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## Proportionate Liability In Construction Litigation

### PROPORTIONATE LIABILITY IN CONSTRUCTION LITIGATION[1]

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I propose to discuss, with particular although not sole reference to construction litigation, the scheme of proportionate liability established in New South Wales by Part 4 of the *Civil Liability Act 2002* (CL Act). I shall not deal, except in so far as it is necessary to do so, with the scheme of proportionate liability established under Commonwealth law pursuant to the CLERP 9 legislative package, [3] including (by way of example) the proportionate liability regime established for claims under s 52 of the *Trade Practices Act 1974* by Part VIA of that Act. [4]

After dealing briefly with the background to proportionate liability “reform”, [5] I shall look at the structure and operation of Part 4 and then consider its application, and problems that may arise from its application, in a number of different scenarios, including some that might be expected typically to arise in construction litigation.

#### Background

Under New South Wales law, proportionate liability is dealt with by Pt 4 of the CL Act. Part 4 was inserted into the Act by the *Civil Liability Amendment (Personal Responsibility) Act 2002*, but was not proclaimed to commence in that form. It was amended by the *Civil Liability Amendment Act 2003* and, so amended, commenced on 1 December 2004. [6]

The proportionate liability regime established by Part 4 applies to civil liability arising before, as well as after, the commencement of Part 4, but does not apply to proceedings commenced before that commencement. [7]

In terms, the proportionate liability regime established by Part 4 applies to all “apportionable claims” as defined in s 34 – I shall return to this. Apportionable claims include, but obviously are not limited to, claims arising out of or relating to building and construction work where those claims fall within the definition of an apportionable claim.

For some 7 years prior to the commencement of Part 4, there had been in force in New South Wales a more limited regime of proportionate liability in “building actions”, established by s 109ZJ of the *Environmental Planning and Assessment Act 1979*. By s 109ZI, a “building action” was defined to mean “an action (including a counter-claim) for loss or damage arising out of or concerning defective building work”; and “building work” was defined in an inclusive fashion that did nothing to limit the ordinary meaning of those words. The scheme of proportionate liability established by s 109ZJ was repealed by Schedule 4.2 to the *Civil Liability Amendment (Personal Responsibility) Act 2002*, with effect from 1 December 2004, [8] the date of commencement of Part 4 of the CL Act.

The background to the introduction of proportionate liability has been comprehensively described by Professor Barbara McDonald in her article “Proportionate liability in Australia: the devil in the detail”. [9] Reference may also be made to her article “Reforms to Liability in the Construction Industry” (1994) 3 Torts Law Journal 285. I will not state, by repeating or seeking to summarise, what Professor McDonald said; but it is interesting to set what she says against the somewhat rosier comments of the Attorney General for New South Wales, the Hon. Bob Debus MP, in his article “Tort Law Reform in New South Wales: State and Federal Interactions”. [10]

#### The legislative scheme

In this section, I look at the key features of the legislative scheme in New South Wales, and advert to some problems that it raises. Those problems are of a general nature, and are not unique to (or even

likely to afflict disproportionately) construction litigation.

The operation of Part 4 is triggered by two key concepts. First, as I have indicated, there must be an "apportionable claim". Second, there must be "concurrent wrongdoers".

Those expressions are defined, and some aspects of their practical operation clarified, in s 34 of the CL Act:

### "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.

...".

The section raises a number of issues. One arises from the references, in paras (a) and (b), to a claim made "in an action for damages": specifically, the word "action". Does the word "action" signify that the proportionate liability regime applies only in proceedings in a court? Or does it extend to arbitral proceedings? If the former – ie, if there is no proportionate liability regime for claims advanced through and decided by arbitration – what is the underlying policy justification? On the face of things, the former would represent an extraordinary outcome, and one liable to increase the flow of work to arbitrators. I suggest that a purposive construction of the phrase "in an action for damages" would apply it to any kind of "proceeding" whereby a claim for damages can be vindicated.

Some support for this approach may be obtained from the decision of the High Court of Australia in *Government Insurance Office of NSW v Atkinson-Leighton Joint Venture*. [11] In that case, it was held, among other things, that an arbitrator had power to award interest on the amount of the award. The basis for this holding was that interest would have been recoverable in a court and the parties by their submission had, by implication, given the arbitrator authority to determine all differences between them according to law. Mason J (with whom Murphy J agreed) said at 247 that a reference to arbitration of "all differences arising out of" a policy of insurance "contemplates that all such differences shall be arbitrated in the light of the general law applicable to the subject matter in dispute." Thus, his Honour said, the effect of the submission was to give the arbitrator power to award interest conformably with s 94 of the *Supreme Court Act 1970* (NSW) (which section, his Honour said, altered "the antecedent principle of law regulating the payment of interest on monies included in judgments between the date when the cause of action arose and the date when the judgment takes effect").

Stephen J said at 235 "that arbitrators must determine disputes according to the law of the land" (with irrelevant exceptions relating to such things as equitable relief). This, his Honour said, led to the

conclusion, supported by authorities to which he referred, "that, subject to such qualifications as relevant statute law may require, an arbitrator may award interest where interest would have been recoverable had the matter been determined in a court of law."

