

THE GOVERNMENT'S DUTY OF CARE

Introduction

1. In 2003, the *Wrongs Act* was amended to include a number of provisions concerning the law of negligence and the liability of public authorities.¹ These provisions are found in Parts X and XII of the *Wrongs Act 1958* (Vic) (the *Wrongs Act*). They were enacted following a federal government inquiry headed by the Honourable Justice David Ipp, which reviewed various aspects of the law of torts. The inquiry culminated in the release of a report titled "Review of the Law of Negligence: Final Report" in September 2002 (the **Ipp Report**).
2. None of the amendments altered the common law requirement that a plaintiff, when making a claim in negligence against a public authority, must establish that the public authority owed the plaintiff a duty to exercise reasonable care. However, sections 83 and 85 of the *Wrongs Act*, in particular, were intended to modify the common law in ascertaining the existence of a duty of care in respect of public authorities².
3. This paper will deal briefly with the general common law principles which apply in determining whether a public authority owes a common law duty of care and the modification of those principles as found in sections 83 and 85 of the *Wrongs Act*.

The General Approach to Duty

4. Consistent with established principle, a court will impose a duty of care upon a public authority only if it is satisfied that:
 - (a) it was reasonably foreseeable that the authority's alleged act or omission could or would be likely to cause loss to the plaintiff (or a class of which the plaintiff was a member) of the kind suffered; and

¹ 'Public Authorities' are defined broadly under s.79 of the *Wrongs Act 1958* (Vic) to include: the Crown; a public service body with the *Public Administration Act 2004*; a body corporate or unincorporated entity established under an Act for a public purpose; a person holding an office established by an Act or appointed by the Governor in Council or a Minister; a prescribed authority or prescribed person.

² This conclusion arises as a matter of construction from section 82 of the *Wrongs Act* which states that "except as provided by sections 83, 84 and 85, this part is not intended to affect the common law".

- (b) the salient features of the case establish a relationship between the authority and the plaintiff which supports the existence of a duty of care.

Reasonable Foreseeability

5. The requirement of reasonable foreseeability originates from the judgment of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562. Its application to the liability of public authorities is not in doubt.³
6. While the test of reasonable foreseeability, in the context of duty, is an undemanding one,⁴ the requirement of "reasonableness" necessarily involves importing a value judgment into the enquiry.⁵ As McHugh J stated in *Tame v New South Wales*, it is a "compound conception of fact and value".⁶ In the same case, Gummow and Kirby JJ observed "it is the assessment, necessarily fluid, respecting reasonableness of conduct that reconciles the plaintiff's interest in protection from harm with the defendant's interest in freedom of action."⁷

Salient Features

7. It has long been accepted that reasonable foreseeability as a sole criterion for the imposition of a duty of care would expand liability in negligence beyond tolerable bounds.⁸ Reasonable foreseeability of harm of the kind suffered is a necessary but insufficient condition upon which to impose a duty of care.⁹ In addition, the Court must examine the salient features of the case to determine whether they give rise to a relationship between the plaintiff and the defendant which calls for the imposition of a duty of care.

³ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 555 at [9] (Gleeson CJ).

⁴ In *Chapman v Hearse* (1961) 106 CLR 112, 120, the High Court noted that it is not necessary to establish that the precise sequence of events which led to the harm was reasonably foreseeable. It is "sufficient in the circumstances ...to ask whether a consequence of the same general character as that which followed was reasonably foreseeable...". See also *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47 (Mason J); *Sullivan v Moody* (2001) 207 CLR 562, 576, [42], where it was observed that the test was satisfied if there was "a real and not far-fetched possibility, that a careless act or omission on the part of one person may cause harm to another.. "

⁵ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 578, [87] (McHugh J).

⁶ *Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317, 355. [105] (McHugh J).

⁷ *Tame v State of New South Wales; Annals v Australian Stations Pty Ltd* (2002) 211 CLR 317, 379 [185] (Gummow and Kirby JJ).

⁸ *Sullivan v Moody* (2001) 207 CLR 562, 576, [42].

⁹ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 555, at [9] (Gleeson CJ).

