

SNAKES AND LADDERS - A TALE OF LIABILITY AND CREDIBILITY

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The Court of Appeal overturns a first instance decision, but findings on credibility meant there was a sting in the tail for the successful appellant.

In Issue

- Whether a defect caused the plaintiff's injuries and was a result of manufacture
- The plaintiff's credibility

The Background

Hartman Pacific Pty Ltd (Hartman) was the manufacturer of a ladder which it supplied to a retailer. In November 2011, William Bamber purchased the ladder from the retailer. On 8 January 2012, when Bamber first used the ladder, he suffered a serious ankle injury when he fell to the ground as he was descending the ladder.

The Decision at Trial

Bamber commenced proceedings against Hartman in the Supreme Court of NSW, seeking damages under section 138 of the *Australian Consumer Law* (ACL). Section 138 relevantly provides that a manufacturer of goods is liable to compensate an individual if it supplies goods that have a safety defect which causes the individual to suffer injury.

Expert evidence indicated that the ladder had been manufactured with two defects. Firstly, the hauling loop of the ladder was too short, preventing the locking mechanism from dropping automatically into the fully engaged position and secondly, four bolts on the two-latch hinge brackets had not been fully tightened. The defects meant that the ladder had a tendency to prevent the safety mechanism from locking fully and tended to stay disengaged.

Despite the expert evidence, the primary judge, Schmidt J, dismissed the claim, finding that Bamber had not proven that his fall was the result of a defect in the ladder which occurred during its manufacture. Her Honour also found that Bamber was not a credible witness and would have reduced damages by 30% for contributory negligence for failing to check that the locking mechanism was engaged.

Bamber appealed.

The Decision on Appeal

Judgment was handed down by Emmett AJA, (Macfarlan and Gleeson JJA agreeing).

The first issue was whether Bamber had established that the ladder had a safety defect which occurred during its manufacture. Hartman had not provided any evidence on the possible cause of the defects if they had not been present when the ladder was supplied by Hartman to the retailer. There was also a question about whether anything was done to the ladder between the incident and the inspection by the experts some months later. While the Court of Appeal indicated that the issue was not without doubt or difficulty, on balance, it found it was more likely than not that the defect was present when the ladder was supplied by Hartman to the retailer.

The next question was whether Bamber was injured because of the defect with the locking mechanism. This was tied in with the issue of contributory negligence (section 137A of the ACL) - i.e. that Bamber must have failed to ensure that the locking mechanism was properly engaged. The ladder contained a warning on its side reading: "ENSURE ALL LOCKING FUNCTIONS ARE SECURE". The Court of Appeal found that Mr Bamber had read the warning and agreed with the primary judge's findings on a 30% reduction for contributory negligence.

The Court of Appeal also agreed with Schmidt J's findings that Mr Bamber's evidence was inaccurate, exaggerated and in some places implausible. This particularly tainted the issue of quantum and while it was accepted that Mr Bamber had a serious injury, the ongoing consequences were significantly less serious than claimed.

The result of these issues and the contributory negligence reduction was an award of damages of \$79,180. This meant that there was a sting in the tail for Mr Bamber. While the Court of Appeal held that Mr Bamber was entitled to 50% of the costs of the appeal proceedings, he should have known that any award of damages would not exceed \$500,000 and should have commenced proceedings in the District Court instead of the Supreme Court. As a result he was not entitled to recover his costs of the primary proceedings.

Implications for you

There are some suggestions here that, despite the issues with Mr Bamber's credit, the Court was willing to give him the benefit of the doubt so far as where the defect arose. There was no clear evidence that the defect arose during manufacture, or clear evidence to the contrary.

However, the cost consequences were certainly a sting in the tail for Mr Bamber despite his success on appeal. An order on costs is generally discretionary, and the issues with Mr Bamber's credit are likely to have influenced the court against making an award for his costs at first instance. This is a lesson on how the approach of a party, particularly on issues of credit, can have far reaching consequences.

[Bamber v Hartman Pacific Pty Ltd \[2018\] NSWCA 248](#)

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