



# McKEAN & PARK

## LAWYERS

### AN AUGURS GUIDE TO REPAIRS AND MAINTENANCE: THE BIRTH OF NEGLIGENCE



**Tim Graham**  
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#### The Birth of Negligence

It was almost 80 years ago that Miss May Donoghue took her seat at the Wellmeadow Café in the Scottish town of Paisley whereupon her companion, a Mr Gutteridge, ordered and paid for a bottle of ginger beer. The owner served the order and May drank some of the ginger beer from a glass. Mr Gutteridge then commenced to pour the remaining portion into his tumbler when he noticed the remains of a decomposed snail fall out of the bottle. May later complained of stomach pain and emotional distress suffered as a result of the incident.

No contractual relationship existed between May and the café owner as she had not ordered nor paid for the drink herself. Whilst a contractual relationship existed between the owner and Mr Gutteridge, he had not consumed the ginger beer. Thus, there was no established legal pathway for May to sue the owner of the café in contract. Undeterred, May filed a Writ alleging that she had become ill with nervous shock and gastroenteritis which named the manufacturer, David Stevenson, as the Defendant. The Writ alleged that the manufacturer owed May a duty to take reasonable care that the drink he manufactured did not contain substances likely to cause her injury.

By a 3-2 majority the House of Lords upheld May's appeal from the decisions of two lower courts, finding that a manufacturer owes a duty to the customer to take reasonable care<sup>1</sup>. The decision was seminal, founding the modern tort of negligence whereby a person owes a duty of care not to injure those who it can be reasonably foreseen would be affected by their acts or omissions.

Two recent New South Wales cases have considered

the circumstances by which an Owners Corporation bears a duty to its members to carry out repair and maintenance works and, indeed, to inspect common property as a matter of precaution.

#### Strata Schemes Management Act 1996

Owners Corporations in New South Wales are governed by the Strata Schemes Management Act ("SSMA"). Section 62 provides, in part, as follows:-

#### 62. What are the duties of an Owners Corporation to maintain and repair property?

- (1) *An owners Corporation must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the Owners Corporation.*
- (2) *An Owners Corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the Owners Corporation.*

#### Ridis<sup>2</sup>: the facts

The Respondent was the Owners Corporation which had the management and control of the common property of a block of units at 206A Victoria Road, Bellevue Hill. The Appellant was an occupier of one of the units in the building when he sustained an injury to his right arm. The injury occurred when the Appellant was entering the building via the front door and put out his hand to prevent the door from closing and locking on him. The glass pane in the door shattered and severely lacerated Mr Ridis' right forearm.

At the time of the accident the glass pane in the door was ordinary annealed glass. It was the original glass installed when the building was constructed in or around 1939. Such glass was known to shatter into dangerously sharp shards when impacted upon. Whereas contemporary safety standards require the installation of safety glass in the front doors of new buildings, such standards did not apply retrospectively to existing buildings. The standard simply required that if the existing annealed glass

<sup>1</sup>Donoghue v Stephenson [1932] AC562

<sup>2</sup>Ridis v Strata Plan 10308 [2005] NSW CA246

was to be replaced it should be replaced with safety glass.

Mr Ridis claimed that the Owners Corporation, in not replacing the glass panes with safety glass, had breached its duty of care as an occupier of the common property and its statutory duties under Section 62 of the SSMA.

### **The decision**

The court of appeal majority dismissed Mr Ridis' appeal, interpreting Subsections (1) and (2) of Section 62 as requiring an Owners Corporation to act reasonably and to monitor the maintenance and state of repair of the common property. On the evidence, the majority found that it was not established that ongoing inspections would, on balance, have brought to the attention of the Owners Corporation the need to replace the glass. The duty of care owed by an occupier of premises to entrants, according to the majority judgement, is to take such care as is reasonable in the circumstances. An occupier has not breached that duty by failing to inspect the premises for the purpose of discovering unknown and unsuspected defects. i.e. the majority found that subsections (1) and (2) are directed to circumstances where something in the common property is no longer operating effectively, is defective or damaged or has fallen into disrepair.

Accordingly, the majority found that Section 62 did not impose upon the Owners Corporation an obligation to insert new glass in a door which was relevantly operating as intended. As there was no evidence that the Owners Corporation was or should have been aware of any danger with regard to the glass it had not breached duty of care.

### **The dissenting judgement**

His Honour Tobias J A dissented, finding that the failure of the Owners Corporation to have inspected and replaced the glass constituted a breach of its statutory obligations pursuant to Section 62(2). It would be appropriate, His Honour stated in reference to the wording of the sub-section, to replace a fixture or fitting even though it was neither broken nor patently defective if it presented a reasonably foreseeable risk of injury because, for example, it did not comply with the current safety standards. In the dissenting judge's opinion the obligations imposed upon the Respondent by Subsection (2) required the body corporate to inspect the common property from time to time for the purpose of replacing any items which it was appropriate to replace.

Whilst Mr Ridis' appeal was rejected it is conceivable that future courts will have regard to the dissenting judge's reasoning and hold in a given case that the duty of an owners corporation requires it to inspect the common areas regularly and take whatever

preventative measures may be appropriate in the circumstances.

