LIABILITY FOR ECONOMIC LOSS UNDER COMMON LAW AND STATUTE

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From whence we have come and whither are we going?

The principal writs which the common law developed against tortuous misconduct were originally Trespass and Case [1] Those forms of action were abolished in England in 1873 culminating in a fundamental change, whereby the form of pleading was no longer to plead the cause of action (that is, the legal result of the fact of the case), but rather to plead the facts and argue at the trial whether those facts disclose a cause of action. The original forms of action no longer clank their armour and rule us from the grave yet the concept of negligence, as an independent basis for tort liability, has come to dominate the tort area and in its most recent form, as a cause of action for financial loss, it has been dubbed 'the most controversial area of our law of tort' [2] That controversy takes various forms at common law What are the principles that govern the existence of a duty of care? To whom is that duty owed? For what damages should a defendant be answerable? *The Civil Liability Amendment Act 2003* (WA) ('the Amendment Act') codifies these issues in Western Australia but is unlikely to quell this controversy at all

I History of the Development of the Common Law of Negligence

It is doubtful that Lord Atkin, when propounding his neighbour test in *Donoghue v Stevenson*,[3] envisaged risks which were other than personal injury or damage to property when he said:

> Who then in law, is my neighbour? The answer seems to be persons who are closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question [4]

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1 John G Fleming, *Law of Torts*, (8th ed, Sydney: Law Book Co, 1992) 16

2 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 262 (Kirby J citing Lord Steyn) ('*Perre*').

3 [1932] AC 562

4 *Donoghue v Stevenson* [1932] AC 562 580

Claims for protecting purely economic interest against negligence were not well received by English speaking courts until liability for a reliance upon negligent misstatements was recognized in *Hedley Byrne v Heller*,[5] yet since that decision in 1964, the principles governing liability for economic loss at common law, which have now been developed further by the Amendment Act in Western Australia, recognise the swift development of this tort, although it is questionable whether the codification and modification of the principles of negligence in the Amendment Act will achieve a significantly greater degree of certainty in the application of these principles.

It is perhaps convenient to first set out the common law principles of liability for negligence resulting in purely economic loss (as distinct from liability for personal injuries and death to which financial loss is an adjunct). These principles are topical because the High Court of Australia recently delivered its judgment in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*,[6] a case concerned with the issue of damages for loss arising out of negligent building construction, and reviewed its earlier decision on the issue in *Bryan v Maloney*.[7] Then I will refer to the provisions in the Amendment Act which codifies and amends the common law relating to causation and negligence in Western Australia. The Amendment Act also affects the principles applicable to economic loss under the *Fair Trading Act 1987* (WA). Finally, I discuss those provisions of the Amendment Act, which have dispensed with the application of joint and several liability to economic loss in favour of proportionate liability. Two recent High Court decisions, relating to assessment of damages under the *Trade Practices Act 1974* (Cth), may still influence damages assessment in this area.

II The Common Law Principles of Negligence for Pure Economic Loss

In order to succeed in a claim for negligence causing pure economic loss, a plaintiff must prove that the defendant was subject to a duty of care to the plaintiff, that there was a breach of that duty of care, and that the defendant's breach of their duty of care caused a material loss to the plaintiff.

In determining whether a duty of care exists between the parties, the courts have enunciated some broad principles. These principles have been, and continue to be, subject to significant criticism and do not, in any event, purport to be more than sign posts being of too general a nature to amount to a practical test to be applied in any individual case.

5 [1964] AC 465.
6 (2004) 205 ALR 522 (*Woolcock*).
7 (1995) 182 CLR 609.

Kirby J[8] favours the three-stage test adopted by the House of Lords in *Caparo Industries Pty Ltd v Dickman*:[9]

1 Was it reasonably foreseeable to the alleged wrongdoer that the particular conduct would be likely to cause harm to the person who has suffered damage?
2 Does there exist between the alleged wrongdoer and such person a relationship characterised by the law as one of 'proximity' or 'neighbourhood'?
3 If so, is it fair, just, and reasonable that the law should impose a duty of a given scope upon the alleged wrongdoer for the benefit of the plaintiff?

The first question posed is not perhaps conducive of difficulty in application. The second question will depend upon an analysis of 'proximity factors'.[10] 'Proximity' designates a separate and general limitation upon the test of reasonable foreseeability. It describes the relationship 'which must exist between the plaintiff and defendant before a relevant duty of care will arise'.[11] The term has also been used as designating the degree of foreseeability which suffices for loss or injury to be contemplated.[12] Proximity 'involves the notion of nearness or closeness and embraces physical proximity' in space and time, 'circumstantial proximity' such as between a professional person and that person's client, and causal proximity between the act and injury sustained.[13] What relationship is sufficiently proximate to give rise to liability depends upon reasoning by analogy from decided cases.[14] The third question involves weighing of competing legal policy considerations if the proximity requirements have been met. These may include, for example, the purport of any statutory responsibilities laid upon the defendants.

However, in *Sullivan v Moody*[15] the High Court rejected the three-stage test in *Caparo Industries Pty Ltd v Dickman*[16] as a representation of the law in Australia.[17] In a joint judgment, the High Court (which did not include Kirby J) said:

> The formula is not proximity. Notwithstanding the centrality of that concept, for more than a century ... it gives little practical guidance ...

