

Economic Loss or Damage to Property and the Proportionate Liability Regime

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Introduction

1. A plaintiff's loss may be caused by two or more wrongdoers. Injustice may result if a plaintiff, by its selection of particular defendants, can throw the burden of liability onto some wrongdoers to the exclusion of others. The common law fashioned a remedy a long time ago, although it has a tortured history. Litigators are familiar with Part IV of the *Wrongs Act (1958) (Vic)* which directs attention to a 'common liability'. It permits a defendant who is held liable to the plaintiffs for the whole loss to recover a contribution in respect of that loss by making a claim against another party who is liable to the plaintiffs in respect of the same damage. This, the traditional policy response of the law, is embodied in s. 23B of the Act¹. The extent of contribution is determined in accordance with s. 24(2) which requires the Court to have 'regard to the extent of that person's responsibility for the damage'.
2. The practice developed whereby a plaintiff would sue, or execute any judgment against, the "deep pocket" defendant only. Thus an injustice was worked. The common law remedy is, procedurally, one for the defendant to prosecute. The defendant who calculates that its responsibility for the plaintiff's damage is less than the damages recovered from it by the plaintiff, can invoke the remedy. The risk that the loss could not be recovered from all those responsible for it is cast upon that defendant, not the plaintiff.

¹ *Alexander & Ors v Perpetual Trustees WA Ltd & Anor (2004) 216 CLR 109* per Gleeson CJ, Gummow and Hayne JJ at [27]. See Doug Jones, *Proportionate Liability - Reform or Regression?* [2007] Intl Constr. Law Rev. 62.

3. Although there had been pressure for reform of the rule of solidary liability over a long time, particularly in construction and engineering disputes, broad political will emerged with the “insurance crisis” at the time of the failure of HIH. Australian legislatures² introduced a proportionate liability regime, ostensibly to make insurance more affordable and widely available to the community³. The scheme **does not** extend to personal injury claims.⁴
4. Proportionate liability seeks to achieve a like purpose, to avoid injustice in the distribution of loss, but by a different process. Part IVAA relieves a defendant, against whom an apportionable claim is made, of the burden of being held liable to the plaintiff for the whole loss, and then facing the risk of pursuing contribution claims against others with a common liability under section 23B of the Act. A defendant who is subject to an apportionable claim has its liability for that loss limited, provided that it can point to others who, as concurrent wrongdoers, also caused the plaintiff’s loss. The extent of that limitation is determined in accordance with s.24AI(1) by “*having regard to the extent of the defendant’s responsibility for the loss and damage*”. The legislation effectively separates the plaintiff’s damage into divisible and discrete parts allocated against respective concurrent wrongdoers⁵.
5. Despite the apparently simple language of the Part one most significant practical changes is that contribution is a procedural remedy. Proportionate liability is a substantive defence. Thus both plaintiffs and defendants must think and act differently.

When does it apply?

6. The Part revolves around three concepts: apportionable claims (s. 24AF), concurrent wrongdoers (s. 24AH) and comparative responsibility (s. 24AI).
7. The key sections read:

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 States and Territories Legislation: Part IVAA *Wrongs Act 1958* (Vic), Part IV *Civil Liability Act 2002* (NSW); Chap 2 Part C *Civil Liability Act 2003* (QLD); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA); Part 1F *Civil Liability Act 2002* (WA); Chap 7A *Civil Law (Wrongs) Act 2002 (ACT)*; Part 9A *Civil Liability Act 2002* (Tas); *Proportionate Liability Act 2005* (NT); Commonwealth Legislation: Part VIA *Trade Practices Act 1974*; Part 2 Div 2 Sub Div GA *ASIC Act 2001*; Part 7.10 Div 2 A *Corporations Act 2001*.

³ See, for example, the Second Reading Speech to the *Wrongs and Limitation of Actions Acts (Insurance Reform) Bill, 2003*, Victoria, Legislative Council, Parliamentary Debates, (Hansard) 10 June, 2003, 2076 – 2083; *Woods v De Gabrielle & Ors* [2007] VSC 177 at [50]; and Explanatory Memorandum to the *Corporate Law Economic Reform Programme (Audit Reform and Corporate Disclosure) Bill 2003*.

⁴ See s 24AG excludes from Part IVAA claims arising from injury.

⁵ *Gunston v Lawley* [2008] VSC 97; (2008) 20 VR 33 at [65] Byrne J; *Shrimp v Landmark Operations Ltd* [2007] FCA 1466; (2007) 163 FCR 510 at [58] Besanko J; *Yates v Mobile Marine Repairs Pty Ltd* [2007] NSWSC 1463 at [94], Palmer J.

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.

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 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.
- 8.** In a practical sense for litigators, there are several issues requiring assessment:
- (a) Is the claim in the proceeding an apportionable claim?
 - (b) Are there concurrent wrongdoers?
 - (c) Is the entitlement to apportion liability excluded by the operation of the legislation; and,
 - (d) How will the court assess the comparative responsibility of a defendant and limit any judgment.
- 9.** The significance and implications of these questions will depend on whether your perspective is that of the plaintiff, the defendant or another concurrent wrongdoer.

Identifying claims susceptible to proportionate judgments

10. Is the claim for economic loss or damage to property?

- (a) Whether a claim is one for economic loss may be more complex than first appears. The applicable principles have been addressed in the cases⁶.
- (b) To date most cases have been concerned with economic loss claims, construction and engineering disputes and claims in relation to financial investment losses have figured prominently.

11. Is it a claim in an action for damages?

- (a) The cases have already raised several issues. “Damages” is defined very broadly in s. 24 AE to include “any form of monetary compensation” and this broad inclusive definition has already proved controversial. A claim for a sum certain owing under a guarantee to a bank was said by the Victorian Court of Appeal in *Commonwealth Bank v Witherow*⁷ not to be a claim in an action for damages as it was a claim to a sum certain, although the ratio of the decision is that a claim for payment under a guarantee is not an apportionable claim. In consequence a debtor could not reduce his liability to the bank by reference to the negligent conduct of his accountant. In *Dartberg*⁸, the Federal Court said that the extended definition of damages would apply to claims for a sum certain. That case concerned a claim for statutory compensation for conduct (representations about the suitability of financial products for the plaintiff) proscribed by the *ASIC Act* and the *Corporations Act*.
- (b) “Action” is not defined but “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. In *Wealthcare*⁹, Cavanough J was dealing with a compensation claim against a financial planner before a panel appointed by the Financial Industry Complaints Service. This body was not held to be a tribunal and the claim was not an action. The court considered “action” referred to legal proceedings in court and closely related comparable proceedings. The question whether a commercial arbitration is “an action for damages” remains controversial¹⁰.
- (c) “(whether in tort, contract, under statute or otherwise)” – The proportionate liability provisions are remedial and are intended to have a broad operation. This phrase first appeared in Part IV of the *Wrongs Act* in reforms, in 1985, which broadened the difficult, and limiting, concept of concurrent tortfeasors in the law of contribution. In that context, the High Court has suggested¹¹ the focus

⁶ *Woolcock Street Investments v CDG* (1999) 197 CLR 1 at [19] - [20], [42], [56]

⁷ [2006] VSCA 45 at [10]

⁸ *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* (2007) 164 FCR 450; (2007) 244 ALR 552; [2007] FCA 1216 per Middleton J at [17]

⁹ *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd* [2009] VSC 7; (2009) 69 ACSR 418

¹⁰ Michael Whitten, “Arbitration, Apportionment, and Part IVA of the *Wrongs Act*”, *Victorian Bar CPD*, 18 April, 2007: Consider whether it is possible to join other concurrent wrongdoers to the “action”. Where the process is covered by private contract, this procedure is unlikely to be available.

