# Proportionate Liability and the Wine Industry

**Ian Thomas**
Special Counsel
Finlaysons, Adelaide

## Abstract

Proportionate liability legislation now applies throughout Australia. Under that legislation, if more than one person is responsible for causing loss to another, the plaintiff may need to sue all wrongdoers in order to make full recovery. It cannot rely on suing only the 'deep pocket' defendant. This article considers the application of proportionate liability legislation to the wine industry in four wine-producing states: New South Wales, South Australia, Victoria and Western Australia.

In particular, it addresses how the legislation (the *Civil Liability Act 2002* (NSW) pt IV; the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) pt 3; the *Wrongs Act 1958* (Vic) pt IVAA; and the *Civil Liability Act 2002* (WA) pt 1F) would apply to a dispute involving two wrongdoers, and how the process would vary between States. It also considers whether industry participants can mitigate or avoid the effect of the legislation through agreement of appropriate contractual terms.

### Introduction[1]

Historically, if a plaintiff suffered harm which had been caused by more than one person, the plaintiff could recover all of its loss from any one of the wrongdoers. The defendant could try to mitigate its loss by claiming contribution or indemnity from another wrongdoer, but that was of no concern to the plaintiff. If the second wrongdoer was insolvent, that was the defendant's risk.[2]

Proportionate liability is radically different. Instead of each wrongdoer being liable for the whole of the plaintiff's loss, the liability of an individual defendant is limited to an amount determined by the court to be just and equitable having regard to the relative responsibility for the loss of the different wrongdoers.[3] Accordingly, the plaintiff would need to sue all parties responsible for the loss in order to make full recovery. If one of the wrongdoers is insolvent, that risk lies with the plaintiff.

This article considers how the proportionate liability legislation can affect participants in the wine industry. By way of illustration, the article uses a case study involving breach of contract and (arguably) negligence by a contract winemaker which leads to a batch of wine becoming unsaleable, in circumstances where the winemaker alleges that the problem was caused by a defective additive provided by its supplier. The article examines how court proceedings by the owner of the wine might take shape, and how the progress, and even the end result, of the litigation, might vary depending on where it takes place. The article also considers what steps (if any) are available to contracting parties in

[1] The views expressed in this article are those of the author alone, and may not reflect the views of Finlaysons as a whole.
[2] See, eg, R P Balkin and J L R Davis, *Law of Torts* (LexisNexis Butterworths, 4th ed, 2009) 825 for a summary of the historical position.
[3] The precise formula for allocating responsibility varies between the different state schemes, as set out in *Civil Liability Act 2002* (NSW) pt IV; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) pt 3; *Wrongs Act 1958* (Vic) pt IVAA; *Civil Liability Act 2002* (WA) pt 1F.

order to avoid what they might see as undesirable effects of the legislation.

The article focuses on the position in four large wine-producing states (New South Wales, Victoria, South Australia, and Western Australia) with regard to claims in contract and tort.

**Case Study: The Facts**

P, the owner of a wine label, contracts with D (a contract winemaker) that D will produce a batch of sauvignon blanc. As part of the winemaking process, D adds bentonite in order to stabilise and clarify the wine. The bentonite is tainted and the batch becomes cloudy and unsaleable. D claims that the problem was caused by the quality of the bentonite provided by its supplier (T). However, if this is true, the defects in the bentonite could have been detected by D carrying out a simple test before using it. P wants to recover its losses.

**Background: The Old Regime of Solidary Liability**

The common law concept of solidary liability, which applied (and continues to apply) in the absence of proportionate liability legislation, has been explained in the following terms:

> Where a plaintiff sues more than one defendant in tort in respect of the same damage, and more than one are held liable, the plaintiff is entitled to judgment against each and every one for the full amount of the damages awarded whether their liability is joint (*Bell v Thompson* (1943) 34 SR (NSW) 431 at 435 per Jordan CJ) or several and concurrent (*Barisic v Devenport* [1978] 2 NSWLR 111 at 116–17 per Moffitt P), such that the liability of the multiple tortfeasors is 'solidary' rather than 'proportionate' to their 'responsibility' for the loss suffered …[4]

Accordingly, before the introduction of the proportionate liability regime, on the facts of the case study, P would, in all probability, have sued D for breach of contract, either for breach of an express or implied warranty or for breach of an implied duty of care and skill.[5] If successful with any of its claims, P would have obtained judgment for 100% of its losses against D.

