

**PROPORTIONATE LIABILITY**

**SOME CREAKING IN THE SUPERSTRUCTURE**

by

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## A. HISTORICAL INTRODUCTION<sup>1</sup>

### 1. Common Law

1 The rules with respect to joint and several liability arose well before the modern statements of the law of negligence in the first half of the last century. The common law divided concurrent tortfeasors into three classes.<sup>2</sup>

#### a. *Joint Tortfeasors*

2 These wrongdoers are participants in the same single tort and are jointly liable for it. Their participation may arise in a number of ways: through vicarious liability; the liability of a principle for the act of an agent; the joint breach of an obligation; or where the wrong was committed by concerted action to a common end.<sup>3</sup>

#### b. *Several Tortfeasors*

3 These wrongdoers performed separate and independent wrongful acts which caused damage to a single victim but which damage can be quantified separately.

#### c. *Several Concurrent Tortfeasors*

4 These wrongdoers performed separate and independent wrongful acts which coincidentally caused the same indivisible damage to the single victim. A familiar example of this is the injury suffered by a passenger in a vehicle which collides with another in circumstances where both drivers are negligent.<sup>4</sup>

5 This classification had procedural and substantive significance. In the case of joint tortfeasors, each of them is liable for the full amount of the plaintiff's loss. This is referred to in the books as solidary liability. The plaintiff might sue any or all of them and the obtaining of a judgment against one meant that the single cause of action merged in the judgment. Accordingly, the non-defendants were discharged notwithstanding that the judgment was not satisfied.<sup>5</sup> Moreover, the release of one

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<sup>1</sup> A useful historical background to the legislation is to be found in J Watson, "From contribution to apportioned contribution to proportionate liability" (2004) 78 ALJ 126.

<sup>2</sup> I adopt the classification in *Halsbury's Laws of Australia*, vol 26, Tort, paras [415-180] - [415-185].

<sup>3</sup> *The Koursk* [1924] P 140 at 156, per Scrutton LJ.

<sup>4</sup> *The Koursk* [1924] P 140 at 159, per Sargant LJ. In *Thompson v ACTV* (1996) 186 CLR 574 at 599-600. Gummow J observed that these torts may be viewed for practical purposes as joint torts.

<sup>5</sup> *Brown v Wootton* (1605) 79 ER 62 at 63.

joint tortfeasor released all of them.<sup>6</sup> This principle, that the cause of action against a joint tortfeasor is single and indivisible, is referred to as the rule in *Brinsmead v Harrison*<sup>7</sup>. The rule did not apply to several tortfeasors.

6 Where a joint tortfeasor satisfied the claim of the plaintiff, he was not permitted to seek contribution or recovery from another joint tortfeasor, for this was seen as an attempt to make a claim based on the claimant's own wrongful act.<sup>8</sup> This meant that the deep pocket defendant was left to bear the whole of the plaintiff's loss.

## 2. The 1949 Statute<sup>9</sup>

7 This situation was changed in the UK by the *Law Reform (Married Women and Tortfeasors) Act 1935* which was adopted in Victoria with effect from 1950. The effect of this legislation was to sweep away the rule in *Brinsmead v Harrison* and those which depended upon it. Accordingly, a plaintiff may sue joint tortfeasors to judgment in separate proceedings and may recover different measures of damage against each.<sup>10</sup> Furthermore, a judgment against the release of one tortfeasor no longer discharged all of them.<sup>11</sup> Finally, the statute permitted a joint tortfeasor to seek contribution against another.

## 3. The 1985 Statute<sup>12</sup>

8 The next change occurred in Victoria<sup>13</sup>, but not elsewhere in Australia. In 1986 the right to contribution was extended to permit any person who is liable for a plaintiff's damage to seek contribution from any other person who is liable for the same damage. This liability was not limited to joint tort liability; the right of contribution arose "whatever the legal basis of liability, whether tort, breach of contract, breach of trust or otherwise". This necessitated a substantial redrafting of Part IV of the

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<sup>6</sup> *Cocke v Jennor* (1614) 80 ER 214; *Duck v Mayeu* [1892] 2 QB 511 at 513.

<sup>7</sup> (1872) LR 7 CP 547.

<sup>8</sup> *Merryweather v Nixan* (1799) 101 ER 1337; *Thompson v ACTV* (1996) 186 CLR 574 at 606 per Gummow J.

<sup>9</sup> *Wrongs (Tort-feasors) Act 1949* (Vic).

<sup>10</sup> *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 459-460.

<sup>11</sup> *Thompson v ACTV* (1996) 186 CLR 574 at 584-5, per Brennan CJ, Dawson and Toohey JJ.

<sup>12</sup> *Wrongs (Contribution) Act 1985* (Vic).

<sup>13</sup> Adopting the English reforms of the *Civil Liability (Contribution) Act 1978*.

*Wrongs Act* so that the local statute no longer resembled its equivalents in other States and in the UK.

#### 4. The 1993 Statute<sup>14</sup>

9 It is at this point that we see the first departure from the traditional concept of solidary liability for joint tortfeasors in favour of what is called proportionate liability. The *Building Act 1993*, as its name suggests, applied only to building actions as there defined:

“building action means an action (including a counter-claim) for damages for loss or damage arising out of or concerning defective building work.”<sup>15</sup>

The operative provisions of this Act provided as follows:

“131. *Limitations on liability of persons jointly or severally liable*

- (1) After determining an award of damages in a building action, the court must give judgment against each defendant to that action who is found to be jointly or severally liable for damages for such proportion of the total amount of damages as the court considers to be just and equitable having regard to the extent of that defendant’s responsibility for the loss or damage.
- (2) Despite any Act or rule of law to the contrary, the liability for damages of a person found to be jointly or severally liable for damages in a building action is limited to the amount for which judgment is given against that person by the court.

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132. *Rights to contribution*

Despite anything to the contrary in the **Wrongs Act 1958**, a person found to be jointly or severally liable for damages in a building action cannot be required to contribute to the damages apportioned to any other person in the same action or to indemnify any such other person in respect of those damages.”

10 It should be noted that this provision was enacted in response to an agreement between the various jurisdictions to introduce proportional liability in building cases

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<sup>14</sup> *Building Act 1993 (Vic)*, Div. 2.

<sup>15</sup> *Building Act 1993 (Vic)*, s. 129.

based on a Model Building Act prepared by the Australian Building Regulations Coordinating Council in 1991. Nevertheless, the statutes enacted around Australia departed significantly from the model in different ways.

11 This Act applied a proportional liability regime to all causes of action for damages; it was not directed exclusively to actions in tort.<sup>16</sup>

#### **B. THE 2003 PROPORTIONATE LIABILITY REGIME**

12 There had been for a decade or more pressure upon government to replace the common law solidary liability regime with a proportionate liability regime. In its interim report of 1990 and its final report of 1999, the New South Wales Law Reform Commission recommended against proportionate liability. The Davis Report of 1994 which was produced following an enquiry established by the Commonwealth and the NSW Attorneys-General, took the opposite view. Other reports, including the recent Ipp Report, were against a change from the existing solidary liability regime.<sup>17</sup> Nevertheless, in response to the perceived crisis in the insurance industry, all of the Australian parliaments have adopted in principle the concept of proportionate liability, but with certain and regrettably different, variations.

13 This is, however, neither the time nor the place to consider the question of principle. My task is to assist you to understand the new regime and to make it work.

14 The first general observation to be made is that the proportionate liability regime will be seen by plaintiffs as disadvantageous to their interests. If a concurrent wrongdoer is insolvent or where, for some other reason, that wrongdoer cannot be compelled to bear its proportionate share of the loss, the plaintiff makes no recovery of that share. In other words, the risk of the impecuniosity of a wrongdoer passes from the solvent wrongdoers to the plaintiff. Furthermore, even if all wrongdoers are solvent, the plaintiff must accept the trouble and expense of extracting the share

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<sup>16</sup> As was recommended by the council and incorporated in s. 180(1) of the proposed Model Act.

