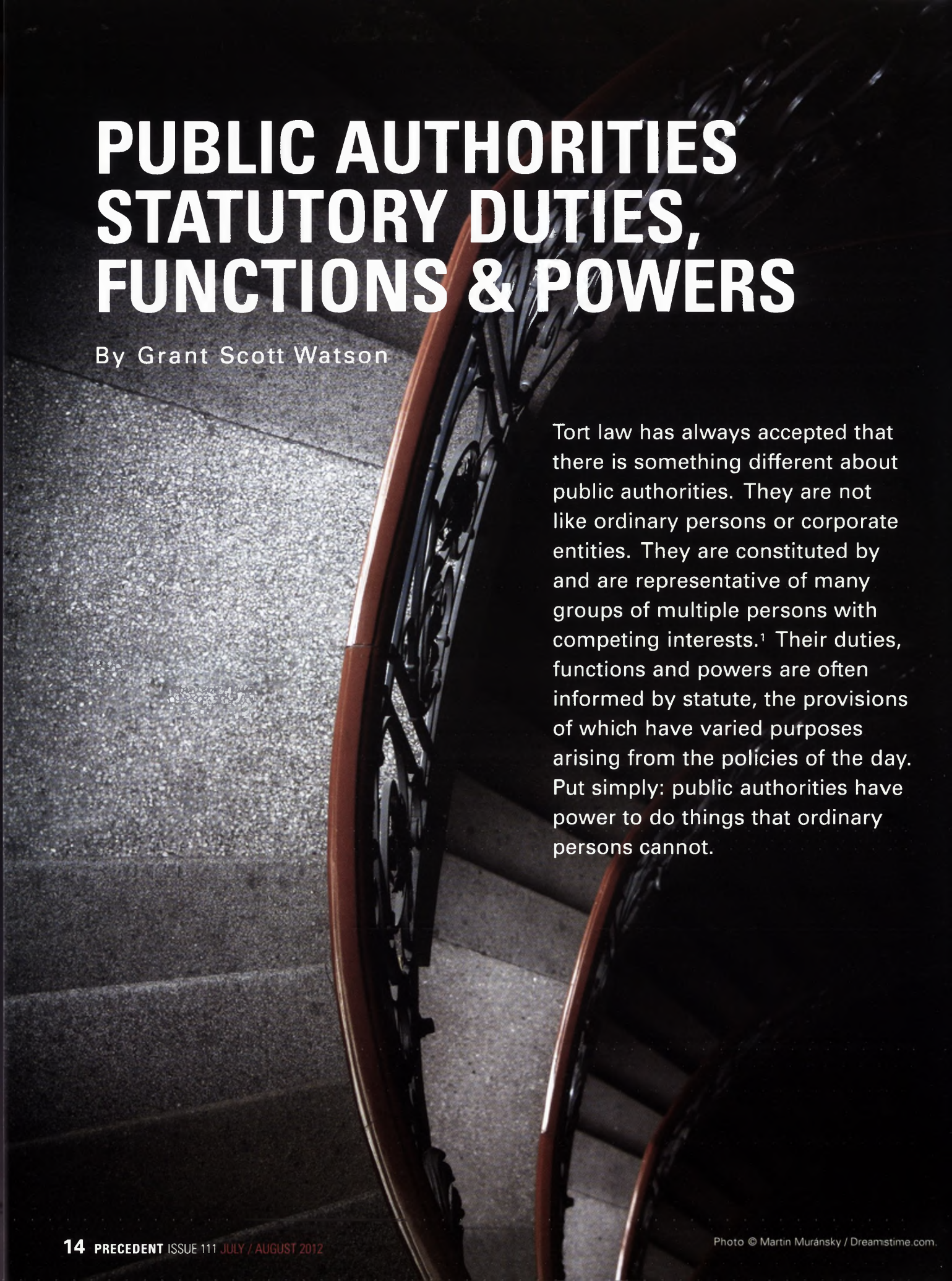
PUBLIC AUTHORITIES STATUTORY DUTIES, FUNCTIONS & POWERS

By Grant Scott Watson



Tort law has always accepted that there is something different about public authorities. They are not like ordinary persons or corporate entities. They are constituted by and are representative of many groups of multiple persons with competing interests.[1] Their duties, functions and powers are often informed by statute, the provisions of which have varied purposes arising from the policies of the day. Put simply: public authorities have power to do things that ordinary persons cannot.

What governments and their agencies can do, and what private law liabilities this can give rise to, are important matters going to the heart of the individual's relationship with the state. It is thus unsurprising that there is continuing controversy in the law as to how to balance appropriately the imposition of tortious duties on public authorities with the nature and responsibilities of those authorities.

