Caltex Refineries (Qld) Pty Limited v Stavar

(2009) 75 NSWLR 649; [2009] NSWCA 258

Supreme Court of New South Wales, Court of Appeal

(This case comes after *Graham Barclay Oysters Pty Ltd v Ryan; Ryan v Great Lakes Council; New South Wales v Ryan* on p 166)

Courts now take a multi-factorial approach to determining whether or not a duty of care exists in a novel situation. To what extent are the various relevant factors dependent on evidence or, rather, legal policy considerations? What remains the starting point for determining a duty of care?

Allsop P.

[651] 1. This is an appeal and a cross-appeal from orders made by the President of the Dust Diseases Tribunal of New South Wales (O'Meally P) in an action for damages brought by Mrs Beverley Stavar against five defendants, [including] Caltex Refineries (NSW) Pty Limited …

2. Mrs Stavar suffers from malignant mesothelioma contracted as a result of coming into contact with asbestos dust and fibres on her husband's work clothes, in the family home and in the family car. Mr Stavar worked at the Lytton oil refinery outside Brisbane, initially in its construction in 1964 and 1965 and, later, as a maintenance worker from 1965 to 1991. …

6. The appeal by Caltex is from the orders holding it liable and concerns the findings of duty of care and breach of duty made in respect of the period from 1974 to 1991. …

[The appellant employer argued that the President of the Tribunal, in his ex tempore judgment, had applied the wrong test when determining whether it owed a duty of care to Mrs Stavar.]

[675] 100. It can be accepted … that the President did not enunciate the required multi-factorial approach in assessing whether a duty of care arose in a novel circumstance or category. This approach recognises what has been said to be the use of foreseeability at a higher level of generality and the involvement of normative considerations of judgment and policy. This approach requires not only an assessment of foreseeability, but also attention to such considerations as control, vulnerability, assumption of responsibility and nearness or proximity.

101. The High Court has rejected its previously enunciated general determinant of proximity, the two stage approach in *Anns v Merton London Borough Council* [1977] UKHL 4; [1978] AC 728 based on reasonably foreseeability, the expanded three stage approach in *Caparo Industries Plc v Dickman* [1990] UKHL 2; [1990] 2 AC 605 and any reformulation of the latter two, such as in Canada in *Cooper v Hobart* (2001) 206 DLR (4th) 193. See by way of example: *Perre v Apand* at 193-194 [9]-

[10] per Gleeson CJ, at 210-212 [77]-[82], 212-213 [83], 216 [93] per McHugh J, at 300-302 [330]-[333] per Hayne J; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; 205 CLR 254 at 288-289 [101] per Hayne J; *Crimmins* at 97 [272] per Hayne J; *Brodie v Singleton Shire Council* at 630-631 [316] per Hayne J; *Sullivan v Moody* at 577-580 [43]-[53] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ; *Tame* at 402 [250] per Hayne J; *Vairy* at 444 [66] **[676]** per Gummow J; *Imbree v McNeilly* at 658 [40]-[41] per Gummow, Hayne and Kiefel JJ.

102. This rejection of any particular formula or methodology or test the application of which will yield an answer to the question whether there exists in any given circumstance a duty of care, and if so, its scope or content, has been accompanied by the identification of an approach to be used to assist in drawing the conclusion whether in novel circumstances the law imputes a duty and, if so, in identifying its scope or content. If the circumstances fall within an accepted category of duty, little or no difficulty arises. If, however, the posited duty is a novel one, the proper approach is to undertake a close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by references to the "salient features" or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury.

103. These salient features include:

(a) the foreseeability of harm;
(b) the nature of the harm alleged;
(c) the degree and nature of control able to be exercised by the defendant to avoid harm;
(d) the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
(e) the degree of reliance by the plaintiff upon the defendant;
(f) any assumption of responsibility by the defendant;
(g) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;
(h) the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff;
(i) the nature of the activity undertaken by the defendant;
(j) the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant;
(k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;
(l) any potential indeterminacy of liability;
(m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff;
(n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests;
(o) the existence of conflicting duties arising from other principles of law or statute;

(p) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and

(q) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law.

104. There is no suggestion in the cases that it is compulsory in any given case to make findings about all of these features. Nor should the list be seen as exhaustive. Rather, it provides a non-exhaustive universe of considerations of the kind relevant to the evaluative task of imputation of the duty and the identification of its scope and content.

