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Trends in liability of public authorities in tort

This article is intended to provide practical comments for legal practitioners instructed to advise or to act against a public authority alleged to be negligent. The emphasis is deliberately practical. I identify some recent developments in the law and make some comments on the assessment of liability and on the conduct of such cases. Plaintiff lawyers sometimes focus on liability in negligence and overlook cognate causes of action such as trespass, breach of statutory duty, breach of the *Trade Practices Act* and breach of contract. As whole books have been devoted to all of these causes of action I merely mention them and will focus on tort liability.

> "(I)t is the failure of the common law to develop more than a general notion of the economic consequences of asserting the requirements of reasonable care, that represents in my view, one of the chief defects in the law of negligence as it has developed."[1]

The Trend

The trend in statute and in the common law is to increase the exposure of public authorities to liability. This field has been described as amongst the most difficult both by judges and scholars.[3] In Australia the basic rule is that the tort liability of public authorities is governed by the same principles as apply to private individuals. There are many refinements of that basic principle. In the United Kingdom a statute confers general immunity subject to specific exceptions including an exception in respect of death or personal injury or damage to or loss of *tangible* property.[4] In Victoria liability is limited to vicarious liability as distinct from the non-delegable direct or personal liability.[5] In some States clauses have been inserted in statutes conferring specific immunity but they have been very strictly construed.

The development of the law in this area has seen some extraordinary about-turns that demonstrate the web of difficulties which have entangled the courts. In the United Kingdom the decision in *Anns v Merton London Borough Council*[6] was overruled in *Murphy v Brentwood District Council*.[7] Lord Keith of Kinkel said:

> "There has been extreme difficulty....in ascertaining upon exactly what basis of principle [*Anns*] did proceed. I think it must now be recognised that it did not proceed on any basis of principle at all, but constituted a remarkable example of judicial legislation."

In Australia, for years after it was handed down, the judgment of Mason J in *Sutherland Shire Council v Heyman* was cited as the leading analysis in this field.[8] His theory of general reliance has recently come under criticism.[9] Even the basic notion of *proximity* is no longer seen as the unifying criterion.[10]

The High Court has considered the issue further in three cases: *Pyrenees Shire Council v Day*, *Romeo Conservation Commission of the Northern Territory* and *Crimmins v Stevedoring Industry Finance* ▶

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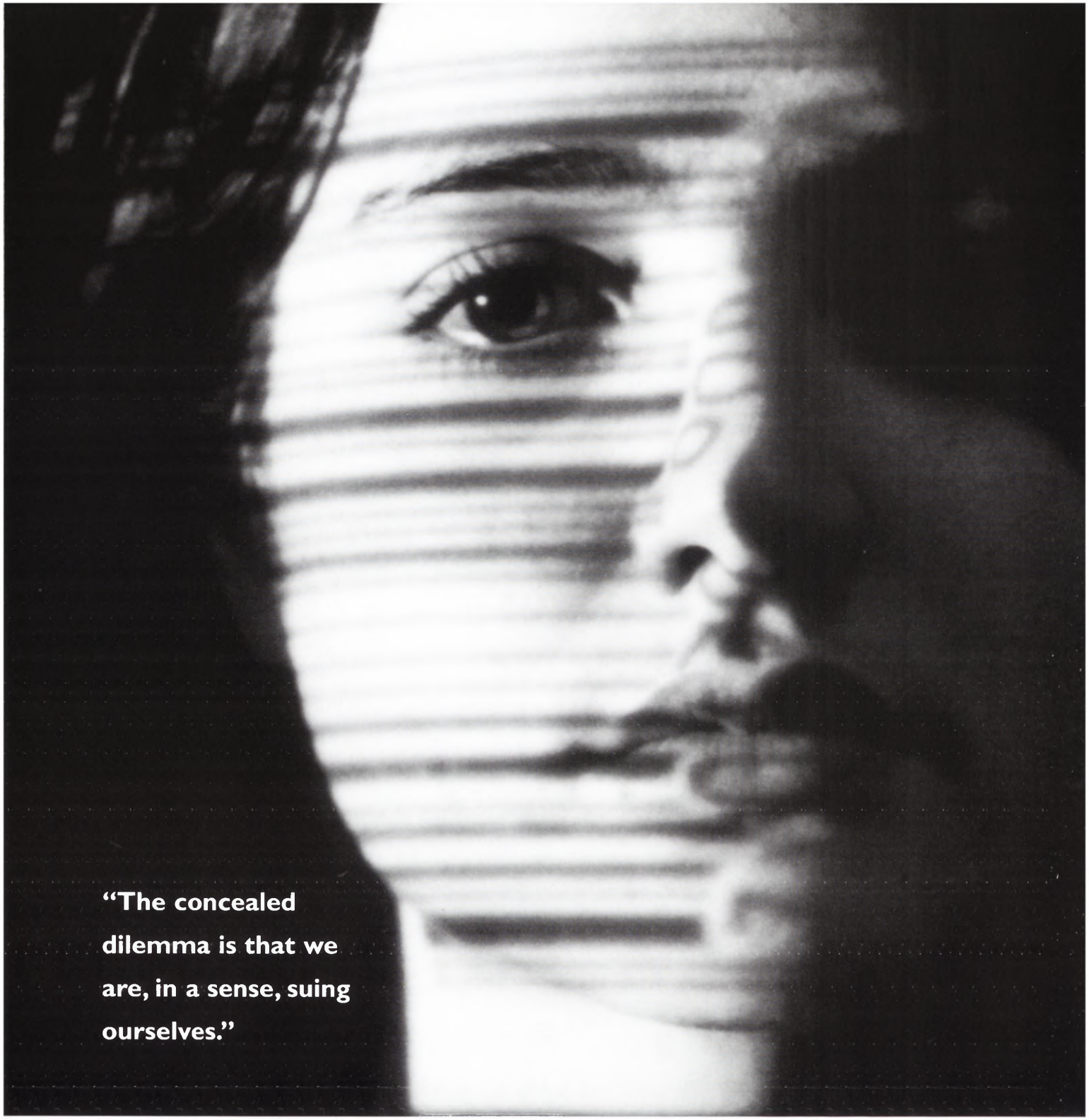

