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Proportionate Liability in claims against Valuers

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7. Mortgagees Power of Sale *23 May 2006*
8. Discharge of Mortgage *28 Nov 2006*
9. Contracts Review Act Defences to Mortgages *29 May 2007*
10. Equitable Defences to Mortgages *18 July 2007*
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14. Licensing a Responsible Entity *20 March 2008**
15. Proportionate Liability in claims against Valuers *29 Oct 2008**
16. Examinations under the Corporations Act and ASIC Act *5 March 2012*†

**Presented jointly with Kate Cooper of Bransgroves Lawyers*
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2. Licensing a Responsible Entity *20 Mar 2008**
3. Proportionate Liability in claims against Valuers *29 Oct 2008**
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**Presented jointly with Matthew Bransgrove of Bransgroves Lawyers*

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Before Proportionate Liability

Solidary liability

Traditionally a plaintiff who was the victim of a tort or breach of contract was entitled to recover its full loss from any person whose concurrent wrong or breach had caused that loss, even if there were a number of other persons who could also be said to have jointly caused that loss (in as much as had any of them refrained from wrongful behaviour the loss would not have happened).

This basic principal is known as "solidary liability" because any concurrent wrongdoer is liable (at least as between the wrongdoer and the plaintiff) for the whole of the loss, and if one wrongdoer pays out the entirety of that loss the liability of all concurrent wrongdoers is satisfied in full (the plaintiff is unable to sue the others and obtain double compensation).

It is the recent State and Commonwealth statutory modification of this principle of law that is the subject of this paper.

Joint liability

When multiple persons acted, or are deemed by law to have acted, in concert to perform a wrongful act, they are classed as joint wrongdoers, (and, in the case of a joint tort, joint tortfeasors). This situation can arise either by way of an overt conspiracy to commit the wrongful act; by one wrongdoer being responsible at law for the actions of another, such as by the doctrines of agency or vicarious liability; or by virtue of the liability arising through an existing joint or common arrangement between the wrongdoers, such as being co-occupiers of premises in which a wrong took place or in the case of a breach of contract being in partnership (where the contract was with the partnership).

In cases of joint liability there was only a single cause of action against all the joint wrongdoers, and if a judgment was obtained against, or settlement concluded with, one of the joint wrongdoers then the cause of action was spent and the plaintiff had no cause of action remaining against any of the other joint wrongdoers, who were thereby effectively released even if the judgment could not be enforced or the settlement was not honoured with the other party.

This rule has now been removed by statute: see s 5(1)(a) of the *Law Reform (Miscellaneous Provisions) Act* 1946 and s 95 of the *Civil Procedure Act* 2005 and *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

Several liability

Several liability for loss to a plaintiff can be of either of two varieties:

1. Several concurrent liability – multiple people, not acting (or deemed to be acting) in concert, inflict a single injury on the plaintiff: for example, a passenger suffers injury from a car accident caused by both the negligence of the driver the car in which she was travelling and the driver of the car which crashed into it.

2. Non-concurrent several liability – multiple people each inflict a different injury to the plaintiff, and those injuries together cause the damage: for example, a negligent surgeon botches an operation on a person run over by a negligent driver, the two acts collectively resulting in the victim's disablement.

In the case of either type of several liability, a separate cause of action exists against each wrongdoer, and thus each claim could traditionally be prosecuted or settled separately without prejudicing other claims. Solidary liability only applies in the case of several concurrent liability. For non-concurrent several liability only that proportion of the liability attributed to the wrongful act could be recovered.

Joint and several liability

By reason of the previously-mentioned statutory reform, the distinction between joint liability and several concurrent liability has effectively ceased to exist, which has led to any form of liability between concurrent wrongdoers sometimes being referred to as "joint and several liability". However, the distinction between this form of liability and non-concurrent several liability remains important and the term "joint and several liability" hides this important distinction. For this reason, the term "joint and several liability" is not used in this paper, but rather the expression "solidary liability".

Contribution

A perceived evil springing from the existence of solidary liability was the ability of a plaintiff to determine (by its choice of defendants) which one or more of multiple concurrent wrongdoers would bear the plaintiff's loss. Section 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act* 1946, however, ameliorated this injustice by initiating a regime of contribution between concurrent tortfeasors (whether or not the tort was also a crime).

Although since this reform, each concurrent tortfeasor was still liable to the plaintiff for the entirety of the loss, concurrent wrongdoers could now sue each other for "contribution", so they could themselves obtain judgment against other defendants and/or from third-parties joined for the purpose so that as between each of the concurrent wrongdoers the loss was apportioned according to what the court considered "to be just and equitable having regard to the extent of that person's responsibility for the damage": s 5(2).

It is important to understand that contribution left the principle of solidary liability intact, as the plaintiff could continue to obtain the entirety of its loss from the defendant of its choice. The plaintiff was not limited to recovery from any particular wrongdoer that proportion of damage the court considered it just and equitable for that wrongdoer to bear - the proportions had effect only in determining rights as between the concurrent wrongdoers.

This distinction was of particular importance in situations where one or more of the concurrent wrongdoers had insufficient assets and/or insurance to meet its share of the liability; in such an instance the plaintiff could recover its full loss against another better insured or more solvent concurrent wrongdoer, and that wrongdoer would be

left to bear the loss occasioned by its inability to enforce its judgment for contribution against the uninsured or insolvent party.

Mixed concurrent wrongdoers

Torts are not the only form of wrong multiple persons may inflict. The *Law Reform (Miscellaneous Provisions) Act* 1946, provides only for contribution between joint tortfeasors and does not deal with:

1. wrongdoers who are other than tortfeasors;
2. wrongdoers some of whom are tortfeasors and some of whom are not; or
3. a case where concurrent tortfeasors exist but the plaintiff sues one or more of them under another cause of action.

The situation where there are concurrent wrongdoers - some of whom are tortfeasors and others not - is known as "mixed concurrent wrongdoers".

Duties in tort and contract frequently overlap (see *Hawkins v Clayton* (1988) 164 CLR 539), and thus by choosing to sue a defendant in contract a plaintiff could deny a defendant who was also a concurrent tortfeasor the opportunity to recoup part of the damages award through an action for contribution under the Law Reform (Miscellaneous Provisions) Act 1946.

The right of a plaintiff to choose to sue in either contract or tort when there were concurrent causes of action was upheld by the High Court in *Astley v Austrust Ltd* (1999) 197 CLR 1.

Contributory negligence

The *Law Reform (Miscellaneous Provisions) Act* 1965 initiated into NSW law the concept of apportionment of loss for contributory negligence. Prior to this Act, causation of damage by negligence was a black and white proposition - either causation existed and the negligent defendant was responsible for the entirety of the plaintiff's loss, or (atypically) the damage was found to have been caused partly by the plaintiff's own failure to take care rather than the defendant's negligence and thus the plaintiff's claim entirely failed.

