

**Would a common law right to apportion liability in contract
facilitate justice in concurrent delay disputes?**

by

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ABSTRACT

This dissertation is concerned with the current position in the law relating to concurrent delay disputes, and the inability at present to apportion liability in claims that exist only in contract. There is a view in relation to the general law, that the position of awarding strict liability on a 'win or lose' basis evades perceived justice in many circumstances, resulting in imbalanced decisions and taking damages beyond compensation to the point of being punitive.

Proposals have been made for reform of the common law to include a right to apportion liability and damages in contract, in a similar manner to the concept of contributory negligence in tort. Suggestion also exists that this position would provide the Courts with the additional, but necessary, tools for dealing with concurrent delay disputes.

The purpose of this dissertation was to consider the current position in law specific to concurrent delay disputes and contrast this with the support for an apportionment approach to be incorporated into the general law. This research was used to establish reasoned argument regarding the reform of the law, and the adequacy or otherwise of standard form contracts commonly in use within the industry.

The evidence indicates that there is widespread perception of injustice within the current law, and this has resulted in support for an apportionment approach in the law generally. Decisions of the Courts have, in some circumstances, defied causation principles, further fuelling the debate.

However, in the concurrent delay context, this is not seen to be relevant. Whilst the current position in the law surrounding concurrent delay remains something of an uncertainty, the conclusion of this research is that a right to apportion liability would only add to this uncertainty. This is primarily due to the status of commercial contracts, which are not viewed as being instruments for this perceived justice.

Commercial contracts regulate agreements between the parties, and, therefore, the recommendation of this study is that greater certainty in contracting terms remains the most effective tool for rationalising and clarifying concurrent delay. Further research is recommended in this area.

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STATUTES

England and Wales

Law Reform (Contributory Negligence) Act 1945

The Civil Liability (Contribution Act) 1978

Unfair Contract Terms Act 1977

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1.0 Introduction

The concept of time is incongruous in construction contracts, setting them aside from most simple commercial contracts. The apt link between time and cost means that the liability for delays caused to the timely completion of contract works is often vigorously disputed, with contracting organisations and employers alike blaming each other for causing the delay. Modern day methods of retrospective delay analysis may have enabled some level of clarity within this complex area, though such methods alone are often not appropriate in circumstances where concurrent causes of delay exist.

Unfortunately, the law¹ is equally unclear in this extremely complex area, partially due to a lack of a clear definition regarding the meaning of concurrency in a delay context. This in itself is a major subject of debate, as the law appears to accept the principle that a period of delay can be attributable to more than one contributing concurrent cause, but does not provide any strict definition.

Instead, the law currently offers a series of differing solutions to dealing with concurrent delays, each of which may appear to be sensible and correct on the basis of the facts in one case, whilst appearing completely inappropriate in relation to another. This lack of clarity is also reflected within the standard form contracts commonly in use within the construction industry, the majority of which do not deal with concurrency either adequately or at all.

The apportionment of liability in view of the causal potency of concurrent causes in delay disputes brought in contract is suggested by some commentators on this subject as being a common sense and logical approach to addressing the shortcomings of the current position in law. However, such an approach is generally not permitted in the current common law in England. The law currently takes a rigid view on liability allowing only

¹ All reference to “*the Law*” is made with regard to the **Law of England and Wales** unless identified otherwise

either claimant or defendant to succeed in proving the other's 100% culpability for causing the delay.

This win or lose position has instigated differences in opinion surrounding the adequacy of the current law to address matters on concurrent delay and the perception of justice within a system that apparently acknowledges the causative principle of concurrent and contributing causes, but does not allow any contribution or apportionment in view of the relative causative potency, in direct relation to liability. Many have called for reform of the law in this area.

This research will examine the issues surrounding the proposals to incorporate an apportionment principle in contract law, and the common perception that its current absence is resulting in imbalanced decisions that do not provide justice to parties in dispute only in contract. This general view will be examined specifically in relation to concurrent delay disputes and the inherent uncertainty present in the current position in law, as well as within the orthodox standard form contracts widely in use.

The aim of the research is to formulate reasoned argument in support the proposed reform of the law, or otherwise, from the viewpoint of the perception of injustice held by many regarding this general position in law.

