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PRODUCT LIABILITY IN THE WINE INDUSTRY

– A LEGAL PERSPECTIVE

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1. Introduction

I told a friend recently that I had to give a paper on product liability in the wine industry. His response was "Oh, like that *Dongohue and Stevens* case with the slug in the bottle". An interesting comment from a guy who has been a grain trader for about 20 years, without any real exposure to the law.

Which goes to show that *Donoghue v Stevenson*[1] is such a seminal case that its name, and factual premise have passed into general commercial knowledge. However, in reality it is the Trade Practices Act (Cth) that governs most claims for product liability.

But as with any other litigation, most plaintiff lawyers will include every claim under the sun, so consideration also needs to be given to common law torts such as the *Donohue v Stevenson*-type claim for negligence.

This paper firstly sets out the areas of law of relevance to product liability claims in the wine industry, then goes on to look at examples of the type of claims which might arise, and the issues raised by such types of claim in the context of Australian law.

These claims may relate to either an issue with the wine itself, or to a packaging-related defect. The latter type may be related to the closure (cork, synthetic / plastic, or tap) or the bottle / bladder.

[1] (1932) AC 562

2. Trade Practices Act

2.1 Product Liability – Part VA

Australia' s system of product liability under the TPA is one of strict liability. It was introduced in 1992, and is based on the 1985 European Community Product Liability Directive.

Part VA provides that a person who is injured or whose property is damaged as a result of defective (i.e. unsafe) goods has a right to compensation against the manufacturer without the need to prove negligence, breach of contract or breach of statutory warranty.

The person does not need to have been the purchaser of the goods (which would be required in contract law), and need not be a 'consumer' (Part V Div 2A of the TPA), and it is not necessary for the loss to have been foreseeable (required for an action in negligence). However, other actions are expressly preserved[2]. It is not possible to 'contract out' of this liability[3].

The standard for whether goods are defective is an objective one, based on a reasonable community expectation of safety[4].

2.1.1 Who is the 'manufacturer'

The word 'manufactured' is defined to include grown, extracted, produced, processed and assembled[5].

A corporation is deemed to be the manufacturer of goods:

- where the corporation manufactures the goods;
- where the corporation holds itself out to the public as the manufacturer;
- where the goods are ``home brand´´ manufactured under licence for the corporation;
- where the corporation permits someone to promote the goods as those of the corporation; or
- where the corporation is the importer of the goods. [6]

Therefore, importers and 'home brand' retailers are 'manufacturers' together with component part manufacturers, assemblers and parties which grow, extract, produce or process goods.

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2 sec 75AR
3 sec 75AP
4 sec 75AC
5 sec 74A(1) under Pt V Div 2A and sec 75AA under Pt VA

2.1.2 Meaning of 'defective'

There are three main types of potential defects:

- design defects, which relate to matters such as the form, structure and composition of the goods;
- manufacturing defects, which relate to matters such as the process of construction and assembly; and
- instructional defects, which are caused by incorrect or inadequate warnings and instructions.

However, the TPA confers on the word 'defect' a special meaning, namely the absence of a level of safety that persons are generally entitled to expect[7], which is a different concept to the ordinary meaning of 'defective'.

The relevant section provides for a 'community expectations of safety' test - an objective standard of safety, having regard to all the relevant circumstances, rather than one based upon individual expectations or absolute safety.[8]

The Act does not require absolute safety, but rather the level of safety, which the community is entitled to expect. It is the objective knowledge and expectations of the community which are to be assessed, not the subjective knowledge and expectations of the injured party. In assessing 'safety', the potential risk of damage to property is to be taken into account as well as the risk of personal injury or death.

The manner in which, and the purposes for which, goods have been marketed is a factor to be considered in determining the extent of the safety of the goods.[9]

Likewise, the packaging, and any instructions for, or warnings with respect to, doing, or refraining from doing, anything with or in relation to goods is also relevant.[10] This is particularly so with goods which are potentially hazardous. In such cases, the general presentation of the product can influence consumer expectations by exaggerating safety aspects or minimising reference to possible risks.

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6 sec 74A(3) -(8)
7 sec 75AC
8 *ACCC v Glendale Chemical Products Pty Ltd* (1998) ATPR ¶41-632 per Emmett J at 40,970.
9 sec 75AC(2) (a)
10 sec 75AC(2) (b)-(d)

Goods which met community expectations at that time are not defective at a later time because the safety expectations of the community have increased.[11]

2.1.3 Secondary use and misuse of goods

The use to which the goods could reasonably be expected to be put is a factor to be considered in determining the extent of the safety of the goods.[12]

This includes all reasonably expected secondary uses and likely potential misuse. In some cases, a manufacturer will be under an obligation to warn consumers of the potential consequences of misuse which could be anticipated by the manufacturer. This may go beyond merely stating that a certain course of action should not be adopted, and may require the manufacturer to detail the specific consequences of such misuse, i.e. to detail the type of injury or damage which may be suffered.

