Proportionate Liability in Commercial Cases: Principles and Practice

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Under the proportionate liability statutes, the court apportions legal responsibility for causing the plaintiff loss and damage between concurrent wrongdoers, when it is just to do so. The circumstances in which the court makes an apportionment are limited. Strategic decisions by the plaintiff as to how it makes its claims, and by the defendant as to how it claims an apportionment, are critical to whether the plaintiff can avoid an apportionment, or the defendant can obtain one. Aspects of statutory construction are unresolved. It is unclear whether the purposes of the proportionate liability regimes are being achieved.

Where the provisions of one of the proportionate liability statutory regimes apply, dependent upon the facts, the defendant has a substantive defence to a part of the plaintiff's loss and damage claim that it would not otherwise have. Accordingly, it is in the defendant's interests to seek to invoke proportionate liability, and in the plaintiff's interests to avoid that. Both sides need to know about proportionate liability, as it potentially applies in relation to a broad range of commercial litigation.

Where the court finds in favour of a plaintiff, and applies one of the proportionate liability statutes,[1] the result is that the defendant's liability will be proportionate to its degree of responsibility for the plaintiff's loss and damage, but will be no more than that. Essentially, but not exclusively, a proportionate liability apportionment is about causation. Where the plaintiff's claim is apportionable and the defendant can successfully point to a concurrent wrongdoer whose conduct also caused the plaintiff's loss and damage, the defendant can reduce its liability to the plaintiff to the extent that the other person caused the loss. However as the words "proportionate liability" suggest, the legislation ultimately is about the extent of the defendant's liability to the plaintiff.

In relation to the *Civil Liability Act 2002* (NSW) (*CLA (NSW)*), the High Court in *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (*Hunt & Hunt*)[2] explained the purpose of the proportionate liability regime as follows:

> [10] Part 4 of the *Civil Liability Act* represents a departure from the regime of liability for negligence at common law (solidary liability), where liability may be joint or several but each wrongdoer can be treated as the effective cause and therefore bear the whole loss. Under that regime, a plaintiff can sue and recover his or her loss from one wrongdoer, leaving that wrongdoer to seek contribution from other wrongdoers. The risk that any of the other wrongdoers will be insolvent or otherwise unable to meet a claim for contribution lies with the defendant sued. By comparison, under a regime of proportionate liability, liability is apportioned to each wrongdoer according to the court's assessment of the extent of their responsibility. It is therefore necessary that the plaintiff sue all of the wrongdoers in order to recover the total loss and, of course, the risk that one of them may be insolvent shifts to the plaintiff.
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> [16] The evident purpose of Pt 4 is to give effect to a legislative policy that, in respect of certain claims such as those for economic loss or property damage, a defendant should be liable only to the extent

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[1] *Wrongs Act 1958* (Vic) ss 24AE–24AQ; *Civil Liability Act 2002* (NSW) ss 34–39; *Civil Liability Act 2003* (Qld) ss 28–33; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) ss 8–11; *Civil Liability Act 2002* (WA) ss 5AI–5AO; *Civil Liability Act 2002* (Tas) ss 43A–43G; *Civil Law (Wrongs) Act 2002* (ACT) ss 107A–107K; *Proportionate Liability Act 2005* (NT) ss 1–16; *Corporations Act 2001* (Cth) ss 1041L–1041S; *Australian Securities and Investments Commission Act 2001* (Cth) ss 12GP–12GW; *Trade Practices Act 1974* (Cth) ss 87CB–87CI; *Competition and Consumer Act 2010* (Cth) ss 87CB–87CI.

[2] *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 (French CJ, Hayne and Kiefel JJ).

> of his or her responsibility. The court has the task of apportioning that responsibility where the defendant can show that he or she is a "concurrent wrongdoer", which is to say that there are others whose acts or omissions can be said to have caused the damage the plaintiff claims, whether jointly with the defendant's acts or independently of them. If there are other wrongdoers they, together with the defendant, are all concurrent wrongdoers.
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> [17] The purpose of Pt 4 is achieved by the limitation on a defendant's liability, effected by s 35(1)(b), which requires that the court award a plaintiff only the sum which represents the defendant's proportionate liability as determined by the court. For that purpose, it is not necessary that orders are able to be made against the other wrongdoers in the proceedings. Section 34(4) provides that it does not matter, for the purposes of Pt 4, that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died. Thus under Pt 4 the risk of a failure to recover the whole of the claim is shifted to the plaintiff. (footnotes omitted)

I suggest that it is sound in principle that a defendant should only be legally responsible for such loss and damage to a plaintiff which its wrongful conduct causes. Where the plaintiff's loss and damage is caused by conduct of the defendant but also by the conduct of others, then the defendant should not bear legal liability to the plaintiff for the whole of the plaintiff's loss and beyond its role in causing the loss. This is the principle which underlies the proportionate liability statutes. The proportionate liability legislation creates a defence that protects a defendant from having to bear more than a just share of liability as determined in proceedings brought against that defendant.[3]

However it is perhaps difficult to discern the principle underlying the legislative choice which has been made to make some causes of action for loss and damage apportionable claims, but not others. Each of the Commonwealth, State and Territory proportionate liability statutes provide that statutory misleading or deceptive conduct damages claims are apportionable claims. Yet closely related statutory damages claims which may be established in relation to the same facts are not included as apportionable claims.[4] The State and Territory statutes also provide that apportionable claims include common law and other claims for damages for economic loss or damage to property arising from a failure to take reasonable care, whether the claim is in contract, tort or otherwise. Misleading or deceptive conduct claims do not require that the plaintiff demonstrate that the defendant failed to take reasonable care. Notwithstanding that the establishment of the proportionate liability statutory regimes was, in part, instigated by concerns that insured defendants were bearing an undue burden of joint and several judgments, the various statutory definitions of apportionable claims do not depend upon whether or not the defendant is insured in respect of the plaintiff's claim. Statutory misleading or deceptive conduct damages claims can relate to a wide range of commercial activity in respect of which the defendant may not be insured.

Further, if a defendant concurrent wrongdoer intended to cause the loss or damage to property that is the subject of the claim, or did so fraudulently, then no apportionment of its liability to the plaintiff to another concurrent wrongdoer under the statutes is permissible.[5] A common feature of the claims which are apportionable ones then is that they involve objectively defined wrongdoing. Yet when the court makes an apportionment, there being concurrent wrongdoers in relation to an apportionable claim, or claims, it is relevant whether the conduct of the wrongdoers was inadvertent or intentional.[6] Apart from apportionment defences under the *Wrongs Act 1958* (Vic),[7] the court may make an apportionment against a solvent non-party concurrent wrongdoer in favour of a defendant concurrent wrongdoer, and without the non-party participating in the trial.[8] Under each of the proportionate liability statutes, the court may make an apportionment against an insolvent non-party concurrent wrongdoer.[9]

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[3] *City of Swan v McGraw-Hill Companies Inc* (2014) 223 FCR 295, [52] (Rares J).

[4] *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661, [24], [35], [36] (French CJ, Kiefel, Bell and Keane JJ).

[5] For example, *Civil Liability Act 2002* (NSW) s 34A(1); *Competition and Consumer Act 2010* (Cth) s 87CC(1).

[6] *Skinner v Redmond Family Holdings Pty Ltd* (2017) 123 ACSR 593, [162] (Gleeson JA; Macfarlan JA and Barrett AJA agreeing).

[7] *Wrongs Act 1958* (Vic) s 24AI(3).

[8] For example, *Civil Liability Act 2002* (NSW) s 35(4); *Competition and Consumer Act 2010* (Cth) s 87CD(4).

[9] For example, *Wrongs Act 1958* (Vic) s 24AI(3); *Civil Liability Act 2002* (NSW) s 35(4); *Competition and Consumer Act 2010* (Cth) s 87CD(4).

In these circumstances, it is perhaps unsurprising that difficult statutory construction issues have emerged, some of which are unresolved, and that anomalous consequences of the application of the statutes have been identified.

At the risk of oversimplification, in relation to a plaintiff's claim for an award of damages for misleading or deceptive conduct, the effect of the State and federal statutory regimes can be stated as follows:

(1) where the defendant has caused the loss or damage the subject of the plaintiff's claim for an award of damages;
(2) and one or more other person or persons, by their misleading or deceptive conduct, has also caused that loss or damage;
(3) and whether or not the other/s did so jointly with the defendant, or independently of the defendant, then –
(4) the defendant's liability to the plaintiff is limited;
(5) to an amount which reflects the proportion of the plaintiff's claim for loss or damage that the court considers just;
(6) having regard to the extent of the defendant's responsibility for the plaintiff's loss and damage, relative to the responsibility of the other/s for the plaintiff's loss or damage.

Proportionate Liability Principles and Consequences

Where the court makes a proportionate liability apportionment, the defendant's liability to pay the plaintiff an award of damages is limited, or reduced, to the extent that it can satisfy the court that it is only partially, and not wholly, responsible for the plaintiff's loss and damage in respect of which the court makes an award of damages. The defendant does that by pointing to the conduct of another, or others, and demonstrating that that other wrongful conduct was also a cause of the plaintiff's loss and damage, together with the defendant's conduct. The court apportions liability between the concurrent wrongdoers, in relation to the plaintiff's loss and damage claim, by reference to the extent to which the conduct of each of them caused that as a matter of fact, but also to the extent to which the concurrent wrongdoers ought bear legal responsibility to the plaintiff. Normative considerations, or the value judgments of the court, are involved as well.

Where the defendant limits its liability to the plaintiff due to the conduct of others, the defendant has no cause of action as such against the other concurrent wrongdoers. The defendant which succeeds in obtaining an apportionment of its liability reduces its liability to the plaintiff to the extent that it can persuade the court that other wrongdoers also caused the plaintiff's loss and damage. Yet the defendant obtains no entitlement to make a dollar claim, or to obtain a dollar judgment, against the others. Where a defendant makes good a proportionate liability plea against a concurrent wrongdoer, the claimant-defendant limits the extent of its liability to the plaintiff. For such a defendant, it partially "wins" against the plaintiff, but in no sense "wins" against the other concurrent wrongdoers. It is doubtful that there is utility in the defendant obtaining declaratory orders against another defendant concurrent wrongdoer as the apportionment made by the court between the defendants only affects the claimant-defendant's liability in relation to the plaintiff, and not any liability between them inter se.[10]

It is a central and striking feature of the proportionate liability regime that the defendant argues: If I am liable to the plaintiff then another person, also a concurrent wrongdoer, is liable to the plaintiff as well, the result of which is that my liability to the plaintiff ought be reduced. The defendant here does not rely upon its own actions or omissions to reduce its liability to the plaintiff, but rather upon the conduct of another, or others, which conduct may have been completely independent of the claimant-defendant's conduct. The plaintiff may not have sued the other person as a defendant. If the plaintiff does not join the other person as a defendant to the proceeding after the defendant has pleaded reliance on one of the proportionate liability statutes, then the defendant arguing for a proportionate liability apportionment will be propounding an argument that the other person is liable to the plaintiff, when the plaintiff makes no such argument. Where this occurs, the plaintiff typically will have declined to sue or join the other

[10] *Hart v JGC Accounting and Financial Services Pty Ltd* (2015) 47 WAR 582, [56]–[58] (Murphy JA).

person as a party to the proceeding in its own best interests. The plaintiff's prospective claim against that other person may be considered to be a weak one, the person may be insolvent or bankrupt or have solvency issues. Hence a joinder application by the defendant of a non-party alleged concurrent wrongdoer can raise difficult issues. A plaintiff which does not seek to join the defendant's alleged concurrent wrongdoer as a defendant may well resist an application by the defendant to join that person as a party to the proceeding, as a means of seeking to defeat the defendant's prospective proportionate liability defence.