¹¹ *Alexander*, at [39]

should be on the quality of sameness in the “damage” where two parties are liable for contribution to a third, as an identical legal basis for that liability is not required by reason of these words. Thus, if all are liable for the same damage claimed by the plaintiff, it matters not that concurrent wrongdoer A is liable in tort, concurrent wrongdoer A is liable in contract and concurrent wrongdoer A is liable by operation of statute. However, “under statute” may not refer to Commonwealth legislation. The particular rules which govern the application of state laws in federal jurisdiction are relevant and the Commonwealth Parliament has legislated for proportionate liability. It will likely be necessary to look in relation to claims in federal jurisdiction to federal legislation for the defence¹².

- (d) “arising from a failure to take reasonable care” – The legislation in Qld uses a different test, “a breach of a duty of care” which is more limited in its scope and the SA legislation is in different terms again. It was initially anticipated that “pleaders will contrive to formulate their claims to escape this definition”¹³.

However, it has become clear that the court will look to the substance of the claim, not just the form of the claim as pleaded and the practical implications of the scope of this phrase may be significant. There are many statutory rights to damages where the loss or damage may arise from a failure to take reasonable care. In *Dartberg*, the plaintiff’s claims against a financial adviser under corporations legislation were pleaded carefully to avoid any claim based on s. 52 or any claim where a failure to take reasonable care was a necessary element. Middleton J said that the terms of the Part IVAA were not so narrow and the court may need to inquire at trial whether the loss or damage claimed did nevertheless arise from a failure to take reasonable care. In that case the Part might apply by the force of the plain language used by the legislature. Consider the practical implications of the following observations made by his Honour¹⁴:

“[30] In my view, Pt IVAA could apply in the circumstances of this proceeding according to its own terms. Where a claim brought by an applicant does not have as one of its necessary elements any allegation of failing to take reasonable care, an additional enquiry into the failure to take reasonable care may become relevant in the course of the trial to determine the application of Pt IVAA. Even though the claims in these proceedings themselves do not rely upon any negligence or a “failure to take reasonable care” in a strict sense, a failure to take reasonable care may form part of the allegations or the evidence that is tended in the proceedings. At the end of the trial, after hearing all the evidence, it may be found that Pt IVAA applies. In these circumstances, where a respondent desires to rely upon Pt IVAA of the Wrongs Act, it will need to plead and prove each of the

¹² See *Dartberg* at [32] – [36]; *BHPB Freight P/L v Cosco Oceania Chartering P/L* [2008] FCA 1656 at [8]; and *Rod Investments (Vic) P/L v Abeyratne & Ors (No. 2)* [2009] VSC 278 at [49]

¹³ Extra judicial paper presented by Justice David Byrne to the Judicial College of Victoria, 19 May 2006 *Proportionate Liability: Some Creaking in the Superstructure*, at [20]

¹⁴ *Dartberg*, at [30] – [31]

statutory elements, including the failure to take reasonable care. In a proceeding where the applicant does not rely upon any such failure, then the need for a particularised plea by a respondent may be particularly important for the proper case management of the proceedings (citation omitted). It would be desirable at an early stage of proceedings for a respondent to put forward the facts upon which it relies in support of the allocation of responsibility it contends should be ordered. If a respondent calls in the benefit of the limitation on liability provided for in Pt IVAA of the *Wrongs Act*, then the respondent has the onus of pleading and proving the required elements. The court, after hearing all the evidence, will then need to determine, as a matter of fact, whether the relevant claim brought by the applicant is a claim arising from a failure to take reasonable care.”

- (e) In *Reinhold v NSW Lotteries Corporation (No 2)*¹⁵ Mr Reinhold thought he held a winning division 1 Oz Lotto ticket. It transpired that the ticket had been cancelled before the draw. The plaintiff claimed against both Oz Lotto and the newsagent. Following a trial, Barrett J held that claims against both defendants for breach of contract and breach of duty of care in negligence had been proved. Neither defendant had pleaded proportionate liability. This did not matter. The court considered that whether or not a claim was one arising from a failure to take reasonable care was to be determined by reference to the findings of liability and causation. He approved of Middleton J’s observations and considered that the evidence warranted a finding to that effect and that the court was constrained by the statute to enter limited proportionate judgments, which after inviting and receiving further submissions he duly did. Whether in contract or in tort, the successful claims arose from the failure of the defendants to take reasonable care in relation to the cancellation of the lottery ticket and the breaches of contract were “of the same character” as the negligence.
- (f) More recently, the Victorian Court of Appeal in *Godfrey Spowers (Vic) Pty Ltd v Lincolne Scott Aust Pty Ltd & Ors (Spowers)*¹⁶ referred with approval to these very observations¹⁷.
- (g) There are cases illustrating the contrary position where apportionable claims were not found. In *Witherow*¹⁸, the bank’s claim to, in effect, seek specific performance of a guarantee by payment of a sum certain did not arise from a failure to take reasonable care. In *Pearsons v Avison*¹⁹, that a claim for breach of trust might fall within the Part as arising from a failure to take reasonable care was doubted. The same conclusion may be reached where there has been a breach of a fiduciary duty. In the case of the duties of directors of corporations to take reasonable care an apportionable claim may arise as the

¹⁵ [2008] NSWSC 187

¹⁶ [2008] VSCA 208 (Nettle, Ashley & Neave JJA)

¹⁷ at [108], see also *Solak v Bank of Western Australia Ltd* [2009] VSC 82 at [35].

¹⁸ [2006] VSCA 45, at [11] and [14] per Maxwell P.

¹⁹ [2009] VSCA 54 (Warren CJ, Buchanan & Ashley JJA)

duty is both equitable and statutory²⁰. A claim for breach of warranty of authority was held by Finkelstein J in *BHPB Freight* not to be an apportionable claim as it did not arise from a failure to take reasonable care. Again, care is needed in analysing the circumstances of the claim. If it is the case that the warranty of authority was in fact breached by careless conduct, it matters not that establishing a breach of a warranty of authority does not require proof of a want of care.

- (h) “for a contravention of s. 9 of the Fair trading Act, 1999” – There is a like uncertainty. What if the claim is not pleaded that the loss was caused by a representation which was deceptive and misleading conduct in contravention of s. 9 but it is pleaded that the loss was caused by the making of a misrepresentation that was false and misleading in a material particular in contravention of s. 12. Relief may be pursued under some other section or other cause of action rather than s. 9. If the defendant alleges and proves, or the Court finds on judgment as in *Reinhold*, that the plaintiff pursuing other relief or causes of action has nonetheless suffered loss by reason of a contravention of s. 9, is the claim an apportionable claim? In an interlocutory strike out application, Hollingsworth J in *Woods v De Gabrielle*²¹ considered this proposition was at least arguable.
- (i) A like argument may be available in relation to the definition of apportionable claims under federal legislation to contend that it is the substance of the claim, not the form of the pleading, which is important. The definitions of apportionable claim in Federal acts are broader than s. 24AF(i)(b) which refers to a “claim for damages for a contravention of s. 9...”. Taking s. 87CB of the *Trade Practices Act, 1974* as the working example²², an apportionable claim is a “claim for damages made under s. 82.....caused by conduct that was done in contravention of s. 52”.

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.

On its form, a claim for compensation under s. 87 caused, for example, by conduct that was done in contravention of s. 53 is not an apportionable claim, but the circumstances found at trial could lead to the conclusion that, as a matter of substance, the plaintiff’s claim is properly characterised as a claim for damages made under s. 82 caused by conduct that was done in contravention

²⁰ see *Wheeler v Permanent Building Society* (1994) 14 ACSR 109; (1994) 11 WAR 187.

