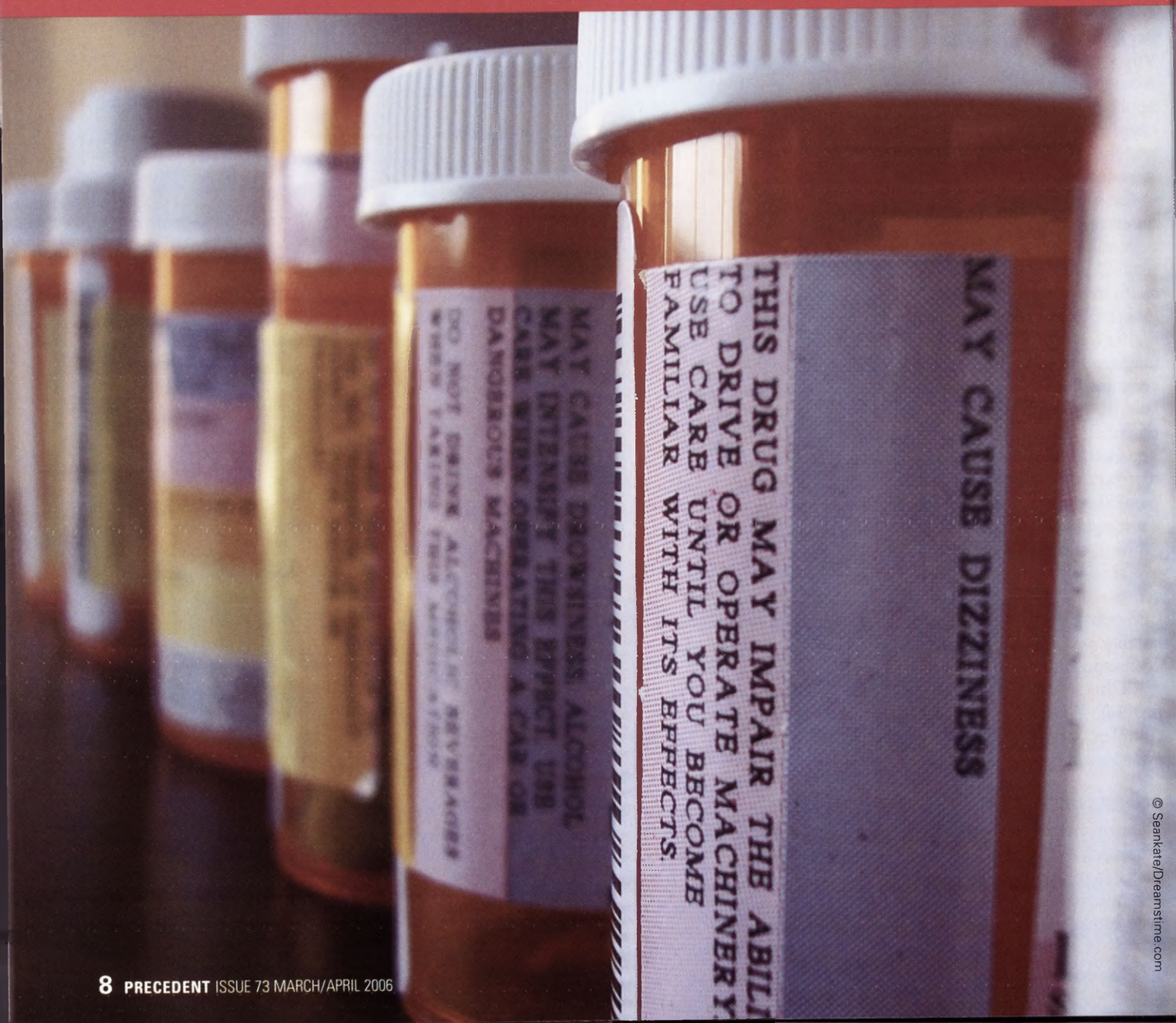
AUSTRALIAN PRODUCT LIABILITY

The demise of the everyday claim

By Michael McGarvie and Lisa Maynard



Optimistic predictions in 2001 suggested that emerging new and innovative dispute-resolution techniques might promise practical, non-litigious and speedy remedies for individuals injured by defective products.[1] How wrong those predictions were in the light of Australia's tort reforms in 2002, 2003, and 2004!

