AUSTRALIAN GOVERNMENT SOLICITOR

Litigation Notes

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Liability of Statutory Bodies

This case carries a firm warning to statutory bodies that any provision in their governing legislation purporting to protect them from liability in tort at common law, in relation to activities carried out in discharge of their functions, will be strictly interpreted so as to afford them no protection beyond that clearly falling within the coverage of the provision. Where a statutory body supplies services on a commercial basis, any negligence on the part of the statutory body which leads to its customer suffering loss or damage through the partaking of those services will normally not be protected by an immunity provision which is expressed only to apply to loss or damage suffered as a consequence of the exercise of a function or power of the body.

Puntoriero v Water Administration Ministerial Corporation

High Court of Australia, 9 September 1999
(1999) 165 ALR 337

BACKGROUND TO THE LITIGATION

The plaintiffs were a husband and wife who grew potato crops on land leased by them in the Riverina area of New South Wales. The land was irrigated by water supplied by the defendant, the Water Administration Ministerial Corporation. The plaintiffs paid the Corporation for the supply of this water. The Corporation was a statutory body established under s.7 of the *Water Administration Act 1986* (NSW), stated as being, 'for the purposes of any Act, a statutory body representing the Crown' (see s.7(2)). The Corporation's activities were governed by the *Irrigation Act 1912* (NSW), as well as the Water Administration Act.

The plaintiffs sowed a crop of potatoes on their land in August 1992. In or about November 1992, the crop started to show effects of poisoning. By December 1992, it was clear that the crop was ruined. It also became clear at this time that the cause of the crop's ruin was the presence in the irrigating waters of a pollutant, a phytotoxic chemical.

The plaintiffs sued the defendant for damages in negligence in the Supreme Court of New South Wales. At trial, a jury found that the damage was caused by failure on the part of the Corporation to exercise reasonable care in testing the irrigation water supply for pollutants and a failure to cleanse the water supply of the phytotoxic pollutant. However, the Corporation claimed that it was immune from liability in negligence on account of s.19(1) of the Water Administration Act. Section 19 provided:

'(1) Except to the extent that an Act conferring or imposing functions on the Ministerial Corporation [i.e. the Corporation] otherwise provides, an action does not lie against the Ministerial Corporation with respect to loss or damage suffered as a consequence of the exercise of a function of the Ministerial Corporation, including the exercise of a power:

(a) to use works to impound or control water, or

(b) to release water from any such works.

(2) Subsection (1) does not limit any other exclusion of liability to which the Ministerial Corporation is entitled.

(3) No matter or thing done by the Ministerial Corporation or any person acting under the direction of the Ministerial Corporation shall, if the matter or thing was done in good faith for the purposes of executing this or any other Act, subject the Minister or a person so acting personally to any action, liability, claim or demand.'

The trial judge ruled that s.19(1) did not confer immunity from liability on the defendant's failure here. He said that he saw nothing in the Water Administration Act which would exclude 'the neighbourly or proximal duty' upon which the customer of the supplier of water ought to be entitled to rely. Judgment was entered for the plaintiffs in the sum of $2,015,219 for damages and interest.

An appeal by the Corporation to the Court of Appeal of New South Wales was successful. Mason P and Stein JA, Meagher JA dissenting, held that the supply of irrigation water, albeit with poisonous pollutants, was an act that the Corporation was empowered to undertake and therefore protected by s.19(1). The plaintiffs obtained special leave to appeal to the High Court. Their appeal to the High Court was allowed, with the judgment in their favour at first instance being restored. The High Court (Gleeson CJ, McHugh, Gummow and Callinan JJ, Kirby J dissenting) held that the immunity conferred by s.19(1) applied only to an activity of the Corporation that involved an interference with the rights of those being supplied with irrigation waters. That was not the case here where the polluted water was supplied as the result of a consensual dealing between the plaintiffs and the Corporation.