²¹ [2007] VSC 177

²² see also s. 1041L of the Corporations Act, 2001 and s.12GP of the ASIC Act.

of s. 52. It might be thought that Finkelstein J closed this door in *BHPB Freight*²³ when he observed that the claim for relief under s. 87 is not an apportionable claim, but that case is about pleadings and turns on the form of the pleadings being considered, a statement of claim. Could not the defendant engage the issue by appropriately pleading that the plaintiff's claim was in fact an apportionable claim in substance? This, in turn warrants consideration whether a claim is defined by the plaintiff's pleading alone, having regard to what the Court of Appeal said in *Spowers*²⁴, albeit in the different context of s.23B of the *Wrongs Act*.

- (j) It remains the case, I suggest, that notwithstanding the triumph of substance over form at trial, there may still be rewards for pleaders who contrive to formulate their claims to escape the definition of apportionable claims or their defences to enliven it.

Multiple plaintiffs and multiple claims

12. It may be convenient at this point to note some other aspects of the provisions. Wrongdoing in large commercial projects can result in more than one person/entity sustaining loss and different causes of action may be available to plaintiffs against different defendants. The damages recoverable in respect of the damage suffered by innocent parties may vary depending on the legal rules for assessment of damages applicable under different causes of action.

- (a) Plaintiffs can bring two or more claims in one proceeding and they can arise out of different causes of action. If those claims are apportionable claims, they are determined in accordance with the Part as if they were a single claim Section 24AF(2) states:

“(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.”

- (b) Under federal legislation the concept of the same damage is utilised in the like provision as the test whether multiple claims may be aggregated. For example, s. 87CB(2):

(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).”

- (c) If the proceeding involves both apportionable and non-apportionable claims, the court is enjoined by s.24AL(2) to determine liability for the apportionable claim in accordance with the Part and liability for the other claim in accordance with other relevant legal rules.

²³ at [9]

²⁴ at [117] per Ashley JA

13. Issues may arise because of the enabling, permissive nature of rules of court with respect to joinder of parties on the one hand²⁵ and these provisions on the other hand. However, issues which may arise about whether the claims of different plaintiffs are aggregated can be worked through by the application of the concept of “same damage”. Only different claims in respect of the same damage can conceptually be treated as a single claim. Where there are apportionable and other claims in respect of one loss, a question arises whether there is a single apportionable claim. If so, is the plaintiff precluded from electing to enter judgment on the non-apportionable claim to avoid the consequences of the defence of limited liability taken on the apportionable claims²⁶. I would not expect such a contention to find favour. I doubt that a court could find a warrant, on a proper construction of the Part, for a substantially broader scope being given to proportionate liability.

Who are concurrent wrongdoers?

14. As stated at the outset we are concerned with claims where a plaintiff’s loss is caused by two or more wrongdoers. To successfully take the defence the defendant must prove that there are other wrongdoers who must bear responsibility for the plaintiff’s loss. While a commercial risk in respect of recovery of its loss is cast upon a plaintiff, it is not intended to cast a further legal risk on the plaintiff. Once entitlement to judgments for its loss is established the court apportions responsibility for the whole loss between the defendants in the proceeding entering judgments which ought, collectively, reflect the plaintiff’s entitlement for the full loss sustained.

15. The concept of a “concurrent wrongdoer” is central.

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.

16. It matters not that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died²⁷ and, except in Victoria, it is not necessary that the wrongdoer be a party to the proceeding²⁸. It is important to recall that the Victorian provisions are unique in their requirement that responsibility can only be apportioned between wrongdoers who are defendants.

17. A concurrent wrongdoer is one who caused the loss. Much ink has been spilled by appellate judges in explaining causation in the context of legal liability in recent times²⁹ and that learning will elucidate the concept. In this context factual causation is not enough. The concepts of wrongdoers bearing responsibility require more. The defendant seeking to reduce the judgment against it must prove other concurrent wrongdoers are legally liable to the plaintiff. In *Sali v Metzke & Allen*³⁰, Whelan J

²⁵ Order 9, Vic. Supreme Court Rules.

²⁶ This argument was put but not decided, possibly doubted, in *Woods v De Gabrielle*, at [31] - [37]

²⁷ s. 24AH(2)

²⁸ s. 24AI(3)

²⁹ e.g. *March v Stramere* (1991) 171 CLR 506

³⁰ [2009] VSC 48 at [282]

concluded that “before a person can be a concurrent wrongdoer that person must be legally liable to the plaintiff”. In *Shrimp*³¹, Besanko J held the “caused” (in s.87CB(3) of the TPA) should be read as meaning “such as to give rise to a liability in the concurrent wrongdoer to the plaintiff or applicant”³².

18. An initial implication of this requirement is that the defendant pleading proportionate liability will need to plead, and ultimately prove, the legal liability of other concurrent wrongdoers to the plaintiff, unless of course the plaintiff chooses to do so. In cases of property damage it may be easier to show that loss was reasonably foreseeable than it may be to show liability for pure economic loss where other factors such as vulnerability, control, or special reliance may be apposite. The section does not require that the basis of legal liability be the same for different concurrent wrongdoers. In *Yates*, Palmer J considered claims against an engine repairer (for negligent work in contract and tort) and the engine manufacturer whose liability was exclusively contractual. The plaintiff’s argument that the manufacturer did not cause the loss by its acts or omissions was rejected on the basis that a contract breaker may be a concurrent wrongdoer whose omission to properly perform the contract caused the loss.
19. There are a number of other issues which have not yet been determined by the courts relevant to the concept of legal liability of the plaintiff and its implications for a defendant seeking to limit its liability by reference to the responsibility of another wrongdoer. What if:
 - (a) the plaintiff’s cause of action against that concurrent wrongdoer has become statute barred; or
 - (b) the plaintiff’s cause of action against that concurrent wrongdoer has been released? Where a plaintiff has settled with, and released, a concurrent wrongdoer who is a party to the proceedings the remaining defendants need to be vigilant to protect their rights and this issue is further discussed below.
20. It remains to identify a further issue in relation to concurrent wrongdoers not immediately evident from reading s. 24 AH. The Court of Appeal held in *Spowers* that a party only has status as a concurrent wrongdoer upon the entry of judgment³³. The implications of this decision are considered below.

How do courts apportion liability?

21. Once a concurrent wrongdoer is identified and provided the claim is not an excluded claim, at trial s. 24AI applies. It is set out above (at 2.1). The phrase “that the court considers just having regard to the extent of the defendant’s responsibility” is not new³⁴. The principles explained in *Podrebersek v Australian Iron & Steel Pty Ltd*³⁵

³¹ [2007] FCA 1468; (2007) 163 FCR 510 , at [62]

³² See also *Dartberg*, at [40] and *Chandra v Perpetual Trustee Vic Ltd* [2007] NSWSC 694; (2007) 13 BPR 24,675; (2007) ANZ ConvR 481; (2007) Aust Torts Reports 81-896, at [110]

³³ at [98], [105] - [106]

³⁴ see s. 24(2) *Wrongs Act* - contribution

³⁵ (1985) 59 ALJR 492

has been applied³⁶ in assessment of proportionate judgments. This decision mandates a factual inquiry into a matrix of causation, meaning the relative importance of the acts in question in causing the plaintiff's loss, and culpability, meaning not moral blameworthiness, but the degree of departure from the required standard³⁷. The court described the exercise as "a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds"³⁸.

22. Chernov JA in *Alcoa Portland Aluminium Pty Ltd v Husson & Anor*³⁹ stated that:

"The approach to be adopted ... requires a comparison both of culpability and the relative importance of the acts of the parties in causing the injury, requiring the whole of the relevant conduct of each of the negligent parties to be subject to comparative examination. The tasks involve matters of proportion, balance and relative emphasis and are, in this regard, similar to the exercise of a broad discretion."

