

Product Liability

Contributing editors

Gregory L Fowler and Simon Castley



2018

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

Product Liability 2018

Contributing editors

Gregory L Fowler and Simon Castley
Shook Hardy & Bacon LLP

Reproduced with permission from Law Business Research Ltd
This article was first published in July 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2008
Eleventh edition
ISBN 978-1-78915-056-8

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between May and June 2018. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Global overview	5	Italy	84
Gregory L Fowler, Simon Castley and Ruth Anne French-Hodson Shook, Hardy & Bacon LLP		Michela Turra and Alessandra Chimienti Gianni, Origoni, Grippo, Cappelli & Partners	
Australia	7	Japan	91
Colin Loveday and Greg Williams Clayton Utz		Oki Mori and Akiko Inoue Nagashima Ohno & Tsunematsu	
Austria	13	Korea	97
Lukas A Weber and Linda Poppenwimmer Brauneis Klauser Prändl Rechtsanwälte GmbH		Ghyo-Sun Park, Gea-Sung Yang and Bo Kyung Lim Shin & Kim	
Bosnia and Herzegovina	19	Mexico	103
Višnja Dizdarević Marić & Co LLC Law Firm		Alfonso Sepúlveda, Habib Díaz and Luis Fuentes Sepúlveda y Diaz Noriega, SC	
Brazil	26	Nigeria	108
Jorge Cesa, Roberta Feiten and Fernanda Girardi Souto, Correa, Cesa, Lummertz & Amaral Advogados		Babatunde A Sodipo Ajumogobia & Okeke	
Bulgaria	33	Russia	116
Kina Chuturkova and Stela Sabeva Boyanov & Co		Yaroslav Klimov, Alexey Borodak and Sergey Avakyan Norton Rose Fulbright (Central Europe) LLP	
China	39	Slovakia	121
Wu Feng Dentons		Jana Černáková and Miroslav Zaťko Čechová & Partners	
Colombia	45	South Africa	126
Daniel Arango and Maximiliano Londoño Londoño & Arango		Evert van Eeden Van Eeden Rabie Inc	
Denmark	50	Spain	131
Søren Stæhr and Søren Elmstrøm Sørensen Gorrissen Federspiel		Sönke Lund Grupo Gispert Abogados & Economistas	
England & Wales	56	Switzerland	138
Simon Castley and Jon Hudson Shook, Hardy & Bacon International LLP		Jodok Wicki and Susanna Gut CMS von Erlach Poncet Ltd	
France	63	Turkey	144
Florian Endrös and Jessika Da Ponte EBA Endrös-Baum Associés		Selma Ünlü, Bilge Derinbay, Fulden Tezer and Gözde Şahin NSN Law Firm	
India	71	United States	149
Amir Singh Pasrich and Siddharth Sanewal I.L.A. Pasrich & Company		Scott D Kaiser and Ruth Anne French-Hodson Shook, Hardy & Bacon LLP	

Preface

Product Liability 2018

Eleventh edition

Getting the Deal Through is delighted to publish the eleventh edition of *Product Liability*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Switzerland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Gregory L Fowler and Simon Castley of Shook Hardy & Bacon LLP, for their continued assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
June 2018

Australia

Colin Loveday and Greg Williams

Clayton Utz

Civil litigation system

1 The court system

What is the structure of the civil court system?

Australia has a federal court system and a hierarchy of courts in each of the states and territories. The High Court of Australia (the High Court) is empowered to determine constitutional disputes and is the ultimate court of appeal. Product liability litigation usually commences in the Federal Court of Australia (the Federal Court) or the supreme, county or district courts of one of the states or territories.

The consideration of choice of law questions, the causes of action alleged and the quantum of damages sought will usually determine the forum for a product liability matter. In complex product liability matters, this will often be the Federal Court.

2 Judges and juries

What is the role of the judge in civil proceedings and what is the role of the jury?

Product liability litigation may be brought in either the Federal Court or the state supreme courts. Such proceedings are generally heard by a judge sitting without a jury. However, there are provisions in the various court rules for some matters to be heard by a jury.

Civil litigation in Australia is conducted on an adversarial basis. The parties present their case to the court. The judge makes findings of fact and law after consideration of the evidence that has been presented, and submissions by the parties on the law.

