ASPECTS OF THE APPLICATION OF THE *CIVIL LIABILITY ACT* 2003 (QLD)

TO CONSTRUCTION CLAIMS

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1. The *Civil Liability Act* 2003 (Qld) ("the Act") was introduced in Queensland following a review of the law of negligence chaired by the Hon. Justice David Ipp in 2002. It was prompted, at least in part, by a concern that the broad range of circumstances in which a plaintiff could successfully sue for negligence had led to a crisis in the affordability and availability of insurance.[3] Similar, but not identical, legislation was introduced in all Australian States and Territories.[4]

2. The Act may not be the first statute that comes to mind when drafting a construction contract, advising on a claim or pleading a statement of claim or defence. But its provisions must be applied in all cases in which they are applicable.[5] To the extent that it applies, the Act's provisions may have significant implications for the contracting parties and their lawyers.

3. The purpose of this paper is to discuss some of the more significant provisions of the Act as may be relevant to contractual construction claims.

Application of the Act (generally)

4. The Act generally applies to "any civil claim for damages for harm" (s. 4(1)).[6] The content of this phrase turns on the definitions of "claim", "damages" and "harm" set out in the Dictionary in Schedule 2 to the Act (though for relevant purposes the definition of "harm" adds nothing of significance).

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[3] de Jersey CJ, "*Recent Developments in Australian Negligence Law: Implications for the Insurance Industry"* [2003] QldJSchol 4.

[4] *Civil Liability Act* 2002 (NSW); *Wrongs Act* 1958 (Vic); *Civil Liability Act* 1936 (SA); *Civil Liability Act* 2002 (WA); *Civil Liability Act* 2002 (Tas*); Civil Law (Wrongs) Act* 2002 (ACT); and *Personal Injuries (Liability and Damages) Act* 2003 (NT); see Douglas SC, Mullins and Grant, "*The Annotated Civil Liability Act* 2003 (Qld)", 3rd ed. at [1.8]. For a discussion of the myriad of issues raised by the legislation, see McDonald, "*Proportionate liability in Australia: The devil in the detail*" (2005) 26 Australian Bar Review 29.

[5] *Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd* [2013] 1 Qd R 319 at [23] per Fraser JA, with whom White JA and Mullins J agreed.

[6] Matters excluded from the Act's application, which are not addressed in this paper, are set out at ss. 4(2) – (5) and s. 5.

5. "Claim" is defined to mean:

> " … a claim, however described, for damages based on a liability for personal injury, damage to property or economic loss, whether that liability is based in tort or contract or in or on another form of action, including breach of statutory duty and, for a fatal injury, includes a claim for the deceased's dependants or estate." (emphasis added)

6. "Damages" is defined to include:

> "…any form of monetary compensation."

7. These definitions mean the Act will have application to a claim for damages for economic loss whether made in contract or tort. It has been held that the Act may apply to a claim under a contractual indemnity for loss suffered as a result of a breach of contract,[7] and to a claim for equitable damages.[8]

8. The Act generally operates so as to modify or otherwise deal with elements of a claim (defined as above) for a breach of a duty.

9. "Duty" is defined in the Dictionary as:

> "(a) a duty of care in tort; or
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> (b) a duty of care under contract that is concurrent and coextensive with a duty of care in tort; or (emphasis added)
>
> (c) another duty under statute or otherwise that is concurrent with a duty of care mentioned in paragraph (a) or (b)."

10. "Duty of care" is in turn defined to mean:

> "a duty to take reasonable care or to exercise reasonable skill (or both duties)."

11. The trigger for the application of the Act in a contractual context is thus the existence of a tortious duty of care, or the existence of a contractual duty to take reasonable care or exercise reasonable skill, but only if that duty is *concurrent and coextensive* with a duty of care in tort.

When is a contractual duty of care concurrent and coextensive with one in tort?

12. It is not within the scope of this paper to examine the circumstances in which a contractor may generally be said to owe a tortious duty of care to the principal. Nor really is it our intention to deal with the implication of a like contractual duty into a construction contract. Rather, the focus of this paper is the application of the Act in particular circumstances where those duties

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7 *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58 at [18] per Macfarlan JA, Barrett JA agreeing.

8 *George v Webb* [2011] NSWSC 1608 at [306] – [316] per Ward J.

or implied terms might exist and to discuss how the drafting of the construction contract may affect the operation of the Act. That said, some preliminary observations can be made.

13. Contracts often provide in express terms, or there is found to be an implied obligation, for a contractor to carry out its works in a proper and workmanlike manner. This has been described as equivalent to an obligation to use reasonable care and skill.[9] It has been treated as "concomitant" with a contractor's duty of care in tort.[10]

14. Similarly, there is often also an express or implied obligation on a contractor, concurrent with that in tort, to take reasonable care in a contract for "professional"[11] or "skilled" services.[12]

15. But it is clear that parties to a construction contract may expressly provide for the nature and extent of the contractor's obligations in a way which is not coextensive with the tortious duty, and indeed so as to prevent not only the law implying terms of the kind discussed above, but also to exclude the tortious duty.

16. A practical illustration of this is contained in the decision of Bleby J in *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49. The case is 469 pages long and, despite that, repays reading by construction lawyers.

