# The liability of agronomists in the light of the helix litigation

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**Abstract**

The drought of the early 1990s provided the background for the use of cotton trash as livestock fodder. The presence of Helix[?] residues in the fodder produced meat with such residues and resulted in farms being quarantined.

The litigation process relating to Helix[?] has highlighted that manufacturers and distributors owe a duty of care to product users and others. Issues raised include physical injury and damage as well as economic loss.

The Trade Practices Act also becomes involved in ensuring that advertising and instructions for use are not misleading or deceptive. Failure to warn is a breach of this Act.

The role and responsibilities of the professional agronomist is considered in this context.

**Key words**

Helix, duty of care, Trade Practices Act

## Introduction

The scarcity of feed for cattle in northern NSW during the drought conditions of the early 1990s resulted in cotton trash being used as a fodder supplement. Shipments of beef were subsequently rejected because of the presence of residues of the chemical Helix[?] which had been sprayed on the cotton crop and had carried though in the cotton trash. Litigation subsequently followed.
The case of McMullin v ICI highlighted the issues relating to the use of pesticides and whose responsibility it is to ensure that physical injury or damage and economic loss are not incurred. This paper looks at the aspects of negligence and the Trade Practices Act and reflects on the expectations of the agronomist as a professional.

## Negligence

### *Duty of care*

Manufacturers and distributors of chemical products owe a duty of care to product users and to others affected by the chemical. This duty of care is generally consistent with the objectives of the relevant legislation and public policy. The object of the *Agricultural and Veterinary Chemicals Act* 1988, for example, is to minimise any undue hazard to, *inter alia*, the general public, the environment and agricultural produce and livestock.

Imposing such a duty is also often consistent with recognition by the chemical companies of their own obligations. These companies usually employ a product steward whose responsibilities include ensuring that the actions taken by the company are in accordance with its moral and professional obligations as a chemical manufacturer. Each company often extols the virtues of product stewardship.

It is an easy extension of the above to hold that agronomists also have a similar duty to those to whom they give advice to use a particular product and to others who might foreseeably be affected by such use, e.g. neighbours through spraydrift.

*General principles*

The High Court has held that a duty of care either to not cause, or to prevent, a given type of loss is not necessarily imposed on A in favour of B by the proof that it is reasonably foreseeable that some act or omission by A will cause the given type of loss by B[14, 33, 36, 38, 42, 61, 68]. Whether such a duty will or will not be imposed may depend in the first instance on the nature of the type of loss.

A distinction has been drawn between physical injury or damage to persons or property on the one hand and what has been termed "pure economic loss" (i.e. financial loss not "casually consequent" upon physical injury to the plaintiff or his or her property[14, 28, 68]. There is some doubt, however, as to whether that distinction is a sufficient one for the purposes of analysis[38].

(a) Physical injury or damage

In the first class of case, the Court has expressed the view that the foreseeability of such injury will generally be sufficient to justify the imposition of a duty of care on a person to avoid causing it[14, 17, 42, 68, 79]. In the terminology of the tests laid down by the Court, that determination will establish a relationship of sufficient proximity to justify the imposition of a duty of care. For a duty of care to exist there must be a relationship of proximity between the person upon whom a duty is imposed and the person or persons to whom that duty is owed.

There may well be a threshold issue in chemical contamination cases as to whether there has been any "injury or damage" to person or property. There are those who seek to argue that the mere presence of a non-naturally occurring chemical is not injury or damage unless it is harmful. Fortunately the Courts have, in the main, taken a different view.

Chief Justice Green held "...the ordinary meaning, and therefore the meaning I should *prima facie* give to the phrase `damage to' when used in relation to goods is a physical alteration or change, not necessarily permanent, which impairs the usefulness of the thing said to have been damaged. It follows that not every physical change to goods would amount to damage.What amounts to damage will depend upon the nature of the goods"[59]. The case concerned the construction of an insurance policy and an exclusion clause in a contract. His Honour stated that he was applying the ordinary meaning of the word "damage". There the fact that scallops had not been refrigerated at a particular temperature which fact rendered them incapable of export was held to constitute damage.

The most recent statement on the issue is that of Judge Wilcox in McMullin v ICI[47] where the Court was dealing with a claim by hundreds of members of the beef industry who had suffered loss as a result of their beef being contaminated by a chemical, which was apparently non-toxic, non-carcinogenic, and had no mutating characteristics. It simply bio-accumulated in the fat tissues of cattle. The beef was rendered either unsaleable, particularly to the export market, or less valuable. The Court held that the contamination was damage.

(b) Pure economic loss

*Approach A*

When the Court is required to determine whether there is a duty of care to avoid inflicting harm to a person or persons or their property outside the first class of cases, it is necessary to identify with specificity the circumstances which establish a relationship of proximity. That relationship must exist between the parties "with respect to both the relevant class of act or omission and the relevant kind of damage"[14]. The determination of the issue as to the existence of a relationship of proximity will be affected by policy considerations, principally:

(i) there should not be "liability in an indeterminate amount for an indeterminate time to an indeterminate class"[17, 61, 68, 74]

This risk exists because of the potential of "pure economic loss" to manifest itself at several degrees removed from the direct detriment inflicted by the defendant's carelessness allied to the leniency of the test of reasonable foreseeability[17]. The extent of this potential is unpredictable as it will depend on the idiosyncratic organisation of commercial and other relations in the community.

The number and identity of persons "downstream" of those who suffer direct detriment is often more a function of the structure of the associated community, industry or industries, and it can be argued that there is no rational basis for distinguishing between any possible applicants and no duty is owed to such persons.

Where no such concern is present in a particular class of case there is no need to give effect to it solely because the damage is pure economic loss[68].

A class is not indeterminate merely because the defendant cannot identify the members thereof at the time of his or her act or omission[61]. The mere fact that the number of likely sufferers of economic loss is large cannot *per se* conclude the inquiry as to whether a duty of care is owed to them. Simply put, the defendant who seeks to affect many people by his or her conduct cannot be heard to say that his or her success in that endeavour precludes the imposition of a duty of care;

(ii) that it is the nature of the economic system that A's material success will be at the expense of B, whether directly or indirectly and that the law does not generally recompense B for that circumstance[14, 38, 42, 68].

