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CAUSATION, CONTRIBUTORY NEGLIGENCE AND CONTRIBUTION UNDER THE TRADE PRACTICES ACT

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Issues of causation, contributory negligence and contribution under the Trade Practice Act are complex. Their complexity has been increased by amendments in 2004 which create a new legal regime that attempts to allocate responsibility between plaintiff and defendant, and between defendants in cases involving contravention of s.52. The new regime only deals with claims for damages under s.82 in relation to economic loss or damage to property caused by conduct in contravention of s.52. These amendments are addressed by Mr McKenna SC. This paper introduces the topics of causation, contributory negligence and contribution so that the implications of the 2004 amendments can be better understood. It attempts to explain what we mean when we use the terms "causation" and "contributory negligence" in disputes under the Trade Practices Act. It focuses upon the proposition that, in law, causation encompasses disputes about responsibility from agreed or proven facts and is concerned with the allocation of legal responsibility. The paper touches upon issues of remoteness and measure of damages. It concludes that the 2004 amendments were a missed opportunity to introduce a principled regime for apportioning legal responsibility between plaintiff and defendant, and between defendants in trade practices claims.

Introduction

1. Lawyers tend to rely on two general propositions in this area. First, a plaintiff does not need to prove that the defendant's contravention of the *Trade Practices Act* ("TPA") was the sole cause of the claimed loss or damage in order to recover all of it. Second, contributory negligence is not a defence to a TPA claim.

2. One purpose of this paper is to explore what we mean by "causation" in this context, and to discuss the pervasive influence of tort law in our thinking about causation and apportionment. This may explain why the High Court reached an "all or nothing" result in *I&L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*[1], and why, in the light of that decision, apportionment of legal responsibility between plaintiff and defendant in many cases now depends upon the enactment of express provisions for apportionment. The concept of causation constrains recovery of losses in TPA cases. It is deployed in TPA cases when courts limit the recovery of a plaintiff's loss on grounds that the common law also would describe in terms of remoteness or

1 [2002] HCA 41; (2002) 210 CLR 109.

foreseeability. This occurs when the plaintiff's own conduct has caused part of the loss. Causation is also the concept used when a plaintiff's conduct is of a character that, as a matter of value judgment, the plaintiff is denied any recovery of its loss. One purpose of this paper is to explain that in these kind of cases we are not enquiring into an historical fact. We are making judgments about legal responsibility. When we say that a causal chain was broken by the plaintiff's conduct we are not determining how a loss came about. We are expressing a conclusion about legal responsibility.

3. The second purpose of the paper is to ask why the term "contributory negligence" even arises for discussion in the context of claims under the TPA, where:

   (a) liability does not depend on proof of negligence;

   (b) generally speaking, a plaintiff does not need to prove that it acted reasonably in order to recover; and

   (c) as a general rule, it is no defence for the defendant to prove that it acted reasonably or that the plaintiff acted unreasonably[2].

   The fact that lawyers and judges often resort to the general proposition that "contributory negligence" is no defence to a claim under the TPA indicates the way we all think. We analyse problems about causation and legal responsibility using familiar concepts drawn from our own experience in tort cases and familiar rules that were developed as tort law evolved. The use or misuse of the term "contributory negligence" is part of a broader issue that can be formulated in terms of "causation", provided we appreciate that "causation" in this context is not about what caused the plaintiff's loss and damage. Causation in this context is not about what happened, since the facts are agreed or proven. Causation in this context is about legal responsibility arising from settled facts.

4. The causation question is: should the defendant be legally responsible for all, some or none of the plaintiff's losses. Expressed differently, the question is: should the plaintiff be held legally responsible for all or any part of its losses because of its own conduct. We should jettison reference to "contributory negligence" in the context of the TPA. Unreasonable or aberrant plaintiff conduct does not generate an issue of contributory negligence. The issue is one that the law describes as causation.

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[2] Issues of reasonableness intrude in some contexts, such as whether a person who made a representation with respect to a future matter had reasonable grounds for making the representation: TPA s.51A. However, in many respects the TPA is not concerned with questions of the reasonableness of either the plaintiff's or defendant's conduct. Many provisions impose strict liability. Others impose liability depending upon the defendant's purpose or the effect of the defendant's conduct.

Causation

5. Legal disputes about causation may involve two different types of enquiry:
   (a) the role played by a factor in the history of an outcome;
   (b) a responsibility issue, namely whether legal responsibility should be attributed to the factor.

6. Cases under ss.82 and 87 of the TPA routinely involve the second type of enquiry. They do so when the court refuses recovery of all or part of claimed losses, despite that, as a matter of incontrovertible fact, the defendant's conduct was a cause of the loss, in the sense that the loss would not have occurred but for the defendant's conduct. Sometimes this occurs because the losses were incurred beyond a certain date. In other cases it is because the losses might be of a character which the common law would characterise as too remote or not foreseeable. In some cases the loss, although having been caused as a matter of historical fact by the defendant's conduct, will not be recoverable because extreme or unreasonable conduct by the plaintiff occurs, such that the court concludes that the defendant's conduct should be found not to have "caused" the plaintiff's loss. In each of these cases the court in limiting the recoverability of losses on the basis of a judgment about the appropriate scope of legal responsibility, not on the basis of an enquiry into historical fact.

7. When we turn to the legal responsibility of multiple defendants[3] we also are concerned with "causation" in terms of legal responsibility. A defendant whose conduct was a cause of the plaintiff's loss and who is held legally responsible for that loss is responsible for the whole of that loss, even though:
   (a) other persons' conduct was an essential pre-condition to, and legal cause of, the plaintiff's loss;
   (b) the plaintiff's loss would not have been sustained had these other persons not conducted themselves as they did.

8. In determining disputes about the apportionment of legal responsibility in trade practices cases, the courts applied what can be described as "rules of causation" that had been developed in tort law. But those rules of causation had been developed and refined after the enactment of statutes which permitted apportionment between plaintiff and defendant, and contribution between tortfeasors.

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[3] This term is used to describe both defendants and third parties against whom contribution or indemnity is claimed.

9. The adoption of causation rules from torts in a legal environment in which there are no apportionment statutes inevitably generated problems. In cases in which the plaintiff's own unreasonable conduct was an *independent* cause of its loss, the law produced the kind of "all or nothing" outcome exemplified in *Henville v Walker*[4]. An attempt to apportion liability under s.82 was decisively rejected in *I&L Securities*[5].

10. The absence of a statutory provision for contribution between defendants for losses caused by a contravention of the TPA means that there is no simple mechanism for legal responsibility between defendants to be apportioned, and a defendant claiming contribution has to fall back on principles of contribution under the general law or, in effect, seek contribution by commencing a separate legal claim against another defendant or third party.

11. These complexities begin with one deceptively simple word: "by".

"By"

12. Section 82(1)[6] provides:

> "A person who suffers loss or damage **by** conduct of another person that was done in contravention of a provision of Part IV, IVA, IVB or V or section 51AC may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention." (emphasis added)

13. In *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No 2)*[7], Gummow J observed:

> "Wrapped up within s 82 are thus concepts the common law would describe by the terms 'causation' and 'remoteness' and 'measure of damages'."

His Honour continued in a passage that warrants being quoted at length:

> "It is to the first of these, 'causation', that s 82(2) directs attention. It does so by fixing the limitation period by reference to the date on which the cause of action accrued and so to the suffering of the loss or damage 'by' conduct contravening the statute. The use of the preposition 'by' indicates the necessity for some sufficient cause or

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4 [2001] HCA 52; (2001) 206 CLR 459.

