



The quarterly publication of the  
National Product Liability Association  
Fourth Quarter: December 2005

# BRIEF

## National Product Liability Association

The views expressed in BRIEF are those of the authors of the articles and do not necessarily represent those of the editors or of NPLA. BRIEF aims to keep NPLA members informed on current issues and developments in Product Liability. It should not be used or relied on as a substitute for legal advice. Members and readers should seek professional advice on any specific product liability issues.

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# PRESIDENT'S REPORT 2005

DAVID POULTON, PRESIDENT, NPLA

I am pleased to report on a successful past 12 months for the Association.

## EXECUTIVE COMMITTEE

In 2005 the Executive Committee consisted of:

David Poulton – President  
Peter Holloway – Vice President  
Melissa Daly – Treasurer  
Derek Begg – Secretary  
Andrew Morrison – Immediate Past President

## COMMITTEE MEMBERS:

Pam Madafoglio (NSW)	George Karalis Maryjane Crabtree
Annette Hughes (Joint Brief Editor)	Peter O'Donahoo Jane Wilhelm
Belinda Thompson (Joint Brief Editor)	Ric Morgan

## BRIEF

We continued this year with quarterly issues of our periodical, Brief. The standard of contributions has continued to be exceptionally high. As always we welcome contributions from all of our members. We encourage members who have not previously contributed articles and may be in a position to do so to consider submitting an article for publication. Thanks to all of our contributors this year.

Annette Hughes and Belinda Thompson have continued as joint editors this year and on behalf of the Association, I would like to thank them for their sterling efforts. In recent times Maryjane Crabtree has acted as relieving editor for Brief as both Annette and Belinda have been on maternity leave. Thanks to Maryjane for stepping into the breach with her usual aplomb.

## LOBBYING SUB-COMMITTEE

The Lobbying Sub-Committee has done a stellar job this year. The major focus of activity has been our response to the Productivity Commission's investigation into the review of the Australian Consumer Product Safety System currently being undertaken by the Ministerial Council of Consumer Affairs (**MCCA**).

The NPLA had made a submission to the MCCA in November 2004 and participated in feedback and consultation meetings conducted by the Productivity Commission in February and October 2005.

The NPLA has carefully considered the issues raised by the review and has responded in a careful and detailed fashion in a manner which we believe reflects the interests of our members.

The NPLA is strongly of the view that so far there is insufficient evidence to support the proposition that a General Safety Provision, as proposed in the MCCA options paper, would generate net benefits over and above those currently achieved by existing regulation. We are pleased to note that the Productivity Commission so far has similarly not been convinced. The NPLA has made detailed submissions in a number of other areas relevant to the review. We will continue to report on these activities in Brief.

Peter Holloway, Deputy President of NPLA in 2005 and our incoming President, has led the NPLA's lobbying Sub-Committee with great distinction. The Association is deeply indebted to Peter and his Sub-Committee for the diligent work they have done again this year.

## WEBSITE

Thanks to the efforts mainly of our Treasurer, Melissa Daly and our Secretariat led by Athena Tashevskva, I am pleased to be able to report that we have been able to launch a completely re-designed website this year. The website already contains a wealth of useful information for our members and is easy to navigate. I am sure that we will continue to improve the website in coming years, but in the meantime commend the existing site to our members. If our members would care to log onto [www.npla.com.au](http://www.npla.com.au) I am sure they will be impressed.

## SECRETARIAT

Whilst on the subject of the Secretariat, I would again like to acknowledge the excellent assistance provided by Athena Tashevskva, the Manager of our Secretariat at the Australian Industry Group. Athena and her team have again provided us with efficient, high quality service this year.

## SEMINARS

The past twelve months have seen a number of interesting and informative seminars for our members. Just on twelve months ago, in conjunction with our colleagues at the Australian Insurance Law Association and the Australian & New Zealand Institute of Insurance & Finance, we supported seminars in Melbourne and Sydney of the Defence Research Institute, a substantial association of US and international defence lawyers. The conference, entitled 'International Liability: New Theories of Liability from the United States - Will you be Ready?' enabled our members to hear from some of the leading trial attorneys in the United States, as well as a number of eminent local speakers, including three NPLA Committee members.

On the same day as the Melbourne seminar the Association was also involved in the organisation of a very successful dinner entitled 'Women in Law' at which the keynote speakers were Chief Justice Marilyn Warren of the Supreme Court of Victoria and the Immediate Past President of the Defence Research Institute Sheryl J Willert of the firm of Williams, Kastner & Gibbs PLLC in Seattle.