The *Law Reform (Miscellaneous Provisions) Act* 1965, introduced a system of apportionment of responsibility between plaintiff and defendant such that the defendant would not be held responsible for that part of the plaintiff's loss which was due to the plaintiff's own failure to take care, but that the loss would be "reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage" (s 9).

In *Astley v Austrust Ltd* (1999) 197 CLR 1, the High Court held that a defence of contributory negligence was not available in a case where the plaintiff sued in contract, even if there was a concurrent liability in negligence. In the wake of *Astley,* however, the *Law Reform (Miscellaneous Provisions) Act* 1965 was amended such that the definition of a wrong covered by the Act in s 8 was expanded to include "an act or omission that … amounts to a breach of a contractual duty of care that is concurrent and co-extensive with a duty of care in tort". That amendment has resulted

in a situation where a defendant can plead contributory negligence as a defence to a suit brought in contract provided that the defendant is also negligent (and regardless of whether negligence is also pleaded by the plaintiff).
S 5A (in conjunction with Part 1A Division 8) of the *Civil Liability Act* 2002 has further extended the operation of contributory negligence to "any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise", although there are certain express exceptions such as damage inflicted by intentional acts.

"Contributory Negligence" under the Trade Practices Act

In *Henville v Walker* [2001] HCA 52, the High Court held that a defence of contributory negligence was not available to a defendant to an action under s 52 of the *Trade Practices Act* 1974. In the negligent valuation case of *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41, the court found that s 87 of the Act similarly did not enable a contributory negligence defence through the device of reducing a plaintiff's damages under that section. Sub-section (1B) was inserted into s 82 in 2004, however, to expressly establish a defence of "failure to take reasonable care" (i.e. contributory negligence) in response to a claim under s 52 of the *Trade Practices Act* 1974.

The reforms

Proportionate liability

The principle of solidary liability places the plaintiff's rights in paramount position, as it enables the plaintiff, at its own convenience, to choose the most deep-pocketed of a set of concurrent wrongdoers and recover the entirety of its loss from that selected defendant, even if that defendant bore only a small share of overall responsibility for the loss.

Although the ability of a concurrent wrongdoer to recover by way of contribution from the other concurrent wrongdoers lessened the potential injustice of this approach, the right of contribution was dependent upon the plaintiff suing in tort and was worthless in any case where the other concurrent wrongdoers in question lacked the means to pay any judgment for contribution.

This meant that frequently the insurers of a defendant would have to meet in its entirety a loss to which its client only contributed to a minor extent. It also meant that taking out insurance could be a two-edged sword, as the very existence of the insurance could very well cause a plaintiff to single out the insured defendant to the exclusion of all others.

This was a particular problem in the area of professional indemnity insurance as, by reason of law, professional rules or long-standing practice, most professional advisers are heavily insured (and known to be so), and the concurrent liability in contract that existed in most cases both made suits against professionals easier and made recovery of contribution much harder (if possible at all).

The alternative to solidary liability was a new form of proportionate liability whereby each wrongdoer was only liable as between that wrongdoer and the plaintiff for the wrongdoer's own fair share of the plaintiff's loss. This meant that the problem of

defendants having to recover contribution from concurrent wrongdoers did not arise as each defendant could not be forced to pay to the plaintiff in the first instance more than that defendant's proportionate share.
Such a system was of obvious benefit to defendants, and the companies who routinely insured them, but at the expense of plaintiffs. In order for a plaintiff to be fully compensated for those losses covered by a proportionate liability scheme, the plaintiff would not only have to sue all concurrent wrongdoers and succeed against them all, but would then have to successfully enforce the judgments against all the wrongdoers.

In the case of any wrongdoer not being able to be located or, even more likely, not having sufficient assets or insurance to meet its share of the claim, the plaintiff would be unable to make up the shortfall from the other defendants and would ~~hence~~ simply not recover the full amount of its loss.

The law reform that ultimately emerged was a new system of proportionate liability whereby the right of a defendant not to pay more than its fair share was emphasized over the right of a plaintiff to recover its loss.

Background to the Proportionate Liability Reform

1989	Tort liability was reviewed by the NSW Attorney General's Department.
1990	The NSW Law Reform Commission published LRC 65, recommending that the principle of solidary liability be retained
1994	The Commonwealth Attorneys General announced an enquiry into joint and several liability. The Davis Report (1994-5) resulted from this enquiry, and recommended a limited introduction of proportionate liability.
1997	The NSW Law Reform Commission published Discussion Paper (No. 38) restating its opposition to proportionate liability and taking issue with the Davis Report.
1998	The *Environmental Planning and Assessment Amendment Act* 1997 came into effect, containing a proportionate liability regime in relation to various actions including those involving defective building work, although the ability to avoid the regime by bringing actions under the *Trade Practices Act* 1974 undercut the new provisions to some extent.
1999	The NSW Law Reform Commission published LRC 89, again addressing solidary liability and again rejecting proportionate liability
2002	The Commonwealth, State and Territory governments jointly commissioned a panel chaired by Justice Ipp to examine the law of negligence. The resulting report declined to recommend proportionate liability on the grounds that it risked less than full recovery by plaintiffs.
2004	Notwithstanding the findings of the jointly-commissioned report, the Commonwealth, the ACT, and all the States proceeded to draft legislation initiating a co-ordinated approach to proportionate liability.

The Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Cth) was the Commonwealth's vehicle for this law reform, and that Act included amendments to the Trade Practices Act to allow contributory negligence defences to s 52 claims and also to institute a proportionate liability regime for such claims.

The NSW legislation came in the form of *Civil Liability Amendment (Personal Responsibility) Act* 2002 and *The Civil Liability Amendment Act* 2003, both of which amended the Civil Liability Act 2002, instituting a proportionate liability regime and expanding the scope of contributory negligence.

The legislation

New South Wales

The most relevant sections of the *Civil Liability Act* 2002 (as currently amended) and Civil Liability Regulation 2003 which would have application in proceedings against valuers are as follows:

Civil Liability Act 2002

3A Provisions relating to operation of Act

(1) A provision of this Act that gives protection from civil liability does not limit the protection from liability given by another provision of this Act or by another Act or law.

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

(3) Subsection (2) extends to any provision of this Act even if the provision applies to liability in contract.

3B Civil liability excluded from Act

(3) The regulations may exclude a specified class or classes of civil liability (and awards of damages in those proceedings) from the operation of all or any specified provisions of this Act. Any such regulation may make transitional provision with respect to claims for acts or omissions before the commencement of the regulation.

34 Application of Part

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

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

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

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

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

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

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

34A Certain concurrent wrongdoers not to have benefit of apportionment

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

(a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim, or

(b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim, or

(c) the civil liability of the concurrent wrongdoer was otherwise of a kind excluded from the operation of this Part by section 3B.

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

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

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 contributory 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.

35A Duty of defendant to inform plaintiff about concurrent wrongdoers

(1) If:

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

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

(i) the identity of the other person, and

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

(c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim,

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

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

36 Contribution not recoverable from defendant

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

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

(b) cannot be required to indemnify any such wrongdoer.

