Inquiry Into The Law Of Joint and Several Liability

Report of Stage Two

Joint and several tortious liability has for some time been an issue of concern to the construction industry; particularly, to consultants and their professional organisations. They should welcome the recommendations for proportionate liability made in this Report. Further action on these recommendations is now a matter for the Standing Committee of Attorneys-General.

The kind permission of the Attorney-General's Department to reproduce the Report of Stage Two of the Inquiry Into The Law Of Joint and Several Liability is gratefully acknowledged.

PREFACE

In February 1994 the federal Attorney-General, Michael Lavarch, and NSW Attorney-General, John Hannaford, established an inquiry into the law of joint and several liability.

The inquiry was conducted by Professor Jim Davis, a leading academic on the law of torts and contract at the Australian National University. It was carried out in close consultation with a steering committee comprising Mr Andrew Rogers QC, a former judge of the NSW Supreme Court, Mr Laurie Glanfield, Director General, NSW Attorney-General's Department and Mr Ian Govey, Principal Adviser, Business Law, Commonwealth Attorney-General's Department.

The report was prepared in two stages. The report on the first stage of the inquiry, which examined the desirability and feasibility of altering the present rules on joint and several liability, was released in July 1994 [see ACLN Issue #37, p36].

Following consideration of the report, the federal and NSW Attorneys-General, with the support of their colleagues from all States and Territories, agreed that the inquiry should proceed to Stage Two.

This report was prepared in light of public comments which were invited on the release of the report of Stage One. It includes the background material provided in the first report and recommends specific changes to the present law on joint and several liability.

Action to be taken in light of the report will now be a matter for the Standing Committee of Attorneys-General.

Any queries concerning the report could be directed in the first instance to:

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EXECUTIVE SUMMARY

Key Recommendations

That the present joint and several liability of defendants in actions for negligence causing property damage or purely economic loss be replaced by liability which is proportionate to each defendant's degree of fault.

That the liability for loss arising from misleading conduct in contravention of the Trade Practices Act, the Fair Trading Acts or the Corporations Law be proportionate to each defendant's degree of responsibility for that loss.

Introduction

- Joint and several liability means that while several persons have, by their negligence, combined to cause loss to a plaintiff, any one of them may be fully liable.
- Proportionate liability divides the loss among the defendants according to their share of responsibility.
- The difference between joint and several liability and proportionate liability has a major impact if one of the defendants does not have significant assets, is insolvent or untraceable; joint and several liability puts that risk, in the first instance, on the other defendants, proportionate liability includes the plaintiff as bearing some or all of that risk.
- In the first stage of this inquiry, the terms of reference required a consideration of joint and several liability as against proportionate liability.
- Stage Two of the inquiry is for the purpose of making specific recommendations about changes to the present law.
- This report is intended to form the single point of reference and consequently reiterates much of the material already included in Stage One of the inquiry.
- The terms of reference exclude:
  - personal injury claims;
  - possible capping of liability;
  - extent of a professional's duty of care.

Present state of the law and reform proposals

- The law of negligence is effective largely because of liability insurance and a 'deep pocket' defendant.
- But liability insurance is becoming prohibitively expensive for professionals, local authorities etc.
- In any case, negligence principles were developed for personal injury claims not economic losses.
- Contribution between joint and several tortfeasors (and contributory negligence) are recent statutory developments aimed at spreading losses fairly among all those responsible, but they have shortcomings.
- Contribution rights do not apply if the liability is in contract and not in tort.
- It is not clear whether contribution rights apply if the liability is based on s 52 of the *Trade Practices Act 1974* or on s 995 of the Corporations Law.
- Under recent legislation in Victoria, South Australia and the Northern Territory, claims for defective building work apply proportionate liability.
- The New South Wales Law Reform Commission, and law reform agencies in Canada and New Zealand, have generally proposed retaining joint and several liability.
- Legislation in British Columbia and the Republic of Ireland allows for proportionate liability when the plaintiff has been contributorily negligent.
- In the United States, more than two-thirds of the States have some form of proportionate liability, but the details differ widely.

Conclusions and recommendations

- The main argument in favour of retaining joint and several liability is that it is the best way of ensuring full compensation to a plaintiff.
- But that is not applicable when the loss is financial and when the effects on liability insurance are taken into account.
- The building legislation of Victoria, South Australia and the Northern Territory favours a fair division of responsibility between defendants over full compensation to the plaintiff.
- A second argument for retaining joint and several liability is that proportionate liability raises practical difficulties.
- But there is no indication that this has been the experience of British Columbia, the Republic of Ireland or those States in the United States which have adopted proportionate liability.
- It is **recommended** that in negligence actions for property damage or purely economic loss, joint and several liability be replaced by proportionate liability.
- Of the various forms of proportionate liability, it is **recommended** that liability in all cases be proportionate to each defendant's degree of fault.
- This follows the lead of the legislation concerning defective building work.
- It puts the risk of an insolvent defendant on to the plaintiff alone.
- But the plaintiff bears that risk under the current law when there is only one defendant.
- It is fair that a defendant's liability should be limited to the degree of fault, unaffected by matters beyond the defendant's control.
- Other forms of proportionate liability have been considered but rejected:

  (a) Proportionate liability only when the plaintiff is partly at fault.
  - If the loss is shared with the plaintiff, why not among each of the defendants?
  - But it depends on determining causes, not degrees of blame.
  - It may be arbitrary, as it does not apply if the plaintiff is not a contributory factor in the loss.

  (b) Proportionate division of an insolvent defendant's share of liability, when the plaintiff is contributorily negligent.
  - This method has been used in Ireland for the last 30 years.
  - It may need two approaches to a court, and thus increases the costs.
  - The results may be arbitrary, depending on the causes of the loss.

  (c) Proportionate liability if the defendant's percentage of blame is below a threshold.
  - This is arguably a fair result for the defendant only marginally at fault.
  - But the percentage is an arbitrary line.
  - More fundamentally, it is not clear as a matter of principle why proportionate liability should be applicable only below a certain threshold.

- The liability under s 52 of the Trade Practices Act (and its equivalent in the fair trading legislation of the States and Territories) for misleading conduct in trade or commerce, and the liability under s 995 of the Corporations Law for misleading conduct in relation to securities is apparently joint and several, but for that to continue would create anomalies with liability in negligence.
- The Trade Practices Act expressly imposes joint and several liability, but only in respect of claims arising out of consumer transactions and claims for personal injury or damage to consumer property.
- It is **recommended** that the statutory liability for loss arising from misleading conduct be proportionate to each defendant's degree of responsibility for that loss. If appropriate, an exception could be provided for claims arising out of consumer transactions.
- Various other statutes currently impose joint and several liability by express provision, in the light of specific circumstances covered by each statute. The policy underlying these provisions has not been examined by this inquiry, which makes no recommendation that they be changed.

- The joint and several liability of members of a partnership, as between themselves, is of the essence of the partners' relationship; consequently, no change is suggested to that liability.
- Vicarious liability involves joint and several liability, but any change in this area would destroy the concept of vicarious liability; it is therefore **recommended** that vicarious liability remain joint and several.

REVIEW OF JOINT AND SEVERAL LIABILITY

1. Introduction

On 17 February 1994, the Attorneys-General for the Commonwealth and New South Wales jointly announced an inquiry into the law relating to joint and several liability. The terms of reference were:

> To consider whether it is desirable and feasible to alter the present rules on joint and several liability, having regard to:
> - legislation on proportional liability in Australian and comparable overseas jurisdictions;
> - reports recommending for or against an alteration of the rules on liability; and
> - any other relevant matters.
>
> The inquiry is to consider in particular the issue of professional liability and is not to examine the operation of the rules on joint and several liability in relation to personal injury claims.

At the time of announcing the inquiry, the Attorneys indicated that it was proposed to be undertaken in two stages. Subject to consideration of the matters covered by the above terms of reference, a further report might be commissioned to consider the nature and scope of any possible changes to the present law.

On 21 July 1994, the Report on Stage One of the inquiry was released. It raised various options for reform, principal among them being a suggestion that the arguments advanced for the retention of joint and several liability were not necessarily relevant to the issue of liability for purely economic loss or property damage. That report also observed that there was reason to consider whether a regime of proportionate liability would be appropriate in some or all circumstances.

When that report was released, the Attorneys sought comment on those options for reform, and announced that the inquiry was to proceed to a second stage, the purpose of which is to make specific recommendations about changes to the present law.

There has been a considerable response to the Attorneys' request for comment on Stage One of the inquiry. The responses have come from a wide range of professional bodies and, with one exception, have expressed a strong preference for replacing joint and several liability with proportionate liability in all circumstances.

In preparing this Report on Stage Two, it was considered appropriate for it to form a single point of reference, and not to depend upon references to the Report of Stage One.

2. The nature of the liability under consideration

(a) Liability of concurrent, but independent, wrongdoers the principal focus

It is necessary for this Report to examine the circumstances in which concurrent wrongdoers may be regarded either as jointly and severally liable, or as proportionately liable, and the similarities and differences between these two types of liability.

The similarities are that both arise when two or more people, each acting independently of the other, have by their separate wrongful acts brought about a single and specific injury to another person. Suppose, for example, that a builder negligently constructs a house with inadequate foundations, that the architect negligently fails to supervise that part of the construction, and that the local authority negligently fails to notice the inadequacy of the foundations. Each of these three has acted independently of the others, but the end result (it may be assumed) is that the house proves to be defective. The owner's complaint is solely that the house needs to be underpinned.

