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AUSTRALIAN civil liability

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AUSTRALIAN civil liability

The latest word on implied duty of good faith: CGU Workers Compensation v Garcia

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The facts in *CGU Workers Compensation (NSW) Ltd (ACN 003 181 002) v Garcia* [2007] NSWCA 193; BC200706429 (10 August 2007) are as follows.

An insurer commenced weekly payments of compensation to an injured worker. During the period in which compensation was being paid, the insurer was investigating the genuineness of the injury and the degree to which employment had contributed to it.

The insurer commissioned an investigator and directed the worker to attend an orthopaedic surgeon for a medical assessment. The reports from the investigator and the surgeon did not support the worker's claim to compensation. The insurer subsequently decided to discontinue the weekly payments of compensation.

At trial, the worked claimed that the taking and maintaining of this position by the insurer on the basis of the surgeon's report amounted to a breach of the insurer's tortious duty of good faith to the worker, and was also in breach of an implied term of good faith in the performance of the insurance contract.

The trial judge, Goldring DCJ, found that there was a breach by the insurer of a tortious duty of good faith to the worker. His Honour found that the insurer's actions in ceasing periodic payments and in refusing to pay for surgery aggravated the worker's depressive illness. Other injuries of a physical and psychiatric nature were found attributable to the insurer's wrongful act. There were also findings as to economic loss and exemplary damages. Given his Honour's findings in relation to the existence and breach of a tortious duty to act in good faith, he did not consider whether there was also a breach of an implied term of the contract of insurance to act in good faith.

Two of the issues raised for consideration by the Court of Appeal were first, whether the law recognised a tortious duty to act in good faith; and second, the circumstances in which there will be implied into a contract a term to act in good faith.

Tort of good faith

Findings at first instance

Goldring DCJ found, in reliance upon the reasoning of Badgery-Parker J in *Gibson v Parkes District Hospital*,[1] for the existence of a tortious duty of good faith. His Honour noted that *Gibson* involved an application to strike out pleadings, but nevertheless concluded that the reasoning was both directly on point and compelling. Goldring DCJ discussed later decisions from other jurisdictions, concluding that they were either distinguishable or not to be followed, in so far as they had expressed reservations about the correctness of *Gibson*.

Goldring DCJ acknowledged that the tort was a novel one in Australian law and that the cause of action did not arise under the principles of negligence.

While his Honour confined himself to the situation as between an insurer and a worker and in relation to a statutory policy, he nevertheless held that a tortious duty requiring the insurer to act in good faith exists 'independently of the details of the legislative scheme'. The duty was said

to be mutual as between insurer and worker. As regards the insurer, it included 'the duty to receive and process bona fide claims by workers without bias or prejudice'. It was 'a general responsibility, in appropriate cases, to provide compensation and to deal honestly and fairly, that is, "in good faith" with the worker'. The judge cited with approval Badgery-Parker J's description of the content of the duty as a duty not to 'in bad faith reject, underestimate or delay payment of a worker's claim for workers compensation'.[2]

Having found for the existence of a duty, the court found that the insurer had breached that duty in a number of respects, including:

- the insurer was already predisposed, if not totally prejudiced, against the worker even before it got the surgeon's report;
- the surgeon's report was contrary to all other medical reports — no other doctor considered that the worker's condition was due to degeneration;
- the surgeon's report was based upon a 'superficial' examination;
- there was no other evidence justifying the insurer's stance;
- the insurer's failure to seek reports from the treating specialists or to review its stance when asked to do so strengthened the inference of bad faith; and
- there was evidence to support an inference that the insurer was 'looking for a pretext' not to pay.[3]

Court of Appeal

The court[4] found that the authorities did not support the existence of a tortious duty of good faith.

Mason P said that the 'judge's formulations of the duty revealed a cause of action that cut across the legislative and contractual framework, in some respects shattering the coherence of the scheme'.[5]

His Honour adopted the remarks of Lord Hoffmann in *OBG Ltd v Allan*,[6] where he said that 'it is not for the courts to create a cause of action out of a regulatory or criminal statute which Parliament did not intend to be actionable in private law'.

