



RICHARD DOUGLAS SC

Mr Douglas is a graduate of the University of Queensland, obtaining a Bachelor of Commerce in 1977 and a Bachelor of Laws, with Honours, in 1980. He is currently completing his Master of Law degree at that university.

He was admitted to the Bar in 1980 and after two years working for solicitors in Townsville commenced practice as a Barrister in Brisbane. In 1998 he was appointed Senior Counsel in and for the State of Queensland. His areas of specialty are insurance, trade practices and real property.

He has chambers in Brisbane and Sydney.

Through the Council of the Bar Association, of which he was a member and Honorary Secretary from 1993 to 1996, and a member from 2000 to 2005, he was engaged in extensive dealings with the Queensland Government in the drafting of the *Personal Injuries Proceedings Act 2002* and the *Civil Liability Act 2003*. He was the principal draftsman of a number of the provisions of those Acts.

He has presented numerous papers and published articles on varying topics on insurance law, security for costs and directors' liability.

He was the Chairman of a stakeholder reference group appointed by the Queensland Attorney General which reported to the Queensland government in early July 2004 as to options available to unify pre-proceeding process regimes.

He was Senior Counsel Assisting the 2005 Queensland Public Hospitals Commission of Inquiry.

He is a joint author of a text *Annotated Civil Liability Act Queensland* published by Butterworths (LexisNexis) in October 2006, national loose-leaf service on civil liability legislation of the states and territories. He is a member of the editorial board of the "Australian Civil Liability" newsletter published by Butterworths.

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Contract and Insurance Issues and
Pitfalls Arising from Construction Site
Accidents

R J Douglas SC

Scenario

- P – Plaintiff suffering injury in a work site.
- D1 – Principal contractor.
- D2 – Subcontractor.
- D3 – Building Product Manufacturer or Hirer.

Topics

- Proportionate liability (briefly).
- Tortfeasor apportionment.
- Contractual indemnity.
- Damages for breach of building obligations.
- Damages for contractual failure to insure.

Proportionate Liability

- *Civil Liability Act 2003* –

- 28 Application of pt 2**

- (1) This part applies to either or both of the following claims (***apportionable claim***)—

- (a) a claim for economic loss or damage to property in an action for damages arising from a breach of a duty of care;

- (b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1989* for a contravention of section 38 of that Act.

...

Proportionate Liability (cont'd)

- *Civil Liability Act* –

(3) This part does not apply to a claim—

(a) **arising out of** personal injury; or

(b) by a consumer.

(analogues interstate exclude claims for personal injury
genesis)

Walton v NEMGIA [1973] 2 NSWLR 73, 84 (“claim made
originated in or sprang from” thing specified)

Proportionate Liability (cont'd)

- *Civil Liability Act 2003 (Qld).*

31 Proportionate liability for apportionable claims

(1) In any proceeding involving an apportionable claim—

(a) the liability of a defendant who is a concurrent wrongdoer in relation to the claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just and equitable having regard to the extent of the defendant's responsibility for the loss or damage; and

(b) judgment must not be given against the defendant for more than that amount in relation to the claim.

(analogues interstate).

Proportionate Liability (cont'd)

- *Civil Liability Act* –

- 32A Contribution not recoverable from concurrent wrongdoer**

- Subject to this part, a concurrent wrongdoer against whom judgment is given under this part in relation to an apportionable claim—

- (a) can not be required to contribute to the damages recovered or recoverable from another concurrent wrongdoer for the apportionable claim, whether or not the damages are recovered or recoverable in the same proceeding in which the judgment is given; and

- (b) can not be required to indemnify the other concurrent Wrongdoer.

(analogues interstate - WA excepts contractual indemnity)

Proportionate Liability (cont'd)

- If concurrent wrongdoers have previously made an agreement by which one indemnifies the other from harm, does the indemnity clause remain enforceable or is it struck down by the operation of s 32A?

Proportionate Liability (cont'd)

“The question is a thorny one. On its face, that is what the section seems to do, but it seems unlikely that Parliament would have intended to so drastically affect a party’s commercial bargain ... one of the ways in which commercial parties arrange their affairs is to require parties contracting with them to provide a full indemnity and to carry insurance for any loss. Why would the legislation cut across that arrangement, thereby increasing the risk of creating an uninsured defendant?”