Absent good reason (such as concerns about D's solvency, or a contractually agreed cap on D's liability), P would probably have chosen not to sue T as well as D. However, if P had done so, and won, according to the principles of 'solidary' liability P would have obtained separate judgments for 100% of its loss against each of D and T. P could then have chosen to enforce either or both of the judgments in order to achieve full recovery.

If D wanted to limit its exposure to P, D could have brought a claim for indemnity against T (based on T's breach of duty to D). As an alternative, or addition to, the indemnity claim, D could have brought a claim for contribution against T (based on T's breach of duty to P). The result of those proceedings would not have affected P's ability to recover the full amount of its judgment against D.

**Background: The Introduction of the New Regime**

The introduction of proportionate liability legislation across Australia was driven by a crisis in the insurance industry, including the collapse of HIH. The concept was discussed and endorsed at a series of meetings in 2002 and 2003, chaired by the then Minister for Revenue and Assistant Treasurer, Helen Coonan, and

[4] *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80, 113 (Santow J).

[5] A contract to do work and supply materials, in the absence of special circumstances, will carry implied warranties that the materials are of good quality and free from latent defects and that they are reasonably fit for their intended purpose: see, eg *Helicopter Sales (Aust) Pty Ltd v Rotor-Work Pty Ltd* (1974) 132 CLR 1. Further, a term will normally be implied into a contract for provision of services that the services will be provided with the reasonable care and skill to be expected from a person providing those services. See, eg *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, 586 and *Costa Vraca Pty Ltd v Berrigan Weed & Pest Control Pty Ltd* [1998] FCA 693.

attended by State Ministers responsible for insurance issues.[6]

The resulting legislation was as follows:

- *Civil Liability Act 2002* (NSW) pt IV;
- *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) pt 3;
- *Wrongs Act 1958* (Vic) pt IVAA;
- *Civil Liability Act 2002* (WA) pt 1F.[7]

In parallel with the introduction of the state schemes, the federal government also implemented legislation to apply proportionate liability to federal claims for damages for misleading and deceptive conduct.[8]

Although the focus of the ministerial meetings was on the affordability of professional indemnity insurance, the proportionate liability legislation does not refer to its application being limited to claims against professionals. Indeed, the Tasmanian Supreme Court has specifically rejected an argument that the legislation should be read down so as to apply only to claims against professionals.[9]

**The Basic Principle of Proportionate Liability**

There is a common theme which underlies all of the state regimes, namely that a defendant's liability should be limited to an amount which is fair and equitable having regard to the relative responsibility of the defendant compared to that of other wrongdoers.

This apparently simple common theme masks a host of legal and practical complexities. There are also very significant differences in the ways the schemes operate in different states. Some of these are considered below.

**Application of the State Regimes**

The legislation in New South Wales, South Australia, Victoria and Western Australia applies only to claims for economic loss and property damage.[10] This reflects the firm recommendations of the report of the Review of the Law of Negligence, prepared by a panel chaired by Ipp J, against the introduction of proportionate liability in personal injury cases.[11]

The legislation further defines the type of liability which is covered by the regime. Each state scheme applies to liability for misleading and deceptive conduct under the relevant state *Fair Trading Act*.[12] As regards other types of liability, there is a significant difference between the position in South Australia and other states.

The South Australian provisions apply only to a liability in damages that either 'arises under the law of torts', 'a liability in damages for breach of a contractual duty of care', and a 'liability in damages that arises under statute'.[13] The provisions in the other states apply to claims (in tort, contract or otherwise) 'arising from a failure to take reasonable care'.[14]

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[6] See, eg Treasury (Cth), 'Joint Communiqué: Ministerial Meeting on Insurance Issues', (4 April 2003) <http://ministers.treasury.gov.au>.

