PROPORTIONATE LIABILITY

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1. INTRODUCTION

Joint and several liability allows a plaintiff to recover the whole of its loss from any number of concurrent wrongdoers. Under this scheme of liability, a particular defendant may be required to pay the entire amount of the plaintiff's loss, notwithstanding that the defendant's responsibility for that loss may have been minor compared to other wrongdoers. It is then the responsibility of the defendant to claim contribution from the other concurrent wrongdoers. On the other hand, proportionate liability shares liability among concurrent wrongdoers according to their respective levels of responsibility. A problem with this method of apportioning liability arises when one wrongdoer is insolvent or otherwise unavailable. In these cases, the plaintiff will not be able to recover the full damages to which it is entitled. Therefore, at the heart of the matter is the philosophical question of whether it is better that the plaintiff receives the full measure of damages to which it is entitled, or that the defendants are only liable to the extent of their responsibility.

Proportionate liability legislation was first introduced in the building industry in the early 1990s. More recently, there has been support for national moves to introduce more general legislation relating to proportionate liability (at least in relation to economic loss), indicating that the question has been decided in favour of the defendants.

This paper intends to briefly outline the competing doctrines of both joint and several liability and proportionate liability and analyse the various arguments in favour of each. The substantial part of the paper outlines the steps taken in the various Australian jurisdictions toward proportionate liability and highlights the different approaches that have been adopted in each jurisdiction. The paper concludes with a brief discussion of the practical effects of the legislation, and forecasts some potential issues that may arise.

2. JOINT AND SEVERAL LIABILITY

Under the common law, where a party suffers some kind of damage due to the actions of another party (the wrongdoer), the wrongdoer is liable to pay damages sufficient to return the injured party to the position it would have been in but for the damage. Where two or more wrongdoers are responsible for the injury suffered by the plaintiff, the principle of joint and several liability allows the plaintiff to take action against any one of the wrongdoers and receive full compensation for the injuries suffered. Joint and several liability can arise under Australian law in a number of circumstances, but most commonly pursuant to a contract or in tort.

The various wrongdoers will often have different capacities to pay. In these situations the plaintiff will usually choose to sue the wrongdoer who is most likely to be able to pay damages. Concerns about the fairness of such a system, and its practical impact on certain defendants, have led to calls for the replacement of joint and several liability with an alternative method of proportional liability.

2.1 The common law doctrine of joint and several liability

Where a person suffers damage as a result of the actions of two or more persons, the extent to which the various wrongdoers will be liable depends on the nature of

their relationship to each other, and the accident in question. There are three main categories of multiple wrongdoers.[1]

(a) Joint wrongdoers

This category includes cases where there is a breach of a duty imposed on two or more persons, or where persons, while acting together for a common end, commit a wrong. Joint wrongdoers are liable for the whole of the damage suffered by the individual party, and this means that they can be sued individually for the full amount of the injured party's loss.

The plaintiff is regarded as only having one cause of action. This means that if the plaintiff obtains a judgment against one wrongdoer, the judgment merges with the cause of action and the plaintiff is barred from commencing or continuing proceedings against the other wrongdoers.[2] Similarly, if the plaintiff agrees to settle the action with one wrongdoer, the agreement releases all other wrongdoers from liability.[3]

(b) Several concurrent wrongdoers

This category refers to cases where a number of persons, without acting together, are responsible for separate wrongful acts and inflict a single injury to a plaintiff. In these cases the wrongdoers are each liable for the full amount of the damage suffered by the plaintiff, but they are not jointly liable for the same wrongful act.[4]

The practical effect of this is that a judgment against one wrongdoer does not release the other wrongdoers from liability.[5] Whether a settlement agreement with one wrongdoer will have the effect of releasing all wrongdoers from liability depends very much on the terms of the agreement.

(c) Several wrongdoers causing different damage

This category includes persons who do not act in concert with each other and inflict separate items of damage on the plaintiff.[6] This is what distinguishes this category of liability. More practically, this means the wrongdoer is only liable for the damage that they themselves caused, and satisfaction by a wrongdoer of the whole of the damage suffered by the plaintiff will not discharge the liability of all the others.[7]

2.2 Contribution

The original position at common law was that joint wrongdoers could not make a contribution claim against the other wrongdoers for assistance in meeting the plaintiff's claim. This was set down in Merryweather v Nixan[8] on the basis that wrongdoers ought not to be allowed to found a cause of action based on their own wrongdoing.[9]

The law of contribution in Australia is complex, and varies in each jurisdiction.[10] However, generally legislation in each jurisdiction allows one concurrent wrongdoer to recover a contribution from the other wrongdoers toward the amount that was paid to the plaintiff.[11] In general, the legislation provides that if a plaintiff suffers damage as a result of a tort, any tortfeasor who is liable in respect of that damage is entitled to claim contribution. Only where the wrongdoers have caused the same damage to the plaintiff may contribution be claimed. Further, only where the concurrent wrongdoer, if sued, would have been liable, will a claim for contribution be successful.

By way of example in NSW, the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) abolishes the judgment bar rule which means a judgment against one tortfeasor will not be a bar to a new action against another tortfeasor. The Act also places a limit on the sum recoverable under multiple judgments so that the aggregate of the sums cannot exceed the amount of the damages awarded by the first judgment. The Act also allows contribution to be recovered by a tortfeasor from any other tortfeasor who, if sued, would have been liable for the same damage.

In some cases the wrongdoer who was held liable may be able to seek contribution from other wrongdoers. There may, however, be several practical difficulties. These include wrongdoers who are insolvent, uninsured or otherwise not amenable to jurisdiction.[12]

Summarising the position, Rogers CJ (Comm Div) suggested in AWA v Daniels[13]:

A well insured defendant, who may perhaps be responsible for only a minor fault, in comparison with the fault of other persons, may nonetheless, be made liable, at least in the first instance, for the entirety of the damage suffered by the plaintiff. The defendant may indeed seek contribution from other persons responsible for the major damage.

His honour posed the question:

Why should the whole of the burden of possibly insolvent wrongdoers, fall entirely on a well insured, or deep pocket defendant? [14]

This is the question asked by advocates of proportionate liability.

3. PROPORTIONATE LIABILITY

Unlike joint and several liability, the aim of proportionate liability is to divide loss among the various wrongdoers according to their

These critics argue that the whole basis of the law of civil liability is that the degree of damages is determined not by the defendant's fault, but by the extent of the injury to the plaintiff. For example, momentary negligence may sometimes cause significant damage, while gross negligence may cause only minimal damage.

level of responsibility. This means that a plaintiff will only be able to claim a portion of their total loss from each wrongdoer. From the defendant's perspective this method is a far more equitable method of apportioning loss, but it may present several practical difficulties, particularly in circumstances where a wrongdoer is unavailable, or there are a large number of wrongdoers. For this reason, the last decade has seen the commissioning of a number of State and Commonwealth reports on the problem of apportioning liability in the hope of finding a workable solution. These reports reveal three main arguments relating to the disadvantages and advantages of proportionate liability.