37 Subsequent actions

(1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent

wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.

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

38 Joining non-party concurrent wrongdoer in the action

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

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

39 Application of Part

Nothing in this Part:

(a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable, or

(b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable, or

(c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

Civil Liability Regulation 2003

3 Proportionate liability

Any civil liability to which Part 4 of the Act would have applied but for this clause is excluded from the operation of that Part, and from the operation of clauses 6 and 13 of Schedule 1 to the Act in their application to that Part, if the liability arose before 26 July 2004.

Commonwealth

The ASIC Act

The *Australian Securities and Investment Commission Act* 2001 ("ASIC Act"), in sections 12GP to 12 GW, has effectively identical proportionate liability provisions to the TPA, which apply in relation to misleading and deceptive conduct under s 12DA of the ASIC Act.

The Corporations Act

The *Corporations Act* 2001 in sections 1041L to 1041S again has the same regime, and again they apply to misleading and deceptive conduct, in this case under s 1041H

of the Corporations Act. Due to the close similarity between these two sets of provisions and those in the TPA, the ASIC Act and Corporations Act provisions are not reproduced below, and for the most part in this paper their operation will not be separately analysed.

Trade Practices Act 1974

Part VIA of the *Trade Practices Act* 1974 ("TPA"), which is headed "Proportionate Liability for Misleading and Deceptive Conduct". Part VIA is worded very similarly to sections 34 - 39 of the *Civil Liability Act* 2002, with sections 87CD – 87CI of the TPA being word-for-word identical of sections 35 - 39 of the *Civil Liability Act* 2002. Sections 87CB and 87CC, although closely mirroring sections 34 and 34A, are slightly different, and for that reason are set out below.

82 Actions for damages

(1B) Despite subsection (1), if:

(a) a person (the ***claimant***) makes a claim under subsection (1) in relation to:

(i) economic loss; or

(ii) damage to property;

caused by conduct of another person (the ***defendant***) that was done in contravention of section 52; and

(b) the claimant suffered the loss or damage:

(i) as a result partly of the claimant's failure to take reasonable care; and

(ii) as a result partly of the conduct referred to in paragraph (a); and

(c) the defendant:

(i) did not intend to cause the loss or damage; and

(ii) did not fraudulently cause the loss or damage;

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 claimant's share in the responsibility for the loss or damage.

Note: Part VIA also applies proportionate liability to a claim for damages under this section for a contravention of section 52.

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.

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

(3) In this Part, 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 Part, apportionable claims are limited to those claims specified in subsection (1).

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

87CC Certain concurrent wrongdoers not to have benefit of apportionment

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

(a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim; or

(b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim.

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

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

Aspects of the scheme

Apportionable claims

Apportionable claims under the *Civil Liability Act* 2002 ("CLA"), the TPA, the *Corporations Act* 2001 and the ASIC Act are all limited to claims for damages for economic loss or damage to property. The CLA further limits claims by expressly excluding "any claim arising out of personal injury".

Civil Liability Act

To be an apportionable claim under the CLA, the claim must also be one "arising from a failure to take reasonable care, but not including any claim arising out of personal injury" or a claim under s 42 of the *Fair Trading Act* 1987 (NSW) ("FTA").

To be an apportionable claim under the TPA, ASIC Act or *Corporations Act* 2001, the claim must be for damages for conduct in contravention of the section in the Act in question prohibiting misleading and deceptive conduct. As these Commonwealth Acts have their own proportionate liability regime, the operation of State Acts such as the CLA do not apply with respect to claims made under the TPA, ASIC Act and Corporations Act which are not caught by the proportionate liability regimes in those Acts: see *Dartberg Pty Ltd v Wealth Care* [2007] FCA 1216 which dealt with the exclusion of the Wrongs Act 1958 (Vic), the Victorian equivalent to the CLA.

Although to be apportionable under the CLA the claim must be one "arising from a failure to take reasonable care", that does not mean that the claim must be pleaded in negligence. For example, a claim for breach of a contractual duty of care is a claim "arising from a failure to take reasonable care", and hence apportionable: see *Yates v Mobile Marine Repairs Pty Ltd* [2007] NSWSC 1463.

In *Commonwealth Bank of Australia v Witherow* [2006] VSCA 45, the Victorian Court of Appeal considered s 24AE of Part IVAA of the Wrongs Act, the Victorian equivalent to CLA s 34, the Commonwealth Bank sued a guarantor on his guarantee.

The guarantor, a Mr Witherow, asserted that the claim was apportionable as he had only entered into the guarantee as a result of the negligence of his accountant, Mr Dennington. The Court rejected that argument, Maxwell P stating at [9]-[11]:

> [9] Under s.24AE in Part IVAA, the term "apportionable claim" is defined to mean "a claim to which this Part applies". In turn, sub-s.24AF(1) relevantly provides that –
>
> > "(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 ..."

> [10] The Bank's claim is not a claim in an action for damages. It is a claim in an action for a sum certain, namely – as set out in the statement of claim – $150,606.90.
>
> [11] Less still is the Bank's claim made "in an action for damages ... arising from a failure to take reasonable care". The Bank sues on a guarantee. It seeks, in effect, specific performance of the contract of guarantee. No question of failure to take reasonable care arises in that claim, or could possibly arise. It is understandable that Mr Witherow has wanted to join, and has now joined, his accountant, Dennington, as a third party, on the ground that her negligence - as he says it was - in failing to advise him accurately of the financial position of the borrower company has resulted in his exposure to loss pursuant to the calling up of the guarantee. But for present purposes, the proposed seeking by Mr Witherow of contribution from Dennington is wholly irrelevant.

In *Woods v De Gabriele* [2007] VSC 177, a plaintiff sought to amended a claim to plead a breach of a duty of "due skill and diligence", rather than "reasonable care and skill" as then pleaded.

The amendment was an effort to make the claim non-apportionable. Hollingworth J held at [58] that it was at least arguable that the claim was apportionable "if the facts on which the claim is based include allegations of a failure to take reasonable care, whether or not the plaintiff chooses to give it that name. In other words, it is arguable that an apportionable claim is a claim for economic loss or damage to property that arises, on the facts, from a failure to take reasonable care."

Middleton J in *Dartberg Pty Ltd v Wealth Care* [2007] FCA 1216 at [30] 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 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.

In *Reinhold v New South Wales Lottery Corporation (No.2)* [2008] NSWSC 187, Barrett J at [29] quoted the above passage in *Dartberg Pty Ltd v Wealth Care Planning Pty Ltd* and then proceeded at [30] to state:

> 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, is to be judged in the light of the findings made and is not determined by the words in which it is framed.

