

DRIFTING TOWARDS PROPORTIONATE LIABILITY: ETHICS AND PRAGMATICS

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ABSTRACT. *This article investigates an apparent, convergent shift in common law jurisdictions away from the traditional principle of joint and several liability towards proportionate liability in cases involving multiple wrongdoers, and argues that this is best seen as an unprincipled drift. The shift is often presented by defendants and legislators as a logical extension of the ethics of comparative (contributory) negligence doctrine. Here we deny any ethical connection between the two doctrines. We also suggest that there is no good, generalisable ethical or pragmatic argument in favour of proportionate liability in its own right and caution jurisdictions currently considering reform of the joint and several liability rule against leaping to any such assumption.*

KEYWORDS: *proportionate liability, joint and several liability, contributory negligence, comparative negligence.*

I. INTRODUCTION

In this article, we examine what appears at first glance to be a striking, convergent trend in common law systems away from principles of joint and several (“solidary”) liability towards “proportionate liability” in cases involving multiple wrongdoers. The trend has been claimed to mark a new era of “liability according to responsibility”, implying an underlying shift of principle, rather than simply a drift in practice. Here, we will question both the reality of the shift, and the suggestion that there is a convincing ethical or pragmatic basis for it. The project of demonstrating the inconsistency of proportionate liability with corrective justice is one that has convincingly been undertaken before¹ but cannot in our opinion offer a complete answer, given the implication that such developments introduce a new ethical strand into the law. If the shift really does put liability on a new ethical basis, its inconsistency with corrective justice cannot constitute a watertight objection. Its ethics and pragmatics must be examined *de novo*.

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1 R. Wright, “Allocating Liability among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure” (1987–8) 21 U.C. Davis L.Rev. 1141.

In a joint and several liability system, all defendants responsible for a single, indivisible injury suffered by a plaintiff are potentially liable to her for the entire loss. If they wish to avoid 100% liability, they must seek contribution from another responsible party. By contrast, in a proportionate liability system, each defendant is only ever liable for such “proportion” of the indivisible injury suffered as is considered to represent his or her own “responsibility” for it, taking account of the relative responsibility of all other liable parties. Once this “share” of liability is determined by a court, it is immutable and the defendant immune to further claims. The result is that the onus is on the plaintiff to find and successfully recover damages from all those responsible, hoping (often vainly) that the total of the sums recoverable from each one will cover 100% of her loss.

Joint and several liability is the traditional default rule in common law systems and, from the plaintiff’s point of view, it has clear advantages. She can choose to sue just one defendant for her entire loss, avoiding the inconvenience of locating and joining additional parties; and she is fully protected if it turns out that one or more of these other parties is now dead, non-existent, untraceable, uninsured, or insolvent. By contrast, in a proportionate liability system, many of these risks are thrown back on her. In some jurisdictions, all of them are, depending on the circumstances. Where all defendants are extant, easily identifiable, and solvent, it may not matter greatly which rule is applied.² Indeed, it is generally only when one or more defendants is no longer amenable to judgment that matters get really contentious. For this reason, the debate about the relative merits of the two types of system is often usefully distilled to a single, difficult question: who should be required to bear the loss when one or more defendants who is legally responsible for a plaintiff’s indivisible injury cannot pay up – should this be the plaintiff, the remaining responsible defendant(s), or both?³

Those who favour proportionate liability (unsurprisingly, this is defendants and their insurers) insist that it is only fair that the loss be borne by the plaintiff. The arguments are that joint and several liability makes them liable in excess of their “own responsibility” and is therefore unethical; that it encourages plaintiffs to seek out “deep pockets” and pick on “peripheral (less responsible) defendants” as “insurers”; and that it unduly inflates the latter’s liability insurance premiums, thereby causing serious and undesirable social effects, such as the withdrawal of important services from the market. It has also been claimed that joint and several liability contributes to “blame culture” and adds to the financial pressures on insurers, contributing to insurance “crises” in some jurisdictions. By contrast, those

² Assuming flexible joinder rules.

³ Some “hybrid” systems split uncollectable losses between defendants and plaintiff in proportion to their relative responsibility for the injury. See Part II.

who favour the joint and several liability rule (plaintiffs and a significant number of academic scholars⁴) insist that it is ethically inappropriate for an innocent party to be made to bear any part of her loss when there are several solvent wrongdoers who are provably responsible for it. Some also take this view when she contributed to her own injury.⁵ Throughout the debate, there has been much contradictory and heated argument about “fairness”, “responsibility”, and the practical sustainability of joint and several liability in the current economic environment, none of which has led to anything like a consensus.

Here we look more critically into the recent shift towards proportionate liability across a number of common law jurisdictions. Our aim is not to give a full account of the reforms that have taken place, but to reflect on the extent to which convergence towards a proportionate liability norm is actual, or justified. We conclude that there is, in truth, no common shift from joint and several liability uniform to all jurisdictions, despite first appearances. That is, not all jurisdictions have abandoned the idea and those that have done so have adopted widely varying solutions. To the limited extent that there is any “convergence”, it is neither linear, nor consistent, nor even directed towards a single norm. When it comes to justifications for the shift, our findings are sceptical. We are unable to discern any good, generalisable ethical argument in favour of a proportionate liability rule and we firmly reject the idea – which is alarmingly widespread amongst proponents of reform – that proportionate liability is another manifestation or natural extension of the ethics of “sharing” that is to be found in modern comparative (contributory) negligence doctrine.⁶ Although these two doctrines share some legal concepts and techniques (splitting, sharing, and comparing, for example), they engage in very different distributive exercises, so that comparisons between them are potentially very misleading. Acceptance of the one certainly does not ethically dictate acceptance of the other. Despite the language of ethics, the real pressures to adopt proportionate liability have, we argue, been pragmatic. Although these pressures are politically real, the arguments supporting them are weak – few are backed by any real empirical evidence; most are capable of cutting both ways; and none is easily generalisable beyond the particular context in which it has been generated.

4 See e.g. Wright, “Allocating Liability”; W. McNichols, “Judicial Elimination of Joint and Several Liability because of Comparative Negligence – A Puzzling Choice” (1979) 32 Okla.L.Rev. 1; A. Burrows, “Should One Reform Joint and Several Liability” in N.J. Mullany and A.M. Linden (eds.), *Torts Tomorrow: A Tribute to John Fleming* (North Ryde 1998), 102.

5 See e.g. J. Swanton and B. McDonald, “Reforms to the Law of Joint and Several Liability: Introduction of Proportionate Liability” (1997) 5 T.L.J. 1; M. Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability* (Victorian Attorney-General’s Law Reform Advisory Council, Expert Report 3, 1998), 20 and fn. 39.

6 For consistency, we refer below to “comparative negligence” across all jurisdictions, including those where the term “contributory” negligence is preferred.

All of this suggests that jurisdictions such as New Zealand that are currently actively considering whether or not to follow the perceived shift (which we call, unflatteringly, a drift) to proportionate liability should think very carefully before they do so. It also teaches us some salutary lessons about the undesirability of allowing ethical arguments to be hijacked by powerful political lobbies, about the strong and sometimes misleading gravitational power of legal concepts, and about the way in which resort to ethical language can give credence to overly generalised responses to particular, pragmatic problems.

Part II provides an overview of recent reforms and five points of assistance in understanding the extent of convergence and divergence between jurisdictions on these issues. Parts III and IV explore the ethics and pragmatics of the debate, respectively. Finally, we state some brief conclusions.

II. ATTITUDES TO REFORM: COMMONALITY AND DIVERGENCE

This section briefly reviews attitudes towards proportionate liability reform across the US, Australia, Canada, the UK, and New Zealand. The clearest departures from universal joint and several liability rules have occurred in the US and Australia, but they are very differently configured. In the US, the trend began in the late 1970s and early 1980s. By 1987, there had been some change to the basic joint and several liability rule in 50% of American states⁷ and, by the time the *Restatement (Third) of Torts (Apportionment of Liability)*⁸ was published in 2000, only 15 states in total retained pure systems of joint and several liability. Around the same number had moved to a pure proportionate liability system of the type described in the introduction above.⁹ The popularity of “pure” systems of either kind has declined further since that time¹⁰ and the overwhelming majority of states now embraces some form of hybrid solution. The *Restatement* divides these variants into three sub species: (1) joint and several liability systems which have an additional mechanism for reallocating the risk of unenforceable judgments amongst all the remaining parties (including the plaintiff);¹¹ (2) systems which retain joint and several liability

7 Wright, “Allocating Liability”, p. 1165.

8 ALI, 2000 (“*Restatement*”).

9 *Ibid.*, at B18, B19.

10 Each type of pure system now commands support in only eight states respectively. Pure joint and several liability is still found in Alabama, Delaware, Maine, Maryland, Massachusetts, North Carolina, Rhode Island, and Virginia; and pure proportionate liability in Arkansas, Georgia, Kansas, Kentucky, North Dakota, Oklahoma, Utah, and Wyoming.

