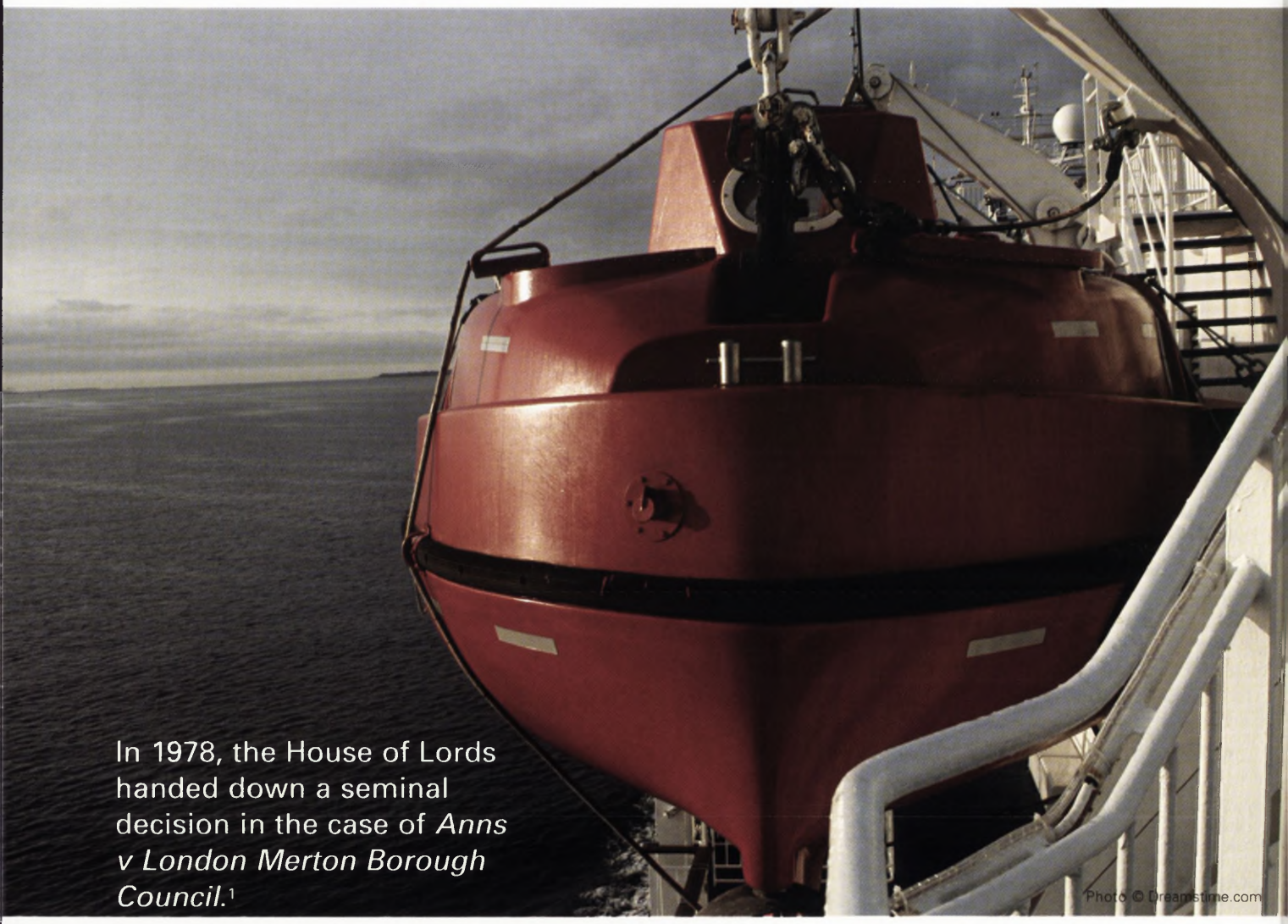
PUBLIC AUTHORITIES' DUTY of CARE

By Kenneth Warner



In 1978, the House of Lords handed down a seminal decision in the case of *Anns v London Merton Borough Council.*[1]

The plaintiffs were leaseholders of a block of flats in London which had been constructed in 1962, prior to their possession. At that time the responsible local authority, Mitchum Borough Council, had approved building plans for the development, which had been lodged by the building company in accordance with by-laws. By the time the plaintiffs had taken possession in 1970, the building was afflicted with obvious symptoms of subsidence, including cracked walls and sloping floors. The plaintiffs alleged that while the plans indicated that the building's foundations were to be constructed at a depth of three feet, they were in fact only two feet six inches in depth, causing damage to the fabric of the building. The council was negligent, it was contended, either in approving those shallow foundations or, alternatively, for failing to inspect and discover that the foundations did not comply with the approved plans. By the time of the trial, Mitchum Council had been superseded by Merton Borough. The House held that the defendants were in breach of a duty of care undertaken towards the plaintiffs, in the exercise of the defendant's statutory powers and duties.[2]