8 *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 419; *Perre* (1999) 198 CLR 180, 275, adopting the test in *Caparo Industries Pty Ltd v Dickman* [1990] 2 AC 605, 617-618 (Lord Bridge).
9 [1990] 2 AC 605.
10 *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 420 (Kirby J).
11 *Pyrenees Shire Council* (1998) 192 CLR 330, 360 (Toohey J citing Deane J in *Jaensch v Coffey* (1984) 155 CLR 549, 584).
12 *Jaensch v Coffey* (1984) 155 CLR 549, 584 (Deane J).
13 *Jaensch v Coffey* (1984) 155 CLR 549, 584-485 (Deane J).
14 *Hill v Van Erp* (1997) 188 CLR 159, 178 (Dawson J).
15 (2001) 207 CLR 562.
16 [1990] 2 AC 605.
17 *Sullivan v Moody* (2001) 207 CLR 562, 579.

> [Proximity] gives focus to the inquiry but as an explanation of a process of reasoning leading to a conclusion its utility is limited [18]

In cases of negligent economic loss, an important consideration is whether the plaintiff could have protected itself against the loss by protective actions — such as obtaining contractual warranties[19] — though caution is required before holding that obligations under contract may automatically deny liability under tort for economic loss However, courts must keep the particular contractual background in mind because '[d]evelopments in negligence should occur in sympathy with the law of contract'[20] The vulnerability of the plaintiff is a justifiable but not always sufficient reason for imposing a duty of care

III LIABILITY TO A SUBSEQUENT PURCHASER: *BRYAN V MALONEY*[21]

The rigorous test that plaintiffs face in proving liability in negligence is shown by the attitude of the courts in building cases The concern was famously expressed by Cardozo J in his dictum that the law avoids the imposition of liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'

In *Bryan v Maloney*[23] a professional builder built a house for a homeowner in 1979 The homeowner sold the land and house to a purchaser who in turn sold it to the plaintiff in 1986 The plaintiff inspected the house three times before purchasing it, noticed no cracks or defects, but six months afterwards, cracks appeared in the walls and damage became extensive The cracks were due to negligently laid footings, and the plaintiff purchaser successfully sued the professional builder for the diminution in the value of the house, once the latent defect had been discovered by the plaintiff The majority (Mason CJ, Deane and Gaudron JJ) said the damage was both foreseeable and that 'the relationship between the builder and subsequent owner … should be accepted as possessing a comparable degree of proximity to that … between the builder and first owner' such as to give rise to a duty of care [24] It was said the nature of the property, being a dwelling house,

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18 *Sullivan v Moody* (2001) 207 CLR 562 578-579 (Gleeson CJ, Gaudron McHugh, Hayne and Callinan JJ)

19 *Perre* (1999) 198 CLR 180 226 (McHugh J)

20 *Perre* (1999) 198 CLR 180, 227 (McHugh J)

21 (1995) 182 CLR 609

22 Cited in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2002] QCA 88 (Unreported, McMurdo P, Thomas JA, Douglas J, 21 March 2002) [27] previously cited in *Bryan v Maloney* (1995) 182 CLR 609, 633 (Brennan J) and subsequently cited in *Woolcock* (2004) 205 ALR 522, 529

23 (1995) 182 CLR 609

24 *Bryan v Maloney* (1995) 182 CLR 609 628

was an important consideration in finding liability.[25] Brennan J dissented, stating that a builder's duty ought not to extend to a remote purchaser for economic loss because a building sold on the open market may be negotiated to sell at a price which reflects the quality of the building sold.[26] His Honour cited the opinion of the US Supreme Court in *East River Steamship Corp v Transamerica Delavel Inc*[27] in which Blackman J said: 'When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong.'[28]

IV THE QUEENSLAND BUILDING CASES

Subsequent to the High Court decision in *Bryan v Maloney*,[29] the Full Court of Queensland, in *Fangrove Pty Ltd v Todd Group Holdings Pty Ltd*,[30] decided that a structural engineer, who inadequately designed a parapet for a commercial building in 1985, owed no duty of care to a subsequent owner of the premises. One point of distinction from *Bryan v Maloney*[31] was that 'the defective design of the parapet was discoverable by visual inspection',[32] and another was that it was a commercial building. As to the second point, De Jersey CJ thought any extension of liability to damage to commercial buildings should be for the High Court.[33] Where persons acquire a commercial building they can ordinarily be expected to employ expert assistance to ascertain the condition of the premises. A vendor of land has, at common law, ordinarily not been considered as impliedly warranting to the purchaser the suitability or quality for any purpose of the land sold. It was a large step to say an engineering designer is liable in negligence to a purchaser 'for design defects that produce economic loss, rather than personal injury,' when the designer was never in a contractual relationship with the purchaser.[34] This was so even if residential buildings since *Bryan v Maloney*[35] were seen to 'occupy a specially favoured place in Australian jurisprudence'.[36]

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25 *Bryan v Maloney* (1995) 182 CLR 609, 630.
26 *Bryan v Maloney* (1995) 182 CLR 609, 640.
27 476 US 858 (1986).
28 *East River Steamship Corp v Transamerica Delavel Inc*, 476 US 858, 870 (1986) cited in *Bryan v Maloney* (1995) 182 CLR 609, 640.
29 (1995) 182 CLR 609.
30 [1999] 2 Qd R 236 ('*Fangrove*').
31 (1995) 182 CLR 609.
32 *Fangrove* [1999] 2 Qd R 236, 245.
33 *Fangrove* [1999] 2 Qd R 236, 241 (De Jersey CJ).
34 *Fangrove* [1999] 2 Qd R 236, 242 (McPherson JA).
35 (1995) 182 CLR 609.
36 *Fangrove* [1999] 2 Qd R 236, 242 (McPherson JA).