Middleton J in *Dartberg* at [31] went on to outline how a case would proceed in which a plaintiff did not plead failure to take reasonable case, but the defendant insisted the claim was apportionable on this basis:

> In these circumstances, where a respondent desires to rely upon Pt IVAA of the Wrongs Act, it will need to plead and prove each of the statutory elements, including the failure to take reasonable care. In a proceeding where the applicant does not rely upon any such failure, then the need for a particularised plea by a respondent may be particularly important for the proper case management of the proceedings: see eg *Ucak v Avante Developments Pty Ltd* [2007] NSWSC 367 at [41]. It would be desirable at an early stage of proceedings for a respondent to put forward the facts upon which it relies in support of the allocation of responsibility it contends should be ordered. If a respondent calls in aid the benefit of the limitation on liability provided for in Pt IVAA of the Wrongs Act, then the respondent has the onus of pleading and proving the required elements. The court, after hearing all the evidence, will then need to determine, as a matter of fact, whether the relevant claim brought by the applicant is a claim arising from a failure to take reasonable care.

It is clear from the above passages that the key test for apportionability in alleged cases of "failure to take reasonable care" under the CLA is not how the claim is pleaded by the plaintiff. The test would appear to be whether, at its heart, the claim is based on the failure of the defendant (or at least of somebody for whose conduct the defendant is responsible) to take reasonable care.

A claim for damages for breach of a contractual term which has nothing to do with taking reasonable care (such as the term of a guarantee which requires money to be paid if the principal debtor defaults: *Commonwealth Bank of Australia v Witherow* [2006] VSCA 45) is not apportionable. A claim based upon the breach of a fiduciary duty would presumably also fall outside the category of apportionable claims (being based not on a failure to take care but upon the lack of good faith by the defendant), unless a concurrent liability existed in negligence or for breach of a contractual duty to take care.

Trade Practices Act

Under TPA s 87CB, a claim is apportionable if it 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 contravention of section 52". It should be noted that the section is not worded to refer to "a claim for contravention of section 52" but "a claim… caused by conduct that was done in contravention of section 52". Thus it would seem that the same approach to construction of CPA s 34 discussed above should be applied to the construction of TPA s 87CB- it matters not whether TPA s 52 is expressly pleaded, what matters is whether the claim is one that can be properly characterised as caused by conduct which is misleading and deceptive.

An example of a claim which, although not pleaded under s 52, would likely be considered an apportionable claim by reason of being a claim caused by conduct that was done in contravention of s 52, would be a claim under TPA s 53. S 53 prohibits certain particular representations in connexion with the supply or possible supply of goods and services, including representations as to the standard, quality, value or

price of the goods. It is hard to conceive of any conduct prohibited by s 53 that would not also be a breach of s 52. The purpose of s 53 in the TPA (apart from drawing extra attention to certain particularly invidious types of misrepresentations) would seem to lie in the fact that contravention of s 53 is an offence, but contravention of s 52 is not. Assuming the relevant breach of s 53 was also a breach of s 52, the conduct in question would surely be "conduct that was done in contravention of section 52" and hence apportionment of liability would apply.

Concurrent wrongdoer

CLA s 34(2) defines "concurrent wrongdoer" as "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". Thus the expression "concurrent wrongdoer" is defined more widely than the common law concept of concurrent wrongdoer previously discussed, as the statutory test is whether the same damage was caused by the various wrongdoers, rather than the narrower common law test of whether a particular injury was inflicted by the wrongdoers.

A defendant seeking to limit liability under proportionate liability provisions bears the onus of pleading and proving that it is a concurrent wrongdoer: *Ferdinand Nemeth v Prynew Pty Limited* [2005] NSWSC 1296 at [17]; *Ucak v Avante Developments* [2007] NSWSC 367.

There is no statutory compulsion under the CLA for either plaintiff or defendant to join all concurrent wrongdoers. Under CLA s 35A a defendant has a duty to inform the plaintiff as soon as practicable of the details of other concurrent wrongdoers, but the only penalty imposed by that section for failure of a defendant is that the defendant may be ordered to pay any costs incurred by the plaintiff as a result on an indemnity basis. In view of the need of the defendant to plead and prove any proportionate liability defence, however, the defendant will need to identify the other concurrent wrongdoers in its Defence in any event.

Under CLA s 35(3), "the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings", and the same rule applies for the TPA proportionate liability regime. This provision contrasts with the equivalent provisions in Western Australia, South Australia and Tasmania where the court "must" take into account the comparative responsibility of non-party wrongdoers. One would presume that the "may" in the NSW (and Commonwealth) legislation means that if the defendant pleads the existence of a non-party concurrent wrongdoer then the court will take that wrongdoer's responsibility into account, but that in the absence of such a pleading the court will ignore the non-party wrongdoer.

CLA s 34(4) states "For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died". Thus the fact that a plaintiff has no practical likelihood of ever recovering damages from a concurrent wrongdoer does not diminish the effect of the existence of that wrongdoer on the proportionate liability of other, more solvent, wrongdoers.

Normally a plaintiff will wish to join as defendants in the one set of proceedings all solvent persons who are alleged with any degree of plausibility by an existing defendant to be concurrent wrongdoers so that if this contention proves correct, the

plaintiff can obtain judgments against each of those other wrongdoers for its proportionate share of the plaintiff's loss. Although CLA s 37 expressly preserves the right of a plaintiff to initiate subsequent proceedings against other concurrent wrongdoers, such wrongdoers will not be bound by the findings in the first proceedings and it is open to them to submit that their proportionate responsibility is less than that determined in the previous proceedings.

The plaintiff is likewise not limited by the previous decision, but as s 37(2) restricts the plaintiff from recovering in the two proceedings combined more than the plaintiff's overall loss the plaintiff's potential advantage from separate proceedings is limited, and outweighed by the disadvantages (from the plaintiff's perspective).

Must a Concurrent Wrongdoer have an existing liability to the Plaintiff?

A more important question is whether a party which is not itself liable to the plaintiff can ever fall within the definition of "concurrent wrongdoer". There is no express requirement in the CLA or TPA for a concurrent wrongdoer to be liable to the plaintiff, but unless such a requirement existed (or the proportionate liability legislation itself created a statutory right against such concurrent wrongdoers), the plaintiff would be left in the position where it could not even bring a suit for a large part of its loss as it lacked any cause of action against some of those persons who were partly responsible. The following cases have considered the question.

In *Commonwealth Bank of Australia v Witherow* [2006] VSCA 45, Maxwell P stated at [14]:

> It would, of course, be impossible to make an apportionment between, on the one hand, Mr Witherow's liability in contract to the Bank and, on the other, the liability of Dennington in tort to Mr Witherow. Plainly, Parliament did not have in mind when it enacted Part IVAA that the Court could be asked to take into account in an action such as this, on a contract of guarantee, the fact that the guarantor has a claim in negligence against a third party on whose advice he relied in giving the guarantee.

Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd [2007] FCA 1216 commented on *Witherow* at [40]

> … it seems to me that the concurrent wrongdoers must each have committed the relevant legal wrong against the applicant. This conclusion seems to be implicit in the reasoning of the Court of Appeal in *Witherow* [2006] VSCA 45, although the issue does not appear to have been addressed specifically.