(a) Policy Issues

The major function of tort law is to provide compensation for losses which are deemed worthy of reparation.[15] Similarly, following a breach of contract, a plaintiff is entitled to seek a remedy, which may take the form of damages. Like tort, the principle governing the award of damages in contract is that they are compensatory.[16] In both tort and contract, the plaintiff is compensated by shifting the cost of the loss from the plaintiff to the wrongdoer.

The principle of joint and several liability aims to ensure, as far as possible, full compensation for a plaintiff and accords with the compensatory rationale of tort and contract law.[17] The mere existence of other wrongdoers should not prejudice a plaintiff's chance of full recovery. The problem is that under such a scheme, one wrongdoer may be called upon to pay more than what would otherwise be their proportionate share of the plaintiff's damage because of the inability of the other concurrent wrongdoers to pay.[18] This is the rationale for proportionate liability. It attempts to balance the right of the plaintiff to compensation with the concept of fairness that each wrongdoer should only be liable for the damage it caused. Critics argue that for this reason, proportionate liability conflicts with the underlying rationale of compensation.

These critics argue that the whole basis of the law of civil liability is that the degree of damages is determined not by the defendant's fault, but by the extent of the injury to the plaintiff. For example, momentary negligence may sometimes cause significant damage, while gross negligence may cause only minimal damage.[19] Thus, as suggested by the New Zealand Law Commission, the fact that joint and several liability imposes liability in excess of responsibility is not a sufficiently compelling reason for a departure from the existing rule, because it is loss rather than fault that has always been used to determine damages.

Under a system of proportionate liability, the plaintiff bears the risk that a wrongdoer will be unavailable to be sued, which means the plaintiff will only recover a portion of their loss. It is argued at a philosophical level that it was the wrongful conduct of each of the wrongdoers that caused the harm suffered by the plaintiff and it therefore should not be open to any of the wrongdoers to resist the imposition of liability for the whole of the harm suffered.[20] The Hon Andrew Rogers QC suggests that this argument is circular:

[I]t is only because of the absence of a comparative fault principle that a defendant, whose percentage fault is relatively small, will none the less be liable for the full amount of the

damage suffered by the plaintiff. One cannot justify resistance to proportionate liability by resort to a principle which starts by accepting the absence of proportionate liability.[21]

(b) Procedural Issues

Under a system of joint and several liability where there are several concurrent wrongdoers, there is the potential for each case to generate multiple and separate proceedings. When one or a number of concurrent wrongdoers are found to be liable for the whole of the damage, it is likely that the judgment against the defendant(s) will generate a number of claims for contribution. However, this problem may be minimised by the relevant court rules in each jurisdiction that permit joinder of parties.

Proportionate liability goes some way to solving the problem of contribution, but the problem of multiple claims will persist under a system of proportionate liability. This is 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.

In a system of proportionate liability, the court will have to determine the responsibility of each wrongdoer. Given the problem that some wrongdoers may be insolvent, or otherwise unavailable, the plaintiff will obviously have a vested interest in ensuring that the greatest proportion of liability attaches to the defendants who are most able to pay. Connected to this issue is the problem of choosing the wrongdoers. In cases where there are many wrongdoers, to what extent should the plaintiff take action against every defendant who is liable to some degree in order to ensure something near full recovery? In both cases, not only is the complexity of arguments presented to the courts increased, but a system of proportionate liability appears to shift the burden of detailed case preparation further onto the plaintiffs.

It is also apparent that a system of proportional liability introduces a number of new procedural considerations, particularly relating to the complexity and size of proceedings. For example, in cases where a number of wrongdoers are absent, how does the judge adequately apportion liability? Furthermore, what happens in complex construction disputes where, for example, a number of different forms of loss are present, in some of which liability is decided proportionally, and others where liability is decided jointly and severally?[22]

(c) Economic Issues

From an economic perspective there are two main issues relevant to the discussion of the apportionment of liability.

The first is that of insurance. The joint and several liability system encourages the plaintiff to target a wrongdoer who is likely to be covered by liability insurance, even if they had only a small level of responsibility. In particular, these concerns have been voiced by accountants, auditors and other professional groups. In the early 1990s, the corporate world saw a number of spectacular collapses. These collapses were followed by litigation directed particularly at the accounting profession. Firms of accountants were sued on the basis that they had undertaken the responsibility to audit the accounts of these collapsed companies. Because the other wrongdoers had limited funds, the accounting firms were faced with the prospect that they would be liable for 100 per cent of the loss, even if the level of its responsibility was minimal. As a consequence, these professionals have led the calls for adoption of proportionate liability.

It is unclear the extent to which the principle of joint and several liability has affected the liability insurance market.[23] This is because it is difficult to predict the effect of different liability regimes on the insurance market because not only are insurance companies unwilling to reveal commercially sensitive information relating to premiums, but insurance cycles are subject to developments in the international economy. Furthermore, changes are unlikely to be detected in the short term because the larger claims can take upwards of 10 years to be fully resolved.[24] Thus, while the advocates of proportionate liability argue that it may be part of the solution to the insurance crisis, it is unclear how much influence a change in the legislation would have.

The second issue relates to the principles underlying tort law, and to a lesser extent contract law; that of deterrence or risk minimisation. Again, it is not clear which form of liability will provide the most efficient deterrent, or indeed if either system of liability is more efficient than the other.

On one hand, it has been suggested that under the system of joint and several liability, imposition of liability on deeper pocket defendants encourages them to adopt excessive levels of care which leads to inefficiency.[25] At the same time, wrongdoers who can anticipate their own absence or insolvency may be less inclined to exercise due care.[26] Offsetting both these factors is the possibility that where a potential wrongdoer

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is likely to be the target of any litigation, it may take it upon itself to supervise the activities of other potential wrongdoers.[27]

With regard to proportionate liability, it has been suggested that by decreasing the potential liability of concurrent wrongdoers by abolishing joint and several liability, the incentive for effective accident prevention would be reduced. This means that potential wrongdoers may not implement safety measures that they otherwise would have.[28] At the same time, each party will know that they will be fully liable to the extent of their responsibility and that the party suffering the damage will not be able to claim all their compensation from one party. Thus, parties may be motivated to exercise due care to ensure that they are not responsible for any damage.

