NSW Law Reform Commission

REPORT 65 (1990) - COMMUNITY LAW REFORM PROGRAM EIGHTEENTH REPORT: CONTRIBUTION AMONG WRONGDOERS: INTERIM REPORT OF SOLIDARY LIABILITY

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To the Honourable J R A Dowd, LLB, MP,
Attorney General for New South Wales

COMMUNITY LAW REFORM PROGRAM

CONTRIBUTION AMONG WRONGDOERS: INTERIM REPORT ON SOLIDARY LIABILITY

Dear Attorney General,

We make this Report pursuant to the reference to the Commission from the then Attorney General, the Honourable T W Sheahan, BA, LLB, MP, dated 12 August 1985.

The Honourable R M Hope QC

(Chairman)

Mr Ronald Sackville

(Commissioner)

Mr H D Sperling QC

(Commissioner)

July 1990

Terms of Reference

On 12 August 1985, the then Attorney General of New South Wales, the Honourable T W Sheahan, BA, LLB, MP, made the following reference to the Commission:

> To inquire into and report upon the following matters:
>
> 1. The law governing rights of contribution between two or more persons responsible for the same damage; and
>
> 2. Any incidental matter.

Participants

Commissioners

For the purpose of work on this Interim Report, a Division was created by the Chairman in accordance with s12A of the Law Reform Commission Act 1967. This Division comprised the following members of the Commission:

NSW Law Reform Commission: REPORT 65 (1990) - COMMUNITY LAW REFORM PROGRAM EIGHTEENTH REPORT: CONTRIBUTION AMONG WRONGDOERS: INTERIM REPORT OF SOLIDARY LIABILITY

1. The Contribution Reference and this Report

1. On 12 August 1985, the Commission was given a reference to inquire into and report upon:

(i) the law governing rights of contribution between two or more persons responsible for the same damage; and

(ii) any incidental matter.

The reference was made under the Commission's Community Law Reform Program.[1] Substantial preliminary research was done on this reference. Subsequently, work on the reference was suspended due to lack of resources and competing priorities.[2] The need to take account of continuing developments in the area of tort liability in recent years, for example the introduction and later abolition of the Transcover scheme, also contributed to the delay in pursuing this project.

2. In 1989 the Attorney General announced that he was reviewing the general law of tort liability in New South Wales.[3] This review has implications for the law of contribution. Of particular concern to the Commission was the possibility of reform of the doctrine of solidary liability. Following discussions with the Attorney General it was agreed that the Commission would prepare an interim report under its contribution reference dealing solely with the question of solidary liability. It was also agreed that this report would be completed by July 1990 in order to allow any proposals for reform to be reviewed together with other reforms being considered by the Attorney General. The Commission will continue with work on the remainder of its contribution reference when the nature of the intended reforms to the tort system are settled.

FOOTNOTES

1. The nature and progress of the Community Law Reform Program are discussed in detail in the Commission's Annual Reports since 1982. The Program entitles the Commission to give preliminary consideration to suggestions for law reform made by members of the legal profession and the community at large and, where it is thought appropriate, to seek suitable references from the Attorney General on matters raised by such suggestions. The present reference was prompted by a letter to the Commission from Mr Justice Clarke of the Supreme Court of New South Wales suggesting an amendment to the legislation which confers a right of contribution between tortfeasors so as to permit rights of contribution between a tortfeasor and a person in breach of contract and between people in breach of separate contracts.

2. See New South Wales Law Reform Commission *Annual Report 1989* Chapter 1 and para 3.48.

3. See below paras 8 to 10.

2. The Doctrine of Solidary Liability

3. It is a fundamental feature of the existing legal rules governing actions against concurrent wrongdoers that a plaintiff is free to recover the whole of his or her loss from any one of a number of concurrent wrongdoers responsible for that loss. Under this system of "solidary liability"[4] a particular defendant can be called upon to pay the entire amount of the plaintiff's claim even if that defendant's share of fault is minor compared to that of other concurrent wrongdoers. In some, but not all cases, a defendant called to pay more than his or her "fair share" of damages may be able to claim contribution from other concurrent wrongdoers. The nature and extent of the right of contribution is the main focus of the remainder of the Commission's reference and will be considered at a later stage.

4. Solidary liability has been criticised as leading to the targeting of deep-pocket defendants, such as public authorities, manufacturers and insurers. Critics of solidary liability argue that it is unjust that a defendant whose comparative fault is minor should be called upon to meet the whole of the plaintiff's claim simply on the basis of ability to pay. Indeed that ability to pay has been called into question, particularly with respect to public authorities, who have been faced with large increases in insurance premiums and the threat of withdrawal of insurance coverage in certain areas.

5. The doctrine of solidary liability has been the subject of reform in some common law systems, particularly in the United States. The most radical reform would of course be to abandon the system of solidary liability in favour of a system of proportionate liability. Under a system of proportionate liability each wrongdoer would only be liable to the plaintiff for his or her proportionate share of the plaintiff's loss. To obtain full compensation therefore, a plaintiff would have to sue and recover payment for damages from all concurrent wrongdoers. As well as being procedurally more difficult, this would require the plaintiff to accept the risk that one or more defendants are insolvent or otherwise not amenable to judgment.

