MICHAEL DUFFY, VIC

Proportionate liability:

Recent state legislation on proportionate liability means that full recovery of economic loss from wrongdoers will become increasingly rare.

Michael Duffy is a Senior Associate at Maurice Blackburn Cashman in Melbourne. He was a solicitor on the recently settled $112 million shareholder class action of *King v GIO*, which involved 11 respondents, five cross respondents and 18 separate cross-claims seeking indemnity and contribution. **PHONE** (03) 3605 2700 **EMAIL** mduffy@mbc.aus.net

The *Wrongs and Limitation of Actions (Insurance Reform) Act* 2003 (Vic), *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW), *Civil Liability Act* 2003 (Qld) and *Civil Liability Amendment Bill* 2003 (WA) all provide for amendments to the law of contribution[1] to introduce proportionate liability in relation to claims for economic loss or damage to property in an action for damages arising from a failure to take reasonable care, including actions for damages arising in contract as well as tort.[2] Except in Queensland, proportionate liability will also apply to economic loss claims arising from misleading and deceptive

A disproportionate *and* problematic reform

conduct as proscribed by state Fair Trading Acts.[3]

BACKGROUND TO THE LEGISLATION

The reform establishing proportionate liability is part of a package of reforms[4] designed to deal with the so-called 'insurance crisis' where the major insurance companies across Australia (and worldwide) have substantially increased their premiums and, in some cases, withdrawn or threatened to withdraw from providing cover. This has affected a wide variety of insurance products, including medical indemnity, public liability and some areas of professional indemnity.

The causes of the 'insurance crisis' are a matter of heated debate and the insurance industry has conducted a concerted campaign to paint large injury awards by courts as the main culprit. In Australia, we have heard much less about the cyclical nature of the insurance and reinsurance premium markets, the inevitable swings between 'soft' and 'hard' markets, worldwide underpricing of insurance premiums throughout the 1990s, and the end in 2000/01 of what has widely been described as the 'longest soft insurance premium market in recent history'.[5] This was a market where insurance companies believed they could afford to sustain uneconomic premiums through their ability to offset losses through investment of that premium income into a rising stock market,[6] and a market where inadequate reserving was common.[7]

The soft market came to a decisive end in the United States with the events of 11 September 2001, which blasted a hole in world reinsurance reserves estimated at up to $50 billion. In Australia, the end of the soft market was also marked by the demise of HIH and the resulting instantaneous contraction of ▶

supply and competition.

Since the end of the soft market, insurers have made frantic attempts to take advantage of the hard market to repair their reserving and profitability. The consumer backlash to this ramping up of insurance premiums has led to the 'insurance crisis'.

The collective action by the insurance industry in systematically underpricing premiums throughout the 1990s was one of the main causes of the present situation. Although this may have been partly an inevitable consequence of excessive competition, mismanagement has also played a part.

However, economic theory suggests that the market forces which produced underpricing, and which now are producing overpricing, will soon move again in the opposite direction to alleviate the problem. Recent huge increases in insurance premiums can only attract new players into the market, increase product supply and competition, and ultimately see premium prices begin to come down again. There are suggestions in the United States that the hard market is already softening through increased supply and that premium rates are likely to start falling of their own volition.[8] This trend will presumably flow on to Australia in the not too distant future.

The question in Australia at the moment is who will bear the cost of the current temporary hard premium market. Recent legislation by Australian state governments suggests that insurance companies are winning the debate at the expense of other sections of society, including the insured and the victims of unlawful conduct, so that it will be the latter who shoulder most of the cost.

In view of what has already been noted about the cyclical nature of the insurance market, it is surprising that there seems to have been no consideration given to limiting the duration of some of the relatively extreme measures that are being taken to alleviate short-term problems. One way to make proportionate liability (and other

reforms) more palatable is to have either a two-year sunset clause or a periodic review of the reforms once the hard insurance market begins to soften. There is also the possibility of a proportionate liability model that equitably splits the risk of insolvency of defendants between plaintiffs and defendants, or of adopting the Queensland proportionate liability model which gives protection to consumers and preserves certain rights against professionals for negligent and misleading advice. Certainly, such options should at least be considered given that the current reforms offer substantial financial relief to wrongdoers and commensurate harm to the victims of their conduct.