The major differences between joint and several liability and proportionate liability emerge when consideration is given to the rights of the injured party. To continue with the above example, if the builder, architect and local authority were to be regarded as **jointly and severally** liable to the homeowner, each would be treated as an effective cause of the whole of the loss. As a result, the homeowner would be entitled to sue any one (or more) of those three. If the owner sues (say) the local authority, it is entitled to bring in the others, either as parties to the original action by the owner, or in separate proceedings, in order to recover from the builder and the architect a just and equitable proportion of the damages payable to the owner.

The right to recover contribution from others who, by the commission of a tort, are responsible for the same harm is provided by the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), Part III, and the equivalent of those provisions in each of the other States and the Territories. There is also a right of contribution, which arises at common law when one of several persons has paid more than his or her proper share towards discharging a common obligation, and which arises in equity when a liability of one of several persons to pay more than his or her share has been ascertained (see, eg, *Spika Trading Pty Ltd v Harrison* (1990) 19 NSWLR 211 at 214 per Giles J).

Joint and several liability, and a concomitant right of contribution, allow for a sharing of liability among a number of persons in the proportion for which each was responsible for the loss. It throws the risk of insolvency or untraceability of any one of the defendants on to the other defendants, and permits a plaintiff to recover the whole of his or her loss from those who are solvent.

If parties are regarded as **proportionately** liable, the liability of each is in all circumstances limited to the extent to which that party is considered to be responsible for the loss. There is no right of contribution between various defendants, since none of them would, as a general rule, be

liable to pay to the plaintiff any more than the proper share owing by each defendant.

Proportionate liability also allows for the sharing of liability among a number of persons. The major difference from joint and several liability is that proportionate liability puts the risk of the insolvency or untraceability of a defendant on to the plaintiff. For the latter to recover the whole of his or her loss, each person responsible for that loss must be sued to judgment, and execution thereon satisfied. A further difference from joint and several liability is that whereas that form of liability assumes that each of those found liable is an effective cause of the whole of the loss suffered by the injured party, proportionate liability apportions causal effectiveness according to the degree of fault of each wrongdoer.

A variation on the notion of proportionate liability has been adopted in some jurisdictions. Under this variant, which may be termed **modified proportionate liability,** the extent of the liability of each defendant is limited, in the first instance, in proportion to the degree of fault of that defendant. But if it turns out that one of the defendants is insolvent or untraceable, the share of that defendant's liability is divided rateably among the remaining, solvent, parties, which may include the plaintiff, if he or she has been found to some extent responsible for the ultimate loss.

(b) Consideration extends beyond professional liability

The terms of reference require consideration to be given 'in particular [to] the issue of professional liability'. It is, however, clear that this inquiry should not be limited to the issue of professional liability.

On the one hand, there is little unanimity as to the fields of endeavour which may be regarded as coming within the notion of a profession. There is consequently no advantage in attempting to address that issue of definition in an inquiry of this nature.

On the other hand, any attempt to confine consideration to those activities which are universally accepted as within the professions would lead at once to unnecessary anomalies. The example of concurrent liability which has already been used - that of a builder, architect and local authority - provides an apt example. Of those three, only an architect would normally be regarded as engaging in professional activities. But the loss caused by the wrongdoing of each is precisely the same, and none should be excluded from consideration simply on the basis of an ill-defined division between professional activities and others.

3. Exclusions from the terms of reference

The terms of reference place various limits on the scope of this inquiry. In the first place, there is an express exclusion of any examination of the rule of joint and several liability in relation to personal injury claims. Hence, this inquiry has not considered the possible liability amongst themselves of members of the medical and nursing professions for medical misadventures. Nor has the inquiry concerned itself with the liability of two or more motorists for the injuries received by passengers or onlookers as a result of a road accident, nor with the liability of an employer and an occupier of premises for injuries suffered by an employee while on those premises. Those questions cannot be separated from the much broader issue of the proper basis of the liability for any form of physical or mental injury or hurt, and the sources of compensation for them.

Secondly, the terms of reference do not mention the possibility of considering a monetary limit on liability for purely economic loss. The omission of any reference to this issue in the setting up of the present inquiry makes it clear that it is excluded from consideration.

A third exclusion from the terms of reference is a discussion of the range of persons to whom a professional might be liable. In the law of negligence, the ambit of liability is determined by the concept of a duty of care. However careless a person might have been, he or she will not be liable in the tort of negligence to anyone to whom no duty of care is owed. The issue of the extent of the duty of care, and the factors which go to determine whether such a duty is owed in any particular circumstances, is one which has given rise to differing views in the highest courts not only in Australia but also in comparable overseas jurisdictions. A resolution of that issue is beyond the scope of this inquiry.

4. Background to the inquiry

In considering the liability of professionals and others for the property damage and purely economic loss that they might cause, it is relevant to take account of the effect of insurance. Professional people, scarcely without exception, are insured against their possible liability to their clients and to members of the public. As a result, a professional person is often the sole target for legal action when losses are suffered in commercial operations, even though he or she is only one of the parties involved. Concern has been expressed for some years at the increasing level of payments which those insurance funds are required to meet, and the consequently increasing cost of that insurance. Among the submissions received in response to the release of Stage One of this inquiry, there was consistent comment that the cost of insurance had reached unacceptable levels. A member of one of the international accountancy firms observed that few, if any, commercial insurers are able to provide cover for those firms, and expressed the view that even the major firms' self-insurance arrangements might not be able to continue to sustain the demands made upon them. Not only is the cost of insurance reflected in the cost of the professional services, but there is a fear that insurance itself is becoming unobtainable.

In 1989, the then Attorney-General for New South Wales, the Hon John Dowd, announced a widespread review of the law of torts in that State, aimed in part at considering the feasibility of limiting the liability of professionals. Following from that initiative, the Western Australian Legislative Council, in November 1991, set up a Select Committee on Professional and Occupational

Liability, the terms of reference of which were, among other matters, to inquire into and report on limitation of professional and other occupational liability.

While those reviews were aimed at considering the liability of all professions, other bodies have been concerned at the increasing level of liability in particular fields. Those with knowledge and expertise of the building industry have argued that joint and several liability is 'patently unfair [and] illogical', in that the practical result of imposing that liability not only on the professional people who may be involved but also on the local authority may often lead to the local authority settling a claim for defective building work for an amount in excess of the authority's perceived share of responsibility (see Dix and Lovegrove, *The Model Building Act for Consideration by the States and Territories*, a monograph published by the Australian Uniform Building Regulations Co-ordinating Council).

The liability of accountants, and especially auditors, in relation to the work that they are obliged to undertake under the Corporations Law has also been the subject of a specialist review. A Working Party of the Ministerial Council for Corporations issued a Report in June 1993 detailing various options for consideration as a means of preventing or curbing any perceived inequities in the liability of accountants and auditors. One option proposed by that Working Party was to address 'the arbitrary and unfair consequences of the present rules regarding joint and several liability of auditors'. However, the Working Party recognised that a review of joint and several liability could not be confined to its impact on auditors undertaking their statutory obligations under the Corporations Law, but would need to consider its effect for members of other professions and (as noted above) for bodies such as local authorities. The present inquiry stems from a meeting of the Standing Committee of Attorneys-General of 4 November 1993 which noted the proposal of that Working Party, and accepted the need to consider the matter in a context wider than that of the Corporations Law.

The rules relating to joint and several liability have also been the subject of judicial comment. Rogers CJ, in *AWA Ltd v Daniels, t/a Deloitte, Haskins and Sells* (1992) 10 ACLC 933 at 1022, observed that joint and several liability gives considerable scope for injustice. His Honour pointed out that, since that principle permits a plaintiff to sue one only of those who are jointly and severally liable, a well-advised plaintiff will take proceedings against the person who has liability insurance adequate to meet the claim made by the plaintiff. But the judge was sceptical of the fairness of this course of action. He said:

> "[A] well insured defendant, who may perhaps be responsible for only a minor fault, in comparison with the fault of other persons, may nonetheless be made liable, at least in the first instance, for the entirety of the damage suffered by the plaintiff. The defendant may indeed seek contribution from other persons responsible for the major damage. Why should the whole of the burden of possibly insolvent wrongdoers fall entirely on a well insured, or deep pocket, defendant?"

5. The course of development of the law

As the law stands at present in Australia, two or more people who are liable in tort for the same damage are, as a general rule, jointly and severally liable, and each has a right of contribution against the other(s). This state of the law is, however, of relatively recent origin.

The current rules relating to joint and several liability, and especially those concerned with contribution between those liable, are one means of spreading the cost of compensating an injured plaintiff. While the plaintiff may choose to sue one only of several who are concurrently liable, the one who is so chosen is entitled to bring in the others in order to recoup from them a fair share of the damages payable to the plaintiff. But the most pervasive means of spreading the cost of compensating a plaintiff is through liability insurance. Although the award of damages is made against the defendant(s), the payment is made by their liability insurers, and the cost of any particular award is spread among all the policy holders, by way of adjustments to future premiums.

A review of the development of the rules relating to joint and several liability requires some mention of the way in which liability generally for negligence has developed during the course of this century, and the relationship between that development and the availability of liability insurance.