6. Although review of the doctrine of solidary liability is not expressly required by our terms of reference, it is clearly a starting point for any consideration of the law of contribution. The question of contribution only arises because a plaintiff is permitted to recover the whole of his or her loss from any one of joint or several concurrent wrongdoers. If a plaintiff were restricted to recovering from a particular defendant only that defendant's proportionate share of responsibility for the plaintiff's total loss, there would be no need for a system of contribution between defendants.

7. In this Report the Commission considers whether the doctrine of solidary liability should be preserved, modified or abolished. Most criticisms of the doctrine have been directed towards its operation in the area of tortious liability. For this reason, the Commission has concentrated on this area in its discussion of the operation of the doctrine. However, solidary liability also applies in other areas of the law, for example as between persons concurrently liable in contract or as co-trustees. The arguments and conclusions concerning solidary liability contained in this Report can be generally applied to these areas of the law.

FOOTNOTES

4. So called because each concurrent wrongdoer is said to be liable "in solidum". Solidary liability is commonly also described as joint and several liability, however, that term is somewhat confusing as the terms "joint" "several" and "joint and several" in fact describe different types of concurrent liability. In the case of each the liability of concurrent wrongdoers is solidary.

3. Work of the Attorney General's Department

8. In August 1989, the Attorney General's Department produced an Issues Paper on the system of tort liability in New South Wales, focusing in particular on the area of damages for personal injury. The paper was expressed to be "in response to reports of the cost of insurance and claims of excessive awards of damages and expansion of findings of liability" in the area of tort liability. The paper referred to the so-called tort liability crisis in the United States and raised the question of whether review of certain areas of tort law was necessary in this State in order to ensure the continued viability of the tort system and the availability of affordable tort liability insurance. Against this background, the Paper put forward a range of possible reforms to the present system of compensation for injury and requested submissions from interested parties.

9. Following the receipt of submissions, a further Paper "Tort Liability in New South Wales: Proposals for Reform" was distributed in May 1990. This Discussion Paper contained a number of specific proposals for reform aimed at containing the cost of awards for personal injury. The main recommendations were for a cap on the level of general damages (of $180,000) and the use of deductibles to discourage small claims. The impact of these proposals on the area of contribution will be considered in the Commission's final report on this reference.

10. The Issues Paper had also raised the possibility of reform of the doctrine of solidary liability (therein referred to as joint and several liability). However, as stated above, it was subsequently agreed between the Commission and the Attorney General that the Commission would give consideration to the area of solidary liability within its contribution reference and that any proposals for reform would await the completion of this study. The Commission has had the advantage of reviewing the submissions made to the Attorney-General's Department on this topic and has been assisted by the work conducted within that department. It is useful to set out the discussion of solidary liability in the Discussion Paper in full:

> ***Joint and Several Liability***
>
> *The Issues Paper discussed the effect of the doctrine of joint and several liability on risk minimisation and noted that the doctrine has been criticised as giving rise to the targeting of the defendant with the deepest pocket. A number of options for proportional contribution were raised.*
>
> *All but one of the submissions received supported a system of proportional contribution to damages by defendants. The opposing submission stated that the "deep pocket syndrome" is not a problem in New South Wales and that the existing rights of plaintiffs should not be reduced.*
>
> *A number of submissions argued that joint and several liability should be abolished in relation to damages for both non-economic and economic loss and proportional contribution should be introduced in respect of the total amount of damages awarded. Two other submissions supported proportional liability in respect of damages for non-economic loss only.*
>
> *It is the last of these views which is favoured. However, a distinction needs to be made between actions in negligence for personal injury and other actions in negligence.*
>
> *The position of plaintiffs in personal injury negligence actions is distinguishable from the position of plaintiffs in other negligence actions. The economic loss for which damages are sought in personal injury actions goes to the plaintiff's ability to pursue his/her livelihood in the physical sense and to the expenses incurred as a direct result of the accident. In cases of serious injury the unavailability of damages for economic loss will mean that a plaintiff cannot obtain appropriate medical help and care and must rely on the social welfare system for basic living expenses. Damages for economic loss in non personal injury cases go to a plaintiff's direct financial loss. There is no interference with a plaintiff's physical ability to work and earn money and therefore no compensation for the loss of this capacity. The plaintiff will not be forced to rely on the social welfare system and will not require on-going medical and other care.*

> *It follows that a particular approach is necessary for personal injury negligence actions as opposed to non personal injury negligence actions. The operation of the joint and several liability doctrine in relation to non personal injury actions will be the subject of a separate paper to be released shortly.*
>
> *The arguments raised by defendants and their insurers that those who are not fully responsible should not be made to pay for the whole of a plaintiff's injury, holds weight in relation to damages for pain and suffering and other non-economic loss. However, these arguments are overridden by the more compelling argument that in the event of availability of compensation through insurance a severely injured plaintiff should be compensated for past and future economic loss and medical expenses. The importance of ensuring compensation for economic loss for a severely injured plaintiff outweighs as a matter of policy the unfairness of an insured defendant who must pay more than his or her "share" of damages.*
>
> *The fact of availability of insurance will mean that a defendant who bears responsibility for loss will not be out of pocket to a great extent. The only financial loss which would arise would be payment of an excess, if applicable, and possibly a slight increase in premium. On the other hand, a plaintiff who is seriously injured would, if inadequately compensated for economic loss, be forced to go without appropriate medical and other care and would be, to some extent, reliant on the social welfare system.*

It is noted that the New South Wales Law Reform Commission was given a reference in 1985 on Contribution Between Persons Responsible for the Same Damage. This reference includes a study of proportionate liability and the Commission has been asked to produce a report on this issue. The Commission's report will be awaited before proceeding to a firm proposal on this issue.