5 Supra.

6 Subsection (1) has effect subject to s.87AB which limits liability in connection with State or Territory professional standards laws. Subsection (1) is also subject to s.82(1B) which is addressed below and also in the paper given by Mr McKenna SC. The word "by" is used in a similar context in s.87.

7 (1987) 16 FCR 410 at 418.

> reason linking the conduct with the recoverable loss or damage: *Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340 at 350-351.
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> The question, to adopt the language of Lord Haldane in *Thorn v Sinclair* [1917] AC 127 at 135, really turns on the nature or quality of the causation which is required by the use of the word 'by'. in logic, the cause of any state of being may be not less than 'the sum of the entire conditions', but the courts both in expounding the common law and in construing statutes which present issues of causation, have selected some one or more out of what is an infinite number of conditions to be treated as the cause: *Thorn v Sinclair* per Lord Haldane (supra); *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569 at 591-596 per Windeyer J. And, as those learned judges also explained, the cause or causes so selected vary with the purpose at hand. In making that selection the law is moved by considerations of policy, not simply of logic: *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310 at 350 per McHugh JA.
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> In defining, construing and applying the common law principles in this field, particularly in negligence and in contract, it is to be remembered that what are often classed as rules are such only prima facie, and may be displaced or modified to meet the particular case; *Wenham v Ella* (1972) 127 CLR 454 at 466.
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> Where the selection to which I have referred concerns statutory rights and obligations it would be an error to translate automatically to the particular statute what appeared the closest analogue from the common law "rules" as to causation." (emphasis added)

14. Despite these cautionary remarks, courts dealing with trade practices claims have picked up and applied common law "rules" as to causation. There is nothing wrong with that. But common law "rules" about causation in tort were developed in the modern era in the context of apportionment statutes. In the absence of apportionment statutes, there was a good policy argument for the courts applying tort "rules" of causation to modify their operation so as to apportion responsibility in appropriate cases. However, this course was decisively rejected in *I&L Securities*.

15. The High Court in *Wardley Australia Ltd v Western Australia*[8] referred to the use of the word "by" in s.82(1) and stated that it should be understood as taking up "the common law practical or common-sense concept of causation":

> "'By' is a curious word to use. One might have expected 'by means of', 'by reason of', 'in consequence of' or 'as a result of'. But the word clearly expresses the notion of causation without defining or elucidating it. In this situation, s.82(1) should be understood as taking

[8] (1992) 175 CLR 514 at 525.

> up the common law practical or common-sense concept of causation recently discussed in this Court in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the Act. Had Parliament intended so say something else, it would have been natural and easy to have said so."

Causation in the context of legal responsibility

16. For something which is said by the High Court to involve a matter of common sense, courts frequently are vexed by disputes about "causation". One reason is that legal disputes about causation may involve two very different types of enquiry.

17. The first concerns "how things came about" and involves a question of fact. The second is concerned with "what made a difference" in bringing about a specified transition and, in the area of legal liability, is concerned with whether a party's conduct should be judged to have made a difference in terms of legal responsibility[9]. The second type of enquiry is not so much a factual question as a question about the attribution of responsibility. We might as well have called this second aspect something else, and sometimes it is dealt with under the label "remoteness". We might simply have called it "responsibility". But if we are to describe it as "causation", then we need to appreciate that we are dealing with causation in law which has these dual aspects. Mingling the two aspects and treating causation simply as a matter of "common sense" disguises the fact that disputes about the second aspect of causation involve value judgments about the imposition of legal responsibility and considerations of policy necessarily intrude. They intrude because one is determining legal responsibility in the context of a particular law. In trade practices cases it is in the context of a statute that has a variety of objectives and which is available to a wide variety of plaintiffs of differing sophistication and resources. Some provisions impose strict liability. They are blind to the purpose, intent or reasonableness of the contravenor's conduct.

18. For anyone with a special interest in the topic of causation I commend Professor Stapleton's article on causation[10]. But one does not need to consult her learned articles to appreciate that legal causation is a concept that is not confined to

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9 Stapleton "*Perspectives on Causation*", in Horder (ed), Oxford Essays in Jurisprudence (4th Series) (Oxford University Press, 2000).

10 Ibid, see also Stapleton "*Legal Cause, Cause-in-Fact and the Scope of Liability for Consequences*" (2001) 54 Vanderbuilt Law Review 941.

determining historical facts, but encompasses disputes about responsibility arising from agreed facts.

19. In *March v E & MH Stramare Pty Ltd*[11], Mason CJ helpfully explained the concept of causation in the context of legal responsibility.

> "It has often been said that the legal concept of causation differs from philosophical and scientific notions of causation. That is because 'questions of cause and consequence are not the same for law as for philosophy and science', as Windeyer J pointed out in *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569, at 591. In philosophy and science, the concept of causation has been developed in the context of explaining phenomena by reference to the relationship between conditions and occurrences. In law, on the other hand, problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence. The law does not accept John Stuart Mill's definition of cause as the sum of the conditions which are jointly sufficient to produce it. Thus, at law, a person may be responsible for damage when his or her wrongful conduct is one of a number of conditions sufficient to produce that damage." (emphasis added)

20. The aspect of causation that is concerned with attributing and apportioning legal responsibility hinges on the court's evaluation of policy[12].

21. The factual context for the resolution of causation disputes between plaintiff and defendant in cases where the facts are agreed or proven typically will be that the plaintiff's own conduct contributed to its loss. In order to determine how a court should apportion legal responsibility between plaintiff and defendant in trade practices cases, one has to have regard to the policy of the Act. The object of the Act is to enhance the welfare of Australians through promotion of competition and fair trading and provision for consumer protection[13]. Its consumer protection provisions were intended by its framers to protect consumers from "the smart practices of businessmen"[14].

22. If one was determining a causation dispute between an individual consumer and a smart businessman who had misled the consumer, then one could readily reach the conclusion that the plaintiff should recover all of its losses caused by a contravention

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11 (1991) 171 CLR 506 at 509.

12 *March* (supra) at 516; *Bennett v Ministry of Community Welfare* (1992) 176 CLR 408 at 413; *Chappel v Hart* (1998) 195 CLR 232 at 238 [7] per Gaudron J, at 243 [24] per McHugh J; at 256 [63] per Gummow J, at 269-270 [93] per Kirby J; *Henville v Walker* (supra) at [99] per McHugh J.

13 TPA s.2.

14 Parliamentary Debates (Hansard), House of Representatives, 16 July 1974, p.232.

of the consumer protection provisions of the Act, despite the fact that the plaintiff had not taken reasonable care to protect its own interests. The policy argument is that the Act is designed to protect consumers who fail to protect their interests, and who are misled by smart businessmen who exploit that fact.

23. But, as we know, the consumer protection and other provisions of the Act are available to corporations that have ample resources to protect their own interests. We also know that, whatever their intent, the consumer protection provisions catch persons who are not smart or sneaky businessmen, including defendants who contravene the Act through statements which are made honestly and reasonably. Of course, the Act catches defendants whose conduct is negligent, but not because their conduct is negligent. Section 52 and other consumer protection provisions catch conduct which is likely to mislead or deceive, irrespective of the defendant's reasonableness or honesty.

24. Some plaintiffs are not the kind of vulnerable consumers that the Parliament had in mind when it passed the act thirty years ago. They include sophisticated commercial entities who treat the Act as providing a form of insurance against loss for which they do not have to pay a premium. The range of plaintiffs who are entitled to recover their losses under the Act, and the range of conduct that is caught by it, may explain why the Act did not make any explicit statement in s.82 or elsewhere about whether or when losses should be apportioned, or the type of plaintiff conduct that should disentitle a plaintiff from recovering all or any part of its losses. These judgments were left to the courts to make. When courts make these judgments they have regard to the policy of the Act. In the context of consumer protection provisions the courts have been reluctant to deny or limit recovery to plaintiffs who fail to take reasonable steps to check and detect that they are being misled.

