

Proportionate liability: who bears the burden?

By Daniel Aghion

In recent times, the Commonwealth, together with all states and territories, has enacted regimes limiting the liability of certain defendants to their proportionate share of the plaintiff's loss. At the time of writing, however, there is very little precedent to provide guidance as to how the various proportionate liability regimes are to be interpreted. This paper sets out some elements of the various legislative schemes, and points to some of the issues that may arise in proportionate liability proceedings.

THE LEGISLATIVE REGIMES

Comparison with joint and several liability

It is, of course, a feature of joint and several liability (which proportionate liability has replaced for the types of claims discussed in this article) that all defendants are liable to the plaintiff for the whole of his or her loss, irrespective of the extent to which the defendant has contributed to that loss. Thus, under a regime of joint and several liability, the risk and financial burden of an insolvent defendant rests with the solvent co-defendants and not with the plaintiff. As will be seen, under a proportionate liability regime, that risk is transferred to the plaintiff. If there is an insolvent defendant, it is the plaintiff who will be disadvantaged, and not the solvent defendants.

The legislation

The various proportionate liability regimes may be found in the following Acts: *Australian Securities and Investment Commission Act 2001* (Cth), ss12GP-12GW; *Corporations Act 2001* (Cth), part 7.10 div 2; *Trade Practices Act 1974* (Cth), part VIA; *Civil Liability Act 2002* (NSW), part 4; *Civil Liability Act 2003* (Qld), part 2; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), part 3; *Civil Liability Act 2002* (Tas), part 9A; *Wrongs Act 1958* (Vic), part IVAA; *Civil Liability Act 2002* (WA), part 1F; *Civil Law (Wrongs) Act 2002* (ACT), ch 7A; *Proportionate Liability Act 2005* (NT).

The regimes vary from place to place. Unless otherwise noted, the NSW legislation is cited.

Definitions

The legislation applies to the following types of claim:

- a) claims for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury; and

- b) claims for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of s42 (misleading or deceptive conduct). These claims are collectively described as 'apportionable claims'.¹

A 'concurrent wrongdoer' is defined as a person who is one of two or more people whose acts or omissions caused, jointly or independently, the damage or loss that is the subject of the claim.²

In any proceedings involving an apportionable claim:

- a) the liability of a defendant who is a concurrent wrongdoer is limited to an amount reflecting the proportion of the damage or loss claimed that the court considers just, having regard to the extent of the defendant's responsibility for it; and
- b) the court may give judgment against the defendant for not more than that amount.³

CLAIMS FOR BREACH OF PERFORMANCE

Proportionate liability applies only to claims 'arising from a failure to take reasonable care'⁴ or for claims that the defendant has engaged in misleading or deceptive conduct. This raises the question of whether breach of a contractual term permits apportionment, if the breach involves no failure of reasonable care by the defendant, or if there is no evidence of misleading or deceptive conduct by the defendant.

Take, for example, a builder who constructs a house that does not comply in material respects with the agreed design drawings. There is no want of reasonable care by the builder – the claim is simply that the builder did not comply with the expected performance as measured by the design drawings. This may not be an apportionable claim. If this proposition is correct, the builder cannot limit its liability by seeking to implicate a building certifier who negligently failed to identify the non-complying work during a site inspection.⁵

There is as yet no superior court authority directly on this point. However, in *Commonwealth Bank of Australia v Witherow*,⁶ the Victorian Court of Appeal rejected an attempt

by a guarantor to resist summary judgment for money due under the guarantee, on the ground that his accountant should be joined to the proceeding for negligently failing to advise that the guarantee should not be signed. The Court held that the bank's claim against the guarantor was not a claim 'arising from a failure to take reasonable care', and thus the guarantor could not be a 'concurrent wrongdoer'. It is implicit from the Court's reasoning that contractual claims, not involving a failure to take reasonable care or misleading or deceptive conduct, cannot be apportioned.

MIXED CLAIMS

Where proceedings involve both an apportionable claim and a non-apportionable claim:

- a) liability for the apportionable claim is to be determined in accordance with the provisions of this part; and
- b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this part) are relevant.⁷

Assume that, in the example given above, the builder's failure to construct the house in accordance with the design drawings also constitutes a failure to comply with the minimum prescribed industry standards. That is, the claim against the builder is both failure of a performance measure and a failure to take reasonable care. The claim is thus a mixed claim.

