PRODUCT LIABILITY DECISIONS UNDER
PART VA (LIABILITY FOR DEFECTIVE PRODUCTS) TRADE PRACTICES ACT 1974 (CTH)

by

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and

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## INDEX

<table>
<thead>
<tr>
<th>CASE CITATION</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Australian Competition and Consumer Commission v Pacific Dunlop Ltd</strong> [2001] FCA 740</td>
<td>1</td>
</tr>
<tr>
<td><strong>Borch v Answer Products Inc</strong> [2000] QSC 379</td>
<td>5</td>
</tr>
<tr>
<td><strong>Bright v Femcare Ltd</strong> [2000] FCA 742</td>
<td>7</td>
</tr>
<tr>
<td><strong>Brooks v R&amp;C Products Pty Ltd</strong> (1996) ATPR 41-537</td>
<td>11</td>
</tr>
<tr>
<td><strong>Carey-Hazell v Getz Bros &amp; Co (Aust) Pty Ltd</strong> [2004] FCA 853</td>
<td>13</td>
</tr>
<tr>
<td><strong>Cheong by her Tutor The Protective Commissioner of New South Wales v Wong</strong> [2001] NSWSC 881</td>
<td>16</td>
</tr>
<tr>
<td><strong>Cook v Pasminco</strong> [2000] FCA 677</td>
<td>20</td>
</tr>
<tr>
<td><strong>Crump v Equine Nutrition Systems Pty Ltd v Horsepower</strong> [2006] NSWSC 512</td>
<td>26</td>
</tr>
<tr>
<td><strong>Eastley v Mauger</strong> [2000] FCA 266</td>
<td>33</td>
</tr>
<tr>
<td><strong>Effem Foods Ltd v Nicholls</strong> [2004] NSWCA 332</td>
<td>36</td>
</tr>
<tr>
<td><strong>Elms v Ansell Ltd</strong> [2007] NSWSC 618</td>
<td>39</td>
</tr>
<tr>
<td><strong>Fitzpatrick v Job (t/a Job's Engineering)</strong> [2005] ALMD 2321</td>
<td>42</td>
</tr>
<tr>
<td><strong>Forbes v Selleys Pty Ltd</strong> [2002] NSWSC 547; [2004] NSWSC 149</td>
<td>47</td>
</tr>
<tr>
<td><strong>Hamilton v Merck and Co Inc</strong> [2006] NSWCA 55</td>
<td>54</td>
</tr>
<tr>
<td><strong>Klease v Brownbuilt Pty Ltd</strong> [2002] QSC 226</td>
<td>56</td>
</tr>
<tr>
<td><strong>Lanza v Codemo Management Pty Ltd &amp; Ors</strong> [2001] NSWSC 845</td>
<td>58</td>
</tr>
<tr>
<td><strong>Laws v GWS Machinery Pty Ltd &amp; Anor</strong> [2007] NSWSC 316</td>
<td>61</td>
</tr>
<tr>
<td><strong>Leeks v FXC Corporation and Others</strong> [2002] FCA 72; (2002) 118 FCR 299</td>
<td>65</td>
</tr>
<tr>
<td><strong>Mayes v Australian Cedar Pty Ltd v/a Toronto Timber and Building Supplies</strong> [2006] NSWSC 597</td>
<td>67</td>
</tr>
<tr>
<td><strong>Morris v Alcon Laboratories (Australia) Pty Ltd</strong> (2003) ATPR 41-923 [2003] FCA 151</td>
<td>70</td>
</tr>
<tr>
<td><strong>Newcombe v Ame Properties Ltd</strong> (1995) 125 FLR 67</td>
<td>72</td>
</tr>
<tr>
<td><strong>Peterson v Merck Sharpe &amp; Dohme (Australia) Pty Ltd</strong> [2006] FCA 875</td>
<td>74</td>
</tr>
<tr>
<td>Case Title</td>
<td>Year</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------</td>
<td>--------</td>
</tr>
<tr>
<td>Roots &amp; Raydene Pty Ltd v Trussmaster Pty Ltd [2003] QSC 348</td>
<td>77</td>
</tr>
<tr>
<td>Stegenga v J Corp Pty Ltd &amp; Ors (1999) ASAL 55-025; ATPR 41-695</td>
<td>83</td>
</tr>
<tr>
<td>Stewart v Pegasus Investments and Holdings Pty Ltd [2004] FMCA 712</td>
<td>86</td>
</tr>
<tr>
<td>Thomas v Southcorp Australia Pty Ltd [2004] VSC 34</td>
<td>87</td>
</tr>
<tr>
<td>Trimstram v Hyundai Automotive Distributors Australia Pty Ltd [2005] WASCA 168</td>
<td>89</td>
</tr>
<tr>
<td>White v Canberra Furniture Manufacturing Pty Ltd (CAN 008 644 540), Dawe Industries Pty Limited (CAN 008 576 823) and Dosyo Pty Limited (CAN 008 620 773) t/as Canberra Walls and Frames and Marie Bishop [1999] ACTSC 53</td>
<td>92</td>
</tr>
<tr>
<td>------------</td>
<td>--------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Country</td>
<td>Australia</td>
</tr>
<tr>
<td>Court(s)</td>
<td>Federal Court of Australia</td>
</tr>
</tbody>
</table>
| Topics     | Latex gloves.  
Sections 52, 75AD, 75AQ, 80 and 82 (Damages) *Trade Practices Act* 1974 (Cth) ("*TPA*"): [Note: section 52 is no longer available as a cause of action in personal injury claims due to changes to the *TPA* introduced by the *Trade Practices Amendment (Personal Injuries and Death)* Act 2006].  
Part VA (Liability of manufacturers of defective products) of the *TPA*: sections 75AD (Liability for Defective Goods causing injuries) and 75AQ (Representative Actions by the Commission).  
Section 21 (Declarations of right) *Federal Court of Australia Act* 1976 (Cth).  
Order 13 rule 2 (General (Amendment)) *Federal Court Rules* ("*FCR*"). |
| Facts      | Proceedings were commenced in the County Court of Victoria against Pacific Dunlop Limited ("PDL"). Robinson sought damages for loss resulting from injuries sustained following a reaction to natural rubber latex in gloves made and sold by PDL.  
Robinson claimed that PDL had contravened section 52 of the *TPA* by making and selling defective household latex rubber gloves and was liable to pay compensation under section 75AD. She was also claimed that PDL was negligent at common law.  
Subsequently, the Australian Competition and Consumer Commission ("ACCC") commenced proceedings on behalf of Robinson in the Federal Court against PDL. Robinson's County Court proceeding was transferred to the Federal Court. Orders were made that it be heard together with the ACCC proceeding.  
The ACCC’s original statement of claim included a claim based on section 75AD of the *TPA*. It argued that the nature of the alleged defect was a failure to warn or otherwise state that the use of the gloves could cause damage to persons allergic to latex.  
The ACCC brought Robinson's complaint and the absence of product warnings to the attention of PDL in March 1998. In July 1998, the ACCC accepted a labelling proposal put forward by PDL. All gloves manufactured by PDL from the first quarter of 1999 were labelled in accordance with this labelling proposal. However, in the early part of 1999, previously distributed stock that did not carry the agreed labelling warnings may have been sold.  
In February 2001, the ACCC filed a notice of motion seeking to amend its original statement of claim. It sought to add a claim alleging that PDL had breached section 52 of the *TPA* by failing to warn consumers of the potential risks associated with the use of the latex gloves. The ACCC alleged that the failure to warn amounted to an implied misrepresentation that was misleading or deceptive, or was likely to mislead or deceive. The ACCC also sought to amend its original application. It sought a declaration that PDL had breached section 52 of the *TPA*. Further, an injunction was sought requiring PDL to implement a trade practices compliance program. |
<table>
<thead>
<tr>
<th>Legal Question(s)</th>
<th>Silence as conduct: whether silence can constitute misleading or deceptive conduct; where alleged failure to warn of dangers of product.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Application to add cause of action and leave to amend statement of claim.</td>
</tr>
<tr>
<td></td>
<td>Whether bad faith on part of regulator in seeking amendments.</td>
</tr>
<tr>
<td></td>
<td>Declaratory relief: where declaration of public right; whether declaration lacked utility.</td>
</tr>
<tr>
<td></td>
<td>Applicable limitation periods.</td>
</tr>
<tr>
<td>Decision(s)</td>
<td>Held:</td>
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<td>1. There is no prohibition against an applicant making claims in different capacities in the same action.</td>
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<td>2. The proposed amendment was allowed. It was a convenient means of disposing of the issues raised in both the existing and the proposed claims. There was sufficient commonality in the necessary factual investigations to make it convenient to deal with all causes of action together.</td>
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<td>3. Under Order 13, rule 22, one of the reasons for allowing amendments is the avoidance of multiplicity of proceedings. This consideration would justify the proposed amendment for the present purpose. In particular, the amendment would permit the new cause of action to be considered together with the existing cause of action in a single proceeding. The commencement of a new action between the same parties is thereby avoided.</td>
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**North J:**

**Claim in different capacities**

In the claim under Part VA (section 75AD), the ACCC sued on behalf of Robinson. In the proposed section 52 claim, it sued in its own right. PDL argued that the proposed amendments should not be permitted because it would allow claims brought by the ACCC in different capacities to be litigated in the same action.

North J noted there was no prohibition against an applicant suing in different capacities in the same action. The additional claim proposed by the ACCC would not, in North J’s view, add to or complicate the trial to an extent which would make it undesirable or inconvenient to permit the amendment.

**Declaration**

PDL argued that the order the ACCC sought seeking a declaration was bad in law because:

- there was no utility in granting the declaration;
- the cause of action sought by the amendment was statute barred; and
- no cause of action was available under section 52 of the TPA for misrepresentation by silence.

The alleged offending conduct was a past failure to warn. Since then, PDL had placed warnings on household use latex gloves. It contended that there was no chance of...
repetition of the conduct, therefore the declaration being sought lacked utility and should not be granted by the Court. PDL also argued that there was a lack of utility in making any declaration because there was no evidence that any person other than Robinson had suffered injury.

The ACCC argued that it was not seeking a declaration to protect the private rights of injured persons. Rather, the declaration sought was to vindicate a public right.

North J agreed with the ACCC and held that even if there were no other injured persons who could make a claim for damages, it did not follow that the declaration lacked utility in the relevant sense. A Court may conclude that there is a wider public interest in declaring that some particular previous conduct was unlawful. On the authorities the Court held that it was at least arguable that the ACCC was entitled to seek a declaration of public right that PDL acted in breach of section 52 of the TPA.

The amendments and declarations sought related to statute barred claims

The ACCC sought a declaration because such an order would provide a basis for other injured consumers to take legal action. PDL, however, argued that it would not be appropriate for a declaration to be made because any claim by an injured consumer for damages under section 82 of the TPA was statute barred.

However, there was a dispute how long it would take for an injury to manifest, the cause of action arising when the applicant suffers injury or could reasonably have appreciated that some injury was suffered: Karedis Enterprises Pty Ltd v Antoniou (1996) 137 ALR 544.

No liability for misrepresentation by silence under section 52

PDL argued that the amendment sought contended that mere silence alone could constitute a breach of section 52. PDL said that such a claim was bound to fail and was incorrect as a matter of law, Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd (1986) 12 FCR 477 being authority that only silence in a situation where there was an obligation to disclose information constitutes a misrepresentation.

However, the Court noted that Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31 was contrary authority. Black CJ said at 32:

"Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive. To speak of 'mere silence' or of a duty of disclosure can divert attention from that primary question. Although 'mere silence' is a convenient way of describing some fact situations, there is in truth no such thing as 'mere silence' because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed."

The Court also noted that in Hampic Pty Ltd v Adams (2000) ATPR 41-737 the New South Wales Court of Appeal held that there was a breach of section 52 due to a failure to warn a consumer adequately about the dangers of personal injury which arose from the use of the seller’s drain clearing preparation with hot water.

Discretion: bad faith
PDL contended that the ACCC made the application for leave to amend in bad faith, and relied upon this argument to oppose the granting of leave to amend.

Bad faith at the beginning or during proceedings exists where the applicant does not genuinely want the relief sought in the litigation. Instead the litigation is pursued for a collateral purpose. Bad faith will be found if the pursuit of the collateral purpose is the predominant purpose.

PDL alleged that the ACCC’s purpose of vindicating the public interest and ensuring that latex glove manufacturers warn of dangers in the use of their products was not in fact the purpose of the application. Rather, it was contended that the ACCC brought the application to exert pressure on PDL to settle Robinson's claim for damages. PDL presented a number of circumstances to support its allegation. However, in the result PDL did not establish that the ACCC brought the application for the predominant purpose of exerting pressure on PDL to settle with Robinson. The Court dismissed the allegations of bad faith.

<table>
<thead>
<tr>
<th>Comments</th>
<th>This was a second representative action brought by the Commission under section 75AQ of the <em>TPA</em>. This provision allows representative actions by the Commission when it obtains the written consent of each of the persons who has suffered loss upon which the application is made. However, unlike <em>Glendale Chemical Products Pty Ltd v Australian Competition and Consumer Commission and Anor</em> (1998) 40 IPR 619, the case did not generate a substantive judgment on Part VA.</th>
</tr>
</thead>
<tbody>
<tr>
<td>References</td>
<td></td>
</tr>
<tr>
<td>Case Title</td>
<td>Borch v Answer Products Inc [2000] QSC 379</td>
</tr>
<tr>
<td>------------</td>
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<tr>
<td>Country</td>
<td>Australia</td>
</tr>
<tr>
<td>Court(s)</td>
<td>Supreme Court of Queensland</td>
</tr>
<tr>
<td>Topics</td>
<td>Mountain bicycle.</td>
</tr>
<tr>
<td></td>
<td>Service outside of the jurisdiction.</td>
</tr>
<tr>
<td></td>
<td>Part VA (Liability of manufacturers of defective products): Section 75AD (Actions in respect of defective products causing personal injury) of the Trade Practices Act 1974 (Cth) (&quot;TPA&quot;).</td>
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<td></td>
<td>Rule 124 Uniform Civil Procedure Rules (Qld).</td>
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<tr>
<td>Facts</td>
<td>Borch sued for facial injuries resulting from a mountain bicycle accident. The second plaintiff claimed damages for nervous shock, the third plaintiff sued for loss of consortium and the fourth plaintiff, his brother, for compensation for damage to the bicycle.</td>
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<td>The suspension forks on the mountain bicycle allegedly collapsed. The first defendant, Answers Products Inc, was the manufacturer of the suspension forks. They were supplied to the second defendant, Cramer, who imported them into Australia. The third defendant, Kev Olsen Cycles, sold the bicycle to the fourth plaintiff.</td>
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<td>The causes of action alleged by the first plaintiff were negligence and contravention of Part VA of the TPA, specifically section 75AD. Borch contended that the suspension forks were defective because they were &quot;unfit and dangerous&quot; and that they were &quot;likely to fracture suddenly in the course of reasonable use in that the same were not of correct or proper design or construction and/or that they were fitted in such a manner that they would or might become, as they in fact became, defective forks&quot;. It was also claimed that the suspension forks had a 'defect' because &quot;in the course of proper and expected use the said forks suddenly fractured&quot;.</td>
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<td>The particulars of the cause of action in negligence were found to be inadequate.</td>
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<tr>
<td>Legal Question(s)</td>
<td>Whether a claim under Part VA of the TPA could be considered a &quot;tortious act or omission&quot;.</td>
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<td></td>
<td>Whether Part VA of the TPA has extra-territorial jurisdiction.</td>
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<td>Whether the cause of action fell outside Rule 124 of the Uniform Civil Procedure Rules, Qld, and therefore should service be set aside because the claim was served without leave.</td>
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<tr>
<td>Decision(s)</td>
<td>Given that the cause of action in negligence was a tortious act or omission, the proceeding fell at least in part within one of the paragraphs of Rule 124 of the Uniform Civil Procedure Rules, Qld, notwithstanding the inadequacy of the particulars. Although other parts of the pleading may not have fallen within the rule, the Court found that the originating process could be served outside of the jurisdiction without leave.</td>
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</table>
|            | The Court made no decision on the question of whether a claim under Part VA amounted to a "tortious act or omission", as Holmes J did not consider it necessary to decide the point. However, in response to a submission that the alleged breach of section 75AD of the TPA could not amount to a "tortious act or omission", His Honour noted that "the proposition was not beyond doubt". He referred to Commonwealth Bank of Australia v
White [1999] 2 VR 672, noting that "tortious act or omission" included misleading and deceptive conduct and that such conduct was a wrong. He concluded that there was nothing in the history of the rule to compel that the word "tort" should be restricted to traditional causes of action.

It was submitted that Part VA of the TPA had no extra-territorial application. His Honour noted that section 51 of the TPA gave extra-territorial effect to Part IVA and Part V of the TPA, but it did not refer to Part VA. In deciding the point, Holmes J stated "...in my view, ... both from first principles and by inference from the absence of an equivalent provision in respect of PtIVA, s75AD was incapable of having application outside of the jurisdiction".

**Comments**
The decision is an important reminder that Part VA of the TPA may not have extraterritorial operation (see Reply by Minister for Justice, Senate Hansard 3 June 1992 at 3374). Industry groups opposed the proposal that Part VA should have extra-territorial effect on the basis that exports should more properly be addressed by community standards applying in the importing country (see letter of 16 March 1992 from the Business Counsel of Australia to the Minister for Justice and Consumer Affairs at p3).

However, it has been argued that the TPA may indeed have some extra-territorial effect. Section 6(2)(c) of the TPA provides that that the TPA has "the effect it would have if: ...(c) any reference in Division 2 of Part V to a contract for the supply of goods or services and any reference in Division 2A of that Part or in Part VA to the supply of goods, were, by express provision, confined to a contract made, or the supply of goods, as the case may be: (i) in the course of, or in relation to, trade or commerce between Australia and places outside Australia; ...". Thus, this sub-section may provide an avenue for the TPA to have some extra-territorial effect (see Senate Hansard debate, 3 June 1992 3374 citing a legal opinion by Hon RJ Ellicott QC; Reply of the Minister for Consumer Affairs, House of Representatives Hansard, 24 June 1992 pp 3705-3706; see also 3709-3710). Further, Wells v John R Lewis (Int) Pty Ltd (1975) 25 FLR 194 at 208; ATPR 40-007 is authority that Part V of the TPA should not be read down as to exclude its operation to conduct that might cause injury to overseas consumers. See also Leeks v FXC Corporation and Others [2002] FCA 72.

**Text of judgment(s)**

**References**

Legal:104946615.1 6
<table>
<thead>
<tr>
<th><strong>Case Title</strong></th>
<th><em>Bright v Femcare Ltd</em> [2000] FCA 742</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Country</strong></td>
<td>Australia</td>
</tr>
<tr>
<td><strong>Court(s)</strong></td>
<td>Federal Court of Australia</td>
</tr>
<tr>
<td><strong>Topics</strong></td>
<td>Medical device.</td>
</tr>
<tr>
<td></td>
<td>Adequacy of warnings.</td>
</tr>
<tr>
<td></td>
<td>Representative proceedings under Part IVA <em>Federal Court of Australia Act</em> 1976 (Cth).</td>
</tr>
<tr>
<td></td>
<td>Negligence.</td>
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<tr>
<td></td>
<td>Interpretation: Sections 4(1), 5(1), 74A and 75AB <em>Trade Practices Act</em> 1974 (Cth) (<em>&quot;TPA&quot;</em>).</td>
</tr>
<tr>
<td></td>
<td>Part V Division 2A (Actions against manufacturer of goods) of the <em>TPA</em> - sections 74B (Actions in respect of unsuitable goods) and 74D (Action in respect of goods of unmerchantable quality).</td>
</tr>
<tr>
<td></td>
<td>Part VA of the <em>TPA</em> - (Liability of manufacturers for defective products), sections 75AC (Meaning of goods having defect) and 75AD (Liability for defective goods causing injuries - loss by injured individual).</td>
</tr>
<tr>
<td><strong>Facts</strong></td>
<td>Femcare manufactured &quot;Filshie Clips&quot; and applicators. The Filshie Clips were to be applied to women's fallopian tubes to prevent pregnancy. To insert the Filshie Clips, a surgeon used laparoscopic surgery to manoeuvre the clip (in an applicator) into place and to then close it over the fallopian tube.</td>
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<td>Filshie Clips and applicators were generally sold to Australian hospitals and doctors via a distributor and sub-distributor. Endovasive Pty Ltd had been Femcare's distributor in Australia since 1993. It was the sole purchaser of clips and applicators from the first respondent for sale to Australian hospitals and doctors.</td>
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<td>Femcare supplied manuals with the Filshie Clips and applicators. Endovasive supplied these manuals to the Australian doctors and hospitals to which the products were sold. The manuals carried a warning with regard to the individual calibration of applicators from 1988 onwards.</td>
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<td>In 1994, a warning was introduced in the manuals advising of the need for periodic servicing or recalibration of its applicators. On several occasions, reminders were sent to hospitals and doctors with respect to the servicing of applicators. In 1998, the Royal Australian College of Obstetricians and Gynaecologists and the Therapeutic Goods Administration also notified its members of the need for calibration safety. In 1999, the first respondent introduced a gauge which could be used by a hospital or doctor to check calibration of the applicators.</td>
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<td>Bright (the &quot;applicant&quot;) was one of a group of women who underwent a sterilisation procedure. The respondents' products were used. It was alleged that the Filshie Clip failed to properly close by reason of a calibration failure of the applicator, causing the sterilisation to fail and subsequent suffering of loss and damage.</td>
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<tr>
<td><strong>Legal Question(s)</strong></td>
<td>Whether the statement of claim should be struck-out on grounds that it insufficiently identified group members and/or reasonable causes of action due to its generality.</td>
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</tbody>
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Whether the applicants’ solicitors should be liable for costs.

Whether costs should be awarded on an indemnity basis (not considered below).

**Decision(s)**

Bright brought representative proceedings or class action against the respondents under Part IVA of the *Federal Court of Australia Act 1976* (Cth).

Bright alleged that the applicator used in her sterilisation procedure was out of calibration, which resulted in turn in a defective clip. She alleged that the goods had a defect under sections 75AC and 75AD of the *TPA* because their safety was not such as doctors and hospitals or patients were generally entitled to expect. Further, it was alleged that the goods were not of merchantable quality in contravention of section 74D, or not fit for purpose as required by section 74B of the *TPA*.

The respondents brought an application to strike-out a third amended statement of claim. They contended that the statement of claim did not sufficiently plead a reasonable cause of action because the pleading went beyond the permissible level of generality in pleading material facts in representative proceedings.

The Court recognised that allegations made in a representative may initially be made at a high level of generality and could be amended to become more specific during the course of the proceedings. However, the Court found that the statement of claim filed by the applicant was inadequate, incomplete and embarrassing. The description it supplied of the represented class of persons was both unduly complex and ambiguous. The pleading was open to various meanings and therefore embarrassing.

*Goods of a kind ordinarily acquired ...*

Bright alleged that the clips in dispute were not reasonably fit for the purpose for which they were commonly supplied (section 74B(1)(d)).

Argument concentrated largely on the questions whether the clips were supplied to, or acquired by, the applicant and group members as was required by the section. It was also argued whether the clips were "goods" of a kind to which section 74B applies: that is, goods of a kind ordinarily acquired for personal, domestic or household use or consumption (section 74A(2)(a)).

Lehane J noted that section 4(1) of the *TPA* has an inclusive definition of the concepts of supply and acquisition.

Femcare argued that a clip was not an item of property which a patient acquires, in the sense of obtaining a proprietary (or perhaps possessory) interest in it, during the course of an operation. For example, unlike spectacles or a hearing aid, it was argued that a clip should be regarded in the same way as a suture or infused plasma. Thus the clip was not a subject of supply to, or acquisition by, a patient.

His Honour was not prepared to determine this question on a strike out application, however.

*... for personal, domestic or household use or consumption*

In relation to whether the clips were properly to be described as goods "ordinarily acquired for personal use", Lehane J noted that hospitals and doctors do not acquire them for personal use. However, His Honour further noted, ‘once the step is taken of saying that a patient acquires clips, it would follow that patients are among those who ordinarily acquire them and it may be that they acquire them for a "use" which is properly described as "personal"’ (at 70).
Extraterritorial effect

"Trade or commerce" includes a supply of goods which may give rise to liability under the TPA and is defined (s4(1)) as meaning trade or commerce within Australia or between Australia and places outside Australia' (per Lehane J at 77).

There is a general presumption that the TPA applies only to conduct within Australia or of Australian nationals (J D Heydon, Trade Practices Law par 2.650). This presumption is reinforced by section 5, which provides a limited extension of the territorial operation of the Act.

Section 5(1) provides:

"(1) Part IV, Part IVA, Part V (other than Division IAA) and Part VB extend to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia or by Australian citizens or persons ordinarily resident within Australia."

Accordingly, conduct may give rise to a liability under the TPA if two conditions are met. First, it is engaged in within Australia (by a corporation) or outside Australia (by a body referred to in s 5(1)). Second, it is conduct in trade or commerce (including that between Australia and some place outside Australia).

General reliance

The Respondents plead that:

"The Applicant and each Group Member relied upon the Respondents and each of them to provide to the hospitals and/or medical practitioners which/who performed the sterilisation procedure(s) upon the Applicant and each Group Member with clear instructions, warnings or advice of all matters relevant to the safe and effective use of the goods so as to avoid and/or diminish the risk of failed sterilisation."

Femcare submitted that "general reliance" was no longer good law in Australia. Lehane J agreed that the concept or doctrine of general reliance was disapproved by a majority of the High Court in Pyrenees Shire Council v Day (1998) 192 CLR 330 at 344 per Brennan CJ, 385 per Gummow J and 411 per Kirby J.

In any case, the applicant clarified that its case was that doctors and hospitals actually relied on the respondents' conduct. They submitted that no claim was based on any reliance, whether specific, actual or "general", on the part of the applicant or any group member.

