# PROPORTIONATE LIABILITY FOR BREACH OF TRUST UNDER THE *CIVIL LIABILITY ACT*: AN OPIATE ON THE CONSCIENCE OF TRUSTEES

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*This article considers the impact that part 4 of the Civil Liability Act 2002 (NSW) may have on the internal workings of the office of trusteeship. It is argued that where more than one trustee has been involved in an imprudent breach of trust that has caused loss, the claims are likely to be apportionable under part 4, with the effect that the trustees are no longer jointly and severally liable for the loss, each being liable severally only, and each liable only for the proportion of the loss for which they are responsible. It is suggested that this conclusion indicates the potential for the statutory regime to operate as something of an opiate on the conscience of trustees, undermining the incentive structures that equitable doctrine traditionally deployed to keep trustees up to their duty.*

## I INTRODUCTION

This article is concerned with investigating whether, and if so how, the proportionate liability scheme contained in part 4 of the *Civil Liability Act 2002* (NSW) ('*Civil Liability Act*')[1] has the potential to alter the internal workings of the office of trusteeship. Other commentators have made observations about how proportionate liability might operate where third parties have participated in a breach of trust in some way, thereby attracting ancillary liabilities such as knowing receipt or knowing assistance liability.[2] The concern here is more with the core

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1 Similar points could potentially be made regarding the statutory proportionate liability regimes in other states, with appropriate modifications for variations between those regimes. For discussion of some of the variations between different states' proportionate liability schemes, see Barbara McDonald, 'Reforming a Reform: Why Has It Been So Hard to Reform Proportionate Liability Reforms?' in Kit Barker and Ross Grantham (eds), *Apportionment in Private Law* (Hart Publishing, 2018) 267, 276 ff ('Reforming a Reform'). See also *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2024) 98 ALJR 880, 928–9 [246] (Steward J) ('*Tesseract International*').

2 See, eg, Alison Gurr, 'Accessory Liability and Contribution, Release and Apportionment' (2010) 34(2) *Melbourne University Law Review* 481. See also, discussing the same point in the United Kingdom, Charles Mitchell, 'Apportioning Liability for Trust Losses' in Peter Birks and Francis Rose (eds), *Restitution and Equity* (Mansfield Press, 2000) vol 1, 211.

operation of the office of trusteeship itself, and the ways in which the statutory reforms have altered the incentive structure for trustees to perform their core obligations of stewardship of the trust property.

Given that is the focus of attention, the investigation is necessarily concerned with situations where the trust is run by more than one trustee at once, as the issue of proportionate liability between trustees – and hence its impact on the duties of those trustees – cannot arise if there is only one trustee.[3] However, as Joshua Getzler has observed, that scenario 'has always been a topic of great practical importance, since the vast majority of express trusts have involved multiple rather than single trustees'.[4]

It is suggested here that where more than one trustee has been involved in conduct that amounts to a breach of the trustees' obligations to act with reasonable care and diligence, and that has caused loss, the beneficiaries' claims are likely to be apportionable under part 4. That will mean that the trustees are not jointly and severally liable for the loss as they would have been previously; instead, each is liable only severally, and each is liable only for the proportion of the loss for which they are responsible. It is suggested that this conclusion indicates the potential for the statutory regime to be something of a Trojan horse that could undermine the incentive structures that equitable doctrine traditionally deployed to enforce its expectations that trustees act diligently and prudently.

In order to sustain that argument, the discussion is divided into three main Parts. Part II provides an outline of the traditional principles of trust law regarding trustee liability for breaches of trust where more than one trustee participated in the breach, with a view to identifying the reasons for the law having adopted a stringent approach to joint and several liability and contribution between trustees. Part III then considers the potential application of the proportionate liability regime in the *Civil Liability Act* to claims against trustees, which in turn permits observations to be made in Part IV as to the ways in which the statutory regime may have altered the traditional equitable principles, thereby potentially altering the office of trusteeship itself.

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3 Similar issues could arise where there is a single corporate trustee and the corporate trustee is run by more than one director, but the liability of those directors would be determined more by reference to corporate law (and the enforcement of the duties that the directors owe to the corporation) than trust law. Related issues could also arise where trustees are replaced and either the original trustees or the successor trustees seek to share the burden of liability for breach of trust with the other group. Those complications are beyond the scope of this article.

4 Joshua Getzler, 'Laying the Axe to the Root of the Tree? Shielding a Co-trustee from Liability' in Paul S Davies, Simon Douglas and James Goudkamp (eds), *Defences in Equity* (Hart Publishing, 2018) 183, 189. Further, trustees cannot retire from a trust under the statutory power in New South Wales ('NSW') unless there will, after the retirement, be at least two trustees remaining (or the NSW Trustee or a trustee company): *Trustee Act 1925* (NSW) s 8(2) ('*Trustee Act*').

## II TRADITIONAL TRUST PRINCIPLES

It is well-established that the doctrine of vicarious liability has no application to trustees: where multiple people occupy the office of trustee, one trustee is not directly responsible for a breach of trust committed by another trustee in that role.[5]

### A Liability of Various Trustees

However, it is equally trite law that where one trustee has committed a breach of trust – for example, by misapplying trust funds to someone who was not entitled to receive them – another trustee of the trust, who did not themself cause that payment to be made, will nonetheless have committed their own breach of trust, and thus be liable, if they somehow assisted or enabled the first trustee to misconduct themself.[6] Trustees are generally expected to act jointly, as a solidary group: as Street J put it, 'trustees must act unanimously. They do not hold several offices – they hold a single, joint, inseparable office.'[7] Thus, where one trustee has done something that amounts to a breach of their obligations as trustee, the other trustees are likely also separately to have committed breaches of trust and be liable, either because they joined in the first trustee's wrongful act or decision, or for having failed to take steps that would prevent the misconduct from occurring.[8]

In this way, despite the lack of vicarious liability, Lord Langdale MR was able to say that 'a trustee who stands by and sees a breach of trust committed by his co-trustee, becomes responsible for that breach of trust'.[9] So, in *Lewis v Nobbs* ('*Lewis*'),[10] two trustees – Nobbs and Gresham – invested trust funds in Russian railway bonds, which was a proper investment for them to make. The bonds were transferable by delivery, Nobbs and Gresham agreeing that each should hold half of them. Gresham became insolvent and absconded, apparently having already disposed of his half of the bonds and applied the proceeds to his own use. Nobbs obviously remained responsible for the half of the bonds that he held, but Hall V-C considered that he also 'did not discharge his duty in allowing his co-trustee to retain possession of one half of the bonds, and the course pursued enabled the co-trustee to improperly deal with them. The duty of the trustees was to make

5 *Townley v Sherborne* (1634) Bridg J 35; 123 ER 1181, 1183; HW Seton, *Forms of Judgments and Orders in the High Court of Justice and Court of Appeal*, ed Arthur Robert Ingpen, Frederic Turner Bloxam and Henry G Garrett (Stevens & Sons, 7th ed, 1912) vol 2, 1084; JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) 543–4 [22-09].

6 *Thompson v Finch* (1856) 22 Beav 316; 52 ER 1130, 1132 (Romilly MR) ('*Thompson Trial*').

7 *Sky v Body* (1970) 92 WN (NSW) 934, 935. See also *Luke v South Kensington Hotel Co* (1879) 11 Ch D 121, 125–6 (Jessel MR) (Court of Appeal); *Dawson v Dawson* [1945] VLR 99, 103 (O'Bryan J); *Re Allen-Meyrick's Will Trusts; Mangnall v Allen-Meyrick* [1966] 1 WLR 499, 505 (Buckley J) (High Court, Chancery Division). It is, of course, possible for the trust terms to permit trustees to act by majority.

8 Getzler (n 4) 187–8.

9 *Booth v Booth* (1838) 1 Beav 125; 48 ER 886, 888 (Lord Langdale MR) ('*Booth*'). See also *The Charitable Corporation v Sutton* (1742) 2 Atk 400; 26 ER 642, 644–5 (Lord Hardwicke LC).

10 (1878) 8 Ch D 591 ('*Lewis*').

an investment in the names of both.'[11] Nobbs' own breach of duty meant he was 'liable for the illegal dealing with the moiety of the bonds of his co-trustee'.[12]

Similarly, *Thompson v Finch* ('*Thompson*')[13] affords another example of one trustee being held liable for acting in a way that facilitated a breach of trust committed by a co-trustee. One trustee, Finch, allowed trust funds to be received by his co-trustee, Hayward, alone. Hayward, who was a solicitor, informed Finch that the funds had been invested on mortgage security, with the beneficiary's agreement. When Hayward became insolvent, Finch was held liable to replace the trust funds: the fact that he acted in good faith, believing what Hayward had said, did not exonerate him from seeing that the investment had actually been made,[14] and that it had been made properly in the names of both trustees.[15] In other words, 'an inactive trustee may himself be a wrongdoer … diligence on his part may well have prevented the error or fraud of his fellow'.[16]

This position is qualified, to some degree, by section 59(2) of the *Trustee Act 1925* (NSW) ('*Trustee Act*'), which provides that a trustee is not liable for the 'neglects, or defaults … of any other trustee … unless the same happens through the trustee's own wilful neglect or default'.[17] While the concept of 'wilful neglect or default' in this statutory context has been contested,[18] it is now considered to mean that a trustee whose breach lays in failing to protect the trust property from defalcations by his co-trustees[19] is only liable if 'he is conscious that, in doing the act which is complained of or in omitting to do the act which it is said he ought to

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11 Ibid 594.

12 Ibid 595. See also *Matthew v Brise* (1843) 6 Beav 239; 49 ER 817, 820 (Lord Langdale MR) ('*Matthew*').

13 *Thompson Trial* (n 6), affd (1856) 8 De G M & G 560; 44 ER 506 ('*Thompson Appeal*').

14 *Thompson Trial* (n 6) 1133 (Romilly MR).

15 *Thompson Appeal* (n 13) 507–8 (Knight Bruce LJ).