[7] The equivalent provisions in other states and territories are *Proportionate Liability Act 2005* (NT); *Civil Law (Wrongs) Act 2002* (ACT) ch 7A; *Civil Liability Act 2002* (Tas) pt 9A and *Civil Liability Act 2003* (Qld) ch 2 pt 2.

[8] See *Trade Practices Act 1974* (Cth) ss 87CB-87CI, *Corporations Act 2001* (Cth) ss 1041L-1041S, *Australian Securities and Investments Commission Act 2001* (Cth) ss12GP-12GW. There was already legislation in force applying proportionate liability in building disputes. See, eg *Development Act 1993* (SA).

[9] See *Aquagenics Pty Ltd v Break O'Day Council (No 2)* [2009] TASSC 89, para 27 (note that an appeal to the Full Bench on another point was made in *Aquagenics Pty Ltd v Break O'Day Council (No 2)* [2010] TSFC 3).

[10] *Civil Liability Act 2002* (NSW) s 34(1); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 3(2); *Wrongs Act 1958* (Vic) s 24AF(1)(a); and *Civil Liability Act 2002* (WA) s 5AI(1).

[11] See Treasury (Cth), *Review of the Law of Negligence: Final Report* (2002), especially at paras 12.17 to 12.19.

[12] *Civil Liability Act 2002* (NSW) s 34(1)(b); *Law Reform (Contributory Negligence and Apportionment of Liability) Act* (SA) s 4(1)(c); *Wrongs Act 1958* (Vic) s 24AF(1)(b); *Civil Liability Act 2002* (WA) s 5AI(1)(b).

[13] *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 4(1).

[14] *Civil Liability Act 2002* (NSW) s 34(1); *Wrongs Act 1958* (Vic) s 24AF(1)(a); and *Civil Liability Act 2002* (WA) s 5AI(1)(a).

The key practical difference between the South Australian and other definitions relates to contractual claims. In South Australia, a defendant may limit its liability for a contractual claim by reference to the proportionate liability legislation only if the claim is for 'breach of a contractual duty of care'. Claims for breach of a strict contractual duty, or for breach of warranty, are not apportionable and the contract breaker will be liable for all of the losses caused by the breach. This would be the case even if the contract breaker had also breached a contractual duty of care.[15] Thus, returning to the case study, P could sue D for breach of contract and obtain judgment for the whole of its loss (provided it could establish breach of a strict duty or breach of warranty). P would not be concerned about D limiting its liability by reference to T's alleged fault.

By contrast, liability for breach of apparently strict contractual duties may be apportioned in other states. The courts will look at substance over form. If the breach of a strict contractual duty 'arose out of a failure to take reasonable care', liability for the contractual claim will be apportionable.

Thus, in relation to the Victorian Wrongs Act, the Federal Court has said that '[t]he provisions do not require that the claim itself be a claim in negligence or for a breach of duty — it only requires that the claim arise from a failure to take reasonable care. The expressions 'arising from' or 'arising out of' are of wide import …'[16]

In adopting this approach, the Tasmanian Supreme Court has indicated that failure to do so would allow plaintiffs to 'circumvent the legislation simply by choosing to rely upon causes of action whose elements do not include failing to take reasonable care'.[17]

In the case study, it may be said that the winemaker, D, would only have breached its contractual duties to P because it did not take reasonable care. Arguably, if D had taken reasonable care, the bentonite problem would not have occurred. Assuming that the bentonite was tainted, one might say that D would only have failed to identify the taint if either (a) it did not test the bentonite at all, or (b) it did not properly perform the standard (and simple) test.

In these circumstances, D would have a chance to limit its liability by reference to somebody else's fault. P might therefore need to sue another party (such as T) in order to make full recovery.