This article examines how the common law currently approaches this balancing exercise through the lens of key Australian authorities. It will then review more closely some of the ways that tort reform legislation in each Australian jurisdiction has intervened. Despite a focus on the provisions of Part 5 of the *Civil Liability Act* 2002 (NSW), which go the furthest and have had the most appellate consideration, the various other state and territory Acts will also be considered ('the Civil Liability Acts').[2] This article does not include a consideration of the provisions applicable only to roads authorities.[3]

DUTY OF CARE AT COMMON LAW

At common law in Australia, the controversy over the liability of public authorities for tortious acts or omissions usually arises at the level of determining the existence and content of an authority's duty of care in the tort of negligence. In *Graham Barclay Oysters Pty Ltd v Ryan*[4] Gleeson CJ observed:

> 'Although the first principle is that the tortious liability of governments is, as completely as possible, assimilated to that of citizens, there are limits to the extent to which that is possible. They arise from the nature and responsibilities of governments. In determining the existence and content of a duty of care, there are differences between the concerns and obligations of governments, and those of citizens.'[5]

Sometimes the differences are not great. Establishing some types of duty can be quite straightforward, such as those arising from established categories that apply to classes of persons generally; for example: occupiers' liability,[6] employment relationships,[7] and the professional responsibilities of medical staff at public hospitals.[8]

Outside of these recognised categories, however, usually when attempts are made to establish liability based on the availability or exercise of a power or function under statute, the position is less clear. In *Sutherland Shire Council v Heyman*,[9] after citing over a century of high authority, Mason J confirmed:

> 'It is now well settled that a public authority may be subject to a common law duty of care when it exercises a statutory power or performs a statutory duty.'[10]

As to the circumstances in which that duty may arise, the common law has been less than "well settled". Over the years, the courts have toyed with a number of supposed 'unifying' theories, acknowledging liability based on dichotomies of act and omission; duty and discretionary power; policy and operations; planning and implementation; through to public law-styled *ultra vires* filters; 'proximity' and 'general reliance'. A detailed analysis of the waxing and waning of these theories is beyond the scope of this article; suffice to say that, in the words of Aronson, there are 'a lot of scraps, but very few of these can be safely assigned to the scrap heap'.[11]

So what is the present common law approach? Ipp JA of the NSW Court of Appeal, and chairman of the panel which conducted the Review of the Law of Negligence,[12] provides an illustrative summary and analysis in *Amaca Pty Ltd v New South Wales*.[13] His Honour begins with the doctrine of 'general reliance' from the decision of Mason J in *Sutherland Shire Council v Heyman*,[14] and states:

'(a) Generally, a public authority, which is under no statutory obligation to exercise a power, owes no common law duty of care to do so.

(b) An authority may by its conduct, however, attract a duty of care that requires the exercise of the power.

(c) Three categories are identified in which the duty of care may so be attracted:

(i) Where an authority, in the exercise of its functions, has created a danger.

(ii) Where the particular circumstances of an authority's occupation of premises or its ownership or control of a structure attracts to it a duty of care. In these cases the statute facilitates the existence of a duty of care.

(iii) Where a public authority acts so that others rely on it to take care for their safety.'[15]

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His Honour then incorporates into his analysis the more recent authorities such as *Pyrenees Shire Council v Day,*[16] *Crimmins v Stevedoring Industry Finance Committee*[17] and *Graham Barclay Oysters Pty Ltd v Ryan*,[18] to draw the following general propositions:

'(a) The totality of the relationship between the parties is the proper basis for the determination of a duty of care.
(b) The category of control that may contribute to the existence of a duty of care to exercise statutory powers includes control, generally, of any situation that contains within it a risk of harm to others.
(c) A duty of care does not arise merely because an authority has statutory powers, the exercise of which might prevent harm to others.
(d) The existence of statutory powers and the mere prior exercise of those powers from time to time do not, without more, create a duty to exercise those powers in the future.
(e) Knowledge that harm may result from a failure to exercise statutory powers is not itself sufficient to create a duty of care.'[19]

Although the doctrine of 'general reliance' as a touchstone of liability was rejected by a majority of the High Court in *Pyrenees Shire Council v Day*,[20] Ipp JA does not disregard it. Perhaps this is because, in what is now referred to as the 'salient factors' approach, reliance is just another way of understanding the control of the authority and the vulnerability of the plaintiff.