3 Pleadings and timing

What are the basic pleadings filed with the court to institute, prosecute and defend the product liability action and what is the sequence and timing for filing them?

Each court has procedural rules that set out the relevant steps involved. Those rules of procedure are not too disparate in the superior courts in Australia. The Federal Court operates a docket system. This means that upon commencement, proceedings are allocated to a specific judge who case manages the proceedings via a series of directions hearings and then becomes the trial judge.

Product liability actions in the Federal Court are commenced by an application, accompanied by a statement of claim. The application specifies the relief claimed by the applicant and the statement of claim contains a statement in summary form of the material facts on which the party relies. After service of the originating process, the respondent must either file an appearance or take some other step towards having service of the originating process set aside. In the Federal Court, the only time requirement is that a respondent must enter an appearance before the date appointed for a directions hearing and before filing any document. Thereafter, the key steps include the filing of a defence and any reply as well as refinement of the matters in dispute, including requests for particulars, in some cases interrogatories, documentary discovery, subpoenas and the service of evidence.

In the Federal Court, orders for many of these key steps are usually made at a court-appointed directions hearing held not long after service of the proceedings. The court has the power to give 'such directions with respect to the conduct of the proceeding as it thinks proper'.

This discretionary power is exercised by the court on a case-by-case basis.

4 Pre-filing requirements

Are there any pre-filing requirements that must be satisfied before a formal law suit may be commenced by the product liability claimant?

Recently, there has been significant legislative activity in the area of 'pre-litigation protocols', which are mandatory steps a potential litigant must undertake before commencing civil proceedings. These protocols oblige litigants to pursue a range of alternative dispute resolution steps before commencing proceedings. Federal legislation obliges parties to take 'genuine steps' to resolve a dispute. Under the federal legislation, genuine steps include the requirement to file a statement specifying the steps that have been taken to resolve the issues in dispute, or the reasons why such steps were taken. Some state and territory jurisdictions have much more elaborate pre-action protocols, which require the exchange of detailed information about claims, as well as some limited discovery, followed by an attempt to settle the claim before proceedings can be commenced.

5 Summary dispositions

Are mechanisms available to the parties to seek resolution of a case before a full hearing on the merits?

Interlocutory procedures exist for parties to move to strike out the whole or any part of a pleading (including causes of action, claims and defences), where the court determines that the pleading discloses no reasonable cause of action or defence, has a tendency to cause prejudice, embarrassment or delay, or is otherwise an abuse of court process.

6 Trials

What is the basic trial structure?

Australian courts proceed on an adversarial basis. Practice, procedure and rules of evidence are similar to those used in English courts. Jury trials are extremely rare, and most trials will be before a single judge.

A product liability action in Australia is usually heard by a court sitting in the capital city of the relevant state. In every case, the capital is both the political and commercial centre of the state.

Most of the trial and any subsequent appeal are conducted orally. There is no provision for depositions as they are understood in the US context. Where written statements or affidavits have been exchanged before the trial and a witness is called, their statement will often be adopted and tendered in court as evidence in chief, with any minor additions or modifications addressed orally at the commencement of the witness' testimony. The witness is then cross-examined.

A witness may be cross-examined at large and often without restriction as to time, subject always to the court's direction. This comparative freedom to cross-examine and the fact that trials are usually conducted by a judge sitting alone means cross-examination in product liability cases is often searching and extensive. Expert witnesses, particularly in matters involving complex issues of medicine or science, are generally subjected to detailed cross-examination relating to both their specific opinion evidence and the underlying science relating to those opinions.

At the conclusion of the evidence, the court hears closing arguments that address questions of both fact and law. In more complex matters heard by a judge alone, this oral argument will be supplemented by detailed written submissions. Where the matter is being heard by a judge and jury, the presiding judge addresses the jury at the conclusion of the parties' submissions. The judge will summarise the evidence and direct the jury as to the law. It is then for the jury to make findings of fact and, if necessary, assess the quantum of damages.

7 Group actions

Are there class, group or other collective action mechanisms available to product liability claimants? Can such actions be brought by representative bodies?

There are detailed class action procedures in the Federal Court, the Supreme Court of Victoria and the Supreme Court of New South Wales. The legislation in each of these jurisdictions is very similar. There are also older-style representative action procedures available in other state jurisdictions, but these are rarely used. An action can only be commenced in the Federal Court where it attracts federal jurisdiction, for example, if it involves a claim under federal legislation.