His Honour noted that:

> The broad framing of the putative tort or the implied contractual term masks the types of conduct the duty is aimed at. This sounds a note of caution about the duty itself. A duty to act in good faith is obviously wider than a duty not to act dishonestly or fraudulently. But it is obviously narrower than a duty of a fiduciary nature requiring the obligee to put the other party's interest above its own. It is also narrower in scope than the obligation of utmost good faith of those about to enter into an insurance contract to make full disclosure of facts relevant to the insurance risk …
>
> The High Court has recently issued stern warnings against intermediate courts of appeal stepping beyond long-established authority derived from English precedents or considered dicta of the High Court itself (*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [134]) … the present case lies well past that point on the plank where even bold judicial spirits might think to stand without firm external support or compelling analogy in the existing case law.[7]

Mason P observed that:

> 'Discovering' a new tort is fraught with difficulties and paradoxes'.[8] His Honour identified three problems inherent with such a tort: exemplary damages, damages for delay and damages for disappointment.[9]

His Honour found that if such a duty existed, it would cut across the statutory mechanism and the adversary context in which the compensation scheme operates:

> The scheme operates on the basis that, if a claim is not accepted or compromised, it is able to be sent to conciliation with the dispute ultimately determined by a specialist Compensation Court on the basis of the evidence presented at a trial. In the final analysis the legislature has adopted an adversary paradigm as the appropriate method to test the truth of claims and to supervise the defence of claims. A duty of good faith in the making or maintaining of a claim, breach of which sounds in damages, lies very uncomfortably with such a framework.[10]

His Honour pointed to policy reasons for rejecting the existence of the duty contended for:

> Goldring DCJ referred to a 'duty to receive and process bona fide claims by workers without bias or prejudice' … Implicitly, this suggested that an insurer faced with a bogus claim might not be under such a duty. In reality, the proposition points to an inherent difficulty with the putative tort, not to mention the difficulty of deciding its boundaries. Sometimes an insurer may have grounds for suspicion …'[11]

His Honour then turned to consider *Gibson*. Mason P said that:

> Badgery-Parker J correctly recognised that the putative tort was not a species of negligence (see at 16–17). Nevertheless, significant unexplained reliance was placed on decisions such as *Anns v Merton London Borough Council* [1978] AC 728 and decisions in England and Australia discussing that precedent. His Honour asked himself whether the tort now in question involved 'elements of inequality and dependence apt to call for the recognition not only of a duty of care but of a duty of good faith' (at 25). Passages in the reasons (at 25, 33) reveal his Honour to have been of the view that similar jurisprudential considerations would determine whether a duty of care exists as relate to the issue of a duty to act in good faith. He did not explain why this is so and I am not persuaded that it is.[12]

His Honour then meticulously considered the cases subsequent to *Gibson* which have been 'hostile to reception of the tort'[13] and concluded that there was no tortious duty to act in good faith.

> … the court found that the insurer had breached that duty in a number of respects …

Was there a contractual duty to act in good faith?

Goldring DCJ did not have to decide this matter, but it had been pleaded and

it was raised by the notice of contention.

Mason P noted that the court had recognised that some commercial contracts contain terms implied as a matter of law imposing an obligation of good faith and reasonableness in the performance of contractual obligations,[14] but that these cases do not establish that such an implied term is to be inserted into every contract or even into every aspect of a particular contract.

His Honour said that 'a duty [to act in good faith] may, however, be implied as a matter of law in specific classes of contracts or as a matter of fact to give business efficacy to a particular contract'.[15]

Further:

> In determining whether the implication is to be drawn from a particular class of contract, courts ask a range of questions that include whether the contract would be effective without it, and whether the enjoyment of the rights expressly conferred would or could be rendered nugatory, worthless or perhaps be seriously undermined. The central criterion is one of 'necessity', a matter to be tested against any applicable statutory policy (see *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 450; *Breen v Williams* (1995) 186 CLR 71 at 80, 102–3 and 124; *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 193–5).[16]

Applying these principles, Mason P held that there was no implied duty to act in good faith in the relevant contract of insurance.

Was any duty breached?

While this issue did not strictly arise for determination, Mason P concluded that there were no reasonable grounds supporting the trial judge's finding of a breach of duty.[17]

Conclusion

Hodgson JA agreed with Mason P and Santow JA. Santow JA delivered a separate judgment in which he agreed with the conclusions reached by Mason P, but added some further observations in relation to the issue of whether there exists a tortious duty to act in good faith. The appeal was upheld. ●