16 George Gleason Bogert, 'The Liability of an Inactive Co-trustee' (1921) 34(5) *Harvard Law Review* 483, 489 <https://doi.org/10.2307/1329470>. See also *Devaynes v Robinson* (1857) 24 Beav 86; 53 ER 289, 293 (Romilly MR) ('*Devaynes*'); *Cowell v Gatcombe* (1859) 27 Beav 568; 54 ER 225; *Wentworth v Tompson* (1859) 2 Legge 1238, 1240 (Stephen CJ for the Court). Indeed, in one case, Kekewich J suggested that inaction by a trustee would amount to dishonesty (although he accepted this was not dishonesty in the usual sense of the word): *Re Second East Dulwich 745th Starr-Bowkett Building Society* (1899) 68 LJ Ch 196, 198.

17 A version of this statutory provision was first enacted in England in section 31 of the *Law of Property Amendment Act 1859*, 22 & 23 Vict, c 35 ('*Property Amendment Act*'). It was re-enacted in section 24 of the *Trustee Act 1893*, 56 & 57 Vict, c 53 and section 30(1) of the *Trustee Act 1925* (UK), but the latter provision has now been repealed: Paul Matthews et al, *Underhill and Hayton Law of Trusts and Trustees* (LexisNexis Butterworths, 20th ed, 2022) 1257 [100.8].

18 See, eg, JE Stannard, 'Wilful Default' (1979) 43 *Conveyancer and Property Lawyer* 345. The first instance of the provision (in section 31 of the *Property Amendment Act* (n 17) in England) suggests that it was only intended to reflect the traditional law that a trustee is not vicariously liable for breaches by other trustees, but only for his own breach: see, eg, *Re Brier; Brier v Evison* (1884) 26 Ch D 238, 243 (Lord Selborne LC) (Court of Appeal) ('*Brier*').

19 The provision does not mean 'that no trustee is ever liable for breach of trust unless the breach is occasioned by his own wilful default … the words are confined to losses for which it is sought to make the trustee liable occasioned … by reason of the wrongful acts or defaults of *another trustee*': *Re Vickery; Vickery v Stephens* [1931] 1 Ch 572, 582 (Maugham J) (emphasis added) ('*Vickery*'). See also *Wilkinson v Feldworth Financial Services Pty Ltd* (1998) 29 ACSR 642, 696 (Rolfe J) (NSW Supreme Court) ('*Wilkinson*').

have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not'.[20]

That standard was applied by Long Innes J in *Dalrymple v Melville*.[21] Melville and Blackmore were joint executors and trustees of an estate. They decided to sell shares from the estate, and so Melville signed transfer forms in blank and left Blackmore, who was a solicitor, to arrange the sale. Melville gave no instructions to the share brokers who conducted the sale regarding the proceeds. He also allowed bearer cheques to remain in Blackmore's possession on an undertaking from Blackmore that he would exchange them for bank cheques. Melville admitted that he knew it was his duty to protect the trust estate, and he did not suspect Blackmore to be dishonest, but Long Innes J held that when Blackmore stole the proceeds of sale cheques, Melville had been negligent in omitting to take precautions that were 'perfectly obvious … to any person in the least degree concerned to see that the [assets] were protected',[22] and held that he 'must have known that he was negligent … [as] he knew he was omitting to perform his duty and was content to take the risk of such omission'.[23] Melville was therefore denied the protection of section 59(2). In other words, passive indifference can still amount to 'wilful default' for these purposes,[24] and so the trustee is liable notwithstanding section 59(2), if the trustee was conscious that they should be taking more care, or was reckless in that regard.[25]

### B Joint and Several Liability

Where more than one of the trustees committed a breach of trust, the liability of each was a joint and several (or solidary) liability to repair the consequences of the breach.[26] While early practice in the Court of Chancery generally required joinder of all trustees to an action for breach,[27] that changed in 1841,[28] such that beneficiaries could potentially proceed against one trustee in the absence of the others.[29] This was not always permitted, and unfortunately '[n]o clear principle [was] laid down determining when all the trustees [were] necessary parties, and when one may be proceeded against without the others; the Court appears rather to have exercised a discretion'.[30] It was tolerably clear that all trustees were required where a general account of the trust was sought,[31] but where the action was in respect of a particular

20 *Vickery* (n 19) 583 (Maugham J). See also *Wilkinson* (n 19) 697–704 (Rolfe J); *Armitage v Nurse* [1998] Ch 241, 252 (Millett LJ) (Court of Appeal) ('*Armitage*'); *Segelov v Ernst & Young Services Pty Ltd* (2015) 89 NSWLR 431, 459 [150] (Gleeson JA).

21 (1932) 32 SR (NSW) 596 ('*Dalrymple*').

22 Ibid 603.

23 Ibid 604–5.

24 *McLauchlan v Prince* [2001] WASC 43, [14] (Master Sanderson).

25 See, eg, *Wilkinson* (n 19) 702–4 (Rolfe J).

26 *Fletcher v Green* (1864) 33 Beav 426; 55 ER 433, 434 (Romilly MR) ('*Fletcher*').

27 Cecil CM Dale et al, *Daniell's Chancery Practice* (Stevens and Sons, 7th ed, 1901) vol 1, 201, 212.

28 Order of Lord Cottenham LC (Court of Chancery, 26 August 1841) [XXXII] (the text of the order can be found in S Atkinson, *Practice of the Court of Chancery* (S Sweet, V & R Stevens and G S Norton, 1842) lxxxi). For discussion, see the note of the reporter, Charles Beavan, in *Devaynes* (n 16) 294–5.

29 Dale et al (n 27) vol 1, 201, 212, 215.

30 Ibid vol 1, 212.

31 Ibid vol 1, 213; Seton (n 5) 1095. See also *Re Jordan; Hayward v Hamilton* [1904] 1 Ch 260, 263 (Byrne J).

breach of trust only, the beneficiaries could potentially pursue whichever trustee was more likely to be able to satisfy the resulting judgment.[32] Thus, in the two cases discussed above, Finch and Nobbs were both liable to pay the entire sum needed to repair the breach of trust, notwithstanding the insolvencies of their co-trustees.[33]

### C Contribution (and Indemnity)

The joint and several liability of trustees who had committed breaches of trust assisted the beneficiaries in recouping their losses, as it meant they were unaffected by 'internal questions of relative fault'[34] between the wrongdoing trustees. That joint and several liability could be harsh for trustees, particularly 'a trustee whose personal circumstances enabled him to make good the loss, and [who] would naturally therefore be sued by the beneficiaries, leaving his poorer – but still liable – colleagues untouched'.[35] As a means to alleviate that potential harshness, equity recognised that '[i]f any one of the trustees should pay the whole, he may come against the others for contribution'.[36]

The right to contribution was normally a right to *equal* contribution from the other wrongdoing trustees, consistently with equity's general preference for equality.[37] Romilly MR's judgment in *Fletcher v Green* suggests that contribution between the trustees might not necessarily be equal,[38] but the suggestion was no more than that, as no contribution claim had yet been made and so he could not

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32 *Coppard v Allen* (1864) 4 Giff 497; 66 ER 802, 805 (Stuart V-C) ('*Coppard Trial*'); *Coppard v Allen* (1864) 2 De G J & S 173; 46 ER 341, 343–4 (Turner LJ) ('*Coppard Appeal*'); *Ex parte Adamson; Re Collie* (1878) 8 Ch D 807, 820 (James and Baggallay LJJ) (Court of Appeal) ('*Adamson*'); *Wilson v Rhodes* (1878) 8 Ch D 777, 786 (Fry J); *Birks v Micklethwait* (1864) 33 Beav 409; 55 ER 426, 427 (Romilly MR) ('*Birks*'); *Re Harrison; Smith v Allen* [1891] 2 Ch 349, 354 (Chitty J). See also, regarding the joint and several liability of third-party accessories to a breach of trust, *Wilson v Moore* (1833) 1 My & K 126; 39 ER 629, 635–7 (Leach MR), affd (1834) 1 My & K 337; 39 ER 709 ('*Wilson Appeal*'); *Blyth v Fladgate* [1891] 1 Ch 337, 353 (Stirling J) ('*Blyth*').

33 In *Thompson v Finch*, the Court allowed Finch to prove in Hayward's insolvency, despite Hayward already having been discharged before the judgment was declared: see *Thompson Trial* (n 6) 1134 (Romilly MR); *Thompson Appeal* (n 13) 508 (Knight Bruce LJ). The point made in the text stands, in the sense that the plaintiff beneficiary could recover fully from Finch.

34 Chantal Stebbings, *The Private Trustee in Victorian England* (Cambridge University Press, 2002) 121.

35 Ibid.

36 *Fletcher* (n 26) 434 (Romilly MR). See also *Trutch v Lamprell* (1855) 20 Beav 116; 52 ER 546, 547 (Romilly MR) ('*Trutch*'); *Birks* (n 32) 427 (Romilly MR). In *Birks* (n 32), the right of contribution is discussed in terms suggesting a form of subrogation by the trustee seeking contribution (and who has paid the liability) to the rights that the beneficiaries had against the other trustees: at 427 (Romilly MR).

37 See, eg, *Dering v Earl of Winchelsea* (1787) 1 Cox 318; 29 ER 1184, 1186 (Eyre CB) (Court of Exchequer), applied to co-trustees in *Robinson v Harkin* [1896] 2 Ch 415, 426 (Stirling J) ('*Robinson*') and *Bacon v Camphausen* (1888) 58 LT 851, 852 (Stirling J) (High Court, Chancery Division) ('*Bacon*'). See also *Sky Channel Pty Ltd v Tszyu [No 2]* [2000] NSWSC 1150, [7] (Young J) ('*Sky*'). *Dering v Winchelsea* concerned co-sureties. The analogy with trusts is not immediately obvious, given co-sureties share coordinate liability because of their agreement to cover the primary liability rather than because they have all (separately) acted in breach of duty. However, the general justice of equal contribution is readily appreciated. 'There is a clear risk of injustice arising if a person who is liable for the same damages or expense does not bear their share of the burden. Accordingly, if any one trustee is sued, he or she may claim a contribution from any other trustee who is also liable': *Selkirk v McIntyre* [2013] 3 NZLR 265, 269 [17] (Katz J) ('*Selkirk*').

