

## **An Introduction to the Civil Liability of Public Authorities**

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This paper provides an introduction to the civil liability of public authorities under Part 5 of the *Civil Liability Act 2002* (NSW). The paper first discusses the authorities and persons to which Pt 5 applies, before setting out and considering the four principles which by dint of s 42 must be applied when a court is called upon to determine whether a public or other authority has a duty of care or has breached a duty of care. In the third section, the operation of s43 and 43A is examined, the combined effect of which is that in certain circumstances the standard of care expected of a public authority is substantially lower than that which may be expected of a private individual. The circumstances in which a public authority will be liable for civil liability for the failure to exercise a regulatory function pursuant to s44 are then considered. Finally, the proper scope and application of s46 of the Act are briefly discussed. The scope of this paper does not include a discussion of section 45 of the Act, which is a modified statutory formulation of the common law rule formerly known as the 'highway rule'.

## Introduction

It has long been recognised that a public authority may be subject to a common law duty of care when exercising a statutory power or performing a statutory duty. As Mason J noted in *Sutherland Shire Council v Heyman*,<sup>1</sup> the principle that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered, has been applied in this country as long ago as *Sermon v Commissioner of Railways*<sup>2</sup> and *Essendon Corporation v McSweeney*.<sup>3</sup> However, the common law has also recognised special factors applicable to statutory and other public authorities which may negative a duty of care which a private individual would owe in apparently similar circumstances,<sup>4</sup> or result in the standard of care owed to a plaintiff by a statutory authority being less than that which would be owed by a private party.<sup>5</sup> These conflicting notions have in recent times been incorporated in to and modified by legislation, with the introduction of Part 5 of the *Civil Liability Act 2002* (NSW), which applies to the determination all claims for damages against certain public or other authorities in proceedings commenced on or after 6 December 2002 (irrespective of when the civil liability arose). The regime applies to acts or omissions which would give rise to civil liability in tort, even where damages are sought in an action for breach of contract or any other action (s40(2)). As with other areas of the Act, Part 5 operates against the background of the existing common law, but it is of “the first importance” to recognise that when questions of duty, content and breach arise the proper “starting point” is the statute:

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<sup>1</sup> (1985) 157 CLR 440 at 458

<sup>2</sup> (1907) 5 CLR 239 at 245; and 254.

<sup>3</sup> (1914) 17 CLR 524 at 530. See also *Caledonian Collieries Limited v Speirs* (1957) 97 CLR 202.

<sup>4</sup> *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [79] per McHugh J.

<sup>5</sup> *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 394-5 per Gummow J.

If attention is not directed first to the *Civil Liability Act*, and then to [the authority's governing legislation], there is serious risk that the inquiries about duty, breach and causation will miscarry.<sup>6</sup>

It is generally a mistake to presume that a reforming statute is intended to do no more than re-state the existing law.<sup>7</sup>

### **To whom does the Act apply?**

The Act applies to a 'public or other authority', an expression defined exhaustively by s41 of the Act in the following terms:

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.

As may be seen, the Crown, government departments, local government authorities, and state owned corporations all fall within the ambit of a 'public or other authority'. However the Act also applies to certain private authorities carrying out quasi-public operations. For example, by dint of s41(c), the Act

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<sup>6</sup> *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 432 [11].

<sup>7</sup> *Brennan v The King* (1936) 55 CLR 253 at 263.

applies to 'a public health organisation', which is defined by s7 of the *Health Services Act 1997* (NSW) to include an 'affiliated health organisation', examples of which include non-profit, religious, charitable or other non-governmental organisations and institutions controlling hospitals, health services or health support services.<sup>8</sup> The Act also applies to persons or bodies conducting non-government schools registered under the *Education Act 1900* (NSW) Div 3, Part 7.<sup>9</sup> Persons upon which public official functions are conferred, or whom act in a public official capacity (whether or not employed as a public official) are also encompassed by the Act in relation to the exercise of such functions or whilst acting in that capacity.<sup>10</sup>

### **Duty of care and breach**

Part 5 sets out four core principles to be applied when a court is called upon to determine whether a public or other authority has a duty of care or has breached a duty of care. These principles do not displace the operation of ss5B and 5C when considering questions of breach: a statute must always be construed on the basis that its provisions are intended to give effect to harmonious goals.<sup>11</sup> The operation of the pre-existing common law principles of negligence must yield to the statute to the extent necessary to give its provisions full legal effect.

