# Apportionment in Private Law

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# 1

# Apportionment in Private Law: Nothing, All, or Something in Between?

**KIT BARKER***

## I. Introduction

One aspect of the increased complexity of private law in the late twentieth and early twenty-first centuries is the rise in the incidence and intricacy of rules designed to apportion responsibility between multiple parties for losses and gains that are legally attributable to more than one of them. As Tony Weir observed in 2004 in an article to which the title of this chapter pays tribute, the law has moved, within a relatively short timeframe, from a formal stance in which civil liability is an 'all-or-nothing' business to one in which it is 'shared' through a set of compromise solutions.[1] Tort plaintiffs whose own careless conduct might previously have led their claims to fail by virtue of strict causation rules, or through the application of the total defence of contributory negligence can hence now often recover something for their injuries. Defendants who, under the old system, were held 100 per cent liable in damages for indivisible injuries for which they were responsible in common with other parties, can obtain contribution or reimbursement (indemnity) from those other parties.[2] Similarly, in the field of gain-based private law claims, there has been a gradual transition from rules in which causes of action are relatively hard to establish, but 'total' on success, to ones in which the basic preconditions to establishing a claim are less exacting, but the resulting liabilities are more often partial. Defendants can thus now offset against their liabilities for unjust enrichment the losses they have themselves been (or may be) caused by innocent changes in their position[3] and they can – through the operation of

* I am grateful to Richard Wright and Ross Grantham for helpful comments upon an earlier draft. All remaining defects are most definitely my own.

[1] T Weir, 'All or Nothing' (2004) 78 *Tul L Rev* 511.

[2] As can their insurers through the process of subrogation.

[3] See generally, C Mitchell, P Mitchell, S Watterson, *Goff and Jones The Law of Unjust Enrichment*, 9th edn (London, Sweet & Maxwell, 2016) ch 27; J Edelman and E Bant, *Unjust Enrichment*, 2nd edn (Oxford, Hart Publishing, 2016) ch 14.

'equitable allowances' or conditions attached to orders for rescission – offset the value of contributions they have themselves made to gains obtained (or claimed by) a plaintiff.

Most recently and perhaps most controversially, there has been a widely-documented drift in some (but not all) common law jurisdictions away from systems of 'solidary' (joint and several) liability towards 'proportionate' liability,[4] so that multiple defendants responsible for the same indivisible injury are no longer even in principle liable to a plaintiff for the whole damage caused, but only for such proportion of it as a court finds them to be responsible, relative to other responsible parties.[5] This is another, modern, 'sharing' solution, albeit one of a very different type and one which, unlike the previous examples, designedly operates to the prejudice of plaintiffs, so as to redistribute the burden of procedural hurdles, evidential difficulties and insolvency risks away from defendants and their insurers. It can leave a significant proportion of those suffering indivisible loss caused by multiple defendants with gaps in their compensation. Whilst such individuals were previously guaranteed full recovery, provided only that they could identify and sue at least *one* of those responsible, they must now accept only partial compensation in any case in which it proves impossible to successfully sue *all* of them.

Weir avoided speculating upon the explanations or justifications for these trends. Apportionment, he sagely observed, is a 'twisted path'[6] that itself invites mixed reactions and is born of mixed motivations. There are only limited commonalities across different legal systems and the criteria underpinning courts' decisions of how to apportion responsibility (for example, parties' 'relative fault' and the 'causal potency' of their conduct) are notoriously difficult to apply in practice, even when they are agreed upon. This can result in uncertainty and potentially prejudice out-of-court settlements. The high degree of variation in the form of the relevant legislation within some federal legal systems can also result in different regimes applying to litigants, depending simply on their postcode.[7] Although 'sharing' solutions are often presented as if they are always more logical, morally sophisticated and 'fair', this is also only true in some instances. As Richard Wright shows in the next chapter, the language of ethical superiority is often pure rhetoric. Much depends on who is sharing what, with whom, and why. On occasions, it is true, the sharing of losses and gains is indeed a response to intuitions concerning parties' proper respective moral responsibility for the consequences

[4] K Barker and J Steele, 'Drifting Towards Proportionate Liability: Ethics and Pragmatics' (2015) 74 *CLJ* 49.

[5] These parties need not, in many jurisdictions, even be joined to the relevant proceedings – a fact which can seriously complicate the job of making reliable assessments.

[6] Weir (n 1) 527.

[7] This is a particular, acknowledged problem in the US and Australia.

of their conduct.[8] On other occasions, however, as in the case of recent proportionate liability reforms, 'shared liability' is simply a synonym for 'less' liability for defendants and constitutes the product of the successful lobbying efforts of particularly powerful defendant groups that have managed to gain the ear of governments.

It cannot be assumed, therefore, that the idea of 'sharing' has any particular moral valence and recent commentaries have begun to count the costs, as well as benefits, of 'partial' solutions – particularly those in which the divisions and compromises are discretionary rather than 'pre-set,' and even more so when they result in the under-compensation of those who have been wronged. Some are accordingly now pressing for a return to more clear-cut, 'digital' (on-off) rules, at least in some instances.[9] With notable exceptions, few empirical studies have been done to determine the actual effects of the changes in apportionment rules that have occurred in terms of the rates or distributions of recovery; economic analysis of the rules is often complex and inconclusive[10] and commentators and courts remain unclear even about their precise rationale. It is hence still a matter of contention whether the rules instantiate norms of corrective[11] or distributive justice;[12] whether they are principled or pragmatic in nature; and whether the benefits of their apparent technical subtleties outweigh the burden of the uncertainties they bring. When it comes to reform, commentators are also divided as to whether the best response to the fractured chaos of recent proportionate liability

[8] This is truest of the defence of contributory (comparative) negligence, although even here, the ethics are disputed. See Section III(B).

[9] Weir himself (n 1, 518) questioned the proprietary of allowing contribution between tortfeasors responsible for the same damage on the basis of its practical complications. Others recently advocating the restoration of 'total' rules include R Stevens, 'Should Contributory Negligence be Analogue or Digital?' in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Tort* (Oxford, Hart Publishing, 2015) ch 13, 253–54 (rejecting the defence of contributory negligence to tort claims), a wide range of academic commentators critical of the recent proportionate liability reforms (on which see Section VI below) and Australian governments reintroducing 100% deductions for contributory negligence in some cases (see Section V(A) below).

[10] For this conclusion in relation to proportionate liability rules (and reference to the literature), see Barker and Steele (n 4) 70; McLay, ch 13. See similarly, regarding comparative negligence, R Wright, 'Principled Adjudication: Tort Law and Beyond' (1999) 7 *Canterbury Law Review* 265, 284–86, 'Allocating Liability' (1988) 21 *UC Davis Law Review* 1141, 1169–79; I Gilead, 'Introduction to Economic Analysis of Loss Division' in K Oliphant (ed), *Aggregation and Divisibility of Damage* (Wien, Springer, 2009) 449, 464; M Faure, 'Economic Analysis of Contributory Negligence' in U Magnus and M Martín-Casals (eds), *Unification of Tort Law: Contributory Negligence* (The Hague, Kluwer Law International, 2004) 233.

[11] Corrective justice has variously been said to justify the solidary liability of multiple defendants for the same harm (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 *UC Davis L Rev* 1141); contribution between defendants (Cheifetz, ch 10); the contributory negligence defence (A Beever, *Rediscovering the Law of Negligence* (Oxford, Hart Publishing, 2007) 340–45) and various restitutionary defences including change of position (R Grantham and C Rickett, A Normative Account of Defences to Restitutionary Liability' (2008) 67 *CLJ* 92; Grantham, ch 8).

[12] Barker and Steele (n 4) 65–66 (in respect of contributory negligence rules).

legislation in Australia and the United States is to try to tidy it up and make it uniform, repeal it completely, or replace it with more targeted solutions designed to protect defendants against 'excessive' exposure, such as capping their liabilities in particular spheres of risk, or even cutting back on their primary legal duties altogether in respect of certain types of harm. Caught mid-stream, reformers are uncertain of their footing and questioning whether it is better, when in blood stepped in so far, to return, or go o'er.[13]

## II. Aims and Overview

The aim of this book is to tackle some of these difficult modern debates across a variety of different common law and civilian jurisdictions, from a number of different perspectives – historical, doctrinal, empirical, and theoretical. In doing so, it canvases a wide variety, but by no means all, apportionment doctrines and readers should look elsewhere for comprehensive statements of the rules.[14] The book is divided into four parts, replicated in the later structure of this chapter. There is significant connection and overlap between the different parts.

Part 1 ('Frameworks, Ethics and Politics') maps some of the legal, ethical and political frameworks within which modern apportionment exercises take place. It provides some terminological and analytical guidance to the field; explores the rationale(s) of some of the different types of apportionment rule and gives an overview of the ways in which different legal systems (common law and civilian[15]) deal with the allocative questions they throw up.

Part 2 ('Originating Doctrines') interrogates some of the most important substantive rules that give rise to 'shared' liabilities, focusing in particular on the doctrines of 'vicarious' and 'accessorial' liability. Although these doctrines do not, strictly speaking, govern the *proportion* in which different parties are held liable for events brought about by them all, the reasons *why* such defendants share liability must, I argue, influence the way that liability is subsequently distributed between them. Unfortunately, as the contributions to this Part illustrate, the reasons for vicarious and accessorial liabilities are various, contested and unstable, which currently makes it hard either to predict the incidence of the liabilities themselves, or to make many generalisations about the way in which they should be apportioned.

[13] An inexact reformulation of Macbeth's rather more serious dilemma: Act 3, Scene 4, lines 142–44.

