

# APLA in the news

## We all benefit from tighter product laws

Last month Dr Ellen Beerworth wrote in these pages that product liability laws were not working and were in need of reform. Consumer lawyer **Rob Davis** examines Dr Beerworth's claims from the consumer's perspective.

Contrary to the assertions made in these pages last month, Australia's product liability laws are balanced and beneficial to society.

Indeed, the laws are also beneficial to Australian manufacturers as they deter importers from flooding our local markets with cheap and nasty products to the financial detriment of local competitors.

Those who call for the abolition of the current regime should consider the pathetic condition of our consumer laws only a decade ago.

Before the introduction of Division 2A of the Trade Practices Act in 1978 most Australian consumers were at the mercy of unscrupulous manufacturers of shoddy and dangerous products.

Sale of Goods Acts only conferred limited protection on those who purchased defective products as that legislation restricted legal remedies to the parties to the contract of sale.

The 1978 amendments to the Trade Practices Act conferred limited protection on consumers who were not the original purchasers of products and limited the ability of sellers to contractually exclude liability. But these amendments still left large groups of consumers without protection. For example, if a young child choked on a dangerous toy that belonged to another then the child had no remedy under the Act.

The Trade Practices Act provisions that Dr Ellen Beerworth complained about, namely Part VA, were introduced to remedy these injustices. Their purpose was to largely demolish the legal (and economic) protectionism enjoyed by manufacturers and sellers of shoddy and dangerous products.

They accomplished this by giving legal remedies to anyone who was injured by a defective product. But while these laws now offer greater protection for consumers, they do not make manufacturers liable for all injury caused by defective products.

Before a consumer will recover compensation he or she must still prove several things:

The defect must have existed in the product when it was supplied by the manufacturer.

The product must be unsafe when measured against the reasonable expectations of an objective consumer.

The consumer must show that the injury arose because of the unsafe nature of the product.

A consumer who has failed to exercise reasonable care for his or her own safety will be required to bear that portion of the loss which is attributable to the consumer's fault.

### Why our liability laws are unsafe at any speed

The laws on product liability that are meant to protect suppliers and consumers alike are not working, writes Ellen Beerworth, who looks at the causes and effects.

The evidence does not support assertions that the Australian product liability laws are too onerous for business.

Six years after the introduction of strict federal product liability laws and Federal Court class actions in Australia, there has not been any significant increase in product litigation in this country. Yet many in the insurance, business and legal community continue to assert the contrary. There are many reasons for this.

First, the new laws have spawned an entire industry of insurance products, legal services and product safety consultants keen to exploit new business opportunities created in the product liability area. These services are sold to product manufacturers by emphasising the legal risks they face.

There is no doubt that the fear of law suits is a potent motivator in purchasing these services.

But under our liability laws, responsible local manufacturers are protected against cheap and shoddy imports. The Australian taxpayer is also relieved from having to fund the otherwise high cost of death and injury from defective products.

Finally, products made in compliance with Australian product liability laws are fit for export anywhere within the developed world.

Everyone in our society is a consumer. This is the case whether you are manufacturing TV sets from component parts or a child eating a hot dog bought at a community fair. We all benefit from safe products.

■ **Rob Davis** is the chairman of the consumer law committee of the Law Council of Australia, a member of the national Council of Australian Plaintiff Lawyers' Association and a joint author of the book *Product Liability Law & Practice*.

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# Mass HIV tests in study of hospital risks

By **JULIE ROBOTHAM**  
and **LINDA DOHERTY**

Three thousand patients in Sydney public hospitals will be tested for HIV and hepatitis B and C before and after colonoscopy and endoscopy operations early next year, amid fears that design flaws in surgical instruments could be putting patients at risk of catching the viruses.

The instruments used in the operations - to examine the lining of the stomach and bowel - are "difficult to clean and difficult to process", according to the chairman of the advisory committee on infection control of the Royal Australasian College of Surgeons, Dr Richard West.

He said manufacturers needed to take more responsibility for ensuring their machines could be used and cleaned effectively in busy operating theatres. There was evidence patients overseas had contracted hepatitis C from surgical instruments.

In a study of four Sydney hospitals two years ago, Dr West's researchers also had found hepatitis B and C viruses in one endoscope even after it had been cleaned, but patients did not contract the viruses.

Next year's study, funded by the National Health and Medical Research Council, will determine the extent of transmission risk.

Dr West's comments came as a leading lawyer warned that the NSW Health Department could be sued for damages by people who have had tests for HIV and hepatitis after recent hospital contamination scares, even if they have not caught the viruses.

The national secretary of the Australian Plaintiff Lawyers' Association, Mr Bill Madden, said patients could bring action if they suffered psychological distress while waiting for the results of tests or were prevented from working.

Mr Madden, who is acting for one of 70 people tested after the September breakdown of sterilising equipment at a Queanbeyan hospital, said there was "no upper limit" on the amount of damages if a person's ability

to earn a living was damaged by the threat of the diseases.

Such cases are decided solely according to the person's state of mind - not an objective assessment of their likelihood of becoming infected.

Eleven people in Gosford were tested this week after having medical procedures involving a health worker who later tested positive to HIV. As well, 10 patients at Cooma were tested after sterilisation of a colonoscope was carried out incorrectly last month.

The Minister for Health, Dr Refshauge, yesterday defended departmental guidelines which recommend health workers be tested for HIV at least once every 12 months but do not oblige them to do so, as it emerged the health worker may have been HIV-positive for more than 12 months.

Dr Refshauge said health workers had a "professional responsibility" to check their HIV status and inform their employer if it was positive.

"The guidelines are effectively working when we see there has been no reported case at all of cross-infection from a health worker to a patient in Australia," he told a media conference yesterday.

But the manager of professional services at the NSW Nurses' Association, Ms Jill Illiffe, said testing at intervals could not prevent transmission to patients, because health workers could become infected just after their last test. Many nurses did not routinely monitor their HIV status.

"People tend not to get tested unless they have a reason [to believe they had been in contact with the virus]," she said.

The Opposition spokeswoman on health, Mrs Jillian Skinner, said inadequate infection control procedures were a sign of low morale in the public hospital system. "It's not good enough to issue a memorandum - you need continuous quality control," she said. "It's about constantly checking equipment to make sure it's sterilised."

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**For more information, contact the APLA  
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