8. In *Graham Barclay Oysters Pty Ltd v Ryan*, Gummow and Hayne JJ explained:

“An evaluation of whether a relationship between a statutory authority and a class of persons imports a common law duty of care is necessarily a multi-faceted enquiry. Each of the salient features of the relationship must be considered. The focus of analysis is the relevant legislation and the positions occupied by the parties on the facts as found at trial. It ordinarily would be necessary to consider the degree and nature of control exercised by the authority over the risk of harm that eventuated; the degree of vulnerability of those who depend on the proper exercise by the authority of its powers; and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute.”¹⁰

Control

9. The fundamental importance of the factor of "control" over the risk of harm in determining whether a public authority owes a common law duty of care is well established.¹¹ As Gummow and Kirby JJ explained in *Tame v New South Wales*:

“A fundamental objective of the law of negligence is a promotion of reasonable conduct that averts foreseeable harm. In part, this explains why a significant measure of control in the legal or practical sense over the relevant risk is important in identifying cases where a duty of care arises.”¹²

10. What is required is a "significant and special measure"¹³ of control in a legal or practical sense¹⁴ over "the source of the risk of harm".¹⁵ That concept can be best understood by reference to the facts of the cases in which public authorities have been sued in negligence. A useful analysis of some of the cases is found in the joint

¹⁰ (2002) 211 CLR 540, 598, [149].

¹¹ See *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 597, [150] and [151] (Gummow and Hayne JJ).

¹² See *Tame v New South Wales* (2002) 211 CLR 317, 379, [185] (Gummow and Kirby JJ).

¹³ See *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 598 [150], [151] (Gummow and Hayne JJ).

¹⁴ See *Tame v New South Wales* (2002) 211 CLR 317, 379, [185] (Gummow and Kirby JJ).

¹⁵ See *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 254 [114] (Gummow, Hayne and Heydon J.J).

judgment of Gummow and Hayne JJ in *Graham Barclay Oysters v Ryan*.¹⁶ Some principles which emerge from the cases include:

- (a) a "significant and special measure" of control over the source of the risk of harm is not met by demonstrating that the authority has control over some aspect of the relevant physical environment, which may have contributed to the harm;¹⁷
- (b) a "significant and special measure" of control is not met by establishing that the public authority has some dominion or control over a necessary step in the causal chain ending in the harm;¹⁸
- (c) a finding that a public authority has a "significant and special measure" of control over the source of the risk of harm may be established where it is shown that the public authority had particular knowledge of the harm in question, not shared by the claimants.¹⁹

Vulnerability

11. The degree of vulnerability of those who depend on the proper exercise by the authority of its powers, is relevant to the existence of a duty of care.²⁰ However, in the case of public authorities who have failed to exercise statutory powers, special dependence or vulnerability has not been universally accepted as a useful analytical tool.²¹
12. The concept of vulnerability is to be understood as "a reference to the inability of a particular person to protect himself or herself from the consequences of the [defendant's] conduct alleged to be negligent".²²

¹⁶ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 598 [150], [151] (Gummow and Hayne JJ).

¹⁷ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 598-599 and [152] (Gummow and Hayne JJ).

¹⁸ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 598-599 and [152] (Gummow and Hayne JJ).

¹⁹ *Pyrenees Shire Council v Day* (1988) 192 CLR 330, 389 [168] (Gummow J).

²⁰ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 596-597 [146], and [149] (Gummow and Hayne).

²¹ *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 629 [308] (Hayne J).

²² *Woolcock Street Investments Pty Ltd v CDG Ply Ltd* (2004) 216 CLR 515, 530 at [23], and 548 at [80].

13. The vulnerability of a plaintiff is exemplified by the factual situations illustrated in the authorities. Chief among the relevant considerations is the plaintiff's knowledge or ability to learn of the risk of harm. Thus, vulnerability was established in *Pyrenees Shire Council v Day* where the occupiers of certain premises and their neighbours knew nothing of latent defects in a chimney which might cause fire to escape and could not reasonably be expected to know of their existence.²³ Similarly, in *Perre v Apand*, vulnerability was established in circumstances where the plaintiffs did not know about, and could do nothing to avoid economic loss caused by the negligent introduction of seed potatoes infected by bacterial wilt on a neighbouring property.²⁴ In *Hill v Van Erp*, the plaintiffs who were beneficiaries under an improperly executed will were vulnerable because they did not know about and therefore could not have taken any steps to protect themselves against a solicitor's negligence.²⁵ In *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*, an important factor in denying that the defendants, who negligently audited the annual accounts of a borrower, owed a duty of care to the plaintiff, was that the plaintiff was a sophisticated investor well able to protect itself.²⁶