[14] See, amongst other works, D Cheifetz, *Apportionment of Fault in Tort* (Aurora, Canada Law Book, 1981); *Restatement of Torts (Third) Apportionment of Liability* (American Law Institute, St Paul, 2000); C Mitchell, *The Law of Contribution and Reimbursement* (Oxford, Oxford University Press, 2003); Oliphant (n 10); WVH Rogers (ed), *Unification of Tort Law: Multiple Tortfeasors* (The Hague, Kluwer Law International, 2004); K Magnus and Martín-Casals (n 10); I Gilead, M Green, B Koch (eds), *Proportional Liability: Analytical and Comparative Perspectives* (Berlin, De Gruyter, 2013).

[15] See Koziol, ch 3.

Parts 3 and 4 of the book then provide a detailed assessment of key apportionment rules. Part 3 ('Plaintiff-Defendant Apportionment') focuses on devices that apportion gains and losses between plaintiffs and defendants – the modern defence of contributory (comparative) negligence, the restitutionary defence of change of position, and the principles governing awards for breach of fiduciary duty, where losses and gains are hard to assess with certainty and where courts apportion the risks of the uncertainties through quantification rules. Part 4 ('Apportionment Between Defendants') finishes with an examination of principles regulating the liability inter se of multiple defendants who are (or may be) responsible for the same, indivisible harm. These include the doctrines of contribution, solidary ('joint and several') and 'proportionate' liability, together with some exceptional causation rules developed in the United Kingdom in the context of asbestos-related claims, that allow the risk of some, very specific types of causal uncertainty to be distributed between defendants, so as to partialise their liability. This part takes in many of the recent debates concerning proportionate liability reform and provides an important insurer's perspective on cases involving uncertain risks.

## III. Frameworks, Ethics and Politics

'Partial' solutions are nothing new. Weir refers to their presence in Roman systems.[16] He also hints at the strong probability that, before contributory negligence ceased to be a total defence to tort claims in the UK in 1945, civil juries regularly made informal apportionments of responsibility behind closed doors[17] by fixing damages in ways that achieved compromise between careless plaintiffs and wrongdoing defendants. This sidestepping of the old, blunt 'all-or-nothing' rule may therefore have been formalised by the legislative change, but was probably hiding in the system long before this date. Actions for contribution and reimbursement are also ancient, dating back in equity to at least 1629, but probably much earlier at common law.[18] What is more modern is their wider availability to tortfeasors and others liable for the same damage[19] and the emergence around them of a new intellectual architecture (unjust enrichment), importing fresh thinking

[16] Weir (n 1), 547–49.

[17] ibid, 549.

[18] *Fleetwood v Charnock* (1629) Nelson 10 (equitable contribution between co-sureties). Mitchell (n 14) 68 cites David Ibbetson for the view that there was a common law example as early as 1380.

[19] Originally, contribution and reimbursement actions were confined to guarantors and co-sureties of the same debt, trustees under a common liability for breach of trust, and company directors liable for breach of equitable duties to the company. In England, the extension to tortfeasors liable for the same damage occurred in 1935 with the Law Reform (Marred Women and Tortfeasors) Act, 25 & 26 Geo 5 (1935). Further extensions occurred under the Civil Liability (Contribution) Act 1978, which extends contribution rights to all persons liable in respect of the same damage.

about their rationale, availability and quantification.[20] The same architecture is responsible for re-invigorating debate about equitable allowances for wrongdoing fiduciaries, which have been in evidence since the early eighteenth century.[21] Even the modern restitutionary defence of change of position probably only formalises the expression of instincts for allocative fairness that were previously given more isolated and invisible effect through technical devices, such as tracing rules.[22] The spirit of compromise is hence not new, but modern apportionment rules strike a different set of compromises to those which have been struck in the past; and they purport to bring a new visibility, legitimacy, science and sense to the process that was formerly lacking.

## A. Terminology – A Short Primer

In this book, the term 'apportionment' is used to refer to any legal mechanism for dividing responsibility for either losses *or* gains between plaintiffs and defendants in private law actions.[23] This is a very broad definition. In Australia, references to 'the apportionment legislation' are usually very specific allusions to the statutory rules enacting what is now known in the United Kingdom as the partial defence of 'contributory negligence.' In the United States and Canada, that, same defence is called 'comparative' negligence', in order to distinguish it from the 'absolute' version still operating in a minority of jurisdictions.[24]

Jurisdictional variations in terminology are highlighted in the following chapters, but it may nonetheless assist to provide a short primer of the main concepts of 'sharing' and 'division' used in the book, referencing their cross-jurisdictional equivalents and variations. Even then, it must be accepted that the meanings specified below are not exclusive; and that the patterns of language used to refer to apportionment issues are more varied still than the table suggests.

[20] Mitchell (n 14); *Goff and Jones* (n 3) ch 19. For doubts about the inclusion of contribution within the taxonomy (due in part to uncertainties about the latter's scope) see Cheifetz, ch 10, n 87 and text.

[21] J Heydon, M Leeming, P Turner, *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies* 5th edn, (Chatswood, LexisNexis Butterworths, 2015) [5-280] cites *Brown v Litton* (1711) 1 P Wms 140, 24 ER 329 as the earliest example.

[22] eg, the rule that a wrongdoer who mixes his own money with that of P and then spends part of the mixture is presumed to spend his own money first (so that he is obliged to bear its loss), whereas an innocent is regarded as spending both P's and his own money in the proportions in which they contributed it (pari passu). See *Goff and Jones* (n 3) 214–19.

[23] The term is also used to refer both to rules that apportion *after* D's liability has been established (eg, the defence of contributory negligence) and rules limiting the amount of P's initial claim (eg, rules apportioning the risk of causal uncertainties, or limiting recoverable gains and losses, such as rules of remoteness, mitigation of loss, and the principles regulating accounts of profit).

[24] The absolute version still exists in 5 US jurisdictions (Alabama, Maryland, North Carolina, Virginia and the District of Columbia), although usually only where P is adjudged at least 50% responsible for his injury.

| **Concept** | **Definition and Variations** |
|---|---|
| 1. Joint Liability | The liability of D1 and D2 to P for one and the same wrong.<br>Note: historically, this term had a procedural connotation, referring only to the subset of those above who might be joined in the same lawsuit. |
| 2. Several Liability | The liability of D1 and D2 to P for separate wrongs.<br>Note: In the *US Restatement of Torts (Third)*, this term is now used to mean 'proportionate liability' as defined below. |
| 3. Concurrent Liability | The liability of D1 and D2 to P for one and the same, indivisible harm. |
| 4. Vicarious Liability | The liability of D1 to P on behalf of D2.<br>Note: Although D1 is liable on D2's behalf, D2 also remains liable to P. For this reason, some prefer to describe vicarious liability as the liability of D1 'for D2's wrong'. |
| 5. Accessorial Liability | The liability of D1 to P for D1's involvement in the wrong of D2. |
| 6. Solidary Liability | The liability of D1 to P for 100% of an indivisible harm for which multiple defendants (D1, D2 … D*x*) are legally responsible.<br>Note: In the UK, US, NZ and Canada, the term 'joint and several' liability is used. |
| 7. Contribution | The process via which a D who is liable on a solidary basis to P exercises a right to claim a proportion of the value of that liability from (an)other D(s) liable in respect of the same, indivisible harm. |
| 8. Indemnity/ Reimbursement | The process via which a D who is liable on a solidary basis to P exercises a right to claim the whole value of that liability from another D liable in respect of the same indivisible harm. |
| 9. Proportionate Liability | The liability of a D to P for (only) such proportion of an indivisible harm caused to P as D is considered personally responsible, relative to other Ds legally responsible for the same harm.<br>Note: the US language is now 'several' liability – see (2) above. |
| 10. Contributory Negligence | The defence according to which D's liability for a loss suffered by P is reduced so as to reflect the relative responsibility of D and P for that loss.<br>Note: In the US and Canada, this defence is referred to as 'comparative negligence', the term 'contributory' negligence being reserved for the absolute version of the defence persisting in only a small number of US jurisdictions. |
| 11. Change of Position | The defence to a restitutionary claim by P to a benefit obtained by D, which permits D to reduce his or her liability on account of some change in D's position. |

## B. Ethics

The ethics of apportionment are complex and contested. Sometimes, as the following section on 'Politics' suggests, they have probably even been purposely confused by governments and lobbyists, who have been anxious to portray the raft of modern proportionate liability reforms as a logical extension of the same sort of ethics as is at work in the defence of contributory (comparative) negligence. That analogy cannot be accepted, since the decision to reduce a plaintiff's damages on account of some contribution she may have made to her own harm is a different kind of decision to the decision that she should only be entitled to recover in part from a defendant because *other defendants* are *also* responsible for the same, indivisible harm.[25] Whilst in the former case, D clearly has a viable argument about his own moral responsibility compared to that of P ('your failure to wear a seatbelt probably made some difference to the injury I culpably caused you') in the latter he has only an argument about the *additional* responsibility to P of other wrongdoers ('don't *just* blame me – I am not the *only* one that did it').

The difference is so obvious that it would be extraordinary if the arguments had genuinely been confused by governments enacting modern proportionate liability reforms. Every parent knows that the fact that his or her child (Joanne) was not the only one to be throwing stones at the school windows is no reason for not holding her fully accountable for a breakage she has caused. If no other child is caught, or has the pocket-money to pay, it is very hard to see why Joanne's pocket money should not be docked until the school's damage is fully made good.[26] As against the innocent school, the uncertainty about precisely what contribution to the damage Joanne's own stone made amongst others is no answer. She must bear the risk. As against other children who are caught, the position is different.