11 *Restatement*, C18, C19, C21. This solution was endorsed in the Uniform Comparative Fault Act (1979) and has many advocates: C. Gregory, *Legislative Loss Distribution in Negligence Actions* (Chicago 1936), 77–79; G. Williams, *Joint Torts and Contributory Negligence* (London 1951), 522–23; J. Fleming, “Foreword: Comparative Negligence at Last-by Judicial Choice” (1976) 64 Cal.L.Rev. 239; J. Wade, “Should Joint and Several Liability of Multiple Tortfeasors Be Abolished?” (1986) 10 Am.J.Trial Advoc. 193. For those supporting joint and several liability, this is the most palatable compromise: Wright, “Allocating Liability”, p. 1191; R. Wright, “The Logic and Fairness of Joint

where a defendant's responsibility exceeds a certain percentage threshold, but which otherwise apply proportionate liability;¹² and (3) systems which retain joint and several liability in respect of economic aspects of loss, but which switch to proportionate liability where the harm is non-economic.¹³ All systems in the US, whatever their formal designation under the above categories, retain joint and several liability for defendants who are "intentional" tortfeasors (§12); whose liability is vicarious (§13); who have acted in "concert" with other wrongdoers (§15); or who have negligently failed to protect a plaintiff against the specific risk of another's intentional tort (§14). The *Restatement* itself takes no formal position on which of these approaches is appropriate, carefully leaving the decision for individual jurisdictions to make for themselves.¹⁴ The extreme complexity of the system overall led the late Tony Weir to describe the *Restatement* despairingly as a "trackless morass, Dismal Swamp and Desolation of Smaug".¹⁵ This criticism is related, in our view, to the lack of any clear ethical thread of justification for it, or that can be derived from it.

In Australia, isolated departures from the joint and several liability rule occurred in the construction context as early as 1993.¹⁶ A general (non-industry-specific) reform of the rule was recommended by the Davis Report in 1995¹⁷ after significant lobbying by professional groups (mainly accountants and auditors), but subsequent inquiries in Victoria¹⁸ and New South Wales¹⁹ at the end of that decade resolved against any basic change and it was not until the financial collapse of Enron in the US and of a very large player in the Australian professional indemnity insurance market in 2001²⁰ that governments were motivated to act. Between 2002 and 2005,

and Several Liability" (1992) 23 Memphis State L.Rev. 45 (accepting this position as "fair"); Burrows, "Should One Reform", pp. 102, 113–14 (still rejecting this as unworkably complex and potentially contrary to plaintiffs' interests). The Uniform Act of 1979 was replaced in 2003 by the Uniform Apportionment of Tort Responsibility Act ("UATRA"), which also offers a hybrid system, but one that takes proportionate liability, not joint and several liability, as its starting point.

12 *Ibid.*, at D18, D19.

13 *Ibid.*, at E18, E19.

14 *Ibid.*, at §17. It nonetheless seems attracted to hybrid solutions on the basis that "pure" systems of joint and several (or proportionate) liability "systematically disadvantage" either plaintiffs or defendants: comment (a) to §10. The same view is implicit in UATRA.

15 T. Weir, "All or Nothing" (2004) 78 Tul.L.Rev. 511, 524 at fn. 63.

16 Building Act 1993 (VIC), s. 131; Development Act 1993 (SA), s. 72; Building Act 1993 (NT), ss. 154–158; Environmental Planning and Assessment Amendment Act 1997 (NSW) (amending the Environmental Planning and Assessment Amendment Act 1979 (NSW), Part 4C); Building Act 2000 (TAS), s. 252; Building Act 2004 (ACT), s. 141. In TAS, SA, and the ACT, these provisions now co-exist alongside the more general proportionate liability provisions subsequently introduced. In the other jurisdictions, they have been repealed. Calls for reform of joint and several liability started earlier, in the 1980s.

17 Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage 2* (1995) ("The Davis Report").

18 Richardson, *Economics*.

19 New South Wales Law Reform Commission, *Contribution between Persons Liable for the Same Damage* (NSWLRC R89, 1999) (affirming the view previously taken in the Commission's interim report: *Contribution among Wrongdoers: Interim Report on Solidary Liability* (NSWLRC 65, 1990)).

20 See generally Hon. Justice Owen, *The Failure of HIH Insurance: Vol 1A Corporate Collapse and Its Lessons* (Sydney 2003).

all Australian jurisdictions enacted generalised proportionate liability provisions in very short order.²¹ The process via which these changes occurred was divisive and the reliability of the empirical assumptions upon it was based remains controversial, as we demonstrate in Part IV. The reforms were intended to be uniform across states and territories, but – as in the US – they turned out to be anything but. Differences in both substance and detail cause considerable complication, uncertainty, and (probably, though we cannot be sure of this) forum-shopping. This is now recognised as a real problem and in no one’s best interest, least of all insurers’, for whom stable patterns of liability are crucial. The shift to proportionate liability is nonetheless essentially complete, with subsequent reviews of the rules since 2002 being aimed less at reappraising its wisdom and more at trying to eradicate what are perceived to be problematic jurisdictional differences.²² Respecting the recommendations of the Davis Report and no doubt also wary of concerns expressed by the Ipp Committee in 2002,²³ the Australian provisions apply only in cases of property damage and economic loss, so that the joint and several liability rule still applies in cases of personal injury. The old rule also survives whenever a defendant’s liability is vicarious, stems from partnership, where the harm was intentional, or (in two jurisdictions²⁴) in cases in which defendants are responsible not just for the same damage, but also the same wrong. A minority of jurisdictions retain joint and several liability in “consumer” claims,²⁵ which appears to be a concession intended to relieve plaintiffs who lack the resources to cope with the risks and rigours of proportionate liability regimes. Interestingly, there is now sufficient sympathy for consumers that the Attorney-Generals’ Standing Council on Law and Justice proposes to incorporate the exception into any uniform model provisions that see the light of day.²⁶ To our mind, this is a dim realisation dawning all too late. Rather than seeking to protect vulnerable plaintiffs from the risks of proportionate

21 See generally K. Barker, P. Cane, M. Lunney, and F. Trindade, *The Law of Torts in Australia*, 5th ed. (Melbourne 2012), 799–804. State and territory provisions differ and are supplemented by federal provisions enacting proportionate liability regimes in cases of misleading or deceptive trade practice under the Corporations Act 2001 (Cth), Australian Securities and Investments Commission Act 2001 (Cth), and Trade Practices Act 1974 (Cth) (now the Competition and Consumer Act 2010, Part 4 – the “Australian Consumer Law”).

22 T. Horan, *Proportionate Liability: Towards National Consistency* (Report for National Justice C.E.O.s, 2007); J.L.R. Davis, *Proportionate Liability: Proposals to Achieve National Uniformity* (Canberra 2009). Model Provisions drafted by the Parliamentary Counsel’s Committee for the Commonwealth Attorneys-General Standing Council on Law and Justice (“Model Provisions”) were released in 2011 and the Council’s most recent *Decision Regulation Impact Statement* (“AGSCLJ Impact Statement”) in October, 2013. Progress has stalled.

23 D.A. Ipp, P. Cane, D. Sheldon, and I. Macintosh, *Final Report of the Review of the Law of Negligence* (Canberra 2002), paras. 12.15–12.18. The concerns were expressed in the context of a review of cases of personal injury and death, but are equally applicable to all other types of damage.

24 QLD and SA.

25 QLD, ACT, and (in some cases) NT. This approach is now endorsed in the Model Provisions, ss. 2(3)(b), (c).

26 Model Provisions, s. 2 (3); *AGSCLJ Impact Statement*, Appendix B, pp. 38–41.

liability by carving out exceptions to it, it would probably have been better never to have implemented that regime in the first place. The formulation of the proposed consumer exception is specific, technical, and not always obviously rational.²⁷

The complexity of the Australian system is further compounded by overlaps between the general regimes now in place in the states and territories and more specific Commonwealth measures designed to deal with misleading and deceptive trade practices.²⁸ To outsiders who are unaware of the fierce internal politics of the Australian federal system, the idea that there can be quite so many, slightly different systems serving a total population of only 23 million may be somewhat astonishing. There is nonetheless little sign of governmental willingness to shrink from the reforms, just some readiness to address the inconsistencies. Even those academics who initially questioned the reforms' wisdom²⁹ appear to have wearied of being ignored and to have resigned themselves instead to trying to make the new system work.³⁰

By contrast with Australia and the US, Canadian attitudes to proportionate liability have remained decidedly tepid, with numerous official reports dating from 1979 to 2013 rejecting any general departure from the traditional joint and several liability rule.³¹ Some business interests voiced objection to that rule in the 1990s³² and, on the back of this, in 1999, the Senate Standing Committee on Banking, Trade and Commerce advised the introduction of a specially tailored proportionate liability regime for financial advisers and others issuing information under federal banking and insurance legislation.³³ The proposed scheme was to be limited to cases of economic loss and again made concessions to "unsophisticated" (generally, poorer) plaintiffs, who were still to be accorded the benefit of

27 One stark irony is that, whilst s. 2(3) of the Model Provisions seeks to protect consumers, claims for misleading and deceptive conduct under s. 18 of the Australian Consumer Law (which constitute a primary consumer-protection device) are expressly reserved to proportionate liability.

28 Above note 21. Specific building provisions also continuing in some jurisdictions: above note 16.

29 S. Swanton and B. McDonald, "Reforms of the Law of Joint and Several Liability: Introduction to Proportionate Liability" (1997) 5 T.L.J. 1; M. Tilbury, "Fairness Indeed? A Reply to Andrew Rogers" (2000) 8 T.L.J. 113; M. Duffy, "Proportionate Liability: A Disproportionate and Problematic Reform" (2003) 60 Plaintiff 8; B. McDonald, "Proportionate Liability in Australia: The Devil in the Detail" (2005) 26 Aust. Bar Rev. 29.