17. The dispute arose out of a subcontract between Alstom and a joint venture between Yokogawa Australia Pty Ltd and Downer EDI Engineering Pty Ltd ("YDRML") for the design and construction of electrical control and instrumentation works.[13] The subcontract was described by Bleby J as a "drafting disaster".[14] His Honour's comments serve as a useful warning for all front-end construction lawyers:[15]

> "A cursory analysis of the EC&I contract reveals how poorly drafted it was. The superimposition of terms results in numerous ambiguities, inconsistencies, lacunae and, in some cases, grammatical nonsense. As this litigation shows, it has provided fertile ground for dispute as to the contract's real meaning and effect. The parties were even unable to agree on the complete text of the EC&I contract.
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> This was a contract between three large multi-national corporations for a contract sum of almost $34 million. Breaches of it had ramifications for the performance of another contract worth $148.5 million inclusive of GST. It is almost inconceivable that such

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9 *Barton v Stiff* [2006] VSC 307 at [15] per Hargrave J, cited in *Building and Construction Contracts in Australia Law and Practice*, Dorter and Sharkey, 2nd ed. 1990 at [1.470].

10 *McGrath Corporation Pty Ltd v Global Construction Management (Qld) Pty Ltd* [2011] QSC 178 at [32] per Daubney J.

11 *Astley v Austrust* (1999) 197 CLR 1 at [47] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

12 However, an obligation to take reasonable care will not apply to a contract for the sale of goods or for work and materials supplied. Ultimately, the question turns on the construction of the contract: see *Tarangau Game Fishing Charters Pty Ltd v Eagle Yachts Pty Ltd and Anor* [2013] QSC 16 at [91] per Jackson J.

13 [1], [3] and [11].

14 [90].

15 [91] – [92]. His Honour did not spare the litigation lawyers, being critical of the pleadings as well at [323].

> parties would allow themselves, without competent legal advice, to enter into a contract for a project of the size and complexity of this one where the contract was so poorly drafted and so obviously defective. It stands as an appalling indictment against those responsible for its drafting."

18. The Court was asked to consider whether YDRML owed a tortious duty of care to Alstom.[16] The pleaded basis for the duty of care included that the subcontract required that the subcontractor perform the works with "Good Electrical Practice" and "Good Power Station Practice."[17]

19. Of course, as mentioned above, there is nothing novel in the coexistence of the duty of care with a contractual duty to like effect. But in concluding that "it would be entirely inappropriate to superimpose the duty of care for which Alstom contends",[18] his Honour discussed and applied a number of useful principles (footnotes omitted):

> "[325] The decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, in which the principle of liability in negligence for purely economic loss was first recognised, contemplated the concurrent existence of a tortious duty of care arising from commercial transactions otherwise governed by contract. However, there was a reluctance to acknowledge such a duty in Australia until the decision of the High Court in *Astley v Austrust Ltd*. That was a case dealing with professional services in which the High Court followed more recent English authority to the effect that, as tortious duties are imposed by the general law and contractual duties are attributable to the will of the parties, there could be no objection to a plaintiff pursuing concurrent claims in contract and in tort.
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> [326] However, there is also a clear acknowledgement in the authorities that the law of tort "is the general law, out of which the parties may, if they can, contract". That was recognised by all members of the court in *Astley v Austrust Ltd* …
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> [328] A number of principles emerge as a result. First, there is no reason why a contract should not declare completely and exclusively what the legal rights and obligations of the parties in relation to their dealings are. This is particularly so, in a commercial relationship. Secondly, it is the contract that will determine the task upon which the party has entered and, to the extent that a concurrent duty in tort is also owed, the scope of the duty owed in tort.
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> [329] … A claim cannot be said to be in tort if it depends, for the nature and scope of the asserted duty of care, on the manner in which an obligation or duty has been expressly and specifically defined by a contract. Where the common law duty of care is coextensive with that which arises as an implied term of the contract, it does not depend on the terms of the contract, and there is nothing flowing from contractual intention which should preclude reliance on a concurrent or alternative liability in tort. The same is also true of reliance on a common law duty of care that falls short of a specific obligation or duty imposed by the express terms of a contract.

[16] [319]. His Honour's analysis is set out in Section 7.5 at [319] – [348].

[17] [322].

[18] [347].

[330] A concurrent liability in tort will not be found if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort.

[331] The imposition of a duty of care is likely to be denied if the parties have clearly considered, discussed and negotiated the terms of their bargain …"

20. In summary, a construction contract may contain express or implied terms imposing a duty of care concurrent and coextensive with that in tort; but that conclusion will yield to the express terms of the parties' agreement.

21. A principal wishing to avoid (to the extent that it can) having its rights affected by the operation of the Act, where the trigger for its operation is the existence of a "duty", should consider drafting the construction contract so as to make whatever contractual obligations it seeks to impose (including any implied obligations) such that they cannot be described as coextensive with any tortious duty.

Liability for a breach of a duty of care: Chapter 2 Part 1 of the Act

Overview

22. But often, of course, this is not done and the principal's rights under the contract will meet the Act's definition of "duty" (because the contractual rights of the principal may be concurrent and coextensive with a tortious duty owed by the contractor to the principal). In that event it is necessary to discuss how the Act affects those rights.