Safety

His Honour noted that goods have a defect for the purpose of Part VA "if their safety is not such as persons generally are entitled to expect" (section 75AC(1)), not specifically as "doctors, hospitals or patients are generally entitled to expect".

Causation

His Honour also noted (at 92) that "liability arises where a corporation supplies goods manufactured by it, those goods have a defect and, because of the defect, an individual suffers injury. What appears to be necessary is that there be a clear link between particular defective goods and "injury" (not loss or damage) suffered by an individual (see Stegenga v J Corp Pty Ltd (1999) ATPR 41-695)".

His Honour noted that those group members who did not undergo a procedure which was unsuccessful due to the applicator used being out of calibration would face difficulties. His Honour did not consider that it was sufficient to plead that a member of the group had
suffered "loss and damage" resulting from defects where "such injury and loss would have been avoided in the event of the ... applicator not being exposed to the risk of being out of calibration."

The statement of claim was struck out and the applicant was given leave to replead.

| Comments | In his judgment, Lehane J made some noteworthy observations in *obiter*. His Honour noted that section 74B subsection (2) provides what might be described as two defences. The first defence requires there to be circumstances outside of the manufacturer's control, arising after the goods left the control of the manufacturer. The second defence depends upon circumstances showing that the consumer did not rely on the skill or judgment of the manufacturer, or that it was unreasonable for the consumer to do so. His Honour also commented on whether the Filshie clips were goods of a kind ordinarily acquired for personal, domestic or household use. He acknowledged an argument that the medical device in question was not the subject of a supply to, or acquisition by, a patient in the same way as spectacles or a hearing device might be, although any "use" might properly be described as "personal". The question of whether there was a sufficient acquisition or supply (of latex gloves in a hospital) was also briefly addressed in a later strike-out decision, *Elms v Ansell Ltd* [2007] NSWSC 618.

It is worth also noting that the present judgment also indicates some judicial impatience with class action filings, but not to the same extent as *Cook v Pasminco* [2000] FCA 677. |
| Text of judgment(s) | [http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/2000/742.html?query=%5e+%28%28femcare%29+and+%28on%29%29](http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/2000/742.html?query=%5e+%28%28femcare%29+and+%28on%29%29) |
**Case Title**: Brooks v R & C Products Pty Ltd (1996) ATPR 41-537

**Country**: Australia

**Court(s)**: Federal Court of Australia

**Topics**
- Cleaning product.
- Whether warning on product label adequate.
- Whether forum appropriate and possible transfer from Federal Court to State Court.
- Negligence (not discussed below).
- Misleading and deceptive conduct under section 52 *TPA*. (Note: section 52 is no longer available as a cause of action in personal injury claims due to recent changes to the *TPA* introduced by the *Trade Practices Amendment (Personal Injuries and Death) Act 2006* (Cth)).

**Facts**
Brooks brought a claim for personal injury incurred after using a product known as "Big Boy Oven Cleaner". Injuries included disfigurement and second-degree burns to his right arm and other injuries. R & C Products Pty Ltd allegedly manufactured and supplied the product between January and April 1993. The packing of the product included the following label:

"SAFETY DIRECTIONS: This product is corrosive. Avoid contact with eyes and skin. Wear rubber gloves at all times. Do not spray towards face and eyes. Try to avoid inhaling fumes. Contents under pressure".

Brooks argued that the label failed to adequately warn users of the danger to the skin associated with the use of the product, or inform of steps that should be taken if the product were to come in to contact with skin. Thus it was argued that the product was defective, the labelling was misleading and deceptive and that the respondent was negligent.

**Legal Question(s)**
- Appropriateness of the forum for the proceedings.
- Whether the case should be transferred from the Federal Court to an inferior State Court.

**Decision(s)**
Individual suits claiming compensation for personal injury in Australia (as opposed to representative or class actions) are more commonly heard in the District Court than in the Federal Court. At a directions hearing, the Court raised the question as to whether the proceedings could more appropriately be dealt with in the District Court of New South Wales.

The respondent supported the transfer, but it was opposed by the applicant. Brooks sought judgment for damages and declaratory relief that "the action goods were goods which had a defect within the meaning of section 75AC of the [Trade Practices] Act [1974 (Cth)]", and the District Court of New South Wales does not have the power to grant declaratory relief.

**Motion**
Matters may be transferred by the Federal Court of Australia to a Court of a State or
Territory under section 86A of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth). However, section 86A also provides that the Federal Court shall not transfer a matter to another Court unless the latter Court has power to grant the remedies sought in the Federal Court. As noted, the District Court of New South Wales does not have the power to grant declaratory relief, thus the Federal Court was prevented from transferring the matter to the District Court.

Lindgren J stated that he would exercise the Court’s discretion and not order the transfer, regardless of whether the Federal Court had the power to transfer the matter to the District Court. His Honour’s reason was that as at the date of the judgment, there were no decisions under Part VA of the *TPA*. It would therefore be more useful for the Federal Court to construe the provisions regarding questions of construction under section 75AC. Further, the definition of "defect" might arise in the proceedings, and it would be more useful for the Federal Court to construe the provisions. Lindgren J also considered the public interest aspect of the litigation. If it were to be successful in terms of the declaratory relief, again it would be more useful to view the matter as more than just a single claim for damages for personal injuries.

No transfer was ordered for the matter and it remained in the Federal Court.

### Comments

Both the Federal Court and State Courts in Australia have jurisdiction to hear and determine proceedings brought under Part VA due to section 75AS of the *TPA*.

Federal Court decisions have shown support for the idea that State Courts are well suited to determine personal injury claims (see *Eastley v Mauger* [2000] FCA 266). In many applications, such an order will be made by consent. The Judges of State Courts are familiar with handling personal injury claims and the Court rules are tailored for dealing with such claims. Further, when proceedings concern a pharmaceutical product or medical device, the plaintiff's intention to join a medical practitioner to the proceedings may be a relevant consideration (see *Crandell v Servier Laboratories (Aust) Pty Ltd* [1999] FCA 1461). A number of Courts appear to be of the view that claims under Part VA are subsidiary to claims founded on negligence (*Crandell v Servier Laboratories (Aust) Pty Ltd* [1999] FCA 1461; *Eastley v Mauger* [2000] FCA 266; *Laws v GWS Machinery Pty Ltd* [2007] NSWSC 316). In such circumstances, it seems likely that the majority of personal injury claims for compensation will be heard by State Courts.

### Text of judgment(s)


### References


<table>
<thead>
<tr>
<th>Case Title</th>
<th><em>Carey-Hazell v Getz Bros and Co (Aust) Pty Ltd</em> [2004] FCA 853</th>
</tr>
</thead>
<tbody>
<tr>
<td>Country</td>
<td>Australia</td>
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<td>Court(s)</td>
<td>Federal Court of Australia</td>
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<td>Topics</td>
<td>Medical device.</td>
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<td>Failure to warn.</td>
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<td>Duty of doctors to warn patients.</td>
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<td>Negligence, breach of duty of care (not discussed below).</td>
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<td>Part VA (Liability of manufacturers for defective goods) of the <em>TPA</em>: sections 74AC (Meaning of goods having defect), 75AD (Liability for defective goods causing injuries - loss by injured individual), 75AK (Defences) and 75AO (Time for commencing action).</td>
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<tr>
<td>Facts</td>
<td>Karen Carey-Hazell (the &quot;applicant&quot;) was diagnosed as having a partial prolapse of the mitral valve in her heart. Her condition was monitored by Dr Thompson (the &quot;second respondent&quot;). In addition, the applicant suffered with balance and vision problems and was seen by a neurologist about these symptoms.</td>
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<td>Subsequently, the applicant was injured in two car accidents. On both occasions, she suffered soft tissue injuries to her neck. Subsequent back and thigh injuries resulted from the second accident. She received radio frequency blocks on the cervical spine and right sacroiliac joint, which provided some relief from the pain for a period.</td>
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<td>In 1996, the applicant was referred to Dr Nicholls (the &quot;third respondent&quot;) by the second respondent for possible surgery in relation to her mitral valve. Following consultation the applicant underwent surgery, but the mitral valve could not be repaired. Instead a mechanical valve was implanted. The valve was made by a US manufacturer, St Jude Medical Inc (&quot;St Jude&quot;), and was imported and supplied by Getz Bros and Co (Aust) Pty Ltd (the &quot;first respondent&quot;).</td>
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<td>When mechanical mitral heart valves are implanted, it is generally accepted that there is a risk of developing thrombi or blood clots on the surface of the valve. Thrombi can obstruct vessels, restrict blood supply and cause tissue necrosis or infarction (accidental death of cells and living tissue caused by inadequate blood supply). A stroke may result if blood supply to the brain is interrupted by an embolism travelling to a cerebral artery.</td>
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<td>After surgery, the applicant was treated with an anticoagulant drug to minimise the risk of thromboembolic complications. However, her body was unable to maintain adequate levels of the substance. In 1997, the applicant suffered a midbrain stroke, plus infarcts to her spleen and left kidney. The valve was surgically removed.</td>
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<td>After secondary analysis using a scanning electron microscope, a small chip was found in the valve. The importer/supplier denied that the chip was responsible for the thrombus seen on the explant. It also disputed the time when the chip came into existence.</td>
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<td>The applicant’s claims against the second and third respondents related to a failure to advise regarding clotting on mechanical valves, the on-going need for anticoagulant drugs and the availability of a tissue valve as an alternative with less associated risk of clotting.</td>
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</table>
**Legal Question(s)**

Whether a defence was available that a defect in the goods alleged to have caused loss did not exist at the time of supply.

Whether the onus of showing that a defect existed at the time of supply rest with the applicant.

Whether a risk of complications associated with a medical device was a defect or amounted to unfitness for purpose.

Whether goods are required to be completely free of risk.

Causation.

**Decision(s)**

The applicant's claim against the importer/supplier (deemed to be the manufacturer under section 74A(4) of the *TPA*) was based on Part V Division 2A and Part VA of the *TPA*. In general terms, the applicant alleged a failure to warn due to insufficiency in information provided to her and an alleged manufacturing defect.

The applicant alleged that certain warnings were absent from the first respondent's booklet, that is, there was a risk of thromboembolism between 2% and 5% per patient per annum associated with the implant of the St Jude valve, notwithstanding the patient taking anticoagulant drugs. She argued that had she been advised of the risks prior to surgery, she would have urgently obtained advice that may have avoided her subsequent injuries. Additionally, she alleged that a manufacturing defect also caused a thrombus to form on the valve whilst it was implanted.

The question in terms of Part V Division 2A and section 74B (Actions in respect of unsuitable goods) of the *TPA* was whether the valve was fit for the purpose for which it was intended (namely to replace damaged natural mitral valves). Given that there was a known risk that thromboembolism might develop and cause injury of the kind that the applicant suffered, could it be successfully argued that the valve was unfit for the intended purpose?

This question is not simply whether or not the goods failed to accomplish their purpose, but regard must be had as to what a consumer could reasonably expect from the goods. Under this test, goods are not unfit for their purpose if it would have been unreasonable for the applicant to have expected an absence of complications, when also taking into account the advice given by the medical practitioners on the risks.

Kiefel J held that the risk of thromboembolism was well known to medical practitioners, and in the circumstances of the case the applicant was in fact advised of this risk. His Honour concluded was not reasonable for the applicant to expect that there was no prospect that the valve would cause the development of thrombi. The claim based on the alleged contravention of section 74B was held not to have been established.

With regard to Part VA and section 75AD of the *TPA* (Liability for defective goods causing injuries - loss by injured individual), the first respondent importer denied that the product was defective when it left its manufacturing facility. It also denied any failure to warn. In the alternative, it argued that any lack of warning could not constitute a "defect" under the *TPA*. It also contended that the claim was statute barred.

The Court found that an applicant was not required to prove that a defect existed at the time of supply under section 75AD(c). The requirement was proof of the existence of a defect in the good, injury and a causal link. Where a link could be established between defect and injury, it was to be inferred that the defect was present at the time of the injury, unless in defence the manufacturer could prove otherwise. A sufficient defence would be established under section 75AK(1)(a) if the manufacturer could show that any defect at the time of supply would have been detected. The manufacturer need not establish that
the defect had occurred after the time of supply.

Regarding the alleged failure to warn, the Court noted that the risks associated with the goods were well known by the medical profession. It was also recognised that they were in a position to inform the patients of the associated risks. When assessing the safety of the product, all relevant circumstances are to be taken into account under section 75AC(2). This includes known negative side effects associated with medicines. In the circumstances of the case, the absence of a warning was in itself insufficient for the Court to conclude that the medical device was defective.

A risk of complication alone does not mean that a medical device has a defect. Such devices are known to confer real benefits to the wider community at large despite having associated risks. A device may not be defective even with a small statistical chance of injury.

The applicant submitted that the extent to which causality between the defect and injury need be proven was lessened by the choice of the words ‘because of’ (the defect) in section 75AD(c), in contrast with the use of the word ‘by’ in s 82(1). The Court rejected the argument, however, holding that in the context of section 75AD, the defect must be shown to have caused an applicant's injuries by applying a common sense approach.

Comments

The main significance of this decision lies in the reasoning as to whether the goods were defective. After reference to the Explanatory Memorandum, Kiefel J noted that the standard was objective and based upon what the public at large was entitled to expect. Part VA did not require that the goods be absolutely risk free.

When assessing the safety of the goods, all relevant circumstances are to be taken into account. This includes the nature of the product, community knowledge of the product, the existence of known side effects and the role of intermediaries, including pharmacists and medical practitioners. The judgment cited previous Australian authority for the principle that duty to warn rests with the treating physician not the manufacturer or distributor (*H v Royal Alexandra Hospital for Children* (1990) Aust Torts Reports 81-000). Thus, His Honour did not think that it was necessary to refer to the US case law in relation to the effect of a "learned intermediary" upon a manufacturer's obligation to warn.

The decision also raises the question of whether Part V Division 2A and Part VA should be seen as the only source of liability for manufacturers of goods, precluding claims in negligence. The argument is based upon the US doctrine of pre-emption. Sections 75 and 75AR of the *TPA* provides that Parts V and VA shall not affect any remedy that a person would have had if those Parts had not been enacted, but the High Court considers that the question remains open (see *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR at 591 per Gummow and Hayne JJ). In this case the Court found it was not necessary to address the question.

In relation to the defence under section 75AK(1)(a) of the *TPA* that the defect did not exist at the time of supply, compare also *Cheong by her tutor The Protective Commissioner of New South Wales v Wong* [2001] NSWSC 881 and *Effem Foods Ltd v Nicholls* [2004] NSWCA 332.

Text of judgment(s)

**Case Title** | Cheong by her tutor The Protective Commissioner of New South Wales v Wong [2001] NSWSC 881
---|---
**Country** | Australia
**Court(s)** | Supreme Court of New South Wales
**Topics** | Retread tyre.
Motor vehicle accident.
Time when a product must be shown to have a defect.
Negligence (not considered below).
Claims for contribution under Part VA (Liability of manufacturers for defective products) *Trade Practices Act* 1974 (Cth) ("TPA").

Liability for defective products under Part VA: sections 75AC (Meaning of goods having defect), 75AD (Liability for defective goods causing injuries - loss by injured individual), 75AE (Liability for defective goods causing injuries - loss by person other than injured individual), 75AK (Defence that defect did not exist in goods at the time of supply; development risks/state of the art defence) and 75AO (Time for commencing action) *TPA*.

**Facts**

Beverly Bikwan Cheong (the "plaintiff") was a passenger in a vehicle owned and driven by the defendant, King Leung Wong, on a Sydney motorway in April 1994. The vehicle crossed to the opposite side of the motorway and collided with oncoming traffic. As a result of the accident, Cheong suffered extensive injuries, including brain damage. The speed limit of the motorway was 110 kilometres per hour.

The police investigation showed that one of the rear tyres of the vehicle was a retread. This fact became central to the proceedings. A key question was whether the condition of the tyre substantially caused the accident. However, the tyre was lost and could therefore not be examined by experts. Police evidence and that of other drivers was, however, that there had been a tyre failure.

Initially, the plaintiff joined six defendants to the proceedings. These included Wong, the Roads and Traffic Authority of New South Wales, a tyre manufacturer, a tyre services firm and the owner of a company which examined the vehicle and issued a certificate of fitness for registration ("pink slip") one month earlier. Several cross-claims were issued seeking indemnity or contribution from different defendants.

No evidence was admitted to suggest that the tyre manufacturer ("Vulcap") did not comply with the relevant Australian standards. The Court was not satisfied that the evidence had established that the defect was in existence at the time of retread by the manufacturer. Neither was it proven that there was any indication of underlying defect which ought reasonably to have been identified and responded to by Vulcap. The Court found that it was equally probable that the tyre had incurred subsequent damage. However, it was noted that section 75AC of the *TPA* provides that there is a relevant defect if the tyre is deficient as to safety, in terms of what persons generally are entitled to expect. Further, the affirmative defence under section 75AK(1) could only be proven if the manufacturer could establish that the defect did not exist at the time of supply.

The vehicle had recently conducted and passed the vehicle in a Roads and Traffic
Authority inspection for the purposes of re-registration. It was alleged that examiners ought to have discovered a defect during an inspection undertaken per specific requirements set down by the New South Wales Roads and Traffic Authority. These requirements included that each tyre be inspected and rejected if having less that 1.5 millimetres in tread depth, or deep cuts, bulges, exposed cords or other signs of carcase failure.

<table>
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<th>Legal Question(s)</th>
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<tr>
<td>Whether the retread tyre was defective (under section 75AC of the <em>TPA</em>).</td>
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<td>The time when the defect must be shown have existed (sections 75AC and 75AK(1)(c) of the <em>TPA</em>).</td>
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<td>Whether there was compliance with standard and the state of the art defence in section 75AK(1)(c) of the <em>TPA</em>.</td>
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<td>Whether various cross-claiming parties could be indemnified or receive contribution (per section 75AE of the <em>TPA</em>).</td>
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The Court held that a defect was present because the safety of the retread tyre was not such as persons were generally entitled to expect, having regard to what might reasonably have been expected to have been done with the product (in this case, used on a vehicle on roads).

The Court was unable to determine whether the tyre was faulty at the time of the retread and supply. However, it was found to be defective because it had lasted only 19,000 kilometres before failure.

Similarly, while the plaintiff did not establish that the tyre was defective at the time of manufacture (the process of retread), the manufacturer also did not prove that it did not have a defect at the time of supply. Accordingly, the defence in section 75AK(1)(a) of the TPA was not established.

In addition, the manufacturer did not establish that the state of scientific or technical knowledge was not such as to enable the defect to be discovered.

A question as to statutory limitation was also raised in the proceedings, specifically, when the statute of limitation period began to run. Section 75AO provides that a person may commence a liability action at any time within 3 years after the time the person became aware, or ought reasonably have become aware of the identity of the manufacturer of the goods (as long as action is commenced within 10 years of the supply).

The plaintiff’s solicitor knew shortly after the accident that the retreading had been done by Vulcap. However, Vulcap traded as more than one corporate entity bearing in its name the word "Vulcap”. Steps were taken to identify which corporate entity was involved by issuing a subpoena upon Vulcap.

The Court concluded that the time of awareness of the identity of the manufacturer included a measure of reasonableness as to the relevant entity where there are a number of companies in a corporate structure, "it is unreasonable to expect the outsider to penetrate the veils and find the right corporate defendant unless there is prompt, frank and adequate disclosure". Such disclosure happened some 4 years after the date of the accident.

The Court also found that Wong was negligent in continuing to drive the vehicle after ample warning was received of imminent danger, failing to slow down and indeed accelerating, in the face of the noise and vibration caused by the loss of the retread.

The evidence did not establish that either the manufacturer of the tyre or the examiners for the pink slip inspection of the vehicle were negligent.

The Court concluded that responsibility for the accident should be attributed 25 percent to the manufacturer of the tyre, 75 percent to the driver.

Regarding claims for contribution, the Court considered whether the driver of the vehicle, being a natural person, could be entitled to contribution from the manufacturer under section 75AE (liability for defective goods causing injuries - loss by person other than injured individual). Wong said that he had suffered loss because of his liability to compensate Cheong in respect of her injuries and that this loss did not come about because of a business relationship. Wong’s argument in this respect addressed the literal wording of the section. However, the Court concluded that a claim under the section was
available only to those who had suffered loss derived from the injuries. This was regarded as distinct from a loss resulting from a legal liability under judgment, in contrast to that person being an actual cause of the injuries.

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| Part VA of the *TPA* does not include provisions relating to claims for contribution and indemnity.  

Part VA provides that if two or more corporations are liable under Part VA, they are jointly and severally liable under section 75AM. However, there is no mechanism allowing the attribution of proportionate responsibility. Part VA also does not allocate responsibility between "manufacturers" (including parties that could be regarded as "deemed manufacturers" under the *TPA*) and other persons who may be liable in respect of the same loss. 

The term ‘manufacturer’ is broadly defined under the *TPA*. Thus, the component part manufacturer, assembler and importer could all be joined into proceedings. Likewise, suppliers may each be deemed to be manufacturers under section 75AJ (Unidentified manufacturer). 

In many cases, agreements between parties in the supply chain contain indemnities. Section 74H gives a party that sells defective goods to a third party a right of indemnity against the manufacturer of the goods in question. There is authority for the principle that this right is enforceable as if it were a right arising out of a contract of indemnity between the seller and the manufacturer (see *Fibreglass Pool Works (Manufacturing) Pty Ltd v ICI Australia Pty Ltd* (1997) ATPR 41-565). 

This case was an attempt to determine liability between such manufacturers and other potentially liable parties. The plaintiff's argument, that the structure of section 75AE of the *TPA* enables it to be used as a vehicle for seeking indemnity between defendants, was rejected. It was determined that the correct interpretation was that the ability to seek joint indemnity was available to those who have suffered loss derived from injuries, as distinct from a loss suffered by being required to meet the sanctions of a judgment by reason of that person being a cause of the injuries: see also *Stegenga v J Corp Pty Ltd and Ors* (1999) ASAL 55-025; ATPR 41-695. 

A right to equitable contribution may exist under Part VA. In *Burke v LFOT Pty Ltd* [2002] HCA 17, the High Court held that a right of equitable contribution existed in Australian law, and that categories in which a Court will order contribution were not closed. In general terms, the principle of equitable contribution requires that those who are jointly or severally liable in respect of the same loss or damage should contribute to the quantum payable in respect of that loss or damage in proportion to the to their respective court-apportioned liabilities. The High Court noted that the doctrine of equitable contribution is usually expressed in terms requiring contribution between parties who share "co-ordinate liabilities" or a "common obligation" to "make good the one loss". Founded in equity, the doctrine is based on concepts of fairness and justice. 

The 2004 amendments to the *TPA* which introduced Part VIA (Proportionate liability for misleading and deceptive conduct) relating to claims for economic loss or damage to property under section 82 caused by conduct that was done in contravention of section 52, do not apply to Part VA. 

This judgment is also significant in holding that the manufacturer was not negligent, but yet was liable under Part VA of the *TPA*. Vulcap could not establish a defence under section 75AK(1)(a) of the *TPA*, that is, that the product was not defective at the time of supply. Under section 75AD, a plaintiff has to provide that goods have a defect and because of the defect, an individual suffers injuries. Although the plaintiff was not able to prove that the goods were defective at the time of supply, the Court was satisfied that a defect in the goods caused the accident. Compare also *Carey-Hazell v Getz Bros*.
<table>
<thead>
<tr>
<th>Text of judgment(s)</th>
<th>[2004] FCA 853 and <em>Effem Foods Ltd v Nicholls</em> [2004] NSWCA 332.</th>
</tr>
</thead>
</table>

### Case Title
*Cook v Pasminco [2000] FCA 677*

### Country
Australia

### Court(s)
Federal Court of Australia

### Topics
- Industrial pollution
- Representative proceedings
- Part VA (Liability for defective goods) - Sections 75AD (Liability for defective goods causing injuries - loss by injured individual) and 75AG (Liability for defective goods - loss relating to buildings etc) *Trade Practices Act 1974 (Cth)* ("TPA")
- Torts of negligence and nuisance (not discussed below)
- Liability for costs under section 43 *Federal Court of Australia Act 1976 (Cth)*

### Facts
Pasminco Ltd operated smelters at both Cockle Creek in New South Wales and Port Pirie in South Australia which emitted noxious fumes allegedly injurious to health.

The applicants brought a representative (class) action under Part VA of the *TPA* alleging that Pasminco manufactured emissions (which were allegedly defective goods) which were in turn supplied to the applicants causing injury to individuals (section 75AD: Liability for defective goods causing injuries - loss by injured individual) and an adverse effect on the safety of land, buildings or fixtures (section 75AG: Liability for defective goods - loss relating to buildings etc).

### Legal Question(s)
Whether factory emissions could be "defective products".

Claims of a colourable nature, not genuine and designed to fabricate jurisdiction.

### Decision(s)
This case was dismissed as incompetent by Lindgren J who held the action brought under the guise of Part VA of the *TPA* to be "doomed to fail", "quite hopeless" or "clearly untenable" and therefore "colourable", "not genuine", "fabricated" and having no accrued jurisdiction to be heard in the Federal Court of Australia.

A prerequisite for liability under sections 75AD and 75AG of Part VA of the *TPA* is that a corporation must have supplied goods manufactured by it in trade or commerce.

The Federal Court characterised the nature of "supply" as being "a bilateral and consensual process". The bilateral "transaction" or "dealing" which occurs in the supply of goods sees one party transferring the goods and the other acquiring them. The applicants’ case, therefore, failed because they were held not to have acquired the emissions as there was no consensual transaction or dealing.

Further, Lindgren J did not consider that the element of "in trade or commerce" had been satisfied. The Court took the view that "in trade or commerce" referred not "merely to the broad field in which a corporation’s general activities of a trading or commercial nature are carried on"; the events must occur "as an aspect or element of activities or transactions which themselves have a trading character". The emissions from the smelter did not satisfy this requirement either.

