Laying down the law of contributory negligence

Astley v Austrust Limited (1999) HCA 6 (4 March 1999)

For such an obscure topic as contributory negligence, this decision has attracted quite a bit of media attention and commentary by the legal profession. LIV President, Michael Gawler, dedicated his column in the June Law Institute Journal to discussion of this case. The question is, what's so important about the *Austrust* decision?

The answer lies in the fact that lawyers, accountants and other professionals may be exposed to paying out 100% of the damages awarded in negligence cases, where they may have only been causally responsible for as little as 1% of the damage.

The *Austrust* decision stands for the proposition that where a defendant is sued in tort and contract for breach of a duty of care, then that defendant cannot succeed with the defence of contributory negligence if the Court has found that there has been a contractual breach.

Austrust sued a South Australian law firm, Finlaysons, claiming that it had received negligent legal advice and that the firm had breached its implied contractual duty to exercise reasonable care.

It was alleged that the law firm had failed to advise *Austrust* that if it assumed the role of trustee of a trading trust, then it would potentially be liable for losses exceeding the value of the trust property. It was alleged that the solicitors should have advised the plaintiff to refrain from accepting the trustee position without an appropriate exclusion for personal liability. The trust subsequently accrued losses of approximately $1.5 million.

The trial judge, having found that the solicitors were negligent, apportioned responsibility equally between the parties and awarded damages against the firm in the sum of approximately $720,000.

The Full Court of the Supreme Court of South Australia reversed the decision of the trial judge on the question of contributory negligence and awarded damages of roughly $1.5 million.

Much of the High Court's judgment deconstructs the meaning of the relevant apportionment legislation, which in South Australia's case is similarly worded to s26 of the Victorian *Wrongs Act*). The majority judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ noted that "in our opinion, the case law in this area is unsatisfactory." The majority went on to conclude that the South Australian *Wrongs Act* did not embrace breaches of contractual duty as well as breaches of tortious duty.

Much of the confusion in this area is sourced from English Court of Appeal decisions which have in turn been followed by single judges in the Australian State Supreme Courts. These decisions have held that contributory negligence applied in circumstances where there is a concurrent liability in tort and contract. The English decisions rely heavily on the view of Professor Glanville Williams in this regard. Callinan J in his dissenting judgment followed this approach and recognised that concurrent liability can give rise to complicated questions concerning choice of limitation period and measure of damages.

It is interesting to note that the majority explored the policy considerations in its judgment. In particular, it addressed the question of whether it was fair upon defendants to not allow them to claim some form of contribution where there have been mitigating circumstances. The majority commented that tort obligations are imposed on the parties, whereas contractual obligations are voluntarily assumed.

At the end of the judgment, the majority curiously commented that "perhaps the apportionment statute should be imposed upon parties to a contract where damages are payable for breach of a contractual duty of care. If it should, and we express no opinion about it, it will have to be done by amendment of that legislation."

There have already been calls by some members of the legal profession to widen the application of the *Wrongs Act* to specifically cover contractual breaches. While it is true that contractual obligations are voluntarily assumed, parties are often not conscious of those rights, nor are those rights frequently exercised. Accordingly, it may assist professional service providers to add a clause into their engagement contracts which would enable the apportionment of liability in the case of contributory negligence on the part of the client.

Until legislation is passed to amend the *Wrongs Act*, it will be interesting to see if plaintiffs continue to plead negligence claims in terms of breach of tort and breach of contractual retainer. It may be that more statements of claim simply plead breach of contract so that the defence of contributory negligence is not available.

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