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Endnotes

1. (1991) 26 NSWLR 9.
2. *Gibson* at p 25.
3. Mason P at [54].
4. Mason P, Santow and Hodgson JJA agreeing, at [57], [110].
5. At [57].
6. [2007] All ER (D) 44 (May); [2007] UKHL 21.
7. At [60], [61].
8. At [71].
9. See [72] and following.
10. At [87].
11. At [89].
12. At [103].
13. At [110] and see *Gimson v Victorian Workcover Authority* [1995] 1 VR 209; *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] QB 665; [1987] 2 All ER 923; *Banque Financiere de la Cite SA v Skandia (UK) Insurance Co Ltd; Westgate Insurance Co Ltd* [1991] 2 AC 249; [1990] 2 All ER 947; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1990] 1 QB 818; [1989] 3 All ER 628; *Employer's Mutual Indemnity (Workers Compensation) Ltd v A Donald Pty Ltd* (NSWCA, Priestley, Cole and Stein JJA, 23 October 1997, BC9705385, unreported); *Lomsargis v National Mutual Life Association of Australasia Ltd* [2005] 2 Qd R 295; [2005] QSC 199; BC200505069.
14. *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349 at 369; 9 BPR 16,385 at 16,400–1; BC9803163; *Burger King Corporation v Hungry Jacks Pty Ltd* [2001] NSWCA 187; BC200103318 at [159], [164]; *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15; BC200400571 at [125].
15. At [134].
16. At [136].
17. At [146]–[152].

casenote

Queensland disclosure requirements: narrower under the Personal Injuries Proceedings Act than under the Uniform Civil Procedure Rules

Ed Zappert CLS LAWYERS

HAUG v JUPITERS LTD T/AS CONRAD TREASURY BRISBANE

[2007] QCA 199; BC200704550

This case in the Queensland Court of Appeal (15 June 2007) involved a member of the rock group Powderfinger, who had made a claim for damages against Jupiters Ltd (the Casino) as a result of his being removed from the Casino on the night of 22 February 2006. The claimant served the Casino with a notice of claim pursuant to the *Personal Injuries Proceedings Act 2002* (Qld) (PIPA) and alleged that the Casino had been negligent. The particulars given in the notice of claim essentially involved an allegation of the use of excessive force by the security guards and also raised issues regarding the training of the guards.

Following service of the notice of claim, the claimant's solicitors wrote to the Casino's solicitors requesting the disclosure of a number of documents pursuant to s 27(1)(a)(i) of the PIPA, and also requesting the provision of certain information pursuant to s 27(1)(b)(i) of the PIPA. The letter requested documents in the following categories:

(1) complete personnel and training records for each security guard involved in the incident involving the claimant;
(2) all documentation relating to the incident;
(3) all documentation relating to the training of security staff at the Casino;
(4) all documentation relating to prior complaints involving security staff at the Casino;
(5) a full floor plan of the Casino;
(6) a floor plan of the Casino indicating camera placement;
(7) copy of all footage from every security camera in the vicinity of the incident, including the period leading up to the incident.
(8) documents relating to previous claims brought against the Casino relating to excessive and/or inappropriate use of force by employees of the Casino;
(9) the names of all security guards and of the roles each played in the incident;
(10) a full description of the type of restraint used, including what body parts were involved and what the purpose or reason was for each type of restraint;
(11) the identifying description of cameras which filmed the incident and their location;
(12) the type and quantity of alcohol consumed by the claimant, any persons at the restaurant with the claimant, and restaurant staff;
(13) the full name and address of the other patron evicted at the same time as the claimant; and
(14) details of any prior complaints or problems with security guards at the Casino, including the name of the person involved, the description of that person's duties, and the date and nature of the complaint.

The Casino declined to produce that documentation and information. The claimant made an application and it was ordered that the Casino provide documents in categories (1), (2), (5), (6) and (7) and the information requested in categories (9)–(13) above.

The Casino appealed in respect of the documents required to be disclosed and in respect of the information requested in category (11) regarding the description and location of all security cameras.

The appeal was successful and it was ordered that the claimant was not required to disclose documents in categories (1), (5), (6) and (7), or the information requested in category (11) of the claimant's solicitor's letter.

The Casino's main contention was that the documents and information went beyond the terms of ss 27(1)(a)(i) and 27(1)(b)(i) of the PIPA.

Those sections state as follows:

> *Duty of respondent to give documents and information to claimant*
>
> (1) A respondent must give a claimant —
>
> (a) copies of the following in the respondent's possession that are directly relevant to a matter in issue in the claim —
>
> (i) reports and other documentary material about the incident alleged to have given rise to the personal injury to which the claim relates;
>
> ...
>
> (b) if asked by the claimant —
>
> (i) information that is in the respondent's possession about the circumstances of, or the reasons for, the incident; or
>
> ...

The court compared disclosure requirements under the PIPA with the requirements under the *Motor Accident Insurance Act 1994* (Qld) and with the corresponding provisions of the *WorkCover Queensland Act 1966* (Qld) and the *Workers' Compensation and Rehabilitation Act 2003* (Qld).

