TORTS LAW
CASE NOTES

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Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54

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Mr Ryan bought a representative action to trial in New South Wales. The decision of the trial judge was appealed by Graham Barclay Oysters, the local Council and the State of New South Wales in the Federal Court of Australia. This case was again on appeal by the same parties from the Federal Court of Australia.[1]

- Facts

In November 1996 heavy rain fell over Wallis Lake in New South Wales which increased the risk of viral contamination of Hepatitis A in oysters cultivated in that lake.[2]

The cultivation of oysters in Wallis Lake began in the early twentieth century and there had not been any known outbreak of hepatitis A since then.[3]

Graham Barclay Oysters Pty Ltd (GBO) ceased harvesting oysters from Wallis Lake for two days after the rain had fallen just to make sure there was little risk of a hepatitis A outbreak in their oysters.[4]

Sample oysters subsequently tested by GBO between 26 November 1996 and 9 January 2003 and the distributor of its oysters, Graham Barclay Distributor Pty Ltd (GBD)

1 Danuta Mendelson, *The New Law of Torts* (Oxford University Press, 2nd ed., 2010), 515.

2 Danuta Mendelson, *Case Supplement* (Oxford University Press, 2nd ed., 2010), 234.

3 Ibid 234.

4 Ibid 234.

were found to be negative for E-coli bacteria which suggested, but did not establish, that the oysters were free from Hepatitis A contamination.[5]

During the period the oysters were harvested they were depurated with clean water, disinfected by ultraviolet radiation and then supplied to distributors for sale.[6]

My Ryan and other complainants ate oysters that were the product of GBO and fell ill as a result. They were all subsequently diagnosed with hepatitis A.[7]

The evidence was that hepatitis A came into the lake through faecal contamination from various outlets, caravan parks and sewerage and storm water drains after the heavy rain.[8]

Apart from GBO and GBD Mr Ryan sued the local Council and the NSW government.[9]

- Issues

The issue was whether the producer, distributors, the council and the state should be liable to the plaintiff who suffered injury as a result of eating oysters contaminated with hepatitis A.[10]

Mr Ryan alleged that the company, the distributor, the local council and the NSW government were liable to those who contracted hepatitis A in negligence.[11]

In relation to the company and its distributor he alleged breach of duty of care.[12]

5 Ibid 234.

6 Ibid 234.

7 Ibid 234.

8 Carolyn Sappideen, Prue Vines, Helen Grant and Penelope Watson, *Torts: Commentary and Materials* (Thomson Reuters, 10th ed.,2009), 278.

9 Mendelson, above n 2, 234.

10 Mendelson, above n 1, 515.

11 Ibid 515.

12 Ibid 515.

In relation to the government and the council the allegation was not that they were careless in the exercise of their respective statutory powers but that they omitted to exercise them at all.[13] The court examined the liability of statutory authorities for a failure to exercise its powers to prevent personal injury.[14]

- Reasoning / Decision (commentary)

The company

The majority determined that the Barclay companies did not breach their duty of care to the plaintiff. This was because the only alternative available to the company to avoid the risk of viral contamination from the heavy rain was to stop harvesting and selling the oysters for a potentially indefinite period of time or to relocate the business to another waterway near no humans. This represented the most expensive and inconvenient type of action in alleviating the risk of harm to consumers. As there had never been a hepatitis A outbreak until that point it did not constitute a magnitude of risk warranting such a reaction. As such, the company, by temporarily ceasing harvesting and by testing oyster samples for E coli bacteria had taken reasonable care to ensure its oysters were safe for human consumption.[15]

However, the minority would have dismissed the Barclay companies' appeals and allowed the original decision that they had breached their duty of care to stand.[16]

The Council and State government

In its claim against the Council the plaintiff argued that it was under a duty to eliminate or reduce the risk of viral contamination in the relevant lake. The Council had various statutory powers to control pollution, and the plaintiff argued that the Council should

13 Ibid 515.

14 Ibid 515.

15 Ibid 515.

16 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 204.

have exercised these powers, in particular by undertaking regular and comprehensive surveys of sanitary facilities around the lake and by testing the water.[17]

The majority decided that the council and state did not omit to exercise the relevant duty of care owed to Mr Ryan the relevant. They felt that government decisions about the proper extent of regulation of private or commercial behaviour of an industry are policy decisions that are not appropriate for judicial review. As such it was stated that powers given to protect the public are given by the Ministers and government authorities in the interests of public health and safety. This legislative grant does not give rise to a duty owed to an individual or to the members of a particular class.[18]