### *Resources*

The first two principles relate to the question of resources. Their combined effect is that a court must, when considering the liability of a public authority in negligence, consider resource constraints faced by the authority in the course of carrying out its functions, but is not to consider any challenge to the general allocation of those resources. These concepts are related, and each is discussed below in turn. Again one must bear firmly in mind, for the purpose of classic tort

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<sup>8</sup> Sch 3 *Health Services Act 1997* (NSW). Examples include St Vincent's Hospital in Sydney, Catholic Health Care Ltd, and the Benevolent Society of NSW.

<sup>9</sup> *Civil Liability Regulation 2009* (NSW) s4.

<sup>10</sup> *Civil Liability Act* s41(e1).

<sup>11</sup> *Project Blue Sky v ABA* (1998) 194 CLR 355 at 381-2.

analysis, that these considerations apply equally at different parts of the inquiry: duty, and breach.

### *Resource constraints*

By virtue of s42(a), a court is to have regard to the fact that the functions required to be exercised by an authority are limited by the financial and other resources which are reasonably available to it for those purposes. This provision does not introduce novel law. These considerations were germane to the common law approach, perhaps especially, but not limited, to the question of the response of the reasonable man to a foreseeable risk which is, of course, essential to breach. The “expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have are central considerations in all questions of breach of duty.”<sup>12</sup>

When attempting to understand the common law position relating to questions of this kind prior to the introduction of the Act, and their bearing on the current rule, the following comments of Gaudron J in *Crimmins v Stevedoring Industry Finance Committee*<sup>13</sup> are instructive:

A public body or statutory authority only has those powers that are conferred upon it. And it only has the resources with which it is provided. If the common law imposes a duty of care on a statutory authority in relation to the exercise or non-exercise of its powers or functions, it only imposes a duty to take those steps that a reasonable authority with the same powers and resources would have taken in the circumstances in question.

Her Honour referred to *Stovin v Wise*<sup>14</sup> as authority for this proposition. In that case, Lord Nicholls of Birkenhead (with whom Lord Slynn of Hadley agreed), when discussing common law liability for omissions, noted that “the standard of reasonableness is to be measured by what may

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<sup>12</sup> *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48.

<sup>13</sup> (1999) 200 CLR 1 at 21

<sup>14</sup> [1996] AC 923 at 933

reasonably be expected of the defendant in [the defendant's] individual circumstances", which circumstances include "financial resources".

As these comments suggest, the tendency of the courts to consider the individual or special circumstances of public authorities, and to deal with such authorities in a manner distinct from other (private) tortfeasors, predates the introduction of Part 5. In *Crimmins*, McHugh J (with whom Gleeson CJ agreed) at [79] said:

Common law courts have long been cautious in imposing affirmative common law duties of care on statutory authorities. Public authorities are often charged with responsibility for a number of statutory objects and given an array of powers to accomplish them. Performing their functions with limited budgetary resources often requires the making of difficult policy choices and discretionary judgments. Negligence law is often an inapposite vehicle for examining those choices and judgments. Situations which might call for the imposition of a duty of care where a private individual was concerned may not call for one where a statutory authority is involved. This does not mean that statutory authorities are above the law. But it does mean that there may be special factors applicable to a statutory authority which negative a duty of care that a private individual would owe in apparently similar circumstances. In many cases involving routine events, the statutory authority will be in no different position from ordinary citizens. But where the authority is alleged to have failed to exercise a power or function, more difficult questions arise.

