CASE NOTE*

PROSPER THE GOVERNMENT, SUFFER THE PRACTITIONER: THE *GRAHAM BARCLAY OYSTERS* LITIGATION

I INTRODUCTION

The Graham Barclay Oysters litigation began in the Federal Court of Australia, with *Ryan v Great Lakes Council* ('*Ryan*').[1] This was a representative claim by Mr Grant Ryan against Graham Barclay Oysters Pty Ltd ('Graham Barclay Oysters'), Graham Barclay Distributors Pty Ltd ('Graham Barclay Distributors'), the Great Lakes Council, the State of New South Wales and fourteen other parties.[2] The plaintiffs sought damages for injury (hepatitis A infection) arising from the consumption of contaminated oysters which were supplied by the Graham Barclay companies, and had been grown in Wallis Lake, which was in the Great Lakes Council area of New South Wales.

In November 1996, heavy rains around Wallis Lake caused faecal matter to be washed into the lake.[3] As a result, oysters growing in the lake became contaminated with the hepatitis A virus ('HAV'). Mr Ryan (and the other plaintiffs whose claims lie behind this case) had consumed oysters grown in Wallis Lake over Christmas of 1996 and contracted hepatitis A. By February 1997, an HAV epidemic had been notified. In total, some 440 people contracted HAV from eating oysters grown in Wallis Lake.[4]

At first instance, before Wilcox J in the Federal Court, Mr Ryan claimed negligence against each of the defendants and six different breaches of the *Trade Practices Act 1974* (Cth) ('*Trade Practices Act*') by the Graham Barclay companies.

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1 (1999) 102 LGERA 123.

2 Those other parties had no part in the subsequent High Court appeal, and will be disregarded for the purposes of this case note.

3 Evidence was called before Wilcox J of possible faecal contamination from a variety of sources, including numerous private septic tanks, two caravan parks, a public toilet and boats. Justice Wilcox was unable to find that any particular source was responsible, but concluded that faecal contamination, 'emanated from many sources': *Ryan* (1999) 102 LGERA 123, 198.

4 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 194 ALR 337, 356 (McHugh J).

Three claims related to Part V Division 2A of the *Trade Practices Act*, which establishes actions against manufacturers of goods.[5] Mr Ryan alleged breaches of s 74B (goods not fit for their purpose), s 74C (goods that do not correspond with their descriptions) and s 74D (goods of unmerchantable quality). His other claims under the *Trade Practices Act* were for alleged breaches of s 75AD (liability for defective goods causing injury), s 52 (liability for misleading and deceptive conduct) and s 71 (an implied contractual condition that goods are of merchantable quality).[6]

Justice Wilcox held each of the defendants liable under the tort of negligence. In addition, two of the claims against Graham Barclay Oysters under the *Trade Practices Act* were successful.[7] The claim under s 74B of the *Trade Practices Act* succeeded, with Wilcox J holding that 'the contaminated oysters were not reasonably fit for human consumption'.[8] The claim under s 74C was rejected on the basis that the description given was 'oysters' and the goods supplied were in fact 'oysters'.[9] The claim under s 74D was also successful. Justice Wilcox held that the contaminated oysters were not of merchantable quality, a finding which followed inexorably from the conclusion that the oysters were not fit for human consumption.

The other claims under the *Trade Practices Act* were rejected. The claim under s 75AD, which creates liability for a supplier of defective goods which cause injury, was held to have been made out. However, a complete defence is available under s 75AK(1)(c) to a supplier of defective goods if 'the state of scientific or technical knowledge at the time … was not such as to enable that defect to be discovered'. In this case, the only method of testing for HAV resulted in destruction of the oyster. Thus, 'discovery [of the defect] and supply were mutually exclusive; the only test that would reveal the defect would destroy the goods'.[10] Accordingly, Wilcox J held that the defence under s 75AK(1)(c) was made out, and the s 75AD claim failed.

