

PROPORTIONATE LIABILITY UNDER THE *WRONGS ACT 1958*:

ONE YEAR ON

Introduction

Part IVAA of the *Wrongs Act 1958* commenced operation on 3 December 2003. It applies to proceedings commenced in a court on or after 1 January 2004.

It is a seminal piece of legislation that will change the way most, if not all, commercial claims are litigated in Victoria, and yet it is a sleeper. Not many lawyers (both barristers and solicitors) are aware of the changes, even fewer lawyers could claim to have a good grasp of the provisions and, to date, Part IVAA has not been the subject of judicial consideration at the Supreme Court level.

In the absence of precedent, this paper can simply point to some likely trends and practical issues that may be faced when seeking to apply the legislation.

Distinction between joint and several liability, and apportioned liability

No doubt, the concept of joint and several liability will be well known to you. A defendant who is liable to the plaintiff, jointly and severally with his or her co-defendants, is liable for the whole of the plaintiff's loss, irrespective of that defendant's individual responsibility. A defendant who causes 1% of the plaintiff's loss is liable for 100% of the claim. The evident purpose of such a scheme is to protect the plaintiff from the risk that one or more defendants may be insolvent. The risk of a defendant's insolvency falls upon the co-defendants who must make up the insolvent defendant's share.

There is a perceived unfairness for defendants in such a regime. In recent times, there has been much clamour about the spiralling cost of insurance premiums due, in part it was said, to solvent and longstanding defendants (such as local councils) shouldering the burden of another defendant's incompetence, where that defendant is insolvent. The answer was said to lie in the abolition of joint and several liability and its replacement with apportioned liability.

In an apportioned liability scheme, each defendant is only liable for their share. The defendant who causes 1% of the plaintiff's loss is only liable for 1% of the plaintiff's claim. In order to recover 100% of its loss, the plaintiff is required to recover from all defendants who are found to be liable to it. It follows that the risk of a defendant's insolvency falls upon the plaintiff, and not upon the co-defendants.

This is not the place for an excursus of the respective merits of a joint and several as opposed to a proportionate regime.¹ We now have proportionate liability for claims for economic loss and damage to property, and that is what must be considered.

What can be said is that the difference between the two regimes is the entirely practical one of risk. In a perfect world, where all defendants are solvent, all are insured with healthy limits of indemnity, all insurance claims are honoured, and transaction costs (i.e. the costs of joining and pursuing parties in litigation) are zero, there would be no difference between the regimes. This is important because, when considering the operation of Part IVAA as a litigator, you will do so from the perspective that your client will be seeking to minimise the risk of being exposed to another's insolvency.

Background

In 1995, proportionate liability was introduced in Victoria for building actions.² This was designed to fit within a broader regime, by which all 'building practitioners' (e.g. builders, engineers, architects, surveyors) were required to be registered and to carry insurance complying with minimum statutory requirements.³

¹ For those with a historical interest, there is an excellent analysis by James Watson, *From contribution to apportioned contribution to proportionate liability* (2004) 78 ALJ 126.

² *Building Act*, ss129-132 (now repealed).

³ Refer *Building Act* ss135-7; *Moorabool Shire Council v Taitapanui* [2004] VSC 239 at [10-11].

In August 1998, Megan Richardson prepared a report for the Victorian Attorney-General's Law Reform Advisory Council on the introduction of proportionate liability. Various options for reform were canvassed, none of which were ultimately adopted.⁴

In 2003, the present scheme was introduced. Interestingly, in its initial form it was designed to deal only with the economic loss component of a personal injury claim, but the Part was amended before it commenced operation to expand its scope to damage to property and economic loss claims generally.⁵

When the *Wrongs and Limitation of Actions Acts (Insurance Reform) Bill* was introduced to Parliament, The Second Reading Speech of the Premier made it clear that the proportionate liability provisions were intended to extend the then existing scheme for building actions to all non-injury claims.⁶ It follows that the limited precedent that governed section 131 of the *Building Act*, will remain good law when considering Part IVAA, at least at a conceptual level. None the less, for those who are familiar with the former scheme governing building actions, there are significant changes. As always, the devil is in the detail.

