CASE NOTES

THOMPSON V. JOHNSON AND JOHNSON PTY LTD[1]

Introduction

Thompson v. Johnson & Johnson Pty Ltd falls within the broad tort of negligence and more specifically that of product liability. It is to date the first toxic shock syndrome (T.S.S.) case to be brought before an Australian court. On October 3, 1989, more than eight years after the injury had occurred, Vincent J. held that the first and second defendants, the manufacturer and the distributor respectively of 'Carefree Tampons', were not liable in negligence for an injury arising out of the use of their product.[2] This decision has since been affirmed by the appellate division of the Supreme Court of Victoria, comprising Murphy, O'Bryan and McDonald JJ.[3]

The significance of the decision of the Supreme Court in its original jurisdiction is that it amounted to a refusal to award damages to a plaintiff whose health and life were jeopardised after contraction of a disease associated with her use of the defendants' tampon product. The result of *Thompson v. Johnson & Johnson Pty Ltd* suggests the 'neighbourhood principle' first expressed in *Donoghue v. Stevenson*[4] is in need of radical reform. It exposes the limitations of the tort of negligence in compensating certain victims and indicates a pressing need for a more flexible judicial approach to incidents of this nature or statutory reform to supplement the 'gaps' in the existing system. The decision suggests existing laws do not satisfy basic policy objectives such as the promotion of an incentive for risk prevention. More drastically, *Thompson v. Johnson & Johnson Pty Ltd* suggests the very foundations of negligence require restructuring in accordance with a system of no fault product liability similar to that recently introduced by the Consumer Protection Act 1987 in England.

Facts

In January 1981 the plaintiff, Ms Thompson, used the defendants' tampon product. She soon became seriously ill, lapsing into unconsciousness. Ms Thompson's condition, eventually being diagnosed as T.S.S., was critical: she was admitted into intensive care in a state of clinical shock, manifesting symptoms of hypotension, fever and central nervous system disorder. The plaintiff sued the defendants in negligence, alleging they had breached their duty to provide warnings alerting both users of their product and the medical profession of the possible association between tampons and T.S.S.

The Standard of Care

There was no question that the defendants owed users of their products a duty of care. In ascertaining the requisite standard of care the trial Judge's reasoning emphasized the importance of analysing events in terms of the then current state of scientific knowledge.[5] In other words, the defendants' alleged negligence in failing to issue warnings ought to be judged as the basis of the level of understanding of the disease as it existed in 1980, rather than present standards informed by epidemiological research not then available. The trial Judge recognized the difficulty involved in the application of this principle to the particular circumstances of the case, which occurred over a temporal period spanning 'the grey area', when suspicion of the causative association between tampons and T.S.S. crystallized into knowledge.

1 (1989) Aust. Torts Reports 80-278; (1991) Aust. Torts Reports 81-075.
2 (1989) Aust. Torts Reports 80-278.
3 (1991) Aust. Torts Reports 81-075.
4 [1932] A.C. 562.
5 *Roe v. Minister of Health* [1954] 2 Q.B. 66, 84.

Vincent J. resolved this problem with reference to evidence indicative of the 'state of the art' over the relevant period and concluded the duty owed by the defendants to warn purchasers of their product of its possible association with T.S.S. did not arise until after 6 October 1980. This was when the first case of T.S.S. was reported outside the United States in a user of tampons manufactured by the second defendants. His Honour held that, despite the fact that warning measures were adopted by the defendants' parent company in America prior to October, it was reasonable at that stage to presume the problem was geographically confined and consequently the defendants' inaction was justifiable.

The crucial time period determined by the trial Judge was between 6 October 1980 and November-December 1980: the time between the defendants' confirmed knowledge of the health risk to which users of their products were exposed and the plaintiff's subsequent purchase of their product. In the absence of evidence to the contrary, the trial Judge decided it would be unreasonable to infer the existence of sufficient time to undertake the procedures necessary to implement appropriate warnings at the point of sale or through media representation. In arriving at this conclusion Vincent J. had recourse to factors whose composite make up the 'calculus of negligence'. In this form of judicial reasoning, the elements of probability of risk and the gravity of that risk should it materialize are balanced against the practicability of instituting precautions and the social utility or value of the defendants' conduct or enterprise.[6]

