

Recent developments in legal liability for animal nutrition products

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Summary

Just as the flutter of a butterfly's wings can result in a cyclone, so loose lips cost (professional) lives. This paper warns of the serious litigious consequences of negligence and breach of contract in the preparation, manufacture, and application of animal foodstuffs, as well as in the giving of advice to the end user. As animal nutrition now gives employment to a number of diverse professionals, negligence in performance or advice has been shown to result in large claims for damages. The paper explores the legal fictions employed both to obtain and to avoid payouts in the courts and suggests an alternative approach to the litigation syndrome.

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Introduction

Anyone involved in the animal nutrition industry is involved in a chain of activities which link research into the health and growth of animals to the design of appropriate feed formulae, the commercial processes of acquisition and manufacture of the ingredients for the feed, its supply and distribution, and ultimately profit from supply of the feed and its use by the livestock producer.

At any one time, on a daily basis, the participants in this chain are exposed to various laws governing sale of goods, liability for advice, trade practices, contract, and standards of legal responsibility at common law.

Sale of goods

The seminal case in the area of sale of goods is still *Ashington Piggeries Ltd v. Christopher* (1971 1 All ER 847). The principles set out in this case are worth revisiting as they are still good law and form the ground level of legal responsibility for producers of animal nutrition products. The facts were that a leading mink farmer approached a well known animal feedstuffs

compounder with a formula which the farmer had developed for production as a top quality mink feed. Although in the business of producing other animal feedstuffs, the defendant had no experience of mink feed. Nevertheless he took on the contract and produced the feed to the farmer's recipe. One ingredient was "herring meal" which the agreement between the parties stipulated was to be of the "best quality available". All went well until after about a year of production, mink being fed the new product began to die in large numbers. The calamity was traced back to the presence of dimethylnitrosamine (DMNA) in some of Norwegian herring meal being used as an ingredient. Unknown to any of the parties the DMNA was generated from reactions, promoted by heating, of feed components with the sodium nitrate used as a preservative in the herring meal. Sadly, though it was common knowledge that all animals had some sensitivity to DMNA, no-one then knew that it was lethally toxic to mink.

The feed manufacturer sued for the cost of the mink feed supplied and was met with a counterclaim in damages for the loss of mink as a result of feeding them the product. The basis of the counterclaim in damages was ss13, 14(1) and (2) of the Sale of Goods Act 1893 (which Act has its Australian equivalents enacted by the States and Commonwealth). Section 13 of that Act implies a condition that where a sale of goods is based on a description then the goods must actually correspond with that description. In *Ashington* the appellants likened the toxic herring meal to East African copra cake in *Pinnock Brothers v. Lewis and Peat Ltd* which was found to be so contaminated with castor seed (toxic to cattle) as to be "not properly copra cake at all." In that case, use of s13 was required because the purchasers had waived their statutory rights regarding merchantable quality and other defects in the copra cake.

In the *Ashington* case the House of Lords declined to stretch the term "misdescription of goods" to the fact that something had gone wrong in the manufacture of one of the ingredients of the mink feed (the herring meal). They did offer relief, however, pursuant to s14 of the Sale of Goods Act which provides that "where

the buyer, expressly or by implication, make known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply...there is an implied condition that the goods shall be reasonably fit for such purpose...".

The Lords found that it is quite possible for section 14 to be activated notwithstanding that a purchaser is only "partially" reliant on the seller's skill and judgment. Thus, although the purchasing mink farmer had dictated the recipe for the mink feed, he was nevertheless still reliant on the manufacturer's skill in the selection of appropriate quality ingredients and it was held that the supplier in this case had warranted that the herring meal it selected for inclusion in the recipe would not be poisonous. The fact that all animals, not just mink, had some sensitivity to the toxicity of DMNA was also critical in the finding that the suppliers should have been aware of the risk of contaminated herring meal to the purchaser's minks. The House of Lords rejected the manufacturer's claim that the mink feed was not a good 'which it was in the course of the seller's business to supply' because even though this was their first contract to make up feed for mink, their business was "to make up compounds for animal feeding and they were only using raw materials which they regularly handled."