The notion of proximity acts as a general limitation upon the test of reasonable foreseeability[17]. The requirement to establish a relationship of proximity between the plaintiff or plaintiffs and the plaintiff or plaintiffs and the defendant in relation to the claimed damage in a novel case necessitates an investigation of all the circumstances of the case[17]. The factors which will determine the existence of the relationship will vary between different categories of case[14, 36, 38, 68] and an "assessment of community standards and demands"[14, 36]. These include:

(i) the physical proximity of the property of the plaintiff(s) to the place where the act or omission of the defendant has its physical effect such that a physical effect on the property of the plaintiff(s) is foreseeable[17];

(ii) the ability to identify a specific individual as likely to suffer loss[17, 36];

(iii) any known reliance and/or assumption of responsibility. Whilst this factor has been identified as important the High Court has held that it is not a necessary factor[14, 28, 36, 61, 68];

(iv) "circumstantial proximity" such as an overriding relationship of employer/employee or professional (e.g. agronomist)/client[38, 61, 68];

(v) "casual proximity" being "the closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss or injury sustained[38, 68];

(vi) The fact that defendant has a position of control[36, 38].

The status of the requirement of proximity as "a unifying theme" or as a means of expressing the need to identify a relation beyond that of reasonable foreseeability of damage prior to the imposition of a duty of care is in a state of some uncertainty. This debate will not generally affect the identification of a duty of care.

*Approach B*

One of the objects of the mandatory chemical registration process is to ascertain whether any physical interaction will take place between the chemical and person or property. The participation in that process is akin to an assumption of responsibility to identify how the chemical sought to be registered will affect the environment, persons or property.

It would offend current community standards to find that the chemical companies were at liberty to market a product which, due to the ordinary practices of the industry to which it was marketed, led to the contamination of persons or property and to do so with impunity.
Agronomists are often the first body to whom the product is marketed but are they to be seen as the unwitting public or as a group of professionals upon whom there is imposed a higher duty to enquire of the manufacturer how the chemical will affect the environment, persons or property? With Helix, the label was silent as to the risk of bio-accumulation, but the Material Safety Data Sheet (MSDS) lodged by ICI clearly alerted the reader to the risk. Whilst a farmer would not be expected to know of the existence of the MSDS nor to obtain a copy, it is submitted that an agronomist would be expected, at law, to investigate further than just accepting what was on the label or in the marketing material.

The fact that the loss suffered is pure economic loss is clearly, of itself, not sufficient to dispose of any duty of care[14, 38].

The dictum in *Ultramares*[74] cautioned against the imposition of liability in tort "in an indeterminate amount for an indeterminate time to an indeterminate class". It did not prohibit the extension of the duty of care to avoid causing pure economic loss to novel cases. It is a matter for the Court to decide on the facts of the case and whether to extend the duty to a novel case.

(i) Existing category

Under legislation and at tort, there is cast upon a chemical manufacturer, the supplier and, presumably, the agronomist a duty to be careful in making representations about a chemical and its constituents, and there is usually widespread reliance upon the manufacturer by the community as to statements in relation to the withholding period, the warning as to the protection of person, wildlife, etc, and the product being environmentally soft and the like.

There is an argument that, in negligence, the Court must distinguish between users of the particular chemical who are claimants and innocent bystanders who are adversely affected by the chemical as a result of someone else's use of it, on the basis that if a duty is owed at all it could only ever be to those who were within the reasonable contemplation of a prudent manufacturer, supplier and agronomist, namely, the user. It may also be necessary to distinguish between use which complies wth the advice and warnings on the label as to application but still causes injury and loss, and off-label practices or abuses.

However, it is submitted that the true position is that the relationship between those non-users adversely affected by the chemical and the manufacturer, supplier and agronomist with respect to the particular kind of of economic loss is, like that between those who used the chemical and the manufacturer, supplier and agronomist, marked by the kind of assumption of responsibility and known reliance which is commonly present in the categories of case in which a relationship of proximity exists with respect to pure economic loss[see 14].

In ordinary circumstances, a manufacturer of chemicals undertakes the responsibility of manufacturing a chemical on the basis that all necessary research and investigation into any adverse effects on, *inter alia*, person and property would be carried out and known prior to release of the product, especially the rates of bio-accumulation and depletion for a period during which it is likely that there will be one or more non-users affected[14]. The supplier and the agronomist also have a duty to ensure those steps have been carried out before they sell or recommend a product.

Such a non-user is likely to be unskilled in matters pertaining to the manufacture of chemicals and inexperienced in the complexities of research, investigation and compliance with the registration process.

Any chemical manufacturer, supplier or agronomist should be aware that such a non-user will be likely, if the contamination has not become manifest, to assume that their person or some particular property is free from contamination because no reasonable, prudent and environmentally aware manufacturer, supplier or agronomist would release, supply or recommend a chemical which had the potential to bio-accumulate, harm or not rapidly deplete without appropriate warnings such as would prevent the contamination of person or property with that chemical.

The majority in Bryan v Maloney[(14)] discussed the issue of proximity in this context:

"....it is obviously foreseeable that that loss will be sustained by whichever of the first or subsequent owners happens to be the owner at the time when the inadequacy of the footings becomes manifest. In the absence of competing or intervening negligence or other causative event, the causal proximity between the negligence on the part of the builder in constructing the footings and consequent economic loss on the part of the owner when the inadequacy of the footings becomes manifest is the same regardless of whether the owner in question is the first owner or a subsequent owner."

In the case of both the user's relationship with the manufacturer, supplier and agronomist and that of non-user's relationships with them, the policy considerations which ordinarily militate against the recognition of a relationship of proximity and a consequent duty of care with respect to pure economic loss are insignificant. Moreover, there are persuasive policy reasons supporting the recognition of a relationship between them adversely affected with respect to the particular kind of economic loss suffered. By virtue of superior knowledge, skill and experience in the manufacture and effects of chemicals, it is likely that a manufacturer will be better qualified and positioned to avoid, evaluate and guard against the financial risk posed by releasing a chemical into the market which will persist, bio-accumulate or harm[(see14)]. It is probable that a Court will see the supplier and the agronomist in a similar position.

