THE CHOICE OF DISPUTE RESOLUTION AND ITS IMPLICATIONS FOR PROPORTIONATE LIABILITY CLAIMS

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1. In this paper I will address certain issues of importance to those entering into construction contracts or who might be concerned with disputes arising from such contracts. The GFC has highlighted the importance of risk assessment in investment decisions. The inability of bankers and investors to properly understand the existence of risk and to evaluate it has been a major contributing factor to the GFC and to its continued ramifications.

2. Construction contract formation is an exercise in clarifying risk – for example:

   which party will take the latent conditions risk;

   which party will take the technological risk;

   which party will take the risk of the time and cost of any variations?

   These contract risks are commonly dealt with by the parties in negotiations and are reflected in the terms of their contract. However, do the parties consciously and fully evaluate the

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implications of proportionate liability laws as part of the risk assessment?

3. In this paper I intend to examine the following matters:

a. What is proportionate liability and why does it exist?

b. Can parties to construction contracts be affected by the restrictions on recovery of damages imposed by the proportionate liability regimes?

c. Do the proportionate liability regimes apply to all construction contract disputes, wherever adjudicated?

d. If a construction contract dispute raises an 'apportionable claim' or its equivalent within the definitions contained in the proportionate liability regimes, what determines which of the individual proportionate liability statutes applies to the dispute?

e. Is there any way to avoid the proportionate liability restrictions?

4. **What is proportionate liability?**

Historically in common law jurisdictions, those suffering loss or damage could recover their entire compensation from all or any of those liable. The law left those responsible to apportion between themselves any compensation paid to the victim, so as to reflect their respective responsibility. The change brought about by proportionate liability is that the risk that one or more of the multiple wrongdoers will be unavailable to be sued, or will be insolvent, rests on the person who suffers the harm. Those

responsible (who may or may not be brought into the litigation, depending on the proportionate liability regime) are only liable to pay such compensation as reflects their respective responsibility for the damage.

5. **A brief explanation of the proportionate liability regimes**

Following the collapse of HIH Insurance and the destruction of the Twin Towers insurance premiums rocketed upwards and many organisations complained that insurance was simply unaffordable. The Honourable Justice Ipp, then of the NSW Supreme Court, was appointed to lead a committee to investigate into and report, inter alia, on ways to

> *'develop proposals to replace joint and several liability with proportionate liability* ***in relation to personal injury and death****, so that if a defendant is only partially responsible for damage, they (sic) do not have to bear the whole loss'.* [emphasis added]

6. The Ipp Committee report was released in October 2002. It made certain recommendations. It recommended no proportionate liability for injury and death claims:

> *'After careful consideration, we have come to the firm view that personal injury law should not be reformed by the introduction of a system of proportionate liability.*

Interestingly, it emphasised that it had not enquired outside its Terms of Reference into other areas where proportionate liability might apply:

> *We have not considered or assessed options for the introduction of a regime of proportionate liability in relation to property damage and pure economic loss, and we make no comment or recommendation in that respect.'*

7. But Governments know best. Notwithstanding the absence of any consideration or recommendation in the Ipp Committee report of proportionate liability for economic loss other than in death or personal injury claims, the states and territories, in what was known in Victoria as the 'third wave reforms', decided to enact proportionate liability for economic loss 'to help stabilise the market in professional indemnity insurance'. On 4 April 2003 at a Joint Ministerial Meeting on Insurance Issues, the Ministers announced that they had

> *'agreed to task the Heads of Treasuries Insurance Issues Working Group (IIWG) to work urgently towards developing a nationally consistent model for proportionate liability for economic loss. The Commonwealth re-affirmed that it will amend the Trade Practices Act 1974 and the Corporations Act 2001 to ensure that proportionate liability applies in both State and Federal jurisdictions.'*

8. This is not the place for a detailed analysis of the scheme. For that I would suggest you examine Barbara McDonald's excellent paper.[2] Nor will I consider whether the changes were justified. Suffice to say that for an apportionable claim subject to one of the proportionate liability regimes the loss is borne proportionately only. 'Apportionable claims' are those which are claims for economic loss and damage to property, whether in contract, tort or under statute, arising from a failure to take reasonable care, claims under state Fair Trading Acts for misleading and deceptive conduct and certain damages claims under the TPA, including, importantly, under s.82 for a s.52 breach, the ASIC Act and the Corporations Act 2001.

