PENELOPE WATSON, NSW

Private v Public:

Negligence and public authorities

The ultimate test of public confidence in the judiciary is 'whether people believe that in a dispute between a citizen and the government, the parties will be dealt with on equal terms'.[1] Increasingly, statutory powers are used to regulate a multiplicity of aspects of business and daily life, leading to an expectation of protection, and coinciding with a climate of accountability in which citizens demand redress for loss or harm. Balanced against this is the potential for conflict between the competing interests of community and individual, and questions about the appropriate relationship between public and private law, and the roles of the judiciary and parliament.

This article examines the liability of governmental and other public authorities in negligence for harm or loss to citizens caused either by careless exercise of powers or inaction. Recent trends in the High Court and the United Kingdom are analysed, along with relevant provisions of the *Civil Liability Act* 2002 (NSW).

The article concludes that judicial protection of public authorities has largely given way to accountability, although there has been a clear shift away from the heavy onus imposed on public defendants in *Nagle v Rottnest Island Board*.[2] Recent decisions indicate a willingness to impose affirmative tort duties on statutory defendants, and a rejection of public law concepts.

The High Court continues to pursue its incremental approach to duty questions, but various common threads can be identified, namely control, reliance, knowledge and vulnerability. The specific sections of the *Civil Liability Act* 2002 (NSW) dealing with public authorities largely mirror the common law, so that while its impact can be expected to be substantial, it will fall fairly evenly on public and private defendants operating within certain 'target' areas, such as recreational activity and areas of 'obvious risk'.

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Public authorities may be defined as bodies 'entrusted by statute with functions to be performed in the public interest or for public purposes',[3] thus distinguishing them from bodies which exercise statutory powers for private gain,[4] and emphasising the central importance of function. Liability of 'public or other authorities' is dealt with in Part 5 of the *Civil Liability Act* 2002 (NSW). Section 41 defines such bodies broadly to include the Crown, government departments, public health organisations, local councils or any public or local authority constituted by or under an Act, persons or bodies prescribed by regulations as relevant authorities, and any person or body in respect of the exercise of public functions of a prescribed class.

The key question regarding public defendants is 'in what circumstances, if at all, ...a public authority come[s] under a common law duty in relation to the performance or non-performance of its statutory functions?'[5] In other words, whether, and when, a statutory authority is under an ordinary common law duty of care when it does exercise its statutory powers, and second and more problematic, whether, and when, a statutory authority is under a common law duty to exercise its statutory powers?

SHOULD PUBLIC AUTHORITIES BE TREATED DIFFERENTLY?

Interface between public and private law

The appropriate interface between tort [private law] and administrative [public] law lies at the heart of questions concerning liability of public authorities in tort, 'stand[ing] at a crucial road junction in the development of the law'.[6] The former doctrine of sovereign immunity from suit, which shielded some, but not all statutory authorities as well as the Crown, has been abolished[7] by parliaments throughout the common law world, indicating a belief that governments should be held accountable to citizens. This means that courts are now required to oversee the activities of all public authorities, and gives rise to issues about the doctrine of judicial review and justiciability, the separation of powers under the Westminster system, and the distinction between the scope of private and public law duties, all of which inform judicial approaches to tort liability of statutory authorities.

The application of common law principles to public authorities is complicated by the multiplicity of functions undertaken by such bodies, ranging from normal commercial activities to administrative or delegated legislative functions, resource issues, and the tension between competing interests.

Underpinning activities of statutory bodies is a general legislative expectation that functions and powers are to be exercised for the public benefit, but this may not always coincide with benefit to a given individual.

A public authority which causes harm in the course of exercising its statutory powers (misfeasance) may be held liable in the same way as any private defendant in the torts of negligence, nuisance and breach of statutory duty,[8] and may also be liable for omissions where duties to act are imposed by or deduced from the relevant statute. In *Nagle,*[9] for example, the High Court treated the public authority charged with control and management of land as if it had been a private defendant, applying the general *Wyong Shire Council* test[10] for breach of duty. Yet in many instances, public authorities are treated differently from private defendants, in ways and for reasons discussed below.