The terms, scope and purpose of a statutory power

14. The existence of a common law duty of care allegedly owed by a public authority turns upon a close examination of the terms, scope and purpose of the relevant statutory regime. In *Graham Barclay Oysters*, Gummow and Hayne JJ observed:

“The question is whether that regime erects or facilitates a relationship between the authority and a class of persons that, in all the circumstances, display sufficient characteristics answering the question for intervention by the tort of negligence.”²⁷

15. In *Stovin v Wise*,²⁸ Lord Hoffman quoting from a speech of Lord Brown-Wilkinson in *X (Minors) v Bedford Shire County Council*²⁹, recognised that any duty of care

²³ *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 381 [145], 389 [168], 389-390 [169], 390 [170] (Gummow J).

²⁴ *Perre v Apand* (1999) 198 CLR 180, 236 [149] (McHugh J).

²⁵ *Hill v Van Erp* (1997) 188 CLR 159.

²⁶ *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241.

²⁷ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 596-597 [146] (Gummow and Hayne JJ) [1996] AC 923.

²⁹ [1995] 2 AC 633, 739(c).

owed by a public authority in performing statutory powers "must be profoundly influenced by the statutory framework within which the acts complained of were done".³⁰ Those remarks apply with at least equal force where the case involves an alleged failure by a public authority to exercise a statutory power.

Purpose

16. The evident purpose of statutory provisions, which might be utilised to avert harm, has been identified as being of vital importance to the existence of a duty of care. In *Stuart v Kirkland-Veenstra*, Crennan and Kiefel JJ pointed to the agreement in the authorities that for a common law duty of care to be enlivened against a statutory authority obliging it to exercise its powers "the statutory powers in question must be directed towards some identifiable class or individual or their property, as distinct from the public at large".³¹ The significance of the requirement that the purpose of the power be directed to the protection of some identifiable class of which the plaintiff is a member, is illustrated in the case law.
17. In *Pyrenees Shire Council v Day*, where a duty of care was imposed, Kirby J noted that the statutory powers in question "existed for the protection against fire of persons such as the claimants".³² By contrast, in *Sutherland Shire Council v Heyman*, where a duty of care was not found, Deane J emphasized that the protection of the owner of the land from the injuries sustained was "no part of the purpose for which the relevant legislative powers and functions were conferred upon the Council".³³ Equally, in *Graham Barclay Oysters Pty Ltd v Ryan*, Gleeson CJ, having noted that the specific power relied upon against the State under the *Fisheries Management Act 1994* was a power to protect the public and not a specific class of persons, said that "A legislative grant of power to protect the general public does not ordinarily give rise to a duty owed to an individual or to the members of a particular class."³⁴ Further, in rejecting the claim against the Council, His Honour observed

³⁰ *Stovin v Wise* [1996] AC 923, 952G.

³¹ *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 260 [131] (Crennan and Kiefel JJ).

³² *Pyrenees Shire Council v Day* (1988) 192 CLR 330, 421 at [2471] (Kirby J).

³³ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 509 and 5112 (Deane J).

³⁴ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 562 at [32] (Gleeson CJ).

that the powers conferred upon it "were conferred for the benefit of the public generally; not for the protection of a specific class of persons".³⁵

Terms

18. The terms of a statutory power are also relevant to an enquiry as to whether a public authority owes a duty of care. Where the statutory power, for example, is of a discretionary nature, this may tell against the imposition of a duty of care. The existence of a statutory discretion on its face indicates an intention by the legislature to confer upon the public authority a discretion as to whether to exercise its statutory power and if so how, in order to give effect to the objective of the statute. The imposition of a duty of care may distort the exercise of that discretion contrary to the legislative intent. The authority subject to such a duty might, as Lord Hoffman recognised in *Stovin v Wise*, be bound to try and play it safe by giving priority to the interests sought to be protected by the common law duty over and above other interests which the public authority is required to consider. Alternatively, when in doubt, the public authority may err in favour of giving priority to the private interests of the claimants. As McHugh J observed in *Graham Barclay Oysters Pty Ltd v Ryan*, "the common law does not seek to convert the statutory discretion into a positive common law duty to exercise it for the benefit of the public or one or more of its members".³⁶

Failure to exercise a power

19. The common law does not ordinarily impose a duty upon a private citizen to rescue another from reasonably foreseeable injury. Only where a person has created the risk of harm or induced another to rely upon his or her intervention, will the common law impose a duty of care upon him or her to take positive action.³⁷
20. Sometimes the claim against a public authority is that it was negligent in failing to exercise a statutory power. This raises the question as to when does a public authority come under a duty of care to exercise a statutory power?