9. Whether the logic of proportionate liability is accepted or the need for it is conceded, the effect is to protect insurers at the expense of

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2 McDonald, B., Proportionate Liability in Australia: The Devil in the Detail. Sydney Law School Research Paper No. 06/25; Australian Bar Review, Vol. 26, pp. 29-50, 2005. Available at SSRN: http://ssrn.com/abstract=934993

plaintiffs in cases to which it applies. It is plaintiffs who now take the risk that one or more of the parties responsible for causing the loss or damage might be insolvent or uninsured. Whereas previously an insured defendant found liable minimally for the loss might have had to bear the entire loss and seek to recover contribution from other responsible parties, now the plaintiff must successfully recover from all responsible parties to recover the entirety of its loss.

10. **In what way could construction contracts be affected by the restrictions on recovery of damages imposed by the proportionate liability regimes of the states, territories or the Commonwealth?**

Owners and developers usually spend a great deal of effort identifying a head contractor with sufficient skill, experience and financial security to undertake the requisite construction obligations. Extensive due diligence is commonly undertaken to ensure that the other contracting party has sufficient assets to withstand any dispute. However if disputes arise which can be characterised as 'apportionable claims' the party ultimately or substantially at fault might be of little or no financial worth who is not able to compensate the owner or developer for its loss. It should be borne in mind that almost any contractual claim can be pleaded as a Trade Practices Act dispute and many straightforward contractual claims could be drawn up as 'arising from a failure to take reasonable care'. Thus although one party might conceive of the dispute in straightforward contractual terms which would not admit of proportionate liability allegations, the other party might initiate the dispute process and draft the claim in terms which could be characterised as an 'apportionable claim'.

11. **Proportionate liability regimes and arbitrations?**

Construction contracts commonly require, or at least permit,

arbitration of disputes. If such dispute involves an apportionable claim, it may be subject to the limitations imposed by the proportionate liability legislation if the dispute is adjudicated in a court (or tribunal such as VCAT). However it may well not be subject to such legislation if the dispute is heard by an arbitrator.[3]

12. The proportionate liability regimes, although similar, are not uniform: as Barbara McDonald made clear in her eponymous paper[4]; the devil is in the detail. Under the Wrongs Act 1958 (Vic) proportionate liability provisions,[5] reliance upon such provisions effectively demands the joinder of all possibly responsible parties to the proceedings. The court cannot have regard to the comparative responsibility of any person who is not a party to the proceedings, unless that party is dead or has been wound up. However an arbitrator has no power to require the joinder to an arbitration of any other party (without the consent of the existing parties and presumably the consent of the proposed new party). Thus the Victorian proportionate liability legislation is inconsistent with arbitration practice, and in that jurisdiction at least, the term 'court' should not be construed to include an arbitral tribunal.

13. In the other states and territories (other than South Australia) the provisions as to joinder are framed in a permissive rather than mandatory format: the defendant may seek to nominate other parties also potentially liable, but need not join them to the proceedings. However the plaintiff is authorised to join any newly identified concurrent wrongdoer to the proceedings.[6] In

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3 See my article *Proportionate liability in arbitrations in Australia?* (2009) 25 BCL 298