4. Appraisal of the Doctrine of Solidary Liability

A. Outline of the Existing System

11. Solidary liability allows a plaintiff to recover the whole of his or her loss from any one of a number of concurrent wrongdoers. A plaintiff is therefore not constrained to sue all wrongdoers in order to obtain full recovery. The plaintiff may choose to sue only one wrongdoer or may sue two or more wrongdoers in a single action. The choice of who to sue will normally be dictated by considerations such as the ease of proof of the plaintiff's case against particular defendants and the perceived ability of each defendant to satisfy a judgment against them. If a plaintiff does successfully sue two or more defendants in a single action, judgment against each of those defendants will be entered for the entire amount of the plaintiff's claim. The plaintiff is then free to take steps to enforce one or more of these judgments, the only limit being that the plaintiff cannot recover in total more than the total amount of his or her loss. Therefore, even when two or more defendants are sued by the plaintiff, a single defendant might still end up satisfying the whole or a substantial part of the plaintiff's claim. It is apparent that in such a system the plaintiff need not be concerned with the issue of the relative responsibility of various concurrent wrongdoers.

12. Generally speaking a defendant sued by the plaintiff has no right to join, or insist that the plaintiff join, any other concurrent wrongdoer as a co-defendant to the plaintiff's action.[5] A defendant may, however, join as a third party any concurrent wrongdoer against whom that defendant would have a claim for contribution or indemnity in respect of his or her liability to the plaintiff.[6] This procedure does not result in the third party becoming a defendant to the plaintiff's action. The plaintiff will still only receive judgment against the defendant he or she originally sued. However, that defendant may in turn receive judgment against the third party in respect of his or her contribution claim.

B. Criticisms of the Doctrine

1. Unfairness to Defendants

13. Solidary liability has been criticised as leading to the targeting of defendants on the basis of ability to pay rather than degree of fault. It is argued that it is unfair that a particular defendant should be called upon to meet more than his or her proportionate share of the plaintiff's damage and that the system allows a plaintiff too much discretion in determining against whom to enforce liability.

14. The Commission is not persuaded by the argument that it is unfair in principle that a plaintiff should be allowed to recover his or her full damage from a single defendant. It is not accurate to say that each of a number of concurrent wrongdoers is only responsible for a part of the plaintiff's loss. In all but exceptional cases,[7] the causal responsibility of each wrongdoer extends to the whole of a plaintiff's loss. Each wrongdoer is liable on the basis that, had it not been for his or her negligence or other breach of duty, the whole of the loss to the plaintiff would have been avoided. An example will help to illustrate the point. Assume P engages a builder to build a house and also an architect to supervise the building. The house is structurally unsound due both to the faulty workmanship of the builder and the negligent failure of the architect to detect these defects. In the Commission's opinion it would not be unfair in this situation to allow P to recover the full cost of repairing the building from either of the builder or architect. Had the architect not been negligent the defects in workmanship would have been discovered and remedied. The whole basis of the duty that the architect owed to the plaintiff was directed towards ensuring that the builder completed the building in accordance with specifications and in a workmanlike manner. In these circumstances it can hardly be an answer to a claim from the plaintiff for the architect to point to the fault of the builder. Similar arguments would apply if it were the builder rather than the architect that was sued. This is not to say that no issue as to the division of responsibility between the builder and the architect arises, it clearly does. However, this is an issue that properly arises as between the tortfeasors themselves.

15. It is also relevant to point out that the nature or extent of negligence is not necessarily any less simply because the negligence of some other person also plays some part in causing injury or loss to a plaintiff. The failure to fence off a dangerous area is no more or less culpable depending on whether a particular plaintiff came into the area as a result of someone else's negligence (for example that of a teacher who failed to properly supervise a class) or as a result of events for which no-one was at fault. To give another example, assume that P is the driver of a car that stops suddenly in traffic and that D1 is a driver of a following car which negligently

runs into the back of P's car, causing injury to P. Had D1 exercised reasonable care he would have stopped his car in time and avoided injury to P. The Commission does not accept that the extent of D1's liability to P should depend on the circumstances leading to P's car stopping, unless it can be shown that P was guilty of contributory negligence. P may have stopped his car for any number of reasons, some of which might be attributable to the negligence of some other person, others not. For example, P may have been forced to stop quickly due to a negligent pedestrian or due to the fact that a tree had fallen across the road as a result of natural forces. On either scenario the nature of D1's negligence is exactly the same. It cannot be argued that D1 should not be fully liable to P simply because another event, the tree falling down, was partly a cause of P's loss. Logically, the conduct of a negligent pedestrian should no more affect the extent of D1's liability to P.

