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insurance law intensive

# insurance in the eye of the storm

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## Proportionate liability

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# **AILA INSURANCE LAW INTENSIVE**

**25 MAY 2006**

## **PROPORTIONATE LIABILITY**

**WHAT DOES IT APPLY TO, WHEN IS IT AVAILABLE, HOW IS IT**

**ACTIVATED – PRACTICAL IMPLICATIONS**<sup>1</sup>

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1. After much discussion, (practically for as long as I can remember in my involvement with the law), a regime of proportionate liability now exists in Queensland, as part of a nationwide scheme. The scheme is not uniform. However it is similar.
2. Chapter 2 of part 2 of the *Civil Liability Act 2003 (Qld)* (“CLA”) implements proportionate liability in Queensland. The original incarnation of part 2 of chapter 2 was completely replaced, before commencement, by the *Professional Standards Act 2004 (Qld)*. Pursuant to subsection 4(3), the part applies to “any incident” that occurred on or after the commencement of that subsection, which commenced on the 1<sup>st</sup> of March 2004<sup>2</sup>. Pursuant to section 2 the part commenced on a date to be proclaimed. The proclamation was made on the 11<sup>th</sup> of March 2005<sup>3</sup>.

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<sup>1</sup> The writer acknowledges significant assistance from an as yet unpublished draft of a text on the CLA prepared by R J Douglas, Gerry Mullins and Simon Grant.

<sup>2</sup> See SL number 16 of 2005.

<sup>3</sup> See SL number 32 of 2005.

3. The proportionate liability scheme is not comprehensive. I will mention below some of its limitations, as well as some of its quirks (of which there are quite a few) but in the first instance it is immediately worth noting the provisions of subsection 28(3) of the CLA which provide as follows:-

“(3) This part does not apply to a claim—

- (a) arising out of personal injury; or
- (b) by a consumer.”

4. The definition of “consumer” for the purposes of the proportionate liability reforms is found in section 29 of the CLA. It provides as follows:-

**“29 Definitions for pt 2**

In this part—

*apportionable claim* see section 28(1).

*consumer* means an individual whose claim is based on rights relating to goods or services, or both, in circumstances where the particular goods or services—

- (a) are being acquired for personal, domestic or household use or consumption; or
- (b) relate to advice given by a professional to the individual for the individual’s use, other than for a business carried on by the individual whether solely or as a member of a business partnership.

*court*, in relation to a claim for damages, means any court by or before which the claim falls to be decided.

*defendant* includes any person joined as a defendant or other party in the proceeding (except as a plaintiff) whether joined under this part, under rules of court or otherwise.”

**THE PRE-EXISTING LAW**

5. The proportionate liability provisions are directed towards the rule in tort regarding unitary liability.

6. As is well known, despite its historical origins<sup>4</sup>, at common law, a tortfeasor, jointly and severally responsible for damage, cannot recover from another joint tortfeasor a contribution to the payment. Thus, whichever or whomever of the tortfeasors the Plaintiff chooses to pursue, (in practise the one with the deepest pocket), is left to shoulder the whole of the liability. This rule applies to joint and several concurrent tortfeasor, as opposed to several tortfeasors causing different damage. Liability is unitary in that there is only one cause of action in the case of joint tortfeasors or one damage in the case of several concurrent tortfeasor causing the same damage. In the case of concurrent tortfeasors, whether joint or several, each is answerable in full for the whole damage caused to the Plaintiff<sup>5</sup>. On the other hand, several tortfeasors causing different damage are merely answerable for the damage each has caused. The clearest example is different employers causing a divisible disease such as asbestosis or hearing loss<sup>6</sup>. In practise, most cases are of joint or several concurrent tortfeasor causing the one loss.
  
7. This resulted in the rule, familiar to all those that practise in tort, commonly expressed, as being that if the Plaintiff can only establish 1% liability against any Defendant, the Plaintiff is entitled to recover 100%.
  
8. Early on in the development of law and equity, rights of contribution developed where one person could be called upon to share the burden with

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<sup>4</sup> See the judgment of Gummow J in *Thompson v. Australian Capital Television Pty Ltd* (1996) 186 CLR 574 particularly at 606.

<sup>5</sup> For example *Dougherty v. Chandler* (1946) 46 SR(NSW) 370 at 375 per Sir Frederick Jordan CJ; *Spiers v. Caledonian Collieries Ltd* (1956) 57 SR(NSW) 483 affirmed (1957) 97 CLR 202.