A manufacturer can reduce the amount of compensation payable, if loss results partly from misuse, to reflect that part of the damage caused by contributory acts or omissions by the injured person.[13] However, this does not relieve the manufacturer of its obligation to warn.

2.1.4 Liability for defective goods

The threshold elements which a plaintiff must establish to obtain compensation are:
that a corporation;
in trade or commerce;
supplied;
goods;
manufactured by it;
with a defect;
and as a result;
an individual has suffered loss or damages of a type which is recognised.

If these elements are satisfied, the manufacturer will be liable unless it can rely on any of the express defences provided for in the Act.

The Act provides for compensation to be payable to dependants of a person injured or deceased because of defective goods who may also suffer their own loss as a result of that person's injuries or

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11 Paragraph 20, Explanatory Memorandum to the Trade Practices Amendment Act 1992
12 sec 75AC(2)(e)
13 sec 75AN

death.[14] However, loss caused by a business relationship between the injured or deceased person and the potential plaintiff is specifically excluded.[15]

Liability also extends to other goods (of a type ordinarily acquired for personal, domestic or household use, **and** intended for consumer-type use) which are damaged or destroyed – for example wine spilt on a dress or suit as a result of defective packaging.[16] (Recovery of damage to commercial property is excluded.)

Liability also extends, in some cases, to land, buildings or fixtures (ordinarily acquired for private use) which are destroyed or damaged by the defective goods.[17] Once again, recovery of damage to commercial real property is excluded. Only loss occasioned through damage to property of a kind ordinarily acquired for private use is recoverable.

2.1.5 Defences

Although liability under the Act is strict, it not absolute. A manufacturer is not liable if it can prove any of the following defences:

- subsequent defect defence - the alleged defect did not exist at the time the goods left the control of the manufacturer;
- compliance with mandatory standard defence - the only reason the product was defective was because it complied with a mandatory standard;
- 'state of the art' defence -: the defect could not have been discovered in the light of the state of scientific and technical knowledge at the time of supply; or
- component manufacturer's defence - the manufacturer of components is not liable if the finished product is defective solely due to an act or omission of the manufacturer of the finished product. [18]

The onus of establishing these defences rests on the defendant.

The 'subsequent defect' defence means that the manufacturer is not liable, in principle, for matters beyond its control which occur either later on in the distribution chain, eg subsequent improper use or tampering with the goods, or which are caused by the injured party or other users of the goods.

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14 sec 75AE(1)
15 sec 75AE(1)(e)
16 sec 75AF
17 sec 75AG
18 sec 75AK(1)

However, for goods to be considered not defective, they must maintain a satisfactory level of safety for a reasonable period of time, and be able to endure reasonable and foreseeable wear and tear and mishandling.

There may also be evidentiary problems in proving, on the balance of probabilities, that a product was defect-free at the time it left the manufacturer's control.

The role of intermediaries may be relevant here - a product cannot be considered to be defective if it acts in an injurious or damaging manner due to the failure of the intermediary to inform the consumer properly, provided that the manufacturer provides the proper information to the intermediary.[19]

The 'state of the art' defence, also known as the 'development risks' defence, was used in the *Wallis Bay oyster* case[20]. The case involved, amongst other things, a claim arising out of the plaintiff's contraction of hepatitis A as a result of eating oysters grown in the contaminated area of Wallis Lake.

The judge held that, as the discovery of the defect and the supply of the products were mutually exclusive (i.e. the only test which would reveal the defect - flesh-testing of the oysters - would destroy the goods), this defence was available.

2.1.6 Example – the drain cleaner case21

A consumer purchased caustic soda to unblock a bathroom drain, and disregarded the recommended use instruction on the label. Using the caustic soda with boiling water caused a volatile reaction which injured the consumer.

The Court found that the label on the container did not warn of the danger of using Caustic Soda with extremely hot water in a confined space. It was found that while consumers may generally be expected to know that caustic soda was potentially dangerous (which was also pointed out on the label), the ordinary consumer would not be expected to know of the dangers attendant on the use of caustic soda with hot water in a confined space. The question was whether, if the goods were capable of being used in a particular way, and are reasonably likely to be used in that way, which can cause damage, a specific warning against such use should be included on the label.

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19 para 50 of the Explanatory Memorandum (although this mainly relates to pharmaceuticals)

20 *Ryan & Ors v Great Lakes Council & Ors* (1999) ATPR ¶46-191

21 *ACCC v Glendale Chemical Products Pty Ltd; Barnes v Glendale Chemical Products Pty Ltd* (1998) ATPR ¶41-632

It was found that the possibility of a reaction with hot water was sufficiently well known for a conclusion to be drawn that it was not safe for caustic soda to be marketed in a package without a warning against using it with hot water and in a confined space.