In *Stuart v Kirkland-Veenstra,*[21] a case where it was unsuccessfully sought to attach a duty of care to police officers in respect of a statutory power to detain mentally ill or suicidal persons, the High Court made its most recent pronouncement on the subject.[22] Gummow, Hayne and Heydon JJ, referring extensively to *Graham Barclay Oysters Pty Ltd v Ryan*,[23] describe the enquiry to be made as follows:

'[112] ... Does that regime erect or facilitate 'a relationship between the authority [here the holder of statutory power] and a class of persons that, in all the circumstances, displays sufficient characteristics answering the criteria for intervention by the tort of negligence'?

[113] Evaluation of the relationship between the holder of the power and the person or persons to whom it is said that a duty of care is owed will require examination of the degree and nature of control exercised over the risk of harm that has eventuated, the degree of vulnerability of those who depend on the proper exercise of the relevant power, and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute. Other considerations may be relevant.

[114] In the present matter, as in a number of cases about the exercise of statutory power, it is the factor of control that is of critical significance.'[24]

In that case, the relevant authorities were police officers who stumbled upon Mr Veenstra apparently having organised an attempt at suicide and did not control the source of the risk, being Mr Veenstra himself. The cases demonstrate that control is often the most critical factor.[25]

The categories of 'salient factors' are not closed. Allsop P in *Caltex Refineries (Qld) Pty Ltd v Stavar* derived 17 of them from the 'non-exhaustive universe of considerations' available.[26] From these, and perhaps with an emphasis on the important factor of control and, to a lesser extent, vulnerability and reliance, some kind of 'synthesis' is then applied in any given case to determine whether or not a duty of care arises.[27]

THE CIVIL LIABILITY ACTS

Each state and territory has now enacted legislation that in various ways seeks to modify, and in most instances restrict, common law liability in tort. All jurisdictions, save for the Northern Territory, have enacted specific provisions in respect of the liability of public authorities;[28] in South Australia's case, limited to roads authorities. The history of these reforms, and their supposed justifications residing in insurance crises; concerns about so-called personal responsibility, and fear of 'Americanisation'; to name a few, are oft-debated and will not be examined here. Rather, the focus will be on the provisions themselves and how they have operated in respect of the tortious liability of public authorities.

A preliminary observation is that, in each jurisdiction, many of the provisions are made applicable not by reference to what a public authority *does*, but rather by reference to *who* the authority *is*. The NSW Act perhaps has the broadest definition of all in s41:

'*public or other authority* means:
(a) the Crown (within the meaning of the *Crown Proceedings Act* 1988), or
(b) a government department, or
(c) a public health organisation within the meaning of the *Health Services Act* 1997, or

(d) a local council, or
(e) any public or local authority constituted by or under an Act, or
(e1) any person having public official functions or acting in a public official capacity (whether or not employed as a public official), but only in relation to the exercise of the person's public official functions, or
(f) a person or body prescribed (or of a class prescribed) by the regulations as an authority to which this Part applies (in respect of all or specified functions), or
(g) any person or body in respect of the exercise of public or other functions of a class prescribed by the regulations for the purposes of this Part.'

The definition is then expanded by regulation to include private schools[29] and, by virtue of the meaning of 'public health organisation' in the *Health Services Act* 1997 (NSW), some private health services.[30] The WA, Victorian and Tasmanian legislation each contain similar definitions.[31] The Queensland definition is more circumscribed,[32] as is the ACT definition, although the latter leaves part of it to subordinate legislation.[33]

Unlike the common law which, to paraphrase the 'first principle' of Gleeson CJ in *Graham Barclay Oysters Pty v Ryan* extracted above, sought to deal with the liability of public authorities in as nearly as possible the same way as ordinary persons, the intention of the Civil Liability Acts is to limit and modify liability for public authorities, irrespective of whether their duties in any particular case stem from recognised categories that could equally apply to ordinary persons (such as occupiers' liability).

Resources

The common law has always recognised that when dealing with public authorities, unlike ordinary persons, the availability and proper allocation of limited resources to mitigate against foreseeable risks are often matters of public policy and ought to be treated somewhat differently. Campbell JA summarises the justification for this in *Roads and Traffic Authority of NSW v Refrigerated Roadways Pty Ltd*:

'[I]t is not open to a statutory authority that has responsibility for administering some field of endeavour conferred on it by statute, to withdraw from that field if it lacks resources to carry out some particular activity that is within its powers. It would ignore reality for a court to proceed on the basis that a statutory authority should be taken to have sufficient resources to carry out all its statutory duties, powers and discretions.'[34]

It has sometimes been unclear as to whether these considerations are properly applied at the duty or breach stages, or some combination of both.

