

## Journals

Article | [Top](#)

# A proposal to reform Australian product liability law

R C Travers <sup>\*</sup>

[Click here for PDF print version](#)

[This article is 7 pages in ALJ]

(1995) 69 ALJ 1006

*After reviewing how different theories of product liability law impact on issues which commonly arise in product liability litigation, this article submits that Australia's product liability law should be simplified. It should provide a practical standard against which manufacturers can assess the safety of their products. Part VA of the Trade Practices Act 1974 (Cth) provides such a standard. It should be adopted as Australia's sole product liability law. This would give a simpler, more efficient law, without compromising the protection of consumers.*

## Introduction

Is there a coherent body of Australian product liability law which determines when compensation is payable for injuries, death or other losses caused by defective products?

A review of the disparate sources of our product liability law demonstrates that the answer is no. It is suggested that Australia's product liability law should be simplified and streamlined.

## Sources of Australian product liability law

Under the present law, if a defective product causes loss, there are many different ways in which a claim for compensation may be formulated.

Five of these – probably the most significant<sup>1</sup> – are:

- (1) a claim in tort under the principle in *Donoghue v Stevenson* ;<sup>2</sup>
- (2) a claim for compensation under Pt VA of the *Trade Practices Act 1974* (Cth) (Pt VA) ;
- (3) a claim for compensation based on Div 2A of Pt V of the *Trade Practices Act 1974* (Cth) (Div 2A) ;
- (4) a claim for compensation for loss or damage resulting from misleading or deceptive conduct; or
- (5) a claim for damages for breach of contract.

Part VA is based on the European Product Liability Directive.<sup>3</sup> When Pt VA was added to the *Trade Practices Act 1974* (Cth) , it was claimed that its enactment would bring Australia's product liability law into line with the emerging international standard.<sup>4</sup>

Part VA did not, however, codify Australian product liability law. The remedies which it conferred were in addition to other rights and remedies. Part VA was not intended to limit the concurrent operation of any law, written or unwritten, of a State or Territory, nor was it to be taken to limit, restrict or otherwise affect any right or remedy a person would have had if it had not been enacted.<sup>5</sup>

The result is that one part of Australia's product liability law conforms with the emerging international standard, but the remaining parts remain

**(1995) 69 ALJ 1006 at 1007**

as idiosyncratic as ever. If a defective product causes loss, plaintiffs may choose from the range of remedies those which best suit their case. A manufacturer or importer putting a product into the chain of commerce must take account of all of the various ways in which a claim may be formulated if the product causes loss.

### How the competing laws interact

At first blush, it is absurd that five similar but different laws should simultaneously govern Australian product liability law. Does Australian product liability law benefit from this unusual situation, or is it, as it appears to be, a case of too many cooks spoiling the broth?

The duties imposed on manufacturers in tort are compulsory and apply universally. Similarly, Pt VA imposes standards which apply equally to all goods.

Division 2A requires manufacturers and importers to honour contract-like obligations based on the terms implied in some contracts by the *Sale of Goods Act*.<sup>6</sup> These obligations are not assumed voluntarily. They operate to impose compulsory standards on goods for personal, domestic or household use or consumption which consumers may enforce against their manufacturers and importers.

The prohibition on misleading and deceptive conduct affects all areas of Australian law. Its impact on product liability law is probably marginal. Whilst it is perfectly conceivable that the marketing of a product may involve misleading or deceptive conduct, it is difficult to conceive of a situation in which a product which is *not* defective under mainstream product liability law could be held to be defective under the law relating to misleading or deceptive conduct.

Contractual obligations may overlay a liability in tort, under Div 2A or under Pt VA, however, because they are assumed voluntarily, the liability which flows from a breach of them is generally within the control of the contracting parties.<sup>7</sup> Unlike the four other sources of our product liability law, the potential for the law of contract to impose compulsory product safety standards is limited.

### A coherent product liability law?

Even from this brief overview, it is difficult to avoid the conclusion that liability for losses caused by defective products depends more on the manner in which claims are categorised for legal purposes than on the defectiveness of the products themselves. If product liability law was, indeed, coherent, it would focus more closely on the qualities which make products defective than on legal theories of product liability.

