Crimmins v Stevedoring Industry Finance Committee - [1999] HCA 59

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

MAUREEN CRIMMINS (as Executrix of the Estate of
BRIAN JOHN CRIMMINS deceased) APPELLANT

AND

STEVEDORING INDUSTRY
FINANCE COMMITTEE RESPONDENT

Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59
10 November 1999
M115/1998

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of Victoria and remit the matter to that Court for determination of the remaining issues in the appeal to that Court, including the costs of that appeal.*

On appeal from the Supreme Court of Victoria

Representation:

T E F Hughes QC with J T Rush QC, J H L Forrest QC and R M Doyle for the appellant (instructed by Slater & Gordon)

D F Jackson QC with C G Gee QC and E A Cheeseman for the respondent (instructed by Blake Dawson Waldron)

CATCHWORDS

Crimmins v Stevedoring Industry Finance Committee

Negligence – Duty of care – Statutory authority for stevedoring industry – Worker directed to places of work involving risk of injury – Whether duty to take affirmative action to protect worker – Factors relevant to determination of existence of duty.

Statutes – Interpretation – Transfer of liabilities from one statutory authority to another – Meaning of "liabilities and obligations" – Whether includes inchoate causes of action.

Words and phrases – "liabilities and obligations".

Stevedoring Industry Act 1949 (Cth), s 13(a) .
Stevedoring Industry Act 1956 (Cth), ss 8, 17(1)(a), 17(1)(d), 17(1)(1), 17(1)(o), 17(1)(p), 17(2), 17(3), 18(1), 20, 23(4), 25(b), 25(e), 28(b)(i), 33(1), 33(2), 35, 36(1) .
Stevedoring Industry Acts (Termination) Act 1977 (Cth), ss 14(a), 14(b), 15 .
Stevedoring Industry Finance Committee Act 1977 (Cth) .

1. GLEESON CJ. Two issues arise in this appeal. The first is whether the Australian Stevedoring Industry Authority ("the Authority") owed a duty of care to the late Mr Crimmins, a waterside worker. The second is whether, upon the true construction of the legislation under which the respondent took the place of the Authority, and assumed all its existing liabilities and obligations as at a certain date, the respondent is legally responsible for a breach of such a duty of care which resulted in injury after that date.

2. The material facts and legislative provisions are set out in the judgment of McHugh J.

3. **Following paragraph cited by:**

   State of New South Wales v Paige (19 July 2002) (Spigelman CJ, Mason P and Giles JA)

   > 93 When considering the issue of coherence it is necessary to give close consideration to the statutory scheme: specifically whether a common law duty is “inconsistent” or “incompatible” with the statute and, relevantly in this case, the regulations. (See e.g. *Crimmins* at [3] , [18] , [93 at 6], [114], [203]-[213]; *Sullivan v Moody* at [60] .) However, issues of coherence may arise even if there is no direct inconsistency. It may be enough if the effect of imposing civil liability is to “distort [the] focus” of the statutory decision-making process. (*Crimmins* at [292] per Hayne J.)

   Morgan v Tame (12 May 2000)

I agree, for the reasons given by McHugh J, that the Authority owed a common law duty of care to Mr Crimmins. That involves the conclusion that the legislation under which the Authority operated was not inconsistent with the recognition of such a duty.

4. We do not have before us for decision an issue as to whether, in the facts and circumstances of the case, and in the light of the statutory functions and powers of the Authority, there was a breach of the duty. The trial jury resolved that question adversely to the respondent, but that aspect of the case is not the subject of the present appeal.

5. **Following paragraph cited by:**

Mallonland Pty Ltd v Advanta Seeds Pty Ltd (28 February 2023) (Morrison and Bond JJA; Williams J)
Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

836. The starting point is to examine the relationships, if any, established by the legislative scheme. This feature of the matter gives rise to two principal overlapping issues. The first is whether the legislation establishes a relationship between the Minister, and the respondents and those whom they represent, such that by reason of that relationship the common law recognises a duty to be careful to avoid the risk of injury as a result of the effects of climate change, the breach of which sounds in damages. This issue directs attention to questions of control and consistency with the legislative scheme. The second issue is whether an allegation of breach in the circumstances of this case could ever be a suitable matter for trial by a court, which is an aspect of coherence. This issue has other dimensions. In order to establish a breach of duty, there is an onus on a claimant to show what course of conduct reasonable care required. It would be insufficient simply to show, for instance, that if the Minister had refused the approval of the Extension Project, injury would have been avoided: *Vozza v Tooth & Co Ltd* [1964] HCA 29; 112 CLR 316 at 318-319 (Windeyer J). It would have to be shown that what the Minister did was unreasonable measured against some standard of reasonable care that the claimants would have to establish. This raises a question of fact for trial, and which would require the formulation of practical content involving complex considerations of national politics, national economic considerations, Commonwealth/State relations, international relations, and the balancing of competing considerations of public interest. Difficulties in formulating the practical content of a standard of care would tell against recognition of the duty: *Crimmins* at [5] (Gleeson CJ) . And the suitability of such issues for trial by a court is an important issue that directs attention to the separate roles of the courts and executive government.

Julia Wedding ATF the Julia Wedding Super Fund v Attorney General for NSW on behalf of State of NSW Government (05 April 2017) (McColl JA and Sackville AJA)
Bankstown City Council v Zraika (22 March 2016) (Gleeson, Leeming and Simpson JJA)
Dansar Pty Ltd v Byron Shire Council (27 October 2014) (Macfarlan, Meagher and Leeming JJA)
New South Wales v West (05 September 2008) (Higgins CJ, Penfold and Graham JJ)

Port Stephens Shire Council v Booth (27 September 2005)

83. The test of exercise of a statutory power with reasonable care has been noted or adopted, sometimes the course of determining whether there was a duty of care, in relation to a stevedoring authority's power to regulate the performance of stevedoring operations (*Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [5] , [34]-[35] , [62] , [360]), a council's exercise of a power to require that work be done upon premises to make them safe (*Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [120], [177], [423]), and a council's power to inspect buildings in the course of erection (*Sutherland Shire Council v Heyman* (1985) 157 CLR 424, at 436-7, 458-9, 484, 509). In *Voli v Inglewood Shire Council* (1963) 110 CLR 74 a council was held liable for negligence in the examination and approval of plans and specifications for a building (although it was the building owner). In *Wollongong City Council v Fregnan* [1982] 1 NSWLR 244 a council was held liable for negligence in granting building approval; the negligence was approving without informing the applicant of a danger of slippage, the land being in the council's slippage register, and it was said that the council failed to take proper care in performance of its duty to consider the danger of slippage (at 248; see also 253).

Acceptance that a statutory authority, in the discharge of its functions, owed a duty of care to a person, or class of persons, is only the first step in an evaluation of the authority's conduct for the purpose of determining tortious liability. In some cases, the difficulty of formulating the practical content of a duty to take reasonable steps to avoid foreseeable risks of harm, for the purpose of measuring the performance of an authority against such a duty, may be a reason for denying the duty. In other cases, of which the present is an example, recognition of the existence of a duty is consistent with the need, when dealing with the question of breach, to take account of complex considerations, perhaps including matters of policy, resources, and industrial relations.

6. **Following paragraph cited by:**

Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) (26 July 2017) (Warren CJ, Tate and Osborn JJA)

143. McHugh J said:

The second question in the appeal is whether, assuming that the Authority would have been liable to the plaintiff, s 14 of the *Termination Act* makes the respondent liable to the plaintiff. That section provides:

On the expiration of the transitional period —

(a) all rights and property that, immediately before the expiration of the transitional period, were vested in the Authority are, by force of this section, vested in the Committee; and

(b) the Committee is, by force of this section, liable to perform all the duties and to discharge all the liabilities and obligations of the Authority that existed immediately before the expiration of that period.

The plaintiff contends that the word 'liabilities' in s 14(b) is wide enough to embrace 'potential, contingent or inchoate' liabilities. Alternatively, given the ambiguity of the provision, the term 'liabilities' should be construed to give effect to the evident purpose of the section, namely, that the Committee was to assume fully the entire spectrum of legal rights and liabilities possessed by the Authority. Any other result, so the plaintiff contends, would be 'capricious and unjust'. The respondent, on the other hand, contends that the words 'that existed' necessarily limited the meaning of 'liabilities' to rights that had accrued or vested as at 26 February 1978. In my opinion, the contention of the plaintiff is correct.

Given that both parties accept that the damage for which the plaintiff seeks to recover damages occurred shortly before symptoms were diagnosed in 1997, Tadgell JA was plainly right when he said that it is 'scarcely possible to contend that the authority could have been amenable on or at any time before 26 February 1978 to a claim, let alone a judgment, for the tort of negligence at the suit of the [plaintiff]'. The tort of negligence is derived from the action on the case. Damage is the gist of that action and is an essential element of the cause of action. To say that the plaintiff did not have a complete cause of action as at 26 February 1978, however, does not end the matter. In two cases involving this very question and legislation, two judges have expressed their opinion that 'liabilities' includes 'potential' or 'contingent' liabilities. It is therefore necessary to determine whether the view of the Court of Appeal judges should be preferred to that of the trial judge in this case and those two judges.

The precise meaning to be given to the word 'liabilities' depends on its context. In *Tickle Industries Pty Ltd v Hann*, Barwick CJ pointed out:

> The use of the word 'liable' can cause difficulty in construction because of the various senses in which the word is or has been from time to time employed. The word takes its particular significance, however, from the context in which it appears and the subject matter and evident policy of the legislation in which it is found.

This is so, even though some judges have expressed the opinion that the 'ordinary or natural meaning' of the word is limited to 'actual' (rather than 'potential') liability.

In some contexts, the meaning of 'liabilities' will be wide enough to embrace a 'contingent' or 'inchoate' liability. Thus, *Jowitt's Dictionary of English Law* defines 'liability' as:

> … the condition of being actually or *potentially subject to an obligation*, either generally, as including every kind of obligation, or, in a more special sense, to denote *inc hoate, future, unascertained or imperfect obligations*, as opposed to debts, the essence of which is that they are ascertained and certain. Thus when a person becomes surety for another, he makes himself liable, though it is unascertained in what obligation or debt the liability may ultimately result.

...

In *Bromilow & Edwards Ltd v Inland Revenue Commissioners*, Megarry J denied 'that the meaning of [liabilities] can be limited … to a present, enforceable liability, excluding any contingent or potential liability'. His Lordship held that the word 'must bear this extended meaning'. [82]

via

[82] Ibid 51–3 [134]–[140] (emphasis in original) (citations omitted).

Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) (26 July 2017) (Warren CJ, Tate and Osborn JJA)
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) (26 July 2017) (Warren CJ, Tate and Osborn JJA)
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) (26 July 2017) (Warren CJ, Tate and Osborn JJA)
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) (26 July 2017) (Warren CJ, Tate and Osborn JJA)
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) (26 July 2017) (Warren CJ, Tate and Osborn JJA)
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) (26 July 2017) (Warren CJ, Tate and Osborn JJA)
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) (26 July 2017) (Warren CJ, Tate and Osborn JJA)
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) (26 July 2017) (Warren CJ, Tate and Osborn JJA)
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) (26 July 2017) (Warren CJ, Tate and Osborn JJA)
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) (26 July 2017) (Warren CJ, Tate and Osborn JJA)

As to the second issue, the outcome depends upon the meaning and effect of s 14(b) of the *Stevedoring Industry Acts (Termination) Act* 1977 (Cth) , which provides:

> "[T]he Committee is, by force of this section, liable to perform all the duties and to discharge all the liabilities and obligations of the Authority that existed immediately before the expiration of [the transitional] period."

7. By the date of the expiration of the transitional period, the acts and omissions of the Authority said to constitute negligence had occurred, but no injury had yet been suffered and therefore no cause of action had arisen. Thus, it was argued, there was no "liability" that "existed" at the relevant time.

8. **Following paragraph cited by:**

> Commissioner of Taxation v Byrne Hotels Qld Pty Ltd (11 October 2011) (Dowsett, Bennett and Greenwood JJ)
> Commissioner of Taxation v Byrne Hotels Qld Pty Ltd (11 October 2011) (Dowsett, Bennett and Greenwood JJ)
> Ballantyne v Workcover Authority of NSW (11 September 2007) (Beazley JA; Ipp JA; Basten JA)

Depending upon the context, the meaning of "liability" can include a contingent or potential liability[1]. When the legislature, in providing for replacement of the Authority by the respondent, stipulated that the respondent was to perform all the duties, and discharge all the liabilities, of the Authority, which was abolished and which had no further capacity itself to meet any claims upon it, there was no good reason to distinguish between complete and inchoate causes of action in cases where the Authority had committed a breach of a legal duty. Such a distinction is not required by the use of the word "liability", and to give it a narrow construction would defeat the evident purpose of the legislation, which was to preserve the just entitlements of those who had dealings with the Authority before its abolition.

---

[1] *Walters v Babergh District Council* (1983) 82 LGR 235 (Queen's Bench Division).

---

9. I agree with the orders proposed by McHugh J.

10. GAUDRON J. The relevant facts and the history of these proceedings are set out in other judgments. I shall repeat them only to the extent necessary to make clear my reasons for concluding that the appeal in this matter should be allowed.

11. Two questions are raised in the appeal. The first is whether the appellant can maintain these proceedings against the respondent, the Stevedoring Industry Finance Committee ("the Committee"), as successor to the Australian Stevedoring Industry Authority ("the Authority"). The second is whether the Authority owed a duty of care to the late Mr Crimmins who contracted mesothelioma as a result of the inhalation of asbestos fibres during his employment as a waterside worker at the Port of Melbourne.

12. The question whether these proceedings can be maintained against the Committee depends on the meaning of s 14(b) of the *Stevedoring Industry Acts (Termination) Act* 1977 (Cth) ("the Termination Act"). Subject to certain transitional provisions, s 4(1) of that Act provides that certain other Acts, including the *Stevedoring Industry Act* 1956 (Cth) ("the Industry Act"), cease to have effect [2] . The Authority was established under s 10 of that latter Act. In that context, s 14 of the Termination Act relevantly provides:

> " On the expiration of the transitional period-
>
> ...
>
> (b) the Committee is, by force of this section, liable to perform all the duties and to discharge all the liabilities and obligations of the Authority that existed immediately before the expiration of that period."

---

[2] See the definitions of "Stevedoring Industry Act" and "Stevedoring Industry Acts" in s 3 of the Termination Act .

---

13. The transitional period referred to in s 14 of the Termination Act expired on 26 February 1978 [3] . It is common ground that the late Mr Crimmins had not then suffered the injury upon which these proceedings are based and, thus, no cause of action had then accrued. On this basis, it was argued for the Committee that there was no liability or obligation on the part of the Authority "that existed immediately before the expiration of [the transitional] period".

---

[3] By s 3 of the Termination Act , "transitional period" is defined as:

> "the period commencing immediately after the commencement of [the Termination Act] and ending on such day as is fixed by the Minister, by notice in the *Gazette*, as the terminating day for the purposes of this definition".

By notice dated 17 February 1978 in the *Commonwealth of Australia Gazette*, G8, 28 February 1978, the terminating day of the transitional period was fixed as 26 February 1978.

---

14. **Following paragraph cited by:**

    Viscariello v Legal Profession Conduct Commissioner (14 May 2021) (Lovell and Hughes JJ; Tilmouth AJ)

The evident purpose of s 14(b) of the Termination Act is to ensure that persons who had a claim on the Authority in respect of unperformed duties and undischarged liabilities and obligations could, once the Authority had gone out of existence, look to the Committee for their performance and discharge. That being its purpose, s 14(b) should be construed as widely as its terms permit. The argument for the Committee is that those terms permit only of the transfer of liabilities and obligations that were enforceable immediately before the expiration of the transitional period. That was so, it was said, because otherwise they would not constitute liabilities or obligations "that existed immediately before the expiration of that period".

15. The word "existed" is not synonymous with "were enforceable". Nor, in my view, should it be so construed. There is no difficulty in speaking of the existence of a liability or obligation that is not presently enforceable: equally, there is no difficulty in speaking of a liability or obligation that existed in the past but was not then enforceable. At least that is so if there is or was some foundation for the liability or obligation in question. For example, there is no difficulty in speaking of the existence – whether past or present – of a person's liability in damages in the event of breach of contract if that person is or was, at the relevant time, under a contractual obligation to do or refrain from doing some particular thing. The example illustrates the potential width of the concluding words of s 14(b). Those words are capable of meaning not only that the liability or obligation should have been enforceable at the expiration of the transitional period, but that its foundation should then have been in existence. In my view, they should be construed to include that latter meaning.

16. The liability which the appellant asserts in these proceedings is liability founded on the breach by the Authority of a duty of care, which breach is said to have occurred well prior to the expiration of the transitional period. Assuming there was such a duty and assuming, also, its breach, the Authority was, prior to the expiry of the transitional period, liable in damages if injury should eventuate. And on that assumption, that liability was, by s 14(b) of the Termination Act , transferred to the Committee.

17. **Following paragraph cited by:**

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

For reasons which will later appear, the question whether the Authority owed a duty of care to the late Mr Crimmins necessitates an analysis of the Industry Act . As already mentioned, the Authority was established by s 10 of that Act. It was given powers and functions and, by s 8, it was provided:

" The Authority shall perform its functions, and exercise its powers, under this Act with a view to securing the expeditious, safe and efficient performance of stevedoring operations."

That section is important in that the purpose or objective with which the Authority's powers and functions were to be exercised encompassed the purpose of securing the safety of stevedoring operations. That objective is entirely consistent with the existence of a common law duty of care on the part of the Authority to take reasonable steps to prevent the foreseeable risk of injury to persons engaged in those operations. However, that does not determine whether that duty existed.

18. The question whether the Authority was under a duty of care to the late Mr Crimmins depends on two matters: first, whether the powers and functions conferred on the Authority are compatible with the existence of that duty; and secondly, whether there was a relationship between the Authority and Mr Crimmins of a kind that gave rise to such a duty. Before turning to these issues, it is convenient to note the duty of care asserted and the matters which are alleged to constitute its breach.

19. The duty of care asserted against the Authority is:

> "a continuing duty of care from 1956 to 1977 in the exercise of its statutory functions, duties and powers to take reasonable care to avoid foreseeable risks of injury to the health of [the late Mr Crimmins] in Stevedoring operations at the Port of Melbourne."[4]

---

[4] Further Amended Statement of Claim, par 6F.

---

20. So far as concerns the statutory functions of the Authority by reference to which the duty of care is asserted, s 17 of the Industry Act relevantly provided:

> "(1) The functions of the Authority are-
> (a) to regulate the performance of stevedoring operations;
> ...
> (i) to regulate the conduct of waterside workers in and about ... wharves and ships;
> ...
> (k) to train, or arrange for the training of, persons in stevedoring operations;
> (l) to investigate means of improving, and to encourage employers to introduce methods and practices that will improve, the expedition, safety and efficiency with which stevedoring operations are performed;
> ...
> (o) to encourage safe working in stevedoring operations and the use of articles and equipment, including clothing, designed for the protection of workers engaged in stevedoring operations and, where necessary, to provide waterside workers with articles and equipment designed for that purpose;

(p) to obtain and publish information relating to the stevedoring industry".

21. The powers of the Authority relevant to the asserted duty of care were those conferred by s 18 (1) of the Industry Act . That sub-section provided:

> " For the purpose of the performance of its functions under [section 17], the Authority may, subject to this section, make such orders, and do all such other things, as it sees fit."

Succeeding sub-sections required consultation with Union and employer representatives before the making of an order [5] , including the holding of hearings if the Authority so determined [6] .

---

[5] Section 18(2) .

[6] Section 18(3) .

---

22. In the context of the powers and functions set out above, it is claimed that the Authority failed to warn of the dangers of asbestos, failed to instruct as to those dangers, failed to provide respiratory equipment, failed to encourage employers to introduce safety measures for the handling of asbestos, failed to ensure that employees were aware of the risks of exposure to asbestos and failed to properly inspect the conditions under which stevedoring operations were carried out.

23. Additionally, it is claimed in the Further Amended Statement of Claim that the Authority was negligent in:

> "(c) Failing to prohibit the [late Mr Crimmins] and other waterside workers from unloading asbestos unless they were adequately protected from the harmful effects thereof;
> ...
> (l) Failing to make orders restricting the [late Mr Crimmins'] exposure to asbestos or obliging his employers or the owners of vessels upon which he worked to take steps to eliminate the risk [to his] health posed by exposure to asbestos;
> ...
>
> (n) Failing to prohibit the [late Mr Crimmins] and other waterside workers from working in conditions where they were exposed to asbestos until suitable precautions had been taken for their safety".

24. The various breaches asserted against the Authority involve failure on its part to take some positive step to avoid a risk of harm. However, the claim that the Authority was negligent in failing to make orders is in a distinct category. And if the claims that the Authority was negligent in failing to prohibit certain action on the part of Mr Crimmins are intended to mean that the Authority failed to make orders prohibiting that action, they are, to that extent, also in that category.

25. **Following paragraph cited by:**

FRM17 v Minister for Home Affairs (28 August 2019) (Kenny, Robertson and Griffiths JJ)
Kudrin v City of Mandurah (27 March 2012) (Buss and Newnes JJA; Allanson J)

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 [7] and the failure to exercise [8] 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 [9] . 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 [10] .

---

[7] *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 220 per Dixon CJ, McTiernan, Kitto and Taylor JJ; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 436 per Gibbs CJ (Wilson J agreeing), 458 per Mason J, 484 per Brennan J, 501 per Deane J; *Stovin v Wise* [1996] AC 923 at 943-944 per Lord Hoffmann; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 391-392 per Gummow J.

[8] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 443 per Gibbs CJ (Wilson J agreeing), 460-461 per Mason J, 479 per Brennan J, 501-502 per Deane J; *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 302 per Kirby P, 328 per McHugh J; *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

[9] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 443-445 per Gibbs CJ (Wilson J agreeing), 460-461 per Mason J, 478 per Brennan J; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 368-369 per McHugh J.

[10] *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.

---

26. **Following paragraph cited by:**

Coffs Harbour City Council v Polglase (23 October 2020) (Basten, Macfarlan and Leeming JJA)

In the case of discretionary powers vested in a statutory body, it is not strictly accurate to speak, as is sometimes done, of a common law duty superimposed upon statutory powers [11] .

Rather, the statute pursuant to which the body is created and its powers conferred operates "in the milieu of the common law" [12] . And the common law applies to that body unless excluded. Clearly, common law duties are excluded if the performance by the statutory body of its functions would involve some breach of statutory duty or the exercise of powers which the statutory body does not possess [13] .

---

[11] 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 483 per Brennan J; *Stovin v Wise* [1996] AC 923 at 935 per Lord Nicholls of Birkenhead, 951 per Lord Hoffmann.

[12] *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 487 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, referring to the statement of Sir Owen Dixon in "The Common Law as an Ultimate Constitutional Foundation", (1965) *Jesting Pilate* 203 at 205 that "[w]e act every day on the unexpressed assumption that the one common law surrounds us and applies where it has not been superseded by statute".

[13] See *Stovin v Wise* [1996] AC 923 at 935 per Lord Nicholls of Birkenhead.

---

27. **Following paragraph cited by:**

FRM17 v Minister for Home Affairs (28 August 2019) (Kenny, Robertson and Griffiths JJ)
Sydney Water Corporation v Abramovic (14 September 2007) (Mason P; Santow JA ; Basten JA)
Newcastle City Council v Shortland Management Services (18 June 2003) (Spigelman CJ, Mason P and Sheller JA)

49 This approach was further explicated by Gaudron J in *Crimmins* at [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, between policy and operational decisions and between powers and duties. 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."
>
> Newcastle City Council v Shortland Management Services (18 June 2003) (Spigelman CJ, Mason P and Sheller JA)
> State of New South Wales v Paige (19 July 2002) (Spigelman CJ, Mason P and Giles JA)

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

---

[14] See, for example, *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1031 per Lord Reid; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 442 per Gibbs CJ; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 736-737 per Lord Browne-Wilkinson; *Stovin v Wise* [1996] AC 923 at 953 per Lord Hoffmann.

[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.

[16] See, for example, *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 at 102 per Lord Romer; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 482 per Brennan J. But compare *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 457 per Mason J, where his Honour points to the limited relevance of the distinction between powers and duties, and *Anns v Merton London Borough* [1978] AC 728 at 755 per Lord Wilberforce.

[17] See *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 500 per Deane J.

---

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] .

28. As already pointed out, the purpose or objective of the Authority's powers and functions, as specified in s 8 of the Industry Act , is not inconsistent with the existence of a duty of care to take positive steps to prevent a foreseeable risk of injury to waterside workers. Moreover, the relevant functions imposed by s 17(1) of the Industry Act and set out above are entirely consonant with the existence of a duty of that kind. At least that is so unless some implication to the contrary is to be derived from s 17(2) . That sub-section provides:

> " In regulating the performance of stevedoring operations under this Act, the Authority shall, except to such extent as, in the opinion of the Authority, is essential for the proper performance of that function, avoid imposing limitations upon employers with respect to their control of waterside workers engaged by them and their manner of performance of stevedoring operations."

29. It should at once be noted that, in terms, s 17(2) is concerned only to prevent "limitations upon employers with respect to their control of waterside workers ... and their manner of performance of stevedoring operations". Moreover, the sub-section is directed only to the Authority's function of "regulating the performance of stevedoring operations". It does not purport to limit the Authority's training functions, or those directed to investigating or encouraging the safety of stevedoring operations, the provision of safety equipment or the publication of information.

30. In a context in which the Authority's functions were to be performed and its powers exercised "with a view to securing the expeditious, safe and efficient performance of stevedoring operations"[18], it is impossible, in my view, to derive any implication from s 17(2) to the effect that the Authority was not intended to be subject to a duty of care in relation to the performance of any of the functions set out above, including that of regulating the performance of stevedoring operations.

---

[18] Section 8.

---

31. Different considerations apply with respect to the Authority's power under s 18(1) of the Industry Act to make orders, although not its power to "do all such other things, as [the Authority thought] fit". The power to do all such other things as the Authority thought fit necessarily extended to doing those things that were essential for and, also, those things that were conducive to the performance of its functions [19] . And unlike the power to make orders, the power to do those things was not confined by succeeding sub-sections requiring consultation with interested organisations. There is, thus, nothing in the Industry Act to exclude the common law in relation to the power to "do all such other things, as [the Authority thought] fit".

[19] See *Herscu v The Queen* (1991) 173 CLR 276 at 281 per Mason CJ, Dawson, Toohey and Gaudron JJ.