Trade practices

Cases since *Ashington Piggeries* have raised further interesting questions involving the intersection of the various Australian Sale of Goods Acts issues and the Trade Practices Act (Cth, 1973).

Golden West was a Perth gold refinery which used hydrochloric acid from Daly Laboratories for its refining process. This process involved the use of glass which meant that the hydrochloric acid had to contain no, or very minimal, hydrofluoric acid. It appears that Daly forgot about this while continuing to maintain supply of appropriate hydrochloric acid. On two occasions Daly's usual source of hydrochloric acid dried up and an alternative was obtained from Clyde Industries, which in turn obtained it from another party and packaged it in drums with "Ajax Chemicals" labels. The first consignment of Ajax acid, used as a temporary stopgap supply, was used without incident. However the second stopgap supply, unknown to both Daly and Golden West, contained a much higher amount of hydrofluoric acid, forty times higher than Golden West suspected, which damaged the refinery's plant and equipment.

At first instance the Federal Court held that there had been no breach of the Sale of Goods Act's implied term that the hydrochloric acid would be fit for the manufacturing purpose communicated to it, but that both Daly Laboratories (the seller) and Clyde Industries had engaged in misleading conduct under the Trade Practices Act and that Clyde Industries alone had

been negligent.

On appeal (by Clyde Industries) the Full Bench of the Federal Court found that even though the conduct of Daly Laboratories (the seller) had been misleading, the buyer could not recover since it had not relied on Daly's representations (that the substitute acid would be suitable for the buyer's manufacturing purpose) because the buyer had not relied on those (false) representations. The Full Court affirmed, however, that Clyde Industries was liable to the purchaser for both misleading conduct under the Trade Practices Act and in negligence.

The case is complex in that Clyde Industries (who were never told about the need to avoid hydrofluoric content of the acid) were held liable to Golden West whilst Daly Laboratories, who were told of the need to avoid fluorine content (but later forgot) and who were found to have made a false representation (that the substitute acid was fit for Golden West's manufacturing purpose) nevertheless escaped liability. The reasons for this odd outcome, however, are illustrative of the careful consideration of liability which a producer of manufactured goods (including animal health or nutrition products) must have for the purpose of that product by the customer down the production chain.

Essentially, Daly Laboratories escaped liability because the Court held that at the time when it falsely represented that the Ajax acid would be a satisfactory substitute, personnel in Golden West had prior knowledge about Ajax chemicals and the fact that its hydrochloric acid could contain up to 100 parts per million hydrofluoric acid. Thus the Court held that in fact at the time it accepted Daly's advice that the Ajax chemical was an adequate alternative it was relying on its own belief (not on Daly's expertise). This is in line with the foreign currency banking cases which have exonerated misleading advice on foreign currency deals on the basis that the borrower in fact had knowledge about the nature of the risk superior to that of the bank officer offering the deal (see *Commonwealth Bank of Australia v. Mehta* 1991 ATPR 41-105).

Clyde Industries however, despite the fact that it was unaware of the need for a hydrofluoric free type acid, was held liable both for misleading conduct under the Trade Practices Act and for negligence essentially because it labelled its acid a certain 'technical grade' compliant to a specific catalogue description (which specified hydrofluoric acid content at about 100 ppm). The first consignment was consistent with the catalogue description, the second was labelled in the same way as the first (thus establishing a 'market expectation' of a similar fluorine content) when in fact the second batch contained fluorine levels of 4000 ppm.

All the while, Daly Laboratories was unaware that the Ajax chemical it was supplying carried a 'market expectation' of not more than 100 ppm fluorine. It is believed that the Ajax acid it was supplying from Clyde was at all time fluorine free although it had at the same time apparently "forgotten" that Golden West had requested a low fluorine hydrochloric acid.

