

A PROPORTIONATE RESPONSE

(By Peter Gordon, with the assistance of Sarah Roache; lawyers at Gordon Legal)

It is only in the last 10 years that governments have realised the marketing value of giving legislation really good names. Brand power for legislation is a new but immensely stimulating field. Young lawyers, particularly those who are fans of the Gruen Transfer, and who are looking for a new and different career should reconsider the possibilities of the parliamentary draftsman's office.

Consider, for example, an act passed by the US Congress in the last ten years which abrogated the right to silence and allowed Government agencies to listen in on private phone calls and intercept personal mail. It went by the catchy title of "**the *Uniting and Strengthening America by Providing Appropriate Tools Required to Obstruct Terrorism Act***".

An act whose principal effect was to get rid of impediments to loggers attacking old growth forests might have been of great community concern....but how could anyone argue with an act called the ***Healthy Forest Restoration Act***?

The Victorian proportionate liability laws should never have been called **The *Wrongs and Limitation of Actions Acts (Insurance Reform) Act***. Any creative draftsman would have gone with "**The Justice for All (insurers) Act**"; though I would have preferred "**The One More Gratuitous and Confusing Piece of Protection for Rich and Negligent Defendants Act.**"

There is no doubt that the proportionate liability laws can be best described in two ways.

- 1.) They have been brought into existence with intentional disregard for 'fairness' on the part of the legislature. They were expressly enacted at both a Federal and State level to provide a windfall benefit to the insurance industry and the large professional service industry.
- 2.) The various proportionate liability provisions of the various State and Federal Acts are complex, apparently contradictory and give rise to a large number of difficulties of interpretation...which one might observe is about what you would expect when Governments rush in to overturn decades of jurisprudence in order to provide an unfair advantage to special interests.

This legislative regime departs from longstanding and hard-forged principles of joint and several liability in the assessment of damages, in order to confer a strategic advantage on wealthy wrongdoers.

Under common law principles of joint and several liability, if a defendant's conduct was found to be a substantial cause of the plaintiff's loss, then that defendant is bound to compensate the plaintiff in full but can pursue its co-defendants for contribution. Insurers complained that this was unfair as plaintiff solicitors targeted defendants with deep pockets. This was even given a name, 'the deep pocket syndrome' as if to assume it is somehow wrong for lawyers to seek to redress their clients' losses by the simplest and most efficacious means.

However, under these legislative provisions in Victoria, a defendant is allowed to reduce its liability with reference to the percentage liability of a concurrent wrongdoer, placing the plaintiff at risk of non-recovery against a viable defendant.

It doesn't assist the impecunious wrongdoer...they can't pay damages awards anyway.

It doesn't assist the innocent wrongdoer...they are not liable in the first place.

And it doesn't assist the wronged and aggrieved consumer for obvious reasons. Its specific intent is to further assist the position of defendants who have a capacity to pay and who have done wrong.

The regime has the effect of requiring the plaintiff to bring additional claims against additional defendants, rather than suing a single defendant that substantially caused the loss complained of.

Lawyers for a plaintiff who has been wronged by multiple wrongdoers, at least one of whom is impecunious, have a duty to consider and advise on all possible framings of the plaintiff's claims so as to recover as close to 100% of the plaintiff's loss as possible. This includes advising the plaintiff on how to frame his claim so as to avoid application of the proportionate liability regime.

So, how might the plaintiff lawyer advise his client to frame his claim? In analysing this question, we ought to be clear as to what is the general obligation of a lawyer for an aggrieved claimant in a civil dispute.

In my view, this obligation is to get the client the best possible financial result in the shortest possible time at the best possible transaction time and cost.

Within that rubric, it seems to me that what the proportionate liability regimes require of a claimant lawyer is to consider the total ambit of persons against whom a liability finding in favour of one's client, might be made.

Then, it is necessary to consider the pecuniosity of each of the likely defendants.

The next step must now be to consider, if there is a real risk of an impecunious defendant being allocated a large share of the total liability in a dispute, to identify a non-apportionable claim against a defendant with means.

In future, claimants will need to consider buying into the inter partes assessments of competing liability between defendants.

It will usually be possible by proper forensic and discovery processes, to have a far more complete picture of the shortcomings of a defendant who is participating in litigation and providing discovery compared to one who is dead, re-registered or hiding somewhere in Ireland. Claimants will need to emphasize to courts the need not to over-burden absent defendants (and therefore the claimants,) with levels of responsibility they are not there to defend or explain.

