SUPREME COURT OF QUEENSLAND

PROPORTIONATE LIABILITY

22ND Lawasia Conference

Ho Chi Minh City, 11 November 2009

Justice Margaret Wilson

1. Chief Justices, Your Honours, Ladies and Gentlemen –

2. I am honoured to have been asked to address the Insurance Law Stream of the 22nd Lawasia Conference.

3. Insurers are the most frequent players in civil litigation – not just in disputes between insured and insurer and in disputes between insurers – but also because they stand behind so many litigants, either in the exercise of rights under policies to bring or defend claims in the names of their insured or in the exercise of rights of subrogation. So they have a very real interest in any legislative change which alters the principles upon which loss is recoverable from or to be shared amongst concurrent wrongdoers.

4. At common law concurrent liability, whether joint, several or joint and several, is a solidary liability (liability in solidum): in other words, the

plaintiff may recover the full amount of the damages against each defendant (and he or she may execute against any of the defendants).

5. Contributory negligence by a plaintiff was a defence to a claim in tort at common law. However, legislation also allowed for apportionment of liability between plaintiff and defendant in the case of contributory negligence. In some jurisdictions, where the defendant owed the plaintiff concurrent and co-extensive liabilities in contract and tort, the damages recoverable in contract (as well as those recoverable in tort) are subject to apportionment for contributory negligence of the plaintiff.

6. Legislation also allowed tortfeasors to claim contribution inter se.

7. But beneficial as those legislative changes were, they did not affect the solidary nature of a concurrent wrongdoer's liability to a plaintiff. By the 1990's there was a rising tide of litigation against professionals such as auditors and solicitors. The professional's proportionate share of responsibility for a plaintiff's loss might be small, but he or she was nevertheless liable for the full amount of the loss. An astute and well-advised plaintiff litigates against a defendant likely to be able to satisfy a judgment rather than one with little or no means. Very often plaintiffs sued professionals because they would be able to claim on professional indemnity policies to satisfy the judgments.

8. It is against this background that proportionate liability for claims for economic loss and property damage has been introduced in recent years. Because ours is a federal system, legislation at federal and state levels has been necessary. The broad outline of the scheme is common to all jurisdictions, but absolute uniformity has not been achieved. Given the forum I am addressing, I will endeavour to present the general thrust of the changes, rather than the minutiae of variations from jurisdiction to jurisdiction.

9. In the federal arena, the legislation is to be found in the *Trade Practices Act* 1974 Part VIA (ss 87CB-87CI), the *Corporations Act* 2001 Part 7.10 Division 2A, and the *Australian Securities and Investment Commission Act* 2001 Part 2 Division 2 Subdivision GA. The States have introduced provisions into legislation dealing generally with civil liability – eg the *Civil Liability Act* 2003 (Qld); the *Civil Liability Act* 2002 (NSW) and the *Wrongs Act* 1958 (Victoria).

10. ***What is an apportionable claim?*** Section 28 of the Queensland legislation is in these terms -

> **"28 Application of pt 2**
> (1) This part applies to either or both of the following claims (***apportionable claim***)—
> (a) a claim for economic loss or damage to property in an action for damages arising from a breach of a duty of care;

(b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1989* for a contravention of section 38 of that Act.

(2) For this part, if more than 1 claim of a kind mentioned in subsection (1)(a) or (1)(b) or both provisions is based on the same loss or damage, the claims must be treated as a single apportionable claim.

(3) This part does not apply to a claim—
(a) arising out of personal injury; or
(b) by a consumer.

(4) Also, this part does not apply to a claim to the extent that an Act provides that liability for an amount payable in relation to the claim is joint and several.

(5) A provision of this part that gives protection from civil liability does not limit or otherwise affect any protection from liability given by any other provision of this Act or by another Act or law."

11. A number of observations can be made about what is an apportionable claim.

(a) The legislation is concerned with claims for economic loss or damage to property. It is not concerned with claims for damages for personal injuries or with consumer claims.

