GOVERNMENT LIABILITY IN NEGLIGENCE

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[The tort reform legislation of most Australian jurisdictions includes provisions directed specifically at protecting government defendants from civil liability. The legislation makes it harder to sue for breach of statutory duty, regulatory failure, the exercise of 'special statutory powers', and negligent failure to inspect the roads. These changes reflect an assumption long held at common law that there is something different about alleging government negligence, at least where the government is exercising statutory powers or performing statutory duties. The cases and reformers have long searched for the answer to the question of what that 'something' might be. This article considers the common law, analyses the legislation and then concludes by suggesting that a more principled approach would, in fact, focus on the nature of the functions performed, rather than on the identity of the defendant.]

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I INTRODUCTION

A V Dicey's conception of the rule of law required governments to be held to account in the 'ordinary' courts according to 'ordinary law'.[1] Although Dicey recognised that there were some laws which applied to government that did not apply to everybody else, his starting point was very modern: wherever possible, the political imperative is to put government on a level playing field with the rest of us.[2] Accordingly, state legislatures in Australia began overturning the Crown's immunity from tort actions in the 1850s.[3] Those statutes which have overturned

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1 A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 193.

2 Ibid 193–4.

3 See, eg, *Claimants' Relief Act 1853* (SA), although that Act was largely procedural. London disallowed an earlier South Australian 'Act', which it feared would lead to further subsidies from the British Treasury: see Greg Taylor, 'John Baker's Act: The South Australian Origins of Australian Claims-against-the-Government Legislation' (2004) 27 *University of New South Wales Law Journal* 736, 755. The *Claims against the Colonial Government Act 1876* (NSW) set substantive tortious liability on a sound footing: see Paul Finn, *Law and Government in Colonial Australia* (1987) 145.

the Crown's tortious immunity typically state that in actions by or against the Crown (or state) the parties' rights shall, 'as nearly as possible', be the same as in a case between subjects.[4] Gleeson CJ commented in *Graham Barclay Oysters Pty Ltd v Ryan* ('*Graham Barclay Oysters*') that:

> That formula reflects an aspiration to equality before the law, embracing governments and citizens, and also a recognition that perfect equality is not attainable. Although the first principle is that the tortious liability of governments is, as completely as possible, assimilated to that of citizens, there are limits to the extent to which that is possible. They arise from the nature and responsibilities of governments. In determining the existence and content of a duty of care, there are differences between the concerns and obligations of governments, and those of citizens.[5]

The remaining Australian statutes which allow suits against the Crown are silent as to the Crown's subjection to ordinary law being 'as nearly as possible'. They nevertheless have the same effect since that qualification flows not from statute but from substantive principles of the common law.[6]

It has long been difficult to give an account of the common law principles governing the liability of public authorities in negligence. While Dicey's equality principle applies in most cases, the exceptions to that principle have never been clear. Francis Trindade, Peter Cane and Mark Lunney have suggested three methods of approaching any discussion of government liability in negligence:[7]

1 By inquiring as to the source of the defendant's authority to have acted, asking whether it was statutory or not — this approach tends to cast the issues primarily as ones of statutory construction, asking whether the relevant Act can be taken as impliedly excluding a common law duty of care;
2 By asking whether the defendant is a public or private body — the danger of this approach is that it contradicts a fairly fundamental goal of our legal system that, as far as possible, the government's civil liabilities should be determined by the same principles that apply to its subjects; or
3 By considering the nature of the defendant's activity which allegedly harmed the plaintiff — on this approach, one asks whether the activity was public or private, but to do so one then has to seek the reason behind this question since the public–private distinction is otherwise unmanageable. This search for the underlying reason takes one straight back to the starting point, which

[4] This form of words appears in the statutes of four jurisdictions: *Judiciary Act 1903* (Cth) s 64; *Crown Proceedings Act 1988* (NSW) s 5(2); *Crown Proceedings Act 1980* (Qld) s 9(2)(a); *Crown Proceedings Act 1958* (Vic) ss 23(1)(b), 25.

[5] (2002) 211 CLR 540, 556 (citations omitted).

[6] The statutes in three jurisdictions apply the 'same' substantive law to the Crown: *Crown Proceedings Act* (NT) s 5; *Crown Proceedings Act 1992* (SA) s 5(1)(b); *Crown Proceedings Act 1993* (Tas) s 5(1)(b). The *Crown Suits Act 1947* (WA) s 5 provides only that the Crown can sue and be sued 'in the same manner as a subject'. The statutory removal of the procedural bar to suing the Crown has the consequence of exposing the Crown to the substantive liability principles of the common law: *Commonwealth v Mewett* (1997) 191 CLR 471, 502 (Dawson J), 513 (Toohey J), 532 (McHugh J), 550–1 (Gummow and Kirby JJ).

[7] Francis Trindade, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (4th ed, 2007) 608–10.

is the search for the criteria for making exceptions to Dicey's equality principle.

The trouble is that while most people have a sense that governments occasionally warrant different treatment, the commentators have difficulty agreeing on a set of principles to determine when that is the case.

It seems to me that Trindade, Cane and Lunney were making a twofold point (with which I agree). First, none of their three approaches is entirely satisfactory. Secondly, and of at least equal concern, each approach is reasonably open in the current state of the common law. The common law on the liability of government authorities in negligence is remarkably confused. It has some failed attempts at unifying theories, plus a considerable number of more specific observations about particular issues as they relate to government liability. It has a lot of scraps, but very few of these can be safely assigned to the scrap heap.

This article will review the common law principles regarding government liability in negligence and attempt to assess the impact which the 'tort reform legislation' (enacted throughout Australia from the end of 2002) had on those principles. There are considerable differences in the detail of that legislation. This article will concentrate on the provisions of Part 5 of the *Civil Liability Act 2002* (NSW) and will indicate where corresponding statutes in other Australian jurisdictions may differ.

Part 5 of the *Civil Liability Act 2002* (NSW) deals solely with the tortious liability of public and other authorities, but one could hardly say that it is devoted to the topic. It has done very little to clarify things, but has done a lot more to make things even more unclear. Part 5 is not a codification of the common law, although it has clearly drawn on the cases. Like a bower bird, it picks up some of the common law's baubles from various judgments, but even these are not simply transplanted into the Act. They appear in the Act with puzzling modifications and with even more puzzling changes to their scope of operation. To make sense of Part 5, one has to understand what the scraps originally meant before one can understand what they might mean now. First, however, it is necessary to give a brief outline of the scope of Part 5.

II THE SCOPE OF THE LEGISLATIVE REFORM

The *Review of the Law of Negligence: Final Report* ('*Ipp Report*') recommended that a number of provisions be enacted to address or clarify particular problems relating to the liability of public authorities.[8] The report's principal recommendation was the enactment of a 'policy defence' to negligence claims against public authorities.[9] But it wanted to be sure that such a defence would not overreach.

Speaking broadly, the *Ipp Report*'s policy defence focused on two types of negligence actions: (i) complaints concerning the careless allocation of scarce resources; and (ii) complaints concerning the careless formulation of social

[8] Panel of Eminent Persons ('Ipp Committee'), *Review of the Law of Negligence: Final Report* (2002) ch 10.

[9] Ibid 158 (recommendation 39).

policy. The report recognised, however, that everyone has to balance scarce resources, and hence it did not want to allow governments to escape liability in negligence merely because they preferred to spend their money in other ways.[10] The report also recognised that its policy defence would overreach if translated into a provision allowing a defence for anything done in the performance of a statutory function, as many statutory functions (such as driving government cars) should be judged by ordinary law.[11] The *Ipp Report*'s real problem, therefore, was to find a way of limiting the applicability of its policy defence, and that is where it provided very little guidance.

Ultimately, the *Ipp Report* recommended that its policy defence be limited to situations in which the defendant exercises a 'public function'.[12] However, the report declined to define that term, stating that '[t]his should be left for common law development.'[13] The *Ipp Report*'s only hint as to how it understood 'public function' was tantalisingly brief — it was 'a function that required the defendant to balance the interests of individuals against a wider public interest, or to take account of competing demands on its resources.'[14] However, this simply restates the policy defence in overly broad terms without indicating how it might be limited. The report suggested that judges should decide whether it was 'appropriate' to apply the defence to any particular situation,[15] stating that:

> It is extremely important to understand that whether any particular function is 'public' in this sense is not a matter of fact or observation but a value judgment which ultimately a court must make.[16]

The *Ipp Report*, therefore, proposed a policy defence but declined to define it. However, it did indicate those for whom the defence should be available. These were to be both corporate bodies and natural persons to the extent that they were exercising public functions.[17] This was in recognition of the fact that government entities are not the only bodies that exercise public functions.[18]

The Ipp Committee intended its policy defence to have a limited effect; it was not to be a total defence.[19] In situations where a court were to regard it as 'appropriate' to apply the policy defence (thus concluding that a 'public function' was involved), the defendant would still be liable if the way it exercised or omitted to exercise its public function was so unreasonable that no reasonable authority would have acted in that way[20] — that is, the *Wednesbury* standard of unreasonableness.[21] In other words, defendants who are able to use the policy

10 Ibid 156.
11 Ibid.
12 Ibid.
13 Ibid.
14 Ibid.
15 Ibid.
16 Ibid.
17 Ibid 158.
18 Ibid 157.
19 Ibid 158.
20 Ibid (recommendation 39).
21 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 ('*Wednesbury*').

defence would be in breach of their duty of care only if they were grossly careless.[22] The *Ipp Report* mistakenly thought that this reflected the state of English law as stated in *Stovin v Wise* ('*Stovin*'),[23] a case which is discussed at some length in Part VII of this article.

The *Ipp Report*'s suggested transplant of *Wednesbury* finds some reflection in Part 5 of the *Civil Liability Act 2002* (NSW), as does its recognition that governments are not the only bodies that perform public functions.[24] But very little else in that Part of the Act can reasonably be blamed on the *Ipp Report*. In particular, Part 5 defines 'function' in the standard form: '*function* includes a power, authority or duty.'[25] It would be drawing a long bow indeed to suggest that Part 5 applies only where (as the *Ipp Report* had originally intended) the court forms a 'value judgment' that this is 'appropriate'.[26]

Part 5 has six substantive sections. Three of these relate not to 'public functions', but 'functions' *simpliciter*.[27] These are the sections laying down some general principles regarding the 'duty' and 'breach' issues for the defendants to which the Part relates,[28] the exercise or failure to exercise regulatory functions,[29] and the statement of principle that the exercise of a function does not in itself create a common law duty to keep on exercising it.[30] The remaining three substantive sections are much less general. They apply to breach of statutory duty,[31] 'special statutory powers'[32] and roads authorities.[33] None of the six substantive sections allows a toehold for the importation of the *Ipp Report*'s suggestion that the policy defence be available only where the judge makes a value judgement that this is appropriate.

The *Ipp Report* recommended that its policy defence be available to anyone exercising a 'public function'.[34] This reflects an observation long recognised in the public law literature, namely, that 'government' is not the only body 'doing government'.[35] Government agencies do many things that need not be called 'public' for any relevant purpose, and private sector bodies and individuals

22 *Ipp Report*, above n 8, 157–9.

23 [1996] AC 923. In fact, *Stovin* had suggested gross carelessness as a reason for imposing liability for failure to act where otherwise there was no duty to act: at 953 (Lord Hoffmann).

24 *Civil Liability Act 2002* (NSW) s 41.

25 *Civil Liability Act 2002* (NSW) s 41 (emphasis in original). The definition is in template form: see *Interpretation Act 1987* (NSW) s 3(2)(a).

26 *Ipp Report*, above n 8, 156.

27 Indeed, s 41 contemplates the making of subordinate legislation expanding the scope of Part 5 to certain 'public *or other* functions' (emphasis added).

28 *Civil Liability Act 2002* (NSW) s 42.

29 *Civil Liability Act 2002* (NSW) s 44.

30 *Civil Liability Act 2002* (NSW) s 46.

31 *Civil Liability Act 2002* (NSW) s 43.

32 *Civil Liability Act 2002* (NSW) s 43A.

33 *Civil Liability Act 2002* (NSW) s 45.

34 *Ipp Report*, above n 8, 157–8 (recommendation 39).

35 See, eg, Mark Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing' in Michael Taggart (ed), *The Province of Administrative Law* (1997) 40; Peter Cane, 'Accountability and the Public/Private Distinction' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (2003) 247; Michael Taggart, 'The Nature and Functions of the State' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 101.

sometimes exercise statutory or other governmental powers. However, Part 5 of the *Civil Liability Act 2002* (NSW) is not so subtle. One of its substantive provisions applies to 'roads authorities',[36] whilst the remaining five apply to 'public or other authorities'.[37] The latter are defined in two ways: the nature of the body, and the nature of the activities in question. It seems that 'public authorities' are those which one would readily recognise as being part of 'government', whilst 'other authorities' are defined in terms of their role. The section lists a number of government bodies, ranging from the Crown to government departments, health organisations, local councils and public or local authorities created by statute.[38] Then there is s 41(e1), which extends the definition of 'public or other authority' to:

> (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 …[39]

Hansard reveals that the immediate purpose of s 41(e1) was to extend Part 5's protection to all doctors with a certification role under the mental health legislation.[40]

In short, Part 5 of the *Civil Liability Act 2002* (NSW) expresses special solicitude for a range of government bodies and for others exercising 'public official functions'. It is not feasible to restrict Part 5's effect on government bodies by limiting 'functions' in the way the *Ipp Report* suggested. It is therefore pointless to attempt a similar limitation with respect to other bodies or people by limiting the meaning of 'public official functions'. Short of amendment, the best that can be done with Part 5 is to try to give a principled interpretation of its substantive provisions.

