

Poster BV heeft daarvoor geen toestemming van Merchandising BV of enige derde.

Adviseur Merchandising BV omtrent de kans van slagen van een verbodsakktie tegen Poster BV.

Uw antwoord kunt u tot 15 december 1990 insturen naar mr. Th.C.J.A. van Engelen, p/a

Stibbe, Blaisse en De Jong, Postbus 3660, 1001 AL Amsterdam. De beantwoording zal geplaatst worden in het maartnummer 1991.

Als altijd komt de beste student-inzender in aanmerking voor een boekenbon van f 50,00 plus een keuze uit het *Ars Aequi Libri*-fonds. Andere serieuze student-inzenders mogen een keuze maken uit genoemd fonds (zie de fondslijst in dit blad).

Rechtsvraag (199) produktenaansprakelijkheid

Prof. mr. E.H. Hondius

In 1989 heeft de Australian Law Reform Commission onderstaand voorontwerp van wet inzake produktenaansprakelijkheid gepubliceerd. Geef aan in hoeverre het voorontwerp afwijkt van de Europese richtlijn inzake produktenaansprakelijkheid. Besteed daarbij aandacht aan de vraag welk stelsel aantrekkelijker is vanuit het gezichtspunt van:

- a het slachtoffer;
- b de producent;
- c de rechtspraktijk; en
- d de samenleving.

Uw antwoord kunt u tot 15 december 1990 insturen naar prof. mr. E.H. Hondius, Molengraaff Instituut voor Privaatrecht, Nieuwe Gracht 58, 3512 LT Utrecht. De beantwoording zal geplaatst worden in het maartnummer 1991.

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A BILL

For
An Act to amend the *Trade Practices Act 1974* to provide for the payment of compensation to persons who suffer loss or damage caused by goods, and for other purposes.

Be it enacted by the Queen, and the Senate and the House of Representatives of the Commonwealth of

Australia, as follows:

Short title, ect.

1. (1) This Act may be cited as the *Trade Practices Amendment Act 1989*.

(2) The *Trade Practices Act 1974* is in this Act referred to as the Principal Act.

2. The Principal Act is amended by inserting after Part V the following Part:

Part VA — rights to compensation for loss or damage caused by goods

Interpretation provisions

"75AA. The following interpretation provisions apply to each provision in this Part unless the contrary intention appears:

act

A reference to a person's act includes a reference to an omission by the person.

acted

A reference to the way goods acted is a reference to any of the following:

- (a) the way the goods acted or behaved;
- (b) the effect the goods had;
- (c) the failure of the goods to act or behave in a particular way, or to have a particular effect.

applied

(1) 'Applied' includes woven in, impressed on, worked into and annexed or affixed to.

(2) A name, brand or mark applied to anything in which goods are contained or in or with which goods are supplied is to be taken to be applied to the goods.

claimant

The claimant is the plaintiff or applicant in a proceeding for compensation.

dependant

The following are the dependants of a dead person:

- (a) a person who, at the time of the death, was wholly or partly financially dependent on the dead person;
- (b) a person who was born not more than 10 months after the death and, when born, would have been wholly or partly financially dependent on the dead person if the dead person had not died;
- (c) a person who, at the time of the injury, or of the onset of the disease, that led to the death, was wholly or partly financially dependent on the dead person;
- (d) a person who was born between the time of the injury, or of the onset of the disease, that led to the death and the death and, when born, would have been wholly or partly financially dependent on the dead person if the dead person had not suffered the injury or contracted the disease.

goods

(1) All personal chattels, except electricity and human blood and tissue, are goods.

(2) Goods do not cease to be goods merely because they are fixed to land or to a building, but a building is not goods.

injury or disease

'Injury or disease' includes psychological or psychiatric injury or disease.

mandatory standard

A mandatory standard is a requirement (however described) imposed by or under a written law of the Commonwealth or of a State or Territory in relation to goods.

manufacture

'Manufacture' includes grow, extract, produce, process and assemble.

owns

A person owns anything in which the person has a proprietary or possessory interest.

persons involved in the manufacture or supply of goods

- (1) A person who, in trade or commerce:
 - (a) designs; or
 - (b) manufactures; or
 - (c) stores, transports, distributes or supplies; particular goods or a component of particular goods is involved in the manufacture or supply of the goods.

(2) A person who imports goods, or on whose behalf goods are imported, is involved in the manufacture or supply of the goods.

workers compensation law

A workers compensation law is an Act or a law of a State or Territory that makes provision for benefits to be paid for injury or death suffered by, or disease

contracted by, a worker (however defined) where the injury, death or disease arose out of or in the course of the worker's employment (however defined).

