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Proportionate Liability

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PROPORTIONATE LIABILITY

by Tony Bowen

Introduction

1. This paper focuses on the proportionate liability regime as it applies in New South Wales and enacted by Part IV of the *Civil Liability Act 2002* ("CLA"). The Carr Government introduced the CLA in response to a perceived surge in litigation, in particular personal injury litigation. Broadly speaking the purpose of the CLA was to provide legislative amendment to matters formerly the subject of common law. The CLA covers a range of such matters; however, the subject of this paper concerns only one aspect – proportionate liability.

Background

2. Prior to the recent wave of tort reform, proportionate liability has been legislated in some areas of law for a considerable period, in particular in relation to building and construction law. Legislation in Victoria, South Australia and the Northern Territory has, since 1993 and 1994, required principles of proportionate liability to apply to actions relating to defective building work. Other jurisdictions subsequently agreed in principle to enact legislation in similar terms. In New South Wales, since 1998, a court determining a building action must determine the liability of each contributing party on the basis of proportionate liability.

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3. Unlike joint and several liability, the principle of *proportionate liability* requires each tortfeasor's liability to be limited to the extent that they are responsible for the plaintiff's loss. There is no right of contribution between tortfeasors as such because each can only be required to compensate the plaintiff for the proper share owing from that tortfeasor.
4. Prior to the enactment of Part IV of the CLA a Plaintiff could sue only one of several wrongdoers who caused the same loss and the Court could enter judgment for the whole of the loss against that single Defendant. Practitioners will be familiar with this principle as "joint and several liability".
5. In *Yates v Mobile Marine Repairs [2007] NSWSC 1463 at [93] – [94]*, Palmer J commented on the impetus for the Part IV reform. His Honour noted prior to the enactment of the proportionate liability regime, even if the Defendant cross claimed for indemnity or contribution against the other wrongdoers, the plaintiff could enforce a judgment against the defendant alone for the whole of the loss. The Defendant was then left to recover from the Cross Defendants if it could. Yet in many instances the Cross Defendant was insolvent, leaving the Defendant to hold the full liability to the Plaintiff. His Honour observed:

"Part IV is designed to alleviate this perceived injustice. It is intended to visit on each concurrent wrongdoer only that amount of liability which the Court considers "just", having regard to the comparative responsibilities of all wrongdoers for the plaintiff's loss. it seems clear enough that the policy of Part IV is that a wrongdoer who is, in a real and pragmatic sense, more to blame for the loss than another wrongdoer should bear more of the liability."

6. It is also important for practitioners to be aware that a proportionate liability regime has been enacted in the Commonwealth sphere, including the *Corporations Act* (ss. 1041L – 1041S), *Australian Securities and Investment Commission Act* (ss 12GP – 12GW) and most notably the *Trade Practices Act* ("the TPA") (ss 87CB- 87CI). An action for damages pursuant to s.52 of the TPA will attract the operation of the proportionate liability regime; however, other remedial sections in the Act do not: ss 53 - 59. You will observe the provisions in the Commonwealth legislation are in similar terms to Part IV of the CLA. This regime also commenced on the same date as the NSW Act, namely 26 July 2004.

Reinhold v New South Wales Lotteries (No 2)

7. The proportionate liability regime received detailed consideration by Barrett J in *Reinhold v New South Wales Lotteries Corporation (No 2)* [2008] NSWSC 187. This decision (in my view) is the leading authority on Part IV of the CLA and is mandatory reading for any practitioner acting on behalf of a Defendant. The facts were as follows:
8. Mr Reinhold (the Plaintiff) was a regular purchaser of lottery tickets in "Oz Lotto" draws conducted by the NSW Lotteries Corp. ("Lotteries"), so much so he had been awarded a personalised player number by Lotteries. On 19 September 2005 the Plaintiff went to a Newsagency operated by the Second and Third Defendants ("the Newsagents") who were authorised by

