

HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

AMACA PTY LIMITED (Formerly known as
James Hardie & Coy Pty Limited)

APPELLANT

AND

THE STATE OF NEW SOUTH WALES & ANOR

RESPONDENTS

Amaca Pty Ltd v State of New South Wales
[2003] HCA 44
7 August 2003
S389/2002

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the order of the Court of Appeal of New South Wales dated 12 December 2001.*
3. *Remit the matter to that Court for further hearing and determination conformably with the reasons of this Court.*

On appeal from the Supreme Court of New South Wales

Representation:

F M Douglas QC with G M Watson SC and T G R Parker for the appellant
(instructed by Allens Arthur Robinson)

J M Ireland QC with J F Burn for the first respondent (instructed by Crown
Solicitor for New South Wales)

No appearance for the second respondent

Notice: This copy of the Court's Reasons for Judgment is subject to
formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

AMACA Pty Limited (Formerly known as James Hardie & Coy Pty Limited) v The State of New South Wales & Anor

Tort – Joint tortfeasors – Contribution – Contribution claimed from third party not found or admitted to be liable to injured plaintiff – Whether claim could be dismissed without first deciding whether third party would if sued have been liable to plaintiff.

Tort – Joint tortfeasors – Contribution – Exemption from liability to contribution – Circumstances in which exemption may be granted.

Appeal and New Trial – Appeal to Court of Appeal of New South Wales – Appeal if error in point of law – Court of Appeal to consider whether appeal to that Court should be dismissed on ground that third party owed injured plaintiff no duty of care.

Law Reform (Miscellaneous Provisions) Act 1946 (NSW), s 5(1), (2).

Dust Diseases Tribunal Act 1989 (NSW), s 32.

1 McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ. Section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) ("the Miscellaneous Provisions Act") provides, among other things, for contribution between tortfeasors. This appeal concerns the operation of those provisions.

2 An injured plaintiff sued three defendants. He obtained judgment by consent against two of them. Those two defendants sought contribution from the appellant, which was not a party to the proceedings brought by the injured plaintiff. The appellant, in turn, sought contribution from the State of New South Wales, not then a party to the proceedings. Could the appellant's claim for contribution be decided without it being found or admitted that the State, if sued, would have been liable to the injured plaintiff?

3 The trial judge held that, *assuming* that the State would have been liable to the injured plaintiff, the appellant's claim for contribution should nonetheless be dismissed. The Court of Appeal, again without deciding whether the State would have been liable to the injured plaintiff, upheld the trial judge's dismissal of the appellant's claim against the State¹.

4 The appeal to this Court against the Court of Appeal's orders should be allowed. The Court of Appeal should have held that the appellant's contribution claim could not be dismissed without first *deciding* whether the State, if sued, would have been liable to the injured plaintiff.

The injured plaintiff's claim

5 In 1993, Mr Warren Hay ("the injured plaintiff") contracted mesothelioma. He had been exposed to asbestos dust and fibre between 1955 and 1961 when he was working on the construction of the Wallerawang Power Station for the Electricity Commission of New South Wales².

1 *Rolls Royce Industrial Power (Pacific) Ltd v James Hardie & Coy Pty Ltd* (2001) 53 NSWLR 626.

2 A body established by the *Electricity Commission Act 1950* (NSW). Its name was changed to "Pacific Power" by the *Electricity Legislation Amendment Act 1995* (NSW). Item 3 of Sched 7 to the *Electricity Commission Act* (now renamed as the *Electricity (Pacific Power) Act 1950* (NSW)) provides that Pacific Power is a continuation of, and the same legal entity as, the Electricity Commission of New South Wales.

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6 The injured plaintiff brought proceedings in the Dust Diseases Tribunal of New South Wales against three defendants: the company which had employed him at Wallerawang (the second respondent to this appeal – Rolls Royce), the Electricity Commission, and a sub-contractor of his former employer. The third of those defendants, the sub-contractor, took no active part in the proceedings.

7 In June 1994, the injured plaintiff settled the proceedings he had brought. By consent, he obtained judgment against Rolls Royce and the Electricity Commission, in each case for \$185,000 (inclusive of costs).