Of course, the particular problem has been resolved by s 32 of the *Commercial Arbitration Act* 1984. But the general principle – that arbitrators decide disputes according to law – is capable of application to the circumstances created by the proportionate liability regime. If that is to be taken as altering "the antecedent principle of law regulating" the doctrine of joint and several liability, then it should be taken to be part of the general law applying, among other things, to the conduct of arbitrations, and the awards of arbitrators, in appropriate cases.

Arbitrations are, of course, a creature of contract (although now with significant legislative support). In the ordinary way, the arbitrator has jurisdiction in accordance with the terms of the submission: that is to say, jurisdiction between the parties to the submission in respect of disputes that fall within the ambit of the submission. If what I have said is correct, and the proportionate liability regime extends to disputes that are to be resolved by arbitration, then a proportionate liability issue may be raised by one of the parties to the contract – typically, by the respondent. It may then be open to the arbitrator to find that the respondent is liable for X percent of the loss and damage sustained by the claimant. But in the ordinary way, unless the other concurrent wrongdoers consent to be joined in the arbitration, the claimant will be left to pursue its remedies against them in the courts. Unlike a plaintiff in ordinary litigation, a claimant in an arbitration cannot join all alleged concurrent wrongdoers to whom the respondent points as having some responsibility for the claimant's loss or damage. Thus, the risk of multiplicity of proceedings, and the consequential risk of inconsistent decisions, is likely to be multiplied.

Another consequence of the contractual nature of arbitrations is that it would be open to the parties to the contract in which the submission is found to agree, pursuant to s 3A(2) of the CL Act, for some regime other than that of proportionate liability established by the CL Act to apply to their relationship.

Similar jurisdictional problems may arise where disputes are, or may be, referred to specialist tribunals such as (in New South Wales) the Consumer, Trading and Tenancy Tribunal. To the extent that the decisions of such tribunals are intended to reflect, or follow, the law of the land, then presumably they would be required, in appropriate cases, to make determinations in accordance with any applicable proportionate liability regime.

It is important to note that an apportionable claim includes one brought in contract, where the economic loss or damage to property is alleged to arise from a failure to take reasonable care. Thus, in many cases it will be the plaintiff's formulation of the claim that determines whether or not a defendant is entitled to the benefit of the proportionate liability regime. However, even where it is not apparent from the plaintiff's pleading<sup>[12]</sup> that the claim is one to which the proportionate liability regime might attach, it would be open to a defendant to plead an entitlement to proportionate limitation of liability, and the material facts from which that entitlement is said to arise.

Because of the wide definition of the noun "damages" in s 3 of the Act ("includes any form of monetary compensation ..."), the proportionate liability regime established by Part 4 is not limited to claims for damages at law or in equity; it would extend, for example, to claims for equitable compensation or claims of a restitutionary nature where those claims otherwise satisfy the requirements of s 34.

Section 34A denies the benefit of apportionment to some concurrent wrongdoers (including those who intend to cause the loss or damage, and those who cause it by fraudulent means).

Section 35 sets out the regime whereby proportionate liability is imposed. By sub s 1(a), the liability of a concurrent wrongdoer defendant must reflect a proportion of the damage or loss that is "just having regard to the extent of the defendant's responsibility for the damage or loss". By para (b), the court cannot give judgment against that defendant for more than that amount.

Section 35(2) deals with proceedings that involve both apportionable and non apportionable claims. They are to be separated and dealt with distinctly: the former under Pt 4 and the latter under whatever legal rules are applicable to it.

Section 35(3)(a) requires that the plaintiff's responsibility (if any) for the damage or loss in question (arising from the plaintiff's contributory negligence) is to be excluded before apportioning responsibility as between defendants. Paragraph (b) entitles the court to have regard to the responsibility of

concurrent wrongdoers who are not parties to the proceedings. It thus appears that, in an appropriate case, the plaintiff's contributory negligence must be taken into account under s 35(3)(a) even though the plaintiff brings its claim in contract: reversing, in the case of an apportionable claim, the effect of *Astley v Austrust Limited*. [13]

Section 35(3)(b) marks a significant distinction between the regime in force in New South Wales (and, for that matter, under Commonwealth legislation) compared to that in force in Victoria. [14]

Another peculiarity of s 35(3) is the shift in language from "defendants" in the opening words to the word "party" in para (b). Responsibility can be apportioned only among defendants. But "defendant" includes any party other than the plaintiff. [15] Regard may thus be had to the comparative responsibility of parties to the proceedings (eg, cross claimants or cross defendants) who are not defendants in the ordinary sense of that word: ie, parties who are not at issue with the plaintiff. Since the court can allocate responsibility to parties who are not at issue with the plaintiff, it would seem that those would be thereby estopped, in later proceedings at the suit of the plaintiff, from disputing the liability so fixed.

Indeed, an expansive application of 35(5) [16] may mean that s 35(1)(b) authorises the court to give judgment against a defendant, in the extended sense, who is not a defendant in the traditional sense – ie, who has not been sued by, and is not at issue with, the plaintiff. If this were the intention of the legislature, it would mark a significant change in the way that litigation has hitherto been conducted.