**To Whom Can Liability Be Apportioned?**[18]

Again, there appears to be a common theme underlying the legislation in the different states. Liability of a defendant may only be limited by reference to the responsibility of other wrongdoers ('concurrent wrongdoers') whose acts or omissions caused the damage or loss that is the subject of the claim.[19] In this regard, it appears that a defendant may only apportion liability to a concurrent wrongdoer if that person has a legal liability in damages to the plaintiff for the same harm caused by the defendant.[20]

[15] The effect of ss 3(2) and 8(1) is that the limitation of liability applies only to the apportionable claim.
[16] *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* [2007] FCA 1216, para 29. See also *Solak v Bank of Western Australia Ltd* [2009] VSC 82, especially at para 35 (Pagone J).
[17] *Aquagenics Pty Ltd v Break O'Day Council (No 2)* [2009] TASSC 89, para 38 (note that an appeal to the Full Bench on another point was made in *Aquagenics Pty Ltd v Break O'Day Council (No 2)* [2010] TSFC 3).
[18] This article does not address the law relating to contributory negligence on the part of the plaintiff. It considers only apportionment of liability by a defendant to third parties.
[19] See the definitions of 'concurrent wrongdoer' in *Civil Liability Act 2002* (NSW) s 34(2); *Wrongs Act 1958* (Vic) s 24AH; and *Civil Liability Act 2002* (WA) s 5AI. The wording in South Australia is a little different. Under the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 8(2)(6), a defendant may limit its liability by reference to 'the extent of the responsibility of other wrongdoers … whose acts or omissions caused or contributed to the harm'.
[20] *Shrimp v Landmark Operations* (2007) 163 FCR 510, paras 59 to 62; *St George Bank v Quinerts* [2009] VSCA 245, paras 59 and 64. Given the different wording of the legislation, it

Despite this similarity between the state Acts, there are again significant differences concerning a defendant's ability to apportion liability to concurrent wrongdoers. In particular, in New South Wales, Western Australia and South Australia, in fixing a defendant's liability, the court 'may'[21] or 'is to'[22] have regard to the responsibility of wrongdoers who are not party to the proceedings. By contrast, in Victoria the court may only have regard to the responsibility of concurrent wrongdoers who are parties to the proceedings.[23]

These differences are not merely procedural. They present parties to litigation with real and practical, and potentially costly, dilemmas.

To return to the case study, D, the winemaker, is a defendant to a claim by P, the owner of the wine label. P believes that the additive supplied to it by T may have been defective. What should the parties do?

In South Australia and New South Wales, D would have a duty (and a strong commercial incentive) to notify P if it has reasonable grounds to believe that T may also be liable to P in respect of an apportionable claim.[24] Once P has been told that T may be a concurrent wrongdoer, P must decide whether or not to apply to join T as a second defendant. Matters might proceed as follows:

- South Australia: P might choose to rely on winning its claim for breach of a strict contractual duty or breach of warranty and achieving full recovery against T. If so, P would not seek to join T as a defendant.
- New South Wales and Western Australia: P would need to assess whether or not T owed and breached a duty of care in tort and whether that breach caused the same loss as has been caused by D. Those questions of law are often very difficult. However, P must try to answer them, at the risk of losing money if the trial judge reaches a different conclusion. If P decides to join T as a defendant and the court finds, for example, that T was not liable to P, P will recover all of its loss against D (if it wins). However, it will have failed in its claim against T and may well be ordered to pay T's costs. On the other hand, if P decides not to join T as a defendant and D persuades the court that T is a concurrent wrongdoer, P would not recover all of its loss. It would need to issue further proceedings against T to recover the balance.[25]

In Victoria, the dilemma rests with the defendant. In the case study, if D does not join T as a second defendant, D cannot shift responsibility for any share of P's losses to T. However, if D makes the wrong call by joining T when the court decides that T had no liability to P, D will be fully responsible to P for P's losses. D will probably also have to pay the costs associated with joining T to the action.

**Deliberate or Fraudulent Wrongdoing**

There are sound policy reasons why a wrongdoer should not be able to take advantage of proportionate liability legislation if it has caused harm either deliberately or fraudulently. This policy has been recognised and implemented in each state, albeit not entirely consistently.[26] However, complexities can still arise

remains to be seen whether these cases will be followed in South Australia.

[21] *Civil Liability Act 2002* (NSW) s 35(3)(b); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 8(2)(b).

[22] *Civil Liability Act 2002* (WA) s 5AK(3)(b).