Lotteries to sell lottery tickets by means of computerised terminals linked to its computerised system. When the Plaintiff made his purchase he was handed a ticket ("the First ticket"). This ticket was incomplete (it had lottery numbers but did not have a barcode or serial number, or the Plaintiff's personalised player number). An employee of the Newsagency contacted Lotteries to attempt to cancel the ticket. Meanwhile, another employee of the Newsagency then issued a replacement ticket ("the Second Ticket") to the Plaintiff which appeared to be in the correct format. The employee on the phone was unable to cancel the First Ticket because she needed a serial number to do so. Lotteries provided the serial number of the second ticket to the employee who then used the computer terminal to cancel the Second Ticket (unbeknownst to the Plaintiff). It was found the cancellation of the Second Ticket was done contrary to the Oz Lotto rules, which were expressly agreed to bind the parties. When the draw took place the numbers on the Second Ticket came up. Lotteries declined to honour the ticket as it had been cancelled. The Plaintiff commenced proceedings against both Lotteries and the Newsagents on the grounds of breach of contract and negligence.

9. His Honour found Lotteries to have breached its duty to the Plaintiff by incorrectly identifying the ticket to be cancelled and the Newsagents to have breached their duty by failing to execute and fulfill the Plaintiff's order, with each of these breaches causative of the Plaintiff loss. His Honour found both Lotteries and the Newsagent each liable for breach of duty and breach of contract and awarded the Plaintiff's damages of \$2M. In the second judgment (cited above) His Honour addressed the issue of whether the action attracted the operation of Part IV, and if so, how liability was to be apportioned between Lotteries and the Newsagents. Ultimately his Honour found Part IV applied and apportioned liability 90% to Lotteries and 10% to the Newsagents. In reaching this decision his

Honour provided detailed analysis of Part IV. I will discuss the provisions of Part IV below in reference to *Reinhold* and other relevant decisions.

S.34: Apportionable Claims & Concurrent Wrongdoers

10. Section 34 is the key section, and it provides as follows:

34 Application of Part

(1) This Part applies to the following claims ("apportionable claims"):

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

(b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of section 42 of that Act.

(1A) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

(2) In this Part, a "concurrent wrongdoer", in relation to a claim, is a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

(3) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).

(4) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

11. Some significant points emerge from s.34. First and foremost is the requirement the claim arises from a "failure to take reasonable care". Secondly, Part IV only applies to a claim for economic loss or for damage to property and proportionate liability does not apply to personal injury matters, but can include a claim for economic loss or damage to property in an action for damages pursuant to the *Fair Trading Act 1987*.
12. Apportionable Claims: Section 34(1) (a) provides Part IV will apply to claims in actions for damages arising from a failure to take reasonable care, where the claim is for economic loss or damage to property. In *Reinhold Barrett J* found the Plaintiff's claims against Lotteries and the Newsagents were "unquestionably" claims for economic loss in an action

for damages. More significantly perhaps, Barrett J also considered circumstances where the Part IV regime might apply to claims in contract also. His Honour resolved this at paras 25 – 30 by emphasising the requirement in s.34(1)(a) the claim arise "*from a failure of reasonable care*".

13. In the proceedings the Plaintiff had submitted that because the breach of contract allegation concerned cancellation of the ticket, it was outside the operation of s.34(1)(a) as the allegation did not involve a breach of an express or implied term that reasonable care be taken. However, His Honour determined the breach of contract came about as a consequence of the Defendants' breach of duty, not as a result of any intentional breach of contract. The fact the court made a finding of want of reasonable care was sufficient, regardless of whether this took place in the context of a contractual or tortious duty. Accordingly it was held both the claim in contract and in tort arose from a failure to take reasonable care and as such s.34(1)(a) applied.
14. Interestingly, s.34(1A) provides: "*There is a single apportionable claim in proceedings in respect of the same loss ... even if the claim for the loss or damage is based on more than one cause of action.*" In *Reinhold Barret J* determined that as both Lotteries and the Newsagent were liable to the Plaintiff, there was a single apportionable claim within the meaning of s.34(1A). It is also worthwhile to note s.37 in this regard.
15. Concurrent Wrongdoers: In determining whether a person is a concurrent wrongdoer s.34(2), the court is required to make findings about the loss or damage caused by the acts or omission of the party concerned. Barrett J noted: "*That claim is, of necessity, a claim already litigated, not a pending or foreshadowed claim*". A person will only be a concurrent

wrongdoer after the court has made its findings in respect to the loss and its cause. This is also relevant to s.34A which outlines exclusions to the proportionate liability regime. See also decision of Bryson AJ in *Chandra v Perpetual Trustees Victoria Limited [2007] NSWSC 694*. In any event, it was held in *Reinhold* that as the Part IV provisions are compulsory, it is the findings that ultimately determine whether the statutory conditions compelling the court to apply Part IV are satisfied.