(ii) Novel category

If the claim by any applicant is held not to fall within an existing category of recovery of pure economic loss, the Court must still embark on the determination of the issue of whether the facts of the case are such as would allow the extension of the duty of care either by the incremental approach or the application of the law of negligence to a completely novel situation. The comments set out above in relation to the majority decision in Bryan v Maloney[(14)] apply equally here.

There is more than sufficient authority to allow the Court to adopt either approach if it thinks the facts of the case warrants it.

The most recent authoritative statement on this is that of Justice Dawson[(38)] where he dealt with the considerations which ordinarily prompt concern about imposing liability for pure economic loss. Those considerations were:

1. to impose liability upon the defendant in such a situation ought not raise the prospect of indeterminant liability. Was the plaintiff capable of classification as a specific, identifiable individual rather than a member of an unascertained class? and; is the liability to such a person at large? Can the amount be ascertained and in fact was it an amount made known (or capable of being made known) to the defendant?

2. secondly, does a question of competitive advantage arise? In appropriate cases that is a consideration which is relevant to the scope of the tort of negligence. The judgement in Bryan v Maloney[(14)] recorded:

"Another consideration is the preception that, in a competitive world where one person's economic gain is commonly another's loss, a duty to take reasonable care to avoid causing mere economic loss to another, as distinct from physical injury to another's person or property, may be inconsistent with community standards in relation to what is ordinarily legitimate in the pursuit of personal advantage".

Does the defendant's negligence have anything to do with the plaintiff obtaining a commercial or competitive advantage? Will the recognition of a duty of care impede the legitimate pursuit of financial gain?

3. thirdly, will the recognition of a duty of care supplant or supplement remedies available in other areas and disturb any general body of rules constituting a coherent body of law?

There is also the other issue of the "indeterminate time" caution. The majority in Bryan v Maloney[14] said of this issue:

"It is true that, in so far as `an indeterminate time' is concerned, the time span in which liability to a subsequent owner might arise could be greater than if liability were restricted to the first owner. Nonetheless, the extent of the time span would be limited by the element of reasonableness both in the requirement that damage be forseeable and in the content of the duty of care. In any event, it would *prima facie* correspond with that applicable to the relationship of proximity which clearly exists as regard physical injury to person or other property. Moreover, any difference in duration between liability to the first owner and liability to a subsequent owner is likely to do no more than reflect the chance element of whether and when the first owner disposes of the house."

The conclusion that a relationship of proximity exists between the manufacturer, supplier and agronomist and the non-users with respect to the particular kind of economic loss is also supported by analogy with the relationship which would have existed between the manufacturer, supplier and agronomist and any person who suffered physical injury if the chemical turns out to be toxic or harmful to humans who are contaminated. It is difficult to see why, as a matter of principle, policy or common sense, a negligent manufacturer, supplier or agronomist should be liable for ordinary physical injury caused to any person by reason of the contamination but be not liable to non-users for losses such as the cost of remedial work necessary to deal with the contamination and to avert consumers from contamination.

The manufacturer controls the process completely from inception through to safe and subsequent withdrawal from the market. It is submitted that a corporation in that position of control ought to have the non-users in contemplation as ones likely to be affected by its failure to research, investigate, disclose, warn, monitor and/or withdraw from sale at an earlier stage. The supplier and the agronomist are in similar positions of control even though with less immediate knowledge. As a determinate of proximity, not excluded from consideration by law or logic, in cases of pure economic loss the Court should find the test is satisfied and the non-users able to recover.

Breach of duty of care

Assuming the existence of a duty of care, the next task is to show that the chemical company, supplier or agronomist breached that duty. Breach of duty is question of fact. The issue of foreseeability and the scope of the duty has three aspects:

(a) was the risk fanciful or far-fetched?[(see for example 41)];

(b) the magnitude of the risk (i.e. the seriousness of the consequences) and its probability of occurring will affect the question of whether there has been a breach of duty: [(see 79)];

(c) the availability of means to alleviate a risk is to be considered, including expense, difficulty or inconvenience to the respondents. The risk to the plaintiffs is to be balanced against such considerations.

Putative knowledge may be fixed on the basis of the body of scientific literature referring to the practice[9, 10, 51]. Judge Mason[79] said:

"A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen the existence of a foreseeable risk of injury does not of itself dispose of the question of breach of duty. The magnitude of the risk and the degree of probability remain to be considered with other relevant factors".

Upon a finding that a reasonable person in the defendant's position would have foreseen a risk to the plaintiff, to resolve the issue of breach of duty a further question has to be answered, namely what a reasonable person would do by way of response.

The question was discussed in a joint judgement of the Full Court of the Supreme Court of Victoria[70] which was concerned with claims arising from tampon toxic shock:

"The question is, `what is the scope of that duty of care?' Is it to take reasonable care to avoid injury to the appellant from her use or continued use of the product? If such is the duty then in determining whether the respondents were in breach of that duty it is necessary to evaluate the magnitude of that risk and all other relevant circumstances and matters in order to determine whether the respondent's response to the risk was reasonable or whether it was such as to constitute a breach of the duty owned [see 79]. If, however, as was contended for on behalf of the appellant the scope of the duty was to warn the appellant as being a member of the class of persons to whom the duty was owed, of the risk involved in using or continuing to use Carefree Super tampons then, putting aside any question of causation in the event of a breach of that duty, the appellant would be entitled to succeed."

Usually the allegations will be that the chemical company was negligent in that it:

? failed to conduct any or any proper tests as to the effect of the chemical in the person or property;

? failed to undertake adequate toxicity and/or residue studies to determine the chemical effect and persistence upon the target to which the chemical is to be applied at the time it was to be applied;

? failed to undetake adequate residue studies to determine the bio-accumulative and harmful effects and depletion rates of the chemical in the person or property;

? failed to warn of the risks or dangers to person or property.

It is submitted the duty of care owed by chemical companies is a duty equivalent to that of the duty owed as manufacturer to a consumer[22, 34], namely a duty of care in the process of manufacture, promotion and distribution of the product. The supplier and the agronomist have a duty to enquire of the manufacturer whether it has properly discharged its duties before selling or recommending the product and to familiarise themselves with any risks and warn of them.

