BRIEF

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17 NOVEMBER 2005

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PRODUCT SAFETY REVIEW - REPORT BY THE PRODUCTIVITY COMMISSION

PETER HOLLOWAY AND ELEANOR SCACCO, FREEHILLS

Previous issues of Brief have reported upon the review of the Australian Product Safety System (***APSS***) by the Ministerial Council of Consumer Affairs (***MCCA***). Subsequent to its initial report, the MCCA asked the Productivity Commission (***Commission***) to consider some of the reforms being considered, and to specifically consider whether the introduction of a general safety provision (***GSP***) would result in significant productivity gains.

The Productivity Commission has recently issued a draft report. The report, which is in excess of 400 pages, canvasses a variety of matters, including:

- the way in which the current product safety system is performing;
- whether there is a need for a GSP;
- how 'foreseeable misuse' of products should be treated; and
- what improvements could be made to the current system.

Each of these matters is commented upon briefly below. The Commission has invited public comment concerning the matters detailed in its report, following which it will report in final to the MCCA, most likely in January or February 2006.

If any NPLA member wishes to make comment, they may comment directly to the Commission, or may make comments through NPLA, which will pass those comments on to the Commission.

HOW IS THE CURRENT SYSTEM PERFORMING?

While acknowledging the limited evidence available upon which to base conclusions, the Commission reported that:

- consumers accept some level of risk with every-day products, but expect that products available in the marketplace will satisfy some minimum level of safety;
- a number of incentives currently exist for businesses to provide safe products to the market, including the force of law, consumer preferences, media influence and consumer advocacy;
- when product defects occur, most producers voluntarily act to remove the product from the market;
- overall, the number of injuries or deaths caused by unsafe consumer product is small relative to other causes of injuries and death; and
- a significant proportion of accidents are caused by consumer misuse rather than through any defect in the products themselves.

IS THERE A NEED FOR A GSP?

The MCCA had raised the possibility of introducing a GSP, being an express obligation for businesses to supply only 'safe' products. This was said to bring Australia into alignment with European law and laws currently under consideration in Canada.

The Commission's preliminary findings are that:

- the benefits of a GSP would be unlikely to justify the associated cost, and a GSP may not affect the biggest risk areas (including those businesses who currently pay too little attention to product safety). Given this, a GSP would deliver little additional benefit, whereas it would potentially add significantly to compliance costs for business.
- if a GSP was to be introduced, then in order to minimise compliance and administration costs, it would be preferable to adopt definitions and standards of safety that are consistent with the existing 'defective goods' regime in the *Trade Practices Act 1974* (Cth).

HOW SHOULD FORESEEABLE MISUSE BE TREATED?

The Commission reported that the behaviour of users of products may be a much more important causal factor of injuries related to products than any product defects. Examples include:

- careless use;
- use for a purpose not intended by the manufacturer;
- inadequate skill of the user;
- failure to understand the risk;
- failure to properly service/maintain the product; and
- intentional self harm.

The Commission considers that general information and awareness campaigns are the best way to address these hazards.

The Commission also noted that while the risk of foreseeable misuse may be reduced through product design, it may not be able to be eliminated altogether without significantly reducing the product's functionality or making it prohibitively costly. Further, as the Commission recognised, consumers must take some responsibility for their own safety.

The Commission came to a preliminary finding that foreseeable misuse should be considered when determining whether a product should be banned or compulsorily recalled, provided that the misuse of the product is not unreasonable.

Some suggestions by the Commission of what may constitute unreasonable misuse include:

- deliberate self harm or harm to another;
- reckless disregard for the user's own safety by not heeding warnings, removing safeguards, or product use under the influence of drugs or alcohol;
- the product not being serviced or maintained as required; and
- where the hazard is well-known and the benefits from safe use are significant in comparison to the cost of preventing misuse e.g. knives are inherently dangerous objects.

WHAT IS THE POSITION IN RELATION TO SECOND-HAND GOODS?

The existing consumer safety legislation generally does not apply to second-hand goods. Further, as the Commission noted, enforcement activity in this area is generally limited and *ad hoc*, resulting in inconsistencies between jurisdictions.

However, the Commission noted that it is almost certain that a large number of products are sold second-hand which do not comply with current standards. Many of those products present a greater hazard than when new, due for example, to wear and tear and poor maintenance.

While the Commission noted that there are good reasons for a case-by-case approach to the enforcement of product safety regulations to second-hand products, it nevertheless made a preliminary recommendation that an inter-governmental policy statement be issued to clarify that second-hand products, when sold in trade or commerce, are covered by governments' existing powers to enforce product safety regulations.

The Commission also noted that, even for commercial second-hand dealers, there will be enforcement problems given facts such as:

- smaller businesses may find it difficult to keep abreast of product safety issues and the standards applying to particular products;
- safety may be difficult to assess by visual inspection;
- normal wear and tear is to be expected and may make compliance with the standards applicable at the time of manufacture no longer possible; and
- instructions for use and sometimes warning labels will often have become detached from second-hand items.