"Judicial protection of public authorities has largely given way to the demands of accountability."

Administrative law and judicial review

Traditional administrative law concepts of judicial review[11] are based on the idea that a court will intervene when a public authority has acted in excess of its powers, or *ultra vires*, irrespective of the merits or policy of the action. The role of the judge is limited to determining whether there has been a proper exercise of the delegated legislative or administrative authority, consistent with a strict separation of powers doctrine as envisaged by Dicey.[12]

In *Home Office v Dorset Yacht Co Ltd*, Lord Diplock said that 'the public law concept of *ultra vires* has replaced the civil law concept of negligence as the test of legality'.[13] *Ultra vires* played a role in *Anns v Merton London Borough Council*[14] and *Sutherland Shire Council*,[15] but has been criticised elsewhere,[16] and was finally rejected in *Crimmins v Stevedoring Industry Finance Committee*.[17] McHugh J said:

'I am unable to accept that determination of a duty of care should depend on public law concepts. Public law concepts of duty and private law notions of duty are informed by differing rationales.'

One aspect of judicial review is the notion of justiciability, which requires a court to decide both whether it 'can' and 'ought' to intervene in the context of the separation of powers. The policy/operational distinction, which has been a prominent feature of both British[18] and Australian case law since *Anns* and *Sutherland*, derives from this. Mason J said:

'A public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations, and the constraints which they entail, ...cannot be made the subject of a duty of care. But it may be otherwise...[as regards] action or inaction that is merely the product of administrative discretion, expert or professional ▶

opinion, technical standards or general standards of reasonableness.'[19]

Superior courts have moved away from the concept in recent years,[20] although it may still apply in relation to 'functions and powers which can be described as part of the "core area" of policy-making, or which are quasi-legislative or regulatory in nature, [these being] not subject to a common law duty of care'.[21] Decisions pertaining to budgetary allocation will still be protected by virtue of section 42 of the *Civil Liability Act* 2002 (NSW).

Modern pluralist notions of society posit multiple institutions wielding power, with parliament controlled by the executive and operating in a party political context, rather than the Diceyan model referred to above. This favours a more normative concept of judicial review, one that emphasises its educative, prescriptive and corrective role.

> "The application of common law principles to public authorities is complicated by the multiplicity of functions undertaken by such bodies."

Theorists, such as Rawlings and Harlow,[22] suggest that the purpose of review is to encourage better administrative practices and improve official behaviour. These competing concepts of the proper relationship between the judiciary and legislature in part account for differences of approach to questions of tort liability. Another element is the very different aims and purposes of tort, with its emphasis on compensation of injuries to individuals, contrasted with the community perspective necessarily adopted by public bodies.

COMPETING APPROACHES TO TORT LIABILITY

Factual analogy with private law and misfeasance

Kneebone[23] argues that courts adopt three basic methods of characterising the facts of tort cases concerning public authorities, each of which contains different assumptions about the boundaries between public and private law.

The first approach classifies cases as factually analogous with private law scenarios, the second distinguishes cases as not factually analogous, and the third looks to factors such as control and reliance to found an affirmative duty of care.

The following discussion is loosely based on an extension of that analysis. Where cases are factually analogous to private law situations so that the defendant's function and the plaintiff's injury could have occurred similarly in a private context, they are 'public-neutral'. If a statutory body has actively caused the plaintiff's loss, for example by making a misleading statement as in *L Shaddock & Associates v Parramatta City Council (No 1)*,[24] or causing physical injury as in *Nader v Urban Transit Authority of New South Wales*[25] and *Wyong Shire Council v Shirt*,[26] or breaching statutory duties in an industrial setting, the public defendant can expect to be treated in the same way as any private defendant. The typical scenario involves positive conduct, or misfeasance, where the function exercised does not involve a policy or discretionary element.

