

## PROPORTIONATE LIABILITY – 3 YEARS ON

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### **Geoffrey Hancy**

Barrister

B.Juris (Hons), LLB (Hons), B.Ec (UWA), LLM (Melb)

#### TOPIC SUMMARY

- 1 My presentation is about certain rules that may enable a wrongdoer or an insurer to pay only a proportion of a loss. I will not address all rules that fall within that broad category.
- 2 There have been comparatively recent developments in statute and case law that may impact on fire claims, construction loss claims, liability of engineers, lawyers, accountants, and other professionals; and insurance indemnity in these and in personal injury claims. Proportionate liability laws created by statute enable a wrongdoer to limit its liability to only a proportion of a plaintiff's economic loss or property damage. In these cases, and in personal injury cases, decisions of the New South Wales Court of Appeal may enable an insurer, in some instances, to provide indemnity for only a proportion of the insured's liability to pay damages.

## INTRODUCTION

- 3 Since 1 December 2004 liability of defendants for pure economic loss or property damage caused by failure to take reasonable care has been “proportionate”. The extent of liability of a tortfeasor to a plaintiff may be less than the full amount of the damages if another tortfeasor contributed to the loss. Previously each tortfeasor was liable for the full amount of the damages with a right of contribution from other tortfeasors.
- 4 Rules of proportionate liability extend beyond tort claims to claims for economic loss or property damage under other causes of action (including contract or statute) that arise from failure to take reasonable care or where the loss was caused by misleading conduct.
- 5 Proportionate liability schemes have been introduced in all States and Territories and under certain Commonwealth legislation. Proportionate liability extends to claims for losses caused by misleading conduct that find their legal source in the *Fair Trading Act 1987* (WA), corresponding State and Territory legislation, the *Trade Practices Act 1974* (Cth), the *Corporations Act 2001* (Cth) and *Australian Securities and Investments Commission Act 2001* (Cth). Changes to Commonwealth laws took effect from 26 July 2004.
- 6 It is not my purpose to examine the intricate detail of what has become a national scheme of proportionate liability. It is important to observe however that despite the common themes, and apparent common language, used in the variety of State, Territory and Commonwealth legislation there are differences that in some instances are substantial from scheme to scheme. This must be borne in mind when considering the applicability of cases on legislation from other jurisdictions. For example, some schemes permit contracting out and others do not.

- 7 I will state what I conclude are legal propositions that have emerged from (mostly first instance) cases that began with a decision of the Victorian Supreme Court in late 2005 and have continued as an increasing stream of decisions from Victoria, New South Wales and the Federal Court. These cases directly concern the plaintiff and defendant or defendants but only indirectly concern liability insurers who may subsequently provide indemnity. No decision has emerged from Western Australia.
- 8 There has been a seemingly allied development in New South Wales case law that may impact directly on insurers' indemnity liability. New South Wales' decisions have resulted in insurers having liability to pay less than full indemnity and effectively only a proportionate sum for the insured's liability to a third party. Coincidentally Ipp J of the New South Wales Court of Appeal (and once a judge of the Supreme Court of Western Australia), whose report *Review of the Law of Negligence* formed the foundation for the push for and implementation of the proportionate liability legislative schemes, has featured in these decisions.
- 9 It is important that I declare that I have been, and I remain, a staunch critic of proportionate liability - my previous papers are:
  - 9.1 "*Proportionate Liability in Negligence for Property Damage and Pure Economic Loss: A Case Against*", Australian Insurance Law Association seminar on **Proportionate Liability for Property Damage and Pure Economic Loss**, April 2003;
  - 9.2 "*Proportionate Liability – What Is It And Why Do We Have It?*" Law Society of Western Australia seminar on **Proportionate Liability**, July 2005.
- 10 The dam has burst for the statutory changes. However, proportionate liability for insurers has not yet travelled successfully beyond the borders of New South Wales.