This is especially so as the issues of fact, law and policy raised by most product liability claims are similar, regardless of the legal theories applied to determine whether compensation should be paid.

Typically, a product liability case arises when it is alleged that loss, injury or, in extreme cases, death has arisen from the way in which a product was designed, manufactured or marketed. From these common facts, and regardless of the legal theories being applied, a few issues repeatedly arise. They include:

- Is the product defective?

**(1995) 69 ALJ 1006 at 1008**

- How do warnings impact on the defectiveness of a product?

- What is the significance of an intermediate inspection which does or should reveal the existence of a defect in the product?
- What is the impact of negligence on the part of the person who is injured by the product?
- What is the position if the plaintiff's injury results from a susceptibility to that type of injury?
- When should a product, which is otherwise defective, be treated as non-actionable because it is, or was, "state of the art"?
- What is the impact of government regulations affecting the safety of products?
- What is the appropriate measure of damages?

The following review of each of these common situations demonstrates that the different legal theories current in Australian product liability law apply differently to each of these common issues. A picture of needless complexity emerges, with each of these issues attracting different treatment depending on the theory being applied.

### Is the product defective?

To be regarded as defective, a product must depart from some norm. Defining the norm is obviously a matter of vital importance to the outcome of any case.

Under Pt VA, the norm is whether the product delivers the level of safety which persons generally are entitled to expect.<sup>8</sup> In an action under Div 2A, the norm may be whether the product is of merchantable quality or reasonably fit for its purpose.<sup>9</sup> In tort (depending on the circumstances), the norm is the exercise of reasonable care in preparing and putting up the product.<sup>10</sup>

### Warnings

Many useful products, such as poisons, have dangerous characteristics. Giving a warning does not remove a dangerous characteristic, but it may enable the user of the product to recognise and avoid it. When is a warning of a dangerous characteristic sufficient that the product should no longer be regarded as defective?

Under Pt VA, the giving of a warning is one of the circumstances to be taken into account in determining the extent of safety of goods.<sup>11</sup> In an action under Div 2A, a warning may have a bearing on whether a product is of merchantable quality or reasonably fit for its purpose. In tort, a warning may discharge the duty of care owed by the manufacturer of a dangerous product.

### Intermediate inspection

The principle in *Donoghue v Stevenson* does not apply if it is contemplated that, in the ordinary course, the product will be examined,

**(1995) 69 ALJ 1006 at 1009**

or tested, or in some way treated before it is taken into consumption or use.<sup>12</sup>

If the reasoning in *Taylor v Rover Co Ltd*<sup>13</sup> is applied to actions under Div 2A and Pt VA, the manufacturer should not be liable if intermediate inspection reveals the existence of a previously hidden defect, and loss results from continued use of the defective product.

It is, however, uncertain what consequences will follow in actions under Div 2A and Pt VA if:

- (i) an intermediate examination should reveal the existence of a defect, but does not do so; or
- (ii) an intermediate examination is contemplated in the ordinary course, but does not take place.

Under Pt VA , such a situation may be covered by s 75AN , which applies when loss is caused both by a defect in the product and an act or omission of the individual who suffers injury or loss.

In an action under Div 2A , it *may* be possible to plead that the failure to detect the defect amounted to contributory negligence. However, the role of contributory negligence in an action under Div 2A is uncertain. Whilst contributory negligence may be available as an answer to a claim for damages for breach of contract,<sup>14</sup> it is undecided whether that principle may be invoked in an action under Div 2A . If contributory negligence is available as a defence to an action under Div 2A , an apportionment of liability may result.

If the plea of contributory negligence is *not* available, the negligence of the consumer may serve to break the chain of causation between the breach by the manufacturer or importer of the obligations imposed by Div 2A and the consumer's loss. This would defeat the consumer's claim altogether.<sup>15</sup>

## Contributory negligence

The absence or ineffectiveness of an intermediate inspection may well amount to contributory negligence on the part of the person injured. The consequences of that have already been discussed.

