PROPORTIONATE LIABILITY REVISITED

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2020 marked 50 years since the collapse of the Westgate Bridge over the Yarra River, a major disaster that occurred in Melbourne, Australia. The collapse, which occurred during construction of the bridge, saw 2,000 tonnes of steel and concrete give way, claiming the lives of 35 construction workers and engineers. This led to the Royal Commission into the Failure of the West Gate Bridge. In its Report released in 1971, the Commission found that although the particular action precipitating the collapse was the removal of a number of bolts, the true sources of failure lay further back with the designers, Freeman Fox & Partners, and contractors, World Services Construction and John Holland.[1] The designers had failed to give proper and careful regard to the process of structural design and failed to properly check the safety of proposals put forward by the original contractors. As a result, the margins of safety for the bridge were inadequate. The second cause of the disaster was the unusual method proposed by the contractor for the erection of two spans. Successful execution required more than usual care. Neither contractor appeared to have appreciated the need for such great care while the designers failed in their duty to prevent the contractor from using dangerous procedures. The Commission recommended that, before construction recommenced, a thorough check be made of the whole design by an independent authority.[2] Construction resumed in 1972 and after 10 years of construction it was finally completed in 1978.[3]

In March 2015, a proposal was presented to the Victorian Government for effectively a duplication of the crossing of the Yarra River, this time by tunnel. The project involves a widening of the West Gate Freeway, boring twin tunnels under Yarraville, and constructing a bridge over the Maribyrnong River to provide a second river crossing.[4] This proposal involved a Public Private Partnership between the Victorian Government

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[1] Royal Commission into the Failure of the West Gate Bridge (July 1971), 9.

[2] *Ibid.*

[3] Silva, K, "The West Gate Bridge collapsed 50 years ago. Can similar tragedies be prevented?", ABC (online, 15 October 2020) https://www.abc.net.au/news/2020-10-15/bridge-safety-50-years-on-from-westgate-tragedy/12740628.

[4] "Project benefits", West Gate Tunnel Project, https://westgatetunnelproject.vic.gov.au/about/project-benefits.

and the toll road owner and operator, Transurban. A joint venture consisting of CPB Contractors and John Holland was engaged as D&C contractors by Transurban to deliver the project.[5] Complex project documentation was completed in December 2017. The estimated project cost was AUS$6.7 billion.[6]

As with the original Westgate Bridge, the West Gate Tunnel Project has not gone according to plan. Serious difficulties have emerged in the construction of the tunnels. In late 2018, contaminated soil was discovered in the vicinity of where the twin tunnels are to be constructed.[7] The D&C sub-contractors made numerous claims to Transurban for variations or modifications, for extensions of time and/or for additional payment arising out of the extent of contaminated soil discovered and their inability to dispose of the soil to allow tunnel works to commence. In January 2020, the sub-contractors sought to terminate the subcontract on the basis there had been a Force Majeure Termination Event arising from the discovery of the soil contamination.[8] Presently, the tunnel boring machines initially scheduled to commence digging in July 2019 sit idle.

As can be confidently anticipated in such circumstances, there has been disagreement amongst the parties as to who should bear the risk of the project delay and the solution to the disposal of the contaminated soil. The impasse among Transurban, the D&C subcontractors and the Victorian state government is estimated to have blown out costs by up to AUS$3 billion. Though no decision has yet been made about where the soil will go, the Environmental Protection Authority has recently approved a plan for the tunnel boring spoil to be stored in a former coal mine in Bacchus Marsh. Residents are leading a campaign voicing concerns that the contamination will leak into waterways and are demanding further consultation and information from the sub-contractors, Transurban and the state government.

Arbitrations have been foreshadowed, and commenced, among the various parties to the complex web of project agreements entered into for the implementation of the project. A dispute has arisen as part of these issues, as to whether an arbitral tribunal or a court should determine the question of whether an upstream arbitration between the state and the concession company should preclude a downstream arbitration between the concession company and subcontractors from proceeding. In a detailed judgment on this question,[9] Lyons J in the Victorian Supreme Court dealt in some detail with the matrix of agreements and noted at paragraph 44 of the judgment: "Clause 44.5 provides that, to the extent permitted by law,

[5] *Transurban WGT Co Pty Ltd v CPB Contractors Pty Ltd* [2020] VSC 476, paragraph 2 (Lyons J).

[6] Powell, G, "West Gate Tunnel project a year off track, Transurban tells ASX", ABC News (online, 4 May 2020) https://www.abc.net.au/news/2020-05-04/west-gate-tunnel-expected-to-finish-2023-transurban-tells-asx/12211374.

[7] *Transurban WGT Co Pty Ltd v CPB Contractors Pty Ltd* [2020] VSC 476, paragraph 9 (Lyons J).

[8] *Ibid*, paragraph 10.

[9] *Ibid.*

the arbitrator will have no power to apply or have regard to the provisions of any proportionate liability legislation which might have applied to any dispute referred to arbitration".

Why exclude the proportionate liability regime? It may have been excluded for a strategic commercial reason. This case exemplifies the common scenario where two contractors enter into an unincorporated joint venture in order to bid for a major construction project. Prior to the introduction of proportionate liability legislation, it was standard practice for the owner to require joint and several liability so that it is not disadvantaged where one contractor is particularly expert but relatively impecunious. Without such an arrangement, the particular joint venture may never win the job. It is this proportionate liability legislation, and its effect upon contractual allocation of liability with which this paper is concerned.

In 2006, I gave the Michael Brown Foundation Lecture at King's College, London, which discussed the history and principles lying behind the development of the concept of proportionate liability in Australia. This paper seeks to revisit the question of proportionate liability and consider the following:

- What has happened in Australia since 2006, legislatively and judicially, regarding proportionate liability?
- What has occurred in other common law jurisdictions if anything, in this area, in the interim?
- What might be the approach to the issues lying behind the legislation from a civil law perspective?

The starting point of this discussion requires laying out the framework of the proportionate liability debate and the issues which lay behind the legislation enacted in 2002 in Australia.

THE FRAMEWORK

The framework for proportionate liability is complex, particularly in large construction projects as many parties are involved in the construction process, including the owner, contractor, sub-contractors, suppliers, designers, operators, and so on. Three key issues inform the proportionate liability debate.

First is the commercial necessity/reality of joint and several liability. A joint and several liability arrangement provides commercial parties with the certainty that they will be able to recover in the event of a dispute. The proportionate liability regime and its scope thus affects the commercial risk and viability of projects, informing who wins projects and the basis on which the project proceeds. It does so by altering the balance sheet calculus, forcing owners of projects to assess the solvency of each party of any major construction work. For insurers, this complicates their

estimation of commercial parties' exposure to risk, potentially increasing the cost of premiums.

Secondly, in the course of a construction project, liability to pay damages may arise in a number of ways. A party may be liable for a negligent breach of duty of care owed to another or for breach of a contractual obligation. Concurrent liability in the proportionate liability regime has given rise to a number of legal uncertainties in the allocation of risk assumed by parties.

