

**Melbourne Law School Construction Law Program**  
**10<sup>th</sup> Anniversary Function**

**Key developments: Proportionate Liability**

**Tony Horan**

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*‘It may be that the changes to the law effected by the proportionate liability legislation ... have had a far wider impact than the problem that led to their introduction.’*

Blow J, *Aquagenics v Break O’Day Council (No 2)* [2009] TASSC 89 at [27]

## Introduction

1. Proportionate liability legislation, introduced about 5 years ago around Australia, changed the landscape of multi-party, non-personal injury compensation claims.<sup>1</sup> Building disputes in some jurisdictions had been subject to proportionate liability since as early as 1994.<sup>2</sup> However, it is the current legislation that is surrounded by controversy and uncertainty, perhaps because its application is so far-reaching.
2. This forum serves as an opportunity to reflect upon how some of the problems experienced with proportionate liability might be addressed, rather than focusing on the mechanics of how proportionate liability presently operates.<sup>3</sup>
3. This is timely. Reform is underway. In July 2006, the Standing Committee of Attorneys-General (‘SCAG’) formed a working group to review the legislative framework.<sup>4</sup> In 2007 and 2008, reports were commissioned under terms of reference entitled: ‘Proportionate Liability: Towards National Consistency’.<sup>5</sup> The terms of reference focused on achieving ‘*greater workability, consistency and certainty*’. In October 2008, SCAG produced ‘Drafting Instructions for Uniform

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<sup>1</sup> Proportionate liability applies in Australian states and territories under Part IVAA *Wrongs Act* 1958 (Vic), Part 4 *Civil Liability Act* 2002 (NSW), Part 1F *Civil Liability Act* 2002 (WA), Chap 2 Part 2 *Civil Liability Act* 2003 (Qld), Chap 7A *Civil Law (Wrongs) Act* 2002 (ACT), Part 9A *Civil Liability Act* 2002 (Tas), *Proportionate Liability Act* 2005 (NT), *Law Reform (Contributory Negligence and Apportionment of Liability) Act* 2001 (SA). It applies under the following Commonwealth legislation: Part VIA (ss 87CB – 87CI) *Trade Practices Act* 1974, Subdiv GA (ss 12GP – 12GW) *ASIC Act* 2001, Div 2A (ss 1041L – 1041S) *Corporations Act* 2001. Proportionate liability also applies to some building disputes under the *Development Act* 1993 (SA) s72, and the *Building Act* 2004 (ACT) s141.

In this paper, references are to sections of Part IVAA of the *Wrongs Act* 1958 (Vic) unless stated otherwise.

<sup>2</sup> *Building Act* 1993 (Vic) s131 (repealed), *Environmental Planning and Assessment Act* 1979 (NSW) s109ZJ (repealed), *Construction Practitioners Registration Act* 1998 (ACT) s26(1) (repealed) and *Building Act* 2004 (ACT) s141 which remains current; *Building Act* 1993 (NT) s155 (repealed); *Development Act* 1993 (SA) s72 which remains current; *Building Act* 2000 (Tas) s252 (repealed).

<sup>3</sup> For an explanation of how proportionate liability operates in practice, see C Macaulay SC and T Horan ‘Proportionate Liability – An Update’, Victorian Bar CLE, 12 August 2009

<sup>4</sup> Commonwealth Treasury, ‘Available and Affordable- Improvements in Liability Insurance Following Tort Law Reform in Australia’ December 2006

<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1200> (‘2006 Treasury Report’) at 33.

<sup>5</sup> T Horan, ‘Proportionate Liability: Towards National Consistency’, for National Justice CEOs, September 2007; Emeritus Prof. J L R Davis, ‘Proportionate Liability: Proposals to Achieve National Uniformity’, for National Justice CEOs, 2008:

[www.scag.gov.au/lawlink/SCAG/ll\\_scag.nsf/pages/scag\\_reports](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_reports).

Liability Provisions’ (‘Drafting Instructions’) for the purposes of consultation.<sup>6</sup> SCAG is yet to publish the outcome of that consultation with a view to introducing uniform legislation.

