



# Building Newsflash

Local Councils

Building Certifiers

Building Designers

Architects

## Duty of Care

### Purpose

To alert building certifiers of their duty of care when undertaking building certification functions, as emphasised in the following report on a Judgment in the Victorian Supreme Court.

### Background

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#### **“Report - Toomey v Scolaro’s Concrete Constructions P/L and Others**

This is a Judgement of Eames J. in the Victorian Supreme Court on 17 August 2001 in which an award of damages in favour of the plaintiff of \$2.248m was made.

The plaintiff (Mr Toomey) fell over a railing on a stair well at an apartment block at Hawthorn and sustained severe back injuries. The issue of negligence turned upon the interpretation of clause D2.16 of the *Building Code of Australia*. The Code required a balustrade of 1000mm whereas the interpretation was that the final drawing specified the rail at a height of 950mm. The Court stated that the architect was responsible for the design which was approved by the building surveyor in issuing the permit. The error was not detected by the surveyor or the inspector who certified the work. The Court found that the height of the rail at the point where the plaintiff fell was 933.5mm.

The decision provides that a statutory requirement in the Regulations or the Code may give rise to a private right of action where it imposes a duty for the safety of others. This is expressed in the objects of the Code, in this case, to protect the users of the building from the risk of falling. The case establishes that the builder and owner owe a statutory duty to users of a building to ensure that the building, as constructed, meets the requirements of the Regulations and the Code. The relevant plan was considered to be ambiguous and to contain inconsistent dimensions which it could reasonably be foreseen could be misinterpreted by a builder and it was found that the architect and builder had been negligent.

It was held that the building surveyor's duty of care is clearly defined in that he or she is required to know the legislative regime including the Code and must take reasonable care to ensure compliance when issuing the required permits. The duty cannot be discharged by the engagement of inspectors alone as there is a non-delegable duty owed to overview the certification process and to ensure that the inspection is adequate. His Honour stated "... the surveyor is meant to be an expert as to the legislative provisions (and is much more highly qualified than an inspector)... it would be perfectly reasonable that the inspector's opinion of the relevant provisions should be specified so that they might be checked by the surveyor before acting on the certificate". The duty of care is reinforced by Reg 15.2 in that the work performed must be of a professional standard. It was found that there was clear negligence on the part of the building surveyor and the inspector."

### **Reliance on competent persons**

The Victorian legislation provides that a building surveyor may rely upon a certificate of inspection from a registered building practitioner. Similarly, Queensland legislation enables building certifiers to rely upon competent persons to carry out inspections. Notwithstanding, the Judgement reinforces the fact that a building surveyor remains responsible to ensure that compliance is achieved.

In addition to being satisfied the competent person is competent to perform the inspection function, building certifiers should make appropriate enquiries to ensure that inspections are properly performed. The Judgement makes it clear failure to do so may result in the certifier being found negligent, liable, and guilty of professional misconduct.

### **Related Newsflashes**

- Inspection of building work by competent persons (Issue No. 2, 3/8/98)
- The assessment of competent persons (Issue No. 42, 22/12/99)

### **Contact Officer**

Please contact Mr John Lamb on (07) 323 71712 should you require further information regarding these matters.