Note that the same sort of uncertainty about the 'precise causal contribution' of D's action to P's harm is present in both the seatbelt (contributory negligence) and the broken window (solidary liability) examples – that uncertainty exists in *any case* in which two or more parties are found to have caused one and the same 'indivisible' injury. That does not, however, mean that one is morally required to deal with the uncertainty in the same way in both cases. There is a perfectly good moral reason to assign the entire risk of the uncertainty to Joanne in the second instance, rather than to the school, because the school's own conduct is not implicated in

[25] Barker and Steele (n 4) 67–68.

[26] It has rightly been pointed out to me by Richard Wright that this example is not the strongest one that can be used to show that solidary liability is ethically justified, since the damage caused by the separate stones being thrown simultaneously at the broken window by the various children in Joanne's case is only 'practically,' not theoretically indivisible. An even stronger case might therefore be one in which several children are pushing simultaneously on a school door, the combined pressure of them all being sufficient to break it, but the individual contributions of each of them being necessary for that result. It follows from the text that I regard both cases of practical and theoretical indivisibility as ones in which solidary liability is ethically justified.

any way in the damage. Where, by contrast, P has failed to wear a seat belt and is therefore careless, the case for assigning some proportion of the risk of the uncertainty to her is stronger. This is so even though P and D are, admittedly, not in a state of exact moral *equivalence*, because P's conduct presented only a risk to herself, whereas D's conduct was a breach of his legal *duty to P*.

There are many, myself included, who have been persuaded by these arguments to conclude that there is no convincing moral case for departing from the basic 'total' solidary liability rule in cases involving multiple parties who are responsible for the same damage, so that the recent wave of proportionate liability reforms is simply a mistake. That conclusion is endorsed by many, but not necessarily all contributors to this book.[27]

For Richard Wright, the moral correctness of solidary liability flows from the premises of corrective justice – one does not lose the responsibility to set right harm that one has wrongfully caused simply because others have also caused it.[28] So stated, the ethical case for the total liability rule appears to be indisputable. The only question, to my mind, is whether corrective justice *itself* justifies that rule. My hesitation stems from the fact that in all cases of solidary liability, the damage suffered by P is itself, by definition, 'indivisible' and this can only mean that, although we know that it would not have happened 'but for' the actions of each of the defendants, we do not – and cannot – know the precise nature and extent of the contribution any of them made to it. 'Indivisibility' of damage is itself a confession of the *impossibility* of precise causal judgement as to parts. The effect of the total liability rule is then surely to assign to all defendants the risk of the uncertainty regarding division. This is most certainly justified morally, given the relative moral positions of an innocent plaintiff and guilty defendants, but the decision to distribute the risk in this way operates covertly *within* the judgement (underpinning the corrective justice view) that each and every one of them caused the *whole* of the damage. In other words, the total liability of each defendant could be regarded as an instantiation of the ethics of localised distributive, not corrective justice.[29]

[27] For a hint that the scheme may be more acceptable in respect of economic than physical injury, see McLay, ch 13. Contrast Wright, ch 2; McDonald, ch 11 and Dietrich, ch 5. The great weight of academic commentary and that of independent law reform bodies has been against the reforms: see Barker and Steele (n 4) 51, nn 4, 5, 19, 31, 41, 46, 47.

[28] Wright (n 11). Wright now prefers the language of 'interactive' not 'corrective' justice: R Wright, 'The Principles of Justice' (2000) 75 *Notre Dame L Rev* 1859.

[29] I take no hard stance on this here. The point turns on whether corrective justice is understood formally, or substantively. If you take the formal view, then the fact that basic causal rules distribute the risks of uncertainty does not mean that, when those rules are satisfied, one is not doing corrective justice when one requires one of a number of wrongdoers found to have caused the damage to pay for all of it. Others taking a more substantive approach to the definition of corrective justice may not agree. In any event, there is no dispute that justice demands the result. The question is simply what type of justice is at stake. On localised distributive justice, see S Perry, 'The Moral Foundations of Tort Law' (1991) *Iowa Law Review* 77 449; 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, OUP, 2014) ch 16, 346–50.

Somewhat surprisingly, similar doubts have recently been voiced about the ethics of the defence of contributory negligence. Later in this volume, Lewis Klar[30] suggests that, although the partial defence has long been recognised in Canada, there may actually be no moral justification for it, at least in cases in which P's own carelessness is a cause only of her injury, not the accident itself. A similar view is taken by Professor Stevens[31] on the basis that what P does to put only herself at risk is not D's 'business'[32] – P does not owe D any duty not to hurt herself (the point made above); and risk-taking is a personal liberty. If P is the real cause of the injury, then she should recover nothing, but otherwise she should recover in full. No partial solution discounting D's liability is warranted. The same argument would clearly also rule out any reduction in a plaintiff's damages on account of her unreasonable failure to mitigate her loss.

No definitive response to this argument can be provided here. It is premised on the view that: (a) all-or-nothing causal judgements are all that is possible ('part causation' is 'conceptually meaningless'), and (b) that splitting the risk of any uncertainty in respect of who (P or D) caused an indivisible injury suffered by P is morally unacceptable. The former proposition is undoubtedly correct, but it does not, I suggest, rule out the possibility of splitting the risks of causal uncertainties between plaintiffs and defendants in contributory negligence cases. 'Part causation' is indeed a meaningless idea, but 'causation of a part' is not. The problem is once again that, in cases involving 'indivisible' injury (imagine a broken skull and associated brain damage resulting from an un-seat-belted passenger's head impacting the windscreen of a vehicle in an accident culpably caused by D), we necessarily cannot separate out different 'parts' of the damage caused by P and D. We only know that 'but for' the failure of each of them, the impact with the screen and the *total indivisible* harm would not have happened. Imposing total liability on D for all the consequences of the accident in such an instance therefore carries a risk of attributing responsibility to him for one (unprovable) part of P's total injury that D *may not* have caused and which cannot in practice be determined. There is a risk, in other words, of imposing upon D a duty to pay for a part – that he *may* not actually have caused – of formally 'indivisible' damage (which he probably *has*, according to the customary 'but for' test). Does this risk of an unwarranted amount of liability not make P's careless conduct his 'business' after all? Could it not justify a defence discounting the liability so as to account for the risk?

There is still, of course, the powerful point made by Klar and Stevens alike that P is innocent of any wrong in the seatbelt case, whereas D is not, so that it is improper to assign the risk of the uncertainty to P, not D. There is, they say, no moral equivalence between the two. But this does not rule out the use of other criteria for distributing the risk between P and D which are not based – or not solely based – on whether P and D have violated each other's prior rights. Indeed,

[30] See ch 6.
[31] Stevens (n 9).
[32] ibid, 254.

the fact that legislatures have almost universally seen fit to permit apportionment in these instances suggests that they take the view that the parties' relative *capacity* to avoid harm is a salient distributive criterion.

The debate about the ethics of using distributive criteria to apportion responsibility between tortfeasors and their victims finds a parallel in modern debates about the form of the new defence of change of position to restitutionary claims. Here, distributive criteria clearly do operate, but there have been attempts to limit them. For example, courts have to date resisted the idea that a defendant should have a defence to a claim for the return of a mistaken payment just because this would cause her hardship. She must have suffered, or stand to suffer, a provable detriment that she would not otherwise have suffered, had she not entertained a genuine belief in her entitlement to the sum in question. The defence hence generally requires prejudice provably connected to circumstances and beliefs surrounding the payment's receipt which make it unjust to require restitution.[33] It is not simply a product of the defendant's relative wealth, poverty, or new circumstances that have given her a particularly pressing need for the money paid. At the same time, bad faith disqualifies her from the defence and, depending on the jurisdiction, her fault may also do so.[34] In some American jurisdictions, she loses the defence and must pay in full if she is more at fault in respect of the original payment than the plaintiff,[35] mirroring the way in which the comparative negligence defence now operates in most States in loss-based claims. In New Zealand, courts take the most flexible approach of all by 'weighing the equities' between the parties and apportioning D's loss proportionately between them, as we shall see in Section V below. All of these approaches carry some risk of uncertainty, but the last has been thought by the Privy Council to do so to an intolerable degree.[36]

Before moving on from ethics, we should further consider the concern about uncertainty, because it is often asserted that a key aspect of any ethical solution to 'sharing' problems is that rules should not only be 'fair', but clear and predictable. It is not impossible for solutions to be both, but the more numerous and open-textured the criteria that bear upon apportionment decisions, and the more flexible their structuring in judicial reasoning, the more clarity and predictability suffer. The perennial question is – how fundamental is the uncertainty problem and where does the proper balance between certainty and justice lie?[37]

[33] The exact formulations differ slightly between jurisdictions. Compare *Lipkin Gorman (a firm v Karpnale Ltd*) [1991] 2 AC 548 (HL), 577–80; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA), 385; *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14 [23], [67], [81], [157]; *Restatement of Restitution and Unjust Enrichment (Third)* (American Law Institute, St Paul, 2011) §65; Judicature Act 1908 (NZ) s 94B; *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211, 227–30.

[34] See further Section V(B) below.

[35] *Restatement of Restitution* (n 33) §65, comment a.

[36] *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC).

[37] J Goudkamp, 'Apportionment of Damages for Contributory Negligence: A Fixed or Discretionary Approach?' (2015) 35 *Legal Studies* 621.

Those who focus on fairness will insist that the introduction of partial contributory negligence and change of position defences has made it possible for judges to give more sensitive expression to the reasons that underpinned older all-or-nothing (usually 'no recovery') rules. This may produce less predictable solutions, they will say, but it is also less arbitrary and more rational. For example, if the reason for initially inhibiting restitutionary causes of action was the fear that innocent defendants might be unduly prejudiced by having to pay money back, then a solution that allows recovery, but which eliminates any resulting prejudice through a change of position defence has greater moral legitimacy than one that denies the plaintiff's claim entirely for fear of the unproven consequence.[38] The duty of rationality that judges have is to give the most accurate and sensitive effect possible to the reasons that they have, and these reasons are more accurately expressed in these instances by partial, than by all-or-nothing rules.