16. Moreover, s.34(2) provides that a "concurrent wrongdoer" in a relation to a claim is a person of one or two or more persons whose acts or omissions caused, independently of each other or jointly, the damage or the loss is the subject of the claim. If the definition of concurrent wrongdoer is satisfied and the matter falls within the definition of an apportionable claim, the proportionate liability regime will apply.
17. In *Reinhold* it was determined Lotteries and the Newsagents were each a "concurrent wrongdoer" within the meaning of s.34(2) and as such the court then took the second step of apportioning liability between the Lotteries and the Newsagents, pursuant to s.35.
18. Finally, it is also important to note that the status of the concurrent wrongdoer, in the legal sense, is of no consequence (s.34(4)). If the concurrent wrongdoer is insolvent, wound-up, ceased to exist or died, they will remain a concurrent wrongdoer for the purpose of the proceedings. In this regard the decision of Young CJ in *Vella v Permanent Mortgages Pty Limited [2008] NSWSC 505* is illustrative. In that matter his Honour apportioned the bulk of liability against two parties who were bankrupt. The Plaintiff was only able to recover 12.5% of the judgment against a non bankrupt party.

S.34A: Certain Wrongdoers not to have the benefit of apportionment

19. Section 34A identifies a number of circumstances where concurrent wrongdoers will not have the benefit of the apportionment regime:

34A Certain concurrent wrongdoers not to have benefit of apportionment

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

- (a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim, or**
- (b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim, or**
- (c) the civil liability of the concurrent wrongdoer was otherwise of a kind excluded from the operation of this Part by section 3B.**

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

(3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part.

20. Section 34A(1)(a) and (b) are self-explanatory dealing with intentional conduct and fraud. However, I make the observation in relation to intentional conduct, that in *Reinhold* the absence of any intentional conduct surrounding the breach of contract by the Defendant led his Honour to conclude the want of reasonable care requirement of s.34(1)(a) was satisfied. It is difficult to envisage the circumstances whereby a finding of breach of contract is made on the grounds of a failure to take reasonable care that is subsequently excluded by s.34A(1)(a) as intentional, although perhaps the same could not be said of a purely tortious claim.
21. Section 34A(1)(c) is a curious section as it refers to the various exclusions from contained in s.3B of the CLA. Section 3B is generally limited to personal injury type matters, specifically excluded by the proportionate

liability regime. You may be familiar with s.3B(1)(a) as it concerns intentional torts and claims relating to dust diseases, use of tobacco, *Motor Accidents Act 1988* and *Motor Accidents Compensation Act 1999*, *Workers Compensation Act* and so forth. This is an area that has had recent amendment, particularly in relation to claims by offenders in custody. However, be aware that s.3B(3) provides that regulations may stipulate further classes of liability to be excluded from operation of the Act.

22. Sections.34A(2) and (3) are important and provide that in circumstances where one concurrent wrongdoer is excluded from the operation of Part IV, the other concurrent wrongdoer may still obtain the benefit of proportionate liability.

Section 35 – proportionate liability for apportionable claims

21. The apportionment mechanism is set out in s.35.

35 Proportionate liability for apportionable claims

(1) In any proceedings involving an apportionable claim:

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

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

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

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

- (a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law, and
- (b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.

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

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

23. Section 35(1)(a) is the operative section following the identification of a concurrent wrongdoer. This section requires the Court to apportion that amount of the claim to a concurrent wrongdoer reflecting "*that proportion of the damage or loss claimed that the Court considers just having regard to the extent of the Defendant's responsibility for the damage or loss*". However, as Palmer J observed in *Yates*, under s 35(1), the exercise is much more complicated than apportioning blame in an action for negligence in tort because the apportionment may have to be made as between a wrongdoer who has breached a contract and wrongdoer who has committed a tort. His Honour went on to consider the apportionment of responsibility, observing the duty to avoid a loss imposed by contract is as weighty as the duty to avoid loss imposed by the common law. In applying s.35(1) His Honour held the Court is required to go beyond the legal character of the duties imposed upon concurrent wrongdoers and to examine the practicalities of responsibility. Accordingly, the Court should apportion liability according to considerations such as (but not limited to):

