Pirelli Considered And Not Followed - Liability of Professional Advisers In Tort For Economic Loss

Pullen v Gutteridge Haskins & Davey Pty Ltd,
Supreme Court of Victoria, Full Court, 9 June 1992.

On 9 June 1992 the Full Court of the Supreme Court of Victoria handed down its decision in the case of Pullen v Gutteridge Haskins & Davey Pty Ltd. The decision makes important advances on various contentious aspects of the law of negligence.

The Facts

In the 1880's swimming baths were first constructed on a site in Batman Avenue, beside the Yarra River. In 1934, new baths were built on the same site. In 1978 work began on yet another new swimming complex, again on the same site. In each case the replacement was needed after the predecessor subsided into the underlying silt and broke up. The latest pool is now subsiding and its future structural integrity is in doubt. It is known as the State Swimming Centre.

The cause of the problem appears to be the geology of the site which is made up of Coode Island Silt. This material is apparently notorious for its property of prolonged, unpredictable movement. Buildings south of the river built of Coode Island Silt are still subsiding after nearly a century.

In designing the State Swimming Centre, the decision was taken to rest parts of the structure on piles extending downwards to the bedrock. Other parts were built on various types of footings resting directly on the silt. A 'preload' was applied to the ground prior to construction, in an attempt to minimise subsidence. The Court found that the footings used proved inadequate to cope with the site conditions. Parts of the structure had subsided considerably, tearing away from those parts which remain nearly stationary. An action in negligence was brought by the Public Works Department and the Minister responsible for the Centre (whom for ease of reference we will call "the plaintiff") against both the builder and the consulting engineers. The action against the builder was compromised, leaving only the claim against the engineer. This was the first action. The defendant engineer had advised on, designed and supervised the construction of the footing system and that work was essentially the subject of the first action.

Construction on the State Swimming Centre had begun in 1978 and reached practical completion just prior to 4 September 1980. The first writ was issued on 8 April 1987 - more than 6 years after the Centre opened.

In the intervening period the plaintiff had also asked the defendant engineer for advice on the cause of the cracking which had appeared and certain advice had been given. That advice formed the basis of the second action which was commenced on 30August1988. In that action it was alleged that if the claims in the first action were statute-barred then that was due to the defendant's breaches of contract and negligence in investigating the defects in the Centre and failing properly to advise the plaintiff of their cause. The plaintiff alleged that, relying on the defendant's advice, it had refrained from obtaining other competent advice which, had it been obtained, would have led to it commencing proceedings before the claim in the first action became statute-barred.

In an action for breach of contract one normally has to prove that there is a contract and that there has been a breach. Damage is not normally one of the essential elements in establishing a cause of action. It was common ground between the parties that in relation to the first action the statute of limitations on the cause of action <u>in contract</u> had expired.

For the tort of negligence however, one has normally to prove duty, breach of duty and damage and the actual damage is an essential element in proving the tort. Without the damage the cause of action is not complete.

The question of whether or not the limitation period had expired in relation to the negligence alleged in the first action depended upon when the damage had occurred as that was when the cause of action was complete.

The issues for the Court in relation to the first action were identified by the Court as follows:

1. Whether the defendant owed the plaintiff a duty of care as alleged;
2. Whether, if it did owe a duty of care, the finding of the trial judge that there was no breach of duty could stand;
3. Whether the defendant was exempted from liability because of a particular contractual term on which the defendant relied;
4. Whether the plaintiff's claims in tort were statute-barred;
5. Whether a new trial should be had on the issue.

In determining these issues in the first action the Court also traversed the question of who had the burden of proving whether the statute of limitations defence was made out. Once the defence was pleaded did the defendant have to prove that the action was statute-barred or did the plaintiff have to prove that it had commenced the proceed-

ings within time?

The Court also grappled with the concept of when a "defect" might be said to have arisen and canvassed a number of other important issues relevant to the law of negligence generally.

The learned judge at first instance gave judgment in favour of the defendant, finding that there had been no negligence and that even if there had been the claim was statute-barred in any event. That disposed of the first action. His Honour also dismissed the second action, finding that the plaintiff had not in fact relied on the defendant in deciding whether or not to commence its proceedings. His Honour found that the plaintiff had in fact relied on its own engineers. In any event, the defendant's advice was not negligent. The second action was therefore dismissed.