'The assumption behind this method of categorisation is that there is no overlap between the objectives of tort law and administrative law. In particular, it assumes that the objective of the private law of tort is to encourage plaintiffs to be self reliant on the basis that they are capable of protecting themselves' as in *Heyman*.[27] Conversely, this approach assumes that public authorities should be protected from suit by individuals.

Public law alternatives

In the second category, cases are distinguished factually from private disputes, and considered unsuitable for tort action because judicial review or other public law processes are available. Delay in reaching a decision,[28] consideration of irrelevant factors, situations where procedures for carrying out the decision were not met,[29] or damage resulting from a wrong decision[30] fall under this head. Denial of a tort remedy is often justified by the public interest in the protection of public services and funds.[31]

FAILURES TO ACT AND AFFIRMATIVE DUTIES

Early cases such as *East Suffolk Catchment Board v Kent*[32] held that authorities were under a duty of care concerning the way in which they exercised their powers (acts), but not as regards failures to act (omissions). In *East Suffolk*, naturally occurring flood waters breached a retaining wall, damaging the plaintiff's land. The board's attempts at repair were incompetent, so that the plaintiff's land was flooded for longer than it might have been. The House of Lords, Lord Atkin dissenting, exonerated the board because it had power but no statutory duty to repair, and had not inflicted 'fresh injury' upon the plaintiff.

This distinction between acts and omissions has been regarded as pivotal in negligence law generally, despite Lord Atkin's formulation[33] of duty as pertaining to both. 'Good Samaritan' or affirmative duties to protect or rescue are rare in tort, outside special relationships such as those between parent and child, employer and employee, teacher and pupil, and other such relationships characterised by power imbalances between the parties.

Apart from the difficulty associated with drawing the distinction between misfeasance and nonfeasance,[34] there is apt to be confusion between duty and causation.[35] The *East Suffolk* principle was extended in *Anns v Merton London Borough*

Council[36] to allow liability for omissions, based either on the policy/operational dichotomy, or on *ultra vires*. Australia has taken the law further in *Crimmins* and *Brodie v Singleton*.[37]

Control and reliance

Kneebone's third category centres around the twin concepts of control and reliance, the issue being whether the public authority in a position of control has assumed responsibility leading the plaintiff to rely on exercise of its powers, thus creating an affirmative duty to act which would not be present otherwise.

Sutherland Shire Council v Heyman and *Pyrenees v Day* emphasise control and reliance and are considered the 'starting points for determining the common law liability of statutory authorities for breach of affirmative duties'[38] in Australia. Control and reliance explain why prison[39] and school[40] authorities may owe a duty to those in their care or custody, and why owners or occupiers of property used by the public may be liable. *Nagle* and *Romeo* fall into this category.

In *Heyman*, the plaintiffs argued that the council had breached a duty owed to them as subsequent purchasers by failing to inspect a house adequately during construction. The plaintiffs suffered economic loss when the house subsided. The High Court held unanimously that the council was not liable in negligence, but for different reasons. The court rejected the two-stage test for duty of care laid down in *Anns v Merton*, but accepted the policy/operational distinction.

Anns was later overruled by the House of Lords in *Murphy v Brentwood District Council*,[41] signalling a firm move in the United Kingdom away from imposing on public authorities tort duties which would render them insurers against private loss.[42]

As Lord Hoffman said in *Stovin v Wise*,[43] 'The trend of authorities has been to discourage the assumption that anyone who suffers loss is *prima facie* entitled to compensation... The default position is that he is not.'

