

Pyrenees Shire Council v Day - [1998] HCA 3

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**HIGH COURT OF AUSTRALIA**

BRENNAN CJ,  
TOOHEY, McHUGH, GUMMOW AND KIRBY JJ

PYRENEES SHIRE COUNCIL  
(previously known as THE PRESIDENT,  
COUNCILLORS & RATEPAYERS OF THE  
SHIRE OF RIPON) APPELLANT

AND

WILLIAM ROSS DAY & ANOR RESPONDENTS

*Pyrenees Shire Council v Day;*  
*Eskimo Amber Pty Ltd v Pyrenees Shire Council* (M57/1996) [1998] HCA 3  
23 January 1998

## ORDER

*Appeal dismissed with costs.*

On appeal from the Supreme Court of Victoria

### **Representation:**

B D Bongiorno QC with M L Warren for the appellant (instructed by Maddock Lonie & Chisholm)

G R Ritter QC with P J Riordan for the respondents (instructed by Oakley Thompson & Co)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

## HIGH COURT OF AUSTRALIA

BRENNAN CJ,  
TOOHEY, McHUGH, GUMMOW AND KIRBY JJ

ESKIMO AMBER PTY LTD & ORS APPELLANTS

AND

PYRENEES SHIRE COUNCIL  
(previously known as THE PRESIDENT,  
COUNCILLORS & RATEPAYERS OF THE  
SHIRE OF RIPON) RESPONDENT

23 January 1998  
M59/1996

### **ORDER**

1. *Appeal allowed with costs.*
2. *Set aside paragraph 2 of the Orders of the Court of Appeal of the Supreme Court of Victoria and in lieu thereof order that:*
  - (a) *The appeal to that Court be allowed with costs;*
  - (b) *Order 4 of the Order of Judge Strong be set aside and in lieu thereof order:*
    - (i) *judgment for Eskimo Amber Pty Ltd against the Pyrenees Shire Council for the sum of \$110,218 together with interest and costs of the proceedings before the County Court; and*

- (ii) *judgment for George and Voula Stamatopoulos against the Pyrenees Shire Council for the sum of \$58,000 together with interest and costs of the proceedings before the County Court; and*

3.

3. *Remit the matter to the Supreme Court of Victoria to make such order as it sees fit with respect to the interest and costs referred to in paragraph (b) of this Order.*

On appeal from the Supreme Court of Victoria

**Representation:**

G R Ritter QC with P J Riordan for the appellants (instructed by Oakley Thompson & Co)

B D Bongiorno QC with M L Warren for the respondent (instructed by Maddock Lonie & Chisholm)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

**CATCHWORDS**

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Negligence – Duty of care – Omission by public authority to exercise statutory powers – Absence of statutory duty – General reliance – Control – Reasonable foreseeability – Proximity – Policy considerations – Public duty – Mandamus – Whether municipal council under a public or common law duty to neighbouring property owners to take positive action to exercise its discretionary powers to notify of or remove fire-risks of which it is aware in order to prevent injury or property damage – Whether such duties are owed to occupiers.

*Local Government Act 1958 (Vic), ss 695 (1A), 885, 891.*

1. BRENNAN CJ. Shortly after midnight on 22 May 1990, Mr Stamatopoulos woke to discover that there was a fire in the premises which he and his family occupied in Beaufort, a small township in Victoria. He succeeded in getting his family out of the premises. Part of the premises was a fish and chip shop and part was a residence. The entire premises were destroyed by the fire. The fire also spread to the shop next door owned by Mr and Mrs Day, the respondents in the first appeal.
2. The tenant of the premises occupied by the Stamatopoulos family was their family company, Eskimo Amber Pty Ltd ("Eskimo"). Eskimo and Mr and Mrs Stamatopoulos are the appellants in the second appeal. Eskimo had gone into possession of the premises in January 1990 under an assignment of the tenancy by Mr and Mrs Tzavaras, the previous tenants. At all material times, the owners of the premises were Mr and Mrs Nakos.
3. The fire which destroyed the premises and damaged the Days' shop escaped from a fireplace in which Mr Stamatopoulos had lit a log fire before he went to bed. Beaufort has a cold climate in the winter and Mr Stamatopoulos had previously lit fires in the fireplace to warm the residential section of the premises during the night. He used a firescreen to prevent the escape of sparks. But the chimney of the fireplace was defective. At the trial of actions arising out of the fire before the County Court of Victoria, it was assumed that the fire escaped because of defects in the chimney that had been found there in August 1988.
4. The defects had been found in August 1988 as the result of the summoning of the Country Fire Authority ("the CFA") to the premises on 9 August when Mr Tzavaras' assistant became alarmed by what he thought was a fire in the chimney. The fire or smoke was quickly doused by the CFA. The CFA officer who attended saw that there was some mortar missing from the bricks in the back and bottom of the fireplace. He advised the assistant that the fireplace was unsafe to use. The CFA notified the Pyrenees Shire Council as it is now called ("the Council") of the occurrence. The Shire Engineer, Mr Humphries, then requested Mr Walschots, a recently appointed building and scaffolding inspector, to inspect the premises.

5. On the morning of 11 August 1988, Mr Walschots inspected the premises and found that the back wall of the fireplace in the residence and the back wall of the fireplace in the shop were parallel, with a space between them. There was a hole connecting the two fireplaces and hence allowing flame to enter the space between the two back walls. The side walls of the fireplace in the residence were fragmented and spalled. These defects created a substantial risk of fire. Mr Walschots pointed out the defects to Mr Tzavaras and told him he should not use the fireplace unless it was repaired.
6. This advice was followed by a letter written by Mr Walschots on the instructions of the Shire Engineer to "P. Tsavaros & S. Nakos" at the address shown on the Council's rate card, which was the address of the premises. The letter read as follows:

"At the request of the Shire of Ripon, Beaufort, I inspected two open fire places at the above location on 11th August, 1988 at 10.15 p.m. (sic).

During the inspection the following items were notes (sic) and are of some concern.

1. A possible fire hazard and unsafe structural condition has occurred on both fire places that are constructed back to back.
  - (a) The near (sic) fireplace brickwork wall of both the rear habitable room and the shop and (sic) damaged and have partially collapsed into the front disused fireplace.
  - (b) The side walls of brickwork in the recently used fireplace located in the habitable room, have broken and there is missing brickwork, damaged mortar jointing and pargetting.
2. The products of combustion can now enter the front fire place in the shop as well as enter into the wall cavity that is part of the dividing partition wall. This cavity could act as a flue for the smoke and fire to enter into the ceiling of the shop.
3. Smoke can now enter the main shop area and the possibility of fire and health risk is great.

It is therefore imperative that the abovementioned fireplaces be not used under any circumstances unless:-

- (a) Structurally sound repairs are made to make the chimneys and fireplaces safe.
- (b) General repairs are made to mortar and brickwork to make the walls heat resistant and prevent smoke leakage.
- (c) Alternatively repair the fireplaces structurally and seal both fireplace openings permanently and discontinue use.

Yours faithfully,

(Sgd)

Chris Walschots,

BUILDING INSPECTOR."

7. Judge Strong, the trial judge, found that Mr Tzavaras received the letter but did not inform Mr Nakos of either the contents of the letter or the warning which Mr Walschots had earlier given him not to use the fireplace. Nor did he communicate that information to Mr or Mrs Stamatopoulos when they were negotiating with him to buy the business and the lease of the premises in January 1990. To the contrary, when Mr Stamatopoulos enquired whether the fire place was in use, Mr Tzavaras misled Mr Stamatopoulos (as Judge Strong found) by telling him that it was. Consequently, when Mr Stamatopoulos lit the fire on 22 May, he had no knowledge of the defects in the fireplace. The defects were latent.

The damage and its cause

8. Eskimo, Mr and Mrs Stamatopoulos and Mr and Mrs Day all suffered property damage. Eskimo lost plant, equipment and stock and, in consequence, loss of profits of its business. Its damages were agreed at \$110,218. Mr and Mrs Stamatopoulos lost property which was assessed at \$58,000. Mr and Mrs Day suffered loss in consequence of the damage to their shop which was agreed at \$38,062. None of the damages suffered was in respect of pure economic loss. In each case, the cause of the loss in question was the escape of the fire from the fireplace. The trial judge found Mr Tzavaras guilty of negligence and judgments were entered against him in favour of Eskimo, Mr and Mrs Stamatopoulos, Mr and Mrs Day and Mr and Mrs Nakos respectively but the only claim which succeeded against the Council was the claim made by Mr and Mrs Day. Appeals to the Court of Appeal by Eskimo and Mr and Mrs Stamatopoulos against the Council and by the Council against Mr and Mrs Day were dismissed. In the appeals from the Court of Appeal to this Court, the question for determination is whether the Council was under a duty, to Eskimo and Mr and Mrs Stamatopoulos in one case and to Mr and Mrs Day in the other, to take some step which it unreasonably failed to take which, if taken, would have avoided the property damage which those parties respectively suffered as the result of the escape of the fire.

9. **Following paragraph cited by:**

[Port Stephens Shire Council v Booth](#) (27 September 2005)

The starting point in answering that question is the identification of the damage which occurred and which, it is said, the Council had a duty to take some step to avoid. It is property damage, not pure economic loss. When the damage in issue is "pure economic loss which is not parasitic upon physical damage" [\[1\]](#), its immediate cause is frequently the action or inaction of the plaintiff who suffers the damage. To sheet home liability to the alleged wrongdoer in cases of that kind, it is necessary to show that some act or omission on the part of the alleged wrongdoer induced the plaintiff to act or to refrain from acting in the way which caused the damage. Thus the chain of causation is established between the act or omission of the alleged wrongdoer and the particular loss. To prove inducement, it is necessary to show



that the plaintiff acted or refrained from acting in reliance on the alleged wrongdoer's act or omission. Reliance becomes a critical link in the chain of causation and a necessary element in the plaintiff's cause of action<sup>[2]</sup>. This is not such a case. The losses which the plaintiffs seek to recover in the present proceedings were caused by the escape of fire from the fireplace in the residence occupied by the Stamatopoulos family, not by any action or inaction on the part of the plaintiffs. They did not know of any action or inaction on the part of the Council on which they might have relied to prevent the occurrence of the loss they respectively suffered.

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<sup>[1]</sup> Lord Goff's description in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 178.

<sup>[2]</sup> Reliance is used in another sense when a defendant has assumed some responsibility to perform a particular task. Reliance in that sense is discussed below.

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10. The preventive steps which might have been taken to prevent the occurrence of the plaintiffs' respective losses were (i) repair of the defects in the fireplace or blocking it up so that it could not be used; (ii) informing Mr Stamatopoulos, representing Eskimo, that the fireplace was dangerous and was not to be used; and (iii) action which might have been taken by the Council under its statutory powers to eliminate the danger of escape of fire. We are not concerned in these appeals with the duty of Mr and Mrs Tzavaras (who knew of the danger) or Mr and Mrs Nakos (who did not) to take any of steps (i) and (ii); we are concerned only with the duty of the Council.

#### The Council's statutory powers

11. The *Local Government Act* 1958 <sup>[3]</sup> (Vic) ("the Act") contains a number of provisions that are material to the taking of action to prevent the risk of fires that might cause damage. The first is s 695(1A) :

"For the purpose of preventing fires the owner or occupier of any land upon which is erected any chimney or fire-place which is constructed of inflammable material or which is not adequately protected so as to prevent the ignition of other adjacent material of an inflammable nature may by notice in writing be directed by the council of the municipality within the municipal district <sup>[4]</sup> of which such land is situated to alter the fire-place or chimney so as to make it safe for use as a fire-place or chimney, as the case may be."

The introductory phrase of this sub-section prescribes the purpose for which the Council is armed with the power to give the notice requiring the owner or occupier to make a fireplace or chimney safe for use as a fireplace or chimney. In sending the letter of 12 August 1988, Mr Walschots presumably exercised or intended to exercise on the Council's behalf the power conferred upon the Council by s 695(1A) of the Act.

[3] The title of the Act was amended to the *Local Government (Miscellaneous) Act* 1958 (Vic) by s 4(4) of the *Local Government (Consequential Provisions) Act* 1989 (Vic), effective from 23 September 1992. The Act was repealed by s 25 of the *Local Government (Amendment) Act* 1994 (Vic), effective from 1 January 1996 but it is convenient to describe its provisions as though they are in the form in which they stood at all relevant times.

[4] Section 3(2)(a) of the Act provides, inter alia, that the corporation of every shire "shall be deemed to be a municipality" and that "the district under the local government of a municipality shall be called its municipal district".

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12. When a notice is given under s 695(1A), the person to whom it is given is bound to comply with it. Section 890 of the Act provides, inter alia:

"Where ... any authority is given by this Act to any person to direct any matter or thing to be done or to forbid any matter or thing to be done and such act so directed to be done remains undone or such act so forbidden to be done is done in every such case every person offending against such direction or prohibition shall be deemed guilty of an offence against this Act."

A penalty is provided by s 891 for failure to comply:

"Every person guilty of an offence against this Act shall for every such offence be liable to the penalty expressly imposed by this Act or by any bylaw or regulation in force in that behalf and if no other penalty is imposed to a penalty of not more than 10 penalty units."

Where the owner of a building makes default in complying with a notice that requires work to be executed by the owner, s 885 authorises the occupier with the approval of the council to -

"cause such work to be executed and the expense thereof shall be a debt due to such occupier by the owner of the building or land, and such occupier may deduct the amount of such expense out of the rent from time to time becoming due from him to such owner."

And, if neither the owner nor the occupier complies with the notice requiring work to be done to prevent fire, s 694(1) of the Act provides:

"The council of any municipality may carry out or cause to be carried out any works or take any other measures for the prevention of fires."

13. The fire-prevention powers of the Council were adequate, if fully exercised, to ensure that the defect in the fireplace which Mr Walschots had found was remedied and that, until it was remedied, no fire would be lit in that fireplace. But the Council did not bring the defect which Mr Walschots had discovered to the attention of the owners, Mr and Mrs Nakos nor, on the change in tenancy, did they bring the defect to the notice of Mr and Mrs Stamatopoulos or otherwise to the notice of Eskimo. Mr Walschots' letter was addressed to "P. Tsavaros & S. Nakos" at 70 Neill Street, Beaufort, because those were the only names and the only

address shown on the rate card at the time. The Council did not enquire whether the owners, Mr and Mrs Nakos, received the notice.

14. **Following paragraph cited by:**

*Meyers v Commissioner for Social Housing* (07 August 2019) (Elkaim, Loukas-Karlsson and Charlesworth JJ)

After Mr Walschots' visit to the premises on 11 August 1988, it was clear that the defect in the premises constituted a serious fire threat if the fireplace were used without the defect being remedied. There was evidence of the practice which ought to be followed by a council to bring the attention of an owner and occupier to their legal obligations to remedy defects of the kind discovered by Mr Walschots, to follow up a notice requiring remedial work to be done and to ensure that the work is done. But that practice was not followed by the Council or its officers. No further inspection of the premises was made. Nothing was done to check whether the directions contained in Mr Walschots' letter were carried out. No attempt was made, whether by threatening prosecution or otherwise, to enforce compliance with those directions. No work on the premises for the prevention of fire was carried out or authorised to be carried out by the Council. These were steps which the Council could have taken to prevent the risk to life and property posed by the defective fireplace. It was a serious risk which, if it eventuated, might have seen the destruction of a large part of the township. If the Council was under any statutory or common law duty to take these steps, it was guilty of negligence; if it was not under any such duty, its carelessness does not expose it to liability in damages.

The basis of liability

15. In *Sutherland Shire Council v Heyman* [5], I adopted a passage from the judgment of Kitto J in *Sovar v Henry Lane Pty Ltd* [6] in holding that, before a right of action in damages for breach of statutory duty arises, "the statute must (either expressly or by implication) impose a duty to exercise the power and confer a private right of action in damages for a breach of the duty so imposed". Kitto J said:

"The intention that such a private right shall exist is not ... conjured up by judges to give effect to their own ideas of policy and then 'imputed' to the legislature. The legitimate endeavour of the courts is to determine what inference really arises, on a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation".

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[5] (1985) 157 CLR 424 at 482.

[6] (1967) 116 CLR 397 at 405.

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16. Breach of statutory duty is a cause of action distinct from the cause of action for common law negligence. The former is the creature of statute; the latter of the common law. However, the same set of circumstances may give rise to either cause of action. In the present case, the statute imposes no general duty on a council to exercise its fire-prevention powers irrespective of the circumstances. For example, if a council has no knowledge of circumstances which create a risk of fire, it is not under a statutory duty to take action to prevent the risk eventuating. Take the present case. If nothing had occurred prior to 22 May 1990 to alert the Council to the defect in the fireplace of the residence occupied by the Stamatopoulos family, the escape of fire from the fireplace on that night would not have exposed the Council to liability for failing to discover the defect and taking action to prevent the fire of that night occurring. The Act leaves the decision whether to take official fire-prevention action to the council in which the powers are reposed. A council or its authorised officers may decide that the only risk of loss from fire is the risk of destruction of property of an owner-occupier who prefers to run that risk. In such a case, it may be officious for the council to interfere. Or the risk of fire or of consequential damage may be so small and the cost or difficulty of rectifying the defects may be so great that it would not be reasonable to require the defect to be rectified or for the council itself to carry out the rectification. No action lies against a council for failing to exercise its fire prevention powers in such cases. The decision not to exercise those powers would be a lawful exercise of the council's discretion.
17. Yet, as the escape of fire frequently exposes neighbouring persons and their property to the risk of damage or destruction, the provision of a measure of protection for those individuals is at least one of the purposes, if not the chief purpose, of arming a council with fire-prevention powers. Consistently with that purpose, a council that knows of a risk by fire to persons or property cannot refuse to exercise its fire-prevention powers where an exercise of those powers would protect those persons or property unless the council has some good reason for not exercising those powers so far as they are needed to prevent the risk from eventuating. If a council unreasonably fails to exercise its powers to prevent a known risk of fire and a fire occurs which an exercise of the fire-prevention powers would have avoided and if the fire causes loss or damage to the person or property of an individual, does that individual have any remedy against the council?

#### The basis of an action for damages

18. Mason CJ supported an action at common law against a public authority for damages that could have been avoided by an exercise of statutory power on a basis stated in his Honour's judgment in *Sutherland Shire Council* [7] :

"In the case of a public authority, the foreseeability of the plaintiff's reasonable reliance is a sufficient basis for finding a duty of care, subject to such dispensations as may arise from the special character of a public authority exercising statutory functions ...

If this be accepted, as in my opinion it should be, there will be cases in which the plaintiff's reasonable reliance will arise out of a general dependence on an authority's performance of its function with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of a plaintiff. Reliance or dependence in this sense is in general the product

of the grant (and exercise) of powers designed to prevent or minimize a risk of personal injury or disability, recognized by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection. This situation generates on one side (the individual) a general expectation that the power will be exercised and on the other side (the authority) a realization that there is a general reliance or dependence on its exercise of power<sup>[8]</sup>. The control of air traffic, the safety inspection of aircraft and the fighting of a fire in a building by a fire authority ... may well be examples of this type of function."

At this point in his judgment, his Honour was not speaking of reliance induced by a practice adopted by a public authority in repeatedly or regularly exercising its statutory powers<sup>[9]</sup>. Nor was he speaking<sup>[10]</sup> of the kind of reliance that a particular plaintiff may place upon a particular defendant who has assumed a responsibility to exercise due care and skill in the conduct of the plaintiff's affairs <sup>[11]</sup> or in his medical treatment <sup>[12]</sup>. Nor does his Honour use "reliance" in this context in the same sense as it is used to describe a causal link connecting a defendant's conduct with a loss produced immediately by a plaintiff's own act or omission. Mason J used "reliance" to indicate an expectation by the community at large that a defendant would act in a particular way in order to perform a statutory function. This basis for imposing a duty of care was said by Lord Hoffmann in *Stovin v Wise* <sup>[13]</sup> to have -

"little in common with the ordinary doctrine of reliance; the plaintiff does not need to have relied upon the expectation that the power would be used or even known that it existed. It appears rather to refer to general expectations in the community, which the individual plaintiff may or may not have shared."

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<sup>[7]</sup> (1985) 157 CLR 424 at 463-464.

<sup>[8]</sup> See Shapo, *The Duty to Act*, (1977) at 95-96.

<sup>[9]</sup> See the judgment at 461.

<sup>[10]</sup> See the judgment at 461-462.

<sup>[11]</sup> See, for example, *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 180, 182; *Spring v Guardian Assurance Plc* [1995] 2 AC 296 at 316, 324.

<sup>[12]</sup> *Thomsen v Davison* [1975] Qd R 93.

<sup>[13]</sup> [1996] AC 923 at 954.

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19. If the "general expectations of the community" were to be the touchstone of liability, the proof of that fact would present considerable difficulty. The test seems to invite consideration of a general expectation of the exercise of a statutory power rather than an expectation referable to particular circumstances which might invite consideration of an exercise of the power. If community expectation that a statutory power will be exercised were to be adopted as a

criterion of a duty to exercise the power, it would displace the criterion of legislative intention. In my respectful opinion, if the public law duty of a public authority to exercise a power is relevant to its liability in damages for a failure to exercise that power, the appropriate criterion is legislative intention. I am respectfully unable to accept "general reliance" as the basis of such a liability.

20. In *Parramatta City Council v Lutz* [14] McHugh JA (as his Honour then was) stated his support for another basis, namely,

"that a public authority should be under a duty to take affirmative action when the control of conduct or activities has been ceded to it by common understanding or when it receives some benefit from the conduct or activities. If in addition to the right of control the authority knows or ought to know of conduct or activities which may foreseeably give rise to a risk of harm to an individual, the authority should be under a duty to prevent that harm."

Although his Honour thought that "the concept of general reliance as expounded by Mason J in [ *Sutherland Shire Council v Heyman* ] is not far removed from the concept of control". [15] , a difference can be seen in his Honour's reference to the scope of the power: it must be a power of control over risk-producing conduct or activity. With respect, I am unable to adopt his Honour's requirement of "common understanding" as a criterion of the existence of a duty to exercise the power. If a statute confers such a power on a public authority, it would seem that the requirement that the power be ceded to the authority "by common understanding" is satisfied simply by operation of the statute. It would be anomalous to impose a common law duty to exercise the power because of a "common understanding" where the statute gives the public authority a discretion to refrain from its exercise. To my mind, both the "general reliance" and the "control" bases of a common law duty of care seem to treat the conferral of a statutory power as the equivalent of an assumption by the repository of responsibility to exercise reasonable care in the performance of the statutory function. Of course, a public authority may act so as to assume a responsibility to exercise the power and to exercise it with reasonable care, in which case it may be held liable for a failure to discharge that responsibility. But the duty of care arises in such cases from the conduct of the public authority, not from a community expectation or a common understanding as to the nature of the statutory power.

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[14] (1988) 12 NSWLR 293 at 328. .

[15] (1988) 12 NSWLR 293 at 330. .

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21. In *Stovin v Wise* [16] , a more cautious approach was taken by Lord Hoffmann in a speech which commanded the concurrence of Lord Goff of Chieveley and Lord Jauncey of Tullichettle:

" In the case of a mere statutory power, there is the further point that the legislature has chosen to confer a discretion rather than create a duty. Of course there may be cases in which Parliament has chosen to confer a power because the



subject matter did not permit a duty to be stated with sufficient precision. It may nevertheless have contemplated that in circumstances in which it would be irrational not to exercise the power, a person who suffered loss because it had not been exercised, or not properly exercised, would be entitled to compensation. I therefore do not say that a statutory 'may' can never give rise to a common law duty of care. I prefer to leave open the question of whether the *Anns* case was wrong to create any exception to Lord Romer's statement of principle in the *East Suffolk* case and I shall go on to consider the circumstances (such as 'general reliance') in which it has been suggested that such a duty might arise. But the fact that Parliament has conferred a discretion must be some indication that the policy of the act conferring the power was not to create a right to compensation. The need to have regard to the policy of the statute therefore means that exceptions will be rare.

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

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[\[16\]](#) [1996] AC 923 at 953.

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22. I respectfully agree that if a decision not to exercise a statutory power is a rational decision, there can be no duty imposed by the common law to exercise the power. I further agree that if it be contrary to the policy of the statute to confer a private right to compensation for non-exercise of a statutory power, the common law cannot create that right. A statutory power and its incidents are creatures of the legislature and the common law must conform to the legislative intention.
23. But the existence of a discretion to exercise a power is not necessarily inconsistent with a duty to exercise it. As Earl Cairns LC said in *Julius v Lord Bishop of Oxford* [\[17\]](#) :

"[t]here may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."

In *Padfield v Minister of Agriculture, Fisheries and Food* [\[18\]](#) , Lord Reid cited this passage and proceeded:

"Lord Penzance said that the true question was whether regard being had to the person enabled, to the subject-matter, to be general objects of the statute and to the

person or class of persons for whose benefit the power was intended to be conferred, the words do or do not create a duty, [19] and Lord Selborne said that the question was whether it could be shown from any particular words in the Act or from the general scope and objects of the statute that there was a duty. [20]. So there is ample authority for going behind the words which confer the power to the general scope and objects of the Act in order to find what was intended."

And in *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* [21], I said with the concurrence of Toohey and McHugh JJ:

"When the power exists and the circumstances call for the fulfilment of a purpose for which the power is conferred, but the repository of the power declines to exercise the power, mandamus is the appropriate remedy even though the repository has an unfettered discretion in other circumstances to exercise or to refrain from exercising the power [22]."

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[17] (1880) 5 App Cas 214 at 222-223 .

[18] [1968] AC 997 at 1033. .

[19] (1880) 5 App Cas 214 at 229-230 .

[20] (1880) 5 App Cas 214 at 235. .

[21] (1994) 182 CLR 51 at 88. .

[22] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, esp at 1033-1034 .

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24. Thus a duty to exercise a power may arise from particular circumstances, and may be enforceable by a public law remedy. Where a purpose for which a power is conferred is the protection of the person or property of a class of individuals and the circumstances are such that the repository of the power is under a public law duty to exercise the power, the duty is, or in relevant respects is analogous to, a statutory duty imposed for the benefit of a class, breach of which gives rise to an action for damages by a member of the class who suffers loss in consequence of a failure to discharge the duty. The general principles of public law establish the existence of the statutory duty to exercise the power and the statute prescribes the class of individuals for whose benefit the power is to be exercised.
25. Where the power is a power to control "conduct or activities which may foreseeably give rise to a risk of harm to an individual" (to use a criterion stated by McHugh JA in *Parramatta City Council v Lutz* [23]) and the power is conferred for the purpose of avoiding such a risk, the awarding of compensation for loss caused by a failure to exercise the power when there is a duty to do so is in accordance with the policy of the statute. An individual who is among the class whose interests are intended to be protected by exercise of the power has both locus standi to seek a public law remedy [24] and a right to compensation for damage suffered as the result of any breach of the duty to exercise the power in protection of that individual's



person or property. It was on the basis of a public authority's breach of its statutory duty properly to control a scenic reserve that this Court held in *Schiller v Mulgrave Shire Council* [25] that a visitor to the reserve was entitled to damages for personal injury when struck by the falling of a dead tree.

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[23] (1988) 12 NSWLR 293 at 328.

[24] *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 557-558.

[25] (1972) 129 CLR 116 at 120, 124, 134.

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26. **Following paragraph cited by:**

*Minister for the Environment v Sharma* (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

*Meyers v Commissioner for Social Housing* (07 August 2019) (Elkaim, Loukas-Karlsson and Charlesworth JJ)

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

27. The care and diligence needed to discharge the duty vary according to the circumstances that are known. The measure of the duty owed to members of the relevant class is no greater than the measure of the public law duty to exercise the power. Where, as in the present case, there is a risk of fire that could destroy a large part of a township, the care and diligence to be exercised are greater than where the risk is of an escape of a fire that poses a threat only to an isolated structure or to crops, trees or pasture within a confined area.
28. In the present case, although there was no public expectation that the Council would exercise its powers to enforce compliance with the requirements set out in Mr Walschots' letter, nor was any reliance placed by the respective plaintiffs on the Council's doing so, the Council was under a public law duty to enforce compliance with the requirements in Mr Walschots' letter. The risk of non-compliance was extreme for lives and property in the neighbourhood of the defective chimney and there was no reason which could have justified the Council's failure to follow up the letter, even to the extent of prosecuting for any default. It is unnecessary to determine whether the Council would have been under a duty itself to rectify the defects in the fireplace if the owners and occupiers all failed or refused to do so. The

likelihood is that no more would have been needed to be done than to ensure that the owners and occupiers knew of the danger and to ensure that they knew of the request to remedy the latent defect which Mr Walschots' inspection had revealed. The Council failed to exercise its powers with the care and diligence demanded by the circumstances and, as a result, Mr Stamatopoulos lit the fire which escaped and destroyed Eskimo's premises and damaged the Stamatopoulos' property and the Days' Shop.

29. I would allow the appeal by Eskimo and Mr and Mrs Stamatopoulos and order that judgment be entered in favour of Eskimo against the Council for \$110,218 damages together with interest and costs and in favour of Mr and Mrs Stamatopoulos for \$58,000 damages together with interest and costs. I would give Eskimo and Mr and Mrs Stamatopoulos leave to bring in short minutes of order by consent within 14 days to give effect to this judgment, otherwise I would remit that matter to the Supreme Court of Victoria to enter such judgment as is consistent with the judgment of this Court. I would dismiss the appeal by the Council against Mr and Mrs Day.
30. TOOHEY J. The circumstances giving rise to this litigation are detailed in the judgment of Kirby J. I accept his Honour's recital of the facts. Some reference to those facts is, however, unavoidable.
31. The Court has before it two appeals from the Court of Appeal of the Supreme Court of Victoria relating to the liability of a local authority in a situation where the local authority knew of a dangerous situation existing in premises but failed to exercise a statutory power or powers available to it which might have prevented damage sustained by the occupiers of the premises and the owners of adjoining premises.
32. Although I am concerned to avoid repetition of the facts, it is necessary before proceeding further to identify those who featured at various times in the events which led to litigation and eventually to these appeals.

#### The parties to the litigation

33. The Pyrenees Shire ("the Shire") is the result of the amalgamation in 1994 of several Victorian local authorities, including the Shire of Ripon where the relevant events took place. Within the Shire is the town of Beaufort with a population of about 1,500. On 22 May 1990 Mr and Mrs Day, the respondents in the first appeal, were the owners of 72 Neill Street, Beaufort. On that day a fire broke out in 70 Neill Street which spread to the adjoining premises and caused considerable damage to both premises. At that time Mr and Mrs Nakos were the owners of No 70. Those premises had been earlier let to Mr and Mrs Tzavaras but in or about January 1990 they had assigned their lease to Eskimo Amber Pty Ltd ("Eskimo Amber"), the family company of Mr and Mrs Stamatopoulos. Eskimo Amber and the Stamatopoulos' are the appellants in the second appeal.
34. There were three actions in the Supreme Court of Victoria and three appeals to the Court of Appeal [\[26\]](#). The reason why there are only two appeals to this Court is that in one action Mr and Mrs Nakos sued Mr and Mrs Tzavaras for damages sustained in the fire which broke out on 22 May 1990. They succeeded at first instance against Mr Tzavaras but not against the Shire [\[27\]](#). Their appeal against the dismissal of their action against the Shire

failed and they have not challenged that result. Nor did Mr Tzavaras appeal against the judgment obtained against him by Mr and Mrs Nakos.

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[26] *Pyrenees SC v Day* [1997] 1 VR 218.

[27] It is convenient to refer to "the Shire" but it is the Pyrenees Shire Council which is the party to each of these appeals.

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35. In one of the other two actions, Mr and Mrs Day claimed damages against Mr and Mrs Tzavaras and against the Shire. They recovered against Mr Tzavaras and the Shire. The Shire unsuccessfully appealed to the Court of Appeal and now appeals to this Court. In the other action Eskimo Amber and Mr and Mrs Stamatopoulos succeeded against Mr Tzavaras but not against the Shire[28]. Their appeal to the Court of Appeal was unsuccessful and they now seek to bring liability home to the Shire as well.
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[28] Eskimo Amber claimed damages for destruction of plant, equipment and stock and loss of profits. Mr and Mrs Stamatopoulos claimed damages for loss of personal property.

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#### The 9 August 1988 incident

36. On 9 August 1988 there was an incident in the premises at 70 Neill Street which caused the Country Fire Authority brigade to be summoned. The details of this incident appear in the judgment of Kirby J but, briefly, a fire lit in one of two fireplaces caused a fire in the chimney or perhaps an escape of smoke which suggested a fire in the chimney.
37. When the Beaufort Brigade of the Country Fire Authority attended at No 70, one of its officers, Mr Gerard, formed the opinion that the fireplaces, which were back to back, were unsafe to use. The brickwork had collapsed and in the fireplace which was used there was missing brickwork and damaged mortar jointing. In consequence, if a fire were lit in that fireplace, smoke could enter the main shop area with the possibility of a fire breaking out.
38. On 11 August Mr Walschots, a building inspector with the Shire, attended the premises at 70 Neill Street at the instance of his superior, Mr Humphries. Mr Walschots' evidence was that the fire bricks were "spalled", that is, they would disintegrate early. In this sense the fireplace was dangerous though the trial judge described the danger as "latent, at least to the extent that it was unlikely to be detected by an occupier of the subject premises who was not versed in the condition of fireplaces". Mr Walschots also gave evidence (which was accepted by the trial judge) that he told Mr Tzavaras not to use the fireplace unless it was repaired or sealed, that he (Walschots) would make a report to the building surveyor and that Mr Tzavaras would soon hear from the Shire Council. Mr Tzavaras undertook not to use the

fireplace. However Mr and Mrs Tzavaras continued to use the fireplace and when they assigned their lease to Eskimo Amber, Mr Tzavaras indicated to Mr Stamatopoulos that the fireplace was serviceable.

39. On 22 May 1990, with a fire burning in the fireplace in question, the building caught on fire causing the damage to 70 and 72 Neill Street to which reference has been made. What action, if any, had the Shire taken in the meantime? What are the legal consequences, if any, by reason of failure to take action? These questions are at the heart of these appeals.

#### The issues before the Court

40. At trial Mr and Mrs Day, Mr and Mrs Nakos, Eskimo Amber and Mr and Mrs Stamatopoulos pleaded both breach of statutory duty and negligence against the Shire. The trial judge dismissed the claims for breach of statutory duty but held the Shire liable in negligence to Mr and Mrs Day. As already noted, he held the Shire not liable in regard to Eskimo Amber and Mr and Mrs Stamatopoulos. Those results were affirmed on appeal. While the Shire has appealed to this Court against the finding of negligence, there has been no notice of contention by the Days in respect of the finding of no breach of statutory duty. Nor have Eskimo Amber and the Stamatopoulos' relied upon a breach of statutory duty in their appeal to this Court. However the statutes to which reference will be made are relevant to an assessment of whether any common law duty of care existed on the part of the Shire.

#### Duty of care

41. The trial judge held that a common law duty of care on the part of the Shire arose from the fact that a "rate payer in the position of the Days" must be able to "rely upon his local council to appropriately address a significant fire hazard, of which the rate payer is entirely ignorant, in an adjoining shop ... which, it was acknowledged, had the potential to 'raze Beaufort'". His Honour concluded that liability arose because there was sufficient "general reliance of a kind which ... produced the requisite proximity".
42. In the Court of Appeal Brooking JA, with whom Ormiston and Charles JJA agreed, made his approach clear when he said [\[29\]](#) :

" In my opinion these appeals are to be resolved by use of the notion of general reliance, first put forward by Mason J in *Heyman* [\[30\]](#) , developed by McHugh JA in *Lutz* [\[31\]](#) and applied or at least recognised in a number of other decisions."

He continued [\[32\]](#) :

" Neighbouring owners and occupiers have no rights of entry or inspection, and in general have no expertise and no special means of knowledge which equip them to deal with dangers of the kind which existed in this case. In my view a duty of care was owed by the Shire to the Days. ... The general reliance on the Shire was reasonable and the Shire ought to have foreseen that reliance."

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[\[29\]](#) [\[1997\]](#) 1 VR 218 at 237. .

[30] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

[31] *Parramatta City Council v Lutz* (1988) 12 NSWLR 293.

[32] [1997] 1 VR 218 at 238.

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43. **Following paragraph cited by:**

*New South Wales v West* (05 September 2008) (Higgins CJ, Penfold and Graham JJ)

However Brooking JA upheld the decision of the trial judge in rejecting the claim by Eskimo Amber and Mr and Mrs Stamatopoulos that the Shire owed a duty of care to them. They were in possession of 70 Neill Street and were able to inspect the chimney. He concluded [33] :

"I do not think that the occupiers of a building with a defect of this kind may be said to rely or depend on the municipality to take reasonable care to safeguard them against loss of the kind here in question, or that any such reliance could be said to be reasonable".

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[33] [1997] 1 VR 218 at 240.

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44. Brooking JA reached these conclusions after an examination of relevant legislation and decisions. It is to the legislation that I now turn.

The legislation and its application

45. The principal statute for consideration is the *Local Government Act* 1958 (Vic) [34] . Section 6 94(1) reads:

" The council of any municipality may carry out or cause to be carried out any works or take any other measures for the prevention of fires."

This empowering provision is in broad terms [35] . It is to be read along with s 883 which authorises the council of a municipality

"for the purposes of this Act ... by itself or its officers to enter at all reasonable hours in the daytime into and upon any building or land within the municipal district for the purpose of executing any work or making any inspection authorized to be executed or made by them under this Act without being liable to any legal proceedings on account thereof".

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[34] All the provisions of the Act relevant to these appeals remained in force until 1 October 1992: see [1997] 1 VR 218 at 229.

[35] Section 40(a) of the *Interpretation of Legislation Act 1984* (Vic) provides that, unless the contrary intention appears, where an Act or subordinate instrument confers a power, the power may be exercised "from time to time as occasion requires".

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46. Counsel for the Shire submitted somewhat equivocally that the Shire did not have a power of entry in the circumstances. This was said to be because s 695(1A) did not permit a power of inspection. That subsection reads:

" For the purpose of preventing fires the owner or occupier of any land upon which is erected any chimney or fireplace which is constructed of inflammable material or which is not adequately protected so as to prevent the ignition of other adjacent material of an inflammable nature may by notice in writing be directed by the council of the municipality ... to alter the fireplace or chimney so as to make it safe for use as a fireplace or chimney, as the case may be."

Brooking JA noted a suggestion that s 694(1), on its own:

"might be interpreted as not empowering the council to enter upon private land against the will of the person entitled to possession or to direct an owner or occupier to carry out works" [36].

Be that as it may, Brooking JA went on to say [37]:

"all parties to these appeals accept that subs (1A) of s 695 was available to the council in the present case as a means of dealing with the incident of August 1988. It is clear, however, that subs (1A) was not invoked in this case".

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[36] [1997] 1 VR 218 at 229.

[37] [1997] 1 VR 218 at 230.

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47. In my view s 694(1), at least when read with s 883, does empower entry on to premises. And, in my further view, a direction requiring a chimney to be made safe is the taking of a measure within s 694(1). There are other sections of the *Local Government Act* which may be noted. Section 885 is a provision whereby, if default is made by the owner of a building or land in the execution of any work required to be executed by him, the occupier may with the approval of the council cause the work to be executed. The expense constitutes a debt owing

by the owner which the occupier may deduct from rent due from time to time. Sections 890 and 891 provide for prosecution and penalties on default in compliance with a direction by the council.

48. Furthermore, I do not agree that s 695(1A) was not invoked. On 12 August 1988 Mr Walschots, as building inspector, wrote to "P Tsavaros (sic) and S Nakos" a letter, the terms of which are set out in the judgment of Brennan CJ. The letter refers to Mr Walschots' inspection of two open fireplaces at 70 Neill Street and identifies a possible fire hazard and unsafe structural condition in both fireplaces. The letter concludes with a firm direction that the fireplaces be not used under any circumstances unless repairs are carried out to make the chimneys and fireplaces safe. Although Mr Tzavaras denied receiving the letter, the trial judge rejected his denial.
49. Brooking JA took the view that the letter of 12 August could not be regarded as a notice given under s 695(1A) . He said [38] :

"In the first place, its terms are not such as to make it clear to the addressee that he is being directed to do something: the words 'it is therefore imperative that' in the letter might reasonably be read as nothing more than a strong exhortation. In the second place, even if the letter may be viewed as containing a direction to alter the fireplace so as to make it safe for use as such, the addressee is given the option of sealing up the fireplace permanently and discontinuing use as an alternative to complying with the direction, so depriving the direction of its necessary mandatory effect."

With respect to his Honour, that view of the letter is overly narrow. It is true that, in one sense, the recipients of the letter could meet its terms by not using the fireplace. But on a reasonable construction of the letter, they were being directed either to repair the chimneys and fireplaces or alternatively repair the fireplaces and seal their openings. And they were being directed to do so "[f]or the purpose of preventing fires", the language of s 695(1A) , even if those concerned with the composition and sending of the letter did not consciously direct their attention to that particular provision [39] .

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[38] [1997] 1 VR 218 at 230. .

[39] *Lockwood v The Commonwealth* (1954) 90 CLR 177 at 184 ; *Brown v West* (1990) 169 CLR 195 at 203. .

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50. There was also some discussion at trial and on appeal as to whether the letter could have constituted a notice under reg 57.2 of the Victoria Building Regulations 1983 which empowered the Shire building surveyor to serve a notice on the owner of a dangerous building [40]. It seems that Mr Walschots and Mr Humphries had this provision in mind when they prepared the letter of 12 August 1988. However this raises an issue as to whether the building was "dangerous", a matter that was not entirely resolved in the courts below and which it is not necessary to resolve here [41] .