25. The case for limiting recovery is different where the plaintiff's unreasonable conduct is an <u>independent</u> cause of the loss, as occurred in *Henville v Walker* and *I&L Securities*. Another category of case where the plaintiff's unreasonable conduct is an <u>independent</u> cause of its loss, or at least part of its loss, occurs when the plaintiff has acquires a business by reason of a contravention of the Act, but it subsequently acts unreasonably in the manner in which the business is conducted, or the length of time during which it continues to operate the business at a loss.

26. Unreasonable plaintiff conduct that introduces an <u>independent</u> cause of loss was the

type of conduct which was the basis for the apportionment sought by the defendant in *I&L Securities*. As we shall see, it has a stronger claim to a reduction in the plaintiff's loss under new s.82(1B) than a plaintiff's unreasonable failure to ascertain that it has been misled.

27. In *I&L Securities* the defendant argued that the policy of the TPA permitted the Court to divide responsibility, or apportion, between the plaintiff and defendant, that such an approach was consistent with the policy of the Act and that such a division had much to commend it in a case where the plaintiff's own *independent* conduct caused the loss. That case illustrated a recurrent problem in the law: what should the legal position be when, following the defendant's contravention of a strict statutory obligation, the plaintiff (in ignorance of that contravention) engages in independent conduct that is extreme, unforeseen, unreasonable or reckless, and a loss results to the plaintiff that would not have occurred but for the defendant's contravention and would also not have occurred but for the plaintiff's conduct. Williams J at first instance accepted the invitation to apportion liability under s.82 and concluded that no High Court authority precluded such a course. But before *I&L Securities* reached the High Court the argument for apportionment suffered a fatal, pre-emptive strike at the hands of the High Court in *Henville v Walker*[15], notwithstanding that each of the parties in that case was contending for an "all or nothing" outcome. The argument for apportionment was decisively rejected by the High Court `in *I&L Securities*.

28. The defendant argued that the trial judge was entitled to do so because the concept of causation expressed by the word "by" was concerned with the apportionment of legal responsibility. Apportionment was said to be appropriate because the plaintiff's independent conduct had caused the loss. The High Court rejected this argument and applied conventional rules of causation which were developed in tort.

Causation rules in tort

29. As the passage quoted from *March*[16] indicates, at law, a defendant may be responsible for all of the loss claimed by the plaintiff when the defendant's conduct was only one of a number of conditions that produced the loss. After the statutory elimination of the common law defence of contributory negligence and the enactment of legislation providing for apportionment between tortfeasors, courts determining torts cases were

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15 Supra.
16 Supra at 509.

not constrained to find a single cause for a consequence, in a search for the cause or the "effective cause" of loss or damage. As Mason CJ observed in *March*:

> "These days courts readily recognise that there are concurrent and successive causes of damage on the footing that liability will be apportioned as between the wrongdoers."

30. Familiar rules about causation that were developed in tort in the context of statutes providing for apportionment between plaintiff and defendant and contribution between defendants have been picked up and applied to claims for damages under the TPA without, at the same time, developing principles for the apportionment of responsibility between plaintiff and defendant and between defendants.

Causation rules in the context of the *TPA*

31. The causation rules that were adapted and applied under the TPA can be summarised along the following lines:

(1) The contravention of the Act need not be the *sole* cause of the loss or damage. It is sufficient if the contravention is one of a number of conditions which contributed to the loss or damage.

(2) Where a contravention of the Act is only one of a number of independent causes of loss or damage, the court does not determine what proportion of the loss or damage was caused by the contravening conduct. If the contravening conduct was *an* effective cause of the transaction, then the loss or damage resulting from the contravention is recoverable in full.

(3) One application of this rule is that when the defendant's contravention of the Act was a cause of the plaintiff's loss or damage, but the plaintiff's failure to act reasonably was another cause, the court does not apportion responsibility between the plaintiff and the defendant. Provided the defendant's conduct was a cause of the loss or damage (in the sense of materially contributing to it), the full amount of the loss or damage is recoverable.

(4) A specific application of this rule arises where the defendant's misleading conduct was a cause of the plaintiff's loss or damage, but the plaintiff (acting reasonably) should have discovered the true position and prevented the loss. The court does not apportion responsibility between the defendant and the plaintiff.

(5) Finally, where the independent causes are the acts of different defendants which were each a cause in law of the plaintiff's loss or damage, the courts do

not apportion responsibility amongst the contravenors. The plaintiff's loss or damage is recoverable from each defendant.[17]

Contributory negligence – a misnomer

32. Once one appreciates that the "rules of causation" (or what might be better described as rules about the attribution of responsibility) allow a plaintiff to recover where its conduct also has been a cause of its loss or damage, one can readily see why unreasonable plaintiff conduct is thought to be no defence[18] unless it is so extreme that the value judgment is made that the defendant should not have any legal responsibility for the plaintiff's losses. When expressed in terms of causation, this value judgment is described as a break in the causal nexus or, more colourfully, a break in the "chain of causation". Sometimes notions from tort law find their way into the discourse and the plaintiff's extreme, intervening behaviour is styled a *novus actus interveniens*. Leaving aside these exceptional cases, one has the application of the modern tort rule that a defendant is legally responsible for the plaintiff's loss even where the plaintiff's unreasonable conduct was a cause of it. This is reflected in the second adage with which I commenced the paper, namely that "contributory negligence is not a defence to a TPA claim". A fuller and more precise expression can be found in the observations of the Full Federal Court in *Amadio Pty Ltd v Henderson*[19]:

> "It was also contended that his Honour erred in not taking into account contributory negligence of the applicants as a defence to the claims under s.52. We are satisfied that his Honour was correct in concluding that no such defence is available under the Act nor can damages awarded be reduced on this basis. The facts giving rise to a contributory negligence claim may be relevant to issues of reliance and causation but cannot otherwise negate, or afford a defence to, the statutory cause of action under s.52."

33. The fact that we use the expression "contributory negligence" in these contexts is interesting. Sometimes it is explicable because claims are brought both in tort and under the TPA. For example, in *I&L Securities* the plaintiff's extreme departure from

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17 Contribution between defendants is discussed later in this paper. Depending upon whether the contravenors also are tortfeasors contribution may be achieved under state apportionment legislation. Alternatively, contribution may be claimed under the general law or contribution or indemnity effectively claimed in separate proceedings between defendants. The present discussion concerns the application of causation rules and why the application of these rules dictates the result that a plaintiff can recover its full loss against each defendant who is held legally responsible for the loss, and why such a defendant cannot avoid legal liability for the whole of the loss by asserting that the loss was also caused by the conduct of other defendants.

18 In the sense of operating as a complete defence to the plaintiff's claim.

19 (1998) 81 FCR 149 at 265.

the norm to be expected of a commercial lender in its position qualified as contributory negligence which reduced its recovery in tort. But in cases in which the only claim is one of strict liability for contravention of a provision like s.52, we still encounter the language of "contributory negligence". One reason may be that we are educated about torts before we learn anything about trade practices and, generally speaking, when we start in practice we do property damage cases about cars that collide at intersections in which a major topic for debate is the contributory negligence of the plaintiff. Our familiarity with tort law and the familiarity of courts with principles that have developed over a longer period than the TPA has existed explains why we readily resort to principles in tort, including causation rules in tort. Courts do this, and we do this, despite repeated reminders from the High Court that analogies with tort and other areas of law may be helpful, but the essential reference point is the Act itself and the policies that underpin it.