Those who, by contrast, favour certainty still have a legitimate argument. Certainty is important both to markets and to the autonomy of individual citizens. Nonetheless, it is, I suggest, a second order value in civil adjudication that only really kicks in once judges' duties to formulate rules rationally has been met. Judges' (and legislatures') *first* duty is to give rules the form that most closely respects the reasons for having those rules – to reason rationally in accordance with the reasons that they have. Their *second* duty is then to make the operation of those rules as clear and predictable as possible. If one applies this approach to private law disputes, then the unpredictabilities that attend modern apportionment rules are certainly undesirable and should be minimised as far as possible, but they are not a reason for not engaging in partial apportionment exercises at all, if these constitute a rational moral practice.

## C. Politics

Despite the dominant language of ethics, politics have been the driving force in most recent changes to apportionment rules.[39] Weir himself credibly suggested that the English contribution legislation was a product of determined lobbying by liability insurers[40] and the same is true both of the legislation introducing the defendant-friendly version of the defence of contributory negligence that now applies in most US jurisdictions[41] and of recent proportionate liability reforms. This explains the inconsistency between proportionate liability provisions in different jurisdictions in the United States and Australia; and it explains why

[38] See, eg, *Lipkin* (n 33) 581 (Lord Goff).
[39] Wright, ch 2; Barker and Steele (n 4).
[40] Weir (n 1) 519.
[41] G Schwartz, 'Contributory Negligence under United States Law' in Magnus and Martín-Casals (n 10) 223 (noting that the modified version has almost universally been introduced by legislation, not judicial decision); *Restatement of Torts* (n 14) §7, Reporter's Note to comment a. See Section V(A) below.

proportionate liability is exclusively the product of legislative, not judicial activity. None of the relevant legislation resulted from the recommendations of an independent law reform commission.

What are the pressures on defendants that have produced these lobbying efforts? Recent economic downturn and the over-exposure of liability insurers to investment risk are two immediate factors. However, background pressure has also been created by a general increase in the 'shared' liability of 'peripheral' defendants (and their insurers) resulting from the expansion of substantive liability doctrines such as vicarious liability, accessorial liability and tort liability for omissions during the latter part of the twentieth century. Such 'peripheral' defendants (public authorities and professional advisers are perhaps the most significant group) are now responsible, where once they were not, for indivisible damage more 'immediately' brought about by other wrongdoers, including fraudsters, unreliable contractors and reckless (or even criminal) employees, many of whom are insolvent or hard for plaintiffs to bring to judgment. A significant proportion of the new, shared liabilities are for pure economic loss and 'peripheral' defendants often end up paying most of the bill. The modern agenda of proportionate liability reform is hence at least in part a reflection of the raw desire of such defendants (and their insurers) to deflect the impact of these additional, shared responsibilities for the conduct of others, and to throw their risk back upon plaintiffs as a group. The term 'peripheral' defendants, it should be noted, is one chosen by defendants themselves to minimise the sense of their responsibility, despite the law having concluded them to be legally responsible for the damage caused.

The strategy has clearly worked effectively in some countries, but it is very unsophisticated, because it is unlikely that the solidary liability rule itself played a significant role in bringing about the economic pressures alleged by defendants.[42] The pressures are also not uniform amongst defendant groups, so that, even if one accepted that they were real and required intervention, there would be no case for implementing proportionate liability as a generalised scheme. It would be far more rational to cap the liabilities of particular defendant groups, where they can prove that their liabilities are so seriously prejudicial to society as a whole that plaintiffs should go partially uncompensated.

There is now a sense in Australia that proportionate liability reformers may have pushed things too far, too fast and in such a random way as to cause trouble for themselves as well as plaintiffs by creating unmanageable complication and uncertainty in the system. The point about pragmatics is that they change all the time. Such pressures as were being experienced by insurers have eased. As Barbara McDonald explains in chapter eleven, the modern debate in Australia has hence ironically become one about how to achieve uniformity and predictability in a scheme that, from a moral point of view, made little sense in the first place and which was precipitated by a short-term crisis that has since receded.

[42] P Cane, 'Reforming Tort Law in Australia: A Personal Perspective' (2003) *MULR* 649, 660–63.

The problem with attempting any radical repeal or change to the new schemes so as to restore greater equity and compensation to plaintiffs, is that the schemes work to the benefit of the very 'peripheral defendant' governments who would be asked to scrap them. The pragmatics of self-interest therefore weigh upon future progress like a dead hand.

## IV. Originating Doctrines

Part 2 of the book analyses two, originating doctrines that give rise to the shared liability of multiple defendants for the same harm – vicarious and accessorial liability. Both doctrines have grown considerably during the twentieth and twenty first centuries and therefore form part[43] of the story of increased shared liability for 'peripheral' defendants outlined above. The former doctrine theoretically creates liability for D1 *on behalf* of D2 (D1 being liable for D2's wrong on account of the *status* of the relationship between them), whereas the latter imposes liability on D1's for his or her *involvement in* the wrong of D2. The precise rationales of the doctrines are, however, still not fully understood.[44]

Warren Swain's historical analysis of vicarious liability in chapter four makes this particularly clear, tracking as it does the evolution of the doctrine from Roman times to the modern day. He shows how the rationale of the principle has never been settled, having variously been stated in terms of practical convenience, social policy, command, authority, agency, or (most recently) 'enterprise risk'. Within these ideas, there are some that are clearly capable of grounding strict moral responsibility for the deeds of others, including consent, control, risk-creation and the obtaining of benefits from others' acts, but there are also references to broader, instrumental policies of deterrence, compensation and efficient loss-spreading. Modern 'tests' of vicarious liability reflect not just the fluid reality of modern employment relationships, but also the mixed reasons that have historically underpinned courts' decisions. Recent cases imposing liability on schools and churches for criminal acts of physical or sexual abuse have exposed the tensions between these theories.[45] Exceptional instances aside (in which the institution authorises, or acquiesces in the abuse), the only reasons really sustaining liability in such instances relate to the special risks created by certain types of job (where there is an especially 'close connection' between

[43] Probably a minor part. The more significant pressures appear to have flowed from the increase in tort liabilities for omission and pure economic loss.

[44] As regards vicarious liability, see the frank admission of the High Court of Australia in *Sweeney v Boylan Nominees Trading as Quirks Refrigeration* [2006] HCA 19, [11] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[45] *Bazley v Curry* (1999) 174 DLR (4th) 45; *Lister v Hesley Hall Ltd* [2002] 1 AC 215 (HL)*; Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; *New South Wales v Lepore* (2003) 195 ALR 412 (HCA); *Prince Alfred College v ADC* [2016] HCA 37.

it and the abuse[46]), the need to compensate victims who lack effective remedies against impecunious criminal offenders, or the desire to incentivise institutions to safeguard vulnerable persons. Only the first of these (the creation of risks of abuse) has any chance of attracting criteria of attribution that have anything like clear edges and the resulting liability then actually seems to flow from the institution's own conduct, not to be 'vicarious' at all.[47]

Until recently, accessorial liability has also lacked a coherent jurisprudence.[48] Several different doctrines operate under its broad umbrella (including joint tortfeasorship, liability for inducing a breach of contract, and accessorial liability in equity), but it has nonetheless forcefully been argued that differences in rules' origins should not preclude their rationalisation within the same organisational framework.[49] In chapter five, Joachim Dietrich, one of the architects of this idea, unravels some of the doctrine's key mysteries, including the tricky question whether accessories' liabilities are for the *same*, or different wrong(s); solidary or proportionate; and necessarily always the same for accessory and principal alike. These matters are especially complicated in equity by virtue of the fact that equitable accessorial liability can be gain- as well as loss-based. As regards the underlying principles grounding the doctrine, these appear to lie in the existence of a common design between defendants (ie, in their combined intentions), or in purposive actions of the accessory which induce, assist or otherwise have a (loosely-defined) relevant causal impact on the commission of the principal wrong.

The uncertainties underpinning the normative foundations of both vicarious and accessorial liability are not just problematic for the doctrines themselves, but also for decisions about how the shared liabilities they create are to be apportioned. The reason why D1 shares D2's liability for harm suffered by P must bear upon the way the liability is then allocated between D1 and D2. If, for example, D1 is liable to P for harm caused by D2 because D1 has *agreed* to protect P against the risk of D2's actions, there is a good reason to make his liability total (solidary). He has consented to making D2's responsibility his own. If, by contrast, D1 and D2 are independent tortfeasors whose separate wrongs happen to coincide to bring about one and the same damage to P, then the case for D1 being only partly liable to P (a solution I personally reject for reasons already given and which Dietrich also rejects) is more arguable. If D1 and D2 are parties

[46] *Bazley* (n 45); *Lister* (n 45). The test in Australia is now formulated slightly differently, in terms of whether the job provided the 'occasion' for the abuse: *Prince Alfred* (n 45) [80].

[47] C Beuermann, 'Vicarious Liability and Conferred Authority Strict Liability' (2013) 20 *Torts Law Journal* 265.

[48] See now J Dietrich and P Ridge, *Accessories in Private Law* (Cambridge, Cambridge University Press, 2016); P Davies, *Accessory Liability* (Oxford, Hart Publishing, 2015).

