PROPORTIONATE LIABILITY—REFORM OR REGRESSION?

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1. INTRODUCTION

At common law, where a party suffers loss or damage due to the wrongful actions of another, the wrongdoer becomes liable to pay damages. Damages may arise in tort or contract law. An award of damages is compensatory, that is, it aims to restore the plaintiff as far as possible to the position it would have been in, but for the damage. This is achieved by shifting the cost of the loss from the plaintiff to the wrongdoer.

In cases where there is a single wrongdoer (except in some instances of tortious liability involving contributory negligence), the approach to liability is simple and uncontroversial: the wrongdoer is liable for 100% of the plaintiff's loss, and the plaintiff bears the risk that the wrongdoer will turn out to be insolvent or otherwise unavailable and therefore unable to pay.

Commonly, however, the injury suffered by the plaintiff is caused by more than one wrongdoer. This is often the case in construction projects. For example, a builder (X) might defectively construct a house. In addition, the builder's defective construction may have been able to be avoided by appropriate estimating, design or supervision by an architect or other professional (Y). Further, a local authority (Z) may have had responsibility for inspecting the construction, which inspection (if properly carried out) would have detected the defect. X, Y and Z have all acted independently of one another, but the ultimate outcome of the defective structure and the need for its rectification will represent a single loss suffered by the house-owner, or perhaps by a subsequent purchaser.

For the purposes of this paper, it is intended to refer to the types of conduct described above as the conduct of wrongdoers who have caused the loss or damage described.

Where two or more wrongdoers have caused the same loss or damage to the claimant, the traditional approach to determining their liability for damages has been to hold them jointly and severally liable, sometimes by

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specific contractual provision, sometimes by operation of law. Under joint and several liability, each individual wrongdoer is potentially liable for 100% of the claimant's loss. An obvious consequence of this is that if one or more of the defendants is impecunious or untraceable, the remaining wrongdoer(s) will be required to compensate the plaintiff fully. This principle of joint and several liability is fundamental to the law of tort, and to the law of contract where the parties often contract jointly and severally.

The effects of joint and several liability have been the subject of considerable debate, as a part of which various professional groups (notably auditors, surveyors and construction professionals) in both Australia and the UK have asserted that the upshot of joint and several liability is that those parties who are either financially secure or insured may be obliged to compensate plaintiffs fully even where they have only marginally contributed to the loss to be recovered.

There have been numerous calls for reform from a variety of interest groups, and measures seeking to redress the position complained of have been examined in detail. These reviews have included reports in Australia by Law Reform Commissions,[2] the Australian Competition and Consumer Commission,[3] and Government[4]; and in the UK by the Law Commission,[5] the Department of Trade and Industry,[6] Government and industry,[7] and members of professional groups.[8] Among the ambit of possible reforms considered, the replacement of joint and several liability with a system of proportionate liability has featured heavily. Changes to the law in Australia have now been implemented to this effect, but calls for reform have so far been rejected (but not stilled) in the UK.

It is intended in this paper to examine the policy debate for and against proportionate liability in both Australia and the UK, and the differing responses which have been taken in each jurisdiction. In doing so, the paper will assess the impact of the UK system of net liability provisions in collateral contracts as an alternative solution to the calls for reform. Finally, the paper seeks to draw some conclusions as to the effectiveness and potential longevity of the Australian reforms.

[2] See, for example, Law Reform Commission, *Contribution Between Persons Liable for the Same Damage*, Report 89 (1999); M Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability*, Victorian Attorney-General's Law Reform Advisory Council Expert Report 3 (1998).

[3] See, for example, ACCC, *Public Liability and Professional Indemnity Insurance—Fourth Monitoring Report* (February 2005).

[4] See, for example, *Commonwealth, Review of the Law of Negligence: Final Report* (October 2002); J L R Davis, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two* (Commonwealth of Australia, 1995).

[5] See, for example, DTI, *Feasibility Investigation of Joint and Several Liability* (London: HMSO, 1996).

[6] See, for example, A Likierman, *Professional Liability: Report of the Study Teams* (London: HMSO, 1989) (''the Likierman Report'').

[7] See, for example, Sir M Latham, *Constructing the Team* (London: HMSO, 1994) (''the Latham Report'').

[8] See, for example, Institute of Civil Engineers, *Professional Liability* (1989); Association of Consulting Engineers, *Professional Indemnity Insurance and Joint and Several Liability in the Construction Industry—The Case for Reform* (2004).

2. INSURANCE COSTS: THE SOURCE OF THE DEBATE

One of the factors providing the most momentum to the push for proportionate liability in both Australia and the UK has been the rising cost of insurance premiums and reduced availability of public liability and professional indemnity insurance in recent years.[9]

In Australia in the early 1990s rising premium costs coincided with several spectacular collapses within the corporate world. These collapses led to litigation directed particularly at the accountants who had undertaken to audit the accounts of the collapsed companies, even where their level of responsibility was slight, because the other wrongdoers involved had limited funds. In this context, an inquiry into the law of joint and several liability was established in 1993 by the Federal and NSW Attorneys-General and conducted by leading academic, Professor Jim Davis; he recommended the adoption of proportionate liability in cases of physical damage or economic loss. The recommendation was considered and subsequently rejected in both Victoria and NSW in 1998 and 1999, respectively, only to resurface in 2001 in reaction to significant increases in insurance premiums which were believed to have arisen as a result of the combination[10] of the collapse of major insurance group HIH, the terrorist attacks of 11 September and the withdrawal by a number of insurers from the professional indemnity and other insurance markets, coupled with a restriction by professional indemnity insurers on the extent of cover which they had previously been prepared to provide.[11] The sum of these events was a perceived insurance ''crisis'' which, in light of the extreme difficulties faced by many consumers in obtaining insurance at a reasonable (or in some cases, at any) price and the subsequent consideration by many professional groups[12] of the withdrawal of services, provoked a reconsideration of the issue.

In the UK, demands for reform of joint and several liability began with professional groups such as engineers and auditors, once again in the context of rising professional indemnity insurance costs, which in the 1980s increased threefold.[13] As a result of investigations into the liability issues faced by auditors, surveyors and construction professionals, the Likierman Report[14] recommended that the introduction of proportionate liability (except in cases of personal injury) be seriously considered and that further

[9] ACCC, *Public Liability and Professional Indemnity Insurance—Monitoring Report* (July 2003).

[10] ACCC, *op. cit.* n. 9, above, p. 6.

[11] Northern Territory Department of Justice, *Proportionate Liability—Northern Territory* (November 2004), p. 2.

[12] For example, the Institute of Chartered Accountants conducted a survey in January 2003 which indicated that over half of its members were considering or had already ceased to offer certain services, particularly auditing services, as a result of premium prices. A survey conducted at the same time by the Association of Consulting Engineers Australia indicated a similar trend in the engineering profession with regard to environmental and geotechnical engineering services.

[13] The Likierman Report, n. 6, above, p. 6.

[14] *Ibid.*

consideration of the issues should be undertaken by the Law Commission.[15] The report found that the law as it stood made professionals ''prime targets'' who ended up paying for the mistakes of others.[16] The Likierman Report argued that construction professionals were particularly vulnerable to being joined to actions where other defendants were no longer in business or went into liquidation.[17] This was followed by the Latham Report in 1994,[18] which 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''.[19] These recommendations spurred an investigation[20] by the Common Law Team of the Law Commission in 1996 into the feasibility of joint and several liability, and the principle of proportionate liability as a possible alternative.

Interestingly, although the debate surrounding proportionate liability was prompted by similar pressures at work in both Australia and the United Kingdom, and at a similar time, and although similar policy concerns were put forward on both sides of the debate in both jurisdictions, the response taken in each case has been markedly different. These solutions are discussed in sections 5 and 6, below.

3. FRAMEWORK OF THE PROPORTIONATE LIABILITY DEBATE

Before exploring in detail the policy debate surrounding proportionate liability and other possible methods of distributing blame consistently with fault, it is necessary first to examine a number of legal issues which inform (and complicate) the debate.

Commercial necessity/reality of joint and several liability

An issue often overlooked in this debate is that joint and several liability may in fact be a critical and strategic commercial part of a transaction. Take, for example, the common scenario of two contractors who enter into an unincorporated joint venture in order to bid for a major construction project. In such cases, it is standard practice for the owner to require joint and several liability, so that it may look to the party of its choosing (or to both) in order to recover 100% of any loss or damage it might suffer

[15] *Ibid.*
[16] *Ibid.* p. 117.
[17] *Ibid.* p. 118.
[18] The Latham Report, n. 7, above.
[19] *Ibid.* paras. 11.9, 11.11.
[20] DTI, *op. cit.* n. 5, above.

throughout the course of the project. In Australia, many recent Design & Construct (D & C) projects have been awarded on this basis, particularly major toll roads projects.[21]

This arrangement allows the owner (and its debt and equity providers, where the project is financed privately) to rely on the combined balance sheets of the contractors both in the execution of their obligations under the contract and in the payment of damages, should they be payable. Further, where one contractor is particularly expert but relatively impecunious, or becomes so during the course of the project, the owner is not disadvantaged, as it may still enforce the contract against the other and recover its loss in full. Without such an arrangement, the particular joint venture may never win the job, for the reasons which follow.

Assume that only one of them has a decent balance sheet, and that the other, while not as financially secure, brings critical skills to the project. Thus the party with ''deep pockets'' might not have been engaged but for the skills of the party with ''shallow pockets'', and *vice-versa*.

In this context, the contractors will typically make their own arrangements in the joint venture agreement in order to protect themselves from 100% liability. For example, they may contractually apportion the risks between themselves (i.e., one may agree to bear 40% of the loss, and the other 60%) or enter into an ''EPC wrap'', which is fundamentally a cost wrap whereby one contractor agrees to bear the whole of the cost risk in return for a premium.

Against this established commercial framework, the introduction of proportionate liability may be doing a disservice to those contractors who have typically relied upon the certainty of joint and several liability in order to do business. At the very least, it is bound to create uncertainty for parties to construction contracts as to the validity of such agreements, particularly if the legislation does not allow contracting out. As will be seen, this is the very situation currently being faced in several Australian jurisdictions where proportionate liability has now been introduced.

Concurrent liability

In the course of a construction project, liability to pay damages may arise in a number of ways. A party may negligently breach a duty of care owed to another (liability in tort) or it may breach an obligation set out in the contract (liability in contract). In addition, it is now well established in both Australia[22] and in the UK[23] that a party may be subject to concurrent duties in both contract and tort (concurrent liability). Concurrent liability

[21] For example, Westlink M7 (Leighton Contractors/Abigroup) and Lane Cove Tunnel (Thiess/John Holland) in NSW and EastLink (Thiess/John Holland) in Victoria.

[22] For a recent authority, see *Astley* v. *Austrust Ltd* (n. 50, below, and linked main text).

[23] See *Forsikringsaktieselskapet Vesta* v. *Butcher* [1989] 1 AC 852 (CA) at 860B (O'Connor LJ), recently applied in *UCB Bank plc* v. *Hepherd Winstanley & Pugh (A Firm)*, 1999 WL 478074 [Westlaw] (CA).

has given rise to a number of uncertainties which bear upon the proportionate liability debate in the context of contributory negligence and contribution between tortfeasors.