<sup>6</sup> *Seltsam Pty Ltd v. Ghaleb* [2005] NSWCA 208.

another who was co-ordinately liable. Principles developed at common law no less than in equity<sup>7</sup> but today equitable principles are taken as covering the field<sup>8</sup>. Principles of contribution were explored at length again not so long ago by the High Court in *Burke v. LOFT Pty Ltd*. Contribution looks to what is common between contributors and not to the fact or form of the liability itself. It arises where parties join together in some common undertaking or design which undertaking or design gives rise to an obligation to share a debt to another or when parties have by separate acts each incurred a liability to another of the same kind and extent<sup>9</sup>.

9. Much of the principle in this area stems from the decision of *Derring v. Earl of Winchelsea*<sup>10</sup>. In that case, a case in equity, a qualification to the principle has been interpreted as denying contribution to a Claimant where the Claimant was culpable in the sense of a wilful or intentional default in the cause of loss. This gave rise to a peculiar status of tortfeasors in the modern law of contribution.
  
10. In *Merryweather v. Nixan*<sup>11</sup>, decided at a time when tort only comprehended intentional wrongs, it was held that, although joint tortfeasors are naturally parties in a common undertaking or design giving rise to a liability to the same extent, they had taken part voluntarily in a wrongful act which was wilful and intentional and which gave rise to an indivisible cause of action. The result was that in claiming contribution one tortfeasor was attempting to recover in

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<sup>7</sup> *Albion Insurance Co Ltd v. GIO (NSW)* (1969) 121 CLR 342 at 349 per Kitto J.

<sup>8</sup> *Burke v. LOFT Pty Ltd* (2002) 209 CLR 282 at 288, paragraph [38].

<sup>9</sup> *Burke v. LOFT Pty Ltd* at paragraph [50]; see also *Cockburn v. GIO Finance Ltd (No. 2)* (2001) 51 NSWLR 624 at 540 at paragraph [76].

<sup>10</sup> (1787) 126 ER 1276; (1787) 29 ER 1184.

<sup>11</sup> (1799) 101 ER 1337.

respect of what in law was the co-tortfeasors own wrong, thus falling within the qualification denying contribution in equity, and also in law, noted in *Derring*. As the law denied contribution on this basis, equity followed the law<sup>12</sup>.

11. Of course the law of tort has moved on to include negligence and many other non-intentional torts such that the basis for denying contribution no longer exists, but the development of the tort of negligence, principally in the 20<sup>th</sup> century, had not developed sufficiently to ameliorate the injustice of one tortfeasor shouldering the whole burden before the legislature intervened, initially by the *Law Reform (Married Women and Tortfeasors) Act 1935*, in the United Kingdom, then followed shortly thereafter throughout the British Commonwealth. In Queensland it is now found in subsection 6(c) of the *Law Reform Act 1995* (Qld). The Court was given a discretion to apportion between the concurrent tortfeasors as the Court considers just, fair or equitable<sup>13</sup>. It is to be recalled that subsection 6(c), and its proviso, denies tortfeasor contribution where one party has agreed to indemnify the other. This is the statutory cause of action for contribution between concurrent joint or several tortfeasors. It is not proposed to discuss this any further, although the difficulties in its application are well known<sup>14</sup>. This reform did not in any way affect the rule of unitary liability between the person suffering the loss, the Plaintiff, and the targeted Defendant. There was no proportionate liability. It still fell on the shoulders of the chosen Defendant but, in tort, the position had been ameliorated by that Defendant being able to seek contribution from

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<sup>12</sup> Meagher, Gummow and Lehane, footnote 13 at page 286.

<sup>13</sup> *Law Reform Act 1995* (Qld), section 7.

<sup>14</sup> See the comments of the High Court again not so long ago in *James Hardie v. Seltsam* (1998) 196 CLR 53.

others. However, if the other Defendants were indigent or unbacked by insurance, it was the chosen or targeted Defendant which shouldered the loss entirely. In terms of lost distribution, debate has always ensued as to whether this is just. It certainly is not just that one Defendant should have to pay the entire amount where others have contributed, and are now bereft of funds to be able to make good the loss. On the other hand it is, I suggest, even more unjust for a person who has not committed any wrong and who has suffered a loss, the Plaintiff, to bear any part of that loss themselves, subject to contributory negligence. This orthodox view, that one Defendant has to pay the full amount, if other Defendants are insolvent, rather than the innocent Plaintiff having to pay part of his, her or its own loss due to the insolvency of the Defendants is that which has been the subject of the changes in the CLA.