[49] Dietrich and Ridge (n 48), J Dietrich, 'Dealing with Complexity: Different Approaches to Explaining Accessory Liability' in K Barker, K Fairweather, R Grantham (eds), *Private Law in the 21st Century* (Oxford, Hart Publishing, 2017) ch 10.

to a 'common design' that harms P, the case is more like the case in which D1 has consented to making D2's responsibility his own, although it is not on an exact par. If D1 *intended* to harm P through his assistance, when D2, the principal wrongdoer, intended P no harm, or if D1 is in breach of a *fiduciary duty* to P, there might be deterrent reasons to make D1 solidarily liable to P, even if D2 is not. Indeed, there might even be a reason to bar D1 claiming a contribution from D2.

There are some signs that the norms underpinning shared liabilities do indeed affect the way in which apportionment schemes later divide those liabilities between defendants. For example, under most American and Australian statutory systems, proportionate liability for indivisible harm is excluded and liability remains solidary whenever D1 acted intentionally or fraudulently with regard to P, where his liability was vicarious, or where it arose from his partnership with D2. In both countries, D1's liability is also solidary where he was acting 'in concert' with D2. In some Australian jurisdictions, the same is true where D1 and D2 were joint tortfeasors liable in respect of the same wrong.[50] In the United States, there is an additional exception preserving solidary liability for the case where D1 had a duty to P to protect P against the risk of D2's wrongdoing, as for example, where D1 is a professional adviser engaged to protect P against fraudulent debtors.[51] That is *not* currently provided for in Australia, but almost certainly should be, given the argument set out above.

The main point, then, is that there is a clear normative connection between the reasons for the existence of shared liabilities in private law and the way they should be shared, but that it is difficult to reach clear or consistent conclusions on how apportionment should work whilst there is uncertainty concerning the rationale of 'originating doctrines' themselves. Although there appears to be a broad consensus that vicarious liabilities should always be total (solidary) whatever the reasons why they exist, conclusions regarding accessorial liabilities may yet to be fully worked through.

## V. Plaintiff-Defendant Apportionment

Part 3 of the Book focuses on three, important mechanisms for apportioning losses and gains between plaintiffs and defendants – the doctrine of contributory (comparative) negligence, the restitutionary defence of change of position and the rules governing the quantification of equitable accounts in cases involving breach of fiduciary duty.

[50] This is the case in Queensland and South Australia.

[51] *Restatement of Torts* (n 14) §14. Contrast the result in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10, critically discussed by McDonald in ch 11.

## A. Loss-Based Claims and the Defence of Contributory Negligence

The partial defence of contributory negligence is now widely accepted, despite the reservations expressed above about its ethics. In the UK, Australia, New Zealand, Canada and virtually all European countries,[52] partial reductions in awards are available even where P was more responsible for his injury than D, whereas in most US jurisdictions this is only the case where P was no more responsible than D.[53] If P is adjudged more responsible than D, the defence bars P's claim completely. This reversion to an absolute bar is now also permitted (but not mandated) in Australia, which causes logical problems considered further below. The precise scope of the doctrine and the criteria according to which it apportions responsibility are also unclear; and we have, until recently, had no clear view of the actual impact of the defence on plaintiffs' awards.

The concern about apportionment criteria is highlighted by Klar in chapter six. Although two are regularly cited – the relative 'causative potency' of P and D's conduct and their relative fault[54] – doubts have been expressed about each. The latter was regarded by Lord Denning as requiring an impractical inquiry into matters that were likely to be hotly contested and hard to resolve.[55] Others go further, claiming that the relative fault criterion is literally impossible to apply because it requires one to compare incommensurables – the breach of D's duty to P and P's want of regard for his own welfare.[56] Comparative fault is nonetheless regularly used to determine allocations in all jurisdictions. In Canada, it is the only criterion formally used. This either means that courts are simply ignoring the incommensurability objection, or (perhaps more likely) that they are crudely comparing *other* aspects of P and D's behaviour that *are* commensurable, such as their relative knowledge and capacity to avoid the harm in question.

The other factor – 'causal potency' – is rejected by Klar on the basis that 'part causation' is a meaningless idea.[57] This is clearly true. For reasons explained above, wherever indivisible damage is brought about by both P and D, what is at stake is the allocation of the *risk of the uncertainty* about causation, not any genuine attempt to assess the relative causal contribution of P and D's conduct. All that the 'causal potency' criterion does in those jurisdictions in which it operates is hence to assign the risk of the uncertainty in accordance with the extent to which P or

[52] Magnus & Martín-Casals (n 10) 259–60.

[53] *Restatement of Torts* (n 14) §7, Reporter's Note to comment a.

[54] *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALR 529, 532–33; J Goudkamp, 'Apportionment of Damages for Contributory Negligence: Appellate Review, Relative Blameworthiness and Causal Potency' (2015) 19 *Edinburgh Law Review* 367.

[55] *Froom v Butcher* [1976] 1 QB 286, 296.

[56] Stevens (n 9) 259.

[57] See further J Goudkamp and L Klar, 'Apportionment of Damages for Contributory Negligence: The Causal Potency Criterion' (2016) 53 *Alberta Law Review* 1.

D's conduct *increased the probability* of P's injury. Given that this is presumably already taken into account in adjudging the extent to which P and D are each regarded as being at fault in respect of that injury, the criterion does indeed seem normatively redundant, although it perhaps helps to single out one component of that inquiry for separate consideration.

The other factors that Klar identifies as being relevant to relative fault in Canada are the nature of D's duty, the number of faulty acts of D and P respectively, their nature, and their temporal sequencing. The *Third Restatement of Torts* adds references to the parties' intentions and their awareness of the risks created by their conduct.[58] Occasional allusions are made in European jurisdictions to the parties' relative financial resources and ability to obtain insurance cover,[59] but this is rare and common law jurisdictions tend to ignore such factors. References to the nature and purpose of D's duty are sensible as they connect the apportionment decision back to the original basis of D's liability – if D's primary duty was to protect P against the risk of his (P's) own conduct, then D must take responsibility for the consequences of P's acts. The sequencing idea is much more controversial, appearing, as it does, to hark back to the old 'last opportunity' or 'last clear chance' rule' that has been abolished in most (but oddly not all) Canadian jurisdictions. If the sequencing of acts is at all relevant, it seems to be more logically relevant to causation (Klar's suggestion), remoteness of damage, or 'causal potency' (understood now to mean the probability that the act might cause the relevant injury, as part of the relative fault inquiry). The first two of these concepts are relevant to D's basic liability, not to the defence, and the last is a criterion that Canadian law has supposedly abandoned. It is therefore hard to dissent from Klar's conclusion that references to last chance doctrine and the sequencing of P and Ds' acts should be dropped in the context of the modern comparative defence.

Whilst the partialism of the contributory negligence defence was always designed to be fairer to plaintiffs, it has not gone unscathed by recent Australian reforms, which now expressly provide for the possibility of 100 per cent reductions.[60] This is part of the larger raft of measures aimed at paring back defendants' liabilities. As courts have been swift to point out,[61] 100 per cent deductions are logically inconsistent with the idea that the modern defence operates on a 'comparative responsibility' basis. For this reason, it has been hinted that the new measures must be understood as having impliedly 'modified' the original legislative schemes so as to permit courts to use a different, *non-comparative* method.[62]

[58] *Restatement of Torts* (n 14) §8.

[59] Magnus and Martin-Casals (n 10) 273.

[60] Civil Liability Act 2003 (Qld), s 24; Civil Liability Act 2002 (NSW), s 5S; Wrongs Act 1958 (Vic), s 63; Civil Law (Wrongs) Act 2002 (ACT), s 47; Wrongs Act 1954 (Tas), s 4(1).

[61] *Wynbergen v Hoyts Corporation Pty Ltd* (1997) 149 ALR 25, 29; *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 (HL), 372; *Anderson v Newham College of Further Education* [2002] EWCA Civ 505; *Buyukardicli v Hammerson UK Properties plc* [2002] EWCA Civ 683; *Pitts v Hunt* [1991] 1 QB 24 (CA).

[62] *French v QBE Insurance (Australia) Limited* [2011] QSC 105, [197] (Fryberg J).

This yields a system akin to the one that exists in most US jurisdictions, save in so far as there is no set point at which the decision to switch from the partial to the complete defence must be made. Courts are therefore at liberty in Australia to apply the defence 'absolutely' wherever they consider this to be 'just and equitable.'

If these reforms were intended as a less-than-subtle legislative hint to judges that they should now revert to a 'total' version of the defence on a regular basis, that signal has for the most part been wisely ignored. There have been only 12 reported cases since the reforms were enacted in which a 100 per cent deduction has been considered appropriate by a court[63] and in each and every instance, the failure of the plaintiff's claim was justified primarily on the basis that P had not proven any breach of duty, or causation. In practice, the provisions' most significant impact is therefore likely to lie in appeal-proofing first instance judgments made on other grounds and in driving down the level of out-of-court settlements.

Australian legislatures have also introduced provisions that reverse the onus of proof in respect of contributory negligence in cases involving plaintiff intoxication (or reliance by a plaintiff upon an intoxicated party). Provisions of the latter kind mandate minimum deductions of 25 per cent or 50 per cent from a plaintiff's award.[64] The effect can be arbitrary and penalise plaintiffs far more harshly than any criminal fine. It can also leave seriously injured victims without the long-term support they need. The financial impact of P getting into a car with a seriously drunk driver on her damages for paraplegia (a minimum 50 per cent cut in the award) could be staggering. If the objective of governments was really to deter recklessness around alcohol and enforce road safety laws (rather than just to reduce defendants' awards), then they have probably not only picked an inefficient tool, but have shot themselves in the foot economically, since many of the long-term disabled caught by the provisions will now have to look to the state for support, not to wrongdoing defendants and their insurers.