Chernov JA went on to note that in some cases there may be a "merger or overlap of the question of culpability and importance of the wrongful acts".

23. To ensure the court's inquiry is properly focussed requires this to be raised by pleadings and then proving at trial the material facts which are the foundation of this inquiry.

What claims may be excluded?

24. There is an ongoing policy debate about exclusions, particularly whether contractual allocation of risk should be excluded. The "uniform" legislation in operation throughout Australia highlights the tensions. In NSW, WA and Tasmania, parties may exclude the application of proportionate liability by contract.⁴⁰ That exclusion is not found in Part IVA. In Qld, contracting out of the statute is expressly prohibited⁴¹.

25. Various specific forms of claims, claims arising out of personal or bodily injury⁴² and claims to compensation⁴³ under specific statutes are excluded.

26. Claims involving particular legal relationships, being vicarious liability, agency or partnership⁴⁴ are excluded.

³⁶ *Reinhold*, at [50 - [51]; *Ginelle Finance Pty Ltd v Diakakis* [2007] NSWSC 60 at [123]; *Vella v Permanent Mortgages Pty Ltd* [2008] NSWCS 505 at [579] & [591]; *Spiteri v Roccisano* [2009] VSC 132; *Sali v Metzke & Allen* [2009] VSC 48 at [290] - 294]

³⁷ *Pennington v Morris* (1956) 96 CLR 10

³⁸ at 532

³⁹ (2007) 18 VR 112; [2007] VSCA 29 at [86]

⁴⁰ s. 3A(2) *Civil Liability Act 2002* (NSW); s. 4A *Civil Liability Act 2002* (WA); s. 3A(3) *Civil Liability Act 2002* (Tas)

⁴¹ s. 7(3) *Civil Liability Act 2003* (QLD)

⁴² defined in s. 24AE

⁴³ s. 24AG

⁴⁴ s. 24AP(a) - (c)

27. In all jurisdictions other than Victoria, intentional conduct is excluded. A finding of fraud or a liability to pay exemplary or punitive damages will exclude proportionate liability⁴⁵.

28. The situation where a defendant is fraudulent attracts s. 24AM which states:

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.

The operation of this provision is yet to be clarified by the courts.⁴⁶

What practical issues arise about parties and pleadings?

29. It will be clear from the discussion thus far that the parties to the proceeding and the nature of the allegations in the pleadings are critical considerations. It is likely that, in case management, the courts will direct the attention of parties to these issues at an early stage. Having identified on instructions the relevant concurrent wrongdoers the plaintiff's advisers must ask whether the plaintiff is, or intends to, claim against them all and the defendant's advisers must consider whether all of the concurrent wrongdoers on whose comparative responsibility it wishes to construct its defence are parties.

30. A particular empowering section for joinder of parties is found in Part IVAA, although the Rules of Court seem sufficient⁴⁷. To add any additional parties to the proceeding raises issues. Traditionally, a defendant joins other parties to the proceeding by third party proceeding not to the claims made by the plaintiff. Third party procedures require claims and entitlement to relief to be pleaded against the third party who in turn responds by a defence. The concurrent wrongdoer defendant seeking the benefit of Pt IV AA is taking a defence against the plaintiff's claim that it is liable for the whole of the plaintiff's loss. Unlike any other defence which might be taken to a plaintiff's claim, this defence requires that the defendant ensure that the other concurrent wrongdoers, whose comparative responsibility to the plaintiff for its loss must be assessed, are parties to the proceeding for the purpose of establishing its defence.

31. For the application of proportionate liability under s. 24 AI, "defendant" is defined⁴⁸ to include any person joined as a defendant or other party to the proceeding (except as a plaintiff) whether joined under this Part, under Rules of Court or otherwise. It has now been established that the proper course to be followed upon a joinder application by the defendant is that such parties ought to be joined as defendants to

⁴⁵ s. 24AP(d)

⁴⁶ See *Chandra v Perpetual Trustees Victoria Ltd* [2007] NSWSC 694; (2007) 13 BPR 24,675; (2007) ANZ ConvR 481; (2007) Aust Torts Reports 81-896.

⁴⁷ S. 24AL and Order 9. Historically the joinder by the defendant of parties to the proceeding against the wishes of the plaintiff was controversial. See *Boral Resources Pty Ltd v Robak Engineering and Construction Pty Ltd* [1999] VSCA 66; [1999] 2 VR 507.

⁴⁸ See s. 24 AE

the plaintiff's claim. The existing defendant seeks no relief against the joined party. Its defence is pleaded against the plaintiff and the requirement of the statute is satisfied if the concurrent wrongdoer is merely a party. Thus, the basis upon which the joined party comes into the proceeding is established by the allegations made in the defendant's defence to the plaintiff's claim and not in some other pleading directed by the existing defendant to the joined party such as a Third Party Notice or a Notice pursuant to R 11.15⁴⁹.

- 32.** Where the existing defendant does seek relief against the joined party, it will be appropriate for the joined party to be added as a third party rather than as a defendant. Instances where joinder has been by third party proceeding and a claim pleaded out against the joined party have involved relief by way of declaration that the joined party is a concurrent wrongdoer. This is unnecessary. In *P and V Industries* the plaintiff contended, in opposing the joinder application that the defendant had to set out, in a pleading served in the joined defendant, the material facts by which the joined party was a concurrent wrongdoer. His Honour stated:⁵⁰

“...While it is true that their primary obligation is to do so in their defence, the obligation may also extend to providing the [joined party] with an opportunity to respond to the allegation made in respect of them and to participate in the proceeding...

[10] In my opinion, any defendant joined under Pt IV AA of the Act should have the right to participate in the proceeding if so advised. They are, after all, a joined party and presumably bound by the outcome which may have foreseen an unforeseen consequence for them. I respectfully agree with the approach adopted by Hargrave J in *Atkins v Interprac* but do not consider a claim for a declaration to be a material factor in deciding whether [the defendant] should be required to formulate and deliver to the [joined party], in appropriate form at the appropriate time, the material facts alleged in respect of them. This may be achieved by way of counterclaim, as in *Atkins v Interprac*, or by some other process or procedure.”

- 33.** The court determined that the defendant was not required to deliver pleadings against the joined party at the time when the order for joinder was made. The joined party was entitled to apply for directions in due course if they wanted pleadings although, by that time the plaintiff may, or may not, have decided to pursue a claim against them. Depending on that decision, the joined party may, or may not, have decided to participate in the proceeding.
- 34.** In a practical sense, the defendant wishing to raise the proportionate liability defence must plead in its defence the following matters:
- (a) The plaintiff's claim is an apportionable claim;
 - (b) Certain identified parties are concurrent wrongdoers because their acts or omissions also caused the loss or damage the subject of the plaintiff's claim;

⁴⁹ *Woods v De Gabrielle*, at [65]; *Atkins v Interprac* [2007] VSC 445; *P and V Industries P/L v Secombs* [2008] VSC 209 and *Cowan v Greatorex* [2008] VSC 401.