The court noted that the obligation to disclose documents is expressed differently in all of those legislative instruments and held (Jerrard JA at [16]) that:

> ... the various statutes are too dissimilar to allow the provisions in the PIPA, regarding the production of documents and giving information, to be construed as achieving the same outcome as in other statutes dealing with personal injury claims. The result of this diversity of obligation is that this collection of legislation about personal injury proceedings leads to a multiplicity of proceedings in court, rather than achieving the stated object in each statute of reducing the incidence of court proceedings.

Section 27(1)(a)(i) only requires the Casino to give the claimant documents about the incident alleged to have given rise to the injury to which the claim relates. The court noted that the obligation is not as broad as an obligation to give the claimant copies of documents that are directly relevant to our matter in issue, where those documents are not about the incident, as required by the *Uniform Civil Procedure Rules 1999* (Qld) (the Rules).

The court confirmed that the PIPA requires that the relevant documents be directly 'about the incident' and confirmed that this should be understood as meaning reports and other documentary material about the incident described in the notice of claim. The court then held (Jerrard JA at [23]) that:

> ... it does not follow that the documents described in paras 1–8, other than para 2, of the respondent solicitor's letter of 17 January 2007 are in any sense documents 'about the incident'. Most of them are demonstrably not.

It was further noted that while the notice of claim suggests subsequent pleadings in any court proceedings could allege inadequate training of the security guards, the documents requested (other than those requested in category (2)), were not about the incident mentioned in the notice of claim and, as such, were not required to be provided by the Casino. In respect of the request for information relating to the description and location of cameras, the court noted that the while the obligation contained in the PIPA to provide information about the circumstances of, or the reasons for, the incident is much broader than the obligation to produce copies of documents, the information must still be information about the incident. In those circumstances, the court refused to order that the location of security cameras be provided.

All members of the court (Williams and Jerrard JJA and White J) emphasised that although provisions such as s 27 of the PIPA should be given a broad remedial construction, it does not mean that the words of limitation found in the section can be ignored.

The effect of the decision is to confirm that the obligation to provide information and documents to a claimant is significantly different under the PIPA than it is under the legislative frameworks relating to motor vehicle accidents and work-related injury. In addition, the requirement to disclose documents is significantly narrower under the PIPA than required under the Rules once proceedings have been commenced — rather than documents directly relevant to matters in dispute on the pleadings, the requirements of s 27 of the PIPA in relation to liability documents require that the documents and information must relate to the incident mentioned in the notice of claim. As such, defendants and their insurers should be aware of the possibility that although some documents requested by claimants may subsequently be relevant and required to be disclosed once pleadings have been filed in court, they may not be required to be provided under the provisions of the PIPA if they do not relate to the incident mentioned in the notice of claim. ●

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AUSTRALIAN civil liability

Litigation update: proportionate liability revisited

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In brief

- There has been much speculation about unforeseen side effects of the proportionate liability legislation, some of which have been addressed in recent cases.
- It is unlikely that the legislation has created a new cause of action against concurrent wrongdoers where one did not already exist.
- Where the defendant is the only concurrent wrongdoer who is legally liable to the plaintiff and there are other concurrent wrongdoers who have no legal liability, the ability of the plaintiff to recover in full may turn on whether the defendant should be regarded as wholly 'responsible' for the plaintiff's loss and what would be 'just' in the circumstances.
- These questions are likely to be assessed in the context of the purpose of the proportionate liability legislation, which is to reduce the liability of defendants and any insurers standing behind them.
- Claimants and defendants should exercise caution when settling with some but not all parties to a claim to which proportionate liability legislation applies.

Proportionate liability legislation has been in force across Australia for a number of years. However, significant questions as to the interpretation of the legislation still remain.

In recent years, all Australian states and the Commonwealth have enacted legislation which, in a limited class of cases, has replaced joint and several liability with proportionate liability. The application of the legislation raises a number of issues which will need to be clarified by the courts. To date, few of the central issues in relation to the interpretation of the legislation have been the subject of judicial consideration.

In this update we address two sets of issues. First, we consider the consequences of the fact that it appears that parties may still be 'concurrent wrongdoers' under the legislation in circumstances where they have no legal liability to the plaintiff, simply because their conduct contributed to the plaintiff's loss.

Second, we identify a number of questions of interpretation that arise in relation to the provisions which affect the resolution of claims.

Unless otherwise stated, this update only considers the proportionate liability legislation in NSW and the Commonwealth (being the *Civil Liability Act 2002* (NSW), the *Australian Securities and Investments Commission Act 2001* (Cth), the *Corporations Act 2001* (Cth) and the *Trade Practices Act 1974* (Cth)), but the issues considered here are probably common to all jurisdictions.