(a) The law of negligence and liability insurance

Although scholars differ as to the details, it is generally accepted that negligence as a separate and identifiable tort did not develop until the latter years of last century. It is often said that the concept of a duty of care - the foundation of the separate tort of negligence - was not clearly articulated until the judgment of Brett MR in *Heaven v Pender* (1883) 11 QBD 503. It is not so well known that liability insurance became available only at about the same time. Prior to the 1880s, the notion that a person might take out insurance against his or her liability to a third party was regarded as contrary to public policy. The incentive to exercise reasonable care, or pay for the consequences, was considered likely to be lost if one could pass one's liability on to an insurer.

It has been argued that it was no mere coincidence that an identifiable tort of negligence was developed at much the same time as liability insurance started to become available (see Davies, 'The End of the Affair: Duty of Care and Liability Insurance' (1989) 9 *Legal Studies* 67). Once a market for liability insurance was created (by the enactment of the *Employers' Liability Act* 1880 (UK)), the courts took advantage of this new found source of real compensation, and new found means of loss spreading, to expand the range of liability for negligence. Whether or not that argument is valid - and it must depend largely on inference and supposition, and not on direct judicial observation - there is no doubt that in the latter years of this century, the availability of liability insurance has had a profound effect upon the law of negligence. As Professor Fleming puts it *(The Law of Torts* (8th ed, 1992), p 10), 'knowledge that the judgment will not be borne

singlehandedly by the one defendant ... has resulted in ... a vast expansion of the scope of liability and substantially stricter liability, especially in areas where insurance is mandatory'. Illustrations of this phenomenon are to be found in *Western Suburbs Hospital v Currie (* 1987) 9 NSWLR 511 at 518 per Kirby P and in *Lynch v Lynch (* 1991) 25 NSWLR 411 at 415-6 per Clarke JA.

This development is obviously beneficial to those who suffer personal injury as the result of another's lack of care. Few people carry their own (first party) insurance against such an eventuality, so that a defendant's (third party) insurance is generally the only source of compensation for accidental injury. But the tort of negligence has expanded far beyond providing compensation for personal injury. Within the last 30 years, as a result of the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, the tort of negligence also includes compensation for the purely financial harm consequent upon a careless misstatement. Although the policies behind imposing liability for a negligent misrepresentation are not necessarily congruent with the policies at the basis of the imposition of liability for personal injury, the same legal principles are applied in both circumstances. The provision of compensation for negligently causing such injury is naturally of the highest priority to the law. And if the injured plaintiff is unlikely to be able to provide that compensation from his or her own resources, the law will go to considerable lengths to insure that compensation is provided by those who are at fault in causing the injury.

But the interest in a person's financial security, and in the preservation of his or her property, is of a lower scale of values. Furthermore, protection of these interests is, not uncommonly, provided by first party insurance, which is likely to be more economically efficient than third party insurance. It is therefore not surprising that on some occasions, members of the judiciary have remarked that compensation of a plaintiff, whose loss flows only from the negligent invasion of an interest in financial security or preservation of property, need not be of such importance as would be the case were the plaintiff to suffer bodily harm (see *Spartan Steel & Alloys Ltd v Martin (Contractors) Ltd* [1973] QB 27 at 38 per Lord Denning MR; *Lamb v Camden London Borough Council* [1981] QB 625 at 637-8 per Lord Denning MR).

(b) Liability of concurrent tortfeasors

The course of development of the liability of concurrent tortfeasors has been as haphazard as that of liability in negligence generally. In the early years of this century, the liability of multiple defendants was determined by common law principles alone, unaffected by any statutory provisions. At that time, there was a substantial difference between joint tortfeasors and several concurrent tortfeasors. Joint tortfeasors - that is, two or more who have to some extent acted in concert - might be sued either separately or together, but if one were sued separately, a settlement of the action with that one, or judgment against him or her, barred further proceedings against the others, even though the judgment were not satisfied, or the settlement agreement not carried out. If, on the other hand, a number of people had brought about the plaintiff's loss by their separate acts of negligence, the common law generally considered only the last of those wrongdoers to be liable, and denied that one the right to claim contribution from others who might have been involved. As Professor Fleming observes *(The Law of Torts* (8th ed, 1992), p 220), this view was largely attributable to 'the traditional preoccupation [of the common law] with finding a *sole* responsible cause'. That preoccupation finds further expression in the common law rule that, if the plaintiff's loss had been brought about, even in part, by his or her own failure to exercise reasonable care, that contributory negligence was a complete bar to recovery.

The first legislative move away from this position, adopted throughout Australia during the 1940s and 1950s, related to the rights inter se of multiple defendants. The *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), Part III, and equivalent legislation in the other States and the Territories, permitted rights of contribution between several concurrent tortfeasors, and abolished the rule that judgment against one tortfeasor barred a subsequent action against another jointly liable.

Once legislation allowed a liability to be shared among several defendants in proportion to their respective degrees of fault, it was not long before plaintiffs also were obliged to bear no more than their share of fault. By virtue of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW), s 10, and the equivalent in the other States and the Territories, the contributory negligence of the plaintiff was no longer a complete bar to his or her action, but led only to an apportionment of the damages payable, on a just and reasonable basis.

6. Current law, and reform proposals, in Australia

(a) Overview

Reference has already been made to the fact that two or more people who are liable in tort for the same damage are, as a general rule, jointly and severally liable, and legislation provides that each has a right of contribution against the other(s). That is, however, no more than a general rule. If the liability of the defendants arises otherwise than by the commission of a tort, their rights of contribution may be severely limited. If the defendants' joint and several liability is imposed by statute, their rights of contribution are based upon principles of common law or equity, and not on legislation. The general rule of joint and several liability is also subject to a clear exception, in the legislation in some jurisdictions relating to the building industry, which provides for proportionate liability. There is a possible anomaly in relation to the statutory liability for misleading or deceptive conduct, in that, while liability is joint and several, there may be no rights of contribution. The New South Wales Law Reform Commission, alone of the law reform agencies around the country, has addressed the issue of whether proportionate liability should replace joint and several liability, but has recommended against any change.

(b) Common law liability not based in tort

Two or more people may, by their concurrent but independent acts or omission, bring about a single loss or injury to another in a wide variety of circumstances, in which each may contravene different rules of law. Thus, a single loss may be caused by two persons independently but concurrently acting negligently and in breach of their respective duties of care. A single loss may also be caused by the combination of one person acting in breach of contract and another in breach of a tortious duty, as with a retailer and manufacturer, or by the combination of one person acting in breach of trust and another in breach of a tortious duty of care. In each case, the two would be regarded by the common law as jointly and severally liable and, if the person suffering the loss were to sue both of them in the one action, their respective shares of responsibility for the damage would be assessed. But if the person suffering the loss were to sue only one of those responsible, as the law currently stands in all jurisdictions other than Victoria, that one would not be able to claim contribution from the other unless both of them were liable to the plaintiff in tort.

The reason for this unfortunate conclusion lies in the wording of the legislation providing for rights of contribution. The *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), Part III, (and the equivalent elsewhere apart from Victoria) was enacted to meet the perceived difficulty of those concurrently liable *in tort* being unable to claim contribution one from another. Its terms are in consequence limited to those so liable. The difficulties which the legislation might otherwise cause have, however, been lessened in recent years by the judicial expedient of finding that contracting parties may, in some circumstances, owe to each other concurrent and co-extensive duties in tort and contract.

(c) Joint and several liability imposed by statute

Legislation on occasion makes explicit reference to joint and several liability. The *Partnership Act* 1892 (NSW), sections 10 and 12, (and the equivalent legislation in each of the other States and Territories) provides that each member of a partnership is jointly and severally liable for any torts committed by any one of the partners while that partner is acting in the ordinary course of business of the firm.

By virtue of section 556(l) of the *Companies Codes,* all directors of a company, together with those who took part in its management, were jointly and severally liable for debts incurred by the company when it was insolvent. The same liability was also imposed by section 592 of the Corporations Law. (From 23 June 1993 that section was replaced by section 588G of the Corporations Law, which confines liability to directors and does not refer in terms to joint and several liability.)

There is a heterogeneous collection of other legislation of the Commonwealth and New South Wales which imposes joint and several liability in a wide variety of circumstances. A selection of that legislation is listed in Appendix A to this Report. In those instances, the liability in question is generally to pay a levy or charge for a service provided by a public authority, or a liability to compensate for expenses incurred by a public authority. Those instances of the statutory imposition of joint and several liability are therefore not relevant to the present inquiry. In other cases, such as section 30 of the *Marine Pollution Act 1987* (NSW), the liability is a clear expression of the policy of the statute, and is equally not relevant to this inquiry. The *Trade Practices Act 1974* (Cth) expressly imposes joint and several liability in two situations (see sections 73(1) and 75AM). They are discussed below, in relation to misleading conduct in trade or commerce.

The joint and several liability imposed by section 556(1) of the *Companies Codes* gave rise to a common obligation or a co-ordinate liability which attracted common law or equitable rights of contribution (see *Spika Trading Pty Ltd v Harrison* (1990) 19 NSWLR 211). It would appear that the joint and several liability imposed by the other legislation referred to above is of the same nature. Members of a partnership also have rights of contribution among themselves.