38 *Fletcher* (n 26) 434.

determine whether there was any priority of liability. There is scarce other evidence in the case law of anything other than equal contribution between co-trustees, apart from a small number of specific situations where one trustee was required to indemnify his co-trustee *completely* against their shared liability.[39] It seems that this was a binary question: where none of those specific situations obtained, the general right of (equal) contribution would apply.[40]

Where one or more of the trustees were insolvent, and thus unable to contribute, the solvent trustees would bear the burden of contribution, thereby further protecting, as far as possible, the trustee who was chosen by the beneficiaries to repair the breach. Thus, for example, in *Bacon v Camphausen* ('*Bacon*'),[41] three trustees – John, Anne and Charles – made a poor investment and were held liable when the beneficiaries sued. Anne and Charles failed to pay the sums ordered, and so the liability was satisfied by John's estate.[42] The estate then obtained a *one third* contribution order against Charles, but he became insolvent and so they recovered nothing from him. The estate therefore sought, and was given, an order against Anne[43] requiring her to contribute *half* of the amount that the estate had paid to cover the liability to the beneficiaries.

## D Culpability and Incentives

The comparative culpability of the defendant trustees appears not to have been taken into account in these cases[44] – certainly, lack of moral impropriety on a defendant trustee's part was no defence for that trustee. In *Thompson*, for example, Romilly MR recognised 'it is quite clear that Finch is perfectly free from

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39 The three main situations were:
(a) Where one trustee was a solicitor and the other relied on his expertise as such: *Lockhart v Reilly* (1856) 25 LJ Ch 697, 702; *Wilson v Thomson* (1875) LR 20 Eq 459, 461 (Hall V-C); *Head v Gould* [1898] 2 Ch 250, 255 (Kekewich J); *Blyth* (n 32) 365–6 (Stirling J); *Re Linsley; Cattley v West* [1904] 2 Ch 785; *Re Partington; Partington v Allen* (1887) 57 LT 654; *Re Turner; Barker v Ivimey* [1897] 1 Ch 536 ('*Turner*');
(b) Where a trustee derived personal benefit from the breach: *Lingard v Bromley* (1812) 1 Ves & B 114; 35 ER 45, 46 (Grant MR) ('*Lingard*'); *Chillingworth v Chambers* [1896] 1 Ch 685, 702 (Kay LJ) (Court of Appeal) ('*Chillingworth*'); *Wynne v Tempest* [1897] 1 Ch 110, 113 (Chitty J); *Goodwin v Duggan* (1996) 41 NSWLR 158, 166 (Handley and Beazley JJA) (Court of Appeal) ('*Goodwin*') (although indirect benefit was insufficient for this purpose: *Butler v Butler* (1877) 7 Ch D 116, 119 (James LJ) (Court of Appeal)); and
(c) Where a trustee acted fraudulently: at 119 (James LJ); Arthur Robert Ingpen, *A Concise Treatise on the Law Relating to Executors and Administrators* (Stevens and Sons, 2nd ed, 1914) 427.
Where a trustee was implicated in the breach and happened also to be a beneficiary, that trustee could not seek contribution from other trustees until he had paid more than the value of his beneficial share in the trust, but could do so after that threshold had been surpassed: *Chillingworth* (n 39) 710 (Kay LJ).

40 *Robinson* (n 37) 425 (Stirling J); *Sky* (n 37) [8] (Young J); *Selkirk* (n 37) 269 [20], 274 [45] (Katz J).

41 *Bacon* (n 37).

42 John died two years after the investment was made. The plaintiffs in the contribution action were trustees of a marriage settlement created when John's wife re-married; that settlement included John's estate.

43 Given the date of the relevant conduct and the rules of coverture, the order was actually made against the trustee and her husband. See, eg, *Bahin v Hughes* (1886) 31 Ch D 390, 394 (Cotton LJ) (Court of Appeal) ('*Bahin*'). The doctrine of coverture was changed by the *Married Women's Property Act 1882*, 45 & 46 Vict, c 75.

44 *Selkirk* (n 37) 268–9 [17] (Katz J).

all improper motive', but he was held liable on the basis that 'he has undertaken to perform a trust and has not performed it'.[45] In *Bacon*, Anne and her husband had been resident abroad since their marriage, before the poor investment was made, and had made an arrangement with the other trustees 'that they should not be troubled about the trust business',[46] and yet they were held liable to contribute half of what John's estate had paid to cover the liability to the beneficiaries.[47]

Some doubt as to the irrelevance of relative moral impropriety between defendant trustees might be thought to arise from Kay LJ's judgment in *Chillingworth v Chambers*, where he said that '[i]t seems to be essential to this claim for equal contribution that the trustees should be *equally to blame* for the breach of trust, and that neither of them should have derived an exclusive benefit from the breach of trust'.[48] It is suggested, however, that one should not read too much into his reference to equality of blame beyond a requirement that both trustees had committed a breach of trust. The focus of the Court of Appeal's decision was on whether the plaintiff trustee was entitled to contribution from the defendant trustee in circumstances where the plaintiff was also one of the beneficiaries of the trust and had concurred or acquiesced in the breach. The judges all decided that the plaintiff had no right to contribution until he had paid more than the value of his beneficial interest. Where Kay LJ spoke in terms of the trustees being 'equally to blame', Lindley LJ and AL Smith LJ both used the Latin '*in pari delicto*',[49] but none of them made any attempt to weigh the relative impropriety of the trustees' respective blames. The stronger indication in the case law was that 'one trustee is treated *in pari delicto* with his co-trustee, although the latter may have taken the more active part in the conduct of the particular business which led to the loss'.[50]

This approach was considered important in creating an incentive structure for trustees which would encourage the diligent attendance of each trustee to his duty. In *Lingard v Bromley*,[51] for example, the plaintiff and defendants were assignees under a commission of bankruptcy. They mistakenly thought the commission invalid and refused to join in a conveyance by the bankrupt's mortgagees, with the ensuing delay causing the property to be sold for less than the mortgagees had initially arranged. The plaintiff made good the loss, and sought contribution from the defendants, who argued that the plaintiff had been the principal decision-maker in the bankruptcy commission, and they had merely concurred for the sake of form. In response to that argument, counsel for the plaintiff – Sir Samuel Romilly – argued that '[i]f one Trustee by acting and giving Advice to another loses his

45 *Thompson Trial* (n 6) 1134. See also *Booth* (n 9) 888 (Lord Langdale MR). See also Lord Brougham LC's discussion of the liability of accessories to a breach of trust in *Wilson Appeal* (n 32): 'The moral impropriety, indeed, if any, is extremely slight … But these circumstances make no difference at all in the legal contemplation of the proceedings': at 715.

46 *Bacon* (n 37) 852 (Stirling J).

47 A trustee who wishes to be relieved of his or her duties should retire. On the mechanisms for retirement, see Heydon and Leeming (n 5) 314–15 [15-76]–[15-79].

48 *Chillingworth* (n 39) 701–2 (emphasis added).

49 Ibid 698 (Lindley LJ), 707 (AL Smith LJ).

50 *Robinson* (n 37) 425 (Stirling J).

51 *Lingard* (n 39).

Right to Contribution, the Effect *would be a Premium to Trustees to be idle*; as the most active would incur the Responsibility'.[52] Grant MR accepted that argument with alacrity:

> The Defence is of a Kind, which a Court of Justice is very unwilling to listen to: that, having undertaken a Trust, they abdicated all Judgment of their own in the Performance of it; and did whatever the Plaintiff desired … *Nothing could be more mischievous than to hold, that Trustees may thus act; and avoid Responsibility* by throwing the Burthen upon the Person, in whom they have reposed this blind Confidence.[53]

A similar concern is evident in the Court of Appeal's decision in *Bahin v Hughes* ('*Bahin*').[54] A testator left property to three of his daughters, Eliza, Sarah and Frances, on trust for the benefit of another daughter, Catherine, and her children. Eliza 'managed the business as acting trustee'[55] and advised her co-trustees to invest in mortgage securities; the other trustees eventually agreed to that course, and allowed the investment funds to be paid to Eliza and James Burden (who had married Sarah). Eliza and James reinvested the funds on leasehold mortgages. These investments were unauthorised, as the leases were chattels real and thus the mortgages were not real securities. The security proved insufficient, so the beneficiaries sued. James and Sarah did not defend the litigation. Frances had married Edward, and they claimed an indemnity from Eliza on the basis that she had been the active trustee. That argument was rejected by Kay J at first instance,[56] and by the Court of Appeal. Cotton LJ observed that the trustees had failed to take care that the money was properly invested, and there was no basis for distinguishing Frances and Edward from Eliza in that regard. He pointed out that Edward had been informed of the leasehold investment in November and had done nothing about it until the following May. Even accepting that Eliza was the active trustee, he said

> it *would be laying down a wrong rule* to hold that where one trustee acts honestly, though erroneously, the other trustee is to be held entitled to indemnity who by doing nothing *neglects his duty more than the acting trustee* … the money was lost just as much by the default of Mr [Edward] *Edwards* as by the innocent though erroneous action of his co-trustee, Miss [Eliza] *Hughes*. All the trustees were in the wrong, and *everyone is equally liable* to indemnify the beneficiaries.[57]

Bowen LJ held some doubt about this, but insufficient to move him to dissent formally.[58] Fry LJ, in contrast, was even clearer than Cotton LJ in his rejection of the attempt by Frances and Edward to avoid liability:

> In my judgment the Courts ought to be very jealous of raising any such implied liability as is insisted on [by a 'passive' trustee against an 'active' trustee], because if such existed it *would act as an opiate upon the consciences of the trustees*; so

52 Ibid 45 (emphasis added).
53 Ibid 46 (emphasis added).
54 *Bahin* (n 43).
55 Ibid 391.
56 Ibid 392.
57 Ibid 396 (emphasis added).
58 Ibid. Before he was appointed to the Court of Appeal, Bowen LJ had sat in the Queen's Bench Division. Cotton and Fry LJJ had more experience in Chancery matters, as Bowen LJ acknowledged in his judgment: 'my Brethren … are more familiar with these matters than I can possibly be': at 396–7.

