Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd - [2013] HCA 10

HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, KIEFEL, BELL AND GAGELER JJ

HUNT & HUNT LAWYERS APPELLANT/APPLICANT

AND

MITCHELL MORGAN NOMINEES PTY LTD
& ORS RESPONDENTS

Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd
[2013] HCA 10
3 April 2013
S270/2012 & S95/2012

ORDER

1. Appeal allowed with costs.

2. Application for special leave dismissed with costs.

3. Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales dated 15 March 2012 and, in lieu thereof, order that:

(a) interest be allowed on the sum assessed by the Supreme Court of New South Wales to be payable by Hunt & Hunt Lawyers at the rates applied by the Court of Appeal in its orders of 15 March 2012;

(b) the appeal by Mitchell Morgan Nominees Pty Ltd and Mitchell Morgan Nominees (No. 2) Pty Ltd (together "Mitchell Morgan") from the orders made on the second cross-claim by the Supreme Court on 3 July 2009 otherwise be dismissed; and

(c) Mitchell Morgan pay Hunt & Hunt Lawyers' costs in the Court of Appeal.

4. On or before 17 April 2013, Hunt & Hunt Lawyers and Mitchell Morgan file a joint minute stating what further consequential orders should now be made by this Court including an order substituting the amount for which judgment should have been entered by the Court of Appeal in favour of Mitchell Morgan. In default of agreement, each of Hunt & Hunt Lawyers and Mitchell Morgan, on or before 17 April 2013, is to file and serve its proposed minute of order together with written submissions not exceeding two pages in support of its proposed order.

On appeal from the Supreme Court of New South Wales

Representation

D F Jackson QC with N Kabilafkas for the appellant/applicant (instructed by King & Wood Mallesons)

B A J Coles QC with S B Docker and L Walsh for the first and second respondents (instructed by Mills Oakley Lawyers)

Submitting appearance for the third and fourth respondents

CATCHWORDS

Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd

Proportionate liability – Loan and mortgage transaction – Fraudsters induced lender to advance monies on security of mortgage – Solicitors negligently drafted mortgage – Lender unable to recover monies advanced – Whether damage or loss the subject of lender's claim against solicitors caused or materially contributed to by fraudsters' conduct – Whether solicitors concurrent wrongdoer together with fraudsters within Pt 4 of *Civil Liability Act* 2002 (NSW) .

Words and phrases – "apportionable claim", "causation", "caused or materially contributed to", "concurrent wrongdoer", "damage", "damages", "factual causation", "proportionate liability", "scope of liability".

Civil Liability Act 2002 (NSW), Pt 4, ss 5D(1), 5D(4), 34, 35(1), 36 .

1. FRENCH CJ, HAYNE AND KIEFEL JJ. Mr Angelo Caradonna and Mr Alessio Vella entered into a business venture relating to a boxing event in late 2005 and opened a joint bank account for that purpose. On the same day, Mr Vella, in the company of Mr Caradonna, attended upon his solicitors and took possession of certificates of title to three properties. Subsequently, and unknown to Mr Vella, Mr Caradonna obtained possession of the certificates of title and used them fraudulently to obtain money for his own purposes.

2. The first and second respondents (referred to collectively as "Mitchell Morgan") advanced $1,001,748.85 to the joint account of Messrs Caradonna and Vella in January 2006 on the security of a mortgage over one of the properties, the "Enmore property". It was Mitchell Morgan's policy at that time to require a borrower's solicitor to certify that the solicitor had identified the borrower and to witness the borrower's signature on all loan and mortgage documents. Mr Caradonna's cousin, Mr Lorenzo Flammia, acted as his solicitor and dishonestly so certified. Mr Caradonna had forged Mr Vella's signature on the documentation. On the basis of the forged documents and the certification, a mortgage was registered over the Enmore property and the funds advanced. The mortgage secured the debt owed to Mitchell Morgan by reference to a loan agreement. Both the mortgage and the loan agreement were drawn by the appellant, Hunt & Hunt Lawyers ("Hunt & Hunt"), a firm of solicitors which acted for Mitchell Morgan on the transaction. Mr Caradonna withdrew the loan money from the joint account by forging Mr Vella's signature on numerous cheques. By the time proceedings instituted by Mr Vella against Mitchell Morgan and others were heard in the Supreme Court of New South Wales [1] , both Mr Caradonna and Mr Flammia (referred to together as "the fraudsters") were bankrupt.

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[1] *Vella v Permanent Mortgages Pty Ltd* (2008) 13 BPR 25,343.

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3. **Following paragraph cited by:**

Defrancesca v Ruby Loans Pty Ltd (13 August 2020) (Beazley J)

The reasoning of the primary judge, Young CJ in Eq, with respect to the claim brought by Mitchell Morgan against Hunt & Hunt in those proceedings is summarised in the reasons of Giles JA in the Court of Appeal [2] . In essence, the loan agreement was void by reason of the forgery and Mr Vella was not liable to Mitchell Morgan under it. The mortgage over the Enmore property, also forged, had gained the benefit of indefeasibility of title [3] , but because it purported to secure Mr Vella's indebtedness by reference to the void loan agreement, it secured nothing and was liable to be discharged. Young CJ in Eq held that Hunt

& Hunt breached its duty of care to Mitchell Morgan. It was negligent because it should have prepared a mortgage containing a covenant to repay a stated amount. These matters are not in issue on this appeal.

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[2] *Mitchell Morgan Nominees Pty Ltd v Vella* (2011) 16 BPR 30,189 at 30,194-30,195 [15]-[17] .

[3] *Real Property Act* 1900 (NSW), s 42 .

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4. In the *Civil Liability Act* 2002 (NSW), s 35(1) in Pt 4 provides that in any proceedings involving an "apportionable claim":

> "(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is 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, and
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> (b) the court may give judgment against the defendant for not more than that amount."

5. Section 34(1)(a) provides that apportionable claims include:

> "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"

but do not include a claim arising from personal injury.

6. More important to the issues on this appeal is the definition of a "concurrent wrongdoer" for the purposes of Pt 4, and s 35(1) in particular. Section 34(2) provides:

> "In this Part, a ***concurrent wrongdoer*** , in relation to a claim, is a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim."

7. **Following paragraph cited by:**

McBride v Christie's Australia Pty Ltd (04 December 2014) (Bergin CJ in Eq)

His Honour the primary judge held that Mitchell Morgan's claim against Hunt & Hunt was an apportionable claim [4] . It is to be inferred, because it was not expressly stated, that his Honour accepted Hunt & Hunt's submission [5] that the fraudsters were, independently of

each other or jointly, a cause of the loss or damage claimed by Mitchell Morgan. His Honour held that Hunt & Hunt's liability should be limited to 12.5 per cent of Mitchell Morgan's loss. Mr Caradonna was taken to be primarily liable, to the extent of 72.5 per cent, and Mr Flammia held liable for 15 per cent [6] .

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[4] *Vella v Permanent Mortgages Pty Ltd* (2008) 13 BPR 25,343 at 25,404 [575] .

[5] *Vella v Permanent Mortgages Pty Ltd* (2008) 13 BPR 25,343 at 25,404 [576] .

[6] *Vella v Permanent Mortgages Pty Ltd* (2008) 13 BPR 25,343 at 25,406 [598] .

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8. The Court of Appeal (Bathurst CJ, Giles, Campbell and Macfarlan JJA and Sackville AJA) allowed Mitchell Morgan's appeal from that decision, holding that Hunt & Hunt was not a concurrent wrongdoer because the fraudsters' acts did not cause the loss or damage which Mitchell Morgan claimed against Hunt & Hunt [7] . The principal issue on this appeal involves the proper identification of that loss or damage.

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[7] *Mitchell Morgan Nominees Pty Ltd v Vella* (2011) 16 BPR 30,189 at 30,199 [44] .

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9. **Following paragraph cited by:**

Bodycorp Repairers Pty Ltd v Holding Redlich (08 February 2018) (Whelan and Santamaria JJA and T Forrest AJA)

180. Bell and Gageler JJ characterised the relevant issue as being the determination of how it was that the financier was 'worse off'. [149] They concluded that the harm suffered by the financier was the absence of protection and the lack of security. [150] The fraudsters did not cause the lack of security, and accordingly the loss suffered as a result of the negligence of the solicitors was different to that suffered as a result of the conduct of the fraudsters. [151]

via

[149] Ibid 649–50 [93] .

Bodycorp Repairers Pty Ltd v Holding Redlich (08 February 2018) (Whelan and Santamaria JJA and T Forrest AJA)

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Bodycorp Repairers Pty Ltd v Holding Redlich (08 February 2018) (Whelan and Santamaria JJA and T Forrest AJA)
Bodycorp Repairers Pty Ltd v Holding Redlich (08 February 2018) (Whelan and Santamaria JJA and T Forrest AJA)
Barouche v Owners Corporation No. 409234V (Owners Corporations) (15 June 2016) (Senior Member A. Vassie)

> 40. The second difficulty, however, does. It is that the argument asks me, impermissibly, to reverse the questions of damage and causation by addressing the question of causation before the question of what loss or damage is the subject of the applicants' claim. In *Hunt & Hunt Lawyers v Mitchell Morgan*
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> *Nominees Pty Ltd* [11] the High Court was considering a section (s34(2)) of the legislation in New South Wales [12] which is in very similar terms to s 24AH(1) of the Wrongs Act . At paragraph [19], the plurality of the court stated:
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> > [19] Section 34(2) poses two questions for the court: what is the damage or loss that is the subject of the claim? Is there a person, other than the defendant, whose acts or omissions also caused that damage or loss? Logically, the identification of the "damage or loss that is the subject of the claim" is anterior to the question of causation.
>
> In that case, the plurality identified the loss or damage that was the subject of a mortgagee-lender's claim as being the inability to recover the money it had advanced to a fraudster [13] , and concluded that the fraudster and the solicitors for the lender's broker were concurrent wrongdoers, having caused that loss or damage even though the fraudster had caused the lender to pay out money when it would not have done so but for the fraud, and the solicitors for the lender's broker had not done that but had caused the lender not to have the benefit of any security for the money paid out.

via
[13] (2013) 296 ALR 3 at [9] .

LM Investment Management Limited (In Liquidation) (Receivers appointed) v BMT and Assoc Pty Limited (18 December 2015) (Ball J)

> 85. The conclusion of the previous paragraphs is consistent with the decision in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613. In that case, Mitchell Morgan lent money on security of real property. The loan was obtained as a result of the borrower's fraud and the fraud of the borrower's cousin, a solicitor, who falsely certified that he had identified the true owner of the property over which Mitchell Morgan took security and witnessed that person's signature on the loan documentation and mortgage, when in fact that person's signature had been forged by the fraudster borrower. The loan

agreement was held to be void because of the forgery, with the result that the mortgage secured nothing. Mitchell Morgan sued its solicitors claiming that they were negligent in failing to draft a mortgage that included a covenant to repay a specific amount. The question before the High Court was whether the two fraudsters were concurrent wrongdoers with Mitchell Morgan's solicitors. That question turned on whether the claim against them was in respect of the same loss. A majority held that it was. That loss was the inability of Mitchell Morgan to recover the moneys advanced. The solicitors and fraudsters each materially contributed to that loss: see [2013] HCA 10 ; (2013) 247 CLR 613 at [9] . But it was plain in that case that the claim available against each of the solicitors and fraudsters was a claim for economic loss arising from a failure to take reasonable care. The majority specifically left open the question whether a claim in debt was a claim for loss or damage: at [42].

These reasons will show that Mitchell Morgan's claim against Hunt & Hunt was an apportionable claim. The loss or damage which Mitchell Morgan suffered was its inability to recover the monies it advanced. Mitchell Morgan's claim against Hunt & Hunt was based on a different cause of action from the claims it would have had against Mr Caradonna and Mr Flammia. But the claims against all of Hunt & Hunt, Mr Caradonna and Mr Flammia were founded on Mitchell Morgan's inability to recover the monies advanced and the acts or omissions of all of them materially contributed to Mitchell Morgan's inability to recover that amount.

Proportionate liability and Part 4

10. **Following paragraph cited by:**

Touch for Health Pty Ltd as Trustee for Knight Superannuation Fund v Property Mentors Australia Pty Ltd (No 3) (02 December 2024) (Neskovcin J)
Ramadan v ACN 098 408 176 Pty Ltd (31 August 2023) (Livesey P; Doyle and Bleby JJ)
Stav Investments Pty Ltd v Taylor (09 March 2022) (Ward CJ in Eq)

547. Under this regime, liability is apportioned to each wrongdoer according to the court's assessment of the extent of their responsibility (*Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; [2013] HCA 10 at [10] per French CJ, Hayne and Kiefel JJ).

Bingo Holdings Pty Ltd v GC Group Company Pty Ltd (23 August 2021) (Meagher, Payne and Brereton JJA)
GC Group Company Pty Ltd v Bingo Holdings Pty Ltd (No 3) (18 March 2021) (Stevenson J)

16. Eg see the discussion in Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd (2013) 247 CLR 613; [2013] HCA 10 at [10] , [16] and [17] (French CJ, Hayne and Kiefel JJ) .

The State of Western Australia v Cunningham [No 3] (23 November 2018) (Buss P, Murphy JA, Pritchard JA)
The State of Western Australia v Cunningham [No 3] (23 November 2018) (Buss P, Murphy JA, Pritchard JA)
The State of Western Australia v Cunningham [No 3] (23 November 2018) (Buss P, Murphy JA, Pritchard JA)

Part 4 of the *Civil Liability Act* represents a departure from the regime of liability for negligence at common law (solidary liability), where liability may be joint or several but each wrongdoer can be treated as the effective cause and therefore bear the whole loss. Under that regime, a plaintiff can sue and recover his or her loss from one wrongdoer, leaving that wrongdoer to seek contribution from other wrongdoers [8] . The risk that any of the other wrongdoers will be insolvent or otherwise unable to meet a claim for contribution lies with the defendant sued. By comparison, under a regime of proportionate liability, liability is apportioned to each wrongdoer according to the court's assessment of the extent of their responsibility. It is therefore necessary that the plaintiff sue all of the wrongdoers in order to recover the total loss and, of course, the risk that one of them may be insolvent shifts to the plaintiff.

[8] Under the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW), s 5 .

11. The final report of the inquiry into the law of joint and several liability completed by Professor Davis in 1995[9] ("the Davis Report") focused upon the liability of concurrent, but independent, wrongdoers[10]. An example there given was of damage resulting to a house by three separate wrongful acts: the builder negligently constructing the house with inadequate foundations; the architect negligently failing to supervise that part of the construction; and the local authority negligently failing to notice the inadequacy of the foundations. Although these acts were independent of each other, the end result is that the house is defective and needs to be underpinned. The act or omission of each wrongdoer was a cause of that damage.

[9] Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, (1995).

[10] Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, (1995) at 8.

12. **Following paragraph cited by:**

Cassaniti v Ball as liquidator of RCG CBD Pty Limited (in liq) and related matters; Khalil v Ball as liquidator of Diamondwish Pty Ltd (in liq) and related matters (25 August 2022) (Gleeson, Leeming and Mitchelmore JJA)

60. Section 5(1)(c) goes on to provide that a tort-feasor may recover contribution between tort-feasors liable in respect of the same damage. This paragraph overturned the rule that contribution was not available either at law or in equity between tortfeasors: see *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; [2013] HCA 10 at [12] and [80] . The fact that these paragraphs address different problems was noted in *Newcrest Mining Ltd v Thornton* (2012) 248 CLR 555; [2012] HCA 60 at [45] (referring to the materially identical Western Australian provision, s 7(1) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA)):

> "The impact of s 7(1) on this position was as follows. The mischief dealt with in s 7(1)(a) was the common law prohibition stated in *Brinsmead v Harrison* against a plaintiff who had recovered against one joint tortfeasor from recovering against another. Section 7(1)(a) improved the position of plaintiffs by abolishing that common law prohibition. The mischief dealt with in s 7(1)(c) was the rule in *Merryweather v Nixan*, which did not affect plaintiffs but tortfeasors. Section 7(1)(c) dealt with that mischief by abolishing the rule. Those changes to the common law position left the risk that plaintiffs, freed from the ban that *Brinsmead v Harrison* imposed on any action against joint tortfeasors after one tortfeasor had been sued to judgment, would abuse that new found freedom by pursuing a multiplicity of actions."

It was observed in the Davis Report[11] that the common law approach to the liability of several concurrent tortfeasors, as distinct from joint tortfeasors, was to regard only the last of the wrongdoers to be liable and to then deny that wrongdoer the right to claim from others who had been involved. This approach was largely attributable to the "traditional preoccupation [of the common law] with finding a *sole* responsible cause"[12]. There were legislative moves away from this position in Australia in the 1940s and 1950s [13] , which permitted rights of contribution between concurrent wrongdoers and abolished the rule that judgment against one barred a subsequent action against another who was jointly liable. However, the legislation providing for contribution operated only as between the defendant and other tortfeasors.

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[11] Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, (1995) at 15.

[12] Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, (1995) at 15, referring to Fleming, *The Law of Torts*, 8th ed (1992) at 220 (emphasis in original).

[13] Such as Pt III of the *Law Reform (Miscellaneous Provisions) Act* 1946 .

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13. **Following paragraph cited by:**

Shinwari v Anjoul by her tutor Therese Anjoul (07 April 2017) (McColl and Gleeson JJA, Emmett AJA)

A principal recommendation of the Davis Report was that "joint and several liability be abolished, and replaced by a scheme of proportionate liability, in all actions in the tort of negligence in which the plaintiff's claim is for property damage or purely economic loss"[14]. It was suggested that arguments in favour of joint and several liability in the context of property damage and economic loss were less compelling than in the area of personal injury claims[15] and that it was fair that a defendant's liability should be limited to his or her degree of fault, unaffected by matters beyond the defendant's control[16].

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[14] Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, (1995) at 34. The "Ipp Report" recommended the solidary liability regime be retained in relation to personal injury or death claims: Commonwealth of Australia, *Review of the Law of Negligence: Final Report*, (2002) at 178 [12.17]-[12.19]. It did not consider the question whether a regime of proportionate liability should be introduced in relation to property damage or economic loss: Commonwealth of Australia, *Review of the Law of Negligence: Final Report*, (2002) at 173 [12.2], 175 [12.8].

[15] Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, (1995) at 14-15.

[16] Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, (1995) at 4.

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14. The background to the inquiry into the law of joint and several liability was a perceived crisis regarding the cost of liability insurance. The fear had been expressed that such insurance would become unobtainable[17]. The terms of reference of the inquiry required, in particular, that consideration be given to the issue of professional liability[18]. The Davis Report noted that professional people are usually insured against liability to clients and as a result are often the sole target of legal action when losses are suffered despite the involvement of others[19].

[17] Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, (1995) at 11.

[18] Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, (1995) at 7, 10.

[19] Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, (1995) at 11.

15. The Davis Report was not mentioned in the Second Reading Speech[20] or the Explanatory Notes[21] to the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW) , which introduced Pt 4 of the *Civil Liability Act* [22] . This may be because some seven years had passed since the release of the Davis Report. In the Second Reading Speech it was suggested that the provisions were directed not only to problems regarding insurance but also, as the title to the amending Act suggested, to defining the limits which should be placed on personal responsibility[23]. Nevertheless, there is a clear connection between the Davis Report and Pt 4 of the *Civil Liability Act*. In 1996, the Standing Committee of Attorneys-General released draft model provisions which reflected the recommendations of the Davis Report[24]. The draft model provisions were eventually adopted, in substantially the same form, in Pt 4 of the *Civil Liability Act* in New South Wales and by the other States and Territories [25] .

[20] New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 October 2002 at 5764; see also New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 19 November 2002 at 6896.

[21] New South Wales, Civil Liability Amendment (Personal Responsibility) Bill 2002, Explanatory Notes.

[22] *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW), Sched 1 [5] .

[23] New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 October 2002 at 5765.

[24] Standing Committee of Attorneys-General, *Draft Model Provisions to Implement the Recommendations of the Inquiry into the Law of Joint and Several Liability*, (1996).

[25] *Wrongs Act* 1958 (Vic) , Pt IVAA; *Law Reform (Contributory Negligence and Apportionment of Liability) Act* 2001 (SA) , Pt 3; *Civil Liability Act* 2003 (Q) , Ch 2, Pt 2; *Civil Liability Act* 2002 (WA) , Pt 1F; *Civil Liability Act* 2002 (Tas) , Pt 9A; *Proportionat e Liability Act* 2005 (NT) ; *Civil Law (Wrongs) Act* 2002 (ACT) , Ch 7A.

16. **Following paragraph cited by:**

Elanor Funds Management Ltd v Alceon Group Pty Ltd (18 September 2024) (Bromwich, Thawley and O'Sullivan JJ)
Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd (02 July 2019) (Bell P, Macfarlan and Payne JJA)
The Owners - Strata Plan 30791 v Southern Cross Constructions (ACT) Pty Ltd (in liq) (No 2) (18 April 2019) (Stevenson J)
Skinner v Redmond Family Holdings Pty Ltd (15 December 2017) (Macfarlan and Gleeson JJA, Barrett AJA)
Redmond Family Holdings v GC Access Pty Ltd (21 December 2016) (Black J)
Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd (22 August 2014) (Mortimer J)

The evident purpose of Pt 4 is to give effect to a legislative policy that, in respect of certain claims such as those for economic loss or property damage, a defendant should be liable only to the extent of his or her responsibility. The court has the task of apportioning that responsibility where the defendant can show that he or she is a "concurrent wrongdoer", which is to say that there are others whose acts or omissions can be said to have caused the damage the plaintiff claims, whether jointly with the defendant's acts or independently of them. If there are other wrongdoers they, together with the defendant, are all concurrent wrongdoers.

17. **Following paragraph cited by:**

Adams v Clark Homes Pty Ltd (27 October 2015) (Judge Jenkins, Vice President)

The purpose of Pt 4 is achieved by the limitation on a defendant's liability, effected by s 35(1)(b) , which requires that the court award a plaintiff only the sum which represents the defendant's proportionate liability as determined by the court[26]. For that purpose, it is not necessary that orders are able to be made against the other wrongdoers in the proceedings. Section 34(4) provides that it does not matter, for the purposes of Pt 4, that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died. Thus under Pt 4 the risk of a failure to recover the whole of the claim is shifted to the plaintiff.

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[26] Under the *Civil Liability Act* 2002 (NSW), s 35(1)(a) .

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18. **Following paragraph cited by:**

Zervas v Burkitt (No 2) (26 September 2019) (Bell P, Macfarlan and McCallum JJA)

Burkitt v Ultimate Car Rentals Australia P/L (02 November 2018) (Judge Levy SC)

It is not disputed that Mitchell Morgan's claim against Hunt & Hunt is an "apportionable claim" within the meaning of s 34(1)(a) . The claim was based upon Hunt & Hunt's breach of an implied term of its retainer that it exercise proper skill, diligence and care. Section 34(1A) p rovides that there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action, whether of the same or a different kind. There is no express limitation on the nature of the claim which might have been brought by the plaintiff against a concurrent wrongdoer, except the requirement of s 34(2) that the acts or omissions of all concurrent wrongdoers have caused the damage in question.

19. **Following paragraph cited by:**

Rove Estate Pty Ltd atf Lane Cove Estate Trust v Chomp Excavations & Demolition Pty Ltd (No 3) (24 March 2023) (Williams J)
Janbar Pty Ltd v Arborcrest Pty Ltd (21 October 2020) (White J)
Trajkovski v Simpson (26 March 2019) (Basten and Brereton JJA, Sackville AJA)
Gandel v Krongold Constructions (Aust) Pty Ltd (23 May 2014) (His Honour Judge Anderson)
Xpak Pty Ltd v Scibilia (04 October 2013) (His Honour Judge Anderson)

Section 34(2) poses two questions for the court: what is the damage or loss that is the subject of the claim? Is there a person, other than the defendant, whose acts or omissions also caused that damage or loss? Logically, the identification of the "damage or loss that is the subject of the claim" is anterior to the question of causation. "Damage" is not a defined term, but damage to property and economic loss are included in the definition of "harm" in s 5 .

20. Something more needs to be said concerning the words "the damage or loss that is the subject of the claim" in s 34(2) . Similar words appear in s 35(1) . It is necessary because it was the view of the Court of Appeal [27] , following a decision of the Victorian Court of Appeal in *St George Bank Ltd v Quinerts Pty Ltd* [28] ("*Quinerts*"), that, so far as concerns concurrent wrongdoers, the loss or damage they caused must be "the same damage". This would be consistent with the requirement in s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) [29] , with respect to contribution as between joint tortfeasors, that a tortfeasor would if sued have been liable in respect of the same damage.

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[27] *Mitchell Morgan Nominees Pty Ltd v Vella* (2011) 16 BPR 30,189 at 30,199-30,200 [48]-[49] .

[28] (2009) 25 VR 666 .

[29] And the *Wrongs Act* 1958 (Vic), s 23B .

21. **Following paragraph cited by:**

P-Value v Vicland Group (15 March 2016) (Digby J)
Cosmetic Laser Clinic Pty Ltd v Pirintji (31 July 2015) (Garling J)
Sanderson Motors Pty Ltd v Lindsay Bennelong Developments Pty Ltd (27 June 2014) (Ball J)
Gandel v Krongold Constructions (Aust) Pty Ltd (23 May 2014) (His Honour Judge Anderson)
Xpak Pty Ltd v Scibilia (04 October 2013) (His Honour Judge Anderson)

It is difficult to see that, as between concurrent wrongdoers, the damage they have caused can be other than the same for the purposes of s 34(2) , since it is identified in each case as that which is the subject of the plaintiff's claim. Moreover, s 34(1A) refers to there being a single apportionable claim "in proceedings in respect of the same loss or damage". However, it is generally considered preferable, on settled principles of construction, to adhere to the language of the statute in question unless there is a warrant for doing otherwise. None is evident from the provisions of Pt 4, which have a different purpose and operation from the provisions of the *Law Reform (Miscellaneous Provisions) Act* . The relationship between the contribution provisions of the *Law Reform (Miscellaneous Provisions) Act* and Pt 4 of the *Civil Liability Act* is expressed in s 36 of the latter Act. It provides that if judgment is given under Pt 4 against a concurrent wrongdoer, that defendant cannot be required to contribute to any damages recovered from any other concurrent wrongdoer or to indemnify that wrongdoer. In any event, it would seem that the purpose of the Court of Appeal in this case, and of the Victorian Court of Appeal in *Quinerts*, in referring to "the same damage", was merely to draw attention to the fact that in some cases the acts or omissions of wrongdoers may result in different damage to the same plaintiff. So much may be accepted.

22. So far as concerns causation, s 5D(1) in Pt 1A of the *Civil Liability Act* contains general principles to be applied in determining whether negligence caused particular harm. Two elements are stated as necessary for such a finding: that the negligence was a necessary condition of the occurrence (factual causation); and that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability) [30] . Section 5 D(4) requires the court to consider, amongst other relevant things, whether or not and why responsibility for the harm should be imposed on the negligent party.

[30] *Strong v Woolworths Ltd (t/as Big W)* (2012) 86 ALJR 267 at 272 [19]; 285 ALR 420 at 425; [2012] HCA 5, explaining that the division of these elements in s 5D(1) of the *Civil Liability Act* 2002 is in line with the recommendations of the "Ipp Report" (Commonwealth of Australia, *Review of the Law of Negligence: Final Report*, (2002) at 114-119 [7.41]-[7.51]).

23. Where a defendant is found to be a concurrent wrongdoer, within the meaning of s 34(2) , s 35 (1)(a) requires the court to determine the proportion of the damage or loss claimed that the defendant should bear, having regard to the extent of the defendant's responsibility for that damage or loss.

The damage or loss

24. **Following paragraph cited by:**

Elanor Funds Management Ltd v Alceon Group Pty Ltd (30 October 2023) (McElwaine J)
ACN 002 402 146 Pty Ltd (manager appointed) (in liq) (formerly known as Tome Bros Pty Ltd) v Ken Crossman & Co Pty Ltd (28 June 2022) (Farrell J)
R v White (No.2) (27 October 2021) (Abadee DCJ)
Insurance Australia Ltd v Milonas (22 September 2021) (McDonald J)
Insurance Australia Ltd v Milonas (22 September 2021) (McDonald J)
The Owners - Strata Plan No 55682 v W. R. Berkley Insurance (Europe), Plc (17 December 2020) (Abadee DCJ)
Brocklands Pty Ltd v Tasmanian Networks Pty Ltd (15 June 2020) (Blow CJ, Estcourt and Pearce JJ)
Dino Dinov v Allianz Australia Insurance Limited (20 October 2017) (Beazley P, Meagher JA and McDougall J)
Willmott Forests Ltd (Receivers and Managers appointed)(In Liq) v Armstrong Dubois Pty Ltd (01 March 2016) (Derham AsJ)

51. The Auditor submits that WFL seeks to make several new or substitute claims in the FASOC and that these depart significantly from that notified by the indorsement. The Auditor submits that in the FASOC:

(a) the damage claimed (in the sense of the injury and other foreseeable consequences suffered [45]) in the causes of action in tort and for contravention of statute is not the same injury the subject of the indorsement so that new courses of action are substituted (' **Different Damage**');[46]

(b) new and substitute material facts are relied on in support of the tortious duty of care compared to those in the indorsement ('**Different Material Facts**');[47]

(c) a new statutory cause of action not notified by the indorsement is relied on – a claim for damages under s 1041I of the *Corporations Act* by reason of a contravention of s 1041H of that Act ('**New Statutory Cause of Action**');[48]

(d) new representations not notified by the indorsement are relied on (' **New Representations**');[49]

(e) substitute causes of action based on contracts not notified by the indorsement are relied on ('**Substitute Contract Claims**').[50] This is essentially the same point as is made in the abandonment issue;

(f) breaches of new contractual obligations not notified by the indorsement are relied on ('**Substitute Breaches of Contract**');[51]

(g) there is reliance on new provisions of the *Corporations Act* imposing obligations not relied upon in the indorsement ('**New Corporations Act provisions Relied on**');[52]

via

[45] *Mahoney v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 527; *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* (2103) 247 CLR 613 at [24] ('***Hunt***').