(d) The building industry

Legislation in Victoria, South Australia and the Northern Territory abolishes joint and several liability for those who may be found responsible for defective building work and creates proportionate liability instead. The legislation was enacted in 1993, the various jurisdictions bringing the statutes into force at differing dates: 1 September 1993 for the Northern Territory, 15 January 1994 for South Australia and (with minor exceptions not presently relevant) I July 1994 in Victoria.

The *Building Act 1993* (Vic), section 131 provides:

> "(1) After determining an award of damages in a building action, the court must give judgment against each defendant to that action who is found to be jointly or severally liable for damages for such proportion of the total amount of damages as the court considers to be just and equitable having regard to the extent of that defendant's responsibility for the loss or damage.
>
> (2) Despite any Act or rule of law to the contrary, the liability for damages of a person found to be jointly or severally liable for damages in a building action is limited to the amount for which judgment is given against that person by the court."

The phrase 'building action' is defined in section 129 as including an action for damages for loss or damage arising out of or concerning defective building work, the same section also providing that building work includes the design, inspection and issuing of a permit in respect of a building project. It is the clear intention of the legislation that those who may be found proportionately liable include the builder, the architect, the engineer, the project manager and the local authority. In view of the fact that each of those is to be proportionately liable, section 132 prohibits

any defendant from seeking contribution from any other defendant.

The equivalent provisions in South Australia and the Northern Territory are section 72 of the *Development Act* 1993 (SA) and section 155 of the *Building Act* 1993 (NT). It is understood that the Ministers responsible for building control in the other jurisdictions around the country have agreed in principle to seek the enactment of relatively uniform legislation.

(e) Misleading conduct in trade or commerce

Section 52 of the Trade Practices Act prohibits a 'corporation' (as broadly defined by that Act) from engaging in misleading conduct in trade or commerce, while section 42 of the *Fair Trading Act* 1987 (NSW) (and the equivalent provision in the fair trading legislation of the other States and the Territories) prohibits a person from engaging in that conduct. The New South Wales statute, together with the equivalent ones in Queensland, Western Australia and the two Territories, define trade or commerce as including any 'professional activity'. French J of the Federal Court has held that a professional person who provides services for reward acts in trade or commerce for the purposes of the relevant legislation in the Commonwealth and the other States *(Bond Corp Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215 at 218-9).

For a professional person to provide incorrect information or advice may well be regarded as misleading conduct. The legislation is therefore of considerable relevance to the general issue of professional liability, the more so because section 52 and its equivalents may be infringed despite the fact that all reasonable care was taken in the circumstances (see *Parkdale Custom Built Furniture Pty Ltd v Puku Pty Ltd* (1982) 149 CLR 191). The remedies available for a breach of section 52 or its equivalents, so far as is presently relevant, are twofold; first, damages under section 82 of the federal Act, section 68 of the New South Wales Act and the equivalent in other jurisdictions, and, secondly, a range of compensatory orders under section 87 of the federal Act, section 72 of the New South Wales Act and the equivalent elsewhere.

There is nothing to prevent a claimant from suing two or more persons who, either jointly or severally, have caused him or her damage by a breach of section 52 or its equivalents. However, concepts relevant to either joint and several liability or proportionate liability do not figure in the scheme of the legislation so far as it seeks to provide compensation for purely economic loss caused by a contravention of section 52. The Act expressly imposes joint and several liability on a corporation which supplies goods to a consumer and a linked credit provider of that corporation, if the consumer should suffer loss or damage as a result of a breach of contract by the supplier (see section 73(1)). The Act also expressly imposes joint and several liability where two or more corporations are liable for personal injury or damage to consumer goods by reason of a breach of one or more of the provisions of Part VA (see section 75AM). The Act, it appears, draws a parallel between personal injury and loss or damage resulting from a misperformed consumer transaction, and distinguishes both of those from the liability flowing from a breach of section 52.

It has already been pointed out that a concomitant of the notion of joint and several liability is the right of one person found so liable to claim contribution from another who is also liable. But neither the Trade Practices Act nor the fair trading legislation make express provision for the exercise of rights of contribution between persons found concurrently liable for a breach of those statutes. It has been held that section 5 of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) and its equivalent in the other States and Territories, which provide for rights of contribution among concurrent tortfeasors, do not apply to those found to have concurrently breached the fair trading legislation *(ANZ Banking Group Ltd v Turnbull & Partners Ltd* (1991) 33 FCR 265 at 276-7 per Sheppard J). On the other hand, it may be argued that if two persons concurrently breach section 52 of the federal Act, or its State equivalent, that will give rise to a common obligation, sufficient to attract the common law or equitable doctrines of contribution (cf. *Spika Trading Pty Ltd v Harrison (* 1990) NSWLR 211 at 241-5 per Giles J).

The Australian Law Reform Commission, in its Report *Compliance with the Trade Practices Act* 1974 (ALRC 68, 1994), noted this gap in the legislation and has recommended, in para 7.23, that the Trade Practices Act be amended 'to provide expressly that courts may make orders for contribution and indemnity'. It is to be assumed that, if the federal Act were to be amended along those lines, the same amendments would be made to the fair trading legislation of the States and Territories.

(f) Misleading conduct in relation to securities

Section 995 of the Corporations Law prohibits a person from engaging in misleading conduct in, or in connection with, any dealing with securities. The terms of the section are thus very similar to section 52 of the Trade Practices Act, except that section 995 is limited to conduct (often constituted by the making of a statement) that relates to company shares, stock, debentures and other securities. A contravention of the section does not entail criminal liability (see subsection 995(3)), but anyone who suffers loss or damage as a result of that contravention may recover it in a civil action from the wrongdoer (see section 1005).

There is no express provision in the Corporations Law for a right of contribution or indemnity if two or more people are found to have been in contravention of section 995. As with section 52 of the Trade Practices Act, it would appear doubtful whether there is a right outside the Corporations Law to obtain contribution or indemnity.

(g) New South Wales Law Reform Commission

In 1990, the Commission prepared a report, *Contribution Among Wrongdoers: Interim Report on Solidary Liability* (LRC 65). The Commission pointed out that, as part of its Community Law Reform Program, it had undertaken work on the general topic of the law governing rights of contribution between two or more persons

responsible for the same damage, but that it had been requested to prepare an interim report dealing solely with the question of solidary liability (in this review referred to as joint and several liability). The Commission canvassed the possibility of retaining joint and several liability or of replacing it with proportionate liability. It concluded (para 46) that 'the existing general rule of [joint and several] liability should be maintained'.

In coming to that conclusion, the Commission foresaw a number of objections to proportionate liability from a practical point of view (paras 37-43). For instance, the Commission considered that proportionate liability could require a plaintiff to join all the possible defendants to the action, thus increasing the time and cost of a trial. The Commission also noted that proportionate liability would give the plaintiff an interest in the determination of the relative proportions of liability of each defendant. If the plaintiff suspected that one defendant was insolvent, the plaintiff would seek to argue that the other (solvent) defendants were responsible for the whole, or by far the greater part, of the loss, thus minimising the effect of a finding of liability against the insolvent defendant. The Commission further expressed concern that proportionate liability would hinder the resolution of disputes by agreement. All the defendants would have to agree not only on their own liability, and the quantum of the plaintiff's loss, but also their own share of that liability, before the plaintiff could receive any compensation. A final point which the Commission made was that to apply proportionate liability in a case where one defendant's obligations arose simply from the fact of its vicarious liability for another would completely undermine the principles of vicarious liability and the policy behind them.

The Commission suggested (para 19) that there might be grounds for abolishing joint and several liability in a case where the plaintiff had been partly to blame for his or her own loss. It pointed out that an argument can be mounted to the effect that 'a contributorily negligent plaintiff deserves no greater favour than a defendant also partly to blame for the plaintiff's loss'. However, it rejected that argument, partly on the grounds of the practical difficulties referred to above, and partly on the basis that 'in many cases a plaintiff's fault is different in kind from that of a defendant' (para 25).

The New South Wales Law Reform Commission was, of course, concerned with liability for personal injury as well as for property damage and purely economic loss. The objections it put forward to proportionate liability may not apply with such force in the case of the latter two types of loss.

7. Current law, and reform proposals, in comparable overseas countries

(a) New Zealand

The law in New Zealand is substantially the same as that in New South Wales. That is, two or more persons liable for the same damage are regarded as jointly and severally liable, and each has a right of contribution from the other or others. Further, a plaintiff who has failed to take reasonable care for his or her own well being will suffer a reduction of the damages otherwise payable, on account of that contributory negligence. One substantial difference between the two jurisdictions is that in New Zealand it is not possible to sue for damages for personal injury (see *Accident Rehabilitation and Compensation Insurance Act 1992* (NZ), s 14).

In 1983, the New Zealand Contracts and Commercial Law Reform Committee, in a *Working paper on Contribution in Civil Cases*, advocated retention of the rules relating to joint and several liability. The issue has recently come before the successor to that Committee, the New Zealand Law Commission. In a Discussion Paper published in March 1992, on *Apportionment of Civil Liability* (NZLC PP19), the Commission considered at some length the arguments for and against replacing joint and several liability.

