CLASS ACTIONS and TOXIC TORTS

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Photo: Lana Vshivkoff

Class actions arising out of toxic torts have had mixed results in Australia to date. Some cases have had successful outcomes while others have failed on their substantive merits. Some have settled before trial. However, numerous cases have failed to proceed to final determination because the courts have held that the proceedings did not satisfy the threshold federal statutory class action requirements. In some instances, success at trial has been overturned on appeal.

CASES THAT HAVE PROCEEDED TO TRIAL AND SUCCEEDED

Pollution and contamination of food

In *Ryan v Great Lakes Council & Ors*, the applicant brought proceedings in the Federal Court on behalf of himself and all other persons who allegedly suffered personal injury between certain dates as a result of eating oysters, contaminated with the hepatitis A virus, from the Wallis Lakes region on the north coast of NSW.

The initial respondents were the Great Lakes Council, which was said to have certain responsibilities with respect to the water quality of the lake, oyster farmers who grew the affected oysters, and some oyster distributors. The oyster farmers and oyster distributors were alleged to have breached common law duties of care, and contravened the misleading and deceptive provisions of the *Trade Practices Act* (TPA) and/or relevant state fair trading legislation. The claims were also said to fall within the product liability provisions of the TPA. The council was alleged to have breached common law duties of care, including in relation to safeguarding water quality, and also to have aided and abetted the contraventions of the product liability provisions of the TPA by the farmers and distributors.

The oysters became contaminated following heavy rainfall which had increased the risk of pollution of the lake, including by human faecal contamination.

At trial, the State of NSW had also been added as a respondent and additional representative applicants had been joined.

Wilcox J held that the Council, the State and the Barclay companies (oyster producers) were each liable in negligence to the applicant and, subject to proof of damage, to the other 184 group members. It was also found that the Barclay companies had contravened ss74B and 74D of the TPA. Wilcox J awarded the applicant $30,000 in respect of his personal claim, apportioned equally between the three respondents.[1] The claim under s75AD was dismissed because of the defence provided for in s75AK(1)(c) (the so-called 'state of the art' defence).

On appeal to the Full Federal Court (Lee, Lindgren and Kiefel JJ) it was held, by differently constituted majorities, that the appeal by the council should be upheld on the grounds that it owed no relevant duty of care to the oyster consumers and the appeals by the State of NSW and the Barclays companies should be dismissed. The Full Court upheld the liability of one of the Barclay companies under ss74B and 74D of the TPA.[2]

On appeal to the High Court, the applicant sought to restore the initial findings of negligence against the Council and the companies and the State of NSW sought to have the negligence findings against it overturned.

In the High Court, all seven judges sat and delivered six separate judgments. All were of the view that there was no liability on the part of the State of NSW or the council. Neither were held to be under a relevant duty of care in the circumstances of the case. All members of the Court similarly rejected the appeal by the representative applicant. However, the Court was divided on the issue of whether the Barclay companies were liable in negligence, finding by a 4:3 majority that they were not. However, the liability of one of the companies under ss74B and 74D of the TPA was not challenged on appeal.[3]

Chemicals and contamination

In *McMullin v ICI Australia Operation Pty Ltd*, proceedings were commenced in May 1995 in the Federal Court under Part IVA of the *Federal Court Act* (the Act) on behalf of owners of cattle contaminated by a chemical (chlorfluazuron or CFZ, otherwise referred to as 'Helix'). As Wilcox J observed: 'This is a case about cattle, cotton and chemicals.'[4]

There were, at the time of trial, approximately 470 group members. The respondents were three ICI companies with the following additional respondents joined later: the Commonwealth of Australia, the National Registration Authority for Agriculture and Veterinary Chemicals ('NRA'), the State of NSW and the State of Queensland. Prior to trial, the proceedings against the NRA and the Commonwealth were struck out. Additional cross-respondents were joined and, by the end of 1996, there were 20 parties to the action. At the initial hearing, the court determined the applicant's primary claims on liability against the respondents, with deferral of the cross-claims and quantification of damages.

The applicant's claim against ICI was based upon two causes of action, negligence and breach of s52 of the TPA. The claim against the State of NSW alleged negligence and breach of s42 of the *Fair Trading Act* (NSW), and the case against the State of Queensland was based on negligence.

Wilcox J found ICI liable in negligence. The claims against NSW and Queensland were dismissed. >>

The proceedings were brought as public interest proceedings and not for pecuniary gain.

The chemical contamination giving rise to the losses suffered arose out of the spraying of cotton with insecticides. After the harvesting of cotton, the remaining parts of the plant were used for stock feed, and this was said to be the primary cause of contamination of the cattle.

