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# Brief

The periodical publication of the  
National Product Liability Association

December 2003

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# PRESIDENT'S REPORT 2003

In November 2002 the Executive Committee of the National Product Liability Association identified a number of internal management and resource concerns which were overdue for attention. In addition to its annual external objectives, the Committee resolved that this year would include a focus on refreshing various long standing internal practices.

In part, this would necessitate revisiting relationships which may have been taken for granted. In part, it was to revitalise the Association to meet the challenge of promoting the objectives of the NPLA Charter and increasing the return on membership loyalty in an increasingly competitive environment. All of this at a time when the focus on tort law reform suggests an interesting time ahead for Australian product liability and those affected by its broad reach.

In 2003 this emphasis on internal reform has resulted in a substantial renewal of the NPLA's association with its secretariat, the Australian Industry Group. This change has been achieved through better use of the AIGroup connection rather than at any increased cost. Further micro-reforms have included a change in the role of the Committee Secretary and much closer attention to members who, for one reason or another, have outstanding subscriptions.

On the broader stage, two editions of Brief, a Melbourne seminar in relation to corporate document management and privilege, an active Sydney calendar and the address to be given by the Deputy Chair of the ACCC at this year's AGM are highlights.

The codification of Australian tort law, in addition to caps on damages, is finally making its presence felt in the southern States. In so doing, it reflects the remarkable way in which the recommendations of the Ipp Committee and the Council of Attorneys General are cutting a swathe through long guarded common law jurisprudence. Whether that process will actually get as far as s52 of the Trade Practices Act remains in the hands of the Senate. For those with a broader interest in Parts V and VA of the TPA, the need for concomitant statutory reform will be a platform for the NPLA in 2004.

In 2003 the Executive Committee consisted of:

Andrew Morrison – President  
David Poulton – Vice President  
Annette Hughes – Treasurer  
George Karalis – Secretary  
Maryjane Crabtree – Immediate Past President/Editor of Brief

and Committee Members:

Derek Begg  
Melissa Daly  
Peter Holloway  
Pam Madafiglio (NSW)  
Peter O'Donahoo  
Sally Sheppard  
Belinda Thompson  
Jane Wilhelm (leave of absence)

Although elected, neither Ian Taylor nor John Waters were able to participate in the Committee this year.

Pam Madafiglio again assumed the demanding job of coordinating further growth in the New South Wales Committee and chapter. She was aided in that task by, amongst others, Fiona Geer and Greg Williams. As in previous years the Committee's correspondents in WA and Queensland were Gary Berson and Michael Klug.

## SECRETARIAT

As a result of a strong discussion at the 2002 AGM, this year the Committee set itself the task of reviewing and, where necessary, recasting its relationship with its Secretariat, the AIGroup. A sub-committee comprising the President and the Treasurer, Annette Hughes, were tasked to explore the benefits and weaknesses of this retainer. This review was conducted with the Association's Executive Officer, Athena Tashevskaja of AIGroup. Consideration was also given to potential alternative service providers.

It is fair to say that a number of Committee Members had expressed the view that the services being provided to NPLA by AIGroup had declined over a number of years to represent something less than full value on the contract. Equally, there was a view that the Committee had become complacent about effectively using the

Secretariat, often preferring to do the work in-house. In addition, concern was expressed that the level of follow up on non-financial members was insufficient in the circumstances. This was of particular concern if, as a result, financial members were being disadvantaged.

It is therefore very pleasing to report that the airing of these concerns has seen a remarkable change in the way in which the Association and the Secretariat interact. This change is most noticeable in the substantially increased level of energy which the Secretariat is putting into the Association's affairs. In this regard, credit and thanks must go to Athena Tashevskva. Her participation in Committee meetings during the second half of the year has been invaluable, not the least because of her ability to act as a conduit to other organisations interested in product liability issues. In 2004 the Committee will be working with AIGroup to further enhance this renewed relationship.

It is also pleasing to report that in the same period inroads have been made into the finalisation of outstanding membership dues. This is reflected in the financial results and will be a continuing goal in 2004.

As a part of this internal focus, the Committee recognised that the role of Secretary has changed with the times. While the traditional minute taking function has been very important, it is now apparent that an office holder should bear specific responsibility for the active growth of the Association's membership. Accordingly, in 2004 the Secretary will assume a membership focus in place of more traditional requirements. The official notes will be the province of both AIGroup and each of the Committee members in turn.

## **BRIEF**

The September 2003 edition of Brief contained excellent papers by Jennifer Gowan (Minter Ellison) on waiver of privilege in light of the Court of Appeal decision in *BATAS v Cowell (McCabe)* [2002] VSCA 197 (special leave to the High Court was refused) and Francesca Bartlett and Belinda Thompson (Allens) on legal professional privilege, particularly in light of the decisions in the Daniels and Pratt Holdings cases.

Brief has and will continue to report the various tort law and product liability reforms in the Australian jurisdictions. The NPLA will also continue to take

advantage of a regular column which has been negotiated in the Australian Product Liability Reporter.

In September this year, the Editor of Brief, Maryjane Crabtree, indicated that, after nearly a decade of editions, perhaps it was time that someone else assumed the role. Maryjane then convinced two of her colleagues, Annette Hughes and Belinda Thompson, that, between them, they would be "just the ticket". With the benefit of an editing aspirant's primer (an exquisite set of guidelines), Annette and Belinda agreed. The Association welcomes the new joint editors.