The claim under s 71 was also unsuccessful. The oysters had been bought by Mr Thomas Ryan and Mr David Ryan, the father and brother respectively of Mr Grant Ryan, the plaintiff. The contracts of sale were thus between Graham Barclay Distributors and Mr Thomas Ryan and between Graham Barclay Distributors and Mr David Ryan. Although s 71 would imply the condition that the goods were of merchantable quality into these contracts, the plaintiff Mr Grant Ryan was prevented by privity of contract from suing on the basis of these contracts to which he was a stranger. Finally, the claim of misleading and

5 Section 74A of the *Trade Practices Act* defines 'manufactured' as including 'grown, extracted, produced, processed and assembled'. It was found that '[t]hese words of extension clearly cover the activities of a corporation such as Barclay Oysters which grows, harvests, cleans, depurates and packs oysters for distribution to retailers': *Ryan* (1999) 102 LGERA 123, 223.

6 Ibid 222.

7 The claims against Graham Barclay Distributors under ss 74B–74D failed because Graham Barclay Distributors had not 'manufactured' the oysters (that having been done by Graham Barclay Oysters): ibid 224.

8 Ibid 223.

9 Ibid 225.

10 Ibid 227.

deceptive conduct under s 52 (said to arise from a failure to give a warning about the oysters) was also rejected.[11]

Thus, at first instance, there was a finding of negligence against the Graham Barclay companies, the Council and the State. In addition, it was found that Graham Barclay Oysters had breached s 74B and s 74D of the *Trade Practices Act*. On appeal, the Full Court of the Federal Court (by majority) upheld the findings of negligence against the Graham Barclay companies and the State of New South Wales,[12] but (by differently-constituted majority) overturned the finding of negligence against the Great Lakes Council.[13] The findings of liability against Graham Barclay Oysters under the *Trade Practices Act* were upheld unanimously.

Special leave to appeal to the High Court was granted. The findings that Graham Barclay Oysters had breached the *Trade Practices Act* were not challenged in the High Court, but the findings relating to negligence were each brought before the Court.

II PROSPER THE GOVERNMENT: NO DUTY OF CARE OWED BY THE STATE OR THE COUNCIL

In *Graham Barclay Oysters Pty Ltd v Ryan* ('*Graham Barclay Oysters*'),[14] the High Court considered in detail the circumstances in which a public authority may be liable under the tort of negligence for exercising or failing to exercise its statutory powers. As a result of the judgments handed down, the liability of public authorities in negligence actions has been significantly reduced.[15]

The claims against the State alleged negligence by the Minister for Fisheries, the Shellfish Quality Assurance Committee and the Wallis Lake Shellfish Quality Assurance Committee (both statutory committees under the Minister for Fisheries), and the Environment Protection Authority, all for failing to ban oyster harvesting at Wallis Lake; and negligence by the Director-General of the Department of Health and the Minister of Health, for failing to prevent the sale of oysters unfit for human consumption.[16] The case against the Council alleged negligence for failing to exercise environment protection and planning powers that may have allowed the Council to reduce or eliminate sources of viral contamination in Wallis Lake.

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11 Ibid.

12 *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307 (Lee and Kiefel JJ, Lindgren J dissenting).

13 Ibid (Lindgren and Kiefel JJ, Lee J dissenting).

14 (2002) 194 ALR 337.

15 See *Saitta Pty Ltd v Commonwealth* [2003] VSC 346 (Unreported, Williams J, 12 September 2003) [230]–[231] for an example of a brief dismissal of a negligence claim against the Commonwealth government. See also *Bell v Australian Capital Territory* [2003] ACTSC 55 (Unreported, Higgins CJ, 9 July 2003) [57]–[59].

16 *Graham Barclay Oysters* (2002) 194 ALR 337, 378–9.