[677] 105. The task of imputation has been expressed as one not involving policy, but a search for principle: see especially *Sullivan v Moody* at 579 [49]. The assessment of the facts in order to decide whether the law will impute a duty, and if so its extent, involves an evaluative judgment which includes normative considerations as to the appropriateness of the imputation of legal responsibility and the extent of thereof. Some of the salient features require an attendance to legal considerations within the evaluative judgment.

106. I have described "foreseeability" as a salient feature; it is perhaps better expressed that the use of salient features operates as a control measure on foreseeability employed at the level of abstraction earlier discussed, for example by Glass JA in *Shirt* as the foundation for the imputation of duty of care. In a novel area, reasonable foreseeability of harm is inadequate alone to found a conclusion of duty. Close analysis of the facts and a consideration of these kinds of factors will assist in a reasoned evaluative decision whether to impute a duty. Whilst simple formulae such as "proximity" or "fairness" do not encapsulate the task, they fall within it as part of the evaluative judgment of the appropriateness of legal imputation of responsibility.

107. The above statement of approach can be seen in: *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* [1976] HCA 65; 136 CLR 529 at 576-577 per Stephen J; *Perre v Apand* at 192 [5], 194-195 [11]-[15] per Gleeson CJ, at 218-231 [100]-[133] per McHugh J, at 252-261, [196]-[221] per Gummow J, 300-307 [330]-[348] per Hayne J, at 326-327 [406]-[413] per Callinan J; *Crimmins* at 13 [3] per Gleeson CJ (agreeing with McHugh J), at 23-24 [42]-[43] per Gaudron J, at 39-51 [93]-[133], per McHugh J, at 96-97 [270]-[272] per Hayne J, at 113-117 [343]-[360] per Callinan J; *Modbury Triangle* at 262-267 [13]-[30] per Gleeson CJ, at 288 [98], 291-294 [108]-[118] per Hayne J; *Sullivan v Moody* at 577-583 [43]-[63] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ; *Tame* at 329-335 [6]-[28] per Gleeson CJ, at 341 [54] per Gaudron J, at 361-362 [123]-[125] per McHugh J, at 397-399 [237]-[241] per Gummow and Kirby JJ, at 425-431 [323]-[336] per Callinan J; *Graham Barclay Oysters* at 555-564 [9]-[40] per Gleeson CJ, at 570 [58] per Gaudron J (agreeing with Gummow and Hayne JJ), at 577-583 [84]-[99] per McHugh J, at 596-610 [145]-[186] per Gummow and Hayne JJ, at 617 [213], 629-631 [245]-[251] per Kirby J, at 663-664 [320]-[321] per Callinan J; *Woolcock Investments* at 529-533 [19]-[33] per Gleeson CJ, Gummow, Hayne and Heydon JJ, at 547-560 [74]-[116] per McHugh J; *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19; 221 CLR 234

at 243 [24] per Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ; *Vairy* at 442-448 [58]-[78] per Gummow J; *Roads and Traffic Authority v Dereder* [2007] HCA 42; 234 CLR 330 at 345 [44] per Gummow J; *Stuart v Kirkland-Veenstra* [2009] HCA 15; 237 CLR 215 at 248-254 [87]-[114] per Gummow, Hayne and Heydon JJ, at 259-262 [130]-[138] per Crennan and Kiefel JJ. …

[678] 110. Whilst the President did not enunciate this approach exhaustively, he did refer to *ACQ v Cook* [[2008] NSWCA 161; 72 NSWLR 318] in which Campbell JA stated that the question of duty required a close examination of the relevant facts. This, in effect, was the task undertaken by the President. He did not refer to each and every salient feature that has been stated by the High Court to be potentially relevant. He was, however, not asked to. He dealt with the factual and legal dispute as to duty that was put before him. Thus, I would reject the arguments of the appellants …

BASTEN JA. **[690]** 170. The tests rejected in *Sullivan* were not erroneous in the sense of being based on irrelevant matters, but were either unhelpful or capable of being misunderstood and misapplied or (in the case of *Caparo*) both. It follows that reference to proximity will not demonstrate an error of law, unless the underlying concept is misunderstood and therefore misapplied. As explained by Gummow J in *Perre v Apand Pty Ltd* [1999] HCA 36; 198 CLR 180 at [198], a case involving a claim for economic loss:

> The question in the present case is whether the salient features of the matter gave rise to a duty of care owed by Apand. In determining whether the relationship is so close that the duty of care arises, attention is to be paid to the particular connections between the parties.

