CASE notes

SAMANTHA TRAVES, BRISBANE

High Court revisits lessor's duty in respect of demised premises

Jones v Bartlett *[2000] HCA 56*

In *Jones v Bartlett* the High Court again considered the basis for, and extent of, the lessor's duty of care to a lessee and a lessee's family, in respect of the condition of the demised premises.

The plaintiff was a member of the lessee's family. He injured himself when he put his knee through a glass panel in a door. The glass in the door had been there for years. At the time it was put in, it complied with normal building practices. By the time of the accident it was inferior to the glass required by the relevant Australian standard. The plaintiff based its claim on a number of causes of action. It is the Court's approach to the duty of care that is of most relevance to practitioners.

The lessor had conducted no inspection of the premises prior to leasing them and it was likely that a glass expert would have discovered the problem. On one view of *Northern Sandblasting Pty Ltd v Harris*[1] the plaintiff had good prospects. However, it was in fact the lessor who was successful.[2] Care needs to be taken, however, in determining what the true ratio decidendi of this case is.

"There remains this difficulty in defining the content of the duty."

The case does affirm that a landlord owes a duty of care to a tenant and members of its household in respect of the demised premises.[3] However, it is not correct to say that the duty is to see that the premises are as safe for the contemplated purpose of the entry as reasonable care and skill on the part of anyone can make them. That would be to put the standard too high.

There remains this difficulty in defining the content of the duty. Gleeson CJ thought it better not to do so,[4] other than to say it was a duty to take reasonable care to put and keep premises in a safe state of repair.[5] Gummow and Hayne JJ held that, broadly, the content of the landlord's duty to the tenant will be coterminous with a requirement that the premises be reasonably fit for the purposes for which they are let, namely habitation as a domestic residence. This did not exceed the content of the statutory requirements in various Australian jurisdictions.[6] Kirby J defined the duty as one to take reasonable care to avoid a forseeable risk of injury to a person in the position of the appellant.[7] Callinan J doubted the existence of the duty but held that, if such duty existed, it was no more than a duty to provide habitable premises only at the inception of the tenancy.[8]

It is important to note that none of the majority held there was a positive obligation to inspect the premises before they were let.[9] However, it is clear that the discharge of the duties formulated may require such an inspection. Gummow and Hayne JJ, for example, noted that the duty required the landlord not to let premises that suffer *defects* which the landlord knows or ought to know make the premises unsafe,[10] and that the duty with respect to dangerous defects will be discharged if the landlord takes reasonable steps to ascertain their existence. Their Honours said that in the ordinary case, the duty required to ascertain dangerous defects will not require the institution of a system of regular inspection for defects during the ▶

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currency of the tenancy. Nor was there found to be a requirement for the engagement of experts in relevant fields, such as electrical wiring, and glass fabrication and installations, where such risks of defects could, in the nature of things, be seen as a possibility.[11]

Delegability of the task of inspection remains an important issue, although not one directly relevant to the present case: if the lessor has done an electrical inspection by an electrician, is that enough? Kirby J takes the view that *Northern Sandblasting Pty Ltd v Harris*[12] established that such duty was delegable.[13] Gummow and Hayne JJ[14] and Callinan J[15] regarded it as sufficient if a competent expert was engaged. That is likely now to be the law. PL

Footnotes:

1 (1997) 188 CLR 313

2 So held by Gleeson CJ, Gaudron J, Gummow and Hayne JJ, Kirby J and Callinan J, McHugh J dissenting.

3 This was said by Kirby J at paras [231]-[234] to be the true gravamen of *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

4 [2000] HCA 56 at para [58]: "The capacity to adjust and adapt, which is inherent in the test of reasonableness, would be diminished if a more particular test were formulated."

5 [2000] HCA 56 at para [93]. Because the glass door was not defective, it was not a breach not to replace it.

6 [2000] HCA 56 at paras [171], [172]; and see sections 103(2)(b) and 103(3)(a) of the *Residential Tenancies Act* 1994 (Qld).

7 [2000] HCA 56 at para [253]

8 [2000] HCA 56 at para [289]

9 Kirby J at para [237] regarded the issue as still open, but noted that Courts in other jurisdictions had refrained from imposing such a duty: para [244].

10 [2000] HCA 56 at para [173]

11 [2000] HCA 56 at paras [183]-[184]

12 (1997) 188 CLR 313

13 [2000] HCA 56 at para [237]

14 [2000] HCA 56 at paras [190]-[191]

15 [2000] HCA 56 at para [284]

Wife not entitled to deceased husband's semen

In the matter of Gray [2000] QSC 390, Supreme Court of Queensland, Chesterman J, No 8459 of 2000

TINA COCKBURN, BRISBANE

An application by a wife for an order authorising her to have a sperm sample removed from her deceased husband has been refused by the Supreme Court of Queensland.

The facts

The applicant's husband died unexpectedly in his sleep. The couple had one child and had intended to have another in the near future.

The applicant wished to become pregnant through artificial insemination, using semen taken from her dead husband. For such a procedure to have any chance of success, the fluid must be extracted within 24 hours of death.

The applicant's husband died intestate, although the applicant was likely to be appointed administrator of his estate. The deceased's father, his next of kin, had consented to the procedure. The deceased had given his consent to the removal of organs in the event of his

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