16. The Commission agrees with the proposition that the ultimate division of liability as between potential defendants should not depend on the plaintiff's choice of whom to sue. However, it must be remembered that while a particular defendant might initially be called upon to pay more than his or her "share" of the plaintiff's damages, that defendant might then be able to claim any excess from other concurrent wrongdoers by way of contribution proceedings. The practical effect of solidary liability in this situation is to shift from P to D1 the procedural inconvenience of pursuing claims against other concurrent wrongdoers and also to shift to D1 the risk that one or more of those concurrent wrongdoers will be insolvent and that therefore their share will be irrecoverable. As between an innocent plaintiff and a wrongdoer whose fault has caused the loss, this result seems unobjectionable. In cases in which the plaintiff is guilty of contributory negligence and therefore partly to blame for his or her own loss, it might be argued that the relative equities of the plaintiff and the defendant dictate a different result and that the plaintiff should at least bear part of the risk of the insolvency of one or more of the concurrent wrongdoers. This argument is examined at paragraphs 18 to 27.

17. In situations in which contribution rights do not exist between concurrent wrongdoers the effect of the doctrine of solidary liability is of greater concern. In such cases P's decision to sue D1 rather than D2 can result in D1 being solely liable for P's loss. This result follows regardless of the relative fault of D1 and D2 and whether or not D2 has the resources to meet a claim. However, this is not an argument for the abolition of the doctrine of solidary liability, but suggests the need for more general rights of contribution between concurrent wrongdoers. This matter will be considered in the Commission's final report on this reference.

2. The Position of a Plaintiff at Fault

18. At common law, a plaintiff guilty of contributory negligence could, generally speaking, recover nothing. This inequitable rule has been replaced by legislation which allows for the apportionment of liability between plaintiff and defendant in such cases. Accordingly, a plaintiff found 20% responsible for his or her own loss can still recover 80% of that loss as damages.

19. It can be argued that the movement to apportionment for contributory negligence requires some revision of the doctrine of solidary liability. The rule of solidary liability arose at a time when only a completely innocent plaintiff could recover damages. That the advantages of solidary liability should also be extended to a plaintiff partly to blame for his or her own loss is open to question. It can be argued that a contributorily negligent plaintiff deserves no greater favour than a defendant also partly to blame for the plaintiff's loss.

20. In some American jurisdictions it has been argued that the adoption of apportionment legislation signalled an intention that liability should only attach in direct proportion to the respective fault of each person whose negligence causedthe damage and that this reasoning should apply as much to multiple wrongdoers as it does between plaintiff and defendant. Where this argument has been accepted, it has been held that the legislation required the assessment of damages against each defendant on the basis of proportionate rather than solidary liability.[8] Perhaps not surprisingly, this reasoning appears to have received most favour in those states that do not have a system of contribution between wrongdoers.

21. The application of the New South Wales apportionment legislation in situations where there is more than one defendant arose for decision by the Court of Appeal of the New South Wales Supreme Court in the case of *Barisic v Devenport*.[9] That Court decided that the terms of the relevant legislation, section 10(1) of the Law Reform (Miscellaneous Provisions) Act 1965, required a unit approach to be taken to the question of

apportionment. This approach requires that the responsibility of the plaintiff on the one hand be compared to the total responsibility of all other persons at fault on the other, so that the amount recoverable is scaled down equally in respect of each defendant. The total liability of the defendants as a group can then be recovered from any one of the defendants on the basis of solidary liability. The Court rejected the proposition that the apportionment legislation required the assessment of each defendant's liability on a proportionate basis. This question only arises in the context of contribution proceedings between the defendants themselves.

22. The decision in *Barisic* definitively states the effect of the existing legislation. The question remains, however, whether there is a case for legislative reform to allow for some modification of the doctrine of solidary liability in cases where a plaintiff is guilty of contributory negligence. The most important underlying issue is the manner in which the risk of the insolvency of one or more defendants is to be spread between the remaining defendants and the plaintiff. Arguably a plaintiff at fault should bear some portion of the shortfall caused by insolvency. An example helps to illustrate the point.

23. Assume P, D1 and D2 are all partly to blame for a motor accident in which P's car suffers $3000 worth of damages. Assume also that P's claim against D1 and D2 is reduced by $1000 to reflect P's contributory negligence and that D1 and D2 are each held to be equally liable for the plaintiff's recoverable loss of $2000. D2 is a man of straw and P recovers $2000 from D1. D1's claim for contribution being worthless, the net result is that D1 is $2000 out of pocket (assuming that he is not covered by insurance) and P is $1000 out of pocket (the uncompensated portion of P's total loss). Given that P and D1 were each nominally only responsible for one third of the loss, it can be argued that this result is unfair and that P should have had to bear a proportion of the loss caused because of D2's insolvency. On this argument P should only have been allowed to recover $1500 from D1. It is clear that a simple movement from solidary to proportionate liability is not a satisfactory solution to this problem as this would simply shift the loss flowing from D2's insolvency wholly from D1 to P.

24. One possible approach for sharing the risk of insolvency is that advocated by Glanville Williams in his leading treatise on the subject of joint torts[10] and by the American Uniform Comparative Fault Act.[11] These models suggest that a plaintiff at fault should initially only be entitled to a primary judgment against each defendant representing that defendant's proportionate share of responsibility. Accordingly, in the example just discussed, P would receive a primary judgment of $1000 against both D1 and D2. If the plaintiff is unable to recover against a particular defendant having taken reasonable steps to do so, a secondary judgment apportioning the insolvent defendant's share between the plaintiff and the remaining defendants would then be available. Alternative procedures might also be considered. For instance, it might be that in the example given above P should be given judgments of $1500 against each of D1 and D2 (with overall enforcement limited to $2000) so that if D2 is insolvent P can recover D1's ultimate liability (that is including D1's share of D2's insolvency) without necessitating further proceedings.