<sup>17</sup> The background to the reform is set out in B McDonald, "Proportionate liability in Australia: The devil in the detail" (2005) 26 *Aust Bar Rev* 29 at 31-2.

from each of them. It may be supposed that the legal advisors of plaintiffs will seek to escape the regime and that those of the defendants will seek to have it applied.

15 I also turn to the legislation which provides the subject-matter of this paper – the *Wrongs and Limitations of Actions Act (Insurance Reform) Act* 2003 which commenced on 1 January 2004. The introduced Part IVAA has already been amended by the *Wrongs and Other Acts (Law of Negligence) Act* 2003. It is presently the subject of further review.

16 At the same time, the Commonwealth Parliament, as part of its CLERP 9 legislative package<sup>18</sup> passed legislation in 2004 to introduce proportionate liability to claims for misleading and deceptive conduct under s. 52 of the *Trade Practices Act* 1974<sup>19</sup>. It also introduced a similar regime for claims for damages for contravention of ss. 1041E to 1041H of the *Corporations Act*<sup>20</sup>, and claims for damages under ss. 12CA - 12CC and 12DA - 12DN of the *ASIC Act*<sup>21</sup>. Although this Commonwealth legislation is, in many respects, different from the *Wrongs Act* there is sufficient resemblance for me to consider it together with the *Wrongs Act*. For convenience, I shall refer only to the *Trade Practices Act* provisions since this legislation is more likely to come the way of those here present.

### 1. The Proportionate Liability Principle

17 The central provision of the legislative schemes is that which, in respect of an **apportionable claim**, limits the liability of a **defendant** who is a **concurrent wrongdoer** to an amount which reflects the proportion of the plaintiff's loss claimed as the court considers just, having regard to the extent of that defendant's **responsibility for that loss and damage** unless the proportionate liability has **no application** to that defendant.<sup>22</sup>

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<sup>18</sup> *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act* 2004.

<sup>19</sup> *Trade Practices Act*, Part VIA. At the same time it introduced the concept of contribution from the plaintiff, rather like contributory negligence under the *Wrongs Act*, see s. 82(1B).

<sup>20</sup> *Corporations Act*, s. 1041L.

<sup>21</sup> *ASIC Act* 2001, s. 12GP.

<sup>22</sup> *Wrongs Act*, s. 24AL(1); *Trade Practices Act*, s. 87CD(1).

18 Two consequences flow from this:

- (a) judgment may not be given against that defendant for a sum greater than that amount; and
- (b) since each defendant bears its own share, no contribution or indemnity may be obtained from another concurrent wrongdoer.<sup>23</sup>

I shall now consider each of the emphasised words in the statement of principle but not necessarily in the order in which they there appear.

## 2. Apportionable Claims

19 Sections 24AF and 24AG of the *Wrongs Act* show that the proportionate liability regime is limited to certain claims in court for damages based on negligence and misleading and deceptive conduct.

### *a. Negligence Claims*

20 These claims must satisfy the following requirements:<sup>24</sup>

- (i) the claim is brought in an action for damages, that is,<sup>25</sup> for any kind of monetary compensation;
- (ii) the claim is for economic loss or damage to property;
- (iii) the claim is brought in tort or, in contract, under statute or otherwise; and
- (iv) the claim arises from the failure to take reasonable care.

### Comment

- (1) It is not altogether clear what was intended by the reference to “action” in (i) above. The statute speaks of particular claims as being apportionable claims.<sup>26</sup> The regime does not

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<sup>23</sup> *Wrongs Act* s. 24AJ; *Trade Practices Act*, s. 87CF.

<sup>24</sup> *Wrongs Act*, s. 24AF(1)(a).

<sup>25</sup> This definition of damages is found in *Wrongs Act* s. 24AE; not in the Commonwealth legislation.

<sup>26</sup> Section 24AE.

appear to apply to arbitrations or proceedings other than actions for damages. It would not include proceedings for non-monetary relief.

- (2) The applicability of the proportionate liability regime will depend upon the claim as pleaded by the plaintiff. And since it may be supposed that plaintiffs will be keen to escape the proportionate liability regime, it may be expected that the pleaders will contrive to formulate their claims to escape this definition. This will mean that judges will need to pay particular care to the form of the pleading.
- (3) The claim is one for damages. The Victorian regime has adopted an idiosyncratic and extensive definition of the expression “damages”. Even so, there may be claims for relief that does not meet this definition. In the case of the Commonwealth regime, the word “damages” is given its ordinary meaning as in s. 82. Other money claims are not included.
- (4) The claim is for negligence, that is, the breach of a duty to take reasonable care. This duty might arise otherwise than in tort. This will mean that, where a plaintiff sues in contract or brings a claim for damages for breach, it will not be an apportionable claim unless the term breached is one to take reasonable care.
- (5) Where a plaintiff in the same proceeding brings apportionable claims and other claims, liability for the other claims is to be dealt with under the common law.<sup>27</sup>
- (6) The claims are limited to claims for economic loss or damage to property.

***b. Misleading and Deceptive Conduct Claims***

21 The legislative scheme<sup>28</sup> applies to claims under s. 52 of the *Trade Practices Act*<sup>29</sup> and s. 9 of the *Fair Trading Act*<sup>30</sup>.

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<sup>27</sup> Section 24AI(2).

<sup>28</sup> As mentioned, I pass over the similar Commonwealth regime applicable under the *Corporations Act* and the *ASIC Act*.

<sup>29</sup> *Trade Practices Act*, s. 87CB(1).

<sup>30</sup> *Wrongs Act*, s. 24AF(1)(b).

### Comment

Under the *Trade Practices Act* these claims are only claims for damages pursuant to s. 82 for economic loss or damage to property.<sup>31</sup> In the *Wrongs Act* this limitation to claims for economic loss or damage to property is applied only to negligence claims.<sup>32</sup> In the normal case this may not be a significant discrepancy, for claims arising out of an injury are excluded from the *Wrongs Act*<sup>33</sup>. In any event, it is difficult to see a claim for non-economic loss other than that arising out of an injury being caused by misleading or deceptive conduct.

### *c. Mixed Claims*

22 Where apportionable claims and non-apportionable claims are made, the proportionate liability regime applies only to apportionable claims.<sup>34</sup>

### Comment

(1) It is not uncommon to see a claim where the same facts are relied upon as providing the basis for a contractual claim, a negligence claim and a misleading and deceptive conduct claim. Take the case of a claim for damages for the supply of defective goods or services. In the appropriate case, this may be pleaded as any or all<sup>35</sup> of the following:

- (i) a breach of an express term in the supply contract that the goods and services will be free of defect;
- (ii) a breach of an implied term in the supply contract as to fitness for a disclosed purpose or as to merchantability;
- (iii) a breach of a collateral warranty as to suitability or fitness or freedom from defect;
- (iv) negligent supply;
- (v) a negligent statement express or implied as to the suitability or fitness or freedom from defect;
- (vi) a fraudulent statement express or implied as to suitability or fitness or freedom from defect;
- (vii) the statement constitutes misleading or deceptive conduct:
  - (x) contrary to the *Fair Trading Act* where the statement is attributed to a person;
  - (y) contrary to the *Trade Practice Act* where the statement is attributed to a corporation or where the statement is made by post or telegraph;

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<sup>31</sup> *Trade Practices Act*, s. 87CB(1).

<sup>32</sup> Section 24AF(1)(a).

<sup>33</sup> Section 24AG(1).

<sup>34</sup> *Wrongs Act*, s. 24AI(2); *Trade Practices Act*, s. 87CD(2).