34. One aspect of the pervasive influence of tort law on our thinking is that we use the term "contributory negligence" in the context of an Act that has nothing to do with negligence. We also tend to think, in the light of our knowledge of tort law, that apportionment is the creature of statute. In tort we needed a statute in order to avoid the capricious "all or nothing" outcomes that arose when contributory negligence was a complete defence. These preconceptions lead us to think that without a general apportionment statute that applies to trade practices claims, or without express apportionment provisions in the Act itself, one is left in the realm of "all or nothing" outcomes in respect of indivisible losses. This thinking is reinforced by recent legal history involving *Astley v Austrust Ltd*[20] and the post-*Astley* amendments to contributory negligence statutes. We have been educated and practiced in a legal environment in which we think that apportionment must be a creature of statute and this message has been powerfully reinforced by the decision in *I&L Securities*.

35. The curiosity remains that the rules of causation in tort that have been picked up and applied to the TPA developed into the form that they did <u>because</u> there were apportionment statutes in tort providing for the apportionment of legal responsibility between plaintiff and defendant and contribution between defendants. The practical result is that without a statute expressly providing for apportionment between plaintiff and defendant, the plaintiff in a case such as *I&L Securities* recovers all of its loss or none of it. The TPA in such a case produces "all or nothing" outcomes.

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[20] (1999) 197 CLR 1.

Plaintiff conduct that severs the causal nexus

36. In order to defeat the plaintiff's claim the defendant must show that the plaintiff's conduct was of a character that warrants the defendant being relieved from any legal responsibility so that the plaintiff carries responsibility for its own losses. Fairly extreme plaintiff conduct is required to reach such a judgment in the context of an Act that is intended to protect consumers from conduct, including conduct which may breach a norm in circumstances in which the defendant acted reasonably. The conclusion that the plaintiff's own conduct disentitles it from recovering its losses may be expressed in the language of causation. In *Argy v Blunts*[21], Hill J stated:

> "A case may perhaps be imagined when an applicant is so negligent in protecting his own interests that there will be a finding of fact that the representation complained of was not in the circumstances a real inducement to his entering into a contract. In such a case the element of causation between misrepresentation and damage will have been severed by the intervention of the negligence of the applicant."

37. In *I&L Securities*[22], McHugh J cited observations of French J in *Pavich v Bobra Nominees Pty Ltd*[23] that "there comes a point where the applicant's own conduct is so dominant in the causal chain as to constitute a *novus actus interveniens*". An example of the kind of plaintiff conduct that was so dominant in the causal chain so as to constitute a *novus actus interveniens* was given:

> "Intentionally refusing to make proper enquiries when advancing loan funds will usually be held to be a voluntary act that breaks the chain of causation between the breach of the Act and the lender's loss. A loss caused by the intentional conduct of the applicant will not ordinarily be characterised as a loss caused "by" the contravening conduct of the respondent."[24]

38. His Honour proceeded to note that in a number of cases, courts have been able to find that part of the loss sustained by an applicant was not attributable to the contravening conduct of the respondent but to some other cause. But in a case such as *I&L Securities* where there was "one indivisible loss"[25] the policy behind the TPA was said to be furthered "if the party whose conduct contravenes the legislation bears the entire loss"[26].

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21 (1990) 26 FCR 112 at 138.
22 Supra at [85].
23 (1988) ATPR (Dig) 46-039.
24 Para [104].
25 Ibid at para [102].
26 Ibid at para [104].

Remoteness – causation under another name – limits on the recovery of a plaintiff's loss

39. As previously noted, Gummow J stated that "wrapped up with s.82 are concepts the common law would describe by the terms 'causation' and 'remoteness' and measure of damages'". To like effect are the observations of the Full Federal Court in *Munchies Management Pty Ltd v Belperio*[27] that s.82 involves "an apparent telescoping of what to the common law would be concepts of causation, remoteness and measure of damages". Some members of the High Court have questioned whether either foreseeability or remoteness limit recovery of losses for contravention of the TPA[28]. These observations involve a rejection of the proposition that common law doctrines of foreseeability or remoteness that have developed in limiting recovery of damages in contract or tort have any role to play in limiting recovery under the TPA. They are to the effect that there is no "express indication that some kinds of loss or damage are to be regarded as too remote to be recovered"[29]. But it is impossible to accept that the TPA permits a plaintiff to recover all loss which follows, as a matter of historical fact, from a contravention of the TPA. Some constraints operate, although they have not been precisely formulated. The constraint may be framed in terms of causation, by reference to notions of reasonableness or as something akin to a rule of remoteness. Justice Heydon in his work "*Trade Practices Law*"[30] states:

> "In formulating a test of causation it is anticipated that the courts will prescribe an appropriate rule of remoteness, fixing a limit beyond which damages will not be recoverable, even though damage may result either directly or consequently from the unlawful acts of the defendant. A damages rule that provides complete indemnity for all losses resulting from a particular breach has been described as 'too harsh a rule'." (emphasis added)

40. It is possible to formulate these issues in terms of causation. This has been the manner in which assessment of damages at common law has been approached in connection with the recovery of trading losses occasioned by the purchase of a

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27 (1988) 58 FCR 274 at 286.

28 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 509 para [34]; *Kenny and Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 428 para [30]. In *Henville v Walker* (supra) at [136] McHugh J stated that it seemed proper to read the term "by" in s.82 as including the concept of remoteness, by which he meant loss that was not reasonably foreseeable even in a general way by the contravenor. This was not to be confused with cases in which the plaintiff's failure to take care was characterised as the sole cause of the loss so that there was "no causal connection between the breach of the Act and the 'loss and damage' to which s.82 refers" [138].

29 *Marks* (supra); emphasis added.

30 Law Book Company, para 18.1297.

business. Dixon J in *Potts v Miller*[31] posed the question of whether the cause of a claimed loss was inherent in the thing itself or whether the cause was "independent", "extrinsic", "supervening" or "accidental" in which case the loss was not regarded as the consequence of the inducement. These issues are encountered under the TPA in cases in which a plaintiff has been induced to purchase a business by reason of a contravention of s.52. Courts have grappled with the issue of whether and when trading losses are recoverable. Losses caused by factors that are not inherent in the nature of the business purchased, such as the plaintiff's inexperience or incompetence in managing the business, increased competition and other factors unrelated to the contravening conduct are not recoverable[32]. The plaintiff's inexperience or incompetence is treated as the cause of the loss. To use or misuse the term "contributory negligence" in this context, the plaintiff's contributory negligence does not preclude relief, but it limits the amount of the loss that is recoverable. Different views have been expressed about whether it is for the plaintiff to prove an entitlement to recover categories of loss, such as trading losses[33] or whether it is for the defendant to make out a case as to why categories of loss that were caused by the contravention should not be recovered. These cases on trading losses illustrate broader principles at play.

41. In *Henville v Walker*[34], McHugh J stated:

> "Arguably, once a plaintiff demonstrates that a breach of duty has occurred that is closely followed by damage, a prima facie causal connection will be established. It is then for the defendant to show that the plaintiff should not recover damages. … [It] is the defendant who must disentangle, so far as possible, the various contributing factors."

In the same case, his Honour stated that the assessment of damages under s.82 involves the application of "notions of reasonableness":

> "No doubt, if part of the loss or damages would not have occurred but for the unreasonable conduct of the claimant, it will be appropriate in assessing damages under s.82 to apply notions of reasonableness in assessing how much of the loss was caused by the contravention of the

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31 (1940) 64 CLR 282 at 298.

32 See for example *Collins Marrickville Pty Ltd v Henjo Investments Pty Ltd* (1987) ATPR 40-822; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 2)* (1989) ATPR 40-968 at 50,584, *Netaf Pty Ltd v Bikane Pty Ltd* (1990) 26 FCR 305 at 309.

