

Same, or different: Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10

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The High Court of Australia's decision in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10 (***Hunt & Hunt***) gives direction on whether a person, who caused a plaintiff to suffer loss or damage, is a 'concurrent wrongdoer' and therefore may be entitled to have its liability to the plaintiff limited by operation of proportionate liability legislation.

By way of background, at common law, if multiple wrongdoers cause loss or damage to a plaintiff, each wrongdoer is 100% liable for the loss or damage.² Contribution legislation permits a defendant to claim contribution from other wrongdoers who cause the 'same damage'.³ Proportionate liability legislation allows a concurrent wrongdoer defendant to reduce its exposure directly to the plaintiff. Proportionate liability legislation was a response by each state of Australia to the insurance crisis caused by 'deep pocket syndrome', where a plaintiff, who suffered loss caused by multiple wrongdoers, sued the wrongdoer that had the deepest pockets (whether because of assets or insurance). Under contribution legislation the defendant carries the risk that it will not be able to recover contribution from other wrongdoers; proportionate liability legislation shifts the risk on to the plaintiff.⁴

Under Victorian proportionate liability legislation, which is located in Part IVA of the *Wrongs Act 1958* (Vic), a wrongdoer may limit its liability to a claim in proportion to its comparative responsibility for the loss or damage where:

- the claim is an ‘apportionable claim’: that is, the claim against the wrongdoer is a claim for economic loss or damage to property in an action for damages arising from a failure to take reasonable care, or a claim for damages in contravention of the prohibition on engaging in misleading or deceptive conduct under the *Australian Consumer Law (Victoria)* [s24AF];
- the defendant is a ‘concurrent wrongdoer’: that is, ‘a person who is one of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim’ [s24AH]; and
- any other concurrent wrongdoers are joined to the proceeding the subject of the claim, unless any other concurrent wrongdoers are dead, or if a corporation, the corporation has been wound up [s24AI].

The decision in *Hunt & Hunt* concerned the construction of s34(2) of the *Civil Liability Act 2002* (NSW), which is the New South Wales equivalent of the second criterion above. Victoria is unique because of the third criterion above: proportionate liability legislation in the remaining states of Australia do not require joinder of other concurrent wrongdoers.

St George Bank Ltd v Quinerts Pty Ltd

In *Hunt & Hunt* the High Court overturned the unanimous decision of a 5 member bench of the New South Wales Court of Appeal (**NSWCA**) in *Mitchell Morgan Nominees Pty Ltd v Vella*.⁵ In reaching its decision, the NSWCA applied the reasoning of the Victorian Court of Appeal (**VSCA**) in *St George Bank Ltd v Quinerts Pty Ltd*⁶ (**Quinerts**), which was another unanimous decision.

In *Quinerts*, a valuer negligently overvalued a property, causing the lender to lend a certain amount of money to a borrower. The borrower and the guarantor failed to repay the money to the lender. Further, the security was insufficient for the lender to recover the loan monies paid. The VSCA concluded that the wrongdoers must cause the 'same damage' to have the benefit of the legislation.⁷ The VSCA held that the loss or damage caused by the borrower and guarantor on the one hand, and the valuer on the other, was not the 'same damage'.⁸

The reasoning for this was that the loss or damage suffered by the conduct of the borrower/guarantor was their failure to pay the loan, whereas the loss or damage suffered by the conduct of the valuer was causing the bank to accept inadequate security. Nettle JA said that nothing which the valuer did or failed to do caused the borrower to fail to repay the loan, and nothing which the borrower did or failed to do caused the bank to accept inadequate security for the loan.⁹

The VSCA held that the valuer was 100% liable for the claim brought by the lender, and this could not be proportionately reduced by reference to the responsibility of the borrower and guarantor.

Hunt & Hunt

The facts of *Hunt & Hunt* were that a fraudster used his business partner's certificate of title to procure a loan of \$1million from a lender. The fraudster forged his partner's signature on the loan and mortgage documentation. It was fraudulently certified that the partner had executed the loan and

mortgage. The money was dissipated and, by the time proceedings were instituted by the lender, the fraudsters were bankrupt.

The lawyer for the lender prepared the loan and mortgage documents. The mortgage was drafted to secure the partner's indebtedness by reference to the loan agreement. However, the loan agreement was procured by fraud and was therefore void. Although it was indefeasible because of registration, the mortgage was ineffective as it secured an amount owing under a void loan agreement. Therefore the lender sued the lawyer, alleging that the lawyer was negligent and should have prepared a mortgage containing a covenant to repay a stated amount so that it remained enforceable. The lawyer claimed it was a concurrent wrongdoer in respect of a single apportionable claim under the *Civil Liability Act 2002* (NSW), and that its liability could be reduced by reference to the fraudsters' responsibility.