It is not enough for the defendant to demonstrate that the conduct of another person was a cause of the plaintiff's loss and damage, together with the defendant's conduct. The other person must, in the court's view, have been legally liable to the plaintiff in relation to the plaintiff's loss or damage.[11] What the court apportions is the extent of legal responsibility, or culpability, as between the concurrent wrongdoers, and it does not merely apportion factual causation between them.[12] That an apportionment may be made against an insolvent company with no practical adverse impact on that company, but a very practical adverse effect upon the plaintiff and to the advantage of the claimant-defendant, could jar with one's sense of principle. Further, that an apportionment may be made against a solvent person who is not a party to the proceeding[13] and who does not participate in the trial also may jar with one's sense of principle. On the other hand, an apportionment against a non-party concurrent wrongdoer has no adverse pecuniary effect upon that person if the plaintiff does not sue the person, and plaintiffs commonly enough obtain judgments on undefended claims. It is not necessary for the claimant-defendant which obtains an apportionment reduction of its liability, to cause the plaintiff to obtain a judgment against the other concurrent wrongdoer whose liability to the plaintiff resulted in that reduction. However if the plaintiff has sued another "concurrent wrongdoer" as a defendant and the court apportions liability, then the plaintiff will only be entitled to the reduced judgment against each of the defendants, totalling 100% of the plaintiff's successful loss or damage claim. Each defendant concurrent wrongdoer if represented at trial, will likely have blamed the other and the court will decide the apportionment of their respective liabilities to the plaintiff between them.

It is for the defendant to take a proportionate liability defence. The proportionate liability statutory provisions do not:

> [S]et out a mechanism for the identification of all those persons who may be concurrent wrongdoers and between whom the claim is to be apportioned. In any particular case, that will depend upon the pleadings. Any apportionment by the Court will only occur between those persons who are identified by the pleadings as concurrent wrongdoers. It is not for the court to determine independently of the pleadings who the concurrent wrongdoers might be.[14]

For the plaintiff, it only gets to apportionment issues if it first succeeds on liability against the claimant-defendant. Obviously enough, issues concerning the extent of its success against the defendant do not arise if the plaintiff fails entirely against the defendant which seeks to apportion its liability to the plaintiff onto another concurrent wrongdoer. This fundamental point sometimes gets lost in discussion about proportionate liability. The primary concern of a plaintiff is to prove its case on liability. Only if the plaintiff succeeds on liability against one or more defendants do proportionate liability issues potentially arise about the extent of each concurrent wrongdoer's liability to it. If this occurs, then the court will decide first, whether the statutory provisions are engaged, and second if so, as a matter of evaluation, what apportionment of the claimant-defendant's liability to the plaintiff ought be made, as a matter of justice, between the concurrent wrongdoers. Barrett J in *Reinhold v NSW Lotteries Corp (No 2)*,[15] explained:

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[11] *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666, [67] (Nettle JA); *Utility Services Corp Ltd v SPI Electricity Pty Ltd* (2012) 35 VR 628, [26], [29], [30], [36], [38], [43] (Dixon AJA).

[12] *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, [57]; *Dual Homes Victoria Pty Ltd v Moores Legal Pty Ltd* (2016) 50 VR 129, [387], [391] (John Dixon J).

[13] Except in Victoria; see *Wrongs Act 1958* (Vic) s 24AI(3).

[14] *Sanderson Motors Pty Ltd v Lindsay Bennelong Developments Pty Ltd* [2014] NSWSC 846, [31] (Ball J).

[15] *Reinhold v NSW Lotteries Corp (No 2)* (2008) 82 NSWLR 762. See also *Ryan Wealth Holdings Pty Ltd v Baumgartner* [2018] NSWSC 1502, [958] (Walton J).

> [32] The provisions of Part 4 are compulsory. They change substantive rights, so that a plaintiff's ability to obtain an adjudication of joint and several liability is removed where the circumstances are of the type to which the alternative regime of proportionate liability is applied. A case no doubt needs to be pleaded and proved by one or more defendants so as to engage the statutory provisions. But it will be the findings ultimately made that determine whether the statutory conditions compelling the court to adopt the proportionate approach are satisfied.

Where the statutory provisions apply then the court must make an apportionment between the concurrent wrongdoers of their respective liabilities to the plaintiff for causing it the same loss or damage, although the court could find one concurrent wrongdoer 100% liable and another, or others, not liable at all.

The plaintiff's interest will be in contending that its loss and damage claim is not an apportionable one so that each defendant against whom it succeeds is, jointly and severally, 100% liable. Where the court finds that the plaintiff's claim succeeds against a defendant, but accepts the defendant's submission that the plaintiff's claim it is an apportionable one, then the plaintiff is in the unhappy position of making submissions as to the extent to which it ought fail against the various concurrent wrongdoer defendants. Each defendant's case will be that it has no liability at all to the plaintiff. For a defendant to submit that if it is liable to the plaintiff then it is liable only to a limited extent because of the conduct of another defendant, necessarily assumes that there is a liability in that defendant to the plaintiff. Hence, the defendants may not want to squarely address proportionate liability issues in closing address on trial. The plaintiff also may not want to address proportionate liability issues either, and put a figure on an apportionment between the defendants. The plaintiff's interest will be in maintaining that each defendant is 100% liable, because it could succeed on liability against only one defendant, but fail completely against the other/s. It will be a matter for the court when counsel for the parties are pressed to disclose their hands, whether in closing address, or after the court has made liability findings. However sooner or later the judge will have to deal with proportionate liability issues, where an unsuccessful defendant has raised them.

THE MAIN LEGISLATIVE PROVISIONS

The history of the introduction of proportionate liability legislation in each State and Territory, and in the Commonwealth *Corporations Act 2001* (Cth), the *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*), the *Trade Practices Act 1974* (Cth) (*TPA*) and the *Competition and Consumer Act 2010* (Cth) (*CCA*) and the political/community concerns which prompted the legislatures to act in the first five years of last decade, have been recorded in many judgments and in legal papers.[16] Those matters are relevant to the proper construction of the various proportionate liability provisions, but their significance can be overstated. While an objective of the provisions may have been to prevent deep-pocketed professionals from being targeted as defendants not because of the extent of their responsibility but because they had insurance allowing them to pay large damages awards, I suggest that the provisions are not merely a pro-defendant means of saving insurers. The legislative provisions mean what they say, and must be applied, regardless of that.

Each State and Territory has proportionate liability legislation. Federally, in relation to misleading or deceptive conduct damages claims, the *CCA*, the *Corporations Act 2001* and the *ASIC Act* which proscribe misleading or deceptive conduct in various contexts, contain substantially identical proportionate liability provisions. The State legislative regimes are similar to the Commonwealth ones, but there are materially different provisions. The State legislative regimes also vary materially as between themselves. Uniform draft legislation has been drafted,[17] but it seems that nothing will happen to achieve uniformity any time soon. It is convenient here to refer to the Victorian *Wrongs Act 1958*, the *CLA (NSW)* and the

[16] *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, [10]–[15] (French CJ, Hayne and Kiefel JJ), [78]–[86] (Bell and Gageler JJ); *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661, [18]–[21] (French CJ, Kiefel, Bell and Keane JJ); *Williams v Pisano* (2015) 90 NSWLR 342, [49], [50] (Emmett JA); *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)* [2008] FCA 1656, [4]–[5] (Finkelstein J); The Hon Justice Kevin Nicholson, Supreme Court of South Australia, "Reflections on the Practical Operation of the (Not Very) Uniform Proportionate Liability Regimes in Australia (Australian Insurance Law Association Geoff Masel Series, 2014) [1]–[21].

[17] Parliamentary Counsel's Committee for the Standing Council on Law and Justice, *Proportionate Liability Model Provisions* (PCC-386, 26 September 2013).

Commonwealth *CCA* provisions, to identify common legislative provisions, but also some contrasting ones.

For the court to limit a defendant's liability to a proportion of the loss and damage claimed by the plaintiff, there are two main essential elements. First, the claim must be of a particular kind or type, an "apportionable claim". Second, the defendant must be a "concurrent wrongdoer" with one or more other persons in relation to the claim. The Victorian Act defines "apportionable claim" to mean two types of claims (s 24AF(1) of the *Wrongs Act 1958*):

> First: "a claim for economic loss or damage to property in an action for damages (whether in contract, in tort, under statute or otherwise) arising from a failure to take reasonable care"
>
> Second: "a claim for damages for contravention of section 18 of the *Australian Consumer Law* (Victoria)."

Each of the States and Territories have enacted Sch 2 of the Commonwealth *CCA* (the *Australian Consumer Law* (*ACL*)) to apply as a law of the respective States and Territories.[18]

An "apportionable claim" for the purposes of the *CCA* is only a claim for s 236 damages caused by conduct in contravention of s 18 of the *ACL*: s 87CB of the *CCA*. The like provisions under the *Corporations Act 2001* (s 1041L) and the *ASIC Act* (s 12GF), relate only to statutory misleading or deceptive conduct damages claims under those Acts: s 1041H of the *Corporations Act 2001* and s 12DA of the *ASIC Act*.

The definition of "concurrent wrongdoer" under the Victorian, NSW and Commonwealth legislation (s 24AH(1) of the *Wrongs Act 1958*, s 34(2) of the *CLA (NSW)* and s 87CB(1) of the *CCA*), are materially the same. Under s 24AH(1), "*concurrent wrongdoer* in relation to a claim, means a person who is one of 2 or more persons whose act or omission caused, independently of each other, or jointly, the loss or damage that is the subject of the claim".

There are two limbs of the provisions under which the court makes a proportionate liability apportionment, the first of which is materially the same in each of the *CLA (NSW)* (s 35(1)) and the *CCA* (s 87CD(1)(a)). The *CLA (NSW)* provides:

> s 35 (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.(emphasis supplied)

However, s 24AI(1) of the Victorian *Wrongs Act 1958* provides that:

> (b) judgment *must not* be given against the defendant for more than that amount in relation to that claim. (emphasis supplied)

I suggest that the reference in the *CLA (NSW)* and the *CCA* to "the court *may* give judgment" does not mean that the court has a discretion not to make an apportionment if the statute otherwise applies. The language is clear enough: "the liability … is limited"; "for not more than that amount". Hence, there is no material difference here in the Victorian, NSW and Federal Acts. The court will make an apportionment between the concurrent wrongdoers of responsibility in relation to an apportionable claim, where the court considers that it is just to do so.

An Apportionable Claim?

It is important to observe that the court will only make an apportionment between concurrent wrongdoers of their liability to the plaintiff where the proceedings involve an apportionable claim. Otherwise, the proportionate liability statutes will have no application. Again, the language of the statutes is clear enough; "In any proceedings involving an apportionable claim". Each of the Victorian *Wrongs Act 1958* (s 24AI(2)), the *CLA (NSW)* (s 35(2)) and the *CCA* (s 87 CD(2)) elaborate that. Section 24AI(2) of the *Wrongs Act 1958* provides as follows:

[18] For example, see Victoria: *Australian Consumer Law and Fair Trading Act 2012* (Vic) ss 7, 8, 12; New South Wales: *Fair Trading Act 1987* (NSW) s 28.

(2) If the proceeding involves 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 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.

Whether the proceeding "involves" an apportionable claim will principally be determined by the content of the pleadings. The causes of action pleaded by the plaintiff are of first importance as they will indicate what "claims" the plaintiff makes, although the defences taken by the defendant, including its proportionate liability defence, must be considered by the court. The plaintiff's interest will be in advancing causes of action which are not "apportionable claims", as alternative bases for an award of damages for causes of action which are "apportionable claims". If the plaintiff succeeds on multiple causes of action which lead to the same loss or damage, one of which is an apportionable claim and one or more of which is not an apportionable claim, then the plaintiff can avoid a proportionate liability apportionment by electing to enter judgment for damages based upon the non-apportionable claim.[19] For that reason, there may be little point in a defendant seeking to rely against another (alleged) concurrent wrongdoer upon an apportionable claim which the plaintiff has not made against that person. However if the plaintiff does not make an apportionable claim which appears open on the facts of the case, then the plaintiff takes its chances that it will succeed on the non-apportionable claims. It would be a bold plaintiff which failed to put an alternative claim which appeared open, just because of a potential apportionment defence foreseeably being put by one or more of the defendants.

