
Report to the Ministry of Business, Innovation and Employment

Liability outcomes in the building sector - glimpses from available data

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Executive summary

The intention of this research is to improve the evidence base relating to liability outcomes in the building sector. Using a mix of fact-based and more conjectural material we are able to derive upper-bound estimates of the answers to the key questions motivating this research. We extrapolate the findings from the analysis of relevant legal cases to the estimated total number of building defect disputes arising between 2008 and 2018 to give a sense of the total amount of expected damages (see Table 1).

The questions relating to parties missing from litigation are answered by reference to known evidence and inference (i.e. assumptions used in the case of missing data). For instance, when interpreting the answer to how often builders are not parties to litigation, we use known numbers of insolvent parties named in cases and assumptions about solvency for those who are not named and who do not have an order made against them as part of the claim.

When providing the overall incidence of builders being missing parties we utilise known evidence of bankruptcy/insolvency and/or liquidation/ removal from the companies register to derive an estimate in relation to the total number of building defect claims.

There are also further questions concerning the distribution of payouts relating to the main parties in the table above, which we were not able to answer directly. We are able to provide information on the distribution of orders made against the parties, as follows:

- *Builders*- \$1,400-\$21 million (average \$670,000) just under 50% of orders against builders are between \$100,001 and \$500,000.
- *Developers*- \$3,000-\$21 million (average \$1 million. Around 45% of orders made against developers are between \$100,001 and \$500,000).
- *Other parties*- \$6,000-\$860,000 (average \$137,000).
- *BCAs*- \$916-\$7.5 million (average \$396,759).

In the specific case of BCAs analysis of legal cases revealed that BCAs had faced additional costs due to missing parties of around 170%. That is, rather than face a cost of around \$29 million in accordance with allocated shares among other liable parties, BCAs would face total costs of around \$78 million. The extrapolation exercise suggested that BCAs would face a total additional cost of around \$332 million for all estimated building defect disputes between 2008 and 2018.

While there are obvious limitations to the analysis which should be borne in mind (e.g. the use of inference, interpolation and assumptions, especially in the extrapolation exercise), we highlight that this particular type of analysis has not been undertaken previously and due to confidentiality constraints much of the relevant data will remain hidden even if further time and resource were devoted to the task. Nevertheless, we believe the estimates are a useful contribution to better understanding liability outcomes in the building sector.

Table 1 Key questions and answers

Question	Answer
<p>What proportion of building consents issued by a BCA result in court action or other dispute resolution process?</p>	<p>2.5% (all building consents) 3.2% (residential consents)</p>
<p>What is the total quantum of damages arising from building defect cases (over past 10 years)?</p>	<p>\$144,972,217 (for the 138 relevant cases identified) \$113,990,420 (excluding the three non-residential cases) \$4.7 billion (extrapolating to the estimated 8,800 disputes in total) \$3.8 billion (extrapolating to total number of disputes less non-residential)</p>
<p>How often are BCAs required to pay 100% of all damages awarded due to being the ‘last man standing’?</p>	<p>48% (up to 30 out of 62 cases where BCAs are liable for some costs)</p>
<p>How often are builders and/or developers not parties to litigation because they are no longer in business or cannot be located?</p>	<p>Builders: up to 70% pre-claim inference, 48% overall (including post-claim evidence) Developers: up to 86% pre-claim inference, overall 68% (including post-claim evidence)</p>
<p>How often are designers not parties to litigation because they are no longer in business or cannot be located?</p>	<p>7%, pre-claim evidence, overall unknown</p>
<p>How often are ‘other parties’ not parties to litigation because they are no longer in business or cannot be located?</p>	<p>Up to 92% pre-claim inference, overall 63% (including post-claim evidence)</p>
<p>How often are owners left ‘out of pocket’ (i.e. their total awards are not sufficient to recoup their financial losses) and by how much?</p>	<p>17% (23 out of 138 cases), totalling \$14 million \$458 million (extrapolating to the estimated 8,800 disputes in total, assuming similar incidence)</p>

1. Introduction

The Ministry of Business, Innovation and Employment (MBIE) has a work programme underway on the allocation of risk, responsibility and liability in the building process.

The intention of the work programme is to advise the Minister for Building and Construction (the Minister) on the nature and magnitude of issues associated with the misallocation of risk, responsibility and liability in the building process.

A key component of the advice to the Minister is an up-to-date and detailed understanding of liability outcomes across the building sector. The research undertaken to supply that understanding is the subject of this report.

The key questions underpinning the research are:

- What proportion of building consents issued by a BCA result in court action or other dispute resolution process?
- What is the total quantum of damages arising from building defect cases (over past 10 years)?
- What is the distribution of payouts made by BCAs in court cases resulting from building defect cases? In particular, how often are BCAs required to pay 100% of all damages awarded due to being the ‘last man standing’?
- What is the distribution of payouts made by builders and/or developers in court cases resulting from building defect cases?
- What is the distribution of payouts made by designers in court cases resulting from building defect cases?
- How often are builders and/or developers not parties to litigation because they are no longer in business or cannot be located?
- How often are designers not parties to litigation because they are no longer in business or cannot be located?
- How often are owners left ‘out of pocket’ (i.e. their total awards are not sufficient to recoup their financial losses) and by how much?

In this report we set out our approach to the research (including limitations), outline the major findings, and provide some comments and reflections. This report covers 2008-2018.

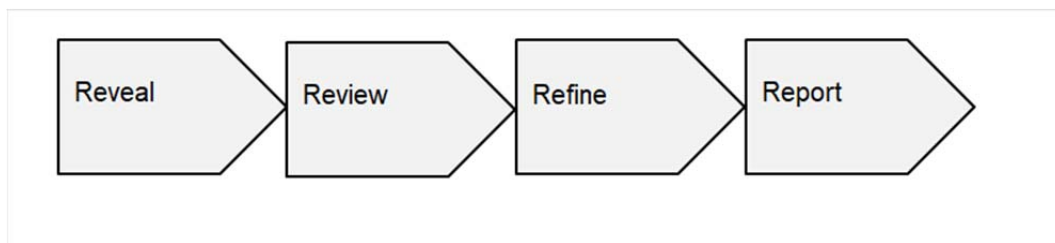
2. Approach

Our approach centred on a review of publicly available documents containing information on liability outcomes in the building sector. In particular, building defect dispute claims in relevant fora (i.e. the Weathertight Homes Tribunal (WHT) and cases in the High Court) are the core source of relevant information.

2.1 Overview of process

The research involved four high-level sequential steps (see Figure 1).

Figure 1 High-level process steps



Source: Sapere

The first step was to determine the scale and scope of useful information available. It involved a search of legal databases and a filtering of the results to establish the core data set. The initial search process, for the years 2008-2018, yielded approximately 1,000 cases that contained the keywords “Building Act 2004” “Building Act 1991” “Building Code” and “Building Defect”.

A further review was undertaken to filter out cases that were irrelevant to the questions at hand (e.g. MBIE determinations / RMA decisions / other regulatory and criminal proceedings). In the next step we examined the identified material to draw out the important facts (e.g. presence or otherwise in the case, determination of liability, allocation of costs, basis for the awards). A spreadsheet template was used to record the major details.

We then looked to refine the information to focus more on the questions motivating the research. This involved further examination of the significant facts in the judgments/determinations (e.g. the use company of structures as a shield to liability, the solvency of parties, reasons for divergence between quantum claimed and quantum awarded).

The final step involved both transcription and analysis components.

2.2 Context and limiting factors

The questions driving the research are primarily concerned with ‘payouts’ from building defect disputes. It is generally accepted that there is a paucity of readily available data relating to liability outcomes in building effects generally, and for ‘payouts’ more specifically.