25. Before proceeding to give detailed consideration to possible procedures for sharing the risk of insolvency, it must first be determined whether to do so is correct in principle. It must be recognised that in many cases a plaintiff's fault is different in kind to that of a defendant. A plaintiff's fault need not be negligent in the sense that it exposes others to harm, it might consist merely of a failure to take adequate care to safeguard his or her own interests (for example the failure to wear a seatbelt). While some reduction for contributory negligence can still be justified to provide an incentive for accident prevention, it might well be unfair in such a case to equate the plaintiff's conduct with that of a negligent defendant for the purpose of apportioning an insolvent defendant's "share" of liability. Moreover, the arguments raised above concerning the nature and extent of an individual defendant's liability to the plaintiff are valid whether or not the plaintiff is guilty of contributory negligence. An individual defendant's responsibility can still be seen as extending to the whole of the plaintiff's loss, or at least to the whole of the plaintiff's recoverable loss after an appropriate reduction for the plaintiff's fault.

26. The practical difficulties that would be involved with a scheme for apportioning the risk of insolvency also detract from the attractiveness of such a scheme. Problems arising in cases where all possible wrongdoers are not party to the proceedings are discussed in more detail at paragraphs 39 to 40. The proposal also raises the problem of the criteria to be used in establishing the insolvency of a concurrent wrongdoer and the prospect of more complex and costly litigation. The Commission is also concerned about the effect that uncertainty as to the amount ultimately recoverable by the plaintiff from a particular defendant would have on the settlement of claims. This matter is discussed in more detail with respect to proportionate liability generally at paragraph 42.

27. The fact of the widespread incidence of liability insurance and the existence and policy behind compulsory insurance schemes must also be considered. Adoption of the proposal under consideration might work in some cases to reduce the liability of a solvent defendant or an insurer, but would do so at the expense of a plaintiff who is generally in no position to pass on that loss to the wider community. In some cases it might lead to largely unproductive proceedings being taken by a plaintiff desperate for recovery against defendants of little means. This might lead to the bankruptcy of that defendant but little real benefit to the plaintiff. In areas of compulsory insurance, such as motor traffic accidents, the present policy is that a plaintiff who is injured as a result of the fault of another person within the ambit of the scheme should have access to compensation, subject to any reduction for contributory negligence. If a plaintiff can point to another driver at fault, the Commission does not believe his or her right to recovery should be jeopardised by the possible concurrence of the fault of some person outside the scheme, for example a negligent pedestrian. Reference to the example of the plaintiff's car being hit from behind discussed above at paragraph 15 demonstrates how capricious such a result could be.

3. Effect on Risk Minimisation

28. The Issues Paper prepared by the the Attorney General's Department put forward the following criticism of the operation of the doctrine of solidary liability:

> *This doctrine* [solidary liability] *has been criticised as giving rise to the targeting of the defendant with the deepest pocket. It also has the effect of diverting attention from the issue of responsibility and thereby fails to allow for consideration of risk minimisation. For example, if one of a number of defendants has taken careful risk minimisation steps so that that defendant's level of responsibility is low, but that defendant is well resourced compared to the others, he or she will still have to pay the whole of the plaintiff's damages. There is little incentive under this doctrine for risk minimisation.*[12]

29. The Commission finds this argument unconvincing. First it ignores the existence of the system of contribution between defendants. This system allows for the apportionment of liability between tortfeasors in accordance with their respective level of fault and therefore provides ample incentive for each to minimise his or her degree of responsibility. There seems no reason to presume that a potential defendant should proceed in advance on the assumption that any other concurrent wrongdoer will necessarily be insolvent. Secondly, the argument concentrates on the incentive to minimise comparative fault rather than the more fundamental consideration that one of the aims of the tort system should be to provide an incentive to avoid negligence altogether. It is apparent that an opposing, and probably more cogent, argument can be put about the effect of the doctrine of solidary liability on risk minimisation. This argument states that the greater the potential liability the greater the resources that will be allocated to risk prevention. It follows that decreasing the potential liability of concurrent wrongdoers by abolishing solidary liability would reduce the incentive for effective accident prevention and might lead to potential defendants not taking safety measures that they otherwise might have implemented.[13]

4. The Liability Insurance Crisis Argument

30. There can be no doubt that the growth of the tort system has been fuelled by the modern prevalence of liability insurance. The tort system would quickly have become unworkable had it simply relied on shifting loss from a plaintiff to the individual responsible for that loss. Few defendants would have the means to fairly compensate even a moderately injured plaintiff and assigning liability might often have led to the impoverishment of both the plaintiff and the defendant.

31. Insurance (or the availability of deep pocket defendants such as large corporations or government bodies that might act as self-insurers) has provided a mechanism by which the cost of accidents can be distributed more widely to the general community. This cost might be reflected in increased insurance premiums or increased costs for goods and services. This development has been accompanied by a re-appraisal of traditional concepts of blameworthiness and liability, with increased emphasis being placed on ensuring the availability of compensation, particularly in areas where recourse to insurance is certain because of compulsory insurance schemes.