<sup>35</sup> This is not to say that these are the only possible causes of action. For example, there might be a claim for a breach of an express warranty or one implied by the Goods Act 1958 ss 17ff or the Trade Practices Act ss 70ff

- (viii) the implied statement of the supplier that it is competent to supply the goods or services is false and constitutes misleading and deceptive conduct:
  - (x) contrary to the *Fair Trading Act* where the statement is attributed to a person;
  - (y) contrary to the *Trade Practices Act* where the statement is attributed to a corporation or where the statement is made by post or telegraph.
- (2) It would seem that claims (iv), (v), (vii)(x) and (viii)(x) would be apportionable claims under the *Wrongs Act* and that claims (vii)(y) and (viii)(y) under the *Trade Practices Act*. Claims based on fraud are non-apportionable.<sup>36</sup>
- (3) Again, I observe that the regime which applies will depend upon the way the plaintiff chooses to plead its claim.
- (4) What is meant by the *Trade Practices Act*, s. 87CB(2)?

**d. Excluded Claims**

- 23 Under s. 24AG of the *Wrongs Act* a list of claims is excluded from the proportionate liability regime. Most of these appear to be arising out of personal injury or claims under various statutory regimes.

**3. Concurrent Wrongdoers**

- 24 A concurrent wrongdoer is defined in s. 24AH of the *Wrongs Act*:

- “(1) A concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim.
- (2) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died.

**Comment**

- (1) An enquiry to determine whether a person is one of a number of concurrent wrongdoers involves each of three questions:
  - (a) Did the act or omission of each person cause the loss to the plaintiff? - A question of fact.

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<sup>36</sup> *Wrongs Act*, s. 24AM; *Trade Practices Act*, s. 87CC(2).

- (b) Was the act or omission of each person a wrongful one? - A question of law.
- (c) Is the plaintiff's loss in each case the same loss? - A question of fact and law.
- (2) Focusing on the Victorian regime, it is necessary to consider the second question in a little detail. The total absence in this statute of any consideration of wrongfulness of the act or omission is explicable only on the basis that the wrongfulness in each case must be such as would provide the basis for an apportionable claim.<sup>37</sup> I have divided these claims into two heads. Does this mean that a claim against D1 based on negligence must be apportioned if a claim against D2 is brought for misleading and deceptive conduct under the *Fair Trading Act*? Suppose the claim against D2 is one under one of the apportionable Commonwealth claims, what then? Such a problem may not arise in VCAT because it does not have jurisdiction under the Federal Scheme. An affirmative answer where the claims are brought in a court proceeding may raise difficult constitutional questions. The more straightforward answer may be to see the Commonwealth regime and the State regime as independent so that there can be no cross-fertilisation between the one and the other. That this is so is consistent with the significant differences of detail which exist between the two regimes and to which I shall refer.
- (3) It is of primary importance to bear in mind that the wrongful act or omission must be wrongful vis-à-vis the plaintiff. So, if the plaintiff sues two concurrent wrongdoers, they must each of done some wrong to the plaintiff. It is not a question of the wrong done by one tortfeasor to the other. One defendant to the other. This will assume some importance when the question of adding parties is considered.

#### **4. Defendants**

25 It is, of course, a fundamental principle of our civil procedure that relief can be obtained in a proceeding only against a party to that proceeding. The proportionate liability scheme appears to acknowledge this for it is expressed to limit the amount recoverable by a plaintiff against a defendant.

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<sup>37</sup> Under the South Australian equivalent of the *Building Act*, it has been held in the District Court that "wrongful acts or defaults" means "a breach of a tortious, or perhaps a contractual, duty imposed by law": *NBD Bank v South Italy Tiling SA* [1997] SADC 3596 at p.45/56.

26 Under the *Building Act* regime this meant what it says. The regimes currently under consideration depart from this inasmuch as a defendant is defined as “a defendant or other party in the proceeding, except the plaintiff”. It must be supposed that this was intended to bring in third and subsequent parties.

**Comment**

(1) Let us suppose that the proceeding is constituted as follows:



The plaintiff sues the defendant for damages for a defective machine. The defendant joins as third party the designer of the machine. The designer joins a metallurgist who advised it about the hardness of the steel which in fact failed. It would seem that, under the proportionate liability regimes the relative responsibility of each of these three parties for the loss of the plaintiff would have to be assessed. As will be seen, this raises serious difficulties.

(2) The extended definition of “defendant” has procedural implications. Normally, a plaintiff’s claim against a defendant is treated as a proceeding separate from that between the defendant and a third party, and so on. So, for example, a third party is not a necessary or proper party to the plaintiff’s proceeding for the purposes of service out of the jurisdiction under rule 7.01;<sup>38</sup> a third party cannot make an offer of compromise to the plaintiff’s claim under Order 26; discovery and interrogatories are not available between those parties under rule 29.02 and rule 30.02, respectively. These rules, and perhaps others, will require some robust interpretation, or even amendment, to cope with the new structure of the apportionment proceedings.

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<sup>38</sup> Williams, *Civil Procedure* para [I.7.01.205].

(3) It is appropriate to observe at this point that the responsibility allocation is not limited to parties to the proceeding. There is at this point an important divergence between the State regime and the Commonwealth regime.

(a) *State regime.* The court in apportioning responsibility must not have regard to a person who is not a party to the proceeding<sup>39</sup> unless:

(i) that person is not a party because the person is dead; or

(ii) if the person is a corporation, the corporation has been wound up.<sup>40</sup>

In the latter event, the expression used is “the corporation has been wound up”; not that “the corporation is being wound up”.<sup>41</sup>

(b) *Commonwealth regime.* No such limit is imposed upon the court. Rather the contrary. By s. 87CD(3)(b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceeding. Since a person may be a concurrent wrongdoer notwithstanding that the person is insolvent, is being wound up or has ceased to exist or has died,<sup>42</sup> the responsibility of any person at all must be assessed, provided that the person is a concurrent wrongdoer. As will be seen, these provisions raise serious procedural difficulties.<sup>43</sup>

## 5. Excluded Concurrent Wrongdoers

27 Each of the regimes denies the advantages of proportionate liability to defendants who are persons whose wrongdoing goes beyond simple negligence or misleading or deceptive conduct. Again, the approach is different in the two regimes.

(a) *State regime.* Section 24AM is in these terms:

“Despite sections 24AI and 24AJ, a defendant in a proceeding in relation to an apportionable claim who is found liable for damages and against whom a finding of fraud is made is jointly and severally

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<sup>39</sup> Why this expression is used rather than “defendant” is not clear.

<sup>40</sup> Section 24AI(3).

<sup>41</sup> See para. [58] below.

<sup>42</sup> Section 87CB(5). Note that the expression here is “is being wound up”.

<sup>43</sup> See paras [49] – [50] below.

liable for the damages awarded against any other defendant in the proceeding.

**Comment**

- (1) The section applies only to a wrongdoer who is a defendant. Deceased wrongdoers and wound up corporations who are not defendants are not included. This is consistent with the scheme which imposes liability (albeit proportionate liability) only on defendants.
- (2) There must be a finding made.
- (3) The finding is one of fraud.
- (4) There is no requirement in terms that the fraud be causally related to the loss or associated with the wrongdoing.
- (5) The drafter imposes on that defendant joint and several liability for the damages awarded against any other defendant. On its face, this imposes joint and several liability even if the circumstances are such that joint and several liability would not exist but for the *Wrongs Act* regime.
- (6) On its face, the section imposes joint and several liability notwithstanding that the defendants in question are not concurrent wrongdoers.
- (7) It may be supposed that s. 24AM was not intended to have the effect suggested in (4), (5) or (6) above, but it is not clear that this intention is apparent.
- (8) Let us assume that D1, D2, D3 and D4 are each concurrent wrongdoers and each is 25% responsible for the plaintiff's loss. Let us assume a finding of fraud against D4. Does that mean that the orders are for D1, D2, D3 to bear 25% each and D4 100%? Or is D4 to be ignored, so that the apportionment is D1, D2 and D3 33.3% each and D4 100%? A third and less likely possibility is that D1, D2 and D3 escape liability altogether and that D4 bears 100%. If D4 is insolvent this may be a matter of some significance.
- (a) *Commonwealth regime.* The Commonwealth regime addresses the same issue but in a very different way in s. 87CC:

- “(1) Nothing in this Part operates to exclude the liability of a concurrent wrongdoer (an **excluded concurrent wrongdoer**) in proceedings involving an apportionable claim if:
- (a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim; or
  - (b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim.
- (2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules (if any) that (apart from this Part) are relevant.
- (3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part.