32. **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)

The critical consideration in relation to the Authority's order-making power under s 18(1) of the Industry Act is that, if made, orders would have had the force of law [20] . It is, thus, appropriate to characterise the power to make orders as legislative in nature. There is considerable incongruity in the notion that the common law might impose a duty of care in relation to the exercise or non-exercise of a power that is legislative in nature[21] . Indeed, so incongruous is that notion that I am of the view that, as a matter of necessary implication, s 18 is to be construed as excluding the operation of the common law in relation to the Authority's exercise or non-exercise of its power to make orders. That aside, however, there is nothing to exclude the operation of the common law in relation to the Authority's power to take other action in the discharge of the functions referred to earlier. More precisely, there is nothing in relation to those powers and functions to exclude a common law duty of care to waterside workers.

[20] Section 20(1)(c) of the Industry Act .

[21] See, for example, *Welbridge Holdings Ltd v Greater Winnipeg* [1971] SCR 957 at 967-968 per Laskin J; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 500 per Deane J; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 393-394 per Gummow J and the cases there cited.

33. To say there is nothing to preclude the existence of a common law duty of care on the part of the Authority to waterside workers is, however, not to say anything as to the content of that duty. Ordinarily, a duty of care is expressed in terms of a duty to take those steps that a reasonable person, in the position of the person who owes the duty of care, would take to avoid a foreseeable risk of injury to another [22] . However, a public body or statutory authority cannot properly be equated with a natural person. Nor is a public body with the powers and functions of the Authority properly to be equated with a reasonable employer of waterside labour and subjected to the same duty of care.

[22] See *Cook v Cook* (1986) 162 CLR 376 at 382 per Mason, Wilson, Deane and Dawson JJ; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488 per Mason, Wilson, Deane and Dawson JJ; *Nagle v Rottnest Island Authority* (1993) 177 CLR 423 at 429-430 per Mason CJ, Deane, Dawson and Gaudron JJ.

34. **Following paragraph cited by:**

Port Stephens Shire Council v Booth (27 September 2005)

90. As was pointed out by Gaudron J in *Crimmins v Stevedoring Industry Finance Committee* at [34] , a common law duty in relation to the exercise or non-exercise of a body's powers "only imposes a duty to take those steps that a reasonable authority with the same powers and resources would have taken in the circumstances in question". Subject to any statutory overlay, however, discharge of the duty requires that the authority act with reasonable care. The test for negligence in the Council' s approval of the development application and the building application is not *Wednesbury* unreasonableness.

A public body or statutory authority only has those powers that are conferred upon it. And it only has the resources with which it is provided. If the common law imposes a duty of care on a statutory authority in relation to the exercise or non-exercise of its powers or functions, it only imposes a duty to take those steps that a reasonable authority with the same powers and resources would have taken in the circumstances in question [23] .

[23] See *Stovin v Wise* [1996] AC 923 at 933 per Lord Nicholls of Birkenhead (Lord Slynn of Hadley agreeing), who was in dissent but only as to the result of the case.

35. For present purposes, it is sufficient to note that, if the common law imposed a duty of care on the Authority, it was a duty to take those steps, short of making binding orders, which a reasonable authority with its powers and resources would have taken in the circumstances, which circumstances included the fact that no relevant orders were made. No question arises in this appeal as to what steps a reasonable authority would have taken in the circumstances of this case. It is, however, appropriate to note that, if there is a common law duty of care, that question was one to be decided by the jury [24] .

[24] See *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 220-221 per Dixon CJ, McTiernan, Kitto and Taylor JJ; *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 44 per Mason J.

---

36. As already indicated, the question whether the Authority owed a duty of care to waterside workers depends on whether there was a relationship of the kind between it and them that gave rise to such a duty. In this regard, it is convenient to note that, at the relevant time, work on the waterfront stood in a somewhat different position from work in most other industries. Employment was casual, with waterside workers being engaged by the day by different stevedoring companies. The shipping companies whose ships were to be loaded and unloaded might or might not be Australian-based: they might or might not meet Australian safety standards. And although employment was regulated by award, day to day activities and conditions might vary from employer to employer, ship to ship and cargo to cargo. Moreover, not only was work on the waterfront casual, it was also hazardous. Much of this finds recognition in various provisions of the Industry Act earlier referred to. Indeed, it explains the particular functions of the Authority set out above and, also, those to which I now turn.

37. In addition to the functions set out earlier in these reasons, s 17(1) also specified that functions of the Authority should include the establishment and administration of employment bureaux for waterside workers[25], the making of arrangements for allotting waterside workers to stevedoring operations[26], the determination of the method of engagement of waterside workers for stevedoring operations, including the time waterside workers should present for work[27] and the making of arrangements to facilitate their engagement[28]. The Authority was also to ensure that sufficient waterside workers were available at each port [29] and pay them attendance and other moneys payable under the Act and under the award which regulated their employment [30] .

---

[25] Section 17(1)(e) .

[26] Section 17(1)(f) .

[27] Section 17(1)(g) .

[28] Section 17(1)(h) .

[29] Section 17(1)(d) .

[30] Section 17(1)(c) .

---

38. It is not in issue that the Authority established work bureaux, allocated work to waterside workers and paid them whatever moneys were due to them. In order to discharge these functions, the Authority was given power to fix quotas for each port [31] and to register waterside workers[32]. Except in special circumstances, it was an offence for any person

without the consent of the Authority to employ waterside workers who were not registered[33] . Waterside workers whose registration numbers were published in newspapers or called by radio broadcast were required to report to specified wharves or docks for work. Workers whose numbers were not published or broadcast reported to the employment bureaux where they might be allocated to particular stevedoring operations. Those workers who reported for work but were not required would be paid attendance money.

---

[31] Section 25 .

[32] Section 29.

[33] Section 39(1).

---

39. In addition to registering waterside workers, the Authority was also empowered to cancel or suspend registration if satisfied of any of the grounds set out in s 36(1) of the Industry Act , including the ground specified in par (e), namely, that the worker had failed:

> "(i) to offer for or accept employment as a waterside worker;
> (ii) to commence, continue or complete an engagement for employment as a waterside worker; or
>
> (iii) to perform any stevedoring operations which he was lawfully required to perform".

40. The system of allocating work to waterside workers also depended on the registration of employers. The Authority was given power to register employers[34] and to apply to the Commonwealth Industrial Court for their deregistration on grounds specified in s 35 of the Industry Act , including on the ground that the employer had been convicted of an offence against that Act [35] . The Authority was empowered to institute proceedings against an employer for an offence against the Industry Act [36] , including for the offence created by s 33(1)(a) , namely, "act[ing] in a manner whereby the expeditious, safe and efficient performance of stevedoring operations [was] prejudiced or interfered with".

---

[34] Section 28.

[35] Section 35(1)(c) .

[36] See s 34(2).

---

41. **Following paragraph cited by:**

Royal and Sun Alliance Insurance Australia Limited v Betta Industries Pty Limited; Harlander Pty Limited (in liq) v State of New South Wales (23 September 2002) (Meagher and Santow JJA, Davies AJA)

In addition to the powers and functions to which reference has already been made, the Authority had power to appoint inspectors to investigate and report in relation to stevedoring operations [37] . Such inspectors were, in fact, appointed. The evidence is that they attended regularly to inspect stevedoring operations at the Port of Melbourne. Thus, there was evidence from which it might properly be inferred that they and, through them, the Authority knew or ought to have known of the conditions associated with the loading and unloading of asbestos cargoes. Those conditions were described in evidence as involving the exposure of waterside workers to considerable quantities of asbestos dust and fibre, on as many as twenty days a year. Moreover, there was evidence that, even if the Authority did not know of the risk of mesothelioma, it knew that exposure to asbestos could be injurious to health.

[37] Section 23 of the Industry Act .

42. Various tests have been propounded as to the factors which will stamp a relationship as one which calls a duty of care into existence. In some cases, emphasis has been placed on the notion of "general reliance". The concept of general reliance in its application to public authorities was explained by Mason J in *Sutherland Shire Council v Heyman* in these terms [38] :

> "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".

His Honour cited the control of air safety, the safety inspection of aircraft and the fighting of fire in a building by a fire authority as examples of situations where general reliance may operate.

[38] (1985) 157 CLR 424 at 464.

43. The notion of general reliance has been the subject of some criticism [39] and more recent decisions of this Court have tended to focus on the vulnerability of the person who suffers injury [40] , on the one hand, and, on the other, the knowledge of risk and the power of the party against whom a duty of care is asserted to control or minimise that risk [41] . And those

precise considerations appear to underpin the notion of general reliance as explained by Mason J in *Sutherland Shire* .

---

[39] See *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 344 per Brennan CJ, 385-388 per Gummow J, 408-412 per Kirby J; *Stovin v Wise* [1996] AC 923 at 953-955 per Lord Hoffmann (Lord Goff of Chieveley and Lord Jauncey of Tullichettle agreeing); *Capital & Counties Plc v Hampshire County Council* [1997] QB 1004 at 1026-1028 per Stuart-Smith LJ delivering the judgment of the Court.

[40] See *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; *Hill v Van Erp* (1997) 188 CLR 159 at 186 per Dawson J (Toohey J agreeing), 216 per McHugh J; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 372-373 per McHugh J, 421 per Kirby J; *Perre v Apand* (1999) 73 ALJR 1190 at 1193-1194 per Gleeson CJ, 1197-1198 per Gaudron J, 1217 per McHugh J, 1231 per Gummow J, 1248 per Kirby J, 1271 per Callinan J; 164 ALR 606 at 611-612, 618, 645, 664, 688, 718 -719.

[41] See, for example, *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 362 per Toohey J, 372 per McHugh J, 389 per Gummow J, 420-421 per Kirby J; *Perre v Apand* (1999) 73 ALJR 1190 at 1193-1194 per Gleeson CJ, 1197-1198 per Gaudron J, 1217 per McHugh J, 1230-1231 per Gummow J, 1248 per Kirby J, 1253-1254 per Hayne J, 1270 per Callinan J; 164 ALR 606 at 611-612, 618, 645, 662-664, 687, 695-696, 718-719 . See also *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 307 per Kirby P; *Stovin v Wise* [1996] AC 923 at 939-940 per Lord Nicholls of Birkenhead; *Brown v Heathcote County Council* [1986] 1 NZLR 76 at 82.

---

44. In the present case, Mr Crimmins was not only vulnerable to injury by reason of the hazardous nature of his employment but he was less able than employees in most other industries to protect his own interests. The casual nature of his employment precluded the development of any longstanding employer-employee relationship in which he might usefully seek to secure his own health and welfare. And his relative powerlessness in that regard was magnified by the Authority's directions as to when and where he was to work in circumstances in which he was at risk of having his registration as a waterside worker cancelled or suspended if he did not obey.

45. **Following paragraph cited by:**

Agius v New South Wales (23 October 2001) (Priestley, Powell and Giles JJA)

As already indicated, the Authority ought to have known from its inspectors of the frequency with which and the degree to which waterside workers at the Port of Melbourne were exposed to asbestos. Further, it knew that exposure to asbestos dust and fibres could be injurious to health. It was in a position to know what, if any steps, employers were taking to avoid the

risks posed by asbestos. And more to the point, if employers were not taking adequate measures, the Authority was in a position to take various steps, short of making orders having the force of law, to control or minimise those risks.

46. Given the vulnerability of the late Mr Crimmins, the knowledge the Authority had or should have had, and its position to control or minimise the risks associated with the handling of asbestos, there was, in my view, a relationship between Mr Crimmins and the Authority giving rise to a duty of care on the part of the Authority to take those steps, short of making binding orders, which, in the circumstances, a reasonable authority with its powers and resources would have taken to avoid foreseeable risk of injury as a result of exposure to asbestos.

47. The appeal should be allowed with costs. The orders of the Court of Appeal of the Supreme Court of Victoria should be set aside and the matter remitted to that Court for it to determine the remaining issues in the appeal to that Court, including the costs of that appeal.

48. McHUGH J. This appeal presents two questions for determination. Both questions arise out of a claim that a statutory authority supervising stevedoring operations at Australian ports negligently exposed a waterside worker to asbestos dust, the inhalation of which eventually caused the terminal lung disease mesothelioma.

49. The first question in the appeal is whether the statutory authority owed the plaintiff a common law duty of care. Resolution of this question requires an examination of the circumstances in which a statutory authority will come under a duty to take affirmative action to protect a person who may suffer harm if the authority does not act. The second question in the appeal is whether any liability of the statutory authority in tort to the worker was transmitted to the authority's successor body, the respondent, in circumstances where the liability could only be described as "contingent or potential" because the damage was suffered, and hence the tort was "complete", only after the respondent had taken over the liabilities of the statutory authority. Resolution of this question turns on the construction of the statutory provisions governing the transmission of liabilities to the respondent.

50. The appeal is brought against an order of the Court of Appeal of the Supreme Court of Victoria [42] which set aside a verdict for the plaintiff in an action for damages for negligence. The Court held that the statutory authority did not owe a duty of care to the plaintiff and that, if it did and had breached that duty, its liability to the plaintiff was not transmitted to the respondent. In my opinion, the Court of Appeal erred in ruling against the waterside worker on both questions.

---

[42] *Stevedoring Industry Finance Committee v Crimmins* [1999] 1 VR 782 (Winneke P, Tadgell and Buchanan JJA).

---

51. The statutory authority owed a duty of care to the worker because it directed him to places of work where there were risks of injury of which the authority was, or ought to have been, aware and in respect of which, the authority knew or ought to have known that the worker was specially vulnerable. The worker's vulnerability arose as a result of the casual nature of his employment and his obligation to obey the authority's directions as to where he worked. Nothing in the legislation governing the authority's powers and functions negatived the existence of a common law duty of care. Furthermore, the respondent was liable for any liability which the predecessor would have had to the plaintiff because the relevant statutory provision should be construed in accordance with the principle that, where legislation is open to a construction that will save existing or potential common law rights, it should not be construed as abolishing or reducing those rights.

The factual and procedural background

52. The appellant, Mrs Maureen Crimmins, is the widow and executrix of the estate of Brian John Crimmins, who was the waterside worker in question and was the plaintiff in the action against the respondent. In or about May 1997, Mr Crimmins ("the plaintiff") was diagnosed as suffering from the lung disease mesothelioma which is caused by the inhalation of asbestos fibres. The disease is inevitably fatal. He died on 23 July 1998. His action was conducted on the basis that the relevant injury was not sustained until shortly before the manifestation of symptoms in May 1997. The respondent accepted that this was so.

53. Between April 1961 and November 1965, the plaintiff was employed as a registered waterside worker in the Port of Melbourne. At that time, stevedoring operations throughout Australia were regulated by the Australian Stevedoring Industry Authority ("the Authority") which was established by the *Stevedoring Industry Act* 1956 (Cth) ("the Act"). The Authority was later abolished and replaced by the respondent, the Stevedoring Industry Finance Committee ("the Committee"), at the expiration of a "transitional period" fixed at 26 February 1978, pursuant to the provisions of the *Stevedoring Industry Acts (Termination) Act* 1977 (Cth) ("the Termination Act") and the *Stevedoring Industry Finance Committee Act* 1977 (Cth) . Section 14(b) of the Termination Act provided that the Committee was to assume "all the liabilities and obligations of the Authority that existed" as at 26 February 1978.

54. The plaintiff contended at trial that the Authority was in breach of the duty of care that it owed to him to protect him from the harmful effects of asbestos dust and that that breach was one of the existing "liabilities and obligations of the Authority" assumed by the Committee on 26 February 1978, notwithstanding that no cause of action arose until 1997.

The Authority

55. During the period from 1960 to 1965, 12 to 15 stevedoring companies were registered with the Authority at the Port of Melbourne where the plaintiff worked. The Act required the Authority to register employers who applied for registration and who satisfied the statutory requirements, one of which was that the employer was capable "of carrying out stevedoring operations ... in an expeditious, safe and efficient manner" [43] . This requirement reflected the obligation imposed by s 8 of the Act which declared that "[t]he Authority shall perform its functions, and exercise its powers, under this Act with a view to securing the expeditious, safe and efficient performance of stevedoring operations."

[43] s 28(b)(i) .

56. During this period, about 5,000 waterside workers were registered with the Authority. Registration was governed by the Act and depended, *inter alia*, upon a medical examination and the satisfaction of the Authority's "reasonable requirements ... as to ... age, physical fitness, competence and suitability"[44]. However, the workers were employed not by the Authority, but by the stevedores (and occasionally the owner or master of a ship), employment being on a job by job basis. But the Authority's role was more than supervisory. The Authority allocated the waterside workers for work in accordance with the needs of the various employers – the workers having no say in the allocation. The Authority was responsible for the payment of attendance moneys, sick pay, long service leave and for public holidays. It funded these payments by a statutory levy on the employers. The Authority also had certain powers of discipline over the workers including the power in certain circumstances to cancel or suspend the worker's registration (though an appeal lay to the Commonwealth Conciliation and Arbitration Commission [45]). Once a worker had been assigned to a wharf, however, he was subject to the direction of the employer, who would supply any safety equipment required by the relevant Award. The Authority was generally ignorant of the structure or size of the ships to which the workers were allocated, and the nature of the cargoes to be handled there.

[44] s 29(1)(b)(i).

[45] s 37 .

57. The Authority's other functions included the adjudication of disputes between waterside workers and employers including the participation in Boards of Reference established under the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) and the Waterside Workers' Award 1960 ("the Award"); the appointment of Port Inspectors who were empowered to make investigations and to report to the Authority and the Commonwealth Conciliation and Arbitration Commission regarding matters of safety and efficiency of stevedoring operations; the power to lay informations for offences by registered employers; the encouragement of safe working conditions including if necessary the provision of the proper safety equipment; and a general power to "regulate the performance of stevedoring operations" [46] . The Authority was empowered, in the performance of its functions, to "make such orders, and do all such other things, as it thinks fit" [47] , although it was to have regard to the desirability of encouraging full employment on the waterfront [48] , and to "avoid imposing limitations upon employers with respect to their control of waterside workers engaged by them and their manner of performance of stevedoring operations" save to the extent the Authority thought it "essential for the proper performance" of its functions [49] .

[46] s 17(1)(a) .

[47] s 18(1) .

[48] s 17(3) .

[49] s 17(2) .

Working conditions and safety on the waterfront

58. During his employment at the Port of Melbourne, the plaintiff was required (by unspecified stevedoring companies) from time to time to unload asbestos cargoes. The asbestos fibres were packed in loosely woven hessian bags, the handling of which resulted in the percolation of the fibres through the hessian and spillage from broken bags, creating clouds of airborne asbestos dust. Dust accumulated on clothes, hair and arms. At times, the dust was so pervasive that the plaintiff would have to blow his nose frequently to expel the dust from his nostrils. The plaintiff estimated that he worked approximately 20 days a year on asbestos cargoes. Neither the Authority nor any employer warned the plaintiff of the dangers of asbestos; nor was he provided with clothing or equipment to protect him from those dangers. From time to time, waterside workers complained of working in dusty conditions, and on occasion they were paid "dirt money" as the result of inspections by Port Inspectors. Upon the evidence, it was open to the jury to find that, during the relevant period, the employers knew or ought to have known that dust generally, and asbestos in particular, was likely to harm those who came into contact with it.

59. As part of its function to encourage safe working practices [50] the Authority corresponded with international shipping companies with respect to safety matters including the stowage and handling of hazardous materials. It threatened to withhold dock workers from vessels whose equipment did not comply with Australian safety standards. It also consulted with domestic unions and employers and disseminated literature regarding proper safety practices. In 1960, the shipowners set up the Federal Advisory Committee on Waterfront Accident Prevention ("FACWAP"), which had representatives from a variety of entities interested in the Australian waterfront including stevedoring companies, unions and the Authority. In 1962 FACWAP adopted a protocol for dealing with matters relating to industrial health on the waterfront. Long-term health issues were referred to the Occupational Health Committee of the National Health and Medical Research Council ("NHMRC"), while urgent matters were referred to the appropriate State health departments. The Authority was the conduit for the provision of information respecting occupational health and safety to the industry.

---

[50] s 17(1)(o) .

---

60. **Following paragraph cited by:**

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

Although the Authority had an overarching supervisory and regulatory role with respect to safety on the waterfront, it is clear that the primary responsibility fell upon the employers. The Award placed a number of very specific safety responsibilities upon the employers (and not the Authority) including an obligation to provide safety equipment where it was needed [51] .

---

[51] *Stevedoring Industry Finance Committee v Crimmins* [1999] 1 VR 782 at 826-827 per Buchanan JA .

The duty of care alleged by the plaintiff

61. **Following paragraph cited by:**

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

783. The primary judge treated the case presented by the respondents at trial as inviting the court to find the existence of a "novel" duty of care. A novel duty of care may be distinguished from a duty arising from accepted categories of relationship, such as road users, employer and employee, occupier and entrant to premises, suppliers of professional services and clients, and manufacturers of goods and consumers, where there are settled principles of legal responsibility. Those upon whom statutory powers are conferred may have a duty of care because they operate within one of these established categories: *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; 200 CLR 1 (***Crimmins***) at [61] (Mc Hugh J, Gleeson CJ at [3] agreeing). Outside the established categories where a duty of care has been held to arise, the common law generally develops by increments, where the legal question whether a duty of care is to be recognised is answered by using the common law technique which looks to precedent, which reasons analogically, and by reference to principles and policy underlying earlier decisions: *Crimmins* at [73]-[78] (McHugh J, Gleeson CJ at [3] agreeing). Those principles include that there be a close examination of any relevant legislative regime where a decision under a statute is involved, which is of particular importance to this case: *Stuart v Kirkland-Veenstra* [2009] HCA 15; 237 CLR 215 at [11

2] (Gummow, Hayne and Heydon JJ). The principles also include, to the extent appropriate, the "salient features" analysis referred to in *Graham Barclay Oysters* at [149] (Gummow and Hayne JJ, Gaudron J agreeing).

Upon these facts, the question arises whether the Authority, as well as the individual employers, owed a common law duty of care to the plaintiff. In my opinion, it did. The correct approach in determining whether a statutory authority owes a duty of care is to commence by ascertaining whether the case comes within a factual category where duties of care have or have not been held to arise. Employer and employee, driver and passenger, carrier and consignee are a few examples of the many categories or relationships where, absent statute or contract to the contrary, the courts have held that one person always owes a duty of care to another. Frequently, a statutory authority will owe a duty of care because the facts of the case fall within one of these categories. The authority may, for example, be an employer or occupier of premises or be responsible for the acts of its employees, such as driving on a public street.

62. **Following paragraph cited by:**

Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)
Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd (22 September 2009) (McColl and Campbell JJA, Sackville AJA)

> 374. Such a duty has also been recognised by McHugh J (with whom Gleeson CJ agreed) in ***Crimmins*** at [62] ff. However, a reading of the Statement of Claim shows that the plaintiff made no mention of any statutory power, or of negligence in the exercise of any such statutory power, in the way it put its case. Rather, the acts of negligence alleged were those that I have set out at para [107] above. When the way the plaintiff puts its case for the liability of the RTA makes no mention of any special statutory power of the RTA, I do not see how that alleged liability could be "*based on*" the RTA's exercise of, or failure to exercise, any special statutory power. The distinction between a case asserting negligent exercise of a statutory power, and a case that a statutory authority had an affirmative obligation to take reasonable steps to prevent harm to a plaintiff is recognised by McHugh J in ***Crimmins*** at [62]-[70] .

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

There is one settled category which I would have thought covered this case: it is the well-known category "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[[52]] to be occasioned, by their exercise, damages for negligence may be recovered" [53] . Similarly, in *Sutherland Shire Council v Heyman* [54] , Mason J, citing *Caledonian Collieries Ltd v Speirs* [55] , said that "[i]t is now well settled that a public authority may be subject to a common law duty of care when it exercises a statutory power or performs a statutory duty."

---

[52] Later cases require "likely" to mean that there is a reasonable possibility that the injury is likely to be occasioned.

[53] *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 220 per Dixon CJ, McTiernan, Kitto and Taylor JJ.

[54] (1985) 157 CLR 424 at 458 .

[55] (1957) 97 CLR 202 at 219-220 .

---

63. In directing the plaintiff and other waterside workers to places of work, the Authority was exercising its power to give directions in aid of its function of making "arrangements for allotting waterside workers to stevedoring operations" [56] . That being so, I would have thought that the Authority owed a duty to the plaintiff as a person affected by the exercise of the power to exercise it with reasonable care for his safety. On that hypothesis, duty would not have been an issue in the case; breach of duty and causation would have been the critical issues for determination. But negligent exercise of a statutory power does not seem to be the way that the case was conducted at the trial or in the Court of Appeal. Nor was it the way that it was conducted in this Court.

---

[56] s 17(1)(f) .

The case as pleaded

64. The plaintiff's Further Amended Statement of Claim alleged that:

> "In the premises, the Authority was under a continuing duty of care from 1956 to 1977 in the exercise of its statutory functions, duties and powers to take reasonable care to avoid foreseeable risks of injury to the health of the Plaintiff in Stevedoring operations at the Port of Melbourne."

The allegation of duty is wide enough to encompass a claim of negligently exercising a statutory power. But the particulars of negligence, which were pleaded, indicate otherwise. They can be grouped into the following classes: failure to disseminate information (encourage, warn, train, publish), failure to inspect, failure to prohibit, failure to provide equipment and failure to make orders. The bulk of the plaintiff's complaints concern the

Authority's failure to act. In this Court, the plaintiff relies principally on s 17(1)(o) of the Act , which stated that one of the Authority's functions was:

> " ... to encourage safe working in stevedoring operations and the use of articles and equipment, including clothing, designed for the protection of workers engaged in stevedoring operations and, where necessary, to provide waterside workers with articles and equipment designed for that purpose ...".

65. **Following paragraph cited by:**

> Berhane v Woolworths Ltd (08 August 2017) (Gotterson and Morrison JJA and Dalton J,)

It is true that the particulars of negligence, though relevant to determining whether a duty existed, go to the question of breach. To speak of failures to do this or that as being concerned with specific duties is in my view wrong in principle, for it tends to elevate questions of fact to principles of law [57] . Thus, a driver owes a duty to other road users to take reasonable care, not a series of specific duties, such as a duty to keep a proper lookout, a duty not to drive at excessive speed or a duty to give a warning where there is a risk of collision. In particular circumstances, failing to keep a lookout, driving at speed or not giving a warning may constitute a breach of the duty to take reasonable care. But that is all. Nevertheless, the particulars pleaded in the present case, while not allegations of duty, do indicate that the plaintiff's case, or at all events his main case, was not concerned with the negligent exercise of power. The various failures alleged against the Authority assume that it owed a duty of care to the plaintiff but they imply that duty was one to take affirmative action.