Thirdly, the liability of a defendant may be reduced by contributory negligence or contribution. Contributory negligence arises where the claimant has failed to take reasonable care to protect its own interests, and this failure in some way contributes to its loss. Contributory negligence, at least in relation to claims for pure economic loss as is generally the case with construction projects, reduces the claimant's recoverable damages by the extent to which the court thinks is just and equitable having regard to the claimant's share in the responsibility for the damage. This means that for contributory negligence to defeat the claim entirely, the degree of negligence by the claimant must be significant. The exception to this can be seen in jurisdictions which retain full contributory negligence, in which the claimant is barred from recovery if it has contributed to the loss at all, which is the system used in certain US States.

Both contributory negligence and contribution represent alternative means of distributing liability consistently with fault. Contribution distributes the claimant's full loss among the available defendants but does not impact on the amount recoverable by the claimant. On the other hand, contributory negligence reduces the total loss recoverable by the claimant as it cannot recover the loss attributable to its own default. Where there is 100% contributory negligence, recovery of damages by the claimant will be precluded, producing a similar result to situations where the claimant's failure to take reasonable care constitutes an intervening act that breaks the causal chain between the defendant's negligence and the claimant's loss.[10]

THE POLICY DEBATE: JOINT AND SEVERAL OR PROPORTIONATE LIABILITY

Significant academic discussion has been devoted to the question of how best to attribute liability for damages where multiple parties are at fault. Underpinning the debate is the fundamental philosophical question: should the plaintiff or the defendant(s) bear the risk that other concurrent wrongdoers might be impecunious or otherwise unavailable to sue? Under the traditional system of joint and several liability, the plaintiff is allowed to recover 100% of its loss from any single wrongdoer regardless of their degree of fault. Consequently, the burden of risk that one or more of the

[10] See *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 516 (Mason CJ).

defendants will be impecunious or untraceable is placed on the remaining wrongdoer(s) who must compensate the plaintiff fully. Proportionate liability reverses this burden by limiting the amount that the plaintiff can recover from any single defendant to the amount that accords with the defendant's level of responsibility for the plaintiff's loss. Surrounding this debate are four key policy considerations.

First, in both tort and contract, damages seek to provide full compensation for the loss caused. As joint and several liability calculates damages by reference to the plaintiff's loss rather than the extent of the defendant's fault, proponents argue that this system best accords with the principle of full compensation. The New Zealand Law Commission has suggested that while joint and several liability may impose liability in excess of responsibility in cases where other concurrent wrongdoers are not available or able to pay, this is not a sufficiently compelling reason for a departure from the existing rule.

Secondly, and related to the compensation theory is the argument of causation. The rationale for joint and several liability can be found in causation principles because the defendant's negligence must have been a necessary cause of the whole of the plaintiff's loss. That is, but for the negligence of each defendant, the plaintiff would not have suffered any loss at all.[11] As such, it should not be open to any of the wrongdoers to resist the imposition of the whole of the harm suffered.

Three objections have been made to this line of argument. First, the Hon Andrew Rogers QC has suggested the argument is circular because "[o]ne cannot justify resistance to proportionate liability by resort to a principle which starts by accepting the absence of proportionate liability".[12] Secondly, like the compensation rationale, the argument does not account for situations where the plaintiff is not "innocent" because it is contributorily negligent. Thirdly, it ignores the fact that in certain cases the plaintiff may have considerable control over the solvency or otherwise of potential defendants, commonly the case in construction projects where the principal/owner has the "ultimate choice as to who carries out the work, and can take steps to assess their solvency and insurance backing, and it therefore ought to bear some of the risk of the insolvency of those parties".[13]

Thirdly, the system of liability adopted should encourage risk minimisation in projects. However, it is unclear which form of liability provides the most efficient deterrent, or whether one is more efficient than the other. Proponents of proportionate liability argue that imposing liability only on "deep pocket" defendants presses them to adopt excessive and inefficient

[11] McDonald, B, "Reforming a Reform: Why Has It Been So Hard to Reform Proportionate Liability Reforms?", in eds Barker, K and Grantham, R, *Apportionment in Private Law* (Oxford, Hart Publishing, 2019) 267, 274.

[12] Rogers, A, "Fairness or joint and several liability", (2000) 8 *Tort Law Journal* 1, 3.

[13] DTI, Feasibility Investigation of Joint and Several Liability (London, HMSO, 1994), paragraph 3.12.

duties of care, while incentivising those who hope to escape responsibility by through absence or insolvency.

On the other hand, supporters of joint and several liability argue this system is an efficient mechanism for risk minimisation. This is because it encourages wrongdoers who are likely to be the target of any litigation to act as "gatekeepers" by supervising the activities of other potential wrongdoers. Further, they contend that proportionate liability reduces the incentive for effective accident prevention by reducing the potential liability of concurrent wrongdoers. Potential wrongdoers may not implement the safety measures they otherwise would have had they faced the prospect of being held liable for 100% of the plaintiff's loss. However, parties may be motivated to exercise due care because they know they cannot escape liability by the plaintiff by choosing to claim the full amount from another responsible party.

Fourthly, under a joint and several liability system, there is potential for each case to generate multiple and separate proceedings for each concurrent wrongdoer. It is uncertain whether proportionate liability improves or aggravates these procedural concerns. While proportionate liability goes some way to solving the problem presented by contribution, the dilemma of multiple claims will persist because the plaintiff may choose to claim against a number of wrongdoers but will not be barred from pursuing other wrongdoers at a later date.

Moreover, proportionate liability may complicate procedural issues. Under a system of proportionate liability, courts must determine the responsibility of each wrongdoer, and given that some wrongdoers may be impecunious, insolvent, or otherwise unavailable, the plaintiff will have a vested interest in ensuring that it recovers close to 100% of its loss. This would appear to increase the complexity of the arguments presented to the courts and shift the burden of detailed case preparation further onto the plaintiffs. Additionally, this may motivate plaintiffs to pursue every party who is liable to some degree, regardless of how minimal, in order to recover as much of its loss as possible. Courts would also need to consider new procedural issues relating to the complexity and size of proceedings. Judges may be confronted with issues of how to adequately apportion liability in cases where a wrongdoer is absent or how to navigate complex cases where different forms of loss are present.

AUSTRALIA

The legislation creating a proportionate liability regime in Australia was enacted following the *Ipp Review of the Law of Negligence*.[14] At the time of that review, popular opinion suggested that the laws in relation to negligence

[14] *Review of the Law of Negligence* (Final Report, September 2002) 173–179 ("*Ipp Review*").

were far too favourable to plaintiffs seeking to bringing claims. In response, a slate of reforms enacted under the Civil Liability Act 2002 (NSW) were taken to limit those favourable conditions, which involved raising the standard to establish liability in negligence[15] and restricting damages payable.[16] Another reform in favour of defendants' rights was through the enactment of a proportionate liability "defence". This meant that in circumstances of concurrent wrongdoing, defendants could argue that they should not be held 100% liable for the plaintiff's loss but instead for a portion of the loss for which they were responsible. The lawmakers at the time saw such an approach as promoting personal responsibility in circumstances of negligence.[17]

Another significant contextual factor for the introduction of the legislation was the perceived "insurance crisis" in the early 2000s. In the early 1990s, rising premium costs in Australia coincided with several spectacular collapses within the corporate world. These collapses led to litigation directed particularly at the accountants who had audited the accounts of the collapsed companies, even where their level of responsibility was minimal, because the other wrongdoers involved had limited funds. Against this background, an inquiry into the law of joint and several liability was established in 1993 by the Federal and NSW Attorneys-General.[18] The result was a recommendation for the adoption of proportionate liability in cases of physical damage or economic loss.[19]

The recommendation while adopted in narrow circumstances at the time, later resurfaced and gained momentum for broader reforms in 2001.[20] This was in response to a continued increase in insurance premiums which were believed to have been a result of the collapse of major insurance group HIH, the terrorist attacks of 11 September 2001 and reduced availability of public liability and professional indemnity insurance. Various professional groups asserted that the upshot of joint and several liability was that parties who were financially secure or insured unfairly bore the burden of compensating plaintiffs fully, even where their contribution to the loss is marginal.

