is only one of the parties involved."[7]

- "A member of one of the international accountancy firms observed that few, if any, commercial insurers are able to provide cover for those firms, and expressed the view that even the major firm's self-insurance arrangements might not be able to continue to sustain the demands made upon them.[8]
- "...the interest of a person's financial security, and the preservation of his or her property, is of a lower scale of values"[9] than liability for personal injury but in any event, "...legislation in many states restricts the damages that may be claimed when personal injury is the result of a motor accident or arises in the course of an injured person's employment."[10]

The report referred to the fact that some academic writers have commented that joint and several liability can produce a result that is unfair to defendants where the plaintiff is partially to blame for his or her own loss and where one of the defendants proves insolvent. In that case the plaintiff, under the current regime, bears none of the risk of insolvency even though the plaintiff has contributed to his or her own loss. But the majority of these academics are firmly against abolition of joint and several liability in such cases if it would cast the entire risk of a defendant's insolvency onto the plaintiff! Nonetheless, that is the effect of the draft Bill prepared in response to the Davis Report.

We strongly suggest all members write to their state and federal Attorney Generals and express their disgust at the proposed legislation. We also suggest those members with political connections within the opposition parties alert these parties to the harsh pro profession and pro insurance bias in the proposed legislation.

1) Prof. Jim Davis, *Inquiry Into The Law of Joint & Several Liability: Report of Stage Two*, Panther Publishing & Printing, Fyshwick, ACT, January 1995, page 3.

2) *Ibid.* 3) *Ibid.* 4) *Ibid.* 5) *Ibid* p. 4.

6) *Ibid* p. 9. 7) *Ibid* p. 11. 8) *Ibid* p. 11.

9) *Ibid* p. 15. 10) *Ibid* p. 32.

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Statutory Caps on Damages and Apportionment under the Health and Other Services (Compensation) Act 1995 (C'th)

Dr James Renwick, Barrister, Sydney

APLA members will be familiar with s 8(1) of the *Health and Other Services (Compensation) Act 1995* (Cth)which relevantly provides that where a judgment or settlement is made in respect of an injury to a (defined) compensable person and a medicare benefit has already been paid in respect of a professional service rendered to that person in the course of treatment of, or as a result of, the injury, then there is payable to the Commonwealth an amount equal to the medicare benefit.

By s 8(2) of the Act where there is an apportionment of liability, for example, because of contributory negligence, which reduces the judgment or settlement then the amount payable to the Commonwealth under subsection (1) is reduced by the proportion corresponding to the proportion of liability for the injury that is apportioned to the compensable person by the judgment or settlement'.

A problem arises when a judgment or settlement is reduced because of a statutory cap on damages. So, for example, a person injured on an airline usually has their damages capped at $100,000 by operation of the *Civil Aviation (Carriers Liability) Act 1959* (Cth). In such cases the HIC will refuse to apportion the s 8(1) amount because it takes the view, in the author's view correctly, that s 8(2) does not cover the situation and so it lacks power to do so.

This would appear to be a legislative oversight. The rationale for s 8(2) as expressed by the then Minister, Senator Crowley in the Parliamentary debates on the act (28/9/1995, *Senate Hansard* p 1658 col 1), was that 'Medicare has some underlying obligation to pay benefits for eligible services which are not covered by a compensation payout'. That rationale is equally applicable to the case being discussed.

What can be done? The simplest option would appear to be to seek a write off of the relevant amount from the Commonwealth pursuant to s 70C of the *Audit Act 1901* (Cth). This provides:

'Writing off, and waiver of rights to, certain moneys and stores.'

70C. (1) The Minister [for Finance] shall have, and shall be deemed at all times to have had, power to write off:

(a) losses or deficiencies of public moneys;

(2) Subject to subsection (4), the Minister has, on behalf of the Commonwealth, power:

(a) to waive the right of the Commonwealth:

(i) to the payment of an amount payable to the Commonwealth...'

Where a right off is sought for an amount under $50,000 the Minister for Finance normally delegates his powers to the agency concerned. Thus correspondence in the first instance should be directed to the HIC, who will no doubt advise of any further information they require.

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Moving Towards Strict Liability of Employers under Workplace Health and Safety Legislation in Australia

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The recent decision of *Rogers v Brambles Australia Ltd* (unreported judgement, Queensland Court of Appeal, 08.Nov 1996) goes some way towards the introduction of strict liability of employers under the Workplace Health and Safety Act 1989 (Qld). Also, the majority in that case have made it clear that not only does an employer commit an offence under the Act itself for breach of its provisions, but the breach will give rise to a separate civil action available to be brought by the employee against the employer in breach.

According to the majority (comprising of Pincus JA and McPherson JA), the onus of proof lies with the employer to satisfy the court that the remedial or protective measures that it is claimed the employer should have engaged are "impracticable" - in other words, it is left to the employer to show that he or she fits within the recognised exceptions to the substantive provisions. Pincus JA based this on the growing importance of the social purpose of such legislation.and the increasing expectations that may be demanded of a reasonably prudent employer.

This view is in accordance with the interpretation taken of the Occupational Health and Safety Act 1983 (NSW) whereby s.15(1) of that Act works to impose absolute liability upon employers, as "ensure" in its ordinary sense was taken to mean "guaranteeing, securing or making certain" (Carrington Slipways Pty Ltd v Callaghan (1985) 11 IR 467 per Watson J).

In dissenting, Shepherdson J distinguished the wording of the New South Wales legislation which makes employers' duties absolute, along with other legislation that has been similarly interpreted. Shepherdson J stated that in determining the question, it was necessary to determine the meaning of "ensure" as used in s.9(1), and that the meaning accorded to it should be that outlined by Vaisey J in *Reliance Permanent Building Society v Harwood Stamper* (1944) 1 Ch 362 at 373. As a result, an employee must satisfy the requirements of s.36 of the Criminal Code and satisfy the court as to the knowledge or mens rea of the employer regarding the breach. It is only once the initial onus is