RESPONDING TO CLIMATE CHANGE: MANAGING YOUR PROFESSIONAL LIABILITY RISKS

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ABSTRACT
Responding to climate change and extreme weather events is an everyday matter for professionals in the water sector. An examination of existing professional liability case law in Australia and internationally indicates that the standard required to discharge a professional's duty of care to take account of future climate change and extreme weather risks is rising and will continue to rise. Water professionals should be aware that mere adherence to existing professional codes or standards may not be sufficient to discharge this duty, particularly where more recent risk information is available. However, there are measures that professionals can take to reduce their professional liability risks.

INTRODUCTION
Professionals in the water sector, like all professionals, owe a duty of care to exercise a fair, reasonable and competent degree of skill and care in the provision of advice and services. This duty can be owed to a client under a contract for professional services or to a third party with whom no contractual relationship exists. The law of negligence extends a professional's duty beyond his or her client to third parties that the professional can reasonably foresee will suffer loss or damage as a result of their careless conduct. In negligence cases, a key question is whether a reasonable person in the professional's position would have foreseen that his or her conduct would lead to the relevant injury, loss or damage and what a reasonable person in that position would have done to avoid that foreseeable risk of injury.

This paper steps through the key components of the standard of care required and looks at measures that professionals can adopt to reduce the risk of being sued for a failure to exercise due care and skill. It does so by examining a number of relevant Australian and international cases and discussing how the principles drawn from these cases might apply in the context of climate change and extreme weather events.

Although the standard of care owed to a client under contract and that owed to third parties under the law of negligence are very similar, the ability to reduce professional liability risks are different. In the case of a contractual duty, a professional may be able to negotiate an altered standard of care and limit his or her liability under contract. This option is not available in the case of third parties with whom no contractual relationship exists. As a result, this paper focuses on what courts have had to say about practical measures for professionals to reduce their professional liability risk. In the author's view, this is a sound approach because even where the professional is able to obtain an indemnity from a client in respect of a third party claim, this will not prevent an action being taken in the courts. Professional reputations can be severely damaged even where a case is not proven, and it should be kept in mind that a professional will be unlikely to recover all his or her costs and will not be able to recoup the lost time and energy that a court case entails.

THE STANDARD OF CARE REQUIRED: KEY PRINCIPLES

Similar standard under contract and negligence
The standard of care required of a professional with a particular expertise or skill is that of the ordinary skilled person exercising and professing to have that expertise or skill. Unless specifically altered by contract, this standard will essentially be the same under contract and under the law of negligence.

An ordinary degree of skill and care is required
In the seminal High Court case of Voli v Inglewood Shire Council (1963) 110 CLR 74 at 84, Justice Windeyer stated:

An architect undertaking any work in the way of his profession accepts the ordinary liabilities of any man who follows a skilled calling. He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill or the highest professional attainments. But he must bring to the task he undertakes the competence and skill that is usual among architects practising their profession.

That an ordinary degree of professional care, skill and diligence is the required standard applies
across the professions (see also Brickhill v Cooke [1984] 3 NSWR 396 at 398 (engineers); Rogers v Whitaker (1992) 175 CLR 479 at 483 and 487 (medical practitioners); Hawkins v Clayton (1988) 164 CLR 539 at 580 (solicitors); Henderson v Amadio (1995) 62 FCR 1 at 135 (accountants); Lewis v Tressider Andrews Associates Pty Ltd [1987] 2 Qd R 533 (insurance brokers)).

Although the use of an extraordinary degree of skill or care is not required, where a specialisation is recognised within a profession and the person holds themselves out as having that specialisation, they will be required to exercise the skill and care of the ordinarily skilled practitioner within the relevant specialisation or field (Rogers v Whitaker (1992) 175 CLR 479 at 483; see Orlit Pty Ltd v JF & P Consulting Engineering Pty Ltd (1995) 11 BCL 260 at 263; and Eckersley v Binnie & Partners (1988) 18 Con LR for engineering subspecialties).

The standard is that which is widely accepted by the relevant profession in Australia

The courts will look to the degree of skill and care that is widely practised and accepted within the relevant profession or specialisation in Australia. In each of the states of Australia this position has been clarified by legislation (see Civil Liability Act 2002 (NSW), ss 50-5P; Civil Liability Act 2003 (QLD), ss 20-22; Civil Liability Act 1936 (SA), ss 40-41; Civil Liability Act 2002 (Tas), ss 21-22; Wrongs Act 1958 (Vic), ss 57-60; and Civil Liability Act 2002 (WA), ss 5PA-5PB.). For example, in New South Wales, the following applies:

5O Standard of care for professionals

1) A person practising a profession (a professional) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.