Professor Aronson has persuasively argued that the enquiry about resources at common law in Australia has now shifted from duty to breach.[35] In *Brodie v Singleton Shire Council*,[36] Gaudron, McHugh and Gummow JJ stated clearly:

'Appeals also were made to preserve the 'political choice' in matters involving shifts in 'resource allocation'. However, citizens, corporations, governments and public authorities generally are obliged to order their affairs so as to meet the requirements of the rule of law in Australian civil society... Local authorities are in no preferred position.'[37]

Instead, a majority found that issues of resources were to be considered as part of the matrix of whether the authority acted reasonably.[38] Campbell JA picked this up in the *Refrigerated Roadways* case as demonstrated in the next lines of the previous extract from his decision:

'An effect of this is that the standard by which one decides whether a statutory authority has acted negligently is not the same as that applicable to a private individual or corporation, but rather is the standard of what a reasonable authority, with its powers and resources, would have done in all the circumstances of the case.'[39]

In NSW, Queensland, WA, Tasmania and ACT almost identical provisions have been introduced requiring particular principles to be applied in respect of resources and responsibilities when assessing whether the authority has a duty and whether it has breached that duty:[40]

'(a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions;
(b) the general allocation of those resources by the authority is not open to challenge;
(c) the functions required to be exercised by the authority >>

CLAs have tipped the balance in favour of public authorities in regard to the imposition of liability in tort, especially in respect of the exercise or non-exercise of statutory duties, functions and powers.

are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate); and/or

(d) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.'

The Victorian legislation does not include clause (b),[41] the 'principle' which most obviously modifies the common law.[42]

If applied only to breach, it is difficult to construct a fact scenario where clauses (a), (c) and (d) produce a different result from the common law. At first glance, clause (d) could have some role to play in a case like *Sutherland Shire Council v Pallister*,[43] where the council unsuccessfully sought to rely on its policy of not repairing footpath displacements of less than 20mm. Matthews AJA (Stein JA and Ipp AJA agreeing) found, applying the common law, that the policy, far from allowing the Council to avoid responsibility, was in all probability responsible for its failure to rectify the situation and implicitly part of its failure to exercise reasonable care.[44] If the Council's rather extreme policy could constitute 'general procedures and applicable standards' within the meaning clause (d), perhaps a different result would ensue, but it seems unlikely that the courts would allow public authorities themselves to define these procedures and standards. As to how clauses (a), (c) and (d) could apply at the duty stage, they would at most become factors to be weighed and synthesised as part of the 'salient factors' analysis in novel cases.

While the provisions must be pleaded and particularised by a defendant authority seeking to rely upon them,[45] it remains incumbent on a plaintiff to plead a case that navigates the provisions. Indeed, in some instances the effect of the provisions may simply be a matter of how the case is framed and particularised. In *New South Wales v Ball*,[46] parts of a plaintiff's statement of claim were struck out due to their inconsistency with clause (b) in the NSW Act. Flowing through the particulars of negligence in that case was the allegation that insufficient resources and staff had been allocated to the Child Protection Enforcement Agency, causing the plaintiff to be overworked and sustain injury. Although the infringing parts of the particulars were struck out, the crucial allegation remained: that the defendant chronically overworked the plaintiff.

In *Refrigerated Roadways*, Campbell JA observes that analysis 'needs to be carried out bearing in mind *each particular manner* in which it is alleged a duty of care has been breached',[47] and importantly, that there are different ways of *alleging* failure to exercise reasonable care, which may or may not involve the 'general' allocation of resources.[48] Certainly, some distinction when applying clause (b) needs to be drawn between the 'general' allocation of resources, and the specific. It remains to be seen the extent to which these provisions will impact on claims against public authorities.

Policy defence

Only Western Australia has chosen to implement a version of the Review Committee's[49] 'policy defence', being s5X of the *Civil Liability Act* 2002 (WA) .[50] The section seems to follow the path of *Stovin v Wise*,[51] and prevents a 'policy decision' being used to support a finding that a defendant was at fault unless the decision was 'so unreasonable that no reasonable public body or officer in the defendant's position could have made it'.[52] Section 5U defines a 'policy decision' as one 'based substantially on financial, economic, political or social factors or constraints'. As observed by Pullin JA of the WA Court of Appeal in *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management*, it is not so much a defence, but a direction to courts that a policy decision cannot be used to support a finding of fault.[53] In that case, the WA Court of Appeal found that the Department did not owe a duty of care to the plaintiffs to avoid smoke taint to grapes when planning and implementing a prescribed burn, the result in this instance apparently unaffected by the applicability of s5X.