Contribution is a legislative scheme which allows a defendant against whom the plaintiff has chosen to make a claim for damages to obtain financial input from other responsible wrongdoers against whom an action has not been brought. Contributory negligence allows a court to reduce the liability of a defendant in situations where the claimant itself has failed to take reasonable care in the protection of its own interests, and this failure in some way contributes to its loss.

A key difference between the two schemes is that contribution distributes the plaintiff's full loss between the (available) defendants, but does not impact on the amount recoverable by the plaintiff. The plaintiff still recovers 100% of its loss from the defendant(s) it has chosen to sue, and that 100% is later apportioned among other defendants. On the other hand, contributory negligence actually reduces the total loss recoverable by the plaintiff. Thus, under contributory negligence the defendants are no longer liable for 100% of the loss; the plaintiff does not recover the loss attributable to its default.

Although contribution and contributory negligence do not themselves fall under the rubric of ''proportionate liability'', they are relevant to the debate in that they represent alternate means of distributing blame consistently with fault. As such, the certainty and effectiveness with which they achieve this aim is relevant to the assessment of the need for a system of proportionate liability and its efficacy compared with these presently existing systems.

Contribution between tortfeasors

The original position at common law was that joint wrongdoers could not make a contribution claim against other wrongdoers for assistance in meeting the plaintiff's claim. This was set down in 1799 in *Merryweather* v. *Nixon*,[24] on the basis that wrongdoers ought not to be allowed to found a cause of action based on their own wrongdoing.[25] Since then, legislation has been enacted in both Australia and the UK which permits defendants to claim contribution in certain cases.

In the UK, the Civil Liability (Contribution) Act 1978 allows a wrongdoer to claim contribution from any person liable in respect of the same damage (jointly or otherwise).[26] In Australia, the law of contribution is complex, and varies in each jurisdiction[27]; but, generally speaking, the legislation in

[24] (1799) 8 TR 186, 101 ER 1337.
[25] Law Reform Commission. *op. cit.* n. 2, above, para. 1.12.
[26] Civil Liability (Contribution) Act 1978 (UK), s. 1 (1).
[27] See the Final Report of the Review of the Law of Negligence, n. 4, above, p. 179.

each Australian state and territory provides likewise.[28] The amount of contribution payable in both countries is that which the court finds to be just and equitable, having regard to the extent of the contributor's responsibility for the damage. This formulation bears a resemblance to that contained in the proportionate liability legislation now in place in several Australian jurisdictions.

On the face of it, the law of contribution may appear to solve the problem of defendants being held liable for the whole of a loss for which they have not been 100% at fault. However, this is not the case. To begin with, as the discussion above illustrates, the law of contribution in both Australia and the UK is complex, lacks uniformity and particularly in Australia, recovery in many cases is uncertain.

(i) Differences in legal basis of liability

A significant difference between the English law and that of each Australian jurisdiction arises in respect of the type of liability for which contribution may be claimed. Importantly, in the UK a claim for contribution can be made whatever the legal basis of the alleged contributor's liability[29] (that is, whether the damage for which they are liable has resulted from a tort, breach of contract, breach of trust or some other wrong). In Australia, to date, Victoria is the only state to have taken on this formulation,[30] which it adopted in 1986 by means of the Wrongs (Contribution) Act 1985. In that state and the UK, therefore, contribution will be available where the damage is suffered as a result of either a tort or breach of contract, as well as where the wrongdoers are concurrently liable in both contract and tort.

With regard to the other Australian states and territories, however, an uncertainty arises as to whether relief in the form of contribution will be available to defendants whose liability lies in contract only, or concurrently in both contract and tort.

For example, the New South Wales, Queensland, Northern Territory and Western Australian Acts expressly allow for contribution where the damage suffered by the plaintiff has occurred as a result of a tort. In these jurisdictions there is no clear right to contribution where the liability of the

[28] Civil Law (Wrongs) Act 2002 (ACT); Law Reform (Miscellaneous Provisions) Act 1946 (NSW); Law Reform (Miscellaneous Provisions) Act 1956 (NT); Law Reform Act 1995 (Qld); Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA); Wrongs Act 1954 (Tas); Wrongs Act 1958 (Vic); Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 (WA).

[29] Civil Liability (Contribution) Act 1978 (UK), s. 6 (1).

[30] Wrongs Act 1958 (Vic), s. 23A.

concurrent wrongdoer(s) lies not in tort but in contract alone. Indeed, the legislation appears to have been interpreted as excluding contribution in such cases.[31]

Nor is the right to contribution in situations of concurrent tortious and contractual liability necessarily unequivocal. However, in *MacPherson & Kelley* v. *Kevin J Prunty & Associates*,[32] the Supreme Court of Victoria held that the contractual liability provided for in a solicitor-client retainer gave rise to a concurrent liability in tort, with the result that the appellants were in fact ''tortfeasors''. In the court's view this was sufficient to attract the operation of the Victorian contribution legislation (at the time framed in exclusively ''tortious'' terms, similar to the current legislation in NSW, Qld, WA and the NT), notwithstanding that the trial judge had assessed the damages on the basis of their liability in contract only. This case indicates that courts may be willing to extend the operation of the contribution statutes to situations of concurrent liability.

The Australian Capital Territory and Tasmanian Acts attempt to remove any uncertainty by expressly providing that a claim for contribution may be made for acts or omissions which give rise to liability in tort alone, or which amount to a breach of a contractual duty which is concurrent and coextensive with a tortious duty of care.[33] Once again, these statutes would appear to exclude recovery of contribution where liability lies in contract alone. Indeed, perhaps even more so, as the express enunciation of the two legal bases of liability to which contribution does apply indicates that the omission of the third was intentional.

The South Australian legislation is arguably the most vague. Section 6 (1) of the Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) states that a person liable for ''harm'' suffered by another may recover contribution. ''Harm'' is defined in section 3 (1) as including loss of life, personal injury, damage to property and loss of any other kind. It is not certain whether damage arising from a contractual breach, or from concurrent liability, would fall within this definition.

Assuming that the legislation in these jurisdictions *does* apply to cases of concurrent liability, one limitation is that it will be necessary for the defendant to show that the concurrent wrongdoers from whom it is intended to recover contribution were also somehow liable to the plaintiff in tort.

[31] See for example, D Marks, ''Professional Negligence: Contribution and Contributory Negligence'' (1989) 15 (2) *University of Queensland Law Journal* 209, citing the *Forty-Second Report of the Law Reform Committee of South Australia Relating to Proceedings Against and Contribution Between Tortfeasors and Other Defendants* (1977), pp. 10–11.

[32] [1983] 1 VR 573 (Sup Ct Vic).

[33] Civil Law (Wrongs) Act 2002 (ACT), s. 19; Wrongs Act 1954 (Tas), s. 2.

(ii) Liability to plaintiff

Contribution is subject to a number of practical limitations, which may result in an unfair proportion of the plaintiff's loss being borne by a particular defendant.[34]

For example, the application of the contribution legislation requires that potential wrongdoers must all be liable to the plaintiff for the damage. However, in complex construction projects this may not always be the case. For instance, where a subcontractor is negligent and a head contractor negligently fails to detect this, there will be a contractual link between the plaintiff and the head contractor, but there may be no such link between the plaintiff and the subcontractor. Tortious liability will only be made out where it can be shown that the subcontractor owed a duty of care to the plaintiff. If this is not made out, a court is likely to hold that contribution is unavailable, and the defendant will be obliged to bear the whole of the plaintiff's loss.

(iii) Exclusions of liability

A limitation which was highlighted in the English case of *Co-operative Retail Services Ltd* v. *Taylor Young Partnership*[35] is the removal of the right to contribution in respect of a particular concurrent wrongdoer, where the contract between that wrongdoer and the plaintiff contains a clause excluding liability in respect of the loss suffered. In that case, the plaintiff, Co-operative, contracted with the contractors (Wimpey Construction) under a standard form JCT contract. Wimpey in turn engaged an electrical subcontractor (Hall). Pursuant to the JCT form, the works were insured in the joint names of the principal and the contractors. The plaintiff also engaged consultants. A fire occurred due to the defective workmanship of a subcontractor, which was not picked up by the consultants. Reinstatement costs and related professional fees were borne by the insurers of Co-operative and the contractors, who subsequently brought a claim against the consultants. The consultants claimed contribution from the contractors. However, contribution was denied on the basis of the joint insurance policy, which the House of Lords held effectively prevented the contractors from being held liable for their negligence.

As Hambly[36] points out, this result is somewhat anomalous. Essentially this outcome means that the consultant defendants are forced to pay 100% of the plaintiff's loss (despite being less than 100% culpable) as a result of the plaintiff's choice to indemnify the contractors in the first place. Hambly suggests that a more "just and equitable" result would be for the plaintiff

[34] See Construction Industry Council Liability Briefing, *Net Contribution Clauses* (December 2004); downloadable from www.cic.org.uk/activities/liability.shtml (visited 4 September 2006).

[35] [2002] UKHL 17, [2002] 1 WLR 1419 (HL).

[36] E T Hambly, "Plugging the Holes in Deep Pockets: The Case for Proportionate Liability in Construction" (King's College London, MSc dissertation, 2004), pp. 40–41.

(or its insurers) to bear the brunt of the loss for which it has indemnified the contractors.

(iv) Solvency and availability of concurrent wrongdoers

Finally, even assuming that contribution is available in a particular case, the risk of concurrent wrongdoers being insolvent, uninsured or otherwise not amenable to jurisdiction[37] remains with the defendant. If several wrongdoers are responsible for the same loss to the claimant, and only one of them is solvent or available to be sued, that defendant will be left with a redundant (although still valid) right to contribution from the other wrongdoers. Thus, on a policy level contribution still leaves the way open for plaintiffs to unfairly target defendants with deep pockets over their more responsible but less solvent fellows.

As Rogers CJ Com Div asked in *AWA Ltd* v. *Daniels*,[38] in such cases, where a well insured defendant who is made liable for the entirety of the plaintiff's loss is entitled to seek contribution from other persons who may be more responsible than he/she, ''[w]hy should the whole of the burden of possibly insolvent wrongdoers fall entirely on a well insured, or deep pocket defendant?''[39]

This is the question asked by advocates of proportionate liability. Accordingly, the law of contribution has not silenced the calls for reform, despite the fact that, in the right circumstances, it does allow for apportionment of damages among wrongdoers in accordance with fault.

Contributory negligence

Contributory negligence is the term used to refer to situations where the claimant has itself failed to take reasonable care in the protection of its own interests, and this failure in some way contributes to its loss.

At common law, contributory negligence was a complete defence to tortious liability for negligence, even where the plaintiff's contribution to the loss was only minor in comparison with the degree of fault of the tortfeasor(s). This has since been altered by statute, first in the UK[40] and subsequently in Australia[41] (''the apportionment legislation''). This legislation provides that contributory negligence on the part of the claimant (at least in relation to claims for pure economic loss, as is generally the case

[37] Law Reform Commission, *op. cit.* n. 2, above, para. 2.3.
[38] (1992) 10 ACLC 993.
[39] *Ibid.* at 1022.
[40] Law Reform (Contributory Negligence) Act 1945 (UK).
[41] Civil Law (Wrongs) Act 2002 (ACT); Law Reform (Miscellaneous Provisions) Act 1965 (NSW); Law Reform (Miscellaneous Provisions) Act 2006 (NT); Law Reform Act 1995 (Qld); Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA); Wrongs Act 1954 (Tas); Wrongs Act 1958 (Vic); Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 (WA).

with construction projects) will reduce the damages which would otherwise be recoverable by the claimant by the extent which the court thinks is just and equitable having regard to the claimant's share in the responsibility for the damage. Given that, in theory, this reduction can be up to 100%, it remains possible for contributory negligence to defeat the plaintiff's claim entirely; however, this is now only possible where the degree of contribution is significant.