2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.

3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.

4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.4

In judging whether a professional has exercised the competence and skill that is usual among his or her profession, courts will take into account expert evidence on the issue and look to relevant published standards and codes. The examination of whether or not a professional has met the required standard of care will be heavily fact dependent with much expert evidence likely to be before the court. However, the courts have made it clear that the standard to be applied is a matter for the court to decide. For example in Council of the Shire of Noosa v Farr & Ors [2001] QSC 60 at [62], the Queensland Supreme Court held, relying on High Court authority (Rogers v Whitaker (1992) 175 CLR 479 at 487), that although it will be “guided by the evidence of acceptable professional practice, it is for the court to adjudicate on what is the appropriate standard of care and whether it has been complied with”.

Standard to be judged with reference to the state of knowledge at the time

The applicable standard of care is that applying at the time the professional services are provided.

Courts have been clear that a professional is not to be judged with the benefit of hindsight. For example, in a case before Queensland Court of Appeal regarding the transfusion of AIDS-contaminated blood in the course of an operation in 1983, the Court held that the defendants were not negligent because at the time the AIDS virus had not been identified or isolated (Dwan v Farquhar [1988] 1 Qd R 234).

This principle will be crucial in the case of professional services that rely on scientific knowledge about climate change and extreme weather events. Courts will look to whether or not the professional acted in accordance with standards and codes of conduct published at the time the services were provided as “very strong evidence as to what is the proper standard which should be adopted and unless there is some justification, a departure from this will be regarded as constituting a breach of duty” (Lloyd Cheynham & Co Ltd v Littlejohn & Co [1987] BCLC 303 at 313; Bevan Investments Ltd v Blackhall and Struthers (No 2) [173] 2 NZLR 45 at 65).

However, because professional standards and practices are in flux due to rapidly changing scientific knowledge and professional codes of practice take time to be agreed and implemented, professionals in the water sector should be cautious in relying solely on such codes. The extent to which codes and other relevant standards have been updated to take into account the latest scientific knowledge on climate change and extreme weather events should be investigated.

Courts will look to published literature to determine the state of knowledge at the relevant time. This presents challenges for professionals given the extent of literature available on climate change and its impacts on the foreseeability of extreme weather events. The cases indicate that while a professional is not required to read every single publication in the field, he or she needs to take into account knowledge that has “entered the general
corpus of knowledge of which all experts in the defendant's field could reasonably be expected to be aware” (Gover v South Australia (1985) 39 SASR 543 (at 562). Water professionals should independently consider the latest climate change information and remain abreast of the latest practices of leaders in the field.

An extreme weather event that is unprecedented may still be foreseeable

Given the current state of knowledge about the impact of climate change on extreme weather events, it will be increasingly difficult to argue that just because an particular weather event is unprecedented, either in its intensity or location, that it was not foreseeable (Cullen Howe 2012, 227-228). Even half a century ago, this argument was not always successful.

In Laukkonen v Jewel Tea Co 222 N.E.2d 584 (III. App. Ct., 4th Dist. 1966) the Appellate Court of Illinois held building engineers liable in negligence for the collapse of a concrete pylon as a result of strongest winds ever recorded at that location. The pylon, located outside a shopping centre, toppled and fell on the plaintiff as she attempted to enter the shopping centre in a severe thunderstorm accompanied by hail and high winds. She was rendered a paraplegic.

Although relevant weather records showed that winds of that magnitude had never been recorded in the area of the site, the Appellate Court of Illinois held that based on the scientific knowledge available at the time of the design and construction of the pylon winds of the magnitude that led to the pylon toppling over were reasonably foreseeable. The defendant engineers knew or should have known that the pylon they designed was incapable of withstanding the wind load force reasonably to be expected at the site and should have used heavier concrete to prevent the eventual collapse. The Court noted that the engineers were members of a licensed profession which exists in large to prevent harm to the public from structurally unsafe buildings. The engineers had not, therefore, used the degree of skill ordinarily and customarily used by the members of the defendants' profession under similar circumstances.