The logical connection his Honour drew between the limited budgetary resources available to public authorities, and the resultant policy choices and discretionary judgments about their allocation, highlights the second limb of s42, to which we will now turn.

#### *Resource allocation*

In addition to considering questions of resource scarcity, the courts have traditionally been reluctant to countenance questions of resource allocation by public bodies. This principle has now been incorporated into the legislative regime in s42(b), which states that "the general allocation of those resources by the authority is not open to challenge". The reference to "those resources" is a reference to the "financial and other resources that are reasonably available to

the authority” in s42(a). Once again, the legislation has not introduced novel law where none previously existed, but has adopted, or perhaps adapted, the pre-existing common law position, the rationale for which was summarised by Gleeson CJ in *Graham Barclay Oysters Pty Ltd v Ryan*.<sup>15</sup> There his Honour noted that it is the essentially political nature of such questions, and their inappropriateness for judicial determination under the Australian system of government, which lies at the heart of the rule:

Decisions as to raising revenue, and setting priorities in the allocation of public funds between competing claims on scarce resources, are essentially political... At the centre of the law of negligence is the concept of reasonableness. When courts are invited to pass judgment on the reasonableness of governmental action or inaction, they may be confronted by issues that are inappropriate for judicial resolution, and that, in a representative democracy, are ordinarily decided through the political process.

The matters now set out in subsections (a) and (b) of s42 have a close connection with a distinction drawn out in the cases between ‘policy’ and ‘operational’ decisions of public authorities. This formulation attempts to clarify the circumstances in which a duty of care may be imposed upon a public authority, and was discussed by Mason J in *Heyman* at in the following terms (at 469):

The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that 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 in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

The origins of the policy/operational distinction may be found in a line of English authority commencing with *East Suffolk Rivers Catchment Board v Kent*.<sup>16</sup> In that

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<sup>15</sup> (2002) 211 CLR 540 at [6]

<sup>16</sup> [1941] AC 74

case, Lord Romer, adapting the dissenting dictum of du Parc LJ in *Kent v East Suffolk Rivers Catchment Board*,<sup>17</sup> said (at 102-3):

...when Parliament has left it to the public authority to decide which of its powers it shall exercise, and when and to what extent it shall exercise them, this may raise "a question involving the consideration of matters of policy and sometimes the striking of a just balance between the rival claims of efficiency and thrift."

These comments were adopted by Lord Wilberforce (with whom Lords Diplock, Simon of Glaisdale, and Russell of Kilowen agreed) in *Anns v Merton London Borough Council*.<sup>18</sup> And, as we have said, Mason J took up the distinction in *Heyman*, while Gibbs CJ (with whom Wilson J agreed) referred to it as "logical and convenient".<sup>19</sup> *Heyman* appears however to have been its high watermark, for in *Stovin v Wise* a majority of the House of Lords rejected the utility of the distinction, calling it an "inadequate tool with which to discover whether it is appropriate to impose a duty of care or not".<sup>20</sup> And in *Romeo v Conservation Commission of the Northern Territory*,<sup>21</sup> Hayne J, while declining to decide on the validity of the distinction, observed that there "seems to be much force" in what was said in *Stovin v Wise*.<sup>22</sup> Gleeson CJ in *Graham Barclay Oysters* appeared also to question the distinction, observing that it "was never rigorous".<sup>23</sup> His Honour also referred without disapproval to the plurality decision of the House of Lords in *Stovin v Wise*, and to the opinion of Gummow J in *Pyrenees Shire Council v Day*<sup>24</sup> in which his Honour referred to the rejection of the distinction by the United States Supreme Court in *United States v Gaubert*,<sup>25</sup> and declined to use it in the circumstances of the case.

The enduring utility of the distinction between policy and operational matters is uncertain. It seems however that while there is significant albeit not unanimous

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<sup>17</sup> [1940] 1 KB 319

<sup>18</sup> [1978] AC 728 at 754

<sup>19</sup> *Sutherland Shire Council v Heyman* (1985) 157 CLR 440 at 442.

