IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S270 of 2012

BETWEEN:

HUNT & HUNT LAWYERS
Appellant

and

MITCHELL MORGAN NOMINEES PTY LTD (ACN 108 571 222)
First Respondent

MITCHELL MORGAN NOMINEES (NO. 2) PTY LTD (ACN 111 09 557)
Second Respondent

ALESSIO EMANUEL VELLA
Third Respondent

AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD
Fourth Respondent

FIRST AND SECOND RESPONDENTS' SUBMISSIONS

Part I: PUBLICATION

1. The first and second respondents (**"Mitchell Morgan"**) certify this submission is in a form suitable for publication on the internet.

PART II: ISSUES ON THE APPEAL

2. The issue raised by the first ground of appeal is whether two fraudsters *"caused ... the damage or loss that is the subject of the claim"* by Mitchell Morgan against the appellant (**"Hunt & Hunt"**) within the meaning of s34(2) of the *Civil Liability Act* 2002 (NSW).

3. Special leave in respect of the second ground of appeal has been referred to the Full Court. It raises the issue of whether the part of the damages awarded to Mitchell Morgan by the Court of Appeal which constituted interest at the rate which would have applied had Hunt & Hunt not been negligent is beyond Hunt & Hunt's scope of liability to Mitchell Morgan pursuant to s5D(1)(b) of the *Civil Liability Act*.

PART III: SECTION 78B, *JUDICIARY ACT* 1903 (CTH)

4. Mitchell Morgan is of the view that notice in accordance with section 78B of the *Judiciary Act* 1903 (Cth.) is not required.

Date of document: 23 October 2012
Filed on behalf of the First and Second Respondents by:
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PART IV: FACTS

5. There are no material facts in contention.

6. The Court of Appeal in its first judgment, *Mitchell Morgan Nominees Pty Ltd (in liquidation) v Vella* [2011] NSWCA 390 (**"CA"**)[1], succinctly set out most of the facts relevant for the purposes of this appeal, which are reproduced below:

> 11. One borrowing was from Mitchell Morgan Nominees Pty Ltd and Mitchell Morgan Nominees (No 2) Pty Ltd (together, "Mitchell Morgan"). Mr Caradonna caused an application for finance to be made in Mr Vella's name through a mortgage broker. He forged Mr Vella's signatures to a loan agreement, a mortgage of the Enmore property and associated documents. He was assisted by a dishonest solicitor, his cousin Mr Lorenzo Flammia, who dealt with Mitchell Morgan's solicitors Hunt & Hunt and misrepresented to them that the documents had been signed before him by Mr Vella and that Mr Vella was the person in some identification documents. The mortgage was registered on 19 January 2006. Upon confirmation that it had been registered, Mitchell Morgan paid $1,001,748.85 to the credit of the joint account in accordance with a direction given by Mr Flammia purportedly as Mr Vella's solicitor.

7. The primary judge's findings in respect to the negligence of Hunt & Hunt[2], (not challenged on appeal), are described by the Court of Appeal as follows[3]:

> 17. The primary judge held that Hunt & Hunt had been negligent because, with a responsibility to protect its client from fraud and in the light of the principles in the relevant cases, it should not have used a form of mortgage securing money payable by Mr Vella to Mitchell Morgan; rather, it should have prepared a mortgage containing a covenant to pay a stated amount. His Honour found that the solicitor handling the matter regarded it as a more or less routine task and did not direct his mind to the possibility of fraud, and that although the solicitor had assurances from Mr Flammia his obligation was to protect the client from fraud and he should have turned his mind to the risk of fraud and prepared a mortgage for a fixed sum to which the indefeasibility would extend.

8. The Court of Appeal described the liability of Mr Caradonna and Mr Flammia as fraudulently causing Mitchell Morgan to pay out $1,001,748.85 and the liability of Hunt & Hunt as being that they negligently failed to ensure Mitchell Morgan had the security of the Enmore property for that sum[4].

9. Hunt & Hunt's submissions at [18c] state that because the mortgage taken by Mitchell Morgan (**"the Mortgage"**) secured nothing it did not gain the benefit of indefeasibility and was liable to be discharged. This is not correct. As the Court of Appeal explained[5], the Mortgage was indefeasible upon registration. It was liable to be discharged because it secured nothing, not because it did not gain the benefit of indefeasibility.

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[1] CA[11]
[2] As Mitchell Morgan's claim against Hunt & Hunt was that Hunt & Hunt breached their contractual and tortious duty of care and no distinction was drawn between those claims by the primary judge, this should be read as including breach of the implied term in the retainer to exercise reasonable care and skill in drafting the Mortgage: Permanent Mortgages Ltd v Vella [2008] NSWSC 505 at [467]-[562].
[3] CA[17]
[4] CA[19]
[5] at CA[15(b)] & [16]

PART V: LEGISLATION

10. Mitchell Morgan accepts Hunt & Hunt's statement of applicable statutes as correct. In addition, s5 of the *Law Reform (Miscellaneous Provisions) Act* 1946, a copy of which is annexed to these submissions, is relevant context for the proper construction of ss34 & 35 of the *Civil Liability Act*.

PART VI: ARGUMENT

Proportionate liability provisions in the *Civil Liability Act*

11. Section 35(1) of the *Civil Liability Act* provides, in the following terms, that a defendant's liability is limited in particular circumstances:

> **35 Proportionate liability for apportionable claims**
>
> (1) 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.

12. Section 35(1) is concerned with limiting the liability of a defendant in relation to an apportionable claim. Hunt & Hunt, a defendant in the proceedings at first instance, seeks to invoke s35(1) to limit its liability to Mitchell Morgan. In order to determine whether Hunt & Hunt's liability to Mitchell Morgan may be limited by s35(1) of the *Civil Liability Act*, the following two matters must be established:

i) Mitchell Morgan's claim against Hunt & Hunt was an apportionable claim: s35(1) chapeau; and

ii) Hunt & Hunt was a concurrent wrongdoer in respect to that apportionable claim: s35(1)(a).

13. Section 34 of the *Civil Liability Act* concerns the application of Part 4, which is entitled *"Proportionate Liability"*. Section 34 describes *"apportionable claims"*, which are the claims to which Part 4 applies, and defines *"concurrent wrongdoer"*. Section 34 was in the following form at the time of the relevant events in January 2006:

> **34 Application of Part**
>
> (1) This Part applies to the following claims (***apportionable claims***):
>
> (a) 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 not including any claim arising out of personal injury,

(b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of section 42 of that Act.