THE HIGH COURT'S DECISION

Gleeson CJ and Gummow J, in a joint judgment, said that s.19(1) was directed to loss or damage suffered as a consequence of the exercise of a function conferred upon the Corporation under its governing legislation, not loss or damage which is suffered as a consequence of a failure to exercise such a function. Two examples of the exercise of functions were referred to in s.19(1) itself; first, the use of works to impound or control water and, secondly, the release of water from any such works. However, the activities of the Corporation extended beyond the discharging of public duties or powers of a public nature. The Corporation was empowered, among other things, under ss.11 and 12 of the Water Administration Act, to join in forming joint ventures, trusts and partnerships and to enter into commercial operations. The power to enter into such arrangements carries the obligation to observe and give effect to them. A construction of s.19 that conferred an immunity in respect of loss or damage arising from breach of the commitments under such commercial arrangements would stultify the objects of the Water Administration Act, being a significant deterrent to the entry by others into commercial relationships with the Corporation. These considerations supported a 'jealous construction' of s.19(1) to 'limit what otherwise would be the rights of plaintiffs and to immunise the Corporation from actions only in respect of the positive acts in exercise of functions which of their nature will involve interferences with persons or property'. The supply of the polluted water in the present case was not such a positive act. Rather it constituted inactivity on the part of the Corporation in failing to take certain steps before supplying the water to the plaintiffs (i.e. testing the water and cleansing it of any harmful pollutants detected).

McHugh J expressed views which essentially coincided with those of Gleeson CJ and Gummow J. He saw his views as shaped by the statement of general principle contained in a judgment in *Coco v The Queen* (1994) 179 CLR 427 to which he was a party, along with Mason CJ, Brennan and Gaudron JJ, that statement being (see at p. 437):

> 'The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of

such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them.'

McHugh J referred to an earlier part of the same judgment in *Coco* where it was said that the presumption was that 'in the absence of express provision to the contrary, the legislature did not intend to authorize what would otherwise have been tortious conduct' (see at p. 436).

Callinan J put the interpretational dilemma posed by a provision such as s.19 most starkly saying:

> 'Perhaps there may be two respectable ways of looking at s.19(1). But the one which pays due regard to the statutory expectation that the respondent [i.e. the Corporation] is to act commercially, and is given some limited express immunities only in its commercial dealings, as well as extraordinary powers which would be denied to any ordinary person or corporation, invites the rejection of the untrammelled operation of the section which the respondent urged upon the Court.'

Kirby J, in dissent, pointed out that the very number and variety of functions assigned by the legislature to the Corporation, combined with the size, scope and operation of irrigation schemes for which it is responsible throughout New South Wales would potentially expose the Corporation to massive liability unless it were protected by a statutory immunity provision such as s.19. He said it was impermissible for a court to then construe that provision 'so as, in effect to erase [it] from the [Water Administration Act] or to deprive it of real meaning and effect.'

Contact for further information:

For further information about the decision contact Paul Sykes, Office of Litigation, Tel: (02) 6250 5836, email: paul.sykes@ags.gov.au.

Text of the decision is available through Scaleplus at http://scale/html/highct/0/99/0/HC000460.htm

The Constitutional Status of Territory Courts

In this matter the High Court considered the constitutional status of courts in the territories and the nature of the jurisdiction that those courts exercise.

Re Governor, Goulburn Correctional Centre and Director of Public Prosecutions (ACT); Ex parte Eastman

High Court of Australia, 2 September 1999
(1999) 165 ALR 171

The case concerned the relationship between Chapter III of the Constitution (which deals with the judicature) and s.122 of the Constitution (the territories power). The particular issue was whether appointments of judges to the ACT Supreme Court must comply with the requirements of s.72 of the Constitution. However, resolution of this issue also has consequences for the validity of decisions of judicial officers in other territories whose appointments have not complied with s.72.

The matter was heard by the High Court on 23–25 March 1999 and judgment was delivered on 2 September 1999. The High Court decided by a 6-1 majority that the appointment in question to the ACT Supreme Court need not comply with s.72. It appears that the same majority would also hold that s.72 does not apply to appointments to any territory courts created by or pursuant to laws made under s.122 of the Constitution. The decision is therefore of considerable importance in confirming the basis on which appointments of judges and magistrates have been made throughout Australia's territories, internal and external.

BACKGROUND TO THE LITIGATION

The applicant was convicted in the ACT Supreme Court in 1995 of murder and sentenced to life imprisonment. The judge who presided over the

trial had been appointed by the Executive of the ACT as an acting judge of the ACT Supreme Court for a limited term of less than one year.

