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# Proportionate Liability in Queensland: An Overview

**Abstract**
Recent years have seen a significant reshaping of civil liability in Australia. A proportionate liability regime for claims concerning purely economic loss and property damage has been introduced by Commonwealth and State governments. At a Federal level, this has been achieved by the introduction of the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Cth) which has amended the Corporations Act 2001 (Cth), the Australian Securities & Investment Commission Act 2001 (Cth) and the Trade Practices Act 1974 (Cth). The introduction of these laws has encouraged State governments, which include New South Wales, Victoria, Western Australia and the ACT, to introduce similar reforms with respect to property and economic loss claims. Currently, the only states which have not enacted laws regarding proportionate liability are South Australia, where a bill before the South Australian Parliament received its second reading on 2 March 2005, and Tasmania. The introduction of Queensland´s new legislation is the focus for this Article.

**Keywords**
proportionate liability, Queensland, Civil Liability Act 2003

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# PROPORTIONATE LIABILITY IN QUEENSLAND: AN OVERVIEW

*By Paul Holmes*[*]

## Introduction

Recent years have seen a significant reshaping of civil liability in Australia. A proportionate liability regime for claims concerning purely economic loss and property damage has been introduced by Commonwealth and State governments. At a Federal level, this has been achieved by the introduction of the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) which has amended the *Corporations Act 2001* (Cth), the *Australian Securities & Investment Commission Act 2001* (Cth) and the *Trade Practices Act 1974* (Cth). The introduction of these laws has encouraged State governments, which include New South Wales,[1] Victoria,[2] Western Australia[3] and the ACT,[4] to introduce similar reforms with respect to property and economic loss claims. Currently, the only states which have not enacted laws regarding proportionate liability are South Australia, where a bill before the South Australian Parliament received its second reading on 2 March 2005,[5] and Tasmania. The introduction of Queensland's new legislation is the focus for this Article.

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1 *Civil Liability Act 2002* (NSW), part IV as amended by section 3 and schedule 2 of the *Civil Liability Amendment Act 2003* (NSW).

2 *Wrongs Act 1958* (VIC) part IVAA as amended by section 1(a)(iii) and section 2 of the *Wrongs and Limitation of Action Acts (Insurance Reform) Act 2003* (VIC).

3 *Civil Liability Act 2002* (WA), part IF as amended by section 9 of the *Civil Liability Amendment Act 2003* (WA).

4 *Civil Law (Wrongs) Act 2002*, chapter 7A as amended by section 4 of the *Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Act 2004*.

5 *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001*, part 3 proposed to be amended by part 2, *Law Reform (Contributory Negligence and Apportionment of Liability) (Proportionate Liability) Amendment Act 2005*.

## The Reasons for Change

The desire for change of the joint and several liability regime to proportionate liability has been driven by a desire to overcome two problems. The first group of changes were made at a State level, in response to what was a perceived crisis in medical negligence and public liability insurance.[6] The proportionate liability amendments attempt to reduce the potential liability for personal injury faced by doctors and community groups.

The second group of changes occurred in the corporate arena. The corporate law reform changes imposed a much larger duty of disclosure and forced a greater independence of corporate advisers, directors and auditors. These changes came in response to the collapse of HIH Insurance locally and of the collapse of companies like Enron in the United States.[7]

The idea behind these reforms to increase the responsibility of advisers and responding to the crisis in the medical industry and for community groups was a noble one. However, because the proportionate liability regime only applies to claims for economic loss and property damage, it means that the responsibility and liability of advisers and other corporate participants is likely to be reduced instead of being increased, so it is a reasonable question to ask whether the package of reforms has achieved its desired aims.

## Who benefits from the Legislation?

It is likely that most professional groups would welcome the reforms because it will reduce their individual liability when they are one of a number of persons that may each be liable to a plaintiff under a negligence claim for economic loss and property damage and would further reduce their costs in negligence claims because they are no longer at risk of being found 100% liable for a plaintiff's loss and being required to undertake contribution proceedings in order to recover damages from other defendants.[8] However, at the same time, the reforms also place more responsibility on corporate entities to make all parties aware of other relevant parties to the dispute.[9]

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6 B McDonald (2005) 26 'Proportionate Liability in Australia: The devil in the detail'. *Aust Bar Rev* 29 at 30.

7 Ibid.

8 G Williams and R McInnes (2004) 'Guidance needed in Proportionate Liability' 15(C8) *APLR* 113 at page 113.

9 Section 32 *Civil Liability Act 2003* (Qld).

These changes would seem to be a fair balance between reducing costs and placing appropriate responsibility on defendants.