30 See e.g. B. McDonald and J.W. Carter, "The Lottery of Contractual Risk Allocation and Proportionate Liability" (2009) 26 J.C.L. 1; B. McDonald, *Submission to the Commonwealth Attorneys-General Standing Council on Law and Justice* (9 November 2011).

31 Institute for Law Research and Reform of Alberta, *Concurrent Contributory Negligence and Wrongdoers* (Report No. 31, 1979); Law Reform Commission of British Columbia, *Report on Shared Liability* (L.R.C. 88, 1986) (advocating a modified joint and several liability system); Ontario Law Reform Commission, *Report on Contribution among Wrongdoers and Contributory Negligence* (1988); Law Reform Commission of Saskatchewan, *The Insolvidum Doctrine and Contributory Negligence* (1998); Law Commission of Ontario, *Joint and Several Liability Under the Ontario Business Corporations Act* (2011) ("*LCO Report*"); Manitoba Law Reform Commission, *Contributory Fault: The Tortfeasors and Contributory Negligence Act* (2013) ("*MLRC Report*").

32 See e.g. Ontario Securities Commission Task Force on Small Business Financing, *Final Report* (1996).

33 Senate of Canada, Standing Senate Committee on Banking, Trade and Commerce, *Joint and Several Liability and Professional Defendants* (1998).

the joint and several liability rule. The proposal progressed no further at that time and, to this day, joint and several liability remains the basic rule in all Canadian provinces and in respect of all types of harm – personal injury, property damage, and economic loss alike – subject to three main exceptions. Firstly, in British Columbia and Nova Scotia, courts have since the early 1980s interpreted legislation introducing comparative negligence into those jurisdictions as intended also to prescribe proportionate liability in cases in which the plaintiff is herself contributorily negligent.³⁴ This provides a general (non-industry-specific) style of proportionate liability scheme for all types of loss in some instances, in two jurisdictions. It makes a link between the doctrines that we consider unsupportable. Secondly, there are a number of context-specific, statutory exceptions now built into the securities legislation of some provinces.³⁵ Finally, since the end of 2002, auditors and others concerned with the provision of financial information governed by the *Canada Business Corporations Act* (“CBCA”) have benefitted from a proportionate liability regime in respect of economic loss.³⁶ The amendments to the CBCA were a federal response to the same catastrophic corporate governance failures and “liability crises” that caused chaos in the US and Australia in the same period. As we have noted, these provisions only apply in cases of pure economic loss and, even then, they retain joint and several liability in cases involving fraud and unsophisticated plaintiffs (small investors), as well (surprisingly) as cases in which the plaintiff is a Crown corporation, the unsecured creditor of a company supplying it with goods or services, or a charitable organisation.³⁷ Most interestingly (and surely fatally, from the point of view of creating any real certainty in respect of risk distribution for insurance purposes), courts retain a residual discretion under the legislation to revert to joint and several liability where they consider it “just and equitable” to do so.³⁸ That must make it very hard to judge in advance precisely where the risk of insolvencies will be made to lie.

Overall, Canada therefore shows little appetite for introducing any generalised proportionate liability system across all jurisdictions in the way that Australia has done and, to the extent that anyone contemplates such a system, it is solely in cases of economic loss. Beyond British Columbia, the only discernible shifts take the form of industry- or context-specific

34 *Cominco Ltd. v Canadian General Electric and Light Co. Ltd.* (1983) 50 B.C.L.R. 145 (B.C.C.A.); *Leischner v West Kootenay Power and Light Co. Ltd.* (1986) 24 D.L.R. (4th) 641 (B.C.C.A.); *Inglis Ltd. v South Shore Sales Ltd., Whynot and Canada Accident and Fire Assurance Co.* (1979) 31 N.S.R. (2d.) 541 (N.S.C.A.). The same interpretation might be taken of the Saskatchewan provision: *MLRC Report*, 14, fn. 13.

35 Securities Act, R.S.O. 1990, c. s. 5, s. 138.6 (Ontario); The Securities Act C.C.S.M. c. s. 50, s. 189 (Manitoba).

36 R.S.C. 1985, c. C-44 (“CBCA”), s. 237.

37 CBCA, ss. 237.2(2), 237.5(1). A small investor is currently one investing CAN\$20,000 or less.

38 CBCA, s. 237.6(1), (2).

schemes, the pragmatic need for which continues to be questioned, and some of which contain last-resort “get-out” clauses that allow courts to revert to the old joint and several liability rule more or less as they see fit. Nor is there any sign that such little impetus towards proportionate liability as exists is being maintained. As recently as 2011,³⁹ the Law Commission of Ontario rejected proposals to introduce proportionate liability into its own, domestic Business Corporations Act for reasons discussed further in Part IV. More recently still in 2013, the Manitoba Law Reform Commission claimed to be entirely “unaware of any suggestion that there is any compelling need” for reform of the joint and several liability rule in that province.⁴⁰

The position in the UK and New Zealand is easier to state, for here there is currently very little sign of any departure from the joint and several liability rule. In the UK, the rule was affirmed by the Law Commission in 1996.⁴¹ More recently, there was some judicial flirtation with proportionate liability in the context of complex mesothelioma cases in *Barker v Corus (UK) Ltd.*,⁴² but that dalliance was swiftly ended by Parliament, which took a different view of the fairness of the result for plaintiffs in the Compensation Act 2006.⁴³ Furthermore, the Supreme Court itself has finished the flirtation *as a matter of common law*, significantly in a case where the Court directly addressed the consequences for insurance – and liability insurers – of the joint and several liability rule.⁴⁴ The judicial abandonment of the proportionate liability approach in *Barker* therefore occurred in a case where liability insurance was the key issue; its completeness is illustrated by the fact that the proportionate liability approach does not now even apply in Guernsey,⁴⁵ where the Compensation Act provision reversing *Barker* has no application. This concerted rejection of proportionate liability in the UK has occurred despite the fact that the country has had comparative negligence since 1945; and joint and several liability survives even where a plaintiff is partly at fault. If there were a necessary ethical link between comparative negligence and proportionate liability, this would be myopic. In fact, we shall suggest, it is anything but.

In New Zealand, official reports into the apportionment of civil liabilities in 1992 and 1998 affirmed the country’s adherence to joint and several liability in all cases,⁴⁶ but the Law Commission was recently asked to look at

39 *LCO Report*.

40 *MLRC Report*, p. 10.

41 UK Law Commission, *Feasibility Investigation of Joint and Several Liability* (1996), at paras. [7.1], [7.4]–[7.5].

42 [2006] UKHL 20; [2006] 2 A.C. 572.

43 Compensation Act 2006, s. 3.

44 *Durham v B.A.I. (Run Off) Ltd. (in scheme of arrangement)* [2012] UKSC 14; [2012] 1 W.L.R. 867 (“The Trigger Litigation”).

45 *International Energy Group Ltd. v Zurich Insurance Plc. UK* [2013] EWCA Civ 39.

46 NZ Law Commission, *Apportionment of Civil Liability* (NZLC PP 19, 1992); Rep. No. 47, *Apportionment of Civil Liability* (1998).

the issue again in light of “financial crises” and industry-specific concerns about “leaky homes” arising since the end of the 1990s. Reading both the Commission’s initial Issues Paper and its final Report,⁴⁷ it is evident that Australia’s shift to proportionate liability was a matter weighing on its mind. The free trade arrangements existing between the two countries provide an added incentive for New Zealand to follow Australia’s lead, so as to create an even liability playing field for businesses on both sides of the Tasman. The businesses most closely implicated fall within the construction, finance, and professional services sectors, although it has also been suggested that liability insurers would benefit by a common regime.⁴⁸ There is of course an immediate and obvious irony in any aspiration to achieve “commonality” with Australia on these issues, when Australia has hitherto failed to achieve internal consistency in its own law. New Zealand has also managed to avoid “insurance crisis” and business is in pretty good shape, which reduces the political pressure to engage in reform. In its final Report, the Commission has now reaffirmed its traditional commitment to joint and several liability as the basic rule in all types of case, clearly stating the view that, as between plaintiffs and defendants, it is appropriate that the risk of uncollectable shares of damages be borne by the latter.⁴⁹ It has, however, recommended giving courts an exceptional power in cases involving “minor” defendants burdened by “unduly harsh and unjust” liabilities to make orders mitigating the risk the latter are required to bear, whilst insisting that the plaintiff always receives an effective remedy and never recovers less than 50% of his or her loss.⁵⁰ The Commission’s sanguine response to the complaints of “deep pocket” defendants in the building and professional services industries has been to recommend a system of limits on liability and damages caps in particular cases,⁵¹ not proportionate liability. Whether these recommendations will be favourably received by government remains to be seen but, if proportionate liability is ever implemented, it is very unlikely to apply to cases of personal injury. There is little political pressure for it to do so, since personal injuries are generally covered by the national accident

47 NZ Law Commission, *Review of Joint and Several Liability* (Issues Paper No. 32, 2012); *Liability of Multiple Defendants* (Rep. No. 132, 2014).