A The Common Approach

The leading High Court judgment is that of Gummow and Hayne JJ, with whom Gaudron J agreed.[17] Justices Gummow and Hayne began their analysis by observing that a duty of care is not established merely by showing that a public authority had knowledge of a risk of harm and a power to minimise that risk.[18]

Rather, the existence of a duty of care on the part of a public authority depends on the 'terms, scope and purpose' of the relevant statutory provisions. The purpose of examining the statute is to determine 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'.[19]

This was said to be 'a multi-faceted inquiry', which needed to examine a variety of issues. Their Honours considered the most salient factors to be:

> the positions occupied by the parties on the facts as found at trial … 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 … and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute.[20]

Their Honours emphasised the importance of control, noting that 'control … is not established by noting the Council's powers in respect of some or most of the sources of faecal pollution'.[21] Although the Council possessed power to control some sources of faecal pollution, between the Council and consumers stood an entire commercial industry over which the Council had no control.[22] Accordingly, the Council failed the test of control over the risk of harm which ultimately materialised.[23]

The argument against the State rested on a submission that the state enjoyed 'substantial managerial control' over the lake by virtue of its ownership, the fact it granted oyster leases at the lake and administered aquaculture permits, its control over the depuration process,[24] and its statutory powers to mitigate pollution and prohibit oyster harvesting which may have been able to be used.[25]

However, Gummow and Hayne JJ stated that the statutory scheme governing oyster growing reflected:

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17 Individual judgments were delivered by Gleeson CJ, McHugh, Kirby and Callinan JJ.

18 *Graham Barclay Oysters* (2002) 194 ALR 337, 375.

19 Ibid.

20 Ibid 376 (citations ommitted).

21 Ibid 377.

22 Ibid 378.

23 Ibid.

24 Health regulations required that oysters be depurated for at least 36 hours. Depuration is a process where, 'oysters are placed in tanks of clean and disinfected estuarine water to which ultra-violet light is applied to destroy viruses and bacteria in the water'. Whilst this period of depuration is normally effective, evidence at the trial revealed that it was not satisfactory if the oysters came from heavily polluted waters, such as those of Wallis Lake at the relevant time: ibid 356–357 (McHugh J).

25 Ibid 379.

> a political decision by the State to enlist shellfish industry participants in a system of industry-funded self-regulation or co-regulation, rather than to impose on that industry a publicly funded regulatory regime … A decision of that nature involves a fundamental governmental choice as to the nature and extent of regulation of a particular industry. It is in a different category to those public resource allocation decisions which, in the manner described in *Brodie v Singleton Shire Council*,[26] may be considered in determining the existence and breach of a duty of care by a public authority.[27]

Justices Gummow and Hayne held that the State did not owe a duty of care to oyster consumers. It had not been shown that the State was aware of any particular risk to consumers, and that was sufficient to release the State from liability.[28]

Justice McHugh similarly began his judgment by examining, 'the words and policy of the legislation'.[29] His Honour noted that it is common for legislation to vest discretionary power in public authorities in order to protect the community. However, even in a case where mandamus might issue to a public authority to consider taking action under a statutory duty,

> [u]nless the proper inference from the statute is that an individual has 'a personal right to the due observance of the conduct, and consequently a personal right to sue for damages if he be injured by a contravention',[30] breach of the statutory duty does not sound in damages.[31]

Rebutting the proposition that the State enjoyed significant managerial control over the oyster industry, McHugh J analysed the facts, determining that 'these matters mean no more than that the Executive government of the State was exercising or could exercise various powers given to it by its legislature. They do not constitute "control" of the industry in any relevant sense'.[32]

Although McHugh J pointed out that the likelihood of a duty of care arising 'increases where the power is invested to protect the community from a particular risk and the authority is aware of a specific risk to a specific individual',[33] neither the Council nor the State satisfied those criteria in this case.

Justice Kirby was generally in agreement with the approach and conclusions of the other members of the High Court on the liability of both the State and the Council,[34] explicitly agreeing with the joint judgment on the issue of the liability of the State.[35]

In his reasons, Callinan J emphasised that the State did not have 'day-to-day control'.[36] He collected a series of factors, being 'vulnerability, power, control, generality or particularity of the class', and 'the resources of, and demands upon

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26 (2001) 206 CLR 512, 559–60.
27 *Graham Barclay Oysters* (2002) 194 ALR 337, 383–4.
28 Ibid 384.
29 Ibid 357.
30 *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 404 (Kitto J).
31 *Graham Barclay Oysters* (2002) 194 ALR 337, 358.
32 Ibid 363.
33 Ibid 359.
34 Ibid 402–4.
35 Ibid 403.
36 Ibid 423.