It is distinctly possible that the performance measure claim would not be apportionable, whereas the breach of standard of care claim could be apportioned. This might produce overlapping results. For example, the builder might be jointly and severally liable to the plaintiff for the whole of the performance measure claim, but only 70% liable for the breach of standard of care claim, with a further 30% to be apportioned against the building certifier who negligently approved the construction work. Practically speaking, the plaintiff owner would recover 100% of its loss if the builder was solvent, but only 30% if the builder was insolvent.⁸

Most of the legislative regimes also provide that there is a single apportionable claim in proceedings in respect of the same loss or damage, even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).⁹ It is not yet clear what effect this 'merging' provision might have upon the analysis set out above. It has been noted, in obiter, that there is a tension between this provision and the one set out above.¹⁰ The tension does not arise under the Victorian regime, where the 'merging' provision applies only to a proceeding involving two or more apportionable claims.¹¹

CAUSATION

Causation is the critical element in establishing that a person is a concurrent wrongdoer – the person's acts or omissions must have caused, jointly or independently, the loss or damage that is the subject of the claim. There has been some debate as to whether this requires proof of factual or of legal causation. If the former, it would be sufficient for a defendant to prove that the other concurrent wrongdoer simply caused the plaintiff's loss. If the latter, it would be necessary for the

defendant to show that the other concurrent wrongdoer breached a legal duty to the plaintiff.¹²

The difficulty with an analysis based solely upon factual causation is that it would permit a defendant to limit its liability by reference to an entity against whom the plaintiff would have no cause of action and no means of redress. Proportionate liability was introduced to shift the risk of insolvency of a wrongdoer on to plaintiffs and away from solvent defendants. It may be going too far to interpret the legislation in a manner that would bar plaintiffs from recovery of part of their loss, irrespective of the solvency of the wrongdoers.

The debate may have been resolved by the recent decision of *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd*, in which Middleton J considered the Victorian Act and expressed the view, in obiter, that:

'having regard to the language of ss24AH(1) and 24AI(1), the operation of s24AJ, and the fact that the loss or damage referred to in s24AH(1) is not divisible in terms of causation, it seems to me that the concurrent wrongdoers must each have committed the relevant legal wrong against the applicant. This conclusion seems to be implicit in the reasoning of the Court of Appeal in *Witherow* [2006] VSCA 45, although the issue does not appear to have been addressed specifically.'¹³

To return to the example given above, the builder could not apportion liability between it and a sub-contractor merely >>

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because the sub-contractor performed the defective work that caused the plaintiff's loss. That is because, other than in special circumstances, a sub-contractor (other than a nominated sub-contractor) does not owe a duty of care in negligence to prevent a proprietor from suffering financial loss.¹⁴ The builder could of course bring a third-party claim against the sub-contractor in the usual manner.

PLEADING APPORTIONABLE CLAIMS

In *Ucak v Avante Developments*, Hammerschlag J identified three necessary elements that a defendant must plead to assert that there is a concurrent wrongdoer:

- a) the existence of a particular person;
- b) the occurrence of an act or omission by that particular person; and
- c) a causal connection between that occurrence and the loss that is the subject of the claim.¹⁵

His Honour agreed with McDougall J (writing extra-judicially) that a defendant should plead an apportionable claim with the same degree of precision and particularity as if it were bringing a cross-claim.¹⁶

In Victoria, a considerable body of authority was developed under the now-repealed proportionate liability provisions of the *Building Act* 1993 in respect of joinder of defendants for apportionment purposes.¹⁷ This required the defendant seeking the joinder to prepare a draft pleading alleging that the proposed defendant owed a duty of care to the plaintiff, that the proposed defendant was in breach of that duty, and the damages claimed by the plaintiff. This test, if adopted under the current Victorian apportionment legislation, might require more detailed pleadings than the *Ucak* test. If so, then it might be justified by the unique requirement in Victoria that all concurrent wrongdoers must also be parties to the proceeding.

It is at least arguable that a proceeding may be treated as raising an apportionable claim even if the plaintiff has pleaded its case in a manner that attempts to avoid the various apportionment regimes. The contrary argument would permit the object of the apportionment legislation to be defeated by the nature of the plaintiff's pleading.¹⁸

PROCEEDINGS AS BETWEEN CONCURRENT WRONGDOERS

Concurrent wrongdoers cannot be required to contribute to the damages payable by another concurrent wrongdoer to the plaintiff, or to indemnify a concurrent wrongdoer for those damages.¹⁹ Contribution proceedings as between defendants who are concurrent wrongdoers are therefore not permissible.