## PROPORTIONATE LIABILITY

### FEATURES OF PROPORTIONATE LIABILITY

- 11 I will not embark upon a detailed restatement of the proportionate liability provisions found in Part 1F of the *Civil Liability Act 2002* (WA) but I will state some of the features of legislative proportionate liability rules in order to establish a context for understanding the discussion that follows. I will not outline the corresponding framework under the *Trade Practices Act 1974* or other Commonwealth legislation. The potential for Commonwealth legislation to apply should be kept in mind when proportionate liability is considered in a given case. Unless otherwise stated, references to a section of an Act are references to the *Civil Liability Act 2002* (WA)
- 12 It is important to state at the outset that proportionate liability does not apply to personal injury claims: ss.3A and 5AI(1). In addition parties may expressly agree between themselves that the operation of Part 1F is excluded, modified or restricted: s.4A.
- 13 Proportionate liability applies only to “apportionable claims” and for the benefit of a “concurrent wrongdoer”: s.5AI. The benefit is that in proceedings involving an “apportionable claim” the liability of a defendant who is a “concurrent wrongdoer” is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant’s responsibility for the damage or loss: s.5AK(1). For example, if two defendant tortfeasors are held equally to blame for financial loss or property damage neither will be liable to pay the plaintiff the full amount of the loss.
- 14 In apportioning responsibility between defendants the court is to have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings: 5AK(3)(b). Presumably a defendant may limit its liability by

persuading the court that another party, even though it is not an additional defendant, was also responsible for the loss or damage suffered by the plaintiff.

#### DEVELOPING CASE LAW

15 Not surprisingly the decided cases to date have been concerned with the following issues:

15.1 What is or is not an apportionable claim;

15.2 Who is or who is not a concurrent wrongdoer;

15.3 Application of the test of what is “just having regard to the extent of the defendant’s responsibility for the damage or loss”;

15.4 Matters of procedure including whether an additional “concurrent wrongdoer” should be joined as a defendant or as the third party and what is required to be pleaded and by whom;

15.5 The interrelationship, if any, between State and Commonwealth schemes.

16 The following discussion outlines rules that appear to me to emerge from single instance decisions. They have not been affirmed at appeal court level or by a Western Australian court.

#### **Apportionable claim**

17 An apportionable claim is a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but it does not include any claim arising out of personal injury. The term includes a claim for economic loss or damage to property in an action for damages for misleading conduct in contravention of s.10 of the *Fair Trading Act 1987* (WA): s.5A1.

18 A claim for a sum certain, such as money due under a guarantee, does not satisfy those tests and is not an apportionable claim: *Commonwealth Bank of Australia v Witherow* [2006] VSCA 45.

- 19 A claim for breach of a contractual obligation to carry out work with reasonable skill and diligence is an apportionable claim: *Yates v Mobile Marine Repairs Pty Ltd* [2007] NSWSC 1463. The claim arises from a failure to take reasonable care. A claim for damages for breach of contract that does not contain as an element an allegation of failure to take reasonable care may nevertheless be an apportionable claim where the claim arose from circumstances where in fact there was a failure to take care: *Reinhold v New South Wales Lottery Corporation (No.2)* [2008] NSWSC 187.
- 20 A plaintiff cannot avoid the operation of the proportionate liability legislation by changing a plea from an allegation of a duty to exercise “reasonable care, skill and diligence” to an allegation of a duty to exercise “due skill and diligence”: *Woods v De Gabriele* [2007] VSC 177. They are indistinguishable claims.
- 21 If the facts giving rise to a claim for damages for a contravention of a provision of the *Corporations Act 2001* (Cth) or the *ASIC Act 2001* (Cth) would also support an action for misleading conduct the statutory claim will be an apportionable claim even though it does not depend on proof of misleading conduct: *Ibid*.
- 22 Where economic loss has been caused by fraudulent conduct of a non-party and negligent conduct by a defendant the liability in each case may be an apportionable claim: *Chandra v Perpetual Trustees Victoria Ltd* [2007] NSWSC 694.

### **Concurrent wrongdoer**

- 23 A “concurrent wrongdoer” is one of two or more persons whose conduct caused, jointly or independently, the damage or loss the subject of the claim: section 5AI. There is no statutory obligation on an existing party to a proceeding to make another claimed wrongdoer a party to the proceeding.