The uncertainty relevant to the proportionate liability debate which arises in relation to contributory negligence concerns the question whether contributory negligence on the part of the plaintiff will operate to reduce the damages payable by the defendant(s) where the plaintiff's claim is brought not in tort, but in contract alone (and could have been, but is not, brought also in tort); or, alternatively, where it is brought in both contract and tort on the basis of concurrent liability.

Is it a precondition to the availability of the defence of contributory negligence that the defendant's breach of duty be tortious?

(i) The UK approach

Prior to legislative reform in Australia at the turn of the millennium, the apportionment legislation in Australia and the UK was expressed in similar terms. It is convenient, therefore, to commence by examining the language of the current UK statute, the Law Reform (Contributory Negligence) Act 1945. Section 1 relevantly provides:

> "(1) Where any person suffers damage as the result partly of his own *fault* and partly of the *fault* of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage . . . "[42]

Section 4 defines "fault" as:

> "negligence, breach of statutory duty or other act or omission which gives rise to a liability in *tort* or would, apart from this Act, give rise to the defence of contributory negligence."[43]

The traditional approach in the UK (and indeed, in most common law jurisdictions, including Australia) was set out in the English case of *Forsikringsaktieselskapet Vesta* v. *Butcher*.[44] In that case, the plaintiffs (an insurance company) insured the owners of a fish farm against loss of fish. Using brokers, they reinsured 90% of the risk with underwriters. Both policies contained a condition that the owners keep a 24-hour watch on the farm. The owners subsequently determined that they would not be able to

[42] Emphasis added.
[43] Emphasis added.
[44] [1989] AC 852 (CA and HL).

fulfil this condition, and informed the plaintiffs that they could not accept it. The plaintiffs phoned the brokers, stating that they would wait for confirmation that non-acceptance of the condition was acceptable. The brokers failed to inform the reinsurers of this development; the plaintiffs failed to follow it up. A provision in the policy stated that non-compliance with any of its terms would render it null and void. Following a storm in which many fish were lost, the plaintiffs settled an insurance claim and sought indemnity from the reinsurers. The reinsurers argued that they were not liable due to the breach of the 24-hour watch condition. The plaintiffs brought an action for damages against the brokers for breach of the duty to inform the reinsurers as to the owners' inability to accept the condition.

At first instance,[45] the court held that the brokers had breached the contract. Nominal damages were awarded only, but the court stated that, had the quantum of damages been greater, it would have reduced the damages recoverable by 75% by reason of the contributory negligence of the plaintiffs in failing to follow up the brokers. The reinsurers appealed, and the plaintiffs brought a cross-appeal against the finding of contributory negligence, arguing that the apportionment legislation had no application to a claim which was or could be made on the basis of breach of contract.

The Court of Appeal confirmed the established principle (accepted by the plaintiffs) that where a general law duty to exercise reasonable care and skill is owed by a party in respect of a particular activity, the performance of which activity is itself governed by a contract, breach of the duty will give rise concurrently to a claim in tort and a claim for breach of contract.

The court adopted the identification by Hobhouse J at first instance of three possible types of liability:

1. Strict liability, arising from breach of contract independent of negligence.
2. Liability for breach of a contractual duty to take care which does not correspond to an independent common law duty of care.
3. Liability for breach of a contractual duty which corresponds to an independently existing liability in tort.

It was concluded that the apportionment legislation did not apply to categories 1[46] and 2; however, O'Connor LJ and (with some reluctance to reverse his original position in an earlier case[47]) Neill LJ agreed that it did apply to the case at hand, which fell into category 3. Accordingly, the plaintiffs' contention was rejected and the apportionment legislation was found to apply, though the claim was brought in contract.

[45] [1986] 2 All ER 488 (QBD, Hobhouse J).
[46] Affirmed more recently in *Barclays Bank plc* v. *Fairclough Building Ltd* [1995] QB 214 (CA).
[47] *AB Marintrans* v. *Comet Shipping Co Ltd* [1985] 3 All ER 442 (QBD).

According to O'Connor LJ, if, as the plaintiffs suggested, a plaintiff in a case of concurrent liability could prevent the defendant from relying on the defence of contributory negligence by simply choosing to frame its claim in contract instead of in tort, ''then the law has been sadly adrift for a very long time''.[48] Indeed, in major construction cases where designers, engineers and contractors may frequently find themselves subject to a tortious duty of care in respect of their activities under the contract, such a finding would clearly be open to abuse by contributory claimants seeking to avoid the reduction to the amount of damages which would otherwise have followed as a result of their conduct.

The upshot of this would appear to be that in England, the apportionment legislation will provide relief to a defendant where its liability lies in tort alone, or in both contract and tort (even where the plaintiff's claim is only framed in contract), but not in contract alone. However, several issues complicate the matter.

To begin with, it should be noted that in *Forsikringsaktieselskapet Vesta* v. *Butcher* Sir Roger Ormrod in the Court of Appeal took a slightly different approach. He held that the existence of a concurrent liability was ''immaterial''[49]; the apportionment legislation applied only in cases where the defendant was liable in tort. The judge also rejected the plaintiffs' cross-appeal, but it appears that his reason for doing so was not based on concurrent liability. He stated that the brokers were not liable for breach of a specific contractual term; rather, he preferred to view the existence of the contract as creating the degree of proximity necessary to give rise to a duty of care and thus to an action in negligence. Thus, although the majority favoured the ''category 3'' approach, this tort-focused line of reasoning may have left the applicability of the apportionment legislation to cases of concurrent liability less than clear.

The decision of the Australian High Court in *Astley* v. *Austrust Ltd*[50] in 1999 may exacerbate any uncertainty. That case concerned the professional negligence of a solicitor in the provision of legal advice to his client (a fledgling trustee company) regarding the risk that the company would be held personally liable for losses incurred by the trust unless it limited its liability—a well-established scenario involving concurrent liability. The solicitor claimed in his defence that the client was contributorily negligent for failing to make appropriate inquiries as to the solvency of the trust. The majority held that the company was clearly guilty of contributory negligence. However, it refused to apply the apportionment legislation (the relevant sections at the time using the same words as the current UK

[48] [1988] 2 All ER 43 at 47 (CA) (O'Connor LJ).

[49] Adopting the formulation of Pritchard J in *Rowe* v. *Turner Hopkins & Partners* [1980] 2 NZLR 550 at 555–556.

[50] (1999) 161 ALR 155 (HCA).

statute), stating that the legislation did not apply to claims in contract, and therefore could not provide relief in a case where the plaintiff's claim sounded concurrently in contract and tort, as it did in the case at hand. Significantly, the court held that a plaintiff could frame its cause of action howsoever it pleased, and could legitimately thereby deprive the defendant of a cause of action if it so chose.[51] According to the court, it was open to the parties to bargain for reduced liability on the part of the defendant in the event of contributory negligence. As they had not done so, the plaintiff was free to recover in full.

As will be seen, there are several inherent problems with this line of reasoning, and the apportionment legislation in Australia has since been revised to avoid a repeat of the decision. For now, however, it suffices to say that at the least the case may add to or create uncertainty surrounding a defendant's ability to rely on the defence of contributory negligence in the UK, where that defendant is subject to concurrent duties in contract and in tort.

(ii) The Australian approach

As mentioned above, the Australian approach to contributory negligence for claims in contract traditionally followed that of the UK. This was no doubt a result of the fact that the contributory negligence legislation in the Australian states and territories used to be the same as the UK statute. However, recent legislative amendments have caused a divergence in the approach of the two countries.

Reform of the Australian apportionment legislation arose as a result of the outcome in *Astley*. Relevantly, at the time the South Australian statute (and those across the other Australian states and territories) defined ''fault'' in the same way as the current UK legislation does, namely: ''negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.'' As discussed above, the High Court of Australia held that the Act applied to tortious claims only, and therefore was not available to reduce the liability of the defendant, despite a clear finding of contributory negligence on the part of the claimant, since the claimant's plea was framed in both tort and contract.

The strict, literal approach to the legislation (in particular, the definition of ''fault'') which the High Court took in that case was widely criticised as artificial and contrary to the body of authority which had previously

[51] *Ibid.* at 181.

developed in Australia and elsewhere.[52] In addition, it was suggested that the ''bargain theory''[53] adopted by the High Court was unrealistic and failed to take into account non-commercial arrangements such as employment contracts. This theory justifies refusing to apply the apportionment legislation to liability in contract (strictly or concurrently) on the basis that it is open to the parties to the contract to bargain for the basis of liability for breach of contract if they so choose. However, Warne points out that this is not necessarily so.[54] For one thing, the legislation in the Australian State of Victoria[55] expressly prohibits solicitors from limiting their liability for any loss occasioned by them to the client in relation to the provision of legal services. As *Astley* dealt specifically with a solicitor-client retainer, this legislation directly contradicts the court's statement of principle in that case. Moreover, Warne argues that the theory ''ignores the reality of the situation'',[56] namely, that the content of the contractual duty of care implied in a solicitor's retainer (and by extension, arguably in the contractual arrangement between any professional service provider and their client) is determined by reference to the objective standards of the concurrent tortious duty, and since it arises from operation of the law and not strictly as a result of the negotiations of the parties, in reality it is ''about as uncontractual a contractual provision as is known to the law''.[57]

The legislative reaction to the decision was to amend the definition of ''fault'' (or ''wrong'') in the apportionment legislation of all Australian jurisdictions to expressly apply to situations of concurrent liability, except arguably in Western Australia, where the legislation enables the court to reduce the plaintiff's damages ''in any claim for damages founded on an allegation of *negligence*'' where the defendant is ''guilty of an act of *negligence* conducing to the happening of the event which caused the damage''.[58]

[52] See, for example, the authorities cited by S Warne, ''Legal Professional Liability—Part 2'' (2001) 9 TLJ 29 at n. 38: *Rowe* v. *Turner Hopkins & Partners* [1980] 2 NZLR 550, [1982] 1 NZLR 178 at 181; *Dairy Containers Ltd* v. *NZI Bank Ltd* [1995] 2 NZLR 30 at 74; *Hanmore* v. *Ganley*, NZ CA, 8 September 1997, unreported; *Forsikringsaktieselskapet Vesta* v. *Butcher*, n. 44, above, and linked main text; *Queen's Bridge Motors & Engineering Co Pty Ltd* v. *Edwards* [1964] Tas SR 93; *W & G Genders Pty Ltd* v. *Noel Searle (Tas) Pty Ltd* [1977] Tas SR 132; *Bains Harding Construction & Roofing (Aust) Pty Ltd* v. *McCredie Richmond & Partners Pty Ltd* (1988) 13 NSWLR 437; *AWA Ltd* v. *Daniels* (1992) 7 ACSR 759; *Challenge Bank Ltd* v. *V L Cooper & Associates Pty Ltd* [1996] 1 VR 220; *Craig* v. *Troy* (1997) 16 WAR 96. Warne also points out that the decision was contrary to the recommendations of the English Law Commission (*Contributory Negligence as a Defence in Contract*, Law Com No 219, 1993) and the Ontario Law Reform Commission (*Contribution Amongst Wrongdoers and Contributory Negligence*, 1988).