⁴ Richardson, *Expert Report 3: Reports on the Economics of Joint and Several Liability versus Proportionate Liability* (August, 1998).

⁵ Compare Act No.60/2003, s.3, and No.102/2003, s.36.

⁶ *Wrongs and Limitation of Actions Acts (Insurance Reform) Bill*, Second Reading Speech, Premier Bracks, 21 May 2003, p1785.

Set out below are some comments about various aspects of the legislative provisions. They are not intended to be a complete coverage of all aspects, but to simply note some of the more difficult issues that may arise under the legislation.

Section 24AE. Definitions

“apportionable claim” means a claim to which this Part applies.

“court” This includes tribunal and, in relation to a claim for damages, means any court or tribunal by or before which the claim falls to be determined. Part IVAA will therefore apply to proceedings commenced at VCAT. Arguably, it may also apply to an arbitration conducted pursuant to the *Commercial Arbitration Act 1984*.⁷

“defendant” includes any person joined as a defendant or other party in the proceeding (except as a plaintiff). Part IVAA therefore applies to a third or subsequent party. It does not apply to a plaintiff, and so can not be used to apportion as between plaintiff and defendants.

Section 24AF. Application of Part

⁷ Unless otherwise agreed in writing, arbitrators must determine questions according to law (*Commercial Arbitration Act 1984*, s22). In the absence of an agreement to the contrary, that will be the law of Victoria: *Mond v Berger* [2004] VSC 45 at [101-115].

Section 24AF(1) provides that Part IVAA applies to:

- 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 care; and
- b) a claim for damages for a contravention of section 9 of the *Fair Trading Act 1999*.

Subsection (2) provides that a proceeding involving two or more apportionable claims arising out of different causes of action is to be determined as if the claims were a single claim.

The effect of the above is that Part IVAA will apply to all claims for economic loss or damage to property arising under Victorian law, irrespective of whether the claims against the various defendants arise under the same or different causes of action. In theory, one could get around the operation of the *Wrongs Act* by pleading a federal cause of action, such as misleading and deceptive conduct in contravention of section 52 of the *Trade Practices Act 1974 (Cth)*.⁸ In practice, that avenue comes to naught because an action for damages under section 82 of the TPA is now subject to apportionment as well, although on a different basis to the State provision we are currently considering.⁹

⁸ See Phipps, *Courts, Federal Jurisdiction and Building Cases*, (2001) 5 BDPS News at 5.

⁹ *Trade Practices Act 1974 (Cth)*, Part VIA.

Section 24AG. What claims are excluded from this Part?

Claims arising out of any injury are excluded, as are certain statutory rights to compensation.

Section 24AH. Who is a concurrent wrongdoer?

Subsection (1) provides that a concurrent wrongdoer, in relation to a claim, is a person who is one of 2 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. Note that the test is a causal one, i.e. a concurrent wrongdoer is someone who is shown to have caused the loss suffered by the plaintiff.

Subsection (2) provides that for the purposes of Part IVAA it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died.

Section 24AI. Proportionate liability for apportionable claims

This is the heart of Part IVAA, which sets out the procedure for the assessment of an apportionable claim. There is no substitute for a close reading of the section itself.

The section provides that:

- in an apportionable claim, 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 loss or damage claimed that the court considers just having regard to the extent of that defendant's responsibility for the loss or damage.
- in an apportionable claim, judgment must not be given against the defendant for more than that amount in relation to that claim.
- if the proceeding involves both an apportionable claim and a claim that is not an apportionable claim, liability for the apportionable claim is to be determined in accordance with Part IVAA. Liability for the non-apportionable claim is to be determined in accordance with the relevant legal rules.
- in apportioning responsibility between defendant in the 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.