33 *Netaf Pty Ltd v Bikane Pty Ltd* (supra) at 308-309; cf *Collins Marrickville Pty Ltd v Henjo Investments Pty Ltd* (1987) ATPR 40-822 (supra).

34 Supra at 507 [148]; see also Gaudron J at 459 [70] who placed the onus on the contravenor; cf Hayne J at 510 [166] who did not need to decide the point.

> Act. But that proposition is concerned with the items that go to the computation of the loss."[35]

42. Subsequently, in *I&L Securities*[36] his Honour reiterated the distinction between recovery of part of the loss, in the sense of a distinct and separate portion of the whole loss, and recovery of an entire loss.

43. If one is concerned with recovery of part of a loss, particularly part of a loss which was caused by the plaintiff's own aberrant or unreasonable conduct, then it is possible to deny recovery by saying that part of the loss was caused by the plaintiff's conduct so that the link between the contravening conduct and the loss in question was broken. Alternatively, the loss in question can be described as too remote. It is even possible to formulate the issue in terms of measure of damages and to say that s.82 applies notions of reasonableness in assessing how much of a loss should be recoverable. Irrespective of whether the issue is formulated in terms of causation, remoteness or measure of damages the conclusion is reached that the loss is not one for which the defendant should be held legally responsible in order to advance the policy of the Act under which damages are claimed. If the issue is formulated as a causation question, then it is worth remembering that the disputed loss was in fact caused, as a matter of historical fact, by the defendant's contravention. The loss satisfies a "but for" test of causation in that if the contravening conduct had not occurred the loss would not have been sustained. But the loss is not recovered because causation in law involves value judgments in the context of the legal rule being enforced about the scope of legal responsibility.

Failure to mitigate

44. Another category of plaintiff conduct which factors into recovery of losses are losses which occurred because of the plaintiff's failure to mitigate.

Measure of damages

45. The awarding of damages under s.82 for contravention of s.52 was addressed by Mr Liam Kelly in an earlier CPD seminar and I commend his paper to you.

46. It is worth adding that legal controversies still abound about the correct measure of damages to be applied in trade practices cases 30 years after the TPA was passed. By

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35 Ibid at [140].
36 Supra at [89].

way of illustration, a special leave application is pending concerning the proper approach to the measure of damages in cases involving the acquisition of property.

47. The issue in that case is whether the statements of principle by Lehane J in *Flemington Properties Pty Ltd v Raine & Horne Commercial Pty Ltd*[37] and by the Queensland Court of Appeal in *Manwelland Pty Ltd v Dames & Moore Pty Ltd*[38] correctly state the law. A recent decision of the Full Federal Court[39] doubted their correctness. The commonly accepted *prima facie* measure of damages in the case of the purchase of property induced by a misleading or deceptive representation is the difference between the real value of the property at the time of the purchase and what the plaintiff paid for it. But a question exists whether the date of transaction rule upheld by the Full Federal Court "is simply a second order rule applicable only where the valuation method is employed"[40], and whether the principles of compensation require account to be taken of financial advantages obtained by the purchaser during its ownership of the property. The argument, which relies on *Flemington Properties* and the Queensland Court of Appeal in *Manwelland* , is that the overriding principle that damages are assessed as compensation for a loss actually suffered requires account to be taken of the financial benefits gained from ownership of property that is acquired as a result of a defendant's conduct in contravention of the TPA.

Apportionment between plaintiff and defendant under s.82(1B) of the TPA – *I&L* revisited – erecting ring fences

48. Mr McKenna SC will address the 2004 amendments. As he will explain, the provision for reducing a plaintiff's loss and damage under s.82 in cases involving contravention s.52 does not apply where the defendant's conduct was intended to cause loss or damage or fraudulent. So far so good. The new section[41] does not identify the types of plaintiff conduct that will be treated as unreasonable or be likely to result in a reduction in damages. There is no guidance in the statute about the types of plaintiff conduct to which the amendment applies and, alarmingly, nothing in the extrinsic material, so far as I am aware, which illuminates the purpose of the amendment. Because we are left in the dark about the purpose of the amendment, it may be useful to briefly revisit some of the policy arguments that influenced courts

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37 (1997) 148 ALR 271.
38 (2001) ATPR 41-845.
39 *Expectation Pty Ltd v PRD Realty Pty Ltd* [2004] FCAFC 189 at [256] – [257].
40 *Smith New Court Ltd v Scrimgeour Vickers* [1997] AC 254 at 284B.
41 See attachment.

prior to *I&L Securities* in not reducing the plaintiff's damages, and also some of the arguments that were deployed in that case.

49. The starting point for any discussion is that the Act is intended to promote competition and fair trading and protect consumers[42]. As Gleeson CJ observed in *Henville v Walker*[43]:

> "The purpose of the statute, so far as presently relevant, is to establish a standard of behaviour in business by proscribing misleading and deceptive conduct, whether or not the misleading or deception is deliberate, and by providing a remedy in damages."

50. Given the remedial and protective nature of the TPA, it is understandable that it did not include a provision akin to a defence of contributory negligence, particularly in respect of s.52 claims. In the context of s.52, such a defence might have reduced the protection of the TPA by enabling a defendant to rely upon a plaintiff's failure to check on the accuracy of the defendant's representation. A number of authorities confirmed that in s.52 cases the plaintiff ought not to be "deprived of his remedy because of his failure to check the accuracy" of the impugned representations[44]. A defence which enabled a plaintiff's damages to be reduced by showing that it did not take reasonable steps to detect the misleading and deceptive conduct might have undermined the protection the Act was intended to give.

51. In *I&L Securities* the defendant in its argument on appeal, attempted to erect a "ring fence" around these kinds of cases and to argue that recognition of a power to apportion damages under s.82 did not mean that these cases would be decided any differently. A plaintiff's failure to check the accuracy of impugned representations would not result in a reduction in damages because courts had repeatedly recognised that a failure by the plaintiff to take reasonable care of its own interests in failing to make proper enquiries did not affect recovery.

52. One is not dealing in this context with the related question which arises at the contravention stage of considering the "minimum standard to be expected of persons

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42 TPA, s.2; *Henville v Walker* (supra) at 498 [96] per McHugh J.

43 Supra at 470 [18].

44 *Sutton v AJ Thompson Pty Ltd (in liq)* (1987) 73 ALR 233 at 239-41 per Foster, Woodward and Wilcox JJ (Full Fed Crt). See also *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546 at 558-9 Lockhart J (Full Fed Crt); *Neilson v Hempston Holdings Pty Ltd* (1986) 65 ALR 302 at 309 per Pincus J; *Trade Practices Com v Optus Communications Pty Ltd* (1996) ATPR 41-478 at 41,891-2 per Tamberlin J.

to whom the alleged misleading or deceptive conduct is addressed"[45]. Instead, one is dealing with a "causation" question in asking whether a plaintiff who has been misled and who failed to take reasonable care of its own interests should be disentitled completely or in part[46] from recovering the amount they lost. In its starkest form in s.52 cases, it involves a defendant saying:

> "Although I misled you, you shouldn't recover your loss and damage. You should not have relied on what I said to you. You should have checked on me and what I said and, if you had, you would have found that what I said was untrue."

53. The failure to check cases may be based on an understanding that, as a matter of policy, the TPA does not require claimants[47] to check on the accuracy of what they have been told. The persons who the TPA was enacted to protect were assumed to include trusting, gullible or naïve persons who fail to take reasonable steps to protect their own interests. The policy of the TPA was not advanced by requiring them to prove, in order to establish their cause of action, that they had taken reasonable care of their own interests, and so a failure to take reasonable care did not necessarily break the chain of causation.