48 NZ Law Commission, Issues Paper No. 32, (2012), paras. [6.18]–[6.23].

49 NZ Law Commission Rep. No. 132 (2014), 4 (this provides the best assurance of plaintiff compensation: para. [3.34]).

50 *Ibid.*, Recs 3–5. Minor defendants are those with only a “minor and limited responsibility” for P’s loss. Any order made in their favour must ensure that (a) P still receives an effective remedy, (b) the result is fair as between P and the minor defendant, and (c) P does not in consequence receive damages representing anything less than 50% of his or her loss. The Commission also proposes changes to contribution rules between defendants, so as to allow unallocated losses to be distributed between them in proportion to their respective responsibility: Recs 6, 7.

51 *Ibid.*, Recs 8–11 suggest liability caps for building consent authorities and limits on liability for commercial building consents. Recs 12–17 suggest that auditors and accountants be permitted to develop capped liability schemes, as in Australia.

insurance system and hence add nothing to defendants' (or their insurers') legal liabilities.

Looking at the debate across the various jurisdictions, there are several key points which help to understand the nature and extent of the shift towards proportionate liability overall. Firstly, such a "shift" as has taken place is neither universal to all jurisdictions nor common in its form in those that have chosen to engage in it. Secondly, where change has occurred, its genesis has almost always been legislative, not judicial. The enacting legislation is also usually a reaction to industry lobbying or perceived economic crisis, not the product of considered deliberation by law reform bodies, most of which have *rejected* the case for change. This tends to affirm our view that the shift has been more political than ethical in motivation.

Thirdly, almost all jurisdictions endorsing change have assumed a conceptual or ethical connection between proportionate liability and comparative negligence rules, such that the two are regarded as part of a single development and the one as logically required by the other. This assumption is most obvious on the face of the *Restatement*, which considers both topics under one title ("apportionment of liability") and expressly states the view that joint and several liability and comparative negligence are "difficult to square" with one another.⁵² In our view, the idea that comparative negligence and proportionate liability share a common ethical pattern is not just unproven, but deeply normatively problematic for reasons explored in the next section. In fact, we will suggest that it is proportionate liability, not joint and several liability, that contradicts the ethics of comparative negligence rules.

A fourth observation relates to a startling difference between the types of case picked out for proportionate liability in the US and elsewhere. In the US, proportionate liability is applied to the non-economic aspects of harm in personal injury cases. Yet this is the one type of case in which one can be assured that it does *not* apply virtually everywhere else. The American position is initially baffling to those of us who take the (surely not unreasonable) view that the protection of a plaintiff's physical integrity is a more important social priority than the protection of her economic interests. It is possible that the explanation lies in the continued use of juries in the US to assess damages awards in personal injury cases, although empirical evidence to this effect is admittedly scant.⁵³ We speculate that the high level of awards in personal injury cases may have made them a particular bone of

52 *Restatement*, comment (a) to §10, p.101. The scope of the *Restatement* project is confined to core cases of personal injury and property damage.

53 For a different view, see D. Partlett, "Apportionment and Tortfeasors in Australia: Professionals' Liability and Economic Loss: An Outside View" (2014) 22 T.L.J. 1 (hinting that there might be a moral case for proportionate liability in personal injury cases, but that cases of pure economic loss are only "in some pale part" a matter of personal responsibility).

contention for insurers and other defendant interests lobbying for reform of the joint and several liability rule; and that this may in turn have fed into the way in which legislation has been framed. The different approach in the US is not readily explicable or defensible ethically and can only be rationalised in terms that are pragmatic and localised. Countries that are currently considering changes to their joint and several liability systems should therefore be particularly wary of making American comparisons.⁵⁴

A final point that may help explain the inconsistent shift across jurisdictions relates to different cultures of government and, in particular, different governmental attitudes to the appropriateness of legislating in response to short-term political pressures. A stunning feature of Australia's reaction to the insurance crisis of 2001 was the extraordinary speed and readiness with which it was prepared to rush to restrict plaintiff rights in a whole variety of ways (of which proportionate liability was just one), on really very little empirical evidence, simply to meet concerns expressed by particular lobbyists.⁵⁵ This type of immediate, short-term interventionism has had profound effects on the shape of the field. Was Australia too precipitous in its reaction to economic forces before these could be fully understood? Now that "insurance pressures" have eased, should it not be reverting to the old rule? Was government all too easily captured by industry interests? Are recent proposals to incorporate "consumer" exceptions into the proportionate liability regime a sign that even government now thinks that the balance of economic risk has tipped too far in favour of defendants and insurers? How much short-term fiddling can the law tolerate if it is to maintain its predictability? Whether governments choose to respond in this way is partly a function of their openness to the demands of powerful lobby groups and this in turn is likely to be affected by local factors such as the length of political terms of office⁵⁶ and the strength of lobbying culture in the jurisdiction in question. Our own view is that decisions need to be longer-term and better balanced than this and that, for this reason too, caution should be exercised in abandoning or further eroding long-established joint and several liability rules in the absence of any compelling ethical argument, or clear evidence of the pragmatic need to do so.

III. ETHICS

What, then, of the ethics? Much of the untapped potential for analysis of this area lies in the following questions: are comparative negligence and

54 Other reasons to be wary of the comparison include different costs provisions and joinder rules: NSWLRC Rep. No. 89 (1999), para. [2.14].

55 See K. Burns, "Distorting the Law: Politics, Media and the Litigation Crisis: An Australian Perspective" (2007) 15 T.L.J. 195.

56 In Australia, these are short – three years at federal level and three or four years in the states and territories.

proportionate liability the source of a novel and important stream of ethical thinking in the law of tort, as some have implied? If so, what is its nature? And are these two doctrines even *consistent* in their ethical basis? We suggest that, whatever ethical contribution comparative negligence brings to tort law, it does not support proportionate liability doctrine.

The contrary view has appealed to some. According to Cardi, the “swift and pervasive” rise of comparative negligence in combination with “the doctrine of several liability ... has heralded a new era of tort law in which justice is based on responsibility, and each party to an action is held liable only for its share of the fault”. The “central concept” identified as “comparative responsibility” is described as “strong and simple”.⁵⁷ We will argue that the idea of “justice based on responsibility” is not nearly as simple as it looks. Even so, Cardi captures very well in these remarks the notion we would like to examine, namely that there is an *ethical* sea-change at work, in which “justice” is based on “responsibility”, and – apparently – a party is held liable “for its share of fault”.

A striking feature of arguments for the ethical desirability of proportionate liability is that they are so rarely independent of an assumed link with comparative negligence. Widespread acceptance of the fairness of comparative negligence allows proponents simply to assert that the same reasons can be used to justify proportionate liability as “fairer than” joint and several liability. It is even sometimes argued that, *given* the existence of comparative negligence, it is positively unfair and inconsistent to maintain joint and several liability. Arguments of the latter type build upon the observation that the spread of comparative negligence and proportionate liability has been simultaneous, particularly in the US. But that timeline is not shared by other jurisdictions (least of all the UK); and it may be explained in a host of different ways, some of which have more to do with the politics of pragmatic choice⁵⁸ than any common logic or ethics underpinning the two doctrines.

A clear focus on the ethical contribution of comparative negligence is essential if we are to assess the ethics of proportionate liability. Plainly there is some relationship between the two developments, beyond the obvious fact that both involve dividing the burden of indivisible harm.⁵⁹ Proportionate liability is not, so far as we can see, found in jurisdictions

57 J. Cardi, “Apportioning Responsibility to Immune Non-Parties: An Argument Based on Comparative Responsibility and the Proposed Restatement (Third) of Torts” (1996–97) 82 Iowa L.Rev. 1293.

58 This is essentially the argument adopted by A. Twerski, “The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics” (1988–89) 22 U.C. Davis L.R. 1125, in his debate with Wright (“Allocating Liability”): the solutions are a product of choice, not logical error.

59 An “analogy” or “conceptual link” is hence noted even by those who reject the idea that comparative negligence can be used to justify introducing proportionate liability: NSWLRC Rep. No. 89 (1999), paras. [2.27], [2.30]; Weir, “All or Nothing”. Weir thought comparative negligence more acceptable than either proportionate liability or (in fact) contribution between tortfeasors, while clearly recognising some links between the different ways in which “all or nothing” was eroded.

that do not adopt comparative negligence doctrine in some form; and rarely are ethical justifications proffered for it which do not also touch on comparative negligence. Therefore, it is problematic that, despite the antiquity of comparative negligence principles, their underlying ethics are rarely seriously explored.

Here we attempt to sketch what kind of “shift” is involved in the adoption of comparative negligence, and some of the features of the doctrine which might mark significant changes in the ethics of tort. We then consider whether proportionate liability is to be regarded as a continuation of the same principles, as is often assumed; a distinct step in need of further justification; or even in certain respects a choice that is *inconsistent with* the underlying ethics of comparative negligence.

A. *What Is the Ethical Contribution of Comparative Negligence?*

At least in those jurisdictions where the shift to comparative negligence was made many decades ago, there was probably one overriding reason for it, namely the harshness of the “all or nothing” rule so far as it affected plaintiffs. That is clearly the case in relation to the UK’s own reform in 1945. The same outlook has been adopted by the UK judiciary in very recent years: far from extending notions derived from comparative negligence into other areas, the courts have now clearly confined comparative negligence itself to torts where contributory negligence would have barred a claim *before* the reform of 1945, expressly on the basis that the aim of the legislation was not to deprive plaintiffs, who would otherwise have succeeded, of part of their damages; but to assist plaintiffs who might otherwise have failed.⁶⁰ Thus, English courts have confirmed that contributory negligence in its revised, comparative form does not apply to cases of trespass to the person,⁶¹ nor to cases of deceit,⁶² and the reason is not the intentional nature of the wrong – which in trespass to the person is in any case of limited significance – but the inapplicability of the earlier rule to those torts.