Previous research focussing on the experiences of Building Consent Authorities (BCAs) was aided by the provision of data from BCAs (through a survey), but, for various reasons, was still partial in terms of coverage and volume.¹ This enquiry is even more constrained in that a survey of other parties is not feasible. Thus, we rely on inference to draw conclusions in some areas. This particularly the case for post-claim events (i.e. what happens after the Court/WHT process).

The situation is worse for pre-claim events. Prior to claims in the HC/WHT, parties may wish to settle, in part or in whole, their dispute through mediation or mutual agreement. These agreements are usually confidential to the parties. Furthermore, parties who might have some involvement in the work that gave rise to the damage (and subsequent dispute) can take action to avoid liability and/or being joined in the claim prior to the claim being lodged.

As a result of these possibilities, we have very little visibility over the pre-claim events and therefore need to rely even more on inference as opposed to 'hard' data. Thus the findings that follow are essentially a combination of facts (i.e. the orders given in the respective jurisdictions) and conjecture (i.e. assumptions concerning behaviour and motivations). They should be considered 'upper bound' in nature, given the assumptions and inference used to determine possible outcomes pre-and-post claims.

¹ MBIE (undated) *Joint and Several Liability – Assessment of the Law Commission’s recommendation for the liability of multiple defendants. Workstream A - Status Quo Evidence Base.* Internal Paper, Construction Market Policy.

3. Data findings

This section presents the research findings (for the years 2008-2018). It starts with descriptive statistics for the entire population of data and then covers each of the main parties separately. The relevant numbers are emphasised in this section. Much of the discussion and interpretation of the numbers is left for the following section.

3.1 The scale of the issue

In order to place further context around the analysis we start by estimating the incidence of building defect disputes relative to building consents issued.

3.1.1 Inference from case data suggests building defect disputes in 2008-2018 were around 3% of relevant building consents issued

Our search yielded a total of 440 cases that involved a building defect dispute between 2008 and 2018. We are able to use this figure and other relevant evidence and opinion to estimate the total number of building defect disputes that might have occurred over the 2008-2018 time period.

In 2011 the then Chief Justice of the High Court delivered a speech where she mentioned the vast bulk of civil disputes are resolved through negotiated settlement, meaning that only a small proportion of disputes are ultimately resolved by a judgment of the court. While careful to point out that available statistics provide only a rough and ready assessment, only around 10% of proceedings commenced by Statement of Claim are resolved through judgment following a full substantive hearing.² This view is supported by anecdotal evidence from lawyers we spoke to who are specifically involved in building disputes, where a view was tended that at least 90% of disputes settle pre-trial.

Thus, we consider it reasonable to assume for the purposes of this study, that that only five per cent of disputes result in relevant decisions. As a result, we infer that there would have been 8,800 building defect disputes in the 2008-2018 period.

In the period 1998-2008 the total number of residential buildings consented was 272,316, while the total number of consents issued for all buildings was 354,104. These figures suggest that the number of building defect disputes as a proportion of total consents issues was between 2.5% and 3.2% depending on the denominator used.³

² Winkelmann H (2011) "*ADR and the Civil Justice System.*" Speech to the Arbitrators' and Mediators' Institute of New Zealand. Available at: https://www.aminz.org.nz/Story?Action=View&Story_id=1483

³ We used the 1998-2008 time period for consents as a simple way of accounting for building delays and the time taken for defects to be discovered. Similar results were obtained using the 2008-2018 time period.

On the face of it, the estimate of around 80 building defect disputes per year requiring resolution through some mechanism may be an under-estimate. We note that there are factors that support and oppose the under-estimate hypothesis.

In particular we note that the information used in this report relates to claims, rather than dwellings. In addition, it covers known disputes and thus excludes cases where defects are not yet known or where there was no dispute as such (e.g. repairs were undertaken by parties voluntarily or the owner did the repairs themselves). Undiscovered damage and defects where there was no actual dispute would mean that the 8,800 estimate may be understated.

On the other hand, the rate of building defect disputes we estimated (around 3% of total consents issued) is over twice the rate of building failure for the period 2002-2008, estimated in previous work as 1.15%.⁴

Without more robust data we are unable to be definitive.

⁴ PWC (2009) *“Weathertightness – Estimating the Cost.”* Report to the Department of Building and Housing, p. 14.

3.2 Descriptive statistics

Table 2 presents some descriptive statistics relating to the data used.

Table 2 Descriptive statistics

Description	2008-2018
Initial search of databases (possible cases)	1,000+
Refined search results (i.e. domain of cases)	440
Review to determine relevance (i.e. cases relating to liability and cost apportionment)	138
Average number of respondents/defendants	5
Average number of liable parties	2
Total value of claims	\$144,972,217
Average value of claims	\$1,487,320
Median value of claims	\$299,087
Average value of orders made	\$1,160,946
Median value of orders made	\$216,657
Total difference in value between claims and orders made (average)	\$339,513
Total difference in value between claims and orders made (median)	\$86,429

Source: Sapere, MinterEllisonRuddWatts

3.2.1 Only around a third of identified cases concern liability and cost apportionment

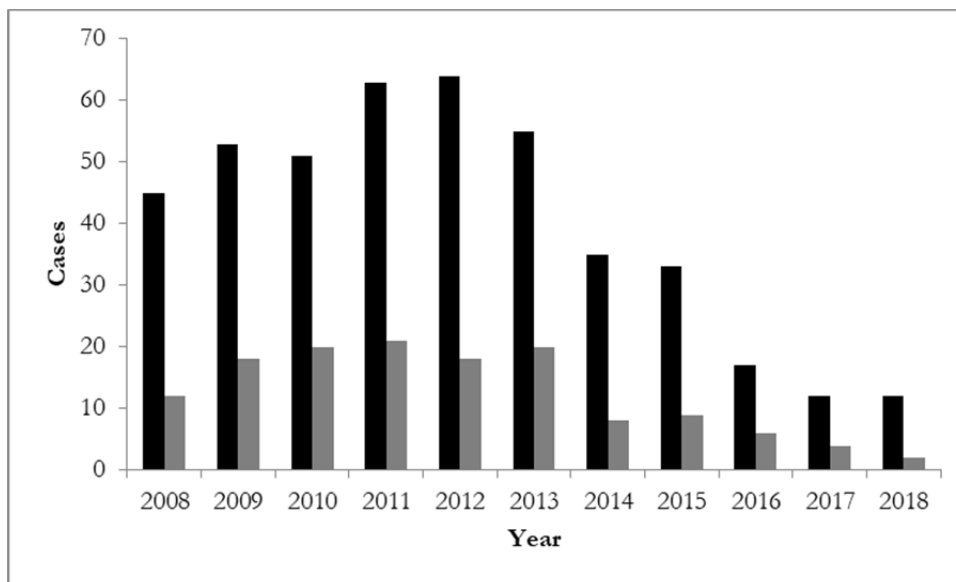
Review of the 440 cases showed that 138 (31%) contained details relating to the apportionment of liability and costs in relevant (i.e. negligence-based) cases. All of the identified relevant cases concerned weathertightness and the vast majority of the cases were heard in the WHT.

3.2.2 Most of the excluded cases dealt with issues not directly in scope, or with procedural matters

Of the 302 cases (around 69%) not dealing with cost and liability apportionment, the largest category of excluded cases was for claims under warranty, contract, or fair trading causes, or they dealt with issues around consent and process. There were 73 such cases. A further 70 cases concerned applications for strike-out of a party or for summary judgment (i.e. the claimant is not likely to be able to prove the case against a party at trial, or further proceedings, and therefore that party should be removed from the claim). A total of 19 cases determined whether claims were limitation or time-barred. The remainder were not relevant for a range of other reasons.