#### **Comment**

- (1) As is so often the case in Commonwealth drafting, the expression “excluded concurrent wrongdoer” is used to refer to a person whose liability is not excluded by the regime. Furthermore, no liability is excluded under Part VIA except perhaps that to contribute or to indemnify another wrongdoer.<sup>44</sup>
- (2) The section operates where the wrongdoer intended to cause the loss or where the wrongdoer’s fraud caused the loss. To this extent it is wider than the State regime.
- (3) A plaintiff wishing to exclude a defendant from the regime will then be required to plead and prove a fact which is extraneous to its cause of action. Neither intent nor fraud is an ingredient of negligence or of misleading and deceptive conduct.

#### **6. Successive Proceedings**

28 Each regime contemplates that a plaintiff may bring a claim against concurrent wrongdoers in separate proceedings.<sup>45</sup> This reverses the old rule in *Brinsmead v Harrison*<sup>46</sup>. Not surprisingly, each regime appears to discourage successive

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<sup>44</sup> Section 87CF.

<sup>45</sup> *Wrongs Act*, s. 24AK(1); *Trade Practices Act*, s. 87CG(1).

<sup>46</sup> Discussed in para. [5] above.

proceedings, for there is express power to join defendants to the claim.<sup>47</sup> The Commonwealth regime goes further; it encourages a defendant to notify the plaintiff of the existence of the concurrent wrongdoer,<sup>48</sup> presumably in the expectation that the plaintiff will join that person as a defendant. The terms of the joinder power, however, are sufficiently wide to permit an existing defendant to join this person as a co-defendant.<sup>49</sup>

29 Under the State regime the prospect of multiple proceedings is fairly remote. If a concurrent wrongdoer is not a party, then, in most cases,<sup>50</sup> liability will be apportioned between those before the court. Let us suppose that four defendants are each ordered to bear 25% and that the plaintiff recovers in full from three of them only. The plaintiff then commences a proceeding against another wrongdoer D5. Assume that each of the five defendants is then found to be equally responsible. Does this mean that D1, D2 and D3 are entitled to a refund? This result must face the rule as to finality of judgments. If not, how much is to be ordered against D5?

30 Section 24AK(2) appears to address this situation, but again, its meaning is not altogether clear. It is in these terms:

“(2) However, in any proceeding in respect of any such action the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the loss or damage, would result in the plaintiff receiving compensation for loss or damage that is greater than the loss or damage actually suffered by the plaintiff.”

The Commonwealth regime has a provision in similar terms.<sup>51</sup>

31 The terminology of the legislation in each case is that “liability ... is limited to an amount” and that judgment may be given for “no more than that amount”.<sup>52</sup>

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<sup>47</sup> *Wrongs Act*, s. 24AL, *Trade Practices Act*, 87CH.

<sup>48</sup> Section 87CE.

<sup>49</sup> This power exists in Victoria under rule 9.06(b) which has been used for this purpose in proceedings under the *Building Act*. See *Boral Resources (Vic) Pty Ltd v Robak Engineering & Construction Pty Ltd* [1999] 2 VR 507.

<sup>50</sup> See s. 24AI(3) discussed above, para. [58] below.

<sup>51</sup> *Trade Practices Act*, s. 87CG.

<sup>52</sup> *Wrongs Act*, s. 24AI(1); *Trade Practices Act*, s. 87CD(1).

Notwithstanding this, it is likely that the process of apportioning responsibility will be done by attributing a share of total responsibility for the plaintiff's loss or damage to each of the concurrent wrongdoers. This will be done by attributing a given percentage to that person and applying that percentage to the amount of the plaintiff's total loss or damage.<sup>53</sup> The effect of this process will be that the first proceeding will allocate all of the responsibility between the concurrent wrongdoers who are available; there will be none left over for any subsequently implicated concurrent wrongdoer.

32 In a proceeding brought under the Commonwealth regime any person may be allocated a share of the responsibility, notwithstanding that that person is not a party. Does this mean that the parties before the court in the first proceeding are bound, not only by the apportionment then ordered, but also by the implied finding that no other person is a concurrent wrongdoer? Does the finding in the first proceeding bind the wrongdoer who was not a party? Section 87CG seems to suggest that the answer to the first question must be in the negative. Ordinary estoppel principles would seem to direct a negative answer also to the second question. What then is the status of a judgment given in the first proceeding on the parties to it?

33 There is also a provision in both regimes which prohibits the joinder as party to a subsequent proceeding of a person who was a party to an earlier proceeding.<sup>54</sup>

#### **Comment**

(1) What is meant by "in any proceeding in respect of any such action"? Is it intended to say "in any such action"?

(2) Subsection 24AK(2) referred to in para [30], prevents a plaintiff from "recovering an amount of damages...". This is to be contrasted with the expression "recovered judgment..." in sub-s. (1). If sub-s. (2) is concerned, not with the judgment but with the recovery of money under

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<sup>53</sup> Assuming that the relevant act or omission of each caused the same amount of the loss or damage.

<sup>54</sup> *Wrongs Act*, s. 24AL(2); *Trade Practices Act*, s. 87CH(2).

the judgment, it may have the consequence that D4 would be liable to suffer judgment for the full amount of the loss and it may be enforced against D4 in full less anything recovered from the defendants in the earlier proceeding. This construction would encourage the plaintiff to bring successive actions against each of the wrongdoers. I doubt whether this was the intention of parliament.

- (3) It seems likely that the intent of the drafter was that a plaintiff might bring a series of proceedings against different concurrent wrongdoers, but it has neglected to consider how this might be done.
- (4) Under the Commonwealth regime, liability may be apportioned to absent parties. In the suggested case, it would be possible in the proceeding against D1, D2 and D3 for judgment against them to be for 25% each with the last 25% being attributed to the absent D4. In the subsequent proceeding against D4 no estoppel would arise, for D4 is not a party to the earlier proceeding. In accordance with accepted principle it may be that judgment in the earlier trial is not even admissible in the subsequent proceeding.
- (5) It may be that the provision prohibiting the joinder of persons who were parties to the earlier proceeding mentioned in para [33] has some bearing on this difficulty. Does it refer only to applications to join additional parties, or does the prohibition apply also to the inclusion of the earlier parties in the subsequent proceeding as originally framed? If the concurrent wrongdoers sued in the earlier proceeding are to be excluded from the subsequent proceeding, there will be serious difficulties in readjusting, in a subsequent proceeding to which they cannot be a party, a finding in the first proceeding as to their relative responsibility or a judgment in that proceeding against them in dollars.