#### PROPORTIONATE LIABILITY – TO WHOM AND WHAT DOES IT APPLY?

12. The basic idea contained within the legislation is that a Defendant is statutorily only liable for the amount of apportioned and the Plaintiff can recover no more from it. Where the claim involves an “apportionable claim”, the Plaintiff may only recover from each “concurrent wrongdoer” the amount of the loss or damage apportioned by the Court as the responsibility of that concurrent wrongdoer.

#### Concurrent wrongdoer

13. Section 30 of the CLA provides:-

**“30 Who is a concurrent wrongdoer**

- (1) A concurrent wrongdoer, in relation to a claim, is a person who is 1 of 2 or more persons whose acts or omissions caused, independently of each other, the loss or damage that is the subject of the claim.
  - (2) For this part, it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died.”
14. Obviously, within this provision, is an assumption that the Court has already found that one or more persons, by an act or omission, caused, independently, the same loss or damage.
15. The Queensland legislation applies only to independent acts or omissions. Where the acts or omissions have been joint the rules of unitary liability continue to apply.
16. It will be noted from subsection 30(2) of the CLA that the non-existence or insolvent state of a concurrent wrongdoer is irrelevant. In such circumstances a Court will have to make determinations as to what part of the liability is to be apportioned to that concurrent wrongdoer.

“Apportionable claim”

17. Subsections 28(1) and (2) of the CLA provides:-

**“28 Application of pt 2**

- (1) This part applies to either or both of the following claims (*apportionable claim*)—
  - (a) a claim for economic loss or damage to property in an action for damages arising from a breach of a duty of care;
  - (b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1989* for a contravention of section 387 of that Act.

- (2) For this part, if more than 1 claim of a kind mentioned in subsection (1)(a) or (1)(b) or both provisions is based on the same loss or damage, the claims must be treated as a single apportionable claim.”
18. As noted above, the legislation applies to is on non-consumer transactions for economic loss and damage to property, with the exclusion of personal injury. Subsection 28(1)(b) also includes the misleading and deceptive conduct provisions of the *Fair Trading Act 1989*. Complementary reforms to the *Trade Practices Act 1974* have been made by the Commonwealth<sup>15</sup>.
19. The purpose of subsection 30(2), it seems, is that no matter whether the Defendant’s liability is founded in one cause of action or different or separate causes of actions such as in contract or in tort, for the purposes of the application the relevant provision that each claim is to be treated as the one apportionable claim if it answers the description found in subsection 28(1)(a) or (1)(b) of the CLA.
20. Use of the words “arising out of” in subsection 28(3), in relation to personal injury, is probably apt to exclude all claims and all claims which might be derivative of personal injury such as claims for economic loss in tort or in contract flowing from the Plaintiff in the subsequent action incurring a loss to another for personal injury.

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<sup>15</sup> Proportionate liability was implemented to various Commonwealth liability schemes in schedule 3 of the *Corporate Law Economic Reform Programme (Audit Reform and Corporate Disclosure) Act 2003* (Commonwealth) commonly known as the “CLERP-9 Act”. This applied proportionate liability in relation to damages under section 12DA of the *Australian Securities and Investments Commission Act 2001*, subsection 104(1)(h) of the *Corporations Act 2001* and section 2 of the TPA. They applied from 26 July 2004.

21. The “consumer” exception is similar to that found in the TPA. The professional advice exclusion is more convoluted. It excludes, from the exclusion, professional advice for the individual’s business purposes and that exclusion relates to any type of advice given for business purposes, whether financial or not.