These policy considerations have been taken into account by the various reports that have been commissioned by State and Federal governments. In 1993, a Working Party of the Ministerial Council for Corporations issued a report that detailed methods of resolving problems of perceived inequities in the liability of accountants and auditors. One option was to review the rules governing joint and several liability. In 1993, the Federal Attorney-General and the NSW Attorney-General established an enquiry into the law of joint and several liability, to be conducted by Professor Jim Davis, a leading academic. The Davis report recommended that in cases of physical damage or economic loss the concept of joint and several liability be replaced by a system where liability is proportionate to each defendant's degree of fault. The Davis report was considered and subsequently rejected by the NSW Law Reform Commission in 1999 and by the Victorian Attorney-General's Law Reform Advisory Council in 1998.[29]

In 2002, with the support of the states and territories, the federal government commissioned a review of the law of negligence by a panel chaired by Justice Ipp. The Ipp report recommended that in relation to claims for negligently caused personal injury and death, the doctrine of solitary liability should be retained and not replaced with a system of proportionate liability. The report, however, did not address options for the introduction of a regime of proportionate liability in relation to property damage or economic loss.

The collapse of the HIH insurance group in 2001, coupled with a general reduction in competition between insurers, resulted in significant increases in premiums. There was perceived to be a general insurance 'crisis' and the community concern resulted in a political reaction. One of the areas of consideration was proportionate liability.

In August 2003, the Commonwealth, State and Territory Insurance Ministers agreed to a package of reforms which endorsed a national model for proportionate liability.[30] Notwithstanding the suggestion that there has been agreement to a national model for proportional liability, it is clear that the legislation does not adopt a uniform approach. Some states are yet to draft the proposed legislation, but all states have indicated their intention to pass legislation in relation to proportionate liability.

4. LEGISLATING FOR PROPORTIONATE LIABILITY

4.1 A national model

The building industry was the first to operate with proportionate liability. Victoria was the first to introduce proportionate liability in the Building Act 1993 (Vic), and subsequently New South Wales,[31] South Australia,[32] Northern Territory,[33] ACT[34] and Tasmania.[35]

This is now a national push to introduce proportionate liability on a more general basis in a nationally consistent way. Only in Victoria is a general proportionate liability scheme in operation, under the Wrongs Act 1958 (Vic). However, Western Australia in the Civil Liability Act 2002 (WA), Queensland in the Civil Liability Act 2003 (Qld) and New South Wales in the Civil Liability Act 2002 (NSW) have enacted provisions relating to proportionate liability, but these provisions have not yet commenced. The Commonwealth has also passed legislation relating to proportionate liability in the Corporate Law Economic Reform Program (Audit Reform & Corporate Disclosure) Act 2004.

In the Second Reading Speech to the Civil Liability (Personal Responsibility) Bill, Premier Carr outlined the NSW Government's policy:

The Government acknowledges that national consistency is desirable to some reforms in this area. For that reason we have modelled many of the new provisions in the bill following the original exposure draft on those recommendations in the Ipp report that are more likely to have a national impact on the Law of negligence. I stress, however, that not all reforms in the bill or in the Ipp report need to be made in other jurisdictions or in exactly the same terms. but it would be helpful to the community and the courts if those reforms dealing with basic principles of the law of negligence were consistent.[36]

Clarifying the position in relation to proportionate liability, in the Second Reading speech to the Civil Liability Bill (which added further provisions to the proportionate liability framework), Mr Iemma said:

In the interests of national consistency, the bill makes some small changes to the proportionate liability provisions to adopt the changes discussed with other jurisdictions.[37]

Similarly, in Victoria, Premier Bracks, in the Second Reading Speech in 2003 for the Wrongs and Limitation of Actions Acts (Insurance Reform) Bill, said:

The Victorian government has previously announced that Victoria supports a legislative environment in which there is national uniformity, or at least consistency, in the way the law of negligence is applied. Victoria will continue to work in national forums towards such a nationally consistent system.

However, it is apparent that desire for national consistency has not resulted in a consistent framework for proportionate liability. The Queensland legislation differs most substantially from the legislation passed in the other states. Notwithstanding this, in the second reading speech to the Civil Liability Bill 2003, The Queensland Attorney-General outlined the policy of the Queensland government:

Our government has been at the forefront of coordinated efforts involving the Commonwealth and other states on possible solutions ... Many of the initiatives in this bill are based upon the recommendations of the National Review of Negligence conducted by His Honour Justice Ipp— a review supported by Queensland and the other states.

Thus, while all states appear to support a national model, the legislation passed in the various states reveals that a more coordinated effort is required if a nationally consistent framework on proportionate liability is to be put into place.

4.2 Overview of the legislation

Despite the lack of uniformity in the general proportionate liability legislation proposed and enacted in Victoria, New South Wales, Queensland and Western Australia, it is possible to identify several common features. In particular, it is possible to generalise about the scope of the legislation, the limits to liability, and some of the more significant differences between the various schemes.

(a) Scope of the legislation

Proportionate liability is intended to apply in situations of economic loss or damage to property in an action for damages, arising from a failure to take reasonable care. This is the situation in Victoria, New South Wales and Western Australia. Queensland appears more conservative. Like the other states, the Queensland legislation does not apply to personal injury, but unlike the other states, the legislation only applies to claims of more than $500,000.

Within these categories, there are a number of situations where joint and several liability is preserved:

- In New South Wales, Queensland and Western Australia, proportionate liability will not impact the principle of vicarious liability for a proportion of any apportionable claim, or the liability of a partner for a fellow partner.

In order to ensure the plaintiff has access to the whole of the compensation to which it is entitled, the legislation in all states abolishes the common law rule that a judgment against one wrongdoer releases the others from liability, and allows the plaintiff cannot further actions against concurrent wrongdoers who were not a party to the original action.

- The Victorian legislation preserves the joint and several liability of a principal against its agent and the power of a court to award exemplary or punitive damages against a particular defendant.
- In Victoria, New South Wales and Queensland, where the defendant is found to have acted fraudulently, that defendant will be jointly and severally liable.
- In New South Wales, where the defendant is found to have intended to cause the damage that defendant will be jointly and severally liable.
- In Queensland, where the concurrent wrongdoers had a common intention to commit an intentional tort, or where the plaintiff engaged a professional to provide advice to prevent the loss caused by another wrongdoer, and the plaintiff relied on that advice, then the professional will be jointly and severally liable.

Important to understanding the scope of the legislation is to understand what is meant by the term 'damages'. It appears that Western Australia adopts the common law standard, but the other states adopt a wider definition of any form of monetary compensation. The impact of this could be quite significant. For example, debts incurred pursuant to a contract will be included under the heading of 'damages' which means that in New South Wales and Victoria it may not be possible to draft around the legislation by creating a debt under the contract.

