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Articles

Misleading conduct by multiple parties and proportionate liability

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The application and interpretation of proportionate liability rules continues to create uncertainty. Those rules have been introduced in all Australian states and territories, as well as under Commonwealth jurisdiction. This article focuses on one specific issue that has troubled courts. How does proportionate liability apply where a plaintiff brings an action for loss caused by misleading conduct engaged in by multiple defendants? Not uncommonly, multiple parties might be responsible for, or participate in, misleading conduct that contravenes s 18 of the ACL (or equivalent sections) in a variety of ways. This article considers the difficult legal questions that arise in such scenarios, a number of which questions remain unresolved. The answers to those questions may depend on the jurisdiction in which those questions arise, since there are critical differences in law between the different jurisdictions. This article concludes that where defendants are jointly liable for the same conduct, other than vicariously so, proportionate liability applies, at least in most jurisdictions, and despite some decisions to the contrary.

Introduction

The proportionate liability rules introduced in all Australian states and territories, as well as under Commonwealth jurisdiction, have been widely criticised from their inception.[1] Proportionate liability potentially applies where a plaintiff has suffered economic loss or property damage that results either from (1) misleading or deceptive conduct that contravenes s 18 of the *Australian Consumer Law* (‘*ACL*’) or equivalent provisions (under Commonwealth and State and Territory legislation) or (2) from ‘a failure to take reasonable care’.[2] If proportionate liability applies, it displaces the joint

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1 See nn 3–5 below. For a more general criticism of the supposed ethical and pragmatic arguments in favour of proportionate liability, see Kit Barker and Jenny Steele, ‘Drifting Towards Proportionate Liability: Ethics and Pragmatics’ (2015) 71 *Cambridge Law Journal* 49.

2 State and Territory: *Civil Law (Wrongs) Act 2002* (ACT) s 107B; *Civil Liability Act 2002* (NSW) pt 4; *Proportionate Liability Act 2005* (NT) s 4; *Civil Liability Act 2003* (Qld) s 28; *Law Reform (Contributory Negligence and Apportionment of Liability Act 2001* (SA) s 3; *Civil Liability Act 2002* (Tas) s 43A; *Wrongs Act 1958* (Vic) s 24AF; *Civil Liability Act 2002* (WA) s 5AI. The Queensland legislation uses the phrase ‘arising from a breach of a duty of care’, but that phrase is defined as a duty to take reasonable care or exercise reasonable skill (sch 2) and hence there is probably no substantive difference. Under the civil liability statutes (as they will be generically described), proportionate liability applies to claims for

and several liabilities of defendants for all of the plaintiff's losses caused by their wrong and instead makes defendants liable only for their apportioned share of the loss.

Many commentators predicted the potential problems that were likely to arise from the complex and difficult drafting of the proportionate liability provisions, the lack of uniformity in drafting between the various jurisdictions, and the potential for 'erratic' results,[3] among other things.[4] These predictions have proved to be largely prescient, even if *some* of the potential problems identified by commentators[5] and problems flowing from early decisions are being resolved. For example, one fear — that losses arising from breaches of strict contractual duties[6] or trust could be subject to apportionment if a defendant could show that failure to take care was the underlying cause — has now been laid to rest.[7] Another concern raised by commentators, that proportionate liability might impact negatively on plaintiffs, is now less likely to eventuate because of the capacity for plaintiffs to frame their claims tactically in order to avoid apportionment (on which more below).[8] This article does not intend to revisit all of the concerns raised by others.[9] Rather, it highlights one key problem that arises in the context of misleading conduct.

The question addressed is this. How does proportionate liability apply where a plaintiff brings an action for loss caused by misleading conduct engaged in by *multiple* defendants? Not uncommonly, multiple parties might be responsible for, or participate in, misleading conduct in the context of negotiations and transactions in a variety of ways, thereby contravening s 18

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losses resulting from misleading conduct contravening s 18 of the *Australian Consumer Law* ('*ACL*') where state or territory jurisdiction is engaged. Proportionate liability also applies to losses resulting from misleading conduct that contravenes s 18 and other legislation where Commonwealth jurisdiction applies. See pt VIA of the *Competition and Consumer Act 2010* (Cth) ('*Consumer Act*') (*ACL* s 18 contraventions); pt 7.10 div 2A of the *Corporations Act 2001* (Cth) (misleading conduct contravening s 1041H); and pt 2 div 2 sub-div GA of the *Australian Securities and Investment Commission Act 2001* (Cth) ('*ASIC Act*') (misleading conduct in trade or commerce for financial services contravening s 12DA).

3 Barbara McDonald, 'Proportionate Liability in Australia: The devil in the detail' (2005) 26 *Australian Bar Review* 29, 49.

4 See, eg, James Watson, 'From contribution to apportioned contribution to proportionate liability' (2004) 78 *Australian Law Journal* 126; Wayne Courtney, 'Problems with the New Regime of Proportionate Liability for Misleading or Deceptive Conduct' (2005) 32 *University of Western Australia Law Review* 164. As to whether proportionate liability could apply to equitable claims, see Vicki Jeannette Vann, 'Equity and proportionate liability' (2007) 1 *Journal of Equity* 199, suggesting a number of circumstances in which equitable liability might be caught by the legislation, though since that article, it does not appear that there have been any successful attempts to circumvent joint and several liability. See, eg, *George v Webb* [2011] NSWSC 1608 (20 December 2011).

5 See, eg, Barbara McDonald and John Carter, 'The Lottery of Contractual Risk Allocation and Proportionate Liability' (2009) 26 *Journal of Contract Law* 1.

6 See ibid.

7 See, eg, *George v Webb* [2011] NSWSC 1608 (20 December 2011) (payment out of funds in breach of trust not apportionable claim: see [306]–[325]).

8 The High Court gave its stamp of approval to such strategies in *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 ('*Selig*').