32. Although arguments in support of these developments can be made on both social and economic grounds,[14] recent developments in the liability insurance market have called into question the affordability of, and justification for, the continued operation of the tort system in its present form. This debate reached its height in the United States in the mid-1980's in the wake of a "crisis" in the liability insurance market which saw drastic increases in the cost of insurance and restrictions being placed on the availability of insurance. Traditional "deep-pocket" defendants, such as local government authorities, were particularly badly affected by these developments. In the resultant clamour for tort reform, the doctrine of solidary liability was attacked by insurers and others as one of the main areas contributing to the development of the crisis and several states passed legislation modifying or abolishing the doctrine.[15]

33. The Commission has examined the American experience in order to determine whether a case can be made for the abolition or modification of solidary liability. It is apparent that there is substantial disagreement among commentators and interest groups as to the causes of the crisis and the appropriateness and effectiveness of various measures taken to rectify it. A fundamental division of opinion emerges as to whether the crisis was precipitated by developments in the underlying tort liability system or was a result of the practices of the insurance industry itself.[16] There is no firm empirical evidence upon which to assess the effectiveness of the various tort reform measures taken in particular states, and it is more difficult still to assess in isolation the impact of the abolition of solidary liability. It has not been established that those states that abolished or modified solidary liability fared any better with the general softening of the insurance market in the late 1980's than did states which had not taken such measures.[17]

34. It is also open to debate to what extent the American experience provides a model for reform in this state. A number of uniquely local factors contributed to the tort crisis in the United States, including the high incidence and amount of awards of punitive damages, the contingency fee system and the widespread use of jury trials. Levels of awards for general damages in the United States have also traditionally been much higher than in Australia. Arguments concerning the effect of solidary liability must also be viewed with some caution due to the lack of any right of contribution between tortfeasors in some American states.

35. The experience of the American liability insurance market was reflected in Australia in certain areas of tort liability, although to a lesser extent. Again, it can be questioned whether these difficulties were attributable to local conditions or were simply the result of perceptions of risk caused by the American experience and the increased cost of reinsurance on the international market caused by the call on reinsurance by American markets.

36. In the light of the above the Commission is not persuaded that arguments relating to the cost and availability of insurance provide a sound basis for revision of the doctrine of solidary liability. The debate concerning the insurance crisis is described in more detail in the Report of the Ontario Law Reform Commission.[18] It is noted that that Commission came to a similar conclusion. While there is anecdotal evidence of an increase in cost of insurance in certain areas, particularly relating to local government authorities, the Commission is not satisfied that these problems are sufficiently acute to justify a general abolition of solidary liability. Moreover, it is by no means clear what impact modification of solidary liability would have on these costs in any case.

FOOTNOTES

5. However, when D1 and D2 are jointly but not severally liable, and only D1 is sued, the court may on the application of D1 stay the proceedings against D1 until all joint wrongdoers are added by the plaintiff as defendants: New South Wales Supreme Court Rules 1978 Pt 8 r 5(2); District Court Rules 1973 Pt 5 r 2; Local Court (Civil Claims) Rules 1988 Pt 5 r 2.

6. When D1 and D2 are both sued by the plaintiff, either may apply by notice to have the issue of contribution between them considered by the court in the same proceedings.

7. The burden of proof of causation may be satisfied if it can be shown that a factor materially contributed to a state of affairs causing injury, even though it may be impossible as a practical matter to determine whether or not the injury would have occurred had it not been for that factor: *McGhee v National Coal Board* [1973] 1 WLR; *Bonnington Castings Limited v Wardlaw* [1956] AC 613; compare *Wilsher v Essex*

Area Health Authority [1988] AC 1074. The but-for test is not determinative of cases where there are multiple sufficient causes of injury: see J G Fleming *The Law of Torts* (Law Book Co, 7th ed, Sydney, 1987) at 176.

8. See *Laubach v Morgan* (1978) 588 P 2nd 1071 (Supreme Court of Oklahoma), *Bartlett v New Mexico Welding Supply Inc* (1982) 646 P 2nd 579 (Court of Appeal of New Mexico). The argument was rejected by the Supreme Court of California: *American Motorcycle Association v Viking Motorcycle Club* (1978) 578 P 2nd 899.

9. [1978] 2 NSWLR 111.

10. G L Williams *Treatise on Joint Torts and Contributory Negligence* (Stevens & Sons Ltd, London, 1951) at 403-409.

11. National Conference of Commissioners on Uniform State Law, Uniform Comparative Fault Act. Section 2(d) provides as follows:

> Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectable from that party, and shall reallocate any uncollectable amount among the other parties including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

12. Legislation and Policy Division, New South Wales Attorney General's Department *Issues Paper: Tort Liability in New South Wales* (August 1989) at 13.

13. For a discussion of these arguments see: Ontario Law Reform Commission *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 37.

14. See Fleming, note 7 above, at 8-10 and the materials there cited.

15. For a brief description of the position regarding reform of solidary liability in various states of the United States see: J R Granelli "The Attack on Joint and Several Liability " (1985) 71 *ABA Journal* 61.

16. See American Bar Association *Report of the Commission to Improve the Liability Insurance System* (1989 Midyear Meeting, Denver Colorado, February 1989), Larry S Stewart "The Tort Reform Hoax" (1986) 22 *Trial* 89. Compare National Conference of State Legislatures *Resolving the Liability Insurance Crisis: State Legislative Activities in 1986, Collected Papers* (1986); Tort Policy Working Group *An Update on the Liability Crisis* (US Government Printing Office, 1987). (The Working Group consists of senior administration officials of eleven federal agencies.)