Class actions have involved products including weight loss drugs, heart pacemakers, aircraft fuel, gas, water, tobacco, pharmaceuticals, financial products and a variety of foodstuffs.

Federal, Victorian and New South Wales legislation provides for the commencement of a class action where seven or more persons have a claim against the same person and the claims are in respect of, or arise from, the same, similar or related circumstances and give rise to a substantial common issue of law or fact.

The Competition and Consumer Act 2010 (Cth) (CCA) expressly provides for the institution of proceedings by the government regulator, the Australian Competition and Consumer Commission (ACCC), on behalf of those who have suffered or are likely to suffer loss as a result of contraventions of federal legislation.

8 Timing

How long does it typically take a product liability action to get to the trial stage and what is the duration of a trial?

Time to trial depends on the particular jurisdiction and the nature of the claim. It may take anywhere from six months to several years for a matter to be heard and determined.

Proceedings in the Federal Court are usually heard faster than those in the state and territory supreme courts, in part because of the Federal Court's case management system whereby each proceeding is allocated to a particular judge who manages the case and usually hears and determines it, and the supreme courts' heavier caseload.

There are provisions in all jurisdictions for expedited hearings in appropriate circumstances, including the ill health of a litigant.

Evidentiary issues and damages

9 Pretrial discovery and disclosure

What is the nature and extent of pretrial preservation and disclosure of documents and other evidence? Are there any avenues for pretrial discovery?

One key aspect of pretrial preparation involves gathering information and evidence in support of a claim and the defence. In Australia, there is no deposition process, so discovery is almost entirely documentary.

In many jurisdictions, documentary discovery is available with the court's leave in personal injury proceedings. Orders will only be made if the court is satisfied that discovery is necessary. However, the threshold to satisfy a court that discovery is required is not very high. Until relatively recently, many Australian courts, notably the Federal Court, would typically restrict discovery to categories of documents in an attempt to limit the burden imposed on parties. This approach is less favoured than it once was. However, Australian courts are generally moving to greater court supervision of discovery in an attempt to limit the cost and delay associated with it. One recent innovation is to defer discovery until after there has been an initial exchange of evidence in the hope that the evidence can be used to focus the discovery.

There is a limited right to administer written interrogatories, but this right is exercised only rarely.

A further procedure for obtaining documents for the purposes of litigation is to ask the court to issue a subpoena. Subpoenas are usually issued to non-parties:

- to require a party to attend to give evidence (a 'subpoena to attend to give evidence'); or
- to produce documents to the court (a 'subpoena to produce').

Finally, there is also a right to apply for preliminary documentary discovery before the commencement of proceedings, if it is necessary to identify a potential defendant or to determine whether or not a potential plaintiff may have a claim, or to gain information from third parties.

10 Evidence

How is evidence presented in the courtroom and how is the evidence cross-examined by the opposing party?

Product liability trials are typically conducted orally. Where written statements or affidavits have been exchanged before the trial and a witness is called, their statement is commonly adopted and tendered in court as evidence in chief, with any minor additions or modifications addressed orally at the commencement of the witness's testimony. The witness may be cross-examined at large and often without restriction as to time, subject always to the court's discretion. This comparative freedom to cross-examine means that cross-examination in product liability cases is often searching and extensive. Expert witnesses are required to prepare a written report outlining their opinion in advance of giving evidence. They are generally subjected to detailed cross-examination on both their specific opinion evidence and the underlying science relating to those opinions.

11 Expert evidence

May the court appoint experts? May the parties influence the appointment and may they present the evidence of experts they selected?

Courts in several Australian jurisdictions may appoint a 'court expert' to inquire into and report on a question of fact arising in a matter before the court, or an 'expert assistant' to assist the court on any issue of fact or opinion (other than an issue involving a question of law) identified by the court in the proceeding, should the need arise. In some jurisdictions, the court expert's report will only be binding on a party to the extent that party agrees to be bound by it. In other jurisdictions, the report is deemed to have been admitted into evidence unless the court orders otherwise.

Where the court has appointed an expert in relation to a question of fact that has arisen in the proceedings, the rules in each jurisdiction provide that the court may limit the number of other experts whose evidence may be adduced on that question, or that a party must obtain leave to adduce such evidence.