The primary judge held that the lawyer was negligent in the way it prepared the mortgage, and liable as to 12.5% as a concurrent wrongdoer with the fraudsters.

The NSWCA allowed an appeal. Following the reasoning in *Quinerts*, Giles JA (giving the main judgment) held that the loss or damage caused by the fraudsters was the payment by the lender when the lender would not otherwise have done so. The loss or damage caused by the lawyer was the lender not having the benefit of security for the money paid. The NSWCA therefore held that because the loss or damage was not the 'same damage', the lawyer was 100% liable to the lender.

On appeal to the High Court of Australia, the majority, comprised of French CJ, Hayne and Kiefel JJ, held that the lawyer was a concurrent wrongdoer with the fraudsters. Bell and Gageler JJ, in the minority, agreed with the NSWCA.

Instead of looking at the 'same damage' issue identified in *Quinerts*, the majority focused upon the language of the statute. In doing so their Honours identified two questions for consideration:¹⁰

1. What is the damage or loss (the harm) that is the subject of the claim?
2. Is there a person, other than the defendant, whose acts or omissions also caused that damage or loss (causation)?

The harm

The majority held that in the context of economic loss, loss or damage may be understood as the harm suffered to a plaintiff's economic interests. The harm to the lender's economic interests was that it could not recover the sums advanced, and this was its loss or damage for the purpose of the legislation. Their Honours referred to the decision of Gaudron J in *Hawkins v Clayton*¹¹ in speaking of the need to identify the interest infringed. After undertaking this analysis, the majority held that the types of damage identified by the NSWCA, and the VSCA in *Quinerts*, were the causative effects of the conduct, but not the harm.¹²

The NSWCA held that the harm occurred when the money was paid to the fraudsters. The majority disagreed. Their Honours considered that in general terms, in a case involving a loan, harm will be sustained and the cause of action will accrue only when recovery of the loan monies can be said, with

some certainty, to be impossible.¹³ That is, when the money was paid by the lender there was a serious risk that loss would accrue, but it could not be said at that point that the lender's rights of recovery against the fraudsters was valueless.¹⁴ Following this reasoning, the majority drew a distinction between the detriment of entering into a loan agreement procured by misrepresentation, and the loss or damage suffered by not being able to recover the funds paid.¹⁵

Their Honours confronted the inquiry, made by the NSWCA and the VSCA in *Quinerts*, of whether one wrongdoer had contributed to the other wrongdoer's actions by noting that the legislation acknowledges that the acts may be independent of one another yet cause the same damage.¹⁶

Causation

On the question of causation, the majority held that the relevant inquiry was whether the act or omission of a wrongdoer played some part in contributing to the loss or damage.¹⁷ It was held that the lawyer had caused lender's inability to recover the sums advanced, and it was necessary to determine whether the fraudsters' acts, independently of the lawyer, also caused the loss or damage.¹⁸

Their Honours noted that there were two conditions necessary for the mortgage to be ineffective, namely the loan agreement being void (caused by the fraudsters) and the mortgage document being ineffective (caused by the lawyer).¹⁹ It was the fraudsters' conduct which caused the lender to enter into the transaction resulting in an unenforceable loan agreement and an inability to recover the loan monies. Also, but for the acts of the fraudsters, there

would never have been the need to take a mortgage nor for the lawyer to draw one. In that sense, the fraudsters' conduct was considered to be a material cause of the harm which resulted,²⁰ and therefore both the fraudsters and the lawyer were concurrent wrongdoers.

Finally, their Honours considered that it is not consistent with the policy of the legislation that the lawyer be held 100% responsible for the damage.²¹ It seems that the High Court considered that finding the lawyer 100% liable for the lender's loss would not properly account for the gravity of the fraudsters' conduct.²²

Previous decisions

So how would the decision in *Hunt & Hunt* be applied to the facts in previous cases?

1. A car passenger suffered personal injury caused by the driver's negligence. The passenger also lost the right to sue the driver as a result of her lawyer not issuing proceedings within the limitation period.²³ The loss or damage caused by the lawyer and the driver was held not to be the 'same damage'.²⁴
2. An owner suffered delay resulting from a builder failing to complete the construction of a hospital by the completion date. The owner also lost the right to sue the builder because the architect incorrectly certified an extension of time for the builder.²⁵ The loss or damage caused by the builder and the architect was held not to be the 'same damage'.
3. A director of a company provided inaccurate financial reports to the company, causing a creditor to continue providing credit to the company.

