Damages and the *Trade Practices Act*

The High Court recently handed down its decision in an important case that has implications for recovery of damages under the *Trade Practices Act* where the plaintiff’s own conduct contributed to his or her loss. Senior Associate Eugene Elisara looks at *I&L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd.*

**Introduction**

In our December 2001 discussion on the High Court’s decision in *Henville v Walker,* we noted the High Court’s approach to assessing damages under s82 of the *Trade Practices Act 1974 (the TPA)* that ‘there is no ground for reading into s82 doctrines of contributory negligence and apportionment of damages’. (To view this earlier article on *Henville v Walker* go to: www.aar.com.au/pubs/insur/foidec01.htm.)

On 22 September 2001, the Queensland Court of Appeal held in *I&L Securities v HTW Valuers (Brisbane) Pty Ltd* that s87 of the TPA could be used to reduce damages awarded to a plaintiff in cases where the plaintiff was partly at fault. The plaintiff (*I&L*) appealed to the High Court, which handed down its decision on 2 October this year. The High Court considered whether s82 or s87 of the TPA permits an allowance to be made for contributory negligence when calculating damages – it held they did not.

**Sections 82 and 87 of the TPA**

Under s82, a plaintiff can recover damages from a defendant where he or she has suffered loss or damage by a defendant’s misleading and deceptive conduct.

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3. See, for example, [2001] HCA 52 at 140 (McHugh J) and 66 (Gaudron J).
The relevant part of s87 provides that where:

the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in...contravention of a provision of Part IV, IVA of V, the Court may,...make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention...if the Court considers that the orders or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.

The background to the case

Camworth Pty Ltd (Camworth) owned land that it proposed to sub-divide and develop. In early 1995, Camworth sought refinancing and obtained a valuation of its land from the respondent (HTW) to assist its loan application. HTW valued Camworth's land at $1.576 million. Camworth used that valuation to obtain a loan of $950,000 from I&L secured by the land.

Camworth subsequently defaulted on the loan and eventually went into liquidation. I&L realised the security and received net proceeds of $592,367. I&L sued HTW for the difference between the amount of the loan and proceeds of the sale on the basis of a negligently prepared/misleading valuation.

Initially, the Supreme Court of Queensland awarded damages for negligence and a breach of the TPA. In both cases, I&L’s claim for damages was reduced by a third on the basis that I&L contributed to its loss by failing to assess Camworth’s ability to repay the loan, and for not undertaking a proper risk assessment of the company.

I&L appealed to the Queensland Court of Appeal, which upheld the original decision but on a different basis. The Court of Appeal relied on s87 of the TPA rather than s82.

I&L then appealed to the High Court raising two issues for determination:

• can a court use s87 of the TPA to reduce damages that might otherwise be awarded under s82?
• does s82 permit an apportionment of damages where the plaintiff’s failure to take reasonable care of its own interests was also a cause of the loss?

High Court ruling

A Full Court of the High Court gave its judgment and allowed the appeal with only one judge dissenting. As to the first issue, the majority found that s82 was to take precedence over s87.5

The main rationale for giving s82 such primacy over s87 was that the sections provided different remedies for different situations. As Justice McHugh stated:

If there is any conflict between the two sections – and I do not think that there is – that conflict is best resolved by giving full effect to the specific provisions of s82 when they apply. The conflict is then alleviated by treating the general provisions of s87 as a supplementary power to be used when an award under s82 will not properly compensate the applicant for its loss or damage. Of course, there is nothing to stop a court from going directly to s87 and including in the applicant’s relief all the compensation that it could recover under s82. But the terms of s87 provide no warrant for depriving an applicant of the right that s82 gives it.

Justice Callinan dealt with a submission by HTW that the apportionment of damages merely reflected an analysis of what the plaintiff’s conduct had actually caused. Despite noting the attractiveness of that argument, and the fact that it would produce a fair and just result, Justice Callinan felt bound by his analysis of s82 and its relationship to s87 to reject it.

The second issue for determination was easily dealt with by a reiteration of the views espoused by the majority in Henville v Walker that s82 does not provide for contributory negligence and apportionment of damages.

The minority judgment

The only dissenting opinion was that of Justice Kirby.

His Honour dealt only with s82 of the TPA and found that the primary judge was correct in determining the loss or damage that I&L had suffered by the conduct of HTW in accordance with s82 of the TPA. This was especially so where the primary judge had the benefit of reviewing all the evidence at trial:

The primary judge was therefore entitled, on the evidence that he accepted and in accordance with the terms of s82 of the Act, to conclude that the only ‘loss or damage’ that had been ‘suffered’ by the appellant, ‘by the conduct of’ the respondent, was that part of the ‘loss or damage’ that his Honour found. It being open to him to ascribe the other part of the ‘loss or damage’ to the conduct of the appellant itself, there was no error in the primary judge’s decision that, under s82(1) of the Act, the appellant could not recover from the respondent in that respect.6

Outcomes
In this case, the High Court has continued a preference for a strict and technical interpretation of the TPA.