The contribution proceedings

8 Rolls Royce and the Electricity Commission, defendants to the injured plaintiff's action, each sought contribution from the appellant ("James Hardie"). Those claims, so far as now relevant, were based on the contention that James Hardie, if sued by the injured plaintiff, would have been liable to him in respect of the damage for which the party claiming contribution was liable. It was alleged that the asbestos products to which the injured plaintiff had been exposed were manufactured, sold and supplied by James Hardie.

9 The Electricity Commission's claim for contribution against James Hardie was settled. Judgment was entered on the Electricity Commission's cross-claim against James Hardie for \$129,500: 70 per cent of the amount for which the injured plaintiff had judgment against the Electricity Commission.

10 James Hardie, being liable to make contribution to the Electricity Commission and potentially liable to make contribution to Rolls Royce, claimed contribution from the State of New South Wales. James Hardie alleged that the State was liable to the injured plaintiff, either vicariously for the acts and omissions of others, or directly for breach of a duty of care which the State allegedly owed the injured plaintiff.

11 The various contribution claims that had not been settled, including James Hardie's claim to contribution from the State, were tried in the Dust Diseases Tribunal. James Hardie's allegation that the State was vicariously liable to the injured plaintiff centred on a contention that the State was responsible for the acts or omissions of inspectors appointed under the *Scaffolding and Lifts Act* 1912 (NSW). (Allegations that the State was vicariously liable for the acts or omissions of the Electricity Commission were not pursued at trial.) The trial

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judge (Judge Curtis) rejected the contention that the State was vicariously liable for the acts or omissions of the inspectors³ and that contention, although maintained in the Court of Appeal, was not dealt with by that Court. It may be put aside.

- 12 Both at trial and in the Court of Appeal, James Hardie contended that the State owed the injured plaintiff a duty of care. In its written submissions to the Court of Appeal, James Hardie said that its case was:

"that the State – armed as it was with various statutory powers and knowing as it did of the dangers of asbestos – was at all relevant times in a position to prevent or to minimise the risk of harm through exposure to asbestos of persons (here Mr Hay) working in power stations and at other sites throughout New South Wales (here, Wallerawang power station)."

- 13 In his reasons for judgment, the trial judge gave some consideration to whether the State owed the injured plaintiff a duty of care but came to no conclusion. He said that he found it unnecessary to decide whether the State did owe a duty to the injured plaintiff because of his views on apportionment. Under the heading, "Apportionment", he said only that:

"Even if the State should have been liable to [the injured plaintiff], I do not believe it just and equitable that it should contribute to the liability of James Hardie. James Hardie created a danger which the State merely failed to avoid. James Hardie made large profits from selling vast quantities of asbestos products heedless of the dangers to others which James Hardie knew to be created by the use of these products. Essentially James Hardie submit that a loss inevitably flowing from these commercial activities should be borne in part, not out of James Hardie's profits or risk capital, but by the taxpayers of New South Wales. Such a result would in my opinion be neither just nor equitable having regard to the State's responsibility for the damage."

- 14 In the Court of Appeal the parties proceeded on the basis that the trial judge had exercised the power under s 5(2) of the Miscellaneous Provisions Act to exempt the State from liability to make contribution. James Hardie submitted to the Court of Appeal that the exemption power given by s 5(2) was not

3 *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626.

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available if both tortfeasors were independently at fault⁴. The State submitted that the exemption power was discretionary, and that the exercise of the discretion was not shown to have miscarried⁵. The State's submissions were accepted in the Court of Appeal⁶. James Hardie's appeal was dismissed. The Court did not decide whether the State owed a duty of care to the injured plaintiff or, if it did, whether it had breached that duty. Attention was not directed to whether, in considering what order should be made under s 5(2) of the Miscellaneous Provisions Act, it was sufficient to make an assumption that the State, if sued, would have been liable to the injured plaintiff.

The Miscellaneous Provisions Act

15 To examine whether the Court of Appeal was right to dismiss James Hardie's appeal, it is necessary to begin by considering the text of s 5 of the Miscellaneous Provisions Act. So far as now relevant, s 5 provides that:

"(1) Where damage is suffered by any person as a result of a tort (whether a crime or not):

...