The Commission observed that regulators must be given the necessary discretion to allow for the various characteristics of second-hand products (such as those outlined above), the manner in which they are supplied and the reasonable expectation of consumers.

WHAT OTHER IMPROVEMENTS SHOULD BE MADE?

Other reforms to the current system suggested by the Commission include:

- harmonising legislation across the States and Territories, including a national approach to approval and implementation of bans and standards;
- enhanced mechanisms for the early detection of unsafe products via improved information collection;
- ensuring consistent coverage of services relating to the installation and maintenance of consumer products;
- providing better information to businesses on regulatory requirements and targeted information campaigns to consumers where this would be effective and efficient;
- making evidence-based hazard identification and risk management central planks for policy making, standard setting and enforcement; and
- targeting enforcement resources on the recalcitrant and 'fly-by-night' businesses most likely to supply unsafe products.

WHAT HAPPENS NEXT?

The Productivity Commission is seeking comments on its discussion draft before finalising its report to the MCCA in January 2006.

In mid October, Peter Holloway, on behalf of NPLA, attended a round-table conference arranged by the Commission in relation to the review being undertaken of the APSS. NPLA has put a submission to the Commission, in response to the discussion draft report issued by the Commission in July 2005. Please contact Peter Holloway at Peter.Holloway@freehills.com if you would like a copy of the submission.

REFORMING THE UNIFORM EVIDENCE LEGISLATION: CROSS-JURISDICTIONAL EFFORTS AND THE IMPLICATIONS FOR MEMBERS OF NPLA

ALEX DANNE, LAWYER, AND SUSIE DOWNIE, LAWYER, ALLENS ARTHUR ROBINSON, WITH ASSISTANCE FROM PETER HOLLOWAY, PARTNER, FREEHILLS

INTRODUCTION AND BACKGROUND

In July 2004, the Commonwealth and New South Wales Attorneys-General asked the Australian Law Reform Commission and the NSW Law Reform Commission (the ***Commissions)*** to review the operation of the uniform Evidence Acts (the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW)). Ultimately, the Commissions produced an Issues Paper which set out specific subject matter and questions for the community which went beyond the broad guidance of the original Terms of Reference.

In collaboration with the Victorian Law Reform Commission (the ***VLRC***), the Commissions processed responses to the Issues Paper into *ALRC Discussion Paper 69: Review of the Uniform Evidence Act.* The ALRC Discussion Paper sets out further questions based on the more recent submissions and also contains a range of reform proposals. Further submissions are invited for consideration in preparation of the final report.

ALRC DISCUSSION PAPER 69

The Commissions were originally requested to assess the effectiveness of the Commonwealth and NSW existing uniform evidence laws. In Victoria, where uniform evidence legislation is yet to appear, the review prefaces the possible introduction of uniform evidence legislation.

The ALRC Discussion Paper notes the ongoing difficulties associated with the various evidentiary legal regimes operating across the States and confirms that for constitutional reasons, the best solution is to be achieved through the enactment of uniform mirror legislation. The Commissions' basic policy position is based on the propositions that uniform evidence legislation should:

- be pursued in all Australian jurisdictions;
- be a comprehensive statement of the laws of evidence; and
- be of general application to both criminal and civil proceedings.

WHAT ISSUES ARE OF MOST RELEVANCE TO NPLA MEMBERS?

The following issues are likely to be of interest to NPLA members:

(i) Narrative evidence

At present, s 29(2) of the uniform evidence legislation requires that a party apply to the court for a direction that a witness give evidence in narrative form. It is suggested that this requirement has the result that the provision is rarely used. On this basis, the Commissions propose to amend s 29(2) to give courts (of their own motion) the power to give directions about what evidence is able to be given in narrative form.[1]

While narrative evidence raises a risk that otherwise inadmissible evidence could inadvertently be brought before a judge or jury, there are many circumstances in which it may be in the interests of justice (and a more efficient use of court time) for the evidence to be given in narrative form, for example, when child witnesses are involved. Further, in exercising a power to give directions as to whether evidence should be given in narrative form, the court must still take into account the s 192(2) factors, including the extent to which it would be likely to add to or shorten the length of the hearing, the extent to which it would be unfair to a party or witness, the importance of the evidence and the nature of the proceeding.

[1] See page 6 of Chapter 5: The ALRC Discussion Paper

(ii) Opinions contained in business documents

Section 69 of the uniform evidence legislation contains the business document exception to the hearsay rule, whereby hearsay statements in business documents will be admissible in the circumstances specified in the provision. The Commissions note in chapter 7 of the Discussion Paper that there is some contention as to whether an expert opinion contained in a business document is admissible, and accordingly seek further submissions concerning the operation of s 69. Case law suggests that s 69 renders admissible opinions in relation to a matter of fact if expressed in a "business record". Accordingly, the opinion of a non-qualified lay person on a particular subject may be admissible even if that subject is more properly in the realm of specialised knowledge.