<sup>20</sup> *Stovin v Wise* at 951 per Lord Hoffman (with whom Lords Goff of Chieveley and Jauncey of Tullichettle agreed, Lords Slynn of Hadley and Nicholls of Birkenhead dissenting).

<sup>21</sup> (1998) 192 CLR 431

<sup>22</sup> *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 at 491.

<sup>23</sup> *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 556.

<sup>24</sup> (1998) 192 CLR 330 at 393.

<sup>25</sup> (1991) 499 US 315



judicial recognition that it is of some use in deciding when a public authority has been negligent (in so far as it makes clear that matters of policy are unsuited to judicial determination), the weight of opinion is against using the distinction as a determinant of when a duty of care is owed.<sup>26</sup> Whatever uncertainties about this were thrown up by common law development, the statute makes clear that the subject matter of paras. (a)-(d) must be taken into account even if, say, the allocation of resources might be seen as an operational consideration.

### *Further principles*

The Act requires the consideration of two further principles. Section 42(c) states that the functions required to be exercised by the authority 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. This is an extension of the principle introduced by s5C(a). Section 42(d) establishes an evidentiary rule allowing a public authority to rely on evidence of its compliance with general procedures and applicable standards for the exercise of its functions as a relevant but not conclusive factor to which a court may have regard when making a determination about whether the conduct of a public authority satisfies its duty of care in particular circumstances.

There are two other matters relevant to the question of whether the law of negligence should impute a legally enforceable duty of care to a public authority, which remain relevant but may be sourced to high common law principle rather than the statute. The first may follow on logically from a discussion of the policy/operational dichotomy. As Hayne J observed in *Crimmins*,<sup>27</sup> “[t]he question of duty of care raises fundamental issues at the intersection of public and private law”. The courts approach their task with a proper appreciation of “the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws”.<sup>28</sup> (Emphasis added).

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<sup>26</sup> *Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360 at 413 [259].

<sup>27</sup> at 88 [243].

Secondly, since *Astley v Austrust Ltd*<sup>29</sup> there has been a heightened appreciation of the need to contain the law of negligence within its proper space; to halt the “imperial march of modern negligence law”, as it were. To put it more formally, in determining whether a duty exists there may be a need “to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships”.<sup>30</sup> It should go without saying that the existence of statutory obligations does not of itself rule out a duty of care.<sup>31</sup> Often their existence will be *the* critical feature giving rise to a duty. That the suggested duty would create inconsistent obligations, however, is a powerful reason to deny its existence.

### **Attenuation of the standard of care in certain circumstances: s43 and 43A**

The legislation affects proceedings for civil liability involving public authorities in a further important respect. The combined effect of ss 43 and 43A is that in certain circumstances the standard of care expected of a public authority is substantially lower than that which may be expected of a private individual.

#### *Alleged breach of a statutory duty*

Where a proceeding for civil liability is based on the tort of breach by a public authority of a statutory duty in connection with the exercise of or failure to exercise a function, it must be shown that the impugned act or omission was in the circumstances so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions: s43(1), (2). As may be readily apparent, this formulation bears close resemblance to the public law concept of *Wednesbury* unreasonableness.<sup>32</sup>

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<sup>28</sup> *Zheng v Cai* 239 CLR 446 at 455 [28].

<sup>29</sup> (1999) 197 CLR 1 at 23 [48].

<sup>30</sup> *Sullivan v Moody* (2001) 207 CLR 562 at 580 [50]; *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215; *MM Constructions (Aust) Pty Ltd v Port Stephens Council* [2012] NSWCA 417 at [98]-[99].

<sup>31</sup> *Ibid* at 582 [60].

<sup>32</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680; [1948] 1 KB 223.

