Tort law reform and the *Trade Practices Act*

By Guy Boyd and Andrew Westcott

Less than four years after the Commonwealth government commissioned the *Review of the Law of Negligence Report* (the Ipp Report),[1] a crisis in the availability and cost of insurance has led to new restrictions on access to product liability damages throughout Australia.

Most of the provisions apply to economic and non-economic loss suffered as a result of personal injuries, which represents a substantial proportion of claims arising from defects in product design, manufacture and warnings. Other provisions apply to claims for damage to property.

There are several alternative causes of action available to a plaintiff in a product liability claim:

(a) negligence;
(b) breach of contract, including breach of a warranty implied under Part V Division 2 of the *Trade Practices Act* 1974 (TPA) (or state *Fair Trading Act* or *Goods Act* equivalents);
(c) s82 remedies for breach of Part V of the TPA, including ss52 and 53 (and their state *Fair Trading Act* equivalents). These causes of action will no longer be available to personal injury plaintiffs once the *Trade Practices Amendment (Personal Injuries and Death) Act* 2006 commences;
(d) Part V Division 2A of the TPA, including ss74B, 74C and 74D; and
(e) Part VA of the TPA (Part VA), including ss75AD - 75AG.

This article focuses on negligence and Part VA.

The restrictions on damages awards are not uniform. Lawyers acting for injured plaintiffs now have to contend with a more complex range of damages regimes. One key issue for practitioners is whether the damages regime is more favourable if the claim is brought in tort or under the TPA. The answer depends on particular features of the claim, and which state regime applies.

PART VA

Part VA came into force on 9 July 1992. This followed an Australian Law Reform Commission Report[2] that recommended a form of strict liability for manufacturers. The provisions themselves are based on a 1985 European Economic Community Directive[3] and apply where manufacturers supply defective goods that cause death or personal injury, or damage to property other than the defective goods.

The causes of action in Part VA are potentially more attractive to a plaintiff because, *inter alia*:

(a) the state of mind of the manufacturer and proof of the manufacturer's conduct are arguably irrelevant under Part VA. It is a strict liability cause of action;[4]
(b) the provisions of Part VA cannot be excluded by contract; and
(c) there are limited defences to a claim under Part VA.

A claim under Part VA will fail if it is shown that the defect did not exist at the time of supply of the goods by their actual manufacturer, or that the state of scientific or technical knowledge at the time the goods were supplied by their actual manufacturer was not such as to enable that defect to be discoverable (s75AK). However, under Part VA the onus of proving these matters is shifted to the defendant.[5]

Section 75AD of Part VA creates a cause of action. In a claim based on s75AD, a plaintiff needs to prove that:

(a) the product was manufactured by the defendant (or is deemed to have been);
(b) the product had a defect (as a question of fact and law); and
(c) the defect caused the plaintiff's injury.

The legal notion of 'defect' is thus central to a claim based on Part VA. Section 75AC(1) of the TPA provides that, for 'the purposes of [Part VA], goods have a defect if their safety is not such as persons generally are entitled to expect'.

The main reason why Part VA is supposed to make it easier for plaintiffs than a claim in negligence is that a form of normative 'consumer expectation' test is used instead of the common law standard of 'reasonable foreseeability'. Under s75AC, a plaintiff does not need to prove that the manufacturer knew, or ought to have known, of the defect that caused the injury.

The advantage for plaintiffs of the consumer expectations test over the reasonable foreseeability test is illustrated in the inadequate warnings case of *Glendale Chemical Products*.[6] In that case, there was no evidence of similar accidents occurring previously. Also, other manufacturers used very similar warning labels on similar products. Nevertheless, it was held that the safety of the label fell short of what the community generally was entitled to expect, and the plaintiff was accordingly entitled to an award of damages.