In the UK,⁶³ it could therefore be said that comparative negligence is *not* thought to disclose a general response to the broad ethical problem hinted at by Card, namely how to approach responsibility in cases of multi-party fault. Rather, it is a specific response to a more specific problem – how to deal with circumstances where the plaintiff’s fault is a cause of *her own injury* – and even then, the solution it provides is not thought appropriate to all such cases. We concede that the shift to comparative negligence may supply the *know-how* to deal with a range of problems; and this

60 *Standard Chartered Bank v Pakistan National Shipping Corpn. and Others (Nos 2 and 4)* [2002] U.K. H.L. 43; [2003] 1 A.C. 959, at [12], per Lord Hoffmann.

61 *Pritchard v Cooperative Group (CWS) Ltd.* [2011] EWCA Civ 329; [2012] QB 320.

62 *Standard Chartered Bank* [2002] U.K.H.L. 43; [2003] 1 A.C. 959.

63 The cases above interpreted legislation which also applies to Scotland.

know-how may itself be ethically significant. Perhaps legal principles and concepts often do emerge from pragmatic solutions; and perhaps these concepts can themselves be imbued with ethical significance.⁶⁴ But, in our view, the *technical* similarity in the “solutions” of comparative negligence and proportionate liability doctrines masks a crucial difference in the “problems” they are designed to resolve.

B. What Ethical Features Might Comparative Negligence Contribute to Tort Law?

The first step is to see what ethical features comparative negligence might possess, setting aside any preconceived view of what ethical framework of analysis is appropriate. Might comparative negligence doctrine have certain features that create “ripples” for later thinking about fairness and ethics?⁶⁵ Might it even have implications for proportionate liability doctrine?

1. “Relativism” and compromise

One possibility is that comparative negligence makes the earlier law appear outdated, even self-defeating in its “all or nothing” approach to responsibility, demonstrating that it is more mature to allow for some responsibility and some fault on either side; and to divide loss accordingly. Put simply, comparative negligence allows courts to *divide* burdens in order to avoid injustice. But the simplicity is misleading. For one thing, in this process, the plaintiff’s “loss” and the defendant’s “liability” are treated as being sufficiently equivalent for such a “division” to be possible, even though losses and liabilities are not actually the same thing. It is striking that this was not a compromise which applied to personal injury in the maritime context: rather, the maritime solution for ships and cargo was taken up by the 1945 reforms and applied to all forms of damage suffered in collisions between cars and pedestrians.⁶⁶ Second, the division means weighing two *distinct* factors – “causal responsibility” and fault – together. No reliable means of weighing these different factors can be arrived at and the process can therefore only involve approximations. For this reason, not only does comparative negligence turn on “relative” responsibility; it is natural to see it in terms of rough “compromise”.

Comparative negligence could thus be said to reflect and encourage an evolving relativism in the law. By “relativism”, we mean, in this context,

64 S. Deakin, “Evolution for Our Time: A Theory of Legal Memetics” (2002) 55 C.L.P. 1, identifies “concepts” as the key to legal evolution.

65 M. Green, “The Unanticipated Ripples of Comparative Negligence: Superseding Cause in Products Liability and Beyond” (2001–2) 53 S.Cal.L.Rev. 1103. Lack of attention to broader effects of comparative negligence is noted by J. Goudkamp, “Rethinking Contributory Negligence” in S. Pitel, J. Neyers, and E. Chamberlain (eds.), *Tort Law: Challenging Orthodoxy* (Oxford 2013), 309.

66 J. Steele, “Collisions of a Different Sort: The Law Reform (Contributory Negligence) Act 1945” in T.T. Arvind and J. Steele (eds.), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Oxford 2013).

recognition that there are few wholly blameless, let alone uniquely responsible, parties; and that this should be reflected in liability principles. Responsibility has broadened. More duties are recognised; more factors are recognised as causes; failing to prevent injury is more often recognised as grounds for an action; more vicarious liability is imposed. At the same time, victims should also consider the risks they face, and think about avoidance or insurance. There is substantial evidence of relativism in this sense, whatever its causes.⁶⁷ For example, the contemporary position is that even legal causes are multiple: rarely is a sole legal cause of harm either sought or attributed; rather, a range of causes which are not “too remote” tends to be identified. It is well documented that comparative negligence is historically linked to a change in the notion of legal cause to this more “open-ended” type of causal enquiry.

“Relativism” in the sense set out above is connected with a move away from absolutes, and it has some support. Sedley L.J., in a much-debated dissenting judgment, said: “Given the ability of the law for over half a century to apportion blame . . . [there is] . . . little substantial justice. . . in sacrificing a judicial apportionment of responsibility on the altar of a doctrinaire refusal to adjudicate.”⁶⁸

Several features of this remark are worth noting. First, there is an implication that apportionment is more in tune with contemporary practice than absolute denial of liability. It is hinted that willingness to divide responsibility – which has been interpreted, rightly or wrongly, as engaging “compromise”⁶⁹ – is a sign of maturity in the law, and that absolutes are outmoded. Second, though, it is a *judicial* apportionment of responsibility that is in issue. Here is a significant feature of both comparative negligence and of proportionate liability, which is easy to forget. Although both smack of relativism and flexibility, they are very different from “compromises” reached by *parties*, such as through settlements, contracts more generally, or mediation.⁷⁰ Such judicial apportionments may entirely fail to capture what the parties themselves would agree. Do they nevertheless reflect what ordinary citizens might think if judging merits “in the round”? Does an inclination to compromise reflect “*common sense*”, even if that becomes a question of *judgment* rather than *agreement*?⁷¹ Something of this view may be found in Tony Weir’s hesitant suggestion that perhaps

67 Weir, “All or Nothing”, sardonically refers to “the ‘let it all hang out’ atmosphere of the 1960s” as a dubious possible explanation (at p. 549).

68 *Vellino v Chief Constable of Greater Manchester* [2001] EWCA Civ 1249; [2002] 1 W.L.R. 218, 229.

69 Comparative negligence is debated in terms of “compromise” by both Weir, in “All or Nothing”, and J. Coons, “Approaches to Court-Imposed Compromise: The Uses of Doubt and Reason” (1963–64) 58 Nw.U.L.Rev. 750.

70 See Coons, “Approaches to Court-Imposed Compromise”.

71 For the possible basis of compromise in agreement, see the starting point adopted by M. Golding, “The Nature of Compromise: A Preliminary Inquiry” in J.R. Pennock and J.W. Chapman (eds.), *Compromise in Ethics, Law and Politics* (New York 1979).

compromise was implicitly reached by civil juries when calculating damages, in a way that ceased to be possible once the job was passed to judges.⁷² But Sedley L.J.'s judgment was notably dismissive of popular opinion. So the "mature" position adopted in comparative negligence is a position adopted by law, not by the parties, nor by popular opinion, and on occasion it may even stand opposed to both of these. Do either comparative negligence or proportionate liability nevertheless genuinely represent "compromise" in any ethically positive sense?

Different opinions have been expressed as to the ethical value of compromise. For some, to compromise is to depart from principle and logic; for others, it is positively desirable.⁷³ Whichever of these views is correct (that is, whether compromise is good in itself or merely justified as a way of avoiding greater evil), we suggest that compromise *solutions* are inherently both particular (non-generalisable) and imprecise. Since compromises necessarily involve exceptions to principled positions, they cannot readily be generalised, least of all from one context to another. Indeed, our point is that the ethics of compromise may actually be contradicted by such a step.

Comparative negligence is a specific compromise solution and offers blunt tools to hack through the tangled knot created by attempts to attribute causal responsibility for a plaintiff's "indivisible" injury to either the plaintiff or the defendant(s), respectively. It is necessarily imprecise and supportable because it alleviates unfairness and is "better than" the alternative produced by traditional common law concepts. The benefits of the solution excuse the bluntness involved. But it does not (and cannot) generate a "true" degree or proportion of liability "according to responsibility". Indeed, the very idea that there can be such a "true" proportion is a distortion of the idea of positive compromise.

2. Distributive ethics

We are happy to accept for current purposes that comparative negligence embodies a form of localised distributive justice operating between parties, which is distinctive in that it deals in divisions.⁷⁴ The sort of "compromise distribution" it involves is localised in its focus, and is recognisable as an internal question of private law. "Liability according to responsibility", embodying local distributions of this type, might "feel" similar in some ways to wider societal distributions which relieve individuals of some of the impacts of misfortune, such as workmen's compensation, or New

72 Above note 15. Note however Coons's suggestion that judges too have some ammunition for achieving compromise, for example where the law generates so many conflicting rules that a court may hold for one party as to some heads, the other party as to others, and the claim is in effect *compromised*.

73 Both positions are reviewed by Golding, "The Nature of Compromise".

74 J. Gardner, "What Is Tort Law For? Part 2. The Place of Distributive Justice" in J. Oberdiek (ed.), *Philosophical Foundations of the Law of Torts* (Oxford 2014), ch. 16, 335.