Proportionate Liability: An analysis of the Victorian and Commonwealth legislative schemes
(Commercial Bar Assoc paper for CLE seminar 18 August 2005) by AG Uren QC and D Aghion.

Tortfeasor Apportionment

- Scenario – P, employee of D1, injured on work site due to negligence of D1, D2 and D3.

Tortfeasor Apportionment (cont'd)

- *Law Reform Act 1995 (Qld)* –

[6] **Proceedings against and contribution between joint and several tortfeasors.** Where damage is suffered by any person as a result of a tort (whether a crime or not)-

...

(c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that **no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.**

(analogue interstate)

Tortfeasor Apportionment (cont'd)

- *Law Reform Act* –

7. **Amount of contribution and power of the Court.**

In any proceedings for contribution under this Part of this Act 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**.

(analogue interstate)

Tortfeasor Apportionment (cont'd)

- Apportionment calculus:

No doubt the making of the apportionment which the legislation requires involves a comparison of culpability of both parties i.e., the degree to which each has departed from what is reasonable (*Podrebersek v. Australian Iron and Steel Pty Ltd* (1985) 59 ALR 529 at 532), but that is not the only element to be considered. Regard must be had to the 'relative importance of the acts of the parties in causing damage' (*Podrebersek* at page 533) and it is 'the whole conduct of each negligent party in relation to the circumstances of the accident which must be subject to comparative examination'.

Winbergen v Hoyts Corporation Pty Ltd (1997) 72 ALJR 65 at 68 per Hayne J.

Tortfeasor Apportionment (cont'd)

- Considerations upon apportionment:

[27] Among the circumstances to be considered are, in my opinion, the terms of any contract governing the rights and liabilities of the parties at the time the damage was done. Those terms may provide for a complete indemnity by one party in favour of the other as regards the damage for which they both are liable to another; or conversely, they may provide a complete exemption from or partial limit on liability for one against the other with respect to damage to be apportioned. Such an indemnity may be express, or it may result from the application of ordinary legal principles regulating contracts of that kind, as, for example, the legal liability to the buyer of a seller of defective goods, as in *Mowbray v Merryweather* [1895] 2 QB 640. Alternatively, there may be a complete or partial limitation of liability in favour of one of the tortfeasors arising, for example, from agreement as in *Alex Kaye Pty Ltd v Fife* (1966) 9 FLR 246, 252; or from a specific statutory provision, as in *Unsworth v Commissioner of Railways* (1958) 101 CLR 73; or, again, **it may be the effect of the nature and terms of the contract between them that one of two tortfeasors should contribute a disproportionately larger share than the other to the loss or damage for which both are liable.**

Kim v Cole [2002] QCA 176 per McPherson JA (HC Special Leave granted but appeal discontinued).

Tortfeasor Apportionment (cont'd)

- Irrelevant that one tortfeasor has actual knowledge, and the other tortfeasor constructive knowledge of the risk which materialises and causes harm.

Higgins v William Inglis & Son Pty Ltd [1978]
NSWLR 649.

BI (Contracting) Pty Ltd v The Myer Emporium Limited [2005] NSWCA 305.

Tortfeasor Apportionment (cont'd)

- Irrelevant merely to identify tortfeasor owes a non-delegable duty to the injured plaintiff. Substance of breach must be scrutinised.

DI (Contracting) Pty Ltd v The Myer Emporium Limited [2005] NSWCA 305 at 21.

Tortfeasor Apportionment (cont'd)

- A 100% apportionment is open to be awarded, at least in case of technical liability in one tortfeasor:

Mr Boulton, for the third defendant, rightly conceded that if it were to be found that his client had negligently fastened the fitting, it should in the end bear the entire liability. I think this concession was correctly made, and that although all parties are liable to the plaintiff by reason of absolute statutory duties, when it comes to considering the question of contribution under s.6 of the *Law Reform (Tortfeasor's Contribution Contributory Negligence and Division of Chattels) Act of 1952*, the "responsibility for the damage" was entirely that of the third defendant.

Tortfeasor Apportionment (cont'd)

Different considerations may apply in a case where the respective defendants are liable only by reason of breach of absolute statutory duty, in which case they may sometimes be entitled to equal contribution from each other. But in a case such as the present where the acts or omissions which caused the plaintiff's loss, and the tortious fault lies completely with one party, whilst the other parties have a legal liability to the plaintiff only by reason of an absolute statutory duty, I think that the other parties are entitled to 100 per cent contribution, and in that sense an indemnity from the third defendant.