54. A respectable body of case law under s.52 establishes that a failure to check and to detect the inaccuracy of impugned representations does not break the chain of causation. Before the High Court in *I&L Securities* ruled out any possibility of apportionment, no cases had even suggested that an unreasonable failure to check justified a reduction in the plaintiff's damages.

55. What then are we to make of the 2004 amendments? Should the plaintiff's unreasonable failure to check which is not so extreme as to sever the causal nexus between the contravention of s.52 and the plaintiff's loss be taken into account under the new s.82(1B) in reducing the plaintiff's damages?

56. In the past courts have erected a ring fence around this category of case. The defendant in *I&L Securities* had no interest in attempting to pull that ring fence down. But none of this necessarily means that an unreasonable failure to check will not be

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45 *Siddons Pty Ltd v The Stanley Works Pty Ltd* (1991) 27 FCR 14 at 18.

46 Section 82(1B) of the 2004 amendments refers to damages being reduced, but the possibility exists of them being reduced to nil in an appropriate case. But compare s.75AN which expressly states that the amount of loss may be reduced to nil.

47 Who the framers of the TPA may have assumed would typically be individual consumers, rather than sophisticated corporations with the resources to verify the accuracy of representations made to them.

taken into account in reduction of damages in future s.52 cases pursuant to the new s.82(1B).

57. Perhaps the Parliament, in the interests of reducing the insurance premiums of auditors, valuers and others, intended to encourage higher standards amongst potential claimants under s.52. Parliament offers no hint about whether it intended to either dismantle or preserve the ring fence that the courts have erected around failure to check cases.

58. A category of case which has a higher claim to attracting a reduction in damages is one in which the plaintiff's unreasonable conduct is an "independent" cause of its loss. Here, the unreasonable conduct is not in being misled by failing to be suspicious or to check on the facts of an impugned representation. The facts of *I&L Securities* present a useful example of the type of case which might attract a reduction in damages under s.82(1B). The plaintiff's conduct in that case involved an extreme departure from the norm to be expected of a skilled commercial lender dealing in moneys invested upon trust with its solicitor. The plaintiff's contribution to the loss was significant in that the borrower failed to meet its very first repayment. The plaintiff's conduct introduced an independent source of risk that was realised almost immediately. The plaintiff was a commercial lender with an ability to protect its own interests. Framed as a question about responsibility, the question was whether the plaintiff should be responsible for any part of the losses that were caused by its own substantial departure from prudent lending practices where, had it made appropriate enquiries about the borrower's capacity to service the loan, no loan would have been made.

59. But the fact that the plaintiff's conduct is an <u>independent</u> cause of the loss does not compel the conclusion that the plaintiff's recovery should be reduced under s.82(1B). Such a case has a higher claim to a reduction than a case where the plaintiff's carelessness was in believing the defendant's representation without further investigation. In order to determine whether the plaintiff's damages should be reduced one must return to the policy of the TPA and the justice and equity of the particular case. In *I&L Securities*[48] the case against a reduction in the plaintiff's damages was powerfully stated by Gleeson CJ:

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[48] Supra at 122 para [33].

> "What is there, then, in the justice and equity of the particular case that might lead to a conclusion that the respondent should not be regarded as legally responsible for the whole of the loss, even though the contravention was a cause of the whole of the loss? Upon what principle might such responsibility be diminished? In a financing transaction, a lender takes security to protect itself against the risk of default by the borrower. One aspect of that risk is that the lender might have failed adequately to assess the borrower's capacity to service the debt. I cannot see why, as a matter of principle, such failure by a lender should be treated, in the application of s 82, as a factor which diminishes the legal responsibility of a valuer by negativing in part the causal effect of the valuer's misleading conduct. The statutory rule of conduct found in s 52, when applied to the relationship between a valuer and a prospective lender, gives rise to a legal responsibility in a case such as the present which extends to the whole of the loss of which the valuer's misleading conduct is a direct cause."

60. Gleeson CJ had earlier explained the concept of causation expressed in the word "by", and how determinations depend on the purpose of the statute and the requirements of justice and equity in the case.

> "The relationship between conduct of a person that is in contravention of the statute, and loss or damage suffered, expressed in the word "by", is one of legal responsibility. Such responsibility is of loss or damage for the purpose of making an order under s 82, it is not merely engaged in the factual, or historical, exercise of explaining, and calculating the financial consequences of, a sequence of events, of which the contravention forms part. It is attributing legal responsibility; blame. This is not done in a conceptual vacuum. It is done in order to give effect to a statute with a discernible purpose; and that purpose provides a guide as to the requirements of justice and equity in the case. Those requirements are not determined by a visceral response on the part of the judge assessing damages, but by the judge's concept of principle and of the statutory purpose."

61. In short, the policy of the TPA had to be applied to a case in which the lender took security, and relied on a valuation in doing so, because it wished to guard against the risk that it own checks on the borrower's creditworthiness may be wrong and the borrower would default. The purpose of the TPA and the justice and equity of the case did not persuade the Chief Justice that there should be any reduction in the defendant's responsibility for the loss.

62. Why should the conclusion be any different under the new s.82(1B) when the court is asked to assess whether justice and equity justify a reduction in damages?

63. One argument is that the policy of the TPA and the justice and equity of the case require commercial entities with the resources to protect their own interests to do so. To allow such plaintiffs to elevate their risk of loss and to treat the TPA like an insurance policy for which no premium is payable is to reward "the smart practices of businessmen": the very thing at which the Act was directed.

64. Another argument may be that the justice and equity of the case should take account of reasonable expectations by a defendant that the plaintiff will take steps to protect its own interests. In the case of a valuer dealing with a commercial lender that holds itself out as checking on a borrower's creditworthiness, the defendant may have a reasonable expectation that the lender will check on the borrower's financial position.

Culpability

65. The next, unresolved question is the extent to which what may loosely be called "culpability" on the part of the defendant is to be taken into account. Under s.82(1B) reduction in damages is not possible where the defendant intended to cause loss or damage, or where the conduct of the defendant that caused the loss or damage was fraudulent. But are other, less culpable forms of defendant conduct relevant in determining whether there should be a reduction in damages and the extent of any reduction? It is well to recall that in *I&L Securities* McHugh J said that for the court to apportion loss or damage suffered by the plaintiff in accordance with the parties' culpability was "not an approach that accords with the policy of the legislation"[49]. But the legislation has been changed. Does that mean that the defendant's culpability as, for example, a tortfeasor now becomes relevant? These are difficult and interesting questions in the context of a statute that establishes in s.52 a standard of behaviour which can be breached by completely innocent persons who have taken all reasonable care.

66. In cases in which a defendant's conduct is also alleged to be negligent, and found to be negligent, apportionment under s.82(1B) may follow apportionment under State apportionment statutes and it may be difficult to think of a reason why it should not. But what about cases in which the defendant's conduct is not alleged to be tortious, for example, where someone engages in misleading and deceptive conduct by adopting and repeating someone else's representation and is held legally responsible to the plaintiff for the consequences? This may occur in circumstances where the

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[49] At 132 [69].

defendant was itself misled through no fault of its own. Is the defendant's lack of culpability to count in determining the apportionment that is just and equitable in the context of a statute that imposes strict liability?

67. An argument exists that a defendant's culpability (or lack thereof) as a tortfeasor should be irrelevant to the just and equitable division of responsibility of loss in the context of a legal rule (s.52) that is not a tort and which, as a matter of policy, imposes legal responsibility on defendants who are not tortfeasors and irrespective of their culpability. In the context of such a legal rule, why should account be taken of a factor that is irrelevant to the defendant's liability? It may even be argued that s.82(1B) deals with the culpability of defendants by creating a divide between:

(a) defendants who intend to cause loss or damage or who fraudulently cause loss or damage; and

(b) other defendants.

