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.

3 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

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

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.

& 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.

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 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.

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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].

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].

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.

9 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 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.

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

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

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.

12 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.

13 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

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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.

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.

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].

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].

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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.

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].

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

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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; *Proportionate Liability Act* 2005 (NT); *Civil Law (Wrongs) Act* 2002 (ACT), Ch 7A.

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[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.

18 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.

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. "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

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

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.

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.

21 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 5D(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.

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

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 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.

25 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],

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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.

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.

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.

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].

27 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.

28 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

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36 (1992) 175 CLR 514 at 527.

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].

40 (1999) 199 CLR 413.

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

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."

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].

32 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

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

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.

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].

33 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.

34 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

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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.

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

49 Mandie JA and Beach AJA.

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."

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

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

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.

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.

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].

39 The judgment at first instance in this case was delivered prior to the decision in *Quinerts*. However, 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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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].

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].

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 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.

42 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.

Causation

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

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

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.

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].

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[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].

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.

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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.

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.

47 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.

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 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 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

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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).

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].

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.

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.

54 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.

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72 Referred to at [7] above.

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

74 See at [45] above.

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.

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].

57 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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77 *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 515.

78 (1991) 171 CLR 506 at 515.

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

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.

58 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.

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.

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

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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].

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

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."

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] as 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."

66 The liability of "excluded concurrent wrongdoers" is not limited by the Part[88]. Excluded concurrent wrongdoers include concurrent wrongdoers who

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84 Section 35(1) of the Act.

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

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

87 Section 34(2) of the Act.

88 Section 34A of the Act.

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].

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

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

90 Section 34A(3) of the Act.

91 Section 34(4) of the Act.

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

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]. Those holdings were not the subject of appeal.

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].

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].

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

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

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

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].

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").

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].

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].

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.

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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].

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

76 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

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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).

Territory[108]. Co-ordinate Commonwealth legislation[109] introduced 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].

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

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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); *Proportionate 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).

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).

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.

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.

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]:

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

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.

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).

> "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].

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."

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

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.

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].

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].

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."

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128 Section 24(2) of the Victorian Act.

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).

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.

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].

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.

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

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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.

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.

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].

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.

91 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

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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.

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

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*.

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.

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

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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.

144 *Harriton v Stephens* (2006) 226 CLR 52 at 104 [168]; [2006] HCA 15. See also *The 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.

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

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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.

solicitor, instead of being for personal injuries, is for damage to property or for economic loss.

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.

99 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].

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,

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

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.

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 *Quinerts* 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.

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

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

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

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.

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].

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

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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).

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].

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.

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