by Aberdeen seeking contribution from the Owners and the contractor under s 3(1) of the Civil Liability (Contribution) Ordinance. Aberdeen claimed that in view of the liquidations and bankruptcy, the Owners and the contractor should contribute to Aberdeen an amount that reflected their proportionate share of the liabilities of the insolvent defendants – in other words, an amount that would greatly exceed the liability assigned to each of them in the 1999 judgment. The judge accepted Aberdeen's argument and ruled that Aberdeen, the Owners and the contractor would bear the shortfall created by the liquidations and bankruptcy according to the original apportionment as follows:

Aberdeen:	15/35 (approximately 42.857 per cent of the total assessed damages)
Incorporated Owners:	15/35 (approximately 42.857 per cent of the total assessed damages)
Contractor:	5/35 (approximately 14.285 per cent of the total assessed damages).

In other words, since Aberdeen already paid to the plaintiffs the full amount of their claims, the Owners should now pay to Aberdeen an amount that reflected 42.857 per cent, so that the payments made by the Owners and Aberdeen were equal.

He came to this conclusion on the interpretation of s 3(1) of the Civil Liability (Contribution) Ordinance, which permits a claim of contribution against other persons liable, including co-defendants. Applying this formula, Aberdeen was entitled to recover HK$9,239, 437.87 from the Owners (taking into account their earlier payment of HK$5,458,631.34), and HK$4,899,127.76 from the contractor. Following the initial judgment, the contractor was made bankrupt, and the trial judge entered a second final judgment ordering the Owners to pay one half of the amount of the contractor's obligation to Aberdeen.[4]

[4] With costs and accrued interest, and the contractor's bankruptcy, the Owners' total payment was by now in the neighbourhood of $25 million: see *SCMP*, 10 Nov 2004, p 3 (n 2 above).

Naturally, this came as a shock to the Owners who, based on the original apportionment, expected to pay only 15 per cent of the assessed damages. The Owners appealed the ruling, arguing that the trial judge had misinterpreted s 3(1) of the Civil Liability (Contribution) Ordinance. They argued that s 3(1), entitling "any person liable in respect of any damage suffered by another person" to "recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)", did not apply, because the contribution claim made by Aberdeen was not in respect of the "same damage". They argued that it was in respect of the insolvency of the co-defendants, not the damage suffered by the plaintiffs. They also argued that Aberdeen's claim constituted a "second bite at the cherry", in that these issues concerning insolvency should have been raised, with ample opportunity for counter-argument, at the time of apportionment.

The Court of Appeal confirmed the trial judge's decision. The court came to this result by reference to s 3(3) of the Civil Liability (Contribution) Ordinance, which deals with persons liable in respect of damage:

> 3(3) A person is liable in respect of any damage for the purposes of this Ordinance if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise).

Le Pichon JA considered that s 3(3) was clear in its meaning, that Aberdeen and the Owners were liable in respect of the same damage, that is, the damage suffered by the plaintiffs, and the fact that some of the others who were also liable were unable to pay did not affect the plain meaning of s 3(3).

This outcome should attract the concern of lawmakers and lawyers, not to mention flat owners in Hong Kong. On the facts of the case the notion that a flat owner can be liable for damages resulting from poor building maintenance and construction over which, in the ordinary course of events, they exercise little or no day-to-day control, may be unsettling in itself. This position comes about as a result of s 17(1)(b) of the Building Management Ordinance (Cap 344), which allows individual owners to be made liable for judgments entered against the Incorporated Owners.[5] But the notion that they may be liable to compensate for the largest or the entire share of

[5] Upon leave being granted by the Lands Tribunal.

damages is likely to shock, as indeed it did in this case.[6] What is the basis for the legal rule that brings about this result?

Joint tortfeasors are those who by their concerted action bring about the same damage suffered by the plaintiff. One way of looking at it is: would the same evidence support an action against each of the tortfeasors?[7] Included in this category are an agent and principal where an agent commits a tort on behalf of the principal, and an employee and employer where the employee commits a tort in the course of employment. So too are the defendants in the instant case, each having neglected their individual duties to maintain the building in a safe condition.

Several tortfeasors are of two categories: tortfeasors acting separately and causing different damage, and tortfeasors acting separately and causing the same damage to the plaintiff. Those causing separate damage are responsible only for that part of the damage caused by that tortfeasor.[8]

The common law has long held that a joint tortfeasor or a several tortfeasor causing the same damage as other tortfeasors is individually liable to the plaintiff for the whole damage, although he is only one of several who caused the loss.[9] Moreover, at common law, there could be no order of contribution or indemnity between them in the absence of an express or implied agreement between them that was not contrary to public policy.[10] The right to contribution was introduced in England by s 6(1)(c) of the Law Reform (Married Women and Joint Tortfeasors) Act 1935, later repealed and replaced and extended by section 6 of the Civil Liability (Contribution) Act 1978. In Hong Kong the relevant provision was enacted in 1985 in the form of s 3(1) of the Civil Liability (Contribution) Ordinance, similar to s 6 of the 1978 Act, and which provides that: "... any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)".