Multiple actions – one apportionable, one not

22. Section 31 of the CLA provides:-

**“31 Proportionate liability for apportionable claims**

- (1) In any proceeding involving an apportionable claim—
- (a) the liability of a defendant who is a concurrent wrongdoer in relation to the claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just and equitable having regard to the extent of the defendant’s responsibility for the loss or damage; and
  - (b) judgment must not be given against the defendant for more than that amount in relation to the claim.
- (2) If the proceeding involves both an apportionable claim and a claim that is not an apportionable claim—
- (a) liability for the apportionable claim, to the extent it involves concurrent wrongdoers, is to be decided in accordance with this part; and
  - (b) liability for the other claim, and the apportionable claim to the extent it is not provided for under paragraph (a), is to be decided in accordance with the legal rules, if any, that, apart from this part, are relevant.
- (3) In apportioning responsibility between defendants in a proceeding the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceeding.
- (4) This section applies to a proceeding in relation to an apportionable claim whether or not all concurrent wrongdoers are parties to the proceeding.”

23. Subsection 31(1) deals with the usual situation of proportionate liability. Before dealing with that, it is of interest to consider subsection 31(2) of the CLA. This endeavours to deal with a set of circumstances that give rise to both claims that are within the definition of “apportionable claim” and others that are not. It provides the apportionable claims are to be dealt with under the provisions while the other claims are to be dealt with otherwise as the law provides. Consequently, the section endeavours to exclude the prospect that claims which do not fall within the definition of “apportionable claim” will be apportionable under the part because they are comprised in proceedings which involve an apportionable claim.
24. Subsection 31(2) also provides that should part of an otherwise apportionable claim not fall within the provisions of chapter 2, part 2 of the CLA, that part of the claim must also be dealt with in accordance with the law that would otherwise apply. The idea behind the provision appears to be circumstances where one of the Defendants is found not to be a concurrent wrongdoer. This person’s liability is to be determined in accordance with the law, other than under the proportionate liability provisions.

#### AN APPORTIONABLE CLAIM – HOW IS IT APPORTIONED?

25. Subsection 31(1)(a) uses the familiar words “the Court considers just and equitable having regard to the extent of the Defendant’s responsibility for the loss and damage”, thereby associating itself with the jurisprudence that has built up around the similar phrases found in subsections 6(c) and 7 of the *Law Reform Act 1995*.

26. It is to be expected that the decisional law concerning the phrase where it appears in the *Law Reform Act 1995*, in a not dissimilar context, will be utilised in the application of subsection 31(1)(a).
27. Factors which have weighed in this discretion have been the causative potency (the degree to which the particular Defendant contributed to the harm), the culpability of the Defendant (the degree of departure from the standard of care required of that Defendant) as well as all other relevant circumstances<sup>16</sup>.
28. Moreover, conferring a discretion on those terms, requiring first of all findings of fact and then an exercise of judicial discretion upon those facts, means that the usual rules applicable to appealing such a discretion will apply<sup>17</sup>.
29. Once this discretion has been exercised the judgment can only be given against that Defendant for no more than the amount decided under the discretion<sup>18</sup>.
30. Subsection 31(4) of the CLA is bound to raise an eyebrow of the litigation liability practitioner. This should be read with the preceding subsection 31(3). The Court is specifically allowed to “have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the

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<sup>16</sup> *James Hardie and Co Pty Ltd v. Roberts* (1999) 47 NSWLR 425 at 433; *Kim v. Cole* [2002] QCA 176 at paragraphs [23]-[27] per McPherson JA; the Court’s decision on the question of whether contractual terms co-extensive with a duty of care in tort were also comprehend by subsection 6(c) of the *Law Reform Act 1995*, with respect, must be doubted (*Flordia Hotels v. Mayo* (1965) 113 CLR 588) but His Honour’s consideration of this point is, again, with respect, orthodox; see also *James Thane Pty Ltd v. Conrad International Hotels Corp* [1999] QCA 516.

<sup>17</sup> *Coal and Allied Operations Pty Ltd v. Australian Industrial Relations Commission* (2000) 203 CLR 194; *Podrebersek v. Australian Iron and Steel Pty Ltd* (1985) 59 ALR 529.

<sup>18</sup> Subsection 31(1)(b) of the CLA.

proceeding”. In many respects, this is a remarkable provision because submissions will be made regarding the alleged absent concurrent wrongdoer, who is not present as a contradictor, and it will be in the nature of an ex parte assessment. No doubt the Courts will require similar standards of proof, and ethics, to be applied. It is more likely that a Court will exercise its jurisdiction found in section 32C of the CLA to join the non-party concurrent wrongdoer to the action, once that wrongdoer has been identified.

31. What might be considered the artificial nature of this process is enhanced, I suggest, by the fact that, no doubt recognising that the party is not joined to the action, and cannot be bound by it, the Court is not permitted to order judgment against the absent wrongdoer.