Despite rising insurance costs being one of the driving factors prompting the introduction of proportionate liability legislation, the true impact of joint and several liability on changes in the liability insurance market is

[15] See Civil Liability Act 2002 (NSW) section 5B "not insignificant" cf *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 44 "far-fetched or fanciful"; Civil Liability Act 2002 (NSW) section 5O.

[16] Civil Liability Act 2002 (NSW) Part 5.

[17] New South Wales, Second Reading Civil Liability (Personal Responsibility) Act 2002 (NSW), New South Wales Legislative Assembly, 23 October 2002 (Robert Carr, Premier).

[18] See Davis, J, *Inquiry into the Law of Joint and Several Liability* (Report of Stage Two, January 1995), 11; New South Wales Attorney-General's Department, *Tort Liability in New South Wales* (Legislation and Policy Division Discussion Paper, July 1990).

[19] Enacted in certain circumstances through Professional Standard Act 1994 (NSW).

[20] A precursor may also be found in the enactment of the Health Care Liability Act 2001 (NSW), which came into force on 5 July 2001, in response to rising insurance premiums in the health care sector.

uncertain. It has been argued that there is no actual evidence of the effect of either system of liability on insurance affordability.[21]

The Scope of the Proportionate Liability Regime

The *Ipp Review of the Law of Negligence* and subsequent reforms were aimed at amending and developing the law of negligence. Perhaps due to that focus, their application in the sphere of contracts and contract law has continued to remain unclear. The State which has enacted a regime most consistent with the intention of the original Review of the Law of Negligence[22] is Queensland. Under the Civil Liability Act 2003 (Qld), an "apportionable claim" — that is one which may be the subject of apportionment among parties, is clearly restricted to circumstances of "a breach of a duty of care".[23] The language of the provisions clearly identifies that the Act is to apply in circumstances of negligence by defining the application of the Act to claims for economic loss or damage to property.[24]

However, legislative language adopted in NSW,[25] which is more representative of the legislation enacted in other states,[26] shows an intention for the proportionate liability regime to go beyond the tort of negligence and operate more broadly. Or at a minimum, the ambiguity of the language adopted in those states has enlivened debate as to the scope of operation of the Act.

In NSW, the Civil Liability Act 2002 (NSW) defines "apportionable claims" as:[27]

> "a claim for economic loss or damage to property in an action for damages arising from a failure to take reasonable care, but not including any claim arising out of personal injury."

These words are ambiguous. It is unclear whether the cause of action must be one in which a failure to take reasonable care must be an element or if, alternatively, the legislation applies to any claim where there is a failure to take reasonable care, even in circumstances where this is not an element of the cause of action.

These contesting interpretations, which affect the scope of application of the proportionate liability regime, were considered by the Supreme Court of NSW in *Reinhold v New South Wales Lotteries Corporation (No 2)* ("*Reinhold (No 2)*").[28] This case concerned the unfortunate cancellation of

[21] McDonald (fn 11) 70–72.
[22] *Ipp Review* (fn 14).
[23] Civil Liability Act 2003 (Qld) section 28(1)(a).
[24] Claims in relation to negligence resulting in personal injury cannot be the subject of apportionment.
[25] Civil Liability Act 2002 (NSW) section 34(1)(a).
[26] Civil Law (Wrongs) Act 2002 (ACT) section 107B; Wrongs Act 1958 (Vic) section 24AF(1)(a); Proportionate Liability Act (NT) section 4(2)(a); Civil Liability Act 2002 (Tas) section 43A(1)(a); Civil Liability Act 2002 (WA) section 5AI(a).
[27] Civil Liability Act 2002 (NSW) section 34(1)(a).
[28] [2008] NSWSC 187 ("*Reinhold (No 2)*").

Mr Reinhold's winning Oz Lotto ticket. Mr Reinhold had purchased two Oz Lotto tickets from his Newsagent. As the first had been incompletely printed, the Newsagent kept the ticket to cancel and issued another ticket. On 20 September 2005, the winning numbers in Oz Lotto Draw 605 were drawn (6, 19, 21, 22, 25 and 31) and corresponded to Mr Reinhold's second ticket. When Mr Reinhold went to claim his winnings, he discovered that the Lotteries and Newsagents had cancelled both his incomplete ticket and second ticket before the draw. Mr Reinhold's despair at this turn of events can be easily understood. However, that despair may have been alleviated upon the Supreme Court of NSW's determination that Mr Reinhold was entitled to damages of AUS$2 million for both breach of contract and negligence.

The key issue was how to apportion liability among the various parties who had caused Mr Reinhold's loss. Justice Barrett determined that the proportionate liability legislation[29] was applicable to the claim. His Honour found that the language of the provision, "a claim for economic loss or damage to property in an action for damages *arising from a failure to take reasonable care*"[30] extended the operation of the Act to include any circumstances in which the court had made a finding of negligence in fact. His Honour stated:[31]

> "[the] nature of the claim, for the purposes of Pt 4, is to be judged in the light of the findings made and is not determined by the words in which it is framed."

On this basis Justice Barrett held that a negligent breach of a strict contractual term could enliven the operation of the legislation. This effectively broadened the ambit of claims falling within the scope of the legislation to any breach of a contractual term, whether or not a concurrent duty of care had been established.

However, this broad reading of the legislation has been the subject of judicial and academic criticism because it can lead to absurd outcomes. This was made clear in the NSW Court of Appeal in *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)* ("*Perpetual Trustee*") by Justice Macfarlan.[32] The claim concerned CTC's liability to Perpetual Trustee for breaching its obligations of care under a mortgage origination deed.[33]

While the scope of operation of the Act did not need to be determined, Justice Macfarlan considered the approach adopted in *Reinhold v New South Wales Lotteries Corporation (No 2)*.[34] His Honour's view was that for the proportionate liability regime to apply, the absence of reasonable care had to be an element of the cause of action upon which the plaintiff succeeded.

[29] Civil Liability Act 2002 (NSW) section 35.
[30] Civil Liability Act 2002 (NSW) section 34(1)(a).
[31] *Reinhold (No 2)* (fn 19) paragraph 30 (Barrett J).
[32] [2013] NSWCA 58, paragraph 22 (Macfarlan JA) ("*Perpetual Trustee*").
[33] *Perpetual Trustee Co Ltd v CTC Group Pty Ltd* [2012] NSWCA 252.
[34] [2008] NSWSC 187.