17. The Ontario Report, note 13 above, refers (at 38) to two studies concerning the effect of reforms of solidary liability, the findings of which it describes as general and inconclusive. The Ontario Report at 38, fn 20, describes these studies as follows:

> The first is a study made for the State of New York, which estimated that 9% of annual claims payouts of the city of New York were attributable to the operation of the doctrine of joint and several liability: New York, *Insuring our Future: Report of the Governor's Advisory Commission on Liability Insurance* (1986) at 131. The Report gives no details of how the study arrived at this figure.
>
> The second study was prepared for the Florida Senate Committee on Commerce in December, 1985: Dimento, Harrison and Belsky, "Joint and Several Liability: A Study of the Fiscal and Social Impact of Change in the Doctrine" (University of Florida, College of Law, mimeograph, December, 1985). Comparing information and data from five states that had

abolished the doctrine, five states that had limited the doctrine and seven states in which the doctrine operated, the authors tentatively concluded that insurance coverage and rates appeared to be increasing in all the jurisdictions studied. Moreover, they found that a greater percentage of respondents from states that had abolished the doctrine reported insurance increases than those that had modified or retained the doctrine. However, in a recent conversation with a representative of the Commission, one of the authors of the study cautioned against placing much reliance on the findings of the study. The study also contained broad disclaimers of its reliability.

18. Ontario Report, note 13 above, at 36-38.

5. The Alternative of Proportionate Liability

37. It is useful to give brief consideration to the manner in which a system of proportionate liability might be implemented in practice. Upon such consideration it becomes apparent that there are several practical difficulties involved with structuring a model for proportionate recovery. These apply whether the movement to proportionate liability is general or is restricted to certain types of damage or categories of cases.

38. The first difficulty to be considered is the manner in which the proportionate share of each concurrent wrongdoer is to be determined. There is no real difficulty in cases where all concurrent wrongdoers are represented in the action. Proportionate shares could be determined in the same manner as is presently done with respect to contribution proceedings.The one difference would be that the plaintiff would have an interest in the determination of the proportionate responsibility of each defendant which he or she does not have under a system of solidary liability. For example, there might be argument as between P and D1 as to share of responsibility of D2, who P and D1 both suspect is insolvent. In this situation P might be put in the somewhat unusual position of arguing against the imposition of liability on D2 in order to maximise the proportionate share of D1 and therefore the amount of recoverable damages.

39. However, difficulty does arise when all possible concurrent wrongdoers are not party to the dispute. At present a plaintiff need not join all wrongdoers but can choose to sue only one of a number of possible defendants. If proportionate liability was the rule, a plaintiff would obviously have an interest in joining all persons responsible for his or her loss in order to achieve full recovery. But the question arises as to how far this should go. Should a plaintiff be expected to take action against all persons who might conceivably be liable in some degree for fear that a defendant might raise their possible liability in order to minimize his or her share of liability? Should the plaintiff be expected to take action against persons who are obviously insolvent or are otherwise not amenable to action, perhaps because they are out of the jurisdiction? The consequences for the cost and efficiency of litigation in such a course are obvious. Particular difficulty would also arise with respect to joining potential defendants who are subject to winding up proceedings or a petition for bankruptcy.[19]

40. Moreover, while it would be possible for the proportionate liability of a non-party (D2) to be determined for the purposes of a claim by P against D1, this also raises the possibility of unfairness to P. The determination of D2's liability in the initial action would not be binding on D2 in any subsequent action by P against D2 and there is a possibility that a later court might hold D2's liability to be less than originally assessed. In this case P would be undercompensated, even assuming both D1 and D2 are solvent.

41. In the Commission's opinion, any system of proportionate liability would have to be structured in a way to take account of these difficulties. One option might be to restrict the assignment of shares of liability solely to the parties to a particular action. This is analogous to the approach currently taken in respect of contribution proceedings.[20] This option would obviously have to be accompanied by a procedure allowing a defendant to join other parties as defendants to the plaintiff's claim. Therefore under this system a plaintiff might still choose to sue only one defendant and it would then be the responsibility of that defendant to join other wrongdoers in order to avoid full liability for the plaintiff's claim. While this option might provide for a workable system of proportionate liability it is still open to the criticism of expanding the scope and complexity of litigation.

42. The Commission is also concerned about the effect that the introduction of proportionate liability would have on the settlement of claims. At present the matters in dispute between a plaintiff and a particular defendant are restricted to the question of the liability of that defendant (which will often be clearly established) and the assessment of the plaintiff's total loss. To add to these issues the question of the possible complicity of any other wrongdoers and the assignment of proportionate liability would introduce a new measure of uncertainty to litigation and might well hinder settlements being reached, thereby further clogging the courts. To the extent that this uncertainty would work in the favour of either party, it is likely to favour defendants, or more particularly their insurers, who are generally in a far better position to bear the risk of an adverse finding and to wait for a court resolution than are plaintiffs.