Section 43A establishes a similar principle with respect to negligence consisting of the exercise or non-exercise of a “special statutory power”. The introduction of this section into Part 5 by the *Civil Liability Amendment Act 2002* (NSW) was a legislative reaction to the decision at first instance of Adams J in *Presland v Hunter Area Health Service*.<sup>33</sup> That was a case in which damages were awarded to a mentally ill individual who, after being released from hospital by health services following a psychiatric assessment, murdered a person about whom he had delusions.

Notwithstanding the fact that the decision was overturned on appeal,<sup>34</sup> s43A was introduced, the effect of which is to lower the standard of care applicable to authorities exercising powers conferred by or under a statute, and which are of a kind that persons generally are not authorised to exercise without specific statutory authority. These are referred to as a ‘special statutory power’,<sup>35</sup> of which the kind discussed in *Presland* is a clear example. Only where an act or omission involving the exercise of, or failure to exercise, such a power was in the circumstances so unreasonable that no authority having the power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power, may civil liability in negligence be imposed.

As the New South Wales Court of Appeal noted in *Bellingen Shire Council v Colavon Pty Limited*,<sup>36</sup> “there does not appear to be any rule that could or should be applied generally or uniformly to determine whether an entity acts pursuant to a ‘special statutory power’”. Furthermore, the High Court of Australia in a unanimous joint judgment has described the operation of s43A as being of “uncertain reach”.<sup>37</sup> Against this backdrop it is not possible to state with a high degree of certainty, beyond the level of assistance provided by s43A(2), whether and in what circumstances an authority is exercising “a special statutory power”. By way of example only, Campbell JA considered, *obiter dictum*, that the erection

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<sup>33</sup> [2003] NSWSC 754

<sup>34</sup> *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22.

<sup>35</sup> *Civil Liability Act 2002* (NSW) s43A(2).

<sup>36</sup> [2012] NSWCA 34 at [38].

<sup>37</sup> *Sydney Water Corporation v Turano* [2009] HCA 42 at [26].

of protective screening on overhead bridges by a roads authority was not done in the exercise of a “special statutory power”.<sup>38</sup>

In *Warren Shire Council v Kuehne*, Whealy J (with whom McColl JA and Sackville AJA agreed) distilled the relevant principles with respect to the operation of s43A in the following manner:<sup>39</sup>

(1) The language of s 43A states a precondition for the existence of civil liability in the context with which it is concerned. Once it is found or assumed, by reference to the pre-existing common law of negligence, that a duty of care exists and there has been a failure to exercise reasonable care, s 43A(3) imposes an additional requirement, beyond those of the common law, before liability can be established.

(2) The origin and legislative history of s 43A make it plain that language modelled on that of *Wednesbury* unreasonableness was adopted from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [citation omitted] with the intention of raising the bar for plaintiffs in proof of breach of duty of care by an authority in the exercise of a special statutory power.

(3) Notwithstanding the difficulty of transposing the concept of *Wednesbury* unreasonableness, derived as it is from administrative law, to the law of negligence, the concept now has statutory force in s 43 and s 43A and is to be applied to an authority's act or omission.

(4) The words "could properly consider" require a determination to be made from the perspective of the authority, but with an objective element...

(5) Although the concept of *Wednesbury* unreasonableness has been expressed in varying terms, some extreme, some more moderate, its transposition into the law of civil liability requires that the unreasonableness must be at a high level. The language of s 43A ("could properly consider" with the restraint of "could" moderated by "properly") necessarily requires questions of degree and judgment.

That these provisions “state a pre-condition” to liability seems to be the settled view.<sup>40</sup> We would respectfully suggest however that this approach adds an unnecessary layer to analysis of the tort. It may be rather that the sections, where they apply, change the substantive law, as we have by our heading suggested,

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<sup>38</sup> *Refrigerated Roadways* at 434 [364]-435 [364].

