

ACCC v Glendale Chemical Products Pty Ltd; Barnes v Glendale Chemical Products Pty Ltd

[1998] 40 IPR 619

Chapter 7

Relevant facts

Glendale Chemical Products Pty Ltd purchased caustic soda, re-packaged it and sold it as 'Glendale Caustic Soda'. The packaging of the product contained warnings about its corrosiveness and stated that contact with eyes and skin should be avoided. It also specifically stated that rubber gloves and safety glasses should be worn when handling the product. Glendale marketed the product for use in unblocking drains. The instructions for use of the product on the packaging were to dissolve it in water before pouring it down the drain. However, the packaging did not contain any specific warnings about using it for unblocking drains in a way contrary to the instructions.

In May 1995, a drain in the shower recess at Michael Barnes' house in Tamworth was partially blocked. He was advised by an acquaintance, the owner of a hardware store, to use caustic soda and to pour hot water down the drain before the caustic soda. On 13 May 1995, Barnes purchased the product from Woolworths. He read the label but followed the instructions given to him by the owner of the hardware store. He poured boiling water down the drain then tipped in part of the contents of the product. A column of hot water rushed out of the pipe and struck Barnes' face causing burns to his eyes and face that resulted in permanent disability.

Barnes sought damages from Glendale for breaches of the *Trade Practices Act 1974* (Cth) and in the tort of negligence. The ACCC brought separate proceedings against Glendale seeking various consumer protection orders.

Legal issue

Had Glendale breached s 75AC of the TPA, that is, was it liable as a manufacturer of a defective good? Had Glendale engaged in misleading and deceptive conduct or been negligent?

Decision

On 27 February 1998, Justice Emmett of the Federal Court of Australia decided that Glendale had breached s 75AC of the TPA and had been negligent. Glendale was ordered to pay compensation to Barnes. Justice Emmett did not make any specific consumer protection orders.

With respect to the claim under s 75AC, Justice Emmett considered whether Glendale was a 'manufacturer' for the purposes of that section. He decided that although Glendale had only packaged the product for resale and its packaging clearly stated that it was 'Packed by' Glendale, it was deemed under ss 74A(3) and 75AB of the TPA to have manufactured the product. In his view, ss 74A(3) and 75AB of the TPA have the effect that if a corporation causes or permits its name, or a brand or mark of the corporation, to be applied to goods supplied by the corporation, the corporation is deemed to have manufactured the goods. His Honour said at 627:

A corporation which is not the manufacturer is deemed to be the manufacturer for the purposes of Pt VA even if it is clearly not. One can understand the policy reasons for the parliament imposing such an obligation. That is to say if a corporation is prepared to lend its name to a product by having its name or its logo affixed to the product, an individual injured by defect in that product need look no further than that corporation. The effect may well be to impose onerous obligations on any corporation which supplies a product with its name or logo applied to the product. Be that as it may, that appears to me to be the clear meaning and intent of the provision.

As Glendale was prepared to lend its name to the product by affixing its name and logo to it, it was deemed to be the manufacturer and Barnes need look no further than Glendale for relief.

Justice Emmett further considered the issue of whether the product was defective. He decided that the adequacy of the product's label as a warning to consumers was ultimately a question for the court, and not for expert evidence. The standard adopted in deciding whether the product was defective was based on the objective knowledge and expectations of the community, not the subjective knowledge and expectations of an injured party.

As Glendale was marketing the product for the purpose for which it was used by Barnes, Barnes was entitled to be warned of the danger, or lack of safety, in respect of a use to which the product might reasonably be put. The warning on the product's label was not adequate, having regard to the nature of caustic soda and the purpose for which it was marketed. His Honour said at 631-2:

Glendale was marketing the product for the purpose for which it was in fact used by Mr Barnes. While there may be no prior evidence of an incident such as this, it is quite foreseeable that caustic soda may have been poured down a drain which had hot water in it. I consider that the possibility of reaction with hot water was one which was sufficiently well known for a conclusion to be drawn that it was not safe for caustic soda to be marketed in a package for the purposes of use such as that described without a warning against using it in hot water in a confined space. ...

The question is whether it could reasonably be expected that a substance marketed for the purposes of cleaning drains could possibly have been used in a way in which it was used by Mr Barnes. In other words, would it be reasonable to expect that a consumer, despite the directions on the label, albeit not in the form of a warning, would use the substance in a different way for much the same purpose.

Persons generally are entitled to expect to be warned of a danger or lack of safety in respect of a use to which goods might reasonably be expected to be put. The description of the method for using caustic soda to make a cleaning liquid for the removal of grease from drain pipes and gully traps contains no hint of warning that caustic soda should only be used in that way for cleaning drains. While there is a warning that the contents of the container are corrosive and that contact with eyes and skin should be avoided, that is not adequate having regard to the nature of caustic soda and the purpose for which it was marketed.

Justice Emmett rejected the argument that Glendale had engaged in misleading and deceptive conduct in breach of s 52 of the TPA. He decided that Glendale had not implicitly represented that there was no other warning which should have been given or that it had disclosed all dangers of which it was aware. In any event, he found that even if Glendale's conduct had amounted to misleading or deceptive conduct, he was not satisfied that Barnes had suffered loss damage by that conduct. However, his Honour noted at 633:

Of course, one might be able to draw the inference that if there had been a warning in express terms against use of the product with hot water in a confined space, Mr Barnes may well not have done what he did. That, however, is a different question from whether Mr Barnes was induced to act as he did in reliance upon an implied representation in the label.

With respect to the negligence claim, Justice Emmett stated that:

There was a foreseeable risk that a consumer of the product might use it in the way which Barnes did. Glendale failed to discharge its duty to include on the product's label a warning as to the consequences of using the product with hot water in a confined space such as a drain.

Barnes had not caused the loss he suffered, despite not wearing rubber gloves and safety glasses as directed by the product packaging nor was his use of the product unreasonable.

Significance

Glendale appealed Justice Emmett's decision. The Full Court of the Federal Court upheld his decision in *Glendale Chemical Products Pty Ltd v Australian Competition & Consumer Commission & Anor* (1998) 90 FCR 40.

This decision is authority for the proposition that a corporation will be deemed to be a manufacturer of goods for the purposes of s 75AC of the TPA if the corporation causes or permits its name, or a brand or mark of the corporation, to be applied to goods supplied by the corporation.

It is also authority for the proposition that in determining whether a product is defective on the grounds that the labelling was inadequate, the adequacy of the product's label as a warning to consumers is ultimately a question for the court, and not for expert evidence. To determine whether a product is defective it is judged based on the objective knowledge and expectations of the community, not the subjective knowledge and expectations of the injured party.