The Court found that the product was 'defective' because it was reasonable to expect that a householder could pour very hot water down the drain in order to dislodge a blockage. By failing to warn of the dangers associated with that use, the product did not provide the level of safety which the community is entitled to expect:

2.2 Part V, Div 1A - Product Safety and Product Information

This part of the Act deals matters such as warning notices, product safety and information standards, and product recalls.

For example, it is prohibited to supply of goods in respect of which there is:

- a prescribed consumer product safety standard with which the goods do not comply;
- a notice declaring the goods to be unsafe; or
- a notice imposing a permanent ban.[22]

Where goods are supplied in contravention of a consumer product safety standard, and a person suffers loss or damage by reason of a defect in, or a dangerous characteristic of the goods, or by reason of not having particular information in relation to the goods; and the loss or damage would not have been suffered if the standard had been complied with, then the person is deemed to have suffered the loss or damage by virtue of the goods having been supplied.

Similar consequences apply to goods, which have been declared to be unsafe, or which are the subject of a permanent ban.

<u>Recent changes</u>

The maximum fine payable for a breach of Part V by an individual was previously $40,000 and by a corporation $200,000. These fines have now been increased to $200,000 and $1 million respectively, and a broader range of orders can now be made than those previously available. These include community service orders, probation orders, disclosure orders and/or advertising orders against persons found guilty of contravening Part V. Examples of community service orders are making a training video explaining advertising obligations under the TPA or carrying out a community

awareness program in relation to the product the subject of the contravention. Examples of probation orders include establishing a compliance program, educating employees and revising internal operations.[23]

The type of punitive orders that the court can make include an adverse publicity order against persons ordered to pay a pecuniary penalty. These orders are available only on application by the ACCC.

The limitation period for seeking damages pursuant to s82 of the Act has been extended from 3 years to 6 years. This amendment was made to make the limitation periods under the TPA uniform and to overcome difficulties faced by some litigants due to the length of some ACCC investigations, which did not allow them to commence litigation within the 3-year period.

2.2.1 Example of product recall - Recall of herbal tea.

By notice dated 28 May 1993, published in Gazette No S164 of 1 June 1993, the Minister for Consumer Affairs stated that:

(i) the person specified in Div 2 of the Schedule below (``the supplier´´), in trade and commerce, is the supplier of goods of a kind specified in Div 1 below (``the goods´´) that are intended to be used, or are of a kind likely to be used, by a consumer;

(ii) it appeared that the goods are goods of a kind which will or may cause injury to a person; and

(iii) it appeared that the supplier has not taken satisfactory action to prevent the goods causing injury to any person.

Therefore, the Minister required the supplier to take the action specified in Div 3 of the Schedule below to recall the goods and directed that the action specified in Div 3 of the Schedule below be carried out in the manner specified in Div 4 of the Schedule below.

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22 sec 65C

23 sec 86C

The Schedule

Division 1: Particulars of the Goods

Blooms Valerian Root (Valeriana officinalis) herbal tea in 75g packs, batch number H1174019, distributed by the supplier.

Division 2: The Supplier

Blooms Health Foods Pty Ltd
212 Bronte Road
Waverley
New South Wales

Division 3: Recall Action

Take action within seven (7) days commencing on the day on which this Notice is published, to recall the goods.

Division 4: Manner in which the recall is to be conducted

Within seven (7) days commencing on the day on which this Notice is published, conduct a recall to retail and consumer level in accordance with ``The Uniform Recall Procedure for Therapeutic Goods´´, published by the Therapeutic Goods Administration.

2.3 Part V, Div 2 - Conditions and Warranties in Consumer Transactions

This part of the Act is well-known, with its implied warranties as to matters such as merchantable quality, fitness for purpose, and supply by description or sample.

These warranties, which cannot be contracted out of, form part of the contract between a supplier and purchaser of product, and can be relied on as the basis of a contractual claim for breach of warranty, if the goods fail to comply with the warranties.

2.4 Criminal offences for breach of TPA

Section 79(1) can make breach of certain parts of Part V a criminal offence.

Division 3 of Part VC establishes that it is a criminal offence of strict liability for a corporation to do things such as:

- supply consumer goods that do not comply with a relevant consumer product safety standard, or in relation to which there is in force a notice declaring the goods to be unsafe or imposing a permanent ban on the goods.

- supply consumer goods that do not comply with a relevant consumer product information standard.
- fail to comply with a Ministerial product recall notice ordering specific action to be taken.
- supply goods of a type to which such a notice relates.

Defences available to these offences include:

- intervening conduct or event;
- duress;
- sudden or extraordinary emergency;
- mistake or ignorance of statute law or subordinate legislation, in certain circumstances.