### **Seiwa<sup>3</sup>: the facts**

The Plaintiff company owned a strata title apartment, Unit 14, in strata Plan 35042. The Defendant was the Owners Corporation of that strata plan. Seiwa sued the Owners Corporation for damages and injunctive relief, claiming that the Owners Corporation had failed to discharge its duty to maintain the common property pursuant to Section 62 of the SSMA.

Seiwa alleged that the rectangular steel uprights which provided the framework enclosing a balcony that formed part of Seiwa's unit had rusted through, posing danger to the public (and to occupants of and entrants to Seiwa's unit).

The second aspect of Seiwa's complaint related to water penetration from the patio into the living area of the unit, resulting from a defect in the waterproof membrane which was laid on top of the concrete floor of the patio, underneath the tiles.

The Owners Corporation defended the claim on the basis that it had taken all reasonable steps to comply with its duty under Section 62. It further alleged that Seiwa had caused the damage by its own negligent failure to notify the Owners Corporation of defects in a reasonable time.

### **The decision**

A single judge of the New South Wales Supreme Court found as follows:-

- Section 62(1) imposes on an Owners Corporation a duty to maintain, and keep in a state of good and serviceable repair, the common property. The duty is not one to use reasonable care, nor best endeavours, but a strict duty to maintain and keep in repair.
- The duty to maintain involves an obligation to keep the common property in proper order by acts of maintenance before it falls out of condition, so that it is fit for purpose.
- The body corporate is obliged not only to attend to cases where there is a malfunction, but also to take preventative measures to ensure that there not be a malfunction.
- The duty extends to require remediation of defects in the original construction of the common property.
- The duty extends to oblige the Owners Corporation to do things which may not be for

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<sup>3</sup> Seiwa Australia Pty Ltd v Owners Strata Plan 35042[2006] NSW SC1157 (6 November 2006)

the benefit of the proprietors as a whole, or even a majority of them.

- The duty of an Owners Corporation under Section 62 is owed to each lot owner, and its breach gives rise to a private cause of action under which damages may be awarded to a lot owner for breach of statutory duty.

In spite of the Owners Corporation's plea that it had used all reasonable steps to perform its Section 62 duty, and that Seiwa was guilty of contributory negligence in that it failed to notify defects to the Owners Corporation in a timely fashion, the Court found that it was irrelevant how long the Plaintiff had known of the breach, and how long it took to remedy it. As the duty is strict one, it matters not whether the problem could have been rectified more rapidly.

Ultimately, the court found in favour of the Plaintiff and ordered that it was entitled to a mandatory injunction for the rectification of the membrane (the steelwork having been repaired in the interim), and loss of use damages of \$150,000.00 (being rental income calculated at \$5,000.00 per week), with additional damages in lieu of the injunction of \$250,000.00 (representing diminution in value) if the works required by the injunction were not performed.

### The thin blue line

An intriguing side issue which arose in this case was the court's response to the Owners Corporation's assertion that the membrane was not located on common property. The annotation to the strata plan denoted that the terrace was limited to a height 2.5m above the upper surface of the floor except where covered. The court held that the reference to a "cover" related to the upper boundary of the terrace such as a roof or awning. The lower boundary is defined in the Strata Schemes (Freehold Development) Act 1973 as being the upper surface of the floor. It was argued by the Owners Corporation that the lower boundary was the upper surface of the concrete slab, excluding the tiles and membrane. The court decided that because the tiles and the membrane had been affixed prior to the registration of the strata plan both the tiles and membrane formed part of the common property. This decision is not in accord with the general understanding about boundaries which regards the tiles and membrane as non-structural. The better view, in my opinion, is that the boundary lies at the upper surface of the structural floor surface irrespective of when the membrane and tiles were affixed.

### A timeous portent

Ridis must be distinguished from Seiwa in a number of important respects. In Seiwa, the Plaintiff relied on a statutory duty said to arise from Section 62. On the other hand, Mr Ridis sought relief in negligence on the basis that the body corporate owed a duty of

care said to arise consequentially from Section 62 SSMA. Whereas Seiwa successfully established the owners corporation had failed to discharge its statutory duty, the majority found in Ridis that the Plaintiff had not made out negligence at common law effusing from section 62.

Whilst the majority judgement in Ridis stands for the proposition that an Owners Corporation is not obliged to conduct or procure expert assessment of every possible source of danger in the common property, future courts may in similar circumstances prefer Tobias JA's minority judgement.

Seiwa held that an Owners Corporation's duty to maintain and keep the common property in a state of good and serviceable repair is strict, and that it is not open to a body corporate to defend a claim on the basis that it was not notified of the issues. The test is onerous and, being the judgement of a single judge, may not be followed in future decisions.

In Victoria, the duty of a body corporate to keep the common property in a state of good and serviceable repair and maintenance<sup>4</sup> may be seen to be a strict liability but the duty is unlikely to be seen as requiring repairs and maintenance which are not obviously required.

Nevertheless, Owners Corporations and their managers are advised to monitor properties with vigilance and acuity, as you would an opaque brown drink bottle whose contents may not be capable of immediate perception.

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<sup>4</sup> See s207 Subdivision (Body Corporate) Regulations 2001