Zealand-style accident compensation: in both of these, smaller sums of money are distributed to more parties; losses are divided and spread; responsibility is shared; they may appear to embrace “relativism” in the sense introduced earlier. But any such “feel” is misleading. In those approaches, the role of fault is minimised and contributory negligence is typically irrelevant. Comparative and proportionate liability schemes are, by contrast, highly focused upon fault. It is unsurprising that such fault-based approaches are championed above all by *insurers*. Emphasis upon “responsibility” above social distribution is capable of being a self-interested mantra for the industry and it is probably insurers who are working most energetically to retain the notion of responsibility-based tort law.⁷⁵

Underlining the existence of widely varied distributive arguments, it is important to note in passing that using tort law to distribute losses locally between parties according to a “responsibility” criterion such as comparative “fault” or contribution to risk can actually undermine broader distributive goals, such as spreading the same losses widely (and therefore more thinly) across society. For example, comparative negligence (or proportionate liability) rules that assign a portion of the loss to a plaintiff in a personal injury case are likely to prevent that loss being further distributed through insurance, because plaintiffs rarely have first-party insurance in such cases.

3. Multiple factors

On the face of it, comparative negligence proceeds as though there is a way of measuring several different ideas on a single scale. In fact, we do not think that this was seriously believed to be possible when the reform was initiated. Rather, we think that there is an implicit fiction at work: courts behave *as though* one can measure parties’ contributions in this way, but the exercise is necessarily imprecise. The value of the doctrine hence lies in the compromise it engages in, not in creating some magical new technique for measuring multiple, incommensurable factors with precision.

The fiction of precision is entirely blurred in generalising statements that comparative negligence makes justice “dependent on responsibility”, as though each party is truly being held liable (only) to the extent of “its responsibility”. Both causal contribution and degree of fault are relevant to comparative negligence. Contribution legislation and proceedings are even more open-ended.⁷⁶ Both invite only rough and ready divisions. Moreover, the factors juggled on the single scale include some (like “causal

⁷⁵ R. Merkin and J. Steele, *Insurance and the Law of Obligations* (Oxford 2013), chs 5 and 11.

⁷⁶ Factors judged relevant to contribution proceedings in UK courts have included the fact that one liable party holds undisgorged profits (*Dubai Aluminium Co. Ltd. v Salaam* [2003] 2 A.C. 366); and the manner in which one party has run its defence (*Re-Source America International v Platt Site Services Ltd.* [2004] EWCA Civ 665). Neither of these is a “causative” factor. Cases in Australia have deployed the same sorts of criteria in proportionate liability proceedings. The appropriateness of this has been questioned – see McDonald, “Proportionate Liability in Australia”.

contribution”) that are themselves compromises of a sort – the idea that we can precisely judge relative causal contributions to an injury that is indivisible is seemingly oxymoronic and it may be that the process here is one of assessing relative contribution to risk, rather than injury. Even accepting this, it is still hard to see how failures to reduce risk, for example, can be assessed against positive contributions to it. So we are not just juggling multiple incommensurables, but some of the incommensurables we are juggling could themselves be seen as “substitutes”. It is true that decisions are made in many contexts that deal with incommensurables and answers are still reached. That is the point of compromise, perhaps: it offers an escape. But rarely are such decisions claimed to produce either a precisely calculable answer, or one which is good for all contexts.

C. From Comparative Negligence to Proportionate Liability

Comparative negligence hence engages in a very “rough and ready” ethical compromise. We have already expressed our doubts that proportionate liability shares the same ethics. Here we go further and suggest that proportionate liability actually *contradicts* the distributive ethics of comparative negligence and that it distributes different things.

The key difficulties arise because, when reasoning from comparative negligence to proportionate liability, it tends to be asserted that the *same* idea of sharing is applicable in each. This is reflected in the idea that, between them, these two developments exemplify a single approach in which “justice depends upon responsibility”. “Responsibility” in this context means *relative* responsibility. We explained above that the *relative* share of responsibility arrived at in a comparative negligence regime results from a broad-brush process of balancing *as between plaintiff and defendant*. In our view, pure proportionate liability contradicts this process, by proposing that the defendant carry a fixed and limited liability. The liability is “fixed” in the sense that it is calculated by reference to factors⁷⁷ that have nothing to do with the plaintiff at all and which bind her (at least in a “pure” system) whether or not her own relative responsibility is engaged. The point is illustrated by the way that proportionate liability can reduce a tortfeasor’s liability towards a plaintiff who bears no responsibility for her injury at all: whereas comparative negligence doctrine would assess the tortfeasor’s responsibility “relative” to the plaintiff’s and deduct nothing in such a case, a pure proportionate liability regime ignores the distributive ethics between plaintiff and defendant and reduces the tortfeasor’s liability regardless.

It is very hard to see, therefore, how proportionate liability engages in anything like the sort of ethical “compromise” we find in comparative

77 Namely, comparison of the defendant’s responsibility with that of other defendants.

negligence doctrine. In a pure proportionate liability scheme, the existence of an untraceable or insolvent tortfeasor is not a risk “shared” between plaintiff and defendant as one might expect in a party compromise, or even a “common sense” solution, but one that is imposed entirely on the plaintiff. The solution (an alleged measure of the defendant’s “own responsibility”) is rendered so static as to be “doctrinaire”.

Comparative negligence and proportionate liability also distribute different things. The familiar system of joint and several liability, combined with comparative negligence doctrine and contribution between defendants, divides two *different* cakes. One cake is shared between plaintiff and defendants according to the plaintiff’s relative fault and responsibility. There is a plaintiff’s share and defendants’ share. This is the (rather unpalatable) “loss” cake: the defendant takes on a share of the loss in the form of liability; the plaintiff bears no liability, but takes on the financial burden of the rest of the loss. These portions of responsibility for the loss are dispensed by comparative negligence doctrine. *Joint and several liability* and *contribution* are concerned with a different cake. That is the liability cake. The plaintiff is not involved with the liability cake. The plaintiff’s role in comparative negligence is to take on a loss, or be compensated. She takes on *liability* only to the extent that she too is a tortfeasor. She owes no *duty* to the defendants, and it is therefore at best misleading to classify comparative negligence as a form of “apportionment of liability”, as the *Restatement* does. No liability attaches to a plaintiff unless she too has breached a duty to the defendants. So, from this point of view also, comparisons between comparative negligence and proportionate liability doctrine are inapposite. Comparative negligence allocates the financial burden of a plaintiff’s loss. Proportionate liability, like the doctrines of joint and several liability and contribution, allocates legal liabilities (*remedial duties*) that arise from wrongs done by defendants to the plaintiff.

Acceptance of the fairness or “approximate justice” of the comparative negligence compromise, or even its superiority to the previously existing approach at common law, does not therefore justify the leap to proportionate liability. While the latter shares some of the *ingredients* of the solution that comparative negligence doctrine provides (comparing and dividing, for example), if the two are presented as ethically *the same*, there is a misunderstanding. The shift to proportionate liability in some ways marks a move *away* from the ethics of comparative negligence, despite employing some of the same tools. Those tools were fashioned for particular purposes, which are actively undermined by turning them to this new use. Therefore, if proportionate liability is a compromise at all, it is not one that gains ethical strength from comparative negligence doctrine, despite the attempts that have been made to sanctify both as instantiations of the same idea of “liability according to responsibility”.

The most innocent explanation for the leap that reformers make from the doctrine of comparative negligence to proportionate liability seems to be that *concepts* and *solutions* are capable of acquiring a gravitational force of their own in legal reasoning and that it is all too easy to be seduced by superficial analogies. Ideas and techniques created for one purpose and in one context (to protect plaintiffs from a particular problem) end up being put to different purposes (the protection of defendants from a different problem that does not precisely match the first) without due reflection on the appropriateness of the transition. The vested interest of some protagonists in having this happen is also no doubt influential. Meanwhile, the emphasis on responsibility above distribution is a familiar feature of insurers' approach generally.

IV. PRAGMATICS

In this final section, we turn our attention briefly to pragmatic arguments. These, we suggested, have the best claim to underpin recent legislative reforms, despite constant references to the ethics of "personal responsibility". The way in which ethical arguments can get hijacked by pragmatists is a fascinating and complex topic in itself, but here we simply highlight clear evidence of the phenomenon in the current context. Australia provides some particularly striking examples – proportionate liability reforms that were originally clearly motivated by pragmatic concerns have later been paraded for legislative purposes as instantiations of the ethics of personal "responsibility".⁷⁸ Our view is that reformers were either ethically confused, or – worse – cynically selected the language of ethics for its rhetorical appeal. If this is so, it is deeply distasteful – for, if there is one thing that is highly offensive to ethics, it is being used as a means to some hidden end.

We touch on four types of pragmatic justification below. They concern economic efficiency; the empirical effects of joint and several liability on insurance markets; the fairness or distributive "justice" of the respective systems in terms of their "impact" on defendants; and arguments about the contribution that joint and several liability rules supposedly make to the development of "blame culture". The third of these arguments expresses a concern about "fairness" and one might wonder therefore what it is doing in this section, rather than the last. We include it here because the sort of distributive argument in play depends on demonstrating that joint and several liability rules have a particularly unfair empirical *effect* on defendants (usually massive or unpredictable liabilities) and is in this sense "impact-driven". We do not canvas all the arguments fully, but aim instead to

⁷⁸ *Hunt & Hunt v Mitchell Morgan Nominees Pty. Ltd.* [2013] HCA 10, at [15], per French C.J., Hayne, and Kiefel JJ. Note also the title of the relevant NSW legislation, which expressly refers to "personal responsibility".

draw out three points that are applicable to each of them to a greater or lesser degree: the arguments tend to be unsupported by any real empirical evidence; they are usually localised and context-dependent; and they are frequently capable of cutting either way. These points serve to affirm our view that there is no generalisable pragmatic argument in favour of a shift towards proportionate liability, any more than there is an ethical one.