The amount of contribution for which a joint tortfeasor may be liable to another joint tortfeasor is determined by s 4(1): "... the amount of

6 The effect of s 17(1)(b) is rather startling: according to the plain meaning of s 17(1)(b), each flat owner is individually liable for the full amount of judgment entered against the corporation. Moreover, as the result of the Court of Final Appeal ruling in *Chi Kit Co Ltd v Lucky Health International Enterprise Ltd* [2000] 3 HKC 143, the judgment, provided it is substantial, is likely to encumber the title of each of the flat owners, making a disposition of the flat virtually impossible until the judgment is satisfied.

7 *Brunsden v Humphrey* (1884) 14 QBD 141 at 147.

8 *Performance Cars Ltd v Abraham* [1962] 1 QB 33.

9 *Clark v Newsam* (1847) 1 Ex 131 at 140. For the purposes of this comment, and for the sake of convenience, subsequent references will be to joint tortfeasors only, but should be taken to include several tortfeasors causing the same damage, since the effect of the legal principle is the same for both.

10 *Merryweather v Nixon* (1799) 8 TR 186.

contribution recoverable from any person 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". Moreover, by s 4(2) the court has the power to exempt a party from liability or to order a complete indemnity.

The Incorporated Owners in *Aberdeen Winner Investments Company Limited v the Incorporated Owners of Albert House* were found under s 4(1) to be responsible for 15 per cent of the damage suffered by the plaintiffs. On this basis they might have expected to pay just over HK$5 million to the plaintiffs. However, the Owners were caught by the common law rule that makes each of the joint torfeasors liable for the full amount of the damages.[11] It is always open to a plaintiff to realize the judgment against the most convenient or pecunious of joint tortfeasors. And it is of no legal significance that, as often happens, convenient or pecunious tortfeasors may be unable to collect contribution for reasons of the impecuniosity of the other tortfeasors. The law's policy protects the plaintiff's position, ensuring compensation, even where this works harshly on a tortfeasor such as the present Incorporated Owners, who were one of only two solvent defendants, each adjudged only minimally responsible for the damage caused. Indeed, it could have been worse for the Owners, if Aberdeen had followed the suit of the other defendants and entered into liquidation, leaving the Owners to foot the entire amount of the judgment.

That this result should follow is not immediately apparent from the wording of s 4(1), which permits a contribution claim against a person jointly liable in an amount "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". Since the Owners were responsible for 15 per cent of the damages, then their contribution should be limited to that amount. However, the court interpreted the provision differently, that a "just and equitable" contribution, having regard to their "responsibility for the damage", in circumstances where some defendants were insolvent, included a share of the additional amounts paid by Aberdeen. Le Pichon JA was reinforced in her thinking by reference to a work by Professor Glanville Williams, in which Professor Williams argued that solvent defendants should bear the effect of the insolvency of co-defendants in proportion to their respective shares of liability,[12] and by reference to the House of Lords decision in *Dubai Aluminum Co Ltd v Salaam and Others*[13] in which Lord Hobhouse and Lord Millett took a view similar to

[11] *See Clark v Newsam* (n 9 above).

[12] *Joint Torts and Contributory Negligence* (London: Stevens, 1951), pp 170–171, interpreting the broadly similar predecessor provisions in the Law Reform (Married Women and Joint Tortfeasors) Act 1935.

[13] [2003] 2 AC 366.

that expressed by Professor Williams. It would be unfair for one of several solvent co-defendants to bear the burden of damages arising from the insolvency of other co-defendants. In other words, an initial allocation of responsibility under s 4(1) of the Ordinance in an amount of 15 per cent is nothing writ in stone, and could increase exponentially depending on the solvency or otherwise of the co-defendants found jointly liable.

There is an element of arbitrariness and uncertainty in such a result. A jointly liable defendant found minimally responsible is in a precarious position. As the months pass and the reality of the judgment sets in for the other defendants, a jointly liable defendant may see its share of liability increase according to the financial health of co-defendants. For this reason the apportionment ruling made at the time of trial is illusory. The arbitrariness is compounded by the fact that the principle of increased contribution liability accepted by Le Pichon JA appears to be triggered only upon the insolvency of the co-defendants. The principle would not be triggered if, for whatever reason, a co-defendant was unable or refused to pay but did not enter into liquidation or bankruptcy.

One might well question such an interpretation. Is it morally justifiable that a defendant minimally responsible for the damage bears a greater or even the entire share? Is a rule of true proportionate liability, perhaps better described as "proportionate recovery", fixed at the time of the trial or the contribution proceedings, more justifiable than a rule of liability that grows with the insolvency of other jointly liable defendants? The counter-position asks whether it is morally justifiable that a plaintiff, in no way at fault, and a victim of collective negligence, should bear the burden of one or more of the defendants' inability to pay. Again, the answer is not obvious. Normally, a plaintiff does bear such a risk, where there is only one defendant, who happens to be impecunious. A plaintiff will normally not even bother to sue such a defendant.