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[40] This regulation, made under the *Building Control Act* 1981 (Vic), was in force from 1 August 1988.

[41] See [1997] 1 VR 218 at 228229 .

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51. The Court of Appeal was also referred to provisions of the *Health Act* 1958 (Vic) and the *Building Control Act* 1981 (Vic). It was accepted by the Court of Appeal that these Acts had no application to the appeal by Mr and Mrs Day. In passing it may be noted that s 165 of the *Building Control Act* contains a power of entry by a council "at any time where the safety of the public or the occupants is at risk".
52. Although the plaintiffs included in their statements of claim reference to the *Building Control Act*, doubts were expressed by both the trial judge and the Court of Appeal as to its application [42]. No particular argument in this regard was addressed in this Court and as the application of the Act involves questions of law and fact that were not determined in the courts below, this legislation can be put to one side.

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[42] See [1997] 1 VR 218 at 226227, 236237 .

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53. In this Court the Shire relied upon the *Housing Act* 1983 (Vic) and the Housing (Standard of Habitation) Regulations 1985 (Vic) as precluding a duty of care. This was because the regulations require that "every fireplace, hearth and chimney or other heating appliance in a house shall be maintained in a safe condition"[43]. The *Housing Act* contains provision for the Director of Housing to take various steps if the regulations are not complied with [44]. The Shire's argument was that the existence of these provisions destroyed any duty of care on the part of the Shire as it placed an obligation on occupiers to "look out for themselves".

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[43] reg 38(i).

[44] See generally regs 37, 38 and ss 6468 .

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54. Counsel for the Shire also referred to the *Country Fire Authority Act* 1958 (Vic) which vests the "control of the prevention and suppression of fires in the country area of Victoria" in the Country Fire Authority and vests various powers in the Authority[45]. No argument on behalf of the Shire was addressed to this Court concerning these provisions. Counsel for Mr and Mrs Day argued that the Shire could not rely upon any of these provisions because they had not been relied upon at trial and that to raise them now would involve issues of fact and law that previously had not been considered.



55. In any event, as is discussed later in these reasons, the existence of powers, even of duties on the part of other statutory authorities does not of itself preclude a duty of care on the part of the Shire.
56. Thus it is appropriate to approach the issue of the liability of the Shire on the footing that, by reason of ss 694 and 883 of the *Local Government Act*, it was empowered to direct the owners and occupiers of 70 Neill Street to make safe the chimneys and fireplaces and, if necessary, to enter upon the premises and carry out the work itself. Furthermore, the letter of 12 August 1998 constituted a direction under s 695(1A).
57. At the same time, it cannot be said, nor was it contended before this Court, that the legislation in question imposed upon the Shire an obligation to take action in circumstances such as were found to exist on 9 August 1988.

#### General reliance

58. The presence of a statutory power which may provide the basis for a duty of care on the part of one statutory authority does not preclude such a duty arising, by reason of another statutory power, on the part of another statutory authority. The point has some relevance when, as here, it is alleged that there was general reliance upon the Shire. In that regard Brooking JA observed [46]:

"even if it could be said that some neighbouring owners or occupiers would rely on the Shire while others would rely on the Country Fire Authority, and that others again might place reliance on one or the other indifferently, this would in my view not prevent a duty of care from arising. General reliance may be on an unidentified public authority."

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[46] [1997] 1 VR 218 at 238.

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59. The Shire's answer to this observation was that if general reliance is to be a criterion of liability in negligence on the part of a public authority, not only must it be possible to define precisely what the authority was supposed to do, but there must be no ambiguity as to the body upon whom it is said the public generally relies. Were it otherwise, the answer continued, a large authority with a high profile might be rendered liable even when a smaller authority with a lower profile actually possessed greater relevant powers so that reliance upon that authority by a potential plaintiff would be more reasonable.
60. Whether a duty of care arises in circumstances such as occurred here involves ascertaining whether the statutory body in question had power to take the steps which, it is said, would

have prevented the loss. Where more than one authority has the relevant power to act, general reliance may be said to be reposed in both unless it can be shown that such reliance upon one is unreasonable. This may be where one of the authorities, whether by reason of its size and financial resources or otherwise, has always been the one to exercise the power. Whether there has been general reliance is a legal concept which necessarily requires careful definition.

61. In this regard it must be stressed that none of the plaintiffs argued specific reliance upon the Shire. None of the plaintiffs relied upon any relevant contact with the Shire in relation to the hazard created by the fireplace in 70 Neill Street.
62. The notion of general reliance has been criticised on the ground that it is a "fiction". Whether the criticism is well founded depends on the sense in which it is intended. What does it mean to say that general reliance is a fiction? It may be a fiction in the sense that it does not involve actual reliance. In the same way, proximity does not involve a person actively assuming responsibility for the safety of another. But if either is a fiction, it is only in the sense that the fiction "forces upon our attention the relation between theory and fact, between concept and reality, and reminds us of the complexity of that relation"[\[47\]](#). More accurately, general reliance is a concept. Concepts have been developed in this area as in other areas of the law; here they direct attention to the considerations which are relevant in order to determine whether a duty of care exists in situations which do not involve "ordinary physical injury or damage caused by the direct impact of [a] positive act". [\[48\]](#).

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[\[47\]](#) Fuller, *Legal Fictions*, (1967) at ix.

[\[48\]](#) *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 495.

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63. As to whether the notion of general reliance is sufficient to impose liability on the Shire in the present appeals, in *Sutherland Shire Council v Heyman* Mason J said [\[49\]](#) :

"[I]f the judgment is to be sustained, it is on the footing that the appellant was in breach of a duty of care based on a general reliance or dependence on the appellant having investigated the building and having satisfied itself that the building complied with the Act and ordinances. It is clear enough that this was not a case in which the respondents specifically relied on the appellant's exercise of its power."

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[\[49\]](#) (1985) 157 CLR 424 at 470.

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64. In *Heyman* the Council was held not liable in negligence in circumstances where it had inspected premises, approved plans and issued a building permit and where defects appeared in the building due to subsidence of inadequate footings. Gibbs CJ and Wilson J held that a duty of care did arise on the part of the Council but that there was insufficient evidence of

negligence. Mason, Brennan and Deane JJ held that no duty of care arose because there was no evidence that the respondent, a subsequent purchaser of the house, relied specifically upon any of the acts of the Council. Mason J said [\[50\]](#) :

"[T]here will be cases in which the plaintiff's reasonable reliance will arise out of a general dependence on an authority's performance of its function with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of a plaintiff. Reliance or dependence in this sense is in general the product of the grant (and exercise) of powers designed to prevent or minimize a risk of personal injury or disability, recognized by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection. This situation generates on one side (the individual) a general expectation that the power will be exercised and on the other side (the authority) a realization that there is a general reliance or dependence on its exercise of power".

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[\[50\]](#) (1985) 157 CLR 424 at 464. .

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65. However, Mason J noted that at no stage was a case of general reliance advanced "by evidence or argument" [\[51\]](#) . In any event his Honour considered that the relevant legislative regime presented an obstacle to general reliance since an intending purchaser could apply for a certificate that a building complied with legislative requirements and could make inquiries of the Council for information or could retain an expert to inspect the building and check its foundations [\[52\]](#) . There is no support for the notion of general reliance in the other judgments in *Heyman* [\[53\]](#). It was accepted in those judgments that the negligent exercise of power may give rise to a liability but that a duty to exercise the power was a prerequisite of liability. In the present cases the Shire submitted that it had done nothing to create or increase the risk of fire. This is clearly correct and was not challenged on appeal.

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[\[51\]](#) (1985) 157 CLR 424 at 470-471 .

[\[52\]](#) (1985) 157 CLR 424 at 471. .

[\[53\]](#) There is a passage in the judgment of Deane J at 508 which arguably is concerned only with specific reliance.

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66. In his judgment in *Heyman* Brennan J said [\[54\]](#) :

"To superimpose such a general common law duty on a statutory power would be to 'conjure up' the duty in order to give effect to judicial ideas of policy. The common law does not superimpose such a duty on a mere statutory power."

His Honour referred to the judgment of Lord Romer in *East Suffolk Rivers Catchment Board v Kent* [55] asserting that "[w]here a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power". However that view did not survive *Anns v Merton London Borough Council* [56] and although *Anns* itself was overruled by *Murphy v Brentwood District Council* [57], Lord Romer's judgment on this point does not strictly accord with the approach taken by the majority of the House of Lords in *Stovin v Wise* [58]. Lord Hoffmann, with whom Lord Goff and Lord Jauncey agreed, said [59] that the question of whether the existence of a statutory power gave rise to a common law duty of care required an examination of the policy of the statute; that the absence of a statutory duty would normally exclude the existence of such a duty; and that, accordingly, the minimum preconditions for basing a duty of care upon the existence of a statutory power were, first, that it would have been irrational not to have exercised the power so that there was in effect a public law duty to act, and secondly, that there were exceptional grounds for holding that the policy of the statute required compensation to be paid to persons who suffered loss because the power was not exercised [60].

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[54] (1985) 157 CLR 424 at 483.

[55] [1941] AC 74 at 102.

[56] [1978] AC 728.

[57] [1991] 1 AC 398.

[58] [1996] AC 923.

[59] [1996] AC 923 at 952-953.

[60] *Stovin v Wise* was considered by the Court of Appeal in *Capital & Counties Plc v Hampshire County Council* [1997] 3 WLR 331; [1997] 2 All ER 865, *Barrett v Enfield London Borough Council* [1997] 3 WLR 628; [1997] 3 All ER 171, and *OLL Ltd v Secretary of State for Transport* [1997] 3 All ER 897.

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67. There may be a fine line between a power conferred on a local authority which, in the exercise of its choice (taking into account policy considerations), has made a decision whether or not to exercise that power and cases where the decision is made as a matter of day to day operations. This is the so called policy/operational distinction. In *Heyman* Mason J observed [61]:

"[T]he dividing line between [policy and operational factors] will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard

of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness."

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[\[61\]](#) (1985) 157 CLR 424 at 469.

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68. However the policy/operational distinction is not particularly appropriate or helpful in determining the present appeals. Certainly no policy considerations were said to motivate the Shire's inactivity following its letter of 12 August 1988. Indeed the sending of the letter itself points up the operational nature involved; no budgetary or other constraints stood in the way of the Shire taking some further step. Furthermore, the power contained in s 695(1A) of the *Local Government Act* is for the express purpose of "preventing fires".
69. It has to be said again, having regard to the arguments addressed to the Court and the authorities marshalled in their support, that the negligence alleged against the Shire is its failure to take steps available to it to prevent damage occurring by reason of the condition of the fireplace. In what sense then can one speak of general reliance in those circumstances? General reliance exists where a plaintiff is dependent on a local authority to perform functions for the protection of that plaintiff. Again, there is an aspect of question begging in putting the matter in that way. In *Parramatta City Council v Lutz* McHugh JA was more specific when he said [\[62\]](#) that general reliance is a necessary development

"justified by the failure of the traditional categories to give protection to individual members of the community from harm in situations where it is impracticable for them to protect themselves. ... Whether a particular situation falls within the general reliance category will be a question of fact in each case."

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[\[62\]](#) (1988) 12 NSWLR 293 at 330.

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70. This Court has not been called upon, until now, to consider the concept of general reliance spoken of by Mason J in *Heyman*. Nevertheless, the concept has been recognised in several decisions of State and Territory courts [\[63\]](#).

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[\[63\]](#) *CasleySmith v F S Evans & Sons Pty Ltd (No 5)* (1988) 67 LGRA 108; *Nagle v Rottneest Island Authority* [1989] Aust Torts Rep ¶80298; *Hicks v Lake Macquarie City Council (No 2)* (1992) 77 LGRA 269; *Romeo v Conservation Commission of the Northern Territory* (1994) 123 FLR 71; *Alec Finlayson Pty Ltd v Armidale City Council* (1994) 51 FCR 378; 123 ALR 155; *Northern Territory of Australia v Deutscher Klub (Darwin) Inc* (1994) 122 FLR 135.

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71. In *Stovin v Wise* Lord Hoffmann appeared to accept the existence of the concept while holding that there were no grounds upon which the case before the House of Lords could be brought within it. His Lordship did say [\[64\]](#) :

"I will only note in passing that its application may require some very careful analysis of the role which the expected exercise of the statutory power plays in community behaviour."

It should also be noted that the concept of general reliance has been accepted as part of the common law in New Zealand [\[65\]](#) . The observations of Mason J in *Heyman* regarding policy and operational decisions by statutory authorities were referred to with approval by Cory J, speaking for the majority, in *Just v British Columbia* [\[66\]](#) . Cory J did not use the language of general reliance. The distinction drawn by Mason J, adopted by Cory J, was applied by the Federal Court of Appeal in *Swanson Estate v Canada* [\[67\]](#) .

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[\[64\]](#) [1996] AC 923 at 954955 .

[\[65\]](#) *Invercargill City Council v Hamlin* [1996] AC 624 at 638639 . See also *Brown v Heathcote County Council* [1986] 1 NZLR 76 at 81 per Cooke P; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 297 per Cooke P.

[\[66\]](#) [1989] 2 SCR 1228 at 12411242 .

[\[67\]](#) (1991) 80 DLR (4th) 741 .

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72. The relevant approach is to ask whether, having regard to considerations bearing upon general reliance and proximity, a duty of care arose on the part of the Shire.

### Proximity

73. The issue in the present appeals may be posed rather in the way stated by Deane J in *Sutherland Shire Council v Heyman* [\[68\]](#) :

"[T]he ultimate question in the present case is whether the relationship between the Council and the respondents possessed the requisite degree of proximity to give rise to a relevant duty of care on the part of the Council to the respondents".

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[\[68\]](#) (1985) 157 CLR 424 at 495 .

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74. It is true that to pose the issue in this way invites a number of questions. And it is necessary to identify proximity in such a way as to avoid begging the very question to be answered. In what Deane J described as "a new or developing area of the law of negligence" [\[69\]](#), proximity directs attention to the fact that inquiry must be made to determine whether there are factors additional to reasonable foreseeability that will justify a finding of proximity. This is a matter explored in *Hill v Van Erp* where I spoke of proximity as a limitation upon reasonable foreseeability as the criterion of the duty of care and said [\[70\]](#) :

" Attention is focused on established categories in which a duty of care has been held to exist; analogies are then drawn and policy considerations examined in order to determine whether the law should recognise a further category, whether that be seen as a new one or an extension of an old one."

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[\[69\]](#) (1985) 157 CLR 424 at 498. .

[\[70\]](#) (1997) 188 CLR 159 at 189-190 . See also *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 351. .

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75. Proximity designates "a separate and general limitation upon the test of reasonable foreseeability in the form of relationships which must exist between plaintiff and defendant before a relevant duty of care will arise" [\[71\]](#) .

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[\[71\]](#) *Jaensch v Coffey* (1984) 155 CLR 549 at 584 per Deane J.

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76. It is true that proximity is not a test accepted by all judges. But the criticism that its use tends to conceal the steps taken is not well founded. The concept assists in determining the categories of case in which liability may exist. The difference between this and other approaches can be overstated. Thus the threestage test adopted in *Caparo Industries Plc v Dickman* [\[72\]](#) looks first to reasonable foreseeability, then to proximity and then to the fairness of imposing a duty of care in the circumstances. Proximity in the sense I have described it embraces these considerations but treats the third by reference to categories rather than individual cases and thus produces a more coherent and predictable approach.

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[\[72\]](#) [1990] 2 AC 605 at 617618 .

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77. Recognition of a concept of "general reliance" brings within the notion of proximity another category of case in which a duty of care may arise. This category acknowledges that a duty of



care may be owed in circumstances where an omission to act on the part of a local authority or statutory body has resulted in loss to certain members of the public. The duty is to those members who would generally rely upon an authority in circumstances where they are particularly vulnerable and the authority exists and is empowered to protect them from the very loss that occurred. It is fair and reasonable for general reliance to form the basis of a duty of care where the omission by the authority is not a result of policy considerations such as lack of funds or resources, but is more properly viewed as within the "operational" sphere of that authority's activities. A further policy consideration militating in favour of a duty of care where general reliance is reposed in a public authority lies in the fact that the liability is not at large. The members of the public who could be said to "generally rely" upon a local authority are in an ascertainable class, namely, ratepayers, though the position of those in occupation of defective premises raises other considerations.

### Conclusion

78. In moving towards his conclusion that the Shire was liable to Mr and Mrs Day, but not to Eskimo Amber and Mr and Mrs Stamatopoulos, Brooking JA said [\[73\]](#) :

" This case concerns a defective chimney giving rise to a risk of fire on privately owned land in a municipality. The Shire had statutory power to deal with that risk. It could take prompt action calculated to cause the owner or occupier of the building to make the chimney safe by one means or another. ... the private law remedies available to a neighbouring owner or occupier were slow and expensive, and the danger was such that urgent action was required. Moreover, the powers, functions and position of the Shire were such that it was the natural focal point for complaints or suggestions that an inspection was desirable and such that its officers had the expertise to enable them to investigate complaints, make appropriate inspections and give appropriate directions."

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[\[73\]](#) [\[1997\] 1 VR 218](#) at 237.

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79. While Brooking JA's exposition does not dictate the outcome of the appeals, it sets the scene in which to consider the application of general reliance and proximity.
80. The authorities warrant, if they do not compel, a conclusion that general reliance is the criterion of proximity in cases where the duty of care is said to arise by nonfeasance and where the danger has not been created or contributed to by the allegedly negligent party. How then does one apply such a "test"? In the present case it is clearly an operational decision with which we are concerned. There is nothing to be gained therefore by the distinction between policy and operations.
81. The steps which led the Court of Appeal to hold the Shire liable in respect of the damage sustained by Mr and Mrs Day are, broadly speaking, the steps I take in arriving at the same result. The Shire had statutory power to deal with the danger constituted by the defective chimney. Through the exercise of that power it could have ensured that the danger was removed. It was a danger, not only to 70 Neill Street but also to adjoining buildings. Indeed,



if a fire broke out, it was almost certain to extend beyond 70 Neill Street, having regard to the age and construction of the buildings. The danger was necessarily unknown to adjoining owners and occupiers. In any event, had they known, the remedies available to them were, as Brooking JA said [74], "slow and expensive". In those circumstances it is but a short step to hold that there was a general reliance by neighbours, such as the Days, that the Shire would take steps to remove the danger of which the Shire was aware and which it had the power to remove. Because the Shire did nothing further after the letter of 12 August 1988, there was a breach of the duty of care which the Shire owed to Mr and Mrs Day. No issue of causation arose on the arguments presented to the Court.

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[74] [1997] 1 VR 218 at 237.

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82. However, Eskimo Amber and Mr and Mrs Stamatopoulos were in a different position, one which, in my view, did not point to any general reliance on their part. The company was in occupation as lessee by reason of the assignment from Mr and Mrs Tzavaras. It is true that Eskimo Amber and the Stamatopoulos' were not in occupation on 9 August 1988. But the company had responsibilities as assignee which extended to the condition of the premises. And, in respect of the premises, the company stood in a particular contractual relationship to the assignors of the lease and to the lessors. It is true that the trial judge described the defect in the premises at No 70 as "latent". However, notice of the danger had been given by the Shire to the owners, at any rate to one of the owners, and to the original lessees, at any rate to one of them. In those circumstances it is not appropriate to speak of general reliance as extending indefinitely to someone in occupation under an assignment of the lease, let alone someone in occupation by reason of their association with the assignee. And this is so even if the Shire was aware of a new tenant coming into the premises.
83. In its written submissions to this Court, the Shire drew attention to the Victoria Building Regulations to which reference is made earlier in these reasons. Regulation 8.8 empowered an "owner" (defined in the *Building Control Act* in terms which would include Eskimo Amber) to request from the Shire "details of any current certificate, notice or report made under the Act in relation to the building". This procedure, the Shire argued, would have entitled Eskimo Amber to ascertain from the Shire the extent of its knowledge of the state of the chimney. This argument against general reliance is in effect an invocation of the remarks of Mason J in *Heyman* mentioned earlier in these reasons. The argument has force but I prefer to reject the claim by Eskimo Amber and Mr and Mrs Stamatopoulos for the reasons already given.
84. It follows that each appeal should be dismissed.
85. McHUGH J. Before the Court are two appeals which raise questions of great importance concerning the common law duty of a local government council to take affirmative action to prevent damage to the property and person of residents of a shire or municipality from any dangerous condition of premises in that shire or municipality. In the first appeal, Pyrenees Shire Council ("the Council") appeals against the decision of the Court of Appeal of the

Supreme Court of Victoria [75] which upheld a finding that it was liable in damages to the respondents, Mr and Mrs Day, whose premises were severely damaged when adjoining premises caught fire as the result of the use of a defective fireplace. In the second appeal, the tenants of the premises where the fire started: Mr and Mrs Stamatopoulos and Eskimo Amber Pty Ltd ("Eskimo"), a company effectively owned and controlled by Mr and Mrs Stamatopoulos, appeal against the decision of the Court of Appeal [76] upholding a finding that the Council did not owe them a duty of care.

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[75] *Pyrenees Shire Council v Day* [1997] 1 VR 218 at 241.

[76] [1997] 1 VR 218 at 240.

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### The factual background

86. At all relevant times, Mr and Mrs Nakos were the owners of premises situated at 70 Neill Street, Beaufort. These premises consisted of a fish and chip shop with an attached residence. Beaufort is a small town in rural Victoria. At the time of the events that give rise to these appeals, Beaufort was part of the Shire of Ripon which had a population of about 3,300 people and about 2,500 rateable properties. In 1994, the Shire of Ripon was dissolved as the result of a reorganisation of local government in Victoria and the Council assumed its responsibilities.
87. In July 1986, Mr and Mrs Nakos leased 70 Neill Street to Mr and Mrs Tzavaras. Mr and Mrs Tzavaras continued to run the shop and live in the premises. On 9 August 1988, a Mr Rayne, who assisted Mr and Mrs Tzavaras in the running of the fish and chip shop and lived on the premises, lit a fire in the fireplace. The fireplace was a double fireplace; Mr Rayne lit a fire in the half of the fireplace in the residential part of the premises. The other half of the fireplace was in a corner of the part of the premises used as a fish and chip shop. This half of the fireplace was never used. Apparently, it was sealed up. Sometime later that evening, Mr Rayne thought that there was a fire in the chimney. He summoned the local Country Fire Authority ("the CFA"). Officers of the CFA attended the premises but found no fire. One of them, however, concluded that the fireplace was unsafe for lighting fires. He told Mr Rayne (Mr and Mrs Tzavaras were absent from the premises) that it was unsafe for use. A few days later, a building and scaffolding inspector ("the inspector") employed by the Council examined the premises at the request of the Shire Engineer. The inspector also concluded that the fireplace was unsafe for lighting fires. He thought that, if the fireplace was used, the possibility of fire was "great" and that the entire row of shops adjoining 70 Neill Street would be at risk. He told Mr Tzavaras, who introduced himself as "in charge", not to use the fireplace until it was repaired. Mr Tzavaras agreed not to do so. The inspector told Mr Tzavaras that he would "be hearing" from the Council.
88. By letter dated 12 August 1988, the inspector wrote to Mr Tzavaras and Mr Nakos at 70 Neill Street. The letter set out the defects in the fireplace and continued as follows:

"Smoke can now enter the main shop area and the possibility of fire and health risk is great.

It is therefore imperative that the ... fireplaces be not used under any circumstances unless:-

- (a) Structurally sound repairs are made to make the chimneys and fireplaces safe.
- (b) General repairs are made to mortar and brickwork to make the walls heat resistant and prevent smoke leakage.
- (c) Alternatively repair the fireplaces structurally and seal both fireplace openings permanently and discontinue use."

89. The trial judge found that only Mr Tzavaras saw the letter and that Mr Nakos never knew of the defective chimney. Mr Tzavaras ignored the Council's warning. He continued to use the fireplace without having it repaired. Following the delivery of the letter, the Council made no further enquiries or inspections to ascertain whether the fireplace was being used or the repairs had been carried out.
90. In January 1990, Mr and Mrs Tzavaras, with the agreement of Mr and Mrs Nakos, assigned the lease over 70 Neill Street to Eskimo, the company effectively owned and controlled by Mr and Mrs Stamatopoulos. Mr and Mrs Stamatopoulos continued to operate the business and reside in the premises. Before the assignment, Mr Stamatopoulos asked Mr Tzavaras if he was using the fireplace. Mr Tzavaras replied that he was. Furthermore, he did not mention the 1988 fire in his discussions with Mr Stamatopoulos.
91. After the assignment of the tenancy, Mr and Mrs Stamatopoulos regularly used the fireplace. On 22 May 1990 that use led to a substantial fire which caused serious property damage to both 70 and 72 Neill Street. At all relevant times, the latter premises were owned by Mr and Mrs Day, who operated a video hire business from the premises.

#### The proceedings before Strong CCJ

92. The fire gave rise to three actions in the County Court of Victoria in respect of property damage, or property damage and consequential financial loss, resulting from the fire. One action was brought by Mr and Mrs Nakos against Mr and Mrs Tzavaras and the Council. As against Mr and Mrs Tzavaras, Mr and Mrs Nakos claimed damages for negligence. As against the Council, Mr and Mrs Nakos claimed damages for negligence and breach of statutory duty. Mr and Mrs Nakos succeeded against Mr Tzavaras<sup>[77]</sup>, but failed in the actions against the Council.

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<sup>[77]</sup> Mrs Tzavaras was held to have had no knowledge of the dangerous condition of the fireplace and therefore to be not negligent.

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93. The second action was brought by Eskimo and Mr and Mrs Stamatopoulos against Mr and Mrs Tzavaras and the Council. Like Mr and Mrs Nakos, they successfully sued Mr Tzavaras for negligence and unsuccessfully sued the Council for negligence and breach of statutory duty.
94. The third action was brought by Mr and Mrs Day against Mr and Mrs Tzavaras and the Council. They succeeded in their action in negligence against Mr Tzavaras. Unlike the other plaintiffs, they also succeeded in their claim in negligence against the Council. That claim relied heavily on the doctrine of general reliance that was formulated by Mason J in *Sutherland Shire Council v Heyman* [78] and applied by myself in *Parramatta City Council v Lutz* [79]. However, Mr and Mrs Day failed in their action against the Council for breach of statutory duty. In respect of the damages payable to Mr and Mrs Day, Strong CCJ apportioned liability as follows: Mr Tzavaras, two thirds; the Council, one third.

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[78] (1985) 157 CLR 424 .

[79] (1988) 12 NSWLR 293 .

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#### The proceedings before the Court of Appeal

95. The Court of Appeal heard three appeals. One was brought by Mr and Mrs Nakos. Another was brought by Eskimo and Mr and Mrs Stamatopoulos. Each of those appellants contended that Strong CCJ had erred in declining to hold that the Council was liable to them in negligence. The third appeal was brought by the Council against the finding of the trial judge that it was liable in negligence to Mr and Mrs Day. Essentially, there were two issues before the Court of Appeal. The principal issue was whether at common law the Council was under a duty of care to Mr and Mrs Nakos, Eskimo, Mr and Mrs Stamatopoulos and Mr and Mrs Day (collectively, "the plaintiffs"). The second issue was whether, assuming that the duty did exist, the Council had breached the duty of care owed to the plaintiffs.

#### Duty of care

96. Brooking JA, with whom Ormiston and Charles JJA agreed, gave the leading judgment in the Court of Appeal. After holding that a relationship of proximity must exist before a duty of care can arise [80], his Honour asked [81] :

"Was there a duty of care calling for positive action by way of exercising the Shire's statutory functions as opposed to a mere duty to abstain from conduct which created or enhanced the risk of fire?"

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[80] [1997] 1 VR 218 at 230 .

[81] [1997] 1 VR 218 at 231 .

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97. Having noted some of the issues arising from the possible application of the *Health Act 1958 (Vic)*, the *Building Control Act 1981 (Vic)*, the Victoria Building Regulations 1983<sup>[82]</sup> and the *Local Government Act 1958 (Vic)* ("the Act")<sup>[83]</sup>, Brooking JA held <sup>[84]</sup> that s 695(1A) of the Act "was available to the council in the present case as a means of dealing with the incident of August 1988", but that the section had not been invoked by the Council. His Honour did not see the *Health Act* provisions as having any relevance and, in the absence of argument from counsel, did not express a concluded view as to the relevance of the *Building Control Act* provisions or the Victoria Building Regulations <sup>[85]</sup>.

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<sup>[82]</sup> SR No 273/1983.

<sup>[83]</sup> The Act was repealed by s 25 of the *Local Government (Amendment) Act 1994 (Vic)*. My discussion is limited to the Act as it applied at the relevant time.

<sup>[84]</sup> [1997] 1 VR 218 at 230.

<sup>[85]</sup> [1997] 1 VR 218 at 236-237.

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98. His Honour noted that the Council had done nothing to enhance the risk of fire <sup>[86]</sup>. He then considered the significance of reliance or dependence and assumption of responsibility in relation to proximity in light of the plaintiffs' dependence on the doctrine of general reliance as expounded by Mason J in *Heyman* and by myself in *Lutz*. Having rejected the Council's submission that general reliance was available only in cases of personal injury <sup>[87]</sup>, Brooking JA went on to examine the doctrine as discussed in *Heyman* and *Lutz*, as well as other decisions where it has been employed, both in Australia and overseas. His survey of the cases led him to conclude that the appeal was to be resolved by the application of this doctrine <sup>[88]</sup>. Brooking JA accepted <sup>[89]</sup> that ratepayers generally rely on councils to exercise their statutory powers to rid neighbouring properties of dangers and detriments. His Honour found that such an expectation may be judicially noticed <sup>[90]</sup>. He also thought that such general reliance "may be on an unidentified public authority" <sup>[91]</sup>. Not surprisingly, he held that the Council owed Mr and Mrs Day a duty of care<sup>[92]</sup>.

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<sup>[86]</sup> [1997] 1 VR 218 at 231.

<sup>[87]</sup> [1997] 1 VR 218 at 232.

<sup>[88]</sup> [1997] 1 VR 218 at 237.

<sup>[89]</sup> [1997] 1 VR 218 at 237.

[90] [1997] 1 VR 218 at 237 ; Brooking JA did note that there was evidence in the present case of the frequency with which notices were served by municipalities in respect of buildings that were dangerous by reason of the risk of fire.

[91] [1997] 1 VR 218 at 238. .

[92] His Honour also confirmed the trial judge's finding that the Council breached this duty. Because of his findings as to duty, his Honour did not need to examine the question of breach vis-a-vis the claims brought by Mr and Mrs Nakos, Eskimo and Mr and Mrs Stamatopoulos.

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99. His Honour then examined whether the Council also owed a duty of care to Mr and Mrs Nakos, Eskimo and Mr and Mrs Stamatopoulos. He held that it did not [93] . Unlike Mr and Mrs Day and other neighbours, who could exercise no control over what precautions were taken at 70 Neill Street, Mr and Mrs Nakos, Eskimo and Mr and Mrs Stamatopoulos "were in a position to do something about a fire hazard on their premises". [94] . Furthermore, in the case of Mr and Mrs Nakos, any reliance on the Council would not be reasonable, especially in light of Mr and Mrs Nakos' lack of dependency [95] . Similarly, his Honour noted the ability of Eskimo and Mr and Mrs Stamatopoulos to inspect the chimney, and held that any reliance by them would not be reasonable [96] . His Honour concluded by noting that unlike the situation in *Lutz* , where I identified the class to which the duty was owed by reference to the class of persons for whose benefit the statutory power was by its terms conferred, the statutory provisions in the current case offered no such assistance [97] .

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[93] [1997] 1 VR 218 at 240. .

[94] [1997] 1 VR 218 at 239. .

[95] [1997] 1 VR 218 at 239-240. .

[96] [1997] 1 VR 218 at 240. .

[97] [1997] 1 VR 218 at 240-241. .

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100. Accordingly, the Court dismissed all three appeals [98] . .

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[98] [1997] 1 VR 218 at 241. .

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### Affirmative duties

101. Following paragraph cited by:

*Ibrahimi v Commonwealth of Australia* (19 December 2018) (Meagher and Payne JJA, Simpson AJA)

*Broughton v Competitive Foods Australia Pty Ltd* (18 May 2005) (Handley and Hodgson JJA, Brownie AJA)

25 Ordinarily, also, one person owes no duty to a second person to take positive steps to prevent harm to the second person, whether from the conduct of a third person, or otherwise, even if there is an obvious danger threatening the second person: *Modbury* at [20], [111] and [140] and *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [101]; and there is an element of irrationality involved in imposing liability on a defendant for not preventing the criminal conduct of others, when society generally has been unable to control that conduct, and the defendant has failed to control that conduct: *Proprietors of Strata Plan 17226 v Drakulic* (2002) 55 NSWLR 659 at [72]. .

As I pointed out in *Lutz* [99], from the time of the Year Books, the common law has drawn a distinction between causing damage by a positive act and "causing" damage by a failure to act. The early forms of action gave no remedy for failure to prevent harm. The writ of trespass, historically the most important of the early writs for remedying wrongs, was available only for direct or forcible injury. Not until the action on the case was developed did the common law provide a remedy for omissions. Initially, both contractual and tortious wrongs were remedied by the action on the case because the distinction between "rights *ex contractu* and *ex delicto* was by no means clear" [100]. When tort and contract separated, contractual wrongs came to be identified with actions in assumpsit while tortious wrongs came to be identified with the action on the case. Speaking generally, remedies for omissions were henceforth seen as remediable by the action in assumpsit, not case. Absent consideration or its equivalent, the common law generally imposed no obligation on a person to protect or help another. As Windeyer J pointed out in *Hargrave v Goldman* [101], "the common law does not require a man to act as the Samaritan did". For that reason in most cases, the occupier of property owes no duty to a neighbour to secure the property so as to prevent thieves gaining access to the property for the purpose of robbing the neighbour's premises [102]. The "general rule" said Dixon J in *Smith v Leurs* [103], "is that one man is under no duty of controlling another man to prevent his doing damage to a third". Nor does the common law generally impose any duty on a person to take steps to prevent harm, even very serious harm, befalling another. Thus, absent a statutory duty, a highway authority owes no duty to motorists to improve the visibility on a dangerous corner even though it is aware of the danger created by the poor visibility [104]. The careless or malevolent person, who stands mute and still while another heads for disaster, generally incurs no liability for the damage that the latter suffers. Harsh though the common law may seem to be, there are nevertheless strong political, moral and economic arguments that justify its approach, as Lord Hoffmann pointed out in *Stovin v Wise* [105]. .

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[99] (1988) 12 NSWLR 293 at 326. .



[100] Sutton, *Personal Actions at Common Law*, (1929) at 26.

[101] (1963) 110 CLR 40 at 66. .

[102] *P Perl (Exporters) Ltd v Camden London Borough Council* [1984] QB 342 at 357358 , 359-360 .

[103] (1945) 70 CLR 256 at 262. .

[104] *Stovin v Wise* [1996] AC 923.

[105] [1996] AC 923 at 943-944 .

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102. **Following paragraph cited by:**

*Proprietors of Strata Plan 17226 v Drakulic* (27 November 2002) (Mason P, Heydon and Hodgson JJA)

90 There is one type of “special” relationship which may in future call for examination – the fiduciary relationship. In *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [102] McHugh J said:

“In the absence of a contract, fiduciary relationship or statutory obligation, the common law makes a person liable in damages for the failure to act only when some special relationship exists between the person harmed and the person who fails to act.”

In this passage McHugh J treated fiduciary relationships as not being “special relationships”. But whether they are to be treated as a potential source of liability separate from special relationships or as an example of them, it is not necessary to consider whether the relationship between a unit owner and the body corporate, or between a unit owner and the manager of the building in which unit owners own units and the body corporate owns common areas is a fiduciary relationship. The Statement of Claim did not plead that these relationships created fiduciary duties, the plaintiff did not argue either at trial or on appeal that they did, and the relevant factual and legislative background was not examined.

*Proprietors of Strata Plan 17226 v Drakulic* (27 November 2002) (Mason P, Heydon and Hodgson JJA)

In the absence of a contract, fiduciary relationship or statutory obligation, the common law makes a person liable in damages for the failure to act only when some special relationship exists between the person harmed and the person who fails to act. By a person's failure to act,



I mean that person's failure to act divorced from positive conduct by that person that causes damage such as the failure to brake while driving a car. A special relationship may arise from the ownership, occupation or control of land or chattels, from the receipt of a benefit or from an undertaking, assumption of responsibility or invitation which might induce the person harmed to act or to refrain from acting. None of those matters is present in this case. But Mr and Mrs Day, Mr and Mrs Stamatopoulos and Eskimo contend that, in the case of a public authority, a special relationship imposing affirmative duties can arise where the public authority has the statutory power to eliminate a dangerous condition, knows or ought to know of that condition, and knows or ought to know that in general members of the public rely on the authority to eliminate the condition. This was the argument that was substantially accepted by the learned judges in the Court of Appeal.

The doctrine of general reliance or general dependence

103. In *Heyman* [106], Mason J, after examining the course of authority in the United States, said:

"The American experience therefore furnishes support for the view that a public authority is liable for negligent failure to perform a function when it foresees or ought to foresee that: (a) the plaintiff reasonably relies on the defendant performing the function and taking care in doing so, and (b) the plaintiff will suffer damage if the defendant does not take care."

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[106] (1985) 157 CLR 424 at 463.

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104. His Honour went on to say [107] that:

"[T]here will be cases in which the plaintiff's reasonable reliance will arise out of a general dependence on an authority's performance of its function with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of a plaintiff. Reliance or dependence in this sense is in general the product of the grant (and exercise) of powers designed to prevent or minimize a risk of personal injury or disability, recognized by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection. This situation generates on one side (the individual) a general expectation that the power will be exercised and on the other side (the authority) a realization that there is a general reliance or dependence on its exercise of power ... The control of air traffic, the safety inspection of aircraft and the fighting of a fire in a building ... may well be examples of this type of function."

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[107] (1985) 157 CLR 424 at 464.

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105. In [Lutz \[108\]](#) , I applied the concept of general reliance to which Mason J referred in *Heyman*. I thought [\[109\]](#) that, in the absence of a binding decision of this Court, the Court of Appeal of New South Wales should adopt that concept as a general rule of the common law because of "the failure of the traditional categories [of negligence] to give protection to individual members of the community from harm in situations where it is impracticable for them to protect themselves". Other Australian courts have also adopted the concept of general reliance in holding public authorities liable for the failure to exercise a function or power [\[110\]](#) . Furthermore, New Zealand courts appear to have acted on the basis of general reliance [\[111\]](#) , and the doctrine seems to have been accepted by Lord Hoffmann in giving the leading speech in *Stovin* [\[112\]](#) .

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[\[108\]](#) (1988) 12 NSWLR 293 at 330. .

[\[109\]](#) (1988) 12 NSWLR 293 at 330. .

[\[110\]](#) *Casley-Smith v F S Evans & Sons Pty Ltd [No 5]* (1988) 67 LGRA 108; *Nagle v Rottneest Island Authority* [1989] Aust Torts Reports par 80-298; *Northern Territory of Australia v Deutscher Klub (Darwin) Inc* [1994] Aust Torts Reports par 81-275; *Alec Finlayson Pty Ltd v Armidale City Council* (1994) 51 FCR 378; 123 ALR 155.

[\[111\]](#) *Brown v Heathcote County Council* [1986] 1 NZLR 76 at 81 ; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 297. .

[\[112\]](#) [1996] AC 923 at 953-955. .

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106. However, the doctrine of general reliance came under sustained attack in this case. It was criticised, inter alia, as a fiction and as being inconsistent with the legislature's omission to impose a statutory duty to exercise a function. When the limits of the general reliance doctrine are properly understood, however, I think that these criticisms are misplaced.
107. First, the doctrine only applies in limited situations "of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection" [\[113\]](#) . Thus, it applies only in those situations where individuals are vulnerable to harm from immense dangers which they cannot control or understand and often enough can not recognise. Controlling air traffic, fighting fires and inspecting the safety of aircraft are the examples that Mason J gave [\[114\]](#) . In these and similar situations, I do not think that it is a fiction to conclude that members of the community rely on the relevant public authority, often endowed with extensive powers, to protect them from harm. At all events, I do not think such reliance is a fiction when an authority provides a service in that area, particularly where the authority "has supplanted private responsibility, as in the case of air traffic controllers" [\[115\]](#) and in cases such as fire control. In the case of aircraft inspections, for example, individuals who travel on planes are aware that their safety is dependent on the aircraft being maintained in accordance with standards laid down by governmental regulatory bodies. They rely on those bodies to regularly examine aircraft to ensure that they comply with those standards.

[113] *Heyman* (1985) 157 CLR 424 at 464 per Mason J.

[114] (1985) 157 CLR 424 at 464.

[115] *Heyman* (1985) 157 CLR 424 at 462.

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108. Second, the public authority must know or ought to know that the plaintiff will suffer damage unless care is taken. A public authority incurs no liability under the general reliance doctrine unless it has knowledge or imputed knowledge of the danger. In many cases where the doctrine applies, the public authority will already have a public duty, enforceable by *mandamus*, to consider whether it should exercise its power or perform its function. In some cases, its knowledge may be such that, though the power or function may be discretionary, it nevertheless has a public duty to act.
109. Third, the fact that the authority owes a common law duty of care because it is invested with a function or power does not mean that the total or partial failure to exercise that function or power constitutes a breach of that duty. Whether it does will depend upon all the circumstances of the case including the terms of the function or power and the competing demands on the authority's resources.
110. Accordingly, I do not think that it is correct to say that the doctrine of general reliance is a fiction or that it gives rise to common law duties that are inconsistent with the conferment of discretionary powers and functions. There is nothing novel in the proposition that, despite the conferment of a discretionary power, particular circumstances may require the power to be exercised [116]. To hold that the existence of the power can give rise to a common law duty to take reasonable care to exercise it is therefore not inconsistent with the existence of the discretion.