## **7. Responsibility for the loss**

34 The requirement that the court make an assessment of what is “just having regard to the extent of the defendants’ responsibility for the loss and damage” is found in both State and Commonwealth regimes. This expression, which is of respectable antiquity,<sup>55</sup> is similar to that adopted for assessing contribution under the *Wrongs Act*

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<sup>55</sup> The expression used in the original English contribution legislation is “just and equitable having regard to the extent of that person’s responsibility for the damage”. See *Law Reform (Married Women*

Part IV,<sup>56</sup> for assessing contributory negligence under Part V<sup>57</sup> and for assessing responsibility under the repealed *Building Act* 1993.<sup>58</sup>

35 In the related areas of contributory negligence<sup>59</sup> and contribution<sup>60</sup>, the task of allocating responsibility for loss involves an assessment of legal culpability and the relative importance of the acts of the parties in causing the damage.<sup>61</sup> Despite the lack of any specification of the criteria to be applied in the traditional expressions of the test for such an allocation, it does not seem to have caused difficulty in these related areas of law over the past half century. Professor McDonald<sup>62</sup>, however, sees greater difficulty in these new environments in which the assessments are to be made. A major difficulty arises from the fact that the wrongdoing in question may be of differing qualities. In the case mentioned in para [26] comment (1) above, how is it possible to apportion a liability under one or more of the apportionable causes of action which are of different character. Suppose that the defendant is liable in contract under a non apportionable cause of action, the designer is in breach of a duty of care owed to the plaintiff and the metallurgist has made misleading and deceptive statements. How are these matters to be dealt with? In these related areas of law the assessments are considered to be a matter particularly within the province of the primary judge and the cases show that apportionment of responsibility will rarely be upset on appeal.<sup>63</sup>

### C SOME PRACTICALITIES

36 Under this heading I offer a miscellany of what I hope are practical suggestions for the conduct of apportionable claims. My experience has been in apportionment

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*and Tortfeasors) Act* 1935, s.6(2).

<sup>56</sup> Section 24(2), using the English expression quoted in footnote 55.

<sup>57</sup> Section 26(1)(b), using the English expression quoted in footnote 55.

<sup>58</sup> Section 131(1), using the English expression quoted in footnote 55.

<sup>59</sup> See *Halsbury's Laws of Australia*, vol 19, Negligence para [300-130].

<sup>60</sup> See *Halsbury's Laws of Australia*, vol 19, Negligence para [300-135].

<sup>61</sup> *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529 at 532-3, per High Court

<sup>62</sup> B McDonald, "Proportionate liability in Australia: The devil in the detail" (2005) 26 *Aust Bar Rev* 29 at 35 - 7.

<sup>63</sup> *Pennington v Norris* (1956) 96 CLR 10 at 15-6.

claims under the *Building Act 1993*, but the same difficulties must be addressed under the regimes presently under consideration.

37 The principal danger to avoid is that caused by what I call “woolly thinking”, which is particularly a problem in an area where fundamental longstanding principles have been changed. Practitioners often have difficulty making the mental adjustment which Parliament now requires of them.

38 A potential difficulty which the proportionate liability regimes, particularly the Commonwealth regime, raise is that of indeterminate issues. If the court is to apportion responsibility between persons who are not parties, how can the judge identify them? If the court is to apportion the responsibility between identified persons, what factors is it to have regard to? I have in *Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (No 2)*<sup>64</sup> taken the position that litigants, and not the court, own the litigation. It is for the parties to raise the issues which they wish determined and that they do so with sufficient particularity to enable the court to determine questions of relevance and to enable the parties to know what is put against them. This has two consequences: if a matter is not raised on the question of responsibility, it is not for the court to seek it out; and, second, the parties must by their pleading or otherwise raise these matters.

39 The strategy which I recommend is that the parties be required to articulate precisely what it is they allege. This will present difficulties in tribunals where parties are often self-represented and where informality is encouraged.

### **1. An Apportionable Claim?**

40 The Commonwealth legislation commenced on 26 July 2004; the Wrongs Act provisions apply to proceedings commenced on or after 1 January 2004.

41 It may be obvious, but I urge judges faced with the prospect of an application of either or both of the apportionable liability regimes, at the earliest stage, to identify

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<sup>64</sup> [2006] VSC 117.

whether this is such a case. It may be that a self-represented party or even a represented party is unaware of this and of its implications.

42 Bear in mind, too, that this will have to be determined essentially from the way the plaintiff's case or the case of any other party to the proceeding is put. When it does appear to be a case of concurrent liability, this characteristic attaches, not so much to the proceeding, but to individual claims made within the proceeding. And so, you may have the misfortune to be faced with a case where the plaintiff puts its case against multiple defendants in a variety of alternate ways.<sup>65</sup> Some might be under the State regime, some under the Commonwealth regime and some at common law. As will appear<sup>66</sup> this may mean that the different claims may have to be treated differently in terms of the making of orders against the various defendants.

43 Further complication may arise when the apportionable claim is made, not by the plaintiff, but by counterclaim of a defendant or by some other party against multiple parties. I mention this only to alert you to the possibility that this complication is possible.

## **2. Summons for Directions**

44 It will be apparent that there are many difficulties which lurk in a claim for apportionment under either regime. I suggest therefore, that as soon as the prospect of such a claim arises, there be appointed a directions hearing at which the following matters at least should be raised and, if they are alive, they be addressed:

- (1) What are the apportionable claims?
- (2) What regimes are applicable?
- (3) Are there claims for fraud or intentional wrong?
- (4) Is responsibility to be attributed to any and if so what non-parties?
- (5) Is the non-party to be joined, and if so, on whose application?

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<sup>65</sup> See para. [22] comment (1) above.

<sup>66</sup> See paras. [65] - [68] below.

- (6) Pleading the claims for apportionment.
- (7) Are the existing discovery, interrogatory and other interlocutory processes appropriate for the claim for apportionment and, if not, what should be ordered.

### 3. Adding Parties

45 As we have seen, each of the regimes contemplate that concurrent wrongdoers will be added as defendants in relation to an apportionable claim. Where the plaintiff does this, there will ordinarily be little difficulty other than that which normally attends joinder.

46 One aspect of this, however, has caused difficulties under the *Building Act* and may well do so under the Commonwealth regime and the State regime. This is the phenomenon known as cascading applications, the making of a series of successive joinder applications. Each joinder will involve an application and may involve the amendment of the pleadings of numerous parties. If a trial date has been fixed the application may cause a postponement. If this practice is undertaken needlessly or as part of a strategy to exhaust other parties, then it should not be tolerated. I have in the past adopted a practice of fixing a date beyond which no further joinder applications may be brought. The difficulty of giving effect to such a direction is that a refusal of a joinder application on the ground that it is made after the deadline would be lucky to survive an appeal.

#### *a. Defendant's joinder application*

47 The plaintiff may be unwilling to join the person. This may be for any of a number of reasons. The person will be unable to pay the costs or to meet the judgment; the plaintiff may be of opinion that the person is not a wrongdoer; the plaintiff may want that person to assist in the case against the existing defendants, assistance which may be denied if that person becomes an adversary; the person may be friendly with the plaintiff or even a related company so that the plaintiff may not

wish to recover from that person; the plaintiff may have settled with the person. The list goes on.

48 It may be, then, particularly under the State regime where, in general, no apportionment is available against a non-party, that a defendant will seek to join the person. This has become a common practice under the *Building Act*. In *Wimmera-Mallee Rural Water Authority v FCH Consulting Pty Ltd*<sup>67</sup>, I set out the procedural requirements for the joinder of a defendant under the *Building Act*. These may be capable of an adaptation to suit a similar application under the regimes hereunder consideration. Upon such an application the court must watch out for a number of matters which, if not attended to, may cause difficulties later.

- (i) the applicant defendant must show that the person may be liable, not to the applicant, but the plaintiff. In this respect it resembles a contribution claim under Part IV. This requirement is obvious enough but it can easily be overlooked.
- (ii) The applicant defendant must show that there is an arguable case that the person is liable to the plaintiff and, further, that the person is a concurrent wrongdoer in relation to the plaintiff's claim.
- (iii) It often happens that the applicant shows little more than that the person's conduct has contributed to the plaintiff's loss. Absent some contractual or statutory liability, this will involve showing an arguable case that the person owed to the plaintiff a duty of care. This may not be easy in the current environment where duty of care for pure economic loss is in retreat.<sup>68</sup> It is helpful in my opinion to require the applicant to file a document in which it pleads against the person the claim which it imputes to the plaintiff.
- (iv) A very tricky point arises if, at the end of the trial, the court finds that the defendant added by a co-defendant is in fact a concurrent wrongdoer and

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<sup>67</sup> [2000] VSC 102 at [22].