3.2.3 The number of building defect cases per year seems to be decreasing

Figure 2 Building defect-related cases



Both the total number of building defect-related cases (black bars) and the relevant building defect-related cases (grey bars) have been steadily decreasing since reaching a peak in 2012. We recognise that the sample size is small and that inferences made may not be representative of how many building defects result in cases; however, there is a clear decreasing trend apparent in the data.

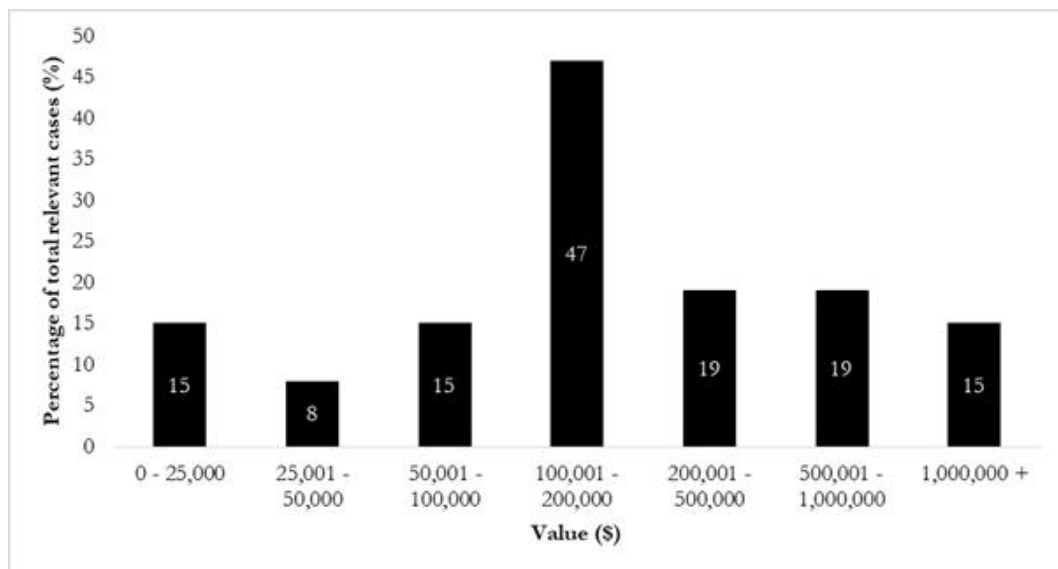
3.2.4 Most cases have fewer than six defending parties and result in more than two parties being held liable

Across the relevant cases, the mean number of named respondents/defendants per case is five, compared to a mean number of two for the number of parties held liable, suggesting some parties are either not held liable or disappear as part of the case (further detail on these aspects is contained in the sections below).

3.2.5 The average claimed amount is around \$1.5 million, while the average amount parties are ordered to pay is around \$1.2 million

For the cases where there is both a claim and an award, the average (mean) amount claimed is \$1,487,320 while the average (mean) awarded is \$1,160,946. Figure 3 shows that the average amount awarded is influenced by the presence of relatively small numbers of very significant claims (although the same number of smaller claims is observed). Over 60% of the cases involve awards that are less than \$200,000. The smallest award made was \$2,200 while the largest award was just over \$49 million.

Figure 3 Distribution of orders to pay by value



There is a difference on average of \$339,513 between the amount claimed and the amount ordered to be paid. This does not necessarily indicate that claimants are somehow ‘out of pocket’ or are getting a raw deal, as there is a range of reasons for why the values might diverge. Further detail on this aspect and the remaining figures is contained in the sections below.

3.3 A note on nomenclature

While our data collection was organised around categories of parties in the building process, the case review process revealed that nomenclature was very much subordinate to function.

That is, what somebody referred to themselves as, or what others called somebody else, is less important than the role they played in the party played in the building process. Roles are determined by consideration of the facts and liability apportioned accordingly.

Inevitably, there is some degree of overlap and disagreement around what people call themselves and what others (including the Court/WHI) refer to them as. For instance, the boundary between what constitutes a builder and what constitutes a developer can be porous and it may be the case that they are often the same party.

Moreover, there are within-group differences that can make recording of outcomes by party difficult. For instance, under the broad rubric of builder, distinctions are often made (or attempted to be made) between “labour-only” builders, “project managers”, “head contractors” and/or installers”. Most often parties attempt this distinction to reduce their perceived liability.

Further, parties often try to distinguish between activities performed as a director or officer of a company (and indeed the company itself) and employees or contractors of the company. Again, these activities are designed to influence the extent to which parties can (or should) be found liable for building defects in the build process.

For the purposes of this research, we have relied as much as possible on what the relevant jurisdiction has found in terms of the respective category a party falls within. Where this is not immediately obvious, we have used interpretation based on a reading of the case.

3.4 What we recorded

3.4.1 We recorded the presence or otherwise of the parties and their responsibility for the loss/damage

We used four possible categories to record the involvement of parties, which we grouped in terms of the party’s presence or otherwise:

- “*Not liable*”- this means that the party was present at the determination but was not held liable for any of the claimed loss
- “*NA*”- means not part of the claim/litigation
- “*Yes*”- the party was present and liable for some of the claimed loss
- “*No*”-the party was not present but was found liable for some of the claimed loss

3.4.2 We recorded the nature of liability shares and contribution amounts

We also captured data on the maximum liability proportion attaching to the respective parties. In most cases, the joint and several liability regime means that parties who are found to have contributed in some way to the loss/damage can be liable for 100% of the costs/damage. The actual contribution of the parties (i.e. the actual award amounts, or orders to pay) is then determined by reference to the extent of their influence in the damage/loss. We recorded both elements.

For example, consider a case where there is a claim for \$100,000 in damage and there are three respondents to the claim. Assume all parties are found jointly and severally liable for 100% of the loss/damage in the claim. This means all parties are ordered to pay the claimant \$100,000. However, claimants are unable to claim more than the total amount of loss/damage, so the liable parties are allocated proportions of the loss/damage above which they are entitled to seek recovery from the other parties by way of contribution of the difference in the parties/ respective influence on the damage/loss.

Assume the first respondent is found to have a 70% influence on the loss/damage; the second respondent has a 20% influence and the third respondent 10%. The first defendant would be ordered to pay the claimant \$100,000 but would be entitled to seek contribution from the second and third respondents of up to \$30,000, for any payment made above \$70,000. Similarly, the second respondent would be ordered to pay the claimant \$100,000, but would be entitled to receive contribution from the first and third respondents of up to \$80,000, for any payment made above \$20,000. The third respondent would be ordered to pay the claimant \$100,000, but would be entitled to receive contribution from the first and second respondents of up to \$90,000, for any payment made above \$10,000.

3.5 Findings for builders and developers

In line with the general distinction made by the Court/WHT we separate builders from developers.