The law regarding contributory negligence in the context of misleading and deceptive conduct is not favourable for insurers and professional advisors. Some might agree with Justice Kirby who said, with respect to the majority’s decision in this case:

The outcome will now burden the party (the respondent) with the total loss or damage suffered by another (the appellant) although the evidence shows (and the primary judge accepted) that part only of such loss or damage was caused by the conduct of the other.7

The important question then is, if a defendant cannot reduce damages by merely pointing to the plaintiff’s own conduct that also caused the losses, is there any way in which damages may be reduced due to other causative factors? The case however, contains very few comments on losses caused by other, external, factors. There seems to be some hope though for defendants who can prove that the alleged contravention ‘did not materially contribute to some part of the loss claimed’ and that the loss to be attributed to that other cause is identifiable or discrete.8

This decision will make it difficult for insurers and defendants facing claims for misleading and deceptive conduct to try to reduce an award of damages. The forensic task will be to establish the distinct external causative factors and the discrete or identifiable parts of the claimed loss or losses flowing therefrom in order to assist a Court to determine, under s82 of the TPA, the precise loss caused by the defendant’s conduct.

Alternatively, a move might be made for legislative reform to mitigate against some of the harsher implications of a strict interpretation of s82.

Sept. 11 – ‘one occurrence’

On 25 September this year, in SR International Business Insurance Co. Ltd. v World Trade Center Properties LLC et al, a judge of the United States Federal District Court ruled that the September 11 attacks on the World Trade Centre amounted to one ‘occurrence’ under a policy form used by three of the insurers. Lawyer Avryl Lattin considers this decision and its impact on Australian insurers.

Introduction
This case involved three of the insurers of the World Trade Centre. The two main issues considered were:

• the effect of a binder where the parties indicate an intention to enter into a formal policy that contains materially different terms; and

• the meaning of ‘occurrence’ where it is defined to include losses attributable ‘directly or indirectly to one cause or to one series of causes’.

Background to the case
At the time of the attack on the World Trade Centre, more than 20 individual insurance companies had signed binders that obliged them to provide property damage insurance but, with a few exceptions, they had not issued formal insurance policies.

In this particular case, the three insurers argued that, at the time the binder was issued, they agreed to be bound on the basis of a specific form of insurance (a WilProp form). The WilProp form contained a definition of ‘occurrence’ and using this definition, the insurers argued that the attack on the World Trade Centre was a single occurrence.

8. Gaudron, Gummow and Hayne JJ at 662 and Callinan J at 216.
The leaseholder of the World Trade Centre did not concede that the Wilprop form was incorporated into the binders, and argued that it was industry practice that the insurers should be bound by the same form as the lead underwriter. Further, it was argued that, even if the Wilprop form was part of the binder, there was more than one reasonable interpretation of the definition of ‘occurrence’.

Decision by US Federal District Court

In order to determine the terms that were incorporated into the binders of the three insurers, US District Court Judge John S. Martin Jr. held that the relevant question to be determined was not ‘What were the terms to which the parties might ultimately have agreed to become bound?’ but rather, ‘What were the terms to which they were bound?’

This decision highlights that a binder takes effect according to its own terms until a formal policy is entered into.

The judge considered the facts about the negotiations between the brokers for the leaseholder and each of the insurers to determine the terms of the binders as at September 11, 2001. In relation to each of the insurers, the judge held that the insurer’s binder specifically incorporated the WilProp form, including the definition of the term ‘occurrence’.

Accordingly, the leaseholder and each of the insurers was bound to the WilProp form, which included the following definition of the term ‘occurrence’:

‘Occurrence’ shall mean all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one occurrence irrespective of the period of time or area over which such losses occur.

The reference to ‘one cause or to one series of similar causes’ is typical wording used in policies covering property damage both in the US and Australia.

In this case, the judge held that an ordinary businessman would have no doubt that when the two hijacked planes hit the Twin Towers within a sixteen minute period, the total destruction of the World Trade Centre resulted from ‘one series of similar causes’.

Relevance to Australia

The judgment in this case draws on US case law and is not binding in Australia. Nevertheless, the principles applied are not materially different to those that would be applied by Australian courts and should be noted by insurers.

This decision highlights that a binder takes effect according to its own terms until a formal policy is entered into. Both parties to a contract of insurance are subject to the terms of the binder at the time of the event and, depending on the circumstances, this position may work for or against insurers.

The determination in this case that the terrorist attacks on the World Trade Centre were ‘one series of similar causes’ is not a surprising outcome and demonstrates a very literal interpretation of the phrase.

For further information, please contact:

Oscar Shub
Partner, Sydney
Ph: +61 2 9230 4305
Oscar.Shub@aar.com.au

John Baartz
Partner, Brisbane
Ph: +61 7 3334 3254
John.Baartz@aar.com.au

Prue Campton
Special Counsel, Melbourne
Ph: +61 3 9613 8741
Prue.Campton@aar.com.au

John Morgan
Partner, Sydney
Ph: +61 2 9230 4953
John.Morgan@aar.com.au

Jenny Thornton
Partner, Perth
Ph: +61 8 9488 3805
Jenny.Thornton@aar.com.au

Simon McConnell
Partner, Melbourne
Ph: +61 3 9613 8543
Simon.McConnell@aar.com.au

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