Otherwise, it follows that a contractual party is better off by breaching a contractual obligation negligently rather than by doing so "innocently" and being left jointly and severally liable.

These contrasting views were not harmonised: in a separate judgment, Justice Barrett reaffirmed his previous position in *Reinhold v New South Wales Lotteries Corporation (No 2)*.[35] Justice Meagher did not comment on the matter.

Little clarity was achieved when the question arose again in 2019 in an interim application in *Colagrossi v Transport for NSW*,[36] involving a dispute concerning damages for alleged public and private nuisance arising from the construction of the South East Light Rail.[37] The scope of application of the proportionate liability regime arose as an issue when the defendant filed an Amended Defence seeking to join other contractors and subcontractors who had worked on the project and to rely on the "defence" of proportionate liability.[38] When assessing the difference between the positions in *Reinhold (No 2)* and *Perpetual Trustee*, Justice Garling determined that both positions were arguable, and as such the application to file an Amended Defence was successful.

Thus, the scope of the proportionate liability regime under NSW law remains unclear. On the one hand, it may be argued the regime extends to breaches of strict liability obligations where reasonable care has not been taken, regardless of whether that is a component of a cause of action. On the other hand, it may be argued that the failure to take reasonable care must be a component of the cause of action to attract the operation of the proportionate liability regime.

The law on proportionate liability in Australia has been complicated by a number of factors, including whether it can be excluded by contract and whether arbitrators have the capacity to apply the provisions.

Contracting Out of the Regime

In NSW parties may contract out of the proportionate liability regime. While this view was not initially endorsed,[39] the language of the legislation,[40] as well as the weight of judicial and academic authority supports this conclusion.[41] As similar provisions to those that apply in NSW operate in Western Australia[42]

[35] *Perpetual Trustee* (fn 33) paragraphs 37–43 (Barrett JA).
[36] [2019] NSWSC 493.
[37] *Colagrossi v Transport for NSW* [2019] NSWSC 493, paragraph 4 (Garling J).
[38] *Ibid*, paragraph 10 (Garling J).
[39] *Reinhold (No 2)* (fn 19).
[40] Civil Liability Act 2002 (NSW) section 3A(2).
[41] *Perpetual Trustee* (fn 33); *CTC Group Pty Ltd v Perpetual Trustee Company Ltd* [2013] HCATrans 248; McDonald (fn 11) 286.
[42] Civil Liability Act 2002 (WA) section 4A.

and Tasmania,[43] it follows that parties in those states may contract out of the proportionate liability regime. By contrast, the Queensland legislation expressly provides that the proportionate liability regime applies, excluding the possibility of contracting out of the provisions.[44]

In Victoria, South Australia, the Northern Territory, and the Australian Capital Territory, the relevant legislation is silent on contracting out of the proportionate liability regime. It has been suggested that this means that the regime may not be contracted out of.[45] The position in these states is yet to be settled.

The resolution of this issue will be commercially significant. It will clarify the ability for parties to expressly seek to avoid the statutory position provided by the proportionate liability regime. But more-so, and perhaps of wider significance, it will clarify the ability for parties to make explicit provision for the allocation of liability within their agreements. Indemnity clauses, as well as clauses which seek to cap the damages of a party, implicitly contravene the proportionate liability regime. Whether those clauses, or the legislative regime, prevail in those states remains an open question.

Application of the Australian Proportionate Liability Regime to Arbitration

The proportionate liability regime is unlikely to apply in arbitral proceedings. Caselaw has excluded the operation of the proportionate liability regime for several reasons.[46] First, the language of the respective parts of proportionate liability regime provides an indication that it is to operate in court proceedings. The relevant language of the respective Acts referred to includes the words: a "court", "plaintiff" and "defendant", in respect of a "judgment".[47] Another factor considered has been the inability in arbitral proceedings to join third parties.[48]

Instead it has been held that where proportionate liability is to apply between parties to an arbitration it must do so through an express or implied term to that effect.[49] Additionally, the ability of parties to apply the regime through express words provides an argument against extending the language of the Act absent such words.

[43] Civil Liability Act 2002 (Tas) section 3A(3).

[44] Civil Liability Act 2003 (Qld) section 7(3).

[45] McDonald (fn 11) 287.

[46] *Aquagenics Pty Ltd v Break O'Day Council* (2010) 20 Tas R 239; *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 (Beech J).

[47] Civil Liability Act 2002 (Tas) section 3; *Aquagenics Pty Ltd v Break O'Day Council* (2010) 20 Tas R 239, paragraph 27 (Evans J).

[48] *Ibid*, paragraphs 89–90 (Tennet J).

[49] Parties may also seek to limit the operation of the proportionate liability regime. See *Transurban v CPB* [2020] VSC 476, paragraph 44 (Lyons J), where clause 44.5 provided: "to the extent permitted by law, the arbitrator will have no power to apply or to have regard to the provisions of any proportionate liability legislation which might have applied to any dispute referred to in arbitration."

Apportioning Claims under Australian Law

Section 35 of the Civil Liability Act 2002 (NSW) sets out the apportionment of claims under the proportionate liability regime. The legislation provides that where the claim in dispute is apportionable,[50] the court will apportion liability among concurrent wrongdoers, such that the defendant in question bears a "just" portion of damage having regard to the extent of its responsibility for the damage or loss.[51]

The determination of the "just" amount, turns on the facts of the relevant case. In making this determination, the court may exercise its discretion considering all circumstances.[52] However, the relevant indicia have largely evolved from apportionment principles in circumstances of contributory negligence.[53] Two key factors are: (i) the relative culpability of the concurrent wrongdoers; and (ii) the causative potency of each wrongdoer in the resulting loss.[54]

The first factor is demonstrated in the decision of the High Court of Australia in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees*.[55] In that case, Mr Caradonna and Mr Flammia used fraudulently obtained certificates of title to obtain money from Mitchell Nominees. The solicitors for Mitchell Nominees, Hunt & Hunt, negligently failed to include a covenant to repay the stated amount in the loan agreement. The majority held that Hunt & Hunt were concurrent wrongdoers, along with the two fraudsters (Mr Caradonna and Mr Flammia). As Mr Caradonna and Mr Flammia were fraudulent, they were more culpable than Hunt & Hunt who had merely acted negligently in drafting the loan agreement. Thus Hunt & Hunt were liable for only 12.5% of the loss incurred.

Both considerations are present in the decision of *Reinhold (No 2)*, the facts of which have been detailed above. In that case, Justice Barrett found that "there was … a very significantly greater degree of culpability on the part of Lotteries and a very significantly stronger causative force in Lotteries' conduct."[56] The aspect of causative potency arose in relation to which party had caused, to a greater extent than the other, the cancellation of the lottery ticket which resulted in Mr Reinhold's loss.[57] It was found that

[50] As outlined above.

[51] Civil Liability Act 2002 (NSW) section 35.

[52] *Smith v McIntyre* [1958] Tas SR 36, 46; applied *Owners Corporation No 1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property)* [2019] VCAT 286 (Judge Woodward, Vice President), paragraph 583.