2.0 Literature Review

Furst et al in the seventh edition of Keating (2001) draw summary conclusion on the subject of concurrent or competing causes of delay, that the law is unclear in the contractual context. This position remains unchanged in the eighth edition of Keating published in 2006, highlighting a continued lack of development in the law in this area. Helps (1999) suggests that the lack of development in the law may be attributable to the fact that standard form contracts traditionally contain arbitration clauses, therefore disallowing the courts the opportunity to establish clear authority. Subsequent to this view, Helps (2001) then suggests that it may be wishful thinking to expect judicial guidance on this point. However, whatever the source of this lack of clarity, Bristow (1986), Hatherley (1984), FitzPatrick (2001), Burrows (2004) and Burr (2005) all concur that the current position in law in England does not provide justice to the parties in circumstances where concurrent liability exists in relation to delay disputes.

This dissatisfaction was considered by Dering (2007), who suggests that the definition of concurrency, by virtue of the variety of meanings attributed it, contributes to the uncertainty in this area. Wrzesien & Wessing (2005) concur with Dering, offering their own definition to the debate. Definition is also offered by Pickavance (2005), as follows: *“...an effect caused by at least two events occurring at the same time...”* comprising *“...probably the most conceptually challenging aspects of delay analysis”*. By contrast, Wrzesien & Wessing’s definition is much more simplistic, noting that concurrency arises *“...where a single period of delay is caused by more than one event”*. Both of these definitions differ in technical content and may also appear to be technically correct in their own right, but they are distinctly different.

Williamson (2005) does not attempt any definition, but does provide a useful example in understanding the inherent complication with concurrent delay disputes. His example is that if an Architect² has failed to grant possession of a site for a period of one week, whilst at the same time the Contractor was not ready to commence the works as it did not

² In the context of the JCT Standard Form Contract(s)

have the requisite labour, then both parties are seemingly culpable for the same one weeks delay. In this circumstance, Williamson suggests that the Employer would naturally be unhappy about having to reimburse loss and expense to the Contractor and would be equally unhappy at the prospect of losing its right to apply liquidated damages for delay. Likewise, the Contractor is also likely to have grievances if it should have to pay liquidated damages and also fail to recover compensation for its preliminary and other resource costs that were prolonged on site. This example leads one to reasonably conclude that it would be unfair and unjust to penalise one party to the benefit of the other as both are precisely and equally at fault. This example is referred to by Williamson as being 'true concurrency', with two events occurring at exactly the same time, of exactly equal causative potency and of exactly equal effect. Whilst any broad definition of concurrency does not appear to have been addressed by the judiciary, the theory and existence of true concurrency has not escaped their attention. In *Brompton v. Hammond*³, Judge Seymour, by reference to the prior ruling of Judge Dyson in the *Malmaison Hotels*⁴ decision, acknowledged the occurrence of true concurrency, but then significantly went on to postulate that there are different types of concurrency without providing any further definition.

Williamson suggests that true concurrency is a most unlikely finding to be made by any Court or tribunal properly applying the law, on the basis that acceptance of this principle is to abandon the search for the truth and concede that it is really too difficult to identify what did cause the delay to the project in question. Hudson (2004)⁵, accepts that true concurrency does occur, at least in the very rare case, adding that in this rare circumstance both parties' claims must fail on the grounds that neither party can meet the essential basis for any contractual claim i.e. "...that neither party would be able to satisfy the necessary causation requirement..." and, therefore, each parties' losses would remain where they fall.

³ Royal Brompton Hospital v. Hammond (& others) [2000] B.L.R. 75

⁴ Henry Boot Construction v. Malmaison Hotel (Manchester) [2000] C.I.L.L. 1572

⁵ Citation taken from Pickavance, K. (2005) *Delay and disruption in construction contracts*, 3rd Edition, London, LLP, at page 625, paragraph 16.24

2.1 The link between causation and concurrency

Williamson continues to set out that in order to understand concurrency it is necessary first to examine the basic principles of causation. Piper (2005) also endorses this method of analysis. The position on causation in law is set out Beale (2004) as follows:

"The courts avoided laying down any formal test for causation; they have relied on commonsense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the Claimant's loss. The answer to whether the breach was the cause of the loss, or merely the occasion for loss must in the end depend on the court's commonsense in interpreting the facts".