4. The reform process is an opportunity not just to reconcile inconsistencies, but also to remedy problems with the current legislation. And there are problems.
5. In this paper, I will briefly address three relevant issues:
  - a. The impact of proportionate liability upon contractual promises;
  - b. Property damage claims; and
  - c. Settling claims.
6. I will first consider what problem this legislation is intended to remedy.

## **Purpose**

7. Proportionate liability answers one question: Who bears the risk when one of the defendants cannot meet its liability to pay damages to the plaintiff?
8. Traditionally, joint and several liability applied when a Court found that a number of defendants were liable to a plaintiff for the ‘same damage’.<sup>7</sup> Each defendant was liable to the plaintiff for the full amount of the plaintiff’s loss. Plaintiffs were encouraged to sue ‘deep pocket’ defendants who, even if they were only marginally liable, underwrote the whole of the loss suffered by the plaintiff.
9. For a defendant protected by proportionate liability, the risk is transferred to the plaintiff. The defendant only pays that part of the plaintiff’s loss which is apportioned against it, provided that it can point to other ‘concurrent wrongdoers’ who also caused and are liable to the plaintiff for the same damage. Where that defendant is indemnified by an insurer, the insurer is only required to cover the loss for which that defendant is responsible. The defendant is no longer a ‘deep pocket’.

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[www.justice.tas.gov.au/\\_\\_data/assets/pdf\\_file/0020/113645/Drafting\\_Instructions\\_Prop\\_Liab\\_301008.pdf](http://www.justice.tas.gov.au/__data/assets/pdf_file/0020/113645/Drafting_Instructions_Prop_Liab_301008.pdf)  
<sup>7</sup> The meaning of ‘same damage’ was considered by the High Court of Australia in *Alexander v Perpetual Trustees WA Ltd* (2004) 216 CLR 109 at [26]–[27]. On 28 October 2009, the Victorian Court of Appeal considered the issue of ‘same damage’ in the context of proportionate liability: *St George Bank Limited v Quinerts Pty Ltd* [2009] VSCA 245 (‘*Quinerts*’). The Court acknowledged that it took a different approach from the NSW Supreme Court in *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505 (‘*Vella*’).

10. The current legislation has been drafted in such a way that its impact arguably goes beyond the problem it was introduced to remedy. Last month, Justice Blow of the Tasmanian Supreme Court commented that:

It may be that the changes to the law effected by the proportionate liability legislation ... have had a far wider impact than the problem that led to their introduction.<sup>8</sup>

11. Is proportionate liability indeed having a ‘*far wider impact*’? Are plaintiffs being effectively penalised in unexpected ways as a result of the legislation? If so, should proportionate liability be confined in such a way that it only addresses the problem it was intended to remedy and doesn’t penalise plaintiffs unnecessarily?
12. In response to the insurance crisis in the early 2000s (including the collapse of Australia’s largest liability insurer, HIH), government nationally introduced tort reforms, including reform of the law of negligence, professional standards legislation, and proportionate liability.<sup>9</sup> Government was particularly concerned that verdicts in personal injury claims had been escalating.<sup>10</sup> Also, some professional groups, such as accountants, complained that their businesses were under threat because professional indemnity insurance premiums had increased substantially.<sup>11</sup> Government wanted to reduce the cost of insurance claims, thereby encouraging insurers and reinsurers to return to the Australian market. In this way, two forms of insurance - public liability and professional indemnity insurance - might become more available and affordable to the community.<sup>12</sup> The ACCC was charged with monitoring the insurance market and premium pricing to ensure that the benefits of the reforms would be passed on to consumers.<sup>13</sup>
13. Proportionate liability formed part of these reforms. Its primary purpose was to protect the ‘deep pocket’ defendant from disproportionate liability by ensuring that the indemnity provided by the insurers would cover their defendants’ liability only, and not the liability of other impecunious defendants.<sup>14</sup>

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<sup>8</sup> *Aquagenics Pty Ltd v Break O’Day Council (No 2)* [2009] TASSC 89 (‘*Aquagenics (No. 2)*’) at [27].

<sup>9</sup> 2006 Treasury Report, above, 1-4

<sup>10</sup> 2006 Treasury Report, above, 2

<sup>11</sup> 2006 Treasury Report, above, 11

<sup>12</sup> 2006 Treasury Report, above, 55. See also ‘Public liability and professional indemnity insurance’, fifth monitoring report, Australian Competition and Consumer Commission (‘ACCC’), July 2005, 1.