(b) While the Queensland provision refers to a claim … in an action for damages <u>arising from a breach of a duty of care</u>, legislation elsewhere refers to such a claim <u>arising from a failure to take reasonable care</u>. This difference is a significant one, as is illustrated by a recent decision of the NSW Supreme Court -

Reinhold v NSW Lotteries Corporation (No 2) [2008] NSWSC 187. The plaintiff purchased an Oz Lotto ticket issued by NSW Lotteries from a newsagent. Because the ticket was only partly printed, the newsagent issued a second ticket, and contacted NSW Lotteries to cancel the first. Both the newsagent and NSW Lotteries failed to follow the proper procedure for cancellation of a ticket – with the result that the second ticket rather than the first was cancelled. The plaintiff thought he had won the lottery when the six numbers in the draw were those on his (second) ticket. NSW Lotteries refused to pay him the prize, on the basis that the ticket had been cancelled. The plaintiff succeeded against the newsagent and NSW Lotteries in negligence and in contract. Barrett J held that the claims in contract and those in tort were apportionable, even though the breach of contract claim was not cast as one for breach of a contractual duty to exercise reasonable care. His Honour held that a claim may properly be regarded as one "arising from a failure to take reasonable care" if, at the end of the trial, the evidence warrants a finding to that effect – whether the breach of contract was or could be pleaded as a failure to take reasonable care. The Victorian Supreme Court

adopted a similarly broad approach in *Woods v De Gabriele* [2007] VSC 177 on an application to amend a statement of claim with a view to precluding apportionment. It allowed the amendment, because the question was not one of how the plaintiff formulated his claim but rather the facts on which it was based.

(c) The legislation provides a mechanism for apportioning the liability of two or more persons for the same loss or damage where they have failed to take reasonable care (whatever the cause of action for that failure). It applies also where one of them has failed to take reasonable care and another has engaged in misleading or deceptive conduct.

(d) His Honour held that the Victorian proportionate liability provisions were not applicable in the case before him because the federal statue evinced an intention not to allow apportionment.

(e) "Damages" are defined as including any form of monetary compensation. I am not aware of any authority on this definition. One commentator has said that it blurs the line between debt and damages, and another had suggested that various equitable forms of relief including equitable compensation, equitable damages and accounts of profits may come within it, and so be apportionable.

12. Broadly speaking, under federal legislation proportionate liability is established in relation to claims for economic loss or damage to property caused by misleading or deceptive conduct. Under the *Trade Practices Act* 1974 (C'th) a claim for damages for such loss or damage caused by conduct in breach of s 52 (misleading or deceptive conduct) is apportionable. Under *Corporations Act* a claim for such loss or damage caused by misleading or deceptive conduct in relation to a financial product or a financial service is apportionable. And under the *ASIC Act* a claim for such loss or damage caused by misleading or deceptive conduct in relation to financial services is apportionable.

13. ***Who is a concurrent wrongdoer?*** In all but two of the state jurisdictions, concurrent wrongdoers are those whose acts or omissions, independently of each other or jointly, caused the plaintiff's loss or damage. The legislation of two states refers to parties who have caused the plaintiff's loss independently of each other. Concurrent wrongdoers are entities guilty of a wrong as against the plaintiff, and against whom the plaintiff has a cause of action in respect of the same loss or damage. In this context an entity may be a concurrent wrongdoer even though insolvent, in liquidation, having ceased to exist or dead – which

underlines the policy of the legislation to shift the risk of non-recovery from a deep pocketed defendant to the plaintiff.

14. In *Shrimp v Landmark Operations Pty Ltd* [2007] FCA 1468 the plaintiffs claimed damages in tort and contract and under the *Trade Practices Act* (C'th) and the *Fair Trading Act* (NT) against the supplier from whom they bought seeds for their farming business. The defendant supplied them with grass seeds, instead of grain seeds. The defendant cross-claimed against the person who had sold the seeds to it, and he in turn cross-claimed against five other parties. The defendant sought to limit its liability to the plaintiffs on the basis that those others were concurrent wrongdoers. The plaintiffs had no claim against the others, never having dealt with them. Besanko J held that the others were not concurrent wrongdoers: they had not "caused" the plaintiffs' loss because their conduct had not make them liable to the plaintiffs. Therefore, they were not concurrent wrongdoers. Accordingly the plaintiffs could recover the whole of their loss from the defendant.

