A Contractual Path Around Proportionate Liability?

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Proportionate liability regimes have been operational in various forms for almost 20 years and the scope and effect of those regimes have, after considerable judicial attention, been largely settled. Nevertheless, there remains one crucial question still to be determined by the Courts which continues to plague litigants: can a claim for damages made purely under contract (eg, under an indemnity) "arise from a failure to take reasonable care" thereby constituting an "apportionable claim"? This article analyses the judicial consideration of this question to date, in addition to weighing the merits of the contrasting approaches in light of the words and purpose of the statutes. This article concludes that the better view is that a claim made solely under contract cannot constitute an apportionable claim for the purposes of the proportionate liability regime, and that a plaintiff is entitled to pursue a sole defendant for damages under such an action.

I. Introduction

A typical commercial construction contract will set out, in prescriptive fashion, a principal's rights of recourse against its contractor for defective or non-compliant works. Such contracts contain a variety of obligations on the contractor which effectively seek to ensure, to the extent possible, that the contractor delivers what the principal has paid for. Some of these obligations – for example, to undertake works with due care, skill and workmanship – mirror those that might otherwise exist under general law. Others, such as compliance with legislative and regulatory standards or fitness for purpose, set a strict, stand-alone contractual standard. Indemnities might also operate to further protect the principal from loss even in the absence of a breach.

Proportionate liability was intended to cut across risk-allocation mechanisms such as those in the construction industry by giving effect to the legislative policy that in respect of claims for economic loss or property damage "arising from a failure to take reasonable care", a defendant should only be liable to a plaintiff to the extent of its responsibility. In theory, this enables a contractor to avoid sole liability to a principal for loss by pointing to wrongdoing on the part of a third party (such as an engineer, architect or surveyor) which also caused to the loss and damage in question. Despite having been operational in various forms for over 20 years,[1] however, one crucial aspect of the regime remains uncertain: what does "arising from a failure to take reasonable care" actually mean?

The answer to the above question has significant implications, and may affect how a principal's cause of action is both framed and run. For instance, a claim against a contractor in negligence or for a contractual failure to take care clearly involves a "failure to take reasonable care" and would invoke the proportionate liability regime. However, can the same be said for a claim against a contractor for the same conduct under a strict contractual indemnity protecting the principal against loss? Put differently, could (and should) a claim framed under a purely contractual cause of action – which does not require proof of carelessness – circumvent the proportionate liability scheme? As yet, there is no binding or definitive answer in any Australian jurisdiction.

This article analyses the divergent judicial opinions on this issue and considers the merits of the competing approaches in light of the background to, and context of, the proportionate liability regime.

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[1] For example, proportionate liability was enshrined in Victoria in the *Building Act 1993* (Vic).

Taking into account the purposes of the regime, the wording of the legislation and the consequences of each approach, this article concludes that the better view is that the proportionate liability regime will not apply where a plaintiff's cause of action is wholly contractual and does not require a finding of a want of care.

II. Principles and Purposes of the Proportionate Liability Regime

A. What Is Proportionate Liability?

Liability for negligence at common law – otherwise known as "solidary" or "joint and several" liability – treats each wrongdoer as the effective cause of a plaintiff's loss. In circumstances where a number of parties have caused the plaintiff's loss, a plaintiff is entitled to pursue each wrongdoer for the whole of that loss, leaving the wrongdoer to seek contribution from other wrongdoers. The risk that any other wrongdoer is insolvent, or unable to meet a claim for contribution, lies with the specific defendant which the plaintiff chooses to sue.

By contrast, under a proportionate liability regime each wrongdoer is only liable to the plaintiff for the portion of the plaintiff's loss for which the court finds the wrongdoer responsible. The plaintiff must join each wrongdoer to the action and claim against them individually or it will not be able to recover the portion of its loss attributable to the omitted party. Such a regime effectively shifts the risk of a particular wrongdoer's insolvency or inability to pay to the plaintiff.