Identification of the Loss or Damage the Subject of the Plaintiff's Claim

The subject matter of the court's apportionment is the "loss or damage" (or "damage or loss"), claimed by the plaintiff against the defendant. That loss or damage is not to be equated with, and must be distinguished from, the ultimate dollar damages awarded by the court by way of compensation for the loss and damage suffered by the plaintiff, which the defendant's conduct caused.[20] A plaintiff in a single proceeding may claim an award of damages against defendant A in respect of loss and damage which it has suffered, while also claiming an award of damages against defendant B in respect of different loss and damage.[21] Typically the causes of action will be different and separate causation issues will determine whether the different loss and damage claims are compensable. Liability invariably follows causation.[22] In such a proceeding the claims made by the plaintiff against the defendants will not be apportionable ones, because the defendants will not be "concurrent wrongdoers". The plaintiff there has two separate loss and damage claims, independently caused by the two defendants. Hence the defendants will not have each concurrently caused the same loss or damage that the plaintiff has claimed.

The factual bases of the causes of action of a plaintiff against multiple defendants are generally, but not invariably,[23] different because it will be the conduct of each defendant that is in issue. Within the statutory limits, the causes of action may also be different in legal kind, but yet the claims can be apportionable ones. However the different wrongful conduct of the defendants must each have been a material cause of the plaintiff's claimed loss or damage, for a defendant to persuade the court that it is just for its liability to the plaintiffs to be reduced because of that other causal conduct by the other defendant/s. For a defendant to obtain a court apportionment, it must establish that conduct of the other wrongdoer/s is concurrent with its own in the sense that that different conduct, in part, was also a material cause of the plaintiff's loss and damage. It is the actions or omissions of each of the persons alleged to be "concurrent wrongdoers" which independently of each other, or jointly, must cause the plaintiff's loss and damage that is the subject of the plaintiff's (apportionable) claim. The issue here of "concurrent wrongdoer",

[19] For example, *Permanent Custodians Ltd v Geagea (No 3)* [2014] NSWSC 1489, [19], [20] (Rothman J).

[20] *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, [24].

[21] Provided that the claims are sufficiently related.

[22] *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, [57].

[23] See, eg, *Robinson v 470 St Kilda Road Pty Ltd* [2018] FCAFC 84, considered below.

or not, is one of causation of the same loss and damage claimed by the plaintiff by the conduct of the alleged concurrent wrongdoers. The causes of action relied upon by the plaintiff are not required to be "concurrent" in any sense. Provided that the claims made by the plaintiff are apportionable ones, the causes of action of the claims can be different yet be apportionable where concurrent conduct by different persons has caused the same loss or damage to the plaintiff.

When does the different conduct of the wrongdoers cause the same loss or damage to the plaintiff? Or when is the loss or damage caused by each wrongdoers' conduct different? The High Court answered these questions in *Hunt & Hunt*, in a 3-2 decision.[24] A lender made a loan of over $1 million to a borrower based on fraudulent documentation. Two fraudsters obtained possession of certificates of title of the borrower without authority, forged loan and mortgage documentation and obtained the funds advanced. The loan agreement was void because of the forgery. Although the registered mortgage was indefeasible despite its forgery, because it purported to secure the borrower's indebtedness by reference to the void loan agreement it secured nothing. The solicitors who had prepared the mortgage had done so negligently because the mortgage should have contained a covenant to repay a stated amount, but the mortgage did not so provide. The moneys were not repaid. The fraudsters went bankrupt.

Young CJ in Eq at trial,[25] ultimately upheld by majority in the High Court, decided that the fraudsters were 87.5% liable, and that the solicitors were only 12.5% liable. However, the NSW Court of Appeal considered that the solicitors were not entitled to an apportionment. That Court reasoned[26] that the fraudsters caused loss and damage to the plaintiff by causing the lender to pay out the money when it would not otherwise have done so, but the solicitors caused loss and damage to the lender because it did not have the benefit of a mortgage which secured repayment of the moneys loaned. Accordingly, the loss and damage caused to the plaintiff by the fraudsters and by the solicitors was different. They were not concurrent wrongdoers.

The High Court rejected that reasoning, holding that the fraudsters and the solicitors were concurrent wrongdoers because the lender's loss was its inability to recover the moneys advanced and the conduct of each of them was a cause of that.[27] The payment of the moneys and the ineffectiveness of the mortgage as a security did not constitute the harm to the lender's economic interests; rather those matters were important in establishing how the loss and damage ultimately suffered was caused.[28] The majority stated that identification of the "damage or loss that is the subject of the claim" is logically anterior to the question of causation,[29] but that that usually points the way to the acts or omission which were its cause.[30]

Gleeson JA in *Skinner v Redmond Family Holdings Pty Ltd*[31] succinctly stated the decision of the High Court in *Hunt & Hunt* in these terms:

> [159] The plurality noted (at [19]) that the definition of "concurrent wrongdoer" raises two questions, namely what is the damage or loss that is the subject of the claim, and is there a person, other than the defendant, whose acts or omissions also caused that damage or loss. The plurality emphasised (at [24]) that the damage or loss that is the subject of the claim is not to be equated with the amount ultimately awarded as "damages". Rather, the injury and other foreseeable consequences suffered by a plaintiff constitutes the damage or loss that is the subject of the claim and, "[i]n the context of economic loss, loss or damage may be understood as the harm suffered to a plaintiff's economic interests." The plurality rejected (at [41]) any requirement of causation, that is, that one wrongdoer

[24] *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 (French CJ, Hayne and Kiefel JJ; Bell and Gageler JJ dissenting).

[25] *Vella v Permanent Mortgages Pty Ltd* (2008) 13 BPR 25,343, [587]–[598]; [2008] NSWSC 505.

[26] See *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, [29], [30].

[27] *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, [24], [28], [30], [40], [46], [48], [58].

[28] *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, [30].

[29] *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, [19].

[30] *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, [35], [43].

[31] *Skinner v Redmond Family Holdings Pty Ltd* (2017) 123 ACSR 593.

> contribute to the wrongful actions of the other in order to cause the damage. A wrongdoer's acts may be independent of those of another wrongdoer yet cause the same damage.

The High Court's conception of "loss or damage" here is a wide one as it does not depend upon the way that the plaintiff has pleaded its loss and damage claim against the various defendant/concurrent wrongdoers, and the claims against them may not be of the same legal kind. It is the conduct of each of them in causing the plaintiff's loss or damage which is critical.

Must the Claims against the Concurrent Wrongdoers Each Be Apportionable Claims?

The statutory provisions provide for an apportionment of a claimant-defendant's liability to the plaintiff against another person, also a concurrent wrongdoer. The plaintiff's claim against the defendant must be an apportionable one. However an important question which has arisen in relation to the State and Territory provisions concerning claims arising from a failure to take reasonable care, and to Commonwealth statutory misleading or deceptive conduct claims, is whether it is necessary that the actual, or notional, claim by the plaintiff against the *other* defendant, or non-party, concurrent wrongdoer *also* be an apportionable one? The answer, I suggest is: Yes.

The plurality in *Hunt & Hunt*,[32] observed that:

> There is no express limitation on the nature of the claim which might have been brought by the plaintiff against a concurrent wrongdoer, except the requirement of s 34(2) that the acts or omissions of all concurrent wrongdoers have caused the damage in question.

However, Ball J in *LM Investment Management Ltd (in liq) v BMT & Assoc Pty Ltd* (*LM Investment*),[33] decided that the claim against the other concurrent wrongdoer must be an apportionable claim, as well as that made by the plaintiff against the claimant-defendant, for reasons that I suggest are compelling:

> [82] The requirement that the loss and damage be the same is a necessary condition for the claim to be an apportionable one. However, it is not sufficient. In order for a claim to be an apportionable one it must relevantly also be a claim for economic loss "in an action for damages … arising from a failure to take reasonable care". And in order for the liability of the defendant to be reduced, the defendant must be a "concurrent wrongdoer". In order for a defendant to be a concurrent wrongdoer there must be at least one other concurrent wrongdoer – that is, at least one other person in relation to the apportionable claim whose acts or omissions caused independently or jointly the damage or loss that is the subject of the claim.
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> [83] Although the legislation is not entirely clear, each person who is said to be a concurrent wrongdoer must be a person against whom a claim is or could be made for economic loss in an action for damages arising from a failure to take reasonable care. It is plain from s 34(1) that Part 4 of the Act is only concerned with apportionable claims. Consequently, when s 34(2) defines a "concurrent wrongdoer" by reference to a claim, it must be doing so by reference to an apportionable claim, with the result that a concurrent wrongdoer is a person relevantly who caused damage or loss that is the subject of a claim for economic loss arising from a failure to take reasonable care. That conclusion is consistent with the fact that the court is required to apportion the claim having regard to the defendant's responsibility for the damage or loss and the comparative responsibility of other concurrent wrongdoers. The word "responsibility" encompasses evaluative notions concerned with the degree to which each party's failure to take reasonable care caused the loss. If a concurrent wrongdoer was simply a person who contributed to the loss, whether as a result of a failure to take reasonable care or not, then it is difficult to see why s 35 uses the word "responsibility". It would have made more sense for the section to require the court to limit the defendant's liability to the amount it considers just having regard to the extent to which the defendant caused the loss.
>
> [84] Any other conclusion would have the odd result that X could be a concurrent wrongdoer with Y in circumstances where Y was not a concurrent wrongdoer with X. For example, take a simple case in which a lender lends money on the basis of a negligent valuation and is unable to recover that money because the borrower is unable to repay it. If the lender were to sue the borrower, that claim would

[32] *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, [18] (French CJ, Hayne and Kiefel JJ).

[33] *LM Investment Management Ltd (in liq) v BMT & Assoc Pty Ltd* [2015] NSWSC 1902.

> not be an apportionable one since there was no claim for economic loss arising from a failure to take reasonable care. The claim is simply a claim to recover a debt. Consequently, the borrower could not seek to have its liability reduced on the basis that it was a concurrent wrongdoer with the valuer. On the other hand, if the valuer were sued, the claim would be an apportionable claim. If anyone who was liable in respect of that claim were a concurrent wrongdoer, the valuer would be a concurrent wrongdoer with the lender and could have its liability reduced – presumably taking into account the borrower's responsibility for the loss. It is difficult to believe that that is what was intended by the legislation.

In *LM Investment*, quantity surveyors engaged in misleading or deceptive conduct by overvaluing to the lender work performed by the builder/borrower. The lender would not have advanced moneys to the borrower to the extent of the overvaluations of the work if the correct valuations had been made. The lender claimed the difference. The builder/borrower was insolvent and the quantity surveyor sought an apportionment against the borrower, Greystanes, in reliance upon *Hunt & Hunt*. Ball J rejected the defendant's claim to an apportionment for these reasons:

> [86] In my opinion, in the present case, Greystanes was not a concurrent wrongdoer because it was not liable in respect of an apportionable claim. It was liable in an action for debt that did not depend on establishing a failure on its part to take reasonable care. It simply depended on a failure to repay the money that was lent.

Arguably, the decision here of Ball J is difficult to reconcile with the decision of the majority in *Hunt & Hunt*. His Honour did so by observing that it was plain in *Hunt & Hunt* that the claim available against each of the fraudsters was a claim for economic loss arising from a failure to take reasonable care.[34] With respect, it is difficult to conceive of a fraud claim, which necessarily involves intentional wrongful conduct,[35] as arising from a failure to take reasonable care. The greater does not include the lesser. Hypothetically, were the same facts as in *Hunt & Hunt* to occur again, I suggest that on an application of the correct reasoning of Ball J in *LM Investment*, that the fraudsters would not be held to be concurrent wrongdoers because their liability to the plaintiff was not in respect of an apportionable claim, and hence there could be no apportionment in favour of the solicitors against the fraudsters. The plaintiff in *Hunt & Hunt* did not argue that the solicitors could not seek an apportionment because the (notional) claim by the plaintiff against the fraudsters was not an "apportionable claim".

It is an attractive argument to contend that a negligent solicitor's liability to a plaintiff ought be reduced because a fraudster's conduct also caused the same loss or damage to the plaintiff. Fraudulent conduct involves a much higher degree of moral culpability than negligent conduct. However, if it be correct that each of the claims of the plaintiff against the concurrent wrongdoers must be an apportionable one, and that a fraudulent claim is not one that arises from a failure to take reasonable care, and hence that there can be no apportionment, then that is simply the result of the statutory language. It could be considered an odd result that a claimant-defendant concurrent wrongdoer by the statute cannot have fraudulently caused the plaintiff's loss and damage,[36] but yet the other "concurrent" wrongdoer can have an apportionment made against it despite, or because of, it having acted fraudulently.

