

# Tort liability of public authorities and manufacturers: *The oyster case*

**T**he High Court recently handed down a decision in *Graham Barclay Oyster Pty Ltd v Ryan*<sup>1</sup> (*Barclay Oysters*). The case addresses two issues relevant to negligence claims: the circumstances in which a public authority owes a duty of care to individuals, and the approach to determining whether a manufacturer of a product has breached its duty of care to consumers of the product.

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## RELEVANT FACTS

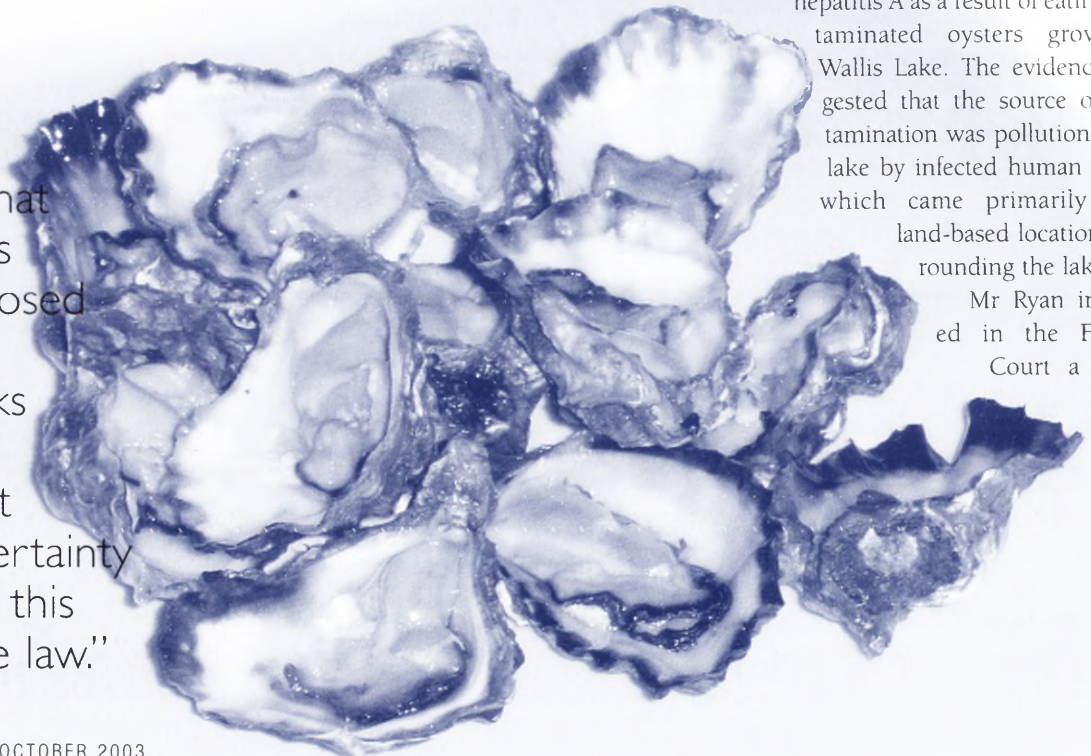
Graham Barclay Oysters Pty Ltd (Barclay Oysters) and other oyster growers grew oysters at Wallis Lake in the Shire of Great Lakes in New South Wales. The Great Lakes Council had statutory powers (including powers relevant to pollution control) in relation to Wallis Lake and the surrounding area. The powers were contained primarily in the *Local Government Act 1993* (NSW).

The State of New South Wales had statutory powers in relation to the oyster industry at Wallis Lake. The powers were contained primarily in the *Fisheries Management Act 1994* (NSW).

A group of consumers, including Grant Ryan, contracted hepatitis A as a result of eating contaminated oysters grown at Wallis Lake. The evidence suggested that the source of contamination was pollution of the lake by infected human faeces, which came primarily from land-based locations surrounding the lake.

Mr Ryan instituted in the Federal Court a repre-

“The fact that four judges each proposed different frameworks of analysis means that some uncertainty remains in this area of the law.”



sentative action on behalf of himself and other consumers against Barclay Oysters, other oyster growers and distributors, the council and the state. He claimed that each respondent owed him a duty of care and breached that duty, causing him to contract hepatitis A. He also made claims under the *Trade Practices Act 1974* (Cth) against Barclay Oysters and the other oyster growers and distributors.

The trial judge held that the council, the state and Barclay Oysters were each liable in negligence to Mr Ryan, and that Mr Ryan was also entitled to succeed in his claim against Barclay Oysters under sections 74B (fitness for purpose) and 74D (merchantable quality) of the *Trade Practices Act*.

The unsuccessful parties appealed to the Full Court of the Federal Court. A majority of the Full Court allowed an appeal by the council, holding that it owed no relevant duty of care to the oyster consumers. A differently constituted majority dismissed an appeal by the state, upholding the primary judge's conclusion.

A majority of the Full Court also upheld the primary judge's conclusion that Barclay Oysters was liable in negligence to Mr Ryan. Further, the Full Court upheld the primary judge's conclusion with respect to the liability of Barclay Oysters under sections 74B and 74D of the *Trade Practices Act*.