Chapter III of the Constitution, in particular s.71, provides for the creation by the Commonwealth Parliament of 'federal courts' which may be invested with jurisdiction over the matters listed in ss.75 and 76 of the Constitution (called federal jurisdiction) to exercise the judicial power of the Commonwealth. Section 71 also refers to 'such other courts' as the Parliament invests with federal jurisdiction. Section 72 of the Constitution includes requirements that a judge of a 'court created by the Parliament' be appointed by the Governor-General in Council for a term of office ending when the judge reaches the maximum retiring age for that court. The appointment by the ACT Executive of the acting judge in the present case would not have met the requirements of s.72 of the Constitution if that provision applied at the time to the ACT Supreme Court.

In *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 the High Court held (following its earlier decision in *Spratt v Hermes* (1965) 114 CLR 226 concerning the ACT Court of Petty Sessions) that the ACT Supreme Court is a territorial court established by exercise of the territories power in s.122 of the Constitution and is not a court to which s.72 of the Constitution applies.

The applicant applied to the High Court for a writ of *habeas corpus* requiring his release from custody. The applicant argued that the earlier High Court authorities should be overruled and that he was entitled to be released from custody as his trial, conviction and life sentence were nullities. The applicant's principal argument was that the ACT Supreme Court is a court created by the Parliament under Chapter III of the Constitution and that the appointment by the ACT Executive of an acting judge for a term of years was invalid as it did not comply with s.72.

THE HIGH COURT'S DECISION

The High Court by a 6-1 majority (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; Kirby J dissenting) upheld the validity of the applicant's trial presided over by an acting judge of the ACT Supreme Court.

In a joint judgment, Gleeson CJ, McHugh and Callinan JJ refused to overrule the High Court's earlier decisions in *Spratt v Hermes* and *Capital TV*. Their Honours decided that s.72 of the Constitution does not apply to courts created pursuant to laws under s.122 of the Constitution. They said that this produces 'a sensible result, which pays due regard to the practical considerations arising from the varied nature and circumstances of territories' which 'are all dealt with, compendiously and briefly, in s 122' (165 ALR at 174, paras 7 and 9). It appears from their Honours' judgment that there is no relevant distinction for this purpose between a territory that enjoys self-government and legislates to create a court and a territory that does not enjoy self-government and for which courts are created directly by Commonwealth laws.

Gaudron J also decided that s.72 does not apply to the ACT Supreme Court or to any court created under or whose existence is sustained by s.122. Thus s.72 did not apply whether the ACT Supreme Court is treated as a court created by the Parliament under s.122 or as a creature of the ACT as a self-governing territory.

Gaudron J drew a distinction from the terms of s.71 of the Constitution between a 'federal' court created by the Parliament to exercise jurisdiction throughout the Commonwealth and a court created under s.122, the jurisdiction of which is necessarily confined to matters arising in relation to a territory. Gaudron J decided that it would be consistent with the reference to 'such other courts' in s.71 for a court created for a territory under s.122 to be invested with federal jurisdiction, but limited to matters arising in relation to the territory.

Gaudron J considered that the ordinary meaning of the words 'created by the Parliament' in s.72 were apt to include a court created by the Parliament under s.122 and, were the question free of authority, that meaning should be preferred. However, her Honour accepted that there was a contextual basis for reading down s.72 as applying only to 'federal' courts created under s.71 of the Constitution in contradistinction to those courts that may be invested with federal jurisdiction and, given the previous decisions of the Court to that effect (*Spratt v Hermes* and *Capital TV*) on which the Parliament has acted, the section 'should...continue to be read in that way' (165 ALR at 181, para 36). Accordingly, it follows from her Honour's judgment that appointments to any territory courts created under s.122, whether directly by a law of the Commonwealth Parliament or by a law of a self-governing territory, need not comply with s.72.

The joint judgment of Gummow and Hayne JJ also concludes that the particular appointment to the ACT Supreme Court at issue in the present case was valid. Their Honours decide that the 'preferable construction' of s.72 is one similar to the approach taken by Gaudron J.