(iii) Social facts

The ALRC Discussion Paper raises the possibility that the provisions relating to judicial notice could be amended to allow judges to take account of 'social facts', defined in the ALRC Discussion Paper[2] as statements relating to human behaviour, the nature of society and its institutions, and social values. Such a development may unnecessarily complicate and potentially politicise litigation. The common law doctrine of judicial notice has traditionally applied only to allow the admission of notorious facts, or facts which are so well known that every ordinary person may be said to be aware of them. Section 144 of the uniform evidence legislation restates the common law doctrine. The very essence of a "social" fact seems contrary to this doctrine. Further, this approach could well undermine the main rationales behind the existing doctrine, being the expedition of cases and uniformity of decision making on matters of fact where a diversity of findings might be embarrassing.

(iv) The admission of expert evidence under the uniform evidence legislation discretionary provisions

Of particular interest to NPLA members is the fact that litigants are increasingly faced with a growing number of experts and areas of expertise, with credentials of varying substance. Despite this, the traditional common law constraints on the admission of expert evidence have largely been either removed or diluted under the uniform evidence legislation. The Commissions make clear in the ALRC Discussion Paper that they regard the admissibility of expert evidence as being a matter predominantly for the discretion of the presiding judges. Query how this sits with the Commissions' stated intention that the uniform evidence legislation should represent a comprehensive statement of law and encourage consistency across jurisdictions. Some legislative guidance should be included regarding when expert evidence (particularly of a scientific nature) will be admissible. For example, in the area of scientific evidence, the legislation might include criteria requiring the evidence given by the person claiming to be an expert in the field to be within a field in which the "expert" is generally accepted by peers as having expertise.

(v) Section 60 clarification regarding the adducing of expert evidence and interaction with the common law basis rule

There is often debate about whether expert witnesses are required to prove the factual basis of their opinion and/or every fact upon which they have relied in forming their opinion. Currently, the case law on section 60 of the uniform evidence legislation, (which allows parties to adduce hearsay evidence for a non-hearsay purpose)

[2] See page 4 of Chapter 15: The ALRC Discussion Paper

leaves a number of questions unanswered, including whether section 60 can be used to show the factual basis of an expert's opinion where this requires evidence of remote hearsay and whether section 60 is confined to the admission of "first-hand" hearsay evidence. There is a real danger of highly prejudicial evidence forming the basis of an expert's opinion being admissible if certain constraints are not retained- for this reason alone, section 60 requires clarification.

(vi) Privilege

The ALRC Discussion Paper includes some discussion of an 'audit privilege', whereby documents created in the process of auditing liabilities are privileged from production to other parties or the court. Currently, parties must rely on legal professional privilege at common law and client legal privilege under the uniform evidence legislation to protect communications made for the purposes of conducting a risk audit. However, for risk audits to be protected by legal advice privilege, they must at present be conducted with the involvement of lawyers. This is often uncommercial and otherwise undesirable. Further, legal advice privilege will only apply where the communications in question are for the dominant purpose of obtaining legal advice. If risk audits are undertaken as part of a company's commitment to risk management, or to find more efficient operating practices, the dominant purpose test may fail. Accordingly, companies may resist conducting risk audits for fear that they will later be used against the companies in legal proceedings. An audit privilege would remove such a disincentive to undertake audits, thereby encouraging companies to identify potentially unsafe features associated with their products at an earlier stage.

WHAT IS THE PROCESS FROM HERE?

If readers believe that additional issues raised by the ALRC Discussion Paper, or which exist in evidence law generally, should form the basis of further submissions to the Commissions, these should be raised with NPLA - see contact details at the end of this article.

While Commissions' views (as set out in the final report) will be given substantial weight, they will not be binding on Parliaments and consequently there may also be scope to put additional submissions after the final report is issued.

Depending on the content of the final report, amendments to the uniform evidence legislation may occur in those jurisdictions which have already enacted the legislation. The report will also be of significance in the enactment of uniform evidence legislation in other Australian jurisdictions, including Victoria.

HOW CAN I GET A COPY OF THE COMMISSIONS' REPORT?

The Commissions' final report is due to be lodged with Federal Parliament on 5 December 2005 and will be available to the public following its tabling.

Copies of the ALRC Discussion Paper and precursor papers are available from the ALRC's website at: www.arlc.gov.au/enquiries/current/evidence/index.htm

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IMPLEMENTATION OF THE EU PRODUCT SAFETY DIRECTIVE IN THE UK

JOSHUA BUDIN, ARTICLED CLERK, ALLENS ARTHUR ROBINSON

Australian manufacturers who place their products into the European market should be aware of new product safety laws that have just come into effect in the United Kingdom (***UK***). On 1 October 2005, the UK's General *Product Safety Regulations* 2005 (2005/1803) (***Regulations***) came into force, replacing the *General Product Safety Regulations* 1994. The Regulations implement the European Union's (***EU***) *General Product Safety Directive* (2001/95/EC) (***Directive***), which grants additional powers to local enforcement authorities and imposes new obligations on suppliers of consumer products to EU markets. This article examines the key features of the Directive, as applied by the Regulations.