<sup>13</sup> 2006 Treasury Report, above, 14, and see n 12 above.

<sup>14</sup> In a speech to the 2003 Insurance Council of Australia Canberra Conference on 14 August 2003, Senator Helen Coonan, then Minister for Revenue and Assistant Treasurer, stated:

14. Since its introduction, the Courts have indicated that the purpose of proportionate liability was to protect professionals.<sup>15</sup> The previous proportionate liability regime, introduced in the 1990s for building disputes (at least in Victoria), was intended for this purpose. In particular, its aim was to encourage professional indemnity insurers to cover private building surveyors.<sup>16</sup> By contrast, in October 2008, government indicated that the legislature's intention in introducing proportionate liability was to address problems with the '*affordability and availability of liability insurance in general rather than just professional indemnity insurance*'.<sup>17</sup> It is unclear what insurance, other than professional indemnity insurance, was being referred to. One would reasonably assume that it is public liability insurance, given that is the other form of insurance which government was seeking to protect by the tort reforms.<sup>18</sup>
15. Mindful of Justice Blow's observation, we should ask the question: Does proportionate liability only protect those defendants who might be protected by public liability or professional indemnity insurance, or does it apply more broadly?
16. Firstly, in relation to professional indemnity insurance, it is clear that the legislation generally protects professionals (including government officers exercising a professional role) for non-personal injury claims covered by such insurance. Proportionate liability presently responds to damages claims, in substance, '*arising from a failure to take reasonable care*' and damages claims

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'The operation of insurance and the law of joint and several liability has given rise to professionals often being singled out as the sole target for legal action in proceedings for property damage and pure financial loss. This may be the case even when a professional is only one of the parties involved and may have only contributed in a minor way to the loss. The deep pocket approach to litigation is one factor driving exponential increases in professional indemnity premiums.'

See also Commonwealth of Australia, *Corporate Disclosure: Strengthening the financial reporting framework*, Corporate Law Economic Reform Program, ninth paper, September 2002 (CLERP 9), 96.

<sup>15</sup> *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)* [2008] FCA 1656 ('*BHPB Freight*') at [4] per Finkelstein J, referred to in *Aquagenics (No 2)* at [12] per Blow J

<sup>16</sup> Second Reading Speech for the *Building Bill*, Victoria, Minister for Planning, Mr Maclellan, Parliamentary Debates (Hansard), 11 November 1993. See also Donald Charrett, 'Proportionate Liability - Uniform Legislation in Australia?' February 2005.

<sup>17</sup> Drafting Instructions, above, 4.

<sup>18</sup> See [12] above.

- involving misleading and deceptive conduct.<sup>19</sup> These are commonly the types of claims pursued against professionals.
17. Anecdotally, the legislation has so far responded to claims, *inter alia*, against: solicitors and barristers<sup>20</sup>, developers<sup>21</sup>, financial planners and advisers<sup>22</sup>, contractors, architects, engineers and building surveyors<sup>23</sup>, accountants<sup>24</sup>, engine repairers and manufacturer's agents<sup>25</sup>, seed suppliers and testers<sup>26</sup>, newsagents and lotto companies<sup>27</sup>, valuers<sup>28</sup> and shipbrokers.<sup>29</sup>
  18. It is reasonable to assume that those defendant concurrent wrongdoers who were sued in respect of professional services were probably covered by professional indemnity insurance.
  19. Secondly, does proportionate liability encourage more affordable and available public liability insurance? Public liability insurance typically responds to damages claims for personal injury and property damage. During the insurance crisis, many sporting clubs, tourism operators, council run community facilities and not-for-profit groups found it difficult to obtain public liability insurance for their events (for example, many rock climbing operators ceased operating).<sup>30</sup> The primary concern was about personal injury risks, rather than damage to property. At a Ministerial Meeting on Public Liability held on 2 October 2002, ministers

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<sup>19</sup> *Wrongs Act 1958* (Vic), s24AF(1). Some other states vary from the Victorian provisions. Queensland uses the more restrictive term '*arising from a breach of a duty of care*', rather than '*arising from a failure to take reasonable care*': *Civil Liability Act 2003* (Qld), s28(1). South Australian legislation uses different nomenclature, referring to '*apportionable liability*': *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), ss 3, 4 and 8. See also *Reinhold v New South Wales Lotteries Corporation (No 2)* [2008] NSWSC 187 at [30] ('*Reinhold*').