[53] *Yates v Mobile Marine Repairs Pty Ltd* [2007] NSWSC 1463, paragraphs 93–94 (Palmer J); *Reinhold v New South Wales Lotteries Corporation (No 2)* [2008] NSWSC 187 (Barrett J), paragraph 45.

[54] As outlined in *Thiess Pty Ltd and John Holland Pty Ltd v Parsons Brinckerhoff Australia Pty Ltd* [2016] NSWSC 173 (McDougall J); See these considerations under contributory negligence *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492, 494 (Gibbs CJ, Mason J, Wilson J, Brennan J and Deane J) applied *Owners Corporation No 1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property)* [2019] VCAT 286 (Judge Woodward, Vice President), paragraphs 582, 585.

[55] *Hunt & Hunt Lawyers v Mitchell Morgan Nominees* (2013) 247 CLR 613.

[56] *Reinhold (No 2)* (fn 19) paragraph 74 (Barrett J).

[57] *Ibid*, paragraph 72 (Barrett J).

Lotteries NSW had systems and procedures in place for the cancellation of tickets, which, if they had been followed, would have avoided the loss suffered by Mr Reinhold. The Newsagent however had no comparable systems. Accordingly, Lotteries NSW were held 90% liable for the loss.[58]

Other relevant considerations, include:

- the age, role and position of the person causing the damage;[59]
- failing to take an obvious and available last opportunity to avoid the damage;[60] and
- whether the party was actively engaged in causing the loss, able to prevent against the loss or had been engaged for the specific reason of preventing against such a loss.[61]

It is important to note that the concurrent wrongdoer's financial strength or profitability, situation or status, or its remorse or lack thereof is not relevant for the purposes of apportionment.[62]

Case Study: Combustible Cladding

Issues of proportionate liability often arise in the construction sector due to the number of participants in construction projects, and the relationships among parties. While the central consideration of this paper relates to proportionate liability in relation to the law of contract, the overlay of tortious duties of consideration in the cladding context demonstrates the complexity involved in the proportionate liability regime.[63]

The term "combustible cladding" refers to materials used for thermal insulation or weather resistance that pose a risk to spread fire. These materials can endanger lives and increase the extent of property damage in the event of fire. In 2017, global attention was drawn to the issue following the Grenfell Tower disaster. As a result of that tragedy, 72 people lost their lives when a fridge-freezer fire spread to the outer aluminium composite material (ACM) which covered the building.[64]

It is worth noting briefly the systematic failures which have given rise to the use of combustible cladding materials.[65] These failures are at three levels: product supply, construction, and regulatory.[66] At the first level, are the manufacturers, importers and sellers of these materials. At the second

[58] *Ibid*, paragraph 81 (Barrett J).
[59] *Smith v McIntyre* (fn 43) 46.
[60] *Ibid.*
[61] *Perpetual Trustee Company Ltd v Ishak* [2012] NSWSC 697, paragraph 194 (Brereton J).
[62] *Reinhold (No 2)* (fn 19) (Barrett J).
[63] See *Bryan v Maloney* (1995) 182 CLR 609; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; *Brookfield Multiplex v Owner's Corporation Strata Plan 61288* (2014) 313 ALR 408; The situation has been further complicated by the Design and Building Practitioners Act 2020 No 7 (NSW).
[64] "Grenfell Tower: What happened", British Broadcasting Corporation News, (online, 28 October 2019) https://www.bbc.com/news/uk-40301289.
[65] Victorian Cladding Taskforce, Report from the Co-Chairs (July 2019); Waller, M, Erfurt, C and Mulroy, T, "Cladding – who will pay?", (2019) 35 *Building & Construction Law Journal* 91, 96.
[66] *Ibid.*

level, are those responsible for the installation of these materials such as builders, architects and engineers. At the third level, are the building certifiers and those involved with ensuring regulatory compliance with building standards.

In Australia, the dangers of combustible cladding have been demonstrated by the Lacrosse tower fire in Melbourne in 2014 and the Neo 200 tower fire in Melbourne in 2019. The 2014 fire was examined by the Victorian Civil and Administrative Tribunal, in 2019, in *Owners Corporation No 1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property)* ("*Lacrosse tower Case*").[67] The fire was started by Mr Jean-Francois Gubitta, who was staying in the building during his working holiday in Australia. Mr Gubitta left an unextinguished cigarette on the balcony of level 8 of the building close to midnight. At 02.23 smoke detectors in the building activated. By 02.35, the fire had spread along the outer cladding of the building to the roof above level 21.

While no residents were harmed, the owners claimed over AUS$24 million in damages had been caused by the fire. The various owners' corporations brought actions on behalf of the residential owners against the builder, the building surveyor, the architects, the fire engineer as well as Mr Gubitta. Due to implied warranties attached to the Lacrosse tower, the builders could be held primarily liable. These warranties were in relation to suitability of materials; compliance with the law; and fitness for purpose.[68] However, as "not every error is negligent",[69] the builders were found not to have acted negligently, as they had acted on professional advice, and had no actual or constructive knowledge of the negligence of that professional advice.

Judge Woodward found that the professional consultants had acted negligently, and that negligence had contributed to *the same loss.*[70] The court held that AUS$5.7 million was payable in damages by the Builder to the applicants. The Builder could then apportion the claim, and recover the loss under the following apportionment:

- Building Surveyor liable for 33% of the loss;
- Architect liable for 25% of the loss;
- Fire Engineer liable for 39% of the loss; and
- Mr Gubitta liable for 3% of the loss.

In determining apportionment among wrongdoers, the court had regard to an array of considerations. In particular, in the circumstances of the case, the complex web of overlapping duties in tort and contract was considered, and regard was had to how this affected the responsibility of each party for the resulting loss. The Fire Engineer was particularly culpable as he

[67] *Owners Corporation No 1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property)* [2019] VCAT 286 (Judge Woodward, Vice President).

[68] *Ibid*, paragraph 282.

[69] *Ibid*, paragraph 306.

[70] Wrongs Act 1958 (Vic) sections 24AH and 51.

had been engaged to guard against the risk that materialised. In a similar vein, the Building Surveyor was particularly culpable given its role in ensuring compliance with building standards. However, the specialisation of the Fire Engineer, and the knowledge of the materials on the building and the danger those materials presented, ultimately led to a greater degree of culpability.

This case provides some indication of the way apportionment factors may be applied in a construction context, albeit in a tortious setting. Legislative developments in NSW are likely to only expand the number of those owing duties of care in the construction sector.[71] The application of the proportionate liability regime to those owing contractual warranties will broaden the scope of parties subject to questions of apportionment.[72] Such breadth brings additional complexity.

COMMON LAW COMPARISON

Casting an eye to other parts of the common law world, the approach adopted in England and Wales and the US should be considered as both jurisdictions differ from the Australian approach.

In contrast with Australia, England and Wales have rejected calls to adopt a system of proportionate liability and have retained joint and several liability rules.[73] Accordingly, all defendants that are responsible for a single, indivisible injury are potentially liable for 100% of the plaintiff's loss.[74] The defendant may however have recourse to a contribution claim against concurrent wrongdoers. Similar to Australia, a plaintiff may have its award of damages reduced for contributory negligence in England and Wales.