9 See also Sandip Mukerjea, 'Proportionate liability for economic loss: The story so far' (2008) 19 *Insurance Law Journal* 279, for discussion of some of the other matters where interpretation issues are being clarified.

of the *ACL* (or equivalent sections). Several parties, perhaps acting in different capacities, may have all made the *same* misrepresentations; or they may have made *different* misrepresentations on which the plaintiff relied; or they may be vicariously liable or otherwise responsible for the misleading conduct of another; or they may be accessories to it. This article considers the difficult legal questions that arise in such scenarios, a number of which legal questions remain unresolved and will continue to trouble the courts in many cases. The answers to those questions may depend on the jurisdiction in which those questions arise, since there are critical differences in law between jurisdictions.

I will set the scene for the discussion by considering a number of fact scenarios and how the proportionate liability provisions are being applied to them, including outstanding issues that the law needs to resolve. In each of these scenarios, the plaintiff, P, relies on the misrepresentation(s) made by the defendant, D, and suffers loss as a result. P sues D, for misleading conduct in trade or commerce, and D pleads that a concurrent wrongdoer also caused P's loss, such that D is only proportionately responsible for part of the loss.[10] For convenience, I use the term misrepresentation as a shorthand for misleading conduct.

Scenario 1 Vicarious liability

A defendant, D, is vicariously liable for a misrepresentation made by its employee or agent, E. There is therefore only one act for which D and E are jointly responsible. Are D and E 'concurrent wrongdoers'? If so, is D precluded from raising proportionate liability because of specific sections in the legislative regimes?

Scenario 2 Joint wrongdoers for same act

D makes a misrepresentation and an accessory, A, is involved in the making of that misrepresentation and is therefore jointly liable for the same contravention as D. The same issue arises where D and D2 engage in joint conduct (for example, authorising an advertisement) that is misleading. Can D raise the proportionate liability provisions where there is only one act for which D, and either A or D2, are jointly liable?

Scenario 3 Independent wrongdoers for distinct acts

D makes a misrepresentation; D2 makes a distinct, different misrepresentation. P relies on both misrepresentations to enter into a loss-making transaction. Can D plead that D2 is a concurrent wrongdoer so that proportionate liability applies?[11] The answer to this question would appear to be clearly, yes, but the answer may be to the contrary in Queensland.[12]

Before turning to the legal questions that these scenarios raise, however, it

10 It is assumed that P is not a 'consumer' for the purposes of these scenarios. If she were, then a defendant would not be successful in seeking proportionate liability in Queensland and ACT jurisdiction.

11 Would it make a difference if D2 is also an agent or employee of D, for whose wrongs D is vicariously liable?

12 See s 32F of the *Civil Liability Act 2003* (Qld), discussed below.

is necessary to outline the legislative regimes and define certain key concepts.

Brief overview of proportionate liability

Where statutory proportionate liability applies, liability is apportioned to each 'concurrent wrongdoer' according to the extent of their responsibility for the harm. Each wrongdoer is then responsible to that extent and no more.[13] Consequently, it is necessary for a plaintiff to sue all of the wrongdoers in order to recover the full loss. The broad purpose and impact of proportionate liability is explained by the High Court in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*[14] by reference to the NSW provisions:

> Part 4 of the *Civil Liability Act* represents a departure from the regime of liability for negligence at common law (solidary liability), where liability may be joint or several but each wrongdoer can be treated as the effective cause and therefore bear the whole loss. Under that regime, a plaintiff can sue and recover his or her loss from one wrongdoer, leaving that wrongdoer to seek contribution from other wrongdoers. The risk that any of the other wrongdoers will be insolvent or otherwise unable to meet a claim for contribution lies with the defendant sued. By comparison, under a regime of proportionate liability, liability is apportioned to each wrongdoer according to the Court's assessment of the extent of their responsibility. It is therefore necessary that the plaintiff sue all of the wrongdoers in order to recover the total loss and, of course, the risk that one of them may be insolvent shifts to the plaintiff.[15]

As the High Court observed in *Selig v Wealthsure Pty Ltd*,[16] '[t]here is an obvious benefit to wrongdoers from this kind of proportionate liability regime.' How this 'obvious benefit' came about,[17] and whether the purported rationales for proportionate liability are, indeed, fair and justifiable,[18] is not the concern of this article. Rather, this article is concerned with the operation of the regime and what defendants must prove in order to obtain the benefit of them.

A defendant who seeks to reduce his or her liability by resort to proportionate liability must establish two key requirements: (1) that the claim

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13 The relevant provisions are as follows: *Competition and Consumer Act 2010* (Cth) pt VIA and equivalents in the *Corporation Act* and *ASIC Act*; *Civil Law (Wrongs) Act 2002* (ACT) ch 7A; *Civil Liability Act 2002* (NSW) pt 4; *Proportionate Liability Act 2005* (NT); *Civil Liability Act 2003* (Qld) ch 2 pt 2; *Law Reform (Contributory Negligence and Apportionment of Liability Act 2001* (SA); *Civil Liability Act 2002* (Tas) pt 9A; *Wrongs Act 1958* (Vic) pt IVAA; *Civil Liability Act 2002* (WA) pt 1F.

14 (2013) 247 CLR 613 ('*Hunt & Hunt*').

15 Ibid 624 [10] (French CJ, Hayne and Kiefel JJ) footnote omitted.

16 (2015) 255 CLR 661, 671–2 [21] (French CJ, Kiefel, Bell and Keane JJ; Gageler J concurring).

17 It suffices to say that the *Davis Report* was one clear impetus for the changes. See the report by Professor Jim Davis: Commonwealth, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two* (1995) ('*Davis Report*'). As the High Court noted, despite the 7-year gap between that report and the NSW *Civil Liability Act 2002* proportionate liability provisions, 'there is a clear connection between' the two, since the NSW Act reflected draft model provisions themselves reflecting the *Davis Report*, and prepared by the Standing Committee of Attorneys-General in 1996. See *Hunt & Hunt* (2013) 247 CLR 656, 626 [15].

18 I do, however, share the doubts expressed by Barker and Steele, above n 1.

for which the defendant is liable is an 'apportionable claim'[19] and, (2) that there are one or more 'concurrent wrongdoers' whose conduct caused the 'loss or damage' that is the subject of the plaintiff's claim.