[53] J Blom, ''Contributory Negligence and Contract—A Canadian View of *Astley* v. *Austrust Ltd*'' (2000) 8 (1) *Tort Law Review* 70 at 76.

[54] S Warne, *op. cit.* n. 52, above, at para. 4.2.

[55] Legal Profession Act 2004 (Vic), s. 7.2.11.

[56] S Warne, *op. cit.* n. 52, above, n. 39.

[57] *Ibid.* n. 39.

[58] Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 (WA), s. 4 (emphasis added).

Unfortunately, the language of the amendments varies slightly between jurisdictions, which may create further uncertainty. For example, in New South Wales, a defence of contributory negligence will be available for:

> "an act or omission that:
> (a) gives rise to a liability in tort in respect of which a defence of contributory negligence is available at common law, or
> (b) amounts to a breach of a contractual duty of care that is concurrent and co-extensive with a duty of care in tort."[59]

The Victorian,[60] Australian Capital Territory[61] and Queensland[62] Acts are similarly worded. The definitions in the Northern Territory[63] and Tasmanian[64] Acts also expressly include breach of statutory duty. These statutes expressly allow the court to reduce the liability of a defendant for contributory negligence by a claimant where the claim is framed in tort, or where it is concurrently framed in both contract and tort. It does not appear to allow for a reduction in damages where the claim is framed exclusively in contract. Further, does this mean that where a defendant's liability could be pleaded in both contract and tort, but the plaintiff chooses only to plead in contract, the defendant may not benefit from the apportionment legislation?

The decision in *Astley* would appear to say as much, yet it is arguable that this would be illogical. Certainly, this is the view held by Seddon, who criticises the "apparent inability of contract law to deal with the situation where both parties are at fault".[65] According to Seddon, in contracts where a party breaches a contractual duty to take care in the provision of services, as in *Astley*, the reduction of the plaintiff's damages where it has also failed to take care is a "sensible mechanism" for apportionment which the High Court cut off unnecessarily in that case. Seddon advances two alternative approaches which he argues were open to the court and would solve the inconsistent "all-or-nothing" solution which has been taken in contract claims to date.

Seddon suggests that one solution would be for the defendant to argue that the claimant had itself breached an implied term of the contract that the claimant would exercise due care for its own interests. For example, he suggests that such a duty could feasibly be found in respect of those aspects of the bargain which are within the claimant's control. Seddon's argument relates specifically to the situation of a client-solicitor retainer. That such a term would be so readily implied into a major construction project

[59] Law Reform (Miscellaneous Provisions) Act 1965 (NSW), s. 8.
[60] Wrongs Act 1958 (Vic), s. 25.
[61] Civil Law (Wrongs) Act 2002 (ACT), s. 101.
[62] Law Reform Act 1995 (Qld), s. 5.
[63] Law Reform (Miscellaneous Provisions) Act 2006 (NT), s. 15.
[64] Wrongs Act 1954 (Tas), s. 2.
[65] N Seddon, "Contract Damages Where Both Parties are at Fault" (2000) 15 JCL 207.

contract, in which the allocation of risk has been the subject of considerable negotiations between the parties, may be doubted. Indeed, even with respect to a retainer, Seddon accepts that the notion may be ''too radical''.

The second solution is a proportionate approach to causation in contract claims, adopting a reasoning process similar (but not identical) to the assessment of damages in tortious claims to which the apportionment legislation does apply. Seddon observes that such an approach has been taken in a number of Canadian decisions. For example, in *Tompkins Hardware Ltd* v. *North Western Flying Services Ltd*,[66] the High Court of Ontario reduced the damages recoverable by a plaintiff for loss occasioned by flying a plane which had been defectively repaired by the defendant, because the plaintiff knew of the defect. This was despite an express acknowledgement by the court of the non-applicability of contributory negligence to the assessment of contractual damages. A similar approach was taken in the Canadian case of *Doiron* v. *La Caisse Populaire D'Inkerman Ltée*.[67] Like *Astley*, that case involved breach of retainer by a solicitor; unlike *Astley*, the court reduced the damages recoverable by the client as a result of its own carelessness. Seddon emphasises that this does not amount to a proposal that contributory negligence applies to contract claims; rather, he explains the result as a comparison of ''fault rather than causation in its strictly legal sense''. The question that should have been asked in *Astley*, and that should be asked in other concurrent liability cases, he contends, is: ''to what extent is the plaintiff responsible for its own losses?''

While the apportionment legislation in these states and territories does not appear to allow for apportionment where the claim is one of strict contractual liability, one might further question whether such an exclusion is warranted. While it accords with the categorisation of contractual liability in *Forsikringsaktieselskapet Vesta* v. *Butcher*,[68] it is arguable that it is somewhat anomalous to allow for the reduction of a defendant's liability where the plaintiff has contributed to its own loss in cases where the defendant has been negligent, but not in cases where the defendant has broken the contract. South Australia is currently the only Australian jurisdiction to have expressly dealt with this issue in the legislation—employing a noticeably broader definition of ''wrong'' which expressly includes both ''a breach of a duty of care that arises under the law of torts'' and ''a breach of a contractual duty of care''.[69]

[66] (1982) 139 DLR (3d) 329 (High Ct Ont).
[67] (1985) 17 DLR (4th) 660.
[68] See notes 44–45 and linked main text above.
[69] Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA), s. 3. Note that the South Australian statute uses the phrase ''negligent wrongdoing'' instead of ''wrong''.

4. THE DEBATE AT A POLICY LEVEL

Essentially, the debate regarding whether proportionate liability should replace joint and several liability concerns the philosophical question: who should bear the risk that other concurrent wrongdoers might be impecunious or otherwise unavailable to sue? The plaintiff or the defendant(s)? The system of joint and several liability places this burden on the defendants, by allowing a plaintiff to recover 100% of its loss from any single wrongdoer, regardless of their degree of fault. Proportionate liability switches this burden to the plaintiff, by preventing the plaintiff from recovering more from any single defendant than that which accords with that defendant's level of responsibility for the plaintiff's loss.

As previously stated, while the issues considered above are not themselves part of the concept of proportionate liability, they inform the policy debate surrounding proportionate liability. Some of the key policy considerations advanced in support of one system over the other are considered below.

Compensation

The major function of tort law, like an award of damages for breach of contract, is to provide compensation for losses which are deemed worthy of reparation.[70] Those in favour of joint and several liability often assert that this principle accords with the compensatory rationale of tort and contract law, because it aims to ensure, as far as possible, full compensation for a plaintiff.[71] They argue that proportionate liability conflicts with the underlying rationale of compensation, as 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.[72] As suggested by the New Zealand Law Commission, these critics contend that damages have always been determined by loss rather than fault, and therefore the fact that joint and several liability may impose liability in excess of responsibility in cases where other concurrent wrongdoers are not available or able to pay is not a sufficiently compelling reason for a departure from the existing rule.

However, this argument should be seen in light of the above analysis of contributory negligence and contribution. If compensation is designed to remedy losses worthy of reparation, it could be argued that it would be contrary to the principle of compensation to allow the plaintiff to recover that part of its loss which has been self-inflicted, on the basis that that portion of the loss is not worthy of reparation. The uncertainties surrounding the availability of the apportionment legislation to all cases to which it

[70] Balkin and Davis, *Law of Torts* (Sydney: Butterworths, 3rd ed., 2004), p. 7.
[71] Law Reform Commission, *op.cit.* n. 2, above, para. 2.17.
[72] New Zealand Law Commission, *Apportionment of Civil Liability,* Report 47 (May 1998), para. 7.

might be logical for it to apply, and the inability of the contribution legislation to take into account a contribution by the claimant strengthen the argument that an alternative system is needed to ensure that a plaintiff does not receive more than the amount worthy of reparation.

Proportionate liability is advanced by its proponents as such a system, since 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.

The "innocent plaintiff" theory

Tied in with the compensation theory is the policy argument that the defendant, not the plaintiff, should rightly bear the risk that other concurrent wrongdoers will be unavailable to be sued, because the plaintiff is the innocent victim of the defendants' wrongful conduct. The contention on the part of supporters of joint and several liability is that since it was the wrongful conduct of each of the wrongdoers that caused the harm suffered by the plaintiff, it should not be open to any of the wrongdoers to resist the imposition of liability for the whole of the harm suffered.[73]

There are three possible objections to this line of reasoning. First, the Hon Andrew Rogers, QC, has suggested that this argument is circular. He states: "... it 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."[74]

Secondly, like the compensation rationale, this line of reasoning does not seem to account for situations in which the plaintiff has contributed to its own loss. In such cases, it can no longer properly be said that the plaintiff is "innocent".

Thirdly, it ignores the fact that in certain cases the plaintiff may have considerable control over the solvency or otherwise of potential defendants. The UK Feasibility Investigation itself acknowledged that this is 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".[75]

Despite this acknowledgment, the Investigation denied that it had any bearing on the shifting of legal responsibility for insolvency, because a plaintiff should be able to assume that no legal wrong will be committed

[73] *Commonwealth, Review of the Law of Negligence: Final Report*, note 4, above, para. 12.5.
[74] A Rogers, QC, "Fairness or Joint and Several Liability" (2000) 8 *Tort Law Journal* 1 at 3.
[75] DTI, *op. cit.* n. 5, above, para. 3.12.

against it. Hambly[76] questions whether such an assumption is fair, given the major part the plaintiff plays in setting the scene for the contractual relationships to which it may potentially fall ''victim'', and argues that the plaintiff's tolerance of the imbalance in participant solvency has the effect of implicating it in the wrongdoing, such that even without contributory negligence it can no longer be described as an ''innocent victim''. However, this does not appear to account for the crucial commercial role that joint and several liability can often play for contractors in securing the transaction (discussed in section 3, above) and the contractual arrangements apportioning risk which contractors commonly make amongst themselves in the context of such projects. The commercial reality is that the ''choice'' that the plaintiff has over the solvency arrangements of its contractors is often what secures the transaction for these parties in the first place. If claimants were no longer permitted to assume that no legal wrong would be committed against them, that is, if they were no longer perceived as ''innocent victims'', these choices might be made differently, to the detriment of the very contractors which advocates of proportionate liability set out to protect.

Uncertainty of proportionate liability as a solution

An important point which is frequently argued by those in opposition to proportionate liability is that it is by no means certain that adoption of that system will solve (or, in Australia, has solved) the problems attributed to joint and several liability. This argument has been raised in a number of different contexts.

The perceived insurance ''crisis''

As discussed earlier in this paper, rising insurance premiums have been one of the driving factors prompting (re)consideration of proportionate liability in both the UK and Australia.

In reality, however, the precise extent to which it can be said that joint and several liability is actually to blame for recent changes in the liability insurance market is unclear.[77] Among other things, this is because:

- It is difficult to predict the effect of different liability regimes on the insurance market, since insurance companies are generally unwilling to reveal commercially sensitive information relating to premiums.