A further ground on which their Honours conclude that s.72 did not apply is that at the time of the appointment in question the legislative basis for the ACT Supreme Court was such that the appointment and remuneration of judges depended on enactments of the ACT Legislative Assembly. This meant that it was not a court created by the Commonwealth Parliament for the purposes of s.72.

Section 52(i)

The Court also decided that the source of legislative power for the ACT Supreme Court was s.122 and rejected the applicant's argument that laws for the government of the ACT are made under s.52(i) (which confers exclusive power on the Commonwealth Parliament to make laws with respect to the seat of government). The ACT and the seat of government are not co-extensive and Parliament must rely on s.122 for the power to make laws for the government of the ACT, including a law establishing the ACT Supreme Court as a court of general jurisdiction in the ACT.

In 1997 the applicant unsuccessfully appealed to the Full Court of the Federal Court against his conviction. In separate proceedings he has applied for special leave to appeal to the High Court against that decision. The application for special leave was heard by the Full High Court on 25 March 1999 and judgment was reserved. The High Court has recently advised that the special leave application has been listed for further argument on 1 February 2000.

Contact for further information:

For further information about the decision contact David Bennett, Constitutional and Native Title Unit, Office of Litigation, Tel: (02) 6250 6223, email: david.bennett@ags.gov.au

Text of the decision is available through Scaleplus at http://scale/html/highct/0/99/0/HC000450.htm

Cross-vesting Schemes

Key provisions of the cross-vesting schemes have been held by the High Court to be invalid. The Court overturned its earlier decision in *Gould v Brown* (see *Litigation Notes* No. 2, 27 May 1998) which by statutory majority had upheld validity.

Re Wakim; Ex parte McNally/Re Wakim; Ex parte Darvall
Re Brown; Ex parte Amann
Spinks v Prentice

High Court of Australia, 17 June 1999
(1999) 163 ALR 270

BACKGROUND TO THE LITIGATION

These four cases challenged two schemes of mirror legislation passed by the Commonwealth, the States and the Territories – the 'general' cross-vesting

scheme which applies generally to civil matters in the participating courts (the Federal Court, the Family Court, and State and Territory Supreme Courts), and the Corporations cross-vesting scheme, which applies only to civil matters arising under the Corporations Law.

The aspect of the cross-vesting schemes under challenge was those provisions which enabled the Federal Court and the Family Court to exercise State or Territory jurisdiction. It was argued that the following laws were invalid:

- the provisions of the general cross-vesting scheme which enable the Federal Court to hear 'State matters' (the two *Re Wakim* matters); and
- the provisions of the Corporations cross-vesting scheme which enable the Federal Court to make orders under the Corporations Law of a State (*Re Brown*) or the Australian Capital Territory (*Spinks v Prentice*).

The basis of this argument was that Chapter III of the Constitution (in ss.75 and 76) sets out exhaustively the jurisdiction which can be conferred on federal courts such as the Federal Court and the Family Court, and this 'federal' jurisdiction cannot be supplemented by cooperative legislative action between the Commonwealth, the States and the Territories.

THE HIGH COURT'S DECISION

All members of the High Court except Kirby J accepted that Chapter III of the Constitution sets out exhaustively the jurisdiction which can be conferred on the Federal Court and Family Court. Therefore, a State could not confer power on the Federal Court to exercise State jurisdiction, either under the general cross-vesting scheme (the two *Re Wakim* matters) or under the Corporations cross-vesting scheme (*Re Brown*). The Court also held this jurisdiction could not be conferred by the Commonwealth either; in particular, it was not 'incidental' to the Commonwealth's express powers to establish, and to confer jurisdiction on, federal courts.

However, the Court held that the Federal Court *could* exercise powers under the Corporations Law of the ACT (*Spinks v Prentice*). Under s.76(ii) of the Constitution, a federal court can be given power to hear matters 'arising under laws made by the Parliament'. The Court held that the Corporations Law of the ACT, enacted by the Commonwealth Parliament under s.122 of the Constitution (the territories power), is such a law.