B. Why Was Proportionate Liability Enacted?

Legislative consideration of proportionate liability arose from an "insurance crisis" which afflicted Australian markets in the 1990s and early 2000s. The crisis had its roots in the stock market crash and recession of the early 1990s which led to the failure of a number of financial institutions and, ultimately, widespread insolvency and bankruptcy in business circles. This was followed by significant amounts of litigation involving failed business ventures, property developments and investments.[2]

The circumstances of the market failure meant that it was often the case that a person or business responsible for another's loss had become insolvent, or otherwise had insufficient means to warrant pursuit in court. This led to plaintiffs seeking to recover losses from those who were able to pay, rather than those who were in fact responsible. As a rule, those parties (often comprising of accountants, lawyers, stock brokers or municipal councils) were insured.[3]

In circumstances where the common law principles of "solidary" or "joint or several" liability applied, the practice of pursuing those with "deep pockets" meant that parties which bore the majority of a plaintiff's loss were often only marginally responsible for it. Insurance companies had come to be regarded as a "bottomless pit" or "magic pudding" from whom a plaintiff could recover the entirety of its loss.[4] This led to significant pressure on the insurance industry and a sharp increase in premiums, to the extent where many businesses were unable to afford insurance or to obtain insurance at an appropriate level.[5] At around this time HIH and UMP, two of the country's largest insurers, collapsed,[6] and there was increasing fear that insurance would become financially unobtainable.[7]

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[2] The Hon Justice Macaulay, "Proportionate Liability – Is it Achieving its Aims?" (Paper presented at the Australian Insurance Law Seminar, 2 December 2010).

[3] The Hon Justice Macaulay, n 2.

[4] The Hon Chief Justice Spigelman, "Negligence and Insurance Premiums: Recent Changes in Australian Law" (2003) 11 *Torts Law Journal* 1, 3.

[5] The Hon Justice Macaulay, n 2.

[6] UMP (United Medical Protection) was then the largest medical defence organisation. HIH was one of the largest general insurers, particularly active in the professional negligence and public liability market.

[7] *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, 625 [14]; [2013] HCA 10.

C. Government Inquiry

It was in this turbulent context that a number of government inquiries were tasked with advising whether the common law approach of joint and several liability should be reconsidered. Some of those inquiries rejected calls for change,[8] stating that there was insufficient evidence that the change was warranted. The most notable of the inquiries, however, which was completed by Professor Davis for the Commonwealth Attorney-General's Department in 1995, recommended that joint and several liability be abolished and replaced by a scheme of proportionate liability in all actions in negligence in which a plaintiff's claim was for property damage or economic loss.[9]

Professor Davis, in his report, gave two primary reasons for amending the regime. The first reason was one of fairness. In this regard, Professor Davis considered that:

> [T]he fairness or justice of a legal rule must be questioned when its effect is to place full liability on a defendant who may have been only marginally at fault, and to provide full compensation to a plaintiff who is able to find one on whom to fix the blame for the loss.[10]

The second and more economic reason concerned the effect of the common law position on the insurance market. Professor Davis noted that insurers had been facing severe difficulties in maintaining adequate levels of cover, leading to statutory limitations on the level of compensation available.[11] He concluded that the cost of liability insurance for professionals had reached unacceptable levels and that claims against companies which are settled tend to be subject to the limits imposed by the level of insurance cover which the company has. Professor Davis considered that a better approach would be instead to limit recovery by reference to the proportion to which any particular defendant was to blame for the loss in question.

The Davis Inquiry was not initially adopted by government, but several years later and after the collapse of HIH and UMP the recommendations were enacted into law.

D. Broader Legislative Reform

Following on from these inquiries, rights of proportionate liability have been legislatively enshrined across the country. Defendants are now able to invoke the proportionate liability regime to reduce the proportion of its liability to a plaintiff by joining other wrongdoers to the action.[12] In order to successfully do so, a defendant must make out two things:

(1) that the claim is an "apportionable claim"; that is, is one "for economic loss or damage to property in action for damages (whether in tort, in contract, under statute or otherwise) *arising from a failure to take reasonable care*";[13] and
(2) that the putative defendants are "concurrent wrongdoers"; that is, are "persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim".[14]

Whether a defendant is a "concurrent wrongdoer" has been the subject of extensive judicial consideration and it is now clear that a putative defendant must independently be liable to the plaintiff for its loss (ie,