Finally, to have breached sections 75AD and 75AG, the applicants had to show the emissions were goods which had a defect. Under section 75AC, goods are defective "if their safety is not such as persons generally are entitled to expect". However, on the pleadings, the emissions were unsafe not due to a defect in them but simply because of
their inherent nature. Lindgren J remarked that “it is a poison that does not do its deadly work that is defective rather than one that does”, and then concluded that emissions could not be defective because they were instead being true to their nature.

Lindgren J also thought there was much to be said for the respondent’s submissions that the emissions were also not “goods” which had been “manufactured”, but he refrained from dealing any further with them.

**Comments**

In a broad sense, the decision is consistent with the test of consumer expectations in section 75AC of the TPA - a reasonable consumer would not usually consider smelter emissions to be a defective product, notwithstanding that they may be noxious. Nevertheless, smelter emissions may be unsafe. Lindgren J’s example of a poison not working and its extension to this case, therefore, is problematic. A poison will rarely be unsafe and hence "defective" under Part VA, because its dangerous properties (as with certain guns or knives) is an inherent characteristic or requirement and meets community expectations of its safety. If it does not work, a poison is likely to be even less unsafe or will cause less injury.

Even more problematic is the example of factory emissions. Unlike a poison or gun, they are not intended to necessarily cause harm. A better approach may have been to draw on work, including by Professor Taschner (a primary architect of the EC Product Liability Directive), that product liability and environmental law are and should remain distinct for broader conceptual and practical reasons.

Lindgren J’s test for what constitutes “supply” (or, in symmetry, “acquiring”) is also not necessarily the same as the “commerciality” test applied in Elms v Ansell Ltd [2007] NSWSC 618. As noted in our Comments on the latter judgment, both also differ from Clarke v New Concept Import Services Pty Ltd (1981) ATPR 40-264, which captured giveaways of goods (albeit for the purposes of Part V Division 1A section 65C of the TPA).

More broadly, Lindgren J’s judgment indicates some judicial impatience emerging with the (ab)use of class actions under Part IVA of the Federal Court Act 1976 (Cth), introduced in 1992 (along with strict product liability under Part VA of the TPA) but only used from the late 1990s. Compare also Bright v Femcare Ltd [2000] FCA 742.

**Text of judgment(s)**


**References**


Country: Australia

Court(s): Federal Court of Australia
Full Court of the Federal Court of Australia
High Court (Application for Special Leave to Appeal)

Topics: Medical device.
Tort of negligence (not discussed below).

Misleading or deceptive conduct: Trade Practices Act 1974 (Cth) ("TPA") sections 52 (misleading and deceptive conduct) and 82 (actions for damages). (Note: section 52 is no longer available as a cause of action in personal injury claims due to changes to the TPA introduced by the Trade Practices Amendment (Personal Injuries and Death) Act 2006).

Part V Division 2A (Actions against manufacturers of goods) TPA section 74B (Actions in respect of unsuitable goods) and section 74D (Action in respect of goods of unmerchantable quality).

Liability for defective products under TPA Part VA (Liability of manufacturers for defective products); section 75AC (Meaning of goods having defect).

Principles governing representative (class) actions (not discussed below) Federal Court of Australia Act 1976 (Cth): sections 33X (Notice to be given of certain matters) and 33ZB(b) (effect of judgment).

Facts: Representative proceedings were commenced under Part IVA of the Federal Court of Australia Act 1976 (Cth) on behalf of the applicant and a group of 992 other persons. All had a specific model of St Jude Medical Tempo Pacemaker surgically implanted in their chests by a surgeon in Australia.

Each pacemaker was surgically implanted in the body of each patient, attached to the heart and was to restore and maintain a regular heartbeat in that patient. The function of the pacemaker is triggered by an irregular pulse in the heart. When this occurs, the device submits an electrical pulse to the heart to enable it to assume a regular normal heartbeat.

A batch of the pacemakers was the subject of a Hazard Alert issued by the Therapeutic Goods Administration, Australia's regulatory agency for medical drugs and devices. These particular devices carried an additional risk of failure due to early battery depletion. Although only a small percentage of the pacemakers would ultimately fail, in many cases patients were advised to have the pacemaker explanted and replaced. The applicant who initiated the action underwent an explanation procedure and his pacemaker was found to be functioning normally.

It was alleged that the model of pacemaker was not fit for its intended purpose under section 74B (Actions in respect of unsuitable goods) of the TPA. In addition it was claimed that the model in question had a defect causing injury to the applicants under section 75AD (Liability for defective goods causing injury – loss by injured individual) of the TPA. Further, the applicants also pleaded that the respondents engaged in misleading and deceptive conduct in contravention of section 52 and breached a common law duty of care owed to the applicants. The remedies sought included declaratory relief.
and compensation.

**Legal Question(s)**

- Whether a medical device is reasonably fit for its intended purpose when it is subject to a significant additional risk of premature failure due to the materials used in the manufacturing process.

- Whether compensation is available where consumers experience worry or anxiety from purchasing goods that are not fit for purpose or not of merchantable quality receive compensation.

**Decision(s)**

**Trial**

Section 74B of the *TPA* provides that when goods are acquired by a consumer for a particular purpose made known to a corporation, those goods must be reasonably fit for that purpose. Similarly, section 74D gives consumers a cause of action in respect of goods which are not of merchantable quality. Goods are not of merchantable quality when they are not as fit for the purpose or purposes for which goods of that kind are commonly bought, having regard to all relevant circumstances including the description and price (section 74(3)).

The pacemakers were acquired for both the particular and common purposes of being surgically implanted to restore and maintain a normal heart beat.

The manufacturer argued that the fitness or merchantability of an item acquired by a consumer should be considered on a case-by-case basis because it was not the situation that the entire batch was faulty. It argued that each item of a batch was not unfit for its purpose or of unmerchantable quality just because a small but unidentified number of items in the group were defective. It was submitted that the question must always be whether the particular item was fit for its purpose or of merchantable quality.

Sackville J rejected this argument. His Honour concluded that a medical device which was subject to a significant additional risk of premature failure by reason of the materials used in the manufacturing process was not as fit for the purpose of restoring and maintaining heart beat as it was reasonable to expect. Although only a small percentage of the pacemakers would actually fail, each pacemaker in the batch was subject to the additional risk of failure. Thus, none were of merchantable quality.

The applicant's claim for damages was based on sections 74B and 74D of the *TPA*. The manufacturer argued that the claim for compensation for stress and anxiety concerning the additional risk of failure was very minor and that no compensation for such worry falling short of psychiatric illness should be awarded.

Sackville J agreed that to recover compensation, something more substantial than mere worry and anxiety was necessary. However, His Honour disagreed that by analogy with negligence law, psychiatric illness was needed. Sackville J noted that there could be cases where compensation might be awarded for anxiety, worry and stress. However, he did not think that an award of damages was appropriate in this case. In the absence of special or unusual circumstances, something more substantial than short-lived anxiety was needed, with some restraint being appropriate to avoid "the creation of a society bent on litigation" (quoting Lord Steyn in *Farley v Skinner* [2002] 2 AC 732).

**Appeal to Full Court of the Federal Court**

On appeal to the Full Court of the Federal Court, the manufacturer argued that the decision at first instance was wrong in concluding that the pacemaker was not of merchantable quality for the reason that it had continued to function. The manufacturer said that it should not be treated as having "the mark of Cain" simply because it was one of a number of pacemakers which was the subject of a hazard alert.
The Court agreed that it was not appropriate to attribute to one item any qualities derived by statistical analysis of a total batch of goods from which the goods came. However, the fact that it was known at the time of the proceedings that goods had not failed did not compel a conclusion that they were of merchantable quality.

Instead, the Court concluded that the fitness for the purpose of the goods in question should be determined objectively, with regard to what was reasonable to expect at the time of supply of the goods to the consumer. However, knowledge later acquired was considered relevant to that determination. In deciding what was objectively reasonable for the consumer to expect, it was concluded that it was necessary to take into account all relevant information available at the time of the trial.

**High Court Special Leave Application**

The manufacturer made an application for special leave to appeal to the High Court against the findings that the goods were not of merchantable quality and were not reasonably fit for their purpose. However, leave was refused (Transcript at 496).

In hearing the application (with Heydon J) Gleeson CJ noted that if contrary findings were made, the decision would stand for the proposition that a pacemaker requiring explantation was reasonably fit for purpose. Given that it had to be explanted due to the level of risk involved, the pacemaker was not reasonably fit for purpose.

**Comments**

The pacemakers the subject of the proceedings were held to be goods of a kind ordinarily acquired for the personal use of the patients in whom they had been implanted. The devices had been supplied to hospitals and doctors for the purpose of resupply to patients (consistent with *obiter* by Lehane J in *Bright v Femcare* [2000] FCA 742).

During the appeal Moore J noted that a paradox exists as a result of the decision. Although the pacemaker was held to be not fit for the purpose for which pacemakers were acquired (and therefore not of merchantable quality), it functioned for its purpose prior to explanation. Indeed it would likely have continued to serve that purpose into the foreseeable future if it had not been explanted. His Honour noted that both elements of the paradox were sustained by facts known at hearing. But these facts were not known, or their significance not appreciated, at the time of implantation.

The facts of the case contrast with those in *Carey-Hazell v Getz Bros* [2004] FCA 853, which involved another medical device. In that case, the risk in question was known about at the time of the supply. The applicant failed to prove that a thromboembolism had resulted from the implantation of a heart valve because the valve was unfit for purpose, because the patient had been aware of the risk. As such, this case can be distinguished from *Courtney v Meditel Pty Ltd* on the facts.

The inclusion of the pacemaker in the hazard alert was dismissed as insufficient to render the device unmerchantable. Sackville J made it clear that Courts would be reluctant to impose liability on a manufacturer because of a hazard alert or warning to consumers, noting that it would discourage manufacturers from disclosing possible defects to consumers (at 272). We note also that under Part VA, section 75AC(3) provides that “an inference that goods have a defect is not to be made only because of the fact that, after they were supplied by their manufacturer, safer goods of the same kind were supplied”.

The decision at first instance is also authority for the principle that when considering the meaning of merchantable quality in respect of the statutory cause of action under section 74D, it was both "unnecessary and undesirable" to look at the common law definition of merchantability. This was considered to be so because the relevant decisions referred to the tests of merchants and were appropriate to commercial sales (at 263).

In the original decision, Sackville J recognised that claims under Part V Division 2A are
founded upon an anomaly. Such claims give consumers statutory causes of actions with a contractual flavour when goods are not of merchantable quality or are unfit for purpose. However, such claims are generally not predicated on the basis of their being either an implied warranty (such as under Part V Division 2) or a notional contract (such as under the Manufacturers Warranties Act 1974 (SA)) (at 182) (but cf section 74H of the TPA which gives a seller the right to recover against a manufacturer or importer "as ... if the liability ... had arisen under a contract of indemnity").

The decision at first instance is also authority for the principle that claims brought under Part V Division 2A are not based upon section 82 (see Courtney v Medtel Pty Ltd (2003) 126 FCR 219 at 276, para 245). This is correct in claims for compensation under sections 74B and 74D. However, section 82 may have one limited application under Part V Division 2A, namely in reference to claims under section 74H (see White v Eurocycle Pty Ltd (1994) ATPR 41-390; (1995 64 SASR 461)).

Sackville J also noted that there is a difference in wording between section 74D of the TPA and section 82. There is an entitlement to compensation under section 74D where the consumer "suffers loss or damage by reason that the goods are not of merchantable quality". In contrast, the wording of section 82 provides that a person who suffers "loss or damage by conduct of another person" in contravention of a provision of the TPA may recover compensation. His Honour was of the view that the wording of section 74D conforms more closely to the High Court’s expectations as to how notions of causation should be expressed (at 198).

While Sackville J declined to award damages for worry and anxiety to the applicant under Part V Division 2A, he did note that they may be available in appropriate cases. Indeed claims for mental stress have been awarded in some instances under section 82: Steiner v Magic Carpet Tours Pty Ltd (1984) ATPR 40-490; Zoneff v Elcom Credit Union Ltd (1990) ATPR-009 and on appeal at ATPR 41-058 but cf Argy v Blunts and Lane Cove Real Estate Pty Ltd (1990) 26 FCR 112. There may be some question as to whether such claims can still be made given the definition of "personal injury" in section 4KA and the terms of Part VIB of the TPA. Compare also Crump v Equine Nutrition Systems Pty Ltd t/as Horsepower [2006] NSWSC 512.


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<thead>
<tr>
<th>Case Title</th>
<th><em>Crump v Equine Nutrition Systems Pty Ltd t/as Horsepower</em> [2006] NSWSC 512</th>
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<tr>
<td>Country</td>
<td>Australia</td>
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<td>Court(s)</td>
<td>Supreme Court of New South Wales</td>
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<td>Topics</td>
<td>Contaminated horse feed.</td>
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<td>Product recall &amp; failure to recall.</td>
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<td>Negligence.</td>
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<td>Exemplary damages.</td>
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<td>Implied warranties under <em>Sale of Goods Act</em> 1923 (NSW).</td>
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<td>Statutory misleading and deceptive conduct: section 52 <em>Trade Practices Act</em> 1974 (Cth) (&quot;TPA&quot;) (Note: sections 52 and 53 are no longer available as a cause of action in personal injury claims due to changes to the <em>TPA</em> introduced by the <em>Trade Practices Amendment (Personal Injuries and Death)</em> Act 2006 (Cth)).</td>
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<td>Interpretation: sections 4(2), 74A (Interpretation) and 75AB (Certain interpretation provisions (importers and others taken to be manufacturers etc.) apply to this Part) of the <em>TPA</em>. Meaning of &quot;conduct&quot; and &quot;personal domestic and household use&quot;.</td>
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<td>Part V Division 2 (Conditions and Warranties in Consumer Transactions) - section 71 (Implied undertakings as to quality and fitness) of the <em>TPA</em>.</td>
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<td>Part V Division 2A - Actions against manufacturer of goods - sections 74B (Actions in respect of unsuitable or unmerchantable goods) and 74D (Action in respect of goods of unmerchantable quality) of the <em>TPA</em>.</td>
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<td>Part VA - (Liability of manufacturers for defective products), 75AD (Liability for defective goods causing injuries - loss by injured individual) 75AF (Liability for defective goods - loss relating to other goods) of the <em>TPA</em>.</td>
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<td>Facts</td>
<td>The Crumps (the &quot;plaintiffs&quot;) were breeders of horses. The plaintiffs commenced proceedings in the Supreme Court of New South Wales claiming losses and personal injury arising out of contaminated horse feed. The claim was brought against the retailer of the product Equine Nutrition Systems and the manufacturer, George Westin Foods.</td>
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<td>It was claimed that the feed was contaminated with monensin, which is used in the production of cattle and poultry feed. However, monensin is toxic to horses. The plaintiffs alleged that one of their horses was damaged and five others injured after eating contaminated feed. There was some question as to whether the feed had in fact been purchased from the retailer.</td>
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<td>The retailer denied that it sold the contaminated feed and that it had breached any duty of care. The manufacturer admitted that: (a) it had manufactured the contaminated feed, (b) some of the plaintiff's horses had ingested the contaminated feed and (c) it had breached its duty of care in the supply and manufacture of the horse feed. However, it did not admit breach of duty in relation to recall or breach of the <em>TPA</em>.</td>
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<td>The limitations in Part VIB (Claims for damages) of the <em>TPA</em> were relied upon by the retailer and the defendant. Both parties also sought to limit the claim based upon provisions of the <em>Civil Liability Act</em> 2002 (NSW).</td>
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**Legal Question(s)**

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<th>Question</th>
<th>Answer</th>
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<td>Whether the conduct of the retailer contravened section 52 <em>TPA</em> by amounting to misleading or deceptive conduct under the section.</td>
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<td>Claims for personal injury in the form of nervous shock.</td>
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<td>Duty of retailer in negligence.</td>
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<td>Duty to recall.</td>
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<td>Whether failure to warn of contamination on packaging amounted to misleading and deceptive conduct.</td>
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<td>Whether worry and anxiety constitute &quot;mental harm&quot; under the <em>Civil Liability Act</em> 2002 (NSW).</td>
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<td>Aggravated and exemplary damages.</td>
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<td>Test for damages under negligence and Part VA of the <em>TPA</em>.</td>
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**Decision(s)**

The plaintiff’s action against the retailer was based on an alleged breach of implied warranties under section 71 of the *TPA* and section 19 of the *Sale of Goods Act*, misleading and deceptive conduct under section 52 of the *TPA*, plus negligent misstatement and negligence in the supply of the contaminated feed due to an alleged failure to implement adequate quality control and an alleged failure to properly recall the contaminated feed. The claim against the manufacturer was based upon an alleged breach of Part V Division 2A and Part VA of the *TPA*.

**Claim against retailer**

The Trial Judge, Hoeben J, determined on the facts of the case that the retailer did not sell the contaminated feed and that the retailer had not made the representations alleged. Accordingly, the claim based on section 71 of the *TPA* and for misrepresentation failed. Similarly, the claim based on a failure to warn also failed.

The plaintiffs claimed that the retailer owed a duty to exercise reasonable care, not only to customers who had purchased the feed directly from it, but also to third parties who acquired it further down the supply chain.

The Court was critical of the plaintiffs’ approach on three bases:

1. The Court was concerned that the content of the duty owed was incorrectly defined. Specifically, "(t)he content of that duty was never articulated other than by reference to the alleged breaches of the duty. As was made clear in the judgments of McHugh, Gummow and Hayne JJ in Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540 defining the content of a duty of care in terms of breach will usually result in error" (per Hoeben J at 166).

2. The Court was critical that the plaintiffs failed to identify what should have been a foreseeable response to the risk posited. It was noted that the plaintiffs appeared to have followed the line of reasoning deprecated by McHugh J in *Tame v State of NSW* (2002) 211 CLR 317. Such reasoning was essentially that in that having determined that the contamination of the feed was foreseeable, the next inquiry was whether that foreseeable danger was preventable. If such danger was indeed preventable, negligence should be found. However, at no point in the plaintiffs' analysis did the plaintiffs refer to the enquiry in *Wyong Shire Council v Shirt* (1980) 146 CLR 40, namely, what was a foreseeable response to the foreseeable risk.

3. The approach by the plaintiffs to the question of duty and breach of duty was grounded in hindsight. The issue of breach from the prospective point of view,
accounting for the state of knowledge and the circumstances at the time when the contamination took place, was not examined. Reference was made to Gummow and Hayne JJ in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 (at 192) "A duty of care that is formulated retrospectively as an obligation purely to avoid the particular act of omission said to have caused loss, or to avert the particular harm that in fact eventuated, is of its nature likely to obscure the proper inquiry as to breach".

His Honour said the duty owed to the product’s ultimate consumers by the retailer "was to take reasonable care that the feed was safe for consumption by horses" given that the retailer had knowledge that Monensin was used in the same factory as that which produced the feed. The Court found that the risk of contamination was not farfetched or fanciful, however there was no evidence as to the likelihood of it happening. Neither the magnitude of the risk, nor the degree of the probability of its occurrence was able to be determined. Thus it was not possible for the Court to decide what would have been a reasonable response on the part of the retailer to the foreseeable risk, taking into account the calculus in *Wyong Shire Council v Shirt*. There was no evidence of any previous contamination, and the remedial action suggested by the plaintiffs would have involved significant expense, difficulty and inconvenience.

The plaintiffs also submitted that the retailer’s attempt to recall the product was inadequate. However, on the evidence presented it was apparent that a recall was put in place covering purchasers of the product the day after it became aware of the contamination. It was true that it took a month for a recall notice to be published and the Court found an earlier recall notice could and perhaps should have been published. However, the Court found that it would have not alerted the plaintiffs to the problem regardless, because there was no evidence that they would have read the newspaper.

Regarding the alleged breach of section 52 of the TPA, the plaintiffs submitted that the feed bags with the retailer’s logo had no warning placed on the bag. Furthermore, it was argued that the bags had purported to contain horse feed, when in reality it was poisonous for horses. The plaintiffs asserted that by allowing the feed to be distributed in bags which expressly described the contents as horse feed, the retailer had engaged in misleading conduct.

However, there was no specific evidence of the bags, the authorship of the writing or the depictions on the bags. There was also no evidence that the plaintiffs had relied upon the information or lack thereof printed on the bags. It was however accepted that there was a general reliance on the fact that the product was horse feed and implicitly that it was safe for consumption.

What the bags did not contain was a warning that the feed might be contaminated, that is misleading and deceptive conduct by silence, namely, an omission.

The Court noted that the definition of conduct in section 4(2) of the TPA included "refuse" and "refrain". Some cases had held that where an omission is relied upon as constituting a breach of section 52, the omission must be the result of a deliberate decision. The Court noted that this approach sits uneasily with the principle that proof of intention is generally not required to establish a contravention of section 52.

According to Hoeben J, the relevant question was, in the particular circumstances, whether the silence constitutes or is part of misleading or deceptive conduct. Knowledge was a relevant consideration, but was not considered to be determinative.

The Court accepted that the retailer was unaware that the feed was contaminated. Its logo was on the bag, however "it was in the same position as a retailer or wholesaler who receives goods in a form which makes impossible any intermediate examination before the goods are sold.” His Honour said that the critical question was whether, in those circumstances, it was misleading for the retailer to sell the bags without the inclusion of a
warning that the contents might be contaminated.

The Court concluded (at 152): "(i) it is difficult to conceive how mere silence of that kind could be sufficient to attract the operation of s52 TPA. To so find would significantly extend the operation of s52 beyond its already broad boundaries".

Claim against manufacturer

A claim was also brought against the manufacturer under Part V Division 2A, Part VA of the TPA, sections 74AD (Liability for defective goods causing injuries - loss by injured individual) and 74AF (Liability for defective goods -loss relating to other goods).

The claim under Part V Division 2A failed because the Court found that 40kg bags of horse feed were not ordinarily acquired for personal, domestic or household use or consumption. However, the claim under section 74AD (Liability for defective goods causing injuries - loss by injured individual) of Part VA was successful.

The claim under section 75AF was withdrawn by the plaintiff. Section 75AF imposes liability on the manufacturer of goods which causes destruction or damage to goods "of a kind ordinarily acquired for personal, domestic or household use". The injured horses were bred as part of a business, so would not satisfy that definition. Presumably this was why the concession was made.

In addition to alleged failure to recall, it was argued that the manufacturer was negligent in failing to appropriately recall the contaminated product. Despite the absence of any direct evidence as to what action the manufacturer took, the Court inferred that the manufacturer had relied upon the retailer to recall the contaminated feed. It was determined that it was not an unreasonable response because the retailer was in the best position to identify the persons to whom it had sold the contaminated product (by reference to numbers on the bags).

No evidence was given as to what more the manufacturer could have done by way of reasonable response in relation to the recall. Thus, the plaintiffs had failed to prove that any failure on the part of the manufacturer was causative of the damage suffered by the plaintiffs.

However, in circumstances where the manufacturer admitted that it was negligent in the manufacture of the feed, resulting in a defective product and personal injury, it was held that the plaintiffs were entitled to damages in tort and for breach of section 75AD.

The calculation of the damages claim in tort was for the property damage involved, being the death of and injury to the horses. This was the subject of lengthy evidence and consideration by the Court.

Substantive issues were raised in the plaintiffs’ claim for damages for personal injury. The injury involved was that of nervous shock, a psychiatric injury recognised by the courts. The nervous shock was claimed to be a direct consequence of the actions of the manufacturer, or as resulting from the damage to property being the death and injury to the horses and for vexation, distress, worry and anxiety.

The Court considered whether the nervous shock was caused by the negligence of the manufacturer. However, the Court held that it was not reasonably foreseeable in the circumstances of the case that a horse owner, having been told about death of that horse, would experience a psychiatric illness. The Court also noted that horses do become ill and die suddenly from a number of natural causes and owners would be expected to have a certain degree of resilience.

Nonetheless, it was held that the plaintiffs were entitled to some damages for vexation and upset. Notwithstanding that these feelings were real, it was considered that they did
not justify a significant award. Significantly, the Court also held that these feelings of distress and upset would not come within the definition of "mental harm" in Part 3 of the Civil Liability Act 2002 (NSW) because they did not involve the impairment of a person's mental condition.

In terms of the claim for damages under section 75AD and Part VA of the TPA, the Court noted that there was no foreseeability requirement. Accordingly, the claim for nervous shock succeeded. However, the Court was of the view that the distress and upset suffered by the plaintiffs did not amount to a personal injury envisaged by section 75AD.

Given that the manufacturer had been found liable in both negligence and under section 75AD of the TPA, this gave rise to the unresolved question of election between such rights. The Court referred to Gummow and Hayne JJ in Graham Barclay at 130:

"The relationship between claims made for relief in respect of contravention of provisions of the Trade Practices Act and common law claims, whether in negligence, deceit or otherwise, has not been examined in detail in any decision of this Court and was not the subject of detailed argument in the present matter. In those circumstances, we proceed on the assumption (which was not challenged) that a plaintiff may frame alternative claims in negligence and under the provisions of the Trade Practices Act relied on here. But it is to be recognised that claims of the kind that were made in these matters, in negligence and under the Trade Practices Act, were alternative claims, and that, if a group member succeeds in establishing the elements of both claims, that group member must elect which remedy will be taken. That election would have to be made no later than at the time of seeking final judgment in the action.

The plaintiffs also made a claim for aggravated and exemplary damages, which was unsuccessful. It was concluded that the actions of the manufacturer were careless, but not deliberate. The Court summarised the law in relation to exemplary damages as follows:

"The classic description of conduct which merits an award of exemplary damages is "conscious wrongdoing in contumelious disregard of another's rights". (Lamb v Cotagno (1987) 164 CLR 1 at 8-9.) It follows from that statement that awards of exemplary damages would be extremely rare in a case based on negligence."