– *which of the wrongdoers was more actively engaged in the activity causing loss;*

– *which of the wrongdoers was more able effectively to prevent the loss happening.*

24. The apportionment exercise was also considered in detail by Barrett J in *Reinhold* who took guidance from case law involving similar provisions. At [49] His Honour observed approaches to apportionment under contributory negligence and contribution statutes were also generally applicable to apportionment among wrongdoers. His Honour further noted the decision of the High Court in *Podrebersek v Australian Iron and Steel Pty Ltd* [1985] HCA 34; (1985) 59 ALJR as authority for the proposition

blameworthiness and causative potency are recognised in Australia as determinants of responsibility.

25. His Honour also considered the case law governing concepts that perhaps might not usually be associated with the apportionment of loss in circumstances where s.35(1) requires the court to have regard to the extent of the Defendant's responsibility for the loss. At [57] His Honour held:

"the financial strength or profitability of a party is not to be taken into account in assessing contribution or apportionment. Nor is it relevant to look to the situation or status of a party (for example, that it is a polity financially dependent on the exaction of revenues from its citizens). The attitude of a wrongdoer in the terms of remorse or lack of remorse is also irrelevant."

26. Interestingly, Barrett J also referred to the decision in *Dubai Aluminum Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 AC 366 which concerned the participation in fraud by members of a solicitor's partnership. The House of Lords held the question of contribution on a just and equitable basis could only be obtained if account was taken of the fact the perpetrators of the fraud retained the proceeds of it. ¹ Barrett J held this aspect had received little attention in Australia and was of the view this circumstance, if it exists, is "inevitably" relevant as it goes to the issue of responsibility with which Part IV is concerned. For my own part, an additional aspect that could be considered here is the notion of what is "just" may impart some flexibility on the court when considering apportionment. In any event Barrett J applied this reasoning when reaching his decision, although of course unlike *Dubai Aluminum*, the matter of *Reinhold* did not

involve fraud which of course is expressly excluded from Part IV: s34A(1)(b).

27. In determining apportionment his Honour also followed the reasoning of Bryson AJ in *Chandra* and Palmer J in *Yates*, in specific reference to s.35(1) and determined apportionment on the basis the court's principal task was to make findings about:

(a) the degree of departure from the standard of care of the reasonable man, as regards the causative conduct of Lotteries and the Newsagents; and

(b) the relative importance of the acts of Lotteries and the Newsagents in causing the economic loss suffered by Mr Reinhold,

making a comparative examination of the whole conduct of each of Lotteries and the Newsagents in relation to the circumstances in which the loss was sustained.

28. His Honour also applied *Dubai Aluminum* and considered whether either party had profited from its own actions that were causative of the plaintiff's loss and whether the other is or will be out of pocket, with any imbalance to be brought into account as an element of the respective degrees of responsibility.² In so doing his Honour apportioned the Plaintiff's loss at 90% to Lotteries and 10% to the newsagents on the basis there was a very significantly greater degree of culpability on the part of Lotteries and a very significantly stronger causative force in

¹This, on one view, may be similar to a plea of unjust enrichment

² It should be noted however that his Honour seemed to discount the *Dubai Aluminum* point later in his judgment at [79]

Lotteries conduct. Lotteries were subject to higher expectations and its degree of departure from accepted standards was much greater.

Contributory negligence and concurrent wrongdoers who are not a party to proceedings

29. S.35(3)(a) stipulates the Court is to exclude any proportion of damages allowed for contributory negligence from the apportionable claim. Additionally, s.35(3)(b) provides the court is to have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings. This section should be read in conjunction with s.35(4) which indicates s.35 applies whether or not all concurrent wrongdoers are party to the proceedings: See decision in *Chandra* as an example where apportionment had taken place in circumstances where one of the concurrent wrongdoers had not been joined to the proceedings. In that matter a client who used false documents was found to be the dominant concurrent wrongdoer, although his solicitor was found to have been negligent, with a 10% liability apportioned to him.³

³ This aspect of the proportionate liability regime bears some similarity to the operation of s.151 Z of the *Workers Compensation Act*, which permits the pleading of employers negligence in actions against non-employer tortfeasors, with the court determining an employer's liability whether they are in the proceedings or not.