³⁵ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 564 at [39] (Gleeson CJ).

³⁶ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 574 -575 at [79].

³⁷ *Agar v Hyde* (2000) 201 CLR 552, 578 at [68] (Gaudron, McHugh, Gummow and Hayne JJ).

21. As with private individuals, a public authority may come under a duty of care to take positive action where, through the exercise of its powers it has created or increased a risk of harm or induced another to rely upon it to take care for their safety.³⁸
22. In *Sutherland Shire Council v Heyman*, Mason J advanced the proposition that a public authority may also come under a duty of care to exercise a statutory power where there is a reasonably based general reliance or dependence by members of the public that the public authority will exercise its power to protect their interests. His Honour observed:
- “There will be cases in which the plaintiff’s reasonable reliance will arise out of a general dependence on an authority’s performance of its functions with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of a plaintiff. Reliance or dependence in this sense is in general the product of a grant (and exercise) of powers designed to prevent or minimise a risk of personal injury or disability, recognised by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection. This situation generates on one side (the individual) a general expectation that the power be exercised and on the other side (the authority) a realisation that there is a general reliance or dependence on its exercise of power.”³⁹
23. The notion of general reliance was rejected as a criterion for imposing a duty of care in *Pyrenees Shire Council v Day*.⁴⁰ However, the basis upon which the Court decided, in that case, that the local Shire owed a duty of care to exercise its statutory powers, is dubious. The Shire was invested with statutory powers to take any measures for the purpose of preventing fires emanating from defective chimneys including issuing notices to the owner or occupier of land upon which the defective chimney was situated to carry out works to make it safe. A fire from a defective chimney escaped causing damage to a shop and an adjoining premises. Two years earlier, the Shire’s building inspector had inspected the chimney and written a letter to a former tenant of the premises in which the defective chimney was located stating that it was imperative that the fireplace should not be used unless fully repaired or

³⁸ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 461 (Mason J).

³⁹ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 464 (Mason J).

⁴⁰ (1998) 192 CLR 330.

should otherwise be sealed. The former tenant failed to communicate the contents of the letter to the owners of the premises upon which the chimney was located. The Shire failed to take further steps to ensure compliance with its letter. The tenants of the shop and the owners of the adjoining premises sued the Shire in negligence for failing to exercise its statutory powers to avert the risk. They were successful in the High Court.

24. Gummow J, in the majority, reasoned that because the Shire had previously taken some steps under its statutory powers to avert the harm, the case was one involving the negligent exercise of a statutory power rather than an omission to exercise a statutory power. The failure by the Shire to take further steps was an omission in the course of positive conduct. Accordingly the case fell within the general rule that public authorities who exercise statutory powers owe a duty to exercise them with reasonable care. His Honour said:

“A public authority which enters upon the exercise of statutory powers with respect to a particular subject matter may place itself in a relationship to others which imports a common law duty to take care which is to be discharged by the continuation or additional exercise of those powers. An absence of further exercise of the interconnected statutory powers may be difficult to separate from the exercise which has already occurred and that exercise may then be said to have been performed negligently.”⁴¹

25. It may readily be accepted that a motorist who fails to apply his brakes has committed a negligent act. The omission is in the course of the positive act of driving and cannot be divorced from it. Moreover, the motorist, by driving, has created a risk of harm and must therefore take positive steps to avert the risk of harm by applying his brakes when required. The same cannot be said of the Shire in *Pyrenees*. It cannot be said that the Shire, by its earlier intervention had created or increased the risk of harm thus requiring it to further exercise its powers. In particular, there was no suggestion that by reason of its intervention, others who were vulnerable to the risk of harm, were induced to act to their detriment by failing to take steps to protect themselves. In the absence of such evidence, the observation by Gummow J that the Shire was responsible for the continued existence of the risk of

⁴¹ At 391-2 [177].

harm⁴², is difficult to understand. The outcome of the case and the reasoning adopted by Gummow J is such that in the end the Shire would have been better off if it had done nothing. In those circumstances, absent the doctrine of general reliance, no duty of care would have arisen.

26. Unsurprisingly, in 2003 s.85 of the *Wrongs Act* was introduced. That section provides:

“In a proceeding, the fact that a public 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.”