the authority', but concluded that while each may be relevant in a given case, 'none should … of itself be decisive.'[37] In the end, Callinan J proposed a test which asked if there was:

> something in all of the circumstances, including of course the terms of the conferral of the powers, which requires that the power be coupled with a duty; or … irrationality in an abstention from exercising the power or some other exceptional matter, or indicator of an intention to permit a person to sue.[38]

B The Chief Justice and the Separation of Functions of Government

The High Court was unanimous in its findings that no duty of care was owed by the State or the Council. However, it is worth commenting separately on the judgment of Gleeson CJ, which deals explicitly with issues relating to the separation of the functions of government.[39]

For Gleeson CJ, the separation of the legislative, executive and judicial functions of government was a dominant consideration:

> Citizens blame governments for many kinds of misfortune. When they do so … they are inviting the judicial arm of government to pass judgment upon the reasonableness of the conduct of the legislative or executive arms of government; conduct that may involve action or inaction on political grounds … Courts have long recognised the inappropriateness of judicial resolution of complaints about the reasonableness of governmental conduct where such complaints are political in nature.[40]

His Honour went on to state that 'setting priorities by government for the raising of revenue and the allocation of resources is essentially a political matter', with the consequence that 'if the reasonableness of such priorities is a justiciable issue, that can be so only within limits'.[41] It is clear that Gleeson CJ was keen to eschew any notion that the judiciary might be involved in reviewing resource allocation decisions.

This led Gleeson CJ to derive a rule for the justiciability of negligence claims against public authorities, holding that, '[t]here will be no duty of care to which a government is subject if, in a given case, there is no criterion by reference to which a court can determine the reasonableness of its conduct'.[42] Applying this rule of justiciability, the fundamental flaw for Gleeson CJ was

> the proposition that the State had a legal duty of care, owed to oyster consumers, obliging it to exercise greater control (and, presumably, to permit less industry self-regulation) takes the debate into the area of political judgment. By what criterion can a court determine the reasonableness of a government's decision to allow an industry a substantial measure of self-regulation?[43]

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37 Ibid 428.

38 Ibid.

39 Chief Justice Gleeson does not delve into the strict separation of judicial power which is affected by Ch III of the *Australian Constitution*, but comments about the consequences of the separation of the legislative, executive and judicial functions of government more generally.

40 *Graham Barclay Oysters* (2002) 194 ALR 337, 340–1.

41 Ibid 341.

42 Ibid 344.

43 Ibid 347.

The notion that a political choice to permit industry self-regulation might be given legal consequences through the tort of negligence was anathema to Gleeson CJ, and the existence of a duty of care owed by the State was rejected. The Chief Justice added that a 'power to protect the general public does not ordinarily give rise to a duty owed to an individual or to the members of a particular class'.[44]

Similar analysis was fatal to the case against the Council, Gleeson CJ stating that:

> the circumstance that, in the public interest, certain powers of regulation of activity within its area are vested by statute in the Council does not mean that the Council owes a legal duty to individuals or classes of person whose health may be affected, directly or indirectly, by decisions made as to the exercise of those powers.[45]

The almost inevitable conclusion that the Council's powers were conferred 'for the benefit of the public generally; not for the protection of a specific class of persons'[46] released the Council from any duty of care to oyster consumers.

It must surely be a rare case where it is possible to say that powers have been conferred on public authorities with the intention of protecting a specific class of persons rather than for the benefit of the public generally. If it is only in such a case that a public authority will be held to owe a duty of care to members of that class, the number of successful negligence actions against governments in Australia will be limited indeed.

III SUFFER THE PRACTITIONER

After dealing with the liability of the public authorities, the judgments turned to consider the liability in negligence of the Graham Barclay companies. This inquiry required an application of the ordinary principles of the law of negligence. It proved to be a more difficult exercise than might be expected.

A Negligence by the Graham Barclay Companies?

All members of the High Court accepted that the risk of injury to oyster consumers, by infection with the hepatitis A virus, was a reasonably foreseeable consequence of the actions of the Graham Barclay companies. The more difficult issue was what the Graham Barclay companies had to do to satisfy their consequent duty to take 'reasonable care' in all of the circumstances.

