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Proportionate Liability: paying a fair share

Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd

[2013] HCA 10

Insurance Update

The first High Court decision on proportionate liability endorses a wider interpretation of the proportionate liability provisions than previously adopted.

In this case, the High Court considered whether independent causes of action (fraud and negligence) were apportionable claims. The High Court held that the different causes of action were founded on the same harm to economic loss and were apportionable.

Facts of the case

Messrs Caradonna and Vella entered into a business venture in late 2005. Unknown to Mr Vella, Mr Caradonna fraudulently executed mortgage and loan documents to procure a $1m loan from Mitchell Morgan Nominees Pty Ltd (**MM**), secured over a property in Mr Vella's name. Hunt & Hunt (**HH**) drafted an all monies mortgage, which secured the debt by reference to a loan agreement.

MM required a borrower's solicitor to certify identification and witness the borrower's signature. Mr Flammia, Mr Caradonna's cousin, acted as solicitor and dishonestly so certified. Subsequently, Mr Caradonna withdrew the loan money from the loan account by forging Mr Vella's signature on numerous cheques.

The loan agreement was void by reason of the forgeries and Mr Vella was not liable to MM under it. The mortgage was also forged and by reference to the void loan agreement it secured nothing and was liable to be discharged. HH was held to be negligent because it should have prepared a mortgage containing a covenant to pay a stated amount.

The issue was whether HH were concurrent wrongdoers with Messrs Caradonna and Flammia within Part 4 of the *Civil Liability Act* 2002 (NSW) (**CLA**). The primary judge held that MM's claim against HH was an apportionable claim. His Honour held that HH's liability should be limited to 12.5% of MM's loss, with Mr Caradonna 72.5% liable and Mr Flammia 15% liable.

Who does this affect?

- Insured persons
- Insurers
- Brokers

Article Highlights

- In respect of claims for economic loss or property damage, a defendant should be liable only to the extent of his or her responsibility.
- It is best to take a non technical, factual approach when considering whether a party is a concurrent wrongdoer.

Appeal to NSW Court of Appeal

MM appealed the decision on proportionate liability. Messrs Caradonna and Flammia were both bankrupt and MM was unlikely to recover the remaining 87.5% of its loss from them.

A unanimous COA overturned the decision at first instance, holding that HH was not a concurrent wrongdoer because the fraudulent acts of Messrs Caradonna and Flammia did not cause the loss or damage MM claimed against HH. The COA followed the decision in the Quinerts case[1] that, so far as concerns concurrent wrongdoers, the loss or damage they caused must be "the same damage". The COA identified different limbs of MM's loss or harm, by reference to causation, as:

- paying out money when it would not otherwise have done so; and
- not having the benefit of security for the money paid out.

High Court's decision

HH was successful in its appeal to the High Court. By a 3:2 split, the High Court disagreed with the COA's identification of damage and found that MM's loss or damage was the inability to recover the monies advanced. It clarified that a wrongdoer's acts may be independent of another wrongdoer yet cause the same damage and, vice versa, the harm suffered can have more than one cause contributing to the same loss or damage. In summary, the issue of causation cannot be equated with identification of the loss or damage.

Implications of the decision

It has been said that "common sense has prevailed". That may be so, when the CLA definition of a concurrent wrongdoer is "*a person who is one of two persons or more whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim*"[2] . However, by the minority judgment of the High Court, which agreed with the unanimous COA bench, it is apparent that the question of whether a party is a concurrent wrongdoer is not clear cut.

The High Court's message is that it is best to take a non technical approach "*References to the liability of a wrongdoer should not, however, distract attention from the essential nature of the enquiry at this point, which is one of fact*".

As intended by the proportionate liability regime, in respect of claims for economic loss or property damage, a defendant should be liable only to the extent of his or her responsibility. Furthermore, the risk that other wrongdoers will be insolvent, or otherwise unable to meet a claim for contribution, has shifted even more onto the plaintiff. This is all good news for insurers/insureds, as professionals were previously targeted by claims to reach insurers' pockets, despite the involvement of others.

[1] *St George Bank Ltd v Quinerts Pty Ltd (2008) 25 VR 666*

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Parties will need to:

- consider the nature of the loss or damage the subject of the claim;
- consider whether there are any concurrent wrongdoers; and
- ensure all of the wrongdoers have been sued or identified in order to recover the total loss or fully limit liability.

Insurers and their advisors may want to consider the effect of this judgment when analysing current claims historically pursued/defended on the basis of the Quinerts case and the COA's reasoning.

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[2] *S.34(2) CLA 2002 NSW, s.5AI(b) CLA 2002 WA*

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