171. Secondly, the rejection of earlier tests has involved an express recognition that the statements of law had overstepped their mark in their search "for a unifying principle": *Sullivan* at [47]. The Court was at pains to emphasise in *Sullivan* that:

> Different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care.

172. Given this warning, as a reflection of the primary problem noted above, it would be misguided to seek a new unifying formulation or approach. Even the "multi-factorial" or "salient features" approach should not be treated in this way. Like the remarks in the judgment of Mason J in *Wyong Shire Council v Shirt*, the purpose of the multi-factorial approach is to remind those seeking to determine whether a duty exists of the scope of the considerations which must be taken into account. It is intended to overcome the very real risk that a principle stated as an aphorism will be circular or at least risk being so, because the principle "is stated in terms which conceal the fact that the process of deciding on liability begins with an answer which is largely intuitive, and reasons backward from it": Lord Mustill, op cit, p 10. The multi-factorial approach should not, therefore, be treated as a shopping list, all the items of which must have application in a particular case. Rather, it provides a list of considerations which should be considered, as potentially relevant, depending on the kind of case before the Court. Further, it is necessary to distinguish between those considerations which are essentially factual, those which require value judgments and those which may require the application

of legal policy.

173. Thirdly, it is necessary to understand the comments in *Sullivan* with respect to the distinction between "policy" and "principle". As noted above, the **[691]** judgment of the Court sought to identify a distinction between "an invitation to formulate policy", and "to search for principle". The judgment stated at [49]:

> The concept of policy, in this context, is often ill-defined. There are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision-making in individual cases.

174. The concept of "policy" was being used to identify that which had earlier been referred to as "a discretionary judgment based upon a sense of what is fair, and just and reasonable as an outcome in the particular case". Such language might be described as inviting an unprincipled approach. It was not suggested that *Caparo* envisaged such an approach, or that such an approach has been adopted subsequently in English case law: see, eg, Witting C, *Duty of Care: An Analytical Approach* (2005) 25 *Oxford J Leg Studies* 33 at 36-38. The Court's purpose was clearly not to exclude questions involving normative elements nor the need for coherence between different parts of the general law: *Sullivan* at [42]; *The Dredge "Willemstad"* above at [168].

175. Fourthly, in considering the various factors which have been identified as salient features, it is important to distinguish between those which are necessary but not sufficient, those which constitute constraints (whether absolutely or as matters of weight) and those factors which are appropriate matters to be considered. It is also necessary, as noted above, to distinguish factual considerations from normative considerations, although both may be involved in a particular factor. To identify error on the part of the Tribunal in deciding a point of law, it may be necessary to find that the Tribunal has treated a particular condition as sufficient, as opposed to merely necessary, or has treated an absolute constraint as a factor to be weighed in the balance or has erroneously identified a relevant legal principle.

176. Fifthly, there is no doubt that factors which are relevant in determining the existence of a duty, may also be relevant to questions of breach and even causation of loss. The three concepts are inter-related: see remarks of Brennan J in *John Pfeiffer Pty Ltd v Canny* [1981] HCA 52; 148 CLR 218 at 241-242, reiterated in *Sutherland Shire Council v Heyman* 157 CLR at 487.

177. To the extent that similar factors are relevant in determining both duty and breach thereof, a critical distinction is the position from which each is to be assessed. Duty requires an objective prospective assessment of the risks foreseeable as possible, but not farfetched or fanciful, to the reasonable person in the position of the defendant. In order to give content to the duty, it would be necessary to consider the steps which might be available to such a person, and his or her capacity to take such steps as might mitigate or avoid the risk. The assessment of breach involves an examination of the actual conduct of the defendant and the options available in the circumstances of the case. This

distinction is valid, but the inter-relationship is clear. The defendant's conduct will be judged against a standard set by the content of the duty.

178. It has also been suggested that a determination as to duty is undertaken at a higher level of abstraction or generalisation than is the determination of breach. In a sense, that is to say no more than that one is a prospective (albeit conducted retrospectively) assessment of the circumstances as they arose prior to the conduct in question: *Vairy* at [124] (Hayne J). Nonetheless, such statements appear to encourage the consideration of duty at a relatively high **[692]** level of abstraction. That approach has been said to have been appropriate "by and large": see *Neindorf* [2005] HCA 75; 80 ALJR 341 at [50] (Kirby J). The reason for such an approach is to avoid mixing questions of duty with questions of breach: see, eg, *Brodie v Singleton Shire Council* [2001] HCA 29; 206 CLR 512 at [309] (Hayne J); *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; 211 CLR 540 at [106] (McHugh J). This theme was picked up again in *Vairy*, where Gummow J, referring to the reasoning of Hayne J, stated:

