

QUT Digital Repository:
<http://eprints.qut.edu.au/>



Stickley, Amanda P. (2008) Apportionment under the Civil Liability Act. *The Queensland Lawyer* 28(6):pp. 292-294.

© Copyright 2008 Thomson Legal & Regulatory

APPORTIONMENT UNDER THE CIVIL LIABILITY ACT

AMANDA STICKLEY

SENIOR LECTURER, QUT, LAW FACULTY

INTRODUCTION

In *Reinhold v New South Wales Lotteries Corporation* [2008] NSWSC 5 (30 January 2008) damages of \$2 million were awarded to the plaintiff. The damages were to compensate the plaintiff for the cancellation of his winning Oz Lotto ticket. The Supreme Court held that Lotteries (the first defendant) and the Newsagents (the second and third defendants) were in breach of contract and had also been negligent in cancelling the ticket.

The next issue to be determined by the court was that of apportionment between the defendants. In *Reinhold v New South Wales Lotteries Corporation (No 2)* [2008] NSWSC 187 (7 March 2008), Barrett J had to determine:

- Whether the proportionate liability regime in Pt 4 of the *Civil Liability Act 2002* (NSW) applied;
- If so, what proportion of the \$2 million liability does each party bear; and
- If the *Civil Liability Act 2002* regime does not apply, what is the contribution between the defendants according to *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).

APPLICATION OF CIVIL LIABILITY ACT 2002 (NSW), PT 4

Section 34(1) of the *Civil Liability Act 2002* (NSW) states that Pt 4 of the Act applies to apportionable claims, that is:

- a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury,
- b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of section 42 of that Act.

In Queensland, proportionate liability is contained in Ch 2, Pt II of the *Civil Liability Act 2003* (Qld), which commenced on 1 March 2005 (*Civil Liability Act 2003*(Qld), s 82). Section 28(1) of the Queensland Act defines “apportionable claim” in similar terms to the New South Wales Act:

- 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.

Section 28(3) excludes the part applying to claims for personal injury and claims by consumers, as defined in s 29.

The proportionate liability introduced by the civil liability legislation changed the existing law as in the *Law Reform Act 1995* (Qld) significantly. Under the *Civil Liability Act 2003* (Qld) a court must apportion liability among concurrent wrongdoers. In doing so, the court must assess the amount that reflects the proportion of the loss or damage that is “just and equitable having regard to the extent of the defendant’s responsibility for the loss or damage” (*Civil Liability Act 2003* (Qld), s 31(1)(a)). The same applies in New South Wales (see *Civil Liability Act 2002* (NSW), s 35(1)(a)).

In *Reinhold v New South Wales Lotteries Corporation (No 2)* it was held that the claim before the court was an apportionable claim – it was a claim for economic loss in an action for damages and did not involve personal injury.

Barrett J then considered whether the each of the defendants was a “concurrent wrongdoer” as defined in s 34(2) of the New South Wales Act (see *Civil Liability Act 2003* (Qld), s 30). To be a “concurrent wrongdoer”, each of the defendants had to be:

a person who is one of two or more persons 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.

The court had previously held that the Newsagents had breached its contract as the conditions for cancelling the Oz Lotto ticket had not been satisfied ([2008] NSWSC 5 at [197]). Lotteries were also found to have breached the contract as the Newsagents were acting as agents for it ([2008] NSWSC 5 at [198]). At [199] – [202] it was held that the Newsagents and Lotteries had breached their duty of care owed to the plaintiff by failing to exercise reasonable care in identifying the correct ticket that was to be cancelled. At [236] it was stated:

The damages for both breach of contract and negligence are therefore the sum of \$2,000,000 necessary to put Mr Reinhold into the position he would have occupied had the deprivation not occurred.

Barrett J stated that Pt 4 was concerned with “claims” not liability, but “claims” was a reference to “determined or decided claims that have been established as sources of liability” ([2008] NSWSC 187 at [18]). Therefore, the “already litigated ‘claim’ will be an ‘apportionable claim’ because of s 34(1) and, if, on the findings made, the acts or omissions of several persons ‘caused’ the ‘damage or loss’ as found, the persons will be ‘concurrent wrongdoers’” (at [20]. See also *Chandra v Perpetual Trustees Victoria Ltd* [2007] NSWSC 694 at [110] and [111]).

At [27], Barrett J noted that it made difference that the breach of contract claim was not framed in terms of a failure to take reasonable care. In determining liability the failure to take reasonable care was the central element to both the breach of contract and the negligence claims (at [26]). At [30] his Honour stated (referring with approval to *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* [2007] FCA 1216 at [30] per Middleton J):

a claim may properly be regarded as one “arising from a failure to take reasonable care” if, “at the end of the trial”, the evidence warrants a finding to that effect and regardless of the absence of “any plea of negligence or a ‘failure to take reasonable care’”. The nature of the claim, for the purposes of Pt 4, is to be judged in the light of the findings made and is not determined by the words in which it is framed.

