By Peter Long

# The effect of PROPORTIONATE LIABILITY legislation on commercial litigation

**As a result of Part IV of the *Civil Liability Act* 2002 NSW (CLA) and similar legislation in other states and territories, and federally, plaintiffs can no longer recover loss for injury (other than personal injury) from a single tortfeasor in circumstances where there are multiple tortfeasors.**



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## AFFECTED CLAIMS

Under the relevant legislation around Australia, apportionable claims are those for economic loss or damage to property in an action for damages arising from:

(i) a failure to take reasonable care (whether in contract, tort or otherwise); or
(ii) misleading and deceptive conduct under the *Fair Trading Act*, (and, federally, under the *Trade Practices Act*, the *Australian Consumer Law*, the *Corporations Act* or the *ASIC Act*).[1]

In NSW, the legislation applies only to a cause of action which arose on or after 26 July 2004, and where the proceedings were commenced on or after 1 December 2004.[2] Other jurisdictions have similar provisions, but the Victorian *Wrongs Act* 1958 appears to have applied it retrospectively to all actions not yet finalised at the date it was introduced in early 2004.

Personal injury claims are specifically *excluded*.[3] This article therefore relates solely to non-personal injury claims, but the wording of the proportionate liability legislation is similar to the legislation governing contribution between joint and several tortfeasors.[4] Section 34(3A) of the CLA also excludes claims for damages arising from a breach of statutory warranty under Part 2C of the *Home Building Act* 1989 NSW, brought by the person having the benefit of the statutory warranty.

Section 3A(1) of the CLA also excludes its application where the loss or damage was intentionally caused or was the result of fraud. Interestingly, Section 34A of the CLA, in effect, repeats that provision such that it provides that the liability of a concurrent wrongdoer will not be limited by apportionment if they cause the loss or damage intentionally or fraudulently.

## MANDATORY APPLICATION OF PROPORTIONATE LIABILITY

So, assuming that you are dealing with an action for damages for economic loss or damage to property, arising from a failure to take reasonable care (whether in contract, tort or otherwise) or misleading and deceptive conduct, liability *must* be apportioned by the court between the concurrent wrongdoers.[5]

## WHO IS AFFECTED?

A 'concurrent wrongdoer' is defined as one of two or more persons whose act(s) or omission(s) cause, independently of each other or jointly, the damage or loss.[6]

This involves a two-step process:

1. identifying the loss or damage that is the subject of the claim; and
2. determining whether the acts or omissions of the alleged concurrent wrongdoers caused, independently of each other or jointly, that damage or loss.

It is necessary for concurrent wrongdoers to be *legally liable* to the plaintiff, not just that his or her conduct was a cause of the plaintiff's loss.[7]

In NSW, Queensland, NT and ACT, the court *must* apportion liability among all concurrent wrongdoers, including those who are not parties to the proceedings. In Tasmania and WA, the court is to *have regard to* such persons or entities but, in Victoria, the court *must not* have such regard unless the reason that the person or entity is not a party is because they are dead or have been wound up.[8] An important consequence of the application of the proportionate liability legislation to a claim is that it results in the claimant bearing the risk of the insolvency of any concurrent wrongdoer.[9]

It is likely that the legislation applies to both joint tortfeasors and several (concurrent) tortfeasors.

## SAME DAMAGE

The earlier decisions of the Victorian and NSW Court of Appeal to the effect that the damage or loss *must* be the *same* damage or loss[10] were overturned by the High Court of Australia on 3 April 2013.[11] In that case, Hunt & Hunt failed to protect their client against a fraud through their negligence in drafting mortgage documents, but argued that the fraudsters were 'concurrent wrongdoers', whose actions had materially contributed to the damage, and that their liability should be restricted to 12 per cent of the loss. The High Court agreed, and held that the solicitors by their negligence, and the fraudsters by their fraud, were responsible for the 'same damage', with the harm that Mitchell Morgan suffered being the 'inability to recover the monies it had advanced' which was caused by both the actions of the fraudsters and the actions of the solicitors.

Note that 'damage' does not mean 'damages'.

It appears that a concurrent wrongdoer's acts or omissions only need to 'materially contribute' to the plaintiff's loss or damage. As such, it must be one that does not fall within the maxim *de minimis non curat lex*.