'Apportionable claim'

Under Commonwealth jurisdiction, an 'apportionable claim' is defined in s 87CB of the *Competition and Consumer Act 2010* (Cth) ('*Consumer Act*') as follows:

> (1) This Part applies to a claim (an ***apportionable claim***) if the claim is a claim for damages made under section 236 of the Australian Consumer Law for:
>
> (a) economic loss; or
>
> (b) damage to property;
>
> caused by conduct that was done in a contravention of section 18 of the Australian Consumer Law.

Under state and territory civil liability statutes, claims for damages under the relevant state acts that give effect to the *ACL*,[20] for contravention of s 18 of the *ACL*, are also included within the definition of 'apportionable claim'. However, a wider range of claims are caught by these provisions, since they extend to any claims for economic loss or property damage that arises from 'a failure to take reasonable care'.[21] It should be noted that in Queensland and the ACT, claims for contravention of *ACL* s 18 are not apportionable if the plaintiff comes within the definition of a 'consumer'.[22] As a consequence of this, if a defendant engages in misleading conduct towards a consumer in those jurisdictions, and the plaintiff's claim can only be brought under the respective Fair Trading Acts, then the defendant would not be able to rely on apportionment, whereas if Commonwealth jurisdiction applies under the *Consumer Act*, then a defendant could reduce its liability.

Importantly, apportionable claims are limited (claims in negligence aside) to contraventions of s 18 of the *ACL* and identical provisions in other acts. This places a significant limitation on the availability of apportionment to defendants. This is because claims brought under more specific prohibitions in the *ACL* (and equivalent legislative protections) are not apportionable. This includes claims made under s 29 (specific false or misleading misrepresentations in connection with the supply or possible supply of goods or services) or s 30 (specific false or misleading misrepresentations in connection with the sale of land).[23] The legislation requires that

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19 Although the legislation uses the term 'claim', it is clear that a claim must be one that gives rise to legal liability against the respective parties against whom claims may be made.

20 See *Fair Trading (Australian Consumer Law) Act 1992* (ACT); *Fair Trading Act 1987* (NSW); *Consumer Affairs and Fair Trading Act* (NT); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1987* (SA); *Australian Consumer Law (Tasmania) Act 2010* (Tas); *Australian Consumer Law and Fair Trading Act 2012* (Vic); *Fair Trading Act 2010* (WA).

21 See *Civil Law (Wrongs) Act 2002* (ACT) s 107B; *Civil Liability Act 2002* (NSW) pt 4; *Proportionate Liability Act 2005* (NT) s 4; *Civil Liability Act 2003* (Qld) s 28; *Law Reform (Contributory Negligence and Apportionment of Liability Act 2001* (SA) s 3; *Civil Liability Act 2002* (Tas) s 43A; *Wrongs Act 1958* (Vic) s 24AF; *Civil Liability Act 2002* (WA) s 5AI.

22 *Civil Law (Wrongs) Act 2002* (ACT) s 107B; *Civil Liability Act 2003* (Qld) s 28.

23 See obiter comments of Emmett JA (Bathurst CJ and McColl JA concurring) in *Williams v Pisano* (2015) 90 NSWLR 342, 353–5 [55]–[64] ('*Williams*').

non-apportionable claims are dealt with by reference to general law principles.[24] In other words, the defendant will be jointly and severally liable for the full extent of a plaintiff's losses arising from the non-apportionable claim. That positon was affirmed by the High Court in *Selig*,[25] clarifying the position after some inconsistent lower court decisions.[26]

In *Selig*, the plaintiffs made generic misleading conduct claims under the equivalents to s 18 of the *ACL* found in the *Corporations Act* and *ASIC Act*.[27] Alongside those claims, the plaintiffs also pleaded a number of more specific infringements of those acts.[28] The loss that was suffered as a result of all of the various breaches was the same.[29] The Full Court of the Federal Court held that all the claims were one apportionable claim.[30] Section 1041L(2) of the *Corporations Act*, equating with 87CB(2) of the *Consumer Act*, states that:

> (2) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

According to the Federal Court, the consequence of this subsection was that there was a single apportionable claim, since one of the causes of action was a generic misleading conduct claim (defined as apportionable under sub-s (1)). The High Court rejected this interpretation of sub-s (2), it being inconsistent with the clear wording of s 1041L sub-s (1) of the *Corporations Act*. Like s 87CB(1) of the *Consumer Act* quoted above, that subsection confines an

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24 See s 87CD(2) *Consumer Act* (the High Court considering the equivalent, s 1041N(2) of the *Corporations Act*) which states:

> If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:
>
> (a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part; and
>
> (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.

25 *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 261.

26 See, eg, *Wealthsure Pty Ltd v Selig* (2014) 221 FCR 1 (Mansfield and Besanko JJ; White J dissenting), overturned on appeal by the High Court, and the different conclusion reached by a unanimous Full Federal Court in *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1 (prior to but consistently with the High Court's appeal decision). For commentary on the position prior to *Selig*, see Richard Douglas, Gerard Mullins and Simon Grant, *Annotated Civil Liability Legislation — Queensland* (LexisNexis Butterworths, 3rd ed, 2012) [28.19]–[28.21].

27 Namely *Corporations Act* s 1041H and *ASIC Act* s 12DA.

28 The plaintiffs' claims, alongside their misleading conduct claims, included contraventions of the *Corporations Act 2001* provisions requiring a provider of financial advice to have a reasonable basis for the advice provided; breaches of statutory warranties that services will be rendered with due care and skill, contrary to s 12ED of the *ASIC Act*; false representations regarding the standard of financial services (contrary to s 12DB of the *ASIC Act*) and concerning financial products (contrary to s 1041E of the *Corporations Act*). See *Wealthsure Pty Ltd v Selig* (2014) 221 FCR 1, 27 [125].

29 *Selig* (2015) 255 CLR 661, 672 [22].