An argument in favour of displacing joint and several liability, which the Commission found most attractive, was that 'joint and several liability may place a wrongdoer whose proportionate share of the blame for the loss caused to the plaintiff is relatively minor at risk of having to bear a very much greater share, even perhaps the whole, of that liability' (para 162). The Commission also saw as beneficial the fact that, under proportionate liability 'there would be no need for complicated rules concerning the apportionment of liability between defendants' (para 163), because the onus would be on the plaintiff to seek out, and bring action against, those defendants who might have contributed to the loss. The Commission also remarked (para 166) on the unfairness of joint and several liability in cases where the plaintiff was contributorily negligent. It noted that circumstances could arise in which the plaintiff's proportionate contribution to the loss was greater than that of the only solvent defendant, but that the latter would be called upon to compensate the plaintiff in respect of the liability of the other (insolvent) defendants.

On the other hand, the Commission was greatly concerned with the effect on plaintiffs which abrogation of the rule of joint and several liability would have. It stressed that the common law is committed to fully compensating a plaintiff for all loss which has been suffered, and observed that joint and several liability 'is one means of achieving this: any risk of an absent or insolvent defendant must be borne by a co-defendant (if there is one)' (para 168). The Commission further raised what it saw as the practical difficulty that under a regime of proportionate liability, 'the plaintiff will usually have to sue all possible defendants even if the claim will be difficult to prove against some' (para 170). It noted that this might tend to be the current practice, but thought that such an approach should not be *required* in all cases.

In the end the Commission expressed the provisional view that the law of joint and several liability should remain (para 192).

Notwithstanding this general conclusion, the Commission suggested that if one defendant is insolvent or

untraceable, and if the plaintiff is partly responsible for his or her own loss, the plaintiff and the other (solvent) defendants should each bear an appropriate share of that part of the loss attributable to the insolvent defendant. The Commission acknowledged that this suggestion was not consistent with its stand on joint and several liability.

> 'It is, in fact, a half-way house between joint and several liability and [proportionate] liability: a compromise. We think it appropriate in the context' (para 186).

(b) Canada

The law in the Canadian Provinces which have a common law system, other than British Columbia, is, to all intents and purposes, the same as that in New South Wales. Two or more persons responsible for the same damage are jointly and severally liable, and each has a right of contribution against other defendants. The question of joint and several liability has been considered by law reform bodies in Alberta and Ontario.

(i) Alberta

The Institute of Law Research and Reform of the University of Alberta (which performs a role similar to that of a law reform commission) published Report No *31, Contributory Negligence and Concurrent Wrongdoers* in April 19~9. The Report considered whether liability among a number of wrongdoers should continue to be joint and several, or should be proportionate. It observed that the law may appear to be unfair if it requires a tortfeasor to satisfy a judgment in an amount greater than his or her relative degree of fault. The Report also acknowledged that proportionate liability would do away with the need to resolve several difficult issues relating to rights of contribution, such as the effect of a settlement by one defendant, and the expiry of a limitation period as against one, but not all, of those responsible. While recognising the force of these arguments, the Report concluded that 'paramount importance should be accorded to the principle that the non-negligent plaintiff should obtain full recovery, if at all possible' (p31).

The Report considered that the arguments in favour of proportionate liability are stronger in cases in which the plaintiff has been partly to blame for the loss. However, it also noted: that there was no evidence of demand for a change in the law; that the plaintiff's fault in failing to look after his or her own interests is different in degree from that of a defendant; and that to have one set of rules applicable to a non-negligent plaintiff and a different set of rules applicable where the plaintiff was partly at fault would result in considerable confusion.

Taking these various factors into consideration, the Institute concluded 'that the liability of concurrent tortfeasors either to a plaintiff who is free from negligence or to a contributorily negligent plaintiff should continue to be joint and several' (Recommendation 7, p 33).

(ii) Ontario

The Ontario Law Reform Commission published a Report on *Contribution Among Wrongdoers and Contributory Negligence* in 1988. In a wide-ranging review of the areas of law encompassed within that title, the Commission considered whether the rules relating to joint and several liability should be changed. It observed that joint and several liability 'helps to assure the goal of full compensation to an injured person for losses attributable to the fault of others, a goal that the Commission regards as fundamentally just' (p 46). It was not persuaded that there were sufficiently strong economic reasons to justify a modification of the rules of joint and several liability. It also considered that any unfairness to a defendant flowing from joint and several liability was outweighed by the unfairness to an innocent plaintiff who, under a regime of proportionate liability, would be undercompensated if any defendant were insolvent or untraceable.

The Commission acknowledged that there was some force in the argument that, in the case of a contributorily negligent plaintiff, the defendants' liability should be proportionate rather than joint and several. However, it rejected adoption of that view for two reasons. The first was that 'in many, although not all, instances, the fault of the injured person and that of the wrongdoer differ in quality and not just in degree' (p 47). The second reason was that the effects in practice of such a change in the law could be to 'create new uncertainty and potential unfairness' (p 47). Instances of such uncertainty and unfairness referred to were the need on the plaintiff's part to proceed against all possible defendants, the need to obtain agreement from all of them in order effectively to settle a matter, and the estimation of the degree of fault of an insolvent or untraceable defendant.

The Commission therefore recommended that 'there should be no change in the law respecting the *in solidum* liability of concurrent wrongdoers to a plaintiff, even where the plaintiff is contributorily negligent' (p 48).

(iii) British Columbia

The Court of Appeal of British Columbia, in *Reekie v Messervey* (1989) 59 DLR (4th) 481 at 491, summed up the law in that Province by saying:

> "Under the *Negligence Act,* RSBC 1979, c298, the liability of a defendant is [proportionate] if the plaintiff is contributorily negligent and joint and several if the plaintiff is not contributorily negligent."

The proportionate liability of a defendant derives from ss 1 and 2(c) of that statute, which are in the following terms.

> ' 1. Where by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault, except that:
>
> (a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and
>
> (b) nothing in this section shall operate so as to

render a person liable for damage or loss to which his fault has not contributed.

2. The awarding of damage or loss in every action to which section 1 applies shall be governed by the following provisions: ...
   (c) as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss shall be entitled to recover from that other person the percentage of the damage or loss sustained as corresponds to the degree of fault of that other person;'

Those provisions were interpreted as providing for proportionate liability when the plaintiff is contributorily negligent by the Court of Appeal in the Province in *Comenco Ltd v Canadian General Electric Co Ltd* (1983) 4 DLR (4th) 186, a decision which was confirmed by a Bench of five Justices in *Leischner v West Kootenay Power and Light Co Ltd* (1986) 24 DLR (4th) 641. That interpretation has been applied to cases of physical injury and, in *Hongkong Bank of Canada v Touche Ross & Co* (1989) 36 BCLR (2d) 381, has been applied to a claim for purely economic loss.

It has also been decided by the Court of Appeal, in *Wells v McBrine* (1989) 54 DLR (4th) 708, that it is a concomitant of those decisions that when a plaintiff is contributorily negligent, the court should decide on the apportionment of liability among all those who are found to have been at fault, whether they are parties to the action or not. While judgment can only be entered against a party to the proceedings, it is considered necessary for those who are before the court to show who all the possible wrongdoers may be, and the degree of fault attributable to each.

The British Columbia Law Reform Commission was charged with the task of reviewing the law relating to shared liability, including the interpretation placed upon that Province's *Negligence Act* by its Court of Appeal. The Commission recommended abrogation of the judicial interpretation, in its *Report on Shared Liability* (LRC 88, 1986, p 22). That recommendation has not been implemented.

(c) Republic of Ireland

Another jurisdiction in the common law tradition, in addition to British Columbia, to make statutory provision for proportionate liability in the case of a contributorily negligent plaintiff is the Republic of Ireland. But in Ireland, unlike in British Columbia, the portion of the total loss attributable to an insolvent or untraceable defendant is to be shared rateably among both the other (solvent) defendants and the plaintiff. The *Civil Liability Act* 1961 provides, in section 38(1), as follows:

"38.(1)Where an action is brought against one or more of concurrent wrongdoers by an injured person who is found in such action to have been guilty of contributory negligence and it is held to be just and equitable that the plaintiff's damages should be reduced under subsection (1) of section 34 having regard to his contributory negligence, the judgment against one wrongdoer shall not be for the whole of the plaintiff's recoverable damages but the court shall determine the respective degrees of fault of the plaintiff and of all the defendants to the plaintiff's claim at the time of judgment, leaving out of account the degrees of fault of persons who are not such defendants, and shall give the plaintiff a several judgment against each defendant for such apportioned part of his total damages as the court thinks just and equitable having regard to that defendant's degree of fault determined as aforesaid."

If one defendant is insolvent or untraceable, the section also allows a plaintiff to apply for a secondary judgment distributing the deficiency among the other defendants in just and equitable proportions (sub-section (2)). The proportionate liability established by sub-section (1) is expressed not to apply to wrongdoers, one of whom is vicariously liable for the wrongs of another (sub-section (3)). A plaintiff is generally barred from bringing a second or subsequent action against a wrongdoer not sued in the initial proceedings, unless the plaintiff satisfies the court that it was not reasonably possible to join that wrongdoer in the first action (sub-section (4)). A defendant against whom damages have been awarded may seek contribution from any wrongdoer not sued in the initial action (sub-section 8)).

Information is not available on the way in which this measure operates in practice. The fact that it has been in force for more than 30 years, however, suggests that it poses no difficulties in implementation, either by the courts in cases that go to litigation or by the parties to a dispute who agree to a settlement.