[76] E T Hambly, *op. cit.* n. 36, above, p. 19.

[77] For example, Law Reform Commission Report 89, n. 2, above; M Richardson, *op. cit.* n. 2, above; University of Alberta, Institute of Law Research and Reform, Contributory Negligence and Concurrent Wrongdoers (Report 31, 1979); and the New Zealand Law Commission, *op. cit.* n. 72, above.

- Insurance cycles are subject to developments in the international economy.
- Changes in the market are unlikely to be detected in the short term, because the larger claims can take upwards of 10 years to be fully resolved.[78]

As a result, while the advocates of proportionate liability insist that adoption of the principle is a necessary step in solving the insurance ''crisis'', the true impact of the system on insurance market conditions is not actually certain.

Incentive for risk minimisation

One of the issues which has been raised in the context of the proportionate liability debate is the concern that the system of liability adopted should encourage risk minimisation in projects. However, it is far from clear which form of liability is able to provide the most efficient deterrent, or indeed whether either system of liability is more efficient than the other.

For example, it has been suggested that imposition of liability on ''deep pocket'' defendants under the system of joint and several liability will encourage them to adopt excessive levels of care which may lead to inefficiency.[79] At the same time, wrongdoers who can anticipate their own absence or insolvency may be less inclined to exercise due care.[80] Yet offsetting these two factors is the possibility that in circumstances where certain wrongdoers are likely to be the target of any litigation, the prospect of expansion of their own liability may cause them to take on the role of ''*de facto* 'cops on the beat' ''[81]; supervising the activities of other potential wrongdoers in order to keep their own risk at a minimum. According to Richardson, such arguments support joint and several liability as an efficient mechanism for minimising risk by promoting this ''gatekeeper'' function.[82]

On the other hand, it has been suggested that proportionate liability reduces the incentive for effective accident prevention by reducing the potential liability of concurrent wrongdoers to that for which they are culpably responsible. This means that 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 claimant's loss.[83] However, on the flipside, each party knows that they will be fully liable to the extent

[78] Law Reform Commission, *op. cit.* n. 2, above, para. 2.61.
[79] New Zealand Law Commission, *op. cit.* n. 72, above, para. 4.
[80] M Richardson, *op. cit.* n. 77, above, para. 2.7.
[81] R Kraakman, ''Gatekeepers: The Anatomy of a Third Party Enforcement Strategy'' (1986) 2 *Journal of Law, Economics and Organizations* 53.
[82] M Richardson, *op. cit.* n. 2. above, para. 2.11.
[83] NSW Law Reform Commission, *Contribution Among Wrongdoers: Interim Report on Solidary Liability* (1990), Report 65, para. 29.

of their responsibility and that they will not be able to escape liability by the plaintiff choosing to claim the full amount from another responsible party. This may motivate parties to exercise due care to ensure that they are not responsible for any damage.

Procedural issues

A further uncertainty is whether proportionate liability would improve or aggravate the procedural concerns which arise under a system of joint and several liability.

Under 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 more concurrent wrongdoers are found to be liable for the whole of the damage, it is likely that that judgment against the defendant(s) will generate several claims for contribution (although 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 dilemma of multiple claims will persist. 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.

Moreover, proportionate liability would appear to have the effect of increasing the complexity of the arguments presented to the courts, and of shifting the burden of detailed case preparation further onto the plaintiffs. This is because under a system of proportionate liability, the court must determine the responsibility of each wrongdoer, and, given that some wrongdoers may be impecunious, insolvent, or otherwise unavailable, the plaintiff will obviously have a vested interest in ensuring that the greatest proportion of liability attaches to those defendants who are most able to pay. Connected to this issue is the problem of choosing the wrongdoers. Where many wrongdoers are involved, should the plaintiff take action against every party who is liable to some degree, regardless of how minimal, in order to ensure that it recovers close to 100% of its loss?

It is also apparent that a system of proportionate liability introduces a number of *new* procedural considerations, particularly relating to the complexity and size of proceedings. For example, how does the judge adequately apportion liability in cases where a number of wrongdoers are absent? And what happens in complex construction disputes where, for example, a number of different forms of loss are present, some of which require liability to be decided proportionally; others of which attract joint and several liability?[84]

[84] Law Reform Commission, *op. cit.* n. 2, above, paras. 2.45–2.56.

5. THE AUSTRALIAN RESPONSE: ADOPTING PROPORTIONATE LIABILITY

In Australia, the perceived insurance ''crisis'' and the various policy considerations it sparked led to the Commonwealth, state and territory Insurance Ministers agreeing in August 2003 to a package of reforms which endorsed a national model for proportionate liability.[85]

Proportionate liability legislation has since been adopted in all Australian states and territories in relation to claims involving pure economic loss and damage to property arising from a failure to take reasonable care.[86] In addition, proportionate liability has been adopted in respect of claims for damages for misleading and deceptive conduct under the various Fair Trading Acts,[87] and at a Commonwealth level under the Trade Practices Act 1974 (Cth), the Corporations Act 2001 (Cth) and the Australian Securities and Investments Act 2001 (Cth).

Prior to the introduction of the new legislation, proportionate liability schemes already existed in respect of defective building work in most jurisdictions.[88] There is some disparity in the approach of the various Australian states and territories towards the effect of the new proportionate liability regime on these existing schemes. In New South Wales, Victoria and the Northern Territory the new statutory regime has replaced earlier proportionate liability schemes, whereas the former schemes continue to operate alongside the new proportionate liability legislation in South Australia, Tasmania and the Australian Capital Territory.

An unsatisfactory solution?

As anticipated, the proportionate liability legislation in all states and territories operates to enable a claimant to recover from any single defendant a sum no greater than that amounting to that individual's responsibility for the damage suffered. This means that a concurrent wrongdoer can no longer be held liable for a plaintiff's full loss unless he/she was 100% at fault.

However, despite agreement in 2003 to a national model, the implementation of proportionate liability by the various Australian states and territories has been staggered and inconsistent. The result is considerable

[85] *Saicorp Newsletter*, Edition 23 (November 2003); downloadable from www.treasury.gov.au/saicorp.

[86] Civil Liability Act 2002 (NSW), Pt 4; Wrongs Act 1958 (Vic), Pt IVAA; Civil Liability Act 2002 (WA), Pt 1F; Civil Liability Act 2003 (Qld), Ch 2, Pt 2; Civil Law (Wrongs) Act 2002 (ACT), Ch 7A; Proportionate Liability Act 2005 (NT); Civil Liability Act 2002 (Tas), Pt 9A; Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA), Pt 3.

[87] Fair Trading Act 1987 (NSW); Fair Trading Act 1999 (Vic); Fair Trading Act 1989 (Qld); Fair Trading Act 1987 (SA); Fair Trading Act 1987 (WA); Fair Trading Act 1992 (ACT); Consumer Affairs and Fair Trading Act 2006 (NT); Fair Trading Act 1990 (Tas).

[88] Environmental Planning and Assessment Act 1979 (NSW), s. 109ZJ (repealed); Building Act 1993 (Vic), ss. 129–131 (repealed); Building Act 1993 (NT), s. 155 (repealed); Development Act 1993 (SA), s. 72; Building Act 2000 (Tas), s. 252; Building Act 2004 (ACT), s. 141.

uncertainty as to the practical operation and interaction of the various statutes and the effect that the differences between them have on the allocation of responsibility for default. For critics of proportionate liability, such uncertainty may spur calls for a reversion to the traditional system of joint and several liability. For those who were advocates of proportionate liability to begin with, it may prompt further calls for reform. In any event, the questions which the new legislation raises indicate that the debate is far from closed, and raise doubts as to the durability of the current solution.

By way of illustration, some of these difficulties are examined below.

Treatment of absent defendants

Perhaps the most noteworthy difference is the variation in the courts' approach to absent defendants when determining the liability of a particular wrongdoer under the legislation. This difference has a significant impact upon the extent to which the risk of unavailability is successfully shifted from the defendant to the claimant in each jurisdiction. For example, in New South Wales,[89] Queensland,[90] the Northern Territory[91] and the Commonwealth,[92] the court may take into account the comparative responsibility of concurrent wrongdoers who are not party to the proceedings, in assessing the comparative responsibility of those defendants who are parties to the proceedings. In Western Australia,[93] South Australia[94] and Tasmania,[95] the court does not merely have the discretion to do so; it must. In Victoria, on the other hand, the court is prohibited from taking into account the responsibility of any wrongdoer who is not a party to the action, unless the reason they are not a party is because they have died or, in the case of a corporation, because they have been wound up.[96]

Essentially this distinction means that in Victoria (and—depending on whether the court chooses to exercise its discretion or not—in New South Wales, Queensland, the Northern Territory and the Commonwealth, too) it may still be possible for a claimant to target deep-pocketed defendants for more than their fair share of the loss in situations where, for one reason or another, other concurrent wrongdoers are not made parties to the proceedings. Theoretically this will not be possible in Western Australia, Tasmania or South Australia, although one might question how straightforward it will be in practice for the court to assess the comparative responsibility of an absent defendant for the purposes of determining the liability of those

[89] Civil Liability Act 2002 (NSW), s. 35 (3) (b).
[90] Civil Liability Act 2003 (Qld), s. 31 (3).
[91] Proportionate Liability Act 2005 (NT), s. 13 (2) (b).
[92] Trade Practices Act 1974 (Cth), s. 87CD (3) (b).
[93] Civil Liability Act 2002 (WA), s. 5AK (3) (b).
[94] Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA), s. 8 (2) (b).
[95] Civil Liability Act 2002 (Tas), s. 43B (3) (b).
[96] Wrongs Act 1958 (Vic), s. 24AI (3).

defendant(s) against whom the claim has been brought. Further difficulties may also arise in situations where an absent defendant is identified after the initial proceedings have been concluded and liability has already been apportioned.[97] Indeed, it was arguments such as these which led the UK Law Commission to conclude that in cases decided under a system of proportionate liability it would be better to divide liability among present defendants only.[98]

The foregoing demonstrates that it is by no means certain that the system of proportionate liability currently in place in the majority of Australian jurisdictions will achieve one of the primary objects of its implementation in the first place, namely, the shifting of the risk of impecuniosity or unavailability of concurrent wrongdoers onto the claimant in order to avoid financially secure but peripherally responsible defendants from being held liable for 100% of a plaintiff's loss.

Destabilisation of contractual risk allocation

Perhaps one of the most troubling effects of the new statutory scheme is that it destabilises the traditional risk allocation provided for in construction contracts. Some of the ways it does this are discussed below. As a result, it is now far more difficult for the parties to a construction project to determine with confidence which risks are theirs to bear.[99]

(i) Subcontractor liability

In construction projects, it is common for principals to enter into a contract with a head contractor for construction of works, and for the head contractor in turn to subcontract some aspects of the construction. The head and subcontracts both typically contain an obligation providing that the contractors must exercise reasonable care, and the head contractor assumes liability for any acts and omissions on the part of its subcontractors.