<sup>20</sup> *Chandra v Perpetual Trustees Victoria Ltd & Ors* [2007] NSWSC 694 ('*Chandra*'), *P&V Industries v Secombs* [2008] VSC 209, *Vella*, above, *Spiteri v Roccisano* [2009] VSC 132 ('*Spiteri*'), *Ginelle Finance Pty Limited v Diakakis and Ors* [2007] NSWSC 60, *Perpetual Trustee Company Limited v Kotevski* [2009] NSWSC 954

<sup>21</sup> *Spiteri*, above

<sup>22</sup> *Woods v De Gabrielle & Ors* [2007] VSC 177 ('*Woods*'), *Solak v Bank of Western Australia Ltd & Ors* [2009] VSC 82, *H.S.D. Co Pty Ltd v Masu Financial Management Pty Ltd* [2008] NSWSC 1279

<sup>23</sup> *Aquagenics (No 2)*, above, *Godfrey Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd & Ors* [2008] VSCA 208 ('*Spowers*'), *McAskell & Anor v Cavendish Properties Ltd & Ors* [2008] VSC 328, *Vollenbroich v Krongold Constructions Pty Ltd & Ors* [2006] VCAT 1710, *Gunston v Lawley & Ors* [2008] VSC 97

<sup>24</sup> *Sali & Anor v Metzke & Allen* [2009] VSC 48 ('*Sali*').

<sup>25</sup> *Yates v Mobile Marine Repairs Pty Ltd & Anor* [2007] NSWSC 1463

<sup>26</sup> *Shrimp v Landmark Operations Limited* [2007] FCA 1468 ('*Shrimp*')

<sup>27</sup> *Reinhold*, above

<sup>28</sup> *Quinerts*, above

<sup>29</sup> *BHPB Freight*, above

<sup>30</sup> 2006 Treasury Report, above, 7

*‘agreed in principle to the development of nationally consistent legislation for provisions relating to liability for personal injury or death resulting from negligence’.*<sup>31</sup> The raft of reforms which followed that agreement was directed at improving the affordability and availability of public liability insurance. It addressed claims arising from death and personal injury, not from property damage.

20. Given that public liability insurance typically does not cover claims for pure economic loss, and excludes claims which would typically be covered by professional indemnity insurance, the only way that proportionate liability could improve the availability and affordability of such insurance would be by limiting liability for property damage claims against non-professionals. Anecdotally, most claims to date involving proportionate liability have been for financial loss alone.<sup>32</sup>
21. In his foreword to the Commonwealth Treasury’s review of the performance of the tort reforms in December 2006, ‘Available and Affordable - Improvements in Liability Insurance Following Tort Law Reform in Australia’, the then Minister for Revenue and Assistant Treasurer, Mr Peter Dutton, referred to *‘the positive impact the [tort law] reforms are having on the availability and affordability of insurance’*<sup>33</sup>. The Report stated that public liability insurance premiums had fallen an average 6.9% in 2004 and 13.4% in 2005, and professional indemnity insurance premiums had fallen 1.2% in 2004 and 6% in 2005, during a period which, according to the Insurance Council of Australia, inflation would otherwise have been driving premiums upwards.<sup>34</sup> I have been unable to find more recent data about whether the tort reforms, and more particularly, proportionate liability, are achieving the desired result.
22. Unfortunately, the 2006 Treasury Report does not specifically identify any reduction in property damage claims against non-professionals as a result of the

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<sup>31</sup> Joint Communique, Ministerial Meeting on Public Liability, Sydney, 2 October 2002: <http://www.treasurer.gov.au/atr/content/publications/2002/20021002.asp>, following recommendations from the ‘Review of the Law of Negligence’ by Justice David Ipp: <http://revofneg.treasury.gov.au/content/Report/PDF/LawNegFull.pdf>

<sup>32</sup> See [17] above.

<sup>33</sup> 2006 Treasury Report, above, v

<sup>34</sup> 2006 Treasury Report, above, 67.