23. The provisions of Chapter 2 Part 1 modify, albeit in a limited way, elements of the common law principles of negligence. The provisions do not affect the duty of care; and the standard of care, which is the subject of ss. 9(2) and 10, has not been greatly altered.[19]

24. Some of the key points to note are that:

    a. in deciding whether there has been a breach of duty, s. 9(1)(b) requires that the risk which a plaintiff was required to avoid must have been "not insignificant" as opposed to the common law criterion of "far-fetched and fanciful";[20]

    b. under s. 11, the primary test for factual causation is the "but for" test. The less stringent test of "material contribution" is available only in an "exceptional case";

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[19] See Douglas SC, Mullins and Grant, "*The Annotated Civil Liability Act 2003 (Qld)*", 3rd ed at [9.40] and generally for a more complete discussion of the Act.

[20] *Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd* [2013] 1 Qd R 319.

c. s. 22 provides a defence to providers of professional services against certain claims,[21] by establishing that the professional "acted in a way that (at the time the service was provided) was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as a competent professional practice" (s. 22(1)) unless the court considers that the opinion is irrational or contrary to a written law (s. 22(2)).

25. Section 11 warrants some further consideration.

Section 11: causation

26. If a breach of duty is established, a plaintiff must prove causation. Causation is governed by s. 11 of the Act. It provides, relevantly:

> "(1) A decision that a breach of duty caused particular harm comprises the following elements—
>
> (a) the breach of duty was a <u>necessary condition of the occurrence of the harm</u> (**factual causation**); (emphasis added)
>
> (b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (**scope of liability**)."
>
> (2) In deciding in an <u>exceptional case</u>, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1)(a)—should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach. (emphasis added)
>
> (3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty had not been so in breach—
>
> (a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and
>
> (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.
>
> (4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty."

Judicial consideration

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21 *Dobler v Halverson* (2007) 70 NSWLR 151 at [59] - [61].

27. In *Strong v Woolworths Limited* (2012) 246 CLR 182, the High Court examined the meaning of "factual causation" for the purposes of s. 5D of the *Civil Liability Act* 2002 (NSW), the analogue of s. 11(1)(a). It held that:[22]

> "The determination of factual causation under s 5D(1)(a) is a statutory statement of the "but for" test of causation: the plaintiff would not have suffered the particular harm but for the defendant's negligence." (footnotes omitted)

28. Even then the condition in s. 11(1)(b) must be satisfied, though this is guided by precedent in the normal class of case: see *Wallace v Kam* (2013) 87 ALJR 648 at [22]. If novel situations arise then the condition in s. 11(4) is to be considered. That, the High Court stated, requires the court to "explicitly … consider and to explain in terms of legal policy whether or not, and if so why, responsibility for the harm should be imposed on the negligent party": [23].

29. If causation cannot be established according to the "but for" test, it is necessary to consider s. 11(2). This was discussed in *Strong*:[23]

> "Negligent conduct that <u>materially contributes</u> to the plaintiff's harm but which cannot be shown to have been a necessary condition of its occurrence may, in accordance with <u>established principles</u>, be accepted as establishing factual causation, subject to the normative considerations to which s 5D(2) requires that attention be directed." (footnotes omitted) (emphasis added)

30. All of this seems remote from the previously accepted test of causation which invoked a test of common sense and practical experience: *March v E & M H Stramare Pty Ltd.*[24]

31. In *Gratrax Pty Ltd v TD & C Pty Ltd* [2013] QCA 385, the Queensland Court of Appeal applied s. 11(1)(b) to prevent recovery of loss suffered by the plaintiff, to the extent that the "more immediate cause" of the damage was a decision of the plaintiff.[25]

32. In summary, the tightening of the test for causation means that a plaintiff has a more difficult task in establishing liability.

"Contracting out" of Chapter 2 Part 1

33. Section 7(3) of the Act allows parties to "contract out" of the provisions of Chapter 2 Part 1 (but, in Queensland, not the proportionate liability provisions in Chapter 2 Part 2). We have already mentioned above how the terms of the contract can (and should) be reviewed so as to exclude the existence of the concurrent and coextensive duties in tort and contract. If done, then the criterion upon which the operation of Chapter 2 Part 1 depends will not arise.

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[22] [18] per French CJ, Gummow, Crennan and Bell JJ.
[23] [26].
[24] (1991) 171 CLR 506.
[25] [23] and [30] per Fraser JA, with whom Morrison JA and Margaret Wilson J agreed.

34. But additionally, other language in the contract may amount to a contracting out of the provisions of this Part of Chapter 2 of the Act. Authorities on the contracting out provisions in Tasmania[26] and New South Wales[27] indicate that no particular form of words need be used, nor must the relevant Act be referred to – all that matters is that the terms of the contract are inconsistent with the provisions of such Act. In *Aquagenics Pty Ltd v Break O'Day Council*, Evans J held that:[28]

> "Consistent with principles of privity of contract, it is the Contractor to whom the Principal is entitled to look for a remedy referable to the contract. That this is so no doubt has a considerable bearing on the insurance, security and retention money provisions in the contract to which I have referred. From the standpoint of the Principal the utility of those provisions would be greatly diminished if the Contractor could limit its liability in respect of a claim made by the Principal, by identifying other concurrent wrongdoers."

