advice as to how the future of the case should be conducted may be perceived as being inadequate). Perhaps insurers should ask for creative and imaginative solutions: how the processing of the immediate claim could be improved, what steps might be taken which have previously not been taken, how to break into new legal territory to the advantage of the insurer?)

In summary, consistent failure to follow the Rules of Court can be equated with the proposition "Procedure abused". If the rules are fashioned to achieve justice, their flouting must be a denial of justice. And the challenge to liability insurers? Surely this - that when a business-like political administration tackles the legal profession, business - like reforms may be expected to ensue. It is to be anticipated that such reforms will generate increased efficiency in the processing of plaintiff personal injury litigation to an extent which may, without hyperbole, be described as "dramatic". What then is to be the insurers' riposte?

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"Strict Product Liability and Insurance: Recent Development in Australia"
by Peter Hopkins, Solicitor, Australian Commercial Disputes Centre Ltd., Sydney (Paper updated to July 1989)

In September, 1987 the Australian Attorney General issued to the Law Reform Commission a reference to review the existing state of product liability law in Australia and to make recommendations for the reform of that law. The Commission's Final Report was delivered to the Attorney General by the required date of 30th June, 1989, but will not be made public until tabled in Parliament later this year. Accordingly these comments (prepared in March and revised in July, 1989) are speculative. They relate in the main to two Discussion Papers issued by the Commission in August, 1988 and April, 1989, and to opinions expressed by members of the Commission, its staff and its critics at the many forums convened to discuss the issues raised by the Papers.

To the Commission's credit it has shown a preparedness to modify its provisional proposals in the light of criticisms it has received. It is not possible in this paper to canvass all the proposals made by the Commission, and it is pointless to make predictions as to what the Final Report will contain. Instead I will concentrate on only a few of the more controversial of the proposals, particularly where it appears the Commission has changed its thinking. In this way we can gain insight into the extent to which the process of reform of law may be influenced in and by the crucible of the

public comment.

Australia's existing product liability law is a confusing and conflicting blend of the common law of contract and of negligence, State sale of goods and fair trading legislation and the Federal Trade Practices Act (TPA) (bearing in mind the federal/ state constitutional framework with which Australia is, in my opinion, burdened). Part 5 of the TPA had been amended in 1978 to introduce a measure of strict product liability on the part of manufacturers (defined to include Australian importers) to consumers injured by defective products. The definition of consumer is prolix, but suffice to say here it did not extend to members of the consumer's family or others to whom he may have given the products, nor to bystanders.

There is very little doubt the fundamental thrust of the Commission's Final Report will be to recommend a much more far - reaching regime of strict product liability than is contained in the TPA, probably by substantial amendments to that Act rather than by new legislation. This would bring Australia into line with the strict product liability environment created in most of the United States by judicial "law making" as long ago as 1965, and more recently in the UK and other EEC countries by legislation following the issue in 1985 of the EEC Product Liability Directive.

The strict liability would be borne by an entity within what the Commission describes as "the enterprise". In essence this is defined to include all the entities that combine to bring a product into being and onto the market. It thus included the product manufacturer, which would usually (but not always) be the primary defendant, by which is meant the obvious and legally sufficient object of a plaintiff's writ. The manufacturer could seek contribution and/or indemnity from any other entity within the enterprise - such as manufacturers of component parts, wholesalers, distributors or retailers-considered by the primary defendant to have contributed to the plaintiff's injuries.

The primary defendant's liability to the plaintiff would be determined on a strict basis, i.e. without proof of negligence, as would be liability of other entities within the enterprise to contribute to, or indemnify, the manufacturer's liability. The plaintiff, quite simply, could be any person injured by a product. There need be no contractual or other legal nexus between that person and the defendant.

In its August, 1988 Discussion Paper the Commission provisionally proposed liability would be borne by an entity within the enterprise if a plaintiff could prove:

(1) the existence of loss or damage;

(2) the product has a particular characteristic which caused loss or damage;

(3) the characteristic was present when the product left the enterprise; and

(4) the characteristic is one that rendered the product either "unsafe" (one option) or "unsafe or unacceptable" (a second option).

This proposal generated considerable criticism, Firstly it took little or no account of the extent to which the plaintiff's conduct may have contributed to his injuries. Secondly, there would be problems in defining what was meant by "unsafe" (if the first option was accepted) and even greater problems in defining "unsafe or unacceptable" (if the second option was accepted). These terms contrasted with the UK Consumer Protection Act, which speaks of products that have a characteristic of being "defective".

