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Graziers win battle against chemical giant

Mullin & Ors v ICI & Ors, Federal Court of Australia, Wilcox J

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In the severe drought in the early 1990's cattle producers had cause to feed cotton trash, a by-product of the process of removing cotton fibre from the cotton plant, to their cattle as a fodder supplement.

Unbeknown to those cattle producers some of the cotton crops had been sprayed with an insecticide known as Helix. The active constituent of that chemical product was Chlorfluazuron (CFZ). Unbeknown to the cattle producers, Chlorfluazuron bio-accumulated in the fat tissues of their cattle and, because of concerns with our major customers of export beef, the cattle producers were denied market access.

The contamination of the cattle with CFZ became known in late October 1994. Further enquiries were conducted and it was discovered that cattle that grazed on pastures or drank water which had been contaminated with CFZ had also ended up in the same predicament.

The government authorities moved quickly to ensure that no contaminated beef left Australia and all at-risk cattle were put onto a monitoring list. They then alerted the meat processing industry and the quarantine authorities that beef from cattle on that list could not leave our shores.

A group of affected cattle producers called a meeting at Boggabri in the North West of New South Wales in February 1995 which some 30 cattle owners attended. It was resolved at that meeting that legal representation would be engaged and a claim for damages pursued, if available. Use of the facility available through

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ICI faces huge claims over cattle feed spray

By ANABEL DEAN

The chemicals giant ICI Australia faces claims of more than $100 million after losing its legal battle against cattle breeders who unknowingly used contaminated cotton waste as drought feed.

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the Federal Court of a representative proceeding was recommended and the recruitment of an appropriate representative applicant commenced. As with all representative actions for economic loss, it was difficult to find an applicant willing to expose himself to the risk of an adverse costs order.

Fortunately, Brian & Leone McMullin were willing to become what subsequently turned out to be new pioneers for the cattle industry. Representative proceedings were commenced in the Federal Court in May 1995 against three associated companies subsequently referred to as ICI.

In August 1995 the pleadings were amended to add the Commonwealth of Australia, the National Registration Authority, the State of New South Wales and the State of Queensland as respondents. The first three subsequently sought to strike out the proceedings against them on the base of immunity from suit.

In May 1996, Justice Wilcox, the presiding Judge, dismissed the proceedings as against the Commonwealth of Australia and the National Registration Authority. The State of New South Wales appealed that decision to the Full Court of the Federal Court but that appeal was subsequently dismissed.

ICI joined in fourteen cross-respondents being the cotton gin operators who had allowed cattle producers access to the cotton trash and also some transport companies which had carted the trash to the farmer's properties.

The usual process regarding discovery and serving of relevant statements and reports followed and the hearing commenced on 24 March 1997. After 5 weeks of evidence and extensive submissions by all parties, Justice Wilcox handed down his findings on 24 June 1997. A summary of those findings is as follows:-

1. CFZ is an organochlorine.
2. CFZ had a tendency to bioaccumulate in the fat of mammals and to persist.
3. These two characteristics were the same as with other organochlorines especially DDT and Dieldrin that led to beef contamination crises in earlier years.
4. Dr Lydiate, the Regulatory Affairs Manager at ICI Australia, knew of these two characteristics.
5. ICI failed to undertake the full environmental field studies recommended by specialist scientists in ICI UK's Environmental Services Division.
6. This failure occurred despite numerous expressions of concern over a period of 4 years by officers of ICI UK to senior officers of ICI Australia about the environmental hazards of CFZ and despite the fact that Dr Lydiate knew Ciba-Geigy had decided not to seek registration of CFZ in the United States because of its environmental problems.
7. The failure of ICI to carry out the research necessary to quantify CFZ's characteristics of bioaccumulation and persistence was a case of wilful blindness.
8. Because the chemical was applied by air it was foreseeable that, from time to time, beef cattle on adjacent properties would ingest Helix from contaminated pasture, waterways or soil.
9. CFZ did not affect the animals' health or well-being.
10. A significant proportion of Australian beef, including beef produced in the areas where cotton is grown, is exported overseas. Despite this point being drawn to ICI's attention, no action was taken by ICI towards causing any overseas countries to establish *Maximum Residue Limits* for beef. This omission meant the detection of any level of CFZ in exported beef, however low, would probably lead to rejection of the shipment and publicity that would be harmful to the whole Australian beef industry.
11. The officers of ICI who made the decision to manufacture and distribute Helix were aware of all the above facts except:

(a) they were not initially aware of the practice of feeding cotton waste to cattle. They should have been aware. The information was readily available from any one of at least three sources including its own cotton representative in Narrabri;

(b) they did not consider whether the Ciba-Geigy field study was adequate or showed acceptable results; so they did not realise its inadequacy and unsatisfactory results. No officer considered whether the results compelled abandonment of the chemical or at least warranted full-scale field tests and/or a system of warning users and relevant members of the public about the risks attaching to the use of Helix. Once again this was a case of wilful blindness.