In calendar 2005 our seminars have had something of a 'biotech' orientation. In Sydney in May, we held a successful seminar entitled 'Genetic Engineering – The Legal Implications', addressed by Professor Ron Trent from the University of Sydney and Professor David Weisbrot, the President of the Australian Law Reform Commission.

A Melbourne seminar held in June dealt with changes to occupational health and safety laws which impact product suppliers. The seminar was addressed by Chris Maxwell QC (now President of our Court of Appeal) and Stan Krpan of WorkSafe.

In October we returned to the biotech theme with a seminar entitled 'Biotech and Stem Cell Products – Invention, Commercialisation & Liability', addressed by Dr Alan Trounson from Monash University, Dr Geoffrey Vaughan from the Industry, Research & Development Board, and Maryjane Crabtree from the NPLA Committee.

I should also note under this heading that at our last general meeting we tried out the idea of inviting to our AGM a speaker on a topic not necessarily directly connected with product liability.

Twelve months ago we kicked off this concept very successfully with Melbourne journalist and broadcaster, John Silvester providing our members and guests with an insight into the activities of Melbourne's underworld.

This year we are delighted to welcome Dr Leslie Cannold as our keynote speaker. Dr Cannold is a bioethicist currently employed as a Research Fellow at the Centre for Applied Philosophy & Public Ethics at the University of Melbourne, and is a well-known writer and social commentator. This year the topic is a little more product liability oriented and like all our members I am looking forward to an entertaining and informative presentation.

Over the next year we will continue to develop new seminar programs which we believe will interest our members. We are aiming to continue to raise our profile in both Melbourne and Sydney.

## LOOKING FORWARD

This is my final AGM as President of NPLA. I am pleased to welcome Peter Holloway as our new President in 2005, and look forward to continue serving on the Committee as its Immediate Past President.

I would like again to thank all members of the Executive Committee for their hard work in the interests of the Association this year. I am delighted that all of our Melbourne Committee is continuing next year, that we are looking to expand our representation in Sydney, and that today we welcome a new Committee member in Cathy Scalzo who will be joining our Committee in Melbourne.

As I mentioned above, our two Brief editors have been on maternity leave recently. It would be remiss of me not to offer the Association's and my personal congratulations - but not only to Annette and Belinda. The Executive Committee has been blessed this year by no less than four new arrivals and one more on the way very shortly. Accordingly, hearty congratulations to our two mothers already mentioned, to our other new mother, Jane Wilhelm, to new father Andrew Morrison, and to expectant father George Karalis, and of course to their spouses and proud families.

Finally, I would like to wish all of our members and friends compliments of the Season and best wishes for the New Year.

# CRIMES (DOCUMENT DESTRUCTION) BILL (2005)

RUTH JEFFERS, ARTICLED CLERK, MINTER ELLISON

## BACKGROUND TO LEGISLATIVE REFORM

The 2002 decision of Justice Eames of the Victorian Supreme Court in *McCabe v British American Tobacco Australia Services*<sup>1</sup> to strike out evidence for failure to comply with discovery orders, has gained much notoriety. Subsequent to *McCabe*, Victorian Attorney-General, Robert Hulls asked Professor Peter Sallmann (Victorian Crown Counsel) to specifically advise on the adequacy of current laws, procedures and practices relating to document destruction. Sallmann concluded his investigations in May 2004. An overview of the Sallmann recommendations, written by Peter Holloway (Freehills), can be found in the September 2004 edition of *Brief*. Further, an insight into the implications of these recommendations, written by David Poulton and Sandip Mukerjea (Minter Ellison) was published *Brief*, December 2004.

In short, Sallmann's '*Report on Document Destruction and Civil Litigation in Victoria*', made the following recommendations for reform:

- a new statutory offence to cover the destruction of documents to prevent their use in judicial proceedings; and
- civil law recommendations to:
  - codify the powers of the courts to intervene in proceedings affected by the unavailability of documents (by way of a broad judicial discretion and amended rules of discovery); and
  - create a professional conduct rule to apply to legal practitioners when advising clients about document retention and destruction.

Attorney-General, Rob Hulls said Victoria will be the first State to create a specific document destruction offence whereby a corporation can be prosecuted in circumstances where there was no direct instruction to destroy a document but it was implied by the corporation's culture.

## THE NEW BILL

In response to the Sallmann recommendations, *the Crimes (Document Destruction) Bill 2005 (the Bill)* was introduced into the Victorian Parliament on 16 November 2005. The purpose of the Bill is to amend the *Crimes Act 1958* to create a new offence in relation to the destruction of a document or other thing that is, or is reasonably likely to be, required as evidence in a legal proceeding. These statutory provisions will be developed with consultation and will be introduced in the 2006 autumn session of Parliament. The Bill (once enacted) is likely to come into operation on or before 1 September 2006.