If the first option were to be accepted, the Commission had proposed the court would determine whether a product was unsafe by reference to such circumstances as the degree of safety the community was entitled to expect; known dangers of goods of that kind; whether effective warnings were given; the intended use of the goods; and the state of scientific and technical knowledge at the time the goods left the enterprise.

If the second option were to be accepted, the Commission had proposed it would be possible for a plaintiff to elect not to attempt to show the goods were "unsafe", but simply that they were "unacceptable". This would be determined by the extent to which the product varied from a standard of "acceptable quality", which would consist of two elements. The first was a basic principle that the goods would be such as would be fairly acceptable to a reasonable person, having regard to all the circumstances. The second element was a listing of aspects of quality, some or all of which may be important in the particular case, including a product's fitness for all its common purpose, its state or condition, appearance and finish, freedom from minor defects and durability.

The criticism of these proposals has been severe, both because of the amorphous and protean standards suggested, and because of their deviation from the notion of defective goods as that term appeared to be used in the Commission's Terms of Reference.

The response of the Commission has been to abandon altogether the use of standards. In its April, 1989, Discussion Paper the Commission said an examination as to whether a product deviated from a standard directs a court's attention away from the

particular facts giving rise to the plaint before it, and instead focuses that attention on forensic discussion and evidence about those standards. This would be so if the standard was whether a product was "unsafe", "unacceptable" or even "defective".

Instead the Commission, in its April 1989 Discussion Paper, proposed as a determinant of liability the way the product acted in the particular instance giving rise to the plaint before it, and provided for a defence to the effect that what the claimant knew about the product would lead a reasonable person to expect the product to act the way it did in the circumstances. The Commissioner in charge of the Product Liability Reference, commenting on the Commission's change of direction, has said this new criterion "reflects the connotation of what is commonly understood by the terms 'unsafe' or defective', while avoiding evidentiary and procedural difficulties which follow from the use of terms such as 'unsafe' in legislation".

In essence the Commission is now proposing that a court directs its attention to what happened when the plaintiff sustained his injuries, and not just the process whereby the product came into being and onto the market from within the enterprise. For example,why did the toaster cause injury by electric shock to the plaintiff? Was there a "short" in the toaster's electric circuitry when it left the enterprise? Or did the plaintiff insert a metal knife into the toaster's opening to extract a piece of toast?

The direction of attention away from standards such as defectiveness or want of safety of a product in essentially theoretical terms to the practical reality of what actually happened is, in my opinion, desirable. One of the (several) factors giving rise to the substantial increase in American product liability litigation has been the preparedness of the courts to embark upon extensive risk/benefit enquiries as to whether a particular product that has caused injury could have been designed or manufactured in a way that would have prevented that injury.

Thus. however bizarre the circumstances giving rise to the plaint before the court, if that court determines the product could have incorporated some feature so as to avoid the injury that occurred then the manufacturers will be held strictly liable for the plaintiff's injuries. For example, in one American case a car manufacturer was held liable for the injuries sustained by a drunken driver in an accident because, the court's view, it was possible to incorporate a safety feature that would have reduced the extent of the plaintiff's injury. Reckless conduct on the part of the plaintiff, far from providing defence in the American legal environment, actually becomes another basis of liability on the part of the defendant, on the ground that the defendant ought to have foreseen the possibility that some of the users of the product would be reckless and ought to have incorporated features guarding against this possibility! In this way

strict liability has, in the United States, been transformed into absolute liability. The Australian Law Reform Commission is to be commended in foreseeing, and therefore avoiding, such a consequence of its reforms.

Another matter in which the Commission has shifted ground has been the defence of compliance by the defendant with mandatory standards. In its August 1988 Discussion Paper the Commission provisionally proposed that such compliance not be a defence to the plaintiff's claim, as it is in the UK Consumer Protection Act.Instead, the Commission had proposed the defendant might have a right of contribution or indemnity from the authority that formulated the standard. The Commission's rationale was that government agencies which formulated standards and made them compulsory, rather than injured plaintiffs, should bear a share of the responsibility for losses caused to those plaintiffs because goods met those standards. This, in the Commission's view, could be best achieved by denying to the defendant the defence of compliance with mandatory standards and thereby effectively forcing him to seek contribution from the relevant authorities.

In its April 1989 Discussion Paper the Commission has resiled from this proposal. It has done so in part because the Constitution prevents liability being cast in state government agencies (which would usually formulate such standards) by federal legislation such as the TPA, thus leaving the primary defendant "holding the baby". The Commission has also conceded the imposition of liability, even to the extent constitutionally possible, might deter government agencies from embarking on the (desirable) task of fixing such standards.