27. Although the impact of the section has yet to be judicially determined, as Professor Aronson has noted, this provision makes it clear that “entering the field” by exercising a power, “can no longer be sufficient in itself (if it ever was) to justify the imposition of a duty to take positive action”.⁴³

28. Where the case presents as one involving a failure by a public authority to exercise a statutory power, there is no reason why an orthodox analysis should not be applied in determining whether a duty of care arises. Thus, a positive duty to exercise a statutory power may arise where:

- (a) it was reasonably foreseeable that a failure to act would cause loss of the kind suffered to the plaintiff, or a class of which the plaintiff was a member;
- (b) the statutory power gave the public authority a “significant and special measure” of control over the source of the risk of harm;
- (c) the plaintiff was vulnerable in the sense that he or she could not take any steps to protect himself or herself against the risk of harm;
- (d) the purpose of the statutory provision was to protect the plaintiff, or a class of which the plaintiff was a member, from the kind of harm suffered;
- (e) the terms of the statute do not otherwise militate against the imposition of the alleged duty of care.

⁴² At [168].

⁴³ See Aronson “Government Liability in Negligence” (2008) 32 Melbourne University Law Review 44 at 70.

Section 83 Wrong Act - Finite Resources

29. Public authorities are often charged with a range of statutory functions but have limited resources to implement those functions. They are almost always having to make choices about how to allocate their limited resources among numerous functions. Moreover, the political imperatives of the government of the day will often dictate how the limited resources of a public authority are allocated. Sometimes a risk of harm eventuates due to a failure by the public authority to allocate any or adequate resources towards a particular statutory function. Where this occurs should the public authority be immune from liability because of the fact that it has finite resources with which to carry out many functions. Should its choice of resource allocation among its statutory functions be justiciable?

Pre-section 83

30. Prior to the enactment of s.83 of the *Wrongs Act*, differing views existed in relation to the relevance of a public authority's finite resources in determining the existence of a duty of care.
31. In *Sutherland Shire Council v Heyman*, Mason J said 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" and "budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care."⁴⁴
32. The view was supported by Gleeson CJ in *Graham Barclay Oysters Pty Ltd v Ryan* where his Honour rationalised the position as follows:

“[people who sue governments] are inviting the judicial arm of government to pass judgment upon the reasonableness of the conduct of the legislative or executive arms of government; conduct that may involve action or inaction on political grounds. Decisions as to raising revenue, and setting priorities in the allocation of public funds between competing claims on scarce resources, are essentially political.”⁴⁵

⁴⁴ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 469 (Mason J).

⁴⁵ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 553 [6] (Gleeson CJ).

33. In contrast, in *Pyrenees Shire Council v Day*, Gummow J observed "on the other hand, questions of resource allocation and diversion, and budgetary imperatives should fall for consideration along with other factual matters to be "balanced out" when determining what should have been done to discharge a duty of care."⁴⁶ That view found favour with Gaudron, McHugh and Gummow JJ in *Brodie v Singleton Shire Council*⁴⁷, where their Honours explained that "citizens, corporations, governments and public authorities generally are obliged to order their affairs so as to meet the requirement of the rule of law in Australian civil society".⁴⁸
34. A third view was advanced by McHugh J in *Crimmins v Stevedoring Industry Finance Committee*, where His Honour appeared to draw a distinction as to the relevance of the resources issues between cases involving positive acts and those where the public authority is alleged to have been negligent for failing to act:

"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."⁴⁹

⁴⁶ *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 394 at [183] (Gummow J).

⁴⁷ *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [104].

⁴⁸ *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [106].

⁴⁹ *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [79].

Section 83

35. Section 83 of the *Wrongs Act* was introduced in 2003, following the Ipp Report, it provides:

“83. Principles concerning resources, responsibilities etc. of public authorities

In determining whether a public authority has a duty of care or has breached a duty of care, a court is to consider the following principles (amongst other relevant things —

- (a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions;
- (b) the 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 proceeding relates);
- (c) the authority may rely on evidence of its compliance with general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceeding relates.”