THE NEW PROVISIONS ON PROPORTIONATE LIABILITY

The operative part of the new provisions is typified by section 35 of the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW) (the NSW law) which provides that:

In any proceedings involving an apportionable claim[9]

- the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed which the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and
- the court may give judgement against the defendant for not more than that amount.

Section 24AI(1) of the Victorian legislation and section 5AF of the *Civil Liability Bill* 2003 WA) are in essentially similar terms.

The Queensland legislation provides:

- If there is more than one defendant in a proceeding, each defendant is liable only for the amount of damages decided by the court.
- The liability of each defendant is the amount decided by the court to be just and equitable having regard to the extent of the defendant's responsibility for the harm.

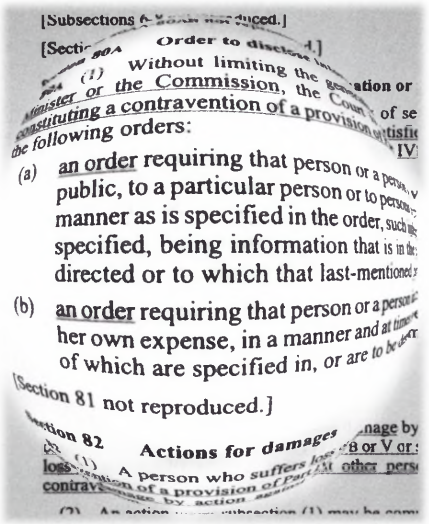
None of the legislation offers any guide as to how the court might determine the proportional loss or damage that the defendant should bear, having regard to the extent of the defendant's responsibility for the loss or damage. This makes the situation somewhat unclear as the current law has generally evolved on the basis that once causation is shown there will be full compensation. It is therefore necessary at this point to review the principles of the current law.

NEGLIGENCE

The traditional law in relation to negligence is that once the plaintiff has proved that through negligence the defendant caused the plaintiff's loss, the plaintiff is entitled to recover from that defendant on the basis of *restitutio in integrum*. Thus, the plaintiff is to be put back into the position they '...would have occupied if the wrong had not been done'.[10]

However, if there is more than one defendant, the principle of 'solidary'[11] or 'joint and several' liability becomes applicable so that all wrongdoing defendants will be both jointly and severally liable for the damage caused. This means a plaintiff can take action against any of the defendants, and if successful against one receive full compensation from that defendant. Issues relating to the defendants' respective contributions to that loss are then determined procedurally by way of third party or contribution claims where the defendants make claims against each other or against new parties for contribution. It is at this point that the principles of respective contributions to damage may come into play. Courts are currently empowered under state contribution legislation[12] to order a party to pay contribution to a defendant for an amount as may be found to be just and equitable having regard to the extent of that person's responsibility for the damage.[13]

It is clear that the parties bringing the contribution claims have the onus of proof in relation to whether another


[Subsections 6- reproduced.]
[Section 80A Order to disclose, etc.]
(1) Without limiting the generality of section 80 or 81, the Court may, on the application of the Minister or the Commission, if the Court is satisfied that a person has engaged in conduct constituting a contravention of a provision of Part IV or V or of section 65C or 65D, make all or any of the following orders:
(a) an order requiring that person or a person who was involved in the contravention, to disclose, to the public, to a particular person or to persons, in the manner as is specified in the order, such information as is specified in the order, being information that is in the possession of the person to whom the order is directed or to which that last-mentioned person has access;
(b) an order requiring that person or a person who was involved in the contravention, to publish, at his or her own expense, in a manner and at times specified in the order, a notice the terms of which are specified in, or are to be determined in accordance with, the order.
[Section 81 not reproduced.]
Section 82 Actions for damages
(1) A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IVA or V or section 65C or 65D may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.
(2) An action under subsection (1) may be commenced at any time within 3 years after the day on which the cause of action accrued.