The claimants included farmers whose cattle had been contaminated; farmers and others such as abattoir operators who had purchased contaminated cattle; meat processors and exporters who owned meat that was found to be contaminated; feed lot operators with contaminated cattle in their possession; owners of cattle placed in detention because of possible contamination; and commercial entities which lost business as a result of the chemical contamination.

Wilcox J found that ICI was in breach of its duty of care by marketing Helix without having first undertaken either the research and testing necessary to determine and quantify its potential deleterious characteristics, or such precautions as were necessary to prevent those characteristics causing damage. His Honour rejected ICI's contention that those who fed 'cotton trash' to cattle were the authors of their own misfortune and ought to have first tested it.

The applicant's claim for exemplary damages was rejected, notwithstanding the finding of 'gross' negligence by ICI. The claim under s52 of the TPA was reserved for future determination. As per the claim in negligence, the claim under the *Fair Trading Act* against the State of NSW also failed.

Although succeeding in negligence against ICI, the favourable finding was limited to four categories of claimants:

- owners of cattle contaminated by CFZ during their period of ownership;
- those who unknowingly purchased already contaminated cattle;
- those who owned meat found to be contaminated; and
- those in possession of contaminated cattle who incurred expense in holding them in detention.

In respect of other claimants, Wilcox J held that there was insufficient proximity between ICI and such claimants to give rise to a duty of care.

Although finding that regulatory bodies had acted negligently in relation to the registration of the chemical in question, such decisions were said to be policy decisions not giving rise to any civil legal liability. The claim that the state governments were vicariously liable for the negligence of officers involved in recommending feeding cotton gin trash to cattle was rejected.

Following the liability findings, the cross-claims were eventually settled and a further hearing was held in respect of seven selected cases in order to resolve further issues, including the quantum of damages.[5]

An application by the applicants to re-open the categories of persons to whom the respondents owed a common law duty of care (following the decision of the High Court in *Perre v Apand Pty Ltd*[6]) was refused.[7]

Following the determination of liability, substantial numbers of individual claims were resolved, either by judgment by Wilcox J[8] or a judicial registrar, or by way of settlement.

In the course of the proceedings, Wilcox J dealt with an application by the respondents to 'close the class' so as to limit the number of group members who could proceed with individual claims. His Honour held that s33Z(1)(g) of the Act did not empower the court to make a procedural order limiting future claims, but that an order fixing a date by which claimants must come forward and identify themselves was within the power conferred by s33ZF(1). Such an order was considered appropriate, after suitable notice, as without one the proceedings would never be finalised.[9]

Environmental tobacco smoke

In *Cameron v Qantas*, class action proceedings were brought in the Federal Court under Part IVA of the Act by Mrs Cameron on her own behalf, and on behalf of other group members, alleging that Qantas had engaged in unconscionable or misleading conduct, or was negligent, in exposing 'non-smoking' airline passengers to cigarette smoke on flights. This was said to have caused or exacerbated health problems.

The appellant and each of the group members was successful at trial before Beaumont J and each was awarded (modest) damages. The proceedings were brought as public interest proceedings and not for pecuniary gain. Apart from compensatory damages, the applicant sought orders, *inter alia*, restraining Qantas from permitting smoke on international airline flights and requiring Qantas to disclose information, including the fact that environmental tobacco smoke may be dangerous to health. Beaumont J, although awarding damages, under s82 of the *Trade Practices Act* or at common law, refused to make the declarations, injunctions and other orders sought.[10] In determining the issue of costs, Beaumont J accepted that the proceedings were conducted as a test case.[11]

On appeal to the Full Federal Court, it was held by majority (Lindgren & Lehane JJ, Davies J dissenting) that the appeal should be allowed on the grounds, *inter alia*, that the evidence at trial provided no basis for inferring that had an appropriate warning been given, the group members would have acted differently. Thus, there was held to be insufficient evidence of a causal link between the failure to warn and the loss or damage suffered (decision 17 May 1996, unreported).

The respondent to the appeal contended that this had not been an issue before the trial judge, was not raised in the notice of appeal and was not an issue before the Full Court on the hearing of the appeal. Accordingly, there was a further application to the

Full Court to set aside its judgment. That application was dismissed.[12] Notwithstanding the success of the appeal by Qantas, one group member remained successful in respect of the claim under s52 of the *Trade Practices Act*. On the question of costs, the public interest nature of the proceedings was considered relevant.[13]

CASES THAT HAVE NOT PROCEEDED TO TRIAL BECAUSE OF A FAILURE TO SATISFY CLASS ACTION STATUTORY REQUIREMENTS

Pollution and toxic chemicals

In *Cook v Pasminco*, the applicants brought class action proceedings in the Federal Court under Part IVA against the owner of smelters at Cockle Creek in NSW and Port Pirie in South Australia, claiming, *inter alia*, damages for injury to their health alleged to have been caused by noxious emissions. In addition, there was a claim for damage to real estate. The causes of action relied upon were negligence, nuisance, and under ss75AD and 75AG of the *Trade Practices Act*.

