



## Proportionate liability — An update

*Cameron Macaulay SC and Tony Horan\**

*The purpose of this article is to provide an update to practitioners on the developing law and procedure of proportionate liability as it applies to multi-party, non-personal injury compensation claims.<sup>1</sup>*

Under the proportionate liability scheme a plaintiff is, in effect, suing each concurrent wrongdoer separately and recovers a separate judgment against it.

Byrne J, *Gunston v Lawley* (2008) 20 VR 33; [2008] VSC 97; BC200802799 at [65].

### Introduction

Proportionate liability is one answer to the question: Who bears the risk when one of the defendants cannot meet its liability to pay damages to the plaintiff?

In cases where joint and several liability applies to a number of defendants, such as defendants held liable for causing personal injury, those defendants possessing sufficient assets or insurance to cover the judgment amount bear that risk. This has encouraged plaintiffs to sue ‘deep pocket’ defendants who, even if they are only marginally liable, are required to underwrite the whole of the loss suffered by the plaintiff.

For a defendant who is entitled to the protection of proportionate liability, the risk is transferred to the plaintiff. The defendant only pays that part of the plaintiff’s loss which is apportioned against it. Where that defendant is indemnified by an insurer, the insurer is only required to cover the loss for which that defendant is responsible. The legislature’s aim was to make insurance more affordable and available to the community.<sup>2</sup>

This article summarises how proportionate liability works, taking into account the guidance received from the courts to date. Two key topics will then be addressed: the procedures required under Victorian and other relevant legislation in order for a defendant to attract proportionate liability, and

\* Members of the Victorian Bar. This article is based on a paper presented at The Victorian Bar, Commercial Bar Association, Insurance & Professional Negligence Section, Continuing Professional Development.

1 Proportionate liability applies in Australian states and territories under Wrongs Act 1958 (Vic) Pt IVAA; Civil Liability Act 2002 (NSW) Pt 4; Civil Liability Act 2002 (WA) Pt 1F; Civil Liability Act 2003 (Qld) Ch 2 Pt 2; Civil Law (Wrongs) Act 2002 (ACT) Ch 7A; Civil Liability Act 2002 (Tas) Pt 9A; Proportionate Liability Act 2005 (NT); Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA). It applies under the following Commonwealth legislation: Trade Practices Act 1974 Pt VIA ss 87CB–87CI; ASIC Act 2001 subdiv GA ss 12GP–12GW; Corporations Act 2001 Div 2A ss 1041L–1041S. Proportionate liability also applies to some building disputes under the Development Act 1993 (SA) s 72, and the Building Act 2004 (ACT) s 141.

2 Second Reading Speech to the Wrongs and Limitation of Actions Acts (Insurance Reform) Bill 2003, Victoria, Legislative Council, Parliamentary Debates, *Hansard*, 10 June 2003, pp 2076–83 particularly pp 2080–1 per Minister for Finance, Mr Lenders. The same second reading speech was given in the Legislative Assembly, Parliamentary Debates, *Hansard*, 21 May 2003, pp 1781–8 particularly p 1785 per Premier Bracks. See also *Woods v De Gabriele* [2007] VSC 177; BC200704554 at [50] per Hollingworth J.

problems and solutions when settling claims which may be subject to proportionate liability. References are to sections of Pt IVAA of the Wrongs Act 1958 (Vic) unless stated otherwise.

### How does it work?

When considering whether proportionate liability applies to a compensation claim against a particular defendant, ask three questions:

- (1) Is it an apportionable claim against that defendant?
- (2) Is that defendant a concurrent wrongdoer?
- (3) Does the legislation exclude that defendant's entitlement to have its liability apportioned?

If proportionate liability responds to a claim against a defendant, the next issue is to consider what criteria the courts will apply in making that apportionment.

#### Question 1 — Is the claim an 'apportionable claim'?

Proportionate liability under Pt IVAA of the Wrongs Act 1958 only applies to an 'apportionable claim' as defined under s 24AF(1):

##### **24AF Application of Part**

- (1) This Part applies to —
  - (a) a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care; and
  - (b) a claim for damages for a contravention of section 9 of the Fair Trading Act 1999.

The elements of an apportionable claim under Pt IVAA are:

- (a) 'a claim for economic loss or damage to property'. To date, the courts have mainly considered proportionate liability in the context of economic loss claims. As discussed below, the fact that proportionate liability also applies to claims for damage to property has potentially significant ramifications; for example, for property damage claims arising from the Victorian bushfires in February 2009;
- (b) 'in an action for damages'. The definition under s 24AE is: 'damages includes any form of monetary compensation'. This would at least appear to ensure that actions for compensatory awards at law (damages), in equity (compensation) and under statute (when designated to be compensatory) attract the operation of the Part. This issue is already controversial:
  - (i) In *Commonwealth Bank of Australia v Witherow*<sup>3</sup> (*Witherow*), the Victorian Court of Appeal held that the bank's claim against the defendant for payment of \$150,606.90 under a deed of guarantee was not an apportionable claim, because inter alia it was not a claim 'in an action for damages' but a claim for a sum certain;

---

3 [2006] VSCA 45; BC200600995 at [10] per Maxwell P, Buchanan JA and Redlich AJA.

- (ii) In *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd*<sup>4</sup> (*Dartberg*), Middleton J took the contrary view. In referring directly to *Witherow*, his Honour stated that the extended definition of ‘damages’ meant that proportionate liability would apply to claims for a sum certain;

Perhaps a distinction needs to be drawn between an action for a liquidated sum which, under a contract, is a genuine pre-estimate of loss (thus compensatory and therefore ‘damages’), and an action under a contract for, say, the price of goods (not compensatory, and thus not ‘damages’). Also, because it seems that the relief must be compensatory in nature (ie, seeking to address the plaintiff’s loss) that requirement may exclude a claim in the nature of restitution (ie, seeking to address the defendant’s gain).

In *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd*<sup>5</sup> (*Wealthcare*), Cavanough J considered that an ‘action’ refers to legal proceedings ‘in court and closely comparable proceedings’ such as before a tribunal, but not a panel appointed by the Financial Industry Complaints Service (FICS) to determine a compensation claim against a financial planner.

This was because a FICS panel must do ‘what in its opinion is fair in all the circumstances, having regard to . . . any applicable legal rule or judicial authority’.<sup>6</sup>

By contrast, in *Aquagenics Pty Ltd v Break O’Day Council (No 2)* (*Aquagenics*), Blow J held that commercial arbitrations are subject to proportionate liability on the basis of an implied term in arbitration agreements by which the arbitrator has authority to give the same relief as would be available to a court of law.<sup>7</sup> Surprisingly, the court did not refer to the statutory requirement that an arbitrator must make a determination according to law, unless the parties to the arbitration otherwise agree in writing that the arbitrator may make determinations ‘by reference to considerations of general justice and fairness’.<sup>8</sup>

- (c) ‘(whether in tort, in contract, under statute or otherwise)’. The legislature intends for proportionate liability to apply in a broad range of situations, not merely common law claims in contract or tort. For example, proportionate liability would appear to govern a claim under a statutory right to damages pursuant to s 16 of the Water Act 1989 (Vic).<sup>9</sup> However, ‘under statute’ does not refer to

4 (2007) 164 FCR 450; 244 ALR 552; [2007] FCA 1216; BC200706483 at [17].

5 (2009) 69 ACSR 418; [2009] VSC 7; BC200900112 at [37].

6 *Ibid*, at [25].

7 [2009] TASSC 89; BC200908988 at [21] citing *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 167 per Gleeson CJ; 131 FLR 422; (1996) ATPR 41-489; BC9601669.

8 Commercial Arbitration Act 1986 (Tas) s 22 (uniform legislation). The issue is addressed in depth by Michael Whitten in ‘Arbitration, Apportionment and Pt IVAA of the Wrongs Act 1958 (Vic)’, Victorian Bar CLE Paper, 18 April 2007.