As a matter of practice, however, court experts are rarely appointed in product liability matters. As a matter of course, parties will retain their own experts and adduce evidence from them during the course of the proceedings.

12 Compensatory damages

What types of compensatory damages are available to product liability claimants and what limitations apply?

At common law, the type of compensatory damages available for claims alleging bodily injury include general damages for pain and suffering, loss of amenities and loss of expectation of life; and special damages, for loss of wages (both past and future), economic loss and medical treatment expenses and the like.

In 2002, reforms to the law of negligence (the Tort Reform Process) led to caps, thresholds and other limitations being placed on the amount of such damages that can be recovered for causes of action in negligence. Damages are also recoverable for mental damage provided it can be established that the claimant is suffering from a diagnosed psychiatric condition. In addition, common law damages are available for damage to the product itself, or other consequential damage to property. One can recover damages for 'pure economic loss' but the nature and extent of such damages is extremely complex.

13 Non-compensatory damages

Are punitive, exemplary, moral or other non-compensatory damages available to product liability claimants?

Exemplary, punitive or aggravated damages can be awarded by the courts, although not in relation to claims brought under the federal legislation and, in some jurisdictions (as a result of the Tort Reform Process), not in negligence actions seeking damages for personal injury. In practice, awards of exemplary damages are extremely rare (and were so even before the Tort Reform Process).

Litigation funding, fees and costs

14 Legal aid

Is public funding such as legal aid available? If so, may potential defendants make submissions or otherwise contest the grant of such aid?

Yes, public funding is technically available but rarely so applied in product liability claims.

15 Third-party litigation funding

Is third-party litigation funding permissible?

Third-party funding of claims is permitted in Australia. While lawyers are restrained from entering into contingency agreements, non-lawyers are not. Consequently, litigation funders have emerged to promote and fund class action litigation. The mechanism is relatively straightforward. A non-lawyer or corporation (the litigation funder) identifies a potential claim, contacts potential claimants and then enters into express contractual arrangements with potential claimants. These agreements provide for the litigation funder to receive an agreed percentage of any monies that come to the claimant by way of settlement or judgment. In addition, the claimants will often assign the benefit of any costs order they receive to the litigation funder who is, under the contractual arrangement, also given broad discretion to conduct the litigation as they see fit. The litigation funder then retains a lawyer who agrees to conduct the litigation on behalf of the litigation funder on the basis of the 'normal' rules governing the legal profession.

Litigation funders are required by Australia's corporate and financial regulator to have adequate procedures to deal with conflicts of interest, but are not otherwise required to be licensed or to have their funding arrangements approved.

Under the court rules, lawyers who have commenced proceedings that have third-party funding arrangements are required to notify the court of the details of that funding arrangement and notify the other party of the fact of that funding arrangement.

16 Contingency fees

Are contingency or conditional fee arrangements permissible?

Rules prohibiting lawyers from entering into contingency fee arrangements have been relaxed and a variety of arrangements are now sanctioned. These arrangements allow lawyers and clients to enter into an agreement that provides for the normal fee, or a fee calculated by reference to some predetermined criteria, such as the amount of time expended by a lawyer, to be increased by a pre-agreed percentage. The relevant rules generally impose a cap on the percentage by which such fees can be increased. Some jurisdictions allow lawyers to enter into an agreement to be paid an 'uplift fee' where an additional fee may be levied, calculable by reference to the initial fees. Not all jurisdictions allow such arrangements in personal injury cases. All jurisdictions continue to prohibit contingency fee arrangements where the lawyer's fee is calculated by reference to a percentage of the client's verdict.

17 'Loser pays' rule

Can the successful party recover its legal fees and expenses from the unsuccessful party?

The unsuccessful party usually pays the costs of the successful party. These costs include not only court filing fees, copying charges and other out-of-pocket expenses, but also the lawyer's professional fees. In this context, a reference to costs is not a reference to the total or actual

costs incurred by the successful party. In some jurisdictions, recoverable costs are calculated by reference to a court scale, which invariably limits the amounts a successful party can claim for disbursements and services performed by their lawyers. In other jurisdictions, the scale approach has been replaced by a system that considers the reasonableness of the costs incurred. However, such systems have retained the distinction between costs incurred and costs actually recoverable.

In some jurisdictions, the Tort Reform Process has resulted in further limitations being imposed on the legal costs recoverable in small personal injury claims (although there are exceptions including where the lawyer and client have entered into a costs agreement that provides otherwise).