2.5 The Australian Competition & Consumer Commission (ACCC)

The ACCC has had quite a lot of press in the business world in the last couple of years – quite often as the subject of 'bashing' by big business – particularly over some of its rulings in relation to applications for approval of mergers and acquisitions which might lessen the amount of competition in Australia.

The ACCC also has a role to play in the area of product liability. Indeed, under the latest amendments to the TPA, the ACCC has been given additional or broader powers in the areas of:

- *Representative proceeding*s - The previous provisions relating to the commencement of representative proceedings by the ACCC[24] have been repealed and replaced by provisions that are designed to allow the ACCC to more easily commence representative proceedings. Representative proceedings now cover contraventions of Part IV as well as Parts IVA, IVB and V and may be commenced by the ACCC on behalf of persons who have suffered loss or damage by contravening conduct where the written consent of those persons has been obtained.
  The limitation period for the commencement of representative proceedings has been extended to 6 years. These amendments enhance the ability of small businesses and individuals to access the remedies provided under the TPA in circumstances where they do not have the time or resources to commence an action themselves.

[24] ss87(1A), (1B) and (1CA), TPA

- *Intervention in private proceeding*s – The ACCC may now, with leave of the Court, apply to intervene in private proceedings instituted under the TPA where an issue of public importance is at stake.[25]

- *Seeking a declaration or determination* - The ACCC may now institute proceedings to seek a declaration as to the operation of some parts of the TPA or a determination as to the validity of something done pursuant to the TPA.[26] This is to allow it to seek declarations to assist in the interpretation and enforcement of the TPA.

2.6 The TPA and ACCC in action – the latex glove case

Pacific Dunlop Ltd is the subject of representative proceedings brought by the ACC in relation to latex rubber gloves it produced.

A Mrs Robinson developed an allergic reaction to latex rubber gloves, manufactured by PDL's Ansell division. She initially commenced proceedings in the Victoria County Court. She claimed PDL had breached sections 75AD and 52 of the TPA, and that it had been negligent by failing to warn consumers of the dangers of latex.

In its capacity as consumer watchdog the ACCC stepped in and commenced a representative action on behalf of the plaintiff in the Federal Court.[27]

The ACCC pleaded a liability action under s75AD of the TPA in the original statement of claim alleging that PDL had sold rubber gloves that contained a defect within the definition provided under s75AC of the TPA and that the labelling and packaging of the gloves did not contain a warning to consumers of the risks. (This is a claim under Part VA of the TPA, the product liability regime.)

The ACCC has since amended the claim to include:

- an action for misleading and deceptive conduct (section 52) based on the argument that PDL were in possession of a pamphlet setting out the dangers of latex exposure from February 1995, yet failed to warn consumers of the potential danger;

- a declaration that PDL engaged in conduct which was in contravention of s52 of the TPA; and

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25 s87CA
26 s163A
27 under s75AQ - *ACCC v Pacific Dunlop Limited* [2001] FCA 740

- an injunction requiring PDL to implement a compliance program requiring the appointment of a Trade Practices Compliance Officer.

If the ACCC wins this case, further proceedings or a class action could follow.

3. Tort - Negligence

Apart from actions under the TPA, consumers who suffer injury or loss as the result of defective goods can sue in negligence for a breach of duty owed by a manufacturer of goods.

It is well-established law that a common law duty of care is owed by manufacturers and suppliers of goods to purchasers and consumers. Our old friend *Donoghue v Stevenson*[28] is authority for the proposition that manufacturers have to reasonably consider consumers of their products when addressing issues of design, manufacture, safety and distribution:. Manufacturers and suppliers are thus in the same position as other tortfeasors who by their acts or omissions cause injury, death or economic loss.

However, plaintiffs who plead negligence often struggle to prove causation when injury has allegedly been caused by faulty goods[29], which is why claims under Part VA of the TPA (see above) are more common and more likely to succeed.

3.1 Duty of care

The person or class of persons to whom a duty of care is owed can rarely be precisely defined in the area of product liability. However, in most cases the person (or class of persons) to whom the duty is owed is the ultimate consumer of the product.