However, much will depend on the facts of the case. Some unprecedented events are not foreseeable and liability will not attach. In Martin v Board of Education of City of Albuquerque 447 P.2d 516 (N.M. 1968) the New Mexico Supreme Court held that an engineer who designed a culvert to carry more water per second than the peak flow recorded in the previous 73 years (since records began) was not negligent. In contrast, in Commissioner of Railways (WA) v Stewart [1936] 56 CLR 520, the High Court of Australia held an engineer liable in negligence for failing to design sufficient culverts or flood prevention when designing an embankment to hold a rail line that was to be constructed across a depression through which water had previously flowed in heavy rains and floods. In a flood event that was the heaviest recorded over the previous 50 years of records (1886 – 1936) and double the previous highest fall (204mm on the day where 102mm was the previous record), the embankment and culverts acted as a dam, flooding property on one side and then damaging property on the other when the embankment broke. The High Court held that a reasonably prudent engineer would have provided against such an event.

However, given the age of these cases and what is now known about climate change, it is unlikely that Courts today will place much weight on the fact that a particular extreme weather event is unprecedented or not. Courts are more likely to look at the body of knowledge about that type of weather event, whether it be flood, drought or storm for example, to examine whether the event was reasonably foreseeable and whether a professional of the particular kind, holding him or herself out as having a particular specialisation, if relevant, would reasonably have provided for that event.

Courts will look closely at the information relied on for a design

Courts will look closely at the information relied on when providing professional advice and services. The standard required of a professional extends to ensuring that the information required on is correct and fit for purpose.

In Council of the Shire of Noosa v Farr & Ors [2001] QSC 60, the Queensland Supreme Court held the defendant engineer to be in breach of a contractual duty to exercise due skill and care because the defendant had relied on inadequate information and had failed to appreciate that more information or studies were required.

In 1985, the plaintiff, Council of the Shire of Noosa, put out to tender a scope of work that involved the design of a scheme by which water could be drawn from the Mary River and piped to the Council's existing water treatment plant near Lake MacDonal. In its entirety, the project was worth $10 million and was required to ensure adequate water supply for Noosa, which was growing quickly. The defendant engineers won the contract for the design of the means by which water was to be taken from the river to the pumps for transport through the pipework. The intakes designed by the defendants were never able to supply adequate water to the pumps and thence to the pipes. The Council sued the engineers for breach of contract claiming losses that it suffered as a result of the failure of the water intake, namely the costs of engaging another consulting engineer to design and build an alternative intake system at a cost of about $500,000.

The defendant engineers had won the contract for the intake design on a number of grounds, including cost. The defendant adopted the cheaper of two
options for the intake, favouring a relatively cheap "screen" intake over a more expensive "in-bank" intake. However, the screen intakes ultimately failed because they were only effective where a stable riverbed and water depth with no siltation could be maintained and ultimately this was not the case in the location the engineers had the intakes installed in the Mary River.

The Queensland Supreme Court heard much expert evidence on the hydrology and characteristics of the Mary River and on recent flood events that had impacted the riverbed. The defendant engineers had assumed, based on inadequate information, that the bed of the Mary River was stable. Expert evidence presented to the Court demonstrated that this was not the case. In particular, the engineers had not undertaken any surveys of the riverbed, nor had they bothered to obtain a copy of an existing survey of the riverbed at the relevant location which they knew to exist. This was despite the fact that the Mary River had been subject to flooding in the time between the submission of the design and the installation of the screen intakes.

The Court held the defendant engineers had been negligent in adopting the screen intake design without conducting adequate surveys of siltation or the effects of frequent flooding on the riverbed at the site where the screen intakes were to be installed. It held that in the absence of evidence disproving the existence of risks, a reasonable engineer would not proceed.

A second, slightly older, case covers similar themes and provides helpful statements that, when applied in the climate change context, provide guidance to professionals providing services today.

The case of Pullen v Gutteridge Haskins and Davey Pty Ltd [1993] 1 VR 27 (Victorian Full Court of Appeal) involved the engineering designs and specifications provided to the plaintiff, the Minister for Works and the State of Victoria, by the defendant, the engineering firm Gutteridge Haskins and Davey, for the renovations and refurbishment of a major swimming complex on the State Swimming Centre site on Batman Avenue in Melbourne (very close to the Yarra River). The work included demolition of the existing open-air pools and the construction of a new indoor main pool and diving pool together with various other structures. It was well known that the site was prone to soil settlement because the soil type, Coode Island silt, was notorious for being unpredictable; indeed, two prior swimming pools at the site had sunk and cracked.

