NEW ZEALAND INSTITUTE OF ARCHITECTS INCORPORATED

The Law Commission of New Zealand
PO Box 2590
Wellington

12th February 2013

SUBMISSION TO THE LAW COMMISSION ON THE REVIEW OF JOINT AND SEVERAL LIABILITY

The New Zealand Institute of Architects (NZIA) has been in existence since 1905, and is the professional body which represents the interests of over 90% of architects in their role as principals and as employers and employees. It liaises with kindred professions and industry participants.

NZIA is aware of the competing interests of both plaintiff and defendants with respect to the uncollectable contribution resulting from joint and several and contrastingly, proportionate liability forums. We welcome the opportunity to participate in discussion resulting from the Law Commission's **Discussion Paper: Review of Joint and Several Liability**.

1) NZIA has been concerned for many years about the consequences of joint and several tort liability on its members. Through the Inter-professional Committee on Liability, we made submissions to the Law Commission in both 1992 and 1998, long before the leaky building saga.

2) The mere fact of being associated with a building project -- through design, documentation, construction-observation, or providing certificates -- is sufficient to implicate the architect in potential joint and several liability litigation. Such involvement is often unwarranted, time-consuming, unproductive, expensive and emotionally debilitating. Architects often question the wisdom of practising their chosen profession, given the risks associated with their potential exposure to litigation.

3) Architects always acknowledge responsibility for their negligent actions, omissions or inadequate advice and they are prepared to bear the cost consequences resulting there from. But they are affronted when joined as defendants in spurious litigation which alleges joint and several tort liability -- where the cost-consequences to them are completely out of proportion to the perceived liability and the architect's financial reward for service.

4) Architects can seek professional indemnity insurance backing which may reinstate their financial position following exposure to legitimate and insurable professional negligence claims. Professional indemnity (PI) insurance allows them to manage their businesses in a commercial environment. What they cannot accept, plan for, or financially accommodate, is their possible exposure to uninsurable losses which may arise from joint and several tort liability. Unfortunately, many have been caught as a by-catch in these these purse-seine litigations.

5) Professional indemnity (PI) insurers can also budget for and plan their own reinsurance and co-insurance arrangements and policy conditions in response to architects' possible risk exposure. What architects and their PI insurers cannot accurately predict, is liability which

goes beyond their proportionate share of liability in a legitimate claim from a "remote" plaintiff – ie, one with whom the architect has no contractual relationship and therefore exposed to unlimited liability, and also residential clients with whom the architect cannot contractually limit their legal liability because of statutory prohibitions imposed by consumer protection legislation, such as the Consumer Guarantees Act, Fair Trading Act, Building Act, etc.

6) NZIA understands that effective PI insurance for building surveyors is difficult to obtain in New Zealand because of the insurance risks associated with joint & several liability. It is our impression that the majority of weathertight building surveyors therefore tend to be overly cautious in their remediation recommendations. This accordingly, inflates the plaintiff's expectation of their entitlement for recoverable losses.

7) Whilst NZIA accepts that any future legislative changes to the rules relating to joint & several liability will not apply retrospectively, and therefore have no application to leaky building claims, there is always the future possibility of similar building industry-related liability issues which may require resolution in circumstances similar to that seen in leaky building dispute resolutions. Similar conservatism by experts may follow.

8) The potential exposure of insured architects to the reality and consequences of joint and several legal liability – and their attractiveness as deep-pocket to plaintiffs – may inevitably force PI insurers to withdraw from the marketplace – as they did with New Zealand leaky building claims from 2003 onwards.

9) For this reason, NZIA made a submission to proposed amendments to the Building Act 2004 and appeared before the select committee to advocate for the concept of proportionate liability in relation to residential properties. A significant number of other informed submitters supported proportionate liability – including Local Government NZ, territorial authorities for Auckland, Tauranga, Wellington and Christchurch, IPENZ, NZIA, Construction Industry Council, Master Builders, Beca and others.

10) The NZIA submission referred to above, centred around a companion mandatory home-warranty scheme which would have ensured that any uncollectable contribution from absent or insolvent concurrent wrongdoers was available to plaintiff's. These submissions were not accepted by Parliament, although Parliament did see fit to remove, as far as possible, territorial authorities from the list of potential defendants in building-related litigation.

11) We understand that Parliament at that time, had no desire to impose on home-owners the extra financial costs associated with a mandatory home-warranty scheme.

12) NZIA accepts the outcome of the parliamentary process in the Building Act Amendment No 4 and several tort liability in New Zealand.

13) This NZIA submission pays heed to the particular characteristics of building disputes, namely:- they involve many potential defendants; they are technically and factually complex and require the input evidence of technical expert witnesses; they are very time-consuming in both pre-trial preparation and subsequent trial and therefore extremely expensive to resolve; their outcomes are often unpredictable and may entail uncollectable contributions from liable defendants.

14) If proportionate liability is not recommended by the Law Commission, and if statutory caps are not recommended in association with a proportionate liability regime, then **NZIA proposes that the rules relating to joint and several tort liability** be modified to more equitably redistribute the liable, but uncollectable contributions from absent or insolvent co-defendants. (Such opportunity exists in what the Review at Chapter3.14-20 refers to as a "hybrid" scheme.)

15) The salient features of this NZIA "hybrid" proposal, which we refer to hereafter as **"No fault"** and which is illustrated by later accompanying diagrams, are:-

16) FOR PLAINTIFF

a) It retains the plaintiff's right to identify at least one liable defendant in any litigation contemplating joint and several tort liability.

b) It acknowledges the consequences to plaintiff and defendants alike, in situations where one or more concurrent wrongdoers are either absent or insolvent.

c) It acknowledges that if all defendants are absent or insolvent, the plaintiff bears their own unrecoverable loss.

d) It acknowledges the contribution of plaintiffs towards their own loss.

17) FOR CO-DEFENDANTS

a) It retains defendant's right to join other co-defendants into the litigation process.

b) It preserves the ability of the court to apportion liability according to how it sees fit and just according to the respective defendant's contribution towards the plaintiff's loss.

c) It acknowledges the possibility of uncollectable contributions from some co-defendants.

d) It acknowledges reduction of the plaintiff's claim entitlement in circumstances where they themselves have contributed to their own loss.

e) It acknowledges the judicial convenience and economy of determining the outcome of all concurrent litigation within a single forum.