Misleading or Deceptive Conduct Claims

Section 1041L appears under the heading to Div 2A, "Proportionate liability for misleading and deceptive conduct", and provides:

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[34] *LM Investment Management Ltd (in liq) v BMT & Assoc Pty Ltd* [2015] NSWSC 1902, [85].

[35] In the context of a common law action for deceit, fraud is proven when it is shown that a false representation has been made knowingly, or without belief in its truth or recklessly without care whether it be true or false: *Derry v Peek* (1889) 14 App Cas 337, 374 (Lord Hershell). Barwick CJ in *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 found that *Derry v Peek* decided that in an action at law for deceit, dishonesty must be proved and that carelessness in making the incorrect statement will not establish dishonesty. Carelessness in this context is not synonymous with negligence. A fraud pleading will focus upon what it was that person making the statement intended to convey. The pleading must allege that the maker knew the statement to be false, or was careless as to its truth or falsity: *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486, [26] (French CJ, Gummow, Hayne and Kiefel JJ).

[36] *Civil Liability Act 2002* (NSW) s 34A(1)(b).

> (1) This Division applies to a claim (an ***apportionable claim***) if the claim is a claim for damages made under section 1041I for:
> (a) economic loss; or
> (b) damage to property;
> caused by conduct that was done in a contravention of section 1041H.
> (2) For the purposes of this Division, 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).
> (3) In this Division, a concurrent wrongdoer, in relation to a claim, is a person who is one of 2 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.
> (4) For the purposes of this Division, apportionable claims are limited to those claims specified in subsection (1).
> (5) For the purposes of this Division, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

For a claim to be an apportionable claim, s 1041L(1) requires that it be a claim for damages made under s 1041I. That provision appears in Div 2 of Pt 7.10 and provides, by s 1041I(1):

> A person who suffers loss or damage by conduct of another person that was engaged in in contravention of section 1041E, 1041F, 1041G or 1041H may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention, whether or not that other person or any person involved in the contravention has been convicted of an offence in respect of the contravention.

Section 1041I(1) creates a cause of action for contraventions of each of ss 1041E, 1041F, 1041G and 1041H. However, s 1041L(1) nominates only claims for loss or damage caused by conduct that was done in contravention of s 1041H to be apportionable claims.

Section 1041H(1) provides that:

> A person must not, in this jurisdiction, engage in conduct in relation to a financial product or a financial service, that is misleading or deceptive or likely to mislead or deceive.

The issue arising from the facts in *Selig v Wealthsure Pty Ltd* (*Selig*)[37] was whether a defendant concurrent wrongdoer can claim an apportionment against other defendant concurrent wrongdoers where the plaintiff succeeds against them under s 1041H, but also on other statutory and common law claims. The High Court answered: No. For there to be an apportionment, the other causes of action on which the plaintiff succeeded against the concurrent wrongdoers must be apportionable ones. However, the other claims there were not apportionable because they were not claims under s 1041H.

The defendants seeking apportionment in *Selig* relied particularly on s 1041L(2), contending that its effect was to disregard the legal basis of the other claim, leaving any claim for the same loss and damage as the basis for the apportionment. The plurality[38] rejected that contention, holding that:

> [31] The function of s 1041L(2) is not to complete the definition of an apportionable claim. That has already been provided by s 1041L(1). Its purpose is to explain that, regardless of the number of ways in which a plaintiff seeks to substantiate a claim for damages based upon a contravention of s 1041H, so long as the loss or damage claimed is the same, apportionment is to be made on the basis that there is a single claim. Regardless of the various causes of action pleaded with respect to s 1041H, the responsibility of the defendants will be apportioned by reference to a notional single claim.[39]

The plurality decided that:

> [37] An "apportionable claim" for the purposes of Div 2A is, relevantly, a claim based upon a contravention of s 1041H. The term does not extend to claims based upon conduct of a different kind.

[37] *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 (French CJ, Kiefel, Bell and Keane JJ; Gageler J concurring). The decision of the High Court in *Selig* was correctly anticipated by Alister Abadee, "Investor Claims and the Reach of Proportionate Liability" (2015) 89 ALJ 260.

[38] French CJ, Kiefel, Bell and Keane JJ.

[39] Gageler J decided to like effect: see *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661, [54].

I suggest that the decision in *Selig* in the context of misleading or deceptive conduct apportionable claims, is consistent with and supports the contentions set forth above concerning apportionable claims arising from a failure to take reasonable care. In both contexts for the proportionate liability statutes to be engaged, each of the plaintiff's claims against the concurrent wrongdoers must be an "apportionable claim".

It is important to be clear as to precisely why it is that where the plaintiff succeeds under s 1041H,[40] but also on other statutory or common law claims, no apportionment can be made. The trial judge in *Selig*,[41] Lander J, whose decision was ultimately upheld by the High Court, stated the result on liability in these terms:

> [1146] There will be no apportionment between the defendants, except for those claims on which the plaintiffs have succeeded under s 1041H. *Because* the plaintiffs have succeeded on other claims, the plaintiffs are entitled to recover all of their damages against the first to eighth defendants. Therefore there will be no declarations as to apportionment. (emphasis supplied)

The plaintiffs in *Selig* obtained judgment against the defendants without any apportionment of liability to the plaintiff between them based upon their successful statutory and common law claims,[42] other than the s 1041H claim. The s 1041H claim was not the basis of the judgments obtained. It dropped away.

Where a plaintiff can demonstrate a contravention of a different statutory prohibition which is not apportionable but which leads to the same loss and damage as a misleading or deceptive conduct claim, then the plaintiff can avoid any apportionment limitation on its claim by electing to seek judgment only upon the other basis of claim. For example, ss 29(1) and 30(1) of the *ACL* concerning the supply of goods and the sale of land, proscribe a large number of specific false or misleading representations which, if proven, would likely also constitute contravention of the general s 18(1) misleading or deceptive conduct proscription. On the High Court's reasoning in *Selig*, the ss 29(1) or 30(1) contraventions would not be apportionable at all, or together with the s 18(1) contraventions, even though the different statutory contraventions caused the same loss or damage to the plaintiff. In particular that is because the s 87CB(1) definition of what an apportionable claim is, is only a s 236 of the *ACL* damages claim caused by conduct in contravention of s 18 of the *ACL*.

In *Williams v Pisano* (*Williams*),[43] Emmett JA considered this issue by way of obiter dicta. The plaintiffs relied upon contraventions of s 30(1)(e), as well as of s 18(1) of the *ACL*. Section 30(1)(e) provides that:

> A person must not, in trade or commerce … in connection with the promotion by any means of the sale or grant of an interest in land: …
>
> (e) make a false or misleading representation concerning the characteristics of the land

Emmett JA followed the reasoning of the High Court in *Selig* and considered that the *CCA* proportionate liability provisions applied "to a claim for damages caused by conduct in contravention **only** of s 18 of the Law" (emphasis in judgment). It followed that if the plaintiffs had succeeded on both the ss 30(1)(e) and 18(1) claims, there would have been no apportionment under s 87CD of the *CCA*. Emmett JA noted that contraventions of s 30 can attract a civil penalty but that contraventions of s 18 do not, and hence that Parliament viewed a s 30 contravention as involving a higher level of moral culpability than a s 18 contravention. That could be a reason why apportionable claims are limited to s 18 contraventions.[44] However, a s 236 damages claim can be made in respect of both contraventions.

Also by way of example I suggest that following the reasoning in *Selig*, the plaintiff can avoid an apportionment by successfully claiming a compensation order under s 237 of the *ACL*, as well as or in lieu of a s 236 damages claim.

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[40] Or its analogues.

[41] *Selig v Wealthsure Pty Ltd* (2013) 94 ACSR 308.

[42] The *Civil Liability Act 2002* (NSW) proportionate liability provisions did not apply in relation to the State and common law claims for other reasons: see *Selig v Wealthsure Pty Ltd* (2013) 94 ACSR 308, [1133]–[1138].

[43] *Williams v Pisano* (2015) 90 NSWLR 342, [55]–[64].

[44] *Williams v Pisano* (2015) 90 NSWLR 342, [62].

A Failure to Take Reasonable Care?

Whether the proportionate liability provisions are engaged can turn on the proper construction of one of the statutory definitions of "apportionable claim". Section 34(1)(a) of *CLA (NSW)* provides that the Part applies to:

> [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.

There are a number of presently unresolved issues as to what the proper construction of those words is in relation to various factual circumstances.

Kunc J in *ASF Resources Ltd v Clarke*[45] explained that Barrett J in *Reinhold v NSW Lotteries Corp (No 2)*,[46] found that in relation to a breach of contract claim it did not matter that the pleaded claim was not framed in terms of a failure to take reasonable care. Some breach of contract claims may involve that (eg breach of a professional retainer), but others may not. Barrett J there approved the approach adopted by Middleton J in *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd*:[47]

> [30] In my view, Pt IVAA could apply in the circumstances of this proceeding according to its own terms. Where a claim brought by an applicant does not have as one of its necessary elements any allegation of failing to take reasonable care, an additional enquiry into the failure to take reasonable care may become relevant in the course of a trial to determine the application of Pt IVAA. Even though the claims in this proceeding themselves do not rely upon any plea of negligence or a "failure to take reasonable care" in a strict sense, a failure to take reasonable care may form part of the allegations or the evidence that is tendered in the proceedings. At the end of the trial, after hearing all the evidence, it may be found that Pt IVAA applies.

Macfarlan JA expressed a different view. His Honour in *Perpetual Trustee Co Ltd v CTC Group Pty Ltd (No 2)*,[48] stated that:

> [22] For a successful action for damages to have arisen from a failure to take reasonable care, it is in my view necessary that the absence of reasonable care was an element of the, or a, cause of action upon which the plaintiff succeeded. As observed by Professors McDonald and Carter in "The Lottery of Contractual Risk Allocation and Proportionate Liability" (2009) 26 *Journal of Contract Law* 1 at 18, the contrary view would produce the absurd result that a party to a contract who failed to perform a strict contractual obligation would benefit from being found to have acted negligently rather than "innocently". If claims could be apportioned where negligence is not an element of the successful cause of action, but merely arises from the facts, a plaintiff could lose his or her contractual right to full damages from a party whose breach of a contractual provision of strict liability happened to stem from a failure to take reasonable care.

This difference of judicial opinion is important and doubtless will be judicially resolved when that is necessary. As to the difference, I simply reiterate that the High Court in *Hunt & Hunt* in considering the proper construction of the different words, "loss or damage" was not constrained by the way that the plaintiff had pleaded its case against the (alleged concurrent wrongdoer) defendants. Also, the apparent breadth of the words, "arising from" a failure to take reasonable care should be noted.[49] However, it may be doubted that there will be many factual circumstances which will arise where the causes of action relied upon do not include a failure to take reasonable care as a necessary element, but yet the defendant's conduct as found by the judge at trial can be characterised as arising from a failure to take reasonable care.

One possible example is provided by the facts in *ASF Resources Ltd v Clarke*,[50] an interlocutory decision of Kunc J. There the plaintiff (ASF) was the victim of the fraud of one of its consultants, Mr Clarke.

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[45] *ASF Resources Ltd v Clarke* [2014] NSWSC 252, [35]–[42].

[46] *Reinhold v NSW Lotteries Corp (No 2)* (2008) 82 NSWLR 762.

[47] *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* (2007) 164 FCR 450.

[48] *Perpetual Trustee Co Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58.

[49] The arguments here for and against a factual inquiry as opposed to a cause of action inquiry, are considered in detail by Grant Lubofsky, "A Contractual Path Around Proportionate Liability" (2018) 34 BCL 5, 8–12. The author there prefers the approach of Macfarlan JA.

[50] *ASF Resources Ltd v Clarke* [2014] NSWSC 252.

