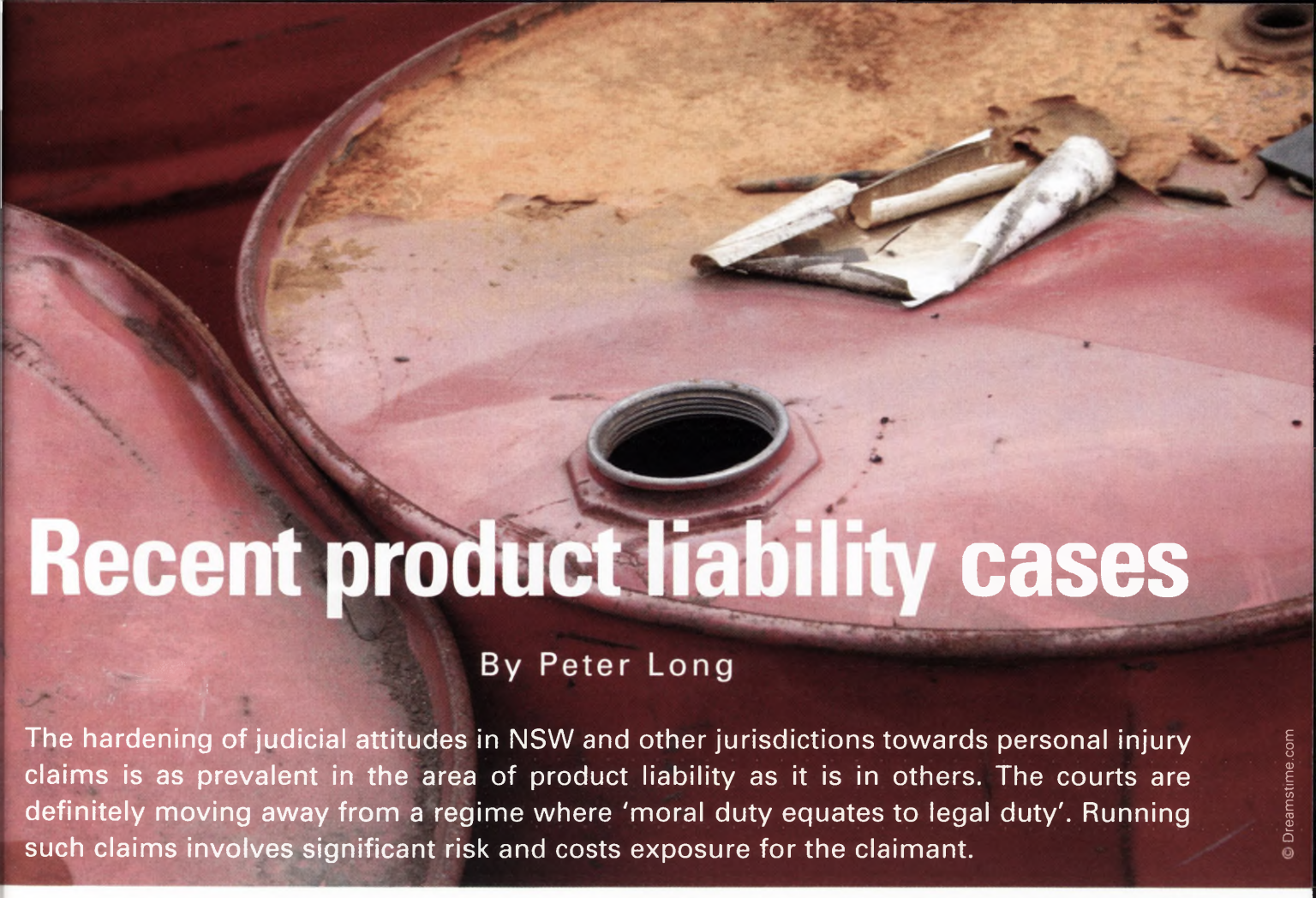

Recent product liability cases

By Peter Long

The hardening of judicial attitudes in NSW and other jurisdictions towards personal injury claims is as prevalent in the area of product liability as it is in others. The courts are definitely moving away from a regime where 'moral duty equates to legal duty'. Running such claims involves significant risk and costs exposure for the claimant.