⁵⁰ At [9] – [10]

- (c) Each of the defendant and those identified parties are concurrent wrongdoers;
 - (d) The defendant's liability in respect of the plaintiff's claim should be limited to an amount reflecting that proportion of the loss or damage that the court considers just having regard to the extent of the defendant's responsibility for that loss or damage; and
 - (e) The pleading should also allege the material facts identifying the comparative responsibility of the other concurrent wrongdoers for the plaintiff's loss by reference to which the defendant contends its responsibility for the plaintiff's loss is to be limited.
 - (f) Any judgment against the defendant in respect of that claim must therefore be limited to that amount.
- 35.** The degree of complexity required in pleading the defence will be influenced by the attitude of the plaintiff, in particular whether the plaintiff is claiming against all concurrent wrongdoers. If the plaintiff has already done so the defendant can simply refer to and adopt the plaintiff's pleading against the concurrent wrongdoer to allege the material facts of comparative responsibility. When the defendant needs to join parties, in the first instance, the material allegations raised in the defence about the comparative responsibility of other wrongdoers may be general. Much will depend upon the expectation as to whether the plaintiff will separately pursue the claim against the concurrent wrongdoer which is being raised by the defendant. These are difficult pleading issues and the guiding principle should be that unless the material facts in relation to the concurrent wrongdoers responsibility to the plaintiff are alleged and proved either by the plaintiff or by the defendant, the court will have limited opportunity to make a proper assessment of proportionate liability. The circumstances may not be complex, as in *Reinhold* where the issues had not been raised on pleadings, or they may be extremely complex as in *Premier Building and Consulting Pty Ltd v Spotless Group Ltd and Others*.⁵¹
- 36.** In part these issues are peculiar to Victoria and to proceedings under Pt IV AA of the *Wrongs Act*. Under other proportionate liability regimes the defendant must notify the plaintiff or face cost penalties.⁵² The defendant is not required to have those concurrent wrongdoers joined to the proceeding in order to obtain a judgment limited to its comparative share of responsibility. Failure to give notice does not result in a denial of the defence. It seems plain that the purpose of notice under other proportional liability regimes is to provide the plaintiff with provable notice of the identity of the concurrent wrongdoers and the circumstances which make those persons concurrent wrongdoers⁵³. These provisions do not impose a positive obligation upon a defendant. Rather, they expose it to the prospect of a cost penalty for non-compliance. An expensive adjournment may be the result of no notice although the court may conceivably decide to press on with the trial. There may be insufficient evidence for responsibility (or significant responsibility) to be attributed to

⁵¹ (2007) 64 ASCR 114; [2007] VSC 377

⁵² Eg s. 87CE TPA

⁵³ Eg s. 87CE TPA

concurrent wrongdoers first identified at a late stage of the proceeding or at trial. The court may strike out the defendant's defence.

37. What needs to be pleaded under the notice regimes has been discussed in NSW decisions. In *Ucak v Avante Developments Pty Ltd*⁵⁴, Hammerschlag J stated that, in respect of another concurrent wrongdoer, the defendant must plead:

- (a) The existence of that person;
- (b) The relevant acts or omission by that person; and
- (c) The facts which would establish a causal connection between those acts or omission or the loss which is the subject of the apportionable claim against the defendant.

This decision was followed in *HST Co Pty Ltd v Masu Financial Management Pty Ltd*,⁵⁵ a financial loss case where the defendant financial advisors were required to allege the basis upon which they asserted that the alleged concurrent wrongdoers owed a duty of care to the plaintiff and had breached that duty.

Can there be more than one proceeding?

38. It appears that the plaintiff is not obliged to pursue all of its claims in the one action. However, double recovery will not be permitted.

24AK. 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 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.

39. Usually, a party to a proceeding against whom a plaintiff brings a subsequent claim defendant will plead *Anshun* estoppel⁵⁶. Do the words "nothing in this Part or any other law" preclude the *Anshun* principle? The section empowers "bringing another action against any other concurrent wrongdoer for that loss". Would it otherwise not apply in the case of the joined defendant against whom the plaintiff declines to pursue a claim only to find on judgment that the court considers the plaintiff must do so to recover all of its loss? There would not be any judgment against that defendant. Should the apportionment of liability reached in the first proceeding be

⁵⁴ [2007] NSWSC 367

⁵⁵ [2008] NSWSC 127

⁵⁶ *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; (1981) 147 CLR 589. Hargrave J discussed, *obiter*, this question in *Atkins*, at [36] without reference to s. 24AK or the benefit of argument

open for reconsideration? Will the joined defendant, who did not participate, be bound by the earlier apportionment? There are all questions for the future.

Conduct of the proceeding, preparation and trial

40. Should a joined defendant⁵⁷ participate in a proceeding? If the plaintiff adopts the claim asserted on its behalf by the concurrent wrongdoer and seeks substantive relief directly against the joined party, the answer is clear. There may be good reasons why the plaintiff chooses not to do so. The asserted claim may, from the perspective of a better informed plaintiff, be misconceived. It may be uneconomic to do pursue a claim, either from the perspective of the prospects of recovery or upon an assessment of litigation risk. The plaintiff and the joined defendant may have ongoing commercial relations. They may have settled, with a release. If the plaintiff does not adopt the claim, there will often be good reasons for the joined defendant to not contest the proceeding. Most defendants in that position will not be insured against defence costs. There is no financial exposure and the negative impact on reputation which might follow from a proportionate judgment against someone else is obscure. Moreover, actively contesting allegations tends to draw judges into making findings and expressing conclusions whereas a lack of a proper contradictor may have the opposite effect.
41. Consequential orders under R. 9.11 effect the procedural changes required to the writ following joinder of a further concurrent wrongdoer. The joined defendant must be served. The writ and statement of claim may show that no relief is sought against the joined defendant by the plaintiff. Careful consideration needs to be given when acting on behalf of a joined defendant whether to even appear in the proceeding. I am not aware of any cases where the court has considered interlocutory processes against a defendant joined solely for the purpose of another defendant's proportionate liability defence. A plaintiff could not enter judgment in default of appearance because it has not made any claim of the type for which an application for judgment in default of appearance may be brought under the Rules.⁵⁸ For the like reason a plaintiff could not bring an application for summary judgment.
42. As there are no pleadings involving the joined defendant, the process of discovery cannot be initiated⁵⁹. However, the court is empowered under R 29.07, and probably pursuant to its inherent jurisdiction to control its own processes, to order the joined defendant to make discovery of documents. Discovery issues may become significant. Where the plaintiff has elected not to proceed against the joined defendant, it may be presumed that the plaintiff is interested in either demonstrating that it does not have a claim against the joined defendant, or that the joined defendant has a good defence or that the comparative responsibility of the joined defendant for its loss is minimal. For its part, the active defendant will be seeking to prove the plaintiff's claim against the joined defendant to maximise the assessment of comparative responsibility. By reason of the allegations in the pleadings about the proportionate liability defence, the plaintiff's documents relevant to the material facts

⁵⁷ Throughout the paper the term "joined defendant" is used to refer to a defendant in the proceeding who is not sued by the plaintiff.

⁵⁸ See Order 21

⁵⁹ See R 29.02

pleaded in the defence (or a reply) for the assessment of comparative responsibility of the joined defendant will be discoverable. It is likely that the defendant will also seek relevant documents from the joined defendant but for the opposite purpose, namely to prove the plaintiff's claim against the joined defendant.

43. Judges have not hesitated to acknowledge that a joined defendant is entitled to participate in the trial should they chose to do so to defend the defendant's prosecution of a claim of the plaintiff against it⁶⁰. It can be expected that where a joined defendant elects to proceed in a trial, some form of pleading may be required of it to define the grounds of its participation and as a basis to clarify and define its obligations and boundaries in respect of documents, evidence, submissions and costs.