Several jurisdictions have broad copies of the New South Wales provisions protecting public authorities as such, although there are differences in detail. Only the NSW legislation extends its protection to non-government bodies or people performing public tasks.[41] The legislation in Queensland, on the other hand, protects only government bodies.[42] Similarly, the legislation in the Australian Capital Territory, Tasmania, Western Australia and Victoria focus on protecting government bodies. However, in these jurisdictions, subordinate legislation may be passed to extend the protective reach of these Acts.[43]

36 *Civil Liability Act 2002* (NSW) s 45.
37 *Civil Liability Act 2002* (NSW) ss 42–4, 46.
38 *Civil Liability Act 2002* (NSW) s 41.
39 One might speculate as to what would transform a public function into one that is both public and official.
40 See NSW, *Parliamentary Debates*, Legislative Assembly, 13 November 2003, 4993 (Morris Iemma, Minister for Health). The government was reacting to the NSW Supreme Court decision in *Presland v Hunter Area Health Service* [2003] NSWSC 754 (Unreported, Adams J, 19 August 2003); revd (2005) 63 NSWLR 22.
41 *Civil Liability Act 2002* (NSW) s 41.
42 *Civil Liability Act 2003* (Qld) s 34.
43 *Civil Law (Wrongs) Act 2002* (ACT) s 109(d); *Civil Liability Act 2002* (Tas) s 37(f); *Wrongs Act 1958* (Vic) s 79(h); *Civil Liability Act 2002* (WA) s 5U(h).

The *Ipp Report* seems to have had the greatest influence in WA. Although the legislation in WA only protects government entities, its provisions are headed: 'Liability relating to public function'.[44] 'Public functions' are not defined, although there is a 'policy defence', and the definition of 'policy decision' has clearly been derived from the *Ipp Report*.[45] Only the Northern Territory and South Australia have omitted all generic protection of public defendants, although the latter does have a particular protection for roads authorities.[46]

III THE COMMON LAW'S INCOMPATIBILITY PRINCIPLE

Since the death of 'proximity' as an organising principle for novel cases, the High Court's negligence decisions have tended to avoid grand statements. This is particularly true of the cases concerning the liability of public authorities in negligence. These cases are clearly viewed as a problem category, but the only solutions so far have been incrementalist. The House of Lords is often less incrementalist and it overtly engages in policy debates when confronted with novel negligence claims by reference to its notions of what might be 'fair, just and reasonable'.[47] Even so, it also admits to a lack of direction in the particular area of government liability in negligence.[48]

Almost 10 years ago in *Pyrenees Shire Council v Day* ('*Pyrenees*'), Kirby J noted that every attempt at 'a single unifying principle for liability in negligence' of public authorities had been exposed as inadequate.[49] We have been left with incrementalism by analogy and with a series of so-called 'salient factors'. Kirby J disparaged what one might call a method of muddling through by analogy.[50] In effect, his Honour called for a map and a compass or, as he put it, 'some concept of the principle by which analogy is to be discovered.'[51] Gummow J tracked the rise and fall of general negligence theory in the High Court, concluding that the search for an overall principle was a pipedream:

> What the above-mentioned shifts in authority over fairly short periods demonstrate is the unlikelihood that any writer who tackles the subject, even in a final

44 *Civil Liability Act 2002* (WA) pt 1C.
45 *Civil Liability Act 2002* (WA) ss 5U, 5X.
46 *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Civil Liability Act 1936* (SA) s 42.
47 *Caparo Industries plc v Dickman* [1990] 2 AC 605, 618 (Lord Bridge).
48 See, eg, *Gorringe v Calderdale Metropolitan Borough Council* [2004] 2 All ER 326, 330 (Lord Steyn) (citations omitted) ('*Gorringe*'):

> This is a subject of great complexity and very much an evolving area of the law. No single decision is capable of providing a comprehensive analysis. It is a subject on which an intense focus on the particular facts and on the particular statutory background, seen in the context of the contours of our social welfare state, is necessary. On the one hand the courts must not contribute to the creation of a society bent on litigation, which is premised on the illusion that for every misfortune there is a remedy. On the other hand, there are cases where the courts must recognise on principled grounds the compelling demands of corrective justice or what has been called 'the rule of public policy which has first claim on the loyalty of the law; that wrongs should be remedied'. Sometimes cases may not obviously fall in one category or the other. Truly difficult cases arise.

49 (1998) 192 CLR 330, 397.
50 Ibid.
51 Ibid.

> court of appeal, can claim thereafter a personal revelation of an ultimate and permanent value against which later responses must suffer in comparison.[52]

In *Graham Barclay Oysters*, Kirby J quoted a passage from Homer reciting Ajax's prayer to the gods: '[S]ave us from this fog and give us a clear sky, so that we can use our eyes.'[53] The fog remains. Indeed, the *Civil Liability Act 2002* (NSW) has made it even thicker.

The only clear rule that Kirby J could identify was that there must be no incompatibility between a public authority's statutory powers and obligations on the one hand, and its common law duties on the other.[54] At the risk of appearing hypercritical, I should say at the outset that even this was misleading in two respects.

Statutory powers and duties prevail whenever they come into conflict with the common law and the common law is unable to make a satisfactory adjustment. This is so regardless of whether the statute's scope extends beyond public defendants to private defendants.

For instance, doctors checking children for signs of sexual abuse owe a paramount duty to the children. Statutes typically require them to report child sexual abuse symptoms regardless of whether the doctors are working in the public or private health sectors.[55] In NSW, the *Children and Young Persons (Care and Protection) Act 1998* (NSW) states that people who are not covered by mandatory reporting obligations 'may' nevertheless make reports,[56] as if an enabling Act were necessary. In each case, the reporting duty or power is conditional on the person having 'reasonable grounds to suspect'.[57] These Acts typically contain a provision protecting people from certain types of civil liability when they make a report. In NSW, such a provision protects people making reports in good faith from actions in defamation, malicious prosecution and conspiracy.[58] It says nothing about negligence. Nor does it offer protection to a person who decides in good faith not to report. In SA, the protection in the *Community Welfare Act 1972* (SA) used to apply to all types of civil liability, but it was limited to people making reports in good faith 'in compliance' with the Act,[59] thus one might

[52] *Vairy v Wyong Shire Council* (2005) 223 CLR 422, 445 ('*Vairy*'). His Honour thought that the English attempts at a more general theory were equally unsatisfying at 444 (citations omitted):

> Instead, in England there has been a trek from *Anns* to the 'incrementalism' of *Caparo Industries plc v Dickman* and *Murphy v Brentwood District Council*, and now towards a vision of adjudication of negligence cases as a dialogue between the muses of 'distributive justice' and 'corrective justice'.

[53] (2002) 211 CLR 540, 616–17.

[54] Ibid 617.

[55] See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 27. The South Australian provision was *Community Welfare Act 1972* (SA) s 91(2)(a) but has now been superseded (although the references following are to the 1972 Act as it applied at the times relevant to the litigation in *Sullivan v Moody* (2001) 207 CLR 562 ('*Sullivan*')).

[56] *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 24. See also *Community Welfare Act 1972* (SA) s 91(1)(a).

[57] *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 27(2)(a); *Community Welfare Act 1972* (SA) s 91(1).

[58] *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29.

[59] *Community Welfare Act 1972* (SA) s 91(5).

doubt whether that applied to those not covered by mandatory reporting obligations.

It is established from *Sullivan v Moody* ('*Sullivan*') that doctors with reporting functions do not owe a common law duty of care to parents suspected of sexually abusing their children.[60] The doctors in that case were in the private sector and their contractual relationship was with the Department of Community Welfare which had sought their opinions. One must therefore qualify even the one clear principle that Kirby J was able to save from the fog. His Honour was right to say that a common law duty of care cannot coexist with an incompatible statutory function. It is obvious that statute trumps the common law if that is what it comes down to. But when statute prevails over the common law, it does so regardless of whether the defendant is a public or private authority.

Sullivan prompts another question, which is whether the incompatibility of duties owed to the child and the parent necessarily depends on statute. The High Court determined two appeals in *Sullivan*, both from the Full Court of the South Australian Supreme Court.[61] The High Court noted at some length that there had been a difference of opinion in the reasons given by the judgments below for denying a duty of care to the parents. It did not resolve that difference of opinion.[62] On one approach, the principal reason was that the statute impliedly denied a common law duty of care because such a duty could conflict with the doctors' *statutory* functions.[63] The alternative approach treated the Act as part of the 'background'.[64] On this approach, a duty of care owed to the parents would have been incompatible with the roles that *anyone* might have in furthering the welfare of the children. In the case of doctors, it would have been incompatible with their 'professional' responsibilities, and in the case of public servants working within the relevant department, it would have been incompatible with their 'statutory responsibilities'.[65] On the second approach, the result in *Sullivan* would have been the same even if there had been no *statutory* basis for reporting suspicions to the authorities. Indeed, could anyone doubt it? The majority in *Sullivan* hinted at this when they suggested that a common law duty of care would clash with the principles of defamation law,[66] although their Honours did not explain why defamation principles should trump negligence principles in this area where the two regimes overlapped. Cases since *Sullivan* have spoken more generally of the need to sustain 'legal coherence' or 'consistency' in determining

60 (2001) 207 CLR 562.

61 *Sullivan v Moody* [2000] SASC 340 (Unreported, Doyle CJ, Williams and Wicks JJ, 17 October 2000); *CLT v Connon* (2000) 77 SASR 449.

62 See *Graham Barclay Oysters* (2002) 211 CLR 540, 597, where Gummow and Hayne JJ said that *Sullivan* was an instance where a statutory regime 'itself' impliedly excluded the common law duty of care.

63 *Sullivan* (2001) 207 CLR 562, 579–82 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

64 Ibid 580, 582.

65 Ibid 582.

66 Ibid 581.

the fit between a duty of care and responsibilities sourced to professional obligations, statute or contract.[67]

Therefore, one should not treat Kirby J's 'incompatibility' principle as something turning on whether an Act has positively excluded the common law duty of care. Statutes usually do not say whether public authorities must act carefully. There is no need. The House of Lords decided in 1878 that the defence of statutory authority was unavailable against a negligence claim.[68] Statutes can authorise all sorts of things that would otherwise be actionable torts, such as nuisance or trespass. Further, one can sometimes *imply* statutory authorisation to do things that would otherwise constitute one of those actionable torts. The traditional test for such an implication is whether the interference with the plaintiff's interests is an unavoidable or inevitable consequence of the particular Act.[69] Authority to be negligent can never be implied by tests of unavoidability or inevitability, because negligence is by definition 'avoidable' and therefore not 'inevitable'.[70] Even where Parliament has specifically authorised a body to engage in high-risk activity, there will still be room for a duty of care unless the Act were improbably to declare that the body could throw all caution to the wind. The House of Lords in *Geddis v Proprietors of Bann Reservoir* ('*Geddis*') therefore decided that a statute which invested the defendant with wide-ranging powers to build and operate a utility was not so wide as to have implicitly authorised the defendant to act negligently.[71] The water utility in that case was authorised to do what was necessary to build the channels by which it sent its stored water downstream to pastures and mills. But negligence in allowing the channels to silt up was far from necessary. The relevant Act neither denied nor established the common law duty of care to maintain the channels — the common law did that, working within a setting which included a statutory authority.[72] Furthermore, not a word was spoken in the House of Lords about negligence being invalid, or a nullity, or ultra vires. That confusion came a century later.

[67] See *Tame v New South Wales* (2002) 211 CLR 317, 335 (Gleeson CJ), 361 (McHugh J); *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22, 46–9 (Kirby J), 87–8 (Callinan J); *New South Wales v Fahy* (2007) 236 ALR 406, 464–5 (Crennan J).

[68] *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430 ('*Geddis*').

[69] *Metropolitan Asylum District v Hill* (1881) 6 App Cas 193 (HL); *Fullarton v North Melbourne Electric Tramway and Lighting Co Ltd* (1916) 21 CLR 181, 187–8 (Griffith CJ).

[70] See *Sutherland Shire Council v Heyman* ('*Sutherland*') (1985) 157 CLR 424, 485, where Brennan J allowed for a possible exception where the statutorily authorised activity is 'inherently dangerous'. One might counter that it is difficult to imagine Parliament authorising an activity that is so inherently dangerous that it can only be performed carelessly.

[71] (1878) 3 App Cas 430. The principles are discussed in *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202, 219–20 (Dixon CJ, McTiernan, Kitto and Taylor JJ); *Benning v Wong* (1969) 122 CLR 249.

[72] *Geddis* had some interesting forebears. *Parnaby v Lancaster Canal Co* (1839) 11 Ad & El 223; 113 ER 400 ('*Parnaby*') held that a canal company incorporated by statute with the intent that it run at a profit could be sued in negligence. Much was made of the company's profit motive. *Mersey Docks and Harbour Board Trustees v Gibbs* (1865) LR 1 HL 93 ('*Gibbs*') decided that no credible distinction could be drawn between the amenability of profit and non-profit companies to actions in negligence. Lord Westbury's concurrence in *Gibbs* was not without regret. His Lordship would have preferred that cases even earlier than *Parnaby* had treated government (his word was 'public') bodies with separate legal personality as no different from individual Crown servants.