#### DISCLOSURE OF CONCURRENT WRONGDOERS

32. Section 32(2) requires a concurrent wrongdoer to advise a Claimant of details relating to other concurrent wrongdoers but subsection 32(1) initially casts an obligation on the Plaintiff. It provides:-

**“32 Onus of parties to identify all relevant parties**

- (1) A person (*claimant*) who makes a claim to which this part applies is to make the claim against all persons the claimant has reasonable grounds to believe may be liable for the loss or damage.”

33. This obligates the Plaintiff to make the claim against all persons the Claimant has reasonable grounds to believe may be liable for the loss or damage.

34. However, there is also an obligation on the targeted Defendants found in subsection 32(2). It provides:-

“(2) A concurrent wrongdoer, in relation to a claim involving an apportionable claim, must give the claimant any information that the concurrent wrongdoer has—

- (a) that is likely to help the claimant to identify and locate any other person (not being a concurrent wrongdoer known to the claimant) who the concurrent wrongdoer has reasonable grounds to believe is also a concurrent wrongdoer in relation to the claim; and
- (b) about the circumstances that make the concurrent wrongdoer believe the other person is or may be a concurrent wrongdoer in relation to the claim.”

35. A concurrent wrongdoer therefore has an obligation to advise a Claimant of the details in subsection 32(2). The obligation arises, in relation to a claim<sup>19</sup> at the time provided for in subsection 32(3):-

“(3) The concurrent wrongdoer must give the information to the claimant, in writing, as soon as practicable after becoming aware of the claim being made or of the information, whichever is the later.”

36. It is noteworthy that subsection 32(2) not only requires information regarding the identity of the alleged concurrent wrongdoer, based on reasonable grounds, but also information that is likely to help the Claimant locate the other person. The information must be given by written notice.

37. There is a costs sanction found for non-compliance by a Claimant and the onus that it has to join everybody if it has reasonable grounds to join. This is found in subsection 32(4):-

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<sup>19</sup> Defined in the Dictionary in schedule 2 to mean a claim however described for damages based on liability, relevantly, for damages to property or economic loss, it is not limited to proceedings in Court only.

“(4) If the claimant fails to comply with the claimant’s obligations under this section, a court may, on a concurrent wrongdoer’s application, make orders as it considers just and equitable in the circumstances of the case on the following—

- (a) apportionment of damages proven to have been claimable;
- (b) costs thrown away as a result of the failure to comply.

38. It is to be observed that this provision is a real change for Plaintiffs who, quite properly, may target only one or two of a number of Defendants for tactical, not just financial, reasons leaving it to others to join the Third Parties. I suggest, also, that this provision means that, provided there were reasonable grounds, and the reasonableness of those grounds will have to be judged in light of the potential cost sanctions under subsection 32(4) then the test of the reasonableness will be a fairly easy benchmark for the Plaintiff to crest, and, consequently, the likelihood of a “Bullock order” or “Sanderson order” is increased.

39. A similar costs sanction applies to non-compliance by a concurrent wrongdoer with its information giving obligation. Subsection 32(5) provides:-

“(5) If a concurrent wrongdoer fails to comply with the concurrent wrongdoer’s obligations under this section, a court may on application, if it considers it just and equitable to do so, make either or both of the following orders—

- (a) an order that the concurrent wrongdoer is severally liable for any award of damages made;
- (b) an order that the concurrent wrongdoer pay costs thrown away as a result of the failure to comply.”

40. Part of the sanction for non-compliance with the information giving obligation of both the Claimant and concurrent wrongdoer found in both subsection 32(4)

and 32(5) of the CLA is to allow the Court to make an award of damages as well as an order that the concurrent wrongdoer is severely liable. This means that, where the concurrent wrongdoer would have been apportioned 50% of the loss, the Court may order that judgment be entered for 100% of the loss (or any other percentage) on the basis that it is just and equitable:- subsection 32(5)(a).

41. Subsection 32(6) provides:-

“(6) However if, as a result of information given by a concurrent wrongdoer under subsection (2), the claimant joins another party to the proceeding for the claim, and that party is found not to be liable to the claimant, the court may make orders about costs as it considers just and equitable in the circumstances of the case.”