Williamson and Piper reiterate the legal and evidential burden upon both claimant and defendant of proving the nexus between the event or cause, and the delay and/or the effect for each concurrent cause pleaded. The prerequisites to which they refer, for delay claims brought in contract (or a common law claim for damages), were reiterated in the Scottish case of *John Doyle v. Laing Management*⁶, that the claimant must aver:

1. the occurrence of an event for which the defendant bears legal responsibility,
2. that he has suffered loss or incurred expense, and
3. that the loss or expense was caused by the event.

Brewer (2001) identifies that the Courts have stated a tacit acceptance that a single period of delay may be attributable to more than one causative event.

⁶ John Doyle Construction Ltd v Laing Management (Scotland) Ltd [2004] S.C.L.R. 872 B.L.R. 295

2.2 The current position in law in relation to concurrent delay

Furst et al (2006) in Keating set out three approaches to concurrent delay as the law currently stands.

The first is referred to as the “*the Devlin approach*”. The approach set out by Mr. Justice Devlin in *Heskell v. Continental Express*⁷ is this:

“If a breach of contract is one of two causes of a loss, both causes co-operating and both of approximately equal efficacy, the breach is sufficient to carry judgement for the loss....”

Williamson condemns this approach referring to its obvious logical flaws that could result in an absurd position where both a Contractor’s claim for loss and expense and an Employer’s claim for liquidated damages succeeded in view of the same period of delay. This is also identified by Furst et al as the “*obverse problem*”. Neither Eggleston (1997) nor Marrin (2002) provide comment on this approach, whilst Chappell (1998) and Knowles (2000) accept the Furst et al view but do not provide further comment in favour or against this approach. Eggleston and Marrin’s ignorance of this approach is suggestive of the lack of support that it has received in construction context. Furst et al also refer to the possibility that application of the Devlin approach may result in the same outcome as the dominant cause approach (which is set out below), as in *Fairfield-Mabey v. Shell*⁸ where it was found that, on the facts, a concurrent cause was the dominant cause.

The second approach identified by Keating (2006) is the “*the burden of proof approach*”⁹, which is said to be as follows:

⁷ Heskell v. Continental Express [1950] W.N. 210

⁸ Fairfield-Mabey v. Shell U.K. (Metallurgical Testing Services) (Scotland) (Third Party) [1989] 1 All E.R. 576

⁹ See Government of Ceylon v. Chandris [1965] 3 All E.R. 48

“If part of the damage is shown to be due to a breach of contract by the Claimant, the Claimant must show how much of the damage is caused otherwise than by his breach of contract, failing which he can recover nominal damages only...”

Williamson again identifies that this approach has the reverse logical consequence of the Devlin position, that on this test neither the Contractor nor Employer would be able to succeed with their respective claims, i.e. the obverse problem identified by Furst et al in reverse. Eggleston (1997) and Chappel (1998) both express reservations regarding this approach, adding that it does not appear to have much support in the construction context.

The third, and the one to which the most weight is given by Furst et al, is “*the Dominant Cause Approach*”, which is said to be as follows:

“If there are two causes, one the contractual responsibility of the Defendants and the other the contractual responsibility of the Claimant, the Claimant succeeds if he establishes that the cause for which the Defendant is responsible is the dominant cause”.

This position has the obvious advantage of being applicable to both claim and counterclaim, thus avoiding the obverse problem. Williamson sets out that if the dominant cause is demonstrated as being the contractual responsibility of the Employer, then the Contractor would recover loss and expense, as well as immunity from liquidated damages for the period of delay. Conversely, if the dominant cause was found to be the contractual responsibility of the Contractor, then his claim for extension of time would fail, allowing the Employer to recover liquidated damages. The decision as to which cause is dominant is a question of fact, which is not necessarily resolved by the chronological order in time, but is to be decided by applying common sense standards, as applied in *Leyland Shipping v. Norwich Union*¹⁰.

