The *Design Building and Practitioners Act 2020* (NSW) –

Pleading a claim under Part 4 and the statutory duty to exercise reasonable care pursuant to section 37.

By Frank Hicks SC

Greenway Chambers CPD Series

8 June 2021

Introduction

1. The passage of the *Design Building and Practitioners Act 2020* (NSW) introduced a statutory duty of care by section 37.

2. We have addressed the common law developments in this area in the consolidated paper prepared for this CPD, in particular the important High Court decisions in *Bryan v Maloney*, *Woolcock Street Investments v CDG* and *Brookfield Multiplex v Owners Corporation Strata Plan 61244*.

3. Part 4 of the *Design Building and Practitioners Act 2020* (NSW), and specifically section 37, was the NSW legislative response to the development of the common law.

The statutory duty of care

4. Section 37 of the *Design Building and Practitioners Act* provides that:

> (1) A person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects--
>
> (a) in or related to a building for which the work is done, and
>
> (b) arising from the construction work.
>
> (2) The duty of care is owed to each owner of the land in relation to which the construction work is carried out and to each subsequent owner of the land.
>
> (3) A person to whom the duty of care is owed is entitled to damages for the breach of the duty as if the duty were a duty established by the common law.
>
> (4) The duty of care is owed to an owner whether or not the construction work was carried out--
>
> (a) under a contract or other arrangement entered into with the owner or another person, or
>
> (b) otherwise than under a contract or arrangement.

5. The term "construction work" is defined broadly by section 36 of the *Design Building and Practitioners Act* to include:

    a. building work;

    b. the preparation of regulated designs and other designs for building work;

    c. the manufacture or supply of a building product used for building work; and

    d. supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to above.

6. Further:

    a. "building work" is also defined for the purposes of Part 4 of the *Design Building and Practitioners Act* as simply including residential building work within the meaning of the *Home Building Act 1989* (NSW);

    b. "building" is defined to have the same meaning as it has in the *Environmental Planning and Assessment Act 1979* (NSW);[1] and

    c. section 36(2) states that, in Part 4, a reference to "building work" applies only to building work relating to a building within the meaning of this Part.

7. As such, the statutory duty of care may apply to a wide range of contractors, design consultants and service providers in the building and construction industry.

---

[1] Section 1.4 of the *Environmental Planning and Assessment Act 1979* (NSW) states that in this Act, except in so far as the context or subject-matter otherwise indicates or requires, "building" includes part of a building, and also includes any structure or part of a structure (including any temporary structure or part of a temporary structure), but does not include a manufactured home, moveable dwelling or associated structure within the meaning of the *Local Government Act 1993* (NSW).

8. Section 38 of the *Design Building and Practitioners Act* provides that:

(1) An owners corporation or an association is taken to suffer economic loss for the purposes of this Part if the corporation or association bears the cost of rectifying defects (including damage caused by defects) that are the subject of a breach of the duty of care imposed under this Part.

(2) The economic loss suffered by an owners corporation or association for the purposes of subsection (1) includes the reasonable costs of providing alternative accommodation where necessary.

(3) Subsection (1) applies whether or not the owners corporation or association was the owner of the land when the construction work was carried out.

(4) Subsections (1) and (2) do not limit the economic loss for which an owners corporation, association or an owner may claim damages under this Part.

9. Section 39 of the *Design Building and Practitioners Act* provides that the statutory duty of care is a non-delegable.

10. Section 40 of the *Design Building and Practitioners Act* provides that parties may not contract out of Part 4 by agreements made after its commencement.

11. Section 41 of the *Design Building and Practitioners Act* provides that the provisions of Part 4:

a. are in addition to the duties, statutory warranties or other obligations imposed under the *Home Building Act 1989* (NSW), other legislation and the common law, and do not limit those duties, warranties or obligations;

b. do not limit the damages that might be otherwise recoverable under another Act or at common law because of a breach of a duty of a person who carries out construction work; and

c. are subject to the *Civil Liability Act 2002* (NSW).

12. Importantly, by Schedule 1, section 5, of the *Design Building and Practitioners Act*, Part 4 extends to construction work carried out before the commencement of s.37 if the loss first became apparent within 10 years immediately before the commencement.

The impact of the introduction of a statutory duty of care

13. There was an almost immediate impact in construction litigation when the *Design Building and Practitioners Act* was introduced. This was particularly so because of the retrospective operation of Part 4.

14. However, it appears that many claimants have perhaps not fully appreciated what is required to assert a claim under section 37. In some cases, the claim has been introduced by amendments which simply:

    a. recite the terms of sections 37 and 38; and

    b. particularise the alleged breach or breaches of the statutory duty by stating "defects".