Product misuse is another significant area in which considerations of contributory negligence arise.

In a claim under *Donoghue v Stevenson* , a plea of contributory negligence is possible where a negligently presented product is handled negligently by its consumer. An example is when a car with defective brakes is driven at excessive speed. An apportionment of liability is possible in such circumstances.

In an action under Pt VA , the application of s 75AN of the *Trade Practices Act 1974* (Cth) would probably produce a similar result.

## Abnormally sensitive users

In tort, a manufacturer does not owe a duty to warn abnormally sensitive individuals of the risks of using their products<sup>16</sup> and abnormally sensitive individuals, who are aware of their sensitivity, are under an obligation to disclose their "known peculiarities".<sup>17</sup>

In a straight contract case (as opposed to a case under Div 2A ), the terms as to merchantability and fitness for purpose may not be implied in

**(1995) 69 ALJ 1006 at 1010**

favour of abnormally sensitive plaintiffs, unless they inform the supplier of the goods of their sensitivity.<sup>18</sup>

The relationship of contractual privity is not an element of cases under Div 2A , SO that the element of personal contact which the doctrine may import is absent. This difference is confirmed by the definition of merchantable quality in s 74D(3) of the *Trade Practices Act 1974* (Cth) . It provides:

- (3) Goods of any kind are of merchantable quality within the meaning of this section if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to:
  - (a) any description applied to the goods by the corporation;

- (b) the price received by the corporation for the goods (if relevant); and
- (c) all the other circumstances.

In other words, whilst the failure to disclose abnormal sensitivities will defeat a claim in a straight contract case, it is unlikely to do so in a case under Div 2A, since the definition of merchantability takes no account of individual susceptibility. By concentrating on the purpose or purposes for which goods of the kind are *commonly* bought, the definition permits individual susceptibility to be ignored.

### The state of art defence

If a product is found to be defective under Pt VA, in that it fails to deliver the level of safety which persons generally are entitled to expect, the manufacturer or importer has a defence if it establishes that the state of scientific or technical knowledge at the time when the product was supplied by its actual manufacturer was not such as to enable the defect to be discovered.<sup>19</sup> This is the so-called "state of the art" defence.

If the same facts were proven in an action under Div 2A, the question would be whether the product was

as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to:

- (a) any description applied to the goods by the corporation;
- (b) the price received by the corporation for the goods (if relevant); and
- (c) all the other circumstances.<sup>20</sup>

In tort, the question would be whether the manufacturer had exercised reasonable care in the circumstances in which the product found its way on to the market.<sup>21</sup>

### Safety standards and regulations

Under Pt VA, it is a defence if the manufacturer or importer of defective goods establishes that they were defective only because there was compliance with a mandatory standard for them.<sup>22</sup> A mandatory standard is a standard for the goods or anything relating to the goods which, under a law of the Commonwealth, a State or Territory, must be complied with when the goods are supplied, and which carries a penalty for noncompliance. Unlike most standards, which may be complied with

**(1995) 69 ALJ 1006 at 1011**

by meeting a higher standard, a mandatory standard is one which will be breached if a lower or higher standard is achieved.<sup>23</sup>

In tort, compliance with relevant statutes and other regulations is a factor to be taken into account in determining whether a duty of care exists or has been breached.<sup>24</sup> In some situations, compliance with a standard set by Parliament provides a complete answer to an allegation that a common law duty has been breached. In *Albery-Speyer v Budden*,<sup>25</sup> it was alleged that an oil company was guilty of negligence because it supplied petrol with an excessive lead content. It was common ground that the lead levels of the petrol were within the limits set by Parliament. This was held to be a complete answer to the allegation of negligence. However, compliance with regulations is not always determinative. For instance, it is no answer to an allegation that the driver of a car was negligent in driving too fast that the speed was within the speed limit.<sup>26</sup>

In an action under Div 2A, compliance with regulations is relevant to determining whether goods are "as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect".<sup>27</sup>