30 Proportionate liability provisions of the *Corporations Act 2001* (Cth) are found in pt 7.10 div 2 of the Act.

'apportionable claim' to economic loss and property damage 'caused by conduct that was done in contravention of' s 1041H of the *Corporations Act* (s 18 of the *ACL*).[31]

As a result of *Selig*, there is therefore a considerable tactical advantage for a party who has relied on misleading conduct in pleading more specific contraventions of the *ACL* (or indeed to plead another claim altogether), even if alongside s 18. Those more specific claims, if made out, will not be apportioned.[32]

'Concurrent wrongdoer'

The second important requirement for the application of proportionate liability is the need to establish that one or more concurrent wrongdoers exist. Here we find a critical difference in the definition that is adopted in the various jurisdictions. In all jurisdictions, *other* than Queensland and South Australia, the definition is as follows:

> a ***concurrent wrongdoer***, in relation to a claim, is a person who is one of 2 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.[33]

Critically, in Queensland and South Australia, the words 'or jointly' are missing from this definition.[34] That difference is likely to have a significant impact on claims brought against multiple parties to misrepresentations in the course of negotiations. The interpretation of this section, and its variation in Queensland and South Australia, is discussed further below.

A number of other issues need to be noted first, however. One limitation on proportionate liability is that if a concurrent wrongdoer intended to cause, or

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31 In support of that conclusion, the High Court noted that the specific contraventions of the *Corporations Act* and *ASIC Act* that the plaintiffs also relied on constituted offences and involved a higher level of moral culpability than mere ordinary misleading conduct. See (2015) 255 CLR 661, 675 [36]. (A similar point was made by Emmett JA in *Williams* (2015) 90 NSWLR 342, 354–5 [62]–[63] with reference to a claim for contravention of s 30, versus s 18, of the *ACL*.) Gageler J reached the same conclusion for similar reasons. Gageler J stressed that the effect of s 1041L(1), (4) is that only claims specified in sub-s (1) can be aggregated into a single apportionable claim under s 1041(2); claim 'cannot be read as referring simply to the economic loss or property damage for which a claimant seeks to recover [55]'. Consequently,

> [a]ny assertion made by the same claimant that liability for the same economic loss or property damage has arisen by reason of the same conduct breaching some other statutory norm, ... does not form part of the same 'claim' even if it is made in the same proceeding: at [57].

32 Tactical pleading can also be used to avoid other undesirable consequences, as is demonstrated by *Perpetual Trustee Co Ltd v Milanex Pty Ltd (in liq)* [2011] NSWCA 367 (28 November 2011) in which the NSW Court of Appeal held that a contributory negligence defence did not apply where the plaintiff sued under state misleading conduct legislation that at the time did not include such a defence, despite Commonwealth legislation including such a defence.

33 See s 87CB(3) of the *Consumer Act*; and similarly, see *Civil Law (Wrongs) Act 2002* (ACT) s 107D; *Civil Liability Act 2002* (NSW) s 34; *Proportionate Liability Act 2005* (NT) s 6; *Civil Liability Act 2002* (Tas) s 43A; *Wrongs Act 1958* (Vic) s 24AH; *Civil Liability Act 2002* (WA) s 5AI.

34 See *Civil Liability Act 2003* (Qld) s 30; *Law Reform (Contributory Negligence and Apportionment of Liability Act 2001* (SA) s 3.

fraudulently caused, the loss, that wrongdoer is fully liable for it.[35] This would include a defendant who is sued in negligence or for misleading conduct, but against whom the plaintiff can establish such intention or fraud. There is some uncertainty as to what is meant by 'intention' and 'fraud' — for example, does the latter include equitable fraud[36] — but these difficulties are not the concern of this article.

Another difficulty that has troubled courts is how broadly or narrowly damage (or loss) and causation of that loss, are to be interpreted. For example, is the loss caused by fraudsters in forging documents to obtain money, the same loss as is caused by solicitors who fail to ensure adequate security for a loan? That issue has now been resolved, at least in part, by the High Court. In *Hunt & Hunt*,[37] the High Court by a bare majority (French CJ, Hayne and Kiefel JJ) took a broad approach to characterising damage and causation of damage. In brief, the case concerned a loss to a plaintiff lender caused by the negligence of the defendant solicitors who had failed to adequately safeguard a security transaction. The majority held that that loss was the same loss as that which was caused by fraudsters (and therefore the concurrent wrongdoers) who had induced the lender to advance the moneys on forged loan documents. That loss was the inability to recover money that the plaintiff had paid out. The majority held that the fraudsters' actions did not have to contribute to the negligent breach of duty by the solicitors. Instead, the relevant issue was whether the actions of each concurrent wrongdoer 'separately, materially contributed to the loss or damage suffered'.[38] The case is a difficult one, and there are good arguments in favour of both the majority and minority views,[39] but the issue is not of relevance to the focus of this article and will not be further discussed.

Having set the context, it is now appropriate to focus on the central question addressed in this article. How does proportionate liability apply, and in which circumstances, where a number of parties are responsible for misleading conduct? That question in turn is answered in part by reference to the meaning

35 *Competition and Consumer Act 2010* (Cth) s 87CC; *Civil Law (Wrongs) Act 2002* (ACT) s 107E; *Civil Liability Act 2002* (NSW) s 34A; *Proportionate Liability Act 2005* (NT) s 7; *Civil Liability Act 2003* (Qld) ss 32D, 32F; *Law Reform (Contributory Negligence and Apportionment of Liability Act 2001* (SA) s 4; *Civil Liability Act 2002* (Tas) s 43A; *Wrongs Act 1958* (Vic) s 24AM; *Civil Liability Act 2002* (WA) s 5AJA.

36 See Vann, above n 4.

37 *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, 626 [15].