Ryan v Balanon (Residential Tenancies) (13 April 2015) (Member E. Fabris)

26. The majority of the High Court observed, however, that "In the context of economic loss, loss or damage may be understood as the harm suffered to a plaintiff's economic interests" [1], and in this case the harm was Mitchell Morgan's inability to recover the sums advanced. The majority found that Hunt & Hunt's negligence was clearly a cause of this harm, because it rendered the mortgage ineffective as security against the property. However, the majority found that the fraudsters' conduct in inducing Mitchell Morgan to enter the loan transaction and pay the loan moneys must be regarded as a material cause of that harm. The majority observed that it is not consistent with the policy of Pt 4 that Hunt & Hunt be held wholly responsible for Mitchell Morgan's loss, and that consistent with that policy, Mitchell Morgan should not recover from Hunt & Hunt any more than that for which Hunt & Hunt was responsible.

via

[1] 247 CLR 613 at [24]

King v Benecke (24 November 2014) (Basten, Macfarlan and Ward JJA)
Wealthsure Pty Ltd v Selig (30 May 2014) (Mansfield, Besanko and White JJ)
Takla v Nasr (13 December 2013) (McColl, Basten and Hoeben JJA)
Fugen Constructions v Terranasa (19 September 2013) (McDougall J)
Symond v Gadens Lawyers Sydney Pty Ltd (19 July 2013) (Beech-Jones J)

Again, this submission appears to conflate the amounts sought to be recovered by Mr Symond with the "injury" he sustained (cf *Hunt & Hunt* at [24] and [40]). Leaving that aside, I am not satisfied that PwC has breached any legal duty that it owed Mr Symond for two reasons. First, on the limited material that was

tendered concerning PwC's role, I am not satisfied that PwC did not canvass with either Mr Symond or one of his advisors the possibility of making the disclosure.

Symond v Gadens Lawyers Sydney Pty Ltd (19 July 2013) (Beech-Jones J)

> In my view Mr Payne SC's submission wrongly conflates the "damage or loss that is the subject of the claim" as referred to in s 34(2) of the CLA and s 87CB (3) of the TPA with the damages that are assessed and awarded in the proceedings (see *Hunt & Hunt* at [24] and [90]). The various liabilities imposed upon Mr Symond by the ATO's assessment are component parts of the damages that are otherwise recoverable by Mr Symond. However, consistent with the approach of French CJ, Hayne and Kiefel JJ in *Hunt & Hunt* at [24] , the relevant "injury" suffered by Mr Symond and identified by Mr Magid was the (massive) exposure to a tax liability he acquired from redeeming preference shares over a three year period. When the "injury" is identified in those terms, then Mr Magid's opinion confirms that Abbott Tout's conduct "caused [at least some of] the damage or loss that is the subject of the claim" in these proceedings (CLA, s 34(2) ; TPA, s 87CB(3)) .

Symond v Gadens Lawyers Sydney Pty Ltd (19 July 2013) (Beech-Jones J)

> In my view Mr Payne SC's submission wrongly conflates the "damage or loss that is the subject of the claim" as referred to in s 34(2) of the CLA and s 87CB (3) of the TPA with the damages that are assessed and awarded in the proceedings (see *Hunt & Hunt* at [24] and [90]). The various liabilities imposed upon Mr Symond by the ATO's assessment are component parts of the damages that are otherwise recoverable by Mr Symond. However, consistent with the approach of French CJ, Hayne and Kiefel JJ in *Hunt & Hunt* at [24] , the relevant "injury" suffered by Mr Symond and identified by Mr Magid was the (massive) exposure to a tax liability he acquired from redeeming preference shares over a three year period. When the "injury" is identified in those terms, then Mr Magid's opinion confirms that Abbott Tout's conduct "caused [at least some of] the damage or loss that is the subject of the claim" in these proceedings (CLA, s 34(2) ; TPA, s 87CB(3)) .

Symond v Gadens Lawyers Sydney Pty Ltd (19 July 2013) (Beech-Jones J)
Selig v Wealthsure Pty Ltd (18 April 2013) (Lander J)

In the identification of the damage or loss that is the subject of the claim, it is necessary to bear in mind that damage is not to be equated with what is ultimately awarded by the court, which is to say the "damages" which are claimed by way of compensation and which are assessed and awarded for each aspect of the damage suffered by a plaintiff. Damage, properly understood, is the injury and other foreseeable consequences suffered by a plaintiff [31] . In the context of economic loss, loss or damage may be understood as the harm suffered to a plaintiff's economic interests. It has already been observed [32] that the *Civil Liability Act* equates "harm" with damage to property and economic loss which results from a failure to exercise reasonable care and skill. Mitchell Morgan's pleading does not expressly state the loss and damage it claims to have suffered. However, it claims that the loss and damage is

continuing and that it has lost the sum advanced, together with interest and other expenses. Taken together this might suggest that Mitchell Morgan claims to be unable to recover those monies.

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[31] *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 527; [1985] HCA 37.

[32] See at [19] above.

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25. **Following paragraph cited by:**

Fugen Constructions v Terranasa (19 September 2013) (McDougall J)
Wheelahan v City of Casey (No 12) (20 June 2013) (Dixon J)

In *Hawkins v Clayton* [33] , Gaudron J pointed out that in an action for negligence causing economic loss it will almost always be necessary to identify, with some precision, the interest infringed by the negligent act [34] . In that case, it was necessary to identify the interest in order to answer the question as to when the cause of action accrued. Its identification is also necessary for a proper understanding of the harm suffered and for the determination of what acts or omissions may be said to have caused that damage. As her Honour observed [35] , economic loss may take many forms. In *Wardley Australia Ltd v Western Australia* [36] , it was said that the kind of economic loss which is sustained, as well as the time when it is sustained, depends upon the nature of the interest infringed and in some cases, perhaps, upon the nature of the interference to which it is subjected.

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[33] (1988) 164 CLR 539 at 601; [1988] HCA 15 .

[34] See also *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 527; [1992] HCA 55; *The Commonwealth v Cornwell* (2007) 229 CLR 519 at 525 [16]; [2007] HCA 16.

[35] *Hawkins v Clayton* (1988) 164 CLR 539 at 601.

[36] (1992) 175 CLR 514 at 527.

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26. An interest which is the subject of economic loss need not be derived from proprietary rights or obligations governed by the general law. The interest infringed may be in the value of property or its physical condition. Thus in *The Commonwealth v Cornwell* [37] , the respondent's interest was an entitlement conferred by federal statute to participate in a Commonwealth superannuation fund. An economic interest must be something the loss or

invasion of which is compensable by a sum of money[38]. One such interest identified in the cases is a lender's interest in the recovery of monies advanced [39] .

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[37] (2007) 229 CLR 519 at 526 [18] .

[38] Cane, *Tort Law and Economic Interests*, 2nd ed (1996) at 5.

[39] *Hawkins v Clayton* (1988) 164 CLR 539 at 601 ; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 533 ; *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 425 [16]; [1999] HCA 25; *The Commonwealth v Cornwell* (2007) 229 CLR 519 at 525 [16] .

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27. **Following paragraph cited by:**

Todd Hadley Pty Limited v Lake Maintenance (NSW) Pty Limited (21 November 2019) (Bell P, McCallum JA and Simpson AJA)

One of the issues in *Kenny & Good Pty Ltd v MGICA (1992) Ltd* [40] concerned the economic loss suffered by a lender in consequence of a negligent property valuation of the proposed security for the loan. Gaudron J pointed out that the interest of the lender which it had sought to protect by obtaining the valuation was that, in the event of default, the lender should be able to recover the amount owing under the mortgage by the sale of the property [41] . It would follow that the harm to the lender's economic interest as a consequence of the negligent valuation was the lender's inability to recover that sum.

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[40] (1999) 199 CLR 413 .

[41] *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 425 [16] .

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28. **Following paragraph cited by:**

Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)
Symond v Gadens Lawyers Sydney Pty Ltd (19 July 2013) (Beech-Jones J)

The nature of Mitchell Morgan's economic interest is much the same. The harm it suffered is that it is unable to recover the sums advanced. That is its loss or damage for the purposes of s 34(2) . Mitchell Morgan's plea that it continues to suffer loss and damage is explicable on the basis that it continues to be unable to recover those sums.

29. The Court of Appeal did not identify Mitchell Morgan's loss and damage in this way. In the reasons of Giles JA, with whom the other members of the Court of Appeal agreed, it is said [42] :

> "The loss, or the harm to an economic interest, is in the one case paying out money when it would not otherwise have done so, and in the other case not having the benefit of security for the money paid out. The losses the subject of the claims for economic loss against Messrs Caradonna and Flammia and the loss the subject of the claim for economic loss against Hunt & Hunt are different."

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[42] *Mitchell Morgan Nominees Pty Ltd v Vella* (2011) 16 BPR 30,189 at 30,198-30,199 [41] .

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30. Mitchell Morgan's loss or damage, the harm to its economic interest, is not identified in these statements. Rather, Giles JA points to the immediate effects of the fraudsters' conduct and of the negligence of Hunt & Hunt, that is to say, Mitchell Morgan's payment of the money and the inefficacy of the security. It is undeniable that these effects are important in establishing how the loss or damage ultimately came to be suffered and therefore to the issue of causation. However, they cannot be equated with that loss and damage.

31. In *Wardley Australia Ltd v Western Australia* , a distinction, in principle, was drawn between the legal concept of loss and damage, and the detriment which a plaintiff may be said, in a general sense, to have suffered upon being induced by a misrepresentation to enter an agreement which proves to be disadvantageous [43] . Entry into a loan agreement in these circumstances does not necessarily mean that a plaintiff has suffered damage, because it will not immediately be self-evident that the value of the chose in action acquired, the right to repayment of the monies advanced, is worth less than the amount paid [44] .

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[43] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 527 ; see also *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 447 [86] .

[44] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 528.

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32. **Following paragraph cited by:**

Perpetual Corporate Trust Limited v Tsiamoulis (03 December 2024) (McNaughton J)

> 99. I accept Perpetual’s argument that it is arguable that a claim in negligence is not statute barred, because a tortious action does not accrue until

damage is sustained: *Commonwealth v Cornwell* (2007) 229 CLR 519; [2007] HCA 16 at [5] . To determine the time at which a tortious action accrues, damage must be actual damage of a measurable kind and prospective or contingent damage is insufficient: *Wardley* at pp 528, 531–532; and there is an available argument that causes of action for tortious conduct giving rise to a lender entering into a contract to loan money may not accrue until the point in time at which recoupment becomes impossible: *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; [2013] HCA 10 at [32] ; *Hawkins* at p 601.

CBRE (V) Pty Ltd v City Pacific Ltd (in liq) (11 April 2022) (Bell CJ, Leeming and Brereton JJA)
City Pacific Ltd (in liq) v CBRE (V) Pty Ltd (30 April 2021) (Walton J)
Lake Maintenance (NSW) Pty Limited v Todd Hadley Pty Limited (22 March 2019) (Wilson J)

A mortgage negligently drawn is also not necessarily productive of loss, except perhaps in the case of a mortgagor whose equity of redemption is affected immediately on its execution [45] .
Recourse to a mortgage will not be necessary in every case. In general terms, in a case involving a loan of monies, damage will be sustained and the cause of action will accrue only when recovery can be said, with some certainty, to be impossible [46] . There are good reasons for a principled analysis of actual damage. One reason is that it would be unjust to compel a plaintiff to commence proceedings before the existence of his or her loss is ascertainable [47] .

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[45] *Forster v Outred & Co* [1982] 1 WLR 86 at 100; [1982] 2 All ER 753 at 765, as explained in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 528-529 .

[46] *Hawkins v Clayton* (1988) 164 CLR 539 at 601 ; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 533 ; *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 425 [16] .

[47] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 527.

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33. **Following paragraph cited by:**

Shinwari v Anjoul by her tutor Therese Anjoul (07 April 2017) (McColl and Gleeson JJA, Emmett AJA)

73.
In *Hunt & Hunt* , [33] French CJ, Hayne and Kiefel JJ described the "evident purpose of Pt 4 [of the Liability Act as being] to give effect to a

legislative policy that, in respect of certain claims such as those for economic loss or property damage, a defendant should be liable only to the extent of his or her responsibility."

At a later point in his reasons, Giles JA identified Mitchell Morgan's loss as the monies paid and said that the loss occurred immediately the monies were paid [48] . His Honour may have assumed that loss had occurred because the loan agreement was unenforceable and the mortgage ineffective. Nonetheless, that is not a complete analysis of loss and damage. At the time the monies were paid there was a serious risk that loss would accrue. But when the agreement and the mortgage were entered into and the payment made, it could not be said that Mitchell Morgan's rights of recovery against the fraudsters, one of whom was a solicitor, were valueless.

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[48] *Mitchell Morgan Nominees Pty Ltd v Vella* (2011) 16 BPR 30,189 at 30,206 [80] .

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34. **Following paragraph cited by:**

Rodriguez & Sons Pty Limited v Queensland Bulk Water Supply Authority t/as Seqwater (No 23) (29 May 2020) (Beech-Jones J)

The approach of Giles JA to the question of Mitchell Morgan's loss or damage was influenced by that taken in *Quinerts*, with which his Honour expressed general agreement. *Quinerts* involved a loan by a bank secured by a mortgage where Quinerts, the valuer, had negligently overvalued the property the subject of the security. The borrower defaulted and the property fetched less than the amount of the advance at sale. Nettle JA, with whom the other members of the Court of Appeal[49] agreed, held, by reference to Pt IVAA of the *Wrongs Act* 1958 (Vic) , which is in terms similar to Pt 4 of the *Civil Liability Act*, that the borrower and guarantor were not concurrent wrongdoers with Quinerts because the damage they had caused was not the same. His Honour said [50] :

"The loss or damage caused by the borrower and the guarantor was their failure to repay the loan. Nothing which Quinerts did or failed to do caused the borrower or the lender to fail to repay the loan. The damage caused by Quinerts was to cause the bank to accept inadequate security from which to recover the amount of the loan. Nothing which the borrower or the lender did or failed to do caused the bank to accept inadequate security for the loan."

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[49] Mandie JA and Beach AJA.

[50] *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666 at 687-688 [76] .

35. In this passage, his Honour characterises the loss or damage caused by the borrower and the guarantor on the one hand and the valuer on the other as different by reference to two circumstances, neither of which can be equated with loss or damage. In the first place, his Honour identifies the default by the borrower and the guarantor under their separate agreement as loss or damage. This identifies the act or omission which may be causative of loss, rather than the harm which results from it. The loss or damage caused by the valuer is said to be the immediate effect of the valuer's negligence, namely the bank taking inadequate security. This is properly to be seen as a step in causation of damage, as it was in this case.

36. Nettle JA referred to two decisions in reaching his conclusion that the damage caused by Quinerts and that caused by the borrower and guarantor were different. Each of those decisions concerned contribution legislation. Neither is applicable to the facts of this case.

37. The firstmentioned case was *Royal Brompton Hospital NHS Trust v Hammond* [51] ("*Royal Brompton Hospital*"). As can be seen from the explanation given in *Alexander v Perpetual Trustees WA Ltd* [52] of the kinds of damage there in question, it is a case far removed from the facts of this case. The Royal Brompton Hospital NHS Trust sued its architects for damages arising from their negligent issue under a building contract of certificates which permitted the builder extensions of time. The architects sought to claim contribution, in respect of the hospital's claim against them, from the builder. The architects were unsuccessful because the hospital's claim against the builder was for its loss which had been caused by the delay in completion of the building, whilst its claim against the architects was for the impairment of its ability to proceed against the builder. The damage was not the same. The builder could not be said to have contributed to the damage claimed to arise from the architects' breach of duty.

[51] [2002] 1 WLR 1397; [2002] 2 All ER 801, referred to by Nettle JA in *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666 at 686-687 [71]-[75] .

[52] (2004) 216 CLR 109 at 124-125 [37]; [2004] HCA 7 .

38. The other case referred to by his Honour [53] was *Wallace v Litwiniuk* [54] , which had been cited in *Royal Brompton Hospital* [55] . That case concerned a plaintiff who suffered physical injuries as a consequence of another driver's negligent driving. Her solicitors, the defendants, also failed to institute proceedings within time. Unsurprisingly, the Alberta Court of Appeal concluded that the damage caused by each wrongdoer was different: the physical injuries the plaintiff suffered were damage distinct from the harm to her economic interests by reason of her inability to recover damages for those injuries [56] .

[53] *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666 at 687 [74], 688 [76] .

[54] (2001) 200 DLR (4th) 534 .

[55] [2002] 1 WLR 1397 at 1411-1412 [29]; [2002] 2 All ER 801 at 814-815 .

[56] *Wallace v Litwiniuk* (2001) 200 DLR (4th) 534 at 543 [32] .

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39. **Following paragraph cited by:**

Woodhouse v Fitzgerald (09 April 2021) (Basten, Meagher and Payne JJA)

The judgment at first instance in this case was delivered prior to the decision in *Quinerts*. Ho wever, Nettle JA was unable to agree with the conclusion reached by the primary judge in this case [57] . To explain the difference Nettle JA saw in the damage caused by the fraudsters and that caused by Hunt & Hunt, his Honour provided the following hypothetical case, which he considered to be analogous to the facts of this case. A thief steals money from a bank. Because of negligence on the part of its insurance brokers, the bank finds that the risk of theft is not covered by its insurance. Nettle JA opined that "the damage caused by the thief would be the loss of the bank's money". However, the insurance brokers did not cause the theft. Nettle JA considered that "the loss or damage caused by the insurance brokers would be the bank's inability to obtain indemnity from an insurance company for the loss suffered by reason of the theft. But nothing done by the thief would have caused the bank's insurance cover to be inadequate." [58]

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[57] *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666 at 688 [79] .

[58] *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666 at 689 [82] .

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40. In that analogy, it is correct to describe the damage or loss suffered by the bank as its inability to recover the monies stolen. One source of recovery could have been its insurer, hence the brokers were a cause of its loss. The other possible source of recovery is the thief. The harm to the bank's economic interests, at a certain point, is the inability to recover from either source.

41. **Following paragraph cited by:**

Patterson & Anor v Mamou (t/as De Novo Conveyancing) (01 March 2024) (Abadee DCJ)

Esined No. 9 Pty Limited v Moylan Retirement Solutions Pty Ltd; P&S Kauter Investments Pty Ltd Atf the Kauter Superannuation Fund v Moylan Retirement Solutions Pty Ltd; Graeme Manning v Arch Underwriting At Lloyds... (08 May 2020) (Slattery J)

In the passage quoted, his Honour tests the damage so identified by reference to causation. In doing so his Honour appears to have assumed that there is some requirement that one wrongdoer contribute to the wrongful actions of the other wrongdoer in order that they cause the same damage. There is no such requirement in Pt 4 of the *Civil Liability Act*. To the contrary, Pt 4 acknowledges, as does the common law [59] , that a wrongdoer's acts may be independent of those of another wrongdoer yet cause the same damage.

[59] *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 527.

42. **Following paragraph cited by:**

Daniel Smith by his tutor Debra Smith v South Western Sydney Local Health Network (31 May 2017) (Meagher, Gleeson and Payne JJA)

Hunt & Hunt also submits that the claim to proportionate liability in *Quinerts* may have been decided on a narrower basis, namely that the liability of the borrower and of the guarantor did not qualify as damage or loss the subject of the claim against the valuer, for the purposes of Pt IVAA of the *Wrongs Act*. They are liable in debt, for the payment of the monies retained [60] . It is not necessary to determine this question.

[60] See *Young v Queensland Trustees Ltd* (1956) 99 CLR 560 at 567, 569; [1956] HCA 51.

Causation

43. **Following paragraph cited by:**

Karpik v Carnival plc (The Ruby Princess) (29 July 2025) (Markovic, Sarah C Derrington and Jackson JJ)
Saadat v Commonwealth (09 May 2025) (Stanley J)
Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)

Absolute Aquarium Products Pty Ltd v Taylor (25 September 2024) (Deputy Michael P Snell)
Sondakh v Herliman (09 September 2021) (Harrison AsJ)
Prestage v Barrett (02 July 2021) (Estcourt J)

554. It is essential I agree, in considering the first step to identify the particular risk of harm to which the later steps will be applied. It is only through the correct identification of the risk that an assessment of the reasonable response can be made. See *RTA v Dederer* [2007] HCA 42, 234 CLR 330 at [59]-[61] and *Hunt & Hunt v Mitchell Morgan* [2013] HCA 10, 247 CLR 613 per French CJ, Hayne and Kiefel JJ at [43] .

Kitching v AAI Ltd t/as GIO Insurance (05 August 2020) (Davies J)
Dinh v Nguyen (29 June 2017) (Gibson DCJ)

74. In *Lucantonio v Stichter* [2014] NSWCA 5, the Court of Appeal identified the test (at [79] – [81]):

> "[79] In order to establish that any breach of duty on the respondent's part caused the appellant harm, the appellant had to establish that that negligence was a necessary condition of the occurrence of that harm, an exercise the Act labels "factual causation": s 5D(1)(a), *Civil Liability Act 2002* . That required the appellant establishing that the respondent's negligence was a condition that must be present for the occurrence of the harm: *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18], [20]) per French CJ, Gummow, Crennan and Bell JJ; (at [44]) per Heydon J.
>
> [80] Such determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E " (*Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14])) and is approached by applying common sense to those facts: *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 (at [43] ; [56]) per French CJ, Hayne and Kiefel JJ. It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeels Palace Pty Ltd v Mourbarak* [2009] HCA 48; (2009) 239 CLR 420 (at [45], [55]). "Proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred": *Strong v Woolworths Ltd* (at [32]) per French CJ, Gummow, Crennan and Bell JJ.
>
> [81] The inquiry into causation is retrospective, seeking to identify what happened and why: *Vairy v Wyong Shire Council* [2005] HCA 62; (2005) 223 CLR 422 (at [124]) per Hayne J; *Lesandu Blacktown Pty Ltd v Gonzalez* [2013] NSWCA 8 (at [28]) per Basten JA (Davies J agreeing). It focuses on the particular conduct or omission which is found to constitute the defendant's breach of duty: *Kocis v SE Dickens Pty Ltd* [1998] 3 VR 408 (at 419) per Phillips JA (Ormiston JA generally agreeing).

Ralston v Jurisich (03 April 2017) (Ward JA, Emmett AJA and McDougall J)

Greenway v The Corporation of the Synod of the Diocese of Brisbane (05 August 2016) (Kingham DCJ)
Baker v Mackenzie (08 September 2015) (Mossop AsJ)
Bradley v Insurance Australia Ltd t/as NRMA Insurance (20 July 2015) (Adamson J)
Warth v Lafsky (01 April 2014) (McColl JA, Preston CJ of LEC and Tobias AJA)
Lucantonio v Stichter (06 February 2014) (McColl, Basten and Barrett JJA)
Takla v Nasr (13 December 2013) (McColl, Basten and Hoeben JJA)

77. Unlike the issues of duty of care and breach, the causation inquiry "is wholly retrospective [and] ... seeks to identify what happened and why": *Vairy v Wyong Shire Council* (at [124]) per Hayne J; see also *Wallace v Kam* (at [26]). Thus "[t]he proper identification of damage should usually point the way to the acts or omissions which were its cause": *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (at [43]).

Conclusion

Takla v Nasr (13 December 2013) (McColl, Basten and Hoeben JJA)
Oyston v St Patrick's College (No 2) (23 September 2013) (Macfarlan and Barrett JJA, Tobias AJA)

The proper identification of damage should usually point the way to the acts or omissions which were its cause. Causation is largely a question of fact, to be approached by applying common sense to the facts of the particular case [61] . This is not to deny that value judgments and policy have a part to play in causation analysis at common law [62] and, as has been observed [63] , both factual causation and scope of liability elements are referred to in s 5D(1) of the *Civil Liability Act*.

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[61] *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 681, cited in *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 515, 523; [1991] HCA 12; see also *Chappel v Hart* (1998) 195 CLR 232 at 238 [6]; [1998] HCA 55.

[62] *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 516-517 .

[63] See [22] above.

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44. In *March v Stramare (E & MH) Pty Ltd* [64] , it was observed that courts are no longer as constrained as they once were to find a single cause for a consequence and to adopt an "effective cause" formula. Courts today usually recognise that there may be wrongdoers whose acts or omissions occur successively, rather than simultaneously, and who may be liable for the same damage, even though one may be liable for only part of the damage for which the other is liable [65] .

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[64] (1991) 171 CLR 506 at 512.

[65] *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 527 ; *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 512.

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45. **Following paragraph cited by:**

Nayyer v I Need a Chef NSW Pty Ltd ATF I Need a Chef NSW Unit Trust (12 August 2025)
Pabai v Commonwealth of Australia (No 2) (15 July 2025) (Wigney J)
Saadat v Commonwealth (09 May 2025) (Stanley J)

> 2537. However, the common law recognises that concurrent and successive tortious acts may each be a cause of a plaintiff's loss or damage. This is reflected in the proposition that it is enough for liability that a wrongdoer's conduct be one cause. The relevant inquiry is whether the particular contravention was a cause, in the sense that it materially contributed to the loss. Material contribution has been said to require only that the act or omission of a wrongdoer play some part in contributing to the loss. [2225] However, if the damage of which the plaintiff complains would have happened if there had been no breach of duty by the defendant it will often be possible to conclude that the breach was not a cause of that damage. [2226] In *Chappel v Hart* Kirby J, in analysing the principles relevant to causation, observed that in certain circumstances, the appearance of a causal connection between the breach and the damage, arising from the application of the "but for" test and the proximity of the damage, is displaced by a demonstration that, *inter alia*, the damage was inevitable and would probably have occurred even without the breach, or, that the negligent event was ineffective as a cause of the damage because the event which occurred would probably have occurred in the same way even if the breach had not happened. [2227]
>
> *via*
> [2225] *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10 at [45] , (2013) 247 CLR 613 at 635.

McDermott v Toll Holdings Ltd (29 April 2025)
Insurance Australia Ltd t/as NRMA Insurance v Kirkpinar (10 March 2025) (Mitchelmore J)
Zhao v Insurance Australia Limited t/as NRMA Insurance (07 November 2024)

> [6] Ground 3 can be dispatched immediately. The nub of the point was captured in Value's written submissions in reply where it was argued that it was the actions taken on behalf of MMM, rather than the actions of Value, which were "the proximate cause of the harm". That is not the relevant legal test for

causation in negligence. The issue under s 5D of the *Civil Liability Act 2002* (NSW) (CLA) is relevantly whether the negligence was a necessary condition of the occurrence of the harm. That notion has been taken to include where the tortfeasor's negligence materially contributed to the harm even if there were other conjunctive causes, just as under the previous common law: *Amaca Pty Ltd v Booth* [2011] HCA 53; (2011) 246 CLR 36 at [70] ; *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 at [20]-[30] . It is necessary only that the relevant act or omission play some part in contributing to the loss, even if minor: *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 at [45] ; *Gould v Vaggelas* [1984] HCA 68; (1984) 157 CLR 215 at 236. It does not require that the cause be characterised as "proximate": note eg *Wallace v Kam* [2013] HCA 19; (2013) 250 CLR 375 at [11] . Here, if Value was negligent in the manner found by the primary judge then there can be no doubt that its negligence was a materially contributing cause of Mr Badra's injuries. Value made a vague suggestion in its written submissions that an issue "perhaps" arose as to scope of liability under s 5D(1)(b) , but the argument was not developed and has no apparent merit.

Zhao v Insurance Australia Limited t/as NRMA Insurance (07 November 2024)
Value Constructions Pty Ltd v Badra (31 July 2024) (Leeming and Kirk JJA, Griffiths AJA)
Watts v State of New South Wales (NSW Police Force) (10 April 2024)
Fisher v Nonconformist Pty Ltd (20 February 2024) (Meagher and Kirk JJA, Simpson AJA)

70. Although the joint judgment used the double negative, the point can be made positively: s 9A imposes a more stringent causal requirement than that involved in the causal requirement in the first limb of s 4(a) . That understanding is implicit in the joint judgment. It is consistent with the Attorney's reference to the "weaker test" in s 4 in his second reading speech. And it reflects a deeper point. The causal standard for the "arising out of employment" notion in workers compensation legislation has long been accepted to involve consideration of whether the employment "caused, or to some material extent contributed to, the injury": *Nunan* at 124. That is relevantly the same approach as taken at common law for tort: see eg ***March v** E & M H **Stramare** Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506 at 514 per Mason CJ. There are various aspects to the notion of "material contribution": note *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 at [21]-[25] . One role that it plays was explained in *Amaca Pty Ltd v **Booth*** [2011] HCA 53; (2011) 246 CLR 36 at [70] per Gummow, Hayne and Crennan JJ and in ***Hunt & Hunt** Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 at [45] per French CJ, Hayne and Kiefel JJ . To quote the latter (citations omitted):

> The law's recognition that concurrent and successive tortious acts may each be a cause of a plaintiff's loss or damage is reflected in the proposition that a plaintiff must establish that his or her loss or damage is "caused or materially contributed to" by a defendant's wrongful conduct. It is enough

> for liability that a wrongdoer's conduct be one cause. The relevant enquiry is whether the particular contravention was a cause, in the sense that it materially contributed to the loss. Material contribution has been said to require only that the act or omission of a wrongdoer play some part in contributing to the loss.