The majority in *Sutherland* agreed there was no common law duty to exercise powers in general, although such a duty may arise through conduct. Mason J explained: 'Statutory powers are not in general mere powers which the authority has an option to exercise or not according to its unfettered choice. They are powers conferred for the purpose of attaining the statutory objects.'[44]

The policy/operational distinction was central. Mason J based much of his reasoning on the idea of reliance, pointing out that a duty to act could arise where reliance and damage were both foreseeable. There may be 'specific reliance,' in which the authority acts in such a manner as to create an expectation by the plaintiff that it will act, or 'general reliance'. The difficulties inherent in the latter concept were pointed out ▶

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by Lord Hoffman in *Stovin v Wise*,[45] and it has received a mixed reception in Australian courts.[46]

Similarly in *Parramatta City Council v Lutz*,[47] the defendant council was held to be under a duty to exercise its statutory powers because the plaintiff had relied on it to do so. Kirby P and Mahoney JA based their decisions on specific reliance, while McHugh JA preferred general reliance.

In *Pyrenees Shire Council v Day*,[48] duty factors common to four of the judgements were consistence with performance of statutory functions, presence of a specific plaintiff rather than the public at large, control and power to protect on the part of the defendant, vulnerability by the plaintiff, and no policy reasons against imposing a duty.[49]

'The fact that the authority owes a common law duty of care because it is invested with a function or power does not mean that the total or partial failure to exercise that function or power constitutes a breach of that duty. Whether it does will depend on all the circumstances of the case, including the terms of the function or power and the competing demands on the authority's resources.'[50]

Imposition of a duty of care is necessarily the first step in liability, but there is still plenty of scope at the breach stage to deny liability, as in *Romeo*, and the two concepts are not always clearly separated.[51]

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"The court has moved a long way forward in its willingness to impose affirmative duties to act."

Vulnerability, knowledge, and the six-point test: *Crimmins*

In *Crimmins*, a negligence action was brought by the estate of a waterside worker whose death from mesothelioma resulted from workplace exposure to asbestos decades earlier. Registered stevedores were allocated to specific employers for individual jobs by a central statutory authority, the predecessor of the defendant. Individual employers were responsible for providing safety equipment, although the authority was responsible for safety generally.

The High Court found by a majority of five to two that an affirmative duty to protect was owed to the plaintiff, but for a variety of reasons. Kirby J applied the three-stage *Caparo Industries v Dickman* test,[52] which has not found favour with other members of the court.

McHugh J, in the majority, discussed duty of care in depth. 'The correct approach [to duty of care for statutory authorities]...is to commence by ascertaining whether the case comes within a factual category where duties of care have or have not been held to arise... The policy of developing novel cases incrementally by reference to analogous cases acknowledges that there is no general test for determining whether a duty of care exists. But that does not mean that duties in novel cases are determined simply by looking for factual similarities... The reasons in each new case help to develop a body of coherent principles.'

McHugh J developed a test for duty based on six questions summarised as follows:

- Reasonable foreseeability of injury to the plaintiff.
- Whether the defendant had power to protect a specific class including the plaintiff.
- Vulnerability of the plaintiff or his interests.
- Knowledge, actual or constructive, by the defendant of risk of harm to the class including the plaintiff.
- Whether the defendant's act or omission falls within 'core policy making' or 'quasi-legislative' functions (no duty).
- Presence of any supervening reasons in policy to deny duty (no duty).

Particular emphasis was placed on the notions of vulnerability of the plaintiff and knowledge on the part of the defendant, just as McHugh J had done previously in *Perre v Apand*[53] in relation to duty in pure economic loss cases when he said, 'vulnerability and knowledge go hand in hand'.

However, his Honour expressed reservations about liability being imposed based on constructive knowledge of risk. Except in cases where there had been assumption of responsibility or control, vulnerability was an 'essential condition' for imposing a duty of care, and the concept of general reliance

discussed above was a combination of the existence of powers to ameliorate harm and vulnerability to that harm.