## Damages

The principles in tort are, of course, well settled. They have been adopted as generally appropriate for the assessment of damages in actions to recover loss or damage caused by conduct in contravention of Part V of the *Trade Practices Act 1974* (Cth) . In *Gates v City Mutual Life Assurance Soc Ltd* ,<sup>28</sup> Mason, Wilson and Dawson JJ said:

The question then is whether it is appropriate to apply the contract measure of damages to the contraventions found to have taken place. The courts are not bound to make a definitive choice between the two measures of damages so that one applies to all contraventions to the exclusion of the other. However, there is much to be said for the view that the measure of damages in tort is appropriate in most, if not all, Pt V cases, especially those involving misleading or deceptive conduct and the making of false statements. Such conduct is similar both in character and effect to tortious conduct, particularly fraudulent misrepresentation and negligent misstatement.<sup>29</sup>

Does it follow from this that the appropriate measure of damages in an action under Div 2A would be the measure of damages applicable in contract? There is no authority on the point. Nor is there authority on the manner in which damages should be assessed in actions under Part VA , although the tort principles would appear to be the natural choice.

## Analysis

A different legal analysis must be applied in each of these common situations depending on whether the claim is formulated in tort, under Pt VA or under Division 2A . Different results often follow from the different analyses.

Applying three or more different legal approaches needlessly complicates the exercise of solving product liability problems. It makes for an incoherent product liability law.

The multiplication of remedies might be justified if it increased the level of protection of consumers, but there is nothing to suggest that it

**(1995) 69 ALJ 1006 at 1012**

does so. A plaintiff injured by a defective product can only recover once. The existence of several superficially similar remedies which, in fact, necessitate many subtle differences of analysis is not conducive of a simpler or more effective right of recovery.

It is absurd that so many different laws should simultaneously govern Australian product liability law. It is time to put an end to this absurd situation.

## Suggested solution

As argued above, a coherent product liability law would focus on the qualities which make products defective, rather than on legal theories of product liability. Of all the competing legal theories, Pt VA is the one which focuses most closely on the defectiveness of products. Its definition of defect is readily understood and applied in practice. The definition may be used as a practical guide to establish product safety standards and, hence, to inform manufacturers and importers in their approach to product safety. It provides a standard against which manufacturers and importers can assess the safety of their products.

The EEC Directive, on which Pt VA is based, has a good claim to be the international standard product liability law. In addition to its adoption in Australia, derivatives of it have been adopted in Japan, as well as throughout the European Community.

Part VA should be adopted as the sole source of product liability law for Australia. Division 2A should be repealed. Section 75AR of the *Trade Practices Act 1974* (Cth) should be amended to provide that the rights conferred by Pt VA supersede all existing rights in tort to recover compensation for loss or damage caused by defective goods.<sup>30</sup>

The result would be a simpler, more efficient product liability law, without any reduction in the level of protection available to consumers.

Footnotes | [Top](#)

\* Partner, Clayton Utz

1 Other possible causes of action include those available under State laws such as the *Consumer Affairs and Fair Trading Act 1990* (NT) ; *Fair Trading Act 1992* (ACT) ; *Fair Trading Act 1987* (NSW) ; *Fair Trading Act 1989* (Qld) ; *Fair Trading Act 1987* (SA) ; *Fair Trading Act 1990* (Tas) ; *Fair Trading Act 1985* (Vic) ; *Fair Trading Act 1987* (WA) ; *Manufacturers Warranties Act 1974* (SA) ; *Sale of Goods Act 1923* (NSW), Pt 8 ; and under the law relating to collateral contracts.

2 [1932] AC 562.

3 European Community Council Directive of 25 July 1985 (1985/374/EEC).

4 Second Reading Speech, Senator Tate, Tuesday, 26 May 1992, *Hansard*, p2661. See also the Report by the Senate Standing Committee on Legal and Constitutional Affairs, *Product Liability – Where Should the Loss Fall?*, December 1992, p12.

5 *Trade Practices Act, 1974* (Cth), s 75AR .