38 Ibid 636–7 [53].

39 Bell and Gageler JJ in dissent reasoned that characterising the loss in broad terms, as an inability to recover money paid out — which loss, according to the majority, was caused by both the fraudsters' fraud and the solicitors' negligence — was to undermine the duty of the solicitors to protect the lenders against risks. The solicitors' negligence caused the lender to lack security, and nothing that the fraudsters did caused that lack of security: ibid 652 [100]. Hence, the fraudsters were not concurrent wrongdoers: ibid 652 [101]. More generally, the dissent noted that the majority approach went beyond that which the *Davis Report*, above n 17, explained as the intended purpose of the reforms, namely to transfer the risk of another wrongdoer's impecuniousness or insolvency. They state 'It would be transferring to A [the plaintiff] some or all of the very risk against which it was the duty of B [the solicitors] to protect A. It would be altering rights and duties to an extent not necessary to achieve the identified statutory purpose. It would be doing so in a manner not compelled by the statutory language': at [95].

of concurrent wrongdoer and whether that concept includes joint wrongdoers.[40] In particular, one critical question on which the courts have reached contradictory conclusions is whether defendants who are jointly responsible for a single act are concurrent wrongdoers. Scenarios 1 and 2 directly raise this issue. In addressing this issue, and others, it is necessary to consider the reasoning in a number of the key cases.

The first case is *Tomasetti v Brailey* from New South Wales.[41] The case concerned the liability of an agent who, on behalf of a company, engaged in misleading conduct in contravention of s 42 of the *Fair Trading Act 1987* (NSW). The NSW Court of Appeal accepted that the company was jointly liable with the agent, irrespective of whether the basis of the company's liability was vicarious, or direct by also treating the agent's conduct as that of the company itself.[42] Nonetheless, the Court went on to state, with almost no analysis, that both parties were liable for 100 per cent of the loss and could not avail themselves of the proportionate liability defence. The Court stated that the parties 'were each fully responsible for the losses and it is just that each be liable for 100 per cent of the losses'.[43] Interestingly, no reliance seems to have been placed on s 39 of the *Fair Trading Act*, which deals with vicariously liable parties (and is discussed below).[44]

Tomasetti was followed in a Queensland decision, *Hadgelias Holdings Pty Ltd v Seirlis*,[45] and similar reasoning was adopted. The Court applied the proportionate liability provisions under the *Trade Practices Act 1974* (Cth) ('*TPA*') ss 87CB, 87CD, but these are in the same terms as the current ss 87CB, 87CD of the *Consumer Act*. The relationships of the various multiple defendants were complex. Hadgelias Holdings Pty Ltd, and an independent contractor engaged by them, Mr Waight, acted as agents to sell an apartment for five vendors of property. One of the vendors was a company. The agents made misleading representations on behalf of the vendors. Those representations were deemed by statute to be those of the vendors.[46] Mr Waight also made a further, distinct misrepresentation which he was not authorised to make, and which was therefore not conduct for which the vendors (or his employer) were responsible.[47] Were the various defendants concurrent wrongdoers? It is worthwhile setting out the relevant definition again from *Consumer Act* s 87CB(3):

> a ***concurrent wrongdoer***, in relation to a claim, is a person who is one of 2 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.

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40 The application of other specific provisions is also relevant.
41 (2012) 274 FLR 248 ('*Tomasetti*').
42 Ibid [152].
43 Ibid [154].
44 A passing and cryptic reference was made to that section: ibid [156].
45 [2015] 1 Qd R 337 ('*Hadgelias*'). *Tomasetti* was also followed in *Hobbs Haulage Pty Ltd v Zupps Southside Pty Ltd* [2013] QSC 319 (18 November 2013) ('*Hobbs*'), discussed below.
46 *Hadgelias* [2015] 1 Qd R 337, 338 [1] (Holmes JA; Gotterson and Morrison JJA agreeing). This was pursuant to s 84 of the *TPA*; see *Seirlis v Bengston* [2013] QSC 240 (11 September 2013) [94]–[103], [117].
47 *Hadgelias* [2015] 1 Qd R 337, 341 [12], 342 [17].

The Court of Appeal held that the definition of concurrent wrongdoers did not extend to situations where the relevant parties were all responsible for a single act and therefore Hadgelias, Waight and the vendors could not take advantage of proportionate liability in relation to the misleading conduct.[48] On a first reading, this conclusion might appear counterintuitive, give the presence of the words 'or jointly' in the definition of a concurrent wrongdoer. In a very brief analysis, however, the Court interpreted the words 'or jointly' as qualifying the word 'caused', rather than describing the acts or omissions (or act or omission).[49] Consequently, Holmes JA concluded:

> I would construe the definition in s 87CB as concerned with distinct acts (or omissions) or sets of acts (or omissions) by different actors, combining or working independently to cause loss or damage, and consequently inapplicable where there is but a single act or set of acts causing loss, attributable to more than one person.[50]

This interpretation is problematic. If the word 'jointly' qualifies the word 'caused', then a distinction must be drawn between joint and independent causes of a loss, and that, surely, can only meaningfully be done by distinguishing between joint or independent conduct. It is difficult to see how joint wrongdoers' conduct might, conceivably, cause loss 'independently', since joint wrongdoers are those who are jointly responsible for a single act (or omission).[51]

In relation to Mr Waight, since his misleading conduct was a distinct act, he was a concurrent wrongdoer with the other parties, but was nonetheless unable to rely on apportionment and was separately responsible for the whole loss. This was because of a specific provision, s 32F of the *Civil Liability Act 2003* (Qld). This provision is unique to Queensland, and is considered further below.

It must be stressed, however, that although the Court's conclusion on the meaning of concurrent wrongdoer is challenged below, the outcome of the case is justifiable. The Court at no time considered the provisions in the *TPA* (now the *Consumer Act*) that exclude from proportionate liability a vicariously liable party. On that basis alone, the Court could have supported its decision with respect to some of the parties.[52]

Similar issues arose in the NSW Court of Appeal case of in *Williams v Pisano*.[53] In that case, two vendors sold their house to the plaintiffs. The vendors jointly made representations concerning the quality of renovation

48 Although the non-corporate vendors were not caught by the *TPA* directly, they were nonetheless liable as accessories to the agents' misleading conduct. See *Seirlis v Bengston* [2013] QSC 240 (11 September 2013) [94]–[103].

49 [2015] 1 Qd R 337, 343 [20].