Godfrey Spowers (Vic) Pty Ltd v Lincolne Scott Aust Pty Ltd⁶¹

44. Building owners pursued a damages claim for economic loss in excess of \$10 million against two defendants, the architect (Spowers) and the builder, alleging that each failed to take reasonable care, causing defects in an office building project. Spowers pleaded that its liability was limited under Part IVAA by reference to its comparative responsibility and that of the builder and two other concurrent wrongdoers, the surveyors and the engineer. To propound the defence in the proceeding Spowers joined the building surveyors and the engineer as third parties. The plaintiffs made no claim against the third parties in the proceeding. Spowers further alleged that, only in the event that Part IVAA did not apply, it was entitled to claim contribution from the third parties under Part IV of the Act.
45. The plaintiffs and Spowers settled. Spowers was released from the plaintiffs' claims, and the proceeding discontinued. The plaintiffs also agreed to release either or both of the engineer and the surveyors from the subject matter of the proceeding upon Spowers' request but they were not parties to the settlement or the Deed. At this point, Spowers amended its third party proceedings to abandon all claims based upon Part IVAA and to seek contribution to the settlement sum it had paid to the plaintiffs.
46. The third parties successfully applied for summary judgment against Spowers. The primary judge held⁶² that Spowers had compromised an exclusive liability to the plaintiffs because, in respect of an apportionable claim, the legislation '*provides for the separate liability of each of the defendants before the court*'. There was no part of the settlement amount to which Spowers could recover contribution, it was not 'just and equitable' under s 24(2) of the Act. The claim to contribution was summarily dismissed as '*no good purpose would be served*' by permitting it to proceed. This decision was reversed on appeal and the Court of Appeal held⁶³ that a party is only subject to proportionate liability under Part IVAA on judgment. In the leading judgment, Ashley JA concluded that protection to a defendant from claims

⁶⁰ This was done, with success, by the building surveyor, Mackenzie Group Consulting Pty Ltd in *Premier v Spotless* (2007) 64 ASCR 114; [2007] VSC 377. However, the plaintiff's claims against the parties who alleged Mackenzie was a concurrent wrongdoer also failed so the success was moot.

⁶¹ [2008] VSCA 208

⁶² [2008] VSCA 90

⁶³ at [98], [105] & [106]

for contribution is only attracted by a judgment when findings of fact are made. Until that time, Part IV, which specifically addresses compromise of proceedings could be utilised. Without findings of fact supporting a judgment, it could not be contended that Spowers had compromised no more than its just proportion of the plaintiff's loss. Having settled the proceeding prior to judgment, there was no impediment to contribution proceedings, a conclusion reinforced by s. 24AO. The court also considered that the purchase of the right to require a release from the plaintiff for the benefit of the third parties was part of the consideration for the settlement sum so the third parties "could hardly complain"⁶⁴.

47. How this reasoning will work in practice remains to be seen as the proceeding was settled⁶⁵.

Determining dispute resolution strategies

48. Many cases where proportionate liability will be in issue will involve complex multiparty disputes. Being commercial cases, settlements will be sought. The first objective of settlement, on either side, is to put an end to the dispute. Often, there are parties facing insolvency or parties with limited insurance cover. The greater the degree of certainty as to the scope and extent of the risks faced by a party in a proceeding the greater the prospect of settlement.
49. Dispute resolution involves, broadly, two tools, direct negotiation and/or structured negotiation, i.e. mediation on the one hand and offers of compromise and/or Calderbank letters on the other hand. The first lesson from *Spowers* is that where judgment has not been entered but the plaintiff has settled with a defendant, a continuing defendant, whether sued by the plaintiff or not may face a substantive contribution claim. This is, of course most unsatisfactory as the management of the risks involved in the litigation cannot be founded on the issues raised between the parties joined. It will depend on the later conduct of others.
50. In a joint and several solidary liability regime a defendant has to negotiate a satisfactory resolution to both its liability to the plaintiff and its liability to contribution between defendants. In practice, settlement of multiparty litigation often involves the collection of separate portions by the plaintiff and the granting of mutual releases. If achievable under a proportionate liability regime, the same result will follow and the defendants will have the necessary assurance that the matter is finalised. When the process failed, in a joint and several solidary liability regime, the parties had to utilise Rules 26.08 and 26.09 or *Calderbank* letters to establish costs protection. These rules turn on allegations and claims made, but Part IVAA does not. It operates on findings and judgments.⁶⁶ A defendant must offer to compromise the claims of all defendants and if joining with other defendants in making the offer must accept joint and several liability for the whole offer. This is unattractive to a defendant specifically seeking to take advantage of the new regime, especially if its

⁶⁴ Ashley JA at [122]. However there is no principle of law which requires a person to make a contribution merely because it may have derived a benefit (*The Ruabon v The London Assurance* [1900] AC 6 at 10, 12; approved by the High Court of Australia in *Mahoney v McManus* (1981) 180 CLR 370 at 337 per Gibbs CJ; see also *Lumbers v W Cook Builders Pty Ltd* (2008) 232 CLR 635 at [80] and *Friend v McArthur* [2009] HCA 21 at [7])

⁶⁵ shortly prior to the return of the application for special leave to appeal to the High Court of Australia

⁶⁶ *Spowers*, see footnote 59

exposure to risk is small. If a defendant makes a separate offer (say 25%) the plaintiff will not be obliged to accept it and will not be exposed to indemnity costs if that defendant succeeds at trial either wholly or more favourably.

51. Can a plaintiff serve an offer to compromise? R. 26.09 requires that it be an offer to all defendants to compromise the claim against all of them. The plaintiff will allege the defendants are all liable for the loss and although the defendants will contend each has a separate liability to the plaintiff⁶⁷, *Spowers* stands for the proposition that rights of contribution will appear to exist, at least until judgment, despite the pleadings. Will R. 26.09 apply? The answer to that question may now turn on when it is being asked.
52. In *Barwon Water v Aquatec Maxcon Pty Ltd*⁶⁸ the proceeding at trial involved claims, which failed, that liability be apportioned under the *Building Act, 1993 (Vic)* between many defendants. Barwon made an offer of compromise on its counterclaim to all defendants for a lesser sum than that for which it ultimately settled, late in a long trial, from Aquatec alone. Should Aquatec alone have accepted the offer? Barwon thought so and appealed the refusal of the trial judge to award it indemnity costs. The court observed⁶⁹

“there does not appear to be any basis under the offer of compromise rule in this Court for the proposition that an offer made to all respondents/defendants can be accepted by only one..... given that one party has no power to compel others it would be unacceptably harsh to insist upon acceptance in all the circumstances.”

53. The plaintiff may engage with the proportionate liability concept and serve separate offers e.g. agreeing to accept 33.3% (say of a discounted claim) from each of D1, D2 and D3 separately although it would be unusual for the plaintiff not to allege joint and several liability for its loss. What if D1 accepts the offer and the trial proceeds against D2 & D3 and the result is that liability is apportioned 50:40:10. More questions arise. D2 suffered a worse result at trial and ought to have accepted the offer. Does the plaintiff recover indemnity costs and if so in respect of what items of costs?
54. Consider where a plaintiff settles with one concurrent wrongdoer only, not in the circumstances of *Spowers* but, where the plaintiff continues its proceeding against other defendants. This situation arose in *Vollenbroich v Krongold Constructions Pty Ltd*⁷⁰. The owner sued the builder, architect and engineer in respect of loss arising from negligent design and construction of a new house. The architect and engineer pleaded proportionate liability and joined others as parties for that purpose. On the first day of trial, the architect and engineer both settled with the plaintiff. They applied for judgment for the plaintiff against them as s. 24AJ states:

⁶⁷ *Gunston v Lawley*, at [65]

⁶⁸ [2007] VSCA 186; (2007) 17 VR 480

⁶⁹ 24

⁷⁰ [2006] VCAT 1710

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—

(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.