[8] See, eg, New South Wales Law Reform Commission, *Contribution among Wrongdoers: Interim Report on Solidary Liability*, Report No 65 (1990); New South Wales Law Reform Commission, *Contribution between Persons Liable for the Same Damage*, Discussion Paper No 38 (1997); New South Wales Law Reform Commission, *Contribution between Persons Liable for the Same Damage*, Report No 89 (1999); M Richardson, "Economics of Joint and Several Liability Versus Proportionate Liability" (Expert Report 3 prepared for the Victorian Attorney-General's Law Reform Advisory Council, 1998).

[9] Professor Jim Davis, "Inquiry into the Law of Joint and Several Liability: Report of Stage Two" (Attorney-General's Department, Commonwealth of Australia, 1995).

[10] Professor Davis, n 9, 31.

[11] Professor Davis, n 9, 31.

[12] As to the appropriate procedure for doing so, see *Cowan v Greatorex* [2008] VSC 401 and the authorities cited therein.

[13] See, eg, *Wrongs Act 1958* (Vic) s 24AF(1)(a). References in this article will be to the Victorian scheme but similar provisions can be found across jurisdictions: see *Civil (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liability and Damages) Act 2003* (NT); *Civil Liability Act 2002* (Tas); *Civil Liability Act 2002* (WA).

[14] *Wrongs Act 1958* (Vic) s 24AH(1).

caused the loss in a legal sense).[15] There is no requirement that the loss and damage caused by each defendant be the same though their conduct must have contributed to the same loss and damage.[16] The interpretation of "apportionable claim", however, is far less certain, and it is this element (specifically, "arising from a failure to take reasonable care") which is the focus of this article.

III. What does "Arising from a Failure to Take Reasonable Care" Mean?

A. The Competing Approaches

There are two principal competing approaches to how "arising from a failure to take reasonable care" might be interpreted. First, it may be interpreted as meaning arising *factually* from a failure to take care; that is, where a failure to take care is present as a matter of fact, whether or not such a failure is a necessary element of the claim. Under this view, the characterisation of the pleaded claim is immaterial, so long as a Court finds that some carelessness has taken place. This would mean that the proportionate liability regime would apply, for example, to a claim made by a principal under an indemnity or a fitness for purpose warranty, even though such claims (being strictly contractual actions) do not require proof of carelessness.

The alternative approach is that "arising from a failure to take reasonable care" means arising *legally* from a failure to take care; that is, where a failure to take care is a necessary element of the plaintiff's cause of action. On this view, a claim by a principal under a strict contractual indemnity against loss could never invoke the proportionate liability regime, regardless of whether there was in fact some underlying carelessness by the contractor.

The distinction is best illustrated by example. Suppose that a builder is engaged to design and construct an office tower. In the course of its work, the contract engages a structural engineer to provide specialist structural advice. A year after constructing the tower, cracks appear in the façade of the building. The principal brings an action against the contractor, who in turn joins the engineer and pleads proportionate liability by pointing to the engineer's negligence.

The plaintiff in this case may have a number of potential causes of action against the contractor:

a) Breach of a duty to take reasonable care under general law.
b) Breach of a contractual warranty that the contractor must act with due care and skill.
c) Breach of a strict contractual warranty – for example, that the contractor will meet all regulatory standards in performing the works.
d) Under a contractual indemnity which requires the contractor to indemnify the principal against all losses arising out of the performance of the building works.

It is clearly in the principal's interests to bring an action under categories (c) or (d). Category (a) requires the plaintiff to establish a duty of care, which may be difficult in commercial cases.[17] Further, both categories (a) and (b) require that the plaintiff prove a failure by the contractor to meet the relevant standard of care, which will likely involve expert evidence and other complex issues of proof. If the plaintiff brings an action under category (c), however, it does not need to prove that the contractor failed to take reasonable care – only that certain regulatory conditions were not met (though this may, as a matter of fact, involve a want of care). Further, if the plaintiff brings an action under category (d), it does not even need to prove a breach of contract – only that it suffered loss in the performance of the works.