There are therefore two qualifications to the one clear principle that Kirby J was able to extract from the fog. His Honour's incompatibility principle can work with or without government defendants. It can also work in both statutory and non-statutory environments. It is the common law which determines the incompatibility, not the statute, and it might decide that its negligence principles are incompatible with other common law principles. The *Ipp Report* had called for a statutory statement of the incompatibility principle as follows:

> A public functionary can be liable for damages for personal injury or death caused by the negligent exercise or non-exercise of a statutory public function only if the provisions and policy of the relevant statute are compatible with the existence of such liability.[73]

Only Victoria and WA adopted this recommendation. Even in these states, its scope is curiously limited to actions for breach of statutory duty.[74] Acts are usually interpreted so as to be meaningful, but these provisions might well end up being treated as all noise and no substance.

IV DOES THE COMMON LAW HAVE CATEGORICAL EXCLUSIONS?

The cases on government liability in negligence have produced at least three sets of intriguing labels. The first set revolves around a distinction between an authority's policy decisions and its operational decisions (although 'policy' has sometimes appeared to be interchangeable with 'planning', 'discretionary' or even 'executive'). The distinction between policy and operational issues made its Australian debut in *Sutherland Shire Council v Heyman* ('*Sutherland*').[75] It played a prominent role in the judgment of Mason J,[76] with Gibbs CJ warmly endorsing it as 'logical and convenient'.[77] The bulk of Deane J's judgment was devoted to defending his Honour's view that 'proximity' could solve a lot of the problems where new categories of negligence liability presented themselves.[78] Whilst his Honour briefly accepted the notion of 'operational' issues, his antitheses were 'policy-making powers and functions of a quasi-legislative character'.[79]

Various explanations have been offered to support a distinction between issues that are 'policy' or 'operational'. The explanations are still relevant, and these are discussed below.[80] However, the labels themselves have attracted so much criticism[81] that, although they have been used,[82] it is probably best to avoid

73 See *Ipp Report*, above n 8, 160 (especially recommendation 41).
74 *Wrongs Act 1958* (Vic) s 84(3); *Civil Liability Act 2002* (WA) s 5Y(2).
75 (1985) 157 CLR 424.
76 Ibid 468–9.
77 Ibid 442. Wilson J agreed with Gibbs CJ: at 471.
78 See ibid 495–8, 505–9.
79 Ibid 500.
80 See below Part V.
81 See *Pyrenees* (1998) 192 CLR 330, 393–4 (Gummow J); *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431, 484 (Kirby J); *Crimmins v Stevedoring Industry Finance Committee* ('*Crimmins*') (1999) 200 CLR 1, 101 (Hayne J); *Graham Barclay Oysters* (2002) 211 CLR 540, 556 (Gleeson CJ), 664 (Callinan J); *Vairy* (2005) 223 CLR 422, 451 (Gummow J).

them. McHugh J gave the labels only lukewarm support in *Crimmins v Stevedoring Industry Finance Committee* ('*Crimmins*').[83] His Honour appeared to be more comfortable with the idea of 'core policy-making' functions. The switch from 'policy' to 'core policy' is as fraught in law as it is in politics and a clear sign that one can place no reliance on the terms themselves.[84]

Deane J had suggested in *Sutherland* that no common law duty of care attached to 'quasi-legislative' functions.[85] That suggestion found broad acceptance in *Crimmins*[86] and was also supported in other cases.[87] There is no common law duty of care to ensure that by-laws are valid, and even more reason for denying a duty of care to *make* valid by-laws.[88]

Having said that, it should be noted that only Deane J adverted to the possibility that the absence of a common law duty of care might also apply to rule-making in the private sector.[89] Private sector organisations engage in rule-making and their rules can have considerable impact on large sections of the public, even though they may lack the force of legislation or subordinate legislation.[90] Seriously injured rugby players in *Agar v Hyde* had sought to argue that individual members of the unincorporated association which laid down most of the game's rules bore a common law duty of care, which they had breached by failing to amend the rules so as to make scrums less dangerous.[91] The argument failed at several points. These included the difficulty in blaming any single member of the association,[92] the vast number of players around the world to whom the alleged duty would have been owed,[93] the difficulty in giving content

82 In *Crimmins* (1999) 200 CLR 1, 79, Kirby J quoted an English decision referring to 'discretionary' functions, but it is not clear whether his Honour intended to endorse that aspect of the quotation. In *Pyrenees* (1998) 192 CLR 330, 358, 361–2, Toohey J held that the policy–operational distinction sometimes drew 'a fine line', but his Honour nevertheless used it, while Kirby J held that '[a]lthough the distinction is far from perfect, it has some validity': at 426.

83 (1999) 200 CLR 1, 36–9, 50–1.

84 See *Graham Barclay Oysters* (2002) 211 CLR 540, 664 (Callinan J). The same comment applies to Kirby J's use in *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431, 485 of 'pure policy', although it is far from clear that his Honour advocated that term.

85 (1985) 157 CLR 424, 500.

86 (1999) 200 CLR 1, 20–1 (Gaudron J), 37–40, 50 (McHugh J), 61–2 (Gummow J), 101–3 (Hayne J). Gleeson CJ agreed with McHugh J: at 13. Kirby J agreed with Gaudron J on this point: at 87.

87 In *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 219, McHugh J stated that quasi-legislative functions are free of a duty of care. He repeated this proposition in *Graham Barclay Oysters* (2002) 211 CLR 540, 577–8. In *Pyrenees* (1998) 192 CLR 330, 393–4, Gummow J preferred to reach the conclusion that legislative functions carry no common law duty of care without taking the route of classifying those functions as 'policy'. Later in *Vairy* (2005) 223 CLR 422, 451, his Honour reasoned that if there was any life left in the policy–operational distinction, then 'the mere circumstance that a function is quasi-legislative should suffice as a basis upon which to describe it as a policy function.' Gleeson CJ took a slightly different view in *Graham Barclay Oysters* (2002) 211 CLR 540, 557, in which he held that 'the reasonableness of legislative or quasi-legislative activity is *generally* non-justiciable' (emphasis added).

88 *Crimmins* (1999) 200 CLR 1, 61–2 (Gummow J), 101–3 (Hayne J).

89 *Sutherland* (1985) 157 CLR 424, 500.

90 The Privy Council acknowledged that non-governmental bodies sometimes perform 'regulatory' tasks of a public nature: *Yuen Kun Yeu v Attorney-General (Hong Kong)* [1988] AC 175, 190 (Lord Keith for Lords Keith, Templeman, Griffiths, Oliver and Sir Robert Megarry).

91 (2000) 201 CLR 552.

92 Ibid 562 (Gleeson CJ), 580 (Gaudron, McHugh, Gummow and Hayne JJ).

93 Ibid 563 (Gleeson CJ), 601 (Callinan J).

to a supposed rule-making duty to distinguish between acceptable and unacceptable risk levels in a body contact sport,[94] and the players' acceptance of a high level of risk.[95] A factor that loomed large in the joint judgment of Gaudron, McHugh, Gummow and Hayne JJ was that the association's board members had 'done nothing that increased the risk of harm to [players]'.[96] Rather, the claims focused on their failure to take positive action to amend the rules. The majority reasoned:

> The complaint is that they failed to alter the status quo, failed to alter the rules under which the respondents voluntarily played the game. In our view, they no more owed a duty of care to each rugby player to alter the laws of rugby than parliamentarians owe a duty of care to factory workers to amend the factories legislation.[97]

Perhaps the common law's reason for the immunity for rule-making, therefore, turns on the nature of rules and how they are made. Most rules are general, not specific, and their making is influenced by broad social, political and economic considerations.

V GETTING BEHIND THE COMMON LAW LABELS

Clearly, it is no longer sufficient to test a government claim for immunity from common law duties of care by reference to a distinction between 'policy' and 'operational' issues. It is submitted that the notion of a 'core policy-making' function will suffer a similar fate. Even the supposed immunity for quasi-legislative functions might not be as straightforward as it seems. Gleeson CJ was careful to say in *Graham Barclay Oysters* that quasi-legislative functions are '*generally* non-justiciable'.[98] Each of those terms is interesting.

One can imagine government activity which takes the *form* of subordinate legislation but which is aimed specifically at a single activity of one individual or firm which is in a relevant commercial relationship with the government. The case for a common law immunity is far less obvious in such a circumstance. Gleeson CJ's concern was with the reason for the label, not the label itself. His Honour's reason was that some government activity was more appropriately judged in the political arena than in the courts. After pointing out that people are inclined to blame government for all kinds of misfortune, especially because it has a deep pocket,[99] his Honour said that negligence actions against the government

> invit[e] 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. So are decisions about

94 Ibid 563 (Gleeson CJ), 581 (Gaudron, McHugh, Gummow and Hayne JJ).
95 Ibid 561 (Gleeson CJ), 583 (Gaudron, McHugh, Gummow and Hayne JJ), 601 (Callinan J).
96 Ibid 578.
97 Ibid.
98 *Graham Barclay Oysters* (2002) 211 CLR 540, 557 (emphasis added).
99 Ibid 553–4.

> the extent of government regulation of private and commercial behaviour that is proper. 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. Especially is this so when criticism is addressed to legislative action or inaction. Many citizens may believe that, in various matters, there should be more extensive government regulation. Others may be of a different view, for any one of a number of reasons, perhaps including cost. Courts have long recognised the inappropriateness of judicial resolution of complaints about the reasonableness of governmental conduct where such complaints are political in nature.[100]

His Honour went on to say that although the policy–operational distinction 'was never rigorous … the idea behind it remains relevant'.[101] In fact, one can detect not one but two ideas behind his Honour's understanding of that distinction.

First, Gleeson CJ was suggesting that there are some actions which are non-justiciable according to a negligence standard because the courts have no sound criterion by which to assess their reasonableness.[102] These can be actions 'dictated by financial, economic, social or political factors or constraints', including decisions about 'budgetary allocations' and 'the allocation of resources'.[103] It is true that, to date, the government has been more likely than private defendants to raise a defence based on these sorts of issues. However, this may not last. Corporations are becoming larger and more powerful, and governments are devolving and shedding more of their functions to the private sector. One can well imagine the time when a private sector firm will claim an immunity from the common law's duty of care in respect of such of its decisions as are dictated by large economic, social or political considerations.

The second factor which Gleeson CJ saw in *Graham Barclay Oysters* as lying behind the policy–operational distinction might often overlap with the first factor, but it is unique to government. His Honour discussed at some length the idea that some government activities were not justiciable according to the reasonableness standard in the law of negligence because they were taken for essentially *political* reasons.[104] Of course, that begs the question as to which factors should be considered 'political'. For Gleeson CJ, budgetary allocations and the allocation of scarce resources were inherently 'political' in a governmental context.[105]

Judicial abstention from second-guessing the reasonableness of 'political' choices (however defined) is something that is not confined to actions for negligence. It is an integral aspect of the separation of powers, even though that concept was not identified by name in *Graham Barclay Oysters*. Kirby J referred in *Pyrenees* to the claim that the separation of powers 'lies at the heart' of the

[100] Ibid.
[101] Ibid 556.
[102] Ibid 557.
[103] Ibid 556–7; *Sutherland* (1985) 157 CLR 424, 469 (Mason J).
[104] *Graham Barclay Oysters* (2002) 211 CLR 540, 553–4.
[105] Ibid 553–4. See also *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 528 ('*Brodie*').

issue,[106] but his Honour's methodology contradicted the claim.[107] Lord Wilberforce was reasonably explicit about the link to the separation of powers in *Anns v Merton London Borough Council* ('*Anns*'):

> As was well said, public authorities have to strike a balance between the claims of efficiency and thrift: *whether they get the balance right can only be decided through the ballot box, not in the courts*.[108]

A separation of powers analysis is likely to produce far fewer instances of immunity from the common law duty of care than an analysis which tries to identify the sorts of decision-making criteria which the courts cannot assess against an objective standard of reasonableness. It would also have the merit of being consistent with other common law principles. In judicial review, for example, the courts do not replace an invalid administrative decision with their own because that would be a usurpation of an executive function. Even review for *Wednesbury* unreasonableness allows considerable scope to decision-makers, and refuses to tell them what to decide.[109] Similarly, accountability for the exercise of judicial functions is conducted through appellate and review processes, rather than via the negligence action.[110]

VI SWITCHING RESOURCE ISSUES FROM 'DUTY' TO 'BREACH'

It will be recalled that Gleeson CJ said in *Graham Barclay Oysters* that government decisions about budgetary allocations and the allocation of scarce resources were inherently 'political' and therefore free of a duty of care.[111] However, four judges rejected the equation of 'resource allocation' and 'political' concerns in *Brodie v Singleton Shire Council* ('*Brodie*').[112] That was a case against a highway authority for negligently failing to inspect or repair one of its bridges. The claim would have been dismissed before *Brodie* because it was essentially a complaint of inaction on the part of the highway authority. Nonfeasance *had* been an absolute defence for highway authorities but *Brodie* withdrew that defence and subjected the highway authorities to the normal law of negligence.[113] Gaudron, McHugh and Gummow JJ said:

> Appeals also were made to preserve the 'political choice' in matters involving shifts in 'resource allocation'. However, citizens, corporations, governments and public authorities generally are obliged to order their affairs so as to meet the requirements of the rule of law in Australian civil society.[114]

106 (1998) 192 CLR 330, 425.
107 His Honour resolved the issue by reference to a number of policy considerations: see ibid 423–7.
108 [1978] AC 728, 754 (emphasis added) (citations omitted). The so-called balance between 'efficiency and thrift' has been quoted many times, but was always odd. Efficiency can be expensive if the goal is expensive.
109 See *Brodie* (2001) 206 CLR 512, 628 (Hayne J).
110 See *Fingleton v The Queen* (2005) 227 CLR 166.
111 (2002) 211 CLR 540, 553–4.
112 (2001) 206 CLR 512.
113 Ibid 540 (Gaudron, McHugh and Gummow JJ), 600, 604 (Kirby J).
114 Ibid 560.