Besanko J in *Shrimp v Landmark Operations Limited* [2007] FCA 1468 at [59] considered this point:

> As the submissions were developed it became clear that Selected Seeds was contending that although the cross-respondents or one or more of them could be concurrent wrongdoers under s 87CB(3) even though they were not liable to the applicants under the substantive law, the effect of the proportionate liability provisions was that the applicants were given a right of recovery against such cross-respondents as fell within s 87CB(3). That construction would involve a

> significant alteration of the substantive law. In my opinion, however the argument is put it must be rejected because clear words would be required before one would accept a construction involving such a substantial erosion of a plaintiff's rights or a change in the substantive law as to the circumstances in which one party is liable to another. There are no such clear words in the provisions and there is no other indication that Parliament intended to change the law so radically or why it would be considered appropriate to do so.

In *Chandra v Perpetual Trustees Victoria Ltd* [2007] NSWSC 694, Bryson AJ at [111] stated that "s 34(2) of the *Civil Liability Act* impliedly requires" a concurrent wrongdoer to be liable to the plaintiff. His Honour also in that case cited an article by Matthew Bransgrove entitled "Mortgage Law: What can solicitors do to reduce mortgage fraud?" in the Law Society Journal, November 2004.

See also *Fletcher Insulation (Vic) Pty Ltd v Renold Australia Pty Ltd* [2006] VSC 269, *Premier Building & Consulting Pty Ltd v Spotless Group Ltd (No.12)* [2007] VSC 377 and *Atkins v Interprac Financial Planning Pty Ltd & Anor* [2007] VSC 445 which all proceed on the basis that a concurrent wrongdoer must have an existing liability to the plaintiff for the wrong in question.

Ucak v Avante Developments [2007] NSWSC 367 is the only authority arguably against the proposition that a person cannot be a concurrent wrongdoer without an existing liability to the plaintiff for its wrong, but that is only because in a stated list of matters required to be pleaded by a defendant alleging limitation of liability by apportionment Hammerschlag J provides at [35] does not include a pleading that the concurrent wrongdoer is liable to the plaintiff, instead identifying the required matters as follows:

(a) the existence of a particular person;

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

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

This inference by ommission is a weak one, particularly in view of the fact that there was no argument in that case concerning whether liability to the plaintiff was a precondition of becoming a concurrent wrongdoer.

It thus emerges from the authorities that a person cannot be a concurrent wrongdoer unless they have an existing liability to the plaintiff for their concurrent wrong, even though there is no express statement to that effect in any of the proportionate liability legislation.

Abolition of contribution with respect to apportionable claims

CLA s 36 abolishes the right of a defendant to an apportionable claim to obtain from a concurrent wrongdoer contribution or indemnity in relation to damages paid by the defendant to the plaintiff. This is because the proportionate liability regime only imposes upon a defendant that defendant's proportionate liability for the plaintiff's loss, and thus there is no need then to adjust the liabilities between the defendants by contribution orders or similar.

It should be noted that although *Ginelle Finance Pty Ltd v Diakakis* [2007] NSWSC 60 was decided in 2007, the events giving rise to the claims occurred in 2000, being before the 26 July 2004 date for operation of the CLA proportionate liability regime, and for that reason the case involved contribution claims between concurrent wrongdoers rather than the raising of proportionate liability defences under that Act.

Exemptions

An intentional or fraudulent wrongdoer is excluded by the operation of CLA s 34A from the benefit of proportionate liability. If, however, one concurrent wrongdoer acted intentionally or fraudulently and a second did not, the first wrongdoer's liability is not limited by apportionment, but the second wrongdoer can claim apportionment in the normal fashion: see *Chandra v Perpetual Trustees Victoria Ltd* [2007] NSWSC 694; (2007) 13 BPR 24,675 at [111]; also *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505 at [600].

Just apportionment

Under CLA s 35 (1), a court cannot give judgment against a defendant for more than the "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". Although this determination of just apportionment is clearly one of the key decisions a court needs to make when considering a proportionate liability defence, there are no guidelines in the Act for the making of that determination other than the words just quoted.

Yates v Mobile Marine Repairs Pty Ltd [2007] NSWSC 1463 was a case involving apportionment of loss suffered as a result of negligent boat repairs, and the boat repair agency to who the boat was taken and the boat repairer's principal who assisted with the work were found to bear equal responsibility.

In *Chandra v Perpetual Trustees Victoria Ltd* [2007] NSWSC 694; (2007) 13 BPR 24,675, the proportionate liability provisions of the CLA were applied so as to apportion liability in that case (which concerned a forged mortgage) at 90% to the forger, Mr Pan, and 10% to the forger's solicitor, Mr Miller, who had unwittingly assisted the fraud after negligently accepting that Mr Pan had authority to act on behalf of the registered proprietors of the land in question. Bryson AJ made this statement at [113]:

> Mr Pan acted deceitfully in pursuit of a large monetary advantage which he gained; Mr Miller was deceived and conducted an apparently small piece of professional work in a way which fell short of appropriate skill. I consider it just, having regard to the extent of his responsibility, that Mr Miller's liability be limited to 10 per cent of the plaintiffs' loss.

In the course of his judgement His Honour also cited an article by Matthew Bransgrove entitled "Mortgage Law: What can solicitors do to reduce mortgage fraud?" in the Law Society Journal, November 2004.

In *Reihold v NSW Lotteries Corporation (No 2)* [2008] NSWSC, a person who had purchased what would otherwise have been the $2,000,000 winning lottery ticket had that ticket accidentally cancelled by the combined negligence of the newsagent at

which it was purchased and the lotteries commission (who accidentally cancelled the ticket in question instead of another, defective, ticket). In that case it was found that the Lotteries Corporation had far greater responsibility as it was very experienced in dealing with ticket cancellations and the newsagent was not, and all the newsagent did was to follow the Lotteries Corporation's instructions (although the newsagent was negligent is not volunteering additional pertinent information). The apportionment was thus 90% to the Lotteries Corporation and 10% to the newsagent.

In *Reinhold,* Barrett J held that a valid analogy could be drawn between apportionment cases and contributory negligence cases, and cited the following test established by the High Court in the contributory negligence case of *Podrebersek v Australian Iron and Steel Pty Ltd* [1985] HCA 34 at 10 for apportionment between plaintiff and defendant as also applicable in an apportionment case as between defendants under the Civil Liability Act:

> 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, i.e. of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris* [1956] HCA 26; (1956) 96 CLR 10, at p 16) and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd* [1953] UKHL 4; (1953) AC 663, at p 682; *Smith v McIntyre* (1958) TasSR 36, at pp 42-49 and *Broadhurst v Millman* (1976) VR 208, at p 219 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.