The Court found that though the council had powers in respect of most of the sources of oyster contamination it did not at any stage exercise control over the risk of the harm that materialised. There was nothing to justify the conclusion that the councils powers were given to them for the protection of oyster consumers.[19] Accordingly, the Court thought that the requisite degree of 'control' was absent on these facts. Further, its powers to control pollution were conferred for the benefit of the public generally, not for the benefit of oyster consumers in particular. Therefore, the policy decision of an authority to allocate a certain amount of resources to a particular activity is not justiciable.[20]

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17 Ibid.

18 Ibid at 32.

19 Ibid at 39.

20 Ibid.

- Ratio

The duty of the Barclay companies did not extend to ensuring the safety of oysters in all circumstances. In deciding whether there has been a breach of the duty of care you must ask whether a reasonable man in the defendant´s position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons. If the answer is yes then you must determine what a reasonable man would do by way of response to the risk. This requires a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking that action. Here the expense, difficulty and inconvenience of Barclay taking action outweighed the magnitude of the risk.[21]

The risk of injury which eventuated in this case was not far-fetched or fanciful, it was real and foreseeable. The Barclay companies knew contamination was possible. But their response to the risk was reasonable.[22]

To create a relationship of legal proximity, which gives rise to a duty of care, the plaintiff must show that they were a reasonably foreseeable member of the class to whom the duty of care is owed. To determine whether the defendant owed the plaintiff a legal enforceable duty of care the court has to consider its existence at an abstract level as well as in relation to the facts of the case.[23]

If the relationship between the plaintiff and defendant does not fall with an established category in which the court is required to impose a duty of care then the circumstances are that of a novel fact situation and the court adopts the salient features approach. The court outlined what the salient features approach is. They stated the salient features are the most pertinent, most conspicuous or most prominent features. The enquiry is multi-faceted, where the ´totality of the relationship´ is assessed.[24] They laid out examples of the salient features including the effect on the administration of justice, control over risk, vulnerability to risk, knowledge of duty, defensive practices, indeterminacy of liability,

21 Ibid at 190.

22 Ibid at 193-197.

23 Ibid at 106.

24 Ibid.

conflicting duties, autonomy of individual and assumption of responsibility.[25] The three stage test was reluctantly relinquished by the judge.[26]

The relevant proposition is that a duty of care is able to be imposed where the authority fails to exercise a power as an 'operational' or 'day-to-day' matter, but not where the authority makes a decision as a matter of policy not to exercise its powers in a particular area, or to exercise them in a particular way.[27]

- Obiter

Gummow and Hayne JJ discussed the rule against hindsight. They stated that formulating a duty of care retrospectively as a way to avoid the act or omission which caused loss or to ignore the particular harm that eventuated was not allowed. As such this rule against hindsight applied across all actions in negligence. This is because allowing one to look retrospectively at a duty of care is likely to cover up the proper inquiry as to the breach of the duty or care which involves identifying what a reasonable person in the position of the defendant would do by way of response to the reasonably foreseeable risk.[28] As such they stated the time for inquiry into the breach of duty must be prospective.[29]

- Order

The trial judge and the majority of the Full Court were wrong in holding that the Barclay companies had breached their duty of care to the oyster consumers. The appeal by the Barclay Distributors should be allowed. As the finding against Barclay Oysters at trial and in the Full Court was not challenged in the High Court the judgement obtained by Mr Ryan against Barclay Oysters should not be disturbed. [30]

25 Ibid.
26 Ibid at 232.
27 Ibid.
28 Ibid at 192.
29 Ibid at 192.
30 Ibid at 204.

The state owed no relevant duty of care to the oyster consumers. Its appeal should be allowed.[31]

Romeo v Conservation Commission of the Northern Territory (1998) 192 CLR 431

- Court details

High Court of Australia

- Procedural history

At trial the plaintiff´s claim was dismissed. On appeal to the Supreme Court of the Northern Territory the plaintiff´s claim was also dismissed. The plaintiff appealed to the High Court of Australia.[32]

- Facts

The plaintiff was a fifteen year old girl. She went with her friends to a beach party at a nature reserve at Dripstone Cliffs near Darwin.[33]

She and her friend bought a 750ml bottle of bourbon on the way to the party.[34]

The plaintiff consumed 150ml of bourbon along with another friend.[35]

31 Ibid at 186.

32 Carolyn Sappideen, Prue Vines, Helen Grant and Penelope Watson, *Torts: Commentary and Materials* (Thomson Reuters, 10th ed.,2009), 225.