Background

As the context in which the legislation was introduced may be relevant to questions of construction, we have included some background information as to what proportionate liability is, when it applies and why it was introduced.

What is proportionate liability?

Proportionate liability is the principle under which, where more than one party has contributed to the plaintiff's loss, each party's liability is limited to that proportion of the plaintiff's loss which reflects that party's responsibility for the loss. Therefore, where a defendant has identified other parties who contributed to the plaintiff's loss, the plaintiff needs to sue all those parties in order to recover their loss in full.

By contrast, under the principle of joint and several liability, a plaintiff can recover their loss in full from any one defendant whose act or wrong was 'a' cause of their loss, even if there are other parties who have materially contributed to their loss and even if the defendant's share of the fault is comparatively small. The defendant is then entitled to seek contribution from those other parties.

The move to proportionate liability has significant consequences, particularly the following.

- Under the principle of joint and several liability, the plaintiff can identify a 'deep pocket' to sue and ignore other possible defendants who may not have the funds to pay any damages. This means that solvent defendants bear the risk of there being other insolvent wrongdoers who materially contributed to the plaintiff's loss.
- Under the principle of proportionate liability, on the other hand, where there are several defendants who contributed to the plaintiff's loss, and one defendant is insolvent, the plaintiff will be unable to recover its loss in full. Thus, the risk of there being an insolvent defendant is borne by the plaintiff.

When does proportionate liability apply?

The proportionate liability legislation in NSW and the Commonwealth applies to claims for economic loss or damage to property in an action for damages arising:

- from a failure to take reasonable care; and
- under state and Commonwealth provisions for misleading or deceptive conduct (namely s 42, *Fair Trading Act 1987* (NSW); s 52, *Trade Practices Act;* s 1041H, *Corporations Act;* and s 12DA, *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*)).

These are known as 'apportionable claims' (s 34, *Civil Liability Act*).

The proportionate liability legislation does not apply to personal injury claims (s 34(1)(a), *Civil Liability Act*).

Why was proportionate liability introduced?

Proportionate liability was introduced in response to the so-called 'insurance crisis' as an attempt to reduce the liability of insured defendants and, in particular, to reduce insurance premiums.

The legislature has acknowledged that plaintiffs may be prejudiced by proportionate liability as they may not be able to recover their loss in full. This is the reason proportionate liability has not been introduced in personal injury cases. Prior to the introduction of the legislation, the former NSW Attorney-General, Robert Debus, said:

> … in cases of negligence not involving personal injury, considerations of prejudice to plaintiffs weigh less strongly than the value of limiting the liability of defendants according to their share of responsibility.[1]

Liability of concurrent wrongdoers who have no legal liability to the plaintiff

A 'concurrent wrongdoer' is defined as 'a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim' (s 34(2), *Civil Liability Act;* s 12GP(3), *ASIC Act;* s 1041L(3), *Corporations Act;* and s 87CB, *Trade Practices Act*).

There is nothing in this definition which requires a person to have any *legal liability* to the plaintiff to be a concurrent wrongdoer. Thus, it would appear, for example, that a barrister who contributed to a plaintiff's loss alongside a solicitor could be a concurrent wrongdoer, as long as the barrister's act or omission caused the plaintiff's loss, even if they were able to rely on the defence of advocate's immunity.

Similarly, a party who did not owe the plaintiff a duty of care under established tort principles — for example, in a situation where the plaintiff suffered pure economic loss — may still be a concurrent wrongdoer within the meaning of the legislation. The effect of this is that a plaintiff may not be able to recover in full where one defendant can establish that there is another concurrent wrongdoer whose act also contributed to the plaintiff's loss, but where that concurrent wrongdoer has no legal liability to the plaintiff. Alternatively, the legislation may be construed to give the plaintiff a cause of action where it previously would not have had one.[2]

The recent case of *Ucak v Avante Developments Pty Ltd* [2007] NSWSC 367; BC200702721 (19 April 2007) highlights the fact that a defendant does not need to plead in their defence the legal liability of a concurrent wrongdoer to the plaintiff. In that case, Hammerschlag J said that for a defendant to assert that there is a person who is a concurrent wrongdoer under the NSW legislation, the defendant must plead:

- the existence of a particular person as the alleged concurrent wrongdoer;
- the occurrence of an act or omission by that person; and
- a causal connection between that occurrence and the loss that is the subject of the claim.