It would seem that the basis upon which liability of a defendant is to be calculated as between defendants has not changed from the contribution provisions.¹⁰ If that is correct, then the only substantial change from a contribution proceeding is that each defendant is now only liable for their share of the loss, and is not jointly and severally liable for the whole of the plaintiff's loss.

Section 24AI envisages that there may be proceedings involving both apportionable claims and non-apportionable claims. An example would be a proceeding where some plaintiffs claim to have suffered an injury, while others claim to have suffered damage to property or an economic loss alone.

The court must not have regard to the comparative responsibility of persons who are not parties to the proceeding, except if they are dead or wound-up. Unlike some other jurisdictions, therefore, the court will apportion 100% of the plaintiff's loss amongst the existing defendants (assuming that there are no persons who are dead or wound-up). The practical consequence, and this is the crux of the matter from the point of view of the defendants, is that it is incumbent upon the existing defendants to join to the proceeding those persons that the defendants believe have caused the plaintiff's loss. If, for example, a person who caused 30% of the plaintiff's loss is not joined to the proceeding, then the remaining defendants will suffer the consequence of that 30% share being apportioned amongst them.

Section 24AJ. Contribution not recoverable from defendant

¹⁰ Section 24B(2) speaks of "just and equitable" rather than "just", but is otherwise in equivalent terms to section 24AI(1).

Section 24AJ is the corollary to section 24AI. In a case of apportioned liability, defendants can not be required to contribute to each other's loss, nor can they be required to indemnify each other for that loss.

Note that the former provisions relating to 'building actions' simply prevented claims as to contribution, and did not prevent claims seeking indemnity.

Section 24AJ raises an interesting problem, for which there is no immediate answer. It is common these days for companies to seek an indemnity from suit as part of standard form contracts governing their business relationships.¹¹ If two defendants, found to be concurrent wrongdoers, have previously made an agreement by which one indemnifies the other from harm, does the indemnity clause remain enforceable or is it struck down by the operation of section 24AJ? The question is a thorny one. On its face, that is what sub-section (2) seems to do, but it seems unlikely that Parliament would have intended to so drastically affect a party's commercial bargain. It also seems to be counter to the policy behind the legislation of responding to the perceived 'insurance crisis'. One of the ways in which commercial parties arrange their affairs is to require parties contracting with them to provide a full indemnity and to carry insurance for any loss. Why would the legislation cut across that arrangement, thereby increasing the risk of creating an uninsured defendant? It will have to be left to the Courts to work out the answer.

¹¹ *Andar Transport Pty Ltd v Brambles Ltd* (2004) 206 ALR 387 is a good example.

Section 24AK. Subsequent actions

A plaintiff who has recovered judgment against a concurrent wrongdoer for an apportionable part of any loss or damage is not prevented from bringing another action against any other concurrent wrongdoer to recover damages from that wrongdoer. However, the plaintiff can not recover an amount greater than the loss or damage actually suffered by it.

The evident purpose of section 24AK is to protect a plaintiff who only recovers part of their loss from the existing defendants, and wishes to recover the balance of the loss from other parties in a subsequent proceeding. Presumably section 24AK could be relied upon to answer any defence that the plaintiff is “Anshun estopped” by reason of having failed to sue that party in the earlier proceeding.¹²

Keep in mind, however, that in the earlier proceeding, the court will only have considered the comparative responsibility of parties to the proceeding, and will not have considered those who are not parties, except persons who are dead or corporations are wound up. The plaintiff's actual loss will therefore have already been apportioned in toto against the defendants to the first proceeding. So who is left to be sued in a subsequent action?