OBJECTIVES AND APPLICATION

The purpose of the Directive is to ensure that consumer products placed on the EU market are safe.[1] The Directive (and therefore the UK Regulations) applies to all products intended for or likely to be used by consumers, unless such products are regulated by other Directives or sector-specific safety legislation. Accordingly, the Directive does not cover food products, which are regulated by the EU *Regulation on Food Safety* (*Regulation 178/2002/EC*). Nor does it apply in the UK to sectors covered by specific safety regulations, such as cosmetics, medicinal products, toys, motor vehicles and tobacco. Some of these sectors may be subject to aspects of the Directive, to the extent that the risks, producer obligations and authorities' powers are not covered in existing sector legislation.[2]

The primary obligation to place only 'safe' products on the market falls on producers, broadly defined to include all EU-based manufacturers, representatives of non-EU manufacturers, importers (in the absence of a representative of a non-EU manufacturer), 'own-branders', and any other professional in the supply chain whose activities affect the safety properties of a product. Secondary obligations fall on 'other parties in the supply chain whose activities do not affect the safety properties of a product', including most wholesalers, distributors and retailers.

THE GENERAL SAFETY REQUIREMENT

A 'safe product' is defined in the Directive as one which under normal or reasonably foreseeable conditions of use does not present any risk, or presents only a minimum risk compatible with the product's use. A product which does not meet this definition is considered a 'dangerous product.'[3]

PRODUCER AND DISTRIBUTOR OBLIGATIONS

The Directive requires producers to:

- monitor the safety of their products,
- keep a register of safety complaints; and
- take appropriate action which may include a recall (Directive Art 5(1); Regulations r 7).

Distributors are required to:

- participate in monitoring; and
- co-operate in the action taken by producers and authorities (Directive Art 5(2); Regulations r 8).

Both producers and distributors are required to:

- inform the relevant authorities when a product does not comply with the general safety requirement;
- notify them of any action taken to prevent risk to consumers; and
- co-operate with the authorities on action to be taken to avoid risks (Directive Art 5(3) and 5(4); Regulations r 9).

[1] *General Product Safety Directive* Article 1.

[2] See the European Commission's *Guidance Document on the Relationship Between the GPSD and Certain Sector Directives with Provisions on Product Safety: http://europa.eu.int/comm/consumers/cons_safe/prod_safe/gpsd/guidance_gpsd_en.pdf*

[3] *General Product Safety Directive* Article 2(b) and (c); *General Product Safety Regulations* regulation 2.

THE NOTIFICATION OBLIGATION

Where a producer or distributor concludes that a product they have placed on the market is 'dangerous', they must 'forthwith notify'[4] the relevant enforcement authority (see below) of:

- the risk posed to consumers;
- the action taken to prevent the risk; and
- where the product has been marketed or supplied to consumers outside the UK, of the member states in which the product has been marketed.[5]

Failure to comply with the notification obligations will constitute an offence attracting fines of up to £5,000 and/or imprisonment for a term not exceeding three months.[6]

ENFORCEMENT

Regulation 10(1) provides that the Regulations are to be enforced by local authorities – i.e. county councils, district councils and London Borough Councils. The enforcement authorities are required to act 'proportionately' to the seriousness of harm and take due account of the 'precautionary principle.' The UK Department of Trade and Industry's (***DTI***) Guidance Notes explain the precautionary principle as follows:

> Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of the scientific study into the risk, but the likelihood of real harm to public health and safety persists should the risk materialise, the precautionary Principle justifies the adoption of measures under the Regulations.

While voluntary action by producers and distributors is generally encouraged, a product posing a 'serious risk' entitles an enforcement authority to take any actions under the Regulations 'urgently and without first encouraging and promoting voluntary action.'[7]

[4] *General Product Safety Regulations* regulation 9(1).

[5] Note that additional information is required where the risk is a 'serious risk': *General Product Safety Regulations* regulation 9(3).

[6] *General Product Safety Regulations* regulation 20(2) and 20(3).

[7] *General Product Safety Regulations* regulation 10(5).

SAFETY NOTICES

An enforcement authority may issue various types of notices under the Regulations, including 'suspension' notices, 'requirements to mark', 'requirements to warn' and 'recall' notices. These notices may be issued where the enforcement authority has reasonable grounds for believing that the Regulations have been breached and, in particular, where the product is 'dangerous'.

Regulation 17 provides for a right of appeal against safety notices. Further, there is a right to compensation for loss or damage suffered through the wrongful issue of a suspension notice, withdrawal notice or recall notice.[8]

CONCLUSION

The DTI has assured UK industry that the new Regulations place little additional burden on businesses in respect of record keeping, notification and co-operation, as products placed on the market by producers and distributors are already required to be safe and for the most part comply with the general safety requirement. Nevertheless, the Regulations do confer additional powers on regulatory authorities and create further responsibilities for all parties involved in the manufacture and distribution of products in the EU. It remains to be seen what practical impact the new laws will have in this regard and the extent to which the UK legislation will contribute to streamlining EU product safety regulation and raising product safety standards.