That approach significantly narrows what might count as 'political' choices when determining whether to deny a duty of care on the part of government. Paradoxically, however, *Brodie*'s denial of a special defence for government highway authorities did not deny them special treatment. Most defendants are not allowed to justify their want of care by crying poor, or by showing that they prefer to spend their money on other safety issues or even on objects other than safety. *Brodie* represents an exception for highway authorities. It decided that questions about the size of a highway authority's budget and about how it decided to prioritise its repair program would no longer be issues negating the common law duty of care. But they *were* to be issues which would fall for consideration when determining whether the authority had acted reasonably.[115] In effect, the majority in *Brodie* signalled a major shift of focus from duty of care to breach,[116] although its exact impact in that regard has yet to be finalised.[117] So far as it applies, however, factors which were previously relevant to negating the existence of a duty of care became criteria to be considered and evaluated against the court's conceptions of reasonableness. Hayne J protested in dissent about the evidentiary and evaluative difficulties caused by this shift, which could indeed be considerable.[118]

Gleeson CJ also dissented in *Brodie* and he returned to the fray in *Graham Barclay Oysters*.[119] Interestingly, judges from both sides of the *Brodie* debate combined to offer an oblique response to Gleeson CJ's concerns in *Graham Barclay Oysters*. Gummow and Hayne JJ (with Gaudron J concurring) sought to distinguish a government decision on whether to exercise intrusive or light-touch regulation from the *Brodie* decision about the deployment of resources. Regulatory design issues were characterised as involving 'a fundamental governmental choice' which should therefore be free of a common law duty of care.[120] Callinan J said in *Graham Barclay Oysters* that resource allocation issues would only sometimes go to the question of the existence of a duty of care.[121]

Several factors might lie behind a proposition that some issues are better handled as relevant only to the content of a duty of care. Part of the explanation might well lie in a natural judicial desire to retain maximum flexibility, enabling the courts to respond to novel situations in a way which accords with their policy

115 Ibid 577–8 (Gaudron, McHugh and Gummow JJ), 601 (Kirby J). Kirby J said that he was applying the 'normal' law of negligence: at 600–3. The joint judgment was careful not to make that claim because, it is submitted, it recognised that it was propounding a modified negligence principle for highway authorities.

116 There were hints of this shift in *Pyrenees* (1998) 192 CLR 330, 371 (McHugh J), 394 (Gummow J), 425–6 (Kirby J).

117 See *Roads and Traffic Authority (NSW) v Palmer* (2003) 38 MVR 82, 126 (Spigelman CJ); *Great Lakes Shire Council v Dederer* [2006] Aust Torts Reports ¶81-860, 38 909 (Ipp JA). The issue did not arise in the appeal: *Roads and Traffic Authority (NSW) v Dederer* (2007) 238 ALR 761.

118 His Honour listed several concerns, including the choice of a benchmark to measure the reasonableness of political or resource choices, and the admissibility of evidence relating to a public authority's political constraints and responsibilities: *Brodie* (2001) 206 CLR 512, 627–30.

119 (2002) 211 CLR 540, 554.

120 Ibid 606–7 (Gummow and Hayne JJ).

121 Ibid 664.

concerns as to whether the state should compensate certain classes of loss.[122] Spigelman CJ saw some negligence judgments as the 'last outpost of the welfare state'.[123] His Honour was particularly critical of the decision to transfer almost[124] all consideration of the *degree* of risk out of the 'reasonable foreseeability of harm' test and into the tests for what a reasonable defendant would have done, in light of the degree of risk, cost of prevention, and any other competing demands and risks to which the defendant had to attend.[125]

There might be a further reason for the pressure to shift some of the factors previously relevant to the 'duty' question to the question of the content of the duty of care. Without exception, judicial attempts to define those government functions which stand outside the common law's duty of care have acknowledged the difficulty of the task. As the criteria for drawing the line become increasingly blurred, it is an understandable response to make the shift.

The policy–operational distinction has been blurred from the outset in Anglo-Australian law. That may have been because it was taken out of context from American statutory law governing that country's federal government's liability in negligence. The *Federal Tort Claims Act* makes the United States government liable if a private person would have been liable,[126] except where the claim is 'based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty … whether or not the discretion involved be abused'.[127] American courts do not apply the 'discretionary function' defence to *all* government activity that has an element of discretion. Rather, the defence is interpreted purposively so as to apply only to cases where the government's actions are driven by public policy considerations of a 'social, economic or political' nature.[128] The section's purpose is to prevent 'tort actions from becoming a vehicle for judicial interference with decision-making that is properly exercised by other branches of the Government'.[129]

The American approach has never been really understood in those English and Australian cases which have used its terminology. The result has been a melange

122 That was evident in Lord Bingham's dissent in *D v East Berkshire Community Health NHS Trust* [2005] 2 AC 373, 400: 'the concept of duty has proved itself a somewhat blunt instrument for dividing claims which ought reasonably to lead to recovery from claims which ought not.' Lord Nicholls (speaking for the majority on this issue) disagreed: at 408–9.

123 J J Spigelman, 'Negligence: The Last Outpost of the Welfare State' (2002) 76 *Australian Law Journal* 432.

124 The only exception relates to risks that are far-fetched or fanciful: ibid 441.

125 Ibid 441–2, criticising *Wyong Shire Council v Shirt* (1980) 146 CLR 40. That case has survived attacks on it, but appellate efforts at reading it down are inevitably weakened by the fact that decisions regarding 'breach' issues usually have less precedent status than decisions on 'duty' issues: see *Vairy* (2005) 223 CLR 422; *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486; *New South Wales v Fahy* (2007) 236 ALR 406.

126 28 USC § 1346(b)(1) (2000 & Supp V, 2006). The requirement for a private sector comparator is not demanding — the broadest of analogues suffices. See *United States v Olson*, 546 US 43 (2005), which held that federal mine inspectors who undertook to warn of danger were like private sector good Samaritans, whose voluntary undertakings to help could ground a common law duty of care.

127 28 USC § 2680(a) (2000 & Supp V, 2006).

128 *Gaubert v United States*, 499 US 315, 323 (White J for Rehnquist CJ, White, Marshall, Blackmun, Stevens, O'Connor, Kennedy and Souter JJ) (1991). See also *Dalehite v United States*, 346 US 15 (1953).

129 35A *American Jurisprudence 2d*, 'Federal Tort Claims Act' § 34 (2007).

of labels concerning the distinction between discretionary or policy factors on the one hand, and operational factors on the other. Divorced from their purpose, the labels are inevitably confusing. The confusion started with *Anns*, in which Lord Wilberforce used the language at the same time as stating that the distinction was one of degree. Lord Wilberforce said that operational acts could also contain policy elements and that it became easier to impose a common law duty as an activity became 'more' operational.[130] *Anns* famously held that a local council's building inspectors had a twofold common law duty of care. Any decision not to inspect a construction site had to be made with care in order to be valid, while (obviously) the inspections themselves had to be performed with care.[131] The policy–operational distinction was primarily relevant to the possibility that there was no inspection. However, Lord Wilberforce was even prepared to use it if there *had* been an inspection:

> Passing then to the duty as regards inspection, if made. On principle there must surely be a duty to exercise reasonable care. The standard of care must be related to the duty to be performed — namely to ensure compliance with the byelaws. It must be related to the fact that the person responsible for construction in accordance with the byelaws is the builder, and that the inspector's function is supervisory. It must be related to the fact that once the inspector has passed the foundations they will be covered up, with no subsequent opportunity for inspection. But this duty, heavily operational though it may be, is still a duty arising under the statute. There may be a discretionary element in its exercise — discretionary as to the time and manner of inspection, and the techniques to be used. A plaintiff complaining of negligence must prove … that action taken was not within the limits of a discretion bona fide exercised …[132]

That single passage contains a number of debatable propositions, but for present purposes it suffices to highlight the astonishing proposition that even the techniques of inspection may have discretionary elements (negating a duty of care to that extent), albeit that inspections are 'heavily operational'.

The idea that policy and operational issues overlap must surely have inspired some to wonder whether it might not be better to shift the entire debate away from 'duty' and into an overtly policy-oriented discussion of the content of the duty of care in any particular context. Lord Wilberforce himself segued seamlessly between duty and standard in the passage quoted above.

One might speculate that the Anglo-Australian view of the policy–operational distinction was doubly manipulable. Its usual detachment from any separation of powers analysis meant that it was manipulable as a distinction of degree. One also suspects that the distinction might in fact have been drawn according to judicially intuited views as to the appropriate standard of care to demand of a public defendant. If this is correct, then a switch from duty to breach would alter very little. However, such a move has the potential to create what would effectively be an unstructured judicial discretion to award damages against the

[130] *Anns* [1978] AC 728, 754.
[131] Ibid 755.
[132] Ibid.

government whenever the judge believes that there has been a more than usually dreadful mistake.[133]

The *Civil Liability Act 2002* (NSW) is agnostic as to whether the switch should be made. Section 42 is reproduced here, with references to corresponding legislative provisions in other Australian jurisdictions. Differences are indicated where the corresponding provisions are not equivalent in substance:

> 42 Principles concerning resources, responsibilities etc of public or other authorities
>
> 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,[134]
> (b) the general allocation of those resources by the authority is not open to challenge,[135]
> (c) 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),[136]
> (d) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.[137]

Apart from the question of whether these factors previously belonged beneath the rubric of duty or breach, it seems reasonable to conclude that s 42(b) is the only factor which clearly overturns any of the leading cases (in this instance, the *Brodie* decision). The net effect of s 42(b) is that it no longer matters whether the common law, if left to its own devices, would have endorsed *Brodie*'s shift of the resources issues into the breach element of negligence. Duty or breach, the Act simply forbids 'challenge' to 'the general allocation' of the public authority's 'financial and other resources'.

133 I owe this point to Roderick Bagshaw. A persistent theme in some of the 'critical' literature in England has been that the courts should be able to award damages for invalid or dreadfully careless government action, without having to find a traditional cause of action. In a sense, that theme is reflected in the line of cases from *Anns* [1978] AC 728 to *Gorringe* [2004] 2 All ER 326. See also Roderick Bagshaw, 'Monetary Remedies in Public Law — Misdiagnosis and Misprescription' (2006) 26 *Legal Studies* 4.

134 *Civil Law (Wrongs) Act 2002* (ACT) s 110(a); *Civil Liability Act 2003* (Qld) s 35(a); *Civil Liability Act 2002* (Tas) s 38(a); *Wrongs Act 1958* (Vic) s 83(a); *Civil Liability Act 2002* (WA) s 5W(a).

135 *Civil Law (Wrongs) Act 2002* (ACT) s 110(b); *Civil Liability Act 2003* (Qld) s 35(b); *Civil Liability Act 2002* (Tas) s 38(b) ('the reasonableness of the allocation of those resources by their authority is not open to challenge'); *Civil Liability Act 2002* (WA) s 5W(b).

136 *Civil Law (Wrongs) Act 2002* (ACT) s 110(c); *Civil Liability Act 2003* (Qld) s 35(c); *Civil Liability Act 2002* (Tas) s 38(c); *Wrongs Act 1958* (Vic) s 83(b); *Civil Liability Act 2002* (WA) s 5W(c).

137 *Civil Law (Wrongs) Act 2002* (ACT) s 110(d); *Civil Liability Act 2003* (Qld) s 35(d); *Civil Liability Act 2002* (Tas) s 38(d); *Wrongs Act 1958* (Vic) s 83(c); *Civil Liability Act 2002* (WA) s 5W(d).