When must manufacturers etc. pay compensation for losses caused by their goods?

"75AB. Subject to this Part, if:

- (a) a person suffers loss or damage caused by the way goods acted (whether or not there were other causes); and
 - (b) the goods were manufactured or supplied by a corporation in trade or commerce;
- the person has a right to compensation.

Note: For 'acted', see section 75AA; for 'loss or damage' see section 4K and section 75AH. For defences see sections 75AC ('acceptance of risk'), 75AD ('state of the art') and 75AE ('mandatory standards'). The amount of compensation is determined under section 75AG.

Defence: the claimant should have known the risk

"75AC. If what the claimant knew about the goods before the loss or damage occurred would have enabled a reasonable person to assess the risk that the goods would act in the way that they did, there is no right to compensation.

Note: Section 75AN requires the claimant to provide the defendant with detailed particulars relevant to the operation of this section before commencing the proceeding.

Example 1: Jayne cut herself with a knife which she knew was sharp. She has no right to compensation under this Part.

Example 2: An ingredient of a drug causes an allergic reaction in persons who have a particular respiratory condition. Only 1 person in 2000 has this condition. Christopher, who had this condition without knowing it, took the drug although he knew (because he had read the manufacturer's warning) that it causes the allergic reaction in people who have the condition. The allergic reaction occurred. Christopher has no right to compensation under this Part because he had all the relevant information about the goods.

'Development risks' defence

"75AD. If, when the goods were first supplied in trade or commerce to a person who did not acquire them for re-supply, it could not have been discovered, using any scientific or other technique then known or in any other way, that the goods could act in the way that they did, there is no right to compensation.

'Mandatory standards' defence

"75AE. if the goods acted in the way they did only because:

- (a) they complied; or
- (b) a person involved in the manufacture or supply of the goods complied; with a mandatory standard applicable to the goods, there is no right to compensation.

Example 1: A mandatory standard requires that automatic locks of a particular design which can be opened only from outside, be fitted to car doors. A car with those locks was involved in a collision and burst into flame. Rosemary was badly burned because she could not unlock the door. The defence applies.

Example 2: There is a mandatory standard that widgets be painted green. If a widget was painted with a lead-based paint, and Rosemary's baby licked the widget and contracted lead poisoning, the defence would not apply because the paint need not have been lead-based.

Who must pay the compensation?

"75AF. (1) The corporation that manufactured the goods is liable to pay the compensation.

"(2) If the manufacturer does not have a place of business in Australia, the importer is also liable to pay the compensation.

"(3) A claimant who cannot identify the corporation that manufactured the goods, or the importer, may ask any corporation that supplied the goods in trade or commerce to identify the person who supplied the goods to it. If the corporation fails to identify that person within a reasonable time, it is also liable to pay the compensation.

"(4) If, but for section 75AE, the claimant would have had a right to compensation, then, if the mandatory standard was imposed:

- (a) by or under a law of the Australian Capital Territory, the Northern Territory or Norfolk Island — the Australian Capital Territory, the Northern Territory of Australia or the Administration of Norfolk Island, respectively, is liable to pay the compensation; or
- (b) by or under a law of some other Territory or by or under a law of the Commonwealth — the Commonwealth is liable to pay the compensation.

Example 1: Fred alleges that he suffered loss or damage caused by the way a car manufactured in Australia acted. The car manufacturer is the proper defendant.

Example 2: Ginger alleges that she suffered loss or damage caused by the way the brakes of a car acted. The manufacturer of the brakes will be the proper defendant.

Example 3: Stan is injured by the way goods purchased from Laurel Pty Ltd acted. He cannot identify the manufacturer of the goods so he asks Laurel Pty Ltd to identify its supplier. Laurel Pty Ltd identifies Hardy Pty Ltd. Stan then asks Hardy Pty Ltd the same question but it is not able to provide the name of its supplier. Hardy Pty Ltd is therefore the proper defendant.

How much compensation must be paid?

"75AG. (1) The amount of the compensation is the total amount of the loss or damage, adjusted in accordance with this section.

"(2) If some part of the loss or damage:

- (a) was caused by an act of the claimant or of some other person (except an act that increa-

sed the risk that the goods would cause the loss or damage); or

- (b) was the result of a cause independent of human control;

exclude the amount of that part of the loss or damage.

Note: This excludes that part of the loss or damage attributable to other causes.