The test for whether a duty of care exists is one of reasonable foresight of consequences:

> "... a manufacturer of products, which he sells in such a form as to show that he intends them to reach the 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 that reasonable care."[30]

The importance of foresight of consequences in establishing a duty of care was apparent in a case in which a water-skier was injured when the propeller of a speedboat, which was about to pick him up, was thrown out from the propeller shaft and hit him:

> "This being a speedboat, as such it was within reasonable foresight of the defendant that it would be used in proximity to persons in the water, and hence, further, the sudden loss of a propeller with its consequent loss of control and steerage way of a boat is something that a

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28 [1932] AC 562

29 See for example *H v Royal Alexandra Hospital for Children* (1990) Aust Torts Reports ¶81-000

> reasonable person should reasonably expect would lead to damage to person or property. Hence, even though the movement of the propeller through the water could not have been reasonably foreseen, the expectation of damage by a speedboat which had lost its propeller, in the circumstances in which a speedboat could reasonably be expected to be used, causing damage to some one or some thing was within reasonable foresight. In my opinion, the facts here establish a duty to the plaintiff, a breach of that duty, and a breach of duty where the defendant, as a reasonable person, ought to have foreseen the likelihood of damage to person or property flowing from the negligence in relation to this unit, to which I have referred above.[31]

The basic questions to be asked are:

(i) was there a reasonably foreseeable risk that the person in fact injured would sustain injury if no precautions were taken to guard against that risk?; and

(ii) was the defendant so situated that it was incumbent on him to take reasonable precautions to guard against that risk?

A risk of injury that is unlikely may nevertheless be foreseeable. Foreseeability does not relate to probability of occurrence, except where the risk is far-fetched or fanciful.[32]

3.2 Reasonable care

When a duty of care to a particular person in particular circumstances is found to exist, then the performance of that duty requires that a manufacturer not do any act or omit to do any reasonable act whereby injury is likely to be caused to a person in the particular circumstances.

The manufacturer may rely on intermediate examination to ensure that its product will not cause injury to users. However, it may be no longer sufficient to rely on competent middlemen in the manufacturing/distribution process. It may be necessary for inspection to be carried out by the manufacturer itself. Despite this, responsibility for ensuring that reasonable precautions have been taken travels down the chain of distribution from manufacturer to ultimate consumer. Each person in the chain bears responsibility for showing reasonable care in his or her treatment of the product; his or her liability for upholding this standard is not abrogated merely because he or she has not increased the danger.

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30 *Donoghue v Stevenson*, (1932) AC 562 per Atkin LJ at p 599
31 *Phillips v EW Lundberg & Son* (1968) 88 WN (Pt 1) (NSW) 166, 173, per McClemens J
32 *Wyong Shire Council v Shirt & Ors* (1980) 29 ALR 217

The standard of care must be maintained not only for the ultimate consumer but also for anyone injured by the defective product. The particular circumstances of each case dictate the standard of care required.

As with Part VA, a manufacturer may meet the required standard of care by providing warnings or instructions, or by testing.

Even the later independent negligence of another party will not always relieve any initial negligence of the manufacturer. If reasonable care calls for the testing of a product, which the manufacturer fails to do, and as a result a defective product is released, it cannot rely on an intermediate examination to detect the defect. A negligent intermediate examination may make the examiner liable but will not always relieve the manufacturer from joint liability.

3.3 Causation and remoteness

The issue of causation merges into the issue of remoteness where there is a chain of distribution from the manufacturer to the consumer.

If the defendant is at the beginning of the chain or distribution or if there is only one defendant, the issue is whether its negligence was the operative cause of the injury. The test most often used to decide this on the basis of each particular fact situation, is the "but-for" test.

Any intermediate distributor between the manufacturer and the retailer may be liable under contract for breach of implied warranty to the party to whom the distributor sold a defective product. However, passing on a defective product does not automatically give rise to liability in negligence. Generally, an intermediate distributor will only be liable, or jointly liable, in respect of a product manufactured defectively if the circumstances give rise to a positive duty of care, such as independently examining the product before passing it on, or to give some kind of warning regarding its use.

Provided the chain of causation has not been broken, the liability of a person further down or at the end of the chain of distribution depends on whether that person's negligence flowed ‘directly and naturally’ from a fault higher up in the chain.

3.4 Examples

In the 1960’s, Leo Buring produced a wine whose closure consisted of a foil top, covering a metal screw cap, which also had a hidden plastic stopper beneath it. Once the screw cap was removed, the plastic stopper would then spontaneously eject, often shooting eight to ten feet. There was no express warning of this characteristic on the packaging.

The plaintiff, who did not normally drink wine, bought a bottle. He unscrewed the cap but failed to notice the stopper. His attempt to pour some wine failed. The stopper then blew out, striking him in one eye which, as a result, was blinded.

The judge held that Leo Buring was clearly liable in negligence as the spontaneous ejection was not only foreseeable, it was actually intended by the defendant. Injury resulting from such an occurrence was also foreseeable.[33]

In a Tasmanian case from the early 1980s, a 52-year-old electrical engineer with a generally robust and resilient personality was having breakfast before work one morning, when he cut a slice of bread from a loaf manufactured by the defendant and ate it. He cut and was about to eat a second slice when he noticed it contained a cross- section of mouse. A dead mouse had been in the loaf, and this realisation caused the plaintiff to become violently ill. He developed a nervous condition of a phobic kind whereby the mere sight of bread, breadcrumbs or cake would induce nausea, vomiting and headaches. He could not take meals with his family, visit restaurants or eat with his workmates who teased him about it. The clinical psychologist who treated the plaintiff gave evidence that his condition was not uncommon and that it was often found in robust people. Further counselling would probably and eventually enable the plaintiff to overcome his condition.