The complex, completed in 1980 according to the defendant's design, fell prey to the Coode Island silt's worst. The pool complex itself suffered serious differential settling which caused the main pool to tilt towards the River and sag it is middle, and substantial cracks to open up in the surrounding structures. The Victorian Supreme Court noted in its judgement that during construction, an engineer disappeared up to his waist in the silt and an excavator sank up to its cabin!

The plaintiff sued the defendant claiming damages for breach of a duty to take reasonable care in the performance of its tasks. It was common ground at the trial that the defendant had held itself out as being a competent civil engineer, with experience in the construction of large water-retaining structures, including swimming pools. At first instance, the trial judge held that although the defendant owed the plaintiff a duty of care, it had not breached that duty. The Victorian Supreme Court, on appeal, held that the defendant had breached its duty of care to the plaintiff and had been negligent in its design of the complex. In particular, the defendant had been negligent not appreciating that certain measurements it relied on relied were not measurements of total settlement but measurements of differential settlement. The defendant should have inquired further in a number of respects.

The Court held that if the information before an engineer is inconsistent or shows unpredictability the engineer may need to inquire further:

[The engineer] should then think about it more and investigate it further. He [or she] should act conservatively. It would be normal grounds to take [into account] the worst possible scenario in his [or her] designs if he [or she] were not aware [of] the reason for the inconsistency (at 48).

There was much expert evidence before the Victorian Supreme Court in Pullen, some of it in conflict. Much was said about the characteristics and likely behaviour of the Coode Island silt, which, as mentioned above, was known to be unpredictable. For example, there were different opinions given about the extent to which a reasonable engineer would have predicted the settling of the site under the load of the pool. In the first instance, the trial judge held that there was no explanation as to the continuing subsidence at the site due to the Coode Island silt which "was guilty of 'wild fluctuation' and could not accurately be predicted by any amount of academic knowledge or experience" (at 39). The Supreme Court agreed only to the extent that "expert opinions differed on the nature of the physical processes leading to the [soil] settlement" but disagreed overall with the trial judge on this point saying this about the site:

Its behaviour – large and undifferentiated settlements – was entirely predictable. What was unpredictable was the extent of the settlement at any given point (at 39).

This reasoning has relevance in the context of the predictability of extreme weather events and climate change. It will be open to a future court to hold that although extreme weather is unpredictable in the sense of exactly when and where an particular event will occur, the growing body of
climate change makes it entirely predictable that extreme weather events within a certain range will occur within in particular region. These two cases also demonstrate that where a professional is faced with unpredictability of risks or inconsistencies in data and the professional is not aware of the reasons for the inconsistencies, a situation that may well arise in the context of climate change and extreme weather events, the standard of care may be to inquire further. However, a professional is only required to act in a manner that (at the time the service is provided) is widely accepted in Australia by peers as competent professional practice. It is important, therefore, to keep abreast of current practice in relation to assessing and providing for climate change-related risks. As noted above, this could well involve considering "worst case scenarios", along with a range of other, lower, risk scenarios.

The standard of care includes a duty to warn a client of risks

The Victorian Supreme Court in Pullen also had something to say about how the defendant engineer should have dealt with constraints put upon the design by the plaintiff client. Failing to warn a client of relevant risks, even where these are brought about by constraints placed on the design by the client, may lead a professional to fall short of the requisite standard care.

The defendant's design for the swimming centre complex in Pullen used four different types of footings. The Court accepted expert evidence that, given the Coode Island site at the site, the only two "foolproof" options for the redesign of the complex would have been to: (1) use piles to bedrock as footings throughout; or (2) to build the complex on a different site. There was some question as to whether the plaintiff client had placed limitations on the ultimate design for the complex, for example by making it clear that it would not accept the more expensive, safer, option of having pilings for all of the footings.

The Court held (at 52) that where there is an element of risk in a design, it is the duty of an engineer to inform the client of the risk. The defendant should have noted the risks associated with the cheaper, riskier proposal and still suggested "foolproof" options regardless of their practicality. It would then be up to the client to reject the safer, cheaper options.

