



Précis Paper

Proportionate Liability Regimes

A discussion of the case of *Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd (NSWCA)* which raised the issue of uncertainties in the interrelationship between independent cross claims and the proportionate liability provisions.

Discussion Includes

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Proportionate Liability Regimes

1. In this edition of BenchTV, Anthony Cheshire SC (Barrister, 8 Wentworth Chambers, Sydney) and Meher Gaven (Barrister, 8 Wentworth Chambers, Sydney) discuss the recent case of *Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd (NSWCA)*, which raised issues concerning proportionate liability regimes.

Proportionate liability regimes

2. There are different proportionate liability provisions and regimes in each of the statutes of the states. In the Commonwealth, cases are brought forward in regards to s2 of the *Competition and Consumer Act 2010 (Cth)*. The case of *Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd (NSWCA)* came within the regime of Pt. 4 of the *Civil Liability Act 2002 (NSW)* as it was brought on the basis of a failure to exercise reasonable care and skill.
3. Under the old law before the *Civil Liability Act 2002 (NSW)* had come into force, if one plaintiff succeeded against multiple defendants, the plaintiff could enforce against one or a combination of the defendants up to 100% of the total loss. Any question of contribution was to be dealt with between the defendants. So, if a plaintiff sued two defendants and they were each held 70% and 30% responsible respectively, the plaintiff could recover against either of them as to 100%. In turn, each of the defendants could then recover the shortfall or the remainder part from the other defendant. In this example, if the plaintiff enforced 100% against the 70% defendant, that 70% defendant will need to retrieve the remaining 30% from the other defendant. In cases where one defendant was sued by the plaintiff, the defendant could join the joint tortfeasor as a third party under s5 *Law Reform (Miscellaneous Provisions) Act 1965 (NSW)*.
4. If the previous example was to occur under the current regime, the 70% defendant, regardless of whether the 30% defendant is joined or not, will only be held liable to the plaintiff as to 70%. So the advantage of the plaintiffs of being able to sue anybody as to 100% has changed. In addition, if there are lots of defendants, each defendant will only be liable to for their proportionate liability. This is regardless of whether all the defendants have joined or not.

How did proportionate liability arise in this case?

5. Continuing the 70% defendant example, the general principle is if a defendant is 70% liable, their liability will be restricted to 70%. This means that they don't need to bring a cross claim for the contribution because that's already being taken into account in assessing their liability. In the case of *Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd (NSWCA)*, the defendant was sued. In response, the defendant claimed there was a concurrent wrongdoer and the defendant brought a cross claim against that concurrent wrongdoer. Initially, the District Court struck out the cross claim. However, the Court of Appeal overturn that decision.

Facts in the case

6. Primarily, the case of *Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd (NSWCA)* concerned a combine harvester and a combine harvester engine. The plaintiffs owned a combine harvester and they gave it to Landpower Australia Pty Ltd (defendant) with the request to fix the engine. The plaintiff's cause of action was a claim the defendant did a poor job of the repairs. The defence of the defendant claimed it did nothing wrong but, if there was someone at fault, there was a concurrent wrongdoer. The defendant had given the combine harvester to the cross defendant (Penske) to repair. This comes under the concurrent wrongdoer provisions in the proportionate liability regime. Landpower Australia Pty Ltd argued that it had a cross claim against Penske which was the claim that was initially struck out by the District Court. The Court of Appeal stated the decision by the primary judge was incorrect since there were potential independent causes of action that the defendant had against the third party (Penske). That is why the Court of Appeal reinstated the cross claim.

How the causes of action are relevant

7. The state of the law is still in a bit of a state of flux when it comes to causes of action. It's clear that one can have a concurrent liability defence - this being the 70% defence. Yet it's also clear that a defendant can have independent causes of action, even against a concurrent wrongdoer. Precisely how they interrelate is uncertain. As the law currently stands, practitioners need to recognise that the proportionate liability provisions only apply in respect of causes of action that the plaintiff has against each wrongdoer. This is in the old-style analysis where a plaintiff has a cause of action against two defendants and their joint tortfeasor. In a circumstance where a plaintiff has a cause of action against both defendant, there's no doubt that it is dealt with

under the current wrongdoer provisions. However, that regime does not apply in circumstances where the causes of action that the defendant wants to use are causes of action against another defendant. These are to be dealt with outside of the concurrent wrongdoing provisions. That's where the primary judge got it wrong in the case at hand, because they were in the pleadings of independent causes of action between the defendant and the third party. They survive outside of the concurrent wrongdoing provisions and, therefore, the cross claim should not have been struck out.