In the Supreme Court of Tasmania the plaintiff was awarded damages for his psychiatric disorder. The judge held that a nervous disorder was a foreseeable consequence of the defendant's admitted breach of duty.[34]

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33 *O'Dwyer v Leo Buring Pty Ltd* [1966] WAR 67

34 *Vince v Cripps Bakery Pty Ltd* (1984) Aust Torts Reports ¶80-668

4. Practical application to the wine industry

4.1 Contaminated wine

The list of permitted additives for wine in Australia is vast – reflective of the fact that winemaking, although a 'natural' process that dates back to Roman times, can nonetheless still be a complex scientific exercise.

This is one of the areas where contamination might occur – for example the wrong chemical may be added during the winemaking process, perhaps because it was in an incorrectly labelled jar or bag.

Or it could be that the additive is deliberately added, in ignorance of laws preventing its use, or ignorance of the possible adverse health effects it might cause.

If you want to deviate from industry standards for any elements involved in making your wine, you need to make sure that there are no potentially harmful health effects from your practice, and if it is not specifically permitted by the Food Standards Code, that it is also not, either expressly or impliedly prohibited. (For example the use of additives which are not listed as permitted additives.)

On this point, you should be aware that new regulations are being phased in between now and January 2003. Producers can comply with one or the other – but not a combination of both – see http://www.anzfa.gov.au/foodstandards/

Alternatively, the source of contamination might find its way into the wine accidentally – it may fall into a vat or tank or into a bottle on the bottling line, and not be detected or intercepted during the procedures put in place for that purpose.

There are many possible slips betwixt lip and cup for today's winemaker, and some errors have the potential to cause harm to consumers. This may be either physical harm – an allergic reaction to a particular additive not disclosed on the label; or perhaps mental harm – such as the dead mouse in the loaf of bread example referred to in section 3.4 above, or in the classic *Donoghue v Stevenson* 'snail in the bottle' situation.

Indeed, most wineries are located in rural areas, and are unlikely to be fully enclosed, sterile environments, such as you might find with other bottling plants for human drink products. This sort of environment makes the possibility of foreign objects dropping into bottles, prior to closure, all the more possible.

4.2 'Defective' packaging

Wine producers are liable to consumers not only for defective wine, but also if any form of the packaging in which the wine is sold is defective.

This can include problems with:

- bottle
- cask / bladder
- cork / synthetic closure
- capsule
- carton / shipper
- label
- muselet / muzzle (cage which holds the cork in a bottle of sparkling)

Examples of some of the things which can 'go wrong' with packaging are:

- closure is hard to extract – with a bottle of still wine, especially using one of those two-pronged cork removers that slot down the sides of the cork, the corkscrew / implement may come away quickly, cutting the person's finger or hand, or even causing the hand to fling up forcefully, effectively punching themselves in the face. With a bottle of sparkling, the person may be tempted to use something like a knife to lever out the cork, in the process scratching the bottle, and causing it to explode (see 4.2.1 below);

- the opposite – the cork comes out when you don't want it to – with a sparkling bottle, this may result in it shooting through the air and injuring the person opening the bottle, or a bystander, or causing damage to property (likewise with the wine that shoots out – particularly if it is a sparkling burgundy-style wine). With still wines, the problem may result from incorrect storage – for example the consumer leaves a bottle of red on the car seat on a hot, sunny day – the wine can expand sufficiently to push the cork right out of the bottle – doing a lovely job on the nice white leather seats;

- remnants of glass in the bottle – either from the time of manufacture, or fragments resulting from the corker not doing the job properly;

- capsules have caused some issues over the years – whether because they contained lead, or because the tin ones could be so sharp they could cut your hand when trying to whisk the capsule off with a flourish;

4.2.1 Exploding sparkling bottles

The contents of an average bottle of sparkling wine (whether or not it is called Champagne) are contained at a pressure approximately equal to the air pressure in a car tyre.

This can give rise to the bottle exploding in one of three different situations:

1. A defect in the bottle before it gets to the retail trade; this could be due to either:

   (i) an inherent manufacturing defect, or

   (ii) damage to the bottle during the sparkling winemaking production process.

2. A defect in the bottle due to mishandling after it has entered the retail distribution channel, usually due to the use by retailer staff of a knife to open cartons containing the sparkling wine:

   (i) cutting across the middle of the box to create a "cut-case display" (the more usual type), or

   (ii) in some cases when simply cutting the top off a box to take bottles out to put them on the shelf.