Abolition of immunity: *Brodie* and *Puntoriero*

Applications for special leave to appeal were considered together in *Brodie v Singleton* and *Ghantous v Hawkesbury City Council*.[54] *Brodie* concerned a bridge which had collapsed under a truck driven by the plaintiff. *Ghantous* was a classic trip and fall case on a public footpath. The court was unanimous in finding no breach of duty in *Ghantous*. In *Brodie*, the High Court abolished the 'highway rule,' which had been thought to confer a special immunity on highway authorities in cases of nonfeasance, by a majority of four to three, subsumed the law of public nuisance as applied to highway authorities into ordinary negligence, and again considered issues of duty of care and breach in the context of public authorities. Highway authorities are now subject to the ordinary common law duty of care in the same way as all other public authorities, based on powers such as those contained in the *Local Government Act* 1919 (NSW) which give them 'a significant and special measure of control over the safety of person and property of road users'.

Authorities with statutory powers regarding the design, construction and maintenance of roads are 'obliged to take reasonable care that their exercise of or failure to exercise those powers does not create a foreseeable risk of harm to a class of persons (road users) which includes the plaintiff.

'Where the state of a roadway…poses a risk…then, to discharge its duty of care, an authority with power to remedy the risk is obliged to take reasonable steps…within a reasonable time to address the risk.'[55]

The content of the duty reflects the factors laid down by Mason J in *Wyong Shire Council* to test for breach, and the formulation of the duty 'includes consideration of competing or conflicting responsibilities of the authority'. It was made clear that the duty of care 'does not extend to ensuring the safety of road users in all circumstances', and plaintiffs are expected to 'take ordinary care' for their own safety, which is the 'starting point' in determining breach.[56]

In *Puntoriero v Water Administration Ministerial Corporation*,[57] a statutory immunity clause[58] precluding suit for 'loss or damage suffered as a consequence of the exercise of a function' failed to protect the water corporation against liability for loss of potato crops due to contaminated irrigation water. By a majority of four to one, the High Court held the authority liable for failure to test carefully for or to remove the pollution, restricting the immunity to positive acts causing harm rather than to nonfeasance, thus imposing an affirmative duty to act.

Relevant factors in the decision were the commercial rather than public nature of the defendant's operations, its monopoly over the supply of water, and a strict (narrow) approach to construction of statutory provisions limiting plaintiffs' rights or authorising tortious conduct. Kirby J, in dissent, said the majority construction had 'in effect erase[d]' the immunity clause, stressing the resource implications of liability as he had done in previous decisions.

No affirmative duty owed to the public at large

Courts have used devices based on the public nature of the functions exercised to limit or deny liability in tort, and English courts, in particular, have used the distinction between public and private law 'rights' to deny a duty of care.[59] One example is *Hill v Chief Constable of West Yorkshire*,[60] in which an action against the police, brought by the mother of a victim murdered by a serial killer, failed because it was held that police owed no duty of care to members of the general public to apprehend criminals.

Similarly, although the House of Lords did allow recovery for negligent damage to property by Borstal escapees in *Dorset Yacht Co Ltd v Home Office*,[61] they were at pains to emphasise the narrow and restricted scope of the duty based on the presence of a specifically identifiable class of potential plaintiffs.[62]

In Australia in *Agar v Hyde*,[63] no duty of care was owed by the International Rugby Football Board to two plaintiffs who broke their necks playing rugby union. The plaintiffs had argued for a duty to amend the rules of the game to minimise such accidents, but the High Court said that 'to hold that each ▶

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of the individual appellants owed a duty of care to each person who played rugby under those laws strikes us as so unreal as to border on the absurd'.[64]

The latest High Court cases on the issue of nonfeasance are *Graham Barclay Oysters Pty Ltd v Ryan*, *Ryan v Great Lakes Council*, and *State of New South Wales v Ryan*.[65] The plaintiff, individually and as representative of a class of 185 other claimants, sued the oyster grower and distributor, the Great Lakes Council and the New South Wales government for having contracted Hepatitis A as a result of eating oysters contaminated by faecal matter in Wallis Lakes.

The plaintiff's case against the State of New South Wales was based on breach of a duty owed to the public, in that it had omitted to exercise powers available to it under the *Fisheries Management Act* 1994 (NSW) to prevent the sale of contaminated oysters.