Committee.[11]

It is useful to look at several aspects of *Crimmins*. One question, in that case, was whether a statutory authority that organised labour for stevedoring operations, but which was not itself an employer, owed a common law duty of care to a worker who developed mesothelioma. The High Court was divided 5/2, the majority holding that the authority owed a duty. The case like the three that preceded it, to which I have referred, illustrates the difficulties that must be addressed by lawyers advising potential plaintiffs.

One thing at least is relatively clear. If the relationship between the potential plaintiff and the statutory authority is one that has already been held to attract a duty of care then a duty will be held to exist in the case under consideration. Such relations include, for example, the relationship of employer and employee and school authority and pupil. I say "relatively" clear because the process of abstraction is not always pure logic; it involves matters of judgment. This is illustrated by the decision in *Puntoriero Water Administration Ministerial Corporation*. There the authority administering the Murrumbidgee Irrigation Scheme and charging water rates was found to stand in the same relationship to a farmer, as the commercial manufacturer of ginger beer stood to the consumer in *Donoghue v Stevenson* or a commercial supplier of petrol to a buyer.[12]

On the other hand where, as in *Crimmins*, the relationship is "novel", the question of whether there is a duty and the content of that duty is a difficult one as the division in the Court demonstrates. McHugh J's reasons (with which Gleeson CJ agreed)[13] include the following:

"In my opinion, therefore, in a

novel case where a plaintiff alleges that a statutory authority owed him or her a common law duty of care and breached that duty by failing to exercise a statutory power, the issue of duty should be determined by the following questions:

Was it reasonably foreseeable that an act or omission of the Defendant, including a failure to exercise its statutory powers, would result in injury to the plaintiff or his or her interests? If no, there is no duty.

By reason of the Defendant's statutory or assumed obligations or control, did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from a risk of harm? If no, then there is no duty.

Was the plaintiff or were the plaintiff's interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or those interests from harm? If no then there is no duty.

Did the defendant know, or ought the defendant to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? If no, then there is no duty.

Would such a duty impose liability with respect to the Defendant's exercise of "core policy-making " or "quasi-legislative" functions? If yes, then there is no duty.

Are there any other supervening reasons in policy to deny the existence of a duty of care (eg. the imposition of a duty is inconsistent with the statutory scheme, or the case is concerned with pure economic loss[14] and the application of the principles in that field deny the existence of a duty)? If yes then there is no duty."[15]

One may be confident that, like many lists, the very formulation of it will provoke criticism. His Honour's own reasons suggest that rather than addressing the individual plaintiff in the first question, regard should be had to persons in some class of which the plaintiff was a notional member.[16] However that may be, McHugh J's list is, with respect to his Honour, a very helpful synthesis that enables a practitioner to commence a critical assessment of a potential claim. The inclusion in his Honour's list of many matters on which minds may differ necessarily entails that simply adopting the list will not produce an answer in a mechanistic way.