<sup>68</sup> See *Wimmera-Mallee Rural Water Authority v FCH Consulting Pty Ltd* [2000] VSC 102; *Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (No 2)* [2006] VSC 117.

must bear, say, 20% of the responsibility for the plaintiff's loss which is found to be, say, \$1M. Let us assume that the plaintiff has declined to make a claim against this added defendant. Is the plaintiff in these circumstances entitled to judgment for \$200,000 against that defendant? Or is this defendant's share merely available to the other defendants or those defendants which have pleaded an apportionment claim against that defendant so that the plaintiff's total recovery is only \$800,000. The statutes in each regime seem to require that the plaintiff should have judgment against each defendant, irrespective of who joined that defendant. Consistent with my principle that it is for the parties to bring a claim, my inclination is that the plaintiff should not have judgment against that defendant against whom it does not wish to make a claim and, presumably, whose costs it will not expect to bear if the defendant escapes responsibility.

*b. Non-party's joinder application*

49 It will be recalled that under the Commonwealth regime the responsibility of non-parties may be brought to account in the allocation of responsibility. In the State regime this is more limited, but it does include a person who is dead or a company which has been wound up. I shall return to these later.<sup>69</sup> The purpose of taking into account the responsibility of absent parties, even those which no longer exist, is to fasten upon them some share of the responsibility for the plaintiff's loss. If this purpose is achieved, it has one, and possibly two consequences. First, it means that the relative responsibility of the other concurrent wrongdoers is diminished. This may, and probably will, reduce the plaintiff's recovery. Second, depending upon the outcome of the estoppel point mentioned above<sup>70</sup>, it may be that this will determine the responsibility of that person if, at some later stage, a subsequent proceeding is brought against that person. In such an event the absent party might be at risk as a result of the allocation of responsibility in the first proceeding. It is for those reasons

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<sup>69</sup> See para. [58] below.

<sup>70</sup> See para. [32] above.

desirable, if not essential, that all persons who are at risk in the proceeding should be given the right to be heard in answer to the allegations against them.

50 I therefore suggest that, if it should appear that an allegation of responsibility is to be made against a person who is not a party and if neither the plaintiff nor the defendant making the allegation is minded to join that person, notice of the allegation be given to that person with an invitation that the person seek to be joined as a party, if so advised. It would seem that the court could order that person to be joined on its own application pursuant to Rule 9.06<sup>71</sup>.

*c. Pleading the plaintiff's claim*

51 Where the order for joinder is made, the plaintiff should first be given the opportunity to amend the statement of claim so as to make the claim against the added defendant. It may, of course, not choose to do so. The applicant defendant should, in such a case, be directed to plead against the added defendant the claim which it, the applicant defendant, puts in the mouth of the plaintiff.

*d. Pleading the claims between "defendants"*

52 Assuming that it appears that the added defendant is arguably a concurrent wrongdoer vis-à-vis the plaintiff, it is necessary that each defendant put forward the facts which it relies upon in support of its allocation of responsibility between them. This has a number of benefits. First, it identifies which parties are seeking to allocate responsibility to the party. Second, it focuses the minds of the defendants upon this issue between them. Third, it provides a framework for rulings on relevance at trial and for disclosing to each other defendant what is put against it. Fourth, it provides a framework for writing the judgment at the end of the day. The proliferation of these pleading documents which are directed to be delivered pursuant to Rule 11.15 is a regrettable consequence of this, but it is preferable to trial by ambush.

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<sup>71</sup> See Williams, *Court Civil Practice*, para. [1.9.06.15].

53 When a party seeks apportionment against a third party or against some other party to the proceeding, it is even more important that this is brought to light and that any party seeking such apportionment show what it contends against that other party.

#### **4. Absent Parties**

54 The question of the responsibility of non-party concurrent wrongdoers must be carefully watched. Two things in particular must be noted.

(i) The State regime and the Commonwealth regime approach the problem in a very different way. This may produce different results.

(ii) In the course of the reasons of the court for its decision it will be necessary to allocate responsibility between all defendant concurrent wrongdoers and perhaps non-party wrongdoers. This will normally be done by expressing this as a percentage with the total 100%. These percentages should not appear in the order or judgment. In each regime the court must give judgment for an amount of dollars against each defendant concurrent wrongdoer. It may not give judgment against a non-party concurrent wrongdoer. I shall return later<sup>72</sup> to the orders which might be made.

55 Under each regime it is expressly provided that a person may be a concurrent wrongdoer notwithstanding that it "is insolvent, it is being wound up, has ceased to exist or has died".<sup>73</sup> At this point the regimes part company. It is only the State regime which carries these forward to the point of apportioning responsibility.

##### *a. The State regime*

56 It is implicit in the *Wrongs Act*, s.24AI that the court is to determine the responsibility of each defendant concurrent wrongdoer for the plaintiff's loss. This can only be done by making an assessment of the comparative responsibility of each and this may be expressed as a percentage of the total responsibility of all.

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<sup>72</sup> See paras. [65] ff below.

<sup>73</sup> *Wrongs Act* s. 24AH(2); *Trade Practices Act* 87CB(5).

57 Section 24AI(3) prohibits the court from having regard to the comparative responsibility of a non-party subject to other exceptions mentioned below. This is presumably in deference to the established rule that the rights of a person should not be affected by a court judgment in a proceeding to which it is not a party. This means that any party contending that a non-party should bear a share of responsibility must have that person joined as a party.

58 To this there are two exceptions.

- (i) the person is not a party because the person is dead; or
- (ii) the person is not a party because the person, being a corporation, has been wound up.

It is not at all clear why the distinction is drawn between a corporation which is being wound up, in s. 24AH(2), and one which has been wound up, in s. 24AI(3). Nor is it clear what is meant by the expression “wound up”. The normal process for winding up a corporation in insolvency culminates in an application to the court for an order that the liquidator be released and that ASIC deregister the corporation pursuant to s. 480. In the case of a voluntary winding up the liquidator convenes a meeting of members or a meeting of creditors and members “As soon as the affairs of the company are fully wound up” and the corporation is deregistered by ASIC three months after the return is lodged.<sup>74</sup> The date upon which the corporation in liquidation has been “wound up” is uncertain and is not a commonly used expression. If what is intended in s. 24AI(3) is that the corporation is deregistered then there are a number of circumstances that produce that result other than the completion of the deregistration.<sup>75</sup>

59 A moment’s reflection, however, will disclose that neither death nor having been wound up is an insuperable object to suing a person or a corporation. The causes of action with which we are concerned survive the death of the wrongdoer. They may

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<sup>74</sup> *Corporations Act*, s. 509.

<sup>75</sup> See *Corporations Act*, ss. 601AA - 601AC.

be pursued against the wrongdoer's estate and recovery may be made from the assets of the estate, including any insurance policy which covers the consequences of the wrongful act. Likewise, against a corporation which is being wound up. It is true that a person may not sue a corporation which is being wound up except with the leave of the court,<sup>76</sup> but this is not uncommon. If the expression "wound up" means that the corporation has been deregistered following liquidation,<sup>77</sup> it is possible to reinstate the registration pursuant to s. 601AH or where there is insurance in respect of the wrong, the plaintiff may recover the insurance proceeds from the liquidator<sup>78</sup> or sue the insurer direct.<sup>79</sup> In these circumstances, it is difficult to suppose that a person or corporation cannot be sued simply because of death or because it has been wound up. The real reason must be because the person or corporation has no assets.