<sup>39</sup> [2012] NSWCA 81 at [117].

by attenuating the standard of care owed at the breach stage. The universal standard of the reasonable man is reduced to *Wednesbury* unreasonableness, *per se*. The current approach seems to require, where a duty has been found to exist, consideration of the conventional breach question, doubtless by reference to s5B, as well as of the s43A question. We acknowledge that our position requires the word “reasonable”, in the phrase “a reasonable person”, where it appears in s5B, to be read, in this context, as incorporating the limitations expressed in s43A. But this ambulatory reading amounts to no more than reading the Act as a whole.

### **Failure to exercise a regulatory function**

Where a public or other authority fails to exercise any function to prohibit or regulate an activity (for example to issue a license or permit, or register or otherwise authorise a person in connection to an activity), section 44(1) states that such an authority is not liable in proceedings for civil liability if the authority could not have been required to exercise the function in proceedings instituted by the plaintiff.

As McHugh J noted in *Crimmins*,<sup>41</sup> common law courts have traditionally experienced some difficulty when attempting to impose an affirmative duty of care on a statutory authority, and have offered a number of different solutions to the problem. The approach reflected in s44 reflects one such solution, the origins of which may be traced back to English authority, but which has since received a mixed reception in Australia.

In *Anns v Merton London Borough Council*,<sup>42</sup> Lord Wilberforce held that a decision with respect to the exercise of a statutory power must be made outside the limits of a discretion bona fide exercised before a plaintiff may rely upon a common law duty of care.

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<sup>40</sup> *MM Constructions* at [213] per Basten JA.

<sup>41</sup> at 35 [81].

<sup>42</sup> [1978] AC 728 at 755.

This view received support in *Stovin v Wise*, where Lord Hoffman (with whom Lord Goff of Chieveley and Lord Jauncey of Tullichettle agreed) said:

...I think that the minimum preconditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised.

The reception of the *Stovin v Wise* approach into the common law of this country has however been, as we have said, mixed. Mason J in *Heyman* expressed early doubts when he said (at 458):

There is... no reason why a public authority should not be subject to a common law duty of care in appropriate circumstances in relation to performing, or failing to perform, its functions, except in so far as its policy-making and, perhaps, its discretionary decisions are concerned. And, despite possible indications to the contrary in *Anns v Merton London Borough Council* [citation omitted], there is no compelling reason for confining such a duty of care to situations in which a public authority or its officers are acting in excess of power or authority.

Notwithstanding these remarks, Brennan CJ, in a dissenting judgment in *Pyrenees* at 346[22], expressed his agreement with Lord Hoffman in *Stovin v Wise*. And it is this approach which has ultimately come to inform the operation of s44. This approach represents an attempt to assimilate public law concepts of remedies by way of judicial review with private law principles governing liability in negligence. A public authority may owe a duty to exercise regulatory functions where a failure to do so would be 'irrational' (this is referred to as a 'public law duty to act'), provided also that the conferral of a private right of compensation for non-exercise of the statutory power would not be contrary to the policy of the statute. Brennan CJ summarised the operation of the rule in the following way in *Pyrenees* at 347 [24]-[26]:

24. ...a duty to exercise a power may arise from particular circumstances, and may be enforceable by a public law remedy. Where a purpose for which a power is conferred is the protection

of the person or property of a class of individuals and the circumstances are such that the repository of the power is under a public law duty to exercise the power, the duty is, or in relevant respects is analogous to, a statutory duty imposed for the benefit of a class, breach of which gives rise to an action for damages by a member of the class who suffers loss in consequence of a failure to discharge the duty. The general principles of public law establish the existence of the statutory duty to exercise the power and the statute prescribes the class of individuals for whose benefit the power is to be exercised.

25. Where the power is a power to control "conduct or activities which may foreseeably give rise to a risk of harm to an individual" (to use a criterion stated by McHugh JA in *Parramatta City Council v Lutz*) and the power is conferred for the purpose of avoiding such a risk, the awarding of compensation for loss caused by a failure to exercise the power when there is a duty to do so is in accordance with the policy of the statute. An individual who is among the class whose interests are intended to be protected by exercise of the power has both locus standi to seek a public law remedy and a right to compensation for damage suffered as the result of any breach of the duty to exercise the power in protection of that individual's person or property...