¹⁰ *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* [1918] A.C. 350

Furst et al submit that the dominant cause approach is, or should be, the correct approach as the law currently stands, drawing authority for this view primarily from the great weight given to this approach in insurance cases. Chappel (1998) agrees with Furst et al's view. Williamson and Newman (1999) also concur with Furst et al, that this is the most robust authority applied and used by the Courts, but this is with some uncertainty on their part. Dering (2007), Knowles (2000), Marrin (2002) and Silver (2005) disagree with Furst et al citing the *H. Fairweather v. L.B. Wandsworth*¹¹ in support of their view. Of the same case, Eggleston (1997) draws attention to the fact that the Court was not directly addressing the matter of causation, and that this decision, in the context as referred, should be used with caution. Chappell (1998) supports Eggleston's view and goes further to reject the view of Dering, Knowles, Marrin and Silver, stating that such reliance on the *Fairweather* case in this way is "...almost certainly obiter this statement nowhere near the kind of condemnation often suggested"¹². Chappell also refers to the *Galoo v. Bright Greame Murray*¹³ case as supporting the dominant cause approach. In the *Galoo* case the 'but for' test was rejected in favour of establishing the effective or dominant cause of the loss, and Chappel's reference to this case is acknowledged by Newman, who adds that "*the Court of Appeal confirmed that the dominant cause approach is correct as a starting point*". Marrin summarises that the rationale commonly offered in support of the dominant cause approach is less than wholly persuasive.

Pickavance's view is that the dominant cause approach is redundant in a modern context, preferring a more complicated study of the facts through retrospective delay analysis. He summarises that a claimant should only be allowed to recover its losses in circumstances of concurrency if it could prove that the losses were suffered as a result of the acts or omissions of the other party, and therefore would not have been incurred in any event. Dering, in contrast to Pickavance's view, comments that in some cases the facts alone cannot always answer the question.

¹¹ *H Fairweather v. Wandsworth L.B.C.* [1988] 39 B.L.R. 106

¹² at page 146

¹³ *Galoo Ltd. v. Bright Grahame Murray* [1994] 1 W.L.R. 1360

Whilst Dering, Williamson, Silver and Newman agree that the dominant cause is, or should be, the correct approach, they also concur that there is no direct authority that expressly supports the dominant cause approach. This raises questions surrounding how their support of this position was formulated. Williamson identifies support for the dominant cause approach, at least to an extent, in the decision of the Commercial Court in *Balfour Beatty v. Chestermount*¹⁴. However, he is critical of the case, as in his view, it only goes part of the way to support the dominant cause approach, and that the Court was not immediately concerned with the issues of causation or concurrency.

Dering and Williamson also identify further support for this approach in the *Malmaison Hotel*¹⁵ case where the Court adopted an approach which recognised that any one delay or period of delay may properly, as a matter of causation, be attributed to more than one delaying event and that it would be sufficient for a Contractor to succeed with its claim if just one event were sufficient as such to afford grounds. Brewer (2001) adds further weight to this decision and refers to its support and replication in the more recent *Brompton Hospital*¹⁶ case. Both Marrin and Dunn (2005) concur that the *Malmaison* approach is most appropriate¹⁷, but Morris (2000) and Nash (2002) express reservations regarding its application.

Marrin (2002) and Knowles (2000) suggest that another approach worthy of consideration is the “*first in line approach*” (also referred to as the ‘but for’ test), which is not identified by Furst et al in Keating, but shares some characteristics with the burden of proof approach. The logic behind this approach takes a somewhat technical view that allows a cause to be prevalent over the other, on the basis that it occurred first. Other causes of delay are, therefore, ignored unless they continue to occur after the first cause has ceased. Marrin is critical of this approach, believing that it has limited application. Knowles simply sets out how this approach is to be applied, summarising generally that there are no hard and fast rules as to which cause of delay should take precedence.

¹⁴ *Balfour Beatty v. Chestermount Properties* [1993] 62 B.L.R. 1

¹⁵ *Henry Boot Construction v. Malmaison Hotel (Manchester)* [2000] C.I.L.L. 1572

¹⁶ *Royal Brompton Hospital v. Hammond (& others)* [2000] B.L.R. 75

¹⁷ Specifically for use with the JCT standard forms of contract

