

By Daniel Aghion



Proportionate liability: An update

An article I wrote, titled 'Proportionate liability: who bears the burden?', appeared in *Precedent* edition 82, published in September/October 2007. It summarised the proportionate liability scheme (PL scheme) as then enacted by legislation in each state and territory and federally, and hazarded some guesses as to how the PL scheme might be interpreted by the courts. Now, some six years later and almost ten years after the legislation was enacted, it is useful to look back and see how the PL scheme has evolved.¹

A 'COOKS TOUR' OF THE LEGISLATION AS ENACTED

Effect of the PL scheme

The effect of proportionate liability is now well known. Unlike joint and several liability, each defendant is liable to the plaintiff only for their proportionate share of the plaintiff's loss. So a defendant who causes 20 per cent of the plaintiff's total loss is responsible only for that 20 per cent, and therefore liable to the plaintiff for only 20 per cent of the total damages awarded.

In a case where joint and several liability applies, a defendant is liable to the plaintiff for the whole of the plaintiff's loss, and must pay the plaintiff the total amount of the plaintiff's damages if called upon to do so.² So far as the plaintiff is concerned, the fact that the defendant caused only part of the plaintiff's loss is irrelevant. Apportionment of responsibility is a matter of contribution between

defendants, and is of no concern to the plaintiff.

By comparison, in a case where proportionate liability applies, each defendant is liable only for their proportionate share of the plaintiff's loss. In order to recover 100 per cent of his or her loss, the plaintiff must collect the damages from each defendant according to that defendant's proportionate share.

The difference between the two regimes is the entirely practical matter of recovery risk. If multiple defendants are jointly and severally liable to the plaintiff, and the plaintiff recovers their damages in full from one solvent defendant, then that defendant carries the risk of being out of pocket when seeking to recover contribution from other insolvent defendants. If, however, the defendants are proportionately liable to the plaintiff and there is an insolvent defendant, it is the plaintiff who will be disadvantaged on recovery, and not the solvent defendants.

In sum, therefore, proportionate liability transfers the risk of an insolvent defendant away from co-defendants and on to the plaintiff.³

The legislation

The PL scheme was enacted by similar, but not identical, legislation in each state and territory, and in the federal jurisdiction.⁴ The regimes vary across jurisdictions. (Unless otherwise noted, the NSW legislation is cited throughout this article.)

The PL scheme applies to the following types of claim:

- (a) 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 not including any claim arising out of personal injury;
- (b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* (NSW) for a contravention of s42 of that Act (before its repeal by the *Fair Trading Amendment (Australian Consumer Law) Act 2010*) or under the *Australian Consumer Law* (NSW) for a contravention of s18 of that law (misleading or deceptive conduct). >>

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These claims are collectively described as 'apportionable claims'.⁵

A 'concurrent wrongdoer' is defined as a person who is one of two or more persons whose act/s or omission/s (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.⁶

In any proceedings involving an apportionable claim:

- (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and
- (b) the court may give judgment against the defendant for not more than that amount.⁷

GENERAL PRINCIPLES

The following general principles have been established by the various State and Federal courts that have considered the PL scheme:

Purpose of the PL scheme

The aim of a PL scheme is to apportion loss amongst concurrent wrongdoers in their respective share of responsibility for the plaintiff's loss or damage. It is to be compared with a regime of joint and several liability, where each defendant is liable for the whole of the plaintiff's loss irrespective of their proportionate share. However, it does not go further than this. Specifically, it does not reduce a defendant's liability by reference to the wrongdoing of another, where that wrongdoer has no liability to the plaintiff under the substantive law.⁸

Application of the PL scheme

Proportionate liability arises only where permitted by the legislation viz. a common law failure to take care, or misleading or deceptive conduct in contravention of fair trading/Australian Consumer Law provisions. If the claim does not involve a failure to take care, or the damages claimed do not arise from the defendant's misleading or deceptive conduct, then the claim is not capable of being apportioned.⁹

A failure to take reasonable care requires the absence of care – that is, negligence – as an essential element of the cause of action. A strict contractual obligation does not involve a failure to take reasonable care and thus might not be apportionable.¹⁰