In this context, the Victorian Supreme Court quoted with approval the following passage from Hudson's Building and Engineering Contracts, 10th edition:

... if, for instance, by reason of known facts relating to soil conditions there is only one really foolproof type of scheme, and another which is considerably more economical but involves an element of risk, it is the adviser's duty, it is suggested, to acquaint his [or her] employer of the position and leave the decision to him [or her], and in that event approval of the less safe course would clearly negative liability (at 52).

The Court in Pullen also considered with approval the Canadian case of City of Brantford v Kempt and Wallace-Carruthers and Associates Ltd (1960) 23 DLR (2d) 640 (Ontario Court of Appeal). In that case an engineer was engaged to design the substructure of a building on the site of a former rubbish dump. The defendant engineer put two options to the client. The first, more expensive option, supported the entire building upon piles and was considered "completely safe". The second, cheaper option was a mix of piles and granular fill and involved a risk of failure. The engineer recommended the second, cheaper, option to the client without identifying the risks involved. The Ontario Court of Appeal held that the engineer's failure to warn the client of the known risks of the cheaper option was a breach of the required standard of care.

Where a project brief involves only one element of a larger project, a court may take this into account. In Council of the Shire of Noosa v Farr & Ors [2001] QSC 60, the Queensland Supreme Court, discussed above, placed reliance on the fact that the screen intake was one element in the larger $10 million project to upgrade Noosa's water supply:

"Given the an efficient intake was essential to the successful operation of the entire augmentation scheme the exercise of reasonable care would have chosen the no risk intake and rejected the unknown risk of the screens." (at 62)

The Court held that although the Council had made clear throughout that it was concerned to reduced costs wherever possible, the Council would not have been prepared to jeopardise the whole $10 million dollar project for the relative small savings represented by the screen intake option (at 57).

Consideration of risks over the lifespan of the infrastructure involved

The lifespan of the infrastructure involved will shape the consideration of risks and the extent of scenario planning that might be involved in meeting the requisite standard of care, particularly the consideration of climate change risks. A number of planning cases have confirmed that decision makers are required to take into account current and future risks. For example, in Taip v East Gippsland Shire Council [2010] VCAT 1222, the Victorian Civil and Administrative Tribunal held that it will be insufficient to consider only those risks as currently assessed and reflected in 'zoning' or flood maps/overlays; the level of risk from sea level rise and other climate change effects must also be considered. Climate change risks must be considered over the design life of the development (Castletown Estates Ltd v Welsh Ministers 2013 WL
LIMITING PROFESSIONAL LIABILITY

Practical measures to reduce liability: lessons from case law

The cases above illustrate some practical steps that professional can take to reduce the risk of professional liability in the climate change context.

These include:

- Ensure that all information relied on for the provision of advice and services is accurate and sufficient. If there are any unexplained inconsistencies in data, either do not rely on it or undertake further inquiries. As a last resort, advise the client of the inadequacies, explain the risks of using the information and seek their written instructions to use it notwithstanding its inadequacies;
- Keep up to date with the latest climate change information relevant to your work and how this is being applied within your profession;
- Where using codes of practice and the like, check on their currency and supplement them with updated climate change information as necessary;
- Take into account the worst case scenario along with a range of other scenarios;
- Warn the client of the risks involved with the options under consideration or any constraints placed on your brief; and
- Include any "foolproof" options, even where uneconomical, for the client's consideration – it need not be the recommended option if it is outside the budget range.

Limiting liability under contract

In addition to taking steps to reduce the risk of liability, professional may consider taking legal advice on limiting liability under contract. However, it is important to be aware that this will only be effective as against the party with whom the contract is made and will not impact on the ability of a third party, with whom no contractual relationship exists, to commence a negligence action.\(^5\) The case of L. H. Bell & Associations Inc. v Granger 543 P.2d 428 (Ariz. 1975) illustrates that a reduction of a professional's standard of care under contract will not be effective against a third party who suffers reasonably foreseeable loss as a result the professional's negligence.

In Bell the Arizona Supreme Court found an engineering contractor liable in negligence for failing to design adequate flood prevention (dikes and culverts) for a bridge. Under the relevant contract, the client – the Maricopa County – required the bridge and its approaches to withstand a so-called "25 year flood" event. The bridge and its approaches were designed by the defendant engineers to this standard.