Both a contract breaker and a tortfeasor may be concurrent wrongdoers liable for the same loss or damage in an apportionable claim.[12]

## APPORTIONMENT

The exercise of apportionment requires two matters to be weighed:

1. relative blameworthiness or culpability – that is, how far the act or omission digressed from the conduct the law requires; and
2. relative causal potency – that is, who had it within their power to avoid the loss.[13]

## NOTICE

A defendant must give notice in writing to the plaintiff as soon as practicable of the concurrent wrongdoers that the defendant believes caused the plaintiff's damage or loss.[14]

## PLEADING

A defendant ought to plead such notice in its defence[15] and include in such pleading:

(a) the existence and identity of a particular person as the alleged concurrent wrongdoer;
(b) the occurrence of an act or omission by that person;
(c) the basis for the cause of action and, if it was in

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contract, identifying the contract and if it was in tort, identifying the duty, its scope and the breach; and
(d) the damage, including the aspects of causation, the alleged extent and proportion of the damages, and the causal connection with the damage said to be suffered by the plaintiff in the substantive proceedings.[16]

The defendant is likely to have not only the onus of such pleading but also of proving the elements of such a defence.[17]

Professors Barbara McDonald and John Carter reason that the definition of apportionable claim should be satisfied in relation to claims for breach of contract only where the action is based on a breach of a duty to take reasonable care which is concurrent and coextensive with a duty of care in tort.[18] The NSW Court of Appeal addressed this issue on 20 March 2013 but, with respect, without positive guidance. Macfarlan JA agreed with this view; Meagher JA preferred not to comment; and Barrett JA followed his previous view that the nature or quality of a 'claim' for these purposes cannot be determined without taking into account the court's decision on the claim. The Victorian Court of Appeal has stated that 'determination of the critical circumstances will depend upon findings having been made'.[19]

There is confusion as to whether a claim for relief under s87 of the *Trade Practices Act* 1974 (Cth) and ss237 to 239 of the *Australian Consumer Law* 2010 (Cth) is an apportionable claim.[20] It seems that a breach of trust claim may fall outside the regime.[21]

## EXTENT OF LIABILITY

The liability of a defendant who is a concurrent wrongdoer is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just, having regard to the extent of the defendant's responsibility for the damage or loss.[22] A court may give judgment against the defendant for not more than that amount.[23] In addition, the court must first exclude any proportion attributable to the plaintiff's contributory negligence under s35(3)(a) of the CLA.

Note that under s39 of the CLA, the proportionate liability provisions do not affect or absolve a person held vicariously or severally liable for a proportion of an apportionable claim for which another person is also liable.

## CONTRIBUTION AND INDEMNITY

Section 36 of the CLA provides that a defendant against whom judgment is given under Part 4 as a concurrent wrongdoer in relation to an apportionable claim cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim, and cannot be required to indemnify any such wrongdoer ('the non-contribution or indemnity provisions'). Section 38(2) of the CLA provides that the court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim ('the prior defendant provisions').

It appears that the impact of those two provisions on settlements is not a matter that has yet come before the courts except in *Godfrey Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd & Ors*[24] and *Gunston v Lawley*,[25] which was applied in *McAskell v Cavendish Properties Ltd (No. 2)*.[26] Defendants must question whether a consent judgment as part of a settlement is a judgment given under the legislation within the meaning of the non-contribution or indemnity provisions, such that it would entitle the defendant to protection from contribution claims, and whether this makes verdicts or judgments for the defendant as part of a settlement less favourable.

The expression 'previously concluded proceedings' is not defined and it is unclear whether it could cover proceedings that have been finalised against one or more of the defendants where there are still claims on foot against other defendants. The legislation envisages that there may be an apportionable claim and a non-apportionable claim. The protection under the non-contribution or indemnity provisions appears to apply only to an apportionable claim.

Where a plaintiff and one of the defendants agree to resolve their dispute in respect of that particular defendant's share of the liability, and the defendant can put itself in a position where it can argue that all rights of contribution are extinguished, it ought to be recorded in writing that the claim is an apportionable claim and there ought to be a consent judgment against that defendant given under the legislation. Obviously, a defendant seeking to extinguish all rights of contribution that others may have against it will most likely be bringing about a similar result to any rights of contribution that it may have had against other concurrent wrongdoers.

Conversely, if a defendant does wish to resolve a dispute but preserve its rights of contribution then, obviously, it should not admit that the claim is an apportionable claim and it should expressly state that it preserves its rights of contribution and, if applicable, the settlement documents should clearly provide that the consideration from the defendant is not only in respect of its proportion of the liability.

If the plaintiff has settled with one concurrent wrongdoer, that settlement has no bearing on the apportionment of liability for the aggregate loss among the remaining concurrent wrongdoers. A plaintiff can receive a series of judgments or judgments and settlements awarding aggregate damages greater than 100 per cent of the loss proved. However, the plaintiff would not be permitted to recover more than 100 per cent of his or her loss.