3. The final type is a defect caused by the consumer:

   (i) use of a metal instrument, such as a corkscrew or knife, to try to remove the cork (either where the cork is 'too tight', and can't be removed by hand; or

   (ii) when the bottle is stored in a steel or terracotta wine rack, with the bottle scratched by the racking when placed in or taken out..

In relation to example 3(i), the integrity of the bottle is destroyed in a more dangerous situation (in terms of personal safety) – the result being that the bottle explodes during the act of it being opened. Although in the remaining examples, the bottle could also explode while being handled, whether by retail staff or by the consumer.

A further, although less common type of damage, arises when bottles are engraved, for example with a congratulatory message for a birthday, engagement, wedding, etc.

There are a number of different circumstances in which the law may regard different parties as bearing liability, or where liability may be shared / apportioned differently.

Obviously, if there is an inherent defect in the bottle, or if the bottle has been damaged during the production process, it would be hard for the wine producer and bottle manufacturer to avoid total liability.

When the problem arises from poor handling or storage of product after it has left the producer's control, the strict legal approach would state that the intermediary – the person causing the problem – would be the person liable.

However, as stated above, the product liability provisions of the Trade Practices Act may make the wine producer liable if the Court believes that it should have given consumers an adequate warning, and it failed to do so.

There is also the problem of producers not wanting to put their retail customers offside by trying to apportion liability to the retailer, for example where the problem results from a cut-case display situation.

When it is the affected consumer (or someone in their presence) who has mishandled the product (as opposed to the retailer scoring the bottle, which explodes in the consumer's possession), it is a different story again. It would seem unfair for the wine producer to bear liability for problems arising from poor handling of product after it has left the producer's control. However, the product liability provisions of the TPA may state otherwise.

The type of damages which an injured consumer may claim for include:

- personal injury;
- mental injury (eg claiming that the incident has given them post-traumatic stress disorder);
- loss or earnings;
- legal costs; and
- other related expenses.

4.3 Alcohol abuse

Although there may be some research which indicates that wine is less likely to be the subject of abuse compared with other forms of alcohol, and we in the industry would like to think wine doesn't have the same sort of problems – there is still the potential for abuse with softpacks (cask wine), and for the old-fashioned types - the 2.0 litre glass flagons, as well as with fortified wine (port, sherry, etc – while we can still call them that).

And it is not necessarily only the lower socio-economic classes (who go for cheap, bulk product) who might be affected – you might have someone on a very good income whose choice of product in which to over-indulge is a premium bottled wine.

Problems caused by alcohol abuse may also occur in the very short term, rather than over a period of months or years. For example, a person may have a couple of hours of binge drinking of your product, then get in a car and commit motor-homicide. The wine producer could be a potential defendant to a law suit by both the family of the victim, as well as by the person who committed the crime.

4.3.1 Health warnings

There seems to be a continuous stream of literature and studies published around the world extolling the positive health benefits from the consumption of wine (in moderation).

Some wine producers would like to capitalise on this by including statements to the effect of "red wine prevents heart disease, cures cancer, removes concern over erectile dysfunction, etc".

The problem with this is that there are still a lot of bad things which alcohol can do, especially when abused, and for every research paper that says a good thing, a plaintiff lawyer will probably find two that contradict it.

Therefore, it is best to remain silent, at least on your labels, about the claimed health benefits of wine. Otherwise, you run the risk of attracting not only the wowser element of society (see US warnings below), but also providing valuable legal ammunition to anyone who might be trying to sue you over an incident or illness relating to alcohol abuse which might have some connection (however tenuous) with your product.

<u>US Warnings</u>

In the early 1990's following list of warnings were tabled in the US Parliament as required to be exhibited on any advertisement for the sale of any alcoholic beverage:

(A) "!!SURGEON GENERAL'S WARNING;!!" Drinking during pregnancy may cause mental retardation and other birth defects. Avoid alcohol during pregnancy. If you are pregnant and cannot stop drinking, call [insert appropriate toll free number]."

(B) "!!WARNING;!!" Alcohol impairs your ability to drive a car or operate machinery. If you or people you love drink and drive, call [insert appropriate toll free number]."

(C) "!!WARNING;!! Alcohol may be hazardous if you are using any other drugs such as over the counter, prescription or illicit drugs. To find out what happens when you drink while using other drugs, call [insert appropriate toll free number]."

(D) "!!WARNING;!!" Drinking alcohol may become addictive. If you know someone who has an alcohol or other drug problem or has trouble controlling drinking, call [insert appropriate toll free number]."

(E) "!!WARNING;!!" It is against the law to purchase alcohol for persons under age 21. For more information about the risks associated with alcohol use among teenagers and young adults, call [insert appropriate toll free number]."

Similar warnings were tabled for advertisements published on radio or TV.