In respect of the claims in negligence, the unsuccessful parties in the Full Court of the Federal Court were granted

special leave to appeal to the High Court. The High Court considered whether the council and the state each owed the oyster consumers a duty of care and breached that duty, and whether Barclay Oysters breached its duty of care to the oyster consumers.

#### TORT LIABILITY OF PUBLIC AUTHORITIES

It is trite law that a party (A) cannot be liable to another party (B) for careless conduct by A that causes injury to B unless A owes B a duty of care. In most categories of cases, the principles determining whether A owes B a duty of care are settled. For example, in cases involving positive acts by A causing physical injury to B, 'reasonable foreseeability of such injury will commonly suffice to establish' that A owes B a duty of care in respect of such acts.<sup>2</sup>

However, in some categories of cases the principles determining whether A owes B a duty of care remain unsettled. One such category involves the circumstances in which a public authority owes an individual a duty of care in respect of acts or omissions causing injury or loss.

Three recent High Court decisions have grappled with this issue. They are: *Pyrenees Shire Council v Day*<sup>3</sup>, *Crimmins v Stevedoring Industry Finance Committee*<sup>4</sup>, and *Brodie v Singleton Shire Council*<sup>5</sup>. *Barclay Oysters* is the fourth case in the series.

The leading judgment is that of Gummow and Hayne JJ, ►

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with whom Gaudron J agreed. Gleeson CJ and McHugh, Kirby and Callinan JJ delivered separate judgments. The following points can be stated.

First, in evaluating whether a relationship between a statutory authority and a class of persons imports a common law duty of care, the majority state that it is ordinarily necessary to consider the following matters:

- The degree and nature of *control* exercised by the authority over the risk of harm that eventuated.
- The degree of *vulnerability* of those who depend on the proper exercise by the authority of its powers.
- The *consistency* or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute.<sup>6</sup>

Second, in relation to the matter of control, the majority said: 'The factor of control is of fundamental importance in discerning a common law duty of care on the part of a public authority.'<sup>7</sup>

The majority also emphasise the importance of evaluating the degree and nature of the control. Where a public authority has exclusive control over a risk of harm, this factor militates in favour of recognition of a duty of care.<sup>8</sup>

Where a public authority's measure of control is indirect or less significant, closer consideration must be given to whether the degree or extent of control held by the public authority is sufficient to give rise to a duty of care.<sup>9</sup>

"The standard of responsibility demanded of manufacturers may be high, but it is not strict."

In *Barclay Oysters*, Gleeson CJ and McHugh and Callinan JJ also acknowledge the factor of control as a matter relevant to whether a duty of care exists in a particular case.<sup>10</sup>

Third, the majority say little in relation to the matter of vulnerability. The issue of vulnerability was not determinative in the case. The concept of vulnerability was considered more extensively in the High Court's earlier decisions of *Crimmins v Stevedoring Industry Finance Committee*<sup>11</sup> and *Perre v Apand*<sup>12</sup>.

Fourth, in relation to the matter of the consistency of any duty of care with the terms, scope and purpose of relevant statute, firstly it is important to closely consider the relevant statute or statutes. The close consideration given by the High Court to the relevant statutes in *Pyrenees Shire Council v Day*, *Crimmins v Stevedoring Finance Committee* and *Barclay Oysters* demonstrates the point.

Further, it is necessary to consider whether the asserted duty of care is consistent with the terms, scope and purpose of the statute. The majority state that '[t]he question is whether [the statutory regime] erects or facilitates a relationship between the authority and a class of persons that, in all the circumstances, displays sufficient characteristics answering the criteria for intervention by the tort of negligence'.

This can be a difficult question. The developing case law provides guidance on the point. In some cases, it has been stated that recognition of a duty of care would be inconsistent with the proper operation of the statutory scheme.<sup>13</sup>

In other cases, it has been stated that recognition of a duty of care would be consistent, or perhaps not inconsistent, with the proper operation of the statutory scheme.<sup>14</sup>

In *Barclay Oysters*, McHugh, Kirby and Callinan JJ also acknowledge this issue as a matter relevant to whether a duty of care exists.<sup>15</sup>

Fifth, the plaintiff's loss or damage, although this may be an aspect of vulnerability, is a further matter. The law of negligence has been more willing to compensate persons in respect of physical injury and property damage than mere economic loss.<sup>16</sup> It is notable that most cases in which Australian and other Commonwealth courts have recognised that a public authority owes a duty of care in respect of a failure to act or exercise a power involve claims for compensation for physical injury or property damage (including buildings with defective foundations).<sup>17</sup> Meanwhile, most claims by plaintiffs that a public authority owes a duty of care in respect of a failure to act or exercise a power causing pure economic loss have failed.<sup>18</sup>

Sixth, all seven judges in *Barclay Oysters* concluded that neither the state nor the council owed a duty of care to the plaintiffs.