Facts similar to those in *Anns*, a decision since abandoned in its jurisdiction of origin,[3] but accepted and channelled without the same apparent dissatisfaction in other common-law jurisdictions, including New Zealand,[4] and Canada,[5] were raised before the High Court of Australia in *Sutherland Shire Council v Heyman*.[6] In *Heyman*, the plaintiffs were householders who had purchased a Sydney property constructed over steep land with unstable soil, with part of it supported by brick piers and steel columns. Again, this construction was not an adequate foundation for the building, and it did not comply with the original plans lodged with the defendant council with respect to its statutory functions relating to building developments. The outcome in *Heyman* was different to that of *Anns*; the High Court concluded that no duty of care had arisen on the council's part towards the Heymans. But the reasoning, ambiguous as it is, is consistent with the thinking in *Anns*. No duty had arisen, because on the facts the Heymans had not relied on the council to take steps to prevent this damage from occurring, which implies, of course, that on different facts, such a duty *can* arise.

Anns and *Heyman* pose questions that are probably the most difficult issues concerning the liability of the public authority in the field of tort law.[7] Several practical lessons emerge from these two cases. In modern law, a duty of care on the part of the authority very often arises alongside the obvious duty of care owed by the 'primary' tortfeasor (in *Anns* and *Heyman*, the builders). The plaintiff is likely to proceed against the authority, because the authority is both more likely to survive the course of time, and to present a financially viable defendant.[8] These factors, together with the wide-ranging spectrum of functions nowadays generally vested in the public authority by statute, present an extensive potential for suit.

The following attempt to canvass the situations in which the requisite duty of care in negligence will arise adopts something of a realist perspective, focusing upon the type of damage suffered by the plaintiff. This may appear paradoxical, but successfully identifying the *kind* of damage, as accepted by the case-law, apart from the *rationes decidendi*, often provides one with a significant indication as to the existence or otherwise of the duty.

PERSONAL INJURY

The position is straightforward where the damage suffered is personal injury, since the duty usually arises by virtue of the authority's responsibility as 'occupier'. Any difficulty lies within the breach issue, since the standard is that of 'reasonable care', with all its attendant considerations, primarily the magnitude of danger, measured against the difficulty of addressing it, assessed as a matter of fact. In *Brodie v Singleton Shire Council*,[9] the defendants were held liable to a truck driver whose vehicle fell through a timber bridge which had rotted out, having made only superficial repairs to it. In *Ghantous v Hawkesbury City Council*,[10] the defendants were not in breach of the duty of care towards the pedestrian who, stepping aside from a narrow path onto a receded verge, rolled her ankle. The danger was

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not significant, and the average person should have been able to cope with it. Where the level of danger is high, the expectation is that the authority will take some measures to alleviate the risk, otherwise liability will follow, subject to some reduction for contributory negligence where the plaintiff has indulged in some foolhardy activity, such as diving into unknown waters.[11] In a rare case, it may be necessary to examine the nature of the duty. In *Mitchell v Glasgow City Council*,[12] the council's duty as landlord to the plaintiff did not encompass taking steps to protect him from his neighbour's murderous assault.

PROPERTY DAMAGE

Property damage in most cases is readily 'foreseeable' and, as such, a duty of care is owed, since *Dorset Yacht Co v Home Office*,[13] where Borstal boys evaded custody and inflicted considerable damage at a nearby yacht club. In *Pyranees Shire Council v Day*,[14] the High Court of Australia found that a duty was owed by the council through its Shire Engineer when, due to a dangerous chimney in a local commercial premises, >>

a fire broke out that destroyed the property of the tenants and the next-door neighbour, to whose premises the fire spread. For Brennan CJ (similarly, Kirby J) it was sufficient to invoke the duty that the engineer knew of the defective fireplace, and the council must be taken to appreciate those likely to be affected.

PURE ECONOMIC LOSS

That an authority may owe a duty of care with respect to a pure economic loss suffered by the plaintiff was established in *Shaddock v Parramatta City Council*. In the course of ordinary conveyancing procedures, the council's planning department had failed to indicate to the plaintiffs that the property that they were in the process of purchasing was affected by a proposed road development. The damage was the difference between the price paid and the value of the property afflicted by the development. Generalising from this, an authority may assume a duty of care, by proffering advice within its range of expertise.[15]

OTHER DAMAGE

In recent times, litigation has been pursued against public authorities in relation to a range of other types of harm, including psychiatric illness,[16] physical and emotional neglect and suffering,[17] enforced separation of young child from mother,[18] failure to diagnose dyslexia in a young child,[19] and failure to provide a child with a school place.[20] Although the reasoning differs according to the factual context, the trend in terms of liability is clear. The courts have consistently declined to invoke any duty of care with respect to these other, less conventional, kinds of damage. Of particular importance here may be a consideration of the purpose of the exercise of the authority's powers, under the relevant legislation. If, in the view of the court, the imposition of a duty of care in negligence would impede or frustrate the primary purpose of the statutory provisions, this will prove fatal to the claim.