The NSW Court of Appeal struck out five particulars of a policeman's negligence claim in *New South Wales v Ball* ('*Ball*')[138] because they breached s 42. Mr Ball claimed damages for serious psychiatric harm which he said he had suffered as a result of his police service. Specifically, he alleged that six years' service in the unit charged with investigating and prosecuting child sexual abuse had eventually proved too much for his mental health. Police service can do that,[139] but Mr Ball was alleging more than that. He claimed that his condition was due to the fact that the NSW Police Service had starved his unit of funds, staff and resources, with the result that he worked far too hard and often had to handle horrible matters alone (whereas previously he would have had more support). The Court struck out five particulars, considering the first of these as the principal allegation offending s 42 and construing the other four allegations as subordinate to the first. The first allegation was that the Police Service had allowed his unit 'to operate without sufficient funds or resources to adequately carry out its investigations or prosecute paedophile offenders.'[140] The Court rejected an argument that Mr Ball's complaint was about a *specific* allocation of resources rather than a *general* allocation.[141]

This case generated considerable adverse publicity for the government. This was partly because it highlighted irrational variations in the coverage and content of various pieces of tort-limiting statutes, but also because there was a perception that the overall effect of s 42(b) was new. With only one qualification, one might respond by doubting whether Mr Ball would have fared differently under a purely common law regime. It is not difficult to imagine that the reason for the apparently appalling run-down in the staff and resources allocated to the child sexual abuse unit was that the state and the Police Service were seriously short of money. In those conditions, governments and senior bureaucrats typically respond to political criticism of wholly inadequate public services by shifting resources, essentially robbing Peter to pay Paul. On any analysis, no plaintiff can claim a common law duty of care owed by the government to manage its resources and resource allocations carefully. Or if they can, due to *Brodie*'s case, then no court will hold the government in breach of its duty of care because of its overall incompetence in economic and management terms. Assuming that there is a viable Opposition, those are issues for the ballot box. Of course, the big difference between upholding the government's defence at the strike-out stage rather than allowing evidence to be heard first will be that in the former case the government will have managed to avoid an embarrassing trial. There is one qualification, however.

The striking feature of Anglo-Australian cases discussing the limits of the negligence action's ability to tackle resource allocation issues is that they are full of conjecture. If Mr Ball were an American detective with access to the common

138 [2007] NSWCA 71 (Unreported, Ipp, McColl JJA and Young CJ in Eq, 28 March 2007).
139 See, eg, *New South Wales v Fahy* (2007) 236 ALR 406.
140 *Ball* [2007] NSWCA 71 (Unreported, Ipp, McColl JJA and Young CJ in Eq, 28 March 2007) [3] (Ipp JA).
141 Ibid [12]–[14].

law,[142] his pleading would not have been struck out before he had seen the government's defence. The court would have disallowed the claim only if the government showed that the relevant agency was strapped for cash, that this resulted in it making hard political choices, and that there were no additional operational reasons which might have caused the plaintiff's loss. In circumstances where the factual accuracy of the government's pleading is disputed, the government might end up having to prove its pleadings at a full trial. In other words, an American court would have looked first to s 42(a) of the *Civil Liability Act 2002* (NSW), where it talks of limits to the authority's financial and other resources 'that are reasonably available' to it. Section 42(b) prohibits 'challenge' to the general allocation of *those* resources, and it is not clear whether the defendant in *Ball* gave any detail in its pleading about the state of its resources, with a view to showing that it had drawn down as much as was 'reasonably available' to it.

There are two reasons for arguing that this is no idle conjecture. First, Mr Ball had indeed pleaded a misallocation of resources to his particular unit, but the clear implication of his complaint was that the Police Service had enough money and staff to fix the problem. Secondly, two of the particulars which were struck out in *Ball* were that he had been chronically overworked and had been expected to carry out duties which were too onerous for one individual. The Court interpreted these particulars as being no more than particulars of the consequences of a misallocation of general resources.[143] However, one could also have interpreted them as complaints that his superiors should have scaled down his workload, albeit at the expense of the public. Employees do not have a limitless capacity to lift productivity without harm to their health. Private sector employers can be liable for overworking an employee into mental ill health if that employee credibly warned them that this was a real possibility.[144] It is not clear from the terms of the *Ball* judgment whether the particulars which survived judicial pruning included complaints of overwork per se.

VII THE RELATIONSHIP BETWEEN STATUTORY AND COMMON LAW DUTIES

Statute affects the common law duty of care, but it does not create it.[145] It follows that the common law duty of care can coexist with both statutory powers and statutory duties. It also follows that the existence of a statutory duty can never be a sufficient basis for the creation of a common law duty of care. There will always be something more, such as a positive and harmful act, or a promise to act, or obligations to act flowing from a relationship between the parties or the

142 American workers are typically stripped of many common law rights against their employers, but that will not be pursued here. See Dan B Dobbs, *The Law of Torts* (2001) vol 2, 1104–7.

143 *Ball* [2007] NSWCA 71 (Unreported, Ipp, McColl JJA and Young CJ in Eq, 28 March 2007) [14]–[15] (Ipp JA).

144 *Koehler v Cerebos (Aust) Ltd* (2005) 222 CLR 44. The case raised more issues than it solved. Possible options following such a warning might be dismissal, a reduction of workload or an increase of paid time to complete it, or redeployment of other staff.

145 See *Graham Barclay Oysters* (2002) 211 CLR 540, 575 (McHugh J); *Gorringe* [2004] 2 All ER 326, 335 (Lord Hoffmann).

occupation of land, or the defendant's direction and control of the plaintiff's activities.[146] A statutory duty might occasionally come packaged with an implied right of action to sue for its breach,[147] but the mere existence of a statutory duty is not enough in itself to create a common law duty. The courts have recognised this in broad terms, but encountered difficulties in its application, particularly where a plaintiff is claiming damages for a government authority's breach of its duty to act.

The principal issue in *Stovin* was the same as the negligence issue in *Brodie*.[148] The highway authority in *Stovin* had failed to carry through with its plan to get rid of an accident 'black spot', but its relevant statutory functions were cast in terms of powers rather than duties. Lord Hoffmann said that it would be odd to impose a common law duty of care to take positive action where, on the proper construction of the relevant Act, Parliament had chosen not to confer a private right of action for breach of statutory *duty*.[149] His Lordship said that it would be even more peculiar to impose a common law duty of care to take positive action if the relevant statutory function was discretionary.[150] He spoke throughout of the problem of turning a statutory 'may' into a common law 'must', and speculated that this might be possible if the authority lacked lawful reasons for not acting.[151] His Lordship said that in that event, the authority's failure to act would be judicially reviewable for 'irrationality' (his term for *Wednesbury* unreasonableness), with the consequence that the discretion had turned into a duty.[152] He reasoned that if the discretion had turned into a duty, then one might sometimes be able to imply a legislative intention to confer a right to damages in addition to the normal judicial review remedies.[153]

Lord Hoffmann later offered a partial recantation of his *Stovin* judgment. He sought in *Gorringe v Calderdale Metropolitan Borough Council* ('*Gorringe*')[154] to give greater emphasis to the distinction between an implied *statutory* right to damages for breach of statutory duty, and a common law duty of care. The highway authorities had omitted to act in both *Stovin* and *Gorringe*, but their relevant statutory functions had been cast differently. The authority in *Stovin* had a statutory discretion, whilst the authority in *Gorringe* had an extremely broad statutory duty to attend to all issues of road safety. The House of Lords called the statutory duty in *Gorringe* a 'target' duty, meaning that it was aspirational. In practical terms, there is no difference between an aspirational duty and a discretion. The limit of their enforcement in judicial review proceedings will be

146 See *Sutherland* (1985) 157 CLR 424, 459–60, 463 (Mason J); *Stovin* [1996] AC 923, 935 (Lord Nicholls); *Crimmins* (1999) 200 CLR 1, 60–1 (Gummow J).

147 See, eg, *Sutherland* (1985) 157 CLR 424, 481–2 (Brennan J).

148 Carol Harlow, *State Liability: Tort Law and Beyond* (2004) 30–41 contains powerful arguments against using the public–private distinction as a test of government liability, and a devastating critique of Lord Hoffmann's typical reliance on 'the simplistic public–private bright-line which so often underlies his reasoning': at 33. Harlow described *Stovin* as a 'maverick case': at vi.

149 *Stovin* [1996] AC 923, 952–3.

150 Ibid.

151 Ibid 953.

152 Ibid 952–3.

153 Ibid 953.

154 [2004] 2 All ER 326, 336–7.

an order commanding that the authority give proper *consideration* to the issue of whether or not to do something.

Whether there was a duty or a 'discretion turned into a duty', the problem in both *Stovin* and *Gorringe* was how one might construct a common law duty to act in the face of the common law's resistance to penalising pure omissions. There was nothing relevant in the way of a pre-existing 'relationship', or an 'occupier's duty', or a misleading statement or road sign, or an undertaking on which the drivers had reasonably relied to their detriment. In short, their Lordships saw nothing to turn these cases into something more than 'pure omissions'. Nothing, that is, unless the mere existence of a statutory duty (*Gorringe*) or statutory 'discretion turned into a duty' (*Stovin*) could be said to have tipped the balance. Their Lordships were unanimous in *Gorringe* that a statutory duty was an insufficient basis for the imposition of a common law duty of care. Their Lordships were also unanimous that this remained the case, even if judicial review (including mandamus) might have been available to compel the performance of the statutory duty.[155] That has been the Australian position since Mason J said in *Sutherland*:

> Moreover, although a public authority may be under a public duty, enforceable by mandamus, to give proper consideration to the question whether it should exercise a power, this duty cannot be equated with, or regarded as a foundation for imposing, a duty of care on the public authority in relation to the exercise of the power. Mandamus will compel proper consideration by the authority of its discretion, but that is all.[156]

Lord Rodger cited that passage in *Gorringe* with approval,[157] even though Mason J had spoken of a duty merely to *consider* the exercise of a power. The *Gorringe* decision was surely correct in this respect. The duty reached by mandamus is statutory, whether it be a duty to act or to consider whether to act. The common law duty of care is separate. It is not something implied from an Act, although the statutory context is clearly important both in shaping the contours of the duty and in shaping its content.

The remedy of mandamus is available for both actual and constructive failures to perform a public duty. In the case of constructive failures, the court looks to the past and declares the purported performance to have been invalid. Whether the failure be actual or constructive, the judicial review remedy looks to the future. It commands the official to get on with it and fulfil an unperformed duty. The court in a negligence action looks to the past by making a finding as to what the defendant should have done. The negligence remedy is a damages award, not an order to go away and do something nor an order to give the matter some more thought. In other words, it is a complete distraction to link the availability of a common law damages award with the availability of judicial review.[158]

155 Ibid 339–40 (Lord Hoffmann), 347–8 (Lord Scott), 353–4 (Lord Rodger), 357 (Lord Brown).

156 (1985) 157 CLR 424, 467. See also *Crimmins* (1999) 200 CLR 1, 35 (McHugh J).

157 *Gorringe* [2004] 2 All ER 326, 353.

158 A point made by Lord Steyn in *Gorringe* [2004] 2 All ER 326, 348–9, citing: *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 736 (Lord Browne-Wilkinson); *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 586 (Lord Hutton); *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, 652–3 (Lord Slynn).

Like Lord Hoffmann, Hayne J in *Brodie* said (in dissent) that it would be unusual to use a statutory duty as the sole basis for imposing a common law duty to act, unless the Act also impliedly conferred a private right of action for breach of statutory duty.[159] Unlike Lord Hoffmann, however, Hayne J also went to some lengths to distinguish the issues and remedies relevant to a judicial review case from the issues and remedy relevant in a negligence case.[160]

McHugh J gave a pithy explanation in *Crimmins* of why he disagreed with Lord Hoffmann's analysis in *Stovin*:

> 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. …
>
> The concerns regarding the decision-making and exercise of power by statutory authorities can be met otherwise than by directly incorporating public law tests into negligence. Mr John Doyle QC (as he then was) has argued,[161] correctly in my opinion, that there 'is no reason why a valid decision cannot be subject to a duty of care, and no reason why an invalid decision should more readily attract a duty of care'.[162]

One should therefore be able to treat as a distraction Lord Hoffmann's concern in *Stovin* about when (if ever) 'a statutory "may" can … give rise to a *common law* duty of care.'[163] The obvious answer is 'never'. A statutory duty is not in itself enough to create a common law duty.

Distractions, however, often lead to more distractions, and *Stovin* is no exception. Some Australian judgments have expressed sympathy with the idea that a common law duty of care to take positive action could arise if the failure to exercise a discretion was invalid, whether for breach of *Wednesbury* unreasonableness standards or otherwise.[164] The net effect would be to turn a duty to reconsider according to law into a common law duty to have taken positive action in the past, with damages for its breach.

Brennan CJ put Lord Hoffmann's reasoning in *Stovin* to an unexpected use in *Pyrenees*. His Honour agreed that in circumstances where a statutory discretion has run out, in the sense that no lawful reasons remain for failing to exercise the relevant power, then mandamus might not be the only remedy.[165] If the statutory

[159] (2001) 206 CLR 512, 633–4. Actually, his Honour said that it would be unusual to construct a common law duty to exercise a 'power' unless there was an implied statutory right of action for breach of statutory 'duty'. In context, it appears likely that his Honour had aspirational duties in mind, and the duty component of these is no more than a duty to give proper consideration to their exercise.

[160] Ibid 628.

[161] J J Doyle, 'Tort Liability for the Exercise of Statutory Powers' in P D Finn (ed), *Essays on Torts* (1989) 203, 235–6.

[162] (1999) 200 CLR 1, 35–6.

[163] *Stovin* [1996] AC 923, 953 (emphasis added).

[164] See, eg, *Graham Barclay Oysters* (2002) 211 CLR 540, 663–4 (Callinan J).

[165] *Pyrenees* (1998) 192 CLR 330, 345–7.

function is designed for the protection of particular individuals (or defined and small classes of individuals), it might sometimes be reasonable to imply a statutory right for breach of the 'power turned into a duty' by analogy with the action for breach of statutory duty.[166] In other words, the availability of mandamus might be a marker for the existence of an implied *statutory* right of action. His Honour was the only judge ever to have made that link between mandamus and actionable duty, but it appears in mangled form in s 44 of the *Civil Liability Act 2002* (NSW), discussed in Part IX of this article.