18) PROPOSED **"NO FAULT"** RULE'S EFFECT UPON BOTH PLAINTIFF & CO-DEFENDANTS

a) It acknowledges society's exposure to risks associated with our economic and political environment over which we often have little or no immediate or long-term influence or control.

b) It acknowledges, but extends the circumstances in which the plaintiff bears some of the risk of uncollectable contributions. (Refer 16 c) above)

c) It acknowledges the real and often unrecoverable cost and economics of joint and several litigation.

d) It acknowledges that a plaintiff's common law right of legal redress may be rearranged in a more cost-effective way, as has happened with the **"no fault"** presumption in the Accident Compensation Act, and also the **"knock for knock"** agreement amongst vehicle accident insurers in NZ. Both of these existing arrangements- one legislated and the other contractual- have been designed to speed the dispute resolution process and to offer a degree of certainty of outcome. The associated legal and expert witness costs saved, are then directed more economically towards the settlement proceeds.

e) NZIA proposes that a similar **"no fault"** or **"knock for knock"** concept be applied to the uncollectable liability contribution from absent or insolvent joint or concurrent defendants. A concept such as this would imply that any uncollectable contribution would be re-allocated equally between the remaining solvent joint/concurrent defendants AND the plaintiff. All solvent parties then bear equally the (liquidity) consequences of our economic and social environment.

19) This **"no fault"** concept for the reallocation of such uncollectable contributions, would surely require no major shift in judicial thinking or policy. (cf; Law Reform Act 1936)

20) If such **"no fault"** redistribution of the uncollectable contribution were to be adopted, it would give a clearer signal to all participants in negotiation and mediation forums which rely upon established legal principles. It will automatically expose a plaintiff to the realities of our current and future commercial environment and encourage them to think more realistically about the risks and cost of litigation. It will retain the current common law joint and several tort liability framework, but will simplify greatly the often unproductive and legally expensive time spent re-allocating the uncollectable settlement contributions from absent or insolvent wrong-doers. It will provide a common sense commercial incentive to both plaintiff and co-defendants alike, to pragmatically consider at an early stage, the cost-benefits of avoiding a protracted and technically complex dispute resolution while at the same time facing the prospect of sharing any uncollectable contribution.

21) The major initial obstacle to dispute mediation, is the plaintiff's often unrealistic expectation of their settlement entitlement - their opening offer. Considerable mediation time is spent realigning the settlement expectations of both plaintiff and defendants. This realignment may occur more quickly under the NZIA **"no fault"** proposal, if early on in their negotiation, all parties were aware of their relative exposure to the redistribution consequences of any uncollectable contribution.

22) The following diagrams 1 – 12 illustrate the concept of a **"no fault"** re-allocation of any uncollectable contributions from absent or insolvent defendants. (Diagram 12 illustrates the application of the suggested **"no fault"** outcome for defendants D3 & D4 which might respectively represent the building consent authority and architect in leaky building litigation)

23) This propsed "no fault" concept, which re-allocates any uncollectable contribution from jointly liable defendants, is intended to apply only to the indivisible losses resulting their negligence. It is not intended to apply to the separate divisible losses caused by con-current (separate) wrong-doers and and which may ultimately become uncollectable, or partly uncollectable.

24) Additionally, **we attach herewith a private, commercially sensitive and therefore confidential resume** of typical outcomes in the leaky building dispute resolution process

involving our member architects**. This is for the private information of the Law Commission only, and not for publication or subsequent dissemination to others without prior reference and the consent of NZIA.**

25) We are aware that Colin Orchiston ,FNZIA, has submitted some worked examples of the likely outcome of our proposed “no fault” concept and draw your attention to these at pages 9 – 12 of his submission.

If requested, we shall be pleased to clarify any matter or answer any questions arising from this submission.

Yours sincerely

John Albert
Acting Chief Executive

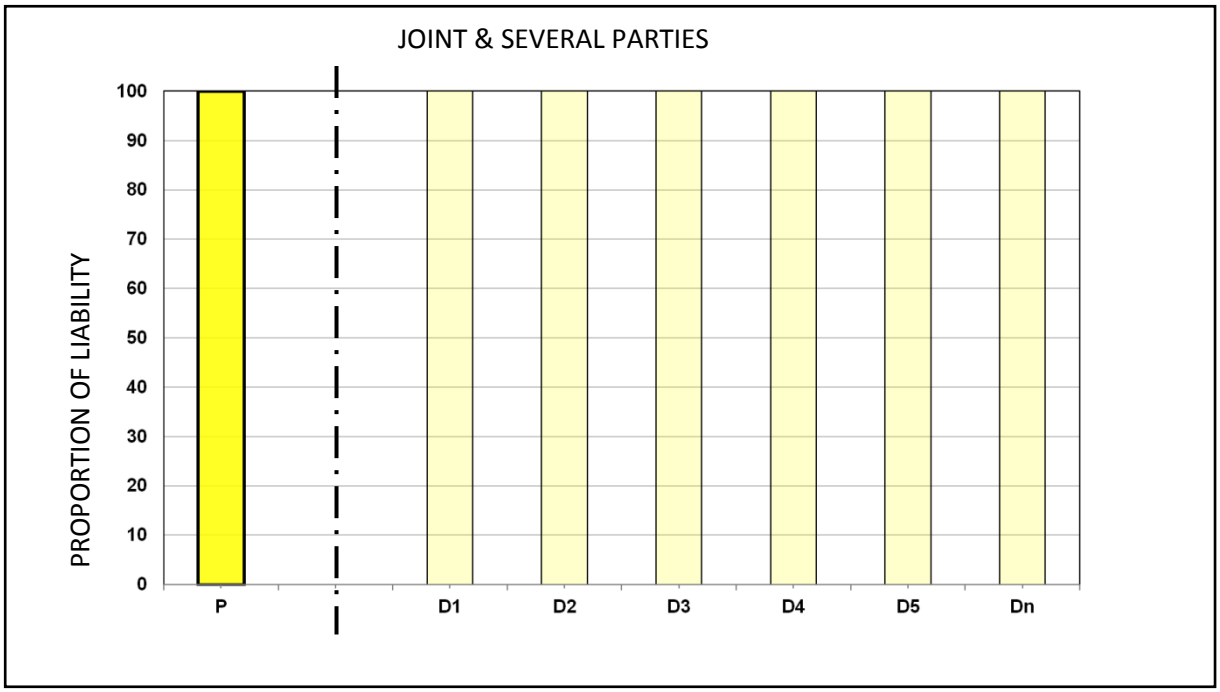


Diagram 1

Graham Strez FNZIA

LEGAL CONCEPT OF JOINT TORT LIABILITY

Plaintiff is legally entitled to recover the full extent of their loss from all (collectively) or each (individual) concurrent defendant in circumstances where the same indivisible loss arises from their failure to exercise adequate duty of care (negligence)

