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case study

Date: 19 October 2011

Merck Sharp & Dohme (Australia) Pty Ltd v Peterson [2011] FCAFC 128

On 12 October 2011 the Full Court of the Federal Court of Appeal upheld an Appeal by the manufacturer of the drug Vioxx against an earlier decision which awarded damages to a man who claimed his heart attack was caused by the drug. In upholding the Appeal the Full Court gave a clear exposition on the law of causation in Australia.

In March 2010 Jessup J of the Federal Court delivered his judgment in a representative action which had been commenced against the manufacturer and distributor of a pharmaceutical product marketed in Australia as Vioxx. Whilst the Trial Judge dismissed the Plaintiff's claim in negligence, he did find that because the drug was associated with a doubling of the risk of heart attack, it was not reasonably fit for the purpose of being used for the relief of arthritic pain, which was the purpose for which it had been primarily marketed. He therefore awarded compensation to the Plaintiff pursuant to the *Trade Practices Act* 1974 (Cth) (the *TPA*).

Issues considered by the Full Court

The Full Court found that the Respondent (Plaintiff) was obliged to show that his consumption of Vioxx was a necessary condition for the occurrence of his heart attack in December 2003 and he had failed to do this. The Court stated that proof of what may be expected to happen in the usual case is of no value unless it is proved that the particular plaintiff is indeed "the usual case". The Court emphasised that the significance of an epidemiological study depends upon whether the plaintiff is a typical member of the population which is the subject of the study. In the present case, the evidence suggested that the Respondent (Plaintiff) stood apart from the ordinary case.

The Full Court also found that a claim pursuant to the TPA could not be substantiated as there was no evidence to suggest that at the time the Respondent (Plaintiff) purchased the Vioxx he impliedly or explicitly made known to the supplier that he was purchasing the drug on the understanding that it had some quality of absolute safety or complete absence of adverse side effects. The Court noted that all medications can be contraindicated for a particular patient or group of patients.

Further the Court held that even if it could be said that Vioxx had a 'defect' for the purposes of s.75AC of the TPA, the Respondent did not demonstrate that the increased risk affected him, in the sense that the heart attack he suffered was caused by (because of) his consumption of Vioxx. His claim therefore failed at the first hurdle.

The Full Court also agreed with the Trial Judge that the state of scientific knowledge at the time of

supply was not such as to have enabled the defect to have been discovered.

The Manufacturer's appeal was therefore upheld and the judgment in favour of the Respondent set aside and his action dismissed.

It is anticipated that the matter will ultimately be considered by the High Court of Australia.

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