42. This is obviously designed to protect the Plaintiff from the consequences of wrongful joinder, based on information supplied by a concurrent wrongdoer. No doubt, if it is found that the information given was liable to mislead or was specious with a view to “spreading the loss”, an indemnity costs order might be made against the concurrent wrongdoer who supplied the incorrect information and the Plaintiff protected from those costs.

43. If the Claimant has failed to comply with its information giving obligation mentioned above, then subsection 32(4)(a) is a matter of some curiosity. It gives the Court a power to make an award “on apportionment of damages to have been claimable”. With all due respect, it is not at all clear what this means but it may allow the Court to reduce an amount to be apportioned to a particular Defendant as some sort of penalty if that be “just and equitable” for the failure to comply. As the failure to comply is unlikely to have any effect

on the actual merits of an apportionment, it is, with great respect, difficult to see a Court exercising its discretion in a punitive way (and without clear words it may be an error of law to take into account an immaterial matter), as opposed to making costs orders which are properly used to show the Courts disapproval of conduct or to punish.

44. From a barrister's point of view, and I dare say, the practising litigation solicitor, attention is immediately turned in one's mind to what you need to do to plead and prove an apportionable claim and what facts are relevant. Recently Einstein J discussed this in *Meneth v. Prynew Pty Ltd*<sup>20</sup>. His Honour noted that "those who are certain must plead", His Honour considered that, as the provisions provided the Defendant with the benefit of a limitation of liability, then the Defendant should plead and prove the elements. His Honour indicated that in cases where the Plaintiff pleads the involvement of a number of wrongdoers, the usual rules of proof will apply, but it does not deal with a situation where a Defendant is unaware of other wrongdoers. In Queensland, unlike New South Wales, there is a notification provision cast upon Plaintiffs prior to the commencement of proceedings. The Plaintiff, as noted above, must join all relevant Claimants. Accordingly, I suggest, it will be the Plaintiff in the first instance who will carry the burden of proof in the first instance.

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<sup>20</sup> [2005] NSWSC 1296.

CONTRIBUTION BETWEEN CONCURRENT WRONGDOERS, INDEMNITY  
CLAUSES AND CONTRACTING OUT

45. Section 32A of the CLA provides:-

**“32A Contribution not recoverable from concurrent wrongdoer**

Subject to this part, a concurrent wrongdoer against whom judgment is given under this part in relation to an apportionable claim—

- (a) can not be required to contribute to the damages recovered or recoverable from another concurrent wrongdoer for the apportionable claim, whether or not the damages are recovered or recoverable in the same proceeding in which the judgment is given; and
- (b) can not be required to indemnify the other concurrent wrongdoer.”

46. The potential breadth of the prohibition contained in section 32A is a matter of great concern.

47. The simple idea behind the provision, is that where concurrent wrongdoers are identified, a Court is not able to award damages against one wrongdoer greater than that apportioned to them. The language of the provision deals with a specific instance being that of an award against one wrongdoer in favour of a Claimant. Irrespective of whether a successful claim can be recovered under the tortfeasor contribution legislation, each party remains liable to the Claimant for the damages awarded.

48. The wording of subsection 32A(a) is far from clear. On one view it may prohibit the usual tortfeasor contribution proceedings meaning that they are replaced by proportionate judgments against each wrongdoer. The use of the past tense – “cannot be required to contribute for damages recovered or

recoverable” – suggests that it is to apply only after judgment, as the opening words of section 32A itself state. To that extent, it might be argued tortfeasor contribution could be maintained in the course of a proceeding but a tortfeasor contribution could not be pursued separately after proceedings have been completed, as sometimes occurs. Without the reform contained in Third Party proceedings, this was the required way in which to proceed because it is not until then that a person qualifies as a tortfeasor to pursue tortfeasor contribution under subsection 6(c) of the *Law Reform Act 1995*. The reform of Third Party proceedings allows this to be decided in advance. Therefore if there is a settlement and a consent judgment, no contribution can be pursued against a tortfeasor!