Davis v Perry O'Brien Engineering Pty Ltd (01 November 2023) (Applegarth J)
Davis v Perry O'Brien Engineering Pty Ltd (01 November 2023) (Applegarth J)
Skues v The Sydney Children's Hospital Network (18 August 2022) (Chen J)
Zervas v Burkitt (No 2) (26 September 2019) (Bell P, Macfarlan and McCallum JJA)
The State of Western Australia v Cunningham [No 3] (23 November 2018) (Buss P, Murphy JA, Pritchard JA)
Berhane v Woolworths Ltd (08 August 2017) (Gotterson and Morrison JJA and Dalton J,)

> 72. However, senior counsel for Mr Berhane also put the case on causation on the basis of s 305D(2) of the *Workers Compensation and Rehabilitation Act* . For that purpose the "but for" test in s 305D(1) is inapplicable, and the test is whether the breach materially contributed to the injury. [64] At trial the case was conducted on the basis that the workplace activities [65] materially contributed to the acceleration of the pre-existing condition.[66] If those workplace activities were carried out as a result of Woolworths' breach of duty, as they were, then the case as conducted would engage s 305D(2) . The conclusion reached in paragraph [50] above would also be sufficient to satisfy s 305D(2) .

via

[64] *Amaca Pty Ltd v Booth* (2011) 246 CLR 36, [2011] HCA 53, at [70] ; *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, [2013] HCA 10 at [45] ; *Strong v Woolworths Ltd* (2012) 246 CLR 182, [2012] HCA 5, at [26] ; *Prasad v Ingham's Enterprises Pty Ltd* [2016] QCA 147 at [90] .

The Corporation of the Synod of the Diocese of Brisbane v Greenway (26 May 2017) (Morrison and McMurdo JJA and Bond J,)
Gratrax Pty Ltd v T D & C Pty Ltd (17 December 2013) (Fraser and Morrison JJA and Margaret Wilson J,)
Takla v Nasr (13 December 2013) (McColl, Basten and Hoeben JJA)
Cross v Moreton Bay Regional Council (30 July 2013) (Jackson J)

The law's recognition that concurrent and successive tortious acts may each be a cause of a plaintiff's loss or damage is reflected in the proposition that a plaintiff must establish that his or her loss or damage is "caused or materially contributed to" by a defendant's wrongful conduct [66] . It is enough for liability that a wrongdoer's conduct be one cause [67] . The relevant enquiry is whether the particular contravention was a cause, in the sense that it materially contributed to the loss [68] . Material contribution has been said to require only that the act or omission of a wrongdoer play some part in contributing to the loss [69] .

[66] *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 514, referring to *Duyvelshaff v Cathcart & Ritchie Ltd* (1973) 47 ALJR 410 at 417; 1 ALR 125 at 138 ; *Tubemakers of Australia Ltd v Fernandez* (1976) 50 ALJR 720 at 724; 10 ALR 303 at 310 ; *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 at 620 ; *McGhee v National Coal Board* [1973] 1 WLR 1 at 4, 6, 8, 12; [1972] 3 All ER 1008 at 1010, 1012, 1014, 1018.

[67] *Henville v Walker* (2001) 206 CLR 459 at 469 [14]; [2001] HCA 52.

[68] *Henville v Walker* (2001) 206 CLR 459 at 480 [60], 493 [106] ; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 128 [56], 130 [62]; [2002] HCA 41; *Roads and Traffic Authority v Royal* (2008) 82 ALJR 870 at 887 [85]-[86], 897-898 [143]; 245 ALR 653 at 675, 689; [2008] HCA 19.

[69] *Gould v Vaggelas* (1984) 157 CLR 215 at 236; [1984] HCA 68.

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46. **Following paragraph cited by:**

Esined No. 9 Pty Limited v Moylan Retirement Solutions Pty Ltd; P&S Kauter Investments Pty Ltd Atf the Kauter Superannuation Fund v Moylan Retirement Solutions Pty Ltd; Graeme Manning v Arch Underwriting At Lloyds... (08 May 2020) (Slattery J)

> 405. The question to be posed under *Civil Liability Act* , s 34(2) is whether the acts of MIG, MIG as trustee for the Bolwarra Heights Investment Trust and Wallalong Investment Holdings independently of MRS caused plaintiffs' damage. The plaintiffs submitted that the failure to repay by MIG, Wallalong Investment Holdings and MIG as trustee of the Bolwarra Heights Investment Trust of the loans advanced to them is a loss "distinctly different from the loss caused by the negligent advice provided by MRS". But in the Court's view, the damage caused by the defaults of these non-MRS actors is identical, with that caused by MRS. The conduct of these other parties did cause that same damage: *Hunt & Hunt* (at [46]).

There can be no doubt, on the findings of the primary judge, that Hunt & Hunt was a wrongdoer whose actions were a cause of Mitchell Morgan's inability to recover the monies advanced. The question under s 34(2) of the *Civil Liability Act* is whether the fraudsters' acts, independently of Hunt & Hunt, also caused that damage.

47. **Following paragraph cited by:**

Australian Pacific Airports (Melbourne) Pty Ltd v CPB Contractors Pty Ltd and Anor (Ruling) (26 March 2024) (Kirton J)

> 26 In any event, these decisions are consistent in noting that the question of a legal liability may be inextricably bound up with an examination of the facts causing loss. As Mortimer J said in *Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd* at [23] :
>
> > Minds may differ on the application of the causation analysis required by the proportionate liability provisions, as the departures in characterisation between the majority and minority in Hunt & Hunt demonstrate. The essential nature of the causation inquiry is one of fact (see Hunt & Hunt 247 CLR 613; [2013] HCA 10 at [47] per French CJ, Hayne and Kiefel JJ), and this emphasises the need for careful examination of the evidence in order to reach a conclusion about whether a person is or is not a "concurrent wrongdoer" for the purposes of the proportionate liability provisions.
>
> Woodhouse v Fitzgerald (09 April 2021) (Basten, Meagher and Payne JJA)
> GC Group Company Pty Ltd v Bingo Holdings Pty Ltd (No 3) (18 March 2021) (Stevenson J)
> The Owners - Strata Plan No 55682 v W. R. Berkley Insurance (Europe), Plc (17 December 2020) (Abadee DCJ)
> GC Group Company Pty Ltd v Bingo Holdings Pty Ltd (No 2) (06 October 2020) (Stevenson J)
> Bird v Stonham trading as John Stonham and Co. Lawyers (15 August 2019) (Abadee DCJ)
> Cosmetic Laser Clinic Pty Ltd v Pirintji (31 July 2015) (Garling J)
> British Marine PLC v Wollongong Coal Ltd (30 April 2015) (Buchanan J)
> Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd (22 August 2014) (Mortimer J)
> Symond v Gadens Lawyers Sydney Pty Ltd (19 July 2013) (Beech-Jones J)

The word "caused", in a statutory provision in terms similar to s 34(2) , has been read as connoting the legal liability of a wrongdoer to the plaintiff[70]. The language of liability is used in contribution legislation [71] , but not in Pt 4 of the *Civil Liability Act*. Nevertheless, it would usually be the case that a person who is found to have caused another's loss or damage is liable for it. References to the liability of a wrongdoer should not, however, distract attention from the essential nature of the enquiry at this point, which is one of fact.

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[70] *Shrimp v Landmark Operations Ltd* (2007) 163 FCR 510 at 523 [62] , which concerned the *Trade Practices Act* 1974 (Cth), s 87CB(3) .

[71] For instance, the *Law Reform (Miscellaneous Provisions) Act* 1946, s 5(1)(c) .

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48. In determining the question of causation, it is necessary to keep clearly in mind the harm suffered by Mitchell Morgan: its inability to recover the monies advanced. Merely to then state the obvious facts – that the monies were advanced under the loan agreement and on the security of the mortgage – is to acknowledge that the harm suffered has more than one cause.

49. **Following paragraph cited by:**

Trajkovski v Simpson (26 March 2019) (Basten and Brereton JJA, Sackville AJA)

Because Mitchell Morgan's damage is its inability to recover monies, it is understandable that attention is focused upon the immediate consequence of Hunt & Hunt's negligence, namely the mortgage's inefficacy as security against the property, as causative of the damage. However, as Hunt & Hunt points out in its submissions, there were two conditions necessary for the mortgage to be completely ineffective: (a) that the loan agreement was void; and (b) that the mortgage document did not itself contain the debt covenant, but did so solely by reference to the loan agreement. Hunt & Hunt was responsible for (b), but the fraudsters were responsible for (a).

50. It should not be overlooked that the effect of the fraudsters' conduct was that Mitchell Morgan entered into the transaction and was left with an unenforceable loan agreement. Mitchell Morgan had no promise to repay upon which it could sue and it was unable, in a practical sense, to recover from the fraudsters when the fraud was discovered. The fraudsters' conduct must therefore be seen as contributing to Mitchell Morgan's inability to recover.

51. **Following paragraph cited by:**

P Twin Holdings Pty Ltd as Trustee for the P Twin Trust v SG Old Pty Ltd (09 June 2017) (Goetze DCJ)

184. In ***Hunt & Hunt*** , it was noted at [51] that fraudster's conduct induced entry into a loan transaction. But for the fraud, the monies, almost certainly, would not have been advanced. Hunt & Hunt were subsequently instructed to draw loan and mortgage documents providing a covenant to repay the borrowed sum. However, the mortgage document, as drawn, did not contain such a provision.

More generally, it is plain that the fraudsters' conduct induced Mitchell Morgan to enter into the transaction, of which the taking of a mortgage was a foreseeable element. The advance of the monies by Mitchell Morgan may have been made on the faith of an ineffective security, but Mitchell Morgan would never have had the need to take a mortgage, nor Hunt & Hunt to draw one, had Mitchell Morgan not been induced to enter into the transaction. The advance was also made on the faith of forged documents and the false certification of a solicitor. On any view, the fraudsters' conduct in inducing Mitchell Morgan to enter into the transaction and pay the monies must be regarded as a material cause of the harm which resulted. The importance of the part the fraudsters' conduct played is reflected in the extent to which the primary judge found them to be responsible for Mitchell Morgan's loss [72] .

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[72] Referred to at [7] above.

52. Giles JA found that Mitchell Morgan would not otherwise have paid the monies out but for the fraud and that it could have sued the fraudsters to recover the monies [73] . In the same passage, however, his Honour expressed the view that the forged loan agreement was merely "part of the occasion" for the loss, arising from the ineffective mortgage, to sound in damages. This view would appear to deny that the forged documents had any causative effect.

[73] *Mitchell Morgan Nominees Pty Ltd v Vella* (2011) 16 BPR 30,189 at 30,206 [80] .

53. Mitchell Morgan in its submissions interprets his Honour's reasoning to be that the forged loan agreement did not cause the mortgage security to be ineffective. In this regard, Mitchell Morgan may be taken to be referring to Hunt & Hunt's negligent drawing of the mortgage as unconnected with the situation the fraudsters had brought about. But as has already been pointed out [74] , it is not a requirement of proportionate liability that the actions of one independent concurrent wrongdoer contribute to the negligence of another. The question is whether each of them, separately, materially contributed to the loss or damage suffered.

[74] See at [45] above.

54. **Following paragraph cited by:**

P Twin Holdings Pty Ltd as Trustee for the P Twin Trust v SG Old Pty Ltd (09 June 2017) (Goetze DCJ)
Takla v Nasr (13 December 2013) (McColl, Basten and Hoeben JJA)

It would appear that Giles JA was influenced to a view that the fraudsters' conduct was not causative of the damage because he considered that Hunt & Hunt's duty extended to protecting Mitchell Morgan from the fraud which occurred [75] . It may be doubtful that Hunt & Hunt's duty is properly described in these terms. It was certainly to protect Mitchell Morgan's economic interests and as such would require any security drawn to be effective [76] , but this is so regardless of the reasons why monies advanced might not be recovered. Hunt & Hunt could not have foreseen that the documentation, certified as correct by another solicitor, was forged. In determining the extent of Hunt & Hunt's duty, care must be taken not to deprive the fraudsters' wrongdoing of any content.

[75] *Mitchell Morgan Nominees Pty Ltd v Vella* (2011) 16 BPR 30,189 at 30,206 [80] .

[76] *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 424-425 [16]

55. His Honour's approach harks back to a preference for there to be an effective or sole cause; an approach which predated apportionment legislation generally [77] . It denies that wrongdoers' acts may occur successively yet be a cause of the same damage. On this view, "but for" Hunt & Hunt's negligence, loss would not have been suffered. But the same can be said "but for" the fraudsters' conduct.

[77] *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 515.

56. In *March v Stramare (E & MH) Pty Ltd* [78] , it was observed that certain commentators subdivided the issue of causation into two questions: causation in fact, to be determined by the "but for" test; and whether a defendant should be held responsible in law for the damage which his or her negligence played some part in producing. The approach was criticised. The "but for" test, although useful for some purposes, has its limitations. The approach placed too much weight on that test, to the exclusion of the common sense approach, which the law has always favoured [79] .

[78] (1991) 171 CLR 506 at 515.

[79] *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 515.

57. **Following paragraph cited by:**

Zervas v Burkitt (No 2) (26 September 2019) (Bell P, Macfarlan and McCallum JJA)
McBride v Christie's Australia Pty Ltd (04 December 2014) (Bergin CJ in Eq)

As to the second question, as has been observed above[80], it is accepted that value judgments and policy considerations have a part to play in determining whether an act is sufficient to bring about the harm suffered by a plaintiff [81] . Section 5D(1)(b) and (4) of the *Civil Liability Act* may be thought to involve such considerations, requiring the court to consider whether and why responsibility for the harm should be imposed on the negligent party. These considerations are necessary because a finding of causation invariably involves liability on the part of a defendant. Such a finding does not, however, involve a determination as to whether a defendant should bear sole responsibility or whether and to what extent it should be apportioned between other wrongdoers. If a finding of causation is made with respect to other

wrongdoers, so that a defendant is a concurrent wrongdoer within the meaning of s 34(2) , s 35 (1) then requires the court to determine the extent of the defendant's responsibility. The value judgments involved in that exercise differ from, and are more extensive than, those which inform the question of causation.

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[80] See at [22] and [43] above.

[81] *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 515 ; *Strong v Woolworths Ltd (t/as Big W)* (2012) 86 ALJR 267 at 272 [19]; 285 ALR 420 at 425.

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58. **Following paragraph cited by:**

Symond v Gadens Lawyers Sydney Pty Ltd (19 July 2013) (Beech-Jones J)

So far as concerns Hunt & Hunt, it is clearly appropriate that its negligence be adjudged a cause and that it be held liable for Mitchell Morgan's damage. However, it is not consistent with the policy of Pt 4 that Hunt & Hunt be held wholly responsible for the damage, when regard is had to the part played by the fraudsters' conduct. Consistent with that policy, Mitchell Morgan should not recover from Hunt & Hunt any more than that for which Hunt & Hunt is responsible, as found by the primary judge.

Application for special leave

59. The remaining issue concerns the rate of interest which the Court of Appeal determined that Hunt & Hunt should pay by way of compensation to Mitchell Morgan, which is the subject of an application for special leave to appeal. The Court of Appeal held that Hunt & Hunt should pay interest at the rates specified in the loan agreement forged by Mr Caradonna [82] . Hunt & Hunt contends that the rate should be limited to that allowed under s 100 of the *Civil Procedure Act* 2005 (NSW) . This contention requires reference to s 5D(1) of the *Civil Liability Act*. Hunt & Hunt accepts that the element of factual causation is met. It does not accept that the second element, that of scope of liability, is met.

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[82] *Mitchell Morgan Nominees Pty Ltd v Vella* (2011) 16 BPR 30,189 at 30,208 [91] ; *Mitchell Morgan Nominees Pty Ltd v Vella (No 2)* [2012] NSWCA 38 at [16] .

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60. Hunt & Hunt's argument centres upon the very high rate of interest that was the subject of the loan agreement and describes Mitchell Morgan as "lenders of last resort". It submits that the scope of its liability should not extend to what is described as a "windfall profit", one which Mitchell Morgan has not shown would have been the subject of agreement by a genuine borrower.

61. The Court of Appeal did not accept the submission [83] . Macfarlan JA considered that Hunt & Hunt undertook the preparation of a mortgage to protect the interests of its client as a lender. Hunt & Hunt was fully aware of the terms of the loan agreement, which it drafted. In these circumstances, his Honour could not see why Hunt & Hunt's liability should not extend to the rates charged by the client, when the loss was caused by its own negligence.

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[83] *Mitchell Morgan Nominees Pty Ltd v Vella (No 2)* [2012] NSWCA 38 at [16] per Macfarlan JA, Sackville AJA agreeing at [20] .

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62. No error is identified in the reasoning of the Court of Appeal. Special leave should be refused.

Orders

63. The appeal should be allowed with costs. The application for special leave should be dismissed with costs. The orders of the Court of Appeal dated 15 March 2012 should be set aside and, in lieu thereof, it should be ordered that the appeal by Mitchell Morgan from the orders made by the Supreme Court on 3 July 2009 be dismissed, except in so far as the sum assessed to be payable by Hunt & Hunt included interest calculated pursuant to s 100 of the *Civil Procedure Act* . Instead, interest should be allowed on the sum assessed by the Supreme Court at the rates applied by the Court of Appeal in its orders of 15 March 2012. The first and second respondents should pay the appellant's costs in the Court of Appeal. The parties should provide the Court with minutes of order in accordance with these reasons within 14 days.

BELL AND GAGELER JJ.

Introduction

64. Part 4 of the *Civil Liability Act* 2002 (NSW) ("the Act") enacts a regime of proportionate civil liability. The central provision of the regime is in the following terms [84] :

> "In any proceedings involving an apportionable claim:
>
> (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is 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, and
>
> (b) the court may give judgment against the defendant for not more than that amount."

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[84] Section 35(1) of the Act .

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65. The expression "apportionable claim" is defined to encompass "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" other than a claim "arising out of personal injury" [85] a s well as "a claim for economic loss or damage to property in an action for damages" for contraventions of certain statutory prohibitions against engaging in misleading or deceptive conduct [86] . The expression "concurrent wrongdoer" is defined as follows [87] :

> "... a ***concurrent wrongdoer*** , in relation to a claim, is a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim."

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[85] Section 34(1)(a) of the Act .

[86] Section 34(1)(b) of the Act .

[87] Section 34(2) of the Act .

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66. The liability of "excluded concurrent wrongdoers" is not limited by the Part [88] . Excluded concurrent wrongdoers include concurrent wrongdoers who intended to cause, or fraudulently caused, the economic loss or damage to property that is the subject of the claim [89] . The liability of any other concurrent wrongdoer is to be determined in accordance with the Part [90] and it "does not matter" for that purpose "that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died" [91] .

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[88] Section 34A of the Act .

[89] Section 34A(1)(a) and (b) of the Act .

[90] Section 34A(3) of the Act .

[91] Section 34(4) of the Act .

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67. This appeal concerns the construction and application of the definition of "concurrent wrongdoer". It concerns, in particular, the application of that definition to a solicitor who is claimed to have caused economic loss to a client by negligently failing to protect the client from the consequences of fraud committed by another person. Is the solicitor a concurrent wrongdoer with the fraudster? Our answer is "No".

Facts: real and hypothesised

68. Alessio Vella and Angelo Caradonna formed a joint venture in pursuance of which they opened a joint bank account. Unknown to Mr Vella, Mr Caradonna obtained certificates of title to properties owned by Mr Vella and used them to borrow for his own purposes. One of the loans Mr Caradonna obtained was from Mitchell Morgan Nominees Pty Ltd and Mitchell Morgan Nominees (No 2) Pty Ltd (together, "Mitchell Morgan"). Mr Caradonna obtained that loan by forging Mr Vella's signature on documents. Those documents included a loan agreement and a mortgage over one of Mr Vella's properties. Mr Caradonna was assisted by a solicitor, Mr Flammia.

69. Mitchell Morgan retained Hunt & Hunt Lawyers ("Hunt & Hunt") to prepare the loan and mortgage documents. Hunt & Hunt prepared a loan agreement and a separate "all moneys" mortgage. Immediately after Hunt & Hunt registered the mortgage, Mitchell Morgan paid the amount of the loan into the joint bank account. Mr Caradonna immediately withdrew that amount from the joint bank account, again by forging Mr Vella's signature.

70. In proceedings in the Supreme Court of New South Wales, the primary judge held that Mr Vella was not liable to Mitchell Morgan on the loan agreement, on which Mr Caradonna had forged Mr Vella's signature, with the result that the registered mortgage secured nothing [92] . The primary judge held that Hunt & Hunt was liable to Mitchell Morgan in negligence on the basis that the duty of care Hunt & Hunt owed to Mitchell Morgan included a duty to protect Mitchell Morgan from fraud and that the reasonable discharge of that duty required Hunt & Hunt to have included a covenant to repay in the mortgage instrument itself [93] . Tho se holdings were not the subject of appeal.

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[92] *Vella v Permanent Mortgages Pty Ltd* (2008) 13 BPR 25,343 at 25,374 [269], 25,380 [328] .

[93] (2008) 13 BPR 25,343 at 25,400 [543], 25,402 [559]-[562] .

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71. The primary judge went on to hold that Hunt & Hunt was a concurrent wrongdoer with Mr Caradonna and Mr Flammia and that the liability of Hunt & Hunt should be limited under Pt 4 of the Act to 12.5 per cent of the amount "which Mitchell Morgan paid out in respect of the forged mortgage" [94] .

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[94] (2008) 13 BPR 25,343 at 25,404-25,406 [575]-[598], 25,414 [680] .

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72. On appeal by Mitchell Morgan, the Court of Appeal of the Supreme Court of New South Wales (Bathurst CJ, Giles, Campbell and Macfarlan JJA and Sackville AJA) held that Hunt & Hunt was not a concurrent wrongdoer with Mr Caradonna and Mr Flammia with the result that Pt 4 of the Act had no application [95] . According to Giles JA, with whom the other

members agreed, Mr Caradonna and Mr Flammia were not persons whose acts or omissions caused the economic loss that was the subject of Mitchell Morgan's claim against Hunt & Hunt. The economic loss caused to Mitchell Morgan by Mr Caradonna and Mr Flammia was "paying out money when it would not otherwise have done so"; the economic loss caused to Mitchell Morgan by Hunt & Hunt was "not having the benefit of security for the money paid out" [96] .

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[95] *Mitchell Morgan Nominees Pty Ltd v Vella* (2011) 16 BPR 30,189.

[96] (2011) 16 BPR 30,189 at 30,198-30,199 [41] .

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73. That result, as Giles JA pointed out [97] , was consistent with the reasoning of the Court of Appeal of the Supreme Court of Victoria (Nettle and Mandie JJA and Beach AJA) in *St George Bank Ltd v Quinerts Pty Ltd* [98] , which concerned the construction and application of equivalent proportionate civil liability provisions in Victoria [99] . There a bank had lent on a negligent valuation of mortgaged property. The bank claimed against the valuer after the borrower and guarantor defaulted on the loan and after the mortgaged property realised less than the valuation. The Court of Appeal held that the valuer was not a concurrent wrongdoer with the borrower and the guarantor. According to Nettle JA, with whom the other members agreed, that was because the borrower and the guarantor could not be said "to have caused or be liable for 'the same damage' as [the valuer]": "[t]he loss or damage caused by the borrower and the guarantor was their failure to repay the loan" but "[n]othing which [the valuer] did or failed to do caused the borrower or the lender to fail to repay the loan" [100] ; conversely "[t]he damage caused by [the valuer] was to cause the bank to accept inadequate security from which to recover the amount of the loan" but "[n]othing which the borrower or the lender did or failed to do caused the bank to accept inadequate security for the loan" [101] .

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[97] (2011) 16 BPR 30,189 at 30,199-30,204 [45]-[68] .

[98] (2009) 25 VR 666 .

[99] Part IVAA of the *Wrongs Act* 1958 (Vic) ("the Victorian Act").

[100] *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666 at 687 [76] .

[101] (2009) 25 VR 666 at 687-688 [76] .

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74. In *Quinerts*, Nettle JA drew an analogy with the hypothetical case of a thief stealing money from a bank and the bank finding that risk of theft is not covered by its insurance because of negligence on the part of an insurance broker. In such a case: "the damage caused by the thief would be the loss of the bank's money" but "[n]othing ... the insurance brokers did or failed to do in effecting appropriate insurance cover would have caused the theft of the bank's

money"; and conversely, "the loss or damage caused by the insurance brokers would be the bank's inability to obtain indemnity from an insurance company for the loss suffered by reason of the theft" but "nothing done by the thief would have caused the bank's insurance cover to be inadequate". Accordingly, "the thief would *not* be a concurrent wrongdoer in relation to any claim which the bank might make against its insurance brokers for failing to arrange appropriate insurance cover" [102] .

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[102] (2009) 25 VR 666 at 689 [82] (emphasis in original).

Hunt & Hunt's arguments

75. Hunt & Hunt argues that the New South Wales Court of Appeal in the present case and the Victorian Court of Appeal in *Quinerts* each proceeded on a wrong construction of the definition of "concurrent wrongdoer". All that the definition requires, argues Hunt & Hunt, is first an identification of the damage or loss that is the subject of the plaintiff's claim against the defendant and second a finding that the acts or omissions of the plaintiff and one or more other persons were in fact a cause of that damage or loss.

76. **Following paragraph cited by:**

Vaughan Constructions Pty Ltd v Melbourne Water Corporation (Building and Property) (Corrected) (07 June 2022) (The Honourable Justice Delany, Acting Member)

Hunt & Hunt argues that the damage or loss of Mitchell Morgan in the present case is properly characterised as Mitchell Morgan's inability to recover the amount loaned. That inability had two causes: one was the manner in which Hunt & Hunt drafted the mortgage; the other was the fraud of Mr Caradonna and Mr Flammia. Hunt & Hunt argues in the alternative that, if the damage or loss of Mitchell Morgan is properly characterised as Mitchell Morgan not having the benefit of security for the amount loaned, the fraud of Mr Caradonna and Mr Flammia was a cause of that damage or loss because the mortgage would not have been registered and the loan would not have been made but for that fraud.

77. Hunt & Hunt suggests that *Quinerts*, although wrongly reasoned, was correctly decided. That is because the default of the borrower and the guarantor could not be described as causing any "damage or loss" to the bank at all; the bank's claim against each of the borrower and the guarantor was in debt not damages. As to the case hypothesised in *Quinerts*, Hunt & Hunt accepts that the insurance broker would not be a concurrent wrongdoer with the thief but argues that the analogy to the present case is "imperfect".

Legislative context

78. Part 4 of the Act was inserted in 2002 [103] , and amended in 2003 [104] , before it was proclaimed to commence in 2004[105]. Its enactment, amendment and commencement formed part of a co-ordinated national response to what was seen as an unavailability of reasonably priced insurance to indemnify against liability for negligence[106]. The equivalent Victorian proportionate liability regime was introduced as part of that response [107] , as were proportionate liability regimes in each other State as well as the Northern Territory and the Australian Capital Territory [108] . Co-ordinate Commonwealth legislation [109] intr oduced proportionate liability in respect of claims for damages for economic loss or damage to property caused by conduct in contravention of Commonwealth legislative proscriptions of engaging in misleading or deceptive conduct [110] .

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[103] *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW) .

[104] *Civil Liability Amendment Act* 2003 (NSW) .

[105] *New South Wales Government Gazette*, No 187, 26 November 2004 at 8549-8550.

[106] Commonwealth of Australia, Treasury, *Joint Communique: Ministerial Meeting on Public Liability Insurance*, Brisbane, 15 November 2002; Council of Australian Governments, *Communique*, Canberra, 6 December 2002; Commonwealth of Australia, Treasury, *Joint Communique: Ministerial Meeting on Insurance Issues*, Perth, 4 April 2003; Commonwealth of Australia, Treasury, *Joint Communique: Ministerial Meeting on Insurance Issues*, Adelaide, 6 August 2003; Standing Committee of Attorneys-General, *Annual Report 2003-04*.

[107] *Wrongs and Limitation of Actions Acts (Insurance Reform) Act* 2003 (Vic) .

[108] *Law Reform (Contributory Negligence and Apportionment of Liability) Act* 2001 (SA) ; *Civil Liability Act* 2003 (Q) ; *Civil Liability Amendment Act* 2003 (WA) ; *Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Act* 2004 (ACT) ; *Civil Liability Amendment (Proportionate Liability) Act* 2005 (Tas) ; *Proportiona te Liability Act* 2005 (NT) .

[109] *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act* 2004 (Cth) .