Section 35(3)(b) gives rise to a problem. If the court decides to have regard to the comparative responsibility of a concurrent wrongdoer who is not a party, then logically it would do so by seeking to determine, for the purpose of excluding from the amount of damages otherwise payable by concurrent wrongdoers who are parties, the amount of damages that reflects the extent of that non party's responsibility. In other words, the court is required to assess the non party's contribution to the overall damage applying the formula set out in s 35(1)(a). But it is to carry out that task without hearing from the non party, and in circumstances where the defendants have a very real interest in fixing that non party with as much of the responsibility as possible. Whilst the plaintiff has a competing interest, in seeking to fix the defendants with as much responsibility as possible (which will minimise the responsibility of the non party), the plaintiff may lack the information or resources available to the defendants. Regardless, the court will be unlikely to have the benefit of hearing from the non party.

There are at least two immediately obvious consequences. The first is that the court's orders may tend to understate the responsibility of the concurrent wrongdoers who are defendants, compared to the responsibility that might have been allocated had all concurrent wrongdoers been defendants. This will diminish the amount of damages recoverable by the plaintiff in the action. The second is that the non party will not be bound by the assessment, in proceedings to which it was not a party, of its responsibility. If, therefore, the plaintiff sues that non party in subsequent proceedings, the plaintiff will be required to run the entirety of its case (involving duplication, which might be thought to be substantial, of the case already run) but with the risk that the defendant against whom that case is run will be able to minimise the extent of its responsibility. The consequence might be that the plaintiff, although it has sued all concurrent wrongdoers, does not recover the full amount of its loss, even though there can be no doubt that, between them, those wrongdoers caused the whole of that loss.

The answer appears to be that the plaintiff should seek to identify all concurrent wrongdoers and to join them all in the one action, so that they can fight out among themselves the amounts of their several liabilities to the plaintiff. Undoubtedly, that is what Parliament intended should happen. But the plaintiff may not always be aware of the identity of all concurrent wrongdoers.

Section 35A seeks to mitigate this situation. It imposes on a defendant a duty to inform the plaintiff of the identity of other persons that the defendant on reasonable grounds believes may be a concurrent wrongdoer in relation to the plaintiff's claim, and to inform the plaintiff of the circumstances that give rise to that belief. However, the only sanction for breach of this duty is that of costs. Particularly where circumstances of common insurance arise, it may well be in the interests of a defendant (or its insurer) to hold back for as long as possible information concerning the identity of concurrent wrongdoers, so as to put the plaintiff in the position where it must elect either to abandon a trial date so as to join the non party or take its chances on the apportionment, at trial, of responsibility to that non party.

It may be that this situation could be dealt with by rules of court or a practice note aimed at preventing a defendant from relying on the comparative responsibility of a concurrent wrongdoer who is not a party where the defendant has breached its duty under s 35A(1)(b) to notify the plaintiff "as soon as practicable" of the relevant matters in relation to that non party. There would remain a question,

whether the express terms of s 35A could be, as it were, reinforced (and, more relevantly, perhaps restricted) in this way; [17] and, in any event, the efficacy of any such rule of court or practice note in relation to a defendant's right under Commonwealth legislation may be questionable. However, the discretionary nature of the power have regard to the comparative responsibility of non-parties (in New South Wales, s 35(3)(b): "may have regard to") may solve this problem.

In New South Wales, the Practice Note relevant to proceedings in the Commercial and Technology and Construction Lists has been amended to reflect s 35A. Paragraph 45 of Practice Note SC Eq 3 reads as follows:

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45. Any party in proceedings involving an apportionable claim, who has reasonable grounds to believe that a particular person may be a concurrent wrongdoer in relation to the claim(s), must, as soon as practicable, give written notice to all other parties to the proceedings of: (1) the identity of that person; and (2) the alleged circumstances that may make that person a concurrent wrongdoer."

Whilst para 45 does not go beyond the terms of s 35A, the rationale of including it in the Practice Note is to reinforce to litigants and practitioners the point that non compliance may call into play any relevant power of the court under the *Civil Procedure Act 2005* and the *Uniform Civil Procedure Rules 2005*: including (without limitation, and by way of example only) a discretionary refusal of leave to amend to raise a "proportionate liability" defence where there has been non compliance with para 45 (and therefore, and *a fortiori*, with s 35A).

However, it is necessary to make the point at this stage that the court's approach to s 35A (and, where applicable, para 45 of the Practice Note) remains to be worked out on a case by case basis. Since the discretionary considerations will depend very heavily on the facts of particular cases, it is difficult to say anything meaningful about the approach that the court might take to the exercise of its powers and discretions where a defendant has not complied with its obligations under s 35A and para 45 of the Practice Note.

The scheme of which s 35(3)(b) forms part is supplemented by s 36 and, in particular, by ss 37 and 38.

Section 36 provides protection to defendants against whom judgment has been given as a concurrent wrongdoer in relation to an apportionable claim. They cannot be required to contribute to damages or contribution recovered from other wrongdoers (whether in the same proceedings or not) and cannot be required to indemnify any such wrongdoer.

Section 37 expressly permits the bringing of subsequent actions against concurrent wrongdoers who were not parties to a previous action. [18] Where the identity of such a concurrent wrongdoer was known to, and not disclosed by, a defendant in the earlier proceedings, this might be thought to be a less than satisfactory solution: particularly having regard to the public interests that are served by preventing multiplicity of litigation in respect of the same "cause".

Where a subsequent action is brought, the plaintiff cannot recover from any "new" defendant more than its apportionable responsibility for the loss or damage; and in any event cannot recover, overall, an amount that would result in the plaintiff's receiving more than the amount of the damage or loss actually sustained by it.