Lindgren J dismissed the application as incompetent, as it was beyond the jurisdiction of the Federal Court under Part IVA. His Honour held that the federal element of the claim sought to be relied upon (under the TPA) was 'not genuine', was 'untenable' or designed to 'fabricate' a basis for the Court's jurisdiction.[14] The applicant had pleaded a claim alleging, for the purposes of the TPA, that the noxious emissions were 'goods' manufactured by Pasminco and supplied in trade or commerce in circumstances where the 'defects' in the emissions were said to have caused injury to the applicant and group members.

Lindgren J made an order for indemnity costs against the applicants' solicitors on the basis that they had given no consideration, or no proper consideration, to the question of whether the federal claim had any prospect of success.[15]

In light of the High Court decision in *Wakim*,[16] subsection 4(1) of the *Jurisdiction of Courts (Cross Vesting) Act* 1987 of the States, including NSW and South Australia, is invalid, thus depriving the Federal Court of cross-vested jurisdiction in respect of 'state matters' such as common law claims in negligence and nuisance. Such claims could of course have been pursued within the 'accrued jurisdiction' of the Federal Court if they were part of a 'single judicial controversy' vis-à-vis federal claims within the jurisdiction of the Federal Court. However, in the present case, the pleaded federal causes of action were held in effect to be spurious.

Even if the cross-vesting legislation had not been declared invalid, a representative proceeding could not have been commenced in the Federal Court in respect of claims where the court's jurisdiction was derived solely by virtue of the *Jurisdiction of Courts (Cross Vesting) Act* 1987 or a corresponding law of a state or territory.[17]

Having been dismissed unceremoniously from the Federal Court, a further attempt was made to litigate a class action in the Supreme Court of Victoria. Four plaintiffs commenced proceedings as a group proceeding under Rule 18A of the *Supreme Court (General Civil Procedure) Rules* of the Victorian Supreme Court. The proceedings were challenged by the defendant on grounds including: (a) the alleged invalidity of Order 18A; and (b) the impermissible extra-territorial effect. Five members of the Court of Appeal upheld (by majority) the validity of Order 18A.[18] In any event, legislation was introduced to resolve any doubt as to the validity of the rule and to provide a statutory basis for group proceedings in Victoria.[19]

Hedigan J resolved initially that it was not necessary for him to reach any final opinion concerning the claimed extra-territorial incompetence of the legislation, given his conclusion that the proceedings were defective by virtue of the attempt to combine two separate group proceedings in one and the difficulties with the requirement as to common matters, etc. Questions also arose as to the appropriate joinder of one or more of the Pasminco >>

> Several cases have failed to proceed to trial not because of a lack of merit, but because of a failure to satisfy class action procedural requirements.

defendants, given the contention that the first defendant did not own or occupy the relevant lands and did not own or operate the relevant lead smelters. The second and third defendants were wholly-owned subsidiaries of the first defendant. The defendants also contended that the proceedings did not comply with the requirement that each plaintiff must have a claim against each defendant.[20]

In the proceedings commenced, the statement of claim identified two separate groups of plaintiffs and two separate groups of defendants. After considering other challenges to the proceedings, Hedigan J concluded that the proceeding should not be permitted to proceed in its present form. The proceeding was dismissed but the plaintiffs were given leave to bring fresh proceedings by separate actions.[21] Subsequently, in view of solvency problems, the Pasminco companies entered into voluntary administration on 19 September 2001 and subsequently executed deeds of company arrangement on 4 October 2001. Claimants were required to lodge claims with the administrator. No provision was made for legal costs. Apparently, only a few claimants submitted claims.

Tobacco

In *Nixon v Phillip Morris*, class action proceedings were commenced in the Federal Court, under Part IVA of the Act, alleging contravention of s52 of the TPA and negligence in connection with the promotion and sale of cigarettes. There were six named applicants and three sets of tobacco company respondents in proceedings brought on behalf of all persons who, between certain dates, contracted one or more type of cancer, emphysema, vascular disease or other specific tobacco-related illnesses, as a consequence of smoking within Australia between certain dates, and where such persons had begun or continued smoking because of the conduct of certain respondents. The proceedings sought damages, both under the TPA and at common law and exemplary damages.