4.4 Recommendations

4.4.1 Additives

Winemakers should ensure that they have an up-to-date list of all additives which are expressly permitted and prohibited as part of the winemaking process (both for the purposes of Australia law, as well as for any proposed export markets, if Australian wine does not have rights of reciprocity in those markets).

Producers should also be vigilant in making label declarations of any additives which are used (eg sulphur dioxide – preservative 220), as some consumers may have allergic reactions, and you need to include warnings of the contents to discharge your duty of care.

Even if a consumer isn't actually allergic to the substance, if they drink too much or have a dodgy vindaloo with the wine, they may make a claim. We had just such a claim (although I hasten to add that there were no unlabelled additives in the wine). A cash-rich, wine-experience-poor consumer, who worked the mines in Indonesia, purchased a bottle of super-premium Hunter Valley red ($40+) at Sydney Airport when in town for the Olympics. He drank it shortly thereafter. Its not clear what else he drank / ate at the same time.

As most people familiar with this type of wine know, it has a tendency to throw a crust. The consumer didn't know this, and claimed to have become ill after drinking the wine, and seeing the 'sludge' at the end of the bottle.

The Gippsland office of a well-known plaintiff law firm acted for the consumer, and threatened to issue proceedings "for the hell of it", on the basis that it would be costly and time-consuming for us to defend. (The lawyer acting was also a friend of the consumer, and seemed to be trying to prove himself to his mate.)

Needless to say, we settled the matter, but an analysis we carried out of the remainder of the wine (which the consumer had kept) showed there was nothing whatsoever wrong with it.

4.4.2 Prevention of contamination – HACCP system

If you have a safety management system in place, this can both minimise the risk of contamination occurring, and can also be pleaded to mitigate damages if you do have a contamination problem.

Management systems need to take into account not only basic regulations and acceptable workplace practices, but should also include contingency plans for potential crises such as product recall.

HACCP (pronounced hass-up) stands for Hazard Analysis Critical Control Point, and is a common foundation for building a safety management system in the food industry.

HACCP is a methodology that systematically identifies, evaluates and controls hazards which are significant for food safety – no matter what the context –with a focus on preventive measures rather than end-product testing. It is internationally recognised as an effective safety risk management methodology.

HACCP is based on principles that can be applied to any food-related operation - growing, storing, bottling, making, transporting, etc.

There are seven principles in the HACCP system

1. conducting hazard analysis
2. identifying the critical control points for each step
3. establishing critical limits
4. establishing monitoring requirements
5. taking corrective action
6. verifying the HACCP system is working correctly
7. keeping records.

The key benefits of a system such as HACCP for the wine industry are:

- reduced risk of contamination, product recalls and related legal action; and
- evidence of due diligence should prosecution occur.[35]

4.4.3 Defective Packaging

If your bottling line runs without close visual supervision, you should consider a scanner of some sort to detect the presence of foreign objects in the empty bottles prior to filling, with an alarm or stop button that prevents any such bottles being filled.

You should also ensure that stocks of empty bottles waiting to be used are kept covered to prevent ingress of foreign objects prior to filling. A rinsing process immediately prior to filling would also assist in preventing the presence of 'nasties' when the bottle is filled and sealed.

If the type of packaging you use has any unusual characteristics of which consumers may not be aware, or which have the potential to cause injury or damage, consider whether you need to draw attention to this with a statement on your label.

<u>Exploding sparkling bottles</u>

If the risk of an exploding bottle incident is something which ordinary consumers would not be expected to know, then it is arguable that the bottle should carry a warning to this effect.

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[35] See the JASANZ website (http://www.standards.com.au/jasanz/abouthaccp.asp) - the government-sponsored joint accreditation authority for Australia and New Zealand.

The main actions which can be taken to protect wine producers from liability are education, and warning labels. Examples of these are:

a. a warning on back labels:

> "WARNING: Contents stored under pressure. Take care not to damage the bottle surface. Handle carefully and return to place of purchase if bottle is scratched or marked, as this may cause the bottle to explode.
>
> To open, point bottle neck away from self and others, hold cork and rotate bottle slowly. Do not use a metal or sharp implement to try to remove closure."

b. a warning on the shippers (a Stanley knife in a circle with a line through it);

c. education for retailers.

4.4.3 Alcohol abuse

It can be argued that this should be a field for government regulation – but by the time that happens people are usually of the view that their industry should be self-regulated.

If you are supplying wine to the public in bulk, you should consider some sort of statement along the line of "Enjoy wine in moderation".

In terms of claims about the positive health benefits of wine, don't be a trailblazer. If you really want to have positive statements about the beneficial health effects of wine, you should qualify them with statements such as "Not applicable to all people", or "Check first with your family doctor" – or something which tones it down. In fact, you probably need to tone it down so much, that there's no point having it on the label in the first place. (Apologies for doing the lawyer thing, and finishing on a "You can't do this" note.)