33 Danuta Mendelson, *The New Law of Torts* (Oxford University Press, 2nd ed., 2010), 359.

34 Ibid 359.

At about 11.45 pm the plaintiff and another friend were intoxicated and wandered through low vegetation where they both fell off a cliff.[36]

They fell 6 metres from the top of the Dripstone Cliffs onto the beach below.[37]

There was a low wooden post and log fence some distance from the cliff. In between there was some open space and along the cliff some low vegetation was growing.[38]

The plaintiff became a quadriplegic as a result and sued the defendant, the Conservation Commission of the Northern Territory, for negligence.[39] The plaintiff claimed damages against the defendant, a public authority, which manages and controls the nature reserve, the Dripstone Cliff and the beach.[40]

The reserve was a popular place for the public to go and view the sunset.[41]

- Issues

The issues in the case was whether the authority should have created a barrier along the two kilometre long cliff or provided illumination of the cliff.[42]

In the alternative it was argued that the Conservation Commission should have erected warning signs near the car park fence warning of the danger of the cliff.[43]

- Reasoning / Decision (commentary)

35 Ibid 359.

36 *Romeo v Northern Territory Coastal Commission* (1998) 192 CLR 431.

37 Mendelson, above n 30, 359.

38 Sappideen, Vines, Grant and Watson, above n 29, 225.

39 *Romeo v Northern Territory Coastal Commission* (1998) 192 CLR 431.

40 Mendelson, above n 30, 359.

41 Sappideen, Vines, Grant and Watson, above n 29, 225.

42 Mendelson, above n 30, 359.

43 Ibid 359.

The majority held that the Conservation Commission, by virtue of the powers vested in it as a public authority, owed a duty of care to persons entering the reserve to take reasonable care to avoid reasonably foreseeable risks of injury to such persons. The Conservation Commission could reasonably foresee that an entrant might occasionally fall off the cliff. However, the failure of the Conservation Commission to erect a barrier or provide illumination of the edge of the cliff or warn of the dangers of the cliff did not amount to a breach of a duty of care.[44]

The Conservation Commission was not required to guarantee that entrants would not suffer injury by falling over the cliff. The Conservation Commission was only required to do what was reasonable in the circumstances to prevent this type of accident occurring. Even though the risk of someone falling from the cliff was reasonably foreseeable that risk existed only when some ignored the obvious danger and therefore the probability of this kind of accident was very low.[45]

Special precautions were not required at the particular spot where the plaintiff fell as the cliff top was an obvious part of the cliff and not a viewing point. As such the Conservation Commissions duty of care did not extend to taking the steps stated by the plaintiff in order to prevent the foreseeable risk of the fall.[46]

The danger of the cliff was obvious and could have been avoided by exercising reasonable care.[47]

In deciding whether the Conservation Commission owed a duty of care to the plaintiff to erect a barrier the court should not focus exclusively on the car park area of the cliffs. An accident of this kind might have occurred at any other cliff in a similar reserve under the control of a public authority to which members of the public have access.[48] Therefore, Kirby J noted that it might not be reasonable to require a statutory authority to expend

44 Ibid 359.
45 Ibid 360.
46 Ibid 360.
47 Ibid 360.
48 Ibid 360.

resources to alleviate a particular risk where this would necessarily divert resources from other matters of equal or possibly greater priority.[49]

The majority considered it inappropriate to ignore the fact that creating a duty to fence one particular cliff area would involve an unreasonably onerous implication requiring the authority to fence off all cliff tops under its control in the Northern Territory to prevent similar risks.[50]

Notions of individual choice and responsibility are factors to be taken into account in determining the reasonableness of the defendant´s actions. There should be a shift away from the previous position, which protected claimants against their own failure to take reasonable care, towards an approach which places greater weight on the responsibility of the individual to take reasonable care for themselves.[51]

In assessing the risk that materialised in a particular case the courts will take into account the range of responsibilities and activities of a public authority like the Conservation Commission and the numerous risks that it has the responsibility to manage and control.[52]

- Ratio

The central issue in any negligence case is whether it is reasonable to impose upon the defendant the duty that is alleged by the plaintiff.[53]

Where the cost of taking precautions is very expensive to prevent a risk that is unlikely to eventuate, the defendant is less likely to be held liable in negligence.[54]

49 *Romeo v Northern Territory Coastal Commission* (1998) 192 CLR 431 at 129.