Their Honours agreed that the answer to this question is to be found in the application of the relevant principles from the case of *Wyong Shire Council v Shirt* ('*Wyong Shire Council*'),[47] which ask:

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44 Ibid 347–8.
45 Ibid 348–9.
46 Ibid 379.
47 (1980) 146 CLR 40.

> what a reasonable man would do by way of response to the risk. The perception of the reasonable man'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 and any other conflicting responsibilities which the defendant may have.[48]

There were two relevant suggestions made by the plaintiffs as to actions which would have been reasonable on the part of the Graham Barclay companies. First, that a warning about possible viral contamination of the oysters should have been given. Secondly, that oyster harvesting should have been suspended for a greater period of time until the safety of the oysters would have been better assured.

The court was unanimous in holding that reasonable care did not require the issuing of a warning about the potential dangers of HAV contamination. All the judges agreed that issuing a warning would be likely to destroy oyster sales, and that this therefore was not a reasonable response to a very low risk of harm.[49] Justice Kirby noted that, although warnings 'can and do play an important part in the discharge of a duty of care', in this case a warning was not necessary.[50]

Having unanimously rejected the possibility of a warning, it was the alternative of a suspension of oyster harvesting that divided the judges. The majority concluded that a reasonable response to the reasonably foreseeable risk to oyster consumers did not require the Graham Barclay companies to cease harvesting oysters, and that accordingly the Graham Barclay companies had not been negligent.

Justices Gummow and Hayne (with whom Gaudron J agreed) concluded that a cessation of oyster harvesting would represent 'alleviating action of the most difficult, expensive and inconvenient type' and would therefore be required only if 'the magnitude of the risk and the degree of probability of its occurrence are great indeed'.[51] In this case, the chance of the risk materialising was simply too low to require such extreme alleviating action.

If there is one dominant feature in the majority application of the principles from *Wyong Shire Council*, it is the fundamental importance of reasonableness. In his reasons, McHugh J particularly noted this feature:

> No doubt the magnitude of the risk, if it eventuated, was high. But so are the magnitudes of many risks that reasonable people run because the alternative is too costly or too inconvenient. The magnitude of the risk of being involved in a motor car accident is very high, and the risk could be minimised, if not eliminated, by no car ever travelling at more than 10 kilometres per hour. But few would contend that travelling at 10 kilometres per hour was the only reasonable response to the risk of a motor car accident.[52]

For the majority, despite the high magnitude of the risk, the apparently very low degree of probability of that risk materialising was not sufficient to require a

48 Ibid 47–8 (Mason J, Stephen and Aickin JJ agreeing). This test was applied in *Graham Barclay Oysters* (2002) 194 ALR 337, 353 (Gleeson CJ), 366 (McHugh J), 387–8 (Gummow and Hayne JJ, with whom Gaudron J agreed), 404–6 (Kirby J).

49 *Graham Barclay Oysters* (2002) 194 ALR 337, 350 (Gleeson CJ), 367 (McHugh J), 390 (Gummow and Hayne JJ).

50 Ibid 405.

51 Ibid 390.

52 Ibid 367.

reasonable oyster grower to close down.[53] Accordingly, Graham Barclay Oysters had not been negligent in continuing to harvest oysters in the face of a very low risk of serious injury to consumers due to possible contamination of the oysters.

In dissent on this issue, Gleeson CJ did not wish to disturb the finding that the Graham Barclay companies had been negligent.[54] Justice Callinan also dissented, stating that 'by a combination of inspections … and a suspension of harvesting for longer than a few days, the risk might have significantly been reduced'.[55]

Justice Kirby joined in dissenting on the liability of the Barclay companies, holding that more could and should have been done, including suspension of oyster harvesting for a longer period, and further testing and depuration of the oysters. Justice Kirby decided that

> in the circumstances of Mr Barclay's knowledge that heavy rain would have increased the viral load in the lake's waters … the conclusion was open that insufficient was done by the Barclay companies to protect consumers in the face of specific awareness of a known and potentially serious risk and that, if more had been done, it could have reduced or eliminated that risk.[56]

The majority, however, held that the Graham Barclay companies were not liable in negligence, as neither issuing a warning nor suspending oyster harvesting was necessary to demonstrate that reasonable care had been taken to avoid the reasonably foreseeable risk of injury to oyster consumers posed by a potential HAV infection.

