

PROPORTIONATE LIABILITY

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Introduction

An action that is determined by reference to the principles of proportionate liability is one where the plaintiff's loss is determined as against each wrongdoer, having regard to each wrongdoer's level of responsibility.

Amendments to Commonwealth and State legislation in 2004 have had the effect of introducing proportionate liability to certain categories of civil actions.

In short, the regime of proportionate liability applies to certain claims for damages for economic loss and property damage based on tort, contract and misleading and deceptive conduct.

Joint and Several Liability

At common law, a plaintiff that suffers loss or damage as a result of another party's negligence or other tort can recover damages in full against any party that may be liable to it in respect of the damage. Historically, the same principle has applied in respect of claims for damages in respect of statutory wrongs. In the event that more than one party is potentially liable to the plaintiff each wrongdoer is considered to be joint and severally liable. The plaintiff is entitled to proceed against as many or as few defendants as it wishes and it will be entitled to recover damages in full provided a defendant sued is

liable to it. In these circumstances, it is, of course, open to a defendant to pursue another wrongdoer for contribution, at least in respect of claims brought in tort and in some circumstances based on equitable principles.

The New Legislation

The Commonwealth legislation introducing the relevant amendments is the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004*, generally referred to as the CLERP 9 reforms.

The reforms apply to claims for damages brought in respect of misleading and deceptive conduct pursuant to the *Trade Practices Act 1974* (Cth) (TPA), and similar provisions in the *Corporations Act 2001* and *Australian Securities and Investments Commission Act 2001*.

The most significant impact will be in respect of claims for damages pursuant to section 82 of the TPA for breach of section 52 of that Act.

These amendments came into force on 26 July 2004. They apply in respect of causes of action that arise after this date.

The relevant State legislation is Part 4 of the *Civil Liability Act 2002(NSW)* (CLA). The provisions of Part 4 commenced operation on 1 December 2004. They do not apply to proceedings before that date or to any civil liability arising before 26 July 2004.

Apportionable Claims

Pursuant to the legislation, the principles of proportionate liability will apply to “*apportionable claims*”.

Under the TPA an apportionable claim is a claim for damages made under section 82 for economic loss or damage to property “*caused by conduct that was done in contravention of section 52*”.

Section 34 (1) of the CLA defines apportionable claims in the following terms:

- (a) *a claim for economic loss or damage to property in an action for [damages](#) (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of [personal injury](#),*
- (b) *a claim for economic loss or damage to property in an action for [damages](#) under the [Fair Trading Act 1987](#) for a contravention of section 42 of that Act.*

Concurrent Wrongdoers

The legislation relating to proportionate liability introduces the concept of the "concurrent wrongdoer". Previously, the focus in respect of apportionment tended to be on joint tortfeasors or, in the case of equitable contribution, parties with “*coordinate liabilities*”. Proportionate liability is determined as between concurrent wrongdoers. In the Commonwealth and State legislation a concurrent wrongdoer is defined in the following terms:

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

The definition of concurrent wrongdoer is a potentially controversial one as it is based solely on the issue of causation without reference to legal liability. This issue is discussed further below.

Proportionate Liability

The key provisions that set out the regime of proportionate liability are section 35 of the CLA and 87CD of the TPA. These sections provide that a court is to award damages against a concurrent wrongdoer in the amount which reflects that wrongdoer's responsibility for the loss or damage suffered by the plaintiff. (section 35 is reproduced in full as an annexure to this paper)

Significantly, the apportionment applies irrespective of whether other concurrent wrongdoers are parties to the proceedings.

The liability of a concurrent wrongdoer is limited to an amount reflecting the proportion of the damage or loss claimed by the plaintiff that the Court considers "*just having regard to the extent of the defendant's responsibility for the damage or loss*".