50 Ibid.

51 Mendelson, above n 30, 356.

52 Ibid 390.

53 *Romeo v Northern Territory Coastal Commission* (1998) 192 CLR 431 at 128.

54 Ibid.

A majority found that competent individuals should take reasonable care for their own safety, at least with regards to obvious risks.[55]

Kirby J stated: ´Where a risk is obvious to a person exercising reasonable care for his or her own safety, the notion that the occupier must warn the entrant about the risk is neither reasonable nor just.´[56] Therefore, a relevant factor in determining breach is whether the plaintiff failed to exercise reasonable care to avoid an obvious risk of injury.[57]

The court refused to find negligence on the basis that the risk of harm (which was so obvious) was very small and that the precautions necessary to avoid the harm would have placed significant pressure on the limited resources of public authorities. These factors outweighed the seriousness of harm that would result if someone walked over the cliff, so that the defendant was justified in ignoring the foreseeable risk of harm to a person in the plaintiff's position.[58]

The majority reaffirmed the principle that liability of a public authority is grounded in common law negligence.[59]

The principle of personal responsibility now govern the scope of duty of care in negligence.[60]

- Obiter

There was no obiter in this case.

- Order

55 Mendelson, above n 30, 359.

56 *Romeo v Northern Territory Coastal Commission* (1998) 192 CLR 431 at 123.

57 Mendelson, above n 30, 360.

58 *Romeo v Northern Territory Coastal Commission* (1998) 192 CLR 431.

59 Ibid at 423.

60 Ibid.

The appeal was dismissed.

Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254

- Court details

High Court of Australia

- Procedural history

The respondent was successful at trial. The respondent was again successful when the appellant appealed to the Full Court of the Supreme Court of South Australia. This is an appeal by the appellant, Modbury Triangle Shopping Centre, to the High Court of Australia.[61]

- Facts

The appellant, Modbury Triangle Shopping Centre, was the owner of a shopping centre. The respondent, Mr Anzil, was employed by a video store which leased premises in the centre. The video shop faced the large outdoor car park for the centre.[62] The car park belonged to the shopping centre, Modbury Triangle.[63]

61 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 41.

62 Carolyn Sappideen, Prue Vines, Helen Grant and Penelope Watson, *Torts: Commentary and Materials* (Thomson Reuters, 10th ed.,2009), 201.

63 Ibid 201.

The video store was open until 10pm and the lights of the car park were automatically switched off at that time.[64]

The respondent departed his workplace at 10.30pm on a Sunday when the car park lights had been turned off.[65]

He was subsequently attacked by three unidentified individuals. One of the individuals was armed with a baseball bat. The respondent was badly injured.[66]

Under the lease the lighting of the common areas, like the car park, was provided at the discretion of the appellant, and the tenant paid a proportion of the cost. Two years before, the practice had been to leave the lights on until 11pm. Then the co-manager of the video store had requested that the lights stay on until 10.15pm but this had ceased and for about 12 months before the attack the lights had been turned off at 10pm.[67]

The plaintiff sued the proprietor of the shopping centre in negligence for failing to exercise reasonable care in leaving the lights on.[68]

- Issues

This case revolved around an occupier's liability for the criminal conduct of third parties.[69]

The main issue was whether and when one person owes another a duty to take reasonable care to control the conduct of a third person.[70]

- Reasoning / Decision (commentary)

64 Ibid 201.

65 Ibid 201.

66 Ibid 201.

67 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254.

68 Ibid.

69 Danuta Mendelson, *The New Law of Torts* (Oxford University Press, 2nd ed., 2010), 308.

70 Ibid 308.

The majority were quite sceptical of the claim that better lighting would have prevented the attack, and the case appears to have been conducted on the basis that the defendant had not 'created or increased the risk of injury' as a result of poor lighting.

The Court pointed out this was not a case where the plaintiff's claim was based on the physical condition of the car park (eg he tripped over because of the absence of lighting). Rather it was a claim that in essence was based on the deliberate criminal actions of a third party. Accordingly, the issue was liability for an omission, in particular liability for the criminal acts of third persons.