"(3) The court may then:

(a) if:

- (i) a person (except a person involved in the manufacture or supply of the goods) advised in the course of a business or profession that the goods be used or that they be used in a particular way; and
- (ii) the fact that the goods were used in accordance with the advice increased the risk that the goods would cause the loss or damage;

subtract such amount as is just (if necessary, the whole of the amount) to take account of the unreasonableness of the advice;

- (b) if an act of the claimant increased the risk that the goods would cause the loss or damage — subtract such amount as is just (if necessary, the whole of the amount) to take account of the unreasonableness of the act; and
- (c) if an act of some other person (except a person involved in the manufacture or supply of the goods) after the goods were first supplied in trade or commerce to a person who did not acquire them for re-supply increased the risk that the goods would cause the loss or damage — subtract such amount as is just (if necessary, the whole of the amount) to take account of the unreasonableness of the act.

Example 1: Lewis is injured when the steering on his car fails and it runs off the road and into a tree. He was exceeding the speed limit. He is taken to hospital where, while he is undergoing an operation to stem internal bleeding, Clark, the anaesthetist, incorrectly administered the anaesthetic, which results in Lewis suffering brain damage. Lewis sues the manufacturer of the car. That part of the loss caused by Clark's administration of the anaesthetic is excluded from the total amount of the loss suffered by Lewis (new subsection (2)). From the amount remaining, the court subtracts a further amount having regard to the fact that Lewis was speeding (new paragraph 3(b)).

Example 2: Stanley crossed a road without looking and was hit by a car. The car's brakes were in good order but Livingstone, the driver, applied them to late. Stanley has no right to compensation from the car manufacturer under this Part; he must claim from Livingstone under the general law.

Example 3: An unknown person contaminates with poison several packets of medicine in a chemist's shop. Grant, an unsuspecting purchaser, takes the poisoned medicine. Because the contamination occurred before the medicine was sup-

plied to a person who did not acquire it for re-supply, Grant has a right to compensation under this Part.

Part does not apply where workers compensation law provides benefits

"75AH. (1) This Part does not apply in relation to loss or damage that arose out of an injury or disease suffered by a person, or the death of a person, if a workers compensation law makes provision for the payment of benefits on account of the injury, disease or death.

"(2) This Part does not apply in relation to loss or damage that is a person's liability under an Act or a law (including a law of a State or Territory) to pay money on account of an injury, disease or death mentioned in subsection (1).

What loss or damage is covered?

"75AI. (1) A person has a right to compensation for loss or damage that arose out of an injury or disease only if the person suffered the injury or disease.

"(2) A person has a right to compensation for loss or damage that arose out of the death of another person only if:

- (a) the person is a dependant of the deceased; and
- (b) had the deceased lived, the deceased would have had a right to compensation under this Part for loss or damage that arose out of an injury or disease that led to the death.

If because of subsection 75AG (2) or (3), no compensation would have been payable to the deceased, the deceased would not have had a right to compensation under this Part.

"(3) A person has a right to compensation for loss or damage that arose out of loss of or damage to property only if the person owned the property when the loss or damage occurred.

"(4) A person has a right to compensation for loss or damage that arose otherwise than as mentioned in subsection (1), (2) or (3) only if:

- (a) the person owned the goods concerned when the loss or damage occurred; or
- (b) the loss or damage is the person's liability under an Act or a law (including a law of a State or Territory) to pay money for loss or damage of a kind mentioned in a provision of this section to a person mentioned in that provision.

"(5) A right to compensation survives for the benefit of the estate of the person who suffered the loss or damage.

Note: For 'loss or damage' see section 4K; for 'owns' see section 75AA.

Rights to contribution

"75AJ. (1) If a person is liable to pay compensation under this Part, every corporation involved in the manufacture or supply of the goods concerned:

(a) whose act in relation to the goods or to a component of the goods caused the goods to act in the way that they did (whether or not there were other causes); or

(b) who supplied a component of the goods that acted in a way that caused the goods to act in the way that they did (whether or not there were other causes);

is a contributor. The person liable to pay compensation may be a contributor.

"(2) If there is only one contributor, that contributor is liable to indemnify the person who is liable to pay the compensation.

"(3) If there is more than one contributor, each contributor is liable to pay contribution to each other contributor in such amount that all contributors will have paid the same amount.

"(4) If the court considers that, in the circumstances, the operation of subsection (3) would be unfair, each contributor is liable to pay contribution to each other contributor in such amount that each contributor will have paid the amount that bears to the amount of compensation the same proportion as the contributor's input into the goods bears to the total of all the contributors' inputs into the goods.