"They will ordinarily not be appropriate where the negligence consists in the failure, notwithstanding bona fide endeavours, to achieve the standard of care towards the plaintiff which the situation or the defendant's professed skills required that they attain ..." (Trend Management v Borg [1996] 40 NSWLR 500)

Further:

"... Exemplary damages could not properly be awarded in a case of alleged negligence in which there was no conscious wrongdoing by the defendant. Ordinarily, then, questions of exemplary damages will not arise in most negligence cases be they motor accident or other kinds of case." (Gray v Motor Accident Commission (1998) 196 CLR 1 at [22]).

Regarding aggravated damages, the Court said:

"The classic description of aggravated damages remains that of Windeyer J in Uren v John Fairfax and Sons Pty Limited (1966) 117 CLR 118 at 149:

"... Aggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done: exemplary damages, on the other hand, are intended to punish the defendant and presumably to
serve one or more of the objects of punishment -- moral retribution or deterrence."

The Court also recognised that there exists a real doubt concerning the award of aggravated damages in claims based on negligence:

"The upshot is that I find no clear guidance in Australian case law on the broad question whether aggravated damages are capable of being awarded in a negligence action. In point of principle, I seriously doubt the need to engraft an award of aggravated damages upon a negligence claim. Compensatory damages would normally include damages for mental distress or injured feeling so long as they can be linked to the tort through existing principles of causation and remoteness of damage. To speak of aggravated damages as a separate component can only have the capacity to confuse and run the risk as to double compensation." (Hunter Area Health Service v Marchlewski [2000] 51 NSWLR 268 at [110].)

Because the Court found that there was no basis for an award of exemplary or punitive damages, the Court did not need to consider whether section 21 (‘Limitation on exemplary, punitive and aggravated damages’) of the Civil Liability Act would prevent such an award.

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| The claim under section 75AF of the TPA was withdrawn. The Court noted in obiter that this concession was properly made on the basis of section 74A of the TPA and that 40kg bags of horse feed were not "goods of a kind ordinarily acquired for personal, domestic or household use". However, with respect to His Honour, this speculation is probably incorrect. Section 74A applies to claims under Part V Division 2A. The definition of "manufactured" in that section includes a reference to "goods of a kind ordinarily acquired for personal, domestic or household use". However this definition is not incorporated into Part VA by virtue of section 75AB, which only imports subsections 74A(3) to (8) into Part VA. A separate definition of "manufactured" appears in section 75AA (Part VA’s own interpretation section), which does not limit ‘manufactured’ goods to those ordinarily acquired for personal, domestic or household use.

In other words, under Part VA, whether goods are for such “personal use” is only relevant to consequential property loss under section 75AF(c) of the TPA. It limits the right to recover loss to the damage or destruction of "goods of a kind ordinarily acquired for personal, domestic or household use".

Thus, if firms wish to sue for consequential loss to business use goods (such as factory equipment that burns up), caused by a defective product ordinarily for personal use (such a television set that catches fire), they can therefore claim under Part V Division 2A but not under Part VA.

Japan’s Product Liability Law of 1994, otherwise modelled on the EC Directive like Part VA of the TPA, goes a step further. It also allows claims for consequential loss to business use goods (and lost profits, etc) arising from a defective product of whatever nature (not limited to products ordinarily for personal use, as required under Part V Division 2A) of the TPA.

The decision raises two questions in reference to the Civil Liability Act 2002 (NSW). First, do claims for distress and upset fall outside the definition of personal injury and mental harm in the Act. Second, does section 21 prevent awards of punitive damages in property damage cases also involving an award for personal injury.

Part 3 of the Civil Liability Act relates to claims for "Mental Harm". This is defined in section 27 (Impairment of a person's mental condition). The definition of personal injury includes pre-natal injury, impairment of a person’s physical or mental condition, and disease. Pure mental harm is also defined as mental harm other than consequential...
mental harm.

Section 29 (Personal injury arising from mental or nervous shock) provides that "In any action for personal injury, the plaintiff is not prevented from recovering damages merely because the personal injury arose wholly or in part from mental or nervous shock."

However, section 31 (Pure mental harm-liability only for recognised psychiatric illness) provides that no liability to pay damages arises for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness. Section 33 (Liability for economic loss for consequential mental harm) means that a Court cannot make an award of damages for economic loss for consequential mental harm caused by negligence unless the harm is a recognised psychiatric illness.

In relation to the claim for exemplary damages, section 11A (Application of Part) of the Civil Liability Act 2002 (NSW) provides:

1. The Part applies to awards of personal injury damages (except awards excluded by section 3B).

2. The provisions apply regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

3. A Court cannot award damages, or interest on damages, contrary to this Part.

A Court cannot award exemplary or punitive damages or damages in the nature of aggravated damages in a personal injury action as a result of section 21 (Limitation on exemplary, punitive and aggravated damages).

In relation to the TPA, section 87ZB provides that exemplary damages are not recoverable.

This section in effect embodies the effect of the previous case law - see Musca v Astle Corp Pty Ltd (1988) 80 ALR 251; Munchies Management Pty Ltd v Belperiod (1989) 84 ALR 700; Marks v GIO Holdings [1998] HCA 69 per Gauldron J. It is unclear whether such damages could be awarded in cases under the TPA not involving personal injury - see Nixon v Philip Morris (Australia) Ltd [1999] FCA 1107. For the interrelationship between exemplary and aggravated damages and claims in negligence together with state law, see Crump v Equine Nutrition Systems Pty Ltd t/as Horsepower [2006] NSWSC 512.


References
<table>
<thead>
<tr>
<th>Case Title</th>
<th>Eastley v Mauger [2000] FCA 266</th>
</tr>
</thead>
<tbody>
<tr>
<td>Country</td>
<td>Australia</td>
</tr>
<tr>
<td>Court(s)</td>
<td>Federal Court</td>
</tr>
<tr>
<td>Topics</td>
<td>Agricultural chemicals.</td>
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<tr>
<td></td>
<td>Transfer of matter from Federal Court of Australia to the District Court of New South Wales.</td>
</tr>
<tr>
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<td>Sections 75AS (Jurisdiction of Courts) and 86A (Transfer of matters) Trade Practices Act 1974 (Cth) (&quot;TPA&quot;).</td>
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<td>Facts</td>
<td>Details not provided in judgment.</td>
</tr>
<tr>
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<td>Pleadings alleged that agricultural chemicals used by a farmer caused chemical sensitivity problems in neighbour's children.</td>
</tr>
<tr>
<td>Legal Question(s)</td>
<td>Transfer of Proceedings</td>
</tr>
<tr>
<td>Decision(s)</td>
<td>An order was made pursuant to Sections 75AS and 86A of the TPA transferring the proceedings to the District Court of NSW.</td>
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<td>Section 75AS (Jurisdiction of Courts) provides:</td>
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<td>Subsections 75B(2) and 86(1), (2), (3) and 4. and sections 86A and 86B operate in relation to an action under this Part as if:</td>
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<td>(a) references in them to PartVI included references to this Part; and</td>
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<td>(b) references in them to Division 1, 1A or 1AA of Part V included references to this Part; and</td>
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<td>(c) references in them to the Minister were omitted.</td>
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<td>Section 86A (Transfer of matters) provides:</td>
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<td>1. Where:</td>
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<td>(a) a civil proceeding instituted (whether before or after the commencement of this section) by a person other than the Minister or the Commission is pending in the Federal Court; and</td>
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<td>(b) a matter for determination in the proceeding arose under Part IVA or IVB or Division 1, 1A or 1AA of Part V;</td>
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<td>the Federal Court may, subject to subsection (2), upon the application of a party or of the Federal Court’s own motion, transfer to a Court of a State or Territory the matter referred to in paragraph (b) and may also transfer to that Court any other matter for determination in the proceeding.</td>
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<td>2. The Federal Court shall not transfer a matter to another Court under subsection (1) unless the other Court has power to grant the remedies sought before the Federal Court in the matter and it appears to the Federal Court that:</td>
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</table>
|                  | (a) the matter arises out of or is related to a proceeding that is pending in the
other Court; or
(b) it is otherwise in the interests of justice that the matter be determined by the other Court.

3. Where the Federal Court transfers a matter to another Court under subsection (1):
(a) further proceedings in the matter shall be as directed by the other Court; and
(b) the judgment of the other Court in the matter is enforceable throughout Australia and the external Territories as if it were a judgment of the Federal Court.

4. Where:
(a) a proceeding is pending in a Court (other than the Supreme Court) of a State or Territory; and
(b) a matter for determination in the proceeding arose under Part IVA or Division 1, 1A or 1AA of Part V;
the Court shall, if directed to do so by the Federal Court, transfer to the Federal Court the matter referred to in paragraph (b) and such other matters for determination in the proceeding the determination of which would, apart from any law of a State or of the Northern Territory relating to cross-vesting of jurisdiction, be within the jurisdiction of the Federal Court as the Federal Court determines.

5. Where:
(a) a proceeding is pending in a Court (other than the Supreme Court) of a State or Territory; and
(b) a matter for determination in the proceeding arose under Part IVA or Division 1, 1A or 1AA of Part V;
the Court may, subject to subsection (6), upon the application of a party or of the Court’s own motion, transfer to a Court (other than the Supreme Court) of a State or Territory other than the State or Territory referred to in paragraph (a) the matter referred to in paragraph (b).

6. A Court shall not transfer a matter to another Court under subsection 5.
unless the other Court has power to grant the remedies sought before the first-mentioned Court in the matter and it appears to the first-mentioned Court that:
(a) the matter arises out of or is related to a proceeding that is pending in the other Court; or
(b) it is otherwise in the interests of justice that the matter be determined by the other Court.

7. Where a Court transfers a matter to another Court under subsection 5., further proceedings in the matter shall be as directed by the other Court.

Notwithstanding that the proceedings included a claim based on Part VA of the TPA, Sackville J was of the impression that this claim was subsidiary to the claim founded on breach of duty. He stated "The District Court is well suited to determine the claim which in substance arises under State law". There was no opposition to the proposed transfer. The Court noted that the District Court had the power to grant the remedies sought in the
| **Comments** | Compare *Brooks v R & C Products Pty Ltd* (1996) ATPR 41-537. |
| **References** |  |
**Case Title**  
*Effem Foods Ltd v Nicholls* [2004] NSWCA 332

**Country**  
Australia

**Court(s)**  
District Court of New South Wales  
Court of Appeal of the Supreme Court of New South Wales

**Topics**  
Food: chocolate bar.  
Contamination of food product with safety pin.  
Time when defect occurred.  
Defence that the defect occurred after the product had left the manufacturer's control and did not exist at the time of supply by the manufacturer.


Part VA (Liability of manufacturers for defective products) *TPA*: Section 75AD (Liability for defective goods causing injuries - loss by injured individual) and section 75AK(1)(a) (Defence that defect did not exist at time of supply).

Section 74D(2)(a)(1) (Liability for defective goods causing injuries--loss by injured individual).

Section 74AK(1)(a) (Defences).

**Facts**  
Nicholls purchased a Snickers chocolate bar from a newsagency. On 21 March 2002, a few days after the purchase, she began to eat it. After pushing the bar partly out of its packaging, she took a bite and felt a hard object which caused momentary pain. She immediately spat out what was in her mouth, which included an open safety pin that had pierced her tongue.

She was given a tetanus injection to which she suffered an allergic reaction. Tests for HIV, Hepatitis B and C were conducted. She also developed an obsessive condition, which gave her a poor appetite and disturbed sleep.

**Legal Question(s)**  
Whether chocolate bar containing a pin was of merchantable quality and/or was defective.

Applicability of defences under sub-section 74D(2)(a)(i) of the *TPA* (that is, that the goods were not of merchantable quality by reason of an act or default of any person not being the corporation or a servant or agent of the corporation after it had left the control of the corporation) and section 75AK(1)(a) of the *TPA* (that is, that the defect in the goods that is alleged to have caused the loss did not exist at the time of supply).

**Decision(s)**  
Trial  
Nicholls and her husband gave evidence along with the food safety manager of the Ballarat factory where the Snickers bar was manufactured. The food safety manager stated that the chances of a bar containing a safety pin surviving the manufacturing process and the metal detector were remote, yet he could not say that such an outcome was impossible. Effem suggested a number of ways in which the bar could be tampered with after leaving the factory.
Notwithstanding this evidence, His Honour concluded that the possibility of it happening at a later stage than the manufacturing process was even more remote than of it happening at an earlier stage in the factory.

In light of these findings, the Trial Judge, Phegan DCJ, held that Nicholls had proved her case. As the bar was not of merchantable quality, section 74D(1) of the TPA was breached. Section 75AD of the TPA was also breached as Effem, in trade and commerce, had supplied defective goods manufactured by it which had injured Nicholls.

**Appeal**

On appeal, Effem argued that in order for it to establish the first defence (that is, that a third party had put the safety pin into the bar after it left the factory) it only had to show that the system of manufacture was such that the possibility of the safety pin getting through undetected was extremely remote and there was evidence that the bar could subsequently have been interfered with.

It also argued that this defence was not restricted to proof of actual interference - a circumstantial case could also be sufficient - and that proof of those matters would also establish the other defence (that is, that the defect did not exist when the bar went into the supply chain).

The Court of Appeal observed that small items such as a Snickers bar had been kept behind the counter by the retailer so as to prevent larceny. Thus, if the manufacturer were not at fault, the only other possible inference was that an employee of the retailer placed the safety pin in the bar. That left two possibilities: an isolated event in the factory caused by an employee's inadvertence or negligence, or a deliberate but isolated act of sabotage by an employee in the retailer's shop.

The Court of Appeal applied the ordinary presumption in civil cases against criminality - in this case, the criminal behaviour would be the deliberate insertion of the pin, which would breach section 41 of the Crimes Act 1900 (NSW). The Court held the evidence of sabotage was a rare possibility and this was not sufficient to discharge the onus of proof of the manufacturer.

In relation to the defences raised by Effem, the Court of Appeal concluded that there was no practical difference between the defences in section 74D(2)(a)(i) and section 75AK(1)(a) of the TPA.

The first defence requires proof that the defect occurred after supply; the second defence, proof that it did not exist at the time of supply. "The defences are simply two sides of the same coin" (Handley JA at [19]).

The manufacturer must establish a defence on the balance of probabilities; speculation and proof of mere possibilities are not enough. Regardless, a manufacturer's liability, while being strict, is not absolute. If examination of a product after an accident makes it clear the product had been deliberately tampered with, there would be scope for the defences to apply. Examples given by Handley JA included the sabotage of car tyres or brake fluid lines or even the presence of poison in a glass of soft drink. The defence can be based on circumstantial evidence; the manufacturer was not to required to lead direct evidence. As the manufacturer’s defence was considered not to rise above a level of speculative possibility, the Court of Appeal upheld the Trial Judge's finding and the appeal was dismissed with costs.

**Comments**

Effem possessed both a legal and the evidentiary burden of proof to establish its defences. The defence, under section 74(2)(a)(i) of the TPA, required Effem to prove, on the civil onus of balance of probabilities, that the safety pin was present in the Snickers bar "by reason of an act or default" of a stranger "occurring after the goods had left the control
of the corporation". The defence under section 74K(1)(a) of the TPA required it to establish that "the defect...did not exist" when Effem delivered the goods into the supply chain.

Effem established that it was a remote chance that the contamination had happened during its manufacturing process. There is authority that when a Court is faced with determining on the balance of probabilities whether an event has occurred, it treats the event as certain if the probability of it having occurred is greater than it not having occurred (Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64 at 122-3).

However, the Court considered that it was faced with a choice between two competing (and both very unlikely) hypotheses, that is, the contamination being due to an isolated event in the factory through the inadvertence or negligence of an employee or a deliberate but isolated act of sabotage by an employee in the retailer's shop.

The Court thought that the evidence of tampering "did not arise above the level of a speculative possibility". Accordingly, Effem failed to establish the defences. In reaching this conclusion, the Court was also assisted by the ordinary presumption against criminality in civil cases. Since any tampering by an employee in the retailer's shop would be a criminal offence, the presumption of innocence applied (Briginshaw v Briginshaw (1938) 60 CLR 336, 362-3).

The decision illustrates that food manufacturers facing contamination claims have certain defences available to them but establishing these may be difficult in the absence of evidence of direct tampering. Nonetheless, circumstantial evidence may be used by a manufacturer to support their defence.

**Text of judgment(s)**


**References**

<table>
<thead>
<tr>
<th>Case Title</th>
<th><em>Elms v Ansell Ltd</em> [2007] NSWSC 618</th>
</tr>
</thead>
<tbody>
<tr>
<td>Country</td>
<td>Australia</td>
</tr>
<tr>
<td>Court(s)</td>
<td>Supreme Court of New South Wales</td>
</tr>
<tr>
<td>Topics</td>
<td>Latex gloves.</td>
</tr>
<tr>
<td></td>
<td>Strike out application.</td>
</tr>
<tr>
<td></td>
<td>Implied warranties under Part V Division 2 (Actions against manufacturers and importers of goods) of the <em>Trade Practices Act</em> (1974) (Cth) (&quot;TPA&quot;).</td>
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<tr>
<td></td>
<td>Interpretation: Sections 4B (Consumer) of the <em>TPA</em>: definition of &quot;acquire&quot;.</td>
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<td>Section 52 (Misleading and deceptive conduct) (Note: sections 52 and 53 are no longer available as a cause of action in personal injury claims due to recent changes to the <em>TPA</em> introduced by the <em>Trade Practices Amendment (Personal Injuries and Death) Act 2006</em> (Cth) and are not considered below).</td>
</tr>
<tr>
<td></td>
<td>Part V Division 2A (Actions against manufacturers of goods) of the <em>TPA</em>: section 74B (Actions in respect of unsuitable goods) and section 74D (Action in respect of goods of unmerchantable quality).</td>
</tr>
<tr>
<td></td>
<td>Part VA (Liability of manufacturers for defective products) of the <em>TPA</em> - section 75AC (Meaning of goods having defect) and section 75AI (No liability action where workers' compensation or law giving effect to an international agreement applies).</td>
</tr>
<tr>
<td>Facts</td>
<td>Elms, (the &quot;plaintiff&quot;), was employed by the South Eastern Sydney and Illawarra Health Service as an enrolled nurse. As part of her employment, Elms was &quot;constantly and continually exposed to products which contained latex&quot;. As a result of this continued exposure to latex, the plaintiff suffered an injury on or about 20 October 2003.</td>
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<tr>
<td>Legal Question(s)</td>
<td>Whether goods &quot;acquired&quot;.</td>
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<td>Whether a claim under Part VA precluded by section 75AI (No liability action where workers' compensation or law giving effect to an international agreement applies) of the <em>TPA</em>.</td>
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<tr>
<td>Decision(s)</td>
<td>On 20 October 2006, Elms applied to the Supreme Court of New South Wales for damages with respect to the injury she had suffered as a result of latex exposure. In her statement of claim, Elms asserted that the actions of Ansell, the manufacturer of the latex gloves, had been both negligent and in breach of sections 75AD (Part VA), 74B (Part V Division 2A) and 52 of the <em>TPA</em>.</td>
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<td>Ansell applied to strike out certain parts of the Statement of Claim on the basis that sections 75AD and 74B of the <em>TPA</em> did not provide the plaintiff with an appropriate remedy in the circumstances.</td>
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<td>Associate Justice Malpass accepted, first, Ansell's submission that the circumstances of the case did not fall within the definition of &quot;acquire&quot; in the context of Part V Division 2A, sections 74B and 75D. Section 74B states that (1) where (a) a corporation supplies goods it manufactured to another person who acquires the goods for re-supply, and (b) a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer, the corporation must compensate the consumer or that other person for loss suffered from the unsuitable goods.</td>
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Section 4B(1)(a) defines “consumer” as a person who has “acquired” certain goods. Section 4(1) defines “acquire” to include, for goods, “acquire by way of purchase, exchange or taking on lease, on hire or on hire purchase”.

His Honour noted that this definition is “clearly inclusive (and not exhaustive)” (at 24), but “has not been the subject of judicial scrutiny”, and that “editorial comment” that it is not limited to acquisition by way of purchase was “not helpful in the present case” (at 25). Associate Justice Malpass concluded (at 26) that: “the inclusive elements enumerated in the definition have a commonality. It may be described as a commercial characteristic. I consider that whatever else may have been intended to be encompassed by the definition would require that commonality. I do not consider that the circumstances of this case fall within the definition.”

Second, Associate Justice Malpass accepted Ansell’s submission that Elms’ claim under section 75AD was excluded by section 75AI as “a loss in respect of which an amount has been, or could be, recovered under a law of the Commonwealth, a State or a Territory that (a) relates to workers' compensation”.

Consequently, the claims under TPA sections 75AD (Part VA), 74B (Part V Division 2A) were struck out of Elms’ statement of claim. Elms was also required to pay the costs of the Notice of Motion.

**Comments**

The second conclusion follows straightforwardly from section 75AI. See also *Klease v Brownbuilt Pty Ltd* [2002] QSC 226. However, as a policy matter it is questionable whether such an exclusion of Part VA strict product liability claims is appropriate, especially since section 75AI has been interpreted to disallow claims for compensation under Part VA beyond any amounts that might be recoverable under workers' compensation: *Lanza v Codemo Management Pty Ltd and Ors* [2001] NSWSC 845.

(Further, for example, Japan’s Product Liability Law of 1994 has no such exclusion.)

With respect to his Honour, however, the reasoning for the first conclusion is questionable. The issue has been raised in reported judgments. In the strike-out application in *Bright v Femcare Ltd* [2000] FCA 742, Lehane J did leave open the question of whether ‘Filshie Clips’ applied unsuccessfully to prevent pregnancy were “acquired” by the patients, under Part V Division 2A, that is, section 74B of the TPA.

However, in *Cook v Pasminco* [2000] FCA 677, Lindgren J struck out a claim under Part VA brought against a polluting factory partly because emissions were not “supplied” as required under section 75AD. His Honour referred (at 23) to TPA section 4(1), which defines supply to include “(a) in relation to goods - supply (including re-supply) by way of sale, exchange, lease, hire or hire purchase”, and noted (at 26) that this was a symmetrical definition to “acquire”. For both, Lindgren J argued that although an essential element is “a bilateral and consensual process which has no application to a case such as the present one where the applicants' case is that the emissions were inflicted upon them without their consent” (at 24; see also 26-7). That would exclude situations where goods are supplied or acquired as a (unilateral) gift,

However, in *Clarke v New Concept Import Services Pty Ltd* (1981) ATPR 40-264, giveaways of banned unsafe goods were held to be covered by Part V Division 1A section 65C(1) of the TPA, which prohibits the “supply of goods that are intended to be used, or are of a kind likely to be used, by a consumer”.

Such situations may also be excluded by the test proposed by Associate Justice Malpass in the present case, requiring a “commercial characteristic”, which furthermore may overlap with but is not necessarily identical to the “bilateral and consensual process” test applied by Lindgren J in *Cook v Pasminco* [2000] FCA 677,
An alternative test, which could cover giveaways, might be that proposed by Ansell in the present case (at 23) but not directly addressed by the Court, namely transactions where the consumer “derives title to the goods”. A difficulty with that alternative could be that suppliers could reserve title (directly, or by asking intermediaries to do the same) and grant consumers only a licence to use the goods, thereby excluding claims under Part V Division 1A and Division 2A or Part VA.

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References
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<td>Country</td>
<td>Australia</td>
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</tbody>
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| Court(s) | District Court of Western Australia  
Full Court of the Supreme Court of Western Australia |
| Topics | Industrial machinery.  
Negligence.  
Product Liability Insurance (not considered below).  
Part VA (Liability of Manufactures and Importers for Defective Goods): Sections 75AC (Meaning of goods having defect) and 75AD (Liability for defective goods causing injuries--loss by injured individual) of the Trade Practices Act 1974 (Cth) ("TPA"). |
| Facts | Fitzpatrick had his left leg amputated after his foot was trapped in a wood processing machine. Fitzpatrick had operated the machine for four months prior to the accident.  
Fitzpatrick's business had bought the machine from V & D Ridolfo ("Ridolfo"). Ridolfo had in turn bought the machine from Jobs Engineering. The machine had been custom-made by Jobs Engineering for Ridolfo and it was manufactured without a cabin which Ridolfo had added after purchase. Jobs had instructed Ridolfo’s staff in the machine's safe use. The machine was then taken to Western Australia where the cabin was custom made by a local fabricator. Critically however, there was no barrier between the cabin and an opening in the splitter box through which logs were fed.  
Fitzpatrick claimed that his accident was caused by defects in the machine and that both the defendants were negligent and Jobs was liable under Part VA of the TPA. Both defendants denied liability. The following defects were particularised in the statement of claim:  
• that the machine did not have an adequate guard or safety barrier around the splitter box on the machine  
• there was no "deadman switch" or safety device to stop the machine in case of emergency.  
• there were no written or sufficient instructions for the safe operation of the machine.  
• the operating lever of the splitter box mechanism was defective.  
• there was no sign warning of the danger of placing any part of the body in the splitter box.  
• the machine did not comply with Australian safety standards.  
The defendants claimed that the accident was caused by Fitzpatrick's own negligence in operating the machine when the splitter box lever was broken and by attempting to move a piece of wood in the splitter box with his foot. |
| Legal | Negligence: duty to provide safety barrier and operating instructions and written |
Question(s) | warnings.  
| Causation and contributory negligence.  
| Manufacturer's liability under Part VA of the TPA.  
| Causation requirement in section 75AD (Liability for defective goods causing injuries - loss by injured individual).  
| Applicability of Part VA to unincorporated person engaged in interstate trade.

Decision(s) | Fitzpatrick claimed that the defendants owed him a duty of care to ensure that the machine was safe to use and operate. Fitzpatrick also asserted that this duty extended to the supply of a machine that was safe to use and operate, the provision of warning signs and a written manual of operating instructions, barrier guards, and design and the manufacture of a machine that complied with Australian Standards.

