

COMMERCIAL COURT – CPD SEMINAR  
PROPORTIONATE LIABILITY UNDER VICTORIAN LEGISLATION

KEY LEGAL PRINCIPLES

1           Part IVAA of the *Wrongs Act 1958* ('the Act'), which was introduced in 2003, provides for proportionate liability of concurrent wrongdoers in relation to claims for damages for economic loss, or damage to property, arising from the failure to take reasonable care or for contravention of s 18 of the *Australian Consumer Law 2011* (Vic).<sup>1</sup>

2           It was enacted as part of a quasi-national co-operative scheme designed to overcome what were perceived to be undesirable consequences of the joint and several liability rule.<sup>2</sup>

*The effect of Part IVAA as enacted*

3           In effect, Part IVAA has made a fundamental change to the previous law of contribution. Before its enactment, a plaintiff could choose to sue only one or some of several wrongdoers who caused the same loss and obtain judgment for the whole of that loss against that one wrongdoer or those wrongdoers. In turn, that wrongdoer or those wrongdoers could claim contribution pursuant to ss 23B and 24 of the Act against other wrongdoers who caused the same loss. But, if other wrongdoers proved to be impecunious, the right of contribution was of little value. 'Deep-pocket' defendants would thus be left to bear the whole or substantial part of the loss.

4           Now, where Part IVAA applies, it enables each concurrent wrongdoer to limit the wrongdoer's liability to the proportion of the loss which the Court considers

---

<sup>1</sup> As set out in Schedule 2 of the *Competition & Consumer Act 2010* (formally known as the *Trade Practices Act 1974*).

<sup>2</sup> See B McDonald, *Proportionate Liability in Australia: The Devil in the Detail*, (2005) 26 Aust Bar Rev 29, 31-2; Byrne J, *Proportionate Liability: Some Creaking in the Superstructure*, Judicial College of Victoria, 19 May 2006.

‘just’ according to the comparative responsibilities of all wrongdoers for the plaintiff’s loss.

### ***What is just?***

5           ‘Just’ is not defined for the purposes of Part IVAA, but conceptually it is similar to the notion of what is ‘just and equitable’ for the purposes of s 24. As Palmer J explained in *Yates v Mobile Marine Repairs Pty Ltd*:<sup>3</sup>

How the Court is to assess what is ‘just’ is not explained. The Court must exercise a large discretionary judgment founded upon the facts proved in each particular case. The principles upon which the Court will exercise this discretionary judgment will come to be developed on a case-by-case basis. However, it seems clear enough that the policy of [the Part] is that a wrongdoer who is, in a real and pragmatic sense, more to blame for the loss than another wrongdoer should bear more of the liability. This calls for the exercise of the same kind of judgment as the Court exercises in apportioning responsibility as between a defendant sued in tort for negligence and a plaintiff who, by his or her own negligence, has been partly responsible for the injury.

### ***What claims does Part IVAA apply to?***

6           Section 24AF of the Act provides that Part IVAA applies to an ‘apportionable claim’. An apportionable claim means:

- a) a claim 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; and
- b) a claim for damages for a contravention of s 18 of the *Australian Consumer Law* (Vic).

### ***What claims does Part IVAA not apply to?***

7           Section 24AG provides that Part IVAA does not apply to claims arising out of an injury and, without limiting that exclusion, does not apply to:

---

<sup>3</sup> [2007] NSWSC 1463, [93]–[94], in relation to the comparable provisions of Pt IV of the *Civil Liability Act 2002* (NSW).