6 Under Div 2A , the manufacturer or importer of some consumer goods may be liable to compensate the consumer if they cause loss because they do not correspond with description, are of unmerchantable quality, do not conform to sample, are not fit for their purpose or because they do not comply with express warranties given in relation to them. See *Trade Practices Act 1974* (Cth), Div 2A .

7 The notable exception here is *Trade Practices Act 1974* (Cth), Div 2, Pt V which compulsorily imports conditions and warranties into many contracts between corporations and consumers.

8 *Trade Practices Act 1974* (Cth), s 75AC(1) .

9 *Trade Practices Act 1974* (Cth), s 74B and 74D .

10 *Donoghue v Stevenson* [1932] AC 562 at 599 per Lord Atkin.

11 *Trade Practices Act 1974* (Cth), s 75AC(2) .

12 See *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 86 per Windeyer J, overruling the suggestion that only a reasonable possibility of intermediate inspection was sufficient. See also *D & F Estates Ltd v Church Commissioners for England* [1989] 1 AC 177 at 206 per Lord Bridge.

13 [1966] IWLR 1491.

14 See, eg, *Forsikringsaktieselskapet Vesta v Butcher* [1988] 1 Lloyd's Rep 19 and [Bains Harding Construction & Roofing \(Aust\) Pty Ltd v McCredie Richmond & Partners Pty Ltd](#) (1988) 13 NSWLR 437<sup>[PDF]</sup>.

15 *Ingham v Imes* [1955] 2 QB 366 and *Lambert v Lewis* [1992] AC 225.

16 [Levi v Colgate-Palmolive Pty Ltd](#) (1941) 41 SR (NSW) 48 and cf *Thompson v Johnson & Johnson Pty Ltd* [1991] 2 VR 449.

17 *Ingham v Imes* [1955] 2 QB 366 at 373–374 per Lord Denning and *Griffiths v Peter Conway Ltd* [1939] 1 All ER 685.

18 *Ibid.*

19 *Trade Practices Act 1974* (Cth), s 75AK(1) .

20 *Trade Practices Act 1974* (Cth), s 74D(3) .

- 21 *Donoghue v Stevenson* [1932] AC 562 at 599 per Lord Atkin.
- 22 *Trade Practices Act 1974* (Cth), s 75AK(1)(b) .
- 23 *Trade Practices Act 1974* (Cth), s 75AA .
- 24 *Henwood v Municipal Tramways Trust (SA) (1938) 60 CLR 438 at 461 per Dixon and McTiernan JJ*; *Tucker v McCann* [1948] VLR 222 at 225 per Herring CJ; *Sibley v Kais* (1967) 118 CLR 424<sup>[PDF]</sup> and *Bux v Slough Metals Ltd* [1973] 1 WLR 1358.
- 25 Unreported, Court of Appeal, UK, 2/5/1980, 78 11469 78 11470.
- 26 *Sibley v Kais* (1967) 118 CLR 424<sup>[PDF]</sup>.
- 27 *Trade Practices Act 1974* (Cth), s 74D(3) .
- 28 (1986) 160 CLR 1.
- 29 *Ibid* at 14: see also *Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340<sup>[PDF]</sup>; *Frith v Gold Coast Mineral Springs Pty Ltd* (1983) 65 FLR 213<sup>[PDF]</sup>; *Corbidge v Bakery Fun Shop Pty Ltd (1984) ATPR 40–493*; *Yorke v Ross Lucas Pty Ltd* (1982) 69 FLR 116<sup>[PDF]</sup> and *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No 2)* (1987) 16 FCR 410<sup>[PDF]</sup>.
- 30 The Report of the Law Reform Commission and the Law Reform Commission of Victoria on *Product Liability* published in 1989 contained a similar proposal to limit the rights of recovery for damage caused by the way goods acted to the rights to compensation available under the scheme which the Commission was then proposing. That proposal included a number of radical suggestions which were widely criticised and, ultimately, superseded by the proposal to adopt a derivative of the EEC Directive. The criticisms of other aspects of the Commission's Report should not detract from the good sense of its proposal to limit the excessive number of avenues of legal recovery for product-related loss or damage. See pp 28–37 of the Report and s 75AM of the legislation which it proposed.