"Proportionate liability in relation to misleading and deceptive conduct will substantially reduce the utility of those provisions."

defendant or third party should make contribution. The plaintiff is not involved in that process. Under the traditional law there will be little advantage for a respondent in bringing contribution proceedings against parties who are insolvent or whose assets are difficult to locate or realise, even if there are good arguable claims against such parties.

MISLEADING AND DECEPTIVE CONDUCT

As noted, the proportionate liability provisions also apply to those sections of the New South Wales, Victorian and Western Australian Fair Trading Acts which deal with misleading and deceptive conduct by natural persons.

Given the federal government's announcement that it intends to amend the *Trade Practices Act* 1974 (Cth) to implement proportionate liability for economic loss[14] (in response particularly to pressure from the auditing profession),[15] the state government reforms constitute a dress rehearsal for changes to the Trade Practices Act, as well as ▶

section 1041H of the *Corporations Act* 2001 (Cth) and section 12DA of the *Australian Securities Investments Commission Act* 2001 (Cth).[16]

Proportionate liability in relation to misleading and deceptive conduct will substantially reduce the utility of those provisions. The impact of this will go beyond so-called 'plaintiff claims' and have effects in relation to a wide variety of commercial and contractual disputes where section 52 of the Trade Practice Act is widely utilised to supplement remedies for contractual misrepresentation. It will also mean a significant reduction in investor protection, which will probably outweigh improvements brought about by the financial services reform legislation.

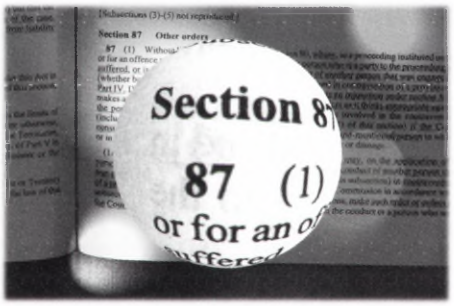
One of the ironies of the introduction of proportionate liability in relation to misleading and deceptive conduct under fair trading legislation is that the High Court recently decisively rejected such an approach at common law in relation to section 52 of the Trade Practices Act.

In *I & L Securities v HTW Valuers,*[17] the facts of the case related to an apportionment between the plaintiff and the defendant (analogous to contributory negligence), rather than between two defendants. However, the reasoning of the case was equally applicable to proportionate liability between defendants. The trial judge's reasoning was that there were two independent causes of damage, one being the defendant's misleading conduct, the second being the plaintiff's failure to take reasonable care which resulted in the trial judge reducing the plaintiff's damages by one third.[18]

However, the High Court found the measure of damages provided by section 82 was for the loss or damage of which the conduct was a cause, and was not limited to loss or damage of which such conduct was the sole cause. In the words of Gleeson CJ:

'The measure of damages stipulated was the loss or damage of which the conduct was a cause. It was not limited to loss or damage of which such conduct was the sole cause. In most business transactions resulting in financial loss there are multiple causes of the loss. The statutory purpose would be defeated if the remedy under section 82 were restricted to loss of which the contravening conduct was the sole cause. What is there, then, in the justice and equity of the particular case that might lead to a conclusion that the respondent should not be regarded as legally responsible for the whole of the loss, even though the contravention was a cause of the whole of the loss? Upon what principle might such responsibility be diminished?'[19]

"It is not clear how proportionate liability can be morally justified."



There is no specific right under the Trade Practices Act for a respondent to claim contribution and indemnity, section 87 having been held to not provide such a right.[20] However, there are suggestions that such a right may exist in equity.[21]

Further, there appears to be no barrier to defendants in misleading and deceptive conduct actions lodging third party or cross-claims which themselves allege independent allegations of misleading and deceptive conduct against other parties, though to the extent that their only loss is liability to the plaintiff this would require a finding that such liability falls within the meaning of 'loss or damage' under section 82 or 87.[22] The onus in proving such third party/cross-claims is on the respondent making the allegation.

PROPORTIONATE LIABILITY – HOW WILL IT WORK IN PRACTICE?