VIII OMISSIONS

Professor Carol Harlow has pointed out that most of the doctrinal difficulties in government negligence law have come out of cases where the nub of the complaint is that the government has failed to act.[167] It may have failed to exercise a statutory duty, or it may have failed to live up to expectations as to how and when it would exercise its statutory powers. Either way, a claim based on a failure to act runs headlong into a strong obstacle to the existence of a common law duty of care. It is an obstacle that applies to both private and government defendants. Harlow noted that an additional obstacle presents itself in cases in which it is contended that the government should have acted to prevent a third party intentionally or negligently harming the plaintiff.[168] In Harlow's terminology, the government in these latter cases is the secondary actor, which is probably being sued because its pockets are deeper than those of the primary actor.[169] Once again, this additional obstacle is not unique to cases against the government.

Various theoretical reasons are given to rationalise the common law's refusal to compel us all to be good Samaritans. These include respect for an individual's private autonomy to decide how to act, the difficulty of balancing the competing interests of plaintiff and defendant when they have no prior relationship or other recognised ties as between each other, the cost of imposing affirmative duties on a defendant who is getting nothing out of it, and the difficulty of answering the 'why me' question — why single out this particular defendant as the person who should have acted positively to save the plaintiff from harm? The theory is satisfying only some of the time. It is morally repugnant where the defendant could easily and safely render assistance to save the plaintiff from serious harm.

Once again at the level of theory, the starting point in most cases involving government defendants is to ask why their status should entitle them to any special dispensation. In other words, the government's civil liability should be judged by the same standards that govern private sector defendants. It is commonplace, however, that people expect positive action from government that they would not demand of a private person or firm,[170] and some of the leading negligence cases have tried to turn that expectation into a common law duty.

166 Ibid 347.
167 Harlow, *State Liability*, above n 148, 16.
168 Ibid.
169 Ibid 16–17, 20.
170 See, eg, *Graham Barclay Oysters* (2002) 211 CLR 540, 553 (Gleeson CJ).

They have a good starting point. The normal theoretical rationalisations for not compelling good Samaritan acts from private persons do not apply. Governments have no 'private' preferences, they are often in complex relationships with their public, their resources are not as fragile as those of a private person, and they are in many respects quite legitimately held to a higher moral standard than private persons. Nevertheless, the imposition of a duty to take positive action on government authorities just because we expect more from them would be tantamount to the creation of what has been called a 'tort tax' based on a welfare state ideology.[171]

Legal doctrine, however, rarely engages directly in such theoretical speculation. At the doctrinal level, negligence liability exists for both acts and omissions, but there has long been a fundamental opposition to requiring defendants to take positive action for the benefit of plaintiffs beyond certain familiar categories. Many of these concern situations in which the plaintiff and defendant were already in a relationship requiring care on the defendant's part towards the plaintiff, as in the case of teachers and their pupils,[172] parents and their children,[173] doctors and their patients,[174] landowners and their entrants,[175] prison guards and their prisoners,[176] and employers and their staff.[177] Various doctrinal rationalisations have been offered for requiring defendant action in those cases. It is sometimes said that the relationship implies an undertaking or assumption of responsibility on the defendant's part, although these are obviously imposed by law. Sometimes, the defendant's omission is characterised as occurring during a positive course of conduct, with the consequence that it is not a *pure* omission.[178] Some of the old highway cases had sought to distinguish between nonfeasance and *mere* nonfeasance.[179] Other cases have stressed the element of 'control' on the defendant's part and 'vulnerability' on the plaintiff's part.[180] These and other strategies have some merit, but it is difficult to see how they do anything more than rationalise the precedents for existing categories. In particular, they offer little help in resolving claims in novel categories.

It will be recalled that Lord Hoffmann had experimented with the idea that a duty to take action might sometimes arise because the public authority's decision

171 Peter W Huber, *Liability: The Legal Revolution and Its Consequences* (1988) 4.

172 See, eg, *Ramsay v Larsen* (1964) 111 CLR 16; *Geyers v Downs* (1977) 138 CLR 91; *Victoria v Bryar* [1970] ALR 809.

173 See, eg, *Kuchel v Conley* (1971) 1 SASR 73; revd *Hanh v Conley* (1971) 126 CLR 276. See also *Robertson v Swincer* (1989) 52 SASR 356.

174 See, eg, *Lowns v Woods* [1996] Aust Torts Reports ¶81-376; *BT v Oei* [1999] NSWSC 1082 (Unreported, Bell J, 5 November 1999).

175 See, eg, *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479. Cf *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254.

176 See, eg, *Howard v Jarvis* (1958) 98 CLR 177; *Dixon v Western Australia* [1974] WAR 65; *L v Commonwealth* (1976) 10 ALR 269.

177 See, eg, *Benedetto v Campsie Freeholds Pty Ltd* (1968) 89 WN (Pt 1) (NSW) 344; *Fraser v State Transport Authority* (1985) 39 SASR 57; *Miller v Royal Derwent Hospital* [1992] Aust Torts Reports ¶81-175.

178 See, eg, *Bolton v Stone* [1951] AC 850; *Nagle v Rottnest Island Authority* (1993) 177 CLR 423.

179 *Municipality of Woollahra v Moody* (1913) 16 CLR 353, 358–9 (Barton ACJ), 361–2 (Isaacs J); *Brodie* (2001) 206 CLR 512, 551 (Gaudron, McHugh and Gummow JJ).

180 *Crimmins* (1999) 200 CLR 1; *Brodie* (2001) 206 CLR 512; *Pyrenees* (1998) 192 CLR 330.

not to act was invalid for *Wednesbury* unreasonableness.[181] Similar suggestions had appeared in *Dorset Yacht Co Ltd v Home Office*[182] and *Anns*,[183] but without the restriction to cases where *Wednesbury* unreasonableness was the ground of the invalidity. A High Court majority in *Sutherland* rejected *Anns*'s suggested link between invalidity and a duty to take action.[184] At the same time, however, Mason J set another hare running. His Honour speculated that 'general reliance' might sometimes be a basis for requiring government to take positive action.[185] His Honour instanced situations in which it was reasonable for members of the public to assume that an authority would exercise its protective functions. These would be situations in which the government had 'supplanted private responsibility', such as air traffic control or the inspection and certification of civil aircraft.[186]

McHugh and Toohey JJ were the only High Court judges persuaded by the idea of 'general reliance', which a majority rejected as a fiction in *Pyrenees*. The *Pyrenees* case is a difficult one because there was no clear majority for any alternative explanation for its result, which was to impose a duty upon a local council to take active steps to stop a dangerous fireplace from being used. The council had sent out notices to stop the fireplace from being used unless and until it was fixed, but it misaddressed one of the notices and failed to take any follow-up action. The judgments emphasised the council's knowledge of the fire risk and the appellants' ignorance of it, and the council's capacity to act to avert the risk materialising.[187] They also emphasised the fact that the council had started to act,[188] but that particular factor can no longer be sufficient in itself (if it ever was) to justify the imposition of a duty to take positive action. Section 46 of the *Civil Liability Act 2002* (NSW) provides:

> 46 Exercise of function or decision to exercise does not create duty
>
> In proceedings to which this Part applies, 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.[189]

There has been a difference of opinion in the High Court as to whether *Pyrenees* depended on the fact that the council had the power to 'control' the risk to

181 See above Part VII.
182 [1970] AC 1004, 1031 (Lord Reid), 1067–8 (Lord Diplock).
183 [1978] AC 728, 758 (Lord Wilberforce).
184 (1985) 157 CLR 424, 464–5 (Mason J), 484–5 (Brennan J), 508–9 (Deane J). The exceptions were Gibbs CJ and Wilson J. Their Honours adopted some of Lord Wilberforce's reasoning but thought that it left a causation issue unresolved.
185 Ibid 464 (Mason J).
186 Ibid 462.
187 *Pyrenees* (1998) 192 CLR 330, 342 (Brennan CJ), 362 (Toohey J), 372 (McHugh J), 389–90 (Gummow J), 421 (Kirby J).
188 Ibid 348 (Brennan CJ), 372 (McHugh J), 391–2 (Gummow J), 423 (Kirby J).
189 The following provisions elsewhere in Australia are equivalent: *Civil Law (Wrongs) Act 2002* (ACT) s 114; *Civil Liability Act 2002* (Tas) s 43; *Wrongs Act 1958* (Vic) s 85; *Civil Liability Act 2002* (WA) s 5AA.

property. McHugh J said that he reached the result without having to characterise the council as being in a position of 'control'.[190] Gummow and Hayne JJ emphasised the council's 'significant and special measure of control'.[191] Of course, the council was not in complete control of the situation but what made its 'measure of control' both 'significant and special' were its knowledge of a grave risk of which the appellants were ignorant, that it could easily have averted that risk, and that it had started a course of conduct designed to avert it.[192]

Whether a measure of control is 'significant and special' is hardly obvious, but it appears that the cases are attempting to distil the factors that might make something 'significant and special'.[193] A combination of factors was considered in *Crimmins*. The statutory authority in that case was not an employer of stevedores but it did have significant power over them and their working conditions. It allocated the men on a daily basis to work on particular ships including, tragically, ships polluted with asbestos dust. The authority's liability could easily have been based simply on the fact that it had *directed* the deceased to work in poisonous conditions, and McHugh J evidently wished that the matter had been pleaded and fought on that basis.[194] As it was, the authority was found liable for failing to take positive action to protect the deceased in a working environment where his employers were casual (the shipowners from time to time), the authority knew or was in a position to know of the hazards, its statutory functions included dockside safety issues, and it was the only coordinating body with both powers of control and a continuing presence in the industry. This was at various points summed up as placing the authority in a position of 'control' in an industry which was 'uniquely organised'[195] and in which the stevedores were particularly 'vulnerable'.[196]

It will be recalled that *Brodie* abolished the special 'non-feasance' defence previously enjoyed by highway authorities.[197] Highway authorities were to be

190 *Graham Barclay Oysters* (2002) 211 CLR 540, 581.

191 Ibid 598.

192 *Pyrenees* (1998) 192 CLR 330, 390 (Gummow J).

193 See *Randwick City Council v T & H Fatouros Pty Ltd* [2007] Aust Torts Reports ¶81-898, 69 887–8 (Ipp JA).

194 *Crimmins* (1999) 200 CLR 1, 29–30; *Graham Barclay Oysters* (2002) 211 CLR 540, 581.

195 *Vairy* (2005) 223 CLR 422, 484 (Callinan and Heydon JJ). Callinan J said of *Crimmins* in *Brodie* (2001) 206 CLR 512, 646 (citations omitted): 'There what were described as functions and powers enacted by [the relevant Act] could, indeed, in my opinion, should be construed as being in the nature of duties to give the legislation any reasonable degree of efficacy at all.'

196 Hayne and Gummow JJ dissented in *Crimmins* (1999) 200 CLR 1. Their Honours thought that the authority lacked sufficient capacity to 'direct and control' for safety, unless it made safety rules with the force of subordinate legislation: at 61 (Gummow J), 98, 100, 104–5 (Hayne J). As explained above, the Court was unanimous that no duty of care attached to rule-making: see above Part IV.

197 (2001) 206 CLR 512, 540 (Gaudron, McHugh and Gummow JJ), 600, 604 (Kirby J). Hayne J dissented, but not because he had any attachment to the 'nicety of distinction [in the older highway cases] between misfeasance and non-feasance': at 635. Indeed, his Honour said in *Crimmins* (1999) 200 CLR 1, 103 that he thought the misfeasance–nonfeasance distinction 'often elusive' and implied that it could not, therefore, be 'an exclusive test' for difficult cases. His Honour wanted a broad immunity for *all* omissions of statutory authorities to exercise their statutory powers, and it seems like that he would also have extended that to most situations in which the authority was in breach of a statutory duty: at 622, 633–4. His reasons were that consideration of whether to exercise large public-regarding statutory functions could not legitimately be required to focus on individual interests, and that the negligence action presupposed a

governed by the same common law principles as those which governed other authorities. That meant that the majority in *Brodie* had to confront the common law's reluctance to penalise omissions as opposed to acts. The majority strongly disparaged, but did not entirely reject, most of the doctrinal rationalisations of those situations in which there is a common law duty to take action.[198] No replacement doctrine was offered, beyond emphasising that in the case of highway authorities 'the factor of control is of fundamental importance.'[199] There was also the fact that the authority had control over the road maintenance program and was the only body in a position to know what was wrong with the bridge. The majority's imposition in *Brodie* of a duty to inspect and repair was not done by analogy with the duties on landowners.[200] Nor was it done by reference to the distinction in 'the ordinary principles of negligence' between omissions on the one hand and omissions occurring within a course of positive conduct on the other hand.[201] To adopt the majority's analysis of some other cases, the 'essential issue concerned a failure by the defendant further to act where action was called for.'[202] The majority's treatment of the 'control' element in *Brodie* gave few clues as to how it might work in other situations:

> Whatever may be the general significance today in tort law of the distinction between misfeasance and non-feasance, it has become more clearly understood that, on occasions, the powers vested by statute in a public authority may give it such a significant and special measure of control over the safety of the person or property of citizens as to impose upon the authority a duty of care. This may oblige the particular authority to exercise those powers to avert a danger to safety or to bring the danger to the knowledge of citizens otherwise at hazard from the danger. In this regard, the factor of control is of fundamental importance.
>
> It is often the case that statutory bodies which are alleged to have been negligent because they failed to exercise statutory powers have no control over the source of the risk of harm to those who suffer injury. Authorities having the control of highways are in a different position. They have physical control over the object or structure which is the source of the risk of harm. This places highway authorities in a category apart from other recipients of statutory powers.[203]

The ruling in *Brodie* that a highway authority's duty of care transcends the old distinctions between misfeasance and nonfeasance was no green light for plaintiffs. Speaking for the majority in a subsequent case, Gummow J emphasised that *Brodie*'s duty of care has a limited scope. It appears that it is owed

sufficiently individualised relationship between plaintiff and defendant as would allow for such a focus: at 629–30.