9 This may resolve the problem for respondents held to be jointly liable under s 16 of the

Commonwealth legislation. In *Dartberg*, Middleton J held that Commonwealth legislation is not subject to proportionate liability under Victorian law.<sup>10</sup>

- (d) ‘arising from a failure to take reasonable care’. It seems reasonably settled that, in determining whether a defendant is entitled to be protected by proportionate liability, the courts will not only consider the form of the claim against it, but also the substance of that claim. In *Dartberg*, Middleton J stated:

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 IVA.<sup>11</sup>

In *Reinhold v New South Wales Lotteries Corporation (No 2)*<sup>12</sup> (*Reinhold*), Barrett J endorsed Middleton J’s view, stating:

I respectfully agree that a claim may properly be regarded as one ‘arising from a failure to take reasonable care’ if, ‘at the end of the trial’, the evidence warrants a finding to that effect and regardless of the absence of ‘any plea of negligence or a “failure to take reasonable care”’. The nature of the claim, for the purposes of Part 4 [of the Civil Liability Act 2002 (NSW)], is to be judged in the light of the findings made and is not determined by the words in which it is framed.<sup>13</sup>

In *Godfrey Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd*<sup>14</sup> (*Spowers*), Ashley JA of the Victorian Court of Appeal referred to the above passage from *Reinhold* with approval.<sup>15</sup>

In *Witherow*, the Commonwealth Bank sued the defendant on the basis of a deed of guarantee. The Victorian Court of Appeal held that the claim did not arise ‘from a failure to take reasonable care’ because the bank was, in effect, seeking specific performance of the contract of guarantee.<sup>16</sup> In *Pearsons v Avison*<sup>17</sup> (*Pearsons*), Buchanan JA of the Victorian Court of Appeal stated: ‘I doubt that a claim for breach of trust, albeit one seeking equitable compensation, falls within the description in s 24AF(1) of the Wrongs Act as “arising from a failure to take reasonable care”’.<sup>18</sup> For the same reason, in

---

Water Act 1989 who arguably could not rely upon s 23B of the Wrongs Act 1958 in seeking contribution or indemnity from each other: *Turner v Bayside City Council* [2000] VCAT 399 at [30] per Macnamara DP.

10 *Dartberg* (2007) 164 FCR 450; 244 ALR 552; [2007] FCA 1216; BC200706483 at [32]–[36] followed by Hansen J in *Rod Investments (Vic) Pty Ltd v Abeyratne (No 2)* [2009] VSC 278; BC200905824 at [49] and by Finkelstein J in *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)* [2008] FCA 1656; BC200809892 at [8] (*BHPB Freight*).

11 *Ibid*, at [30].

12 [2008] NSWSC 187; BC200801327 at [30].

13 See also *Woods v De Gabrielle* [2007] VSC 177; BC200704554 (*Woods*) at [58] per Hollingworth J.

14 (2008) 21 VR 84; [2008] VSCA 208; BC200809232 per Nettle, Ashley and Neave JJA.

15 *Ibid*, at [108]. See also *Solak v Bank of Western Australia Ltd* [2009] VSC 82; BC200901550 (*Solak*) at [35] per Pagone J.

16 *Ibid*, at [11] and [14] per Maxwell P.

17 [2009] VSCA 54; BC200901901 per Warren CJ, Buchanan and Ashley JJA.

18 *Ibid*, at [30].

*BHPB Freight*, Finkelstein J held that a claim for breach of warranty of authority is not an apportionable claim.<sup>19</sup>

- (e) And ‘a claim for damages for a contravention of s 9 of the Fair Trading Act 1999’. Damages are available under ss 158(2)(e) and 159 of the Fair Trading Act 1999 (FTA) for contravening s 9 by engaging, in trade or commerce, in conduct which is misleading and deceptive or is likely to mislead or deceive. It remains unclear whether proportionate liability only applies to claims expressly made for a contravention of s 9 of the FTA, or whether it is sufficient to prove (as part of the defence) that the claim could in fact have been made under s 9, even if the plaintiff might be pursuing compensation under some other section of the FTA or some other cause of action. In *Woods*, Hollingworth J said that it was ‘at least arguable’ that a damages claim made for contravention of ss 12(e) and 12(n) of the FTA might constitute an apportionable claim if the conduct in fact contravened s 9.<sup>20</sup> In *Woods*, her Honour was only deciding an interlocutory application and so was not required to make a final determination on the issue.

The Trade Practices Act 1974 (Cth) (TPA) defines an ‘apportionable claim’ as follows:

**87CB Application of Part**

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

- (a) economic loss; or
- (b) damage to property;

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

‘Apportionable claim’ is defined in the same way under s 1041L of the Corporations Act 2001 (Cth), and s 12GP of the Australian Securities and Investments Commission Act 2001 (ASIC Act), in each case applying to damages claims for misleading and deceptive conduct in contravention of that legislation.<sup>21</sup>

Section 87CB of the TPA refers to a claim ‘*caused by conduct that was done in a contravention of section 52*’.<sup>22</sup> Accordingly, there is an argument to say that, provided the defendant’s conduct in fact contravened s 52 of the TPA, the claim is apportionable even though the plaintiff did not allege that the defendant contravened that section but, for example, pleaded the claim as a contravention of s 53. It seems possible that substance could override form in relation to claims alleging misleading and deceptive conduct under the TPA,

19 [2008] FCA 1656; BC200809892 at [9]. However, while it is true that a breach of warranty of authority does not *depend* on showing the defendant failed to act with reasonable care, the warranty may *in fact* have been breached due to carelessness. Arguably then, on the test stated in *Reinhold* above, it would be necessary to await the end of the trial to determine this point.

20 *Ibid*, at [51].

21 For damages sought under s 82 for contravention of s 52 of the TPA, under s 1041I for contravention of s 1041H ASIC Act, and under s 12GF for contravention of s 12DA of the Corporations Act.

22 Emphasis added. Section 24AF(1)(b) is more restrictive, referring to a claim ‘*for a contravention of section 9*’.

Corporations Act and the ASIC Act using a similar analysis as has been employed in respect of the requirement in other regimes that a claim must arise from a failure to take reasonable care. Interestingly, however, that was not the view of Middleton J in *Dartberg*.<sup>23</sup>

However, the TPA specifically states that proportionate liability under Pt VIA applies if the claim 'is a claim for damages made under section 82'.<sup>24</sup> This appears to be prescriptive. The claim is either made under that section or it is not. Accordingly, by pursuing damages under s 87 of the TPA a plaintiff may argue that proportionate liability does not apply. In *BHPB Freight*, Finkelstein J expressed this view.<sup>25</sup> The main distinction between the two sections is that under s 82, the limitation period commences from the time when actual loss or damage is suffered, whereas under s 87, it commences from the time when loss or damage is likely to have been suffered.<sup>26</sup>

Legislation in other states and territories vary from the Victorian provisions. Most notably, Queensland uses the more restrictive term 'arising from a breach of a duty of care', rather than 'arising from a failure to take reasonable care'.<sup>27</sup> South Australian legislation uses different nomenclature, referring to 'apportionable liability'.<sup>28</sup>

Where there are two or more apportionable claims from different causes of action in the one proceeding, the court must treat them as a single claim when determining liability under Pt IVAA: s 24AF(2).

Where the proceeding involves a mixture of apportionable and non-apportionable claims (for instance a no fault contractual claim and a negligence claim), then the liability for each type of claim should be dealt with by the court separately: s 24AI(2).

However, in *Woods*,<sup>29</sup> Hollingworth J identified a difficulty in clarifying the meaning of ss 1041L(2) and 1041N(2) of the Corporations Act regarding how the courts should treat mixed claims.<sup>30</sup>

Section 1041L(2) provides that:

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).

Section 1041N(2) provides that:

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

23 See *Dartberg* (2007) 164 FCR 450; 244 ALR 552; [2007] FCA 1216; BC200706483 at [19] where Middleton J opined that proportionate liability was not available when the contravention alleged was s 12DB of the ASIC Act (the analogue of s 53 of the TPA).

24 By contrast, s 24AF(1)(b) does not refer to remedial ss 158 or 159 of the FTA.

25 [2008] FCA 1656; BC200809892 at [9].

26 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 543; 109 ALR 247; (1992) ATPR 41-189; BC9202700 per Deane J.

27 Civil Liability Act 2003 (Qld) s 28(1).

28 Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) ss 3, 4 and 8.

29 [2007] VSC 177; BC200704554 at [31]–[36].