Duty on the Defendant to inform the Plaintiff of concurrent wrongdoers

S.35A

35A Duty of defendant to inform plaintiff about concurrent wrongdoers

(1) If:

(a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the "other person") may be a concurrent wrongdoer in relation to the claim, and

(b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:

(i) the identity of the other person, and

(ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim, and

(c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim,
the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.

(2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.

30. S. 35A is also a curious section as it in many respects reflects the usual obligations on parties to properly plead and particularise all relevant matters so the court can properly determine the real issues in dispute. It is surprising therefore that s.35 does not impose an obligation for the Defendant to do so, but simply provides certain cost consequences where a defendant does not inform a plaintiff about concurrent wrongdoers. It is perhaps therefore not surprising to see the court has taken a very strict approach to the Defendant's obligations when it comes to raising proportionate liability in a defence.
31. One of the first decisions to deal with the operation of the proportionate liability regime at case management level was that of Einstein J in *Ferdinand Nemeth & Anor v Prynew Pty Ltd* (2005) NSWSC 1296. In this matter, the Defendant sought leave to amend its Defence to plead its liability in a property damage claim to be in the following terms:

"... the defendant's liability is limited to such other proportion as the Court determines is just and equitable, having regard to the extent of its liability for any damage."

32. In that decision, Einstein J permitted the grant of leave to administer interrogatories to meet the terseness of the allegation in the defence holding:

"Additionally the Court may impose a continuing obligation on each defendant to update its previously communicated state of mind concerning other entities upon whose conduct, as further concurrent wrongdoers, the defendant may seek to rely. This is the same obligation as the continuing obligation to give discovery."

33. Moreover, a paper was published on the Supreme Court website by Justice McDougall in relation to proportionate liability and construction litigation. Again, this was an early source of authority that dealt with many of the issues that may arise in terms of the application of the scheme.

34. In the decision of *Ucak v Avante Developments* (2007) NSWSC 367, Hammerschlag J formed the view that:

"... for a defendant to assert that there is a person who is a current wrongdoer the defendant must plead the necessary elements which result in the asserted conclusion. Those elements are:

(a) the existence of a particular person;

*(b) the occurrence of an act or omission by that particular person;
and*

(c) a causal connection between that occurrence and the loss that is the subject of the claim."

35. In that decision, His Honour found what the Defendant had done was assert a conclusion without material facts upon which that conclusion depended which of course is not permissible. His Honour agreed with McDougall J that:

"... a defendant should plead with the same degree of precision and particularity as it would have done before the Act if it were bringing a cross-claim against an alleged concurrent wrongdoer."

36. He further noted that pursuant to s.345(1) of the *Legal Profession Act 2004* that a practitioner:

"... must not provide legal services on a defence of a claim for damages unless a legal practitioner reasonably believes, on the basis of provable facts, and a reasonably arguable view of the law, that the defence has reasonable prospects of success."

37. His Honour took the view that the Defence did not comply with these requirements and struck out the offending paragraphs from the Defence.
38. The upshot of these decisions and the discussion paper of McDougall J is that allegations of concurrent wrongdoers in a defence need to be drafted with particular care. It is insufficient to simply identify another party. Moreover, the Court may impose (and the authorities would suggest) there is a continuing obligation on a party to disclose information regarding the liability of a concurrent wrongdoer as it comes to hand.

Contribution is not recoverable from a Defendant who is a concurrent wrongdoer in relation to an apportionable claim.

36 Contribution not recoverable from defendant

A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim:

- (a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant), and**
- (b) cannot be required to indemnify any such wrongdoer.**

39. This section provides that where a judgment is given against a Defendant in relation to an apportionable claim, that Defendant cannot be required to contribute to any amount payable by another concurrent wrongdoer in respect of the same apportionable claim. In *Reinhold* this aspect received little attention although it was noted s.36 had the effect of preventing Lotteries or the Newsagents from claiming contribution from each other. The effect is s.5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act* would not operate to enable concurrent wrongdoers to be concurrent tortfeasors in respect of apportionable claim.
40. Similarly, s.36(b) provides that where a judgment is given against a Defendant in relation to an apportionable claim, that Defendant cannot be required to indemnify another concurrent wrongdoer in respect of the same claim. This section should not be confused with contractual indemnities generally, as any contractual claim for the purposes of s.34 requires a failure to take reasonable care to attract the operation of Part IV.