Some jurisdictions permit a party to contract out of the PL scheme by making express provision for their rights, liabilities and obligations.¹¹

Thus, in *Aquagenics Pty Ltd v Break O'Day Council*,¹² a standard form building contract provided a code for the

resolution of disputes, including the determination of a party's liability. Among other things, the contract provided that the contractor would be liable for the acts and omissions of its subcontractors and their employees and agents. The contract also provided for referral of disputes to arbitration. In this case, the principal referred a dispute to arbitration. The contractor sought a stay of the arbitration on the ground that there were complex questions of proportionate liability involving subcontractors, which were best suited for determination by a court. The Tasmanian Full Court doubted, obiter, that the definition of 'court' in the proportionate liability scheme included a private arbitration. In any event, the Court held that the nature and extent of the liability provisions in the contract excluded a defence of proportionate liability by the contractor due to the acts of the subcontractors. It followed that the principal and contractor had contracted out of the PL scheme.

Similarly, the NSW Court of Appeal held that a mortgage origination deed containing a complete indemnity clause constituted an implicit contracting out of the NSW proportionate liability scheme.¹³

Subsequent to *Aquagenics*, it has been decided that a private arbitration is not a 'court' for the purpose of proportionate liability. Accordingly, the provisions are not available to a respondent to an arbitration.¹⁴

Concurrent wrongdoers and causation

In order for the PL scheme to apply, there must be one or more 'concurrent wrongdoers'. A concurrent wrongdoer is, in relation to a claim, a person who is

one of two 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.

As noted above, the concurrent wrongdoers must each have 'caused' the loss or damage that is the subject of the claim.

This means that the concurrent wrongdoer must be capable of being held legally liable to the plaintiff in the sense of having 'committed the relevant legal wrong against the plaintiff'.¹⁵

Unlike the defendant who seeks to reduce their exposure to the plaintiff by reference to the acts or omissions of other concurrent wrongdoers, there is no express requirement that the concurrent wrongdoer must itself have failed to take reasonable care.¹⁶ Exactly what must be shown in order to establish concurrent wrongdoing remains uncertain at this time.

There is a series of recent cases, the effect of which is that where two people cause a single loss – for example, misrepresentation by a vendor and vendor's agent to a purchaser – then the loss is not apportionable between them. That is because they are not concurrent wrongdoers within the meaning of the legislation.¹⁷

It would be quite wrong to say that a finding of apportionment in one case compels the same result in another, but the cases can stand as a guide.

In those jurisdictions where joinder of a person is not required in order to allege concurrent wrongdoing by them,¹⁸ the court may nonetheless direct that the person be joined as a defendant for case management purposes.¹⁹

Apportionment

The language of apportionment is relevantly indistinguishable from existing and longstanding legislative provisions relating to contributory negligence and contribution among tortfeasors. Thus, the existing tests for those provisions are an apposite reference point.²⁰

It would be quite wrong simply to say that a finding of apportionment in one case compels the same result in another, but the cases can stand as a guide.²¹

The role of pleadings

It is at least arguable that a proceeding may be treated as raising an apportionable claim, even if the plaintiff has pleaded its case in a manner that attempts to avoid the various apportionment regimes. The contrary argument would permit the object of the apportionment legislation to be defeated by the nature of the plaintiff's pleading.²²

The proportionate liability provisions do not apply of their own right. A defendant who wishes to take advantage of a proportionate liability defence must comply with the notice provisions set out in the legislation.²³ Further, the defendant must plead and prove an apportionment defence.²⁴ This includes the material facts that engage and make out the statutory limitation on the plaintiff's damages.²⁵

In *Ucak v Avante Developments*,²⁶ Hammerschlag J identified three necessary elements that a defendant must plead to assert that there is a person who is a concurrent wrongdoer:

- (a) the existence of a particular person;
- (b) the occurrence of an act or omission by that particular person; and
- (c) a causal connection between that occurrence and the loss that is the subject of the claim.

His Honour agreed²⁷ with McDougall J (writing extra-judicially)²⁸ that a defendant should plead with the same degree of precision and particularity as it would have done before the Act if it were bringing a cross-claim against an alleged concurrent wrongdoer.

*Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*²⁹

For a time, there had been a debate as to whether concurrent wrongdoers were required to be liable for the same loss and damage, as is the case in contribution proceedings. In *Hunt & Hunt*, the High Court resolved this question in the negative.


The proceeding concerned a forged mortgage. The trial judge declared the mortgage to be void as a result of the forgery. The lender sought to recover its loss from its solicitors on the ground that they erred in the drafting of the mortgage, thereby causing the lender to lose the benefit of statutory indefeasibility. The solicitors in turn alleged that the forger and an attesting witness were concurrent wrongdoers, and that the solicitors' liability to the lender should be reduced on a proportionate basis. The NSW Court

of Appeal,³⁰ following a Victorian Court of Appeal decision,³¹ held that the loss and damage caused by the forger and the attesting witness was not the same as the loss and damage caused by the solicitors. On appeal from the NSW Court of Appeal, the High Court held in *Hunt & Hunt* by majority of 3:2 that the loss and damage caused by the defendant and the concurrent wrongdoer need not be the same in order for the proportionate liability provisions to be applied.

The following propositions may be extracted from the plurality's reasons:

- [Concurrent wrongdoing] poses two questions for the court: what is the damage or loss that is the subject of the claim? Is there a person, other than the defendant, whose acts or omissions also caused that damage or loss? Logically, the identification of the 'damage or loss that is the subject of the claim' is anterior to the question of causation.³²
- 'Damage' is different to 'damages'. Damage, properly understood, is the injury and other foreseeable consequences suffered by a plaintiff. In the context of economic loss, loss or damage may be understood as the harm suffered to a plaintiff's economic interests.³³
- It will almost always be necessary to identify, with some precision, the interest infringed by the negligent act. It is necessary for a proper understanding of the harm suffered and for the determination of what acts or omissions may be said to have caused that damage.³⁴

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- In the case of a lender such as Mitchell Morgan, the harm it suffered was the inability to recover the sums advanced. That was its loss for the purpose of considering apportionment.³⁵
- Previous authorities concerning causation in contribution proceedings are inapplicable to determining causation in proceedings where a defence of apportionment is pleaded.³⁶
- The proper identification of damage should usually point the way to the acts or omissions which were its cause.³⁷
- The lender's inability to recover the monies advanced was caused by the solicitors in preparing an ineffective mortgage, and by the forger and attesting witness in inducing the lender to enter into the transaction and pay the monies.³⁸ Accordingly, each of them, separately, materially contributed to the loss or damage suffered.³⁹
- It is not consistent with the policy of Part 4 of the *Civil Liability Act* (NSW) that the solicitors be held wholly responsible for the damage, when regard is had to the part played by the fraudsters' conduct. Consistent with that policy, the lender should not recover from the solicitors any more than that for which the solicitors are responsible, as found by the primary judge.⁴⁰
- The trial judge's finding of fact – that the solicitors had caused and were responsible for 12.5 per cent of the loss – should be restored.

The effect of the decision in *Hunt & Hunt* is to significantly broaden the circumstances where an apportionment defence

If... the defendants are proportionately liable to the plaintiff and there is an insolvent defendant, it is the plaintiff who will be disadvantaged on recovery, and not the solvent defendants.

can successfully be taken. Specifically, professionals who are involved in certifying activities – such as valuers, auditors, building certifiers and checking solicitors – can use the liability of the primary wrongdoer to reduce their liability on a proportionate basis.

CONCLUSION

As a result of the judicial working out of the provisions, more is now understood about the PL scheme than when first enacted. Specifically, certifying professionals and other 'gatekeepers' will be held liable only for their proportionate share of the plaintiff's damage if the primary wrongdoer and the gatekeeper both materially contributed to the loss or damage suffered.

One significant uncertainty is the legal duty required on the part of the defendant and the so-called concurrent wrongdoer in order to establish concurrent wrongdoing. It would appear that both intentional and unintentional conduct is caught by the PL scheme.