[110] Subdivision GA of Div 2 of Pt 2 of the *Australian Securities and Investments Commission Act* 2001 (Cth) ; Div 2A of Pt 7.10 of the *Corporations Act* 2001 (Cth) ; Pt VIA of the then *Trade Practices Act* 1974 (Cth) .

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79. The definition of "concurrent wrongdoer" in the Act is replicated in substantially identical terms in the proportionate liability provisions so introduced into legislation of the Commonwealth [111] and of each Territory [112] and of each other State [113] with the exception of South Australia [114] and Queensland [115] . The origins of the definition can be traced to draft model provisions, released for public comment by the Standing Committee of Attorneys-General of the Commonwealth and the States and Territories ("SCAG") in 1996,

to implement recommendations of an inquiry into the law of joint and several liability completed by Professor J L R Davis of the Australian National University in 1995 ("the Draft Model Provisions")[116]. To place the drafting and eventual adoption of those model provisions in perspective, it is necessary to note the previously existing law and the recommendations made by Professor Davis.

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[111] Section 12GP(3) of the *Australian Securities and Investments Commission Act* 2001 (Cth) ; s 1041L(3) of the *Corporations Act* 2001 (Cth) ; s 87CB(3) of the *Competition and Consumer Act* 2010 (Cth) .

[112] Section 6(1) of the *Proportionate Liability Act* (NT) ; s 107D(1) of the *Civil Law (Wrongs) Act* 2002 (ACT) .

[113] Section 24AH(1) of the Victorian Act ; s 5AI of the *Civil Liability Act* 2002 (WA) ; s 43A(2) of the *Civil Liability Act* 2002 (Tas) .

[114] Section 3(2)(b) of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act* 2001 (SA) .

[115] Section 30(1) of the *Civil Liability Act* 2003 (Q) .

[116] SCAG, *Draft Model Provisions to Implement the Recommendations of the Inquiry into the Law of Joint and Several Liability*, (1996).

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80. The common law of Australia, following the common law of England, knew only "solidary liability": a defendant whose tortious conduct caused loss or damage to a plaintiff was liable to compensate the plaintiff for the whole of that loss or damage [117] . The common law knew no general principle of contribution between those who were liable for tortious conduct: a defendant liable to compensate a plaintiff for the whole of the plaintiff's loss or damage ordinarily had no right to contribution from other persons whose tortious conduct also caused that loss or damage to the plaintiff. That was so irrespective of whether those persons acted in concert with the defendant ("jointly")[118] or separately from the defendant ("severally")[119] to cause the loss or damage that the plaintiff suffered.

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[117] See eg *Dougherty v Chandler* (1946) 46 SR (NSW) 370 at 375.

[118] *Merryweather v Nixan* (1799) 8 TR 186 [101 ER 1337].

[119] *The Koursk* [1924] P 140.

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81. Legislation providing for contribution was enacted first in England in 1935[120] and was replicated in each Australian State and Territory [121] . That standard form contribution legislation, as it remains in force in New South Wales, provides [122] :

> "Where damage is suffered by any person as a result of a tort (whether a crime or not): … any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by that person in respect of the liability in respect of which the contribution is sought."

The amount of contribution recoverable from any person is "such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage" [123] .

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[120] *Law Reform (Married Women and Tortfeasors) Act* 1935 (UK).

[121] Section 25(c) of the *Wrongs Act* 1936 (SA), inserted by the *Wrongs Act Amendment Act* 1939 (SA); s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) ; s 7(1)(c) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA) ; s 2(1)(c) of the *Wrongs (Tort-feasors) Act* 1949 (Vic); s 5 (c) of the *Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act* 1952 (Q) ; s 3(1)(c) of the *Tortfeasors and Contributory Negligence Act* 1954 (Tas); s 11(4) of the Law Reform (Miscellaneous Provisions) Ordinance 1955 (ACT); s 12(4) of the Law Reform (Miscellaneous Provisions) Ordinance 1956 (NT).

[122] Section 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) .

[123] Section 5(2) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) .

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82. Two limitations on the contribution for which the standard form contribution legislation provides are apparent on its face. One is that contribution is confined to contribution between persons each liable to the same person in respect of "the same damage". The other is that contribution is confined to persons so liable in tort.

83. The second of those limitations, but not the first, was removed by revised contribution legislation enacted in England in 1978[124]. That revised contribution legislation was substantially mirrored in legislation enacted in Victoria in 1985[125] but was not taken up in other Australian States and Territories. The revised contribution legislation, as it remains in force in Victoria, provides that "a person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with the first-mentioned person or otherwise)" [126] and explains that for this purpose [127] :

> "a person is liable in respect of any damage if the person who suffered that damage, or anyone representing the estate or dependents of that person, is entitled to recover compensation from the first-mentioned person in respect of that damage whatever the legal basis of liability, whether tort, breach of contract, breach of trust or otherwise."

The amount of contribution recoverable remains such as may be found by the court or jury "to be just and equitable having regard to the extent of that person's responsibility for the damage" [128] .

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[124] *Civil Liability (Contribution) Act* 1978 (UK).

[125] *Wrongs (Contribution) Act* 1985 (Vic).

[126] Section 23B(1) of the Victorian Act .

[127] Section 23A(1) of the Victorian Act .

[128] Section 24(2) of the Victorian Act .

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84. The common law principle of solidary liability remained unaltered in Australia until legislation in Victoria, South Australia and the Northern Territory in 1993 introduced a limited regime of proportionate liability for defendants found to be jointly or severally liable in an action for loss or damage arising out of or concerning defective building work: in such a case, a court was required to "give judgment against each defendant ... for such proportion of the total amount of damages as the court considers to be just and equitable having regard to the extent of that defendant's responsibility for the loss or damage" [129] .

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[129] Section 131(1) of the *Building Act* 1993 (Vic) . See also s 72 of the *Development Act* 1993 (SA) ; s 155 of the *Building Act* 1993 (NT) .

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85. The inquiry which Professor Davis completed in 1995 was commissioned in 1994 by the Attorneys-General of the Commonwealth and New South Wales. The terms of reference required Professor Davis to "consider whether it [was] desirable and feasible to alter the present rules on joint and several liability" having regard to recent developments but excluded examination of personal injury claims[130]. In his final report, Professor Davis pithily explained the critical difference between joint and several (or solidary) liability and proportionate liability in terms of their differential impact "if one of the defendants does not have significant assets, is insolvent or untraceable": "joint and several liability puts that risk, in the first instance, on the other defendants, proportionate liability includes the plaintiff as bearing some or all of that risk"[131]. He said that[132]:

> "the fairness or justice of a legal rule must be questioned when its effect is to place full liability on a defendant who may have been only marginally at fault, and to provide full compensation to a plaintiff who is able to find one on whom to fix the blame for the loss."

He recommended that joint and several liability in negligence actions for property damage or purely economic loss be replaced by proportionate liability, liability in all such cases being proportionate to each defendant's degree of fault[133]. He also recommended that statutory liability for loss arising from misleading conduct be proportionate to each defendant's degree of responsibility for that loss[134].

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[130] Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, (1995) at 7.

[131] Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, (1995) at 2.

[132] Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, (1995) at 33.

[133] Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, (1995) at 4.

[134] Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, (1995) at 5.

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86. The Draft Model Provisions were explained to be drafted to reflect the recommendations of Professor Davis and as having as their object "to provide for a scheme of proportionate liability for certain types of claims for damages ('actionable claims') instead of joint or several liability"[135]. The central provision of the draft limited the liability of a defendant who was a "concurrent wrongdoer" in proceedings involving an "apportionable claim" in terms substantially identical to those subsequently taken up in the central provision of Pt 4 of the Act [136] . The definition of "concurrent wrongdoer" in the draft was "a person who is one of two or more persons whose individual acts or omissions would, independently of each other, have caused the damage or loss that is the subject of the claim"[137]. The only substantive alteration made to the definition as subsequently taken up in Pt 4 of the Act was to change "would, independently of each other, have caused" to "caused, independently of each other or jointly". The purpose of that change was evidently better to reflect the recommendations by squarely capturing persons who engaged in joint action as well as persons who engaged in several actions rather than by hypothesising several actions in all cases.

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[135] "Explanatory note" in the Draft Model Provisions at ii.

[136] Clause 2 of the Draft Model Provisions.

[137] Clause 1(2) of the Draft Model Provisions.

Construction

87. Lord Bingham of Cornhill observed in 2002 that it has been "a constant theme of the law of contribution from the beginning that B's claim to share with others his liability to A rests upon the fact that they (whether equally with B or not) are subject to a common liability to A" [138] . He noted that the questions that arise in any claim for contribution are: "(1) What damage has A suffered? (2) Is B liable to A in respect of that damage? (3) Is C also liable to A in respect of that damage or some of it?" [139] He pointed out that it does not matter greatly "whether, in phrasing these questions, one speaks ... of 'damage' or of 'loss' or 'harm', provided it is borne in mind that 'damage' does not mean 'damages'" [140] .

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[138] *Royal Brompton Hospital NHS Trust v Hammond* [2002] 1 WLR 1397 at 1401 [5] ; [2002] 2 All ER 801 at 805-806 .

[139] [2002] 1 WLR 1397 at 1401 [6]; [2002] 2 All ER 801 at 806, quoted in *Alexander v Perpetual Trustees WA Ltd* (2004) 216 CLR 109 at 122 [26]; [2004] HCA 7.

[140] [2002] 1 WLR 1397 at 1401 [6]; [2002] 2 All ER 801 at 806.

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88. The key to the construction of the definition of "concurrent wrongdoer" lies in recognising that the proportionate liability provisions, of which the definition forms part, are a variation on that "constant theme". The proportionate liability provisions are a different means of apportioning the liability of B for the harm B has caused to A amongst persons who are (or would be if they continued to exist) liable to A for causing that same harm.

89. The proportionate liability provisions fall to be engaged where B is liable to A on an apportionable claim. The definition is then applied to determine whether or not the liability of B is limited. The liability of B to A on the apportionable claim means that B necessarily answers the description in the definition of "a person … whose acts or omissions (or act or omission) caused ... the damage or loss that is the subject of the claim". What is determined through the application of the definition is whether there is another person – C – who also answers that description.

90. The application of the definition starts with an identification of the "damage or loss" that is the subject of the claim by A against B. The damage or loss that is the subject of the claim by A against B is distinct from the "damages" that A claims from B [141] : the damage or loss is the harm that A claims to have been caused by one or more wrongful acts or omissions of B, which harm is to be compensated in an award of damages.

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[141] *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 527; [1985] HCA 37.

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91. **Following paragraph cited by:**

Larsen as trustee for the Larsen Superannuation Fund v Tastec Pty Ltd (formerly Wonders Building Company Pty Ltd) (No 2) (12 September 2025) (Adamson and Stern JJA, Price AJA)
DSHE Holdings Ltd (Receivers and Managers) (in liq) v Potts; HSBC Bank Ltd v Abboud; Potts v National Australia Bank Ltd (26 August 2022) (Leeming and Kirk JJA, Basten AJA)
Vaughan Constructions Pty Ltd v Melbourne Water Corporation (Building and Property) (Corrected) (07 June 2022) (The Honourable Justice Delany, Acting Member)
Bingo Holdings Pty Ltd v GC Group Company Pty Ltd (23 August 2021) (Meagher, Payne and Brereton JJA)
Janbar Pty Ltd v Arborcrest Pty Ltd (21 October 2020) (White J)

388. Sections 72 and 8 reflect a legislative policy that, in respect of claims for economic loss or property damage, respondents should be liable only to the extent of their own responsibility. However, both provisions operate only in respect of wrongdoers, namely, persons who are themselves liable to the applicant. See *Hunt & Hunt* at [91] in which Bell and Gageler JJ said:

> To answer the description of "a person … whose acts or omissions (or act or omission) caused" that damage or loss or harm, C (in common with B) must be (or have been) legally liable to A for the damage or loss that is the subject of the claim. The reference in the definition to "acts or omissions (or act or omission)" is to one or more *legally actionable* acts or omissions. The reference in the definition to acts or omissions having "caused ... the damage or loss that is the subject of the claim" is not, as has correctly been held, merely to causation in fact. "Questions of causation are not answered in a legal vacuum" but "are answered in the legal framework in which they arise". The reference here is to causation that results, or would result, in *legal liability*.

(Emphasis in the original and citations omitted)

F.Y.D. Investments Pty Ltd v Promptair Pty Ltd (No 2) (26 March 2019) (White J)
Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd (22 August 2014) (Mortimer J)

16. The argument that the provisions were intended to go further than that, and to focus only on a causation analysis, so as to reduce the damages available to a plaintiff or applicant, irrespective of whether those who caused some of the loss or damage were liable to the plaintiff or applicant, has been rejected: see, eg, *Shrimp v Landmark Operations Ltd* (2007) 163 FCR 510; [2007] FCA 1468 at [59] per Besanko J; *Quinerts* 25 VR 666; [2009] VSCA 245 at [59] per Nettle JA. The setting of this limit was endorsed by Bell and Gageler JJ in *Hunt & Hunt* 247 CLR 613; [2013] HCA 10 at [91] , where their Honours said:

> To answer the description of “a person … whose acts or omissions (or act or omission) caused” that damage or loss or harm, C (in common with B) must be (or have been) legally liable to A for the damage or loss that is the subject of the claim. The reference in the definition to “acts or omissions (or act or omission)” is to one or more *legally actionable* acts or omissions. The reference in the definition to acts or omissions having “caused … the damage or loss that is the subject of the claim” is not, as has correctly been held, merely to causation in fact. “Questions of causation are not answered in a legal vacuum” but “are answered in the legal framework in which they arise”. The reference here is to causation that results, or would result, in *leg al liability*.

To answer the description of "a person … whose acts or omissions (or act or omission) caused" that damage or loss or harm, C (in common with B) must be (or have been) legally liable to A for the damage or loss that is the subject of the claim. The reference in the definition to "acts or omissions (or act or omission)" is to one or more *legally actionable* acts or omissions. The reference in the definition to acts or omissions having "caused ... the damage or loss that is the subject of the claim" is not, as has correctly been held [142] , merely to causation in fact. "Questions of causation are not answered in a legal vacuum" but "are answered in the legal framework in which they arise" [143] . The reference here is to causation that results, or would result, in *legal liability*.

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[142] *Shrimp v Landmark Operations Ltd* (2007) 163 FCR 510 at 521-523 [59]-[62] . See also *Quinerts* (2009) 25 VR 666 at 682 [58], 684 [64] .

[143] *Chappel v Hart* (1998) 195 CLR 232 at 238 [7]; [1998] HCA 55.

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92. Once the damage or loss or harm that A claims to have been caused by one or more wrongful acts or omissions of B is identified, the question posed by the definition can be translated in simple terms: is (or was) C also liable to A for the same harm?

93. The identification of the harm that A claims to have been caused by a wrongful act or omission of B "invites comparison between what would have been and what is" [144] : it involves making a comparison between the position of A that would have existed had the act or omission of B not occurred and the position of A as it has come to exist. The question is: how is A worse off? The answer to that question is informed by the nature of the act or omission of B and by the nature of the right or interest of A that has been affected by that act or omission [145] . To answer the question merely by pointing out that A is out of pocket may be appropriate in some circumstances, but in other circumstances may involve a conflation of the concept of damage or loss or harm with the distinct concept of damages.

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[144] *Harriton v Stephens* (2006) 226 CLR 52 at 104 [168]; [2006] HCA 15. See also *T he Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 116; [1991] HCA 54.

[145] *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 424 [15]; [1999] HCA 25; *The Commonwealth v Cornwell* (2007) 229 CLR 519 at 525-526 [16] -[19]; [2007] HCA 16.

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94. Where the wrongful act or omission of B is to breach a duty of care that B has to protect A from the consequences of a possible wrongful act or omission on the part of C, the harm to A that is caused by that act or omission on the part of B lies in the absence of protection in the event that the wrongful act or omission on the part of C occurs. The consequences of the wrongful act or omission on the part of C are not themselves part of that harm. Those consequences are the coming home of the risk that it is the duty of B to take reasonable care to prevent.

95. Were B to become a concurrent wrongdoer with C in circumstances where B has failed to take reasonable care to protect A from the consequences of a possible wrongful act or omission on the part of C, the impact of proportionate liability would extend well beyond the impact explained by Professor Davis. The proportionate liability regime would not be transferring to A some or all of the risk of B or C being impecunious, insolvent or untraceable. It would be transferring to A some or all of the very risk against which it was the duty of B to protect A. It would be altering rights and duties to an extent not necessary to achieve the identified statutory purpose. It would be doing so in a manner not compelled by the statutory language.

96. That is the point that is illustrated by the analogy drawn by Nettle JA in *Quinerts* to the hypothetical case of a thief stealing money from a bank where risk of theft is not covered by the bank's insurance because of negligence on the part of an insurance broker.

97. The decided cases provide other illustrations of much the same point. Three will suffice. One is the case of a solicitor whose negligent omission leads to his client's claim for personal injuries being dismissed for want of prosecution [146] or becoming statute barred [147] . It has been pointed out that in such a case the loss that is caused by the solicitor's negligence is "the loss of a cause of action for personal injuries" and that what is compensated in damages is the value of that lost cause of action [148] . The fault of the person who was or would have been the defendant in the actual or putative action for personal injuries gives rise to the cause of action that is lost. Through the combined faults of that person and the solicitor, the client may be out of pocket. But the harm caused by that person and the harm caused by the solicitor are separate and distinct. The harm caused by that person is personal injuries. The harm caused by that person is not the loss of the cause of action. The harm caused by the solicitor is the loss of the cause of action, not the personal injuries [149] . The analysis would be no different if the cause of action that is lost by reason of the negligence of the solicitor, instead of being for personal injuries, is for damage to property or for economic loss.

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[146] *Johnson v Perez* (1988) 166 CLR 351; [1988] HCA 64.

[147] *Nikolaou v Papasavas, Phillips & Co* (1989) 166 CLR 394; [1989] HCA 11.

[148] *Johnson v Perez* (1988) 166 CLR 351 at 360.

[149] *Wallace v Litwiniuk* (2001) 200 DLR (4th) 534 at 543 [32] , approved in *Royal Brompton Hospital NHS Trust v Hammond* [2002] 1 WLR 1397 at 1411-1412 [29]; [2002] 2 All ER 801 at 814-815 .

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98. Another illustration is the case of a solicitor acting for a vendor whose negligent omission is to fail to procure a guarantee from the directors of a corporate purchaser which later defaults on the contract of sale. In such a case, it has correctly been held that the purchaser is not a concurrent wrongdoer with the solicitor on the basis that "[t]he damage caused by [the solicitor] was to deprive the [vendor] of the opportunity to obtain security for the purchaser's obligations under the contract" and "[n]othing which the purchaser did or failed to do caused the [vendor] to accept inadequate security for the purchaser's obligation to pay the price" [150] . The analysis would be no different if the purchaser induced the vendor to enter into the contract of sale through fraudulent or misleading or deceptive conduct.

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[150] *Ashbrooke Institute Pty Ltd v Holding Redlich* [2010] VSC 579 at [126] .

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99. **Following paragraph cited by:**

Todd Hadley Pty Ltd v Lake Maintenance (NSW) Pty Ltd (No 2) (30 April 2020) (Bell P, Basten and Macfarlan JJA)

Yet another illustration, like *Quinerts*, is the case of a negligent valuation of a property that is to be mortgaged to secure a loan. It has been pointed out that in such a case: the interest that a mortgagee seeks to protect by obtaining a valuation "is that, in the event of default, [the mortgagee] should be able to recoup, by sale of the property, the amount owing under the mortgage"; "the risk that recoupment might not be possible ... calls the valuer's duty of care into existence"; "it is the interest in recoupment that is infringed by breach of that duty"; and the time at which "loss occurs (and hence the time when the tort is complete) is when recoupment is rendered impossible" [151] . The harm caused to the mortgagee by the negligent valuation lies in the inadequacy of its security in the event of non-payment of the loan by the borrower. The non-payment of the loan by the borrower may be the event which crystallises the loss but non-payment of the loan by the borrower does not cause the inadequacy of the security [152] .

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[151] *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 424-425 [16] .

[152] Cf *Royal Brompton Hospital NHS Trust v Hammond* [2002] 1 WLR 1397 at 1413 [33]; [2002] 2 All ER 801 at 816-817, overruling *Hurstwood Developments Ltd v Motor & General & Andersley & Co Insurance Services* [2002] Lloyds Rep IR 185.

Application

100. In the present case, Hunt & Hunt was found to have breached its duty of care to Mitchell Morgan by failing to protect Mitchell Morgan from the fraud of Mr Caradonna and Mr Flammia. Had Hunt & Hunt not breached that duty, Mitchell Morgan would have included a covenant to repay in the mortgage instrument with the result that Mitchell Morgan would have had the security of the mortgage over Mr Vella's property for the money paid into the joint bank account notwithstanding the fraud of Mr Caradonna and Mr Flammia. Mitchell Morgan was worse off as a result of the negligence of Hunt & Hunt because it had no security. Nothing done by Mr Caradonna or Mr Flammia caused that lack of security. The fact that the loan transaction would not have occurred at all but for the fraud of Mr Caradonna or Mr Flammia is not to the point.

101. The New South Wales Court of Appeal was correct to hold in the present case that Mr Caradonna and Mr Flammia were not persons whose acts or omissions caused the economic loss – the lack of security – that was the subject of the claim by Mitchell Morgan against Hunt & Hunt. Hunt & Hunt is not a concurrent wrongdoer.

102. The Victorian Court of Appeal was also correct to reason in *Quinerts* that the borrower and the guarantor were not persons whose acts or omissions caused the economic loss – the inadequate security – that was the subject of the claim by the bank against the negligent valuer. It is unnecessary to decide whether the same result might have been reached in *Quiner ts* on the basis, suggested by Hunt & Hunt, that the omissions of the borrower and guarantor caused to the bank no "damage or loss" at all within the meaning of the proportionate liability provisions. Whether, and if so in what circumstances, a failure to discharge an obligation to pay under a loan or a guarantee might be said to have caused "damage or loss" to a lender gives rise to potentially complex issues[153]. They should not be decided tangentially.

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[153] See Jackson and Powell, *Professional Liability*, 7th ed (2012) at 132 [4-008]; *How kins & Harrison v Tyler* [2001] Lloyd's Rep PN 1.

A separate question about damages?

103. There is before the Court, in addition to the appeal, an application by Hunt & Hunt for special leave to appeal from a separate and subsequent decision of the New South Wales Court of Appeal concerning the assessment of Mitchell Morgan's damages [154] . The Court of Appeal held that Mitchell Morgan should be compensated for the time value of the amount it paid out on the loan for the period between the date of the loan and the date on which

Mitchell Morgan would have first had the opportunity to sell the mortgaged property had the loan been secured by the mortgage. On the basis that a non-negligent solicitor would have drawn the mortgage with a covenant to repay the amount lent with interest at mortgage rates, the Court of Appeal calculated the amount of that compensation by reference to the rates of interest specified in the loan document prepared by Hunt & Hunt on which Mr Caradonna came to forge Mr Vella's signature.

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[154] *Mitchell Morgan Nominees Pty Ltd v Vella (No 2)* [2012] NSWCA 38.

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104. The ground on which Hunt & Hunt seeks special leave to appeal concerns the Court of Appeal's choice of that rate of interest. Hunt & Hunt seeks to argue that the choice is precluded by the "scope of liability" requirement of a section of the Act which states [155] :

> "A determination that negligence caused particular harm comprises the following elements:
>
> (a) that the negligence was a necessary condition of the occurrence of the harm (***factual causation***), and
>
> (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (***scope of liability***)",

and which goes on to explain [156] :

> "For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party."

In circumstances where Mitchell Morgan adduced no evidence that the loss of the use of the money advanced on the loan caused it special loss, Hunt & Hunt seeks to argue that Mitchell Morgan was adequately compensated by the application of the lower statutory rate of interest [157] .

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[155] Section 5D(1) of the Act .

[156] Section 5D(4) of the Act .

[157] Section 100 of the *Civil Procedure Act* 2005 (NSW) .

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105. The argument was described in the Court of Appeal, by Macfarlan JA, with whom Sackville AJA agreed, as lacking in substance. His Honour pointed out that Hunt & Hunt "undertook to prepare a mortgage to protect the interests of its client lender" and that "[i]t was fully aware of the terms of the loan transaction, including the interest rates payable, as it

drafted the relevant Loan Agreement". In those circumstances, his Honour concluded there was "no reason why its liability should not extend to a loss of interest calculated at the rates contained in that document where that loss was caused by its own negligence" [158] .

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[158] *Mitchell Morgan Nominees Pty Ltd v Vella (No 2)* [2012] NSWCA 38 at [16] .

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106. That response to the argument was manifestly sound in principle. The point is not simply that the rates of interest set out in the loan document would have been set out in the mortgage instrument but for the negligence of Hunt & Hunt. The point is that the duty of Hunt & Hunt to take reasonable care to protect the interests of Mitchell Morgan required Hunt & Hunt to ensure that the rates of interest set out in the loan document were set out in the mortgage instrument. It is appropriate for the scope of Hunt & Hunt's liability to correspond with the scope of the failure of Hunt & Hunt to perform that duty. Special leave should be refused.

Orders

107. The appeal and the application for special leave to appeal should each be dismissed with costs.

Cited by:

Larsen as trustee for the Larsen Superannuation Fund v Tastec Pty Ltd (formerly Wonders Building Company Pty Ltd) (No 2) [2025] NSWCA 210 (12 September 2025) (Adamson and Stern JJA, Price AJA)

Bird v DP (a pseudonym) [2024] HCA 41; (2024) 98 ALJR 1349; *Woodhouse v Fitzgerald* (2021) 104 NSWLR 475; [2021] NSWCA 54; *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; [2013] HCA 10 ; *Whisprun v Dixon* (2003) 77 ALJR 1598; [2003] HCA 48; *Water Board v Moustakas* (1988) 180 CLR 491; [1988] HCA 12; *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481; [1985] HCA 28; *Coulton v Holcombe* (1986) 162 CLR 1; [1986] HCA 33; *Bingo Holdings Pty Ltd v GC Group Company Pty Ltd* [2021] NSWCA 184, considered.

Larsen as trustee for the Larsen Superannuation Fund v Tastec Pty Ltd (formerly Wonders Building Company Pty Ltd) (No 2) [2025] NSWCA 210 -
Shahin v Plaspro Enterprises Pty Ltd [2025] NSWPICMP 656 -
Nayyer v I Need a Chef NSW Pty Ltd ATF I Need a Chef NSW Unit Trust [2025] NSWPIC 396 -
Karpik v Carnival plc (The Ruby Princess) [2025] FCAFC 96 -
Pabai v Commonwealth of Australia (No 2) [2025] FCA 1575 -
Fall-Armytage v Victorian Managed Insurance Authority [2025] VCC 709 (04 June 2025) (Macnamara J)

110 McDonald J said "in the context of an action for negligence causing economic loss, loss or damage means the harm suffered to a plaintiff's economic interests", citing *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] 247 CLR 613, 629 [24] , and the statement of the joint judgment in that case at [49] that:

"... the kind of economic loss which is sustained, as well as the time when it is sustained depends upon the nature of the interest infringed and in some cases perhaps on upon the nature of the interference to which it is subjected."

Saadat v Commonwealth [2025] SASC 59 (09 May 2025) (Stanley J)

2537. However, the common law recognises that concurrent and successive tortious acts may each be a cause of a plaintiff's loss or damage. This is reflected in the proposition that it is enough for liability that a wrongdoer's conduct be one cause. The relevant inquiry is whether the particular contravention was a cause, in the sense that it materially contributed to the loss. Material contribution has been said to require only that the act or omission of a wrongdoer play some part in contributing to the loss. [2225] However, if the damage of which the plaintiff complains would have happened if there had been no breach of duty by the defendant it will often be possible to conclude that the breach was not a cause of that damage. [2226] In *Chappel v Hart* Kirby J, in analysing the principles relevant to causation, observed that in certain circumstances, the appearance of a causal connection between the breach and the damage, arising from the application of the "but for" test and the proximity of the damage, is displaced by a demonstration that, *inter alia*, the damage was inevitable and would probably have occurred even without the breach, or, that the negligent event was ineffective as a cause of the damage because the event which occurred would probably have occurred in the same way even if the breach had not happened. [2227]

via

[2225] *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10 at [45] , (2013) 247 CLR 613 at 635.

Saadat v Commonwealth [2025] SASC 59 -
Saadat v Commonwealth [2025] SASC 59 -
McDermott v Toll Holdings Ltd [2025] NSWPIC 175 (29 April 2025)

107. In *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [5] the High Court said it must be established that the loss is caused or materially contributed to by the respondent, which requires only that the act or omission of a wrongdoer plays some part in contributing to the loss.

