
Product liability law reform

by Barry Hunt

Major legal reforms have been announced to make it easier for people injured by defective products to seek compensation.

The federal Minister for Justice and Consumer Affairs, Senator Michael Tate, said in May that federal Cabinet has agreed to introduce an extensive new product liability regime.

Under the new laws a person who is injured or suffers property damage as a result of a defective product will have a right to compensation against the manufacturer, without the need to provide negligence.

The new regime will follow the EEC model, an emerging international standard for product liability laws. It is designed to avoid the excesses of product liability payouts experienced in the United States.

On the key question of who should bear the onus of proving a product is defective, the government has reached a compromise position which should be acceptable to both industry groups and consumers. They took a lead from the Industry Commission which said that it would be more economically efficient to require the manufacturer to show that a defect does *not* exist. But as a quid pro quo the government will require the consumer to show that his or her damage did not arise solely through misuse of the product.

The government decided not to implement the ALRC's proposal that claimants need only show they suffered loss or injury as a result of how the goods acted.

Senator Tate said that a cause of action under the new laws would be established if the consumer was able to show that damage had been suffered, that the damage was caused by the product in question, and that the damage did not result from the consumer misusing the product. But where the manufacturer can show that the product was not defective no compensation will be payable.

Senator Tate said that by matching the European standard the Australian legislation would enhance the position of Australian manufacturers in export markets.

Other important points of the proposed scheme provide that:

- The person to pay compensation will normally be the manufacturer of the product.
- In addition to the 'no defect' defence, there will be a 'state of the art' defence, ie that in the light of scientific knowledge at the time of manufacture the defect could not have been known.

- Where it is shown that the damage suffered was in part the fault of the consumer the award of compensation can be reduced.

Senator Tate said that in cases where loss or damage is caused by a defect in a product, and the defect only existed because the product complied with a mandatory standard imposed by the federal Government, the Commonwealth would be liable to compensate any person for that loss or damage.

Product liability reforms — key features

Legislation

The new laws will constitute a new part of the Trade Practices Act 1974.

The law will only apply to products which are put on the market after the commencement of the legislation.

Cause of Action

An action may be commenced where the applicant (consumer) can prove that:

- he/she suffered loss or damage;
- the product caused the loss or damage; and

- the loss or damage suffered did not result solely from the product being used unreasonably.

Who may be liable

- The manufacturer or the producer of the product; or
- any person who, by putting his or her name, trade mark or other distinguishing features on the product, represents himself or herself as its manufacturer or producer; or
- where the manufacturer or producer is located outside Australia, the importer; or
- where the manufacturer or producer cannot be identified, each person in the supply chain is liable unless, within a reasonable time, that supplier can identify the manufacturer or producer or the person from whom the product was acquired.

Defences

A manufacturer or producer will have a defence to an action where it can show:

- the product was not defective;
- that it (the manufacturer or producer) did not put the product into circulation;
- that it is probable that the defect which caused the loss did not exist at the time the product was put into circulation;
- that the product was neither:
 - manufactured by it for sale or any form of distribution for economic purposes; nor
 - manufactured or distributed by it in the course of its business;
- that the product was defective only because it complied with a mandatory standard;
- in the case of the manufacturer of a component, that the defect is attributable to the design of the product in which the component was fitted or to the instructions given by the manufacturer of the product; or

- that the state of scientific and technical knowledge at the time the product was put into circulation was not such as to enable the existence of the defect to be discovered.

Meaning of 'defective'

A product is defective when it does not provide the safety which persons generally are entitled to expect. Matters to be taken into account when applying this standard include:

- the presentation of the product (manner of presentation, existence of warnings, instructions etc);
- what might reasonably be expected to be done with or in relation to the product; and
- the time at which the product was supplied by its producer to another person.

Contributory negligence

Where the damage suffered by the applicant is in part the fault of the applicant or any person for whom the applicant is responsible, the award of damages may be reduced.

Loss recoverable

The law will permit recovery of loss arising from:

- death or personal injury; or
- damages to property (other than the product itself) provided the property is of a kind ordinarily acquired for personal, domestic or household use.

Limitation periods

Actions must be brought within three years of the time the applicant became aware (or ought to have become aware) of both the damage and the identity of the manufacturer or producer.

Rights to compensation for personal injury under the scheme are extinguished twenty years after

the date upon which the product was put on the market. Rights to compensation for property damage are subject to a ten year limit.

Other legal rights

The new law will not supersede or replace any existing laws.

In particular, rights of action arising in the law of negligence are not affected by this reform.

Criticisms

Katie Strange, of International Public Relations Pty Ltd, discussed the mixed reactions to product liability law reform in the June issue of *Focus Australia*.

While the Public Interest Advocacy Centre (PIAC) welcomed the proposed reforms, it also criticised the Government for allowing manufacturers to invoke a 'state of the art' defence. This means that manufacturers will not be liable if, in the light of scientific and technical knowledge at the time of manufacture, the defect could not have been known. The PIAC believes that this defence is likely to be used in association with pharmaceutical products).

The Confederation of Australian Industry (CAI) and the Business Council of Australia (BCA) issued a response to Senator Tate's announcement saying that they found the reforms 'unacceptable' and 'misrepresentative of the findings of the IC'.

The industry groups maintain that the new legislation does not follow the European Community Directive on product liability, which requires claimants to demonstrate that a product is unsafe and defective.

The groups' representatives say the Government's decision is not in line with what industry groups have said should form part of the legislative reform.

The Metal Trades Industry Association of Australia (MTIA) has also criticised 'the Government's proposal to depart from

the fundamental principle in both European and Australian product liability law that claimants must bear the onus of proving that goods are defective', because of the costly imposts this will place on industry.

The Australian Chamber of Manufacturers (ACM) has responded to the proposed product liability laws by saying that they 'would create a dangerous precedent'.

The ACM argues that by placing the onus of proof on the defendant instead of the plaintiff, the proposed laws have the potential to:

- establish a dangerous legal precedent and erode confidence in the system of justice;
- touch off an upsurge in damages claims by plaintiffs who would not need to prove their claims;
- expose companies to the constant threat of damages actions and associated legal costs;
- force up insurance and product costs and, consequently, prices and inflation;
- deter the development and introduction of new products in Australia; and
- divert companies and jobs from Australia. □

Death on the roads is homicide

The VLRC's discussion paper *Dangerous Driving Causing Death* was released in July by the Attorney-General, Jim Kennan QC. The paper suggests that a much tougher stance should be taken towards road killers.

The present law on the subject sends the wrong message to the community. It allows people who are clearly guilty of manslaughter to be charged with a lesser offence with a lesser penalty.

The Commission's proposals restore a proper balance to the law, and enable the courts to respond to community concerns over the existing law.

The paper identifies two major problems with the present law. These are the inadequacy of the penalties, and the fact that a person can only be charged with *either* manslaughter *or* culpable driving causing death *or* reckless driving. A person who gets off cannot be charged with a lesser offence.

The VLRC proposes that

- the charge of culpable driving should be abolished
- a new offence should be created — 'causing death or very serious injury by dangerous driving'. A person found guilty of this offence should receive a maximum penalty of 7 years imprisonment;
- alternative verdicts should be available so that juries can convict of a lesser offence if that is warranted.

Copies of the discussion paper are available from the VLRC, 7th floor, 160 Queen Street, Melbourne, telephone (03) 602 4566.