ASF sued a bank in respect of ASF's cheques that Mr Clarke presented to the bank, but which the bank paid into accounts of persons other than the named payee of the cheques. ASF's claim against the bank alleged causes of action in conversation and for money had and received. The bank pleaded that it had acted in good faith and without negligence when it collected the cheques, in reliance upon s 95(1) of the *Cheques Act 1986* (Cth). The bank sought to make an apportionment against the fraudster. ASF sought to strike out the bank's proportionate liability plea, but Kunc J permitted the plea to proceed to trial and dismissed the plaintiff's strike out application. The difference of views between Barrett JA and Macfarlan JA appeared likely to be squarely in issue as it was common ground that:

(a) proof of negligence or acting without reasonable care was no part of the causes of action alleged by ASF against the Bank in conversion or for moneys had and received;
(b) s 95(1) made a defence available to the bank which would require it to prove that it had acted without negligence in the sense of "carelessness" or "without reasonable care"; and
(c) the resolution of the bank's liability would almost certainly involve a finding as to whether or not the bank acted without reasonable care.[51]

Mossop J in the Supreme Court of the Australian Capital Territory considered the issue in *Dunn v Hanson Australia Pty Ltd*.[52] The plaintiffs were the owners of a residential property which they purchased from the third defendant. The first defendant, a company, built the house for the third defendant. The second defendant was the sole director of the builder. The building was defective. The plaintiff's claim against the first defendant builder was for breach of statutory warranties implied by s 88 of the *Building Act 2004* (ACT) that the building work would be carried out in a proper and skilful way and would carry out or supervise the work. The plaintiff also claimed against the builder under the *TPA* for falsely representing that it would conduct or supervise the work. The claim against the second defendant company director was in relation to his involvement in the builder's wrongful conduct. The claim against the third defendant vendor was for breach of express contractual warranties that the construction of the house would be carried out in a proper and workmanlike manner. Judgment was entered against those defendants and at the hearing of an assessment of damages, the first and second defendants sought to rely upon the ACT apportionment provisions.[53]

The plaintiffs submitted that the claims against the defendants were not apportionable ones because they were not claims "arising from a failure to take reasonable care". Mossop J accepted that submission, for the following reasons:

> [48] Having regard to the nature of the claims made against the first, second and third defendants, I do not consider that they are claims arising from a failure to take reasonable care in the statutory sense. In my view the expression "failure to take reasonable care" is designed to encompass actions which involve the establishment of that legal standard. It is not meant in some non-technical sense that invites a characterisation exercise so as to establish that the breach of some other legal standard involves a failure take reasonable care.
>
> [49] In the present case it is not open to re-characterise breaches by the first defendant of the statutory warranties under the *Building Act* as failures to take reasonable care, even though, in a colloquial sense, such breaches might be said to so arise.
>
> [50] Even more clearly, the breaches by the first and second defendants of the *TPA* do not arise in the statutory sense from a failure to take reasonable care. True, it is that a person might not engage in a misleading or deceptive course of conduct if the person was taking reasonable care. However neither the cause of action that has been pleaded, nor the admissions implicit in the admission of liability involves an admission of failure to take reasonable care.
>
> [51] So too with the third defendant. The claim against her is a breach of warranty. That warranty ("that the construction of a residence on the land will be carried out in a proper and workmanlike manner") does not expressly or necessarily involve a failure to take reasonable care.

[51] The proceeding was later dismissed, without an adjudication on the merits.

[52] *Dunn v Hanson Australia Pty Ltd* (2017) 12 ACTLR 138.

[53] *Civil Law (Wrongs) Act 2002* (ACT) ss 107A–107K.

A claim for damages for breach of a warranty of authority is not an apportionable claim because such a claim does not arise from a failure to take reasonable care.[54] Rothman J in *Permanent Custodians Ltd v Geagea (No 4)*[55] decided as follows:

> [40] Notwithstanding the uncertainty referred to above, the provisions of the *Civil Liability Act* applies to all claims for economic loss arising from a failure to take reasonable care. In the view I take, it matters not whether breach of warranty or authority is a cause of action in contract. It does matter whether it causes economic loss (which has been found) and whether it arises from a failure to take reasonable care.
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> [41] Damages for breach of warranty of authority do not depend upon negligence or a failure to take reasonable care. It is a strict liability, in the sense that it requires no actual intention, no fraud, no negligence, or any fault on the part of the agent. It requires only that a warranty of authority was given upon which the recipient of that warranty relied and the conduct in reliance on the authority caused damage.

In *Cassegrain v Cassegrain*[56] Basten JA decided that a liability of a defendant to pay equitable compensation was not a failure to take reasonable care, and hence the proportionate liability provisions of the *CLA (NSW)* were not engaged. His Honour so decided without having to resolve the difference of judicial opinion to which I have referred. The basis of the order made at trial against the appellant that she must pay equitable compensation to a company, was that she was the knowing recipient of assets of the company (being shareholding in two other companies) which had been transferred to her by the directors (her co-defendants) for a consideration that was far less than the true value of the assets. At trial the appellant's liability was held to be both joint and several with her co-defendants. Before the Court of Appeal, the appellant sought an apportionment against her co-defendants. Sackville AJA and Emmett AJA dismissed the appellant's application for leave to appeal because her apportionment claim was made too late, no such claim having been made at trial. Basten JA however decided against the appellant on the substantive ground that the equitable compensation claim against her was not an apportionable claim.

Basten JA reasoned as follows:

> [22] The third point of construction is whether there is, implicit in the phrase "failure to take reasonable care" an assumption as to the existence of a legal duty which has been breached. The formulation of the question may be thought to add unnecessary complexity to relatively straightforward language. However, the question is useful because the answer illustrates the distinction between strict liability, a failure to exercise reasonable care and intentional misconduct. In broad terms, strict liability does not depend upon advertence by the tortfeasor to the consequences of his or her action. An intentional tort, on the other hand, clearly does. One can articulate an intentional tort, such as trespass to the person, in terms of a duty to avoid certain conduct, but the "duty", so formulated, is to avoid deliberately assaulting another person without his or her consent; it is not a duty to take reasonable care not to assault a person without consent. On the other hand, the tort of negligence is always expressed in terms of a duty to take reasonable care. It is wrong to describe an element of negligent driving as an obligation not to run down a pedestrian or an obligation to ensure that pedestrians are not run down; the correct formulation is a duty to take reasonable care to avoid running down a pedestrian.
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> [23] In this sense, the phrase "failure to take reasonable care" does envisage a duty expressed in negative terms but, more importantly, in terms which are inapt with respect to an intentional tort. Similar reasoning applies to the liability based on receipt of property transferred in breach of a fiduciary duty. The duty of a person dealing with fiduciaries is not to take reasonable steps to avoid becoming party to their breach of duty, but rather not knowingly to receive the property of the company with knowledge of circumstances which would allow an honest and reasonable person to recognise that an impropriety had been committed. …
>
> [26] It follows that the basis of the appellant's liability was not a failure to take reasonable care; it was receipt of property with knowledge of the circumstances in which it was conveyed and which told

[54] *Permanent Custodians Ltd v Geagea (No 3)* [2014] NSWSC 1489, [19], [20] (Rothman J); *Permanent Custodians Ltd v Geagea (No 4)* [2016] NSWSC 934, [35]–[41] (Rothman J).

[55] *Permanent Custodians Ltd v Geagea (No 4)* [2016] NSWSC 934.

[56] *Cassegrain v Cassegrain* [2016] NSWCA 71.

> of impropriety. A failure to inquire was not only not an element of the appellant's liability, it was insufficient to ground liability. The equitable liability depends on the subjective state of mind of the recipient, not an objective test of a reasonable person.
>
> [27] Although it is not necessary to decide the point, there is a further reason why the appellant's submissions should be rejected. Even if a failure to inquire as to the circumstances of a transaction were sufficient to ground liability, and accepting that it would involve an objective element, it is not readily characterised as a failure to exercise reasonable care.

Turning again to fraudulent claims, in the first instance decision which ultimately became *Hunt & Hunt* in the High Court, *Vella v Permanent Mortgages Pty Ltd*,[57] Young CJ in Equity, rejected a submission by Mitchell Morgan that s 34A of the *CLA (NSW)* prevented the solicitors from advancing a claim for apportionment. His Honour held that s 34A only prevents intentional or fraudulent wrongdoers from *claiming* the benefit of the apportionment legislation, and the solicitors, Hunt & Hunt, were not in either of those categories.[58] However, if the concurrent wrongdoer against whom the claimant-defendant seeks an apportionment has engaged in fraudulent conduct, I suggest that the reasoning of Basten JA has analogous application in that other context. Fraudulent liability depends upon the subjective state of mind of the fraudster in relation to the impugned conduct, and not upon the objective test of a reasonable person. A failure to act reasonably is not an element of liability for fraudulent conduct and is insufficient to ground liability.

Hence where the liability of the other concurrent wrongdoer to the plaintiff is for fraudulent conduct, the claimant-defendant I suggest cannot obtain an apportionment against that person. In such circumstances there is no apportionable claim by the plaintiff against the fraudster because liability of that kind is not a claim for damages arising from a failure to take reasonable care. The claimant-defendant's interest will be in contending that the plaintiff's claim against the concurrent wrongdoer can be found to be a lesser claim than fraud, and to arise from a failure to take reasonable care.

Independently or Jointly?

For one of the proportionate liability statutes to be engaged there must be two or more concurrent wrongdoers. For that to be so, the acts or omissions of the two persons must have caused, "independently of each other or jointly" the loss or damage that is the subject of the plaintiff's claim. Issues about whether two persons are concurrent wrongdoers have arisen where a company, and its director or officer, engaged in misleading or deceptive conduct by the acts or omissions of the director or officer, and that person has sought to apportion his liability against the company when the company has become insolvent.

As a matter of principle, as opposed to how the statutes operate, different views can be held as to whether or not an individual should be able to reduce his or her liability to the plaintiff when the alleged concurrent wrongdoer company has become insolvent. A purpose of the proportionate liability statutes is to shift the risk that one of two jointly and severally liable wrongdoers becomes insolvent from the solvent wrongdoer to the plaintiff. On that view, the solvent individual should be able to reduce his liability to the plaintiff because of the acts or omissions of the insolvent company. However where the wrongful conduct of the company *was* the conduct of the individual, for which the company was legally responsible, as well as the individual, it perhaps offends one's sense of justice that the individual can obtain an apportionment against the company. Were that to occur, one could consider that the individual was taking advantage of his own wrong. The individual's conduct was the reason why the company was legally responsible to the plaintiff. There was no act or omission of the company independent of the individual's conduct, only an attribution of legal responsibility to the company for the individual's conduct. The factual basis of the legal liability of the company and the individual was the same, not different.

In circumstances such as these the Full Federal Court in *Robinson v 470 St Kilda Road Pty Ltd* (*Robinson*),[59] held that the (insolvent) company was not a concurrent wrongdoer with the individual

[57] *Vella v Permanent Mortgages Pty Ltd* (2008) 13 BPR 25,343; [2008] NSWSC 505.

[58] *Vella v Permanent Mortgages Pty Ltd* (2008) 13 BPR 25,343, [599]–[600]; [2008] NSWSC 505.

[59] *Robinson v 470 St Kilda Road Pty Ltd* [2018] FCAFC 84 (McKerracher and Markovic JJ, Rangiah J agreeing).

whose conduct on behalf of the company was the basis of the company's liability to the plaintiff. Mr Robinson was the Chief Operating Officer of a private building company, Reed. Reed contracted to convert an office building into a residential apartment building for the principal, 470 St Kilda Road Pty Ltd. Towards the end of the building work, in accordance with an established procedure, Mr Robinson made a statutory declaration to the Principal that the company was entitled to make a progress payment. The declaration included statements that after having made all reasonable enquiries, Mr Robinson believed that all workmen, subcontractors and suppliers had been duly paid. That was not the case. The Principal paid the progress payment based on Mr Robinson's statutory declaration. Reed went into liquidation.