The majority held that the duty of the owners of Modbury Triangle Shopping Centre, as occupiers, did not extend to taking precautions to prevent physical injury to the plaintiff by criminals.[71]

To determine whether a duty of care is owed by occupiers to those that enter there land the proximity test is used. This test involves physical proximity (the notion of nearness in space and time between the person or property of the plaintiff), circumstantial proximity (an overriding relationship between the parties) and casual proximity (closeness or directness of the casual connection or relationship).[72]

Additionally, the three stages test can be used. The three stages are whether the damage to the plaintiff was reasonably foreseeable, whether the relationship between the plaintiff and the defendant was sufficiently proximate and if so was it fair, just and reasonable to impose a duty of care.[73]

Questions that should be asked in order to determine whether the standard of care was breached include was it foreseeable, was the risk not insignificant and would a reasonable person in the position of the defendant have taken the precautions. It is

71 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 90.

72 Ibid.

73 Ibid.

important to consider other relevant factors such as whether the precautions would significantly increase costs of energy consumption.[74]

- Ratio

An occupier of land does not owe a duty of care to take reasonable care to prevent physical injury to a plaintiff resulting from the criminal behaviour of third parties on that land.[75] This is the case here as the occupier had no power to control the actions of the attackers or the circumstances of the attack.[76]

The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third.[77]

Generally, the duty of care for the purposes of occupier's liability in negligence with regard to the physical state or condition of the premises arises from the occupiers´ power to control who enters and remains on the land and their power to control the state or condition of the land. Additionally, they are in a better position than an entrant to know the physical state of the premises.[78]

The occupier's duty of care did not extend to taking reasonable steps, such as keeping the lights on for longer, to prevent injury to the plaintiff by criminal acts of a third party over whom the defendant had no control, including their presence at the car park.[79]

In regard to the issue of a duty to control third parties, the majority decided that the scope of an occupier's duty of care does not extend to third parties. Other than in exceptional circumstances or in a special relationship between the parties the common

74 Ibid.

75 Ibid.

76 Ibid.

77 Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254.

78 Ibid at 17 and 102.

79 Ibid at 266-67.

law does not impose liability for omissions to take positive steps to protect another from a third party´s criminal acts.[80]

Gleeson CJ states that ´in the absence of a special relationship, one person has no duty to prevent harm to another from the criminal conduct of a third party even if the risk of such harm is foreseeable´.[81]

The Court recognised that there will be exceptional cases where a duty will be imposed to take positive steps that are reasonably necessary to prevent a reasonably foreseeable risk of injury which was created independently of the defendant's conduct. This is where the parties are in a protective or special relationship where the defendant has assumed an obligation to protect the plaintiff. These protective relationships will arise where the defendant was in a position to control the risk of harm to the plaintiff and where the plaintiff was vulnerable and dependent on the plaintiff to prevent the harm.[82]

Here the occupier could not control the actions of the attackers, and had no knowledge of the intended attack. Criminal attacks are unpredictable, and the occupier could not control their occurrence.[83]

The occupier was not liable here as the direct and immediate cause of the injuries was the deliberate attack by the offenders, not the absence of lighting. Additionally the occupier had not assumed responsibility for the respondents safety, and could reasonably act on the basis the respondents employer would protect him. As far as the occupier was concerned, the respondent was in the same position as any other member of the public, and the occupier's contribution to the respondent's injuries was negligible. To impose liability on the occupier would be to shift financial responsibility for the consequence of a crime from the wrongdoer to another member of society who has little or no capacity to influence the behaviour which caused injury.[84]

80 Ibid.

81 Ibid at 29.

82 Ibid.

83 Ibid at 291

84 Ibid.

- Obiter

The court found that the conduct of a criminal is not necessarily dictated by reason or prudential considerations.[85]

Kirby J referred to the failed notion of ´proximity´ as the universal indicator of the duty of care at common law but he noted that:

> ¨as a measure of factors relevant to the degree of physical, circumstantial and casual closeness, proximity is the best notion yet devised by the law to delineate the relationship of ´neighbour´¨[86]

- Order

The occupier was held not liable for the respondent's injuries.[87]

The appeal should be allowed with costs. The orders of the Full Court of the Supreme Court of South Australia should be set aside. In place of those orders, the appeal to that Court should be allowed with costs, the judgement of the trial judge should be set aside and the action should be dismissed with costs.[88]

85 Ibid at 291.

86 Ibid.

87 Ibid.

88 Ibid at 41.

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