Clause 3 of the Bill inserts a new Division into the *Crimes Act 1958* containing the new offence, whereby Division 5 (new sections 253–255) will be inserted into Part 1 of the *Crimes Act 1958*.

## NEW SECTION 253 – DEFINITIONS

Section 253 defines certain terms for the purpose of the Bill. Of note are the following:

- The term 'corporate culture' is defined to mean an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant conduct (a defined term) is carried out or the relevant intention (also a defined term) formed.
- The term 'relevant conduct' is defined to mean the destruction, concealment, or rendering illegible, undecipherable or incapable of identification, of a document or other thing of any kind.
- The term 'relevant intention' is defined to mean the intention of preventing a document or other thing of any kind from being used in evidence in a legal proceeding.

## NEW SECTION 254 – INDIVIDUALS

Section 254(1) creates a new offence of destruction of evidence, pertaining to individuals, as follows:

A person who –

- knows that a document or other thing of any kind is, or is reasonably likely to be, required in evidence in a legal proceeding; and either –
- destroys or conceals it or renders it illegible, undecipherable or incapable of identification; or
- expressly, tacitly or impliedly authorises or permits another person to destroy or conceal it or render it illegible, undecipherable or incapable of identification and that other person does so; and
- acts as described above with the intention of preventing it from being used in evidence in a legal proceeding –

is guilty of an indictable offence.

The term 'document' is broadly defined under section 38 of the *Interpretation of Legislation Act 1984*. The term therefore includes, in addition to a document in writing, items such as photographs, labels, discs or other devices in which sounds or other data are embodied so as to be capable of being reproduced, films or other devices in which one or more visual images are embodied so as to be capable of being reproduced, and other markings which are capable of carrying a definite meaning to persons conversant with them.

The offence will apply where all of the elements of the offence can be proven by the prosecution. The offence will not apply to lawful forms of document destruction that do not involve the type of criminal misconduct covered by the offence.

The maximum penalty for individuals will be five years imprisonment or a fine of 600 penalty points (currently \$62, 886) or both.

Section 254(2) provides that the new offence applies with respect to a legal proceeding, whether the proceeding is one that is in progress or is to be, or may be, commenced in the future.

## NEW SECTION 255 – CORPORATIONS

The new offence will also apply to corporations. Many parties to litigation are corporations and often these corporations have significant financial and legal resources. Accordingly, the Bill is designed to ensure that modern corporations take their obligations regarding document management and retention policies very seriously.

The Bill provides additional principles that indicate how the offence applies in the corporate context. In general terms, the offence will apply if an employee, agent or officer of the corporation (an associate) knows that the document is, or is reasonably likely to be, required in evidence; and

- (i) an officer of the corporation destroys or conceals the document with intention to prevent use in evidence; or
- (ii) the corporation authorises or permits the destruction or concealment of the document with intention to prevent use in evidence.

Authorisation or permission could be provided by the corporation's board of directors or officers (unless the corporation exercised due diligence to prevent such authorisation or permission) or as a result of the corporation's 'corporate culture'.

'Corporate culture' will cover situations where corporate policies and processes provide implied authorisation or permission. For example, there may be situations where, despite the absence of formal policy documents, the reality was that non-compliance was expected.

The maximum penalty for corporations will be a fine of 3000 penalty units (currently \$314,430).

## DOCUMENT DESTRUCTION AND CIVIL PROCEEDINGS

The Victorian Government also plans to implement Sallmann's recommendations concerning civil proceedings in all Victorian courts.

The legislation will enable courts to intervene in proceedings affected by the unavailability of relevant documents, including when documents have been destroyed or removed in advance of legal proceedings.

The legislation will focus on whether the unavailability of relevant documents has made a fair trial impossible. This is intended to complement the criminal offence which will address the unlawfulness of the conduct.

Although the courts currently possess some power to deal with the unavailability of documents, the new legislation aims to clarify what the powers of the courts are and what the consequences might be for parties to litigation who make relevant documents unavailable, whether those documents become unavailable pre- or post-commencement of proceedings.

It is envisaged that these statutory provisions will be introduced in the 2006 autumn session of Parliament. It is anticipated that the commencement of legislation dealing with civil proceedings will coincide with the commencement of the *Crimes (Document Destruction) Bill*.