3.5.1 Builders have orders made against them in half the cases, averaging around \$670,000 per case

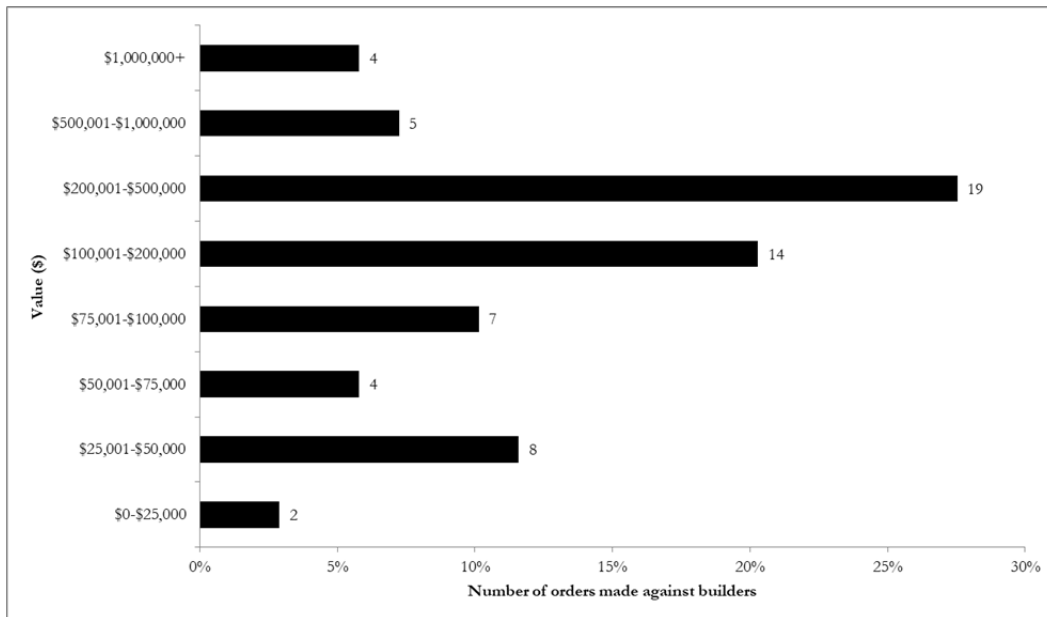
Table 3 contains summary data relating to builders. Of the 138 cases that are relevant to cost and liability apportionment, 69 (50%) involve a builder being ordered to pay for at least some of the claimant’s loss/damage. The vast majority of those orders name individuals, indicating the willingness to hold parties personally liable for their actions, even if attempts are made to limit liability through company structures.

Table 3 Summary data for builders

Category	Value
Number of cases where builder was ordered to make payment	69
Total value of orders made against builders	\$46,167,327
Average value of orders made against builders	\$669,092
Median value of orders made against builders	\$136,693
Builders’ share of total awarded amounts in all relevant cases	32%

The range of order values for builders is shown in Figure 4. From a low of just under \$1,400 to a high of over \$21 million, there is considerable variation and obviously the larger values pull up the overall average. Just under 50% of orders against builders are between \$100,001 - \$500,000, which explains the difference between the median and average value of orders made against builders shown above.

Figure 4 Distribution of orders made against builders (value)



3.5.2 Builders are usually jointly and severally liable for the full amount of damage, and allocated 51% of costs on average

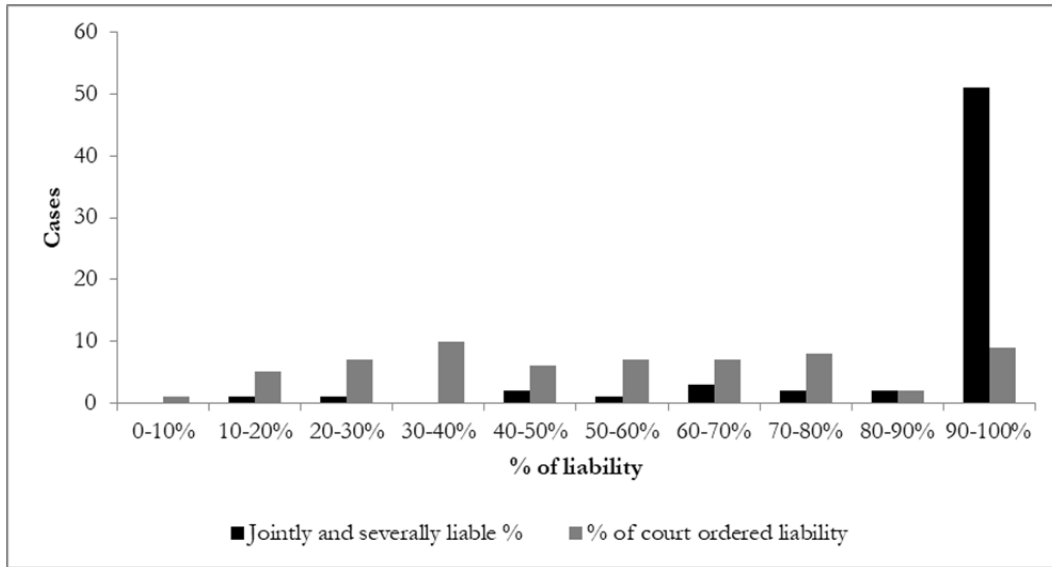
Recall in section 3.4.2 that we highlighted the difference between a finding of joint and several liability against parties and the ability to seek contributions from other parties who are also found jointly and severally liable. In practical terms the most important factor is the finding of joint and several liability, as that relates to the responsibility the particular party (or parties) who have done wrong has to the claimant or plaintiff. On the other hand, the ability to seek contributions over and above a certain amount from other parties concerns the responsibility among all wrongdoers to each other.

Figure 5 compares the number of cases where builders were found jointly and severally liable, including the proportion of the plaintiff's loss that they were responsible for. In addition it shows the proportion of the order that the builder is allowed to seek contribution for from other liable parties.

In 51 cases where builders were ordered to make payment (around 74% of such cases) builders were jointly and severally liable for the full amount of claimant losses. This is the maximum amount of damages that builders are exposed to if other parties also jointly and severally liable are unable to contribute their actual share.

There were 10 cases where a builder’s actual responsibility for the loss (i.e. the extent to which the builder was ordered to pay for claimant losses less contribution possibilities) is 90%-100%. On average, builders are allocated responsibility for 51% of claim costs.

Figure 5 Distribution of liability shares for builders



3.5.3 Evidence and inference show builders could be slipping the responsibility net around 48% of the time

Of the 69 cases where a builder did not have an order to pay made against them:

- six cases mentioned a settlement
- five could not be served
- six mentioned that the builder was in liquidation
- 15 found the builder not liable
- 37 cases did not include mention of why the builder was not part of the claim or did not have an order made against them

Based on these figures, it is possible that around 70% of cases (up to 48 out of the 69 cases) where there is no order against builders is because they are either unable to be found, or are no longer operating.

In 18 of the cases where orders were made against builders, checks on the Companies Register and Insolvency Register showed that the party was insolvent and/or removed from the Companies Register and totalled around \$30,877,676. In nine of these cases, local authorities were involved in the case, indicating that the share of liability assigned to these builders would most likely pass to the local authorities, totalling \$23,280,025 or about 50% of the total liability cost apportioned to builders.

In total, the known and prospective data suggests that builders may not meet their responsibilities about 48% of the time (i.e. 66 cases out of 138).

3.5.4 Developers have orders made against them in a third of cases, averaging around \$1 million per case

Table 4 contains summary data relating to developers. Of the 138 cases that are relevant to cost and liability apportionment, 46 (33%) involve a developer being ordered to pay for at least some of the claimant's loss/damage. Again, the vast majority of those orders name individuals, indicating the willingness to hold parties personally liable for their actions, even if attempts are made to limit liability through company structures.

Table 4 Summary data for developers

Category	Value
Number of cases where developer was ordered to make payment	46
Total value of orders made against developers	\$46,735,976
Average value of orders made against developers	\$1,015,999
Median value of orders made against developers	\$200,291
Developer's share of total awarded amounts in all relevant cases	32%

Like builders, the average value of orders made against developers is heavily influenced by small numbers of larger orders. The maximum order was for almost \$21 million, while the smallest order amount was just over \$3,000. Almost 45% of the orders made against developers are in the range \$100,001-\$500,000 (see Figure 6). The significant difference between the median and average figures in the table above reflects the influence of larger claims.