A. Economics

The economics literature makes each of these three points rather nicely. Although several studies have been conducted which attempt to model and compare joint and several liability and proportionate liability systems in terms of their relative efficiency, all of them are self-confessedly inconclusive⁷⁹ and the one that we have found which focuses most directly on the problem created by insolvent defendants concludes that generalisation is simply impossible.⁸⁰ This is a serious barrier to the case in favour of *either* type of solution. Most economic arguments (excluding perhaps those of the Austrian school,⁸¹ which appear to have been subject to considerable criticism for precisely this reason) depend for their validity on the *possibility* at least of empirically verifiable conclusions and the admission that efficient outcomes may simply be untestable in the current context is therefore not just a problem for proportionate liability proponents; it raises question marks over the utility of the economic framework itself in generating answers to problems of this type. But even if we overlook this difficulty and engage in a less evidence-based exercise of informed speculation, the economic arguments are clearly context-dependent and capable of cutting either way. If they favour proportionate liability in cases involving “deep pocket” defendants,⁸² then in the more standard type of case they may well support joint and several liability, because the latter system presumptively places robust incentives on those (defendants) who are most easily able to identify and police the behaviour of persons collectively responsible for the plaintiff’s injury.⁸³ The additional delay and complexity that flow in a proportionate liability system from plaintiffs being unable to

79 W. Landes and R. Posner, “Joint and Multiple Tortfeasors: An Economic Analysis” (1980) 9 J.L.S. 517; L. Kornhauser and R. Revesz, “Sharing Damages among Multiple Tortfeasors” (1989) 98 Yale L.J. 831; “Apportioning Damages Amongst Potentially Insolvent Actors” (1990) 19 J. L.S. 617; C.A. Blyth and B.M.H. Sharp, “Solidary and Proportionate Liability: An Economic Analysis” (unpublished paper, 1995); “The Rules of Liability and the Economics of Care” (1996) 26 V.U.W.L.R. 91; Richardson, *Economics*; NZ Law Commission, Issues Paper No. 32 (2012), para. [8.3] and Rep. No. 132 (2014), para. [1.4].

80 Kornhauser and Revesz (1990), op cit.

81 The deductive approach to economics (reliant on “praxeology”) is most often associated with the work of Ludwig Von Mises. See further Murray N. Rothbard, “Praxeology: The Methodology of Austrian Economics” in Murray N. Rothbard (ed.), *The Logic of Action One: Method, Money, and the Austrian School* (Cheltenham 1997), 58–77.

82 Blyth and Sharp, “Solidary and Proportionate Liability”.

83 Richardson, *Economics*, at paras. [2.11]–[2.12] (pointing to the role of “gatekeepers”).

deal with a single, responsible defendant also seems likely to increase administration costs and inhibit settlement.⁸⁴ Perhaps for these reasons, arguments of economic efficiency have not been pressed very hard by proponents of proportionate liability reform. Indeed, from the *efficiency* point of view, it may be more important to insurers that a system is stable, predictable, and uniform to the jurisdictions in which they operate than that it be one of joint and several, or proportionate, liability. This is especially likely to be true in fields of activity in which insurers of defendants are also the insurers of plaintiffs – that is, where they span both the first-party and liability insurance markets. Ironically, this is most often the case in relation to property damage and pure economic loss – which are precisely the fields in which such a fuss has been made in Australia about the need to abandon the joint and several liability rule.

B. Insurance

The murky nature of the pragmatic arguments is equally evident when it comes to assertions that proportionate liability is necessary to control escalating insurance premiums, avert insurance “crisis”, and thereby ensure that defendant businesses and governments are able to continue to provide services (affordably or at all) to the community. It is too commonly assumed that there is a clear link between the level of defendants’ tort liabilities in general (and their “extra” liabilities under a joint and several liability system), the recent collapse of major insurers, and exponential rises in the rate of liability insurance premiums.⁸⁵ In fact, there is little, if any, empirical evidence to support this contention in Australia at least. In that jurisdiction, a study of personal injury cases has shown that litigation rates were pretty stable – sometimes even falling – in the lead-up to “the crisis” of 2001, which makes tort liability an unlikely culprit.⁸⁶ It is now admitted (somewhat belatedly, one might think) that the economic factors responsible for the ailments of the insurance industry in the early 2000s were so complicated that it is impossible to attribute premium increases to anything so specific as a joint and several liability rule. Chronic undercapitalisation, aggressive under-pricing in the industry, and a series of natural and man-made disasters seem likely to have been far more significant factors.⁸⁷

84 On the potential effects, see T. Horan, “Key Developments: Proportionate Liability”, paper presented to the Melbourne Law School Construction Law Program 10th Anniversary Function, 10 November 2009, paras. [37]–[43]; D. Levin, “Proportionate Liability: The Australian Experience” (2011) 9–11 *Build. Law* (New Zealand Building Disputes Tribunal Quarterly Newsletter).

85 See e.g. Senator Helen Coonan, Speech to the Insurance Council of Australia Conference, Canberra, 14 August 2003 (joint and several liability has “giv[en] . . . rise to a deep pocket approach to litigation” which is in turn a “factor in driving exponential increases in professional indemnity premiums”). See also *Report on Reform of Liability Insurance Law in Australian* (Commonwealth 2004), 10.

86 E. Wright, “National Trends in Personal Injury Litigation: Before and After Ipp” (2004) 14 *T.L.J.* 233.

87 J.J. Spigelman, “Negligence and Insurance Premiums: Recent Changes in Australian Law” (2003) 11 *T.L.J.* 1; P. Cane, “Reforming Tort Law in Australia: A Personal Perspective” (2003) *M.U.L.R.* 649.

It is true that premiums have declined significantly since the reforms,⁸⁸ but it is again hard to infer much from this, since proportionate liability was just one plank in a much larger raft of reforms introduced at the time and market conditions have since improved out of all recognition.⁸⁹ All of this has led one writer to suggest that governments were sold a quick lie by a powerful insurance lobby⁹⁰ but, even if we avoid speculation about the politics in play, the point about empirical gaps remains.⁹¹ This is a serious issue in its own right, for, unless pragmatic arguments about impacts are simply inspired guesswork, they must have a sound, empirical underpinning.

Arguments about insurance effects are also obviously *specific* to particular sectors of the insurance market and – as we have observed above – to particular time frames. They are not perennial (indeed it seems most likely that they are *cyclical*) and they are not generalisable. From this point of view, the Australian reforms are simply irrational in their current form because they introduce a *generalised* proportionate liability regime when the “insurance” case for change was only ever made with regard to *particular* sectors of economic activity such as professional service provision, building, and public liability.⁹² What is more, economic conditions and insurance markets change and adapt fluidly over time so that, even if proportionate liability was a rational response to insurance conditions in Australia in 2001 (we think not), this does not prove that it is right in 2015, nor that it is suitable for other jurisdictions. Reflecting on this point recently, the Ontario Law Commission has pointed to new market solutions (such as financial statement insurance and catastrophic bond securitisation) that are now available in Canada and which are probably better suited to deal with particular sectors of insurance risk.⁹³ Indeed, one problem with using proportionate liability regimes to deal with such risks (the risks of auditors’ liability flowing from failures to detect massive malpractice in financial markets is a topical example) is that they may not reduce liabilities to anything like a manageable size. A small percentage of liability for a billion dollar loss is still a very serious thing and additional

88 A recent report by the Australian Prudential Regulation Authority (*Overview of Professional Indemnity and Public and Product Liability Insurance*, June 2013) suggests that both professional indemnity and public/product liability insurance premiums have declined (by up to 50% and between 20% and 25% respectively) since 2003.

89 For the view that there is “no clear evidence” that proportionate liability has reduced premiums, see Hon. Justice C. Macaulay, “Proportionate Liability: Is It Achieving Its Aims?”, paper presented at Australian Insurance Law Seminar, 2 December 2010; B. McDonald, “The Impact of the Civil Liability Legislation on Fundamental Principles and Policies of the Common Law of Negligence” (2006) 14 T.L.J. 268 (caps on damages and costs are more likely to be responsible).

90 Wright, “National Trends”. See similarly on the US experience Wright, “Allocating Liability”; “Throwing the Baby out with the Bathwater: A Reply to Professor Twerski” (1989) 22 U.C. Davis L.Rev. 1147.

91 On precisely this point, see the *LCO Report*, pp. 35–36: “not enough public data”; “while there are data on rising litigation exposure, they do not establish that joint and several liability is responsible or that proportionate liability is necessarily the answer”.

92 Horan, *Proportionate Liability*, Recs 2, 3 and pp. 16, 30.

93 *LCO Report*, pp. 32–33.

control mechanisms, such as liability caps, may be required. The Commission's conclusion is that the market can fix these problems more accurately and more effectively through traditional contractual risk-allocation mechanisms and new insurance products than through the use of any bludgeoning proportionate liability scheme. In short, pragmatic solutions should be precisely tailored to pragmatic problems – they should be no smaller and no bigger than the problem they are designed to fix.