(b) Apportionment of Liability

In cases where there are concurrent wrongdoers, liability is to be limited to a proportion that reflects the defendant's responsibility, and judgment is not to be given against the defendant for more that that amount. This is the case in Victoria, New South Wales and Western Australia. Queensland appears to grant to the judiciary slightly more discretion as it provides that liability must be *just and equitable, having regard* to the extent of the defendant's responsibility. It remains to be seen if this difference is anything more than merely cosmetic.

In order to ensure the plaintiff has access to the whole of the compensation to which it is entitled, the legislation in all states abolishes the common law rule that a judgment against one wrongdoer releases the others from liability, and allows the plaintiff further actions against concurrent wrongdoers who were not a party to the original action. Of course, the plaintiff cannot recover, through different actions, more than what they were originally entitled to.

The legislation also abolishes the law of contribution and defendants are not permitted to apply for contribution from other defendants to the same action under the Victorian, New South Wales and Western Australia legislation, however the Queensland scheme does not prevent a defendant seeking, in another proceeding, contribution from another defendant in relation to the claim.

(c) Important Differences

An important differences between the states is the way in which the court assesses the responsibility of the defendant(s). Victoria and Queensland do not allow the court to have regard to the comparative responsibility of any person who is not a party to the proceeding, unless the party is dead, or (if a corporation) is wound up. In contrast, New South Wales and Western Australian legislation allows the court to compare the

responsibility of defendants, even where the defendants may not be a party to the proceedings. This point will be further discussed in the following section.

This raises the question of whether the determination of the previous proceeding will be binding on a party to a subsequent action. It is most unlikely that the previous judgment could have a res judicata effect on a subsequent, but different, party and this therefore has the potential to give rise to some interesting questions of procedural fairness.

A second significant difference is that they legislation in Queensland and Western Australia specifically allows the parties to contract out of the provisions of the legislation, but the Victorian and New South Wales legislation include no such provisions. This lack of uniformity is significant because if the parties wish to exclude the operation of the proportionate liability scheme, they may choose to have their contract governed by Queensland or Western Australian law.

The New South Wales legislation also includes a novel section which requires the defendant to inform the plaintiff of other concurrent wrongdoers, in an attempt to reduce costs for the plaintiff in pursuing its claim and to ensure the plaintiff recovers the full amount to which it is entitled. This appears to be an attempt to strike a balance between the fair apportioning of liability, and the right of a plaintiff to full recovery.

The following sections analyse in more detail the legislation of the various Australian jurisdictions. The following discussion is intended to deal in more detail with some of the differences between the legislation in each jurisdiction.

4.3 Victoria

The previous Victorian legislation relating to proportionate liability for building works provided:

129 Definitions

In this division—

'building action' means an action (including a counterclaim) for damages for loss or damage arising out of or concerning defective building work

'building work' includes the design, inspection and issuing of a permit in respect of building work

131 Limitations on Liability of Persons Jointly or Severally Liable

(1) After determining an award of damages in a building action, the court must give judgment against each defendant to that action who is found to be jointly or severally liable for damages for such proportion of the total amount of damages as the court considers to be just and equitable having regard to the extent of that defendant's responsibility for the loss or damage.

(2) Despite any Act or rule of law to the contrary the liability for damages of a person found to be jointly or severally liable for damages in a building action is limited to the amount for which judgment is given against that person by the court.

(3) In this section 'court' includes the Victorian Civil and Administrative Tribunal

While this legislation limited the concept of proportional liability to building actions, the application of proportionate liability was not explicitly limited to the legal basis of claim. However, it only applied to an 'award of damages' which had its common law meaning.

In June 2003, the Wrongs and Limitation of Actions Acts (Insurance Reform) Act was passed. The Act states as one of its main purposes to amend the Wrongs Act 1958 to provide for proportionate liability in proceedings for economic loss, and amend the Building Act 1993 to repeal the provisions relating to proportionate liability.

It is apparent from the Second Reading speeches that the primary purpose of this legislation was to protect insurers. The Victorian Premier in his Second Reading speech suggested:

The reforms contained in this bill are designed to balance the rights of people to have access to the courts to sue for personal injuries and the need to access to affordable insurance.

Because everyone relies on insurance to run a business, to see a doctor, to give birth to a child, to play sport on the weekend, to support a local fete and indeed give fair compensation for injury, government needs to ensure that insurance works well both against a set of legal principles of fairness and justice and in terms of the real, practical human consequences of the workings of the insurance system.[38]

More specifically, Mr Bracks suggested the reforms to the system of joint and several liability were based on notions of fairness.

The bill implements 'proportionate liability' in place of joint and several liability for purely economic losses—that is, losses that do not relate to death or personal injury. This means that persons or entities, including government, will each only be liable for the proportion of economic loss caused by their own negligence.

They will not have to be responsible for the whole amount of economic loss

damages awarded if they did not cause 100 per cent of the loss.

Given that insurers tend to be the group most often burdened with responsibility for the whole of the loss, it is clear that these provisions were enacted with insurers at the front of mind.

The Act applies generally to:

(a) a claim for economic loss or damage to property in an action for damages (whether in tort, contract, under statute or otherwise) arising from a failure to take reasonable care; and

(b) a claim for damages for a contravention of section 9 of the Fair Trading Act 1999.[39]

The expression 'damages' is defined as including 'any form of monetary compensation'.[40] The word is used in a wider sense than its traditional common law use and may include an action for debt. For example, in a contract that includes liquidated damages for delay, it is highly arguable that the Act will apply.

The main limitation on the application of the Act is that it applies to economic loss or damage to property (therefore doesn't cover personal injury[41]) and the damage must arise 'from a failure to take reasonable care'. While this invokes the language of negligence, it does not appear to limit its action to claims in negligence, given that the claim can arise 'in tort, contract, under statute or otherwise'. Rather, it appears that all that is required is that the claim must arise from a failure to take reasonable care. For example, a claim for a breach of a warranty, which arises from a failure to take reasonable care, is likely to fall within the ambit of the legislation.

Furthermore, as explained above, it is apparent from the Second Reading speeches that the primary purpose of the Act is to protect insurers. As is the case under the Act, in most indemnity policies the liability of insurers is limited to circumstances where the professional has failed to exercise reasonable care. Insurance policies usually cover instances where liability arises out of a failure to take care. Accordingly, many policies do not focus on the nature of the cause of action, but on the circumstances in which the claim arises. To construe the legislation in this way is consistent with the clear purpose of the Second Reading speeches.