The state ultimately succeeded in its appeal on the duty of care question, with five separate judgements being delivered. Gummow and Hayne JJ, with whom Gaudron J agreed, posited a 'multi-faceted' test for duty, taking into account policy factors, degree of control over the risk by the authority, vulnerability of plaintiffs, and consistency with the relevant legislation. Gleeson CJ saw the problem in terms of justiciability, as he had done in *Crimmins*, reasoning that such matters fall within the political, not the judicial realm.

Failure to establish causation was also relevant. McHugh J's views turned on construction of the legislative intention, consistency with the statute, and the width of the discretion available to the authority. He applied the six-point test developed in *Crimmins*.

Callinan J specifically rejected the policy/operational and core/non-core function tests, regarding foreseeability, control, and vulnerability as insufficient to found a duty, and distinguishing *Pyrenees*.

Kirby J applied the criterion of reasonableness, focusing on the impossibility of the state policing all sources of food contamination and the 'massive obligation' that a contrary view would impose. He too distinguished *Pyrenees*.

CIVIL LIABILITY ACT 2002 (NSW)

Liability of public authorities is dealt with directly in Part 5 of the *Civil Liability Act* 2002 (NSW). Division 4 (assumption of risk) and Division 5 (recreational activities) will also impact heavily on many public authorities because of the nature of their activities.

Section 41 defines a function as including a power, authority or duty, thus eliminating confusion about distinctions between powers and duties.

Section 42 deals with resource allocation in relation to duty of care and breach, specifically stating in section 42(b) that 'the general allocation of resources by the authority is not open to challenge', incorporating ideas derived from the policy/operational dichotomy. Functions exercised by the authority are 'to be determined by reference to the broad range of its activities', in keeping with the common law.

Section 43 deals with breach of statutory duty, and section 44 covers liability for failure to exercise regulatory functions. Liability cannot attach to failure to regulate unless the plaintiff could have forced the authority to regulate by instituting proceedings. This approximates the administrative law approach discussed above in Kneebone's second category of competing approaches to tort liability.

Section 45 restricts, but does not entirely reverse, the effect of *Brodie v Singleton* on highway immunity, despite stringent efforts by various state governments and lobby groups to persuade the Ipp Committee to recommend reversal. Section 45 confers a special nonfeasance protection for roads authorities, so that no liability can exist unless there is actual knowledge of the risk, mirroring McHugh J's concerns in *Crimmins* about imposing liability based only on constructive knowledge.

Section 45(2) clearly states that actual knowledge of risk does not by itself create a duty of care, and the section does not affect the standard of care. It does not appear that these sections alter the common law in any significant respect.

The Act's major impact is likely to come from other aspects, including sections 5B (standard of care), 5D (causation), 5F and 5H (obvious risk) and 35-36 (proportionate liability).[66] Division 4 incorporates the concept of 'obvious risk', imposes a presumption that injured persons are aware of obvious risks, and provides that there is no proactive duty to warn of obvious risk unless the plaintiff has requested information or advice, a legal requirement to warn exists, or the defendant is a professional and the risk is one of personal injury or death. This last section leaves *Rogers v Whitaker* intact, and the obvious risk concept echoes the views of Kirby J in *Romeo*.[67]

Liability for materialisation of inherent risks is excluded, although not in relation to duties to warn. Division 4 clearly has the potential to exclude plaintiffs injured in situations such as those in *Romeo* and *Nagle*, although given the outcome in *Romeo* it seems likely that many such plaintiffs would fail at common law as well. Division 5 is extremely sweeping, defining recreational activities to include any sport, any pursuit engaged in for enjoyment, relaxation or leisure, and covering public open spaces in which such activities take place.