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[116] *Ward v Williams* (1955) 92 CLR 496 at 505-506.

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#### The Council owed a duty of care to Mr and Mrs Day

111. In my opinion, the Court of Appeal was correct in holding that the Council owed a duty of care to Mr and Mrs Day and that it owed no duty to Mr and Mrs Nakos or to Mr and Mrs Stamatopoulos and Eskimo.
112. Section 695(1A) of the Act empowers the council of a municipality by notice in writing to direct the occupier or owner of land on which is erected any chimney or fireplace to alter the chimney or fireplace so as to make it safe for use when the chimney or fireplace is not adequately protected to prevent the ignition of other adjacent material of an inflammable nature. That power is given "[f]or the purpose of preventing fires" [117]. Failure to comply with a s 695(1A) notice is an offence against the Act [118]. If the owner of a building fails to comply with the notice, s 885 of the Act authorises the occupier with the approval of the

council to cause the work to be done. If neither the owner nor the occupier comply with a notice requiring work to be done to prevent a fire, the council "may carry out or cause to be carried out any works or take any other measures for the prevention of fires" [\[119\]](#) . These powers were sufficient to ensure that the fireplace was repaired. However, it appears from the evidence that the inspector who wrote the letter of 12 August 1988 was unaware of the power conferred by s [695\(1A\)](#) of the Act. He wrote the letter relying on reg 57.2 of the Victoria Building Regulations 1983 made under the *Building Control Act*. That sub-regulation authorised the serving of a notice "on the owner of a dangerous building, requiring the owner ... to carry out any work necessary to ensure that the building is", inter alia, made secure or repaired. Whether the premises at 70 Neill Street were a "dangerous building" is debatable, having regard to the terms of reg 57.1, which rather indicate that reg 57 is only concerned with buildings that are about to collapse. For present purposes, however, it is enough that the Council had a statutory power in respect of buildings "[f]or the purpose of preventing fires" [\[120\]](#) .

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[\[117\]](#) s [695\(1A\)](#) .

[\[118\]](#) s [890](#) .

[\[119\]](#) s [694\(1\)](#) .

[\[120\]](#) s [695\(1A\)](#) .

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113. Furthermore, by reason of the inspection that took place in August 1988, it is clear that the Council knew of the danger that the chimney and fireplace posed to the health, safety and premises of the occupiers of Neill Street. The inspector considered that a fire arising from 70 Neill Street could threaten the whole town of Beaufort.
114. Finally, it appears from the judgment of Brooking JA [\[121\]](#) that for very many years municipalities in Victoria have exercised extensive statutory powers for the purpose of reducing dangers to safety and health from the risk of fire. As a natural consequence, those who own or occupy premises in a municipality in Victoria look to the council and municipal officers to eliminate the dangers that arise from the use or condition of neighbouring properties [\[122\]](#) .

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[\[121\]](#) [\[1997\] 1 VR 218](#) at [237](#) .

[\[122\]](#) [\[1997\] 1 VR 218](#) at [237](#) .

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115. **Following paragraph cited by:**

Given the extensive powers of the Council, its entry into the field of inspection on this occasion, if not other occasions, its actual knowledge of the danger to the health and property of the occupiers of Neill Street and, at the least, its imputed knowledge that residents of the shire generally relied on it to protect them from the dangers arising from the use or condition of premises, the Council owed a duty of care to Mr and Mrs Day.

116. Like Brooking JA in the Court of Appeal, however, I am unable to conclude that under the general reliance doctrine the Council owed any duty of care to Mr and Mrs Nakos or to Mr and Mrs Stamatopoulos and Eskimo. Mr and Mrs Nakos as owners had rights of inspection and entry. They were not in the position of vulnerability of Mr and Mrs Day. It was not reasonable for them to rely on the Council to exercise its powers to protect them from defects in their own premises. Moreover, they were the persons to whom a s 695(1A) notice could and should have been given and at whose expense repairs had to be carried out. That being so, it would be an odd result for the common law to hold that the Council owed Mr and Mrs Nakos a common law duty of care. It would mean that the Council had a common law duty to give them a notice to repair the premises and that the Council would be in breach of that common law duty if it failed to ensure that Mr and Mrs Nakos had carried out the statutory direction to repair the chimney and fireplace. I do not think that the Council owed them a common law duty any more than it owed such a duty to Mr Tzavaras. For much the same reasons, I do not think that the Council owed Mr and Mrs Stamatopoulos or Eskimo a duty of care. They were the occupiers of 70 Neill Street. It was not reasonable for them to rely on the Council to protect them from defects in the premises. Moreover, on the assumption that the Council had a continuing duty in respect of 70 Neill Street, Mr and Mrs Stamatopoulos and Eskimo, as occupiers, were persons to whom a notice under s 695(1A) could be given.
117. In my opinion, therefore, the Council owed a duty of care under the general reliance doctrine only to Mr and Mrs Day.
118. Furthermore, I am unable to see any other basis, apart from the doctrine of general reliance, for concluding that the Council owed a common law duty of care to Mr and Mrs Nakos or to Mr and Mrs Stamatopoulos and Eskimo. The fact that the Council inspected the premises and wrote the letter of 12 August 1988 is not sufficient to impose a duty of care on the Council. It is still the law that the mere failure to exercise a discretionary statutory power is not negligent. Unless the Council already owed an anterior duty to take affirmative action, its entry onto the premises or the sending of the letter imposed no obligation on it to take any further steps in the matter. Unless the inspection or the sending of the letter increased the risk of harm or induced the owner or occupier to act to their detriment, the Council was entitled to desist from further action.
119. I fully accept that the circumstances may require a power such as that conferred by s 695(1A) to be exercised and that the failure to exercise the power may give rise to a breach of duty under the statute and to an action for damages at common law, as the judgment of Brennan CJ demonstrates. Independently of the doctrine of general reliance, this reasoning may, as his Honour holds, give rise to a right of action for damages in favour of Mr and Mrs Day. However, on the facts of this case, I am unable to accept that that line of reasoning gave rise

to any duty of care to Mr and Mrs Nakos or to Mr and Mrs Stamatopoulos and Eskimo. Much of the reasoning that leads me to the conclusion that the doctrine of general reliance does not create a duty in their favour applies to the contention that the Council's powers and the particular circumstances of the case by themselves generated a duty of care to them. I agree with Brennan CJ that, once the Council was put on notice, it had a duty under s 695 to take action and that action required the giving of notices under s 695(1A) to the owner and the occupier. Moreover, since the Council had a continuing public duty to remedy the defective chimney and fireplace, Mr and Mrs Stamatopoulos and Eskimo were persons to whom a notice could and perhaps should have been given. But I am unable to agree that this means that the Council owed them a common law duty of care to give them a notice and to ensure that the repair work was done. Nothing in the history of the common law of which I am aware suggests that, where a public authority has the power to give a notice to a person to carry out a function, the public authority owes that person a common law duty of reasonable care to give the notice and to ensure that it is carried out.

#### The Council was in breach of its duty to Mr and Mrs Day

#### 120. Following paragraph cited by:

Port Stephens Shire Council v Booth (27 September 2005)

In the very unusual circumstances of this case, I am of the opinion that the Council was in breach of the duty that it owed to Mr and Mrs Day. If the fireplace at 70 Neill Street had not been situated in premises that contained a wall linking the 70 Neill Street premises with the premises occupied by Mr and Mrs Day, I think that the Council would have arguably discharged its duty simply by writing a letter in the terms of the letter of 12 August. The letter warned the owner and the occupier of the dangers and informed them that it was "imperative" that the "fireplaces be not used under any circumstances". If 70 Neill Street had been a free standing building, that would arguably have been enough to discharge any common law duty arising from the Council's knowledge of the circumstances and its powers under the provisions of the Act. However, although the fireplace was on the eastern side of 70 Neill Street and the premises of Mr and Mrs Day were on the western side, "[t]he building to the west was ... built adjacent to the fish and chip shop and there were no brick party walls between that building and the fish and chip shop". The evidence showed that there was a firewall between premises to the east and the premises at 70 Neill Street. However, there was only a corrugated galvanised iron wall between the premises occupied by Mr and Mrs Day and the premises at 70 Neill Street. The Council knew that the use of the fireplace posed great danger to the adjoining shops and even to the town itself. In these circumstances, the discharge of its public duty and the private duty that it owed to Mr and Mrs Day required the Council to eradicate the danger. That being so, the failure to give a *direction* under s 695(1A) and the failure to ensure that the direction was carried out was a breach of those duties.

#### Orders

#### 121. The appeals should be dismissed with costs.

Introduction

122. Following paragraph cited by:

*Mansfield v Great Lakes Council* (11 August 2016) (Beazley P, Basten and Leeming JJA)

These appeals are brought from the Victorian Court of Appeal [123]. They involve the application of the tort of negligence to the statutory responsibilities of local government authorities for fire prevention. Much of the argument in this Court was directed to the particular position of the Shire of Ripon as a public body with statutory powers. Those parties which asserted liability of the Shire to them in tort sought to translate the public law "may" into the common law "ought". In these reasons, the term "the Shire" is used with respect to events before 1994 to identify the Shire of Ripon and thereafter its successor, the Pyrenees Shire Council.

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[123] *Pyrenees Shire Council v Day* [1997] 1 VR 218.

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123. In *South Australia v The Commonwealth* [124], Dixon CJ referred to ss 64, 79 and 80 of the *Judiciary Act 1903* (Cth) and continued:

"But it is one thing to find legislative authority for applying the law as between subject and subject to a cause concerning the rights and obligations of governments; it is another thing to say how and with what effect the principles of that law do apply in substance. For the subject matters of private and public law are necessarily different."

That is not to deny that the law of tort, with its concerns for compensation, deterrence and "loss spreading", may bear directly upon the conduct of public administration. The established actions for breach of statutory duty and for misfeasance in public office [125] counter any such general proposition. Again, significant questions of public law have been determined as issues in actions in tort, particularly in trespass [126]. Further, in this country, sovereign immunity in tort was modified or removed long before the enactment of the *Crown Proceedings Act 1947* (UK) and the *Federal Tort Claims Act* of 1946 [127] ("the US Tort Claims Act") in the United States [128], and there is a long history here of the entrusting of governmental functions to statutory corporations [129]. However, in the sense identified above by Dixon CJ, these appeals concern the application to public administration of the substance of principles of tortious liability which were formulated primarily for operation in the field of private law.



[124] (1962) 108 CLR 130 at 140.

[125] See *Northern Territory v Mengel* (1995) 185 CLR 307 at 345348, 355360, 370371.

[126] *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 71 ALJR 327 at 359-360; 141 ALR 545 at 588; *Ousley v The Queen* (1997) 71 ALJR 1548 at 1574; 148 ALR 510 at 545.

[127] 28 USC §§1346(b), 26712680. Section 1346(b) confers jurisdiction on district courts for claims against the United States:

"for money damages ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred".

[128] See *Maguire v Simpson* (1977) 139 CLR 362 at 371373; *The Commonwealth v Mewett* (1997) 71 ALJR 1102 at 11331135; 146 ALR 299 at 341344.

[129] See *Re Residential Tenancies Tribunal of NSW* (1997) 71 ALJR 1254 at 12831284; 146 ALR 495 at 533534.

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124. **Following paragraph cited by:**

FRM17 v Minister for Home Affairs (28 August 2019) (Kenny, Robertson and Griffiths JJ)

The expansion in the scope of the tort of negligence followed rather than preceded these developments in Australian public law and administration. Negligence has a doctrinal basis which differs from the action for breach of statutory duty. That action, originally deriving from the relationship between the legislature and the promoters of private Acts and later extending more generally, usually imposes strict liability but rests upon legislative intention [130]. Misfeasance in public office concerns conscious maladministration rather than careless administration, and has been said to be the only tort having its roots and application within public law alone [131]. Yet such is the degree of control by governmental authority over the daily conduct of the affairs of individuals and corporations that there are considerations favouring recovery of loss sustained by careless or incompetent administration. *Sutherland Shire Council v Heyman* [132] established that the circumstance that a public authority is the repository of a statutory discretion does not prevent the application of the ordinary principles of the law of negligence.

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[130] *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459461.



[131] Sadler, "Liability for Misfeasance in a Public Office", (1992) 14 *Sydney Law Review* 137 at 138.

[132] (1985) 157 CLR 424 .

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125. The broad concepts which found the modern law of negligence reflect its development from the action on the case. Windeyer J explained this in *Hargrave v Goldman* [133] . These concepts are expressed in major premises which, if unqualified, may extend liability beyond the bounds of social utility and economic sustainability. This has proved particularly to be so with liability for economic loss caused by negligent misstatement [134] . In argument on the present appeals, various "control mechanisms" [135] were canvassed for the application to local government bodies of the principles of negligence with respect to the discharge of their statutory functions. These included the distinctions between policy and operational decisions, between misfeasance and nonfeasance, and between the exercise of statutory powers and the performance of statutory duties. Submissions also were based upon the new doctrine of "general reliance". This appears to be designed to bridge a gap seen between the perceived importance in negligence law of specific reliance by the plaintiff and the absence in many instances of any duty upon public authorities to take affirmative action.
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[133] (1963) 110 CLR 40 at 64. .

[134] See *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 282289, 297300 .

[135] A phrase used by Millett J in *Al Saudi Banque v Clark Pixley* [1990] Ch 313 at 330. . In *Hargrave v Goldman* (1963) 110 CLR 40 at 64, Windeyer J referred to the use of the phrase "control device" to describe the requirement of a duty of care.

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126. **Following paragraph cited by:**

FRM17 v Minister for Home Affairs (28 August 2019) (Kenny, Robertson and Griffiths JJ)

210. Of course, that is not to say that statutory provisions are irrelevant in a proceeding brought against a statutory authority for breach of a common law duty of care. As McHugh J stated in *Crimmins* at [114] "[n]o common law duty of care can be imposed on a statutory authority if to do so is either forbidden by the relevant Act or is inconsistent with the statutory scheme", not the least because coherence of the law must be preserved. Accordingly, in such a case, close attention has to be paid to relevant statutory provisions (see, for example, *Pyrenees Shire Council* at [126] (Gummow J); *Sullivan v Moody* at [50] and [55] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Leichardt Municipal Council*

*v Montgomery* [2007] HCA 6; 230 CLR 22 at [137] (Hayne J); *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47; 239 CLR 390 at [41] (Gummow, Heydon and Crennan JJ)). Such attention may be particularly important where the statute “establishes relationships, conduct or other subject matter which are not previously known to the common law and whose origins lie wholly within the four walls of the statute”: *Crimmins* at [159] (Gummow J). In a case founded upon a common law duty, however, the source of a statutory authority’s alleged liability is the common law, with the statutory provisions providing the “setting in which its acts and omission have to be considered”: *Heyman* at 434 (Gibbs CJ); and see also *Crimmins* at [25] (Gaudron J), [154] and [157] (Gummow J); *Birch* at 658-659 (Barwick CJ); *Graham Barclay Oysters* at [80] (McHugh J).

*Meyers v Commissioner for Social Housing* (07 August 2019) (Elkaim, Loukas-Karlsson and Charlesworth JJ)

*Warren Shire Council v Kuehne* (16 April 2012) (McColl and Whealy JJA, Sackville AJA)

*SAS Trustee Corporation v Cox* (20 December 2011) (McColl and Campbell JJA, Sackville AJA)

*Newcastle City Council v Shortland Management Services* (18 June 2003) (Spigelman CJ, Mason P and Sheller JA)

*City of Ballarat v Perovic* (13 December 2001) (Ormiston and Callaway, JJA and O'Bryan, AJA)

Some of these distinctions and doctrines are entrenched in the common law of Australia, others are not. All of them, as the present appeals will demonstrate, tend to distract attention from the primary requirement of analysis of any legislation which is in point and of the positions occupied by the parties on the facts as found at trial. This analysis is of particular importance where, as here, the facts do not fall into one of the classes, referred to by Gibbs CJ in *Sutherland Shire Council v Heyman* [136], already recognised by the authorities as attracting a duty of care, the scope of which is settled.

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[136] (1985) 157 CLR 424 at 441442.

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### The facts

127. These appeals arise out of a fire which occurred on 22 May 1990 at Beaufort, a small country town in Victoria which at the time was located in the Shire of Ripon. This fire ("the second fire") started in premises at 70 Neill Street. These premises comprised a fish and chip shop and dwelling. They were destroyed. Neill Street contained a row of buildings used for various commercial purposes. Serious damage was also done by the second fire to adjoining premises at 72 Neill Street. Mr and Mrs Day owned these premises and conducted a video hire business there. They were ratepayers of the Shire. An earlier and less serious fire had occurred at 70 Neill Street on 9 August 1988 ("the first fire").

128. Mr and Mrs Nakos ("the owners") were the owners of the premises at 70 Neill Street. They had bought the premises in 1983. In July 1986 they let them to Mr and Mrs Tzavaras ("the former tenants"). The former tenants conducted the fish and chip shop business. They lived in the dwelling at the time of the first fire and until January 1990. At that time, with the agreement of the owners, the former tenants assigned the lease to Eskimo Amber Pty Ltd ("Eskimo Amber"), a company effectively owned by Mr and Mrs Stamatopoulos ("the tenants"). In May 1990, when the second fire took place, Eskimo Amber was conducting the business and the tenants, with their two children, were living in the residence at the rear of 70 Neill Street.
129. Three actions were brought in the County Court of Victoria with respect to the damage caused by the second fire. The plaintiffs in the three actions were, respectively, the owners, Eskimo Amber and the tenants, and the Days. The defendants in each action were initially the former tenants and the President, Councillors and Ratepayers of the Shire of Ripon. The Shire had a population of some 3,300 and only about 2,500 rateable properties. In 1994 the Shire ceased to exist as part of the reorganisation of local government in Victoria. The Court of Appeal made an order substituting Pyrenees Shire Council in the title of the proceeding.
130. Among other matters which are no longer in issue, including claims for breach of statutory duty against the Shire, each of the plaintiffs made allegations of negligence against the Shire and the former tenants. The trial judge (Strong CCJ) dismissed proceedings brought against the Shire for breach of statutory duty and all claims in negligence against one of the former tenants, Mrs Tzavaras. The other former tenant, Mr Tzavaras, was held liable in negligence for damage sustained by Eskimo Amber and the tenants, by the owners and by the Days for reasons which will become clear. The loss suffered by Eskimo Amber was agreed at \$110,218 and that by Mr and Mrs Stamatopoulos (to their personal property situated at the premises) was found to be \$58,000, not the \$86,336 they had alleged. The \$110,218 represented destruction of plant, equipment and stock and loss of profits. Judgment for these sums was entered against Mr Tzavaras. Strong CCJ held that there had been no contributory negligence by the Days and that the Shire was liable in negligence to them for damages in the agreed sum of \$38,062. His Honour dismissed the claim against the Shire made by the owners and also the claim against the Shire by the tenants and Eskimo Amber.
131. The Days had recovered judgment against both the Shire and Mr Tzavaras in the same sum, \$38,062. The trial judge ordered contribution between the Shire and Mr Tzavaras of one third and two thirds respectively.
132. Three appeals were heard by the Court of Appeal. The former tenants, Mr and Mrs Tzavaras, were not parties to those appeals. The Shire appealed against the judgment against it in favour of the Days. Eskimo Amber and the tenants, as well as the owners, appealed against the dismissal of their claims against the Shire. Brooking JA delivered a judgment with which Ormiston and Charles JJA agreed. His Honour upheld Strong CCJ's judgment against the owners and against Eskimo Amber and the tenants on the basis that the Shire did not owe any of them a duty of care [\[137\]](#). Eskimo Amber and the tenants (Mr and Mrs Stamatopoulos), but not the owners (Mr and Mrs Nakos), have appealed to this Court against that decision. Brooking JA also upheld the judgment obtained by the Days against the Shire [\[138\]](#).

on the footing that the Shire owed a duty of care to the Days which principally was based upon the doctrine of general reliance or dependence propounded by Mason J in *Sutherland Shire Council v Heyman* [139]. The Shire has appealed to this Court against that decision.

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[137] [1997] 1 VR 218 at 240.

[138] [1997] 1 VR 218 at 240241.

[139] (1985) 157 CLR 424.

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133. The issues that remain for consideration by this Court concern the liability of the Shire to Eskimo Amber and the tenants and to the Days for negligence in what was done or not done by the Shire in the period between the first fire and the second fire. The particular negligence alleged against the Shire is an omission to exercise or inadequate exercise of its powers in relation to what it knew was a dangerous situation in response to the first fire.
134. The question is whether the Shire was under, and in breach of, a common law duty of care to these parties with respect to the prevention of the second fire and the damage resulting from it. The damage suffered was physical injury to property or loss flowing therefrom. These are not cases where the damage consists of nothing more than economic loss. Nor are they cases of the negligent provision of advice or information within the line of authority stemming from *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [140] where, in response to a request for information or advice, or both, the defendant assumed, undertook or disclaimed responsibility.
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[140] [1964] AC 465.

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135. I now turn to consider the circumstances of the first fire. In the corner of the living room of the premises at 70 Neill Street there was a fireplace which backed onto another fireplace in the adjoining shop (No 72). When the owners had occupied the premises, the mouth of the fireplace in the living room had been closed off. Upon leasing the premises in July 1986, Mr Tzavaras reopened the fireplace and used it in the winter months that followed. At all times, the fireplace in the shop was sealed off so as to be incapable of use.
136. On the evening of 9 August 1988, Mrs Tzavaras was not living in Beaufort and Mr Tzavaras was at a nearby hotel. Mrs Tzavaras had arranged for a friend, Mr Rain, to assist in the fish and chip shop during her absence. Mr Rain was living in the residence and lit a fire in the fireplace. Some time after lighting the fire, Mr Rain thought there was a fire in the chimney and summoned the brigade of the Country Fire Authority ("the CFA"). This comprised volunteers.
137. Mr Gerard of the CFA attended the premises but, as the trial judge understood Mr Gerard's evidence, no fire was observed. However, Mr Gerard inspected the fireplace and told

Mr Rain that the fireplace was unsafe for use. The premises at No 70 were about 100 years old. It was common for lime mortar used a century ago in the construction of chimneys to deteriorate and fall out. This rendered the fireplaces unable to contain fires lit in them. Mr Gerard had found mortar missing from the back and bottom of the fireplace at No 70.

138. The Shire subsequently became aware of the circumstances of the first fire. On or about 11 August 1988, the Shire Engineer, Mr Humphries, received a telephone call concerning the fire from a fireman from the local fire brigade. The caller, who was not identified, referred to 70 Neill Street and expressed concern about the chimney. Mr Humphries requested Mr Walschots, a building and scaffolding inspector employed by the Shire, to visit the premises.
139. Before attending the premises, Mr Walschots ascertained from the rates office that Mr Tzavaras was the owner of the premises. He attended the premises immediately and spoke to Mr Tzavaras and two women. Mr Walschots conducted what the trial judge held was a competent inspection. He examined the fireplace and chimney and discovered defects which led him to conclude that there was a substantial risk of fire. Mr Walschots also requested Mr Tzavaras to inspect the defects in the chimney, which he did with the aid of a torch. After pointing out the defects, Mr Walschots told Mr Tzavaras that Mr Tzavaras should not use the fireplace unless it was repaired. Mr Tzavaras agreed. Mr Walschots also told Mr Tzavaras that he was going to report his findings and that Mr Tzavaras would be hearing from the Shire.
140. As a result of his inspection, Mr Walschots formed the view that the fireplace was very dangerous and that the possibility of fire was "great". He was also concerned that, should a fire start in the fireplace, the entire row of shops adjoining 70 Neill Street could be threatened.
141. Mr Walschots informed Mr Humphries of the result of the inspection and showed him a sketch of the fireplace and the defects which had been observed. Mr Humphries asked Mr Walschots to do a better sketch and to draft a letter. Mr Walschots then consulted the rates card to ensure that the letter was posted to the correct address. The rates card indicated that Mr and Mrs Nakos were the owners of the premises but the only address on the card was 70 Neill Street. Mr Tzavaras' name also appeared on the rates card. Accordingly, the letter was addressed to "P Tsavaros [sic] & S Nakos" at 70 Neill Street.
142. Section 876 of the *Local Government Act* 1958 (Vic) ("the Local Government Act") was in Div 1 (ss 862881) of Pt XLVII. It provided that every notice, order or demand which by that statute was authorised or required to be given to the owner or occupier of any building or land might be served by post by prepaid letter addressed to the owner or occupier at the usual or lastknown place of abode or business of that person. Any notice or order required under the *Local Government Act* to be served on any owner or occupier was binding on every subsequent owner or occupier as if served upon that person, provided due service was effected in the first instance (s 877). Vendors of land were required to give notice to the Shire of disposal of land in the Shire (s 879). The Shire was obliged by s 878 to keep a book in which particulars were entered of notices given by vendors of sales of property in its area, and vendors remained liable for rates and liabilities which accrued before they gave notice. Notice to the Shire also was required by persons becoming the occupier of any premises in the Shire (s 880) [\[141\]](#).

[141] The law relating to local government in Victoria was substantially amended with effect after the second fire. The *Local Government Act* was retitled the *Local Government (Miscellaneous) Act 1958 (Vic)* by s 4(4) of the *Local Government (Consequential Provisions) Act 1989 (Vic)*. Most of the provisions of the *Local Government Act* were repealed and the *Local Government Act 1989 (Vic)* was enacted in their place. The repeal of Div 1 of Pt XLVII of the *Local Government Act* was effective on 1 October 1992.

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143. The letter was dated 12 August 1988 and signed by Mr Walschots. It referred to his inspection on 11 August and provided details of a "possible fire hazard and unsafe structural condition" in relation to the fireplaces "that are constructed back to back". It concluded by stating that it was "imperative that the abovementioned fireplaces be not used under any circumstances unless :-

- (a) Structurally sound repairs are made to make the chimneys and fireplaces safe.
- (b) General repairs are made to mortar and brickwork to make the walls heat resistant and prevent smoke leakage.
- (c) Alternatively repair the fireplaces structurally and seal both fireplace openings permanently and discontinue use."

144. The trial judge found that a single copy of the letter was sent to 70 Neill Street. The owners did not receive, and were not made aware of the contents of, the letter. They were unaware that the fireplace was dangerous until after the second fire of 22 May 1990. After the letter was sent no further steps were taken by Messrs Walschots, Humphries or any other officer of the Shire in relation to the chimney until after the second fire.

145. The trial judge found that the danger constituted by the fireplace was latent rather than patent and that there was no evidence that any individual was aware of the defective condition of the fireplace other than Mr Humphries, Mr Walschots, Mr Gerard, Mr Rain and Mr Tzavaras. When the tenants inspected the premises with a view to purchasing the former tenants' business in late 1989, Mr Tzavaras did not alert Mr Stamatopoulos to the circumstances of the earlier fire or otherwise indicate that the fireplace was unsafe. The tenants took possession of the premises on 22 January 1990. As the weather grew colder they started using the fireplace. Mr Stamatopoulos lit a fire late in the afternoon of 21 May 1990. He retired to bed, in the living room, at about 11.45 pm. Shortly after midnight he noticed the flicker of flames through nail holes in the wall. He raised the alarm. CFA members arrived to extinguish the fire but they were unable to prevent the damage to the premises at 70 Neill Street and the adjoining shop at 72 Neill Street. The trial judge found that the second fire was caused by the defective condition of the fireplace which had been noted by Mr Walschots following the first fire in August 1988.

#### The powers of the Shire

146. In submissions to this Court and in the courts below, reference has been made to a number of statutes which are said to have provided the Shire with powers to take action after the first fire in relation to the danger caused by the defective fireplace and chimney at 70 Neill Street. Such powers were of a continuing character and were exercisable from time to time as



the occasion required [\[142\]](#) . The Court of Appeal regretted that "[n]o argument of any consequence was forthcoming" as to the scope of the legislation which had been pleaded against the Shire [\[143\]](#) .

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[\[142\]](#) See *Interpretation of Legislation Act 1984* (Vic), s 40 ; *Lawrie v Lees* (1881) 7 App Cas 19 at 29 ; *Comeau's Sea Foods Ltd v Canada* [1997] 1 SCR 12 at 2628 .

[\[143\]](#) [1997] 1 VR 218 at 236. .

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147. Part XXVI (ss 694-695A) of the *Local Government Act* was headed "PREVENTION OF FIRE" [\[144\]](#) . Section 694(1) conferred a general power on the Shire to "carry out or cause to be carried out any works or take any other measures for the prevention of fires". One "measure" for the prevention of further fires at No 70 was the inspection in August 1988 and the steps taken on that occasion by Mr Walschots, including the conversation with Mr Tzavaras. Another, and consequential, measure was the warning given to those who appeared to be the owners and occupiers of the premises by the imperative terms of the letter of 12 August 1988. The Shire did not go further in the exercise of its powers under s 694(1) by carrying out or causing the carrying out of any works there. To have done so would have left the Shire with the expense of the works and without any statutory right of recoupment. Under s 885 of the *Local Government Act* , whenever default was made by the owner in the execution of work required by the Act, the occupier was permitted to carry out the work with council approval and claim the expense as a debt due from the owner or as a deduction from the rent due to the owner. No similar right of indemnification was reposed in the Shire for work performed by it.

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[\[144\]](#) Part XXVI was repealed by the *Local Government (Consequential Provisions) Act 1989* (Vic) with effect on 1 October 1992.

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148. The case for Eskimo Amber and the tenants and for the Days is that, having embarked upon the exercise of its powers, the Shire did so inadequately by not following up upon its initial measures. Their case is on a stronger footing if based upon the subsequent failure of the Council to exercise, not its powers under s 694(1) to carry out works at its own expense, but powers which, if exercised, would have placed the burden of expense more effectively upon others.
149. Section 695(1A) was directed specifically to a fire hazard caused by a fireplace or chimney. It provided:

"For the purpose of preventing fires the owner or occupier of any land upon which is erected any chimney or fire-place which is constructed of inflammable material or which is not adequately protected so as to prevent the ignition of other adjacent material of an inflammable nature may by notice in writing be directed by the

council of the municipality within the municipal district of which such land is situated to alter the fire-place or chimney so as to make it safe for use as a fire-place or chimney, as the case may be."

Section 695(1) provided that subs (1A) applied throughout the whole of Victoria.

150. The powers to enforce the provisions of the *Local Government Act* were contained in Div 2 (ss 882896AA) of Pt XLVII[145]. Section 883 conferred power on officers of the council to enter "any building or land within the municipal district for the purpose of executing any work or making any inspection authorized to be executed or made by them under [the Local Government Act] without being liable to any legal proceedings on account thereof". In its terms, s 883 created a power of entry rather than a power to execute any work. In combination with s 694, it conferred power on the Shire to carry out work on private premises. Such a power may not have been conferred by s 694 in isolation[146]. Where the owner defaulted in the execution of any work required by the *Local Government Act*, the occupier was permitted to carry out that work at the owner's expense (s 885). As I have indicated, no equivalent power is conferred on the Shire. Section 890 created an offence where any matter was directed to be done pursuant to the provisions of the *Local Government Act* and that matter remained undone.

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[145] Division 2 of Pt XLVII was repealed by the *Local Government (Consequential Provisions) Act 1989 (Vic)*, with effect on 1 October 1992.

[146] See *Coco v The Queen* (1994) 179 CLR 427.

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151. Although s 695(1A) conferred a power upon the Shire, Brooking JA found that the letter of 12 August 1988 was not notice given under that section. Both Mr Walschots and Mr Humphries were unaware of the section's existence and Brooking JA considered that the letter lacked the "necessary mandatory effect" [147]. I accept that the letter was not a notice which answered the description in s 695(1A), given its terms. However, had it otherwise answered the description in s 695(1A), ignorance of that provision as a source of power would not have been fatal to its efficacy[148]. As I have indicated, the letter was a "measure" within the meaning of s 694(1). In its ordinary meaning, a measure may be a step or definite part of a progressive course of action.

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[147] [1997] 1 VR 218 at 230.

[148] *Lockwood v The Commonwealth* (1954) 90 CLR 177 at 184; *Brown v West* (1990) 169 CLR 195 at 203; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1401; 147 ALR 42 at 116117.

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152. The evidence at the trial indicated that Mr Walschots and Mr Humphries had in mind the Victoria Building Regulations 1983 (Vic)[\[149\]](#) ("the Regulations") when they prepared the letter of 12 August 1988. The Regulations were made under the powers conferred by Div 3 (ss 2530) of Pt III of the *Building Control Act* 1981 (Vic) ("the Building Control Act"). The letter was prepared as a notice under reg 57.2 which provided that "the building surveyor may serve a notice on the owner of a dangerous building, requiring the owner within a time to be specified in such notice to carry out any work necessary to ensure that the building is" made secure, repaired or demolished. In the Court of Appeal, Brooking JA concluded that reg 57 had no application because the premises at 70 Neill Street was not a "dangerous building" for the purposes of that regulation[\[150\]](#). In this Court, the tenants and the Days have not relied on the Regulations as providing a relevant source of power for the Shire.

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[\[149\]](#) SR No 273/1983.

[\[150\]](#) [\[1997\] 1 VR 218](#) at 237.

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153. The only other provision upon which the tenants have relied as conferring a relevant power on the Shire is s 165 of the Building Control Act [\[151\]](#) . That section provided:

"[A]ny council ...or any officer or person authorized in that behalf by that council ... shall have power to enter any building or land at any time where the safety of the public or the occupants is at risk".

The term "council" is defined to mean "the council of a municipality and in relation to any building or land means the council of the municipal district in which that building or land is situated". The power conferred by s 165, in the context of this litigation, supplements the power of entry under s 883 of the [Local Government Act](#) . Indeed, it may well be wider in scope because it is not conditioned upon the existence of a purpose of making an inspection authorised to be made under the [Local Government Act](#) .

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[\[151\]](#) Section 165 of the Building Control Act was repealed by s 264 and Sched 5 of the [Building Act 1993](#) (Vic) .

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154. Section 165 of the Building Control Act, taken with s 883 and ss [694\(1\)](#), [695\(1A\)](#), [885](#) and [890](#) of the [Local Government Act](#) , would have empowered the Shire to follow up the letter of 12 August 1988 by various steps. These included reentering the premises at 70 Neill Street and further inspecting the chimney and fireplace to ascertain what, if any, work had been done, requiring in mandatory terms the owner or occupier to perform alterations to make the chimney and fireplace safe for use, and prosecuting any failure to comply. At the very least,

the Shire could have endorsed their records so that, upon receipt by it of notification of the transfer or change in occupancy of 70 Neill Street, the new owner or occupier would be alerted to the contents of the letter of 12 August 1988. None of these further steps was taken.

155. On its part, the Shire also referred to statutory provisions which conferred powers to take action in consequence of the first fire on persons or bodies other than the Shire. Its argument was that the existence of these other powers negated any application of a doctrine of "general reliance" on the Shire and hence the existence of a duty of care. This amounted to a variation of the "why pick on me?" response to imposition of liability for an omission to take positive steps to assist a person in peril [\[152\]](#). In that regard the Shire referred to the powers of the CFA under the *Country Fire Authority Act 1958 (Vic)*, and the powers of the Director of Housing under the *Housing Act 1983 (Vic)* and the Housing (Standard of Habitation) Regulations 1985 (Vic). The Shire also pointed to steps which Eskimo Amber and the tenants could have taken to protect themselves pursuant to provisions of the Regulations made under the Building Control Act. Under reg 8.8 any person authorised in writing by the owner could request (using Form 10) details of "any current certificate, notice or report made under" the Building Control Act. The trial judge found that, although Eskimo Amber was not the owner of No 70, had its solicitor, Mr Glare, submitted a Form 10 request to the Shire when he was acting on the assignment of the lease in late 1989, this would have triggered searches in the Shire's files which probably would have thrown up the letter of 12 August 1988.

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[\[152\]](#) See *Stovin v Wise* [1996] AC 923 at [943944](#) per Lord Hoffmann.

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156. It is unnecessary to resolve the question whether the application of the general reliance doctrine is negated in this fashion. This is because I have reached conclusions which are adverse to the existence of such a doctrine.

#### General reliance

157. The submissions at trial and in the Court of Appeal appear to have been fixed upon this subject. In my view, the Days and also Eskimo Amber and the tenants should succeed, but not on this basis. Rather, the "general reliance" doctrine itself is not sound.
158. It was formulated by Mason J in *Heyman* as part of his Honour's consideration of the liability of public authorities for negligent failure to perform a function [\[153\]](#). His Honour began [\[154\]](#) by emphasising the importance in establishing a duty of care of reliance on the defendant taking care in circumstances where the defendant is or ought to be aware of that reliance. However, as *Hill v Van Erp* [\[155\]](#) recently illustrated, reliance is not always an essential requirement for the plaintiff in a negligence case. The primary significance of reliance is in cases of alleged negligent provision of advice or information where reliance aids the formulation of a duty of care and detrimental reliance enters into the question of causation of loss. These appeals are not in that category.

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[\[153\]](#) (1985) 157 CLR 424 at 463.

[154] (1985) 157 CLR 424 at 461. .

[155] (1997) 188 CLR 159 .

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159. In *Heyman* , Mason J referred to various United States decisions upon the discretionary function exception to the US Tort Claims Act[156]. The exception operated to preserve immunity from suit, not as a source of private law duties[157]. However, after reference to these authorities, Mason J concluded [158] :

"If this be accepted, as in my opinion it should be, there will be cases in which the plaintiff's reasonable reliance will arise out of a general dependence on an authority's performance of its function with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of a plaintiff. Reliance or dependence in this sense is in general the product of the grant (and exercise) of powers designed to prevent or minimize a risk of personal injury or disability, recognized by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection. This situation generates on one side (the individual) a general expectation that the power will be exercised and on the other side (the authority) a realization that there is a general reliance or dependence on its exercise of power[159]."

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[156] The discretionary function exception is found in 28 USC §2680 which provides:

"The provisions of this chapter and section 1346(b) of this title shall not apply to -

- (a) Any claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

[157] Woodall, "Private Law Liability of Public Authorities for Negligent Inspection and Regulation", (1992) 37 *McGill Law Journal* 83 at 8889.

[158] (1985) 157 CLR 424 at 464. .

[159] See Shapo, *The Duty to Act*, (1977) at 9596.

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160. Drawing from the factual situations in several of the United States authorities, his Honour gave as examples of general reliance or dependence on the exercise of power, the control of air traffic and the safety inspection of aircraft [160] . The context in which Mason J was

speaking negatives a conclusion that these examples concerned, as matters of statutory interpretation, the exercise of powers coupled with duties to exercise them reasonably, so that a duty was found in the statute.

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[\[160\]](#) (1985) 157 CLR 424 at 464.

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161. What is involved in the doctrine of general reliance may have some affinity with the notion of legitimate expectation as part of the public law doctrine of procedural fairness, at least in the form in which it was expounded in the joint judgment in *Minister for Immigration and Ethnic Affairs v Teoh* [\[161\]](#). It may also be related to the private law doctrine of estoppel by convention, where the parties cannot deny an assumed state of facts upon which they have conducted their relations [\[162\]](#). In the latter case, proof of custom may suffice to show the parties adopted the alleged assumption; but the general notoriety of the alleged custom must be established by the evidence [\[163\]](#).
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[\[161\]](#) (1995) 183 CLR 273 at 290291.

[\[162\]](#) *ConStan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 244245.

[\[163\]](#) *ConStan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 234241, 244; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 423424, 440441.

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162. In the Court of Appeal, Brooking JA, after referring to the above passage in *Heyman*, asked how general reliance or dependency may be shown at trial, saying [\[164\]](#):

"Is evidence admissible? Is evidence essential? May the necessary facts be judicially noticed?"

Counsel for the Shire submitted to this Court, in my view correctly, that, if evidence be essential, it was lacking. In particular, there were no findings as to the practices of the Shire, or other councils in Victoria or elsewhere in Australia, with respect to the exercise of their statutory powers of fire prevention, or as to any general attitudes, beliefs or expectations of ratepayers, property occupiers and others concerning those matters.

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[\[164\]](#) [1997] 1 VR 218 at 233.

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163. However, on my understanding, the general reliance doctrine does not operate on such a basis, nor is it merely an evidentiary presumption. Rather, as formulated, it has the nature of a legal fiction, in the same way as an action on a *quantum meruit* once was seen as based on a fictional promise to pay [165], the fiction of the lost Crown grant protected present titleholders [166], and trespassers were treated as being upon the defendant's land under an imputed licence, "fictional though it must inevitably [have] seem[ed]" [167]. In such cases, the fiction may operate to reconcile a specific legal outcome or result with a premise or postulate involving unexpressed considerations of social and economic policy [168]. The prevalence in modern fused systems of administration of law and equity of substance over form marks the spirit of the times as unfavourable to the preservation of legal fictions and hostile to the creation of new legal fictions [169]. This is particularly so with the tort of negligence, where expansion of the scope of liability calls for consideration of possible consequences [170]. I see no sound doctrinal footing for a doctrine of general reliance. It assumes too general a significance for reliance in the law of negligence and then adds further complexity. Liability should not be imposed (to adapt terms used by Dixon CJ) in terms which do not "command an intellectual assent" and which do not refer liability "directly to basal principle" [171].

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[165] See now *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; *Westdeutsche Bank v Islington London Borough Council* [1996] AC 669 at 710.

[166] See *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 212.

[167] *Commissioner for Railways (NSW) v Cardy* (1960) 104 CLR 274 at 282.

[168] Fuller, *Legal Fictions*, (1967) at 71. See also Harmon, "Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment", (1990) 100 *Yale Law Journal* 1 at 1416.

[169] cf Pound, *Interpretations of Legal History*, (1923) at 130131.