In Western Australia, and possibly also NSW and Tasmania, parties may contract out of parts of the regime by written agreement.²⁰ Depending upon the terms of the contract, indemnity claims between defendants may be permissible. It is unclear whether these provisions will have any effect if the plaintiff is not a party to the written agreement. In Queensland, contracting out is expressly prohibited.²¹ The remaining jurisdictions are silent on contracting out.

APPORTIONMENT AGAINST NON-PARTIES

In all jurisdictions except Victoria, a court may have regard to,²² or is to have regard to,²³ the comparative responsibility of any wrongdoer who is not a party. It is not yet resolved whether the distinction between 'may' and 'is' will prove significant.

In Victoria, a court must not have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceeding unless the person is not a party because the person is dead or, if the wrongdoer is a corporation, it has been wound up.²⁴ The Victorian provisions may apply to a cause of action under a federal statute, unless that statute 'otherwise provides' for the determination of liability to compensate a person who has suffered loss or damage by conduct in contravention of the federal statute.²⁵

The practical distinction is that, if a defendant wishes to take advantage of the apportionment regime, in Victoria the onus will fall upon that defendant to apply to join other potential concurrent wrongdoers to the proceeding. The Victorian regime thus favours plaintiffs, because it removes the risk of apportionment against a person who is not a party

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to the proceeding. Elsewhere, it is sufficient for the defendant to identify the alleged wrongdoers and their acts or omissions that are said to have caused the plaintiff's claimed loss. The plaintiff then faces the difficult question of whether to accept the defendant's contention and join the alleged concurrent wrongdoers to the proceeding, or take the risk of losing part of his or her damages if the identified wrongdoer is not joined.

NOTIFYING PLAINTIFFS OF OTHER POTENTIAL CONCURRENT WRONGDOERS

If a defendant fails to give the plaintiff, as soon as practicable, written notice of the information the defendant has about the identity of another person who may be a concurrent wrongdoer and why that person might be a concurrent wrongdoer, then the court may order that the defendant pay any unnecessary costs incurred by the plaintiff.²⁶ In Queensland, the court can also make the defendant severally liable for the plaintiff's damages.²⁷ The most effective form of notice would be to give the plaintiff a draft claim against the concurrent wrongdoer, containing the matters referred to by Hammerschlag J in *Ucak*.²⁸

There is no notice provision in Victoria, which is understandable given the requirement that concurrent wrongdoers must also be parties to the proceeding in most cases.

SUBSEQUENT PROCEEDINGS

A plaintiff who has recovered judgment against a concurrent wrongdoer for an apportionable part of any loss or damage is not prevented from bringing another action against any other concurrent wrongdoer to recover damages from that wrongdoer. However, the plaintiff cannot recover an amount greater than the loss or damage actually sustained.²⁹

EXCEPTIONS FOR CERTAIN DEFENDANTS

Almost all jurisdictions exclude defendants who act intentionally or fraudulently.³⁰ There are various other matters excluded from each regime. A careful reading of the relevant legislation is warranted.

CONCLUSION

Proportionate liability proceedings raise new tactical considerations, not encountered when the liability of defendants was determined on a joint and several basis. All of these considerations will turn upon minimising the risk of exposure, whether as a plaintiff or as a defendant, to an insolvent wrongdoer. It will take some time before there is sufficient settled authority to provide guidance as to how the legislative schemes are to be interpreted and applied. ■

Notes: **1** *Civil Liability Act 2002* (NSW) s34(1). See also *Australian Securities and Investments Commission Act 2001* (Cth), s12GP(1); *Corporations Act 2001* (Cth), s1041L(1); *Trade Practices Act 1974* (Cth), s87CB(1); *Civil Liability Act 2003* (Qld), s28; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s3(2); *Civil Liability Act 2002* (Tas), s43A(1); *Wrongs Act 1958* (Vic), s24AF; *Civil Liability Act 2002* (WA), s5A(1); *Civil Law (Wrongs) Act 2002* (ACT), s107B; *Proportionate Liability Act*