Fitzpatrick’s claim failed at first instance. His Honour found that it was the plaintiff's actions that led to his leg and foot being caught in a splitter box and dragged into the knives. His Honour also found that the plaintiff's action was not an inadvertent act, instead being a deliberate and conscious act and not one that had occurred in isolation. Fitzpatrick's work methods were also found to be a significant departure from the methods adopted by the other operators and one that was clearly an unsafe system and contrary to the demonstrations, verbal instructions and advice that had been given to him.

Accordingly, the District Court found that there was no causal connection between the lack of warning signs on the cabin or on the machine and the lack of any written manual operating instructions and the plaintiff's accident.

The majority of the Western Australian Court of Appeal disagreed with the decision of the District Court, however, finding that Fitzpatrick's actions had constituted contributory negligence and were not a supervening act breaking the chain of causation.

By a majority, the Court of Appeal found that Job’s Engineering had breached its duty of care to Fitzpatrick by failing to advise Ridolfo of the necessity for installing a guardrail to prevent any part of the body from entering the splitter box. The Court of Appeal then discounted the verdict by 70% on account of the plaintiff’s gross contributory negligence.

**District Court [2005] WADC 161; 39 SR (WA) 210**

French DCJ held that although manufacturers are under a duty to warn of foreseeable risks and to take into account the possibility of users acting in an inadvertent or forgetful manner, there is no duty to warn against deliberate unsafe use.

In considering what warnings might have been needed the Court said that regard should be had to the possibility of an operator acting contrary to the instructions in an inadvertent or forgetful manner. However, it is not reasonable to expect defendants to guard against the possibility of someone such as Fitzpatrick who would deliberately operated the machine in an unsafe manner while being fully aware of the risks.

Accordingly, the District Court found that there was no causal connection between the lack of warning signs on the machine or the lack of any written manual operating instructions and the accident.

French DCJ also held against Fitzpatrick in his claim under Part VA against Jobs. Fitzpatrick did not claim against Ridolfo under Part VA. (Nor did he claim that the goods were unmerchantable under section 71 of Part V Division 2: as noted at 62, the latter is applicable only to “consumers” under section 4B, whereas the machine here was for more
than $40,000 and not ordinarily acquired for personal use.)

However, French DCJ (at 63) explained that; “Although [Fitzpatrick] makes no claim under [Part VA] of the TPA as against [Ridolfo] that issue is raised in [Jobs’] contribution proceedings against [Ridolfo] whereby it is claimed that [Ridolfo] is the manufacturer of the machine and is therefore liable for any relevant breaches of [Part VA]” of the TPA.”

French DCJ acknowledged (at 63) that although [Jobs’] “are not a corporation they are covered by the provisions of [Part VA] of the TPA because of the interstate element of the supply of goods” to Ridolfo. However, his Honour ruled against Jobs on three grounds. First, His Honour found the requisite causation, as required under section 75AD was lacking (at 68).

Second, French DCJ found (at 65):

“that the goods manufactured by [Jobs] were confined to the machine supplied to [Ridolfo] in September 1996, namely a machine without a cabin. If the lack of a barrier or guard in the cabin is a defect in the machine it is [Ridolfo] rather than [Jobs] that is the manufacturer for the purposes of any liability under PT 5A. This is consistent with my finding above that [Ridolfo] designed and constructed the cabin independently of [Jobs]. It is also consistent with the provision of s 75AK of the TPA and the definition of "supply time" in that section as being "the time when they were supplied by the actual manufacturer". I accept the submissions of [Ridolfo] that there is nothing in Pt 5A of the TPA that precludes the possibility of two or more manufacturers. In fact this is contemplated by the provision of s 75AM providing for joint and several liability if two or more corporations are liable for manufacturing defective goods. However, I am not satisfied that the evidence establishes that it was anyone other than [Ridolfo] that manufactured the cabin on the machine.”

Third, in any case, French DCJ (at 67) was “not satisfied that the absence of a barrier guard on the cabin renders the machine defective within the meaning of s 75AC of the TPA. The statutory meaning of "defect" in relation to goods is described in terms of "goods have a defect if their safety is not such as persons generally are entitled to expect". Although this at first glance looks rather like the reasonable man test the definition is to be arrived at by taking into account all relevant circumstances including the specific matters listed in s 75AC(2). The relevant circumstances in this case include the issues that arise in s 75AC(2)(a), (d) and (e), namely the circumstances of the sale, the use to which the machine is intended to be put and instructions that are given in relation to the machine. In this case it is significant that the machine is not a product that is directed and marketed to consumers in general but "custom made" to individual purchaser's requirements. The machine is manufactured and supplied to persons who are operating wood yards and are therefore of a class of persons who are inevitably going to be dealing with implements or machines for cutting wood. These implements or machines will of their nature be dangerous in the sense that an axe or chainsaw or wood splitter can be dangerous if not used and operated correctly. It is also relevant to a determination as to whether the machine is defective that together with the supply of the machine [Jobs] gave instructions as to its correct and safe operation together with express and/or implied warnings in relation to the use of the machine. Any purchaser of a wood processing machine would therefore be aware of any dangers in the machine or the operation of the machine and it is significant in this respect that the plaintiff was aware of such dangers. The meaning of defective goods is further refined by s 75AC(3) that stipulates that an inference is not to be drawn that goods have a defect because after the subject supply safer goods of the same kind were subsequently supplied. This confirms that the determination of goods as defective is not solely an objective one but involves subjective considerations in relation to the circumstances of the sale and the expected use of the machine.”
Court of Appeal

The rulings on Part VA were not subject to appeal, only the negligence claims.

Majority (Steytler, Buss JJA)

An injury of the nature suffered by Fitzpatrick, and the general manner in which it might occur, were found by the Court of Appeal to have been reasonably foreseeable. At all material times, Job's Engineering had carried on a business which included the design, manufacture and supply of machines of this kind (with or without cabins) for commercial use. The machine involved in the accident had an operating life of at least several years, and it was therefore reasonably foreseeable that the machine may be sold and be used by operators of varying abilities, capacity and attention, including those who were momentarily or habitually inattentive or careless.

The Court of Appeal found that the obviousness of the danger posed by the splitter box did not justify Jobs Engineering supplying the machine without installing a fixed barrier guard between the cabin and the splitter box. Job's Engineering was found to owe a duty to all potential users of the machine (including Fitzpatrick) and had therefore been required to advise and inform Ridolfo of the safety features which should have been installed on the cabin. Job's Engineering was found to have breached that duty by failing to advise that a fixed barrier guard should be installed between the cabin and the splitter box.

Ridolfo asserted that it was likely that it would have installed a fixed barrier guard on the cabin if Job's Engineering had given advice to that effect. The absence of a fixed barrier guard had increased the risk of an operator using his foot in the manner described and therefore the guard would have been effective to prevent the dangerous work practice which Fitzpatrick adopted before the accident.

In the circumstances, a prima facie causal connection existed was said to exist between Jobs Engineering's breach of duty and the event which resulted in Fitzpatrick's reasonably foreseeable loss or damage.

Job's Engineering was therefore found to have an evidentiary onus to point to other evidence which suggested that no causal connection existed between the breach of duty and the occurrence of the event. Job's Engineering failed to satisfy this evidentiary onus.

Fitzpatrick's actions were not found to be a supervening event which wholly negatived the causal effect of Jobs Engineering's breach of duty.

Fitzpatrick was found guilty of contributory negligence as a result of his use of his foot to realign log rings which had become misalignaged. This practice was said not to be an isolated incident, but rather a dangerous work practice he had willingly adopted.

In the circumstances, it was determined that Fitzpatrick's damages should be reduced by 70 per cent in consequence of his contributory negligence.

Minority (Steytler P)

Steytler P considered that Job's Engineering had not been under a duty to supervise the work carried out by Ridolfo nor to give advice to Ridolfo about the need for a barrier.

Steytler P also considered Ridolfo as the vendor of second-hand goods to be under a duty to warn of any danger which it was aware and was not obvious. Ridolfo, having been approached by Fitzpatrick to sell the machine, was under no duty to carry out work before the sale was completed. Ridolfo was also not under any duty to install a barrier guard to prevent negligent use by the purchaser of the machine.
Steytler determined that the hazard or risk of injury from the machine was plain for all to see. The machine could be operated without the operator having to introduce a limb into the splitter box. The risk of this injury was so obvious that no reasonable person would consider the need to prevent access to the splitter box while it was operating.

Ridolfo was found not to be under a duty to warn of such an obvious risk. In any case, Ridolfo had discharged that duty as it had taken considerable care to demonstrate the safe use of the machine and, by doing so, warned Fitzpatrick of the danger posed by the splitter box.

Steytler P found that it was unlikely that even if Jobs Engineering had given the advice that Ridolfo would have constructed the cabin with a barrier since Ridolfo, which was well aware of the risk of injury, had reached its own conclusions about what was necessary to protect the operator.

His Honour considered that Fitzpatrick had been entirely the author of his own misfortune and that he was injured as a result of his adoption of an unsafe system of work.

<table>
<thead>
<tr>
<th>Comments</th>
<th>If Fitzpatrick had pursued his Part VA directly against Ridolfo, for adding a defective cabin to the machine, the latter could have been held to be a manufacturer under Part VA; but Fitzpatrick might still have failed to establish that Ridolfo was responsible for a defect which caused his injury.</th>
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</thead>
<tbody>
<tr>
<td>Case Title</td>
<td>Forbes v Selleys Pty Ltd [2002] NSWSC 547; [2004] NSWSC 149</td>
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| **Court(s)** | Supreme Court of New South Wales  
Court of Appeal of New South Wales |
| **Topics** | Household chemical.  
Whether chemical exposure through use of a product caused the applicant's illness.  
Negligence.  
Statutory liability for defective products (warnings).  
Proof on the balance of probabilities, causation and scientific/medical evidence.  
Part VA (Liability of manufacturers for defective products) Trade Practices Act 1974 (Cth) ("TPA") - section 75AD (Liability for defective goods causing injuries--loss by injured individual) of the TPA. |
| **Facts** | On 15 February 1997, Forbes (the "appellant") used "Selleys Space Invader" ("SSI") to seal part of a fireplace. Observing the instructions on the product, he ensured that the relevant areas were well ventilated by opening windows and doors and placing two fans in appropriate positions. The product application took approximately 15 to 30 minutes. At certain periods during the application time, Forbes' face came close to the area where the SSI was directed.  
On the same afternoon, Forbes developed a headache which continued and worsened significantly during the following day. It was not however until 17 February, when Forbes was at work, that he collapsed and was taken to St Vincent's Hospital. Forbes was admitted to hospital in an unconscious condition and was in a coma for two days. The provisional diagnosis was encephalitis (an infection or inflammation of the brain). Forbes subsequently made a rapid recovery and was released from hospital on 28 February.  
When admitted to hospital, the appellant's wife had claimed that Forbes had suffered an upper respiratory tract infection during the previous week and had donated blood on 14 February. However, from the afternoon of 15 of February through to 16 February, Forbes had complained of "feeling unusually tired" and had suffered headaches, progressively worsened speech and difficulty in comprehension.  
The appellant claimed to have suffered physical, psychological and cognitive loss. These injuries allegedly affected his working capacity and caused the breakdown of his marriage. |
| **Legal Question(s)** | The nature of scientific evidence to establish causation on the balance of probabilities. |
| **Decision(s)** | Trial  
Forbes' claim was based on Section 75AD of the TPA and negligence. He alleged that Selleys Pty Ltd (the "respondent") had failed to warn him that normal use of SSI involved exposure by inhalation to a dangerous or hazardous amount of the chemical methane diisocyanate ("MDI"). Cripps AJ accepted that Forbes had followed the instructions on the label. The known causes of encephalitis, both bacterial and viral, capable of detection by testing had been excluded in relation to the illness and the parties agreed that if a chemical were capable of causing Forbes' illness it would have resulted from the use of MDI. The
question before the Trial Judge was whether the MDI in the product had caused Forbes' encephalitis.

Forbes' claim failed at first instance as the Trial Court Judge was not satisfied, on the balance of probabilities, that the appellant's encephalopathy was caused by MDI as a consequence of ingestion of fumes from SSI.

Expert evidence in relation to scientific studies was presented (namely two papers published in the British Journal of Industrial Medicine). There was a clear conflict between the evidence of the principal experts for the parties. Neither the studies nor the witnesses were able to prove conclusively a connection between the appellant's illness and SSI. It was suggested the appellant could possibly have suffered from toxic encephalopathy caused by the SSI. However, the Trial Judge was not satisfied of this on the balance of probabilities and therefore while it may be possible to contract toxic encephalopathy from the use of MDI, "possible" was not to be equated with "probable".

At trial, Forbes claimed the respondent bore the evidentiary onus in excluding SSI as the "probable culprit", arguing that as the manufacturer of the product, the respondent knew or ought to have known about its product and that it could possibly cause toxic encephalopathy. There was no suggestion that the respondent held back any information that would be relevant to the issue of causation. Consequently, it was held by the Court that the appellant bore the ultimate onus of proof on causation.

Evidence relating to the odour of SSI was presented before the Court. Forbes had attempted to argue that as the SSI he used had a strong smell, it contained a dangerous quantity of MDI. The respondent provided evidence to the contrary which suggested that unless the substance was heated, the odour threshold could not be reached. As the substance was not heated by the appellant, the Judge was unable to accept any inferences or assumptions based on the supposed smell of the product.

Forbes also sought to prove the potential danger of MDI by reference to the warning on the SSI cans, which stated - "WARNING Intentional misuse by deliberately concentrating and inhaling contents can be harmful or fatal". Forbes argued that this label demonstrated that the respondent must have considered there to be a certain degree of risk associated with the use of the product and as a result of its failure to call evidence to explain this risk, the Court should have concluded that there was a potential admission in this omission. The Trial Judge did not support this line of argument as the Court did not find that Selleys had failed to disclose any information relevant to causation.

**Appeal**

Giles JA and McColl JA agreed with the judgment of Mason P, who upheld the judgment at first instance and dismissed the appeal.

No expert witness was able to identify a finite list of ineffective causes of encephalitis, though they were able to establish a range of "possible" causes. This body of evidence suggested more than purely hypothetical alternatives as the evidence of all of the experts recognised the possibility of an alternative diagnosis and alternative toxins.

Mason P stated he found the case was "troubling" as the "lay instinct is to draw a conclusion of cause and effect from the raw data about the onset of symptoms shortly after the use of the product" at [130]. The scientific evidence was "strongly divergent". Mason P noted that the Trial Judge did not fall into the error of requiring the appellant to prove his case at the level of scientific proof. Rather, the Trial Judge had preferred the evidence of one expert over another. It was also noted that the Trial Judge had an advantage stemming from the fact that he had heard the totality of the evidence.

The Court of Appeal considered whether the Trial Judge's approach in relation to causation...
was correct. The appellant submitted that the manufacturer bore an evidentiary onus to rebut a finding that its product was the probable cause of the illness.

The Court of Appeal noted that a plaintiff may be assisted by a shifting of the evidentiary burden in relation to causation and that a "robust and pragmatic approach to proof" permitted, but did not compel, a favourable finding in particular circumstances.

However, it concluded that the Trial Judge had not erred in either his approach or conclusion on causation. The Court of Appeal noted that the Trial Judge was able to infer probable cause from the epidemiological evidence but was not required to have done so.

Due to Forbes' failure to establish causation between use of the product and the appellant's subsequent injuries, it was unnecessary for the Court of Appeal to give further consideration to whether otherwise, the elements of negligence and sections 75AD and 75AK of the TPA, had been established.

### Comments

A number of principles relating to proof of causation can be distilled from this decision.

Mason P quoted with approval dicta of Spigelman CJ in *Seltsam Pty Ltd v McGuinness* [2000] 49 NSWLR 262: the Courts must determine the existence of a causal relationship on the balance of probabilities. However, as is the case with all circumstantial evidence, an inference as to the probabilities may be drawn from a number of pieces of particular evidence, each piece of which does not itself rise above the level of possibility. Epidemiological studies and expert opinions based on such studies are able to form "strands in a cable" of circumstantial evidence.

Australian law has not adopted a formal reversal of onus of proof of causation in negligence, although a robust and pragmatic approach to proof permits but does not compel a favourable finding in particular circumstances.

A plaintiff may be assisted by a shifting in the evidentiary burden of proof in relation to causation. A Court may infer causation if the breach is such that in the ordinary course of events as perceived by the Court, that type of harm is a consequence of the breach. In such a case, unless the defendant can point to some particular reason why the instant case is outside the norm, causation may (but not must) be inferred. Mason P quoted with approval, dicta of Dixon J in *Betts v Whittingslowe* (1945) 71 CLR 637 at 649 that "...the breach of duty coupled with an accident of the kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the contrary, that in fact the accident did occur owing to the act or omission amounting to the breach of statutory duty".

Simply because a risk is "not far-fetched or fanciful", however, does not mean that the trier of fact is required to infer that it came home or that the Defendant's negligent conduct caused it to happen or materially contributed to its happening.

### Text of judgments:

*Forbes v Selleys Pty Ltd* [2002] NSWSC 547 -  

*Forbes v Selleys Pty Ltd* [2004] NSWSC 149 -  

### References

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<tr>
<td>Country</td>
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<td>Full Court of the Federal Court of Australia</td>
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<td>Topics</td>
<td>Adequacy of instructions and warnings on a household chemical.</td>
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<td>Part VA of the <em>Trade Practices Act</em> 1974 (Cth) (&quot;TPA&quot;): Sections 74A, 75AA and 75AB (Interpretation), 75AC (Meaning of goods having defect), 75AD (Liability for defective goods causing injuries - loss by injured individual), 75AF (Actions in respect of failure to provide facilities for repairs or parts), 75AN (Contributory acts or omissions to reduce compensation) and section 75AQ (Representative actions by the Commission).</td>
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<td>Statutory misleading and deceptive conduct and misrepresentations: Sections 52 (Misleading or deceptive conduct) and 53(c) (False or misleading representations) of the <em>TPA</em>. (Note: sections 52 and 53 are no longer available as a cause of action in personal injury claims due to recent changes to the <em>TPA</em> introduced by the <em>Trade Practices Amendment (Personal Injuries and Death) Act 2006</em> (Cth) and are not considered below).</td>
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<td>Section 87(1B) (Orders) of the <em>TPA</em>.</td>
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<td>Facts</td>
<td>Glendale Chemical Products Pty Ltd (&quot;Glendale&quot;) purchased caustic soda in bulk and packed it for retail sale. Barnes purchased the caustic soda distributed by Glendale known as &quot;Glendale Caustic Soda&quot; in order to clear a partially blocked drain in his home. Barnes purchased the product from a retailer after being advised by the retailer that caustic soda had been used to clean drains for a very long time. The retailer provided Barnes with directions for the use of the product advising him to firstly pour hot water down the blocked drain hole and then tip the whole content of the product down the drain. After receiving these directions from the retailer, Barnes read the instructions on the label and then proceeded to purchase the product. Some time later after arriving home, Barnes re-read the label and on the same afternoon tipped around 1.8 litres of boiling water down the drain. After commencing the procedure, Barnes left the room to obtain a tool to remove the chrome cover over the shower recess waste pipe. Upon returning to the bathroom Barnes removed the cover and poured a further quantity of boiling water down the drain pipe and soon after sprinkled the product down the drain. This action was performed in reliance on the retailer's instructions and not because of the instructions contained on the label of the product. After one third of the product was sprinkled down the drain water rushed out of the pipe and struck Barnes on the top half of the face. Prior to this incident, Barnes had read the label twice and understood that he was to dissolve the product in water before pouring it down the drain. However, the label did not indicate that hot water should not be used in this process. As a consequence of the incident Barnes suffered burns to his face and both eyes.</td>
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| Legal Question(s) | Whether the respondent was a "manufacturer" of the product for the purposes of Part VA of the TPA.  
The adequacy of warnings printed on the product label and whether the product was defective under Part VA.  
Whether causation was established between the defect and the injuries.  
Contributory negligence, whether the acts or omissions of the victim contributed to his injuries. |
| Decision(s) | The proceedings in the Federal Court involved two different categories of claim.  
The ACCC brought a consumer protection claim in the form of a representative proceeding on behalf of the community generally, while Barnes brought an individual compensation claim under Part VA.  
In terms of the representative proceeding, the ACCC had sought an injunction (under section 80) restraining Glendale from engaging in misleading conduct contrary to sections 52 and 53(c) of the TPA, and orders under section 80A of the TPA requiring Glendale to undertake remedial advertising and relabelling of the product.  
Orders were also sought under sections 87(1B), 75AD and 75AF of the TPA that Glendale pay compensation to Barnes in respect of his loss and damage. Barnes had previously sued Glendale for such compensation in the NSW District Court, but this was transferred to the Federal Court when the ACCC sought compensation for Barnes along with the other orders it sought.  
**Trial**  
Emmett J held that while Glendale did not actually manufacture the product (it simply packed it), it was a manufacturer in terms of the definition of "manufacturer" under sections 74A and 75AB of the TPA as its act of repackaging and labelling came within the meaning of "processing" or "assembling". Emmett J also found that Glendale had also caused or permitted the name or mark of the corporation to be applied to the goods and therefore was deemed to be the manufacturer.  
The warning label on the product was found by the Federal Court to be insufficient in terms of warning consumers of the possible dangers of using the product as it did not make specific reference to the nature of caustic soda and the purpose for which it was marketed. The Court asserted that while consumers might know that caustic soda was corrosive, ordinary consumers would not be aware of the risks of its use with hot water. The test of whether a product was defective was to be applied by reference to the public at large rather than any particular individual.  
In terms of the adequacy of the warning labels and the role of expert evidence, Emmett J noted:  
*The Court is clearly much benefited by evidence as to the chemical properties of substances such as caustic soda. Further the Court is equally benefited by evidence as to the harm and damage which might be occasioned to human tissue as a consequence of contact with caustic soda. However, the adequacy of labels to warn consumers of such dangers is ultimately a question for the Court. Expert evidence may be of assistance in describing what is habitually done by organisations which are involved in the handling or use of substances such as caustic soda. Whether those practices are adequate by reference to some standard, however, is a question for the Court.*  
Emmett J also held that it was foreseeable that a consumer could use the product in the manner of Barnes and that caustic soda was by its nature inherently dangerous. In these
circumstances, there was a duty on Glendale to warn as to the risk of using the product with hot water and the Court found it was negligent in not doing so.

**Appeal**

On appeal, the Full Federal Court upheld the Trial Judge's findings supporting the view that if a corporation lends its name to a product by having its name or logo affixed to it, it is a manufacturer under sections 74A and 75AB of the TPA. The definition of "manufactured" within the TPA includes "processed" and "assembled". By repackaging and relabelling the product, Glendale was held to have "assembled" the product.

The Full Federal Court rejected an argument that the caustic soda was not defective because it had operated as intended. Glendale had argued that "the label was in concise clear language", multi-coloured, "gave adequate directions for use" and if Barnes had complied with the directions for use as detailed on the label, notably the wearing of safety glasses, then the product would have been safe. The Court found that the defect of the product was in its labelling.

The Court also held that it was unlikely that the use of safety glasses would have totally saved Barnes from injury. Furthermore it was found that the label's instruction to "Always wear rubber gloves and safety glasses when handling caustic soda" would not cause the average reader to be alerted to the risks that mixing caustic soda with hot water. Accordingly, having regard to the instructions and warnings on the label, the goods did not have the safety which persons generally are entitled to expect and were defective under section 75AC of the Act.

Despite Barnes having conceded that he relied on the advice from the retailer and not on the product label when using the caustic soda, causation was established by the Court as it accepted Barnes' evidence that if the label had contained an instruction not to use hot water he would not have used the product in such a way. For this reason, Glendale's defence of contributory negligence on the part of Barnes also failed.

**Comments**

This remains the only case in which the ACCC has pursued to substantive judgment a representative action under Part VA of the TPA on behalf of someone harmed, as is envisaged by section 75AQ. (Compare Australian Competition and Consumer Commission v Pacific Dunlop [2001] FCA 740.) Consumer advocates would regard it as disappointing that the ACCC has not taken more such actions to help further clarify these statutory provisions. This decision is also significant as it was the first substantive judgment under Part VA.

"Manufacturer" for the purposes of Part VA of the TPA includes a corporation who lends its name to a product by having its name or logo affixed to the product. Thus, an individual who is injured by the product may seek relief from the corporation despite the product having been produced by another.

Regardless of whether or not an individual relies on a label complying with its instructions, if it is held to be defective, a claim will not necessarily be defeated. Causation may still be established and contributory negligence negated.