[8] *General Product Safety Regulations* regulation 16.

KEEPING EXPERTS INDEPENDENT

DUNCAN TRAVIS, LAWYER, ALLENS ARTHUR ROBINSON

INTRODUCTION

Some recent decisions in *Uniform Evidence Act* jurisdictions demonstrate the increasing scrutiny being given to the independence of expert witnesses. This scrutiny arises at a time that the role of experts is subject to review by the New South Wales Law Reform Commission. It appears that very careful thought needs to be given to the selection, briefing, and management of experts, both in and out of court. Of particular concern in a product liability context is the potential impact on an expert's opinion flowing from what may be described as 'past associations' with the litigant seeking that opinion, or with the product in relation to which the opinion is sought.

THE *RICH* LITIGATION

Facts

Following the collapse of One.Tel, ASIC commenced investigations into the actions of One.Tel's directors and executives. PricewaterhouseCoopers (***PwC***), led by partner Paul Carter, was engaged by ASIC to assist with the investigation. PwC had unrestricted access to material obtained by ASIC during its investigations. Some of this material could not be used in evidence at the trial. Carter prepared a report of his investigations which was provided to ASIC on 21 November 2001 (***November Report***). The November Report referred to information which could not be used in evidence. The PwC team had ongoing involvement in decisions relating to the institution of proceedings against Mr Rich and other One.Tel directors.

Once litigation commenced, Carter was retained by ASIC to prepare an independent expert report. He was separated from the investigation work which other members of the PwC team, who maintained complete access to ASIC's materials, continued to perform. Other PwC members were largely responsible for preparing a draft of the report, which was given to ASIC for comment. ASIC instructed PwC that the draft report could not refer to witness statements or interview transcripts. The report was altered to remove such references, and Carter drafted the final report (***Carter Report***). The Carter Report still resembled closely the November Report.

At trial, Carter was examined on a *voir dire* on four specific parts of his report. The purpose was to reveal that his previous involvement with ASIC, and the access he had to information that could not be admitted into evidence, had tainted his conclusions which were said to have necessarily relied on that information. Rich sought to have the Carter Report ruled inadmissible on two bases:

- it was not an expert opinion under section 79 of the *Evidence Act 1995* (NSW) (***Evidence Act***) because, by excluding facts to which Carter still had regard, it did not identify the factual basis of the expert opinion; and
- in the exercise of the Court's discretion under section 135 of the *Evidence Act*, the Carter Report's probative value was outweighed by its unfair prejudice, misleading and confusing nature, and because it would cause an undue waste of time.

The judgment at first instance[1]

Justice Austin held that Carter's previous involvement with ASIC did not, of itself, evidence a lack of independence such as to make the Carter Report inadmissible.

What was of more concern, however, was the access Carter had to information as a result of that previous involvement. It was more likely than not that Carter's opinions were influenced by information to which he was not entitled to have regard in forming them, although that information had been excluded from his report, and this influence was 'pervasive'. The Carter Report, therefore, was held to be inadmissible as a whole under section 79 of the *Evidence Act*: it did not identify the factual basis and reasoning process of Carter's opinions because the factual basis included information omitted from the Carter Report.

[1] *ASIC v Rich* (2005) 53 ACSR 110; (2005) 23 ACLC 430; [2005] NSWSC 149.

Justice Austin also ruled the Carter Report inadmissible in the exercise of his discretion under section 135. His Honour concluded that, if he was wrong in finding that Carter's opinions were based on excluded information, there was, at least, a substantial risk that they were. The Carter Report was unfairly prejudicial to Rich because if it was allowed into evidence, the defendants were exposed to having excluded material used against them unless they sought to expose it.

The appeal judgment

ASIC appealed to the New South Wales Court of Appeal. In a judgment delivered by Chief Justice Spigelman[2], the appeal was upheld against both the section 79 and the section 135 aspects of Justice Austin's decision.

The decision to exclude the evidence as not disclosing the factual basis of the expert opinion was wrong because it sought to determine whether or not the facts upon which the opinion was based were 'true'. This is not the correct approach to an expert opinion: the facts upon which the opinion is based are 'assumed' for the purposes of admissibility under section 79 of the *Evidence Act*. Those facts may later, with the benefit of all of the evidence, be proved or disproved. The opinion need only be *capable* of being based on the proved facts. The Court noted, however, that the weight to be given to the opinion may be affected by the fact it is based upon undisclosed facts.

The exercise by Justice Austin of his discretion under section 135 was found to have been brought into error by a failure properly to assess the probative value of the Carter Report against the other section 135 factors. The Carter Report should not have been rejected in its entirety based upon the 'pervasive' influence of the excluded material. What is required is an assessment of the strength of each opinion, including an assessment of the extent to which excluded material was used to form it. This assessment had not been undertaken. The matter was remitted to Justice Austin to reconsider the Carter Report in the correct way.