50 Ibid 343 [21].

51 And two independent wrongdoers' acts can only, one would assume, 'independently' rather than 'jointly' cause a loss.

52 Admittedly, this basis would not excuse the vendors who were accessories to the agents' wrong. Nonetheless, there was a further basis for the decision that the Court did not, however, consider to be available. The Court stated that if the claim was an apportionable claim, the fact that the purchasers had also made out a specific contravention of *TPA* s 53A (now *ACL* s 30: misleading conduct relating to the sale of land) alongside *TPA* s 52 (*ACL* s 18), this did not prevent the claim being apportionable (see at [25]). That conclusion is now incorrect in light of *Selig* (2015) 255 CLR 661, discussed above.

53 (2015) 90 NSWLR 342.

work, which were repeated by their agent to the purchasers with the authority of both defendant vendors. Those representations were misleading conduct under both ss 18, 30 of the *ACL*. The plaintiffs sued the vendors,[54] but failed in the NSW Court of Appeal because the defendants' conduct was not in trade or commerce. Nonetheless, Emmett JA in obiter comments considered the argument raised by the defendant vendors that the claim against them was apportionable, and that each should therefore only be liable for a percentage of the total loss (should they have been held liable).[55] On that matter, the key question addressed by Emmett JA was:

> whether s 87CB(3) [of the *Consumer Act* defining 'concurrent wrongdoer'] applies to a situation where a single act that causes damage that is the subject of a claim under the *Consumer Act* is committed by two or more persons jointly.[56]

Since both defendant vendors had (jointly)[57] been responsible for the misleading conduct of the agent, could it be said that that single act had been carried out by 'concurrent wrongdoers'?

In Emmett JA's view, the definition of 'concurrent wrongdoer' was not free from difficulty, but taking the definition as a whole, the answer to the above question led to a contrary conclusion to that which was reached in *Tomasetti*[58] and *Hadgelias*.[59] In his Honour's view, the existence of the words 'acts or omissions (or act or omission)', as well as 'or jointly', appear to make it clear that *joint* wrongdoers are encompassed by the language of the section. In short, the singular 'act or omission' could apply equally to '2 or more persons' and not just to one person, that is, the *act* of two or more persons (jointly).[60]

Emmett JA concluded, correctly so in my view: 'There is no reason why [the] purpose [of the proportionate liability provisions] should not extend to wrongdoers who jointly commit a single act [or who all contribute to a single

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54 Even though the vendors' responsibility for the representations arose vicariously as a result of the acts of the agent (ibid 358 [78]), the plaintiffs did not further prosecute their proceedings against the agent, due to it being in liquidation. See also *Pisano v Dandris* (2014) 17 BPR 33,583.

55 It should also be noted that the vendors did not seek to limit their liability based on the responsibility of the agent, but only on the basis of their respective concurrent wrongdoing inter se. The trial judge had rejected the proportionate liability defence, and held the two vendors to be equally responsible for the misleading conduct and therefore 100 per cent of the loss suffered as a result. See *Pisano v Dandris* (2014) 17 BPR 33,583. In the NSW Court of Appeal, Bathurst CJ and McColl JA concurred in allowing the appeal that no liability arose and that, further, even if so liable, was not subject to proportionate liability because a separate claim under *ACL* s 30 would have been made out. However, their honours did not concur in the part of Emmett JA's judgment that considered the issue here under discussion, preferring to leave the question of the meaning of concurrent wrongdoer open. More recently, Buchanan J in *Ambergate Ltd v CMA Corporation Ltd* (2016) 110 ACSR 642, 686 [271] endorsed Emmett JA's approach.

56 *Williams* (2015) 90 NSWLR 342, 355 [67].

57 The responsibility of each for the representations arose vicariously from the acts of the agent: ibid 358, [78]).

58 *Tomasetti v Brailey* (2012) 274 FLR 248.

59 *Hadgelias Holdings Pty Ltd v Seirlis* [2015] 1 Qd R 337.

60 The word 'whose' in the definition, on Emmett JA's analysis, therefore qualifies '2 or more persons' rather than just the 'one' person, a conclusion that must surely be correct to avoid a strained interpretation. See *Williams* (2015) 90 NSWLR 342, 355–6 [69]–[70].

act][61] that causes loss claimed by the plaintiff.'[62]

Therefore, on Emmett JA's construction of s 87CB of the *Consumer Act*, joint tortfeasors and joint wrongdoers, whether so as a result of their relationship (for example, as a vicariously liable employer and employee, or as multiple jointly vicariously liable employers), or the involvement of one in another's wrong (as an accessory), or because each contributed to the one act or acts, or held a joint duty, would all potentially be concurrent wrongdoers. Emmett JA therefore rejected the reasoning in *Hadgelias* that a vicariously liable party is not a concurrent wrongdoer, but accepted that the outcome of the case was correct, since specific sections in any case exempt vicarious liability employers from relying on the proportionate liability regime by asserting that their employees were concurrent wrongdoers.[63] However, in the case before him, those exemptions did not apply: the two vendors were both jointly vicariously responsible for the same misleading conduct (of their agent).

There are, therefore, two different interpretations of 'concurrent wrongdoer' and those differences are critical in deciding cases. Although the courts in both *Tomasetti* and *Hadgelias* rejected the interpretation later adopted by Emmett JA, they did so with little analysis of the definition of 'concurrent wrongdoer' and usually in circumstances where proportionate liability would in any case then have been precluded for other reasons. As long as those differences in interpretation remain unresolved, the correct adjudication of the problem in Scenario 2 remains uncertain. In my view, Emmett JA's interpretation is to be preferred. Having said that, however, irrespective of the correct resolution of the problem in other jurisdictions, the position may differ in Queensland and South Australia.

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61 Ibid 360 [85].

62 Ibid 359 [81]. In light of *Selig* (2015) 255 CLR 661 which was decided after *Williams*, Emmett JA would have needed to reject apportionment in any case since the plaintiffs had also established a contravention of *ACL* s 30. Emmett JA went on to reject the possibility that concurrent wrongdoers could each be held 100 per cent responsible. Instead he held that their total responsibility combined cannot exceed 100 per cent: ibid 360–2 [86]–[93]). That conclusion must be correct, although the reasoning in *Tomasetti* (2012) 274 FLR 248 [152] could on one interpretation be supporting the opposite approach, as was also noted in *Hadgelias* [2015] 1 Qd R 337, 343 [19] (not apparent in *Tomasetti* (2012) 274 FLR 248 whether reasoning concerned meaning of concurrent wrongdoer or apportionment).