This reinforces that the legislation does not require the concurrent wrongdoer to have any legal responsibility to the plaintiff. The plaintiff's ability to recover its loss in full where one of the concurrent wrongdoers has no legal liability will depend upon whether:

- as suggested, the legislation will be interpreted so as to create a new cause of action where there otherwise would not have been one; or
- the legislation will otherwise be interpreted so that where one of the concurrent wrongdoers has no legal liability to the plaintiff, the liability of the other concurrent wrongdoers will not be reduced on the basis of the first concurrent wrongdoer's contribution to plaintiff's loss.

A new cause of action?

For several reasons, we consider it unlikely that the legislation creates a new cause of action.

The legislation would only be interpreted as creating a new cause of action if it is clear from the language of the legislation that this is what was intended. Three provisions possibly point to the creation of a cause of action but arguably stop short of doing so. Those provisions are the following.

- The definition of 'concurrent wrongdoer', which, as mentioned,

applies as long as a person's acts or omissions *caused* the loss or damage.
- Section 38(1) of the *Civil Liability Act* and corresponding provisions in the Commonwealth legislation, which give the courts power to give leave for the joinder of 'any' persons as defendants, without specifying the cause of action that could be relied on as a basis for joining them.
- Section 35(5) of the *Civil Liability Act* and corresponding provisions in the Commonwealth legislation, which define 'defendant' as 'any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise'.

Even though s 35(5) contemplates that defendants may be 'joined under this Part', and even though s 38(1) gives the courts power to join defendants, it should be remembered that to obtain leave to join a party to proceedings, a plaintiff would need to establish that it has both a cause of action against that party (at least on a prima facie basis) and that the court should otherwise exercise its discretion in favour of permitting the joinder. Arguably, s 38(1) would be relevant only to the court's exercise of discretion to join parties where there is already a cause of action. This is supported by the location of the phrase 'joined under this Part' in s 35(5), next to 'under the rules of court'. The rules of court generally do not create causes of action, but are relevant to how the courts exercise their discretion on procedural matters.

Further, as mentioned, one purpose of the proportionate liability legislation was to *reduce* the liability of defendants (and their insurers) so as to reduce insurance premiums. If a new cause of action were created, that purpose would be undermined, as the liability of some potential defendants would be greatly *expanded* rather than reduced. For example, in a claim for pure economic loss, a plaintiff may suddenly have a cause of action against a party that otherwise owes them no duty of care under established principles of tort. This would have far-reaching ramifications as it would, for example, expose manufacturers to claims from unascertainable and indeterminate classes of plaintiffs. This is something that the courts have been very careful to limit and it seems unlikely, absent clear words, that the courts would interpret the proportionate liability legislation in a way which is inconsistent with this established line of authority.

Interpretation — could plaintiffs still recover in full where a concurrent wrongdoer has no legal liability?

Rather than interpreting the legislation as creating a new cause of action, it seems more likely that in cases where a concurrent wrongdoer has no legal liability to the plaintiff, the outcome will turn on how the courts interpret the words 'responsibility' and 'just' in s 35(1) of the NSW legislation and the corresponding provisions in the Commonwealth legislation. Section 35(1)(a) of the *Civil Liability Act* reads:

> 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 damage or loss claimed that the court considers *just* having regard to the extent of the defendant's *responsibility* for the damage or loss. [Emphasis added.]

If 'responsibility' includes some concept of legal liability, then the plaintiff would not under-recover in these circumstances, as the 'responsibility' of a concurrent wrongdoer with no legal liability may be nil, allowing the plaintiff to recover in full from the other concurrent wrongdoers. Thus, no new cause of action would be needed.

Alternatively, the courts may take the view that as the legislature contemplated that plaintiffs might under-recover (so as to reduce insurance premiums), there is no reason to interpret the legislation in a way that ensures the plaintiff recovers its loss in full. The courts' interpretation of the word 'just' will also be relevant here.

Settlement issues

A number of questions of interpretation also arise in relation to the provisions which affect the resolution of claims. In this section we identify some of these issues. At this stage, as it is unclear how the courts will interpret the legislation, parties should be mindful of these uncertainties when they settle claims to which the proportionate liability legislation applies.

Specific issues for plaintiffs when settling with some but not all defendants

If proportionate liability applies, there is a risk that a plaintiff may not be able to recover 100 per cent of its loss if it settles with some but not all of the defendants.

It appears that, except in Victoria, the court could still take into account the conduct of the defendant(s) with whom the plaintiff has settled when apportioning liability to the remaining defendants. This is because in all states except Victoria, the court *may* (or, in Tasmania and WA, *must*) have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.

The same risk would not arise in Victoria, where the court must not have regard to a concurrent wrongdoer who is not a party to the proceedings, unless they are dead or have been wound up.