However, panels appointed to consider the issue of proportionate liability, including the IPP Panel in its review of the law of negligence,[10] are not as convinced that proportionate liability should be extended beyond its current scope to replace the system of joint and several liability for other negligence claims which involve personal injury.[11]

The reason behind the reluctance to adopt a proportionate liability for personal injury claims is the belief that a proportionate liability system may not provide what would be considered a just outcome for a plaintiff that is physically injured as a result of another's negligence.[12] Under the current system, a plaintiff is able to recover 100% of the loss or damage from any concurrent wrongdoer who was a cause of the loss. The reason for this position relates to the legal principles of causation which requires proof by the plaintiff that the loss that they have suffered would not have occurred at all but for the negligence of the defendant.[13] This test applies even if others were also to blame for the physical injury suffered by the plaintiff.

This system allowed plaintiffs to make a choice concerning which wrongdoer they are going to sue. It is the responsibility of the defendants to pursue other potential defendants for a contribution to any damages award. As a result, most plaintiffs would choose deep pocket or easy target defendants rather than the harder to find but often more responsible defendants. As a result, groups like accountants and lawyers and their insurance companies are more likely to be sued.

Many defendants and their insurers do not see the justice of having to bear 100% of the plaintiff's loss and then having to go to the expense of chasing the others who are also responsible. Consequently they welcome the new regime and would not mind its extension to personal injury claims.

Having examined the policy behind the new scheme, it is important to examine the content of Queensland's new proportionate liability regime.

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10 'Final Report of the Review of the Law of Negligence' D A Ipp, P Cane, D Sheldon, I MacIntosh, (Treasury Department, Commonwealth of Australia) October 2002 http://revofneg.treasury.gov.au/content/home.asp.

11 See note 10 at 12.17 and 12.18.

12 See note 10 at 12.18.

13 See note 6, at page 32.

## What is Proportionate Liability?

Under a proportionate liability regime, any plaintiff that wants to make a claim and recover 100% of their loss is required to sue each and every party that they believe has contributed to that loss.[14] No one defendant will be primarily liable to the plaintiff for more than their own share of responsibility for the loss that a plaintiff has suffered.[15] Defendants will not be required to bear any legal liability that is attributable to another defendant or an unjoined party. As a consequence, unless a contractual or statutory right of indemnity is being enforced, contribution or indemnity proceedings will no longer be required. This approach should reduce the costs of litigation placed on a defendant.

## The Proportionate Liability Regime in Queensland

By introducing a proportionate liability regime, the Queensland Government wants to create a fairer system for defendants whereby a Plaintiff will be required to sue all parties that they believe are responsible for causing their economic loss, instead of just the easier deep pocket targets like insurance companies. Similarly to other jurisdictions, the Regime only applies to those claims that arise for purely economic loss or damage to property.

Queensland's proportionate liability regime is in chapter 2, part 2 of the *Civil Liability Act 2003* as it is amended by sections 75 and 76 of the *Professional Standards Act 2004*. Section 3 of the *Civil Liability Act 2003* ('Act') provides that chapter 2 part 2 applies only in relation to a breach of duty happening on or after the commencement of this subsection.[16] This means that the Act has no retrospective application.

The Queensland proportionate liability regime was proclaimed to commence on 1 March 2005, and applies only to causes of action that happen on or after 1 March 2005.

Issues raised by the introduction of a proportionate liability regime in Queensland

In considering Queensland's proportionate liability regime, a number of issues must be considered when assessing its overall effectiveness.

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14 See note 6 at page 33.

15 Section 31(1)(a) *Civil Liability Act 2003* (Qld) as amended by sections 75 and 76 of the *Professional Standards Act 2004* (Qld).

16 See section 3 of *Civil Liability Act 2003* (Qld).

1. How are 'consumer' and 'apportionable claims' defined under the Act?

It is important to consider what potential plaintiffs are required to use the proportionate liability regime. To consider this properly, the definition of a consumer under the Act must be considered. The reason for this is that a consumer is the only one who will be required to use the proportionate liability regime.[17] Section 29 defines a consumer as:

> an individual whose claim is based on rights relating to goods or services, or both, in circumstances where the particular goods or services -
> (a) are being acquired for personal, domestic or household use or consumption; or
> (b) relate to advice given by a professional to the individual for the individual's use, other than for a business carried on by the individually whether solely or as a member of a business partnership.