## CRITICISM OF STATE REFORM

As raised in the December 2004 edition of *Brief*, it has been contended that Australia needs a *federal* approach to document retention and monitoring. Arguably, if new document destruction laws are introduced in a piecemeal fashion throughout Australian states, national companies may find it very difficult to operate in compliance with a patchwork of state legislation. The prevalence of electronic communication via email further exacerbates the potential for confusion. For the time being, however, it seems imminent that state legislation will govern the destruction of documents. Not all states may follow the Sallmann recommendations as closely as Victoria, conversely, some states may not introduce legislation at all. With Victoria being the front runner in response to the Sallmann report, the effect of such potential diversity remains to be seen.

# HEALTH CLAIMS FOR FOOD: FOOD STANDARDS REVIEW UPDATE

MELISSA DALY, SENIOR ASSOCIATE, MALLESONS STEPHEN JAQUES

The June 2005 edition of *Brief* contained a review of the various options being considered by Food Standards Australia and New Zealand (**FSANZ**) in relation to the regulation of food labelling and advertising in Australia and New Zealand. Since 2003, FSANZ has been carrying out a review and consultation with respect to removal of the prohibition of health claims for foods. This review was undertaken in response to a request by the Australian and New Zealand Food Regulation Ministerial Council to develop a standard which would allow food manufacturers to make health claims if the food is safe and the claims can be scientifically substantiated.

On 28 November 2005, FSANZ released its Draft Assessment Report *'Nutrition, Health and Related Claims – A Guide to a New Standard'*. After

considering comments from 147 submitters and undertaking research into the impact of health and nutritional claims upon the consumption choices of consumers, FSANZ has developed a proposed claims system which will allow the making of nutrition and health claims for foods, provided the claims meet specific conditions and are fully substantiated. Pre-market substantiation and FSANZ approval will be required for 'high-level' claims.<sup>1</sup> The new standard will be incorporated in the Australia New Zealand Food Standards Code, and be legally enforceable under the various State and Territory Food Acts.<sup>2</sup> Breaches of the standard will be enforced by state and territory consumer affairs authorities. In addition, a 'Health Claims Watch Dog' will be established by the governments of Australia and New Zealand to monitor and record complaints received about food related health claims.

<sup>1</sup> High level claims refer to the presence of a nutrient or substance in a food and its relationship to a serious disease or condition or to an indicator of a serious disease.

<sup>2</sup> See, for example, s 16(4) of the Food Act 1984 (Vic), which states that a person must not sell or advertise for sale any food in a manner that contravenes a provision of the Food Standard Code.

Key features of the new standard include:

- a requirement that all claims be substantiated;
- criteria for foods to be the subject of claims (for example, food carrying a health claim must contain no more than 16g total sugars per serve);
- specific qualifying criteria for nutrient content claims (for example, food described as 'low salt' must contain no more than 120mg of salt per 100g for solid food);
- additional labelling for some content claims (for example, the percentage of a daily reference value must be stated);
- specific conditions for some claims (for example, a weight loss or weight maintenance claim must state that the specific health effect must be considered in the context of the importance of regular exercise);
- substantiated and approved claims about diet-disease relationships (for example, claims that a low sodium diet assists in reducing blood pressure will be allowed); and
- recommendations for endorsement programs, cause-related marketing and dietary advice.

Substantiation of health claims will be a key requirement of the new standard. The report contains a substantiation framework which must be used by manufacturers before making a health claim for a food product.

General level health claims and nutrient content health claims can be made based on a pre-approved list of statements considered to have been substantiated, or based upon authoritative, generally accepted information sources.

High level health claims will involve a case by case assessment by FSANZ. FSANZ is currently developing a list of pre-approved high level claims that will be available for use when the Standard comes into force. To date, the following diet-disease relationships have been substantiated:

- calcium, vitamin D and osteoporosis;
- calcium and bone mineral density;
- sodium and blood pressure;

- folic acid and neural tube defects;
- saturated fatty acids and LDL-Cholesterol; and
- saturated and trans fatty acids and LDL-Cholesterol.

Other diet-disease relationships, such as the role of fruit and vegetables in preventing coronary heart disease, are currently under review by FSANZ.

Any new high level claims require pre-approval by FSANZ before use. Once a new claim has been approved, it will be available for use by all producers and manufacturers. A confidentiality regime will be established to ensure that commercial confidentiality is not jeopardised by the assessment process.

Health claims will only be able to be made on foods which meet certain qualifying standards, in order to prevent health claims being made for 'unhealthy' foods. In particular, foods with high levels of salt, saturated fats and sugar will not be able to carry claims. Furthermore, health claims will not be permitted on alcoholic beverages or infant formula.