## SCHOOLS

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As stated above, in the category of cases involving public authorities the principles determining whether a public authority owes an individual a duty of care in respect of its acts or omissions have been unsettled.

*Barclay Oysters* helps settle those principles, although not as much as hoped. It is helpful that three judges in the case agreed upon a framework of analysis. However, the fact that the remaining four judges each proposed different frameworks of analysis means that some uncertainty remains in this area of the law.

## TORT LIABILITY OF PRODUCT MANUFACTURERS

*Barclay Oysters* acknowledged that as the manufacturer of a product it owed a duty of care to consumers of the product. The High Court considered whether *Barclay Oysters* breached that duty.

The trial judge and a majority of the Full Court of the Federal Court held that *Barclay Oysters* breached its duty of care by failing to do certain things, which in the court's view it should have done. A majority of the High Court allowed the appeal of *Barclay Oysters* and held that the company did not breach its duty of care to the plaintiffs.

The matters relevant to whether *Barclay Oysters* breached its duty of care are peculiar to the facts of the case. For the purpose of this article, there are two more general points to make.

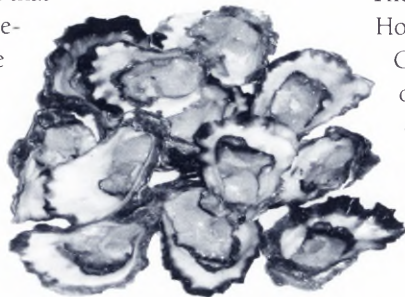
First, the High Court emphasised the need to consider the question of breach of duty by reference to the formula stated by Mason J in *Wyong Shire Council v Shirt*<sup>19</sup>.

Adopting the *Wyong Shire Council* test to manufacturers of products, where a manufacturer owes a duty of care to a consumer in respect of a risk of injury, 'the tribunal of fact must determine what a reasonable [manufacturer] would do by way

of response to the risk' and 'the perception of the reasonable [manufacturer's] response calls for 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 alleviating action'.<sup>20</sup>

There is nothing new in this proposition. However, a majority of judges in the Federal Court failed to consider the question of breach of duty by reference to this formula. A majority of the High Court held that this constituted an error and that on proper application of the test *Barclay Oysters* did not breach its duty of care.

Second, it is sometimes said that the standard of responsibility demanded of manufacturers has assumed characteristics of strict liability.<sup>21</sup> The *Barclay Oysters* case indicates that while the standard of responsibility demanded of manufacturers may be high, it is not strict. **PL**



**Endnotes:** 1 (2002) 77 ALJR 183. 2 *Bryan v Maloney* (1995) 182 CLR 609 at 619. 3 (1998) 192 CLR 330. 4 (1999) 200 CLR 1. 5 (2001) 206 CLR 512. 6 *Graham Barclay Oysters Pty Ltd v Ryan* at [149]. 7 *ibid* at [150]. 8 See *Brodie v Singleton Shire Council* at [103]; *Romeo v Conservation Commission* (1998) 192 CLR 431. 9 See *Pyrenees Shire Council v Day; Crimmins v Stevedoring Industry Finance Committee* (1999); *Agar v Hyde* (2001) 206 CLR 512. 10 Gleeson CJ at [20] and [35], McHugh J at [84] and [90]-[100], and Callinan J at [319]. 11 (1999) 200 CLR 1 at [43]-[46], [100], [104]-[109], [233]. 12 (1999) 198 CLR 180 at [15], [41]-[42], [118]-[119], [149]-[151], [296]. 13 See *Sullivan v Moody* (2001) 75 ALJR 1570; *Chapman v Luminis Pty Ltd* [2001] FCA 1106; *Hill v Chief Constable* [1989] AC 53; *Morrison v Upper Hutt City Council* [1998] 2 NZLR 331. 14 See *Crimmins v Stevedoring Industry Finance Committee - Gleeson CJ and McHugh J* at [30], *Gaudron J* at [28], and *Kirby J* at [220]. See also *Perrett v Collins* [1998] 2 Lloyds Rep 225 at 271 and 276; *Kent v Griffiths* [2000] 2 WLR 1158 at 1163, 1165 and 1171; *TC v State of New South Wales* (1999) Aust Torts Reports 81-500 at [158] and [184]. 15 McHugh J at [84], *Kirby J* at [213], and *Callinan J* at [310] and [322]. 16 See *Bryan v Maloney* (1995) 182 CLR 609 at 617; *Perre v Apand* at [70]. 17 See *Brodie v Singleton Shire Council; Crimmins v Stevedoring Industry Finance Committee; Pyrenees Shire Council v Day; City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641; *Jane Doe v Metropolitan Toronto Commissioners of Police* (1998) 160 DLR (4th) 697. 18 See *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] 1 AC 175; *Reeman v Department of Transport* [1997] 2 Lloyds Rep 648; *Cooper v Hobart* (2001) DLR (4th) 193. 19 (1980) 146 CLR 40 at 47-48. 20 *ibid*. 21 eg *Fleming* (1998) *The Law of Torts* p 539.

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