[170] See, for example, the discussion by McHugh J in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 282289.

[171] *Commissioner for Railways (NSW) v Cardy* (1960) 104 CLR 274 at 285.

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164. We were referred to a number of Australian and New Zealand decisions [172] in which the doctrine has been discussed. The facts in one of these cases, *Parramatta City Council v Lutz* [173], appear to have been such as to support the result independently of the doctrine. Since the decision of the Court of Appeal in this litigation, the matter has been discussed in the House of Lords. As a result of criticisms in Lord Hoffmann's speech in *Stovin v Wise* [174], the doctrine now is disregarded in English law [175].

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[172] Many of these had been discussed by Brooking JA: [1997] 1 VR 218 at 234235.

[\[173\]](#) (1988) 12 NSWLR 293 .

[\[174\]](#) [1996] AC 923 at 953955 .

[\[175\]](#) *Capital & Counties Plc v Hampshire County Council* [1997] 3 WLR 331 at 341342; [1997] 2 All ER 865 at 876877 ; *OLL Ltd v Secretary of State for Transport* [1997] 3 All ER 897 at 906907 .

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165. If the Shire is to be treated as liable in negligence, it must be independently of the doctrine of general reliance. .

The existence and extent of the duty of care

166. **Following paragraph cited by:**

*Valmont Interiors Pty Ltd v Giorgio Armani Australia Pty Ltd (No 2)* (19 May 2021)  
(Bell P, Macfarlan and Leeming JJA)

The judgment of Dixon J in *Shaw Savill and Albion Co Ltd v The Commonwealth* [\[176\]](#) contains three general propositions of importance for the present litigation. The first is that [\[177\]](#) :

"[t]he obligation of due care to avoid harm to others, though a general duty, arises out of the situation occupied by the person incurring it or the circumstances in which he is placed."

The second proposition was that [\[178\]](#) :

"where what is alleged against [the defendant] is failure to fulfil an obligation of care, the character in which he acted, together, no doubt, with the nature of the duties he was in the course of performing, may determine the extent of the duty of care".

Earlier, Isaacs ACJ had expressed a related point by stating that no conclusion of negligence could be arrived at until, first, "the mind conceives affirmatively what should have been done" [\[179\]](#) . The third proposition to be found in the judgment of Dixon J is that, in the application of the other propositions, regard is to be had both "to reason and to policy" [\[180\]](#) .

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[\[176\]](#) (1940) 66 CLR 344 .

[\[177\]](#) (1940) 66 CLR 344 at 360. .

[\[178\]](#) (1940) 66 CLR 344 at 361. .

[\[179\]](#) *Metropolitan Gas Co v Melbourne Corporation* (1924) 35 CLR 186 at 194. .

167. The Shire was deemed by par (a) of s 3(2) of the *Local Government Act* to be a municipality and that statute provided for the conduct by municipalities of various activities and the exercise of a range of powers with respect to such things as the making and maintenance of streets (Pt XX), maternity and child welfare centres (Pt XXXVII), septic tanks (Pt XLVI), and building regulations (Pt XLIX), as well as the prevention of fire (Pt XXVI). As has been indicated earlier in these reasons, with particular reference to the fire prevention provisions of Pt XXVI, the exercise of the authority vested by statute in the Shire was a matter of discretion rather than obligation.

168. **Following paragraph cited by:**

*Dansar Pty Ltd v Byron Shire Council* (27 October 2014) (Macfarlan, Meagher and Leeming JJA)

*Kirkland-Veenstra v Stuart* (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

*Kirkland-Veenstra v Stuart* (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

What then was the situation occupied by the Shire, or the circumstances in which it was placed, with reference to the condition of the fireplace and chimney at 70 Neill Street at the time of the second fire? In May 1990, the situation occupied in relation to this litigation by the Shire as the arm of local government gave it a significant and special measure of control over the safety from fire of persons and property in Neill Street. Such a situation of control is indicative of a duty of care [181]. The Shire had statutory powers, exercisable from time to time, to pursue the prevention of fire at No 70. This statutory enablement of the Shire "facilitate[d] the existence of a common law duty of care" [182], but the touchstone of what I would hold to be its duty was the Shire's measure of control of the situation including its knowledge, not shared by Mr and Mrs Stamatopoulos or by the Days, that, if the situation were not remedied, the possibility of fire was great and damage to the whole row of shops might ensue [183]. The Shire had a duty of care "to safeguard others from a grave danger of serious harm", in circumstances where it was "responsible for its continued existence and [was] aware of the likelihood of others coming into proximity of the danger and [had] the means of preventing it or of averting the danger or of bringing it to their knowledge". [184].

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[181] See *Howard v Jarvis* (1958) 98 CLR 177 at 183; *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 328; *Hawkins v Clayton* (1988) 164 CLR 539 at 553; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 427; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 556557; *Hill v Van Erp* (1997) 188 CLR 159 at 198199, 234.



[182] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 460. .

[183] cf *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 328. .

[184] *Commissioner for Railways (NSW) v Cardy* (1960) 104 CLR 274 at 286 per Dixon CJ.

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169. This is not a case where liability is sought to be imposed upon the Shire simply because there was reasonable foreseeability of loss by fire damage if nothing further was done. Apart from Mr Gerard, Mr Rain and Mr Tzavaras, only Shire officers (Mr Humphries and Mr Walschots) knew of that latent defect in the physical condition of No 70 which presented a significant fire risk to it and neighbouring premises. Mr Humphries agreed in cross-examination that, from the statutory inquiry forms which Eskimo Amber's solicitor (Mr Glare) had submitted to the Shire in January 1990, he had known that Mr Stamatopoulos was a new tenant coming into No 70. Mr Humphries also agreed that the Shire had had "a rotational type system for show cause notices" whereby they might be followed up by the building inspector.
170. There was no finding that the Days, Mr and Mrs Stamatopoulos or Eskimo Amber had relied upon the Shire to exercise those powers with respect to the condition of the premises. However, as I have indicated earlier in these reasons and as *Hill v Van Erp* [185] and the other decisions discussed by McHugh JA in *Parramatta City Council v Lutz* [186] show, a defendant may be obliged to take action where the plaintiff has not relied upon the defendant to do so. Further, unlike the Shire, those at 70 and 72 Neill Street at the time when the second fire occurred did not know of the imperative need for something to be done. Their ignorance was itself the product of the incomplete and inadequate course of action taken by the Shire after the first fire.

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[185] (1997) 188 CLR 159. .

[186] (1988) 12 NSWLR 293 at 327-328. .

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171. The position of Mr and Mrs Stamatopoulos is not to be distinguished in this respect from that of their neighbours, the Days. An object of further steps taken by the Council would have been the eliciting of a response by Mr and Mrs Stamatopoulos to make certain, for example, that requirements in the letter of 12 August 1988 were met. There is nothing to suggest that, if alerted, they would have taken no action in the matter.

172. **Following paragraph cited by:**

*Minister for the Environment v Sharma* (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)



The question then is what, as the acceptable minimum, in discharge of its duty of care, should have been done by the Shire before the second fire, bearing in mind the character in which the Shire would have acted and the nature of its duty. At the very least, the Shire was obliged to monitor the failure of Mr Tzavaras to carry out the repairs referred to in the letter of 12 August 1988 and to alert the new occupiers of No 70 of the serious but latent danger constituted by the fireplace in the living room. The duty was not discharged. The Shire failed to take steps in the further exercise of its powers which were required by the circumstances. The liability of the Shire in negligence does not turn upon the further (and public law) question whether (as may have been the case) [187] those who later sued in tort would have had standing to seek against the Shire an order in the nature of mandamus. Their actions for damages in negligence are not brought in addition to or in substitution for any public law remedy [188].

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[187] cf *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 398-399; de Smith's *Judicial Review of Administrative Action*, 4th ed (1980) at 550-553; Wade and Forsyth, *Administrative Law*, 7th ed (1994) at 705-706.

[188] cf *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 676-677, 681-682.

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173. The loss claimed in the two actions under appeal followed upon the breach of duty. There was no denial, upon this hypothesis, of the necessary element of causation. However, recovery was resisted by reliance upon various protective screens which as a matter of legal doctrine are said to shield the Shire from the imposition of a duty of care. I referred to these "control mechanisms" in the opening passages of these reasons.

#### Control mechanisms

174. One of these turns upon the distinction between misfeasance and nonfeasance, and between omission to exercise a statutory power and failure to discharge a statutory duty. Here there was no statutory duty in the relevant sense. Nor do the appeals turn simply upon liability for negligent omission to exercise a statutory power.
175. Unlike the situation in *Stovin v Wise* [189], this litigation does not concern the exercise of one statutory power designed by the legislature for use in particular classes of case. Rather, it concerns interconnected provisions with which the Shire was endowed to further the evident legislative purpose of fire prevention within the area under the administration of the Shire.

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[189] [1996] AC 923.

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176. The distinction in this area between misfeasance and nonfeasance was accepted in *Heyman* and is not challenged in these appeals. Nevertheless, and as will appear, the existence of the distinction is not fatal to the case against the Shire.

177. **Following paragraph cited by:**

*Minister for the Environment v Sharma* (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

*Ibrahimi v Commonwealth of Australia* (19 December 2018) (Meagher and Payne JJA, Simpson AJA)

214. Yet, as Lord Hoffmann observed in *Stovin v Wise* at 945, “the conditions necessary to bring about an event *always* consist of a combination of acts and omissions” (emphasis added). Thus, meaningful use of the distinction between acts and omissions depends on a “common sense” approach to causation, which in this context entails an approach focused on the purpose of that distinction in the attribution of legal responsibility. The point is classically illustrated by a motorist whose driving, rather than failure to brake, is said to cause an accident. In that example, the former act (or series of acts) initiates a physical process which in the ordinary course of nature could bring about the event unless the person takes some further action: see also HLA Hart and Tony Honoré, *Causation in the Law*, (2nd ed 1985, Oxford University Press) 138–141; *Pyrenees* at [177] (Gummow J).

*Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* (04 April 2012) (McLure P, Pullin JA, Buss JA)  
*Western Districts Developments Pty Ltd v Baulkham Hills Shire Council* (18 September 2009) (Giles and Campbell JJA, Preston CJ of LEC)

The general rule is that "when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered" [190]. A public authority which enters upon the exercise of statutory powers with respect to a particular subjectmatter may place itself in a relationship to others which imports a common law duty to take care which is to be discharged by the continuation or additional exercise of those powers [191]. An absence of further exercise of the interconnected statutory powers may be difficult to separate from the exercise which has already occurred and that exercise may then be said to have been performed negligently [192]. These present cases are of that kind. They illustrate the broader proposition that, whatever its further scope, Lord Atkin's formulation in *Donoghue v Stevenson* [193] includes "an omission in the course of positive conduct ... which results in the overall course of conduct being the cause of injury or damage" [194].

[190] *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 220 ; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 436, 458, 484. .

[191] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 459-460. .

[192] cf *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 479 ; *Fellowes v Rother District Council* [1983] 1 All ER 513 at 522 ; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 763. .

[193] [1932] AC 562 at 580. .

[194] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 501. .

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178. In the period shortly after the first fire, the Shire became aware of a serious risk to the entire row of shops in Neill Street by reason of the great possibility of fire at No 70. A competent inspection was conducted by an officer of the Shire and an oral warning was given to and an undertaking provided by Mr Tzavaras. Mr Tzavaras was told that he would be hearing from the Shire and there followed the letter of 12 August 1988. This emphasised the conclusion reached by the Shire that it was imperative that the fireplaces be not used under any circumstances unless certain work was performed. These steps were measures under Pt XXVI of the *Local Government Act* apt to assist in the prevention of further fire but, without more, by no means likely to do so. Adjoining owners and occupiers were not put on notice nor was anything done to put the Shire in the position to alert future owners or occupiers of No 70. The taking of such additional measures under s 694(1) would have engaged the exercise of the interrelated and specific powers conferred by such provisions as ss 695(1A), 883 and 890 of the *Local Government Act* . The Shire occupied such a situation and had placed itself in such circumstances that in stopping where it did it did not exercise its powers under s 694(1) with the care and diligence required by the circumstances.
179. The evidence does not show that, at least stopping short of a prosecution, the further pursuit by the Shire of a course of action with respect to its letter of 12 August would have interfered with the budgetary priorities of the Shire, or distorted its priorities in the discharge of its statutory functions [195] . There is no case here for restricting or excluding the scope of the duty of care, by adoption of the reasoning of Lord Hoffmann in the last paragraph of his judgment in *Stovin v Wise* . His Lordship was dealing with a complaint founded upon the failure of a highway authority to execute certain roadworks and said [196] :

"In my view the creation of a duty of care upon a highway authority, even on grounds of irrationality in failing to exercise a power, would inevitably expose the authority's budgetary decisions to judicial inquiry. This would distort the priorities of local authorities, which would be bound to try to play safe by increasing their spending on road improvements rather than risk enormous liabilities for personal injury accidents. They will spend less on education or social services. I think that it is important, before extending the duty of care owed by public authorities, to consider the cost to the community of the defensive measures which they are likely to take in order to avoid liability."

[195] cf *Schiller v Mulgrave Shire Council* (1972) 129 CLR 116 at 135136 .

[196] [1996] AC 923 at 958. .

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180. **Following paragraph cited by:**

*Minister for the Environment v Sharma* (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

Nor is this a case within that "core area" of policy making which in *Sutherland Shire Council v Heyman* Mason J regarded as immune from any liability in negligence [197] . Further, officers of the Shire were not exercising the policymaking powers and functions of a "quasilegislative character" which Deane J identified in the same case [198] .

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[197] (1985) 157 CLR 424 at 469. .

[198] (1985) 157 CLR 424 at 500. .

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181. In *Heyman* , Gibbs CJ said that the distinction between the area of policy and the operational area was "logical and convenient" [199] . This has been doubted by political scientists[200] and in 1991 was disclaimed by the United States Supreme Court in *United States v Gaubert* [201] . The Supreme Court there reviewed decisions construing the "discretionary function exception" to the removal of immunity by the US Tort Claims Act, to which reference had been made in *Heyman* [202] . The phrase "operational level" had been coined in 1953 in *Dale hite v United States* [203] to identify activities to which the exception would not apply. In 1991, the Supreme Court concluded that the earlier decisions did not stand for the proposition that "decisions made at an operational level could not also be based on policy" [204] .
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[199] (1985) 157 CLR 424 at 442. .

[200] See Allars, "Tort and Equity Claims Against the State" in Finn (ed), *Essays on Law and Government*, (1996), vol 2, 49 at 5556. See also Woodall, "Private Law Liability of Public Authorities for Negligent Inspection and Regulation", (1992) 37 *McGill Law Journal* 83 at 9095, 110111; Klar, *Tort Law*, 2nd ed (1996) at 233237.

[201] 499 US 315 (1991) . See Davis and Pierce, *Administrative Law Treatise*, 3rd ed (1994), vol 3, §19.4.

[202] (1985) 157 CLR 424 at 469. The cases reviewed by the Supreme Court included *Dal ehite v United States* 346 US 15 (1953) and *United States v Varig Airlines* 467 US 797 (1984).

[203] 346 US 15 at 42 (1953); see also *United States v Gaubert* 499 US 315 at 326 (1991).

[204] *United States v Gaubert* 499 US 315 at 326 (1991).

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182. **Following paragraph cited by:**

*Minister for the Environment v Sharma* (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

*Minister for the Environment v Sharma* (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

*Minister for the Environment v Sharma* (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

The preferable view is that the policy/operational classification is not useful in this area. Rather, the class of case to which Deane J referred in *Heyman* is not cognisable by the tort of negligence [205]. This precludes the application of negligence to quasilegisative activity of public authorities such as zoning prescriptions and to the intergovernmental dealings with which, in a contractual setting, this Court dealt in *South Australia v The Commonwealth* [206]. It would be consistent with a line of Canadian authority commencing with the judgment of Laskin J in *Welbridge Holdings Ltd v Greater Winnipeg* [207]. In *Welbridge*, the Supreme Court of Canada decided that no action in negligence lay in respect of the passing by the defendant of a bylaw, later declared invalid, which had caused economic loss to the plaintiff. This line of authority was discussed, together with remarks of Dixon J in *James v The Commonwealth* [208], by the Full Federal Court in *Bienke v Minister for Primary Industries* [209].

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[205] See *Rowling v Takaro Properties Ltd* [1988] AC 473 at 503; cf *Unilan Holdings Pty Ltd v Kerin* (1993) 44 FCR 481.

[206] (1962) 108 CLR 130.

[207] [1971] SCR 957 at 967-968. See Klar, *Tort Law*, 2nd ed (1996) at 240-241.

[208] (1939) 62 CLR 339 at 372.

[209] (1996) 63 FCR 567 at 590-596; 135 ALR 128 at 149-154.

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183. Following paragraph cited by:

*Minister for the Environment v Sharma* (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

On the other hand, questions of resource allocation and diversion, and budgetary imperatives should fall for consideration along with other factual matters to be "balanced out" [\[210\]](#) when determining what should have been done to discharge a duty of care. In *Just v British Columbia* [\[211\]](#), Cory J explained that the standard of care which is owed to a plaintiff by a government agency may be less than that which would be owed by a private party.

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[\[210\]](#) *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 4748. See also the remarks of McHugh J in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 285286, and cf *Dietrich v The Queen* (1992) 177 CLR 292 at 312 per Mason CJ and McHugh J.

[\[211\]](#) [1989] 2 SCR 1228 at 12431244.

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184. Following paragraph cited by:

*Owners - Strata Plan No 13218 v Woollahra Municipal Council* (08 April 2002)

In *Just*, the Supreme Court of Canada was concerned with the duty of care owed by the British Columbia Department of Highways with respect to the reasonable inspection and maintenance of a major road between Vancouver and ski resorts at Whistler Mountain. Cory J distinguished between the duty of care owed by a government agency, which might be the same as that owed between individuals, and the standard of care. He continued [\[212\]](#):

"Nevertheless the standard of care imposed upon the Crown may not be the same as that owed by an individual. An individual is expected to maintain his or her sidewalk or driveway reasonably, while a government agency such as the respondent may be responsible for the maintenance of hundreds of miles of highway. The frequency and the nature of inspection required of the individual may well be different from that required of the Crown. In each case the frequency and method must be reasonable in light of all the surrounding circumstances. The governmental agency should be entitled to demonstrate that balanced against the nature and quantity of the risk involved, its system of inspection was reasonable in light of all the circumstances including budgetary limits, the personnel and equipment available to it and that it had met the standard duty of care imposed upon it."

In the event, none of the "control mechanisms" operate to preclude or provide an answer to the liabilities of the Shire in negligence.

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[212] [1989] 2 SCR 1228 at 1244. Dickson CJ, Wilson, La Forest, L'HeureuxDubé and Gonthier JJ agreed with Cory J; Sopinka J dissented. Lord Nicholls of Birkenhead made a similar point in *Stovin v Wise* [1996] AC 923 at 933.

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### Conclusion

185. The appeal by the Shire should be dismissed with costs.

186. The appeal by Eskimo Amber and Mr and Mrs Stamatopoulos against the Shire should be allowed with costs and the following order made:

1. Set aside paragraph 2 of the orders of the Court of Appeal of the Supreme Court of Victoria and in lieu thereof order that:

- (a) the appeal to that Court be allowed with costs;
- (b) order 4 of the order of Judge Strong be set aside and in lieu thereof order:
  - (i) judgment for Eskimo Amber against the Shire for the sum of \$110,218 together with interest and costs of the proceedings before the County Court;
  - (ii) judgment for Mr and Mrs Stamatopoulos against the Shire for the sum of \$58,000 together with interest and costs of the proceedings before the County Court.

2. Remit the matter to the Supreme Court of Victoria to make such order as it sees fit with respect to the interest and costs referred to in paragraph 1(b) of this order.

187. KIRBY J. These appeals from the Court of Appeal of the Supreme Court of Victoria [213] concern the outer boundary of liability in negligence. Specifically, they raise the question of the liability of a public authority consequential upon its failure to exercise effectively, or at all, statutory powers conferred on it for the protection of the public.

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[213] *Pyrenees SC v Day* [1997] 1 VR 218.

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188. The issues raised bear some similarities to those recently dealt with by appellate courts in England [214], Scotland [215], Canada [216] and New Zealand [217]. The appeals provide this Court with an opportunity to reconsider its decision in *Sutherland Shire Council v Heyman* [218] in the light of difficulties presented by subsequent applications of that decision [219], judicial [220] and academic [221] commentary, the general development of the law and the facts of this case.

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[214] *Dorset Yacht Co v Home Office* [1970] AC 1004; *Anns v Merton London Borough* [1978] AC 728; *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175; *Murphy v Brentwood District Council* [1991] 1 AC 398; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633; *Stovin v Wise* [1996] AC 923; *Capital and Counties v Hants CC* [1997] 3 WLR 331; [1997] 2 All ER 865; cf Craig, "Negligence in the Exercise of a Power" (1978) 94 *Law Quarterly Review* 428; Dugdale, "Public Authority Liability and the Citizen's Entitlement" (1994) 45 *Northern Ireland Legal Quarterly* 69; Brodie, "Public Authorities And The Duty Of Care" [1996] *Juridical Review* 127; Cane, "Suing Public Authorities in Tort" (1996) 112 *Law Quarterly Review* 13.

[215] *Micosta SA v Shetland Islands Council* 1986 SLT 193; *Ballantyne v City of Glasgow District Licensing Board* 1987 SLT 745 noted Reid, "Liability of public authorities" [1990] *Juridical Review* 101 at 102-103.

[216] *Barratt v North Vancouver* [1980] 2 SCR 418; (1980) 114 DLR (3rd) 577; *Kamloop s v Nielsen* [1984] 2 SCR 2; (1984) 10 DLR (4th) 641; *Tock v St John's Metropolitan Area Board* [1989] 2 SCR 1181; (1989) 64 DLR (4th) 620; *Just v British Columbia* [1989] 2 SCR 1228; (1989) 64 DLR (4th) 689; *Rothfield v Manolakos* [1989] 2 SCR 1259; (1989) 63 DLR (4th) 449; *CN v Norsk Pacific Steamship Co* [1992] 1 SCR 1021; (1992) 91 DLR (4th) 289; *Winnipeg Condo Corp v Bird Construction Co* [1995] 1 SCR 85; (1995) 121 DLR (4th) 193; cf Reynolds and Hicks, "New Directions For The Civil Liability Of Public Authorities In Canada" (1992) 71 *Canadian Bar Review* 1; Woodall, "Private Law Liability of Public Authorities for Negligent Inspection and Regulation" (1992) 37 *McGill Law Journal* 83; Sopinka, "The Liability Of Public Authorities: Drawing the Line" (1993) 1 *Tort Law Review* 123; Hoehn, *Municipalities and Canadian Law - Defining the Authority of Local Governments* (1996) 46-89.

[217] *Bowen v Paramount Builders* [1977] 1 NZLR 394; *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234; *Brown v Heathcote County Council* [1986] 1 NZLR 76; [1987] 1 NZLR 720; *Rowling v Takaro Properties Ltd* [1988] AC 473; *Sth Pacific v NZ Security* [1992] 2 NZLR 282; *Invercargill City Council v Hamlin* [1994] 3 NZLR 513; cf Smillie, "Liability Of Public Authorities For Negligence" (1985) 23 *University of Western Ontario Law Review* 213; Todd, "Public Authorities' Liability: The New Zealand Dimension" (1987) 103 *Law Quarterly Review* 19; Manning, "Torts and Accident Compensation" [1996] *New Zealand Law Review* 442 at 443-451.

[218] (1985) 157 CLR 424 (hereafter "*Heyman's case*"). See also *Bryan v Maloney* (1995) 182 CLR 609.

[219] For example *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 (hereafter "*Lutz's case*"); see also *Northern Territory v Deutscher Klub Inc & Boral Gas* (1994) 4 NTLR



25 at 28-29; 84 LGERA 87 at 88-89 ; *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101; cf Wallace, "The *Murphy* Saga in Australia: *Bryan* in Difficulties?" (1997) 113 *Law Quarterly Review* 355 at 358.

[220] For example *Stovin v Wise* [1996] AC 923; *Capital and Counties v Hants CC* [1997] 3 WLR 331 at 341-342; [1997] 2 All ER 865 at 876 ; Brennan, "Liability in Negligence of Public Authorities: The Divergent Views" (1990) 7 *Australian Bar Review* 183; Malcolm, "The Liability and Responsibility of Local Government Authorities: Trends and Tendencies" (1990) 7 *Australian Bar Review* 209; McHugh, "Neighbourhood, Proximity and Reliance" in Finn (ed) *Essays on Torts* (1989) 5-42.

[221] Hogg, "The Liability Of A Public Authority For The Failure To Carry Out A Careful Exercise Of Its Statutory Powers: The Significance Of The High Court's Decision In *Sutherland Shire Council v Heyman* ." (1991) 17 *Monash University Law Review* 285; Davies, "Common Law Liability of Statutory Authorities" (1997) 27 *University of Western Australia Law Review* 21.

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189. This field of the law of negligence has been acknowledged to be amongst the most difficult, both by judges [222] and scholars[223]. An optimistic view is that the difficulty arises because the law is "developing"[224]. A more realistic perspective may be that it is a category which is conceptually unsettled [225]. The fundamental problem is that a single unifying principle for liability in negligence, easy to apply and predictable in outcome, has proved elusive[226]. Differing theories hold the legal stage for a time. But then their defects and inadequacies are exposed. None has won permanent acceptance[227]. The best that observers of this branch of the common law have been able to offer is the cautionary advice to study the cases in the hope of deriving guidance from analogies[228]. However, in order to do this it is necessary to have some concept of the principle by which the analogy is to be discovered.

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[222] See for example *Heyman's case* (1985) 157 CLR 424 at 440. .

[223] cf Manning, "Torts and Accident Compensation" [1996] *New Zealand Law Review* 442 at 443.

[224] Fleming, *Law of Torts*, 7th ed (1987) at 144.

[225] *Stovin v Wise* [1996] AC 923 at 933 per Lord Nicholls of Birkenhead.

[226] Doyle, "The Liability Of Public Authorities" (1994) 2 *Tort Law Review* 189 at 198.

[227] McHugh, "Neighbourhood, Proximity and Reliance" in Finn (ed) *Essays on Torts* (1989) at 6 citing Green, "The Duty Problem in Negligence Cases" 28 *Colorado Law Review* 1014 (1928).

[228] Reid, "Liability of public authorities" [1990] *Juridical Review* 101 at 106-107; cf Trindade and Cane, *The Law of Torts in Australia* (2nd ed) (1993) at 331.

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190. The appeals before the Court provide it with an opportunity to afford a more principled approach which is at once more realistic about the law's objectives and operation, more straight-forward in application and, to the extent possible, more predictable in outcomes.

A dangerous fire hazard is discovered by a Shire

191. Beaufort is a small town in rural Victoria. At the times relevant to the events out of which these proceedings arise, it had a population of about 1,500. It was the principal town of the Shire of Ripon. The Shire covered an area of 1,500 square kilometres, had a total population of about 3,300 and enjoyed only 2,500 rateable properties. In 1994, as a result of a legislative policy of amalgamating local government authorities in Victoria, the Shire of Ripon became absorbed in the Pyrenees Shire ("the Shire"), whose Council was substituted as the defendant<sup>[229]</sup>. The main street of Beaufort is Neill Street. At number 70 Neill Street was a fish and chip shop and a dwelling at the rear of the shop. Abutting these premises, at number 72 Neill Street, was a video hire business. It belonged to Mr and Mrs Day ("the Days"). They resided in the dwelling at the rear of their shop.

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<sup>[229]</sup> By order 11 of the Court of Appeal, the title of the proceedings was amended by substituting for the expression "the President, Councillors and Ratepayers of the Shire of Ripon" the expression "Pyrenees Shire Council". See Order, 8 March 1996.

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192. In about 1983, the fish and chip shop was purchased by Mr and Mrs Nakos ("the Nakoses"). Until July 1986 they conducted the business themselves and also lived in the dwelling at the rear. In a corner of the living room of the dwelling was a fireplace. It was accepted that the Nakoses did not use the fireplace. The Nakoses had a gas heater in position in the fireplace. They used this until it broke down shortly before the middle of 1986, after which they used an electrical radiator. Thereafter the fireplace was covered with a sheet of plywood. This was not because of knowledge of, or concern about, its safety but for other reasons such as the prevention of draughts.
193. In July 1986 the Nakoses let the premises to Mrs and Mrs Tzavaras ("the Tzavarases"). This couple moved into the dwelling and conducted the business. To fend off the cold of Beaufort in winter, Mr Tzavaras reactivated the fireplace. He acquired an antique mantelpiece and surround which were installed. By inference, the plywood and the gas heater, were removed. The open fireplace was frequently used by the Tzavarases during the winter months.
194. On 9 August 1988 a friend of the Tzavarases, a Mr Rayne, was residing in their dwelling. He lit a fire in the fireplace. However, he became alarmed by an accumulation of smoke which followed. He concluded that something was amiss, possibly a fire in the chimney. He summoned the Country Fire Authority ("CFA"), a volunteer fire brigade. It sent a crew to the premises. A member of the crew, Mr David Gerard, removed the burning logs. He inspected the fireplace. He found mortar missing from between the bricks constituting the fireplace. He

told Mr Rayne that the fireplace was unsafe to use. According to Mr Gerard's evidence, the faults were fairly obvious to him. He asked Mr Rayne to inform the Tzavarases. Apparently they were at a nearby hotel at the time.

195. The shop and dwelling at 70 Neill Street was found to have been about 100 years old. Objection was taken to this finding for lack of direct evidence. However, there is no merit in this complaint. Photographs received into evidence confirm the inference which the trial judge (Judge Strong) drew. It was an old building in a row of shops, all apparently built at the same time. At that time, it was common for lime mortar to be used. With the passage of years, mortar deteriorates. A danger is then presented by the fact that the fireplace and chimney cannot properly contain the fire. Presumably it was this danger, apparent to a person such as Mr Gerard who had 12 years experience with the CFA, that caused him, or some other member of the brigade, on 11 August 1988 to contact the Shire Engineer and Building Surveyor, Mr Peter Humphries. The fire was reported. Concern was expressed about the chimney. Mr Humphries instructed a newly appointed building inspector, Mr Christopher Walschots, to investigate the fire and to report further.
196. Mr Walschots checked the Council's rates records. The rates ledger bore two names, viz "P Tzavaras and S Nakos". Mr Walschots was unaware of their relationship and he did not check it. He thought that they were perhaps business partners. The rate ledger contained columns for the name and address of the "owner" and likewise for the "occupier". In the former, the names of the previous owners were crossed out and the names of Mr and Mrs Nakos inserted in handwriting. However, the typewritten address remained unchanged. In the column relating to the "occupier" the typewritten word "owner" appeared followed by no address. Next to this, in handwriting, were the words "Rates to - Mr P Tzavaras, 70 Neill Street Bft".
197. Armed with this knowledge, Mr Walschots went to the fish and chip shop. He met Mr Tzavaras who described himself as being "in charge here". He was aware of the fire and accompanied Mr Walschots to the fireplace and chimney which the latter examined using a torch. Mr Walschots discovered the serious defects in the mortar joints. At his request, Mr Tzavaras, using the torch, inspected inside the chimney. Mr Walschots identified the gaps in the mortar. He told Mr Tzavaras not on any account to use the chimney. The latter gave an assurance that he would not do so. Whilst he was making a sketch, Mr Walschots reiterated that the fireplace should not be used in any circumstances and again Mr Tzavaras repeated his assurance. Before he left, Mr Walschots told Mr Tzavaras that he must either replace the fireplace or seal it up and that he was not to use it in the meantime. He indicated that he intended to report his finding to the Building Surveyor and that Mr Tzavaras would hear from the Shire.
198. At the trial, the foregoing description of events was hotly contested by Mr Tzavaras. However, Judge Strong preferred the evidence of Mr Walschots. The appeals must be decided on that footing.

A warning letter is sent by the Shire

199. Mr Walschots reported his findings to Mr Humphries. He was instructed to prepare a more detailed sketch and a draft letter which Mr Humphries would settle. Eventually a letter was posted by the Council of the Shire of Ripon. Its terms are set out in the reasons of Brennan CJ.

200. Mr Tzavaros denied ever receiving this letter. However, again he was disbelieved. The judge found that he did receive it. He also accepted that the Nakoses did not receive the letter. He found that, before the second fire, yet to be mentioned, the Nakoses had no notice of the dangers of the fireplace revealed by the first fire and confirmed by Mr Walschots' letter.
201. As a result of his inspection, Mr Walschots' considered that the fireplace presented a danger to life and also to the spread of fire to adjoining buildings. His evidence on this point, which was accepted, was as follows:
- "Q: ... [Y]ou mentioned that your preoccupation was with the possibility of fire?  
... That's correct.
- Q: And that was estimated by you to be great? ... That's correct.
- Q: And you just mentioned- I believe you said, your concern was not only for this shop, if this shop went up, next door could go up? ... That's correct.
- Q: And I think in Beaufort there's a whole row of old shops along there, aren't there? ... That's correct.
- Q: You could raze Beaufort? ... That's right.
- Q: The shopping centre of Beaufort. So this was a very significant problem from the council's point of view? ... Yes.
- Q: One that threatened - could threaten the whole town? ... Yes".
202. Notwithstanding the potential gravity of the situation inherent in this realisation, nothing was done by the Shire beyond sending the admonitory letter. Mr Humphries, an officer of considerable experience, had had no previous involvement in relation to dangerous building notices arising out of a hazardous fireplace and chimney. He and Mr Walschots said that, when they drafted the letter of 12 August 1988, they had reg 57 of the Victoria Building Regulations 1983 in front of them. The letter was intended to be a notice under reg 57.2, to which reference will later be made. They were unaware of other statutory powers. Mr Humphries gave no instructions for follow up because he considered that the letter was sufficient. Mr Walschots regarded the letter, together with the strong warnings he had given Mr Tzavaras and the latter's apparent acceptance of the dangers, as reasons for taking the matter no further. Neither officer apparently turned his mind to notification to neighbours (including the Days), subsequent occupiers, tracking down the Nakoses (who had not been spoken to) or recording the serious risk of fire for follow-up or other remedial action. At one stage in his evidence, Mr Walschots said that he and Mr Humphries considered that they lacked the statutory authority to require work to be done to render the fireplace and chimney safe.
203. According to the evidence, notwithstanding the foregoing warnings, written and oral, the Tzavarases continued to use the fireplace. In late 1989, they decided to sell their business. They advertised that it was for sale. Mr and Mrs Stamatopoulos ("the Stamatopouloses") responded to the advertisement. There was inconclusive evidence concerning alleged conversations with the Stamatopouloses about the fireplace. Certainly, the Tzavarases removed their mantelpiece and surround. The lease of number 70 Neill Street

Beaufort was assigned by the Nakoses to the Stamatopouloses' company, Eskimo Amber Pty Ltd ("Eskimo Amber"). The Stamatopouloses went into occupation of the dwelling at the rear of the shop. Their solicitor omitted to request a Form 10 certificate relating to "any current certificate, notice or report made under the Act on the ... property"[\[230\]](#). Mr Humphries stated that, if such a request had been made, the Shire would have turned up the letter of 12 August 1988 revealing the danger of the fireplace and chimney. The solicitor gave evidence that it was not the practice to seek such certificates in the case of leases but only for the purchase of freehold interests. Being uninformed about the dangers of the fireplace, the Stamatopouloses proceeded to use the fireplace during the winter months.

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[\[230\]](#) Victoria Building (Amendment) Regulations (1988), No 7, reg 7 inserting Form 10.

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### A second fire causes substantial damage

204. The fire out of which the present proceedings arose occurred after midnight on 22 May 1990. Mr Stamatopoulos had lit the fire late in the afternoon. He retired to his bed in the living room near the fire. He awakened after midnight to observe the flicker of flames. After alerting his wife, he ran across the street to the fire station to raise the alarm. After a delay, he succeeded in finding the alarm bell. Members of the CFA arrived about twenty minutes after the fire had apparently begun. The fire was extinguished but not before substantial damage had been done to the shop and residence occupied by Eskimo Amber and the Stamatopouloses and the adjoining property owned by the Days.

### The decision of the primary judge

205. Arising out of such damage, three actions were commenced in the County Court of Victoria. The first was by the Nakoses for damages for the effective destruction of their shop and attached residence. The second was by the Stamatopouloses and their company, Eskimo Amber in respect of the personal property of the Stamatopouloses and the loss of plant, equipment, stock and profits of the company. The third action was brought by the Days.
206. All three proceedings were brought respectively against Mr and Mrs Tzavaras and the Council of the Shire. Contribution and third party proceedings fell to be disposed of in the light of the findings in the principal actions.
207. Simplifying matters somewhat, the claims made were for breach of contract (in the case of the Nakoses against the Tzavarases); breach of statutory duty (in the claims against the Shire) and negligence (in all claims). All claims in negligence against Mrs Tzavaras were dismissed by Judge Strong on the basis that there was no separate evidence of personal negligence on her part[\[231\]](#). The judge also dismissed all proceedings brought against the Shire for breach of statutory duty [\[232\]](#). These holdings left the remaining claims in negligence against Mr Tzavaras and the Shire and the Nakoses' action in contract based on the lease.
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[231] *Nakos v Tzavaras* unreported, County Court of Victoria, 1 February 1994 (hereafter "judgment of Judge Strong") at 9.

[232] The plaintiffs had relied on the *Health Act 1958 (Vic)*, s 42 and the *Building Control Act 1981 (Vic)*, s 133.

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208. So far as the claims by the Nakoses were concerned, Judge Strong concluded that Mr Tzavaras, as assignee of the lease, owed a duty of care to the Nakoses, that he was in breach of that duty and therefore liable for the full amount of the Nakoses' loss[233]. The separate claim based on the lease was dismissed. The claim by the Nakoses against the Shire was also dismissed. Even if a duty were owed by the Shire to the Nakoses (which Judge Strong was inclined to doubt), it had been sufficiently discharged by directing the letter to him as it did[234]. In the result, the Nakoses recovered the entirety of their loss against the Tzavarases in negligence. All third party and contribution proceedings were dismissed.
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[233] Judgment of Judge Strong at 16.

[234] Judgment of Judge Strong at 35.

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209. In the claims in negligence by Eskimo Amber and the Stamatopouloses, Judge Strong upheld their entitlements to recover for their respective losses from Mr Tzavaras[235]. He found that the risk of damage to the Stamatopouloses and their company was foreseeable in light of the warning and direction which Mr Tzavaras had received from the Shire. As to the claims by these parties against the Shire, Judge Strong concluded[236] that they could not be sustained "in the face of the High Court's decision in *Heyman*". [237]. Accordingly, the only remedy open to the Stamatopouloses and Eskimo Amber in negligence was against Mr Tzavaras. Their claim against the Shire was dismissed.
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[235] Judgment of Judge Strong at 15.

[236] Judgment of Judge Strong at 40.

[237] *Heyman's case* (1985) 157 CLR 424 .

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210. The position of the Days was held to be different. Again, Mr Tzavaras was found liable in negligence to them and judgment was entered against him for their loss[238]. But in the case of the claim by the Days against the Shire, Judge Strong "by a narrow margin"[239]



concluded that the Shire was in breach of a duty of care which it owed to the Days. Although there was no "special reliance", he concluded that there was "general reliance" by them on the Shire sufficient to produce "the requisite proximity" [\[240\]](#) .

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[\[238\]](#) Judgment of Judge Strong at 18.

[\[239\]](#) Judgment of Judge Strong at 29.

[\[240\]](#) Judgment of Judge Strong at 30 relying on *Heyman's* case and the judgment of McHugh JA in *Lutz'* case (1988) 12 NSWLR 293 at 330. .

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211. The judge dismissed allegations of contributory negligence made against each of the claimants. He disposed of third party and contribution proceedings between the Shire and Mr Tzavaras by concluding that, in the one action where judgment was entered against both of them, Mr Tzavaras should pay two-thirds of the sum recovered by the Days and the Shire of Ripon one-third. This reflected Judge Strong's view that Mr Tzavaras was "primarily responsible for what occurred" [\[241\]](#).
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[\[241\]](#) Judgment of Judge Strong at 50.

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212. The Tzavarases were not involved in the appeal to the Court of Appeal which followed. However, the Shire appealed from the judgment entered against it in favour of the Days. The Nakoses, Eskimo Amber and the Stamatopouloses appealed from the dismissal from their claims against the Shire. It must be assumed that, despite the relatively small sums involved, the appeals had a practical point. By inference, the Shire was concerned to contest its liability in negligence based upon its omissions, particularly its failure to use more effectively its available statutory powers. In the case of the appeals by the Nakoses, Eskimo Amber and the Stamatopouloses, it is entirely possible that Mr Tzavaras was not insured, or not sufficiently insured, or otherwise able to meet the judgments entered against him. However that may be, all of the claimants sought to recover from the Shire whose "long pocket" was presumably viewed as a safer fund for their recovery, if it was available. .

#### The Court of Appeal confirms the decision

213. The judgment of the Court of Appeal was delivered by Brooking JA [\[242\]](#) . His Honour rejected the appeal by the Nakoses. He upheld the judgment entered against them in their proceedings against the Shire [\[243\]](#) . As this aspect of the decision of the Court of Appeal is not challenged in this Court, the entitlements (if any) of the owners can be ignored except in so far as it is relevant to test the propositions affecting the scope of the duty of care owed by the Council to all of those claiming. Brooking JA concluded that no duty was owed to the Nakoses [\[244\]](#) :



" A duty of care to avoid damage to neighbouring properties from an outbreak of fire from a dangerous chimney is one thing. The most obvious means of discharging the duty is the taking of reasonable steps to induce the owner of the offending chimney to make it safe. It is another thing altogether to say that the Shire is under a duty of care to the owner of the faulty chimney, which duty it would ordinarily discharge by endeavouring to persuade or compel the prospective plaintiff to put his own house in order. The owner is not in a state of "dependency". Indeed, it is his lack of dependency which lies at the bottom of the statutory schemes for the removal of hazards."