The schema of the Victorian legislation suggests that contribution claims may still be filed.[23] This also appears to be the case in New South Wales, Queensland and Western Australia, though this is less explicit. Despite this, section 24AJ of the Victorian legislation provides that:

'Despite anything to the contrary in Part IV, a defendant against whom judgement is given under this part as a concurrent wrongdoer in relation to an apportionable claim:

- cannot be required to contribute to damages recovered or recoverable from another concurrent wrongdoer in the same proceeding for the apportionable claim; and
- cannot be required to indemnify any such wrongdoer.'

Section 36 of the New South Wales legislation and section 5AG of the Western Australian Bill are in similar terms.[24]

Thus, although tortfeasors may still have a right to serve third party or contribution notices on each other and to prove those claims, any party against whom the plaintiff is successful in proving direct liability will not be liable to indemnify any of the other parties pursuant to any such successful claims for contribution.

Why then would a defendant make a claim for contribution or indemnity? It appears that defendants may still have an incentive to serve third party or contribution claims because it is likely that their alleging and demonstrating the liability of other parties will provide the factual material upon which an application for apportionment would be made. This would therefore have the significant effect of reducing their own direct liability to the plaintiff.

In Victoria and Queensland, third parties who are not currently a party to the proceeding would presumably be joined for the same purpose. Section 24AI(3) of the Victorian legislation provides that:

'In apportioning responsibility between defendants in a proceeding the court must not have regard to the comparative responsibility of any person who is not a party to the proceeding unless the person is not a party to the proceeding because the person is dead, or if the person is a corporation, the corporation has been wound up.'

Sections 30(3)(b) and 30(4) of the Queensland legislation are to the same effect.[25] However, the position appears to be quite different in New South Wales and Western Australia. Section 35(3)(b) of the New South Wales legislation provides:

'In apportioning responsibility between defendants in the proceedings the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.'

Section 5AF(3) of the Western Australian Bill provides:

'In apportioning responsibility between defendants in the proceedings the court is to have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.'

Both laws clearly contemplate apportionment of responsibility to non-parties,[26] whereas under the Victorian and Queensland models such parties must be joined to the proceedings to attract an apportionment of fault, unless they are in liquidation or deceased. This is a significant divergence. While a defendant making a proportionate liability application in relation to a non-party in Victoria and Queensland will need to file and serve the contribution claim, in New South Wales and Western Australia the defendant will merely need to plead the allegation in its defence.

In all jurisdictions it appears the burden of establishing proportionate liability and the fault of other parties will fall on the defendants. However, much of the burden of rebutting those allegations will in practice fall on the plaintiff where a concurrent wrongdoer is impecunious.[27]

It appears that a contribution claim may of itself be sufficient to mount an application for an apportionment of liability. It is less clear that other types of indemnity or third party claims will necessarily allow an application for apportionment as it would appear that the first defendant will also need to show that the defendant to the indemnity/third party claim has direct liability to the plaintiff in respect of the 'same damage', though not necessarily joint liability with the first defendant for that same damage,[28] and could also have been successfully sued by the plaintiff, even though the plaintiff has not done so. This would appear to raise some evidential issues for the defendant who will have some of the plaintiff's evidential burden against the co-defendant.

NOTICE TO PLAINTIFFS OF POTENTIAL DEFENDANTS

At the ministerial meeting of state and commonwealth ministers on insurance issues on 6 August 2003 it was agreed that defendants should be required to notify plaintiffs in writing of the identity and alleged role of any other potential defendants of whom they are aware. It is said that this is intended to provide protection to plaintiffs. As will be seen, the main problem of proportionate liability for plaintiffs will be the existence of insolvent defendants. This proposal will not provide any protection to plaintiffs in relation to this problem. Further, it does not appear to add much in the way of identifying possible co-defendants, even if they are solvent. It could be expected that these co-defendants would have to be identified by defendants in due course anyway, in their defences and third party claims.