(1A) For the purposes of this Part, 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 or not of the same or a different kind).

(2) 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.

(3) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).

(4) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

(5) (Repealed)

14. It is common ground (and it was before the Court of Appeal) that Mitchell Morgan's claim against Hunt & Hunt was an apportionable claim. That is, it was *"a claim for economic loss ... in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury"*: see s34(1)(a) *Civil Liability Act*.

15. On the question of *"concurrent wrongdoer"* the Court of Appeal noted (correctly):

> 33. As the provisions are framed, it should not be asked whether Messrs Caradonna and Flammia were concurrent wrongdoers in relation to the apportionable claim. For s 35(1) the question is whether Hunt & Hunt was a concurrent wrongdoer in relation to the apportionable claim. That is answered by whether Hunt & Hunt was one of two or more persons (Hunt & Hunt, Mr Caradonna and Mr Flammia) "whose acts or omissions ... caused, independently of each other or jointly, the damage or loss that is the subject of the claim".

16. The question is whether there is someone other than Hunt & Hunt whose acts or omissions caused the damage or loss caused by Hunt & Hunt's acts or omissions. The Court of Appeal[6] refined the question to:

> Did the acts or omissions of Mr Caradonna and Mr Flammia giving rise to their liabilities to Mitchell Morgan cause, even if independently, the loss the subject of Mitchell Morgan's claim for economic loss against Hunt & Hunt?

17. This is essentially the question identified in Hunt & Hunt's submissions at [28]. Mitchell Morgan agrees with Hunt & Hunt's submissions at [30] where it states that the task presented by s35(1) of the *Civil Liability Act* in this case is to identify[7]:

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[6] CA[34]

[7] A similar approach to the application of contribution legislation in the United Kingdom was prescribed by Lord Bingham of Cornhill in Royal Brompton Hospital NHS Trust v Hammond [2002] 1 WLR 1397 at 1401, cited with approval in Alexander v Perpetual Trustees WA Ltd [2004] HCA 7; (2004) 216 CLLR 109 at 121-122[26] per Gleeson CJ, Gummow and Hayne JJ

i) first, *"the damage or loss that was the subject of the claim"*, which means Mitchell Morgan's claim against Hunt & Hunt;

ii) second, whether the acts or omissions of Mr Caradonna and Mr Flammia *"caused"* that *"damage or loss"*.

18. However, this does not go far enough. The damage or loss caused by the acts or omissions of Hunt & Hunt must then be compared with the damage or loss caused by the acts or omissions of Mr Caradonna and Mr Flammia to ascertain whether it is the same or partly the same damage or loss. It is necessary to determine whether any of the damage or loss is the same because the definition of concurrent wrongdoer in s34(2) requires identity of damage or loss caused by two or more persons for any of those persons to fall within the definition. This proposition is supported by purpose, context and text of the proportionate liability provisions.

19. The purpose of the proportionate liability reforms is to overcome what were perceived to be undesirable consequences of the joint and several liability rule, in respect of apportionable claims[8]. That is, the reforms provide a mechanism for sharing liability amongst multiple wrongdoers for the same loss or damage in a way that shifts the burden of irrecoverability from one or more of the wrongdoers onto the plaintiff[9]. Before the reforms, the sharing of liability amongst multiple wrongdoers was achieved through legislation providing for contribution[10]. Under this legislation, contribution is only available between tort-feasors liable for the same damage. Under s36 of the *Civil Liability Act*, a defendant against whom judgment has been given in relation to an apportionable claim cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in relation to the apportionable claim.

20. The proportionate liability provisions complement statutory schemes for the making of claims for contribution as the method of sharing responsibility between wrongdoers. It should not be concluded without clear words that the requirement has been altered that the loss or damage caused by each wrongdoer be the same before liability is shared[11].

21. In contribution legislation, a tort-feasor may recover contribution from any other tort-feasor *"liable in respect of the same damage"*[12]. This term is not used in the definition of *"concurrent wrongdoer"*, where the term *"caused ... the damage or loss that is the subject of the claim"* is used[13]. In *St George Bank Ltd v Quinerts Pty Ltd*[14], Nettle JA (with whom Mandie JA and Beach AJA agreed) explained that the term *"the loss or damage that is the subject of the claim"* in the proportionate liability provisions has an equivalent meaning as *"liable in respect of the same damage"* in the contribution provisions. His Honour explained that the phrase *"liable in respect of the same damage"*

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[8] St George Bank Ltd v Quinerts Pty Ltd [2009] VSCA 245; 25 VR 666 at 681[57]
[9] CA[46]-[47] and see Yates v Mobile Marine Repairs Pty Ltd [2007] NSWSC 1463 at [93]-[94] per Palmer J
[10] such as the Law Reform (Miscellaneous Provisions) Act 1946 s5 and the Wrongs Act 1958 (Vic) ss23B & 24
[11] CA[46]-[49] & [60], where the statement by Nettle JA in St George Bank Ltd v Quinerts Pty Ltd [2009] VSCA 245; (2009) 25 VR 666 at [59] that there is no suggestion that it was intended to do more by way of apportionment than in theory could be achieved by contribution is cited. See also Shrimp v Landmark Operations Ltd (2007) 163 FCR 510 at 523[62] per Besanko J and Sali v Metzke & Allen [2009] VSC 48 at [282]
[12] Law Reform (Miscellaneous Provisions) Act 1946 s5(1)(c) and see Wrongs Act 1958 (Vic) ss23B(1) (where the order of "damage" and "loss" is swapped)
[13] s34(2) Civil Liability Act 2002 (NSW) and Wrongs Act 1958 (Vic) ss24AH(1)
[14] [2009] VSCA 245; 25 VR 666 at 683-685[63]-[68]

could not be employed in the proportionate liability provisions because an entity which has ceased to exist (and is therefore no longer liable) can still be a concurrent wrongdoer.