- tort reforms. One might infer from that report that the primary influence upon the availability and affordability of public liability insurance was the range of reforms to personal injury liability. If that is correct, and also noting that the majority of reported proportionate liability cases to date have not involved property damage, it seems that proportionate liability may have had minimal, if any, effect upon the improvement in the availability and affordability of public liability insurance.
23. If that is the case, one must ask whether proportionate liability is serving any useful purpose in respect of public liability insurance, or whether the perceived benefits are limited to improving the availability of professional indemnity insurance. If there are no apparent benefits in respect of public liability insurance, then there remains a case for confining proportionate liability to claims against those covered by professional indemnity insurance.

### **Impact upon contractual promises**

24. The Drafting Instructions propose an amendment to the definition of ‘apportionable claim’ so that proportionate liability responds to claims for:
- (a) a breach of tortious duty of care, or from a breach of a contractual obligation which is concurrent and coextensive with such a tortious duty, or
  - (b) a breach of a statutory prohibition on misleading or deceptive conduct.<sup>35</sup>
25. The Drafting Instructions state that this approach will ‘*ensure that the legislation will only apply to the intended type of claims*’.<sup>36</sup>
26. This amendment should mean that a defendant who assumes contractual liability beyond that commensurate with a common law duty to take care, such as liabilities arising under warranties, indemnities and other purely contractual assumptions of responsibility, cannot reduce that contractual liability by seeking protection from proportionate liability.
27. This may help to solve the immediate concern by many, particularly in the construction industry, that proportionate liability undermines single line accountability, and the sovereignty of contractual promises. Under this proposal, a contractor cannot avoid liability to indemnify the owner by pointing to others (such as architects or engineers) who might also be liable to the plaintiff in respect

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<sup>35</sup> Drafting Instructions, above, 5

<sup>36</sup> Drafting Instructions, above, 5

- of that defective work.<sup>37</sup> To be protected by proportionate liability the contractual liability must be commensurate with a liability in negligence.
28. However, one must ask whether this proposal is fair and just. Whenever proportionate liability responds to a claim, the plaintiff bears the risk if a concurrent wrongdoer is unable to pay its apportioned share of liability for a plaintiff's loss. Why should a plaintiff bear that risk where there is no benefit to the community in maintaining available and affordable insurance? For example, why should proportionate liability apply to non-professionals, such as contractors, developers, manufacturers' agents, newsagents and Lotto companies in respect of claims involving economic loss? How does that serve to encourage insurers to provide affordable insurance?
29. Under the proposed revised definition of 'apportionable claim', a defendant will receive the protection of proportionate liability provided that it is liable for a breach of a tortious duty of care, even if that defendant does not have, nor could ever have, public liability or professional indemnity insurance in respect of that claim. The plaintiff assumes the risk of an insolvent concurrent wrongdoer for no apparent benefit to the community. Where the claim against the defendant is for economic loss, and the defendant is not a professional who might be covered by professional indemnity insurance, there seems to be no benefit.
30. Secondly, the Drafting Instructions' proposed amended definition of 'apportionable claim' is likely to add to procedural complexity, uncertainty and cost. Parties will commonly need to plead on the basis that proportionate liability applies, and also, alternatively, in case it does not apply. For example:
- a. A plaintiff sues a defendant seeking damages, alleging a failure to pay under a contractual indemnity and/or breach of a contractual duty to take care;
  - b. In its defence, the defendant:
    - i. pleads that the indemnity is, for some reason, inapplicable and/or unenforceable;

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<sup>37</sup> Which was effectively the argument (unsuccessfully) run by the head design and construct contractor against the owner in *Aquatec-Maxcon Pty Ltd v Barwon Regional Water Authority (No 2)* [2006] VSC 117 ('*Aquatec*') at [20].