> 60. The determination of the existence and content of a duty is not assisted by looking first to the damage sustained by the plaintiff and the alleged want of care in that regard by the defendant. There is a particular danger in doing so in a case such as the present. The focus on consideration of the issue of breach necessarily is upon the fate that befell the particular plaintiff. In that sense analysis is retrospective rather than prospective.
>
> 61. In his reasons in this appeal, Hayne J explains why an examination of the causes of an accident that has occurred does not assist, and may confuse, in the assessment of what the reasonable person ought to have done to discharge the anterior duty of care. Moreover, an assessment of what ought to have been done, but was not done, critical to the breach issue, too easily is transmuted into an answer to the question of what if anything had to be done, a duty of care issue.

179. On the other hand, the higher the level of abstraction at which the duty is identified, the less likely it is to provide any useful role in determining the outcome of the case: *Vairy* at [73] (Gummow J); see also *Amaca Pty Ltd v AB & P Constructions Pty Ltd* [2007] NSWCA 220; (2007) Aust Torts Rep 81-910; 5 DDCR 543 at [137]. In other circumstances, the High Court has emphasised the desirability of having regard to the harm suffered by the plaintiff in considering the scope of the relevant duty, if any: see also *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd ("Wagon Mound [No 1]")* [1961] UKPC 1; [1961] AC 388 at 425 (PC – Viscount Simonds). As explained by Gummow and Hayne JJ, in *Cole v South Tweed Heads Rugby League Football Club Ltd* [2004] HCA 29; 217 CLR 469:

> 81. In these circumstances it is neither necessary nor appropriate to decide any question about the existence of a duty of care. … It is not appropriate to do so because any duty identified would necessarily be articulated in a form divorced from facts said to enliven it. And, as the present case demonstrates, the articulation of a duty of care at a high level of abstraction either presents more questions than it answers, or is apt to mislead.

> 82. Here, as in so many other areas of the law of negligence, it is necessary to keep well in mind that the critical question is whether the negligence of the defendant was a cause of the plaintiff's injuries. The duty that must be found to have been broken is a duty to take reasonable care to avoid what *did* happen, not to avoid 'damage' in some abstract and unformed sense.

180. The diminishing need for reliance on the concept of duty to control decision-making by juries, the difficulty in formulating the level at which the duty should be identified, the lack of clarity as to how a court should approach novel cases and the possibility that a focus on duty will marginalise important factual questions, have led both to calls for the abandonment of reliance upon any such concept (beyond the test of foreseeability) and to fears that an important element in the law of negligence is disintegrating: for an example of the former, see Handsley E, *Sullivan v Moody: Foreseeability of injury is not enough to found a duty of care in negligence – but should it be?*" (2003) 11 Torts LJ 1; as an example of the latter, see Weinrib E, "The **[693]**Disintegration of Duty" in *Exploring Tort Law* (Madden, ed, Camb UP, 2005) and Witting C, "Tort Law, Policy and the High Court of Australia" [2007] MelbULawRw 23; (2007) 31 Melb UL Rev 569. As pithily expressed by Professor Weinrib (p 149):

> The disintegration of duty is the consequence of thinking that duty is a matter of policy, and that policy, in turn, refers to the various independent goals that liability might serve. On this view, each particular kind of duty represents the balance of goals, in themselves diverse and competing, that is peculiar to it. However, another notion of policy refers to the exercise of practical judgment in elucidating what the general conception of duty might mean in particular circumstances. The general conception provides not (as has often been assumed) a test of duty, but a structure of thinking that is actualized in legal reasoning through the casuistic assessment of facts or comparison of cases or through the elucidation of its particular normative features in the overall context of a legal system that values coherence.

181. On one view, the attempt by Lord Atkin in *Donoghue v Stevenson* to set out a "general conception" identified as the "neighbour" principle was an exercise which ran counter to the methodology of the common law, at least as understood by the American realists. On the other hand, it has been remarkably successful over more than half a century in supplying a touchstone for coherence within the tort of negligence, providing a basis for rationalising existing areas of duty, whilst providing some guidance in the development of the concept in novel areas.

[Basten JA agreed that the Tribunal had shown no error in its decision that the appellant owed a duty of care to Mrs Stavar. Simpson JA agreed with Allsop P and Basten JA]

Appeal dismissed