The common law rule has been significantly modified in the case of representative or class actions. Statutory provisions restrict a costs order being made against class members other than those who actually commenced the proceedings. Where the representative action is successful, a costs order may be made in favour of the class members who commenced the representative proceedings in an amount determined by the court.

Sources of law

18 Product liability statutes

Is there a statute that governs product liability litigation?

A plaintiff who claims to have been injured by a product or who has otherwise suffered loss or damage as a result of a defective product can bring an action for compensation on a number of grounds. The causes of action most commonly pleaded are the common law tort of negligence, a breach of a statutory duty or a breach of the Australian Consumer Law (ACL), which forms part of a federal statute called the Competition & Consumer Act 2010 (Cth). The liability of manufacturers for safety defects is now covered by Part 3-5 of the ACL. It is a 'no fault' regime of strict liability. Specifically, goods are said to have a 'safety defect' if their safety is 'not such as persons generally are entitled to expect'.

The ACL now provides a single, unified statute that applies to each state and territory. Part 3 of the ACL provides a range of specific protections aimed at regulating unfair practices, consumer transactions, safety of consumer goods and product-related services, information standards and (as noted above) the liability of manufacturers for goods with safety defects.

Sections 18 and 29 of the ACL relate to misleading or deceptive conduct and false or misleading representations respectively, and Part 3-2, Division 1 of the ACL sets down the 'consumer guarantees' (which equate to the former actions for fitness for purpose and merchantable quality (now 'acceptable quality')). A person who has suffered loss or damage by reason of conduct contravening chapter 2 or 3 of the ACL may make a claim for damages. Some restrictions apply to claims for personal injury.

In addition, Part 5-4 of the ACL provides a range of remedies against suppliers and manufacturers of goods in relation to the consumer guarantees. If an action is brought against a manufacturer, a consumer's remedy is limited to damages. For actions against suppliers, an affected person may seek a broader range of remedies, including rejecting goods or terminating contracts. The nature of the breach will also affect the remedy available. A failure to comply with a guarantee is considered to be a 'major failure' if:

- the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure;
- the goods depart in one or more significant respects from any description, sample or demonstration model;
- the goods are substantially unfit for a purpose for which goods of the same kind are commonly supplied and they cannot (easily and within a reasonable time) be remedied to make them fit for such a purpose;
- the goods are unfit for a disclosed purpose made known to the supplier of goods or a person involved in negotiations or arrangements about the acquisition of goods, and they cannot (easily and within a reasonable time) be remedied to make them fit for such a purpose; or
- the goods are not of acceptable quality because they are unsafe.

Part 3-5 of the ACL provides specific actions against manufacturers of goods with safety defects. An individual may recover, by action against a manufacturer, the amount of the loss or damage (which includes injury) suffered by the individual. If the individual dies because of the injuries, a law of a state or territory about liability in respect of the death of individuals applies as if the action were an action under the law of the state or territory for damages in respect of the injuries, and the safety defect were the manufacturer's wrongful act, neglect or default. Liability for loss or damage may also extend to a person other than the injured individual.

19 Traditional theories of liability

What other theories of liability are available to product liability claimants?

In Australia, theories of liability are a mixture of the common law and statute. A person who claims to have been injured or who has otherwise suffered loss or damage, may commence an action for compensation on the following bases:

- the common law tort of negligence, which is tort-based;
- contract; and
- breaches of the various statutory provisions.

20 Consumer legislation

Is there a consumer protection statute that provides remedies, imposes duties or otherwise affects product liability litigants?

The CCA establishes a single, national regime that applies to each state and territory by incorporating the ACL into Schedule 2 of the CCA. The ACL is a federal statute that will be relied upon in product liability claims as it contains consumer protection, product safety and quality provisions.

See also question 18.

21 Criminal law

Can criminal sanctions be imposed for the sale or distribution of defective products?

Yes. Certain conduct by corporations and their officers may be subject to criminal sanctions under federal or state legislation.

22 Novel theories

Are any novel theories available or emerging for product liability claimants?