## **SEMINARS**

In 2003, the Executive Committee again looked to its Back to Basics seminar series as an important educative tool for practitioners and executives alike. However, a combination of later than desirable timing and increasingly stiff competition in the seminar market meant that attendances were not as strong as hoped. While the series is still regarded as important, in 2004 it is likely that a smaller number of sessions will be held earlier in the calendar year.

Thanks go to the partners and solicitors at Minter Ellison, Freehills and Middletons for their work in presenting these sessions.

Around this series, the Victorian chapter of the Association arranged two keynote sessions. The first seminar focused on the law in relation to document management and legal professional privilege, as relevantly confirmed or modified by the decisions in the McCabe appeal, *ACCC v Daniels* and the Pratt Holdings case. As noted above, the presenters' papers were then published in Brief.

The second will be the Keynote Address to follow the Annual General Meeting. This year, the Committee was intent on securing a keynote speaker to provide a high level regulatory focus on the broad range of commercial and legal interests at play in Australian product liability. It is therefore an honour to confirm that Louise Sylvan, Deputy Chair of the Australian Competition & Consumer Commission, accepted this invitation. It will certainly be a privilege to hear what one of Australia's most senior consumer protection guardians has in mind for the ACCC's agenda in 2004.

In 2004 the Committee has identified a need to ensure that more higher level seminars are arranged so as to

meet the interest and knowledge needs of members at every level of business and legal practice.

The NSW Chapter Committee had a reasonably productive year holding three seminars on the topics of 'cancerphobia', 'addiction' and 'advertising'. Bret Walker SC spoke at the cancerphobia seminar which was well received by all attendees. The NSW Committee anticipates holding a seminar on genetic engineering early in the new year.

## **LOBBYING COMMITTEE**

After a flurry of activity in 2002, the Lobbying Committee has been quiet this year. In the main this is attributable to the way in which the various States and Territories have generally adopted the recommendations of the Ipp Report on a wholesale basis. At present the removal of s52 of the TPA (misleading or deceptive conduct) from the personal injury arena is dependent on the Senate. If that reform fails then, coupled with wider concerns about statutory law reform, the Lobbying Committee will have an issue-specific focus in 2004.

## **WEBSITE**

With thanks to Melissa Daly, the NPLA website has been resurrected and is now receiving the ongoing attention it requires. In 2004 the Committee has resolved to consider the more effective use of technology for members including the provision of material in one or more electronic forms. The website will figure as part of this process. Go to [www.npla.com.au](http://www.npla.com.au)


## **RETIREMENT AND THANKS**

There can be no doubt that the NPLA's reputation and reach has long been built on the quality of its periodical publication, Brief. It is essential that this journal be edited consistently in the interests of the NPLA Charter and its members. For nearly a decade, that task has fallen to Maryjane Crabtree. Anyone who reads Brief, and has done so over that period, will appreciate the role which Maryjane has played. Anyone who sees what is involved in the process will appreciate the effort that is required time and time again. On behalf of the Committee, Committees past and the readership, a very special thanks and congratulations to Maryjane is thoroughly deserved.

In 2004, the Association will have a new Secretary. In part this reflects the increased role now being played by the Secretariat. In part it is because that role has been somewhat redefined to give greater emphasis to membership needs. Either way, it means that George Karalis will now be able to serve, as he has done so conscientiously for so long, as a Committee Member without having to take detailed notes. George's service as the Secretary is also deserving of public thanks.

My thanks to those Committee members who were able to participate in the Committee and its activities during 2003. The Committee requires participation and energy, which is something more than interest and attendance. I again encourage all those who are seeking re-election to provide support to an organisation which has an important and worthwhile charter.

Having now completed my term of office, I look forward to serving the Association under different leadership. The privilege of being President is the pleasure of working with an executive that is plainly interested in and committed to product liability in theory and practice. The burden of that role is to ensure that the Association sustains the principles set out in its charter, specifically the need to ensure that members know of and understand product liability developments and issues as they occur. I value the privilege and have sought to discharge the burden. I congratulate my successor and the new office holders and wish the Committee and the Association the very best for 2004.

Andrew Morrison   
President  
National Product Liability Association  
17 November 2003

# WARNING SIGNS FROM HIGH COURT

In October 2003, the High Court of Australia again considered the role of warning signs in occupier's liability cases. However, the Court's most recent consideration of this issue will also be of particular interest to manufacturers and retailers concerning their own liabilities for instructions, warnings and product packaging.

## **HOYTS PTY LTD V BURNS<sup>1</sup>**

The case is a decision of five judges of the High Court of Australia, handed down on 9 October 2003. Whilst McHugh, Gummow, Hayne and Callinan JJ delivered the leading judgment in the case, the separate judgment of Kirby J is of special interest as he presented a more detailed analysis of whether, in a particular case, an occupier's duty to warn entrants about risks includes the obligation to provide a warning notice.

## **THE FACTS**

The defendant (who was the appellant before the High Court) owned and operated a cinema in Sydney. The plaintiff worked as a teacher's aide specialising in disabled children and attended the cinema in this capacity, accompanied by five adults and eight disabled young children. She was responsible for a boy aged four, who was transported in a wheelchair but was still capable of crawling very quickly. The plaintiff had not been inside a cinema for many years.