22. It is also necessary to determine the extent to which the damage or loss is the same for the purpose of s35(1) because a defendant's liability for the damage or loss the subject of the apportionable claim involved in the proceedings is reduced by the extent of the comparative responsibility of another concurrent wrongdoer for that damage or loss. This is implicit in the words of s35(1), because it would be illogical and unfair to a plaintiff for a defendant's liability to be limited or reduced under that section for damage or loss for which the defendant is solely responsible. Moreover, s35(3)(b), which allows the court to have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings, supports the proposition.

23. The word *"caused"* in s34(2) of the *Civil Liability Act* means giving rise to liability in the concurrent wrongdoer to the plaintiff[15]. It is consistent with the subject matter of s34(2) that the word *"caused"* is used in a sense of producing legal liability. This is reinforced by the ordinary meaning of the word *"wrongdoer"*, which is part of the term being defined in s34(2), and the use of the word *"responsibility"* in s35(1). It must follow that the comparison between the damage or loss caused by Hunt & Hunt and the damage or loss caused by Mr Caradonna and Mr Flammia is limited to the damage or loss that each would be liable to Mitchell Morgan.

Identifying *"the damage or loss that was the subject of the claim"* against Hunt & Hunt

24. The meaning of the words *"the damage or loss that was the subject of the claim"* in s34(2) of the *Civil Liability Act* are central to this appeal. The term *"the claim"* in s34(2) refers to Mitchell Morgan's claim against Hunt & Hunt. Mitchell Morgan made no claim against Mr Caradonna or Mr Flammia.

25. The words *"damage"* and *"loss"* are not defined in the *Civil Liability Act*, nor is the term *"damage or loss"*. The Macquarie Dictionary Revised Third Edition 2001, defines these words as follows:

> "loss ... *noun* 1. detriment or disadvantage from failure to keep, have or get: *to bear the loss of a robbery*. 2. that which is lost. 3. ..."
>
> "damage ... *noun* 1. injury or harm that impairs value or usefulness ... 2. *(plural) Law* the estimated money equivalent for detriment or injury sustained. 3. ..."

26. Part 4 of the *Civil Liability Act*, which contains ss34-39, applies to apportionable claims and it is only the damage or loss the subject of an apportionable claim which may be apportioned under s35(1): see s35(2). The damage or loss the subject of an apportionable claim is restricted to claims for *"economic loss or damage to property"* by reason of s34(1). Accordingly, the term *"damage or loss"* in s34(2) refers to the economic loss or damage to property the subject of the apportionable claim involved in the proceedings, which is Mitchell Morgan's claim for economic loss against Hunt & Hunt in this appeal.

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[15] This is common ground, see Hunt & Hunt's submissions at [43]-[44]. See also St George Bank Ltd v Quinerts Pty Ltd, supra, at [64], Shrimp v Landmark Operations Ltd (2007) 163 FCR 510 at [59]-[62] and HSD Co Pty Ltd v Masu Financial Management Pty Ltd [2008] NSWSC 1279 at [17]-[25]

27. It is common ground that *"damage or loss"* in s34(2) and in s35(1) is not to be equated with *"damages"*: see Hunt & Hunt's submissions at [35]-[36] and the cases cited there. This is because damages is the monetary sum awarded by a court as compensation and loss or damage is the detriment or injury suffered by the plaintiff for which compensation in the form of damages is awarded. The dictionary definition of the plural of *"damage"* above draws this distinction. It is a distinction recognised by this Court in *Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd*[16], *Mahony v J Kruschich (Demolitions) Pty Ltd*[17], *Alexander v Perpetual Trustees WA Limited*[18] and *Tabet v Gett*[19]. Most importantly, s34(1) draws the distinction between *"a claim for economic loss or damage to property"* and *"an action for damages"* [20]. It must follow that the *"damage or loss"* the subject of Mitchell Morgan's claim against Hunt & Hunt is not the damages awarded for the claim or which would be awarded but for s35(1).

28. Neither *"economic loss"* nor *"damage to property"* is defined in the *Civil Liability Act*, although each forms part of the definition of *"harm"* in s5 and *"non-economic loss"* is defined in s3. Accordingly, the ordinary meaning of these terms must be considered in their context[21], which includes that such loss or damage may arise from various causes of action including a failure to take reasonable care in contract, in tort and otherwise (such as under statute) and arising from a contravention of s42 of the *Fair Trading Act* 1987 (NSW), which prohibited misleading or deceptive conduct in trade or commerce[22].

29. In *Hawkins v Clayton*, a negligence case, Gaudron J said the following[23]:

> Physical loss imports damage sustained by a physical object whether it be property or person. Economic loss, on the other hand, imports loss sustained by a juristic entity in relation to the assets or liabilities of that entity. The various and complex economic relationships which are a feature of present day economic organization suggest that loss may manifest itself in various forms, and it is for this reason that there may be occasions when it is necessary to identify precisely the interest which has been infringed.
>
> It would be too simplistic to restrict analysis of economic loss merely to a consideration of reduced value or increased liability. However, a consideration of reduced value suffices in the present case, for the loss sustained by Mr. Hawkins was the difference between the value of the assets of the estate when they came under his control as executor and the value they would then have enjoyed had he then held them in the same capacity and had they been properly managed from the time of the death of the testatrix.

30. Current definitions of *"economic loss"* are similar[24]. Such definitions refer to detriment or loss in wealth or income. In *Wardley Australia Ltd v Western Australia*, a case involving a claim for damages for economic loss arising from misleading or deceptive conduct in trade or commerce under s82 of the *Trade Practices Act* 1974, Mason CJ,

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[16] (1975) 132 CLR 323 at 326
[17] (1985) 156 CLR 522 at 527
[18] [2004] HCA 7; (2004) 216 CLR 109 at 125[38]
[19] [2010] HCA 12; (2010) 240 CLR 537 at 585[135] per Kiefel J
[20] and see s37
[21] See, for example, Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31 at 33 per Black CJ, at 42-44 per Gummow J and per Cooper J at 46-47
[22] See Wardley Australia Ltd v Western Australia (1992) 175 CLR 514 at 525 re the diversity of claims under s82 of the Trade Practices Act 1974 (Cth.)
[23] (1988) 164 CLR 539 at 601-602
[24] see Butterworths Australian Legal Dictionary, Butterworths, 1997 and in LexisNexis Concise Australian Legal Dictionary 4th Edition, LexisNexis Butterworths Australia 2011

Dawson, Gaudron and McHugh JJ said that economic loss is *"loss other than physical injury to person or property"*[25]. Damages claims in contract are primarily concerned with economic loss, in the sense that the term is used in the law of negligence[26], although other kinds of loss or damage such as personal injury, distress and disappointment may be claimed in certain circumstances[27].