In this context, the consumer can only make a claim for an apportionable claim which is defined by section 28 of the *Civil Liability Act* as:

> (1)(a) a claim for economic loss or damage to property in an action for damages arising from a breach of a duty of care;
> (b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1989* for a contravention of section 38 of that Act.
> (2) For this part, if more than one claim of a kind mentioned in subsection (1)(a) or (1)(b) or both provisions is based on the same loss or damage, the claims must be treated as a single, apportionable claim.
> (3) This part does not apply to a claim (a) arising out of a personal injury; or (b) by a consumer.

The important part of these definitions is that Mum and Dad consumers will not be required to identify all the parties that have contributed to any economic loss or property damage that they have suffered.[18] By excluding, in section 29, goods and services for personal and domestic or household use or consumption or professional advice received by the individual from being an apportionable claim, the regime quite rightfully places more responsibility on corporate Australia that has suffered property damage or economic loss to pursue all parties responsible for their loss. These groups are the very groups who have the greatest ability to identify all wrongdoers that have caused their loss to sue all of these wrongdoers.

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17 See sections 28 and 29 *Civil Liability Act 2003* (Qld).

18 See definition of consumer in section 29 *Civil Liability Act 2003* (Qld).

An individual consumer who may not have the means, know-how or ability to identify all of the wrongdoers that have contributed to their loss, still remain able to identify their primary loss causer and sue just the one party for 100% of the loss suffered. This would leave the defendant sued responsible for obtaining contribution from other responsible parties. This is a defendant, who in a majority of cases, will have the means and ability to identify all other responsible parties.

These changes take away concerns about the legislation that plaintiffs will lack the means properly to identify all relevant defendants by restricting the class of plaintiffs required to use the regime to companies and assisting them by requiring defendants to assist in the identification of other potential defendants. The one potential detraction from this approach is the requirement that defendants are required to provide information identifying other potentially relevant defendants.[19] Such a requirement is not in keeping with our adversarial system of justice and the idea that it is a plaintiff's responsibility to decide how their case is run without fear of interference from any other party.

However, on balance, the changes create a more equal playing field between plaintiffs and defendants and perhaps more equitably divide the cost of a commercial dispute between both sides of a dispute.[20]

The exclusion of individual consumers and actions involving goods and services for personal use or consumption from the new regime shows that the legislature believes that companies and other corporate entities are in the best position and have the most financial means to be able to identify all parties involved in causing loss or damage.

2. Can contributions be recovered?

The issue of contributions is dealt with by section 32A of the *Civil Liability Act*. Section 32A provides:

> Subject to this part, a concurrent wrongdoer against whom judgement is given under this part in relation to an apportionable claim --
> (a) can not be required to contribute to the damages recovered or recoverable from another concurrent wrongdoer for the apportionable claim, whether or not the damages are recovered or recoverable in the same proceeding in which the judgement is given; and
> (b) cannot be required to indemnify the other concurrent wrongdoer.[21]

19 See section 32 *Civil Liability Act 2003* (Qld).
20 See note 8 at page 114.

The effect of this section is to reduce the scope of the liability that they might be exposed to in a Court case brought by a plaintiff.[22] This section achieves one of the aims of the proportionate liability regime because it provides defendants with certainty and it does not require defendants with deep pockets to bear the burden of paying damages for injury caused by other defendants who may not be able to pay the extent of any damages awarded against them. Defendants are only required to bear the liability to the extent that their actions caused the loss.

In contrast, this section has a great and not necessarily positive effect on plaintiffs. The problem will be that instead of being guaranteed that a plaintiff will recover 100% of any damages awarded to them, plaintiffs are now put to the expense of having to obtain portions of the damages awarded to them from a number of defendants.[23]

The effect of this requirement that plaintiffs pursue all parties, is that the costs of enforcing judgement or even obtaining judgement in the first place are likely to be increased. Also a plaintiff may not recover the full extent of their loss because all parties may not be capable of paying their share of any judgment.[24] While the proportionate liability regime does not apply to individuals or to claims made regarding items purchased for domestic or other personal use, the effect of this legislation on small companies or corporations who may not have the ability to pay these increased costs of enforcing judgement or be able to bear recovering less than 100% of the damages awarded to them may be significant financial hardship. This marks a shift in the idea of liability in Australia in the sense that instead of a plaintiff being almost guaranteed to recover 100% of the damages awarded to them from the defendant sued, the onus is now placed in favour of a defendant in these actions and ensure that they do not pay any more than their negligent actions require them to under the law. The new regime is a win for defendants but places significant extra costs on small corporate plaintiffs.