---

[57] *Tidy v Battman* [1934] 1 KB 319 at 322 per Lord Wright.

---

66. Curiously, the case that was left to the jury was wide enough to include the negligent exercise of power. However, the jury were never specifically directed that the plaintiff's case was concerned with the negligent exercise of a statutory power. The learned trial judge directed the jury:

> "The defendant was under an obligation not to do anything which it could reasonably have foreseen might cause injury to the plaintiff of the kind which he suffered. Conversely, it could be put: the Authority was under an obligation not to omit to do something which it might reasonably have done so as to prevent the plaintiff suffering the foreseeable injury."

67. Despite the width of these statements, the judgment of the trial judge on the duty issue and those of the learned judges of the Court of Appeal suggest that the case that was made at trial was not a case of the negligent exercise of power. In the Court of Appeal, Winneke P said:

"The duty, and the scope of it, which his Honour found to exist was a general one to take reasonable steps to prevent foreseeable harm befalling waterside workers engaged in stevedoring operations."

68. Similarly, Tadgell JA, who did not determine the question of duty of care – his Honour decided the case on the succession of liability issue – thought that the plaintiff's case was that "the Authority, as well as his various employers, had owed him, as an allotted waterside worker, a duty to take reasonable care for his safety".

69. These formulations accord with my reading of the trial judge's judgment on the duty issue which emphasises what the Authority could have done rather than what it did.

70. **Following paragraph cited by:**

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

Thus, the plaintiff's claim at the trial seems to have been that, in all the circumstances of the case, the Authority owed him a duty to take reasonable steps to avoid harm to him from reasonably foreseeable risks of harm, notwithstanding that his Honour's charge records counsel for the Authority as stating that the Authority "was not negligent either as to what it did or as to what it failed to do." In other words, the plaintiff's case seems to have been conducted on the basis that the Authority had an affirmative obligation to prevent harm to the plaintiff from the stevedoring operations in which he was engaged, rather than having negligently exercised the power to give directions to him. Because that is so, I think that it would be wrong at this stage to treat the case as one concerned with the negligent exercise of a statutory power. The plaintiff's case must stand or fall as one concerned with an affirmative obligation on the part of the Authority to take reasonable steps to protect the plaintiff from injury.

The common law liability of statutory authorities in negligence

71. The present case has no factors which require it to be categorised as a case where a duty always exists or never exists, although the plaintiff asserts that the case is analogous to an employer-employee relationship and should be examined in that light. Nor is the case one where the factual situation is identical or nearly so with a situation where a common law court has held that the defendant owed no duty of care. It is a case where the plaintiff claims that a statutory authority owed him a duty to take affirmative action to protect him. The question of duty must therefore be determined by reference to what has been decided in similar cases.

72. **Following paragraph cited by:**

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

R v Moore (15 December 2015) (Bathurst CJ, Simpson JA and Bellew J)

Basic to that determination, as always, is the question: was the harm which the plaintiff suffered a reasonably foreseeable result of the defendant's acts or omissions? A negative answer will automatically result in a finding of no duty. But a positive answer then invites further inquiry and a close examination of any analogous cases where the courts have held that a duty does or does not exist. In determining whether the instant case is analogous to existing precedents, the reasons why the material facts in the precedent cases did or did not found a duty will ordinarily be controlling.

73. The policy of developing novel cases incrementally by reference to analogous cases acknowledges that there is no general test for determining whether a duty of care exists. But that does not mean that duties in novel cases are determined by simply looking for factual similarities in decided cases or that neither principle nor policy has any part to play in the development of the law in this area. On the contrary, the precedent cases have to be examined to reveal their bases in principle and policy. Only then, if appropriate, can they be applied to the instant case. A judge cannot know whether fact A in the instant case is analogous to fact B in a precedent case unless he or she knows whether fact B was material in that case and, if so, why it was material. Only then can the judge determine whether the facts of the current case are sufficiently analogous to those in an apparently analogous precedent to treat the precedent as indicating whether a duty of care did or did not exist in the current case. By this means, reasons of principle and policy in precedent cases are adapted and used to determine new cases. Very often, the existence of additional facts in the current case will require the judge to explain or justify why they are or are not material. In this way, the reasons in each new case help to develop a body of coherent principles which can be used to determine whether a duty of care does or does not exist in novel cases and which also provide a measure of certainty and predictability as to the existence of duties of care.

74. **Following paragraph cited by:**

R v Moore (15 December 2015) (Bathurst CJ, Simpson JA and Bellew J)

Much legal reasoning proceeds by way of analogy. In his recent book *One Case at a Time* [58] , Professor Sunstein pointed out:

> "[A]nalogical reasoning reduces the need for theory-building, and for generating law from the ground up, by creating a shared and relatively fixed background from which diverse judges can work. Thus judges who disagree on a great deal can work together far more easily if they think analogically and by reference to agreed-upon fixed points."

---

[58] (1999) at 42-43.

---

75. He went on to say[59]:

> "The fact that precedents provide the backdrop removes certain arguments from the legal repertoire and in that way much simplifies analysis. The search for relevant similarities, and low-level principles on which diverse people can converge, often makes legal doctrine possible. Of course intense disagreements may remain."

---

[59] Sunstein, *One Case at a Time* (1999) at 43.

---

76. Analogical reasoning therefore reduces the cost of decision-making and the chance of error. Where the background of legal decision-making is relatively fixed, the range of evidentiary materials is narrower than is usual where a case is to be decided by vague standards or relatively indeterminate principles. This reduces the cost of litigation and the cost per case of providing public courts. It also makes it easier for professional advisers to predict the outcome of litigation with the result that costly litigation can be avoided or, at worst, settled at an early stage when the relative strengths of the opposing cases become apparent. Where the background is relatively fixed, there is also less chance that appellate courts will take a different view of the material facts from that of the trial court, thus discouraging appeals and preventing the defeat of the expectations of the successful party at the trial.

77. **Following paragraph cited by:**

Mallonland Pty Ltd v Advanta Seeds Pty Ltd (28 February 2023) (Morrison and Bond JJA; Williams J)

> 291. A similar point was recognized in *Howard Smith & Patrick Travel Pty Ltd v Comcare* , when Basten JA (with whom Beazley P and Sackville AJA agreed), made the following observations at [36] : [224]
>
> > "The statements of principles to be applied in determining whether a defendant owes a plaintiff a duty of care have undergone a degree of linguistic metamorphosis over the last two decades. It is now common in this country to require reference to the "salient features" of the relationship between the plaintiff and the defendant. In *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258; 75 NSWLR 649, Allsop P provided a list or catalogue of some 17 salient features, described as "a non-exhaustive universe of considerations of the kind relevant to the evaluative task of imputation of the duty and the identification of its scope and content": at [103] and [104] . However, the value of such a catalogue is limited. As noted by McHugh J in *Crim mins* at [77] :

> ‘Since the demise of any unifying principle for the determination of the duty of care and the general acknowledgment of the importance of frank discussion of policy factors, the resolution of novel cases has increasingly been made by reference to a 'checklist' of policy factors. The result has been the proliferation of 'factors' that may indicate or negative the existence of a duty, but without a chain of reasoning linking these factors with the ultimate conclusion. Left unchecked, this approach becomes nothing more than the exercise of a discretion ... There will be no predictability or certainty in decision-making because each novel case will be decided by a selection of factors particular to itself. Because each factor is only one among many, few will be subject to rigorous scrutiny to determine whether they are in truth relevant or applicable.’”
>
> Howard Smith & Patrick Travel Pty Ltd v Comcare (03 July 2014) (Beazley P, Basten JA and Sackville AJA)

Since the demise of any unifying principle for the determination of the duty of care and the general acknowledgment of the importance of frank discussion of policy factors, the resolution of novel cases has increasingly been made by reference to a "checklist" of policy factors[60]. The result has been the proliferation of "factors" that may indicate or negative the existence of a duty, but without a chain of reasoning linking these factors with the ultimate conclusion. Left unchecked, this approach becomes nothing more than the exercise of a discretion – like the process of sentencing, where the final result is determined by the individual "judge's instinctive synthesis of all the various aspects" [61] . Different judges will apply different factors with different weightings. There will be no predictability or certainty in decision-making [62] because each novel case will be decided by a selection of factors particular to itself. Because each factor is only one among many, few will be subject to rigorous scrutiny to determine whether they are in truth relevant or applicable. In my opinion, adherence to the incremental approach imposes a necessary discipline upon the examination of policy factors with the result that the decisions in new cases can be more confidently predicted, by reference to a limited number of principles capable of application throughout the category. In this case, the relevant principles are found in cases concerned with the common law liability of statutory authorities, the control of another person's liberty and the duty to take positive action.

---

[60] See Stapleton, "Duty of Care Factors: a Selection from the Judicial Menus" in Cane & Stapleton (eds), *The Law of Obligations – Essays in Celebration of John Fleming* (1998), 59.

[61] *R v Williscroft* [1975] VR 292 at 300 per Adam and Crockett JJ .

[62] See *Perre v Apand Pty Ltd* (1999) 73 ALJR 1190 at 1205; 164 ALR 606 at 628-629 per McHugh J .

---

78. Sometimes, as in *Perre v Apand Pty Ltd* [63] , no case will be found which can reasonably be regarded as analogous to the instant case. Where such novel cases arise, the existence of a duty can only be determined by reference to the few principles of general application that can be found in the duty cases. My judgment in *Perre* [64] refers to the principles which are ordinarily applicable in cases of pure economic loss.

---

[63] (1999) 73 ALJR 1190 at 1206-1207; 164 ALR 606 at 630-631 .

[64] (1999) 73 ALJR 1190 at 1214; 164 ALR 606 at 641-642 .

General principles concerning statutory authorities

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

80. In Australia, the starting points for determining the common law liability of statutory authorities for breach of affirmative duties are the decisions of this Court in *Sutherland Shire Council v Heyman* [65] and *Pyrenees Shire Council v Day* [66] . In *Heyman* [67] , Mason J, speaking with reference to a failure to exercise power, said:

> "Generally speaking, a public authority which is under no statutory obligation to exercise a power comes under no common law duty of care to do so … But an authority may by its conduct place itself in such a position that it attracts a duty of care which calls for exercise of the power. A common illustration is provided by the cases in which an authority in the exercise of its functions has created a danger, thereby subjecting itself to a duty of care for the safety of others which must be discharged by an exercise of its statutory powers or by giving a warning …"

---

[65] (1985) 157 CLR 424 .

[66] (1998) 192 CLR 330 .

[67] (1985) 157 CLR 424 at 459-460 .

Public law concepts and the policy/operational distinction

81. Common law courts have offered a number of different solutions to the problem of imposing an affirmative duty of care on a statutory authority. In *Stovin v Wise* [68] , Lord Hoffmann (with whose speech Lord Goff of Chieveley and Lord Jauncey of Tullichettle agreed) said:

> "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."

[68] [1996] AC 923 at 953, extracted in *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 345 by Brennan CJ.

82. **Following paragraph cited by:**

Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd (08 September 2021) (Basten, Meagher and Leeming JJA)
FRM17 v Minister for Home Affairs (28 August 2019) (Kenny, Robertson and Griffiths JJ)
Scott v Pedler (26 March 2004) (Gyles, Conti and Allsop JJ)
Newcastle City Council v Shortland Management Services (18 June 2003) (Spigelman CJ, Mason P and Sheller JA)
State of New South Wales v Paige (19 July 2002) (Spigelman CJ, Mason P and Giles JA)

With great respect to the learned judges who have expressed these views, I am unable to accept that determination of a duty of care should depend on public law concepts. Public law concepts of duty and private law notions of duty are informed by differing rationales. On the current state of the authorities, the negligent exercise of a statutory power is not immune from liability simply because it was within power, nor is it actionable in negligence simply because it is ultra vires. In *Heyman* , Mason J rejected the view that mandamus could be "regarded as a foundation for imposing … a duty of care on the public authority in relation to the exercise of [a] power. Mandamus will compel proper consideration by the authority of its discretion, but that is all." [69]

[69] (1985) 157 CLR 424 at 465 .

83. The concerns regarding the decision-making and exercise of power by statutory authorities can be met otherwise than by directly incorporating public law tests into negligence. Mr John Doyle QC (as he then was) has argued[70], correctly in my opinion, that there "is no reason why a valid decision cannot be subject to a duty of care, and no reason why an invalid decision should more readily attract a duty of care."

[70] Doyle, "Tort Liability for the Exercise of Statutory Powers", in Finn (ed), *Essays on Torts* (1989) 203 at 235-236.

84. Another way in which courts in many jurisdictions have attempted to accommodate the difficulties associated with public authorities is the "policy/operational distinction". Mason J referred to this distinction in *Heyman* [71] :

> "The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness."

[71] (1985) 157 CLR 424 at 469 .

85. In *X (Minors) v Bedfordshire County Council* Lord Browne-Wilkinson formulated a three-stage test to accommodate the policy/operational distinction [72] :

> "[First] Where Parliament has conferred a statutory discretion on a public authority, it is for that authority, not for the courts, to exercise the discretion: nothing which the authority does within the ambit of the discretion can be actionable at common law. [Second] If the decision complained of falls outside the statutory discretion, it *can* (but not necessarily will) give rise to common law liability. However, if the factors relevant to the exercise of the discretion include matters of policy, the court cannot adjudicate on such policy matters and therefore

cannot reach the conclusion that the decision was outside the ambit of the statutory discretion. Therefore a common law duty of care in relation to the taking of decisions involving policy matters cannot exist.

…

[Third] If the plaintiff's complaint alleges carelessness, not in the taking of a discretionary decision to do some act, but in the practical manner in which that act has been performed … the question whether or not there is a common law duty of care falls to be decided by applying the usual principles …"

---

[72] [1995] 2 AC 633 at 738-739 (Lords Jauncey of Tullichettle, Lane, Ackner and Nolan agreeing, emphasis original).

---

86. **Following paragraph cited by:**

State of New South Wales v Paige (19 July 2002) (Spigelman CJ, Mason P and Giles JA)

Although his Lordship had earlier criticised the use of public law principles, this formulation is obviously greatly influenced by those principles. Recently, however, the distinction has come under attack. A year after *X (Minors)* , a majority of the House of Lords held that the distinction was "inadequate" [73] . The Supreme Court of the United States in *United States v Gaubert* [74] has also pointed out that almost anything done by a public authority involves discretionary and policy judgments about priorities and resources. In *Pyrenees* , two justices of this Court expressed the view that the distinction was unhelpful on the facts of that case [75] .

---

[73] *Stovin v Wise* [1996] AC 923 at 951 per Lord Hoffmann (Lords Goff of Chieveley and Jauncey of Tullichettle agreeing).

[74] 499 US 315 (1991) .

[75] (1998) 192 CLR 330 at 358-359 per Toohey J, 393-394 per Gummow J; see also *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 at 484-485 per Hayne J.

---

87. **Following paragraph cited by:**

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

Despite these criticisms, there is some support in this country for the distinction, albeit not in the form described in *X (Minors)* . It may be that functions and powers which can be described as part of the "core area" of policy-making, or which are quasi-legislative or regulatory in nature, are not subject to a common law duty of care [76] . Outside this narrowly defined policy exception, however, as Professor Todd has argued, it seems preferable to accommodate the distinction at the breach stage rather than the duty stage[77]. He has argued:

> "While the issue as to the ambit of a public body's discretion and whether it has acted reasonably or rationally certainly needs to be addressed, it is better taken into account in determining whether the public body is in *breach* of a duty independently held to exist … Indeed, it is significant that the decisions purporting to use the exercise of policy or discretion as a duty concept sometimes themselves lapse into the language of breach. [78]
>
> The question whether a decision was made within the ambit of a statutory discretion seemingly has a direct analogy with the question whether a professional or skilled person took reasonable care in exercising his or her professional judgment. The professional person is not bound to ensure that he or she has made the right decision or to guarantee success in any particular venture. Rather, his or her obligation is to speak or to act within the boundaries reasonably to be expected of a person claiming skill and competence in the particular area. Whether a public or a private defendant is involved, the same kind of question can be asked in relation to any acts or decisions involving the exercise of judgment … "

---

[76] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 469 per Mason J, 500 per Deane J; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 393-394 per Gummow J; *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567 at 593-596 per Black CJ, Davies and Sackville JJ.

[77] Todd, "Liability in Tort of Public Bodies", in Mullany & Linden (eds), *Torts Tomorrow – A Tribute to John Fleming* (1998) 36 at 46-47 (emphasis original).

[78] See especially *Just v British Columbia* [1989] 2 SCR 1228 at 1244 ; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 737.

---

88. He went on to say[79]:

> "And the degree of care expected of a public body in meeting the standard of reasonableness must be determined in the light of its obligation to carry out

various statutory functions and its inability simply to desist from any exercise of its responsibilities … So the funding and other resources which are available to meet the demands which are made upon the public body are very relevant …"

---

[79] Todd, "Liability in Tort of Public Bodies", in Mullany & Linden (eds), *Torts Tomorrow – A Tribute to John Fleming* (1998) 36 at 47.

---

89. In *Pyrenees* , I said [80] :

"[T]he 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."

---

[80] (1998) 192 CLR 330 at 371 ; see also at 394-395 per Gummow J.

---

90. To highlight the different position of statutory authorities therefore, it also seems best to formulate an authority's duty by reference to what a "reasonable authority" – rather than a "reasonable person" – would have done (or not done) in all the circumstances of the case.

The obligation of a statutory authority to take affirmative action

91. In his article "Liability in Tort of Public Bodies", Professor Todd has argued that, despite the current conceptual uncertainty in the law in Australia relating to the common law liability of statutory authorities for a failure to act, "as regards four of the judgments [in *Pyrenees* , Brennan CJ apart] there is arguably a measure of underlying agreement."[81] He then listed what in his view were the key elements that could be distilled from the recent decisions of this Court[82]:

"(i) the imposition of a common law duty is consistent with and complementary to the performance by the public body of its statutory functions;

(ii) the duty can be seen to arise specifically in relation to a known plaintiff rather than generally in relation to the public at large;

(iii) the defendant is in a position of control and is under a statutory obligation, or at least has specific power, to protect the plaintiff from the danger;

(iv) the plaintiff is in a position of special vulnerability or dependence on the defendant. He or she cannot reasonably be expected to safeguard himself or herself from the danger;

(v) on a policy overview there is no good reason for giving the defendant an immunity from liability."

---

[81] Todd, "Liability in Tort of Public Bodies", in Mullany & Linden (eds), *Torts Tomorrow – A Tribute to John Fleming* (1998) 36 at 55.

[82] Todd, "Liability in Tort of Public Bodies", in Mullany & Linden (eds), *Torts Tomorrow – A Tribute to John Fleming* (1998) 36 at 55.

---

92. I am in substantial agreement with this analysis. I would prefer, however, to subsume Professor Todd's first criterion into his fifth. I also think that it is necessary to add a further element – that the authority knew, or ought to have known, of the risk of injury to the plaintiff.

93. **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)
Hammond v State of New South Wales (30 September 2015) (Emmett and Gleeson JJA)
Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

In my opinion, therefore, in a novel case where a plaintiff alleges that a statutory authority owed him or her a common law duty of care and breached that duty by failing to exercise a statutory power, the issue of duty should be determined by the following questions:

1. Was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise its statutory powers, would result in injury to the plaintiff or his or her interests? If no, then there is no duty.

2. By reason of the defendant's statutory or assumed obligations or control, did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from a risk of harm? If no, then there is no duty.

3. Was the plaintiff or were the plaintiff's interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or those interests from harm? If no, then there is no duty.

4. Did the defendant know, or ought the defendant to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? If no, then there is no duty.

5. Would such a duty impose liability with respect to the defendant's exercise of "core policy-making" or "quasi-legislative" functions? If yes, then there is no duty.

6. Are there any other supervening reasons in policy to deny the existence of a duty of care (e.g., the imposition of a duty is inconsistent with the statutory scheme, or the case is concerned with pure economic loss and the application of principles in that field deny the existence of a duty)? If yes, then there is no duty.

94. **Following paragraph cited by:**

Roads and Traffic Authority of NSW v Palmer (28 March 2003) (Spigelman CJ, Handley and Giles JJA)

If the first four questions are answered in the affirmative, and the last two in the negative, it would ordinarily be correct in principle to impose a duty of care on the statutory authority.

95. I have already discussed some aspects of the last two questions. But it may be helpful to say something about the second, third and fourth of these questions and their impact on the last two questions.

The grant of powers for the protection of a specific class of plaintiff

96. In *Stovin v Wise* , Lord Nicholls of Birkenhead (dissenting, Lord Slynn of Hadley agreeing) said [83] :

"Parliament confers powers on public authorities for a purpose. An authority is entrusted and charged with responsibilities, for the public good. The powers are intended to be exercised in a suitable case."

[83] [1996] AC 923 at 935 .

97. Similarly, in *Pyrenees* Kirby J said [84] :

"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 powers existed for the protection against fire of persons such as the claimants."

[84] (1998) 192 CLR 330 at 421.

98. **Following paragraph cited by:**

Top Hut Banoon Pastoral Co Pty Ltd t/as Trustee for the Wakefield Family Trust v Walker (08 December 2021) (Gleeson JA, Preston CJ of LEC and Stevenson J)

His Honour then went on to say [85] :

"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."

---

[85] (1998) 192 CLR 330 at 423.

---

99. These statements bring out the point that some powers are conferred because the legislature expects that they will be exercised to protect the person or property of vulnerable individuals or specific classes of individuals. Where powers are given for the removal of risks to person or property, it will usually be difficult to exclude a duty on the ground that there is no specific class. The nature of the power will define the class – e.g., an air traffic control authority is there to protect air travellers. Furthermore, a finding that the authority has powers of this type will often indicate that there is no supervening reason for refusing to impose a duty of care and that no core policy choice or truly quasi-legislative function is involved.

Vulnerability

100. **Following paragraph cited by:**

Karpik v Carnival plc (The Ruby Princess) (29 July 2025) (Markovic, Sarah C Derrington and Jackson JJ)
R v Moore (15 December 2015) (Bathurst CJ, Simpson JA and Bellew J)
Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)
State of NSW v Tyszyk (26 May 2008) (Mason P ; Giles JA ; Campbell JA)
State of New South Wales v Napier (13 December 2002)

> 15. The significance of vulnerability as a factor in determining the existence of a duty of care has been emphasised in a number of different contexts. (See e.g. *Perre v Apand Pty Ltd* (1999) 198 CLR 180 esp at [104]-[105], [118], [125]-[129] ; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 esp at [100] .)

Except in cases where a statutory authority has assumed responsibility, taken control of a situation or is under a statutory obligation to act, it seems an essential condition for imposing a duty of care on an authority that the plaintiff is vulnerable to harm unless the authority acts to avoid that harm. I use the term "vulnerable" in the sense that, as a practical matter, the plaintiff has no or little capacity to protect himself or herself. In earlier cases, it was common to refer to the concept of general reliance or dependence as a necessary condition for imposing a duty of care on a statutory authority [86] . As I remarked in *Perre v Apand Pty Ltd* , however, while the concept of general reliance has been criticised, properly understood, the concept was merely one way of testing for an important requirement in the determination of duty of care – how vulnerable is the plaintiff as the result of the defendant's acts or omissions [87] . In the context of the common law liability of statutory authorities, general reliance is a combination of the requirements of the existence of powers in the statutory authority to ameliorate harm and the vulnerability of the plaintiff to that harm. In that sense it was an important element for all the justices in *Pyrenees* [88] . Similarly in *Heyman* [89] , it was an important, even decisive, consideration that the plaintiffs in that case were able to protect their own interests by making inquiries, requesting a certificate and retaining experts. In *Yuen Kun Yeu v Attorney-General of Hong Kong* [90] , the Judicial Committee of the Privy Council held that one of the factors relevant to denying a duty of care was that the plaintiffs could have potentially protected themselves by inspecting publicly available records or consulting investment advisers. Similarly in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* [91] , I thought that the likelihood of harm to the plaintiff was minimised by its capacity to protect itself.

---

[86] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 464 .

[87] (1999) 73 ALJR 1190 at 1213; 164 ALR 606 at 639-640 .

[88] (1998) 192 CLR 330 at 347 per Brennan CJ, 361 per Toohey J, 370 per McHugh J, 389-390 per Gummow J, 421 per Kirby J.

[89] (1985) 157 CLR 424 at 470-471 per Mason J, 494 per Brennan J, 510-511 per Deane J.

[90] [1988] AC 175 at 195.

[91] (1997) 188 CLR 241 at 284-285 .

Knowledge

101. **Following paragraph cited by:**

Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)

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] .

---

[92] (1999) 73 ALJR 1190 at 1214; 164 ALR 606 at 640-641 .

[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).

---

102. **Following paragraph cited by:**

State of New South Wales v Williamson (13 October 2005) (Santow and Basten JJA, Simpson J)

In *Perre* , I also discussed the issue of constructive knowledge, saying that "[i]t would not be wise, or perhaps even possible, to set out exhaustively when it would be permissible to rely on constructive knowledge." [94] That statement also applies to this area of the law as much as to cases of pure economic loss. In my opinion, however, one must be very careful about using constructive knowledge in this area. *Pyrenees* , for example, would have taken on a very different complexion if the shire council did not have actual knowledge of the risk. Speaking generally, I think it is unlikely that a plaintiff could succeed because of the authority's constructive knowledge of an area of risk, unless it can be said that the defendant authority had an obligation to seek out the requisite knowledge in all the circumstances, including cases where the defendant authority already possesses certain actual knowledge, but fails to look further. It would be a far-reaching step to impose affirmative obligations on a statutory authority merely because it could have or even ought to have known that the plaintiff was, or was a member of a class which was, likely to suffer harm of the relevant kind.

<u>The Authority owed a duty of care to the plaintiff</u>

---

[94] (1999) 73 ALJR 1190 at 1209; 164 ALR 606 at 634.

The risk of harm to the plaintiff was reasonably foreseeable

103. **Following paragraph cited by:**

Howard Smith & Patrick Travel Pty Ltd v Comcare (03 July 2014) (Beazley P, Basten JA and Sackville AJA)
Sydney Water Corporation v Abramovic (14 September 2007) (Mason P; Santow JA ; Basten JA)

Safety on the waterfront was part of the Authority's general responsibilities. I do not understand the respondent to contend otherwise. Keeping in mind the generalised nature of the inquiry at the duty stage, it is clear that it was reasonably foreseeable that, if the Authority failed to perform its safety functions with reasonable care, then waterside workers would be liable to suffer injury, even if only because it was reasonably foreseeable that the employers might be derelict in performing their own duties.