The Proportionate Liability Debate in England and Wales

To understand the position in England and Wales, it is helpful to consider the policy arguments that sparked the debate surrounding the introduction of a proportionate liability system and the reasons for its rejection. In England and Wales in the 1980s, professional groups such as engineers and auditors, dissatisfied with rising professional indemnity insurance costs, led the demand for reform of joint and several liability.[75] In response to the liability issues faced by such professionals, the Likierman report

[71] Design and Building Practitioners Act 2020 No 7 (NSW).

[72] *Reinhold (No 2)* (fn 19) paragraph 30 (Barrett J); *Perpetual Trustee* (fn 33) paragraphs 37–43 (Barrett JA).

[73] Barker, K and Steele, J, "Drifting Towards Proportionate Liability: Ethics and Pragmatics", (2015) 74 *Cambridge Law Journal* 1, 49.

[74] *Ibid.*

[75] DTI, Professional Liability: Report of the Study Teams (London, HMSO, 1989), 6.

recommended the introduction of proportionate liability (except in cases of personal injury), and that further consideration of the issues should be undertaken by the Law Commission.[76] The Latham report followed in 1994.[77] That report noted the risk joint and several liability posed to deep pocketed defendants in the construction industry, and recommended that liability in construction cases, other than personal injury, be limited to "a fair proportion of the plaintiff's loss, having regard to the relative degree of blame".[78] These recommendations spurred an investigation by the Common Law Team of the Law Commission in 1996 ("Law Commission") into the feasibility of joint and several liability, and the principle of proportionate liability as a possible alternative.[79]

Ultimately, the Law Commission concluded that:[80]

> "[i]f there were an overwhelming case in terms of economic efficiency, or the overall public interest, for sacrificing sound principle, we would consider the form of modified proportionate liability which excludes consumers and reallocates some of the uncollected share up to 50 per cent of each defendant's share (exemplified by the US reform of securities legislation) to be the most pragmatic way of reforming joint and several liability. But we regard the policy objections to joint and several liability to be, at best, insufficiently convincing to merit a departure from principle …"

The Law Commission considered that proportionate liability would only substitute existing unfairness to defendants with unfairness to plaintiffs.[81] Specifically, the report cited four principles that militated against the adoption of full proportionate liability:[82]

- it shifts the risk of a defendant becoming insolvent from the other defendants to a legally blameless plaintiff;
- the principles of causation in joint and severable liability present sufficient barriers to a plaintiff making out its claim;
- under proportionate liability, the plaintiff is less likely to recover full damages if it is the victim of two wrongs rather than one wrong; and
- where a peripheral wrongdoer is insolvent, it is unfair that the innocent plaintiff should bear this risk rather than the principal wrongdoer.

Interestingly, the debates surrounding proportionate liability in Australia and England and Wales share numerous similarities. These debates, arising at a similar time, were both prompted by concerns about rising insurance costs. As can be expected, similar policy concerns and arguments were also

[76] *Ibid*, 39, 118 and 160.
[77] Latham, M, *Constructing the Team* (Final Report, July 1994) ("*The Latham Report*").
[78] *Latham Report*, paragraphs 11.9, 11.11.
[79] Common Law Team of the Law Commission, *Feasibility Investigation of Joint and Several Liability*, HMSO 1996. See Thirtieth Annual Report 1995 (1996) Law Com No 239, paragraph 2.21.
[80] *Ibid*, paragraph 7.4.
[81] *Ibid*, paragraph 1.2.
[82] *Ibid*, paragraphs 3.12–3.16.

put forward on both sides of the debate in each jurisdiction. And yet, the response taken in each case has been different. Many Australian jurisdictions have adopted proportionate liability in respect of claims for economic loss or damage to property. England and Wales have not done so. Instead, the principle of joint and several liability was retained. Other solutions were introduced to address the problems raised, including compulsory insurance schemes and caps on professional indemnities.

Current State of the Law in England and Wales

How then has the law evolved in England and Wales? To answer this question, the traditional joint and several liability rules and their implications for defendants, as well as recent judicial commentary on the apportionment of liability must be considered. This will lead to an analysis of the potential benefits of joint and several liability as retained in England and Wales.

Judicial Consideration of Proportionate Liability

Judicial consideration of proportionate liability in England and Wales has often arisen in the context of torts and mesothelioma cases. In the House of Lords' decision in *Barker v Corus (UK) plc*,[83] the plaintiff was exposed to asbestos by several employers, some of whom were or became insolvent. In accordance with the *Fairchild* decision,[84] the parties were liable in the proportions to which they contributed to the harm. *Barker* found that this principle applied even where the plaintiffs exposed themselves to asbestos. However, following backlash from victims' groups, the position taken in *Barker* was reversed by amendments to the Compensation Act 2006 section 3, which confirmed wrongdoers were joint and severally liable to asbestos victims.[85]

As noted by Lord Neuberger, this legislation has been a source of confusion.[86] This is demonstrated by the decisions that followed, including the 2012 decision of *Durham v BAI* (*the "Trigger Litigation"*),[87] which concerned section 3 of the 2006 Act.[88] The main judgment found the insurer jointly

[83] (HL) [2006] UKHL 20; [2006] 2 AC 572; [2006] 2 WLR 1027; [2006] 3 All ER 785 ("*Barker*").

[84] *Fairchild v Glenhaven Funeral Services Ltd* (HL) [2002] UKHL 22; [2002] Lloyd's Rep Med 361; [2003] 1 AC 32; [2002] 3 WLR 89; [2002] 3 All ER 305.

[85] Compensation Act 2006 (UK) section 3; Kramer, A, "Smoothing the Rough Justice of the Fairchild Principle", (2006) 122(4) *Law Quarterly Review* 1, 547–553.

[86] Lord Neuberger, "Implications of Torts Decisions" (Speech, Northern Ireland Personal Injury Bar's Inaugural Conference, 2017), paragraph 10.

[87] *Durham v BAI (Run Off) Ltd (in scheme of arrangement)* (SC) [2012] UKSC 14; [2012] Lloyd's Rep IR 3; [2012] Lloyd's Rep IR 371; [2012] 1 WLR 867; [2012] 3 All ER 1161 (*the "Trigger Litigation"*).

[88] Lord Neuberger, "Implications of Torts Decisions" (Speech, Northern Ireland Personal Injury Bar's Inaugural Conference, 2017).

and severally liable for the negligent exposure of an employee to asbestos, as the insurer's obligation to indemnify the employer was enlivened.[89]

More recently, in the 2015 case of *Zurich Insurance plc UK Branch v International Energy Group Ltd*,[90] the Supreme Court split 4-3 overturned the Court of Appeal's decision in unanimously finding that: (i) *Barker* represents the common law in Guernsey (as the Act does not apply there); (ii) Zurich was liable only for its proportion of the settlement figure; and (iii) that it could claim contribution against the insured itself in respect of any period of uninsured exposure.