In the *Re Wakim* matters, the Court held that, despite the invalidity of the general cross-vesting scheme, the Federal Court could hear these matters under its 'accrued jurisdiction'. (In general terms, the accrued jurisdiction allows a federal court to hear matters otherwise outside its jurisdiction which are so bound up with matters within its jurisdiction that they form part of the one controversy.) As the matter within jurisdiction (involving a statutory claim against the Official Trustee in Bankruptcy) was raised in separate proceedings, this suggests that the Court will take a broad view of the scope of a federal court's accrued jurisdiction.

IMPLICATIONS OF THE DECISION

The decision means that federal courts cannot be given a general power to exercise State jurisdiction. One practical consequence is that State Corporations Law matters will generally be heard in State courts rather than the Federal Court. The decision will also have implications for other cooperative schemes under which States have purported to confer jurisdiction on the Federal Court (e.g. the Competition Code).

STATE VALIDATING LEGISLATION

At the date of this note, all States except for Victoria have passed legislation to overcome the effect of the decision in relation to State matters that have already been decided by a federal court.

This legislation will retrospectively validate decisions of the Federal Court and the Family Court that were made without jurisdiction, by deeming these decisions to be decisions of the Supreme Court of that State.

The legislation will also make provision for matters commenced in the Federal Court or the Family Court in reliance on cross-vested jurisdiction to be transferred to the relevant State Supreme Court. It should be noted this legislation is itself the subject of constitutional challenge.

Contact for further information:

Further information in relation to these four cases can be obtained from Graeme Hill, Constitutional and Native Title Unit, Office of Litigation (02) 6250 5536, e-mail graeme.hill@ags.gov.au. Text of the decisions is available through Scaleplus at http://scale/html/highct/0/99/0/HC000280.htm

Conferral of Powers of Determination on Administrative Bodies

The High Court has unanimously upheld the constitutional validity of the legislative scheme under which the Superannuation Complaints Tribunal determines complaints against decisions of trustees of regulated superannuation funds.

Attorney-General of the Commonwealth v Breckler

High Court of Australia, 17 June 1999
(1999) 163 ALR 576

The Commonwealth Attorney-General had appealed to the High Court against a decision of the Full Federal Court which ruled that the Tribunal, an administrative body, invalidly exercised judicial power.

The case is significant in its consideration of the nature of the powers to determine disputes which may validly be conferred by Commonwealth laws on administrative bodies. The Court's reasons suggest mechanisms which would facilitate the validity of the conferral of powers of determination on administrative bodies.

BACKGROUND TO THE LITIGATION

The *Superannuation Industry (Supervision) Act 1993* ('the Supervision Act') and the *Superannuation (Resolution of Complaints) Act 1993* ('the Complaints Act') are part of a legislative scheme for the management and supervision of certain regulated superannuation funds. The application of the legislative scheme depends on an election being made by the trustee of a superannuation fund that the scheme should apply to the fund. A superannuation fund which elects that the scheme should apply to it is entitled to concessional tax treatment.

The Superannuation Complaints Tribunal is established by the Complaints Act and is intended to provide a mechanism for the resolution of complaints by members or beneficiaries of superannuation funds. Under the Complaints Act, the Tribunal is empowered to conciliate complaints about, and if necessary review, certain decisions of trustees of superannuation funds on the grounds that a decision was 'unfair or unreasonable'.

This provides a broader scope to challenge discretionary decisions of a trustee than would have been available under the general law including relating to trusts. Section 37 of the Complaints Act provides that, in reviewing a decision of a trustee, the Tribunal must determine either to affirm or vary the trustee's decision, set aside the trustee's decision and substitute its own decision or remit the matter to the trustee for reconsideration.

By s.41(3) a decision of the Tribunal was 'for all purposes' taken to be a decision of the trustee. Under the Supervision Act and the Superannuation

Industry (Supervision) Regulations, it is an offence for a trustee, without lawful excuse, not to comply with a determination of the Tribunal. Section 315(3) of the Supervision Act empowers a court to grant an injunction requiring a trustee to give effect to a determination of the Tribunal. A party may appeal to the Federal Court, on a question of law, from a determination of the Tribunal.