Although Vincent J. initially emphasized the most significant consideration in determining the standard of care was the possible detrimental effect of the defendants' product on the health of its users, this statement takes on the aspect of token humanitarianism in light of the importance he then proceeded to attach to the impracticability of preventative measures. His Honour, in the absence of any evidence submitted by the plaintiff regarding the necessary time frame and expenditure required to provide the relevant information to potential users, was not satisfied on the balance of probabilities that such precautions could have been taken. Without evidence to the contrary, the difficulty and inconvenience involved in implementing warnings in such a limited time frame were seen as sufficiently great to place such measures outside the standard of care reasonably expected. Furthermore, the trial Judge doubted the effectiveness of public warnings in the instant case saying that there was no evidence to suggest whether or not, if such steps had been taken, the plaintiff would have been aware of the danger. Vincent J. went on to endorse a point raised by Dr Langsford, a witness for the defendants, that public warnings at the point of purchase and through the media may have so exaggerated the risk that unjustified levels of fear and anxiety in the general population may have arisen with 'untoward consequences'.[7] Although these 'untoward consequences' were not specified by the Judge, it can be inferred by the statements made by Dr Langsford that they encompassed the potential economic loss suffered by the defendants as a result of the state of mass panic engendered by disclosure of the association between T.S.S. and tampons.[8] Despite Vincent J.'s assertion to the contrary, it appears that in weighing up the factors determining the appropriate standard of care, economic considerations were elevated above others, including the risk of serious, and potentially fatal, health problems suffered by tampon users. This risk/utility analysis was also employed by the Court on appeal. The appellate Court reasoned that the gravity of the risk to which the consumer was exposed was insufficient in itself to impose an obligation to warn unless it outweighed other 'material considerations' relevant to the assessment of the standard of reasonable care.[9]

The facts of the case necessitated an analysis of two distinct alleged breaches of the duty of care owned by the defendants to users of their products. First, Vincent J. considered the issue of whether the defendants' failure to insert warnings at the point of purchase or their publication *via* the media constituted a breach of the requisite standard of care. As a result of the plaintiff's failure to adequately discharge the evidential burden of proof as to the practicality and effectiveness of the precautions which should have been taken, the content of the standard of reasonable care could not be determined. Consequently, no breach of the duty of care was established in relation to public

6 *Wyong Shire Council v. Shirt* (1980) 146 C.L.R. 40, 47.
7 (1989) Aust. Torts Reports 80-278, 68, 969.
8 *Ibid.* 68, 966.
9 (1991) Aust. Torts Reports 81-075, 68, 602.

warnings. With respect to the second allegation of breach, Vincent J. did, however, establish as negligent the omission on the part of the defendants to disseminate to the medical profession the necessary information regarding the association of T.S.S. with tampons, to enable that profession's prompt and appropriate response to patients with symptoms of T.S.S. On appeal, the Court over-ruled this part of the trial Judge's decision and concluded that there had been no breach of the defendants' duty of care by their failure to alert the medical profession of the potential risks associated with their product. The appellate Court attached great significance to the defendants' reliance on the advice tendered by the relevant Australian public health authorities. The fact that the National Health and Medical Research Council did not lend its support to the suggestion that the defendants write to the medical profession informing them of the correlation between T.S.S. and the use of tampons was influential in the appellate Court's rejection of Vincent J.'s finding that this omission constituted a breach of the duty of care, at least on the defendants' part.[10]

The impact of the appellate Court in over-ruling this part of Vincent J.'s reasoning is of academic significance only, as this breach was not found by the trial Judge to be causally relevant to the injury sustained by the plaintiff.

Causation

Before damages can be awarded, a negligent act or omission must be shown to have caused the injury forming the subject of the claim. This explains the apparent inconsistency in the trial Judge's decision: that, on the balance of probabilities, Ms Thompson was in fact suffering from T.S.S. and the defendants' tampon product was a causally relevant factor in its development, and his ultimate conclusion that the defendants' negligence was not established as the cause of injury. Vincent J., through the strict application of legal principles, did not, on the available evidence, feel justified in attributing successive inaccurate diagnoses to the general ignorance of the medical profession regarding T.S.S.. In the absence of the testimony of the original treating doctor, the trial Judge concluded he had insufficient evidence to infer that, had the doctors involved been appropriately informed, Ms Thompson's condition would have been accurately diagnosed initially, and treatment would not have been delayed.[11]

The trial Judge's formalistic approach and his consequent inability to award damages is significant in that it highlights the practical effect of legal analysis more concerned with satisfying the demands of an abstract and artificial construct of logic rather than those of justice and fairness. The strict adherence of the Victorian Supreme Court in its original and appellate jurisdictions to the rules relating to the evidentiary burden cannot be judged too harshly in view of the weight of established legal precedent that confronted it. Perhaps in the long term, by focusing attention on the discrepancy between the recovery under law of negligence, based on strict concepts of factual causation and proof, and community expectations of compensation for injury incurred, Vincent J. has in fact demonstrated the need for reform.