(d) England

The law in England, in all relevant respects, is the same as that in New South Wales. Concurrent wrongdoers are jointly and severally liable to the plaintiff, and have rights of contribution among themselves.

A suggestion that these rules should be changed was made in a Report published in April 1989 of Study Teams set up by the Department of Trade and Industry, under the chairmanship of Professor Andrew Likierman. The Report noted that many professionals 'argue that in commercial matters they should be liable only for the share of the damages which would be apportioned to them as just and equitable' (para 4.7); in other words, that they should be under proportionate liability. The authors of the Report had sympathy with that view, but considered that the matter should be referred to the Law Commission - the body charged with reviewing and proposing reform of the law in England. However, the issue does not fall within the Law Commission's present program, and even if the reference is made it is likely to be some time before it is formally considered by that body.

(e) United States

The rules on the liability of concurrent wrongdoers in the United States vary considerably, ranging from those States which apply joint and several liability in all circumstances to those which apply proportionate liability in all circumstances. The rules as to the liability of defendants tend to be linked to some extent to the approach in each State towards the contributory negligence of the plaintiff.

The law in most States adopts some form or other of apportionment of damages to take account of the plaintiff's contributory negligence. Until the 1970s, the law in the United States was the same as the common law in Australia, in decreeing that contributory negligence was a complete bar to a plaintiff's action. While the Australian States and Territories replaced that rule in the 1950s and 1960s with one for the sharing of the loss between the plaintiff and defendant, it was not until the 1970s and 1980s that a similar move was made in the United States. It is now the rule in all but four of the 50 States.

With acceptance of the view that damages could thus be allocated on the basis of the relative degrees of fault of the plaintiff and defendant came the attitude in some States that damages could also be allocated as between several defendants, and that there was no objection in principle to proportionate liability. Whereas joint and several liability was the norm throughout the country some 40 years ago, that rule has now been modified or abrogated in two-thirds of the States.

There are still 13 States, and the District of Columbia, in which those concurrently liable for the same damage are jointly and severally liable, whatever the nature of the damage suffered. In a further three States (California, Nebraska and Ohio), joint and several liability is generally imposed, although liability for general damages (non-economic loss) in a personal injury action is proportionate.

On the other hand, eight States have abolished joint and several liability altogether. In four of those States (Alaska, Utah, Vermont and Wyoming), the abolition was by statute, while in the other four (Kansas, Kentucky, Oklahoma and Tennessee) it was brought about by judicial decision. A further eight States have established proportionate liability as the norm, but have retained joint and several liability in cases of intentional wrongdoing, or those involving widespread personal injury, such as products liability, defective medicinal products, or aircraft accidents.

In the remaining 18 States, the nature of a defendant's liability - ie, whether it is joint and several or proportionate - depends upon the degree of fault attributable to that defendant or any fault on the part of the plaintiff, or a combination of both. In four States (Georgia, Michigan, Missouri and Texas), the defendants will be proportionately liable if the plaintiff is also contributorily negligent. In other States, a defendant will be proportionately liable, so long as his or her share of responsibility for the loss is less than a percentage specified by the relevant legislation (ranging from 20% to 50%), but otherwise jointly and severally liable. And in other States again, a defendant's liability will be proportionate, where his or her degree of fault is less than a specified percentage, or less than that of the plaintiff.

In addition, the proportionate liability system in some States allows any one or more of the defendants to seek a secondary judgment whereby the share of a defendant who turns out to be insolvent or untraceable may be re-allocated among the remaining parties.

As well as changes in State law, there has been a move to introduce proportionate liability into federal law. The federal *Securities Exchange Act* 1934 imposes civil liability for making an untrue statement of material fact in any transaction relating to securities, or for omitting to state a material fact in such a transaction. As the law currently stands, that liability is joint and several. A bill, introduced into the 102nd Congress, and re-introduced on 5 January 1993 into the 103rd Congress, sought to change that position. The bill proposed the insertion of a new section 20B into the *Securities Exchange Act* 1934, whereby in any private civil action for damages under that Act, the various defendants' liability would be proportionate, unless 'the trier of fact specifically determines that [a particular] defendant engaged in' fraudulent conduct in relation to a securities transaction. The bill was not proceeded with in the 103rd Congress, and there has not yet been an opportunity for it to be re-introduced into the 104th Congress.

8. Views of academic writers

In view of the fact that joint and several liability is the currently applicable rule in Australia (apart from the very recent legislation relating to the building industry) and in New Zealand and England, and that joint and several liability has only recently been departed from, and then only in some jurisdictions, in the United States, it is not surprising that only three of the text-books in those countries have addressed the issue of whether there should be any change from that rule.

Trindade and Cane, *The Law of Torts in Australia* (2nd ed, 1993), at pp 730-1, conclude that 'provided we accept that the main aim of the law of tort is compensation, and that tort liability coupled with a system of liability insurance is the best way to ensure that people who suffer loss are compensated for it, then [joint and several] liability coupled with rights of contribution seems better suited to achieving this aim than proportionate liability' (p 731). The authors acknowledge, in a footnote, however, that both of the assumptions on which that conclusion is based 'can be attacked either generally or as they apply to particular areas of tort liability'.

Fleming, *The Law of Torts* (8th ed, 1992), generally accepts the then current state of law, comprising joint and several liability and rights of contribution. He considers, however (at p 275), that if the plaintiff is partly to blame for the loss, and if one of the defendants is insolvent, the joint and several liability of the defendants may be as unfair as would be the proportionate liability of the defendants. This is because their joint and several liability throws the burden of that insolvency on the remaining solvent

defendant(s), while their proportionate liability throws the burden of the insolvency on the plaintiff alone. Professor Fleming goes on to suggest that the 'more equitable solution would be to distribute [the insolvent defendant's] share [among the plaintiff and solvent defendant(s)] in proportion to their own responsibilities. This can be accomplished by a "secondary judgment", on the basis of what is "just and equitable" in case of supervening insolvency.' He observes that, alone of the countries with a common law tradition, the Republic of Ireland has adopted this approach, in s 38 of the *Civil Liability Act* 1961, which has been referred to above.

Professor Glanville Williams, *Joint Torts and Contributory Negligence* (1951), in a review of the area of law encompassed in that title, accepted that joint and several liability is correct as a matter of principle, in cases where the plaintiff is free of any blame for the loss. However, he also considered that 'where the plaintiff is guilty of contributory negligence, the defendants ought not to be liable *in solidum* [jointly and severally], but should share the liability between them, together with the risk of insolvency of one of their number, the plaintiff also taking his own due share' (§ 104, p 406). The method proposed by Professor Williams for achieving this end was a 'secondary judgment', described in summary form by Professor Fleming, as quoted above. Professor Williams dealt with both the reasons supporting his view, and the means for giving it effect, at some length (§§ 102-104, pp 398-409). As has already been observed, only the Republic of Ireland has paid heed to them.

The editor of one of the two leading text-books on tort law in the United States, Professor Gray, (editor of Harper and James, *The Law of Torts* (2nd ed, 1986)), is critical of those States which have modified or abolished joint and several liability. He points out that, under joint and several liability, the risk of one defendant's insolvency was borne by the other defendant(s), and describes as spurious any argument that would change that allocation of risk if the plaintiff is free of blame for loss. The text continues: 'If plaintiff was negligent, there is considerable support for the proposition that under comparative negligence the risk of loss from a non-paying defendant should be shared among all the other negligent actors, including the plaintiff, in proportion to their respective shares of fault' (§ 22.17, pp 412-3). However, Professor Gray contends that the mere fact that the risk of insolvency of one party is capable of being apportioned does not establish that such should be the case. He concludes by saying that the fact that 'defendants' losses are generally more likely to be insured than plaintiffs' is, it is submitted, a better reason for not changing the allocation of this risk, than is the "logic" of comparative fault for making such a change'.

Since the above edition was prepared, law review articles have been published in the United States on the topic of joint and several liability, as against proportionate liability. Consistent with the wide variety of approaches taken by the courts and legislatures in that country, as described above, the authors of articles espouse a broad range of views. This is illustrated by two recent articles. One of them, Mednick and Peck, 'Proportionality: A Much-Needed Solution to the Accountants' Legal Liability Crisis' (1994) 28 *Valparaiso Law Review* 867, proposes a federal statute, along the lines of the Bill to amend the Securities Exchange Act referred to above, embodying the principle of proportionate liability for accountants and others coming within the ambit of the federal securities laws. The other article, Wright, 'The Logic and Fairness of Joint and Several Liability' (1992) 23 *Memphis State University Law Review* 45, trenchantly criticises a decision of the Supreme Court of Tennessee which, in 1992, abolished joint and several liability in that State and replaced it with proportionate liability. Wright argues that joint and several liability should be retained, and proportionate liability abandoned.

9. Conclusions and recommendations

(a) Should joint and several liability be retained?