30 And the following equivalent provisions: ASIC Act ss 12GP(2) and 12GR(2), and TPA ss 87CB(2) and 87CD(2).

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

In *Woods*, the defendants argued that s 1041L(2) meant that ‘all of the claims in the proceeding that are in respect of the same loss are a single apportionable claim, regardless of whether they are individually apportionable claims’.<sup>31</sup> Such a construction could broaden the scope of proportionate liability significantly; provided that at least one claim in a proceeding was apportionable, all claims in respect of the relevant loss would then be subject to an apportionment. Arguably, this conflicts with s 1041N(2) which addresses a situation where a proceeding involves apportionable and non-apportionable claims. Her Honour did not make a determination on this issue but commented that ‘s 1041L(2) may ultimately be held not to have the meaning for which the defendants contend’.<sup>32</sup>

## Question 2 — Is the defendant a ‘concurrent wrongdoer’?

For a defendant to have its liability for an apportionable claim limited it must point to others who must also bear responsibility. The defendant must establish that it is a concurrent wrongdoer, as defined under s 24AH(1):

### **24AH Who is a concurrent wrongdoer?**

- (1) A concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim.

The defendant who wishes to attract proportionate liability must point to other parties whose acts or omissions caused the loss or damage which is the subject of the claim against that defendant. This includes concurrent wrongdoers who are insolvent, are being wound up, have ceased to exist or have died.<sup>33</sup>

However, it is not enough just to establish that the other parties also caused or contributed to the plaintiff’s loss or damage. The courts have held that a defendant must also prove that the other concurrent wrongdoers are legally liable to the plaintiff for that loss or damage. After all, they are described as ‘wrongdoers’. In *Shrimp v Landmark Operations Ltd*<sup>34</sup> (*Shrimp*), Besanko J held that the word ‘caused’ (in the equivalent s 87CB(3) of the TPA) ‘should be read as meaning such as to give rise to a liability in the concurrent wrongdoer to the plaintiff or applicant’.<sup>35</sup>

The courts have reasoned that it was not parliament’s intention to deprive a plaintiff from having full recourse against all concurrent wrongdoers. This

---

<sup>31</sup> [2007] VSC 177; BC200704554 at [33].

<sup>32</sup> *Ibid*, at [37].

<sup>33</sup> Section 24AH(2).

<sup>34</sup> (2007) 163 FCR 510; [2007] FCA 1468; BC200708057.

<sup>35</sup> *Ibid*, at [62]. See also *Dartberg* (2007) 164 FCR 450; 244 ALR 552; [2007] FCA 1216; BC200706483 at [40]; *Chandra v Perpetual Trustees Victoria Ltd* (2007) 13 BPR 24,675; (2007) NSW ConvR 56-187; [2007] NSWSC 694; BC200705487 (*Chandra*) at [110] per Bryson AJ and *S Sali & Sons Pty Ltd v Metzke and Allen* [2009] VSC 48; BC200900775 (*Sali*) at [282] per Whelan J.

right of recourse can only be available if a concurrent wrongdoer is, by definition, a party who is legally liable to the plaintiff because otherwise a plaintiff's recovery could be diminished by reference to the responsibility of persons whom it could never sue.

This requirement of legal liability effectively limits the number of parties that a defendant can point to as concurrent wrongdoers. In a claim for pure economic loss a defendant may find difficulty in establishing that another party also owed the plaintiff the requisite duty of care.<sup>36</sup> However, where the plaintiff's claim against a defendant is for property damage, there is much greater scope for that defendant to prove that another party also caused and was liable for the plaintiff's loss, because the defendant is only required to establish that the damage was reasonably foreseeable by that other party.<sup>37</sup>

In *Yates v Mobile Marine Repairs Pty Ltd*<sup>38</sup> (*Yates*), the plaintiff alleged that the first defendant (engine repairer) and the second defendant (MAN Australia, the engine manufacturer) were liable for the negligent repair of the plaintiff's game fishing vessel. The plaintiff submitted that proportionate liability did not apply because MAN Australia was not a concurrent wrongdoer. While the first defendant did physical work, MAN Australia's liability was exclusively contractual; it did not cause the loss by its 'acts or omissions'.<sup>39</sup> Palmer J dismissed the argument:

I do not accept . . . that MAN Australia's breach of contract was not an 'omission' causing Mr Yates' loss. The contract imposed an obligation on MAN Australia to ensure that the work was done properly. It 'omitted' to perform a contractual duty which, if performed, would have prevented the loss. In my opinion, a breach of contractual duty to ensure that work is done properly by others, whether employees, agents or independent contractors, is an 'omission' within s 34(2) CLA [Civil Liability Act 2002 (NSW) equivalent to Wrongs Act, s 24AH(1)] such as may make a contract breaker a concurrent wrongdoer within the operation of Part IV CLA.<sup>40</sup>

If a concurrent wrongdoer is defined as one who has been held to be causally responsible and legally liable for the plaintiff's loss or damage, is it possible for the plaintiff artificially to avoid proportionate liability by:

- releasing that wrongdoer from liability;
- settling with that wrongdoer for a nominal sum including terms of release; or
- allowing its right of action against that wrongdoer to lapse and become statute barred,

particularly when that wrongdoer has little or no assets or insurance?

36 Taking into account the various salient features of the relationship between the plaintiff and that other party, particularly the vulnerability of the plaintiff to suffer harm because of that other party's conduct. See *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529 at 576–8; 11 ALR 227; 51 ALJR 270; BC7600087 per Stephen J; *Perre v Apand Pty Ltd* (1999) 198 CLR 180; 164 ALR 606; [1999] HCA 36; BC9904592 per Gummow J; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; 205 ALR 522; [2004] HCA 16; BC200401482 at [22] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

37 *Bryan v Maloney* (1995) 182 CLR 609 at 619; 128 ALR 163; [1995] HCA 17; BC9506413 per Mason CJ, Deane and Gaudron JJ.

38 [2007] NSWSC 1463; BC200710991.

39 *Ibid*, at [92].

40 *Ibid*, at [98].

The courts are yet to consider this issue directly. It seems that a plaintiff should not be entitled to defeat the purpose of the legislation by adversely affecting the right of a defendant to limit its liability by reference to concurrent wrongdoers, particularly where they are impecunious. It may be argued that the courts' requirement of legal liability is satisfied even where the plaintiff then extinguishes that liability by its own conduct or inaction.<sup>41</sup>

Section 24AH(1) requires the defendant to prove that the concurrent wrongdoers each caused 'the loss and damage that is the subject of the claim'. By comparison, in establishing a right to claim contribution under s 23B of the Wrongs Act, a defendant must demonstrate that the other party is liable to the plaintiff in respect of 'the same damage'. In *Quinerts*, the Victorian Court of Appeal held that these phrases have the same meaning.<sup>42</sup> The court held that a valuer sued by a bank for negligent valuation of a property could not have its liability limited by reference to the borrower and the guarantor as concurrent wrongdoers. The damage was not the same. The loss caused by the borrower and the guarantor was their failure to repay the loan, whereas the loss caused by the valuer was the bank's failure to take adequate security over the loan.<sup>43</sup>

In *Spowers*,<sup>44</sup> Ashley JA held that a party only has status as a concurrent wrongdoer *upon* the entry of judgment. As discussed below, this is relevant where the plaintiff settles with a defendant and so there will be no judgment against it.

### Question 3 — Does the legislation exclude the defendant's entitlement?

There appear to be three general categories of claims which are excluded from proportionate liability:

- claims and liability beyond the usual liability to compensate for negligence, including claims involving a finding of fraud,<sup>45</sup> and liability to pay exemplary or punitive damages.<sup>46</sup> In all jurisdictions except Victoria, intentional conduct is also excluded.
- claims involving particular legal relationships; namely, vicarious liability,<sup>47</sup> principal and agent<sup>48</sup> and partnerships;<sup>49</sup>

41 In *St George Bank Ltd v Quinerts Pty Ltd* [2009] VSCA 245; BC200909697 (*Quinerts*) at [64], Nettle JA indicated that a concurrent wrongdoer may be a person who is not presently liable but who was previously liable and has since ceased to exist. Similarly, the courts might hold that a person is a concurrent wrongdoer provided that it was previously liable to the plaintiff even if that liability was subsequently extinguished by conduct of the plaintiff.