His Honour also examined English authorities (such as *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48) relating to the *Civil Liability (Contribution) Act* 1978 (UK) (which contains a similar test for apportionment), noting that the UK position included a consideration of the insolvency of the various defendants even though that had nothing to do with responsibility. His Honour rejected that approach as being applicable in Australia, stating at [53]:

> There is not in the Australian case law any indication that factors beyond the relevant person's "responsibility for the damage in question" may be taken into account in the determination of what is "just" or "just and equitable"; or that the benefit of profits or burden of losses is relevant to the question of such "responsibility". The "having regard to" specification delimits the field of inquiry.

At [57], after citing *Amaca Pty Ltd v State of New South Wales* [2003] HCA 44 and *Rexstraw v Johnson* [2003] NSWCA 287, his Honour noted:

> These two cases show that the financial strength or profitability of a party is not to be taken into account in assessing contribution or apportionment. Nor is it relevant to look to the situation or status of a party (for example, that it is a

> polity financially dependent on the exaction of revenues from its citizens). The attitude of a wrongdoer in the terms of remorse or lack of remorse is also irrelevant. The *Dubai Aluminium* case (above) raises an issue which, it appears, has not received direct attention in Australia, that is, whether the fact that one wrongdoer has profited from the wrongdoing and retains the profit may be taken into account. I am of the opinion that, for the reasons stated at paragraph [53] of the speech of Lord Nicholls (see paragraph [48] above), that fact, if it exists, is inevitably relevant since, as his Lordship observed, it goes to the issue of responsibility with which s 35(1)(a) of the *Civil Liability Act* is expressly concerned.

In *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505, Young CJ in Eq applied the proportionate liability scheme under the CLA to the case before him, which involved the forgery of a mortgage. The mortgagee lost its money, and was found to have done so as a result of the wrongful actions of three people, being Mr Caradonna who forged the mortgage and took the money, Mr Flammia who falsely witnessed the purported signature of the mortgagor on the mortgage, and the mortgagee's solicitors, Hunt and Hunt, who had badly drafted the mortgage by choosing to use an "all monies" form of mortgage despite the much greater vulnerability of such a form of mortgage to fraud.

His Honour noted the 90%/10% liability split in *Chandra v Perpetual Trustees Victoria Ltd*, and also referred to the same apportionment of 90% responsibility to the fraudster and 10% to the solicitor in *Ginelle Finance Pty Ltd v Diakakis* [2007] NSWSC 60 (a case heard by Hoeben J and in which again the solicitor had acted negligently but without fraud). As noted previously, *Ginelle* was a contribution case rather than one decided under any proportionate liability legislation, this reference illustrates the readiness of courts in determining proportionate liability to take a similar approach as was taken in determining contribution between concurrent wrongdoers.

Young J found that in a case of forgery the persons perpetrating the forgery should bear the great majority of the responsibility for the loss, and a solicitor innocent of any intentional wrongdoing only a small share. His Honour contrasted such a case with that of *State Bank of NSW Ltd v Yee* (1994) 33 NSWLR 618, in which a solicitor had falsely attested that a document had been signed in his presence and a finding had been made that it was the solicitor's conduct rather than a series of subsequent forgeries that were the cause of the plaintiff's loss. *Yee* is of limited assistance in the field of proportionate liability, however, as the case was not one involving any form of apportionment, either between concurrent wrongdoers or even for contributory negligence.

In *Vella*, Young CJ in Eq allocated to the solicitor a slightly larger proportion of the liability than in *Chandra* or in *Ginelle*, stating at [597-8]:

> I consider that the degree of negligence of the solicitors exceeds that in the cases before Hoeben J and Bryson AJ. I consider that the fact that Hunt & Hunt were retained to protect the client from what actually happened is a significant factor…

His Honour's comments were referring to the fact that Hunt and Hunt had been engaged by the mortgagee to draft the mortgage documents to head off just the sort of problem that had occurred. His Honour then ordered that Hunt & Hunt pay 12.5% of the mortgagee's loss, with the responsibility of Mr Caradonna set at 72.5% and that of Mr Flammia at 15%. Both Mr Caradonna and Mr Flammia were bankrupts, but as noted previously, that makes no difference in a proportionate liability situation. In consequence, the claimant, Mitchell Morgan, was only able to recover one-eighth of its loss.

The Bullet Proof Vest Argument

In *Vella*, a bullet proof vest analogy was put to Young CJ in Eq on behalf of Mitchell Morgan on the advice of Matthew Bransgrove. The argument was that if a bullet proof vest manufacturer was sued by the victim of a gunshot wound arising from the failure of the vest itself, it is not open for the manufacturer to claim that the shooter is a concurrent wrongdoer because the failure of the bullet proof vest is the event that gave rise to the injury, the shooting is immaterial as had the bullet proof vest worked properly, no injury would have been sustained.

This argument was rejected by his Honour at [584-586], citing *Astley v Austrust Ltd* (1999) 197 CLR 1 at 12-14, in which the High Court "rejected the argument that as an auditor or solicitor was designed to protect the client, the client's own carelessness could never be contributory negligence."

Young J acknowledged that there were differences between that case and "the bullet proof vest case" but concluded "however, it seems to me that the High Court's approach to these sorts of case in *Astley* tells against accepting Mitchell Morgan's argument."

Marcus Young considers that the real problem with the bullet proof vest argument (at least in its most general form) is that a similar argument can be applied to exculpate any defendant. If an injury only occurred because of the conjunction of two events (call them Events A and B), the perpetrator of Event A can always say that Event A was immaterial as no injury would have been sustained if Event B had not occurred, whilst perpetrator of Event B will similarly say that Event B was immaterial as no injury would have been sustained if Event A had not occurred.

Mr Young's notes that his opinion is predicated on the assumption that the failure of the bullet proof vest is properly characterised as arising from the failure of the manufacturer to exercise reasonable care in manufacturing the vest. If, for example, the contract for the supply of the vest contained specifications for the vest and the manufacturer deliberately ignored those specifications (rather than merely adopting negligent quality control procedures), then there would be an excellent argument that the claim for breach of contract was not one affected by proportionate liability as it was not a case of failure to take reasonable care but rather a deliberate breach of contractual terms.

Mr Bransgrove notes that the problem with this is the existing decisions as extracted below make it impossible to avoid by pleading the failure to take reasonable care definition and that arguably the failure to adhere to express contractual requirements will always also be characterisable as a failure to take reasonable care.

Middleton J in *Dartberg Pty Ltd v Wealth Care* [2007] FCA 1216 at [30] 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 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.

In *Reinhold v New South Wales Lottery Corporation (No.2)* [2008] NSWSC 187, Barrett J at [29] quoted the above passage in *Dartberg Pty Ltd v Wealth Care Planning Pty Ltd* and then proceeded at [30] to state:

> 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, is to be judged in the light of the findings made and is not determined by the words in which it is framed.

Thus if in the retainer agreement between a valuer and a lender a valuer is required to complete a checklist and to sign off on each item a failure to carry out one of the checklist items could potentially be characterised as a breach of contract rather than a failure to take due care – however the defendant will simply cite *Reinhold* and *Dartburg* and argue that the failure to address each item on the checklist was also a failure to take due care. However the situation may be effected by the express contracting out clauses – see below.