63 Emmett JA in *Williams* (2015) 90 NSWLR 342, 357–8 [76] noted that the relevant protective section under the *Consumer Act* s 87CI, was not referred to by the Queensland Court of Appeal in *Hadgelias* [2015] 1 Qd R 337. That section, according to Emmett JA, means that there is no need for apportionment of liability between principal and agent (and employer and employee) in situations of vicarious liability. This conclusion must be correct, though note the discussion below that the language of the relevant sections is poorly drafted to achieve this. Importantly, vicarious liability was the context in which the question of parties being jointly responsible for the same act or acts had arisen in *Hadgelias*, but this was not the issue that arose in *Williams*. It should also be noted that if a claim were brought in Queensland under the *Fair Trading Act* for contravention of the *ACL*, and not under Commonwealth jurisdiction, then the proportionate liability governing provisions (found in the *Civil Liability Act 2003* (Qld)) are differently drafted and support the exclusion of joint wrongdoers who are liable for a single act: see below.

Queensland and South Australia are different

In Queensland and South Australia, the conclusion that parties who are jointly responsible for a single act are not concurrent wrongdoers may be correct. This is because of the absence of the word 'or jointly' in the definition of 'concurrent wrongdoer', which must surely have been intended to exclude all circumstances where one party is 'jointly' liable with another. In other words, only (distinct) acts (or omissions) that cause loss independently are caught.

That interpretation is supported by the case of *Hobbs Haulage Pty Ltd v Zupps Southside Pty Ltd*.[64] In *Hobbs*, the issue was whether the liability for breach of contract of a contractor who had contracted with the plaintiff, was concurrent with the subcontractor who had performed the work, allegedly negligently. The Court found that it was not. In part, the Court simply accepted the reasoning in *Tomasetti*[65] and the trial judgment in *Hadgelias*.[66] However, the Court gave further reasons specifically by reference to the Queensland Act and held that since the loss was caused by one and the same conduct, each party being responsible for that single conduct, the parties were not persons whose acts 'independently of each other' caused the loss that was the subject of the claim.[67] That conclusion is justifiable in Queensland, given the absence of the words 'or jointly'. It also seemingly applies beyond the factual context of the case, so that *all* types of joint tortfeasors would not be covered by the Queensland or South Australian provisions. If the facts of *Tomasetti* and *Hadgelias* were therefore subject to adjudication under the Queensland or South Australian civil liability statutes, then proportionate liability would not apply for that reason, among others that have already been noted, including vicarious liability, to which we now return.

Exemptions for vicarious liability

To summarise thus far: joint wrongdoers who are jointly responsible for a single act or omission that is the subject of a claim are concurrent wrongdoers, at least on the better view as to the construction of that term (and at least outside of Queensland and South Australian jurisdiction). If this is accepted, then an employer is a concurrent wrongdoer with the employee for whose wrong it is vicariously liable. However, this does not mean that proportionate liability applies to the employer in these circumstances. This is because of specific provisions contained in the various proportionate liability regimes. The wording of *Consumer Act* s 87CI, which is representative, is as follows:

> Nothing in this Part:
>
> (a) prevents a person being held vicariously liable for a proportion of an apportionable claim for which another person is liable; or
>
> (b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or

64 [2013] QSC 319 (18 November 2013).
65 *Tomasetti v Brailey* (2012) 274 FLR 248.
66 *Seirlis v Bengston* [2013] QSC 240 (11 September 2013), which was endorsed in *Hadgelias* [2015] 1 Qd R 337.
67 *Hobbs* [2013] QSC 319 (18 November 2013) [26]–[27].

(c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.[68]

Certainly, it is generally assumed that proportionate liability was not intended to apply to employers and principals who are vicariously liable for their employees' or agents' wrongs.[69] Section 87CI (and its equivalents) may well give effect to that intention. That position, however, is not as clear cut as it should be.

Section 87CI clearly does encompass the situation where conduct of an employee, E, causes loss, alongside the concurrent wrong of another defendant, D2. In that case, the employer of E, D1, would be vicariously liable for the (presumably full) proportion of the loss apportioned to E's conduct. But what if there are only two relevant wrongdoers, an employee and the vicariously liable employer? If the employer pleads the proportionate liability defence, how does the section operate in that scenario? Could it be said that the employer is vicariously liable for the proportion of the loss for which E is liable? Is the effect of para (a) that employer is liable for its own (let us say 50 per cent) responsibility, and then vicariously liable for E's (50 per cent) as well? That must surely be the only appropriate conclusion.

Although that seems the likely effect of the section, it is odd that in *Tomasetti*[70] and *Hadgelias*[71] the courts did not rely on the relevant exemptions and conclude that proportionate liability has no role where a defendant is vicariously liable for the acts of its employee/agent.

In Scenario 1, therefore, proportionate liability does not apply and the employer defendant would not be entitled to limit its liability. This is because of the operation of the specific exemptions. The same would apply to principals (liable for their agents) and partners.[72]

Although this seems a sensible conclusion, there are further possible complications. Let us consider the situations where a plaintiff seeks to hold a defendant liable by reliance on provisions of the *Consumer Act* (s 139B/84(2) or s 139C/84(4)) that *deem* a defendant to be liable for certain acts of agents and employees. Under these sections, a defendant is deemed to be liable *directly*, as a *principal* wrongdoer. How would proportionate liability apply here?[73] Do the exemptions for 'vicarious liability' apply, since that concept

68 *Competition and Consumer Act 2010* (Cth) s 87CI; *Civil Law (Wrongs) Act 2002* (ACT) s 107K; *Civil Liability Act 2002* (NSW) s 39; *Proportionate Liability Act 2005* (NT) s 14; *Civil Liability Act 2003* (Qld) ss 32D, 32F; *Law Reform (Contributory Negligence and Apportionment of Liability Act 2001* (SA) s 9; *Civil Liability Act 2002* (Tas) s 43G; *Wrongs Act 1958* (Vic) s 24AP; *Civil Liability Act 2002* (WA) s 5AO. The Queensland section has a further para (d) which allows for exemplary damages.