Accordingly the Commission now proposes a defence of compliance with mandatory standards similar to that allowed under the EEC Directive. However, even this is qualified. The defendant must show, not only such compliance, but also that it was impossible for the defendant to act simultaneously so that the standard was complied with and to ensure the product would not act in the way it did. In other words compliance with a mandatory standard is to be a permissible defence, but not necessarily a complete one.

I turn now to the state of the art defence. In its August, 1988 Discussion Paper the Commission provisionally proposed there be no such defence, notwithstanding its optional availability under the EEC Directive and the exercise of that option in the UK Consumer Protection Act and in the legislation of certain other EEC countries. Notwithstanding swingeing criticism the Commission has remained resolute on this point. In its April, 1989 Discussion Paper the Commission has stated: "The persons involved in the manufacture and supply of goods obtain economic benefits from

placing on the market goods which are 'state of the art' and which incorporate all the latest developments in scientific and technical knowledge. It is no justification for relieving them of the risk of the way the goods act that the goods are 'state of the art'"

The Commission continues to argue that the availability of a state of the art defence conflicts with the Commission's objective that losses caused by products should be reflected in the price of the product to the extent that those losses are a consequence of the activity of a person in the enterprise. Implicit here is the assumption that the pricing of a product would include premium for insurance against the possibility of that activity causing loss, injury or damage to persons outside the enterprise.

It has to be said the Commission's stand is at least consistent with its objectives. What the state of the art defence essentially is about is knowledge. If it is to be accepted that the burden of loss referable to the "activity" of a person within the enterprise is to be borne by that enterprise, then it matters not whether that person knew or was even capable of knowing his "activity" was going to cause that loss. The Commission intends that the focus of the Court's attention be not the conduct or knowledge of the defendant (as it would be in the common law of negligence), but how and why the product acted the way it did when it caused injury to the plaintiff.

Since issue of its April, 1989 Discussion Paper, however, there have been indications the Commission may yet yield some ground on this point. Both manufacturing and insurance lobby groups have questioned the Commission's implicit assumption that the state of the art risk is insurable, so that the pricing of the product need only incorporate the cost of that insurance. These lobby groups argue that insurers quantify risks by application of probability theory to known data so as to assess the risk of future events. Where the basic data is unknown and unknowable insurers would not be prepared to expose themselves to such risk at any price, or premium. Without the protection of insurance cover manufacturers would also not be prepared to risk ruin by the manufacturing and marketing of state of the art products.

My belief is that the Commission in its Final Report now awaiting tabling in Parliament, will allow a limited state of the art defence in specified cases. This will be in those industries, such as the pharmaceutical industry, where some necessary and sociably desirable goal (rather than simple profit maximisation) is being achieved by facilitating the continued manufacture and marketing of state of the art products.

As said at the outset it is not possible within the constraints of this paper to review all aspects of the Australian Law Reform Commission's provisional proposals for the reform of Australian product liability law. Instead I have concentrated on only some

of the more controversial, where - in the true spirit of legal reform in a democratic and open society - the Commission has evinced a preparedness to communicate its ideas and to modify them in the light of criticism from the community it serves.

THE LONDON COLLOQUIUM - JULY 1989

Those members and foreign visitors who attended BILA's Colloquium at University College London between 12 - 14 July this year could not fail to have been impressed by the quality and content of the papers given as well as the high standard of the discussions that followed. Had they been present at the Moot on the last day they may have been forgiven for thinking that some members participating as witnesses should consider abandoning their own professions for an even more lucrative career in Acting.

The subject chosen for this Colloquium was 'The Making and Breaking of Insurance Contracts' and the first day was taken up by the study of the duties of disclosure in Common Law and Civil Jurisdictions. Michael Gill from Australia was first into bat and took us through the Insurance Contracts Act of 1984 which had the effect of introducing a statutory code that effectively replaces the Common Law on non-disclosure and misrepresentation. The Act, which does not apply to Marine, Workers Compensation or Motor Vechicle injury insurance, has a number of inovations as follows:-

(1) The test of materiality is radically different from the test at Common Law. What matters now is what *the insured knows* to be relevant to the insurer's decision in acceptance of the risk and at what terms and what a prudent insurer might consider.

(2) The 'prudent insurer' (often thought to be a mythical being) is now substituted by the 'particular insurer' test. This was thought to be more onerous where the insurer happened to have a high or unusual standard of underwriting.

(3) As to what the insured discloses, the Act states that it is limited to matters the insured knows or that which a reasonable person could be expected to know.

(4) Where the policy is avoided, the Court now has the power to disregard the avoidance if it would be harsh and unfair not to do so. Where the Court disregards the avoidance it can award the whole or such part as the Court thinks just and equitable.