Section 38 empowers the court to give leave for non party concurrent wrongdoers to be joined in proceedings concerning an apportionable claim (thus dealing, at least to an extent, with the situation that would arise if a defendant to existing proceedings complies with its duty under s 35A(1)(b)). However, a person who was a party to any previously concluded proceedings in respect of that claim cannot be joined under s 38.

#### **Proportionate liability and construction litigation**

I have already adverted to some difficulties with the proportionate liability legislation in New South Wales. In this section, I shall look at some applications of the legislation to scenarios that commonly

occur in construction legislation. I shall also look at some difficulties that, whilst not necessarily unique to construction litigation, may nonetheless be raised frequently in the context of that litigation.

### *Onus of proof*

This is a particular problem in New South Wales and those other jurisdictions that empower the Court to take into account, in assessing the responsibility of defendants, the proportionate responsibility of non parties. [19] But it is also a problem of more general application.

The application of the CL Act depends, as I have said, on there being both an apportionable claim and concurrent wrongdoers in respect of that claim. In the ordinary way, it would not be in the interests of a plaintiff having a non apportionable claim against one deep pocketed defendant to plead material facts that might show the existence of an apportionable claim and concurrent wrongdoers. A clear example is a plaintiff having a claim against a contractor for breach of an express contractual warranty to hand over the works by the time limited for practical completion (as extended from time to time) free of defects. A claim in respect of defective works (and/or for late delivery) could be brought for breach of that promise. In terms, it would not be an apportionable claim.

However, the defendant might wish to allege that its breach of contract was the result of negligence: negligently failing to manage and undertake the works, and negligently failing to use reasonable care and skill in and about their execution. This gives rise to two problems:

- (1) Who "owns" the litigation?
- (2) Where does the onus of proof lie?

As to the first question: it is hard to see why the application of the statutory regime (which, after all, was introduced to serve the interests of prospective defendants and their insurers) should be governed by the ingenuity of those who plead plaintiffs' causes of action. Put in less emotive language: the question should fall to be answered by considerations of substance rather than form.

As to the second question: a plaintiff is not entitled to judgment against a defendant for more than the amount that the court "considers" to reflect that proportion of the damage or loss for which the defendant is responsible: s 35(1). Where a plaintiff sues one defendant only, then it is likely to be clear, at least by implication, that the plaintiff is asserting that the defendant sued is responsible for the whole of the loss or damage. [20] But what is the position where the plaintiff sues several alleged concurrent wrongdoers? Is the plaintiff obliged to plead, and prove, the proportionate responsibility of each? Or is it a matter for the defendants to raise?

Perhaps the plaintiff can sue in the alternative, pleading that the first defendant, alternatively the second defendant, alternatively the third defendant, is wholly responsible for its loss and damage. But there may be real practical (and indeed legal) problems in this approach.

In *Platt v Nutt*, [21] Kirby P at 238 referred to "the general rule which obtains in our courts, namely that those who assert must prove". His Honour said that this principle "applies throughout the law". I do not think that the force of his Honour's observations on this point is diminished by his dissent in the result.

On that basis, a plaintiff that sought to attribute proportionate responsibility to various defendants (eschewing the device of alternative attributions of total liability) would be required to plead, with adequate particularisation, the material facts supporting the proposed allocation. Where the court found that a defendant's contribution was less than that asserted by the plaintiff, there would be no difficulty; but query whether this would be so if the court found that a particular defendant's responsibility was greater than that alleged by the plaintiff.

Application of the principle enunciated by Kirby P would mean that a defendant that wished to limit its liability by reliance on the concurrent wrongdoing of others would need to plead the defence (as did the third defendant in *Ferdinand Nemeth v Prynew Pty Ltd* [22]). On this basis, a single defendant sued in respect of what on the plaintiff's pleading is not an apportionable claim might be entitled to plead material facts showing that it is in substance a material claim, and showing the existence of concurrent wrongdoers; and would bear the onus of proving those material facts (and, one might think, rightly so).

In each case, the onus would follow the allegation; and the person making the allegation would be required to plead (and ultimately to prove) material facts in support of the allegation.

However, the legislation is not entirely clear on this point. Thus, although (as I have said) it imposes on defendants an obligation to identify to the plaintiff others whom the defendant believes on reasonable grounds may be concurrent wrongdoers, [23] it does not impose on them any obligation to plead or prove the contribution of those concurrent wrongdoers to the overall loss and damage.

Professor McDonald has discussed this problem in the article to which I have already referred (“Proportionate liability in Australia: the devil in the detail”) [24]. She points out that in some cases the defendant will be in a better position than the plaintiff to identify concurrent wrongdoers. That circumstance – likely to be of very common application indeed in construction litigation – provides a sound policy basis, in addition to the “general rule” identified by Kirby P, for allocating the onus of proof to defendants where they wish to avail themselves of the benefits offered by the legislation.

Einstein J addressed the onus of proof issue in *Nemeth* at paras [17] and following. [25] Having referred at para [17] to the article of Professor McDonald, to which I have referred above, his Honour said at para [19] that “the position is made quite clear by the terms of sections 35 and 35A of the *Civil Liability Act*”. His Honour did not state explicitly what it was that was made “quite clear”. By inference, I think, his Honour was suggesting that a defendant could, but need not, raise a proportionate liability defence, but that the onus of proof lay upon it if it did. This I think follows from his Honour’s discussion at paras [20] to [22] of the limited legislative sanctions imposed on defendants who do not comply with their duty of disclosure.