69 See *Davis Report*, above n 17, 41; *Williams* (2015) 90 NSWLR 342, 359 [80], 359–60 [84].

70 *Tomasetti v Brailey* (2012) 274 FLR 248.

71 *Seirlis v Bengston* [2013] QSC 240 (11 September 2013), which was endorsed in *Hadgelias* [2015] 1 Qd R 337.

72 It is unclear how these provisions would operate in those rare circumstances in which a plaintiff brought action against the employee.

73 In *Williams* (2015) 90 NSWLR 342, 358–9 [79], Emmett JA assumes that there is no difference between whether a company is vicariously liable for a director's misleading conduct, or is directly liable on the basis that the conduct was that of the company itself, for the purposes of determining whether two persons are concurrent wrongdoers, since on either

largely overlaps with the circumstances in which deeming apply? Such questions remain unresolved, but they are not merely academic, given that the precise basis for a claim and how it is pleaded can make a difference in this context.[74]

Scenarios 2 and 3

Let us return to the remaining scenarios set out above. In Scenario 2 'joint wrongdoers', if Emmett JA is right, the parties are jointly responsible for the single wrongful act and are caught by the proportionate liability regimes. This seems consistent with the purpose of proportionate liability, namely to transfer the risk of insolvency etc of one wrongdoer, onto plaintiffs. For example, if D is assisted by an accessory A in committing a wrong, or if D1 and D2 jointly engage in the same conduct, each would be only proportionately liable for their respective share of the loss. The exceptions to this are Queensland and South Australia, it would seem. In those jurisdictions, each defendant would probably be fully liable.

In Scenario 3, the parties are clearly concurrent wrongdoers and this conclusion follows irrespective of the disputed interpretation of that term. In Scenario 3, therefore, proportionate liability applies, with one jurisdictional exception, to which we now turn.

Postscript: Queensland really is different

In *Hadgelias*,[75] the trial judge and the Court of Appeal dealt with the situation where the real estate agent, Waight, had made a separate and distinct misrepresentation for which the corporate agent and vendors were not responsible. Waight was therefore a concurrent wrongdoer with respect to that conduct; that is, there were two distinct acts, of distinct parties, that were misleading. One would have thought, therefore, that Waight would be able to claim apportionment of liability on the basis of that distinct wrong. However, uniquely among the Australian jurisdictions, the following provision of the *Civil Liability Act 2003* (Qld) applies in Queensland.

> **32F What if a concurrent wrongdoer is proved to have engaged in misleading or deceptive conduct under the Fair Trading Act**
>
> Despite sections 31 and 32A, a concurrent wrongdoer in a proceeding in relation to an apportionable claim who contravenes the Australian Consumer Law (Queensland), section 18 is severally liable for the damages awarded against any other concurrent wrongdoer to the apportionable claim.

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basis, director and company would be jointly liable. I would agree; however, if a plaintiff pleaded only that the director's acts were deemed to be that of the company, which was therefore liable as principal, would the provisions excluding a vicariously liable defendant from the defence and thereby resulting in 100 per cent liability, apply?

74 See *Selig* (2015) 255 CLR 661, discussed above. In *Hadgelios* [2015] 1 Qd R 337 the corporate vendor and the corporate agent were in fact *directly* liable as *principal* wrongdoers because of deeming provisions, ss 139B, 139C of the *Consumer Act*. In that case, the plaintiffs could easily have also pleaded vicarious liability of the parties (for their employees' or agents' wrongs), instead of relying on ss 139B, 139C. Would it make a difference which course was adopted if proportionate liability had been a live issue?

75 *Seirlis v Bengston* [2013] QSC 240 (11 September 2013); *Hadgelias* [2015] 1 Qd R 337.

This section is bizarre, to say the least. It seemingly undermines the whole purpose of the proportionate liability provisions. Section 28 of the *Civil Liability Act 2003* (Qld) expressly includes breaches of s 18 *ACL* as apportionable claims. If D1 and D2 each engage in separate acts of misleading conduct, and D1 pleads proportionate liability, D1 and D2 will both be precluded from relying on the defence as a result of this section, even after they have successfully jumped through the hoops of establishing an 'apportionable claim' and that they are 'concurrent wrongdoers'. This is the conclusion that McMurdo J reached at trial, upheld in the Court of Appeal in *Hadgelias*. In neither judgment was there any analysis of the issue, nor did either court note the seeming absurdity of the provision.

Importantly, s 32F means that defendants who are natural persons and are only liable under the Queensland *Fair Trading Act* are in a worse positon than corporations that are subject to the proportionate liability rules of the Commonwealth *Consumer Act*![76]

Conclusion

It remains to briefly summarise what the analysis above has shown.

(1) Where a loss arises from an apportionable claim, parties that are jointly liable for a single act are concurrent wrongdoers, at least on the interpretation that is most persuasive, and the one which will most likely prevail.[77] Jurisdiction matters, however, and this is not so, probably, in Queensland and South Australia.

(2) However, vicariously liable joint wrongdoers — even if they are 'concurrent wrongdoers' — cannot take advantage of proportionate liability because specific provisions exclude that possibility, or so it would seem.

(3) It is definitely in plaintiffs' interests to plead contraventions of more specific misleading conduct provisions, or different claims altogether, even if alongside *ACL* s 18 claim, in order to circumvent possible proportionate liability defences by defendants (*Selig*).

(4) Jurisdiction matters, again: Any claim in Queensland for breach of the *Fair Trading Act* is not subject to apportionment at all (*Civil Liability Act 2003* s 32F), contrary to the very definition of apportionable claim in s 28, and as strange as that may seem.

76 McMurdo J in *Seirlis v Bengston* [2013] QSC 240 (11 September 2013) did not clearly explain whether this section also potentially applied to the other defendants (at [121]) (who, in any case, were not proportionately liable for other reasons). However, he concluded that none could reduce their liability: at [122].

77 See *Ambergate Ltd v CMA Corporation Ltd* (2016) 110 ACSR 642, 686 [271].