O'Callaghan J at trial[60] held that the statutory declaration was misleading or deceptive. Mr Robinson knew that his company had dire cash flow problems, had not paid all subcontractors and suppliers in full and that critical subcontractors had threatened to block or cease supply to the project. The judge ordered Mr Robinson to pay damages to the principal in the amount of the progress payment. O'Callaghan J rejected Mr Robinson's claim to a 50% apportionment against the company, on whose behalf Mr Robinson made the statutory declaration. On appeal, Mr Robinson maintained his argument that such an apportionment should be made. The trial judge had noted that Mr Robinson was insured in respect of the principal's claim, the insurer having been unsuccessful in denying Mr Robinson's claim to indemnity in protracted legal proceedings.[61]

The Full Federal Court rejected Mr Robinson's contention, holding that Reed was not a "concurrent wrongdoer" within the statutory definition, s 87CB(3) of the *CCA*. The Court accepted Mr Robinson's submission that Reed was directly liable for his conduct, by reason of so-called "Tesco liability". Lord Reid in *Tesco Supermarkets Ltd v Nattrass* stated:[62]

> A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or action **for** the company. He is acting **as** the company and **his mind which directs his acts is the mind of the company**. (emphasis added by the Full Court)

Reed was directly and fully liable, as Mr Robinson was its acting mind and will. However, the Court distinguished such direct liability from vicarious liability, which did not apply there,[63] as vicarious liability usually imposed liability on a company where directors, servants or agents acted within the scope of their authority for the company. The Full Court referred with approval, and adopted, the reasoning of Mossop J in *Dunn v Hanson Australasia Pty Ltd*[64] in these terms:

> [50] In considering s 87CB(3) of the *TPA*, his Honour (at [61]) noted that in cases where the acts of the director are the acts of the company and hence there is only the act of a single person, it cannot be said that the act or acts caused "independently of each other or jointly" (the express words used in s 87CB(3) of the *TPA*), the damage or loss the subject of the claim.
>
> [51] His Honour opined, and we agree, that, first, it cannot be said that the acts are independent because there is a single act carried out by the person which is also the act of the company. Secondly, it cannot be said that the acts "jointly" caused the damage or loss. There is no capacity for joint conduct because there is only a single act, which makes it artificial to say that there are two acts of persons, one of the company and one of the director. The company, on the facts of *Dunn*, did nothing, but was directly liable only by reason of the acts of its senior officer. In those circumstances, there cannot be

[60] *470 St Kilda Road Pty Ltd v Robinson* [2017] FCA 597.

[61] *470 St Kilda Road Pty Ltd v Robinson* [2017] FCA 597, [2].

[62] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170.

[63] It should be noted that the proportionate liability statutes expressly provide that the apportionment provisions do not prevent a person from being held vicariously liable for a proportion of an apportionable claim for which another person is liable; see, eg, *Competition and Consumer Act 2010* (Cth) s 87 CI(a).

[64] *Dunn v Hanson Australasia Pty Ltd* (2017) 12 ACTLR 138. A different part of the decision of Mossop J in *Dunn* is discussed above.

any concurrent wrongdoing within the definition of s 87CB(3) of the *TPA* or in any common use of the expression "concurrent wrongdoer".

[52] In the present circumstances also, and for those reasons, there could be no apportionment of the wrongdoing to Reed, represented by Mr Robinson. This construction also appears more harmonious with the view of the Queensland Court of Appeal in *Hadgelias*[65] (at [21]).

[53] The reason why s 87CB(3) of the *CCA* could not apply may be put another way. The provision requires that the concurrent wrongdoer be a person who is one of two or more persons whose individual acts or omissions would, independently of each other, have caused the damage or loss. In the present instance, there is no independent act at all of Reed which could fall for consideration. While the company would have been 100% liable if sued for the acts of Mr Robinson, the acts were not acts which were independent of the acts of Mr Robinson. To the contrary, they were directly dependent upon his conduct in that they are regarded at law as one and the same act.

[54] As a consequence, it would be impossible to form any view that Reed, by virtue of conduct of some other employee or officer, should contribute any percentage, let alone 50% by way of apportionment. The very concept of apportionment requires an assessment of the degree of wrongdoing of the contributory wrongdoer. There is no evidence of any wrongdoing on the part of Reed, but for the actions of Mr Robinson himself.

The Full Court in *Robinson* distinguished the facts there from those in the NSW Court of Appeal decision in *Williams*.[66] Mr Robinson relied upon obiter dicta comments made by Emmett JA in *Williams*, about which the other members of the Court there expressed no views.[67] In *Williams*, vendors of a residential property undertook renovation works as owner/builders. The purchasers were induced to purchase the property induced by misleading or deceptive representations about the standard of the renovations, the nature of the representations and the competence of the builder. The representations were statements published in an internet advertisement, a brochure and made by the vendors' real estate agents. The statements were made with the authority of both vendors.

In *Williams*, the appeal against the damages awarded made by the trial judge was upheld on the basis that the representations were not made in trade or commerce because sellers of residential property, whether a real estate agent was used or not, are not ordinarily engaged in trade or commerce. Emmett JA, however, went on to consider apportionment issues as between the two vendors and would have apportioned the purchaser's damages claim against them 50/50. His Honour considered that the vendors were concurrent wrongdoers as each of the vendors contributed to a single act, the making of the representations by their agent that caused the damage the subject of the purchaser's claim. Their wrongful conduct was committed by them jointly. No apportionment was sought by either of the vendors against the agent. The agent had become insolvent.

In *Robinson*, the Full Court observed that in *Williams*, Emmett JA disagreed with the Queensland Court of Appeal in *Hadgelias Holdings v Serlis* (*Hadgelias*).[68] In *Hadgelias*, at trial the purchaser of an apartment successfully sued the vendor and the vendor's real estate agents as she had been induced to purchase by false representations by the agents to the effect that there were three carparks. In truth, there were two carparks and a third space for storage. The agents at trial submitted that the vendors should bear the entirety of the purchaser's loss as they knew of the existence of the legal impediment to the use of the third carpark, something of which the agents were not informed. The trial judge rejected the argument for apportionment.[69] McMurdo J held that although the vendors and the agents were "concurrent wrongdoers" for the purpose of s 87CD of the *TPA*, as the relevant acts or omissions were those of the agents, which in turn were deemed[70] to be the vendors' acts or omissions, as their

[65] *Hadgelias Holdings v Serlis* [2015] 1 Qd R 337.

[66] *Williams v Pisano* (2015) 90 NSWLR 342.

[67] *Williams v Pisano* (2015) 90 NSWLR 342, [4], [6] (Bathurst CJ and McColl JA).

[68] *Hadgelias Holdings v Serlis* [2015] 1 Qd R 337 (Holmes JA, Gotterson and Morrison JJA agreeing).

[69] *Seirlis v Bengtson* [2013] QSC 240, [90]–[103], [108]–[122] (Philip McMurdo J).

[70] By *Trade Practices Act 1974* (Cth) s 84(4).

conduct and corresponding responsibility for the purchasers loss were identical, s 87CD required no apportionment between them.

In the Court of Appeal, the agents' appeal against the decision of the trial judge not to make an apportionment failed. Holmes JA reasoned:

> [19] I do not think that the fact of the parties' joint liability necessarily resolves the question of whether they are concurrent wrongdoers.
>
> [20] The phrase "independently of each other or jointly" in the s 87CB(3) definition qualifies the verb "caused", rather than describing the acts or omissions. In other words, the issue is not whether acts or omissions are jointly undertaken but whether they either independently produce the same outcome or combine in their effect to do so.
>
> [21] The majority of the High Court in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees* observed that the equivalent definition of "concurrent wrongdoer" in the *Civil Liability Act* 2002 (NSW) posed two questions:
>
> > "… what is the damage or loss that is the subject of the claim? Is there a person, other than the defendant, whose acts or omissions also caused that damage or loss?"
>
> Consistently with the form of the second question, I would construe the definition in s 87CB as concerned with distinct acts (or omissions) or sets of acts (or omissions) by different actors, combining or working independently to cause loss or damage, and consequently inapplicable where there is but a single act or set of acts causing loss, attributable to more than one person.
>
> …
>
> [24] On my construction of s 87CB, the agents and vendors in the present case performed a single set of acts which caused loss. They were not "concurrent wrongdoers" so as to attract the application of s 87CD.[71]

The factual circumstances in *Hadgelias* were not the same as those in *Williams*. The issue in *Williams* was whether an apportionment should be made between the vendors, not between the vendors on the one hand and the agent on the other hand. The apportionment issue in *Hadgelias* was as between the agents and the vendors. However, as observed by Emmett JA in *Williams*, the holding of Holmes JA in *Hadgelias*[72] appeared to apply to the circumstances in *Williams*. The facts in *Robinson* were different again because Mr Robinson's mind and acts were the acts of Reed. In *Robinson*, the Full Court found it unnecessary to comment on the views of Emmett JA in *Williams*, but observed that the Court's decision "appears more harmonious with the view of the Queensland Court of Appeal in *Hadgelias* (at [21])".[73] I suggest, with respect, that the decision of the Full Court in *Robinson* is correct, but that it is presently unclear which of the inconsistent views of Emmett JA and Holmes JA will prevail. Of course, the result depends upon the facts. However, I suggest that the view of Holmes JA is too narrow and is not warranted by the statutory language. In *Williams* the acts of each of the vendors authorised the agents to misrepresent the property.

How Does the Court Make an Apportionment?

Where one of the statutes applies, the court limits the defendant's liability to the plaintiff to an amount reflecting the proportion of the plaintiff's loss or damage which the court considers is just having regard to the extent of the defendant's responsibility for that. Where the plaintiff's claim is for damages by the defendant's misleading or deceptive conduct, how does the court decide what is a just limitation of the defendant's liability? In the different context of a successful negligence claim, necessarily involving a want of reasonable care by the defendant, familiar contributory negligence principles provide guidance:

(a) The High Court in *Pennington v Norris*[74] observed:

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[71] *Hadgelias Holdings v Serlis* [2015] 1 Qd R 337.

[72] *Hadgelias Holdings v Serlis* [2015] 1 Qd R 337, [21].

[73] *Robinson v 470 St Kilda Road Pty Ltd* [2018] FCAFC 84, [52].

[74] *Pennington v Norris* (1956) 96 CLR 10, 16 (Dixon CJ, Webb, Fullagar and Kitto JJ).

> What has to be done is to arrive at a "just and equitable" apportionment as between the plaintiff and the defendant of the "responsibility" for the damage. It seems clear that this must of necessity involve a comparison of culpability. By culpability, we do not mean moral blameworthiness but the degree of departure from the standard of care of the reasonable man.

(b) In *Podrebersek v Australian Iron & Steel Pty Ltd*[75] the High Court stated:

> The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man: *Pennington v Norris* and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd*; *Smith v McIntyre* and *Broadhurst v Millman*, and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance. (citations omitted)

Dixon J recently restated these principles in a proportionate liability context in connexion with a negligence claim against multiple defendants,[76] as follows:

> [391] What is required of the court is a broad consideration of both the culpability of the departure from the standard of reasonable care and the relative importance of the acts of the parties which caused the damage. The concept of culpability which is applied is not "moral blameworthiness but [the] degree of departure from the standard of care of the reasonable man", while the relative importance of the conduct of the wrongdoers invokes an assessment of causal potency. These considerations may overlap. (citations omitted)

A misleading or deceptive conduct claim does not require proof that the defendant failed to use reasonable care in relation to the plaintiff. However, the statutory proscription of misleading or deceptive conduct likewise provides a norm of legal conduct against which the defendant's conduct can be measured.[77] Value judgments and policy considerations have a part to play in the court's decision as to whether causation is demonstrated.[78] However the Court's determination here of the extent of the defendant's responsibility involves value judgments different from and more extensive than those which inform the question of causation.[79] Hence in making a just proportionate limitation on a defendant's liability to the plaintiff, the Court considers the extent of the defendant's departure from the standard of not engaging in misleading or deceptive conduct, as well as the relative importance of the conduct of the concurrent wrongdoers in assessing the causal potency of the defendant's conduct. The Court asks: Was the defendant's failure to comply with the statutory norm more substantial, or egregious, than that of the other concurrent wrongdoer/s? In determining the relative responsibility of concurrent wrongdoers for a loss, it is necessary to compare the blameworthiness and causative potency of the conduct of each of them. Factors relevant to that assessment include, but are not limited to, which of the wrongdoers was more actively engaged in the conduct causing the loss and which was more able effectively to prevent the loss.[80] The issue of apportionment as between concurrent wrongdoers is an inherent element of the extent of the defendant's liability and is separate from and independent of the assessment of the quantum of the plaintiff's loss.[81] All of the circumstances of the case are to be considered. The Court's decision is discretionary in nature, and attracts the principles in *House v The King*[82] where an appellant seeks to overturn an apportionment decision on appeal.[83]

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[75] *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529, 532–533; [1985] HCA 34.

