The re-engineered blades of section 52 of the Trade Practices Act 1974

By A W Street SC

The action for damages under s82 of the *Trade Practices Act 1974* for a contravention of s52 has being bowdlerised by the introduction of sub-section (1B) into s82 introducing the common law concept of contributory negligence, a new statutory concept of 'shared responsibility' and the Chancellor's foot as to what is 'just and equitable'. If this mandatory diminution was not exciting enough in relation to the statutory cause of action, the new provisions of Part VIA entitled 'Proportionate liability for misleading and deceptive conduct' potentially resurrects a need for the common law practitioners' wisdom and expertise in apportionment claims. This re-engineering of the litigator's playground for concurrent wrongdoers in Part VIA introduces the fuzzy Lord Denning-type criterion limiting the proportion to an amount considered 'just' measured by reference to an unstated foundation and conceived as 'the extent of the defendant's responsibility'. If this was not enough to create the feeling that the occupants of *The Castle* have taken over the role as legislative scriveners, there is also a need for regard to 'the comparative responsibility' of others. The apportionment is concerned with economic loss and damage to property the subject of a claim under s82.

Contrary to what some may think, these changes go beyond, and in some case directly depart from, the recommendations of the Ipp Panel which produced the *Review of the law of negligence* report released 2 October 2002 under a Commonwealth ministerial term of reference.[1] The predecessor of these reforms can be found in *Maritime Conventions Act 1911* (UK)[2] and the history thereafter is summarised by Professor Glanville Williams in *Joint torts and contributory negligence*, published in 1951. These sparkling new reforms are reminiscent of the judicial discretion familiar to Roman lawyers *et judex vel tanti condemnat quanti nos aestimaverimus, vel minoris, prout illi visum fuerit*[3], paragraph 224 of *De Injuriis* in Book II of the Institutions of Gaius on the civil law of Rome penned more than 1,800 years ago. Unfortunately the judicial discretion is confined to the inexact art of assessment of the degree of fault in both reduction and apportionment, the application of the assessment by reducing or limiting damages is mandatory.

It would be churlish to diminish the superlative joy of others by waxing lyrical about the significance of these legislative reforms in the sphere of commercial litigation in which s52 is the modern day crusaders' weapon of mass destruction. The author has tempered the temptation to explore more fully the conceptual difficulties in reconciling a mandated norm with fault. It will be a challenge to determine what misleading conduct is 'a' cause of loss which is a result of the plaintiff's failure in the circumstances to take reasonable care for the safety of its own property or financial position. There can be fine lines between what is contributory negligence, failure to mitigate or unreasonable reliance. The sting of reduction for contributory negligence is likely to bite deep in the utility of this proscribed statutory standard of misbehaviour.

As intent and fraud defeat the statutory reduction for contributory negligence and the apportionment of liability there will be renewed interest in the pleader determining whether intent or fraud can properly be raised. The discovery focus with its expanding electronic treasure chest, will become more significant in attacking the limitation shields for want of intent or fraud. The line of attack in cross examination where intention or fraud has been raised as part of the facts in issue, will no doubt require careful preparation and focus. What level of Nelsonian blindness or recklessness will amount to intent is another interesting issue.

Happily, the existing causes of action prior to commencement of these new provisions will still permit the sanguine blades of s52 to be used with its old vigour. There are a myriad of interesting issues likely to arise in relation to competing cross claims where the loss and damage arguably has not yet been sustained despite the prudence of the pleader having sought relief under s82 and s87. There may be a complex contribution of different causes of action for different s52 conduct with some accrued and some non-accrued causes of action. Some wrongdoers will be made of straw or insolvent and the proportionate contribution will be worthless. No doubt the armoury of s87[4], which is not so circumscribed by the legislative changes, may well be used to escape the adverse impact of empty damages orders. Indeed the relief might be framed as being wholly under s87 so as not to be an apportionable claim.

There may be a need to carefully scrutinise all existing s52 proceedings to determine the extent to which the cause of action has in fact accrued and, if not, careful attention needs to be given to how the case has been pleaded, whether intention or fraud is available, the consequences of contributory negligence and the significance of the proportionate limitation of liability under Part VIA and notification obligations under s87CE. These notification obligations although only sounding in costs open up factual disputes as to grounds for belief and the relevant circumstances. It is a novel notion of disclosure alien to adversarial contest and the notice itself is probably outside the scope of s52.