36. This provision makes it clear that resource constraints upon a public authority are relevant in determining whether a duty of care is owed. Beyond this, the effect of the section upon the common law position remains unclear.
37. It is at least clear that resource constraints may not of themselves deny the existence of a duty given that section 83 also makes those factors relevant to an enquiry concerning breach. This is consistent with the Ipp Report, which rejected the proposition that policy decisions should be non-justiciable. It is also consistent with the fact that section 83 of the *Wrongs Act* does not include a provision that the general allocation of resources by a public authority is not open to challenge. This is to be contrasted with section 42 of the *Civil Liability Act 2002* (NSW) which relevantly provides:

“The following principles apply in determining whether a public or other authority has a duty of care or has breached a duty of care in proceedings for civil liability to which this part applies:

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

38. The Explanatory Memorandum on the *Wrongs Act and Other Acts (Law of Negligence) Bill* 2003 provides no guidance as to why the Parliament of Victoria decided not to include a similar provision to s 42(b) of the *Civil Liability Act* 2002 (NSW).
39. The enactment of paragraphs (a) and (b) of section 83 of the *Wrongs Act* makes the issue of resources relevant; in fact always required to be considered, both at the duty stage and at the breach stage. The rationale for this approach, always requiring consideration at both stages, is unclear. It is difficult to see how, if taking into account those matters at the duty stage led to the conclusion that the authority did owe a duty of care, there could be any useful purpose in taking them into account again at the breach stage.
40. It must be said that the Court’s approach to the principles set out in paragraphs (a) and (b) of section 83 of the *Wrongs Act* (in cognate provisions) has been ad hoc. In many cases, for example, section 83 is only considered after an analysis of the issue according to common law authorities, as confirmatory that the conclusion to which the Court has arrived at would be no different.⁵⁰
41. If it is accepted that section 83 of the *Wrongs Act* make the principles in paragraphs (a) and (b) mandatory relevant considerations, the issue in each case would be what weight should be given to them.⁵¹ In its terms (“among other relevant things”), section 83 contemplated that there will be other relevant considerations to the

⁵⁰ See, for example, Campbell JA in *Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360 at [287]. See also: *Council City of Liverpool v Turano* [2008] NSWCA 270 at [129], [143], [175]; *Regent Holdings Pty Ltd v State of Victoria* [2013] VSC 601 at [236].

⁵¹ *Regent Holdings Pty Ltd v State of Victoria* [2013] VSC 601 at [236] as an example of the Court giving them close to zero weight.

determination, for example, of whether the public authority owes a duty of care. In this regard, the approach in section 83 is consonant with the multifactorial analysis endorsed by the High Court for determining the duty question in novel cases. The approach is also consistent in respect of the breach question, with what Gummow J said in *Pyrenees Shire Council v Day* that “questions of resource allocation and diversion and budgetary imperatives should fall for consideration along with other factual matters to be balanced out when determining what should have been done to discharge a duty of care”.⁵²

42. Accordingly, it would be open to a Court to find that, in a given case, the public authority’s limitation on financial and other resources being limited to being utilised while discharging many functions and not just the one at issue in the proceeding, are to be given very little weight having regard, for example, to the degree of control over the risk which is possessed by that authority. Another type of case where very little weight might be given to resource limitations is where the public authority chose to exercise the function (and that exercise of the function, it is alleged, caused harm). There are *dictum* in cases decided before the enactment of Part XII of the *Wrongs Act* (in cognate provisions), to the effect that if a public authority chooses to exercise a function, it is not open to it then to plead lack of resources.
43. Nonetheless, it remains open for a Court to find, for example, against existence of a duty of care because the choice made by the public authority is not justiciable. This is more likely to be the case now, as in the past, when the allegation of negligence is of a failure to exercise a statutory power.

Resources Reasonably Available

44. A further and important issue that arises in the construction and application of section 83 is what is meant by “resources that are reasonably available to the authority”.
45. There is no binding authority on the meaning of section 83(a). The meaning of the equivalent provision – section 42(a) in the New South Wales *Civil Liability Act* – was considered by the New South Wales Court of Appeal in *Roads and Traffic*

⁵² (1998) 192 CLR 330 at [183].

*Authority of New South Wales v Refrigerated Roadways Pty Ltd.*⁵³ That case involved a claim in negligence against the State Roads and Traffic Authority for failing to screen a bridge passing over the Hume Highway so as to prevent objects from being dropped onto passing motorists. An employee of the respondent was killed while driving under the bridge when struck by concrete dropped from the bridge. Campbell JA (with whom McColl JA and Sackville AJA agreed) held that although a duty of care was owed by the authority, it did not breach that duty. His Honour reached that conclusion by applying the common law principles governing breach without having to consider the application of section 42(a).⁵⁴ Consequently, his remarks in relation to that section, as well as those of Sackville AJA, were obiter.