The plaintiff was vulnerable as the result of the directions of the Authority

104. **Following paragraph cited by:**

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

To my mind, the factor that points compellingly to the Authority owing an affirmative duty of care is that the Authority directed the waterside workers where they had to work and that the failure to obey such a direction could lead to disciplinary action and even deregistration as a waterside worker. That factor points so strongly to the existence of a duty of care that it should be negatived only if to impose the duty was inconsistent with the scheme of the Act . It can seldom be the case that a person, who controls or directs another person, does not owe that person a duty to take reasonable care to avoid risks of harm from that direction or the effect of that control. The police officer who directs traffic [95] , the gaoler who has the custody of the prisoner [96] and the helpful bystander, who obligingly points the way to the traveller seeking guidance, all owe a duty to take care that their directions or control do not lead to harm.

---

[95] See *O'Rourke v Schach* [1976] 1 SCR 53 .

[96] See *Howard v Jarvis* (1958) 98 CLR 177 .

---

105. Sometimes the duty which arises from direction or control may extend to controlling the actions of a third party. In *The Law of Torts*, Professor Fleming described the general principles applicable in this area[97]:

"Duties to control the conduct of third persons provide yet another illustration of obligations of affirmative action. Ordinarily, it is true, the law does not demand that one interfere with the activities of another for the purpose of preventing harm to him or strangers, but certain relations call for special assurances of safety in accordance with prevailing assumptions of social responsibility. Such a special relation may subsist either between the defendant and the injured person who is entitled to rely upon him for protection or between the defendant and the third party who is subject to the former's control.

Illustrative of the former [is] the conventional [relationship] between … employer and employee …"

---

[97] 9th ed (1998) at 168 (footnotes omitted).

---

106. Later, he said[98]:

"An obligation to control another may arise by dint of a special relationship between the defendant and that person. But in the absence of a right to control, there is ordinarily no corresponding duty to exercise it for the protection of others."

---

[98] Fleming, *The Law of Torts*, 9th ed (1998) at 170.

---

107. **Following paragraph cited by:**

R v Moore (15 December 2015) (Bathurst CJ, Simpson JA and Bellew J)

What is required to discharge a duty arising from a direction or the control of a person's freedom of action will depend on the circumstances, and, in some cases, it may be very little. But usually the very fact of the direction or control will itself be sufficient to found a duty. Where the person giving the direction or in control of another person's freedom of action knows that there is a real risk of harm unless the direction is given or the control is exercised with care, the case for imposing a duty is overwhelming. I find it impossible to accept, for example, that, if the Authority knew that it was sending waterside workers to a ship where there was a high risk of death or injury, it owed no duty of care to those workers.

108. No doubt the vulnerability of waterside workers to injury arose primarily from their working conditions in respect of which the Award and s 33 of the Act made the employers responsible. But certain features of the relationship between the workers and their employers made the

workers especially vulnerable to harm unless the Authority took action. The Authority knew that the workers were being directed to work on ships where there could be a significant risk of injury to the workers from the use of equipment and machinery, the stowage of cargo and the hazardous nature of the materials which the workers had to handle. It also knew that it was directing the waterside workers to participate in transient, casual employment on the waterfront – a factor recognised in s 25(b) of the Act . In this context, the power of the Authority to direct the waterside workers as to when and where they *must* work placed them in a very real position of vulnerability. The casual nature of the employment, employment sometimes lasting only for a few hours, was likely to mean that employers did not have the same incentives to protect their employees from harm as do employers who must utilise the same work force day after day. Fear of deregistration as a stevedore was likely to have been the greater incentive to better safety practices on the part of employers than concern for maintaining a fit and available work force. However, the extent of such fear must inevitably have depended upon the extent to which the Authority was prepared to intervene in the conduct of stevedoring operations.

109. No doubt the vulnerability of the plaintiff was reduced to some extent by him belonging to a union. But membership of a union could not justify the Authority ignoring the risks of harm which might flow from its directions. The bare fact of union membership was not enough to eliminate the vulnerability of the plaintiff and his effective inability to protect himself in the circumstances.

110. No doubt also the Authority was entitled to take into account that the only employers who could obtain registration under the Act were those who satisfied the statutory requirements, one of which was that the employer was capable "of carrying out stevedoring operations ... in an expeditious, safe and efficient manner" [99] . But that was a factor that went to the issue of breach of duty, rather than the existence of a duty.

---

[99] s 28(b)(i) .

---

111. Similarly, questions concerning the Authority's knowledge of the risks of handling asbestos are matters going to breach, not duty. As Winneke P noted in the Court of Appeal, "[t]here was dispute at the trial as to the state of medical and scientific knowledge at the relevant time with regard to the degree of risk which the handling of asbestos posed to the health of waterside workers." [100] The Authority took an active role in discussing safety matters, including corresponding with shipping companies, participating in FACWAP and conveying information between the Occupational Health Committee of the NHMRC and State health departments and the industry. There was more than sufficient evidence to show that it was widely known at the relevant time that dust generally, including asbestos, was a work hazard. Furthermore the Authority's functions included investigating means of improving safety procedures [101] , encouraging safe working conditions [102] and obtaining and publishing information relating to the stevedoring industry [103] including presumably safety matters. Those functions and the wide powers of Port Inspectors to conduct investigations mean that the Authority ought to have known of the conditions on the waterfront, at least in a general fashion, and of the state of knowledge at the time concerning the harmful effects of

asbestos dust. The payment of "dirt money" by Port Inspectors indicates that at a minimum it knew that dust was undesirable in the workplace. Even if, contrary to my view, knowledge of the risk of handling asbestos was relevant to the duty issue, there was ample evidence that the Authority knew, or ought to have known, that dust (including asbestos) was dangerous and that workers often unloaded cargoes off ships in conditions that were "primitive and unhealthy" [104] , exposing the workers to a significant risk of injury.

---

[100] *Stevedoring Industry Finance Committee v Crimmins* [1999] 1 VR 782 at 788 .

[101] s 17(1)(l) .

[102] s 17(1)(o) .

[103] s 17(1)(p) .

[104] *Stevedoring Industry Finance Committee v Crimmins* [1999] 1 VR 782 at 789 per Winneke P.

---

112. **Following paragraph cited by:**

Stevedoring Industry Finance Committee v Gibson (21 July 2000) (Mason P, Stein and Heydon JJA)

Subject to the question of whether the imposition of a duty is forbidden or would be inconsistent with the scheme of the Act or involves "core policy" issues, the plaintiff has made good his pleaded allegation that "the Authority was under a continuing duty of care ... in the exercise of its statutory functions, duties and powers to take reasonable care to avoid foreseeable risks of injury to the health of the Plaintiff". What was required to discharge that duty of care, as always, depended upon all the circumstances of the case. It was plainly open to the jury, however, to find on the issue of breach that the Authority knew or ought to have known that the plaintiff was exposed to a significant risk of injury from the effects of asbestos dust. What, if any, steps the Authority should reasonably have taken to eliminate that risk are matters going to the issue of breach of duty with which this Court is not concerned. Nor is the Court concerned with whether the taking of those steps (if any) would have avoided the harm which the plaintiff suffered. That goes to the question of causation which depends on what the exercise of reasonable care required. In so far as reasonable care required that directions or instructions be given to the plaintiff and his employers, a question may well arise as to whether the harm to the plaintiff could have been avoided even if the Authority had given those instructions or directions.

113. The conclusion that a duty of care arose from the directions of the Authority makes it unnecessary to examine the plaintiff's further contention that the relationship of the Authority and the plaintiff was analogous to that of an employer and employee and that, consequently,

the Authority owed him a duty of care because of that relationship. Thus, in *Stevens v Brodribb Sawmilling Co Pty Ltd* [105] , this Court held that the duty of care owed by an employer to an independent contractor extended to providing a safe system of work. However, it is unnecessary to examine this contention because, even if the plaintiff's argument is correct, the alleged analogous relationship would not have imposed a higher duty of care on the Authority.

---

[105] (1986) 160 CLR 16 at 31 per Mason J.

The legislative scheme – the functions and powers of the Authority

114. **Following paragraph cited by:**

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

No 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. To that question, I now turn.

115. Section 8 of the Act provided that "[t]he Authority shall perform its functions, and exercise its powers, under this Act with a view to securing the expeditious, safe and efficient performance of stevedoring operations." The functions of the Authority were set out in s 17(1) of the Act . They included regulating the performance of stevedoring operations; ensuring that sufficient waterside workers were available for stevedoring operations at each port and that their labour was used to the best advantage; making arrangements for allotting waterside workers to stevedoring operations; determining the method of, and other matters relating to, the engagement of waterside workers; regulating the conduct of waterside workers in and about employment bureaux, wharves and ships; providing or assisting in providing, at places where satisfactory provision therefor was not, in the opinion of the Authority, made by employers or any other person or authority, first-aid equipment, medical attendance, ambulance services, rest rooms, sanitary and washing facilities, canteens, cafeteria, dining rooms and other amenities for waterside workers; training, or arranging for the training of, persons in stevedoring operations; *investigating means of improving, and encouraging employers to introduce methods and practices that would improve, the safety with which stevedoring operations were performed; encouraging safe working in stevedoring operations and the use of articles and equipment, including clothing, designed for the protection of workers engaged in stevedoring operations and, where necessary, providing waterside workers with articles and equipment designed for that purpose*; and obtaining and publishing information relating to the stevedoring industry.

116. Sub-sections (2) and (3) of s 17, however, provided that:

"(2) In regulating the performance of stevedoring operations under this Act, the Authority shall, except to such extent as, in the opinion of the Authority, is essential for the proper performance of that function, avoid imposing limitations upon employers with respect to their control of waterside workers engaged by them and their manner of performance of stevedoring operations.

(3) In the performance of its functions under sub-section (1) of this section, the Authority shall have regard to the desirability of encouraging employers to engage waterside workers for regular employment in stevedoring operations and waterside workers to offer for regular employment with employers in stevedoring operations."

117. Section 18 gave the Authority power to make orders and to do all such things as it thought fit to carry out its functions. Section 20 provided that orders of the Authority would have the force of law. Section 23 empowered the Authority to appoint Port Inspectors to make investigations and reports in relation to stevedoring operations, and to suggest to employers and waterside workers, in appropriate cases, means by which stevedoring operations may be performed with greater safety and efficiency and the labour of waterside workers may be used to better advantage.

118. Section 23(4) provided:

"(4) For the purpose of carrying out his duties under this Act, an Inspector may, at any time during working hours –

(a) enter any wharf or ship;

(b) inspect any stevedoring operations and any material, machinery, appliances or articles used for or in connexion with stevedoring operations and any books, documents, papers or things relating to stevedoring operations; and

(c) interview any person."

119. The Authority was to maintain a register of registered waterside workers and registered employers [106] . Section 25 also provided that the Authority could determine quotas for the number of waterside workers at each port for the purpose, *inter alia*, of ensuring the "expeditious, safe and efficient performance of stevedoring operations".

---

[106] s 25(e) .

---

120. Section 33(1) declared that a registered employer should not act in a manner whereby the expeditious, safe and efficient performance of stevedoring operations was prejudiced or interfered with and should provide proper supervision of the performance of stevedoring

operations by waterside workers engaged by him; and should ensure that, as far as was practicable, stevedoring operations for which it had engaged waterside workers were expeditiously, safely and efficiently performed.

121. Section 33(2) provided that an employer who failed to comply with these provisions was guilty of an offence. Section 35 provided that, if an employer was convicted of an offence, the Commonwealth Conciliation and Arbitration Commission could order the cancellation or suspension of the registration of an employer.

122. Section 36(1) provided that the Authority could cancel or suspend a waterside worker's registration where, after such inquiry as it thought fit, the Authority was satisfied that the worker's registration should be cancelled or suspended. The power to cancel or suspend was conditional upon satisfaction that the worker was, by reason of his physical or mental condition or his incompetence or inefficiency, a danger to others or had acted in a manner whereby the safe performance of stevedoring operations had been prejudiced or interfered with. There was also power to cancel or suspend registration when the worker had failed to comply with an order or direction of the Authority under the Act or an award of the Commission.

123. The evidence indicates that the Authority, or at least some of its officers, gave a broader interpretation to its powers and functions than the legislation warranted [107] . However, since the plaintiff did not attempt to make out a case of actual reliance on the conduct of the Authority, it is unnecessary to discuss this evidence. Nevertheless, it is clear that the Authority actually, and not merely theoretically, played, and was expected by the Parliament to play, an essential role in ensuring the safety of waterfront operations.

---

[107] *Stevedoring Industry Finance Committee v Crimmins* [1999] 1 VR 782 at 826 per Buchanan JA.

---

124. The respondent's submissions characterise the policy of the legislation in the following terms:

> "The scheme of the Act , on analysis, reveals the truly administrative character of the Authority, clothed with certain disciplinary powers which had to be reposed in some authority or body …
>
> The Authority took no part whatever in stevedoring operations except to act as the operator of the employment bureaux. Even here, the Authority performed its functions so as to give effect to the day-to-day requirements for labour of employers. When performing loading or unloading operations the waterside workers such as the Plaintiff were under the direct control and supervision of the stevedoring company who employed them. The Authority had no power to direct or control waterside workers once they were engaged for work."

125. The respondent contends that the Authority's power was to regulate, not control. It refers to the differences between the Act and its predecessor [108] , the *Stevedoring Industry Act* 1949 (Cth) , which set up the Australian Stevedoring Industry Board. Section 13(a) of that Act

provided that one of the functions of the Board was "to regulate *and control* the performance of stevedoring operations" (emphasis added). By contrast, the Minister in his Second Reading Speech on the Act declared that[109]:

> "Secondly, the bill proposes to give the authority clear, but rather more limited, functions than the present board has. In certain directions the functions of the authority are being stated more explicitly. The main differences from the present functions of the board are that the power to control the performance of stevedoring operations, except during emergencies declared by the Minister – and I should hope that they would be rare to the point of non-existence – is to be eliminated, and the present power to regulate is being limited so that its exercise will avoid, as far as possible, impingement on the control by employers of their labour and their methods of working."

---

[108] See *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 408 per Kitto J.

[109] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 29 May 1956 at 2555.

---

126. The respondent argues that this policy is reflected in the terms of the Act and that a survey of the functions of the Authority in s 17(1) generally reveals a facilitative rather than coercive approach – to "investigate", to "encourage" and to "administer", for example. Apart from powers and functions of regulation, only s 17(1)(d) overtly seems to impose a mandatory duty – and that is over the waterside workers. Moreover, s 17(2) imposed a general limitation to "avoid imposing limitations upon employers" save where "essential for the proper performance of that function". The power to make orders under s 18 was to be the result of a consultative process. The powers of Port Inspectors in s 23 were limited to the making of investigations and suggestions and providing opinions. The Authority's power to discipline employers was also limited, and the power to punish cumbersome, requiring legal action[110].

---

[110] ss 33-35.

---

127. It is true that the Authority's power over employers was limited. But nothing in the Act prohibi ted the Authority from taking steps to eliminate, so far as was reasonably practicable, the risk of harm to waterside workers. On the contrary, the obvious expectation of the Act was that the Authority would investigate the safety of waterfront conditions and encourage employers to eliminate unsafe practices. Furthermore, although the making of orders under s 18 was to be the result of a consultative process, the Authority had the power to make orders binding on one or more employers in respect of particular working conditions. The scheme and terms of

the Act placed a responsibility on the Authority for the maintenance of a certain *minimum* standard of safety on the waterfront. The Minister's Second Reading Speech supports this view of the legislation. He said[111]:

> "[T]he safeguard is there, and will continue to exist at all times, that, where standards fall below what is believed to be desirable, the authority will have the power to remedy the position."

---

[111] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 29 May 1956 at 2555.

---

128. Section 8 and other sections required the Authority to exercise its powers "with a view to securing the expeditious, *safe* and efficient performance of stevedoring operations" (emphasis added). Section 17(1)(o) empowered the Authority "where necessary, to provide waterside workers with articles and equipment" for safety purposes, articles and equipment which the Authority was empowered to purchase by s 16(a)(iv) of the Act .

129. Nothing in the foregoing account of the Act gives the slightest indication that imposing a common law duty of care on the Authority was either forbidden or was inconsistent with the Act . But the respondent naturally places much reliance on s 17(2) which required the Authority to "avoid imposing limitations upon employers with respect to their control of waterside workers" save where "essential for the proper performance" of its functions. However, s 17(2) spoke only of "regulating the performance of stevedoring operations", which was only one of the functions[112] imposed on the Authority. Thus, it did not limit the Authority's abilities with respect to warning or instructing employers and workers about dangers likely to arise in the course of employment or from encouraging them to adopt practices which would eliminate or reduce those dangers. Nor did it limit the Authority, in more extreme cases, from supplying waterside workers directly with the appropriate "articles and equipment" or from refusing to assign waterside workers to premises it deemed hazardous.

---

[112] s 17(1)(a) .

---

130. In my opinion, an examination of the scheme and purpose of the Act reveals that the Authority possessed the necessary powers and functions to protect the specific class of waterside workers by ensuring that certain minimum standards of safety were observed, either by direct action, or via its control and influence over employers. Furthermore, nothing in the Act forbade, or was inconsistent with the imposition of, a common law duty of care on the Authority.

"Core policy-making" and "quasi-legislative" functions

131. Section 20 of the Act declared that any orders made by the Authority had the "force of law". This section indicates that orders made by the Authority were part of the exercise of a "quasi-legislative" function and beyond the scope of any duty of care. This, however, does not exhaust the Authority's powers, even within s 18(1) itself. The Authority still retained sufficient powers to ameliorate the risk of injury to the waterside workers and those powers do not fall within the definition of "core policy-making". The "policy/operational" distinction has certain difficulties that attend it, but the nature of the other powers and functions exercised by the Authority with respect to safety clearly fall closer to the "operational" end of the spectrum. Although they involve considerations of convenience, discretion and budgetary allocation, they are matters appropriately considered as part of the breach question.

Other policy factors

132. **Following paragraph cited by:**

Australian Capital Territory v Crowley (17 December 2012) (Lander, Besanko and Katzmann JJ)

There are no other reasons to deny a duty of care. There are no considerations such as those that led the House of Lords to deny a duty of care in *X (Minors) v Bedfordshire County Council* [113] – cutting across of a statutory scheme, the "delicacy" of the relationship between the parties or the fact that the officers of the Authority might adopt a "more cautious and defensive approach to their duties." Quite the opposite – in this case a recognition of a duty would likely have made the Authority more vigilant in its role. Nor do I think that the position of the Port Inspectors is analogous to the position of police officers [114] , given that the Authority was charged with responsibility for the safety of a specific class – the waterside workers under its direction.

---

[113] [1995] 2 AC 633 at 749-750 per Lord Browne-Wilkinson (Lords Jauncey of Tullichettle, Lane, Ackner and Nolan agreeing).

[114] *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335.

---

133. The Authority, as a reasonable authority in the exercise of its statutory functions, powers and duties (excepting the power to make orders), therefore owed a duty to the plaintiff to take reasonable care to protect him from reasonably foreseeable risks of injury arising from his employment. Whether it was open to the jury to find that there was a breach of that duty and that that breach was causally connected with the plaintiff's mesothelioma does not arise for consideration in this Court.

Succession of liability

134. The second question in the appeal is whether, assuming that the Authority would have been liable to the plaintiff, s 14 of the Termination Act makes the respondent liable to the plaintiff. That section provides:

> "On the expiration of the transitional period –
>
> (a) all rights and property that, immediately before the expiration of the transitional period, were vested in the Authority are, by force of this section, vested in the Committee; and
>
> (b) the Committee is, by force of this section, liable to perform all the duties and to discharge all the liabilities and obligations of the Authority that existed immediately before the expiration of that period."

135. The plaintiff contends that the word "liabilities" in s 14(b) is wide enough to embrace "potential, contingent or inchoate" liabilities. Alternatively, given the ambiguity of the provision, the term "liabilities" should be construed to give effect to the evident purpose of the section, namely, that the Committee was to assume fully the entire spectrum of legal rights and liabilities possessed by the Authority. Any other result, so the plaintiff contends, would be "capricious and unjust". The respondent, on the other hand, contends that the words "that existed" necessarily limited the meaning of "liabilities" to rights that had accrued or vested as at 26 February 1978. In my opinion, the contention of the plaintiff is correct.

136. **Following paragraph cited by:**

Orica Ltd v CGU Insurance Ltd (11 November 2003)

Given that both parties accept that the damage for which the plaintiff seeks to recover damages occurred shortly before symptoms were diagnosed in 1997, Tadgell JA was plainly right when he said that it is "scarcely possible to contend that the authority could have been amenable on or at any time before 26 February 1978 to a claim, let alone a judgment, for the tort of negligence at the suit of the [plaintiff]." [115] The tort of negligence is derived from the action on the case. Damage is the gist of that action and is an essential element of the cause of action [116] . To say that the plaintiff did not have a complete cause of action as at 26 February 1978, however, does not end the matter. In two cases involving this very question and legislation, two judges have expressed their opinion that "liabilities" includes "potential" or "contingent" liabilities[117]. It is therefore necessary to determine whether the view of the Court of Appeal judges should be preferred to that of the trial judge in this case and those two judges.

---

[115] *Stevedoring Industry Finance Committee v Crimmins* [1999] 1 VR 782 at 812 per Tadgell JA.

[116] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 527 per Mason CJ, Dawson, Gaudron and McHugh JJ; *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd ("Wagon Mound [No 1]")* [1961] AC 388 at 425 ; *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 at 777 per Lord Pearce.

[117] *Gibson v Stevedoring Industry Finance Committee* unreported, Dust Diseases Tribunal of New South Wales, 2 June 1998 at 6 per Curtis J; and *Wintle v Stevedoring Industry Finance Committee* unreported, Supreme Court of Victoria, 5 April 1989 at 8 per McGarvie J, although in the latter case his Honour did not actually decide the question, stating only that the wider construction of "liabilities" is "strongly arguable".

---

137. **Following paragraph cited by:**

Deputy Commissioner of Taxation v Bluebottle UK Ltd (14 December 2006) (Mason P; Santow JA; Basten JA)

The precise meaning to be given to the word "liabilities" depends on its context [118] . In *Tickle Industries Pty Ltd v Hann* [119] , Barwick CJ pointed out:

> "The use of the word 'liable' can cause difficulty in construction because of the various senses in which the word is or has been from time to time employed. The word takes its particular significance, however, from the context in which it appears and the subject matter and evident policy of the legislation in which it is found."

This is so, even though some judges have expressed the opinion that the "ordinary or natural meaning" of the word is limited to "actual" (rather than "potential") liability [120] .

---

[118] *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321 at 330 per Barwick CJ; see also *Scala v Mammolitti* (1965) 114 CLR 153 at 157 per Kitto J and *Bromilow & Edwards Ltd v Inland Revenue Commissioners* [1969] 1 WLR 1180 at 1189-1190 per Megarry J; [1969] 3 All ER 536 at 543.

[119] (1974) 130 CLR 321 at 330.

[120] *Preston v Lord; Ex parte Preston* [1984] 2 Qd R 269 at 272-273 per McPherson J; see also *O'Keefe v Calwell* (1949) 77 CLR 261 at 295-296 per Williams J.

---

138. In some contexts, the meaning of "liabilities" will be wide enough to embrace a "contingent" or "inchoate" liability. Thus, *Jowitt's Dictionary of English Law* [121] defines "liability" as:

> "… the condition of being actually or *potentially subject to an obligation*, either generally, as including every kind of obligation, or, in a more special sense, to denote *inchoate*, *future*, *unascertained or imperfect obligations*, as opposed to debts, the essence of which is that they are ascertained and certain. Thus when a person becomes surety for another, he makes himself liable, though it is unascertained in what obligation or debt the liability may ultimately result."

---

[121] 2nd ed (1977), vol 2 at 1091 (emphasis added).

---

139. In *Ogden Industries Pty Ltd v Lucas* [122] Windeyer J, after describing the words "liable" and "liability" as "chameleon-hued", said that:

> "… there are at least three main senses in which lawyers speak of a liability or liabilities. The first, a legal obligation or duty: the second the consequence of a breach of such an obligation or duty: the third a situation in which a duty or obligation can arise as the result of the occurrence of some act or event."

---

[122] (1967) 116 CLR 537 at 584.

---

140. In *Bromilow & Edwards Ltd v Inland Revenue Commissioners* [123] , Megarry J denied "that the meaning of [liabilities] can be limited ... to a present, enforceable liability, excluding any contingent or potential liability." His Lordship held that the word "must bear this extended meaning."

---

[123] [1969] 1 WLR 1180 at 1190; [1969] 3 All ER 536 at 543.

---

141. The plaintiff points out that the term "obligations" is used in conjunction with "liabilities" in s 14(b) of the Act . He contends that, to avoid tautology [124] , "obligations" must mean "something that has accrued, [such as] a judgment debt", while "liabilities" must refer to the "existing potentiality of future subjection thereto created by the past acts or omissions" of the Authority. The respondent counters that argument by pointing to s 15 of the Termination Act a nd contending that, if the word "obligations" had the limited meaning submitted by the plaintiff, s 15 would be redundant. But I do not think either contention is decisive of this case or needs to be addressed; nor do I think that it is necessary to ascribe a definite meaning to either "liabilities" or "obligations". Given the "amplitude of meaning" [125] that can be given

to both words, it seems likely that the legislature simply used this particular formula out of an abundance of caution to ensure that all responsibilities of the Authority, however characterised, devolved upon the Committee.

---

[124] See *Hill v William Hill (Park Lane) Ltd* [1949] AC 530 at 546-547 per Viscount Simon.

[125] *Bromilow & Edwards Ltd v Inland Revenue Commissioners* [1969] 1 WLR 1180 at 1190 per Megarry J; [1969] 3 All ER 536 at 543.

---

142. **Following paragraph cited by:**

Viscariello v Legal Profession Conduct Commissioner (14 May 2021) (Lovell and Hughes JJ; Tilmouth AJ)

The context of the words "liabilities and obligations" in s 14(b) suggests that they should be given the widest possible reading. That context includes the substitution of the respondent for the Authority as the controlling waterfront authority, the vesting of the Authority's rights and property in the respondent, and the imposing of a liability on the respondent to perform the Authority's duties. It makes it inherently likely that the words "liabilities and obligations ... that existed immediately before" were intended to make the respondent liable for discharging the consequences of any existing act or omission which could ground a legal action against the Authority. It would be surprising if the legislature intended that the liabilities of the respondent on the handover date were to be any less than those of the Authority if it had continued in existence. It seems most unlikely that the legislature could have intended to deprive people of rights that they would have had if the role of the Authority had not been taken over by the respondent. A statutory provision should not be given a construction that leads to an unjust or capricious result in cases appearing to come within its terms unless "the statutory language is intractable" [126] .