CAPS, THRESHOLDS AND LIMITATIONS FOR PERSONAL INJURY DAMAGES

Many of the reforms implemented following the Ipp Report apply not only to negligence claims but generally to claims for 'personal injury damages',[7] with a range of exclusions. South Australian provisions apply to personal injury claims in tort or contract,[8] and Tasmanian provisions apply to personal injuries resulting from a 'breach of duty'.[9]

The authors of the Ipp Report recommended uniform commonwealth and state laws that would apply regardless of whether the claim is brought in tort, contract, under a statute, or any other cause of action.[10] It was hoped that this would prevent plaintiffs from 'shopping' for a more favourable cause of action or forum.

Instead, there are significant differences between the caps, thresholds and other restrictions introduced by the states, territories and the commonwealth. Lawyers acting for product liability claimants need to be familiar not only with the provisions and procedures that apply in their state, but also with the damages regimes that apply under the TPA and in other states and territories. The changes are wide-ranging and this article can touch only briefly on a sample to illustrate the concepts being discussed.

Minimum thresholds for non-economic loss

Each state except Queensland imposes minimum impairment thresholds below which damages for non-economic loss (pain and suffering or loss of amenity or enjoyment of life) cannot be recovered. The same is true of the TPA.

In NSW, and for claims under Part VA of the TPA, no damages for non-economic loss may be awarded unless the severity of injury is at least 15% of a most extreme case. >>

In Victoria and the Northern Territory the impairment must generally be at least 5%, as assessed under the AMA Guides (10% for psychiatric injuries in Victoria).

In South Australia, the ability to lead a normal life must have been significantly impaired for at least seven days, or medical expenses must have reached a prescribed minimum.

In Western Australia and Tasmania, damages for non-economic loss are awarded only if they exceed statutory minimum amounts.

Caps for economic and non-economic loss

There are also caps on the amount of damages that can be awarded for both non-economic loss and economic loss.

For non-economic loss, indexed caps on damages apply in Victoria ($398,630); NSW ($416,000); South Australia ($264,050); Queensland ($250,000), Western Australia, Northern Territory; and under the TPA ($257,570). There are no equivalent caps on damages for non-economic loss in Tasmania or the Australian Capital Territory.

For economic loss, caps on damages for loss of earnings are in most jurisdictions restricted to three times average earnings. For example, in Victoria, the restrictions apply to past and future economic loss due to the deprivation or impairment of earnings or the loss of expectation of financial support. In South Australia there is a prescribed maximum amount of damages that may be awarded for loss of earning capacity. However, s87U of the TPA provides that in all proceedings to which Part VIB of the TPA applies, damages for economic loss due to deprivation or impairment of past earnings or future earning capacity or an expectation of financial support are capped at twice average weekly earnings.

Limitation of actions

There is now a limitation period that applies to personal injury claims of three years (instead of six years) from the date of discoverability or when the cause of action accrues (depending on the jurisdiction). This applies in each state, the Northern Territory, the Australian Capital Territory and to Part VA, pursuant to Part VIB of the TPA.[11] There is also in some jurisdictions a further limit of 12 years from the date of the act or omission alleged to have caused the injury.

APPORTIONMENT AND CONTRIBUTION FOR DAMAGE TO PROPERTY

The new proportionate liability provisions apply to product liability claims for damage to property, but not personal injury. They have been introduced to limit damages payable by a defendant to the proportion of the damage or loss claimed that the court considers just, having regard to the extent of the defendant's responsibility for the damage or loss.

In NSW negligence law (except in personal injury cases) and in claims under s52 of the TPA, a defendant's liability to a plaintiff for damages is limited to the extent of that defendant's responsibility for the loss or damage, regardless of whether the other wrongdoers are joined as parties to the proceeding. By contrast, in Victoria, proportionate liability applies only in relation to wrongdoers who are parties to the proceeding.

