



## Moorabool Shire Council & Anor v Taitapanui & Ors [2006] VSCA 30

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Traditionally, the common law has restricted claims for negligently inflicted “pure” economic loss.

In *Bryan v Maloney*<sup>1</sup> Brennan J said:

“If liability were to be imposed for the doing of anything which caused pure economic loss that was foreseeable, the tort of negligence would destroy commercial competition, sterilize many contracts and, in the well-known dictum of Chief Judge Cardozo<sup>2</sup>, expose defendants to potential liability “in an indeterminate amount for an indeterminate time to an indeterminate class”.

However, as we often see, a number of exceptions to the general rule have developed. For example:

- In *Bryan v Maloney*<sup>3</sup> the High Court, by majority, held that the builder of a house owed a subsequent owner a duty to take reasonable care in the construction of the house and was liable to her in damages for an amount equal to the decrease in its value;

but

- In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (“Woolcock”)<sup>4</sup> the High Court determined that engineers who designed a commercial building owed no duty of care to a subsequent purchaser of the building;

The law in this area has been described as “disgraceful”<sup>5</sup> and it has led to great uncertainty.

### THE FACTS IN TAITAPANUI

The Taitapanuis (the Plaintiffs) sued the Moorabool Council (Council), Wally Mellis (the surveyor), HIA Insurance Services Pty Ltd (HIA) (the domestic building insurer) and the builder, Watson Constructions Pty Ltd (builder) for damages for defective building work. The house was sold by the builder to the Pozmans, who subsequently sold it to the Plaintiffs. It was only after the Plaintiffs purchased the property that serious defects were noticed. Most of the experts opined that the house required demolition.

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<sup>1</sup> (1995) 182 CLR 609 at 632

<sup>2</sup> *Ultramares Corporation v Touche* 255 NY 170 at 179

<sup>3</sup> (1995) 128 ALR 163

<sup>4</sup> (2003) 216 CLR 515

<sup>5</sup> Bailey J in *Metal Roofing & Cladding Pty Ltd v Eire Pty Ltd* (1999) 9 NTLR 82



Mellis was a private building surveyor employed by Council and Council was therefore vicariously liable for Mellis' actions.

Mellis was retained by the builder. Mellis issued a building permit. There were alleged deficiencies in the issue of the permit – there was no specifications describing materials and methods to be used in construction. The plans did not identify the external wall material. It was alleged that during various stages of the building process, the surveyor ought not to have given approval. While nothing in particular turns on it, the VCAT described Mellis' actions as “gross carelessness and incompetence”.

At first instance the Plaintiffs' claim succeeded at VCAT. The Tribunal accepted that the house required demolition, and apportioned liability on a 50/50 basis as between the council/surveyor on the one hand and the builder on the other.

The council and surveyor appealed to the Supreme Court and failed. A further appeal to the Victorian Court of Appeal also failed.

An application for special leave has been made to the High Court.

#### **THE COURT OF APPEAL'S DECISION**

The case was conducted, on the basis that the result depended on the applicability – or otherwise – of the decision in *Bryan v Maloney* and the applicability of that decision depended, in turn, on the views expressed by the High Court in the subsequent decision in *Woolcock*.

Ormiston and Ashley J.A. in the majority judgment observed that over the past 30 years there had been “recurrent, intensive, consideration – at the highest judicial levels in Australia and elsewhere ...” as to the circumstances in which a duty of care will arise to avoid causing pure economic loss. They identified what they considered to be the pertinent considerations as the law now stands in Australia: the categories of cases are “special” – foreseeability of loss, and an unbroken chain of causation are necessary but by themselves not sufficient. Additional elements are required.

According to the Judges, the question to be answered is whether, having regard to the “salient features” of the particular case the connection between the parties is sufficiently close as to give rise to a duty of care.

If the defendant's acts or omissions arise in connection with the discharge of statutory duties (as in the case of the surveyor), the statutory framework is itself a salient feature to which consideration must be given.

In addition, three policy considerations are pertinent in every case:

- a decision should not leave a defendant open to claims which are indeterminate as to class or number of potential claimants, time or amount;



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- the effect of a decision should not unduly hinder ordinary commercial transactions; and
- the decision should not intrude into another area of the law.

The majority judges analysed the facts of the case and the 3 policy considerations to that the Council/surveyor's appeal ought fail. They identified several features of the statutory regime, the circumstances of the case and the relationship of the parties that led them to that conclusion.

Some of those features were:

- Mellis assumed a powerful position and must be taken to have known the significance of issuing a building permit and that it must be disclosed to a later prospective purchaser;
- The Taitapanuis were "vulnerable"<sup>6</sup>
- The Nature and scope of Mellis' duty was discernable from his statutory obligations (and the practical content of the duty of care owed to the original owner/builder and the Taitapanuis was the same);
- Mellis must have been made aware that the owner/builder was only interested in obtaining a building permit and later an occupancy permit;
- The imposition of a duty of care upon Mellis did not impair his reasonable freedom of action, but was compatible with his acting consonantly with his statutory obligations;
- There was no risk of indeterminacy – the duty could only run in favour of a small class of readily identifiable beneficiaries, and for a short time;
- The Plaintiffs purchased the property during the seven year period stipulated by the Sale of Land Act (and the Court did not therefore consider the situation of a person buying in a further period);
- There was an unbroken chain of causation between the negligent acts and the economic loss suffered by the Plaintiffs;
- While the Plaintiff's did not assert conscious reliance upon the surveyor, they did entrust the purchase to solicitors and in any event the absence of actual reliance will not mean the failure of a claim for pure economic loss.

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<sup>6</sup> In the sense described by Gleeson CJ, Gummow, Hayne and Heydon JJ in *Woolcock* at 530-531



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Interestingly, President Maxwell (who agreed with the majority justices with some exceptions) concluded:

“The appellants would have it that to apply the *Bryan/Woolcock* reasoning to a surveyor represents “impermissible judicial legislation”, and that such a step could only be taken – if at all – by the High Court. For the reasons I have given, I disagree. The decisions arrived at in this case – first by the Tribunal and then by the learned Judge – are examples – fine examples – of the time-honoured approach of applying to particular facts general principles laid down by the High Court. This is of course the only possible approach. Otherwise the wheels of justice will grind to a halt, and the common law will ossify”.

It remains to be seen whether the special leave application will be granted and if so whether the High Court will clarify the perceived uncertainty about the duties professionals owe for pure economic loss.