On appeal, the Full Court (Brooking, Fullagar and Hayne JJ) reversed the decision of the learned trial judge.

1. Did the defendant owe the plaintiff a duty of care?

The Full Court had to deal with the question of whether or not the decisions of the House of Lords in *D & F Estates Ltd v Church Commissioners for England* (1989) Act 177 and *Murphy v Brentwood District Council* (1991) 1 AC 398 prevented the plaintiff from alleging that the defendant owed a duty of care independent of any right under contract. The Full Court distinguished those decisions.

The Full Court also found that it was not necessary in the circumstances to establish a relationship of proximity which it had been held in *Opat v National Mutual Life Association of Australasia Ltd* (1992) 1 VR 283 had to be established in such claims in tort.

The Full Court found that it was clearly the law in Australia that an architect or engineer may be liable to this client in tort as well as in contract. In any event, in a professional relationship it was not necessary to prove "reliance" in order to establish proximity as a duty of care was implicit in such a relationship. Moreover, it was manifest that the plaintiff had relied on the defendant as the designer of the Centre.

That disposed of the first point of the appeal.

2. Did the evidence disclose a breach of duty of care?

The Court then went on to examine the expert evidence given on behalf of both parties and the state of knowledge in relation to the problem caused by Coode Island Silt. The Court found that in fact there had been a breach of duty on the part of the defendant on the facts of the particular case. The Court embarked upon a detailed analysis of the expert evidence to come to this conclusion. That part of the decision is beyond the scope of this article.

3. Could the defendant rely on a contractual term to avoid liability?

The Court next had to interpret a particular clause in the contract between the plaintiff and the defendant (that is in the client/engineer agreement) to see whether it had the effect of limiting or extinguishing the defendant's liability in tort. It is beyond the scope of this article to canvass the interpretation of the clause in question other than to note that the Court went to considerable pains to find that the clause did not have the effect which the defendant contended it had. In any event the clause was considered ambiguous and was construed against the defendant.

4. Was the plaintiff's claim statute-barred?

The chief point of interest is the manner in which the Full Court dealt with the application of the *Limitations of Actions Act* and, in particular, the decision of the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 A.C. 1.

In *Pirelli*, the defendants were consulting engineers who oversaw the design and construction of a large industrial chimney on behalf of the plaintiff during 1969. During 1970 the chimney began cracking due to inappropriate materials used in its construction. On the evidence, these cracks could not have been discovered prior to October 1972, and the plaintiff did not, in fact, discover the cracks until 1977. An action in negligence was commenced against the consulting engineers in 1978. The House of Lords held that the plaintiff's cause of action accrued in 1970 when the cracks occurred. It was held, by analogy with the law relating to personal injuries (Cartledge v E jopling & Sons Limited [1963] A.C. 758), that the occurrence of damage cannot be determined by reference to the time of discovery of that damage. Accordingly, it was held that the six year limitation period had run and Pirelli's action was statute-barred. The Court expressly overruled what was then called "the discoverability test". That is, that the cause of action in negligence accrued (ie, the damage was suffered) when the damage or defect could first reasonably have been discovered.

The damage (i.e. the physical damage to the structure) had occurred more than six years before the proceedings were commenced and the action was therefore statute-barred.

The Court also proposed the "doomed from the start" principle as a possible exception where the cause of action might accrue at an even earlier time (e.g. when the work was first done) and the statute of limitations expire at an earlier time. The House of Lords noted: "where the advice of an architect or consulting engineer leads to the erection of a building which is so defective as to be doomed from the start" (Pirellie, ibid, 18) the cause of action will accrue when the building reaches completion, regardless of the existence or otherwise of physical damage at that time.

The essence of *Pirelli* is that it relies on categorising the "damage" as being the physical damage or defect in the building. Once that "physical damage" occurs, time starts running against a plaintiff. *Pirelli* focuses on, and categorises the damage as, physical damage.

Pirelli has caused serious headaches for plaintiffs and spawned quite a few judicial decisions.

The "doomed from the start" principle has led to the less than satisfactory consequence in England that architects, engineers and others have tried to avoid liability in some cases by proclaiming their negligence to have been of the grossest kind so that the building was always

"doomed from the start" thereby causing the limitation period to be measured from the date of completion of the building, long before any problems occurred.