Recently, this issue was again examined in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*,[37] which went on appeal from the Queensland Court of Appeal to the High Court of Australia in 2004. In 1987 the trustee owner of a warehouse and offices in Townsville engaged the first defendant, an engineer, to provide structural design and documentation for the complex. In September 1992 the plaintiff bought the building from a trustee who had, the previous year, been substituted for the original trustee owner. The plaintiff did not engage an engineer or building expert to provide any inspection before purchase, nor did the plaintiff obtain any warranty that the complex was free of structural defects. In 1994 structural stress to the complex became manifest though it is not known when the problems were first reasonably discoverable. The plaintiff claimed economic loss including the cost of demolishing and reconstructing particular sections of the complex and loss of rent during reconstruction.

In holding that the plaintiff could not recover for economic loss, Thomas JA, who wrote the leading judgment of the Queensland Court of Appeal, said that commercial purchasers can protect themselves against losses because they 'may be expected to employ expert assistance to ascertain the conditions of the premises', they may require warranties, they may 'bargain with the benefit of legal and other expert advice, and may 'buy cheaply enough to absorb the cost of remedying defects'.[38] Conversely, the ordinary homebuyer, such as the purchaser in *Bryan v Maloney*,[39] acquires for personal need rather than commercial profit.[40] A homebuyer is more vulnerable and less able to protect their position than those in commercial dealings. Although his Honour saw some difficulties with buildings used for 'mixed purposes' and, indeed, a commercial entity might employ the same experts and seek similar conditions whether purchasing home units or commercial buildings, but his Honour said 'few distinctions have tidy edges', and he thought the distinction between purchasers of commercial buildings who cannot recover, and purchasers of dwelling houses who can, is a distinction that can be properly maintained.[41]

The Queensland Court of Appeal observed that both New South Wales and Victoria declined to extend liability to commercial buildings though

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37 (2004) 205 ALR 522; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2002] QCA 88 (Unreported, McMurdo P, Thomas JA, Douglas J, 21 March 2002).

38 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2002] QCA 88 (Unreported, McMurdo P, Thomas JA, Douglas J, 21 March 2002) [31].

39 (1995) 182 CLR 609.

40 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2002] QCA 88 (Unreported, McMurdo P, Thomas JA, Douglas J, 21 March 2002) [31].

41 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2002] QCA 88 (Unreported, McMurdo P, Thomas JA, Douglas J, 21 March 2002) [32].

both cases involved residential properties.[42] In both Canada and New Zealand there is support for bringing claims in such cases. Those countries have developed principles first set out in England in *Anns v Merton London Borough Council*.[43] The *Anns* approach involved a two stage test. First, is there a sufficient relationship of proximity or neighbourhood between the alleged wrongdoer and the person who suffered damage so that in the reasonable contemplation of the former, carelessness may be likely to cause damage to the latter? Second, if so, are there any other considerations which would reduce the scope of the duties or the damage to which the breach gives rise.[44] The *Anns* approach was rejected in Australia in *Sutherland Shire Council v Hayman*,[45] and has also been reversed in its country of origin in *Murphy v Brentwood District Council*.[46] Whilst opinion is divided amongst States in the United States that, country 'continues to be dominated by Cardozo J's fear of opening the flood gates and remains reluctant to extend damages for economic loss'.[47]

V The High Court Judgment in *Woolcock*[48]

The High Court granted special leave to the plaintiff and delivered their judgment on 1 April 2004. The appeal was dismissed with only Kirby J dissenting. The majority (Gleeson CJ, Gummow, Hayne and Heydon JJs) held that the decision in *Bryan v Maloney*[49] has been overtaken by various statutory forms of protection for those who buy houses with latent defects. Furthermore, their Honours said the decision in *Bryan v Maloney*[51] depended upon the overriding requirement of a relationship of proximity and decisions of the court since then 'reveal that proximity is no longer seen as the "conceptual determinate" in this area.'[52]

In a separate concurring judgment, McHugh J said it was unnecessary to determine whether the majority justices would have reached the same result in *Bryan v Maloney*[53] if the doctrine of proximity was not

42 *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101, 133; *Zampano v Montagnese* [1997] 2 VR 525.

43 [1978] AC 728.

44 *Anns v Merton London Borough Council* [1978] AC 728, 751-752 (Lord Wilberforce).

45 (1985) 157 CLR 424.

46 [1991] 1 AC 398; see also the comments of McHugh J in *Perre* (1999) 198 CLR 180, 212-213.

47 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2002] QCA 88 (Unreported, McMurdo P, Thomas JA, Douglas J, 21 March 2002) [27].

48 (2004) 205 ALR 522.

49 *Bryan v Maloney* (1995) 182 CLR 609.

50 *Woolcock* (2004) 205 ALR 522, 532.

51 *Bryan v Maloney* (1995) 182 CLR 609.

52 *Woolcock* (2004) 205 ALR 522, 528.

53 *Bryan v Maloney* (1995) 182 CLR 609.

regarded as binding[54] Callinan J also considered a final opinion as to the correctness of that decision did not have to be decided[55] Kirby J thought that the case can 'be seen as resting on a defective doctrinal basis'[56] but would not favour overruling it[57]

The joint judgment considered the principles engaged in *Bryan v Maloney*[58] 'did not depend for their operation upon any distinction between particular kinds, or uses for, buildings'[59] Their Honours said the vulnerability of the plaintiff had now emerged as an important requirement in cases where a duty of care to avoid economic loss has been held to be owed 'Vulnerability' means the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care So in *Perre*[60] 'the plaintiff could do nothing to protect themselves from the economic consequences to them of the Defendant's negligence in sowing a crop which caused the quarantining of the plaintiff's land'[61] The economic loss may be physical damage to a building as was the case here,[62] but 'damages for pure economic loss are not recoverable if all that is shown is that the defendant's negligence was a cause of the loss and the loss was reasonably foreseeable'[63]