The new regime reflects a balancing exercise between the interests of consumers, industry, and public health agencies. The new standard will encourage innovation on the part of food manufacturers, while providing clarity and certainty. The strict substantiation process and eligibility criteria should work to protect consumers from misleading and inappropriate health claims. A lengthy transitional period (two years) provides the food industry with ample time to allow development of packaging and labelling materials.

A further round of public consultation is underway, with submissions regarding the proposed standard being invited from industry and the public.

All submissions must be provided to FSANZ by 22 February 2006. Following receipt of submissions, the FSANZ Board will consider a final report in May 2006, following which a recommendation will be made to the Ministerial Council. Progress of the development and implementation of the new standard can be viewed at [www.foodstandards.gov.au/whatsinfood/healthnutritionandrelatedclaims](http://www.foodstandards.gov.au/whatsinfood/healthnutritionandrelatedclaims)

# CASE NOTE:

## CSR LTD V EDDY (2005) HCA 64

RUTH JEFFERS, ARTICLED CLERK, MINTER ELLISON

In *CSR Limited v Eddy*, Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ in the High Court of Australia held that a person who has suffered personal injury cannot recover special damages on account of a loss of capacity to care for a disabled family member.

### OVERVIEW

The major focus of the High Court in *CSR Limited v Eddy* was the re-examination of the damages principle behind *Sullivan v Gordon*. *Sullivan v Gordon* damages do not consider the injured person's needs, rather, the needs of a third party who the injured person has provided services for. The *Sullivan* case had not been applied consistently across Australia. Accordingly, the need for national consistency was one reason why leave to appeal was granted. The majority held that 'all the Australian cases supporting *Sullivan v Gordon* as a principle of Australian common law should be overruled.' This decision has reinstated the law in *Burnicle v Cutelli*, whereby, the inability of an injured person to care for others is assessed as part of general damages only. This decision effectively restricts the overall damages awarded to an injured person at common law, however, it also alleviates the court's difficult task of calculating each plaintiff's 'need' to care for others.

### FACTS

John Thompson developed malignant mesothelioma as a result of exposure to asbestos dust and fibre between 1960 and 1963 when working for a factory owned by CSR and Micalco in Adelaide. The companies admitted liability for negligently exposing Mr Thompson to asbestos and causing him to contract mesothelioma which he was diagnosed with in 2002, and died from in November 2003, aged 61.

In April 2003, the Dust Diseases Tribunal of NSW ordered CSR and Micalco to pay \$465,899.49 in damages to Mr Thompson, which included \$165,480 awarded in damages described as '*Sullivan v Gordon* damages'. This amount was awarded as compensation for Mr Thompson's inability, after the onset of mesothelioma, to continue to provide domestic assistance to his wife, who suffered from osteoarthritis. The figure of \$165,480 was calculated on the basis that Mr Thompson would have cared for his wife for another 20 years, for approximately 1.5 hours a day, at \$25 per hour (equivalent commercial rate). The total calculation was discounted by 20% for contingencies.

### APPEAL

The \$165,480 *Sullivan v Gordon* damages and was the subject of the appeal by CSR and Micalco. The New South Wales Court of Appeal rejected CSR and Micalco's application for leave to re-argue *Sullivan v Gordon*, a 1999 NSW decision, and upheld this aspect of the damages. The companies appealed to the High Court.

### DECISION – GLEESON CJ, GUMMOW AND HEYDON JJ.

The High Court unanimously allowed the appeal and held that *Sullivan v Gordon* should be overruled. The Court held that *Sullivan v Gordon* losses should be covered by general damages rather than as a head of special damages. Accordingly, the High Court reduced Mr Thompson's total award of damages by subtracting the *Sullivan v Gordon* award of \$165,480.

The High Court did not increase the award for general damages allowed by the court below (\$165,000) on the basis that that sum already adequately compensated for all losses of amenities of life including the plaintiff's inability to provide services to his incapacitated wife.

## THE EFFECT OF THE JUDGMENT

As a result of the judgment, plaintiffs are no longer able to claim *Sullivan v Gordon* damages based on the commercial cost of providing such gratuitous services. However, plaintiffs are permitted to include as part of their claims for general damages (for pain and suffering and loss of enjoyment of life), the fact that they are no longer able to provide the gratuitous services to, for example, their spouse, and this can be considered in assessing general damages.