C. Unfair Impact on Defendants

This brings us to the argument that, whatever the insurance position, the *impact* of joint and several liability on defendants is “unfair”. This is not the argument previously considered (and dismissed) about it being inherently ethically fairer for a plaintiff to bear the loss than the defendant, as a matter of local risk distribution between them. It is a broader argument to the effect that joint and several liability places serious and unsustainable burdens of liability on select, “deep pocket” defendants as a result of their being “targeted” by plaintiffs, so that – looking globally at the distributive effects of the two systems – it is fairer to leave the risk of uncollectable losses with plaintiffs. This argument is connected to the idea that tort law as a whole is now too plaintiff-oriented, given recent extensions in liability rules, more generous causal judgments, and the like, and that some sort of trade-off is required as a result that is pro-defendant. This compromise is needed in order to deal with an otherwise undesirable state of affairs in terms of the balance of risks between injurers and victims generally as groups.

Since these arguments depend once again on the existence of a proven connection between joint and several liability and unsustainable “impacts” being felt by targeted defendants, they too run into problems of proof. No doubt plaintiffs do litigate cases against those most likely to be able to pay at the end of the day (“deep pockets”) – this seems entirely economically rational. But the objection of defendants is not really about *where* a plaintiff chooses to aim the litigation arrow and more about the *force* with which that arrow strikes – the complaint is that joint and several liability produces a wound that is too deep to be borne by just one of a number of responsible parties. The problem is that there is nothing to show that the joint and several liability rule is responsible for the wound that defendants are allegedly experiencing. The evidence consists almost entirely of anecdotal stories and industry claims.

Furthermore, even if these claims were empirically verifiable, they would not support a *generalised* response, merely more specific responses to particular problems being encountered in particular sectors, such as the building, professional services and public liability sectors. Indeed, embracing proportionate liability across the board could disproportionately skew the

balance of distributive justice between injurers and victims back in favour of injurers as a whole. Generalised schemes make all plaintiffs forego part of their compensation from *all* defendants who are responsible for injuring them simply because *some* such defendants in *some* contexts may be experiencing difficulty. This is a very questionable approach to take. It threatens to locate the unallocated part of a plaintiff's loss (in personal injury cases at least) in precisely the place where it is least likely to be broadly spread (few plaintiffs have first-party insurance in such cases); and it threatens to reduce the size of settlements out of court generally, prejudicing plaintiffs' compensation for wrongs done whenever more than one person is potentially responsible for them.

The last of these points shows that the argument about "distributive injustice" in the broader sense of fairness to plaintiffs and defendants as groups is capable of cutting equally easily in either direction. Indeed, it is probably for fear of unduly prejudicing plaintiffs that legislation in Queensland originally provided for proportionate liability to apply only to claims above AUSS\$500,000. It could also explain why the model provisions currently being considered for introduction across all Australian states and territories retain the joint and several liability rule in "consumer" cases. It is not our aim to suggest that either of these particular solutions is desirable. But what they do indicate is that reformers themselves are keenly aware of the fact that the argument about "distributive justice" as between groups of plaintiffs and defendants is equally capable of favouring the former as the latter in a wide variety of cases. This in turn means that any pragmatic argument based on distributive impact that is made in favour of proportionate liability is most unlikely to support a solution that is generalised to all defendants, or which applies to all plaintiffs. Almost inevitably, there is going to be a messy trade-off which recognises that the final solution is far from ideal.

There is another serious point. If the argument is that some compromise is needed because, taken as a whole, tort rules really are too generous to plaintiffs, there are other ways of changing the equation without shifting to *either* a general *or* an industry-specific proportionate liability regime. One strategy would be for courts or legislatures to curtail duties of care for defendants whose liabilities are otherwise likely to be unduly crushing.⁹⁴ There is some evidence in the New Zealand Law Commission's latest review that the push for proportionate liability is, in part, a response to court decisions that expose both public bodies and private builders to extensive tort liabilities, in the former case for economic harms which flow purely

⁹⁴ One objection to this approach voiced by Twerski is that it simply may not be practical – the common law is too slow to respond to urgent pressures and it is impossible for legislatures constantly to intervene in its substance in particular fields: Twerski, "The Joint Tortfeasor Legislative Revolt", pp. 1132, 1138, 1140. There is some substance to these points which may be another reason why damages caps are a better solution. See further below.

from omission, not commission.⁹⁵ Were courts or governments to retreat from this approach in the way that they have in the UK,⁹⁶ proportionate liability might not even be on the table for discussion. An alternative and potentially better strategy for dealing with the pragmatic problem would be to allow for the introduction of specific liability caps in industries under threat. Such schemes have now been approved in Australia in respect of auditors and accountants; and the UK has acted to permit the capping of liability for auditors.⁹⁷ This is a reform option now advocated by the New Zealand Law Commission. The possible advantages of capping over proportionate liability, or lesser duties of care, are several. It is a great deal simpler, carries much lower administration costs, and produces clear, stable limits to liability that can easily be predicted in advance by both defendants and their insurers. Moreover, as particular pragmatic problems arise over the course of time, the limits can quickly and easily be raised or lowered by legislative amendment without complication. And – perhaps the strongest point – “capping solutions” reveal pragmatic choices about “burdens of liability” for exactly what they are, rather than masking them in the language of ethics. Such schemes thereby potentially offer a non-generalised solution that is not just better targeted at the difficulties in question, but one which is a lot more honest with the public.

D. Blame Culture

When Bobb Carr outlined the reason for introducing a raft of pro-defendant reforms (including proportionate liability) in his second reading speech to the New South Wales Parliament in 2002, he alluded not just to perceived community and “consumer” benefits in terms of increasing the availability and affordability of liability insurance, but also to a need to arrest a drift of the law away from “personal responsibility” towards a culture of blame. Although he did not explain joint and several liability in these terms, the clear implication is that the idea forms part of a system that encourages plaintiffs to look to others to assume responsibilities that are really their own and thereby leads plaintiffs to seek to attribute fault both more widely and away from themselves. These assertions were unsupported by any empirical study establishing that “blame culture” exists in Australia, or indeed that joint and several liability is associated with it. The same evidential vacuum exists in the UK.

There is actually a profound irony in the idea that joint and several liability increases – whilst proportionate liability decreases – “blame culture”.

95 NZ Law Commission, Issues Paper No. 32 (2012), paras. [5.6]–[5.26] and Rep. No. 132 (2014), para. [1.18], fn 18.

96 *D.&.F Estates Ltd. v Church Commissioners for England* [1989] A.C. 177; *Murphy v Brentwood District Council* [1991] A.C. 398.

97 Companies Act 2006, ss. 532–538, providing for the validity of agreements to limit auditors’ liability so far as they are fair and reasonable.

In a proportionate liability system, plaintiffs have successfully to pursue *more* defendants in order to recover, not fewer, precisely because they are no longer able simply to satisfy themselves out of a single judgment. Defendants are incentivised to find others legally responsible for the harm they have caused and then plaintiffs must recover from them too. This hardly minimises the search for blame! True it is that, in joint and several liability systems, defendants must look for others from whom to seek contribution if they are to avoid paying the full the bill, but proportionate liability does nothing to alleviate this search for culpability and indeed draws victims into it in a way that joint and several liability does not. We end up with more “blame-seeking”, not less. Of all the arguments presented, blame culture arguments are therefore the least well supported empirically, the least credible, and the least readily generalisable. “Blame” is precisely what “liability according to responsibility” is inclined to elevate. In our view, such arguments should be entirely discarded.

V. CONCLUSIONS

What appears from some well-chosen vantage points to be a convergent, paradigm shift towards proportionate liability across jurisdictions, supported by strong ethical considerations, turns out on closer inspection to be something very different. We prefer to characterise it as a rudderless drift, energetically encouraged by particular interest groups and presented enthusiastically (but implausibly) to the public by some governments as an effective response to crisis. In fact, proportionate liability does not reflect “flexible justice and compromise”, as might superficially appear, and it bears nothing ethically in common with comparative negligence doctrine. The similarities between the doctrines are superficial, formal, and technical – what one might call commonalities of method – not moral, and there is nothing illogical, or inherently morally inconsistent, in a jurisdiction’s choosing to endorse one doctrine but not the other. Concepts may be infectious, but their ethical implications can be transformed completely by changing the context in which they are applied. The choice of proportionate liability is exactly that – a non-principled, primarily political choice between different interests that is particular to its context and time.

The idea that proportionate liability is driven by general moral currents as opposed to particular, pragmatic concerns can lead to over-generalisation in the way legal rules are structured (as we argue it has in Australia) and it can invite inapposite cross-jurisdictional comparisons. New Zealand should be particularly wary of the second of these points as it now considers whether or not to cross the Rubicon and abandon its long-standing joint and several liability rule. It should be certain that the evidence supports whatever pragmatic case is put by defendants for proportionate liability reform and, if persuaded that there is a genuine pragmatic problem, should seek to tailor a

specific solution which not only accurately suits the concern, but which benefits from a higher level of certainty and a lower level of complication than proportionate liability systems tend to bring. That might well, we think, mean constructing a different solution altogether (isolated damages-capping schemes for example). The general case for proportionate liability reform certainly remains highly uncertain, whether one adopts an ethical or a pragmatic point of view. Moreover, the true extent of its weakness is only revealed when the ethics are distinguished from the pragmatics and each is given the close critical attention it deserves.