- 24 A person whose conduct may be said to have caused the damage or loss but who has no liability to the plaintiff is not a concurrent wrongdoer for the purposes of the legislation: *Shrimp v Landmark Operations Ltd* [2007] FCA 1468. A “concurrent wrongdoer” is a person whose conduct gives rise to a liability of the concurrent wrongdoer to the plaintiff.
- 25 A party that is held after a trial not to have a liability to the plaintiff is not a concurrent wrongdoer: eg. *Premier Building & Consulting Pty Ltd v Spotless Group Ltd (No.12)* (2007) 64 ACSR 14; [2007] VSC 377.
- 26 A director of a company owes no duty of care to the creditors of the company and, in the absence of additional facts giving rise to a duty of care, a director of a company in respect of which a plaintiff has made failed investments will not be a concurrent wrongdoer: *Atkins v Interprac and Crole* [2007] VSC 445. Additional pleaded facts may establish an arguable case that a director is a concurrent wrongdoer: *Atkins v Interprac and Crole (No.2)* [2008] VSC 99.
- 27 A defendant against whom judgment is entered as an apportionable claim, exclusive of amounts for which other defendants are responsible, cannot seek contribution from the other defendants and a defendant who makes a *bona fide* settlement with the plaintiff is in no better position: *Godfrey Spowers (Vic) Pty Ltd v Lincolne Scott Australia Pty Ltd* [2008] VSC 90. In other words a concurrent wrongdoer has no right of contribution against other concurrent wrongdoers even though the claim against the first concurrent wrongdoer is resolved by settlement rather than judgment.

### **Pleadings, onus and joinder**

- 28 In the first decided case on proportionate liability it appears to have been suggested that it was sufficient for a defendant merely to plead in general terms that its liability was limited to a proportion as the court determines to be just and

equitable having regard to the extent of the defendant's liability for the damage. In that event the court may be empowered to permit the plaintiff to administer interrogatories directed at eliciting the facts, if any, that gave rise to the defendant having reasonable grounds to believe that a particular person may be a concurrent wrongdoer in relation to the claim: *Nemeth v Prynew Pty Ltd* [2005] NSWSC 1296.

- 29 In *Ucak v Avanti Developments* [2007] NSWSC 367 the court held that it was necessary to plead the existence of a particular person, the occurrence of an act or omission by that person, and the causal connection between the occurrence and the loss that was the subject of the claim. It would also seem necessary to plead that there has been a failure to take reasonable care or facts amounting to misleading conduct: *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* [2007] FCA 1216. The defendant has the onus of pleading and proving the required elements: *Ibid*.
- 30 There are suggestions in some of the cases that a finding that there has been "a failure to take reasonable care" for the purpose of identifying an "apportionable claim" may arise from the allegations or the evidence tendered in the action even though the claims do not rely on any pleaded negligence or "failure to take reasonable care": *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* [2007] FCA 1216; *Reinhold v New South Wales Lottery Corporation (No.2)* [2008] NSWSC 187; and see also *Woods v De Gabriele* [2007] VSC 177. I find it difficult to contemplate how that might occur in the absence of pleaded facts that raise the issue of failure to take reasonable care.
- 31 In order for an alleged concurrent wrongdoer to be added as a party it will only be necessary to plead a case that is arguable or "not hopeless": *Woods v De Gabriele* [2007] VSC 177; *Shrimp v Landmark Operations Ltd* [2007] FCA 1468;



*Atkins v Interprac and Crole* [2007] VSC 445; *Atkins v Interprac and Crole (No.2)* [2008] VSC 99.