Rich applied for special leave to appeal to the High Court but was unsuccessful[3]. Ultimately, most of the Carter Report was either withdrawn by ASIC or ruled inadmissible by Justice Austin in his re-exercise of the section 135 discretion[4]. As dictated by the Court of Appeal, Justice Austin applied a process of paragraph by paragraph analysis of the Carter Report to ascertain the probative value of each opinion, balanced against its potential prejudice, confusion or time costliness.

Comment

These decisions have significant implications for the use of expert opinions in product liability litigation in New South Wales. The prior involvement of an expert with a litigant, or a product, and in particular, the information gained by an expert as a result of that prior involvement, may detract significantly from the weight of that expert's opinion if that information is not disclosed or to be used in evidence. While the opinion may still be admissible as an expert opinion, its probative value could be undermined and subject to rejection in the court's discretion.

Experts are used frequently in product development and testing, including testing designed to ensure regulatory standards are met. They may have been engaged in prior litigation concerning the same or similar products. The challenge of engaging an expert with such prior associations is to ensure, to the extent possible, that the information and assumptions provided to form the expert's opinion are corralled from information gained by the expert from any prior involvement. This in itself can be difficult, because it is accepted that experts draw on what the Court of Appeal called an 'entire body of experience' which is incapable of articulation. Distinguishing between a body of experience in the abstract, and information gained from a prior association in the specific instance, appears to be a complex and subtle task. If an expert's prior involvement appears likely to cause difficulties, it may be preferable to engage a different expert, although this may be problematic in areas where the requisite expertise is limited to a few individuals.

A further significant aspect of the *Rich* litigation concerns the way in which an expert's report may be attacked on the basis that undisclosed information has affected the expert's opinion. The attack is limited to the exercise of the court's discretion under section 135, and this requires an assessment of the probative value of each opinion in the expert's report *before* evidence proving or disproving the assumed facts has been heard. It would appear that the likelihood of having expert evidence ruled inadmissible during the interlocutory stage of a proceeding has reduced.

THE KAZAA CASE

On 5 September 2005 Justice Wilcox of the Federal Court delivered judgment in the case concerning breach of copyright by the use of the Kazaa file sharing system.[5] One widely reported aspect of the judgment concerns an expert report prepared for one of the parties by Professor Ross. Professor Ross was found to have amended his report to include wording suggested by a solicitor acting for the party which engaged him. That solicitor had put to Professor Ross that the change was designed to avoid his being exposed to criticism. The change included a conclusion which Professor Ross had said, in correspondence, he was not aware of. Justice Wilcox's judgment on this issue demonstrates the dangers which lie where an expert's opinion is changed at the request of the party which has sought that opinion:

> I am forced to conclude that Professor Ross was prepared seriously to compromise his independence and intellectual integrity. After this evidence, I formed the view it might be unsafe to rely upon Professor Ross in relation to any controversial matter.

In the Federal Court jurisdiction, the duty of an expert is first and foremost to the Court. As Justice Wilcox's judgment demonstrates, the Court is willing to act strongly where the evidence demonstrates that an expert is acting in a partisan manner.

[2] *ASIC v Rich* (2005) 54 ACSR 326; (2005) 23 ACLC 1111; [2005] NSWCA 152.

[3] *Rich v ASIC* [2005] HCATrans 416.

[4] *ASIC v Rich* [2005] NSWSC 650.

[5] *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242.

MARS RECALL

TOM HARBER, ARTICLED CLERK, ALLENS ARTHUR ROBINSON

According to various media releases and press articles, published since June of this year, MasterFoods, the Australian manufacturer of Mars and Snickers bars, received a series of threatening letters from an unknown extortionist. The first, received on the 8th of June, included a Snickers bar that had been contaminated with a pesticide-like substance. The letter made threats against an unconnected Sydney organisation, now known to be Star City Casino. MasterFoods shared the letter with police, though no recall action was taken at that stage. Subsequently, another letter making similar threats was received on the 15th of June. On the 1st of July, a third letter was received in which it was claimed that seven contaminated Mars and Snickers bars had been distributed throughout Sydney. In consultation with the police and health authorities, MasterFoods immediately issued a recall of all Mars and Snickers bars distributed in New South Wales.

This would prove to be one of New South Wales' most complex recalls. During the next two weeks, Mars and Snickers bars would be taken off the shelves, out of fundraising boxes and from vending machines across New South Wales. Over 3 million chocolate bars would be recalled from more than 40,000 outlets. To implement the recall successfully, MasterFoods engaged in a number of proactive measures: it set up a multi-lingual toll free customer hotline and a dedicated internet recall site; it took out full page newspaper ads, alerting the public to the risk; and it issued frequent media releases. Overall, excluding public and retailer participation, the entire process involved a team of over 1,000 people. MasterFoods, after consultation with environmental protection authorities and other experts, then destroyed the recalled bars at a secure location using a deep pit burial technique.

The ramifications flowing from this extortion threat and recall have been significant for MasterFoods. Estimates suggest that it will cost the company more than $10 million in lost revenue, a figure expected to rise. After the products are returned to shelves, it remains to be seen whether there is a continued reduction in sales, or whether MasterFoods can quickly restore confidence in the product, a litmus test for consumer loyalty. Recently, MasterFoods have taken one step toward lifting consumer confidence by handing out thousands of free chocolate bars as part of the its product relaunch.