[76] *Dual Homes Victoria Pty Ltd v Moores Legal Pty Ltd* (2016) 50 VR 129, [391].

[77] *Latol Pty Ltd v Gersbeck* (2015) 303 FLR 298, [56] (Hamill J).

[78] *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, [57].

[79] *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, [57].

[80] *Ryan Wealth Holdings Pty Ltd v Baum Garner* [2018] NSWSC 1502, [963]–[964] (Walton J).

[81] *Rennie Golledge Pty Ltd v Ballard* (2012) 82 NSWLR 231, [16] (Basten JA).

[82] *House v The King* (1936) 55 CLR 499, 505.

[83] *Metzke v Sali* [2010] VSCA 267, [94] (Warren CJ, Neave JA and Beach AJA). A useful illustration of an apportionment made in a *Corporations Act* context, is the decision of Black J in *Redmond Family Holdings Pty Ltd v GC Access Pty Ltd* [2016] NSWSC

Contribution, Contributory Negligence and Proportionate Liability Compared

The Victorian *Wrongs Act 1958* provides as follows:

> S.23A(1) For the purposes of this Part a person is liable in respect of any damage if the person who suffered that damage, or anyone representing the estate or dependents of that person, is entitled to recover compensation from the first-mentioned person in respect of that damage whatever the legal basis of liability, whether tort, breach of contract, breach of trust or otherwise.
>
> S.23B(1) … a person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with the first-mentioned person or otherwise).
>
> S.24(2) … in any proceedings for contribution under section 23B the amount of the contribution recoverable from any person shall be such as may be found … by the court … to be just and equitable having regard to the extent of that person's responsibility for the damage; and … the court … shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

Under the contribution provisions if the defendant were to be successful in obtaining contribution against another defendant or a third party, that would not have the effect of reducing the defendant's liability to the plaintiff. Hence a plaintiff is typically unconcerned about contribution proceedings initiated by the defendant.

A related matter is that in misleading or deceptive conduct cases it is well established that it is sufficient for loss or damage to have been suffered "by" the plaintiff, and hence be compensable, that the impugned conduct was a material cause of that loss or damage. The conduct of the defendant need not have been the sole causal reason why the plaintiff suffered loss and damage.[84] However, the but-for test still has wide application. Initially, contributory negligence by the plaintiff was no defence to a misleading or deceptive conduct damages claim.[85] However, a statutory contributory negligence defence was introduced in 2008 by s 82(1B) of the *TPA*. Section 82(1B) relevantly provided that where the claimant suffered the loss and damage partly as a result of its failure to take reasonable care, "the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the Court thinks just and equitable having regard to the claimants share in the responsibility for the loss or damage". Like provision is now made in s 82(1B) of the *CCA*, effective 1 January 2011.

It should be clearly recognised that a defendant's attempt to apportion liability is fundamentally different to contributory negligence and contribution pleas. Where the plaintiff has been guilty of contributory negligence and failed to take reasonable care of its own interests, the plaintiff's claim against the defendant is reduced. There it is the plaintiff's conduct that is in issue. However where the defendant is able to apportion some of its liability to another concurrent wrongdoer, it is the conduct of that other person, relative to that of the defendant, which is in issue. Both contributory negligence and a proportionate liability apportionment may reduce the extent of the defendant's liability to the plaintiff, but the reason for the court doing so in each instance is completely different.

That said, a successful proportionate liability plea by the defendant is not inconsistent with a successful contributory negligence defence. However where both of the defendant's pleas are successful, the liability of the defendant which is apportioned is its liability to the plaintiff after contributory negligence has been taken into account, or net of the plaintiff's contributory negligence. Section 87CD(3) of the *CCA* provides that:

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

1883. On an appeal, the Court of Appeal found no error in the judge's reasoning there *Skinner v Redmond Family Holdings Pty Ltd* (2017) 123 ACSR 593, [152]–[171] (Gleeson JA; Macfarlan JA and Barrett AJA agreeing).

[84] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 525 (Mason CJ, Dawson, Gaudron and McHugh JJ); *Henville v Walker* (2001) 206 CLR 459, [106] (McHugh J), [14] (Gleeson CJ); *Travel Compensation Fund v Robert Tambree* (2005) 224 CLR 627, [32] (Gummow and Hayne JJ); *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, [45] (French CJ, Hayne and Kiefel JJ); As to causation issues generally in misleading or deceptive conduct cases, see Graeme S Clarke QC, "Misleading or Deceptive Conduct Cases in the Supreme Court of Victoria" (2015) 89 ALJ 397, 410–416.

[85] *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109; *Henville v Walker* (2001) 206 CLR 459.

> (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.

Section 35(3)(a) of the *CLA (NSW)* is the same. Section 24AF(3) of the *Wrongs Act 1958* provides that:

> (3) A provision of this Part that gives protection from civil liability does not limit or otherwise affect any protection from liability given by any other provision of this Act or by another Act or law.

If the plaintiff's claim against the defendant is reduced by 20% due to the plaintiff's contributory negligence, the starting point for the defendant in seeking to reduce its liability to the plaintiff by a proportionate liability apportionment is only 80% of the plaintiff's claim, not 100%. If the defendant is able to attribute 50% of its liability to the plaintiff to another concurrent wrongdoer, then overall the defendant would be liable for only 40% of the plaintiff's claim, rather than 50%.

However, where the court makes an apportionment in favour of a claimant-defendant, that person cannot then claim contribution against the other concurrent wrongdoer defendant. McDougall J in the Supreme Court of New South Wales explained this in *Dymocks Book Arcade Pty Ltd v Capral Ltd*[86] as follows:

> [19] … The purpose of contribution under s 5 is to adjust rights and liabilities between, on the one hand, defendants to suits who are adjudged to be liable, and, on the other, those who are joined as cross-defendants and are adjudged also to have been liable for the loss in respect of which the defendant is adjudged liable. By contrast, the purpose of Part 4 of the *Civil Liability Act* is to enable that apportionment of liability to occur in the action brought by the plaintiff, whether or not those responsible for any damage suffered by the plaintiff have been joined as concurrent wrongdoers. Thus, as Part 4 of the *Civil Liability Act* works its way out, the judgment given against a concurrent wrongdoer who is a defendant will represent only that concurrent wrongdoer's proportion of responsibility. It will not reflect any proportion of responsibility that the court attributes to any other concurrent wrongdoer. It follows, in my view necessarily, that when a judgment is given against a concurrent wrongdoer in respect of an apportionable claim, that judgment is not one in respect of which the concurrent wrongdoer is entitled to contribution or indemnity from any other concurrent wrongdoer. That is because, on the hypothesis that Part 4 requires to be considered, no other concurrent wrongdoer has contributed to the particular loss which is the particular or apportioned responsibility of the concurrent wrongdoer who is sued and against whom a judgment is given.

Nevertheless, a defendant which makes a proportionate liability plea should also consider making an alternative contribution claim against the other (alleged concurrent wrongdoer) defendant.[87] For one reason or another, the provisions of the relevant proportionate legislation might not be engaged.

Parties and Joinder Applications

If the Court holds that the defendant was responsible for only 40% of the plaintiff's loss and damage, that would be because the Court holds that the other wrongdoer/s is or are 60% responsible. However, the other partially responsible wrongdoer/s have no liability to the defendant as a result of the Court's order limiting the defendant's liability to the plaintiff. Proportionate liability acts as a shield for the defendant as against the plaintiff, but not as a sword for the defendant against a concurrent wrongdoer.

In our example, if the plaintiff has not joined the other wrongdoer/s as defendants and proven its claim for loss and damages against it or them, then the plaintiff only has a judgment for 40% of its loss or damage, and hence it would be 60% short. As a result of this, if a defendant pleads a proportionate liability defence against the plaintiff identifying the factual and legal basis upon which a non-party is also liable for the

[86] *Dymocks Book Arcade Pty Ltd v Capral Ltd* [2010] NSWSC 195, [19]. Equitable and statutory rights of contribution, in the context of the proportional liability statutes, is considered in detail by Rahul Arora, "Contribution between Wrongdoers of Mixed Liability: Discerning the Role of Equity and Statute" (2018) 45 *Australian Bar Review* 130.

[87] The position is different in Western Australia. The provisions of Part 1F of the *Civil Liability Act* 2002 (WA) have the effect of abolishing the statutory right of contribution or indemnity provided by s 7(1) of the *Law Reform (Contributory Negligence and Tortfeasors) Act 1947 (WA)*, because of an amendment to that section made by s 14(2) of the *Civil Liability Amendment Act 2003 (WA)*. See *Fudlovski v JGC Accounting v Financial Services Pty Ltd [No 2]* [2013] WASC 301, [10]–[38] (Kenneth Martin J); *Hart v JGC Accounting & Financial Services Pty Ltd* (2015) 47 WAR 582; [2015] WASCA 22, [13]–[16] (Martin CJ, Newnes & Murphy JJA).

plaintiff's loss and damage as a concurrent wrongdoer, then the plaintiff has an important decision to make: Whether to join the non-party as a defendant, and claim against that person, or not?

The plaintiff may at the outset have been aware of it having a potential claim against the non-party and made a considered decision not to join that person as a defendant because its claim there was weak. Or if the defendant was impecunious, the plaintiff may have decided to take its chances and proceed against the defendant alone notwithstanding that it had a reasonable basis for putting a claim against that other prospective defendant. On the other hand, the plaintiff, after considering the defendant's proportionate liability plea in relation to the non-party, might decide to join the alleged non-party concurrent wrongdoer as a defendant so as to hedge its bets.

It would be an unhappy result for the plaintiff if the defendant established that another solvent person was partially liable for its loss and damage, when the plaintiff had made no allegation of wrongdoing against that person. In other words where a claimant-defendant raises a proportionate liability defence against the plaintiff based upon alleged wrongful conduct by a non-party in relation to it, the plaintiff could take the view that it should join the non-party as a defendant in common cause with the defendant that the non-party was partially responsible to the plaintiff. However, the plaintiff should choose its defendant-targets in accordance with its own views, and not be dictated to by the defendant's conduct as to how best to succeed on liability. The plaintiff likely will be in a better position to assess whether to claim against the defendant's alleged non-party concurrent wrongdoer as a defendant, after considering the material facts and causes of action upon the basis of which the defendant pleads that the other person is also liable to the plaintiff.

Importantly, the definition of "concurrent wrongdoer" does not confine concurrent wrongdoer to persons who are defendants, or other parties to the plaintiff's proceeding. The legislation, where it applies, operates to apportion liability between "the defendant", and other "concurrent wrongdoers". However the various statutory regimes go on to deal with the question parties, but somewhat inconsistently.

Proportionate liability issues may arise in a relatively straightforward manner. A plaintiff may sue two or more defendants seeking an award of damages in respect of loss and damage suffered by it, based on the same cause of action, but where the different conduct of the defendants contributed to the plaintiff suffering that loss or damage. The defendants may be concurrent wrongdoers, the claims may be apportionable ones, the plaintiff may well be aware of that and indeed the plaintiff may concede that. Each of the defendants may allege that the claims made against them should be apportioned so that as against the plaintiff, their liability should be limited in accordance with their comparative responsibility. For the defendants, the plaintiff may have sued all the potential concurrent wrongdoers. If so, no issue would arise as to apportionment with any non-party. Each of the defendants would just seek to limit its liability to the plaintiff because of the conduct of the other defendants. Each defendant would need to plead out, and seek to prove at trial, that the other defendants were concurrent wrongdoers with it such as to justify an apportionment of responsibility among them by the court. Where the various defendants could each meet a judgment against them, an important qualification, it could be in the plaintiff's interests at trial that the various defendants blamed each other in relation to liability to the plaintiff, because that might suggest to the court that the defendants are liable for the plaintiff's loss and damage, and that the only real issue is what the extent of the apportionment of the plaintiff's claim between the defendants.

The court may grant leave to join an alleged concurrent wrongdoer involving an apportionable claim as a defendant to the proceeding: s 24AL(1) of the *Wrongs Act 1958*, s 38(1) of the *CLA (NSW)*, s 87CH(1) of the *CCA*.

The NSW and Commonwealth Acts go on to provide that for the purposes of the legislation the joined person is to be regarded as a "defendant" howsoever the person is joined as a matter of procedure. Section 35(5) of the *CLA (NSW)* and s 87CD(5) of the *CCA* both provide that:

> 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 the rules of court or otherwise.