55. Judgment was opposed by the other defendants as the consequence would be that the architect and engineer would no longer be parties to the proceeding precluding the remaining defendants from referring to their comparative responsibility as concurrent wrongdoers. Neither could the other defendants re-join the architect and engineer as parties for the purposes of apportionment⁷¹. The tribunal struck out the owner's claims against the architect and engineer, stating that judgment would be entered at the conclusion of the proceeding for the settlement sums and ordered that the architect and engineer remain as nominal parties for the purposes of the defences of the remaining defendants.

56. Now consider a different issue. Take an example where four concurrent wrongdoers are each equally properly liable for a loss of \$1M but D1 settled for 50% of the plaintiff's claim and the remaining defendants have proceeded to trial. Assume further that D1 remains a party to the proceeding holding a release from the plaintiff. The plaintiff has recovered \$500,000 from D1. How is this recovery accounted for? Can the other defendants contend that any judgment against them must be limited to \$166,666? Can the plaintiff contend it is entitled to a judgment against each remaining defendant for \$250,000?

57. This issue arose on a review of a decision of the VCAT before Byrne J in *Gunston v Lawley*⁷². Finding in favour of the latter contention, that the liability of a concurrent wrongdoer will not be reduced by reference to the settlement with another wrongdoer and commencing with recognition of the rule against double compensation⁷³ his Honour then stated⁷⁴ (omitting references):

[57] Within the proportionate liability regime of Part IVA of the Wrongs Act, the same principle is adopted. Section 24AK permits a plaintiff to seek and obtain in a subsequent proceeding an order for damages in respect of the same loss and damage as was the subject of an earlier proceeding. The terminology of this section and s 24AL is a little awkward. It may be supposed that, in the first proceeding, the plaintiff would have obtained

⁷¹ s.24AL(2) precludes joinder of of any person who was a party to any previously concluded proceeding in relation to the apportionable claim.

⁷² [2008] VSC 97; (2008) 20 VR 33

⁷³ see *Bonchristiano v Lohmann* [1998] 4 VR 82, 89

⁷⁴ in *Spowers Ashley* JA at [109] - [111] considered these observations "pertinent" and not "at odds" with the views he was expressing.

orders against all of the concurrent wrongdoers before the Court, which in total would amount to 100% of its loss or damage, for the task of the Court in that proceeding was to determine responsibility for that loss as between all of those concurrent wrongdoers. The second proceeding, against another concurrent wrongdoer, could not disturb the allocation of responsibility made in the first proceeding because none of the wrongdoers then before the Court might be joined in the subsequent proceeding. The consequence of a successful prosecution of the second proceeding, therefore, would be to give to the plaintiff an order which, together with those previously made, would exceed the total loss and damage suffered. This indicates that the intention of s 24AK(2) is not to prevent double judgments.

- [58] With this in mind, I return to s 24AI(1). Paragraph (a) is concerned with liability; paragraph (b) with judgments. In each case, the section speaks of an amount which marks the limit of each concurrent wrongdoer's liability and the limit of the permissible judgment against that wrongdoer. In each case the amount reflects the proportion of "the loss or damaged claimed" which is found to be just having regard to that person's responsibility for that loss or damage. I have been troubled by the word "claimed" in the quoted phrase. This cannot refer to the quantum of the claim for this might be reduced after trial. It must refer to the type of loss or damage claimed, leaving to one side the quantum of this which has been established. I construe the expression "loss or damage claimed" as a shorthand version of the expression "the proved loss or damage which is the subject of the claim".
- [59] The scheme of s 24AI is that any given defendant is at risk of liability and judgment for an amount limited to its proper share of the loss or damage the subject of the claim. This risk is not increased by dealings between the plaintiff and another concurrent wrongdoer. For example, a failure by that wrongdoer to pay its share does not increase the liability of any other defendant. Nor is it diminished by dealings between the plaintiff and another wrongdoer as, for example, the successful outcome of a subsequent proceeding under s 24AK. I speak here of the risk represented by the liability which has been determined in the first proceeding and the judgment given in that proceeding. Where, however, the plaintiff recovers money in the subsequent proceeding, the rule against double recovery may come into play to bring about some adjustment as between the wrongdoers.
- [60] The effect of the proportionate liability regime, therefore, is to transform fundamentally the relationship which exists between a plaintiff and a concurrent wrongdoer defendant. Where under a solidary liability regime each defendant is liable for the whole of the plaintiff's loss, a payment by one must affect the liability of the other. It is for this reason that the plaintiff, after settlement with one wrongdoer which involves payment by that wrongdoer in diminution of the plaintiff's loss, cannot obtain judgment for the total loss. In the proportionate liability regime, however, a payment by one concurrent wrongdoer is a benefit conferred on the plaintiff independently of its right of redress against each other wrongdoer. To adapt the dictum of Dixon CJ in *National Insurance Co v Espagne*, the benefit of the payment

made by the concurrent wrongdoer is intended for the plaintiff; it is not intended in relief of the liability of the others each to compensate the plaintiff to the limit of its proportionate liability.”⁷⁵

Costs

58. In *Spowers*, the Court of Appeal⁷⁶ thought it significant that Part IVAA did not make mention of settlement or compromise. It makes no mention of costs. In my view, unsuccessful defendants will be jointly and severally liable for costs in the usual way, that is that costs are in the discretion of the court. The provisions of the Rules in relation to offers of compromise⁷⁷ have not been affected by Part IVAA. How those rules operate in a proportionate liability regime is not readily discernable, as discussed above.

59. In *Gunston v Lawley*⁷⁸ Byrne J also reviewed a costs order made by VCAT in a building dispute. The tribunal had dismissed claims against two alleged concurrent wrongdoers and upheld claims against three concurrent wrongdoers, the builder, the building surveyor and the architectural draughtsman. The case is helpful in several respects. On costs the tribunal had sought to make orders which made each of the unsuccessful respondents liable for the separate costs of the owners claims against them. To this end it ordered that the unsuccessful respondents pay the plaintiff's separate costs of their claims against each respondent and an equal share of the majority of the costs common to the plaintiff's claims against all respondents. On review it was contended that all of the owners' costs should be distributed in the same proportions as liability. Byrne J ruled⁷⁹

“....This is said to reflect the philosophy underlying the proportionate liability regime. It was not put that the provisions of Part IVAA require this to be done; it was said that, in the exercise of its discretion, the Tribunal should be mindful of and have regard to this philosophy.

[71] The Tribunal in making the costs orders which it did was exercising its discretion – a discretion which will not lightly be disturbed on appeal. It is apparent that the Tribunal considered and rejected the contention that is now offered by the architectural draftsman and the building surveyor. The Tribunal was mindful of the proportionate liability regime but it was well and truly entitled to allocate costs in terms of the time occupied in dealing with the different claims and their outcomes.”

60. There are other issues. Consider the joined defendant who participates in the proceeding after joinder but against whom no claim is brought by the plaintiff. The defendant may contend that the presence before the court of the joined defendant is required by legislation to enable it to limit its liability to the plaintiff. It is a matter for the plaintiff to meet the defence not the joined defendant. The court may encourage

⁷⁵ see also *McAskell v Cavendish Properties P/L & Ors* [2008] VSC 328 at [24] - [25]

⁷⁶ at [98]

⁷⁷ e.g. O. 26 of the Supreme Court Rules

⁷⁸ [2008] VSC 97

⁷⁹ at [70]

the development and articulation of the comparative wrongdoing of that joined defendant in order to properly assess the comparative responsibility of the concurrent wrongdoers. That process may see the joined defendant actively participate. This may make the claim more complex and costly for the other parties. Assume the court allows the defence and limits the liability of the defendant. The court will then need to consider whether the costs of the joined defendant are party/party costs⁸⁰. Next, what is the event that costs should follow. Is it the plaintiff's failure to resist the defendant's claim that judgment should be limited. Is it the joined party's failure to show it bore no comparative responsibility for the plaintiff's loss. Should there be *Bullock* or *Sanderson*⁸¹ orders⁸²?