Cases Cited   <a href="#">Top</a>
-----------------------------------

Albery-Speyer v Budden

[Bains Harding Construction & Roofing \(Aust\) Pty Ltd v McCredie Richmond & Partners Pty Ltd](#) (1988) 13 NSWLR 437<sup>[PDF]</sup>

[Brown v Jam Factory Pty Ltd](#) (1981) 53 FLR 340<sup>[PDF]</sup>

*Bux v Slough Metals Ltd* [1973] 1 WLR 1358

*Corbidge v Bakery Fun Shop Pty Ltd (1984) ATPR 40–493*

*D & F Estates Ltd v Church Commissioners for England* [1989] 1 AC 177 at 206 per Lord Bridge

*Donoghue v Stevenson*

[Elna Australia Pty Ltd v International Computers \(Aust\) Pty Ltd \(No 2\)](#) (1987) 16 FCR 410<sup>[PDF]</sup>

*Forsikringsaktieselskapet Vesta v Butcher* [1988] 1 Lloyd's Rep 19

[Frith v Gold Coast Mineral Springs Pty Ltd](#) (1983) 65 FLR 213<sup>[PDF]</sup>

*Gates v City Mutual Life Assurance Soc Ltd*

*Griffiths v Peter Conway Ltd* [1939] 1 All ER 685

*Henwood v Municipal Tramways Trust (SA) (1938) 60 CLR 438 at 461 per Dixon and McTiernan JJ*

*Ingham v Imes* [1955] 2 QB 366

*Lambert v Lewis* [1992] AC 225

[Levi v Colgate-Palmolive Pty Ltd](#) (1941) 41 SR (NSW) 48

[Sibley v Kais](#) (1967) 118 CLR 424<sup>[PDF]</sup>

Taylor v Rover Co Ltd

Thompson v Johnson & Johnson Pty Ltd [1991] 2 VR 449

Tucker v McCann [1948] VLR 222 at 225 per Herring CJ

Voli v Inglewood Shire Council (1963) 110 CLR 74 at 86 per Windeyer J

[Yorke v Ross Lucas Pty Ltd \(1982\) 69 FLR 116<sup>\[PDF\]</sup>](#)

#### Legislation Cited | [Top](#)

Consumer Affairs and Fair Trading Act 1990 (NT)

Consumer Affairs and Fair Trading Act 1990 NT

Fair Trading Act 1985 (VIC)

Fair Trading Act 1985 Vic

Fair Trading Act 1987 (NSW)

Fair Trading Act 1987 NSW

Fair Trading Act 1987 SA

Fair Trading Act 1987 WA

Fair Trading Act 1989 (QLD)

Fair Trading Act 1989 Qld

Fair Trading Act 1990 (TAS)

Fair Trading Act 1990 Tas

Fair Trading Act 1992 (ACT)

Fair Trading Act 1992 ACT

Manufacturers Warranties Act 1974 (SA)

Manufacturers Warranties Act 1974 SA

Sale of Goods Act 1923 (NSW)

Sale of Goods Act 1923 8 NSW

Trade Practices Act, 1974 (CTH)

Trade Practices Act, 1974 2A Cth

Trade Practices Act, 1974 75AR Cth

Trade Practices Act, 1974 VA Cth

Trade Practices Act 1974 (CTH)

Trade Practices Act 1974 2A Cth

Trade Practices Act 1974 2 Cth

Trade Practices Act 1974 74B74D Cth

Trade Practices Act 1974 74D(3) Cth

Trade Practices Act 1974 75AA Cth

Trade Practices Act 1974 75AC(1) Cth

Trade Practices Act 1974 75AC(2) Cth

Trade Practices Act 1974 75AK(1)(b) Cth

Trade Practices Act 1974 75AK(1) Cth

Trade Practices Act 1974 75AM Cth

Trade Practices Act 1974 75AN Cth

Trade Practices Act 1974 75AR Cth

Trade Practices Act 1974 Cth

Trade Practices Act 1974 VA Cth

Trade Practices Act 1974 V Cth

---

---

---

---