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[\[242\]](#) *Pyrenees SC v Day* [1997] 1 VR 218 (with Ormiston and Charles JJA concurring).

[\[243\]](#) *Pyrenees SC v Day* [1997] 1 VR 218 at [240](#).

[\[244\]](#) *Pyrenees SC v Day* [1997] 1 VR 218 at [239-240](#).

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214. So far as the appeals by Eskimo Amber and the Stamatopouloses were concerned, Brooking JA could see no reason to distinguish their position from that of the Nakoses. The Shire owed the tenant, Eskimo Amber, no duty of care [\[245\]](#) :

"It was entitled to possession, and in possession, of the premises. It had the ability to inspect the chimney. The defective chimney constituted an actual fire hazard only when in use and it was the use by the company of the defective chimney which led to the outbreak of fire. ... The approximate age of the building must have been apparent and the defect was evidently the natural result of age and normal use. It is reasonable to expect the owners and occupiers of a building to assume responsibility for taking reasonable steps to safeguard neighbouring buildings against dangers from a defect of this kind, and I do not think that the occupiers of a building with a defect of this kind may be said to rely or depend on the municipality to take reasonable care to safeguard them against loss of the kind here in question, or that any such reliance could be said to be reasonable."

The position of the Stamatopouloses was no better than that of their company [\[246\]](#) .

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[\[245\]](#) *Pyrenees SC v Day* [1997] 1 VR 218 at [240](#).

[\[246\]](#) *Pyrenees SC v Day* [1997] 1 VR 218 at [240](#).

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215. This left the judgment against the Shire in favour of the Days. Brooking JA upheld that judgment. He did so after a scrutiny of the statutory provisions which clothed the Council with powers (as distinct from a duty) to require that action be taken with respect to fire

hazards found in buildings within the Shire [247]. By the time the matter was before the Court of Appeal the claimants relied upon the statutory provisions only so far as their respective claims in negligence were concerned. Brooking JA complained about the lack of assistance which the Court had received on the applicability of the several statutory provisions [248] mentioned. However, he noted that, on the appeal, the Shire had conceded that it had available applicable powers under the *Local Government Act* 1958 (Vic), s 695(1A) as a means of "dealing with the chimney problem" [249]. He concluded that "the Shire had power to deal with this chimney" under that subsection [250]. The applicability of other statutory provisions was more dubious. Their application was likely to have been more dilatory. In the end, therefore, Brooking JA fixed on s 695(1A). So far as the Days were concerned, he agreed that "general reliance or dependence" of the kind mentioned by Mason J in *Heyman* was made out [251]:

"In my view a duty of care was owed by the Shire to the Days ... The general reliance on the Shire was reasonable and the Shire ought to have foreseen that reliance."

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[247] Four statutory provisions were considered namely *Health Act* 1958 (Vic), s 42; *Building Control Act* 1981 (Vic), ss 133, 142A, 143; *Victoria Building Regulations* 1983, reg 57.2(1) and *Local Government Act* 1958 (Vic), ss 694, 695(1), 695(1A).

[248] *Pyrenees SC v Day* [1997] 1 VR 218 at 236.

[249] *Pyrenees SC v Day* [1997] 1 VR 218 at 236.

[250] *Pyrenees SC v Day* [1997] 1 VR 218 at 236.

[251] *Pyrenees SC v Day* [1997] 1 VR 218 at 238.

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216. These conclusions led the Court of Appeal to dismiss all three appeals. The Nakoses having fallen by the way, there are now before this Court, by special leave, the appeal by the Shire against the judgment against it confirmed in favour of the Days and the appeal by Eskimo Amber and the Stamatopouloses against the judgment confirmed in their proceedings in favour of the Shire.

#### Matters not in issue

217. From the foregoing review of the facts, it will be appreciated that the pleadings were complicated and in some cases plainly defective [252]. The disposal of the contribution proceedings by the primary judge was based, in the claims of Eskimo Amber and the Stamatopouloses, upon the assumption that the entirety of the losses found would fall upon Mr Tzavaras and him alone. Were those claims now to succeed against the Shire, a question would arise about the proper order for contribution. To isolate the issues remaining for decision in the appeals, it is useful to note a number of matters, formerly contested, which can now be put out of account:

1. Various factual disputes, litigated with much ferocity at trial, must be taken as determined in the way found by Judge Strong. Thus, the disputes concerning whether Mr Tzavaras and Mr Nakos received the Shire's letter was decided: the former did and the latter did not. The finding that Mr Tzavaras removed the impediments to the fireplace and left it operational and without warning to the Stamatopouloses must also be accepted. Various factual complaints which persisted to this Court can safely be ignored. They included complaints about the inferences drawn concerning the age of the shops, that the Days were ratepayers of the Shire and that the Days both owned and occupied the adjoining shop.

2. Similarly, this Court can safely dismiss challenges to findings which seem entirely reasonable. Thus, the suggestion that the losses of Eskimo Amber and of the Stamatopouloses flowed from the failure of their solicitor to secure a Form 10 certificate from the Shire was rejected and should not be reopened. Nor should the claim by Eskimo Amber and the Stamatopouloses against the Shire based on negligent mis-statement be re-opened, having been determined against them at trial [253]. Given Brooking JA's complaint that, despite "tacit invitations" [254], insufficient assistance was afforded concerning the statutory powers relied upon by the several parties, I would not entertain the attempt of the Shire, before this Court, to deflect liability to other statutory authorities, such as those established by the *Housing Act* and the Housing (Standard of Habitation) Regulation or the *County Fire Act 1958* (Vic). Quite apart from the fact that these arguments were so belated, they appear to raise factual questions not explored at the trial [255].

3. The remaining statutory provisions, still relied upon, need only to be examined so far as they bear upon the respective parties' claims against the Shire for breach of its common law duty in negligence. The matter must be approached upon the footing that all of the claimants accepted that there was no statutory duty owed by the Shire to them, giving rise to a personal cause of action for its breach [256].

4. The cases must also be considered on the basis that the Shire did not dispute that the second fire, which occasioned the damage to the several claimants, was caused by the deficiencies in the condition of the fireplace and chimney found by Mr Walschots [257]. The Shire accepted that, if it was under a duty of care to the claimants and was in breach of that duty by reason of its omissions, such breach was the cause of the losses which they had suffered [258]. A claim by two of the original claimants (the Nakoses) that negligence could be brought home to the Shire by reason of its careless failure to consider the exercise of its powers has not been re-agitated [259] by the others.

5. Finally, no dispute was raised as to the transmission of any liability on the part of the Shire of Ripon to the Pyrenees Shire Council which was substituted as the party in the appeals.

[252] For example in the Days' case the Statement of Claim alleged a duty of care owed to Eskimo Amber. This "slip" was overlooked by the Court of Appeal; see *Pyrenees SC v Day* [1997] 1 VR 218 at 220.

[253] *Pyrenees SC v Day* [1997] 1 VR 218 at 221.

[254] *Pyrenees SC v Day* [1997] 1 VR 218 at 237.

[255] For example, the characterisation of the residence and its qualification as a "house" within the meaning of the *Housing Act* was not the subject of particular evidence or submissions at the trial.

[256] *Pyrenees SC v Day* [1997] 1 VR 218 at 220-221.

[257] As found by Judge Strong and noted by the Court of Appeal; see *Pyrenees SC v Day* [1997] 1 VR 218 at 225.

[258] *Pyrenees SC v Day* [1997] 1 VR 218 at 225.

[259] *Pyrenees SC v Day* [1997] 1 VR 218 at 225 ; cf *Heyman's case* (1985) 157 CLR 424 at 445.

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218. These issues, some of them strongly fought in the courts below, being resolved or disregarded for the reasons stated, it is now possible to address the central issue which attracted special leave to this otherwise unpromising case of disputed facts. That issue concerns the liability of the Shire respectively to the Stamatopoulos interests and to the Days.
219. In order to approach the applicable rules of the common law, it is first necessary to note the statutory provisions affording the Shire the powers to act. It was the central tenet of the claimants'[260] contentions that, given their respective relationships with the Shire, dependence and reliance upon it, and ignorance of the latent defect in the fireplace and chimney of which the Shire was aware, it was actionable negligence at common law for the Shire to have failed to exercise its powers to remove the defect or otherwise to alert them to the very high dangers to which they were exposed. The response of the Shire's officers was described by the claimants as completely inadequate and such as to attract legal liability to pay them damages. Although in the courts below the claimants were separately represented, before this Court they made common cause. They argued that all of those remaining were entitled to recover against the Shire and that the differentiation found by the trial judge, and endorsed by the Court of Appeal, was wrong in legal principle and unjust.

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[260] The Days, Eskimo Amber and the Stamatopouloses are hereafter collectively referred to as "the claimants".

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## The statutory powers of the Shire

220. The claimants relied upon a combination of statutory powers which, they argued, armed the Shire with the authority to ensure that the serious fire risk found by Mr Walschots be repaired or removed. It is necessary only to refer to two sources of statutory power.
221. The first is reg 57.2 of the Victoria Building Regulations 1983. By this, the Building Surveyor of the Shire was empowered to "serve a notice on the owner of a dangerous building" which required the owner within a time specified to "carry out any work necessary to ensure that the building" is "made secure and repaired" [\[261\]](#). Brooking JA gave a number of persuasive reasons as to why this regulation might not have applied to the facts of the present case. The letter addressed by the Shire to Messrs Tzavaras and Nakos is expressed in the language of admonition not legal requirement. It can hardly constitute a notice under reg 57. I only mention that regulation because Messrs Walschots and Humphries said that they had reg 57.2 in mind in preparing their letter. Furthermore, two building surveyors from other municipalities, who gave evidence, accepted that a notice under reg 57.2 was the appropriate means of requiring a fire risk in a building to be removed [\[262\]](#).

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[\[261\]](#) Reg 57.2(1)(d) of the Victoria Building Regulations.

[\[262\]](#) *Pyrenees SC v Day* [1997] 1 VR 218 at 228.

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222. The statutory provision which the Shire conceded, and the Court of Appeal found, afforded power to it to deal with the specific problem of an unsafe chimney was s [695\(1A\)](#) of the *Local Government Act* 1958 (Vic), read with other provisions of that Act. The terms of that subsection and of ss [694](#) and [695\(1\)](#) appear in the reasons of Brennan CJ. The enforcement provisions are found in ss [883](#), [885](#), [886](#), [890](#) and [891](#) of the Act. The relevant provisions are set out by Brennan CJ and by Toohey J.
223. By s [890](#) of the Act where, by any order or notice under the authority of the Act, a matter is directed to be done and it remains undone, every person offending against such direction is deemed guilty of an offence against the Act.
224. These provisions, in combination, make it clear that the Shire's concession was properly made. The Council of the Shire had power to require the owner to carry out and pay for the works necessary to render the fireplace and chimney safe. Where the owner defaulted, the occupier was authorised by the Act to cause the work to be executed and to deduct the expenses from the rent [\[263\]](#). These are the powers which the claimants submitted the Shire should have used, and followed up, instead of writing an imploring letter and then apparently forgetting about the matter.

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[\[263\]](#) *Local Government Act* 1958 (Vic), s [885](#).

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## Reliance on general reliance

225. In the Court of Appeal, Brooking JA made clear his view that the entitlements of the claimants to damages for negligence had to be resolved by asking whether they had established "reliance" or "dependence" upon the Shire sufficient to establish the "proximity" which was necessary to the existence of a duty of care on the part of the Shire to them [\[264\]](#) . There was no suggestion of specific reliance in this case. None of the claimants (including, as found, Mr Nakos) had had any relevant contact with the Shire concerning the fire hazard. Accordingly, Brooking JA proceeded to deal with the suggested "reliance" or "dependence" under the concept of so-called "general reliance or dependence" to which Mason J had referred in *Heyman* [\[265\]](#) .

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[\[264\]](#) *Pyrenees SC v Day* [1997] 1 VR 218 at 232-234 .

[\[265\]](#) *Pyrenees SC v Day* [1997] 1 VR 218 at 233 referring to *Heyman's* case (1985) 157 CLR 424 at 470-471 .

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226. As Brooking JA pointed out, the *obiter* remarks of Mason J in *Heyman* quickly became a foundation for decisions in Australia [\[266\]](#) and overseas [\[267\]](#) , based upon "general reliance" said to be extracted from the facts relevant to the relationship of the parties.

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[\[266\]](#) For example, *Casley-Smith v F S Evans & Sons Pty Ltd [No 5]* (1988) 67 LGRA 108; *Nagle v Rottnest Island Authority* [1989] Aust Torts Reports §80-298 (WASC) and on appeal [1991] Aust Torts Reports §81-090 (WAFC - Wallace J); *Hicks v Lake Macquarie City Council [No 2]* (1992) 77 LGRA 269; *Curran v Greater Taree City Council* [1992] Aust Torts Reports §81-152 (NSWCA); *Alec Finlayson v Armidale City Council* (1994) 51 FCR 378; *Northern Territory v Deutscher Klub Inc & Boral Gas* (1994) 4 NTLR 25; [1994] Aust Torts Reports §81-275 (NTCA); *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101; cf Malcolm, "The Liability and Responsibility of Local Government Authorities: Trends and Tendencies" (1990) 7 *Australian Bar Review* 209 at 218, 221222.

[\[267\]](#) *Williams & Ors v Mount Eden Borough Council* (1986) 1 NZBLC 102,544; *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 at 529-530 ; cf *Stovin v Wise* [1996] AC 923 at 953-955 .

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227. The notion of "general reliance" was taken up, soon after *Heyman*, in McHugh JA's consideration of Mrs Lutz' claim against the Parramatta City Council [\[268\]](#) . In that case, I based my opinion upon specific reliance which I inferred from the numerous dealings between Mrs Lutz and the Council [\[269\]](#) . Mahoney JA rested his conclusion on the claim for damages for negligent advice [\[270\]](#) . But McHugh JA found that the court "should adopt the general

reliance concept" [271] . His opinion proved influential in many of the Australian cases which followed. Some passages in the reasoning of the majority opinions in this Court in *Bryan v Maloney* [272] might be read as suggesting adoption of the "general reliance" theory [273] . That case concerned a claim in negligence by a subsequent purchaser against a professional builder for cracks later discovered. There had been no actual contact between the parties to the proceedings. There was therefore no room for an imputed, but actual, reliance. Nevertheless, as I read the decision, *Bryan* did not ultimately turn on a rule of "general reliance". There is therefore no holding of this Court on the subject. .

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[268] *Lutz*' case (1988) 12 NSWLR 293 .

[269] *Lutz*' case (1988) 12 NSWLR 293 at 309. .

[270] *Lutz*' case (1988) 12 NSWLR 293 at 316-319 .

[271] *Lutz*' case (1988) 12 NSWLR 293 at 330. .

[272] (1995) 182 CLR 609 .

[273] (1995) 182 CLR 609 at 627 per Mason CJ, Deane and Gaudron JJ.

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228. The Shire criticised the so-called rule of general reliance. In doing so, it was able to invoke a formidable array of judicial [274] and academic [275] criticism. Putting it bluntly, that criticism suggests that "general reliance" is a fiction, entirely artificial [276] , subject to precisely the same castigation as has been directed by critics of the notion of "proximity" itself when that concept has been offered as a working criterion of universal liability for negligence [277] .
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[274] *Invercargill City Council v Hamlin* [1996] AC 624; *Stovin v Wise* [1996] AC 923; *Capital and Counties v Hants CC* [1997] 3 WLR 331; [1997] 2 All ER 865.

[275] Manning, "Torts and Accident Compensation" [1996] *New Zealand Law Review* 442 at 448; Wallace, "The *Murphy* Saga in Australia: *Bryan* in Difficulties?" (1997) 113 *Law Quarterly Review* 355 at 357; Hogg, "The Liability Of A Public Authority For The Failure To Carry Out A Careful Exercise Of Its Statutory Powers: The Significance Of The High Court's Decision In *Sutherland Shire Council v Heyman* ." (1991) 17 *Monash University Law Review* 285; see also McHugh "Neighbourhood, Proximity and Reliance" in Finn (ed), *Essays on Torts* (1989); cf Feldthusen, "Failure To Confer Discretionary Public Benefits: The Case for Complete Negligence Immunity" (1997) 5 *Tort Law Review* 17.

[276] Wallace, "The *Murphy* Saga in Australia: *Bryan* in Difficulties?" (1997) 113 *Law Quarterly Review* 355 at 357.



[277] *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340 at 368 ; *Hawkins v Clayton* (1988) 164 CLR 539 at 555-556 ; *Gala v Preston* (1991) 172 CLR 243 at 260-3 ; *Bryan v Maloney* (1995) 182 CLR 609 at 653 per Brennan J; cf *Murphy v Brentwood District Council* [1991] 1 AC 398 at 487.

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229. The most recent criticisms of "general reliance" may be found in England in the decisions of the House of Lords in *Stovin* [278] and the Court of Appeal in *Capital and Counties v Hants CC* [279]. In *Stovin*, Lord Hoffmann, speaking for the majority (with the concurrence of Lord Goff of Chieveley and Lord Jauncey of Tullichettle) remarked [280], after citing Mason J's opinion in *Heyman* [281]:

" This ground for imposing a duty of care has been called 'general reliance'. It has little in common with the ordinary doctrine of reliance; the plaintiff does not need to have relied upon the expectation that the power would be used or even known that it existed. It appears rather to refer to general expectations in the community, which the individual plaintiff may or may not have shared. A widespread assumption that a statutory power will be exercised may affect the general pattern of economic and social behaviour. For example, insurance premiums may take into account the expectation that statutory powers of inspection or accident prevention will ordinarily prevent certain kinds of risk from materialising. Thus the doctrine of general reliance requires an inquiry into the role of a given statutory power in the behaviour of members of the general public ... It appears to be essential to the doctrine of general reliance that the benefit or service provided under statutory powers should be of a uniform and routine nature, so that one can describe exactly what the public authority was supposed to do. ... But the fact that it would be irrational not to exercise the power is ... only one of the conditions which has to be satisfied. It is also necessary to discern a policy which confers a right to financial compensation if the power has not been exercised."

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[278] (1996) AC 923 at 954.

[279] [1997] 3 WLR 331 at 341-343; [1997] 2 All ER 865 at 876-877.

[280] [1996] AC 923 at 954.

[281] (1985) 157 CLR 424 at 464.

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230. In my opinion, the criticisms of the notion or "rule" of "general reliance" are unanswerable. At least this is so to the extent that general reliance is presented as a holy grail to solve disputes over the existence or absence of a duty of care in a public authority for its failure to exercise statutory powers. If the course of McHugh JA's reasoning in *Lutz* is

examined closely, it will be seen that his Honour proceeded to list nine factors, [282] which he took as establishing "the general reliance concept" in that case, and as imposing a duty on the Council to exercise its powers to protect Mrs Lutz. However, these considerations may, I think, properly be viewed as "proximity factors" or a spectrum of considerations or arguments as to why a duty of care existed which, in the particular circumstances, obliged the public authority to exercise its powers. The inter-position of the "general reliance concept" was therefore unnecessary. It rested upon the assumption that usually, or always, an element of reliance or dependence was essential to create the "proximity" which gave rise to a legal duty of care.

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[282] *Lutz*' case (1988) 12 NSWLR 293 at 331.

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231. There was no enquiry in *Lutz* into the behaviour, beliefs or expectations of ratepayers or of members of the public generally [283]. "General reliance" was simply attributed to Mrs Lutz by judicial invention. The law should, so far as possible, avoid fictions. "General reliance" is such a fiction. It was devised because of a hypothesis about the components, or usual incidents, of the duty relationship which does not bear sustained analysis. It is true that reliance or dependence, actual or implied, may sometimes afford a foundation for holding that a duty in law to act to prevent a foreseeable risk of damages to others is established. But it is not a universal criterion. And the artificial fiction of "general reliance" should not be adopted because of a difficulty of explaining with a simple word or phrase what it is about complex facts that warrants the imposition or denial, of a legal duty of care for the breach of which damages may be recovered.

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[283] cf *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 at 526 per Richardson J. referred to in *Stovin v Wise* [1996] AC 923 at 954 per Lord Hoffmann.

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232. It was understandable, in the state of authority, that the Court of Appeal of Victoria should have accepted "general reliance" as a touchstone in this case for deciding the liability in negligence of the Shire. However, the notion does not yield a persuasive foundation for differentiating the Shire's liability to the several remaining claimants. This is because in this case, as in *Lutz*, it is pure speculation as to whether members of the public, including the Stamatopoulos and Day interests, "relied" upon the Shire to exercise its powers. If a duty of care is to be found, it must be discovered by the application of criteria less artificial and fictitious. But what should such criteria be?

#### Liability of public authorities for negligent omissions

233. Initially, a number of legal considerations combined to afford local authorities a large measure of immunity at common law where claims in negligence were brought against them arising out of their failure to exercise statutory powers. Before *Donoghue v Stevenson* [284] introduced the general concept of obligations arising from the "neighbour relationship", there was

simply no category of liability into which such claims could be pressed. Moreover, in the absence of express statutory authority, it had even been doubted that a public body was liable in tort in the same way as a private individual.

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[284] [1932] AC 562 ; cf Smith and Burns, "*Donoghue v Stevenson* - The Not So Golden Anniversary" (1983) 46 *Modern Law Review* 147.

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234. The last-mentioned impediment was knocked away when the House of Lords decided in *Mersey Docks and Harbour Board Trustees v Gibbs* [285], subject always to consideration of the body's statutory powers [286], and, where relevant, the discretions conferred upon it [287], that a public body could be liable in tort where, in analogous circumstances, a private individual would be so.

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[285] (1866) LR 1 HL 93 .

[286] *Allen v Gulf Oil Refining Ltd* [1981] AC 1001.

[287] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633.

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235. Even after *Donoghue v Stevenson* was decided, two other principles of the common law provided obstacles to recovery on the basis of omissions on the part of a public authority to exercise its powers alleged to be negligent. The first was the principle preventing recovery in a claim for pure economic loss: often the alleged outcome of a public authority's neglect [288]. The second was an application to public authorities of the general reluctance of the common law to impose affirmative duties to act to prevent harm caused by others (as distinct from a duty not to cause such harm by one's own actions). Applied to public authorities this disinclination led to an accepted legal rule that they could not be made liable for damage sustained by a failure to exercise their powers, as distinct from embarking upon the exercise and performing them negligently [289]. Only for the latter could a public authority be rendered liable at common law [290].

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[288] Until *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

[289] *Heyman's case* (1985) 157 CLR 424 at 498 ; 500-501 per Deane J; cf *Sheppard v Glossop Corporation* [1921] 3 KB 132 at 150 ; *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 at 101-102 .

[290] *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) LR 1 HL 93; *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 at 1050. .

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236. These rules, developed by the courts of England, were applied in Australia, as in England, without much consideration of the implications for them of the broader concept of liability adopted in 1932 in *Donoghue v Stevenson*. However, in *Anns v Merton London Borough Council* [291] following closely on an earlier suggestion by Lord Denning [292], the House of Lords "liberated the law from this unacceptable yoke" [293]. In *Anns*, Lord Wilberforce propounded a two-stage test for ascertaining the existence of a duty of care which was a precondition to liability laid down in *Donoghue v Stevenson*. The first stage involved consideration of whether it was reasonably foreseeable that, without action, carelessness might cause damage to another person. If it was, prima facie, a duty of care would exist. But the second stage in the *Anns* test required attention to be given to any considerations which "negative, or ... reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise" [294].

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[291] [1978] AC 728.

[292] In *Dutton v Bognor Regis UDC* [1972] 1 QB 373 at 391 per Lord Denning MR. He suggested that the basis of the Council's liability was "control", a notion said to fall between "power" and "duty". This explanation was rejected by Lord Wilberforce in *Anns v Merton London Borough* [1978] AC 728 at 751-752; cf Brennan, "Liability in Negligence of Public Authorities: The Divergent Views" (1990) 7 *Australian Bar Review* 183 at 191.

[293] *Stovin v Wise* [1996] AC 923 at 931.

[294] [1978] AC 728 at 752.

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237. Although the decision in *Anns* has been accepted and applied in Canada [295] and New Zealand [296], this Court held back from endorsing its formulation. Dissatisfied with the capacity of "foreseeability" to mark an acceptable boundary for the duty relationship and disinclined to embark upon the unpredictable policy evaluations envisaged in the second step of Lord Wilberforce's formulation, for more than a decade a majority of this Court has been attempting to express criteria which would be more objective, certain and predictable of outcomes than *Anns* appeared to be. Although the whole Court declined to endorse the broad strokes and conceptual approach offered in *Anns*, endorsing instead the incremental development of new categories expressing duty situations [297], a sharp division emerged. A majority favoured use of the concept of "proximity" as the basic criterion to justify creation of a duty of care at common law [298]. A minority regarded proximity as a "slippery word" [299]. Justice Brennan, in particular, considered it as a legal rule without specific content, resistant to precise definition and therefore inadequate as a tool for the guidance of solicitors in their offices [300] and, one might add, citizens in the community or judges bound to apply the law at trial and on appeal. The result has been great confusion in, and complexity of, a body of law which is of daily application throughout the nation.

[295] Collected and discussed in Woodall, "Private Law Liability of Public Authorities for Negligent Inspection and Regulation" (1992) 37 *McGill Law Journal* 83; Reynolds and Hicks, "New Directions For The Civil Liability Of Public Authorities In Canada" (1992) 71 *Canadian Bar Review* 1.

[296] Collected and discussed in Manning, "The Duty of Care Owed by Public Authorities: Three Recent Court of Appeal Cases" (1986) 3 *Canterbury Law Review* 116.

[297] *Bryan v Maloney* (1995) 182 CLR 609 at 661 approving *City of Kamloops v Nielsen* [1984] 2 SCR 2; cf *Hill v Van Erp* (1997) 188 CLR 159 at 193-194 per Gaudron J.

[298] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; *Bryan v Maloney* (1995) 182 CLR 609; cf *CN v Norsk Pacific Steamship Co* [1992] 1 SCR 1021 at 1149; (1992) 91 DLR (4th) 289 at 367 ; Amirthalingam and Faunce, "Patching up 'proximity': problems with the judicial creation of a new medical duty to rescue" (1997) 5 *Torts Law Journal* 27 at 34-35.

[299] To use the description adopted in *Stovin v Wise* [1996] AC 923 at 932. .

[300] *Bryan v Maloney* (1995) 182 CLR 609 at 653. .

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238. **Following paragraph cited by:**

*Adeels Palace Pty Ltd v Moubarak* (26 February 2009) (Beazley JA; Giles JA ; Campbell JA)

Notwithstanding the criticisms of "proximity", this Court persisted with the use of that concept as "a general limitation upon the test of reasonable foreseeability" [301]. McHugh J, writing *ex curia* predicted that neither "proximity" nor the recognition that the concept of proximity involved in most cases an element of "reliance" [302], would last forever as universal *indicia* for a duty of care at common law [303]. Scholars took up the judicial criticism of "proximity". They declared that it was a concept often used by courts to disguise the procedural, evidentiary and other problems involved in inventing a new duty of care [304]. Finally, in *Hill v Van Erp* [305], four members of this Court [306] recognised the limitations in the usefulness of the notion of proximity in determining individual claims to the existence of a duty of care enforceable at law. When to these voices is added the consistent criticism of "proximity" expressed for a decade by Brennan CJ, it is tolerably clear that proximity's reign in this Court, at least as a universal identifier of the existence of a duty of care at common law, has come to an end.

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[301] *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340 at 355 per Gibbs CJ, Mason, Wilson and Dawson JJ.

[302] As suggested by Mason J in *Heyman's* case (1985) 157 CLR 424 at 462. .

[303] See McHugh, "Neighbourhood, Proximity and Reliance" in Finn (ed) *Essays on Torts* (1989) at 6, 12, 36.

[304] Amirthalingam and Faunce, "Patching up 'proximity': problems with the judicial creation of a new medical duty to rescue" (1997) 5 *Torts Law Journal* 27 at 29.

[305] (1997) 188 CLR 159 .

[306] (1997) 188 CLR 159 at 177-178 per Dawson J, at 188-189 per Toohey J, at 210-211 per McHugh J, at 237-239 per Gummow J.

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239. Ironically, it was criticism in this Court of *Anns*, and particularly of the broad strokes, and the consequential failure to adopt an incremental approach, that encouraged the House of Lords to over-rule that decision, in part, in *Murphy v Brentwood District Council* [307] . In *Caparo* [308] , their Lordships adopted a new approach. They accepted a three-fold test, approaching the questions "the other way round" [309] . They have now accepted that it is impossible to nominate "any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope" [310] . They have also accepted that the law has [311] :

"moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes."

Nevertheless the House of Lords established a general approach which builds upon *Anns* and is more explicit about the steps to be taken. It is also clear that the burden is on the person asserting the duty to establish each of those steps to make out a duty of care [312] :

"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit ... that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope."

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[307] [1991] 1 AC 398 .

[308] [1990] 2 AC 605 .

[309] *Stovin v Wise* [1996] AC 923 at 949 .



[310] *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 617 referring to *Governors of Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 at 239-241 ; *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175 at 190-194 ; *Rowling v Takaro Properties Ltd* [1988] AC 473 at 501 ; *Hill v Chief Constable of West Yorkshire* [1989] AC 53 at 60.

[311] *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 618 per Lord Bridge of Harwich citing with approval the opinion of Brennan J in *Heyman's* case (1985) 157 CLR 424 at 481.

[312] *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 617-618.

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240. From time to time, in this Court, Brennan CJ has expressed anxiety that the approach of the House of Lords in *Anns* would be reintroduced under the guise of "proximity", despite the Court's rejection of *Anns* in *Heyman's* case [313]. However, whatever the defects of the notions of "foreseeability" [314], "proximity" [315] and the imprecision of the policy evaluation inherent in measurement of "fairness", "justice" and "reasonableness", some guidance must be given by the Court as to how the duty question is to be answered when it is contested in a particular case. Otherwise, confronted with a suggested new category, lawyers in their offices and courts in Australia would have no instruction for their task of reasoning by analogy from past categories. It would then be all too easy to declare that those categories are closed, leaving all future extensions to the unpredictable vagaries of specific legislation[316]. This would amount to an abdication of the function of common law courts. Legislatures simply cannot anticipate the myriad of circumstances presenting with the assertion that a duty of care is, or is not, to be imposed by the common law. To perform the task of reasoning by analogy, accepting or rejecting new categories; the individual affected, the lawyer advising and the court deciding have a right to know at least the general approach which they should adopt in order to resolve the controversy.

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[313] See for example *Bryan v Maloney* (1995) 182 CLR 609 at 655.

[314] *Ultramares Corporation v Touche* 174 NE 441 at 444 (1931) per Cardozo CJ applied in *Bryan v Maloney* (1995) 182 CLR 609 at 618.

[315] Collected in *Bryan v Maloney* (1995) 182 CLR 609 at 652-655 by Brennan J.

[316] This is what some commentators urge. See for example Amirthalingam and Faunce, "Patching up 'proximity': problems with the judicial creation of a new medical duty to rescue" (1997) 5 *Torts Law Journal* 27 at 44.

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### Competing approaches to ascertaining a duty of care

241. Several suggestions have been made for the approach which courts should take in deciding whether to find a duty of care and, if so, what its scope should be:



1. One approach would be to accept that the attempts to dissect Lord Atkin's famous speech in *Donoghue v Stevenson* [317] have failed. They have certainly introduced undue complexities without the merit of compensating precision and predictability. Upon this view, each of the elements of "foreseeability", "proximity" and policy evaluation are, properly understood, inseparable components of the attempt by the common law to answer a single question. That question may be stated as whether the relationship of the parties is such as to make it reasonable to impose upon the one a duty of care to the other [318]. Upon this view, a defendant should only be liable for damage where a reasonable person in the defendant's position could have avoided the damage by exercising reasonable care and was in such a relationship to the other that that person ought to have acted to do so [319]. This formulation may be condemned as tautologous. Yet it may state what, ultimately, the other concepts of "foreseeability", "proximity" and policy are struggling to express at the price of introducing distinctions which, in Lord Hoffmann's words, are not always "visible to the naked eye" [320]. The closest that any member of this Court has come to expressing such a bedrock idea is Deane J. In *Jaensch v Coffey* [321] he suggested that the underlying notion of liability in negligence was "a general public sentiment of moral wrongdoing for which the offender must pay" [322]. Clearly enough, Deane J did not consider that this single criterion would afford adequate guidance to the imposition of a duty of care. Hence his repeated explorations of the notion of "proximity" as affording the "ultimate" criterion [323]. However, the obvious overlap of the components of the alternative tests suggests that a single concept exists, although it has so far proved impossible to define.

2. The second approach is the two-stage one expressed in *Anns*. It has certain attractions which even its critics acknowledge [324]. Not least, in the context of the failure of public authorities to exercise statutory powers reposed in them, it has created an "increased sensitivity in all jurisdictions ... towards the relationship of public authorities and the communities they serve" [325]. *Anns* gave the debates about the duty of care a broad conceptual structure and rightly acknowledged the part which the policy of the law inescapably plays in fixing the outer boundary of liability to an action in negligence [326]. However, the weaknesses of the *Anns* approach included the excessive work assigned to the notion of foreseeability of harm. That notion will not of itself automatically lead to a duty of care at law [327]. Something more is necessary. Relevant to that something more is the existence of a relationship between the parties which is such as to make it the duty of the one to act so as to avoid the risk of reasonably foreseeable damage to the other [328].

3. Whatever the defects of "proximity" (and its common alter-ego "reliance") as universal indications of the existence of a duty of care, and however resistant the word "proximity" has proved to precise definition, the concept is nonetheless useful as an elaboration of the equally opaque notion of the neighbour relationship expressed in *Donoghue v Stevenson* [329]. Whereas *Anns* treated proximity and foreseeability as substantially synonymous [330], differentiation of the concepts in *Caparo* [331] reflects the long history of the common law that the mere foreseeability of the risk of harm to another is insufficient, of itself, to impose a legal duty to act so as to avoid the consequences to that other. The other merit of

the *Caparo* formulation is that it makes it plain that the duty of satisfying the policy criteria (that it is "fair, just and reasonable that the law should impose a duty" [332]) is upon the party asserting the duty. This is where the onus would normally lie for those seeking to render another liable to them in law. It is important to emphasise that the third element is in addition to the foreseeability of harm and the existence of a "proximate" or "neighbour" relationship. It is not open to a court, absent those pre-conditions, to create a duty of care simply because, in the opinion of the court, fairness, justice or reasonableness suggests that one should exist[333].

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[317] [1932] AC 562 at 580 ; cf *Stovin v Wise* [1996] AC 923 at 932 citing *Heyman's* case (1985) 157 CLR 424 at 496 per Deane J.

[318] *Heyman's* case (1985) 157 CLR 424 at 495 where Deane J described it as the "ultimate question".

[319] cf Corbett, "A Reformulation of the Right to Recover Compensation for Medically Related Injuries in the Tort of Negligence" (1997) 19 *Sydney Law Review* 141 at 148; see also McHugh, "Neighbourhood, Proximity and Reliance" in Finn (ed) *Essays on Torts* (1989) at 7 citing Winfield, "Duty in Tortious Negligence" 34 *Colorado Law Review* 41 at 64 (1934).

[320] *Stovin v Wise* [1996] AC 923 at 956.

[321] (1984) 155 CLR 549 .

[322] (1984) 155 CLR 549 at 607 ; cf McHugh, "Neighbourhood, Proximity and Reliance" in Finn (ed) *Essays on Torts* (1989) 5 at 38.

[323] *Heyman's* case (1985) 157 CLR 424 at 495.

[324] See Brennan, "Liability in Negligence of Public Authorities: The Divergent Views" (1990) 7 *Australian Bar Review* 183 at 199-200.

[325] Brennan, "Liability in Negligence of Public Authorities: The Divergent Views" (1990) 7 *Australian Bar Review* 183 at 202.

[326] *Sth Pacific v NZ Security* [1992] 2 NZLR 282 at 294-295 ; cf Todd, "Negligence and Policy" in Rishworth (ed), *The Struggle for Simplicity in the law: Essays for Lord Cooke of Thorndon* (1997) 105.

[327] *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175 at 191 per Lord Keith of Kinkel; *Caparo Industries Plc v Dickman* [1990] 2 AC 605 ; cf Brennan, "Liability in Negligence of Public Authorities: The Divergent Views" (1990) 7 *Australian Bar Review* 183 at 197.

[328] *Jaensch v Coffey* (1984) 155 CLR 549 at 583-586 adopted in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 541-543 ; see also *Bryan v Maloney* (1991) 182 CLR 609 at 619-620 ; cf Corbett, "A

Reformulation of the Right to Recover Compensation for Medically Related Injuries in the Tort of Negligence" (1997) 19 *Sydney Law Review* 141 at 149.

[329] [1932] AC 562 at 580.

[330] McHugh, "Neighbourhood, Proximity and Reliance" in Finn (ed) *Essays on Torts* (1989) 5 at 17.

[331] As in *Stovin v Wise* [1996] AC 923 at 949.

[332] *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 618.

[333] cf Amirthalingam and Faunce, "Patching up 'proximity': problems with the judicial creation of a new medical duty to rescue" (1997) 5 *Torts Law Journal* 27 at 44.

242. **Following paragraph cited by:**

*Couch v Attorney-General* (13 June 2008)

[53] Except in cases of clear impediment (such as where tortious liability is inconsistent with statute), the judgment whether as a matter of proximity and policy it is right to recognise a duty of care in novel circumstances will usually be intensely fact-specific. Lord Steyn in *Gorringe v Calderdale Metropolitan Borough Council* emphasised the especial need to focus closely on the facts and background social context when negligence arises in the exercise of statutory duties and powers, a subject he regarded as one of "great complexity and very much an evolving area of the law". [79] Kirby J in *Pyrenees Shire Council v Day* thought it best to accept that liability in negligence in such hard cases is fixed by reference to a "spectrum" of factors of the kind examined in *Stovin v Wise* by Lord Nicholls [80] and by the "candid evaluation of policy considerations" by Lord Hoffmann [81] in the same case. [82] We agree with that view. It is effectively the approach taken in *South Pacific Manufacturing*.

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[82] (1998) 192 CLR 330 at para [242].

Several variations on the themes of the foregoing approaches to the establishment of a legal duty of care, and to the definition of its content, may be found in the copious judicial and academic writings on this topic [334]. The overlap of the steps stated in the *Caparo* test may be acknowledged. The imprecision of the criteria may be fully accepted. The particular difficulty, and inherent unpredictability, of the third (policy) criteria is inescapable. However, the search in this Court for exact precision and sure predictability by the use of concepts such as "foreseeability", "proximity" and "reliance" should, I think, be taken to have failed. In these circumstances, it is preferable to adopt an approach which accepts honestly that exact

precision and certainty are ultimately unattainable in this area of the law. In particular, it is preferable to accept that the outer boundary of liability in negligence is fixed by reference to a "spectrum" of factors of the kind examined by Lord Nicholls of Birkenhead in [Stovin \[335\]](#) and by the candid evaluation of policy considerations in the same case by Lord Hoffmann [\[336\]](#).

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[\[334\]](#) See for example Doyle, "The Liability Of Public Authorities" (1994) 2 *Tort Law Review* 189 at 195-196; Amirthalingam and Faunce, "Patching up 'proximity': problems with the judicial creation of a new medical duty to rescue" (1997) 5 *Torts Law Journal* 27 at 44. Other proposals range from one of complete negligence immunity to public authorities (see Feldthusen, "Failure To Confer Discretionary Public Benefits: The Case For Complete Negligence Immunity" (1997) 5 *Tort Law Review* 17 at 29-30) to the introduction of a criterion of proportionality (see Mullender, "Negligence, The Public Interest And The Proportionality Principle" (1997) 5 *Tort Law Review* 9 at 11 referring to *Mulcahy v Ministry of Defence* [1996] 2 WLR 474; [1996] 2 All ER 758).

[\[335\]](#) [1996] AC 923 at 939-941.

[\[336\]](#) [1996] AC 923 at 956-958.

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243. It is true that the course which I favour might render it difficult, in particular cases, to determine whether a court would find a duty of care of relevant content was owed by the defendant. But that difficulty already exists. It is masked, but not eliminated, by the use of single word formulae such as "foreseeability", "proximity" and "reliance". Nor does it disappear by the suggestion that the task in hand involves analogous reasoning from established categories of duty relationships, as if such a task could be performed by a court without a theory by which to test the suggested analogies.

244. **Following paragraph cited by:**

[Electro Optic Systems Pty Ltd v State of New South Wales](#) (31 October 2014)  
(Murrell CJ, Jagot and Katzmann JJ)

[Electro Optic Systems Pty Ltd v State of New South Wales](#) (31 October 2014)  
(Murrell CJ, Jagot and Katzmann JJ)

[Electro Optic Systems Pty Ltd v State of New South Wales](#) (31 October 2014)  
(Murrell CJ, Jagot and Katzmann JJ)

I would therefore adopt as the approach to be taken in Australia the three-stage test expressed by the House of Lords in [Caparo \[337\]](#). To decide whether a legal duty of care exists the decision-maker must ask three questions:

1. Was it reasonably foreseeable to the alleged wrong-doer that particular conduct or an omission on its part would be likely to cause harm to the person who has suffered damage or a person in the same position [\[338\]](#) ?

- 2 Does there exist between the alleged wrong-doer and such person a relationship characterised by the law as one of "proximity" or "neighbourhood"[\[339\]](#)?
3. If so, is it fair, just and reasonable that the law should impose a duty of a given scope upon the alleged wrong-doer for the benefit of such person[\[340\]](#)?