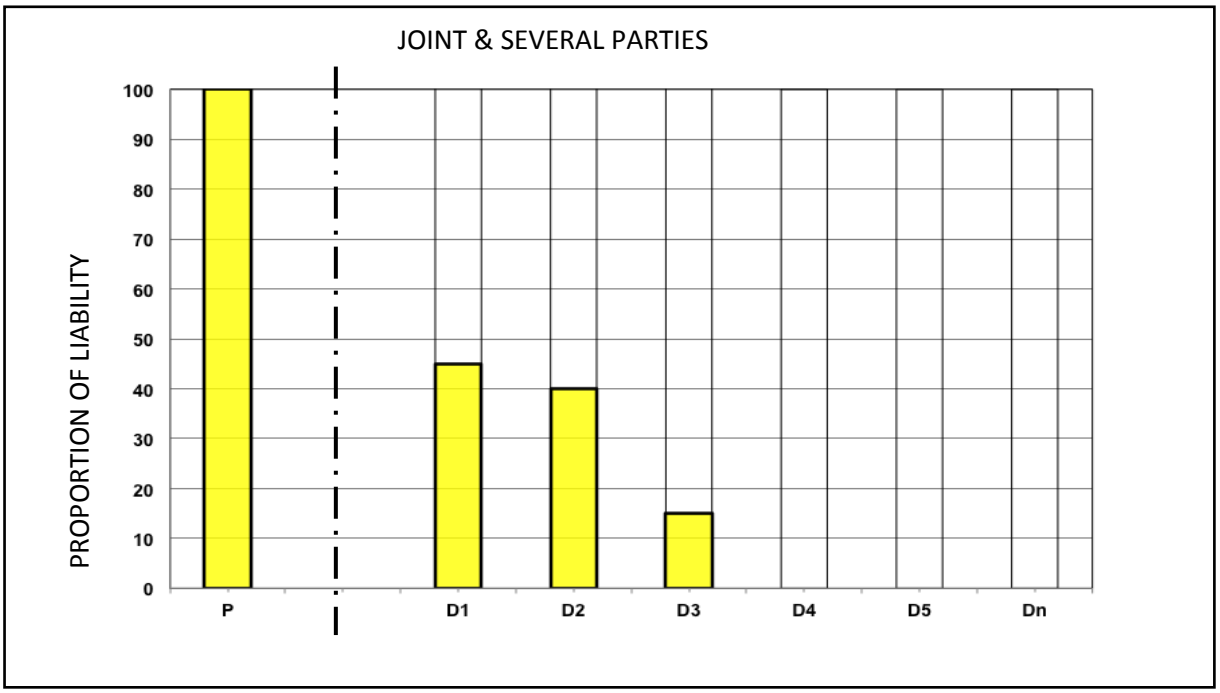


Diagram 2

Graham Strez FNZIA

LEGAL CONCEPT OF SEVERAL TORT LIABILITY

Each concurrent tortfeaseor will be liable to the plaintiff for their own proportionate share of the plaintiff ‘s loss

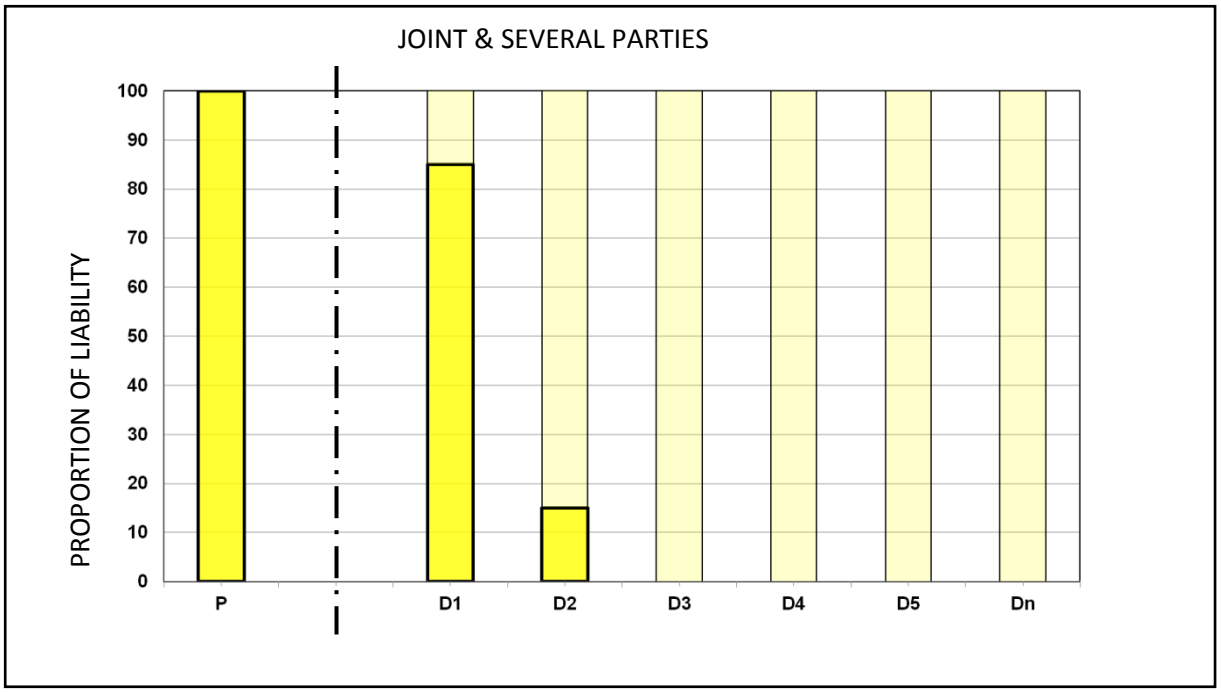
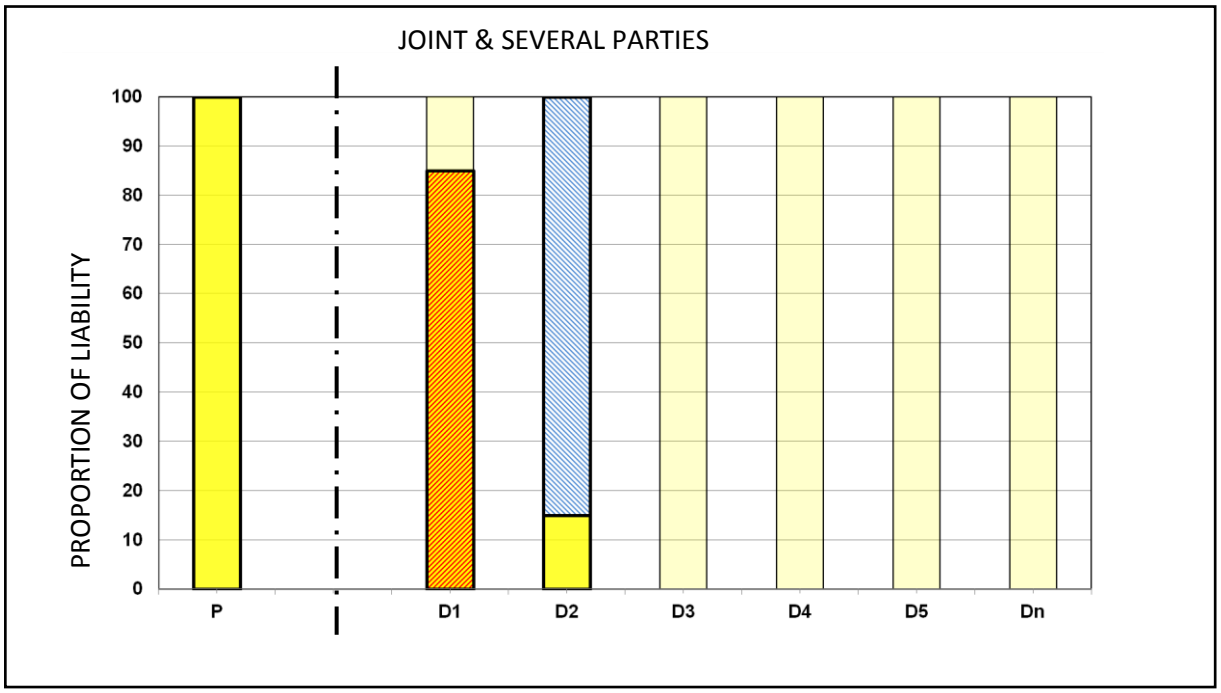