The *Golden West* case also confirmed the principle that if a buyer has a particular purpose in mind it must communicate that “eccentric” purpose to the seller if it wishes to avail itself of the s14 Sale of Goods Act ‘reliance’ provisions. Hence, for example, the owners of a boat that had an abnormal or excessive torsional resonance but did not explain this to the suppliers of camshaft which was adequate for a normal boat could not complain of the quality of the camshaft supplied when they had failed to communicate their “abnormal requirement”—as held by the court in *Slater v. Finning* (1996 ALL ER 398).

The decision in *Golden West* was determined to a large extent on the basis of rules of causation. That is to say only the party whose conduct in fact caused the injury complained of is held liable to the injured party. Thus the Full Federal Court was concerned to ensure that, regardless of the behaviour of the various parties involved, only the intermediate supplier (Clyde Industries) whose action in (a) creating a market expectation of fluorine levels in its ‘Ajax’ labelled acid, and (b) impliedly falsely labelling the second different batch of acid, was held liable. This is, notwithstanding that the behaviour of the seller (Daly Laboratories) was not itself entirely ‘innocent’, the causal link between its behaviour and the damage sustained by *Golden West* was not demonstrated.

In *March v. Stramare Pty Ltd* (171 LR 506) the Australian High Court held that it is possible and in many cases sensible to apportion causation (and hence liability for negligence) between two parties whose actions are in varying degrees culpable and show a causal connection to the damage complained of. In *Stramare*, a drunk and speeding driver was injured when his vehicle collided with a truck parked across the centre line of a six lane road. The truck was loading fruit at night and habitually loaded by parking in that position with parking and hazard lights illuminated. At first instance the trial judge apportioned responsibility for the accident under s27(a) of the Wrongs Act 1936 (SA) as 70% against the plaintiff car driver and 30% against the owners of the parked truck.

On appeal the Court held that “sole effective cause” of the accident was the car driver’s own negligence and the appeal was dismissed. On further appeal the High Court held that “as a matter of both logic and common sense” the wrongful conduct of a defendant cannot be ignored just because either an injured but negligent plaintiff, or a negligent third party also contributed to the accident. The High Court held that where a defendant’s wrongful conduct has “generated the very risk of injury resulting from the negligence of the plaintiff or a third a and that injury in the ordinary course of things “the defendant’s negligence... is properly to be regarded as a cause of the consequence...” (Mason CJ p.518).

Stramere is important because it is a major modification of the principle that where one negligent act is superseded by another (the *novus actus interveniens*), it is this latter negligent actor (tortfeasor)

who will be held liable for the damages ensuing. An example might be the negligent inclusion in an animal feed of a slightly toxic product which may have no effect in small quantities but, if carelessly fed out or combined in a manner typical of the ‘ordinary course of things’ on a farm or feedlot, may have lethal or morbid effect. The manufacturer of the product may not escape liability just because subsequent administration of the product was sloppy or careless.

Obviously packaging and written warnings are important but these may not always be sufficient to allow the manufacturer and/or supplier to escape liability where the inclusion of the problem ingredient is itself accidental and probably not known to the manufacturer at the time of packaging.

A discussion of the development of the law of negligence will follow in the next section. However, it is important to note that Wilcox J, in the case concerning contamination of cattle feed and consequently of cattle by Helix pesticide spray-drift from cotton crops, expanded the categories of economic loss to include not only the persons who owned the cattle, rendered unsaleable because of the contamination, but also those who suffered ‘transferable losses’, for example subsequent owners of the cattle in possession when the contamination was discovered (*McMullin & McMullin v. ICI Australia Operations Pty Ltd & Ors.*; 1997 541 FCA at 76). Wilcox J used the cattle as the proximity link between ICI (the manufacturer of the chemical spray used on cotton producers) and those victims who suffered economic losses which ought to have been in the mind of ICI when putting this chemical on the market. Wilcox J place his own limit on the numbers of classes of victims arising out of ICI’s negligence in addition to those classes of a kind whose losses a reasonable chemical manufacturer and distributor would foresee (FCA at 76).