Importantly, the MasterFoods experience raises a number of key issues of which all manufacturers should be aware. First, there is the need to ensure that appropriate insurance coverage is in place. Product recall insurance generally will not cover malicious acts as they are too hard to quantify.[1] Frequently, policies may only extend to those who become sick as a result of consuming contaminated product. However, in light of a number of recent Australian product contamination cases - Arnotts, Herron and SmithKline Beecham etc - manufacturers of various consumable products have hastened to ensure appropriate insurance coverage. According to the Insurance Council of Australia, there has been an increased demand for extensions on product recall policies to cover costs and losses associated with product contamination. So called 'extortion insurance' is no longer unusual.[2] MasterFoods has not commented on whether it was covered by insurance.

Second, manufacturers need to realise that if, unlike MasterFoods' prompt response, they failed to report receiving a contamination threat, they run the risk, should a consumer be injured, of civil or criminal liability, under common law and trade practices legislation. In addition, under various State and Territory regimes, they may be subject to prosecution as accessories after the fact, for hindering an investigation or for attempting to pervert the course of justice.

[1] Susannah Moran, 'Mars recall to cost $2m each month', *Australian Financial Review*, 5 July 2005.

[2] Jenelle Miles, 'Extortion Insurance Not Unusual for Big Firms, Council Says', *Australian Associated Press*, 21 March 2000.

Finally, it is very important for manufacturers, if they have not done so already, to establish a policy for reporting and handling extortion threats. They should ensure relevant staff are aware of the policy, and ensure the policy requires the immediate reporting of a contamination threat and extortion demand to the police and careful evaluation of whether and if any product testing should occur in advance of such reporting. Urgent consultation with lawyers in this regard is also advised.

DVT CLAIMS AGAINST AIRLINES CRASH IN HIGH COURT

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BACKGROUND

In proceedings commenced in the Supreme Court of Victoria against Qantas and British Airways, Mr Povey alleged that during the course of or following flights between Sydney and London he suffered from deep vein thrombosis (***DVT***) 'caused by the conditions of and procedures relating to passenger travel upon the flights'. Mr Povey identified these conditions and procedures as including:

- cramped seating from which it was not easy to move;
- the discouragement of movement about the cabin; and
- the offering of alcohol, tea and coffee during the flights.

Mr Povey also alleged that the airlines failed to warn him of the known dangers of, and precautions to be taken against, the occurrence of DVT.

Notably, Mr Povey did not allege that anything happened on board the aircraft which was in any respect out of the ordinary or unusual.

Mr Povey claimed damages under the *Civil Aviation (Carriers Liability) Act 1959* (Cth), section 11 of which incorporates the Warsaw Convention (the ***Convention***) and limits the rights of an injured passenger to those provided by the Convention. Article 17 of the Convention provides that:

> The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if *the accident which caused the damage* so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. [*emphasis added*]

The airlines applied for summary judgment alleging that the claims made against them were bound to fail.

JUDGMENT AT FIRST INSTANCE

At first instance, Justice Bongiorno dismissed the airlines' applications. His Honour held that the failure to warn passengers of the risk of developing DVT could be an 'accident' within the meaning of Article 17, if it was unusual for passengers not to be warned about that type of risk. The airlines appealed Justice Bongiorno's decision.

JUDGMENT OF THE COURT OF APPEAL OF THE SUPREME COURT OF VICTORIA

The Court of Appeal of the Supreme Court of Victoria upheld the airlines' appeal and ordered that the proceedings be permanently stayed. The court unanimously held that a failure to warn, of itself, could not constitute an 'accident' for the purpose of Article 17. By a majority of 2-1, the court held that mere non-action or any failure to act could not be characterised as an 'accident'.

This approach was consistent with the approach adopted by the UK Court of Appeal in *The Deep Vein Thrombosis and Air Travel Group Litigation*[1], in which the UK Court of Appeal held that an 'accident' involved an 'event' and that neither the usual features of travel by aircraft nor the failure to give a warning about the risk of developing DVT could be 'accidents' within the meaning of Article 17 because they were not 'events'.

Mr Povey was granted special leave to appeal the orders of the Victorian Court of Appeal to the High Court.[2]

[1] [2003] All ER (D) 69; [2003] ERCA Civ 1005; [2004] QB 234; [2004] 1 All ER 445; [2003] 3 WLR 956; [2004] 1 All ER (Comm) 459.

[2] [2004] HCA Trans 345.

THE APPEAL TO THE HIGH COURT

During the course of the appeal to the High Court, the parties accepted the following propositions established by decisions of the US Supreme Court. First, that an 'accident' for the purpose of Article 17 is 'an unexpected or unusual event or happening that is external to the passenger'.[3] Second, that a failure to act could be an 'accident' for the purposes of Article 17.