What is and is not an apportionable claim is easier to identify sometimes than others of course and may indeed conflict between Federal and State Acts or even within Acts; but in general terms, it would seem now that the following are claims which ought to be considered;

- a) Claims involving allegations of fraud (specifically excluded as apportionable under the S 24A1 of the Victorian Act;.) Remember though that if you are satisfied that a defendant has a capacity to pay because of insurance, an allegation of fraud may also have the effect of vitiating the defendant's indemnity under the insurance policy;
- b) Claims for equitable compensation for breach of trust may not be apportionable claims, as was held by Buchanan JA. in Pearsons v Avison;
- c) Claims for breaches of Federal Statute other than those with their own proportionate liability regimes; have been held by Middleton J. in Dartberg v Welfare Planning not to be apportionable claims pursuant to Pt IVAA of the Wrongs Act; Claims for breach of warranty have been held by Finkelstein J. not to be apportionable claims in PHPB Freight;

These exceptions should all be read of course with the utmost caution because courts have indicated that they will determine the question of whether there is an apportionable claim in accordance with the evidence rather than the way the claimant chooses to assert his rights. (Dartberg, Reinhold, Spowers).

At its broadest, according to a review written by Macauley and Horan in the Insurance Law Journal, these propositions may mean that if a defendant's conduct was misleading and deceptive and in trade and commerce, it is an apportionable claim, however it is configured or brought before the Courts.

This creates its own set of potential problems and conflicts. Fraudulent conduct by corporations, for example, is usually misleading and deceptive; and therefore notionally apportionable, but expressly precluded from apportionability under the express provisions of Part IV AA.

The judgment of Justice Hollingworth in Woods v DeGabriele is interesting in this regard. In the context of this interlocutory application, Her Honour found that it is at least arguable that claims pursuant to sections 12(e) and 12(n) of the FTA may be determined to be apportionable if a court is satisfied that the conduct giving rise to the claim contravened section 9 of the FTA (which the Wrongs Act deem to be apportionable).

I'd like to now consider an example of how a claimant may frame his case so as to avoid application of the proportionate liability regime. A claim for damages pursuant to section 1041I (the relevant civil damages provision) for economic loss caused by conduct in contravention of section 1041H – is an apportionable claim. 1041H(1) prohibits conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive. However, a plaintiff has the option of seeking damages for contravention of section 1041H pursuant to section 1325 (extracted below) – to which the proportionate liability provisions do not automatically apply.

Section 1325, entitled Other Orders, gives the court far reaching discretion to order compensation for those who have suffered loss by reason of another's contravention of the relevant parts of the Corporations Act.

- (1) Where...the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage because of conduct of another person that was engaged in contravention of Chapter 5C, 6CA or 6D, subsection 798H(1) or Part 7.10, the Court may... make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention ... if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.
- (2) The Court may, on the application of a person who has suffered, or is likely to suffer, loss or damage because of conduct of another person that was engaged in in contravention of Chapter 5C, 6CA or 6D, subsection 798H(1) or Part 7.10... make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention ... if the Court considers that the order or orders concerned will compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or

damage, or will prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person.

How would the court respond to such a pleading? Would it view the pleadings as a means of avoiding the application of the proportionate liability provisions and use its discretion to reduce the damages anyway? Would the plaintiff's inability to recover all of its losses, and the unfairness of that result impact upon the court's interpretation? What obligations do the courts have to consider 'fairness' in the context of this legislative regime? Justice Nettle in his remarks pointed to the requirement that the court apportion in accordance with its view of what is just. But the completion of those provisions is that it be apportioned in accordance with what is **"just having regard to the extent of the defendant's responsibility for the loss and damage."** Of course what is just to the defendant may not be what is just to the injured plaintiff.

Turning to the Wrongs Act, section 24AF(1) states that the proportionate liability regime applies to claims for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) **arising from a failure to take reasonable care).**

It is relevant to note that while the proportionate liability provisions of the Corporations Act apply to sections concerning false or misleading statements (1041E), inducing persons to deal (1041F), dishonest conduct (1041G), and misleading and deceptive conduct (1041H), **none of these is in the nature of a claim for failure to take reasonable care.**

If the claim can be configured in such a way as to enliven a claim which goes beyond a **mere failure to take reasonable care, does the framework of the Victorian Act then require a conclusion that the claim is not apportionable?**

Torts such as deceit, negligent misrepresentation, conspiracy or conversion may be important to consider in this context, but so might be negligence torts which involve positive allegations of misconduct, particularly those which might give rise to a claim for exemplary damages.

The interpretive argument which might be advanced to the court in such circumstances is that while parliament might have intended to provide some extra relief to the merely negligent, there is every reason to suppose it did not intend that relief to extend to the reckless or insolent wrongdoer.

As I have said, in this context, it should be noted that section 24AM of the Wrongs Act specifically excludes defendants found liable for fraud in a proceeding from being able to take advantage of the relief offered in these provisions, to rich wrongdoers.