Diagram 3

Graham Strez FNZIA

LEGAL CONCEPT OF JOINT & SEVERAL TORT LIABILITY

Plaintiff's legal entitlement to full recovery of their loss caused by negligent defendants will fail if all liable defendants are absent or insolvent. – i.e. Plaintiff bears full loss.



Graham Strez FNZIA

Diagram 4

LEGAL CONCEPT OF JOINT & SEVERAL TORT LIABILITY

Uncollectable contribution attributed to absent or insolvent defendants is made good by remaining solvent defendants.

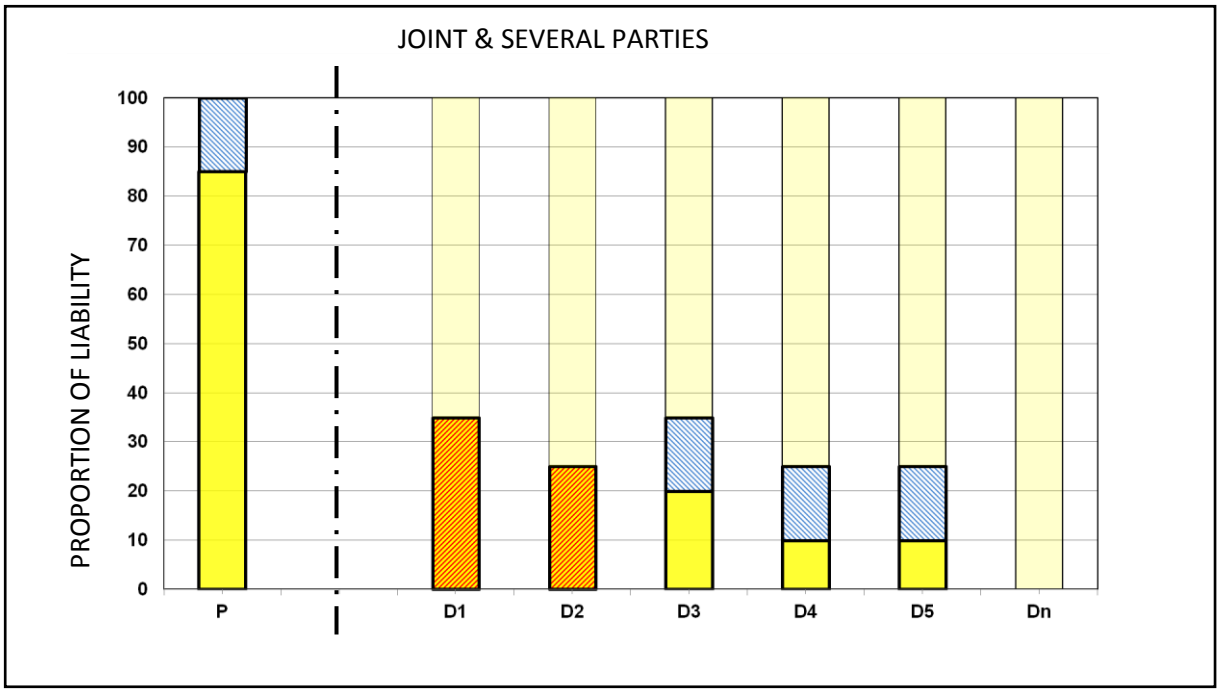
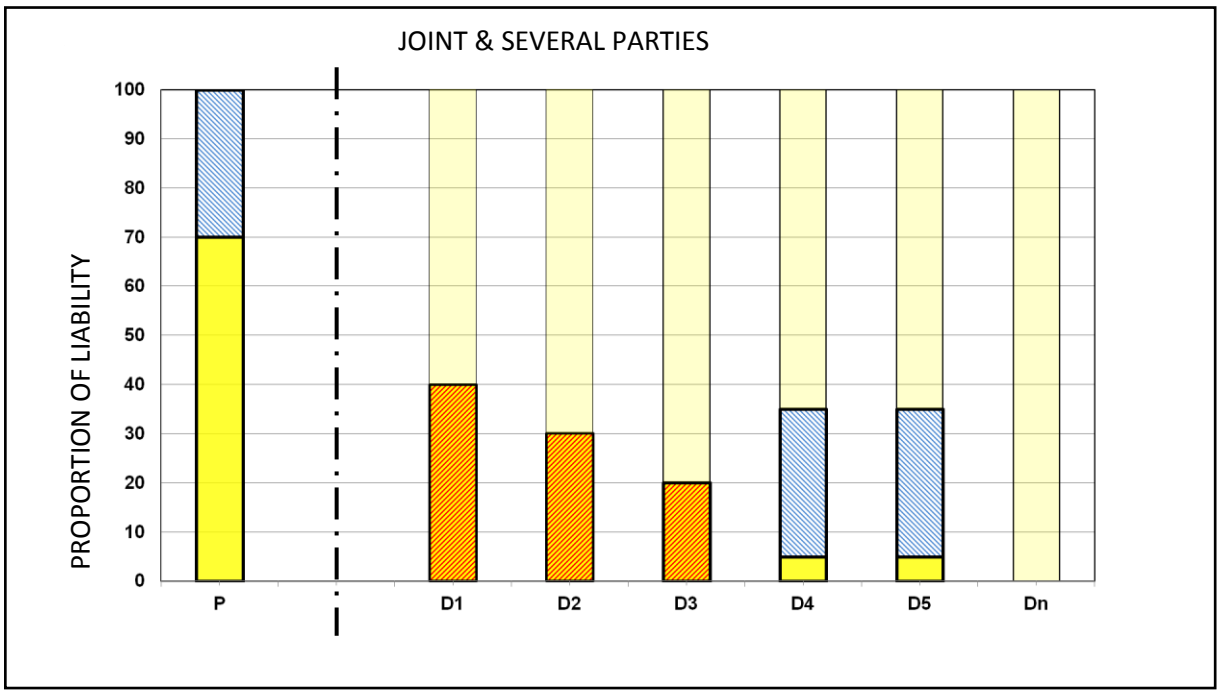