THE DECISION OF THE HIGH COURT

The argument on appeal was confined to the question of the meaning of 'accident' in Article 17.[4] In a joint judgment, Chief Justice Gleeson and Justices Gummow, Hayne and Hayden (the majority) (with whom Justice Callinan agreed) observed that in French, English, American and Australian legal discourse, 'accident' may be used to refer to the 'event' of a person's injury, or to the 'cause' of injury. The majority contrasted the meaning of 'accident' with that of 'accidental', which is used to describe the cause of an injury (and not the event of a person's injury) and is often used as an antonym to 'intentional'. In this context, the majority stated that the term 'accident' in Article 17 refers to the 'event' of the injury; and not to the 'cause' of the injury.[5] In light of this, the majority stated that there were 3 distinct concepts in Article 17, namely:

A. damage;
B. 'the death or wounding of a passenger or any other bodily injury suffered by a passenger'; and
C. the 'accident which caused the damage so sustained'.

The majority held that the 'accident' under Article 17 must be 'an unfortunate event, a disaster, a mishap'; not 'an adverse physiological consequence which the passenger has suffered'.[6] Accordingly, the majority characterised the development of DVT as 'accidental', but not an 'accident'[7], within the meaning of Article 17.

In the majority's view, when considering the application of Article 17, the correct approach is to ask:

1. what happened on board the aircraft (or during embarking or disembarking) that caused the injury of which the complaint is made; and
2. was what happened unusual or unexpected?[8]

Applying this 2-stage approach, the court unanimously held that, in the absence of a practice or express obligation to warn of the risk of developing DVT, the airlines' failure to do so was not an 'event' and, therefore, could not be an 'accident' within the meaning of Article 17.[9] Further, the majority noted that there was no basis for introducing concepts of (e.g.) the common law of negligence, as a basis for a duty to warn of the risk of developing DVT to the construction or application of international treaties, such as the Convention.[10]

The majority also noted that the description of what happened as a 'failure' suggests that the warning could or should have been given on the aircraft. If it was necessary or appropriate to give a warning, the majority considered that it is not apparent why it should not have been given at a much earlier time (e.g. at the time of making travel arrangements), which would have taken the 'failure' outside the scope of the circumstances in which the airlines would have been liable under Article 17, because it did not take place on board the aircraft or in the course of embarking or disembarking. Moreover, the majority considered that the court was concerned with what happened on the aircraft; not what 'might have, could have, or perhaps should have happened'.[11] As, by the plaintiff's own omission, nothing unusual or unexpected happened on board the aircraft or in the course of embarking or disembarking, the court held by a majority of 6-1 that no cause of action was established.[12]

[3] *Air France v Saks* 470 US 392 (1985)

[4] [2005] HCA 33 at para [27].

[5] [2005] HCA 33 at para [33]; citing *Air France v Saks* 470 US 392 at 400 (1985).

[6] [2005] HCA 33 at para [34].

[7] Ibid.

[8] [2005] HCA 33 at para [36].

[9] [2005] HCA 33 at paras [41] to [43] per Chief Justice Gleeson and Justices Gummow, Hayne and Hayden; paras [84] to [86] per McHugh J; paras [201] per Kirby J; [203] per Callanan J.

[10] [2005] HCA 33 at [41].

[11] [2005] HCA 33 at para [42].

[12] Chief Justice Gleeson and Justices Gummow, Hayne, Heydon, Kirby and Callinan; Justice McHugh dissenting

IMPLICATIONS OF THIS DECISION

This decision will stall all claims in Australia by passengers against airlines for damages as a result of developing DVT during the course of a flight where the plaintiff is unable to identify:

1. any unusual or unexpected event external to the passenger on board the aircraft or in the course of embarking or disembarking that could be characterised as an accident; or
2. if the claim includes an allegation that the airline failed to warn the passenger of the risk of developing DVT, the practice or the source of the obligation to do so.

This is likely to be most, if not all, historical claims in respect of DVT.

In the context of the desirability of signatory countries adopting a consistent approach to the interpretation of the Convention, by leaving open the issue of whether a failure to act where there is a duty to do so could be an 'accident' within the meaning of Article 17, the reasoning of the High Court is consistent with that of the US Supreme Court in *Olympic Airways v Husain*. By holding that a failure to warn of the risk of developing DVT is not an accident in the absence of a duty to do so, the High Court's reasoning is also consistent with that of the UK Court of Appeal in *Re Deep Vein Thrombosis and Air Travel Group Litigation*. Now that it has become usual in the airline industry to provide warnings about the risks of developing DVT and of precautions that may be taken to mitigate this risk, it may be open to airline passengers who develop DVT in the future to argue that a failure by an airline to deliver these messages is an 'accident' with the meaning of Article 17. If such an argument succeeded, the plaintiff would still need to overcome significant evidentiary difficulties to prove that the failure to warn caused the passenger to develop DVT.

The next major development in the DVT story is likely to be the appeal to the UK House of Lords (the court of last resort in the UK), which was scheduled to be heard on 19 and 20 October 2005. The decision is likely to be delivered in the following months.

BRIEF

National Product Liability Association