McDermott v Toll Holdings Ltd [2025] NSWPIC 175 -
Henry v Henry's Transport Solutions Pty Ltd [2025] NSWPIC 120 -
Henry v Henry's Transport Solutions Pty Ltd [2025] NSWPIC 120 -
Henry v Henry's Transport Solutions Pty Ltd [2025] NSWPIC 120 -
Henry v Henry's Transport Solutions Pty Ltd [2025] NSWPIC 120 -
Insurance Australia Ltd t/as NRMA Insurance v Kirkpinar [2025] NSWSC 162 -
Xu v Salter Brothers Asset Management Pty Ltd [2025] FCA 89 -
Hayes v PFD Food Services Pty Ltd [2024] NSWPICMP 883 -
Pafburn Pty Limited v The Owners - Strata Plan No 84674 [2024] HCA 49 -
Pafburn Pty Limited v The Owners - Strata Plan No 84674 [2024] HCA 49 -
Perpetual Corporate Trust Limited v Tsiamoulis [2024] NSWSC 1544 (03 December 2024) (McNaughton J)

99. I accept Perpetual's argument that it is arguable that a claim in negligence is not statute barred, because a tortious action does not accrue until damage is sustained: *Commonwealth v Cornwell* (2007) 229 CLR 519; [2007] HCA 16 at [5] . To determine the time at which a tortious action accrues, damage must be actual damage of a measurable kind and prospective or contingent damage is insufficient: *Wardley* at pp 528, 531–532; and there is an available argument that causes of action for tortious conduct giving rise to a lender entering into a contract to loan money may not accrue until the point in time at which recoupment becomes impossible: *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; [2013] HCA 10 at [32] ; *Hawkins* at p 601.

Touch for Health Pty Ltd as Trustee for Knight Superannuation Fund v Property Mentors Australia Pty Ltd (No 3) [2024] FCA 1381 -
Ezy-Fit Engineering Group Pty Limited v Microm Nominees Pty Limited (No 2) [2024] FCA 1367 (27 November 2024) (Banks-Smith J)

80. I reject FAT HACO's submission that I should start with the position that each party bears 50% of the responsibility for EzyFit's loss. That is not consistent with s 87CD(1) , which, as explained in the excerpt from *Hunt & Hunt* above, requires the Court to assess responsibility by way of value judgements. It does not call for any such assumption about a starting point.

Ezy-Fit Engineering Group Pty Limited v Microm Nominees Pty Limited (No 2) [2024] FCA 1367 -
Zhao v Insurance Australia Limited t/as NRMA Insurance [2024] NSWPIC 624 (07 November 2024)

[6] Ground 3 can be dispatched immediately. The nub of the point was captured in Value's written submissions in reply where it was argued that it was the actions taken on behalf of MMM, rather than the actions of Value, which were "the proximate cause of the harm". That is not the relevant legal test for causation in negligence. The issue under s 5D of the *Civil Liability Act 2002* (NSW) (CL A) is relevantly whether the negligence was a necessary condition of the occurrence of the harm. That notion has been taken to include where the tortfeasor's negligence materially contributed to the harm even if there were other conjunctive causes, just as under the previous common law: *Amac a Pty Ltd v Booth* [2011] HCA 53; (2011) 246 CLR 36 at [70] ; *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 at [20]-[30] . It is necessary only that the relevant act or omission play some part in contributing to the loss, even if minor: *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 at [45] ; *Gould v Vaggelas* [1984] HCA 68; (1984) 157 CLR 215 at 236. It does not require that the cause be characterised as "proximate": note eg *Wallace v Kam* [2013] HCA 19; (2013) 250 CLR 375 at [11] . Here, if Value was negligent in the manner found by the primary judge then there can be no doubt that its negligence was a materially contributing cause of Mr Badra's injuries. Value made a vague suggestion in its written submissions that an issue "perhaps" arose as to scope of liability under s 5D(1)(b) , but the argument was not developed and has no apparent merit.

Zhao v Insurance Australia Limited t/as NRMA Insurance [2024] NSWPIC 624 -
Zhao v Insurance Australia Limited t/as NRMA Insurance [2024] NSWPIC 624 -
Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

56 Team Building submitted that it is open and arguable that the OCs claims may well turn out to be apportionable claims within the meaning of the *Wrongs Act* . The relevant question will then become whether the apportionable defence concerns the same loss and damage. [34]

via

[34] *Hunt and Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, 627 [18] .

46 Team Building then turned their attention to the OC's contention that the Court of Appeal in *Tanah Merah* overturned the above authorities. Counsel submitted that such a conclusion is not borne out on a careful reading of the judgment. Counsel's submissions set out the following relevant parts of the *Tanah Merah* judgment: [26]

Thomas Nicolas and Elenberg Fraser relied upon *Reinhold* and *Dartberg* to support arguments that the Owners' claims against LU Simon were apportionable. In our view, however, the plain meaning of the statutory provision requires a claim arising from a failure to take reasonable care. The claim in *Hunt & Hunt* exemplifies such a claim.

> It is not disputed that Mitchell Morgan's claim against Hunt & Hunt is an 'apportionable claim' within the meaning of s 34(1)(a). The claim was based upon Hunt & Hunt's breach of an implied term of its retainer that it exercise proper skill, diligence and care. Section 34(1A) provides that there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action, whether of the same or a different kind. There is no express limitation on the nature of the claim which might have been brought by the plaintiff against a concurrent wrongdoer, except the requirement of s 34(2) that the acts or omissions of all concurrent wrongdoers have caused the damage in question. [27]

The definition does not extend to a claim 'involving circumstances arising out of a failure to take reasonable care'. The claim itself must arise from a failure to take reasonable care. Such a construction is consistent with the purpose identified at [16] of *Hunt & Hunt*.

Moreover, despite the breadth of the observations of Barrett J in Reinhold, in *Perpetual Trustee Company Limited v CTC Group Pty Ltd [No 2]*, [28] his Honour speaking as a member of the NSW Court of Appeal subsequently said:

> It cannot be suggested (nor do I think it has been suggested in any decided case) that the nature or quality of a 'claim' is, for relevant purposes, to be determined solely by looking at the court's decision in relation to it. Nor is the nature or quality of a 'claim' to be determined solely by looking at the terms in which it is framed. Rather, it is a combination of the terms in which the claim is framed (or pleaded) and relevant findings of the court in relation to it that must be assessed in order to decide whether it is a claim 'in an action for damages . . . arising from a failure to take reasonable care' and has the other attributes of an 'apportionable claim' under s 34(1)(a).

In our view, this passage makes it clear that the terms in which the claim is framed are the **starting point** for deciding whether the claim is of the kind referred to in s 24AF(1)(a) of the *Wrongs Act*.

...

> Notwithstanding what Barrett J said in *Reinhold* , it seems to us that his Honour' s view (as expressed in *Perpetual Trustee*) is now that the terms in which the claim is framed are an essential determinant of whether a claim can be said to arise from a failure to take reasonable care. In our opinion, that is the correct approach.

via

[27] *Hunt & Hunt* (2013) 247 CLR 613, 627 [18] .

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 -
Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 -
Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 -
Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)

164. However, in ***Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*** , [38] French CJ, Hayne and Kiefel JJ reiterated, in the context of causation under s 5D(1) of the *Civil Liability Act 2002* (NSW) , that [43]:

> Causation is largely a question of fact, to be approached by applying common sense to the facts of the particular case (***Stapley v Gypsum Mines Ltd*** [1953] AC 663 at 681, cited in ***March v Stramare (E & MH) Pty Ltd*** (1991) 171 CLR 506 at 515, 523 ; see also ***Chappel v Hart*** (1998) 195 CLR 232 at 238 [6]). This is not to deny that value judgments and policy have a part to play in causation analysis at common law (***March v Stramare (E & MH) Pty Ltd*** (1991) 171 CLR 506 at 516-517) and ... both factual causation and scope of liability elements are referred to in s 5D(1) of the *Civil Liability Act* .

via

[38] ***Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*** [2013] HCA 10; (2013) 247 CLR 613 .

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)

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Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)

Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10 ; (2013) 247 CLR 613

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 -
Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 -
Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 -

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 -
Absolute Aquarium Products Pty Ltd v Taylor [2024] NSWPICPD 61 -
Elanor Funds Management Ltd v Alceon Group Pty Ltd [2024] FCAFC 121 -
Johnston v Watts [2024] WADC 62 -
Johnston v Watts [2024] WADC 62 -
Tesseract International Pty Ltd v Pascale Construction Pty Ltd [2024] HCA 24 -
Tesseract International Pty Ltd v Pascale Construction Pty Ltd [2024] HCA 24 -
Tesseract International Pty Ltd v Pascale Construction Pty Ltd [2024] HCA 24 -
Tesseract International Pty Ltd v Pascale Construction Pty Ltd [2024] HCA 24 -
Value Constructions Pty Ltd v Badra [2024] NSWCA 181 -
Value Constructions Pty Ltd v Badra [2024] NSWCA 181 -
Whitaker v F.P & H.S Keogh Pty Ltd (Building and Property) [2024] VCAT 708 -
Whitaker v F.P & H.S Keogh Pty Ltd (Building and Property) [2024] VCAT 708 -
Chu v Lin, in the matter of Gold Stone Capital Pty Ltd (Trial Judgment) [2024] FCA 766 -
R v AGJ [2024] QCA 124 -
Sheck-Townsend v Downer EDI Ltd [2024] NSWPIC 310 (14 June 2024)

295. In *Fisher*, Kirk JA (Meagher JA and Simpson JA agreeing) said [at 106]:

> "To begin with, the High Court here did not suggest that any invocation of common sense in relation to issues of causation involved legal error. Indeed, in *Hunt & Hunt* [10], three members of the High Court – including French CJ, who was in *Martin* – said the following: 'Causation is largely a question of fact, to be approached by applying common sense to the facts of the particular case' (at [43]). Whilst that judgment was three years prior to *Martin*, it was well after the authority cited in *Martin* in the passage just quoted. The notion of common sense has been invoked by members of the High Court more recently with respect to related factual assessments: see eg *Military Rehabilitation and Compensation Commission v May* per French CJ, Kiefel, Nettle and Gordon JJ; *Lewis v Australian Capital Territory* per Gordon J; *Queensland v Masson* per Nettle and Gordon JJ". (Citations omitted).

Sheck-Townsend v Downer EDI Ltd [2024] NSWPIC 310 -
Kary v Red Metal Limited [2024] NSWPIC 250 -
Kary v Red Metal Limited [2024] NSWPIC 250 -
Fell v Willoughby City Council [2024] NSWPIC 224 -
Fell v Willoughby City Council [2024] NSWPIC 224 -
Absolute Tiling Solutions Pty Ltd v Certain Underwriters at Lloyds [2024] NSWSC 364 (10 April 2024) (Nixon J)

381. If it were necessary to decide this issue, I would have determined that the negligence of each of Coverforce and AIB / Mr Moon was a necessary condition of the occurrence of the harm suffered by Absolute Tiling, within the meaning of s 5D(1)(a) of the *Civil Liability Act 2002* (NSW). That is, the wrong of each of Coverforce and AIB / Mr Moon, in failing to neutralise the effect of cl 6.12 in, respectively, the 2019/20 Policy and the 2020/21 Policy was a necessary condition to bring about the situation where Absolute Tiling was not covered under cl 2.15.3 of the Policy. In such circumstances, the appropriate outcome would not have been to determine that neither was liable (on the basis that the loss would not have occurred but for the other's conduct), or to determine that one of them was solely liable for the loss, but rather to determine that the loss should be apportioned between them: see, for example, *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; [2013] HCA 10 at [48]-[50] per French CJ, Hayne and Kiefel JJ.

Watts v State of New South Wales (NSW Police Force) [2024] NSWPIC 179 -
Watts v State of New South Wales (NSW Police Force) [2024] NSWPIC 179 -

Watts v State of New South Wales (NSW Police Force) [2024] NSWPIC 179 -
Watts v State of New South Wales (NSW Police Force) [2024] NSWPIC 179 -
Watts v State of New South Wales (NSW Police Force) [2024] NSWPIC 179 -
Australian Pacific Airports (Melbourne) Pty Ltd v CPB Contractors Pty Ltd and Anor (Ruling) [2024] VCC 357 (26 March 2024) (Kirton J)

> Cases Cited: *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 ; *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd* [2015] VSCA 98; *McClafferty v Greg Smith Pty Ltd* (Building and Property) [2019] VCAT 299 ; *Tanah Merah Vic Pty Ltd (ACN 098 935 490) v Owners Corporation No 1 of PS613436T & Ors* [2021] VSCA 72; *Melbourne Water Corporation v Vaughan Constructions Pty Ltd* [2022] VSCA 241 ; *Woodhouse v Fitzgerald* [2021] NSWCA 54; 104 NSWLR 475 ; *Equal 54 Pty Ltd v Dennis Galimberti* [2016] VSC 588 ; *Cosmetic Laser Clinic Pty Ltd v Pirintji* [2015] NSWSC 983 ; *Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd* [2014] FCA 880; 224 FCR 519; *St George Bank Ltd v Quinerts Pty Ltd* [2009] VSCA 245; *ABL Nominees Pty Ltd v MacKenzie (No. 2)* [2014] VSC 529.

Australian Pacific Airports (Melbourne) Pty Ltd v CPB Contractors Pty Ltd and Anor (Ruling) [2024] VCC 357 (26 March 2024) (Kirton J)

> 26 In any event, these decisions are consistent in noting that the question of a legal liability may be inextricably bound up with an examination of the facts causing loss. As Mortimer J said in *Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd* at [23] :
>
> > Minds may differ on the application of the causation analysis required by the proportionate liability provisions, as the departures in characterisation between the majority and minority in Hunt & Hunt demonstrate. The essential nature of the causation inquiry is one of fact (see Hunt & Hunt 247 CLR 613; [2013] HCA 10 at [47] per French CJ, Hayne and Kiefel JJ), and this emphasises the need for careful examination of the evidence in order to reach a conclusion about whether a person is or is not a "concurrent wrongdoer" for the purposes of the proportionate liability provisions.

Australian Pacific Airports (Melbourne) Pty Ltd v CPB Contractors Pty Ltd and Anor (Ruling) [2024] VCC 357 -
Australian Pacific Airports (Melbourne) Pty Ltd v CPB Contractors Pty Ltd and Anor (Ruling) [2024] VCC 357 -
Leakes Road Property Development Pty Ltd v Brasse [2023] VSCA 34 -
Australian Pacific Airports (Melbourne) Pty Ltd v CPB Contractors Pty Ltd and Anor (Ruling) [2024] VCC 357 -
Leakes Road Property Development Pty Ltd v Brasse [2023] VSCA 34 -
Australian Pacific Airports (Melbourne) Pty Ltd v CPB Contractors Pty Ltd and Anor (Ruling) [2024] VCC 357 -
BTY v Michael Hill Jeweller (Australia) Pty Ltd [2024] NSWPIC 126 (14 March 2024)

> 460. Kirk JA (Meagher JA and Simpson JA agreeing) said [at 106]:
>
> > "To begin with, the High Court here did not suggest that any invocation of common sense in relation to issues of causation involved legal error. Indeed, in *Hunt & Hunt* [8] , three members of the High Court – including French CJ, who was in *Martin* – said the following: 'Causation is largely a question of fact, to be approached by applying common sense to the facts of the particular case' (at [43]). Whilst that judgment was three years prior to *Martin*, it was well after the authority cited in *Martin* in the passage just quoted..."

via

[8] *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 .

BTY v Michael Hill Jeweller (Australia) Pty Ltd [2024] NSWPIC 126 -
Patterson & Anor v Mamou (t/as De Novo Conveyancing) [2024] NSWDC 47 -
Patterson & Anor v Mamou (t/as De Novo Conveyancing) [2024] NSWDC 47 -
Fisher v Nonconformist Pty Ltd [2024] NSWCA 32 (20 February 2024) (Meagher and Kirk JJA, Simpson AJA)

114. The invocations of common sense by the Member had nothing to do with normative or purposive limitations on factual causation (the fourth sense identified above). Nor did they manifest any other erroneous understanding of the nature of the legal test to be applied. The appellants' argument amounted to saying that any reference to common sense crosses a trip wire of error. As the use of that term in cases such as *Hunt & Hunt* illustrates, that is not so.

Fisher v Nonconformist Pty Ltd [2024] NSWCA 32 (20 February 2024) (Meagher and Kirk JJA, Simpson AJA)

70. Although the joint judgment used the double negative, the point can be made positively: s 9A imposes a more stringent causal requirement than that involved in the causal requirement in the first limb of s 4(a) . That understanding is implicit in the joint judgment. It is consistent with the Attorney's reference to the "weaker test" in s 4 in his second reading speech. And it reflects a deeper point. The causal standard for the "arising out of employment" notion in workers compensation legislation has long been accepted to involve consideration of whether the employment "caused, or to some material extent contributed to, the injury": *Nunan* at 124. That is relevantly the same approach as taken at common law for tort: see eg ***March v E & M H Stramare Pty Ltd*** [1991] HCA 12; (1991) 171 CLR 506 at 514 per Mason CJ. There are various aspects to the notion of "material contribution": note *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 at [21]-[25] . One role that it plays was explained in *Amaca Pty Ltd v* ***Booth*** [2011] HCA 53; (2011) 246 CLR 36 at [70] per Gummow, Hayne and Crennan JJ and in ***Hunt & Hunt*** *Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 at [45] per French CJ, Hayne and Kiefel JJ . To quote the latter (citations omitted):

> The law's recognition that concurrent and successive tortious acts may each be a cause of a plaintiff's loss or damage is reflected in the proposition that a plaintiff must establish that his or her loss or damage is "caused or materially contributed to" by a defendant's wrongful conduct. It is enough for liability that a wrongdoer's conduct be one cause. The relevant enquiry is whether the particular contravention was a cause, in the sense that it materially contributed to the loss. Material contribution has been said to require only that the act or omission of a wrongdoer play some part in contributing to the loss.

Fisher v Nonconformist Pty Ltd [2024] NSWCA 32 (20 February 2024) (Meagher and Kirk JJA, Simpson AJA)

106. To begin with, the High Court here did not suggest that any invocation of common sense in relation to issues of causation involved legal error. Indeed, in *Hunt & Hunt* , three members of the High Court – including French CJ, who was in *Martin* – said the following: "Causation is largely a question of fact, to be approached by applying common sense to the facts of the particular case" (at [43]). Whilst that judgment was three years prior to *Martin* , it was well after the authority cited in *Martin* in the passage just quoted. The notion of common sense has been invoked by members of the High Court more recently with respect to related factual assessments: see eg *Military Rehabilitation and Compensation Commission v May* [2016]

HCA 19; (2016) 257 CLR 468 at [62] per French CJ, Kiefel, Nettle and Gordon JJ; *Lewis v Australian Capital Territory* [2020] HCA 26; (2020) 271 CLR 192 at [90] per Gordon J; *Queensland v Masson* [2020] HCA 28; (2020) 94 ALJR 785 at [111] per Nettle and Gordon JJ.

Fisher v Nonconformist Pty Ltd [2024] NSWCA 32 (20 February 2024) (Meagher and Kirk JJA, Simpson AJA)

Nunan v Cockatoo Docks & Engineering Co Ltd (1941) 41 SR (NSW) 119; *Gould v Vaggelas* [1984] HCA 68; (1984) 157 CLR 215; *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 , considered.

Fisher v Nonconformist Pty Ltd [2024] NSWCA 32 -
Fisher v Nonconformist Pty Ltd [2024] NSWCA 32 -
Davis v Perry O'Brien Engineering Pty Ltd [2023] QSC 243 -
Davis v Perry O'Brien Engineering Pty Ltd [2023] QSC 243 -
Elanor Funds Management Ltd v Alceon Group Pty Ltd [2023] FCA 1291 -
Ramadan v ACN 098 408 176 Pty Ltd [2023] SASCA 91 -
Ramadan v ACN 098 408 176 Pty Ltd [2023] SASCA 91 -
Tristram-Howard v Morris Corporation (Aust) Pty Ltd [2023] WADC 60 (09 June 2023) (Burrows DCJ)

178. The relevant law regarding causation was set of by Murphy, Beech & Pritchard JJA in ***Apostolic Church Australia Ltd v Dixon*** [144] at [65] [67] as follows:

> 65 Section 5C(1), s 5C(2) and s 5D of the CLA provide:
>
> **5C General principles**
>
> (1) A determination that the fault of a person (the tortfeasor) caused particular harm comprises the following elements -
>
> (a) that the fault was a necessary condition of the occurrence of the harm (factual causation); and
>
> (b) that it is appropriate for the scope of the tortfeasor's liability to extend to the harm so caused (scope of liability).
>
> (2) In determining in an appropriate case, in accordance with established principles, whether a fault that cannot be established as a necessary condition of the occurrence of harm should be taken to establish factual causation, the court is to consider (amongst other relevant things) -
>
> (a) whether and why responsibility for the harm should, or should not, be imposed on the tortfeasor; and
>
> (b) whether and why the harm should be left to lie where it fell.
>
> ...
>
> **5D Onus of proof**
>
> In determining liability for damages for harm caused by the fault of a person, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

66 Generally, causation is largely a question of fact to be determined by the application of 'common sense' to the facts of the particular case.[97]

67 In cases governed by the CLA, the two questions identified in s 5C(1) must be kept distinct.[98] The determination of factual causation in accordance with s 5C(1)(a) involves nothing more or less than the application of a 'but for' test of causation.[99] In a novel case not governed by precedent, the scope of liability question dictated by s 5C(1)(b) requires the identification and articulation of an evaluative judgment by reference to the purposes and policy of the relevant part of the law.[100]

(FN[97]: *March v E & MH Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506, 515 - 516, 522 - 524, 530 - 532 ; *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 [43])

(FN[98]: *Wallace v Kam* [2013] HCA 19; (2013) 250 CLR 375 [12])

(FN[99]: *Wallace v Kam* [16] ; *Badenach v Calvert* [2016] HCA 18; (2016) 257 CLR 440 [36])

(FN[100]: *Wallace v Kam* [23])

Sam v Wu & Ors (Ruling) [2023] VCC 582 (18 April 2023) (Brimer J)

28 Bell P stated that:

The key to the present case lies, in my opinion, in focusing upon the nature of the interest infringed...

The nature of the interest infringed was, relevantly, the ability to "recoup" from the proceeds of sale the moneys advanced by way of loan...

Lake Maintenance [the lender] could no longer look to the property to recover its debt. Any subsequent recovery from the borrower would have to be brought to account, but the prospect or possibility of such recovery did not stand in the way of an action being brought against the Valuer then and there. The cause of action had accrued.

If it were the case that the borrower was still solvent but Lake Maintenance had not sued it, it may have been open to the Valuer to contend that there had been a failure to mitigate the loss sued upon, or possibly to raise a proportionate liability defence consistent with the decision in *Hunt & Hunt* . But neither of these potential defences would mean that the cause of action had not accrued. They would be germane only to matters of quantum. [12]

Sam v Wu & Ors (Ruling) [2023] VCC 582 -
Sam v Wu & Ors (Ruling) [2023] VCC 582 -
Sam v Wu & Ors (Ruling) [2023] VCC 582 -
Sam v Wu & Ors (Ruling) [2023] VCC 582 -
Sam v Wu & Ors (Ruling) [2023] VCC 582 -
Sam v Wu & Ors (Ruling) [2023] VCC 582 -
Sam v Wu & Ors (Ruling) [2023] VCC 582 -
Sam v Wu & Ors (Ruling) [2023] VCC 582 -
Sam v Wu & Ors (Ruling) [2023] VCC 582 -
Lenane Holdings Pty Ltd v Summit Rural (WA) Pty Ltd [2023] WADC 42 -
Lenane Holdings Pty Ltd v Summit Rural (WA) Pty Ltd [2023] WADC 42 -
Rove Estate Pty Ltd atf Lane Cove Estate Trust v Chomp Excavations & Demolition Pty Ltd (No 3) [2023] NSWSC 274 (24 March 2023) (Williams J)

Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd (2013) 247 CLR 613; (2013) 87 ALJR 505; (2013) 296 ALR 3; [2013] Aust Torts Reports 82-127; [2013] NSW ConvR 56-314; [2013] ANZ ConvR 13-012; [2013] HCA 10

Rove Estate Pty Ltd atf Lane Cove Estate Trust v Chomp Excavations & Demolition Pty Ltd (No 3) [2023] NSWSC 274 -
Rove Estate Pty Ltd atf Lane Cove Estate Trust v Chomp Excavations & Demolition Pty Ltd (No 3) [2023] NSWSC 274 -
Rove Estate Pty Ltd atf Lane Cove Estate Trust v Chomp Excavations & Demolition Pty Ltd (No 3) [2023] NSWSC 274 -
Rove Estate Pty Ltd atf Lane Cove Estate Trust v Chomp Excavations & Demolition Pty Ltd (No 3) [2023] NSWSC 274 -
Reddock v St&T Pty Ltd [2022] QSC 293 (13 January 2023) (Jackson J)

> 119. Even so, in my view, there is an unsatisfactory aspect of reasoning upon a principle that is said to devolve to a matter of common sense. The High Court has said so, more than once. [19] The same may be said of the alternative sometimes advanced of a "material" cause, [20] unles s there is a criterion or principle to distinguish between what is material and what is not.

via

[20] *Hunt & Hunt v Mitchell Morgan Pty Ltd* (2013) 247 CLR 613, 635 [45] .

Reddock v St&T Pty Ltd [2022] QSC 293 (13 January 2023) (Jackson J)

> 118. Causation against the second defendant is to be considered under the common law. There is no statutory condition that requires that the negligent act or omission is a necessary condition of the occurrence of the injury. Instead, the question at common law is whether the negligent act or omission was a cause of the injury as a matter of common sense. [18]

via

[18] *Hunt & Hunt v Mitchell Morgan Pty Ltd* (2013) 247 CLR 613, 637 [56] .

Reddock v St&T Pty Ltd [2022] QSC 293 -
Houghton v Potts & Anor. (No 2) [2022] NSWSC 1778 -
Re Richards [2022] WADC 100 -
Re Richards [2022] WADC 100 -
Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 (10 November 2022) (Sifris, Kennedy and Walker JJA)

> 142. The definition of 'concurrent wrongdoer' might, on its face, be thought to encompass a merely factual contribution to the loss or damage in question. However, the respondents relied upon the remarks of Bell and Gageler JJ in *Hunt and Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* , [90] as follows:
>
> > To answer the description of 'a person ... whose acts or omissions (or act or omission) caused' that damage or loss or harm, C (in common with B) must be (or have been) legally liable to A for the damage or loss that is the subject of the claim. The reference in the definition to 'acts or omissions (or act or omission)' is to one or more *legally actionable* acts or omissions. The reference in the definition to acts or omissions having 'caused ... the damage or loss that is the subject of the claim' is not, as has correctly been held, [91] merely to causation in fact. 'Questions of causation are not answered in a legal vacuum' but 'are answered in the legal framework in which they arise'. [92] The reference here is to causation that results, or would result, in *legal liability*. [93]

via

[90] (2013) 247 CLR 613; [2013] HCA 10 (' *Hunt and Hunt*'). That case concerned provisions in the *Civil Liability Act 2002* (NSW) , which were equivalent to pt IVAA of the *Wrongs Act* .

Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 (10 November 2022) (Sifris, Kennedy and Walker JJA)

96. Finally, both parties referred to the regime created under Part IVAA of the *Wrongs Act* . As the judge observed, these provisions came into existence after the Act , and therefore can have limited relevance. Suffice to say that the approach I have adopted is consistent with the approach adopted in respect of Part IVAA. More specifically, the majority in *Hunt and Hunt* st ated that the value judgments involved in determining the extent of a defendant's 'responsibility' differed from, and were more extensive than, those which informed the question of causation. [54]

via

[54] *Hunt and Hunt* (2013) 247 CLR 613, 638 [57] (French CJ, Hayne and Kiefel JJ); [2013] HCA 10 . See also *Spiteri v Roccisano* (2009) 22 VR 596, 630 [105] (Kaye J); [2009] VSC 132.

Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 -
Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 -
Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 -
Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 -
Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 -
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Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 -
Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 -

D.J. & M.A. Hose Pty Ltd ATF the Hose Family Trust ACN 010 999 210 v Wide Bay Insurance Broking Pty Ltd ATF the Wide Bay Business Trust ACN 130 391 301 [2022] QSC 191 (14 September 2022) (Hindman J)

6. The relevant principles that I am required to apply to determine whether two persons are concurrent wrongdoers are set out in the High Court majority decision in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 (the majority comprised French CJ, Hayne and Kiefel JJ; Bell and Gageler JJ in dissent) (**Hunt & Hunt**).

D.J. & M.A. Hose Pty Ltd ATF the Hose Family Trust ACN 010 999 210 v Wide Bay Insurance Broking Pty Ltd ATF the Wide Bay Business Trust ACN 130 391 301 [2022] QSC 191 -
DSHE Holdings Ltd (Receivers and Managers) (in liq) v Potts; HSBC Bank Ltd v Abboud; Potts v National Australia Bank Ltd [2022] NSWCA 165 -
DSHE Holdings Ltd (Receivers and Managers) (in liq) v Potts; HSBC Bank Ltd v Abboud; Potts v National Australia Bank Ltd [2022] NSWCA 165 -

Cassaniti v Ball as liquidator of RCG CBD Pty Limited (in liq) and related matters; Khalil v Ball as liquidator of Diamondwish Pty Ltd (in liq) and related matters [2022] NSWCA 161 (25 August 2022) (Gleeson, Leeming and Mitchelmore JJA)

60. Section 5(1)(c) goes on to provide that a tort-feasor may recover contribution between tort-feasors liable in respect of the same damage. This paragraph overturned the rule that contribution was not available either at law or in equity between tortfeasors: see *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; [2013] HCA 10 at [12] and [80] . The fact that these paragraphs address different problems was noted in *Newcrest Mining*

Ltd v Thornton (2012) 248 CLR 555; [2012] HCA 60 at [45] (referring to the materially identical Western Australian provision, s 7(1) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA)):

> "The impact of s 7(1) on this position was as follows. The mischief dealt with in s 7(1)(a) was the common law prohibition stated in *Brinsmead v Harrison* against a plaintiff who had recovered against one joint tortfeasor from recovering against another. Section 7(1)(a) improved the position of plaintiffs by abolishing that common law prohibition. The mischief dealt with in s 7(1)(c) was the rule in *Merryweather v Nixan*, which did not affect plaintiffs but tortfeasors. Section 7(1)(c) dealt with that mischief by abolishing the rule. Those changes to the common law position left the risk that plaintiffs, freed from the ban that *Brinsmead v Harrison* imposed on any action against joint tortfeasors after one tortfeasor had been sued to judgment, would abuse that new found freedom by pursuing a multiplicity of actions."