In Queensland, the proportionate liability provisions do not apply to a claim by a consumer who asserts rights relating to goods or services acquired for personal, domestic or household use or consumption.[12]

Proportionate liability applies to claims for damages under s82 of the TPA for personal injury or damage to property caused by contravention of s52 of the TPA (misleading or deceptive conduct). At the time of writing, an Act to abolish the right to bring personal injury claims for contravention of s52 awaits Royal Assent. As Part VA targets corporate manufacturers or deemed manufacturers, who are jointly and severally liable, it appears unlikely that the concept of proportionate liability will in future be applied to claims under these provisions.

The absolute defence to the tort of negligence of voluntary assumption of risk now has only limited relevance. State and territory legislation provides that a claim for damages, at least in tort or in contract, is not necessarily defeated if the claimant's own negligence contributed to the loss, but the damages are reduced in line with the claimant's contributory negligence. Several jurisdictions now expressly provide that a plaintiff may be found contributorily negligent to the extent of 100%.

A limitation on damages equivalent to contributory negligence is contained in s75AN of the TPA, under which damages for loss caused by both the defect, and an act or omission of the individual who suffers the loss, are reduced to such extent as the court thinks fit. A similar provision has been inserted into s82 and applies to damages for contravention of s52 of the TPA.

NEGLIGENCE OR PART VA?

As can be seen from the summary above, there are some significant variations between the states in caps, thresholds and methods of assessing damages. These differences will undoubtedly tempt plaintiffs to choose the jurisdiction and cause of action that may enable or maximise an award of damages.

However, since the decision of the High Court in *John Pfeiffer v Rogerson*,[13] there are fewer opportunities for plaintiffs to 'forum shop' in Australia. For torts, Australian courts must apply the substantive law of the place of the tort. Matters that affect the existence, extent or enforceability of the parties' rights or duties are matters of substantive law, whereas rules directed to governing or regulating the mode or conduct of court proceedings are matters of procedural law and depend on the forum selected. Accordingly, the caps and other limits on damages enacted in various states are likely to be considered substantive rather than procedural law.

This does not mean that plaintiffs cannot 'cause of action shop'. An interesting issue may arise if a plaintiff succeeds in a personal injury claim both in tort and under Part VA. Which cap on damages for non-economic loss applies (assuming that they differ)? Section 87E of the TPA provides that Part VIB applies to 'proceedings taken under this Act' 'that relate to' Part IVA, Division 1A or 2A of Part V or to Part VA, 'in which the plaintiff is seeking an award of personal injury damages'. Thus it appears that the application of Part VIB is not expressly restricted to TPA

claims. What then of proceedings in which both TPA claims and tortious claims are pleaded?

The explanatory memoranda and second reading speeches for the *Trade Practices Amendment (Personal Injuries and Death) Act* 2004, which introduced Part VIB, shed no light on this question. As noted above, many of the state reforms expressly apply generally to awards of damages for personal injury. Arguably there is a direct inconsistency between, for example, the cap on non-economic loss damages under the Victorian provisions and the cap under Division 3 of Part VIB of the TPA. Does the lower cap under Part VIB of the TPA prevail by reason of there being a direct inconsistency between the two caps activating s109 of the Constitution? Arguably so. Alternatively, it may be argued that s87E of the TPA should be read down as relating only to the TPA claim and a mixture of Part VIB and state provisions apply to an award of damages.

If s87E of the TPA prevails over the state laws and, as a consequence Part VIB applies to damages for the tort of negligence in proceedings that include a claim under Part VB, it would be interesting to see what approach courts would take. Would a proceeding be 'taken under' an applicable provision of the TPA even after any relevant TPA claim is withdrawn? Given the youth of these provisions and the apparent lack of decisions testing these issues, the answers are not clear.