4 Supra

5 Joinder is required subject to narrow exceptions by reason of s.24AI(3) Wrongs Act 1958 (Vic)

6 E.g. s.43F(1) of the Civil Liability Act 2002 (Tas); s.32C Civil Liability Act 2003 (Qld); s.5AN Civil Liability Act 2002 (W.A.); s.11(1) Proportionate Liability Act 2005 (N.T.); s.107J(2) Civil Law (Wrongs) Act 2002 (ACT); s. 87CH Trade

circumstances where a claimant cannot obtain an order for joinder to an arbitration of other parties alleged by a respondent to be also proportionately liable, for the reasons set out above, it is very arguable that the proportionate liability legislation should not be held to apply. Careful examination of the relevant legislation is always required, but in no jurisdiction is arbitration expressly incorporated in the provisions. In the W.A. legislation, for example, the terms 'court', 'plaintiff' and 'defendant' are used, terms consistent with the application of the legislation to court proceedings not arbitrations.

14. In South Australia a slightly different set of provisions applies. Pursuant to ss 9 and 10 of the Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 the defendant must identify for the plaintiff any person not a party to the action who may be liable in relation to an 'apportionable liability'. If no joinder takes place the judgment in the initial action determines for all subsequent actions for the same harm against concurrent wrongdoers the amount of the damages, the proportionate liability of the party or parties to the initial action and any finding of contributory negligence. There is no definition in the South Australian Act of 'plaintiff', 'court', 'action' or 'judgment': all are terms associated with litigation rather than arbitration which would ordinarily refer to 'claimant', 'arbitration', 'notice of dispute' and 'award'. 'Defendant' is defined, but only to include third parties, itself a concept alien to arbitrations. Furthermore, whereas 'claimant' is used in the Act in relation to the long-standing provision dealing with contribution, only the term 'plaintiff' is used in relation to PL. In my view it is unlikely that the S.A. legislation will be held to apply to arbitrations.

Practices Act 1974 (Cth); s.1041R Corporations Act 2001 (Cth); s.12GV(1) ASIC Act 2001 (Cth).

15. However in the only superior court decision on this issue, Aquagenics Pty Ltd v Break O'Day Council (No 2)[7] the Tasmanian Supreme Court has decided that by implication of a term, the Tasmanian proportionate liability scheme is incorporated into arbitrations in that state. Blow J concluded that:

> *'subject to any inconsistent express contractual terms, a contract by which a dispute is referred to arbitration contains an implied term that a claimant is entitled to such rights and remedies as would have been available in a court of appropriate jurisdiction. The effect of such an implied term must be that, when a claimant's damages would have been reduced by a court pursuant to proportionate liability legislation, they must be similarly reduced by an arbitrator.'*

16. With the greatest respect to the learned judge, I venture to disagree with this conclusion for a number of reasons:

a. it ignores the importance of construing the text of the relevant statutory provisions consistently. If 'the court' in s.43B(1)(a), (1)(b), 3(a) and 3(b) of the Wrongs Act 1954 (Tas), for example, includes a commercial arbitration then it should mean the same in s.43F of the same Act which empowers 'the court' to give leave for joinder of other persons as defendants in proceedings involving an apportionable claim. Yet the notion of an arbitrator having the power to join a party to an arbitration who is not subject to the arbitration agreement runs contrary to fundamental norms of arbitration law across the world.

b. It ignores the fact that, an arbitrator would not have power to compel the parties to consent to the joinder of an outside party to the arbitration.

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7 [2009] TASSC 89

c. it ignores the importance of the proportionate liability legislation operating in a forum which has jurisdiction over all potential defendants.[8]

d. It downplays the fact that the proportionate liability provisions in Tasmania, as in other Australian jurisdictions, are not applicable in all situations. Indeed they apply in relatively limited situations under Tasmanian law.[9] They would not apply, for example, when Commonwealth legislation was in issue.[10]

17. Furthermore the analysis applied by Blow J, that of implying a term into any contract which had an arbitration agreement for the settlement of disputes between the parties thereto, fails to consider the requirements prescribed for the implication of terms into contracts.[11] The touchstone for the implication of a term into all contracts of the particular type is "necessity".[12] This would require the implication of any term the omission of which would be 'totally inconsistent with the nature of the relationship'. Why would it be inconsistent with the nature of the relationship between the parties to an arbitration agreement if they not agree to empower the arbitrator to give effect to the proportionate liability provisions of the relevant statute where the effect of such a term would be to compel the claimant to institute separate proceedings to recover any damages in respect of an apportionable claim for which the respondent is found not to be entirely responsible by the arbitrator's award?