FORBES v SELLEYS PTY LIMITED [2004] NSWCA 149

On 12 May 2004, the NSW Court of Appeal (Mason P, Giles JA and McColl JA) dismissed an appeal with costs. The Court held that when faced with determining, on the balance of probabilities, whether an event had occurred, the court should treat the event as certain if the probability of it having occurred was greater than it not having occurred. The issue or event that had to be established on the balance of probabilities in this case was whether the plaintiff's exposure to a Selleys product caused illness. The causation issue remained one based on circumstantial evidence and in *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262 Spigelman CJ had said (at 278) that the courts must determine the existence of a causal relationship on the balance of probabilities. However, as was the case with all circumstantial evidence, an inference as to the probabilities could be drawn from a number of pieces of particular evidence, none of which rose above the level of possibility. Epidemiological studies and expert opinions based on such studies were able to form 'strands in a cable' of a circumstantial case.

Australian law has not adopted a formal reversal of onus of proof of causation in negligence, although a robust and pragmatic approach to proof permits, but does not compel, a favourable finding in particular circumstances. A plaintiff may, however, be assisted by a shifting in the evidentiary burden of proof in relation to causation. This concept originated in a dictum of Dixon J in *Betts v Whittingslowe* (1945) 71 CLR 637 at 649, where his Honour said that the breach of duty coupled with an accident of the kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the contrary, that in fact the accident did occur owing to the act or omission constituting to the breach of statutory duty.

The decision-maker may infer causation if the breach was such that in the ordinary course of events (as perceived by the decision-maker) that type of harm is a consequence of the breach, especially where breach was closely followed by damage. In such cases, unless the defendant can point to some particular reason why the instant case is outside the norm, causation may (not must) be inferred. Simply because a risk is 'not far-fetched or fanciful' does not mean that the trier of fact is required to infer that it eventuated or that the defendant's negligent conduct caused it to happen or materially contributed to its happening.

In this case, the causation issue turned upon the state of scientific knowledge about something that had never happened before in similar conditions. The trial judge was fully aware of his capacity to infer probable cause from the epidemiological possibility evidence. But he was not bound to do so. The duty to find facts and give reasons did not require the judge to go beyond the level of medical and scientific certainty. >>

Photo: Bill Madden

CAREY-HAZELL v GETZ BROS & CO (AUST) PTY LTD [2004] FCA 853

This case concerned the implant of a prosthetic mitral valve in the applicant's heart. She subsequently developed thrombo-embolisms, which had serious consequences, including the need for further surgery to replace the valve with a bio-prosthetic valve. The applicant's case was brought against the supplier of the valve, the cardiologist, and the surgeon.

On 6 July 2004, Kiefel J in Brisbane dismissed the application and ordered the applicant to pay the costs of all the respondents on the following grounds:

In relation to the TPA claim brought by the applicant, there were three aspects to an action brought under s75AD: the supply of goods by a corporation in trade or commerce; the goods having a defect; and a person suffering injuries *'because of'* the defect.

The standard referred to in s75AC(1) – that goods are defective if they do not provide the level of safety that persons generally are entitled to expect – was an objective standard. It was based upon what the public at large, rather than any particular individual, is entitled to expect. Further, the standard does not require that the goods be absolutely free from risk. Section 75AC(1) applies even if there is no inherent defect in the goods.

However, a person bringing a claim under s75AD must establish the existence of a defect in the goods and the fact of their injury. Additionally, they must prove causation. If the manufacturer has no statutory defence, the scheme of Part VA establishes liability.

The words in s75AD denote clearly the requirement of causation and the defect must be shown to have caused an applicant's injuries by applying a common sense approach. The fact that a risk of complication attended their use would not of itself render the goods defective. Goods are not required to be completely free of defect.

His Honour found that it was not possible to conclude generally that the valve was defective. The fact that it was the cause of thrombo-embolisms in the applicant established only that she unfortunately fell within a small number of persons who suffer such a complication. The development of a thrombus because of the defect in the valve in question was a scientific possibility. There was, however, no scientific literature or other evidence that could elevate it to a higher level, and the applicant could not establish that the defect was the cause of her thrombo-embolic events.

Section 75AK(1)(a) requires the defendant to show that the defect did not exist at the time they passed from the manufacturer's control.