The incident arose out of the plaintiff's failure to appreciate the automatic operation of the cinema seats. Each seat automatically rose to rest at an angle of 70 degrees to the floor when there was no weight upon it. The plaintiff entered the cinema with her charge whilst the lights were on and they sat in the front row. Once the lights had dimmed and the film began, the young boy became very agitated and crawled away from his seat. The plaintiff left her seat to retrieve him but he became extremely agitated. As the plaintiff had hold of the boy in her arm, she moved to sit down in her seat again, but as the seat had risen automatically, she fell to the ground and was injured.

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<sup>1</sup> [2003] HCA 61 (9 October 2003).

<sup>2</sup> (1993) 177 CLR 423.

<sup>3</sup> (1998) 192 CLR 431.

The plaintiff claimed that the cinema operator was negligent in failing to warn her of the dangers from seats folding up when no weight was on them, and that her seat would rise should she need to leave the seat for any reason.

## **THE MAJORITY JUDGMENT**

The High Court found in favour of the plaintiff. However, the majority was more focused upon ensuring the plaintiff had received a fair hearing on the facts, than developing any firm criteria for dealing with the need for warning signs.

The trial judge had made a number of general observations about the plaintiff's credibility, clearly concerned at the plaintiff's assertion in evidence that if there had been a warning sign, she would have been aware that the seat would retract when she stood up. Despite those concerns, the Court of Appeal then found there was an overwhelming inference that a person who had been warned of the seat operation would have included that added piece of knowledge in the thinking processes involved when returning to their seat.

The majority in the High Court disagreed with this inference, and held that nothing in the evidence pointed positively to the conclusion that, as a matter of fact, the plaintiff would have acted differently had she received the warning she asserted the defendant should have provided. However, the majority did not then go on to consider at any length the more pressing question of the circumstances in which a warning sign was required as part of the occupier's duty to entrants. This was dealt with in the judgment of Kirby J.

## **JUSTICE KIRBY'S ANALYSIS**

Justice Kirby began his discussion on the requirement for a warning by considering two previous cases before the High Court on this issue, *Nagle v Rottneest Island Authority*<sup>2</sup> and *Romeo v Conservation Commission (NT)*.<sup>3</sup>

In *Nagle*, a plaintiff was injured when he dived into water at a swimming reserve and hit a submerged rock, sustaining very serious injuries. No warning sign had been provided at the reserve. The High Court held that the defendant occupier had owed a duty of care

that extended to the provision of a warning about the presence of submerged rocks, and that the failure to provide a warning had constituted a breach of the occupier's duty. On the facts, the High Court then found that (contrary to the decision at trial) the absence of a warning had caused the plaintiff's injury, and found for the plaintiff.

In *Romeo*, the plaintiff asserted that a local authority had failed to provide a barrier and a warning sign at the top of a cliff in a nature reserve to discourage persons in an intoxicated state from approaching the edge. The issue in that case was the extent to which the risk to a reasonable person was obvious, thereby negating the need for a warning. Justice Kirby noted in that case:

Where a risk is obvious to a person exercising reasonable care for his or her own safety, the notion that the occupier must warn the entrant about that risk is neither reasonable nor just.<sup>4</sup>

Concerned at the danger that this statement might now be taken as "a universal proposition of law", his Honour added in the present case:

In every case, it is necessary to evaluate the suggested need for, and effectiveness of, a warning by reference to the proved circumstances.<sup>5</sup>

His Honour then made reference to his minority decision with Justice McHugh in *Woods v Multi-Sport Holdings Pty Ltd*<sup>6</sup> (where the plaintiff was injured playing indoor cricket, asserting that special warnings about the type of ball used should have been required), but noted the majority decision in that case which 'rejected the need for a notice, considering that the particular risks were self-evident and inherent in voluntary participation in the sport'.<sup>7</sup>

## THE REQUIREMENT FOR A NOTICE

Justice Kirby's approach in *Hoyts* was to balance, through the analysis of a number of considerations, the social impetus for the law in this area from the point of view of the occupier (to encourage attention to accident prevention) and the entrant (to make informed choices about risks).

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<sup>4</sup> [2003] HCA 61, [67].

<sup>5</sup> [2003] HCA 61, [67].

<sup>6</sup> (2002) 208 CLR 460.

His Honour listed<sup>8</sup> the considerations relevant to the obligation to provide a warning notice as:

- whether the occupier has an economic or other interest in the entry of the plaintiff to the premises;
- whether, because of previous incidents, public discussion or otherwise, the occupier could be expected to know of any particular risks against which warnings should be given;
- whether there was any hidden feature of the place or activity that might not be plain to an ordinary entrant, but which should be known to (or reasonably discoverable by) the occupier;
- whether, if the risk eventuated, the consequences to the person affected would be minor or significant;
- whether imposing a requirement to provide a notice could be confined to particular areas or would have large implications, costs and other consequences;
- whether the activity in question rendered the presence of a sign irrelevant to actually preventing the injury.