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8 Wealthcare per Cavanough J at [38

9 s.43A(3) Wrongs Act 1954 (Tas); See also, a propos of the Victorian legislation, Cavanough J in Wealthcare at [37]

10 See Dartberg Pty Ltd (As Trustee for the Pollard Children Trust) v Wealthcare Financial Planning Pty Ltd (2007) 244 ALR 552

11 See Esso Australia Resources Ltd v Plowman (Minister for Energy & Minerals) (1995) 183 CLR 10 esp Mason J at 30

12 Liverpool City Council v Irwin [1977] AC 239 esp Lord Wilberforce at 254-6, referred to with approval by Brennan J in Esso Australia Resources Ltd v Plowman (1995) 183 CLR 10 at 30

18. **If a construction contract dispute raises an 'apportionable claim' within the definitions contained in the proportionate liability regimes, what determines which of the individual proportionate liability statutes applies to the dispute?** Commonly construction contract have a clause nominating the applicable law. However that provision does not necessarily determine which of several possibly competing proportionate liability regimes might apply to any dispute arising out of the contract. The proportionate liability regimes do not create any causes of action; an apportionable claim must exist in order for the proportionate liability provisions to be triggered. They merely regulate how damages will be allowed to be recovered against each of several parties liable in respect of an apportionable claim. The several proportionate liability Acts limit the liability of concurrent wrongdoers in relation to apportionable claims to an amount which reflects their individual responsibility.[13]

19. Thus there is a very respectable argument, as yet untested, that the proportionate liability statutory provisions are procedural in character and not substantive. The substantive law is the law giving rise to the legal rights and obligations in issue, the lex loci delicti. The substantive law must be applied to the facts of the claim wherever the dispute is heard. The procedural law is that aspect of the legal process which is properly characterised as procedural; it is determined by the location where the litigation is being heard – the lex fori. If this is correct, then the relevant statute of the place where the arbitration was being held would be the applicable proportionate liability regime rather than the legislation of the law to which the contract was itself subject or the

[13] s.24AI(1)(a) Wrongs Act 1958 (Vic); s.35(1)(a) Civil Liability Act 2002 (NSW); s.43B(1)(a) Civil Liability Act 2002 (Tas); s.31(1)(a) Civil Liability Act 2003 (Qld); s.5AK(1)(a) Civil Liability Act 2002 (W.A.); s.13(1)(a) Proportionate Liability Act 2005 (N.T.); s.107F(1)(a) Civil Law (Wrongs) Act 2002 (ACT); s.8 Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (S.A.); s. 87CD(1)(a) Trade Practices Act 1974 (Cth); s.1041N(1)(a) Corporations Act 2001 (Cth); s.12GR(1)(a) ASIC Act 2001 (Cth).

law of the place where the relevant events occurred giving rise to the cause of action.

20. Anyone who claims to understand the precise distinction between the 'substantive and 'procedural' categorisation deserves to be on the bench! In the present situation we are dealing with a conflict between the lex fori – the law of the relevant forum where the action is being determined and the lex contractu (the law of the contract) or lex loci delicti (the law at the location of the event giving rise to the cause of action) – the law applying to the dispute.

21. The importance of the distinction between substantive or procedural in the context of proportionate liability is that if proportionate liability is substantive the regime derived from the law of the contract or the law of the place where the legal rights arose will be applicable to the dispute regardless of the location of the hearing, whereas if proportionate liability is procedural only the law as to proportionate liability applicable at the venue of the hearing will be imposed upon the disputing parties, regardless of the generally applicable law of the dispute.