[23] *Wrongs Act 1958* (Vic) s 24AI(3). There are exceptions if the person is dead or is a company which has been wound up.

[24] *Civil Liability Act 2002* (NSW) s 35A(1); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 10(1). There are also incentives built into the legislation in the form of potential costs penalties on a defendant who fails to comply with that duty. See *Civil Liability Act 2002* (NSW) s 35A and *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) ss 10(2) and (3).

[25] It may then find that S, as supplier, seeks to limit its liability in those proceedings by reference to the proportionate responsibility of its own supplier.

[26] *Civil Liability Act 2002* (NSW) s 34A(1) and *Civil Liability Act 2002* (WA) s 5AJA do not allow a person who intentionally or fraudulently causes loss to limit its liability

under the legislation even in cases of deliberate wrongdoing.

Suppose in the case study, one of D's employees deliberately chose not to test the bentonite before adding it to the wine. Would D be taken to have caused P's losses intentionally?[27]

The short point is that the answer will depend on all the facts. And the facts can only be determined on the basis of evidence and investigation, much of which might well have been irrelevant and unnecessary when dealing with a claim for breach of contract under the old regime.

**Allocation of Proportionate Responsibility for Losses**

If a party can limit its liability under the proportionate liability legislation, a court will need to decide how to apportion responsibility for the plaintiff's losses. The rule (expressed slightly differently in different states) is that a defendant's liability should be limited to an amount which is 'just',[28] or 'fair and equitable'[29] having regard to the extent of the defendant's responsibility and the relative responsibility of concurrent wrongdoers.

There is some guidance as to how this apportionment exercise should be performed. In particular, courts have stated that the approach taken by the High Court in *Podrebersek v Australian Iron and Steel Pty Ltd*[30] with regard to contributory negligence should apply 'whenever the issue is apportionment between parties'.[31]

It was stated in *Podrebersek* that apportionment is 'a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis and of weighing different considerations. It involves an individual choice or discretion as to which there may well be difference of opinion by different minds'.[32]

Further, the High Court stated that:

> [apportioning liability] involves a comparison both of culpability, ie the degree of departure from the standard of care of the reasonable man … and of the relative importance of the acts of the parties in causing the damage … It is the whole conduct of each of the negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case …[33]

So, in the case study, which of the winemaker and the supplier would be treated as more responsible for the plaintiff's losses, and by how much?

Again, these questions are not capable of immediate answers. The assessment by the court will depend on all relevant circumstances, some of which will be unknown when a dispute arises. What if T, D's supplier, was merely a distributor of the bentonite in circumstances where it would be standard practice to rely on its own supplier to provide bentonite of the requisite quality? Should D bear any significant responsibility at all (even if breach of duty could be established)?

This tends to illustrate that allocation of responsibility is not a predictable or exact science. Moreover, given the

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under the Act. *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 3(2)(c) limits 'apportionable liability' to liability of a 'negligent or innocent' wrongdoer. *Wrongs Act 1958* (Vic) s 24AM makes a fraudulent wrongdoer jointly and severally liable for damages awarded against other defendants.

[27] Issues can also arise under the proportionate liability regime as to whether or not an employee is vicariously liable for the acts of an employee or as to the attribution of an employee's knowledge to a company. Consideration of those issues is beyond the scope of this article.

[28] *Civil Liability Act 2002* (NSW) s 35(1)(a); *Wrongs Act 1958* (Vic) s 24AI and *Civil Liability Act 2002* (WA) s 5AK(1).

[29] *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 8(2).

[30] [1985] 59 ALJR 492.

[31] *Sali & Sons Pty Ltd v Frank Metzke and Russell Allen* [2009] VSC 48, para 290 (Whelan J).

[32] Adopting what was said in the House of Lords in *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197, 201.

[33] [1985] 59 ALJR 492, 494.

level of discretion afforded to judges, it may be difficult to challenge their findings on appeal.

**Can the Effects of the Legislation Be Avoided?**

The concept of proportionate liability is relatively simple. However, we have seen that the legislation may cause complexity, expense and uncertainty at almost every level.