On a strike-out motion by the respondents, Wilcox J held that a case for summary dismissal of the proceedings had not been made out. However, the applicants' pleadings were struck out with leave to file a further amended application and to prepare a further amended Statement of Claim.[22]

On appeal, the Full Court determined, by majority, that it was inappropriate for the claims to be pursued by means of a representative proceeding, and that the proceedings were no longer to continue under Part IVA of the Act. Each of the applicants, who were parties to the representative proceeding, was permitted to proceed with their individual claim.

Sackville J (with whom Spender & Hill JJ agreed) held that s33C(1)(a) of the Act was not satisfied if some applicants and group members have claims against one respondent or group of respondents, while other applicants and group members have claims against another respondent or group of respondents. According to his Honour: 'As the parties accepted, s33C(1)(a) requires every applicant and representative party to have a claim against the one respondent or, if there is more than one, against all respondents.'[23]

As Sackville J noted, the Statement of Claim did not plead a 'case of collective conduct on the part of all three respondents'.[24] As Merkel J later noted in *Bray*:

> 'The absence of claims that the three respondents in *Phillip Morris* engaged in the misleading and deceptive conduct alleged against them collectively or in concert was found by their Honours to be a fundamental flaw in the representative claims of the applicants and the group members.'[25]

Members of the Full Court were, perhaps understandably, concerned at the wide ambit of the proceedings and the broad allegations in respect of the conduct of the six respondent tobacco companies over a period of four decades. The Full Court was, however, divided over the question of whether the applicants should have leave to re-plead their case. Despite various concerns, Sackville J concluded, on balance, that they should have leave to re-plead. The majority (Spender & Hill JJ) concluded that the matter should not be allowed to proceed as a class action. Thus, notwithstanding the 2:2 split between the total of four judges who had considered this issue, at first instance and on appeal, the High Court refused the application for special leave to appeal.

Pesticide contamination of cattle

In *Symington*, class action proceedings were commenced in the Federal Court on behalf of graziers alleging that cattle owned by them had ingested or absorbed a pesticide (endosulfan) sprayed from airplanes on adjoining or nearby cotton fields. This was alleged to have drifted on to their properties and contaminated vegetation and water ingested by the cattle. Following the detection of endosulfan residues in beef and in beef cattle, the applicant and group members suffered economic loss. Various chemical companies were joined as respondents. The applicants contended that their individual claim arose out of the products supplied to their neighbours by the first respondent and conceded that they had no individual claim against the other five respondents. Accordingly, Wilcox J determined that >>

they had no standing to sue the other respondents and ordered that the claims against them be dismissed.[26]

CASES THAT HAVE SETTLED

Numerous other cases arising out of exposure to various toxic or contaminated substances have settled. These include various proceedings brought on behalf of classes of persons who experienced food poisoning from contaminated food stuffs[27] and illness from contaminated water used in cooling towers in a commercial building.[28]

Other 'mass tort' cases that have resulted in settlements in recent years include the claims of persons who acquired HIV through contaminated blood, and economic loss claims by businesses as a result of contaminated water alerts in Sydney in late 1998.

CASES THAT HAVE PROCEEDED TO TRIAL AND FAILED

Herbicide spraying and damage to crops

In *Schneider*, numerous proceedings were commenced following damage to wheat crops in north western NSW, allegedly as a result of spraying with a chemical herbicide (Puma S). One of the proceedings commenced was a class action against the manufacturer of the herbicide on behalf of all affected farmers (all wheat growers in the affected region who claimed loss) and the distributor from whom the applicant had purchased the herbicide.

The causes of action relied upon included alleged contraventions of the TPA, negligence, breach of contract and implied conditions and warranties. The proceedings that had not settled were heard together by consent, although they were not consolidated.

Although the evidence at trial established that the wheat crops had suffered damage, there was considerable dispute as to the role, if any, played by the chemical in question.

The trial judge, Matthews J, did not accept that the spraying with the chemical was, in a legal sense, a cause of the damage to the represented growers' crops. Thus, the claims against both the manufacturers and the distributors of the chemicals failed.[29]

An appeal to the Full Federal Court was dismissed.[30]

CONCLUSION

The introduction of a class action regime in the Federal Court, and in the Victorian Supreme Court, has clearly facilitated the pursuit of significant claims, many of which would not have been undertaken otherwise.

However, there have been relatively few toxic tort class actions in Australia to date. A number of cases that have succeeded at trial have been overturned on appeal. Other matters have not proceeded to trial because of the inability to satisfy the class action statutory requirements, rather than because of lack of merit.