- 32 The reliance upon proportionate liability should be the subject of a plea in a defence and it may be appropriate for the court to grant leave to join the additional concurrent tortfeasors as defendants to a counterclaim or as defendants to the plaintiff's case: *Atkins v Interprac and Crole* [2007] VSC 445; contrast *Woods v De Gabriele*. Which method is appropriate depends on how the issue is raised before the court. If the defendants make no claim against the new party that could be the subject of a third party notice then the alleged concurrent wrongdoer should be added as a defendant in the plaintiff's claim: *Woods v De Gabriele*. However if the defendant seeks a declaration then it may be appropriate to add the alleged concurrent wrongdoer as a defendant to a counterclaim: *Atkins v Interprac and Crole* [2007] VSC 445.
- 33 If a concurrent wrongdoer is added as a defendant to a counterclaim but not added as a defendant to the plaintiff's claim then it has been suggested that it is likely that the plaintiff subsequently would be estopped from later making a direct claim against the added concurrent wrongdoer: *Atkins v Interprac and Crole* [2007] VSC 445.

### **The extent of the "proportion"**

- 34 The concurrent wrongdoer's liability to the plaintiff is limited to "that 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".
- 35 In determining the extent of the defendant's proportionate liability the court must exercise a discretionary judgment founded upon the facts proved in each particular case so that a wrongdoer who is more to blame for the loss than another wrongdoer should bear more of the liability: *Yates v Mobile Marine*

*Repairs Pty Ltd* [2007] NSWSC 1463. The exercise of the discretionary judgment is similar to that required when apportioning responsibility between a defendant and a plaintiff in a case of contributory negligence: *Ibid.*

36 Cases concerning contributory negligence and apportionment of liability between tortfeasors under the superseded law may be applied by analogy so that in the exercise of the discretionary judgment attention is focused on the relative blameworthiness (degree of culpability) of each wrongdoer and the causal potency of the conduct of each wrongdoer: *Reinhold v New South Wales Lottery Corporation (No.2)*.

37 The following considerations are irrelevant:

37.1 Financial strength of the defendant or its profitability,

37.2 That the defendant is a government body that extracts revenue from its citizens,

37.3 The attitude of remorse or lack of remorse by the defendant: *Ibid.*

38 The fact that one wrongdoer may have profited from the wrongdoing might be relevant: *Ibid.*

### **Interaction between State and Commonwealth laws**

39 The proportionate liability provisions of State law cannot be applied to claims for damages brought under Commonwealth statutes: *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* [2007] FCA 1216.

### **'PROPORTIONATE' INDEMNITY**

40 A plaintiff is entitled to recover the full amount of damages from any one tortfeasor, subject to any reduction for contributory negligence which is an amount common to all tortfeasors: *Fitzgerald v Lane* [1989] 1 AC 328. There is no 'proportionate liability' for the benefit of tortfeasors who cause personal injury.

Personal injury claims are excluded from the ambit of the proportionate liability statutes.

41 However in some cases the tortfeasor might not be able to recover the full damages from its insurer - leading to a result that resembles proportionate liability and applies for the benefit of an insurer *vis a vis* the insured. Two comparatively recent decisions of the Court of Appeal of New South Wales suggest that where the insured, although liable to pay damages in full to a plaintiff, is obliged to make a payment to another tortfeasor under a contractual indemnity something less than full indemnity might be recoverable from the insurer: *Multiplex Constructions Pty Ltd v Irving* [2004] NSWCA 346; *Gordian Runoff Ltd v Heyday Group Pty Ltd* [2005] NSWCA 29.

***Multiplex Constructions v Irving***

42 Fugen was the injured plaintiff's employer and a contractor to Multiplex at a building site. Both were held liable to pay damages to the plaintiff (Mr Irving) and each was determined to be equally culpable. Fugen had contracted to provide a complete indemnity to Multiplex. The full amount of the judgment was paid by Multiplex to the plaintiff and it received 50% of that amount from Fugen. Royal, Fugen's insurer, paid Fugen that amount.

43 Multiplex required Fugen to indemnify it for the additional amount paid by Multiplex. With the support of Multiplex, Fugen claimed from Royal the balance of the judgment amount. The New South Wales Court of Appeal held that Fugen was not entitled to be further indemnified by Royal.