A problem with speculations of this type and indeed with any attempt to work out the impact of the modern defence upon plaintiffs overall is the lack of empirical evidence. We need information on three, key matters: first, what deductions do courts make in practice in which types of case; secondly, how have out-of-court settlements been affected; and thirdly, how has the availability of the partial defence

[63] *Adams v State of New South Wales* [2008] NSWSC 1257, [133]; *Zilio v Lane* [2009] NSWDC 26 [227]; *Russell v Lozanes* [2011] NSWDC 149, [111]; *Thompson v New South Wales Land & Housing Corporation* [2011] NSWSC 94, [71]]; *Richardson v Mt Druitt Workers Club* [2011] NSWSC 31, [26]; *Davis v Swift* [2013] NSWDC 99, [57]; *Vourvahakis v Marrickville Metro Shopping Centre Pty Ltd* [2013] NSWDC 73, [70]; *Jacobe v QSR Pty Ltd (t/as Kentucky Fried Chicken Lakemba)* [2014] NSWDC 150, [120]; *Lim v Cho* (NSWDC, unrep, 5 July 2017) (aff'd [2018] NSWCA 145); *Knibbs v Sheteh* [2017] NSWDC 119, [278]; *Burke v State of Queensland* [2013] QDC 186, [25] (aff'd [2014] QCA 200); *Contor v Bickey* [2016] QSC 91, [35]. A 100% award was set aside in *MacKenzie v Nominal Defendant* [2005] NSWCA 180.

[64] See, eg, Civil Liability Act 2003 (Qld) ss 48, 49.

affected courts' use of other, absolute ones? Goudkamp and Nolan's pioneering recent work has greatly advanced our understanding of the first question[65] and is continued in this volume with a penetrating critical analysis of the incidence and size of deductions in cases involving professional defendants. Their findings suggest that although the defence's success rate is much lower than in other categories of case, the average discount rate is higher. The success rate of the defence is also much lower in respect of lawyers than other professionals.

The second and third questions are harder to answer. In respect of the third, introducing partial defences has in the past often resulted in courts being less ready to allow total ones such as *volenti non fit injuria*, illegality and (in the restitutionary context) estoppel. But Australian governments have in turn introduced measures which seek to make it easier for defendants to establish *volenti*;[66] and which bar plaintiffs from claiming any compensation at all in cases in which they have tortiously been caused any injury which is an obvious risk of a dangerous recreational activity, even if this is a risk of which they were unaware.[67] To the extent, therefore, that the recognition of comparative negligence represents a cultural shift away from all-or-nothing solutions in the name of ensuring fairness to plaintiffs, Australian governments have sought partially to reverse it. This is not to say that one who places herself at risk by engaging in a dangerous activity should recover in full, but if she did not assent to the risk of a defendant's negligence in that context and was unaware of it, it is hard to see why she should recover *nothing,* when the accident would not have occurred had the defendant properly met his duty of care. The normal logic of partialism, as it applies in contributory negligence cases, seems a fairer and more rational response. It may come as no surprise to learn that the bar on damages in respect of 'obvious' risks of dangerous 'recreational' activities was the product of the lobbying efforts of recreational services providers (including councils). It may also come as no great surprise to learn that courts have allowed the defence on only nine occasions since the legislation was introduced and that on each occasion the plaintiff had failed to prove the breach of any duty of care.[68] There is little appetite for the new absolutism amongst judges.

[65] J Goudkamp and D Nolan, 'Contributory Negligence in the Twenty-First Century: An Empirical Study of First Instance Decisions' (2016) 79 *MLR* 575; J Goudkamp and D Nolan, 'Contributory Negligence in the Court of Appeal: An Empirical Study' (2017) 37 *LS* 437.

[66] See eg Civil Liability Act 2003 (Qld), ss 13, 14. There is little evidence that this change has made any difference.

[67] Civil Liability Act 2003 (Qld), s 19; Civil Liability Act 2002 (NSW), s 5L; Civil Liability Act 2002 (Tas), s 20; Civil Liability Act 2002 (WA), s 5H.

[68] *Jaber v Rockdale City Council* [2008] NSWCA 98; *Vreman and Morris v Albury City Council* [2011] NSWSC 39; *Echin v Southern Tablelands Gliding Club* [2013] NSWSC 516; *Streller v Albury City Council* [2013] NSWCA 348; *Price v Southern Cross Television (TNT9) Pty Ltd* [2014] TASSC 70; *Campbell v Hay* [2014] NSWCA 129; *Sharp v Parramatta City Council* [2015] NSWCA 260; *Goode v Angland* [2017] NSWCA 311; *Samahar Miski v Penrith Whitewater Stadium Ltd* [2018] NSWDC 21.

## B. Gain-Based Claims and the Defence of Change of Position

Turning to gain-based claims, the defence of change of position is a classic example of partialism providing a more rational response to questions of allocation between plaintiffs and defendants than former, absolute, 'no liability' rules. Its development is analogous in this regard to the defence of contributory negligence in tort. Like the latter defence, its partialism poses a potential challenge not just to strict 'no-recovery' rules, but also to absolute defences capable of applying on the same facts, such as bona fide purchase and estoppel. Although it was at first suggested that it might entirely supersede the former of these,[69] that prediction has proven incorrect, because, whilst there is some historical overlap in the rationales of the respective defences in equity, the bona fide purchase has always had an additional, instrumental function in securing title to property in order to release it to the market for unencumbered economic exchange. That, distinct function requires an absolute all-or-nothing rule to protect property purchasers outright and to clear the title of the relevant property of all claims.[70] The result is that the two defences now operate side-by-side. The difference in their rationale means that they can co-exist without significant normative tension.

Matters are less clear regarding estoppel and it is still possible that a fully-developed change of position defence will result in it withering away entirely. It does not feature anywhere in the recent *Third Restatement of Restitution and Unjust Enrichment*. There have been very few, if any, cases since the advent of change of position in which estoppel has operated to bar a restitutionary claim *in toto* and it seems to be accepted that its operation as a total bar will be exceptional now that a partial solution exists.[71] The fact that estoppel's own rules of operation can be modified so as to allow it to operate partially in cases in which it would be unconscionable for it to operate totally;[72] and the fact that the change of position defence can itself bar a claim completely if this is necessary to avoid unfairly prejudicing D,[73] have significantly reduced the points of tension between the two defences. In practice, although one protects expectations and the other out-of-pocket loss, both can now operate partially in the right conditions and where they operate totally, this appears to be a product of courts recognising the proper balance of justice between the parties, not an adhesion to all-or-nothing thinking for its own sake.

[69] P Key, 'Bona Fide Purchase as a Defence in the Law of Restitution' (1994) *LMCLQ* 421; The Hon Sir Peter Millett, 'Tracing the Proceeds of Fraud' (1991) 107 *LQR* 71, 82.

[70] K Barker, 'After Change of Position: Good Faith Exchange in the Modern Law of Restitution' in P Birks (ed) *Laundering and Tracing* (Oxford, Clarendon, 1995) ch 7.

[71] *Scottish Equitable plc v Derby* [2001] 3 All ER 818, 828–30.

[72] *Derby* (n 71); *National Westminster Bank v Somer International Ltd* (2002) QB 1286.

[73] *Hills* (n 33).

The defence of change of position only goes so far in apportioning the gains and losses of the parties to a defective or wrongful transaction. Some statutory regimes that effect restitution (such as those that provide for the consequences of contractual frustration) go much further and allow the pooling and subsequent division of the combined losses and gains of *both* P and D.[74] By contrast, change of position only allows for D's detriment to be brought into account in reduction of P's claim for a benefit bestowed by P. This is less sophisticated, but also less complicated and, therefore, less likely to dissolve into an unfathomable discretionary process. To the extent that wider sharing of the losses of both P and D appears to be sanctioned in some frustration regimes, it is probably the result of neither party being responsible for the transactional failure and neither having agreed to accept the risk of the failure, which might provide a case for similar outcomes where neither P nor D are responsible for a mistaken payment.

The defence can also assume at least three different forms, which are progressively more complicated. Under the first, which is current in England, D is completely disqualified from the defence and is left to carry his own losses where he was in bad faith, or a 'wrongdoer'.[75] Under the second, which is the dominant model in the United States ('relative fault'), D is disqualified if he is more at fault than P. Otherwise, his liability is reduced to the full extent of the detriment suffered.[76] Under the third model ('comparative fault'), which prevails in New Zealand, the defence operates in all cases to apportion D's losses to P and D in accordance with their respective fault, whichever of P or D happens to be more to blame.[77] A fourth possible model, sitting between the third and the fourth, would be to disqualify D completely if he is more at fault than P, but in other cases to allow him to set off a proportion of his losses, calculated by reference to his fault relative to P. Each of these positions strikes a different compromise. As in the case of contributory negligence, there are uncertainties about the exact criteria of distribution, which tend to focus on the respective roles of P and D in relation to D's enrichment and their actual or (in some jurisdictions) constructive knowledge of the defect.

If the new defence is to operate coherently, its underlying logic clearly needs to be understood. In chapter eight, Ross Grantham sets out to advance this project, dismissing the view, which was at one time popular, that the defence responds to the diminution of D's enrichment, rather than to detriment he or she has suffered. He seeks to justify the existence and operational features of the defence by reference to the underlying logic of unjust enrichment claims themselves, arguing

[74] See E McKendrick, 'Frustration, Restitution and Loss-Apportionment' in A Burrows (ed), *Essays on the Law of Restitution* (Oxford, Clarendon, 1991) ch 6.

[75] *Dextra* (n 36); *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2003] EWCA Civ 1446, [164]–[165]. Whether fault disqualifies in Australia was not decided in *Hills* (n 33).

[76] *Restatement of Restitution* (n 33) §52(3), §65, comment (a), (g) and illustrations 24–26. Note that some of P's losses associated with the transaction can also be brought into account in the US system: §52(2).