Another problem is the injustice of having time running against a plaintiff at a time when damage could not possibly have been discovered. To some extent, Courts in England have tried to avoid this effect of the decision by recourse to basic principles of tort and by adopting novel approaches. It appears now to be the law in England that damages for 'pure economic loss' are recoverable only where a special relationship amounting to reliance (*Nitrigin Eireann Teoranta & Anor v Inco Alloys Ltd & Anor* (1992) 1 WLR 498, 501) (e.g. that of professional and client) existed between tortfeasor and victim. To escape the rigours of *Pirelli* it has been suggested that faults appearing in a building as a result of latent defects which existed from the beginning constitute pure economic loss, since no injury has been caused to person or property; *D & F Estates Limited v Church Commissioners for England* [1989] AC177, *Murphy v Brentwood District Council* [1991] 1 AC 398. The decision in *Nitrigin Eireann Teoranta & Anor v Inco Alloys Ltd & Anor* is another good recent example of the sort of difficulties *Pirelli* has caused in England.

The question of whether *Pirelli* is the law in Australia was squarely raised in Pullen. Having decided that the defendants were negligent, the Full Court decided that *Pirelli* was not to be followed in Australia, on the authority of the reasoning of Deane J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 and in *Hawkins v Clayton* (1988) 164 CLR 539. On the basis of the judgments of Deane J in those cases and supported by obiter dicta of other members of the High Court in those cases, the Full Court found that the common law in Australia and the common law in England was different.

The crucial distinction lies in what the Court categorises the "damage" to be in order to complete the cause of action. In particular, the question is, how is damage constituted in cases where the cause of action rests, fundamentally, on a latent defect? By contrast with the House of Lords in *Pirelli*, the Full Court held that knowledge of the damage is an essential component of the damage itself. The analysis of the case as one of "economic loss" rather than "physical loss" is crucial to this conclusion. The "economic loss" may not be suffered until well after the "physical loss" occurs. In cases where a building never existed without a latent defect "...the only loss which could have been sustained by the owner was the economic loss which would be involved if and when the defect was actually discovered or became manifest, in the sense of being discoverable by reasonable diligence, with the consequence that the damage was then sustained by the then owner"; Hawkins ibid per Deane J, quoted by the Full Court in Pullen at page 81. That is when the damage (i.e. the economic loss) first occurs.

The Full Court, by categorising the loss as economic loss, thereby also accepted the discoverability test and did not follow *Pirelli*.

The result was that, in the case of latent defects, time begins to run only when the damage is manifest or becomes discoverable by reasonable diligence, the damage being economic loss.

It is important to note that the damage which was actionable, and which the plaintiff had to be aware of before time began to run, was the actual latent defect itself. The observance of physical injury to the building was held not to be enough, of itself, to give automatic knowledge of the underlying problem: "...on the facts of this case settlement in general and differential settlement in particular does not necessarily bespeak inadequacy of the footings"; Pullen ibid page 104. According to the Court, some time elapsed between the settlement and cracking first being observed and the realisation that the footings of the building were inadequate. The question of what constitutes the damage or defect which is the subject of the action must, in theory, be a question peculiar to each individual case, dependent upon the terms in which the action is couched. However, *Pullen* defines the "damage" in cases of latent defects as cause of the loss rather than the observable "damage" which results form it. It was only when the plaintiff could reasonably realise that defective footings were causing the cracking that time started to run against the plaintiff.

Having disposed of these points, the Court in Pullen had to deal with the question of whether or not it was an essential part of the plaintiff's case to prove that the action was not statute-barred.

The Full Court held that the onus rests upon the defendant who is relying upon the statute to prove that the cause of action did not accrue within six years prior to the issue of proceedings. The reason is that it is not part of the cause of action in negligence that the action is not statute-barred. Moreover, it was held here that the onus was not shifted by the plaintiff having, in its reply, positively pleaded that damage occurred within six years of the cause of action arising. The defendant still carried the burden of proof.

The second action

As noted above, as a result of the defendant's pleading of the statute of limitations argument in the first action and because great uncertainty existed prior to this decision on the statute of limitations question, the plaintiff brought the second action (to be heard with the first action), in case the first was found to be statute-barred. Although strictly obiter in view of its reasoning about *Pirelli* in the first action, the Court then dealt with the learned trial judge's finding in favour of the defendant in the second action.