43. The final matter to be considered is the need for some reservation of the application of proportionate liability in particular cases. The obvious example is the case where D1 is vicariously liable for the negligence of D2. To apply proportionate liability in such a case would make a nonsense of the principle of vicarious liability and the policy behind it. The application of proportionate liability to other cases in which one party assumes responsibility for the conduct of another, and to joint liability generally, would also need some examination. In

situations in which two people assume a single obligation or combine to commit a single breach of duty it can be argued that any division of responsibility for that breach (other than as between themselves) is inappropriate. Even where liability is several there may be cases where the relationship between D1 and D2 suggests that proportionate liability is inappropriate, for example if D1 is a company and D2 is the director and principal shareholder of that company.

FOOTNOTES

19. Where an order has been made for the winding up of a company, or a provisional liquidator has been appointed in respect of a company, no action or other civil proceeding may be commenced or proceeded with against the company except by leave of the Court: Companies (New South Wales) Code s371(2). With respect to bankruptcy, while an action might be available, it might be futile to proceed with this action as demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in bankruptcy: Bankruptcy Act 1966 (Cth) s82(2).

20. See Fleming, note 7 above, at 250.

6. The Commission's Conclusions

A. The Case for General Reform of the Doctrine

44. Solidary liability facilitates the recovery of damages by a plaintiff who has suffered loss. Abolition of the system would prejudice the position of plaintiffs and would lead to some plaintiffs who would presently receive full compensation being undercompensated. This of itself is not a justification for continuation of the principle if it could be shown that its operation was unfair or unworkable. However, in the Commission's opinion, any such arguments would have to be firmly established in order to justify change. As is apparent from the above discussion of criticisms of the rule, the Commission does not believe that a firm case for abolition of the rule can be made out.

45. In the Commission's opinion, consideration of arguments concerning fairness as between the plaintiff and tortfeasors weigh in favour of retention of solidary liability and against a system of proportionate liability. It is the Commission's opinion that the existing system of solidary liability coupled with rights of contribution between tortfeasors best reflects the substantive rights and responsibilities of a plaintiff on the one hand and of tortfeasors on the other. An argument can be made for some modification of solidary liability to allow for apportionment of the risk of insolvency of one or more wrongdoers in cases in tort where the plaintiff is guilty of contributory negligence. However, in light of the contrary considerations discussed above at paragraphs 25 to 27, the Commission has come to the conclusion that a sufficiently strong case for reform cannot be established. The major argument that can be advanced for a movement to a system of proportionate liability is that concerning the need to ensure the continued availability of affordable insurance coverage. As stated earlier, the Commission does not believe that the available evidence in this area justifies the abolition or modification of solidary liability. Moreover, the Commission considers that there are real practical and other difficulties associated with the adoption of a system of proportionate liability.

46. Accordingly, the Commission has come to the conclusion that a general movement away from solidary liability cannot be justified. **The Commission therefore recommends that the existing general rule of solidary liability should be maintained.** This recommendation is consistent with those made by other Commonwealth law reform agencies which have considered this matter in recent years.[21] It remains to be considered whether the more limited proposal for reform put forward by the Attorney General's Department should be proceeded with.

B. Abolition of Solidary Liability in Respect of General Damages in Personal Injury Cases

47. The favoured view of the the Attorney General's Department in its Discussion Paper was that a system of proportionate liability should be adopted in respect of damages for non-economic loss in actions in negligence for personal injury.[22] Although the limited scope of this proposal will restrict its potential for hardship to plaintiffs,[23] the Commission still finds it difficult to support. In addition to the general factors weighing against a system of proportionate liability discussed above, the Commission has reservations about the fragmented approach suggested by the Discussion Paper. To distinguish between economic and non-economic loss in the manner suggested would create substantial practical difficulties. A plaintiff seeking full recovery would have to proceed under two different regimes. A system of rules governing proportionate recovery would still be needed, but would apply to what might be only a small part of the plaintiff's overall claim. The practical result might be that some plaintiffs would drop their claim for general damages, or at least choose not to proceed against particular defendants. This does not seem a fair way of rationalising the cost of general damages claims.

40. The Commission recognises that questions of cost may play a part in relation to liability and assessment of damages in personal injury cases. However, it seems unlikely that the savings flowing to insured defendants from the abolition of solidary liability in respect of non-economic loss would have a significant impact on the availability of insurance or the levels of premiums. The Discussion Paper itself suggests that a limit of $180,000 should be placed on general damages claims and that this figure should be awarded in only the most extreme cases, with other cases being assessed in proportion to that figure having regard to the relative severity of injury. Moreover, in cases of serious injury the amount awarded for non-economic loss will normally be only a small proportion of the total award of damages, particularly having regard to the likely component for loss of future earnings. While the proportion of non-economic loss to total damages might be more significant in cases of minor injury, the level of award in these cases will be fairly low and, in any case, the system of deductibles put forward in the Discussion Paper should serve to limit the number of such claims.

49. For the reasons just stated, **the Commission recommends against the adoption of a system of proportionate liability limited to awards for non-economic loss in personal injury cases.**

FOOTNOTES

21. Ontario Report, note 13 above, at 30-33; New Zealand Contracts and Commercial Law Reform Committee *Working Paper on Contribution in Civil Cases* (1983) at 5-10; Institute of Law Reform and Research, Alberta *Report on Contributory Negligence and Concurrent Wrongdoers* (Report No 31, 1979) at 30-33.

22. See para 10 above.

23. The Discussion Paper cites the potential for hardship to plaintiffs as the reason why proportionate liability should not also apply in respect of an injured plaintiff's economic loss.