In *Sullivan v Moody*,[21] the plaintiff was the father of three young boys. The mother took them to the sexual assault referral centre where they were examined by two doctors, who diagnosed sexual assault. The plaintiff was charged by the police, but the charges were later withdrawn. The plaintiff claimed that the diagnosis had been negligent. The High Court of Australia held that no duty of care had arisen. The *Community Welfare Act* 1972 (SA) required that the defendants hold the welfare of the child as of paramount interest, and to impose a common law duty of care on them would be inconsistent with their proper functions under the legislation.[22] In the recent case of *Jain v Trent Strategic Health Authority*,[23] in which the authority invoked statutory powers to seek an urgent court order to close down the plaintiffs' nursing home, which destroyed their business, it was held that to impose a duty of care would militate against the primary purpose of the authority's powers: to act for the protection of the elderly residents. In other cases, imposing a duty of care might result in a 'cautious and defensive approach' to the exercise of powers for the benefit of those who are subject of the provisions, and this, again, weighs heavily against the claimant.[24]

READING THE STATUTE

In an action based upon negligence in the exercise of a statutory duty, there are occasions when, in a novel case, it is necessary to construe the relevant legislation more broadly. In particular, the provision of remedial machinery within the Act itself may be taken by the court as an indication that it should be treated as exhaustive, with the result that a common law duty of care will not be invoked.[25] Alternatively, in a situation where a duty does clearly arise, other provisions in the Act may be taken to indicate the scope of that duty. In *Wentworth v Wiltshire County Council*,[26] the plaintiff was a dairy farmer who had been in dispute with the local authority over the responsibility to repair the public road that served his farm. The Milk Marketing Board, which took bulk deliveries from his farm via tankers, claimed that the road had become dangerous to traffic, and discontinued service. As a result, the plaintiff gave up his dairy herd. Approximately one year later the plaintiff successfully applied under the *Highways Act* 1959 for a court order for the defendant authority to repair the road.[27] He then instigated a civil suit to recover his financial loss on the dairy business from the defendants. It was held that the defendants were under no duty of care in respect of this loss. The Act itself provided machinery for the redress of the neglect of this specific duty on the part of the authority. In addition, other sections of the same legislation indicated that if any distinct common law duty of care in negligence did arise, it would be restricted to injury or damage to the property of road-users caused by the dangerous condition of the road.[28]

RESIDUAL ISSUES: MISFEASANCE; NON-FEASANCE

The case-law shows reluctance on the part of the courts to impose a common-law duty of a care, where to do so would require the authority to engage in a venture involving a considerable expenditure of resources. This resource/operational distinction is really one of degree; maintaining traffic lights costs money, but there is surely a duty on the responsible authority's part to do so. However, the authority cannot be expected to provide traffic lights at every intersection. As a general proposition, it may be stated that where the resource issue presents itself, it is less likely that a duty of care in negligence will be found, but it is not the case that such a duty cannot arise. In *Stovin v Wise*,[29] the plaintiff was riding a motor-cycle when a motorist drove out from a road on the left and the plaintiff was seriously injured in the subsequent collision. In recent years, there had been three such reported accidents at this location, where a bank obscured visibility from the intersection. Warning signs and road markings would not have assisted. The bank was on land owned by British Rail, with whom the defendant authority had met, and proposed having part of the bank removed at its expense. At the time of the accident, British Rail had not responded to the defendant's

proposal. The authority was found liable in negligence. Having decided to devote resources to the danger, the authority had brought itself under a duty towards the travelling public to act with reasonable expedition.[30]

DUTIES AND POWERS

Connected to the idea of non-feasance is the dichotomy between a statutory duty and a power; modern legislation conferring functions on public authorities frequently contains extensive reference to both. Logically there is a distinction, since 'duty' implies an obligation upon the duty-bearer to act, whereas 'power' implies some sort of discretion as to whether to act or not. In the case of a power, then, if the authority takes no action, can it be said that no duty of care can arise? The answer is no.[31] The matter was considered by the High Court of Australia in *Sutherland v Shire Council v Heyman*.[32] A duty of care may arise where the public has a reasonable expectation that the authority will exercise functions, and will do so with due care, or has been placed in a position where it is reasonably relying upon the authority to exercise those functions.[33] ■