Section 5L precludes liability for obvious risks even where the plaintiff is not aware of them, and the presence of a risk warning also forestalls liability unless the injured person is an 'incapable person' under the control of another. A defendant is not required to establish that the injured person received or understood the warning or was capable of doing so. Divisions 4 and 5 are not aimed specifically at public defendants, but it is highly likely that they will offer a significant measure of pro-

tection from liability to such defendants across a broad range of activities.

CONCLUSION

In *Pyrenees v Day*,[68] Kirby J described the liability of public authorities as one of the most 'difficult' areas of law.

'An optimistic view is that the difficulty arises because the law is "developing". A more realistic perspective may be that it is a category which is conceptually unsettled. The fundamental problem is that a single unifying principle for liability in negligence, easy to apply and predictable in outcome, has proved elusive.'

This article has attempted to trace various approaches to the task of identifying an appropriate basis for liability of public defendants and to explain the tensions inherent in the interface between public and private law, from which much of the difficulty stems.

While the law could not be considered settled, several common themes emerge. In keeping with its general reluctance to lay down one touchstone for duty of care questions which fall outside the basic *Donoghue v Stevenson* parameters, the High Court has adhered to its incremental approach, placing emphasis on various factors as indicators of duty in particular circumstances. Control and reliance feature prominently, as do knowledge and vulnerability. Judicial protection of public authorities has largely given way to the demands of accountability. The court has moved a long way forward in its willingness to impose affirmative duties to act, as long as these are confined to identifiable classes of plaintiffs, and not the public as a whole.

In most cases of misfeasance, public defendants will be treated in the same way as private defendants. The continued expansion of the tort of negligence, which has eliminated strict liability under *Rylands v Fletcher*[69] and subsumed occupiers liability since *Voli*[70] and *Safeways*,[71] has continued in this area, with the absorption of public nuisance into negligence in *Brodie*. This makes the search for principle in negligence even more compelling.

The impact of 'tort reform' legislation seems unlikely to vary greatly between public and private defendants, since Part 5 of the *Civil Liability Act* 2002 (NSW) largely mirrors the common law. PL