It would be prudent for plaintiffs, if they are minded to settle with some but not all of the defendants, to seek to include a clause in any settlement agreement which, to the extent possible, prohibits the defendant with whom they have settled from assisting the other defendants against the plaintiff.

Protecting defendants from claims for contribution

Defendants to claims to which proportionate liability applies should be mindful of ss 36 and 38(2) of the *Civil Liability Act* and their equivalents in the other proportionate liability regimes.

Section 36 (Contribution not recoverable from defendant) provides that:

A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim:

(a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in

which judgment is given against the defendant), and

(b) cannot be required to indemnify any such wrongdoer.

Section 38(2) (Joining non-party concurrent wrongdoer in the action) provides that:

> The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

These provisions raise the following questions which are yet to be resolved by the courts.

- Would a consent judgment as part of a settlement be a judgment 'given under this Part' within the meaning of s 36, so as to protect the defendant from contribution claims?
- If so, is it necessary to structure settlements using consent judgments against defendants? Would discontinuances, dismissals or consent judgments *in favour* of a defendant activate this protection of the defendant against claims for contribution or indemnity?
- If the remaining defendant has had or may have their liability limited on the basis of the relative responsibility of the defendant(s) with whom the plaintiff settled, would the remaining defendant have any basis upon which to seek contribution or indemnity from the defendant with whom the plaintiff had settled, regardless of how that settlement was structured?
- Are there 'concluded proceedings' within the meaning of s 38(2) where the plaintiff has settled with some but not all of the defendants, or do the proceedings need to be concluded as between all parties?
- Do these sections prevent a 'concurrent wrongdoer', who is also a defendant to a separate but non-apportionable claim in relation to the same loss, from seeking contribution from the defendant to the apportionable claim? Note, in particular, that s 36 only protects a defendant from having to contribute to another wrongdoer 'in respect of the apportionable claim'.

In the absence of judicial guidance, both plaintiffs and defendants will need to give careful consideration to whether and how to settle proceedings involving apportionable claims with several concurrent wrongdoers.

Conclusion

These are just some of several uncertainties in the application of the proportionate liability legislation which require judicial guidance.

In our view, it seems unlikely that the legislature intended to create a new cause of action in the proportionate liability provisions. To do so would undermine long-established principles which limit liability for pure economic loss in circumstances where there is no express cause of action in the legislation. Rather, it would seem likely that the issues surrounding the possibility that plaintiffs may under-recover in some circumstances will be resolved by the courts interpreting the legislation in the context of its purpose — namely, to reduce the liability of defendants, where appropriate, so as to reduce insurance premiums.

In addition, both plaintiffs and defendants should think carefully before settling an apportionable claim, particularly when the settlement will be between only some but not all of the parties to the dispute. Plaintiffs, for example, need to ensure that they do not place themselves at risk of under-recovering by settling with some, but not all, concurrent wrongdoers. Defendants, on the other hand, need to ensure that they are protected from any later claims for contribution by another defendant. ●

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Endnotes

1. Debus R 'Tort law reform in New South Wales: state and federal interactions' (2002) 25(3) *UNSW Law Journal* 825.

2. As suggested by Wright J and Casey B in 'Proportionate liability: what is it all about?' (2005) 14(4) *The Australian Corporate Lawyer* 10.

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School bullying revisited

COX v NEW SOUTH WALES
[2007] NSWSC 471; BC200703487

In what appears to be a first for Australia, the NSW Supreme Court has found a school liable for a student's psychological condition caused by bullying from another student.

The plaintiff, Benjamin Cox, was six and seven years old when he was bullied by another child at a public school in NSW. The bullying was reported to staff, who said they would 'keep an eye' on him, but the harassment continued until Cox left the school. He received some psychological assessment and treatment at the time. Cox suffered from anxiety symptoms through his later childhood and teenage years, and was eventually diagnosed with depression and anxiety disorder, separation anxiety disorder and post-traumatic stress disorder. These conditions were said to be unlikely to resolve and resulted in him receiving a disability pension. That the school owed Cox a duty of care was uncontroversial, and the trial judge, Justice Simpson, defined the duty in accordance with the accepted principles enunciated by the High Court in *Geyer v Downs* (1977) 138 CLR 91 as follows:

> The duty of care owed by [the teacher] required only that he take such measures as in all the circumstances were reasonable to prevent physical injury to [the pupil]. This duty not being one to ensure against injury, but to take reasonable care to prevent it, required no more than the taking of reasonable steps to protect the plaintiff against risks of injury which ex-hypothesi [the teacher] should reasonably have foreseen.