Is the claim apportionable at all? Does it arise out of a failure to take reasonable care? Who else might be responsible? Do those persons owe a legal duty to the plaintiff? Have they caused the same loss as a matter of law? Should the plaintiff (or defendant) join other parties, or should they take their chances in suing (or standing alone as) a single defendant? Will it be commercially worthwhile joining another defendant given the anticipated level of apportionment to that person?

Given the significant levels of uncertainty associated with a potentially apportionable claim, many businesses may want to avoid the operation of the legislation. Whether they can do so may vary between states.

The position in Western Australia is relatively clear. 'A written agreement signed by the parties to it may contain an express provision by which a provision of [Part 1F] is excluded, modified or restricted'.[34] Similarly, contracting out of the legislation is expressly permitted in New South Wales.[35]

By contrast, the legislation in South Australia and Victoria says nothing about contracting out.[36] Would an attempt to contract out in those jurisdictions be effective?

The governing principle is that, 'the courts may disregard or refuse effect to contractual obligations which … contravene "the policy of the law" as discerned from a consideration of the scope and purpose of the particular statute'.[37] It has not yet been tested in the courts whether the legislative policy of apportionment would prevail over the parties' traditional freedom to allocate risk and responsibility as they think fit. However, we can expect cases on the validity of contracting out agreements to be heard in due course.

Until then, (but subject to some important caveats), parties concerned about the potential effect of the legislation on the certainty of their contractual arrangements — and their ability to enforce them — might wish to build 'contracting out' provisions into their agreements, on the basis that, if they are held ineffective, they will be no worse off than if they had said nothing. These might take different forms, such as an agreement that the parties' liabilities should be determined without regard to proportionate liability legislation, or an undertaking by a contractor not to invoke proportionate liability provisions.

Whatever form of wording parties might use, there are some important issues to consider. For example:

- Commercially, a contractor might not wish to contract out of the proportionate liability legislation.
- If a contractor does agree to forego its rights to apportion liability, how would that agreement be treated by its insurer? Would the amount of loss which could have been apportioned be treated as a liability which had been voluntarily assumed, and therefore excluded from cover?

[34] *Civil Liability Act 2002* (WA) s 4A. But different considerations may apply to an attempt to contract out of the proportionate liability provisions relating to misleading and deceptive conduct under the *Trade Practices Act 1974* (Cth), which has no equivalent contracting out provisions.

[35] *Civil Liability Act 2002* (NSW) s 3A(2) and (3).

[36] In South Australia, businesses might avoid or mitigate the effect of the legislation by the inclusion of strict contractual duties or warranties. Whether the contractor will give them will be a matter for negotiation.

[37] *Akai Pty Ltd v People's Insurance Company Ltd* (1996) 188 CLR 418, 447.

- Particularly with regard to interstate contracts, the parties should pay attention to their choice of law. They can make a difference to proportionate liability issues.
- Parties wanting to avoid the proportionate liability rules should try to exclude all potentially applicable legislation and all potential for a contractor to apportion liability. For example, businesses may be subject to the proportionate liability rules not only under state legislation, but also under Commonwealth legislation providing for liability for misleading and deceptive conduct. Clauses should (if that is the parties' intention) be drafted widely enough to cover these different heads of liability.[38]

**Conclusions**

The facts of the case study are not complicated. However, under the regime of proportionate liability, the dispute may be very difficult and expensive to resolve. One may question whether the consequences that have flowed from the legislation were fully anticipated, let alone intended. Businesses concerned about those consequences should give serious consideration to trying to exclude them.

[38] Parties may also need to exclude proportionate liability for claims arising from building work. See also *Aquagenics Pty Ltd v Break O'Day Council (No 2)* [2009] TASCC 89, paras 41-47, in which a contracting out provision was held by Blow J to be wide enough to exclude apportionment to some wrongdoers, but arguably not others. On appeal to the Full Court, Evans J, with whom Wood J agreed, accepted that the provision was wide enough to exclude the contractor's right to apportion liability. Tennent J did not disagree with Blow J's conclusion. See *Aquagenics Pty Ltd v Break O'Day Council (No 2)* [2010] TSFC 3, paras 15 to 24, 70 to 73 and 111.