In March 1998 a Full Court of the Federal Court held that the Complaints Act invalidly conferred judicial power on the Tribunal contrary to the separation of powers required by Chapter III of the Constitution. The Attorney-General had intervened in the Federal Court and was granted special leave to appeal to the High Court. The appeal was heard on 8 December 1998.

THE HIGH COURT'S DECISION

The High Court unanimously decided that the Superannuation Complaints Tribunal, in making a determination concerning the distribution of a benefit, was not exercising the judicial power of the Commonwealth contrary to Chapter III of the Constitution. Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ delivered a joint judgment and Kirby J delivered a separate judgment upholding validity. The Court decided that a determination by the Tribunal was an administrative act and did not bear the character of a 'binding, authoritative and curially enforceable determination' which would require that it be made by a court as an exercise of judicial power.

The High Court gave several reasons for this conclusion. In the first place, the terms of the Trust Deed in question (clause 1.2) expressly obliged the trustee to observe the requirements in the legislative scheme. The Tribunal's determination therefore did not involve the exercise of judicial power but 'the arbitration of a dispute using procedures and criteria adopted by the constituent trust instrument, the existing charter, for the resolution of certain disputes arising thereunder' (163 ALR at 588, para 43).

Of more general significance, the High Court said that even without clause 1.2, the legislation was valid. This was because the application of the provisions of the Complaints Act, including the determination powers of the Tribunal, depended on an election by the trustee. In the context of the present legislative scheme, the availability of an election of this nature was 'a decisive pointer in favour of validity' (163 ALR at 588–589, para 44). The Court applied earlier authority which upheld the validity of laws such as tax laws which give a person the option of review of decisions by an administrative body or by a court.

Further, the legislative scheme was valid as it took 'the existence of a determination by the Tribunal as a criterion by reference to which legal norms are imposed and remedies provided for their enforcement' (163 ALR at 589, para 45). The legislation took the Tribunal's determination as a factum by reference to which the legislation then conferred rights and liabilities enforceable by a court. The Tribunal's determination was given effect through these enforcement mechanisms which involved an independent exercise of judicial power.

Finally, the Court noted a consideration which 'although not necessarily decisive, strengthens the case for validity which is otherwise made out' (163 ALR at 589, para 46). This was that the Complaints Act did not purport to give the Tribunal's determinations a conclusive character which would prevent collateral challenge. That is, the validity of a determination could be challenged in proceedings brought to compel its observance.

Contact for further information:

For further information about the decision contact David Bennett, Constitutional and Native Title Unit, Office of Litigation (02) 6250 6223, e-mail david.bennett@ags.gov.au. For advice on implications of the decision contact Guy Aitken, Office of General Counsel (02) 6250 6414, e-mail guy.aitken@ags.gov.au. Text of the decision is available through Scaleplus at http://scale/html/highct/0/99/0/HC000290.htm

Liability for Duty of Care

First, this case stands to be a major authority on the circumstances that give rise to a duty of care for pure economic loss. It confirms the extension of the scope of compensable economic loss, commenced in the High Court's decision in *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529.

Secondly, the case revisits the vexed question of what factors limit the creation of a duty of care, beyond reasonable foreseeability of loss or damage.

Perre v Apand Pty Limited

High Court of Australia, 12 August 1999
(1999) 164 ALR 606

In particular, following on from the Court's decision of January 1998 in *Pyrenees Shire Council v Day* (see (1998) 192 CLR 330), the usefulness of the notion of 'proximity' in this area is further questioned. There appears to be a movement away from 'proximity' as the sole or dominant determinant, to a consideration of a wider range of factors, of which 'proximity' is only one. In the end, the shift seems be towards a determination of a duty of care on a 'case-by-case' or incremental approach. Starting with *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, and in cases during the Sir Anthony Mason's term as Chief Justice, this approach was generally disfavoured by the High Court (with the exception of Sir Gerard Brennan).

BACKGROUND TO THE LITIGATION

The defendant was a producer of potato chips. For the purpose of enhancing the quality of potatoes for its product, the defendant provided certain potato seed to one of the plaintiffs, along with other potato growers who were potential suppliers of potatoes to it. The planting of this seed by this plaintiff in certain of its potato fields in South Australia introduced a plant disease called 'bacterial wilt'.