Diagram 5

Graham Strez FNZIA

CONCEPT OF PROPOSED "*NO FAULT*" AMENDMENT TO JOINT & SEVERAL TORT LIABILITY

Solvent concurrent tortfeasors contribute their own proportionate share of liability and the uncollectable contribution attributed to absent or insolvent defendants is re-allocated equally between remaining solvent defendants and plaintiff.



Graham Strez FNZIA

Diagram 6

CONCEPT OF PROPOSED "*NO FAULT*" AMENDMENT TO JOINT & SEVERAL TORT LIABILITY

Solvent concurrent tortfeasors contribute their own proportionate share of liability and the uncollectable contribution attributed to absent or insolvent defendants is re-allocated equally between remaining solvent defendants and plaintiff.

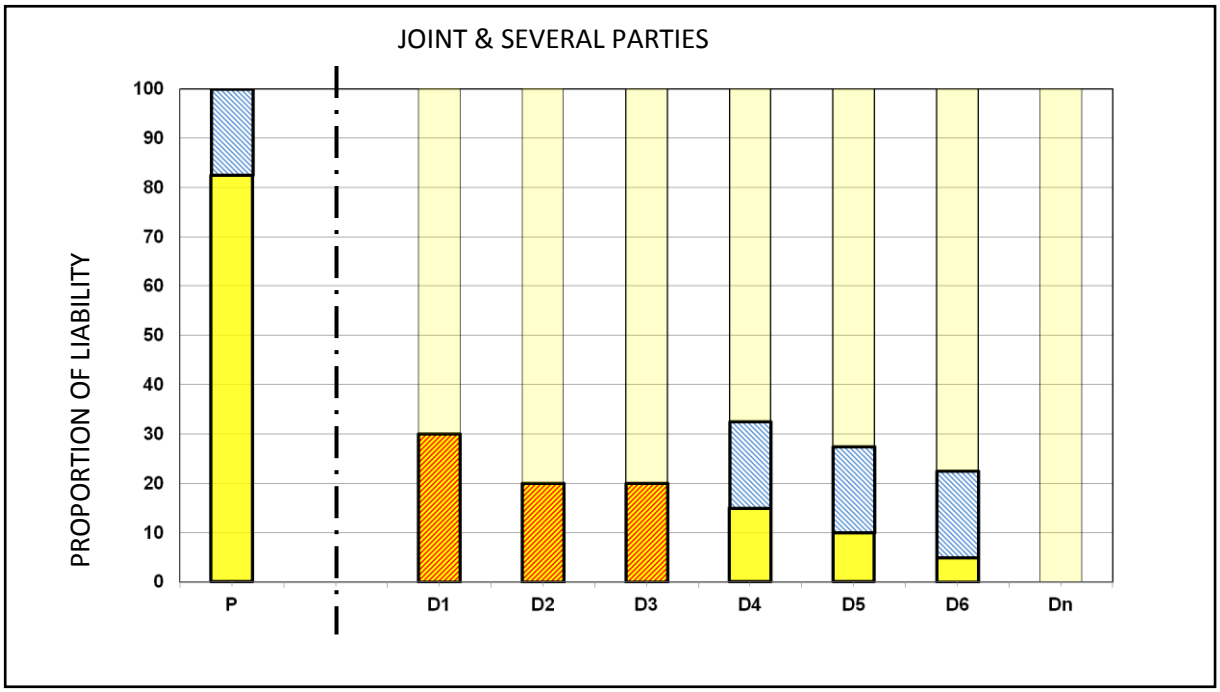


Diagram 7

Graham Strez FNZIA

CONCEPT OF PROPOSED "*NO FAULT*" AMENDMENT TO JOINT & SEVERAL TORT LIABILITY

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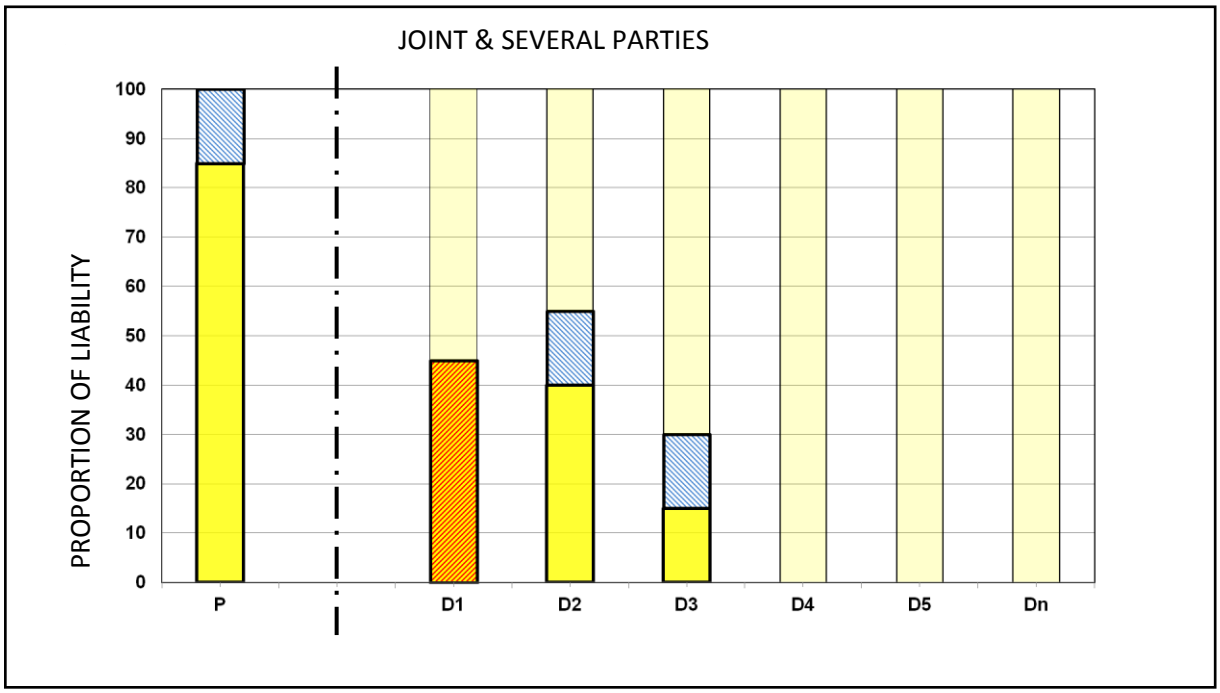