Although the insurance industry and governments might claim that they have saved Australia from a (fictional) litigation frenzy, what amounts to the destruction of real consumer rights for small to medium-sized claims will forever distort the public's perception of the value of consumer-protection legislation. For the sad fact is that remedies for those who have suffered ordinary injuries from dangerous, defective products are simply no longer available, having been locked from reach by misinformed legislators. For all but the most seriously injured consumers, everyday rights are gone. This article examines the impact of recent tort reforms on product liability cases in Victoria.

TORT REFORM

Clarke, Loveday and Williams described one of the earliest tort-reforming laws – the *Civil Liability Act* (NSW) 2002 (CLA) – as a 'hotchpotch of legislation'. It codified negligence, lowered the standard of care, capped damages and restricted lawyers in an attempt to tilt the balance against plaintiffs and reduce the level of litigation.[2] The CLA worked so effectively in NSW that it reduced some claims by 66% over a two-year period.[3]

Similar legislation has been enacted in most jurisdictions across Australia, both federally and within the states. The Victorian changes emerged with the passage of the *Wrongs and Statute of Limitations Acts (Insurance Reform) Act* (Vic) 2003 (New Wrongs Act). At the time, it was argued that this state legislation probably did not affect the legal rights of individuals injured by defective products because it appeared to be limited to common law claims, not claims and remedies available under the strict liability provisions of Part VA of the *Trade Practices Act* (Cth)1974 (TPA).[4]

However, any optimism about the survival of ordinary consumer rights that might have been justified in Victoria in 2003 was dashed on 13 July 2004 with the introduction of the *Trade Practices Amendment (Personal Injuries and Death) Act (No.2)* (Cth) 2004 (TPA No. 2). It is now 12 years since the innovative, socially responsible and globally relevant defective product provisions of Part VA were added to the TPA on 9 July 1992. These provisions were measured, practical and reflected international standards. Their implementation brought consumers and manufacturers together in a spirit of co-operation rarely seen before.[5] TPA No. 2, however, has now blunted that spirit of co-operation and has also despatched a genuine remedy for more than 50% of those injured by defective products. TPA No. 2 imposes limits on the amount of general damages that can be awarded, and requires compliance with a high threshold before non-economic loss damages can be awarded at all.

An earlier bill, now the *Trade Practices Amendment (Personal Injuries and Death) Act* 2006 (TPA First Amendment), also amending the TPA, has just been passed to prevent plaintiffs seeking compensation for death or injury under Division 1 of Part V. This Division covers conduct such as false and misleading representations, and therefore does not impact on the ability to sue under the defective product provisions in Part VA of the TPA. It was originally designed to prevent people from resorting to the old consumer protection provisions contained within Part V of the TPA, thereby avoiding the more restrictive state public liability laws. Curiously, it was originally presented in Bill form over two years ago, but it has only become an Act this year.

WHAT HAS CHANGED?

TPA No. 2 inserted a new Part VIB into the TPA. The inserted provisions provide similar limitations on recovery of damages in personal injury cases to those imposed in all states during 2002 and 2003 following the federal government's review of the law of negligence.[6] The limits on monetary compensation >>

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follow a similar pattern to those in the CLA and *Motor Accidents Act* (NSW) 1988 (MAA). They do not, however, apply to smoking or tobacco-related proceedings.

LIMITATION PERIODS

TPA No. 2 sets a three-year limitation period from the date of discoverability for actions relating to personal injuries. Section 75AO already limited the time for bringing an action under the TPA to three years, but this covers all actions claiming damages for losses in general. The new sections 87F to 87K inserted by TPA No. 2 relate only to personal injury claims and introduce the concept of a 'date of discoverability'.