In *Burnicle v Cutelli* the majority did not hold that the lost capacity of injured plaintiffs to assist their families was incomensurable. Rather, if the loss was to be compensated, such compensation was to be given not as special damages but as part of general damages. Reynolds JA, with whom Mahoney JA agreed, said:

An assessment must be made as a component of an award of general damages, just as must be done in respect of any other deprivation which does not produce financial loss. The injured plaintiff has in such a case as this lost part of a capacity, the exercise of which can give to her pride and satisfaction and the receipt of gratitude, and the loss of which can lead to frustration and feelings of inadequacy.

The reasoning in *Burnicle v Cutelli* effectively denied compensation for this type of loss to be calculated by reference to the market cost of replacing the services. Accordingly, in *CSR Limited v Eddy*, the majority reasoned that although an injured plaintiff who loses the ability to care for a disabled relative loses 'something of real value' to the plaintiff as well as the relative, such a loss is inconclusive: There is a loss, but it can be compensated as part of general damages.

## GRIFFITHS V KERKEMEYER DAMAGES

*Griffiths v Kerkmeyer*<sup>2</sup> damages are awarded to injured plaintiffs to cover the commercial cost of nursing and domestic care provided to the plaintiff by family or friends. The distinguishing focus of this case is that such services are gratuitous and received by the plaintiff rather than provided by the plaintiff to others. Accordingly, the judgment in *CSR Limited v Eddy* will not effect the ability to recover *Griffiths v Kerkemeyer* damages. The joint

judgment of Gleeson CJ, Gummow and Heydon JJ confirmed this as follows:

*Griffiths v Kerkemeyer* is well established, no challenge was made to it in this case, and nothing in this judgment is intended to encourage any future challenge.

Nonetheless, before *Griffiths v Kerkemeyer* damages will be awarded, the plaintiff must have incurred a commercial cost of nursing and domestic services, which have been provided to them by family or friends. Such services must be reasonably required by the plaintiff, as a result of the injuries, subject to the claim.

## VICTORIAN LEGISLATION AND SULLIVAN V GORDON

Gleeson CJ considered that a possible ground for not overruling *Sullivan v Gordon* might exist if it had achieved certain types of legislative recognition. An example would arise if the states had enacted legislation which assumed its existence and correctness, particularly if the legislation was only workable on the assumption of its correctness. However, only three Australian legislatures have dealt with the issues raised by *Sullivan v Gordon* – Queensland, ACT & Victoria. The relevant Victorian legislation states as follows:

Section 28ID of the Wrongs Act 1958 (Vic) provides:

No damages may be awarded to a claimant for any loss of the claimant's capacity to provide gratuitous care for others unless the court is satisfied that –

- (a) the care –
  - i) was provided to the claimant's dependants; and
  - ii) was being provided for at least 6 hours per week; and
  - iii) had been provided for at least 6 consecutive months before the injury to which the damages relate; or
- (b) there is a reasonable expectation that, but for the injury to which the damages relate, the gratuitous care would have been provided to the claimant's dependants -
  - i) for at least 6 hours per week; and
  - ii) for a period of at least 6 consecutive months.

Although the Victorian legislation assumes a common law position, (with limitations) it was not sufficient in this circumstance to lend more authority to the decision in *Sullivan v Gordon*.

Gleeson CJ concluded by saying, if it is desired to confer the rights recognised in *Sullivan v Gordon* on plaintiffs, the correct course to follow is that taken in the Australian Capital Territory and Scotland: to have the problem examined by an agency of law reform, and dealt with by the legislature if the legislature thinks fit. Accordingly, all the Australian cases supporting *Sullivan v Gordon* as a principle of Australian common law should be overruled.

## MCHUGH J

In a separate judgment McHugh J stated that if the law of damages was to retain its coherence, overruling *Sullivan v Gordon* was a necessity. It was a decision inconsistent with long established principle and finds no support in *Griffiths v Kerkemeyer*. The critical difference between *Griffiths v Kerkemeyer* and the cases that have extended it is that *Griffiths v Kerkemeyer* damages arise as a direct result of the creation of a need in the plaintiff of the provision of the particular services. McHugh J held that it is therefore inherently limited. By contrast, no inherent limit exists for *Sullivan v Gordon*-type damages.

McHugh J stated that the correct question is whether the work is being performed in response to an injury-caused need of the plaintiff. This is the essence of the error in *Sullivan v Gordon*: it moved

from the needs of the plaintiff (which *Griffiths* sanctioned) to the needs of third parties. It elided the plaintiff's injury-caused needs with the pre-injury needs of others, albeit using one of the policy considerations behind *Griffiths v Kerkemeyer*, namely that innocent parties should not suffer unrecoverable losses as a result of the tortfeasor's negligence.