In cases where the Act applies, where a defendant who is one of two or more persons whose acts or omissions caused, independently or jointly, the loss or damage that is the subject of the claim,[42] the defendant's liability is limited to: 'an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage'.[43] Importantly, 'judgment must not be given against the defendant for more than that amount in relation to that claim'.[44]

One of the issues raised in the NSW Law Reform Commission's Report was the problem of determining liability in proceedings involving both an apportionable claim and a claim that is not apportionable.[45] Victorian legislation indicates a choice to place the burden of the complexity on the parties and the courts. Liability for the apportionable claim is to be determined in accordance with the proportionate liability provisions, and liability for the other claim is to be determined in accordance with the applicable legal rules.[46]

Allied to this problem is the problem of determining liability of a defendant where the other defendants are not present. The Act provides that:

[I]n apportioning responsibility between defendants in the proceeding the court must not have regard to the comparative responsibility of any person who is not a party to the proceeding.[47]

This point is somewhat unclear. Much of the academic discussion concerning this section suggests that the total damages will be apportioned between the defendants to the action.[48] This was certainly the case under the Building Act 1993 (Vic). Thus, where there is only one defendant, the burden will fall on the defendant to identify other concurrent wrongdoers and join them as defendants. However, if a non-party is not present because the person is dead or, if a corporation, the corporation has been wound up, the court may determine the defendant's responsibility by taking into account and comparing the conduct of the non-party. It is somewhat uncertain as to how this will operate. It will be in the plaintiff's best interests to argue that the third party had little to no responsibility, and the defendants' interests to argue that the third party had a significant responsibility. It is essential to keep in mind the right of the plaintiff to receive compensation of the losses, and the courts will have to be careful to see that this provision does not prejudice the rights of plaintiffs and derail the proceedings.

A defendant will not always be protected by proportionate liability. An exception to the regime is provided for in the Act where a defendant is found to be fraudulent. In these cases, a defendant will be jointly and severally liable for the damages awarded against any other defendant in the proceeding.[49]

The plaintiff is not barred from bringing another action against a wrongdoer not a party to the original apportionable claim. However, the plaintiff may not recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of that loss or damage, would result in the plaintiff receiving compensation that is greater than the damage actually suffered.[50]

Wrongdoers will not be able to apply for contribution. In an action, once a wrongdoer has had a judgment entered against it, the wrongdoer will not be able to require another wrongdoer to contribute to damages awarded against it in the same proceeding, nor will a wrongdoer be required to indemnify fellow wrongdoers.[51]

4.4 New South Wales

Proportional liability is presently provided for in New South Wales by the Environmental Planning and Assessment Act 1979 (NSW) ('EPA Act'). Section 109ZJ provides for proportionate liability:

109ZJ Apportionment of liability

(1) After determining an award of damages in a building action or subdivision action, a court must give judgment against each contributing party for such proportion of the total amount of damages as the court considers to be just and equitable, having regard to the extent of that party's responsibility for the loss or damage in respect of which the award is made.

(2) Despite any Act or law to the contrary, the liability for damages of a contributing party is limited to the amount for which judgment is given against that party by the court.

(3) A contributing party cannot be required:

(a) to contribute to the damages apportioned to any other person in the same building action or subdivision action, or

(b) to indemnify any such other person in respect of those damages.

(4) In this section 'contributing party', in relation to a building action or subdivision action, means a defendant or other party to the action found by the court to be jointly or severally liable for the damages awarded, or to be awarded, in the action.

It is noted that this section applies only in relation to a 'building action' or 'subdivision action'. These terms are defined in section 109ZI as:

'*building action*' means an action (including a counter-claim) for loss or damage arising out of or concerning defective building work.

'*building work*' includes the design, inspection and issuing of a Part 4A certificate or complying development certificate in respect of building work.

'*subdivision action*' means an action (including a counter-claim) for loss or damage arising out of or concerning defective subdivision work.

'*subdivision work*' includes the design, inspection and issuing of a Part 4A certificate or complying development certificate in respect of subdivision work

The Civil Liability Act 2002 (NSW) was enacted as part of the NSW reforms of the law of negligence. The Act did not originally include any provisions on proportionate liability, but the Civil Liability Amendment (Personal Responsibility) Act 2002 and the Civil Liability Amendment Act 2003 amended the Civil Liability Act to include provisions on proportionate liability. These amendments are yet to be proclaimed, but now that the Commonwealth has amended

In an action, once a wrongdoer has had a judgment entered against it, the wrongdoer will not be able to require another wrongdoer to contribute to damages awarded against it in the same proceeding, nor will a wrongdoer be required to indemnify fellow wrongdoers.

the Trade Practices Act to include provisions for proportionate liability, it is likely that the New South Wales legislation will commence in the near future.

In the second reading speech for the *Civil Liability (Personal Responsibility) Bill*, the Premier, Mr Bob Carr argued:

The introduction of this bill today is a triumph for commonsense. Personal responsibility will rightly assume a much higher profile in our law thanks to these reforms.[52]

Section 34 outlines the claims to which proportionate liability applies and is framed in substantially the same terms as the Victorian legislation.

Like the Victorian Wrongs Act, the *Civil Liability Act* also provides that some concurrent wrongdoers will not have the benefit of apportionment.[53] Both NSW and Victorian legislation stipulates that where the wrongdoer fraudulently caused the damage, the liability of the wrongdoer is to be determined in accordance with the ordinary legal principles. However, NSW goes one step further and also allows for joint and several liability in cases where the wrongdoer intended to cause the loss or damage.

In determining the extent of proportionate liability, the Civil Liability Act is very similar to the Wrongs Act. That is, the liability of a defendant is limited to an amount reflecting the proportion of the damage or loss that the court considers just, having regard to the defendant's responsibility and the court may not give judgment for more than that amount.[54] The NSW legislation also adopts the same position as Victoria with respect to proceedings that involve both an apportionable claim and a non-apportionable claim. That is, liability for the apportionable claim is to be determined in accordance with the legislation, and liability for the non-apportionable claim is to be determined in accordance with the relevant legal rules (apart from the section).[55]

There are, however, a number of significant differences between the Victorian and New South Wales legislation.

- In apportioning responsibility between the defendants, the court is to exclude the proportion of the damage or loss to which the plaintiff is contributorily negligent[56];
- The court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceeding.[57] This is only the case in Victoria where the defendant is insolvent or unavailable.
- Where a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that another person may be a concurrent wrongdoer, and the defendant fails to give the plaintiff, as soon as possible, written notice of the information the defendant has about that person, and the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that there was another concurrent wrongdoer, the court may order the defendant to pay all or any of those costs of the plaintiff.[58]

This appears to be an attempt to respond to one of the criticisms of proportionate liability, that the plaintiff may have to assume additional cost. The burden is on the defendant to attempt to reduce the cost to the plaintiff by making available information as to the identity of other concurrent wrongdoers.