60 I conclude from all of this that it will be a rare case where, under the State regime, the responsibility of a non-party will fall to be considered pursuant to s. 24AI.

*b. The Commonwealth regime*

61 The Commonwealth regime is more bold. Included in the definition of the concurrent wrongdoer are persons who are insolvent or dead and corporations which are insolvent, being wound up or have ceased to exist.

62 By s. 87CD the court is required to apportion responsibility between concurrent wrongdoers. By sub-s. (3)(b), the court may have regard to the comparative responsibility of those concurrent wrongdoers who are not parties.

63 It is not clear what matters are to guide the court in deciding whether to include these non-party concurrent wrongdoers in the comparative allocation of responsibility.

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<sup>76</sup> *Corporations Act*, s. 471B.

<sup>77</sup> Pursuant to *Corporations Act*, s. 601AC.

<sup>78</sup> *Corporations Act*, s. 562(1).

<sup>79</sup> *Corporations Act*, s. 601AG.

64 If a party contends that the comparative responsibility of such a non-party  
wrongdoer is to be taken into account, it is essential, for reasons given already that  
this person be identified and that sufficient particulars be given of the matter relied  
upon to establish that that person is a concurrent wrongdoer and that the person is  
responsible for the plaintiff's loss.<sup>80</sup>

*c. Orders where absent parties*

65 I have already mentioned that the percentages of responsibility should not be  
included in orders. The orders should deal only with the amounts adjudged to be  
paid by each of the defendants. The aggregate of these amount will normally equal  
the amount which the court finds to be the amount of the plaintiff's loss and damage,  
subject to the apportionment against absent parties. That this will be different under  
the two regimes appears from the following:

66 Assume that there are five concurrent wrongdoers, three of whom, D1, D2 and D3  
are parties and two NP1 and NP2 are not parties. Assume, too, that each concurrent  
wrongdoer is found to be equally responsible for the plaintiff's loss. Let us assume  
also that NP1 is not joined as a party because he is dead. NP2 is not joined but does  
not fall within the proviso to s. 24AI(3). The judgments will then be as follows.

*State Regime*

67 Judgment against the defendants as follows:

Against D1 - \$250,000

Against D2 - \$250,000

Against D3 - \$250,000

**Comment**

(1) The share of NP1 is ignored pursuant to s. 24AI(3).

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<sup>80</sup> *NBD Bank v South Italy Tiling SA* [1997] SADC 3596 at p.48/56.

(2) The share of NP2 which is valued at \$250,000 is brought to account but no judgment may be entered against it since it is a non-party.<sup>81</sup>

(3) The plaintiff might expect to collect \$750,000 of its total loss and damage.

*Commonwealth Regime*

68 Judgment against each of the defendants as follows.

Against D1 - \$200,000

Against D2 - \$200,000

Against D3 - \$200,000

**Comment**

(1) The shares of NP1 and NP2 total 40% and these maybe brought to account pursuant to s. 87CD(3)(b). The plaintiff might expect to collect \$600,000 of its total loss and damage.

69 I shall leave to you the task of formulating these orders where the following variations to the findings are made:

- (i) D1 is found guilty of fraud; or
- (ii) D1 is found to have intended to cause the plaintiff's loss; or
- (iii) an alternative non-apportionable claim is also made.

**5. Contractual Implications**

70 The legislation in each regime appears to have been prepared to deal with proportionate liability for claims for damages in tort. The difficulty is that the regimes must now operate in a regime where contractual relationships commonly exist, creating liabilities and excluding them. It seems to me that contracts may have a role to play in any or all of the following levels of the process of applying the regimes.

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<sup>81</sup> Section 24AI(3) proviso.

*a. Concurrent wrongdoers*

71 We have seen<sup>82</sup> that the enquiry for the purpose of identifying concurrent wrongdoers involves a question of fact, whether the act or omission of a defendant caused the loss of the plaintiff. What is the position where the defendant performed no such act or omission but, nevertheless, assumed by contract liability to the plaintiff for its loss? What is the position where the defendant's act or omission did in fact cause the plaintiff's loss but it created no civil liability to the plaintiff because no duty of care was owed or because its contract with the plaintiff excludes liability? The defendant in each such a case is not a wrongdoer.

*b. Allocation of responsibility*

72 This involves questions of causation and culpability. What is the position where the terms of the plaintiff's contract with D1 are such that D1 assumes total responsibility for the loss? What about the other concurrent wrongdoers? On the other hand, D1 might have caused the loss but it is subject to a contractual protection, for example, a final certificate in a building contract?<sup>83</sup>

*c. Post-loss contracts*

73 Let us suppose that the evidence shows that all defendants must bear responsibility but that D1 has entered into a contract of settlement with the plaintiff. How is this to be dealt with? This brings me to my final topic.

**6. Settlement and Offers of Compromise**

74 I have already mentioned that it may not be possible to make an offer of compromise under Order 26.<sup>84</sup> This difficulty may be overcome by a generous reading of the rules or by the use of a *Calderbank* offer. The fundamental problem here is that it is extraordinarily difficult for one of a number of concurrent wrongdoer defendants to settle with the plaintiff. If, for example, D1 agrees to pay \$200,000 to the plaintiff this may not necessarily represent a specific proportion of responsibility. Even if it did

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<sup>82</sup> See para. [24] comment (1) above.

<sup>83</sup> Further issues at this level are identified in B McDonald, "Proportionate liability in Australia: The devil in the detail" (2005) 26 *Aust Bar Rev* 29 at 35-6.

<sup>84</sup> See para. [26] comment (2) above.

represent an agreed proportion, are the other defendants who are not parties to the settlement agreement bound by it? Is the court bound by it? The consequence is that, for practical purposes, it will be difficult, if not impossible, to settle part only of the litigation.

- 75 An associated problem is that it will not be possible to give judgment for some default against any defendant. This removes a powerful coercive tool from the armoury of the court.

#### **D CONCLUSION**

- 76 I very much regret that this paper seems to raise more difficulties and pose more questions than it does provide answers. All I can say in my defence is that when foundations which have supported a structure for nigh on 400 years are interfered with, you must expect some creaking in the superstructure. This may be expected to require urgent attention by those whose function it is to look after and operate the superstructure. You are those persons.

## E THE STATUTES

### 1. *Wrongs Act 1958 (Vic)*

s. 24AE

#### PART IVAA—PROPORTIONATE LIABILITY

S. 24AE  
inserted by  
No. 60/2003  
s. 3 (as  
amended by  
No. 102/2003  
s. 36).

##### 24AE. Definitions

In this Part—

"**apportionable claim**" means a claim to which this Part applies;

"**court**" includes tribunal and, in relation to a claim for damages, means any court or tribunal by or before which the claim falls to be determined;

"**damages**" includes any form of monetary compensation;

"**defendant**" includes any person joined as a defendant or other party in the proceeding (except as a plaintiff) whether joined under this Part, under rules of court or otherwise;

"**injury**" means personal or bodily injury and includes—

- (a) pre-natal injury; and
- (b) psychological or psychiatric injury; and
- (c) disease; and
- (d) aggravation, acceleration or recurrence of an injury or disease.

S. 24AF  
inserted by  
No. 60/2003  
s. 3 (as  
amended by  
No. 102/2003  
s. 37).

##### 24AF. Application of Part

- (1) This Part applies to—
  - (a) a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care; and
  - (b) a claim for damages for a contravention of section 9 of the **Fair Trading Act 1999**.
- (2) If a proceeding involves 2 or more apportionable claims arising out of different causes of action, liability for the apportionable claims is to be determined in accordance with this Part as if the claims were a single claim.
- (3) 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.