Apart from 'vulnerability' as an important requirement, their Honours saw assumption of responsibility and known reliance by a plaintiff, particularly in negligent misstatement cases, as giving rise to a duty of care where the 'defendant knew the plaintiff would rely on the accuracy of the information the defendant provided'[64]

McHugh J favoured five principles, which he had first enunciated in *Perre*,[65] as indicia to determine whether a duty exists in all cases of liability for economic loss Other principles may also guide the outcome of a case but five core principles should always be consulted. Aside from the 'key issue' of vulnerability, these principles were:

- reasonable foreseeability that loss would be suffered;
- indeterminacy of liability;
- autonomy of the individual; and
- the defendant's knowledge of the risk and its magnitude[66]

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54 *Woolcock* (2004) 205 ALR 522, 542
55 *Woolcock* (2004) 205 ALR 522 578
56 *Woolcock* (2004) 205 ALR 522 560
57 *Woolcock* (2004) 205 ALR 522, 561
58 *Bryan v Maloney* (1995) 182 CLR 609
59 *Woolcock* (2004) 205 ALR 522, 527
60 (1999) 198 CLR 180
61 *Woolcock* (2004) 205 ALR 522 529
62 *Woolcock* (2004) 205 ALR 522 528
63 *Woolcock* (2004) 205 ALR 522, 529
64 *Woolcock* (2004) 205 ALR 522, 529-530
65 (1999) 198 CLR 180
66 *Woolcock* (2004) 205 ALR 522 543

Ordinarily, liability will be restricted to the owner of the building where damage manifests itself.'[67] Indeterminacy of liability refers to the lack of boundaries for liability and this will usually defeat a claim that a duty of care exists. Autonomy of the individual refers to the circumstances where a person is legitimately pursuing a commercial interest. In such a situation 'the common law does not require that a person be concerned with the effect of his or her conduct' upon others.[68] Where a defendant has knowledge of a risk then the case for imposing a duty is strengthened.[69]

Aside from these five principles, his Honour considered various other policy factors could be applicable militating against liability, for example, the reluctance of the common law to impose a duty to control others (that is, builders being required to control subcontractors),[70] the availability in a given case of a contractual remedy,[71] whether a liability incurred would be disproportionate to the defendant's fault,[72] the lack of a measurable standard of carelessness as defectiveness cannot be divorced from the contract price, and whether recognition of a duty would be consistent with other legal doctrines. Because damage in tort does not occur until the defect manifests itself, it may fall well outside the time limitation imposed for a contractual breach, and this severely and often unfairly may prejudice a defendant in establishing his or her case.[73]

Applying the five stated principles, Kirby J and Callinan J still arrived at diametrically opposite results, with Kirby J holding the plaintiff had a potential claim and Callinan J concluding that it would not.[74] Kirby J said he was bound, since *Perre*,[75] to apply these five principles but his Honour still believed the *Caparo*[76] approach preferable[77] and his Honour viewed the majority approach as an 'unfortunate misstep in the development of the law'.[78]

McHugh J considered that, 'in the absence of a contract between the owner of commercial premises and a person involved in the design of those premises, the latter does not owe a duty to the current owner to prevent pure economic loss.'[79] Where a contract exists the concepts of

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67 *Woolcock* (2004) 205 ALR 522, 543.
68 *Woolcock* (2004) 205 ALR 522, 544.
69 *Woolcock* (2004) 205 ALR 522, 545.
70 *Woolcock* (2004) 205 ALR 522, 546.
71 *Woolcock* (2004) 205 ALR 522, 546.
72 *Woolcock* (2004) 205 ALR 522, 548.
73 *Woolcock* (2004) 205 ALR 522, 549.
74 *Woolcock* (2004) 205 ALR 522, 565-571 (Kirby J); 580-581 (Callinan J).
75 (1999) 198 CLR 180.
76 [1990] 2 AC 605.
77 *Woolcock* (2004) 205 ALR 522, 563.
78 *Woolcock* (2004) 205 ALR 522, 571 (Kirby J citing *Aas v Superior Court* 12 P 3d 1125, 1156 (2000)).
79 *Woolcock* (2004) 205 ALR 522, 553.

assumption of responsibility and reliance may create a duty of care in tort as well as obligations in contract The joint judgment held that the terms of a contract between the owner and builder or engineer is a relevant circumstance 'in considering what duty a builder or engineer owed others'[80] Where the terms of the contract are at variance with performance of a duty claimed by a subsequent purchaser there would be obvious difficulty in erecting a duty of care to avoid economic loss.[81] This was of some relevance, for the consulting engineers, who were the defendants here, had obtained a quotation for geotechnical investigations, which the original owner then refused to pay for.[82]

The general tenor of the majority view in *Woolcock*[83] is that circumstances will be rare indeed where a subsequent purchaser will be owed a duty of care by the original architect, builder or engineer in the future regardless of whether the building is commercial or residential

McHugh J bluntly concluded no duty of care in tort is owed by those who design or construct commercial premises to subsequent purchasers of those premises that the building is free from defects so as to prevent pure economic loss to the purchasers [84] The joint judgment does not go so far but their Honours were content to say merely that principles applicable in cases of negligently inflicted pure economic loss have evolved since *Bryan v Maloney* was decided [85] McHugh J may therefore not have laid to rest 'the spectre of the cartographer' who is 'haunting the corridors of the common law' having been 'held liable to all the passengers and all the owners of a ship and its cargo that had been sunk by the cartographer's negligence in omitting to mark a reef on the map'[86] But the spectre is now likely to be seldom seen

VI The Amendment Act, the Ipp Recommendations and the Replacement of the Common Law Principles of Negligence and Causation