Subsequent actions

37 Subsequent actions

(1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.

(2) However, in any proceedings in respect of any such action the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

41. This section permits the Plaintiff to commence separate or subsequent actions against other concurrent wrongdoers in circumstances where there has been an earlier judgment against an earlier concurrent wrongdoer. However, s.37(2) provides in any subsequent action the Plaintiff cannot recover more than the Plaintiff's actual loss.

Joinder of non-party concurrent wrongdoer

38 Joining non-party concurrent wrongdoer in the action

(1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.

(2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

42. In *H.S.D. Co Pty Ltd v Masu Financial Management Pty Ltd* [2008] NSWSC 1279 (3 December 2008) Rothman J commented on s.38 thus:

" the plaintiff can, in circumstances where a defendant alleges the existence of concurrent wrongdoers and a limitation in liability proportionate to the extent to which the defendant is responsible, join the alleged concurrent wrongdoers as defendants to the proceedings. While this may make the proceedings more complicated and more expensive from the perspective of the plaintiff, any prejudice to the plaintiff created thereby can be overcome with appropriate orders for costs."

43. The significant aspect of his Honour's decision is the reference to any prejudice to the Plaintiff's being overcome by appropriate orders for costs. His Honour did not expand on this theme but practitioners can well imagine the circumstances whereby a Plaintiff who has joined an alleged concurrent wrongdoer to proceedings, following assertions in a defence, subsequently fails to make out a case against the joined party might seek a *Bullock* or *Sanderson* order in respect to an adverse costs order. The lesson being any allegations as to concurrent wrongdoers must not be made lightly.

Application of Part

39 Application of Part

Nothing in this Part:

- (a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable, or
- (b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable, or
- (c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

44. Section 39 provides that proportionate liability will not operate in circumstances of vicarious liability (a classic example is an employer and an employee) nor will proportionate liability exist between members of a partnership.

Commencement

45. For Part IV of the CLA to apply the cause of action must have arisen after 26 July 2004, in line with the Commonwealth proportionate liability regime.⁴

⁴ However be aware that due to some legislative anomalies, the enabling legislation did not commence until 1 December 2004, so for proceedings commenced before 1 December 2004, involving a cause of action

Conclusion

- A defence is only available for causes occurring after 26 July 2004;
- Part IV does not apply to personal injury claims;
- Actions under s.52 of the *Trade Practices Act* and other Commonwealth Legislation are also subject to proportionate liability;
- Proportionate liability may attach to a claim for breach of contract provided the requirement in s.34(1)(a) that the breach arose from a failure to take reasonable care is satisfied. An intentional breach of contract is unlikely to attract the operation of Part IV.
- In many circumstances, Part IV will obviate the need for a Defendant to issue cross claims for indemnity and/or joining parties to the proceedings and the risk of obtaining judgment against an impecunious Defendant is shifted to the Plaintiff;
- Allegations of concurrent wrongdoers need to be full pleaded and particularised in a Defence and should not be done lightly in view of potential exposure to adverse costs orders.
- Moreover, any Defendant raising an allegation of proportionate liability needs to be ready to put evidence before the court in support of the

that arose after 26 July 2004, Part IV does not apply: *Bestcare Foods v Origin Energy*; [2007] NSWSC 354
For a cause of action that arose after 26 July 2004 and proceedings commenced after 1 December 2004,
Part IV will apply.

allegation, whether the concurrent wrongdoer is joined to the proceedings or not;

- In determining apportionment between concurrent wrongdoers the court will examine the whole of the conduct of the parties, having regard to responsibility of each Defendant for the loss sustained. The court will consider the causal potency of the actions or omissions of the concurrent wrongdoers. Additionally, in determining apportionment the court may consider whether a concurrent wrongdoer has profited from its errant conduct.

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11 March 2009