The former category are not entitled to seek a reduction in damages. The latter category are, but it can be argued that their culpability (or lack thereof) is otherwise irrelevant to issues of apportionment.

68. This argument places store on the terms of s.52 (which establishes a standard of behaviour in business independent of the contravenor's reasonableness or culpability) and the terms of s.82, but has no regard to the "equity of the statute". The Act is a socially-directed piece of reform legislation expressed in simple language. The "equity of the statute" requires the courts to render more effective the legislative will by an interpretation which averts hardship or injustice. The Act's socially-directed rules, such as s.52, and the remedies provided for contravention of them, including ss.82 and 87, are expressed in simple, concise terms. The framers of the TPA intended the courts to fashion remedies which facilitate the consumer protection and fair dealing objectives of the TPA. Speaking of s.82 in its unamended form, Gleeson CJ stated[50]:

> "The task is to select a measure of damages which conforms to the remedial purpose of the statute and to the justice and equity of the case." (emphasis added)

The amendments to s.82 explicitly require the court to reduce damages "to the extent to which the court thinks just and equitable having regard to the claimant's share in

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50 *Henville v Walker* (supra) at [18].

the responsibility for the loss and damage". It is possible, though unattractive, to argue that this requires the court to ignore the contravenor's culpability (or lack thereof).

Assigning shares of responsibility under a strict liability statute

69. It remains to be seen whether Australian courts will look overseas in determining the principles that might guide the division of responsibility now permitted by s.82(1B) in respect of a legal norm that imposes strict liability such as s.52[51]. For example, the "*Restatement Third Torts: Apportionment of Liability*" embodies the general principle of comparative responsibility.

70. The general principle is "that liability should be apportioned among all legally culpable actors according to proportionate shares of responsibility". This approach covers both strict and fault-based causes of action. It is because of this width of coverage that the term used to describe it is "comparative responsibility". The specific policies embodied in a particular cause of action, especially a statutory cause of action, may preclude a plaintiff's negligence as a comparative defence[52]. The rule set out in section 7 is that a plaintiff's negligence that is a legal cause of an indivisible injury to the plaintiff reduces the plaintiff's recovery in proportion to the share of responsibility assigned to the plaintiff. This rule applies even though a party's conduct violated a statute unless the purpose of the statute is to place the responsibility for such harm on the party[53].

71. The *Restatement* gives the following commentary about assigning shares of responsibility:

> "The factfinder does not assign percentages of 'fault,' 'negligence,' or 'causation.'

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51 Other legal systems embody principles of comparative responsibility. Honore, *International Encyclopedia of Comparative Law* 7-144ff addresses the conduct of the injured party and states at 7-148 that various theories of causation and remoteness point to the rule of apportionment, with exceptions and criteria of quantification which vary according to the theory chosen. Some Codes, as in France, refer merely to the tortfeasor causing harm to another, and say nothing of the injured party causing or contributing to its own injury. But under these Codes when there is a concurrent fault of the injured party and the tortfeasor leading to the harm, each is responsible for it to a limited extent, and the damages recoverable are therefore reduced from what they would have been had the sole fault lain with the tortfeasor (4-146). Honore further states that when the tortfeasor is strictly liable any theory which stresses the causal contribution of the injured party's fault normally leads to a reduction or, in extreme cases, extinction of the strict liability (7-173).

52 *Restatement Apportionment of Liability*, pp.10,17, Comment d Exceptions.

53 Ibid p.66, Comment d.

> 'Responsibility' is a general and neutral term. Assigning shares of 'fault' or 'negligence' can be misleading because some causes of action are not based on negligence or fault. Assigning shares of 'causation' wrongly suggests that indivisible injuries jointly caused by two or more actors can be divided on the basis of causation. Assigning shares of 'culpability' could be misleading if it were not made clear that 'culpability' refers to 'legal culpability,' which may include strict liability.
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> Of course, it is not possible to precisely compare conduct that falls into different categories, such as intentional conduct, negligent conduct, and conduct governed by strict liability, because the various theories of recovery are incommensurate. However, courts routinely compare seemingly incommensurate values, such as when they balance safety and productivity in negligence or products liability law. 'Assigning shares of responsibility' may be a less confusing phrase because it suggests that the factfinder, after considering the relevant factors, *assigns* shares of responsibility rather than *compares* incommensurate quantities."[54]

72. Section 8 of the *Restatement* identifies the factors for assigning shares of responsibility. These include:

(a) the nature of the person's risk-creating conduct, including any awareness or indifference with respect to the risks created by the conduct and any intent with respect to the harm created by the conduct; and

(b) the strength of the causal connection between the person's risk-creating conduct and the harm.

The nature of each person's risk-creating conduct includes how unreasonable the conduct was under the circumstances, the extent to which the conduct failed to meet the applicable legal standard, the circumstances surrounding the conduct, each person's abilities and disabilities, and each person's awareness, intent, or indifference with respect to the risks. The comparative strength of the causal connection between the conduct and the harm depends on how attenuated the causal connection is, the timing of each person's conduct in causing the harm, and a comparison of the risks created by the conduct and the actual harm suffered by the plaintiff[55].

73. Importantly, one or more of the factors identified in section 8 may be relevant for assigning percentages of responsibility, even though they may not be a necessary element proving a particular claim or defence[56]. For example, in the United States there is strict liability at common law for manufacturing defects. The plaintiff is

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54 Ibid pp.86-87.

55 *Restatement* p.87.

56 Ibid p.87.

relieved of the necessity of proving fault. But the defendant can introduce evidence of its lack of fault when percentages of responsibility are being assigned[57].

74. Most states apply comparative-responsibility to strict products liability. Most states hold that a plaintiff's negligence that constitutes more than a mere failure to discover or guard against the possibility of a product defect supports the factfinder assigning a percentage of responsibility to the plaintiff[58].

75. Courts apply comparative responsibility because "it is unwise to relieve users and consumers of all responsibility for safe product use and consumption"[59]. One rationale is the unfairness of ignoring plaintiff misconduct in strict products liability actions. Another is that the failure to allocate costs in proportion to the parties' relative abilities to prevent or reduce those costs is economically inefficient[60].

Apportionment under s.82(1B)

76. Now that s.82(1B) permits apportionment of responsibility, the range of considerations which may influence the division of responsibility are numerous and include:

(a) the degree of likelihood of such damage considered from the point of view of a reasonable person in the defendant's position;

(b) the nature of the damage (physical injury justifying more extensive responsibility than merely economic);

(c) the degree of the defendant's culpability, and in particular whether it was careless, reckless, intended to mislead although not intended to cause loss or damage;

(d) whether the defendant had a reasonable opportunity of limiting its liability by an agreed term;

(e) the plaintiff's capacity to protect its own interests;

(f) the extent to which the plaintiff's failure to take reasonable care departed from the steps that could reasonably be expected of a party in its circumstances;

(g) whether the plaintiff's failure introduced an independent cause of loss, or caused it not to ascertain that it had been misled by the defendant's conduct.

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57 Ibid p.91.
58 Ibid p.12.
59 *Restatement Third: Torts: Product Liability*, p.324.
60 *Duncan v Cessna Aircraft Co* 665 SW 2d 414, 425 (Texas, 1984).