Figure 6 Distribution of orders made against developers (value)



3.5.5 Developers are routinely jointly and severally liable for the full amount of damage, and allocated 62% of costs on average

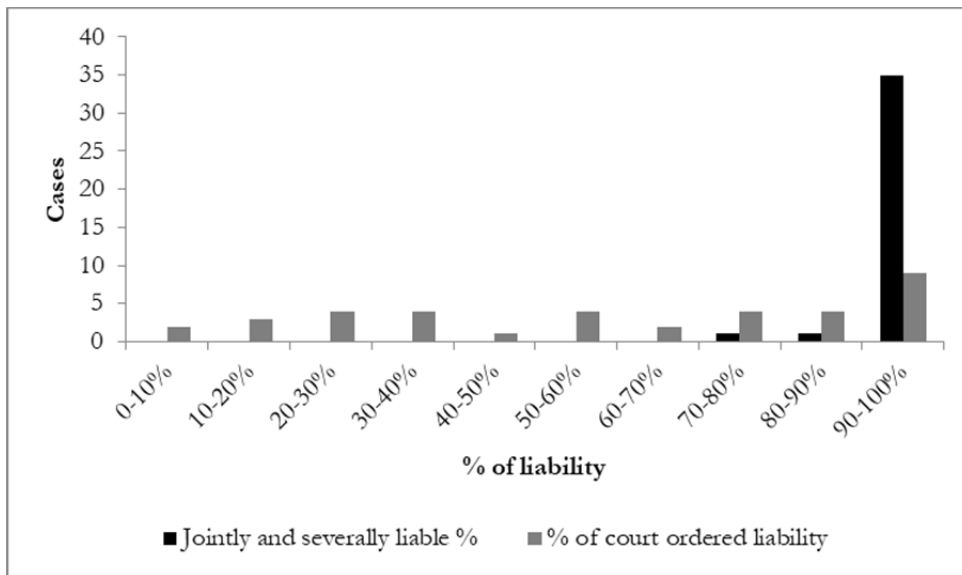
Recall in section 3.4.2 that we highlighted the difference between a finding of joint and several liability against parties and the ability to seek contributions from other parties who are also found jointly and severally liable. In practical terms the most important factor is the finding of joint and several liability, as that relates to the responsibility the particular party (or parties) who have done wrong has to the claimant or plaintiff. On the other hand, the ability to seek contributions over and above a certain amount from other parties concerns the responsibility among all wrongdoers to each other.

Figure 7 compares the number of cases where developers were found jointly and severally liable, including the proportion of the plaintiff’s loss that they were responsible for. In addition it shows the proportion of the order that the developer is allowed to seek contribution for from other liable parties.

In 35 cases where developers were ordered to make payment (around 76% of such cases) developers were jointly and severally liable for the full amount of claimant losses. This is the maximum amount of damages that developers are exposed to if other parties also jointly and severally liable are unable to contribute their actual share.

There were fewer than 10 cases where a developer’s actual responsibility for the loss (i.e. the extent to which the developer was ordered to pay for claimant losses less contribution possibilities) is 90%-100%. On average, developers are allocated responsibility for 62% of claim costs.

Figure 7 Distribution of liability shares for developers



3.5.6 Evidence and inference show developers could be slipping the responsibility net almost 70% of the time

Of the 92 cases where a developer did not have an order to pay made against them:

- one case involved an earlier settlement
- one case involved a developer who was deceased and no further action was taken
- two could not be served
- three cases mentioned the developer being in liquidation prior
- 11 cases found the developer not liable
- 74 cases did not include mention of why the developer was not part of the claim or did not have an order made against them

Based on these figures, it is possible that around 86% of cases (up to 79 out of the 92 cases) where there is no order against developers is because they are either unable to be found, or are no longer operating.

In 15 of the cases where orders were made against developers, checks on the Companies Register and Insolvency Register showed that the party was insolvent and/or removed from the Companies Register which amounted to \$39,530,574. In nine of the cases, local authorities were involved in the case, indicating that the share of liability assigned to these developers would most likely pass to the local authorities. The amounts passed onto BCAs totalled around \$25,096,283, or about 54% of the total liability cost apportioned to developers.

In total, the known and prospective data suggests that developers may not meet their responsibilities about 68% of the time (i.e. 94 cases out of 138).

3.6 Designers

The case material relates mostly to architects in terms of the category of designers, but we do note that very occasionally engineers are also mentioned.

3.6.1 Designers have orders made against them in around a seventh of cases, averaging \$890,000 per case

Table 5 contains summary data relating to designers. Of the 138 cases that are relevant to cost and liability apportionment, 19 (around 14%) involve a designer being ordered to pay for at least some of the claimant’s loss/damage.⁵

Table 5 Summary data for designers

Category	Value
Number of cases where designer was ordered to make payment	19
Total value of orders made against designers	\$15,985,723
Average value of orders made against designers	\$888,095
Median value of orders made against designers	\$26,731
Designer’s share of total awarded amounts in all relevant cases	11%

3.6.2 Designers are jointly and severally liable for the full amount of damage in half of relevant cases, and allocated 17% of costs on average

Although the number of cases where designers have orders made against them is relatively small, half of the time designers are jointly and severally responsible for the full amount of claimant losses (i.e. 9 out of 19 specific cases). On average, designers are allocated responsibility for 33% of claim costs.

3.6.3 Small sample size lowers strength of evidence and makes inference difficult

Of the 119 cases where a designer did not have an order to pay made against them:

⁵ We have noted a 20th case involving a payment from a designer, but this was through a mediated settlement prior to the determination.

- one case identified the designer as being in liquidation
- one could not be served
- five cases involved an earlier settlement
- 22 cases found the designer not liable
- 90 cases did not include mention of why the developer was not part of the claim or did not have an order made against them

On the strength of these figures, it is possible that around 79% of cases (i.e. up to 92 out of the 129 specific cases) where there is no order against designers is because they are either unable to be found, or are no longer operating.

In two of the cases where orders were made against designers, checks on the Companies Register and Insolvency Register showed that the party was insolvent and/or removed from the Companies Register which amounted to \$530,738⁶. In both cases, local authorities were involved in the case, indicating that the share of liability assigned to these designers would most likely pass to the local authorities.

Following the approach taken for other parties to the building process, we could infer that the known and prospective data suggests that designers may not meet their responsibilities about 68% of the time (i.e. 94 cases out of 138).

There are two major reasons why we would caution against drawing such conclusions. Firstly, a designer may not always be involved in the work that gave rise to the defect (and subsequent damage). Secondly, previous work suggests that designers routinely seek to settle claims (and remove themselves from proceedings) for reputational reasons. In addition, unlike some other parties that struggle to obtain adequate insurance coverage, we understand that designers are able to insure themselves against claims from building defects, though perhaps with terms and conditions that are above what they might otherwise be.⁷

3.7 Other building parties

While not the subject of a specific research question, we also captured data on other building parties who featured in the apportionment of liability and costs. These other parties include roofers, plasterers, plumbers, installers and non-building-activity service firms such as house inspectors.

3.7.1 Other parties have orders made against them in over 40% of cases, averaging almost \$137,000 per case

Table 6 contains summary data relating to other parties. Of the 138 cases that are relevant to cost and liability apportionment, 55 (around 40%) involve an “other party” being ordered to pay for at least some of the claimant’s loss/damage either as a company or an individual.

⁶ Note that the two cases involved the same designer as they were adjoining properties.