---

[126] *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321 at 331 per Barwick CJ; see also *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ and *Sharp v Associated Pulp and Paper Mills Ltd* [1989] VR 139 at 147 per Murphy, Gobbo and Southwell JJ.

---

143. No doubt what is unjust or capricious depends on the circumstances of the case. But a matter that points to the result for which the respondent contends as being unjust – indeed capricious – is that the principal object of the legislation was not the ascertainment of the existing rights, duties and liabilities of persons including the Authority but the re-organisation of the industry.

That re-organisation was seen as requiring a new controlling statutory authority at the organisational level. But the terms of s 14 make it clear that there was to be no clean break with the past. Nothing in the legislation indicates that its purpose was to close the books, so to speak, wind up the Authority and commence an entirely new financial era with a new statutory authority unburdened by the actions of the Authority. On the contrary, the terms of s 14 plainly show that the respondent was to carry the burden of any consequences of the Authority's conduct. For years to come, actions taken by the Authority in respect of acquiring property, entering into contracts and employing people, to take a few examples, would control the future course of the respondent's authority. Against that background, it seems capricious and unjust to give s 14 a construction that would result in a person being deprived of rights that he or she would have if the Authority had continued in existence. The better view is to regard s 14(b) as intended to make the respondent liable to anybody to whom the Authority would be liable if it had continued to exist.

144. The judgment of Woolf J in *Walters v Babergh District Council* [127], sitting in the Queen's Bench Division, supports the construction that I have placed on s 14(b). His Lordship had to determine a question which, though it arose in a different legislative context, was similar in principle to that which arises in the present case. In that particular context, his Lordship found that "liabilities" taken over in a local government re-organisation extended to contingent and potential liabilities. Woolf J said[128]:

> "The whole tenor of the order is designed to ensure that the reorganisation would not effect events which would otherwise have occurred further than is absolutely necessary because of that reorganisation. That the public should be able to look to the new authority precisely in respect of those matters which it could look to the old authority; that the public's position should be no better or no worse. If the draftsman has not used words which are appropriate to cover potential liabilities it can only be because he was so crassly incompetent as not to appreciate that for actions in tort it is not sufficient to have a breach of duty; you must also have damage."

---

[127] (1983) 82 LGR 235.

[128] (1983) 82 LGR 235 at 242.

---

145. He then said[129]:

> "I regard the word 'liabilities' as capable of having amplitude of meaning. In the context of this case I consider that it is wide enough to apply to contingent or potential liabilities. It appears to me that I have a fair choice … Having that choice I have no hesitation in choosing an interpretation which makes, in my view, sense of this part of the order, rather than leaving a large gap between obligations and causes of action which have accrued."

---

[129] (1983) 82 LGR 235 at 243.

146. In my opinion, his Lordship's comments are entirely applicable to this case. The respondent disagrees with this, contending that the words "liabilities vested in or attaching to an authority" in the legislation considered in *Walters v Babergh District Council* [130] distinguish that case from this case. In my opinion those words do not make *Walters* distinguis hable. In that case, as in this case, the Court had a choice between a restricted meaning of "liabilities" and one which embraced "potential" or "contingent" liabilities. Given that the legislation was concerned with the re-organisation of an industry, his Lordship thought that principle required that the term "liabilities" should be given the meaning which would save potential rights in tort that would have matured into causes of action if there had been no re-organisation. Nor, in my view, is it wrong to speak of a contingent liability in tort "that existed" as at 26 February 1978 [131] . There is no evidence to suggest that the mesothelioma developed from anything other than the exposure to asbestos in the years 1960-1965. Thus at the end of the "transitional period" when the Committee succeeded the Authority, assuming breach of a duty owed the plaintiff is established, there was what could quite accurately be described as a "contingent" liability in tort which would become a complete cause of action dependent only on the development of mesothelioma with the effluxion of time.

[130] (1983) 82 LGR 235 at 239.

[131] But cf *Stevedoring Industry Finance Committee v Crimmins* [1999] 1 VR 782 at 815-816 per Tadgell JA, 818 per Buchanan JA.

147. The language of s 14 is not "intractable". Given the evident object of s 14 , I see no reason for giving the words "liabilities and obligations" a narrow meaning. The case would be different if the respondent was to be liable only for *causes of action* "that existed immediately before the expiration of that period." But the legislature has chosen a more ambiguous term. That ambiguity should be resolved in a way that protects, rather than destroys, potential rights. It should therefore be given an interpretation which protects the rights which the plaintiff would have had against the Authority but for the legislative re-organisation of the industry.

Orders

148. The appeal should be allowed and the matter remitted to the Court of Appeal for further hearing.

149. GUMMOW J. I agree generally with the reasons for judgment of Hayne J.

150. I would add only the following respecting, first, the nature of the jurisdiction exercised in this case by the Supreme Court of Victoria and, secondly, the interaction between statute and the common law duty of care, the existence of which is asserted by the appellant.

151. It appears to have been accepted in the course of argument in this Court that, although the action was brought in tort, the jurisdiction exercised by the Supreme Court was federal jurisdiction invested by s 39(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). Two heads of federal jurisdiction were engaged by this action.

152. First, the liability of the respondent to the appellant depended upon federal law for its existence. The respondent was obliged by s 14(b) of the *Stevedoring Industry Acts (Termination) Act* 1977 (Cth) to discharge the relevant liability and obligation of the Australian Stevedoring Industry Authority ("the Authority"). Had it not been for s 14(b), the action would not have lain against it. Thus, there was a matter arising under a law of the Commonwealth within the meaning of s 76(ii) of the Constitution [132] .

---

[132] *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581.

---

153. Secondly, the provisions of the *Stevedoring Industry Finance Committee Act* 1977 (Cth) which establish the respondent and provide for its operations indicate that it is to be classified as a Commonwealth agency or instrumentality which is included in the term "the Commonwealth" in s 75(iii) of the Constitution [133] . The members of the respondent are appointed by the Minister (s 5(2)); its Chairman holds office during the pleasure of the Minister (s 24(1)); it is funded out of the Consolidated Revenue Fund (s 16); approval of the Treasurer is required for borrowings (s 20); it is not subject to income tax (s 27(2)(a)); and its accounts are audited by the Auditor-General (ss 22, 30).

---

[133] *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 232.

---

154. The rules of decision respecting the liability of the respondent in tort were, in the first instance, supplied by the common law of Australia. This applied save for its displacement by any applicable relevant law of the Commonwealth. One relevant law is s 79 of the Judiciary Act , which would "pick up" the law of Victoria except as otherwise provided by the Constitution or other laws of the Commonwealth. However, no such laws of Victoria were relied upon to modify the common law in any essential respect. Rather, the case in tort turned upon the interrelation between the common law and federal statute law. Whether this body of common law was rendered applicable by s 80 of the Judiciary Act [134] , or applied as part of the ultimate constitutional foundation[135], it is unnecessary to decide[136]. This is because s 80 uses the expression "the common law in Australia as modified by the Constitution".

---

[134] *The Commonwealth v Mewett* (1997) 191 CLR 471 at 526-527 .

[135] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-566 .

[136] The constitutional adequacy in s 80 of the criterion of the laws of the State or Territory of the venue to displace the common law in Australia from such a case may be a question for another occasion. Here the *locus delicti* and the venue coincided.

---

155. The relationship between federal statute law and the common law was considered in the judgment of the Court in the *Native Title Act Case* [137] . The Court said [138] :

> "A law of the Commonwealth may exclude, wholly or partially, the operation of the common law on a subject within its legislative power [139] or it may confirm the operation of the common law on such a subject [140] or it may simply assume that the common law applies to the subject [141] , as in truth it does unless excluded."

---

[137] *Western Australia v The Commonwealth* (1995) 183 CLR 373.

[138] *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 487.

[139] Eg, s 6 of the *Diplomatic Privileges and Immunities Act* 1967 (Cth) .

[140] Eg, s 5 of the *Insurance (Agents and Brokers) Act* 1984 (Cth) .

[141] Eg, s 5 of the *Bills of Exchange Act* 1909 (Cth) ; see *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 137-139 .

---

156. The case pleaded here did not involve the operation of a law of the Commonwealth which expressly excluded, wholly or partially, the operation of the common law on a relevant subject. The appellant does not rely upon the confirmation by a law of the Commonwealth of the operation of the common law. Nor does the appellant seek to reformulate established rules of common law so that they adopted, by analogy, the provisions of a law of the Commonwealth [142] .

---

[142] cf *Esso Australia Resources Ltd v Commissioner of Taxation* (1998) 83 FCR 511 at 519-525, 539-547, 568-572 . The judgment on appeal to this Court is reserved.

---

157. **Following paragraph cited by:**

HNOE Limited v Angus & Julia Stone Pty Ltd (19 November 2024) (Bell CJ, Leeming and Payne JJA)

More significantly, the appellant eschewed a claim for breach of statutory duty, founded in the provisions of the *Stevedoring Industry Act* 1956 (Cth) ("the Authority Act"). The appellant did not contend that, upon its proper construction, the Authority Act had conferred upon her husband a cause of action for the recovery of damages for breach by the Authority of duties imposed upon it by the legislation. Any such argument would have run into difficulties. First, the appellant pointed to no relevant statutory duty attended by a sanction for non-performance. Secondly, "there is no action for breach of statutory duty unless the legislation confers a right on the injured person to have the duty performed" [143] and, as Dixon J pointed out in *O'Connor v S P Bray Ltd* [144] , the legislation will rarely yield the necessary implication positively giving a civil remedy. Thirdly, as indicated by McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd* [145] , where the legislation is a law of the Commonwealth, and the question is one respecting the creation of new rights and liabilities to engage Ch III of the Constitution , it is to be expected that the Parliament will clearly state its will.

---

[143] *Northern Territory v Mengel* (1995) 185 CLR 307 at 343-344 .

[144] (1937) 56 CLR 464 at 477-478 .

[145] (1995) 185 CLR 410 at 458.

---

158. What was said in *Byrne* respecting actions for breach of statutory duty imposed by a law of the Commonwealth is consistent with the approach taken by the Supreme Court of the United States since *Touche Ross & Co v Redington, Trustee* [146] to the identification of Congressional intent to create private rights of action. Questions respecting the separation of judicial from legislative powers arise in any consideration of what Dixon J in *O'Connor* plainly regarded as the unsatisfactory reasoning, drawn from English decisions, by which the existence of actions for breach of statutory duty have been discovered by the courts[147].

---

[146] 442 US 560 (1979) ; see also *Karahalios v National Federation of Federal Employees, Local 1263* 489 US 527 (1989).

[147] See Chemerinsky, *Federal Jurisdiction*, 3rd ed (1999) at 383-384.

---

159. **Following paragraph cited by:**

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

To determine the manner of interaction between a particular statute and the common law of negligence, it is necessary to comprehend the legislative scheme. The starting point will commonly lie, as in the present appeal, in the terms of the statute and a determination of the scope of its operation. It obscures rather than illuminates the scheme established by the legislature to posit a common law duty of care and then determine whether the existence of that duty has been negatived by the statute, or other factors. Such reasoning may fail to clearly elucidate the interaction between the common law and statute. This lack of clarity will afford decision-makers, in both the judicial and legislative branches of government, little guidance, in particular where, as here, 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.

160. Where such distinct and particular statutory schemes have been enacted, it is particularly inapposite to develop the law by increments. Incrementalism suffers from a "temporal defect" [148] . In the context of the interaction of the common law of negligence and statute, this may result in the determination of the existence of duties by reference to a vagary, whether the legislature has enacted similar laws in the past. However, few legislative schemes lack distinctive peculiarities. This suggests that the existence of a duty of care does not turn on rules for recognising whether an appropriate increment is apparent. Further, if there were such a requirement, there would be cases where, in the face of proper reasoning which would disclose a duty of care, liability nevertheless must be denied because of the absence of the necessary "increment". The proper approach in the present appeal is to give due accord to the distinct and particular statutory scheme which has been enacted, from which rules as to the ambit of the common law can be identified for future cases.

---

[148] *Perre v Apand Pty Ltd* (1999) 73 ALJR 1190 at 1227; 164 ALR 606 at 659.

---

161. The present is not a case where a failure to observe statutory obligations is relied upon itself as providing a cause of action. Nor is such failure used merely in an evidentiary sense as indicative of negligence at common law [149] . Rather, the present is a case where the regime established by the Authority Act is essential to the formulation of the duty of care upon which the appellant relied for the cause of action in tort.

---

[149] cf *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 459.

---

162. Neither the respondent nor its predecessor, the Authority, enjoyed any capacity to engage in practical affairs beyond that with which statute endowed them. Statute established the Authority to discharge governmental functions respecting stevedoring operations performed in a Territory or on goods in trade and commerce with other countries or among the States [150] . It may be accurate enough to say of the Authority that, in doing or failing to do that of which the appellant complains, it operated, as did the Water Administration Ministerial Corporation

with respect to those commercial activities considered in *Puntoriero v Water Administration Ministerial Corporation* [151] , "in a milieu of the external legal order" [152] . This legal order would include (in *Puntoriero*) the law of contract and (in the present case) the common law respecting tortious liability. But that common law, so far as relevant here, is concerned with the presence of a duty of care obliging the Authority, at the hazard otherwise of encountering liability in negligence to stevedores, to exercise in a particular way certain of the powers conferred upon it by its constitutive statute. Thus here the common law could operate only upon the normative structure established by the legislation. It would lack content and could have no relevant anterior operation and normative force wholly outside that legislative structure. Thus the first task must be to analyse the particular structure in question.

---

[150] Authority Act, s 7(3) .

[151] (1999) 165 ALR 337 .

[152] cf *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 225.

---

163. The identification of this relationship between statute, particularly a law which on its face is concerned with public administration not the creation of private rights, and the other elements from which a duty of care arises is crucial to this appeal. The nature of the linkage between statutory duties or powers and the other criteria applied to discover a duty of care in a particular instance will vary from case to case. The resolution of this appeal is assisted by a consideration of some of the categories disclosed by the decided cases.

164. In some cases, statute may operate upon a known or pre-existing category or relationship to which the common law attaches consequences expressed in the law of negligence. An example is the relationship of employer and employee. Statute and common law may coincide in their view of the precaution necessary for the employer to do what is required for the protection of the personal safety of the employees. However, as Lord Keith explained in *M atuszczyk v National Coal Board*, it would be "quite a different thing from saying that, if the protective clauses are not complied with in some respect, the failure is a failure in statutory duty only, and cannot also be a failure in common law duty" [153] . The Lord President, Lord Cooper, in the same case, made the point that it would be "a novel idea in modern law that proof of facts pointing to freedom from criminal liability should necessarily infer freedom from civil liability"[154]. On the other hand, failure to observe the statutory requirements may, as indicated above, operate adjectivally, as evidence of negligence.

---

[153] 1953 SC (Ct Sess) 8 at 15. The decision was relied on by the New South Wales Full Court in *Hirst v Jessop* (1962) 63 SR (NSW) 15 at 21, which in turn was cited in *Suth erland Shire Council v Heyman* (1985) 157 CLR 424 at 459 by Mason J as authority that, unless the statute provides otherwise, the existence of a statutory cause of action "does not exclude liability for breach of a common law duty of care".

[154] 1953 SC (Ct Sess) 8 at 18.

165. Statute may establish a relationship between the parties which is said to be so analogous to a relationship to which the common law attaches duties that the common law should act in like manner with respect to the relationship flowing from the statute. An example is the position of statutory bodies which have power to manage, and do manage, land which the public uses as of right; the position of the statutory authority is seen as analogous to that of an occupier of private land and a duty of care may arise as to members of the public who go to the areas managed by the authority [155] .

[155] *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 at 452-453, 458, 460, 472, 487-488 .

166. In other cases, the powers vested by statute in a public authority may give to it such a significant and special measure of control over the safety of the person or property of the plaintiff as to oblige it to exercise its powers to avert danger or to bring the danger to the knowledge of the plaintiff. The powers of the appellant with respect to fire prevention in *Pyrenees Shire Council v Day* [156] were in this category.

[156] (1998) 192 CLR 330 .

167. In the present case, the appellant's case was put first on the footing that the statutory powers of the Authority placed it in a position similar to that of an employer, in the same way as the public authority in *Romeo v Conservation Commission of the Northern Territory* was put by statute in a position analogous to that of an occupier of private land. Hayne J demonstrates in his reasons that the analogy which the appellant sought to draw breaks down at several points.

168. Alternatively, the case was put that the Authority owed stevedores such as the appellant's husband a common law duty of care to exercise various of its statutory powers, in particular the power to supply equipment. However, the existence of those powers did not place the Authority in control of the working situation of stevedores. The Authority occupied a position lacking the practical and legal measure of control enjoyed by the local government authority in *Pyrenees* with respect to the particular premises in question.

169. As Hayne J explains, the Authority could have required the use of respirators only by making an order of general application under s 18 of the Authority Act . Upon its true construction, the provision for the making of orders under s 18 provided the complete statement of the legislative provision for the regulation of the subject-matter[157]. The Authority owed no common law duty of care to the stevedores in deciding whether or not to exercise that power.

[157] *Hirst v Jessop* (1962) 63 SR (NSW) 15 at 21.

170. The imposition of a common law duty of care on a statutory authority in respect of a matter the subject of a quasi-legislative power such as that in s 18 would imperil the devolution of responsibility from the legislature to that statutory authority. The common law would circumvent the legislative scheme by entering upon a field which, upon construction of the statute, is constituted by legislatively created norms which provide for delegated law-making. No action in negligence lies in respect of the passing of a by-law which causes economic loss to a plaintiff even if it later be declared invalid [158] . Still less does an action in negligence lie in respect of a failure to exercise a power to pass a by-law which, if passed, would have been valid.

[158] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 394 ; *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567 at 590-596 .

171. The appeal should be dismissed with costs.

172. KIRBY J. This appeal from the Court of Appeal of Victoria [159] raises two questions of difficulty. The first concerns the transmission of legal liability from one statutory authority of the Commonwealth to another. The second concerns whether the original statutory authority (whose liability is said to have been transmitted to the new one) is liable in the circumstances according to the common law of negligence. Specifically, it is whether the original authority owed a duty of care to a person claiming damages arising out of the authority's exercise, or non-exercise, of its statutory functions and powers.

[159] *Stevedoring Industry Finance Committee v Crimmins* [1999] 1 VR 782.

The course of the proceedings

173. Mr Brian Crimmins ("the deceased") was a waterside worker. Between 1961 and 1965 he performed his duties at the Port of Melbourne. In the course of those duties, he was exposed to the inhalation of asbestos fibres. In 1997 he was diagnosed as suffering from mesothelioma. This is a malignant condition which, after a long period of latency, manifests itself in painful, and ultimately fatal, injury to the lungs and pleura [160] .

[160] A description of mesothelioma appears in *American Home Assurance v Saunders* (1987) 11 NSWLR 363 at 365.

174. Legal proceedings were commenced against a number of parties said to have been liable to the deceased. The respondent, the Stevedoring Industry Finance Committee ("the Committee"), was joined as a defendant in that action. The deceased's claims against the other defendants were settled before trial, leaving on foot only his action against the Committee. Before that action was heard in the Supreme Court of Victoria, the trial judge (Eames J), in a preliminary ruling[161], held that the Committee had succeeded in law to the liability of the Australian Stevedoring Industry Authority ("the Authority") established under earlier legislation. His Honour held that it had done so by virtue of statutory provisions governing the transition to the new statutory regime which created the Committee [162] .

[161] *Crimmins v Stevedoring Industry Finance Committee* unreported, Supreme Court of Victoria, 20 March 1998.

[162] *Stevedoring Industry Acts (Termination) Act* 1977 (Cth), s 14(b) .

175. The trial of the deceased's action was conducted before Eames J and a jury. However, before the jury's verdict was taken, the Committee moved, in effect, for a verdict by direction on the basis, relevantly, that no duty of care was owed by the Authority to the deceased so that no liability existed to which the Committee could succeed. Full argument on this point was postponed. The Committee was given leave to repeat its propositions after the jury's verdict, should that verdict be in favour of the deceased. It was, and in the sum of $833,622. Following additional argument for the Committee that it was entitled to a verdict in its favour *non obstante veredicto*, Eames J gave a further ruling[163]. He rejected the Committee's submission. He entered judgment in favour of the deceased in accordance with the jury's verdict.

[163] *Crimmins v Stevedoring Industry Finance Committee* [1998] Aust Torts Rep ¶81-477.

176. The Committee appealed to the Court of Appeal. It challenged the first ruling, thereby giving rise to the transmission of liability point. It also challenged the verdict of the jury and the ruling by Eames J that the Authority was under a duty of care to the deceased. Its contentions in that regard give rise to the duty of care point.

177. Two further issues were argued before the Court of Appeal. The first (on the assumption that the earlier issues were decided adversely to the Committee's submissions) was whether a breach of the duty of care had been established so as to sustain the judgment (the breach of

duty point). The second was a challenge by the Committee to the damages awarded to the deceased (the quantum of damages point). In the event, the Court of Appeal did not deal with these last two points[164]. All members of that Court decided the transmission of liability point against the interests of the deceased [165] . Two of the judges [166] also found against him on the duty of care point. Despite a high measure of expedition both of the trial and of the appellate hearings, the deceased died just prior to the delivery of the judgment of the Court of Appeal, inferentially of mesothelioma.

---

[164] In the Court of Appeal, Winneke P remarked that the breach of duty issue was not pressed. The notice of appeal to the Court of Appeal does not specifically raise the question. However, it was agreed in this Court that the issue was still alive.

[165] *Stevedoring Industry Finance Committee v Crimmins* [1999] 1 VR 782 at 809-810 per Winneke P, 816 per Tadgell JA, 821 per Buchanan JA.

[166] *Stevedoring Industry Finance Committee v Crimmins* [1999] 1 VR 782 at 809 per Winneke P, 829 per Buchanan JA.

---

178. By special leave, an appeal has now been brought to this Court. The appeal seeks reconsideration of the decisions on the transmission of liability point and the duty of care point. It was common ground that, if the decisions of the Court of Appeal on those points were reversed, it would be necessary to return the proceedings to that Court so that the other points might be decided. In this Court, Mrs Maureen Crimmins, as executrix of the will of the deceased, was substituted as the appellant. She is seeking restoration of the judgment won at first instance.

The background facts

179. Over the past 50 years and more, the federal involvement in stevedoring operations at Australian ports has changed with successive legislation reflecting evolving views about the proper role of a federal stevedoring agency, in turn influenced by changes of government and of policy. The *Stevedoring Industry Act* 1947 (Cth) established a Stevedoring Industry Commission ("the Commission") with given powers. This was soon replaced by the Australian Stevedoring Industry Board ("the Board") constituted under s 7(1) of the *Stevedoring Industry Act* 1949 (Cth) ("the 1949 Act"). The Board's functions included those of regulating and controlling the performance of stevedoring operations [167] . They extended to the provision of first aid equipment and various facilities and amenities for waterside workers[168]. The Board was enjoined to "perform its functions … with a view to securing the speedy, safe and efficient performance of stevedoring operations" [169] .

---

[167] 1949 Act, s 13(a) .

[168] 1949 Act, s 13(g).

[169] 1949 Act, s 14 .

180. In 1955 the Government established a committee of inquiry to investigate the working of the 1949 Act. On the basis of the report of that committee, a Bill was introduced which became the *Stevedoring Industry Act* 1956 (Cth) ("the 1956 Act"). That Act established the Authority [170] . In place of regulation and control, the first of the listed functions of the Authority was simply "to regulate the performance of stevedoring operations" [171] . It will be necessary to return to the Authority's other functions and the scheme of the 1956 Act.

[170] 1956 Act, s 10(1) .

[171] 1956 Act, s 17(1)(a) .

181. It was under the 1956 Act that the deceased became a "registered waterside worker" [172] . He was never an employee of the Authority. His employers were the various stevedoring companies whose ships docked at the Port of Melbourne and required waterside labour. The deceased was directed by the Authority to work for such employers. He complied with such directions. He had no say as to where the Authority allocated him. The employment was casual. The actual employing stevedore varied from job to job.

[172] ss 7(1) and 29 .

182. Between the time of his original registration in April 1961 and the cessation of his registration in November 1965, the deceased performed varied duties. From time to time, these duties involved unloading asbestos. In the years after the Second World War, this product was recovered and refined in increasing quantities in Australia and elsewhere. It was frequently carried around, and to, Australia by ship. In his evidence, the deceased estimated that he had been engaged in unloading asbestos packed in hessian bags approximately 20 days of each of the years that he worked at the Port of Melbourne. Because the hessian bags were loosely woven, there was considerable spillage of the asbestos product. This resulted in airborne fibres and dust in which the deceased was obliged to work, sometimes for hours at a time.

183. The deceased did not claim, either at the time he ceased being a registered waterside worker or, indeed, until shortly before he developed the symptoms of mesothelioma in 1997, that he had suffered an "injury" for legal purposes. The uncontested medical opinion at the trial was that the deposit of asbestos fibres on lung and pleural surfaces initially caused no observable, discernible or discoverable bodily injury to the deceased. The evidence showed that it was not inevitable that the inhalation of asbestos fibres by the deceased would proceed to mesothelioma. Doubtless to avoid difficulties which might otherwise arise from the law governing limitations of actions for negligence in Victoria [173] it was part of the deceased's

case, at trial, that the "injury" constituting the damage necessary to the existence of a fully formed cause of action in negligence did not occur until shortly before the deceased issued his writ in August 1997. The Committee accepted this proposition. But it sought to turn it to its advantage in its arguments on the transmission of liability point [174] .

---

[173] *Limitation of Actions Act* 1958 (Vic), s 5 .

[174] Relying on the principle that to establish the actionable wrong there has to be some actual damage and not simply a prospective loss: *Hawkins v Clayton* (1988) 164 CLR 539 at 599-602 ; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 527 ; *Rabadan v Gale* [1996] 3 NZLR 220 at 222.