31. The need for precision in identifying the economic loss the subject of a claim has been recognised by this Court and other courts in various contexts. These cases are useful because they illustrate this and other courts' approaches to identifying economic loss.

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32. The first context is time limitation cases. In *Wardley Australia Ltd v Western Australia*, Mason CJ, Dawson, Gaudron and McHugh JJ said[28]:

> Economic loss may take a variety of forms and, as Gaudron J. noted in *Hawkins v Clayton*, the answer to the question when a cause of action for negligence causing economic loss accrues may require consideration of the precise interest infringed by the negligent act or omission. The kind of economic loss which is sustained and the time when it is first sustained depend upon the nature of the interest infringed and, perhaps, the nature of the interference to which it is subjected. (citations omitted)

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33. The reference to Gaudron J's judgment in *Hawkins v Clayton*, also a case where the time the cause of action accrued was in issue, is to the following passage[29]:

> It may, for example, be relevant to consider the precise interest infringed by the negligent act or omission. In actions in negligence for economic loss it will almost always be necessary to identify the interest said to have been infringed to determine whether the risk of loss or injury to that interest was reasonably foreseeable and whether a sufficient relationship of proximity referable to that interest was present so as to establish a duty of care. If the interest infringed is the value of property, it may be appropriate to speak of a
30 cause of action in negligence for economic loss sustained by reason of latent defect as accruing when the resultant physical damage is known or manifest, for as was explained by Deane J in *Heyman* (CLR at 505) it is only then that the actual diminution in market value occurs. If, on the other hand, the interest infringed is the physical integrity of property then there is a certain logic in looking at the time when physical damage occurs, as was done in *Pirelli*. So too, if the interest infringed is an interest in recouping moneys advanced it may be appropriate to fix the time of accrual of the cause of action when recoupment becomes impossible rather than at the time when the antecedent right to recoup should have come into existence, for the actual loss is sustained only when recoupment becomes impossible.

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34. In *Commonwealth of Australia v Cornwell*, Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ said[30]:

> **[16]** In *Hawkins*, Gaudron J emphasised the importance for actions for negligence causing economic loss in identifying the interest said to be infringed, whether it be the value of property, the physical integrity of property, or the recoupment of moneys advanced. ...

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[25] (1992) 175 CLR 514 at 527
[26] See Perre v Apand (1999) 198 CLR 180 at 241-242[167] per Gummow J
[27] *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 363 & 404
[28] (1992) 175 CLR 514 at 525
[29] (1988) 164 CLR 539 at 600-601
[30] [2007] HCA 16; (2007) 229 CLR 519 at 525-526[16]-[18]

> **[18]** Here, the economic loss which the respondent sustained was alleged to be the lesser benefit which he obtained on his retirement, this being worth less than it would have been had he not relied upon the negligent advice given to him in 1965. But to speak simply of a "retirement benefit" and its value is to obscure the nature of the economic loss involved. This does not turn upon proprietary or other rights or obligations created and governed by the general law, such as the indemnity granted by the respondent in *Wardley*, or the continuing financial obligations undertaken by the lessees in *Murphy v Overton Investments Pty Ltd.* What the respondent stood to enjoy upon "retirement" was an "entitlement" conferred by federal statute law. This "entitlement" was his "interest" in the sense used in the above passage from *Wardley*. (citations omitted)

35. The second area where courts have been concerned with identifying economic loss is cases concerning claims for contribution between tortfeasors. Both the Court of Appeal[31] and *St George Bank Ltd v Quinerts Pty Ltd*[32] discuss the principal authorities in this area, in which it is necessary for the loss or damage caused by both the claimant and potential contributor to be the same. Those cases include *Alexander v Perpetual Trustees WA Ltd*[33], *Royal Bampton Hospital NHS Trust v Hammond*[34] and *Howkins and Harrison v Tyler*[35], all of which involved claims for economic loss and required the loss or damage to be identified in terms of the economic interest of the plaintiff which had been harmed.

36. Gaudron J's judgment in *Kenny & Good Pty Ltd v MGICA (1992) Ltd*[36] is a third area where economic loss is identified. It was an action for damages on a claim for economic loss arising from a failure by a valuer to take reasonable care in valuing a property to be used as mortgage security. The issue before this Court was the measure of damages for the economic loss. At [15]-[17], her Honour said:

> **[15]** It was pointed out in *Wardley* that "[t]he kind of economic loss which is sustained and the time when it is first sustained depend upon the nature of the interest infringed and, perhaps, the nature of the interference to which it is subjected". *Wardley* was concerned with an action for damages for breach of s 52 of the Act. However, there is no reason in principle why the position should be any different in tort.
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> **[16]** *The interest that a mortgage lender seeks to protect by obtaining a valuation of the proposed security is not simply an interest in having a margin of security over and above the mortgage debt. Rather, it is that, in the event of default, it should be able to recoup, by sale of the property, the amount owing under the mortgage.* And that is also the interest of a mortgage insurer. It is the risk that recoupment might not be possible that calls the valuer's duty of care into existence. And it is the interest in recoupment that is infringed by breach of that duty. Moreover, the time that loss occurs (and hence the time when the tort is complete) is when recoupment is rendered impossible. In the case of a mortgage transaction, that will occur when it is reasonably ascertainable that sale will result in a loss. At the earliest it will be when default occurs and, at the latest, when the property is sold.
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> **[17]** Once the interest which calls the valuer's duty of care into existence is identified as the interest of the mortgage lender in recouping what is due under the mortgage in the

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[31] CA[50]-[64]
[32] [2009] VSCA 245; (2009) 25 VR 666 at [69]-[75]
[33] [2004] HCA 7; (2004) 216 CLR 109 at 123-124[37]-[40]
[34] [2002] UKHL 14; [2202] 1 WLR 1397
[35] [2001] Lloyd's Rep PN 27
[36] (1999) 199 CLR 413