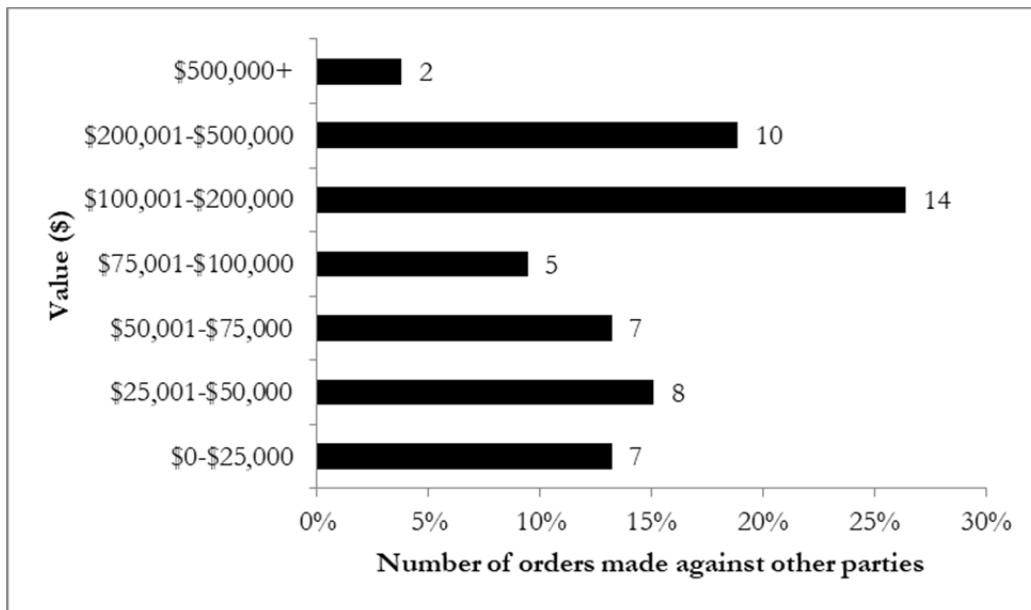
⁷ Moreover, in two cases the designers was also the developer and are captured as developers in our dataset.

Table 6 Summary data for other parties

Category	Value
Number of cases where other parties were ordered to make payment	55
Total value of orders made against other parties	\$7,518,610
Average value of orders made against other parties	\$136,702
Median value of orders made against other parties	\$88,566
Other parties' share of total awarded amounts in all relevant cases	5%

The maximum order was for slightly above \$860,000, while the smallest order amount was over \$6,000 (see Figure 8).

Figure 8 Distribution of orders made against other parties (value)



3.7.2 Other parties are jointly and severally liable for the full amount of damage over 60% the time, and allocated 46% of costs on average

Recall in section 3.4.2 that we highlighted the difference between a finding of joint and several liability against parties and the ability to seek contributions from other parties who

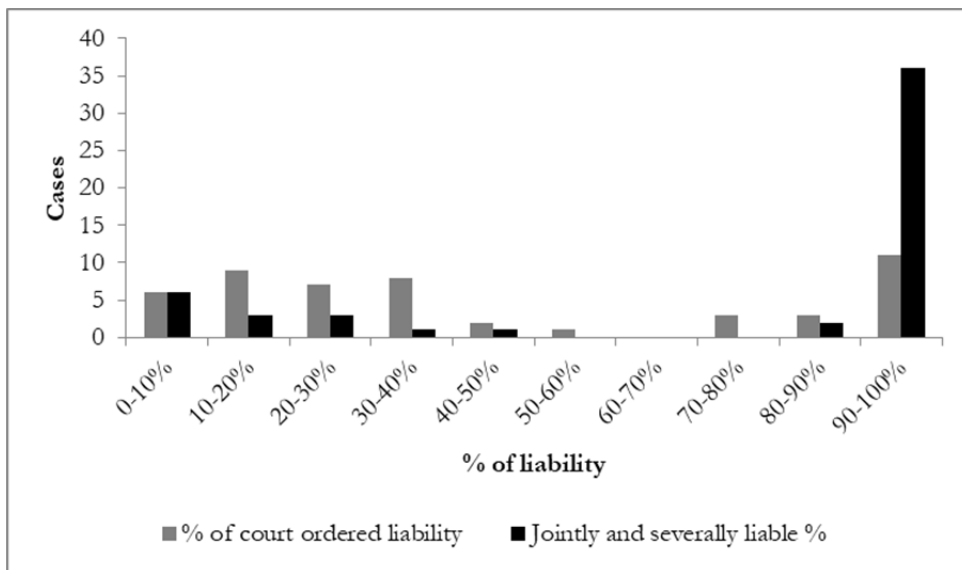
are also found jointly and severally liable. In practical terms the most important factor is the finding of joint and several liability, as that relates to the responsibility the particular party (or parties) who have done wrong has to the claimant or plaintiff. On the other hand, the ability to seek contributions over and above a certain amount from others concerns the responsibility among all wrongdoers to each other.

Figure 9 compares the number of cases where other parties were found jointly and severally liable, including the proportion of the plaintiff's loss that they were responsible for. In addition it shows the proportion of the order that the other party is allowed to seek contribution for from other liable parties.

In 36 cases where other parties were ordered to make payment (around 65% of such cases) other parties were jointly and severally liable for the full amount of claimant losses. This is the maximum amount of damages that other parties are exposed to if those who were also found jointly and severally liable are unable to contribute their actual share.

There were fewer than 10 cases where an other parties' actual responsibility for the loss (i.e. the extent to which the other party was ordered to pay for claimant losses less contribution possibilities) is 90%-100%. On average, other parties are allocated responsibility for 46% of claim costs.

Figure 9 Distribution of liability shares for other parties



3.7.3 Evidence and inference show other parties could be slipping the responsibility net around 63% of the time

Data is very patchy on the reasons on why an “other party” did not have an order to pay made against them. To the best of our knowledge (and judgment), of the 79 instances where this is the case:

- one case found an “other party” was not liable
- three could not be served

- five cases involved an earlier settlement
- 10 cases involved liquidation and /or insolvency
- 60 cases did not include mention of why the “other party” was not part of the claim or did not have an order made against them

On the strength of these figures, it is possible that almost 92% of cases (i.e. up to 73 out of the 79 specific cases) where there is no order against other parties is because they are either unable to be found, or are no longer operating.

In 7 of the cases where orders were made against other parties, checks on the Companies Register and Insolvency Register showed that the other party was insolvent and/or removed from the Companies Register that totalled \$2,864,312. In 5 of the 7, local authorities were involved in the case, indicating that the share of liability assigned to these other parties would most likely pass to the local authorities. The amounts passed onto BCAs totalled around \$361,766, or about 5% of the total liability cost apportioned to other parties. The remaining cases involved private building certifiers who are no longer in existence, suggesting home owners are likely to be out of pocket.

In total, the known and prospective data suggests that “other parties” may not meet their responsibilities about 58% of the time (i.e. 80 cases out of 138).

3.8 Building Consent Authorities (BCAs)

Given the role that BCAs play in the building process it is not surprising that they feature quite frequently in orders made. The claims in some of the years 2008-2018 captured both public and private building certifiers. Most of our attention is focussed on local authorities, as private certifiers no longer exist, and many were noted as such in the case reviews.

Table 7 contains summary data relating to BCAs. Of the 138 cases that are relevant to cost and liability apportionment, 73 (around 53%) involve BCAs being ordered to pay for at least some of the claimant’s loss/damage.

Table 7 Summary data for BCAs

Category	Value
Number of cases where BCAs ordered to make payment	73
Total value of orders made against BCAs	\$28,963,382
Average value of orders made against BCAs	\$396,759
Median value of orders made against BCAs	\$82,500
BCAs share of total awarded amounts in all relevant cases	20%

The values for orders made against BCAs range from just over \$916 to almost \$7,485,885 (see Figure 10).

Figure 10 Distribution of orders made against BCAs (value)



3.8.1 BCAs are routinely jointly and severally liable for the full amount of damage, and allocated 36% of costs on average

BCAs were not always jointly and severally responsible for the full amount of claimant losses. In nine cases BCAs were adjudged to be sufficiently remote from the defect and subsequent damage that they were held jointly and severally liable for less than 100% of the damage (values at the lower end were 13% and 19%, while the upper end saw values of 89% and 90% allocated). In one case involving a mediated settlement we were not able to determine the appropriate proportion.