Under such arrangements, owners were previously able to rely on the strength of the head contractor's balance sheet to satisfy any loss or damage it might suffer at the hands of either the head contractor itself or one of its subcontractors. Therefore, it did not matter if the subcontractors were of precarious solvency because the owner could recover the full loss from the head contractor under the principle of joint and several liability. Indeed, as discussed in section 3, above, this has often been an instrumental consideration for the owner when awarding the deal.

[97] DTI, *op. cit.* n. 5 above, para. 3.7.
[98] *Ibid.* para. 3.8.
[99] See generally, O Hayford, ''Proportionate Liability—Its Impact on Risk Allocation in Construction Contracts and What to Do About It'' (paper presented at Clayton Utz Continuing Legal Education Seminar, 8 March 2006).

Now, however, under proportionate liability it would appear that in awarding the contract the owner must concern itself with the balance sheets of the subcontractors as well. For where the head contractor and one or more subcontractors cause the same damage to the owner and the court finds that the owner has a cause of action against the subcontractors (in negligence, if not in contract), it appears that the legislation no longer allows the head contractor to take on responsibility for the full loss; it can only be held liable for that portion of the owner's loss for which it was culpably responsible, and the subcontractors will be held liable for the remaining loss attributable to their wrongdoing.

In a large-scale infrastructure project, it is not uncommon for subcontractors to carry out a significant part of the construction work under the supervision of the head contractor. In such cases, the court is likely to lay the responsibility for the plaintiff's loss primarily at the feet of the subcontractors, with only minimal blame assigned to the negligent supervision of the head contractor. This means that in cases where the subcontractors have limited (or no) assets, the owner will be unable to recover the majority of its loss.

More troubling still is the fact that it may not be possible to contract out of the proportionate liability regime. This is discussed in greater detail below. If this is the case, the legislative scheme in such a case essentially overrides the commercial negotiations of the parties in arriving at the head contractor arrangement, and fails to give effect to the intentions of the parties, expressly set out in the contract. Further, even if it is possible to contract out of the legislation, it will be seen that the effectiveness of attempts to do so remains unclear. At the very least, therefore, the new legislation can be said to cast severe doubt upon the contractual allocation of risk provided for in such projects.

(ii) Independent cause of action?

Perhaps the most serious aspect for principals of the above scenario is the risk that the new legislation might operate to allow the court to apportion loss to the subcontractors even if the claimant does not have an independent cause of action against them.

It has been suggested that this is a possible interpretation of the legislation, since it states only that a person must be a ''concurrent wrongdoer'' for the legislation to apply (i.e., a person who has caused the relevant damage or loss). Situations where damage may be caused to the owner by a person against whom they have no direct cause of action are not difficult to imagine, particularly in construction projects. To take the situation described above, for example, the subcontractors will typically owe a duty of care to the head contractor, but not to the owner. Thus there may be no independent action for pure economic loss in respect of damage caused to the owner by the subcontractor. Further, there will be a contract

between the subcontractor and the head contractor, but generally not between the subcontractor and the owner. Despite this, a subcontractor would appear to be capable of falling within a literal interpretation of ''concurrent wrongdoer''. Does this mean they can be joined to the action, and a cause of action effectively ''created'' against them?

This interpretation is probably unlikely. A counter-argument might be that the application of the legislation to ''claims'' requires that an independent cause of action exist before the legislation will apply. In light of the presumption that statutory provisions will not override the common law without a clear and unambiguous intention to do so,[100] it would most likely be held that the proportionate liability legislation is not intended to override the common law requirement that a plaintiff have a viable cause of action against the party it proposes to join.

While the statutes do not evince a clear and unambiguous intention, the lack of certainty is nonetheless a concern for parties to major construction contracts, the negotiation and success of which rely heavily on the clear identification of risk and its allocation to the party best equipped to bear it.

(iii) Strict liability

Many contracts, particularly in the construction industry, contain provisions the breach of which will give rise to a claim for damages, but which do not themselves constitute a failure to take reasonable care. One of the most common is a warranty that the works (or the materials used to construct the works) will be ''fit for purpose''. If it turns out that they are not fit for purpose, the contractor will generally be liable under the contract for breach of warranty.

Another question raised with respect to the legislation is whether a strict contractual obligation, such as this, attracts the operation of proportionate liability. For this to be the case, such an instance must be characterised as an ''apportionable claim'' under the legislation.

The definition of ''apportionable claim'' varies between the different Australian states and territories. Accordingly, the extent to which strict liability claims are captured by the legislation may vary, too.

The meanings of the Queensland and South Australian definitions are relatively clear. In Queensland, an ''apportionable claim'' is defined as ''a claim for economic loss or damage to property in an action for damages arising from a *breach of a duty of care* . . . ''[101] In South Australia, the legislation does not define ''apportionable claims'', but makes it clear that

[100] Observed by R Johnston *et al.*, *Insurance Update: Proportionate Liability Advancement of Defence* (Ebsworth and Ebsworth Lawyers Seminar Series, 2006), p. 7. See also, A G Uren and D Aghion, *Proportionate Liability: An Analysis of the Victorian and Commonwealth Legislative Schemes*, Commercial Bar Association Paper for CLE Seminar, 18 August 2005.

[101] Emphasis added.

in respect of contract claims, proportionate liability will apply only where there has been a ''breach of a *contractual duty of care*''.[102]

In the other jurisdictions,[103] the legislation defines ''apportionable claim'' as ''a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) *arising from a failure to take reasonable care* . . . ''[104]

This could be interpreted in a number of ways. For example, it could mean that proportionate liability applies[105]:

(1) only to claims which are actually pleaded as claims for breach of an express or implied contractual duty of care. If this is so, strict contractual obligations will not be covered under the legislation;
(2) to claims for strict contractual liability, but only where the defendant's conduct giving rise to the breach of contract in fact constitutes a breach of a duty of care owed to the plaintiff; or
(3) to claims for strict contractual liability, but only where the defendant's conduct giving rise to the breach of contract in fact constitutes a failure to exercise reasonable care. This would not require a duty of care to be owed to the plaintiff.

Of these three interpretations, there are several reasons why it would appear that a court would be unlikely to take approach (1). For example, professional liability insurance policies typically cover breaches of strict contractual obligations where liability arises from a failure to take reasonable care, regardless of the way the cause of action is actually pleaded. Accordingly, this approach would not give liability insurers the benefit of the new system, which was one of the primary purposes of adopting the legislation to begin with. It would also render unnecessary the legislative provisions which expressly ''save'' vicarious liability of employers and several liability of partners (both of which are forms of strict liability). Further, the language ''*arising from* a failure to take reasonable care''[106] implies that the claims must factually so arise but need not be so pleaded.

It is less simple to determine which of approaches (2) and (3) a court would prefer. Unlike approach (1), both approaches give meaning and effect to the express ''saving'' of the vicarious and partners' liability provisions.

[102] Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA), s. 4 (1) (c) (emphasis added).

[103] New South Wales (Civil Liability Act 2002 (NSW), s. 34 (1) (a)); Victoria (Wrongs Act 1958 (Vic), s. 24AF (1) (a)); Western Australia (Civil Liability Act 2002 (WA), s. 5AI (1) (a)); Tasmania (Civil Liability Act 2002 (Tas), s. 43A (1) (a)); Australian Capital Territory (Civil Law (Wrongs) Act 2002 (ACT), s. 107B (2) (a)); and Northern Territory (Proportionate Liability Act 2005 (NT), s. 4 (2)(a)). Note the Northern Territory provision is formulated slightly differently: ''a claim for damages (whether in tort, in contract, under a statute or otherwise) arising from a failure to take reasonable care.''

[104] Emphasis added.

[105] O Hayford, *op. cit.* n. 99, above.

[106] Emphasis added.

On the one hand, approach (2) gives effect to legislative policy by protecting liability insurers from joint and several liability in respect of policies covering contractual liability arising from a breach of duty of care. Further, it is consistent with the Queensland legislation, which clearly defines an ''apportionable claim'' as ''a claim for economic loss or damage to property in an action for damages arising from a breach of a duty of care''.[107] On the other hand, approach (2) does not cover insurance policies which do not exclude contractually assumed liability which would not have arisen at common law (that is, contractual liability for a ''failure to take reasonable care'' as opposed to a breach of duty).

As many policies are expressed in terms of a ''failure to take reasonable care'', approach (3) arguably gives greater effect to the policy of the legislation by protecting liability insurers in respect of both types of liability. In addition, the difference in language between the Queensland legislation and that of these other jurisdictions may have been intended, and approach (3) gives effect to the reasonable and ordinary meaning of the words ''arising from a failure to take reasonable care''. One objection to this approach is that it could have the effect of giving the plaintiff the right to recover from a concurrent wrongdoer against whom it has no independent cause of action, by requiring only that the wrongdoer fail to exercise reasonable care, and not specifically requiring that the defendant owe a duty of care to the plaintiff. This issue was raised in respect of the head contractor scenario under (ii), above. For the reasons set out there, it is probably unlikely that a court would so hold. In the absence of court authority to this effect, however, it should nevertheless be borne in mind.

As a consequence of the ambiguities inherent in these provisions, liability insurers face the possibility that not all of their policies will come within the ambit of the new scheme, unless they err on the side of caution and ensure that all policies contain an exclusion of contractually assumed liability which would not have arisen at common law. Further, it will lead to uncertainty on the part of parties as to their ability to avoid or attract the operation of the proportionate liability legislation. For example, plaintiffs hoping to avoid proportionate liability altogether may seek to prove that the wrongdoer did not fail to take reasonable care. Alternatively, defendants wishing to avoid 100% liability for a claimant's loss may argue that they did fail to take reasonable care in order to attract the operation of the legislation. However, the success of such tactics cannot yet be predicted with any certainty.

No contracting out?

As mentioned above, one of the most unsettling aspects of the uncertainties which the new Australian liability regime raises is the possibility that the

[107] Civil Liability Act 2003 (Qld), s. 28 (1) (a).

legislation may override the express intentions of the parties, by precluding parties from excluding its operation in their contract. The problem is exacerbated by the fact that whether this is the effect of the legislation is itself unclear.

There are a number of different ways in which parties might try to avoid the application of the legislation. The most obvious is by including in the contract a provision expressly excluding application of the legislation. Once again, doubts as to the effectiveness of any or all of these methods are called up by the inconsistencies between the statutes in the various jurisdictions.

In Queensland, it is apparent that this method would be ineffective, as section 7 (3) of the Civil Liability Act 2003 (Qld) expressly prevents the parties to a contract from making express provision as to their rights, obligations and liabilities under the contract in relation to any matter to which the proportionate liability legislation applies. Conversely, Western Australia expressly permits contracting out.[108]

The position in Tasmania and New South Wales is less clear. The relevant legislative provisions in those jurisdictions provide:

> "This Act (except Part 2) does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract with respect to any matter to which this Act applies and does not limit or otherwise affect the operation of any such express provision."[109]

The correct interpretation of these words has been the subject of debate. There have been suggestions that it should be interpreted in the same way as the Western Australian provision, to expressly allow parties to contract out of the proportionate liability legislation.[110] Also in support of this view is the former Queensland provision, which was framed in the same language, and which was interpreted to allow for contracting out. On the other hand, Stephenson[111] postulates that it is "far less likely" that courts in these jurisdictions (and indeed, in those jurisdictions which remain silent on the issue) will allow contracting out, as to do so would be to go against the intention of the legislation to protect liability insurers, which is made explicit in the negotiations and second reading speeches.