#### *Plaintiff unaware of identities of those responsible*

Where the plaintiff either knows, or is likely to know, the identity of all those who have (or may have) contributed to its loss, it has the choice to sue some or all of those that it believes to be responsible. If it chooses to sue some only, one could say that the consequences (including recovering less than the full amount of its loss, or being forced to the expense and delay of further proceedings) are of its own making.

But in some cases, the plaintiff may not know who may be responsible. Take, for example, the situation of a plaintiff whose land and premises are damaged by adjacent works. The plaintiff may know the name of the builder carrying out those works (or the principal for whom those works are carried out). But it may not know precisely who was responsible for all aspects of the works which led to the damage.

In those circumstances, the plaintiff may sue those who it knows, or thinks, to be responsible. But what is it to do if those who are sued do not comply with their obligations under s 35A(1)? How, then, is the plaintiff to ascertain the names of potential defendants?

Einstein J confronted just this situation in *Nemeth*. The nature of the proceedings was summarised succinctly in paras [1] and [2] of his Honour’s reasons:

“[1] The plaintiff claims damages arising from the subsidence of premises at 46 Mona Road, Darling Point. At the time of the subsidence the first and second defendants were apparently developing the adjoining lot, 44 Mona Road.

[2] Claims are made that the subsidence was caused by a breach of duty of care owed by the first and second defendants, a breach of duty of care owed by the third defendant and breaches of statutory duty by the first, second and/or third defendants. Claims are also made in nuisance against the first, second and third defendants.”

A number of issues arose for consideration in the context of case management. The only relevant one related to the third defendant’s proposed amendment of its defence, claiming a limitation of liability under s 35 of the *Civil Liability Act*. The plaintiff opposed the grant of leave on the basis, as explained by Einstein J at para [15] “that as a condition of obtaining such leave, the third defendant should be required to identify the particular person or persons whom the third defendant has reasonable grounds

to believe may be the concurrent wrongdoer in relation to the claim.”

Einstein J gave the third defendant leave to amend; but, as a condition, required it to answer interrogatories administered by the plaintiff as to the identity of those whom the third defendant believed to be concurrent wrongdoers. His Honour noted at para [25] that interrogatories were generally to be directed to facts, not to state of mind. However, he said at para [28], s 61 of the *Civil Procedure Act* [26] could be used to permit the grant of leave to administer such interrogatories. His Honour said that this was “perfectly consistent” with the case management requirements of Part 6 of the *Civil Procedure Act*, and that it “especially caters for efficiency in terms of the disposal of the business of the court” (presumably, in the particular case).

At para [30], his Honour noted that nothing would prevent the third defendant from relying on new information which might emerge as to a further concurrent wrongdoer; but said in para [31] that the court could impose a continued obligation on that defendant to update what it had said in answer to interrogatories if it became aware of the identity of other possible concurrent wrongdoers. As his Honour noted:

“This is the same obligation as the continuing obligation to give discovery.”

It is likely that, as parties and practitioners become used to the proportionate liability regime, the courts will need to be careful to ensure that case management procedures enable the real issues to be exposed in a way that does not threaten ambush and that minimises the risk of multiplicity of proceedings in relation to the same event of loss.

#### *One defendant is wholly responsible*

Consider a case where a plaintiff (principal) sues to recover damages in respect of defective workmanship. The claim is one for economic loss. Those responsible might include the builder (under a contract with the principal); the architect (under a retainer imposing on the architect, among other things, an obligation to inspect construction work carried out and to require the rectification of defects); and the supervisor (retained under a contract obliging it to certify the value of progress payments, so as to entitle the builder to payment, and oblige the principal to pay).

In the ordinary case, the defective workmanship will be the responsibility of the builder or its subcontractors. The damage recoverable would be, with some qualifications, the cost of rectification. [27] The damages recoverable against the architect might be the same, or (if it be different) the value of the lost opportunity to require the builder to rectify. The damages against the supervisor might be the amount of progress claims overpaid by failing to take into account the cost of defect rectification. But, overall (and in broad outline) the total damages recoverable would not in the ordinary case exceed the cost of rectification.

On ordinary common law principles of causation, it may readily be seen that each of the builder, the architect and the supervisor have some liability to the principal. But under the proportionate liability regime, the court would be required to assess the individual contributions of each. In a case of defective workmanship, the builder – who (by itself or through those for whom it is responsible) negligently carries out the works so as to hand over a defective building requiring rectification – may be thought to be responsible for 100% of the loss suffered. A finding that one defendant is responsible for 100% of the loss might be thought to suggest that there is no percentage responsibility (or no proportionate responsibility) to allocate to any other defendant. If this is the correct outcome of the application of s 35(1) of the *Civil Liability Act*, the negligent architect and the negligent supervisor would escape scot free. Alternatively, if the proportionate responsibilities of the architect and the supervisor are considered before that of the builder, and each is fixed with some percentage of responsibility, the result may be that the builder, who in the real world should be regarded as liable for the whole of the loss, has its liability diminished by operation of the statutory scheme. Section 35(3) seems to make clear what is in any event implicit in the scheme: that the court’s task is to apportion responsibility between defendants. That must mean an apportionment of the total (100%), not an apportionment that yields a greater amount (in excess of 100%) of the total amount of damages.