The Court’s reasoning appears to be based on practicality. As in an English case involving economic losses arising out of an outbreak of foot and mouth disease, the discovery of chemical contamination in cotton trash which destroyed a gin trash business which developed to sell such as stock feed was held by Wilcox J. to be “a tragedy which can foreseeably affect almost all businesses in (an agricultural) area” (FCA at 77), but which was outside the limits of liability established by the tortious principle of proximity.

While Wilcox J. justified his limiting of the proximity test to those who dealt with the contaminated cattle by citing Gibbs J. in the *Caltex Oil* case (see below), that is that “damages are not recoverable for economic loss which is not consequential upon injury to the plaintiff’s person or property” (FCA at 77), in fact it could be said that while there is no rational distinction to be made between economic loss which was foreseeable (e.g. a cotton trash stock feed business would be destroyed once it was known that the trash was contaminated), the learned Judge had an eye to the impracticality of allowing such an extension to liability for which one was unlikely to obtain insurance cover.

Negligence

A major part of the chain of causation is the advice given by the merchant, the rural adviser and sometimes the neighbour. Academics write papers in learned journals and usually escape liability for their errors because the readers of these journals are either academics, or so sceptical that they never would rely on any conclusion drawn in such a paper. But what if these conclusions get onto the Internet where the working person reads them and then acts on them?

The author of such a paper might avoid liability by writing at the end of the paper words to the effect that "the above are only academic musings and should not be used for any purpose in real life". But then would this not destroy the purpose of the paper and undermine the credibility of the author?

A step closer to the farm gate is the merchant who sells chemical and seed by inducing the farmer to believe that the product recommended is suitable for the purpose of, for example, establishing pasture which is both permanent and nutritious. In a case where insufficient care was taken by the merchant to first inspect the soil type in the paddock planned to be improved and then research the literature for the suitability of the seed variety for that soil type, would the merchant be liable for the loss of expected production from the 'improved' pasture (as well as the replacement cost of the chemical, the seed and the labour)? Certainly, if the *Helix* case were to be followed in such a case, ignorance by the merchant would not be exoneration (see *McMullin v. ICI* at 83).

As for the rural adviser, there is the Winston Churchill syndrome which compels him/her to give the same advice over and over again, all the while failure after failure for the successive recipients of that advice are staring him in the face. For example one adviser might say concerning a patch of Chilean needle grass that it has a special nutritional quality and that the 'green' farmer should be relaxed and comfortable about having it. Another might say plough the needle grass in and sow oats with the result is that the needle grass became distributed over the whole paddock. In both instances the advisers could be liable for negligent misstatement.

Even the neighbouring farmer who gives advice over the fence is responsible for its accuracy and applicability in the circumstances known to him or that ought to be known by him.

In fact the law of negligence took a major leap in the dark a century ago when it extended responsibility for damages arising out of a careless act to include that class of victims (defined as "neighbours") whom the careless person ought to have known might be injured (or suffer damage) as a result of that careless act. The House of Lords in *Donoghue v. Stevenson* (1932 AC 562) held that in law a careless person (the tortfeasor, the person who commits the tort) is responsible to his/her neighbour, and then defined 'neighbour' as those persons "who are so closely and directly related by my act that I ought to be reasonably to have them in

contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question" (per Lord Atkin at 580).

The Australian High Court developed this concept of negligence in *Jaensch v. Coffey* (1984; 15 CLR 549) to limit the scope of liability by way of clarifying the limits of "proximity" to be added to the "foreseeability" limits of the *Donoghue v. Stevenson* principle. Deane J. said that once the risk of injury was reasonably foreseeable, the "proximity" test was satisfied where there had been physical injury which was of a kind that was reasonably foreseeable.

What proximity meant was not defined except by the following metaphor: "An existing category of proximity grows as instances of its application multiply until the time comes when the cell divides" (per Deane J. at 585, citing Lord Devlin in *Hedley Byrne*). Deane J. defined proximity as arising when physical injury or damage had occurred and reserved to another day the question of whether purely economic injury could satisfy the proximity test.