> that instead of the *cestui que trust* having the benefit of several acting trustees, *each trustee would be looking to the other or others for a right of indemnity, and so neglect the performance of his duties*. Such a doctrine would be against the policy of the Court in relation to trusts.[59]

As Fry J had earlier said in *Rodbard v Cooke*:

> It may be stated as a general rule of law, that where there are two trustees, and one of them places a fund so that it is under the sole control of the other, if the money is misapplied by that other, both are equally liable. *The object of having two trustees is to double the control over the trust property*, and when one trustee thinks fit to give the other the sole power of dealing with the trust property *he defeats that object and becomes himself responsible*.[60]

Similarly, Romilly MR had noted that

> [i]t is constantly argued by counsel, but the conclusion is as constantly rejected by the Court, that a person who acts is not an active trustee, and is not liable, because he has only acted for conformity's sake. It is a contradiction in terms to say that a trustee who acts is not an active trustee …[61]

While some have considered this harsh where a trustee was inactive,[62] the very point of the doctrine 'has been to afford a maximum degree of security and protection to the interests of beneficiaries of a trust estate. … The law does not distinguish between active and passive trustees',[63] just as it draws no distinction between 'the commission of a breach of trust, which involves activity … [and] breach of trust [that] arises from the want of doing some act'.[64] As Lord Langdale MR said, in *Booth v Booth*, of an executor who had proved the will but apparently considered that he had not thereby undertaken any duty:

> [T]he law will not permit a party to neglect the duty which, by proving the will, he has undertaken. … There is no corrupt motive … but he undertook the performance of a duty which he did not perform. This is no small blame: a man cannot be allowed to neglect a duty which he has undertaken.[65]

The duty that each trustee is expected to perform, and particularly the expectation that trustees will act with reasonable care and diligence in discharging

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59 Ibid 398 (emphasis added). See also *Mickleburgh v Parker* (1870) 17 Grant Ch 503, 506 (Spragge C): 'Great mistakes, and of very serious consequence, often occur from a trustee assuming that he may safely remain passive and leave the management of the trust estate to a co-trustee.'

60 (1877) 36 LT 504, 505 (emphasis added) (High Court, Chancery Division) ('*Rodbard*'). See also *Re Flower, MP, and Metropolitan Board of Works* (1884) 27 Ch D 592, 596–7 (Kay J):

> The reason why more than one trustee is appointed, is that they shall take care that the moneys shall not get into the hands of one of them alone … The duty of trustees is to prevent one of themselves having the exclusive control over the money, and certainly not, by any act of theirs, to enable one of themselves to have the exclusive control of it.

61 *Trutch* (n 36) 547.

62 Mitchell (n 2) 221.

63 *Fales v Canada Permanent Trust Co* [1977] 2 SCR 302, 323 (Dickson J). See also *Selkirk* (n 37) 274 [45] (Katz J).

64 *Devaynes* (n 16) 293 (Romilly MR). See also *Grayburn v Clarkson* (1868) LR 3 Ch App 605, 607 (Wood LJ).

65 *Booth* (n 9) 888. See also *Mucklow v Fuller* (1821) Jac 198; 37 ER 824, 826 (Eldon LC); *Styles v Guy* (1849) 1 Mac & G 422; 41 ER 1328, 1331 (Cottenham LC). Executors are not in all respects analogous to trustees: see, eg, Heydon and Leeming (n 5) 29 [2-40]. However, the analogy holds good insofar as equity considers the two kinds of office holders duty-bound to perform the duty they have undertaken: see, eg, at 357–8 [17-20].

the trusts, does take into account whether the trustee is engaged in that role as part of 'the trustee's profession, business or employment',[66] but the 'standard is an external one, and is independent of the special skill and prudence of the trustee personally'.[67] Even amateur trustees are expected to perform their trusts and to do so with care: they cannot delegate that performance to their co-trustees and they are required to 'exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons'.[68] The courts are not here perpetuating a fiction that trustees always understand the responsibilities of their office; rather, the courts expect trustees to meet a particular standard of conduct, and have consciously rejected the 'highly inconvenient' argument that the standard should 'necessitate an exhaustive inquiry into the private transactions of each individual member, – the interest of the trustee being to shew that he was a stupid fellow, careless in money matters'.[69] A failure, even by an amateur trustee, to attend diligently and carefully to the trusts that they have undertaken is a failure to meet the objective standard that courts of equity expect of all trustees. Holding trustees liable for their own failures to meet that objective standard created an incentive for all trustees to participate in the performance of the trust, thereby increasing the likelihood (albeit not guaranteeing)[70] that the trust will be performed to the benefit of the beneficiaries.

The right of contribution between trustees does not undermine this incentive, as each trustee knows that they face liability to the beneficiaries for the full sum if sued alone, and can recover no more than an equal proportion of the liability from the other trustees who were involved in the breach (assuming a claim for indemnity is not made out), and can only do so against other trustees who are solvent. A trustee who passively stands by while others actively breach the trust is no better off and so each has an equal incentive to perform their duty properly.

The approach evident in these judicial statements remains current in modern trust doctrine.[71] In *Goodwin v Duggan*, for example, Handley and Beazley JJA discussed the cases mentioned above and referred with approval to 'the fundamental principle that where two or more trustees commit a breach of trust, though one may appear more active than the others … all trustees are equally liable to their beneficiaries'.[72] And in *Sky Channel Pty Ltd v Tszyu [No 2]*, Young J said that the cases where a loss is incurred in circumstances where a professional trustee was left in virtual control

66 *Trustee Act* (n 4) s 14A(2). See also *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504, 517–18 (Finn J).

67 Heydon and Leeming (n 5) 354 [17-18].

68 *Trustee Act* (n 4) s 14A(2)(b). See also *Speight v Gaunt* (1883) 9 App Cas 1, 10 (Lord Selborne LC) ('*Speight*'); *Learoyd v Whiteley* (1887) 12 App Cas 727.

69 *Knox v Mackinnon* (1888) 13 App Cas 753, 766–7 (Lord Watson). See also *Rae v Meek* (1889) 14 App Cas 558, 569–70 (Lord Herschell).

70 Trustees are not insurers of the trust property, and so are not liable for depreciation of the fund if they have acted carefully within their powers: *Re Chapman; Cocks v Chapman* [1896] 2 Ch 763, 775 (Lindley LJ); *Clough v Bond* (1838) 3 My & Cr 490; 40 ER 1016, 1018 (Cottenham LC) ('*Clough*').

71 *Goodwin* (n 39) 162–6 (Handley and Beazley JJA); *Selkirk* (n 37) 273 [42]–[43] (Katz J).

72 *Goodwin* (n 39) 162.

of the trust by an unskilled trustee exemplified the 'principle very clearly … [that] unless the right of indemnity can be established, contribution is equal'.[73]

The decision in *Re Mulligan (deceased)* ('*Mulligan*')[74] provides a modern instance of these principles in action. In *Mulligan*, the trustees of a testamentary trust failed to diversify the trust investments over a period of 25 years, with the consequence that the value of the capital remainder was eaten away over time by the corrosive effects of inflation. The trustees were the testator's widow, Mrs Mulligan, who was also the life tenant of the fund, and a professional trustee company, PGG Trust Ltd. The capital residue was held for the testator's nieces and nephews. Over the 25-year period, various employees of PGG had responsibility for managing the trust alongside Mrs Mulligan. Each of those PGG officers recognised the negative impact that inflation was having on the residue, and each attempted to convince Mrs Mulligan of the need to diversify the trust's investment portfolio beyond fixed-interest investments to include shares or land,[75] but Mrs Mulligan rejected those suggestions. The possibility of seeking judicial advice was also considered by some of the PGG officers, but that step was not taken. When Mrs Mulligan died, the residuary beneficiaries sued the professional trustee and Mrs Mulligan's estate. Panckhurst J concluded that the trustees had acted in breach of trust, having failed to act prudently regarding the capital value of the trust's investments. Importantly for present purposes, that liability was shared equally between PGG and Mrs Mulligan: '[U]pon entering the office each individual trustee has a separate responsibility to ensure that the terms of the trust are carried out. It is not open for one trustee to defer to the wishes of another trustee in the absence of proper reasons for doing so.'[76] PGG and Mrs Mulligan's estate each then sought full indemnity from the other. PGG argued that Mrs Mulligan had benefitted from the breach of trust as her rejection of the suggestions to diversify meant that she received higher income payments as the life tenant. That argument was rejected as Mrs Mulligan was entitled to all of the trust income as life tenant, whatever it might be, and it seems that she would in fact have received a better income if the trust fund had been diversified to include dividend-bearing shares.[77] Mrs Mulligan's estate in turn argued that she was entitled to an indemnity from PGG, on the basis that PGG had a 'higher duty' as a professional trustee and that Mrs Mulligan could rely on PGG to provide her with guidance. But that argument was also rejected: '[B]oth trustees were at fault although their contributions to the breach were different in nature. In these circumstances it is only appropriate that both trustees should be jointly answerable.'[78]

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73 *Sky* (n 37) [8].
74 [1998] 1 NZLR 481 ('*Mulligan*').
75 Ibid 498–500 (Panckhurst J).
76 Ibid 502. See also *Selkirk* (n 37) 273–4 [41]–[45] (Katz J).
77 *Mulligan* (n 74) 511 (Panckhurst J).
78 Ibid 512.

## III APPLICATION OF PART 4 OF THE *CIVIL LIABILITY ACT 2002* (NSW) TO TRUST CLAIMS

Part 4 of the *Civil Liability Act* removes solidary liability in particular circumstances, and replaces the joint and several liability of concurrent defendants in those cases with a liability that is several only, with each individual defendant severally liable only for the proportion of the plaintiff's loss for which that defendant is personally responsible.[79] As others have noted, the effect of these provisions is to accelerate consideration of the relative wrongdoing of the defendants to the liability stage of the main proceeding, rather than waiting until liability to compensate the plaintiff has been established and then later considering the relative contributions to that liability of various defendants in contribution proceedings.[80] Having done so, there is no need for contribution between wrongdoers, and so that right is removed by the statute where the claim is apportionable between multiple defendants, as is any right of indemnity that might otherwise exist between those wrongdoers.[81] 'It is therefore necessary that the plaintiff sue all of the wrongdoers in order to recover the total loss.'[82] The statute also makes clear that 'it does not matter that a concurrent wrongdoer is insolvent',[83] and so the risk of insolvency of an individual defendant is now borne by the plaintiff, rather than the other (wrongdoing) defendants.[84]

As has been seen above, equity's approach to the shared liability of trustees who acted in breach of trust was stringent, and the case law makes clear that this was a conscious policy decision on the part of experienced Chancery judges with the avowed aim of ensuring that trustees would engage actively in the management of their trusts in order to better protect the beneficiaries of those trusts against avoidable losses. A settlor was free to depart from that approach in the terms of their trust, but if that had not been done then the default position would apply, encouraging trustees to perform their collective duties properly and thereby providing protection for the beneficiaries.