Skues v The Sydney Children's Hospital Network [2022] NSWSC 1128 -
ACN 002 402 146 Pty Ltd (manager appointed) (in liq) (formerly known as Tome Bros Pty Ltd) v Ken Crossman & Co Pty Ltd [2022] FCA 749 -
Vaughan Constructions Pty Ltd v Melbourne Water Corporation (Building and Property) (Corrected) [2022] VCAT 633 -
Vaughan Constructions Pty Ltd v Melbourne Water Corporation (Building and Property) (Corrected) [2022] VCAT 633 -
Vaughan Constructions Pty Ltd v Melbourne Water Corporation (Building and Property) (Corrected) [2022] VCAT 633 -
CBRE (V) Pty Ltd v City Pacific Ltd (in liq) [2022] NSWCA 54 -
Stav Investments Pty Ltd v Taylor [2022] NSWSC 208 (09 March 2022) (Ward CJ in Eq)

547. Under this regime, liability is apportioned to each wrongdoer according to the court's assessment of the extent of their responsibility (*Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; [2013] HCA 10 at [10] per French CJ, Hayne and Kiefel JJ).

Owners Corporation PS623721 v Shangri- La Construction Pty Ltd (Building and Property) [2022] VCAT 1499 -
Owners Corporation PS623721 v Shangri- La Construction Pty Ltd (Building and Property) [2022] VCAT 1499 -
Owners Corporation PS623721 v Shangri- La Construction Pty Ltd (Building and Property) [2022] VCAT 1499 -
Herridge Parties v Electricity Networks Corporation T/As Western Power [2021] WASCA 111 (S) -
Herridge Parties v Electricity Networks Corporation T/As Western Power [2021] WASCA 111 (S) -
Cargill Australia Ltd v Viterra Malt Pty Ltd (No 28) [2022] VSC 13 -
Tycho Pty Ltd v Trustworthy Nominees Pty Ltd (No 2) [2021] QSC 302 -
Tycho Pty Ltd v Trustworthy Nominees Pty Ltd (No 2) [2021] QSC 302 -
5 Boroughs NY Pty Ltd v State of Victoria [2021] VSC 785 -
Manny v David Lardner Lawyers (No 2) [2021] ACTSC 289 -
Manny v David Lardner Lawyers (No 2) [2021] ACTSC 289 -
R v White (No.2) [2021] NSWDC 580 -
Insurance Australia Ltd v Milonas [2021] VSC 602 (22 September 2021) (McDonald J)

59. In the context of an action for negligence causing economic loss, loss or damage means the harm suffered to a plaintiff's economic interests. [48] In *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [49] the plurality stated:

> In *Hawkins v Clayton* , Gaudron J pointed out that in an action for negligence causing economic loss it will almost always be necessary to identify, with some precision, the interest infringed by the negligent act. In that case, it was necessary to identify the interest in order to

> answer the question as to when the cause of action accrued. Its identification is also necessary for a proper understanding of the harm suffered and for the determination of what acts or emissions may be said to have caused that damage. As her Honour observed economic loss may take many forms. In *Wardley Australia Ltd v Western Australia,* it was said that the kind of economic loss which is sustained, as well as the time when it is sustained, depends upon the nature of the interest infringed and in some cases, perhaps, upon the nature of the interference to which it is subjected. [50]

Insurance Australia Ltd v Milonas [2021] VSC 602 -
Insurance Australia Ltd v Milonas [2021] VSC 602 -
Insurance Australia Ltd v Milonas [2021] VSC 602 -
Sondakh v Herliman [2021] NSWSC 1144 -
Bingo Holdings Pty Ltd v GC Group Company Pty Ltd [2021] NSWCA 184 (23 August 2021) (Meagher, Payne and Brereton JJA)

29. It is also consistent with decisions of this Court construing the provisions in the *Civil Liability Act* . In *Woodhouse v Fitzgerald* [2021] NSWCA 54, Basten JA said (Meagher and Payne JJA agreeing) that:

> "[94] Thirdly, subsequent authority supports the continuation of the construction of the legislation which requires that the concurrent wrongdoer has at some stage been legally liable, even if no longer subject to a possible suit.
>
> [95] In this Court, *Perpetual Trustee Company Ltd v Milanex Pty Ltd (in liq)* [[2011] NSWCA 367 at [94] (Macfarlan JA, Campbell JA and Young JA agreeing)] held that concurrent wrongdoers 'are people who are, or at least were, liable to a plaintiff (who is advancing an apportionable claim) in respect of the same loss suffered by that plaintiff'. *Milanex*, it is true, was decided before *Hunt & Hunt* and followed *St George Bank*. However, subsequently, following the decision in *Hunt & Hunt* , this Court in *Trajkovski v Simpson* reaffirmed the view that '[i]t is inherent in the notion of "concurrent wrongdoer" that the plaintiff has, or had, a good – albeit not necessarily recoverable – cause of action sounding in damages against the alleged concurrent wrongdoer.'"

Bingo Holdings Pty Ltd v GC Group Company Pty Ltd [2021] NSWCA 184 -
Bingo Holdings Pty Ltd v GC Group Company Pty Ltd [2021] NSWCA 184 -
Bingo Holdings Pty Ltd v GC Group Company Pty Ltd [2021] NSWCA 184 -
Johnson v Mackinnon [2021] NSWCA 152 -
Johnson v Mackinnon [2021] NSWCA 152 -
Prestage v Barrett [2021] TASSC 27 (02 July 2021) (Estcourt J)

554. It is essential I agree, in considering the first step to identify the particular risk of harm to which the later steps will be applied. It is only through the correct identification of the risk that an assessment of the reasonable response can be made. See *RTA v Dederer* [2007] HCA 42, 234 CLR 330 at [59]-[61] and *Hunt & Hunt v Mitchell Morgan* [2013] HCA 10, 247 CLR 613 per French CJ, Hayne and Kiefel JJ at [43] .

Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
Talacko v Talacko [2021] HCA 15 -
Talacko v Talacko [2021] HCA 15 -
Talacko v Talacko [2021] HCA 15 -
Talacko v Talacko [2021] HCA 15 -
Talacko v Talacko [2021] HCA 15 -

Joseph v Parnell Corporate Services Pty Ltd [2021] FCAFC 67 (11 May 2021) (Logan, Katzmann and Snaden JJ)

166. In *Hunt & Hunt* their Honours were discussing causation in the context of damages in tort but the same principle applies to the assessment of damages in contract: ***Unity Insurance** Brok ers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603, 616 [34] (McHugh J).

Joseph v Parnell Corporate Services Pty Ltd [2021] FCAFC 67 -
City Pacific Ltd (in liq) v CBRE (V) Pty Ltd [2021] NSWSC 456 -
Woodhouse v Fitzgerald [2021] NSWCA 54 (09 April 2021) (Basten, Meagher and Payne JJA)

96. In these circumstances, the trial judge was in error in determining that the High Court had ruled inconsistently with the line of authority in intermediate courts of appeal which was applied before and has been applied after *Hunt & Hunt* . At least by implication, intermediate courts of appeal have seen no inconsistency between the earlier authorities with respect to legal liability and the reasoning in *Hunt & Hunt* .

Woodhouse v Fitzgerald [2021] NSWCA 54 (09 April 2021) (Basten, Meagher and Payne JJA)

90. There are three reasons for not reading the passage in *Hunt & Hunt* at [47] as rejecting the need for legal liability on the part of a concurrent wrongdoer. First, as explained more fully by Bell and Gageler JJ in dissent in *Hunt & Hunt* , the purpose of Pt 4 in the *Civil Liability Act* (and equivalent provisions in other jurisdictions) was to vary, with respect to property damage and claims for economic loss, the existing statutory scheme which assumed the entitlement of the plaintiff to recover in full from any wrongdoer which had caused the plaintiff's damage, leaving it to the wrongdoers to make claims for contribution against each other. Professor JRL Davis, in a report which was the source of the reforms created by Pt 4 of the *Civil Liability Act* , stated: [44]

> "• Joint and several liability means that while several persons have, by their negligence, combined to cause loss to a plaintiff, anyone of them may be fully liable.
>
> • Proportionate liability divides the loss among the defendants according to their share of responsibility.
>
> • The difference between joint and several liability and proportionate liability has a major impact if one of the defendants does not have significant assets, is insolvent or untraceable; joint and several liability puts that risk, in the first instance, on the other defendants, proportionate liability includes the plaintiff as bearing some or all of that risk."

Woodhouse v Fitzgerald [2021] NSWCA 54 -
Woodhouse v Fitzgerald [2021] NSWCA 54 -
Woodhouse v Fitzgerald [2021] NSWCA 54 -
Woodhouse v Fitzgerald [2021] NSWCA 54 -
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Woodhouse v Fitzgerald [2021] NSWCA 54 -

Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T [2021] VSCA 72 (26 March 2021) (Beach and Osborn JJA; Stynes AJA)

132. In truth, insofar as Elenberg Fraser's submissions relied upon what the High Court said in *Hunt & Hunt*, those submissions involved a misreading of that decision. *Hunt & Hunt* was not a case which concerned whether a claim was or was not apportionable. It was a case about the identification of loss or damage for the purposes of the New South Wales equivalent of s 24AH(1) of the *Wrongs Act* . [87] As was pointed out by the majority in *Hunt & Hunt* ,[88] it was not disputed in that case that the only relevant claim made in that proceeding was an apportionable claim. [89]

via

[89] Ibid 627 [18] .

Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T [2021] VSCA 72 -
Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T [2021] VSCA 72 -
Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T [2021] VSCA 72 -
Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T [2021] VSCA 72 -
Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T [2021] VSCA 72 -
Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T [2021] VSCA 72 -
GC Group Company Pty Ltd v Bingo Holdings Pty Ltd (No 3) [2021] NSWSC 252 (18 March 2021) (Stevenson J)

16. Eg see the discussion in Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd (2013) 247 CLR 613; [2013] HCA 10 at [10] , [16] and [17] (French CJ, Hayne and Kiefel JJ) .

J.K. Williams Staff Pty Limited v Sydney Water Corporation [2021] NSWLEC 23 -
GC Group Company Pty Ltd v Bingo Holdings Pty Ltd (No 3) [2021] NSWSC 252 -
Talacko v Talacko & Ors [2021] HCATrans 39 -
Talacko v Talacko & Ors [2021] HCATrans 39 -
Talacko v Talacko & Ors [2021] HCATrans 39 -
Talacko v Talacko & Ors [2021] HCATrans 39 -
Talacko v Talacko & Ors [2021] HCATrans 39 -
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Talacko v Talacko & Ors [2021] HCATrans 39 -
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Talacko v Talacko & Ors [2021] HCATrans 39 -
Talacko v Talacko & Ors [2021] HCATrans 39 -
Talacko v Talacko & Ors [2021] HCATrans 39 -
Ethicon Sarl v Gill [2021] FCAFC 29 -
The Owners - Strata Plan No 55682 v W. R. Berkley Insurance (Europe), Plc [2020] NSWDC 758 -
The Owners - Strata Plan No 55682 v W. R. Berkley Insurance (Europe), Plc [2020] NSWDC 758 -
Peniamina v The Queen [2020] HCA 47 -
Janbar Pty Ltd v Arborcrest Pty Ltd [2020] FCA 1519 (21 October 2020) (White J)

388. Sections 72 and 8 reflect a legislative policy that, in respect of claims for economic loss or property damage, respondents should be liable only to the extent of their own responsibility. However, both provisions operate only in respect of wrongdoers, namely, persons who are themselves liable to the applicant. See *Hunt & Hunt* at [91] in which Bell and Gageler JJ said:

> To answer the description of "a person ... whose acts or omissions (or act or omission) caused" that damage or loss or harm, C (in common with B) must be (or have been)

legally liable to A for the damage or loss that is the subject of the claim. The reference in the definition to "acts or omissions (or act or omission)" is to one or more *l egally actionable* acts or omissions. The reference in the definition to acts or omissions having "caused ... the damage or loss that is the subject of the claim" is not, as has correctly been held, merely to causation in fact. "Questions of causation are not answered in a legal vacuum" but "are answered in the legal framework in which they arise". The reference here is to causation that results, or would result, in *legal liability*.

(Emphasis in the original and citations omitted)

Janbar Pty Ltd v Arborcrest Pty Ltd [2020] FCA 1519 -
Janbar Pty Ltd v Arborcrest Pty Ltd [2020] FCA 1519 -
Nine Network Australia Pty Ltd v Wagner [2020] QCA 221 (13 October 2020) (Morrison and Mullins JJA and Jackson J)

52. Before the introduction, from 2002, in this country of statutory regimes of "proportionate liability", [38] the common features of the joint and several liability of joint tortfeasors and the several liabilities of several concurrent tortfeasors were described as "solidary liability" in the Davis Report,[39] following the adoption of a similar description in a report of the New South Wales Law Reform Commission.[40] The description was taken up by the High Court in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* ,[41] when considering the operation of the proportionate liability regime.

via

[41] (2013) 247 CLR 613 , 624-625 [10]-[13] .

Nine Network Australia Pty Ltd v Wagner [2020] QCA 221 -
GC Group Company Pty Ltd v Bingo Holdings Pty Ltd (No 2) [2020] NSWSC 1360 -
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 -
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 -
Defrancesca v Ruby Loans Pty Ltd [2020] SADC 106 -
Defrancesca v Ruby Loans Pty Ltd [2020] SADC 106 -
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Defrancesca v Ruby Loans Pty Ltd [2020] SADC 106 -
Defrancesca v Ruby Loans Pty Ltd [2020] SADC 106 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Kitching v AAI Ltd t/as GIO Insurance [2020] NSWSC 1014 -
C and F Nominees Mortgage Securities Ltd v Karbotli and Ors [2020] VCC 987 (22 July 2020) (His Honour Judge Macnamara)

107 In the present case it is unnecessary to seek to distil the true rule governing the indefeasibility of covenants to pay in registered mortgages. The problems affecting C & F's mortgage are more fundamental and structural than the ones considered in cases such as *Win au* and *Cox* . As the survey of the evidence above indicates, the C & F mortgage was documented to give effect to a transaction in which C & F was to advance money to Mazop with Mr James Karbotli as guarantor and Ms Issa as guarantee mortgagor. The easiest way to document such a transaction would be to have an "off the register" loan agreement showing Mazop as borrower with a guarantee or guarantees showing Mr Karbotli and Ms Issa as guarantors with Ms Issa's liability as guarantor secured by a registered mortgage. Documentation in this form, however, would run

the risk that if, as a matter of general law, any of the "off the register" documents were a forgery, an indefeasible registered mortgage would be ineffective to secure the relevant debt because the "off the register" documents would be nullities unprotected by any doctrine of indefeasibility (*Mitchell Morgan Nominees Pty Ltd v Vella* [2011] NSWCA 390 [16]–[17] per Giles JA; *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613).

C and F Nominees Mortgage Securities Ltd v Karbotli and Ors [2020] VCC 987 -
Liprini v Hale [2020] NSWCA 130 (03 July 2020) (Macfarlan and McCallum JJA, Emmett AJA)

> *Trajkovski v Simpson* [2019] NSWCA 52; *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; [2013] HCA 10 , referred to.

Liprini v Hale [2020] NSWCA 130 -
Brocklands Pty Ltd v Tasmanian Networks Pty Ltd [2020] TASFC 4 -
Rodriguez & Sons Pty Limited v Queensland Bulk Water Supply Authority t/as Seqwater (No 23) [2020] NSWSC 650 -
Esined No. 9 Pty Limited v Moylan Retirement Solutions Pty Ltd; P&S Kauter Investments Pty Ltd Atf the Kauter Superannuation Fund v Moylan Retirement Solutions Pty Ltd; Graeme Manning v Arch Underwriting At Lloyds... [2020] NSWSC 359 (08 May 2020) (Slattery J)

405. The question to be posed under *Civil Liability Act* , s 34(2) is whether the acts of MIG, MIG as trustee for the Bolwarra Heights Investment Trust and Wallalong Investment Holdings independently of MRS caused plaintiffs' damage. The plaintiffs submitted that the failure to repay by MIG, Wallalong Investment Holdings and MIG as trustee of the Bolwarra Heights Investment Trust of the loans advanced to them is a loss "distinctly different from the loss caused by the negligent advice provided by MRS". But in the Court's view, the damage caused by the defaults of these non-MRS actors is identical, with that caused by MRS. The conduct of these other parties did cause that same damage: *Hunt & Hunt* (at [46]).

Esined No. 9 Pty Limited v Moylan Retirement Solutions Pty Ltd; P&S Kauter Investments Pty Ltd Atf the Kauter Superannuation Fund v Moylan Retirement Solutions Pty Ltd; Graeme Manning v Arch Underwriting At Lloyds... [2020] NSWSC 359 -
Esined No. 9 Pty Limited v Moylan Retirement Solutions Pty Ltd; P&S Kauter Investments Pty Ltd Atf the Kauter Superannuation Fund v Moylan Retirement Solutions Pty Ltd; Graeme Manning v Arch Underwriting At Lloyds... [2020] NSWSC 359 -
Esined No. 9 Pty Limited v Moylan Retirement Solutions Pty Ltd; P&S Kauter Investments Pty Ltd Atf the Kauter Superannuation Fund v Moylan Retirement Solutions Pty Ltd; Graeme Manning v Arch Underwriting At Lloyds... [2020] NSWSC 359 -
Todd Hadley Pty Ltd v Lake Maintenance (NSW) Pty Ltd (No 2) [2020] NSWCA 81 -
Todd Hadley Pty Ltd v Lake Maintenance (NSW) Pty Ltd (No 2) [2020] NSWCA 81 -
Todd Hadley Pty Ltd v Lake Maintenance (NSW) Pty Ltd (No 2) [2020] NSWCA 81 -
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Todd Hadley Pty Ltd v Lake Maintenance (NSW) Pty Ltd (No 2) [2020] NSWCA 81 -
Woodhouse v Fitzgerald and McCoy (No 2) [2020] NSWSC 450 -
Jadwan Pty Ltd v Rae & Partners (A Firm) [2020] FCAFC 62 -
Jadwan Pty Ltd v Rae & Partners (A Firm) [2020] FCAFC 62 -
Olympic Place Pty Limited v Gamcorp (Melbourne) Pty Ltd [2020] NSWSC 261 (20 March 2020) (Henry J)

63. The proportionate liability regime implemented by Part 4 of the *Civil Liability Act* enables a defendant to seek to reduce its liability by reference to the existence of other concurrent wrongdoers who have not been joined by a plaintiff as defendants in the proceedings. By doing so, the defendant shifts the risk of a failure to recover the whole of the claim onto the plaintiff: *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; [2013] HCA 10 at 626-7 .

PC Case Gear Pty Ltd v Instrat Insurance Brokers Pty Ltd (in liq) [2020] FCA 137 (19 February 2020) (Anderson J)

131. The onus is on the plaintiff to demonstrate the causal link between the breaches of duty by the defendant and the losses suffered by the plaintiff: *Unity Insurance Brokers Pty Limited v Rocco Pezzano Pty Limited* [1998] HCA 38; 192 CLR 603 (***Unity***) at [5] per Brennan CJ and [22] per McHugh J; s 52 of the *Wrongs Act 1958* (Vic) (***Victorian Wrongs Act***). Some general principles in relation to the establishment of causation of loss were summarised by French CJ, Hayne and Kiefel JJ in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; 247 CLR 613 as follows:

> [43] The proper identification of damage should usually point the way to the acts or omissions which were its cause. Causation is largely a question of fact, to be approached by applying common sense to the facts of the particular case. This is not to deny that value judgments and policy have a part to play in causation analysis at common law ...
>
> [44] ... courts are no longer as constrained as they once were to find a single cause for a consequence and to adopt an "effective cause" formula. Courts today usually recognise that there may be wrongdoers whose acts or omissions occur successively, rather than simultaneously, and who may be liable for the same damage, even though one may be liable for only part of the damage for which the other is liable.
>
> [45] The law's recognition that concurrent and successive tortious acts may each be a cause of a plaintiff's loss or damage is reflected in the proposition that a plaintiff must establish that his or her loss or damage is "caused or materially contributed to" by a defendant's wrongful conduct. It is enough for liability that a wrongdoer's conduct be one cause. The relevant inquiry is whether the particular contravention was a cause, in the sense that it materially contributed to the loss. Material contribution has been said to require only that the act or omission of a wrongdoer play some part in contributing to the loss.
>
> (Citations omitted.)

Frederick William McMurray and Jennifer Grace McMurray v AIG Insurance Australia Ltd [No 3] [2019] WASC 452 (06 December 2019) (Smith J)

28. The majority in ***Hunt & Hunt*** referred to a Canadian decision of the Alberta Court of Appeal in ***Wallace v Litwiniuk*** as an example of what they regarded to be an obvious case where the damage caused by each wrongdoer was different. [8] In that matter a plaintiff suffered physical injuries as a consequence of another driver's negligent driving. Her solicitor also failed to institute proceedings within time. The Alberta Court of Appeal concluded that the damage caused by each wrongdoer was different because the physical injuries the plaintiff suffered were damage distinct from the harm to her economic interests by reason of her inability to recover damages for those injuries.

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via

[8] ***Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*** [2013] HCA 10; (2013) 247 CLR 613 [38] (French CJ, Hayne & Crennan JJ) [97] (Bell & Gageler JJ) citing ***Wallace v Litwiniuk*** 200 DLR (4th) 534 [32].

Frederick William McMurray and Jennifer Grace McMurray v AIG Insurance Australia Ltd [No 3] [2019] WASC 452 -
Frederick William McMurray and Jennifer Grace McMurray v AIG Insurance Australia Ltd [No 3] [2019] WASC 452 -
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Frederick William McMurray and Jennifer Grace McMurray v AIG Insurance Australia Ltd [No 3] [2019] WASC 452 -
Hummingbird Homes v Light Consultants [2019] SADC 178 (29 November 2019) (Slattery J)

587. I am satisfied that in this context, and only based upon the assumptions I make in addressing this issue, the Builder and the Engineer are members of the same group of wrongdoers. If there is an apportionment to be made then I am unable to accept the principal submission of the Engineer that the Builder bears the predominant responsibility for the loss under an apportionment. The Builder failed to notify the Engineer of the groundwater in the cellar at lot 106 and of its failure to construct the Owners' cellar in accordance with the specification. The latter conduct led to the formation of cold joints in that cellar. The same can be said of the masonry dividing wall. I am satisfied that each of them separately, unilaterally and materially contributed to the loss or damage suffered. [547]

via

[547] *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at 637 [53] per French CJ, Hayne and Kiefel JJ .

Hummingbird Homes v Light Consultants [2019] SADC 178 -
Trani v Trani [2019] VSC 723 (26 November 2019) (Forbes J)

35 In Hunt & Hunt, 17 referring to the analogy of the thief and the insurance broker, the High Court said:

In that analogy, it is correct to describe the damage or loss suffered by the bank as its inability to recover the moneys stolen. One source of recovery could have been its insurer, hence the brokers were a cause of its loss. The other possible source of recovery is the thief. The harm to the bank's economic interests, at a certain point, is the inability to recover from either source. 18

Trani v Trani [2019] VSC 723 (26 November 2019) (Forbes J)
Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd (2007) 164 FCR 450 ; Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd (2013) 247 CLR 613 applied.

Trani v Trani [2019] VSC 723 (26 November 2019) (Forbes J)

(2013) 247 CLR 613 (Hunt & Hunt).

Trani v Trani [2019] VSC 723 -
Trani v Trani [2019] VSC 723 -
Trani v Trani [2019] VSC 723 -
Gill v Ethicon Sàrl (No 5) [2019] FCA 1905 -
Todd Hadley Pty Limited v Lake Maintenance (NSW) Pty Limited [2019] NSWCA 262 -
Todd Hadley Pty Limited v Lake Maintenance (NSW) Pty Limited [2019] NSWCA 262 -
Zervas v Burkitt (No 2) [2019] NSWCA 236 -
Zervas v Burkitt (No 2) [2019] NSWCA 236 -
Zervas v Burkitt (No 2) [2019] NSWCA 236 -
Carna Group Pty Ltd v The Griffin Coal Mining Company [2019] FCA 1276 (15 August 2019) (McKerracher J)

50. The issue was also discussed but not decided in *Smith* to which I have already referred and on which Griffin principally relies. By way of background, the Australian Executor Trustee (**AET**) was trustee for debenture holders. AET dealt with, on behalf of the debenture holders, debentures in **Provident** Capital Limited. Provident was subsequently placed into receivership. The debenture holders claimed damages against AET on the basis of alleged breaches of statutory duties under the *Corporations Act* and/or fiduciary duties owed to the debenture holders. AET filed a cross-claim against, *inter alia*, the auditors of Provident (PricewaterhouseCoopers, or **PwC**) in relation to financial reports issued by PwC as auditors of Provident for certain financial years. AET's claims against PwC included ones for statutory or equitable contribution in respect of any liability AET was found to have to the debenture holders: *Smith* at [13] . Like Mr Grey, PwC, sought orders that the claim be summarily dismissed or struck out. The Court in *Smith* struck out the pleading (but allowed AET to re-plead). Summary judgment was not ordered. Ward CJ said (at [180]) that her Honour was 'not persuaded that that the pleading deficiency cannot be cured'. Her Honour made the following observations regarding contribution without deciding the matter (at [45], [47]- [48], [60], [62], [70], [168], [172] and [176]):

> 45 The second basis for the statutory contribution claim is that PwC engaged in misleading conduct in contravention of the statutory prohibitions pleaded earlier (at [25] and [32]) which has caused the plaintiff and group members loss, that being the same loss in respect of which the plaintiff and group members seek to recover damages in this proceeding from AET. It is asserted that, if AET is liable as alleged in the statement of claim, then that liability could have been established in tort (see [41]-[43]). (How that tortious liability could arise is not articulated in the pleading.)
>
> ...

47 The claim for statutory contribution is made pursuant to s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) (the 1946 Act), s 23B of the Wrongs Act 1958 (Vic) and "such other corresponding provision of the contribution legislation of the other States and Territories as may be applicable to each group member's claim against AET" (see, for example, [44]).

48 The alternative claim for contribution is made pursuant to the doctrine of equitable contribution on the basis that if AET is liable to the plaintiff or group members as alleged in the statement of claim then its liabilities are coordinate with those of PwC ([45]- [46]). For the purpose of the equitable contribution claim, the focus is on the statutory claims: the alleged breach by PwC of the statutory prohibitions on misleading and deceptive conduct and the alleged breach by AET of its statutory duties.

...

60 Second, AET argues that PwC's applications raise two likely High Court points: first, the question as to whether the auditor of a corporation that issues debentures under Ch 2L of the Corporations Act owes a duty of care to the trustee for debenture holders and the debenture holders themselves; and, second, the question as to whether s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* can extend to statutory wrongs.

...

62 As to the second, AET points to a divergence of views in the authorities and in academic writing (referring to *Jonstan Pty Limited v Nicholson* (2003) 58 NSWLR 223; [2003] NSWSC 500 at [97] (Hulme J); *Dorrough v Bank of Melbourne Limited* [1995] FCA 1573 at [73] ; and the argument in favour of characterising the action for breach of s 52 as a tort advanced by Campbell J, as his Honour then was, writing extra judicially in "Contribution, Contributory Negligence and Section 52 of the Trade Practices Act" (1993) 67 ALJ 87, 177) on the one hand (cf *ANZ Banking Group Ltd v Turnbull* (1991) 33 FCR 265 at 277 (Shepherd J); *Bialkower v Acohs Pty Ltd* (1998) 83 FCR 1 at 11 (Full Federal Court)); and *Burke v LFOT Pty Ltd* (2000) 178 ALR 161; [2000] FCA 1155 at [131] (Lehane J), dicta in *ACQ Pty Ltd v Cook* (2008) 72 NSWLR 318; [2008] NSWCA 161 at [174] (Campbell JA, with whom Beazley JA, as her Honour then was, and Giles JA agreed) and dicta in *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; [2013] HCA 10 (Bell and Gageler JJ) on the other hand.

...

70 Where what is pleaded is a novel claim, it has been said that the court does not apply strike out procedures in a way that might stultify the development of the law (see *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564; [2000] FCA 1572 at [50] ; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 740-741).

...