The High Court had previously held that "as a general rule damages are not recoverable for recoverable for economic loss which is not consequential upon injury to the person or his/her property" (*Caltex Oil (Australia) Pty Ltd v. the Dredge Willemstad*, 1976; 136 CLR 529, per Gibbs J. at 555) but in this case held that, while Caltex owned neither a damaged pipeline nor the oil lost through the damage, nonetheless the dredge operator knew both of the existence of the pipe and that the oil was being supplied to Caltex the interruption of which would cause Caltex economic loss.

In the same case Stephen J. said that what is sufficient proximity will reflect "the courts assessment of the demands of society for protection from the carelessness of others" (at 5740575, citing Lord Pearce in *Hedley Byrne*). Mason J. in the same case insisted that the law should deny compensation "in an indeterminant amount... to those who may suffer foreseeable physical damage" (at 592).

With due respect to the learned Judge, the above is misleading as a general principle, since there is often no physical injury sustained when a person suffers economic loss arising out of poor advice (negligence mis-statement) as held in *Hedley Byrne*.

Hence the High Court emphasised the element of reliance as a test of proximity in actions for damages arising out of negligent mis-statement (*San Sebastian Pty Ltd v Minister for Planning and Environment*, 1986; 162 CLR 430).

Beside the element of reliance, the High Court has examined the difficulty of linking in a causal way the losses suffered by a person who relied on a negligent misstatement or misrepresentation. In *South Australia v Johnson (Full Court)* 42 ALR 161 the case involved an Ex-Serviceman who served in the armed forces from 1941 to 1964. He retired to take up an offer from South Australia Government to lease a property of 1958 acres on Kangaroo Island on the inducement by the South

Australia Government that that property was suitable for wool growing and lamb production, even though the State knew that the pastures of this property were dominated by Dwalganup and Yarloop clovers and hence were a highly potent cause of ewe infertility and other disorders affecting lamb and wool production.

The Court at first instance held that this inducement was false: the representation of the property as suitable for fat lambs and wool production was false and misleading and caused Mr. Johnson's losses. It held that the damages to be awarded to Mr. Johnson should have been such as to put him in such position as he would have been had the negligent misrepresentation had not been made. Because it was not argued by Mr. Johnson's legal representatives, this approach was not followed. The damages were assessed on the basis of Mr. Johnson's loss of profit.

However the High Court, whilst agreeing with the position of the South Australia Court and the Full Court of the Supreme Court, nonetheless reduced the quantum of damages to the amount that was owed to the State by way of unpaid rent. The net result was that Mr. Johnson received nothing.

In assessing damages arising out of misrepresentation, it is necessary to identify only those effects which arose out of the misrepresentation. In rural production, the climate, soil fertility, management practices and the volatility of the market place make assessment of damages difficult.

Conclusion

One might draw the conclusion from the above review of the law that if someone can conduct litigation long enough everyone may be liable to pay damages in cases where, through the victim's own failure to think, to check out for him/herself the accuracy or applicability of the advice the supplier is using to promote its product, that victim has suffered a loss which is compensable.

This has developed especially in Australian courts because Judges think that everyone is or should be insured and that every insurance company exists to pay up. The billions lost in the current HIH Insurance failure might prove a turning point in litigation. If shipowners for almost 100 years have an international treaty which affords them limits on their liability, why should professionals not press parliament for the same rights? A consequence would be that with the certainty of a limit to the amount of damages claimable from a tortfeasor the public would cease to be a mendicant to the courts and become more responsible for its own well-being. We can wait with interest to see whether parliaments have the courage to tackle this issue.

We have looked at the development of the law in relation to breach of contract, breaches of the Sale of Goods Act and the Trade Practices Act, which as professionals we should be aware of, since they can leave to expensive claims in the courts. We have seen that even though one might be sued for damages, clever

legal footwork can often get us out of trouble. We have seen how the courts will try hard to assist the private individual against another who carries insurance—although the HIH collapse might cause a change in the attitude of judges to such claims. It is recommended that professionals take advantage of that collapse to lobby parliament for legislation creating 'caps' on liability for damages arising out of negligence.