The question to be addressed here is the extent to which part 4 of the *Civil Liability Act* applies to claims for breach of trust, which will then permit assessment of the degree to which the statutory reforms might have altered the foundations of trustee

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79 *Civil Liability Act 2002* (NSW) s 35 ('*Civil Liability Act*').

80 Andrew Burrows, 'Should One Reform Joint and Several Liability?' in Nicholas J Mullany and Allen M Linden (eds), *Torts Tomorrow: A Tribute to John Fleming* (LBC Information Services, 1998) 102, 106.

81 *Civil Liability Act* (n 79) s 36; *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, 628 [21] (French CJ, Hayne and Kiefel JJ) ('*Hunt & Hunt*').

82 *Hunt & Hunt* (n 81) 624 [10] (French CJ, Hayne and Kiefel JJ). See also Barbara McDonald, 'Proportionate Liability in Australia: The Devil in the Detail' (2005) 26(1) *Australian Bar Review* 29, 33 ('Proportionate Liability in Australia'); *Tesseract International* (n 1) 902–3 [108] (Gageler CJ), 932 [262] (Steward J).

83 *Civil Liability Act* (n 79) s 34(4).

84 *Hunt & Hunt* (n 81) 624 [10], 627 [17] (French CJ, Hayne and Kiefel JJ); McDonald, 'Proportionate Liability in Australia' (n 82) 41; *Tesseract International* (n 1) 902–3 [108] (Gageler CJ). See also Richard W Wright, 'Allocating Liability among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure' (1988) 21(4) *University of California Davis Law Review* 1141, 1143 ('Allocating Liability among Multiple Responsible Causes'); Michael Tilbury, 'Fairness Indeed?: A Reply to Andrew Rogers' (2000) 8(1) *Torts Law Journal* 113, 116; New Zealand Law Commission, *Liability of Multiple Defendants* (Report No 132, 2014) 22 [3.16]–[3.17], 27 [3.37].

liability from the position that obtained before those reforms were implemented. The leading Australian trust law text omits any mention of part 4, while continuing to discuss the traditional equitable principles that have been outlined above,[85] and others have suggested that part 4 does not apply to breaches of trust.[86] However, the case law does not (yet) go so far, and it is suggested that the statutory provisions probably do apply to some (albeit not all) claims for breach of trust.

### A Apportionable Claims

The protection that the statute affords in part 4 to concurrent wrongdoers – in the sense that each is liable only severally, and only for the proportion of loss for which they are responsible – is predicated on the claim against each wrongdoer being an 'apportionable claim', the definition of which is for present purposes most relevantly[87] 'a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care'.[88] Where two or more persons caused the loss or damage that is the subject of such a claim, those persons are concurrent wrongdoers, and can (with certain exceptions)[89] claim the benefit of the proportionate liability regime in part 4.

It is generally considered inapt to describe a trustee's liability for breach of trust as a liability to pay 'damages',[90] given the trustee is not ordered to pay common law damages but rather equitable compensation, and traditionally that order was only made after an account of the trustee's stewardship of the trust assets had been

85 Heydon and Leeming (n 5) 524–7 [21-17]–[21-20].

86 McDonald, 'Reforming a Reform' (n 1) 281.

87 There is also potentially an apportionable claim if the defendant trustees are sued for misleading and deceptive conduct in trade, under the Australian Consumer Law: see *Civil Liability Act* (n 79) s 34(1)(b). However, that potential form of claim is beyond the scope of this article given the focus of the analysis offered here is on the impact of the *Civil Liability Act* (n 79) on the core duties of trusteeship.

88 Ibid s 34(1)(a).

89 The protection is not available to a concurrent wrongdoer that *intended* to cause the economic loss or damage, nor to one that *fraudulently* caused that loss or damage: ibid s 34A(1). The reference to 'fraud' in section 34A appears unlikely to be intended to capture all 'equitable fraud', as that would capture *any* breach of equitable duty, including perhaps imprudent conduct: *Nocton v Lord Ashburton* [1914] AC 932, 954 (Haldane LC); *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189, 194 [10] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ). Further, although, as was discussed earlier, trustees are sometimes only liable under section 59(2) of the *Trustee Act* (n 4) if they are conscious or reckless that they are acting in breach, that provision applies where the trustee is sought to be held liable for loss occasioned by the wrongful acts or defaults of *another trustee* (see n 19 above): see above nn 17–25 and accompanying text. Hence, the trustee's conscious breach of their own duty is unlikely to amount to an intention to cause the economic loss that the other trustee brought about, and so seems unlikely to fall within section 34A(1)(a) of the *Civil Liability Act* (n 79).

90 See, eg, *Cassaniti v Ball* (2022) 109 NSWLR 348, 378 [117] (Gleeson, Leeming and Mitchelmore JJA); *British America Elevator Co Ltd v Bank of British North America* [1919] AC 658, 663–4 (Viscount Haldane for the Board) (Privy Council) ('*British America Elevator*'); *Manners v Pearson & Son* [1898] 1 Ch 581, 589 (Lindley MR) (Court of Appeal) ('*Manners*'); PJ Millett, 'Equity's Place in the Law of Commerce' (1998) 114 (April) *Law Quarterly Review* 214, 225. Cf Justice Edelman, 'Equitable Damages' in Ben McFarlane and Steven Elliott (eds), *Equity Today: 150 Years after the Judicature Reforms* (Hart Publishing, 2023) 147 <https://doi.org/10.5040/9781509960101.ch-008>.

taken.[91] However, the statute defines 'damages' in 'broad words':[92] the concept as used in the Act 'includes any form of monetary compensation'.[93] Even where an account was taken of the trustee's conduct of the trust, the order that the court made after the account had been conducted was generally an award of monetary compensation[94] designed to repair the breach by returning the value of wrongfully disbursed trust assets to the trust fund,[95] or bringing the trust fund up to the level that it should have been had the trustees acted properly.[96]

Further, it is difficult to see how a claim for that kind of compensation is not a 'claim for economic loss or damage to property': '[a]n interest which is the subject of economic loss need not be derived from proprietary rights or obligations governed by the general law',[97] and the interest of beneficiaries in having breaches of trust repaired is clearly an interest in having the detrimental economic effects of those breaches reversed.[98]

One commentator has suggested that a distinction can be drawn between claims for breach of trust that call for performance of the trust and claims that call for compensation,[99] arguing that 'there will be considerable reluctance in the courts to apply the new [proportionate liability] regime to breaches of trust calling for reconstitution of the trust estate'.[100] While there may be such reluctance, a trustee's liability to reconstitute the trust fund arises not only where the trustee has disbursed trust assets in an unauthorised transaction, but also where the transaction

91 Over time, in part as a result of the Judicature Act reforms, the court developed a power to award equitable compensation for particular breaches of trust without the need for an account to be taken: see Matthew Conaglen, 'Judicature and Accounts' in Ben McFarlane and Steven Elliott (eds), *Equity Today: 150 Years after the Judicature Reforms* (Hart Publishing, 2023) 123, 131–6 <https://doi.org/10.5040/9781509960101.ch-007>.

92 *Perpetual Trustee Co Ltd v CTC Group Pty Ltd [No 2]* [2013] NSWCA 58, [17]–[18] (Macfarlan JA) ('*Perpetual Trustee v CTC Group*').

93 *Civil Liability Act* (n 79) s 3; *Cassegrain v Cassegrain* [2016] NSWCA 71, [11] (Basten JA) ('*Cassegrain*').

94 See, eg, *Phillipson v Gatty* (1848) 7 Hare 516; 68 ER 213, 220 (Wigram V-C), affd (1850) 2 H & Tw 459; 47 ER 1763 ('*Phillipson Appeal*'); *Adamson* (n 32) 819 (James and Baggallay LJJ); *Re Salmon; Priest v Uppleby* (1889) 42 Ch D 351, 371 (Fry LJ) (Court of Appeal) ('*Salmon*'); *Blyth* (n 32) 354 (Stirling J); *Turner* (n 39) 544 (Byrne J); *Manners* (n 90) 590–1 (Rigby LJ); *British America Elevator* (n 90) 663–4 (Viscount Haldane for the Board) (Privy Council). An account would not always result in a liability to pay, eg, where the trustee was found to have been justified in the way they acted: *Coppard Appeal* (n 32) 344 (Turner LJ).

95 *George v Webb* [2011] NSWSC 1608, [316] (Ward J) ('*George*').

96 The latter form of liability required the account to be taken on a wilful default footing, which involved a more wide-ranging investigation of the trustee's conduct and which could potentially involve a compensation order greater than the sums that the trustee had received and dealt with, but it still ultimately led to an order against the trustee to pay monetary compensation: see discussion in Matthew Conaglen, 'Equitable Compensation for Breach of Trust: Off *Target*' (2016) 40(1) *Melbourne University Law Review* 126, 129–35.

97 *Hunt & Hunt* (n 81) 629 [26] (French CJ, Hayne and Kiefel JJ).

98 *Cassegrain* (n 93) [10] (Basten JA); *George* (n 95) [312] (Ward J). See also the definition of 'non-economic loss' in section 3 of the *Civil Liability Act* (n 79), which suggests that the statute uses the inverse (but undefined) concept of 'economic loss' in a broad sense.