4.5 Queensland

Unlike NSW and Victoria, Queensland has not enacted any legislation to deal specifically with proportionate liability in the construction industry. However, the state has enacted (but not yet proclaimed) a system of proportional liability in the Civil Liability Act 2003 (Qld)

The Act is quite different from those that have been enacted in NSW and Victoria, and it is worth looking at the relevant provisions in some detail.

To begin with it is important to note that, like other jurisdictions, the proportionate liability provisions do not apply to a claim for a breach of duty resulting in personal injury. However, there is an additional limiting factor, which is that the provisions do not apply to a claim for damages for less than $500,000.[59]

Section 30 outlines the scope of proportionate liability:

30 Proportionate liability

(1) If there is more than 1 defendant in a proceeding, each defendant is liable only for the amount of damages decided by the court.

(2) The liability of each defendant is the amount decided by the court to be just and equitable having regard to the extent of the defendant's responsibility for the harm.

(3) In apportioning responsibility as between the defendants—

(a) the court is to exclude the proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and

(b) the court must not have regard to the comparative responsibility of any other person who is not a party to the proceeding.

(4) Despite subsection (3)(b), the court may have regard to the comparative responsibility of another person who is not a party to the proceeding if the person is not a party to the proceeding because the person is dead or, if

the person is a corporation, the corporation has been wound up.

(5) The liability of each defendant is several only and not joint except as otherwise provided under this part.

'Damages' are defined in schedule 2 as including 'any form of monetary compensation' which mirrors the position in NSW and Victoria.

Another important difference can be found in s.7(3). This section provides:

(3) This Act, other than chapter 3 [Assessment of damages for personal injury] does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract (the 'express provision') in relation to any matter to which this Act applies and does not limit or otherwise affect the operation of the express provision.

Based on this, it appears that in Queensland it will be possible to contract out of the proportionate liability requirements. This is an important point and means that as long as the states continue to lack uniformity in their legislation, Queensland law may be the popular governing law of contracts that seek to avoid the proportionate liability regime.

The Queensland legislation also differs from the other states in respect of its exceptions to proportionate liability. Section 31 provides four situations where joint and several liability is preserved:

- Defendants are jointly and severally liable where they formed a common intention to commit an intentional tort and actively took part in the commission of that tort.[60] This is an interesting provision. Unlike the rest of the Act that takes a narrower view of proportionate liability, this exception is, in fact, narrower than the NSW provision that preserves joint and several liability where the concurrent wrongdoer intended to cause economic loss or damage.
- A defendant is jointly and severally liable for the damages awarded against another defendant in the proceedings if, the plaintiff suffers loss as a result of another defendant's acts, the defendant was engaged to provide professional advice to prevent the loss, and the plaintiff relied on that advice.[61] This is not something that is covered in the Victorian and NSW Acts.
- This is an important point to note and must to some extent undermine the very reason for introducing proportionate liability. National reforms were motivated by the insurance crisis, particularly arguments from the accounting industry and other professional bodies that it was unfair that they were continually being held liable for damage out of all proportion to their responsibility. However, under the Queensland Act, some professionals will continue to be held jointly and severally liable.
- A defendant in a proceeding against whom a finding of fraud is made or who contravenes the Fair Trading Act 1989, section 38, or Trade Practices Act 1974, section 52, is also jointly and severally liable for the damages awarded against any other defendant in the proceeding.[62] This is a wider application of this principle than under the Victorian and NSW Acts.

Importantly, unlike the NSW and Victorian Acts, the Queensland Act entitles a defendant to seek contribution from a person who is not a party to the original proceeding.[63] Again this seems to undermine one of the procedural advantages of proportionate liability.

Based on this, it appears that in Queensland it will be possible to contract out of the proportionate liability requirements. This is an important point and means that as long as the states continue to lack uniformity in their legislation, Queensland law may be the popular governing law of contracts that seek to avoid the proportionate liability regime.

Again, in the absence of uniformity, Western Australian law may prove to be favourable for those wishing to avoid proportionate liability.

4.6 Western Australia

No proportional liability legislation currently applies in Western Australia. However, the Civil Liability Amendment Act 2003 (WA) provides for proportionate liability, but the relevant sections of the Act relating to proportionate liability are yet to be proclaimed. The legislation looks very similar to the Victorian Wrongs Act. Section 5AI provides:

(1) In this Part—

'*apportionable claim*' means—

(a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from the failure of 2 or more concurrent wrongdoers to exercise reasonable care (but not including any claim arising out of personal injury); or

(b) a claim for economic loss or damage to property caused by conduct that was done in contravention of the Fair Trading Act 1987 section 10 arising from the acts or omissions of 2 or more concurrent wrongdoers;

'*concurrent wrongdoer*', in relation to a claim, means a person who is one of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

Further, as in the Wrongs Act, section 5AK provides that:

(1) In any proceedings involving an apportionable claim—

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

(b) the court may give judgment against the defendant for not more than that amount.

Unlike the Victorian legislation, what is meant by 'damages' is not defined in the legislation. In the Victorian Act and other proportionate liability statutes, 'damages' stretches to include 'any monetary compensation'. Without such a definition, the common law meaning of 'damages' is unlikely to stretch this far. This of course then reduces the number of circumstances in which proportionate liability will apply.

In apportioning responsibility between the defendants, the court will also have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.[64]

Significantly, section 4A of the Civil Liability Act 2002 (WA) allows for limited contracting out and applies to apportionment.

(1) A written agreement signed by the parties to it may contain an express provision by which a provision of Part 1A, 1B, 1C, 1D, 1E or 1F is excluded, modified, or restricted and this Act does not limit or otherwise affect the operation of that express provision.

(2) Subsection (1) applies to any provision of this Act referred to in that subsection even if the provision applies to liability in contract.

Again, in the absence of uniformity, Western Australian law may prove to be favourable for those wishing to avoid proportionate liability.

4.7 South Australia

Proportionate liability only applies in certain cases of building work in South Australia. Section 72 of the Development Act 1993 (SA) provides:

(1) If—

(a) building work is defective; and

(b) the defect or defects arise from the wrongful acts or defaults of two or more persons; and

(c) those persons would, apart from this section, be jointly and severally liable for damage or loss resulting from the defective work; and

(d) an action is brought against any one or more of those persons to recover damages for that damage or loss,

the court may only give judgment against a defendant, or each defendant, for such amount as may be just and equitable having regard to the extent to which the act or default of that defendant contributed to the damage or loss.