Section 74B provides that a manufacturer is liable to compensate a consumer who acquires goods that are not reasonably fit for the purpose for which they were acquired, and who suffers loss or damage by reason that they were not reasonably fit for that purpose. The valve could not, however, be regarded as unfit for that purpose because there was a known risk that thrombo-embolisms might develop and cause injury of the kind suffered by the applicant. The applicant had identified only that she fell within the category of persons who develop such a complication. The question as to whether goods that have a use are reasonably fit for it must be assessed not only by reference to the fact that they failed to accomplish their purpose, but also by reference to what a consumer could reasonably expect from the goods. The evidence clearly established that the risk in question was well known to medical practitioners. The applicant was advised of this risk. It could not therefore have been reasonable for the applicant to expect that there was no prospect that the valve would cause the development of thrombi; thus this claim was not made out.

The first breach of duty alleged was that the supplier supplied a valve that was not fit for the purpose for which it was supplied. His Honour's findings in connection with the claim under s74B applied to this allegation and no breach was established. The third alleged breach was one of failure, on the part of the supplier, to warn the cardiologist and surgeon of the need to warn the applicant of the risks of using the valve, including the risk of thrombo-embolism despite anti-coagulants. However, both doctors were well aware of the risks and did not need instruction. Thus, this claim failed.

The remaining allegation was failure to warn the applicant herself of the risks. The supplier claimed that no such duty was owed to the applicant. It relied upon the defence of the provision of advice or warnings to *'learned intermediaries'*. The effect of a *'learned intermediary'* upon a manufacturer's duty has been the subject of considerable case law in the US but in Australia it has been held that the duty to warn rests with the treating physician, not the manufacturer or distributor (see *H v Royal Alexandra Hospital for Children* (1990) Aust Torts Reports 81-000). His Honour felt that it was not necessary to resort to the doctrine. The risks were well known to doctors and the cardiologist and surgeon had in fact conveyed this to the applicant. If there were a duty owed to the applicant as alleged, any failure to warn her could have no effect, given the information she received from others. The applicant's case against the doctors for failure to advise or warn of material risks failed.

ROLFE v KATUNGA LUCERNE MILL PTY LTD [2005] NSWCA 252

On 28 July 2005, Hodgson JA, Santow JA and McClellan AJA of the NSW Court of Appeal dealt with an appeal from Hughes DCJ's rejection of a claim involving contaminated stockfeed (chaff) being supplied by a produce outlet to a consumer for feeding his horses. It appears that the appellant may have benefited from being able to plead a contractual cause of action as compared to one based in negligence.

The defendant's resistance to any liability for breach of the contract based on s19(2) of the *Sales of Goods Act* 1923 comprised of (i) supervening cause not attributable to any breach of warranty (feeding the horses knowing the chaff was contaminated or at least likely to be); and (ii) remoteness in relation to any losses which the appellant suffered. The defendant contended that it had neither been established as a matter of fact, nor found by the trial judge, that such harm as befell the appellant's horses could be attributed to the contaminated chaff. Its appeal relied on making good the proposition that there was neither a finding of causation nor the basis for a finding on the evidence before the trial judge; namely, that the contaminated chaff materially contributed to the damage, quite apart from any unreasonable conduct on the part of the plaintiff.

The court was of the opinion that causation had two aspects. The first concerned whether it could properly be inferred, in the absence of a finding by the trial judge, that the contaminated chaff actually caused the death of the appellant's horse. The court found that while the appellant still bore the ultimate onus of proving the essential elements of its case, the evidentiary onus had passed to the defendant to rebut the inference that the contaminated chaff supplied by the defendant to the appellant caused the death of his horse. That inference rested not only on an admission in a letter of 17 May 2000, in which the defendant conceded that horses had been poisoned by its chaff, but also on the undoubted fact of the defendant's supply of that contaminated chaff to the appellant, its likely ingestion by his horses, followed by the death of one of them.

Given the absence of any rebuttal by the defendant, the only question remaining was the appellant's knowledge before he fed the horses and its implications for causation and liability. That question was correctly dealt with in argument on appeal as not being a matter going to whether the warranty of merchantable quality was to be implied. Under s19(2), there was no suggestion that, in terms of the proviso to that subsection, examination of the chaff ought to have revealed the botulism. Rather, the question was whether, accepting that the implied warranty was capable of application, such knowledge as the appellant had, bearing on the likelihood of contamination by the botulism, would break the chain of causation between the defendant's breach and the plaintiff's loss or damage.