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[\[337\]](#) [\[1990\] 2 AC 605](#) at 617-618 per Lord Bridge of Harwich.

[\[338\]](#) *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488 applying *Hackshaw v Shaw* (1984) 155 CLR 614 at 662-663 per Deane J.

[\[339\]](#) Whereas some authorities treat proximity and foreseeability as substantially synonymous, the differentiation reflects the long history of the common law in which foreseeability of the risk of harm to another is insufficient of itself to impose a legal duty to act to avoid consequences to that other; cf McHugh, "Neighbourhood, Proximity and Reliance" in Finn (ed) *Essays on Torts*, (1989) 5 at 17.

[\[340\]](#) This tripartite test is to be preferred to simplistic tests which impose undue work to be done by the notions of proximity and foreseeability; cf Dugdale, "Public Authority Liability: To What Standard" (1994) 2 *Tort Law Review* 143 at 156.

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245. The answer to the first question may often be a relatively easy one. This is because the law usually affords its answer with the wisdom of hindsight, knowing that harm has occurred, the risk of which could have been avoided by the exercise of reasonable care. The answer to the second question will depend upon an analysis of the spectrum of "proximity factors" advanced to define the relationship between the parties out of which a duty is said to arise. Sometimes, but not always, an element of reliance will give content to that relationship. The answer to the third question, which will be necessary only if the first two have been decided in the affirmative, will require the decision-maker to weigh any competing considerations of legal policy in order to determine whether, notwithstanding the proof of foreseeability and proximity, the law should not impose a duty at all or a duty of a scope which the injured party needs in order to succeed. In conformity with the incremental approach accepted by this Court, each of the three questions will be answered with the guidance of the responses given, in analogous circumstances in earlier cases, where a duty of care has been asserted and either found to exist or rejected.

#### Application of a three stage test in this case

246. Reasonable foreseeability In the present case, the answer to the first question is readily given. This is not a situation where the suggested wrong-doer (the Shire) was ignorant of the harm that might arise from a failure to exercise its powers. The case is distinguishable from one in which a claimant is forced to argue that an authority *ought to* have known of a danger

because of its superior resources, powers, skills and so on. Here, the danger was expressly drawn to the notice of the Shire's relevant officers. Both by the letter they wrote at the time, and by their evidence in court, those officers indicated that they were fully aware of it. In particular, the testimony of Mr Walschots cited above was such as to demonstrate that he foresaw a risk that the defect could raze the whole town of Beaufort. This made it plain that he, and through him the Shire, foresaw the likelihood of damage to those in the connected shops and dwellings unless something were done. Clearly, the immediate neighbours of the dwelling containing the dangerous fireplace and chimney (the Days) were within the reasonable contemplation of the risk of such damage. So, as it seems to me, were future tenants who might take occupation if the risk were unattended and if they lacked notice of the Shire's warning.

247. Relationship of "proximity" or "neighbourhood" The second question, upon analysis, may also be answered favourably to the remaining claimants. A number of "proximity factors" tend to establish the kind of relationship between the Shire and the claimants that, in the past, has been held to give rise to a duty of care:

1. The claimants were occupants of shops and attached dwellings to which a fire, of the kind foreseen, could spread. It is of the nature of fires, if unchecked, to spread readily. One might say particularly in a row of connected buildings of indeterminate but advanced age.
2. The Days were, as the judges below inferred, rate-payers of the Shire. Eskimo Amber and the Stamatopouloses were occupiers of a shop and dwelling for which rates were also paid to the Shire. In this sense, none of the claimants was a stranger to the Shire as, for example, was the claimant motorist in *Stovin* who just happened to be driving on a road controlled by a highway authority.
3. The Council of the Shire had relevant powers to require the owners of the shop and residence containing the dangerous chimney and fireplace to repair or remove the danger. The fact that the Shire officers were ignorant of those powers is beside the point. The powers existed for the protection against fire of persons such as the claimants. Had the powers been utilised, they would have provided a ready means for the removal of the danger which persisted and later gave rise to the fire causing the damage sued for.
4. The claimants were in a vulnerable position, and to that extent they were dependent upon the Shire and its officers in the use which they made of the knowledge gained by the inspection by Mr Walschots. The Days had no occasion to examine the fireplace of their neighbour to inspect and discover any dangerous defects. They had no legal right to do this if, remarkably, they had foreseen their risk. The Stamatopouloses had the opportunity of inspection. However, not having been alerted to the danger and presented with a fireplace apparently in ordinary use, they had no occasion to conduct an inspection or to anticipate the existence of the dangers which the Shire's officer had observed and perceived to be potentially hazardous.



5. Although there was no express reliance by any of the claimants upon the Shire, they would have been entitled, had they thought about it, to anticipate that the Shire's officers would have done more for the protection of rate-payers and occupiers at risk from a "razing of Beaufort" than they did. Apart from the enforcement of a notice under s 695(1A) of the *Local Government Act*, it would have been open to the Shire to take other steps, less drastic but also effective. These might have included (a) noting its records to follow-up the warning given in Mr Walschots' letter; (b) alerting immediate neighbours most at risk so that they could be vigilant about the use of the fireplace and chimney, including by strangers, visitors and successors to Mr Tzavaras; (c) noting the Shire's records to ensure that on sale or fresh lease of the premises any new purchasers or occupants would be warned; or (d) requesting the CFA to carry out periodic checks and also to check other fireplaces and chimneys in the row of shops and dwellings. By mentioning these considerations I do not mean to revive the fiction of "general reliance". However, given the foregoing "proximity factors", the undoubted statutory powers of the Shire, the high risk to which it had found the offending fireplace and chimney exposed the shops and dwellings and those who owned and occupied them, it is not at all unreasonable to suggest that *prima facie* more should have been done than to write the rather inconsequential letter which the Shire considered to be the discharge of its responsibilities. This is especially so as the costs and inconvenience of doing any or all of the foregoing would have been small and particularly if measured against the risk that an omission to attend to the danger could result in a fire in which the whole shopping centre could be razed and the town and its occupants threatened.

248. There were, therefore, sufficient "proximity factors" to warrant the success of the remaining claimants, and all of them, against the Shire.
249. Imposition of a duty: policy considerations This brings me to the third requirement which the claimants are obliged to establish in order to succeed. Can it be said that it would be fair, just and reasonable for the common law to impose a duty of care upon the Shire for the benefit of the claimants?
250. It is here that it is necessary to return to the statutory powers and duties of the Shire. The claimants did not persist with their earlier claim that such statutory provisions were a source of a legal obligation which was actionable by them. Instead, they argued that the statutory provisions represented the setting in which the acts and omissions of the Shire had to be considered [341]. Of their nature, some statutory powers are such that they are not susceptible to providing a foundation for, or evidence of, a concurrent common law duty [342]. However, I do not consider that s 695(1A) of the *Local Government Act* 1958 (Vic) falls into this class. It is true that, in this respect, the statute did not itself confer a right to a civil action as, theoretically, it might have done [343]. But that consideration has not in the past necessarily prevented a statute from forming the basis upon which the common law might build a duty of care giving rise to a cause of action [344]. There is nothing inherent in the powers conferred on the Council of the Shire in s 695(1A) which suggests a legislative purpose to *exclude* liability for negligence. That might also have been made clear by Parliament. Several cases exist where public authorities have been rendered liable for



negligent failure to exercise their powers to prevent harm to others who were exposed to a risk of harm held to have been within their contemplation [345]. Therefore, the terms of the Act do not, without more, yield the answer to the question of the Shire's liability in negligence at common law. But they do provide the context in which the policy question, remaining in the three-stage test, must be decided.

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[341] *Heyman's case* (1985) 157 CLR 424 at 434 per Gibbs CJ.

[342] cf *Stovin v Wise* [1996] AC 923 at 938.

[343] *Heyman's case* (1985) 157 CLR 424 at 460 per Mason J.

[344] *Heyman's case* (1985) 157 CLR 424 at 460 per Mason J citing *Scott v Green & Sons* [1969] 1 WLR 301 at 304; [1969] 1 All ER 849 at 850 per Lord Denning MR.

[345] *Anns v Merton London Borough* [1978] AC 728; *Peabody Donation Fund v Sir Lindsay Parkinson Ltd* [1985] AC 210 and other cases cited by McHugh, "Neighbourhood, Proximity and Reliance" in Finn (ed) *Essays on Torts* (1989) 5 at 17-22.

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251. A number of considerations, drawn from earlier cases, where like questions have been decided, argue for and against rendering the Shire liable to the claimants here.

252. **Following paragraph cited by:**

*Kirkland-Veenstra v Stuart* (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

*Kirkland-Veenstra v Stuart* (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

In favour of imposing a duty of care extending to the use of the powers under s 695(1A) of the *Local Government Act* are the following considerations:

1. The statutory power in question is not simply another of the multitude of powers conferred upon local authorities such as the Shire. It is a power addressed to the special risk of fire which, of its nature, can imperil identifiable life and property. Therefore, the nature of the power enlivens particular attention to its exercise and to the proper performance of a decision whether to give effect to it or not[346]. Upon the evidence in this case, the proper exercise of the power was not considered for the simple reason that the Shire's officers were ignorant of s 695 (1A) of the Act.
2. It is settled law that where a public authority enters upon the exercise of its powers, it must do so carefully [347]. Whilst it is true that, in the present case, the Shire did not enter upon the exercise of the power under s 695(1A), still less the

enforcement provisions elsewhere in the *Local Government Act* (as it might), it did take some steps. It took them, according to its officers, with other statutory powers of dubious relevance in mind. Even then, the letter sent was not a competent exercise of those powers. Therefore, what occurred might fairly be viewed as a recognition by the officers of the Shire of a need for positive action on its part but a wholly incompetent discharge of the perceived need. Although in this case, it cannot be said that the Council positively created the risk of the fire which ensued [348], its response to the discovery of that risk was not entirely passive. This was not, therefore, a case of pure omission. It involved action but plainly inadequate and incompetent action. Had the action been competent and careful, the damage suffered by the claimants would probably have been avoided.

3. In many cases where action is brought against public authorities for omission to exercise statutory powers, emphasis is placed upon the degree of danger to which the claimant is exposed by that omission; the expertise available to the authority; the opportunities of intermediate self-protection; and the cost and inconvenience involved in the exercise of the powers. The plainest cases of this class involve the inspection of aircraft by a public authority where a failure to exercise statutory powers could have devastating consequences upon those who depend upon the authority to do so [349]. In the present case, as it happens, the damage done to the claimants was relatively modest. However, in determining whether the Shire ought to have used its powers it is relevant to take into account its own estimates of the peril judged at the time at which it acquired its knowledge. Those estimates were of a very high danger indeed in circumstances where it would have known that most of the people at risk were vulnerable, being ignorant of the danger which the Shire's inspection had disclosed and unable or unlikely by their own conduct to discover it.

4. Whilst the promotion of individual choice and the efficient use of resources is a proper concern for public authorities, so is the adoption of good administration and procedures for the proper use of statutory powers. It cannot be conducive to good public administration if serious dangers do not enliven an effective exercise of available powers; if the response is wholly inadequate and then if it is not followed up at all. Simply in economic terms, given the potential danger foreseen by Mr Walschots, this is arguably not the exercise of the power under s 695(1A) of the *Local Government Act* which Parliament envisaged when that power was conferred on the Shire for the protection of the public.

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[346] Manning, "Torts and Accident Compensation" [1996] *New Zealand Law Review* 442 at 449.

[347] *Heyman's case* (1985) 157 CLR 424 at 459 per Mason J.

[348] *Heyman's case* (1985) 157 CLR 424 at 465 per Mason J.

[349] For example *Clemente et al v United States* 567F 2d 1140 (1977); *United Scottish Insurance v United States* 692F 2d 1209 (1982); *S A Empresa De Viaco Aerea Rio Grandense v United States* 692 F 2d 1205 (1982); see *Heym*

253. **Following paragraph cited by:**

*Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd* (22 September 2009) (McColl and Campbell JJA, Sackville AJA)

As against these considerations, there are others which argue that it is not "fair, just and reasonable that the law should impose a duty of a given scope" upon the Shire:

1. The Shire was small in numbers. By inference, its resources were small and its personnel few. What might be expected of a large public authority, well resourced and expertly advised, could not reasonably be imposed upon a body such as the Shire. On the other hand, the small size and population of the Shire made it easier for officers to visit and inspect sources of serious danger. It seems hardly likely that the discovery of a fire risk with a potential to threaten the main town of the Shire would be an everyday occurrence.

2. The small resources of the Shire make it reasonable that owners and occupiers of premises within the Shire should be expected to take precautions to protect themselves against risks rather than looking to the "deep pocket" of the public purse to do so. In this case that pocket would not be very deep at all. Owners and occupiers of property commonly do, and should, protect themselves, including by fire insurance [350] . The law should encourage self-reliance because it tends to promote greater economic efficiency [351] . To some extent, Shire rates and services would have been arranged with the operation of individual self-protection and private insurance in mind. These principles, whilst valid, cannot be extended to exclude recovery for *every* failure of the public authority to use its available powers[352]. That would not only contradict many decisions in negligence claims. It would be inconsistent with the established legal rule that in some circumstances, "may", in a statute empowering a public authority to act, can mean "must" [353] .

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[350] *Stovin v Wise* [1996] AC 923 at 955 ; see also at 933; cf Rubinstein, "The Liability Of Bodies Possessing Statutory Powers For Negligent Failure To Avoid Harm" (1987) 13 *Monash University Law Review* 75 at 118.

[351] *Stovin v Wise* [1996] AC 923 at 944. .

[352] Hoehn, *Municipalities and Canadian Law - Defining the Authority of Local Governments* (1996) at 76-77.

[353] *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214; cf *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 88, 97.

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3. A particular consideration of policy mentioned by Lord Hoffmann in *Stovin* is the undesirability of adopting a rule which would result in insurance companies, under to their rights of subrogation, recouping themselves from the purse of a public authority [354]. However, in the absence of evidence (assuming it to be admissible) it is pure speculation as to whether the claimants here were insured or whether the public authority was uninsured. Of more direct concern would be the extension of duties to public authorities which would make it more difficult for them to obtain insurance or result in the curtailment of services because they are effectively uninsurable. There was no evidence on any of these questions.

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[354] *Stovin v Wise* [1996] AC 923 at 955.

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4. In many cases, a court is not competent to review the decisions of public authorities as to their use of their resources. It has been suggested that the separation of powers lies at the heart of restraint of courts in substituting their judgments for those of the public authority [355]. Typically, a court does not have the "financial, economic, social or political factors or constraints" before it that are available to the officers of the public authority [356] in the deployment of its resources. Courts have drawn a distinction between "policy" decisions, which they will leave to the public authority itself, and "operational" decisions which they will have competence to evaluate [357]. Although the distinction is far from perfect, it has some validity. In the present case, more effective notice to the owner and occupier of 70 Neil Street concerning the hazard of fire and the provision of follow-up would certainly fall on the "operational" side of the line. But this conclusion leaves standing Lord Hoffmann's comment that courts should be wary of undue intervention in decisions having significant implications for the budgets of public authorities [358]:

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[355] Doyle, "The Liability Of Public Authorities" (1994) 2 *Tort Law Review* 189 at 195.

[356] Doyle, "The Liability Of Public Authorities" (1994) 2 *Tort Law Review* 189 at 197.

[357] *Heyman's case* (1985) 157 CLR 424 at 469; cf *Anns v Merton London Borough* [1978] AC 728 at 754.

"This would distort the priorities of local authorities, which would be bound to try to play safe by increasing their spending on road improvements rather than risk enormous liabilities for personal injury accidents. They will spend less on education or social services. I think that it is important, before extending the duty of care owed by public authorities, to consider the cost to the community of the defensive measures which they are likely to take in order to avoid liability."

On the other hand, expensive defensive measures against the perils of individual accidents may be less likely to be held to impose a legal duty than modest measures in a small town to remove a source of fire considered a potential danger.

5. The extent of the risk necessary to convert a statutory power into an obligation to act in particular circumstances has been variously described. In *Stovin*, Lord Hoffmann suggested that a consideration would be whether it could be said to be "irrational" for the authority not to exercise its powers [359]. Although such a test might have the attraction of reconciling principles of the law of negligence and administrative law, it would impose on a claimant a burden more onerous than the law of negligence typically does. It may be "fair, just and reasonable" to impose on a public authority a duty of care to exercise relevant statutory powers in given circumstances although a refusal to do so would not have attracted the epithet "irrational". This would be especially so where the beneficiaries of the power "could not guard themselves" [360] or where the defects said to call forth the

exercise of the power are dangerous and even life-threatening [361]. The fact that, in the result, injury to life and body were not caused in this case is irrelevant to the peril which was foreseen. It was that peril which rendered it fair, just and reasonable that the Shire should have exercised its powers on this occasion.

6. The final consideration of policy relates to the opportunity which the several claimants had to inspect and appreciate the source of the danger to them [362]. Reasonable assumptions of self-reliance make it appropriate to withhold the imposition of a duty of care where the party suffering loss had reasonable opportunities to inspect a danger or otherwise to protect itself. But where the defects which give rise to the damage are latent and such as may not manifest themselves for a considerable time, or until it is too late, the party injured may have no appreciation of the danger and no occasion to consider it and take steps in self-protection. In the balance of the possession of relevant information here the Shire was at an enormous advantage. The claimants were at a profound disadvantage.

[359] *Stovin v Wise* [1996] AC 923 at 954.

[360] *Stovin v Wise* [1996] AC 923 at 954.

[361] *Winnipeg Condo Corp v Bird Construction Co* [1995] 1 SCR 85; (1995) 121 DLR (4th) 193; cf *Bryan v Maloney* (1995) 182 CLR 609 at 649-650 per Brennan J; see also comment in Wallace "The *Murphy* Saga in Australia: *Bryan* in Difficulties?" (1997) 113 *Law Quarterly Review* 355 at 355.

[362] *Bryan v Maloney* (1995) 182 CLR 609 at 663 per Toohey J citing *Lempke v Dagenais* 547 A 2d 290 (1988).

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Conclusion: a duty to exercise powers is shown

254. The risk of harm to the claimants was known to the Shire and the damage which ensued from that risk was foreseeable. Similarly, all of the claimants can quite readily be classified as within a proximity relationship in respect of the Shire. The difficult question is, as it will usually be, whether considerations of policy make it "repugnant" to allow recovery against the Shire [363]. I do not agree with the remark of the Privy Council in *Yuen Kun Yeu v Attorney-General of Hong Kong* [364] that the evaluation of the policy considerations "will rarely have to be applied" to deny the imposition of a duty of care and thus of liability [365]. Unless policy considerations of fairness, justice and reasonableness are to be hidden again in the malleable, imprecise and sometimes fictitious concepts of "foreseeability", "proximity" and "general reliance", the ultimate question will often need to be addressed. And it is, in every case which is not covered by an established category, a question of legal policy disciplined by the application of analogies derived as far as possible from past authority.

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[363] *Gala v Preston* (1991) 172 CLR 243 at 278 per Dawson J; cf Amirthalingam and Faunce, "Patching up 'proximity': problems with the judicial creation of a new medical duty to rescue" (1997) 5 *Torts Law Journal* 27 at 36.

[364] [1988] AC 175 at 193. Note that this was stated in the context of considering *Anns* in its application to the law of Hong Kong.

[365] Amirthalingam and Faunce, "Patching up 'proximity': problems with the judicial creation of a new medical duty to rescue" (1997) 5 *Torts Law Journal* 27 at 39.

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255. It will be apparent from my comments on the policy considerations elaborated above that I would conclude, alike with Judge Strong and Brooking JA, that the law did impose a duty of care on the Shire for the benefit of the Days. The scope of the duty was to oblige the Shire to consider and effectively to exercise the powers which it had under s 695(1A) of the *Local Government Act*. It also required the Shire to follow up action under that subsection. The



most important considerations for imposing that duty on the Shire in the case of the Days were the dangers to human life and to identifiable property discovered on the Shire's inspection, the substantial risk of harm if the dangers were not repaired or removed, the latent character of the dangers and the inability of persons such as the Days to discover them and to protect themselves and their property from them, save by insurance, the possibility of which cannot alone deny rights to the Days. The appeal by the Shire against the judgment entered in favour of the Days therefore fails.

256. As for Eskimo Amber and the Stamatopouloses, the position is more complicated but essentially by one factor only. This is that they were resident in the premises and could have (had they thought to do so) inspected the fireplace and chimney and taken advice on its apparent defects. However, in default of a notice from the Shire or a warning from Mr Tzavaras (neither of which was found to be forthcoming) there was no reason for such an inspection to take place. Eskimo Amber and the Stamatopouloses were presented with a fireplace and chimney, apparently available for use. They too became the victims of the wholly inadequate response by the Shire to the serious dangers which Mr Walschots had discovered. The situation would have been different if the Shire had not taken action, had conducted no inspection, had no prior notice or no powers as clearly applicable as s 695(1A) was. But having embarked upon action, and then having performed it so inadequately, it is neither fair, just nor reasonable, to deny recovery and to differentiate the position of the Stamatopouloses' interests from those of the Days. The former had no occasion to inspect for defects, whereas the Shire was fully alerted to them and clothed with powers enacted by Parliament for the protection of them and others in the field of danger. A tenant would not normally embark upon structural repairs to a fireplace and chimney of demised premises. That is presumably why the enforcement provisions of the *Local Government Act* permitted repairs to be effected, if necessary by the occupier, at a cost deducted from the recalcitrant landlord's rent [366]. Because the defects discovered by the Shire were latent, it is not reasonable in this case to suggest that the Stamatopouloses and Eskimo Amber should have discovered them or anticipated them and protected themselves. Nor can the facility of securing their own insurance present a complete answer to their claims against the Shire. In the circumstances, it is therefore fair, just and reasonable that the law should impose a duty on the Shire in relation to Eskimo Amber and the Stamatopouloses. Its scope is the same as in the case of the Days. They are entitled to succeed in their appeal.

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[366] *Local Government Act* 1958 (Vic), s 885.

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257. In the conclusion which Judge Strong reached, the only third party or contribution proceedings which arose for consideration were those between the Shire and Mr Tzavaras in the action by the Days [367]. His Honour recorded that, although there were third party proceedings by the Shire against Mr Tzavaras no notice of contribution had been filed under the *Wrongs Act*. Nevertheless, it appears to have been accepted that the judge should treat the third party proceedings as if they were contribution proceedings. It was upon that footing that Judge Strong apportioned the Days' damages between Mr Tzavaras and the Shire in the ratio previously stated [368]. It would appear likely that a similar apportionment would be made in respect of the judgments in favour of Eskimo Amber and the Stamatopouloses. However, in



light of the defects in the pleadings, the absence of submissions on this point and the need to give the parties the opportunity to be heard before orders were finally made, it is appropriate that this issue should be remitted to the Court of Appeal for final orders.

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[367] Judgment of Judge Strong at 49.

[368] Judgment of Judge Strong at 50.

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## Orders

258. I agree in the orders proposed by Gummow J.

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## **Cited by:**

Von Stalheim v Director of Housing [2025] TASFC 2 -

Mitchell v The Queen [2023] HCA 5 -

Seiffert v The Prisoners Review Board [2023] WASCA 15 (01 February 2023) (Buss P; Mazza and Beech JJA)

Pyrenees Shire Council v Day [1998] HCA 3 ; (1998) 192 CLR 330

Seiffert v The Prisoners Review Board [2023] WASCA 15 -

Electricity Networks Corporation v Herridge Parties [2022] HCA 37 (07 December 2022) (Kiefel CJ, Gageler, Gordon, Edelman and Steward JJ)

28. Where a statutory authority which, consistent with its express functions, in fact "ent[er[s] into the field" [18] of exercising specific powers in the discharge of its functions [19], the exercise of power is sometimes also described in terms of "control": the assumption of control [20]; the taking "advantage of ... control" [21]; or the "control exercised" [22]. However described, it is the identification of the statutory authority's powers that it in fact exercised that is critical because it is the manner of the exercise of those powers to which a common law duty of care may attach [23]. Having identified the powers that were in fact exercised by the statutory authority in the performance of its functions, the question is: does the common law impose on the statutory authority a duty of care as to the manner of its exercise of those statutory powers (or performance of its statutory duties) [24]? And in answering that question, it is often helpful to ask whether the statutory authority has exercised its powers to "intervene in a field of activity" in a manner which has increased the risk of harm to persons whom it had the power to protect [25].

*via*

[24]  
[177]

*Sutherland Shire Council* (1985) 157 CLR 424 at 458, 484; *Pyrenees* (1998) 192 CLR 330 at 391-392

Electricity Networks Corporation v Herridge Parties [2022] HCA 37 -

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[Electricity Networks Corporation v Herridge Parties](#) [2022] HCA 37 -  
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[Electricity Networks Corporation v Herridge Parties](#) [2022] HCA 37 -  
[Electricity Networks Corporation v Herridge Parties](#) [2022] HCA 37 -  
[Electricity Networks Corporation v Herridge Parties](#) [2022] HCA 37 -  
[Electricity Networks Corporation v Herridge Parties](#) [2022] HCA 37 -  
[Minister for the Environment v Sharma](#) [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

859. In [Vairy](#) at [86], Gummow J referred again to the reference to “assumed legislative intent” in the above passage from Deane J’s judgment in [Heyman](#), and refined his views about the foundation for excluding some types of government activity from the tort of negligence –

However, as appears from the passage just quoted, his Honour saw “assumed legislative intent” as the basis for such an exclusion of liability. That proposition can no longer be said to provide a complete representation of the present state of the law in Australia. In [Crimmins](#), Hayne J said [at [292]]:

Put at its most general and abstract level, the fundamental reason for not imposing a duty in negligence in relation to the quasi-legislative functions of a public body is that the function is one that must have a public rather than a private or individual focus. To impose a private law duty will (or at least will often) distort that focus. This kind of distinction might be said to find reflection in the dichotomy that has been drawn between the operational and the policy decisions or functions of public bodies. And a quasilegislative function can be seen as lying at or near the centre of policy functions if policy and operational functions are to be distinguished. But as more recent authority suggests, that distinction may not always be useful.

(Footnotes omitted.)

Three points may be extracted from this passage. First, it is not so much an assumed legislative intent, as it is the public focus of a quasi-legislative function, which limits the private law duties of a public body. Secondly, the distinction between the operational and policy functions of such a body is of dubious utility [citing [Pyrenees](#) at [180]-[182]]. And, thirdly, to the extent that this distinction nonetheless is useful and should be preserved, the mere circumstance that a function is quasi-legislative should suffice as a basis upon which to describe it as a policy function. Hayne J was one of the minority in [Crimmins](#) but these points were all reflected in the various other judgments, both of the majority and minority [citing [Crimmins](#) at [32], [93], [170]].

[Minister for the Environment v Sharma](#) [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

192. The respondents submitted that in circumstances of a duty of care to avoid personal injury or death the test for inconsistency or incoherence was the exclusion of the duty by the statute in express terms or necessary implication. Incoherence cannot, however, be the disguise or cloak of a principle to preclude the Executive being liable for the negligent but valid exercise of a statutory power. Such would be in conflict with [Crimmins](#) 200 CLR 1, [Pyrenees](#) 192 CLR 330 and the premise of s 75(iii),

[Minister for the Environment v Sharma](#) [2022] FCAFC 35 -

Hobart International Airport Pty Ltd v Clarence City Council [2022] HCA 5 (09 March 2022) (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ)

- via*

Della Franca v Lorenzo; Burwood Council v Lorenzo [2021] NSWCA 321 -  
Della Franca v Lorenzo; Burwood Council v Lorenzo [2021] NSWCA 321 -  
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 (02 July 2021)  
 (Buss P, Murphy JA, Mitchell JA)

- via*

[104] *Pyrenees Shire Council v Day* [1998] HCA 3; (1998) 192 CLR 330 [126]; *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; (1999) 200 CLR 1 [159]; *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; (2002) 211 CLR 540 [78] - [79], [146] - [148]; *Stuart v Kirkland-Veenstra* [2009] HCA 15; (2009) 237 CLR 215 [52], [75]; *Hunter and New England Local Health District v McKenna* [2014] HCA 44; (2014) 253 CLR 270 [22] - [23].

*Herridge Parties v Electricity Networks Corporation t/as Western Power* [2021] WASCA 111 -  
*Valmont Interiors Pty Ltd v Giorgio Armani Australia Pty Ltd (No 2)* [2021] NSWCA 93 -  
*Calidad Pty Ltd v Seiko Epson Corporation* [2020] HCA 41 (12 November 2020) (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ)

78. It should not be overlooked that the licence upon which the doctrine depends is a fiction. It is not a licence in fact granted by a patentee to a purchaser or later owner of a patented product [120]. It is not implied to give business efficacy to the sale agreement. It is imposed by the courts in an endeavour to resolve a perceived tension in the law. In *Pyrenees Shire Council v Day* [121], Gummow J remarked that a legal fiction, such as trespassers being treated as having been upon a defendant's land under an imputed licence, may "operate to reconcile a specific legal outcome or result with a premise or postulate involving unexpressed considerations of social and economic policy". His Honour considered that the modern preference for substance over form did not favour the preservation of legal fictions. In that regard it may also be said that greater emphasis would now be given to the maintenance of fundamental legal principle. Any adjustment of rights arising according to fundamental legal principle with statutory rights would not be undertaken without first determining the scope of the statutory rights, by a process of construction,

via

[121] (1998) 192 CLR 330 at 387 [163].

*Calidad Pty Ltd v Seiko Epson Corporation* [2020] HCA 41 -  
*Raine v The Queen* [2020] NSWCCA 32 -  
*Raine v The Queen* [2020] NSWCCA 32 -  
*Raine v The Queen* [2020] NSWCCA 32 -  
*FRM17 v Minister for Home Affairs* [2019] FCAFC 148 (28 August 2019) (Kenny, Robertson and Griffiths JJ)

210. Of course, that is not to say that statutory provisions are irrelevant in a proceeding brought against a statutory authority for breach of a common law duty of care. As McHugh J stated in *Crimmins* at [114] "[n]o common law duty of care can be imposed on a statutory authority if to do so is either forbidden by the relevant Act or is inconsistent with the statutory scheme", not the least because coherence of the law must be preserved. Accordingly, in such a case, close attention has to be paid to relevant statutory provisions (see, for example, *Pyrenees Shire Council* at [126] (Gummow J); *Sullivan v Moody* at [50] and [55] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Leichardt Municipal Council v Montgomery* [2007] HCA 6; 230 CLR 22 at [137] (Hayne J); *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47; 239 CLR 390 at [41] (Gummow, Heydon and Crennan JJ)). Such attention may be particularly important where the statute "establishes relationships, conduct or other subject matter which are not previously known to the common law and whose origins lie wholly within the four walls of the statute": *Crimmins* at [159] (Gummow J). In a case founded upon a common law duty, however, the source of a statutory authority's alleged liability is the common law, with the statutory provisions providing the "setting in which its acts and omission have to be considered": *Heyman* at 434 (Gibbs CJ); and see also *Crimmins* at [25] (Gaudron J), [154] and [157] (Gummow J); *Birch* at 658-659 (Barwick CJ); *Graham Barclay Oysters* at [80] (McHugh J).

*FRM17 v Minister for Home Affairs* [2019] FCAFC 148 -

Meyers v Commissioner for Social Housing [2019] ACTCA 19 (07 August 2019) (Elkaim, Loukas-Karlsson and Charlesworth JJ)

Pyrenees Shire Council v Day [1998] HCA 3; 192 CLR 330  
Southern Union Insurance Co of Australia v Altinier

Meyers v Commissioner for Social Housing [2019] ACTCA 19 (07 August 2019) (Elkaim, Loukas-Karlsson and Charlesworth JJ)

137. Since Graham Barclay and Pyrenees were decided, irrationality and illogicality of the kind identified in Wednesbury have been identified as specific instances of legal unreasonableness, as explained in Minister for Immigration and Citizenship v Li [2013] HCA 18; 249 CLR 332 ( Li ). It is well established that a decision made pursuant to a statute (including a decision not to exercise a power conferred in discretionary terms) may be vitiated for jurisdictional error if the decision falls outside of the permissible area of decisional freedom reposed in the decision-maker. The area of decisional freedom is to be discerned by a close examination of the statute under which the power is conferred: see Li at [28] (French CJ); Minister for Immigration and Border Protection v Stretton [2016] FCAFC 11; 237 FCR 1 ( Stretton ) at [7], [11] (Allsop CJ). It follows that an authority may be “required” to exercise a discretionary power in a particular way if a decision not to exercise the power in that way would be *legally* unreasonable. In such a case, mandamus may issue to compel the exercise of a power, notwithstanding that the power is conferred in discretionary terms.

Meyers v Commissioner for Social Housing [2019] ACTCA 19 -

Meyers v Commissioner for Social Housing [2019] ACTCA 19 -

Meyers v Commissioner for Social Housing [2019] ACTCA 19 -

Meyers v Commissioner for Social Housing [2019] ACTCA 19 -

Meyers v Commissioner for Social Housing [2019] ACTCA 19 -

Meyers v Commissioner for Social Housing [2019] ACTCA 19 -

Brighten v Traino [2019] NSWCA 168 -

Osborne Park Commercial Pty Ltd v Miloradovic [2019] WASCA 17 -

Osborne Park Commercial Pty Ltd v Miloradovic [2019] WASCA 17 -

Ibrahimi v Commonwealth of Australia [2018] NSWCA 321 (19 December 2018) (Meagher and Payne JJA, Simpson AJA)

214. Yet, as Lord Hoffmann observed in Stovin v Wise at 945, “the conditions necessary to bring about an event *always* consist of a combination of acts and omissions” (emphasis added). Thus, meaningful use of the distinction between acts and omissions depends on a “common sense” approach to causation, which in this context entails an approach focused on the purpose of that distinction in the attribution of legal responsibility. The point is classically illustrated by a motorist whose driving, rather than failure to brake, is said to cause an accident. In that example, the former act (or series of acts) initiates a physical process which in the ordinary course of nature could bring about the event unless the person takes some further action: see also HLA Hart and Tony Honoré, *Causation in the Law*, (2nd ed 1985, Oxford University Press) 138–141; Pyrenees at [177] (Gummow J) .

Ibrahimi v Commonwealth of Australia [2018] NSWCA 321 -

Ibrahimi v Commonwealth of Australia [2018] NSWCA 321 -

Ibrahimi v Commonwealth of Australia [2018] NSWCA 321 -

Ibrahimi v Commonwealth of Australia [2018] NSWCA 321 -

Laming v Jennings [2018] VSCA 335 -

Fuller-Wilson v State of New South Wales [2018] NSWCA 218 -

Chiro v The Queen [2017] HCA 37 (13 September 2017) (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ)

122. A fiction deems to be true that which is known not to be so or that which is unproved. The purpose of a fiction is “to reconcile a specific legal result with some premise or postulate” [151].



That postulate is generally an unexpressed consideration of social and economic policy [152]. The consideration of social policy underlying the appellant's submission that the sentencing judge should have sentenced him on the basis that he committed only the most minor acts alleged must be that facts constituting the s 50 offence must be found by a jury and not by a judge. This would mean that in many cases involving offences charged under s 50(1), a general verdict of the jury would no longer be sufficient for proper sentencing.

via

[152] Fuller, *Legal Fictions*, (1967) at 71; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 387 [163] per Gummow J; [1998] HCA 3.

*Chiro v The Queen* [2017] HCA 37 -

*Mansfield v Great Lakes Council* [2016] NSWCA 204 -

*Mansfield v Great Lakes Council* [2016] NSWCA 204 -

*DC v State of New South Wales* [2016] NSWCA 198 -

*Electro Optic Systems Pty Ltd v State of New South Wales* [2014] ACTCA 45 (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)

221. NSW pointed out that in *Drexel London (a firm) v Gove (Blackman)* (2009) 170 LGERA 54; [2009] WASCA 181 McClure JA said:

[266] This is not a pure omission case. The City purported to perform its duty under s 5(6)(c). The injured claimants (who were visitors to the building) say this fact alone brings the City within an established category giving rise to a duty of care: see *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 219–220; *Sutherland Shire Council v Heyman* (at 458; 144) (Mason J); *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [62] (McHugh J). I am not satisfied that is an accurate proposition. It ignores the role of the statutory scope and purpose of the relevant duty or power. The exercise of a statutory power or performance of a statutory duty may (not must) import a common law duty to take care: *Sutherland Shire Council v Heyman* (at 458–459; 144–145) (Mason J).

[267] For example, there will be no common law duty of care if the statute expressly or impliedly excludes a parallel common law duty. There are other examples where positive conduct undertaken in a regulatory context has not given rise to a common law duty of care: *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] 1 AC 175 (which concerned both acts and omissions); *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] 1 AC 211; *Reeman v Dept of Transport* [1997] 2 Lloyd's Rep 648; cf *Perrett v Collins* [1998] 2 Lloyd's Rep 255.

[268] Although the mere existence of a statutory duty or power does not create a common law duty, the scope and purpose of the statutory duty or power can inform and affect the existence and content of any common law duty: *Sutherland Shire Council v Heyman* (at 439, 447; 129–130, 135–136); *Pyrenees Shire Council v Day* (1998) 192 CLR 330; 96 LGERA 330; *Stuart v Kirkland-Veenstra* at [139]–[146]; *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101; 91 LGERA 361.

*Electro Optic Systems Pty Ltd v State of New South Wales* [2014] ACTCA 45 -

*Electro Optic Systems Pty Ltd v State of New South Wales* [2014] ACTCA 45 -

*Electro Optic Systems Pty Ltd v State of New South Wales* [2014] ACTCA 45 -

*Electro Optic Systems Pty Ltd v State of New South Wales* [2014] ACTCA 45 -

*Electro Optic Systems Pty Ltd v State of New South Wales* [2014] ACTCA 45 -

*Dansar Pty Ltd v Byron Shire Council* [2014] NSWCA 364 -

*Dansar Pty Ltd v Byron Shire Council* [2014] NSWCA 364 -

*Dansar Pty Ltd v Byron Shire Council* [2014] NSWCA 364 -

*Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 (08 October 2014) (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ)

21. An extended concept of proximity was adopted in this Court as a criterion of the existence of a duty of care in the 1980s and until the beginning of this century [46]. It was used to identify categories of cases in which a duty of care arose under the common law of negligence, rather

than as a test for determining whether the circumstances of a particular case brought it within such a category [47]. It was invoked in 1995 in *Bryan v Maloney* [48], in which the Court held that the builder of a dwelling house owed a duty of care to a subsequent purchaser of the house, a breach of which, by careless construction giving rise to latent defects, would support an action in negligence for economic loss. Thereafter it became a metaphor under threat. McHugh J in *Perre v Apand Pty Ltd* [49] regarded it as already despatched [50]. In *Sullivan v Moody*, it was put to rest by the whole Court, which observed that despite its centrality for more than a century [51]:

"it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established".

That was not to say, and the Court did not say, that its application in previous cases such as *Bryan v Maloney*, which was of a classificatory and conclusionary character, falsified the underlying judgments that the circumstances said to be indicative of "proximity" gave rise to a duty of care. As Basten JA observed in the Court of Appeal, "the factors which were apt to be included" in "the concept of 'proximity' as a touchstone of the existence of a duty of care ... remain relevant" [52].

via

[50] (1999) 198 CLR 180 at 209–210 [74] referring to *Hill v Van Erp* (1997) 188 CLR 159 at 176–177 per Dawson J, 210 per McHugh J, 237–239 per Gummow J; [1997] HCA 9 and *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 414 per Kirby J; [1998] HCA 3.

*Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 (08 October 2014) (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ)

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[50] (1999) 198 CLR 180 at 209–210 [74] referring to *Hill v Van Erp* (1997) 188 CLR 159 at 176–177 per Dawson J, 210 per McHugh J, 237–239 per Gummow J; [1997] HCA 9 and *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 414 per Kirby J; [1998] HCA 3.



165. In Heyman, [92] the purpose of the statutory scheme was 'to ensure that buildings are properly constructed in the interests of health and safety' and 'in the interest of achieving or maintaining a standard of building appropriate to the municipality or area of the municipality concerned.' In Pyrenees, [93] the statute gave the Council 'significant and special measure of control over the safety from fire of persons and property in [the claimant's] street'.

via

[93] (1998) 192 CLR 330 .

Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd [2014] VSCA 165 -  
Apache Energy Ltd v Alcoa of Australia Ltd [No 2] [2013] WASCA 213 -  
Apache Energy Ltd v Alcoa of Australia Ltd [No 2] [2013] WASCA 213 -  
MM Constructions (Aust) Pty Ltd v Port Stephens Council [2012] NSWCA 417 -  
MM Constructions (Aust) Pty Ltd v Port Stephens Council [2012] NSWCA 417 -  
Kable v State of New South Wales [2012] NSWCA 243 -  
North Shore City Council v Attorney-General [2012] NZSC 49 -  
North Shore City Council v Attorney-General [2012] NZSC 49 -  
North Shore City Council v Attorney-General [2012] NZSC 49 -  
North Shore City Council v Attorney-General [2012] NZSC 49 -  
Warren Shire Council v Kuehne [2012] NSWCA 81 (16 April 2012) (McColl and Whealy JJA, Sackville AJA)

132. The law has in recent times grappled with the problem of ascertaining whether a duty of care arises in such cases. This is especially so in a case where a person has been harmed, arguably as a consequence of a failure by a person or body to exercise an available statutory power. In such a case, the existence and nature of the statutory power is central to the resolution of the problem. As Gummow J pointed out in Pyrenees Shire Council v Day ([1998] HCA 3; 192 CLR 330) at [126] :

"Some of these distinctions and doctrines are entrenched in the common law of Australia, others are not. All of them ... tend to distract attention from the primary requirement of analysis of any legislation which is in point and of the positions occupied by the parties on the facts as found at trial. This analysis is of particular importance where ... the facts do not fall into one of the classes ... already recognised by the authorities as attracting a duty of care, the scope of which is settled."