Statutory duties and functions

In all jurisdictions except South Australia and Northern Territory, the Civil Liability Acts have included a provision in respect of proceedings against public authorities based on 'breach of statutory duty' imposing, like the WA 'policy defence', a test akin to *Wednesbury*[54] unreasonableness.[55] The Queensland provision may indeed be broader, given its use of the word 'function' in the text of the section (despite the heading).[56] The provisions are somewhat curious, given that the tort of breach of statutory duty has been aptly described as having 'almost no life in this country beyond its original context of workplace injuries'.[57] Perhaps rightly, the provisions have thus been attributed with having the practical effect of 'placing the final nail in the coffin' of the now rather obscure tort.[58]

Ipp JA of the NSW Court of Appeal, writing extra-curially, observes the 'virtual silence' about the NSW provision since its commencement, and speculates (and this author believes correctly) that the silence is due to the fact that while in many cases the basic allegation is that the public authority was negligent for failing to exercise its statutory powers, the action itself is a common law action based on a breach

of duty of care.[59] Professor Vines, however, raises doubts about this interpretation, arguing that the section imposes a test of reasonable behaviour, which is a hallmark of the question of breach in negligence and not the tort of breach of statutory duty.[60] The application of the provisions will remain uncertain until they receive substantive judicial consideration.

In NSW, Tasmania and ACT, provisions have also been enacted that prevent public authorities from being found liable based on failures to exercise or consider exercising functions to prohibit or regulate activities, unless the functions could have been required to be exercised in proceedings instituted by the plaintiff.[61] The sections are reminiscent of Lord Diplock in *Home Office v Dorset Yacht Co Ltd*[62] or, more recently, Brennan CJ in *Pyrenees Shire Council v Day*,[63] requiring *ultra vires* or some public law justification before permitting the intervention of the courts. The sections have thus far received little attention. In *Warren Shire Council v Kuehne*,[64] a case where the trial judge found that the test in s44 of the NSW Act was met,[65] the plaintiff was ultimately unsuccessful for other reasons. *In obiter* however, Whealy JA suggested that the section did not require that any proceedings instituted by the plaintiff *would* be successful, merely that they *could* have been, and accordingly that the section is concerned merely with standing.[66] Either way, it is likely that the plaintiff in *Crimmins v Stevedoring Committee*[67] would have had difficulties with the section if it applied.

Finally, on this topic, the NSW, Victorian, WA, Tasmanian and ACT Civil Liability Acts all include a provision to the effect that if a public authority exercises or decides to exercise a function, that fact does not *of itself* indicate the authority is under a duty.[68] The need for these sections is baffling. At common law, such an exercise or decision to exercise a function would not *of itself* indicate that a duty in any event. If the legislature is trying to circumvent cases such as *Pyrenees Shire Council v Day*,[69] it has with respect missed the point. As emphasised by Gummow and Hayne JJ in *Graham Barclay Oysters Pty Ltd v Ryan*, the touchstone of the council's liability in that case was its 'significant and special measure of control' and knowledge,[70] not simply that it had previously decided to act.

Special statutory powers

With s43A of its *Civil Liability Act* 2002, NSW alone has chosen to intervene to restrict liability in respect of the exercise of what are described as 'special statutory powers'. The Queensland and Victorian Acts arguably come close with their supposed 'breach of statutory duty' provisions that refer to 'functions'.[71] The WA 'policy defence' discussed above also may ultimately prove to be similar in application. The perhaps unprincipled origins of the provision have been dealt with elsewhere.[72] The section provides that when the liability of a public authority is based on the exercise or failure to exercise a 'special statutory power' – being a statutory power of a kind that persons are generally not authorised to exercise without specific statutory authority – the authority is not liable unless it was so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power. Like the WA 'policy defence', or the 'breach of statutory duty' provisions, the section imposes a test akin to *Wednesbury*[73] unreasonableness.

The chief controversies arising under the section understandably surround the meaning of 'special statutory power' and the application of the *Wednesbury* unreasonableness test. The courts are yet to resolve either controversy. The High Court in *Sydney Water Corporation v Turano*[74] commented on the 'uncertain reach' of the section and declined to deal with it in that case.[75] As to the applicability of the section, a power of a kind that persons generally cannot exercise without *specific* statutory authority must be different from that for which *general* statutory authority would suffice. Professor Aronson has suggested that this requirement limits the section to statutory powers 'permitting coercive acts or non-consensual rights-depriving acts'.[76] This would be consistent with the section's supposed justification in response to the first instance decision in *Presland v Hunter Area Health Service*.[77] There are lots of things that persons are generally not permitted to do but would not require specific, as opposed to general, statutory authority; for >>

example, erect road signs or inspect someone else's new building for defects. Further, public authorities are usually repositories of many *general* powers, so the determination of whether a particular power requires *specific* statutory authority should be made within the context of the general powers also possessed.[78]