The ACL has introduced a significant change by introducing a new legal standard of 'acceptable quality'. Where a person supplies goods to a consumer, there is a guarantee that the goods are of acceptable quality. Goods will be considered to be of acceptable quality if they are:

- fit for all purposes for which goods of that kind are commonly supplied;
- acceptable in appearance and finish;
- free from defects;
- safe;
- durable; and
- as a reasonable consumer fully acquainted with the state and condition of the goods (including any 'hidden defects' of the goods) would regard, as acceptable having regard to the nature of the goods, the price of the goods, any statements made on any packaging or label, any representation made by the supplier or manufacturer or any other relevant circumstance relating to supply.

There is no breach of this guarantee when:

- the reason the goods are not of acceptable quality is specifically drawn to the consumer's attention before supply in writing and in a manner that is 'transparent';
- the consumer to whom they are supplied causes them to become of unacceptable quality or fails to take reasonable steps to prevent them from becoming of unacceptable quality and they are damaged by abnormal use; or
- the consumer examines the goods before acquisition and that examination ought reasonably to have revealed that the goods were not of acceptable quality.

The former Trade Practices Act equivalent provision required goods to be of 'merchantable quality'. While the extrinsic material surrounding introduction of the new term suggests there should not be any substantive change to the interpretation of this term, this remains to be seen in practice.

23 Product defect

What breaches of duties or other theories can be used to establish product defect?

The ACL provides that goods are defective if their safety is not such as persons generally are entitled to expect. The ACL also makes it clear for the purposes of applying this test that a defect may exist by reason of product-related design, testing, manufacturing, warnings and directions for use.

In addition, the ACL also makes manufacturers liable to consumers if goods are not of acceptable quality (analogous to merchantable quality).

Liability for product defects established in this way attaches to a 'manufacturer'. However, 'manufacturer' is broadly defined in the ACL and will, for example, include an importer of goods, if the actual manufacturer is not present in Australia, and a person who allows their brand or mark to be affixed to or used in relation to the goods in question.

24 Defect standard and burden of proof

By what standards may a product be deemed defective and who bears the burden of proof? May that burden be shifted to the opposing party? What is the standard of proof?

In negligence, contract and under most provisions of the ACL, the claimant has the burden of proving that the product was defective.

The statutory warranty or guarantee and the defective or unsafe product causes of action under the ACL are often referred to as 'strict liability' provisions. A claimant need not prove fault but, nonetheless, must establish, on balance, that the subject goods are defective or not of acceptable quality.

At common law, in contract and in other actions based on the provisions of the ACL, the claimant must establish:

- that loss or damage has been suffered;
- that the relevant conduct is either in breach of a common law duty, in breach of the contract or contravenes one of the provisions of the ACL; and
- that the loss or damage was caused by the defendant's conduct.

25 Possible respondents

Who may be found liable for injuries and damages caused by defective products?

Under the ACL, manufacturers will be held strictly liable directly to consumers for injury to persons or property damage suffered as a result of a defective product. Goods are considered to be defective if their safety is not such as persons generally are entitled to expect.

The definition of 'manufacturer' under these provisions of the ACL is extremely broad and will, for example, include an importer of goods, if the actual manufacturer is not present in Australia, and a person who allows his or her brand or mark to be affixed to or used in relation to the goods in question, as mentioned in question 23.

26 Causation

What is the standard by which causation between defect and injury or damages must be established? Who bears the burden and may it be shifted to the opposing party?

A claimant must prove that he or she has suffered damage 'because of' the defect in question. The test has been held to correspond to the test of causation, which applies in common law negligence claims. The claimant's onus is discharged by proving causation on the balance of probabilities.

In recent years, the High Court has made it clear in numerous cases that it is not possible for a claimant to shift this onus. It is either discharged on the basis of the totality of the evidence or it is not.

27 Post-sale duties

What post-sale duties may be imposed on potentially responsible parties and how might liability be imposed upon their breach?

Under the common law, manufacturers and suppliers of products owe a continuing duty to purchasers and foreseeable users to take reasonable care to prevent a product from causing harm, including after the product is sold. Failure to recall a product that may cause harm may amount to negligence and give rise to the obligation to pay compensation to persons suffering injury, loss and damage as a result.

The issues that will be considered in deciding whether recall action is necessary include:

- the magnitude of the potential harm involved;
- the probability of such harm occurring;
- the availability and effectiveness of alternative remedial action; and
- the degree of knowledge in potential users of the potential harm.