It is undoubted that manufacturers, suppliers and agronomists owe a duty of care to persons or property closely and directly affected by their acts and omissions. In the context of users of the product, the duty was expressed by Lord Atkin[22] in the following terms:

"...a manufacturer of products, which he sells in such a form as to show that he intended them to reach their ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take reasonable care."

This formulation of the duty was stated to be the law in Australia[34].

Subsequent decisions[78] have refined the duties of a manufacturer who must take all reasonable steps to ensure that a product is safe, i.e. that there is no substantial risk to people or property from using it in a normal or proper manner. A manufacturer must also use due care in the design or formulation of the product[7, 39] and may extend to warning about the risks and dangers of the product. Should the

circumstances be such as to warrant a duty to warn, the question becomes whether the warning provided is adequate and sufficient. The specificity and adequacy of the warning will be determined according to the facts of each case.

An insufficient warning will be treated in the same vein as no warning at all. An example[35] was in relation to manufactured sheep dip which was supplied in drums upon which there was a label which warned that the dip was corrosive when not diluted. When the plaintiff claimed damages after his stud rams suffered poisoning when immersed in the dip, it was held that the warning on the label was inadequate since it did not alert the plaintiff to specific danger of absorptive poisoning to animals.

In the English decision of Vacwell Engineering Co Ltd v BDH Chemicals[25], a warning was found not to be *sufficiently specific to alert users to a particular danger*. This case featured the supply by the defendant chemical manufacturer of the chemical boron tribromide in glass ampoules for industriall use. While the ampoules were being washed there was a violent explosion which killed a visiting Russian physicist who was working with the chemical. Unknown to both the plaintiffs and the defendant was the fact that the chemical was an explosion hazard when brought into contact with water. The warning "harmful vapour" which appeared on the lable of the ampoules was not specific enough to alert users of the chemical of the risk of contact with water. This case was cited by the Full Federal Court of Australia[19] as authority for the proposition that an insufficient warning is no warning at all; and in the Supreme Court of Victoria[62] for the view that a manufacturer has a duty to warn its customers of major industrial hazards.

Two other Canadian decisions drive home the emphasis upon specificity. In[60] the defendants manufactured crop spray that was supplied with the warning not to allow the spray to come into contact with flowers, vegetables, or plants other than those to be treated. There was no reference to the fact that the mist that was invisible had the potential to drift up to a quarter of a mile beyond the sprayed area. The defendants were held liable to the plaintiff, whose tomato crop was damaged by the mist, for failure to give adequate warning.

In[46] the defendants manufactured a fast-drying sealer. The can in which the sealer was old bore three warnings that the product was inflammable. The plaintiff was applying the sealer when it was ignited by the pilot light of a gas furnace in an adjacent room. Nevertheless, the Canadian Supreme Court found that the warnings were inadequate for failing to explicitly warn about the specific dangers, such as pilot lights in adjacent rooms.

This issue was considered by the High Court of Australia[54]. In outlining the criteria for the content of the duty to warn, Justice Barwick highlighted the *identity of the user* of the product as a factor to take into account in determining whether the content of a warning is sufficient:

"Where the dangerous quality of the substance sold can be adequately described so as thereby to communicate to the purchaser the knowledge of the dangers of its use, an adequate description of that dangerous quality is all that, in my opinion, is called for. In such a case, the manufacturer is not required to instruct the purchaser in the use of the material or as to the safeguards which may be necessary in any of the great variety of circumstances in which the substance may, in the ordinary course, be used in order that the dangers involving such usemay be contained. There may be substances whose dangerous qualities only manifest themselves in particular circumstances in which case it may well be that the warning must relate to those circumstances. It may well be that there are substances where adequate knowledge of the danger in using them can only be communicated by directions for use or even by directions as to particular safeguards to be taken during or in connection with the use either in general or in particular circumstances. Of course, in applying these statements, the identity of the purchase is particularly significant because who and what he is will affect the question whether the description of the substance or, for that matter, any other statement by way of warning or direction is adequate to communicate the relevant knowledge."[54]

The product label is the main way by which a chemical manufacturer can communicate information about the product to the end user. Brochures however may be the first reference source provided to customers.

Customers are sometimes informed that the brochure contains all the necessary instructions and the information without reference to any potential to harm or bio-accumulate. It is incumbent upon a responsible chemical company to provide a clear warning and to give instructions for use to ensure that the product is used in such a way that the active ingredient, if it has a tendency to do so, will not harm or bio-accumulate.

The Material Safety Data Sheet is an essential document for chemical manufacturers and supplements the information provided on the label but is not a substitute for providing information on the label because it provides different information and is used for a different purpose. The MSDA addresses matters concerned with occupational health and safety. The MSDS is not provided to the user of the chemical product therefore any warning contained on the MSDS will not have been effectively communicated.

Warnings must be provided in clear concise terms in language which will be readily understood by the user. Technical terms such as "bioaccumulate", "residue limit" and "withholding period" are not well understood. In addition, a manufacturer's duty to warn extends beyond the point in time when a product is distributed: the duty to warn is a *continuing* obligation.

The Court[77, 78] considered the alternatives for a manufacturer who discovers that its product is unsafe. In this case, the relevant product, Nonox S, was withdrawn from the market by the manufacturer in 1949. The issue was whether there had been a breach of the duty of care in not withdrawing it prior to 1943. The Court found that by 1943, the manufacturer was in a position to appreciate that a tyre factory's workers were at risk. The Court held that:

"If the manufacturer discovers that his product is unsafe, or has reason to believe that it is unsafe, his duty may be to cease forthwith to manufacture or supply the product in its unsafe form. It may be that in some circumstances the duty would be fulfilled by less drastic action: by, for example, giving proper warning to persons to whom the product is supplied of the relevant facts, as known or suspected, giving rise to the actual or potential risk. Factors which would be relevant would be the gravity of the consequences if the risk should become a reality, and the gravity of the consequences which would arise from the withdrawal of the product."