198 (2001) 206 CLR 512, 552–4 (Gaudron, McHugh and Gummow JJ).

199 Ibid 559 (citations omitted).

200 Ibid 566, 577.

201 Ibid 554. It is submitted that the majority was not disparaging that distinction as it appears in the general principles of negligence, but was critical of some of the older highway cases for excluding omissions in the course of positive conduct from the definition of nonfeasance for the purposes of the highway rule.

202 Ibid 552.

203 Ibid 559 (citations omitted).

only to those who are exercising reasonable care when using the road.[204] It is too early to tell whether to take that literally and, if so, whether it would leave any room for the operation of the principles of contributory negligence.[205] Nor is it yet clear whether the limitation applies only to claims of a failure to take affirmative steps to improve safety.

Section 45 of the *Civil Liability Act 2002* (NSW) makes a substantial inroad into *Brodie*. It has six equivalents elsewhere in Australia.[206] Section 45 rewards ignorance. Roads authorities are no longer liable for failing to carry out (or even to consider carrying out) road work (defined very broadly), unless they have 'actual knowledge' of the particular risk whose materialisation harmed the plaintiff.[207] In other words, it overrides the common law duty to inspect the roads. It may even excuse inspections which negligently fail to notice particular risks. However, positive actions (such as repair work) must still be undertaken carefully.[208]

Victoria has an equivalent to s 45,[209] but it also has a number of provisions designed to make it even harder to sue a road authority. Its legislation encourages road authorities to develop and promulgate codes of practice, policies and road management plans. The plans can include policies. The codes constitute admissible evidence as to what one can reasonably expect of a road authority in the performance of its functions.[210] Policies have more bite. Decisions in accordance with them cannot be in breach of a common law duty of care unless the policy is 'so unreasonable that no road authority in that road authority's position acting reasonably could have made that policy'.[211] Decisions are based on policies if, having regard to the authority's broad range of activities, they are 'based substantially on factors or constraints which are financial, economic, political, social or environmental.'[212]

IX REGULATORY FAILURE

Depending to some extent on one's definition of 'regulation', it is possible to view some of the cases already considered in relation to complaints about government inaction as instances of regulatory failure. A regulatory authority's failure to regulate will usually be characterised as an omission to act, and the heading to s 44 of the *Civil Liability Act 2002* (NSW) talks of an authority's 'failure to exercise regulatory functions'. The section itself provides:

204 *Roads and Traffic Authority (NSW) v Dederer* (2007) 238 ALR 761.
205 A majority held in *North Sydney Council v Binks* (2007) Aust Torts Reports ¶81-911 that the road authority's duty of care was owed to inebriated and poor drivers.
206 *Civil Law (Wrongs) Act 2002* (ACT) s 113; *Civil Liability Act 2003* (Qld) s 37; *Civil Liability Act 1936* (SA) s 42; *Civil Liability Act 2002* (Tas) s 42; *Road Management Act 2004* (Vic) s 102; *Civil Liability Act 2002* (WA) s 5Z.
207 *Civil Liability Act 2002* (NSW) ss 45(1), (2).
208 *Civil Liability Act 2002* (NSW) s 45(2)(b).
209 *Road Management Act 2004* (Vic) s 102.
210 *Road Management Act 2004* (Vic) s 27.
211 *Road Management Act 2004* (Vic) ss 39(5), 103.
212 *Road Management Act 2004* (Vic) s 39(2).

> 44 (1) A public or other authority is not liable in proceedings for civil liability to which this Part applies to the extent that the liability is based on the failure of the authority to exercise or to consider exercising any function of the authority to prohibit or regulate an activity if the authority could not have been required to exercise the function in proceedings instituted by the plaintiff.
>
> (2) Without limiting what constitutes a function to regulate an activity for the purposes of this section, a function to issue a licence, permit or other authority in respect of an activity, or to register or otherwise authorise a person in connection with an activity, constitutes a function to regulate the activity.

This provision has equivalents in only two other jurisdictions.[213] It is peculiar in a number of respects.

First, it is largely unnecessary. Regulatory powers come in different contexts. Where the power in question is designed to protect the public at large, the common law is extremely unlikely to hold the regulator negligent for failing to exercise its powers. The regulatory powers of the state and local council in *Graham Barclay Oysters* could have been exercised more proactively to safeguard the interests of oyster consumers generally, but the common law would not require that. This was particularly so because the oyster growers themselves had an obvious commercial interest in food safety so that, in Harlow's terms, the case against the 'regulators' was a complaint that they failed to save the consumers from the 'primary' wrongdoer. The general comments by Gummow and Hayne JJ are pertinent:

> the co-existence of knowledge of a risk of harm and power to avert or to minimise that harm does not, without more, give rise to a duty of care at common law. The totality of the relationship between the parties, not merely the foresight and capacity to act on the part of one of them, is the proper basis upon which a duty of care may be recognised. Were it otherwise, any recipient of statutory powers to licence, supervise or compel conduct in a given field, would, upon gaining foresight of some relevant risk, owe a duty of care to those ultimately threatened by that risk to act to prevent or minimise it. As will appear, the common law should be particularly hesitant to recognise such a duty where the relevant authority is empowered to regulate conduct relating to or impacting on a risk-laden field of endeavour which is populated by self-interested commercial actors who themselves possess some power to avert those risks.[214]

A similar argument was presented to the Privy Council in *Yuen Kun Yeu v Attorney-General (Hong Kong)*[215] but their Lordships preferred not to say something generic about regulatory liability. The government agency in that case was the regulator of deposit-taking institutions. The regulator was held to be under no common law duty of care to existing depositors or to would-be depositors (essentially, the public at large) to deregister an improvident and quite

213 *Civil Law (Wrongs) Act 2002* (ACT) s 112; *Civil Liability Act 2002* (Tas) s 41.

214 (2002) 211 CLR 540, 596.

215 [1988] AC 175, 187, 189 (Lord Keith for Lords Keith, Templeman, Griffiths, Oliver and Sir Robert Megarry).

possibly fraudulent company. The judgment was framed in terms of the lack of a necessary 'close and direct relationship of proximity' between regulator and plaintiffs.[216] It is common in the omission cases for judgments to look for the indicators for or against a 'relationship', but that begs the question unless the defendant has specifically accepted or undertaken responsibility.

The rare cases where a regulator has been found liable for its omissions are easily distinguished from *Yuen Kun Yeu v Attorney-General (Hong Kong)*. The defendant's duty of care in *Crimmins* was not to the public at large but to stevedores, over whom it had a measure of control and for whose benefit it had been given a unique statutory function regarding workplace safety.[217] It operated in an environment in which it was a more informed and stable presence than any of the shipowners who came and went on an almost daily basis.[218] Further, the defendant's liability in *Crimmins* was not for failing to promulgate better safety rules but for failing to issue protective clothing or warnings that such clothing was needed.[219] The defendant council in *Pyrenees* could in one sense be viewed as a 'regulator' but it was dealing with a specific property (including its owners and occupants) rather than with the general public.

The second peculiarity in s 44 of the *Civil Liability Act 2002* (NSW) is its linkage between mandamus and negligence. Perhaps the drafters were inspired by Lord Hoffmann's ill-fated and misconceived attempt in *Stovin* to build a common law duty to take positive action out of the breach of a duty to validly consider whether to exercise a power (as if its proper consideration must have averted the plaintiff's harm).[220] That is possible because the *Ipp Report* had recommended that his Lordship's reasoning be adopted into statutory form.[221] Alternatively, s 44's link to mandamus might have been intended as a round-about way of saying that regulatory duties owed only to the public at large should not be actionable. Either of those approaches would result in the section doing least damage. This is particularly so when one considers the breadth of what falls within a 'regulatory' function. The individual stevedore in *Crimmins* would surely have been entitled to a mandamus to compel the authority to give further consideration to the hazards of working in clouds of asbestos. And the property owner in *Pyrenees* would also have been entitled to a mandamus to require the council to consider whether to follow through on its initial resolve to stop further use of the defective fireplace.

The difficulty, however, lies in s 44's drafting. It does not say that a regulator's common law duty to act can exist only where there is a statutory duty at least to consider whether to act. Nor does it say that regulatory omissions are actionable at the suit of those who could have obtained mandamus to prod the regulator to start thinking. Section 44(1) requires the plaintiff to have been able to obtain a mandatory order that the authority 'exercise the function'. The position is not

216 Ibid 192–3.
217 (1999) 200 CLR 1, 22–3, 25 (Gaudron J).
218 See, eg, ibid 22, 25.
219 See, eg, ibid 86–7 (Gummow J).
220 *Stovin* [1996] AC 923, 952–3. See above Part VII.
221 *Ipp Report*, above n 8, 157.

entirely clear, but it appears likely that this means that the plaintiff must have been able to compel *action*, not just *consideration* of whether to act. On that reading, Mrs Crimmins would have lost, and only Brennan CJ would have provided relief to the plaintiffs in *Pyrenees*.

X STATUTORY 'POLICY' DEFENCES AND *WEDNESBURY* UNREASONABLENESS

It will be recalled that the *Ipp Report* recommended a specific 'policy defence' where a judge thought that it was 'appropriate' to allow such a defence (and therefore characterised the defendant's acts or omissions as the performance of a 'public function').[222] 'Defence' was something of a misnomer, since it would not have negated a duty of care. Rather, it would have lowered the standard of care to *Wednesbury* unreasonableness — the relevant act or omission would be in breach of a duty of care only if it was so unreasonable that no reasonable authority in the defendant's position would have behaved in the same way.[223]

Only two states adopted those recommendations from the *Ipp Report*, albeit with some changes. As noted above, Victoria has an *Ipp*-style policy 'defence', but only for road authorities and with no mention of 'public function'.[224] WA has adopted a general 'policy defence' for claims based on 'policy' decisions arising out of the performance or non-performance of 'public functions'. As the *Ipp Report* recommended, its effect is to lower the standard of care to *Wednesbury* unreasonableness.[225] 'Public function' is undefined, although there is a definition of 'policy decision', which means 'a decision based substantially on financial, economic, political or social factors or constraints'.[226] No other jurisdiction has a specific policy defence, but several have adopted *Wednesbury* for specific contexts.

The first context into which *Wednesbury* has been imported is the action for breach of statutory duty. That might raise a few eyebrows in Australia because the action for breach of statutory duty has almost no life in this country beyond its original context of workplace injuries;[227] it has been largely the force of precedent which keeps it alive and well in that area.[228] The *Civil Liability Act 2002* (NSW) does not apply to employees' negligence claims against their employers,[229] which further minimises the practical impact of s 43. That section states that in actions for breach of statutory duty against public or other authorities, there is no breach unless the defendant's act or omission was 'so unreason-

222 See above Part II.
223 *Ipp Report*, above n 8, 157.
224 *Road Management Act 2004* (Vic) ss 39(5), 103.
225 *Civil Liability Act 2002* (WA) s 5X.
226 *Civil Liability Act 2002* (WA) s 5U.
227 Trindade, Cane and Lunney, above n 7, 165–6.
228 See Neil Foster, 'Breach of Statutory Duty and Risk Management in Occupational Health and Safety Law: New Wine in Old Wineskins?' (2006) 14 *Tort Law Review* 79; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 424 (Brennan CJ, Dawson and Toohey JJ), 458–62 (McHugh and Gummow JJ); *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304, 315–16 (Gleeson CJ, Gummow and Hayne JJ), 321–2 (Gaudron J).
229 *Civil Liability Act 2002* (NSW) s 3B(1).

able that no authority having the functions of the [defendant] could properly consider the act or omission to be a reasonable exercise of its functions.'[230] It is fortunate that this section has so little practical effect. It is unprincipled in two ways. First, it effects a generic reduction of the different standards of care otherwise imposed by a range of actionable duties and lowers them so far as to make the action useless. Secondly, it applies only for the benefit of public defendants and others exercising public official functions. The same actionable duties lying upon private defendants remain unaltered.[231]

The *Ipp Report* touched lightly on the action for breach of statutory duty but its recommendation was quite different. It recommended that where the standard of care prescribed by an actionable statutory duty is equivalent to the standard which would apply in negligence law, then a plaintiff should not be able to outflank the Act's limitations on negligence actions by suing on the statute.[232] Victoria has adopted the *Wednesbury* standard for actions against public authorities for breach of statutory duty but not where those duties prescribe an absolute standard of care.[233]

WA has a provision relating to actions against public defendants for breach of statutory duty but it does not alter the standard of care. It merely requires that 'the provisions and policy of the enactment in which the duty is created are compatible with the existence of' a liability for breach per se.[234]

NSW has transplanted *Wednesbury* into one more section dealing with the liability of public and other authorities. Section 43A of the *Civil Liability Act 2002* (NSW) applies to the extent that a claim is based upon the exercise or failure to exercise a 'special statutory power'. Where it applies, the standard of care is reduced to *Wednesbury*'s level, so that the defendant will be in breach only where its act or omission was 'so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power'.[235] The section was rushed through Parliament to forestall further claims similar to the plaintiff's claim in *Hunter Area Health Service v Presland* ('*Presland*').[236]

In *Presland*, police and others had forcibly subdued Mr Presland whilst he was in the midst of a violent and psychotic episode. They took him to a public hospital's psychiatrist, who decided to release him, negligently as it was found by the trial judge.[237] The hospital would have been liable in negligence if he had harmed either himself or others, and if he or they (respectively) had sued. But this case was unusual because there was no claim for personal injury or death.