46. In his reasons, Campbell J observed that the words “resources that are reasonably available” as they appear in section 42(a), “seem to leave open an argument about whether more money than was actually made available to the authority from external sources was reasonably available”.⁵⁵ It is not entirely clear what His Honour meant by this observation, but his reference to “external sources” was plainly a reference to sources other than the State Government which was responsible for appropriating funds to the authority.⁵⁶ Campbell JA had earlier noted that although the State Government had adopted the position that funding for the national highway was a matter for the Federal Government, the evidence did not establish any limitations arising under the budgetary processes of the State Government that would have prevented State sourced money from being made available to the authority.⁵⁷
47. Sackville AJA agreed with the judgment and reasons of Campbell JA, but added some brief comments in relation to section 42(a). In considering the words “resources that are reasonably available”, His Honour suggested the Court should “take account of the opportunities reasonably available to the RTA to gain additional funding from the Commonwealth or other sources for the purposes of addressing particularly acute risks of which it was aware, or should have been aware”.⁵⁸

⁵³ *Roads and Traffic Authority of New South Wales v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360.

⁵⁴ At [14] – [16] and 424 at [309].

⁵⁵ At 439 – 440 at [393].

⁵⁶ At 440 at [394].

⁵⁷ See 422 at [301].

⁵⁸ See 451 at [449].

48. Again, the meaning of these remarks is not clear, but they appear to be directed to the existence of “opportunities” which may have existed for the authority to obtain funding from sources other than from the State Government. Neither Campbell JA nor Sackville AJA suggested that section 42(a) invites an enquiry as to whether the authority should have sought more money than it did in the annual budgetary appropriation process.
49. It is at least arguable, that the expression “reasonably available” ought to be understood as requiring that, first, one looks to those resources which the authority actually has, and then asks which of those resources was reasonably available. It gives recognition to the fact that not all resources which an authority actually has, may be reasonably available for use in discharging the function in respect of which it has been criticised. An example was given by Campbell JA in *Refrigerated Roadways*.⁵⁹
50. Further, the Parliamentary Speeches relevant to section 83 of the *Wrongs Act* demonstrate that the purpose of the section was to narrow the scope of liability of public authorities.⁶⁰ To construe resources “reasonably available” expansively would have the opposite effect.
51. Construing the provision expansively would create other difficulties. It would effectively demolish public interest immunity over Cabinet decisions and deliberations. It would require the courts in applying this section to examine requests for additional resources made to the executive arm of government by a public authority and what Cabinet decided and why in relation to such requests. It is well established that the decisions and deliberations of Cabinet over such matters are subject to public interest immunity (now governed by section 130 of the *Evidence Act*).⁶¹ It cannot be supposed that the legislature intended to erode that immunity by the passage of section 83(a). Moreover, the public authority would not be at liberty to waive the immunity. The Court would be left in a position where the question of whether additional resources were “reasonably available” to a public authority could only be determined by reference to information and documents which would, in the public interest, be excluded from being adduced in evidence.

⁵⁹ See 439 at [393].

⁶⁰ Parliamentary Debates (Hansard), Second Reading Speech of John Brumby, page 1423.

⁶¹ The authorities are collectively discussed in the judgment of Derham AsJ in *Mathews v SPI Electricity Pty Ltd and Others (No. 11)* [2014] VSC 65.

Evidence

52. Whatever may be said to be the scope of section 83, a public authority wishing to rely upon it on the issue of duty and/breach must lead evidence in support of it.⁶² That evidence will need to include, at a minimum, detailed evidence of the financial and other resources that were available to the public authority during the period leading up to the alleged negligence (which may sometimes span a number of years), the functions which were performed by the public authority during that period, the manner in which the public authority allocated its resources among those functions during the relevant period, and the basis upon which it made those decisions. Evidence will then need to be led as to the nature and amount of resources that would have been required to discharge the alleged duty of care. Such evidence will be led in aid of a submission to the effect that a duty of care should not be imposed, or alternatively that any duty of care which arose was not breached, having regard to the limited resources available to the public authority.

19 November 2015

Pat Zappia QC

Chancery Chambers

Georgia Douglas

Owen Dixon West

⁶² *Gunnerson v Henwood* [2011] VSC 440 at [411] per Dixon J.