Between 1982 and 1985 the defendant prepared various reports for the Public Works Department on the faults appearing in the State Swimming Centre. These reports noted the subsidence and the fact that some subsidence had been expected. However, the reports failed to acknowledge any inadequacy in the footing or any failure on the part of the defendant in its capacity as designer. The plaintiff claimed that this had caused it to refrain from commencing proceedings.

The Court held that the enquiries made by the defend-

ant in preparing the reports were inadequate and negligent.

Alternatively, the Court held that the negligence of the defendant in failing to recognise likely long term settlement for the purposes of the original designs was repeated in the preparation of the reports: the defendant should have recognised its earlier negligence. The Court held that, had it not been negligent in preparing the reports, the defendant would have told the plaintiff that the defendant was largely responsible for the defects in the Centre. The plaintiff was held to have relied on the advice of the defendant; thus a causal connection was established between the negligent reports and the failure of the plaintiff to commence proceedings. Had the primary negligence action been statute-barred, loss of that action would have been damage compensable by the defendant in the second action.

The learned trial judge's decision was therefore reversed. This reversal included the costs award made in favour of the defendant by the trial judge. The Full Court ordered the defendant to pay interest under the Penalty Interest Rates Act 1983 on the money which the plaintiff had paid to the defendant pursuant to the cost order. It is notable that, while the interest was essentially given by way of compensation for the loss of the use of the money, the Court did not apply *Hungerfords v Walker.*

Should a new trial be ordered?

Finally, the court ordered a new trial on the question of damages only, not on the question of liability, and it substituted its findings for those of the learned trial judge on the question of liability.

Conclusion

Pullen v Gutteridge Haskins & Davey Pty Ltd has, on one view, brought about a revolution in Victoria in the area of the law of torts in relation to latent defect cases. It is understood that application for special leave to appeal to the High Court has been filed by the defendant. The application relies on many grounds, including the Full Court's findings on factual issues.

It is to be hoped that, whatever the ultimate decision of the High Court, it will deal as decisively with all of the issues as all of the other judges have done to date so that this important area of law is clarified once and for all in Australia.

One is left with the uneasy feeling, however, that the formulation of the test may in itself contain some of the *Pirelli* "doomed from the start" problem. If the test is one of "discoverability" of the loss or when the loss becomes "manifest" the query may arise as to whether a structure which is "doomed from the start" is one in which the loss was always "manifest" or "discoverable". It is to be hoped that we will not see a procession of defendants in Victoria pleading that their work was so hopelessly negligent as to have been manifestly bad from the outset even though the plaintiff may not have realised it. One hopes that the High Court will, if it grants leave to appeal, also deal with this aspect of the problem and proffer some views on it.

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Pollution - Artificial Lake

Electricity Commission of NSW v Environment Protection Authority, unreported, Court of Criminal Appeal, Gleeson C J, Carruthers J, Smart J, 7 October 1992.

Facts

Elcom (now Pacific Power) appealed against its conviction in the Land & Environment Court for polluting waters in breach of s.16 of the Clean Waters Act. The conviction arose out of an accidental spill of diesel oil into Lake Liddell, a purpose-built cooling pond for two of Elcom's power stations in the Hunter Valley.

The grounds of the appeal were that "waters" in the Act meant waters outside private premises, and Elcom's licences permitted this type of pollution.

Importance

The Court of Criminal Appeal dismissed the appeal on the basis that the waters of the artificial lake were "waters" within the meaning of the Act and that Elcom's licence did not permit the pollution which had occurred. Whilst the term "waters" included waters on privately owned land, the Court indicated that a "commonsense" approach should be used to decide when such waters were being "polluted". In relation to the example raised in the proceedings of placing chlorine in a domestic swimming pool, Gleeson CJ said this would not be pollution because of its insignificant nature. In the Court's view, none of Elcom's licences permitted the type of pollution which occurred. The conviction and penalty imposed by the Land & Environment Court were upheld.

This decision has important ramifications for all industrial users with artificial lakes or ponds who discharge into such waters. The practical effect may be that each such discharge needs to be explicitly permitted by a licence.

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