42 *Ibid*, at [68] per Nettle JA. The court acknowledged that it took a different approach from the NSW Supreme Court in *Vella v Permanent Mortgages Pty Ltd* (2008) 13 BPR 25,343; [2008] NSWSC 505; BC200803886. The meaning of 'same damage' was considered by the High Court of Australia in *Alexander v Perpetual Trustees WA Ltd* (2003) 216 CLR 109; (2004) 204 ALR 417; [2004] HCA 7; BC200400244 at [26]–[27].

43 *Ibid*, at [76] per Nettle JA.

44 (2008) 21 VR 84; [2008] VSCA 208; BC200809232 at [98], [105], [106].

45 Section 24AM.

46 Section 24AP(d).

47 Section 24AP(a).

48 Section 24AP(b).

- claims specifically excluded by statute, including claims arising out of an injury<sup>50</sup> and claims under various statutes.<sup>51</sup>

Section 24AM has uncertain consequences. It provides as follows:

**24AM What if a defendant is fraudulent?**

Despite sections 24AI and 24AJ, a defendant in a proceeding in relation to an apportionable claim who is found liable for damages and against whom a finding of fraud is made is jointly and severally liable for the damages awarded against any other defendant in the proceeding.

It is unclear whether there needs to be a connection between the fraud and the apportionable claim. Furthermore, this provision seems to impose joint and several liability even if it would not be the case under the common law. It is also unclear whether the defendant would be jointly and severally liable even in respect of those defendants who had a separate liability to the plaintiff in the one proceeding.

The most controversial exclusion is not included in Victorian legislation. In New South Wales, Western Australia and Tasmania, parties may be permitted to exclude proportionate liability by contract.<sup>52</sup> By contrast, Queensland expressly prohibits contracting out.<sup>53</sup> These provisions are yet to be tested by the courts.

In Queensland and the Australian Capital Territory, proportionate liability does not apply to a claim by a ‘consumer’.<sup>54</sup>

## Apportioning liability

If a defendant qualifies as a concurrent wrongdoer who is subject to an apportionable claim which is not excluded under the Act, then the court applies s 24AI in making an apportionment.

Section 24AI(1) provides:

**24AI Proportionate liability for apportionable claims**

- (1) In any proceeding 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 loss or damage claimed that the court considers just having regard to the extent of the defendant’s responsibility for the loss or damage; and
  - (b) judgment must not be given against the defendant for more than that amount in relation to that claim.

Under s 24AE, ‘defendant’ is broadly defined as including ‘any person joined as a defendant or other party in the proceeding’ other than the plaintiff. This would include a plaintiff as defendant to a counterclaim.

In determining the extent to which a defendant’s liability, in respect of an

---

49 Section 24AP(c).

50 Section 24AG(1).

51 Sections 24AG(2) and 24AP(e).

52 Civil Liability Act 2002 (NSW) s 3A(2); Civil Liability Act 2002 (WA) s 4A and Civil Liability Act 2002 (Tas) s 3A(3).

53 Civil Liability Act 2003 (Qld) s 7(3).

54 Civil Liability Act 2003 (Qld) s 28(3)(b); Civil Law (Wrongs) Act 2002 (ACT) s 107B(3)(b).

apportionable claim, should be limited by what the court considers ‘just’, the courts have generally applied the principles in *Podrebersek v Australian Iron & Steel Pty Ltd*<sup>55</sup> by comparing ‘the culpability of the parties, and also the relative importance of their acts in causing the injury which is the subject of the claim’.<sup>56</sup>

According to Whelan J in *Sali*,<sup>57</sup> culpability does not connote moral blameworthiness, but ‘the degree of departure from the required standard’. In *Solak*,<sup>58</sup> Pagone J considered that moral blameworthiness was not the overriding criterion in apportioning liability.

Uniquely under s 24AI(3) of the Victorian legislation, when apportioning liability:

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

Accordingly, for a defendant to have its liability limited under Pt IVAA of the Wrongs Act by reference to other concurrent wrongdoers, it must have them joined as parties to the proceeding, unless they are a corporation which has been wound up, or a person who has died. The phrase ‘has been wound-up’ is not defined, but probably refers to a company which has been deregistered.

While s 24AI(3) refers to a corporation which ‘has been wound-up’, in defining ‘concurrent wrongdoers’, s 24AH(2) refers to a corporation which ‘is insolvent, is being wound up, has ceased to exist . . .’.<sup>59</sup> Accordingly, in order to attract the protection of proportionate liability, it appears necessary for a corporation to be joined to the proceeding where it is ‘being wound up’ but it is unnecessary where the corporation ‘has been wound up’. Procedural issues arising from this are addressed below.

There is a linguistic anomaly within s 24AI. Section 24AI(1) directs the court to limit the liability of ‘a defendant’, having regard to the extent of its responsibility for the loss and damage. By contrast, s 24AI(3) provides that, in apportioning responsibility ‘between defendants’, the court may only have regard to the comparative responsibility of parties to the proceeding (except where the party is dead or has been wound up). Taken literally, this might bring the conclusion that if there is only one defendant there is no need to join

---

55 (1985) 59 ALR 529; 59 ALJR 492 at 494; [1985] HCA 34; BC8501090 per Gibbs CJ, Mason, Wilson, Brennan and Deane JJ. See also *Alcoa Portland Aluminium Pty Ltd v Husson* (2007) 18 VR 112; [2007] VSCA 209; BC200708642 at [86] per Chernov JA. *Podrebersek* has been specifically referred to in proportionate liability claims by Barrett J in *Reinhold* [2008] NSWSC 187; BC200801327 at [50]–[51]; by Young CJ in *Vella v Permanent Mortgages Pty Ltd* (2008) 13 BPR 25,343; [2008] NSWSC 505; BC200803886 (*Vella*) at [579] and [591]; by Kaye J in *Spiteri v Roccisano* [2009] VSC 132; BC200902414 (*Spiteri*) at [105]; by Hoeben J in *Ginelle Finance Pty Ltd v Diakakis* (2007) ANZ ConvR 278; (2007) NSW ConvR 56-174; [2007] NSWSC 60; BC200701204 (*Ginelle*) at [123], and by Whelan J in *Sali* [2009] VSC 48; BC200900775 at [290]–[294]. In *Yates* [2007] NSWSC 1463; BC200710991 at [94], Palmer J applied the same principles.

56 *Spiteri* [2009] VSC 132; BC200902414 at [105].

57 [2009] VSC 48; BC20090775 at n 32.

58 [2009] VSC 82; BC200901550 at [45].

59 Strangely, ‘wound-up’ is hyphenated in s 24AI(3) but not in s 24AH(2).

a concurrent wrongdoer in order to have that wrongdoer's responsibility taken into account, but the reverse applies if there are two or more defendants. This is an unlikely distinction. It was surely not the intention of the legislature.

### Procedure

The procedure by which proportionate liability is dealt with by the courts remains unresolved, although the courts have provided some guidance.

Essentially, proportionate liability grants relief to a defendant. When apportioning liability, a court *limits* a defendant's liability. Hence, the relevant defendant is really pointing to the concurrent wrongdoers' relative responsibility for the plaintiff's loss as a form of defence. The defendant has the onus of establishing the basis upon which the court should order that the defendant's liability be limited by reference to the responsibility of other concurrent wrongdoers for the loss and damage.

Provided that the criteria outlined above are satisfied, it appears that the courts are bound to apply proportionate liability.<sup>60</sup> This seems to be mandated under s 24AI(1)(b) which provides that a court must not give judgment against a defendant for more than the limited liability as determined under Pt IVAA. There are two exceptions:

- (a) As mentioned above, under s 24AI(3), if a defendant wants to have the court take into account particular concurrent wrongdoers when determining its liability, then the defendant must bring them before the court as parties to the proceeding, except where the concurrent wrongdoer is a corporation which has been wound up or a person who has died (Victorian Model);
- (b) Under all other Australian proportionate liability legislation, a defendant who wishes to have liability limited by reference to other concurrent wrongdoers must notify the plaintiff accordingly or face costs penalties (National Model).<sup>61</sup> The defendant is not required to have them joined to the proceeding. Although the legislation does not exclude a defendant from an apportionment where it has failed to give notice, in the absence of such information, the court may conceivably find there is insufficient evidence upon which to attribute responsibility to such concurrent wrongdoers, or may strike out the defendant's claim for such relief.