49. Whatever concerns there may be about subsection 32A(a), they pale into insignificance, I suggest, with the concerns that arise regarding the phrasing of subsection 32A(b). It will immediately occur to anybody who practises in litigation liability proceedings that the breadth of subsection 32A(b) may be such as to prohibit recovery under contractual indemnity, so prevalent in leases, building contracts, labour hire agreements, subcontracts and the like. This is restricted to pursuing contractual indemnities post judgment. If that is the true construction of the subsection it is a drastic and an uncalled for result. It cannot be justified and it is hard to believe that that is what is intended.
50. A way around what appears to be the initial meaning of the words is to give them a strict literal construction. As the apportionment is to be made having regard to what the Court considers just having regard to the extent of the person’s responsibility for the damages or loss, indemnity may be accounted

for either as a matter going to the extent of a person's responsibility or perhaps a factor forming such an apportionment as is just. However this does not deal with the prospect of such contractual indemnity proceedings, after judgment, being outlawed by subsection 32A(b).

51. Another way of reading down subsection 32A(b) would be to read the reference indemnity as importing only the common law claim for indemnity between tortfeasor according to the tortfeasor contribution legislation or common law principles or equitable principles, but this requires reading in qualifying words. Courts are not normally disposed to do this.
52. No doubt the Courts will be astute to apply construction devices to read down the legislation, unless there is some indication that, prohibiting recourse to contractual indemnities, after judgment, was what Parliament truly intended. It does seem such an absurd result that it cannot be thought to be the will of Parliament. However, be that as it may, it is certainly an open, and from one point of view, the plain construction of the legislation. The Western Australian legislature has recognised the problem. It has added a subsection which specifically states that agreements to indemnify are not affected.
53. Queensland should urgently follow suit by introducing such an amendment<sup>21</sup>.

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<sup>21</sup> I am pleased to learn that I am not the only person who, when reading this legislation, formed the view that its wording may prohibit the use of contractual indemnities post judgment. The same point is made in "From Contribution to Apportioned Contribution to Proportionate Liability" by James Watson of the Sydney Bar (2004) 78 ALJ 126 at 143-4.

SUBSEQUENT AND MULTIPLE ACTIONS AND JOINDER OF WRONGDOERS

54. A matter which supports reading down section 32A in the manner I have suggested above is the presence of section 32B. It provides:-

**“32B Subsequent actions**

- (1) In relation to an apportionable claim, nothing in this part prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any loss or damage from bringing another action against any other concurrent wrongdoer for that loss or damage.
- (2) However, in any proceeding in relation to the other action, the plaintiff can not recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in relation to the loss or damage, would result in the plaintiff receiving compensation for loss or damage that is greater than the loss or damage actually suffered by the plaintiff.”

55. Therefore, notwithstanding the obligation cast upon a Claimant by subsection 32(1) and the provisions of section 32A, the CLA in fact contemplates that only one concurrent wrongdoer might be pursued to judgment. Then subsequently the Claimant (but, according to subsection 32A, not the concurrent wrongdoer) may pursue another concurrent wrongdoer in another proceeding. Accordingly, a Claimant may sue one party, obtain a judgment for one portion of the damage suffered, then sue another to obtain judgment for another portion, and so on.

56. Why it is a Claimant would wish to do this, given the cost and expense involved, and the provisions of subsection 32(1) of the CLA, is not altogether apparent. Further, as I have indicated, it does suggest that, if the Claimant can

do this, then why would a concurrent wrongdoer not be able to pursue tortfeasor contribution and contractual indemnities?

57. In any subsequent claim the Claimant cannot be awarded an amount which results in a damages award exceeding the actual loss. The subsequent hearings will involve a rehearing of evidence and termination of the apportionment attributable to the concurrent wrongdoers the subject of a claim. No requirement exists for a subsequent Court to accept the decision of a prior Court as to the amount apportioned to a prior wrongdoer.
58. Different proceedings might result in different results. One issue that occurs to me is the application of the so called “Anshun estoppel” against a Plaintiff. If the Plaintiff did not include everybody within the proceedings and seeks to do better in a subsequent proceeding against another Defendant, could an “Anshun estoppel” be raised? Section 32B makes it plain it cannot be, even if that was possible. However the vice to which the Anshun principle is directed, preventing multiple proceedings and the Court’s process being abused, appears to be facilitated by section 32B<sup>22</sup>. The vice which those principles are directed, and the avoidance of multiplicity of proceedings, is to ensure that public confidence in the integrity of the judicial system is maintained. However, this provision appears to contemplate that subsequent Courts in all jurisdictions, at first instance (not on appeal) may come up with differing adjudications as to the liability of concurrent wrongdoers. A subsequent Court could, for example, award an amount against a concurrent