35. These authorities are not directly applicable as they were concerned with whether the parties had contracted out of the proportionate liability provisions. Thus the reasoning, which highlights an inconsistency between the operation of the proportionate liability provisions and the provisions of the parties' contract, is not directly applicable to whether the different provisions of Part 1 are inconsistent with the parties' contract. Relevantly, the parties' contracts seldom deal explicitly with issues of foreseeability (the subject of s. 9) or causation (s. 11) and so are unlikely to give rise to any inconsistency.

36. The safer course, if it is intended to contract out of the operation of Chapter 2 Part 1 of the Act, is to do so by express statement to that effect. At the very least professional advisors ought to consider and advise their clients in relation to whether to contract out of the Act given the impact of its application on the elements of the cause of action discussed above (especially causation).

Chapter 2 Part 2 of the Act: Proportionate Liability

37. The proportionate liability provisions of the Act[29] are directed to limiting the liability of a defendant in circumstances where more than one person causes the plaintiff's loss. These provisions have the potential to undermine or "destabilise" contracting parties' agreed allocation of risk.[30] For example, it could negate a head contractor's "single point liability",

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26 *Aquagenics Pty Ltd v Break O'Day Council* (2010) 20 Tas R 239.

27 *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58 at [14] per Macfarlan JA, with whom Meagher JA and Barrett JA agreed.

28 [20].

29 Sections 28 – 33.

30 Hayford, "*Proportionate liability – its impact on risk allocation in construction contracts*" (2006) 22 BCL 322 at 326.

where a subcontractor causes loss. It could also undo obligations imposing joint and several liability on multiple parties; for example, in a joint venture agreement.[31]

38. Where a defendant can establish that the provisions apply its liability will, under s. 31(1)(a), be "limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just and equitable having regard to the extent of the defendant's responsibility for the loss or damage."

39. Unlike the liability provisions in Chapter 2 Part 1, the proportionate liability provisions cannot be avoided by contracting out. Section 7(3) of the Act provides that the Act (*other than,* relevantly, the proportionate liability Part) "does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract (the ***express provision***) in relation to any mater to which this Act applies and does not limit or otherwise affect the operation of the express provision."

40. Generally speaking, the matters for a defendant to establish in order to claim the benefit of the provisions are:

    a. that the claim is an "apportionable claim" under s. 28; and

    b. that the defendant is one of two or more "concurrent wrongdoers" under s. 30.

Apportionable claims

41. Section 28(1) of the Act defines an apportionable claim as:

    > "(a) a claim for economic loss or damage to property in an action for damages <u>arising from a breach of a duty of care</u>; or (emphasis added)
    >
    > (b) a claim for economic loss or damage to property in an action for damages under the Fair Trading Act 1989 for a contravention of the Australian Consumer Law (Queensland), section 18."

42. Section 18 prohibits misleading and deceptive conduct. It is not considered further in this paper.

What is a claim "arising from a breach of a duty of care"?

43. The authorities on s. 28(1)(a) and its analogues are divided on the types of claims which amount to claims "arising from a breach of a duty of care." There are two competing interpretations:

[31] See the useful discussion of such scenarios by Hayford, ibid, 326 – 327; 332.

a. that the Act refers to claims in which a breach of duty must be pleaded as an element of the claim; and

b. that the Act refers to claims where the loss claimed was brought about by a breach of duty.

44. Take, for instance, a claim against a contractor for breach of an obligation to ensure the works are fit for purpose. The liability of the contractor is strict: a principal may recover damages if the works are not fit for purpose even if that has not resulted from the contractor's failure to take reasonable care. What if the contractor's breach of the obligation arose from its failure to take reasonable care?

45. On the first interpretation, the claim would not be an apportionable claim: the contractor would bear the whole of the loss. On the second, the claim could be an apportionable claim, and the contractor's liability could be limited.

46. The issue has been considered at appellate level in New South Wales,[32] in a number of single judge decisions[33] and by commentators.[34]

47. The divergence of views is best illustrated in *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58, a decision of the New South Wales Court of Appeal, considering the *Civil Liability Act* 2002 (NSW). It is important to note that the whole of the discussion on this issue was *obiter dicta* as it was held the parties had contracted out of the proportionate liability provisions, as they were able to do in New South Wales.

48. Macfarlan JA stated:[35]

> "For a successful action for damages to have arisen from a failure to take reasonable care, it is in my view necessary that the absence of reasonable care was an element of the, or a, cause of action upon which the plaintiff succeeded … If claims could be apportioned where negligence is not an element of the successful cause of action, but merely arises from the facts, a plaintiff could lose his or her contractual right to full damages from a party whose breach of a contractual provision of strict liability happened to stem from a failure to take reasonable care."

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32 *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58.

33 See for example *Dartberg Pty Ltd (as Trustee for the Polard Children Trust) v Wealthcare Financial Planning Pty Ltd* (2007) 164 FCR 450; *Reinhold v New South Wales Lotteries Corporation (No 2)* (2008) 82 NSWLR 762; *Hobbs Haulage Pty Ltd v Zupps Southside Pty Ltd* [2013] QSC 319; *ASF Resources Ltd v Clarke* [2014] NSWSC 252.

34 See for example Hayford, "*Proportionate liability – its impact on risk allocation in construction contracts*" (2006) 22 BCL 322 at 329 – 332; McDonald and Carter, "*The Lottery of Contractual Risk Allocation and Proportionate Liability*", (2009) 26 Journal of Contract Law 1.