Similarly, the Supreme Court of Canada confirmed that the duty to warn "is a continuing duty, requiring manufacturers to warn not only of dangers known at the time of sale, but also of dangers discovered after the product has been sold and delivered"[23]

The alternatives to manufacturers who discover that their products are unsafe have been canvassed in the English Court of Appeal[77] and in the Supreme Court of Victoria[70]. In the latter case, the plaintiff sued the defendants, as manufacturers and distributors of a brand of tampon, alleging negligence resulting in personal injuries in the form of toxic shock syndrome. JudgeVincent considered the manufacturer's duty when a product is used in the period between the "emergence of a suspicion that the use of the product might represent a health risk and the later establishment that the suspicion was justified". His Honour found that there was no easy way of resolving this conundrum:

"The balance to be struck between - or possibly in some circumstances even the combined effect of - the degree of risk and the seriousness of the possible consequences, if the risk becomes reality, can arise for assessment in an almost infinite variety of combinations and fact situations. Circumstances may well occur in which the existence of a danger to potential users could require the immediate recall of all merchandise and that immediate steps be taken to ensure that the maximum amount of publicity which is possible in the circumstances should given in order to protect potential consumers. In other cases, it may be appropriate and quite sufficient to provide information or warnings to those who could be affected in order that the individuals concerned might be placed in a situation where they would be able to make up their own minds as to whether or not they wished to assume any risk which might be considered to be present or to desist from using the product."

The paramount consideration, in Vincent's view, was to ensure that "as far as possible, the consumers are not unnecessarily or, through no fault of their own, unknowingly exposed to the risk of injury or other

adverse consequences being suffered by reason of their use of products available to them in the marketplace."

It is submitted that the Full Court's caution in implying the duty to warn does not detract from the principle that, once implied, the duty requires manufacturers to be cognizant of new risks and developments, by installing appropriate monitoring, research and testing facilities and to safeguard consumers from exposure to such risks.

It does not take much intellectual reasoning to group suppliers and agronomists in with manufacturers when considering the above decisions on breach of duty.

Damage

The law in relation to damage was concisely summarised by Justic Wilcox in McMullin v ICI(47) when he said:

"First, the basic principle governing recoverability of damage in negligence cases is that the damage must be foreseeable(see 56). It is not enough that the damage be the direct consequence of the tortfeasor's negligence. Neither is it sufficient to ask whether the damage would not have occurred `but for' the tortfeasor's negligence(see 48).

"Second, the criterion of foreseeability does not require the claimant to demonstrate that the precise nature or extent of the damage was foreseeable. It is enough that the damage is not different in kind from what is foreseeable(see 40). In negligence cases `damages can only be recovered if the injury complained of was not only caused by the alleged negligence but was also an injury of a class or character foreseeable as a possible result of it'.

"Third, the foregoing principles must be applied on the basis of commonsense and experience. It is worth recalling the words of Judges Deane, Dawson, Toohey and Gaudron(49):

`For the purposes of the law of negligence, the question whether the requisite causal connexion exists between a particular breach of duty and particular loss or damage is essentially one of fact to be resolved, on the probabilities, as a matter of commonsense and experience. And that remains so in a case such as the present where the question of the existence of the requisite causal connexion is complicated by the intervention of some act or decision of the plaintiff or a third party which constitutes a more immediate cause of the loss or damage. In such a case, the `but for' test, while retaining an important role as a negative criterion which will commonly (but not always) exclude causation if not satisfied, is inadequate as a comprehensive positive test. If, in such a case, it can be seen that the necessary causal connexion would exist if the intervening act or decision be disregarded, the question of causation may often be conveniently expressed in terms of whether the intrusion of that act or decision has had the effect of breaking the chain of causation which would otherwise have existed between the breach of duty and the particular loss or damage. The ultimate question must, however, always be whether, notwithstanding the intervention of the subsequent decision, the defendant's wrongful act or omission is, as between the plaintiff and the defendant and as a matter of commonsense and experience, properly to be seen as having caused the relevant loss or damage. Indeed, in some cases, it may be potentially misleading to pose the question of causation in terms of whether an intervening act or decision has interrupted or broken a chain of causation which would otherwise have existed. An example of such a case is where the negligent act or omission was itself a direct or indirect contributing cause of the intervening act or decision'.

"Fourth, a claimant is bound to do all things reasonable to mitigate the loss suffered by him or her as a result of the tortfeasor's negligence. The Full Court of the Victorian Supreme Court adopted three rules concerning mitigation of damages:

The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the plaintiff cannot recover for avoidable loss.

The second rule is the corollary of the first and is that where the plaintiff does take reasonable steps to mitigate the loss to him consequent upon the defendant's wrong he can recover for loss incurred in so doing; this is so even although the resulting damage is in the event greater than it would have been had the mitigating steps not been taken. Put shortly, the plaintiff can recover for loss incurred in reasonable attempts to avoid loss.

The third rule is that where the plaintiff does take steps to mitigate the loss to him consequent upon the defendant's wrong and these steps are successful, the defendant is entitled to the benefit accruing from the plaintiff's action and is liable only for the loss as lessened; this is so even although the plaintiff would not have been debarred under the first rule form from recovering the whole loss, which would have accrued in the absence of his successful mitigating steps, by reason of these steps not being ones which were required of him under the first rule. Put shortly, the plaintiff cannot recover for avoided loss.'

"I add one further point, which is relevant to some of the items in dispute in these cases. While hindsight may be used in measuring the loss actually suffered by a claimant, as distinct from the loss it appeared the claimant mght suffer at the time of the tortious act or discovery of its consequences, it must not be used to judge the reasonableness of the claimant's reaction to the tortious act or discovery of damage. This point was made by a Full Court of this Court:

`Whilst a claimant for damages, in circumstances such as these, must always act reasonably, his conduct should be looked at at the relevant time and not with the use of hindsight. It cannot be stressed too strongly that a claimant, such as the respondent in this case, which is placed in a dilemma by the wrongful conduct of the party sued, very often has to make difficult decisions on inadequate information.'

"That was certainly true in these cases. When the CFZ problem was first discovered in November 1994, very little information was available concerning its effects. Cattle owners did not know how long their cattle were likely to be quarantined or whether overseas countries would agree to accept beef containing a low CFZ level. It was several months before some (but not all) of Australia's major customers agreed to accept beef containing a CFZ level not exceeding 0.2 mg/kg. In the meantime, cattle owners in northern New South Wales and southern Queensland had to decide what course to take. And they had to do so at the height of a drought in their areas that some have described as the worst in living memory. In evaluating decisions under challenge in these cases, it is necessary to remember these facts and put onself in the position of the cattle owner at the time. It is not to the point that, with the benefit of hindsight, some decisions might be thought to have been unnecessary, or even unwise.