Endnotes: **1** Gleeson CJ, *Sydney Morning Herald*, 13-14 September 2003 at 10. **2** (1993) 177 CLR 423. **3** S Kneebone (1998) *Tort Liability of Public Authorities*, LBC, p 1. See also *Stovin v Wise and Norfolk County Council* [1966] AC 923 at 935 per Lord Nicholls. **4** eg as in *Caparo Industries v Dickman*. See also *Puntoriero v Water Administration Ministerial Corporation* [1999] HCA 45. **5** *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 per Mason J at 456-57. **6** supra 3 - Foreword by The Hon Sir Anthony Mason. **7** eg s 5(2) *Crown Proceedings Act* 1988 (NSW); s 6(1) *Crown Proceedings Act* 1947 (UK). **8** eg *Romeo v Conservation Commission of the Northern Territory* [1998] HCA 5 per Brennan CJ **9** supra 2. See also ibid. **10** *Wyong Shire Council v Shirt* (1980) 146 CLR 40 per Mason J. **11** see supra 3, pp 6-28. **12** ECS Wade (ed), AV Dicey (1959) *Introduction to the Study of the Law of the Constitution* 10th ed, p 193. **13** [1970] AC 1004 at 1068. **14** [1978] AC 728 (HL). **15** supra 5, per Gibbs CJ, but rejected per Mason J. **16** See JJ Doyle QC (1989) 'Tort Liability for the Exercise of Statutory Powers' in PD Finn (ed) *Essays on Torts*, LBC, pp 233-36. **17** (1999) 200 CLR 1. **18** see three-stage test formulated in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 738-9. **19** supra 5 at 469. **20** see *Stovin v Wise* [1996] AC 923 at 951; *Pyrenees v Day* (1998) 192 CLR 330; *Crimmins v Stevedoring Industry*. See also *United States v Gaubert* (1991) 499 US 315. **21** *Crimmins*, per McHugh J. **22** C Harlow and R Rawlings (1984) *Law and Administration*, Weidenfeld and Nicholson, London. **23** supra 3 at 28-38. **24** (1981) 150 CLR 225. **25** (1985) 2 NSWLR 501. **26** supra 9. **27** supra 5 at 29. **28** eg *Calveley v Chief Constable of Merseyside* [1989] 1 AC 1228. **29** ibid. **30** eg *Bourgoin SA v Ministry of Agriculture Fisheries and Food* [1986] 1 QB 716. **31** eg *Rowling v Takaro Properties Ltd* [1988] 1 AC 473; Kneebone supra 3 at 30. **32** (1941) AC 74. **33** *Donoghue v Stevenson* [1932] AC 562. **34** Criticised in *Brodie v Singleton* (2001) 180 ALR 145 as giving rise to 'illusory distinctions'. **35** eg in *East Suffolk*, Viscount Simon and Lord Thankerton viewed the plaintiff's loss as caused by 'forces of nature'. **36** supra 14. **37** supra 34. **38** *Crimmins*, per McHugh J. **39** eg *Kirkham v Chief Constable of Greater Manchester Police* [1990] 2 QB 283. **40** eg *Commonwealth v Introvigne* (1982) 150 CLR 258; *Watson v Haines* (1987) Aust Torts Reports 80-094; *Carmarthenshire CC v Lewis* [1955] AC 549. **41** [1991] 1 AC 398. **42** ibid per Lord Oliver at 491-92; *Phelps v Hillingdon London Borough Council* [2000] 3 WLR 776 appears to be a high point in a trend back to liability since the late 1990s. **43** [1996] AC 923 (HL) at 949. **44** *Sutherland* per Mason J at 457-58. **45** [1996] AC 923 (HL) at 954-5. **46** eg rejected by Hayne J in *Brodie v Singleton* and Brennan CJ, Gummow and Kirby JJ in *Pyrenees Shire Council v Day* (1998) 192 CLR 330, but accepted by Toohey and McHugh JJ in *Pyrenees*, and McHugh J in *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 and restated by McHugh J in *Crimmins*. **47** ibid. **48** (1998) 192 CLR 330. **49** Todd (1998) 'Liability in Tort of Public Bodies' in Mullany and Linden (eds) *Torts Tomorrow – A Tribute to John Fleming*, LBC, p 36; endorsed by McHugh J in *Crimmins*. **50** per McHugh J at 371; see also per Gummow J at 394-5. **51** see eg comments per McHugh J in *Crimmins*. **52** [1990] 2 AC 605 (HL) - foreseeability + proximity + fair, just and reasonable. **53** (1999) 198 CLR 180 at 230. **54** supra 34. **55** ibid, per Gaudron, McHugh, Gummow JJ. **56** ibid. **57** [1999] HCA 45. **58** s 19(1) *Water Administration Act* 1986 (NSW). **59** eg *Calveley v Chief Constable of Merseyside* [1989] 1 AC 1228; *Jones v Dept of Employment* [1989] QB 1; *Beds CC* [1995] 2 AC 633 at 730; see also supra 3 at 7. **60** [1989] AC 53 (HL). **61** [1970] AC 1004 (HL). **62** ibid, per Lord Diplock at 1070-71. **63** (2000) 201 CLR 552. **64** ibid, per Gaudron, McHugh, Gummow, Hayne JJ. **65** [2002] HCA 54. **66** See generally P Taylor SC 'The Future of Public Authority Liability' (2002) 54 *Plaintiff*, p 6. **67** supra 8 at 299. **68** supra 48 at 397. **69** *Burnie Port Authority v General Jones P/L* (1994) 179 CLR 520. **70** *Voli v Inglewood Shire Council* [1963] 110 CLR 74. See also *Comissioner for Railways (NSW) v Anderson* (1961) 105 CLR 42 per Fullager J at 56. **71** *Australian Safeway Stores Pty Ltd v Zaluzna* [1987] 162 CLR 479.

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