An accountant failed to advise the creditor to discontinue providing credit to the company.²⁶ The loss or damage caused by the director and the accountant was held to be the 'same damage'.

4. The example in *Quinerts*: a thief steals money from a bank. Because of the negligence of the bank's insurance broker, the risk of theft is not covered by the insurance. Nettle JA, formulating this example, considered that is not the 'same damage'.

Applying the analysis in *Hunt & Hunt*²⁷, it is unlikely that the outcome of the first three would change. However, the outcome in *Quinerts*, and the example by Nettle JA, could change. This is because, applying the *High Court's* reasoning, there is no requirement that one wrongdoer contributed to the actions of the other wrongdoer, and the harm in both cases was the inability of the bank to recover its money from either party. However, there are further considerations, including whether the claim was in 'debt' rather than in respect of 'damage or loss'.²⁸

Precedent

When construing legislation, Courts must give effect to the purpose of the legislation, and judicial decisions on similar or identical legislation in other jurisdictions are guides to, but cannot control, the meaning of legislation in the court's jurisdiction.²⁹ However, where the court is construing uniform national legislation, it should not depart from the decisions in intermediate appellate courts in another jurisdiction unless they are convinced that the interpretation is plainly wrong.³⁰ As noted above, Part IVAA *Wrongs Act 1958* (Vic) is not strictly uniform with other State-based proportionate liability legislation.

The decision of the High Court in *Hunt & Hunt* overturned the decision of the NSWCA, in which the NSWCA applied the reasoning of the VSCA in *Quinerts*. *Quinerts* concerned the construction of the equivalent Victorian provision to that in *Hunt & Hunt*. Strictly speaking the decision in *Hunt & Hunt* is not binding on the Courts of Victoria.³¹ However, because of the way that the High Court addressed the reasoning in *Quinerts*, a Victorian Court is likely to treat *Hunt & Hunt* as being highly persuasive, if not binding in a practical sense.

Conclusion

The High Court's approach in *Hunt & Hunt* signifies a departure from the technical analysis in *Quinerts*. In 2011 the Standing Committee of Attorneys-General (**SCAG**) released a consultation draft for proportionate liability model provisions with a definition of a concurrent wrongdoer as a person who caused 'the loss or damage the subject of the claim or *substantially or materially similar loss or damage*'. The language of the provision appears to address the reasoning in *Quinerts*, and it seems to reflect a desire on the part of SCAG to move away from this reasoning and towards the kind of outcome seen in *Hunt & Hunt*. Given the High Court's reasoning in *Hunt & Hunt*, it is unclear whether this amendment would be considered to be desirable.

Endnotes

1. The author acknowledges the assistance of Tony Horan of the Victorian Bar.
2. *Hunt & Hunt*, [80].
3. *Wrongs Act 1958*, s23B(1).

4. *Hunt & Hunt*, [10].
5. (2011) 16 BPR 30,189.
6. (2009) 25 VR 666.
7. *Ibid*, [68].
8. *Ibid*, [76].
9. *Ibid*, [76].
10. *Hunt & Hunt*, [19].
11. (1988) 164 CLR 539, 601.
12. *Hunt & Hunt*, [29], [30].
13. *Ibid*, [32].
14. *Ibid*, [33].
15. *Ibid*, [31].
16. *Ibid*, [41].
17. *Ibid*, [44], [45].
18. *Ibid*, [46].
19. *Ibid*, [49].
20. *Ibid*, [51].
21. *Ibid*, [58].
22. *Ibid*, [54].
23. *Wallace v Litwiniuk* (2001) 92 Alta LR (3d) 249.
24. Note: this is a personal injury matter which would be excluded from proportionate liability legislation; however, it was considered in *Quinerts*.
25. *Royal Brompton Hospital NHS Trust v Hammond & Ors* [2002] UKHL 14.
26. *Metzke & Anor v Sali & Anor* [2010] VSCA 267.
27. Note: the first two examples are contribution claims.
28. *Hunt & Hunt* [42], [77].
29. *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603, 632-633; *Walker Corp v Sydney Harbour* (2008) 233 CLR 259, 270;
30. *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492.
31. *Roads Corporation v Love* [2010] VSC 537, [146].