(2) An act or default for which a person is vicariously liable will be taken to be an act or default of that person for the purposes of this section.

The South Australian Government intends to introduce more wide ranging legislation relating to proportionate liability as part of its third stage of tort liability reforms, but no such legislation currently exists.[65]

4.8 Tasmania

Section 252 of the Building Act 2000 (Tas) introduced proportional liability in building actions. The section reads:

(1) In determining an amount for damages in a building action, the court is to apportion the amount among the persons found liable and any defendant or third or subsequent parties joined in the action, having regard to the extent of each person's responsibility for the damage incurred.

(2) The liability for damages of a person referred to in subsection 1 is limited to the amount apportioned to that person under that subsection.

(3) A person referred to in subsection 1 is not required to—

(a) contribute to the damages apportioned to any other person in the same building action; or

(b) indemnify that person.

The Tasmanian Government has also indicated its intention to introduce proportional liability for economic loss and property damage, but it has not proceeded with the legislation.

4.9 Australian Capital Territory

Proportional liability applies to building actions under s.26 of the Construction Practitioners Registration Act 1998 (ACT):

26 Limit of liability of persons jointly or severally liable

(1) A court that determines an award of damages in a building action shall give judgment against each defendant to the action who is found to be jointly or severally liable for the damage for the proportion of the total amount of the damages that the court considers to be just, having regard to the extent of that defendant's responsibility for the loss or damage.

(2) Notwithstanding any other Act or any rule of law, the liability for damages of a person found to be jointly or severally liable for damages in a building action is limited to the amount for which judgment is given against that person.

The legislation will be replaced by the Building Act 2004 (Cth) on 26 September 2004 but this change appears largely cosmetic. Section 141 provides:

(1) A court that decides an award of damages in a building action must give judgment against each defendant to the action who is found to be jointly or severally liable for the damage for the proportion of the total amount of the damages that the court considers to be just, having regard to the extent of that defendant's responsibility for the loss or damage.

(2) The liability for damages of a person found to be jointly or severally liable for damages in a building action is limited to the amount for which judgment is given against the person, even if another Act or a rule of law provides otherwise.

An amendment to the Civil Law (Wrongs) Act 2002 to include proportionate liability is currently before the Legislative Assembly.

The Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Bill 2004 is substantially similar to the New South Wales Act, but differs in one significant respect. The Bill adopts a similar definition of apportionable claim as Victoria, New South Wales and Western Australia, but excludes consumer claims. A consumer claim is defined as a claim by an individual relating to goods or services acquired by the claimant from a defendant, or the supply of goods or services to the claimant by a defendant, for the claimant's personal, domestic or household use or consumption. Alternatively, a consumer claim is a claim by an individual relating to personal financial advice supplied to the claimant by a defendant. However, a when the claimant acquires the goods or services for the purpose of resupplying them, using or transforming them in manufacture or production, or repairing or treating other goods or fixtures on land, then the claim is not a consumer claim.

This is clearly an attempt by the ACT to protect small consumers and to ensure they receive the full measure of damages to which

they are entitled. While such a provision may make sense, it is inconsistent with the legislation proposed by the other states and territories and illustrates the problem of achieving national uniformity.

4.10 Northern Territory

At present, there is no general legislation for proportionate liability in the Northern Territory. However, it has agreed to the idea of 'developing a nationally consistent model for replacing the legal principle of joint and several liability with a system of proportional liability for economic loss'.[66]

4.11 Commonwealth

The Commonwealth has introduced proportional liability with the Corporate Law Economic Reform Program (Audit Reform & Corporate Disclosure) Act 2004. The Act amended the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth). More significantly in construction law, it applies to claims under s.52 of the Trade Practices Act 1974 (Cth). These amendments commenced operation on 13 July 2004 and it is likely that this will be the necessary catalyst for the states and territories to proclaim or enact similar legislation. It is worth noting that the Part appears to most closely resemble the New South Wales proportionate liability provisions.

87CB Application of Part

(1) This Part applies to a claim (an apportionable claim) if the claim is a claim for damages made under section 82 for:

(a) economic loss; or

(b) damage to property;

caused by conduct that was done in a contravention of section 52.

(2) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

Like the other jurisdictions, the Commonwealth legislation provides that certain wrongdoers are not to have the benefit of apportionment. Section 87CC reads:

(1) Nothing in this Part operates to exclude the liability of a concurrent wrongdoer (an excluded concurrent wrongdoer) in proceedings involving an apportionable claim if:

(a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim; or

(b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim.

(2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules (if any) that (apart from this Part) are relevant.

In apportioning liability, the TPA uses similar wording to that used in New South Wales and Victoria:

87CD Proportional liability for apportionable claims

(1) In any proceedings involving an apportionable claim:

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

(b) the court may give judgment against the defendant for not more than that amount.

(2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:

(a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part; and

(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.

Of interest is that the Commonwealth Government appear to have followed the New South Wales and Western Australian legislation in allowing the court to compare the responsibility of wrongdoers who are not parties to the proceeding.

(3) In apportioning responsibility between defendants in the proceedings:

(a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and

(b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.

(4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.

(5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise.

The legislation also incorporates the New South Wales provisions that the defendant is to notify the plaintiff of any concurrent wrongdoers of whom the defendant is aware.

The amendments to the Trade Practices Act and the Corporations Act are very important in the context of a national proportionate liability scheme. Prior to the federal amendments, the proportionate liability legislation could effectively be bypassed by resort to the Trade Practices Act.

5. DISCUSSION OF THE REFORMS

5.1 Insurance

In the second reading speeches, it is apparent that there was a general belief that such a liability regime will reduce insurance premiums. It also means that companies or individuals with deep pockets, but only a small degree of responsibility will no longer be threatened by being 'insurers of last resort'. (However, this may not be the case in Queensland where some professionals will still be held to be jointly and severally liable).

For insurance companies that argue that premiums were increased by large awards of damages that had to be paid by insurance companies, the legislation is a success. However, as discussed in the various law reform reports, it is not clear that the insurance crisis was actually caused by this.

Michael Duffy writes:

[T]he insurance industry has conducted a concerted campaign to paint large injury claims by courts as the main culprit. In Australia, we have heard much less about the cyclical nature of the insurance premium markets, the inevitable swings between 'soft' and 'hard' markets, worldwide underpricing of insurance premiums throughout the 1990s, and the end in 2000/01 at what has widely been described as the longest soft insurance premium market in recent history.[67]

Instead of proportionate liability, Duffy argues:

Economic theory suggests that the market forces which produced underpricing, and which now are producing overpricing, will soon move again in the opposite direction to alleviate the problem.