## LIMITATIONS ON THE TEST

Justice Kirby then considered whether, in all the circumstances, a warning sign would have prevented the plaintiff's injuries, and found that it would not have done so. Having considered the "social factors" listed above, His Honour concluded by reiterating the need to look at the facts of each case:

... it would be a mistake to infer from *Romeo and Woods* that the provision of warnings by occupiers to entrants upon their premises is no longer part of the law. *Nagle* clearly holds to the contrary. Common sense and frequent experience confirm that notices can be important means of accident prevention.<sup>9</sup>

## WARNING SIGNS FOR MANUFACTURERS

Manufacturers should look at Kirby J's approach in this case carefully when considering their obligations in warning consumers of foreseeable risks in using their products.

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<sup>7</sup> [2003] HCA 61, [68].

<sup>8</sup> [2003] HCA 61, [71].

<sup>9</sup> [2003] HCA 61, [76].

The effect of warnings in occupier's liability cases is clearly an attractive issue to the High Court, and the same would have to be assumed for the effect of warnings in product liability cases. This case illustrates that at least some members of the High Court are prepared to focus on the direct effect of warnings on the particular consumer. At the same time, the case is a further indication of the Court's willingness to look at the broader social aspects of a claim, taking into account not only the consumer's right to be informed of risks, but the defendant's general responsibilities with regard to accident prevention.

The case is perhaps a comforting indication of the pendulum continuing to swing towards the defendant's side in liability cases. Nevertheless, Kirby J's warning should be heeded – manufacturers must retain their focus on accident prevention if they are to maximise their prospects of avoiding and, if necessary, successfully defending claims.

Derek Begg   
Middletons (Melbourne)



# COMPENSATION, FINES AND DAMAGES IN PRODUCT LIABILITY

(This paper came out of a presentation the author gave to NPLA members as part of the NPLA's 2003 'Back to Basics' series of seminars.)

Previous 'Back to Basics' seminars have focused on issues arising out of the manufacturing process – the design and manufacture of goods, warnings attached to them, their safety, the existence of faults, and the recall process. We have seen how these matters can give rise to liability based on negligence, breach of contract or breach of the Trade Practices Act. We now take the next step: once liability for loss or damage has been proven, what financial consequences will the court impose upon the manufacturer?

## DAMAGES AS COMPENSATION

In product liability claims, a court will award compensatory damages for three main areas of loss: personal injury (eg. a plaintiff contracting a disease from using a product), property damage (eg. a product causing a factory fire) and pure economic loss (eg. a defective piece of equipment causing the user to breach their supply contracts).

Courts are also prepared to award non-compensatory damages. These most easily divide up into aggravated damages (compensation for insult or humiliation), exemplary or punitive damages (equating to a civil fine), and nominal damages (compensation where there is no actual damage).

Defendants also face the possibility of fines arising from penal provisions of the Trade Practices Act, and possibly other legislation, regulating manufacturers' liabilities for production of goods.

## PERSONAL INJURY

Personal injury cannot be looked upon just as a case of acute harm. It also includes the infliction of acute or chronic pain, contracting a disease, and the development of psychiatric conditions.

Where a plaintiff sues in negligence, compensation for injury will be recoverable if the injury is reasonably foreseeable, in that there was a real risk that it would occur. The precise nature or extent of the injury need not have been foreseen.

Food cases are often the most graphic examples of injuries in a product liability setting. For example, in *Vince v Cripps Bakery Pty Ltd*,<sup>1</sup> the plaintiff developed a phobia of baked food from discovering the remains of a mouse in a slice of bread. In *Greenwood v Sefton Holdings*,<sup>2</sup> the plaintiff developed internal and psychiatric injuries from swallowing a toothpick that was hidden within a tin of diet food.

Psychiatric injuries are prevalent, but do tend to highlight the difficulties in assessing what is reasonably foreseeable. In a straightforward case, the development of a psychiatric condition might occur in parallel with the plaintiff's physical injuries. Broadly speaking, if the physical injuries are foreseeable, then the psychiatric injuries will be too. However, if a psychiatric injury (but not the specific nature of it) is reasonably foreseeable, then the real question in negligence will be to assess the closeness of relationship between plaintiff and manufacturer. Courts have held that the injury must be the direct consequence of witnessing or participating in the event or its aftermath. What if the event is not immediate in time (such as the contraction of an illness or disease)? What if the event is property damage rather than personal injury? What if the condition arises from a perception of a risk of injury or only the prospect of having been infected? Any firm analysis of the point at which remoteness will prevent recovery may depend more properly on the facts of a particular case.

Where a plaintiff sues in contract, compensation for any injury will be recoverable provided the injury is not too remote from the cause. This will be the case where it is fairly and reasonably considered to have arisen (or is likely to have done so) in the usual course of the breach. The plaintiff can also recover for lesser forms of injuries such as distress and inconvenience.

<sup>1</sup> (1984) Australian Torts Reports 80-668.

<sup>2</sup> (Unreported, Supreme Court of NSW, Wood J, 6 July 1990).

Again, contract cases often involve food claims, but it is less common for a plaintiff with personal injuries to have entered a contract with the manufacturer. Other contract cases might include an infection contracted from tinned food purchased from a manufacturer, food bought at a market, and where there is a mix of product and service contracts such as injuries in a ferry accident.

The Trade Practices Act provides a general test for injured plaintiffs – the right to recover “loss or damage”. Under s4K, loss or damage includes injury and accordingly the possibility of seeking compensation under the Trade Practices Act for personal injuries is confirmed.