Sherras v Van der Maat & Ors [1989] 1 QdR 114 at 117-8

Contractual Indemnity

- The traditional view was that an indemnity, like an exclusion clause in a commercial contract was to be construed according to its ordinary natural meaning, and *contra proferentem* in the case of ambiguity.

Darlington Futures Ltd v Delco Australia Pty Ltd (1986) 161 CLR 500.

Contractual Indemnity (cont'd)

- The surety jurisprudence now applies in construing all indemnities:

At law, as in equity, the traditional view is that the liability of the surety is *strictissimi juris* and that ambiguous contractual provisions should be construed in favour of the surety. The doctrine of *strictissimi juris* provides a counterpoise to the law's preference for a construction that reads a provision otherwise than as a condition. A doubt as to the status of a provision in any guarantee should therefore be resolved in favour of the surety.

Andar Transport Pty Ltd v Brambles Ltd (2004)
217 CLR 424 at 561

Contractual Indemnity (cont'd)

... by reason of the judgment in *Andar*, the approach in *Darlington Futures Ltd v Delco Australia Pty Ltd* can no longer be relied on in regard to indemnity clauses.

F & D Normoyle Pty Ltd v Transfield Pty Ltd
[2005] NSWCA 193 per Ipp JA (McColl JA
agreeing).

Contractual Indemnity (cont'd)

- The duo of issues on construction of indemnities consist of close scrutiny of the objective commercial intention of the parties in allocation of risk, coupled with construing any hint of ambiguity against the indemnity beneficiary.

Roads & Traffic Authority of New South Wales v Palmer [2003] NSWCA 58.

Ellington v Heinrich Constructions Pty Ltd [2004] QCA 475.

F & D Normoyle Pty Ltd v Transfield Pty Ltd [2005] NSWCA 193.

Sebastian v Australian Capital Territory [2006] ACTSC 6

D Gosewisch *Difficulties with indemnities between business entities* (2006) 34 ABLR 89.

Damages for Breach of Building Obligations

- *King v Cole* remains the law in Queensland but good reason to doubt its meaning and efficacy, in particular noting NSWCA cases.

Oxley County Council v MacDonald [1999] NSWCA 126.

Redken Laboratories (Aust) Pty Ltd v Docker [2000] NSWCA 100 (HC special leave refused).

Climax Management Pty Ltd v Scansash [2002] NSWCA 167.

cf. *Commex Communications Ltd v Cammeray Investments Pty Ltd* [2005] QSC 394.

Damages for Breach of Building Obligations (cont'd)

- UK jurisprudence would allow of recovery of damages irrespective of tortfeasor apportionment:

I cannot accept the argument which in effect says that the apportionment between Foster Wheeler and Cement Gun by this court necessarily decides that the accident as to 25 per cent, was not caused by Plibrico's breach of warranty.

Damages for Breach of Building Obligations (cont'd)

... I cannot see why this application of the law of contract is altered or superseded by the introduction and exercise of the jurisdiction under the Act of 1935 to apportion the incidence of liability between joint tortfeasors. I consider, therefore, that that part of the judgment I favour of the plaintiff which Foster Wheeler cannot pass on to Cement Gun, the 25 per cent., is recoverable from Plibrico as damages for breach of the implied warranty.

Sims v Foster Wheeler Ltd & Anor [1966] 1 WLR 769 at 777 per Russell LJ.

Damages for Breach of Building Obligations (cont'd)

- New South Wales authority is to same effect:

67 While the legislative scheme the High Court considered in *Astley v Austrust* was different in text, history and purpose, the reasoning confirms the distinction between obligations in tort and obligations in contract and the preservation of the right of a party, which suffered damage as a result of a tort, to pursue its remedies for any breach of a contract between it and the tortfeasor. Brambles' obligation to Oxley flowed from a promise voluntarily made for good consideration. **In the absence of some contractual stipulation to the contrary, there is no reason of justice or sound legal policy which should prevent Oxley recovering for all the damage that is causally connected to Brambles' breach of contract even though Oxley's conduct contributed to the damage which it suffered.** By its own voluntary act, Brambles accepted an obligation to load and secure the goods with reasonable care and skill so that they could be unloaded in a safe and proper manner at the Oxley depot, without presenting a risk of injury to Oxley's employees there to assist in the unloading, and to pay damages for any loss or damage flowing from a breach of that obligation. (Compare *Astley v Austrust* 73 ALJR at 423 para 86).