22. In Harding v Wealands,[14] the House of Lords had to consider whether damages for personal injury caused by negligent driving in New South Wales (but the subject of legal proceedings in England) should be calculated according to the applicable law selected in accordance with Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (UK) (hereafter "Part III") (in which case it would be restricted by the relevant NSW statutory provisions) or whether it was a question of procedure to be determined in accordance with English law. The trial judge had

14 [2006] UKHL 32

determined that English law applied but this was reversed by the Court of Appeal.[15]

23. In coming to the conclusion that English law provided the applicable remedy afforded by the law in the fact situation found by the trial judge Lord Hoffman drew on the English (and Australian) common law rule for determining whether damage caused by acts committed abroad was actionable in tort as laid down by the Court of Exchequer Chamber in Phillips v Eyre.[16] Indeed in the course of considering the issue, Lord Hoffman went back 250 years to Robinson v Bland.[17] He then explained the crux of the distinction between the right and the remedy in these words:

> *"… in tort, the courts have distinguished between the kind of damage which constitutes an actionable injury and the assessment of compensation (ie damages) for the injury which has been held to be actionable. The identification of actionable damage is an integral part of the rules which determine liability. As I have previously had occasion to say, it makes no sense simply to say that someone is liable in tort. He must be liable for something and the rules which determine what he is liable for are inseparable from the rules which determine the conduct which gives rise to liability. Thus the rules which exclude damage from the scope of liability on the grounds that it does not fall within the ambit of the liability rule or does not have the prescribed causal connection with the wrongful act, or which require that the damage should have been reasonably foreseeable, are all rules which determine whether there is liability for the damage in question. On the other hand, whether the claimant is awarded money damages (and if so, how much) or, for example, restitution in kind, is a question of remedy."*

24. Although aware of the fact that the High Court had overruled Stevens v Head, Lord Hoffman in Harding was quite satisfied that the explanation in that decision of the traditional distinction between substance and procedure which treats remedies, including

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15 [2004] EWCA Civ 1735
16 (1870) LR 6 QB 1, 28-29
17 (1760) 2 Burr 1077

limitations on quantum, as matters of procedure, should be characterised as procedural. He held at 47-8:

> *"[47] The Merchant Shipping (Amendment) Act 1862 extended the right to limit liability to all ships of whatever nation and thereafter it became impossible to regard such a provision as equivalent to a contractual term imposed upon British subjects. In my opinion, therefore, Clarke J was right in Caltex Singapore Pte Ltd v BP Shipping Ltd [1996] 1 Lloyd's Rep 286 to treat a modern limitation statute (in that case, of Singapore) as a procedural provision, limiting the remedy rather than the substantive right: see also Seismic Shipping Inc v Total E&P UK plc (The Western Regent) [2005] EWCA Civ 985; [2005] 2 Lloyd's Rep 359, 370.*
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> *[48] There is accordingly in my opinion no English authority to cast any doubt upon the conclusion of the Australian High Court in Stevens v Head (1993) 176 CLR 433 that, for the purposes of the traditional distinction between substance and procedure which treats remedy as a matter of procedure, all the provisions of MACA, including limitations on quantum, should be characterised as procedural. This was also the view of the Court of Appeal in Roerig v Valiant Trawlers Ltd [2002] EWCA Civ 21; [2002] EWCA Civ 21; [2002] 1 WLR 2304."*

25. In John Pfeiffer Pty Ltd v Rogerson,[18] however, the Australian High Court had reversed Stevens v Head, abandoned the traditional rule (at least for torts committed in Australia) and confined the role of the leges fori of the Australian States to procedure in the narrow sense of rules "governing or regulating the mode or conduct of court proceedings".[19] The law by which the dispute is determined is a matter of agreement or juridical determination; the law of the venue determines the procedure according to which the dispute is to be determined and depends upon where the hearing is located or initiated. Given that all of the states and territories have their own statutory provisions as to proportionate liability, as does the