(c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by that person in respect of the liability in respect of which the contribution is sought.

(2) In any proceedings for contribution under this section 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; and the court shall

4 (2001) 53 NSWLR 626 at 645 [122].

5 (2001) 53 NSWLR 626 at 646 [126].

6 (2001) 53 NSWLR 626 at 648-649 [143]-[147] per Stein JA, 653-654 [174]-[176] per Fitzgerald AJA, 658 [189] per Davies AJA.

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have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity."

Section 5(2) provides for three different outcomes in contribution proceedings: (i) recovery of an amount such as may be found by the court to be just and equitable having regard to the extent of the contributing party's responsibility for the damage; (ii) an order exempting any person from liability to make contribution; and (iii) a direction that the contribution to be recovered should amount to a complete indemnity. (As noted earlier, in the Court of Appeal it was accepted that the trial judge had made an order of the second kind – exempting the State from liability to make contribution.)

16 Those three outcomes of proceedings for contribution are predicated upon the claimant being entitled to recover contribution. The circumstances in which that entitlement arises are specified in s 5(1)(c). Two matters must be established: (i) that the claimant is a tortfeasor liable in respect of particular damage; and (ii) that the person against whom the claim is made is another tortfeasor "who is, or would if sued have been, liable in respect of the same damage".

17 As was pointed out in *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd*⁷, the contribution provisions of the Miscellaneous Provisions Act have become notorious for the conceptual and practical difficulties they engender. Some of those difficulties stem from the fact that it is possible to bring proceedings for contribution that are heard and determined separately from proceedings establishing the liability in respect of which contribution is sought. It was the separation between hearing the proceedings brought by an injured plaintiff and hearing proceedings for contribution which gave rise to the issue decided by this Court in *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd*. In that case, contribution proceedings were brought against a defendant sued by the injured plaintiff. By consent, however, the defendant had obtained judgment dismissing the injured plaintiff's claim against it. This Court held that the consent judgment in favour of that defendant absolved it from liability to make contribution to another defendant that had been found liable to the plaintiff. The Court also held, however, that a person who wished to seek contribution from a defendant

7 (1998) 196 CLR 53 at 59 [7] per Gaudron and Gummow JJ. See also at 69 [45] per McHugh J and 69-70 [46] per Kirby J.

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against whom the plaintiff was content not to pursue a claim was entitled to be heard in opposition to the entry of judgment for that defendant by consent⁸.

18 Like *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd*, the principal proceedings brought by the injured plaintiff in this case were determined separately from the contribution claims. Unlike *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd*, however, in the present case there has been no judicial determination (whether by consent or otherwise) that the person from whom contribution is sought (the State) is or would, if sued, have been liable to the injured plaintiff. Nor did the State admit that liability. Accordingly, the premise for making any of the orders specified in s 5(2) was neither established nor admitted, whether in the contribution proceedings or in the principal proceedings instituted by the injured plaintiff.

The trial judge erred

19 The trial judge made two errors in dealing with James Hardie's claim for contribution from the State. First, the reasons given for concluding that it was not just and equitable that the State should contribute to the liability of James Hardie were irrelevant. That James Hardie was a commercial enterprise pursuing profit and the State a polity raising revenue by taxation are not considerations relevant to their respective responsibilities to contribute to the damage sustained by the injured plaintiff.

20 Secondly, and no less fundamentally, the assumption which the trial judge made about the State's liability was an insufficient basis for deciding what order should be made in the contribution claim against the State. The making of assumptions and the acceptance of concessions for the purpose of litigation is sometimes an appropriate and efficient way to proceed. It may allow a court to sever irrelevant or immaterial questions to permit it to concentrate on those issues that are legally essential to the decision. However, this was not a case where such a shortcut could be taken. What was assumed was that the State had breached a duty of care which it owed the injured plaintiff. But neither the duty nor the breach was identified with any particularity. Without identifying the duty owed, and the breach or breaches committed, it was not, and is not, possible to identify the extent of that party's responsibility for the damage. Nor is it possible to say that that party should be exempted from liability despite it having breached

8 (1998) 196 CLR 53 at 62-63 [17] per Gaudron and Gummow JJ, 98-99 [133] per Callinan J.