In Victoria, South Australia, the ACT, the Northern Territory and under the Commonwealth Trade Practices Act 1974 there is no express provision either allowing or disallowing contracting out. However, it may be possible to draw an implication (at least in Victoria where by contrast other sections of the Wrongs Act 1958 do expressly allow contracting out) that the absence

[108] Civil Liability Act 2002 (WA), s. 4A.

[109] Civil Liability Act 2002 (NSW), s. 3A (2); Civil Liability Act 2002 (Tas), s. 3A (3).

[110] See for example, Victorian Department of Justice, *Review of Contractual Allocation of Risk and Part IVAA of the Wrongs Act 1958*, Discussion Paper (December 2005); B McDonald, "Proportionate Liability in Australia: The Devil in the Detail" (2005) 26 *Australian Bar Review* 29 at 44; R Johnston *et al.*, *op. cit.* n. 100, above, at p. 10.

[111] A Stephenson, "Proportional Liability in Australia—The Death of Certainty in Risk Allocation in Contract" [2005] ICLR 64 at 90.

of an express provision suggests that parties may not contract out of the legislation.

An alternative method by which parties may seek to avoid apportionment of liability might be to expressly provide that where a claim attracts the operation of the Act, liability is to be apportioned in a specified way. For example, would a clause such as that discussed above, providing that a head contractor will be liable for any acts or omissions on the part of its subcontractors, succeed in excluding the legislation? It is likely that it would in those states and territories which allow for contracting out, although, as the above discussion demonstrates, with the exception of Western Australia it is unclear whether there are any.

Finally, parties may try to elude the legislation by referring all disputes to some form of alternative dispute resolution, such as arbitration, and expressly excluding the arbitrator, mediator, etc., from resolving the dispute under the proportionate liability scheme. This relies on a literal interpretation to the words ''the court'' in the legislation. Such an approach would not be taken in New South Wales, Tasmania or the Northern Territory, as the legislation specifically includes tribunals in the definition of ''court''. This is also the case in Victoria, although in that state the Act expressly bars the court from taking into account the comparative responsibility of wrongdoers unless they are parties to the action. As a court may join parties to an action, but an arbitral tribunal typically cannot (and can be expressly prevented from doing so under the arbitration agreement) it may be possible to argue that this inconsistency means that arbitrations are not subject to the legislation in Victoria.[112] In other Australian jurisdictions, it is unlikely that this tactic would succeed, as arbitral tribunals have the authority to provide parties to an arbitration with the same relief (including relief derived purely from statute) which would be available in a court of law.[113]

On a practical level, the variations between the legislative schemes in each jurisdiction may cause conflict of law issues where, for example, a contract excluding operation of the proportionate liability legislation and governed by Western Australian law (which allows for this) is the subject of a claim brought in Queensland, which expressly prohibits contracting out. Further, it has been suggested that where parties in jurisdictions which do not allow contracting out seek to avoid the operation of the legislation by providing that their contract is governed by the law of a jurisdiction which does allow it, such a provision may be struck down if the court holds that the proportionate liability statute is mandatory or that it would be contrary to public policy to give effect to it.[114] Thus, despite the best efforts and express

[112] *Ibid.* at p. 68.

[113] *Government Insurance Office of NSW* v. *Atkinson-Leighton Joint Venture* (1981) 146 CLR 206; *IBM Australia Ltd* v. *National Distribution Services Pty Ltd* (1991) 22 NSWLR 466.

[114] R Johnston *et al.*, *op. cit.* n. 100, above, p. 10.

intentions of the parties to a contract, the proportionate liability legislation, and all the uncertainties which come with it, may be unavoidable.

Separate actions

Although not an example of a variation in the legislative schemes *per se*, a further potential incongruity arises with regard to the court's treatment of separate proportionate liability claims in respect of a single loss.

Proportionate liability claims may be made separately or together in a single action against all potential wrongdoers. An important feature of the legislation is that where the claimant runs separate actions, the court must take into account the damages which have previously been awarded in order that the maximum amount recovered by the claimant does not exceed the sum of the loss it has suffered. Thus, if A and B together are responsible for 100% of the claimant's loss, and A has previously been found responsible for 40% of the total amount, B's responsibility in a separate action cannot exceed 60%. This prevents the claimant from bringing separate actions for the strategic purpose of recovering more than 100% of its loss by inflating the proportions for which it claims each separate wrongdoer is responsible.

Interestingly, however, the converse does not apply. That is, where A has been found 40% responsible in an earlier action and a separate action is subsequently brought against B, the court in the later action is not bound to find that A's responsibility came to the same percentage that the previous court arrived at. Thus, in assessing B's liability, it is open to the court to find that A was in fact responsible for more than 40% of the plaintiff's loss. Accordingly, B's liability will be less than 60%.

The upshot of this is that while bringing separate actions can never strategically advantage the plaintiff, they do have the potential to act to his/her disadvantage, resulting in an ultimate recovery of less than 100% of the loss suffered.

6. THE UK RESPONSE: REJECTING PROPORTIONATE LIABILITY

The above examination constitutes but a part of the discussion and debate which has arisen in Australia in relation to the operation and effect of the new proportionate liability legislation. However, it is useful in the context of the present analysis to consider the difficulties identified in the Australian system, as they inform the evaluation of the alternative solution adopted by the UK in preference to proportionate liability.

As detailed above, the climate of rising insurance costs and pressure from professional groups led in the UK, as in Australia, to consideration of a system of proportionate liability as an alternative to joint and several

liability. This consideration culminated in the Feasibility Investigation conducted by the Law Commission in 1996. Unlike Australia, however, the Commission concluded that the arguments of general policy and economic efficiency put forward in favour of proportionate liability did not outweigh the ''convincing arguments of principle for retaining joint and several liability''.[115] As a result, the Law Commission rejected full proportionate liability as a viable solution. Nor did it believe that proportionate liability should be introduced in the limited context of the construction industry (which was an alternative solution suggested). According to the Law Commission, ''[i]f proportionate liability makes sense it must make sense as a matter of principle that transcends the boundaries of professions or industries''. Since the Commission could not justify the replacement of joint and several liability across the board, it could not justify it at all.

It should be noted that the Law Commission also considered and rejected other alternative proposals for modified proportionate liability, namely:

- proportionate liability where the claimant is contributorily negligent[116];
- proportionate liability for a peripheral wrongdoer only[117]; and
- proportionate liability with some reallocation of an uncollected share (although the Commission was more favourably disposed towards this option).[118]

It is necessary to bear in mind the purpose of the Feasibility Investigation in order to understand fully the view reached by the Law Commission. This was to determine not whether proportionate liability should necessarily be adopted, but rather, whether a full Law Commission project should be undertaken on the subject. In order to justify a new law reform project, it had to be of the belief that the existing law was in some way flawed (notably in terms of unfairness or inefficiency) and that there were ''acceptable legislative solutions'' which would fix it.[119] From the outset the Law Commission did not hold such a belief; believing instead that proportionate liability would only substitute existing unfairness to defendants with unfairness to plaintiffs.[120] Specifically, the report cited four principles that militated against the adoption of full proportionate liability[121]:

(1) it shifts the risk of a defendant becoming insolvent from the other defendants to a legally blameless plaintiff;
(2) the principles of causation in joint and severable liability present sufficient barriers to a plaintiff making out its claim;

[115] DTI, *op. cit.* n. 5, above, para. 3.23.
[116] *Ibid.* paras. 4.2–4.15.
[117] *Ibid.* paras. 4.16–4.21.
[118] *Ibid.* paras. 4.22–4.26.
[119] *Ibid.* para. 1.2.
[120] *Ibid.*
[121] *Ibid.* paras. 3.12–3.16.

(3) 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
(4) where a peripheral wrongdoer is insolvent, it is unfair that the innocent plaintiff should bear this risk rather than the principal wrongdoer.

A number of these arguments have already been examined throughout this paper.

Alternatives to proportionate liability

Although proportionate liability was ultimately rejected in the UK, it is important to note that the Law Commission was not suggesting that proportionate liability did not have its merits, or that joint and several liability was without its faults. On the contrary, the Investigation expressly acknowledged that some means of overcoming the insurance ''crisis'' and the burdensome effect which joint and several liability could have on deep-pocket (usually professional) defendants was desirable.[122] To this end, although strictly outside its terms of reference, the Law Commission put forward three alternative suggestions which left the principle of joint and several liability intact. In the construction context, these were:

1. Compulsory insurance schemes: This would require potential defendants, including those without substantial assets, to acquire professional indemnity insurance. The Law Commission recognised that it would be a ''radical step'' to require compulsory insurance to be taken on by a wide range of businesses which are not presently covered, and that it could result in simply creating more ''deep-pocketed'' defendants. It also conceded that it might be problematic to develop ''a sufficiently comprehensive scheme of compulsory insurance for all potential litigants in litigious commercial activities . . . at reasonable rates''. However, the Law Commission did not dismiss the idea outright, looking to recent developments in New Zealand which had created a system of compulsory insurance in respect of directors and officers of insurance companies.[123]

2. Contractual exclusions of liability: The Law Commission also raised the possibility that professionals who foresee themselves as potentially incurring extensive liability might be able to exclude such liability in their contracts. The Commission noted that there were a number of problems associated with this option. Most importantly, such clauses would be subject to the Unfair Contract Terms Act 1977, under which an exclusion clause will be invalid if it is found to be ''unreasonable''. The Commission also noted as problematic the disparity of judicial opinion as to the reasonableness of

[122] *Ibid.* para. 5.1.
[123] *Ibid.* paras. 5.8, 5.9.

such clauses, and the absence of any consistent approach to clauses limiting the liability of professionals. However, it thought that there was ''scope for review'' of the extent to which liability could be limited by contract.[124]

3. Statutory caps on professional liability: The Law Commission also raised the ''radical'' but not novel suggestion of placing statutory caps on the amount of damages recoverable in respect of property damage and pure economic loss. While acknowledging that such an approach would ameliorate the unfairness alleged by defendants with respect to the effect of joint and several liability, the Commission ultimately concluded (as it did in respect of full proportionate liability itself) that there were ''no principled arguments'' for such a scheme, and that it simply had the effect of benefiting the defendants at the expense of the plaintiff.

Of these three alternatives, the Law Commission seemed to prefer option 2: contractual exclusion of liability. In particular, the Commission gave an example of one such clause found in the Royal Institute of British Architects standard form architects' appointment contract[125]:

> ''The Architect's liability for loss or damage shall be limited to such sum as the Architect ought reasonably to pay having regard to his responsibility for the same on the basis that all other consultants, Specialists, and the contractor, shall where appointed be deemed to have provided to the Client contractual undertakings in respect of their services and shall be deemed to have paid to the Client such contribution as may be appropriate having regard to the extent of their responsibility for such loss or damage.''

This is an early example of a specific type of exclusionary clause, the ''net contribution clause''. As will be seen, the alternative solution to proportionate liability in the UK construction industry has been to adopt a system of net contribution clauses and collateral warranties in order to circumvent the problem of defendants having to pay 100% of a claimant's loss where their fellow wrongdoers are unable to pay their share.