**Text of judgment(s)**

*Australian Competition and Consumer Commission v Glendale Chemical Products Pty Ltd* [1998] 180 FCA (27 February 1998)


*Glendale Chemical Products Pty Ltd v Australian Competition and Consumer Commission and Anor* [1998] 1571 FCA (10 December 1998)
References


<table>
<thead>
<tr>
<th>Case Title</th>
<th>Hamilton v Merck and Co Inc [2006] NSWCA 55</th>
</tr>
</thead>
<tbody>
<tr>
<td>Country</td>
<td>Australia</td>
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<td>Representative proceedings.</td>
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<td><em>Personal Injuries Proceedings Act</em> 2002 (Qld).</td>
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<td>Sections 79 (State or territory laws to govern where applicable) and 80 (Common law to govern) <em>Judiciary Act</em> 1903 (Cth).</td>
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<td>Part 7 rule 7.4 <em>Uniform Civil Procedure Rules</em> 2005 (NSW) (UCPR).</td>
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<td>Part VA of the <em>TPA</em> (Liability for Defective Goods): Section 75AD (Liability for defective goods causing injuries--loss by injured individual).</td>
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<td>Facts</td>
<td>Hamilton brought a class action in the Supreme Court of New South Wales (under then SCR Pt 8 r 13 (now UPCR Pt 7 r 7.4)) claiming damages for personal injuries in both tort and under Part V Division 2A and Part VA of the <em>TPA</em>.</td>
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<td>All of the alleged torts had occurred in Queensland and a number of the plaintiffs also resided in Queensland. The defendants disputed the jurisdiction of the NSW Supreme Court arguing that the failure of the claimants to comply with the notice before action and compulsory conference provisions of the <em>Personal Injuries Proceedings Act</em> 2002 (Qld) (&quot;the Queensland provisions&quot;) meant that the claims were not enforceable in New South Wales. The issue was whether the Queensland provisions, which require that certain pre-litigation procedures be complied with (and had not been), were applicable to the NSW litigation.</td>
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<td>The proceedings involved the NSW Court of Appeal exercising Federal jurisdiction and at issue was whether the correct choice of law rule was determined by sections 79 and 80 of the <em>Judiciary Act</em> 1903 (Cth). Also at issue was whether the provisions of the <em>Personal Injuries Proceedings Act</em> 2002 (Qld), which related to compliance with the notice before action and compulsory conferences, were procedural or substantive.</td>
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<td>Legal Question(s)</td>
<td>Choice of law.</td>
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<td>Were the <em>Personal Injuries Proceedings Act</em> 2002 (Qld) provisions procedural or substantive?</td>
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<td>Were the provisions of the Queensland Act relevant to the litigation in NSW?</td>
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<tr>
<td>Decision(s)</td>
<td>The statutory causes of action under sections 74D and 75AD of the <em>TPA</em> invoked an exercise of the federal jurisdiction of the Supreme Court of New South Wales and since they rested on a common substratum of facts, the negligence claims also invoked that jurisdiction so that the federal jurisdiction determined the whole controversy.</td>
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|                     | The *Personal Injuries Proceedings Act* 2002 (Qld) was not relevant as it was a procedural
law of the State of Queensland.

Provisions that affect the enforceability of the rights or duties of the parties to proceedings are relevant in determining if the provisions are substantive. However, it is not determinative because a procedural condition may still be found to be essential in terms of validity. The issue is always one of statutory interpretation. The fact that the Personal Injuries Proceedings Act 2002 (Qld) stated that the provisions were substantive was not determinative of the issue (per Spigelman CJ and Handley JA).

The Personal Injuries Proceedings Act 2002 (Qld) concerns the "regulation of the mode or conduct of Court proceedings" and constituted part of the "mechanism or machinery of litigation" and the provisions therefore were procedural: (by Spigelman CJ in McKain v R W Miller and Co (SA) Pty Ltd (1991) 174 CLR 1. The Personal Injuries Proceedings Act 2002 (Qld) must be complied with before an action can be validly commenced in Queensland. The provisions literally "do not affect... the rights and duties of the parties to the action once it has been validly commenced". The Queensland provisions were viewed as procedural as they were concerned with the conduct of the proceedings, how they were to be regulated and formed part of the framework by which the litigation was conducted.

Handley JA noted that Personal Injuries Proceedings Act 2002 (Qld) also did not preclude the accruing of a cause of action in tort as soon as damage was suffered, with time running from the date of injury. Consequently, at the date of injury there are rights and liabilities fixed by reference to previous facts, matters or events.

As the provisions were not substantive law they did not form part of the law which must be applied by a NSW Court.

**Comments**

Compare cases on transfer from the Federal Court to state District Courts, such as Brooks v R & C Products Pty Ltd (1996) ATPR 41-537.

**Text of judgment(s)**

<table>
<thead>
<tr>
<th>Case Title</th>
<th>Klease v Brownbuilt Pty Ltd [2002] QSC 226</th>
</tr>
</thead>
<tbody>
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<tr>
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</tr>
<tr>
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<td>Strikeout application.</td>
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<td>Negligence.</td>
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<td>Part VA (Liability of manufacturers of defective products) of the Trade Practices Act 1974 (Cth) (&quot;TPA&quot;): sections 75AD (Liability for Defective Goods causing injuries) and 75AI (No liability action where workers' compensation applies).</td>
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<tr>
<td>Facts</td>
<td>Klease (the &quot;first plaintiff&quot;) claimed that he suffered an injury at work when he sat on a chair which broke underneath him. Klease claimed that the chair had broken as a result of it having been manufactured in a defective manner.</td>
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<tr>
<td>Legal Question(s)</td>
<td>Whether a claim under section 75AD of the TPA is precluded by the operation of section 75AI through the existence of workers compensation.</td>
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| Decision(s)      | Klease applied to the Supreme Court of Queensland for relief against Brownbuilt Pty Ltd, the manufacturer of the chair, in negligence and under section 75AD of the TPA. Section 75AD provides that "(a) a corporation, in trade or commerce, supplies goods manufactured by it; and
(b) they have a defect; and
(c) because of the defect, an individual suffers injuries;
then:
(d) the corporation is liable to compensate the individual for the amount of the individual's loss suffered as a result of the injuries; and
(e) the individual may recover that amount by action against the corporation; and
(f) if the individual dies because of the injuries--a law of a State or Territory about liability in respect of the death of individuals applies as if:
(i) the action were an action under the law of the State or Territory for damages in respect of the injuries; and
(ii) the defect were the corporation's wrongful act, neglect or default."
At the time of Klease's accident there was a Queensland legislative instrument under which Klease had the potential to claim worker's compensation. The existence of this statute was accepted by both parties.
In this matter, Brownbuilt Pty Ltd applied to the Supreme Court of Queensland to strike out the parts of Klease's statement of claim relating to the application under section 75AD. Brownbuilt argued that Klease's claim under section 75AD did not apply to any potential loss that Klease had suffered as section 75AI of the TPA specifically excludes the operation of 75AD in circumstances where the loss claimed can be recovered under a...
State (or Federal) workers compensation statute.

Fryberg J granted Brownbuilt's application finding that the Queensland workers compensation instrument was the type intended by section 75AI to preclude section 75AD applications and therefore precluded Klease's action in the area. Consequently, His Honour struck out the relevant paragraphs on the basis that they not disclose a cause of action.

**Comments**

See also *Elms v Ansell Ltd* [2007] NSWSC 618 and *Lanza v Codemo Management Pty Ltd and Ors* [2001] NSWSC 845.

**Text of judgment(s)**


**References**
<table>
<thead>
<tr>
<th>Case Title</th>
<th>Lanza v Codemo Management Pty Ltd and Ors [2001] NSWSC 845</th>
</tr>
</thead>
<tbody>
<tr>
<td>Country</td>
<td>Australia</td>
</tr>
<tr>
<td>Court(s)</td>
<td>Supreme Court of New South Wales</td>
</tr>
<tr>
<td>Topics</td>
<td>Safety harness.</td>
</tr>
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<td>Claim arising in the course of employment.</td>
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<td></td>
<td>Negligence.</td>
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<td>Whether instructions were adequate.</td>
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<td>Part VA of the Trade Practices Act 1974 (Cth) (&quot;TPA&quot;) (Liability of Manufacturers and importers for defective goods): Sections 75AC (Meaning of goods having defect), 75AD (Liability for defective goods causing injuries--loss by injured individual) and 75AI (No liability action where workers' compensation or law giving effect to an international agreement applies).</td>
</tr>
<tr>
<td>Facts</td>
<td>Lanza became a quadriplegic as a result of a workplace accident involving a cherry picker. At the time of the accident, Lanza was working from the bucket of a mobile cherry picker and wearing a safety harness. However, when Lanza fell from the cherry picker basket, the safety harness failed to arrest his fall. At the time of the hearing, Lanza had already recovered some amounts under NSW laws relating to worker's compensation.</td>
</tr>
<tr>
<td>Legal Question(s)</td>
<td>Whether section 75AI of the TPA precluded all recovery from the manufacturer under Part VA where a recovery can be made under a workers' compensation law.</td>
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<tr>
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<td>Claim against employer and manufacturer of safety harness in respect of injuries suffered involving a motor vehicle.</td>
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<td>Whether instructions were adequate.</td>
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<td>Compliance with Australian Standard or common practice.</td>
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<tr>
<td>Decision(s)</td>
<td>Lanza brought proceedings against his employers who were the owner of the cherry picker, the manufacturer and supplier of the safety harness and the supplier of a safety hook.</td>
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<td>It was found by the Supreme Court of New South Wales that the safety harness had failed to arrest Lanza's fall from the cherry picker basket due to the manner in which a lanyard was hooked onto the D ring before the harness was fitted. Whilst the risk and the correct method of fitting was obvious to an expert (whether because of an expert's concern with safety matters or because of their use of such equipment) the Court found that the risk to a casual user or to a worker who may be preoccupied with other activities was not so obvious.</td>
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<td>No complaint was made by Lanza in relation to the design of the harness which complied with the relevant Australian Standard. The complaint was that a warning should have been included in relation to the risk of the event which occurred, which the Judge considered was &quot;real, foreseeable and neither fanciful or far-fetched&quot;. Lanza asserted that had instructions been included on the harness, he would have followed them.</td>
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</table>
|                  | The Judge noted that the fact that instructions had been given concerning "the way in which the harness was to be worn, and the need for care in its maintenance, in permanent form by way of an indelible label indicated that it was thought necessary for users to have
such information and a permanent reminder of their terms”. Accordingly, the Court held that the manufacturer and supplier of the harness were in breach of its duty of care in negligence, for failing to provide clear instructions and warnings relating to it.

The fact that the harness complied with an Australian Standard or common practice was not to solely or primarily determine whether negligence existed. While such standards and practices may help to determine what proper care and skill is required in particular circumstances, in this case, the Court held that the risk and the need for warnings was “insufficiently addressed” in the Standard. In addition to a warning on the product, the Judge considered that a warning should have been included in sales catalogues and a pamphlet or user's manual supplied with the product.

The Court observed that a claim had been made under section 75AD of the TPA and noted the definition of "defect" under section 75AC. However, it did not make any finding that the goods were defective as it was unnecessary due to the operation of section 75AI. Section 75AI provides that Part VA does not apply to "a loss in respect of which an amount has been or could be recovered under a law of the Commonwealth, a State or Territory that ...relates to worker's compensation”.

The Court, therefore, considered whether section 75AI operated to bar all recovery under Part VA or to limit the recovery to a quantity of damages that would otherwise be recoverable beyond any cap arising under the relevant worker's compensation legislation.

The Judge noted that the section was ambiguous and that accordingly, it was appropriate to make reference to the Explanatory Memorandum. It stated that "Loss caused by work-related injuries has therefore been excluded, as it is considered that this field is comprehensively regulated under existing workers' compensation regimes". Accordingly, the Judge held that a plaintiff who has the protection of workers compensation legislation cannot also bring a claim against a manufacturer under Part VA of the TPA.

An argument was also made by Lanza that his claim was not a case in which a loss "could be recovered" under worker's compensation legislation because of a provision in the statute which required the plaintiff to seek recovery under the Motor Accidents Act 1988 (NSW). However, the Judge considered that recovery under the Motor Accidents Act was limited to recovery for fault whereas the plaintiff was also entitled to receive benefits (and indeed had received benefits) under the workers' compensation legislation.

Comments

Section 75AI of the TPA has been applied in several judgments in relation to workplace accidents, including most recently, Elms v Ansell Ltd [2007] NSWSC 618. In many ways, it is an unsatisfactory provision. It is ambiguously worded. On the basis of the present decision, it operates to exclude an applicant from claiming under Part VA at all in respect of any loss recoverable (rather than simply excluding the amount recoverable) under a workers' compensation law. A consumer injured by the same product outside of the workplace, however, could bring a claim.

Section 75AI also excludes claims under Part VA in respect of a loss which could be recovered under laws that give effect to an international agreement. The Australian Law Reform Commission releases a Report in 1989 entitled "Product Liability”, which considered the need for law reform prior to the introduction of Part VA, identified the 1980 United Nations Convention on Contracts for the International Sale of Goods and those affecting the liability of civil aviation carriers (see at page 96-7 at paragraph 7.10) as being such laws. Article 14 of the EC Directive on Defective Products provides that it does not apply to injury or damage arising from nuclear accidents and covered by international conventions ratified by the Member States.

Similarly, it is not immediately apparent as a matter of policy why loss caused by work-related injuries (which are insured) have been excluded and those involving a motor
vehicle are not. Compensation for injuries resulting from motor vehicle accidents are similarly comprehensively regulated. The Australian Law Reform Commission noted the issue but concluded that because the economic impact of strict product liability to motor vehicles was inconclusive, there should be no exclusion in respect of such claims (at page 99 para 7.13).

**Text of judgment(s)**


**References**


<table>
<thead>
<tr>
<th>Case Title</th>
<th><em>Laws v GWS Machinery Pty Ltd &amp; Anor</em> [2007] NSWSC 316</th>
</tr>
</thead>
<tbody>
<tr>
<td>Country</td>
<td>Australia</td>
</tr>
<tr>
<td>Court(s)</td>
<td>Supreme Court of New South Wales</td>
</tr>
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<td>Topics</td>
<td>Tractor tyre.</td>
</tr>
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<td></td>
<td>Negligence.</td>
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<td>Implied warranties under Part V Division 2 of the <em>Trade Practices Act</em> (1974) (Cth) (<em>TPA</em>): Section 71 (Implied undertakings as to quality or fitness).</td>
</tr>
<tr>
<td></td>
<td>Interpretation: Sections 4B (Consumers) of the <em>TPA</em>: 74A (Interpretation) and 75AB (Certain interpretation provisions (importers and others taken to be manufacturers etc.) apply to this Part).</td>
</tr>
<tr>
<td></td>
<td>Part V Division 2A (Actions against manufacturers of goods) of the <em>TPA</em>: section 74B (Actions in respect of unsuitable goods) and section 74D (Action in respect of goods of unmerchantable quality).</td>
</tr>
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<td>Part VA (Liability of manufacturers for defective products) of the <em>TPA</em>: section 75AC (Meaning of goods having defect), section 75AD (Liability for defective goods causing injuries - loss by injured individual) and section 75AI (No liability action where workers' compensation).</td>
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<tr>
<td>Facts</td>
<td>On 10 March 1999, Laws Senior was fitting a tyre to the tyre rim of a Massey Ferguson 35 Tractor when the tyre and tube exploded and pushed the rim outwards. This explosion resulted in injury being caused to both Laws Senior and his son, Laws Junior.</td>
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<td>A tractor tyre is known to be a dangerous product. The tyre was supplied without instructions and warning of the relevant danger. At the relevant time, it was standard industry practice to employ trained tyre fitters to install agricultural tyres because of the risks. Some of the catalogues made clear that tyre fitting was for a specialist, in the absence of which the task was &quot;exceedingly dangerous&quot; possessed a &quot;real risk of serious injury and/or death.&quot; Any retailer who read the catalogue provided by the importer and distributor, would have actual knowledge of these risks. Laws Senior however, was completely unacquainted with the dangers associated with the process.</td>
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<td>There was no warning on the tyre or accompanying documentation with a relevant instruction or warning. The process of embossing a tyre with a warning involves an initial and extremely minor one-off cost, a form of warning common on tyres at that time and mandatory in a number of developed countries. In addition, the provision of a printed warning either in the form of a sticker attached to the tyre or a small booklet would have also been an inexpensive and easily achieved means of warning tractor users as to the potential dangers associated with the tyre changing process.</td>
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<tr>
<td>Legal Question(s)</td>
<td>Duty of care of retailer and importer/wholesaler of goods.</td>
</tr>
<tr>
<td></td>
<td>Meaning of &quot;consumer&quot;.</td>
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<td>Whether goods ordinarily acquired &quot;for personal, domestic or household use or consumption&quot;.</td>
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<tr>
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<td>Whether goods of merchantable quality in absence of warning.</td>
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Whether safety of the tyre was not such as persons generally are entitled to expect.

**Decision(s)**

The Laws sued the retailer of the tyre, GWS Machinery Pty Limited ("GWS") in negligence and in contract, for breaches of conditions including by sub-sections 71(1) and 71(2) of the TPA.

The plaintiffs also sued the importer and distributor (and for some present purposes the manufacturer) of the tyre, Motokov Australia Limited ("Motokov") in negligence and for breaches of sections 74B, 74D and 75AD of the TPA. Laws Junior sued GWS in negligence. Laws Junior also sued Motokov again in negligence and also for breach of section 75AD of the TPA.

**Negligence of GWS as a retailer**

No general duty is imposed on a vendor of goods for the damage or injury arising from the use of the goods. The nature of the duty of care owed by a vendor to a purchaser was considered by the Court of Appeal of New South Wales in *Pesl v Ray Smith Tractors* [2007] NSWCA 74 and *McPherson's Ltd v Eaton* [2005] NSWCA 435 in which the Court affirmed its previous judgment in *Laundess v Laundess* (1994) 20 MVR 156 that to impose a duty "something more" is required.

In addition, Rotham J noted that "[i]n the textbook examples, one is reminded that one does not expect a supermarket to be responsible for detecting, or preventing, a dead bee in a can of soup."

In present matter, the damage suffered by each of the plaintiffs was a personal injury caused by undertaking a task known by GWS to be "inherently dangerous". The injuries sustained by Laws Senior and his son were found by the Court to be foreseeable injuries to a class of persons likely to be injured.

Rothman J noted that had an appropriate warning given to Laws Senior it would have resulted in him not performing the task and therefore a chain of causation was established and a breach of duty was found to have caused the injury. His Honour also noted that the "probability of the risk being realized must be considered in light of the seriousness of the foreseeable injury if it were realized" and that it was "necessary to evaluate the difficulty of obviating the risk (or minimizing it), including expense and inconvenience, and weigh that difficulty against any competing responsibilities" (*Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47 per Mason).

His Honour found that the risk could have been eliminated (and the purchaser could have possessed the same knowledge as the vendor) through the provision of a "simple warning and/or provision of information sufficient to allow the purchaser to evaluate for himself the risk in question."

**Negligence of Motokov**

Rotham J found that even in the circumstances where Motokov was treated as an importer or wholesaler, rather than a manufacturer, that it still had the capacity to attach a warning to the product. Consequently, Motokov in its role as either and importer or wholesaler, was found by the Court to posses a duty of care to warn potential customers about the danger of changing a tyre on the tractor. As a result of the existence and subsequent breach of this duty by Motokov, His Honour determined that the company was liable to both Laws Senior and Laws Junior in negligence under section 75AD of the TPA.

**Trade Practices Act 1974 (Cth)**

**Meaning of "Consumer"**

The question that arose with respect to the *Trade Practices Act* claims was whether the...
tyre fitted the description of goods acquired "for the purpose of using them up or transforming them in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land" under the definition of consumer in section 4B of the TPA.

GWS successfully maintained that the goods were acquired "for the purpose of using them up in the course of repairing or treating other goods". Their argument was based upon the proposition that the term "use up" includes "consumed the whole of or exhaust". GWS argued that since the tyre was perishable or depreciable and had the potential to blow out and be damaged beyond repair, it was consumed in whole or exhausted.

His Honour, however, considered this to be a misreading, noting that "[a] tyre for a car may or may not be subject to the consumer protection provisions depending upon whether the car is being used for business or for private purposes. Given the range of purposes for which a motor vehicle might be used and the times when it may be used partly for business and partly for private use, there would be no certainty in rights and duties of any retailer of such goods or in the person purchasing." His Honour found that such an approach would result in the consumer protection provisions only covering the tyre when on the initial vehicle, but not when sold separately. His Honour viewed this approach as inconsistent.

Accordingly Rothman J found that the purchase of the tyre was a "consumer transaction" and that the provisions of sections 66, 68 and 71 of TPA applied to the present circumstances.

**Part V Division 2**

Rothman J noted that an ordinary consumer (i.e. a person who is not a vendor of tyres, or involved in the tyre industry) would not generally be expected to know of the dangers associated with fitting a tyre to a tractor. As a result of the existence of the risks associated with this process, His Honour viewed the tyres as not being of merchantable quality namely "as fit for the purpose ... for which ... [it is] ... commonly bought as it is reasonable to expect" in the circumstances" (see by analogy ACCC v Glendale (1998) ATPR 41-632 at 40,970-40,971). Consequently, His Honour found that the goods were not of merchantable quality under section 71(1)(a) of the TPA as there had been no warning provided to Laws Senior nor was there any danger evident on the inspection of the wheel.

**Part V Division 2A**

The plaintiffs also applied for compensation against Motokov under sections 74B and 74D of the TPA. However, in order for sections 74B and 74D to apply, the supply (re-supply and acquisition) must be of goods. The TPA defines the meaning of "goods" in section 74A(2)(a) of the Act to mean goods "ordinarily acquired "for personal, domestic or household use or consumption". Rothman J viewed a "tractor tyre acquired for use on a tractor which, in turn, is used in business" as not fitting the definition provided in 74A(2)(a) (See also Atkinson v Hastings Deering (Qld) (1985) 6 FCR 331 and Minchillo v Ford [1995] 2 VR 594, and compare Crago v Multiquip (1998) ATPR 41-620 and Jillawarra Grazing v John Shearer (1984) ATPR 40-441 and Bunnings v Laminex [2006] FCA 682).

Consequently, as a rear tractor tyre is not a product ordinarily acquired for personal, domestic or household use or consumption, neither section of Part V Division 2A applied.

**Part VA**

As section 75AD of the TPA is within Part VA of the Act and not Part V Division 2A, the definition of goods in section 74A(2)(a) of the Act were found by His Honour not to be relevant to the claim under Part VA and that the broader definition of "goods" in section 4
Rothman J found that Motokov was a corporation for the purposes of section 75AD of the Act and that it had manufactured and supplied the tyres. His Honour consequently determined that as Motokov had "marketed the goods without any warning as to the fitting process and given: the manner in which the tyres would be marketed...for sale to consumers; the packaging of the tyres (and particularly the absence of any accompanying and attached warnings); and that the tyre might reasonably be expected to be fitted to rims; the safety of the tyre was not such as persons generally are entitled to expect".

Consequently, His Honour found the tyres to be defective under 74AC of the TPA and deemed Motokov liable under section 75AD requiring the company to compensate both Laws Senior and Laws Junior for their injury and loss.

**Damages**

Rothman J awarded Law Senior $272,433.79 in damages. Laws Junior, who had been more seriously injured in the incident, was awarded $9,146,462.05 in damages.

**Comments**

See also the commentary on *Crump v Equine Nutrition Systems Pty Ltd t/as Horsepower* [2006] NSWSC 512, regarding the different definitions of “goods” applicable respectively to Part VA and Part V Division 2A.

**Text of judgment(s)**


**References**
--- | ---  
**Country** | Australia  
**Court(s)** | Federal Court of Australia  
**Topics** | Electronic device. Actual and deemed manufacturers.  
Part V Division 2A *Trade Practices Act 1974* (Cth) ("TPA") (Actions against manufacturers of goods): Sections 74A (Interpretation), 74B (Action in respect of unsuitable goods), 74D (Action in respect of goods of unmerchantable quality), 74E (Actions in respect of non-correspondence with samples etc) and 74G (Actions in respect of non-compliance with express warranty).  
Part VA (Liability of manufacturers of defective products): section 75AA (Interpretation), section 75 AB (Certain interpretation provisions (importers and others taken to be manufacturers etc.) apply to this Part) and section 75AD (Liability for defective goods causing injuries - loss by injured individual) of the TPA.  
**Facts** | FXC Corporation ("FXC"), a company incorporated in the United States, manufactured a device known as the Astra Expert Automatic Activation Device ("AEAAD") to automatically open reserve parachutes in certain circumstances.  
The applicant, Leeks commenced proceedings against FXC after the AEAAD malfunctioned, opening the reserve parachute when it was not required and causing him injury. He claimed FXC had breached Parts V and VA of the TPA, also suing the importers as deemed manufacturers of the AEAAD under section 74A of the TPA.  
Section 74A(3) provides that if a corporation holds itself out to the public as the manufacturer of goods and allows another person to hold itself out to the public as the manufacturer of the goods, then the corporation is deemed for the purposes of Part V Division 2A to have manufactured the goods.  
Section 74A(4) provides that if the goods were imported into Australia by a corporation that was not the manufacturer of the goods and at the time of the importation the manufacturer of the goods did not have a place of business in Australia, then the corporation is deemed under Part V Division 2A to have manufactured the product.  
**Legal Question(s)** | Whether parallel claims could be made against an actual and deemed manufacturers concurrently.  
**Decision(s)** | The Court held that the actual foreign manufacturer could be a party to proceedings brought by a consumer against the importers and deemed manufacturers of the product into Australia under section 74(4) of the TPA (approving Boehm AJ in *White v Eurocycle* (1994) 16 ATPR 41-330).  
The Court also held that there was no express legislative intent evident from the wording of the section to limit its operation or any other reason that the Court could discern why the various subsections of section 74 should be treated as being mutually exclusive so that only one of the deemed manufacturers could be sued (quoting von Doussa J in *ETSA v Krone (Australia) Technique Pty Ltd* (1994) 16 ATPR 41-337 at 42,426 with approval).  
Accordingly, section 74A of the TPA does not require the applicant to elect between either an actual or deemed manufacturer when commencing proceedings; the provision provides
for concurrent liability.

**Comments**

Under Part V Division 2A and Part VA, a consumer has a range of parties it can join to proceedings.

Sections 74(1) and 75AA provide that "manufactured" includes grown, extracted, produced, processed and assembled. Under sections 74(A)(3) to (8) and section 75AB, a manufacturer, importer or corporation which holds itself out as the manufacturer, a corporation which has branded goods manufactured under licence for it, and a corporation which permits someone to promote goods as those of the corporations are all manufacturers.

These provisions allow the plaintiff the opportunity to institute proceedings against more than one party to maximise the chance that it will obtain compensation.

On the extra-territorial effect of the TPA, see also *Borch v Answer Products Inc* [2000] QSC 379.