Of course, the fact that the case involved one student bullying another presented the school with a 'difficult task', as it owed a duty not only to Cox, but also to the other student involved. The crucial factor in Justice Simpson's opinion, however, was the fact that 'the defendant made no attempt to explain the conduct of the school authorities or to show that they acted reasonably in all of the circumstances'. As a result, the school authority's response to the bullying was found to be inadequate, and the authority was in breach of its duty. Much of the judgment was concerned with the issue of causation. While there was no doubt that the bullying had caused some 'trauma' or 'anxiety', the authority argued that Cox would have recovered from it, were it not for his family history and his 'over-enmeshed' relationship with his mother.

The evidence suggested that Cox's mother (and, indeed, other relatives) suffered from depression, and that she had inadvertently perpetuated Cox's anxiety symptoms. Justice Simpson found that while Cox's relationship with his mother was certainly a factor in his current conditions, the bullying was also a cause of his problems. As the legal test for causation was encapsulated in s 5D of the *Civil Liability Act 2002* (NSW), Cox had to establish that the negligence was 'necessary' to the 'particular harm' he suffered. On that point, Justice Simpson found that the 'particular harm' was the diagnosed conditions of separation anxiety disorder, post-traumatic stress disorder and depression. As the evidence established that, even during a period of partial respite, Cox nevertheless continued to manifest symptoms of anxiety related to the bullying, the authority's negligence was a 'necessary' condition of that harm. It was not essential, for the purposes of s 5D, that Cox prove that the negligence was the sole cause of the 'particular harm'.

As a result, Cox succeeded in his claim, and damages to be assessed were awarded. ●

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LEGISLATION update

Civil Liability Act 2002 (NSW)

Crimes and Courts Legislation Amendment Act 2006 No 107 (NSW)

No change from last issue; commencement details unchanged.

Mental Health Act 2007 (NSW)

Will make a very minor amendment.

Assent Gazettal reference: GG 81 22 June 2007 p 3804.

Civil Liability Act 1936 (SA)

Equal Opportunity (Miscellaneous Amendments) Bill 2006 (SA)

The amending Bill would provide that an action for damages for racial victimisation brought under the principal Act precludes the making of a complaint under the *Equal Opportunity Act 1984 No 95* (SA).

Passed Second Reading, House of Assembly, 21 February 2007; no change since then.

Civil Liability Act 2002 (Tas)

Victims of Crime Assistance Amendment Bill 2007 (Tas)

Specifically, the Bill proposes to make minor and consequential amendments to s 3B (Civil liability excluded from Act).

First Reading, Legislative Council, 5 July 2007; no action since then.

Civil Liability Act 2002 (WA)

Chiropractors Act 2005 No 31 (WA)

Will make very minor amendments.

Occupational Therapists Act 2005 No 42 (WA)

Will make very minor amendments.

Acts Amendment (Consent to Medical Treatment) Bill 2006 (WA)

The Bill would clarify the definition of 'Health Professional' under s 5PA of the principal Act.

Second Reading, Legislative Council, 6 December 2006; no change since then. Referred to standing comittee on legislation 5 September 2007

Statutes (Repeals and Minor Amendments) Bill 2006 (WA)

The Bill would repeal a variety of legislation, and make numerous minor and consequential amendments.

Second Reading, Legislative Assembly, 18 October 2006; no change since then.

Pharmacists Bill 2006 (WA)

Second Reading, 3 May 2007; no change since then.

Medical Practitioners Bill 2006 (WA)

Passed Second Reading, 28 March 2007; no change since then.

Civil Law (Wrongs) Act 2002 (ACT)

Justice and Community Safety Legislation Amendment Bill 2007 (ACT)

According to the Explanatory Statement, the Bill proposes to:

(a) insert new s 16 (3A), to provide that damages for pain or suffering, for any bodily or mental harm or for curtailment of expectation of life can be awarded to the estate of a person who has died from an asbestos-related disease, only if the person had initiated a claim for damages, but died before an award was made;

(b) insert a new definition of 'asbestos-related disease' into s 16(7);

(c) amend s 84 to allow an expert who has provided a health service for a claimant in relation to the claim to also give expert medical evidence in the proceeding;

(d) amend s 97(3) to provide 'that the presumption of contributory negligence where the injured person was not wearing a seatbelt at the time of the accident can be rebutted if it can be established that the injured person was incapable of fastening the seatbelt without assistance'; and

(e) amend Sch 4, 'to provide for the setting up of schemes that limit the liability of members of associations of practitioners of particular trades or professions'.

Passed Legislative Assembly, 21 August 2007; awaiting amendments.

Wrongs Act 1958 (Vic)

No change.

Proportionate Liability Act 2005 (NT)

No change.

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