12. As a result of the CFZ contamination many people suffered financial losses.
13. Nobody associated with ICI deliberately intended to cause contamination of cattle. The contamination resulted from lack of a proper system of work.
14. Problems raised by outsiders, including officers of ICI UK, were brushed aside as if it was considered they were irrelevant to, or would complicate, the goals of registration and sales.

Brian & Leone McMullin were willing to become what subsequently turned out to be new pioneers for the cattle industry.

The applicants have established breach of the duty of care ICI owed, in connection with the manufacture and distribution of Helix, to:

(i) claimants (mainly graziers) whose cattle became contaminated by CFZ

during the claimants' period of ownership;

(ii) claimants (graziers and others such as abattoir owners) who unwittingly purchased already-contaminated cattle;

(iii) claimants, such as meat processors and exporters, who owned meat that was found to be contaminated and was, therefore, condemned; and

(iv) claimants, such as feed lot owners, who found that cattle in their possession (but not ownership) were contaminated and thereafter incurred expense in holding them in detention.

Justice Wilcox dismissed the claims against the States on the basis that they had engaged in policy decisions rather than operational decisions. ICI sought leave to appeal those orders on the basis of its claim for contribution against the States.

On 9 July 1997, the Court was informed that ICI would not be proceeding with that appeal and that settlement had been arrived at between ICI and 12 of the 14 cross-respondents. The hearing of ICI's claim against the remaining cross-respondents being two of the major cotton gins proceeded on 4 August 1997.

Although the Court has found duty and breach of duty by ICI to some of the claimants, there are still issues for hearing in relation to causation, reliance and damage. The "innocent bystanders" did not succeed on the negligence claim but still have the Section 52 claim for misleading and deceptive conduct on the part of ICI which will be addressed in either September or October of 1997.

The "innocent bystanders" are those who did not own or possess contaminated beef, be it living or dead, at the time when market access was denied. They include many, many cattle producers whose properties were caught in a blanket quarantine introduced by the regulatory authorities to ensure that no contaminated beef would leave Australia. Those persons had to subsequently prove that their cattle were not contaminated but in the meantime were denied market access and suffered loss.

Excellent work has been done by Susan O'Toole at Townsends, Solicitors of Adelaide, in relation to a Federal Court claim for similarly affected "innocent bystanders" caught up in the quarantine of potato producing properties in South Australia. At first instance those producers were unsuccessful but an appeal was lodged and has been heard and Judgment is anxiously awaited. Obviously the Judgment of the Full Court of the Federal Court in Susan's case, known as *The Sparnon Case* will have significant ramifications for the "innocent bystanders" in the Helix case.

Whilst the preparation and hearing to date consumed enormous time and resources... the work has only just begun for the Applicants.

It is anticipated that at the next hearing involving the Applicants there will only be the two parties left in the proceedings being the Applicants and ICI. Thereby bringing the proceedings around full circle to were they were when they were commenced in May 1995.

Whilst the preparation and hearing to date consumed enormous time and resources, particularly when there was something in excess of 30,000 documents to be discovered by the relevant parties, the work has only just begun for the Applicants. By way of analogy the last two years has been spent drafting and introducing the Workers Compensation Act and now it is necessary to process the individual claims of in excess of 500 workers.

Each claimant who is found eligible to claim will have to undergo a full assessment process of his or her loss, individual discovery, file and serve a Statement and subsequently give evidence. Work is already well under way in relation to that part of the process.

The use of the representative proceedings provisions of the Federal Court Act have enabled a group of people to access justice in circumstances where, as individuals, they may never have contemplated bringing proceedings. The original group of 30 identified cattle producers has grown to where it now exceeds 500 and it is still growing. In addition to those identified claimants there are also many unidentified claimants upon whom the findings are equally binding.

Whilst there is no provision under the Act for an opt-in date for those unidentified claimants, it appears that simple logistics and management of the claim will require the Court to set a date, at some time in the future, where all claimants who are eligible to claim must come forward and identify themselves. Appropriate advertising will be necessary to alert the various publics to that requirement. That advertising won't commence until the outstanding Section 52 issue has been finalised.

Further updates will appear in later issues of *Plaintiff*. ■

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