Contracting Out

Different pieces of proportionate liability legislation have different rules concerning contracting out, and this each must be examined individually.

Section 3A of CLA reads as follows:

> (2) This Act (except Part 2) does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract with respect to any matter to which this Act applies and does not limit or otherwise affect the operation of any such express provision.
>
> (3) Subsection (2) extends to any provision of this Act even if the provision applies to liability in contract.

The proportionate liability provisions of the CLA are not found in Part 2, and thus s 3A gives an express right to contract out of those proportionate liability provisions. Of course, the contract can only bind the contracting parties, thus any non-contracting defendant is free to rely on a proportionate liability defence even if another defendant

may be excluded by contract from raising proportionate liability. In such a case the contracting defendant would be liable for the entirety of the loss, whilst the non-contracting defendant would be liable only for their proportional share as if there were no contract.

It is important to note that CLA s 3A(2) refers to parties "making express provision" (not implicit) in their contract. In order to exclude or modify proportionate liability, therefore, an express term needs to be included in the contract, setting out in clear words the agreed exclusion or modification.

It should be noted that the proportionate liability legislation in Victoria, Queensland, Western Australia and the ACT prevents contracting out.

There is no equivalent to CLA s 3A in the TPA, the Corporations Act or the ASIC. None of these Acts expressly permits contracting out of the Act's proportionate liability provisions, and thus by implication contracting out is impossible. Accordingly a Lender that has, in their retainer agreement with a valuer, contracted out of proportionate liability should bring its action in the Supreme Court and not plead Cwth statutory causes of action.

Settlement

A concurrent wrongdoer who settles an apportionable claim must bear in mind that, given the abolition of actions for contribution or indemnity against other concurrent wrongdoers with respect to such claims, the settling defendant cannot proceed to recoup part or all of its settlement payment from those other concurrent defendant: see *Godfrey Spowers (Vic) Pty Ltd v Lincolne Scott Australia Pty Ltd* [2008] VSC 90. Such a defendant should therefore be careful not to settle for an amount likely to be in excess of its proportionate share of liability.

A plaintiff who settles against one of several concurrent wrongdoers is not prejudiced by this settlement in suits against the remaining wrongdoers: see *Gunston v Lawley* [2008] VSC 97. Also, settlement is not an award of damages that needs to be taken into account under CLA s 37. In regard to settlement, a plaintiff is thus in a better position under a proportionate liability regime, as under common law solidary liability recovery in any form from one concurrent wrongdoer reduced the liability of all concurrent wrongdoers.

Issues relating to proportionate liability of valuers

Proportionate liability exclusion clauses

Given the ability to contract out of proportionate liability under the CLA, persons in NSW engaging valuers who are keen to ensure that the valuer (and, more importantly, the valuer's professional indemnity insurer) can be held liable for the full extent of any loss suffered by the engaging party as a result of negligent valuation will want to ensure that they enter into an express (and preferably written) contract with the valuer which contains a term to the following effect:

> Pursuant to s 3A(2) of the Civil Liability Act ("the Act"), it is hereby agreed that, as between the parties to this agreement, the rights, obligations and liabilities of the parties to this agreement shall be treated as if the provisions of

> Part 4 of the Act have no effect, and (without limiting the generality of the foregoing) no party to this agreement may raise a defence against the other pursuant to s 35 of the Act.

Intelligent valuers will, of course, not wish to enter into such agreements, and their insurers will likely be particularly keen to avoid such an outcome. In the circumstances one might predict that insurers will make it a condition of insurance cover that no agreement be entered into that limits rights of apportionment pursuant to the CLA or other legislation. Thus even if a person seeking to engage a valuer proposes a contract containing a clause along the lines of that above, there is no guarantee that a valuer will be found prepared to enter into that contract.

It is Mr Bransgrove's opinion that if contracting out is prohibited by insurers, lenders will be better served by bringing the valuation of property in-house. This is because:

1. An apportionment of 10% liability is close enough to 0% to make proceedings for all but the largest losses unviable.
2. From an underwriting point of view if a valuer cannot be held accountable for a faulty valuation the valuation becomes worthless and only of persuasive value – like a valuation procured by a borrower has always traditionally been considered.
3. If valuers cannot be sued they will be more likely to be reckless and more likely to be swayed by borrowers and brokers. This tendancy has been seen in the very high values ascribed to properties by reputable valuer's where their valuations have been procured by the borrower (and their subsequent downward revision or refusal when asked to assign to a lender).
4. The fee paid to a valuer represents not just the comfort to the lender of the valuer's professional skill but also his insurance policy (the ability to recover losses caused by negligence). Not all of this recoverability margin is handed over to insurers. Valuers can therefore expect fees for valuations (where there is no contracting out) will plummet to contemptable levels. This in turn will reduce the effort valuers are prepared to put into their work resulting in lower quality valuations.
5. The accountability of an in-house employee valuer will prove more reliable than retaining an unaccountable outsider – whose work cannot be monitored. Put quite simply the only utility in using an external valuer was his insurance policy – take that away and they are of no use to a lender.

Mr Bransgrove predicts insurers (who lobbied for this legislation) will ban contracting out in their policies. This will lead to lenders ceasing to use valuers and/or when still using them no longer requiring they have insurance (what value is it). This will lead to market forces (driven by the valuer's desire to get renumerative work and the insurer's desire to write policies) eventually removing such restictions from valuer's professional indemnity policies.

Where a retainer agreement does contract out of the proportionate liability regime, lenders must be careful if they took an assignment of the valuation. Often a simple letter allowing the lender to rely on the vauluation will not constitute a contract between the lender and valuer, but simply negate third party disclaimer clauses in the

valuation. Accordingly it would be wise to insist on a freash valuation addressed to the lender and ensure that consideration flows from the lender to the valuer.

Will a valuer's liability arise from a failure to take reasonable care?

In a typical case, if a suit exists against a valuer it will arise out of a failure of the valuer to take reasonable care in preparing the valuation. Thus, normally the liability of a valuer will be subject to proportionate liability if there are concurrent wrongdoers and the CLA has not been excluded by contract.

The case law may reveal that there can be instances where proportionate liability would not be attracted due to the wrong being better characterized as something other than a failure to take reasonable care (and not concurrently being also a failure to take reasonable care). If, for example, the valuer is expressly instructed to undertake a particular valuation methodology or in accordance with an API standard and to undertake particular enquiries in preparing a valuation, then if the valuer deliberately fails to use that methodology or fails to make those enquiries and that failure leads to an incorrect valuation, then the loss so caused would not be due to a failure to take care but a deliberate departure from the terms of the contract. However see the discussion on page **25** above.