The issue which a court will face, in the proportionate liability context, is whether the regime – which applies to claims "arising from a failure to take reasonable care" – will apply only to categories (a) and (b), which require proof of such a failure, or will equally apply to categories (c) and (d) where

[15] See, eg, *Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd* (2008) 21 VR 84, 101; [2008] VSCA 208, quoting *Shrimp v Landmark Operations Ltd* (2007) 163 FCR 510, 523; [2007] FCA 1468; *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666, 682–683; [2009] VSCA 245, also quoted in *Kheirs Financial Service Pty Ltd v Aussie Home Loans Pty Ltd* (2010) 31 VR 46, 67–68; [2010] VSCA 355.

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

[17] See, eg, *Brookfield Multiplex Ltd v Owners — Strata Plan No 61288* (2014) 254 CLR 185; [2014] HCA 36.

carelessness need not be proved. This article will now consider the competing judicial views as to this "serious and difficult question of construction".[18]

B. Approach A: A Factual Inquiry

A factual interpretation finds support in a number of first-instance decisions, most notably that of Barrett J in *Reinhold v NSW Lotteries Corp (No 2)* (*Reinhold*).[19] That decision concerned the wrongful cancellation of the plaintiff's winning lottery ticket by a newsagent and the NSW Lotteries Corporation. At trial, his Honour determined that both parties had breached their contract with the plaintiff by improperly cancelling his ticket. His Honour also found that each of the defendants were negligent.

The plaintiff sought to rely on its contractual claim only and argued that the proportionate liability regime did not apply because the claims in contract were concerned only with the fact of cancellation, regardless of how the cancellation may have arisen and whether it was careless. The plaintiff noted that there would have been a breach of contract even if the defendants knowingly cancelled the ticket without the plaintiff's consent, such that proof of a want of care by the defendants was not a necessary element of its cause of action. The plaintiff argued that this meant that its claim did not "arise from a failure to take reasonable care" and was not therefore apportionable.

His Honour did not accept the plaintiff's argument for two reasons. First, his Honour held that the "clear objective" of the regime was to abolish solidary liability under which all defendants found guilty of negligence are jointly and severally liable to the plaintiff for the whole of its loss. The new provisions, which are compulsory, reflect "legislative views about allocation of risk as between plaintiffs and defendants".[20] Though pleadings are relevant to engaging the statutory provisions, it will be the findings made at trial which determine whether statutory conditions compelling the Court to adopt the approach are satisfied.[21] If such findings involved a finding of carelessness, the regime will be engaged.

Second, his Honour contrasted the language in the *Civil Liability Act 2002* (NSW) with the contributory negligence regime in Pt 3 of the *Law Reform (Miscellaneous Provisions Act) 1965* (NSW). That regime entitles a Court to reduce the assessment of a plaintiff's damages for contributory negligence in respect of "a breach of contractual duty that is concurrent or co-extensive with a duty of care in tort". His Honour held that the language in the proportionate liability regime departed from that language and showed a legislative intention going beyond contractual duties existing in parallel with duties of care in tort.[22]

In making his finding his Honour followed various other first-instance decisions including that of Middleton J of the Federal Court in *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd*, where his Honour stated:

> Where a claim brought by an applicant does not have as one of its necessary elements any allegation of failing to take reasonable care, an additional enquiry into the failure to take reasonable care may become relevant in the course of a trial to determine the application of Pt IVAA. Even though the claims in this proceeding themselves do not rely upon any plea of negligence or a "failure to take reasonable care" in a strict sense, a failure to take reasonable care may form part of the allegations or the evidence that is tendered in the proceedings. At the end of the trial, after hearing all the evidence, it may be found that Pt IVAA applies.[23]

[18] *ASF Resources Ltd v Clarke* [2014] NSWSC 252, [42] (Kunc J).

[19] *Reinhold v NSW Lotteries Corp (No 2)* (2008) 82 NSWLR 762; [2008] NSWSC 187.

[20] *Reinhold v NSW Lotteries Corp (No 2)* (2008) 82 NSWLR 762, [31]; [2008] NSWSC 187.