The date of discoverability is the date when the plaintiff knew, or ought to have known:

- that the death or personal injury had occurred, and;
- that the death or personal injury was attributable to a contravention of the TPA, and;
- that the injury was significant enough to justify bringing an action.

There are various exceptions to this provision, such as a long-stop provision and extensions for minors or those under a disability. It is therefore possible that some actions can be commenced more than three years after the supply of a defective product.

LIMIT ON DAMAGES FOR NON-ECONOMIC LOSS

TPA No. 2 altered the TPA to impose a maximum amount for non-economic loss damages that is indexed annually in accordance with CPI. The maximum amount, currently around $257,000, is to be awarded only in a most extreme case. All other injuries are to be awarded a percentage or a graded proportion of the maximum amount, unless they are less than 15% of a most extreme case. For any injury less than 15% of a most extreme case, no non-economic loss damages can be awarded.

A graduated scale operates for all injuries between 15% and 32% of a most extreme case. For example, an injury that is 15% of a most extreme case must be awarded 1% of the maximum amount payable – that is, approximately $2,570 (20% fetches $8,995, 25% fetches $16,705).[7] Where an injury is between 33% and 100% of a most extreme case, the amount of compensation awarded is the same percentage of the maximum amount that can be awarded.

What is a 'most extreme case'?

A most extreme case is defined in s87P(2) as 'a case in which the plaintiff suffers non-economic loss of the gravest conceivable kind'. The type of injury that actually satisfies the definition of a most extreme case has been discussed by judges in NSW, where this wording has been in use for some time in the MAA. It has been said that cases of quadriplegia, some serious cases of paraplegia, cases of serious brain damage and perhaps some cases of extremely serious scarring and disfigurement may fall into the most extreme case category,[8] but that it does not mean the worst case imaginable.[9]

An example of a case where 100% of a most extreme case was awarded was a transport accident case where the plaintiff was rendered a T7 paraplegic.[10] These types of injuries are not the only ones to be assessed as a most extreme case. The courts in NSW have acknowledged that similar injuries do not always result in similar losses for all individuals.[11] The court must undertake a close examination of the entirety of the plaintiff's circumstances and the effect of the injury upon their life.

Hoeben J, in *Manning v State of NSW*,[12] assessed the plaintiff's entitlement to non-economic loss at 80% of a most extreme case under the CLA. The plaintiff, who was 31 years of age at the time of judgment, had been savagely beaten by his cell-mate while in prison and was left with brain damage and other disabilities. He was left with severely slurred and limited speech with restricted lip, tongue and jaw movement. He required the assistance of a walker to get around and assistance with most activities of daily living. The defendant in that case submitted that although the plaintiff had suffered significant brain damage, he had a reduced appreciation of his disability and limitations, and therefore should be granted only a nominal amount of non-economic loss damages. The court acknowledged that 'the plaintiff's reduced appreciation of what he has suffered and what he has lost is a factor to be properly taken into account in reducing the extent of the plaintiff's entitlement to non-economic loss'[13] but determined that he does have some appreciation of his disabilities and therefore awarded non-economic loss at 80% of a most extreme case.

How do you assess the percentage of a most extreme case?

The findings in *Manning* show how courts can use some level of ingenuity to reach fair results. Bryson JA, in *Doubleday & Anor v Kelly* stated: 'A finding of facts which reduces findings about severity of non-economic loss to a proportion expressed as a percentage of a most extreme case is not a finding which can be justified by cogent detailed reasoning, in the mathematical terms which the requirement to reach a percentage seems to invoke, nor in any other terms ... the discernment of the reasonably available range is a matter of impression and cannot be further elucidated.'[14] Courts must look at all of the circumstances surrounding the plaintiff and their injury. Factors such as the plaintiff's age, the extent and timeframe of their pain and suffering, and any pre-existing or subsequent injuries, will be taken into account.