61. Offers of compromise throw up issues of such complexity that resort to carefully crafted *Calderbank* letters will be needed.

The High Court decides – Hunt & Hunt

62. The High Court's decision in the Hunt & Hunt case will mean a court is more likely to find that defendants are concurrent wrongdoers.
63. One of the original aims of the proportionate liability regime was to ensure that deep pocket defendants (including insurance companies) are not held entirely liable for loss to which others' conduct contributed. However, in recent years we have seen a number of cases where the courts have interpreted the relevant legislation in a way which ensured maximum recovery to plaintiffs (and arguably failed to achieve the original aims of the regime).
64. The majority's decision in the recent High Court case of *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*⁸³ is a refreshing look at proportionate liability.
65. The High Court has taken the regime back to its roots and the purpose for which it was created, clarifying when parties will be found to be concurrent wrongdoers for the purposes of apportioning liability under sections 34 and 35 of the *Civil Liability Act* 2002 (NSW) (and their equivalent provisions in other jurisdictions¹) and specifically considering when one or more people will have caused the damage or loss the subject of the claim.
66. This is good news for potential deep pocket defendants to litigation.
67. Key points:
- the regime requires one or more persons to cause the damage or loss that is the subject of the claim;
 - damage or loss should be seen as the harm to a plaintiff's economic interest rather than the underlying myriad of causes – ie. artificial distinctions between the damage or loss caused by one or more people should be avoided;

⁸⁰ arguably they may be solicitor/client costs as the joined defendant faced no claim.

⁸¹ *Sanderson v Blyth Theatre Co.* [1903] 2 KB 533

⁸² See *State of Victoria v Horvath & Ors* (No. 2) [2003] VSCA 24.

⁸³ [2013] HCA 10

- this practical approach to the interpretation of the Civil Liability Act in NSW means that a court is more likely to find that defendants are concurrent wrongdoers; thus assisting the regime to meet one of its initial aims of preventing deep pocket defendants from being held liable for the whole of the loss where others are also responsible.
- 68.** Under Part 4 of the *Civil Liability Act 2002* (NSW), courts apportion liability between concurrent wrongdoers in claims for economic loss or damage to property (not personal injury) arising out of actions for damages (such as for negligence or breach of contract). The liability of a concurrent wrongdoer is limited to an amount reflecting the proportion of the damage or loss that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss.
- 69.** The term "*concurrent wrongdoer*" is defined in section 34(2), and may be broken down into the following elements:
- a person who is one of two or more persons;
 - whose acts or omissions independently of each other or jointly;
 - caused the damage or loss that is the subject of the claim.
- 70.** The last element is highlighted because that was the specific issue which the Court had to consider in *Hunt & Hunt*.
- 71.** The matter arose out of fraud committed by a Mr Angelo Caradonna, who, with assistance from his cousin, solicitor Mr Lorenzo Flammia (the fraudsters), forged business partner Mr Alessia Vella's signature and used the certificates of title to a number of his properties to secure loans amounting to just over \$1 million from the first and second respondents (Mitchell Morgan). In other words, the fraudsters induced Mitchell Morgan into a loan agreement to which it would not otherwise have agreed.
- 72.** Despite being forged, the mortgage had gained indefeasibility and was effective upon registration under the Real Property Act 1900 (NSW). As a result of negligent drafting by Mitchell Morgan's legal representatives at *Hunt & Hunt Lawyers*, the mortgage was worded to secure money owed by Mr Vella to Mitchell Morgan. As Mr Vella was the victim of fraud and not liable to pay Mitchell Morgan, the mortgage effectively secured nothing.
- 73.** The contentious issue on appeal was whether *Hunt & Hunt* were concurrent wrongdoers with the fraudsters, and were therefore liable only for the proportion of Mitchell Morgan's loss that reflected their responsibility. The resolution of this issue depended upon two legal questions:
- how to characterise Mitchell Morgan's loss/damage; and
 - whether *Hunt & Hunt* and the fraudsters could both be said to have caused the loss or damage, concurrently.
- 74.** The majority's pronouncement on proportionate liability: Definition of "loss or damage"

- 75.** Under section 34(2), concurrent wrongdoers must each have caused the "damage or loss that is the subject of the claim". The majority, Chief Justice French and Justices Hayne and Kiefel, stated that "loss or damage", in the context of economic loss, was "the harm suffered to a plaintiff's economic interests", and characterised the loss or damage of Mitchell Morgan as its inability to recover the sum advanced.
- 76.** This is to be distinguished from Justice Giles' characterisation of "loss or damage" (in the Court of Appeal). He found Mitchell Morgan had suffered two different "losses":
- the loss caused by the fraudsters, which resulted from Mitchell Morgan paying out money it would not have otherwise done so; and
 - the loss caused by Hunt & Hunt, which was not having security for the money paid out.
- 77.** The majority stated that Justice Giles had incorrectly equated the immediate effects of the fraudulent and negligent conduct, with the loss and damage suffered as a result. The Court considered that these immediate effects were important to showing how it was that each of the concurrent wrongdoers "caused" the loss or damage but they could not be equated with such loss and damage. Rather, the damage only manifested itself (and the cause of action only accrued) later, when recovery was said to be impossible.
- 78.** The minority opinion of Justices Bell and Gageler took a different approach. They stated that identifying the loss claimed by the plaintiff involves comparing the position of the plaintiff had the act or omission of the defendant not occurred to the position of the plaintiff as it has come to exist. Applying this approach, the minority explained that had Hunt & Hunt not breached its duty to protect Mitchell Morgan from fraud, Mitchell Morgan would have had the security of the mortgage notwithstanding the fraud. The fact that the loan transaction would not have occurred at all were it not for the fraud was "not to the point".
- 79.** Accordingly, the minority held that the NSW Court of Appeal was correct in holding that Hunt & Hunt was solely responsible for the lack of security, not a concurrent wrongdoer and the loss was not apportionable.
- 80.** The minority took issue with the alteration of rights caused by the majority's judgment, saying that the majority's decision had the effect of transferring not only the insolvency/recoverability risk to the plaintiff, but also transferring some or all of the very risk which in this case the defendant (Hunt v Hunt) had an obligation to assist the plaintiff to avoid.
- 81.** What does the decision mean for parties to potential litigation? The majority's decision is practically significant because it gives effect to the intention of the proportionate liability regime, by transferring liability to the plaintiff for loss caused by the wrongful act or omission by another who is impecunious. The deep pocket defendant will only be held liable for that proportion of the loss that reflects its responsibility.

- 82.** This practical approach to the interpretation of the *Civil Liability Act* in NSW means that a court is more likely to find that defendants are concurrent wrongdoers, thus assisting the regime to meet one of its initial aims of preventing deep pocket defendants from being held liable for the whole of the loss where others are also responsible. It's good news if you are a deep pocket defendant, particularly if you are in the business of providing assurances, as your liability is likely to be limited to that for which you are responsible.
- 83.** Of course, as pointed out by the minority, the outcome is not such good news for parties entering business transactions where they are reliant upon the services of assurance-givers. Those parties arguably now bear the precise risk that they had retained a third party to give them assurance about. Such parties may want to consider contracting out of the proportionate liability regime (if permitted in the relevant jurisdiction).

Conclusion

- 84.** Overall the introduction of the regime has proved to be fairer and more just in its outcomes. Whether it will ever be extended to cases involving injuries is most unlikely for public policy considerations.