It is generally considered that courts will apportion responsibility along the same lines as they have in the past pursuant to relevant apportionment legislation, in New South Wales the *Law Reform (Miscellaneous Provisions) Act 1946*. Interestingly, the test is what the Court considers "*just*" whereas the apportionment legislation uses the phrase "*just and equitable*". Whether this difference is merely a matter of plain English drafting remains to be seen but with the increased prospect of plaintiffs being unable to pursue or enforce against particular wrongdoers it is possible the courts will adopt different criteria than those that have been adopted in the past.

Other significant aspects of the section are:

- Exclusion of the amount reflecting the plaintiff's contributory negligence - that is, the apportionment against the concurrent wrongdoers is determined after the plaintiff's damages have been reduced by reason of contributory negligence.
- Concurrent wrongdoers who are not parties actions are relevant and are taken into account by the court.
- The term "*defendant*" includes parties who have been joined to proceedings by way of cross-claim.

Excluded Categories of Wrongdoers

The proportionate liability provisions do not apply in respect of intentional and fraudulent wrongdoers (s 34A CLA, s 87CC TPA).

In circumstances where some but not all wrongdoers are excluded, judgment will be delivered against a (non-excluded) concurrent wrongdoer in respect of an amount reflecting the extent of that wrongdoer's responsibility for the loss or damage. However, judgment will be obtained in full against an excluded concurrent wrongdoer.

Accordingly, if the plaintiff chooses to do so, he or she may enforce the judgment in full against the excluded concurrent wrongdoer.

Duty to Inform Plaintiff About Concurrent Wrongdoers

The legislation encourages a defendant that has reasonable grounds to believe that a particular person may be a concurrent wrongdoer to notify the plaintiff of the identity of

that person and the circumstances that make that person a concurrent wrongdoer (s 35A CLA, s 87CE TPA). The legislation does not impose a strict obligation on a defendant to provide such notification, however if the defendant fails to do so and the plaintiff unnecessarily incurs costs in the proceedings because the party was unaware that the other person may be a concurrent wrongdoer the court hearing the proceedings may order that the defendant pay the costs of the plaintiff, possibly on an indemnity costs basis.

Commentary

An interesting feature of the legislation which will excite some argument is the fact that the definition of “*concurrent wrongdoer*” focuses on the issue of causation without reference to that person's liability to the claimant.

It is, in my opinion, unlikely that the legislation has the effect of rendering liable to the plaintiff a person whose actions caused the plaintiff's loss without that person otherwise having a legal liability to the plaintiff. The legislation (s 35(1)(a) CLA, s 87CD(1)(a) TPA), in setting out the theory of proportionate liability includes what appears to be a presumptive reference to the “*liability of the defendant*”. Additionally, consistent with principles of statutory interpretation and common sense, a Court is likely to proceed on the basis that such a radical alteration to the common law would require express words and clear intention.

It would be remarkable if the effect of the legislation is to impose upon the court an obligation to determine the degree of responsibility to the plaintiff's loss of a “*concurrent wrongdoer*” who does not have a legal liability to the plaintiff. However, even if the legislation does not impose a potential risk that a person whose actions have contributed

to a party's loss will have to pay damages to that party in the absence of legal liability, there is room to argue that the court, in apportioning responsibility, must take into account the causal contribution of all concurrent wrongdoers, irrespective of whether the party has a legal liability to the plaintiff.

Other potential difficulties arising from the legislation are as follows:

- A likelihood of increased parties in litigation.
- The practical difficulty in determining the degree of responsibility of a concurrent wrongdoer when the wrongdoer is not a party to the action.
- The limitation of the TPA amendments to contravention of section 52 but not other types of misleading and deceptive conduct that provide a basis to recover damages under the TPA.
- The interaction/potential clash between an award of damages under section 82 of the TPA and the disparate forms of remedies available under section 87 of that Act.
- Is there a duty on a defendant to inform a plaintiff of a concurrent wrongdoer present when the defendant is in possession of the relevant information on a confidential basis?

August 2005

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Proportionate Liability

Section 35 Civil Liability Act 2002 (NSW)

Proportionate liability for apportionable claims

35 Proportionate liability for apportionable claims

(1) In any proceedings involving an apportionable claim:

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

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

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

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

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

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

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

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

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

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