PROBLEMS WITH THE SCHEME

It is notable that the Ipp Report, which provides the basis for most of the reforms to the law of negligence now being implemented, specifically rejected proportionate liability and recommended retention of the doctrine of solidary (joint and several) liability for negligence.[29] This was presumably due to some of the problems with the scheme, which can be illustrated by a practical example: ▶

An accountant negligently advises an elderly client to invest in a risky start-up company by providing misleading information to her about the investment. The company goes into liquidation due to gross mismanagement and ineptitude by three of its officers. The investor sues the accountant who recommended the investment for negligence and misleading and deceptive conduct.

The accountant joins the three officers of the start-up company, alleging negligence on their part, negligence by the company and contributory negligence by the investor herself (in New South Wales and Western Australia actual joinder would not be required). On an application by the accountant under the proportionate liability provisions, the court accepts the accountant's evidence and submissions that his liability should be limited having regard to the responsibility of the company and its officers for the loss of the investor's money, which the court assesses as 20% for each of the company and its three officers - together adding up to 80%. The court finds no contributory negligence on the part of the investor. The officers, facing this and an avalanche of other creditors and lawsuits, seek bankruptcy protection under Part IX or X of the *Bankruptcy Act* 1966 (Cth).

Thus, the court orders the accountant (who is insured) to pay the investor only 20% of her loss. After payment of liquidation costs there is no dividend from the company, but there is a five-cents-in-the-dollar dividend from the three officers. The investor lodges claims in the three bankruptcies and recovers an additional five cents in the dollar from each of the three officers. After exhausting all her remedies and succeeding 100% on liability, the investor, who has been found innocent of any contributory negligence, has thus recovered only 23% of her loss.

PRESERVATION OF JOINT AND SEVERAL LIABILITY UNDER THE QUEENSLAND MODEL

It is notable that in Queensland the proportionate liability provisions may not apply to the above situation as section 31(3) preserves joint and several liability where one of the defendants was engaged by the plaintiff to provide professional advice to prevent the loss that the plaintiff suffered and the plaintiff relied upon that advice.

Further, the Queensland provisions do not apply to damages of less than $500,000[30] and they specifically preserve joint and several liability where:

- there is a common intention to commit an intentional tort and the defendants actively took part in the commission of that tort;[31]
- the defendant was principal and damages are awarded against their agent;[32]
- there is a finding against the defendants of fraud or misleading and deceptive conduct.[33]

PROBLEMS OF THE NEW LAW[34]

Inconsistency with current case law

The current law on causation in relation to both negligence and misleading conduct appears in some situations to be conceptually inconsistent with proportionate liability. It is not yet clear how the courts will resolve this conflict, but it must be presumed that they will seek to implement the intention of the legislature insofar as that intention can be sensibly discerned.

Burden on the plaintiff in relation to contribution/third party proceedings

Under existing rules for contribution proceedings, the plaintiff is not required to become involved in disputes between the various defendants. Under proportionate liability the disputes between respective defendants will have a direct impact on the plaintiff's ability to recover, particularly if one of the defendants is impecunious and uninsured. Thus, the plaintiff will have an interest in that issue and will need to be integrally involved in the contribution disputes between defendants.

Insolvent defendants and 'straw persons'

The most obvious problem with proportionate liability will be the incentive for defendants to bring third party/contribution claims or make allegations against other defendants or third parties who may be in a doubtful financial position to defend themselves, unrepresented, or not even parties in the proceedings. Although actual joinder will not be necessary in New South Wales and Western Australia, there will still be an incentive to make such allegations, presumably pleaded in a defendant's defence. By laying blame on such parties, defendants will be able to reduce their own liability. In Victoria and Queensland deceased persons and corporations in liquidation will not have to be joined in the proceeding, but the court will still be entitled to have regard to their comparative responsibility.

Practitioners with experience in litigation will be aware that typically there is no shortage of actual or potential parties to litigation who are insolvent, 'judgment proof' or from whom recovery prospects are otherwise problematic. Under proportionate liability defendants will have a strong incentive to join such parties to proceedings or make allegations against them. This means the burden of blame will often be able to be shifted onto other impecunious parties who may have little incentive to defend the claims, may be unrepresented, or in New South Wales and Western Australia may not be parties. This will have the effect of reducing the plaintiff's ability to recover. Clearly, judges will face a heavy burden in doing justice where such third parties/co-defendants are unrepresented.