In addition, the product safety provisions of Part 3-3 of the ACL contain a stringent regime for the compulsory recall of goods that:

- do not comply with a prescribed safety standard;
- have been declared to be unsafe goods or permanently banned; or
- will or may cause injury to any person.

Limitations and defences

28 Limitation periods

What are the applicable limitation periods?

There are considerable variations between the limitation periods applicable to common law and statutory proceedings in the various Australian jurisdictions, resulting from a profusion of specialist legislation and court decisions, although the Tort Reform Process has resulted in more uniformity in relation to the limitation period applicable to personal injury actions.

In most jurisdictions, the limitation period applicable to claims for personal injury is either:

- the earlier of three years from the date the cause of action is discoverable by the plaintiff ('the date of discoverability') or 12 years from the date of the alleged act or omission ('the long-stop period'); or
- three years from the date the cause of action accrued.

Limitation periods, including those applicable to personal injury claims, are usually suspended while a claimant is suffering from a legal incapacity, which encompasses the period prior to a claimant turning 18, or during which a claimant suffers from a mental or physical disability that impedes him or her from properly managing his or her affairs.

29 State-of-the-art and development risk defence

Is it a defence to a product liability action that the product defect was not discoverable within the limitations of science and technology at the time of distribution? If so, who bears the burden and what is the standard of proof?

If a product is found to be defective under the federal legislation, the manufacturer or supplier can rely on what is commonly referred to as the 'state of the art defence' or 'development risk defence'. The manufacturer or supplier must establish 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. The defence must be established on the balance of probabilities.

This defence is only available in respect of claims based on the 'defective product' provisions in the ACL. It is not available in respect of claims that a product was not of 'acceptable quality' (although, arguably, similar considerations may be imported into the concept of 'acceptable quality').

In negligence, the claimant must establish that the manufacturer failed to exercise reasonable care. The state of scientific and technical knowledge is often pertinent to this issue.

Update and trends

Australia continues to have a very active product liability litigation environment. This is due in part to Australia's consumer product regulator (ACCC) playing an influential role in product safety compliance and in product liability claims. There continues to be a strong interplay between the ACCC's enforcement activity and claims for compensation by consumers against manufacturers for alleged breaches of the ACL. More often than not these claims are brought by way of a class action.

In the past 12 months, Australia has witnessed the commencement of multiple class actions concerning diesel motor emissions issues and multiple class actions in respect of Takata airbags, among other things. A number of other product liability class actions in other industry sectors are also before the courts.

In addition, the ACCC has been extremely diligent in its overview of product recalls.

30 Compliance with standards or requirements

Is it a defence that the product complied with mandatory (or voluntary) standards or requirements with respect to the alleged defect?

Under the defective goods provisions of the federal legislation, it is a defence that the goods had the defect only because there was compliance with a mandatory standard. A mandatory standard is a standard for the goods or anything relating to the goods that, under law, must be complied with when goods are supplied, and that carries a penalty for non-compliance. A standard that simply requires that the goods achieve a minimum standard is not a mandatory standard.

In an action for negligence and under the statutory warranty or guarantee provisions of the federal legislation, compliance with regulations or standards is a relevant factor in determining whether goods are as fit for the purposes that goods of that kind are commonly expected to be when bought.

31 Other defences

What other defences may be available to a product liability defendant?

Defendants are permitted to rely on a statutory right to contribution from other concurrent tortfeasors (whether joint or several). Alternatively, defendants may seek to rely on a contractual right of indemnity. These remedies may be pursued either in the same or subsequent proceedings. If subsequent proceedings are required, time limits do apply. These differ between jurisdictions and depend on the cause of action.

Following the Tort Reform Process, all Australian state and territory jurisdictions enacted a statutory regime of proportionate liability for non-personal injury claims for damages. The liability of a defendant who is a concurrent wrongdoer is now limited to an amount reflecting the proportion of the damage the court considers just having regard to the extent of that defendant's responsibility.

Certain state jurisdictions allow parties to expressly contract out of the proportionate liability scheme.

32 Appeals

What appeals are available to the unsuccessful party in the trial court?

In virtually all jurisdictions, there is a right of appeal from the judgment of a trial judge. The procedure varies depending on the jurisdiction in which the original trial was conducted. Leave to appeal is usually necessary when the appeal is from an interlocutory judgment. Even though appeals generally turn on questions of law, it is not uncommon for parts of the evidence used at trial to be reviewed during the course of an appeal.