This point is perhaps partially illustrated by the consideration of the section by Campbell JA in *Roads and Traffic Authority of NSW v Refrigerated Roadways Pty Ltd*.[79] In that case, the plaintiff sought to establish liability against the RTA for the failure to install a screen on a bridge that would have prevented a lump of concrete being thrown on to traffic below. In considering s43A (in obiter) his Honour left aside any distinction that may need to be drawn between a special statutory power and a statutory power *simpliciter*[80] in determining that there was no special statutory power involved. His Honour reasoned that the RTA owned the bridge and, accordingly, did not need to exercise a power conferred under statute, but rather a routine property right.[81] The plaintiff had not pleaded a case dependant on the exercise of a special statutory power, so how could liability be 'based on' such a power?[82] Similar reasoning was applied, although only on the question of whether a defendant should be permitted to raise the section at a late stage, by Beazley JA in *Bellingen Shire Council v Colavon Pty Ltd*.[83] Unfortunately, in *Allianz Australia Insurance Ltd v RTA; Kelly v RTA*,[84] the seemingly contrary reasoning of the trial judge[85] was not ventilated on appeal.[86]

Another consideration is whether the section is really a type of immunity provision, and whether, accordingly, some distinction ought to be drawn in its application between those acts and omissions that are integral to the exercise of the special statutory power, and those that are incidental. The limited cases thus far have not determined whether or not the section should be considered an immunity provision: see *Precision Products (NSW) Pty Ltd v Hawkesbury City Council*;[87] *Allianz Australia Insurance Ltd v RTA; Kelly v RTA*.[88] If it is, perhaps the reasoning in the line of cases starting with *Board of Fire Commissioners (NSW) v Ardouin*[89] should apply.

In *Ardouin*,[90] a fire engine negligently collided with a motorcycle on its way to fight a fire. The relevant immunity provision was found by a majority of the High Court not to apply, because no power granted under the relevant statute was being exercised in order to drive along a public street. Kitto J went further and found that not only did the immunity apply only to powers to do things that would otherwise be illegal but, further, that it applies only to *integral* parts of the exercise of such powers, and not mere *incidental* elements.[91] Travelling to the burning premises by road is merely incidental to the power granted to damage the premises in order to put out the fire. The *Ardouin* decision has consistently been followed and applied in cases such as *Hudson v Venderheld*,[92] *Australian National Airlines Commission v Newman*,[93] and *Puntoriero v Water Administration Ministerial Corporation*.[94] Arguably the words 'special statutory power' in s43A should be interpreted following similar reasoning.[95] This possibility is obliquely referred to by Campbell JA in *Roads and Traffic Authority of NSW v Refrigerated Roadways Pty Ltd*,[96] although he finds it unnecessary to consider it further in that particular case.

> Each state and territory has enacted legislation that seeks to modify common law liability in tort ... the focus here is how the provisions have operated in respect of the tortious liability of public authorities.

Ascertaining the precise limits of the applicability of s43A is important, given the rigours involved in meeting the *Wednesbury* unreasonableness test. It has been suggested that the test may almost never be satisfied, given its stringent application in Australian administrative law.[97] On its face, it does not even impose a standard of care *at all*, but rather a standard of decision-making that is totally unrelated to reasonable care.[98] There has still been very little consideration by appellate courts of the test as it applies in the Civil Liability Acts. In *Allianz Australia Insurance Ltd v RTA; Kelly v RTA* it was confirmed that the test is objective,[99] and requires unreasonableness at a 'high level'.[100] Terms like 'irrational' were found to be unhelpful.[101] Whether it is akin to 'gross negligence' is a matter of debate but, as observed by Allsop P in *Precision Products (NSW) Pty Ltd v Hawkesbury City Council*: 'It is plain that the drafter of s43A was attempting to ameliorate the rigours of the law of negligence.'[102] It remains for the courts to determine just how, in practice, this very restrictive public law test will be adapted to apply in the private law context.