The categorisation of a case as "novel" or otherwise is not always self-evident. This may be illustrated by applying the test to the facts in *Puntoriero*. Such an exercise leads readily to a conclusion that there would be no duty. This suggests that, but for the fact that the Court regarded the relationship in *Puntoriero* as not being "novel", but as requiring categorisation in accordance with earlier cases, the result would have been the opposite of the one that was reached by the categorisation approach.

In making an assessment of whether to sue in a "novel" case the reasons for judgment of all of the members of the Court, in each of the four cases to which reference has been made, would require close consideration. For example, the "three-stage approach" adopted by Kirby J has not been expressly adopted by other members of the Court and finds no favour with McHugh J.

In *Crimmins* Gaudron J. emphasised that it is inaccurate to speak of a common law duty *superimposed* on the statutory powers. The common law applies to statutory bodies unless excluded expressly or impliedly.[17] She also emphasised that the duty is "to take those steps...which a *reasonable authority* with its powers *and resources* would have taken in the circumstances" (my emphasis added).[18] The reference to a reasonable authority is a reminder that the scope of the duty must be assessed in the statutory context. The reference to resources may provide the answer to the implications of deteriorating services to which I refer below.

Before leaving *Crimmins*, plaintiff lawyers should note with care the remarks of McHugh J as to the way that case was pleaded, particularised and conducted at first instance. The pleading was wide enough to encompass a claim that there existed a statutory duty, but the particulars of breach and the way the case was conducted below led his Honour to say:

> "In other words, the plaintiff's case seems to have been conducted on the basis that the Authority had an affirmative obligation to prevent harm to the plaintiff from the stevedoring operations in which he was engaged, rather than having negligently exercised the power to give directions to him. Because that is so, I think that it would be wrong at this stage to treat the case as one concerned with the negligent exercise of statutory power."[19]

Deteriorating Public Services

The advance of privatisation and the reduction of expenditure on public services raise an interesting prospect, namely, that public services will deteriorate. Waddell A-JA in *Cekan v Haines* (1990) 41 NSWLR 296 concluded his judgment with these words:

> " I wish only to add that it cannot be assumed that the means available to the State will, in the future, justify *raising* the standard of care which should be imposed upon it (my emphasis added)".[20]

In the same case Kirby J wrote:

> "(at) some future time it may be necessary to consider the adequacy and appropriateness of the tort of negligence as a source for recovery from the community for injuries and losses suffered as a result of the suggested failure of the community to discharge (its) obligations."[21]

In *Pyrenees* Gummow wrote:

> "In *Just v British Columbia*[22] Cory J explained that the standard of care which is owed to a plaintiff by a government agency may be less than that which is owed by a private party."[23]

The concealed dilemma is that we are, in a sense, suing ourselves. It was less obvious when public authorities seemed remote and wealthy. If a large verdict was occasionally awarded against a public authority that had failed to reach acceptable community standards, it seemed to have no particular significance. Today the trend is to sue public authorities in circumstances where considerable ingenuity required to particularise the negligence. ▶

"Plaintiff's lawyers may establish that a lack of resources required to avoid injury to the plaintiff was the consequence of a negligent failure to devote available resources to measures available to avoid the injury."

Judges are increasingly disposed to find such authorities negligent and huge sums are being awarded. Rightly or wrongly, public administrators are prepared to pay large sums to compromise such claims because of these trends and the complexity of the law in this area. With the deterioration of public services and the shrinking of public resources devoted to them the courts will soon have to deal squarely with the question of whether a *lower* standard should be accepted from the public sector than the private sector. That may in turn depend upon whether or not the services are voluntary or quasi-commercial, or whether they are compulsory in the sense that they are essential services, which a Government supplies in exercise of a responsible political decision. The trend of recent cases in the High Court demonstrates the difficulties in this area. The solutions reached by the courts raise profound questions. Some are these. Can the authority insure and still remain viable? If it cannot what will happen to services that are not profitable and cannot be privatised? Are they to be provided or not? Is Parliament to be treated by the courts as having spoken? Are the courts to adjudicate on issues once thought to be within the province of Parliament and therefore not justiciable?