> event of default, it is simply a matter of common sense to treat the loss arising from inability to recoup as flowing from breach of that duty, except to the extent that that inability is, in law, referable to the lender's own actions or some supervening event. At least that is so where, but for the negligent valuation, there would have been no mortgage transaction at all. (citations omitted, emphasis added)

37. The Court of Appeal[37] identified the economic loss suffered by Mitchell Morgan caused by Hunt & Hunt's breach of duty to take reasonable care and by Mr Caradonna's and Mr Flammia's fraud as follows:

> For s35, the economic interest should not be identified at the general level of not being financially worse off. That would merge loss or damage with damages, and would be at odds with corresponding identification of the loss or damage where there is harm to an interest in property. At the correct level of identification, in the present case there are different interests. Mitchell Morgan could be fraudulently induced to pay out money. It could protect itself and avoid losing the money if it obtained adequate and enforceable security. *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. (emphasis added)

38. The Court of Appeal's identification of the economic loss suffered by Mitchell Morgan was correct. Consistent with authority discussed above, it precisely identifies the economic interest harmed by Hunt & Hunt's negligent conduct. Hunt & Hunt's breach of duty and of contract was their failure to take reasonable care to protect Mitchell Morgan against the risk of fraud[38]. The interest Mitchell Morgan was seeking to protect was the ability to recoup from the sale of the security property under the Mortgage and s58 of the *Real Property Act* 1900 (NSW) a sum certain identified in the Mortgage plus interest, in circumstances where had no personal right to recoup that amount against the mortgagor. If Hunt & Hunt had acted carefully, the Mortgage would have secured that amount upon its registration because of its indefeasibility under s42 of the *Real Property Act* 1900 (NSW) and Mitchell Morgan could have sold the Enmore property. As a result of Hunt & Hunt's breach of duty, Mitchell Morgan received the Mortgage but it was worthless.

39. Hunt & Hunt's argument[39] slips from *"the inability to enforce the security against the Enmore property"* at [40] to the *"inability to recoup the advance from Vella"* at [41] & [42]. There is a significant difference between the two. Regardless of how the Mortgage was drafted it could not confer on Mitchell Morgan the right to recover from Mr Vella if it was forged, because a personal covenant in a registered mortgage is not protected by indefeasibility[40]. There is nothing in the underlined extract from Gaudron J's judgment in Kenny & Good which supports this slip. On the contrary, it could not be suggested that negligence in valuing a security causes the inability of the lender to recover from the borrower. If that were the case, result in *St George Bank Ltd v Quinerts Pty Ltd* would have been different because the other loss St George Bank suffered was the failure of the borrower and guarantor to repay the loan.

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[37] CA[41]
[38] CA[17]
[39] Hunt & Hunt's submissions at [38]-[42]
[40] Grgic v Australia and New Zealand Banking Group Ltd (1994) 33 NSWLR 202 at 224

40. Hunt & Hunt[41] also argue that the Court of Appeal erred in using Hunt & Hunt's acts and omissions as part of the process of identifying the harm they caused to Mitchell Morgan. It is not *an error of principle* to identify the damage or loss caused by each wrongdoer by reference to their acts or omissions constituting their breach of duty. As the Court of Appeal explained[42], the breaches of obligation and their consequences are part of the process of identifying the loss caused by each wrongdoer. This must be correct because the definition of *"concurrent wrongdoer"* in s34(2) uses the term *"caused ... the damage or loss that is the subject of the claim"* (our emphasis), which means that the concurrent wrongdoer has to be liable to the plaintiff for the loss or damage[43]. In other words, the analysis is limited to identifying the loss or damage caused by the wrongful acts or omissions of the wrongdoers.

41. Hunt & Hunt[44] argue that the *"true 'damage or loss the subject of the claim' is not just the loss of security, it is the loss of the security in circumstances where the advance was made"*. The words *"in circumstances where the advance was made"* do not describe any loss *"that is the subject of the claim"*, which was caused by Hunt & Hunt. The negligent drafting of the Mortgage did not cause the money to be paid out, because whether its mortgage was negligently drafted or not, the money would have been paid out. Mr Caradonna and Mr Flammia did not cause the Mortgage to be less valuable or worthless by forging it because it became indefeasible pursuant to s42 of the *Real Property Act* on registration. Nor did the money being paid out (which was caused by the fraud) cause the Mortgage to be worthless because if there was no forgery no money would have been paid out and the Mortgage would still have been worthless as there would have been no advance to secure.

42. Hunt & Hunt's approach is also inconsistent with the observations of Gleeson CJ and Gummow and Hayne JJ in this Court in *Alexander v Perpetual Trustees WA Ltd*[45] that the concept *"in respect of the same damage"* is narrower than that of liabilities arising out of, or by reason of the same transactions or related transactions. The payment out of the money by Mitchell Morgan is a contingency of the economic loss caused by Hunt & Hunt accruing in the same way as the retirement of Mr Cornwell was a contingency in *Commonwealth of Australia v Cornwell*[46].

43. Hunt & Hunt's identification of the economic loss which it caused to Mitchell Morgan is too broad because it does not precisely identify the economic interest of Mitchell Morgan which Hunt & Hunt harmed in the drafting of the Mortgage, being the right under the Mortgage to sell the security property to recoup a sum certain plus interest.

Identifying the damage or loss caused by Mr Caradonna and/or Mr Flammia

44. Mr Caradonna and Mr Flammia also caused Mitchell Morgan economic loss. That loss, which was correctly identified by the Court of Appeal[47] was the paying out of over $1 million. Mr Caradonna's and Mr Flammia's fraud caused Mitchell Morgan to pay out

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[41] Hunt & Hunt's submissions at [80]
[42] at CA[73]
[43] St George Bank Ltd v Quinerts Pty Ltd, supra, at [64], Shrimp v Landmark Operations Ltd (2007) 163 FCR 510 at [59]-[62] and HSD Co Pty Ltd v Masu Financial Management Pty Ltd [2008] NSWSC 1279 at [17]-[25]
[44] Hunt & Hunt's submissions at [79]
[45] [2004] HCA 7; (2004) 216 CLR 109 at [27]
[46] [2007] HCA 16; (2007) 229 CLR 519
[47] CA[41]

money it would not have paid out but for the fraud. Contrary to Hunt & Hunt's submissions[48], the payment of money is not just an act, it is also economic harm because after the payment Mitchell Morgan had less money than before it.