The effect of the Victorian Model is that the defendant determines who might be added to a proceeding after its commencement for the purposes of an apportionment of liability. Under the National Model, a defendant must provide information about the concurrent wrongdoers in its pleadings, but the

---

<sup>60</sup> Barrett J in *Reinhold* [2008] NSWSC 187; BC200801327 at [32] stated:

The provisions of Part 4 [of the Civil Liability Act 2002 (NSW)] 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.

<sup>61</sup> See, eg, s 87CE of the TPA.

plaintiff decides whether to pursue a claim against those parties, taking into account the costs and risks of doing so.

Given that under s 24AI(1)(b) a court must not give judgment against a defendant to an apportionable claim for more than the apportioned amount, it appears therefore that a court cannot enter default judgment in the usual way against such a defendant; eg, for failure to file a defence.<sup>62</sup>

The question whether proportionate liability is substantive law or a matter of procedure has drawn differing views. In *BHPB Freight*,<sup>63</sup> Finkelstein J described as ‘controversial’ Middleton J’s assumption in *Dartberg* that proportionate liability was a matter of procedure (if indeed that assumption was made). In so far as the distinction is relevant, the High Court’s statement that all ‘laws that bear upon the existence, extent or enforceability of remedies, rights and obligations should be characterized as substantive and not as procedural laws’<sup>64</sup> would appear to make it sufficiently clear that proportionate liability laws are substantive.

### The Victorian model — joining concurrent wrongdoers

Under the Victorian Model, how does a defendant apply to join other concurrent wrongdoers to a proceeding? The application can be made under s 24AL which grants to the court power to give leave for the joinder of persons ‘who are concurrent wrongdoers’ in relation to an apportionable claim.<sup>65</sup> The application may also be made under r 9.06 of the Supreme Court (General Civil Procedure) Rules 2005 (Supreme Court Rules) on the basis that the concurrent wrongdoer is a necessary party. This was the procedure used under previous proportionate liability legislation.<sup>66</sup>

It is important to note that the defendant seeking the apportionment is not making a claim against the concurrent wrongdoers. Accordingly, the defendant is merely bringing concurrent wrongdoers to the proceeding as required by s 24AI(3). There is no claim, and so the defendant is not seeking monetary relief from the concurrent wrongdoers. It is for this reason that the courts have consistently held that it is inappropriate to have concurrent wrongdoers joined by third party notice; they should be joined as

62 Justice David Byrne, ‘Proportionate Liability: Some Creaking in the Superstructure’, presented to the Judicial College of Victoria, 19 May 2006, p 20. It remains to be seen what the effect of *Spowers* is on this proposition.

63 [2008] FCA 1656; BC200809892 at [8].

64 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [102].

65 In *Spowers* (2008) 21 VR 84; [2008] VSCA 208; BC200809232 at [112], Ashley JA rejected the contention that the reference in s 24AL to the joinder of persons who ‘are’ concurrent wrongdoers was inconsistent with the view that a concurrent wrongdoer is only identifiable upon judgment and not prior to or at the time of joinder.

66 This was the procedure for joining defendants under the Building Act 1993 (Vic) s 131 (repealed) (Building Act). See *Boral Resources (Vic) Pty Ltd v Robak Engineering & Construction Pty Ltd* [1999] 2 VR 507; [1999] VSCA 66; BC9903063 per Tadgell, Batt and Chernov JJA (*Robak*) and *Wimmera-Mallee Rural Water Authority v FCH Consulting Pty Ltd* [2000] VSC 102; BC200001174 (*Wimmera-Mallee*) per Byrne J.

defendants.<sup>67</sup> In *P&V Industries*, Judd J noted that, for the same reason, it is inappropriate to deliver a Notice of Contribution against concurrent wrongdoers under r 11.15.<sup>68</sup>

On that basis, what form of pleadings should be used, and when are they required? It seems that this may depend upon what form of joinder application was used by the defendant.

In *Woods*, the defendants (investment advisers) sought no relief against the concurrent wrongdoer (an investment adviser in liquidation). Hollingworth J allowed the concurrent wrongdoer to be joined as a co-defendant.

By contrast, in *Atkins* the defendants (investment advisers) not only applied to have concurrent wrongdoers (issuers of promissory notes and others) joined to the proceeding but also sought relief against them by way of a declaration that they were concurrent wrongdoers. Hargrave J ordered that the concurrent wrongdoers be joined as defendants by counterclaim. On the basis that the plaintiff did not intend to make a claim against the newly joined concurrent wrongdoers, his Honour ordered that the investment advisers deliver an amended defence and counterclaim so that the plaintiff and the concurrent wrongdoers (as defendants to the counterclaim) could plead their response to the investment advisers' allegations. His Honour noted that a response by the concurrent wrongdoers was unlikely given that there could be no monetary order against them.<sup>69</sup>

In *P&V Industries*, Judd J was asked to determine whether a defendant (a firm of solicitors) must deliver a pleading on the newly joined defendants (barristers) setting out the material facts by which they were alleged to be concurrent wrongdoers. In commenting on the solicitors' obligations to plead out their allegations regarding the barristers, His Honour stated:

... While it is true that their primary obligation is to do so in their defence, the obligation may also extend to providing the barristers with an opportunity to respond to the allegation made in respect of them and to participate in the proceeding ...

In my opinion, any defendant joined under Pt IVAA of the Act should have the right to participate in the proceeding if so advised. They are, after all, a joined party and presumably bound by the outcome which may have foreseen and unforeseen consequences for them. I respectfully agree with the approach adopted by Hargrave J in *Atkins v Interprac* but do not consider a claim for a declaration to be a material factor in deciding whether the solicitors should be required to formulate and deliver to the barristers, in appropriate form at the appropriate time, the material facts alleged in respect of them. This may be achieved by way of counterclaim as in *Atkins v Interprac* or by some other process or procedure.<sup>70</sup>

His Honour determined that the solicitors were not required to deliver pleadings against the barristers at the time when the order joining them was made. The barristers were entitled to apply for directions in due course if they

<sup>67</sup> *Woods* [2007] VSC 177; BC200704554 at [65], approved by Hargrave J in *Atkins v Interprac Financial Planning Pty Ltd* [2007] VSC 445; BC200709897 (*Atkins*), and followed by Judd J in *P&V Industries Pty Ltd v Secombs (a firm)* [2008] VSC 209; BC200804683 (*P&V Industries*) and Hollingworth J in *Cowan v Greatorex* [2008] VSC 401; BC200808915 (*Cowan*).

<sup>68</sup> [2008] VSC 209; BC200804683 at [4].

<sup>69</sup> [2007] VSC 445; BC200709897 at [35], [36].

<sup>70</sup> [2008] VSC 209; BC200804683 at [9]–[10].

wanted the solicitors to serve pleadings on them. By that time, the plaintiff may have decided to pursue a claim against the barristers and serve an amended statement of claim against them.<sup>71</sup>

Similar to *P&V Industries*, in *Cowan*, the defendants (company directors) applied to join a concurrent wrongdoer (the former company CEO) as a third defendant but submitted that it was unnecessary to deliver any pleading against him. The plaintiff asserted that the company directors should be required to seek a declaration that the CEO was a concurrent wrongdoer and that he should be joined as a defendant to a counterclaim. Hollingworth J followed *P&V Industries* in finding that no pleading against a concurrent wrongdoer was required at the time of the joinder. Her Honour stated that the question whether such pleadings were required would be made after the time for the CEO to file an appearance had expired, by which time the plaintiff would have had time to consider whether to pursue a compensation claim against him.<sup>72</sup> In fact, the company directors had sought an apportionment by reference to two concurrent wrongdoers: the former CEO, who was an undischarged bankrupt, and the former Chief Financial Officer, who had died.<sup>73</sup>

It seems that the simpler method, when applying to join concurrent wrongdoers, would be for the defendant not to seek any relief against them. In that way, the incumbent defendant will only be required to plead directly against the joined parties if they seek directions for such an order. Insolvent parties who are joined to the proceeding are unlikely to require pleadings. Furthermore, it may be that by seeking declaratory relief from joined concurrent wrongdoers, the defendant is more exposed to an argument that it should pay their costs of the proceeding.