35 [22].

49. Barrett JA[36] (with whom it seems Meagher JA, at [36], agreed on this point) expressed a contrary view, to the effect that whether a particular claim is an apportionable claim must be determined by considering the terms in which the claim is pleaded and the findings of the court in relation to it. In doing so, His Honour affirmed his view in *Reinhold v NSW Lotteries Corporation (No 2)* (2008) 82 NSWLR 762.[37]

50. In *Reinhold*, his Honour held[38] that a claim for breach of contract, which was not founded upon a contractual duty to take reasonable care, could be an apportionable claim because:

> "On the findings actually made … there was a breach of the contractual term <u>because of actions entailing want of care rather than intention to breach or knowing breach</u> … The breaches of contract to which the [event causing the loss] gave rise were of the same character as the negligence. Each had as its central element failure to take reasonable care." (emphasis added)

51. In *Perpetual*, Barrett JA referred to Ashley JA's approval of his approach in *Godfrey Spowers (Victoria) Pty Ltd v Lincoln Scott Australia Pty Ltd* (2008) 21 VR 84.[39] It should be noted, however, that *Godfrey Spowers* was a decision made on very different facts - the court was required to determine if a claim could be determined to be an apportionable claim in the absence of a judgment.

52. In our opinion the view of Macfarlan JA is to be preferred. The language of s. 28 is to identify the Part as applying to "a claim for economic loss … in an action for damages arising from a breach of duty of care". To refer to a claim as being one "for economic loss in an action for damages" focuses attention on the *nature of the claim* (that is the pleaded cause of action) and not on the nature of particular factual findings that may emerge in the judgement. Moreover, the contrary view, as other authors have pointed out, produces potentially absurd results. A contracting party who breaches a strict obligation is better off if at trial it is found this resulted from a negligent act rather than a wholly innocent one.[40]

53. This has been the position taken (recently) by Jackson J in Queensland, in *Hobbs Haulage Pty Ltd v Zupps Southside Pty Ltd & Anor* [2013] QSC 319. In that case the plaintiff, Hobbs, applied to strike out parts of Zupps' pleading which raised a defence of proportionate liability.[41] Hobbs had contracted to buy a new truck from Zupps. The contract price included the cost of

36 [42].
37 [19] – [30].
38 [26].
39 [105].
40 See McDonald and Carter, "*The Lottery of Contractual Risk Allocation and Proportionate Liability*" (2009) 26 Journal of Contract Law 1 at 18.
41 [1].

the modification work to be carried out on it prior to delivery. Zupps contracted the modification work to Trakka Pty Ltd.[42] Zupps joined Trakka as a third party to the proceeding.

54. Hobbs alleged[43] that Zupps had breached:

    a. the conditions of fitness for purpose or merchantable quality implied by ss. 17(a) and (c) of the *Sale of Goods Act* 1896 (Qld);

    b. the corresponding conditions of fitness for purpose and merchantable quality implied by ss. 71(2) and 71(1) of the *Trade Practices Act* 1974 (Cth) ("TPA"); and

    c. the implied warranty under s. 74(1) of the TPA that services will be rendered with due care and skill, to the extent that the contract was one for the supply of services.

55. Jackson J was required to consider, *inter alia*, whether the claim was one "arising from a breach of a duty of care".[44] His Honour held:[45]

> "None of Hobbs' claims for damages for breach of any implied condition, as to fitness for purchase or merchantable quality as previously mentioned, is an "apportionable claim" within the meaning of s 28(1)(a), because none of them is a claim arising from a duty to take reasonable care or to exercise reasonable skill. (emphasis added)
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> There is a question whether Hobbs' claim for damages under s 74(1) of the TPA for breach of the implied warranty that services will be rendered with due care and skill is also not an "apportionable claim" within the meaning of s 28(1)(a) because it is not a claim from a breach of "duty of care" ... on its proper construction, [s.74(1)] operates to create the term of the contract which in law obliges the supplier corporation as promisor to render the services with due care and skill …"

56. His Honour, it seems, was not referred to either *Perpetual* or *Reinhold* and in any event did not refer to the views of Barrett JA on this point in those cases. That said, as we have already indicated, we believe the result his Honour reached was correct and required by the language of the Act (and is consistent with the view of Macfarlan JA). In the absence of appellate authority, *Hobbs Haulage* represents the law in Queensland.

Who is a concurrent wrongdoer?

57. The proportionate liability provisions are further contingent upon there being two or more "concurrent wrongdoers". Section 30 of the Act provides the definition:

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42 [3] – [5].
43 [3].
44 [11] – [12].
45 [13] – [14].

"(1) A concurrent wrongdoer, in relation to a claim, is a person who is 1 of 2 or more persons whose acts or omissions caused, independently of each other, the loss or damage that is the subject of the claim. (emphasis added)

(2) For this part, it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died."

When is the loss or damage "caused independently" by a concurrent wrongdoer?

58. The answer to this question turns on the proper identification of the "damage", as opposed to "damages"; the monetary amount payable as compensation for that damage.[46]

59. In *Hobbs Haulage*, Jackson J determined that there was no "independent" cause of the loss or damage:[47] the damage was caused by Trakka's negligence in the modification of the truck. By virtue of the contractual arrangements, Zupps was liable to compensate Hobbs for that damage, but its acts did not cause the damage. Accordingly, Zupps could not argue that it was a concurrent wrongdoer with Trakka.