45. Hunt & Hunt[49] argues that Mr Caradonna and Mr Flammia caused Mitchell Morgan's inability to recoup its advance because the loan agreement was void. This does not accurately describe the consequences of Mr Caradonna's and Mr Flammia's acts and commits the error identified in the paragraph above. There was no advance because there was no loan agreement and, because it cannot be inferred Mr Vella would have signed a loan agreement if given the opportunity, there was never going to be a loan agreement or an advance.

46. The same error is repeated in Hunt & Hunt's submissions[50], where it is stated that Mr Caradonna and Mr Flammia caused a transaction *"in which the respondents advanced money to Vella on faith of a security that was inadequate"*. Mitchell Morgan did not enter into any transaction with Mr Vella, nor did it advance him any money. It paid out money to Mr Caradonna.

47. Hunt & Hunt's submissions[51] assert that the Court of Appeal erred[52] in rejecting Hunt & Hunt's argument that Mr Caradonna and Mr Flammia caused not only the making of the advance but also the Mortgage to be ineffective. However, the forging of the loan agreement was not a necessary part of the Mortgage securing nothing because it would have secured nothing even if there were no forgery. This is because without the forgery nothing would have been paid out, a point made by the Court of Appeal[53]. The statement that *"the forged loan agreement was part of the occasion for that loss"*[54] is another way of saying the absence of a loan agreement did not cause the absence of mortgage security.

48. Moreover, the Court of Appeal[55] does not state that the loss caused by Mr Caradonna and Mr Flammia and Hunt & Hunt arose at different times. What was being explained was that Hunt & Hunt's negligence deprived Mitchell Morgan of the ability to recover the loss caused by Mr Caradonna and Mr Flammia, being the payment out of the monies, through an effectively drafted mortgage. This is different from the ineffective mortgage being another cause of the payment out of the monies. The effectiveness of the Mortgage affects the quantum of damages claimable from Mr Caradonna and Mr Flammia[56], not

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[48] Hunt & Hunt's submissions at [66]
[49] Hunt & Hunt's submissions at [50]
[50] Hunt & Hunt's submissions at [51]-[52]. Also Hunt & Hunt's submissions at [51] also introduce a concept described as *"the unitary nature of mortgage transactions"* by reference to Gaudron J's judgment in *Kenny & Good* and the NSW Supreme Court decision in *Ross v Cook* [2009] NSWSC 671, which considered the question of when a cause of action in negligence in favour of a lender arose against the valuer of a mortgage security, being after default under the mortgage and when a capital loss first becomes ascertainable. This says nothing about the nature of the loss a lender suffers from paying out money to a fraudster or by not having a security which protects it against fraud. The negligent valuer causes no loss before default because at that stage the lender may not have resort to the security and may never have resort to the security. Moreover, even if there is a concept described as *"the unitary nature of mortgage transactions"* it is irrelevant to this case because there was no loan and mortgage transaction and it does not change the fact that the loan agreement and the mortgage in such a transaction confer different and severable rights and interests on the lender.
[51] Hunt & Hunt's submissions at [81]-[83]
[52] at CA [80]
[53] at CA[79]-[80]
[54] at CA [80]
[55] at CA [80]
[56] See Wardley Australia Ltd v Western Australia (1992) 175 CLR 514 at 530

the type of economic loss caused by their fraud. Similarly, any money recovered from Mr Caradonna and Mr Flammia on a deceit claim would not affect the type of loss caused by the negligently drawn mortgage, it would only affect the quantum of damages claimable from Hunt & Hunt.

The economic loss caused by Mr Caradonna/Mr Flammia and Hunt & Hunt is not the same

49. Drafting a worthless security in the case of fraud is different economic loss to fraudulently inducing a lender to pay out money. Accordingly, the economic loss caused by Mr Caradonna's and Mr Flammia's fraudulent acts is not the *"damage or loss the subject of the claim"* against Hunt & Hunt within the meaning of s34(2) of the *Civil Liability Act.*

50. In their submissions[57], Hunt & Hunt attempt to respond to the analogy of the bank thief and the negligent insurance broker in *St George Bank Ltd v Quinerts Pty Ltd*, which Nettle JA applied to this case[58]. Hunt & Hunt attempt to distinguish Mr Caradonna from a bank thief on the basis that he stole Mr Vella's money, not Mitchell Morgan's. In fact, although the money went into the joint account, Mr Vella never received it because he did not know the money went into the joint account[59]. Mr Vella was never entitled to the money. The money was Mitchell Morgan's. There is no relevant distinction between what Mr Caradonna and a bank thief. Hunt & Hunt also try to distinguish themselves from a negligent insurance broker on the basis that that payment to Mr Caradonna was part of a single loan and mortgage transaction. This distinction is illusory because there was no such transaction.

51. The analogy made by Nettle JA is applicable because the negligence of Hunt & Hunt and the insurance broker lay in failing to protect the plaintiff from foreseeable damage or loss caused by another. Hunt & Hunt do not suggest the thief and the negligent insurance broker caused the same damage.

52. The loss or damage caused by a failure to protect the plaintiff from the loss or damage caused by another or by compromising the plaintiff's ability of redress has been found in many cases to be different to the loss of damage caused by other wrongdoer. These cases include *St George Bank Ltd v Quinerts*[60] and *Howkins & Harrison v Tyler*[61], where in each case the valuer failed to protect the lender against the loss it would suffer if the security were inadequate and the borrower and guarantor failed to repay the loan (thereby making the promise to repay less valuable). They also include *Royal Bampton Hospital NHS Trust v Hammond*[62], where the architect negligently took away the plaintiff's redress against the builder who finished the job late by issuing certificates, *Wallace v Liwiniuk*[63], where the negligent solicitor failed to bring a personal injury claim against the negligent driver before the cause of action expired, and *Ashbrooke Institute Pty Ltd v*

[57] Hunt & Hunt submissions at [61]-[63]
[58] at [82]-[83]
[59] see *National Commercial Banking Corporation of Australia v Batty* (1986) 160 CLR 251 and see Permanent Mortgages Ltd v Vella [2008] NSWSC 505 at [638]
[60] [2009] VSCA 245; 25 VR 666
[61] [2001] Lloyd's Rep PN 1
[62] [2002] UKHL 14; [2202] 1 WLR 1397, cited with approval in Alexander v Perpetual Trustees WA Ltd [2004] HCA 7; (2004) 216 CLLR 109 at 124-125[37] per Gleeson CJ, Gummow and Hayne JJ
[63] [001] ABCA 118

Bartone Biomedical Pty Ltd[64] where the negligent solicitor failed to procure a guarantee from the directors of a corporate purchaser of land, which defaulted on the contract.