Under the unmerchantable products provisions of the Act (Division 2A Part 5), each section provides for an entitlement to claim against the manufacturer. For example, s74B (unsuitable goods) provides ‘... the corporation is liable to compensate the consumer... for the loss or damage and the consumer... may recover the amount of the compensation by action against the corporation’. An example of this is the series of cases associated with *Ryan v Great Lakes Council*<sup>3</sup> which concerned contaminated oysters.

Under the defective products provisions of the Act (Part 5A) a similar test applies. For example, s75AD (defective goods causing injury) provides ‘... the corporation is liable to compensate the individual for the amount of the individual’s loss suffered as a result of the injuries’. An example of this is *ACCC v Glendale Chemicals*<sup>4</sup> which concerned a plaintiff injured when using drain-cleaning chemicals.

Under Part 5 of the Act (which includes the misleading and deceptive conduct provisions and the false representations provisions), two sections will affect potential defendants. Under s82 there is a general right for an injured plaintiff to recover loss and damage for breach of Part 5 (and indeed other parts of the Act). Section 87 then permits a court to make other orders, many of which might have financial consequences. This might include varying the terms of a contract, ordering a refund, or ordering the supply of further services.

## PROPERTY DAMAGE

This includes damage over real or personal property where the plaintiff has a proprietary or a possessory right over the property. Examples are crop damage, and damage to buildings or plant and equipment. A mere contractual right to use the property without having ownership will be insufficient. Nevertheless, a defendant’s duty of care may extend to the actual owner and the defendant may therefore still face action, albeit from a different plaintiff.

Examples of cases where property damage was claimed include the loss of a flock through an incorrectly labelled sheep dip, a fire caused by inadequate warnings on thinners, and a collision at sea caused by defective communications equipment.

Where a plaintiff sues in negligence, essentially the same test as for personal injury applies. The plaintiff will recover where there was a real risk of damage to property. Once again, the nature or extent of the damage need not have been foreseeable.

Where a plaintiff sues in contract, once again the same test as for personal injury applies. There will be a greater incidence of property damage claims based in contract because of the higher likelihood of commercial loss (which often involves property damage) where a product has been purchased directly from the manufacturer in the course of business.

Under the Trade Practices Act there are some limitations on claiming for property damage. Although the ‘loss or damage’ definition adopted by the Act naturally includes property damage, under the defective products provisions (Part 5A), recovery is limited to goods, land, buildings or fixtures ‘ordinarily acquired for private use’<sup>5</sup>. Destroyed or damaged property that was in commercial use will therefore not be covered under a defective products claim. Such a claim would not be restricted in this manner under the misleading and deceptive conduct or false representations provisions of the Act.

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<sup>3</sup> Culminating in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 194 ALR 337.

<sup>4</sup> (1998) 90 FCR 40; (1999) ATPR 41-672.

<sup>5</sup> Sections 75AF and 75AG.

## **PURE ECONOMIC LOSS**

Economic loss tends to be divided into economic loss consequential upon property damage and pure economic loss. The former is perhaps self explanatory. Examples of the latter include costs of rectification, recall costs for a defective product, loss of expectation as to quality or fitness for purpose, loss of profits, loss of ability to trade and an ongoing loss of market share. Liabilities to third parties through breach of supply contracts might also be claimed under this head of damage.

Pure economic loss is recoverable where the loss was foreseeable and the plaintiff is a member of an ascertainable class likely to be injured by the defendant's conduct, especially where the plaintiff was vulnerable to the loss and unable to protect itself.<sup>6</sup> An example of such a case is in the assembly of finished products which use a defective component, or the supply of diseased seed to farmers reliant on its quality.

It is also possible to recover pure economic loss on the basis of negligent misrepresentation, ie. a breach of a duty of care not to be negligent in making a representation to the plaintiff. The mere foreseeability of a loss is insufficient, and courts will look to elements of trust and reliance upon a defendant's advice: *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.<sup>7</sup> Losses based on negligent misrepresentation might commonly arise in product warning or financial services cases.

It is very common to find pure economic loss in contract cases, where an economic reliance on the quality of goods supplied is often critical. The test for recovery of pure economic loss is the same as for other contract cases.

The Trade Practices Act test of 'loss or damage by a defendant's conduct' does not preclude a claim for pure economic loss. However, a plaintiff may well have evidentiary challenges in demonstrating a causal link between a loss and a manufacturer's conduct. This was recently highlighted in *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd*,<sup>8</sup> where a commercial plaintiff was able

to demonstrate damage to its plant and equipment, but was unable to prove the damage was caused by any act or omission on the defendant's part.

## **NOMINAL DAMAGES**

The awarding of nominal damages allows a court to order compensation without a plaintiff having proven actual damages. An award is made as a vindication of the plaintiff's rights.

Nominal damages are not available under the Trade Practices Act. Section 82 only gives the right to recover 'the amount of the loss or damage'. Such an award is uncommon, but can be possible if problems of proof make it difficult to prove an actual loss. An example is *JLW (Victoria) Pty Ltd v Tsiloglou*,<sup>9</sup> where a plaintiff was induced to enter a commercial lease by representations about the alarm system, but when a theft had occurred the plaintiff was unable to demonstrate the value of the goods stolen.

