The Changing Landscape of Personal Injury Claims – liability of Manufacturers, Animal Owners and Aviators[1]

Introduction

At its core, strict liability holds a blameless defendant liable for a plaintiff's injury, loss and damage. In a tort law system where negligence is now so widespread, and where it makes sense that plaintiffs can seek recompense for a defendant's *wrongful* conduct, it is sometimes difficult to understand why strict liability prevails. And indeed in 1995, the High Court of Australia observed that:[2]

> *…the recent trend of legal development, here and in other common law countries, has been to the effect that liability in tort depends on either the intentional or the negligent infliction of harm. That is not a statement of law but a description of the general trend.*

But the law ebbs and flows and, perhaps, in some tort law areas, strict liability has surprisingly taken on greater significance in more recent times, than less. I wish to look at three such areas, concerning:

1. manufacturers;
2. animal owners; and
3. aviators.

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[2] *Northern Territory v Mengel* [1995] HCA 65; (1995) 185 CLR 307; (1995) 129 ALR 1 (1995) per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ cited in the Australian Law Reform's *Serious Invasions Of Privacy In The Digital Era (ALRC Report 123)*.

Manufacturers

Most provisions in the *Australian Consumer Law*[3] are based on principles of negligence or breach of contract, in effect requiring an act or omission by the defendant for a plaintiff to succeed in the claim.

However, there is an important exception that is sometimes still overlooked, but may now be taking a foothold in personal injury claims.

Section 138 of the ACL provides:

(1) A manufacturer of goods is liable to compensate an individual if:

(a) the manufacturer supplies the goods in trade or commerce; and

(b) the goods have a safety defect; and

(c) the individual suffers injuries because of the safety defect.

There is nothing in that section that requires an act or omission of a defendant or a breach of a duty of care or contract for a plaintiff to succeed.

If the manufacturer supplies goods in trade or commerce and a person is injured by it, to succeed, the plaintiff simply needs to establish the cause of the injury was the good's safety defect, save for some narrow statutory defences.

Section 9 of the ACL provides a generous definition of what a "safety defect" may be, which is a good whose "safety is not such as persons generally are entitled to expect".

This does not mean a defendant is left defenceless if the product is not as safe as persons generally would expect. Its defences are found in section 142 of the ACL. Most notably, if

[3] Schedule 2 to the *Competition and Consumer Act 2010* (Cth), but also enacted through Victorian legislation.

the state of scientific or technical knowledge at the time the goods were supplied could not uncover the defect, it will not be liable (sub (c)).

But the Johnson & Johnson mesh litigation[4] does send something of a warning signal to defendants seeking to rely on these defences. There, the Court at first instance and the Full Federal Court rejected each of the respondents' arguments under section 142 of the ACL that they could not have identified the defects in the mesh products based on then scientific knowledge, for example. The High Court recently refused special leave to appeal.[5]

Animal owners

Animal law throws up a fascinating range of issues in personal injury cases.

Unlike other Australian jurisdictions, the *Domestic Animals Act 1994* (Vic) appears to provide fairly limited statutory recourse for those injured by domestic animals, although that aspect of the law, and a breach of statutory duty claim under that legislation, may need further testing.[6]

Likewise, as animals have minds of their own, and may act spontaneously, it is not always a simple task of bringing home a negligence claim against the animal's keeper for lack of reasonable care over the animal.

Quite apart from negligence is a cause of action under the principle of *scienter*. Scienter is related to the word science and speaks of 'knowledge'. It works in this way:

- if an animal's keeper has a wild animal, the keeper is assumed with knowledge that the animal may do harm, and is strictly liable if it does do harm. Domestic animals, such

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4 *Ethicon Sàrl v Gill* [2021] FCAFC 29; (2021) 387 ALR 494.

5 For a brief note, see https://pinpoint.cch.com.au/document/legauUio3442982sl1299965298/high-court-refuses-special-leave-application-in-medical-mesh-negligence-claim-fed.

6 See *Johnson v Buchanan & Anor* [2012] VSC 195, which is effectively the only relevant recent case in the area of the application of the statute.

as dogs and horses, probably do not meet the definition of 'wild', regardless of breed, and therefore this would not assist a plaintiff's case when dealing with domestic animals;

- but if an animal, of a domestic breed, has shown a mischievous or vicious tendency in the past, and someone is hurt, a keeper may also be strictly liable for that. *Fleming's The Law of Torts* refers to this as the "one free bite" rule, that is, that the dog can bite once without there being liability, but if it bites twice, the keeper is strictly liable.