2005 (NT), s4. **2** *Civil Liability Act 2002* (NSW) s34(2). See also *Australian Securities and Investments Commission Act 2001* (Cth), s12GP(3); *Corporations Act 2001* (Cth), s1041L(3); *Trade Practices Act 1974* (Cth), s87CB(3); *Civil Liability Act 2003* (Qld), s30; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s3(2); *Civil Liability Act 2002* (Tas), s43A(2); *Wrongs Act 1958* (Vic), s24AH; *Civil Liability Act 2002* (WA), s5A(1); *Civil Law (Wrongs) Act 2002* (ACT), s107D; *Proportionate Liability Act 2005* (NT), s6(1). **3** *Civil Liability Act 2002* (NSW), s35(1). See also *Australian Securities and Investments Commission Act 2001* (Cth), s12GR(1); *Corporations Act 2001* (Cth), s1041N(1); *Trade Practices Act 1974*, s87CD(1); *Civil Liability Act 2003* (Qld), s31(1); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s8(2); *Civil Liability Act 2002* (Tas), s43B(1); *Wrongs Act 1958* (Vic), s24A(1); *Civil Liability Act 2002* (WA), s5AK(1); *Civil Law (Wrongs) Act 2002* (ACT), s107F(1); *Proportionate Liability Act 2005* (NT), s13. **4** In Queensland, the legislation applies to liability for damages 'arising from a breach of a duty of care': *Civil Liability Act 2003* (Qld), s28(1). In South Australia, the legislation applies to 'a liability in damages for breach of a contractual duty of care': *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s4(1). The distinction is unlikely to be relevant for the purposes of this article. **5** This proposition has been accepted by a member of the Victorian Civil and Administrative Tribunal (VCAT) in *Lawley v Terrace Designs Pty Ltd* [2006] VCAT 1363 at [318]ff. **6** [2006] VSCA 45. **7** *Civil Liability Act 2002* (NSW), s35(2). See also *Australian Securities and Investments Commission Act 2001* (Cth), s12GR(2); *Corporations Act 2001* (Cth), s1041N(2); *Trade Practices Act 1974* (Cth), s87CD(2); *Civil Liability Act 2003* (Qld), s31(2); *Civil Liability Act 2002* (Tas), s43B(2); *Wrongs Act 1958* (Vic), s24A(2); *Civil Liability Act 2002* (WA), s5AK(2); *Civil Law (Wrongs) Act 2002* (ACT), s107F(3); *Proportionate Liability Act 2005* (NT), s9. **8** Similar reasoning was adopted by VCAT in *Lawley v Terrace Designs Pty Ltd* [2006] VCAT 1363. **9** *Civil Liability Act 2002* (NSW) s34(1A). See also *Australian Securities and Investments Commission Act 2001* (Cth), s12GP(2); >>



SCHOOLS

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Corporations Act 2001 (Cth), s1041L(2); *Trade Practices Act 1974 (Cth)*, s87CB(2); *Civil Liability Act 2003 (Qld)*, s28(2); *Civil Liability Act 2002 (Tas)*, s43A(9); *Civil Liability Act 2002 (WA)*, s5AJ(4); *Civil Law (Wrongs) Act 2002 (ACT)*, s107B(6). **10** *Woods v De Gabriele* [2007] VSC 177 at [31]–[36], per Hollingworth J. **11** *Wrongs Act 1958 (Vic)* s24AF(2). See also *Proportionate Liability Act 2005 (NT)*, s8. **12** See, for example, McDonald, 'Proportionate Liability in Australia: The Devil in the Detail' (2005) 26 *Aust Bar Review* 29 at 42; Hayford, 'Proportionate Liability – Its Impact on Risk Allocation in Construction Contracts' (2006) 22 *BCL* 322 at 327–9. **13** [2007] FCA 1216 at [40]; see also *Chandra v Perpetual Trustees Victoria* [2007] NSWSC 694 at [110]–[111], per Bryson AJ. **14** See *Wimmera Mallee Rural Water Authority v FCH Consulting Pty Ltd* (No. 2) [2000] VSC 193 at [8], per Byrne J; cf *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520. **15** *Ucak v Avante Developments* [2007] NSWSC 367 at [35]. **16** *Ucak* at [41], citing McDougall, 'Proportionate Liability in Construction Litigation' (2006) 22(6) *Building and Construction Law Journal* 394 at 400. **17** *Boral Resources v Robak Engineering* [1999] 2 VR 507; *Wimmera Mallee Rural Water Authority v FCH Consulting Pty Ltd* [2000] VSC 102; *Wimmera Mallee Rural Water Authority v FCH Consulting Pty Ltd* (No. 2) [2000] VSC 193; *Hampton Park Central Pty Ltd v Australian Safeway Stores Pty Ltd* [2000] VSC 422; *Westkon Concrete Pty Ltd v Multiple Constructions Pty Ltd* [2000] VSC 491; *TNT Australia Pty Ltd v CMW Design & Construction Pty Ltd* (No. 1) [2003] VSC 338; *TNT Australia Pty Ltd v CMW Design & Construction Pty Ltd* (No. 2) [2003] VSC 339. **18** *Woods v De Gabriele* [2007] VSC 177 per Hollingworth J at [41]–[44], [50]–[51], [58]; contra Byrne J (writing extra-judicially) in Byrne, 'Proportionate Liability: Some Creaking in the Superstructure', paper presented to the Judicial College of Australia (2006) pp7, 9. **19** *Civil Liability Act 2002 (NSW)*, s36. See also *Australian Securities and Investments Commission Act 2001 (Cth)*, s12GT; *Corporations Act 2001 (Cth)*, s1041P; *Trade Practices Act 1974 (Cth)*, s87CF; *Civil Liability Act 2003 (Qld)*, s32A; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA)*, s9 (contribution only); *Civil Liability Act 2002 (Tas)*, s43C(1); *Wrongs Act 1958 (Vic)*, s24AJ; *Civil Liability Act 2002 (WA)*, s5AL(1); *Civil Law (Wrongs) Act 2002 (ACT)*, s107H; *Proportionate Liability Act 2005 (NT)*, s15. **20** *Civil Liability Act 2002 (WA)*, ss4A, 5AL(2); *Civil Liability Act 2002 (NSW)*, s3A(2); *Civil Liability Act 2002 (Tas)*, ss3A(3), 43C(2). **21** *Civil Liability Act 2002 (Qld)*, s7(3). **22** NSW: *Civil Liability Act 2002*, s35(3) (b); Queensland: *Civil Liability Act 2003*, s31(3); ACT: *Civil Law (Wrongs) Act 2002*, s107F(2); Northern Territory: *Proportionate Liability Act 2005*, s13(2)(b). Commonwealth: *Australian Securities and Investments Commission Act 2001*, s12GR(3)(b); *Corporations*