"(5) A contributor's input into the goods is the amount of the price of the goods that is attributable to anything done to or in relation to the goods, or the manufacture of the goods, by the contributor.

"(6) The operation of this section as between contributors may be excluded or modified by agreement, but the exclusion or modification must be fair, having regard to the bargaining positions of the parties in making the agreement.

Liabilities and rights of action to survive against estates

"75AK. A liability of a person, and a right of action against a person, arising under this Part survive the death of the person and may be enforced against the person's estate.

Enforcement of judgements etc, against holding companies

"75AL. If a judgement, decree or order that:

(a) is made in a proceeding under this Part (whether for compensation or contribution) against a corporation involved in the manufacture or supply of the goods; and

(b) requires the corporation to pay money (including on account of costs);

is not satisfied within 60 days after it is entered, the holding company of the corporation also becomes, by force of this section, jointly and severally liable to pay the amount unpaid.

Note: For 'holding company' see section 4A(4).

Claimants' rights under this Part generally exclusive

"75AM. (1) A provision of an Act or of a law of a

State or Territory that gives effect to a treaty, convention or international agreement to which Australia is a party prevails, to the extent of any inconsistency, over this Part.

“(2) This Part does not affect a right to recover compensation or damages for loss or damage in respect of goods in an amount equal to the value of:

- (a) the consideration paid for the goods; or
- (b) the cost of repair of the goods; or
- (c) the cost of replacement of the goods.

“(3) This Part excludes other rights to compensation or damages for loss or damage from a corporation involved in the manufacture or supply of the goods if, in a proceeding to enforce those rights, the way the goods acted must be proved.

“(4) It does not matter how the cause of action or the defence in the proceeding is described, nor whether the right arises under some other Part of this Act or under some other law, including a law of a State or Territory and the common law.

Example 1: George buys a toaster from Gracie Pty Ltd. It does not work. George's right to return the roaster and claim a refund of the price is not affected by this Part.

Example 2: Amos buys a toaster from Andy Pty Ltd. The toaster malfunctions and causes a fire, which damages Amos' house. Amos' only right to claim compensation for the damage to his house from corporations (including Andy Pty Ltd) involved in the manufacture and supply of the toaster is under this Part.

Claimant must give particulars of the circumstances of the loss or damage

“75AN. (1) A proceeding for compensation must not be commenced unless the claimant has, at least 28 days before, given to the defendant written particulars on oath of the circumstances in which the loss or damage occurred, and of the matters mentioned in subsection (2), so far as they are known to the claimant.

“(2) The matters of which particulars are to be given are:

- (a) if the goods were supplied to a person who did not acquire them for re-supply:
 - (i) the presentation of the goods when they were acquired;
 - (ii) the time when they were acquired;
 - (iii) the warnings and instructions, if any, that accompanied them;
 - (iv) the consideration paid or provided for the goods;
 - (v) the representations, if any, made about the goods; and
 - (vi) the person from whom they were acquired;
- (b) the use to which the goods were put at any time;
- (c) the persons who have had possession of the goods;
- (d) what maintenance or repair work has been carried out on the goods; and

- (e) whether the claimant was aware of any warnings, instructions or other information about the goods and, if so, what the warnings, instructions or information were.

“(3) The claimant must, if required by another party to the proceeding or by a party to a proceeding for contribution under section 75AJ, be available for cross-examination on the notice.

“(4) The court may give leave for a proceeding to be commenced or continued even though some other provision of this section has not been or cannot be complied with. Leave may be on such terms, including terms as to costs or further particulars, as are just.

When can liability under this Part be excluded or modified?

“75AO. (1) This Part applies in relation to goods that have been manufactured or supplied in Australia in trade or commerce, or imported into Australia, notwithstanding the law of any other place.

“(2) Except as provided by subsection 75AJ(6), it is not possible:

- (a) to exclude or modify the application of this Part;
- (b) to affect the exercise of a right conferred by this Part;
- (c) to modify a liability that may arise under this Part; or
- (d) to enforce an indemnity from the claimant in respect of a liability to pay compensation.

“(3) However, it is possible to do so by an agreement between a corporation and a person made in connection with the supply by the corporation of the goods to the person in trade or commerce if:

- (a) the person acquires the goods for use in trade or commerce; and
- (b) the exclusion or modification is fair, having regard to the bargaining positions of the parties in making the agreement.

When must proceedings be commenced?