60. The same principle applies where an employer is vicariously liable for an act of an employee: those parties cannot be concurrent wrongdoers if it is merely the act of the employee that caused the loss or damage.[48]

61. It is likely this requirement for independent causes of the loss will mean that a contractor (while liable for the consequences) will not be able to point to a defaulting subcontractor as an independent cause of the same loss. Similarly, an action for recovery under a guarantee, even if it could be characterised as an action for damages,[49] would not be an apportionable claim.

62. Problems may arise where the putative concurrent wrongdoers are carrying out different obligations. For example, assume that a principal has engaged a construction manager, which engages a subcontractor. The construction manager's obligation is to take reasonable care in supervising the subcontractor. The construction manager fails to do so. The subcontractor fails to carry out the works in a workmanlike manner. As a result, the works are defective and the principal claims for the cost of rectification.[50]

63. Is the construction manager a concurrent wrongdoer with the subcontractor?

46 *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at [19], [24], and [90].
47 [17] – [26].
48 *Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd* [2013] 1 Qd R 319 at [64] - [65] per Fraser JA.
49 See *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58 at [17] per Macfarlan JA.
50 A similar scenario is discussed by Hayford, "*Proportionate liability – its impact on risk allocation in construction contracts"* (2006) 22 BCL 322 at 327.

64. It depends on how the "damage" caused by the construction manager is characterised. Is the damage the defects in the works? Or is the damage the risk that, if the construction manager failed to take reasonable care, the subcontractor would negligently carry out the works?

65. Analogous questions were considered by the High Court in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613. In that case Mitchell Morgan loaned money to a fraudster. The fraudster obtained the loan by forging the signature of his business partner on the loan and mortgage documents. Mitchell Morgan had the benefit of indefeasibility of title to the property offered as security. Hunt & Hunt, Mitchell Morgan's lawyers, drafted the documents. They negligently omitted to include a separate covenant to repay the loan in the mortgage document – the obligation to repay depended on the effectiveness of the loan agreement. The loan agreement was held to be void by reason of the fraud. In the absence of the loan, there was no covenant on behalf of the borrowers to repay the loan, making the security worthless. The fraudster and another engaged in the fraud were bankrupt and Mitchell Morgan sued Hunt & Hunt.[51]

66. Hunt & Hunt claimed that it was a concurrent wrongdoer under the *Civil Liability Act* 2002 (NSW) and that its liability should be apportioned with that of the fraudsters. The majority of the High Court[52] identified the "loss or damage" of Mitchell Morgan as its inability to recover the sums advanced.[53] On this basis, Hunt & Hunt were concurrent wrongdoers with the fraudsters because their negligence in drafting of the mortgage caused the loss, independently of the acts of the fraudsters. The cause of action against the fraudsters was different from the cause of action against the solicitors, but the loss or damage was characterised as the same loss or damage (that is the same ultimate injury or other foreseeable consequence).

67. Bell and Gageler JJ, in dissent, took a contrary view (and would have upheld the decision of the New South Wales Court of Appeal). They held:[54]

> "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 <u>absence of protection</u> in the event that the wrongful act or omission on the part of C occurs. The <u>consequences of the wrongful act or omission on the part of C are not themselves part of that harm</u>. Those consequences are the <u>coming home of the risk that it is the duty of B to take reasonable care to prevent</u>." (emphasis added)

68. Returning to the example, adopting the majority's view, it seems correct to conclude that the construction manager would be a concurrent wrongdoer with the subcontractor, and would be

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51 [1] – [3].
52 French CJ, Hayne and Kiefel JJ.
53 [24] – [28].
54 [94].

entitled to have its liability apportioned between it and the subcontractor, despite (if it be the case) the subcontractor's insolvency.

69. In the somewhat analogous case of *McGrath Corporation Pty Ltd v Global Construction Management (Qld) Pty Ltd and Anor* [2011] QSC 178, Daubney J found[55] a construction manager and subcontractor to be concurrent wrongdoers, anticipating the majority in *Hunt & Hunt*.

70. It is worth noting the majority's view in *Hunt & Hunt* that the provisions of the New South Wales analogue of ss. 11(1)(b) and (4) governing causation did not determine the size of the apportionment that is required under s. 31. Their Honours stated:[56]

> "Section 5D(1)(b) and (4) of the Civil Liability Act may be thought to involve [value judgments and policy 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. The value judgments involved in that exercise differ from and are more extensive than, those which inform the question of causation."

Must a concurrent wrongdoer be legally a wrongdoer?

71. What if a third party's acts or omissions caused (independently of the defendant) the loss suffered by the plaintiff, but not so as to make that party legally liable to the plaintiff? Would the party be a concurrent wrongdoer?