Act 2001, s1041NO(3)(b); *Trade Practices Act 1974*, s87CD(3)(b). **23** Tasmania: *Civil Liability Act 2002*, s43B(3); Western Australia: *Civil Liability Act 2002*, s5AK(3)(b). **24** *Wrongs Act 1958 (Vic)*, s24AL(3). **25** *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* [2007] FCA 1216 at [16]–[36], per Middleton J, applying *Judiciary Act 1903 (Cth)*, s79. **26** *Australian Securities and Investments Commission Act 2001 (Cth)*, s12GS; *Corporations Act 2001 (Cth)*, s1041O; *Trade Practices Act 1974 (Cth)*, s87CE; *Civil Liability Act 2002 (NSW)*, s35A; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001*, s10; *Civil Liability Act 2002 (Tas)*, s43D; *Civil Law (Wrongs) Act 2003 (ACT)*, s107G; *Proportionate Liability Act 2005 (NT)*, s12. **27** *Civil Liability Act 2003 (Qld)*, s32(5). **28** *Ucak v Avante Developments Pty Ltd* [2007] NSWSC 367. **29** *Trade Practices Act 1974 (Cth)*, s87CG; *Australian Securities and Investments Commission Act 2001 (Cth)*, s12GU; *Corporations Act 2001 (Cth)*, s1041Q; *Civil Liability Act 2002 (NSW)*, s37; *Civil Liability Act 2003 (Qld)*, s32B; *Civil Liability Act 2002 (Tas)*, s43E; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001*; *Wrongs Act 1958 (Vic)*, s24AK; *Civil Liability Act 2002 (WA)*, s5AM; *Civil Law (Wrongs) Act 2002 (ACT)*, s107I; *Proportionate Liability Act 2005 (NT)*, s16. **30** *Australian Securities and Investments Commission Act 2001 (Cth)*, s12GQ(1); *Corporations Act 2001 (Cth)*, s1041M(1); *Trade Practices Act 1974 (Cth)*, s87CC(1); *Civil Liability Act 2002 (NSW)*, s34A(1); *Civil Liability Act 2003 (Qld)*, ss32D, 32E; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA)*, s3(2); *Civil Liability Act 2002 (Tas)*, s43A(5); *Wrongs Act 1958 (Vic)*, s24AM (fraud exception only); *Civil Liability Act 2002 (WA)*, s5AJA(1); *Civil Law (Wrongs) Act 2002 (ACT)*, s107E(1); *Proportionate Liability Act 2005 (NT)*, s7.

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