In recent years, in the UK and elsewhere, auditors and other professional bodies, including solicitors, have expressed dissatisfaction with the present state of joint liability rules, and have lobbied for a rule of proportionate recovery, in which each defendant's liability to the plaintiff, and his liability to contribute to co-defendants, is restricted to the amount of damage for which he was found responsible.[14] These professional bodies have complained that, with the expansion of the tort of negligence into the arena of professional advice and service, it has become very difficult to remain solvent and stay in business. An auditor who is only one of several tortfeasors, minimally to blame,

[14] "British Accountants' Liability: Big Six PLC", *The Economist*, 7 Oct 1995, p 87; "Joint Liability Report Puts Plaintiffs First", *The Lawyer*, 4 Jun 1996, p 7; "Professional Negligence: to Cap it All", *The Lawyer*, 28 Jun 2004, p 42.

impleaded as a virtual afterthought, may be required to pay the full amount of the judgment because other tortfeasors may be impecunious or in the case of fraudulent directors, may have absconded. These professional bodies complain that they can no longer purchase insurance to cover their risks because of the insurers' fears of large payouts, a not surprising position in the post-September 11 2001 and post-Enron environment, and argue for a law of true proportionate liability. However, these arguments have thus far fallen on deaf legislative ears, legislators taking the view that such a rule should not be passed and applied selectively. For now, the rule of full liability for each of jointly liable tortfeasors is here to stay.[15]

For flat owners in Hong Kong, relief can only be found in the form of an appropriate third party risks liability insurance policy. The problems encountered by auditors and other professional bodies in obtaining insurance should not be as acute for owners or Incorporated Owners, given that, in the nature of things, exposure is not likely to be as great. The collapse of a bank or a large financial corporation can impose an almost unlimited liability on auditors, and as recent cases involving the failure of corporate governance has shown, is an all too frequent occurrence. However, damages resulting from poor building maintenance will not normally be very great, and pose no greater burden on insurers than takes place with say, ordinary motor vehicle accidents.

The Hong Kong government is apparently not oblivious to the plight of flat owners. In 2000, amendments to the Building Management Ordinance authorized the making of regulations requiring Owners Corporations to take out a policy of third party risks liability insurance.[16] The regulations can stipulate the type and extent of cover, and the conditions and requirements in respect of policies that are binding on corporations and owners, and on insurance companies. However, the government has been slow to act, apparently awaiting consultation with the insurance industry, and now offering only a promise to have such regulations in place sometime in the coming year.[17]

[15] In 1995 the Law Commission's Common Law Team undertook a study, at the request of the Department of Trade and Industry, on the feasibility of reform of the law of joint and several liability (Department of Trade and Industry Consultation Document, *Feasibility Investigation of Joint and Several Liability by the Common Law Team of the Law Commission*, HMSO 1996), and recommended against reform, a recommendation that was accepted by the Secretary of State for Trade and Industry in Sep 1998 (*see* the Law Commission's 33rd Annual Report 1998, para 1.25). The Ontario Law Reform Commission's *Report on Contribution Among Wrongdoers* (1988) and the New South Wales' Law Commission's Report *Contribution Among Wrongdoers* (LRC 65) (1990), also recommended against reform. An intermediate position, that would protect the position of personal injury plaintiffs such as those in the instant case, was taken in a report prepared for the federal and New South Wales' Attorney-Generals that recommended proportionate recovery where only economic loss or property damage is suffered (*Inquiry into the Law of Joint and Several Liability* (1995)), but no action has been taken on the report.

[16] Ordinance 34 of 1999, now s 41 of the Building Management Ordinance (Cap 344).

[17] Promise made by Secretary for Home Affairs Patrick Ho Chi-ping, cited in SCMP, 10 Nov 2004, p 3 (n 2 above).

Moreover, the regulations would only cover those buildings with Incorporated Owners.[18] The cooperation of the insurance industry is needed, but it is not clear that it will be forthcoming, one representative expressing the view that insurance coverage would not be extended to old buildings.[19]

It is submitted that this is an issue in need of immediate and close attention by the government. It is one that affects all flat owners in Hong Kong in ways that flat owners may not fully appreciate. A law requiring mandatory third party liability insurance will serve the interests of flat owners, and more importantly, those unfortunate victims injured as a result of poor building maintenance. It should be extended to the repair of slopes on land owned by the Owners Corporations, especially since poorly maintained slopes are just as capable of causing damage as poorly maintained buildings. The government should also consider extending the reach of any such legislation to all buildings, whether or not owners have been incorporated. And, as is now apparent to the flat owners in Albert House, following the decision in *Aberdeen Winner Investments Company Limited v the Incorporated Owners of Albert House*, this is a reform that is made all the more urgent, in the absence of a rule restricting liability of a defendant to his proportionate share in the responsibility for the damage.

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[18] *See* n 16 above.
[19] *See* SCMP, 10 Nov 2004, p 3 (n 2 above).
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