#### *Conflict between tortious and contractual liability*

In the facts just referred to, it is likely that responsibility for defective workmanship will be attributed to the builder pursuant to the contract between the builder and the principal. However, in the usual case, the underlying or primary responsibility may be attributed to the subcontractor who performed the negligent work, under a contract with the builder.

If the pleaded case against the builder demonstrates that there is an apportionable claim then, notwithstanding that the builder may be sued in contract, the proportionate liability regime will be engaged. In those circumstances, the builder may seek to limit its liability by pointing to the responsibility of the subcontractor.

If the court finds that the subcontractor is a concurrent wrongdoer with the builder then it is to give damages against them having regard to the extent of their respective responsibilities for the damage or loss. What does "responsibility" mean in this context?

The builder's primary responsibility is its contractual obligation to deliver a completed building (or whatever) in accordance with the relevant plans and specifications and other requirements, and free of defective workmanship. [28] That responsibility will usually arise under express contractual provisions; otherwise, it will be implied on well understood principles. [29] It is a basic principle of the law that people should honour their contracts; that idea "forms part of our idea of what is just". [30]

Did the legislature intend to override this general policy of the law? Or is the builder's contractual responsibility something to be taken into account in assessing what is "just having regard to the extent of the [builder's] responsibility for the damage or loss"?

Perhaps the answer may be found in s 39(a) of the CL Act, whereby nothing in Part 4 is to prevent "a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable". That may reinforce an approach which suggests that, when considering questions of allocation of responsibility, the court may well take into account the primary contractual obligation and the responsibilities, of a vicarious nature, embodied in it.

This suggests that questions of the application of the proportionate liability regime may well depend upon a close analysis of the pleaded claim. If this is so, then those advancing claims pursuant to a contract might be well advised to plead them very carefully, and to restrict them to the contract. In particular, they might be well advised to avoid the currently fashionable practice of alleging all possible causes of action including in contract, negligence and under the *Trade Practices Act* or equivalent regime. [31]

#### *Proliferation of parties ...*

Typically, in construction litigation, there may be many entities that are, or may be said to be, liable for damage suffered by a plaintiff. The previous example was very simple. In more complex cases, both external professionals (including the various engineering professionals engaged for different aspects of the design and construction process) and various subcontractors may all be thought to have some part of the overall responsibility. Hitherto, a plaintiff was able to pick its victim and to proceed, in an attempt to keep the proceedings as simple as possible, and to obtain a resolution of its claim with the minimum expense of time and money, against that victim only. But under the new regime, a plaintiff will be forced to consider very seriously who may be liable, and the result will be proliferation of defendants. Even if the plaintiff does not pursue this task vigorously, it may be expected that defendants will do so, with the same result.

Thus, resolution of the dispute is likely to require resolution of a very large number of subordinate disputes, each with its own peculiarities and complexities. This is likely to lead to a very substantial increase in demands on court (or referee or arbitrator) time and very substantial increases in costs.

It may be said that the risk of proliferation of parties is exaggerated, because in many cases under the "old" regime, defendants that are sued will in any event join others who they think may be liable as cross-defendants, so as to claim contribution or indemnity. Two things may be said about this. First, where defendants do so, it is at their risk as to costs, not the plaintiff's (except in the case of an order that the plaintiff meet those costs [32]). The second is that it is not uncommon, at least in New South Wales, for those who have been sued to make common cause with those who might have been sued, taking the view that this is the best way to defeat the plaintiff's claim. The proportionate liability regime,

by encouraging proliferation of defendants (on the assumption that a plaintiff, having been notified of the identity of potential concurrent wrongdoers, will seek to join them as defendants) may in fact make it more difficult for a defendant successfully to resist a claim. It may be doubted that the legislature had this possible consequence in mind.

I do however acknowledge that one likely result of the proportionate liability regime will be a reduction in the number of cross-claims.

There is no evidence that the legislature or the executive have made any plans to meet the likely significant increase in court and related resources that will be required to deal with these problems.

*... or multiplicity of proceedings*

The alternative is that the plaintiff will seek to keep the proceedings as simple as possible, and to take its chances on recovering all, or the great part, of its damages against those whom it has chosen to sue. If the plaintiff is not successful in this endeavour (ie, if those whom it has chosen to sue succeed in deflecting a substantial part of the responsibility onto non parties), then it is likely that the plaintiff will commence further proceedings against those “found” in the earlier proceedings to have some responsibility. [33] The result, as I have already indicated, will be further litigation in which much if not all of that which has already been heard and resolved will need to be reheard. Firstly, this means that the same court may be required to hear what is substantially the same dispute several times over, but against different defendants. Secondly, it is likely to mean that the defendants in the second and later proceedings will ask for a judge other than the one who heard the first or earlier proceedings, upon the obvious basis of apprehension of bias.

Presumably, we will need either more Construction List judges (in jurisdictions such as the Supreme Court of New South Wales, where there is a specialist Technology and Construction List) or more judges who are willing, or if not willing at least available, to be co-opted (“drafted” might be a better word) into hearing building cases.

Again, it does not appear that the legislature or the executive have made plans to cope with the likely increased demand on court resources.

