Daniel Klineberg, 'Police duty of care'

to the High Court's decisions in *Modbury Triangle Shopping Centre Pty Limited v Anzil*[14] and *Sullivan v Moody*[15] noting that in the latter decision, the High Court 'cited the decision of the House of Lords in Hill in support of the proposition that the conduct of a police investigation involves a variety of decisions on matters of policy and discretion, including decisions as to priorities, and that it is inappropriate to subject those decisions to a common law duty of care'.

Lord Toulson then said that the common law does not as a general rule impose liability on a defendant for injury or damage to the person or property of a claimant caused by the conduct of a third party. This is because the common law does not generally impose liability for pure omissions.[16] His Lordship also referred to various exceptions from that rule.

Following this analysis, Lord Toulson said that although there existed in society what Lord Toulson described as a 'protective system', it did not follow from the setting up of that protective system from public resources, that if that system failed to achieve its purpose through organisational defects or fault on the part of an individual, 'the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible'. That would be 'contrary to the ordinary principles of the common law'.[17]

Accordingly, leaving aside the issue as to whether the police should have a special immunity as referred to in Hill, there was no basis for creating an exception to the ordinary application of common law principles against there being a duty of care owed by the police which would cover the facts of the present case.[18] Accordingly, his Lordship considered the appeal should be dismissed.

In separate judgements, Lord Kerr and Lady Hale would have allowed the appeal based on arguments which involve the concept of proximity.

Endnotes

1. [2015] UKSC 2 at [20].
2. [2015] UKSC 2 at [29].
3. [2015] UKSC 2 at [33].
4. [1989] AC 53.
5. [2015] UKSC 2 at [37].
6. [2015] UKSC 2 at [43].
7. [2015] UKSC 2 at [44].
8. [2009] 1 AC 225 – the two cases were heard jointly.
9. [2015] UKSC 2 at [60].
10. [2015] UKSC 2 at [70].
11. [2015] UKSC 2 at [71].
12. [2001] QB 36.
13. [2015] UKSC 2 at [80].
14. (2000) 205 CLR 254.
15. (2001) 207 CLR 562.
16. [2015] UKSC 2 at [97].
17. [2015] UKSC 2 at [114].
18. [2015] UKSC 2 at [116], [118], [130].

Duty of care to an owners corporation

Victoria Brigden reports on *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36

The High Court unanimously allowed the appeal of a builder, Brookfield Multiplex Ltd, from a decision of the New South Wales Court of Appeal in which it had been held that Brookfield owed a duty of care to the owners corporation of strata-titled serviced apartments to exercise reasonable care in the construction of the building to avoid causing the owners corporation to suffer pure economic loss resulting from latent defects in the common property which were structural or constituted a danger to persons or property in the vicinity or made the apartments uninhabitable.[1] The High Court found, in four separate judgments, that Brookfield did not owe the owners corporation a common law duty of care.

Consideration of earlier decisions of the court in *Bryan v Maloney*[2] and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[3] was critical to the court's reasoning. In *Bryan v Maloney*, the High Court held that a builder of a dwelling house owed a duty of care to a subsequent purchaser of the house, a breach of which, by careless construction giving rise to latent defects, would support an action in negligence for pure economic loss. Six members of the court in *Woolcock* held that an engineering company which designed the foundations of a warehouse and office complex did not owe a subsequent purchaser of the building a common law duty of care to avoid economic loss. The reasoning in *Woolcock* was applied, and *Bryan v Maloney* distinguished.

French CJ

French CJ considered the development of the notion of vulnerability in the context of establishing the existence of a duty of care for pure economic loss, the concept referring to the plaintiff's incapacity or limited capacity to take steps to protect itself from economic loss arising out of the defendant's conduct.[4]

His Honour held that there was a sharp distinction between *Bryan v Maloney* and the present case on the question of vulnerability, and that the distinction was analogous to that made in *Woolcock*.[5] His Honour observed that the question as to whether the plaintiff was vulnerable in *Woolcock* could not be answered definitively in that case.[6]

In considering whether Brookfield owed a duty of care to the owners corporation, his Honour found that the responsibility assumed by Brookfield with respect to the developer, as the initial owner of the lots, was defined in detail by the design and construct contract, and therefore there could be no responsibility on the part of Brookfield for pure economic loss flowing from latent defects beyond the limits of responsibility imposed by the contract. His Honour also found that there was no duty of care owed to the owners corporation as a proxy for the developer by virtue of the statutory relationship between them.[7] His Honour then considered whether there was a duty of care owed to the owners corporation by virtue of its relationship to subsequent purchasers from the developer, and observed that because the contract for sale already contained specific provisions relating to the construction of the building and the developer's obligation to undertake repairs, it was not a case in which the subsequent owners could be regarded as vulnerable, nor the owners corporation as their statutory agent.[8]

His Honour found that the relationship between Brookfield and the owners corporation was not analogous to the relationship in *Bryan v Maloney* between the builder and the later purchaser of the house, but considered that it was analogous, but not identical, to the position of the purchaser of the complex in *Woolcock*. His Honour found that there was no duty of care in relation to pure economic loss flowing from latent defects owed by Brookfield to the owners corporation, nor any duty of care owed by Brookfield to the subsequent owners, therefore no duty of care owed to the owners corporation.