¹² *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

Section 24AK is thus a curious provision, which admits of two possible interpretations. The first possible interpretation is that it only applies to subsequent actions against the estate of a deceased person, or against the insurer of a company that has been deregistered.¹³ This produces its own theoretical problems, because s24AI(3) excludes apportionment against companies that are wound-up, not companies that have been deregistered. There may be a material difference, in that it is possible for a company to be voluntarily deregistered without first being wound up.¹⁴

The second possible interpretation of section 24AK is that it applies to a plaintiff who has “recovered judgment” against a concurrent wrongdoer, but has not “recovered ... damages” from that wrongdoer.¹⁵ If “recovered judgment” is read as meaning “obtained judgment”, then arguably section 24AK might apply where a plaintiff has obtained judgment against a number of defendants, but is unable to recover damages from one or more of those defendants due to insolvency, and now seeks to recover the ‘gap’ from someone who is not a party to the proceeding. That seems to make more sense, but as noted above, it requires a reading of section 24AK to the effect that “recover” in sub-section (1) means a different thing to “recover” in sub-section (2).

¹³ By applying s601AG of the *Corporations Act 2001*.

¹⁴ Compare ss601AA & 601 AC of the *Corporations Act*.

¹⁵ Compare the use of “recovered judgment” in sub-section (1) with the phrase “damages previously recovered” in sub-section (2).

Section 24AK does not appear to be completely thought through, and its interpretation is unclear. Again, it will be for the Courts to decide how the provision ought be interpreted.

Section 24AL. Joining non-party concurrent wrongdoer in the action

A court may give leave for any one or more persons who are concurrent wrongdoers in relation to an apportionable claim to be joined as defendants in a proceeding in relation to that claim.

This is a different test to the standard tests for joinder found in the *Supreme Court Rules*¹⁶ and in the *Victorian Civil and Administrative Act 1998*.¹⁷ Under the former provisions dealing with “building actions”, a considerable body of authority had been developed to deal with applications for joinder.¹⁸ Central to the question was the requirement that the defendant seeking joinder must show that a question may exist as between the existing defendant and the party to be joined. This required the existing defendant to demonstrate that the party to be joined owed a duty of care to the plaintiff.¹⁹ A number of applications for joinder were rejected on the basis that the

¹⁶ Rule 9.06.

¹⁷ Section 60.

¹⁸ *Boral Resources v Robak Engineering* [1999] 2 VR 507; *Wimmera Mallee Rural Water Authority v FCH Consulting Pty Ltd* [2000] VSC 102; *Wimmera Mallee Rural Water Authority v FCH Consulting Pty Ltd (No.2)* [2000] VSC 193; *Hampton Park Central Pty Ltd v Australian Safeway Stores Pty Ltd* [2000] VSC 422; *Westkon Concrete Pty Ltd v Multiple Constructions Pty Ltd* [2000] VSC 491; *TNT Australia Pty Ltd v CMW Design & Construction Pty Ltd (No.1)* [2003] VSC 338; *TNT Australia Pty Ltd v CMW Design & Construction Pty Ltd (No.2)* [2003] VSC 339.

¹⁹ *Wimmera- Mallee (No.1)* at [8].

defendant could not show sufficient nexus between the negligent act of the party to be joined and the harm suffered by the plaintiff.²⁰

Under the former provisions concerning building actions, determining whether a question may exist between the defendant and the party to be joined required the application of the conventional pleading test to show that the proposed defendant owed a duty of care to the plaintiff, that the proposed defendant was in breach of that duty, and the damages which the plaintiff claimed were, in part, caused by the breach.²¹ The burden was not a heavy one.²² If the proposed claim was not unarguable or was not clearly hopeless, then joinder was likely to be ordered.²³

Under the 'building action' provisions, when determining whether it was just and convenient to permit the joinder, paramount considerations were to avoid multiplicity of proceedings and to serve the policy of the legislation in permitting apportionment amongst defendants, including defendants that the plaintiff may have chosen not to sue.²⁴

²⁰ In *Wimmera-Mallee (No.2)* at [8], Byrne J stated that he was not referred to, nor had he been able to find a case where a subcontractor, other than a nominated subcontractor had been held liable in negligence to a proprietor in the absence of special circumstances.

²¹ *Wimmera-Mallee Rural Water Authority v FCH Consulting Pty Ltd (No.1)*, citing *Robak*.

²² *Hampton Park Central Pty Ltd v Australian Safeway Stores Pty Ltd* [2000] VSC 422 at [9].