*Impact on prospects of settlement*

It may be wondered whether the proportionate liability regime, and its propensity for proliferation of parties or multiplicity of proceedings, will facilitate settlement of disputes. On the one hand, the regime may be thought to provide defendants with further opportunities to limit or pass off to others their liability. On the other, complex multiparty disputes, involving numerous cross-claims for contribution, have proved to be susceptible to alternative dispute resolution in the past, and it may be that the new regime will not produce any different outcome.

However, there remains the situation where a party may wish to extricate itself from proceedings either by making an offer of compromise under the relevant rules or by making a “Calderbank” offer. Some of the problems in this connection were articulated, in the context of the *Building Act*, by Tim de Uray, “Building Act 1993 (Vic), s 131 – application and effect”. [34] It may be that the courts of Victoria have some experience of the application of the proportionate liability regime to those mechanisms. There is not so far as I know any consideration of the problem in New South Wales under s 109ZJ of the *Environmental Planning and Assessment Act* (which may reflect the fact that many litigants appeared to be either unaware of the section and its effect or unwilling to poke a stick into the viper’s nest).

*Causation*

It will be seen that the concept of causation lies at the heart of the proportionate liability regime: see the definition of “concurrent wrongdoer” in s 34(2) of the CL Act, set out above.

In New South Wales, the concept of causation is addressed by s 5D of the CL Act. Two elements are involved: factual causation and scope of liability. The former requires a conclusion “that the negligence

was a necessary condition of the occurrence of the harm". The latter involves the conclusion "that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused".

In determining causation according to those elements, and in determining the scope of liability, the court is required to address "whether or not and why responsibility for the harm should be imposed on the negligent party". This is required to be considered both: whether, "in an exceptional case", negligence that cannot be shown to be a necessary condition of the harm should nonetheless be accepted as establishing factual causation (s 5D(2)); and, as I have indicated, in considering the scope of liability once causation is found.

I set out the section in all its glory:

#### **"5D General principles**

(1) A determination that negligence caused particular harm comprises the following elements:

(a) that the negligence was a necessary condition of the occurrence of the harm ("**factual causation**"), and

(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("**scope of liability**").

(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:

(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party."

#### *Pleading issues*

I have adverted to one particular issue already and will not repeat what I have said.

Further, in considering pleadings, it will be necessary to have regard to the onus of proof and, at least in New South Wales, to the requirements of s 5D of the CL Act.

It will be observed that the form of defence propounded in *Nemeth* simply sought an order that the relevant defendant's liability be "limited to such other proportion [of the plaintiff's loss and damage] as the Court determines is just and equitable, having regard to the extent of [that defendant's] liability for any damage."

To my mind, a defence in those terms should not be permitted. If pleaded, it should be struck out; and if sought to be raised by amendment, leave to amend should be refused. That is so even having regard to the more liberal rules that attend proceedings entered in the Technology and Construction List.

If a defendant wishes to take advantage of the statutory regime for limitation of its liability, it should plead, and particularise adequately, the material facts. To my mind, that would require the defendant

to identify the other persons whom it believes to be concurrent wrongdoers, and to set out the material facts that, it says, show that they are concurrent wrongdoers. In other words, I think, a proper pleading should address the issues raised by s 35(1)(b) of the Act: identifying the alleged concurrent wrongdoer and the circumstances that may make that person a concurrent wrongdoer. In substance, the defendant should plead with the same degree of precision and particularity as it would do under the old regime if it were bringing a cross-claim against that alleged concurrent wrongdoer.

### *Case management*

As I have said, courts will need to ensure that their case management procedures are adapted to ensure that cases where proportionate liability is an issue are managed efficiently, so as (among other things) to eliminate multiplicity of proceedings. However, and again as I have indicated, there may be some tension between such case management procedures which, typically, might impose on defendants who do not comply with their obligations under s 35A(1) (in a timely way) a sanction more severe than costs and the terms of the legislation.

One topic that will require particular attention is that of pleading and particulars, where a defendant relies on limitation of its liability to its proportionate share. That raises the more fundamental question of onus of proof. I now turn to those questions dealing with the latter first.

### END NOTES

[1] A revised version of a paper presented to the Building Dispute Practitioners' Society, Melbourne, on 10 July 2006.

[2] A Judge of the Supreme Court of New South Wales. The views expressed in this paper are my own, not necessarily those of my colleagues or of the Court. I gratefully acknowledge the very substantial contribution of my tipstaff, Anne Egan Wagstaff, BA, summa cum laude (Providence College), JD, cum laude (University of Notre Dame).

[3] *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004*.

[4] Equivalent regimes are established under the *Corporations Act* (s 1041L) and the *ASIC Act 2001* (s 12GP) for claims under the provisions of those Acts that are analogous to s 52.

[5] The noun "reform" connotes the amendment, or change for the better, of something that is faulty: see, for example, **The Oxford English Dictionary** (online version at <http://dictionary.oed.com>). (That dictionary's citations include what might be thought to be an apt quotation from "Florio" by the obscure 19th century writer, Hannah More, (Dramas, 1827): "He said when any change was brewing, Reform was a fine name for ruin".)

[6] See Proclamation 2004 No 754, 24 November 2004.

[7] See CL Act Schedule 1, cls 6(1), 13.