[77] *Waitaki* (n 33).

that such claims are only normatively justified to the extent that they leave D no worse off. Since the normative force of restitutionary claims lies in some defect in P's decision-making or purposiveness, D should, he suggests, have the defence wherever he has innocently integrated the benefit received into his own purposes, such that restitution would detrimentally affect his life choices. There are in this account detectable echoes of Kantian thinking that contrast with the more pragmatic distributive schemes implicit in some of the more complex models identified above.

## C. Allocating the Risk of Causal Uncertainty Through Other Rules

Contributory negligence rules are not the only ones to distribute the risk of causal uncertainties between plaintiffs and defendants. In all jurisdictions, there are rules permitting similar risk-allocations in cases in which causal processes are impossible to penetrate, or where facts are causally over- or under-determined. Some of these strategies are 'all-or-nothing' in the sense that they place the risk of the uncertainty fully on either P or D. Examples in this category are rules allowing for reversals in the legal or evidential onus of proof[78] or the drawing by courts of 'robust inferences' of causation in cases where the normal standards of proof simply cannot be met. *Fairchild*[79] is one such example.

Other strategies, however, split the risk of insuperable causal uncertainties between P and D – a tactic generally applauded by Helmut Koziol[80] and by Jenny Steele and Rob Merkin[81] in this book. This can be done by deploying a probabilistic approach to causation rules themselves (the result arguably achieved in England in *Barker v Corus UK Ltd*[82] and used in some civilian jurisdictions[83]), or by reformulating P's damage in terms of a 'loss of chance'. The cases in which this is permitted to occur vary from jurisdiction to jurisdiction. A particularly striking anomaly is that loss of chance analyses and 'part damages' are allowed in Australia and the UK in cases in which P's damage is purely economic, but not where he or she has suffered physical injury; whereas in the US, the

[78] For example, the doctrine of *res ipsa loquitur*.

[79] *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 (HL). Note that the court did not determine the issue whether Ds liabilities were total (solidary), but this has now been affirmed in respect of mesothelioma victims, in reaction to *Barker v Corus UK Ltd* (n 82 below) by the Compensation Act 2002 (UK), s 3. For a different scenario, but similar 'robust' approach to causal rules in Australia, see *Chappel v Hart* (1998) 195 CLR 232 (HCA).

[80] Ch 3.

[81] Ch 12.

[82] [2006] 2 AC 572 (HL). The case is limited to cases involving scientific uncertainty and singular types of risk.

[83] See generally, Gilead, Green and Koch (n 14), 1–67.

position is precisely the reverse.[84] In ethical or public policy terms, one might think that the Americans have it right, given that the body should be more highly valued than the dollar, but the explanations are more complicated than that. The perceived role of tort rules in deterring malpractice is a factor underpinning the American position, whereas in England and Australia, courts are evidently concerned about the financial consequences of loss of chance claims for public health services.

Another set of rules that allocates the risk of uncertainties are the rules governing the quantification of monetary awards – both gain-based and loss-based ones. In chapter nine, Simone Degeling takes these rules to task in the context of awards for breach of fiduciary duty, where speculation is required in calculating the value of an opportunity allegedly lost or gained by P or D (respectively) as a result of a fiduciary's wrong. In respect of both the calculation of loss and gain, she argues that, although probabilistic reasoning is normally permissible to discount awards, the nature of a defendant fiduciary's primary duty to a principal should preclude any discount for the possibility that the plaintiff principal would not have taken up the opportunity that the fiduciary wrongly exploited. Although this approach throws up some tensions with existing rules, it uses the underlying logic of the primary liability rule (here – deterrence) to inform the way in which risks of uncertainty are in split in apportioning monetary relief, which appears to be rationally justified.

## VI. Apportionment Between Defendants

This brings us finally to the rules apportioning liabilities between multiple defendants responsible for the same harm. Of all apportionment rules, these are probably the least well understood and most complicated. Their ethics and politics have been discussed above. A full exposition of their detail is not possible here, but the following table provides an overview of some of the current possibilities. It draws on the *Third Restatement of Torts*, but also pinpoints other approaches and reform suggestions in the footnotes. It models a hypothetical in which three defendants (D1, D2, D3) are responsible for P's indivisible harm, with D1 and D2 both being 40 per cent responsible for it and D3 being 20 per cent responsible. D3 is insolvent (or otherwise not susceptible to judgment), so that there is always an 'uncollectible share' of liability. Save where otherwise indicated in the table itself, the assumption is that P is not herself also responsible for the harm. Where she is, the rules in some (American) jurisdictions combine the processes of plaintiff-defendant and defendant-defendant apportionment into a broader, collective 'all parties' allocation system. Such systems probably represent the apogee of system complexity.

[84] Compare *Gregg v Scott* [2005] UKHL 2; *Tabet v Gett* [2010] HCA 12; *Matsuyama v Birnbaum* 452 Mass 1; 890 NE 2d 819 (Mass, 2008).

## A. Multiple Defendant Liability Apportionment Models

| System | Basic Regime | Variant 1 | Variant 2 | Variant 3 |
|---|---|---|---|---|
| **Solidary Liability** ('Joint and Several' Liability)<br>Examples | D1, D2, D3 all individually liable 100% to P.<br>No contribution between Ds.[85]<br>If P sues D1, D1 is liable for 100%. D1 may recover nothing from D2 or D3. | As for basic regime, but contribution available between Ds.<br>No provision for reallocating unrecoverable shares between Ds.[86]<br>If P sues D1, D1 is liable for 100%. D1 may recover only 40% from D2.<br>D3's 20% share is uncollectible and cannot be reallocated, so is born wholly by D1. D1 bears a total of 60% liability. | As for Variant 1, but provision is made for reallocating unrecoverable shares of liability between Ds in proportion to their relative responsibility.[87]<br>If P sues D1, D1 is liable for 100%, but may now recover 50% from D2 (D3's 20% share is split equally between D1 and D2). | As for Variant 2 but, where P is also partly responsible, D3's share can be reallocated to *all* parties (D1, D2 *and P*) in proportion to their relative responsibility.[88]<br>If the responsibility shares are D1: 40%; D2: 40%; D3: 10% and P: 10%, then, if P sues D1, D1 is liable (after deduction for P's 10% share) for 90% in total, but may, on proving D3's insolvency, apply for reallocation of a proportion of that uncollectible share to P. |

[85] This model has been superseded in virtually all jurisdictions.

[86] This variant remains dominant in the UK, New Zealand, Canada and almost all European jurisdictions.

[87] This solution is proposed by Cheifetz in ch 10.

[88] This variant was endorsed in the US Uniform Comparative Fault Act (1979) (now replaced by the Uniform Apportionment of Tort Responsibility Act – see n 90 below) and exists in Ireland and some US jurisdictions (*Restatement of Torts* (n 14) §C18, §C21). Certain Ds are precluded from seeking reallocation: intentional tortfeasors, tortfeasors acting in concert; vicariously liable parties and defendants who were primarily responsible for protecting P against other Ds' intentional torts.

| System | Basic Regime | Variant 1 | Variant 2 | Variant 3 |
|---|---|---|---|---|
| **Proportionate Liability** ('Several' Liability') | D1, D2, D3 liable to P only for only 40%, 40% and 20% respectively.<br>No contribution is possible between Ds.[89] | As for the basic regime, but P can apply for D3's uncollectable share to be reallocated proportionately between remaining defendants D1and D2. | As for Variant 1, but the reallocation of D3's share is made proportionately between D1, D2 *and P* if P is also responsible.[90] | |
| **Hybrid Models** | Solidary liability where D's own share of responsibility exceeds a set threshold (eg 20%). Otherwise, proportionate liability only.[91] | Solidary liability where P's harm is of one type; proportionately liability where it is of another.[92] | Solidary Liability where P's loss is below a certain threshold level, proportionate liability where it is above it.[93] | Proportionate liability, with broad discretion to revert to solidary liability where it is 'just and equitable' to do so.[94] |

[89] This model applies in some US jurisdictions in cases in which the defendants' liability is several (ie where they have committed independent wrongs), irrespective of the type of harm: *Restatement of Torts* (n 14) §B18 and illustration 3.

[90] This is the basic regime under the US Uniform Apportionment of Tort Responsibility Act, s 5 (as from 2003).

[91] *Restatement of Torts* (n 14) §D18. A model of this sort was suggested as a possibility in cases of economic harm only by the NZ Law Commission, in the form of a limited, minor defendant' exception to solidary liability: NZLC, *Liability of Multiple Defendants* (Rep No 132, 2014), recs 3–5. It has not been implemented.

[92] This approach applies generally in Australia and in some US jurisdictions, with opposite patterns. In Australia, solidary liability hence applies in all cases of personal injury and proportionate liability is confined to cases of property damage and economic loss. By contrast, in the US jurisdictions taking this hybrid approach, solidary liability applies to the economic portion of damages and proportionate liability to the non-economic portion: *Restatement of Torts* (n 14) §E18.

[93] A model limiting proportionate liability to claims of AUD $500,000 or more was originally proposed in Queensland. The final legislation dropped that approach, but incorporated a limited 'consumer plaintiff' exception instead: Civil Liability Act 2003 (Qld), s 28(3)(b). That exception now appears in draft model provisions: Parliamentary Counsel's Committee for the Commonwealth Attorneys-General Standing Council on Law and Justice, *Proportionate Liability Model Provisions* (PCC-386, 26 September 2013), ss 2(3)(b),(c).

[94] This type of approach can be found in the Canada Business Corporations Act RSC 1985 c C-44, s 237.6(1), (2) (which applies in respect of the liability of auditors and others for pure economic loss). A solution of this type is suggested for Australia by McDonald in ch 11 as a possible salve for the ills of the current proportionate liability system.