²³ *Westikon Concrete Pty Ltd v Multiplex Constructions Pty Ltd* [2000] VSC 491 at [16]. See also *TNT Australia Pty Ltd v CMW Design & Construction Pty Ltd (No 1)* [2003] VSC 338 & *TNT Australia Pty Ltd v CMW Design & Construction Pty Ltd (No. 2)* [2003] VSC 339.

²⁴ *Robak*, per Tadgell JA at [5, 6], Batt JA at [12, 19], Chernov JA at [73].

The current test requires two things to be shown: the proposed party is a concurrent wrongdoer, and the proceeding involves an apportionable claim. This would seem to require the existing defendant to show that the proposed party caused, independently or jointly with the existing defendant, the loss or damage that is the subject of the claim.

It remains to be seen whether this formulation engenders a different result to the earlier test of whether “there may exist a question arising out of or related to or connected with any claim in the proceeding which it is just and convenient to determine as between that person and that party as well as between the parties to the proceeding”²⁵, and whether the rationes developed in relation to that test remain applicable to the current legislation. My view is that it will make little practical difference. It will still be necessary for the party seeking joinder to show that the proposed wrongdoer owes a duty to the plaintiff (whether in tort, in contract, under statute or otherwise), such that it could be said that the party to be joined caused the loss or damage that is the subject of the claim.

In *Wimmera-Mallee (No.1)* at [22], Byrne J set out some procedural requirements for joinder of a defendant to a building action. With some modification, there seems no reason why those requirements should not apply to joinder under section 24AL:

²⁵ *Supreme Court Rules*, Chapter 1, r9.06(b(ii)).

1. It is not necessary first to bring a third party claim against the proposed defendant. The costs of doing so should not be allowed unless there is some good reason to join that party as a third party (but note the comment below).
2. The joinder application should be made on summons served on all existing parties and on the proposed defendant.
3. Assuming that joinder is successful, there will exist a claim between the two defendants which probably falls within Rule 11.15. Whether it does or not, proper management of the question between these defendants requires that pleadings pass between them as would be required under that rule.
4. The application for joinder should, in the ordinary course, be supported by an affidavit showing that there exists a question between the defendant and the proposed defendant. The applicant should place before the court a proposed statement of claim for delivery to the proposed defendant to enable the court, the proposed defendant and any interested party to see precisely how the case is put.
5. If the application is successful a time will be fixed for appearance by the added party and directions will be given as to pleadings, discovery and generally.

A last point on the question of joinder. While section 24AL(1) permits a Court to give leave to join a concurrent wrongdoer as a defendant, section 24AE defines "defendant" as including "any person joined as a defendant or other party in the

proceeding (except as a plaintiff) whether joined under this Part, under rules of court or otherwise". It clearly includes joinder as a third party.²⁶ If that is correct, then why not simply serve a third party notice within the time permitted by r11.05, and avoid the need to apply on summons, on notice to the proposed party, supported by an affidavit and draft pleading?

Section 24AM. What if a defendant is fraudulent?

A defendant against whom a finding of fraud is made remains jointly and severally liable to the plaintiff.

Section 24AN. Liability for contributory negligence not affected

Part V of the *Wrongs Act 1958* remains available to defendants to reduce the plaintiff's claim on the ground that the plaintiff has caused or contributed to its own loss.

Section 24AP. Part not to affect other liability

Proportionate liability does not affect:

- a) a person being held vicariously liable for the apportioned liability of another;

²⁶ cf *Boral Resources v Robak Engineering* [1999] 2 VR 507 at [40-55], per Chernov JA, Tadgell & Batt JJA agreeing.

- b) a principal being held jointly and severally liable for the acts of their agent;
- c) a partner from being held jointly and severally liable with another partner;
- d) the power of a court to award exemplary or punitive damages; or
- e) the operation of any other Act that may impose several liability.

Section 24AS. Transitional

Part IVAA applies to proceedings that are commenced in a court on or after 1 January 2004.

Daniel Aghion

Latham Chambers

23 March 2005