[21] *Reinhold v NSW Lotteries Corp (No 2)* (2008) 82 NSWLR 762, [31]–[32]; [2008] NSWSC 187.

[22] *Reinhold v NSW Lotteries Corp (No 2)* (2008) 82 NSWLR 762, [28]; [2008] NSWSC 187.

[23] *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* (2007) 164 FCR 450, [30]; [2007] FCA 1216.

C. Approach B: A Legal Inquiry

The scope of the proportionate liability regime was considered more recently in *Perpetual Trustee Co Ltd v CTC Group Pty Ltd (No 2)* (*Perpetual*),[24] which concerned a breach by the respondent of its obligations of care under a mortgage origination deed. The deed contained a number of warranties, including to exercise reasonable care. Relevant for present purposes, however, was a warranty that CTC was not aware of any circumstances in respect of which a proposed loan could reasonably be expected to cause a prudent lender to regard the Loan or Mortgage (as defined) as an unacceptable investment. This warranty did not require a finding of carelessness. An indemnity was granted protecting Perpetual against losses arising from a breach of the warranty, which Perpetual submitted was invoked by CTC's breach. Perpetual submitted that the proportionate liability regime was not engaged as the claim under the specific warranty did not arise from a failure to take reasonable care.

The Court ultimately determined that the effect of the indemnity was that the parties intended to contract out of the proportionate liability regime,[25] so the Court's consideration of arguments surrounding the scope of the regime was *obiter* only. That said, Macfarlan JA concluded, contrary to the decision in *Reinhold*, that "[f]or a successful action for damages to have arisen from a failure to take reasonable care, it is in my view necessary that the absence of reasonable care was an element of the, or a, cause of action upon which the plaintiff succeeded".[26] His Honour noted that the contrary view would produce the absurd result that a party who failed to perform a strict contractual obligation would benefit from being found to have acted negligently rather than innocently. His Honour concluded as follows:

> In my view the application of Part 4 turns not on the facts that happen to be found but on the essential character of the plaintiff's successful cause of action. Subject to cases that are conducted without regard to the pleadings, if negligence is an essential element of that cause of action, it will have been pleaded in the Statement of Claim. If it is not, it will not have been pleaded. It would be curious indeed if, to attract Part 4 of the Act, the defendant pleaded and proved his or her own negligence when that was not alleged by the plaintiff. The text of s 34(1) does not, in my view, contemplate that occurring. The natural meaning of the words used indicates that a failure to take reasonable care must be part of, and therefore an element of, the plaintiff's successful cause of action.[27]

His Honour's reasoning was not adopted by the remainder of the Court. Meagher JA declined to express a view on the issue. Further, Barrett JA did not agree, referring to his earlier decision in *Reinhold* and to like comments made by Ashley JA in support of that decision.[28] The issue has not been considered by an appellate court since.[29]

IV. Approach B (a Legal Inquiry) Should Be Preferred

In the author's view, approach B above – namely, a legal, rather than a factual inquiry – is the correct and preferable one. Strict claims under contract should not be subject to the proportionate liability regime whether or not a Court finds that a failure to take care existed in fact. There are five main reasons why this is the case.

First, a claim under an indemnity or a strict contractual warranty does not, in the author's view, "arise from" a failure to take reasonable care using those words' ordinary meaning. For causes of action in tort, a failure to take reasonable care is an essential (if not sufficient) element of the cause of action. However, a failure to take reasonable care has no relevance at all to a contractual cause of action. It is not

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

[25] This is a feature unique to the NSW, Western Australian and Tasmanian legislation where parties are entitled to contract out of the proportionate liability regime – see, eg, *Civil Liability Act 2002* (NSW) s 3A(2). Parties in Victoria do not enjoy this right.

[26] *Perpetual Trustee Co Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58, [22].

[27] *Perpetual Trustee Co Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58, [23].

[28] *Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd* (2008) 21 VR 84, [106]; [2008] VSCA 208.