Therefore it was concluded that the Newsagents and the Lotteries were concurrent wrongdoers and each caused the damage claimed by the plaintiff, making the claim an apportionable claim under the *Civil Liability Act 2002*. At [34] it was stated:

The want of care of Lotteries, through Mr Cardwell, in identifying the ticket to be cancelled was causative of Mr Reinhold’s economic loss, as was the want of care of the Newsagents, through Ms Skinner, in executing and fulfilling Mr Reinhold’s order.

THE APPORTIONMENT PROCESS

Apportionment under the civil liability legislation in effect limits the liability of the concurrent wrongdoer to a particular amount (at [38]). In apportioning the liability a court must determine what is “just having regard to the extent of the defendant’s responsibility for the damage or loss” (see *Civil Liability Act 2002* (NSW), s 35(1)(a) and *Civil Liability Act 2002* (Qld), s 31(1)(a)). Barrett J noted that many statutory provisions use similar words and considered whether the use of the word “just” on its own instead of the common “just and equitable” as a significant difference. At [42] he stated:

There is a question whether “just” alone means something different from “just and equitable”. I doubt that it does or that any shade of difference there may be is of significance. That which is not “equitable” is unlikely to be “just”. In any event, a direction that the court, acting judicially, do what it considers “just” is, in reality, a direction that it undertake an evaluation and come to a discretionary conclusion about where the justice of the case lies.

Barrett J pointed out that “[b]lameworthiness and causative potency” (at [50]) are influential in determining apportionment (see *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALR 529 at 532; 59 ALJR 492 at 494). There is no need to consider factors beyond the wrongdoer’s responsibility for the loss or damage (at [53]). Therefore the fact that Lotteries may have financial strength or the profit from the lottery does not influence the apportionment (at [57], see *Amaca Pty Ltd v State of New South Wales* (2002) 199 ALR 596; 77 ALJR 1509 at [19]; *Rexstraw v Johnson* [2003] NSWCA 287).

In analysing the blameworthiness of the Lotteries and the Newsagents, it was concluded that the want of care on the part of both parties were causative of the plaintiff’s loss and if either had exercised care the loss would not have been suffered (at [68]). The loss arose due to the plaintiff having a partially printed

ticket. Such tickets are cancelled and in the plaintiff's case the wrong Oz Lotto ticket was cancelled, not the partially printed ticket. The evidence was that Lotteries dealt with partially printed tickets "routinely and frequently" but for the Newsagents dealing with such tickets was a rare occurrence (at [69]). As Lotteries was in charge of the computer system used by Oz Lotto, it was the natural thing for the employee of the Newsagent when dealing with the partially printed ticket to contact Lotteries and follow their instructions for cancelling the ticket. The person who dealt with the query of the Newsagent did not follow the standard procedure but at the same time, the Newsagents had not taken steps to bring the procedure of partial tickets and cancellation to the attention of its employees (at [72]).

The Newsagents raised the issue of the equitable principles discussed in the High Court decision of *Burke v LFOT Pty Ltd* (2002) 209 CLR 282; 187 ALR 612; 76 ALJR 749, that the cancellation of the wrong ticket deprived the plaintiff of his prize money, but also caused the Lotteries to retain the \$2 million that it otherwise would have paid out. It was argued that this was unjust enrichment and it should be taken into account in the apportionment (at [75]). Barrett J held that there was no unjust enrichment on the facts. If there is no winner, the prize money jackpots to the next draw, therefore the money that is the prize is not beneficially enjoyed as such by the Lotteries (at [78]).

Barrett J concluded that Lotteries had a "significantly greater degree of culpability" and was a "very significantly stronger causative force" and had departed from the expected standard of care to a greater degree than the Newsagents (at [80]). Apportionment was assessed as 90% to Lotteries and 10% to the Newsagents.

CONCLUSION

The decision of *Reinhold v New South Wales Lotteries Corporation (No 2)* is of interest as it provides a rare discussion of what influences a court when apportioning loss between wrongdoers. On the facts of this case, Lotteries and the Newsagents were negligent in cancelling the incorrect ticket and each were a cause of the plaintiff's loss. However, looking at the actual practice and reality of the processes, Lotteries were assessed to more responsible for the loss than the Newsagents. The determining of what is "just and equitable" or simply "just" as in the case of the civil liability legislation, is known to involve a comparison of culpability, but this decision goes further by actually identifying what each party did, how it was wrong and which party had departed more from the expected standard of care.