53. If Hunt & Hunt caused the same loss or damage as Mr Caradonna and Mr Flammia, all of these cases were wrongly decided. Moreover, *Hurstwood Developments Ltd v Motor and General & Andersley & Co Insurance Services Limited*[65], which Lord Steyn in *Royal Bampton Hospital* concluded was wrongly decided because it found the negligent insurance brokers caused the same loss as the risk they were negligent in failing to insure, was correctly decided.

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54. Hunt & Hunt also make no attack on the reasoning of the Court of Appeal[66], where the loss caused by Mr Caradonna and Mr Flammia and Hunt & Hunt is analysed from the viewpoint of how the recoverable compensation for such losses are determined. This is a legitimate approach not because the amount of compensation must be the same for the loss or damage to be the same but because the process of determining the compensation requires identification of the loss or damage. This analysis supports the conclusion that Mitchell Morgan suffered loss by Hunt & Hunt's negligence not because the money was paid out but because it could not be recovered from the security. This loss was not caused by Mr Caradonna and Mr Flammia, who had nothing to do with the way the
20 mortgage was drafted.

Conclusion on ground 1

55. The Court should find that Hunt & Hunt have failed to establish any error by the Court of Appeal in finding that Hunt & Hunt is not a concurrent wrongdoer in respect of Mitchell Morgan's claim against them within the leaning of s34(2) of the *Civil Liability Act*. In particular, Hunt & Hunt has failed to establish the Court of Appeal erred in finding that Mr Caradonna and Mr Flammia did not cause *"the damage and loss the subject of the claim"* against Hunt & Hunt. It follows that s35(1) does not apply to that claim and Hunt
30 & Hunt's liability in relation to that claim should not be limited under s35(1).

Ground 2 – scope of liability

56. In *Mitchell Morgan Nominees v Vella (No 2)* [2012] NSWCA 38 (**"CA2"**) at [8]-[17], the Court of Appeal dealt with the quantification of damages on the basis that s35(1) did not apply. However, in CA[91], the Court of Appeal set out the basis on which damages should be calculated in the following terms:

> With respect, the primary judge appears to have partly erred in his dealing with interest.
40 Assuming no recovery from the fraudsters, Mitchell Morgan's damages are the amount it would have obtained from a sale of the Enmore property, in the absence of other information at the time of the cancelled auction, and interest thereafter. The amount it would have obtained depends on the non-negligent wording of the mortgage. No finding was made other than in terms of a fixed or specific amount; presumably a non-negligent solicitor would have drawn the mortgage with a covenant to pay $1,001,748.85 and interest on that sum at the mortgage rates. If so, the amount Mitchell Morgan would have obtained is not just the amount of the principal but also interest at the mortgage rates until the date of realisation of its security. The amount of principal plus interest depends

[64] [2010] VSC 579 at [126]
[65] [2001] EWCA Civ 1785
[66] at CA[42]-[44]

> on the date of the cancelled auction; it is possible that the Enmore property would not have sold for a price sufficient to meet the interest as well as the principal, and in that event the net sale amount will be a cap. In the exercise of the discretion under s 100 of the Civil Procedure Act 2005, the interest thereafter should not be at the exorbitant mortgage rates but at Court rates, and it should run from when the money would have been obtained and not from 19 January 2006.

57. There was no recovery from Mr Caradonna and Mr Flammia and no cap because of the value of the Enmore property[67]. The judgment awarded by the Court of Appeal was for $2,370,601.54, which was made up of damages in the amount of $1,565,581.74 (the advance of $1,001,748.85 plus *"interest at mortgage rates"* to 5 September 2006) and pre-judgment interest pursuant to s100 of the *Civil Procedure Act* 2005 (NSW) from 6 September 2006 to judgment.

58. In its second ground of appeal, Hunt & Hunt challenges the *"interest at mortgage rates"* part of the damages awarded by the Court of Appeal. Hunt & Hunt do not suggest that the approach of the Court of Appeal was wrong in principle and in [89] of Hunt & Hunt's submission it is accepted that the Court of Appeal's approach satisfies the *"factual causation"* test in s5D(1)(a) of the *Civil Liability Act*.

59. However, Hunt & Hunt's submissions at [90]-[98] assert that this part of Mitchell Morgan's damages award is beyond the *"scope of liability"* under s5D(1)(b) of the *Civil Liability Act*. One basis for this argument is that the cause of action against Hunt & Hunt accrued immediately upon the advance being made on 19 January 2006. This is incorrect. The economic loss Mitchell Morgan suffered by Hunt & Hunt's conduct arose when at the time Mitchell Morgan would have realised the security property if the Mortgage had been carefully drawn, which accorded with the approach of the Court of Appeal.

60. Another basis for Hunt & Hunt's assertion is that *"there is something repugnant"* in Mitchell Morgan recovering the interest it would have recovered under an effective mortgage over the property of an innocent third party in the event of a *"fraudulent loan"* because the interest rate was *"penal"*. Hunt & Hunt also argue that Mitchell Morgan have not adduced evidence that it would have made a loan to a genuine borrower at the same rates and that Mitchell Morgan failed to make the enquiries a reasonably prudent lender would have.

61. The arguments set out in Hunt & Hunt's submissions at [90]-[98] do not identify any error in the reasoning in CA[91] (set out above) or in CA2[6]-[17], nor do they articulate any of the policy considerations that bear on the determination of the scope of liability under s5D(1)(b) of the *Civil Liability Act*[68] including s5D(4). Macfarlan JA (with whom Sackville AJA agreed) said at CA2[16] that Hunt & Hunt was aware of the mortgage rates when drafting the Mortgage and concluded that in the circumstances there was no reason why Hunt & Hunt's liability should not extend to the interest Mitchell Morgan would have been entitled if Hunt & Hunt had not been negligent in drafting the Mortgage.