## **AGGRAVATED, EXEMPLARY AND PUNITIVE DAMAGES**

Two cases help to define the distinction between these heads of damage. *Nixon v Philip Morris (Australia) Ltd*,<sup>10</sup> held that in assessing aggravated damages the court examines the effect of the defendant's conduct on the plaintiff, whereas for exemplary damages, it focuses on the conduct itself.

The High Court of Australia in *Lamb v Cotogno*<sup>11</sup> stated:

Aggravated damages, in contrast to exemplary damages, are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like. Exemplary damages, on the other hand, go beyond compensation and are awarded "as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself".<sup>12</sup>

<sup>6</sup> *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

<sup>7</sup> [1964] AC 465.

<sup>8</sup> (2003) Australian Torts Reports 81-692.

<sup>9</sup> [1994] 1 VR 237.

<sup>10</sup> (1999) 165 ALR 515; appeal (2000) 170 ALR 487.

<sup>11</sup> (1987) 164 CLR 1 at 8.

<sup>12</sup> Citing *Wilkes v Wood* (1763) 98 ER 489 at 498

Exemplary damages are clearly available in negligence.<sup>13</sup>

Under the Trade Practices Act, aggravated damages are capable of award under s82 or s87.<sup>14</sup> Section 87, however does not permit the award of exemplary damages.<sup>15</sup> Indeed, they are not available for a breach of Part V at all.<sup>16</sup> There is some suggestion however that exemplary damages may be recoverable by a reliance upon s22 of the Federal Court of Australia Act, a provision that obliges a court to determine matters between parties finally and completely.

## FINES

Section 79 of the Trade Practices Act prescribes a fine for contravention of Part V. Although a breach of s52 (misleading and deceptive conduct) is excluded, a breach of s53 (false or misleading representations) is importantly included. Breaches might include goods that failed to comply with product safety standards on country of origin labelling requirements.

Section 79 also provides for accessory liability, where a party aids, induces, is knowingly concerned with, or conspires in a breach.

Under s79, individuals face a maximum fine of \$40,000, whilst corporations face a maximum fine of \$200,000.

General sentencing principles apply to fines imposed under this section, and these are set out in s16A of the Crimes Act 1914 (Cth). Amongst them are the usual sentencing criteria of the nature of the offence, the commission of other offences, deterrence and punishment, and the prospects for rehabilitation. Where a corporate offender is involved, it may well be that a trade practices compliance program could form part of a sentence.


Fines that have been imposed upon defendants have varied greatly in amount and in circumstances. They vary from very low fines for being knowingly concerned in goods that were not labelled correctly, to the most blatant offences of mislabelling and even labelling in contravention of consumer product safety standards. These have resulted in significant fines both to companies and to their management.<sup>17</sup>

## LAW REFORM

Details of tort law reform in the area of damages will not be discussed in this paper, as they remain the subject of significant comment elsewhere. However, it is observed that the current climate is one of readjustment and spreading the burden of loss in tort law generally. Despite opportunities, the courts have so far taken a conservative line on economic loss claims. There is a renewed tension between the rights of injured persons and defendants and their insurers. Stakeholders and lobby groups are also taking a more intense interest in reform than has been the case for a long time. The procedural burdens of class actions have had some effect on the operation of tort law in society. These burdens may well have discounted the attraction of class actions for plaintiffs' lawyers.

Areas which have already been affected and may be the subject of further legislative intervention in many Australian jurisdictions include statutory minimum loss requirements, statutory damages limitations, changes to contributory negligence and some effect upon contribution and indemnity claims.

In short, the entire area is once again at the forefront of politics, and governments have clearly indicated that recent changes to tort law will not be the last.<sup>18</sup>

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Middletons (Melbourne)

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<sup>13</sup> Nixon v Philip Morris (Australia) Ltd (1999) 165 ALR 515; appeal (2000) 170 ALR 487.

<sup>14</sup> Ibid.

<sup>15</sup> Marks v GIO Australia Holdings Ltd (1998) 196 CLR 494.

<sup>16</sup> Nixon v Philip Morris (Australia) Ltd (1999) 165 ALR 515; appeal (2000) 170 ALR 487.

<sup>17</sup> Beerworth, Product Liability Australia (Butterworths) contains a detailed list of examples at [32.190].

<sup>18</sup> Readers interested in looking at this area in greater detail are directed to Beerworth, above, Chapter 32, and to some of the principal texts in this area: McGregor on Damages (16<sup>th</sup> ed, 1997) and Luntz, Assessment of Damages for Personal Injury and Death (4<sup>th</sup> ed, 2002). Miller's Annotated Trade Practices Act: 2003 (24<sup>th</sup> ed, 2003) also provides detailed commentary and examples.'

# THE CASE OF THE POISONED ORANGES: *DOWDELL V KNISPEL FRUIT JUICES*

The Federal Court decision in *Dowdell v Knispel Fruit Juices Pty Ltd*<sup>1</sup> involved 507 cases of salmonella poisoning caused by the consumption of unpasteurised orange juice. This case is an interesting example of how product liability risk can spread through the distribution chain of a product. It also demonstrates the importance of contractual obligations to product liability claims.