Warren Shire Council v Kuehne [2012] NSWCA 81 -  
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -  
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -  
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -  
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -  
Kudrin v City of Mandurah [2012] WASCA 65 -  
Kudrin v City of Mandurah [2012] WASCA 65 -  
SAS Trustee Corporation v Cox [2011] NSWCA 408 -  
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11 -  
Meshlawn P/L v State of Qld [2010] QCA 181 (20 July 2010) (McMurdo P, Chesterman JA and Fryberg J,)

83. In *Graham Barclay Oysters, Gummow and Hayne JJ* said (598):

“In *Brodie*, the council exercised physical control over the condition of the roads which it was empowered by statute to maintain and which ... constituted the direct source of harm to road users ... . The council’s measure of control over the safety of the person or property of citizens was ‘significant and exclusive’ ... . So, too, the fact of control over, and knowledge of, land or premises has been significant in identifying the duty of care owed to users of land or premises by a statutory authority which controls and manages that land or premises ... . Again, in *Pyrenees Shire Council v Day* ... , the Shire held a significant and special measure of control over the safety from fire of persons and property at the relevant premises. That degree of control was the touchstone of the Shire’s duty to safeguard others from the risk of fire in circumstances where the Shire had entered upon the exercise of its statutory powers of fire prevention and it alone ... knew of, and was responsible for, the continued existence of the risk of fire ...”. (footnotes omitted)

Meshlawn P/L v State of Qld [2010] QCA 181 -

Meshlawn P/L v State of Qld [2010] QCA 181 -

Meshlawn P/L v State of Qld [2010] QCA 181 -

Meshlawn P/L v State of Qld [2010] QCA 181 -

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Meshlawn P/L v State of Qld [2010] QCA 181 -

Meshlawn P/L v State of Qld [2010] QCA 181 -

Pollard v Wilson [2010] NSWCA 68 (08 April 2010) (Macfarlan JA Young JA McClellan CJ at CL)

151. The other particulars of alleged negligence in relation to the Council may be shortly disposed of. There is no obligation on a council to supervise work on a building site for which its approval has not been required or given. It may be that if a council in some manner assumes responsibility for supervising the quality of the building work it may have a duty of care to carry out this task without negligence (see *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; [1985] HCA 41; *Parramatta City Council v Lutz* (1988) 12 NSWLR 293; *Pyrenees v Day* (1998) 192 CLR 330; [1998] HCA 3; *Ryan v Great Lakes Council* [1999] FCA 177; *Makawe Pty Ltd v Randwick City Council* [2009] NSWCA 412). But that was not the present case. The lopping of the jacaranda tree and removal of the pistachio nut tree did not require the Council’s approval and the Council did not assume control of or in any manner supervise that work. Although in the proper discharge of its function the Council should have considered the complaints of the Pollards, it did this and ultimately, and so far as I can see, appropriately decided to take no action.

Pollard v Wilson [2010] NSWCA 68 -

Makawe Pty Ltd v Randwick City Council [2009] NSWCA 412 (15 December 2009) (Hodgson and Campbell JJA, Simpson J)

138 A further submission made was put as follows:

“34.

(c) Sometimes one salient feature, or factor can assume overwhelming significance, so it is unlikely that all other factors also need to be satisfied before a duty is found.”

*Pyrenees Shire Council v Day* [1998] HCA 3; (1998) 192 CLR 330 was cited as an illustration of the proposition.

25 In *Pyrenees*, Brennan CJ (at 344) asserted that legislative intention was the criterion for a public law duty of a public authority to exercise a power, and he was unable to accept “general reliance” as the basis of such a liability. Gummow J (at 387-88) described the general reliance doctrine as having the nature of a legal fiction, with no sound doctrinal footing. Kirby J (at 411) also said general reliance was a fiction, and said that it could not be a basis for finding a duty of care. Toohey J (at 356) did not accept that general reliance was a fiction, and he went on (at 359-61) to suggest that, while general reliance may not of itself give rise to a duty of care, it could be relevant to the question whether a duty of care exists. McHugh J (at 370-71) considered it was incorrect to say the doctrine of general reliance was a fiction, and said that it could give rise to a duty of care.

Makawe Pty Ltd v Randwick City Council [2009] NSWCA 412 -

Makawe Pty Ltd v Randwick City Council [2009] NSWCA 412 -

Makawe Pty Ltd v Randwick City Council [2009] NSWCA 412 -

Makawe Pty Ltd v Randwick City Council [2009] NSWCA 412 -

Makawe Pty Ltd v Randwick City Council [2009] NSWCA 412 -

Adeels Palace Pty Ltd v Moubarak [2009] HCA 48 -

Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181 -

Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181 -

Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 (22 September 2009) (McColl and Campbell JJA, Sackville AJA)

247. Amongst various factors against recognising a duty of care that Kirby J identified in *Pyrenees* at [253] were the comparatively small resources of the Shire Council, and the ability of the owners and occupiers to protect themselves by obtaining fire insurance. He also recognised that “In many cases, a court is not competent to review the decisions of public authorities as to their use of their resources.” On the facts of *Pyrenees*, however, providing more effective notice to the occupier would, he said, clearly fall on the operational side of the policy/operational divide. However, he accepted that “this conclusion leaves standing Lord Hoffmann’s comment that courts should be wary of undue intervention in decisions having significant implications for the budgets of public authorities”, and went on to quote from the speech of Lord Hoffmann in *Stovin v Wise* at 958.

Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 (22 September 2009) (McColl and Campbell JJA, Sackville AJA)

260. *Pyrenees* was a case where the omission that was held to be negligent was the failure of the council to follow up on and exercise its statutory powers concerning a requirement it had made of a building owner not to use a particular fireplace. That was a situation where the cost of taking the follow-up action was likely to have been comparatively small. At 392 [179], Gummow J noted that it was not a case where “at least stopping short of prosecution, the further pursuit by the Shire [of follow-up action to its initial notice] would have interfered with the budgetary priorities of the Shire, or distorted its priorities in the discharge of its statutory functions.” (citation omitted) On that ground he distinguished the last paragraph of the speech of Lord Hoffmann in *Stovin v Wise* that I have quoted at para [245] above.

Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 -

Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 -

Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 -

Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 -

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Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 -

Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 -

Western Districts Developments Pty Ltd v Baulkham Hills Shire Council [2009] NSWCA 283 -

[33] In his submissions Mr Hunt emphasised that the hazard in the present case (fire) was of a different nature and quality than the hazard in *Te Mata Properties* (moisture ingress). He also noted that at least some of Charterhall's damages claim relates to physical damage. He called in aid the decisions of the Supreme Court of Canada in *Winnipeg Condominium Corp No 36 v Bird Construction Co* [1995] 1 SCR 85 and the High Court of Australia in *Pyrenees Shire Council v Day* (1998) 192 CLR 330. These, he said, recognised a duty to avoid dangerous defects in buildings in a commercial as well as a residential context. (The duty in *Winnipeg Condominium* was owed by the company which constructed an apartment building to the original owner and also to a subsequent purchaser; the duty in *Pyrenees Shire Council* was owed by a council to the owners of partly residential and partly commercial properties which were damaged in a fire caused by a defective fireplace, the council knowing of the defect and having taken ineffective steps to have it remedied.)

Queenstown Lakes District Council v Charterhall Trustees Ltd [2009] NZCA 374 -  
Central Goldfields Shire v Haley & Ors [2009] VSCA 101 (24 June 2009) (Neave and Redlich JJA and Pagone AJA)

85. The joint reasons in *Brodie* recognised that decisions such as *Sutherland Shire Council v Heyman*, [99] *Pyrenees Shire Council v Day*, [100] *Romeo v Conservation Commission (NT)* [101], and *d Crimmins v Stevedoring Industry Finance Committee* [102], were important because they reflected an underlying principle that 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 which may oblige the authority to exercise those powers to avert a danger. [103]. The joint reasons in *Brodie* recognise that the powers vested in road authorities are an example, involving the safety of the person and property of road users. [104]. The formulated duty in *Brodie* which required the road to be safe for users exercising reasonable care for their own safety [105], was informed by these considerations. In *Leichhardt Municipal Council v Montgomery* [106] the High Court rejected the proposition that the council owed a non-delegable duty of care to such users when engaging an independent contractor to perform road works. As Hayne J stated, such a proposition could not stand with the restatement in *Brodie* and *Ghantous* of the common law of negligence in its application to highway authorities. [107].

via

[100] (1998) 192 CLR 330 .

Central Goldfields Shire v Haley & Ors [2009] VSCA 101 -  
Stuart v Kirkland-Veenstra [2009] HCA 15 (22 April 2009) (French CJ, Gummow, Hayne, Heydon, Crennan and Kiefel JJ)

145. In *Pyrenees Shire Council v Day* [180] Brennan CJ said that the existence of a discretion to exercise a power is not necessarily inconsistent with a duty to exercise it [181]. The case to which his Honour referred, *Julius v Lord Bishop of Oxford* [182], whilst concerned with a matter of public law, the issue of a writ of mandamus, also involved the construction of a statutory provision which included the words "it shall be lawful" in connection with the exercise of power. The nature and object of a power, and the persons for whose benefit it is intended to be exercised, were matters which Earl Cairns LC considered might "couple the power with a duty" so as to oblige its exercise [183].

via

[181] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 346 [23] .



[119] (1998) 192 CLR 330; [1998] HCA 3.

Pyrenees Shire Council v Day [1998] HCA 3 ; (1998) 192 CLR 330 ;

Imbree v McNeilly [2008] HCA 40 -

[53] Except in cases of clear impediment (such as where tortious liability is inconsistent with statute), the judgment whether as a matter of proximity and policy it is right to recognise a duty of care in novel circumstances will usually be intensely fact-specific. Lord Steyn in *Gorringe v Calderdale Metropolitan Borough Council* emphasised the especial need to focus closely on the facts and background social context when negligence arises in the exercise of statutory duties and powers, a subject he regarded as one of “great complexity and very much an evolving area of the law”. [79] Kirby J in *Pyrenees Shire Council v Day* thought it best to accept that liability in negligence in such hard cases is fixed by reference to a “spectrum” of factors of the kind examined in *Stovin v Wise* by Lord Nicholls [80] and by the “candid evaluation of policy considerations” by Lord Hoffmann [81] in the same case. [82] We agree with that view. It is effectively the approach taken in *South Pacific Manufacturing*.

via

[82] (1998) 192 CLR 330 at para [242].

Couch v Attorney-General [2008] NZSC 45 -  
Couch v Attorney-General [2008] NZSC 45 -  
Couch v Attorney-General [2008] NZSC 45 -  
Couch v Attorney-General [2008] NZSC 45 -  
Couch v Attorney-General [2008] NZSC 45 -  
Kirkland-Veenstra v Stuart [2008] VSCA 32 (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

45. At the time of the decision in *Pyrenees* the approach to the determination of questions of duty was that of ‘reliance’. After *Pyrenees*, the concept of reliance was replaced by the concept of vulnerability, that is, a duty to protect from a ‘great harm’. [45] And, as already discussed, the multi-factorial approach has been authoritatively adopted by the High Court.

Kirkland-Veenstra v Stuart [2008] VSCA 32 (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

110. Like the Chief Justice, I am altogether unpersuaded that the imposition of a duty of care to Mr Veenstra in the circumstances would ‘significantly and impermissibly’ constrain the discharge by police officers of their duty to consider whether or not the power under s 10 is exercisable and should be exercised. On the contrary, to impose a duty of care in these circumstances is entirely consistent with what Gummow J described as ‘the general rule’, as follows:

When statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered. [102].

His Honour went on:

A public authority which enters upon the exercise of statutory powers with respect to a particular subject matter may place itself in a relationship to others which imports a common law duty to take care which is to be discharged by the continuation or additional exercise of those powers. [103].

via

[102] *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 391 [177] citing *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202, 220 (Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ).

*Kirkland-Veenstra v Stuart* [2008] VSCA 32 (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

48. McHugh J goes on to consider some of the situations where the law may or may not impose such a duty. [49] His Honour expressed the view that a public authority is no different from an individual in that the common law does not usually impose a duty to intervene, unless the authority has created or increased the risk. Furthermore:

In most cases, a public authority will not be in breach of a common law duty by failing to exercise a discretionary power that is vested in it for the benefit of the general public. [50]

However, his Honour continues:

The likelihood of the common law imposing an affirmative duty of care whose content may require the exercise of a statutory power increases where *the power is invested to protect the community from a particular risk and the authority is aware of a specific risk to a specific individual*. If the legislature has invested the power for the purpose of protecting the community, it obviously intends that the power should be exercised in appropriate circumstances. [51]

It is by this reasoning that his Honour explains *Pyrenees Shire Council v Day*. [52]

via

[52] (1998) 192 CLR 330 .

*Kirkland-Veenstra v Stuart* [2008] VSCA 32 (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

116. The policy of the *Act* is that there should be intervention in order to prevent suicide, when there is an identified risk that it may occur. As with protective powers conferred to advance occupational health and safety [109] or fire safety [110] or child safety, [111] the notion of a 'chilling effect' has no meaningful application in the present context. On the contrary, as in those cognate fields, a precautionary approach, responsive to rather than dismissive of indicia of risk, must be seen as conducive to the achievement of the statutory purpose and the promotion of the public interest in the saving of lives and the prevention of injury. [112]

via

[110] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 .

*Kirkland-Veenstra v Stuart* [2008] VSCA 32 -  
*Kirkland-Veenstra v Stuart* [2008] VSCA 32 -  
*Kirkland-Veenstra v Stuart* [2008] VSCA 32 -  
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*Kirkland-Veenstra v Stuart* [2008] VSCA 32 -



[Kirkland-Veenstra v Stuart](#) [2008] VSCA 32 -  
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[Kirkland-Veenstra v Stuart](#) [2008] VSCA 32 -  
[Jazabas Pty Ltd v Haddad](#) [2007] NSWCA 291 -  
[Jazabas Pty Ltd v Haddad](#) [2007] NSWCA 291 -  
[Sydney Water Corporation v Abramovic](#) [2007] NSWCA 248 (14 September 2007) (Mason P; Santow JA ; Basten JA)

Sydney Water Corporation v Abramovic [2007] NSWCA 248 -  
Randwick City Council v T & H Fatouros Pty Ltd [2007] NSWCA 177 (20 July 2007) (Giles JA; Ipp JA;  
Tobias JA)

“[I]n *Pyrenees Shire Council v Day* ... the Shire held a significant and special measure of control over the safety from fire of persons and property at the relevant premises. That degree of control was the touchstone of the Shire’s duty to safeguard others from the risk of fire in circumstances where the Shire had entered upon the exercise of its statutory powers of fire prevention and it alone among the relevant parties knew of, and was responsible for, the continued existence of the risk of fire.” [my emphasis]

## Revesz v Commonwealth of Australia

[Sutherland Shire Council v Becker](#) [2006] NSWCA 344 -  
[Sutherland Shire Council v Becker](#) [2006] NSWCA 344 -  
[Sutherland Shire Council v Becker](#) [2006] NSWCA 344 -  
[Sutherland Shire Council v Becker](#) [2006] NSWCA 344 -  
[Sutherland Shire Council v Becker](#) [2006] NSWCA 344 -  
[Sutherland Shire Council v Becker](#) [2006] NSWCA 344 -

[Peden P/L v Bortolazzo](#) [2006] QCA 350 (15 September 2006) (McMurdo P, White and Philippides JJ, Joint reasons for judgment of McMurdo P and Philippides J; separate reasons of White J, concurring as to the orders made)

15. Pennycuik VC's statement of the law relating to a lessor's liability for a nuisance created by a tenant has been recently followed by the English Court of Appeal in [Hussain v Lancaster City Council](#) [19] on a strike out application [20] and was even more recently referred to with approval by the New South Wales Court of Appeal in [Wilkie v Blacktown City Council](#), [21]. Pennycuik VC's conclusions concerning the absence of a duty of care in a landlord in selecting tenants were endorsed in [Wills](#). [22] Mason P (Beazley JA agreeing) noted that Pennycuik V-C's approach was "nothing more than a particular application of judicial restraint based upon the fear of creating 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'", consistent with McHugh J's observations in [Pyrenees Shire Council v Day](#) [23] (see also Shaw J in [Godfrey v New South Wales](#) [24]).

via

[23] (1998) 192 CLR 330, 368..

[Peden P/L v Bortolazzo](#) [2006] QCA 350 -

[The Finance Brokers Supervisory Board v Van Stokkum](#) [2006] WASCA 97 -

[The Finance Brokers Supervisory Board v Van Stokkum](#) [2006] WASCA 97 -

[Hobson v Attorney-General CA74/05](#) [2006] NZCA 409 -

[Edson v Roads and Traffic Authority](#) [2006] NSWCA 68 (07 April 2006) (Beazley JA at 1; Ipp JA at 2; Hunt AJA at 170)

74 I noted that in [Sutherland Shire Council v Heyman](#), Mason J did not suggest that the categories of circumstances in which an authority may attract a duty of care are closed. After referring to what had been said in [Pyrenees Shire Council v Day](#), [Crimmins](#), and [Graham Barclay Oysters Pty Ltd v Ryan](#) I observed (at [23]):

“Later cases, which are in accord with the general propositions laid down in [Sutherland Shire Council v Heyman](#), have extended the categories to situations where an authority has control over a particular situation that carries with it a risk of harm of which the authority knows or should know. That is to say, where an authority has such control, a duty of care may (not, I stress, must) be recognised.”

[Edson v Roads and Traffic Authority](#) [2006] NSWCA 68 -

[Edson v Roads and Traffic Authority](#) [2006] NSWCA 68 -

[Edson v Roads and Traffic Authority](#) [2006] NSWCA 68 -

[Moorabool Shire Council v Taitapanui](#) [2006] VSCA 30 (24 February 2006) (Maxwell, P., Ormiston and Ashley, Jj.A)

78. More recently, in [Pyrenees Shire Council v Day](#), [83] the scope of the Council's relevant statutory functions was central to the Court's conclusion that the Council owed a duty of care at common law. Thus, Gummow J said:

“A public authority which enters upon the exercise of statutory powers with respect to a particular subject-matter may place itself in a

relationship to others which imports a common law duty to take care which is to be discharged by the continuation or additional exercise of those powers.” [84].

[Moorabool Shire Council v Taitapanui](#) [2006] VSCA 30 -  
[Moorabool Shire Council v Taitapanui](#) [2006] VSCA 30 -  
[Moorabool Shire Council v Taitapanui](#) [2006] VSCA 30 -  
[Moorabool Shire Council v Taitapanui](#) [2006] VSCA 30 -  
[Moorabool Shire Council v Taitapanui](#) [2006] VSCA 30 -  
[Moorabool Shire Council v Taitapanui](#) [2006] VSCA 30 -  
[Moorabool Shire Council v Taitapanui](#) [2006] VSCA 30 -  
[Moorabool Shire Council v Taitapanui](#) [2006] VSCA 30 -  
[Moorabool Shire Council v Taitapanui](#) [2006] VSCA 30 -  
[Moorabool Shire Council v Taitapanui](#) [2006] VSCA 30 -  
[Moorabool Shire Council v Taitapanui](#) [2006] VSCA 30 -

[Neindorf v Junkovic](#) [2005] HCA 75 -

[Attorney-General v Body Corporate 200200 Ca30/05](#) [2005] NZCA 296 -

[Fortuna Seafoods Pty Ltd v The Ship “Eternal Wind”](#) [2005] QCA 405 -

[Vairy v Wyong Shire Council](#) [2005] HCA 62 (21 October 2005) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

86. However, as appears from the passage just quoted, his Honour saw "assumed legislative intent" as the basis for such an exclusion of liability. That proposition can no longer be said to provide a complete representation of the present state of the law in Australia. In [Crimmins](#), Hayne J said [109]:

"Put at its most general and abstract level, the fundamental reason for not imposing a duty in negligence in relation to the quasi-legislative functions of a public body is that the function is one that must have a public rather than a private or individual focus. To impose a private law duty will (or at least will often) distort that focus. This kind of distinction might be said to find reflection in the dichotomy that has been drawn between the operational and the policy decisions or functions of public bodies. And a quasi-legislative function can be seen as lying at or near the centre of policy functions if policy and operational functions are to be distinguished. But as more recent authority suggests, that distinction may not always be useful". (footnotes omitted)

Three points may be extracted from this passage. First, it is not so much an assumed legislative intent, as it is the public focus of a quasi-legislative function, which limits the private law duties of a public body. Secondly, the distinction between the operational and policy functions of such a body is of dubious utility. [110]. And, thirdly, to the extent that this distinction nonetheless is useful and should be preserved, the mere circumstance that a function is quasi-legislative should suffice as a basis upon which to describe it as a policy function. Hayne J was one of the minority in [Crimmins](#) but these points were all reflected in the various other judgments, both of the majority and minority. [111].

via

[110] See [Pyrenees Shire Council v Day](#) (1998) 192 CLR 330 at 393394 [180]-[182].

[Mulligan v Coffs Harbour City Council](#) [2005] HCA 63 -

[Mulligan v Coffs Harbour City Council](#) [2005] HCA 63 -

[State of New South Wales v Williamson](#) [2005] NSWCA 352 -

[State of New South Wales v Williamson](#) [2005] NSWCA 352 -

[Port Stephens Shire Council v Booth](#) [2005] NSWCA 323 (27 September 2005)

86. There is good reason for not testing negligence by *Wednesbury* unreasonableness. The law of torts serves a different purpose from that providing public law remedies. In *Pyrenees Shire Council v Day* Gummow J referred to translation of the public law “may” into the common law “ought”, and to principles of tortious liability being “formulated primarily for operation in the field of private law” (at [122]-[123]). In *Crimmins v Stevedoring Industry Finance Committee* Kirby J said (at [217]-[218]) -

“[217] From time to time judges have expressed concern that the imposition of a duty of care upon a public authority might cut across discretions which that body enjoys by statute, or impose upon it economic and other imperatives which judges and juries might be ill-equipped to evaluate. Importation of a common law duty could distort the performance of the functions of the statutory body in the attempt to avoid private actions. Judges have therefore sought to devise formulae to restrict the supplementation by the common law of the enforcement machinery provided in a statute. Some have resorted to the fiction of what Parliament “intended” to be the mechanism of enforcement. Others have applied public law criteria to evaluate whether a right of action at common law can coexist with the statute. This was the way in which Brennan CJ approached his decision in *Pyrenees Shire Council v Day*. Whilst that approach has distinguished supporters it did not find favour with the majority of this Court in *Pyrenees*. It has also been expressly rejected by the unanimous opinion of the House of Lords.

[218] In *X (Minors) v Bedfordshire County Council*, Lord Browne-Wilkinson remarked, with the concurrence of all of the participating Law Lords:

‘ ... I do not believe that it is either helpful or necessary to introduce public law concepts as to the validity of a decision into the question of liability at common law for negligence. ... [I]t leads, in my judgment mistakenly, to the contention that claims for damages for negligence in the exercise of statutory powers should for procedural purposes be classified as public law claims and therefore ... should be brought in judicial review proceedings’.

[Port Stephens Shire Council v Booth](#) [2005] NSWCA 323 -

[Port Stephens Shire Council v Booth](#) [2005] NSWCA 323 -

[Port Stephens Shire Council v Booth](#) [2005] NSWCA 323 -

[Port Stephens Shire Council v Booth](#) [2005] NSWCA 323 -

[Town of Mosman Park v Tait](#) [2005] WASCA 124 -

[Berrigan Shire Council v Ballerini](#) [2005] VSCA 159 -

[Berrigan Shire Council v Ballerini](#) [2005] VSCA 159 -

[Berrigan Shire Council v Ballerini](#) [2005] VSCA 159 -

[Berrigan Shire Council v Ballerini](#) [2005] VSCA 159 -

[Broughton v Competitive Foods Australia Pty Ltd](#) [2005] NSWCA 168 (18 May 2005) (Handley and Hodgson JJA, Brownie AJA)

25 Ordinarily, also, one person owes no duty to a second person to take positive steps to prevent harm to the second person, whether from the conduct of a third person, or otherwise, even if there is an obvious danger threatening the second person: *Modbury* at [20], [111] and [140] and *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [101]; and there is an element of irrationality involved in imposing liability on a defendant for not preventing the criminal conduct of others, when society generally has been unable to control that conduct, and the defendant has failed to control that conduct: *Proprietors of Strata Plan 17226 v Drakulic* (2002) 55 NSWLR 659 at [72].

[Broughton v Competitive Foods Australia Pty Ltd](#) [2005] NSWCA 168 (18 May 2005) (Handley and Hodgson JJA, Brownie AJA)

[Pyrenees Shire Council v Day](#) (1998) 192 CLR 330

[Proprietors of Strata Plan 17226 v Drakulic](#)

[Hunter Area Health Service v Presland](#) [2005] NSWCA 33 -



40 Mr Pledge's response to these submissions was that the case against the Council was never cast as being a failure to exercise a statutory power in the sense referred to in Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1, Sutherland Shire Council v Heyman (1985) 157 CLR 424 or Pyrenees Shire Council v Day (1998) 192 CLR 330. It was argued that the duty arose by reason of the active involvement of the RTA and the Council in the design, construction and maintenance of the service road including agreement between the RTA and the Council. Reference was made to what was said in the joint judgment in Brodie at 180 [150]-[151]. The duty which arises under the common law imposes upon authorities having statutory powers of the nature here in question to take reasonable care that their exercise or failure to exercise those powers does not create a foreseeable risk of harm to a class of persons such as pedestrians which would include the plaintiff.

Roads and Traffic Authority v Ryan; Blue Mountains City Council v Ryan [2005] NSWCA 34 -

Roads and Traffic Authority v Ryan; Blue Mountains City Council v Ryan [2005] NSWCA 34 -

Roads and Traffic Authority v Ryan; Blue Mountains City Council v Ryan [2005] NSWCA 34 -

Smith v Eurobodalla Shire Council [2004] NSWCA 479 (02 March 2005) (Mason P, Santow JA and McClellan AJA)

103 In Pyrenees Shire Council v Day (1998) 192 CLR 330, the High Court found that the Council had a duty to exercise its regulatory powers to avert the substantial risk of fire of which it was aware.

Smith v Eurobodalla Shire Council [2005] NSWCA 89 (02 March 2005) (Mason P, Santow JA and McClellan AJA)

98 However, the role of proximity, specific and general reliance, foreseeability, and the obligations of a public authority to efficiently mobilise its limited resources have proved fertile grounds for judicial and academic discussion: see Heyman; Brodie v Singleton Shire Council, Ghantous v Hawkesbury Shire Council (2001) 206 CLR 512; Pyrenees Shire Council v Day (1998) 192 CLR 330; Parramatta City Council v Lutz (1988) 12 NSWLR 293; San Sebastian Pty Ltd v Minister Administering Environmental Planning Act (1986) 162 CLR 340.

Smith v Eurobodalla Shire Council [2005] NSWCA 89 -

Smith v Eurobodalla Shire Council [2004] NSWCA 479 -

Smith v Eurobodalla Shire Council [2004] NSWCA 479 -

Smith v Eurobodalla Shire Council [2005] NSWCA 89 -

North Australian Aboriginal Legal Aid Service Inc v Bradley [2004] HCA 31 (17 June 2004) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

7. The capacity, conferred on the Administrator by s 6, to determine the remuneration of a Magistrate, including the Chief Magistrate, from time to time, involves both a power and a duty. Section 6 is not expressed in terms that are either permissive or obligatory. It simply provides that an appointee is to be paid such remuneration and allowances as the Administrator determines. Leaving to one side any question as to the form and content of such a determination, whether it can be for a fixed period, or for an interim period, or of indefinite duration, and whether and in what circumstances a redetermination may be made, the section clearly confers on the Administrator an authority to make a determination in respect of any appointee. It may be made in respect of a class generally, or it may be made in respect of an individual, such as a Chief Magistrate. It is a matter of statutory interpretation to decide whether there is a duty as well as a power to exercise the authority. It is to be used, at least in part, for the benefit of an appointee, and this in itself is a strong indication that there is a duty to exercise it at least once in relation to any given appointee [15]. Another strong indication is that the existence of the Northern Territory magistracy, in a practical sense, depends upon having in place, at any time, appropriate arrangements for the remuneration of magistrates. A statutory provision that an office

holder "shall be paid" such remuneration as the Executive, from time to time, determines, should not be understood to mean that the Executive may choose never to make a determination, or never to make a determination in relation to an office holder, in which event the office holder will be paid nothing; least of all where the office holder is meant to be independent of the Executive. On any view, therefore, the Administrator is obliged to make at least one determination of the remuneration to be paid to a Chief Magistrate. Section 41 of the Interpretation Act provides that, where an Act confers a power or imposes a duty, the power may be exercised and the duty shall be performed from time to time as the occasion requires. The Administrator is entitled to make further determinations of such remuneration from time to time as the occasion requires, and there may be circumstances giving rise to an obligation to do so. An example of such a requirement would be the expiry of an earlier determination. Apart from the circumstances of the present case, to which reference will be made below, it is not difficult to imagine how that might occur. Suppose, for example, that, as sometimes happens, the Executive decides that there is to be a general review of remuneration and allowances of magistrates, and it is expected that such review may take a considerable time to complete. The statute would permit an interim determination pending the outcome of the review. The completion of the review may then be an occasion requiring a further determination. This is not uncommon, and is not inconsistent with the requirements of independence. There is no reason to give the general words of s 6 a strained and narrow construction which would prevent the making of a determination for an interim period, or a determination that for some other legitimate reason may come to an end in circumstances that require the making of a further determination. Such a construction does not advance any legislative purpose. It produces a result that is unreasonable. It should be rejected.

via

[15] *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 at 222-223; *Ward v Williams* (1955) 92 CLR 496 at 505-506; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 346 [22]; *Samad v District Court (NSW)* (2002) 209 CLR 140.

*Amaca Pty Ltd v The State of New South Wales* [2004] NSWCA 124 (17 May 2004) (Mason P, Ipp and McColl JJA)

149 In *Pyrenees*, the Council, on 12 August 1988, sent a letter to the occupier of the premises where the fireplace was situated drawing attention to the fire hazard constituted thereby. The letter concluded:

“It is therefore imperative that the abovementioned fireplaces be *not* used any circumstances unless: -

- (a) Structurally sound repairs are made to make the chimneys and fireplaces safe.
- (b) General repairs are made to mortar and brickwork to make the walls heat resistant and prevent smoke leakage.
- (c) Alternatively, repair the fireplaces structurally and seal both fireplaces openings permanently and discontinue the use.”

*Amaca Pty Ltd v The State of New South Wales* [2004] NSWCA 124 (17 May 2004) (Mason P, Ipp and McColl JJA)

36 As I understand his Honour’s remarks, the measure of control exercisable by the Council in *Pyrenees* was “significant and special” because of the sole and actual knowledge that the Council had of the risk, coupled with the particular powers it had which, if exercised, would have prevented the materialisation of the risk.

65 In summary, the following propositions can be drawn from *Pyrenees*, *Crimmins* and *Graham Barclay Oysters* :

- (a) The totality of the relationship between the parties is the proper basis for the determination of a duty of care.
- (b) The category of control that may contribute to the existence of a duty of care to exercise statutory powers includes control, generally, of any situation that contains within it a risk of harm to others.
- (c) A duty of care does not arise merely because an authority has statutory powers, the exercise of which might prevent harm to others.
- (d) The existence of statutory powers and the mere prior exercise of those powers from time to time do not, without more, create a duty to exercise those powers in the future.
- (e) Knowledge that harm may result from a failure to exercise statutory powers is not itself sufficient to create a duty of care.

The facts of the case to which this Court may have regard

Amaca Pty Ltd v The State of New South Wales [2004] NSWCA 124 (17 May 2004) (Mason P, Ipp and McColl JJA)

54 Before going to *Graham Barclay Oysters* it is worth noting that in *Brodie v Singleton Shire Council* (2001) 206 CLR 512 (the next High Court decision dealing with the negligent exercise of statutory powers) Gaudron, McHugh and Gummow JJ, after referring to *Sutherland Shire Council v Heyman*, *Pyrenees*, and *Crimmins* adopted the test of a “significant and special measure of control” (the phrase used by Gummow J in *Crimmins* (at 61, [166]) Their Honours said (at 558-559, [102]) :

“The decisions of this Court in [ *Sutherland Shire Council v Heyman*, *Pyrenees*, *Romeo v Conservation Commission (NT)* (1998) 192 CLR 432 and *Crimmins* ] are important for this litigation. 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 ...”

Amaca Pty Ltd v The State of New South Wales [2004] NSWCA 124 (17 May 2004) (Mason P, Ipp and McColl JJA)

151 Thus, in *Pyrenees*, in addition to the inspection by the Council, there had been a positive exercise of its powers to compel affirmative action (an exercise that proved to be inadequate).

Amaca Pty Ltd v The State of New South Wales [2004] NSWCA 124 (17 May 2004) (Mason P, Ipp and McColl JJA)

142 There was, undoubtedly, a power on the part of the State to direct Mr Hay’s employer, Rolls Royce, to take appropriate remedial steps to prevent the inhalation by Mr Hay of asbestos dust. But the power of the State in this respect and the degree of control exercised by it differed significantly from the control exercisable by the Council in *Pyrenees* and the Authority in *Crimmins*.



[Amaca Pty Ltd v The State of New South Wales](#) [2004] NSWCA 124 -  
[Amaca Pty Ltd v The State of New South Wales](#) [2004] NSWCA 124 -  
[Amaca Pty Ltd v The State of New South Wales](#) [2004] NSWCA 124 -  
[Amaca Pty Ltd v The State of New South Wales](#) [2004] NSWCA 124 -  
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[Amaca Pty Ltd v The State of New South Wales](#) [2004] NSWCA 124 -  
[Amaca Pty Ltd v The State of New South Wales](#) [2004] NSWCA 124 -  
[Woolcock Street Investments Pty Ltd v CDG Pty Ltd](#) [2004] HCA 16 (01 April 2004) (Gleeson CJ,  
McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

124. In this appeal, this Court must do its best with the unelaborated facts upon the basis of which we were asked to decide the matter. I cannot but think that this course of events has disadvantaged the party seeking recovery. When the boundaries of liability in negligence are pushed forward it is often because detailed evidence, adduced at trial, appears in its totality to call out for a remedy [183] or to indicate that one is not appropriate [184].

*via*

[183] As in *Hill v Van Erp* (1997) 188 CLR 159; *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Perre v Apand Pty Ltd* (1999) 198 CLR 180; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.

**Woolcock Street Investments Pty Ltd v CDG Pty Ltd** [2004] HCA 16 (01 April 2004) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

158. Nevertheless, as I pointed out in *Perre* [228], crafting a different and convincing substitute rule that is viable and easy to apply has not proved easy. In *Perre* [229] I favoured, as I did in many other cases before and after, the application of the three-fold test expressed by the House of Lords in *Caparo Industries Plc v Dickman* [230] for deciding whether a duty of care existed in a particular factual situation, which the law of negligence would enforce. This approach requires consideration of reasonable foreseeability and proximity (in the sense of "neighbourhood") without attributing to either of these factors the primacy accorded to them in the past and without turning either into a *sufficient* criterion for acceptance of a duty of care. *Caparo* also obliges a transparent consideration of the issues of legal policy that tend to favour, or reject, the imposition of a legal duty of care sounding in damages for a negligent breach. Since *Perre* [231], I have been obliged by the holdings of this Court [232] to abandon the *Caparo* approach for the time being. This is so although, in various guises, that approach continues to be applied in the final appellate courts of most Commonwealth countries.

via

[228] (1999) 198 CLR 180 at 268-275 [246]-[258]. See eg *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 419-420 [243]-[244]. See also reasons of McHugh J at [45]-[48].

*Timbs v Shoalhaven City Council* [2004] NSWCA 81 -  
*Timbs v Shoalhaven City Council* [2004] NSWCA 81 -  
*Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16 -  
*Timbs v Shoalhaven City Council* [2004] NSWCA 81 -  
*Timbs v Shoalhaven City Council* [2004] NSWCA 81 -  
*Timbs v Shoalhaven City Council* [2004] NSWCA 81 -  
*Timbs v Shoalhaven City Council* [2004] NSWCA 81 -  
*Timbs v Shoalhaven City Council* [2004] NSWCA 81 -  
*Timbs v Shoalhaven City Council* [2004] NSWCA 81 -  
*Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16 -  
*Timbs v Shoalhaven City Council* [2004] NSWCA 81 -  
*Uzabeaga v Town of Cottesloe* [2004] WASCA 57 -  
*British American Tobacco Australia Ltd v Western Australia* [2003] HCA 47 -  
*Cattanach v Melchior* [2003] HCA 38 -  
*Newcastle City Council v Shortland Management Services* [2003] NSWCA 156 -  
*Newcastle City Council v Shortland Management Services* [2003] NSWCA 156 -  
*Eastman v Director of Public Prosecutions (ACT)* [2003] HCA 28 -  
*Gordon v Tamworth Jockey Club* [2003] NSWCA 82 (16 April 2003) (Sheller, Beazley and Giles JJA)

37 Heydon JA quoted from the judgment of McHugh J in *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [101] – [102] pointing out the historical distinction at law between causing damage by a positive act and “causing” damage by a failure to act. “A special relationship may arise from the ownership, occupation or control of land or chattels, from the receipt of a benefit or from an undertaking, assumption of responsibility or invitation which might induce the person harmed to act or to refrain from acting.”

*Gordon v Tamworth Jockey Club* [2003] NSWCA 82 -  
*Roads and Traffic Authority of NSW v Palmer* [2003] NSWCA 58 -  
*Roads and Traffic Authority of NSW v Palmer* [2003] NSWCA 58 -  
*Roads and Traffic Authority of NSW v Palmer* [2003] NSWCA 58 -  
*Mensinga v Director of Public Prosecutions* [2003] ACTCA 1 -  
*Mensinga v Director of Public Prosecutions* [2003] ACTCA 1 -  
*Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 (05 December 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

307. Mr Ryan's submission is that there is no doubt that the Council did have statutory power to protect him and other consumers of oysters: the fact that the Council's powers are not expressed to be duties should not be fatal to his claim. As to the nature and purpose of the powers of the Council, he draws attention to s 7 of the *Local Act*, from which the true legislative purposes may be inferred. These, together with the powers granted by the interconnected provisions of that Act and other legislation, amount not only to a formidable array of power, but also a duty to exercise that power. So to hold would not, it is argued, be to produce an incompatibility with other functions and powers of the Council: nor would recognition of a duty of care in these circumstances distort the law or impinge upon the exercise of other statutory powers. Mr Ryan further argues that the class to which he belongs is not an indeterminate one, that its members can be clearly identified, and that it is a class for whose benefit it should be accepted the Council would, and should exercise its powers. The exercise of the relevant powers would not involve the taking of legislative, or quasi-legislative steps, and would not relate to a “core-policy” [273] function. Mr Ryan made the further point that the injury that he suffered was physical injury, and not pure economic

loss, towards the former of which the law has more consistently been tender than the latter. The Council had a large measure of control over the situation, that is to say the state of sanitary containment in the area of the Council. Consumers were particularly vulnerable and had little or no means of self-protection against contaminated oysters,

via

[273] See Mason J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 469. See also McHugh J in *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 393 [180].

*Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 (05 December 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

39. The powers conferred upon the Council, insofar as they are presently relevant, were conferred for the benefit of the public generally; not for the protection of a specific class of persons [17]. In *Pyrenees Shire Council v Day* [18], there was a clearly identified cause of harm, specific action or inaction on the part of the Council, and, as Kiefel J pointed out, "coincidence between the action which was necessary to prevent the fire, the powers given to the Council and the purpose for which they were given". Here the Council had general powers for the protection of public health, which would have embraced activity of the kind Wilcox J thought should have been undertaken, such as regular and comprehensive surveys of sanitary facilities in areas around the lake, or water testing. But there is nothing in the relevant statutory provisions, or in the circumstances concerning the relationship between the Council and oyster consumers, to justify a conclusion that the Council's powers were given for the protection of oyster consumers, or any other particular class.

*Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 (05 December 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

151. In *Brodie*, the council exercised physical control over the condition of the roads which it was empowered by statute to maintain and which themselves constituted the direct source of harm to road users [100]. The council's measure of control over the safety of the person or property of citizens was "significant and exclusive" [101]. So, too, the fact of control over, and knowledge of, land or premises has been significant in identifying the duty of care owed to users of land or premises by a statutory authority which controls and manages that land or premises [102]. Again, in *Pyrenees Shire Council v Day* [103], the Shire held a significant and special measure of control over the safety from fire of persons and property at the relevant premises. That degree of control was the touchstone of the Shire's duty to safeguard others from the risk of fire in circumstances where the Shire had entered upon the exercise of its statutory powers of fire prevention and it alone among the relevant parties knew of, and was responsible for, the continued existence of the risk of fire [104]. It will be recalled that, in *Pyrenees*, the only other party with that knowledge was the former tenants. They had not communicated it to the subsequent tenants or adjoining occupiers, who were the relevant parties in this Court.

via

[103] (1998) 192 CLR 330.

*Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 (05 December 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

234. *Competing Australian approaches*: Whilst these developments were occurring in other common law countries, Australian courts, led by this Court, continued with their attempts to propound alternative and different tests for establishing the existence of a duty of care. It

was obvious that "foreseeability" alone was insufficient to give rise to the potentially onerous obligations of a legal duty to act. Hence the experiments with other concepts such as "proximity" [\[184\]](#) and "reliance" – including the fiction of "general reliance" [\[185\]](#) .

via

[\[185\]](#) cf *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 409 [\[226\]](#)–[\[227\]](#) where the authorities are reviewed.

*Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 (05 December 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

249. *Pyrenees* is distinguishable because of the absence of notification of a precise risk to a public authority with immediate power and functions to act. *Crimmins* is distinguishable by the established evidence of long-term awareness in that case of the safety issues and elements of day-to-day control. *Brodie* is different because of the direct involvement and control of the authority over the relevant subjects of accident prevention. The claim against the State was therefore properly rejected by the Full Court.

*Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 (05 December 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

283. Lindgren J was of a different opinion [\[248\]](#) :

"My conclusion that the State was not shown to be liable is, I think, supported by various approaches to the issue. First, I do not think that the array of statutory powers referred to, including the power given by s 189(1) of the *Fisheries Management Act* to close an oyster fishery where the Minister was satisfied that, relevantly, oysters were, or were likely to be, unfit for human consumption, gave rise to the duty. A duty to exercise that power would, in my view, in accordance with *Pyrenees* [\[249\]](#) and *Lutz* [\[250\]](#) , not arise unless, at least, the State knew that the oysters to be harvested would be, or would be likely to be, unfit for human consumption. But there had not previously been an outbreak of hepatitis A arising from the consumption of oysters harvested from the Lake. The Lake's growers' practices of depuration and suspension of harvesting for a sufficient period following a 'fresh' had apparently worked in the past. Of course, the possibility of the irresponsible grower was always of general concern, but this did not rise to the required level to impose a duty to exercise statutory powers. Similarly, although, no doubt, instances of faecal contamination over time can be pointed to, the evidence did not establish that the standard of purity of the Lake's water was known to the State to be dangerous by being, for example, significantly lower than that of the water in which oysters were satisfactorily grown and harvested elsewhere in the State or overseas.

But let it be assumed that the standard throughout the State was lower than the standard insisted upon in Europe and the United States of America. It may be said that the State government failed in its duty to the public in this respect. That is, it may be said that in the interests of public health the State should have adopted a different régime from that which it did adopt. In particular, it may be said that the State should have adopted a system involving sanitary surveys of the estuaries or flesh testing or both. I do not think, however, that a failure of that kind, which I would characterise as a failure of policy, necessarily indicates breach of an actionable duty of care to those members of the public who consume oysters.



A further point in relation to 'fishing closures' under s 189 of the *Fisheries Management Act* is that the duty proposed would have to be understood as one requiring the Minister to consider the question whether he should be satisfied that the Lake's oysters were or were to be likely to be unfit for human consumption. To my mind this highlights, at least in relation to that particular power, the fact that what is involved is a question of priorities and allocation of resources.

I accept the State's submission that, rightly or wrongly, the government of the day took a policy decision in 1994-1995 to the effect that the State would distance itself from the day to day management of the oyster industry in favour of a system of industry-based control to be implemented through two bodies representative of the industry: a State QAP Committee and local estuary-based QAP committees. I do not mean to suggest that by merely recording a policy of 'noninvolvement', a public authority can necessarily avoid incurring legal liability. It is hard to accept that the formal adoption of a policy of nonintervention would have saved the Shire in *Pyrenees* or the Council in *Lutz*. The nature of their legislative powers and the facts and circumstances of their knowledge of the particular danger and the steps taken in relation to it would have prevailed to render them liable nonetheless. But in the present case the State did act consistently with its policy. It did not, for example, embark upon testing the growing waters of the Lake's oyster fishery or the flesh of oysters taken from it. There is no scope for saying that partial action gave rise to 'a common law duty to take care which is to be discharged by the continuation or additional exercise of [partially exercised] powers' [251].

The State's policy is to be contrasted with the learned primary judge's finding that the State 'managed' the oyster fishery in the Lake. A question arises as to the meaning of the notion of 'management' in the present context. The State had ultimate control but this is not management of a kind that would generate a duty of care. Moreover, I do not think the State's roles of licensing and inspecting depuration facilities, inspecting premises from an environmental viewpoint through the EPA, granting oyster leases, issuing aquaculture permits, participating in the Lake's Oyster Quality Assurance Committee as from 14 December 1992, or providing the State's employee, Dr Kerry Jackson, to coordinate the State QAP as from 2 September 1996, constituted 'management' of the day to day oyster and harvesting activity of a kind that would give rise to a duty of care.

I do not accept Mr Ryan's submission that his Honour should have found that the State owed him a duty to ensure that the local QAP was in place by November 1996. His Honour felt unable to reach that conclusion on the evidence and I do not think it is shown that this was a finding of fact at which he was not entitled to arrive.

Mr Ryan submits that control of the fishery was 'ceded' to the State. But in one sense, so is virtually every aspect of the control of the production of food. The individual consumer cannot protect himself or herself and so is 'vulnerable' and hopes that someone will have taken steps to minimise the risk to his or her health. But is it to be said that in every case of 'food poisoning', the State must be liable for having failed to exercise its statutory powers? It seems to me that as a matter of policy the law refrains from imposing the kind of duty on which Mr Ryan is obliged to rely.

I would not conclude, so far as it may remain relevant, that Mr Ryan 'specifically relied on' the State to protect him. There was no dealing between the State and

Mr Ryan before he consumed the oysters. As noted earlier, the doctrine of 'general reliance' no longer enjoys support in the High Court as a touchstone of the existence of a duty of care of a public authority to exercise statutory powers.

In my view, on the evidence the State did not 'manage' the shellfish industry in the Lake in any way that might have given rise to a duty of care in favour of Mr Ryan.

#### Breach of duty

If I had thought that the State owed a duty of care to Mr Ryan, I would have held that the State was not shown to have breached it. The case would have called for consideration of what steps the State, acting reasonably, would have taken. This would have immediately raised considerations of the kind referred to by Mason J in *Wyong Shire Council v Shirt* [252], ... as discussed in the context of breach in relation to the Council's appeal. I have referred to some of these considerations as relevant to the State in the context of my treatment of the duty issue above. In the case of the State, questions of the magnitude of the risk, the fact that the Lake's oysters had not previously caused a problem and the cost to the State of taking (and maintaining) the course of action described by his Honour in all of the State's oyster-growing estuaries would have arisen.

#### Causation

For the reasons I gave for allowing the Council's appeal, it is not shown that the course of action that his Honour decided was required (the taking of the steps that were reasonably open to minimise faecal contamination of the Lake) would have prevented Mr Ryan from contracting hepatitis A.

#### A suggested alternative ground of the State's liability

Because I have held that the State did not owe Mr Ryan a duty of care at all, I need not consider whether it was required to exercise its power to close the fishery (exercise of that power would have prevented Mr Ryan from contracting hepatitis A). But I would not have been prepared to find on the hearing of this appeal that it was required to do so. The issue is one that would call for the making of findings by the primary judge, particularly as to the reasonableness of the State's being required to monitor pollution at the shoreline of all its oyster-growing estuaries and closing oyster-growing businesses from time to time, in the light of the magnitude of the risk in question.

#### Mr Ryan's notice of contention

This leaves to be dealt with Mr Ryan's notice of contention insofar as it relates to the State's appeal.

I gave reasons for not accepting Mr Ryan's contention relating to causation based upon a duty to minimise faecal contamination of the Lake when dealing with the Council's appeal.

Another contention relating to the State is that his Honour should have found the State owed to Mr Ryan a duty of care to implement a specific local QAP which required:

- (i) a comprehensive and competent sanitary survey of the Lake's oyster fishery 'and surrounding area'; and
- (ii) in the absence of such a survey, a closure of the fishery, particularly after a heavy rainfall episode, until such a survey was carried out and it was then safe to reopen the fishery.

I would not accept the contention. For the reasons given above, it was not incumbent upon the State to exercise its powers at all, in my view.

The remaining contention relating to the State is that his Honour should have found that the State, through the EPA, breached a pleaded duty to ensure that, relevantly, 'the relevant caravan parks' did not pollute the Lake. His Honour rejected the submission by reference to *Bendix* [253], that is, because although the escape of sewage effluent from caravan parks increased the risk, this was not enough: it would have to be shown that it materially contributed to the actual suffering of the illness by Mr Ryan. With respect, I agree with his Honour."

*via*

[249] (1998) 192 CLR 330.

*Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 (05 December 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

98. However, a public authority does not come under an affirmative duty of care merely because the authority knows that unless it acts an individual will suffer harm [63]. Nor is the present case like *Pyrenees* where the Council knew of a risk of harm to certain individuals from a specific problem.

*Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 (05 December 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

82. The likelihood of the common law imposing an affirmative duty of care whose content may require the exercise of a statutory power increases where the power is invested to protect the community from a particular risk and the authority is aware of a specific risk to a specific individual. If the legislature has invested the power for the purpose of protecting the community, it obviously intends that the power should be exercised in appropriate circumstances [46]. If the authority is aware of a situation that calls for the protection of an individual from a particular risk, the common law may impose a duty of care. In that situation, failure to exercise the power may constitute negligence. This seems the best explanation of *Pyrenees Shire Council v Day* [47] where the majority of the Court held that a Council which knew of a fire risk owed a duty of care and breached it by not exercising its powers. Kirby J said [48]:

"The statutory power in question is not simply another of the multitude of powers conferred upon local authorities such as the Shire. It is a power



addressed to the special risk of fire which, of its nature, can imperil identifiable life and property. Therefore, the nature of the power enlivens particular attention to its exercise and to the proper performance of a decision whether to give effect to it or not."

via

[48] (1998) 192 CLR 330 at 423 [252] .

*Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 (05 December 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

310. As long ago as 1880 Earl Cairns LC said this: [274].

"[t]here may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."

It may, with respect, be doubted whether it is possible to make a more accurate or better statement in relation to the powers and obligations of a statutory authority. Another way of expressing his Lordship's view is to say that there has to be something either unique (as it was in *Crimmins* [275] case) or special about the role, or involvement of the authority, or the relationship between it and the affected person, or special about the non-exercise of the power such as marked irrationality in abstention from employing it [276], before liability may be sheeted home to the former [277]. It is of course understandable that courts should strive to find and state a principle capable of universal application, but so far such a principle has remained just as elusive as has any alternative formula to "beyond reasonable doubt" in criminal cases, although from time to time various opinions have held sway. The test propounded by Mason J in *Sutherland Shire Council v Heyman* [278], of general reliance which I would read to be little different from that stated by Deane J in that case, enjoyed a considerable amount of support. It was adopted and applied by McHugh JA in the Court of Appeal in New South Wales in *Lutz*, [279] and restated by his Honour in the High Court in *Pyrenees* [280] albeit with some qualifications. But *Pyrenees* also sounded its demise on its express disapproval by three of the Justices, Brennan CJ [281], Gummow [282] and Kirby JJ [283]. The Chief Justice in that case was influenced by the speech of Lord Hoffmann (with whom Lord Goff of Chieveley and Lord Jauncey of Tullichettle agreed) in *Stovin v Wise* [284], which had been decided shortly before the Court was called upon to reconsider what had been said by Mason J in *Sutherland*. Lord Hoffmann said [285]:

"In the case of a mere statutory power, there is the further point that the legislature has chosen to confer a discretion rather than create a duty. Of course there may be cases in which Parliament has chosen to confer a power because the subject matter did not permit a duty to be stated with sufficient precision. It may nevertheless have contemplated that in circumstances in which it would be irrational not to exercise the power, a person who suffered loss because it had not been exercised, or not properly exercised, would be entitled to compensation. I therefore do not say that a statutory 'may' can never give rise to a common law duty of care. I prefer to leave open the question of whether the *Anns* case [286] was wrong to create any exception to Lord Romer's statement of principle in the *East Suffolk* case [287] and I shall go on to consider the circumstances (such as 'general reliance') in which it has been suggested that such a duty might arise. But the fact that Parliament has conferred a discretion must be some indication that the policy of the act conferring the power was not



90 There is one type of “special” relationship which may in future call for examination – the fiduciary relationship. In Pyrenees Shire Council v Day (1998) 192 CLR 330 at [102] McHugh J said:

“In the absence of a contract, fiduciary relationship or statutory obligation, the common law makes a person liable in damages for the failure to act only when some special relationship exists between the person harmed and the person who fails to act.”

In this passage McHugh J treated fiduciary relationships as not being “special relationships”. But whether they are to be treated as a potential source of liability separate from special relationships or as an example of them, it is not necessary to consider whether the relationship between a unit owner and the body corporate, or between a unit owner and the manager of the building in which unit owners own units and the body corporate owns common areas is a fiduciary relationship. The Statement of Claim did not plead that these relationships created fiduciary duties, the plaintiff did not argue either at trial or on appeal that they did, and the relevant factual and legislative background was not examined.

Proprietors of Strata Plan 17226 v Drakulic [2002] NSWCA 381 -

Proprietors of Strata Plan 17226 v Drakulic [2002] NSWCA 381 -

Proprietors of Strata Plan 17226 v Drakulic [2002] NSWCA 381 -

Proprietors of Strata Plan 17226 v Drakulic [2002] NSWCA 381 -

Lloyd Russell Jones v Commissioner of Main Roads [2002] WASCA 307 (20 November 2002) (Malcolm CJ, Murray J, Steytler J)

Pyrenees Shire Council v Day (1998) 192 CLR 330

Lloyd Russell Jones v Commissioner of Main Roads [2002] WASCA 307 -

Royal and Sun Alliance Insurance Australia Limited v Betta Industries Pty Limited; Harlander Pty Limited (in liq) v State of New South Wales [2002] NSWCA 323 -

Royal and Sun Alliance Insurance Australia Limited v Betta Industries Pty Limited; Harlander Pty Limited (in liq) v State of New South Wales [2002] NSWCA 323 -

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

186. It was observed in Pyrenees Shire Council v Day [158]:

"The broad concepts which found the modern law of negligence reflect its development from the action on the case. Windeyer J explained this in Hargrave v Goldman [159]. These concepts are expressed in major premises which, if unqualified, may extend liability beyond the bounds of social utility and economic sustainability."

So, as in cases respecting the liability in negligence of public authorities [160], the recovery of damages for economic losses resulting from negligent misstatement [161], and the recovery of economic loss in the absence of physical injury to person or property [162], various "control mechanisms" have been postulated to restrict liability in negligence for psychiatric illness not consequent upon physical harm. The control mechanisms reflect a perceived need to keep liability within practicable bounds.

via

[158] (1998) 192 CLR 330 at 376 [125].

[Tame v New South Wales](#) [2002] HCA 35 -  
[Tame v New South Wales](#) [2002] HCA 35 -  
[Tame v New South Wales](#) [2002] HCA 35 -  
[State of New South Wales v Paige](#) [2002] NSWCA 235 -  
[State of New South Wales v Paige](#) [2002] NSWCA 235 -  
[State of New South Wales v Paige](#) [2002] NSWCA 235 -  
[State of New South Wales v Paige](#) [2002] NSWCA 235 -  
[State of New South Wales v Paige](#) [2002] NSWCA 235 -  
[Van der Sluice v Display Craft Pty Ltd](#) [2002] NSWCA 204 -  
[Owners - Strata Plan No 13218 v Woollahra Municipal Council](#) [2002] NSWCA 92 -  
[Owners - Strata Plan No 13218 v Woollahra Municipal Council](#) [2002] NSWCA 92 -  
[Owners - Strata Plan No 13218 v Woollahra Municipal Council](#) [2002] NSWCA 92 -  
[R v Hong Phuc Truong](#) [2002] VSCA 27 -  
[R v Hong Phuc Truong](#) [2002] VSCA 27 -  
[Minister for Immigration and Multicultural Affairs v Bhardwaj](#) [2002] HCA 11 -  
[Canterbury Municipal Council v Taylor](#) [2002] NSWCA 24 -  
[Canterbury Municipal Council v Taylor](#) [2002] NSWCA 24 -  
[Frost v Warner](#) [2002] HCA 1 -  
[Frost v Warner](#) [2002] HCA 1 -  
[Frost v Warner](#) [2002] HCA 1 -  
[Frost v Warner](#) [2002] HCA 1 -  
[Frost v Warner](#) [2002] HCA 1 -  
[City of Ballarat v Perovic](#) [2001] VSCA 222 -  
[Matheson v Commissioner of Main Roads](#) [2001] WASCA 402 -  
[Matheson v Commissioner of Main Roads](#) [2001] WASCA 402 -  
[City of Ballarat v Perovic](#) [2001] VSCA 222 -  
[City of Ballarat v Perovic](#) [2001] VSCA 222 -  
[City of Ballarat v Perovic](#) [2001] VSCA 222 -  
[Rolls Royce Industrial Power \(Pacific\) Ltd v James Hardie & Co Pty Ltd](#) [2001] NSWCA 461 -  
[Rolls Royce Industrial Power \(Pacific\) Ltd v James Hardie & Co Pty Ltd](#) [2001] NSWCA 461 -  
[Rolls Royce Industrial Power \(Pacific\) Ltd v James Hardie & Co Pty Ltd](#) [2001] NSWCA 461 -  
[Wong v The Queen](#) [2001] HCA 64 (15 November 2001) (Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ)

146. Once again, it is not necessary in this case to determine this argument. Clearly, the [Constitution](#) envisages the performance by State courts of appellate functions, including when exercising federal jurisdiction. These have traditionally involved the identification and formulation of general principles as ancillary to the disposal of the particular case before the court [\[211\]](#). The binding rule of a decision is limited by the issues that were in contest between the parties and the way in which those issues were decided by the [majority of the] court [\[212\]](#). But it is not at all unusual, in achieving the orderly application and development of the law, for appellate courts, including this Court [\[213\]](#), to identify the applicable principles in terms that go beyond the strict requirements of the dispute between the parties. Doing this, in a way that affords general principles for use in other current or future cases not before the court, does not necessarily take the court concerned outside its jurisdiction in a "matter". That this is so, can be seen in many instances where this Court has, in the context of a particular case, propounded broad principles [\[214\]](#) or condoned judicial guidelines as compatible with law [\[215\]](#).

via

[\[211\]](#) [Muschinski v Dodds](#) (1985) 160 CLR 583 at 615; [Pyrenees Shire Council v Day](#) (1998) 192 CLR 330 at 397 [\[189\]](#).

[TC v State of New South Wales](#) [2001] NSWCA 380 -  
[TC v State of New South Wales](#) [2001] NSWCA 380 -

Reynolds v Katoomba RSL All Services Club Ltd [2001] NSWCA 234 -  
Deepcliffe Pty Ltd v Council of the City of Gold Coast [2001] QCA 342 (31 August 2001) (McMurdo P,  
Williams JA and Helman J,)

Pyrenees Shire Council v Day (1998) 192 CLR 330 , referred to

Deepcliffe Pty Ltd v Council of the City of Gold Coast [2001] QCA 342 -

Deepcliffe Pty Ltd v Council of the City of Gold Coast [2001] QCA 342 -

Deepcliffe Pty Ltd v Council of the City of Gold Coast [2001] QCA 342 -

Deepcliffe Pty Ltd v Council of the City of Gold Coast [2001] QCA 342 -

Ashrafi Persian Trading Co Pty Ltd v Ashrafinia [2001] NSWCA 243 -

Melchior v Cattanaach [2001] QCA 246 (26 June 2001) (McMurdo P, Davies and Thomas JJA,)

41. Kirby J preferred the approach taken in Caparo and expressed by him in Pyrenees Shire Council v Day, [63].

via

[63] (1997-98) 192 CLR 330 , 419-420 .

Brodie v Singleton Shire Council [2001] HCA 29 (31 May 2001) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

140. There may remain the apprehension that to put aside the "immunity" in respect of the exercise or failure to exercise statutory powers such as those conferred by the LG Act upon the respondents, particularly those of road maintenance, offers no discrimination whereby to some but not others of the wide range of permissive powers vested in various statutory authorities there attaches the "ought" of the duty of care. Such an apprehension would be excessive. The powers vested by the LG Act in the respondents gave them a measure of control over the safety of the person or property of citizens which was significant and exclusive. In general, road users in New South Wales are not empowered to manage or change the features of public roads. Without the consent of the relevant authority, a person must not erect a structure or carry out work in, or over, a public road, dig up or disturb its surface or remove or interfere with a structure, work or tree upon it [250]. The result, as indicated earlier in these reasons under the heading "Negligence and statutory powers", is that the powers vested in road authorities give them a significant and special measure of control over the safety of the person and property of road users. This may make it incumbent upon the authority to exercise its powers, whether by averting the danger to safety or by bringing it to the notice of persons in the situation of the plaintiff. In Pyrenees Shire Council v Day [251], the powers of the appellant were in this category [252].

via

[251] (1998) 192 CLR 330 .

Brodie v Singleton Shire Council [2001] HCA 29 (31 May 2001) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

288. At the most basic level, the distinction between misfeasance and nonfeasance can be seen as a particular reflection of the fact that "[f]rom the time of the Year Books the common law has drawn a distinction between damage which is the result of a positive act and damage which is the consequence of a failure to act" [517]. Thus, in cases of omission, the question which must always be asked is why was there a duty to act? At least since Sutherland Shire Council v Heyman [518] it has been clear that the ordinary principles of the law of negligence apply to public authorities with the result that [519]:



"they are liable for damage caused by a negligent failure to act *when they are under a duty to act*, or for a negligent failure to consider whether to exercise a power conferred on them with the intention that it should be exercised if and when the public interest requires it". (emphasis added)

But that leaves unanswered the questions when and why should a duty to act be found? Those are the underlying questions in these cases.

via

[517] *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 326 per McHugh JA. See also *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 368 [101] per McHugh J.

*Brodie v Singleton Shire Council* [2001] HCA 29 (31 May 2001) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

144. It is true, as Gaudron J pointed out in *Romeo v Conservation Commission (NT)*, that the mere existence of powers in an authority does not of itself create a duty of care [259]. However, her Honour subsequently stated in *Crimmins v Stevedoring Industry Finance Committee* [260]:

"It is not in issue that a statutory body, such as the Authority, may come under a common law duty of care both in relation to the exercise [261] and the failure to exercise [262] its powers and functions. Liability will arise in negligence in relation to the failure to exercise a power or function only if there is, in the circumstances, a duty to act [263]. What is in question is not a statutory duty of the kind enforceable by public law remedy. Rather, it is a duty called into existence by the common law by reason that the relationship between the statutory body and some member or members of the public is such as to give rise to a duty to take some positive step or steps to avoid a foreseeable risk of harm to the person or persons concerned [264]."

via

[264] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 368-369 per McHugh J. See also *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 460-461 per Mason J and the cases there cited.

*Brodie v Singleton Shire Council* [2001] HCA 29 (31 May 2001) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

213. First, it is appropriate for the Court to take into account the extent to which the challenged rule is established by longstanding authority [376] and whether it has recently been reaffirmed and applied by this Court [377]. If the rule reflects longestablished authority and is frequently applied, a sudden change of direction may be seen as an act legislative, rather than judicial, in character. It may undermine not only the authority of the substituted rule but also respect for established legal principles, which it is the duty of this Court to defend.

via

[376] eg *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 ("Crimmins"); *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

*Brodie v Singleton Shire Council* [2001] HCA 29 (31 May 2001) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)



*via*

[illegible]

78 Given the reference in that passage to the question of "expense", it is as well to add, here, a reference to the passages in the Judgments of McHugh and Gummow JJ in *Pyrenees Shire Council v. Day* (1998) 192 CLR 330 to which reference was made in the Council's Written Submissions. In his Judgment in that case *supra* at 371 McHugh J said:

BarNet publication information - Date: Sunday, 28.09.2025 - Publication number: 00035 - User: jayspudvilas@gmail.com

to exercise that function or power constitutes a breach of that duty. Whether it does will depend upon all the circumstances of the case including the terms of the function or power and the competing demands on the authority's resources"

while, in his Judgment *supra* at 394-395 Gummow J said:

"On the other hand, questions of resource allocation and diversion, and budgetary imperatives should fall for consideration along with other factual matters to be 'balanced out' when determining what should have been done to discharge a duty of care. In **Just v. British Columbia** ([1989] 2 SCR 122, 1243-1244) Cory J. explained that the standard of care which is owed to a plaintiff by a government agency may be less than that which would be owed by a private party. In **Just**, the Supreme Court of Canada was concerned with the duty of care owed by the British Columbia Department of Highways with respect to the reasonable inspection and maintenance of a major road between Vancouver and ski resorts at Whistler Mountain. Cory J distinguished between the duty of care owed by a government agency, which might be the same as that owed between individuals, and the standard of care. He continued ([1989] 2 SCR at 1244):

'Nevertheless the standard of care imposed upon the Crown may not be the same as that owed by an individual. An individual is expected to maintain his or her sidewalk or driveway reasonably, while a government agency such as the respondent may be responsible for the maintenance of hundreds of miles of highway. The frequency and the nature of inspection required of the individual may well be different from that required of the Crown. In each case the frequency and method must be reasonable in the light of all the surrounding circumstances. The governmental agency should be entitled to demonstrate that balanced against the nature and quantity of the risk involved, its system of inspection was reasonable in light of all the circumstances including budgetary limits, the personnel and equipment available to it and that it had met the standard duty of care imposed upon it."

Similar observations may be found in the Judgment of Priestley JA, with whom Meagher JA and I agreed, in **Hatch v. Central Sydney Area Health Service** [1999] NSWCA 168 paras. 29-30. However, while it is clear that the various demands which might be made upon the finances of a local authority are a factor relevant to be taken into account in determining the content of any duty of care owed by that authority to members of the public, it seems to me that, if, in a given case, a Council seeks to say that what might otherwise appear to have been a step which a reasonable authority ought to have taken to avoid a risk to members of the public was not one which its finances permitted it to take, the Council would bear the onus of demonstrating that that was so rather than the onus of demonstrating that that was not so lying on the person who was injured - support for that approach is to be found in the passage from the Judgment of Cory J in **Just v. British Columbia** included by Gummow J in the passage from his Judgment in **Pyrenees Shire Council v. Day** which I have set out above.

North Sydney Municipal Council v Harrison [2001] NSWCA 4 -

Wentworth v Wentworth [2000] NSWCA 350 -

Wentworth v Wentworth [2000] NSWCA 350 -

Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61 -

Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61 -

Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61 -

Scott v Davis [2000] HCA 52 -

Scott v Davis [2000] HCA 52 -

Scott v Davis [2000] HCA 52 -

Scott v Davis [2000] HCA 52 -

Scott v Davis [2000] HCA 52 -

Prast v Town of Cottesloe [2000] WASCA 274 -

Prast v Town of Cottesloe [2000] WASCA 274 -

State Rail Authority of New South Wales v Gudgeon [2000] NSWCA 165 (07 August 2000) (Meagher, Handley and Stein JJA)

Pyrenees Shire Council v Day (1998) 192 CLR 330.

Stevens v Brodribb Sawmilling Company Pty Ltd (1985 - 1986)

State Rail Authority of New South Wales v Gudgeon [2000] NSWCA 165 -

City of Rockingham v Curley [2000] WASCA 202 (04 August 2000) (Wallwork J, Murray J, Anderson J)

Pyrenees Shire Council v Day; Eskimo Amber Pty Ltd v Pyrenees Shire Council [1998] HCA 3; (1998) 192 CLR 330; 151 ALR 147.

R v Forty-Nine Casks of Brandy 3 Hagg Adm 275

City of Rockingham v Curley [2000] WASCA 202 (04 August 2000) (Wallwork J, Murray J, Anderson J)

Pyrenees Shire Council v Day; Eskimo Amber Pty Ltd v Pyrenees Shire Council [1998] HCA 3; (1998) 192 CLR 330; 151 ALR 147.

R v Forty-Nine Casks of Brandy 3 Hagg Adm 275

City of Rockingham v Curley [2000] WASCA 202 -

Agar v Hyde [2000] HCA 41 -

Woods v Multi-Sport Holdings Pty Ltd [2000] WASCA 45 -

Woods v Multi-Sport Holdings Pty Ltd [2000] WASCA 45 -

Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59 (10 November 1999) (Gleeson CJ, gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

27. Legislation establishing a statutory body may exclude the operation of the common law in relation to that body's exercise or failure to exercise some or all of its powers or functions. Even if the legislation does not do so in terms, the nature or purpose of the powers and functions conferred, or of some of them, may be such as to give rise to an inference that it was intended that the common law should be excluded either in whole or part. That is why distinctions are sometimes drawn between discretionary and non-discretionary powers [14], between policy and operational decisions [15] and between powers and duties [16]. Where it is contended that a statutory body is not subject to a common law duty in relation to the exercise or non-exercise of a power or function because of the nature or purpose of that power, what is being put is that, as a matter of implication, the legislation reveals an intention to exclude the common law in relation to the exercise or non-exercise of that power [17].

via

[15] See, for example, Anns v Merton London Borough [1978] AC 728 at 754 per Lord Wilberforce; Sutherland Shire Council v Heyman (1985) 157 CLR 424 at 442 per Gibbs CJ, 468-469 per Mason J, 500 per Deane J; X (Minors) v Bedfordshire County Council [1995] 2 AC 633 at 737-738 per Lord Browne-Wilkinson; Pyrenees Shire Council v Day (1998) 192 CLR 330 at 425-426 per Kirby J. See, however, Rowling v Takaro Properties Ltd [1988] AC 473 at 501 per Lord Keith of Kinkel, delivering the opinion of the House of Lords; Stovin v Wise [1996] AC 923 at 951-952 per Lord Hoffmann; Pyrenees Shire Council v Day (1998) 192 CLR 330 at 393-394 per Gummow J where it is said that the policy-operation distinction is problematic and may not be useful.

Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59 (10 November 1999) (Gleeson CJ, gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

101. In Perre v Apand Pty Ltd, I said that "[t]he cases have recognised that knowledge, actual or constructive, of the defendant that its act will harm the plaintiff is virtually a prerequisite of a duty of care in cases of pure economic loss. Negligence at common law is still a fault based system ... It would offend current community standards to impose liability on a defendant

for acts or omissions which he or she could not apprehend would damage the interests of another." [92]. This applies no less to cases regarding the common law duty of public authorities – vulnerability and knowledge go hand in hand. The authority defendant's knowledge was considered an important, even essential, factor weighing in favour of a duty in *Pyrenees* [93].

*Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59 (10 November 1999) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

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via

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*Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59 (10 November 1999) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

216. From time to time judges have expressed concern that the imposition of a duty of care upon a public authority might cut across discretions which that body enjoys by statute, or impose upon it economic and other imperatives which judges and juries might be ill-equipped to evaluate. Importation of a common law duty could distort the performance of the functions of the statutory body in the attempt to avoid private actions. Judges have therefore sought to devise formulae to restrict the supplementation by the common law of the enforcement machinery provided in a statute. Some have resorted to the fiction of what Parliament "intended" to be the mechanism of enforcement [239]. Others have applied public law criteria to evaluate whether a right of action at common law can coexist with the statute [240]. This was the way in which Brennan CJ approached his decision in *Pyrenees Shire Council v Day* [241]. Whilst that approach has distinguished supporters it did not find favour with the majority of this Court in *Pyrenees*. It has also been expressly rejected by the unanimous opinion of the House of Lords [242].

via

[241] (1998) 192 CLR 330 at 347.



*Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59 (10 November 1999) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

299. These arguments of the appellant are all founded in allegations that the Authority failed to exercise its powers, not that it exercised them carelessly. I do not, however, consider that the classification of the alleged breaches as non-feasances rather than misfeasances concludes whether the Authority owed the deceased worker a duty of care to exercise the powers in question. The distinction between non-feasance and misfeasance is often elusive and even if that were not so, adopting that distinction as an exclusive test for deciding whether a duty was owed may well be inconsistent with *Pyrenees*. The majority of the Court held in that case that the Council owed a duty to exercise its statutory powers and was liable for failing to do so.

*Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59 (10 November 1999) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

203. The beginning of a consideration of the duty of care point requires the examination of the legislative scheme governing the Authority's functions, powers, rights and responsibilities at the time the deceased was working at the Port of Melbourne when he was exposed to asbestos fibres. This is the approach that is required both by authority in this country [198], in England [199] and elsewhere. If, from the terms of the legislation, it is plain that the Parliament has ruled out a coexistence of a common law duty of care with the operation of the statute [200], or has imposed on the statutory body discretionary functions which are incompatible with the existence of an action by a person affected, liability will be excluded on a true reading of the legislation [201].

via

[198] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 376-377 per Gummow J.

*Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59 (10 November 1999) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

101. In *Perre v Apand Pty Ltd*, I said that "[t]he cases have recognised that knowledge, actual or constructive, of the defendant that its act will harm the plaintiff is virtually a prerequisite of a duty of care in cases of pure economic loss. Negligence at common law is still a fault based system ... It would offend current community standards to impose liability on a defendant for acts or omissions which he or she could not apprehend would damage the interests of another." [92]. This applies no less to cases regarding the common law duty of public authorities – vulnerability and knowledge go hand in hand. The authority defendant's knowledge was considered an important, even essential, factor weighing in favour of a duty in *Pyrenees* [93].

via

[93] (1998) 192 CLR 330 at 371 per McHugh J, 389 per Gummow J, 420 per Kirby J; see also *Stovin v Wise* [1996] AC 923 at 939-940 per Lord Nicholls of Birkenhead (Lord Slynn of Hadley agreeing).

*Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59 (10 November 1999) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

271. There are several reasons why the task is difficult. As Gummow J pointed out in *Pyrenees Shire Council v Day* [317], a person claiming against a public body with statutory powers seeks "to translate the public law 'may' into the common law 'ought'". Should the courts (and can the courts) distinguish between policy and operational decisions of statutory bodies? Is the





[Crimmins v Stevedoring Industry Finance Committee](#) [1999] HCA 59 -  
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[Crimmins v Stevedoring Industry Finance Committee](#) [1999] HCA 59 -  
[Mahlo v Westpac Banking Corporation Ltd](#) [1999] NSWCA 358 (01 October 1999) (Spigelman CJ, Mason P and Sheller JA)

“I prefer the approach taken by Stephen J in [Caltex Oil](#). His Honour isolated a number of ‘salient features’ which combined to constitute sufficiently close relationship to give rise to a duty of care owed to Caltex for breach of which it might recover its purely economic loss. In [Hill v Van Erp](#) and [Pyrenees Shire Council v Day](#), I favoured a similar approach, with allowance with for the operation of appropriate ‘control mechanisms’.”

[Mahlo v Westpac Banking Corporation Ltd](#) [1999] NSWCA 358 -  
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[Mahlo v Westpac Banking Corporation Ltd](#) [1999] NSWCA 358 -  
[Elliott v Minister for Transport for the State of Western Australia](#) [1999] WASCA 134 (19 August 1999) (Pidgeon J, Anderson J, Parker J)

47 I also note that at 301 [77] his Honour would confine the use of general reliance as a basis of the finding the existence of a duty of care to cases where the omission by the authority was not a result of policy considerations such as a lack of funds or resources, but is more properly to be viewed as within the "operational" sphere of that authority's activities; this refers back to a passage which his Honour quoted at 368 [67] from Mason J in the [Heyman](#) decision which is further discussed by Toohey J at 358 - 359 [68]. It is the plaintiff's case that the Department had failed at all to staff and equip the port of Onslow to provide the communication and navigational service contended for. That commends itself as raising issues of policy and provides no arguable foundation for a contention that the failure was operational in the relevant sense. In my view the approach which commended itself to Toohey J in the [Pyrenees](#) decision would not support, even on an arguable basis, the case which the plaintiff seeks to advance against the Minister.

[Elliott v Minister for Transport for the State of Western Australia](#) [1999] WASCA 134 (19 August 1999) (Pidgeon J, Anderson J, Parker J)

14 The way the claim was argued was that the department of the Minister had a function under s 5 to do the matters to which I have referred. The submission is that it is arguable that the Minister was negligent in the circumstances which arose through the department not performing the function it had. The submission is based on the cases of [Pyrenees Shire Council v Day](#) (1998) 192 CLR 330 and [Romeo v Conservation Commission of the Northern Territory](#) (1998) 192 CLR 431. In the first case a municipality was given certain powers it may exercise for the purposes of preventing fires. A defect in a chimney was brought to its notice and it did not fully exercise its powers to prevent the danger which arose. It was held that the municipality was liable in negligence. Brennan CJ considered that the municipality was liable as it was under a public law duty to exercise its statutory powers. The other members of the Court considered that there was liability on the ground that the municipality was in breach of a duty of care owed to the adjoining shop owners. In the second case a person received injury when falling on land under the occupation and control of the respondent. It was held by the majority that the respondent was under a duty to persons

entering the land to take reasonable care to avoid reasonably foreseeable risks of injury and the risk which occurred was reasonably foreseeable, but it was held that the respondent was not in breach of its duty of care by failing to erect a fence on the cliff from which the plaintiff fell.

[Elliott v Minister for Transport for the State of Western Australia](#) [1999] WASCA 134 -  
[Elliott v Minister for Transport for the State of Western Australia](#) [1999] WASCA 134 -  
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[Elliott v Minister for Transport for the State of Western Australia](#) [1999] WASCA 134 -  
[Elliott v Minister for Transport for the State of Western Australia](#) [1999] WASCA 134 -  
[Perre v Apand Pty Ltd](#) [1999] HCA 36 (12 August 1999) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

269. Even in England, since *Hedley Byrne*, an increasing number of judges have begun to reconceptualise negligence claims involving pure economic loss in terms of the general approach established by [Caparo](#) [356] which I followed in [Pyrenees](#). Thus in [Spring v Guardian Assurance Plc](#) [357] Lord Lowry considered the question of whether a legal duty of care existed in negligence in that case by reference to the foreseeability and proximity tests. He then rejected the defendant's argument that public policy required that recovery be denied [358]:

"This argument falls to be considered on the assumption that, but for the overriding effect of public policy, a plaintiff who is in the necessary proximate relation to a defendant will be entitled to succeed in negligence if he proves his case. To assess the validity of the argument entails not the resolution of a point of law but a balancing of moral and practical arguments. This exercise could no doubt produce different answers but, for my own part, I come down decisively on the side of the plaintiff."

[Perre v Apand Pty Ltd](#) [1999] HCA 36 (12 August 1999) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

216. The Perres had no way of appreciating the existence of the risk to which they were exposed by the conduct of the Apand experiment and no avenue to protect themselves against that risk. They thus stood in quite a different position from that of the financier in [Esanda Finance Corporation Ltd v Peat Marwick Hungerfords](#) which had the power to deal from a position of strength in ordering its commercial relationship with the party to whom it provided financial accommodation [252]. Here, the relevant risk to the commercial interests of the appellants was in the exclusive control of Apand. Its measure of control was at least as great as that of the Shire in [Pyrenees Shire Council v Day](#) [253]. The effect of the Western Australian legislation upon the export market from South Australia was such that, within the buffer zone, the economic loss would flow directly and inevitably and the possibility of its occurrence would not be speculative.

[Perre v Apand Pty Ltd](#) [1999] HCA 36 (12 August 1999) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

26. The first of the various approaches propounded in this area of the law was formulated by Lord Wilberforce in *Anns v Merton London Borough Council* [19]. That approach involved two considerations: firstly, foreseeability and, secondly, considerations which "negative, or ... reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise" [20]. In *Sutherland Shire Council v Heyman*, Brennan J favoured the development of "novel categories of negligence incrementally and by analogy with established categories" [21], an approach later adopted by the House of Lords in *Murphy v Brentwood District Council* [22]. And in *Pyrenees Shire Council v Day* [23], Kirby J advocated the three stage test which is now generally applied in England [24]. That test involves firstly, foreseeability, secondly, the existence of a relationship between the parties of "proximity" or "neighbourhood" and finally, a consideration of policy to determine whether it is "fair, just and reasonable" to impose the duty of care in question [25].

via

[23] (1998) 192 CLR 330 at 419-420.

*Perre v Apand Pty Ltd* [1999] HCA 36 (12 August 1999) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

201. I prefer the approach taken by Stephen J in *Caltex Oil*. His Honour isolated a number of "salient features" which combined to constitute a sufficiently close relationship to give rise to a duty of care owed to Caltex for breach of which it might recover its purely economic loss [244]. In *Hill v Van Erp* [245] and *Pyrenees Shire Council v Day* [246], I favoured a similar approach, with allowance for the operation of appropriate "control mechanisms". In those two cases, the result was to sustain the existence of a duty of care.

via

[246] (1998) 192 CLR 330 at 389.

*Perre v Apand Pty Ltd* [1999] HCA 36 (12 August 1999) (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

128. In *Pyrenees Shire Council v Day* [143], Brennan CJ rejected general reliance as a useful concept in that case. Gummow J and Kirby J also rejected general reliance on the ground that it was a legal fiction and dependent on a principle – reliance – which already held too much sway in negligence [144]. These criticisms of general reliance, however, do not apply to the concept of vulnerability. Vulnerability is not a legal fiction, nor is it dependent on reliance.

*Perre v Apand Pty Ltd* [1999] HCA 36 -  
*Perre v Apand Pty Ltd* [1999] HCA 36 -  
*Perre v Apand Pty Ltd* [1999] HCA 36 -  
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*Perre v Apand Pty Ltd* [1999] HCA 36 -



Scrase v Jarvis [1998] QCA 441 -

Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 (02 February 1998)  
(Brennan CJ,toohey, Gaudron, McHugh, Gummow, Kirby and Hayne JJ)

117. In Pyrenees Shire Council v Day [173], I have expressed my preference for the conclusion that three considerations are involved in deciding whether a duty of care exists:

1. Whether it was reasonably foreseeable to the alleged wrong-doer that particular conduct or an omission on its part would be likely to cause harm to the person who has suffered damage or a person in the same position, [174];
2. Whether there exists between the alleged wrong-doer and such person a relationship characterised by the law as one of "proximity" or "neighbourhood" [175]; and
3. Whether it is fair, just and reasonable that the law should impose a duty of a given scope on the alleged wrong-doer for the benefit of such person, [176].

Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 -

Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 -

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