3. Are insurers and defendants required to identify all relevant parties?

The introduction of the new *Civil Liability Act* has led to some suggestion that insurers and other defendants may be required to make a plaintiff's case for them because there is a duty imposed on all parties to identify all relevant parties to a claim. Section 32 of the Act provides the onus of parties to identify all relevant parties and says:[25]

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21 See section 32A of the *Civil Liability Act*.
22 See note 6.
23 See section 32(1) *Civil Liability Act 2003* (Qld).
24 See section 32 and 32A *Civil Liability Act 2003* (Qld).
25 Section 32 *Civil Liability Act 2003* (Qld).

(1) A person ('claimant') who makes a claim to which this part applies is to make claim against all persons the claimant has reasonable grounds to believe may be liable for the loss or damage.

(2) A concurrent wrongdoer, in relation to a claim involving an apportionable claim, must give the claimant any information that the concurrent wrongdoer has -

(a) that is likely to help the claimant to identify and locate any other person (not being a concurrent wrongdoer known to the claimant) who the concurrent wrongdoer has reasonable grounds to believe is also a concurrent wrongdoer in relation to the claim; and

(b) about the circumstances that make the concurrent wrongdoer believe the other person is or may be a concurrent wrongdoer in relation to the claim.

(3) The concurrent wrongdoer must give the information to the claimant, in writing, as soon as practicable after becoming aware of the claim being made or of the information, which ever is the latter.

….

(5) If a concurrent wrongdoer fails to comply with the concurrent wrongdoer's obligations under this section, a court may on application, if it considers it just and equitable to do so, make either or both the following orders -

(a) an order that the concurrent wrongdoer is severally liable for any awarded damages made;

(b) an order that the concurrent wrongdoer pay costs thrown away as a result of the failure to comply.

(6) However, if as a result of the information given by a concurrent wrongdoer under subsection (2), the claimant joins another party to the proceeding for the claim, and that party is found not to be liable to the claimant, the court may make orders about costs as it considers just and equitable in the circumstances of the case.

The consequence of this section is that not only is a concurrent wrongdoer required to inform the plaintiff of other potential defendants, which it would appear involves a defendant directly assisting the plaintiff to make their case.[26] In the event that a concurrent wrongdoer acts reasonably in informing the plaintiff about another potential defendant and that potential defendant turns out not to be liable, a defendant not only faces the prospect of being liable for all of the plaintiff's damage, it also faces the possibility that they might attract a costs order against them.[27]

In addition, the possibility exists that a defendant will become aware of another relevant party just before a trial is due to begin, and then by fulfilling their duty under

26 Section 32(2), (3) and (4) *Civil Liability Act 2003* (Qld).

27 Section 32(5) *Civil Liability Act 2003* (Qld).

the Act to identify that party to the plaintiff is likely to result in a trial having to be postponed and costs greatly increasing for all parties in the dispute as a result. However, in contrast to this, there would be a significant benefit to defendants in assisting plaintiffs to identify all potentially relevant parties to a dispute because that will ensure that they are subject to the correct liability for injury.

These benefits to defendants does not outweigh the detriment posed by the possibility of a defendant being both severally liable and facing a costs order against them, due to a failure on their behalf to identify all relevant parties is not in keeping with the apparent intention of the proportionate liability regime to reduce a defendants potential exposure to liability for claims with respect to pure economic loss and property damage.

4. If a party has capped their liability under a contract with another party will the cap be upheld under the provisions of the *Civil Liability Act*?

A further issue that must be considered as a result of the *Civil Liability Act 2003* ('Act') is if a party has capped their liability under a contract, will the cap be upheld if they are found to be a concurrent wrongdoer for the purposes of the Act?

The answer is yes, a cap will be upheld under the Act. Parties are entitled to specify contractually whether liability will be capped between them and there is nothing in the *Civil Liability Act* proportional liability regime that does anything to abrogate this agreement.

Any cap that is agreed to under a contract will be managed in the following way:

- the court will first apportion the party's liability; and
- the court will then apply the cap - which could be more or less than the party's apportionment of liability.

In the event that the cap agreed to is less than the damages awarded, the plaintiff will recover less than 100% of the damages awarded to them.

5. Is it possible to contract out of the proportionate liability regime?

Unlike the proportionate liability regimes in New South Wales,[28] Victoria,[29] Western Australia[30] and the ACT,[31] the Queensland proportionate liability regime specifically

28 Section 3A(2) *Civil Liability Act 2002* (NSW).
29 Sections 46 and 70 *Wrongs Act 1958* (VIC).

prohibits parties from contracting out of the regime.[32] Section (7)(3) of the *Civil Liability Act 2003* says:

> this Act, other than chapter 2, part 2 and chapter 3, does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract (the express provision) in relation to any matter to which this act applies and does not limit or otherwise effect the operation of the express provision.