CONCLUSION

The Civil Liability Acts have unquestionably tipped the balance in favour of public and other authorities when it comes to the imposition of liability in tort, especially in respect of the exercise or non-exercise of statutory duties, functions and powers. How far it has been tipped, however, even after almost a decade, is still uncertain. ■

Notes: **1** See P Vines, 'Straddling the public/private divide: tortious liability of public authorities' (2010) 9 *The Judicial Review* 445-75, 451-2. **2** Pt 3, *Civil Liability Act* 2003 (Qld); Pt 1C, *Civil Liability Act* 2002 (WA); Pt XII, *Wrongs Act* 1958 (Vic); Pt 6, *Road Management Act* 2004 (Vic); Pt 9, *Civil Liability Act* 2002 (Tas); Ch 8, *Civil Law (Wrongs) Act* 2002 (ACT); Pt 6 Div 5, *Civil Liability Act* 1936 (SA). The Northern Territory legislature has not sought to intervene in this specific area. **3** Section 45, *Civil Liability Act* 2002 (NSW); ss102

and 103, *Road Management Act* 2004 (Vic); s37, *Civil Liability Act* 2003 (Qld); s5Z, *Civil Liability Act* 2002 (WA); s42, *Civil Liability Act* 1936 (SA); s42, *Civil Liability Act* 2002 (Tas); s113, *Civil Law (Wrongs) Act* 2002 (ACT). **4** (2002) 211 CLR 540. **5** *Ibid* at 556. **6** *Voli v Inglewood Shire Council* (1963) 110 CLR 74. **7** *New South Wales v Fahy* (2007) 232 CLR 486. **8** That the defendant is a public authority rarely comes into it at the duty stage, save for difficult cases such as *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22, where the duty alleged was associated with a statutory power to detain a psychiatric patient. **9** (1985) 157 CLR 424. **10** *Ibid* at 458. See also *Crimmins v Stevedoring Committee* (1999) 200 CLR 1 at 29 per McHugh J (Gleeson CJ agreeing). **11** M Aronson, 'Government liability in negligence' (2008) 32 *Melbourne University Law Review* 44-82, 46. **12** In respect of public authorities, see 'Review of the Law of Negligence: Final Report' (2002), 151-63. **13** [2004] NSWCA 124. **14** (1985) 157 CLR 424. **15** *Amaca Pty Ltd v New South Wales* [2004] NSWCA 124 at [22]. **16** (1998) 192 CLR 330. **17** (1999) 200 CLR 1. **18** (2002) 211 CLR 540. **19** *Amaca Pty Ltd v New South Wales* [2004] NSWCA 124 at [65]. **20** (1998) 192 CLR 330 at 343-5 per Brennan CJ; 376-7 and 386-8 per Gummow J; 410-2 per Kirby J. **21** (2009) 237 CLR 215. **22** The Court ultimately found that a necessary precondition to the exercise of the power was not met and hence the power could not have been exercised in any event. **23** (2002) 211 CLR 540. See especially 596-8 per Gummow and Hayne JJ. **24** *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at 254. **25** *Crimmins* (1999) 200 CLR 1 at 24-5, 42-3, 61, 82, 104, 116; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 558-559; *Graham Barclay Oysters* (2002) 211 CLR 540 at 598-9. **26** [2009] NSWCA 258 at [103]-[104]. Allsop P's list was picked up by Hodgson JA (Simpson JA agreeing) in *Makawe Randwick City Council* [2009] NSWCA 412 at [17]. **27** *Makawe Randwick City Council* [2009] NSWCA 412 at [21] per Hodgson JA; [137] per Simpson JA. **28** Above note 2. **29** *Civil Liability Regulation* 2009 (NSW). **30** Sections 7 and 62 *Health Services Act* 1997. **31** Section 5U, *Civil Liability Act* 2002 (WA); s79, *Wrongs Act* 1958 (Vic); s37, *Civil Liability Act* 2002 (Tas). **32** Section 34, *Civil Liability Act* 2003 (Qld). **33** Section 109, *Civil Law (Wrongs) Act* 2002 (ACT). **34** (2009) 77 NSWLR 360 at 414. **35** Aronson , above note 11, 58-62. **36** (2001) 206 CLR 512. **37** *Ibid* at 560. **38** *Ibid* at 577-8 per Gaudron, McHugh and Gummow JJ; 601 per Kirby J. The enquiry simply forms part of the consideration of 'any other conflicting responsibilities' as in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-8 per Mason J. **39** *Roads and Traffic Authority of NSW v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360 at 414. **40** Section 42, *Civil Liability Act* 2002 (NSW); s35, *Civil