Questions then abound about whether the animal had done the act, or a similar act, on a previous occasion, or whether that prior act was "mischievous" or "vicious", making the keeper strictly liable in the claim if so. Problems of proof also arise, because often plaintiffs know nothing of the animal until the fateful incident. While there is said to be a rule of "slight evidence" to assist plaintiffs in this regard, and evidence needs to be assessed against the ability of the person to call that evidence,[7] ultimately a plaintiff bears the onus of proof.

Another interesting aspect of the law of animals is the old "highway rule". In a case of *Searle v Wallbank*,[8] adopted in Australia,[9] it was held that an animal's keeper was under no duty of care to keep one's animal off highways. Thus, if a person struck an animal in a motor vehicle on a road and was injured, the driver could not sue the owner for negligence. An exception was if the animal had a known mischievous or vicious propensity.

But that law has been abolished by section 33 of the *Wrongs Act*. Now, should an animal stray onto a "highway" due to the negligence of the keeper, such as by a failure to erect a fence, the keeper will be liable. It is as well to remember that the word "highway" at common law, and

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7 *Blatch v Archer* [1774] 1 Cowp 63.

8 [1947] AC 341.

9 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617; (1979) 26 ALR 67.

in this context, is not as a layperson may think of a highway, being a principal thoroughfare, but simply means a public passageway.[10]

Still more obscure is the old common law "cattle trespass", where a keeper of domestic animals is strictly liable for damage done by straying animals trespassing on another's land. In many jurisdictions, this tort has been abolished, but the cause of action remains available in Victoria.[11]

Aviators

Aviation law is another area where strict liability applies in personal injury cases and yet may be fraught with difficulties.

At all levels – State, Federal and International – a strict liability regime is in place for such injured persons.[12] Internationally, the Montreal Convention 1999 applies,[13] although not all countries have ratified this Convention. For interstate incidents, the *Civil Aviation (Carries' Liability) Act 1959* (Cth) applies, effectively applying the Montreal Convention 1999. For intrastate incidents, the *Civil Aviation (Carries' Liability) Act 1961* (Vic) applies, mirroring the Federal legislation.

Generally speaking, this legislation is limited in its reach to those injured in commercial air operations. It is also important to note that a two year limitation period applies, after which

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10 See *Keilor v O'Donohue* [1971] HCA 77; (1971) 126 CLR 353 per McTiernan J:

> *"But it is no longer necessary that to be a highway a road should lead from town to town, or village to village. Indeed it need not be a thoroughfare at all: it may be a cul-de-sac. It need not be a main road, a high-way as distinct from a by-way. In short, the characteristic for law of a highway is simply that it is a way over which all members of the public are entitled to pass and repass on their lawful occasions."*

11 See *Halsbury's Laws of Australia* at [20-825].

12 With caps on compensation under what is called Special Drawing Rights, which value is reviewed by the International Monetary Fund. There is also an ability for a plaintiff to seek greater compensation, but there the plaintiff must prove negligence.

13 Or the Warsaw Convention 1929 before it.

the claim is extinguished, not merely statute barred.[14] Missing this date has caused many plaintiff lawyers great consternation.

Now, as to the strict liability regime, so long as there is an "accident" on board the aircraft or in the process of embarking or disembarking the aircraft, and the person sustains "bodily injury", which probably excludes pure psychiatric injury,[15] a person is entitled to claim for their injuries, loss and damage.

That appears, at first sight, to be simple enough. But there has been endless litigation over the meaning of an "accident" under these provisions. The term does not lend itself to simple definition. In the leading case of *Air France v Saks*,[16] it is said that an "accident" means an "unexpected or unusual event or happening external to the passenger, not an internal reaction to the usual, normal and expected operation of the aircraft."[17]

But what does that mean in practice?

In *Di Falco v Emirates (No 2)*,[18] a passenger felt nauseated, got up from her seat to go to the bathroom, and fainted, fracturing her ankle. She had asked for water, but attendants had been delayed providing the water to her. The plaintiff submitted that what was unusual and external to the plaintiff was that Emirates had not given the plaintiff adequate water before the incident. The learned judge held that there was no 'accident' because the attendants dealt with the requests for water in accordance with usual practice, meaning there was nothing unusual or unexpected.

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14 See section 34 of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth), which applies also to Victorian claims.

15 *Pel-Air Aviation Pty Ltd v Casey* (2017) 93 NSWLR 438.

16 (1985) 470 US 392.