Graham Strez FNZIA

Diagram 8

CONCEPT OF PROPOSED "*NO FAULT*" AMENDMENT TO JOINT & SEVERAL TORT LIABILITY

Solvent concurrent tortfeasors contribute their own proportionate share of liability and the uncollectable contribution attributed to absent or insolvent defendants is re-allocated equally between remaining solvent defendants and plaintiff.

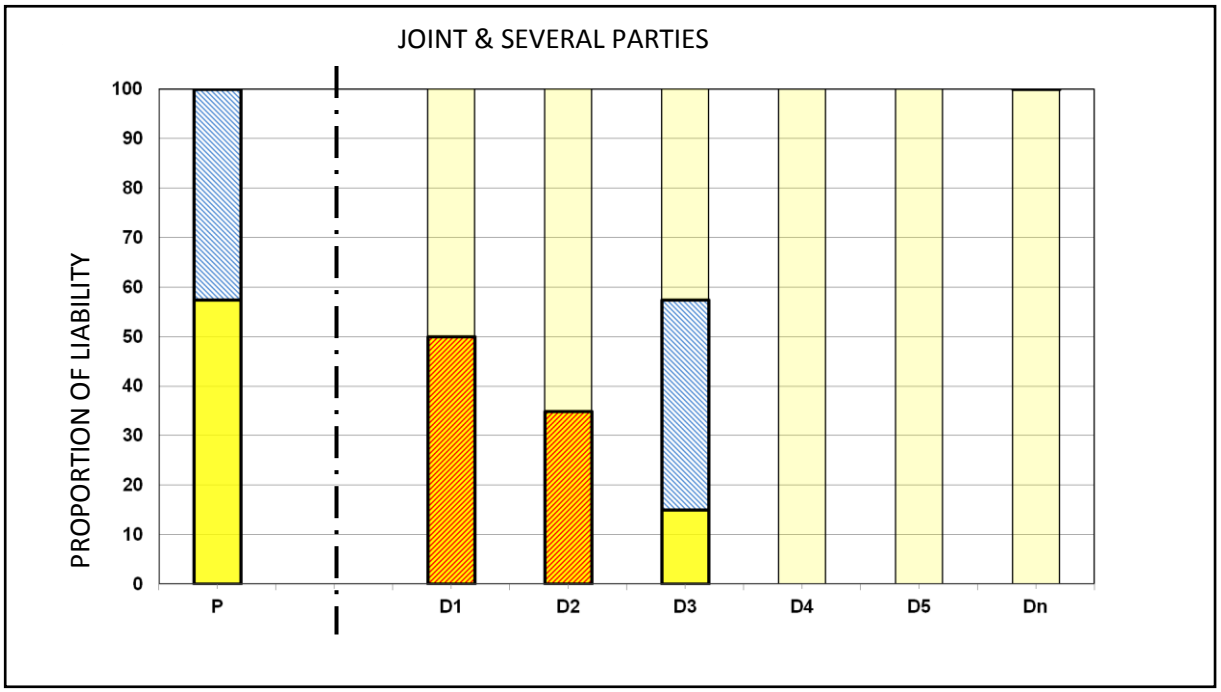

Diagram 9

Graham Strez FNZIA

CONCEPT OF PROPOSED "*NO FAULT*" AMENDMENT TO JOINT & SEVERAL TORT LIABILITY

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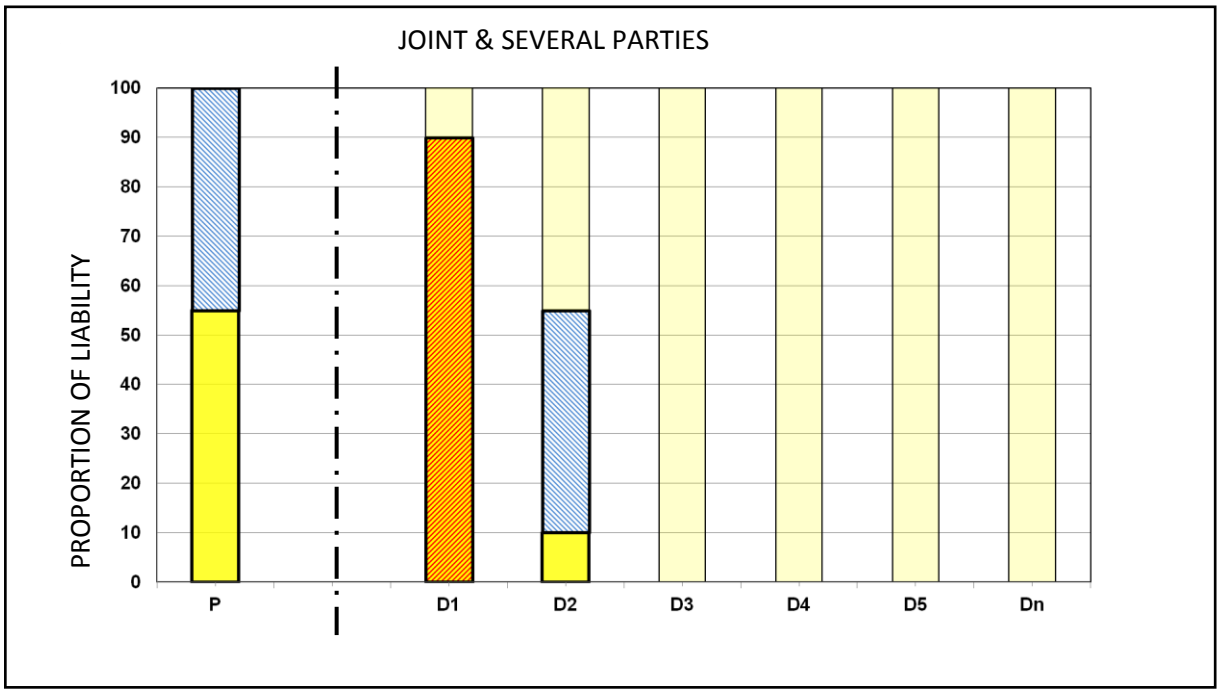