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a duty which it owed the plaintiff. (It is unnecessary to consider whether, or in what circumstances, it would be proper to exempt a negligent party from liability to contribute. It may be that the power to exempt is engaged only where the party to be exempted was not at fault but found liable for some form of strict liability. That question was not argued and need not be decided.)

21 The trial judge, therefore, made errors of law in concluding that James Hardie's claim for contribution from the State should be dismissed. Unless the order dismissing the claim for contribution could be supported on some other basis, James Hardie's appeal to the Court of Appeal should have been allowed. What orders should the Court of Appeal have made?

22 The appeal to the Court of Appeal was brought pursuant to s 32 of the *Dust Diseases Tribunal Act* 1989 (NSW)⁹. So far as is now relevant, s 32 then provided¹⁰:

- "(1) A party who is dissatisfied with a decision of the Tribunal in point of law or on a question as to the admission or rejection of evidence may appeal to the Supreme Court.
- (2) The Supreme Court may, on the hearing of any appeal under this section, remit the matter to the Tribunal for determination by the Tribunal in accordance with any decision of the Supreme Court and may make such other order in relation to the appeal as the Supreme Court sees fit."

Whether, once an error in point of law is identified, the Court of Appeal is confined to that point only and has no power to decide any other matter may not be clear¹¹. It is not necessary to decide that question here.

9 Section 48 of the *Supreme Court Act* 1970 (NSW) assigned to the Court of Appeal proceedings in the Supreme Court on an appeal from the Dust Diseases Tribunal.

10 Amendments since made to s 32(4) by the *Courts Legislation Miscellaneous Amendments Act* 2002 (NSW) need not be noticed.

11 *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 447 [14] per Gleeson CJ, Gummow and Callinan JJ, 464 [69]-[70] per Kirby J; cf *Krew v Federal Commissioner of Taxation* (1971) 45 ALJR 324 at 325-326 per Walsh J.

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23 The trial judge came to no final conclusion about whether the State owed a duty of care to the injured plaintiff and he did not decide what the scope or content of any such duty might be. Accordingly, it may be said that such findings of fact as he made about what the State did or did not do were not made with any definition of duty in mind. It follows that it may not be clear whether all the findings of fact that might bear upon any question of breach of duty were made at trial. If not all necessary findings about breach were made at trial, and if it became necessary to compare the respective degrees of responsibility of James Hardie and the State for the damage suffered by the injured plaintiff, the trial judge's reasons would have provided an insufficient factual platform for doing so. In those circumstances it may well have been appropriate for the Court of Appeal to allow the appeal and remit the matter to the Dust Diseases Tribunal for determination in accordance with the Court of Appeal's decision.

24 But the question whether the State owed a duty of care to the injured plaintiff is logically anterior to any question of apportionment of responsibility. As these reasons have sought to demonstrate, deciding whether the State was a tortfeasor, which if sued would have been liable to the injured plaintiff, precedes any decision about the kind of order to be made under s 5(2) of the Miscellaneous Provisions Act.

25 The State sought leave to file at the hearing of the appeal to this Court a notice of contention alleging, first, that the State had owed no duty of care to the injured plaintiff and, secondly, that the State had not breached any duty. Leave to rely on that notice was refused. Consideration of those contentions in this Court would have required extensive reference to a very large factual record. That is a task which, not having been performed in either of the courts below, it is not appropriate that this Court should undertake.

26 For the reasons given earlier, there may be some question about whether the Court of Appeal, and therefore this Court, could undertake a review of the factual question of breach. But it is clear that the Court of Appeal did have power to determine whether, on the facts found at trial, the State did owe the injured plaintiff a duty of care. That was a question of law. If the Court of Appeal had identified the errors of law which the trial judge made, it would then have been appropriate, and in this case necessary, for the Court of Appeal to go on to consider whether the claim for contribution should have failed on the ground, urged by the State, that the State owed no duty of care to the injured plaintiff. The Court of Appeal should now consider that question.

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27 The appeal to this Court should be allowed with costs. The orders of the Court of Appeal made on 12 December 2001 should be set aside and the matter remitted to that Court for further hearing and determination.