Before supplying this seed, the defendant had been aware of the risk of the spread of the disease through seed, and knew that the best way of avoiding the risk of the disease was to ensure that only seeds which had been certified under a Victorian Government testing program were provided to growers. However, despite this, the defendant had withdrawn the seed in question from the testing program, and invited this plaintiff and other growers to plant it. The defendant also knew that there were potato fields belonging to other growers in the vicinity of this plaintiff's fields.

A portion of this plaintiff's potato crop was destined for sale in lucrative Western Australian markets. Regulations under Western Australian legislation (i.e. *Plant Diseases Act 1914*) prohibited the introduction into Western Australia of either potatoes affected by 'bacterial wilt' disease or potatoes that were grown, within 5 years of an outbreak of the disease, within 20 kilometres from crops that were affected by that outbreak. The other plaintiffs comprised in outline:

- 12 individuals owning different potato fields within the vicinity of the first plaintiff's fields, and within a 20 kilometre radius from them;
- what (for ease of reference) will be referred to as a 'joint venture' which grew potatoes in some or other of the fields of the individuals;
- a company which, as well as growing potatoes in some or other of the fields of the individuals, purchased all the potatoes grown by the joint venture, and packaged and exported those potatoes along with the potatoes grown by itself; and
- a company that owned the facilities and land upon which last-mentioned company carried out its operations under a tenancy at will.

A large portion of the potato crops involving these plaintiffs was produced for Western Australian sale.

None of these potato crops was affected by the disease. The alleged loss suffered by these other

plaintiffs was, in all instances, purely economic, allegedly arising by operation of the regulations. The packaging and exporting company claimed loss of income through inability to export potatoes to Western Australia. The joint venture claimed for the loss of sales to the packaging and exporting company that it would have made but for the prohibition on Western Australian sales. The remaining company, the 'owning' company, claimed for the loss of its tenancy at will to the packaging and exporting company (which in the circumstances had to be terminated) and inability otherwise to use the land and facilities that had been the subject of that tenancy. Finally, the individuals either claimed that the value of their fields had decreased or that they had sold their fields at a loss.

The Full Court of the Federal Court upheld the primary judge's finding that the defendant owed a duty of care to the first plaintiff whose crop became infected with the disease, but not to the other plaintiffs for their pure economic loss claims. On appeal to the High Court, the latter finding was overturned, to some extent, by all justices presiding (each justice giving a separate judgment). Five justices allowed the appeals of the 15 plaintiffs in full, holding that there was a duty of care covering all headings of loss claimed by each. In relation to the other two justices, McHugh J found a duty of care on the part of the defendant to exist in favour of these plaintiffs only in so far as the losses in relation to the growing, sale and export of the potatoes was concerned. This led to his exclusion of the loss of the packaging and exporting company in relation to the loss attributable to the packaging and processing sides of its operations and of the whole of the claim of the 'owning' company. By contrast to all his colleagues, Hayne J took a much stricter position. He held that the only duty of care owed by the defendant in the circumstances to avoid pure economic loss was to those who were directly affected by the application of the regulations. Of the other plaintiffs, the only one to which the prohibition against export into Western Australia under the regulations applied was the packaging and export company. He would have allowed its appeal, but dismissed the appeals of all the others.

All justices, to the extent that they found any duty of care to avoid economic loss to any of the other plaintiffs, proceeded on the basis that such duty had been breached. Under the final order of the Court, concurred in by all justices who allowed the appeals in full, the case was remitted to the court at first instance to make further findings with respect to the loss suffered by these plaintiffs.

THE HIGH COURT'S DECISION

All justices rejected the notion of an exclusionary rule of liability for economic loss which was subject to exception only in the case of economic loss consequential upon injury to person or property or in the case of negligent misstatement (see *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465). However, several justices indicated that the considerations which had supported such a rule were still cogent, and, generally, recognised the force of Cardozo CJ's statement about the undesirability of exposing defendants to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class' (see *Ultrameres Corporation v Touche* (1931) 174 NE 441, at 444).