**Text of judgment(s)**


**References**

Mayes v Australian Cedar Pty Ltd t/a Toronto Timber and Building Supplies [2006] NSWSC 597, [2006] ATPR 42-119

Country: Australia

Court(s): Supreme Court of New South Wales

Topics: Building product - manufactured pine decking.  
Negligence.  
Section 74A(4) (Interpretation) of the Trade Practices Act 1974 (Cth) ("TPA").  
Part VA (Liability of manufacturers and importers of defective goods) of the TPA.

Facts: The plaintiff, Mayes, ran a handyman business and had experience in building timber decks. He obtained an owner/builder's permit to erect a new deck of significant dimensions (thirteen by three metres) adjoining an existing deck at his home. The plaintiff was a customer of the Treated Pine Shack ("the Pine Shack") where he ordered the decking and other necessary timber to build the deck. The formula to determine the necessary linear metreage of decking was to multiply the squareage (13x3) by eleven. This should have resulted in a calculation of 429 linear metres (13x3x11). The relevant invoice specified 396 linear metres. 

Once the Pine Shack delivered the timber decking, Mayes started building the deck and was, at various times, assisted by friends and neighbours. After securing the joists, the plaintiff and his assistants started to lay the decking. Less than halfway through the construction period, Mayes stepped on a piece of decking which broke under his foot. This break in the decking resulted in Mayes falling through the partially constructed deck and catching himself on the joists. The deck was three metres above ground level at the time of the accident. The plaintiff did not fall all the way through the deck, but suffered what he believed to be a graze to his right leg descending down to his shin. After the accident, the injury was packed with ice and elevated. 

The accident occurred on 10 February 2002. Approximately two days later, Mayes resumed the construction task and completed it in the following weeks. Although the plaintiff finished the deck, the condition of his leg was deteriorating. After treatment which included surgery, and resulted in complications, Mayes was able to return to work with limited hours in June 2002 and to full time employment (with limited capacity) the following month. The plaintiff was left with an ugly scar on his leg and a permanent area of numbness around the scar. The injured area required daily application of various creams.

Legal Question(s): Negligence - no obligation upon importer to unpack and inspect goods before further supply. 
Liability of importer as deemed manufacturer under TPA.  
Contributory negligence under Part VA.

Decision(s): Held: application allowed. 

District Court 
The plaintiff commenced proceedings in the District Court alleging that he had suffered personal injuries because of a defect in the decking supplied by Toronto Timber, which was an importer of treated pine timber decking from New Zealand. Mayes maintained
that the defective decking, which he bought from the Pine Shack, was part of such an import. Mayes claimed that he was entitled to damages from Toronto Timber at common law in negligence and/or pursuant to the provisions of Part VA of the TPA. Pursuant to section 74A(4), the defendant was a deemed manufacturer of goods, which it imported and was statutorily liable in circumstances where injury results from defect in the manufactured goods.

Concerning liability under Part VA of the TPA, the defendant argued that the issue was whether the plaintiff had proven that the defendant had supplied the defective deck board.

Although the experts retained by each party were in contradiction about other issues connected with the matter, they were in agreement as to the defective nature of the deck board and that the timber in the deck was not fit for such use. At the relevant time, Pine Shack had two sources of decking for sale to customers, the defendant and Pine Solutions Australia. The experts were in vigorous disagreement with respect to whether it could be concluded from a scientific point of view that the timber could be identified as a product of New Zealand manufacture and therefore identified as the subject of import by the defendant. Other arguments submitted by the defendant included that the length of timber was indicative of the fact that the timber was not provided by it. It was further argued that the plaintiff had sourced the decking from suppliers other than Pine Shack because the actual linear metres delivered to the plaintiff were only 396 linear metres (per the Pine Shack invoice to the plaintiff).

On the issue of damages, a contention of contributory negligence was raised by the defendants who relied upon evidence that there were perceptible dangers in walking upon unnailed decking and the concession of Mayes that he had been aware of this danger.

The plaintiff's action was removed to the Supreme Court of New South Wales where the defendant sought indemnity or contribution from Eastown Timber of Wanganui, New Zealand, the alleged actual manufacturer of the decking. The jurisdiction of the Supreme Court was necessary if there became a requirement to enforce a successful cross-claim in the jurisdiction of New Zealand. However, the hearing proceeded only to determine the principal action.

**Negligence**

The evidence before the Court suggested that the defendant’s operation did not involve the physical handling of the imported goods. The business practices of the respondent involved it placing an order for timber goods and on the arrival of the goods in Australia, customs clearance was arranged by their agent. At this point in time a carrier would deliver the treated pine directly to a retailer in strapped and packaged units. The goods were not unpacked or inspected by Toronto Timber prior to being forwarded to its customer.

His Honour did not consider that it was a reasonable requirement that it should "deconstruct the package and inspect the goods". The assertion that this would not be commercially viable was not in dispute. His Honour did not consider it a reasonable response to risks that the goods might be defective in some way to require Toronto Timber so to do.

**Part VA**

His Honour did not set out the statutory path to be followed in order to demonstrate the potential liability of the defendant pursuant to Part VA of the TPA, which he described as "lengthy".
His Honour found in concise terms that the deck board which failed was defective and causative of the plaintiff’s injury, the contrary not having been suggested, and that the particular piece of treated pine was imported by the defendant and acquired by the plaintiff through the Pine Shack. Accordingly, Mayes was entitled to a verdict pursuant to the TPA.

**Contributory Negligence**

A defence of contributory negligence was raised. The defendant alleged that there were perceptible dangers in walking upon unnailed decking and that Mayes had conceded that he was aware of this risk.

His Honour, however, noted that this danger had nothing to do with the actual risk. His Honour asserted that it is "irrelevant that the plaintiff may have been aware of any number of potential dangers because his injury was, on any view of the evidence, caused only by the fracture of a defective board under his body weight". His Honour found that there was no suggestion that the occurrence of the accident had been "contributed to by the board not being nailed, by its moving in the plane of the decking or by some careless steps by the plaintiff". His Honour stated that it was "trite to observe that the onus is on the defendant and it suffices to record that it has failed to prove that the plaintiff contributed to his damage by any relevant failure on his part to take reasonable care for his own safety".

<table>
<thead>
<tr>
<th>Comments</th>
<th>On the possibility of suing a foreign manufacturer directly under Part VA, see for example <em>Borch v Answer Products Inc</em> [2000] QSC 379.</th>
</tr>
</thead>
<tbody>
<tr>
<td>References</td>
<td></td>
</tr>
</tbody>
</table>
### Case Title

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Court(s)</td>
<td>Federal Court of Australia</td>
</tr>
</tbody>
</table>

#### Topics
- Medical device.
- Part VA _Trade Practices Act_ 1974 (Cth) ("TPA") (Liability of manufacturers for defective goods): Sections 75AC (Meaning of goods having defect) and 75AD (Liability for defective goods causing injuries - loss by injured individual).

#### Facts
Morris alleged "severe visual disturbances" following surgery to implant an ocular lens in her right eye.

She alleged that the implanted lens had a defect and that it was unfit for its purpose and not of merchantable quality. In relation to the particulars of defect, she pleaded that the lens was "not as safe as persons generally are and were entitled to expect" given that it had caused her symptoms and that a warning had not been provided with respect to the potential risk of such symptoms occurring.

The manufacturer sought to dismiss the claim on the basis that the claim under section 75AD of the _TPA_ was not sufficiently particularised and argued that the applicant was required to particularise the circumstances giving rise to the defect by reference to the sub-sections in section 75AC and causation. Further, the manufacturer contended that even if the case as pleaded was made out, there would be no evidence to establish the defect because it was not enough to infer a defect from the fact of injury.

#### Legal Question(s)
- Whether a defect can be inferred from the fact of injury.
- Whether the applicant was required to particularise the defect by reference to the circumstances set out in section 75AC(2) of the _TPA_.
- Whether a claim pursuant to section 75AC(2) can be based on process of inferential reasoning.

#### Decision(s)
Section 75AC of the _TPA_ provides that in determining the extent of good safety, regard is to be had to all relevant circumstances including the manner and purposes for which they have been marked, their packaging, the use of any mark in relation to them, any instructions or warnings, what might reasonably be expected to be done with or in relation to them and the time when they were supplied by their manufacturer.

The manufacturer argued that the applicant's claim as pleaded must fail as the applicant ought to have expected that "complications affecting vision sometimes occur and a complete description of such possible complications would be discussed with patients prior to surgery". Further, it submitted that the alleged failure of the doctor to warn the applicant and the fact that a surgeon had implanted the lens meant that there was a failure to make out a case of causation. Finally, it said that an inference could not be relied upon to establish a defect from the fact of injury, noting that there was nothing pleaded to establish an "actual defect in the lens" or the existence of "certain particular circumstances which would entitle persons generally to have particular expectation of the lens".

Nicholson J noted that in determining whether or not a product was defective, section 75AC of the _TPA_ requires regard be had to "all relevant circumstances". The list of circumstances in subsection (2) was inclusive but not confined to them, and neither set outer parameters of the relevant circumstances nor defined a minimum qualification.
Whether any of the circumstances could be satisfied would depend on the evidence of the particular case. Absent evidence satisfying a finding of any of the circumstances in subsection (2), the applicant will have more difficulty satisfying the requirements of section 75AC(1) but it does not mean that the requirements cannot be met.

In relation to the onus of proof, the Court noted that it was for the applicant to determine what evidence s/he views as sufficient to establish liability under sections 75AC and 75AD. The Judge noted that the applicant's counsel had stated that the evidence would show that the cause of all of the symptoms in the applicant's eye was the lens and that would be "sufficient to raise an inference that the safety of the goods was not such as persons generally are entitled to expect" relying upon The Nominal Defendant v Haslbauer (1967) 117 CLR 448 per Barwick CJ at 452. Nicholson J considered that it was open for the applicant to establish the cause of action by inference from the evidence in her case and stated that there was no reason in law or the Act why an evidentiary inference could not be relied upon, in particular given the consumer protection character of Part VA.

Further, Nicholson J observed that if the evidence was that the goods had been "causative of injury", the Court would be required to move to a finding with respect to the extent of the safety of the product and whether that safety was not to the level as persons generally were entitled to expect. If that were established, the Court would move to finding that the goods were defective and then would move to the application of section 75AD.

Comments

There is no doubt that inferences of defect can be drawn from the evidence under Part VA of the TPA. For example, section 75AC(3) provides that an inference that goods have a defect is not to be made only because of the fact that, after they were supplied by their manufacturer, safer goods of the same kind were put on the market.

The usual onus of proof applies in cases under Part VA, that is, that the applicant must prove their case on the balance of probabilities. A distinction is to be drawn, however, between a legal burden of proof imposed by the law itself and the shifting of inferences of fact, as evidence is tendered, which may give rise to inferences unless further evidence is adduced (see Brown v Rolls Royce Ltd (1960) 1 All ER 577 at 581 per Denning LJ in relation to a claim in negligence). See also Forbes v Selleys Pty Ltd [2002] NSWSC 547.

Text of judgment(s)


References

**Country**: Australia

**Court(s)**: Supreme Court of Western Australia


**Facts**: Newcombe initiated proceedings in the Supreme Court claiming damages for the personal injuries sustained when she slipped on a stone surface during the course of her employment with the first defendant, AME Properties Limited. There was an associated TPA claim against the second defendant, the manufacturer of the stone surface.

The provisions of section 93D(4) of the Workers' Compensation and Rehabilitation Act 1981 (WA) required an applicant to seek the leave of the District Court before commencing such proceedings. Newcombe had not sought such leave. Consequently, the first defendant entered a conditional appearance with respect to the present matter and obtained an order from the acting master setting aside the writ.

Newcombe sought leave to appeal on the basis that the jurisdiction of the Supreme Court had not been limited by the Act and that a plaintiff was not required to seek the leave of the District Court to initiate proceedings in the Supreme Court. Newcombe also asserted that the effect of the Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) and the Jurisdiction of Courts (Cross-vesting) Act 1987 (WA) granted the cross-vested Court with the associated claim "free from the limitation imposed on the cross-vesting Court".

**Legal Question(s)**: Workers compensation claim. Associated claim under TPA. Whether Federal Court acquires jurisdiction in associated claim?

**Decision(s)**: Leave to appeal refused:

1. It is a requirement of the Workers' Compensation and Rehabilitation Act 1981 (WA) that all Part IV, Division 2 proceedings require the leave of the District Court to be obtained before a writ can be issued from the jurisdiction of the Supreme Court. Section 93D(4) of the Workers’ Compensation and Rehabilitation Act 1981 (WA), as a valid enactment, must be given effect to in accordance with its terms.

2. If proceedings have been commenced in the Federal Court of Australia for relief under section 75AD of the TPA, and the claim for common law damages was treated as an associated claim, the limits imposed under section 93D(4) would still apply under
operation of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 WA.

3. The commencement of proceedings without leave constituted a "nullity" and it was appropriate for the defendant to obtain an order under the *Rules of the Supreme Court* 1971 WA, O 12, r 6.

<table>
<thead>
<tr>
<th>Comments</th>
<th>See also Section 75AI of the <em>TPA</em>, excluding Part VA claims which are or may be covered by statutory workers compensation schemes.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Text of judgment(s)</strong></td>
<td>Available via Lawbook Online Subscription</td>
</tr>
<tr>
<td><strong>References</strong></td>
<td></td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Case Title</th>
<th><em>Peterson v Merck Sharpe and Dohme (Australia) Pty Ltd</em> [2006] FCA 875</th>
</tr>
</thead>
<tbody>
<tr>
<td>Country</td>
<td>Australia</td>
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<td>Court(s)</td>
<td>Federal Court of Australia</td>
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<tr>
<td>Topics</td>
<td>Medical device:</td>
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<td>Adequacy of warnings.</td>
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<td>Adequacy of pleadings.</td>
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<td>Negligence.</td>
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<td>Representative proceedings under Part 4A <em>Supreme Court Act</em> 1986 (Vic).</td>
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<td>Part V Division 2A (Actions against manufacturer of goods) <em>Trade Practices Act</em> 1974 (Cth) (<em>TPA</em>) - sections 74B (Actions in respect of unsuitable or unmerchantable goods) and 74D (Action in respect of goods of unmerchantable quality).</td>
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<td>Part VA - (Liability of manufacturers for defective products) of the <em>TPA</em> - sections 75AC (Meaning of goods having defect) and 75AD (Liability for defective goods causing injuries - loss by injured individual).</td>
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<td>Facts</td>
<td>This proceeding was commenced as a group proceeding under Part 4A of the <em>Supreme Court Act</em> 1986 (Vic) and concerned a non-steroidal anti-inflammatory drug sold in tablet form under the name &quot;Vioxx&quot; prescribed for the relief of arthritis.</td>
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<td>Peterson had taken Vioxx for this purpose, on prescription, between May 2001 and September 2004. He alleged that he suffered a &quot;myocardial infarction&quot; as a result of his Vioxx consumption. It was also alleged that other group members who had taken Vioxx had also suffered certain cardiovascular conditions.</td>
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<td>Peterson's claim in negligence alleged that Vioxx could &quot;materially increase the risk&quot; of a patient suffering a cardiovascular condition which the manufacturer either knew or ought to have known, that it was negligent in that it had marketed rofecoxib rather than another drug which did not materially increase the risk of cardiovascular conditions and that it had failed to undertake proper research in relation to the adverse side effects and health risks of the product. Moreover, it was also asserted that the manufacturer had failed to provide &quot;adequate information, advice or warning&quot; to consumers, pharmacists, medical practitioners and other health care professionals and until 30 September 2004, had failed to withdraw or recall Vioxx tablets for the market.</td>
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<td>In relation to its claim under section 52 of the <em>TPA</em>, Peterson's case was one of omission, that is by failing to provide information, advice and warnings, the manufacturer and distributor engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, within the meaning of that provision.</td>
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<td>Peterson made two claims under Part V Division 2A (Actions against Manufacturers and Importers of Goods) of the <em>TPA</em>. In relation to section 74B (Actions in respect of unsuitable goods) of the <em>TPA</em>, Peterson pleaded that the Vioxx tablets were acquired for the &quot;purpose of consumption as a safe non-steroidal anti-inflammatory drug&quot;, a purpose which was made known to the first respondent. Peterson alleged that the tablets were not reasonably fit for that purpose, and that he suffered one of the &quot;Vioxx cardiovascular conditions&quot; as a result of taking the arthritis medication. In relation to the claim under</td>
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section 74D (Action in respect of goods of unmerchantable quality) of the TPA, the applicant alleged that, because the consumption of rofecoxib could materially increase the risk of suffering the "Vioxx cardiovascular conditions", the Vioxx tablets were not of merchantable quality, and that he had suffered loss and damage as a result.

In relation to the claim under Part VA (Liability for Defective Goods) and section 75AD (Liability for defective goods causing injuries - loss by injured individual) of the TPA, the applicant alleged that the Vioxx tablets contained a defect, and that he suffered injuries as a result.

### Legal Question(s)
- Adequacy of pleadings.
- Meaning of "safe".

### Decision(s)
The first respondent, the Australian manufacturer and distributor of Vioxx tablets alleged that the amended statement of claim was deficient, confusing and embarrassing.

Many of the objections raised were essentially pleading issues. Objection, however, was taken to the use of the word "safe".

In its pleading, the applicant alleged that: "Each group member acquired the Vioxx tablets consumed by them for the purpose of consumption as a safe non-steroidal anti-inflammatory drug ("the purpose of acquisition"). The first respondent submitted that use of the word "safe" was vague and embarrassing, and should be the subject of specific elaboration. The applicant accepted an obligation to provide the particulars of this word, but resisted the proposition that the pleading itself was bad simply because it used the word "safe".

Concerning its use in pleadings, the Court stated:

"The word "safe" is an ordinary word in common usage and is appropriate for incorporation in allegation of the kind ... Because it is a word of broad potential connotation in the circumstances of a particular case, however, I accept that the applicant's proposal to provide particulars is sensible...."

The respondents also alleged that the manner in which Peterson's own case was pleaded was deficient because it did not state what the applicant himself, or what his general practitioner, prescribing pharmacist, or other relevant health professional, would have done if adequate information and advice had in fact been given leaving open the possibility that, even if a warning might have been given, the applicant might have chosen not to heed that warning and to consume Vioxx tablets nonetheless.

The Court disagreed stating: "As pleaded, and as concerns the applicant himself, the allegations in the Amended Statement of Claim are relatively straightforward: in essence, it is alleged that the first respondent manufactured and sold a product without warning intending users of the possibility of damaging side effects. It is said that the applicant consumed the product and suffered those side effects. The paragraphs of the Amended Statement of Claim with which I am concerned arise under the applicant's case in negligence, and I do not consider it to be a necessary part of that case -- either at all or to avoid embarrassment -- that the applicant should specify how he would have acted in other circumstances."

### Comments

### Text of
| judgment(s) | harpe%20and%20Dohme |
| References |                      |
Roots and Raydene Pty Ltd v Trussmaster Pty Ltd [2003] QSC 348

Country: Australia

Court(s): Supreme Court of Queensland

Topics:
- Timber products.
- Claim arising in the course of employment.
- Part VA (Liability of manufacturers for defective products) - Section 75AC (Meaning of goods having defect), 75AD (Liability for loss causing injury - loss by injured individual) and section 75AI (No liability action where workers' compensation or law giving effect to an international agreement applies) of the Trade Practices Act 1974 ("TPA").

Facts: Roots was employed by Raydene Pty Ltd, a company of which he was a director, and was in turn employed by Trussmaster Pty Ltd to operate a truck for the purposes of delivering pre-nailed wooden house frames and other timber products to building sites in the south east region of Queensland. On 30 July, 1997, Roots suffered injury when he fell to the ground while attempting to secure the load on one of Trussmaster's trucks. Roots made a claim for damages pursuant to section 75AD of the TPA. Trussmaster joined two insurance companies to the proceedings which had refused to indemnify the company in relation to Roots' claims prior to going into liquidation. The matter proceeded without opposition.

Legal Question(s): Were the pre-nailed wooden house frames defective?

Decision(s): The Court found that it was well-known that carriers climbed up on loads and used the frames as walking frames when securing the loads. Accordingly, the Court was satisfied that the frame had a defect in as much as it failed in circumstances where Roots relied upon it as a safe platform. Accordingly the manufacturer was liable to compensate him pursuant to section 75AD of the TPA.

Comments: Part VA does not apply to a loss in respect of which compensation can be recovered under a workers compensation statute (section 75AI).

Presumably in this case, a workers' compensation claim was not possible either because Roots was effectively self employed and/or a contractor (but cf Newcombe v Ame Properties Ltd (1995) 125 FLR 67, a decision concerning jurisdiction and cross vesting, where the proceedings including a claim based on section 75AD was made by the plaintiff suffering personal injuries in the course of her employment and section 75AI appears not to have been pleaded).


References
**Case Title**  

*Graham Barclay Oysters v Ryan* (2000) ATPR (Digest) 46-207;


**Country**  
Australia

**Court(s)**  
Federal Court of Australia  
Full Court of the Federal Court of Australia  
High Court

**Topics**  
Food products - oysters contaminated with Hepatitis A.

State of scientific and technical knowledge, development risks defence and destructive testing.

Fitness for purpose, merchantable quality, defect.

Tort of negligence.

Part V Division 2A of the *Trade Practices Act 1974* (Cth) ("TPA"): Actions against Manufacturers of Goods: Sections 71 (Implied undertakings as to quality or fitness), 74A (Interpretation), 74B (Actions in respect of unsuitable goods), 74C (Actions in respect of false descriptions), 74D (Action in respect of goods of unmerchantable quality).

Part VA of the *TPA* - Liability of Manufacturers for Defective goods: Sections 75AA (Interpretation), 75AD (Liability for defective goods causing injuries - loss by injured individual) and 75AK (Defences).

**Facts**  
Ryan and others contracted the medical condition Hepatitis A as a result of consuming contaminated oysters grown, processed and sold by Barclay Oysters.

Barclay Oysters relied on the state of scientific and technical knowledge defence and that any testing would be destructive and practically impossible.

The oysters were grown for human consumption in a lake subject to faecal contamination. Ryan alleged that the Local Council/State government should have carried out tests as to lake water quality.

**Legal Question(s)**  
The tort of negligence, and the duty of care owed by farmers and government authorities and whether they were under a duty to test water quality.

Whether oysters are "manufactured" within the meaning of the *TPA*.

Whether the contaminated oysters were "unsuitable good" not reasonably fit for the purpose for which they were acquired, namely human consumption and goods of "unmerchantable quality". The reasonableness of consumers to rely on the skill and judgment of the oyster farmer, and to expect that oysters will be free of viruses.

The "state of scientific or technical knowledge" and whether it enabled viruses (potentially a defect) to be discovered.
**Decision(s)**

The definition of the term "*manufactured*" under section 74A of the *TPA* includes the growing, extraction, production, processing and assembly of a product. This definition encompassed the activities of the oyster farmer and its growing, harvesting, cleaning, depurating and packing oysters for sale to consumers by retailers.

The Trial Judge found that the oysters supplied by Barclay Oysters were not reasonably fit for human consumption and were therefore in breach of section 74B of the *TPA* on the basis that Ryan, as a consumer of their oysters, had reasonably relied on the farmer’s skill and judgment with regard to the oysters being of merchantable quality (and he had not been provided a warning to the contrary).

Barclay Oysters submissions to the Court were rejected by the Trial Judge who found that it was not reasonable for the consumer to be required to rely on its skill and judgment to ensure that the goods were reasonably fit for the purpose of consumption, given the practical impossibility of the testing oysters for the presence of viruses, the farmer’s inability to know that the oyster leases had been subjected to viral contamination and the farmer’s inability to control the environment in which the oysters grow (with reference to contact with contaminants from private land or council stormwater). The Court also noted that in the absence of an obvious defect, special circumstances or warning of the possibility that the oysters might contain viruses that could not be detected, a consumer will be reasonably free to assume that goods are fit for the purpose for which they were intended.

The Trial Judge also held that the oysters were not of merchantable quality, in breach of section 75D, since the oysters were not "fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect". The Trial Judge emphasised that the standard was an objective one, focusing on the consumer’s reasonable expectations, rather than the reasonableness or otherwise of the manufacturer’s behaviour.

### Federal Court

On appeal to the Full Court of the Federal Court, the oyster farmer submitted that whether or not it was "*unreasonable for the consumer to rely on the skill or judgment of the corporation*" under section 74B(2)(b) was to be assessed objectively, with the result that it must be hypothesised that the consumers knew all the relevant facts, including what the manufacturer knew or should have known, the circumstances in which the manufacture took place and the steps available or otherwise to the manufacturer to ensure that the goods were reasonably fit for the purpose they were intended. The Court rejected this construction holding that "special technical knowledge" involving manufacturing processes should ordinarily not be imputed to the consumer.

In relation to the claim under Part VA (Liability of Manufacturers and importers for defective goods) of the *TPA*, the oyster farmer was found to have supplied defective goods within the meaning of the Act. However, the Court held it was entitled to rely upon the development risks defence in section 75AK(1)(c), namely that "the state of scientific or technical knowledge at the time when they were supplied by their actual manufacturer was not such as to enable that defect to be discovered".

The Court reasoned that: "*The paragraph obviously intends the defence be unavailable if the goods were supplied notwithstanding the possibility of discovery of the defect. Conversely, the defence is available if the defect was not capable of discovery before supply. In the present case, discovery and supply were mutually exclusive; the only test that would reveal the defect would destroy the goods.*"

### High Court

In the High Court, Graham Barclay Oysters did not challenge the findings that it
contravened sections 74B and 74D of *TPA* in that the oysters were not fit for the purpose for which they were sold (ie to be eaten) and were not of merchantable quality.

In relation to findings of negligence on the part of Graham Barclay Oysters, the High Court held that a judgment as to the reasonableness of the conduct of the manufacturer in response to the risk of contamination required an evaluation of the magnitude of the risk and the degree of probability of its occurrence. Also a factor, however, was an examination of the expense, difficulty and inconvenience of the available alternatives. The temporary cessation of harvesting in November 1996 was a response to a recognised increase in the risk of contamination. It was followed by resumption of harvesting and selling over Christmas and New Year periods (Gleeson CJ).