S. 24AG  
inserted by  
No. 60/2003  
s. 3.

##### 24AG. What claims are excluded from this Part?

- (1) This Part does not apply to claims arising out of an injury.
- (2) Without limiting sub-section (1), this Part does not apply to the following—
  - (a) a claim to which Part 3, 6 or 10 of the **Transport Accident Act 1986** applies;

- (b) a claim to which Part IV of the **Accident Compensation Act 1985** applies;
  - (c) a claim in respect of an injury which entitles, or may entitle, a worker, or a dependant of a worker, within the meaning of the **Workers Compensation Act 1958** to compensation under that Act;
  - (d) a claim for compensation under Part V of the **Country Fire Authority Act 1958** or a claim for compensation under a compensation scheme established under the regulations made under that Act;
  - (e) an application for compensation under Part 4 of the **Victoria State Emergency Service Act 2005**;
  - (f) a claim for compensation under Part 6 of the **Emergency Management Act 1986**;
  - (g) an application for compensation under the **Police Assistance Compensation Act 1968**;
  - (h) an application for assistance under the **Victims of Crime Assistance Act 1996**;
  - (i) a complaint under the **Equal Opportunity Act 1995**;
  - (j) a claim for compensation under Part 8 of the **Juries Act 2000** or Part VII of the **Juries Act 1967**;
  - (k) a claim for compensation under Division 6 of Part II of the **Education Act 1958**.
- (3) This Part does not apply to claims in proceedings of a class that is excluded by the regulations from the operation of this Part.

s. 24AH

S. 24AG(2)(e)  
substituted by  
No. 51/2005  
s. 58(10).

**24AH. Who is a concurrent wrongdoer?**

- (1) A concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim.
- (2) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died.

S. 24AH  
inserted by  
No. 60/2003  
s. 3.

**24AI. Proportionate liability for apportionable claims**

- (1) In any proceeding involving an apportionable claim—
  - (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and
  - (b) judgment must not be given against the defendant for more than that amount in relation to that claim.
- (2) If the proceeding involves both an apportionable claim and a claim that is not an apportionable claim—
  - (a) liability for the apportionable claim is to be determined in accordance with this Part; and
  - (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.
- (3) In apportioning responsibility between defendants in the proceeding the court must not have regard to the comparative responsibility of any person who is not a party to the

S. 24AI  
inserted by  
No. 60/2003  
s. 3.

proceeding unless the person is not a party to the proceeding because the person is dead or, if the person is a corporation, the corporation has been wound-up.

S. 24AJ  
inserted by  
No. 60/2003  
s. 3.

#### **24AJ. Contribution not recoverable from defendant**

Despite anything to the contrary in Part IV, a defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim—

**s. 24AKI**

(a) cannot be required to contribute to the damages recovered or recoverable from another concurrent wrongdoer in the same proceeding for the apportionable claim; and

(b) cannot be required to indemnify any such wrongdoer.

#### **24AK. Subsequent actions**

S. 24AK  
inserted by  
No. 60/2003  
s. 3.

(1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any loss or damage from bringing another action against any other concurrent wrongdoer for that loss or damage.

(2) However, in any proceeding in respect of any such action the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the loss or damage, would result in the plaintiff receiving compensation for loss or damage that is greater than the loss or damage actually suffered by the plaintiff.

S. 24AL  
inserted by  
No. 60/2003  
s. 3.

#### **24AL. Joining non-party concurrent wrongdoer in the action**

(1) Subject to sub-section (2), the court may give leave for any one or more persons who are concurrent wrongdoers in relation to an apportionable claim to be joined as defendants in a proceeding in relation to that claim.

(2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceeding in relation to the apportionable claim.

S. 24AM  
inserted by  
No. 60/2003  
s. 3.

#### **24AM. What if a defendant is fraudulent?**

Despite sections 24AI and 24AJ, a defendant in a proceeding in relation to an apportionable claim who is found liable for damages and against whom a finding of fraud is made is jointly and severally liable for the damages awarded against any other defendant in the proceeding.

S. 24AN  
inserted by  
No. 60/2003  
s. 3 (as  
amended by  
No. 102/2003  
S. 29AO)

#### **24AN. Liability for contributory negligence not affected**

Nothing in this Part affects the operation of Part V or Division 7 of Part X.

S. 24AO  
inserted by  
No. 60/2003  
s. 3.

#### **24AO. Effect of Part IV**

Except as provided in section 24AJ, nothing in this Part affects the operation of Part IV.

S. 24AP  
inserted by  
No. 60/2003  
s. 3.

#### **24AP. Part not to affect other liability**

Nothing in this Part—

(a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable; or

(b) prevents a person from being held jointly and severally liable for the damages awarded against another person as agent of the person; or

(c) prevents a partner from being held jointly and severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or

(d) prevents a court from awarding exemplary or punitive damages against a defendant in a proceeding; or

(e) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

**24AQ. Supreme Court—limitation of jurisdiction**

It is the intention of sections 24AI and 24AL to alter or vary section 85 of the **Constitution Act 1975**.

**24AR. Regulations**

- (1) The Governor in Council may make regulations generally prescribing any matter or thing required or permitted by this Part to be prescribed or necessary to be prescribed to give effect to this Part.
- (2) The regulations—
  - (a) may leave any matter to be determined by the Minister; and
  - (b) may apply, adopt or incorporate, wholly or partially or as amended by the regulations, any matter contained in any document as existing or in force—
    - (i) from time to time; or
    - (ii) at a particular time.

**24AS. Transitional**

This Part applies to proceedings that are commenced in a court on or after the commencement of section 3 of the **Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003**.

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s. 24AQ  
~~S. 24AG~~  
inserted by  
No. 60/2003  
s. 3.

S. 24AR  
inserted by  
No. 60/2003  
s. 3.

S. 24AS  
inserted by  
No. 60/2003  
s. 3.

2. *Trade Practices Act 1974 (Cth)*

**Part VIA – Proportionate liability for misleading  
and deceptive conduct**

**87CB Application of Part**

- (1) This Part applies to a claim (an *apportionable claim*) if the claim is a claim for damages made under section 82 for:
  - (a) economic loss; or
  - (b) damage to property;caused by conduct that was done in a contravention of section 52.
- (2) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).
- (3) In this Part, a *concurrent wrongdoer*, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.
- (4) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).
- (5) For the purposes of this Part, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

**87CC Certain concurrent wrongdoers not to have benefit of apportionment**

- (1) Nothing in this Part operates to exclude the liability of a concurrent wrongdoer (an *excluded concurrent wrongdoer*) in proceedings involving an apportionable claim if:
  - (a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim; or
  - (b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim.
- (2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules (if any) that (apart from this Part) are relevant.
- (3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part.

**87CD Proportionate liability for apportionable claims**

- (1) In any proceedings involving an apportionable claim:
  - (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and

- (b) the court may give judgment against the defendant for not more than that amount.
- (2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:
  - (a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part; and
  - (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.
- (3) In apportioning responsibility between defendants in the proceedings:
  - (a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and
  - (b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.
- (4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.
- (5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise.

**87CE Defendant to notify plaintiff of concurrent wrongdoer of whom defendant aware**

- (1) If:
  - (a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the *other person*) may be a concurrent wrongdoer in relation to the claim; and
  - (b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:
    - (i) the identity of the other person; and
    - (ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim; and
  - (c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim;

the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.
- (2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.

**87CF Contribution not recoverable from defendant**

A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim:

- (a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant); and

- (b) cannot be required to indemnify any such wrongdoer.

**87CG Subsequent actions**

- (1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.
- (2) However, in any proceedings in respect of any such action, the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

**87CH Joining non-party concurrent wrongdoer in the action**

- (1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.
- (2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

**87CI Application of Part**

Nothing in this Part:

- (a) prevents a person being held vicariously liable for a proportion of an apportionable claim for which another person is liable; or
- (b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or
- (c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.