B The Search for Doctrinal Clarity

While clarifying issues relating to the negligence of public authorities, perhaps the only sure result of the *Graham Barclay Oysters* case is continuing uncertainty in the law of negligence generally. This is a topic which considerably energised Kirby J.

Justice Kirby began his judgment expressing the hope that:

> One day this Court may express a universal principle to be applied in determining such cases. Even if a settled principle cannot be fashioned, it would certainly be desirable for the Court to identify a universal methodology or approach, to guide the countless judges, legal practitioners, litigants, insurance companies and ordinary citizens in resolving contested issues about the existence or absence of a duty of care, the breach of which will give rise to a cause of action enforceable under the common law tort of negligence.[57]

Regrettably, *Graham Barclay Oysters* was not to be the case where that occurred. Justice Kirby cited with apparent approval a description of the state of the law of negligence as doctrinal chaos,[58] before claiming that the current state

53 Ibid 368.
54 Ibid 353.
55 Ibid 431.
56 Ibid 405.
57 Ibid 392.
58 Ibid 392, citing Christian Witting, 'The Three-stage Test Abandoned in Australia – or Not?' (2002) 118 *Law Quarterly Review* 214, 214.

of the law imposes intolerable burdens upon legal actors.[59] Indeed, Kirby J went on to say that

> once a decision-maker passes beyond … elementary principles of agreed doctrine, he or she enters a realm of great uncertainty in which there is no principle that currently commands universal assent, unless it be that such a principle is not presently discoverable.[60]

Justice Kirby's dissatisfaction stems in part from the rejection by the High Court of his preferred approach, the three-stage test applied by the House of Lords in *Caparo Industries v Dickman* ('*Caparo*').[61] It is the rejection of this approach, charged Kirby J, that has led Australian courts through a series of attempts to propound 'alternative and different tests for establishing the existence of a duty of care', each of which Kirby J said has 'collapsed under the demonstration of the inadequacy of the propounded words to perform all of the functions expected of them'.[62]

It is with clearly evident displeasure that Kirby J accepts the demise of the *Caparo* approach in Australia:

> In the face of this explicit disapproval of the *Caparo* approach, my duty is to conform to the opinion that the majority of this Court has stated … Nevertheless, I relinquish my adherence to the *Caparo* approach with reluctance. It is, after all, the methodology adopted in the major common law legal systems with which Australian judges are familiar. It at least provides a methodology or approach for the determination of a complex question, which a search for the so-called 'salient features' of a case does not.[63]

Justice Kirby is not merely frustrated that his view has not been accepted, but is concerned that the current state of the law of negligence is uncertain. Following the demise of the *Caparo* approach in Australia, and the rejection of the proximity principle,[64] the 'salient features' approach has now been clearly adopted by the High Court. The problem with this approach is that the term 'salient features' would appear to have little content beyond that encompassed in the terms 'material facts' or 'relevant considerations'.

Determining the 'salient features' may be a necessary pre-condition to reaching a conclusion on negligence. But finding the 'salient features' alone cannot be sufficient, for the facts in the end must be subject to some sort of legal test. The question is, at what point do a collection of 'salient features' become of sufficient weight to attract a duty of care under the tort of negligence?

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59 *Graham Barclay Oysters* (2002) 194 ALR 337, 392.
60 Ibid 393.
61 [1990] 2 AC 605.
62 *Graham Barclay Oysters* (2002) 194 ALR 337, 398.
63 Ibid 400.
64 *Sullivan v Moody* (2001) 207 CLR 562, 578.