Given the very low degree of probability of the risk of viral contamination occurring again, it was not unreasonable for the Barclay companies to resume harvesting when they did (McHugh J).

Further, the High Court noted that the common law duty of the Barclay companies did not extend to ensuring the safety of its oysters in all circumstances. In this regard, the High Court followed decisions such as *Brodie v Singleton Shire Council* (2001) 206 CLR 512 and *Wyong Shire Council v Shirt* (1980) 146 CLR 40 (Gummow, Hayne JJ).

### Comments

The decision highlights important difference between claims against manufacturers based upon negligence, the statutory causes of action under Part V Division 2A and under Part VA of the *TPA*.

In negligence, the focus is upon whether the manufacturer's conduct was reasonable given the risk posed by the product and possible remedial action in the circumstances.

It is a defence to a claim for a breach of warranty that the circumstances show *inter alia* that it was unreasonable for the consumer to rely on the skill or judgment of the corporation.

Under Part VA of the *TPA*, it is a defence that the state of scientific or technical knowledge at the time when they were supplied by their actual manufacturer was not such as to enable the defect to be discovered.

Both tests are to be applied objectively; however, their focus and scope are different. In relation to a warranty claim, it is the reasonableness of the consumer's reliance which is in question and all circumstances are to be taken into account. Under Part VA, one matter is considered, that is, whether the state of knowledge allowed the manufacturer to discover the defect.

These differences explain the varying results under Part V Division 2A and Part VA.

In this case, it seems the Federal Court may also have been influenced by the fact that the only test for contamination gave "false negatives", and results from a test applied to the sample could not be extrapolated to the whole batch. Even if negatives had been reliable, one would have to test and thereby destroy each oyster.

On appeal to the Full Federal Court, Lindgren J observed (obiter, at para 549): *"If the problem of the 'false negative' had not existed and if it had been appropriate to test by sample, an interesting question would have arisen as to whether the expression 'such as to enable that defect to be discovered' in section 75AK1(c) was to be construed as importing a modifying notion of reasonableness or practicability: Let it be assumed that extrapolation from sample to bulk was valid, but that the testing of the sample had to take place at a laboratory a considerable distance from the grower's establishment, the cost of the testing was great and the results could not be known for some days. A question would have arisen whether it could be truly said in these circumstances that the state of"*

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scientific or technical knowledge enabled the defect to be discovered."

The approach taken by the Federal Court both at first instance and on appeal contrasts with other Courts in other jurisdictions applying quite similarly worded defences (eg in Japan, and in England - notably, A and Others v National Blood Authority [2001] 3 All ER 289). In the latter decision Justice Burton noted that the safety in question was not what was actually expected by the public at large, but what they were entitled to expect with the Judge acting as the "informed representative of the public at large". It was noted that the level of safety which persons generally are entitled to expect may differ from that of someone with medical knowledge and also that in some circumstances that the public has no expectation at all as to the level of safety. In the circumstances, the Judge did not consider that there was any public knowledge or acceptance of the risk of contamination of blood products with hepatitis C and he did not consider it to be a product which by its very nature contained a risk. In all of the circumstances, Burton J held that "the public at large was entitled to expect that the blood transfused to them would be free from infection".

The defendant argued that the development risks defence applied to it in that it was not possible to identify the individual bag(s) of blood which contained the virus. However, in circumstances where the risk of hepatitis C was known, the Court held that the defence did not apply.

In Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (Case No. C-300/95 para 26), the European Court of Justice was called to consider whether the implementation of the development risk defence in the EC Product Liability Directive 1985 (85/374 EEC) was appropriate. Under article 7(e) of the Directive, the producer has a defence if it can prove "that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered".

The defence in the English Consumer Protection Act 1987 was differently worded. The producer has a defence if that manufacturer can prove that the state of such knowledge was "not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control".

The Commission took the view that the Act did not properly transpose the EC Directive and, on 26 April 1989, sent the United Kingdom Government a letter of formal notice in accordance with the procedure laid down by Article 169 of the Treaty, requesting it to submit its observations on six complaints listed therein within a period of two months. By letter dated 19 July 1989, the United Kingdom denied the Commission's allegations.

The European Court of Justice, however, accepted the submission of the Advocate General that Article 7(e) refers to "scientific and technical knowledge at the time when [the producer] put the product into circulation", and it is not specifically directed at the practices and safety standards in use in any industrial sector in which the producer is operating. Rather, the defence refers to the state of scientific and technical knowledge generally, including the most advanced level of such knowledge, at the time when the product in question was put into circulation.

The ECJ also made clear that to take into account the subjective knowledge of a producer, having regard to the standard precautions taken in the industrial sector in question, it would not be a proper implementation of the EC Directive.

One additional difference between the Australian wording of the defence and that in Article 7(e) of the EC Directive is that section 75AK1(c) of the EC Directive refers to the state of scientific "or" technical knowledge whereas Article 7(e) uses the word "and". An issue may arise as to whether the scientific and technical knowledge are cumulative. The
difference in wording, however, was not relevant in this decision.

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## Case Title

Stegenga v J Corp Pty Ltd and Ors (1999) ASAL 55-025; ATPR 41-695

## Country

Australia

## Court(s)

District Court of Western Australia

## Topics

Timber joist.

Part VA of the *Trade Practices Act* 1974 (Cth) ("TPA"): Sections 75AD (Liability for defective goods causing injuries - loss by injured individual), 75AE (Liability for defective goods causing injuries - loss by person other than injured individual), 75AF (Liability for defective goods causing injuries - loss by person other than injured individual) and section 75AG (Liability for defective goods - loss relating to buildings etc) of the *TPA*.

Part VI (Enforcement and Remedies) of the *TPA*: Section 82 (Actions for damages).

## Facts

The plaintiff, Stegenga was injured while standing on a timber joist which gave way in the course of the construction of a roof. At the time of the accident, Stegenga was working as a subcontractor to the defendant, J Corp Pty Ltd. As a result of the accident, Stegenga instigated proceedings against the defendant, J Corp for breach of duty of care in the District Court of Western Australia.

The timber joist involved in the accident had been supplied to the defendant by Regal Towers Pty Ltd (the "Third Party"). Regal Towers was issued with a third party notice by the defendant claiming that the Third Party had been contracted to provide joists of adequate strength to the defendant and that they were liable to compensate the plaintiff for damages under section 75AD of the *TPA*.

In turn, the Third Party joined Wespine Industries Pty Ltd (the "Fourth Party") to the proceedings alleging that it was this Fourth Party who manufactured the joists. The Third Party alleged that the Fourth Party had manufactured and supplied a joist which was not fit for its intended purpose due to its inadequate strength. Therefore, it was asserted that the plaintiff had been exposed to a risk of injury as a result of the joist being of below necessary strength.

## Legal Question(s)

Whether Part VA of the *TPA* conferred a right of action on commercial third parties.

Whether use of the word "person" in section 75AE of the *TPA* allows claims to be made by corporate entities.

Whether the nature of a "business relationship" precludes recovery under section 75AE of the *TPA*.

## Decision(s)

The District Court held that Part VA of the *TPA* was intended to create a strict liability regime for use by private individuals as opposed to commercial entities and that it would be inconsistent with that purpose to interpret "person", within section 75AE, as including corporate entities. Accordingly, section 75AE does not create a right of action in a commercial party.

The Court also rejected the argument that the reference to "person" in the section includes corporate entities, as elsewhere in Part VA, such as in section 75AD - the Act refers to an "individual" where a reference to a natural person was intended. Rather, it said section 75AE had been intended by parliament to allow claims by those "individuals" who have a claim for loss of dependency either through the death or injury of a person upon whom they possess a degree of dependency or with whom they are not in a business
Section 75AE also expressly prohibits relief being granted in circumstances where there is a business relationship between the party claiming relief and the injured person.

Notwithstanding the operation of section 75AE of the *TPA*, the District Court found that the Third Party did not have a business relationship with the plaintiff. Dean DCJ considered the third party’s claim against the fourth party to be the commercial rights equivalent to that of a business relationship and therefore excluded under the operation of the section.

**Comments**

The Court held that the purpose of Part VA of the *TPA* was to create a liability regime for the benefit of natural persons who have suffered loss as a result of defective products. This decision gives effect to that purpose.

Section 75AE is intended to impose liability upon manufacturers of defective products if individuals suffer loss as a result of the injuries or death caused by the product. "*Person*" in section 75AE is to be interpreted to mean a natural person and not a corporate entity.

The section makes clear that a claim is not available if the loss comes about because of a business relationship between the individual suffering the injuries or death and the person suffering the loss. Relief cannot be sought by a person under section 75AE if that claim depends on commercial rights or a business relationship (including a professional relationship or a relationship of employer and employee).

The section overcomes difficulties that might otherwise exist under the *TPA* in relation to compensation to relatives claims. For example, section 82 of the *TPA* may not allow claims by relatives, the reference to "*a person* possibly not extending to or including the estate of a deceased person or the representative of that estate" (see *Pritchard v Racecage Pty Ltd* (1996) FCR 96 per O'Loughlin J at 114 (obiter)).

In relation to claims under Part V Division 2A of the *TPA*, the language of sections 74B(1)(c) and 74D(1)(d) ("*loss or damage by reason that*") is not identical to that in section 82 ("*loss or damage by conduct*") although both wordings require a causal connection between the loss or damage that is alleged to have occurred and the relevant conduct: see *Wardley v Western Australia*, at 525; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, at 510, per McHugh, Hayne and Callinan JJ.

However, in similar fashion to Part V Division 2A of the *TPA*, sections 75AD to 75AG (inclusive) provide that a corporation is liable to compensate a person in relation to loss of a type indemnified in the sections and accordingly claims for damages under Part VA are not based upon section 82.

**Text of judgment(s)**

*Stegenga v J Corp Pty Ltd and Ors* (1999) Australian Trade Practices Reporter 41-695. See below for Western Australian District Court Judgment


Also available via CCH online subscription.

**References**


| 107. |
### Case Title
*Stewart v Pegasus Investments and Holdings Pty Ltd* [2004] FMCA 712

### Country
Australia

### Court(s)
Federal Magistrates Court

### Topics
- Jurisdiction of Federal Magistrates Court.
- Part V Division 1 (Unfair Practices) of the *Trade Practices Act* 1974 (Cth) ("TPA").
- Part Division 1A (Product safety and product information) of the *TPA*.
- Part V Division 2 (Conditions and warranties in consumer transactions) of the *TPA*.
- Part V Division 2A (Actions against manufacturers of goods) of the *TPA*.

### Facts
Stewart alleged that shoes she had purchased caused a fall which resulted in a broken ankle. She said that the shoes were not fit for purpose, were unmerchantable and defective.

### Legal Question(s)
Whether claim under Part V Division 2A of the *TPA* could be transferred to the Federal Court when the Federal Magistrates Court did not have jurisdiction.

### Decision(s)
The parties agreed that the Federal Magistrates Court had jurisdiction over claims under Part V Division 1 or 1A but not under Part V Division 2 or 2A of the *TPA* (this has since changed - see Comments below).

The respondent submitted that as the Federal Magistrates Court did not have jurisdiction over the Division 2 and 2A claims therefore there was no proceeding pending in the Court and no proceedings to transfer.

The Federal Magistrate disagreed with the arguments of the respondent. The Court held that the issue of whether it possessed jurisdiction had not been raised. As the matter remained to be decided, the proceedings were deemed to be still pending. Accordingly, a transfer to the Federal Court was considered to be in the interests of justice because the Court possessed the necessary jurisdiction to hear the matter.

### Comments
The position regarding the jurisdiction of the Federal Magistrates Court has changed since this decision. Under section 86(1A) of the *TPA*, the Federal Magistrates Court has jurisdiction in any matter arising under Division 1, 1A or 2A of Part V or Part VA in respect of which a civil proceeding is instituted by a person other than the Minister or the Commission (subject to the monetary limit specified in section 86AA). See Part V Division 2A and Part VA, added by Jurisdiction of the *Federal Magistrates Court Legislation Amendment Act* 2006 (Cth).

### Text of judgment(s)

### References
<table>
<thead>
<tr>
<th>Case Title</th>
<th><em>Thomas v Southcorp Australia Pty Ltd</em> [2004] VSC 34</th>
</tr>
</thead>
<tbody>
<tr>
<td>Country</td>
<td>Australia</td>
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<tr>
<td>Court(s)</td>
<td>Supreme Court of Victoria</td>
</tr>
<tr>
<td>Topics</td>
<td>Heater.</td>
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<td>Negligence.</td>
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<td>Claim for psychological injury in negligence.</td>
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<td>Part VA (Liability of manufacturers for defective products): Sections 75AC (Meaning of goods having defect), 75AF (Liability for defective goods - loss relating to other goods), 75AG (Liability for defective goods - loss relating to buildings etc) of the <em>Trade Practices Act</em> 1974 (Cth) (&quot;TPA&quot;).</td>
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<tr>
<td>Facts</td>
<td>A fire which destroyed a house and its contents was allegedly caused by a gas heater. Thomas, and his wife, (the &quot;plaintiffs&quot;) alleged that the fire originated from a blockage of the drain tube in the gas heater. The manufacturer of the heater, Southcorp Australia (&quot;Southcorp&quot;) disputed this assertion claiming that for the fire to have resulted from the heater, it must have been in operation on the day. Thomas had no recollection that the heater had been in use, although evidence was given as to use of automatic activation. The gas heater, which had been severely damaged by the fire, was evidence in the proceedings. It had been the subject of a number of service calls since it was installed by a plumber in June 1995. Expert evidence was given as to the cause of the fire. One of the plaintiffs, Mrs Thomas, also made a claim for psychiatric injury.</td>
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<td>Legal Question(s)</td>
<td>Whether the heater was defective and whether the manufacturer was negligent.</td>
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<td>Defective household heater causing a fire. Reasoning process to be applied to determine whether a product is defective and whether a manufacturer is negligent.</td>
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<td>Decision(s)</td>
<td>The first question to be determined by the Supreme Court of Victoria was whether, on the balance of probabilities, the fire originated in the gas heater. While noting that there were &quot;many difficulties with the factual evidence&quot;, the Court was satisfied that this fact was established.</td>
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<td>The second question considered by the Court was whether the goods were defective under section 75AC of the <em>TPA</em>, taking into account &quot;all relevant circumstances&quot;. The Court found that while goods were not required to be absolutely safe, individuals generally, or &quot;the public at large&quot;, were entitled to expect that a gas heater will not operate so as to cause a &quot;significantly destructive fire&quot; and pose a risk to human life and property.</td>
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<td>Since the heater was found by the Court to be defective, the plaintiffs were entitled to relief under sections 75AF and 75AG.</td>
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<td>The claim in relation to psychiatric injury was brought in negligence as the limitation period under Part VA had expired. The defendant argued that as the risk of harm was slight, they were not in breach of their duty of care. The plaintiff argued that while the risk of injury may have been small, it had been reasonably foreseeable and there had existed cheap, easy and effective way to eliminate the risk.</td>
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|                    | Reference was made to McHugh J in *Tame v New South Wales* [2002] HCA 35; [2002] 191 ALR 449: "whether the creation of the risk was unreasonable must depend on
whether reasonable members in the community in the Defendant's position would think the risk sufficiently great to require preventative action. This is a matter for judgment after taking into account the probability of the risk occurring, the gravity of the damage that might arise if the damage occurs, the expense, difficulty and inconvenience of avoiding the risk and any other responsibilities that the defendant must discharge”.

The Court held that it was reasonably foreseeable that if a fire had emanated from the heater, significant damage could have resulted. However, there was no evidence that what occurred on this occasion had ever occurred previously. The degree of probability of its occurrence was deemed by the Court to be slight.

<p>| Comments | This decision provides a useful juxtaposition of the different judicial approaches in determining whether conduct is negligent or whether a product is defective. It would appear that in determining whether a product is defective, and notwithstanding that products are not required to be absolutely safe, the phrase &quot;all relevant circumstances&quot; does not require a consideration of the product's safety history or the degree of probability of the risk occurring. While those are factors which &quot;reasonable members in the community in the Defendant's [ie manufacturer's] position&quot; would consider relevant, persons generally or the public at large, would not. |</p>
<table>
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<tr>
<th>Case Title</th>
<th>Trimstram v Hyundai Automotive Distributors Australia Pty Ltd [2005] WASCA 168</th>
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<tbody>
<tr>
<td>Country</td>
<td>Australia</td>
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<tr>
<td>Court(s)</td>
<td>District Court of WA Court of Appeal, Supreme Court of WA</td>
</tr>
<tr>
<td>Topics</td>
<td>Motor vehicle.</td>
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<td>Cracked sub-frame of car.</td>
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<td></td>
<td>Amendment of pleadings.</td>
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<td>Section 4KA (Personal Injury) of the Trade Practices Act 1974 (Cth) (&quot;TPA&quot;).</td>
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<td>Section 52 (Misleading and deceptive conduct) of the TPA (Note: section 52 is no longer available as a cause of action in personal injury claims due to changes to the TPA introduced by the Trade Practices Amendment (Personal Injuries and Death) Act 2006)</td>
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<td>Part V Division 2A (Actions against manufacturers and importers of goods) of the TPA - Actions against manufacturers of goods: Sections 74B (Actions in respect of unsuitable goods), 74D (Action in respect of goods of unmerchantable quality).</td>
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<td>Part VA (Liability of manufacturers and importers of defective goods) of the TPA - Section 75AD (Liability for defective goods causing injuries - loss by injured individuals).</td>
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<td>Part VI (Enforcement and Remedies): Section 82 (Actions for Damages) of the TPA.</td>
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<td>Facts</td>
<td>Trimstram, (the &quot;plaintiff&quot;) claimed damages for injuries she sustained in a motor vehicle accident in 1998. Trimstram asserted that the accident had been caused by defects in her 1995 Hyundai Excel which she had purchased as a second hand vehicle in July 1996. The vehicle was repaired in September 1997, but it was alleged by the plaintiff that these repairs were not carried out in a proper manner. Trimstram alleged that the vehicle's sub-frame cracked resulting in difficulties with directional control and steering and the subsequent accident in May 1998. A writ was filed in May 2001.</td>
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<td>Legal Question(s)</td>
<td>Whether claim was statute barred.</td>
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<td>Statute of limitations.</td>
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<tr>
<td>Decision(s)</td>
<td>There were two issues considered by the Court: (1) whether the amendment sought was within time and (2) whether it should be granted.</td>
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<td>The original pleading in the case only comprised particulars of the claim in negligence but included a statement making reference to the provisions of the TPA asserting that the first defendant was negligent as a result of &quot;supplying to the plaintiff a Hyundai motor vehicle which was inherently defective and not of merchantable quality&quot;. In her amended statement of claim, in addition to alleging that the manufacturer was negligent, Trimstram also alleged that Hyundai had engaged in misleading and deceptive conduct by failing to effect a product recall or otherwise warn consumers of the defect and also that the vehicle as a good, was defective being, not reasonably fit for the purpose it was intended or of merchantable quality.</td>
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|                    | The question before the Court was whether the original pleadings provided notice to the
defendant of the nature of the claim and the relief sought in summary.

The Deputy Registrar at first instance concluded that the reference to the goods being defective and not of merchantable quality was confined within the context of a cause of action in negligence and accordingly was not broad enough to support the inclusion of the additional claims.

On the basis of the pleadings, the Deputy Registrar also concluded that the plaintiff must have known of the causes of action when she purchased the motor vehicle and accordingly the amendments were time barred. The Deputy Registrar held that delivery of the substituted statement of claim did not operate to amend the writ such that the proposed amendments could be backdated. In these circumstances, on any view, the amendments were out of time.

**Court of Appeal**

The plaintiff's grounds of appeal and outline of written submissions "fell well short of the standard required", serving "to obscure rather than identify the matters in issue". The plaintiff submitted that both findings of the Court were in error and that the time of the accident, when she suffered loss, was the relevant time when the statute of limitations had began to run.

In relation to whether the writ was broad enough to support the inclusion of the additional claims, the Court of Appeal asserted that regard also should be made to the material facts alleged in the writ. In circumstances where there were facts pleaded relevant to the claims under sections 74B, 74D, and section 75AD the appeal was upheld. In relation to the amendments concerning section 52, the matter was remitted back to the Court below for consideration.

The Court of Appeal also noted that regard appeared not to have been had with respect to the rules which conferred upon the Court a discretion, in limited circumstances, to amend a writ in order to add a cause of action which was barred by statute at the time of the amendment application.

In relation to the statute of limitations, the Court of Appeal noted that a claim under section 52 or section 82 had to be commenced within 3 years of the cause of action accruing. Similarly, actions under sections 74B and 74D must be commenced within three years of the date the owner of the goods "first became aware or ought to have become aware that the goods were not reasonably fit for purpose or were not of merchantable quality", and under section 75AD, within 3 years after the time the person became aware, or ought reasonably have become aware of the alleged loss, the defect and the identity of the person who manufactured the goods.

In circumstances where the appeal in relation to the addition of the statutory causes of action was granted, the matter was remitted back to the District Court for determination as to whether the Deputy Registrar erred in striking out the causes of action.

**Comments**

This decision is interesting in two respects. First, it highlights the different statute of limitation periods arising under the different causes of actions. In terms of whether the personal injury claim was statute barred, one would expect that the loss would not have occurred prior to the injuries. In relation to a claim for any property damage, in particular, the claims that the vehicle was not of merchantable quality or fit for purpose, however, one might expect that the time would commence earlier at the time of the discovery of the defects.

Second, while section 52 is no longer available as a cause of action in personal injury claims due to recent changes to the **TPA** introduced by the Trade Practices Amendment (Personal Injuries and Death) Act 2006 (Cth), it can be brought in a claim alleging
property damage.

Under section 4KA, "Personal Injury" in the *TPA* includes prenatal injury, impairment of a person's physical or mental condition or disease but does not include an impairment of a person's mental condition unless the impairment consists of a recognised psychiatric illness.

Claims for mental stress have also been awarded in some instances under section 82: *Steiner v Magic Carpet Tours Pty Ltd* (1984) ATPR 40-490; *Zoneff v Elcom Credit Union Ltd* (1990) ATPR-009 and on appeal at ATPR 41-058 but cf *Argy v Blunts and Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112.

Sackville J agreed in *Courtney v Medtel Pty Ltd* [2003] FCA 36 at first instance in relation to Part V Division 2A claims that to recover compensation, something more substantial than mere worry and anxiety is necessary. However, he disagreed that by analogy with negligence, psychiatric illness was needed. While recognising that there could be cases where compensation might be awarded for anxiety, worry and stress, he did not think that an award of damages was appropriate in this case. In the absence of special or unusual circumstances, something more substantial than short lived anxiety was needed, some restraint being appropriate to avoid "the creation of a society bent on litigation" (quoting Lord Steyn in *Farley v Skinner* [2002] 2 AC 732. In that case, the applicant was worried that his medical device might fail because it was the subject of a defective batch -- but upon explantation it was normal.

| Text of judgment(s) | 1. District Court Judgment  
2. Supreme Court Judgment  
**Case Title**  
*White v Canberra Furniture Manufacturing Pty Ltd (CAN 008 644 540), Dawe Industries Pty Limited (CAN 008 576 823) and Dosyo Pty Limited (CAN 008 620 773) t/as Canberra Walls and Frames and Marie Bishop [1999] ACTSC 53*

**Country**  
Australia

**Court(s)**  
Australian Capital Territory Supreme Court

**Topics**  
Building materials.

The need for and significance of correct identification of the defendant.

The requirement that the defendant be a "corporation".

Negligence (not discussed below).

Part VA (Liability of manufacturers for defective products): section 75AD (Liability for defective goods causing injuries - loss by injured individual) *Trade Practices Act 1974 (Cth) ("TPA").*

**Facts**  
White (the "plaintiff") brought a claim against a partnership which comprised a number of corporations, trading as Canberra Wall Frames. Although each of the partners was incorporated, the partnership itself was not.

It was alleged that Canberra Wall Frames was a manufacturer and supplier of timber cottage frames. During the erection of the trusses of one such frame, the plaintiff walked across the top plate. This gave way, causing him to fall onto a concrete slab below. The plaintiff brought an action in negligence and a claim under Part VA of the *TPA.*

**Legal Question(s)**  
Whether Part VA of the *TPA* applied.

**Decision(s)**  
Part VA only applies if "a corporation, in trade or commerce, supplies goods manufactured by it".

Gallop J held that as Canberra Wall Frames was not a corporation within the meaning of the *TPA.* Accordingly, it could not be held liable under section 75AD. The plaintiff's claim failed in limine.

**Comments**  
The decision does not consider the effect of section 6(1) and (2)(h) "Extended application of Parts IV, IVA, IVB, V, VA VB and VC" of the *TPA.* Section 6 provides:

1. Without prejudice to its effect apart from this section, this Act also has effect as provided by this section.

2. This Act, other than Parts IIIA, VIIA and X, has, by force of this subsection, the effect it would have if:

   (h) subject to paragraphs (d), (e), (ea), (eb) and (g), a reference in this Act to a corporation, except a reference in section 4, 48, 50, 50A, 81, 151AE or 151AJ, including a reference to a person not being a corporation.

The constitutional basis for this provision is not expressly identified. If enacted under the Commonwealth Parliament's trade and commerce power, this provision would appear to result in the *TPA,* including Part VA, an having application to natural persons if they are engaged in interstate or overseas trade or commerce, or trade or commerce between
territories or with a territory.

The constitutionality of this provision does not appear to have been tested, but it was not challenged in *Fitzpatrick v Job (t/as Job's Engineering)* [2005] WADC 89 where French DCJ was on the view that the interstate element of the supply of goods allowed a claim against an unincorporated body (at 63).

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<td>References</td>
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