"Fifth, there are occasions when it is not possible precisely to calculate the extent of a claimant's loss. Provided it is clear some loss has occurred, in such a case the court must do the best it can(see 26). The court must make an estimate, even though it cannot arithmetically demonstrate its correctness.

The Trade Practices Act

*General principles*

Expectations of a product's quality, purpose and safety are primarily influenced by marketing and by advertising. Indeed, it is marketing which induces consumers to purchase a product. Product users presume manufacturers, suppliers and agronomists to have expert knowledge of the design, performance and suitability of a product for particular applications. Packaging, instructions for use and warnings on a product also contribute to create in consumers' preconceptions as to what a product can deliver. Product users do not have the information, the technical sophistication, the time or the inclination to accurately assess the advantages and disadvantages of each product.

Section 52 of the *Trade Practices Act* 1974 (Cth) provides that a corporation shall not engage in conduct that is misleading or deceptive or likely to mislead or deceive. It imposes strict liability on suppliers for inaccurate representations, express or implied, which they make in relation to their products. Such statements include overselling with respect to the safety, performance quality or characteristics of a product[see 4, 13, 18].

For those agronomists who are not incorporated there is, however, no relief as the Fair Trading Acts in the relevant States repeats the wording of section 52 as against individuals.

*Test*

In determining whether conduct is false or misleading and deceptive, the test is whether a person "not particularly intelligent or well informed but perhaps of somewhat less than average intelligence and background knowledge" would be misled or deceived[e.g. 5]. An extraordinarily stupid person would not be protected although the gullible, the not so intelligent and the poorly educated may be[58].

An obvious consideration for the purpose of deciding whether conduct is misleading or deceptive or likely to mislead or deceive is the class of consumers likely to be affected by the conduct[57]. This is not expressly stated in section 52 and will generally turn on the facts of an individual claim[31].

The Court has held that reference should be had to all people who come within the relevant section of the public including the astute and the gullible, the intelligent and the not so intelligent, the well educated and the poorly educated[69].

This does not mean that section 52 should not be construed in a loose or expanded way[57]. The section must be regarded as contemplating the effect of the conduct complained of on reasonable members of the class to which it is directed.

*Silence*

In appropriate circumstances, silence may constitute misleading and deceptive conduct[20]. Silence is but one of the circumstances which are to be taken into account in assessing whether conduct is misleading or deceptive or is likely to mislead or deceive.

There is not a general duty of disclosure. Rather the question is "whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive". As Justice Gummow[20] put it "the question is whether in the light of all relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is or is likely to be misleading or deceptive. Conduct answering that description may not always involve misrepresentation".

Liability under section 52 *Trade Practice Act 1974* has been found to exist in cases of failure to warn. Failure to warn that use of a product without a licence would constitute a patent infringement has been held to be a breach of section 52. In this case the Applicants alleged that Ramset supplied a rapid life system, including clutches and anchors together with brochures which gave instructions to users of the system. The Applicants alleged that if the instructions were followed, their patent for an invention entitled "life systems for tilt up walls" would be infringed. In addition to claims under the *Patent Acts* 1952 and 1990 (Cth), the Applicants claimed that Ramset's alleged failure to disclose that use of the clutches and anchors without the licence of the applicants would constitute a patent infringement, amounted to a breach of section 52. Justice Hill held that the failure to warn of the potential infringement constituted conduct which was misleading or deceptive or likely to mislead or deceive users of the system. Hill also held that silence could be misleading or deceptive if the circumstances give rise to a reasonable expectation of disclosure or otherwise have the result that a failure to disclose is misleading. His Honour held that the failure to warn of the potential infringement constituted conduct in trade or commerce which was misleading and/or deceptive or likely to mislead and/or deceive users.

In another example[24, 25] the Respondent manufactured and sold conductors bearing the words "pat pend", when in fact no application for a patent had been made. The court considered this conduct constituted a breach of section 52. The Respondent had also stated that the conductors could be used in plastic conduit to carry electrical wiring, when in reality they did not comply with AS 2053-1984. While the product made no express claim to comply with this standard, the court nonetheless held that in the circumstances of the case the silence of the respondent created an impression that its product met all relevant standards and so contravened section 52.

Reliance as a trigger to the recovery of damages

Damages may only be recovered under section 82 of the *Trade Practices Act* 1974 (Cth) if loss or damage is suffered "by conduct of another person that was done in contravention of ... Part ... V". In cases where the contravention is in the nature of a misrepresentation, this will usually mean that the person who was misled or deceived suffered loss or damage as a result of his or her reliance on the misleading conduct complained of[76]. However it is not necessary to prove that the claimant relied on the conduct, although a relevant nexus must be established[43].

Rather the common law practical or common-sense concept of causation is relevant. It is sufficient for an Applicant to show that he was induced to do something or has been influenced to do something giving rise to the damage by the relevant conduct.

Declaration

The Federal Court has the power to make a declaration in respect of whether particular conduct contravenes section 52 *Trade Practices Act* 1974 (Cth) under both sections 21 *Federal Court of Australia Act*[see 30] and in representative proceedings under section 33Z(c) and (g) *Federal Court of Australia Act*.

The remedy is discretionary.

Further, there is a public interest in a declaration being made. It will make the Court's disapproval of the particular conduct.

The Full Federal Court indicated that the public interest may allow the grant of declaratory relief in cases of the contravention of section 52 of the Act. The case concerned an advertisement by the TIA on the volume of evidence concerning passive smoking. The advertisement was held to be conduct amounting to a contravention of section 52 of the Act. The Full Court agreed that there was a public interest, which Justice Sheppard defined as the "public health and well-being of the nation", in the Court indicating the result of the litigation by declaration of right. Justice Sheppard also emphasised that the TIA had fought the proposition that it had engaged in misleading and deceptive conduct unsuccessfully before each of the judges who had dealt with the issue.

Similarly in[72], a products liability case involving an alleged failure to warn, Justice Lindgren in *orbitea cicta* indicated that public interest was a relevant element in regard to whether to make a declaration.