168 PwC submits that the fact that the damage may be the same does not establish that the liabilities are co-ordinate. It says that AET's statutory obligations under s 283DA cannot reasonably be characterised as co-ordinate with alleged misleading and deceptive conduct by PwC (referring to *Burke v LFOT Pty Ltd* (2002) 209 CLR 282; [2002] HCA 17, where McHugh J said that:

> "although the conduct of both parties may ultimately have been responsible for the loss, their respective responsibility arose from the breach of substantially different obligations"; at [56]).
>
> ...
>
> 172 As a further practical matter, PwC says that the nature of AET's contribution claim, as now put forward in the proposed amendments, would mean that the hearing of the main proceedings will determine whether AET is liable to the plaintiffs; and AET would seek to press a contribution claim in respect of that liability in circumstances where it expressly does not have grounds for that contribution claim in respect of the plaintiffs because AET cannot plead that PwC owed any duty to the plaintiffs. PwC says that it follows from this that AET's contribution claim could not be resolved at the hearing in July 2018, because that claim cannot arise in respect of the plaintiffs' claims, and cannot be the subject of any common question because no facts will be before the court by which any such common question could be determined. PwC further says that as a result the determination of AET's contribution claim against PwC in respect of Group Members (other than the Plaintiffs) would be, at any initial trial, entirely hypothetical. Reference is made in this regard to what was said in *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; [1999] HCA 9 at [49] .
>
> ...
>
> 176 I am not persuaded that it is appropriate at this stage, in advance of the final hearing, to make a determination (or comment) on the dispute as to the various matters raised in relation to the contribution claims, other than to note that to the extent that the pleading of the contribution claims alleges audit wrongdoing and causation of loss, it suffers from the same deficiencies earlier identified, and that AET should articulate which contribution regime is said to apply to what causes of action and why. PwC should not be left to speculate as to those matters.

Bird v Stonham trading as John Stonham and Co. Lawyers [2019] NSWDC 419 -
Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd [2019] NSWCA 161 -
Orwin v Rickards [2019] VSC 375 -
The Owners - Strata Plan 30791 v Southern Cross Constructions (ACT) Pty Ltd (in liq) (No 2) [2019] NSWSC 440 -
The Owners - Strata Plan 30791 v Southern Cross Constructions (ACT) Pty Ltd (in liq) (No 2) [2019] NSWSC 440 -
F.Y.D. Investments Pty Ltd v Promptair Pty Ltd (No 2) [2019] FCA 419 (26 March 2019) (White J)

402. The purpose of s 87CD was discussed by French CJ, Hayne and Kiefel JJ in *Hunt & Hunt* :

> [16] The evident purpose of Pt 4 is to give effect to a legislative policy that, in respect of certain claims such as those for economic loss or property damage, a defendant should be liable only to the extent of his or her responsibility. The court has the task of apportioning that responsibility where the defendant can show that he or she is a "concurrent wrongdoer", which is to say that there are others whose acts or omissions can be said to have caused the damage the plaintiff claims, whether jointly with the defendant's acts or independently of them. If there are other wrongdoers they, together with the defendant, are all concurrent wrongdoers.

> [17] The purpose of Pt 4 is achieved by the limitation on a defendant's liability, effected by s 35(1)(b), which requires that the court award a plaintiff only the sum which represents the defendant's proportionate liability as determined by the court. For that purpose, it is not necessary that orders are able to be made against the other wrongdoers in the proceedings. Section 34(4) provides that it does not matter, for the purposes of Pt 4, that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died. Thus under Pt 4 the risk of a failure to recover the whole of the claim is shifted to the plaintiff.
>
> (Citation omitted)

Trajkovski v Simpson [2019] NSWCA 52 -
F.Y.D. Investments Pty Ltd v Promptair Pty Ltd (No 2) [2019] FCA 419 -
F.Y.D. Investments Pty Ltd v Promptair Pty Ltd (No 2) [2019] FCA 419 -
Trajkovski v Simpson [2019] NSWCA 52 -
Lake Maintenance (NSW) Pty Limited v Todd Hadley Pty Limited [2019] NSWSC 297 -
Babscay Pty Ltd v Pitcher Partners (a Firm) [2019] FCA 480 (15 March 2019) (Middleton J)

43. Two questions are relevant: (1) what is the damage or loss the subject of the plaintiff's claim; and (2) is there another person (aside from the defendant) whose act or omission also caused that damage or loss? In that context, it is important to note the following matters:

    · the phrase 'damage or loss' in the apportionment regimes means the 'harm suffered to the plaintiff's economic interests' and 'is not to be equated with what is ultimately awarded by the court, which is to say the "damages" which are ... awarded' (*Hunt & Hunt* at 628-9 [24]);

    · 'there is no express limitation on the nature of the claim that might have been brought by the plaintiff against a concurrent wrongdoer, except the requirement ... that the acts or omissions of all concurrent wrongdoers have caused the same damage' (*Hunt & Hunt* at 627 [18]);

    · it is not necessary 'that one wrongdoer contribute to the wrongful actions of the other wrongdoer in order that they cause the same damage', and there may be wrongdoers whose acts occur successively rather than simultaneously, and who may be liable for the same damage even though one may be liable for only part of the damage (*Hunt & Hunt* at 634 [41]); and

    · the acts of a concurrent wrongdoer may cause the damage the plaintiff claims, whether jointly with the defendant's acts or independently of them (*Hunt & Hunt* at 626 [16]).

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Babscay Pty Ltd v Pitcher Partners (a Firm) [2019] FCA 480 -
Babscay Pty Ltd v Pitcher Partners (a Firm) [2019] FCA 480 -
Babscay Pty Ltd v Pitcher Partners (a Firm) [2019] FCA 480 -
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Babscay Pty Ltd v Pitcher Partners (a Firm) [2019] FCA 480 -
McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 (04 March 2019) (Senior Member M. Farrelly)

economic interests. [10]

via

[10] *Hunt & Hunt* , at [24]

McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 (04 March 2019) (Senior Member M. Farrelly)
may be found to have caused the same damage. [11] In my view, this is the
via

[11] *Hunt & Hunt* , at [41]

McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 -
McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 -
McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 -
McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 -
The State of Western Australia v Cunningham [No 3] [2018] WASCA 207 (23 November 2018) (Buss P, Murphy JA, Pritchard JA)

117. More generally, damages are the common law remedy for a civil wrong. Under the common law, concurrent tortfeasors are persons, although not acting in concert between themselves, who inflict a single injury to the plaintiff. [192] At common law, the liability of concurrent tortfeasors causing the same damage is 'in solidum' in that each is responsible to make good the whole of the damage caused. [193] The common law's recognition that concurrent tortious acts may each be a cause of a plaintiff's loss or damage is reflected in the proposition that the plaintiff must establish that his or her loss or damage is 'caused or materially contributed to' by a defendant's wrongful conduct. It is enough for liability under the common law that the wrongdoer's conduct be one cause. The relevant inquiry is whether the particular contravention was a cause, in the sense that it materially contributed to, the plaintiff's loss. [194]

via

[193] ***Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*** [2013] HCA 10; (2013) 247 CLR 613 [10] ; ***Barisic*** (139 140).

The State of Western Australia v Cunningham [No 3] [2018] WASCA 207 -
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The State of Western Australia v Cunningham [No 3] [2018] WASCA 207 -
Burkitt v Ultimate Car Rentals Australia P/L [2018] NSWDC 328 -
Ryan Wealth Holdings Pty Ltd v Baumgartner [2018] NSWSC 1502 -
Evans v Fynnan Pty Ltd [2018] VCAT 1335 -
Evans v Fynnan Pty Ltd [2018] VCAT 1335 -
Apostolic Church Australia Ltd v Dixon [2018] WASCA 146 (21 August 2018) (Murphy JA, Beech JA, Pritchard J)

66. Generally, causation is largely a question of fact to be determined by the application of 'common sense' to the facts of the particular case. [97]

via

[97] ***March v E & MH Stramare Pty Ltd*** [1991] HCA 12; (1991) 171 CLR 506, 515 - 516, 522 - 524, 530 - 532 ; ***Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*** [2013] HCA 10; (2013) 247 CLR 613 [43].

Apostolic Church Australia Ltd v Dixon [2018] WASCA 146 -
Makings Custodian Pty Ltd v Orchid Avenue Realty Pty Ltd; Orchid Avenue Realty Pty Ltd v Makings Custodian Pty Ltd [2018] QCA 33 (09 March 2018) (Gotterson and Morrison JJA and Henry J)

70. On appeal, consideration was given to an anterior question, namely, whether the agents and the principals were concurrent wrongdoers. Holmes JA (with whom Morrison JA and I agreed) answered the question in the negative and affirmed the judgment under appeal on that basis. As to construction of s 87CB(3) , her Honour said:

> "[20] The phrase "independently of each other or jointly" in the s 87 CB(3) definition qualifies the verb "caused", rather than describing the acts or omissions. In other words, the issue is not whether acts or omissions are jointly undertaken but whether they either independently produce the same outcome or combine in their effect to do so. Thus, for example, although Mr Waight was not jointly liable with the other defendants for the statement found to have been made without their authority, it caused Mrs Seirlis' loss jointly with the statements they made to the same effect. In *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* , [81] on the other hand, the fraud of parties who had forged documents to obtain a mortgage and the negligence of the mortgagee's solicitors in failing properly to secure the loan were independent causes of the loss.
>
> [21] The majority of the High Court in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees* observed that the equivalent definition of "concurrent wrongdoer" in the *Civil Liability Act* 2002 (NSW) posed two questions:

> "...what is the damage or loss that is the subject of the claim? Is there a person, other than the defendant, whose acts or omissions also caused that damage or loss?"[82]
>
> Consistently with the form of the second question, I would construe the definition in s 87CB as concerned with distinct acts (or omissions) or sets of acts (or omissions) by different actors, combining or working independently to cause loss or damage, and consequently inapplicable where there is but a single act or set of acts causing loss, attributable to more than one person."

via

[81] (2013) 247 CLR 613 .

Makings Custodian Pty Ltd v Orchid Avenue Realty Pty Ltd; Orchid Avenue Realty Pty Ltd v Makings Custodian Pty Ltd [2018] QCA 33 -
Makings Custodian Pty Ltd v Orchid Avenue Realty Pty Ltd; Orchid Avenue Realty Pty Ltd v Makings Custodian Pty Ltd [2018] QCA 33 -
Michelangelo Alfredo Mascarello v Registrar-General of New South Wales [2018] NSWSC 284 (08 March 2018) (Sackar J)

52. K R Lawyers, in their Outline of Submissions at paragraph [26], draw attention to standard formulations of causation in *March v Stramare (E & MH)* [1991] HCA 12 (***March v Stramare***) and *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees* [2013] HCA 10 (***Hunt & Hunt***). At paragraphs [43]-[45] in *Hunt & Hunt* , French CJ and Hayne and Kiefel JJ observed (references omitted):

> [43] The proper identification of damage should usually point the way to the acts or omissions which were its cause. Causation is largely a question of fact, to be approached by applying common sense to the facts of the particular case. This is not to deny that value judgments and policy have a part to play in causation analysis at common law and, as has been observed, both factual causation and scope of liability elements are referred to in s 5D(1) of the *Civil Liability Act* .
>
> [44] In *March v Stramare (E & MH) Pty Ltd*, it was observed that courts are no longer as constrained as they once were to find a single cause for a consequence and to adopt an "effective cause" formula. Courts today usually recognise that there may be wrongdoers whose acts or omissions occur successively, rather than simultaneously, and who may be liable for the same damage, even though one may be liable for only part of the damage for which the other is liable.
>
> [45] The law's recognition that concurrent and successive tortious acts may each be a cause of a plaintiff's loss or damage is reflected in the proposition that a plaintiff must establish that his or her loss or damage is "caused or materially contributed to" by a defendant's wrongful conduct. It is enough for liability that a wrongdoer's conduct be one cause. The relevant enquiry is whether the particular contravention was a cause, in the sense that it materially contributed to the loss. Material contribution has been said to require only that the act or omission of a wrongdoer play some part in contributing to the loss.

Michelangelo Alfredo Mascarello v Registrar-General of New South Wales [2018] NSWSC 284 -
Michelangelo Alfredo Mascarello v Registrar-General of New South Wales [2018] NSWSC 284 -
Bodycorp Repairers Pty Ltd v Holding Redlich [2018] VSCA 17 (08 February 2018) (Whelan and Santamaria JJA and T Forrest AJA)

180. Bell and Gageler JJ characterised the relevant issue as being the determination of how it was that the financier was 'worse off'. [149] They concluded that the harm suffered by the financier was the absence of protection and the lack of security. [150] The fraudsters did not cause the lack of security, and accordingly the loss suffered as a result of the negligence of the solicitors was different to that suffered as a result of the conduct of the fraudsters. [151]

via

[149] Ibid 649–50 [93] .

Bodycorp Repairers Pty Ltd v Holding Redlich [2018] VSCA 17 -
Bodycorp Repairers Pty Ltd v Holding Redlich [2018] VSCA 17 -
Bodycorp Repairers Pty Ltd v Holding Redlich [2018] VSCA 17 -
Bodycorp Repairers Pty Ltd v Holding Redlich [2018] VSCA 17 -
Bodycorp Repairers Pty Ltd v Holding Redlich [2018] VSCA 17 -
Bodycorp Repairers Pty Ltd v Holding Redlich [2018] VSCA 17 -
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Bodycorp Repairers Pty Ltd v Holding Redlich [2018] VSCA 17 -
Bodycorp Repairers Pty Ltd v Holding Redlich [2018] VSCA 17 -
Bodycorp Repairers Pty Ltd v Holding Redlich [2018] VSCA 17 -
Bodycorp Repairers Pty Ltd v Holding Redlich [2018] VSCA 17 -
Bodycorp Repairers Pty Ltd v Holding Redlich [2018] VSCA 17 -
Mabior by her Next Friend Mary Kelei v Child and Adolescent Health Service [2018] WADC 12 -
Mabior by her Next Friend Mary Kelei v Child and Adolescent Health Service [2018] WADC 12 -
Skinner v Redmond Family Holdings Pty Ltd [2017] NSWCA 329 -
Dino Dinov v Allianz Australia Insurance Limited [2017] NSWCA 270 -
Smith v Australian Executor Trustees Ltd [2017] NSWSC 1406 -
Berhane v Woolworths Ltd [2017] QCA 166 (08 August 2017) (Gotterson and Morrison JJA and Dalton J,)

72. However, senior counsel for Mr Berhane also put the case on causation on the basis of s 305D(2) of the *Workers Compensation and Rehabilitation Act* . For that purpose the "but for" test in s 305D(1) is inapplicable, and the test is whether the breach materially contributed to the injury. [64] At trial the case was conducted on the basis that the workplace activities [65] materially contributed to the acceleration of the pre-existing condition.[66] If those workplace activities were carried out as a result of Woolworths' breach of duty, as they were, then the case as conducted would engage s 305D(2) . The conclusion reached in paragraph [50] above would also be sufficient to satisfy s 305D(2) .

via

[64] *Amaca Pty Ltd v Booth* (2011) 246 CLR 36, [2011] HCA 53, at [70] ; *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, [2013] HCA 10 at [45] ; *Strong v Woolworths Ltd* (2012) 246 CLR 182, [2012] HCA 5, at [26] ; *Prasad v Ingham's Enterprises Pty Ltd* [2016] QCA 147 at [90] .

Berhane v Woolworths Ltd [2017] QCA 166 -
Libra Collaroy Pty Ltd v Bhide [2017] NSWCA 196 -
Libra Collaroy Pty Ltd v Bhide [2017] NSWCA 196 -
Libra Collaroy Pty Ltd v Bhide [2017] NSWCA 196 -
Dunn v Hanson Australasia Pty Ltd [2017] ACTSC 169 -
Dinh v Nguyen [2017] NSWDC 156 (29 June 2017) (Gibson DCJ)

74. In *Lucantonio v Stichter* [2014] NSWCA 5, the Court of Appeal identified the test (at [79] – [81]):

"[79] In order to establish that any breach of duty on the respondent's part caused the appellant harm, the appellant had to establish that that negligence was a necessary condition of the occurrence of that harm, an exercise the Act labels "factual causation": s 5D(1)(a), *Civil Liability Act 2002* . That required the appellant establishing that the respondent's negligence was a condition that must be present for the occurrence of the harm: *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18], [20]) per French CJ, Gummow, Crennan and Bell JJ; (at [44]) per Heydon J.

[80] Such determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E " (*Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14])) and is approached by applying common sense to those facts: *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 (at [43] ; [56]) per French CJ, Hayne and Kiefel JJ. It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeels Palace Pty Ltd v Mourbarak* [2009] HCA 48; (2009) 239 CLR 420 (at [45], [55]). "Proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred": *Strong v Woolworths Ltd* (at [32]) per French CJ, Gummow, Crennan and Bell JJ.

[81] The inquiry into causation is retrospective, seeking to identify what happened and why: *Vairy v Wyong Shire Council* [2005] HCA 62; (2005) 223 CLR 422 (at [124]) per Hayne J; *Lesandu Blacktown Pty Ltd v Gonzalez* [2013] NSWCA 8 (at [28]) per Basten JA (Davies J agreeing). It focuses on the particular conduct or omission which is found to constitute the defendant's breach of duty: *Kocis v SE Dickens Pty Ltd* [1998] 3 VR 408 (at 419) per Phillips JA (Ormiston JA generally agreeing).

Dinh v Nguyen [2017] NSWDC 156 -
P Twin Holdings Pty Ltd as Trustee for the P Twin Trust v SG Old Pty Ltd [2017] WADC 77 (09 June 2017) (Goetze DCJ)

184. In ***Hunt & Hunt*** , it was noted at [51] that fraudster's conduct induced entry into a loan transaction. But for the fraud, the monies, almost certainly, would not have been advanced. Hunt & Hunt were subsequently instructed to draw loan and mortgage documents providing a covenant to repay the borrowed sum. However, the mortgage document, as drawn, did not contain such a provision.

P Twin Holdings Pty Ltd as Trustee for the P Twin Trust v SG Old Pty Ltd [2017] WADC 77 -
P Twin Holdings Pty Ltd as Trustee for the P Twin Trust v SG Old Pty Ltd [2017] WADC 77 -
P Twin Holdings Pty Ltd as Trustee for the P Twin Trust v SG Old Pty Ltd [2017] WADC 77 -
P Twin Holdings Pty Ltd as Trustee for the P Twin Trust v SG Old Pty Ltd [2017] WADC 77 -
P Twin Holdings Pty Ltd as Trustee for the P Twin Trust v SG Old Pty Ltd [2017] WADC 77 -
Daniel Smith by his tutor Debra Smith v South Western Sydney Local Health Network [2017] NSWCA 123 -
The Corporation of the Synod of the Diocese of Brisbane v Greenway [2017] QCA 103 -
The Corporation of the Synod of the Diocese of Brisbane v Greenway [2017] QCA 103 -
Shinwari v Anjoul by her tutor Therese Anjoul [2017] NSWCA 74 (07 April 2017) (McColl and Gleeson JJA, Emmett AJA)

73. In *Hunt & Hunt* , [33] French CJ, Hayne and Kiefel JJ described the "evident purpose of Pt 4 [of the Liability Act as being] to give effect to a legislative policy that, in respect of certain claims such as those for economic loss or property damage, a defendant should be liable only to the extent of his or her responsibility."

Shinwari v Anjoul by her tutor Therese Anjoul [2017] NSWCA 74 (07 April 2017) (McColl and Gleeson JJA, Emmett AJA)

27. The genesis of Pt 4 of the Liability Act was discussed by the majority (French CJ, Hayne and Kiefel JJ) in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* , principally by reference to the Davis Report. [15] Their Honours noted the Davis Report recommendation that "joint and several liability be abolished, and replaced by a scheme of proportionate liability, in all actions in the tort of negligence in which the plaintiff's claim is for property damage or purely economic loss". [16] Although their Honours did not refer to this fact, the Terms of Reference for Professor Davis' Inquiry expressly excluded "any examination of the rule of joint and several liability in relation to personal injury claims". [17]

Shinwari v Anjoul by her tutor Therese Anjoul [2017] NSWCA 74 -
Shinwari v Anjoul by her tutor Therese Anjoul [2017] NSWCA 74 -
Shinwari v Anjoul by her tutor Therese Anjoul [2017] NSWCA 74 -
Shinwari v Anjoul by her tutor Therese Anjoul [2017] NSWCA 74 -
Ralston v Jurisich [2017] NSWCA 63 -
Redmond Family Holdings v GC Access Pty Ltd [2016] NSWSC 1883 -
Equal 54 Pty Ltd v Dennis Galimberti [2016] VSC 588 -
Equal 54 Pty Ltd v Dennis Galimberti [2016] VSC 588 -
Equal 54 Pty Ltd v Dennis Galimberti [2016] VSC 588 -
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Equal 54 Pty Ltd v Dennis Galimberti [2016] VSC 588 -
Equal 54 Pty Ltd v Dennis Galimberti [2016] VSC 588 -
Greenway v The Corporation of the Synod of the Diocese of Brisbane [2016] QDC 195 -
Greenway v The Corporation of the Synod of the Diocese of Brisbane [2016] QDC 195 -
Barouche v Owners Corporation No. 409234V (Owners Corporations) [2016] VCAT 938 (15 June 2016) (Senior Member A. Vassie)

40. The second difficulty, however, does. It is that the argument asks me, impermissibly, to reverse the questions of damage and causation by addressing the question of causation before the question of what loss or damage is the subject of the applicants' claim. In *Hunt & Hunt Lawyers v Mitchell Morgan*

Nominees Pty Ltd [11] the High Court was considering a section (s34(2)) of the legislation in New South Wales [12] which is in very similar terms to s 24AH(1) of the Wrongs Act . At paragraph [19], the plurality of the court stated:

> [19] Section 34(2) poses two questions for the court: what is the damage or loss that is the subject of the claim? Is there a person, other than the defendant, whose acts or omissions also caused that damage or loss? Logically, the identification of the "damage or loss that is the subject of the claim" is anterior to the question of causation.

In that case, the plurality identified the loss or damage that was the subject of a mortgagee-lender's claim as being the inability to recover the money it had advanced to a fraudster [13] , and concluded that the fraudster and the solicitors for the lender's broker were concurrent wrongdoers, having caused that loss or damage even though the fraudster had caused the lender to pay out money when it would not have done so but for the fraud, and the solicitors for the lender's broker had not done that but had caused the lender not to have the benefit of any security for the money paid out.

via

[13] (2013) 296 ALR 3 at [9] .

Barouche v Owners Corporation No. 409234V (Owners Corporations) [2016] VCAT 938 -
Richtoll Pty Ltd v WW Lawyers (in Liquidation) Pty Ltd [2016] NSWSC 438 -
Richtoll Pty Ltd v WW Lawyers (in Liquidation) Pty Ltd [2016] NSWSC 438 -
Cassegrain v Cassegrain [2016] NSWCA 71 -
Cassegrain v Cassegrain [2016] NSWCA 71 -
P-Value v Vicland Group [2016] VSC 100 (15 March 2016) (Digby J)

533. Furthermore, I have found that all the representations which were wrongful and prohibited, including the offer representation, caused P-Value's claimed loss and damage and I consider it contrary to the evidence I have identified, including at [222], [223] and [226], and impractical and unrealistic to endeavour to attempt to ascribe parts of P-Value's loss and damage as arising from, or being caused by, particular prohibited representations and not by others. [366]

via

[366] *Mitchell Morgan* (2013) 247 CLR 613 at [45]-[51] .

P-Value v Vicland Group [2016] VSC 100 -
P-Value v Vicland Group [2016] VSC 100 -
Dual Homes Pty Ltd v Moores Legal Pty Ltd [2016] VSC 86 -
Willmott Forests Ltd (Receivers and Managers appointed)(In Liq) v Armstrong Dubois Pty Ltd [2016] VSC 61 (01 March 2016) (Derham AsJ)

51. The Auditor submits that WFL seeks to make several new or substitute claims in the FASOC and that these depart significantly from that notified by the indorsement. The Auditor submits that in the FASOC:

(a) the damage claimed (in the sense of the injury and other foreseeable consequences suffered [45]) in the causes of action in tort and for contravention of statute is not the same injury the subject of the indorsement so that new courses of action are substituted (' **Different Damage**');[46]

(b) new and substitute material facts are relied on in support of the tortious duty of care compared to those in the indorsement ('**Different Material Facts**');[47]

(c) a new statutory cause of action not notified by the indorsement is relied on – a claim for damages under s 1041I of the *Corporations Act* by reason of a contravention of s 1041H of that Act ('**New Statutory Cause of Action**');[48]

(d) new representations not notified by the indorsement are relied on (' **New Representations**');[49]

(e) substitute causes of action based on contracts not notified by the indorsement are relied on ('**Substitute Contract Claims**').[50] This is essentially the same point as is made in the abandonment issue;

(f) breaches of new contractual obligations not notified by the indorsement are relied on ('**Substitute Breaches of Contract**');[51]

(g) there is reliance on new provisions of the *Corporations Act* imposing obligations not relied upon in the indorsement ('**New Corporations Act provisions Relied on**');[52]

via

[45] *Mahoney v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 527 ; *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* (2103) 247 CLR 613 at [24] (' ***Hunt*** ').

Willmott Forests Ltd (Receivers and Managers appointed)(In Liq) v Armstrong Dubois Pty Ltd [2016] VSC 61 -
Siegwerk Australia Pty Ltd (In liq) v Nuplex Industries (Aust) Pty Ltd [2016] FCA 158 -
Siegwerk Australia Pty Ltd (In liq) v Nuplex Industries (Aust) Pty Ltd [2016] FCA 158 -
LM Investment Management Limited (In Liquidation) (Receivers appointed) v BMT and Assoc Pty Limited [2015] NSWSC 1902 (18 December 2015) (Ball J)

85. The conclusion of the previous paragraphs is consistent with the decision in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613. In that case, Mitchell Morgan lent money on security of real property. The loan was obtained as a result of the borrower's fraud and the fraud of the borrower's cousin, a solicitor, who falsely certified that he had identified the true owner of the property over which Mitchell Morgan took security and witnessed that person's signature on the loan documentation and mortgage, when in fact that person's signature had been forged by the fraudster borrower. The loan agreement was held to be void because of the forgery, with the result that the mortgage secured nothing. Mitchell Morgan sued its solicitors claiming that they were negligent in failing to draft a mortgage that included a covenant to repay a specific amount. The question before the High Court was whether the two fraudsters were concurrent wrongdoers with Mitchell Morgan's solicitors. That question turned on whether the claim against them was in respect of the same loss. A majority held that it was. That loss was the inability of Mitchell Morgan to recover the moneys advanced. The solicitors and fraudsters each materially contributed to that loss: see [2013] HCA 10 ; (2013) 247 CLR 613 at [9] . But it was plain in that case that the claim available against each of the solicitors and fraudsters was a claim for economic loss arising from a failure to take reasonable care. The majority specifically left open the question whether a claim in debt was a claim for loss or damage: at [42].

LM Investment Management Limited (In Liquidation) (Receivers appointed) v BMT and Assoc Pty Limited [2015] NSWSC 1902 -
LM Investment Management Limited (In Liquidation) (Receivers appointed) v BMT and Assoc Pty Limited [2015] NSWSC 1902 -
Khoury v Coffey Projects (Australia) Pty Ltd [2015] NSWCA 371 -
Khoury v Coffey Projects (Australia) Pty Ltd [2015] NSWCA 371 -
Khoury v Coffey Projects (Australia) Pty Ltd [2015] NSWCA 371 -
Adams v Clark Homes Pty Ltd [2015] VCAT 1658 (27 October 2015) (Judge Jenkins, Vice President)

64. Finally it is appropriate to refer to the High Court decision in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd.* [36] In considering corresponding apportionment legislation in NSW, [37] the High Court effectively overturned the approach previously followed by the Victorian Court of Appeal in *St George Bank v Quinerts*. [38]

Adams v Clark Homes Pty Ltd [2015] VCAT 1658 -

Adams v Clark Homes Pty Ltd [2015] VCAT 1658 -
Adams v Clark Homes Pty Ltd [2015] VCAT 1658 -
Adams v Clark Homes Pty Ltd [2015] VCAT 1658 -
Neradovsky v Burnett [2015] NSWSC 1458 -
Baker v Mackenzie [2015] ACTSC 272 -
Sartor v Theos (Building and Property) [2015] VCAT 1312 (26 August 2015) (Deputy President C Aird)

32. I am fortified in my view that this is the approach to be taken by a respondent seeking to rely on Part IVAA by the comments by the majority in *Hunt & Hunt* at [10] where their Honours said:

> ...under a regime of proportionate liability, liability is apportioned to each wrongdoer according to the court's assessment of the extent of their responsibility. It is therefore necessary that the plaintiff sue all of the wrongdoers in order to recover the total loss and, of course, the risk that one of them may be insolvent shifts to the plaintiff.

Sartor v Theos (Building and Property) [2015] VCAT 1312 -
Sartor v Theos (Building and Property) [2015] VCAT 1312 -
Waller v James [2015] NSWCA 232 (13 August 2015) (Beazley P, McColl and Ward JJA)

117. In *Hawkins v Clayton* [1988] HCA 15; 164 CLR 539 Gaudron J, at 601, likewise stated that it will almost always be necessary in an action for economic loss to identify the interest said to have been infringed. This passage was endorsed in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees* [2013] HCA 10; 247 CLR 613 by the plurality (French CJ, Hayne and Kiefel JJ) who stated, at [25], that an understanding of the interest said to be infringed was necessary, relevantly:

> "... for a proper understanding of the harm suffered and for the determination of what acts or omissions may be said to have caused that damage."

Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Drake v Wight and Strickland Lawyers [2015] NSWSC 1090 -
Cosmetic Laser Clinic Pty Ltd v Pirintji [2015] NSWSC 983 (31 July 2015) (Garling J)

124. Secondly, I accept Mr Crumpton's evidence, accompanied by submissions from the bar table, that the real prejudice to be found in allowing the amendments is that, as a matter of the perception about the likelihood, where other concurrent wrongdoers are found to have caused loss in cases involving solicitors, courts have generally but not universally, found that the percentage of contribution by the solicitors was relatively small. *Mitchell Morgan* is one such example where the solicitors were found to be proportionally liable to the extent of 12.5%. That perception or belief is not an unreasonable one.

Cosmetic Laser Clinic Pty Ltd v Pirintji [2015] NSWSC 983 -
Cosmetic Laser Clinic Pty Ltd v Pirintji [2015] NSWSC 983 -
Cosmetic Laser Clinic Pty Ltd v Pirintji [2015] NSWSC 983 -
Cosmetic Laser Clinic Pty Ltd v Pirintji [2015] NSWSC 983 -
Cosmetic Laser Clinic Pty Ltd v Pirintji [2015] NSWSC 983 -
Cosmetic Laser Clinic Pty Ltd v Pirintji [2015] NSWSC 983 -
Cosmetic Laser Clinic Pty Ltd v Pirintji [2015] NSWSC 983 -
Bradley v Insurance Australia Ltd t/as NRMA Insurance [2015] NSWSC 950 -
Williams v Pisano [2015] NSWCA 177 -
Ligon Sixty-Three Pty Ltd v ClarkeKann [2015] QSC 153 (05 June 2015) (Philip McMurdo J)

46. Thirdly, by s 31(1)(a) the liability of a defendant who is a concurrent wrongdoer in relation to the claim is limited, as the court considers just and equitable, having regard to the extent of the defendant's *responsibility* for the loss or damage. And in apportioning responsibility between defendants in a proceeding, the court may have regard to the *comparative responsibility* of any concurrent wrongdoer who is not a party to the proceeding. Thus a concurrent wrongdoer, whether a defendant or not, is a person with some responsibility for the loss or damage. The extent of a wrongdoer's responsibility must be assessed in comparison with that of the other wrongdoer or wrongdoers. In *Hunt & Hunt Lawyers*, French CJ, Hayne and Kiefel JJ described the value judgments to be employed in that exercise of comparison. [40] But the notion that there could be a responsibility for the loss or damage, which is not a legal responsibility but which could be assessed and compared as required by s 31 , is problematical at least.

via

[40] (2013) 247 CLR 613 , 637 [57] .

Ligon Sixty-Three Pty Ltd v ClarkeKann [2015] QSC 153 -
Ligon Sixty-Three Pty Ltd v ClarkeKann [2015] QSC 153 -
Ligon Sixty-Three Pty Ltd v ClarkeKann [2015] QSC 153 -
Selig v Wealthsure Pty Ltd [2015] HCA 18 (13 May 2015) (French CJ, Kiefel, Bell, Gageler and Keane JJ)

19. At the time these statutes were amended to provide for proportionate liability with respect to apportionable claims, such provision had already been made with respect to actions of certain kinds in State and Territory legislation dealing with civil liability [10] . It was observed in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [11] that the background to the inquiry which led to the introduction of this legislation in the States and Territories was a perceived crisis regarding the cost of liability insurance. The Davis Report[12] had noted that people, such as professional people, who are usually insured against liability to clients are often the sole target of legal action when losses are suffered, despite the involvement of others. It was suggested[13] that, in actions of negligence involving claims for property damage or economic loss, a defendant's liability should be limited to his or her degree of fault.

via

[10] See *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at 626 [15] , especially footnote 44; [2013] HCA 10 .

Selig v Wealthsure Pty Ltd [2015] HCA 18 (13 May 2015) (French CJ, Kiefel, Bell, Gageler and Keane JJ)

21. Under the statutory regime of proportionate liability, liability is apportioned for each wrongdoer according to the court's assessment of the extent of their responsibility. As was also observed in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [17] , it is necessary for a plaintiff to sue all of the wrongdoers in order to recover the total loss. There is an obvious benefit to wrongdoers from this kind of proportionate liability regime. Further, in such a regime, proportionate liability applies regardless of whether a concurrent wrongdoer is insolvent or is being wound up [18] . The risk of a failure to recover from a particular wrongdoer shifts entirely to the plaintiff.

via

[17] (2013) 247 CLR 613 at 624 [10] .

Selig v Wealthsure Pty Ltd [2015] HCA 18 -
Selig v Wealthsure Pty Ltd [2015] HCA 18 -
Selig v Wealthsure Pty Ltd [2015] HCA 18 -
Selig v Wealthsure Pty Ltd [2015] HCA 18 -
British Marine PLC v Wollongong Coal Ltd [2015] FCA 403 -
British Marine PLC v Wollongong Coal Ltd [2015] FCA 403 -
Ryan v Balanon (Residential Tenancies) [2015] VCAT 431 (13 April 2015) (Member E. Fabris)

26. The majority of the High Court observed, however, that "In the context of economic loss, loss or damage may be understood as the harm suffered to a plaintiff's economic interests" [1] , and in this case the harm was Mitchell Morgan's inability to recover the sums advanced. The majority found that Hunt & Hunt's negligence was clearly a cause of this harm, because it rendered the mortgage ineffective as security against the property. However, the majority found that the fraudsters' conduct in inducing Mitchell Morgan to enter the loan transaction and pay the loan moneys must be regarded as a material cause of that harm. The majority observed that it is not consistent with the policy of Pt 4 that Hunt & Hunt be held wholly responsible for Mitchell Morgan' s loss, and that consistent with that policy, Mitchell Morgan should not recover from Hunt & Hunt any more than that for which Hunt & Hunt was responsible.

via

[1] 247 CLR 613 at [24]

Ryan v Balanon (Residential Tenancies) [2015] VCAT 431 -
Ryan v Balanon (Residential Tenancies) [2015] VCAT 431 -
J Redman Investments Pty Limited v Malcolm Nelson Johns [2015] NSWDC 39 -
J Redman Investments Pty Limited v Malcolm Nelson Johns [2015] NSWDC 39 -
Victorian WorkCover Authority v Clarke [2015] VCC 62 -
McBride v Christie's Australia Pty Ltd [2014] NSWSC 1729 -
McBride v Christie's Australia Pty Ltd [2014] NSWSC 1729 -
King v Benecke [2014] NSWCA 399 -
Permanent Custodians Limited v Geagea (No 3) [2014] NSWSC 1489 (30 October 2014) (Rothman J)

15. The passage in *Hunt & Hunt* , at [16]-[18] , on which the defendants rely must be understood in the context that the reference by the plurality to "acts or omissions of all concurrent wrongdoers" is a reference to acts or omissions of concurrent wrongdoers who are liable under an apportionable claim. That, of course, was the circumstance with which the High Court was dealing.

Permanent Custodians Limited v Geagea (No 3) [2014] NSWSC 1489 -
Byrne v People Resourcing (Qld) Pty Ltd [2014] QSC 269 -
Kronenberg v Bridge [2014] TASFC 10 -
Powney v Kerang and District Health [2014] VSCA 221 (11 September 2014) (Osborn and Beach JJA and Forrest AJA)

59. *Bonnington Castings* has been accepted and applied in the United Kingdom and in Australia. [17]

via

[17] See, in Australia for example, *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, 635 [45] ; *Amaca Pty Ltd v Booth* (2011) 246 CLR 36, 62 [70] ; *Henville v Walker* (2001) 206 CLR 459, 493 [106] ; *Chappel v Hart* (1998) 195 CLR 232, 244 [27] ; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408, 428.

Wieland v Texxcon Pty Ltd [2014] VSCA 199 -
Wieland v Texxcon Pty Ltd [2014] VSCA 199 -
Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd [2014] FCA 880 (22 August 2014) (Mortimer J)

14. The national scheme was intended to remove perceived inequities and undesirable consequences flowing from the imposition on multiple defendants of liability on a joint and several basis. The development of the common law principles on joint and several liability, and their modification by statute, is traced by Bell and Gageler JJ in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; [2013] HCA 10 at [80]-[84] .

Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd [2014] FCA 880 (22 August 2014) (Mortimer J)

16. The argument that the provisions were intended to go further than that, and to focus only on a causation analysis, so as to reduce the damages available to a plaintiff or applicant, irrespective of whether those who caused some of the loss or damage were liable to the plaintiff or applicant, has been rejected: see, eg, *Shrimp v Landmark Operations Ltd* (2007) 163 FCR 510; [2007] FCA 1468 at [59] per Besanko J; *Quinerts* 25 VR 666; [2009] VSCA 245 at [59] per Nettle JA. The setting of this limit was endorsed by Bell and Gageler JJ in *Hunt & Hunt* 247 CLR 613; [2013] HCA 10 at [91] , where their Honours said:

> To answer the description of "a person ... whose acts or omissions (or act or omission) caused" that damage or loss or harm, C (in common with B) must be (or have been) legally liable to A for the damage or loss that is the subject of the claim. The reference in the definition to "acts or omissions (or act or omission)" is to one or more *legally actionable* acts or omissions. The reference in the definition to acts or omissions having "caused ... the damage or loss that is the subject of the claim" is not, as has correctly been held, merely to causation in fact. "Questions of causation are not answered in a legal vacuum" but "are answered in the legal framework in which they arise". The reference here is to causation that results, or would result, in *legal liability*.

Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd [2014] FCA 880 -
Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd [2014] FCA 880 -
Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd [2014] FCA 880 -
Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd [2014] FCA 880 -
Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd [2014] FCA 880 -
Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd [2014] FCA 880 -
Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd [2014] FCA 880 -
Hadgelias Holdings and Waight v Seirlis [2014] QCA 177 (29 July 2014) (Holmes, Gotterson and Morrison JJA)

20. The phrase "independently of each other or jointly" in the s 87CB(3) definition qualifies the verb "caused", rather than describing the acts or omissions. In other words, the issue is not whether acts or omissions are jointly undertaken but whether they either independently produce the same outcome or combine in their effect to do so. Thus, for example, although Mr Waight was not jointly liable with the other defendants for the statement found to have been made without their authority, it caused Mrs Seirlis' loss jointly with the statements they made to the same effect. In *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [7] , on the other hand, the fraud of parties who had forged documents to obtain a mortgage and the negligence of the mortgagee's solicitors in failing properly to secure the loan were independent causes of the loss.

via

[7] (2013) 247 CLR 613

Hadgelias Holdings and Waight v Seirlis [2014] QCA 177 -
Hadgelias Holdings and Waight v Seirlis [2014] QCA 177 -

Hadgelias Holdings and Waight v Seirlis [2014] QCA 177 -
Hadgelias Holdings and Waight v Seirlis [2014] QCA 177 -
Rivercity Motorway Finance Pty Limited (Administrators Appointed) (Receivers and Managers Appointed) v AECOM Australia Pty Ltd (No 2) [2014] FCA 713 (18 July 2014) (Nicholas J)

70. The majority in *Hunt & Hunt* explained the purpose of Pt 4 of the NSW Act at [16]-[17] in these terms:

> [16] The evident purpose of Pt 4 is to give effect to a legislative policy that, in respect of certain claims such as those for economic loss or property damage, a defendant should be liable only to the extent of his or her responsibility. The court has the task of apportioning that responsibility where the defendant can show that he or she is a "concurrent wrongdoer", which is to say that there are others whose acts or omissions can be said to have caused the damage the plaintiff claims, whether jointly with the defendant's acts or independently of them. If there are other wrongdoers they, together with the defendant, are all concurrent wrongdoers.
>
> [17] The purpose of Pt 4 is achieved by the limitation on a defendant' s liability, effected by s 35(1)(b) , which requires that the court award a plaintiff only the sum which represents the defendant's proportionate liability as determined by the court. For that purpose, it is not necessary that orders are able to be made against the other wrongdoers in the proceedings. Section 34(4) provides that it does not matter, for the purposes of Pt 4 , that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died. Thus under Pt 4 the risk of a failure to recover the whole of the claim is shifted to the plaintiff.

(footnotes omitted)

The proposition that the liability of a concurrent wrongdoer (with the exception of an "excluded concurrent wrongdoer") who is found to be proportionately liable to the plaintiff under s 35(1) is limited to the extent to which he or she is considered to be responsible for the loss is fundamental to the statutory scheme established by Pt 4 of the NSW Act . In the result, I am not satisfied that there is any reason to doubt the correctness of Barrett J's decision.

Rivercity Motorway Finance Pty Limited (Administrators Appointed) (Receivers and Managers Appointed) v AECOM Australia Pty Ltd (No 2) [2014] FCA 713 -
Rivercity Motorway Finance Pty Limited (Administrators Appointed) (Receivers and Managers Appointed) v AECOM Australia Pty Ltd (No 2) [2014] FCA 713 -
Sanderson Motors Pty Ltd v Lindsay Bennelong Developments Pty Ltd [2014] NSWSC 846 (27 June 2014) (Ball J)

36. Fifth, there is a question concerning the effect of Pt 4 on a defendant's right to claim contribution or an indemnity from a concurrent wrongdoer against whom judgment has not been given. Such a claim for contribution is not expressly excluded by Pt 4 . In *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505; (2008) 13 BPR 25,343, Young CJ in Eq held that such a claim was maintainable. In that case, his Honour had determined that Hunt & Hunt Lawyers was liable for 12.5 per cent of the loss claimed by the plaintiff. Hunt & Hunt sought indemnity from a joint tortfeasor, Mr Flammia, for the whole of that amount. Mr Flammia, who was bankrupt, had not been joined as a defendant by the plaintiff. Hunt & Hunt succeeded before Young CJ in Eq. Young CJ's decision that Hunt & Hunt was liable for 12.5 per cent of the loss was overturned by the Court of Appeal (see *Mitchell Morgan Nominees Pty Ltd v Vella* [2011] NSWCA 390; (2011) 16 BPR 30,189) on the ground that the claim against Hunt & Hunt was not an apportionable claim because the loss in respect of which they were sued was different from the loss in respect of which the other tortfeasors were sued. That decision itself was overturned by a majoity of the High Court in *Hunt & Hunt Lawyers v*

Mitchell Morgan Nominees Pty Ltd [2013] HCA 10; (2012) 247 CLR 613 . The High Court did not deal with Hunt & Hunt's claim for contribution against Mr Flammia. It said nothing to suggest that claims for contribution were excluded, except to the extent that they were excluded by s 36 : see [2013] HCA 10; (2012) 247 CLR 613 at [21] .

Sanderson Motors Pty Ltd v Lindsay Bennelong Developments Pty Ltd [2014] NSWSC 846 -
Sanderson Motors Pty Ltd v Lindsay Bennelong Developments Pty Ltd [2014] NSWSC 846 -
Wealthsure Pty Ltd v Selig [2014] FCAFC 64 -
Wealthsure Pty Ltd v Selig [2014] FCAFC 64 -
Wealthsure Pty Ltd v Selig [2014] FCAFC 64 -
Wealthsure Pty Ltd v Selig [2014] FCAFC 64 -
Wealthsure Pty Ltd v Selig [2014] FCAFC 64 -
Wealthsure Pty Ltd v Selig [2014] FCAFC 64 -
Bakovski v Lenehan [2014] NSWSC 671 -
Bakovski v Lenehan [2014] NSWSC 671 -
Gandel v Krongold Constructions (Aust) Pty Ltd [2014] VCC 650 (23 May 2014) (His Honour Judge Anderson)

> 31 The focus of the decision in the High Court related to a different issue to that considered in *Godfrey Spowers* , and upon which I must now decide. In any event, I consider that *Hunt & Hunt* confirms the conclusion reached by the Court of Appeal in *Godfrey Spowers* that questions of whether a claim is apportionable, or another party is a "*concurrent wrongdoer*", must be decided at trial. Until that happens, the rights of a party to claim contribution or indemnity under Part IV of the *Wrongs Act* a re not affected.

Gandel v Krongold Constructions (Aust) Pty Ltd [2014] VCC 650 -
Gandel v Krongold Constructions (Aust) Pty Ltd [2014] VCC 650 -
Gandel v Krongold Constructions (Aust) Pty Ltd [2014] VCC 650 -
Polon v Dorian [2014] NSWSC 571 -
Polon v Dorian [2014] NSWSC 571 -
City of Swan v McGraw-Hill Companies Inc [2014] FCA 442 (07 May 2014) (Rares J)
Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd (2013) 247 CLR 613 referred to

City of Swan v McGraw-Hill Companies Inc [2014] FCA 442 -
City of Swan v McGraw-Hill Companies Inc [2014] FCA 442 -
City of Swan v McGraw-Hill Companies Inc [2014] FCA 442 -
City of Swan v McGraw-Hill Companies Inc [2014] FCA 442 -
City of Swan v McGraw-Hill Companies Inc [2014] FCA 442 -
City of Swan v McGraw-Hill Companies Inc [2014] FCA 442 -
City of Swan v McGraw-Hill Companies Inc [2014] FCA 442 -
City of Swan v McGraw-Hill Companies Inc [2014] FCA 442 -
Warth v Lafsky [2014] NSWCA 94 (01 April 2014) (McColl JA, Preston CJ of LEC and Tobias AJA)

> 59. Proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred: *Strong v Woolworths Ltd* (at [32]) per French CJ, Gummow, Crennan and Bell JJ. Causation is "approached by applying common sense to the facts of the particular case": *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 623 (at [43]) per French CJ, Hayne and Kiefel JJ. If factual causation is established, the plaintiff must also establish that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("scope of liability"): s 5D(1)(b) *Civil Liability Act* . The appellant did not contend that there was any reason why his liability should not so extend if factual causation was established.

Warth v Lafsky [2014] NSWCA 94 -

JNJ Resources P/L v Crouch & Lyndon [2014] QSC 13 -
JNJ Resources P/L v Crouch & Lyndon [2014] QSC 13 -
Lucantonio v Stichter [2014] NSWCA 5 -
Gratrax Pty Ltd v T D & C Pty Ltd [2013] QCA 385 (17 December 2013) (Fraser and Morrison JJA and Margaret Wilson J,)

21. The appellant relied upon three grounds of appeal. The first two grounds challenge the trial judge's approach to causation.

> The learned trial judge erred in law by approaching the question of causation by means of a two part analysis, being a statutory factual causation test and scope of liability test (Reasons at [70] - [79] and particularly at [74] - [75]), as opposed to an enquiry whether the particular contravention was a cause in the sense that it materially contributed to the loss (as set out in *Hunt* & *Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA lo at [45] - [57]).Ground 1:
>
> Having adopted the incorrect approach, the learned trial judge [then] erred in failing to find that the defendant's conduct was a cause of all of the plaintiff's loss, which the trial judge found to be $91,668.40.Ground 2:

Gratrax Pty Ltd v T D & C Pty Ltd [2013] QCA 385 -
Gratrax Pty Ltd v T D & C Pty Ltd [2013] QCA 385 -
Gratrax Pty Ltd v T D & C Pty Ltd [2013] QCA 385 -
Takla v Nasr [2013] NSWCA 435 (13 December 2013) (McColl, Basten and Hoeben JJA)

77. Unlike the issues of duty of care and breach, the causation inquiry "is wholly retrospective [and] ... seeks to identify what happened and why": *Vairy v Wyong Shire Council* (at [124]) per Hayne J; see also *Wallace v Kam* (at [26]). Thus "[t]he proper identification of damage should usually point the way to the acts or omissions which were its cause": *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (at [43]).

Conclusion

Takla v Nasr [2013] NSWCA 435 -
Takla v Nasr [2013] NSWCA 435 -
Takla v Nasr [2013] NSWCA 435 -
Takla v Nasr [2013] NSWCA 435 -
Hobbs Haulage P/L v Zupps Southside P/L [2013] QSC 319 -
Hobbs Haulage P/L v Zupps Southside P/L [2013] QSC 319 -
Hobbs Haulage P/L v Zupps Southside P/L [2013] QSC 319 -
Re Colorado Products Pty Ltd (in prov liq) [2013] NSWSC 1613 -
Xpak Pty Ltd v Scibilia [2013] VCC 1294 -
Xpak Pty Ltd v Scibilia [2013] VCC 1260 (04 October 2013) (His Honour Judge Anderson)

> 42 Mr Ravech referred to the approach taken by Young CJ in Eq in *Vella v Permenant Mortgages Pty Ltd* [2008] NSWSC 505 ("*Vella*"). *Vella* was the case at first instance determined by the High Court in the appeal of *Hunt & Hunt* . Young CJ in Eq had apportioned the liability of the solicitors Hunt & Hunt, with concurrent wrongdoers, Mr Flammia and Mr Caradonna. In a related proceeding, Young CJ in Eq allowed Hunt & Hunt to recover from Mr Flammia the damages (as apportioned) that Hunt & Hunt had been ordered to pay the plaintiff, Mitchell Morgan.

Xpak Pty Ltd v Scibilia [2013] VCC 1260 -
Xpak Pty Ltd v Scibilia [2013] VCC 1260 -
Xpak Pty Ltd v Scibilia [2013] VCC 1260 -
Xpak Pty Ltd v Scibilia [2013] VCC 1260 -
Xpak Pty Ltd v Scibilia [2013] VCC 1260 -
Oyston v St Patrick's College (No 2) [2013] NSWCA 310 -
Fugen Constructions v Terranasa [2013] NSWSC 1422 -
Fugen Constructions v Terranasa [2013] NSWSC 1422 -
Sydney Water v Asset Geotechnical Engineering [2013] NSWSC 1274 (06 September 2013) (Campbell J)

207. All the parties accepted that if I found more than one party liable, the plaintiff's claim was an apportionable claim within Part 4 *CLA* . Given this commonality of approach, no difficult question of principle concerning the application of Part 4 arises (cf *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; 87 ALJR 505). Each of the four defendants is a concurrent wrongdoer and by s.35(1) the liability of each of them is limited to an amount reflecting that proportion of the damage or loss claimed that the Court considers just, having regard to extent of the defendant's responsibility for the damage or loss. And the Court is not empowered to give judgment against the defendant for more than that amount. Barrett J (as his Honour then was), gave close consideration to the effect of s.35(1) in *Reinhold v New South Wales Lotteries Corporation (No. 2)* [2008] NSWSC 187; 82 NSWLR 762. His Honour summarised his conclusions at [60] in the following terms:

> Because the legislature has seen fit to adopt in s 35(1)(a) of the Civil Liability Act a form of words concerning apportionment which is almost indistinguishable from that which has long been used in statutes concerning contributory negligence and contribution among tortfeasors, I consider it appropriate to follow approaches to the meaning of those words developed andsanctioned by appellate courts. I therefore approach the matter before me on the basis that my principal task is to make findings about:
>
> (a) the degree of departure from the standard of care of the reasonable man, as regards the causative conduct of Lotteries and the News agents; and
>
> (b) the relative importance of the acts of Lotteries and the Newsagents in causing the economic loss suffered by Mr Reinhold,
>
> making a comparative examination of the whole conduct of each of Lotteries and the Newsagents in relation to the circumstances in which the loss was sustained.

(See also Ward J (as her Honour then was) in *George v Webb* [2011] NSWSC 1608 [323] - [324] .)

Venerdi Pty Ltd v Anthony Moreton Group Funds Management Ltd [2013] QSC 219 -
Fudlovski v JGC Accounting & Financial Services Pty Ltd [No 2] [2013] WASC 301 -
Fudlovski v JGC Accounting & Financial Services Pty Ltd [No 2] [2013] WASC 301 -
Cross v Moreton Bay Regional Council [2013] QSC 215 (30 July 2013) (Jackson J)

127. In an even more recent case, *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* , [53] th e High Court said that:

> "Material contribution has been said to require only that the act or omission of a wrongdoer play some part in contributing to the loss."

Cross v Moreton Bay Regional Council [2013] QSC 215 -
Symond v Gadens Lawyers Sydney Pty Ltd [2013] NSWSC 955 (19 July 2013) (Beech-Jones J)

Again, this submission appears to conflate the amounts sought to be recovered by Mr Symond with the "injury" he sustained (cf *Hunt & Hunt* at [24] and [40]). Leaving that aside, I am not satisfied that

PwC has breached any legal duty that it owed Mr Symond for two reasons. First, on the limited material that was tendered concerning PwC's role, I am not satisfied that PwC did not canvass with either Mr Symond or one of his advisors the possibility of making the disclosure.

Symond v Gadens Lawyers Sydney Pty Ltd [2013] NSWSC 955 (19 July 2013) (Beech-Jones J)

In my view Mr Payne SC's submission wrongly conflates the "damage or loss that is the subject of the claim" as referred to in s 34(2) of the CLA and s 87CB(3) of the TPA with the damages that are assessed and awarded in the proceedings (see *Hunt & Hunt* at [24] and [90]). The various liabilities imposed upon Mr Symond by the ATO's assessment are component parts of the damages that are otherwise recoverable by Mr Symond. However, consistent with the approach of French CJ, Hayne and Kiefel JJ in *Hunt & Hunt* at [24] , the relevant "injury" suffered by Mr Symond and identified by Mr Magid was the (massive) exposure to a tax liability he acquired from redeeming preference shares over a three year period. When the "injury" is identified in those terms, then Mr Magid's opinion confirms that Abbott Tout's conduct "caused [at least some of] the damage or loss that is the subject of the claim" in these proceedings (CLA, s 34(2) ; TPA, s 87CB(3)) .

Symond v Gadens Lawyers Sydney Pty Ltd [2013] NSWSC 955 (19 July 2013) (Beech-Jones J)

In my view Mr Payne SC's submission wrongly conflates the "damage or loss that is the subject of the claim" as referred to in s 34(2) of the CLA and s 87CB(3) of the TPA with the damages that are assessed and awarded in the proceedings (see *Hunt & Hunt* at [24] and [90]). The various liabilities imposed upon Mr Symond by the ATO's assessment are component parts of the damages that are otherwise recoverable by Mr Symond. However, consistent with the approach of French CJ, Hayne and Kiefel JJ in *Hunt & Hunt* at [24] , the relevant "injury" suffered by Mr Symond and identified by Mr Magid was the (massive) exposure to a tax liability he acquired from redeeming preference shares over a three year period. When the "injury" is identified in those terms, then Mr Magid's opinion confirms that Abbott Tout's conduct "caused [at least some of] the damage or loss that is the subject of the claim" in these proceedings (CLA, s 34(2) ; TPA, s 87CB(3)) .

Symond v Gadens Lawyers Sydney Pty Ltd [2013] NSWSC 955 -
Symond v Gadens Lawyers Sydney Pty Ltd [2013] NSWSC 955 -
Symond v Gadens Lawyers Sydney Pty Ltd [2013] NSWSC 955 -
Symond v Gadens Lawyers Sydney Pty Ltd [2013] NSWSC 955 -
Tan Republic Pty Ltd (ACN 147 290 926) v Isabella Shop Fitout and Design Pty Ltd (ACN 147 193 815) [2013] NSWDC 320 (21 June 2013) (Gibson DCJ)

200. In addition, Mr Ishkanian's evidence was simply unnecessary. None of the advice given by Mr Ishkhanian was negligent. The defendants rely in their submissions upon *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* , *supra*, where a law firm was found to have breached its duty by negligently preparing a mortgage which should have contained a covenant to repay a stated amount. Mr Ishkanian did not perform his obligations as the solicitor for the lessee negligently; those duties did not include any of the matters adverted to by the defendants. The principles enunciated by the High Court in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* , *supra*, do not confer on solicitors the obligation to perform the tasks set out by the defendants in the particulars of negligence.

Conclusions concerning concurrent tortfeasors

Tan Republic Pty Ltd (ACN 147 290 926) v Isabella Shop Fitout and Design Pty Ltd (ACN 147 193 815) [2013] NSWDC 320 -
Wyman v R.T. Edgar Bellarine Pty Ltd [2013] VCC 567 -
Tan Republic Pty Ltd (ACN 147 290 926) v Isabella Shop Fitout and Design Pty Ltd (ACN 147 193 815) [2013] NSWDC 320 -
Wheelahan v City of Casey (No 12) [2013] VSC 316 -

Wheelahan v City of Casey (No 12) [2013] VSC 316 -
Wheelahan v City of Casey (No 12) [2013] VSC 316 -
Elturan v Unicon Property Group Pty Ltd & Ors (Domestic Building) [2013] VCAT 924 (06 June 2013) (Member M. Farrelly)

> 190. Further, in my view *Hunt and Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [7]* is High Court authority to the effect that different causes of action against respondents may be treated as one apportionable claim provided the loss or damage suffered is the same under each cause of action. The loss and damage I have assessed as attributable to Unicon's breach of damage is different to the loss or damage I have attributed to the owners' loss of opportunity to make a warranty insurance claim.

Elturan v Unicon Property Group Pty Ltd & Ors (Domestic Building) [2013] VCAT 924 -
Selig v Wealthsure Pty Ltd [2013] FCA 348 (18 April 2013) (Lander J)
Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10
Ingot Capital Investments & Ors v Macquarie Equity Capital Markets & Ors

Selig v Wealthsure Pty Ltd [2013] FCA 348 -