That judicial consideration of proportionate liability arises exclusively within a sub-set of the narrow context of mesothelioma cases falling outside the scope of the Compensation Act, demonstrates that the regime has been all but abandoned by judiciary and legislature alike. Joint and several liability are the principles of choice and apply in breach of contract or construction disputes. Where a construction dispute involves a breach of contract or negligence attributable to multiple defendants (for example, there is a design fault by an architect, poor workmanship by the contractor, and a failure to inspect by a surveyor), all parties will be joint and severally liable for the loss or damage flowing from the breach.

It seems that for the foreseeable future, joint and several liability is here to stay.

Contribution from Concurrent Wrongdoers

Under joint and several liability rules, where two or more wrongdoers are liable for causing the same kind of damage, a plaintiff can recover full compensation from one wrongdoer alone. This will often be the insured defendant or one with the deepest pockets. However, where other parties have contributed to the same damage, the defendant who was liable for the damage may then seek a contribution claim against any other wrongdoer that contributed to the breach. The relevant legislation is the Civil Liability (Contribution) Act 1978. Section 6 of the Act establishes that contribution can be made regardless of the legal basis of the contributor's liability: whether the damage occurred in tort, or due to a breach of contract or where a wrongdoer is concurrently liable in both contract and tort.[91]

Accordingly, a wrongdoer who is liable for 100% of the loss, but "responsible" for only part of it may seek contribution from other wrongdoers

[89] *The Trigger Litigation*, paragraph 74.

[90] (SC) [2015] UKSC 33; [2015] Lloyd's Rep IR 598; [2016] AC 509; [2015] 2 WLR 1471; [2015] 4 All ER 813.

[91] Civil Liability (Contribution) Act 1978 (UK) section 6(1).

who are liable in respect of the same damage.[92] Although the defendant may seek recourse against other wrongdoers, the onus falls on the defendant to pursue a contribution claim. This accords with the state of the law in Australia prior to the enactment of the proportionate liability regime.

Comparable Principles in the United States

Across the Atlantic, the United States has clearly departed from a joint and several liability system, but has done so in a manner distinct from Australia.[93] In a similar way to other jurisdictions, support for a proportionate liability system grew in the United States in the late 1970s and early 1980s. As was the case in England and Wales, lobbying by insurers was a driving factor behind the reforms.[94] By 2000, only 15 US States retained pure systems of joint and several liability. Similar to Australia, the haphazard approach taken by the different states has resulted in a lack of uniform application of proportionate liability.

Tortious Liability

The approach to proportionate liability in the US varies considerably across the States.[95] States including North Carolina, Rhode Island and Virginia have retained a purely joint and several system.[96] Other states have taken the opposite approach and adopted proportionate liability in its entirety.[97] In Kentucky, for example, each defendant is liable to pay only its portion of awarded damages.[98]

The third approach eschews the binary approach taken by other states to proportionate liability in adopting a hybrid system. States such as Texas employ a system of variable liability based on the percentage of fault. Defendants in Texas who are more than 50% at fault and those who act with intent to harm, are jointly and severally liable in tort.[99] Interestingly, a defendant who is jointly and severally liable and pays more than their proportionate share of the loss does not have a right to contribution.[100]

[92] Civil Liability (Contribution) Act 1978 (UK) section 1(1).

[93] Barker, K (fn 73) 51.

[94] New Zealand Law Commission, Review of Joint and Several Liability (November 2012, New Zealand, Issues Paper No 32) 7.21 "United States".

[95] Wilson Elser, Joint and Several Liability: 50-State Survey (2013).

[96] Alabama, Delaware, Maine, Maryland, Massachusetts, North Carolina, Rhode Island and Virginia.

[97] Alaska, Arkansas, Georgia, Kansas, Kentucky, Oklahoma, Utah and Wyoming.

[98] *Dix & Assocs Pipeline Contractors v Key* 799 S.W.2d 24 (Ky 1990).

[99] Texas Civil Practice and Remedies Code section 33.013 (2003); *Sharyland Water Supply Corp v City of Alton* 354 S.W.3d 407 (Texas 2011).

[100] Texas Civil Practice and Remedies Code section 33.015 (1995); *C & H Nationwide v Thompson* 903 S.W.2d 315 (Texas 1994).

California has also adopted hybrid and variable liability. The California Civil Code 1431 provides for joint and several liability systems in respect of economic loss, but then switches to proportionate liability where the harm is non-economic.[101]

It is apparent that the system in the US varies greatly according to each state. In 2003, an ambitious project was undertaken to harmonise the US position, with the creation of the Uniform Apportionment of Tort Responsibility Act. This would have introduced a system of proportionate liability in a tortious context (with exceptions for parties acting in concert and for those who fail to prevent another from causing intentional harm).[102] This project may have been too ambitious, as no states have yet adopted the Act.

Contractual Liability

The position in the US differs in respect of liability in contract.[103] In a situation where two parties independently breach contractual obligations under the same contract causing loss to a third contracting party, in the absence of express agreement between the parties,[104] the courts will likely apply joint and several liability.[105]

Some courts in states with proportionate liability regimes have held that the "use of comparative negligence theory is not proper in breach of contract actions".[106] This is an area of continuing debate, with opponents arguing that joint and several liability is unfair for defendants and that proportionate liability for breach of contract would result in more efficient risk allocation in contracting.[107]

Thus, construction parties suing in tort may find themselves liable under proportionate liability, depending on the particular US state. However, the position in contract is not so clear, with courts more likely to apply joint and several liability principles where two co-obligors have breached obligations under the same contract, causing loss to the plaintiff.

[101] *Evangelatos v Superior Court* 753 P2d 585 (California 1988); *Buttram v Owens-Corning Fiberglas Corp* 941 P2d 71 (California 1997).

[102] Wilson Elser (fn 95) 3.

[103] *Ibid.*

[104] Bussel, D, "Liability for Concurrent Breach of Contract", (1995) 73(1) *Washington University Law Review* 97.

[105] Schneck, J and Goss, K, "Liability for Construction Defects that Result from Multiple Causes", (2015) 9(1) *Journal of the ACCL* 45; See *California & Hawaiian Sugar Co v Sun Ship* 794 F2d 1433 (9th Cir 1986); *Petrochemical Co v Thorsen & Thorshov Inc* 211 N.W2d 159, 163 (Minn 1973).

[106] Schneck (fn 96) 69; citing *Haysville USD No 261 v GAF Corp* 233 Kan 635, 643, 666 P2d 192, 199, 12 Ed Law Rep 957 (1983).

[107] Schneck (fn 96); Olthoff, "If You Don't Know Where You're Going, You'll End Up Somewhere Else: Applicability of Comparative Fault Principles in Purely Economic Loss Cases", (2001) 49 *Drake Law Review* 589.