Hayne and Kiefel JJ

Hayne and Kiefel JJ held that the question of vulnerability, consistent with *Woolcock Street*, would determine the appeal.

Their Honours observed that it was not necessary or profitable to attempt to define what would constitute vulnerability, but stated that:[9]

> It is enough to observe that both the developer and the original purchasers made contracts, including the standard contracts, which gave rights to have remedied defects in the common property vested in the Owners Corporation. The making of contracts which expressly provided for what quality of work was promised demonstrates the ability of the parties to protect against, and denies their vulnerability to, any lack of care by the builder in performance of its contractual obligations.

Their Honours therefore concluded that Brookfield did not owe the owners corporation a duty of care.

In so deciding, their Honours stated that that conclusion did not depend upon making any a priori assumption about the proper provinces of the law of contract and the law of tort, nor did the conclusion about the absence of vulnerability depend upon a detailed analysis of the particular content of the contracts the parties made.[10]

Crennan, Bell and Keane JJ

Their Honours held that the expansive view of Brookfield's obligations to the owners corporation as upheld by the Court of Appeal was not supported by *Bryan v Maloney* and did not accord with *Woolcock*, stating:[11]

The court's decision in *Bryan v Maloney* does not sustain the proposition that a builder that breaches its contractual obligations to the first owner of a building is to be held responsible for the consequences of what is really a bad bargain made by subsequent purchasers of the building. To impose upon a defendant builder a greater liability to a disappointed purchaser than to the party for whom the building was made and by whom the defendant was paid for its work would reduce the common law to incoherence.

Their Honours noted that in *Woolcock*, the concept of vulnerability did not afford a basis for holding the defendant liable because the facts did not show that the plaintiff could not have protected itself against the economic loss it alleged it had suffered, and referred to a passage of the judgment of McHugh J in which his Honour noted that purchasers of commercial premises are usually sophisticated and well-advised. In those circumstances, the court must assume, in the absence of contrary evidence, that first and subsequent purchasers are

able to bargain for contractual warranties from the vendor of such premises.[12] Their Honours stated:[13]

> These passages accord with the primacy of the law of contract in the protection afforded by the common law against unintended harm to economic interests where the harm consists of disappointed expectations under a contract. The common law has not developed with a view to altering the allocation of economic risks between parties to a contract by supplementing or supplanting the terms of the contract by duties imposed by the law of tort.

In considering the obligations of Brookfield to the developer, their Honours found that the relevant provisions of the contract placed the risk of deficient work upon Brookfield, rather than the developer, and to supplement those with an obligation to take reasonable care would alter the allocation of risks effected by the contract.[14]

Their Honours found that a duty was not owed by Brookfield to the owners corporation independently of its obligations to the developer, and a contrary finding was not consistent with the court's finding in *Woolcock*.[15] The correct question was not whether the relevant legislative scheme excluded a duty of care in favour of the owners corporation, but whether the owners corporation itself suffered a loss in terms of the value of the common property vested in it when it came into existence, viewed separately from the individual owners. The fact that the owners corporation did not exist at the time that the defective work was carried out was held to point against, rather than in favour of, the duty of care propounded by the owners corporation.[16]

Their Honours noted that their conclusion accorded with the position in the United Kingdom and the preponderance of judicial authority in the United States, although it differed from the approach in Canada, which their Honours considered should not be followed in Australia.[17]

Gageler J

His Honour considered the position in other jurisdictions on the issue of whether a builder should be recognised to owe a duty of care to a subsequent owner, and observed that there was no reason to consider any one of those approaches to result in a greater net cost to society than any other. Rather, provided the principle of tortious liability is known, his Honour considered that builders can be expected to accommodate it in the contractual terms on which they are prepared to build, and subsequent owners can be expected to accommodate it in the contractual terms on which they are prepared to purchase. His Honour observed that there is a net cost to society which arises from uncertainty as to the principle to be applied.[18]

In considering the principle for which *Bryan v Maloney* remained authority after *Woolcock*, his Honour referred to the judgment of McHugh J in *Woolcock* and in particular to the finding that the ultimate question was whether the residual advantages that an action in tort would give were great enough to overcome the disadvantages, and in the absence of data to permit that judgment to be made, the better view was that the court should not take the step of extending the principle of *Bryan v Maloney* to commercial premises.[19]

Gageler J held that absent any application that *Bryan v Maloney* should be overruled, and absent data which might permit the making of a value judgment different from that made in *Woolcock*, the view expressed by McHugh J in the latter decision should be accepted. His Honour considered that the authority of *Bryan v Maloney* should be confined to cases concerning dwelling houses and where the subsequent purchasers could be shown by evidence to fall within a class of persons incapable of protecting themselves from the consequences of the builder's want of reasonable care, because, by virtue of the freedom they have to choose the price and non-price terms on which they are prepared to contract to purchase, there is no reason to consider that subsequent owners cannot ordinarily be expected to be able to protect themselves against incurring economic loss of that nature.[20]

Endnotes

1. *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479.
2. (1995) 182 CLR 609.
3. (2004) 216 CLR 515.
4. At [22].
5. At [23].
6. At [29].
7. At [34].
8. At [34].
9. At [58].
10. At [59] – [60].
11. At [69].
12. At [130] – [131].
13. At [132].
14. At [142] – [144].
15. At [148].
16. At [149] – [150].
17. At [164].
18. At [176] – [177].
19. At [183].
20. At [185].