A *Negligence under the Statute*

The Amendment Act adopts many of the recommendations of the panel appointed by the Commonwealth government to review the law of negligence The panel, chaired by Justice Ipp produced the 'Review of

80 *Woolcock* (2004) 205 ALR 522 531
81 *Woolcock* (2004) 205 ALR 522 531
82 *Woolcock* (2004) 205 ALR 522, 530
83 *Woolcock* (2004) 205 ALR 522
84 *Woolcock* (2004) 205 ALR 522 533
85 *Woolcock* (2004) 205 ALR 522 532
86 *Woolcock* (2004) 205 ALR 522 535

the Law of Negligence Final Report' in 2002 ('the Ipp Report')[87] The Amendment Act includes a codification of the principles governing negligence and causation based upon the conclusions of the Ipp Report although the panel's terms of reference did not embrace examining negligence in the context of pure economic loss Nonetheless, the Amendment Act defines 'harm' as including economic loss as well as personal injury and damaged property (s 5(1)) though some damages relating to personal injuries for intentional acts and statutory damages are excluded (s 3A) It extends to claims of damages for harm caused by the fault of a person which occur on or after the commencement date of the Amendment Act on 1 December 2003 (s 5A(5))

A person is not liable for harm caused by the person's fault in failing to take precautions against a risk of harm unless:

- the risk was foreseeable (that is, a risk of which the person knew or ought to have known);
- the risk was not insignificant; and
- in the circumstances, a reasonable person in that person's position would have taken those precautions (s 5B(1))

In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider all relevant matters including the probability that the harm would occur if care were not taken, the likely seriousness of the harm, the burden of taking precautions to avoid the risk of harm; and the social utility of the activity that creates the risk of harm (s 5B(2))

Cases such as *Perre*[88] have already stressed that it is an important consideration at common law whether the plaintiff has protected itself against loss by appropriate protective action

It was said in *Perre*[89] that '[t]he principles concerned with foreseeability of loss, in determinacy of liability, autonomy of the individual, vulnerability to risk, and the defendant's knowledge of risk and its magnitude [are] relevant in determining whether a duty exists in all cases of liability for economic loss[90] McHugh J said that '[t]he vulnerability of the plaintiff to harm from the defendant's conduct is therefore ordinarily a prerequisite to' the imposition of a duty of care[91]

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87 Justice David Andrew Ipp *Review of the Law of Negligence Final Report* (Canberra: Negligence Review Panel Commonwealth Treasury 2002) The Ipp Report is available online <http://revofneg treasury gov au/content/Report2/PDF/Law_Neg_Final pdf>

88 (1999) 198 CLR 180

89 (1999) 198 CLR 180

90 *Perre* (1999) 198 CLR 180 220 (McHugh J)

91 *Perre* (1999) 198 CLR 180 225

B *Negligence at Common Law*

Section 5B modifies the common law in three respects Firstly, the section requires a higher degree of risk In *Wyong Shire Council v Shirt*,[92] the High Court held that a person cannot be held liable for failure to take precautions against a risk that could be described as 'far fetched or fanciful' even if the risk was foreseeable. The Ipp Report preferred 'not insignificant' as intending to indicate a risk that is of a higher probability than is indicated by "not far fetched or substantial" but not so high as a 'substantial risk'.[93] Secondly, to ensure a court does not conclude that because a risk can be described as 'not insignificant' it would follow that negligence existed if precautions were not taken against it, there is provision that negligence depends upon whether a reasonable person would take precautions against a risk.[94] Thirdly, to guard against a danger that concepts of foreseeability and probability are seen as determinative All the factors in s 5B(2) should be considered.[95]

C *Causation under the Statute*

Section 5C is concerned with causation principles It says there are two conditions necessary to determination that the fault of a person caused particular harm Firstly, that the fault was a necessary condition of the occurrence of the harm ('factual causation') and secondly, that it is appropriate for the scope of the tortfeasor's liability to extend to the harm so caused ('scope of liability') (s 5C(1))

The scope of liability requires the court to consider inter alia whether responsibility for the harm should be imposed on the tortfeasor (s 5C(4)). As to determination of factual causation the court considers 'inter alia' whether responsibility should be imposed on the tortfeasor and whether harm should be left to lie where it fell (s 5C(2))

Where it is relevant to factual causation the matter is to be determined by considering what the injured person would have done if the tortfeasor had not been at fault (s 5C(3)(a)), but the evidence of the injured person, as to what he or she would have done if the tortfeasor had not been at fault, is inadmissible (s 5(3)(b)).

The stipulation that causation be two pronged under s 5C(1), requiring both 'factual causation' and 'scope of liability', gives effect to an Ipp Report recommendation The Report says 'the ultimate question to be answered, in relation to a negligence claim, is not the factual one of

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92 (1980) 146 CLR 40

93 Ipp Report, [7 15]

94 Ipp Report [7 16]-[7 17]

95 Ipp Report [7 18]

whether the negligent conduct played a part in bringing about the harm, but rather a normative one about whether the defendant ought to pay damages for that harm'[96] A 'finding that negligence was a necessary condition of the harm is not by itself enough to support this conclusion 'because there is an infinite number of necessary conditions of every event'[97]

Section 5C was introduced to meet the concern 'that there appears to be a perception amongst various groups that courts are too willing to impose liability for consequences that are only remotely connected with the defendant's conduct'[98]

D *Causation at Common Law*

Section 5C(2) was introduced to plug an evidential gap The current law in Australia appears to be that whether or not negligent conduct caused the harm is to be answered by the application of 'common sense' rather than rigid adherence to a 'but for', 'dominant cause', or some such other rigid formula Sometimes loss or injury is brought about by the cumulative operation of two or more factors and it is not possible to determine the relative contribution of the various factors