230 *Civil Liability Act 2002* (NSW) s 43(2).

231 Three other jurisdictions have provisions equivalent to the NSW provision: *Civil Law (Wrongs) Act 2002* (ACT) s 111; *Civil Liability Act 2003* (Qld) s 36; *Civil Liability Act 2002* (Tas) s 40. In Queensland's case, it is the section's heading which indicates that it is meant to apply to actions for breach of statutory duty.

232 *Ipp Report*, above n 8, 163 (recommendations 42–3).

233 *Wrongs Act 1958* (Vic) s 84.

234 *Civil Liability Act 2002* (WA) s 5Y.

235 *Civil Liability Act 2002* (NSW) s 43A(3).

236 (2005) 63 NSWLR 22.

237 *Presland v Hunter Area Health Service* [2003] NSWSC 754 (Unreported, Adams J, 19 August 2003) [169], [172].

Mr Presland killed another soon after the doctor let him go but his insanity meant that he was found not guilty. He spent 18 months in detention as a forensic patient and he sought damages for the greater part of that loss of liberty.[238] There was no doubting that the doctor owed a duty of care to Mr Presland, but the Court of Appeal held (by a majority) that the duty's scope did not extend to the sort of loss (namely, loss of liberty) that was the basis of the action.[239] Policy reasons were given.[240] The Premier saw the case as an attempt by Mr Presland to profit from his crime.[241] The *Civil Liability Act 2002* (NSW) already had provisions making it harder for criminals to sue, but Mr Presland was not a criminal. Those provisions were amended at the same time as s 43A was inserted into the principal Act. It goes further than discriminating against undeserving plaintiffs because it ensures that *no-one* could again sue the health authorities in certain circumstances unless they could establish gross negligence. There is nothing in Hansard to explain why the government thought it fit to lower the doctor's standard of care to third parties. The only hint as to why its Bill changed more than just the scope of the duty of care was a repeated assertion that mental health doctors have a difficult task because they have to balance clinical and social concerns against a number of statutory criteria, including a principle of least intrusive medical intervention.[242]

It is important to understand s 43A's scope. It applies to 'special statutory powers', which are defined as follows:

> (2) A *special statutory power* is a power:
>
> (a) that is conferred by or under a statute, and
> (b) that is of a kind that persons generally are not authorised to exercise without specific statutory authority.[243]

We know from Hansard that the section was intended to apply to doctors performing certification roles under the mental health legislation.[244] By analogy and equally unfortunately, it may also apply in the context of police watch-houses and prisons, but nothing is certain.

The definition of 'special statutory power' talks separately of *power* and *authority*. The idea appears to have been to distinguish statutory authority per se (such as a statutory corporation's authority to operate a recreational facility) from statutes permitting coercive acts or non-consensual rights-depriving acts. If that is correct, then one of the limits to the section's scope is that the defendant

238 The trial judge accepted that if the doctor had detained him, it would have taken a month or so to stabilise him: ibid [174].

239 *Presland* (2005) 63 NSWLR 22, 102 (Shellar JA), 117–18, 120 (Santow JA).

240 Ibid 101–2 (Shellar JA), 113, 118 (Santow JA).

241 See NSW, *Parliamentary Debates*, Legislative Assembly, 13 November 2003, 4980–1 (Bob Carr, Premier). That was an answer to a question without notice. Mr Iemma moved the Bill later the same day: NSW, *Parliamentary Debates*, Legislative Assembly, 13 November 2003, 4992 (Morris Iemma, Minister for Health).

242 NSW, *Parliamentary Debates*, Legislative Assembly, 13 November 2003, 4993 (Morris Iemma, Minister for Health).

243 *Civil Liability Act 2002* (NSW) s 43A(2).

244 NSW, *Parliamentary Debates*, Legislative Assembly, 13 November 2003, 4993 (Morris Iemma, Minister for Health).

must have received statutory authority to act in a way that changes, creates or alters people's legal status or rights or obligations without their consent.[245] Statutes often prevent 'persons generally' from doing things unless they hold a relevant licence. It might be possible to treat the licence as an 'authority' but, without more, the licensee has no 'power'.

This construction is further supported by the section's restrictive definition of 'special statutory power' to one that needs *specific* statutory authority. McHugh J used that very term in *Puntoriero v Water Administration Ministerial Corporation*, which upheld the right to sue in negligence despite a section immunising an authority from any claim for loss suffered 'as a consequence of the exercise of [statutory] power', where 'power' included a reference to a right, authority and duty.[246] The majority's approach was to restrict the immunity to the consequences of coercive or non-consensual acts, with the traditional result that it did not immunise negligence.[247] Section 43A cannot be read down in exactly the same way because its evident intent is to water down the negligence standard in some situations, which means that it *does* apply to negligence actions. However, it might be possible to derive from the need for a *specific* statutory authority a limitation to the coercive or non-consensual act itself, rather than its accompanying acts or omissions. In Mr Presland's case, for example, a lower standard of care would apply to the certification function, but not to any decisions about medication.[248]

In addition to the requirement that a person be authorised to exercise a power, the definition also requires a comparison between the defendant's position and 'persons generally'.[249] The exact nature of this comparison is unclear. Police have lots of coercive powers conferred by statute, but private persons still retain vestigial police powers.[250] Teachers in government schools have prescribed disciplinary powers over their students, which are different from the powers of private school teachers.[251]

In summary, five jurisdictions — ACT, NSW, Queensland, Tasmania and Victoria — have adopted the *Wednesbury* standard for actions for breach of statutory duty. Victoria also has adopted this standard for road authorities, while WA is unique in having it as part of an *Ipp*-style generic policy defence. Only NSW has it for special statutory powers. The question which now arises is how *Wednesbury* might work in practice.

245 The analogy here would be with the scope of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), which applies only to decisions *under an enactment*: s 3. See *Griffith University v Tang* (2005) 221 CLR 99, 121–4, 130–1 (Gummow, Callinan and Heydon JJ); M Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1, 13–14.

246 (1999) 199 CLR 575, 588.

247 See, eg, *Geddis* (1878) 3 App Cas 430.

248 A distinction between integral and incidental functions is proposed in Grant Scott Watson, 'Section 43A of the *Civil Liability Act 2002* (NSW): Public Law Styled Immunity for the Negligence of Public and Other Authorities?' (2007) 15 *Torts Law Journal* 153, 163–6. That might well be the result of the requirement for *specific* authority, but it is not the test itself.

249 *Civil Liability Act 2002* (NSW) s 43A(2)(b).

250 See, eg, *Law Enforcement (Powers and Responsibility) Act 2002* (NSW) s 100; *Crimes Act 1958* (Vic) s 458.

251 See, eg, *Education Act 1990* (NSW) s 35.

The English test comes from Lord Greene MR's judgment in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*,[252] although there are those on the High Court who would prefer one to cite Dixon J's judgment a year later in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*.[253] The grounds of judicial review of administrative action have ebbed and flowed, but there is one constant. It is not the function of the judicial review court to determine the merits of the exercise of an administrative power. The court is limited to deciding whether that exercise was lawful, and it remains lawful even if the court thinks that it would have been better exercised in another way. Only the grossest unreasonableness will invalidate the exercise of a statutory discretion.[254] This is most commonly expressed as requiring that the decision be so unreasonable that no reasonable decision-maker in the same position would have made that decision. Despite its evident circularity, it is that version which has been transplanted into the tort reform legislation.

Legal transplants are notoriously tricky, and this transplantation is no exception. Administrative decision-makers must typically exercise their statutory discretions without any sense of personal self-interest. Indeed, some of the more pronounced forms of self-interest — such as personal advancement, personal convenience, personal dislike of the other party, and the wish to make a profit — might well count against the validity of a purported exercise of public power without the need to resort to *Wednesbury* unreasonableness.[255] When their decisions are measured against *Wednesbury*, the court does not balance the decision-maker's interests against the interests of the person affected by the decision. Negligence law by contrast tries to strike a balance between the interests of plaintiff and defendant. The verbal formula is the same, therefore, but transplanting *Wednesbury* into negligence soil will mean that it has a wholly different operation. Before its transplant, *Wednesbury* had nothing to say to decision-makers about being careful to avoid harming others.[256]

It might have been more straightforward to draft the new standard simply as 'gross negligence'. The *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) provides a drafting model. It criminalises deaths caused by the activities of organisations where the fault lies with poor management or organisation by senior management.[257] There has to be a breach of one of a number of listed common law duties of care,[258] and the breach has to be 'gross'.[259] It is

252 [1948] 1 KB 223, 229–30.
253 (1949) 78 CLR 353, 360.
254 See Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 334–43.
255 See ibid 579–92.
256 See, eg, Bagshaw, above n 133, 15–19. That article takes a cost-benefit model for determining the negligence standard of care to show that, at some point, it requires attention to how much time or money the defendant should reasonably have spent in looking out for the plaintiff's interests. *Wednesbury* unreasonableness in public law rarely, if ever, involves a cost-benefit analysis. The author's point was to refute a common suggestion in England that the two reasonableness standards are converging.
257 *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) c 19, s 1.
258 *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) c 19, s 2(1).
259 *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) c 19, s 1(1)(b).

gross if the relevant conduct 'falls far below what can reasonably be expected of the organisation in the circumstances'.[260]

Evidence is rarely led in judicial review cases to establish (or contradict) the reasonableness of a discretionary judgment on the decision-maker's part. When it is led, there are real problems as to how far (if at all) it can include evidence which is 'fresh' in the sense that it was unavailable at the time of the original decision.[261] That issue should not be relevant to a negligence court's assessment of whether the defendant's act or omission fell far below what one should reasonably expect of a defendant authority in the same position.

It is submitted that it should be possible to establish gross negligence even if there is no hard evidence that a public authority in the same position would have acted differently. The test is framed in terms of whether no *reasonable* authority would have acted as the defendant did. In one respect it is tougher than the approach taken in *Bolam v Friern Hospital Management Committee*,[262] which asks whether a professional's behaviour was standard. It is also tougher than the legislated terms that now apply to professional negligence actions, which is whether the professional acted according to *widely accepted* peer professional standards that were not 'irrational'.[263] Whether all other public authorities would have done what the defendant did is a matter for evidence. However, whether that would have been *reasonable* is surely a normative judgment for the court.

XI CONCLUSION

Answering the question of when government entities owe a common law duty of care has never been easy, and the tort reform legislation has introduced further and largely unprincipled hurdles. The time might have come to question whether the fault might lie in the question itself. Government activities are usually judged by the 'ordinary' law of negligence, and one can often find good reasons for the exceptions. It is submitted, however, that it is *never* a good reason to deny a duty of care simply because the defendant is the government, or because it is a statutory authority, or because it has statutory powers or statutory duties. Each of those reasons is both far too general and far too narrow. They are too general because not all government entities are the same, and nor are their functions. They are too narrow because they imply that the private sector has no analogues equally deserving of special consideration. The search for categorical exemptions from government liability has proved elusive. Even the case of rule-making has its private sector analogue. Perhaps, therefore, a better approach would be to stop asking what special rules should apply to government or even to governmental actions. It might be better to focus more directly on the judicial role in a negligence case and ask which factors might be considered either too difficult for the courts or inappropriate for their resolution according to a negligence

260 *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) c 19, s 1(4)(b).
261 See *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446.
262 [1957] 2 All ER 118.
263 See, eg, *Civil Liability Act 2002* (NSW) s 5O.

standard, regardless of whether the defendant is a government body or its actions a governmental function.

One might therefore say with the benefit of hindsight that the *Ipp Report*'s best response to its term of reference that the Panel 'address the principles applied in negligence to limit the liability of public authorities'[264] would have been to recommend some general principles about 'duty' and 'breach' going into a statutory form applicable to all.[265] The tort reform legislation of the NT and SA have no provisions aimed solely at public authorities. As for the remaining jurisdictions, aside from the provisions relating to road authorities for which one would presume there were political and economic justifications, it is difficult to understand what possessed the Parliaments to grant government entities generic permissions to be careless, or careless to a degree not permissible to their private sector analogues.

264 *Ipp Report*, above n 8, 151.

265 Harlow would deny the need for hindsight: see Carol Harlow, '"Public" and "Private" Law: Definition without Distinction' (1980) 43 *Modern Law Review* 241.