[8] See Proclamation 2004 No 755, dated 24 November 2004.

[9] (2005) 26 Aust Bar Rev 29 at 30-33. Reference may also be made to her article "Reforms to Liability in the Construction Industry" (1994) 3 Torts Law Journal 285.

[10] (2002) UNSWLJ Vol 25(3) at 825.

[11] (1981) 146 CLR 206.

[12] Or equivalent. In New South Wales, for cases brought in the Commercial List or the Technology and Construction List, there are no pleadings. See Practice Note. Parties are required to file "statements" and "responses" appropriate to the nature of the claim or cross-claim being asserted. Those documents are not pleadings; they are required to eschew formality; but they are required to enable the true issues to be exposed. (Whether or not they achieve this is a matter on which minds may differ.) In this paper, I will use the common and well understood term "pleadings" to include any form of quasi pleading whereby a claim or a defence is propounded before a court or arbitral tribunal.

[13] (1999) 197 CLR 1.

[14] *Wrongs Act 1958* (Vic), s 24A(3): the exceptions set out in that subsection may be put to one side for present purposes.

[15] CL Act, s 35(5).

[16] Which, as indicated, provides that "[a] reference ... to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff)".

[17] Such a practice note, or rule of court, might be justified in New South Wales by ss 56 and 57 of the *Civil Procedure Act 2005*. Those sections provide as follows:

#### **"56 Overriding purpose** (cf SCR Part 1, rule 3)

(1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

(2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.

(3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.

(4) A solicitor or barrister must not, by his or her conduct, cause his or her client to be put in breach of the duty identified in subsection (3).

(5) The court may take into account any failure to comply with subsection (3) or (4) in exercising a discretion with respect to costs.

## **57 Objects of case management**

(1) For the purpose of furthering the overriding purpose referred to in section 56 (1), proceedings in any court are to be managed having regard to the following objects:

(a) the just determination of the proceedings,

(b) the efficient disposal of the business of the court,

(c) the efficient use of available judicial and administrative resources,

(d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

(2) This Act and any rules of court are to be so construed and applied, and the practice and procedure of the courts are to be so regulated, as best to ensure the attainment of the objects referred to in subsection (1).”

See also r 2.1 of the *Uniform Civil Procedure Rules 2005*:

### **“Part 2 – Case management generally**

#### **2.1 Directions and orders**

(cf SCR Part 26, rule 1)

The court may, at any time and from time to time, give such directions and make such orders for the conduct of any proceedings as appear convenient (whether or not inconsistent with these rules or any other rules of court) for the just, quick and cheap disposal of the proceedings.

...”

[18] In the case of joint tortfeasors, this abolishes the principle known as the rule in *Brinsmead v Harrison* (1872) LR 7 CP 547.

[19] CL Act, s 35(3)(b).

[20] There will be exceptional cases, particularly where, having sued one defendant or group of defendants, and recovered part only of its loss, a plaintiff decides to sue other alleged concurrent wrongdoers for the balance of its loss.

[21] (1998) 12 NSWLR 231.

[22] [2005] NSWSC 1296.

[23] CL Act, s 35A(1).

[24] See footnote 9 above.

[25] I deal with this decision in more detail in the following section.

[26] Which reads:

#### **“Division 2 Powers of court to give directions**

**61 Directions as to practice and procedure generally** (cf SCR Part 23, rule 4; Act No 9 1973, section 68A)

(1) The court may, by order, give such directions as it thinks fit (whether or not inconsistent with rules

of court) for the speedy determination of the real issues between the parties to the proceedings.

(2) In particular, the court may, by order, do any one or more of the following:

(a) it may direct any party to proceedings to take specified steps in relation to the proceedings,

(b) it may direct the parties to proceedings as to the time within which specified steps in the proceedings must be completed,

(c) it may give such other directions with respect to the conduct of proceedings as it considers appropriate.

(3) If a party to whom such a direction has been given fails to comply with the direction, the court may, by order, do any one or more of the following:

(a) it may dismiss the proceedings, whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular claim,

(b) it may strike out or limit any claim made by a plaintiff,

(c) it may strike out any defence filed by a defendant, and give judgment accordingly,

(d) it may strike out or amend any document filed by the party, either in whole or in part,

(e) it may strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,

(f) it may direct the party to pay the whole or part of the costs of another party,

(g) it may make such other order or give such other direction as it considers appropriate.

(4) Subsection (3) does not limit any other power the court may have to take action of the kind referred to in that subsection or to take any other action that the court is empowered to take in relation to a failure to comply with a direction given by the court."

[27] *Bellgrove v Eldridge* (1954) 90 CLR 613.

[28] That contractual responsibility will ordinarily extend to the whole of the defects.

[29] *B.P. Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266.

[30] *Baltic Shipping Company v Dillon* (1991) 22 NSWLR 1, 9 (Gleeson CJ). The decision was reversed in the High Court (1993) 176 CLR 344, but nothing said in the High Court casts doubt on this statement of fundamental principle.

[31] These suggestions are not made entirely without self interest.

[32] As to which, see eg *Edginton v Clark* [1964] 1 QB 367; *Thomas v The Times Book Co Ltd* [1966] 1 WLR 911.

[33] I have italicised the word "found" to emphasise that the non parties will not be bound by any such finding.

[34] (2003) 19 BCL 162 at 171-17