In *Fairchild v Glenhaven Funeral Services Ltd*[99] the plaintiff contracted Mesothelioma, as a result of successive exposure to asbestos while working for different employers, and the scientific evidence did not justify a conclusion in relation to any of the plaintiff's employers that, but for the negligence of that employer, the plaintiff would not have contracted the disease The House of Lords held proof that the defendant's negligent conduct 'materially increased the risk'[100] that the plaintiff would contract Mesothelioma would suffice to establish a causal connection between the conduct and the harm The status of this principle in Australian law is not yet decided[101]

Although the Ipp panel accepted that the 'material contribution to risk'[102] approach may be sufficient, even if the 'but for' test is not satisfied, the outcome depends upon a value judgment about how costs of injuries and death should be allocated, and this, the panel said, will require development of common law principles[103]

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96 Ipp Report, [7 41]
97 Ipp Report, [7 42]
98 Ipp Report, [7 47]
99 [2002] 3 WLR 89
100 *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 WLR 89 105 (Lord Bingham citing Lord Wilberforce in *McGhee v National Coal Board* (1973) 1 WLR 1 5-6)
101 *Bendix Mentex Pty Ltd v Barns* (1997) 42 NSWLR 307
102 *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 WLR 89, 105 (Lord Bingham)
103 Ipp Report [7 32]

An example under s 5C(3), where it is relevant to ask what the injured person would have done if the tortfeasor had not been at fault, may be illustrated by an employer, who unreasonably fails to provide an employee with a particular safety device, which could have prevented the harm suffered by the plaintiff if it had been used. The employer alleges that even if it had been provided the employee would not have used it. Another example is *Chappell v Hart*[104] where it was held that a doctor had failed to fulfil the reactive duty to inform a patient of a risk in a surgical operation, which risk materialised. The patient said she would not have had the operation if she had been warned.

The question of what the plaintiff would have done, if the defendant had not behaved negligently, could be assessed subjectively or objectively. The first approach, adopted presently in Australia, is endorsed in s 5C(3)(a). However, the Ipp panel said that it is unrealistic to expect a plaintiff to testify that he or she would have had the operation (or not used the safety device) even if given the relevant information. Accordingly, the evidence of the injured person, as to what she or he would have done, should be inadmissible, and this recommendation is given effect in the Amendment Act.

E *The Plaintiff's Onus of Proof*

Significantly, the Amendment Act states that, in determining liability for damages for harm caused by the fault of the person, the plaintiff always bears the onus of proof on the balance of probabilities of any fact relevant to the issue of causation (s 5D). As the explanatory memorandum explains, this legislative restatement

> has the effect of reversing a change introduced in recent years by the courts which has had the effect of casting the onus on the issue of causation onto the defendant, once it has been established that the defendant owed a plaintiff a duty of care and breached that duty and that the plaintiff had suffered a foreseeable injury.[105]

The Ipp Report said that the problem created by the inability of a plaintiff to satisfy the 'but for' test had been resolved by the court shifting the onus of proof to the defendant once a duty of care and breach of that duty had been established. In *Bennett v Minister for Community Welfare*,[106] Gaudron J said:

> generally speaking if an injury occurs within an area of foreseeable risks then in the absence of evidence that the breach had no effect or that the injury would have occurred even if the duty had been performed it will

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104 (1998) 195 CLR 232

105 Explanatory Memorandum, Civil Liability Amendment Bill 2003 (WA) 6

106 (1992) 176 CLR 408

be taken that the breach of the common law duty of care caused or materially contributed to the injury [107]

Henville v Walker[108] is discussed later but for present purposes it is enough to say that the Amendment Act now casts the onus back on the plaintiff. The consequence of doing so may be to persuade the courts to adopt the English approach of holding that negligence is established where the defendant's conduct materially increased the risk of harm, as found in *Fairchild's Case*.[109] This approach would dictate a court holding that this sufficed to constitute 'factual causation' under s 5C(2).

VII PROPORTIONATE LIABILITY IN CLAIMS FOR ECONOMIC LOSS

The Amendment Act inserts Part 1F (ss 5AI-5AO) into the *Civil Liability Act 2002* (WA) which introduces proportionate liability for damages for pure economic loss.[110]

The Ipp Report did not recommend proportionate liability for personal injury and death claims and the Amendment Act does not introduce proportionate liability in such matters. The Report made no comment on proportionate liability in relation to pure economic loss which in any event was outside its terms of reference.[111] However, the Commonwealth proposed in a Discussion paper in September 2002 that it would seek the agreement of the States to introduce proportionate liability in the context of pure economic loss and property damages. At a joint Commonwealth and State ministerial meeting on public liability insurance held in Brisbane in November 2002 there was general agreement on proportionate liability for economic loss.[112] This was supported by the Western Australian representatives and has now been introduced in the Amendment Act.

Joint and several liability arises where a plaintiff is free to recover the whole of his or her loss from any one of a number of concurrent wrongdoers responsible for that loss. This represents the current legal position subject to some qualification mainly in the area of contributory

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107 *Bennett v Minister for Community Welfare* (1992) 176 CLR 408, 420-421, cited with approval in *Rosenberg v Percival* (2001) 205 CLR 434, 461 (Gummow J); see also remarks of Gaudron J in *Henville v Walker* (2001) 206 CLR 459, 483 regarding the onus being on the contravening party under s 82(1) of *Trade Practices Act 1974* (Cth).

108 (2002) 206 CLR 459.

109 [2002] 3 WLR 89.

110 Part 1F has not yet entered into force. The *Civil Liability Amendment Act 2003* (WA) was proclaimed to come into effect on 1 December 2003 except for s 9 (which inserts Part 1F into the *Civil Liability Act 2002* (WA)) and s 14.