Philosophical objections

The main philosophical objection to proportionate liability is that where one wrongdoer is insolvent or unable to meet a judgement debt, the burden of this will fall upon the plaintiff rather than upon another wrongdoer. Putting aside the possibility of contributory negligence, the effect is that an innocent

plaintiff who has been the victim of wrongdoing, but has themself not been found guilty of any wrongdoing, will bear the effect of the insolvency or non-recovery in the form of reduced damages. Meanwhile, the other defendants to the litigation who have been found guilty of wrongdoing will have the benefit of being exonerated to the extent of that shortfall or insolvency.[35]

"It is notable that the Ipp Report, which provides the basis for most of the reforms to the law of negligence now being implemented, specifically rejected proportionate liability and recommended retention of the doctrine of joint and several liability for negligence."

It is no secret that this is exactly the outcome this reform is designed to implement. As noted in the report of the Victorian Attorney-General's Law Reform Advisory Council in 1999, in a 'perfect world', where all wrongdoers were available for suit and sufficiently solvent to meet their judgment debts, it would not matter whether joint and several or proportionate liability were adopted as the outcome would be the same.[36] It is only in the imperfect world of insolvent wrongdoers that proportionate liability will significantly alter the current position.

Clearly, the 'perfect world' outcome is that all parties share their respective proportions of the burden. However, in the case when one party is insolvent, putting aside the possibility of the existence of viable insurance, that party will not bear that burden and it will need to be shifted to other parties in the proceedings. The current system adopts the morally defensible position that it is preferable to place that burden on parties who have themselves been found guilty of some wrongdoing, rather than on to an innocent party. The basis of proportionate liability is that the burden is to be shifted from parties who have been found guilty of some wrongdoing to the plaintiff who has not been found guilty of any wrongdoing. It is not clear how this can be morally justified.[37]

The New South Law Reform Commission Report[38] raised the other possibility of that burden being equitably distributed between the plaintiff and the other solvent defendants. Although still imparting some burden on the innocent plaintiff, this would be preferable to the position that appears to be adopted by the proportionate liability legislation.

Another philosophical/economic objection is that the current system encourages efficient deterrence where people monitor the behaviour of those they deal with in relation to third parties.[39] There is already a strong tendency for large organisations, both private and government, to contract out specialised or problematic tasks to third party consultants and professionals. The large organisation, which is 'gatekeeper' under existing law, has an added incentive to deal with competent and solvent third parties, such as consultants and professionals, as to do otherwise would impact adversely on its own potential liability to an innocent third party. Proportionate liability removes this incentive. Moreover, it creates a positive incentive to contract out the most difficult tasks to the type of organisation which may not have the financial resources to fulsomely defend contribution proceedings or proceedings by a plaintiff.

Unforeseen effects on contract law

In all jurisdictions, apart from Queensland, the legislation applies to claims for economic loss or damage to property, in contract as well as tort, if the claims arise from a failure to take reasonable care. This may have unforeseen consequences on contractual rights as it appears to contemplate a contractor who breaches a contract by failing to take reasonable care being able to reduce the damages payable to his contractee by pointing to the negligence or fault of a party outside the contract. This effect on contractual rights may prove to be quite profound.

Procedural and ethical problems for lawyers

Proportionate liability means that successful contribution claims against defendants or third parties who are impecunious will directly reduce the quantum of a plaintiff's claim. A lawyer's duty to their client means they must take reasonable steps to prevent such prejudice to the client. Yet, at present,

a solicitor is not permitted to communicate with such a third party or co-respondent if they are represented, much less assist them in the preparation of their defence to a contribution claim. It is difficult to see how lawyers, with their hands so tied, will be able to marshal the evidence to adequately negate a problematic contribution allegation, yet this will directly reduce the damages their clients will receive.