Diagram 10

Graham Strez FNZIA

CONCEPT OF PROPOSED "*NO FAULT*" AMENDMENT TO JOINT & SEVERAL TORT LIABILITY

Solvent concurrent tortfeasors contribute their own proportionate share of liability and the uncollectable contribution attributed to absent or insolvent defendants is re-allocated equally between remaining solvent defendants and plaintiff.

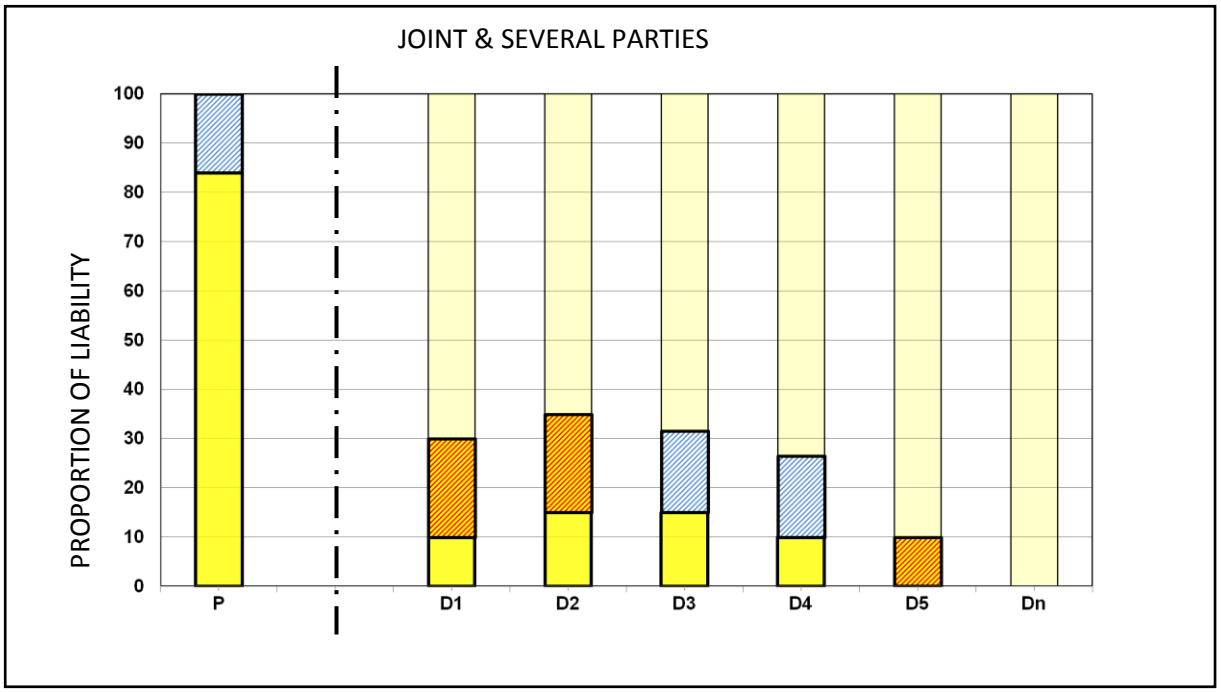

Diagram 11

Graham Strez FNZIA

CONCEPT OF PROPOSED "*NO FAULT*" AMENDMENT TO JOINT & SEVERAL TORT LIABILITY

Solvent concurrent tortfeasors contribute their own proportionate share of liability and the uncollectable contribution attributed to absent or insolvent defendants is re-allocated equally between remaining solvent defendants and plaintiff.

