12. Proportionate Liability

Term of Reference

3 In conducting this inquiry, the Panel must:

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

12.1 This Term of Reference could be interpreted as requiring the Panel to make recommendations for the replacement of 'joint and several' liability for negligently-caused personal injury and death with a system of proportionate liability. The Panel has not considered itself to be constrained in this way. We have been asked to review the law of negligence generally, and it is not possible to do this properly without giving careful consideration to, and evaluating options for, the reform of this important area of the law. In our view, the Terms of Reference should be so construed.

12.2 After careful consideration, we have come to the firm view that personal injury law should not be reformed by the introduction of a system of proportionate liability. We have not considered or assessed options for the introduction of a regime of proportionate liability in relation to property damage and pure economic loss, and we make no comment or recommendation in that respect.

The concepts of joint and several liability and proportionate liability

12.3 This area of the law is concerned with situations in which the same damage is caused by negligence (or other legal wrong) on the part of more than one person. Historically, it was important to distinguish between two different types of case. One involved what was called 'joint' wrongdoing and the other 'concurrent' wrongdoing. Joint wrongdoing occurs where two or more people act together, and their concerted action causes harm to another. Concurrent wrongdoing occurs where two or more people act independently of one another, but their various independent actions cause harm — the same harm — to another. As a result of statutory provisions and decisions of the courts over the past 60 years or so, the distinction between joint and concurrent

wrongdoing is now largely irrelevant. For present purposes, we can use the term 'multiple wrongdoers' to cover both types of case.

12.4 Multiple wrongdoers are 'severally liable'. This means that each can be held liable for the full amount of any damages awarded to the plaintiff, and the plaintiff is entitled to seek to recover the full amount of those damages from any of the people held liable. Of course, the plaintiff can only recover once, but is free to get as much of the total amount due as it is possible to get from any of the persons held liable. This maximises the plaintiff's chance of full recovery. If, for instance, there were two wrongdoers and one of them is solvent and the other is insolvent, the plaintiff is entitled to recover the full amount of the damages from the solvent wrongdoer. This phenomenon is sometimes referred to as 'solidary liability' (as opposed to 'proportionate liability').

12.5 The basic justification for solidary liability is that because the wrongful conduct of each of the wrongdoers was a necessary condition of the harm suffered by the plaintiff, it should not be open to any of the wrongdoers to resist — as against the plaintiff — the imposition of liability for the whole of the harm suffered.

12.6 Any and every one of a number of multiple wrongdoers is entitled to recover 'contribution' from the others towards any amounts paid to the plaintiff. Under the statutes dealing with contribution, the court has a very wide discretion to 'apportion' the liability between the various wrongdoers in such proportions as the court thinks just. The most important practical consequence of solidary liability is that the risk that one or more of the multiple wrongdoers will not be available to be sued or will not be able to pay the damages awarded, rests on the other wrongdoers rather than on the plaintiff. The justification for this is that as between the various wrongdoers and an innocent plaintiff, it is unfair that the risk that one or more of the wrongdoers will be unavailable to be sued or will be insolvent should rest on the plaintiff. This reasoning explains suggestions made from time to time that the rule of solidary liability should be reformed, but only in cases where the plaintiff was contributorily negligent.

12.7 Contrasted with solidary liability is proportionate liability. Under a regime of proportionate liability, liability for the harm caused (jointly or concurrently) by the multiple wrongdoers is divided (or 'apportioned') between them according to their respective shares of responsibility. A plaintiff can recover from any particular wrongdoer only the proportion of the total damages awarded for which that wrongdoer is held liable, assessed by reference to the wrongdoer's comparative degree of responsibility (defined in terms of some statutory criterion or criteria). The main practical effect of

proportionate liability is that the risk that one or more of the multiple wrongdoers will be unavailable to be sued, or will be insolvent, rests on the person who suffers the harm.

Law reform, academic and legislative opinions regarding the issue

12.8 Many law reform bodies, both in Australia and overseas, have considered the question of whether solidary liability should be replaced by a system of proportionate liability.[1] Some have concluded that in cases of pure economic loss, that is, loss not consequent upon personal injury or death, proportionate liability should be introduced.[2] As mentioned, we make no comment on this aspect of proportionate liability. The Panel is not aware of any law reform report that has recommended the introduction of a system of proportionate liability in relation to claims for personal injury or death.