- ii. alleges that, if the defendant is held liable for a breach of the contractual duty of care, then proportionate liability applies; and
  - iii. identifies other concurrent wrongdoers.<sup>38</sup>
31. If the Court upholds the contractual indemnity, then proportionate liability will not apply to the defendant. However, in the face of the defendant's defence, the plaintiff must decide whether to pursue claims against the other concurrent wrongdoers, in case the plaintiff fails on its claim for indemnity, and succeeds in proving that the defendant breached a contractual duty of care.
32. Uncertainty about whether proportionate liability might apply will encourage alternative pleadings and claims, consequent complexity and uncertainty, and make it more difficult to achieve negotiated settlements.<sup>39</sup> This will be the case where there remains uncertainty over whether a claim is ultimately an 'apportionable claim', and whether the relevant parties are 'concurrent wrongdoers'.<sup>40</sup> To operate effectively, the legislation requires simple, clear definition, so that dispute over the applicability of the legislation is minimised.

### Property damage claims

33. The Courts have held that a defendant who wishes to attract proportionate liability must point to other parties (concurrent wrongdoers) whose acts or omissions caused the loss or damage which is the subject of the claim against that defendant,<sup>41</sup> but also must prove that the other concurrent wrongdoers are legally liable to the plaintiff for that loss or damage.<sup>42</sup>
34. This requirement of legal liability effectively limits the number of parties that a defendant can point to as concurrent wrongdoers. In a claim for pure economic

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<sup>38</sup> Assuming the claim is subject to proportionate liability under non-Victorian legislation, or the concurrent wrongdoers identified by the defendant have died or are corporations which have been wound up, the defendant need not join the concurrent wrongdoers to the proceeding.

<sup>39</sup> See, for instance, *Aquatec*, above, at [15] where Byrne J noted that the pleadings, not including separately delivered particulars and schedules, ran to over 750 pages. These pleadings pursued defences of proportionate liability pursuant to the *Building Act* 1993 (Vic), s 131 (now repealed) and alternative claims for contribution.

<sup>40</sup> For example, the decision in *Quinerts*, above, is likely to encourage pleadings and disputes over whether the liability of concurrent wrongdoers to a plaintiff is for the 'same damage'.

<sup>41</sup> *Wrongs Act* 1958 (Vic), s 24AF, including concurrent wrongdoers who are insolvent, are being wound up, have ceased to exist or have died.

<sup>42</sup> *Shrimp*, above, at [62]. See also *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd and Roberts* [2007] FCA 1216 at [40], *Chandra*, above, at [110] per Bryson AJ and *Sali*, above, at [282] per Whelan J.

- loss a defendant may find difficulty in establishing that another party also owed the plaintiff the requisite duty of care.<sup>43</sup> However, where the plaintiff's claim against a defendant is for property damage, there is much greater scope for that defendant to prove that other parties also caused and were liable for the plaintiff's loss, because the defendant is only required to establish that the damage was reasonably foreseeable by those other parties.<sup>44</sup> This is an 'undemanding test'.<sup>45</sup>
35. For example, a fire destroys a warehouse. The owner (a subsequent purchaser) pursues a claim against the builder on the basis that it caused the fire by failing to take care in complying with the relevant standards. The builder may seek the protection of proportionate liability by identifying in its defence<sup>46</sup> a number of other parties who might also be liable to the plaintiff for that loss. Given that the test for establishing liability for property damage is merely that the harm was reasonably foreseeable, the number of concurrent wrongdoers could be extensive, including:
- a. subcontractors to the builder for carrying out the work negligently;
  - b. the architect and engineer for design responsibility;
  - c. the building surveyor and building inspectors for negligent approvals.
  - d. a neighbour for causing or contributing to the fire.
36. The plaintiff must decide whether to pursue claims against these additional parties, or take the risk of a shortfall in recovering its loss. There is a realistic possibility that the subcontractors may have no assets or insurance for such a claim. Why should proportionate liability (under the current regime and under the proposal in the Drafting Instructions) permit the builder to limit its liability by reference to the subcontractors which it engaged, even though the builder most likely would have rights to pursue claims against the subcontractors for breach of contract in respect of the builder's liability to the owner? One might argue that

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<sup>43</sup> Taking into account the various salient features of the relationship between the plaintiff and that other party, particularly the vulnerability of the plaintiff to suffer harm because of that other party's conduct. See *Caltex Oil (Aust) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529 at 576-8 per Stephen J; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 per Gummow J, *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at [22] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

<sup>44</sup> *Bryan v Maloney* (1995) 182 CLR 609 at 619 per Mason CJ, Deane and Gaudron JJ

<sup>45</sup> *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 at 641 per Glass JA.

