Swick Nominees Pty Limited v Leroy International Inc (No. 2) (2015) WASCA 35

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Supreme Court of Western Australia – Court of Appeal
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Swick purchased an Air Compressor, the bearings of which failed after about 950 hours of operation resulting it seems in the compressor becoming useless. Business interruption also occurred. The claim appears to have been for wasted costs of the compressor and financial loss from its non-operation. From a legal perspective it is important to note that the inability of the Air Compressor to operate did not result in any damage to other property belonging to Swick or otherwise cause injury.

Swick brought proceedings against its seller and against the ultimate manufacturer in negligence.

The structure of the claim, as such, is not an unusual product liability claim. The claim in negligence did not succeed. The reasoning of the Court was very much based on existing precedent on how Courts have viewed claims for negligence where the sole damage is to the product supplied.

The "classic" product liability action is brought in contract by the purchaser against its seller with resultant claims ultimately finding their way back to the manufacturer via a chain of contracts. Typically the purchaser, assuming the purchaser is not a "consumer" for the purposes of the Competition and Consumer Act 2010, will allege breach of express and implied terms in the event of the breakdown or the arrangement of the machine. The implied terms will usually involve concepts of fitness for purpose and merchantable quality in accordance with state based sale of goods legislation. The seller will then make parallel claims against its supplier.

What happens if a contracting party is unable to pay or has gone into liquidation? Is there a claim against a manufacturer where there is no resultant "damage" beyond the failure of the machine itself?

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The Court of Appeal of the Supreme Court of Western Australia in ***Swick*** was faced with this problem. The seller had gone into liquidation and therefore the only claim was in negligence against the manufacturer. Many issues were covered in the case but the interesting one from a product liability perspective is the question of whether a duty of care existed between owner and manufacturer.

The trial judge correctly characterised the claim as one of pure economic loss. This is because the loss was not for damage to property but for value of the machine and lost productivity. The loss was economic but the key issue was whether a defective product gave rise to a duty of care.

The Court of Appeal went through many authorities including from the High Court on the question of pure economic loss. The judgment of Murphy JA and Etlman J provides a useful analysis of the law in this area. There was particular reliance upon a Victorian case called ***Minchillo v Ford Motor Company of Australia Limited*** (1995) 2VR 594 involving the claim of the owner of the truck against the manufacturer for defects in a truck. The Victorian Court of Appeal rejected that there was a general duty of care owed by the manufacturer of a chattel to any user who suffers economic loss arising from faulty manufacture where the damage does not involve property damage or injury. Wider authority such as ***Woolcock*** [2004] HCA16 was also influential. This case denies the duty of care in a commercial context where the sole damage is to the building.

The Western Australian Court of Appeal held that there was no duty of care. As such the decision is in line with many other recent decisions in the area of pure economic loss. It is also a timely reminder to parties of the difficulty of a claim against a manufacturer where the sole damage is to the product supplied. Traditionally it has been said that no duty exists at common law. The Court has reinforced these existing principles.

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