15. The *Civil Liability Act 2002* (NSW) applies to Part 4 of the *Design Building and Practitioners Act*, and the *Civil Liability Act* has important provisions as to, amongst other things:

    a. general and other principles with respect to the existence of a duty of care (sections 5B and 5C);

    b. the determination that negligence caused particular harm (section 5D);

    c. the onus of proof (section 5E);

    d. the standard of care for professionals (section 5O);

    e. liability based on non-delegable duty (section 5Q).

What and how to plead

16. As noted, the statutory duty may apply to a wide variety of persons engaged in various activities and different stages of the construction process.

17. A claim which is made by simply noting that there are defects in works performed and identifying the role played by a builder, constructor, design consultant, certifier or any other person is liable to be struck out.

18. Leaving aside general rules of pleading, paragraph 9(b) of the NSWSC Technology & Construction List Practice Note SC Eq 3 requires a plaintiff to state the allegations made with adequate particulars.

19. A claim under the *Design Building and Practitioners Act* concerns several issues.

20. First, the issue of *"carries out construction work"* is fundamental. It is necessary to state the manner in which the person "carried out" construction work with adequate particulars.

21. Where the relevant person is a builder or a trade contractor, this might be a relatively simple matter.

22. However, where it is asserted that a developer "carried out" construction work because, for example, the developer is alleged to have exercised substantive control over the carrying out of the work, then this allegation will need to be supported with adequate and detailed particulars.

23. There is no equivalent in the *Design Building and Practitioners Act* to those provisions in the *Home Building Act* which make a developer liable to successors in title as if the developer was required to hold a contractor licence and had done the work under a contract with that successor in title to do the work.[2]

24. Secondly, the relevant duty is to *"exercise reasonable care to avoid economic loss caused by defects"*.

25. Arising from the first issue, the manner in which a person was required to carry out construction work must be articulated to identify the substance of the duty to exercise *"reasonable care"* (i.e., what the duty required of the person who carried out construction work).

26. Furthermore, the manner in which the person actually did carry out construction work must be articulated to identify the breach(es) of the duty to exercise reasonable care.

---

[2] Section 18C(1); see also section 18C(2) whereby residential building work done on behalf of a developer is taken to have been done by the developer.

27. Each of these matters must be stated with adequate particulars.

28. Thirdly, and most critically, it must be pleaded how the acts or omissions said to constitute a breach of the relevant duty to exercise reasonable care caused the defects and economic loss. Section 5D of the *Civil Liability Act* stipulates that a determination that negligence caused particular harm comprises the following:

    a. the negligence was a necessary condition of the occurrence of the harm (**"factual causation"**), and

    b. it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (**"scope of liability"**);

29. It is well established that, when invoking the apportionment provisions of the *Civil Liability Act* a defendant must plead the following necessary elements to assert that another party is a concurrent wrongdoer:

    a. the existence and identity of a particular person;

    b. the basis for the cause of action – if it be contract, identify the contract; if it be tort, identifying the duty, its scope and the breach; and

    c. the loss and damage for which the concurrent wrongdoer is alleged to be also liable by reference to matters of causation.[3]

30. There is no reason to consider that a plaintiff seeking to assert a claim under section 37 would be under any different obligation with respect to pleading.

[3] *Ucak v Avante Developments Pty Ltd* [2007] NSWSC 367 at [35]; *HSD Co Pty Ltd v Masu Financial Management Pty Ltd* [2008] NSWSC 1279 at [14]- [18].

The existence of defects

31. The existence of defects does not, *ipso facto*, establish:

    a. that there was a duty owed by any particular person involved in the construction work;

    b. what was required of the person alleged to owe the duty to exercise reasonable care;

    c. how or in what respects or that the person failed to fulfil the duty to exercise reasonable care;

    d. how that failure caused any defect or economic loss.

32. These matters must be stated with precision and particulars. A pleading that defects contained in a schedule or report arose by reason of a failure to exercise reasonable care in that the works were not carried out:

    a. with all due care and skill;

    b. in a proper and workmanlike manner; and / or

    c. in accordance with the applicable codes, standards, guides and provisions of the *Building Code of Australia*,

    may be familiar when dealing with claims for breach of contract, particularly contractual or statutory warranties. However, for a claim for breach of the statutory duty under section 37, this may be so vague as to be meaningless and liable to be struck out.

33. The fact of a defect does not establish that construction work was not performed with due care and skill. The *Design Building and Practitioners Act* does not create a regime of strict liability.

34. A plaintiff, asserting a breach of the statutory duty to exercise reasonable care to avoid economic loss caused by defects, must state the substance or scope of the duty, the alleged breach(es), and the loss and damage suffered as a matter of causation. Specifically, the contentions must articulate, with adequate particulars:

a. how or in what respects a person carried out construction work;

b. what was required of the person in carrying out the construction work having regard to its role or functions;

c. how or in what respects did the person fail to do that which it was required to do, or do what it was required to refrain from doing, by reference to each and all of the particular incidents or defects the subject of claim; and

d. how the failure to exercise reasonable care caused each and all of the particular incidents or defects the subject of claim.