44 Fugen was held not to be entitled to be indemnified against a contractual liability to Multiplex. Royal's policy provided indemnity against any amount that the insured became liable to pay independently of the Workers' Compensation Act for any injury to any person who was a worker of the insured. The Court,

following its previous decision in *Nigel Watts Fashion Agencies Pty Ltd v GIO General Ltd* (1995) 8 ANZIC 61-235, held that indemnity in those terms covered liability to pay damages at common law but not contractual liability.

- 45 Ipp JA (with whose reasons Santow JA and Pearlman AJA agreed) held that the remaining 50% claimed by Fugen was not in respect of Fugen's liability at common law but in respect of its liability under the contract between it and Multiplex. He said that the 50% provided by Royal "represented the full amount for which Fugen was liable to Mr Irving at common law as a joint or concurrent tortfeasor".
- 46 The result resembles proportionate liability. The ultimate burden of the liability to the plaintiff was borne equally by Fugen and Royal. Royal's obligation to indemnify was reduced and it bore only a proportion of its insured's liability. Although Fugen was insured against its liability to pay damages to Mr Irving it recovered only half of what it was found liable to pay. Was the required extent of the agreed indemnity the full amount of the liability, contrary to the outcome in this case?
- 47 I suggest that this decision should be treated with a great deal of caution. The Court correctly decided that there was no indemnity for contractual liability. It did not follow that the extent of Fugen's liability to the plaintiff Mr Irving was only 50% of the damages sum. A tortfeasor is liable for the full amount of the damages payable to the plaintiff. That outcome is not altered by any question of apportionment between one tortfeasor and another. The correct position was identified by Ipp JA at [72] but not applied.
- 48 The correct position derives from the decision of the High Court in *State Government Insurance Office (Qld) v Brisbane Stevedoring Pty Ltd* (1969) 123 CLR 228. The Court of Appeal in *Multiplex Constructions* referred to *Brisbane*

*Stevedoring* on the issue of the ambit of the insuring clause in that case. The insuring clause in *Brisbane Stevedoring* was held to be wider than the clause in *Multiplex Constructions*. It extended to contractual liability “in respect of” rather than merely “for” personal injury.

49 However the Court in *Multiplex Constructions* does not appear to have appreciated the significance of *Brisbane Stevedoring* to the issue of extent of indemnity. I suggest that in *Multiplex Constructions* the Court of Appeal overlooked the importance of the insurer’s obligation to indemnify the full amount of its insured’s liability to a third party. That obligation was unaffected by cross claims between tortfeasors.

50 The Court in *Multiplex Constructions* referred to, but did not discuss, section 151Z(2) of *Workers’ Compensation Act 1987* (NSW). Accordingly, the decision cannot be explained and distinguished by the wording of that Act. Section 151Z(2) was concerned with circumstances that might lead to a reduced judgment against a party other than an employer. There does not appear to have been any provision that would lead to a reduced judgment against an employer: as to which see *Glynn v Challenge Recruitment Australia Pty Ltd* [2006] NSWCA 203. It appears that judgment was entered in Mr Irving’s favour for the full amount of his damages: see Ipp JA [72].

### ***Brisbane Stevedoring***

51 The plaintiff’s employer was insured by SGIO against “legal liability ... to pay damages in respect of ... injury”. The plaintiff was a wharf labourer. He was injured when he was struck by a mobile crane owned by Queensland Shipping Services and hired to Brisbane Stevedoring. Both his employer and the owner of the crane were held liable to pay damages. The trial judge held that an indemnity clause in the hiring agreement entitled the owner to complete

indemnity against the plaintiff's judgment. SGIO was, nevertheless, ordered to indemnify the employer in respect of all sums payable by the employer under the judgment for damages including sums payable to the crane owner by way of indemnity.

52 SGIO appealed. The High Court held that the insurer was obliged to indemnify the employer for the whole amount of the verdict and it was not necessary for any order to have been made for indemnity of the crane owner: 235-6 per Barwick CJ, 245-246 per Kitto J, 248 per Windeyer J, 251 per Owen JJ, 254-255 per Walsh J.