He concludes that:

In view of what has already been noted about the cyclical nature of the insurance market, it is surprising that there seems to have been no consideration given to limiting the duration of some of the relatively extreme measures that are being taken to alleviate short term problems.

If this is the true state of the insurance market, then the proportionate liability reforms would seem to have tilted the balance too far in favour of giving financial relief to deep pocket defendants at the expense of assuring the victims receive adequate compensation.

5.2 Construction Contracts

For the construction industry, one of the most important effects of the changes to the apportionment of liability is that parties may not be able to rely upon the risk allocation agreed in their contract. In cases where the legislation applies, and the act or omission of two or more persons causes loss or damage, each will only be liable to the extent that it is 'just' having regard to the extent of their responsibility for the loss or damage, seemingly irrespective of what might have been the contractual liability.

If this is correct, a party will not be able to rely on the collective balance sheets of the participants in a project, notwithstanding that those participants had accepted, by contract, the risks associated with the project. Of course, in cases where all wrongdoers are capable of meeting their respective

In the second reading speeches, it is apparent that there was a general belief that such a liability regime will reduce insurance premiums. It also means that companies or individuals with deep pockets, but only a small degree of responsibility will no longer be threatened by being 'insurers of last resort'.

liabilities, the legislation will have limited practical effect, other than complicating and increasing the cost of litigation brought to enforce the rights set out in the contract. However, where a wrongdoer is unable to meet its liability, the amount recoverable will be reduced by the amount for which the insolvent wrongdoer is liable.

Joint venturers may also face uncertainty. Where two joint venture parties are wrongdoers, their liability may be determined by their responsibility, rather than their contractual arrangement which may provide for liability in accordance with their proportional interest in the joint venture. It may be possible to avoid this result by using an indemnity clause where the parties agree to indemnify each other to the extent of their respective investments. However, such a clause will need to be carefully drafted.

The legislation in Western Australia and Queensland clearly contemplates this problem and allows parties to contract out of the proportionate liability legislation. Because there is not yet a consistent national model for proportionate liability, the inconsistency between the legislation enacted in the states and territories may give rise to 'forum shopping' and contracting parties may be able to choose the governing law of the contract and the apportionment of liability that best suits their particular circumstances. It is unclear how successful this method of avoiding proportionate liability will be. Where a contract is expressed to be governed by Queensland or Western Australian law, and the parties have contracted out of the proportionate liability provisions, but brought proceedings in Victoria or New South Wales, then the difference in legislative schemes will raise interesting conflict of law issues.

5.3 Alternative Dispute Resolution

The last decade in the construction industry has seen alternative dispute resolution processes increase in popularity as methods of resolving disputes. A dispute could be resolved easily where there were joint wrongdoers because a settlement with one party would also release the other parties from liability. Under the proportionate liability regime, each party will be liable to the extent of its own responsibility. Unless all parties agree to participate in the one dispute resolution process, it may be more efficient for the plaintiff to proceed to court and join all wrongdoers in the one action.

Furthermore, an additional complication is added to settlement negotiations. Where previously a defendant would be liable for the whole of the damages, a defendant will now have to factor in the possible responsibility of other wrongdoers.

5.4 Procedural Difficulties

Procedural difficulties are caused by the fact that in an attempt to apportion damages more fairly the plaintiff bears an increased risk that their full entitlement of damages will not be able to be recovered. Two issues are connected to this. The first is that the plaintiff will be forced to demonstrate not only the quantum of damages suffered, but it is in the plaintiff's best interest that those defendants with capacity to pay be found to be responsible for the largest possible proportion of the damage. The second issue, relevant to New South Wales and Western Australia, is that plaintiffs will need to take steps to reduce the risk of not receiving their full entitlement of damages by including as many potential wrongdoers in their action as possible. This will inevitably increase the complexity and length of trials. There may also be cases where the plaintiff only receives a portion of their damages because a responsible party was not a party to the proceedings.

In Victoria and Queensland, where the court is disallowed from comparing the responsibility of wrongdoers who are not parties to the proceedings, the defendants to the action will be liable for the total loss suffered by the plaintiff. Where a plaintiff chooses to claim against only one defendant, the burden will be on these defendants to join other potential wrongdoers to the action. Thus, the proportionate liability scheme operates in these states on the basis that the defendant(s) can apply to the court to have other wrongdoers joined. This raises an interesting question where the dispute has been submitted to arbitration because only those parties to the arbitration agreement will be a party to the arbitration.

A plaintiff does not have to ensure that all wrongdoers are joined in the one action because the legislation allows the plaintiff to bring fresh proceedings against a defendant to recover the damages for which that defendant was responsible. As well as the obvious inefficiency, it is also possible new evidence may arise in subsequent proceedings that show the loss was greater than that originally proved. In Victoria, New South Wales and Western Australia, it is unclear then whether a defendant to the first proceeding who had judgment for its proportion of the original claim entered against it might be called upon by the defendant in the second proceedings to contribute to their judgment. This is because the legislation only provides that, having had judgment for its proportion

entered against it, a wrongdoer cannot be required to contribute to any damages awarded against another wrongdoer in the same proceeding.

Clearly, the federal, state and territory governments are yet to agree on a uniform framework for proportionate liability. It is also clear that the lack of uniformity causes a number of problems. In order that these issues are properly resolved, perhaps a periodic review of the reforms should be put into place, particularly once the insurance market begins to return to more sensible levels.

6. CONCLUSION

Proportionate liability works best where all wrongdoers are solvent and available. This is not a reality. In an imperfect corporate world, the underlying difference between proportionate liability and joint and several liability is a philosophical approach to the allocation of damages. The question is whether it is better to allocate liability fairly, or to ensure that the victim receives the total amount of compensation to which it is entitled. The recent approach of the federal, state and territory governments appears to indicate that they consider it better to allocate liability fairly among the wrongdoers.

There are compelling policy arguments both for and against proportionate liability, as indicated by the conflicting conclusions of the various law reform reports commissioned in Australia and overseas. Only time will tell if the reforms will be successful and it is for these reasons that it is suggested that the proportionate liability legislation to be periodically reviewed to ensure that its operation in practice accords with the policy reasons for its enactment. Furthermore, it is clearly important for there to be a more defined national approach to proportionate liability. If proportionate liability is to be successful it is important to get the legislation right and that includes having legislation that is consistent between the various jurisdictions.

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The question is whether it is better to allocate liability fairly, or to ensure that the victim receives the total amount of compensation to which it is entitled. The recent approach of the federal, state and territory governments appears to indicate that they consider it better to allocate liability fairly among the wrongdoers.