A party dissatisfied with the decision of a state or territory court of appeal or the full federal court may seek leave to appeal to the High Court, the country's ultimate appellate court. The High Court will only grant leave to appeal if it is convinced that there is a significant question to be determined.

Jurisdiction analysis**33 Status of product liability law and development**

Can you characterise the maturity of product liability law in terms of its legal development and utilisation to redress perceived wrongs?

Prior to 2011, Australia had a relatively well-settled product liability regime. From 1 January 2011, the ACL introduced significant changes. The ACL was designed to establish a single, national law concerning consumer protection and fair trading and by streamlining pre-existing state and federal legislative regimes, the ACL introduces obvious benefits. However, the ACL also significantly amends previous federal legislation and introduces important changes to the law. These include the mandatory reporting requirements, but it will take some time to assess the effect of the ACL in a litigation environment, which is already heavily influenced by litigation funding and class actions.

34 Product liability litigation milestones and trends

Have there been any recent noteworthy events or cases that have particularly shaped product liability law? Has there been any change in the frequency or nature of product liability cases launched in the past 12 months?

The effects of the new ACL are now beginning to be felt. Manufacturers and suppliers are coming to terms with the following changes:

- the introduction of mandatory reporting where suppliers must report to the appropriate regulator products that have been associated with serious injury or death. This is potentially the most significant change for suppliers, including manufacturers, in terms of post-market surveillance requirements and product reporting;
- a broader test for bans and recalls. Previously, the minister could ban or recall goods that were unsafe because of a defect in the product itself, but it was unclear whether he or she could do so if the threat to consumer safety arises only as a result of consumer misuse. Under the ACL, the threshold test for bans and recalls would cover all goods of a kind that, under normal or reasonably foreseeable conditions of use, will or may cause injury to any person. In a country where self-regulation through reportable voluntary recalls has been the norm, this change will force manufacturers and suppliers to give careful consideration to both anticipated consumer use and misuse, including 'off-label' use (namely, use other than for indicated or approved purposes); and
- the practical impact of provisions relating to apparent 'major failures' on suppliers, particularly in relation to a claim that goods would not have been acquired by a consumer had the consumer been 'fully acquainted with the nature and extent of the failure'.

35 Climate for litigation

Describe the level of 'consumerism' in your country and consumers' knowledge of, and propensity to use, product liability litigation to redress perceived wrongs.

Australia has a long history of product liability litigation. More than 70 years ago, Australia's highest appellate court considered the application of sale of goods implied warranties to the consumer model. More recently, product liability litigation has been influenced by a focus on consumer protection and product safety. In the 1990s, Australia introduced its version of the EC Product Liability Directive and a class action procedure. Both had been significant forces in shaping product liability litigation and consumer activism. Indeed, much of Australia's product liability litigation in the two decades commencing from 1990 mirrored the mass tort cases that were being conducted in the United States. While the introduction of the ACL was primarily designed to establish uniform laws concerning consumer protection and fair trading, it provided the federal regulator with new powers. The federal regulator is noticeably exercising its powers both in terms of enforcement action and regulatory overview of product safety and product recall actions. This demonstrates the current importance politically of consumerism and consumer protection.

36 Efforts to expand product liability or ease claimants' burdens

Describe any developments regarding 'access to justice' that would make product liability more claimant-friendly.

Australia continues to have a very active class action system and litigation funding environment. There is no need for further 'access to justice' legislative amendments to make product liability more claimant-friendly.

Mandatory reporting requirements under the ACL continue to be vigorously enforced by the regulator. If a supplier becomes aware of the death or serious injury or illness of any person and considers that it was caused, or may have been caused, by the use or foreseeable misuse of consumer goods, they must report to the appropriate regulator within two days. This obligation also arises if they become aware of another person who considers there is a notifiable event. In those instances where the facts are unclear or where there are contradictory accounts, it can be difficult to decide whether the reporting requirements have been triggered, much less within the prescribed time limits.

CLAYTON UTZ

**Colin Loveday
Greg Williams**

**cloveday@claytonutz.com
gwilliams@claytonutz.com**

Level 15, 1 Bligh Street
Sydney NSW 2000
Australia

Tel: +61 2 9353 4000
Fax: +61 2 8220 6700
www.claytonutz.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com