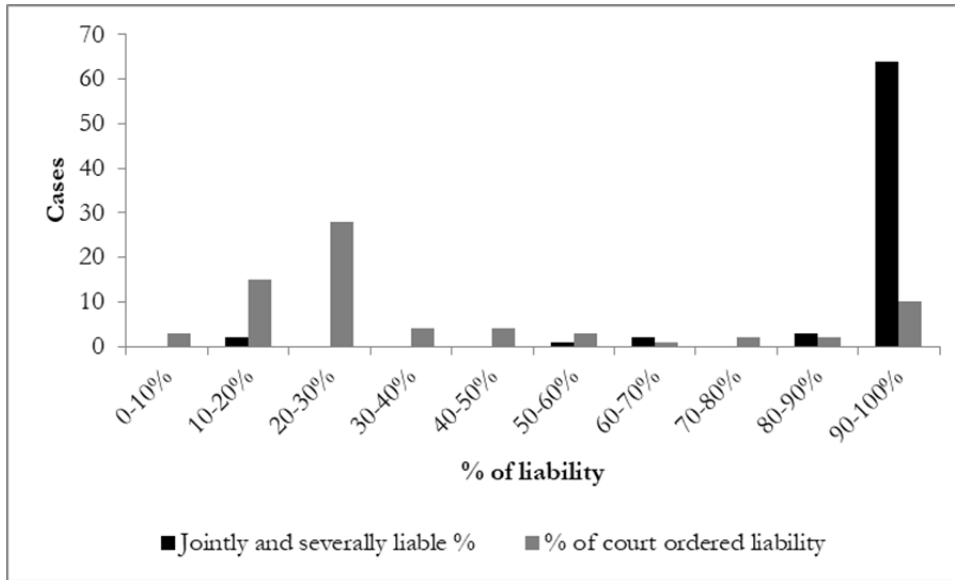
Recall in section 3.4.2 that we highlighted the difference between a finding of joint and several liability against parties and the ability to seek contributions from other parties who are also found jointly and severally liable. In practical terms the most important factor is the finding of joint and several liability, as that relates to the responsibility the particular party (or parties) who have done wrong has to the claimant or plaintiff. On the other hand, the ability to seek contributions over and above a certain amount from other parties concerns the responsibility among all wrongdoers to each other.

Figure 11 compares the number of cases where BCAs were found jointly and severally liable, including the proportion of the plaintiff's loss that they were responsible for. In addition it shows the proportion of the order that the BCA is allowed to seek contribution for from other liable parties.

In 63 cases where BCAs were ordered to make payment (around 86% of such cases) BCAs were jointly and severally liable for the full amount of claimant losses. This is the maximum amount of damages that BCAs are exposed to if those who were also found jointly and severally liable are unable to contribute their actual share.

There were 10 cases where a BCAs actual responsibility for the loss (i.e. the extent to which the BCA was ordered to pay for claimant losses less contribution possibilities) is 90%-100%. On average, BCAs are allocated responsibility for 36% of claim costs.

Figure 11 Distribution of liability shares for BCAs



3.8.1 BCAs face payouts for uncollected shares in almost half of their relevant cases

Local authorities are unable to cease trading or ‘disappear.’ Therefore, where local authorities are the relevant BCA and other parties are not able to pay their share of the damage costs, BCAs may face the full amount of the damage costs (unless they are found jointly and severally liable for a share that is below 100%).

As indicated earlier, we have much less visibility over events leading up to a decision. What we are able to determine from the data is as follows:

- 26 cases cannot result in the BCA paying 100% of the awarded costs:
 - sixteen cases involve settlements with claimants prior to decision (not included in the 73)
 - two case involves the owner being allocated a major share of liability with no scope for contribution from the BCA
 - nine cases involve a decision to restrict the joint and several liability of the BCA to below 100%
- 29 cases have been identified where there is a possibility of the BCA being left covering all of the loss as other liable parties were previously identified as being illiquid or there were parties identified as insolvent following the decision
- nine of the cases are common to both groups, where the BCA is jointly and severally liable for less than 100% of the damage

All this means that, at best BCAs would face the situation of paying out 100% of the claims for damage in around 48% of cases (30 out of 62) where they are liable and face responsibility. This is calculated by subtracting the eleven cases outlined in the second and third sub-bullets above from the total number of cases where BCAs face liability (73), leaving a maximum 62 possible cases where the BCA could face 100% of costs awarded. Accounting for the nine ‘overlap’ cases and subtracting them from the 29 cases that were identified as potentially resulting in BCAs facing 100% of the awarded costs leaves 42 claims, which represents around 67% of relevant BCA cases (i.e. 30/62).

The figure of 48% of cases relates to the situation where the BCA is found jointly and severally liable for 100% of the claimants damage. For all intents and purposes that is a significant burden in the context of orders of liability respectively.

3.9 Homeowners

One of the research questions concerns the extent to which home owners are or could be left out of pocket (i.e. their total awards are not sufficient to recoup their financial losses). We describe the instances where this could happen and calculate an indicative estimate of the number of cases and the costs that owners might face.

3.9.1 Insolvency with no BCA presence or liability most likely source of owners being left ‘out of pocket’

The most obvious occurrence giving rise to owners being ‘out of pocket’ is where there are insolvent or missing parties that have been ordered to pay some share of claimant costs and there is no other party in the claim that is available to meet the contribution (e.g. a local authority BCA).

Our review has also shown that two other instances can result in a home owner being out of pocket and total awards not being sufficient to cover the claimed financial losses. The first situation can arise where the home owner is found to be contributorily negligent by their actions, and is ordered to shoulder some of the responsibility for costs themselves. The second situation can arise when the award is reduced as part of the claim determination. For instance, the costs of remediation might include irrelevant items or claims for general damages and consequential losses such as loss of rent and interest are lowered by the adjudicator/judge.

While all possible examples can result in a divergence between claimed and awarded amounts, the case of missing and insolvent parties is likely to be the element that most impacts home owners, in strict financial terms.

3.9.2 Owners left out of pocket in an estimated 17% of cases, totalling almost \$14 million

Unfortunately, the data that we have collected does not allow us to estimate with any precision all of the possible examples of owners being ‘left out of pocket.’ What we have been able to estimate is contained in Table 8. It shows that there were 23 cases (17% of the 138 relevant cases identified) totalling almost \$14 million in costs.

As expected, the major cause of possible costs to owners is where one or more respondent/defendant is insolvent and there is either no local authority BCA involvement or the local authority BCA is not held liable. This category of cases accounted for just under half of the number of cases where owners could be ‘out of pocket’ but just over half the total value of costs to owners.

The total estimate of the extent to which owners are ‘out of pocket’ represents almost 10% of the value of total claims in the cases under study.

Table 8 Estimate of homeowner out of pocket costs

Category	Number	Value
Insolvency, no BCA involvement or BCA not liable	11	\$7,452,611
Insolvency, BCA already settled	1	\$1,984,385
Contributory negligence of homeowner	5	\$2,791,213
Sole defendant/s insolvent	2	\$483,611
Defendants not liable	4	\$1,255,727
TOTAL	23	\$13,967,548

4. Comments and reflections

We make the following initial comments and reflections:

- *This was a worthy, but difficult exercise*

Comments from parties involved in defective building disputes agreed that the questions driving the research were important and relevant to the overall consideration of liability and wider outcomes in the building process.

However, they also agreed that the questions are extremely difficult to answer. Little data is routinely collected, principally because the return to such an undertaking is not clearly visible or measurable. In addition, the liability environment is complex and no two claims are the same. Different circumstances give rise to different parties being involved and different approaches being taken. Thus, it is hard to generalise or standardise disputes such that they are amenable to analysis.