In some cases a valuer's misconduct might be properly characterised as being in the nature of misleading and deceptive conduct (representing the value of land at a particular value when it does not have that value), but that is of no assistance given that such a characterisation would bring it within the ambit of TPA s 52 (and/or FTA s 42) and thus within the ambit of the proportionate liability attaching to claims caused by conduct breaching TPA s 52.

Potential concurrent wrongdoers in a lender's suit against a valuer

A typical action against a valuer is brought by a lender who has lost money as a result of lending on the strength of a negligent valuation to a borrower who lacks the resources to repay the loan, with the real property security for the loan proving inadequate due to the land being worth substantially less than the valuer estimated and the mortgagee believed.

There are potentially many different concurrent wrongdoers in an action against a valuer, including:

1. Any borrower or guarantor who may have made false statements relevant to the making of the loan, such as the borrower's income, the borrower's credit history, or the intended application of the loan proceeds. However it remains to be seen whether such wrongdoing is subsumed by the primary obligation to repay the debt and therefore not apportionable in accordance with *Commonwealth Bank of Australia v Witherow* [2006] VSCA 45. There is also the argument that these representations (which do not go to the value of the security) are outside the scope of wrong at the crux of the action – that the lender was led to believe the security was worth more than it was.

2. Any borrower or guarantor who may have made false statements relevant to the value of the property – for example providing a false rent roll or survey. However it remains to be seen whether such wrongdoing is subsumed by the primary obligation to repay the debt and therefore not apportionable in accordance with *Commonwealth Bank of Australia v Witherow* [2006] VSCA 45.
3. Any broker or third party who who may have made false statements relevant to the value of the property – for example providing a false rent roll or survey. This is subject to them having a duty of care and therefore liability to the lender.
4. One common error valuers fall into is relying on selling agents of comparable properties to tell them how much other propoerties were sold for. Alernatively relying on falsely inflated sales engineered to assist with finacing of unrelated projects. These parties however have no liability to the lender and so cannot be involved as concurrent wrongdoers.
5. Any financial or legal advisor of the lender who negligently advised that the loan should proceed. However this will be met with the argument that this advice was outside the scope of wrong at the crux of the action – that the lender was led to believe the security was worth more than it was.
6. Any broker, agent or confederate of a borrower who assisted the borrower in making the false statements or made the false statements on the borrower's behalf.
7. Other valuers who may have negligently confirmed the false value. Unless these were check valuations they usually have no liability to the lender and so can not be concurrent wrongdoers.
8. A common class of concurrent wrongdoers are tenants who for a case of beer or other like inducement indulge in what they believe is the harmless vice of confirming inflated rents. In such instances there could conceivably be a very large number of concurrent wrongdoers.

In addition to the possibility of apportionment between concurrent wrongdoers, the valuer may also raise contributory negligence against the mortgage itself, if the mortgagee has not taken reasonable care of its own interests in entering into the loan.

Just apportionment in valuer cases

Assuming a case where a proportionate liability defence is available to a valuer and one or more concurrent wrongdoers exist in addition to the valuer, the manner of apportionment will depend very much on the facts of the case. Some of the most important factors in making a determination of just apportionment are set out below.

The extent to which the valuer fell short of the proper standard of care

The more negligent the valuation, the larger the valuer's share of responsibility is likely to be.

The extent of reliance placed by the plaintiff on the valuation

Valuations can be of greater or lesser importance to the person commissioning them depending both on the reason for obtaining a valuation and on the system of decision making adopted by the plaintiff. Taking the typical case of a potential mortgage

lender obtaining a valuation, some lenders initiate very lengthy and broad enquiries into the borrower, the security, and the intended use of the loan monies and then weigh up all these different factors in determining whether to make the advance. To such a lender, a valuation of the security is only one of a number of factors the lender takes into account to advance monies, and thus the responsibility of a negligent valuer for any ensuing loss is likely to be diminished upon contributory negligence grounds.

Other lenders (particularly those extict creatures known as sub-prime or non-conforming lenders who lack the opportunity to make extensive enquiries) can base their decision to lend almost solely on a single valuation, lending almost as a matter of course up to a preset percentage of the valuation. To such lenders the valuation is of overriding importance in their decision to lend, and thus it is likely in such cases that a negligent valuer will be held to be responsible for the great majority of the lender's loss.

Fraud

The reasoning applied in *Chandra v Perpetual Trustees Victoria Ltd* [2007] NSWSC 694; (2007) 13 BPR 24,675 and *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505 to reduce the liability of negligent yet honest solicitors at the expense of those engaged in actual fraud is likely to have some impact on the mind of a judge determining a case in which the concurrent wrongdoers are a negligent yet honest valuer and a fraudster borrower.

Nevertheless, a fraudster who had only a small causal role with respect to a loss may only be apportioned a small share of responsibility- the fraudulent witness in *Vella*, Mr Flammia, was allocated only a 15% share of responsibility, only slightly higher than the 12.5% responsibility of Hunt & Hunt. In the case of loan made primarily because of a negligent valuation and only to a small extent because of fraud by the borrower, one would presume that more than 50% of the responsibility would be apportioned to the valuer notwithstanding the valuer's honesty, even if the share was somewhat diminished by the fraud of the borrower.

Is suing valuers still worthwhile?

In a paper presented to the Association of Mortgage Investing Corporations on 4 July 2008, Andrew Sharpe of DLA Phillips Fox, co-author of the Australian Valuer's Institute took a very bullish view (on behalf of valuer's and their insurers) opining that *in most cases involving valuer negligence there will be a concurrent wrongdoer and that concurrent wrongdoer will be fraudulent and based on Vella lenders can expect to recover only 10-12%.* Matthew Bransgrove considers that this might be overstating things. Each case will depend upon its facts, however it is certain that *Vella* is not authority for an automatic awarding of only 10% against a non-fraudulent party.

Assuming that a plaintiff is not successful in excluding the operation of proportionate liability either by express contracting out or by the structure of the valuer's retainer, proportionate liability legislation is only of benefit to defendant valuers if concurrent wrongdoers exist. There will be no concurrent wrongdoers unless:

1. There are persons other than the defendant who also caused the plaintiff's loss; and

2. Those persons also have a legal liability to the plaintiff to the extent that they partially caused the loss.

Even if there are persons who are alleged to be concurrent wrongdoers, they will only be held to be so in circumstances where they are found (or would have been found had the plaintiff sued them) to be liable in damages to the plaintiff - if the court would not have been prepared to enter judgment against those persons, they are not concurrent wrongdoers.

Assuming there are genuine concurrent wrongdoers, they may be held only to have a small proportionate liability as a result of the principal cause of, say, a lender advancing funds being reliance on the valuation rather than the activities of any other parties.

Thus, although the potential availability of proportionate liability is an additional matter for a plaintiff to consider, and in some cases may cause a significant reduction in damages awarded against a negligent valuer, in many cases the valuer will have no arguable case for apportionment, and even when apportionment is available the gain to the valuer may be small. Thus suing valuers for their negligence is still worthwhile notwithstanding proportionate liability legislation such as the CLA.

-End of Paper-