Plaintiffs also need to be cautious of the risk of “infecting” non-apportionable claims against one wrongdoer with apportionable claims pleaded in the same proceedings against another wrongdoer.

By way of example, consider the tension between sections 1041L(2) and 1041N(2) of the Corporations Act, which, to my knowledge, the courts have yet to resolve. Section 1041L(2) states that ‘there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).’ Compare this to section 1041N(2), which states that ‘If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim: (a) liability for the apportionable claim is to be determined in accordance with the provisions of this Division; and (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Division) are relevant.’

If the court was to interpret these sections to mean that apportionable claims could “infect” non-apportionable claims brought in the same proceedings, it would likely have the effect of promoting multiplicity of proceedings. This is clearly an adverse outcome for the administration of justice and the goals of getting the outcome in the shortest possible time and with the minimum transaction time and cost, but as a lawyer seeking to achieve the best outcome for his client, it may be a much more effective option.

I want to make one more point relating to statutory interpretation in this general context.

One can readily anticipate defendants everywhere in this situation saying courts ought to give effect to the plain meaning of the words... and of course they should. But if a literal interpretation of the words does present an ambiguity in the area of, for example, concurrent defendants in different proceedings, and there are plenty of examples where it does, the principle of statutory interpretation which suggests a court should interpret a statute in such a way as to achieve a just outcome should be asserted by the claimant.

The various second reading speeches do not go out of their way to say they want to do aggrieved plaintiffs any favours, they do not talk about achieving fairness in outcomes. Let’s talk about those speeches for a moment.

Then Premier Bracks characterised the reforms as “a balanced response to a complex issue.” [1788, 21 May 2003]. His speech touched on fairness for both plaintiffs and defendants, **but only with reference to personal injury claims**, to which the proportionate liability scheme does not apply. One might conclude that Mr Bracks wanted fairness to be a feature of personal injury claims but not other civil disputes where the money of insurers might be at risk?

In her judgment in the matter of *Woods v De Gabriele* Justice Hollingworth also noted that the then Premier had little to say about proportionate liability in his second reading speech. Justice Hollingworth noted that the explanatory memorandum made it clear that the

proportionate liability provisions are part of the national scheme in response to the purported "insurance crisis", and the intent thereby inferred that the objectives of the Victorian legislation must be similar to those articulated in the explanatory memorandum to the federal legislation.

In his judgment in *St George Bank Limited v Quinerts* [2009] VSCA 245, Justice Nettle looked to the second reading speech on the Commonwealth government's proportionate liability legislation, noting that:

the object of the apportionment legislation was to put a defendant in exactly the position it would have been if all other concurrent wrongdoers liable to make contribution under the Commonwealth equivalent to s 23B were before the court and of sufficient means to meet their obligations to make contribution according to their respective responsibilities for the loss and damage suffered by the plaintiff.

It seems then, from Justice Nettle's remarks, that the Commonwealth parliament **did indeed** intend to shift the burden of risk from well resourced concurrent wrongdoers to aggrieved plaintiffs, and that the Victorian parliament adopted this intention by acquiescence.

The so called justification for this very significant deviation from the common law principle of joint and several liability was to end perceived injustice to defendants, who argued that they were being forced to pay more than their "fair share".

Courts should be urged, in my respectful view, to keep in mind that a fundamental role of the legal system is to mediate fairness and to strive to achieve fairness where possible. This legislation was expressly enacted to benefit the insurance industry and it clearly has and does and will. But it ought not be interpreted beyond its strict limits where there is an obvious impost to fairness.

Footnote:

In question time after this paper was presented, a member of the audience with some apparent knowledge of the provenance of these reforms, suggested these reforms were not just about helping the insurance industry but reflected the very real concerns of the professional service industry, particularly the big accounting firms, after the Enron crisis.

I did not, because of time constraints, have an opportunity to respond. Had I had the opportunity, I wish I would have said the following;

- i) From my knowledge of and involvement in opposing the capital strike and public relations war launched by the insurance industry in 2003-2004 following a

decline in international equity markets, and which were designed to achieve the tort reforms which are now the law, I readily agree that the big professional service firms, both legal and accounting, worked hand-in-glove with the insurers to achieve the proportionate liability reforms;

- ii) The confusing and contradictory nature of the reforms reflects the atmosphere of hysteria in which they were hatched;
- iii) If the rationale which the proponents of the proportionate liability changes now wish to advance, was the need to protect accounting firms in the wake of the “Enron disaster”; they should reflect long and hard about whether Arthur Anderson’s behaviour in the Enron case provided any kind of moral or jurisprudential reason to turn one hundred years of settled common law on its head.