Significance of the Case for the Reform of the Tort of Negligence

The significance of this case lies in the attention it devotes to the need to establish a causal link between the alleged fault of the defendants and the subsequent injury suffered by the plaintiff and the difficulties a plaintiff has in establishing these matters. A possible means to remedy such harsh and seemingly unjust results in actions for damages for personal injury would be to reverse the burden of proof in the plaintiff's favour and require from the manufacturer defendant evidence of reasonable precautions taken to avoid risk of consumer injury. The appeal decision indicates that counsel for the plaintiff argued that the evidential burden ought to fall on the defendants in view of their knowledge of the practicalities involved in implementing warnings. The Court did not directly address this contention, nor did the argument appear to have any substantive impact on their judgment.[12] If this

[10] *Ibid.* 68, 605.

[11] His Honour seemed prepared to accept that but for the misdiagnosis and the subsequent delay in receiving appropriate treatment, the plaintiff's condition would not have worsened: (1989) Aust. Torts Reports 80-278, 68, 970.

[12] (1991) Aust. Torts Reports 81-075.

procedural device had been adopted, the onus would have been on the defendants to provide evidence necessary to avoid the allegations of negligence, making Ms Thompson's task less daunting.

Thompson v. Johnson and Johnson Pty Ltd demonstrates the subordination of the considerations of fairness in the compensation of victims whose injuries were sustained as a result of using the product manufactured or distributed by the defendants, to the formal requirements of establishing liability and abstract legal reasoning. Such an approach fails to recognize policy considerations, such as the capacity and desirability of multi-million dollar corporations accepting responsibility for and absorbing the cost of losses incurred by purchasers of their product. Although the defendants knew by at least June 1980 of the implication of tampons — manufactured by various companies — in the deaths of numerous women in the United States, within the context of Australian product liability laws, they were under no legally recognized obligation to convey this knowledge to those at risk. The purported adverse economic consequences to the defendants and the impracticability of alerting users of their product within the crucial time period were permitted, through the application of the rules of negligence, to defeat the social imperatives of prevention of, and compensation for, foreseeable harm. The moral justification for continuing to predicate tort liability on concepts of fault is also diminished by the prevalence of insurance.[13] In this way the punitive aspects of damages payments are undermined by shifting the economic loss.

Consumer safety ought to be the first priority of the legal system, and holding manufacturers and distributors strictly liable may provide extra incentive to ensure that this expectation is realized. The introduction of a strict liability regime would mean damages would be awarded even if the manufacturer did not breach the duty of care owed to the consumer. Victims of an unforeseeable or unavoidable risk would be compensated under this scheme. The imposition of strict liability has been used to alleviate in certain circumstances the problem of proving fault through Commonwealth and State legislation such as the Trade Practices Act 1974 (Cth) and Fair Trading Act 1985 (Vic.). For example, under section 74D of the Commonwealth Trade Practices Act, liability is imposed on the manufacturer directly to the consumer of goods which are not of merchantable quality.[14] The Australian and Victorian Law Reform Commission report on product liability[15] recommends the amendment of the Trade Practices Act to attach liability to manufacturers merely on the basis of a casual association between the way the goods acted and the injury incurred. If such proposals were to be implemented, the criteria for excluding certain plaintiffs from the right to compensation would be less reliant on such arbitrary and often fortuitous circumstances as those which proved determinative in the present case.

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13 Buckley, R. A. *The Modern Law of Negligence* (1988) 368.

14 Had Ms Thompson based her claim on section 74D (1) the defendants could have argued, perhaps successfully, that her injury had arisen as a result of an idiosyncratic reaction to the product as opposed to a consequence of the goods being of an unmerchantable quality.

15 Australian Law Reform Commission, *Product Liability*, Report No. 51 (1989); Law Reform Commission of Victoria, Report No. 27 (1989).

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