12.9 The strong weight of academic opinion is also that solidary liability is preferable to proportionate liability in cases of personal injury or death.

12.10 This preponderance of opinion is reflected in legislation. There is no statutory enactment in Australia that provides for proportionate liability in cases involving personal injury or death. There are certain statutory provisions in the States and Territories that establish a system of proportionate liability, but none apply to claims for personal injury or death.[3]

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1 For example, NSW Law Reform Commission, Contribution Among Wrongdoers: Interim Report on Solidary Liability, LRC 65; NSW Law Reform Commission, Contribution Between Parties Liable for the Same Damage, Report 89 (1999); Victorian Attorney-General's Law Reform Advisory Council, Expert Report 3 (1998); New Zealand Law Commission, Apportionment of Civil Liability Report 47 (1998); Canada Standing Committee on Banking, Trade and Commerce, Joint and Several Liability and Professional Defendants (Report, 1998); JLR Davis, Inquiry into the Law of Joint and Several Liability: Report of Stage 2 (Commonwealth of Australia, 1995).

2 The Commonwealth Government's Corporate Law Economic Reform Program Phase 9 (CLERP 9) proposes that the present rule of joint and several liability in relation to pure economic loss and property damage be replaced by a proportionate liability regime.

3 Development Act 1993 (SA); Building Act 1993 (Vic); Building Act 1993 (NT). See also Civil Liability Amendment (Personal Responsibility) Bill 2002, Part 6 (NSW).

Arguments advanced against solidary liability

12.11 Some have argued that solidary liability is unfair and makes it difficult for insurers properly to assess the insured risk. Several reasons are given to support this conclusion:

(a) Under a system of solidary liability, an insured may be liable for a loss in circumstances where its 'contribution to the loss' is relatively small and its right of contribution against other wrongdoers is worthless because they are either impecunious or not available to be sued. Consequently, it is said, a plaintiff's loss is 'distributed' by reference to the relative ability of the various wrongdoers to pay, rather than their respective contributions to the loss.

(b) Under a system of solidary liability, an insurer must set premiums on the basis that its insured will be completely liable for a plaintiff's loss, even though the insured's contribution to the loss may be relatively small and the balance of the loss may not be recoverable because the other wrongdoers are impecunious or unavailable to be sued.

(c) Under a system of solidary liability, 'deep pocket' defendants (for example, public authorities or professionals with insurance) tend to be targeted in preference to other wrongdoers regardless of their relative responsibility for the harm. This, it is said, is unfair because such defendants may have little control over the conduct of other concurrent wrongdoers.

(d) A system of solidary liability may discourage the development of risk-management procedures because defendants who invest in such procedures may find themselves being held fully liable, while other wrongdoers who did not make such investments may get off scot-free.

12.12 As regards the person who suffered harm, the argument that solidary liability is unfair can be met by pointing out that the conduct of each of the multiple wrongdoers was a necessary condition of the harm suffered; and in this sense, each of the multiple wrongdoers is fully responsible for it. From the plaintiff's point of view, it would seem very difficult to justify a situation in which a person who was harmed by more than one wrongdoer (only one of

whom was solvent and available to be sued) could be worse off than a person who was harmed by only one wrongdoer who was solvent and available to be sued.

12.13 As between multiple wrongdoers, the possibility of recovering contribution can be seen simply as a piece of good luck. If a wrongdoer negligently causes harm to another, that person is liable for it regardless of the degree of fault their conduct displayed. The fact that the degree of a particular wrongdoer's fault is small does not, by itself, provide a reason for reducing that person's liability to the harmed person. In this light, the fact that a wrongdoer whose fault was slight may be unable to recover contribution from another wrongdoer whose fault was greater, provides no reason to reduce the liability of the former simply because the former was only one of a number of wrongdoers responsible for the same harm. Nor does it result in the plaintiff's loss being distributed by reference to ability to pay, rather than responsibility for the loss. Rather, it is distributed by reference to the principle that a person who negligently causes harm to another must pay for it.