In *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 at 361, McHugh JA (as he then was) cited the following passage from the High Court's decision in *Mahoney v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 528:

> '... A line marking the boundary of the damage for which a tortfeasor is liable in negligence may be drawn either because the relevant injury is not reasonably foreseeable **or because the chain of causation is broken by a *novus actus interveniens***: *M'Kew v Holland & Hannen & Cubbitts* ... But it must be possible to draw such a line clearly before a liability for damage that would not have occurred but for the wrongful act or omission of a tortfeasor and that is reasonably foreseeable by him is treated as the result of a second tortfeasor's negligence alone: see *Chapman v Hearse* >>

... Whether such a line can and should be drawn is very much a matter of fact and degree .. ' [McHugh JA's emphasis]

The court was of the opinion that the appellant may have been less than prudent in using chaff the possible dangers of which he had heard rumours about, but that did not amount in fact and degree to the kind of knowledge that would break the chain of causation resulting from the breach of warranty of merchantable quality by the defendant.

Particularly telling was that, had the appellant known of the clear likelihood of danger to his horses from feeding the chaff, it would be entirely irrational for him knowingly to inflict damage on his own business in that way. That militated strongly against him doing so, or acting with a deliberate hiding of the eyes. His horses were too valuable to him to make that credible.

The court found that the losses suffered had not been shown to be too remote to qualify for compensation.

MCPHERSONS LTD v EATON & ORS [2005] NSWCA 435

The trial judge, Judge O'Meally, had held that McPhersons was liable for the damages suffered by Mr Eaton. His Honour found liability on the basis that a general duty of care existed between a vendor of retail goods and the public. His Honour held that, in addition, McPhersons 'ought to have known' of the danger of asbestos and this reinforced its duty to warn its customers or remove the offending products from sale.

On 16 December 2005, the NSW Court of Appeal of Mason P, Hodgson JA and Ipp JA took a different view:

Mason P held that in cases where the alleged omission by the distributor involved no more than a failure to disclose or warn about some inherent quality of the product, something more was required before a duty of care could be found. It was both feasible and just, in the circumstances of this case, to impose a particular limit on McPhersons' duty of care, confining it to one requiring reasonable care in the avoidance of personal injury by reference to what McPhersons knew or had reason to know. The difference between 'ought to know' and 'has reason to know' was more than semantic in the context of the case. The formulation 'has reason to know' appeared to capture the appropriate scope of the duty, at least outside the situation of the distributor whose own activities have contributed to the harmful potential of the product.

The whole bench believed that the relationship between a vendor and purchaser, or vendor and end-consumer, did not automatically give rise to a duty of care, and that to establish a duty of care 'something more' was needed. This additional factor will depend upon 'the nature of the goods, the risk involved, and the circumstances of the case'. What the defendant 'ought to know' was knowledge that a person, acting reasonably in all the circumstances of the case, should possess. When imputed knowledge was being considered for the purposes of ascertaining the existence of a duty of care, the 'circumstances' of the case did not include an assumed duty of care. A finding that a defendant 'ought to know' of a danger was based, to a significant degree, on notions of reasonable foreseeability.

When determining reasonable foreseeability in relation to the postulated duty of care, the standard was that of a reasonable retailer in the position of McPhersons. The trial judge needed to determine whether there was any fact that should have led McPhersons to know not only that the inhalation of asbestos was dangerous, but that asbestos fibres, in the quantities likely to be released when millboard was cut, might be dangerous. This required proof of actual facts from which a reasonable inference might be drawn, not merely an exercise of some moral or other judgment based on a world view of the duties of retailers generally. In circumstances where the scope of the duty of care was unclear, it was incumbent on the judge to identify with necessary precision the reasonable response to the risk of harm that existed. The trial judge erred by merely identifying the duty of McPhersons as a duty to warn without identifying what warning should have been given, how it should have been given and to whom it should have been given. These matters called for factual findings as to the particular facts that should have been known to a retailer in McPhersons' position over the relevant period. ■

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