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[67] The finding of the primary judge in Permanent Mortgages v Vella [2008] NSWSC 505 at [683]-[684] that the value of the Enmore property was $1.65 million was not challenged on appeal (and see CA[43]).

[68] See Strong v Woolworths Ltd [2012] HCA 5 at [19]

62. Hunt & Hunt do not suggest any defence Mr Vella could have raised to interest charges if the mortgage was effective if the interest rates were *"penal"*, nor do Hunt & Hunt identify how a court should approach the determination of whether or not the mortgage interest rates are *"penal"* under s5D(1)(b). Whether Mitchell Morgan could have made another loan at the same rates is beside the point because Mitchell Morgan's loss was not the loss of an opportunity to make such a loan, it was its inability to recover from the Enmore property the payment it did make. Hunt & Hunt's argument about failure to make enquiries is a contributory negligence argument (rather than a causation argument), which was not made in the Court of Appeal.

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63. Special leave should not be granted in respect of ground 2 because no error has been demonstrated, no point of principle is raised by it and Hunt & Hunt's submissions suggest no principled approach to determining the scope of liability under s5D(1)(b) of the *Civil Liability Act*. Alternatively, if special leave is granted, the ground should be rejected. If it the appeal is upheld on this ground only, it will be necessary for there to be a recalculation of damages.

PART VII: NOTICE OF CONTENTION/ NOTICE OF CROSS APPEAL

20 64. Not applicable.

PART VIII: ORAL ARGUMENT

65. Mitchell Morgan estimates that its oral argument will require two hours.

DATED: 24 October 2012

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S270 of 2012

BETWEEN:

HUNT & HUNT LAWYERS
Appellant

and

MITCHELL MORGAN NOMINEES PTY LTD (ACN 108 571 222)
First
Respondent

MITCHELL MORGAN NOMINEES (NO. 2) PTY LTD (ACN 111 09 557)
Second
Respondent

ALESSIO EMANUEL VELLA
Third
Respondent

AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD
Fourth
Respondent

ANNEXURE TO FIRST AND SECOND RESPONDENTS' SUBMISSIONS

1. Section 5 of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) was in the following form between 1 November 2002 and 19 May 2010.

5 Proceedings against and contribution between joint and several tort-feasors

(1) Where damage is suffered by any person as a result of a tort (whether a crime or not):

(a) judgment recovered against any tort-feasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage,

(b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the spouse, brother, sister, half-brother, half-sister, parent or child, of that person, against tort-feasors liable in respect of the damage (whether as joint tort-feasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless

the court is of opinion that there was reasonable ground for bringing the action,

(c) 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.

(2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be 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; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

(3) For the purposes of this section:

(a) the expressions "parent" and "child" have the same meanings as they have for the purposes of the *Compensation to Relatives Act of 1897* as amended by subsequent Acts, and

(b) the reference in this section to "the judgment first given" shall, in a case where that judgment is reversed on appeal, be construed as a reference to the judgment first given which is not so reversed and, in a case where a judgment is varied on appeal, be construed as a reference to that judgment as so varied, and

(c) the expression ***spouse*** of a person includes a person with whom the person had a de facto relationship (within the meaning of the *Property (Relationships) Act 1984*) at the time of his or her death.

(3A) For the purposes of this section, where a person commits a tort and the Crown is vicariously liable under section 8 of the *Law Reform (Vicarious Liability) Act 1983* in respect of that tort, the Crown and the person are joint tort-feasors.

(4) Nothing in this section shall:

(a) apply with respect to any tort committed before the commencement of this Part, or

(a1) apply so as to cause the Crown and a person in the service of the Crown to be joint tort-feasors with respect to a tort to which section 8 of the *Law Reform (Vicarious Liability) Act 1983* applies committed before the day appointed and notified under section 2 (2) of the *Law Reform (Vicarious Liability) Act 1983*, or

(b) affect any criminal proceedings against any person in respect of any wrongful act, or

(c) render enforceable any agreement for indemnity which would not have been enforceable if this section had not been passed.

(5) An amendment made to this section by the *Miscellaneous Acts Amendment (Relationships) Act 2002* does not apply in respect of an action where the tort concerned occurred before the commencement of the amendment.

2. Section 5 of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) has been in the following form since 19 May 2010.

5 Proceedings against and contribution between joint and several tort-feasors

(1) Where damage is suffered by any person as a result of a tort (whether a crime or not):

(a) judgment recovered against any tort-feasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage,

(b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the spouse, brother, sister, half-brother, half-sister, parent or child, of that person, against tort-feasors liable in respect of the damage (whether as joint tort-feasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action,

(c) 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.

(2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be 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; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to

be recovered from any person shall amount to a complete indemnity.

(3) For the purposes of this section:

(a) the expressions "parent" and "child" have the same meanings as they have for the purposes of the *Compensation to Relatives Act of 1897* as amended by subsequent Acts, and

(b) the reference in this section to "the judgment first given" shall, in a case where that judgment is reversed on appeal, be construed as a reference to the judgment first given which is not so reversed and, in a case where a judgment is varied on appeal, be construed as a reference to that judgment as so varied, and

(c) the expression ***spouse*** of a person includes the de facto partner of a person at the time of his or her death.

Note. "De facto partner" is defined in section 21C of the *Interpretation Act 1987*.

(3A) For the purposes of this section, where a person commits a tort and the Crown is vicariously liable under section 8 of the *Law Reform (Vicarious Liability) Act 1983* in respect of that tort, the Crown and the person are joint tort-feasors.

(4) Nothing in this section shall:

(a) apply with respect to any tort committed before the commencement of this Part, or

(a1) apply so as to cause the Crown and a person in the service of the Crown to be joint tort-feasors with respect to a tort to which section 8 of the *Law Reform (Vicarious Liability) Act 1983* applies committed before the day appointed and notified under section 2 (2) of the *Law Reform (Vicarious Liability) Act 1983*, or

(b) affect any criminal proceedings against any person in respect of any wrongful act, or

(c) render enforceable any agreement for indemnity which would not have been enforceable if this section had not been passed.

(5) An amendment made to this section by the *Miscellaneous Acts Amendment (Relationships) Act 2002* does not apply in respect of an action where the tort concerned occurred before the commencement of the amendment.