## THE MAIN CHARACTERS

There were five main players in this dispute:

- The Knispel brothers (John and Jeff, both known as “Nippy” at school). The Knispel family owned a South Australian orange juice company which manufactured and distributed “Nippy’s Fruit Juices”. John Knispel managed Knispel Fruit Juices Pty Ltd (Nippy’s), which manufactured and distributed orange juice for retail sale. His brother Jeff Knispel managed Nippy’s Waikerie Producers Pty Ltd (Packing), which sourced and supplied oranges to Nippy for juicing.
- The Constas brothers (Peter and Theo). The Constas brothers each owned orange orchards. The oranges picked from the orchards were packed in a packing shed operated by the brothers. They were then distributed to buyers, including Packing. Packing then on-sold the oranges to Nippy’s.
- The bacteria known as Salmonella Typhirium phage type 135a. Salmonella is a general term for some 2000 types of bacteria which cause food poisoning in humans. The bacteria breeds in the human intestine, producing toxins that cause a variety of symptoms, such as vomiting, diarrhoea, nausea, dizziness, fever and chills. In optimal conditions, salmonella can reach enormous populations in only a few hours. Salmonella dislikes the cold, although refrigeration will not kill it. It also dislikes chlorine, although it may endure a

chlorine attack. However, salmonella rarely survives exposure to high levels of acid, including citric acid. This was an important fact for the outcome of this case.

## THE BACKGROUND FACTS

In the period between 1 January 1999 and 31 May 1999, the South Australian Department of Human Services was notified of about 507 cases of salmonella poisoning. One common feature of all of these cases was the consumption of Nippy’s fruit juice. The Department purchased a sample of Nippy’s juice, which tested positive for salmonella. At the beginning of March 1999, the Department prohibited the sale of Nippy’s juices. Nippy’s ceased trading until mid-April 1999.

After some investigation, the source of the salmonella was traced back to the Constas brothers’ packing shed. Inside the packing shed was a machine which prepared the oranges grown by the Constas brothers either for table fruit or for juicing. Oranges were size graded, then washed in water to remove dirt, and then sprayed with a fungicide solution to prevent the growth of mould. After that, the oranges were coated in wax to improve their shine and extend their shelf life.

Salmonella was found in very high concentrations in the fungicide tank and also in the wax tank of the packing machine. This meant that the oranges were effectively bathed in a salmonella solution, which was then sealed in by the wax (which also contained salmonella). The contaminated oranges were sold to Packing, which sold them to Nippy’s.

Once the oranges arrived at Nippy’s, they were immersed in a chlorine solution. Normally, this would have killed any salmonella, but unfortunately, the wax on the oranges made them impervious to the chlorine. They were then brushed, washed, juiced, and the juice was immediately chilled. The chilling lowered the acidity of the juice, allowing the salmonella to survive in the juice until it reached the consumer.

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<sup>1</sup> [2003] FCA 851 (13 August 2003).

## THE CLAIMS

Some of the people who suffered food poisoning as a result of drinking the juice brought a class action against Nippy's. Nippy's admitted that it was liable pursuant to Part VA of the Trade Practices Act 1974 (Cth), which imposes strict liability on manufacturers who supply a product with a defect (the defect usually being that the safety of the product is not such as consumers are entitled to expect). A settlement scheme was established and Nippy's paid out the claims.

In respect of the amounts it paid to the consumers, as well as its own damages and losses arising from the salmonella outbreak, Nippy's cross-claimed against two other parties. The first of these parties was the Constas brothers. Nippy's alleged that they were liable to Nippy's in negligence and breach of statutory duty under the Citrus Industry Regulations 1992 (SA).

The second cross-claim brought by Nippy's was against Packing. Nippy's alleged that Packing breached its contract to Nippy's by supplying oranges that were not fit for purpose or of merchantable quality. Fitness for purpose and merchantable quality are terms which are implied into contracts for the sale of goods by the Sale of Goods Act 1895 (SA).

Packing in turn brought its own cross-claim against the Constas brothers, alleging that they were liable to Packing in negligence, breach of statutory duty (of the Citrus Industry Regulations) and breach of the contract with Packing by supplying it with oranges that were not fit for purpose or of merchantable quality.

There were also a number of cross-claims by various parties against their respective insurers, but these were settled prior to the conclusion of the trial.

## THE OUTCOME

The ultimate result of the case was that the Knispel brothers vanquished the Constas brothers, who ended up having to pay for the entire salmonella crisis. How was this result reached?

### 1. Breach of statutory duty

None of the cross-claims relating to breach of statutory duty succeeded. The court held that the Citrus Industry Regulations did not apply to this particular fact situation and that, in any event, they did not confer a

private right of action (as opposed to the right of the government to bring actions).

### 2. Negligence

None of the negligence actions succeeded because at the time of the salmonella crisis, none of the parties could have foreseen that orange juice could be contaminated by salmonella. Prior to the outbreak involving Nippy's, there had been no known cases of salmonella poisoning involving orange juice. All of the parties knew that the acidity of orange juice killed bacteria and they were therefore not concerned about contamination from this source. Although the installation of a sanitiser either at the Constas brothers' packing shed or at Nippy's factory, or the pasteurisation of the juice would have prevented the contamination, the court held that because none of the parties could have reasonably foreseen the possibility of salmonella contamination they had no duty to take steps which could have stopped the outbreak.