The question of joinder of a non-party alleged concurrent wrongdoer in relation to a proportionate liability apportionment allegation will arise upon the defendant's application. Importantly, the defendant is only likely to seek to join another solvent alleged concurrent wrongdoer if the defendant, in its view, really needs to do that to seek to make good its proportionate liability apportionment plea. The defendant

is likely to take that view so as to have the benefit of interlocutory processes, such as discovery, against the alleged concurrent wrongdoer, and also because judges are generally reluctant to make findings against a (solvent) person not before the court.[88] It is likely to be contrary the plaintiff's interests for joinder to be ordered, because the plaintiff will not want anything to occur to increase the defendant's chances of limiting its liability.

The non-party may be content to be joined so as to seek to vindicate a position that it had not engaged in any wrongful conduct in relation to the plaintiff, or to seek to protect its reputation. More likely perhaps, the non-party would oppose being joined as a party. There would be little if anything for the non-party to gain from being made a party to the proceeding. It will likely have no interest in the defendant's liability to the plaintiff being reduced, because the non-party would not be adversely affected by that. The non-party would not be at risk of incurring any liability to the defendant if it made good its apportionment plea. However, the non-party could be at risk of incurring liability to the plaintiff, if the plaintiff changed its mind and claimed directly against the non-party as a defendant. The non-party would incur legal costs if joined, at least some of which it might not recoup even if a costs order was made in its favour. Hence for the non-party, there would likely to be no upside to it being dragged into legal proceedings as a third party, or as a defendant.

As to the court's attitude to a non-party joinder application by the defendant, much will depend on the attitudes of respondents to the application, but also upon the particular legislative provisions concerned. In relation to a non-party joinder application by the defendant, differences in the statutory language may lead to differing decisions by the court.

Section 87CD(3)(b) of the *CCA* and s 35(3)(b) of the *CLA (NSW)* both provide that:

> (3) In apportioning responsibility between defendants in the proceedings:
>
> (b) the court *may have regard to* the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings. (emphasis supplied)

The like Victorian provision is materially different. Section 24AI(3) of the *Wrongs Act 1958* states:

> In apportioning responsibility between defendants in the proceeding the court *must not have regard to* the comparative responsibility of any person who is not a party to the proceedings unless the person is not a party to the proceeding because the person is dead or, if the person is a corporation, the corporation has been wound up. (emphasis supplied)

In *Fabfloor (Vic) Pty Ltd v BNY Trust Company of Australia Ltd* (*Fabfloor*),[89] Dixon J of the Supreme Court of Victoria granted a defendant's application to join five alleged concurrent wrongdoers to the proceeding as defendants, over the objection of the plaintiff. The critical reason for the judge in granting the application was s 24I(3) of the *Wrongs Act 1958*:

> [34] The persons that DTM seeks to join as defendants to the proceeding are persons whose presence is necessary to ensure that all questions before the court are effectually and completely determined and adjudicated upon. That such persons must necessarily be parties to the proceeding follows from the limitation in s 24AI(3) of the Act on the Court's power to apportion responsibility between defendants in the proceeding. Because of that limitation on the Court's power, a defendant's proportionate liability defence cannot be effectually and completely determined and adjudicated upon if some of the parties that it alleges are concurrent parties are not parties to the proceedings …
>
> [37] … By permitting an existing defendant to satisfy a procedural limitation that would otherwise constrain the complete and effective adjudication of its defence, the Court can permit a just determination of the issue raised by the amendments.

In other words, procedural limitations should not determine substantive rights. Under the Victorian *Wrongs Act 1958*, a defendant which wanted to allege that a solvent non-party was a concurrent

[88] *Fudlovski v JGC Accounting and Financial Services Pty Ltd (No 2)* [2013] WASC 301, [40], [41], [42] (Kenneth Martin J); compare *Hart v JGC Accounting and Financial Services Pty Ltd* (2015) 47 WAR 582, [40]–[42], [56], [62] (Murphy JA, Martin CJ and Newnes JA agreeing); *Lion-Dairy Drinks Pty Ltd v Sinclair Knight Merz Pty Ltd* [2014] FCA 386, [19] (Griffiths J); *Rivercity Motorway Finance Pty Ltd v AECOM Australia Pty Ltd (No 2)* [2014] FCA 713, [91] (Nicholas J).

[89] *Fabfloor (Vic) Pty Ltd v BNY Trust Company of Australia Ltd* [2016] VSC 99.

wrongdoer with it and that an apportionment of the defendant's liability to the plaintiff should occur as a result, would be shut out from making such a contention at trial if it did not add the non-party as a defendant to the proceeding. It is understandable that given such a statutory regime, the court would be slow to shut the defendant out by refusing its joinder application.

Further Dixon J, in *Fabfloor*, after a detailed consideration of arguably contrary authorities, went on to hold that for the defendant there was no positive requirement to lead some evidence showing that there was substance to the claims proposed, and that the claims are not hopeless.[90] The judge held that:

> [75] It is sufficient for a defendant to establish that the proposed pleadings contain facts or allegations which, if established at trial, could arguably found one or more of the causes of action alleged and that if the Court is satisfied such an arguable case has been put forward, joinder should be allowed.

Where, as under the *CCA* or the *CLA (NSW)*, a defendant can make good a proportionate liability plea against the plaintiff without having to join the concurrent wrongdoer as a party to the proceeding, the ultimate question for the court on a joinder application by the defendant is whether its proportionate liability plea about the non-party's conduct in relation to the plaintiff, can be justly determined without the person being made a party.

The decision of Mortimer J in *Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd*[91] points up the clear difference between the Victorian *Wrongs Act 1958* (joinder of all concurrent wrongdoers necessary), and the Commonwealth *CCA* (joinder not necessary):

> [48] Section 24AI(3) requires that a Court "must not have regard to the comparative responsibility of any person who is not a party to the proceeding". By contrast, s 87CD(4) applies "whether or not all concurrent wrongdoers are parties". In my opinion, it is clear that, on its terms, the proportionate liability provisions in Part VIA of the *Competition and Consumer Act* are irreconcilable with the corresponding provisions in Part IVAA of the *Wrongs Act*. It is an express aspect of the federal scheme that the concurrent wrongdoer need not be a party to a proceeding in which a court makes apportionment orders.

It follows that Part IVAA of the *Wrongs Act 1958* is not applied by ss 79 or 80 of the *Judiciary Act 1903* (Cth) in proceedings in the Federal Court,[92] where the applicant's claim is for s 236 damages for breach of the Commonwealth *ACL*. The difference between these statutory provisions concerning joinder could impact on a plaintiff's decision to sue in respect of misleading or deceptive conduct in the Supreme Court of Victoria, or in the Federal Court. However, where the Federal Court decides a common law claim with a federal claim in exercise of the accrued jurisdiction of that Court, then the relevant State or Territory proportionate liability statute can potentially be engaged.[93]

In *Yeo v Freeman*,[94] the plaintiff liquidators of an insolvent company sued the directors of the company, alleging that they breached their directors' duties of care imposed by s 180 of the *Corporations Act 2001*. The plaintiffs sought compensation for the breaches under s 1317H(1) of the Act. The first defendant applied pursuant to s 24AL(1) of the *Wrongs Act 1958* to join as a defendant to the proceeding the company accountant, to contended that if the plaintiffs' claims concerning the inadequacies of the company's accounts were correct, then the accountant breached the duty of care that she owed to the company and that caused or contributed to the company's losses. The plaintiffs opposed the joinder application. They contended that the *Corporations Act 2001* provided for a proportionate liability regime, but that was confined to claims for misleading or deceptive conduct in contravention of s 1041H, and that that regime did not extend to claims for compensation arising from a breach of director's duties.

Gardiner AsJ dismissed the joinder application, and hence the first defendant's prospective apportionment claim against the company accountant.[95] The judge so held for the following reasons:

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[90] *Fabfloor (Vic) Pty Ltd v BNY Trust Company of Australia Ltd* [2016] VSC 99.

[91] *Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd* (2014) 224 FCR 519.

[92] *Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd* (2014) 224 FCR 519, [51].

[93] *BHPB Freight Pty Ltd v Cosco Chartering Pty Ltd (No 2)* [2008] FCA 1656, [8] (Finkelstein J).

[94] *Yeo v Freeman* [2018] VSC 448.

[95] *Wrongs Act 1958* (Vic) s 24AI(3).

> [47] In my view, the Commonwealth legislation has enacted a scheme which entitles the plaintiffs to recover the damages they are entitled to recover under s 1317H, subject to relief from all or part of that liability under ss 1317S and 1318. I consider that, as with the provisions under consideration in *Dartberg*,[96] the provisions of Pt IVAA are not picked up by s 79 [of the *Judiciary Act 1903* (Cth)] because the provisions of the *Corporations Act* under consideration "otherwise provide." The *Wrongs Act* provisions are not complementary but rather are inconsistent with the scheme of the *Corporations Act* under which the plaintiffs make their claim. Moreover, I cannot conceive of how the proportionate liability provisions could operate alongside s 1317S (and s 1318) which by their terms provide for the grounds on which a defendant to a claim under s 1317H can obtain full or partial relief from liability, a process somewhat akin to apportionment of liability.

The Plaintiff's Claim against a Newly Joined Alleged Concurrent Wrongdoer

Where a defendant has joined another alleged concurrent wrongdoer as a party to the proceeding, the claimant-defendant will have pleaded out the basis upon it alleges that the other concurrent wrongdoer was also liable to the plaintiff in respect of the claimed loss and damage. The plaintiff is not then obliged to sue the other person making the same or any like claims. The plaintiff can wait and see whether the claimant-defendant obtains an apportionment as the plaintiff is entitled to sue the other concurrent wrongdoer later: For example, s 24AK(1) of the *Wrongs Act 1958*. Section 24AK(2) goes on to provide:

> However, in any proceeding in respect of 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 loss or damage, would result in the plaintiff receiving compensation for loss or damage that is greater than the loss or damage actually suffered by the plaintiff.[97]

Where the plaintiff does seek to sue the other concurrent wrongdoer, it must plead out the cause of action which it relies upon. In *Coi Building Group Pty Ltd v 100 Percent Plumbing Ltd*[98] the first defendant joined two other defendants, alleging that they were also concurrent wrongdoers if it was liable to the plaintiff. The plaintiff sought leave to file an amended statement of claim, to the effect that if the first defendant obtained an apportionment against the second and/or third defendant, then it would claim judgment against the second and/or third defendant in accordance with the Court's determination.

Vickery J refused the application for leave to amend. The plaintiff did not squarely allege causes of action against the second and third defendants, but only advanced claims contingent upon the first defendant obtaining an apportionment. Such "fence sitting" was not permissible. The second and third defendants at trial were entitled to know whether the plaintiff was making a claim against them, on the basis of what facts and causes of action, and what loss and damage claim was made. In effect, if the plaintiff did not choose to sue the second and third defendants directly, it would be obliged to take separate proceedings against them after the plaintiff had recovered the reduced judgment against the first defendant because of the court's apportionment against the second or third defendants, if that occurred. As a matter of practice it is likely to be in the plaintiff's interests to make a claim against the newly joined parties directly, unless the claimant-defendant's apportionment claim is hopeless.

Conclusion

Proportionate liability is a conceptually difficult, but substantive, part of the law in commercial cases. The key messages which emerge, I suggest, are that:

(a) very close attention to the wording of the applicable statutory regime is necessary;
(b) care should be taken in the application of decisions on the provisions in other States, or federally, where the statutory language is different; and that
(c) in applying the statutory provisions and the cases decided in relation to them, one should be mindful of the judicial disagreements that persist.

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[96] *Dartberg Pty Ltd v Wealthsure Financial Planning Pty Ltd* (2007) 164 FCR 450, [32]–[36], (Middleton J).

[97] The like provisions of *Australian Securities and Investments Commission Act 2001* (Cth) s 12GU are considered in detail by Rares J in *City of Swan v McGraw-Hill Companies Inc* (2014) 223 FCR 295, [46]–[75].

[98] *Coi Building Group Pty Ltd v 100 Percent Plumbing Ltd* [2017] VSC 418.