[29] Special leave to appeal was sought to the High Court, but only on the issue of whether the parties intended to contract out of the proportionate liability regime; see *CTC Group Pty Ltd v Perpetual Trustee Co Ltd* [2013] HCATrans 248.

an element of that action, it need not be proved for the action to succeed, and nor is due care a defence. A failure to take care is, in fact, entirely irrelevant to liability under a contractual claim and damages awarded under it. A contractual claim cannot logically or semantically be said to therefore "arise from" a failure to take care.[30]

Second, the purpose of the proportionate liability regime was to replace and avoid the perceived injustices of the joint and several liability rule in cases of pure economic loss and property damage.[31] Courts have consistently stated, however, that the regime was not intended to go beyond that purpose, and it cannot create a cause of action where none otherwise existed.[32] A claim under an indemnity where a single party is surety is a contractually allocated cause of action against that party. Issues of joint and several liability do not arise in such a context as a third party cannot be liable under such a claim. The proportionate liability regime was not, it is submitted, intended to operate in those circumstances to create a liability which would not otherwise exist.

Third, as noted by Macfarlan JA in *Perpetual*, the approach in *Reinhold* would produce the "absurd result" that a defendant who wishes to invoke the proportionate liability regime would need to plead its own negligence in order to do so. This would lead to defendants sued for breach of a strict contractual obligation to themselves plead that they did not breach any duty; but if they did, they were careless. It is difficult to understand the rationale why those who take care ought not to enjoy the benefit of apportionment, but those who do not will.

Fourth, notwithstanding the comments made by Barrett J in *Reinhold*, that approach would be the one which in fact leads to an inconsistency between the proportionate liability and contributory negligence regimes. Contributory negligence applies where the damage in question is caused partly by the claimant's own failure to take care and partly by the "wrong" of any other person, which is defined as an "act or omission that amounts to a breach of a contractual duty of care that is concurrent and co-extensive with a duty of care in tort".[33] This is, quintessentially, a legal rather than a factual analysis. If the interpretation in *Reinhold* is accepted, the proportionate liability regime – which would adopt a factual inquiry – would operate far more broadly than the contributory negligence regime.

Finally, a consideration of the legislative policy to reduce the onus on professional indemnity insurers does not support the broad reasoning set out in *Reinhold*. In this regard, most insurers write policies in terms which cover contractual liability, provided that the liability would otherwise have arisen at general law (ie, from a failure to take reasonable care). Such policies generally contain a liability exclusion for loss which is voluntarily assumed by a party.[34] If contractual liability arose without a breach of duty of care (as occurred in *Perpetual*), the vast majority of professional and other liability policies would exclude cover and would not therefore be adversely affected. A broad interpretation is therefore in excess of what is needed to protect insurers.[35]

V. Conclusion

It is both surprising and unsatisfactory that an issue which holds such importance, relevance and influence on risk allocation and legal proceedings has not been considered in greater detail either at an appellate or High Court level. Courts have consistently recognised the difficulties which arise in construing the

[30] See generally Barbara McDonald and John Carter, "The Lottery of Contractual Risk Allocation and Proportionate Liability" (2009) 26 *Journal of Contract Law* 1.

[31] *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, 625 [16]–[17]; [2013] HCA 10.

[32] See generally *Gunston v Lawley* (2008) 20 VR 33; [2008] VSC 97.

[33] See, eg, *Wrongs Act 1958* (Vic) s 25.

[34] Owen Hayford, "Proportionate Liability – Its Impact on Contractual Risk Allocation" (2010) *Building and Construction Law* 11, 18–19; Andrew Stephenson, "Proportionate Liability in Australia – The Death of Certainty in Risk Allocation in Contract" (2005) *The International Construction Law Review* 64, 72–73.

[35] Andrew Stephenson, "Proportionate Liability in Australia – The Death of Certainty in Risk Allocation in Contract" (2005) *The International Construction Law Review* 64, 73.

scope of the proportionate liability regime and until the issue is properly dealt with at a judicial level, uncertainty will continue to plague parties in this area. In the meantime, it is hoped that this article provides some guidance to parties as to which way a Court might lean should the issue arise in a given case. Though an argument either way will remain fraught with risk, as a matter of law and policy courts ought to adopt a legal interpretation of the words "arising from a failure to take reasonable care" and exclude from the operation of the regime strictly contractual claims.