“75AP. (1) A claimant may commence a proceeding for compensation at any time within a period of 3 years after the claimant became, or ought reasonably to have become, aware:

- (a) of the loss or damage; and
- (b) that the way the goods acted caused or contributed to the loss or damage

“(2) A person may commence a proceeding for contribution at any time within a period of 3 years after the earlier of the following days:

- (a) the first day on which the person made a payment in discharge of the liability on which the proceeding is based;
- (b) the day on which the process initiating the relevant proceeding for compensation or contribution was served on the person.

“(3) The court may extend either period on application made before or after the end of the period, and may do so conditionally.

Special rules about compensation for estates of persons
"75AQ. In a proceeding for compensation for the benefit of the estate of a person, the amount of the loss or damage:

- (a) must be calculated without reference to any loss or gain to the estate resulting from the death (except funeral expenses); and
- (b) is not to include:
 - (i) any loss or damage relating to a period after the death; or
 - (ii) damages for pain and suffering or for loss of enjoyment of life.

Special rules for dependants' proceedings for compensation

"75AR. (1) All proceedings for compensation for loss or damage arising out of the death suffered by dependants of a dead person must be conducted as one proceeding.

"(2) The proceedings may be commenced by the same initiating process, which must name all the dependants.

"(3) The proceedings must be commenced and maintained by the person's personal representative, but if:

- (a) there is no personal representative; or
- (b) the personal representative does not commence them within 6 months after the death;

any one of the dependants may commence and maintain them.

"(4) The amount of the loss or damage suffered by a dependant must be calculated without regard to:

- (a) any payment or right to payment, arising on the death, under:
 - (i) a contract of insurance (however described); or
 - (ii) a superannuation or retirement scheme;

- (b) any payment or right to payment of an amount by way of a pension, benefit or allowance under any law, including a law of a State or Territory or a law of another country, on account of the death; or

- (c) any gratuity paid on account of the death; whether the payment was or is to be made to a dependant or to the estate.

"(5) In applying the other provisions of this Part (except subsection 75AF(3), section 75AN and subsection 75AP(1)) in relation to such a proceeding, references to the claimant are to be read as references to the deceased.

Presumptions identifying manufacturers and importers

"75AS. (1) If a corporation holds itself out as the manufacturer of particular goods, it is to be taken to have manufactured the goods.

"(2) If a person holds himself or herself out as the importer of particular goods, the person is to be taken to have imported the goods.

"(3) The holding out may be by applying the corporation's or the person's name, trade or other mark or brand to the goods or in any other way.

"(4) If a corporation's or a person's name, trade or other mark or brand is applied to goods, it shall be presumed, unless the contrary is proved, that the corporation or person applied it."

Consequential amendments

3. The Principal Act is amended as follows:

- (a) omit from paragraph 6(2)(c) 'and any reference in Division 2A of that Part', substitute 'and any reference in Division 2A of that Part or in Part VA'.

Boekaankondigingen

J.M. van Dunné, *Ex tunc, ex nunc; twee generaties juristen aan het woord over de ontwikkeling van het recht*. Tjeenk Willink, Zwolle 1990. 364 p., f 49,50.

Lezers van *Ars Aequi*, velen van u zijn waarschijnlijk student. Het kan haast niet anders, of elke student — en zeker een rechtenstudent — denkt bij tijd en en wijle 'waar ben ik in vredesnaam mee bezig?' of 'waar doe ik dit voor?' Het lezen van *Ex tunc, ex nunc* kan ik dan van harte aanbevelen. Dit is namelijk een boek waarin tien juristen aan het vertellen slaan. Van Dunné ondervroeg een 'oude' en een 'jonge' jurist in vijf beroepsgroepen: *L.D. Pels Rijcken* en *E.J.*

Dommering (de advocatuur), *G.J. Wiarda*, en *C.A. Terwee-van Hilten* (de rechterlijke macht), *C.A.E. Uniken Venema* en *J. Spier* (de bedrijfsjuristen), *W.C.L. van der Grinten* en *C. Kerk* (de universiteit) en *J. van der Hoeven* en *L.A. Geelhoed* (de overheid/wetgever), en informeerde (al weer even geleden, overigens) naar hun jeugd, studie jaren, eerste arbeidservaringen, leermeesters, toekomstverwachtingen en dergelijke. Nu kunnen wij — maar daarvoor zijn wij een juridisch *studentenblad* — het uiteraard niet eens zijn met Van Dunné's aanduiding 'jonge' juristen: deze zijn stuk voor stuk de veertig gepasseerd. In hun belevenissen zullen weinigen van onze lezers hun ervaringen weerspiegeld zien.