Examples

8. An example case study that survives completely independently and outside of the concurrent wrongdoing provisions is in circumstances where the 70% defendant has gotten entitlement to a contractual indemnity from the 30%. The reason is because the 70% defendant as to the plaintiff will only reduce his liability to 70%. But under contractual indemnity, he's entitled to 100%. So his ultimate liability is 0. It would be very odd if the proportionate liability provisions had destroyed his ability to claim under the contractual indemnity. Another example is there may have been misleading and deceptive conduct between the two defendants. This has no impact upon the claim that the plaintiff brings. However, one defendant may say to the other defendant that they were guilty of misleading or deceptive conduct which has caused either separate losses or has caused them to be liable to the plaintiff. In either case, the analysis depends upon the defendant having a separate and independent cause of action against the co-defendant or a third party. If one takes the contractual indemnity example, the 70% defendant has a contractual indemnity and should ultimately end up paying nothing. In practice, the way that the case gets to this conclusion may be unclear. Normally, that won't matter as long as the result is that the defendant doesn't need to pay. Though a problem can arise if one of the parties does not have the money to satisfy judgment since the route by which it gets there can be interrupted.
9. One analysis of this type of case is to first deal with the concurrent wrongdoing provisions. In the example of the 70% defendant, they reduce their liability to 70% towards the plaintiff. Then, one looks to the contractual indemnity and determines for that 70% they pass that on to the 30% defendant. Another analysis is to determine that it's a matter of election. The 70% defendant has to decide whether to rely upon the concurrent wrongdoing provisions, or upon the contractual indemnity. This seems to be a logical analysis, but it may not actually be right because of section 36 of the *Civil Liability Act 2002 No22 (NSW)*. It states that if two defendants have been dealt with under the concurrent wrongdoing provisions, then neither of them can then claim an indemnity or a contribution from the other at that stage. This seem to make sense,

because the whole point is that the concurrent wrongdoing provisions replaced claiming indemnities and contribution under *s5 Law Reform (Miscellaneous Provisions) Act 1965 (NSW)*. The problem is that s36 would seem to prevent exactly the sort of independent claims for contribution and indemnity. If this was the case, a defendant who uses the concurrent wrongdoing provisions then cannot claim contribution or indemnity, even if it's under an independent cause of action. It may force a defendant into an election to decide either to go under the concurrent wrongdoing provisions or claim under some independent cause of action.

Assessment at the pleading stage

10. In the first stage of procedures the judge has to make findings of fact and what findings of law should follow. The law does not address in isolation how it operates, it needs a factual matrix to apply. From the perspective of the defendant, making an informed assessment of the case at the pleadings stage is difficult with the defendant being required to make an educated guess as to what's going to happen in the court. Even though there are many uncertainties as to the direction the judge will take proceedings, the defendant needs to take into account precisely how to frame their defence from the outset.

The possibility of a separate determination

11. The two practitioners discuss if there could be situations that lead to the possibility of the parties seeking an early separate determination of factual questions. Mr Cheshire argues that the courts don't like preliminary questions since there are often appeals, or there can be things that happen in litigation that are unexpected. Experience teaches that very often the separate question adds to the expenses of the proceedings. A difficulty can also be that a separate determination of fact only binds these parties to the litigation. So if a defendant has not brought a cross claim, the cross defendant is not party to the proceedings and would not be bound by any findings of fact. In regards to a cross claim from a defendant's point of view, a defendant will usually want to ensure that all interested parties are involved in the proceedings so they're bound by the proceedings and judgment is given across the board.
12. Generally, it's to a defendant's advantage to bring in potential parties by way of a cross claim, but this process isn't without risk. At the stage of drafting the defence, care and consideration needs to be given to analysing where the matter may end up, both in terms of the substantive liabilities and also the potential cost consequences before a

decision is taken. A defendant should at least hesitate to bring in new potential parties to a case since there can be nasty cost consequences for a defendant due to the fact that they will have to pay the costs of the cross claim, even if the defendant has defended the claim against the plaintiffs successfully. In regards to the case *Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd (NSWCA)*, proportionate liability provisions raise new and different factors that need to be put into the equation before making the decision. In particular here in this scenario, the existence of independent cross claims and the interrelationship with the proportionate liability provisions is often where the uncertainty arises. This additional factor perhaps hasn't always been recognised in the past and wasn't recognised by the District Court in this case.

Why had this issue not arisen before?

13. Mr Cheshire acknowledges the uncertainty of the relationship between independent cross claims and their interrelationship with the proportionate liability provisions, and the impact of this uncertainty has had on past cases. There have been strikeout applications in terms of cross claims in the context of proportionate liability, but only in the very simple cases. The primary judge of *Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd* relied on the case of *Dymocks Book Arcade Pty Ltd v Capral Ltd [2010] NSWSC 195* very heavily. In the case of *Dymocks Book Arcade Pty Ltd v Capral Ltd*, the plaintiff sued two defendants under the concurrent wrongdoer provisions. One defendant said against the other one that they would be entitled to contribution because they were both joint tortfeasors. However, that argument was going back to the older law and there was no need for the cross claim. Therefore, it was struck out.
14. In this case *Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd*, the Court of Appeal pointed out that there is a grey area in the determination of independent cross claims. There can be an independent cause of action which can be completely separate from the plaintiff's cause of action against the defendant. It may have different facts or have different damages.