111 Ipp Report, [12.80].

112 Law Council of Australia, *Proportional Liability in relation to Pure Economic Loss and Property Damage* Policy Paper (2002) [14]-[16].

negligence.[113] By contrast, proportionate liability is a situation where each wrongdoer would only be liable to the plaintiff for his or her proportionate share of the plaintiff's loss

The proposed Part 1F of the amended *Civil Liability Act 2002* (WA) states that in any proceedings involving an 'apportionable claim' the liability of a defendant, who is a concurrent wrongdoer in relation to that claim, is limited to payment of the proportion of damage or loss the court considers just having regard to the extent of his responsibility (s 5AK(1)).

An 'apportionable claim' is a claim for economic loss or damage to property in an action for damages arising from a failure to take reasonable care (but not including any claim arising out of personal injury) (s 5AI(1)). A 'concurrent wrongdoer' means one of two or more persons whose act or omission caused, jointly or independently, the damage or loss that is the subject of the claim (s 5AI(1))

The features of an 'apportionable' claim under the amendments proposed to the *Civil Liability Act 2002* (WA) are as follows:

1 it applies to causes of action accruing after commencement of the Amendment Act (s 5AJ(3));[114]
2 the claim may arise from a failure to exercise reasonable care but not a claim arising out of personal injury (s 5AI(b));
3 the claim may arise from a claim for economic loss or damage caused by conduct in contravention of s 10 of the *Fair Trading Act 1987* (WA) (engaging in misleading or deceptive conduct in trade or commerce) (s 5AI(1)(b));
4 in making the apportionment the liability of a concurrent wrongdoer is limited to that proportion of the damage or loss the court considers just having regard to the defendants' responsibility (s 5AK(1)(a));
5 in making the apportionment the court is to exclude the proportion of damages or loss in relation to which the plaintiff is contributorily negligent (s 5AK(3)(a));
6 in making the assessment the court is to have regard to the responsibility of any concurrent wrongdoer who is not joined as a party to the proceedings (s 5AK(3)(b));
7 if proceedings involve both an apportionable claim and one that is not, the liability for the apportionable claim is determined in accordance with the Amendment Act and the other claim determined in accordance with such other legal rules as apply (s 5AK(2));
8 a defendant cannot be required to contribute to the damages recovered from another concurrent wrongdoer in respect of an

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113 S Owen-Conway Contributory Negligence and Apportionment of Damages (1990) 6 *Australian Bar Review* 211.

114 Section 9 of the Amendment Act, which inserts Part 1F into the *Civil Liability Act 2002* (WA), is yet to be proclaimed

apportionable claim in the same proceedings, nor can the defendant be required to indemnify any concurrent wrongdoer. This is subject to any existing arrangement by a defendant to contribute to or indemnify another wrongdoer in relation to an apportionable claim (s 5AL);

9 a plaintiff is not prevented from taking separate actions, or the same actions against concurrent wrongdoers, so long as the total damages do not exceed the plaintiff's losses (s 5AM);

10 a person who was previously a party to a concluded action cannot be joined in later actions (s 5AN);

11 the principles of proportionate liability claims will apply in cases involving vicarious liability for another's acts. However several liability of a partner for the liabilities of a partnership is preserved.

Finally, the Amendment Act reserves the operation of any legislation that may otherwise impose several liability (s 5AO).

Following the passage of the *Civil Liability Amendment Act 2004* (WA), certain concurrent wrongdoers who intentionally or fraudulently caused the economic loss suffered do not have the benefit of apportionment (s 5AJA of the amended *Civil Liability Act 2002* (WA)). Furthermore, a defendant in proceedings involving an apportionable claim is under a duty to give the plaintiff written notice of a concurrent wrongdoer who he or she knows about and is required to pay all or any of the costs incurred by the plaintiff where that duty is not discharged (s 5AKA).

VIII The Introduction of Proportionate Liability for Economic Loss under the Amendment Act

The Law Council of Australia had favoured the introduction of proportionate liability for cases involving physical damage and economic loss but not for personal injuries. The reasons advanced for drawing a distinction between the two is that bodily integrity is in issue in personal injury cases thus justifying an approach favouring a plaintiff. The commercial nature of many pure economic loss and property cases justify an approach less favourable to the Plaintiff. The consequence of proportional liability is that to obtain full compensation a plaintiff has to succeed and recover payment from all concurrent wrongdoers. Under joint and several liability a defendant may be wholly liable to a plaintiff, and thus compelled to run the risk of seeking contribution from concurrent wrongdoers, who may be insolvent or otherwise unavailable. Under proportionate liability this risk is transferred to the plaintiff.[115]

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115 Law Council of Australia *Proportional Liability in relation to Pure Economic Loss and Property Damage* Policy Paper (2002) [27]. See also Annette Schoombee (Paper presented at the Australian Insurance Law Association Breakfast Seminar, Perth, 16 April 2003).

The proposed Part 1F of the amended *Civil Liability Act 2002* (WA) enjoins the court to make an assessment based upon what is 'just having regard to the extent of the defendant's responsibility for the damage or loss'.[116] Having excluded that proportion of damage or loss that may arise through the plaintiff's contributory negligence the court is 'to have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings'.[117]

IX RECENT HIGH COURT DECISIONS ON LIABILITY FOR DAMAGES FOR ECONOMIC LOSS UNDER S 52 OF THE *TRADE PRACTICES ACT 1974* (CTH)

Two recent decisions of the High Court are apposite to the issues here. Both concern damages for economic loss under s 52 of the *Trade Practices Act 1974* (Cth) which mirror, in the case of activities engaged in by commercial and trading corporations, the liability which falls upon ordinary persons under s 10 of the *Fair Trading Act 1987* (WA). Both provisions penalise a defendant who has engaged in false and misleading conduct causing loss to others.