72. Section 30(1) suggests (without stating) that to be a concurrent wrongdoer the other person must have a legal liability to the plaintiff. It uses the expression "wrongdoer" as well as referring to "acts or omissions", the latter at least implying some failure to act in accordance with a legal obligation to act. The majority in *Hunt & Hunt* similarly suggested that legal liability or responsibility was contemplated, but unfortunately did so in language which admits of the *possibility* that it is not a prerequisite to a third party being a wrongdoer. When discussing causation, the majority stated, in *obiter*, that: [57]

> "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. The language of liability is used in contribution legislation, but not in Pt 4 of the Civil Liability Act. Nevertheless, it would <u>usually</u> be the case that a person who is found to have caused another's loss or damage <u>is liable for it</u>. References to the liability of a wrongdoer should not, however,

55 [193].
56 [57].
57 [47].

distract attention from the essential nature of the inquiry at this point, which is one of fact.” (footnotes omitted) (emphasis added)

73. The reasons delivered by Bell and Gageler JJ put the matter more definitively in stating:[58]

> “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.” (footnotes omitted) (emphasis added)

74. This was also the view of Fraser JA (the other members of the court agreeing) in *Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd* [2013] 1 Qd R 319[59] which was decided prior to the decision in *Hunt & Hunt*.

Proportionate liability and arbitrations

75. Does any of this apply if the dispute is to be determined in an arbitration? The better view seems to be: no. The effect of s. 31 is that the liability of the defendant is limited to the proportion that “the court considers just and equitable”.

76. A number of arguments have been raised to support the view that the proportionate liability legislation will apply to arbitrations. These are:

   a. that the provisions apply to arbitrations as a matter of statutory interpretation;

   b. that an arbitrator is empowered to apply the provisions pursuant to an implied term in the arbitration agreement; and

   c. that commercial arbitration legislation permits the arbitrator to apply the provisions.

77. The weight of the (limited) authority on these issues[60] favours the view that an arbitrator is not empowered to apply the proportionate liability provisions of the Act.

Statutory interpretation of the Act

58 [91].

59 [62].

60 See also Levin QC, “*Proportionate liability in arbitrations in Australia?*” (2009) 25 BCL 298 and McDougall J, “*Proportionate liability in construction litigation*” (2006) 22 BCL 394 at 395 – 396.

78. In *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449, Beech J considered the language of Part 1F of the *Civil Liability Act* 2002 (WA) and concluded that the proportionate liability provisions in that Part did not apply to arbitrations.[61]

79. A similar view, although not necessary for the decision, was taken by Evans and Tennent JJ in interpreting Pt 9A of the *Civil Liability Act* 2002 (Tas) in *Aquagenics Pty Ltd v Break O'Day Council* (2010) 20 Tas R 239.[62]

80. In each case, the judges considered, among other relevant terms, the meaning of the expression "court". "Court" was not defined in the Western Australian legislation. It was defined in the Tasmanian Act to include a tribunal. By contrast, "court" is defined in s. 29 of the Act to mean:

> "in relation to a claim for damages...any court by or before which the claim falls to be decided."

81. The narrow scope of the Act's definition lends support to the view that, as a matter of statutory construction, the Act does not apply to arbitrations.

Implied term

82. An alternative basis claimed to support the application of proportionate liability schemes to arbitrations is the existence of a term to be implied into an arbitration agreement that the arbitrator is to have the authority to give the parties such relief as would be available to them in a court of law.[63]

83. In *Curtin University*, despite a detailed consideration of the issue, Beech J declined to express a view as to whether such a term might be implied in the circumstances of that case.[64] Nevertheless, his Honour considered that the inability of an arbitrator to join a party was a weighty consideration militating against any such construction.[65]

84. In *Aquagenics*, neither Evans J nor Wood J expressed a view on this issue, as it was not necessary to do so. However Tennent J considered the issue in some detail.[66] Taking a contrary view to Blow J at first instance,[67] his Honour considered[68] that the implied term would not permit the application of the proportionate liability provisions, stating:

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61 [43] – [52].
62 [33] per Evans J; [95] – [98] per Tennent J.
63 See for example *Government Insurance Office (NSW) v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 234 – 235 per Stephen J.
64 [84].
65 [85] – [90].
66 [81] – [93].
67 *Aquagenics Pty Ltd v Break O' Day Council (No 2)* [2009] TASSC 89 at [17] – [25].
68 [90].

"One consequence of the implication of the term framed by the learned judge is that an arbitrator, because he or she would have no power to join a third party to the arbitration proceedings, would be precluded from exercising at least one of the powers conferred by the Act, Pt 9A, that is the power to join a potential concurrent wrongdoer. Can therefore an implied term such as that found to exist be implied in circumstances where the intended forum cannot give effect to the law sought to be invoked?"

85. In Queensland, Boddice J, in *Parsons Brinckerhoff Australia Pty Ltd v Thiess Pty Ltd* [2013] QSC 75, expressed the view (as a conclusion without detailed reasoning) that the proportionate liability provisions of the Act would be unlikely to apply to arbitrations. The decision concerned an application for a stay of an arbitration by Parsons Brinckerhoff. Among other grounds, Parsons argued that without a stay there would be a risk of multiplicity of proceedings and the joinder of third parties.[69] Although his Honour refused to grant a stay, he commented that:[70]

> "It is also undesirable for proceedings to occur in circumstances where not all parties relevant to the determination of all issues in dispute are able to be heard at the one time. This is a risk in arbitration proceedings as potential third party claims may not be able to be considered by the arbitrator having regard to the terms of the dispute referred to arbitration. This risk is compounded by the likelihood that any arbitration would be unable to consider claims in respect of proportionate liability pursuant to the Civil Liability Act 2003 (Qld)."