Defendants must consider the need for a cross-claim against any other concurrent wrongdoer given the effect of the non-contribution or indemnity provisions and the prior defendant provisions. If the requisite notice is pleaded in a defence, it appears that such cross-claims have become otiose.[27]

## SUBROGATION

An insurer of a defendant who is, or may be, a concurrent wrongdoer in relation to an apportionable claim can rely upon the proportionate liability provisions to reduce its liability to the proportion its deregistered insured corporation would have had.[28]

## COSTS

A court would be likely to exercise its discretion in relation to an award of costs by apportioning the same in a similar manner to what it did in relation to liability.[29]

## EXCLUSION OF PROVISIONS

Some of the relevant legislation throughout Australia allows parties to a contract to expressly exclude the proportionate liability provisions: see s3A(2) of the CLA and s4A of the WA CLA, but note that it is prohibited by s7(3) of the Qld CLA. The other states' legislation is silent. The NSW Court of Appeal also addressed this issue on 20 March 2013 and was unanimous in upholding such an exclusion clause, even though it was entered into before the legislation and, thus, neither party had the proportionate liability provisions in mind when the contract was signed.[30] The issue for practitioners advising clients in relation to contracts, disclaimers and the like is whether that client is likely to be a plaintiff or a defendant in any subsequent dispute. The former would be eternally grateful to a lawyer who ensured that recovery from the wrongdoer with the deepest pockets remained available, while the latter would want and expect to have the benefit of apportionment.

## CONCLUSION

Proportionate liability remains the sleeping giant of commercial litigation and continues to be only spasmodically considered by practitioners and pleaded by parties. It is a significant weapon in the hands of defendants and, as such, must be included in any initial advice given to plaintiffs, especially in circumstances where the defendant with the greatest (or only) ability to pay may be liable for only a small proportion of the damages awarded. For example, the liability of lawyers in professional negligence cases is being apportioned around 12.5 per cent in many cases. ■

**Notes:** **1** CLA, s34(1). **2** *Ucak v Avante Developments* [2007] NSWSC 367. **3** CLA, s34(1)(a). **4** See, for example, *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW), s5; *Lovick & Son Developments Pty Ltd & Anor v Doppstadt Australia Pty Ltd & Anor* [2012] NSWSC 529. **5** CLA, s35(1)(a). **6** *Ibid*, s34(2). **7** *Chandra v Perpetual Trustees Victoria Ltd* (2007) NSWSC 694; *Gunnersen v Henwood* [2011] VSC 440. **8** *Gippsreal Ltd v Hausfeld Johnson Pty Ltd* [2012] FCA 956. **9** *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3. **10** CLA s34(1A); *St George Bank Ltd v Quinerts Pty Ltd* [2009] VSCA 245 & *Mitchell Morgan Nominees Pty Ltd & Anor v Vella & Ors* [2011] NSWCA 390. **11** *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10. **12** *Yates v Mobile Marine Repairs Pty Ltd & Anor* [2007] NSWSC 1463. **13** *Reinhold v New South Wales Lotteries Corporation (No. 2)* [2008] NSWSC 187. **14** CLA, s35(A). **15** *Permanent Custodians Limited & Anor v King & Ors* [2010] NSWSC 509. **16** *Ucak v Avante Developments* (2007) NSWSC 367; *HSD Co Pty Ltd v Masu Financial Management Pty Ltd* [2008] NSWSC 1279. **17** *Gunnersen v Henwood* [2011] VSC 440, per Dixon J at [406] and [411]. **18** 'The Lottery of Contractual Risk Allocation and Proportionate Liability', *Journal of Contraqct Law*, Vol. 26, No. 1 (2009) pp1-24. **19** *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No. 2)* [2013] NSWCA 58; *Godfrey Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd & Ors*. **20** *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No. 2)* [2008] FCA 1656 and *(No. 3)* [2009] FCA 1087 and *Bennett v Elysium Noosa Pty Ltd (In liq.)* [2012] FCA 211 compared with *Khoury v Sidhu (No .2)* [2010] FCA 1320. **21** *Pearson Barristers & Solicitors v Avison* [2009] VSCA 54. **22** CLA, s35(1)(a). See *Shrimp v Landmark Operations Ltd* [2007] FCA 1468. **23** CLA, s35(1)(b). **24** *Godfrey Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd & Ors* [2008] VSCA 208. **25** *Gunston v Lawley* [2008] VSC 97. **26** *McAskell v Cavendish Properties Ltd (No. 2)* [2008] VSC 563. **27** *Dymocks Book Arcade Pty Ltd v Capral Ltd* [2010] NSWSC 195. **28** *The Owners-Strata Plan 62658 v Mestrez Pty Limited & Ors* [2012] NSWSC 1259. **29** *Lym International Pty Ltd v Marcolongo* [2011] NSWCA 303. **30** *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No. 2)* [2013] NSWCA 58.

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