Contribution

77. There is no simple, statutory mechanism to apportion responsibility between defendants and between defendants and third parties similar to State statutes that allow contribution between tortfeasors[61]. State legislation providing for contribution between tortfeasors is probably not applicable because the prevailing view is that a contravention of a provision such as s.52 is not a tort[62]. This view was expressed by Sheppard J in *Australia & New Zealand Banking Group v Turnbull and Partners Ltd*[63] and has been supported by a subsequent Full Federal Court decision in *Bialkower v Acohs Pty Ltd*[64]. A contrary view was argued by J C Campbell QC in "*Contribution, Contributory Negligence and Section 52 of the Trade Practices Act*"[65].

78. The absence of a general statutory provision allowing claims for contribution to be made between defendants in respect of contraventions of the TPA prompts resort to other mechanisms to claim contribution. A defendant who is liable to pay damages under the TPA may claim contribution under the general law from another party who is also liable to the plaintiff. A right to contribution arises when two parties have common obligations towards an injured party, or obligations of the same nature and extent. The right to contribution depends upon the existence of a co-ordinate liability. It does not arise "simply because the respective liabilities of parties arise out of a *similar relationship* or *related* transaction"[66]. The decision in *Burke v LFOT Pty Ltd* left open the possibility of contribution between a defendant who contravened the Act and another party who was liable at common law[67]. But as Callinan J stated[68], the right of contribution depends on the precise nature and content of the parties' respective obligations and rights and the degree of correspondence between them.

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61 See for example *Law Reform Act*, 1995, s.6(c) (Qld).

62 The *Wrongs Act* in Victoria is wider and the term "wrong" is defined in such a manner as to include a contravention of s.52: *Henderson v Amadio Pty Ltd* (1995) 62 FCR 1 at 201-202; *Bialkower v Acohs Pty Ltd* (1998) 83 FCR 1 at 11-12.

63 (1991) 33 FCR 265 at 277.

64 Supra.

65 (1993) 67 ALJ 87 at 177.

66 *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 at 303 [43].

67 Ibid at 294 [22] per Gaudron ACJ and Hayne J; at 303-304 [51] per McHugh J; at 320 [101] per Kirby J; at 336-337 [142]-[145] per Callinan J. The claim for contribution was rejected by a majority of the Court for various reasons arising from the facts of the case.

68 Ibid at [145].

79. One major practical limitation on the doctrine of contribution under the general law, compared to a right of contribution conferred by statute, is that it is doubtful that the doctrine of contribution permits contribution in unequal shares[69].

80. There have been various unsuccessful attempts to obtain contribution under the TPA by resort to ss.82 and 87. As French J stated in *Re La Rosa; Norgard v Rodpat Nominees Pty Ltd*[70]:

> "… there is no mechanism in s.87, nor in the Act generally that would enable the Court to make orders for contribution or indemnity against other contravenors of the Act or persons involved in the primary contravention."

81. Despite this, an argument has been made that it is possible for a defendant to cross claim under s.87 against another defendant and to assert a claim to damages in respect of the loss and damages they are likely to suffer by reason of the cross respondent's contravention of the TPA[71]. But the claim in such a case is not a claim to contribution that is conferred by s.87 or any other section[72]. It is an original action which, if it succeeds, may have the same practical effect as a claim for contribution or indemnity.

The missed opportunity to reform apportionment and contribution

82. Mr McKenna SC will address the 2004 amendments to the TPA which deal with apportionment of s.52 claims for damages made under s.82. Apart from s.82(1B) there is no express mechanism for apportioning responsibility in claims under s.82[73] between plaintiff and defendant, and the High Court in *I&L Securities* rejected the argument that s.82 permits apportionment between plaintiff and defendant. The TPA does not contain any provision for defendants to claim contribution from each other.

83. In general, there is no scope to apportion liability between plaintiff and defendant in the manner undertaken by Williams J at the trial of *I&L Securities*. Outside of those s.52 claims in which damages are sought under s.82 and which are subject to the 2004

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69 *Bialkower v Acohs Pty ltd* (1998) 83 FCR 1 at 13; *Burke v LFOT* (2000) 178 ALR 161; [2000] FCA 1155 at [107], [137]; cf *Jones v Mortgage Acceptance Nominees Ltd* (1996) 63 FCR 418 at 422; *Burke v LFOT Pty Ltd* (supra) at 325 [119] per Kirby J.

70 (1991) 31 FCR 83 at 88; see also *Australia & New Zealand Banking Group Ltd v Turnbull and Partners* (supra) at 276; *Bialkower v Acohs Pty Ltd* (supra) at 7-12.

71 Campbell "*Contribution, Contributory Negligence and Section 52 of the Trade Practices Act*" (1993) 67 ALJ 87 at 90.

72 Ibid, *Australia and New Zealand Banking Group Ltd v Turnbull & Partners Ltd* (1991) 33 FCR 265 at 276.

73 Part VA, which deals with the liability of manufacturers and importers of defective goods and which was introduced in 1992, contains in s.75AN its own provision for reduction of loss having regard to the injured individual's share in causing loss.

amendments, the Court is left with "all or nothing" choices to make. These "all or nothing" choices about who, as between plaintiff and defendant, should have legal responsibility for the plaintiff's losses force courts to reach perplexing decisions cast in the language of "causation". This is well-illustrated in the all or nothing outcomes in *Henville v Walker* at trial and on appeal before the Full Court of Western Australia.

84. The unfairness of "all or nothing" results in cases like *Henville v Walker* and *I&L Securities* has been addressed, to some extent, by the amendments to s.82(1B) in respect of s.52 claims. But s.52 is not the only provision that deals with misleading or deceptive conduct, and well-advised litigants will avoid the effect of s.82(1B) by bringing their claims, if they can, under other sections of the TPA.

85. It is unclear whether the 2004 amendments that introduced s.82(1B) were intended to create a more extensive scope to reduce damages on account of unreasonable plaintiff conduct in cases in which the plaintiff's conduct is <u>not</u> an independent cause of loss. If s.82(1B) facilitates reduction of damages in "failure to check" cases, then it amounts to a significant piece of law reform in which the protection given by the TPA has been substantially altered. We are left to guess which types of plaintiff conduct are intended to qualify for reduction in damages. We are left to guess whether failure to check cases are to remain "fenced off" on grounds of policy.

86. Mr McKenna SC will explain other aspects of the 2004 amendments which have significant practical consequences for the conduct of trade practices claims.

87. In 2002 the High Court delivered two important decisions about apportionment between plaintiff and defendant under the TPA and the scope for contribution between defendants. The decisive rejection of apportionment under s.82 in *I&L Securities* called out for reform. But two years later we have reform in respect of <u>some</u> claims under s.82, being a reform which is neither principled nor clear in its intent. Two years after the decision in *Burke v LFOT Pty Ltd* we do not have a simple provision for contribution between defendants, including defendants whose liability rests on contravention of the Act. Instead, we have a radical new regime for proportionate liability in s.52 claims which, for reasons that Mr McKenna SC will explain, has important implications for the conduct of litigation.

88. Unfortunately, the Commonwealth Parliament missed the opportunity to create a coherent regime for apportionment between plaintiff and defendant and contribution between defendants.

Section 82

82. (1) A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV, IVA, IVB or V or section 51AC may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

(1AA) Subsection (1) has effect subject to section 87AB.

(1B) despite subsection (1), if:

(a) a person (the "claimant") makes a claim under subsection (1) in relation to:

(i) economic loss; or
(ii) damage to property;

caused by conduct of another person (the "defendant") that was done in contravention of section 52; and

(b) the claimant suffered the loss or damage:

(i) as a result of the claimant's failure to take reasonable care; and]
(ii) as a result of the conduct referred to in paragraph (a); and

(c) the defendant:

(i) did not intend to cause the loss or damage; and
(ii) did not fraudulently cause the loss or damages;

the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage.

(2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.