A principal issue is whether the reasons put forward for retaining joint and several liability continue to be valid. A major reason advanced by all of the law reform agencies referred to in this review is that the principal aim of the law of torts is to provide full compensation (wherever possible) to one who has been injured by the fault of another. No-one can doubt that this is an accurate statement when applied to a plaintiff who has suffered personal injury. The interest in bodily integrity is rightly accorded a high priority. But full compensation for personal injury is, in many cases, no more than the aim of the law. Legislation in many of the States restricts the damages that may be claimed when the personal injury is the result of a motor accident or arises in the course of the injured person's employment. If, in these instances, the demands of full compensation should give way to contrary community considerations, it is clearly doubtful whether the interest in financial security should always be completely protected by the law. It may certainly be questioned whether that interest should be put on the same plane as the protection of bodily integrity. In reviewing the course of development of the law, the point was made that there is some judicial resistance to the unthinking application to cases of financial loss and property damage of the principles developed for the compensation of personal injury.

The legislation in Victoria, South Australia and the Northern Territory, applying proportionate liability to claims for defective building work, clearly takes the view that if the plaintiff's claim relates to property damage or economic loss, the argument for the provision of full compensation should be subordinated to the dictates of fairness in the allocation of responsibility. In New Zealand the law of torts does not protect personal injury by accident, and the New Zealand Law Commission has tentatively proposed that joint and several liability should not be retained if the plaintiff is partly at fault.

The law of negligence, and its avowed aim of providing compensation to one who is injured, depends upon a finding of fault in at least one defendant. If the injured

person can find no-one else to blame for the injury, he or she cannot recover compensation. When these principles are applied to cases of purely economic loss - the focus of this current inquiry - it becomes clear that under the existing rules of joint and several liability, one who has suffered financial harm will do everything possible to fix even a small measure of the blame for that loss on a person who is solvent, or insured against that liability. But the fairness or justice of a legal rule must be questioned when its effect is to place full liability on a defendant who may have been only marginally at fault, and to provide full compensation to a plaintiff who is able to find one on whom to fix the blame for the loss.

The other reason put forward by each of the law reform agencies for retaining joint and several liability was the practical difficulties that each could foresee as arising from the implementation of proportionate liability. It may, however, be suggested that any practical problems in implementing a regime of proportionate liability are more apparent than real. It has already been observed that the Republic of Ireland has had such a regime for more than 30 years, and no evidence has emerged of any practical difficulties. The Province of British Columbia has also had such a regime for more than 10 years, and there is no indication of practical difficulties. Equally, there has been no suggestion from those States in the United States of America which have adopted one of the various forms of proportionate liability that the change in the law has led to difficulties of applying it in practice. Furthermore, the application of proportionate liability in British Columbia has demonstrated that there is no need for all the possible parties to litigation to be joined in the one action. As a consequence, if the plaintiff and the solvent defendant(s) wish to settle their action, there is no need for them to include in the negotiations those parties who are clearly insolvent. All that is required is agreement on the proportion of fault of those defendants who are parties to the negotiation.

A view expressed by two of the academic writers referred to (Trindade and Cane in Australia and Harper and James in the United States) is that joint and several liability is an adequate solution when coupled with the fact that at least one of the defendants will have liability insurance sufficient to cover the losses suffered by the plaintiff. However, even in cases of personal injury resulting from road and industrial accidents, insurers are facing severe difficulties in maintaining adequate levels of cover, leading to statutory limitations on the compensation available. Among the comments received in response to Stage One of this inquiry, the view was expressed that for professionals the cost of liability insurance has reached unacceptable levels and that some of the international accounting firms may be able to continue their current self-insurance arrangements for no more than a few years. These comments also made the point that claims against those firms which are settled tend to be subject to the limits imposed by the level of insurance cover which a firm has. If, in those cases, full compensation is constrained by the extent of the defendant's insurance, it may be observed that a fairer and more just limit would be the proportion to which any particular defendant was to blame for the loss.

It is suggested that the arguments that have been advanced for the retention of joint and several liability are not applicable to the current situation, focussing as it does on the liability professionals and others for financial harm and property damage.

It is therefore **recommended** that joint and several liability be abolished, and replaced by a scheme of proportionate liability, in all actions in the tort of negligence in which the plaintiff's claim is for property damage or purely economic loss.

(b) Which type of proportionate liability?

Reference has already been made to the fact that at least four different types of proportionate liability have been introduced in various jurisdictions in the common law world over the last 30 years. It is necessary to consider each of them, in order to see which might be recommended as a replacement for joint and several liability, in the circumstances referred to above.

(i) Proportionate liability in all circumstances

The variant used in the legislation of Victoria, South Australia and the Northern Territory dealing with claims for defective building work imposes proportionate liability in all circumstances, without regard to whether the plaintiff has also been in any way to blame for the loss.

The advantages of this scheme, as perceived not only by the proponents of the legislation but also by the law reform agencies in New Zealand and Alberta, are twofold. First, it is regarded as inherently fair that each defendant should bear no more than the proper proportion of the loss that has been suffered by the plaintiff and inherently just that liability should be equated with responsibility. Secondly, the law reform agencies saw advantage in the fact that the existing complicated rules as to contribution between various defendants would no longer be necessary.

But despite these advantages, the two law reform agencies recommended against the adoption of such a regime. Their reason, in essence, was that, whereas joint and several liability puts the risk of insolvency and untraceability of a defendant on to the other (solvent) defendants, proportionate liability puts that risk on to the plaintiff. In their view the advantages of proportionate liability did not outweigh the disadvantage of that transfer of risk. It may, however, be observed, in response to that view, that if a plaintiff is not able to show that any more than one person is responsible for the loss suffered, the plaintiff bears the risk that that lone defendant might be insolvent or untraceable. It may therefore be questioned whether that risk should be transferred, simply because two or more people may be responsible for the loss.

This variant of proportionate liability does not depend on findings, or assumptions, as to the cause or causes of the plaintiff's loss, but requires only the attribution of fault, and degrees of fault, to a defendant against whom action is brought. Once a defendant is found to bear a certain

percentage of the blame for a particular loss, that defendant can be assured that the extent of his or her liability will not increase solely because another defendant is either insolvent or has only minimal assets with which to satisfy a judgment. Joint and several liability is imposed on defendants despite the fact that each has acted independently of the others in bringing about the plaintiff's loss. It can scarcely be regarded as just that one of the defendants should bear the burden of satisfying a claim for loss, when the principal reason for that loss lay in the activities and defaults of others, over whom the one solvent defendant had no real control.

It is therefore **recommended** that joint and several liability for negligence which causes only property damage or economic loss be replaced by liability which apportions fault, in all circumstances, among those responsible for the damage or loss.

(ii) Proportionate liability when plaintiff partly at fault

Another variant of proportionate liability is in the legislation of British Columbia. Under this variant, proportionate liability is applied only when the plaintiff has been contributorily negligent; if the plaintiff is not to blame for the loss, the defendants are jointly and severally liable.

This variant was given serious consideration by the law reform agencies in New South Wales, Alberta and Ontario. Those agencies saw advantages for it in principle, on the basis that, since the total loss suffered by the plaintiff was to be apportioned between the plaintiff on the one hand and the defendants on the other, that loss ought also to be apportioned among each of the defendants in proportion to the degree of fault of each. The law reform agencies concluded, however, that the contributory negligence of the plaintiff was not an adequate reason for proposing a move to proportionate liability. Their common reason for that view was that the fault of a contributorily negligent plaintiff is often different in kind from the fault of a defendant. Each of the agencies pointed out that a plaintiff will be contributorily negligent merely by being partly to blame for the loss or damage, and need not be a cause, in part, of the defendant's breach of duty. Hence, in a motor car accident, a plaintiff may be found contributorily negligent in failing to wear a seat belt. However, the present inquiry is concerned with instances of purely economic loss and property damage. In these circumstances, it is less easy to distinguish between contributing to the damage suffered and contributing to the breach of duty.

This variant places considerable emphasis on the causes behind the plaintiff's loss. If the plaintiff were not in any way a cause of that loss, each of the defendants is regarded as being an effective cause of the whole of the loss, and therefore potentially liable to compensate for all the loss. It may, however, be observed that concepts of cause are notoriously difficult to apply with any precision. It could be regarded as arbitrary for the extent of a defendant's liability to depend on whether the plaintiff played any part in bringing about the loss that he or she has suffered. It might also be regarded as unfair to a defendant who is found to be, say, 10% at fault that his or her liability is limited to that proportion, so long as the plaintiff is even marginally also at fault, but extends to the whole of the loss if the plaintiff is not at fault and the other defendants are insolvent or untraceable.

For these reasons, this variant of proportionate liability does not appear to be as fair and just as that recommended above.

(iii) Proportionate division of insolvent defendant's share

A third variant of proportionate liability is that in the legislation of the Republic of Ireland and put forward as a tentative proposal by the New Zealand Law Commission.

This variant, like the one referred to under the preceding heading, would impose proportionate liability only when the plaintiff was found to have been contributorily negligent. This variant is different from that mentioned above in that under this variant, if any defendant turns out to be insolvent or untraceable, his or her share of the loss or damage is divided rateably among all the other parties, including the plaintiff, in proportion to their respective shares of responsibility. Whereas the British Columbia legislation would throw the risk of an insolvent defendant on to a contributorily negligent plaintiff alone, the legislation of the Republic of Ireland would spread that risk among all the remaining parties.