Whether a strict liability obligation, arising under statute or contract, establishes concurrent wrongdoing presently remains an open question. ■

Notes: **1** A recent and useful summary of some aspects of the PL scheme appears in an article by Peter Long, 'The effect of proportionate liability legislation on commercial litigation', in *Precedent* edition 115, March/April 2013, pp46-9. **2** Subject of course to the plaintiff being restricted to recovery of no more than 100 per cent of the plaintiff's total loss. **3** *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at [10] per French CJ, Hayne & Kiefel JJ. **4** *Australian Securities and Investment Commission Act 2001* (Cth) ss12GP-

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12GW; *Corporations Act 2001* (Cth) Part 7.10 Div 2A; *Competition and Consumer Act 2010* (Cth) Part VIA; *Civil Liability Act 2002* (NSW), Part 4; *Civil Liability Act 2003* (Qld) Part 2; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) Part 3; *Civil Liability Act 2002* (Tas) Part 9A; *Wrongs Act 1958* (Vic) Part IVA; *Civil Liability Act 2002* (WA) Part 1F; *Civil Law (Wrongs) Act 2002* (ACT) Ch 7A; *Proportionate Liability Act 2005* (NT). **5** *Civil Liability Act 2002* (NSW) s34(1). See also *Australian Securities and Investments Commission Act 2001* (Cth) s12GP(1); *Corporations Act 2001* (Cth) s1041L(1); *Competition and Consumer Act 2010* (Cth) s87CB(1); *Civil Liability Act 2003* (Qld) s28; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s3(2); *Civil Liability Act 2002* (Tas) s43A(1); *Wrongs Act 1958* (Vic) s24AF; *Civil Liability Act 2002* (WA) s5A(1); *Civil Law (Wrongs) Act 2002* (ACT) s107B; *Proportionate Liability Act 2005* (NT) s4. **6** *Civil Liability Act 2002* (NSW) s34(2). See also *Australian Securities and Investments Commission Act 2001* (Cth) s12GP(3); *Corporations Act 2001* (Cth) s1041L(3); *Competition and Consumer Act 2010* (Cth) s87CB(3); *Civil Liability Act 2003* (Qld) s30; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s3(2); *Civil Liability Act 2002* (Tas) s43A(2); *Wrongs Act 1958* (Vic) s24AH; *Civil Liability Act 2002* (WA) s5A(1); *Civil Law (Wrongs) Act 2002* (ACT) s107D; *Proportionate Liability Act 2005* (NT) s6(1). **7** *Civil Liability Act 2002* (NSW) s35(1). See also *Australian Securities and Investments Commission Act 2001* (Cth) s12GR(1); *Corporations Act 2001* (Cth) s1041N(1); *Competition and Consumer Act 2010* (Cth) s87CD(1); *Civil Liability Act 2003* (Qld), s31(1); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s8(2); *Civil Liability Act 2002* (Tas) s43B(1); *Wrongs Act 1958* (Vic) s 24A(1); *Civil Liability Act 2002* (WA), s5AK(1); *Civil Law (Wrongs) Act 2002* (ACT) s107F(1); *Proportionate Liability Act 2005* (NT) s13. **8** *Shrimp v Landmark Operations Limited* (2007) 163 FCR 510 at [58]-[59], [62] per Besanko J; *Yates v Mobile Marine Repairs Pty Ltd* [2007] NSWSC 1463 at [94] per Palmer J; *Godfrey Spowers (Vic) Pty Ltd v Lincoln Scott Australia Pty Ltd* (2008) 21 VR 84 at [93] per Ashley JA, Nettle & Neave JJA agreeing; *Solak v Bank of Western Australia* [2009] VSC 82 at [35] per Pagone J; *St George Bank Ltd v Quinerts Pty Ltd* (2009) VR 666 at [57]-[59] per Nettle JA; *Kheirs Financial Service Ltd v Aussie Home Loans Ltd* (2010) 31 VR 46 at [89] per Maxwell P, Tate JA & Habersberger AJA; *Lovick & Son Developments Pty Ltd v Doppstadt Australia Pty Ltd* [2012] NSWSC 529 at [254] per Slattery J. **9** *Commonwealth Bank v Witherow* [2006] VSCA [45] – claim by lender against guarantor not apportionable; see also the cases discussed at endnote 8. **10** *Perpetual Trustee Co Ltd v CTC Group Pty Ltd* (No. 2) [2013] NSWCA 58 at [22] per Macfarlan JA in obiter; Meagher & Barrett JJA not deciding. **11** New South Wales, Tasmania and Western Australia permit contracting out; Queensland does not; the other States and Territories are silent. **12** (2010) 20 Tas R 239 per Evans, Tennant & Wood JJ. **13** *Perpetual v CTC*. See endnote 10. **14** *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 per Beech J. **15** *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* (2007) 164 FCR 450 at [40] per Middleton J; *Chandra v Perpetual Trustees Victoria* (2007) 13 BPR 24,675 (2007) ANZ ConvR 481; (2007) Aust Torts Reports 81-896; (2007) NSW ConvR 56-187at [110]-[111] per Bryson AJ; *S Sali & Sons Pty Ltd v Metzke & Allen* [2009] VSC 48 at [282] ff per Whelan J – appealed on other grounds *Metzke & Allen v Sali* [2010] VSCA 267; *Gunnerson v Henwood* [2011] VSC 440 at [406]-[410] per Dixon J obiter. **16** *Solak* (see endnote 8 above) and *Hunt & Hunt* (see endnote 3 above) – concurrent wrongdoer was a forger; *Yates* (see endnote 8 above) at [95]-[97] – concurrent wrongdoer was liable for breach of contract; Vann, ‘Equity and proportionate liability’, (2007) 1 *Journal of Equity* 199 at 205-6, 208-9 – author expresses the opinion that a concurrent wrongdoer may be found liable on an equitable claim; cf *Hunt & Hunt* (see endnote 3 above) at [42] per the majority – not deciding whether a person who is liable in debt is a ‘concurrent wrongdoer’. **17** *Tomasetti v Brailey* [2012] NSWCA 399; *Serilis v Bengston* [2013] QSC 240 per McMurdo J; *Hobbs Haulage Pty Ltd v Zupps Southside Pty Ltd* [2013] QSC 319 per Jackson J. **18** Namely, all jurisdictions except Victoria. **19** *Fudlovi v JGC Accounting & Financial Services Pty Ltd* (No. 2) [2013] WASC 301 per Kenneth Martin J. **20** *Reinhold v New South Wales Lotteries Corporation* (No. 2) (2008) 82 NSWLR 762 at [60] per Barrett J; *Vella v Permanent Mortgages Pty Ltd* (2008) 13 BPR 25,343 at [578]ff. The court must ‘assess the “causal