Community Values

In the process by which courts have required defendants to *raise* their standards of conduct the courts have often identified community values rather than those of a particular group as dictating the result. *Albrighton*[24] and *Rogers v Whittaker*[25] are illustrations of such an approach. When courts impose higher standards the process attracts criticism, especially from the interest group affected. In *Cekan* the court was required to determine whether the conduct of a prison authority was reasonable. Kirby P identified as factors influencing that assessment; community values, the economic and social relationship between the parties, social values affecting the parties and the practice of public authorities insofar as they affected the parties. In *Romeo* Kirby J considered that regard should be had to the aesthetics of the natural environment and the avoidance of measures which would significantly alter the character of a natural setting at a substantial cost and for an improvement in safety of negligible utility.[26]

Cost /Benefit Analysis

Courts have suggested that evidence of the cost of the precaution should be measured against the benefits of the suggested measure.[27] What evidence should be led on such an issue? Clearly enough, interrogatories should be addressed by a plaintiff to a public authority in order to ascertain the experience of the authority in injuries in circumstances such as those alleged.[28] It seems that the public authority, in its defence, can adduce evidence of the cost of prevention, how wide-ranging it should be and what its available resources are. In an appropriate case the remedial steps may involve the whole of the public sector concerned and require a State-wide or Territory-wide assessment.[29]

Evidence Regarding Resources

As mentioned above there seems to be no reason why the resources that have been made available from public funds and the allocation of those resources within a public authority should not be the subject of evidence in the defence case.[30] That approach finds support in comments made in *Pyrenees* and *Crimmins*.[31] But where does such evidence lead? In the case of essential services where the public authority is the only provider, it may support an argument that the public authority did its best with the funds made available to it by Parliament and that the public authority could not do more.[32]

Misfeasance and Non-feasance

This terminology was once thought to identify a dichotomy that conferred immunity if the omission could be described as non-feasance. The completeness of the so-called dichotomy has never been sound because it depends on the level of abstraction at which the activity of the public authority is analysed.[33] The High Court has granted special leave in cases that raise this issue.

The Policy/Operational Dichotomy

This so-called dichotomy was enunciated in *Anns* where Lord Wilberforce said "the more 'operational' a power or duty may be, the easier it is to superimpose upon it a common law duty of care."[34] The new development in *Anns* was to superimpose a duty on a power to perform a statutory function once a policy decision had been made to exercise the power where a failure to perform the function may be likely to cause damage to an individual.

In Canada some decisions have illustrated the so-called dichotomy. A developer who relied upon a by-law that was later found to have been ultra vires failed, because the decision was in the policy area.[35] However a building authority was held liable if its inspectors were slow in implementing a policy decision.[36] The same case confined the "policy" immunity to decisions made in good faith. One asks, what is the nature of a decision made by a hospital regarding the allocation of its resources to waiting lists?

In Australia there is still comparatively little authority on this dichotomy.[37] McHugh J deals with it in *Crimmins*.[38] His Honour's observations justify the use of the words "so-called". It is an imperfect dichotomy that is clear enough in the middle ground but fuzzy round the edges. In its formulation it is expressed in relative terms. It conceals value judgments that change with time. For example, one view expressed in 1988 was that "the courts of this country (England) cannot arrange the lists in the hospital".[39] It is hard to believe that such a view would be accepted uncritically in the courts of this country. In *Pyrenees SC v Day* Gummow J wrote:"(t)he preferable view is that the policy/operational classification in not useful in this area"[40] McHugh J prefers the notion of "the 'core area' of policy-making."

The Separation of Powers

The adducing of evidence regarding the allocation of funds in a State or Territory budget must necessarily raise the question of the constitutional separation of powers. But if paucity of funds affects the quality of services, what is the level at which the evidence should stop? "(T)he provision of resources for that purpose might involve the diversion of them from purposes which, in the exercise of a responsible political judgment, Government might see as having priority over the supervision of prisoners".[41]

Failure to Devote Resources

For completeness it should be noted that plaintiff's lawyers may establish that a lack of resources required to avoid injury to the plaintiff was the consequence of a negligent failure to devote available resources to measures available to avoid the injury. This may be done by Freedom of Information applications, discovery, interrogatories, subpoenas and notices to admit and produce.

The Defence of Statutory Immunity

This defence is very confined to ▶

Australia. If the act complained of is the very act that is authorised by the statute then no additional immunity is required.[42] If however there is a departure from what has been specifically authorised, an immunity clause will provide little defence to the public authority.[43] That is the clear message of the decision of the High Court in *Puntoriero*.