Res ipsa loquitur

35. In many claims as pleaded or asserted, it appears that the plaintiff has (deliberately or otherwise) relied on the principle or process of *res ipsa loquitur*, which literally translates as *"the thing speaks for itself"*.

36. In *Schellenberg v Tunnel Holdings*,[4] Gleeson CJ and McHugh J considered the principles and authorities in respect of *res ipsa loquitur*. The following is drawn from that analysis.

37. *Res ipsa loquitur* is concerned with negligence arising from an unknown or unspecified cause in the context of an external event whose cause is under the control of the defendant. It is a principle in respect of proof that a defendant was causally responsible for the occurrence and a breach of duty.

---

[4] [2000] HCA 18; 200 CLR 121, at [31]-[38].

38. It is a requirement for the application of the principle that the incident or accident must be such as in the ordinary course of things does not happen if those who have the management use proper care (citing *Mummery v Irvings Pty Ltd* [1956] HCA 45; (1956) 96 CLR 99 at 116).

39. The relevant cause must be the immediate cause of the occurrence, which means the occurrence must be defined with reasonable precision. Definition of the occurrence will determine:

    a. whether the accident is of a class that does not ordinarily happen if those who have the management use proper care; and

    b. whether the cause of the occurrence has been established.

40. In *Mummery v Irvings Pty Ltd*, it was held that:

    a. *res ipsa loquitur* would have applied if the evidence had established no more than that, upon entering the defendant's premises, the plaintiff had been violently struck by a piece of wood flying through the air;

    b. however, the evidence established that the wood was thrown by a circular saw and this was not *res ipsa loquitur*;

    c. in the circumstances, the court does not consider whether negligence may be inferred from the mere fact that a piece of wood struck the plaintiff, but whether it may be found from the fact that a piece of wood was thrown from a circular saw.[5]

41. When the immediate cause of the accident is established, the question then becomes whether that cause was the product of negligence and the principle of *res ipsa loquitur* ceases to operate. A party may still prove negligence by inferential reasoning. In addition, a pleading of particular acts or omissions of negligence does not preclude reliance on the principle or process of *res ipsa loquitur*.[6]

---

[5] As above, at 116-7.
[6] *Schellenberg v Tunnel Holdings* at [25].

42. In the context of a claim under section 37, it is difficult to see how a claim could be made that defects simply do not arise in the ordinary course of things if those who have the control or management of construction works use proper care. Therefore, it is unlikely that the principle of *res ipsa loquitur* would commonly arise.

The assertions made or proposed to be made

43. A claim for breach of the statutory duty may be made more readily against certain parties. For example, if may be relatively straightforward to articulate a claim that:

    a. a design consultant owed a duty of care to exercise reasonable care in providing a design and design services for construction work;

    b. the design consultant provided a design and design services for construction work;

    c. the design and design services provided were inadequate in material and particular respects such that the design consultant failed to exercise reasonable care;

    d. the construction works were completed in accordance with the design and design services provided;

    e. defects exist in the works as constructed and the plaintiff has suffered economic loss.

44. Similarly, it may be relatively clear that a duty to exercise reasonable care required that the construction work be performed in accordance with relevant *Australian Standards*. If it can be shown that the works were not performed in accordance with the relevant *Australian Standards*, and the works thereby contain defects, then a claim may be made for breach of the statutory duty.

45. However, what is important to bear in mind is that the existence of defects does not of itself and necessarily prove a failure to exercise reasonable care or that the construction work was not performed in accordance with relevant *Australian Standards*. It is this critical question of causation that must be engaged when pleading the claim.

46. The issue becomes more complicated, if not vexed, when examining the role and responsibilities or project managers, certifiers or persons said to be responsible to supervise, coordinate or substantively control the performance of construction works. In claims such as this, the plaintiff must identify:

a. the source of such a duty (i.e., how or why, in the circumstances of the case, was this duty assumed or imposed);

b. the content of such duty (i.e., in practical, material and particular terms, what did the duty require of the person);

c. what the person did or did not do;

d. how the acts or omissions were a breach of the statutory duty to exercise reasonable care having regard to the provisions of the *Civil Liability Act*; and

e. how the breach(es) of the statutory duty caused defects and economic loss.

Conclusion

47. Part 4 of the *Design Building and Practitioners Act* does not create a regime of strict liability, and the fact of a defect does not establish that construction work was not performed with due care and skill.

48. The correct pleading or statement of contentions for a claim for breach of the statutory duty under section 37 requires careful consideration of the facts and obligations of persons involved in construction work, and the causal link between an alleged failure to exercise reasonable care and defects giving rise to economic loss.

Dated: 8 June 2021

Frank Hicks SC

frank.hicks@greenway.com.au