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18 (2000) 203 CLR 503

19 See (2000) 203 CLR 503 at 543-544

Commonwealth itself under certain legislation, the conflict is one between competing legislative regimes. The High Court in John Pfeiffer Pty Ltd v Rogerson[20] reversed its previously held position[21] by concluding that quantification of damages was a matter of substantive law in the Australian Federal context rather than procedural.[22] However even in Pfeiffer the majority judgment[23] expressly restricted the ambit of the decision to the specific issues which arose in that case and stated:

> *"Other and more difficult questions arise where, in the case of the States and Territories of Australia, the statute law of two law areas differs and it is sought to apply one rather than the other as the governing law. That is not this case."*

26. The reversal of the pre-existing law in Pfeiffer was said to be required by constitutional imperatives of Australian federalism. In the majority judgment determined:

> *"[86] In Australia, in all its law areas, the same common law rules apply and any relevant difference in substantive law will stem from statute. Applying the lex loci delicti will apply a single choice of law rule consistently in both federal and non-federal jurisdiction in all courts and will recognise and give effect to the predominant territorial concern of the statutes of State and Territory legislatures. These factors favour giving controlling effect to the lex loci delicti rather than the lex fori.*
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> *[87] Application of the lex loci delicti as the governing law in Australian torts involving an interstate element is similar to the approach adopted in Canada following the decision of the Supreme Court of Canada in Tolofson v Jensen[24]. Moreover and so far as the subject matter permits, it gives effect to the reasonable expectations of parties. And it is a rule which reflects*

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20 Supra

21 (2000) 203 CLR 503 at [100]; Canada had taken a similar course in Tolofson v Jensen (1994) 120 DLR (4th) 289

22 This reverse the pre-existing law found in Stevens v Head (1993) 176 CLR 433

23 Delivered by Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

24 [1994] 3 SCR 1022

> *the fact that the torts with which it deals are torts committed within a federation. Accordingly, the common law should now be developed so that the lex loci delicti is the governing law with respect to torts committed in Australia but which have an interstate element."*

27. The importance of all of this legal erudition is to emphasise the uncertainty surrounding whether proportionate liability legislation is properly characterised as 'substantive' or 'procedural'. Notwithstanding the latest pronouncements from the High Court, and perhaps because of my emotional attachment to the common law in this area, I prefer the logic of the House of Lords, which is still open to be applied here.

28. **Is there any way to avoid the proportionate liability restrictions?**

One simple solution if you do not wish to be faced with proportionate liability limitations, is to include a provision in the contract excluding the application of such laws. Some States expressly permit contracting out of proportionate liability[25]; other states[26], both territories and the Commonwealth are silent on the issue and so it is assumed that opting out is allowed; Queensland alone prohibits contracting out.[27] A contracting party, therefore, need only ensure that the contract or relationship is not subject to Queensland legislation and that the dispute is not being heard and determined in Queensland to effectively contract out of proportionate liability or avoid its operation.

29. **Conclusion**

So for those negotiating construction contracts and for their legal advisers the lessons are clear:

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25 s.3A(2) Civil Liability Act 2002 (NSW); s.3A(3) Wrongs Act 1954 (Tas); s.4A Civil Liability Act 2002 (W.A.);

26 South Australia and Victoria

27 s.7(3) Civil Liability Act 2003 (Qld)

a. Whenever possible and where the applicable law allows they should contract out of proportionate liability risk by expressly opting out in the construction contract. This can be done everywhere in Australia except in a contract subject to Queensland law.

b. The contract should provide that disputes are to be determined by arbitration rather than litigation so as to reduce the risk of proportionate liability being applied.

c. Finally, whenever possible they should expressly contract for Victorian law to apply and for disputes to be determined by arbitration heard in Victoria. The benefit of this course is that irrespective of whether the proportionate liability provisions are found to be substantive or procedural, the Wrongs Act 1958 (Vic) Part 4AA permits the most powerful argument to be advanced that its proportionate liability provisions do not apply to arbitrations.