- a) a claim to which Part 3, 6 or 10 of the *Transport Accident Act 1986* applies;
- b) a claim to which Part IV of the *Accident Compensation Act 1985* applies;
- c) a claim in respect of an injury which entitles, or may entitle, a worker, or a dependant of a worker, within the meaning of the *Workers Compensation Act 1958* to compensation under that Act;
- d) a claim for compensation under Part V of the *Country Fire Authority Act 1958* or a claim for compensation under a compensation scheme established under the regulations made under that Act;
- e) an application for compensation under Part 4 of the *Victoria State Emergency Service Act 2005*;
- f) a claim for compensation under Part 6 of the *Emergency Management Act 1986*;
- g) an application for compensation under the *Police Assistance Compensation Act 1968*;
- h) an application for assistance under the *Victims of Crime Assistance Act 1996*;
- i) a complaint under the *Equal Opportunity Act 1995*;
- j) a claim for compensation under Part 8 of the *Juries Act 2000* or Part VII of the *Juries Act 1967*;
- k) a claim for compensation under Part 5.6 of the *Education and Training Reform Act 2006*; or
- l) claims of a class that is excluded by regulation.

### *The mechanism of Part IVAA work*

8 The pivotal provisions of Part IVAA are sections 24AH, 24AI and 24AJ:

- Section 24AH provides that, for the purposes of Part IVAA, **a concurrent wrongdoer** in relation to a claim is a person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim.
- Section 24AI provides that the **liability of a concurrent wrongdoer who is a defendant in a proceeding** is limited to the proportion of the

claim which the court determines to be just having regard to the extent of the concurrent wrongdoer's responsibility for the loss and damage suffered.

- Section 24AJ provides that, despite anything to the contrary in Pt IV of the Act, a defendant against whom judgment is given under Pt IVAA as a concurrent wrongdoer in relation to an apportionable claim cannot be required to contribute to the **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.

*Claims by and against concurrent wrongdoers only if they are defendants to the proceeding – the need for joinder*

9           Perforce of the emphasised words in ss 24AI and 24AJ, Part IVAA does not apply to a concurrent wrongdoer unless the **concurrent wrongdoer is a defendant** in a proceeding, and perforce of s 24AI(3), a concurrent wrongdoer who is a defendant in a proceeding may only claim the benefit of apportionment in respect of other **concurrent wrongdoers who are defendants**.<sup>4</sup>

10           Other things being equal, therefore, it will be to the advantage of a concurrent wrongdoer who is a defendant to a proceeding to ensure that other concurrent wrongdoers are joined as defendants to the proceeding pursuant to s 24AI of the Act.<sup>5</sup>

*The effect on third party proceedings*

11           Under s 24AJ, a concurrent wrongdoer who is a defendant in a proceeding is

---

<sup>4</sup> Section 24AI(3), unless the concurrent wrongdoer is dead or has been wound up.

<sup>5</sup> As to the considerations applicable to joinder applications, see *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* (2007) 164 FCR 450, 458 (Middleton J); *Cowen v Greatorrex* [2008] VSC 401 (Hollingworth J); *P & V Industries Pty Ltd v Secombs (a firm)* [2008] VSC 209 (Judd J); *Main Road Property Group Ltd v Pelligra & Sons Pty Ltd* [2010] VSC 5 (Pagone J).

**only entitled to apportion liability under Part IVAA in respect of a judgement** on an apportionable claim given against that defendant in the proceeding.

12 Because a defendant's liability in respect of an apportionable claim is so limited, a concurrent wrongdoer who is a defendant in a proceeding cannot maintain a third party claim for contribution and/or indemnity against another concurrent wrongdoer in respect of the apportionable claim.<sup>6</sup>

13 By contrast, a concurrent wrongdoer who is a defendant in a proceeding who settles an apportionable claim under Part IVAA, and thus against whom no judgment is or can be given under Part IVAA in respect of the apportionable claim, is entitled (in some circumstances) to claim contribution in respect of the settlement sum pursuant to Part IV of the Act.<sup>7</sup>

#### *Determining whether wrongdoers are concurrent wrongdoers*

14 Perforce of s 24AH, wrongdoers are concurrent wrongdoers in relation to a claim only if each of them by their acts or omissions **caused**, independently of each other or jointly, **the loss or damage that is the subject of the claim**.