Further, all justices approved the High Court's decision in *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (*supra*). (That decision had not been followed in a Privy Council decision, on appeal from the Supreme Court of New South Wales, *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* [1986] AC 1 because of a perceived absence of common reasoning in the judgments.) In *Caltex Oil*, the defendants who were responsible for damaging an oil pipeline on the bed of Botany Bay were held to have a duty of care to prevent economic loss to the plaintiff who relied upon the pipeline for oil supplies. It was held that, because the defendants ought to have realised that the pipeline was specifically servicing the plaintiff, and was not like a water main or electric cable serving

the public generally, the defendants should have had the plaintiff in contemplation as a person who would suffer economic loss if the pipeline were ruptured. They were held liable for the economic loss of the plaintiff in the cost of alternative transport for the supply of the oil pending the repair of the pipeline.

McHugh J, while he did not allow all appeals in their entirety, provided a succinct statement of principle on the measure of compensable economic loss. He talked of a concept of determinacy, pointing out that a potential liability can be so indeterminate that no duty of care is owed.

He said that the indeterminancy issue does not require that the defendant's knowledge be limited to individuals who are known to be in danger of suffering harm from the defendant's conduct. A liability can be determinate even when the duty is owed to those members of a specific class whose identity could have been ascertained by the defendant. McHugh J talked of a 'ripple effect' flowing from the loss of persons within a class who are primarily affected by the defendant's negligence. He referred to these persons as 'first line victims'. Those touched by the ripple effect he referred to as 'second line victims'. McHugh J indicated that the concept of determinacy would ordinarily support a duty of care being owed only to the first line victims.

McHugh J went on to point out that the cases where a plaintiff will fail to establish a duty of care for pure economic loss are not limited to those where imposing a duty of care would expose the defendant to indeterminate liability, but included cases where the imposition of a duty would interfere with the defendant's legitimate acts of trade or where there was no vulnerability on a plaintiff's part to the defendant's conduct (that is where it was reasonably open to the plaintiff to take steps to protect itself from risk of the economic loss in question). Gleeson CJ expressed himself in similar terms on these points.

Other justices approached the scope of compensable economic loss in negligence from broader perspectives. This raised the question of what factors limit the creation of a duty of care, beyond reasonable foreseeability of loss or damage. On the one hand, Kirby J, emphasising the need for a comprehensive set of criteria, adopted the three stage test which he had propounded in *Pyrenees Shire Council v Day* (*supra*); that is:

(i) was it reasonably foreseeable to the alleged wrongdoer that an act or omission on its part would be likely to cause harm to the person that suffered damage;

(ii) does there exist between the alleged wrongdoer and such person a relationship characterised by the law as one of 'proximity' or 'neighbourhood'; and

(iii) if so, is it fair, just and reasonable that the law should impose a duty of care upon the alleged wrongdoer for the benefit of such a person?

This approach is, in effect, a refinement of the so-called 'three stage' test of Lord Bridge of Harwich in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 involving 'foreseeability', 'proximity' and competing 'policy'. Gaudron J's path of analysis seems broadly to accord with an application of these tests.

On the other hand, Gleeson CJ and McHugh J regard this 'three stage' test as inadequate, among other things, pointing to its over-reliance on the notion of 'proximity' and the arbitrary nature of the policy assessments involved. Hayne J appears not to go as far, only drawing attention to some limitations upon the utility of the test, and the present need for the law to develop incrementally. Gummow J does not enter upon detailed discussion of this issue. He, instead, goes back to Caltex Oil where Stephen J identified certain 'salient features' of the relationship between plaintiff and defendant which could combine to create a duty of care, saying that Stephen J's approach was similar to his own in *Hill*

v Van Erp (1997) 188 CLR 159 and in *Pyrenees Shire Council* of postulating certain 'control mechanisms' for determining whether a duty of care comes into being. Callinan J also draws on Stephen J's judgment in *Caltex Oil*. Callinan J does accept that 'a sufficient degree of proximity', as spoken of by Stephen J in *Caltex Oil*, is a relevant factor. He does not see it, though, as an all-embracing determinant, acknowledging the importance of incremental development of the law in the area of economic loss.

Contact for further information:

For further information about the decision contact Paul Sykes, Office of Litigation, Tel: (02) 6250 5836, email: paul.sykes@ags.gov.au.

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