This approach is supported by Professor Glanville Williams and by Professor Fleming, as being more fair than either joint and several liability or the other forms of proportionate liability referred to above. However, this approach would often require a plaintiff to face court proceedings a second time, if one or more of the defendants were found to be insolvent or untraceable. The costs of a second adjudication on the division of the plaintiff's loss are regarded by some as outweighing the fairness of the ultimate result. This variant, like the one discussed under the preceding heading, places considerable emphasis on the causes for the plaintiff's loss, in that it applies only when the plaintiff is found to be one of those causes. As already mentioned, a defendant who is found to be only 10% to blame may, in the end, be obliged to satisfy the whole of a judgment if the other defendants are insolvent. Despite the advantages perceived by academic writers for this variant of proportionate liability, it is considered that they are outweighed by the disadvantages just referred to.

(iv) Proportionate liability and defendant's degree of fault

The other variant of proportionate liability applies in some jurisdictions in the United States. Under these schemes, the details of which vary from State to State, a defendant will be proportionately liable so long as his or her share of the responsibility is less than a specified percentage. These schemes have the advantage of limiting the liability of a party whose comparative degree of fault is relatively minor when compared to the degree of fault of other defendants, or of the plaintiff. As pointed out by

academic writers in that country, such fairness is bought at the price of some arbitrariness. There may be little difference in substance between a defendant who is 19% to blame for a loss and one who is 21% to blame, but the liability of the former may be proportionate and confined to 19% of the overall loss, while that of the latter may be joint and several and, depending on the solvency of other parties, effectively 100% of the overall loss.

A further and more fundamental criticism of this variant is that it is difficult, if not impossible, to see its rational basis. If it is regarded as fair that one defendant should be proportionately liable when he or she was 10% to blame for a loss, it would appear to be equally fair for another defendant also to be proportionately liable if he or she is 30% to blame. But if the arbitrary line at which proportionate liability ceases is 20%, the second of these hypothetical defendants would be jointly and severally liable.

It is suggested that the arbitrary nature of this variant of proportionate liability militates against its adoption in Australia.

(c) Statutory liability

Reference has been made earlier in this report to the statutory liability for misleading conduct, which appears to create an anomaly when compared with liability in negligence, and to the statutory imposition of joint and several liability. Neither has been included within any of the above recommendations, but both matters fall within the terms of reference.

(i) Liability for misleading conduct

It has been noted that two or more persons may, by their separate breaches of section 52 of the *Trade Practices Act 1974* (Cth) (or its equivalent in the fair trading legislation of the States and Territories), cause loss or damage to another person. As the law stands at present, while it is assumed that those who have brought about that loss would be regarded as jointly and severally liable, it is doubtful whether any of them has a right of contribution against another or others. Equally, two or more who have caused loss or damage by a contravention of section 995 of the Corporations Law would presumably be jointly and severally liable, but would be unlikely to have any rights of contribution one against the other.

Although liability in negligence is different from these forms of statutory liability, in that the statutory provisions may be infringed despite all reasonable care having been taken, there are many similarities between the two forms of liability. In particular, so far as the present inquiry is concerned, both forms of liability may arise when a professional person makes a misstatement on which others rely, to their financial detriment.

Because of the similarities between professional liability for negligence and under these statutes, it is anomalous that, in the case of multiple wrongdoers, any one of such a group should be exposed to a considerably different extent of liability depending solely on whether action is brought at common law or under one or other of the statutory provisions. On the other hand, a contravention of section 52 of the Trade Practices Act, or its State or Territory equivalent, may arise from a multitude of circumstances far removed from that of a professional person making a statement which turns out to be incorrect. Hence, a solution which removed the anomaly just referred to in relation to professional liability may bring with it further difficulties in relation, say, to a contravention of section 52 constituted by misleading the public as to the trading relationship between one business and its rival.

Subject to the comments below on claims arising out of consumer transactions, it is therefore **recommended** that, if two or more are together responsible for a contravention of section 52 of the Trade Practices Act (or its equivalent in the fair trading legislation of the States and Territories) or of section 995 of the Corporations Law, each should be liable only in proportion to the degree of responsibility which he or she bears for the contravention, and not jointly and severally.

It has been noted above that the Australian Law Reform Commission recommended the amendment of the Trade Practices Act to allow for the introduction of rights of contribution and indemnity among respondents to proceedings under that Act. Adoption of this recommendation as it stands would be consistent with the present rule of joint and several liability as applied in an action in negligence. When defendants to an action are jointly and severally liable it is appropriate for any one of them to be able to seek contribution or indemnity from any of the others. But if the recommendations of this Report are accepted, and proportionate liability is adopted for an action in negligence relating to property damage or purely economic loss, it would be appropriate for proportionate liability to apply, in general, to remedies for misleading conduct under the Trade Practices Act and the Corporations Law.

However, if the principle of providing full compensation for consumer claims under the Trade Practices Act were regarded as being of paramount importance, joint and several liability might be maintained for these claims, in a similar manner to that presently applicable under the Act for personal injury claims.

Reference has already been made to the fact that the Trade Practices Act currently draws a distinction between consumer transactions and business transactions, and appears to equate the former with claims for personal injury. Section 75AM expressly imposes joint and several liability for a breach of other provisions of Part VA which causes death, personal injury or damage to consumer goods, and subsection 73(1) expressly imposes joint and several liability for a breach of certain consumer contracts. In those cases in which the claim arises by reason of personal injury or from a consumer credit transaction, the Act specifies that liability shall be joint and several, whereas no such specification is made with respect to claims arising, for instance, in a business context from a contravention of section 52. The clear reason for imposing joint and several liability in cases of personal injury is to ensure adequate compensation tor the injured person. A

similar rationale is no doubt behind the express imposition of joint and several liability in some cases where loss or damage arises from a consumer transaction.

(ii) Joint and several liability imposed by statute

It has been noted earlier in this report that a heterogeneous collection of Commonwealth and New South Wales statutes (see Appendix A) expressly imposes joint and several liability in various circumstances. It has also been noted that sections 10 and 12 of the *Partnership Act* 1892 (NSW) (and the equivalent legislation in the other States and Territories) renders each member of a partnership jointly and severally liable for any torts committed by any one of the partners while that partner is acting in the ordinary course of the business.

It has already been observed that joint and several liability is generally imposed in the statutes listed in Appendix A to ensure the recovery by a public authority of a levy or rate for a service provided, or to ensure the recovery of expenses incurred by a public authority. Those purposes are wholly different from issues relating to the division of liability among multiple tortfeasors. The policy underlying these provisions has not been examined by this inquiry, which makes no recommendation that they be changed.

The statutorily imposed liability of partners between themselves must necessarily remain. It is of the essence of the relationship between those who have agreed to become partners that, for instance, they owe fiduciary duties each to the other and that each is responsible for the torts committed by any fellow partner acting in the ordinary course of the partnership business.

(d) Vicarious liability excluded

It was pointed out by the New South Wales Law Reform Commission that to apply proportionate liability in a case where one defendant's liability arose simply from its vicarious liability for another defendant would completely undermine the principles of vicarious liability and the policy behind them. This proposition is unarguably correct. However, while the Commission used that argument to support its view that no change should be made to joint and several liability, it is suggested that a better approach is that adopted in the Republic of Ireland. Subsection 38(1) of the *Civil Liability Act* 1961 creates a form of proportionate liability, but sub-s 38(3) excludes those cases where one is vicariously liable for the wrongs of another. It is therefore **recommended** that any change to the present rules on joint and several liability should be expressed not to apply to instances of vicarious liability.

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APPENDIX

Selection of Legislation Imposing Joint and Several Liability

Part 1 - Commonwealth

- *Great Barrier Reef Marine Park Act 1975*, s 61B(2) (Liability for expenses incurred by the Commonwealth or the Authority resulting from contravention of the Act)
- *Lighthouses Act 1911*, s 14 (Persons liable to light dues)
- *Migration Act 1958*
  s 65(2), (3)(a) (Costs of deporting deportees)
  s 66(2), (3)(a) (Costs of keeping deportees in custody)
  s 88(7) (Costs of custody of prohibited entrant during stay of vessel in port)
  s 89(7) (Costs of custody of prohibited entrant during stay of aircraft in Australia)
- *Navigation Act 1912*, s 415 (Expenses in taking person to sea)
- *Petroleum Retail Marketing Franchise Act 1980*, s 22(7) (Compensation for contravention of the Act)
- *Shipping Registration Act 1981*, s 72 (Expenses of taking officers to sea)

Part 2 New South Wales

- *Cattle Compensation Act 1951*, s 16F(5) (Levy of rates on owners of cattle)
- *Charitable Fundraising Act 1991*, s 41(5) (Recovery of certain expenses from unincorporated association)
- *Drainage Act 1939*, s 50(1) (Liability of joint owners for rates)
- *Marine Pollution Act 1987*, s 30 (Liability of owner, lessee, licensee and other user of pipeline for discharge)
- *Maritime Services Act 1935*, s 13YA(2) (Liability of owner and master of vessel for damage to Board's property)
- *Pilotage Act 1971*, s 28A(2) (Liability of owner and master of ship under pilotage)
- *Rivers and Foreshores Improvement Act 1948*, s 19(3) (Liability of joint owners of property for rates and contributions)
- *Strata Titles Act 1973*, s 59(4) (Liability of present and previous proprietor for levies by body corporate)
- *Strata Titles (Leasehold) Act 1986*, s 89(3) (Liability of present and previous proprietor for levies by body corporate) ❑