Does a defendant have a duty to third parties to mitigate its liability to a plaintiff by joining concurrent wrongdoers? Arguably yes. Let's say that a developer sues a structural engineer for breach of contract and negligence arising from delays in completion of a commercial building project. The structural engineer had engaged a soil engineer as a subconsultant, and now seeks an indemnity from it under the contract between them alleging that the delays arose because of inadequate soil tests and advice. The soil engineer does not owe a duty of care to the developer and therefore is not a concurrent wrongdoer in respect of the claim against the structural engineer; the soil engineer is purely a third party to the structural engineer's indemnity claim. It seems plausible that the soil engineer could, in its defence, assert that the project architect was also liable to the developer for the delays and was therefore a concurrent wrongdoer alongside the structural engineer; the failure by the structural engineer to join the architect as another defendant was a failure by the structural engineer to mitigate its loss. The soil engineer's exposure to the indemnity claim was greater than if the structural engineer had sought to limit its liability to the plaintiff by reference to the architect.

---

<sup>71</sup> Ibid, at [11].

<sup>72</sup> [2008] VSC 401; BC200808915 at [35], [36]. In *Cowan*, Hollingworth J referred to *Woods*, *Atkins* and *P&V Industries* and also considered *Robak* and *Wimmera-Mallee*.

<sup>73</sup> An apportionment could take into account the deceased former CIO: ss 24AH(2) and 24AI(3).

The actual form of pleading eventually used against concurrent wrongdoers is unclear, although anecdotally, at least one Supreme Court judge has required that concurrent wrongdoers be served with notice under r 11.15 of the Supreme Court Rules. It would appear that a defendant might plead that, if it was found to have caused the plaintiff's loss and damage (which would typically be denied), then:

- the plaintiff's claim was an apportionable claim as defined under ss 24AE and 24AF(1);
- certain identified parties were concurrent wrongdoers because their acts or omissions also caused the loss and damage the subject of the plaintiff's claim: s 24AH;<sup>74</sup>
- the defendant and those parties were concurrent wrongdoers: s 24AH;
- the defendant's liability in respect of the plaintiff's claim should be limited to an amount reflecting that proportion of the loss or damage that the court considers just, having regard to the extent of the defendant's responsibility for the loss or damage: s 24AI(1)(a); and
- any judgment against the defendant in respect of that claim must therefore be limited to that amount: s 24AI(1)(b).

In *Atkins*,<sup>75</sup> Hargrave J commented, obiter, that where a plaintiff did not pursue a claim against concurrent wrongdoers who had been joined as parties to the proceeding, it might be estopped from later making a claim against those concurrent wrongdoers in a separate proceeding. His Honour relied upon the principles in *Port of Melbourne Authority v Anshun Pty Ltd*.<sup>76</sup> What is unclear is whether these principles are overridden by s 24AK which provides that nothing in Pt IVAA 'or any other law' prevents a plaintiff who has recovered judgment from a concurrent wrongdoer for an apportionable part of the loss and damage from 'bringing another action against any other concurrent wrongdoer for that loss and damage'. Does that include a concurrent wrongdoer who was a party to the previous proceeding, but because the plaintiff made no claim against that wrongdoer, no judgment was entered against it? The courts are yet to consider this question. It might be argued that the amount of the concurrent wrongdoer's liability is fixed by the court in the first proceeding under s 24AI(1) and, accordingly, in any subsequent action the plaintiff could at best seek to enter judgment for the apportioned liability set by the court in the first proceeding. No doubt the courts will want to discourage plaintiffs from pursuing subsequent actions against such concurrent wrongdoers.

Is a defendant required to seek leave to join a concurrent wrongdoer in liquidation?

In *Woods*,<sup>77</sup> Hollingworth J considered whether it was necessary under s 471B of the Corporations Act for the court to grant leave to have the company in liquidation joined to the proceeding as a concurrent wrongdoer. Under that section, leave is required before a person can 'begin or proceed

---

<sup>74</sup> But note text accompanying n 35 above.

<sup>75</sup> [2007] VSC 445; BC200709897 at [36].

<sup>76</sup> (1981) 147 CLR 589; 36 ALR 3; [1981] HCA 45; BC8100097.

<sup>77</sup> [2007] VSC 177; BC200704554 at [67].

with a proceeding in a court against' such a company. Her Honour described the 'unusual situation' where defendants applied to join a concurrent wrongdoer in liquidation:

- the defendants are not permitted to claim contribution against the concurrent wrongdoer: s 24AJ;<sup>78</sup>
- the defendants do not claim any relief against the concurrent wrongdoer in favour of the plaintiff; and
- the plaintiff understandably does not pursue a claim against that company.

To remove doubt, her Honour granted leave, but expressed an opinion that leave might not be necessary because the defendant was not in fact 'beginning' a proceeding against that party.<sup>79</sup>

### The National model — informing the plaintiff

Under all other relevant legislation, the defendant is entitled to an apportionment by referring to other concurrent wrongdoers who are also responsible for the loss and damage, irrespective of whether they are parties to the proceeding.

Therefore, for reasons of natural justice, and in order that the plaintiff can decide whether to pursue an action against non-party wrongdoers, the defendant needs to provide the plaintiff with proper notice of the identity of the concurrent wrongdoers and the reasons why an apportionment should be made.

For example, s 87CE provides:

**87CE Defendant to notify plaintiff of concurrent wrongdoer of whom defendant aware**

(1) If:

- (a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the *other person*) may be a concurrent wrongdoer in relation to the claim; and
- (b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:
  - (I) the identity of the other person; and
  - (II) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim; and
- (c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim;

the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.

---

<sup>78</sup> 24AJ Contribution not recoverable from defendant

Despite anything to the contrary in Part IV, a defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim —

- (a) cannot be required to contribute to the damages recovered or recoverable from another concurrent wrongdoer in the same proceeding for the apportionable claim; and
- (b) cannot be required to indemnify any such wrongdoer.

<sup>79</sup> [2007] VSC 177; BC200704554 at [68]. Hargrave J in *Atkins* [2007] VSC 445; BC200709897 at [37] agreed.

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

Although the heading to the legislation implies some form of duty to notify, the provision itself imposes no specific duty, but permits the court to exercise its discretion in awarding costs against a defendant who fails to notify a plaintiff of others who may be concurrent wrongdoers.<sup>80</sup>

The legislation does not require the defendant to notify the non-party concurrent wrongdoers.

What do the courts require by way of notification? The duty is derived from the usual court rules, and the rules of natural justice. The plaintiff is entitled to know the facts and other matters by which the defendant asserts that its liability should be reduced by reference to the comparative responsibility of other concurrent wrongdoers. Hammerschlag J in *Ucak v Avante Developments Pty Ltd*<sup>81</sup> (*Ucak*) stated that, like any other claim for an entitlement under statute, the defendant must state the material facts which demonstrate that entitlement.<sup>82</sup> Accordingly, a plaintiff can use the Court Rules to force the defendant to plead out the entitlement properly or have that part of the defence struck out.

In *Ucak*, his Honour held that, in respect of another concurrent wrongdoer, a defendant must plead the following elements:<sup>83</sup>

- the existence of that person;
- the relevant acts of omissions by that person; and
- the facts which would establish a causal connection between those acts or omissions and the loss which is the subject of the apportionable claim against the defendant.

In *HSD Co Pty Ltd v Masu Financial Management Pty Ltd*<sup>84</sup> (*HSD*), Rothman J followed *Ucak* in requiring the defendants (financial advisers) to provide the plaintiff (investor) with properly pleaded allegations that Westpoint Corporation Pty Ltd and other entities were concurrent wrongdoers for the purposes of an apportionment of liability under the Civil Liability Act 2002 (NSW), the ASIC Act and the TPA. Rothman J required the defendants to articulate the basis upon which they asserted that the alleged concurrent wrongdoers owed a duty of care to the plaintiffs, and had breached that duty.<sup>85</sup>

Where a defendant delays giving the plaintiff such notice, the usual court

---

80 This is even more explicit under the Civil Liability Act 2002 (NSW): s 35A is entitled 'Duty of defendant to inform plaintiff about concurrent wrongdoers'. See also Civil Law (Wrongs) Act 2002 (ACT) s 107G; Proportionate Liability Act 2005 (NT) s 12; Civil Liability Act 2003 (Qld) s 32; Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) s 10; Civil Liability Act 2002 (Tas) s 43D; Civil Liability Act 2002 (WA) s 5AKA; ASIC Act s 12GS; Corporations Act s 1041O.