12.14 When premiums are set, an insurer must necessarily assess the risk on the assumption that the insured will be liable for the full amount of any harm. This is so regardless of whether the law provides for solidary or proportional liability because at the time the premium is set, the insurer must allow for the possibility that the insured will be a sole wrongdoer. It seems unlikely that the difference between being held liable proportionately as opposed to having a (possibly worthless) right to recover contribution from other wrongdoers could have any significant impact on the setting of premiums. At all events, provided the law is clear (as it is), the fact that it establishes solidary liability will not make the setting of premiums any more difficult than it would be under a system of proportionate liability. The mere fact that premiums might be higher under a system of solidary liability than they would be under a system of proportionate liability provides, by itself, no argument against the former if it is considered, on other grounds, to be fair.

12.15 Once it is accepted that each of a number of multiple tortfeasors is responsible for the harm, and that the right to claim contribution from the others does not alter this fact, there is nothing unfair in 'deep pocket' defendants being targeted.

12.16 The argument that a system of solidary liability reduces incentives for risk management is fallacious. In deciding what risk-management measures to take, a person must necessarily assume that their activities may be the sole cause of harm without any contribution from other people.

The problem with proportionate liability

12.17 In the Panel's view, although no significant practical problems would arise as a result of the introduction of a system of proportionate liability in relation to negligently-caused personal injury or death, there is a major problem of principle that weighs conclusively against any proposal for such a system.

12.18 Under a system of proportionate liability, the plaintiff bears the risk that one of a number of multiple wrongdoers will be impecunious or unavailable to be sued. If there are two wrongdoers, D1 and D2, each of whom is 50 per cent responsible for the same harm, and D2 is impecunious or unavailable to be sued, under a system of proportionate liability the plaintiff will only recover 50 per cent of their loss (from D1). This is so regardless of whether the plaintiff was also in any way at fault. In the result, a person who is harmed by two people may be worse off than a person who is harmed by one. Conversely, a person who negligently causes harm to another will be better off merely because someone else also caused the person harm. This is difficult to justify.

12.19 For this reason, the Panel is firmly of the view that it should make no recommendation to replace joint and several liability with proportionate liability.

Recommendation 44

In relation to claims for negligently-caused personal injury and death, the doctrine of solidary liability should be retained and not replaced with a system of proportionate liability.

An option for proportionate liability

12.20 Consistently with the task of the Panel to identify options for reform and, despite Recommendation 44, the Panel considers that the proposal set out in the next paragraph would be a suitable basis for legislation to replace joint and several liability for negligently-caused personal injury and death with proportionate liability.

Option for proportionate liability

12.21 In any claim for negligently-caused personal injury or death, the following principles will apply:

12.22 Any damages awarded to a plaintiff against a defendant are limited to such proportion of the total amount claimed as the court considers just having regard to the defendant's responsibility for the harm.

12.23 The court may not give judgment against the defendant for more than that amount.

(a) In any case where more than one person is liable in respect of the same damage, none may recover contribution from any of the others towards any damages that the person is liable to pay.

12.24 This proposal does not distinguish between cases involving a single wrongdoer and cases involving multiple tortfeasors. This is because under a system of proportionate liability, it is always open to a wrongdoer to claim that he or she was not a sole wrongdoer. Paragraph (a) allows the court to hold the defendant 100 per cent liable if it concludes that the defendant was the only wrongdoer who bore responsibility for the harm. Under a system of proportionate liability, there are, necessarily, no rights to contribution. Paragraph (c) is, therefore, strictly unnecessary.

Contribution between parties liable for the same harm

12.25 Under a regime of proportionate liability, the plaintiff can recover damages, from each party liable for the same harm, only for that proportion of the harm for which each was held responsible. It follows that no liable party has a right to recover contribution from any other liable party towards the damages which the former has to pay. By contrast, under a regime of solidary liability, the plaintiff can recover, from each party liable for the same harm, damages for the total harm suffered; and each liable party has a right to recover from the other liable party (or parties) a contribution towards those damages proportionate to the latter party's responsibility for the harm.

12.26 The law of contribution in Australia is extremely complex, and it varies in significant respects from one jurisdiction to another. In the time available to us, we have not been able to give the law of contribution the consideration it needs and deserves. Our view is that if our Recommendation is accepted that the existing regime of solidary liability be retained in relation to personal

injury and death claims, there should be a review of the law of contribution with the aim of introducing a uniform national regime of rules to govern contribution.