Defendants may face similar problems. They appear to be required to establish both contribution or fault against a co-defendant and liability (though not necessarily the same sort of liability) of that co-defendant to the plaintiff for the same damage, all the while being unable to communicate with the plaintiff.[40] Proceedings are also likely to become increasingly unwieldy in all jurisdictions because parties (the defendant in Victoria and Queensland, the plaintiff in New South Wales and Western Australia) will probably join any solvent party who is alleged by anyone to be at fault.

Other problems

In some cases, claims may involve economic loss or damage to property, combined with personal injury. In those situations, proportionate liability will apply to the economic loss/property damage aspect, but not to the personal injury aspect of the loss. This is likely to create confusion.

At present, co-defendants/third parties are able to settle contribution claims between themselves. Under proportionate liability, plaintiffs will have a direct interest in such settlements and it would be unconscionable for them to proceed without the plaintiff's consent. The possibility for abuse where an insolvent or judgment proof third party/co-respondent accepts substantial liability from a solvent respondent to the detriment of a plaintiff means that the court is unlikely to be able to have regard to such settlements unless the plaintiff has consented to the same. Such consent would appear to be generally unlikely meaning that additional court time will be taken up. The prospects for overall settlements may also diminish.[41]

CONCLUSION

Proportionate liability is a relatively drastic response to a substantial but cyclical rise in insurance premiums. The problems and injustices of proportionate liability are likely to become more apparent over time as the courts grapple with the detail of the changes and plaintiffs realise that complete success on liability may bring only partial recovery of losses. The reform was sought by the insurance, auditing and other professions in order to limit and minimise liability for negligence and misleading conduct.

Apart from in Queensland, lawyers do not appear to have vigorously opposed this measure as much as they might. As professionals themselves, lawyers are exposed to liability suits and rising insurance costs. However, this should not blind the profession to the impact of such changes upon victims of unlawful conduct in their ability to recover losses. PL