99 VJ Vann, 'Equity and Proportionate Liability' (2007) 1(3) *Journal of Equity* 199, 213.

100 Ibid 216.

was imprudent and that imprudence has caused the loss of trust assets.[101] In those circumstances, it is difficult to see how the latter sort of claim is not an apportionable claim under the statute merely because it is a claim to reconstitute the trust fund.

The possibility that claims against trustees for breach of trust could fall within the concept of an apportionable claim is further supported by the statute referring to such claims as claims 'in an action for damages (whether in contract, tort *or otherwise*) arising from a failure to take reasonable care'.[102] Although they were not specific as to which ones, the drafters of the statute clearly envisaged that the proportionate liability regime could be applied to claims for failure to take care outside of tort and contract.

However, that point also emphasises that the proportionate liability regime in the statute *only* applies where the claim arises from a 'failure to take reasonable care'.[103] There are two points to be considered here regarding the application of that regime to claims for breach of trust. The first point is whether a trustee's liability for imprudence would fall within that statutory concept of an apportionable claim. A trustee's 'duties of skill and care, prudence and diligence',[104] and to exercise 'all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own',[105] were not – and are not – duties owed in the common law of negligence. However, the statutory concept of an apportionable claim eschews any distinction based on the doctrinal source of the claim,[106] and thus seems not to distinguish between conduct actionable at common law and conduct actionable in equity. In any event, there are numerous references in equitable doctrine to breach of a trustee's prudence obligations as a form of 'negligence'.[107] So, the mere fact that the claim is a claim for failure *by a trustee* to take reasonable care is unlikely to take the claim outside of the statutory concept of an apportionable claim.

The second point to be noticed, however, is that the Court of Appeal held in *Rahme v Benjamin & Khoury Pty Ltd* ('*Rahme*'),[108] that in order for a claim to be apportionable, 'it is necessary … that the absence of reasonable care was an element of the, or a, cause of action upon which the plaintiff succeeds'.[109] A more

101 See, eg, *Matthew* (n 12) 820; *Phillipson Appeal* (n 94) 1766; *Mant v Leith* (1852) 15 Beav 524; 51 ER 641, 642 (Romilly MR); *Turner* (n 39) 543–4 (Byrne J).

102 *Civil Liability Act* (n 79) s 34(1)(a) (emphasis added).

103 Ibid.

104 *Armitage* (n 20) 253 (Millett LJ).

105 *Speight* (n 68) 19 (Lord Blackburn). See also *Trustee Act* (n 4) s 14A(2); Heydon and Leeming (n 5) 354 [17-18].

106 *Cassegrain* (n 93) [16] (Basten JA).

107 See, eg, *Ryder v Bickerton* (1743) 3 Swans 90; 36 ER 782, 782 (Hardwicke LC); *Hanbury v Kirkland* (1829) 3 Sim 265; 57 ER 998, 1001 (Shadwell V-C); *Phillipson Appeal* (n 94) 1764, 1766; *Coppard Trial* (n 32) 804–5 (Stuart V-C); *Brier* (n 18) 243 (Lord Selborne LC); *Bahin* (n 43) 394 (Cotton LJ); *Dalrymple* (n 21) 604 (Long Innes J). See also Heydon and Leeming (n 5) 354–7 [17-18]. Indeed, liability in common law negligence is also discussed at times in terms which have 'regard to caution such as a man of ordinary prudence would observe': *Vaughan v Menlove* (1837) 3 Bing (NC) 468; 132 ER 490, 493 (Tindal CJ).

108 *Rahme v Benjamin & Khoury Pty Ltd* (2019) 100 NSWLR 550 ('*Rahme*').

109 Ibid 576 [135] (Macfarlan JA).

recent Court of Appeal decision has called that approach into question,[110] but on the approach endorsed in *Rahme*, a claim is only apportionable under section 34 if 'the *essential character* of the plaintiff's successful cause of action'[111] includes an element of failure to exercise reasonable care – it is insufficient that the claim is based on conduct which could be described as careless if the claim does not require the plaintiff to establish a failure to take reasonable care as one of its elements.[112] Thus, for example, a claim against a solicitor who acted in breach of fiduciary duty in entering into a (secured) costs agreement with his client without obtaining their fully informed consent has been held not to be apportionable because failure to take care is not an essential element of the claim for breach of fiduciary duty.[113]

Similarly, in *George v Webb*, Ward J held that solicitors who held client funds on trust were not entitled to have their liability for breach of trust apportioned where the client's claim was based on misapplication of those funds for purposes beyond those for which the client had permitted them to be used. It was not relevant that the reason why the solicitor had permitted the funds to be misused lay in the solicitor having failed to act carefully enough:

> [I]rrespective of the fact that the failure to take reasonable care may have contributed to or been the underlying cause of the conduct that amounted to the relevant breach of trust, the principal liability here is a liability for breach of trust by the payment out of the funds other than in accordance with the express purpose trust on which they were held. … the liability, as found, is not one predicated on or arising from a failure to take reasonable care and this is not an apportionable claim.[114]

However, irrespective of whether the Court of Appeal ultimately abandons the approach it adopted in *Rahme*, it will remain the case that some claims for breach of trust are apportionable. Where a breach of trust succeeds on the basis that the trustee acted imprudently, in breach of their duties of prudence and diligence, the essence of that claim would be based on a failure by the trustee to take reasonable care, which would fall within the concept of an apportionable claim under section 34(1). If more than one trustee were involved in a breach of trust of that kind, the beneficiaries' claims against those trustees would be apportionable, with the effect that each of the trustees would be liable severally only,[115] rather than jointly and severally as they would be under traditional equitable doctrine, and the liability of each would be 'limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss'.[116]

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110 *Gerrard Toltz Pty Ltd v City Garden Australia Pty Ltd [No 2]* [2024] NSWCA 232, [173]–[182] (Stern JA), [187]–[240] (Basten AJA). Cf at [2] (Kirk JA), [183] (Stern JA).

111 *Perpetual Trustee v CTC Group* (n 92) [23] (Macfarlan JA) (emphasis added).

112 Cf Vann (n 99) 206; Gurr (n 2) 515. The wording of section 34 was ambiguous in this respect: McDonald, 'Reforming a Reform' (n 1) 279.

113 *Rahme* (n 108) 576 [135]–[137] (Macfarlan JA). Similarly, see *Cassegrain* (n 93) regarding liability in knowing receipt.

114 *George* (n 95) [325]. In other words, careless conduct by the trustee may bring about a breach of trust, but the claim itself is not thereby necessarily a claim based on that negligence: see, eg, *Magnus v Queensland National Bank* (1888) 37 Ch D 466, 477 (Cotton LJ) (Court of Appeal).

115 *Civil Liability Act* (n 79) s 35(1)(b).

116 Ibid s 35(1)(a).

## B Contributory Negligence

The *Civil Liability Act* makes clear that when apportioning responsibility between the defendants in such proceedings, the court must first[117] exclude any loss or damage 'in relation to which the plaintiff is contributorily negligent under any relevant law'.[118] Division 8 of part 1A of the Act deals with certain matters connected with contributory negligence, which raises a question as to whether that part applies to claims for equitable compensation for breach of trust. That question was left open by Leeming JA in *Paul v Cooke* ('*Paul*'),[119] given matters of causation (which are dealt with in division 3 of part 1A of the Act) are traditionally addressed differently in equity; although in *Goode v Angland* his Honour referred, in obiter, to that part of his decision in *Paul* as supporting the point that part 1A of the Act uses the concept of 'negligence' in a way that 'can include causes of action in contract, *equity* and under statute'.[120] The application of part 1A in breach of trust claims therefore perhaps cannot be regarded as yet finally resolved, but that point does not determine the availability of contributory negligence arguments in breach of trust claims in any event, as the provisions in division 8 of part 1A that deal with contributory negligence 'do not confer a right to raise a defence of contributory negligence. They operate where that right otherwise exists.'[121]

Section 9(1) of the *Law Reform (Miscellaneous) Provisions Act 1965* (NSW) ('*1965 Act*') means that a plaintiff who has been contributorily negligent will receive a reduced damages award, but that is only so where the defendant's conduct '(a) gives rise to a liability in *tort* in respect of which a defence of contributory negligence is available at common law, or (b) amounts to a breach of a *contractual* duty of care that is concurrent and co-extensive with a duty of care in tort'.[122] Unlike the *Civil Liability Act* provisions,[123] the phraseology in the *1965 Act* clearly refers to those claims in doctrinal terms,[124] and it does not provide a defence of contributory negligence where the claim is for breach of trust (nor for breach of fiduciary duty).[125]

In this respect, therefore, there is no change from the position that obtained before the *Civil Liability Act* was enacted: '[W]here a trustee is ordered to pay equitable compensation for breach of trust, the amount is not reduced by contributory negligence on the part of the beneficiary.'[126] It remains the case, of

117 *Rennie Golledge Pty Ltd v Ballard* (2012) 82 NSWLR 231, 262 [135] (Campbell JA); *Polon v Dorian* (2014) 102 ACSR 1, 121 [864] (Hall J); McDonald, 'Proportionate Liability in Australia' (n 82) 40.

118 *Civil Liability Act* (n 79) s 35(3)(a).

119 (2013) 85 NSWLR 167, 177 [40] ('*Paul*').

120 *Goode v Angland* (2017) 96 NSWLR 503, 544 [205] (emphasis added).

121 *Perpetual Trustee Co Ltd v Milanex Pty Ltd (in liq)* [2011] NSWCA 367, [87] (Macfarlan JA) ('*Perpetual Trustee v Milanex*'). See also *ACQ Pty Ltd v Cook* (2008) 72 NSWLR 318, 350 [158]–[159] (Campbell JA); *Rahme* (n 108) 574 [127] (Macfarlan JA).

122 *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) s 8 (definition of 'wrong') (emphasis added).

123 *Paul* (n 119) 177 [40]–[41] (Leeming JA).

124 *Perpetual Trustee v Milanex* (n 121) [88] (Macfarlan JA).

125 *Rahme* (n 108) 575 [128]–[130] (Macfarlan JA).

