

COMMERCIAL COURT - CPD SEMINAR

Part IVAA of the *Wrongs Act*

Revised speaking notes

(C M Caleo SC)

- This presentation shall address several issues relevant to the management of a case involving the provisions of Part IVAA viewed particularly (but not solely) from the point of view of a defendant.
- It is intended to focus on a series of practical issues confronted by a defendant and its legal advisers.
- When served with a written statement of claim, a defendant must, now as before, consider matters of both defence and attack. In the past, “defence” involved making allegations in the defence that supported a denial of liability; “attack” involved assessing whether, if the defendant were liable, it could lay off liability by bringing a claim against a third person.
- Where it applies, Part IVAA alters this dynamic because what was previously part of the “attack” is now an aspect of its “defence” - see s 24AI(1).
- Depending upon the circumstances, that change may make matters more simple, or more complex, for a defendant.
- The question “is the claim made against me an apportionable claim?” may not be readily answered. It may be difficult to determine whether a claim arises “from a failure to take reasonable care” (see *Kheirs Financial Services Pty Ltd v Aussie Home Loans Pty Ltd* [2010] VSCA 355 at [87]-[95].)
- In cases of uncertainty, one must both defend and attack. Thus, allege in the defence that the claim is an apportionable claim and that you and other parties are concurrent wrongdoers, invoking the benefits of s 24AI(1). In addition, seek contribution from the third party or third parties in the event that your client is liable, but it is not an apportionable claim.
- Both courses may be pursued even though s 24AJ prohibits the benefits of both regimes being enjoyed at the same time.

Procedure

- Several first instance decisions in the Supreme Court of Victoria dealing with questions of procedure for invoking Part IVAA have yielded some key propositions (conveniently addressed in *Cowan v Greatorex* [2008] VSC 401):
 - Part IVAA provides a basis of defence, invoked by pleading facts that give rise to its application in the defence to the statement of claim.
 - At the time of service of the defence, make application to the Court to add the alleged “concurrent wrongdoer” as an additional defendant to the proceeding. The mere addition of this party does not result in anyone making a claim against that party.
 - Because the addition of this party does not involve making a claim, the original defendant need not resort to the device of seeking a declaration.
 - No rules of court deal expressly with the way in which a matter proceeds once a concurrent wrongdoer has been joined - in particular, what should happen if the plaintiff chooses not to make a claim against that new party but the new party nevertheless wishes to participate in the proceeding and respond to allegations that it bears responsibility to the plaintiff.
- The future course of the proceeding will depend on decisions made at this point in time by both the plaintiff and the new party.
- The plaintiff must determine whether it will adopt the allegations about the acts or omissions of the new party or proceed only against the original defendant and face the risk that its recovery will be limited. The impecunious status of the new party may mean that little purpose is served by pursuing a claim against it (see *S Sali & Sons Pty Ltd v Metzke & Allen* [2009] VSC 48).
- If the plaintiff does not adopt the allegations made against the new, joined party, that party is in the odd position where allegations of wrongful conduct on its part have been made but no one seeks relief against it. Should it bother with the time and expense of participating when, absent participation, no relief can be granted against it? To what extent, if at all, does s 24AK(1) permit a subsequent proceeding to be brought against it by the plaintiff?

Impact on Proceedings

- Practical experience of cases involving Part IVAA has revealed two significant respects in which it has impacted on the course of proceedings:
 - Complexity - there are many examples of proceedings in which Part IVAA has been invoked and more parties have become involved than might have been the case previously. The presence of more parties can greatly increase complexity in both procedural and substantive terms. In particular, pleadings can become very complex and numerous as each party replicates allegations made by other parties.
 - Settlement - the mere presence of more parties may make settlement more difficult. In addition, however, notwithstanding the decision in *Godfrey Spowers (Vic) Pty Ltd v Lincolne Scott Australia Pty Ltd* (2008) 21 VR 84, there remains uncertainty and potential difficulty in extricating a client from a proceeding in which Part IVAA has been invoked.