Lessons from this case

15. There is a main lesson from this case which has two distinct aspects. The first aspect is about summary disposal and the other is about the proportionate liability regime. In terms of summary disposal, what the Court of Appeals said was nothing novel, but it perhaps reinforces that summary disposal can be highly effective and very useful. It can, in particular, mean that a party involves being involved in lengthy and expensive

proceedings. It should be noted that summary disposal is not the same as a striking out or a pleading. A summary disposal will only be given in the clearest of cases where it is clear that there really is no possible cause of action available. In the case of *Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd*, the Court of Appeal determined that this is not the clearest of case and therefore the matter should not be struck out.

16. In terms of the proportionate liability provisions, there is still a lot of uncertainty about how they work and, in particular, how they interact with independent causes of action that defendants may have as between themselves or against third parties. In each case, it may well be that ultimately the cause of action set out in the court in any cross claim will fail, either because of issues of law, or because of issues in fact. What is clear is that they can rarely be resolved at a preliminary stage on a summary disposal basis. There's so much uncertainty in this area of proportionate liability that practitioners need to be very careful at that pleading stage for a defendant to work out what is the likely result in terms of the facts and then how this impacts the defence.

Is reform necessary?

17. The proportionate liability provisions have already been to the High Court on at least one occasion. At face value, section 36 of the *Civil Liability Act 2002 No22 (NSW)* is certainly a problem. The provision does seem to suggest that claims for contribution in indemnity cannot be pursued once you have a concurrent wrongdoing defence that's being applied. Certain issues would be resolved if independent claims outside of the claims towards the plaintiffs survive and are completely unaffected. If it did that, it would probably resolve at least the issue that arose in the case at hand.
18. Reform is unlikely with main reason being that the proportionate liability provisions exist in various forms in each of the states and territories and the Commonwealth. This would mean a number of parliaments would need to appreciate this problem and have the political will to resolve it. Mr Cheshire believes it's far more likely that this will be resolved by going up to the High Court who could determine precisely how section 36 and other provisions should apply. Their decision is likely to impacts upon the similar legislation in each of the states, territories and Commonwealth.

Risks

19. If the primary judge in the case of *Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd* was right, the defendants would have lost their independent causes

of action. This would have been a bizarre result. It is a good example of the fact that independent causes of action do survive. Defendants can easily get caught out by not thinking about that question and not approaching the question of the cross claim of whether they do have independent cause of action. Questioning if it truly independent is important since it could be something that is going to be caught out by section 36.

20. A defendant who does not bring cross claims against an existing defendant faces a real risk of never being able to bring those cross claims. It's perhaps less of a risk for a defendant choosing not to join a third party who's not party to the proceedings, because that third party will not be bound by the findings of fact. This raises another issue which of course is the advantage of bringing a cross claim, which is that everything gets resolved in the one proceedings. So a defendant who chooses not to bring a cross claim in existing proceedings needs to be aware that the independent causes of action that the defendant may ultimately have to bring would then have to be brought in separate proceedings. This will mean more expense and then the other third party not being bound by the findings of fact. So there's pros and cons that always need to be weighed up. There can be a tendency for practitioners to miss these potential issues and to make a decision which was not based upon a full consideration of the necessary facts.

BIOGRAPHY

Anthony Cheshire

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Anthony Cheshire SC graduated law from the University of Oxford. He was first called to the Bar in the United Kingdom in 1992. He was then called to the NSW Bar in 2004 and appointed silk in 2015. Anthony maintains a wide ranging trial and appellate practice across the civil and equity jurisdictions. Anthony also lectures extensively in the rules of civil litigation and harnessing the rules of the Court to obtain a litigious advantage.

Meher Gaven

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As a solicitor in 2000, Meher was in both private and government practice. In private practice, Meher's work was principally in commercial litigation and included inter alia property disputes and contractual and consumer claims. As a senior litigator for the Australian Government Solicitor, Meher acted in a number of high profile litigation actions. Meher's government practice focused on Commonwealth enforcement action and included service to the ACCC and IP Australia. Meher also was seconded to the Arts Law Centre of Australia advising artists on a range of matters including intellectual property, contracts and employment issues. As barrister, Meher has concentrated her practice in commercial litigation, intellectual property and employment law and has acted in a broad range of matters for corporate, government, not-for-profit organisations and individual clients. The focus areas of her practice are Intellectual Property; General Commercial and Equity; Consumer Law; Discrimination and Employment law; Property law; Corporations and Bankruptcy; Wills disputes; and Appellate work in any of these areas.

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Focus Case

Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd (NSWCA)

Benchmark Link

https://benchmarkinc.com.au/benchmark/insurance/benchmark_05-07-2019_insurance.pdf

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Legislation

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Schedule 2 of the Competition and Consumer Act 2010 (Cth)

s5 Law Reform (Miscellaneous Provisions) Act 1965 (NSW)