81 [2007] NSWSC 367; BC200702721.

82 *Ibid*, at [33].

83 *Ibid*, at [35] and [41].

84 [2008] NSWSC 1279; BC200810786.

85 *Ibid*, at [21]–[25].

rules and case law would presumably apply in respect of late amendments to pleadings.<sup>86</sup>

Accordingly, the costs sanction under s 87CE of the TPA and equivalent provisions would appear to be additional to the primary rights of the plaintiff to costs in respect of a defendant's pleading.

### Costs and settlement offers

Part IVAA deals with apportioning liability. It makes no reference to costs. It seems that costs orders are not subject to proportionate liability. Defendants are therefore jointly and severally liable for costs in the usual way.

In *Gunston v Lawley*<sup>87</sup> (*Gunston*), Byrne J was asked to review an order by the Victorian Civil and Administrative Tribunal that each unsuccessful respondent pay the plaintiffs' separate costs of the claim against it, and pay an equal share of the majority of costs which were common to the plaintiff's claims against all respondents. The respondents did not argue that Pt IVAA should apply to an award of costs. They submitted that the tribunal should have distributed the common costs in the same proportions as judgment was apportioned under Pt IVAA. Byrne J dismissed this argument, finding that in exercising its discretion, the tribunal was entitled to take into account such matters as the time spent in dealing with various claims.<sup>88</sup>

Where proportionate liability applies to some or all of the defendants to a proceeding, parties will have difficulty preparing effective settlement offers which protect them on the question of costs. Under s 24AI(1)(b), judgment must not be entered for more than a concurrent wrongdoer's apportioned liability. Therefore, an offer of compromise made by a plaintiff to all defendants<sup>89</sup> will be problematic because each defendant has a separate liability to the plaintiff. In *Barwon Region Water Authority v Aquatec-Maxcon Pty Ltd*<sup>90</sup> (*Barwon*), the Victorian Court of Appeal alluded to this problem. In *Reinhold*, Barrett J refused to order costs on an indemnity basis, finding that the plaintiff's offers of compromise might have been effective if the defendants had each received judgment against them for the whole of the plaintiff's loss, but was ineffective because of the operation of proportionate liability.<sup>91</sup>

Under the Victorian Model, parties face the dilemma of how costs will be dealt with when a defendant joins another concurrent wrongdoer, but the plaintiff chooses to make no claim against it. In *Atkins*, Hargrave J stated: 'The plaintiff has made it clear that she will not seek any relief against them [the newly joined concurrent wrongdoers]. In these circumstances, it is unlikely that the added parties will wish to incur the costs of defending the claims

86 See *Aon Risk Services Australia Ltd v Australian National University* (2009) 258 ALR 14; 83 ALJR 951; [2009] HCA 27; BC200906905 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

87 (2008) 20 VR 33; [2008] VSC 97; BC200802799.

88 *Ibid.*, at [68]–[71].

89 As required under the Supreme Court Rules r 26.09.

90 (2007) 17 VR 480; [2007] VSCA 186; BC200707688 at [30] per Warren CJ, [32] and [35] per Kaye AJA, [37], [38] and [45] per Whelan AJA when considering proportionate liability under the Building Act s 131 (now repealed).

91 [2008] NSWSC 187; BC200801327 at [88].

against them for declarations.’<sup>92</sup> This raises an interesting issue. If a concurrent wrongdoer is not the subject of any monetary claim, who should pay its costs when it chooses to participate in the litigation? It may be argued that, while the wrongdoer is entitled to appear and defend the allegations against it, the costs of doing so may constitute solicitor/client rather than party/party costs.

When considering the prejudice which a plaintiff might face because of a defendant’s joinder of other concurrent wrongdoers, Rothman J stated in *HSD*: ‘While this may make the proceedings more complicated and more expensive from the perspective of the plaintiff, any prejudice to the plaintiff created thereby can be overcome with appropriate orders for costs.’<sup>93</sup>

## Settlements

### Negotiations

It is universally accepted that resolving disputes should be encouraged and the majority of civil cases settle before trial. Byrne J in *Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (No 2)*<sup>94</sup> (*Barwon No 2*) commented that the procedural complexity of proportionate liability<sup>95</sup> had been, he suspected, a ‘cause for great difficulty in achieving a commercial settlement’.

It can be difficult to negotiate a settlement when it is unclear whether a particular defendant is protected by proportionate liability, and the other defendants are under threat of insolvency. That defendant might face a risk of, say, 10% liability if it is protected, but would otherwise be jointly and severally liable for 100% of the plaintiff’s loss.

The effect of proportionate liability is that the plaintiff bears the risk if a particular defendant, at the end of a lengthy trial, is unable to meet a judgment debt. This can increase the pressure on plaintiffs to compromise well prior to trial.

Under the Victorian Model, there are cases where a defendant will have joined a concurrent wrongdoer for the purposes of an apportionment, but the plaintiff has chosen not to pursue a claim against that wrongdoer. Accordingly, neither the plaintiff nor the incumbent defendant is pursuing a claim against that party. This presents a difficulty in mediations. On the one hand, the defendant may argue that the concurrent wrongdoer need not attend mediation as it is not the subject of a claim. On the other hand, the concurrent wrongdoer may wish to attend in order to respond to the allegations against it, and reduce the risk of the plaintiff<sup>96</sup> pursuing a claim.

### Settling with one defendant — *Vollenbroich*

Needless to say, if a plaintiff reaches a settlement with all concurrent wrongdoers, then terms of settlement can be executed by all parties, and the defendants can be comforted that the claims have been resolved once and for all.

---

92 [2007] VSC 445; BC200709897 at [36].

93 [2008] NSWSC 1279; BC200810786 at [13].

94 [2006] VSC 117; BC200601653 at [17].

95 Pursuant to the Building Act s 131 (now repealed).

96 Or other concurrent wrongdoers after settling with the plaintiff per *Spowers*.

However, how does one defendant (concurrent wrongdoer) settle its dispute with the plaintiff, when the proceeding against other defendants is ongoing? Obviously, the defendant will only agree to settle on the basis that it is not vulnerable to being brought back into the proceeding by other defendants claiming contribution.

In *Vollenbroich v Krongold Constructions Pty Ltd*<sup>97</sup> (*Vollenbroich*), owners of a new house sued the builder, architect and engineer for damages alleging negligent design and construction. They, in turn, joined other parties for the purposes of limiting their liability under s 24AI.

The owners settled with the architect and the engineer shortly prior to trial. They each applied for judgment in the owners' favour for their respective settlement sums. The architect and the engineer were seeking protection under s 24AJ because other concurrent wrongdoers in the proceeding could not seek contribution or indemnity from a defendant '*against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim*'.

The builder (and others) opposed the application, expressing concern that, if judgment were entered against the architect and the engineer, then s 24AJ prevented the builder from pursuing contribution or indemnity from those parties, and (under Victorian law) the builder could not refer to their comparative responsibility as concurrent wrongdoers under s 24AI(3) because they would no longer be parties to the proceeding. Furthermore, s 24AL(2) prevented the builder from re-joining the architect and the engineer for the purposes of an apportionment.

Senior Member Walker refused to enter judgment, but instead:

- struck out the owners' claims against the architect and the engineer;
- ordered that the architect and the engineer should remain parties (nominally) to the proceeding;
- excused counsel for the architect and the engineer from further appearance; and
- stated that he would enter judgment against the architect and the engineer at the conclusion of the proceeding for the settlement sums.

In this way, the owners were able to settle with the architect and the engineer, who were able to withdraw from actively participating in the proceeding, and the builder (and others) remained entitled to have their comparative responsibility taken into account when determining the builder's liability under s 24AI(1).