26. No duty breach of which sounds in damages can be imposed when the power is intended to be exercised for the benefit of the public generally and not for the protection of the person or property of members of a particular class. And I doubt whether a duty breach of which sounds in damages would be held to exist if the power were conferred merely to supervise the discharge by a third party of that party's duty to act to protect a plaintiff from a risk of damage to person or property. (Citations omitted).

However, as Kirby J noted in *Crimmins* at 78 [216], the *Stovin v Wise* approach did not enjoy majority approval in *Pyrenees*, and has been expressly rejected by the unanimous opinion of the House of Lords in *X (Minors) v Bedfordshire County Council*.<sup>43</sup> McHugh J also expressed disapproval of this approach in *Crimmins* at 35 [82]:

With great respect to the learned judges who have expressed these views, 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. On the current state of the authorities, the negligent exercise of a statutory power is not immune from liability simply because it was within power, nor is it actionable in negligence simply because it is ultra vires.

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<sup>43</sup> [1995] 2 AC 633 at 736-737.

As we have said, cases which precede the enactment of the statute must yield to it in the event of inconsistency. Section 44 on any reading seems to pick up Brennan CJ's dissent from *Pyrenees*. On this understanding it limits both the statutory subject matter capable of founding a duty of care, and the class of persons entitled to the benefit of it.

## **Section 46**

Section 46 states that the fact that a public or other authority exercises or decides to exercise a function does not of itself indicate that the authority is under a duty to exercise the function or that the function should be exercised in particular circumstances or in a particular way. As we will demonstrate below, it is doubtful whether the fact that a public authority exercised a function has ever of itself given rise to a duty in the manner apprehended by the section.

Mr Villa of the Bar, in his *Annotated Civil Liability Act 2002 (NSW)*, 2<sup>nd</sup> Edition (2013), argues that perhaps the section is directed at negating any potential for duty to be imputed on the basis of notions of reliance of the kind espoused in *Heyman*. But, as he notes, "general reliance" was rejected as a criterion of liability for public authorities in *Pyrenees Shire Council*, and furthermore he points out that even if "general reliance" remained a criterion of duty, it could not be said that the mere exercising of a power would suffice; other factors, to which s46 has no application, would also be necessary, such as vulnerability on the part of the person who suffers injury, knowledge on the part of the authority of the risk, and the authorities capacity to minimise the risk (see *Crimmins* at [43] and [100] per McHugh J).

Another view of this section is that it is intended to restrict the reach the of the "well-settled principle" from *Caledonian Collieries*:<sup>44</sup>

...that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their

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<sup>44</sup> (1957) 97 CLR 202 at 221.



exercise, damages for negligence may be recovered (citations omitted).

With respect, even when expressed this statement was not intended to establish an absolute rule applicable in every case of any exercise of power, of whatever nature, conferred by statute.<sup>45</sup> It is worth bearing in mind that the case was a compensation to relatives claim on behalf of a widow and her children whose husband and father were killed when a string of runaway coal-laden railway trucks, operated under statutory authority by the appellant, collided with his car on a level crossing intersecting the public street he was lawfully passing along. Even in March 1957 there were refinements to this branch of the law it was unnecessary to state for the purpose of the case before the Court. As the plurality went on to write:<sup>46</sup>

As a general proposition it would seem undeniable that in the occupation and management of a railway which crosses a busy highway the appellants owe a duty to those using the highway to exercise reasonable care for their safety from the dangers which arise from the presence of the railway.

Nothing, we venture to suggest, in s46 alters that rule, even though a railway may be operated under statutory authority.

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<sup>45</sup> *Crimmins* at 29 [62]; *MM Constructions* at [88]-[93]

<sup>46</sup> *Caledonian Collieries* at 221.