126 *Alexander v Perpetual Trustees WA Ltd* (2004) 216 CLR 109, 127 [44] (Gleeson CJ, Gummow and Hayne JJ), citing *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 201–2 [86] (McHugh, Gummow, Hayne and Callinan JJ), 230–1 [170]–[173] (Kirby J). See also *Lloyds TSB Bank plc v Markandan & Uddin*

course, that a beneficiary who concurs in, or authorises, a breach of trust cannot then sue the trustee for that breach.[127] That protection is, however, only effective against the beneficiaries who consent, and so does not prevent other beneficiaries from successfully bringing a suit against the trustees to repair the breach;[128] the trustees may be able to impound the beneficial interests of the concurring beneficiaries and use that to help defray any liability,[129] but that does not reduce the quantum of liability that is needed to repair the breach and so it does not detract from the protection that the other beneficiaries have in their claim for breach of trust.

### C Apportionment

Thus, not all trust claims are apportionable under the *Civil Liability Act*, but where a claim arises against multiple trustees for breach of trust and the essence of that claim is that the trustees failed to exercise reasonable care in their management or operation of the trust, that claim is likely to be apportionable, and the trustees will be entitled to the protection that part 4 of the Act confers. The trustees will not be able to reduce the awards against them by reference to contributory negligence on the part of the beneficiaries, but each trustee will only be liable for the proportion of the liability which 'the court considers just having regard to the extent of [that] defendant's responsibility for the damage or loss'.[130] Where the claim is apportionable, the provisions of part 4 are compulsory[131] (and alter the parties' substantive rights – they are not merely procedural provisions),[132] so the court must award against each individual defendant 'not more than that amount'.[133] If more than one party is responsible for the loss, the statute appears to require an apportionment between them, such that no one defendant (except one who intentionally or fraudulently caused the loss)[134] can be held responsible for all of the loss.[135]

The Act does not explain how the court should apportion liability among the concurrent wrongdoers,[136] beyond its general injunction to determine what is

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*(a firm)* [2012] EWCA Civ 65, [55], [57] (Rimer LJ). Glanville Williams argued that 'on principle' the defence of contributory negligence should apply to 'an action for negligent (or other unintentional) breach of trust', but recognised that no authority supported that proposition: Glanville L Williams, *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-Law Dominions* (Stevens & Sons, 1951) 222 § 60.

127 *Brice v Stokes* (1805) 11 Ves Jr 319; 32 ER 1111, 1113–14 (Eldon LC); *Walker v Symonds* (1818) 3 Swans 1; 36 ER 751, 774 (Eldon LC); *Evans v Benyon* (1887) 37 Ch D 329, 344–5 (Cotton LJ) (Court of Appeal) ('even although the claimant did not at the time of the distribution know that he was interested, and although he did not at the time know that the division was a breach of trust'); *Chillingworth* (n 39) 698–9 (Lindley LJ) (Court of Appeal).

128 See, eg, *Devaynes* (n 16) 290.

129 See, eg, *Trustee Act* (n 4) s 86; Dale et al (n 27) vol 2, 1811; Heydon and Leeming (n 5) 527–9 [21-21]–[21-25].

130 *Civil Liability Act* (n 79) s 35(1)(a).

131 *Reinhold v New South Wales Lotteries Corporation [No 2]* (2008) 82 NSWLR 762, 771 [32] (Barrett J) ('*Reinhold*').

132 Ibid. See also *Tesseract International* (n 1) 902–3 [108] (Gageler CJ), 920 [201] (Edelman J).

133 *Civil Liability Act* (n 79) s 35(1)(b).

134 Ibid s 34A.

135 McDonald, 'Proportionate Liability in Australia' (n 82) 36–7.

136 *Yates v Mobile Marine Repairs Pty Ltd* [2007] NSWSC 1463, [94] (Palmer J) ('*Yates*').

just having regard to each defendant's responsibility for the loss. That involves a 'large discretionary judgment'[137] which takes into account 'blameworthiness and causative potency'.[138] It is not obvious how the court will identify which of several trustees 'is, in a real and pragmatic sense, more to blame for the loss than another',[139] particularly when the cases indicate that '[r]elevant factors include, but are not limited to, which of the wrongdoers was more actively engaged in the activity causing loss, and which was more able effectively to prevent the loss'.[140] For the reasons discussed above, where one trustee has committed an imprudent breach of trust and the other trustee is concurrently liable for having permitted the first trustee to control the trust in a way that amounted to a breach of that trustee's duties, the first trustee was more actively engaged in the activity that caused the loss to the trust fund but the passive trustee was in a position – and was duty-bound – to prevent that loss by taking a more active role in the management of the trust.

The cases also indicate that even where a solicitor was engaged in order to protect their client against potential misconduct of another, and that misconduct eventuated but the solicitor negligently failed to identify or prevent it, the solicitor's liability is apportionable and the solicitor may be held liable only for a relatively small proportion of the loss that the solicitor was engaged to prevent.[141] It is unclear, therefore, how the court will determine what proportion of responsibility each trustee bears for the loss where the claim is apportionable under the Act: as has been said in the context of the similar assessment of contributory negligence, the 'significance of the various elements involved in such an examination will vary from case to case'.[142] It is clear, however, that apportionment will be required in cases where the claim is apportionable and that the apportionment may not be equal between the wrongdoing trustees. What remains to consider is the potential impact of that approach on the traditional incentive structure that equitable doctrine had created for trustees.

## IV IMPACTS ON TRUSTEESHIP

One of the arguments in favour of joint and several liability among concurrent wrongdoers to plaintiffs, counterbalanced with the benefit of a right of contribution between those wrongdoers, is that

> the imposition of full liability on the defendant puts the defendant in the position of a 'gatekeeper' and this promotes efficient deterrence by promoting compliance

137 Ibid.
138 *Reinhold* (n 131) 776 [50] (Barrett J).
139 *Yates* (n 136) [94] (Palmer J).
140 *Perpetual Trustee Co Ltd v Ishak* [2012] NSWSC 697, [194] (Brereton J) ('*Perpetual Trustee v Ishak*').
141 See, eg, *Hunt & Hunt* (n 81); ibid.
142 *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529, 533 (Gibbs CJ, Mason, Wilson, Brennan and Deane JJ). See also *Wynbergen v Hoyts Corporation Pty Ltd* (1997) 149 ALR 25, 29 (Hayne J); *Reinhold* (n 131) 776 [50] (Barrett J).

> with the standards of conduct demanded of all actors by the law in the particular circumstances.[143]

As has been explained in Part II, a perspective of that kind clearly underpins the rationale which Chancery judges took to the liability of trustees who were implicated in a breach of trust. Further, the Chancery judges appear only to have allowed unequal contribution between wrongdoing trustees in relatively limited circumstances, and where they were prepared to allow that, the consequence was a full indemnity from one trustee to the other(s). The avowed purpose of taking that approach was to keep trustees up to their duty: trustees would have an unacceptable incentive to be idle if the more active trustees would bear responsibility for any breach of trust,[144] and '[n]othing could be more mischievous'[145] as it would defeat '[t]he object of having two trustees [which] is to double the control over the trust property'.[146]

Where a trust claim is apportionable, the proportionate liability regime in the *Civil Liability Act* has the clear potential to interfere with that approach to trustee liability: where the claim is apportionable, trustees no longer face the risk of insolvency of their co-trustees as they have several liability only, that liability is limited to the proportion of loss for which each trustee is severally responsible and the insolvency of another trustee is now at the plaintiff beneficiaries' risk rather than his or her co-trustees. That change has the clear potential to alter the incentive structure that the Chancery judges created in the 19th century and which modern judges have accepted continues to remain appropriate for trustees today.

For example, if *Bahin* were dealt with in New South Wales ('NSW') today, and if the investments that Eliza made were authorised but imprudent, the liability of Frances and Eliza would be apportionable (assuming Frances' conduct was sufficiently conscious to satisfy the threshold in section 59(2) of the *Trustee Act*,[147] without which she would not be liable at all). While Frances' passive approach to the management of the trust clearly should not exonerate her from liability entirely, it is difficult to know what proportion of responsibility the courts would consider that she bore for the breach. Similarly, in *Mulligan*, the breaches of trust committed by the professional trustee, PGG, and the life tenant trustee, Mrs Mulligan, were quite different, but each contributed to the loss of capital value that had to be repaired. Again, the quantification of the responsibility of each trustee is a difficult matter. Particularly in cases like *Bahin*, the potential for a court now to conclude that a trustee like Frances, who took a passive attitude to her duties as trustee, was less responsible for the loss that flowed from the erroneous investments, risks encouraging a supine attitude in trustees. It was precisely that concern that motivated the judges to decide *Bahin* as they did and yet that 'opiate upon

143 Tilbury (n 84) 116.
144 *Bahin* (n 43) 396 (Cotton LJ), 398 (Fry LJ); *Lingard* (n 39) 45 (Grant MR).
145 *Lingard* (n 39) 46 (Grant MR).
146 *Rodbard* (n 60) 505 (Fry J).
147 See above nn 17–25 and accompanying text.

the consciences of the trustees' is now statutorily peddled by part 4 of the *Civil Liability Act*.[148]

It is, of course, possible that the courts would conclude in cases like these that the trustees bore equal responsibility and thus should be responsible for equal proportions of the loss (bearing in mind that, in *Bahin*, Sarah would also bear a third of the liability), which would be consistent with the traditional equitable approach to contribution. However, the Act requires that such a decision be reached on the facts of each case, as it requires the court to consider what is just having regard to the extent of the particular defendant's responsibility for the loss, rather than as a matter of judicial policy regarding the liability of trustees generally. The point that matters to the discussion here is that even if the court might conclude that the loss should be borne by the defendants equally in some (and perhaps even most) cases, the fact that it is *possible* that the liability will not be equal means the incentive structure for trustees has been changed. That leaves the beneficiaries of trusts in a worse position, not merely because they now bear the risk of insolvency of their trustees but also because their trustees may be less driven to protect the trust fund as assiduously as they might previously have done.

A second consequence of the application of the part 4 proportionate liability regime to trust claims is that it places a new emphasis on the articulation of the standards against which trustees' conduct is assessed, in a way that was not hitherto necessarily required by the courts' approach to trustee liability. The point here is that the Act requires courts to be clear about whether the essential characteristics of a cause of action involve a failure to exercise reasonable care, as it is only those claims that are apportionable under part 4.