This seems a useful way of dealing with the problems created by the Victorian Model when one defendant wishes to settle with the plaintiff.

### Contribution claims after settlement — *Spowers*

In *Spowers*, the Victorian Court of Appeal held that a party is only subject to proportionate liability under Pt IVAA upon judgment.<sup>98</sup> Accordingly, it is a matter for the court to make a determination which fixes a proportion of liability upon a particular concurrent wrongdoer. For this reason, the parties' interests will change if they reach a settlement of the dispute.

---

97 [2006] VCAT 1710.

98 (2008) 21 VR 84; [2008] VSCA 208; BC200809232 at [98], [105], [106].

The plaintiffs sued an architect and a contractor alleging they each failed to take reasonable care, causing defects in their office building project. The architect pleaded that, if it was held liable to the plaintiffs (which of course it denied), then the claim was an apportionable claim and it was entitled to have its liability limited by reference to other concurrent wrongdoers. The architect joined a building surveyor and an engineer as third parties for the purpose of seeking that apportionment.<sup>99</sup> The owners did not pursue a claim against the third parties.

The plaintiffs settled with the architect under a Deed of Settlement by which the architect was released from the plaintiffs' claims. Under the deed, the plaintiffs agreed to release the third parties from any future claims upon the architect's request. The surveyor and the engineer were not parties to the settlement.

After the settlement, the proceeding between the plaintiffs and the architect was struck out, and the architect amended its third party claim seeking contribution towards the settlement sum from the surveyor and the engineer under s 23B(4) of the Wrongs Act.

The third parties successfully applied for summary judgment against the architect. The primary judge held that the architect had compromised an exclusive liability to the plaintiffs because, in respect of an apportionable claim, the legislation 'provides for the separate liability of each of the defendants before the court'.<sup>100</sup> Accordingly, there was no part of the settlement amount to which the architect could recover contribution because it was exclusive of the liability of the third parties under Pt IVAA. It therefore could not be 'just and equitable' for the defendant to recover any contribution from the third parties.<sup>101</sup>

In *Spowers*, the Court of Appeal reversed the primary judge's decision. In the leading judgment, Ashley JA reasoned that it is only when judgment is given against a defendant concurrent wrongdoer in relation to an apportionable claim that the defendant attracts the protection from claims for contribution under s 24AJ.<sup>102</sup> Until judgment, Pt IVAA cannot impinge upon the operation of Pt IV.

Accordingly, where a defendant settles an ostensibly apportionable claim, that defendant would appear to be entitled to pursue a claim for contribution from other concurrent wrongdoers under Pt IV of the Wrongs Act.

Logically, the defendant can only recover contribution from other wrongdoers where the defendant has paid more in settlement than the amount to which it would have been liable to the plaintiff on judgment as apportioned by the court. Nettle JA opined that there is nothing which prevents a defendant from settling an apportionable claim for an amount greater than the amount which would have been apportioned against it under s 24AI, and then claiming

---

<sup>99</sup> Today, the surveyor and the engineer would have been joined as defendants rather than as third parties. See text accompanying n 67 above and *Woods* [2007] VSC 177; BC200704554 at [65].

<sup>100</sup> *Godfrey Spowers (Victoria) Pty Ltd v Lincoln Scott Australia Pty Ltd* [2008] VSC 90; BC200802270 at [18].

<sup>101</sup> *Ibid*, at [17] pursuant to s 24(2) of the Act.

<sup>102</sup> (2008) 21 VR 84; [2008] VSCA 208; BC200809232 at [98], [99] and [104].

contribution in relation to the settlement sum.<sup>103</sup> Ashley JA noted that the settlement amount was not described in the deed as being confined to the architect's 'sectioned off' liability, and second, the architect had also purchased the right to require the plaintiffs to release the third parties from liability.<sup>104</sup> Therefore, the third parties could not be potentially liable to the plaintiffs and the architect in respect of the same loss or damage.

Therefore, if a defendant concurrent wrongdoer compromises a claim with the plaintiff (being a claim which would be apportionable on judgment), then the defendant may be entitled to pursue contribution claims against other concurrent wrongdoers. In order to be successful, the defendant will need to have compromised for more than what its apportioned liability to the plaintiff would have been.

Under the Victorian Model, if a plaintiff settles its claim against D1, then D2 who remains in the litigation (and who is also a concurrent wrongdoer), appears to have a choice:

- (a) in line with *Vollenbroich*, D1 remains nominally as a defendant exclusively so that its comparative liability is taken into account when apportioning liability against D2 under s 24AI; or
- (b) in line with *Spowers*, D2 pursues a contribution claim against D1 on the basis that s 24AJ provides no protection to D1 because judgment had not been given in respect of the apportionable claim against it.

*Vollenbroich* would appear to be the preferred approach because judgment against D2 will be limited to its apportioned liability. Under the *Spowers* approach, D2 will be liable for 100% of the plaintiff's loss and would then pursue contribution or indemnity from D1.

Any settlement payment made by D1 to the plaintiff is not taken into account at the time of the apportionment.<sup>105</sup>

### Some hints

As a general comment, in multi-party cases involving proportionate liability, pleadings can become very complex and voluminous, particularly where defendants plead alternative claims for contribution and indemnity. To avoid the problems faced by Byrne J in *Barwon No 2*,<sup>106</sup> it may be worthwhile ensuring that pleadings issues are sorted out well prior to trial as part of case management.

Where possible, a plaintiff might pursue a claim in a forum other than a court or tribunal. It will try to plead non-apportionable claims, being claims:

- not 'arising from a failure to take reasonable care';
- not for 'damages', as defined in s 24AE;
- not for contravention of s 52 of the TPA and s 9 of the FTA;
- seeking relief under s 87 rather than under s 82 of the TPA.

---

<sup>103</sup> Ibid, at [5].

<sup>104</sup> Ibid, at [114].

<sup>105</sup> *Gunston* (2008) 20 VR 33; [2008] VSC 97; BC200802799 at [61]–[66] followed by Hansen J in *McAskell v Cavendish Properties Ltd* [2008] VSC 328; BC200807573 at [24], [25].

<sup>106</sup> [2006] VSC 117; BC200601653 at [15]–[24]. His Honour at [15] noted that the pleadings in that case ran to over 750 pages.

Of course, in many cases the substance of the claim will demand that the defendants are entitled to have their liability apportioned. However, pleadings may be critical.

Where concurrent wrongdoers are not parties to the proceeding,<sup>107</sup> the plaintiff should require full particulars in line with *Ucak* and *HSD* referred to above. The plaintiff may wish to join those who are solvent or have insurance. The plaintiff may apply to strike out that part of a defence which refers to a concurrent wrongdoer where the allegations are not adequately particularised.

Conversely, defendants should, where possible, plead that the plaintiff's claim is apportionable and point to others who are concurrent wrongdoers, joining them where required under Pt IVAA. Defendants should endeavour to strike out non-apportionable claims.

### The Future

The Standing Committee of Attorneys-General (SCAG) is presently reviewing national proportionate liability laws with the aim of achieving greater national consistency and addressing the vexed question whether parties should be entitled to contract out. Two reports were commissioned.<sup>108</sup> In October 2008, Drafting Instructions for Uniform Proportionate Liability Provisions were issued for stakeholder comment.<sup>109</sup>

---

<sup>107</sup> Being wrongdoers under Pt IVAA who have died or have been wound up, or wrongdoers under non-Victorian legislation.

<sup>108</sup> T Horan, 'Proportionate Liability: Towards National Consistency', for National Justice CEOs, September 2007; Emeritus Prof J L R Davis, 'Proportionate Liability: Proposals to Achieve National Uniformity', for National Justice CEOs, 2008, at <[www.scag.gov.au/lawlink/SCAG/ll\\_scag.nsf/pages/scag\\_reports](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_reports)>.

<sup>109</sup> At <[www.justice.tas.gov.au/\\_\\_data/assets/pdf\\_file/0020/113645/Drafting\\_Instructions\\_Prop\\_Liab\\_301008.pdf](http://www.justice.tas.gov.au/__data/assets/pdf_file/0020/113645/Drafting_Instructions_Prop_Liab_301008.pdf)>.