The "net contribution clause"

Generally speaking, a net contribution clause is a contractual clause which limits the liability which would potentially be apportionable to a defendant under joint and several liability (that is, up to 100% if no contribution can be claimed from other wrongdoers) to the amount which the defendant would be liable to pay if contribution were obtainable from the other concurrent wrongdoers. In this way it essentially ''neutralise[s] the effect of joint and several liability'',[126] by calculating liability for damages on the assumptions that:

[124] *Ibid.* paras. 5.10–5.26.

[125] RIBA Standard Form of Agreement for the Appointment of an Architect, SFA/92, cl. B 6.1.

[126] A Blocker, *In for a Penny, in for a Pound?* Legal500.com in association with Kennedys; downloadable from www.legal500.com/devs/uk/is/ukis_089.htm (visited 4 September 2006).

(1) any other wrongdoers responsible for the same loss are likewise contractually liable to the claimant; and
(2) all other such wrongdoers have paid the claimant the proportion of the loss which would have been apportioned to them under the contribution legislation.

At a glance, net contribution clauses, provided they are expressed in the right manner, would appear to solve the problems raised for defendants by joint and several liability. However, there are several reasons why this may not be the case.

Variation in language and scope

As with any contractual provision, the precise terms of a net contribution clause may vary, and the extent to which it does so may impact practically upon the extent to which joint and several liability will continue to apply. To this end, parties should take care when including such clauses in their contracts, to ensure that they are appropriately tailored to the deal which is being done.

For example, a net contribution clause may provide for a defendant's liability to be apportioned on the basis of the above-mentioned assumptions where that defendant is unable to obtain contribution for certain specified reasons, such as an exclusion, restriction or limitation of liability by way of a financial cap or in respect of a certain aspect of the project such as pollution. Alternately, such a clause might be contained in a collateral warranty and provide that the assumptions will apply where the warrantor is prevented from recovering contribution due to the absence of a like warranty. Where a clause is expressed in this limited way, the extent to which the operation of joint and several liability is averted will necessarily be less than it will be in a clause which simply provides that the defendant's liability shall not exceed such sum as it would be just and equitable for it to pay on the basis of its responsibility for the loss and the application of the assumptions.[127]

The form and language in which the applicable assumptions are expressed are also highly relevant to the protection offered to defendants by net contribution clauses. This is demonstrated by the case of *Co-operative Retail Services*.[128] As discussed in section 3, above, in that case the court held that a joint insurance policy in the names of the owner, the contractors and the subcontractors of the works excluded the contractor and subcontractor from liability to the owner in respect of the damage suffered. As the contractor and subcontractor were therefore not liable, and as the availability of a right of contribution depends on the party from whom contribution

[127] Construction Industry Council, *Sample Net Contribution Clauses* (December 2004); downloadable from www.cic.org.uk/activities/liability.shtml (visited 4 September 2006).
[128] See n. 35 and linked main text, above.

is sought being liable to the claimant for the same damage, the consultants were unable to claim contribution.

In such a case, a net contribution clause expressed in the terms of the above assumptions alone would be insufficient to protect the consultants from 100% liability, as it still requires that the other wrongdoers be responsible for the same loss. The Construction Industry Council has published a series of sample net contribution clauses which aim to remedy this lacuna by adding a third assumption. The clauses suggested by the Council therefore provide that the defendant's liability shall be assessed according to his/her degree of responsibility, assuming that:

> "(i) all other consultants, contractors, sub-contractors, project managers and advisers engaged in connection with [the Project] have provided contractual undertakings on terms no less onerous than those set out in Clause [–] to [the Funder/Purchaser/Tenant] in respect of the carrying out of their obligations in connection with [the Project]; and
>
> (ii) there are no exclusions of or limitations of liability nor joint insurance or co-insurance provisions between [the Funder/Purchaser/Tenant] and any other party referred to in this clause and any such other party who is responsible to any extent for the loss and damage is contractually liable to [the Funder/Purchaser/Tenant] for the loss and damage; and
>
> (iii) all the parties referred to in this clause have paid to [the Funder/Purchaser/Tenant] such proportion of the loss and damage which it would be just and equitable for them to pay having regard to the extent of their responsibility for the loss and damage."[129]

The terms of the net contribution clause will also be important from a procedural point of view, as they dictate how the apportionment is to be effected. For example, the clause might provide that the claimant is to repay the wrongdoer the amount of contribution which the wrongdoer is prevented from recovering from another defendant. Alternately, it may provide that the wrongdoer pay damages in the amount of the loss suffered by the claimant, less the figure representing the lost contribution. The difference is subtle, but the former example requires the plaintiff actively to pay the amount totalling the unobtainable contribution, while the latter simply subtracts that amount from the total received by the plaintiff. A net contribution clause may also provide a dispute resolution mechanism in the event of disagreement between the parties. This will also be relevant procedurally.

Reliance on bargaining positions of the parties

Net contribution clauses are now contained in a number of standard form construction contracts in the UK. For example, clause 8.3 of the Association for Consultancy and Engineering (ACE) Agreement A(1) 2002 limits the consultant's liability for any loss or damage to "such sum as it would be just

[129] CIC, *op. cit.* n. 127, above.

and equitable for the Consultant to pay having regard to the extent of his responsibility for the loss and damage'' on the basis of the same assumptions suggested by the CIC.[130] In 2005, a revised suite of the standard form JCT contracts was issued, the Intermediate Form of which now provides for collateral warranties to be given by contractors and subcontractors in less restrictive terms than those contained in the optional clause included in the 1998 suite.[131]

However, whether or not a net contribution clause is contained in a standard form contract, its inclusion in the contract is not a *fait accompli*. The commercial reality is that inclusion or otherwise of a net contribution clause, and the scope of such a clause if it is included, are contractual matters which are ultimately determined by the relative bargaining strengths of the parties.[132] Thus it is entirely possible that, in order to secure the deal, contractors and consultants may be compelled to agree to arrangements which do not contain such provisions, or which do so in a very limited way.

Furthermore, net contribution clauses have not been universally embraced within the industry. Indeed (unsurprisingly), they have met with considerable resistance by funders and clients, and suggestions have been made that they should be abolished altogether.[133]

The controversial new Consultancy Agreement recently issued by the British Property Federation illustrates that the place of net contribution clauses in the construction industry is far from unequivocal. The agreement, which is the first of its kind to include a schedule of ''third party rights'' operating in place of collateral warranties,[134] has been prepared by employers, for employers; as a result it contains no net contribution clause or cap on consultants' liability.

On the one hand, it has been heavily criticised by the ACE, RIBA and consultants generally for being overly employer-focused and essentially uninsurable,[135] as it exposes consultants to unlimited liability.[136] In fact, the ACE Legal Director has described the form as ''risk dumping'' and advised consultants not to sign it, and the RIBA Director of Association of Development has recommended the RIBA standard form instead.[137]

[130] *Ibid*.

[131] Joint Contracts Tribunal Ltd, *Intermediate Building Contract* (JCT05/IC) (London, Sweet & Maxwell, 2005).

[132] Norton Rose, Legal500.com; available at www.legal500.com/devs/uk/cn/ukcn_025.htm (visited 4 September 2006).

[133] *Over Taylor Biggs Solicitors News* (August 2005); available at www.otb.uk.com/news/starwars.html (visited 4 September 2006), referring to recent initiative advanced by the Legal Adviser of Wren Managers, a mutual insurer of consultants.

[134] Although if warranties are to be used, the BPF has also issued revised Forms of Collateral Warranty for use in conjunction with the Consultancy Agreement. Notably, the warranties contain net contribution clauses, but in limited terms. Apportionment is subject to an assumption of ''no limitation on liability'' only with respect to the project team, not the contractor.

[135] *Kendall Freeman Briefing*, ''The British Property Federation Consultancy Agreement'' (July 2005).

[136] Over Taylor Biggs, *op. cit.* n. 133, above.

[137] *Ibid*.

A member of the Construction Industry Council Liability Panel has claimed that the failure by the BPF to include a net contribution clause effectively reverses the compromise reached within the industry after years of negotiation. On the other hand, it has been argued that the Agreement is commercially realistic, reflecting as it does the fact that capped liability will not generally be acceptable to employers and that the inclusion of net contribution clauses in appointment documents (rather than collateral warranties) is not generally accepted.[138]

The unwillingness of employers in this respect may be based on the ''innocent plaintiff'' theory described in section 4, above; that is, the belief that it is better for a culpable defendant to bear the risk of other wrongdoers becoming insolvent than for an innocent owner to do so.[139]

Application of Unfair Contract Terms Act 1977

Finally, even if a net contribution clause is included in a collateral warranty, its enforceability is not guaranteed. Like any contractual limitation on liability, net contribution clauses can be struck out by the court under the Unfair Contract Terms Act 1977 if they do not comply with the requirement of ''reasonableness''. The onus of proving reasonableness lies on the party seeking to rely on the clause.

Whether a court would hold a net contribution clause ''reasonable'' is uncertain.[140] On the one hand, it has been observed that courts ''are generally ready to hold clauses limiting liability as unreasonable'' and that courts might be less disposed to find such a clause reasonable where the warrantor is covered by professional indemnity insurance. On the other hand, courts might uphold such a clause on the basis of freedom of contract.

In *Safeway Stores* v. *Interserve Project Services Ltd (formerly known as Tilbury Douglas Construction Ltd)*[141] the court upheld a ''no greater liability'' clause in a collateral warranty. In that case, Safeway contracted with Chelverton Properties Ltd for the design and construction of a supermarket and car park. Chelverton entered into a building contract with Interserve, and Interserve later entered into a collateral warranty agreement with Safeway. Clause 3.3 of the warranty provided that the contractor would have no greater liability under that deed than that which it owed the developer (Chelverton) under the building contract. Ramsey J interpreted this as restricting Interserve's liability to Safeway to the equivalent of its liability to Chelverton. As Interserve had a defence of equitable set-off available to it in respect of Chelverton, which was greater than its liability to Chelverton, it had no liability to Chelverton and subsequently, no liability to Safeway.

[138] Kendall Freeman, *op. cit.* n. 135, above.
[139] Over Taylor Biggs, *op. cit.* n. 133, above.
[140] See generally, Norton Rose, *op. cit.* n. 132, above.
[141] [2005] EWHC 3085, 105 Con LR 60 (TCC).

Although no mention of the reasonableness test was made in the case, the fact that such a clause was found to be valid may indicate that the courts will be willing to uphold net contribution clauses, at least where they have a similar effect to the ''no greater liability'' clause in *Safeway Stores*.

7. CONCLUSION

It is true that the blunt instrument of joint and several liability has effected injustice in a number of circumstances. The consequence has been a potential distortion of the markets for professional services and liability insurance.

The issue is nevertheless complex at a legal, commercial and policy level. The Australian experience demonstrates that there is no simple and just means of legislative reform, although adoption of a more uniform legislative approach by the various states and territories would at least ameliorate some of the uncertainties currently faced by parties to construction contracts in that country.

Although market forces are imperfect means for legal reform, this is one area where they remain critical in determining a sensible outcome to the problem.

It is hoped that the comparative law analysis contained in this paper will provide some assistance to the ongoing debate in the UK, and that identification of some of the difficulties currently being faced under Australian reforms will assist in finding a ''middle ground'' more acceptable to both sides.