---

184. **Following paragraph cited by:**

Hunter Area Health Service v Presland (21 April 2005) (Spigelman CJ, Sheller and Santow JJA)

Twelve years after the deceased had ceased to work as a waterside worker, the federal legislation was changed once again. The Parliament enacted the *Stevedoring Industry Finance Committee Act* 1977 (Cth) which established the Committee[175]. A cognate measure with that Act was the *Stevedoring Industry Acts (Termination) Act* 1977 (Cth) ("the Termination Act"). The former Act reflected a decision to move away from the system of pools of casual labour to a new arrangement involving the employment by various stevedoring companies of permanent waterside workers. On this footing, the functions of the new federal stevedoring agency (the Committee) were to be much more limited than those successively carried out by the Commission, the Board, and the Authority. By force of s 4 of the Terminatio n Act , the 1956 Act was repealed, thereby abolishing the Authority.

---

[175] s 4(1).

---

185. Although the Termination Act came into force on 5 December 1977, s 5 of that Act provided that the Authority would continue to exist until the last day fixed in conformity with the Act 's provisions. That day was 26 February 1978. Thereafter, the Committee would perform the narrow list of functions which the Parliament had assigned to it [176] . Essentially, these included the establishment and maintenance of registers of waterside workers, the making of payments in accordance with the Act and the making of recommendations to the Minister as to any additional levy to be imposed on employers in respect of the employment of waterside workers [177] . From the detailed system of regulation and control of the performance of stevedoring operations provided in the federal legislation of the 1940s, the Committee was to

have much more limited functions. This was in keeping with the new and more regular employment arrangements envisaged for the industry.

---

[176] *Stevedoring Industry Finance Committee Act* 1977 (Cth) .

[177] Levies are imposed pursuant to the *Stevedoring Industry Levy Act* 1977 (Cth) .

---

186. With each successive federal Act, abolishing in turn the Commission[178] and the Board [179] , it was necessary to make provision for the transmission of rights, property and assets to the new agency and to impose on it responsibility for the obligations and liabilities of its predecessor. The Parliament duly enacted such transmission provisions. The same was done when, by s 14 of the Termination Act , the Authority was abolished and succeeded by the Committee. The deceased was not employed by the Committee any more than he had been by the Authority. But he claimed that the Committee had succeeded to the liability which the Authority owed to him under the common law of negligence. It is the Committee's contest of this assertion, unanimously supported by the decision of the Court of Appeal, that requires the determination of the transmission of liability point. If such liability as the Authority owed to the deceased was not transmitted to the Committee, no other issue needs to be considered. The Authority having been abolished with the repeal of the legislation which had constituted it, it was not itself now liable to be sued. The deceased recognised this by bringing his action against the Committee in respect of the Authority's alleged negligence.

---

[178] 1949 Act, s 5(3)(a).

[179] 1956 Act, s 6(9) .

The transmission of liability provisions

187. There are two provisions of the Termination Act which are relevant to the consideration of the transmission of liability point. They are ss 14 and 15 . Eames J concluded that the relevant question was whether the word "liabilities", appearing in s 14(b), included contingent or inchoate liabilities[180]. He dismissed the Committee's objection by reference to dictionary definitions of, and judicial observations about, the meaning of the word "liabilities" appearing in like legislation, general principles for the construction of legislation which he took to be applicable and the absence of any suggestion of a definite purpose to deprive persons such as the deceased of what would otherwise be their legal rights. As s 14 is set out in the reasons of other members of this Court, I will not repeat it.

---

[180] *Crimmins v Stevedoring Industry Finance Committee* unreported, Supreme Court of Victoria, ruling on preliminary issue, 20 March 1998 at 121O.

188. In the Court of Appeal, Tadgell JA explained his reasons for rejecting both the approach and reasoning of the primary judge. He disputed the utility of the authorities cited by Eames J[181] . Buchanan JA also rejected the argument that the word "liabilities" in s 14 of the Termination Act included notions of contingency or inchoateness. Whereas such notions were proper to describe contingent liabilities under a guarantee before default by the principal debtor, or under a contract before breach (for which s 15 of the Termination Act expressly provided), they were inapposite to a cause of action in tort [182] . Principles of construction which imputed to the Parliament respect for accrued rights (abolishing such rights only by clear and unambiguous words [183]) simply begged the question which had to be answered from a consideration of the text of s 14 . If, properly understood, there were no "accrued rights", because the tort in question was not fully formed before the expiration of the transitional period [184] , no presumption or approach to statutory interpretation could resurrect such rights. If they did not exist until after the termination of the transitional period, they did not secure the benefit of s 14(b) of the Termination Act . They expired with the abolition of the Authority.

---

[181] eg *Walters v Babergh District Council* (1983) 82 LGR 235.

[182] *Stevedoring Industry Finance Committee v Crimmins* [1999] 1 VR 782 at 818-819 per Buchanan JA.

[183] cf *Bropho v Western Australia* (1990) 171 CLR 1 at 17 ; cf *Sharp v Associated Pulp and Paper Mills Ltd* [1989] VR 139 at 147.

[184] cf *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 211-213 per Lord Hoffmann; applied *Platform Home Loans Ltd v Oyston Shipways Ltd* [1 999] 2 WLR 518 at 533-535; [1999] 1 All ER 833 at 847-849 .

---

189. I pay tribute to the clear way in which each of the judges in the Court of Appeal explained the conclusions to which they came and their reasons for differing from the preliminary ruling of Eames J. I do not pretend that the construction of s 14(b) is without difficulty. The fact that I have ultimately concluded that Eames J's construction is the preferable one does not mean that the point is incontestable or that minds may not differ upon it. As Tadgell JA pointed out in his reasons, a number of the decisions in earlier cases concerning the meaning of statutory measures for the transmission of liability were reached by majority. This suggests that these are problems upon which judicial unanimity will be rare.

The liability of the Authority was transmitted to the Committee

190. The starting point for an approach to a provision such as s 14(b) of the Termination Act is a recognition that words such as "liability" and "liable" are not fixed either in their ordinary usage in the English language (something to which dictionary definitions attest) or by the assignment of a technical legal meaning. The context is all [185] . Even when the context is thoroughly analysed, uncertainty may persist [186] . Thus, in some contexts "liable" will

connote found liable in law. But in other contexts it will connote potentially or contingently or notionally liable if certain events occur or if a court were asked to determine the point [187] .

---

[185] *Ogden Industries Pty Ltd v Lucas* (1967) 116 CLR 537 at 587 ; *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321 at 331.

[186] *Brambles Constructions Pty Ltd v Helmers* (1966) 114 CLR 213 at 219.

[187] *O'Keefe v Calwell* (1949) 77 CLR 261 at 285, 295 ; *Hitchins v Martin* [1964] WAR 144 at 145 ; *Preston v Lord; Ex parte Preston* [1984] 2 Qd R 269 at 272-273 .

---

191. The combination in s 14(b) of the words "liabilities" and "obligations" suggests that each word had work to perform. This, in turn, indicates that the "obligations" of the Authority referred to were such "liabilities" as had already been conclusively and authoritatively determined to be owed in law. In the context of the use of the two nouns, the word "liabilities" indicates a responsibility of the Authority (to use a neutral word) which has not yet been conclusively determined to be a legal "obligation". In short, in the context, the use of the two words lends weight to the argument for the appellant that "liabilities" means, or at least includes, contingent and inchoate liabilities. Such "liabilities" might not be "obligations" because awaiting future events. But they are "liabilities" just the same.

192. It is always permissible, in seeking to derive the meaning of ambiguous legislation, to have regard to its legislative history [188] . Whereas the 1949 Act "imposed" on the Board the "obligations and liabilities" of the previous Commission[189], when the 1956 Act was enacted, it referred only to "all liabilities to which the Board was subject immediately before [a specified date]" **[190]** . This may indicate that the formula in s 14(b) of the Termination Act is nothing more than the preference of a particular drafter. But, to the extent that the Termination Act varied the language of transmission which had been used in the case of its immediate predecessor, it did so in a way that apparently enlarged the transmission of the legal responsibilities of the Authority. Not only were liabilities transmitted. So were "obligations".

---

[188] *Acts Interpretation Act* 1901 (Cth), s 15AB . See also Bennion, *Statutory Interpretation – A Code*, 3rd ed (1997) at 472-487.

[189] s 5(3)(a).

[190] s 6(9) .

---

193. Secondly, the legislative history of the successive agencies of the Commonwealth (Commission, Board, Authority and now the Committee) affords the statutory context in which a provision such as s 14 must be construed. The enactment of legislation in relation to

the Australian waterfront has seen many changes of direction. However, a constant theme has been the need for a federal agency of some kind. Because the abolished agency has necessarily accumulated property and assets and incurred obligations and liabilities, it is unsurprising that successive Acts should have afforded the means to transmit the entitlements and responsibilities of the abolished body to the newly created one, in an orderly way.

194. This history also suggests a purpose of the successive transmission provisions that was designed to avoid the injustice which could arise, either to the new agency or to persons with claims against it, if it were held that their entitlements or responsibilities fell into a gap in the legislation. Of course, gaps sometimes occur in legislation [191] . But it seems a proper approach to such provisions (of which s 14(b) of the Termination Act is an example) to assume that no gap was intended. The language of the section must still be given meaning. It must ultimately govern the ascertainment of the legislative purpose [192] . But the legislative history encourages the approach to s 14(b) which McGarvie J expressed, obiter, in *Wintle's* case [193]:

> "[I]t is hardly to be expected that Parliament intended that if a liability which was in the process of crystallising but had not crystallised before the relevant date, crystallised after the relevant date, the party to whom the liability would have been owed if it had crystallised before the relevant date, be left without remedy."

Eames J relied on that approach. This course was criticised by the Court of Appeal. But I consider that it was correct and especially when the history of successive transmission provisions is remembered.

---

[191] A recent example is *Byrnes v The Queen* (1999) 73 ALJR 1292 at 1307-1308; 164 ALR 520 at 542-543 .

[192] *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523.

[193] *Wintle v Stevedoring Industry Finance Committee* unreported, Supreme Court of Victoria, 5 April 1989 at 8. See also now *Gibson v Stevedoring Industry Finance Committee* unreported, Dust Diseases Tribunal (NSW), 2 June 1998 (Judge Curtis).

---

195. In the case of federal legislation (as distinct from that of a State) there may also be constitutional reasons, not argued in this appeal, which would support a construction of such provisions favourable to the survival of valid legal claims (choses in action) against a successor agency of the Commonwealth and unfavourable to their abolition [194] . In the case of a number of medical conditions, with long periods of incubation and latency, there seems no reason of principle to hold that the notion of contingent, potential, inchoate or uncrystallised liability is inapplicable.

---

[194] cf *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297. See also *Acts Interpretation Act* , s 8 .

196. Obviously, upon the assumption made for the purposes of the present argument, some lasting physiological change short of injury took place in the deceased's body at the time of his exposure to asbestos fibres whilst employed as a waterside worker in the 1960s. The mere fact that it produced no immediate symptoms and constituted no "injury", in the sense of occasioning damage for which the deceased could then have sued, does not destroy its contingent potential. The same would be true in a case of negligent exposure of a person to an extremely serious virus, such as strains of hepatitis or the human immunodeficiency virus. The potentiality for future damage would be caused at the moment of such exposure. Without such exposure there would be no possibility of future damage, absent a new event. There seems no reason of principle to treat such a case as different from the liability of a surety under a guarantee before the events giving rise to legal obligations have occurred. There may be no legal "obligation" of the Authority actually existing immediately before the expiration of the period specified. But given the clear purpose of the transmission provision, it seems unduly narrow to read "liabilities" as excluding contingent or potential liabilities.

197. Thirdly, it was correctly pointed out in the Court of Appeal that great care must be paid in drawing lessons for the meaning and operation of s 14(b) of the Termination Act from a study of the way in which the courts have construed transmission provisions in other legislation. With the recent proliferation of statutory authorities and changes of legislative direction, such provisions are now relatively common. So are the problems which they present. There is no standard provision, as the successive sections in the stevedoring legislation indicate. In each case, there is therefore no other alternative than to scrutinise the legislative language to find its meaning and purpose.

198. Having accepted the virtual uniqueness of each transmission provision, the case which appears to come closest to the present one is *Walters v Babergh District Council* [195]. That case involved a legislative scheme whereby the liabilities of one authority (a Rural Council) were transferred, on an appointed day, to a new authority (the District Council). The question was whether the word "liabilities" in the legislation included "contingent or potential liabilities" of the previous Council so that such liabilities were inherited by the new Council. Woolf J (as the Master of the Rolls then was) held that the statutory formula was apt to effect a transfer of liability in negligence (and breach of statutory duty) arising from the approval of building plans. It was alleged that the former Council had certified those plans although they negligently provided inadequate foundations. The case was one in which the plaintiff did not purchase the affected building until after the statutory transfer of responsibility. Indeed, the building showed no sign of subsidence until after that date. But Woolf J adopted a meaning of the word "liabilities" which avoided defeat of the legislative purpose as he perceived it [196] . The key passage in Woolf J's reasons is set out by McHugh J. I will not repeat it.

---

[195] (1983) 82 LGR 235.

[196] *Walters v Babergh District Council* (1983) 82 LGR 235 at 243 applying reasoning derived from *Bromilow & Edwards Ltd v Inland Revenue Commissioners* [1969] 1 WLR 1180 at 1190 per Megarry J; [1969] 3 All ER 536 at 543.

---

199. *Walters* has a dual purpose for this appeal. It provides an illustration of an approach to the meaning of the word "liabilities" which seems apt to the use of that word in the provision under consideration. But it also illustrates an acceptance of the fact that "liabilities" may apply in the case of a claim in tort (specifically of negligence) although the damage had not occurred before the transmission provision attached and, therefore, the tort was not fully formed by that time. Once again, applied to the present statutory language, an "obligation" did not exist immediately before the specified date. But a "liability", within the meaning of the provision, did.

200. I accept that there are differences between the statutory language under consideration in *Walters* and the provisions of s 14(b) of the Termination Act. That will invariably be the case. The use of the words "that existed" in s 14(b) is insufficient to render inapplicable the approach and conclusion expressed in *Walters*. The liability did "exist". It was simply a liability of a particular kind, namely one contingent or potential. In different legislation the word might invite a more restrictive meaning. But in a provision for the transmission of liability from one federal agency to its successor, a narrow approach would tend to frustrate the achievement of the obvious objective of the Parliament. Especially would this be so as the provision in question is understood against the background of earlier similar legislative changes.

201. Fourthly, the Committee placed emphasis upon the terms of s 15 of the Termination Act relating to contracts. The Parliament expressly provided in that section that the Committee was to be regarded as substituted for the Authority as a party to a contract, so that, if the Authority had breached a contract during its existence, the Committee could be sued in respect of the liability occasioned by that breach. It was therefore submitted that s 15 would have been unnecessary if the word "liabilities" in s 14 had the meaning urged for the appellant. There are several answers to this argument. Section 14 designedly provides the general rule on transmission of entitlements and responsibilities. There could be many reasons why, for the special consequences of contracts, it was deemed appropriate to make particular provision in that regard. In any case, as Eames J observed, a provision similar to s 15 was part of the scheme of the legislation considered by Woolf J in *Walters* [197]. It did not deflect his Lordship from the construction of "liabilities" which he preferred. Nor does it me.

---

[197] (1983) 82 LGR 235 at 237-239.

---

202. The primary judge was therefore right in the meaning which he gave to s 14(b) of the Termination Act. That meaning furthered the objectives of the provision, properly understood. The alternative meaning frustrated their achievement. No good reason could be offered by the Committee as to why the Parliament, having adopted such a transmission provision, would

have done so for the purpose of depriving a person in the position of the deceased (and now the appellant) of such legal rights as could be proved against the Authority. The only explanation which could be offered was that the claim fell into an unforeseen gap in the legislation necessitated by a strict reading of a word of acknowledged ambiguity. The alternative reading is preferable. The transmission of liability point should therefore be determined in favour of the appellant.

The Authority's functions and powers: the legislative scheme

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] .

---

[198] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 376-377 per Gummow J.

[199] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 730 per Lord Browne-Wilkinson.

[200] *Bedfordshire* [1995] 2 AC 633 at 735.

[201] *Bedfordshire* [1995] 2 AC 633 at 736.

---

204. If the conclusion of incompatibility with the statute were reached, it would not then be necessary to proceed to the next step of reasoning, which is to judge, by the application of ordinary principles, whether (the statute being silent on the point) the common law imposes an enforceable obligation on the statutory body so as to permit the plaintiff's claim. The present case is made simpler because the appellant accepted (as the deceased in his lifetime had done by the way he pleaded and argued his claim against the Authority) that the 1956 Act did not give rise to a cause of action for a breach of statutory duty *simpliciter* [202] . No such claim was ever alleged in this case. What was contended was that the statutory duties imposed upon the Authority had "brought about such a relationship between [them] as to give rise to a duty of care at common law" [203] . To see whether this is so, or whether it is expelled as a possibility by a true understanding of the provisions and scheme of the legislation, it is necessary to examine what the 1956 Act provided.

---

[202] *Bedfordshire* [1995] 2 AC 633 at 731.

[203] *Bedfordshire* [1995] 2 AC 633 at 735.

205. The 1956 Act placed the Authority in charge of the registration of waterside workers [204] . Unless a person were registered as such, he could not be employed as a waterside worker[205]. In specified circumstances, the Authority could declare by instrument in writing that use of unregistered waterside workers was permitted in a given port[206]. The Authority had the power to require registered waterside workers to submit to medical examination[207]. If an applicant for registration satisfied the reasonable requirements of the Authority as to age, physical fitness, competence, union membership and absence of relevant criminal conviction, that person was entitled to registration[208].

[204] Including ss 25, 27, 29, 30 and 31 .

[205] 1956 Act, s 39(1).

[206] 1956 Act, s 40.

[207] 1956 Act, s 32A (inserted in 1961).

[208] 1956 Act, s 29(1) and (1A) (inserted in 1965).

206. Although the scheme of the 1956 Act contradicted any suggestion that the Authority was the employer of registered waterside workers, the Authority certainly enjoyed substantial powers in the allocation of their services to the employing stevedores. In accordance with the requirements of incoming ships, and having regard to the nature of their cargoes, the Authority determined the quota of waterside workers for each port [209] , maintained a register of both employers and waterside workers [210] and made arrangements for the allocation of waterside workers to stevedoring operations so as to ensure, as far as practicable, a fair distribution of work amongst the workers [211] . The Authority thus controlled and administered the system which facilitated the employment of the workers on the wharves and ships [212] . It was empowered to pay attendance money [213] to registered waterside workers who attended for duty but were not allocated[214]. It was also empowered to pay amounts, in accordance with the 1956 Act, in respect of long service leave [215] and other amounts payable under the Act or applicable award [216] . No express provision was made for objection to, or review of, allocations, whether by reference to concerns of health, danger or otherwise. A worker such as the deceased was obliged by the legislative scheme to go to the wharf and ship to which the Authority allocated him.

[209] 1956 Act, s 25(d) .

[210] 1956 Act, s 25(e) .

[211] 1956 Act, s 17(1)(f) .

[212] 1956 Act, s 17(1)(e) and (f).

[213] 1956 Act, s 17(1)(c)(i) .

[214] Under the Waterside Workers' Award 1960.

[215] 1956 Act, s 17(1)(c)(ii) (amended in 1961).

[216] 1956 Act, s 17(1)(c)(iii) .

---

207. The Authority also had certain powers with respect to the discipline of waterside workers. The evidence disclosed that, if a worker refused to work, or to continue to work, on a particular cargo he would be dismissed by the foreman of the stevedore. If the worker did not complete his shift, a "red discharge" would be issued by the stevedore in respect of him. He was then obliged to see the Authority's senior officer at the port before being re-rostered for a new allocation to work. The Authority was empowered to cancel or suspend the registration of a waterside worker in specified cases including misconduct, physical or mental condition, incompetence or inefficiency, inexpeditious or unsafe work performance, irregular attendance, failure to accept employment and failure to comply with an order or direction of the Authority under the 1956 Act or applicable award [217] . From such cancellation or suspension an appeal lay to the Commonwealth Conciliation and Arbitration Commission [218] .

---

[217] 1956 Act, s 36(1) .

[218] 1956 Act, s 37 (as amended by the *Stevedoring Industry Act* 1961 (Cth), s 17 – appeal originally lay to the Commonwealth Industrial Court).

---

208. The 1956 Act made a number of references to the issue of safety. By s 8 it was provided that the "Authority shall perform its functions, and exercise its powers, under this Act with a view to securing the expeditious, safe and efficient performance of stevedoring operations". A condition for registration by the Authority as an employer at a port was that the person applying for such registration had "the means ... of carrying out stevedoring operations at the port in an expeditious, safe and efficient manner" [219] . By s 33 , the obligations of employers were listed. They included that of ensuring, as far as practicable, that "stevedoring operations for which he has engaged waterside workers are expeditiously, safely and efficiently performed" [220] . In determining the quota of waterside workers and the register of employers, the Authority was obliged to ensure that a sufficient number of workers of the necessary physical fitness, competence and efficiency were available "for the expeditious, safe and efficient performance of stevedoring operations at each port" [221] .

---

[219] 1956 Act, s 28(b)(i) .

[220] 1956 Act, s 33(1)(c)(i) .

[221] 1956 Act, s 25(a) .

---

209. It is against this background that the Authority's functions relevant to safety must be evaluated. Those functions were stated in s 17 of the 1956 Act. They were critical to the deceased's case. The whole scheme of the section was relied upon by the appellant. Most of the relevant provisions are set out in the reasons of Gaudron J and McHugh J. The most important function of all was that appearing in s 17(1)(o) . It deserves repetition:

> "to encourage safe working in stevedoring operations and the use of articles and equipment, including clothing, designed for the protection of workers engaged in stevedoring operations *and, where necessary, to provide waterside workers with articles and equipment designed for that purpose*". (Emphasis added)

210. In addition to these functions, the appellant relied upon various powers which, it was said, afforded the Authority the means, if it had chosen to do so, to translate the functions assigned to it by the 1956 Act into effective protection of the safety of waterside workers whom it allocated, such as the deceased. Thus, by s 18(1) of the 1956 Act, the Authority was empowered, subject to the section, to "make such orders, and do all such other things, as it thinks fit" for the performance of its functions as contained in s 17. Although restrictions were imposed on the making of orders, no restrictions were imposed on the doing of "such other things". Specifically, no restriction was imposed on the provision to waterside workers of articles and equipment designed for their protection, as s 17(1)(o) envisaged. By s 23 the Authority was empowered to appoint an Inspector under the Act to investigate and report "in relation to stevedoring operations" as either the Authority or the Commonwealth Conciliation and Arbitration Commission directed [222] . Among the specific duties of the Inspectors was that of suggesting to employers and waterside workers means by which stevedoring operations might be performed with "greater expedition, safety and efficiency" [223] . A registered employer who failed to ensure that stevedoring operations were, as far as practicable, "expeditiously, safely and efficiently performed" [224] , was guilty of an offence [225] . The Authority had the power to initiate a prosecution for such an offence[226] and – following application to, and upon the direction of, the Commonwealth Conciliation and Arbitration Commission – the power to suspend or cancel the registration of an employer [227] not carrying on its operations in an "expeditious, safe and efficient manner" [228] .

---

[222] 1956 Act, s 23(2)(a) .

[223] 1956 Act, s 23(2)(b) .

[224] 1956 Act, s 33(1)(c)(i) .

[225] 1956 Act, s 33(2) .

[226] 1956 Act, s 34(2).

[227] 1956 Act, s 35(1) (as amended by the *Stevedoring Industry Act* 1961 (Cth), s 15 – such applications were originally made to the Commonwealth Industrial Court).

[228] 1956 Act, s 35(1)(a) .

211. Two strikingly different conceptions of the role of the Authority were urged upon this Court based upon the foregoing functions and powers. The Committee argued that the Authority was a mere employment bureau intended to facilitate the provision to the employing stevedores of the casual labour of registered waterside workers. Although the Authority and its inspectors could encourage employers to provide safety clothing and equipment, it was the employers who (both under the common law and by the applicable award[229]) had the legal obligation to do so. The Authority could do little more than exercise the functions of encouraging safe working practices; acting as a conduit for information about occupational health; and occasionally gathering information for such purposes. Moreover, the repeated references to "safety" in the context of tripartite goals of "expedition, safety and efficiency" implied that the "safety" being referred to involved no specific concern for individual waterside workers. Rather, it was a reflection of a broader legislative objective in which the whole of Australian society had an interest. This was the good economic management of stevedoring throughout Australia. Safety, in so far as it was mentioned, was an aspect of expedition and efficiency in stevedoring, not of the wellbeing of individual waterside workers.

[229] Waterside Workers' Award 1960, cll 11(b) and 23.

212. For the appellant, the 1956 Act imposed upon the Authority identifiable obligations to ensure minimum standards of safety in stevedoring operations throughout the nation for the waterside workers whom it registered and allocated to work. The Act recognised the likelihood of variable standards of safety in the vessels owned by individual employers. It imposed on the Authority the duty "where necessary" to provide waterside workers with articles and equipment designed for their protection [230] . And it afforded the Authority significant powers to go beyond mere encouragement so as to ensure that minimum nationwide standards of safety for Australian waterside workers were in fact met.

[230] 1956 Act, s 17(1)(o) .

Duty of care and statutory functions

213. The first question is thus whether the provisions of the Act are so inconsistent with the imposition by the common law of a duty of care to individuals such as the deceased that the argument should be rejected at the threshold.

214. In working out the relationship between the common law and legislation, it is often necessary to evaluate the extent to which the former may supplement the latter [231] . There was a time

when, absent an express provision of a statutory cause of action, the common law would not afford an individual an enforceable remedy for damage alleged to have been suffered in consequence of a public body's performance or non-performance of its functions. The theory behind the rejection of such a remedy was that, if Parliament had meant it to exist, it would have said so in plain terms. However, in *The Mersey Docks Trustees v Gibbs* [232] , the House of Lords decided that, in some circumstances, a public body could be liable in tort where, in an analogous case, a private individual would be liable. Any liability would depend on a close consideration of its statutory powers [233] and, where relevant, the discretions conferred upon the body to act or not to act [234] . As the law developed, both in Australia and England, the earlier principle gradually came to be reversed. If the statute provided its own remedy, that would ordinarily exclude the availability of a private cause of action [235] . But if the statute "provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer" [236] .

---

[231] cf *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 320-322 .

[232] (1866) LR 1 HL 93 .

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

[234] *Bedfordshire* [1995] 2 AC 633 at 728 ff.

[235] *Cutler v Wandsworth Stadium Ltd* [1949] AC 398; *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173.

[236] *Bedfordshire* [1995] 2 AC 633 at 731 per Lord Browne-Wilkinson.