After the bridge was constructed the area was subject to a "100 year flood" event and although the bridge itself did not suffer any relevant damage, the design of the dikes and culverts caused water to pond and flood a nearby property, owned by the plaintiffs. As a result, a building on the plaintiff's property floated off its foundation and was destroyed. The engineering firm was held liable in negligence for the plaintiff's loss because a "100 year flood" was held by the Arizona Supreme Court to be reasonably foreseeable. The fact that the engineering firm was only required under contract to design the bridge and its approaches to cater for a "25 year flood" was not relevant to the question of the standard of care owed to a third party.

As noted above, the critical test in negligence is foreseeability. Any contractual limitation will limit liability to the contracting party but will have no bearing on the question of the foreseeability of injury to third parties. While an indemnity may cover financial liability of the professional for a successful court action against the professional, it will not protect professional reputation, and in most cases it will not adequately compensate the professional for lost time and effort involved in defending an action. Prevention is really the best cure!

CONCLUSION

Professionals in the water sector must exercise an ordinary degree of professional care, skill and diligence. When providing advice and services where consideration of climate change and extreme weather events is a factor, the relevant standard of care will be based on the scientific knowledge available at the time the services are provided and the widely accepted practice of the relevant profession, or specialisation, in Australia. Because professional standards and practices are in flux due to rapidly changing scientific knowledge and professional codes of practice take time to be agreed and implemented, professionals in the water sector should also consider the latest climate change information and remain abreast of the latest practice of leaders in the field.

The cases examined in this paper demonstrate that even where a client has placed constraints on a design or a budget on a project, a prudent professional can reduce the risk of a claim by a client by adopting a range of practical measures. Professionals in the water sector should warn clients of the risks of particular designs or courses of action. Where a client places fiscal or operational parameters on a project that effectively rule out climate change resilient designs or actions, professionals can limit their potential liability by outlining a range of options together with the risks of each option. In the climate change context, this could involve the use of scenario planning where
worst-case climate change scenarios are modelled and costed as well as a range of more favourable ones. Care must be taken to rely on accurate and adequate information and to undertake further inquiries where there is uncertainty or inconsistencies in data. Professional liability can also be limited by contract. However, water professional should be aware that this will not reduce the risk of an action in negligence by a third party. Professionals must ensure that their conduct does not cause damage to any person that can reasonably be foreseen will suffer loss or damage as a result of their careless conduct. In the context of delivering professional services that require consideration of climate change and extreme weather events, courts will refer to the published body of knowledge of climate change risks in order to assess the issue of reasonable foreseeability at the time the relevant services are provided.

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Taip v East Gippsland Shire Council [2010] VCAT 1222

Voli v Inglewood Shire Council (1963) 110 CLR 74


END NOTES

1 Liability under contract and in negligence exist concurrently (Voli v Inglewood Shire Council (1963) 110 CLR 74; Astley v Austrust Ltd (1999) 197 CLR 1 at 20; Henderson v Merrett Syndicates Ltd [1995] 2 AC 145; and Central Trust Co v Rafuse (1986) 31 DLR (4th) 481). A duty of care is implicit in the relationship between a professional and his or her client (Pullen v Gutteridge Haskins and Davey Pty Ltd [1993] 1 VR 27 relying on Sutherland Shire Council v Heyman (1985) 157 CLR 4240). A plaintiff can choose the most advantageous cause

2 The scope of this paper does not include a comprehensive survey of the law of contract or negligence and in particular does not include a discussion of the situations in which a duty of care will be imposed, including in cases where a plaintiff is suing in negligence for pure economic loss. In addition, it does not examine the interaction of the duty of care with statutory regimes for negligence.

3 Cases have been selected based on relevance of subject matter (for example, involve an extreme weather event) or defendant involve a profession relevant to the water sector). There are no cases that examine the standard of care owed by a professional where failure to take into account climate change-related information has been directly argued. To date, cases directly involving climate change-based arguments have been about planning and development decisions by relevant government authorities or similar.

4 Note that section 5P of the *Civil Liability Act 2002* (NSW) provides: "This Division does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in respect of the risk of death of or injury to a person associated with the provision by a professional of a professional service."

5 Although the Court held that the defendant engineers had failed to meet the relevant standard of care, the Council's action ultimately failed because a term of the contract meant that the action was time-barred.

6 It is possible to obtain an indemnity from the client under contract under which the client agrees to indemnify the professional against any losses caused by third party claims in negligence.