Justice Kirby goes on to propose that

> liability should therefore be imposed where it was judged that a reasonable person in the defendant's position *could* have avoided damage by exercising reasonable care and was in such a relationship to the plaintiff that he or she *ought* to have acted to do so. … This is always the ultimate question that must be answered in all cases of a disputed duty of care in negligence. Somehow in the end accumulated facts must be turned into an 'ought'.[65]

In *Graham Barclay Oysters*, Gleeson CJ sought 'a judgment as to the reasonableness of the conduct' of the alleged tortfeasors.[66] Justice Kirby applied the test derived in his joint judgment with Gummow J in *Tame v New South Wales*,[67] holding that 'a duty of care will be imposed when it is reasonable in all the circumstances to do so'.[68] Justices Gummow and Hayne asked 'what a reasonable person in the position of the defendant would do by way of response to the reasonably foreseeable risk'.[69] Justice McHugh paraphrased *Donoghue v Stevenson*[70] to formulate the proposition that '[t]he duty of care owed by a manufacturer or producer to a consumer is a duty to take reasonable care to avoid injury to the consumer'.[71]

These tests are all very similar to the famous dictum of Lord Atkin in *Donoghue v Stevenson* that '[y]ou must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour'.[72] There would appear to be considerable force in the following observation of Kirby J:

> Perhaps this is the ultimate lesson for legal theory in the attempted conceptualisation of the law of negligence and the expression of a universal formula for the existence, or absence, of a legal duty of care on the part of one person to another. The search for such a simple formula may indeed be a 'will-o-the wisp'. It may send those who pursue it around in never-ending circles that ultimately bring the traveller back to the very point at which the journey began. Thus we seem to have returned to the fundamental test for imposing a duty of care, which arguably explains all the attempts made so far. That is, a duty of care will be imposed when it is reasonable in all the circumstances to do so … it is obvious that the 'touchstone' of reasonableness is fundamental to … the existence or otherwise of a duty of care. So after 70 years the judicial wheel has, it seems, come full circle.[73]

Graham Barclay Oysters is part of the continuing evolution of the law of negligence in Australia following the rejection of proximity in *Sullivan v Moody*.[74] It may well be that any attempt to state the law of negligence in Australia after the *Graham Barclay Oysters* case will be limited to saying that a

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65 *Graham Barclay Oysters* (2002) 194 ALR 337, 401 (emphasis in original).
66 Ibid 353.
67 (2002) 191 ALR 449.
68 *Graham Barclay Oysters* (2002) 194 ALR 337, 402. See also *Tame v New South Wales* (2002) 191 ALR 449, 493.
69 *Graham Barclay Oysters* (2002) 194 ALR 337, 388 (Gummow and Hayne JJ).
70 [1932] AC 561.
71 *Graham Barclay Oysters* (2002) 194 ALR 337, 366.
72 *Donoghue v Stevenson* [1932] AC 561, 580.
73 *Graham Barclay Oysters* (2002) 194 ALR 337, 402.
74 (2001) 207 CLR 562.

court must analyse the 'salient features' of the relationship between the parties in order to determine whether an alleged tortfeasor acted reasonably in response to a reasonably foreseeable risk. The principles from *Wyong Shire Council* may enjoy considerable judicial support, but their application is far from certain, a matter illustrated by the split of four judges to three on the High Court in the *Graham Barclay Oysters* case. It would appear that it is not currently possible to further define all that is encapsulated in the word 'reasonable'.

C An Issue for the Future: Legislative Pre-emption of the Common Law

Four of the judgments also referred to the issue (not argued before the lower courts in this case) of the relationship between the *Trade Practices Act* and the common law of negligence. In doing so, the judges flagged an issue for the future relating to legislative pre-emption of the common law.

Referring to his earlier discussion of the issue in *Crimmins v Stevedoring Industry Finance Committee*,[75] Kirby J viewed the issue as requiring a consideration of whether both common law and statutory liability can co-exist, adding that this issue might arise generally, not only for the law of negligence. Justice Kirby's comment on the possible operation of such a legislative pre-emption of the common law was:

> If, for example, it is clear that a legislature, with full constitutional powers to do so, has, in effect, completely and exhaustively covered the applicable subject matter of legal regulation, it will not be competent for a court to add to the legislative design additional and inconsistent legal duties which the court attributes to general principles of the common law. In such a case, the statutory provisions will expel the common law's capacity to so prescribe.[76]

The issue not being expressly raised before the lower courts in this case, Kirby J was content to proceed to decision without detailed consideration of any possible legislative pre-emption of the common law.[77] Chief Justice Gleeson, noting that this is an issue of potential interest, declined to consider it in this case for the same reason.[78]