53 According to Walsh J if the crane owner had paid the judgment and obtained recoupment from the employer this would only be a different mode by which the legal liability of the employer to pay the whole amount of the damages due to the plaintiff would be satisfied. The contract of indemnity in the hiring agreement did not change the character of the loss that the employer suffered and in respect of which it was insured.

***Gordian Runoff Ltd v Heyday Group Pty Ltd***

54 The reasoning in *Multiplex Constructions* was applied by the New South Wales Court of Appeal in *Gordian Runoff Ltd v Heyday Group Pty Ltd* [2005] NSWCA 29.

55 Heyday was insured by GIO against liability to pay damages “for any injury to” an employee. Under a subcontract Heyday agreed to indemnify Baulderstone against any claim or proceedings in respect of injury to an employee of Heyday. The injured plaintiff was an employee of Heyday. Each of Baulderstone and Heyday was held liable to pay damages to the plaintiff and the respective degrees of responsibility were 65% Baulderstone and 35% Heyday. The plaintiff

was entitled to judgment for the full amount of his damages against each defendant.

56 The Court in *Gordian Runoff*, without proper analysis of *Brisbane Stevedoring*, held that Heyday was only entitled to indemnity for 35% of the judgment amount from GIO

57 The reasoning in *Gordian Runoff* was doubted in the later New South Wales Court of Appeal decision *Glynn v Challenge Recruitment Australia Pty Ltd* [2006] NSWCA 203. That was not a case about indemnity under an insurance contract.

### **CONCLUDING COMMENTARY**

58 A body of cases that have interpreted proportionate liability laws has begun to develop. However the cases have come from New South Wales, Victoria and the Federal Court and in the majority of instances they have addressed interlocutory issues such as joinder of parties and pleadings. A number have held merely that certain pleadings and contentions are “arguable” or “not hopeless”. Confirming, or overturning, decisions from appeal courts look to be some distance in the future, after cases on “arguable” points have worked their way through the court systems.

59 The obvious targets for disputes have been what are or are not “apportionable claims” or “concurrent wrongdoers”, who should plead what about another alleged wrongdoer, how to add an additional wrongdoer as a party, how to apportion damages, and the interrelationship between Commonwealth and State laws. These disputes have arisen from seemingly straightforward language in the statutes.

60 It could be argued that some of the first instance decisions are not obviously correct. Almost all decided cases to date have yet to be confirmed or overturned by an appeal Court. One example is the determination that it is arguable that a

statutory claim that does not depend on an allegation of failure to take care or misleading conduct is an apportionable claim if the facts giving rise to the statutory claim also would support a claim based on an allegation of failure to take care or misleading conduct. One might have readily concluded that if a statutory claim did not depend on an allegation of failure to take care or misleading conduct then it did not fall within the statutory definition of apportionable claim and hence was not apportionable.

61 Another example is the suggestion that a finding that a claim is apportionable may arise from the evidence even though facts necessary to attract the operation of the statute have not been pleaded. Yet another is the decision that a wrongdoer who enters into a settlement should be treated like a wrongdoer against whom a judgment has been entered.

62 Decisions on how to interpret these laws have not developed to an advanced degree. Substantial scope for argument remains. Issues that have not yet been addressed by the courts undoubtedly will arise and may spawn a new and vast array of disputes. For example, how will claims that are not apportionable affect apportionable claims and vice versa? How will an apportionable claim under a Commonwealth statute affect, or be affected by, an apportionable claim under a State statute?

63 Proportionate liability laws will be a boon for lawyers. It is too early to know whether there will be benefits for litigants that, when the interests of plaintiffs are balanced against those of wrongdoers, justify the nationwide “reform” from and abandonment of the previous system of solidary liability for claims for economic loss or property damage.

64 One development, that applies also to personal injury claims, that has not advanced beyond New South Wales is the apparent rule permitting an insurer to



pay part indemnity where its insured has entered into an indemnity agreement with another tortfeasor. There is good reason to anticipate that this development may be reversed by a future judicial decision, should an opportunity arise. It is difficult to justify permitting an insurer to indemnify an insured for less than the apparently agreed extent of cover.

G R Hancy

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