Liability Act* 2003 (Qld); s5W, *Civil Liability Act* 2002 (WA); s38, *Civil Liability Act* 2002 (Tas); s110, *Civil Law (Wrongs) Act* 2002 (ACT). **41** Section 83, *Wrongs Act* 1958 (Vic). **42** See discussion in Aronson, above note 11, 62. **43** [2002] NSWCA 66. **44** *Ibid* at [24]. **45** *Port Stephens Council v Theodorakakis* [2006] NSWCA 70 at [15] per Bryson JA (Giles and Ipp JJA agreeing). **46** [2007] NSWCA 71 per Ipp JA (McColl JA and Young CJ in Eq agreeing). **47** *Roads and Traffic Authority of NSW v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360 at 440. **48** *Ibid* at 441-2. **49** Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002), 151-63. **50** Victoria introduced something similar, but applying only to roads authorities: s103, *Road Management Act* 2004 (Vic). **51** [1996] 1 AC 923. **52** Section 5X, *Civil Liability Act 2002* (WA). **53** [2012] WASCA 79 at [300]. **54** *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. **55** Section 43, *Civil Liability Act* 2002 (NSW); s84, *Wrongs Act* 1958 (Vic); s36, *Civil Liability Act* 2003 (Qld); s5Y, *Civil Liability Act* 2002 (WA); s40, *Civil Liability Act* 2002 (Tas); s111, *Civil Law (Wrongs) Act* 2002 (ACT). **56** Section 36, *Civil Liability Act* 2003 (Qld). **57** Aronson, above note 11, 76. **58** G Weeks, 'A marriage of strangers: the Wednesbury standard in tort law' (2010) 7 *Macquarie Journal of Business Law* 131-46, 143. **59** DA Ipp AO, 'The metamorphosis of slip and fall' (2007) 29 *Australian Bar Review* 150-60, 154-5. **60** Vines, above note 1, 469-70. **61** Section 44, *Civil Liability Act* 2002 (NSW); s41, *Civil Liability Act* 2002 (Tas); s112, *Civil Law (Wrongs) Act* 2002 (ACT). **62** [1970] AC 1004. See, in particular, 1067-70. **63** (1998) 192 CLR 330 at 347. **64** [2012] NSWCA 81. **65** *Ibid* at [21]. **66** *Ibid* at [150] **67** (1999) 200 CLR 1. **68** Section 46, *Civil Liability Act* 2002 (NSW); s85, *Wrongs Act* 1958 (Vic); s5AA, *Civil Liability Act* 2002 (WA); s43, *Civil Liability Act* 2002 (Tas); s114, *Civil Law (Wrongs) Act* 2002 (ACT). **69** (1998) 192 CLR 330. **70** *Graham Barclay Oysters P/L v Ryan* (2002) 211 CLR 540 at 598. **71** Section 36, *Civil Liability Act* 2003 (Qld); s84, *Wrongs Act* 1958 (Vic). **72** G Watson, 'Section 43A of the Civil Liability Act 2002 (NSW): Public law styled immunity for the negligence of public and other authorities?' (2007) 15 *Torts Law Journal* 153-78, 155-8. **73** *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. **74** (2009) 239 CLR 51. **75** *Ibid* at 65. **76** Aronson, above note 11, 78. **77** [2003] NSWSC 254. See Watson, above note 72, 156. **78** See discussion in Watson, above note 72, 164-5. **79** (2009) 77 NSWLR 360. **80** *Ibid* at 435-6. **81** *Ibid* at 435. **82** *Ibid* at 436. **83** [2012] NSWCA 34 at [38]. **84** [2010] NSWCA 328. **85** *Rickard v Allianz Australia Insurance Ltd* [2009] NSWSC 1115 at [111]-[112] per Hoeben J. **86** *Allianz Australia Insurance Ltd v RTA; Kelly v RTA* [2010] NSWCA 328 at [10] and [38]. **87** (2008) 72 NSWLR 102 at 140. **88** [2010] NSWCA 328 at [75]. **89** (1961) 109 CLR 105. **90** *Ibid.* **91** *Ibid* at 117. **92** (1968) 118 CLR 171. **93** (1987) 162 CLR 466. **94** (1999) 199 CLR 575. **95** Watson, above note 72, 162-6 & 170. **96** (2009) 77 NSWLR 360 at 436. **97** Weeks, above note 58, 142. **98** Watson, above note 72, 175-7. **99** [2010] NSWCA 328 at [72] per Giles JA. **100** *Ibid* at [87] per Giles JA (McColl JA and Sackville AJA agreeing). **101** *Allianz Australia Insurance Ltd v RTA; Kelly v RTA* [2010] NSWCA 328 at [88]. **102** (2008) 72 NSWLR 102 at 141. Whealey JA in *Warren Shire Council v Kuehne* [2012] NSWCA 81 described the test as having 'the intention of raising the bar for plaintiffs in proof of breach of duty of care'.

Grant Scott Watson *is a solicitor in practice at TD Kelly & Co Solicitors, Sydney.* **PHONE** *(02) 9267 7003.*
EMAIL *grant@tdkellyandco.com.*