Consequently parties are prevented from contracting out of the proportionate liability regime.[33]

On balance, it is appropriate approach to prohibit contracting out of the regime because for a proportionate liability regime to be truly effective within Queensland it must be applicable to all disputes concerning pure economic loss and property damage. This is despite the fact that Queensland is the only State so far to prevent contracting out of the regime. If the new regime was not to be applicable to all disputes then there would be inconsistencies with respect to how this type of dispute is dealt within our legal system.

6. Will an exclusion clause in a contract or a hold harmless agreement be upheld if without such a clause the party would have otherwise been a concurrent wrongdoer for the purposes of the *Civil Liability Act*?

An exclusion clause in a contract will be upheld because chapter 2, part 2 of the *Civil Liability Act* does not apply to a party if that party does not have a duty of care to a plaintiff.[34] Therefore, if two parties were to negotiate an exclusion clause in a contract between them that provides a party does not owe the plaintiff a duty of care for whatever reason in any circumstances then the new regime will not apply.[35] The reason why the *Civil Liability Act* will not apply is because of the exclusion clause there would never have been a duty of care in existence that would come under the jurisdiction of the Act.

While it may be argued that this is a by-stealth way of avoiding the new regime, it is in keeping with the autonomy of parties to negotiate the legal relationships between

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30 Section 4A *Civil Liability Act 2002* (WA).
31 Note the exception in section 58 *Civil Law (Wrongs) Act 2002* (ACT).
32 Section 7(3) *Civil Liability Act 2003* (Qld).
33 Ibid.
34 See section 28(1)(a) *Civil Liability Act 2003* (Qld).
35 See section 28 and 29 *Civil Liability Act 2003* (Qld).

themselves to allow parties who do not wish a duty of care to exist between them to specify that no duty of care exists. Parties should retain and under this legislation have retained, the right to contract out of a duty of care between the parties if they choose to.

In addition, indemnities between any concurrent wrongdoers will not be upheld under the *Civil Liability Act*. The reason for this is that an indemnity would constitute contracting out of the proportionate liability regime which is prohibited under the *Civil Liability Act 2003*.[36]

7. Who is a concurrent wrongdoer under the act? How does this definition apply to the Construction Industry?

The proportionate liability regime will only apply where there are 'concurrent wrongdoers'. As a result the question we must ask is who qualifies as a concurrent wrongdoer. The ability of a party to be determined as a concurrent wrongdoer seems to rest on whether or not they owe or owed at the relevant time a duty of care to the plaintiff.

In the context of the Construction industry, the issue of the duty of care that a potential concurrent wrongdoer may owe, is particularly important because there are often a number of parties, other than the party (Plaintiff) who suffers loss, who a party may owe a duty of care to.

What needs to be decided is whether or not breaching just one duty of care is enough for a party to become a concurrent wrongdoer and allow a potential plaintiff to bring a claim against them?

For example, in circumstances where there are 2 levels of contract eg a contract between the main contractor and the owner and then a subcontract between the main contractor and any subcontractors, one possible interpretation suggests that for the subcontractor to become liable for a breach of duty of care and therefore a concurrent wrongdoer all they would have to have done is breach a duty of care which does not necessarily need to have been owed to the plaintiff. However, the more appropriate view is that in order for a subcontractor in these circumstances to be held to be a concurrent wrongdoer under the Act, both the subcontractor and the original main contractor have to owe separate duties of care to the plaintiff.[37] This view is supported by section 30(1) of the *Civil Liability Act 2003* which says -

36 See section 7(3) *Civil Liability Act 2003* (Qld).

37 See section 30 *Civil Liability Act 2003* (Qld).

> A concurrent wrongdoer, in relation to a claim, is a person who is 1 of 2 or more persons whose acts or admissions cause, independently of each other, the loss or damage that is the subject of the claim.

As a result for a subcontractor to be a concurrent wrongdoer it is not enough that they have breached a duty of care that they owe to the principal or main contractor.

**Conclusion**

It is true that the proportionate liability regime in the *Civil Liability Act 2003* has increased the certainty for defendants and insurers regarding their liability for claims concerning pure economic loss and property damage and arguably reduced their costs and liability at the same time. The legislation has struck a fairer balance and allocation of liability between defendants in economic loss and property damage claims and a fairer allocation of costs between plaintiffs and defendants.

In the context of the Construction Industry, on one reading, all that may be required for a party to become a concurrent wrongdoer under the Act is that they have breached a duty of care, owed, not necessarily to the plaintiff, to any party involved in a dispute. With respect, the better interpretation is for a party to be a concurrent wrongdoer under the new proportionate liability scheme the party will have to have breached a duty of care owed to the plaintiff.