

Contribution between tort-feasors

Amaca Pty Ltd v State of New South Wales [2003] HCA 44

Section 5(1) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) (‘the Act’) provides that where a tort-feasor is liable in respect of damage to a plaintiff, the tort-feasor ‘may recover contribution from any other tort-feasor who is...liable in respect of the same damage’.

Section 5(2) provides that in any proceedings for contribution ‘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’. Section 5(2) adds, ‘[t]he court shall have power to exempt any person from liability to make contribution.’

Each Australian state and territory has almost identical legislation. The High Court has considered some issues arising from this legislation.

The Facts

The plaintiff (H) contracted mesothelioma. He had been exposed to asbestos dust and fibres when he was working on a construction site. He successfully brought proceedings against his employer and the occupier of the construction site. The occupier of the construction site then successfully obtained contribution from Amaca Pty Ltd, which manufactured and supplied the asbestos products to which H had been exposed.

In turn, Amaca claimed contribution from the State of New South Wales. Amaca contended that the state was liable to H either vicariously for the acts and omissions of others, or directly for breach of a duty of care that the state allegedly owed H.

The trial judge held that the state was not required to make contribution to Amaca. He did not decide whether the state owed a duty of care to H because, even if the state should have been liable to H, he did not believe it just and equitable that the state should contribute to the liability of Amaca.

The Court of Appeal dismissed Amaca’s appeal. Amaca was granted leave to appeal to the High Court. It contended that the exemption power given by section 5(2) of the Act was not available if both tort-feasors were independently at fault and that the trial

judge erred in exempting the state from making contribution.

High Court Decision

The High Court agreed with Amaca’s argument. It held that Amaca’s contribution claim against the state could not be dismissed without first deciding whether the state, if sued, would have been liable to H. The question of whether the state owed a duty of care to H was logically anterior to any question of apportionment of responsibility.

The High Court also held that the trial judge’s reasons for concluding that it was not just and equitable that the state should contribute to the liability of Amaca were irrelevant. This constituted another error by the trial judge.

Comment

The High Court noted in its decision that ‘the contribution provisions of [the Act] have become notorious for the conceptual and practical difficulties they engender’.¹ The High Court’s decision involves a technical matter. However, it is important that practitioners around Australia have an understanding of the contribution legislation in the jurisdiction in which they practise. ■

Endnote: 1 at [17].

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