<sup>46</sup> In Victoria, the additional parties would need to be joined to the proceeding unless they were dead or a corporation which had been wound up: s24AI(3) *Wrongs Act* 1958 (Vic).

the builder might have public liability insurance and this protection ensures the availability and affordability of such insurance. As discussed above, I have seen no evidence to support this contention.

## Settling claims

37. Proportionate liability legislation makes no reference to the settlement of claims.<sup>47</sup> The SCAG Terms of Reference for developing uniform proportionate liability provisions does not mention the effect which proportionate liability may have on how parties achieve a settlement. The Drafting Instructions do not address this issue.
38. This is surprising given that it is universally accepted that resolving disputes should be encouraged, and the majority of civil cases settle before trial. One wonders whether policymakers and those who draft legislation take into account the fundamental need for legislation (which impacts upon civil liability) to operate in such a way that it does not impede, and hopefully encourages, settlement negotiations.
39. In relation to proportionate liability, Justice Byrne has commented that its procedural complexity had been, he suspected, a '*cause for great difficulty in achieving a commercial settlement*'.<sup>48</sup>
40. It can be difficult to negotiate a settlement when there is uncertainty whether a particular defendant is protected by proportionate liability, and other defendants are under threat of insolvency. That defendant might face a risk of, say, 10% liability if it is protected, but would otherwise be jointly and severally liable for 100% of the plaintiff's loss. Accordingly, settlements will be more likely if the legislation more clearly and precisely defines (or perhaps, more aptly, 'confines') the scope of proportionate liability.
41. Secondly, proportionate liability makes it particularly difficult for a defendant to settle with the plaintiff when the proceeding against other defendants (concurrent wrongdoers and others) is ongoing. Typically, the defendant will only agree to settle on the basis that the settlement with the plaintiff is 'once and for all', and

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<sup>47</sup> As noted by the Victorian Court of Appeal in *Spowers*, above, at [83] per Ashley J, in respect of the Victorian legislation.

<sup>48</sup> *Aquatec*, above, at [17] applying proportionate liability pursuant to the *Building Act* 1993 (Vic), s 131 (now repealed).

- the defendant is not vulnerable to being brought back into the proceeding by other defendants claiming contribution.
42. This sits at the heart of the problem. The advantage of proportionate liability is that a defendant's liability is limited. However, if a defendant settles with the plaintiff, that limited liability is lost. In *Spowers*, the Victorian Court of Appeal determined that the statutory prohibition on contribution and indemnity claims made by other concurrent wrongdoers against a defendant is only available 'upon judgment'.<sup>49</sup> Accordingly, if a defendant chooses to settle with the plaintiff, it loses the protection of proportionate liability (unless consent judgment is entered on the settlement<sup>50</sup>) and faces the risk of subsequent contribution claims by other concurrent wrongdoers. This is clearly a disincentive to a single defendant pursuing a settlement with a plaintiff 'once and for all'.
43. Furthermore, procedural rules are yet to be developed which enable the delivery of effective offers of compromise in respect of claims which are subject to proportionate liability.<sup>51</sup>

## The Future

44. On the one hand, we need reform of proportionate liability quickly in order to remedy the current problems. On the other hand, given the problems with the original legislation, it is also important that the proposed reforms are carefully thought through. It is hoped that the reforms will be made before we face an escalation of litigation which might attract proportionate liability, such as property damage claims arising from the Black Saturday bushfires in Victoria or from some other calamity.

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<sup>49</sup> *Wrongs Act 1958* (Vic), s24AJ, as noted by the Victorian Court of Appeal in *Spowers*, above, at [83].

<sup>50</sup> In Victoria, consent judgment requires the consent of all other parties: *Supreme Court (General Civil Procedure) Rules 2005*, r 59.06. Other defendant concurrent wrongdoers are unlikely to consent, given that the consent judgment will remove the rights of the remaining defendants to claim contribution.

<sup>51</sup> These difficulties were considered by the Victorian Court of Appeal in *Barwon Region Water Authority v Aquatec-Maxcon Pty Ltd* [2007] VSCA 186 in respect of proportionate liability pursuant to the *Building Act 1993* (Vic), s 131 (now repealed).