McHugh J reasoned it was not enough that the policies supporting *Griffiths v Kerkemeyer* damages and *Sullivan v Gordon* damages were consistent. *Sullivan v Gordon* was not supported by anything decided or said in *Griffiths v Kerkemeyer*. *Sullivan v Gordon* damages were not concerned with the injured person's needs but the needs of a third party for whom the injured person has provided services. Accordingly, McHugh J held that *Sullivan v Gordon* and the cases that follow it, or were decided on the same or similar grounds, are wrong in law and must be overruled.

## CALLINAN J

Callinan J agreed with the reasons and conclusions of the majority on the substantive issues of the appeal. However, he took a different view on the issue of costs. His honour stated that settlements are encouraged by the courts in the public, as well as the parties', interests. The purpose that they are intended to serve is not to be subverted in a particular case simply because one of the parties has miscalculated his prospects. The respondent in this case, should therefore have to pay the appellants' costs of both appeals.

# NEW TRIBUNAL FOR DUST CLAIMS

## SUSIE DOWNIE, LAWYER, ALLENS ARTHUR ROBINSON

The South Australian Government has moved to establish a South Australian Dust Diseases Tribunal in the wake of *BHP Billiton Pty Ltd v Schulz* (2004) 211 ALR 523, where the High Court held that proceedings brought by a plaintiff who had suffered from exposure to asbestos in South Australia should be removed from the New South Wales Dust Diseases Tribunal to the Supreme Court of South Australia.

The South Australian Parliament has considered reform of the law governing asbestos related diseases in the past. In 2001, the Survival of Causes of Action Act 1940 was amended to provide that where an action is brought in respect of a dust-related condition, damages for pain and suffering, bodily and mental harm, and curtailment of expectation of life are recoverable for the benefit of the plaintiff's estate where the plaintiff dies before the action is finally determined.

The Dust Diseases Bill 2005, which passed through both Houses of Parliament on 1 December 2005, represents a far more extensive revision of the legal framework governing dust disease actions. It is largely similar to the equivalent legislation in New South Wales; indeed, the expressed object of the Bill is to ensure that South Australian residents who claim rights of action for or in relation to dust diseases 'have essentially the same legal and procedural advantages as are available in the Dust Diseases Tribunal of New South Wales'.

Some key elements of the Bill are:

- No temporal limitation will apply to a dust disease action.
- The Tribunal itself will be established as a separate division of the South Australian District Court, and the procedure is to correspond "as nearly as practicable" to the procedure in the New South Wales Dust Diseases Tribunal.
- Special rules of court will be made by the Chief Judge of the District Court to deal with dust disease actions. Any dust disease action commenced in the District Court before the commencement of the proposed Act will be transferred to the Tribunal, while such an action commenced in the South Australian Magistrates Court or Supreme Court will be transferred to the Tribunal on the application of any party.
- Special rules of evidence and procedure will apply in the Tribunal. For example, the Tribunal may admit evidence admitted in any earlier dust disease action before the Tribunal, a court or the New South Wales Dust Diseases Tribunal as evidence in an action before the Tribunal, whether or not the earlier action was between the same parties. Further, once issues of a general nature have been established by a decision of the Tribunal, the New South Wales Dust Diseases Tribunal or another court or tribunal of coordinate jurisdiction, the Tribunal will not permit the issues to be re-litigated unless it is of the opinion that it is in the interests of justice to do so.

- Special rules will apply where multiple defendants or insurers are involved. For multiple defendants, the Tribunal will appoint a representative defendant to represent all defendants, and judgment will be given against that defendant (with contributions recoverable from the other defendants). The Tribunal will also, where multiple insurers are involved, appoint a designated insurer for the purposes of the action.
- The legislation will have retrospective operation, and the amendments made will apply to causes of action arising and actions commenced before or after its commencement. However, it will not affect the rules of procedure for an action if the hearing had commenced before the commencement of the proposed Act.

The Tribunal will also have significant powers with respect to damages. In determining damages, the Tribunal is directed to have regard to and seek consistency with awards in corresponding actions before the New South Wales Dust Disease Tribunal. Further, the Tribunal will have the power to award provisional damages. If it appears that a dust disease might in the future develop into another dust disease of pathological condition, the Tribunal will be able to award damages in the first instance on the assumption that the possible future development will not occur. If a dust disease of pathological condition subsequently occurs, the Tribunal may award damages at a future date.