For example, in *Australian Executor Trustees (SA) Ltd v Kerr* ('*Kerr*'),[149] the trustee of a unit trust for investment in pine forests was held to have acted in breach of trust when it released charges over the land on which the pine trees were growing in order to facilitate the sale of that land, without requiring that the charges be replaced by any form of security over the proceeds of sale of the land. The proceeds of sale were not held in trust for the investors[150] and so they were expended in satisfying other charges over the land without any payment being made to the investors. The trustee had held the charges as trust property, and the court held that the trustee had 'breached its duty as trustee because it failed to protect the encumbrances as trust assets, and failed to vindicate the rights attaching to them as trust assets'.[151] There was only one trustee in this case, and so the issue of an apportionable claim did not arise,[152] but if there had been more than one trustee involved in a case like this the question could arise. That potentially raises the question whether the duty which the court found the trustee had breached – the

148 *Bahin* (n 43) 398 (Fry LJ).

149 (2021) 151 ACSR 204 (NSW Court of Appeal) ('*Kerr*').

150 *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62.

151 *Kerr* (n 149) 219 [68] (Gleeson JA).

152 There was an issue as to whether there needed to be apportionment between the trustee and its solicitors, if the solicitors had given the trustee negligent advice, but the applicable law was South Australian law, where the apportionment legislation does not apply to a claim for equitable compensation for breach of trust: ibid 242–4 [220]–[230] (Gleeson JA).

duty to vindicate and protect the trust property – is only breached if the trustee failed to exercise reasonable care in protecting the trust property (which would be an apportionable claim) or can be breached without establishing carelessness of that kind (which would not).[153]

Traditionally, trustees have not been held liable where they are unable to produce trust property because it had been lost or stolen, provided the trustee had taken reasonable care to prevent the loss of the trust property.[154] The trustee is not an insurer of the trust property.[155] That would seem to suggest that the obligation to vindicate and protect the trust property involves a care-based liability. However, a trustee who gave the property to someone who was not entitled to it could not defend a claim by the true beneficiary by arguing that the trustee had taken care to pay the correct person and had been fooled. Where the issue of apportionment is live in a case, the court will need to be precise as to whether the trustee's failure to vindicate and protect the trust property in a case like *Kerr* arose only because the trustee failed to take reasonable care to protect the interests of the beneficiaries regarding that property, or whether the liability could arise without that being an essential element of the claim. Similarly with cases like *Lewis* and *Thompson*, which were discussed earlier: if one trustee allowing trust assets to remain in the hands of another trustee alone (instead of the assets being held jointly) is seen as an imprudent failure to protect the assets, the claim would appear to be apportionable, but if it is seen as breach of a duty to protect the trust assets irrespective of whether it was prudent in the circumstances, then the claim will not be apportionable. The 19th century cases appear to have considered that liability to be strict,[156] but it is perhaps less clear with other scenarios such as the trustees lending trust assets to one trustee alone.[157] The point is not that these questions are insoluble – the case law is generally tolerably clear as to the difference between conduct that is beyond power and that which is within power but imprudent[158] – but the courts will need to be more precise than vague references to breaches of duty like a trustee having failed to vindicate and protect the trust property.

153 The trustee in *Kerr* (n 149) admitted that it had failed to exercise due care and diligence: *Kerr v Australian Executor Trustees (SA) Ltd* [2019] NSWSC 1279, [32] (Stevenson J). However, the trustee's failure to vindicate and protect the trust property appears to have been considered a different claim.

154 *Morley v Morley* (1678) 2 Chan Cas 2; 22 ER 817; *Jones v Lewis* (1750–1) 2 Ves Sen 240, 241; 28 ER 155; Isaac Preston Cory, *A Practical Treatise on Accounts* (William Pickering, 2nd ed, 1839) 277.

155 See above n 70.

156 *Re Massingberd's Settlement; Clark v Trelawney* (1890) 63 LT 296, 298 (Cotton LJ) (Court of Appeal); *Clough* (n 70) 1018 (Cottenham LC); *Thompson Appeal* (n 13) 508 (Knight Bruce LJ); *Lewis* (n 10) 594 (Hall V-C).

157 See, eg, *Baynard v Woolley* (1855) 20 Beav 583; 52 ER 729; *Stickney v Sewell* (1835) 1 My & Cr 8; 40 ER 280.

158 See, eg, *Salmon* (n 94) 367 (Cotton LJ).

## V CONCLUSIONS

The proportionate liability regime in part 4 of the *Civil Liability Act* appears to have been poorly conceived in response to industry lobbying[159] which ought not to have been so persuasive.[160] As Andrew Burrows said, regimes like part 4 'replace harshness for defendants with glaring unfairness for plaintiffs'.[161]

One suspects that the authors of part 4 gave no real thought to its application to equitable claims for breach of trust, nor to its impact on the office of trusteeship. Had they been forced to justify the application of proportionate liability to trust claims, they would presumably have drawn on arguments like the one made by Andrew Rogers, that 'joint and several liability allows considerable scope for injustice'[162] in exposing parties with deep pockets (particularly those with liability insurance) to full liability 'for the entirety of the damage suffered by the plaintiff'[163] when that defendant 'may perhaps be responsible for only a minor fault, in comparison with the fault of other persons'.[164] Arguments of that ilk are weak as the 'fact that some other person also tortiously contributed to the same injury does not – logically or otherwise – eliminate or reduce each tortfeasor's responsibility for the entirety of the injury'.[165] Rogers' argument 'identifies fairness or justice only from the defendant's point of view'[166] which leaves fairness or justice to the plaintiff out of view:

> The 'fairness to the defendants' argument is a 'fairness *among* the defendants' argument which applies only to the restitutionary contribution claims among the defendants and which is secondary to the plaintiff's corrective justice claim against each defendant for full compensation for the injury that the defendant tortiously caused.[167]

Proportionate liability is thus difficult to defend for tort and contract claims, but it is even more odd when applied to the office of trusteeship. Unless the trust terms permit them to act otherwise, trustees are expected to act *collectively* with a view to protecting the best interests of the beneficiaries. One of the arguments made against joint and several liability among tort defendants is that they exercise no control over one another and so it is unfair for them effectively to be required to insure the actions of each other.[168] That argument is flawed in the tort context,[169] but it is entirely inapposite in the context of trusts, where the very object of appointing more than one person to the role of trustee at the same time is so that no one trustee

159 McDonald, 'Reforming a Reform' (n 1) 270–6.
160 Wright, 'Allocating Liability among Multiple Responsible Causes' (n 84).
161 Burrows (n 80) 109.
162 Andrew Rogers, 'Fairness or Joint and Several Liability' (2000) 8(1) *Torts Law Journal* 107, 107.
163 *AWA Ltd v Daniels* (1992) 10 ACLC 933, 1022 (Rogers CJ Comm D) (NSW Supreme Court).
164 Ibid.
165 Wright, 'Allocating Liability among Multiple Responsible Causes' (n 84) 1153.
166 Tilbury (n 84) 116.
167 Richard W Wright, 'The Logic and Fairness of Joint and Several Liability' (1992) 23(1) *Memphis State University Law Review* 45, 70 (emphasis in original) ('Logic and Fairness'). See also HLA Hart and Tony Honoré, *Causation in the Law* (Oxford University Press, 2nd ed, 1985) 235 <https://doi.org/10.1093/acprof:oso/9780198254744.001.0001>.
168 Wright, 'Logic and Fairness' (n 167) 69.
169 See ibid 63–70.

can act without the agreement of the others, thereby increasing the protection afforded to the interests of the beneficiaries.

It is concerning that this core principle of trustee responsibility has been undermined, apparently by a side-wind through legislation aimed at tort and contract liabilities, but that appears to be the consequence of the way the legislation has been drafted in NSW. Where more than one trustee has breached a trust by acting imprudently in a way that caused loss, the claims against those trustees seem to be apportionable claims under part 4 of the Act, and so the trustees are no longer subject to joint and several liability, and are no longer expected by default to contribute equally to that liability. Instead, each trustee faces liability only for the proportion of the loss for which they are responsible and so the incentive structure for each trustee has been altered from the approach that equitable doctrine required of trustees before the Act was passed. That directly undermines the protection that appointment of multiple trustees is designed to provide to the trust estate and to the beneficiaries: the trustees no longer have the same incentives to perform their duties assiduously as a collective group. The beneficiaries now also bear the risk of insolvency of one of their trustees in a way that was not the case previously, further undermining the protection of their position in a way that directly contradicts traditional trust principles.

One potential means of avoiding this result, if a settlor wishes when the trust is created, could be for the terms of the trust to include provisions which expressly provide for a liability regime for the trustees that reflects the traditional equitable doctrine. Section 3A(2) of the *Civil Liability Act* permits the parties to a contract to make express provision for rights, obligations and liabilities in ways that differ from the provisions of the Act. While the terms of a trust are not strictly a contract, it is hard to believe that a court would refuse to apply those terms, and would instead apply part 4 of the Act, if the settlor and original trustees had agreed in the trust instrument to apply a different and bespoke liability regime that mimics the approach from before the Act.[170] That might potentially be thought unfair to successor trustees, who take office after the terms of the trust were originally agreed upon, but those successor trustees are on notice as to the terms of the trust – a trustee ought not to accept appointment without becoming acquainted with the terms of the trust[171] – and they are not obliged to accept office if they are unwilling to act on that basis.

170 There is some analogy here with the difficult questions regarding the enforceability of arbitration clauses in trust deeds: see, eg, Matthew Conaglen, 'Trust Arbitration Clauses' in Richard C Nolan, Kelvin FK Low and Tang Hang Wu (eds), *Trusts and Modern Wealth Management* (Cambridge University Press, 2018) 76 <https://doi.org/10.1017/9781316756539.005>. However, the beneficiaries are unlikely to demur where the trust contains clauses such as those suggested in the text, as those clauses will work to the advantage of the beneficiaries when compared with the alternative approach that would obtain if part 4 were to be applied.

171 Heydon and Leeming (n 5) 336–7 [17-01].