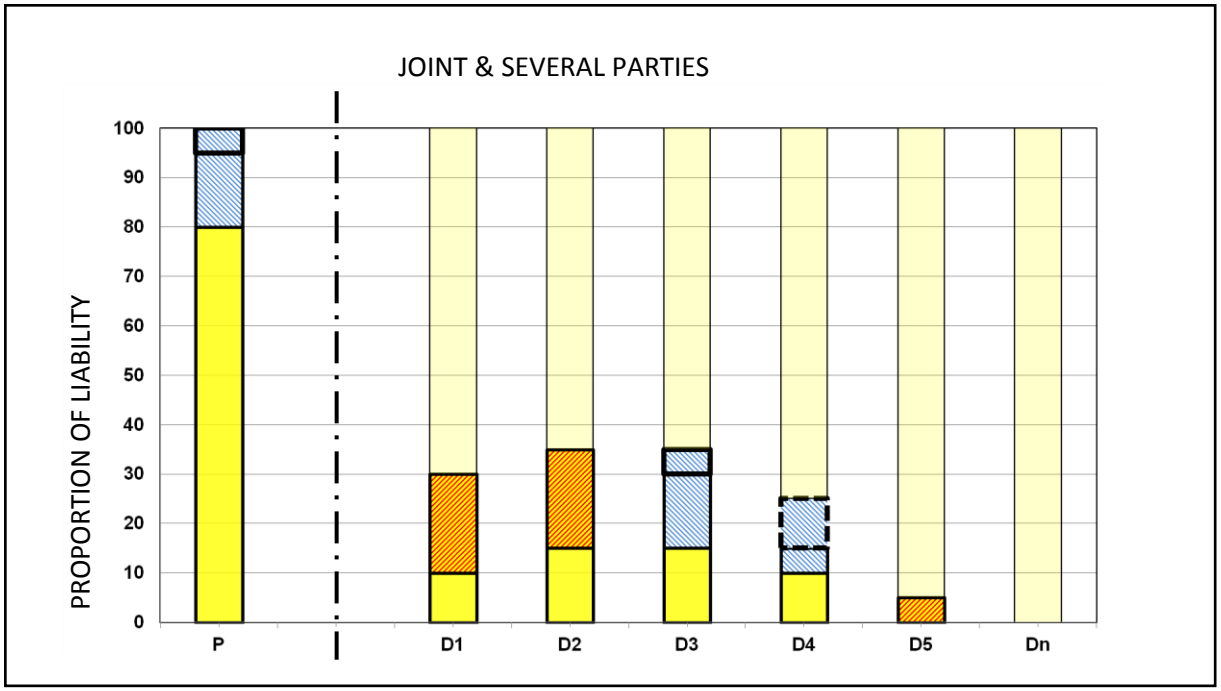

Diagram 12

Graham Strez FNZIA

CONCEPT OF PROPOSED "*NO FAULT*" AMENDMENT TO JOINT & SEVERAL TORT LIABILITY

Uncollectable contribution attributed to absent or insolvent defendants is re-allocated equally between solvent tortfeasors and plaintiff, ad infinitum. In this example D1 and D2 make part contribution; D5 makes no contribution. The uncollectable contribution is re-distributed between P, D3 and D4. Of this re-distribution, D4 can partly contribute to the re-allocation. D4's uncollectable contribution is re-allocated equally between P and solvent D3.

ANSWERS TO QUESTIONS POSED BY LAW COMMISSION

1 Joint & several liability works well when there are solvent defendants. It is also easy for plaintiffs, in that they don't have to identify all appropriate defendants.

2 It is unfair that defendants should contribute more to a plaintiff's loss than their reasonable proportion of that plaintiff's loss.

3 Our observation in leaky building disputes is that rarely is the question of "same damage" properly considered to be indivisible as between defendants. There has been judicial criticism of the current dispute resolution process wherein the majority of claims are settled by confidential mediation. It is our observation that a lax interpretation of the legal principles associated with joint & several liability implicates architects unfairly by requiring a "risk/cost-saving" settlement contribution quite unrelated to the proportionate contribution towards the plaintiff's alleged loss.

4 I suspect not in the case of leaky building claims, because of the technically complex factual and opinionated evidence involved and the high financial cost and emotional burden suffered by plaintiff's, who are led to believe by an overly conservative approach frequently adopted by building surveyors who fear their own exposure to joint & several liability should their assessments be considered as a negligent misstatement. The plaintiff's inflated expectation of any settlement sum will necessarily cause them to believe they were not fully recompensed.

The plaintiff will never be compensated if the defendants are absent, impecunious, or insolvent.

5 If the claim is genuinely for the same loss and indivisible as to causation between joint defendants, then the principle of recovery from one joint defendant is reasonable, provided any defendant can join other defendants to the proceedings. But a caring and just society should consider the overall balance of interests between plaintiff and defendant, particularly in circumstances where, as with many leaky building claims and their consequential fiscal fallout, the background to insolvency is a wide societal problem over which the plaintiff and defendants have no control.

6 It works well only if all defendants are solvent, and when no one party is intransigent, or in circumstances were their legal representative is inexperienced.

7 Joint & several liability is fairer to plaintiffs when some defendants are impecunious. Proportionate liability is fairer to defendants in situations where there are solvent defendants. What is needed is a legal system which recognises the merits and problems of each and fairly balances the respective interests when some defendants are insolvent. (Refer to submission attached)

8 Refer to answer to Q 7 & 9 and submission attached.

9 Our submission prefers an alternative hybrid system, which we describe for our convenience as "no fault" because we allocate any uncollectable contribution equally between the remaining solvent defendants AND the plaintiff without further judgement, in the interests of

fairness and convenience. The leaky building crisis and fiscal crisis are primarily both societal and international in origin.

10 If any threshold is suggested, the judicial argument will concentrate upon achieving this threshold. It will distort the argument unfairly as between major and minor contributors.

11 If proportionate liability is appropriate for defendants, and we argue that it is, then it should also apply to the plaintiff.

12 The hybrid "No fault" scheme proposed by NZIA in its submission.

13 Yes, for reasons of equity.

14 Yes, for reasons of equity.

15 We see no reason why they shouldn't be the same.

16 Definitely yes! The subject matter is highly charged emotionally and it is compelling at first glance to empathise with the plaintiff. Many property developers have protected themselves from the litigation process and re-emerged as a new entity responsible later for the same havoc. Many experience sub trades which relied upon BRANZ Appraised products, have gone out of business, at a time when their expertise is needed in remediation. Leaky building mediations, whether within the WHRS mediation forum or otherwise, are often resolved with inordinate haste without proper recourse to reasoned technical (as distinct from legal) exploration and argument as to causation and consequence.

17 Refer answer to Q 9

18 It hasn't, because many defendants are now insolvent or absent, leaving only major solvent defendants, such as building consent authorities, major building product suppliers, major construction companies and insured building professionals, as the only potential contributors to settlement.

19 NZIA argued for proportionate liability within the residential building sector only, before the select committee inquiry into Building Act Amendment No4. Liability exclusions can otherwise be covered by contractual means.

20 Refer to Q19 prior. The NZIA submission for proportionate liability was based upon the premise of an accompanying mandatory home warranty scheme being established. This would require funding through a building consent levy applicable to all new renovations and constructions. The premium might profitably be apportioned to skilled and properly qualified building inspectors in the belief that their vigilant construction inspections might reduce the incidence of claims against the warranty provider. This would reduce their risk exposure and liability. The cost of such premium is likely to be less than the cost of building professionals giving advice on leaky buildings and the current cost of settlements upon ratepayers. ACC was initially funded on a similar concept. Housing New Zealand required such mandatory warranty be taken out on new houses funded by them in the early 1980s.

21 Probably yes, because joint & several liability provides a vehicle for plaintiffs to extort demanding settlement contributions prior to trial. The costs of trial are significant,

particularly in the case of building and accounting claims involving forensic technical experts and voluminous documentation.

22 No comment

23 No comment

24 NZ registered architects have reciprocal registration rights in Australia and vice versa.

25 No comment

26 No comment

27 Refer Q9 prior. Fairness should perhaps precede efficiency.

28 Deep pockets within the NZ building industry include Building Consent Authorities, national building companies and material suppliers and insured professionals. Many building professional could not obtain effective PI insurance and became impoverished following “a day at the mediation.”

29 Refer answer to Q9 prior and submission attached .

30 Only when all liable defendants are present and solvent. A proportionate allocation of distributable resources will follow.

31 Only when all liable defendants are present and solvent.

32 Refer answer to Q9 prior and submission attached.

33 Refer answer to Q9 prior and submission attached

34 Refer answer to Q 9 prior and submission attached.

35 Refer answer to Q9 prior and submission attached.

36 Adopt a hybrid system referred to in answer to Q9 prior and submission attached.