Causation

At the risk of stating the obvious, where a breach of a relevant duty of care is shown, it is still necessary for the plaintiff to prove, on the balance of probabilities, that such breach caused the damage in the relevant sense.[44] In *Romeo* Kirby J makes comments on this requirement in the context of the liability of public authorities and he warns of the need to be cautious of the wisdom of hindsight.[45]

Conclusion

There is a trend to find statutory authorities liable in novel cases. It is an area of law of particular complexity in which principles are being changed and developed by the courts. Liability in negligence is one of several potential bases of liability, which require careful consideration. The standard of care is not necessarily the same as the standard applicable to individuals and may be affected by limited resources. Statutory provisions conferring immunity on statutory authorities will be narrowly construed by the courts. The prospects of success in these difficult claims are certain to be enhanced by careful attention to matters of principle before the proceedings are commenced and at every stage of the pleading, preparation for trial and the conduct of the trial. PL

Footnotes:

1. *Cekan v Haines* (1990) 21 NSWLR 296 per Kirby P.
2. As to breach of statutory duty see Brennan J, "Liability in Negligence of Public Authorities: The Divergent Views," 7 *Australian Bar Review* (1990), pp184-190 and *Pyrenees Shire Council v Day* (1998) HCA 3 [15-17] 192 CLR 330 at 341-343.
3. *Pyrenees Shire Council v Day* [1998] HCA 3 at 192 CLR 330 at 397 per Kirby J. *Romeo v Conservation Cmn (NT) [1998] HCA 5* argument of Pauling Q.C. footnote 14 [85]-[86] 192 CLR 431
4. *State Immunity Act* 1978. Presumably no action would lie against a public authority for pure economic loss.
5. *Crown Proceedings Act* (Vic) s. 23 (1) (b). As to non-delegable duties see *Kondis v State Transport Authority* (1984) 154 CLR 672, *Introvigne v Commonwealth* (1982) 150 CLR 258, *Stevens v Brodribb Sawmilling* (1986) 160 CLR 16 and the cases summarised in *El Sheek v Australian Capital Territory Schools Authority* Miles CJ U/r 27 August 1999 reversed on appeal by the Full Federal Court on 17th May 2000 for reasons not yet delivered.
6. [1978] AC 728
7. [1990] 3 WLR 414
8. (1985) 157 CLR 424 at 458.
9. *Pyrenees Shire Council v Day* (1998) 192 CLR 330
10. ibid [233] -[245] See also *Hill v Van Earp (1997)* 188 CLR 159.
11. [1998] HCA 3192 CLR 330, [1998] HCA 5 192 CLR 431 and [1999] HCA 59 74 ALJR 1
12. [1999] HCA 45 per Gleeson CJ and Gummow J [20]-[23]. Callinan J at [114]
13. [1999] HCA 59 [3]
14. As to which see the confounding decision in *Perre v Apand Pty Limited* 73 ALJR 1190
15. ibid [93] See also Mc Hugh J's remarks in *Abalos v Australian Postal Commission* 171 CLR 167 at 179-180
16. *Crimmins* at [96]-[99].
17. [1999] HCA 59 at [26]-[27].
18. Ibid [35]
19. ibid [64] - [70]
20. 316
21. 299
22. [1989] 2 SCR 1228 at 1243-1244
23. 192 CLR 330 at 394.
24. *Albrighton v Royal Prince Alfred Hospital* [1979] 2 NSWLR 165; 1980 2 NSWLR 542;
25. 175 CLR 479
26. At [130].
27. Dugdale, "Public Authority Liability: to what Standard?" 143 *Torts Law Review* 1994; *Romeo* [132]; Kneebone, *Tort Liabilities of Public Authorities*, LBC at 386 et seq.
28. ibid 146
29. *Romeo* [123]
30. *Romeo [129]*
31. 192 CLR 330 at 371 per Mc Hugh J and at 394 per Gummow J and [1999] HCA 59 at [34] per Gaudron J and [88]-[90] per Mc Hugh J.
32. *Heyman* at 456-7 *Romeo at [86]*
33. *Puntoriero* In the Court of Appeal 42 NSWLR 676 at 678 per Mason P.
34. At 754.
35. *Welbridge Holdings v Metropolitan Corp of Greater Winnipeg* (1971) 22 DLR (3rd) 470.
36. *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641
37. *Romeo* [138]; Sopinka, "The Liability of Public Authorities: Drawing the Line", 1 *Tort Law Review* (1993) p123; Fabian Gleeson, "Liability of Public Authorities" 6 *Australian Construction Law Reporter*, 1987 pp. 5-15.
38. [1999] HCA 59[84]-[87].
39. *R v Central Birmingham Health Authority; Exhibit p Collier* (Uc Eng CA 1988 per Stephen Brown LJ)
40. [182] See also *Puntoriero* 42 NSWLR 676 at 678
41. *Cekan* per Mahoney JA at 312-313
42. *Examination-in-chief (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 738-739; but see McHugh J in *Crimmins at* [82]
43. Puntoriero v Water Administration Ministerial Corporation [1999] HCA 45, 9 September 1999.
44. *Nagle v Rottnest Island Authority* 177 CLR 423 at 443-444 per Brennan J.
45. *Romeo* [133-137].