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<sup>22</sup> Abuse of process is a separate and distinct doctrine which might prevent litigation of issues that ought to have been litigated in earlier proceedings and may well be broader than the “Anshun” principle; *Tiufino v. Warland* (2000) 50 NSWLR 104; *Rippen v. Chilcotin Pty Ltd* (2001) 53 NSWLR 198.

wrongdoer in the subsequent proceedings less than the remainder and, if no other wrongdoer exists, the Plaintiff recovers less than the actual damage suffered! Conversely, where a later Court considers a concurrent wrongdoer was dealt with harshly in the first place and may wish to award more against the second wrongdoer in the later action, but little of the total remains, it appears nothing can be done in the subsequent proceeding because the subsequent Court is bound not to award an amount greater than that which will total the actual loss of the Plaintiff!

59. Section 32H is relevant in this regard:-

**“32H Concurrent wrongdoer may seek contribution from person not a party to the original proceeding**

Nothing in this part prevents a concurrent wrongdoer from seeking, in another proceeding, contribution from someone else in relation to the apportionable claim.”

60. This appears to be directed towards the rights of the wrongdoer against insurers and the like. Otherwise how can it be reconciled with the prohibition that appears under section 32A? Perhaps, it is another reason for reading down subsection 32A(b) because otherwise the recalcitrant insurer could not be joined, although section 32H refers only to “contribution” not indemnity. Section 32H speaks of contribution from somebody else in relation to the apportionable claim whereas as section 32A deals only with the situation where the liability which is being carved up is the liability to the Plaintiff. Section 32H involves liability to the concurrent wrongdoer. This is not an easy reconciliation.

VICARIOUS LIABILITY – AGENCY AND PARTNERSHIPS

61. Section 32I of the CLA provides:-

**“32I Part not to affect other liability**

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 person from being held jointly and severally liable for the damages awarded against another person as agent of the person; or
- (c) prevents a partner from being held jointly and severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or
- (d) prevents a court from awarding exemplary or punitive damages against a defendant in a proceeding.”

62. Accordingly, nothing within the proportionate liability provisions prevents the parties from being held liable on the basis of various liability or the laws relating to partnership.

63. The intention is, it seems, that despite the provisions relating to the inability to award a contribution discussed above, a Court will still be able to award an amount on joint or several basis against one concurrent wrongdoer that includes an amount the wrongdoer is liable for on the basis of vicarious liability or as a partner. Liability for an agent is dealt with in the same way.

### CONTRIBUTORY NEGLIGENCE OF THE CLAIMANT

64. Prior to the apportionment between Defendants, any proportion of the damage attributable to the Claimant's negligence and conduct is to be deducted<sup>23</sup>. The Act of course does not provide for contributory negligence of the Claimant directly, although it seeks to modify the application of those principles by division 6 of part 1 of chapter 2, and those statutory principles are still found in the *Law Reform Act 1995*<sup>24</sup>.

### FRAUD AND INTENTIONAL CONDUCT

65. Section 32D of the CLA makes a person guilty of fraud or intentional tortious conduct severely liable i.e., the unitary liability position of such a person remains. The same applies to intentional conduct<sup>25</sup>.

### CONCLUSION

66. The proportionate liability provisions are going to be a considerable challenge. It has many drafting flaws and much uncertainty. The most disconcerting provision, apart from the concept itself, is section 32A and its interrelationship with contractual indemnities and section 32H.
67. The notification provision relating to the onus of each concurrent wrongdoer and also the Plaintiff, I suggest, will also be a burr in the side of a litigation

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<sup>23</sup> Section 32G of the CLA.

<sup>24</sup> Section 10.

<sup>25</sup> Section 32E of the CLA.

liability practitioner and, undoubtedly, will be the subject of many a fight. I have also raised the question of what would occur, in the unlikely event, that a Claimant exercises the statutory right given to the Claimant to pursue each concurrent wrongdoer separately for its proportionate liability will have on doctrines such as abuse of process. Notwithstanding there is a statutory right to do so, will circumstances exist where, given the obligation under subsection 32(1), the doctrine of Anshun estoppel and abuse of process can continue to apply? Indeed, from one point of view, subsection 32(1) provides an additional platform to argue for an abuse of process. The possibility of inconsistent subsequent results in subsequent proceedings against individual concurrent tortfeasor is to be deplored.

K F Holyoak