15 The words '**caused...the loss or damage the subject of the claim**' are critical. Since Part IVAA was designed to do no more by way of apportionment than could previously have been achieved by contribution under s 23B of the Act (assuming all contributors were solvent), it has been construed as putting a defendant in the same position as the defendant would have been if all other concurrent wrongdoers liable to make contribution under 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.<sup>8</sup>

---

<sup>6</sup> *Dymocks Book Arcade Pty Ltd v Capral Ltd* [2010] NSWSC 195, [9].

<sup>7</sup> *Godfrey Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd & Ors* (2008) 21 VR 84.

<sup>8</sup> *Shrimp v Landmark Operations Ltd* (2007) 163 FCR 510, [62] (Besanko J) (interpreting the comparable provisions of Part IVA of the *Trade Practices Act 1974* (Cth), on which Part IVAA of the *Wrongs Act 1958* is substantially based).

16 On that basis, ‘the loss or damage the subject of the claim’ has been construed as equivalent to the ‘same damage’ in s 23AB of the Act.<sup>9</sup> That is a narrower concept than ‘substantially or materially similar damage’. The mere fact that two or more wrongs may lead to a common result does not of itself mean that the wrongdoers are liable in respect of the same damage.<sup>10</sup>

*Some examples of what is and is not the same damage*

*(i) Example 1:*

17 By way of example, consider first the damage suffered by a ship owner when its ship is damaged in a collision caused by the negligence of another ship’s captain, and in circumstances where the ship owner’s solicitors negligently fail to institute proceedings against the other ship’s captain within the limitation period. The negligence of the other ship’s captain and the negligence of the solicitors lead to a common result. But the damage caused by the other ship’s captain’s negligence is not the ‘same damage’ as the damage as is caused by the solicitors’ negligent failure to institute proceedings. In the case of the negligent ship captain, the damage caused to the ship’s owner is the physical damage to the ship. In the case of the solicitors, the damage caused to the ship owner is the loss of a chance to recover damages from the other ship’s captain for the physical damage to the ship. To adopt and adapt the words of the Alberta Court of Appeal in *Wallace v Litwiniuk*:<sup>11</sup>

The distinct nature of the original claim [against the other ship’s captain] and the professional negligence claim [against the solicitors] is recognised by the need to estimate the value of the original claim, and then discount for the costs of pursuing the original litigation, and allow for any chance that the original claim might not have succeeded.

---

<sup>9</sup> *St George Bank Ltd v Quinerts Pty Ltd* [2009] VSCA 245, [68].

<sup>10</sup> *Royal Brompton Hospital NHS Trust v Hammon* [2002] 1 WLR 1397, 1417 [47].

<sup>11</sup> (2001) 92 Alta LR (3d) 249, 257 [32] and [34]; approved in *Royal Brompton Hospital NHS Trust v Hammon*, *ibid* 1412 [29] (Lord Steyn).

*(ii) Example 2*

18 Secondly, consider the damage suffered by a building owner by reason of delay in completion of the building caused by the negligence of the builder, in circumstances where the architect has negligently certified for time extensions and thus compromised the ability of the owner to recover from the builder. The negligence of each wrongdoer leads to a common result that the owner is out of pocket to the extent of the delay. But the damage in each case is different. The damage caused by the builder is the damage caused by the delay. The damage caused by the architect is the loss of a chance to recover from the builder. It could not be said that the architect's negligence caused the delay and it could not be said that the builder's negligence caused the loss of the chance of recovery.<sup>12</sup>