Endnotes: **1** Similar legislation may be proposed in other states. South Australia has expressed support for the adoption of proportionate liability in relation to economic loss and property damage rights. Tasmania has not at this stage proposed the introduction of proportionate liability. The NT and ACT may look at the issue as part of their package of reforms in response to the *Review of the Law of Negligence* Final Report September 2002 (the Ipp Report). **2** Contractual claims are specifically included under the NSW, Victorian and WA provisions. The Queensland legislation has certain exclusions not including contractual claims and is otherwise applicable to a defendant 'in a proceeding'. **3** The relevant misleading and deceptive conduct provisions are: s 9 *Fair Trading Act* 1999 (Vic); s 42 *Fair Trading Act* 1987 (NSW); and s 10 *Fair Trading Act* 1987 (WA). However, s 31 *Civil Liability Act* 2003 (Qld) specifically preserves joint and several liability for defendants who contravene the misleading and deceptive conduct provisions of the *Fair Trading Act* 1989 (Qld), as well as preserving joint and several liability in a number of other situations. **4** Many of these reforms were flagged in the Ipp Report. However, that report specifically recommended against the adoption of proportionate liability (see recommendation 44, p 178). **5** See Swiss Reinsurance Company Economic Research & Consulting, 'Profitability of the Non-Life Insurance Industry: It's Back-to-Basics Time' (2001) 5 *sigma*; International Insurance Society Conference presentation by Steve McGill, Chief Executive, Jardine Lloyd Thompson Group PLC, Singapore, 15 July 2002; Statements by Joe Annotti of the National Association of Independent Insurers in the United States http://www.chase.com/cm/cs?pagename=Chase/Href&urlname=chase/pf/insurance/apr02homeauto **6** ibid. **7** See for example HIH Royal Commission, *The Failure of HIH Insurance*, April 2003. **8** G Smith, 'It's Coming Eventually, But This Time We're Ready For It' (2003) April 25 *Insurance Journal: The Property Casualty Magazine*. **9** s 34 of the NSW law defines apportionable claim as (a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from the failure of two or more concurrent wrongdoers (but not including any claim arising out of personal injury) to take reasonable care; and (b) a claim for damages for a contravention of s 9 *Fair Trading Act* 1987 (NSW) arising out of the acts or omissions of two or more concurrent wrongdoers. **10** See D Hamer *Chance Would Be a Fine Thing: Proof of Causation and Quantum in an Unpredictable World* MULR; S Waddams 'Principles of Compensation' (1992) 1 *Essays on Damages*, 11. **11** See NSW Law Reform Commission (1999) *Contribution Between Persons Liable for the Same Damage* Report No 89. **12** s 12 *Law Reform (Miscellaneous Provisions) Act* 1955 (ACT); s 24(2) *Wrongs Act* 1958 (Vic); s 7 *Law Reform Act* 1995 (Qld); s 26 *Wrongs Act* 1936 (SA); s 5 *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW); s 3 *Tortfeasors and Contributory Negligence Act* 1954 (Tas); *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA); s 12 *Law Reform (Miscellaneous Provisions) Act* (NT). **13** ibid. **14** Joint Communique of ministerial meeting on insurance issues, Perth, 4 April 2003. http://assistant.treasurer.gov.au/atr/content/publications/2003/Medical_Indemnity.asp **15** See Department of Treasury (2002) *Corporate Disclosure – Strengthening the Financial Reporting Frameworks*. http://www.treasury.gov.au/documents/403/PDF/Clerp9.pdf **16** An exposure draft of the amendments was released on 30 September 2003 in the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill. **17** (2002) 192 ALR 1. **18** (2000) 179 ALR 89. **19** supra 15 at 9. See also A Field, 'Having Your Cake and Eating it Too: Section 52 of the Trade Practices Act and Contributory Negligence' 77(5) *LIJ*, 28. **20** *Bialkower v Acohs Pty Ltd* (1998) 83 FCR 1 at 11; 154 ALR 534. **21** *Hanave Pty Ltd v LFOT Pty Ptd (formerly Jagar Projects Pty Ltd) and Others* (1999) 168 ALR 318 at 327. See also *Dorrough v Bank of Melbourne Ltd* (1995) 8 ANZ Ins Cas at 61-290; (1995) ATPR (Digest) at 46-152. **22** See J Campbell, 'Contribution, Contributory Negligence and Section 52 of the Trade Practices Act' (1993) 67 *Australian Law Journal*, 90. **23** s 24A0 *Wrongs Act* 1958 (Vic) provides that: 'Except as provided in s 24AJ nothing in this part affects the operation of Part IV.' **24** s 36 *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW). **25** However, the exception for companies that have been wound up does not appear to contemplate companies under administration. Nor is there an exception for individuals who are bankrupt or operating under Part IX or X of the Bankruptcy Act. Given that leave is required to join such persons to a proceeding it is not clear what happens if leave is not given. **26** The NSW law appears to be permissive, while the proposed WA law is arguably mandatory. **27** supra 11 at 2.45. **28** s 5(1)(c) *Civil Liability Amendment (Personal responsibility) Act* 2002 (NSW); s 23B(1) *Wrongs and Limitation of Actions Acts (Insurance Reform) Act* 2003 (Vic). See also supra 11 at 3.9-3.10. **29** supra 4. **30** s 28. **31** s 31(1). **32** s 31(2). **33** s 31(4). **34** See supra 11 for further discussion. **35** For a more detailed economic analysis see M Richardson (1998) *Report on the Economics of Joint and Several Liability Versus Proportionate Liability* Victorian Attorney-General's Law Reform Advisory Council Expert Report 3. **36** ibid, p v. **37** See A Rogers, 'Fairness or Joint and Several Liability' (2000) 8 *Torts Law Journal* 107; M Tilbury, 'Fairness Indeed? A Reply to Andrew Rogers' (2000) 8 *Torts Law Journal* 113. **38** Supra 11 at para 2.29. **39** supra 33, pp vi-vii. **40** This problem may not arise to the same degree in NSW and WA where the concurrent wrongdoer may not be joined in the proceedings as a result of s 35(3)(b). **41** supra 11, para 2.53.