---

215. Faced with an assertion of an entitlement to a private remedy, enforceable by an action based upon the common law tort of negligence, a plaintiff would commonly have to overcome a number of hurdles. Would that mode of enforcement be consistent with the language and scheme of the Act taken as a whole? Would it be compatible with any remedies provided by the Act on the basis that legislation would not ordinarily impose duties of imperfect obligation but would provide a means of enforcement, however apparently inadequate [237] ? Is the statute enacted solely for the benefit of the entire community or can it be shown to apply to the protection of a specific class of persons of which the plaintiff is a member [238] ?

---

[237] *Bedfordshire* [1995] 2 AC 633 at 731. Sometimes, although criminal penalties for breach are provided by the statute, a civil cause of action based on breach has been upheld: *Groves v Wimborne (Lord)* [1898] 2 QB 402.

[238] *Bedfordshire* [1995] 2 AC 633 at 731-732 .

---

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] .

---

[239] eg *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430 at 455-456 ; *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 at 1030 per Lord Reid.

[240] *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 at 1066-1067 per Lord Diplock.

[241] (1998) 192 CLR 330 at 347.

[242] *Bedfordshire* [1995] 2 AC 633 at 736-737 .

---

217. In *X (Minors) v Bedfordshire County Council*, Lord Browne-Wilkinson remarked [243] , 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".

---

[243] [1995] 2 AC 633 at 736.

---

218. This does not mean that the common law of negligence will necessarily take an approach entirely different from that which an application for relief by way of public law remedies would produce. After all, each remedy arises from the same subject matter, namely the meaning and operation of the statute and its enforcement. Each remedy will be obliged to respect the discretions accorded to the statutory body in question. Such discretions

necessarily imply, in some circumstances at least, a right to act and a privilege not to act. But whereas public law has been developed, substantially, around notions of *ultra vires* and has adopted (for that reason) stringent rules of judicial restraint [244] , the common law of negligence has developed in a different way and by reference to considerations of reasonableness. I agree with Lord Browne-Wilkinson that it would be a mistake to attempt to assimilate these two branches of the law. Their purposes are different. In a negligence action, the plaintiff is not seeking, as such, to have the public authority perform its statutory functions in the future. Indirectly and eventually the proceedings might have that consequence. But what the plaintiff is asserting is that a duty of care, specific to him or her, has been breached, resulting in personal damage to the plaintiff for which recompense is sought.

---

[244] As in the case of Wednesbury unreasonableness: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229 ; cf *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-41 .

---

219. When the foregoing approach is adopted, I do not regard the recognition of a private right of action in an individual waterside worker against the Authority as incompatible with the 1956 Act. Certainly, there is no provision in that Act for any specific remedy, available to an individual waterside worker, which would expel the amenability of the Authority to a private claim framed in negligence. Contrary to the submissions for the Committee, I would not accept that the many references to "safety" are limited to concerns about the financial burden which accidents and injuries caused for the stevedoring industry. The "safety" referred to was that of the personnel who alone were entitled to work in the industry. Except for rare and infrequent exceptions, that meant only the registered waterside workers, such as the deceased. They were a designated and easily identifiable class. In respect of them the Parliament had armed the Authority with functions and powers extending to exhortation of employers and, where necessary, had imposed a function on the Authority "to provide waterside workers with articles and equipment designed for [the] purpose" of "protection of workers engaged in stevedoring operations" [245] .

---

[245] 1956 Act, s 17(1)(o) .

---

220. A rational policy can be discerned in the imposition of this function upon the Authority. It is to recognise the variability of the safety standards observed by individual stevedores (some of whom were from overseas) and to require observance of a minimum national standard for the safety of waterside workers which "where necessary" the Authority was obliged to ensure. Nothing in the 1956 Act is inconsistent with the availability of a private cause of action to a person such as the deceased. On the contrary, there are provisions in that Act which support the availability of such an action. The deceased's claim therefore passes the threshold.

221. In these circumstances, the proper approach for a court to take is that explained by Lord Browne-Wilkinson in *Bedfordshire* [246] :

> "If the plaintiff's complaint alleges carelessness, not in the taking of a discretionary decision to do some act, but in the practical manner in which that act has been performed … the question whether or not there is a common law duty of care falls to be decided by applying the usual principles ie those laid down in *Capa ro Industries Plc v Dickman* [247] . Was the damage to the plaintiff reasonably foreseeable? Was the relationship between the plaintiff and the defendant sufficiently proximate? Is it just and reasonable to impose a duty of care?"

---

[246] [1995] 2 AC 633 at 739.

[247] [1990] 2 AC 605 at 617-618 . See also *Rowling v Takaro Properties Ltd* [1988] AC 473; *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

---

222. This was the approach which I favoured in *Pyrenees* [248] . Although not expressed in precisely the same terms, I do not take it to be substantially different from the approach adopted in that case by Gummow J [249] . It has the endorsement of the unanimous opinion of the House of Lords in *Bedfordshire* . It is followed in other common law jurisdictions [250] . Although it has its critics, it has been strongly defended as affording the best methodology or approach so far devised for solving the problems presented by a disputed claim about the existence of a duty of care at common law [251] . No other criterion (whether "foreseeability", "proximity", "reliance" or "control") mentioned in earlier cases – nor "principles" suggested since [252] – is adequate to serve as a universal identifier of the existence of a legal duty of care or a guide to the way in which the law will uphold or reject the existence of such a duty. Some earlier attempts (such as "general reliance") must now be regarded as fictions, rejected by this Court [253] . Pending the emergence of any different methodology or approach, I consider that the three-stage formulation, adapted from*Caparo* , applied in *Bedfordshire* and expressed in *Pyrenees* should be applied.

---

[248] (1998) 192 CLR 330 at 419-420 .

[249] (1998) 192 CLR 330 at 388-393 .

[250] See cases from New Zealand and Canada cited in *Perre v Apand Pty Ltd* (1999) 73 ALJR 1190 at 1240-1242; 164 ALR 606 at 676-679 .

[251] See Katter, *Duty of Care in Australia* (1999) at 173. See also *Perre v Apand Pty Ltd* (1999) 73 ALJR 1190 at 1233, 1240-1246; 164 ALR 606 at 667, 676-685 .

[252] *Perre v Apand Pty Ltd* (1999) 73 ALJR 1190 at 1212-1213 per McHugh J; 164 ALR 606 at 638-640 .

[253] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 356-360 per Toohey J, 385-388 per Gummow J, 408-412 of my reasons.

Application of the three-stage approach

223. *Reasonable foreseeability*: The approach to foreseeability, as applied to the ascertainment of the existence of a duty of care, is that stated by this Court in *Wyong Shire Council v Shirt* [254]. Where what is in question is the existence of a duty of care, the decision maker is obliged to conduct a "generalised enquiry" [255] to ask whether a reasonable person in the defendant's position would have foreseen that the conduct involved a risk of injury to the plaintiff, or to a class of persons including the plaintiff. The test is described as "undemanding" [256]. This is because it is not necessary that the defendant should have foreseen the precise injury which has occurred, or that such injury would have occurred to the plaintiff in particular or that it was likely to eventuate [257]. Lord Reid in *C Czarnikow Ltd v Koufos* [258] stated that liability extended to "any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case". Later in his speech [259] the words "likely to happen" were clarified as meaning "not unlikely" to happen, so as to include even an event that could be described as "a very improbable result" of the acts or omissions in question. It is this approach that was adopted by this Court in *Wyong Shire Council v Shirt*. Because the foreseeability test is so "undemanding", it cannot afford a universal criterion of the existence of a duty of care. The proper approach needs to be supplemented by the additional considerations of proximity and policy.

---

[254] (1980) 146 CLR 40.

[255] (1980) 146 CLR 40 at 47.

[256] (1980) 146 CLR 40 at 44 citing *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 at 641 per Glass JA.

[257] *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 at 642 per Glass JA.

[258] [1969] 1 AC 350 at 385.

[259] [1969] 1 AC 350 at 389.

---

224. The "undemanding test" is satisfied in the present case. According to evidence called at the trial, the Authority had corresponded with international shipping companies as early as 1961 concerning relevant safety matters. In one case it even suggested that it would withhold waterside workers from service on a particular company's vessels where the gear provided did not comply with Australian standards. In its successive annual reports for 1961, 1962 and

1963, the Authority reported on safety issues, including those relevant to the exposure of waterside workers to chemicals and other hazardous cargoes requiring the issue of industrial clothing, masks and goggles, protective clothing and rubber gloves.

225. Even in 1960, the Authority was distributing literature concerning the dangers of inhalation of dust and of diseases caused by exposure to dust as well as about compensation schemes for workers affected by the inhalation of dust, including asbestos dust. It is true that mesothelioma was not specifically mentioned in any of this material. That is a consideration which may go to the breach of duty issue. But, doubtless in furtherance of its statutory functions, the Authority did show concern about safety issues, received information, and could have received and disseminated much more and done much more, concerning the specific risks of prolonged and intensive exposure to dusts, including asbestos fibres[260]. It was therefore reasonably foreseeable to the Authority that persons, including the deceased, in the class allocated to working on ships in conditions of intense exposure to asbestos dust and fibres, were not unlikely to suffer harm as a consequence. The first criterion of liability is therefore satisfied.

---

[260] For example, at the Port of Melbourne the Harmful Gases, Vapours, Fumes, Mists, Smokes and Dusts Regulations 1945 (Vic) would have been breached in the operations described in the deceased's evidence.

---

226. *Relationship of proximity or "neighbourhood"*: A number of "proximity" factors satisfy the second consideration [261] . Many of these factors have been mentioned already in the description of the statutory functions of the Authority and the relationship between it and registered waterside workers such as the deceased. The fact that such workers were not employed by the Authority is by no means determinative of the duty question or even of the question about the "proximity" of the relationship in issue. If the deceased had been employed by the Authority, there would have been no need to consider the three-stage approach to ascertain whether a duty of care existed [262] . It is indisputable that such a duty exists as between an employer and its employees. That has long since been decided by the courts. What must be determined here is whether, in the circumstances, that duty existed in the more limited relationship created by the 1956 Act between the Authority and registered waterside workers.

---

[261] To determine the existence and scope of a duty of care requires scrutiny of the precise relationship between the parties: *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 441 applying *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 at 240. See also *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 73 ALJR 901 at 916-917 per Gummow J; 163 ALR 611 at 633-635 .

[262] Where there is a settled duty of care with an established scope and content there is no need to go further into analysis: *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 441-442 per Gibbs CJ.

227. That relationship was unique, although there may have been other quasi-employment relationships bearing a number of similarities in other Australian industries where casual labour was provided to employers, eg in the shearing industry. What was unique about the stevedoring industry was the creation by statute of a federal agency with extensive powers of coordinating its functions with those of employers in respect of the same labour force. Most especially there were a number of indications of control which the statute afforded to the Authority over waterside workers, as already outlined.

228. Quite apart from the letter of the 1956 Act, it is clear from the evidence (including that called by the Committee) that, in practice, the Authority commonly gave a broad interpretation to its powers. The evidence of the Authority's then senior officer, Mr Neil, was considered by Buchanan JA to have involved a "rather grand description" of the powers of the Authority "not matched by the terms of the Act " [263] . It was suggested that this might have arisen from a confusion between the powers enjoyed by Mr Neil as the representative of the Authority in the Port of Melbourne and the powers conferred upon him when he was constituted a statutory Board of Reference [264] .

[263] *Stevedoring Industry Finance Committee v Crimmins* [1999] 1 VR 782 at 826 per Buchanan JA.

[264] Stemming from the provisions of the Waterside Workers' Award 1960 and ultimately from the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) . See *Stev edoring Industry Finance Committee v Crimmins* [1999] 1 VR 782 at 826 per Buchanan JA.

229. It might be unsafe to draw such an inference of confusion where Mr Neil was not given a fair opportunity to rebut it. But in any case, Mr Neil was a witness called by the Authority. He gave a clear description of the powers exerted by the Authority in particular circumstances not only over individual waterside workers but also over a stevedoring company which did not conduct its operations in a way considered proper by the Authority. It was Mr Neil who said that the inspectors provided opinions concerning work conditions and played an "essential role" in matters of work safety. He himself inspected the loading and unloading of ships with safety in mind. He did so regularly. In these circumstances, a relationship of "proximity" or "neighbourhood" is sufficiently established between the Authority and registered waterside workers such as the deceased. That relationship can be discerned from the face of the Act . As described in the evidence, the Authority was much more than a disinterested employment agency which did no more than supply labour. Although not itself the employer of registered waterside workers, it had a direct, regular and multi-layered relationship with those whom it registered and allocated to their work. The second criterion is also met.

230. *Imposition of a duty: policy considerations*: It is the third consideration which is likely, in cases such as the present, to provide the greatest obstacle to a claim by an individual plaintiff who seeks to establish a duty of care against a statutory body for failure to exercise its statutory powers. *Bedfordshire* [265] affords a good illustration of claims that failed on this

criterion. In that appeal, the House of Lords rejected the plaintiffs' argument that the third consideration in *Caparo* was applicable only where the claim was for pure economic loss and did not apply where (as there and as here) the claim was for physical damage [266] . Whilst accepting that a court would approach the question with an appreciation of the general desirability that wrongs of serious neglect should be remedied, Lord Browne-Wilkinson listed several "very potent counter considerations" [267] which overrode that policy in the cases before their Lordships. These included that "a common law duty of care would cut across the whole statutory system" set up in that case for the protection of children at risk [268] ; that it would intrude damages litigation into the "extraordinarily delicate" issue of management of children at risk [269] ; that it "might well" cause the officers of a statutory body to adopt a "more cautious and defensive approach to their duties" [270] ; and that it was not necessary because the statute and other legislation provided remedies that were arguably adequate [271] .

---

[265] [1995] 2 AC 633 at 728 ff.

[266] [1995] 2 AC 633 at 749.

[267] [1995] 2 AC 633 at 749.

[268] [1995] 2 AC 633 at 749.

[269] [1995] 2 AC 633 at 750.

[270] [1995] 2 AC 633 at 750.

[271] [1995] 2 AC 633 at 751.

---

231. Similar conclusions have been reached in other cases in England [272] and by the Privy Council in relation to Hong Kong [273] in respect of attempts to make the police or statutory regulators liable to pay damages for a failure, said to have been negligent, to protect the plaintiff from harm. In Australia, the plaintiff in *Romeo v Conservation Commission (NT)* [274] failed on the issue of breach of duty, in circumstances where a duty of care was found to exist. It was held in that case that the statutory body had not breached its duty to the plaintiff by failing to fence a popular cliff face against the risk that a person, intoxicated as was the plaintiff, would walk forward and fall over the cliff. Yet in different, more remote, circumstances, it could readily be imagined that a statutory body, created to conserve and protect the natural environment, would be held to owe no duty of care at all to fence an undeveloped promontory from the risk that a very occasional visitor, intoxicated or otherwise, might fall and be injured.

---

[272] eg *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

[273] *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175 at 189.

[274] (1998) 192 CLR 431 at 477.

232. In the present case, a number of considerations of policy favour the Committee's argument that the Authority did not owe a duty of care to the deceased. These considerations include the following:

· The 1956 Act maintained the relationship of employment between waterside workers and stevedores and thus recognised the continuance of the primary duty of the individual employer to the workers concerned.

· The 1956 Act was intended to impose on the Authority functions more limited than those previously performed by the Commission and the Board[275].

· The Authority was obliged to operate in 42 ports throughout Australia. At those ports cargoes were received from all over the world. The Authority might not have any notice as to the contents, packaging and dangers of such cargoes nor any warning of the specific precautions that should be taken for the safety of waterside workers.

· The Authority did not generate income and profit as such. It was funded entirely from payments from Consolidated Revenue in amounts equal to monies collected under the *Stevedoring Industry Charge Act* 1947 (Cth) [276] .

· The present case might not stand alone. Other claims might be brought, significantly straining the financial resources of the Committee and quickly exhausting the reserves transmitted from the Authority to the Committee. Because the Committee's resources depend upon the levy on current stevedores, this would involve, potentially, levying present stevedores for the defaults of others long ago to the redress of which defaults they made no contribution.

· So far as reliance was placed upon the fact that orders could be given by the Authority to employers, the power so to order was significantly circumscribed by the Act [277] . In any case, arguably, the making of such orders involved the performance of an independent statutory function for the careless exercise of which no claim in negligence could arise [278] . So far as it concerned suggested defaults on the part of inspectors, they would not be rendered liable in law for the independent performance of their statutory duties any more than police officers, who have been held generally exempt from such liability [279] .

[275] See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 29 May 1956 at 2555.

[276] 1956 Act, s 46.

[277] 1956 Act, s 18 .

[278] cf *Bienke v Minister for Primary Industries and Energy* (1996) 135 ALR 128 affirming (1994) 125 ALR 151 at 175.

[279] *Hill v Chief Constable of West Yorkshire* [1989] AC 53; cf *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241.

---

233. As against these considerations of policy, others more powerful, as it seems to me, argue in favour of accepting that a duty of care existed in this case. The most important of the considerations include**:**

· The particular vulnerability of persons in the position of the deceased and the lack of any real opportunity to protect themselves when allocated by the Authority to work in conditions involving an unsafe or unhealthy working situation.

· The access which the Authority secured, and the power it enjoyed, to obtain specialised expertise and knowledge about the safety of work conditions involving waterside workers whom it registered and allocated to their work duties.

· The resources potentially available to the Authority as an agency of the Commonwealth charged with safety responsibilities and "where necessary" with the function of providing waterside workers with articles of clothing and equipment for their protection.

· The specificity of the group of persons exposed to danger who constituted a defined and particular class much narrower than the community at large.

· The high public interest which existed during the deceased's service as a waterside worker in the competent discharge of the functions of a body such as the Authority and the achievement, where necessary, of national minimum standards for the safety of Australian waterside workers.

234. This is not a case, as the House of Lords held *Bedfordshire* [280] to be, where to hold that a common law duty of care exists would cut across the statutory scheme, so far as it provided for safety in the stevedoring industry. On the contrary, had a claim such as the present been brought during the existence of the Authority, and upheld, it might well have encouraged a more energetic attention by the Authority to its statutory powers and functions than appears to have occurred.

---

[280] [1995] 2 AC 633 at 749-750 .

---

235. There is no extraordinary delicacy of relationship [281] which would be endangered by holding that the law imposed such a duty on the Authority. Far from suggesting that it might

have made the Authority more "cautious and defensive" in the performance of its functions relating to safety, it is hard to conceive how that performance could have been much more nominal than it was. No other remedies provided by the 1956 Act, or otherwise, make the imposition of a common law duty of care redundant or unnecessary. In so far as the Committee suggests that, where a novel category of negligence is presented, a court "should proceed incrementally and by analogy with decided categories" [282] , the cases where the existence of a duty of care has been rejected are easily distinguished. In the unique statutory arrangements between registered waterside workers and the Authority, the closest analogy (although by no means exact) is that of the employment relationship. Having assumed some of the functions which, in other circumstances, would be performed by an employer, it is unsurprising that a conclusion is reached, by incremental development of the common law, that the relationship here was close enough to that of employment to make it fair, just and reasonable that the law should impose a duty of care on the Authority towards a person such as the deceased [283] . The third consideration is therefore resolved in favour of the appellant.

---

[281] cf *Bedfordshire* [1995] 2 AC 633 at 750.

[282] *Bedfordshire* [1995] 2 AC 633 at 751.

[283] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 419 ; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 476 applying *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 617-618 ; cf *Gala v Preston* (1991) 172 CLR 243 at 253 , 260-262, 272.

Conclusions and orders

236. I would therefore hold that, between 1961 and 1965, the Authority owed a duty of care to the deceased to take reasonable steps to ensure that, when he was allocated to perform work for individual stevedores, the working conditions would be reasonably safe. Where necessary (as where the stevedore failed or neglected to do so), the Authority owed a duty of care to provide waterside workers such as the deceased with articles and equipment designed for their protection and safety in carrying out their work and to ensure that such articles and equipment were used. I agree with Gaudron J that there was no duty of care controlling the giving of orders under s 18(1) of the 1956 Act. The obligations, if any, to give such orders would arise solely from the legislation.

237. The foregoing conclusions require that the appeal be allowed. They leave undetermined the breach of duty point and the quantum of damages point. All that is resolved by these reasons are the two points argued in this appeal.

238. The breach of duty point may prove, in this case as it did in *Romeo* [284] , a significant hurdle for the appellant, notwithstanding the finding that a duty of care existed. Much of the evidence pressed upon the Court during the hearing of this appeal, related to the knowledge and means of knowledge of the Authority in the early 1960s concerning the dangers of exposure of workers to asbestos fibres and dust. That evidence was, as it seemed to me, highly relevant to the breach of duty point but much less relevant (if relevant at all) to the

existence of the duty of care. That question depends upon the legislation and evidence concerning the relationship of the parties and how the Authority's powers and functions were actually exercised. The resolution of the breach of duty point is also complicated by the way in which the trial was fought and by the fact that some issues were left to the jury whilst others were decided by the trial judge [285] . In light of the fact that the proceedings must be returned to the Court of Appeal, it would be inappropriate for more to be said on the remaining points in advance of that Court's resolution of them.

---

[284] (1998) 192 CLR 431 .

[285] *Puntoriero v Water Administration Ministerial Corporation* (1999) 165 ALR 337 at 350-352 .

---

239. I agree in the orders proposed by Gaudron J.

240. HAYNE J. The appellant alleges that the Australian Stevedoring Industry Authority (a Commonwealth statutory authority) should have acted to prevent physical injury that was suffered by a waterside worker as a result of his exposure to asbestos fibres in the course of his employment by various stevedoring companies in the Port of Melbourne between 1961 and 1965. The worker sued the respondent, the Stevedoring Industry Finance Committee, claiming damages for negligence. The worker (to whom I shall refer as "the deceased worker") died soon after the trial of the proceeding. His legal personal representative is now the appellant in this Court.

241. The appellant contends that the Australian Stevedoring Industry Authority ("the Authority") owed the deceased worker a duty of care, that the Authority breached that duty, that the breach of duty was a cause of the injuries from the effects of which he died soon after the trial of the proceeding, and that the respondent succeeded to responsibility for the Authority's liability to the deceased worker.

242. The procedural history of the matter is set out in the reasons for judgment of Kirby J. In this Court only the questions of duty of care and succession to liability have been debated. If both are resolved in the appellant's favour, the parties agree that the matter should be remitted to the Court of Appeal to consider questions of breach and damage that were raised in, but not decided by, that Court. If the respondent succeeds on either the question of duty of care or the question of succession, the appeal and the claim for damages both fail.

243. The question of succession is a short but difficult question of statutory construction. The question of duty of care raises fundamental issues at the intersection of public and private law.

Succession

244. The Authority was established by s 10 of the *Stevedoring Industry Act* 1956 (Cth) ("the Act")[286] . The constitution of the Authority was changed by the *Stevedoring Industry (Temporary*

Provisions) Act 1970 (Cth) and from 1 July 1970 the Authority consisted solely of a Director appointed by the Governor-General [287] .

---

[286] Section 10 of the Act provided:

"(1) There shall be an Australian Stevedoring Industry Authority, which shall consist of –

(a) a Chairman;

(b) a member experienced in industrial affairs by reason of having been an employer in any industry or having been otherwise associated with management in industry; and

(c) a member experienced in industrial affairs by reason of having been associated with trade union affairs.

(2) The Authority shall be a body corporate with perpetual succession and a common seal and may acquire, hold and dispose of real and personal property and shall be capable of suing and being sued in its corporate name.

(3) All courts, judges and persons acting judicially shall take judicial notice of the seal of the Authority affixed to any document and shall presume that it was duly affixed.

(4) The exercise of the powers, or the performance of the functions, of the Authority is not affected by reason only of there being a vacancy in the office of a member of the Authority."

[287] *Stevedoring Industry (Temporary Provisions) Act* 1970 (Cth), s 6 .

---

245. The *Stevedoring Industry Acts (Termination) Act* 1977 (Cth) ("the Termination Act") provided that:

"4 (1) Subject to this Part, the Stevedoring Industry Acts cease to have effect at the commencement of this Act.

(2) Where a provision of the Stevedoring Industry Acts ceases to have effect at any time by reason of the operation of this Part, that provision shall be deemed, for the purposes of section 8 of the *Acts Interpretation Act* 1901 , to have been repealed at that time by this Act.

(3) The provisions of this Part other than this section cease to have effect at the end of the transitional period and shall be deemed, for the purposes of section 8 of the *Acts Interpretation Act* 1901 , to have been repealed at the end of that period by an Act other than this Act.

5 (1) The Authority is continued in existence during the transitional period for the purpose of the performance of functions by the Authority under the succeeding provisions of this Part.

(2) Such of the provisions of the Stevedoring Industry Acts as are necessary for or in relation to –

(a) the performance by the Authority of functions under the succeeding provisions of this Part; or

(b) the operation of any of the succeeding provisions of this Part,

continue to have effect during the transitional period.

(3) Without limiting by implication the generality of sub-section (2), sections 14 and 15 and Part IV of the Stevedoring Industry Act and sections 6A, 6B, 6D, 6E, 6F , 6G and 6H of the [*Stevedoring Industry (Temporary Provisions) Act* 1967 (Cth)] continue to have effect during the transitional period for the purpose mentioned in that sub-section."

The "Authority" referred to in the Termination Act was defined by s 3 as "the Australian Stevedoring Industry Authority established by the Stevedoring Industry Act and constituted in accordance with section 6A of the [*Stevedoring Industry (Temporary Provisions) Act* 1967]". The "transitional period" mentioned in ss 4(3) and 5(1) of the Termination Act was defined as "the period commencing immediately after the commencement of this Act and ending on such day as is fixed by the Minister, by notice in the *Gazette*, as the terminating day for the purposes of this definition". The Minister fixed 26 February 1978 as the terminating day.

246. The appellant contended that s 14 of the Termination Act made the respondent liable to discharge the liability for damages that the Authority owed to the deceased worker and thus to the appellant as his legal personal representative. Section 14 of the Termination Act provided:

"On the expiration of the transitional period –

(a) all rights and property that, immediately before the expiration of the transitional period, were vested in the Authority are, by force of this section, vested in the Committee; and

(b) the Committee is, by force of this section, *liable to perform* all the duties and *to discharge all the liabilities and obligations of* the Authority that existed immediately before the expiration of that period." (emphasis added)

The respondent is the "Committee" referred to in s 14 .