*(iii) Example 3*

19 Thirdly, consider the case of an armed-guard service charged with transportation of a bank's money where the armed-guard service conducts itself so negligently as to lose the bank's money. Assume that the bank is insured against loss of its money but, due to the negligence of its insurance brokers, the policy does not extend to losses caused by the negligence of an armed-guard service. Consequently, when the bank makes a claim on the insurance company for the loss of its money, the claim is rightly rejected. In those circumstances, the wrong committed by the armed-guard service and the wrong committed by the insurance brokers lead to the common result that the bank's assets are left depleted by the value of the lost money. But that does not mean that the armed-guard service and the insurance brokers have caused the **same damage**. The damage caused by the armed-guard service is the physical loss of the bank's money. Nothing done or omitted to be done by the insurance brokers caused that money to be lost. The damage caused by the insurance brokers is the bank's inability to obtain indemnity

---

<sup>12</sup> *Royal Brompton Hospital NHS Trust v Hammon* [2002] 1 WLR 1397, 1402 [7]; *Alexander v Perpetual Trustees WA Ltd* (2004) 216 CLR 109, 122 [26]-[27].

from its insurers. Nothing done or omitted to be done by the armed-guard service caused the bank's insurance cover to be inadequate. The damage in each case is different, even though the quantum in each case may be the same.<sup>13</sup>

*(iv) Example 4*

20 Finally, by way of example, consider a case where a corporate purchaser of land defaults in completion of the contract of sale, and thereby causes damage to the vendor, in circumstances where the vendor's solicitors have negligently failed to advise the vendor to obtain a third-party guarantee from the directors of the purchaser. In one sense, the purchaser's breach of contract and the solicitors' negligence result in the same loss. But that does not mean that the defaulting purchaser and the negligent solicitors have caused the **same damage**. The damage caused by the defaulting purchaser is the difference between the contract price and the value of the land thrown back on the hands of the vendor.<sup>14</sup> Nothing done or omitted to be done by the negligent solicitors caused the default of the purchaser. The damage caused by the negligent solicitors is the vendor's loss of a chance to compel guarantors to perform the purchaser's obligations or to indemnify the vendor against the loss caused by the purchaser's default. Nothing done or omitted to be done by the defaulting purchaser caused the vendor not to take a guarantee of the purchaser's obligations.<sup>15</sup>

*The significance of pleadings*

21 Finally, it is to be observed that whether a claim is an apportionable claim cannot be determined on the basis of pleadings alone. As Barrett J said in *Reinhold v NSW Lotteries Corporation (No 2)*:<sup>16</sup>

---

<sup>13</sup> *St George Bank Limited v Quinerts Pty Ltd* [2009] VSCA 245, [82].

<sup>14</sup> *Real Estate Securities Ltd v Kew Golf Links Estate Pty Ltd* [1935] VLR 114, 123.

<sup>15</sup> *Ashbrooke Institute Pty Ltd v Bartone Biomedical Pty Ltd (in liq) and Holding Redlich* [2010] VSC 579, [126].

<sup>16</sup> [2008] NSWSC 187, [32]; see also *Godfrey Spowers (Victoria) v Lincolne Scott Australia* (2008) 21 VR 84,105, 108 (Ashley JA).

A case no doubt needs to be pleaded and proved by one or more defendants so as to engage the statutory provision. But it will be the findings ultimately made that determine whether the statutory conditions compelling the court to adopt the proportionate approach are satisfied.

22 That does not preclude the possibility of a successful application to strike out a defendant's pleading (that the plaintiff's claim is an apportionable claim and that the defendant's liability in respect of it should be limited accordingly). But, in accordance with established principles, and, as much as anything, because it is difficult to judge the issue until all the evidence is in,<sup>17</sup> strike-out applications will be closely scrutinised and in most cases are unlikely to succeed.<sup>18</sup>

--- O ---

---

<sup>17</sup> *Wickstead v Browne* (1992) 30 NSWLR 1, 5–6 (Kirby P).

<sup>18</sup> For some recent examples, see *AED Oil Ltd v Back (No 2)* [2010] VSC 43 (Judd J); *Main Road Property Group Ltd v Pelligra & Sons Pty Ltd* [2010] VSC 5 (Pagone J).