For example, a child plaintiff who suffered a severe break to her dominant right arm in a trampolining accident when aged seven was assessed at 20% of a worst case under the CLA. This assessment was reached by taking into account her age, and the fact that she must live the rest of her life with loss of sensation in her thumb and two fingers, numbness paraesthesia, and weakness in her hand.

Another plaintiff who became the respondent in an appeal to the NSW Supreme Court had her assessment of non-economic loss entitlement reduced from 33% to 20%. The plaintiff's injury in this case was an inoperable ankle injury that limited her participation in outdoor and sporting activities, and meant that she could no longer work as a croupier.[15] Although the reduction still meant she was entitled to damages for non-economic loss, the amount of these damages plummeted from $127,000 to $9,500. If a similar case were determined under the provisions of the amended TPA, this person's entitlement would drop from $84,810 to $8,995.

In a 1998 NSW motor vehicle collision case, permanent scarring to the right lower leg of a ten-year-old girl was determined at 18%.[16] The scar was prominent, stretching roughly in the shape of the numeral seven. It was on the front of the right leg commencing just below the knee, extending down the leg and with suture marks on either side. The scar was also associated with decreased sensation and paresthesia and discomfort on deep palpation. A significant factor in this determination was the age of the plaintiff and the length of time that she would have to endure the physical and psychological consequences of her injury. If this injury were assessed under the TPA in 2006, she would recover only $6,425. Many lawyers would regard this sum to be the sort of money only recovered in 'hopeless' or 'nuisance' cases, yet the mutilating, disfiguring scars described above seem to deserve so much more by current community (and jury) standards.

Injuries that would fall below the minimum of 15% of a most extreme case would include many of the hundreds of artery, nerve, ligament, muscle and tendon injuries suffered in the last 10 years by adults and children who have badly lacerated their hands and fingers using defective porcelain door handles. Most of the everyday injuries that arise out of the use of defective household and domestic equipment are not catastrophic. In fact, they don't often produce injuries which would fall into the category of 15% of a most extreme case.

OTHER LIMITS

TPA No. 2 inserts a 5% discount rate on economic loss damages, and limits these damages to twice the amount of average weekly earnings. It also limits the amount of damages that can be awarded for gratuitous attendant care services >>

either provided to the plaintiff, or to cover the loss of the plaintiff's capacity to provide these services. The court must be satisfied of various criteria, such as the fact that the services were required, and that they are required or were provided for at least six hours per week over a period of at least six months. If gratuitous attendant care services are required or would have been provided for at least 40 hours per week, the maximum amount that can be awarded is the amount of average weekly earnings for that period.

CHOICE OF COURT

There is no single forum for dealing with defective product claims. They can be brought in the state common law courts and can also be dealt with through the federal court system in either the federal court or the federal magistrates' court. Section 86AA of the TPA limits the amount that the federal magistrates court can award to $200,000 for loss or damage. A Bill is currently before the federal parliament to increase this jurisdiction to $750,000.[17] Of course, if a damages claim for defective product injury caused by negligence was being pursued under state torts legislation and at common law, then the state common law courts would be the most likely choice of forum.

THE EFFECT OF THE CHANGES

The least obvious vice in this limit on damages is the statutory maximum. In 15 or 20 years' time, that maximum will be unacceptably low compared to the then community standards for damages for pain and suffering being awarded by courts in catastrophic cases. When the non-indexed cap on general damages in common law claims against the Commonwealth was set at $110,000 in 1988 by the *Safety Rehabilitation and Compensation Act* (Cth) 1988, very few commentators predicted how quickly the value of that maximum would be eroded by time and changing community standards. That static statutory maximum is now hopelessly low and outdated for the standards of 2006, which was at least $250,000 by federal parliament's 2004 standards. The statutory maximum for non-economic loss set by the *Transport Accident Act* (Vic)1986 is $400,310 and the maximum set by the *Accident Compensation Act* (Vic)1985 is $438,020. Despite the existence of CPI increases under the TPA, significant erosion of the remedy will tragically compound the most extreme injuries suffered in defective product accidents within a decade or two.

