



GREENWAY CHAMBERS

Pafburn and Beyond: Where to from here?

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Pafburn and Beyond

Agenda

1. Battle of the statutes.
2. What is the duty of care?
3. Outside forces, government responses, the High Court and the duty of care.
4. *The Owners – Strata Plan No 84674 Pty Ltd* [2023] NSWSC 116.
5. *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd* [2023] NSWCA 301.
6. Impact of *Pafburn* and future developments?

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Design and Building Practitioners Act
vs
Civil Liability Act



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What is the duty of care?

“A duty of care at common law is a duty of a specified person, or a person within a specified class, to exercise reasonable care within a specified area of responsibility to avoid specified loss to another specified person, or to a person within another specified class.”

Per Gageler J in *Brookfield v Owners Corporation* 61288 at 240



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Duty of Care: formation



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Duty of care: changing shape



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The road to *Pafbun*

2000 – Insurance crisis

- ☐ **market for public liability insurance imploded**
- ☐ **public outcry**



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The road to *Pafburn*

Federal Government response to insurance crisis?

- ☐ **2002 legislative reform**
- ☐ ***Civil Liability Act 2002 (NSW)***

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The road to *Pafburn*

1995 - *Bryan v Maloney* (1995) 182 CLR 609

- High Court held that the builder of a house **does** owe a **duty of care** in tort to subsequent purchasers.



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The road to *Pafburn*

2014 - *Brookfield Multiplex Ltd v Owners Corporation 61288* (2014) 214 CLR 185

- High Court held that **no duty of care** is owed by builders to developers and future owners in claims for pure economic loss.

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December 2018 - Opal Tower



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The road to *Pafburn*

NSW State Government response to building defect crisis?

- **February 2019** – announce legislative reform.
- **June 2020** – *Design and Building Practitioners Act 2020* (NSW).



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2nd Reading Speech - Design and Building Practitioners Bill 2019

“Members would be aware of the recent devastation caused by defective buildings, such as at Mascot and Opal towers. **These incidents, coupled with a number of legal cases,** have **reduced consumer confidence** and provided **uncertainty** about the extent of **protections** available for financial damages or pure economic loss...”



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2nd Reading Speech - Design and Building Practitioners Bill 2019

“Clause 30 expressly provides that **people who carry out construction work owe a duty of care to certain categories of owner**. These owners ...include individual titleholders and subsequent owners of a building, owners corporations... **It is these categories of owner whose protections have been weakened and this bill seeks to protect them.**

This means that **owners of property will be receiving protections** that are owed to them **against any kind of defect** that arises from construction work and will be properly safeguarded under this law.”



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s37 Extension of duty of care

- (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**.

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s39 Duty must not be delegated

- A person who owes a **duty of care** under this Part is **not** entitled to **delegate** that duty.

s41 Relationship with other duties of care and law

- Part 4 of the DBP Act is subject to the Civil Liability Act: s 41(3)

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5Q Liability based on non-delegable duty

- (1) The extent of **liability in tort** of a person (the defendant) **for breach of a non-delegable duty** to ensure that reasonable care is taken by a person in the carrying out of any work or task **delegated or otherwise entrusted to the person by the defendant** is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person in connection with the performance of the work or task.



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The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWSC 116 – (Rees J)

FACTS

1. OC of a strata development in North Sydney sued the builder for damages for breach of duty of care: s 37 of the DBP Act.
2. Builder relied on a proportionate liability defence under Part 4 of the Civil Liability Act – nominates 9 “concurrent wrongdoers”.

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The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWSC 116 – (Rees J)

FACTS

3. The OC applied to strike out the builder's defence.
4. The OC argued that *Part 4 of the Civil Liability Act* **does not apply** to the duty of care owed to it by the builder, because the duty is **non-delegable**.

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The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWSC 116 – (Rees J)

- Part 4 of the Civil Liability Act (proportionate liability) **does** apply to a claim for breach of the s37 DBP Act duty of care.
- The s37 DBP Act duty of care is **not** a “**tort**” for the purposes of s5Q of the Civil Liability Act.

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The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWCA 301 – Basten AJA

- Two pathways to determine the issue.
 - **First** – apply harmonious construction approach to statutory construction.
- OR
- **Second** – determine what is a “tort” by operation of s5Q of the Civil Liability Act.

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The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWCA 301 – Basten AJA [43],[53]

1. The party subject to the non-delegable duty of care is liable for the **whole** of the **loss or damage** caused by a breach of duty by a third party: s39 of the DBP Act.
2. This principle in the DBP Act will be **incoherent** if the Civil Liability Act (s36) prevents this outcome: at [53]

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The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWCA 301 – Basten AJA [70]-[87]

1. The issue of what is a “**tort**” by reference to s5Q of the Civil Liability Act?
2. Rejected Builder’s contention that a “tort” did not include a creation by statute, even if the statute operated by creating a “duty of care”.

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The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWCA 301- **Adamson JA** at [11]

- Section 37 DBP Act creates a new cause of action from statute which is to be treated as if it were a cause of action in tort.
- The duty in s 37 is non-delegable: s39. This excludes Part 4 of the Civil Liability Act by implication.

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The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWCA 301- **Adamson JA** at [13]

“To read Part 4 of the Civil Liability Act as applying to an action for breach of a non-delegable duty, whether imposed by the common law or, as in the present case, imposed by statute, would be **entirely inconsistent** with the character of the builder’s duty as non-delegable. In these circumstances, the proportionate liability provisions of the Act can have no sensible application.”



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The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWCA 301

Ward P at [1]

“I agree that the fact that *the duty of care in s 37* of the *Design and Building Practitioners Act 2020 (NSW)* *is non-delegable* (see s 39) *excludes* by necessary implication the provisions of *Part 4 of the Civil Liability Act 2002 (NSW)* dealing with proportionate liability”



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Applying *Pafbun*

- *Pafbun* has limited application due to its facts?
 - applies to claims against **builders** only?
 - does **not** apply to **designers**?
 - applies only to principals who are vicariously liable for their delegates?

OR

- *Pafbun* has broad application beyond its facts?



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Impact of Pafburn?

- Departure from the practical consequences of the High Court decision in *Brookfield v OC* and application of the Civil Liability Act.
- Arguably *Pafburn* requires a change in approach.
- Defendants to s37 DBP Act claims to consider cross claiming to limit liability rather than pleading proportionate liability defences and forcing plaintiffs to join concurrent wrongdoers.

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Future developments following *Pafbun*?

UNCERTAINTY DUE TO:

- special leave application
- possible High Court appeal





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Questions?