17 Bartsch, R., *Aviation Law in Australia*, 5th Ed, at [10.210].

18 [2019] VSC 654.

Another interesting aspect of aviation law is to which aircraft it applies. It is obvious enough that it applies to commercial planes. It appears, for example, that it would extend to commercial ballooning operations.[19] It has previously been held to apply to commercial gliding operations.[20] And it arguably applies to commercial skydiving, including incidents of "disembarking", such as where a passenger's equipment fails during descent. To my knowledge, this latter proposition has not yet been tested and it would be interesting to see how far the meaning of "disembarking" would extend in this context. Is it a bridge too far?

Other differences in strict liability claims - damages and contributory negligence

For plaintiffs, avoiding negligence strictures is not the only benefit of bringing a strict liability claim.

In each of the three types of claim described above, there are good bases to argue that restrictions on damages under Parts VB and VBA of the *Wrongs Act 1958* (Vic) do not apply.

Di Falco v Emirates[21] is an apt example. Further to the above, this was a proceeding brought under Federal Law, namely the *Civil Aviation (Carriers' Liability) Act 1959* (Cth). The Supreme Court of Victoria was exercising Federal jurisdiction.

The parties were at odds about whether the plaintiff required a Significant Injury Certificate under Part VBA of the *Wrongs Act 1958* (Vic) to claim non-economic loss damages.

The learned judge found that Part VBA did not apply to the plaintiff's claim because:

1. section 28LE, the section requiring a Significant Injury, only applied to an injury to a person "caused by the fault of another". As noted, given there was no requirement relating to fault in the proceeding, this section was not engaged; in any event,

[19] See *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2. (2019); 266 CLR 428; (2019) 363 ALR 188, although not directly on point.

[20] *Mount Beauty Gliding Club Inc v Jacob* (2004) 10 VR 312; [2004] VSCA 151.

[21] 57 VR 394 per Keogh J.

2. Part VBA of the *Wrongs Act* was not 'picked up' as Federal law under section 79 of the *Judiciary Act 1903* (Cth) because the Federal law already covered the field relating to damages. The Federal law otherwise provided as to damages entitlements, such that the State laws as to damages were not 'picked up' and did not apply to the proceeding.[22]

By analogy, in strict liability claims against manufacturers brought under Federal law, which has its own damages regime, it seems that the same outcome would apply.

In animal liability claims that are strict liability claims under the *scentier* principles, Part VBA of the *Wrongs Act* will probably not apply, even though the claims would be brought under State law, because there is no 'fault'.

Like provisions restricting or modifying damages under Part VB of the *Wrongs Act*, such as the relevant discount rate for future economic loss,[23] also require "fault". That Part applies to personal injury damages, which are defined as "damages that relate to the death of or injury to a person caused by the fault of another".[24]

Another interesting aspect here is contributory negligence. Under section 25 of the *Wrongs Act*, "wrong" is defined as an "act or omission" relating to tort or contract,[25] which is then used in section 26 to provide that, if a plaintiff suffers damage partly as a result of a failure by the plaintiff to take reasonable care and partly because of the wrong of another person, damages may be reduced for that contributory negligence. If there is no "wrong" by the defendant because there was no relevant "act or omission" by the defendant held strictly liable, is

[22] There may be an argument for re-visiting this decision in light of *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2 (2019); 266 CLR 428; (2019) 363 ALR 188, although it appears unlikely to affect the outcome given the latter case focused more on various obligations relating to safety in aircraft operations under State and Federal laws, not entitlements to damages which are provided for already under Federal law.

[23] Section 28I.

[24] Section 28B.

[25] Noting "fault" above, is defined to include an "act or omission".

contributory negligence available at all? If the *Wrongs Act* does not apply, does common law? If the common law applies, does it completely bar the plaintiff's claim, which is what led to the contributory negligence statutory reforms in the first place?[26] Or is there no contributory negligence because there is no "negligence" or "breach of contract" claim to start with?[27] To my knowledge, this has not yet been tested in this area in Victoria. That said, the ACL and civil aviation regimes do have their own contributory negligence provisions for these strict liability claims, and there is conflicting authority about whether contributory negligence is available in scienter claims.

There is much in these areas yet to be uncovered.

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[26] For an interesting article on the history of contributory negligence and statutory reforms, see Justice Basten's paper *Personal Injury – Contributory Negligence* available at: https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2017%20Speeches/Basten_20170311.pdf.

[27] See section 25 relating the "act or omission" to liability in tort or for breach of contract.