15. ***How is loss or damage apportioned?*** The liability of a concurrent wrongdoer is limited to that proportion of the loss or damage that the Court considers "just and equitable" (in Queensland) or "just" or "fair and equitable" in other jurisdictions. In *Yates v Mobile Marine Repairs*

Pty Ltd [2007] NSWSC 1463 Palmer J said that the Court must exercise a large discretionary judgment founded upon the facts proved in each particular case. He said the legislation calls for the same kind of judgment as that required in apportioning responsibility between a defendant and a plaintiff guilty of contributory negligence. Apportionment for contributory negligence requires an assessment of the relative culpability and the causal responsibility of the parties. But, in Palmer J's view the exercise of apportioning liability under the proportionate liability provisions is much more complicated than that, because the apportionment may have to be between one wrongdoer who has breached a contract and another who has committed a tort. The Court is required to go beyond the legal character of the concurrent wrongdoers' duties, and to examine the practicalities of responsibility. Accordingly, the Court should consider (inter alia) which of the wrongdoers was more actively engaged in the activity causing loss, and which of them was more able effectively to prevent the loss happening.

16. Vicarious liability and liability between partners is excluded from the ambit of the legislation. So too is the liability of a concurrent wrongdoer who was fraudulent or who intentionally caused the loss.

17. If a claim is apportionable, liability is to be apportioned whether or not all the concurrent wrongdoers are parties to the proceeding, and in most jurisdictions, in apportioning it the Court may have regard to the comparative responsibility of a concurrent wrongdoer who is not a party. In some jurisdictions it must have regard to the comparative responsibility of concurrent wrongdoers who are not parties, and in one jurisdiction (Victoria) it must not do so unless the non-party is dead or in liquidation.

18. This leads to the question – ***Whose responsibility is it to identify all the concurrent wrongdoers?*** The legislation of the various jurisdictions is not uniform on this.

19. In Queensland, but not in other jurisdictions, a plaintiff who makes a claim that is apportionable is obliged to make it against all persons he or she has reasonable grounds to believe to be concurrent wrongdoers. There is a sanction for failure to do so: the Court may make such orders as it considers just and equitable on the apportionment of damages proved to be claimable and on costs thrown away by the non-compliance. Further, in Queensland a concurrent wrongdoer who is sued must give the plaintiff information to assist the plaintiff to identify and locate any other person (other than a concurrent wrongdoer known to

the plaintiff) who the concurrent wrongdoer has reasonable grounds to believe is also a concurrent wrongdoer, and information about the circumstances that make him or her believe the other person is or may be a concurrent wrongdoer. Failure to do so may result in the Court's making such order as it considers just and equitable, including an order that the concurrent wrongdoer is severally liable for any award of damages and an order that the concurrent wrongdoer pay the costs thrown away as a result of his or her non-compliance.

20. In this regard, the provisions in other jurisdictions are different – the most common form being one which does not place a direct obligation on the defendant to notify the plaintiff, but which provides that a failure to provide such information as the defendant might reasonably have may render the defendant liable to the plaintiff for any costs which the plaintiff has unnecessarily incurred as a result.

21. There have been calls for uniformity of approach, and Emeritus Professor JLR Davis has recommended the adoption of the Queensland model.

22. ***Contracting out***. Currently only the Queensland legislation prohibits parties from contracting out of the scheme.

23. ***Conclusion***. The proportionate liability legislation of the various jurisdictions effected a fundamental policy change in the law relating to concurrent liability for economic loss or damage to property. It is regrettable that true uniformity was not attained initially. But sometimes it is ultimately for the good of all that different approaches are tested in one or more jurisdictions and, if successful, are able to be picked up by others, or if unsuccessful are able to be replaced by what others have found successful. The Standing Committee of Attorneys General (SCAG) is reviewing the current legislation and has commissioned and received two reports containing recommendations for achieving greater national consistency. Drafting instructions for model uniform legislation were released for targeted consultation in December 2008, and are being refined by a working group. This process is a fine illustration of co-operative federalism.

24. Thank you for your interest in this topic, ladies and gentlemen. I would be interested to learn whether similar changes have been made or are mooted elsewhere in Lawasia jurisdictions.