Justice McHugh referred to the pre-emption doctrine of the United States, which in certain circumstances restricts the development of the common law where comprehensive statutory provisions have been enacted dealing with the same issues.[79] His Honour noted that it remains to be seen whether such an approach might be adopted in Australia, although McHugh J had already stated in *Crimmins v Stevedoring Industry Finance Committee*[80] that any 'cutting across' of a statutory scheme by the common law would be a relevant policy consideration in considering the imposition of a duty of care.[81]

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75 (1999) 200 CLR 1, 76–80.
76 *Graham Barclay Oysters* (2002) 194 ALR 337, 396.
77 Ibid.
78 Ibid 349–50.
79 Ibid 371.
80 (1999) 200 CLR 1.
81 Ibid 51.

Specifically in relation to overlap between the law of negligence and the *Trade Practices Act*, Gaudron J commented that if the common law developed to a point where it imposed 'more onerous obligations' than the relevant statutory law, an issue would arise as to whether 'those provisions had supplanted the general law'.[82]

On the approach suggested by Gaudron J, this issue apparently would arise only if the common law of negligence imposed a higher standard than the relevant statute. The pre-emption approach mentioned by McHugh J, and the approach of Kirby J, are potentially broader, and might apply where comprehensive legislation had, in effect, covered the field of legal regulation on a particular subject.

It is impossible to draw any more about legislative pre-emption of the common law from the judgments in *Graham Barclay Oysters*.[83] The issue having not been raised at trial, it was not necessary for the judges to finally determine this issue, nor to define tests for determining whether or not a subject matter has been 'completely and exhaustively covered' and whether or not common law duties are, in fact, 'inconsistent' with a statutory regime. One possible source for such tests is the High Court's jurisprudence on inconsistency (including the concept of 'covering the field') arising under s 109 of the *Australian Constitution*. It is not clear, however, whether such tests could be transferred to the issue of legislative pre-emption of the common law, and the Court has not itself suggested such an approach.

It remains to be seen whether the judges of the High Court return to this issue in the future. In large part, that will depend on whether serious argument is addressed to the Court on this issue. The invitation to do so has clearly been made. For now, legislative pre-emption of the common law remains an interesting topic for the future.

IV CONCLUSION

The High Court was ultimately unanimous in its rejection of liability in negligence on the part of the Council and the State. A coherent approach to the issue of negligence by public authorities was adopted. However, the court divided on the liability in negligence of the Graham Barclay companies, the majority holding that the Graham Barclay companies were not liable in negligence.

Thankfully for Mr Ryan and his fellow consumers, the findings that Graham Barclay Oysters had breached s 74B and s 74D of the *Trade Practices Act* were unchallenged, and damages flowed accordingly. Governments around Australia

82 *Graham Barclay Oysters* (2002) 194 ALR 337, 354.

83 On legislative pre-emption of the common law of solicitors' negligence in the context of the *Trade Practices Act*, see *Metcash Trading Ltd v Hourigan's IGA Umira Pty Ltd* [2003] NSWSC 683 (Unreported, Young CJ in Eq, 30 July 2003) [50]–[52].

no doubt breathed a sigh of relief as they understood the ramifications of this decision for the liability of public authorities.

The consequences for the law of negligence are significant. A cynic might suggest that lawyers will take delight in the ensuing doctrinal uncertainty. Indeed, it is inevitable that many billable hours will be generated in attempts to mould collections of 'salient features' into conclusions about conduct being reasonable or unreasonable. However, more serious issues are at play.

The outcome was not a victory for certainty in the law of negligence, but rather a recipe for uncertainty extending into the future. Assessing the 'salient features' of a case to determine whether conduct was reasonable in all the circumstances is not an inherently improbable exercise to expect a court to perform. However, the difficulty with this approach lies in its lack of predictive power, giving legal actors little guidance about what is, or is not, reasonable. In a world full of issues about which reasonable minds may differ, the law of negligence cannot be left to drift on the sea of uncertainty created by the *Graham Barclay Oysters* case.