The introduction of Part VIB into the TPA will have different consequences for product liability plaintiffs, depending on where they are injured. For example, a plaintiff injured in NSW may see little difference between a claim in tort and a claim under Part VA as the non-economic loss thresholds are the same, but the cap is substantially higher for a claim in tort. In an appropriate case, a plaintiff may wish to plead both causes of action in the hope that the consumer expectation test will be satisfied if the claim in tort fails. On the other hand, if both causes of action are pleaded, potential advantages in relying on the TPA alone may be lost. The factual enquiry to be undertaken will no longer be narrower if negligence is also pleaded. There is also the possibility that the award of damages will be more restricted if a less advantageous cause of action is selected.

For plaintiffs injured in Victoria, different non-economic loss thresholds and caps apply, depending on the cause of action selected. For those who satisfy the Victorian threshold, Part VA still offers some advantages in establishing liability, but may impose a lower cap on damages for non-economic loss.

All this serves to demonstrate that despite easing a plaintiff's burden of proving liability, Part VB claims raise complex questions when it comes to determining a possible award of damages.

CONCLUSION

The new restrictions on damages under the product liability provisions of the TPA have reduced the compensation available to innocent consumers who suffer loss because of a defective product. Some claims that might otherwise have been brought under Part VA will not meet the threshold prescribed for damages for non-economic loss by Part VIB. Other claims will be reduced due to the caps prescribed for economic and non-economic loss.

These changes were intended to complement state reforms and ease the pressure on the availability and cost of public liability insurance for manufacturers in the Australian market. As a consequence, in future, the cost of goods will not, in theory, reflect the losses they cause. Also, the reduced threat of damages awards, albeit a risk mitigated and spread by insurance, will reduce economic incentives for manufacturers to invest in product safety. As a consequence, consumer protection will depend more on other controls over product safety, such as the manufacturer's concern for corporate reputation. However, the threat of adverse publicity caused by litigation will probably also be reduced.

Where the tort of negligence and a claim under Part VA are both potentially applicable, product liability plaintiffs (and their lawyers) now face even more complex considerations in selecting the cause of action and jurisdiction, depending on the applicable state or territory laws.

If substantial damages for non-economic loss are claimed, plaintiffs are likely to be attracted to the cause of action with the highest cap. However, these plaintiffs are also likely to wish to rely on a Part VA claim if liability in tort would be difficult to establish. ■

Notes: **1** Commonwealth of Australia, *Review of the Law of Negligence Report* was delivered to the Minister for Revenue & Assistant Treasurer on 30 September 2002. **2** Australian Law Reform Commission, *Product Liability*, Report No. 51 (1989). **3** Directive 85/374/EEC, OJ No L210, 7.8.1985, page 29. **4** See Guy Boyd, 'Personal injuries law reform: An unintended effect on product liability claims?' (2003) 11 *Torts Law Journal* 262. **5** See *Effem Foods Ltd v Nicholls* [2004] ATPR 42-034. **6** *Glendale Chemical Products Pty Ltd v ACCC* (1998) 90 FCR 40. **7** *Wrongs Act* 1958 (Vic) s28C(1); *Civil Liability Act* 2002 (NSW) s11A, *Civil Liability Act* 2003 (Qld) s50; *Civil Liability Act* 2002 (WA) s6.; *Personal Injuries (Liabilities and Damages Act)* 2003 (NT) s4(1); *Civil Law (Wrongs) Act* 2002 (ACT) s93. **8** *Civil Liability Act 1936* (SA) s51. **9** *Civil Liability Act* 2002 (Tas) s24. **10** Above n1, p1, Recommendation 1. **11** TPA, s87F; *Limitation of Actions Act* 1958 (Vic), s27D; *Limitation Act* 1969 (NSW), s50C; *Limitation of Actions Act* 1974 (Qld), 11; *Limitation of Actions Act* 1936 (SA); s36; *Limitation Act* 2005 (WA), s14; *Limitation Act* 1974 (Tas), s5A; *Limitation Act* 1981 (NT), s12; *Limitation Act* 1985 (ACT), s16B. **12** *Civil Liability Act* 2003 s28(3). **13** (2000) 203 CLR 503.

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