- *No ‘off the shelf’ method exists, but the approach and findings are probably as good as it gets*

We developed a process specifically for this undertaking as no ready-made alternative was available. Previous work suggesting a similar approach was not followed through as it was considered labour and time intensive.⁸ Despite the limitations highlighted in the report, it is probably the best that can be done given timing and resource constraints.

In particular, the findings of the work address two information gaps. The first is the nature and quantum of awards made in more formal disputes, which was lacking in earlier work. The second gap relates to payouts as opposed to orders. The latter is necessarily more approximation than observation, but again advances understanding. Finally, the work covers parties other than BCAs, who were not previously examined

- *The relatively small number of relevant cases is noticeable, but not unexpected*

The final dataset of 138 cases over an almost 11-year period might suggest that building liability disputes are a very insignificant and infrequent occurrence, considering overall building and consenting activity. Reasons why this suggestion is not well supported include:

- Actual dispute numbers are likely to be in the order of 20 times higher than the number of cases as parties settle to avoid the cost and time of hearings
- Cases are often taken for reasons other than liability and cost apportionment (e.g. to establish precedent or clarify matters of uncertainty such as eligibility of claims and claimants as well as appeals that are necessarily heard in higher jurisdictions
- Claim volumes by themselves may not be a good guide to quantum; fewer claims may be lodged but they may involve multi-unit dwellings and/or be much more complex and costly

⁸ MBIE (undated) *Joint and Several Liability – Assessment of the Law Commission’s recommendation for the liability of multiple defendants. Workstream A - Status Quo Evidence Base.* Internal Paper, Construction Market Policy.

- The reasonable close alignment with the volume of data collected in the previous exercise, where findings were made from 118 cases that had both an initial finding of liability and final pay out for roughly the same number of years that were studied here
- *The work provided confirmation of some general understandings*

The research confirmed the following generally accepted but not proved understandings:

- parties with more of a hands-on role in building activity generally bear a greater share of liability (at least in terms of orders from the Court/WHT) than those who are more remote from the damage, such as gatekeepers
- designers do not feature prominently in cases of adjudications
- in general, defendants/respondents involved in disputes are found jointly and severally liable for the whole of the claimants' damage, as intended
- apportionment of costs (through orders dealing with contributions from other wrongdoers) takes account of past decision but is decided on the facts of the particular case
- the ability to “hide behind a corporate veil” is quite limited in the Court/WHT setting as individuals are often named and found liable in addition to company structures

Appendix 1 Extrapolation and BCA-specific analysis

Extending the analysis to estimated total building defect cases

In the main body of the report we used the number of ‘formal’ building defect cases and available evidence and expert opinion to estimate that there were a total of 8,800 building defect disputes between 2008 and 2018. Given the 138 ‘formal’ disputes analysed represent less than two per cent of the estimated number of building disputes, it is natural to consider what the findings mean for the total number (i.e. ‘formal’ and ‘informal’ building defect disputes).

Simple extrapolation results in estimated total damage costs of \$9.2 billion for all building defect disputes, but removing commercial cases lowered that to \$7.4 billion

The simplest method for doing this would be to multiply the average damages claim from the 138 cases (\$1,050,523) by the difference between the number of total disputes and the ‘formal’ disputes (8,662). This would give a total estimated damages quantum for 2008-2018 of around \$9.2 billion.

The \$9.2 billion figure is below the total estimated costs of weathertightness issues calculated previously of \$11.3 billion, but the previous work spanned a much longer period (2002-2020), so on an equalised basis is around twice as high as the previous work.⁹

Furthermore, the estimated total damages between 2008 and 2018 include three non-residential claims that account for around \$31 million themselves. Removing the commercial cases sees total estimated (residential) damages for 2008-2018 drop to \$7.4 billion.

Accounting for likely differences between claims settled in different settings reduces total damage costs to \$4.7 billion for all building defect disputes and \$3.8 billion for residential only

The \$7.4 billion and \$9.2 billion figures above are estimated based on the assumption that ‘formal’ claims are the same as ‘informal’ claims in both their nature and magnitude. That is not realistic. One of the reasons that parties to disputes might settle before a hearing is to avoid the costs associated with such resolution procedures. Estimates for legal, expert and other costs suggest that they are around a quarter of total claim costs.¹⁰

⁹ PWC (2009) *Op.cit.*

¹⁰ *Ibid.*

Finally, there is likely to be a difference between the value of more ‘formal’ and those that are more ‘informal’ (i.e. those claims that proceed to trial/hearing or adjudication are likely to be for larger amounts than those settled ‘informally’).

For the reasons set out above, we would suggest any extrapolation should reduce the average value of the damage claim by half. On this basis, the total estimated (residential) damages quantum for 2008-2018 was around \$4.7 billion, while the residential equivalent alone was around \$3.8 billion.

Using the calculated share of total awarded damage amount for each of the relevant players we can derive the distribution of damages faced by each of the players.

Table 9 Distribution of estimated total damages by party

Party	Share	Residential only	Total
Builders	32%	\$1,207,116,332	\$1,502,332,377
Developers	32%	\$1,207,116,332	\$1,502,332,377
Designers	11%	\$414,946,239	\$516,426,755
Other parties	5%	\$188,611,927	\$234,739,434
BCAs	20%	\$754,447,708	\$938,957,736
TOTAL	100%	\$3,772,238,538	\$4,694,788,680

A detailed look into the possible burden on BCAs and homeowners

BCAs face a total payment burden of \$1.1 billion and additional costs of \$332 million from uncollected shares

The so-called incidence and burden of BCAs being “last-man standing” has been and will likely continue to be of specific interest. As we saw earlier, BCAs could be “last man standing” in almost half of the cases where they are liable and face some responsibility.

Using known figures from the available cases, we calculated that BCAs would face an increase in costs (relative to the situation where all liable parties were present and paid their share) of around 170%. That is, rather than face a cost of around \$29 million in accordance with allocated shares among other liable parties, BCAs would face total costs of around \$78 million, due to the inability to collect shares from other liable parties (see Table 10).

Extending that analysis to the estimated number of total building defect disputes was not a straightforward process. It first involved the use of the ‘multiplier’ calculated using the cases analysed (i.e. 2.7) to the estimated value of orders made against BCAs for the entire set of

building defect disputes. The next step scaled down that estimated figure to reflect the number of cases involving a liable and responsible BCA and then finally calculating the difference between the two.

Table 10 indicates that BCAs faced an estimated additional cost of \$332 million due to uncollected shares between 2008 and 2018. We reiterate our earlier caveats and limitations of the analysis based on available data and highlight that extrapolations of this nature extend the need for caution.

Table 10 Estimated additional uncollected share costs faced by BCAs

	Cases analysed	Total cases
Total value of orders made against BCAs	\$28,963,382	\$754,447,708
Amount BCAs estimated to actually pay	\$78,232,194	\$1,086,836,234
Difference	\$49,268,812	\$332,388,526

Homeowners face ‘out of pocket’ costs of \$458 million

In the case of homeowners, we applied the same basic logic used for BCAs. Specifically, we assumed that the average amount per claim that homeowners face would be 50% less than that which applies for cases in the High Court and WHT.

Further, we assumed that the incidence of cases where they would be left ‘out of pocket’ that we estimated using case review data (17%) applied equally across the remaining total estimated number of residential building defect disputes.

This process led us to calculate that there would be 1,463 additional instances where homeowners could be left ‘out of pocket’ totalling \$444.2 million in costs faced. Combining that with the \$14 million in costs faced by homeowners that we estimated using case-review data results in total costs of around \$458 million.