GREENWAY CHAMBERS

The Statutory Duty of Care under the Design and Building Practitioners Act – who is liable?

The recent decision of the Supreme Court of NSW in *Boulus Constructions Pty Ltd v Warrumbungle Shire Council* [2022] NSWSC 1368 (**Warrumbungle**) has clarified that everyone involved in construction work, including:

(a) builders;
(b) building companies;
(c) employees of building companies, including in particular foremen, but also managers, site engineers, contract administrators, accountants, carpenters, and labourers;
(d) directors of building companies;
(e) licence holders;
(f) engineering consultants;
(g) employees and directors of consultants;
(h) architects;
(i) employees and directors of architects;
(j) subcontractors;
(k) employees and directors of subcontractors;
(l) certifiers;
(m) employees and directors of certifiers;
(n) manufacturers of building products;
(o) employees and directors of manufacturers of building products;
(p) suppliers; and
(q) employees and directors of suppliers,

owes the owners of land on which construction work is done a statutory duty of care under section 37 of the *Design and Building Practitioners Act* 2020 (**DBPA**) to avoid defects in the construction work. That liability is also retrospective, meaning that the duties may apply to any project that was completed in the last 10 years.

The three basic elements of a claim in negligence are:

(a) the existence of a duty of care and its scope;
(b) a breach of that duty by the defendant; and
(c) damage that is not too remote from the breach.

The statutory regime enacted in the DBPA, which is designed to fit within the common law of negligence, seeks to remove the requirement to prove the first element of a claim in negligence, the existence of a duty, making all participants in the construction industry subject to such a duty. The second and third elements, breach and damage, must still be proven in order to sheet home liability to a defendant.

All projects involve defects, and on a large project, that may mean that any and every one of thousands of people will be liable for defects that exist in the works if they can be found to have caused the defects in some way. Accordingly, the application of section 37 may see individual workers held liable for millions of dollars in defects for projects that have already been completed.

In particular, those with general responsibility for construction work, such as managers, foremen, site engineers, and certifiers, are at significant risk due to the wide ambit of their responsibilities on site, which can result in liability for any and all defects identified on a project.

While the elements of breach and causation will still have to be proven, that will be of no comfort to defendants who are required to spend hundreds of thousands of dollars to defend themselves from claims under a duty that did not exist when they performed the work, and for which they are not insured. In addition, for the reasons below, while plaintiffs may be expected to welcome the new avenue of claim, and there are instances where a plaintiff would be well advised to plead such a claim, there are some issues with how it plays out in practice.

In another recent decision of the Supreme Court of NSW, *Owners Strata Plan No 84674 v Pafburn Pty Ltd* [2023] NSWSC 116, it was confirmed that the proportionate liability regime under Part 4 of the *Civil Liability Act* 2002 applies to this new duty. Together with the broad reach of section 37 as determined in Warrumbungle, this can create some issues for DBPA proceedings for a breach of the duty imposed under section 37, including the sheer scale and number of potential parties to any such proceedings.

Even when duty has been proscribed by section 37, proving breach and liability requires a plaintiff to prove:

1. the identity of a particular person who carried out construction work that contains or caused the alleged defect, and how they carried out the construction work;
2. the scope of the duty (i.e. precautions that were required to be taken by the defendant to avoid defects in the works);
3. the occurrence of an act or omission by that particular person that is a breach of the duty; and
4. the causal connection between the act or omission identified and the damage said to be suffered by the plaintiff.

Any potential plaintiff to such a claim will no doubt carefully select their defendants so that they are able to prove their case, and so that the proceedings are manageable and provable. However, the availability of proportionate liability, combined with the availability of multiple other potential defendants means that any defendant will be able to identify numerous concurrent wrongdoers in their defence to defray their alleged liability. This will introduce new issues into the proceedings, as the defendant will then have to prove the same elements as a plaintiff against those concurrent wrongdoers, and the plaintiff will have to consider whether or not those concurrent wrongdoers should be joined to the proceedings as defendants. The result is a number of rounds of pleading as defendants are successively joined, identify concurrent wrongdoers, and new defendants are joined, and identify concurrent wrongdoers, and so on, at the end of which there are a large number of defendants and concurrent wrongdoers identified, and the subject matter of the proceedings has blown out to potentially unmanageable proportions.

As a result of these recent decisions, it has become clear that while there may be good reasons for plaintiffs to plead a claim under the DBPA for breach of the statutory duty of care under section 37, any potential plaintiff must carefully consider whether such a claim is really necessary, and worth the potential cost, complexity and time taken to prosecute it.

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