In the first of these, *Henville v Walker*,[118] the court held that, in awarding damages under s 82, a court cannot reduce the amount of an applicant's damages because of the applicant's contributory negligence. There the applicant engaged in a property development and was induced to do so in part by the respondents, who were the agents of the owner, and who misrepresented, by overstating, the value of the units which the applicant was to purchase, and the likely time it would take the applicant to sell them. The other error was in the applicant overestimating carelessly the cost of his development of the unit. It was held that it was enough for the applicant to show the conduct of the respondents was one of the two causes of the loss. What was necessary was to ascertain whether damages for the loss were directly attributable to the false and misleading conduct of the applicant and this was found to be so.

This was followed by *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*[119] where the misleading or deceptive conduct involved an erroneous valuation of real estate over which a mortgage was to be given as security for a loan by the appellant. Relying upon the valuation the appellant made the loan, the borrower defaulted, and the security, when realised, was insufficient to meet the borrower's liability. The appellant sued for the deficiency and related losses. It had been found by the trial

116 s 5AK(1)(a) *Civil Liability Act 2002* (WA) as amended.
117 s 5AK(3)(b) *Civil Liability Act 2002* (WA) as amended.
118 (2002) 206 CLR 459.
119 (2002) 210 CLR 109; (*I & L Securities*).

judge that the appellant failed to exercise reasonable care to protect its own interest by investigating the credit worthiness of the borrower. In the joint judgment (Gaudron, Gummow and Hayne JJ) it was said:

> The [*Trade Practices Act 1974* (Cth)] creates certain norms of behaviour. It prescribes what constitutes a contravention of those norms. There is nothing in the terms in which those norms are prescribed or in the terms in which remedies for contravention are provided that warrants injecting into the inquiry some a priori assumption about distributing responsibility for loss and damage suffered between those who have contravened the Act and those who have not. In the light of what was held in *Henville v Walker* about the operation of s 82 (which entitles the person who suffers loss or damage by conduct of another done intentionally or negligently in contravention of various provisions of the Act to recover that loss and damage), it would at least be anomalous if s 87 were to be read in such a way as would permit the claimant's carelessness (not in contravention of the Act) to be taken into account to reduce the amount of the loss or damage caused by the contravener's conduct which is to be compensated or prevented by the making of orders under s 87 ...
>
> Nothing in the words of s 82 and s 87 requires or permits a court to make orders which will compensate a person who has suffered loss or damage by conduct in contravention of a relevant provision of the Act for only part of the loss or damage which has been suffered by that person by that conduct ...
>
> As was recognised in *Henville v Walker*, there may be cases where it will be possible to say that some of the damage suffered by a person following contravention of the Act was not caused by the contravention. But because the relevant question is whether the contravention was a cause of (in the sense of materially contributed to) the loss, cases in which it will be necessary and appropriate to divide up the loss that has been suffered and attribute parts of the loss to particular causative events are likely to be rare.[120]

Gleeson CJ, McHugh J and Callinan J wrote separate but concurring judgments. Callinan J thought the appellant's argument must be accepted but the result was unfair, while Kirby J dissented.

X THE IMPLICATIONS OF *HENVILLE V WALKER*[121] AND *I & L SECURITIES*[122] UPON *ACTIONS UNDER THE TRADE PRACTICES ACT 1974* (CTH) AND THE *FAIR TRADING ACT 1987* (WA)

Section 52 of the *Trade Practices Act 1974* (Cth) mirrors s 10 of the *Fair Trading Act 1987* (WA) which s 5AI(1)(b) of the Amendment Act expressly states will now be subject to proportionate liability. It remains to be seen if the courts will regard s 5AI(1)(e) of the Amendment Act as

120 *I & L Securities* (2002) 210 CLR 109, 129-130

121 (2002) 206 CLR 459.

122 (2002) 210 CLR 109

sufficient to nullify the principles set out in *Henville v Walker*[123] and *I & L Securities*,[124] thus heralding in a regime of proportionate liability where actions are brought under the *Fair Trading Act 1987* (WA) It seems likely that this will occur.

The Ipp Report recommended abolition of personal injury actions which may still be brought under s 52 of the *Trade Practices Act 1974* (Cth) where false and misleading conduct involving a trading corporation can be shown [125] Under the Amendment Act it is not contemplated that proportionate liability will apply to actions for personal injury. Thus far no steps have been taken to prevent actions proceeding under s 52 to obtain damages for purely economic loss, in accordance with the principles set out in *Henville v Walker*[126] and *I & L Securities*,[127] thereby enabling an applicant in an appropriate case to circumvent difficulties that a plaintiff might otherwise face at common law in facing the constraints of the proportionate liability principles set out in the Amendment Act.[128]

Given the Commonwealth Government's benign attitude towards proportionate liability further amendments to s 82 and s 87 of the *Trade Practices Act 1974* (Cth) may yet be introduced

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123 (2002) 206 CLR 459

124 (2002) 210 CLR 109

125 In *Concrete Construction (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 an action for personal injuries under s 52 of the *Trade Practices Act 1974* (Cth) failed because it was not found to be made in trade or commerce See comments in Ipp Report [5 25]

126 (2002) 206 CLR 459

127 (2002) 210 CLR 109

128 The Ipp Report recognised that much advice given by professionals is in the course of trade and commence and capable of amounting to misleading and deceptive conduct (*Bond Corp Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215) There is no need under s 52 to prove the false and misleading statement was made negligently or without honesty (Ipp Report [5 24])