The most pernicious feature of the legislation is the assumption that people with an injury that is less than 15% of a most extreme case are suffering from only trivial or superficial conditions that do not deserve compensation. Like the provisions of many of the laws implementing tort reform in each state, these restrictions mean that those who eventually recover from major injuries caused by defective products will not be entitled to any, or any adequate, compensation for their pain and suffering endured during the recovery years.

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CONCLUSION

Where do these deserving, wronged individuals now go to seek a remedy? In Victoria, some have been advised to consider negligence actions under the new *Wrongs Act*. But to do this, Victorians must pass a 6% whole-person threshold before recovering damages for pain and suffering for physical injuries. This is almost certainly a lower threshold than 15% of a most extreme case. An action in negligence would mean not relying on the more simplified strict liability provisions of Part VA of the TPA. It would involve overlooking all the good work done by the 1992 amendments to the TPA which

reformed product liability in Australia. It would also mean that plaintiffs would have to return to the bad old days of a paper chase, trying to identify the supplier, importer, manufacturer, retailer or another link in the production-and-supply chain that might be said to have acted negligently in producing the defective product. The consumer would then have to make the difficult and risky choice of identifying who in the supply line is blameworthy and whom to sue.

The beauty of a Part VA TPA claim was that the last supplier in line was primarily responsible in a liability action if adequate information was not rapidly handed over to the injured person when asked. It also deemed the importer to be the manufacturer and overcame the need for an injured individual to sue beyond the shores of Australia. The unfair balance tipped against injured individuals by the product liability laws that pre-existed Part VA in 1992 will return if most everyday consumer injuries can be dealt with only in the common law courts rather than under the TPA. Cases will falter because of the impairment or other entitlement thresholds, the new Ipp definitions of negligence[18] or the remoteness of the overseas manufacturer.

Everyday injuries may never be appropriately recognised or adequately compensated again. Sadly, many people will become aware of their missing entitlements only when they are injured by defective products in the future, and then discover that no remedies are available to them. ■

Notes: **1** McGarvie, 'Product Liability – Another Way', *Plaintiff*, 46, 2001, pp6-10. **2** Clark, Loveday and Williams, 'The future for public liability law in Australia', *Australian Product Liability Reporter*, 16(9) 2005, pp129-31. **3** *Ibid*, 129. **4** McGarvie, 'Where to for product liability in Victoria?', *Australian Product Liability Reporter*, 14(8), 2003, 109-11. **5** McGarvie, above n1, p10. **6** Commonwealth of Australia, *Review of the Law of Negligence Report*, Canberra, 2002. (the 'Ipp Report'). **7** Note, all figures are approximates only. **8** *Kurrie v Azouri* (1998) 28 MVR 406. **9** *Dell v Dalton* (1991) 23 NSWLR 528. **10** *Mato v Zarkas* [2005] NSWSC (15 August 2005). **11** *Dell v Dalton* (1991) 23 NSWLR 528. **12** [2005] NSWSC 958 (28 September 2005). **13** *Ibid*, at para 57. **14** Bryson JA, *Doubleday & Anor v Kelly* [2005] NSWCA 151 at para 35 (12 May 2005). **15** *Owners – Strata Plan 156 v Gray* [2004] NSWCA 304 (3 September 2004). **16** See, for example, *Kurrie v Azouri* (1998) 28 MVA 406. **17** Jurisdiction of the Federal Magistrates Court Legislation Amendment Bill 2005. Introduced into the Senate on 7 December 2005. **18** Above, n6.

Michael McGarvie *is a senior personal injuries partner at Holding Redlich.* **PHONE** *(03) 9321 9740*
EMAIL *michael.mcgarvie@holdingredlich.com.au*
Lisa Maynard *is a senior associate at Holding Redlich.*
PHONE *(03) 9321 9803* **EMAIL** *lisa.maynard@holdingredlich.com.au*