Notes: **1** [1978] AC 728. **2** *Anns* liability was not new. In *Dutton v Bognor Regis UDC* [1972] QB 373, the English Court of Appeal found the council to be under a duty of care and liable, but the general potential for suit at that time was not nearly so extensive. **3** In a series of judicial reviews culminating in *Murphy v Brentwood District Council* [1990] 3 WLR 414. **4** *Stiella v Porirua City Council* [1986] 1 NZLR 84. **5** *City of Kamloops v Neilson* (1984) 10 DLR (4th) 641. **6** [1985] 157 CLR 424. **7** In the building inspection cases, there is the question as to the point at which the cause of action arises. At first instance in *Anns*, the learned judge held that the plaintiff's claim was time-barred, as indeed it would be if the damage occurred at the time of inspection or no inspection, and that proposition would almost certainly in practical terms protect the authority from continuing liability. But this finding was reversed on appeal. Time would run from the point at which the plaintiff had reasonable opportunity to appreciate the existence of such damage. The point was not directly raised in *Sutherland Shire Council v Heyman*, although Mason J refers to the damage in terms of cracking and bowing of the house. There is also the matter of categorisation of damage. In the House of Lords, Lord Wilberforce (roundly criticised by Professor Weir for so doing; Tony Weir, *A Casebook on Tort*, 5th Ed, p62) preferred to regard the loss as equivalent to 'property damage', rather than as a claim for economic loss. The view of Mason and Brennan JJ in *Sutherland Shire Council v Heyman* was that, for duty purposes, it doesn't matter (although one surmises that for purposes of assessment of damages it might). So with respect to subsequent occupiers of premises, the authority is clearly subject to a continuing duty, as is, after *Bryan v Maloney* (1995) 182 CLR 609, the builder. The practical significance of the latter is that if at the time of suit the builder still exists and is financially viable, the authority may seek a contribution as joint tortfeasor, and it may be a hefty one. **8** The authority may seek a contribution from the primary tortfeasor as joint tortfeasor, but the same practical factors that incline the plaintiff to proceed against the authority rather than the other militate against this. In *Investors in Industry Commercial Properties Ltd v South Bedfordshire District Council* [1986] 1 All ER 787, the builders, civil engineers and architects primarily responsible for the damage were financially inadequate and uninsured. **9** (2001) 206 CLR 512. **10** [2001] 1 HCA 29. **11** *Nagle v Rottnest Island Authority* (1993) 177 CLR 423. Where all measures to address the risk short of closing the facility are exhausted, there is no liability; *Tomlinson v Congleton Borough Council* [2004] 1 AC 46. **12** [2009] UKHL 11. **13** [1970] AC 1004. **14** (1998) 192 CLR 330. **15** It is, therefore, the ordinary negligence duty, founded on *Hedley Byrne v Heller & Partners* [1964] AC 465. In *Welton v North Cornwall District* [1997] 3 WLR 414, the defendant council was found liable when its building inspector gave all manner of erroneous advice about required alterations to the kitchen facility of the plaintiffs' summer guest house. Damages here included a sum for the disruption of the plaintiffs' family life. **16** *Sullivan v Moody* (2001) 207 CLR 562. See also, *D v East Berkshire Community NHS Trust* [2005] 2 AC 373. **17** *X (Minors) v Bedfordshire County Council* [1995] 3 WLR 152. **18** *M (A Minor) v Newham Borough Council* [1995] 3 WLR 152. **19** *E v Dorset County Council*[1995] 3 WLR 152. **20** *The Bromley case* [1995] 3 WLR 152. **21** (2001) 207 CLR 562. **22** Also *Hillman v Black* [1997] Aust Torts Rpts 81-419. **23** [2008] QB 246. **24** *X (Minors) v Bedfordshire County Council*[1995] 3 WLR 152. **25** *Lonrho v Shell Petroleum Co Ltd* [1981] 3 WLR 33. **26** [1993] 2 All ER 256. **27** Under s44(1) 'the highway authority for a highway maintainable at public expense shall…be under a duty to maintain the highway'. Section 59(2)-(10) provides that any person alleging that the highway is out of repair may apply for an order that it be put in repair by the authority within a reasonable time, as specified in the order. **28** Section 5(2), s5(3). **29** [1994] 1 WLR 1124. **30** In *Brodie v Singleton Shire Council* (2001) 206 CLR 512, the High Court of Australia rejected the view that there was 'immunity' for non-feasance under the 'Highway rule', opining that the ordinary principles of negligence apply, involving a consideration of the risk of danger to the public against the resources necessary to alleviate that risk. **31** The older view, in *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74, that the authority is liable only if it decides to act and make matters worse, and then only to the extent of the worsening, is not sound. **32** (1985) 157 CLR 424. **33** See also *Brodie v Singleton Shire Council* (2006) 206 CLR 512, *Pyranees Shire Council v Day* (1998) 192 CLR 330.

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