CIVIL LAW COMPARISON

Civil law jurisdictions such as France and Germany have not adopted proportionate liability regimes. A joint and several liability approach has been preferred,[108] with full compensation to the harmed plaintiff at the core of their legal principles of liability and damages, even at the risk of higher insurance premiums and those with the deepest pockets sustaining loss. The principle of full compensation for contract and tort is regularly reiterated by the French Supreme Court[109] and implied in the French Civil Code.[110] In Germany, full compensation is set out in relation to contract and tort in the German Civil Code (Bürgerliches Gesetzbuch or "BGB").[111]

However, a different balance is struck between full compensation to the plaintiff and fair allocation of responsibility to the wrongdoer. Under French law, there is no general duty to mitigate, meaning contributory negligence is not recognised in tort[112] or contract.[113] However, the principle of non-cumulation provides some limits to liability by preventing a claimant from enforcing extra-contractual liability (such as tortious liability) where the conditions for contractual liability are met.[114]

An important feature of French law that is particularly relevant to the construction industry is the system of decennial liability. This far-reaching liability is joint and several as between all participants of the construction process.[115] The French Civil Code holds "builders" of a work strictly liable for 10 years for damage suffered, even resulting from a defect of the ground, which compromises the strength of the work and renders it unfit for its intended purpose.[116] A "builder" of a work is defined broadly and includes any architect, contractor, technician, or other person bound to the owner by contract.[117] Accompanying decennial liability is a mandatory insurance

[108] Moréteau, O, "French Tort Law in the Light of European Harmonization", (2013) 6 *Journal of Civil Law Studies* 760, 792 (France); BGB §830(1) (Germany).

[109] Brienenstock, S, "The Deterrent Effect of French Liability Law: The Example of Abusive Contract Terms" (2019) 129(2) *Revue d'économie politique* 205, 216. The original phrase can be found the decision Cass. Civ. 2e, 23 November 1966.

[110] Civil Code (France) Articles 1231-1233 (contract), 1240 (tort, formerly Article 1382).

[111] BGB §249 (contract) and §823 (tort).

[112] Cour de cassation [French Court of Cassation], 00-22.302, 19 June 2003, reported in (2003) Bulletin n° 203, 171.

[113] Cour de cassation [French Court of Cassation], 12-13.851, 10 July 2013, unpublished.

[114] De Graff, R, "Concurrent Claims in Contract and Tort: A Comparative Perspective", (2017) 25(4) *European Review of Private Law* 701, 710; The *Cour de Cassation* refers to "*la règle du non-cumul des responsabilités contractuelle et délictuelle*" (Cass. 2e Civ. 3 March 1993, no 91-17.677) and to "*le principe de non-cumul des responsabilités contractuelle et délictuelle*" (Cass. 1e Civ. 28 June 2012, no 10-28492).

[115] Frilet, M and Karila, L, "Contractors', Engineers' and Architects' Duty to Advise and Decennial Liability in Civil Law Countries: Highlights and Some Prevailing Principles", (2012) 7(2) *Construction Law International* 23.

[116] Civil Code (France) Articles 1792, 2270.

[117] Civil Code (France) Article 1792-1.

scheme which requires any person who may be subject to decennial liability to be insured.[118] Failure to take mandatory insurance results in heavy criminal and pecuniary penalties of up to six months imprisonment and a 75,000 fine. As decennial liability is a matter of public policy, it cannot be excluded contractually or by any means.[119] A builder can escape liability only by proving that the damages were caused by an extraneous event such as a natural disaster.[120]

Decennial liability is found in many other civil law jurisdictions including Spain,[121] the United Arab Emirates[122] and Qatar.[123] The decennial liability regime is not identical in every jurisdiction. For example, unlike France and Spain, decennial liability insurance is not mandatory in the UAE and Qatar, meaning that the requirement for insurance is governed contractually between parties.[124] Decennial liability typically applies to defects rendering the building not fit for purpose by compromising its strength, stability and safety. It encompasses, for example, claims for soil defects, weatherproofing and waterproofing. It is a relevant concern in the high-rise context where structural defects have been prevalent. Although uncertain, decennial liability may apply to combustible cladding where it poses a threat to the building's strength and safety.

In Germany, the regime is similar to that in England and Wales. Joint and several liability is set out clearly in the BGB,[125] and parties can pursue a claim in tort if time-barred in contract or if the tortious claim is more advantageous.[126] Unlike French law, German law recognises contributory negligence and, where it is established, the claimant's entitlement to damages will be reduced proportionately to its contribution to the damage.[127]

CONCLUSION

The issue of proportionate liability remains unsettled. In any jurisdiction, the crucial task is to ensure that parties have certainty as to the assignment of liability. In undertaking to complete any major project, parties must understand the liability they are assuming so this can be factored into contract pricing and the important decisions affecting parties' balance sheets.

[118] Insurance Code (France) Article L.241-2.
[119] Civil Code (France) Article 1792-5.
[120] Civil Code (France) Article 1792.
[121] Civil Code (Spain) Article 1581.
[122] Civil Code (United Arab Emirates) Article 880.
[123] Civil Code (Qatar) Articles 711-715.
[124] Rippon, J, "Closing the Gap: Decennial Liability Insurance – The Solution to the Strata Living Crisis in New South Wales", (2020) 35 *Building and Construction Law Journal* 338, 351.
[125] BGB §§830(1) and 840(1) (torts) and §421 (contract).
[126] BGH 24 November 1976, BGHZ 67, 359; BGH 4 March 1971, BGHZ 55, 392; BGH 11 February 2004, VIII ZR 386/02.
[127] BGB §254.

The current system of proportionate liability in Australia is both broad in its application and uncertain in terms of scope, presenting obstacles to clarity. While this simple approach was aimed at addressing the deep pocket syndrome, this objective can likely only be effectively achieved through a cohesive and holistic approach that accounts for the complexities inherent to concepts of liability.

The reforms implemented have not yet achieved their intended purpose of containing the increase in insurance costs. The New Zealand Law Commission, in conducting a study of comparative jurisdictions, detected no noticeable change to insurance costs in Australia under its proportionate liability regime.

Whether this can be attributed to the Australian implementation of a proportionate liability regime or the concept more generally, is unclear.

The answers are not much clearer or more uniform elsewhere. Having shown an interest in moving away from joint and several liability, England and Wales appear disinclined to adopt proportionate liability. The diverging approaches taken by the states of the US demonstrate the need for a uniform approach to proportionate liability. In civil law jurisdictions such as France and Germany, a joint and several liability approach favouring the plaintiff prevails in different forms; in some jurisdictions builders are held strictly liable under a system of decennial liability while such a regime does not exist in others.

Returning to where we began, the infrastructure developments underway and planned just in the public sector in Australia, including road and rail projects, exceed AUS$110 billion over 10 years from 2020–2021.[128] Many of these are being delivered with significant private sector financial support by way of a variety of public private partnerships. These are complex logistically and legally, and as demonstrated by the West Gate Tunnel Project, are fraught with substantial risk. Apart from these public sector mega projects, the Australian economy is also substantially dependent upon commercial and domestic construction, and resources developments.

It can be legitimately asked whether it is economically and legally sensible to maintain a regime of proportionate liability uncertain in its application, varying from state to state, and in concept inimical to the effective financing and delivery of construction projects across the board. This question is all the more relevant given that the policy objective behind the reform of the law of proportionate liability, a reduction in insurance costs, has not been demonstrably achieved.

[128] See Department of Infrastructure, Transport, Regional Development and Communications "Infrastructure Investment Program" (2020): https://investment.infrastructure.gov.au/.