Commercial arbitration legislation

86. Finally, it may be possible to argue that the proportionate liability provisions apply to arbitrations by virtue of the terms of the relevant *Commercial Arbitration Act*.

87. It was argued in *South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd* (1996) 66 SASR 509, for example, that s. 22(1) of the *Commercial Arbitration Act* 1986 (SA) allowed an arbitrator to exercise the court's statutory power to award indemnity costs.[71] That provision, which was in the same terms as the former s. 22(1) of the *Commercial Arbitration Act* 1990 (Qld), provided:

> "Unless otherwise agreed in writing by the parties to the Arbitration Agreement, any question that arises for determination in the course of proceedings under the Agreement shall be determined according to law."

88. The Full Court of the Supreme Court rejected that submission, holding that the words "according to law" meant according to the principles of the common law, and not statute.[72]

89. The correctness of this decision, however, has been doubted.

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69 [55].
70 [57].
71 Equivalent to s. 22 of the *Commercial Arbitration Act* 1990 (Qld).
72 512.

90. In *620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 3)* [2006] VSC 492, Osborn J held that s. 22 of the CAA was not to be construed as amplifying the power to award costs in s. 34 of the CAA, but observed "this is not to say that the phrase 'according to law' is necessarily to be limited to the meaning of 'according to the principles of common law' as stated in the [*Leighton Contractors*] case."[73]

91. In *Curtin University*, the same argument was advanced with respect to the applicability of the proportionate liability provisions of the Act. That is, it was argued that, as an arbitrator was required to determine questions arising in the dispute "according to law", the proportionate liability provisions applied to the arbitration.[74] As s. 22 was part of uniform legislation throughout Australia, Beech J considered that he was obliged to follow *Leighton Contractors* unless that decision was "plainly wrong". No submissions were made on this issue. Ultimately, his Honour held:[75]

> "Without the benefit of authority, as a matter of first impression, I would not have read the words "according to law" in s 22 as being limited to principles of common law, as that might appear to be a gloss on the words of the statute. However, in the absence of detailed submissions I am not persuaded that the decision of the statement of the South Australian Full Court is plainly wrong."

92. The former uniform commercial arbitration legislation has been repealed in all jurisdictions in favour of legislation based on the UNCITRAL Model Law. Section 28 of the *Commercial Arbitration Act* 2013 (Qld), which concerns the rules applicable to the substance of the dispute, relevantly provides:

> "(1) The arbitral tribunal must decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute." (emphasis added)

93. As yet, no court has considered the new provisions, but two observations may be made:

    a. *first*, it is apparent that the new s. 28 is drafted in broader terms than the former s. 22. The "rules of law" to be applied by the arbitral tribunal are those "chosen by the parties". It is very unlikely that contracting parties will have intended to adopt only the common law rules of a particular jurisdiction. It is much more likely that, when specifying the law of a particular jurisdiction as applicable to the substance of the dispute, the parties would not (objectively) be taken to have drawn such a fine distinction between sources of law, and their "choice" would be taken to include the statute law of the jurisdiction;

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73 [37].

74 See the discussion at [65] – [71].

75 [69].

b. *secondly*, intermediate courts are now free to act on the doubts expressed in *620 Collins Street* and *Curtin University.* The reason in *Leighton Contractors* is no longer binding as a matter of comity, as the reasoning concerns repealed legislation.

94. Thus, while it remains to be tested, there may be scope for contending that if the parties select Queensland law to govern their rights, they are to be taken to have conferred on the arbitrator the power in s. 31 of the Act to determine the limit of the defendant's liability notwithstanding that the arbitrator would not have the power to join the concurrent wrongdoer to the arbitral proceedings.

95. Otherwise, on the existing authority, the proportionate liability provisions of the Act are unlikely to apply to arbitrations in Queensland. But the existence of that possibility makes more likely the argument that the proportionate liability provisions of the Act will be capable of being applied (as between the parties to the arbitration) in an arbitration. If they wish to avoid that consequence, then in the drafting of their arbitration provisions and in particular in selecting the rules of law the parties should make it plain that they do not include the Act.

Conclusion

96. The law pertaining to the operation of the Act in commercial contexts is still developing. It will no doubt prompt defendants to raise novel defences. But, it would be dangerous to altogether disregard the Act in drafting contracts, advising on prospects or pleading claims or defences.

97. The Act will have application if the plaintiff is suing in tort for negligent breach of a duty of care and indeed if the contract between the parties is relied on as containing a concurrent and coextensive obligation. This aspect of the operation of the Act is readily displaced by appropriate drafting of the express obligations of the contract.

98. The Act, where it operates, contains provisions that affect (rather than fundamentally alter) the content and requirements of certain of the elements of the cause of action (including causation and the means of proving it). These are set out in Chapter 2 Part 1, but can be contracted out of.

99. More importantly, the Act provides for a limit on the defendant's liability where there is an apportionable claim and concurrent wrongdoer where both that wrongdoer and the defendant independently of each other caused the loss or damage the subject of the plaintiff's claim. This is likely to apply in at least some contractual arrangements as discussed above.

100. Finally, there remains some doubt whether those provisions can apply in an arbitration, though the present trend of the authorities is against it having any application.