Implied warranties

A section of the Trade Practices Act which has not received much attention but which will be a powerful weapon available to product users bringing claims against agronomists who recommended and/or sold chemicals is Section 74.

Under that Section the allegations is that in acquiring the agronomic services and the chemical product the users expressly and by implication made known to the agronomist the particular purpose for which the services were required: and the result that they desired the services to achieve so as to show that the users relied on the agronomist's skill and judgement, whereby there was an implied warranty under Section 74(2) of the Act that the services supplied under the contract for the supply of the services and

chemical product supplied in connection therewith would be reasonably fit for such purpose or are of such a nature and quality that they might reasonably be expected to achieve such desired result.

Damage

Section 82 allows a "statutory right to damages intended to have a broader ambit than the common law actions of tort or negligent mis-statement....(that is) ....Applicants who establish a cause of action under the Act are entitled to those losses which are the immediate result of the offending conduct and also to consequential losses if sufficiently direct".

The bottom line

Agronomists were not sued in the Helix litigation but could very well find themselves embroiled in similar litigation in the future. The decision of Justice Wilcox in McMullin v ICI did not create some new area of law, rather the judge applied existing legal principles to a new fact situation.

The majority of cotton producers who used Helix had not seen the product, the label nor the brochures. They had not attended the ICI Cotton Conferences where the product was promoted. Those cotton producers who had cattle affected by Helix, and there were many of them, either would not have used the product if they had been warned of its potential to bio-accumulate or would have taken the necessary precautions to segregate their cattle from the risk. They were denied that opportunity by ICI's failure to warn. The great number of innocent cattle producers were unfamiliar with the product until November 1994.

It is trite to say that 99% of those who used Helix would not have wanted to harm their neighbours' and friends' cattle. Obviously if the cotton gin operators had known of the risk, they would not have allowed the trash to leave the gin for cattle feeding purposes.

It is difficult to show that the cotton producers and the cattle producers were misled by anything ICI did or didn't do.

So to whom was all the promotion and marketing of Helix directed? Who recommended its use to cotton producers? Who was directly misled by ICI's failure to warn? Who relied on ICI's silence? The agronomists and cotton consultants, that's who. But is it enough for those professionals to say: "If we had been warned, we either would not have recommended the product to our clients or would have informed our clients of the risks to their and their neighbours' cattle but since ICI didn't tell us about the risks, you can't blame us."?

It is submitted that the law requires more of a professional in his or her dealings with the client than such wilful blindness. A second year chemistry student at University would see that the formulation of chlorfluazuron made it an organochlorine yet ICI did not receive a single enquiry from an agronomist or cotton consultant as to its formulation or the risks associated with it. These professionals were told the product was environmentally soft yet were swayed by its extraordinary persistence on the plant. They knew that it was to be applied at a time when the plant was nearing the end of its life and was about to become dry vegetative matter. They knew that cotton trash was being fed to cattle. Despite all this there was no enquiry as to where such a persistent organochlorine might end.

The duty of a professional extends to due enquiry because of the assumption of responsibility by the professional, the reliance by the client and the position of control in which the professional is placed. The common law recognises that duty and the Federal and State Parliaments have codified it into the various consumer protection legislation.

The agronomists were fortunate not to have been sued in the Helix case. The Applicants believed they had an extremely strong case against ICI and did not wish to complicate matters. ICI's legal team

considered joining the agronomists and cotton consultants but they could only succeed against them through the Applicants as ICI did not have a sufficient legal relationship with those professionals.

In other current litigation agronomists have become involved, although as employees of pastoral houses and chemical suppliers recommending the use of products which were not suitable for the purpose for which they were acquired. Consider a situation where a product is developed in the southern half of Australia for application as a selective herbicide on cereal crops. The label stipulates that the chemical is to be applied during a window of plant age, say 3 to 6 weeks. The client does not see the label because the in-house agronomist, after inspecting the crop, recommends the chemical, supplies it and engages a spray applicator (often in-house as well) to apply the chemical. The particular crop is not however being grown in the colder southern cropping districts but rather in the warm, black soil country of north-west NSW. At 3 to 6 weeks in a particularly good season the crop is growing vigorously and is well ahead of its southern counterpart. The chemical affects the crop to such a degree that the client suffers significant loss.

Is the agronomist, as a qualified professional similar to a doctor or a lawyer, able to escape liability by saying: "But I relied on the label?"

Should the agronomist enquire as to whether the "window" is appropriate for a crop that is two to three times as advanced as those crops on which the product was developed? Should the client be warned that the product could do substantial harm?

Would an agronomist accept that a doctor, who slavishly followed the pharmaceutical company's label as to required dosage for age without taking into account that the child was abnormally big for his age thus rendering the treatment ineffective and not controlling the meningitis, was not responsible for the resultant brain-damaged child?

The bottom line is that the existing law does not allow agronomists to promote themselves as professionals, charge like professionals and receive the benefits in the community of being professionals without also inheriting the burden of community expectations as to the responsibilities of being professionals.

References

Judgements

1. Adelaide Chemical and Fertilizer Company Ltd v Carlyle (1940) 64 CLR 514.

2. Advanced Building Systems Pty Ltd v Ramset Fastener (Australia) Pty Ltd (1995) AIPC 91-129.

3. Allianz Insurance Co. Ltd v Kemcon Pty Ltd Court of Appeal NSW, unreported 8 February 1993 p.5.

4. American Optical Corp & Anor v Allergan Pharmaceuticals Pty Ltd (1985) ATPR 40-539.

5. Annand & Thompson Pty Ltd v TPC (1979) 25 ALR 91.

6. Austral Plywoods Pty Ltd v FAI General Insurance (1992) 7 ANZ Insurance Cases 61-110.

7. Australian Shipbuilding (WA) Pty Ltd v Packer (1993) 9WAR 375.

8. Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd (1987) 74 ALR 7.

9. Bale v Seltsam Pty Ltd (unreported, Supreme Court of Queensland Court of Appel, 23 August 1996).

10. Barrow and Heys v CSR Limited (unreported, Supreme Court of Western Australia, 04/08/88).

11. Bayer Australia Ltd v Kemcon Pty Ltd (1991) 6 ANZ Insurance cases 61-026.

12. Brooks v R&C Products Pty Ltd (1996) 18 ATPR 41-537.

13. Brown v Australian Harvestore Products Pty Ltd & Ors (1989) ATPR (Diget) 46-051.

14. Bryan v Maloney (1995) 182 CLlR 609.

15. Buchan v Ortho Pharmaceutical (Canada) Limited (1986) 25 DLR (4th) 658.

16. Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520 at 543.

17. Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad" (1976) 136 CLR 539.

18. Colgate-Palmolive Pty Ltd v Rexona Pty Ltd (1981) 37 ALR 391.

19. David Securities Pty Ltd v Commonwealth (1990) 23 FCR 1.

20. Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31.

21. Distillers Co (Biochemicals) Ltd v Thompson (1971) AC 458.

22. Donoghue v Stevenson (1932) AC 562.

23. Dow Corning Corp v Hollis (1995) 129 DLR (4th) 609.

24. Elconnex Pty Ltd v Gerard Industries Pty Ltd (1991) 32 IPR 491.

25. Elconnex Pty Ltd v Gerard Industries Pty Ltd (1992) 25 IPR 173.

26. Enzed Holdings Ltd v Wynthea Pty Ltd (1984) 57 ALR 167.

27. Esanda Finance Corporation v Peat Marwick Hungerford (1997) 142 ALR 750 at 773.

28. Esanda Finance Corporation Limited v Peat Marwick Hungerford (Reg) unreported H.C.A. 18.3.97.

29. Evatt, supra at 571.

30. FAI General Insurance Co Ltd v RAIA Insurance Brokers Ltd (1992) ATPR 41-176 on appeal (1993) ATPR 41-225.

31. Finucane v NSW Egg Corporation (1988) 80 ALR 486.

32. Frith v Gold Coast Mineral Springs Pty Ltd (1983) 65 FLR 213.

33. Gala v Preston (1991) 172 CLR 243.

34. Grant v Australian Knitting Mills Ltd (1935) 54 CLR 49.

35. Grant v Cooper McDougal & Robertson Limited (1940) NZLR 947.

36. Hawkins v Clayton (1988) 164 CLR 539.

37. Hedley Byrne & Co. Ltd. v Heller & Partners Ltd (1964) AC 465.

38. Hill v Van Erp (1997) 142 ALR 687..

39. Hindustan Steam Shipping Limited v Siemens Bros & Co Limited (1955) 1 Lloyds Rep 167.

40. Hughes v Lord Advocate (1963) AC 837.

41. Inverell Municipal Council v Pennington (1993) Aust Torts Reports 81-234.

42. Jaensch v Coffey (1984) 155 CLR 549 at 552-4, 582-7.

43. Janssen-Cilag Pty Ltd v Pfizer Pty Ltd (1992) 37 FCR 526.

44. Jenkins v NZI Securities Australia Ltd (1994) 120 ALR 237.

45. Kabwand Pty Ltd v National Australia Bank Limited (1989) ATPR 40-950.

46. Lambert v Lastoplex Chemicals Co (1971) 25 DLR (3d) 121.

47. McMullin v ICI 72 FCR at 79.

48. March v E & M H Stramare Pty Limited (1991) 171 CLR 506.

49. Medlin v State Government Insurance Commission (1995) 182 CLR 1.

50. Metcalf v NZI Securities Australia Ltd (unreported, 29.6.95).

51. Midales Pty Ltd v Rabenault (1989) VR 461.

52. Mutual Life & Citizens Assurance Co Ltd v Evatt (1968) 122 CLR 556.

53. Mutual Life & Citizens Assurance Co Ltd v Evatt (1970) 122 CLR 628.

54. Norton Australia Pty Ltd v Streets Ice Cream Pty Ltd (1968) 120 CLR 635.

55. Overseas Tankships (UK) Ltd v Mort's Dock & Engineering Co Ltd ("The Wagon Mound" No. 1) (1961) AC 388.

56. Overseas Tankships (UK) Ltd v Miller Steamship Co Pty Ltd ("The Wagon Mound No.2) (1967) 1 AC 617.

57. Parkdale Custom Built Furniture Pty Ltd v Puxu Pty (1982) 149 CLR 191.

58. Puxu Pty Ltd v Parkdale Custom Built Furniture Pty Ltd (1980) 31 ALR 73.

59. Ranicar v Frigmobile Pty Ltd (1983) 2 ANZ Insurance Cases 60-525.

60. Ruegger v Shell Oil Co (1964) 41 DLR (2d) 183.

61. San Sebastian Pty Ltd v The Minister (1986) 162 CLR 340.

62. Scanlon v American Cigarette Company Overseas Pty Ltd & Anor (No.2) (1987) VR 281.

63. Seas Sapfor Forests Pty Ltd v Electricity Trusts of South Australia (Supreme Court of South Australia).

64. Seltsam Pty Ltd v Minahan (unreported, NSW Court of Appeal, 20 March 1996.

65. South Coast Basalt Pty Ltd v RW Miller & Co Pty Ltd 1 NSWLR (1981) 356.

66. Sparnon & Ors v Apand Pty Ltd & Ors (Federal Court of Australia, South Australian District Registry, General Division, No. SG 28 of 1994, 20 December 1996).

67. Streets Ice Cream Pty Ltd v Australian Asbestos Institute Pty Ltd (1967) 1 NSWLR 50.

68. Sutherland Shire Council v Heyman (1985) 157 CLR 424.

69. Taco Co of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177.

70. Thompson v Johnson & Johnson Pty Ltd (1991) 2 VR 449.

71. Tobacco Institute of Australia Ltd v AFCO (1993) 113 ALR 259.

72. Tobacco Institute of Australia Ltd v AFCO (1993) 41 FCR 89.

73. Tuncel v Renown Plate Co Pty Ltd (1976) VR 501.

74. Ultramares Corporation v Touche (1931) 174 NE 441.

75. Vacwell Engineering Co Ltd v BDH Chemicals (1971) 1 QB 88.

76. Wardley Australia Ltd v Western Australia (1992) 175 CLR 514.

77. Wright v Dunlop Rubber (1972) 13 KIR 255.

78. Wright v Dunlop Rubber Pty Ltd & Anor (1972) 13 KIR 255.

79. Wyong Shire Council v Shirt (1979) 146 CLR 40.