potency” of the various factors which singularly or together went to bring about the loss caused’ –*Solak* (endnote 8 above) at [38]. **21** *Solak*, see endnote 8 above, at [43]. **22** *Woods v De Gabriele* [2007] VSC 177 at [41]-[43], [50]-[51], [58] per Hollingworth J obiter; *Solak* (endnote 8 above) at [35]. **23** In most States and Territories, and at federal level, the defendant must give the plaintiff written notice of the identity of the alleged concurrent wrongdoer and the circumstances that make the other person a concurrent wrongdoer in relation to the claim. In Victoria alone, the concurrent wrongdoer must be joined to the proceeding. **24** *Permanent Custodians Ltd v King* [2010] NSWSC 509 per Schmidt J. **25** *Weelahan v City of Casey* (No. 12) [2013] VSC 316 at [131] per Dixon J. **26** [2007] NSWSC 367 at [35]; followed in *GEJ & MA Geldard Pty Ltd v Mobbs & Ors* (No. 2) [2011] QSC 33 at [56]-[60] per Ann Lyons J, and in *Miletech v Murchie* [2012] FCA 1013 at [113]-[114] per Gray J. **27** At [41]. **28** Robert McDougall, ‘Proportionate Liability in Construction Litigation’ (2006) 22(6) *Building and Construction Law Journal* 394 at 400. **29** (2013) 247 CLR 613. **30** *Mitchell Morgan Nominees Pty Ltd v Vella* (2011) 16 BPR 30,189. **31** *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666. **32** *Ibid*, at [19]. **33** *Ibid*, at [24]. **34** *Ibid*, at [25]. **35** *Ibid*, at [28]. **36** *Ibid*, at [36]. **37** *Ibid*, at [43]. **38** *Ibid*, at [51]. **39** *Ibid*, at [53]. **40** *Ibid*, at [58].

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