### 3. Breach of contract

However, both claims for breach of contract succeeded (the claim by Nippy's against Packing and by Packing against the Constas brothers). Nippy's had an oral contract with Packing which amounted to a standing offer on the part of Packing that it would supply oranges to Nippy's, subject to Packing being able to obtain the oranges required. Both parties knew that the oranges supplied under the contract were intended to be used for the manufacture of unpasteurised orange juice.

Packing in turn had entered into a series of oral contracts with the Constas brothers for the supply of oranges. Once again, both parties knew that the oranges supplied were to be used for the manufacture of unpasteurised orange juice.

The contract between Nippy's and Packing and the contracts between Packing and the Constas brothers were all contracts for the sale of goods. This meant that certain conditions were implied into the contracts by the Sale of Goods Act. The legislation implied terms to the effect that:

1. Where a buyer makes known to a seller the particular purpose for which goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which

it is in the course of the seller's normal business to supply, there is an implied condition that the goods shall be reasonably fit for the purpose specified.

2. Where goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality.

In relation to the contract between Nippy's and Packing, the Court held that the oranges supplied by Packing were not of merchantable quality because a purchaser would not buy oranges if it knew they were contaminated with salmonella. Packing had therefore breached its contract with Nippy's.

In relation to the contracts between Packing and the Constas brothers, the Court held that the Constas brothers had breached the term relating to fitness for purpose, as Packing had made it known to them that the oranges were required for the manufacture of unpasteurised juice and the oranges supplied were clearly not fit for that purpose. The Court also held that the oranges supplied by the Constas brothers were not of merchantable quality.

As a result of these findings, the Court held that Packing was liable for the loss and damage Nippy's suffered following the salmonella outbreak. The court also held that the Constas brothers were liable for the loss and damage suffered by Packing as a result of its liability to Nippy's. This meant a victory for the Knispel brothers against the Constas brothers, who were left having to pay for Nippy's loss and damage.

The Constas brothers had to pay several million dollars to Nippy's which included damages covering the amounts paid to the injured consumers, the costs incurred in managing the crisis and loss of profits.

## **INTERESTING POINTS**

The most interesting point about this case is how few people were aware of the Nippy's salmonella crisis. This contrasts with the Garibaldi smallgoods outbreak of food poisoning, which has become notorious. One of the main reasons for this was Nippy's excellent crisis management plan. Nippy's was proactive in managing the crisis, putting together a team of legal, accounting, public relations and scientific advisers. Nippy's management of the crisis allowed it to quickly resume trading and maintain the reputation of its brand.

The case is also a reminder of the importance of contract claims to product liability actions. Product liability claims tend to focus on liability for negligence, and negligence has certainly been the focus of recent civil liability reforms around Australia. However, it is important to remember that even where negligence is not an issue, there may still be risks and liability associated with implied terms in contracts.

Importantly, the case highlights the risks of liability in all parts of the supply chain. Our focus in product liability actions is often on the manufacturer/consumer relationship, but this case makes it clear that all links in the supply chain may be exposed to some risk.

Kylie Giblett and Louise Keats  
Allens Arthur Robinson



# JUDICIAL DISTINCTION

We don't usually include the full text of judgments in Brief, but we were so impressed with Judge Crocker's erudition, we thought you would enjoy this one.

In the United States District Court for the Western District of Wisconsin Order 02-C-647-C

Hyperphase Technologies, LLC and Hyperphases INC., Plaintiffs,

V.

Microsoft Corporation,  
Defendant.

Pursuant to the modified scheduling order, the parties in this case had until June 25, 2003 to file summary judgment motions. Any electronic document may be e-filed until midnight on the due date. In a scandalous affront to this court's deadlines, Microsoft did not file its summary judgment motion until 12:04:27am. on June 26, 2003, with some supporting documents trickling in as late as 1:11:15am. I don't know this personally because I was home sleeping, but that's what the court's computer docketing program says, so I'll accept it as true.

Microsoft's insouciance so flustered Hyperphrase that nine of its attorneys, namely Mark A. Cameli, Lynn M. Stathas, Andrew W. Erlandson, Raymond P. Niro, Paul K. Vickrey, Raymond P. Niro, Jr., Robert Greenspoon, Matthew G. McAndrews and William W. Flachsbar, promptly filed a motion to strike the summary judgment motion as untimely. Counsel used bolded italics to make their point, a clear sign of grievous iniquity by one's foe.

True, this court did enter an order on June 20, 2003 ordering the parties not to flyspeck each other, but how could such an order apply to a motion filed almost five minutes late? Microsoft's temerity was nothing short of a frontal assault on the precept of punctuality so cherished by and vital to this court.

Wounded though this court may be by Microsoft's four minute and twenty-seven second dereliction of duty, it will transcend the affront and forgive the tardiness. Indeed, to demonstrate the even-handedness of its magnanimity, the court will allow Hyperphrase on some future occasion in this case to e-file a motion four minutes and thirty seconds late, with supporting documents to follow up to seventy-two minutes later.

Having spent more than that amount of time on Hyperphrase's motion, it is now time to move on to the other Gordian problems confronting this court. Plaintiff's motion to strike is denied.

Entered this 1<sup>st</sup> day of July, 2003.

By the court:

(signature) Stephan L. Crocker. Magistrate Judge