The Bill was first read on 9 November 2005 and has been passed with some urgency by the Parliament. It will become clear in coming months whether the number of plaintiffs bringing claims in the Tribunal reflects that urgency. Regardless, the establishment of the Tribunal is likely to result in higher damages for plaintiffs, in line with the damages awards made by the New South Wales Tribunal, than those previously awarded by the South Australian Supreme Court.

# REPRODUCING INEQUALITY

LESLIE CANNOLD

The Lockhart review is currently touring the nation seeking the views of experts and interested parties for its report to the Government – due in December – on the Human Cloning Act 2002 and the Research Involving Humans Act 2002. What better time to ponder the big, moral questions raised by biotechnological discoveries, and their conversion into medical technologies with the capacity to profoundly change how we partner, reproduce, parent, compete and generally go about the business of being human?

It goes without saying that reproductive and genetic – or reprogentic – technologies will continue to offer people valuable information and options to improve the quality of their lives and those of their children. The younger brother of a friend has cystic fibrosis (CF). When he was diagnosed, my friend's parents decided against having any more kids: the only way, back then, to avoid the birth of another affected child. More than thirty years later, my friend's brother has used reprogentic technologies to conceive an embryo genetically related to him and his wife and to screen it to ensure it would neither carry nor be affected by CF.

But if not properly regulated, reprogentic technologies have the capacity to increase social inequality; entrenching the disadvantages already suffered by the poor. Research repeatedly demonstrates that as family incomes fall, the risk of poor developmental outcomes for children increases.

One little-recognised problem concerns the anticipated development – through the use of stem cell therapies – of replacement tissues and organs. Many of us have been led to expect that 'therapeutic cloning', will primarily enable the creation of say, pancreas and heart muscle cells for the treatment of diabetes and cardio-vascular disease, with DNA identical to that of the intended recipient. However, such technology can also be used to create a 'bank' of human embryonic stem cells matched to – and so able to treat – the majority of people.

But to create this bank, you need to have DNA that is representative of the different segments of the

population. In particular, if only excess embryos from IVF clinics are used to create embryonic stem cells, there may not be matched cell lines for those unable to afford such reproductive treatments in the first place. Sadly, social discrimination will ensure that a disproportionate number of those unrepresented will be ethnic and racial minorities.

Having first missed out on having any or the number of children they wanted due to their inability to afford any or enough IVF treatment, it may be that in the future the poorest 10 per cent of the population may also be unable to benefit as much as the rich from the best medical treatment science can provide.

Embryo selection techniques may also lead to the creation of future populations in which the economically deprived suffer genetic disadvantages. Currently, the motive for diagnosing embryos created in the lab is to discover which are most likely to implant and develop into a baby, or to identify embryos unaffected by an inherited condition. However, parents are also allowed to select against embryos that carry, rather than are affected by, particular genetic defects and one Sydney-based clinic allows parents with a child of one sex to select an embryo of the other in order to 'balance' their family.

The present worry is that the disproportionate access the wealthy have to screening and selection techniques are – at the margins – enabling them to improve the health of their genetic lines in ways unavailable to the poor. The future worry is that this genetic advantage will expand to non-disease characteristics and predispositions if and when we gain the knowledge to screen and select for such things in the future.

What if, for example, scientists eventually isolate the constellation of genes that will predispose a child to have a high IQ? It seems unlikely that some parents at least, particularly those already screening to eliminate a disease-trait or to have a child of the right sex, might not want to know if any of their embryos has this constellation and – if it were possible – to implant an embryo both free of disease and enhanced with high IQ genes.

The problem would be that, insofar as such genetic selection actually did cash out for the resulting child in higher IQ, it would be the children of the rich who would be disproportionately rewarded. Indeed, wealthy children in such a brave new world might be doubly advantaged when it came to developing valued human characteristics like IQ compared to the poor. Firstly because, as is currently the case, they have the environmental advantages that contribute to IQ like quality schooling and secondly, because they will have been genetically predisposed to develop a high IQ.

How can we ensure biotechnology continues to enrich all our lives, but doesn't exacerbate existing disadvantages suffered by the poor? One suggestion, made by high-profile ethicist Peter Singer, is that the state should subsidise genetic enhancement services so they are equally available to everyone.

What matters is that we – ethicists, scientists, politicians and the public – get our head around the problem now. Not, as has so often been the case in the past, after the rerogenic horse has bolted.

## ABOUT THE AUTHOR

Dr Leslie Cannold is a Research Fellow at the Centre for Applied Philosophy and Public Ethics. Her most recent book is *What, no baby? Why women have lost the freedom to mother and how they can get it back*.



# BRIEF

National Product Liability Association