The class action remains a useful procedure for achieving access to justice and redress for victims of toxic torts. However, significant economic disincentives, and the lack of adequate rewards in successful cases, will continue to constrain its use. ■

Notes: **1** *Ryan v Great Lakes Council* [1999] FCA 177. **2** *Graham Barclay Oysters Pty Ltd v Ryan* [2000] FCA 1099. **3** *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 (5 December 2002). **4** Judgment, 24 June 1997 [1997] 541 FCA; 72 FCR 1. **5** See *Brian McMullan & Anor v ICI Australia Operations Pty Ltd & Ors* [1997] 1298 FCA (27 November 1997). **6** [1999] HCA 36; 164 ALR 606. **7** See *McMullen v ICI Australia Operations Pty Ltd* [1999] FCA 1814 (23 December 1999). **8** See, for example, *Brian McMullan & Anor v ICI Australia Operations Pty Ltd & Ors* [1998] 1172 FCA (17 September 1998); *Brian McMullan & Anor v ICI Australia Operations Pty Ltd & Ors* (No. 7) [1998] 962 FCA (14 August 1998); *Brian McMullan & Anor v ICI Australia Operations Pty Ltd & Anor* [1998] 1408 FCA (2 November 1998), setting aside the determination of judicial registrar, Walker. **9** *McMullan & Anor v ICI Australia Operations Pty Ltd* 156 ALR 257 (12 June 1998). **10** *Leonie Cameron v Qantas Airways Limited* (1995) ATPR 41-417; (1995) 55 FCR 147. **11** Although judgment was for an amount of less than $100,000, Beaumont J held that the costs

recoverable by the successful applicant should not be reduced by one-third, pursuant to Order 62, Rule 36A(1) of the *Federal Court Rules*. However, in view of the mixed outcome of the proceedings, the respondent was ordered to pay 70% of the applicant's costs: *Leonie Cameron v Qantas Airways Limited,* Judgment 15 August 1995. At trial, five of the group members had succeeded in the misleading conduct claim and all had succeeded in the claims based on negligence. **12** *Qantas Airways Ltd v Leonie Cameron* [1996] 715 FCA 1 (14 August 1996). **13** *Qantas Airways Ltd v Leonie Cameron* [1996] 765 FCA 1 (30 August 1996). **14** *Cook v Pasminco Ltd* [2000] FCA 677 (12 May 2000); (2000) 99 FCR 548. **15** *Cook v Pasminco* (No. 2) [2000] FCA 1819 (12 December 2000). Stone J granted leave to appeal from the order for costs; *Cook v Pasminco Limited* [2001] FCA 1277 (7 September 2001). **16** *Re Wakim; ex parte McNally* (1999) 163 ALR 270, (27 June 1999). **17** Section 33G of the Act. **18** *Shutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* [2000] VSCA 103 (8 June 2000)a. **19** New Part 4A *Supreme Court Act* 1986. **20** See *Phillip Morris Australia Ltd v Nixon* [2000] FCA 229 (13 March 2000), discussed below. **21** Cook & Ors v Pasminco Ltd & Ors [2000] VSC 534 (15 December 2000). **22** Nixon v Phillip Morris (Australia) Ltd [1999] FCA 1107 (13 August 1999). **23** At para 126. This interpretation is open to question. See, for example, Bray v F Hoffmann La Roche [2002] FCA 1405 (15 November 2000). **24** Sackville J at para 143; Spender J came to a similar conclusion, at paras 4-6. **25** Bray v F Hoffman-La Roche [2002] FCA 1405 (15 November 2000) at para 49. **26** Leonard Thomas Symington & Anor v Hoechst Schering Agrevo Pty Ltd & Ors [1997] 969 FCA (4 September 1997). **27** For example, in February 2003 class action proceedings were commenced in the Supreme Court of Victoria on behalf of victims of salmonella poisoning from contaminated food. A settlement agreement was reached in August 2003, and group members were compensated by February 2004. There have been a number of similar cases. **28** In May 2000, class action proceedings were commenced on behalf of persons who suffered illness and injury allegedly as a result of exposure to Legionella while attending the Melbourne Aquarium between 8-27 April 2000. On 11 February 2004, the Victorian Supreme Court made orders approving of the settlement. Group members were compensated in June and July 2004. **29** *Schneider v Hoechst Schering Agrevo Pty Ltd* [2000] FCA 154. **30** *Schneider v Hoechst Schering Agrevo Pty Ltd* [2002] FCA 102 (21 February 2001), per Spender, Hill & Healy JJ.

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