Each of the solutions identified above allocates the risks of litigation and of defendant insolvency in a slightly different way. In all variants of solidary liability, the 'litigation onus' is on D1, if D1 wishes to avoid total liability for the harm caused, whereas in all systems of proportionate liability, the litigation onus is on P if P is to avoid having to bear the loss of D3's uncollectible share. I confine myself here to a few observations regarding general patterns of distribution and three challenges forming the central focus of the contributions to this book.

## B. Patterns of Distribution

A first point to note is the stark contrast in apportionment strategies between Australian and US jurisdictions, on the one hand, and European jurisdictions, Canada and New Zealand, on the other. The former have slipped from the basic solidary liability rule towards proportionate liability, or have endorsed 'hybrid' systems in which proportionate liability plays a significant part, whereas the latter have held more firmly to the original rule. Why proportionate liability lobbyists have been more active and successful in some jurisdictions than others is a fascinating question beyond the scope of this work. The answer most likely lies in contextual factors, such as litigation culture, local economic conditions, insurance markets, and the nature and strength of the connections between business interests and government legislative programmes. It probably also lies in a different social policy outlook. It has hence been observed that 'solidary liability is so deeply embedded in European systems that … its abolition would amount to a legal revolution of a profoundly "anti-claimant" nature.'[95] In New Zealand, the culture of welfare and plaintiff compensation is strong, the impact of global economic crisis has been less pronounced and the virtual absence of accidental personal injury litigation (owing to the national accident compensation scheme) has meant that there are fewer pressures on defendants in that area of risk.

A second observation relates to the startling array of different criteria – across jurisdictions that admit of some choice – that are regarded as being relevant in determining whether solidary or proportionate liability applies to a particular defendant. These include: (a) the type of harm (physical or economic) suffered by P;[96] (b) whether P was a 'consumer,' or suffered damage falling below a particular threshold value;[97] (c) whether or not P was also at fault in respect of the harm;[98] (d) the extent of D's responsibility for the harm, relative to other defendants (whether or not it falls below a magic threshold percentage, or – the terms chosen by the New Zealand Law Commission – whether the defendant is just a

[95] Rogers (n 14) 288.
[96] Hybrid model variant 1 and n 91.
[97] Hybrid model variant 2 and n 93.
[98] Solidary liability model variant 3, Proportionate liability model variant 2 and nn 88, 90.

'minor' defendant);[99] (e) whether the defendant was acting in concert with the other defendants;[100] (f) whether the defendant was vicariously responsible for another defendant;[101] (g) whether a defendant owed P a primary legal duty to protect P against the wrongs of other defendants;[102] and (h) whether or not the defendant's own wrong was intentional.[103] There are many other, more specific variables and limitations.

A particularly intriguing contrast with respect to these criteria between the US and other jurisdictions is that Americans are more ready to make D only proportionately liable for non-economic, than economic harm. Why this is so is unclear, but it may in the end again come down to politics. Damages for non-economic harm are customarily much higher in the US than in other jurisdictions and therefore more likely to have been targeted by defendant lobbying groups. If one were to divide the risks in accordance with moral interests, most people would, I suspect, conclude that if P had to go uncompensated for something, it should be for injury to her pocket, not her person. Another questionable criterion in the above list is whether or not P was herself in some measure responsible for her own harm (as in solidary liability, variant 3, in the table). Since this will already have been taken into account and her damages already reduced accordingly as against all defendants through deductions for her contributory negligence, using her responsibility a second time as a reason to assign to her part of the risk of D3's insolvency is surely double-counting. For this reason, I suggest, there is more merit in the second variant of solidary liability (endorsed by David Cheifetz later in this volume) than in either the third identified variant of solidary liability, or the second variant of proportionate liability, both of which allow for this odd type of double jeopardy effect.

## C. Challenges

One problem addressed by both David Cheifetz in chapter ten and Geoff McLay in chapter thirteen relates to the inadequate reach or operation of contribution rules in some jurisdictions in which solidary liability is the basic governing rule. Cheifetz astutely notes that, in cases involving multiple defendants (D1, D2, D3), the current Canadian machinery appears to leave the risk of D3's insolvency to fall on a single contribution claimant (D1), when the fairer solution would be to split the risk proportionately between D1 and D2. That solution, he convincingly suggests, is probably already available if courts interpret the legislation correctly in accordance with equitable contribution principles. In New Zealand, the defects of

[99] Hybrid model, 'Basic Regime' and n 91.
[100] See text to n 50 above.
[101] ibid.
[102] ibid.
[103] ibid.

the relevant legislation are more serious, because it formally still limits contribution claims to cases involving joint tortfeasors, when it clearly needs to be updated to allow claims between all defendants liable in respect of the same harm. That move is mandated by the logic of unjust enrichment underpinning contribution claims. Courts have made good the defects in this instance by bypassing the legislation and using equitable contribution principles instead, which produces just distributions, but as McLay points out, it leaves the relevant law unwritten and therefore uncertain.

A second, associated, problem identified by both McLay and McDonald lies in motivating governments to reform apportionment rules. The fact that they are dragging their feet in fixing the chaos of current proportionate liability legislation in Australia is particularly ironic, considering that it was they that created the mess by rushing in such precipitous fashion to their own, random solutions in the first place. McDonald makes a series of sensible suggestions for resolving some of the uncertainties and inconsistencies, but refers with frustration to the lack of governmental appetite for sorting out the mess. Some of the more self-interested reasons why government might not be keen to peel back the reforms have already been mentioned above, but it is probably also true to say that there are simply too few votes in private law generally to make even more moderate adjustments an interesting project. The upshot is that in both New Zealand and Australia, it is currently being left to courts to sort out the irregularities of apportionment rules as best they can. They are making some worthy contributions in this regard, but their operations can only be limited and in many instances their hands are now tied.

A third and final question posed by McLay is this – are proportionate liability reforms simply answering the wrong question? If what has produced them are real pressures on particular defendant groups that have been created by increased shared liabilities, or wider primary duties in respect of pure economic loss, then would it not be better to tailor the solutions to the actual source of the relevant problems? One possibility he accordingly suggests is to curb the liabilities of public authorities for pure economic loss that have given rise to concern in New Zealand. Another would be to cap the liabilities of particular defendant groups where they can prove that these liabilities are genuinely causing social problems. This is not, of course, to rule out all possibility of 'proportional' liability for multiple defendants, for in some instances this can be a rational and fair response to insuperable difficulties that a plaintiff may face in proving which member of a group of defendants is responsible for causing harm that has undoubtedly been caused by one of them. In chapter twelve, Rob Merkin and Jenny Steele hence convincingly defend the form of partial liability endorsed by English law in *Fairchild* and *Barker* as fair and appropriate in both tort and insurance law. The point about this form of apportionment solution is that it actually works to P's *advantage* by adjusting the way in which normal causal rules operate and assigning the risk of exceptional scientific uncertainties to each defendant in accordance with the extent to which he or she individually exposed P to the risk of the relevant harm. This is morally very different to the type of defendant-oriented 'proportionate' liability solution

set out above, which operates to the *detriment* of P, even when P has established that *every* defendant in the group has wrongly caused her damage. It would hence be perfectly rational to scrap existing 'proportionate' liability reforms entirely, whilst retaining the type of partial liability solution found in *Barker* in exceptional instances.

## VII. Conclusions

This book is not the final word on apportionment, nor even the final paragraph. The field is vast and the rules complicated, even within non-federal legal systems. The reader will have the sense that fierce debates are still to be had and that the complexities of the field are not simply technical, but moral and political. If there are three lessons to be taken forward from this, starting point, they are nonetheless these:

First, there is clearly no singular logic to the sorts of apportionment in which private law engages and it is often harmful to pretend that there is. It is hoped that the above investigation will encourage greater, more explicit and more careful discrimination between the different types of 'sharing' solution and their various justifications. 'Compromise' may be the right approach both ethically and politically in some instances, but not in others. Everything is fine-grained. The most important distinction to respect in this way is that between, on the one hand, sharing responsibility fairly between plaintiffs and defendants and, on the other hand, sharing liability fairly between defendants. Although that distinction has been deliberately obfuscated in the course of recent proportionate liability reforms, it must now be kept very clearly in mind.

Secondly, different types of apportionment rule engage in very different trade-offs between sensitivity to the distributive criteria that underpin them, on the one hand, and systemic sophistication, or complexity on the other. I have suggested above that where sharing responsibility is ethically justified, bluntness should not be preferred simply for the additional certainties it may bring. On the other hand, systems in which the criteria of distribution are unstated, or in which the choice between all or nothing solutions and sharing ones is left to an open and unarticulated judicial discretion are not easy to accept, especially (but not only) in commercial contexts. The very minimum standard is that the criteria of distribution be clearly articulated and make normative sense. There is space in this regard for making stronger connections in many instances between the reasons for imposing shared liabilities and the ways of then sharing them. Beyond this, any process that weighs and balances a number of different normative criteria in the process of apportionment will necessarily entail a degree of unpredictability. That is an inescapable fact and should not, perhaps, give rise to an undue sense of insecurity.

The third, final, and rather depressing message, is that politics have not helped in recent years to create the morally rational apportionment solutions that we deserve, or indeed to fix up the law's technical problems. They have too often been used as a neo-liberal lever for redistributing risk back to victims and away from commercial interests, for introducing partialism where it is not ethically warranted; and, even worse, perhaps, for reintroducing 'nothing' as the default apportionment solution in some instances in which 'something' is the right moral result. The same deficits in the political process that spawned this development are now responsible for obstructing the adjustments needed to fix it. In the meantime, as always, it is our judges that have been left to hold the can.