Working out what is or is not an apportionable claim will be quite exciting. There will be considerable scope for debate in the application of the apportionment legislation as to whether it is 'the same loss and damage' and what is meant by causes of action of a different kind. The problem will be compounded where the different cause of action is outside trade and commerce, involves trade and commerce but is outside the s5 nexus, the minister declines to consent under s5, does not involve corporations or involves persons not with s75B. There are some interesting issues of possible inconsistency in relation

to omissions and intent given the operation of s4(2)(c) in the context of conduct manifested by refusing to do an act which must be otherwise than inadvertent. Speaking of inconsistency, the absence of contributory negligence reductions for breach of statutory duty involving property or economic loss might well have some problems under s109 if included with a s52 claim. So too s5D of the *Civil Liability Act* 2002 (NSW) and Division 5C of Part II of the *Legal Profession Act 1987* (NSW) may raise similar problems unless read down where because of s52 the court is exercising federal jurisdiction.

The reform does not overcome the difficulty in trying to advance claims for equitable contribution for co-ordinate liabilities arising from s52 contravention claims and other statutory claims or causes of action where apportionment is not available. The non-party concurrent wrongdoer limitation is likely to have some very unfortunate consequences given the variety of problems that can arise from identification, location, jurisdiction to enforcement in the non-joinder. The work done by s84 is also likely to be the subject of renewed excitement in the competing positions on apportionment of the parties and also the agency characterisation of the non-parties. Authority for particular conduct or the want thereof may itself be the subject of misleading conduct by the alleged agent or others and will compound the exercise of judicial determination. The potential unfairness for both the non-parties and the actual parties in this area of agency and apportionment is obvious. In this regard s87CF which purports to protect a wrongdoing party the subject of judgment is likely to be abused. Further the reform may well result in increasing dramatically the scope of the dispute, the number of parties, costs and demand upon precious court resources.

Curiously, there is no specific time bar found in Part VIA and the provisions do not sit comfortably with existing *Anshun* notions. The unattractive prospect of re-litigating apportionment outcomes, as well as the damage actually sustained by the plaintiff and the unsavoury prospect of inconsistent findings are all well alive.

Finally, on the battle front, there is still likely to be a healthy use of the unconscionable conduct provisions in Part IVA, contravention of industry codes under Part IVB and s53 as reduction or limit breakers. The amendments will also breathe new life into the advantages of contract and will be the subject of refined provisions which create a material fault exposure in the whole of contract and non-reliance clauses.

The sphere of conduct that leads into error involving financial services or financial products is caught by s1041H of the *Corporations Act 2001* which has similar amendments made by the same statute and raises many of the same issues and concerns touched on above. Personal injuries and death are addressed in the new Part VIB of the *Trade Practices Act 1974* introduced by the *Trade Practices Amendment (Personal Injuries and Death) Act (No 2) 2004*. There are similar provisions to be introduced by the *Civil Liability Amendment Act 2003* (NSW) assented to on 10 December 2003.

The new and tantalising changes to the *Trade Practices Act 1974* have been enacted by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004*, schedule 3.

Section 2 of this reform legislation identified the date of commencement for schedule 3 being the day fixed by proclamation 'however, if any provision(s) do not commence within the period of six months beginning on the day on which this Act receives royal assent, they commence on the first day after the end of that period'. Assent was given to the Act on 30 June 2004. The proclamation as to commencement, published at: http://www.scaleplus.law.gov.au/html/instruments/0/145/0/2004080601.htm, specifies that schedule 3 commences on 26 July 2004.

Paragraph 1466 of schedule 12 to the said Act contains transitional provisions for schedule 3 which relevantly provides 'the amendments made to this Act and the *Trade Practices Act 1974* by schedule 3 to the amending Act apply to causes of action that arise on or after the day on which that schedule commences'.

Second reading speeches

The second reading speech in the House of Representatives was made on 4 December 2003, see: Commonwealth, Parliamentary Debates, House of Representatives, 4 December 2003, p.23761 (Peter Costello, Treasurer), www.aph.gov.au/hansard/hansreps/htm and in the Senate on 1 March 2004, see: Commonwealth, Parliamentary Debates, Senate, 1 March 2004, p.20313, (Senator Ian Campbell), www.aph.gov.au/hansard/hanssen/htm.

The explanatory memorandum

The explanatory memorandum can be found at: http://www.scaleplus.law.gov.au/html/ems/0/2003/0/2003120806.htm.

1 The ministerial term of reference may be found at http://revofneg.treasury.gov.au/content/home.asp.

2 Maritime law both lead the statutory reform and had in fact already recognised the more equitable outcome of apportionment, *The Englishman and the Australia* [1894] P 239.

3 'And the judge may either condemn the defendant in the whole of this sum, or in a lesser sum at his discretion.'

4 *Murphy v Overton Investments Pty Ltd* (2004) HCA 3