68 Accordingly s5 (1) of the 1946 Act does not affect Oxley's right to recover damages for breach of contract. The amount of the damages would be measured by the damages and the costs Oxley was ordered to pay to the plaintiff and its own costs of the proceedings brought by the plaintiff against it, less any amount paid by Brambles on account of those damages and costs.

Oxley County Council v MacDonald [1999] NSWCA 126 per Sheller JA.

Damages for Breach of Building Obligations (cont'd)

- Remains potential for damages in contract to be reduced for contributory fault (but probably with lesser apportionment than vis-à-vis plaintiff) where contractual obligation breached is one co-extensive with a duty of care in tort, but not where an absolute or prescriptive contractual obligation is so breached.

Suosarri v Steinhardt [1989] 2 QdR 477.

Damages for Contractual Failure to Insure

- Damages for breach of contract are also recoverable for failure by one party to provide another party with insurance cover.

Besselink Bros Pty Ltd v Citra Constructions Pty Ltd [1984] FCAFC (31 October 1984).

Western Sydney Regional Organisation of Councils Group Apprentices v Statrona Pty Ltd [1995] NSWCA (29 August 1995).

Hacai Pty Ltd v Rigal Kent Pty Ltd [1996] WAFC (16 August 1996).

Thiess Contractors Pty Ltd v Norcon Pty Ltd [2001] WASCA 364.

Ellington v Heinrich Constructions Pty Ltd [2004] QCA 475.

Damages for Contractual Failure to Insure (cont'd)

- It is irrelevant if the party suing for breach of failure of the other party to insure is itself indemnified by insurance, with the insurer exercising a right of subrogation:

There is no difference in principle where a plaintiff is entitled to recover damages for breach of a contract to effect liability insurance for its benefit. **The plaintiff's entitlement under a different contract for indemnity on the contingency of its becoming legally liable to pay compensation to the worker does not reduce the damages recoverable for breach of contract.** The plaintiff is not indemnified by the second contract of insurance for breach of the first contract but because it has made a contract for a contingency upon the happening of which it became entitled to indemnity. If ... [the plaintiff] claims against an insurer to be indemnified it must account to the insurer for any benefit which reduces the loss or liability insured against; ... For like reason it is immaterial that, had ... [the defendant] obtained the cover it contracted to obtain, that insurer might have been entitled to contribution from some other of ... [the plaintiff's] insurers.

WCROCG v Statrona [1995] NSWCA (29 August 1995) per Sheller JA

Damages for Contractual Failure to Insure (cont'd)

- Important that parties effect agreement as to insurance where required (eg. “take out policy with insurer, and on terms, satisfactory to the head contractor”):

[33] The subcontract was executed by both appellant and respondent. The page containing the second schedule was signed, or at least initialled, on behalf of both parties. Apparently by oversight the amount of cover (and other details) to be effected by the insurance policy was omitted.

[34] The appellant submits that the consequence is to invalidate its promise to effect the policy. It is said that that part of the contract comprising the obligation to take out the policy is illusory or ‘irremediably obscure’. Another way of expressing the point is that the promise is void because an essential term of it was uncertain or was left to be agreed.

Damages for Contractual Failure to Insure (cont'd)

[35] There can be no doubt about the correctness of the submissions. They are supported by *Groves & Anor v BMW Finance Ltd* [2001] QCA 16 especially at paras [20], [40], [43] and [44]. In that case the lessor of motor vehicles was entitled, in the event of the lessee's default, to recover an amount of money calculated in accordance with a formula set out in the lease. The calculation depended upon a sum representing the 'final value' of the vehicles being inserted in a schedule to the lease. The amount was omitted and it was held that the calculation on which proof of the lessor's claim depended could not be made.

[36] The extent of the appellant's obligation to effect insurance was to be measured by the agreement of the parties recorded in Schedule 2. The terms of the contract suggest, irresistibly, that the parties did not reach agreement on the point and did not record the measure. According to Kirby P in *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130 at 135, although the court endeavours to uphold the validity of agreements it cannot do so:

'... where, in effect, it is asked to spell out, to an unacceptable extent, that to which the parties have themselves failed to agree. Nor will the court clarify that which is irremediably obscure.'

Ellington v Heinrich Constructions Pty Ltd & Anor [2004] QCA 475 per Chesterman J (for the court).