247. The Termination Act made several other provisions for what was to happen as the Authority stopped performing its functions and the Committee began to perform its. Provision was made in the Termination Act for the Authority to make payments to the Committee[288]; for the continued payment of certain charges to the Authority[289]; for the Authority to dispose of its assets[290]; for the Authority to make certain payments to workers[291] and employers [292] ; for what was to happen about appeals against the suspension or cancellation of the registration of workers[293], or against suspension of a worker's entitlement to attendance money[294]; and for what was to happen about appeals to a medical board[295].

[288] s 6.

[289] s 7.

[290] s 8.

[291] s 9.

[292] s 10 .

[293] s 11.

[294] s 12.

[295] s 13.

248. Section 15 provided:

> "Any contract or other instrument subsisting immediately before the expiration of the transitional period to which the Authority was a party has effect after the expiration of that period as if –
>
> (a) the Committee were substituted for the Authority as a party to the contract or other instrument; and
>
> (b) any reference in the contract or other instrument to the Authority were (except in relation to matters that occurred before the expiration of that period) a reference to the Committee."

249. Section 16 obliged the Authority to prepare and furnish to the Minister its financial statements and a report on its operations for the period between its last report and the end of the transitional period.

250. It is in this context that s 14 must be construed. When the "transitional period" mentioned in the Termination Act ended on 26 February 1978, the Authority ceased to exist. The deceased worker alleged that he did not suffer any damage as a result of his exposure to asbestos dust until many years later, and the proceeding was conducted at all stages on the basis that any cause of action that the deceased worker had was not complete until 1997. Did s 14 of the Ter mination Act make the respondent liable to satisfy the deceased worker's claim?

251. The chief obstacle in the path of the appellant's contention that the respondent assumed liability to the deceased worker is the temporal expression in s 14 – "that existed immediately before the expiration of [the transitional] period". Were there no temporal reference in the section it may be easier to say that the "liabilities and obligations of the Authority" that the respondent was required to discharge included all forms of liability and obligation, whenever

incurred. In turn, however, that invites attention to what is meant by "liability" or "obligation" of the Authority. In particular, do those words apply where the Authority has broken a duty of care but no damage has been suffered by anyone as a result of that breach?

252. "Liability" and "obligation" are not always easy words to construe. In *Ogden Industries Pty Ltd v Lucas* , Windeyer J said [296] :

> "without descending to too much refinement there are at least three main senses in which lawyers speak of a liability or liabilities. The first, a legal obligation or duty: the second the consequence of a breach of such an obligation or duty: the third a situation in which a duty or obligation can arise as the result of the occurrence of some act or event."

Neither of the first two senses identified by Windeyer J can be applied to the circumstances where a person (in this case, the Authority) has allegedly broken a duty of care but no-one has yet suffered any damage. At that time there is no legal obligation owed to any third party and there is no consequence to the breach of the duty of care.

---

[296] (1967) 116 CLR 537 at 584.

---

253. For present purposes, it is the third sense that is relevant. Does s 14(b) use "liabilities" and "obligations" to refer to situations in which a duty or obligation can arise as the result of the occurrence of some past or future act or event? That is, may it be said that "liabilities" and "obligations" extend to partly formed liabilities and obligations – those that will be fully formed on the occurrence of some future event? Or, to adopt language from another statutory context, are they words that include "all liabilities, duties and obligations, whether actual, contingent or prospective" [297] , the burden of which was to be transferred to the Committee [298] ?

---

[297] *Commonwealth Banks Restructuring Act* 1990 (Cth), s 65 .

[298] Compare the generality of the provision for transfer of "liabilities" on a scheme of arrangement under the *Companies Act* 1961 (NSW), s 183(1) , the *Companies (New South Wales) Code*, s 317(1) or the Corporations Law, s 413(1) .

---

254. The use of the words of temporal limitation in s 14(b) was said to require that the liabilities or obligations in question must "exist", in the sense of being fully formed, at the critical date. But to adopt that construction is to say that liabilities "exist" only when fully formed whereas it is clear that the term can be used to refer to obligations that have not yet been fully formed.

255. Further, the appellant pointed to the results that follow from giving the temporal words in s 14 (b) the effect of limiting liabilities to those that are fully formed by the relevant date. That construction was characterised as unjust or unintended because adopting it means that no provision is made for liabilities and obligations that were not fully formed at the critical date. The provisions of s 14 do not provide for a winding up of the affairs of the Authority – with the books of the Authority ruled off, liabilities identified and met, and any surplus transferred to the Committee. The purpose of s 14 , so the argument goes, was not to provide for a winding up but to provide a seamless transition from the Authority to the Committee in which all rights and property of the Authority were vested in the Committee and all liabilities and obligations of the Authority were transferred to the Committee.

256. This view of the effect of s 14 (as providing for a seamless transition) is supported by s 15 and its provision for substitution of the Committee for the Authority as a party to "[a]ny contract or other instrument subsisting immediately before the expiration of the transitional period". To give effect to that understanding of the purpose of s 14 , it is necessary to read the temporal reference in s 14(b) as there only to give emphasis to the fact that the expiration of the transitional period was to mark the point of assumption and transfer rather than to read it as limiting the kinds of liabilities and obligations that were transferred.

257. Must the construction urged by the appellant be adopted if unjust and unintended results are to be avoided? At first sight that question may seem to depend on whether the Authority is liable in negligence to persons like the appellant. There will be a "gap" in the transmission effected by s 14(b) only if there are liabilities or obligations that were not fully formed at the expiration of the transitional period but which later became fully formed. Claims for negligence for personal injury might be seen as the kind of case most likely to be of that kind. In this regard it is important to recall that the Authority was itself an employer[299]. It was, therefore, by no means unlikely that a person who had been employed in the service of the Authority constituted by s 15, or who had been employed as a temporary or casual employee under s 15(7) , might have had some potential claim in negligence against the Authority in which the alleged breach of duty had occurred but damage had not been suffered by the time spoken of in s 14 of the Termination Act . On the construction urged by the respondent that employee of the Authority would have had no claim against the Committee. That being so, I prefer to construe s 14 in the way for which the appellant contends. It is necessary, therefore, to consider the question whether the Authority owed the appellant a duty of care.

---

[299] The Act, s 15.

The duty of care alleged

258. The amended statement of claim in the proceeding alleged that the Authority was under "a continuing duty of care from 1956 to 1977 in the exercise of its statutory functions, duties and powers to take reasonable care to avoid foreseeable risks of injury to the health of [the deceased worker] in Stevedoring operations at the Port of Melbourne". It was alleged that the

deceased worker, in unloading and handling bagged asbestos fibre, was exposed to asbestos dust and fibres "as a consequence" of the negligence of the Authority, its servants or agents. Numerous particulars of negligence were given. They included: failing to warn, failing to instruct as to dangers, failing to prohibit workers from unloading asbestos unless they were adequately protected, and failing to provide suitable and safe respiratory protective equipment.

259. The duty alleged was a duty to take reasonable care "in the exercise of [the Authority's] statutory functions, duties and powers". The statement of claim made particular reference to the Authority's functions, duties and powers with respect to (a) the regulation and control of the performance of stevedoring operations; (b) the development of port facilities used in connection with stevedoring operations (including the introduction, modification, replacement and operation of machinery, plant and equipment); (c) the provision of sufficient waterside workers for stevedoring operations; and (d) ensuring that the labour of waterside workers was used to the best advantage. In addition, the statement of claim referred to the disciplinary powers of the Authority in respect of registered waterside workers and their employers.

260. On the hearing of the appeal in this Court, the appellant gave a different description of the Authority's duty of care. It was said that the Authority owed "a general duty of care … to take reasonable steps to ensure that there were safe working conditions for waterside workers" and, in particular, "a mandatory duty … to provide waterside workers with articles and equipment 'designed for the protection of workers' in carrying out their work". The specific duty was said to be imposed by s 17(1)(o) of the Act which provided that:

> "(1) The functions of the Authority are –
>
> …
>
> (o) to encourage safe working in stevedoring operations and the use of articles and equipment, including clothing, designed for the protection of workers engaged in stevedoring operations and, where necessary, to provide waterside workers with articles and equipment designed for that purpose".

It is convenient, however, to deal first with the general statement of duty for which the appellant contended on the hearing of the appeal. (I do not stay to consider the differences between the way in which the duty was expressed in argument in this Court and the way it was put in the pleadings. Nothing was said to turn on these differences.)

261. The appellant pointed to a number of matters which were said to support the conclusion that the Authority owed waterside workers the general duty of care that has been described. The most important of these was said to be the relationship between the Authority and waterside workers – a relationship which gave the Authority powers of a kind ordinarily exercisable only by employers. Four particular powers were mentioned: (a) the power to discipline; (b) the power to require medical examinations; (c) the power to direct workers to turn up for work; and (d) if work was available, the power to direct waterside workers where and when to work. Describing the Authority's powers in this summary way is not complete and, to that extent, may be inaccurate. It is as well, therefore, to refer to the relevant provisions of the Act .

The functions of the Authority

262. The Act defined the functions of the Authority in 17 paragraphs [300] . Paragraph (o) of those functions has already been mentioned. Other functions that should be noticed include:

---

[300] s 17(1) .

"…

(c) to pay to registered waterside workers –

(i) attendance money payable under an award of the Commission;

…

(d) to ensure that sufficient waterside workers are available for stevedoring operations at each port and that their labour is used to the best advantage;

(e) to establish and administer employment bureaux for waterside workers;

(f) to make arrangements for allotting waterside workers to stevedoring operations so as to ensure, as far as practicable, a fair distribution of work in stevedoring operations amongst registered waterside workers, including arrangements under which waterside workers who have been allotted to stevedoring operations may be transferred to other stevedoring operations, whether or not the transfer involves a change of employers;

(g) to determine the method of, and other matters relating to, the engagement of waterside workers for stevedoring operations …

(h) to make arrangements for facilitating the engagement of waterside workers for stevedoring operations …

(k) to train, or arrange for the training of, persons in stevedoring operations;

(l) to investigate means of improving, and to encourage employers to introduce methods and practices that will improve, the expedition, safety and efficiency with which stevedoring operations are performed;

…"

263. These functions must be read against the background of other provisions of the Act . Particular reference should be made to s 8 of the Act which directed the Authority to perform its functions and exercise its powers "with a view to securing the expeditious, safe and efficient performance of stevedoring operations" and to s 17(2) which provided that:

"In regulating the performance of stevedoring operations under this Act, the Authority shall, except to such extent as, in the opinion of the Authority, is

essential for the proper performance of that function, avoid imposing limitations upon employers with respect to their control of waterside workers engaged by them and their manner of performance of stevedoring operations."

264. Regard must also be had to the fact that the Act cast obligations on registered employers. In particular, s 33(1) required a registered employer to ensure that "as far as is practicable … stevedoring operations for which he has engaged waterside workers are expeditiously, safely and efficiently performed".

265. The Authority did have some disciplinary powers. In particular, it had power to cancel or suspend the registration of waterside workers if satisfied of any of a number of grounds. Those grounds included: "misconduct in or about an employment bureau, or a wharf or ship" [301] , a worker being incapable of properly carrying out the duties of a waterside worker by reason of his physical or mental condition or his incompetence or inefficiency[302], and a worker acting in a manner "whereby the expeditious, safe or efficient performance of stevedoring operations has been prejudiced or interfered with"[303]. The Authority's power to cancel a worker's registration on these grounds can be seen as analogous to an employer's power to dismiss an employee; the power to suspend does not find an analogy so readily. Nevertheless, it may be accepted that the Authority had power to discipline waterside workers.

---

[301] s 36(1)(a) .

[302] s 36(1)(b).

[303] s 36(1)(c).

---

266. The Authority's powers over registered employers were more limited than the disciplinary powers it had over workers. It could apply to the Commonwealth Conciliation and Arbitration Commission for an order directing the Authority to cancel or suspend the registration of an employer as a registered employer of waterside workers [304] . One ground for making such an order was that the employer did not have the means of carrying out stevedoring operations in an expeditious, safe and efficient manner, or of discharging the duties and obligations of an employer under the Act [305] . But what is notably absent was any power on the part of the Authority to deal directly with an allegation that an employer that had the means of carrying out stevedoring operations safely did not use those means to do so. A registered employer who did not ensure that, as far as was practicable, stevedoring operations for which waterside workers were engaged were performed expeditiously, safely and efficiently could be prosecuted for an offence [306] , and conviction for an offence under the Act was a ground for the Commission to order cancellation or suspension of registration [307] . But the Authority could not itself cancel or suspend the employer's registration; that was a decision for the Commission.

---

[304] s 35 .

[305] s 35(1)(a) .

[306] s 33(1)(c) and (2).

[307] s 35(1)(c) .

---

267. For the purpose of the performance of its functions the Authority had power to make orders [308] . Those orders might be expressed to apply to persons included in a class of persons, to a class or kind of stevedoring operations or at a particular place [309] , but s 18(5) provided that an order made by the Authority "shall not be expressed to apply to a particular person or to a particular stevedoring operation". The Act required the Authority to consult representatives of registered employers and unions that were likely to be affected by a proposed order [310] and provided that consultation could take the form of a hearing [311] . Section 20(1) of the Act gave legislative force to such orders. It provided that they should not be deemed to be Statutory Rules but should "have the force of law". A person who contravened or failed to comply with a provision of an order made by the Authority committed an offence [312] . If an order was made after a hearing, it was deemed to be an award of the Commonwealth Conciliation and Arbitration Commission [313] .

---

[308] s 18(1) .

[309] s 18(5) .

[310] s 18(2) .

[311] s 18(3) and (4).

[312] s 20(2) .

[313] s 20(3) .

---

268. The Authority had power to direct waterside workers about when and where they were to work. The Authority had two relevant functions – to establish and administer employment bureaux for waterside workers [314] , and "to make arrangements for *allotting* waterside workers to stevedoring operations" [315] . Had the Authority's functions stopped at the establishment and administration of employment bureaux, it may be that its role would have stopped at the provision of information to employers and employees upon which each was free (but not bound) to act. But its functions went beyond telling workers and employers what work was available and who was available to perform it: it had to make arrangements for allotting workers to stevedoring operations. In fact the Authority itself undertook this task of allotting workers and it is right then to say (as the appellant submitted) that, if work was available, the Authority had power to direct waterside workers where and when to

work. Whether or not the Authority knew what cargoes were being unloaded, it was the Authority's act of allotting workers to particular stevedoring operations which determined which workers unloaded cargoes of asbestos.

---

[314] s 17(1)(e) .

[315] s 17(1)(f) . (emphasis added)

---

269. These being the relevant powers and functions of the Authority, did it owe the deceased worker a duty of care in their performance and exercise?

Statutory authorities and negligence

270. The fact that the Authority is a statutory body given statutory discretions does not prevent the application of ordinary principles of the law of negligence [316] . But the courts have often found the task of identifying the duty of care that is owed by a statutory body to be difficult. To whom is the duty owed? What is the content of the duty?

---

[316] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

---

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 distinction between non-feasance and misfeasance relevant? Does it matter that the constituting statute gives a body some statutory duties and then, in different language, gives it some statutory powers? Is the body to be liable in negligence when it does not use the powers it was given but was under no statutory duty to use them (or perhaps even to consider their use)? All these, and more, are questions that may arise.

---

[317] (1998) 192 CLR 330 at 375.

---

272. **Following paragraph cited by:**

Caltex Refineries (Qld) Pty Ltd v Stavar (31 August 2009) (Allsop P at 1; Basten JA at 149; Simpson J at 242)

None of these questions is answered by the adoption of the three-stage test said [318] to have been expressed by Lord Bridge of Harwich in *Caparo Industries Plc v Dickman* [319] and requiring reference to (a) foreseeability, (b) proximity or neighbourhood and (c) whether it is "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" [320] . As Lord Bridge himself went on to say in *Caparo* [321] :

> "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."

And it is because these considerations of proximity and fairness are not susceptible of precise definition that, as Brennan J said in *Sutherland Shire Council v Heyman* [322] :

> "the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed'."

---

[318] *Pyrenees* (1998) 192 CLR 330 at 419 per Kirby J; *Perre v Apand Pty Ltd* (1999) 73 ALJR 1190 at 1240 per Kirby J; 164 ALR 606 at 676.

[319] [1990] 2 AC 605 at 617-618 .

[320] *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 618 per Lord Bridge.

[321] [1990] 2 AC 605 at 618.

[322] (1985) 157 CLR 424 at 481. See also *Caparo* [1990] 2 AC 605 at 618 per Lord Bridge; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 751 per Lord Browne-Wilkinson; *Barrett v Enfield London Borough Council* [1999] 3 WLR 79 at 90 per Lord Slynn of Hadley; [1999] 3 All ER 193 at 204 .

---

273. As I have pointed out, the appellant alleged that the Authority owed the deceased worker a duty to take reasonable care in the exercise of its statutory functions, duties and powers. But the central complaint of the appellant appeared to be that the Authority could and should have taken steps which, if taken, would have prevented the deceased worker suffering the injuries he did.

274. It is convenient to consider at this point the analogy which it was sought to draw between the relationship of the Authority to the deceased worker and the relationship of an employer to an employee.

Was the Authority in a position similar to an employer?

275. Emphasis was given to the fact that the Authority was obliged to, and did, allot the deceased worker to the stevedoring operations which, it is alleged, caused him the injuries which he suffered and from which he died. To *that* extent it may be said that the Authority stood in the same position as an employer directing an employee to perform those stevedoring operations. But the analogy between the Authority's having and exercising power to allot waterside workers to particular stevedoring operations, and an employer doing so, must be treated with care. It does not lead inexorably to the conclusion that, on each occasion the Authority exercised its power to allot the deceased worker to stevedoring operations, it was under a general duty to exercise reasonable care to avoid exposing him to unnecessary risk of injury.

276. **Following paragraph cited by:**

S v State of New South Wales (17 July 2009) (Beazley JA at 1; Giles JA at 2; Macfarlan JA at 3)
State of New South Wales v Williamson (13 October 2005) (Santow and Basten JJA, Simpson J)
McDonald v State of New South Wales (11 September 2001) (Meagher and Stein JJA, Davies AJA)
State of New South Wales v Seedsman (12 May 2000) (Spigelman CJ, Mason P and Meagher JA)

The common law imposes a duty on the employer because the employer is in a position to direct another to go in harm's way and to do so in circumstances over which that employer can exercise control. The duty is, of course, not absolute; it is the duty "of a reasonably prudent employer and it is a duty to take reasonable care to avoid exposing the employees to unnecessary risks of injury" [323] .

---

[323] *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18 at 25 per Dixon CJ and Kitto J. See also *Vozza v Tooth & Co Ltd* (1964) 112 CLR 316 at 319 per Windeyer J; *Bankstow n Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 307308 per Mason, Wilson and Dawson JJ, 313 per Brennan and Deane JJ.

---

277. Both the power to direct and the power to control are important. As was said by Mason J in *K ondis v State Transport Authority* [324] :

"The employer has the exclusive responsibility for the safety of the appliances, the premises and the system of work to which he subjects his employee and the employee has no choice but to accept and rely on the employer's provision and judgment in relation to these matters. The consequence is that in these relevant respects the employee's safety is in the hands of the employer; it is his responsibility. The employee can reasonably expect therefore that reasonable care and skill will be taken."

---

[324] (1984) 154 CLR 672 at 687-688 .

---

278. Unlike an employer, the Authority's power to influence (let alone control) the system of work used by a waterside worker or the state of the workplace to which it sent a waterside worker was limited. The Authority was not in the same position as the stevedore (which was the employer of waterside workers) to control the way in which work was done or the places and conditions in which it was to be done.

279. First, as I have noted earlier, the Authority was enjoined by its statute not to impose limitations on employers with respect to their control of waterside workers engaged by them and their manner of performance of stevedoring operations "except to such extent as, in the opinion of the Authority, is essential for the proper performance" of its function of regulating the performance of stevedoring operations [325] .

---

[325] s 17(2) .

---

280. Secondly, the Authority's function of "regulating" the performance of stevedoring operations could be carried out by making orders under s 18 . But that was a quasi-legislative power and could be exercised by making general orders about how a class or kind of stevedoring operation should be performed. The Authority was forbidden to make an order expressed to apply to a particular stevedoring operation or a particular person [326] .

---

[326] s 18(5) .

---

281. Thirdly, it had functions of investigating means of improving and encouraging safe working [327] and a function of training or arranging for the training of persons in stevedoring operations [328], but the whole tenor of the Act was that primary responsibility for safety in each particular workplace rested with employers, not the Authority. The Authority's functions were directed to the industry as a whole, not to the individual workplace.

[327] s 17(1)(l) , (m) and (o).

[328] s 17(1)(k).

282. Fourthly, it is necessary to consider s 17(1)(o) upon which the appellant placed considerable emphasis. The first part of par (o) described the Authority's function as being

> "to *encourage* safe working in stevedoring operations and the use of articles and equipment, including clothing, designed for the protection of workers engaged in stevedoring operations". (emphasis added)

The paragraph went on to confer on the Authority the function of providing workers with articles and equipment designed for that purpose, but that function was limited by its introductory words "where necessary". There was some debate in argument about whether the words "where necessary" were to be read as a wholly objective test of necessity, or were to be read as requiring the formation of some opinion by the Authority that it was necessary to provide equipment. I need not resolve this debate. The appellant did not press a claim of breach of statutory duty.

283. Whatever is meant by "necessary" in the context of s 17(1)(o) , deciding whether it was necessary for the Authority to provide respirators would require consideration of what funds the Authority had available and whether those funds could have and should have been expended in this way. That is, it would require consideration of whether some other, better use of the Authority's funds could (or should) have been made and would, therefore, require consideration of how the budgetary priorities of the Authority should have been ordered.

284. Further, it is always necessary to recall that the power given to the Authority was a power to *pr ovide* equipment. One complaint of the appellant was that respirators should not only have been available for use but that a worker (including the deceased worker) should have been required by the Authority to wear them when unloading cargoes of asbestos. On this branch of the argument, a failure by the Authority to provide respirators would be significant to the appellant's claim against the Committee only if it were shown that the Authority could and should have required their use. That would direct attention to the Authority's relevant power to require wearing of respirators: the quasi-legislative power to make orders under s 18 .

285. The analogy which the appellant sought to draw between the Authority and an employer is not exact. It breaks down at several points. The Authority did not have day to day control of the system of work used for unloading individual ships. It did not have day to day control of the safety of the individual workplaces where stevedoring operations were conducted. It did have power to prescribe rules having the force of law that would generally govern such matters. It could provide safety equipment but, short of making a general order, it could not enforce the use of that equipment by workers or employers. Deciding whether to provide safety equipment would be affected by what other obligations the Authority had to meet to fulfil its statutory obligations and, in the case of safety equipment, it would be affected by considering (amongst other things) whether it would be better if employers could and would provide it.

286. No doubt the differences that I have identified suggest that it may be unsafe to rely on the analogy with an employer that the appellant sought to draw. But the differences are more significant than that. They reveal why no common law duty of care of the kind alleged by the appellant should be held to have been owed to the deceased worker.

Duty of care to exercise powers?

287. The appellant based her case on breach of a common law duty of care, not on breach of any statutory duty owed to the deceased worker, whether under s 17(1)(o) or otherwise. For the purposes of the claim in negligence then, the significance of s 17(1)(o) is that the Authority had power to provide safety equipment for use by waterside workers. And the significance of s 18 is that the Authority had power to make orders regulating the performance of stevedoring operations. Did the Authority owe waterside workers (and the deceased worker in particular) a common law duty of care to exercise those powers? The appellant placed greatest weight on the power to supply equipment but it is convenient to deal first with the power given by s 18 to make general orders.

Duty to make an order?

288. As I have said, the Authority could have required the use of respirators only by making a general order under s 18 . The Authority owed no common law duty of care to the deceased worker in deciding whether or not to exercise that quasi-legislative power. There are several reasons why that is so.

289. First, to hold that the Authority owed waterside workers a duty of care that would be broken if the Authority did *not* make general orders providing for a safe system of work and safe place of work for those members, would be contrary to the express statutory limitation on the Authority's exercise of its function to regulate the performance of stevedoring operations. Secti on 17(2) provided that the power of the Authority to regulate the performance of stevedoring operations should be exercised only where it was "essential for the proper performance" of that function. To impose the alleged duty of care on the Authority would transform the nature of the relationship between the Authority and individual stevedores that was prescribed by the Act : from one in which the Authority would limit the control of stevedores over waterside workers (or their manner of performance of stevedoring operations) only where to do so was *e ssential*, to one in which the Authority would interfere in the day to day operations of the waterfront.

290. Of course if the Authority were under a duty to take reasonable care, observing that duty could be said to be "essential" to the proper performance of its functions. But the point I seek to make is not one that depends upon some difficulty of reconciling the imposition of a common law duty of care with individual words in s 17(2) . It is that s 17(2) was intended to achieve a particular balance between the role of the Authority and the role of employers and that balance would be transformed if it were to be held that the Authority was liable in negligence if workers suffered injury as a result of the Authority failing to exercise the powers given to it by s 18 .

291. Secondly, as has been identified in a number of authorities [329] , there are other, more deep-seated reasons for rejecting the imposition of a duty of care that would require the performance of quasi-legislative functions by a body such as the Authority.

[329] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 442 per Gibbs CJ, 469 per Mason J, 500 per Deane J; *Pyrenees* (1998) 192 CLR 330 at 393-394 per Gummow J; *Stovin v Wise* [1996] AC 923.

292. **Following paragraph cited by:**

Govier v The Uniting Church in Australia Property Trust (Q) (10 February 2017) (Fraser and Gotterson JJA and North J,)
Dansar Pty Ltd v Byron Shire Council (27 October 2014) (Macfarlan, Meagher and Leeming JJA)
Hunter Area Health Service v Presland (21 April 2005) (Spigelman CJ, Sheller and Santow JJA)
State of New South Wales v Paige (19 July 2002) (Spigelman CJ, Mason P and Giles JA)

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 [330] . 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 [331] and I do not need to apply it in deciding the present matter.

[330] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 442 per Gibbs CJ, 469 per Mason J, 500 per Deane J; *Dalehite v United States* 346 US 15 (1953).

[331] *Pyrenees* (1998) 192 CLR 330 at 393 per Gummow J; *United States v Gaubert* 499 US 315 (1991). See also *Just v British Columbia* [1989] 2 SCR 1228.

293. I have referred to a "distortion" of what should be the public focus of the performance of a quasi-legislative function. I turn to explain what I mean and do so by reference to the position if, contrary to the position in this case, the Authority had made an order under s 18 .

294. An order, when made, had the force of law. An order could not lawfully be directed to a particular person or to a particular stevedoring operation; it had to have more general application. No doubt the class of persons affected by an order could be identified and in many (perhaps all) cases the class of persons for whose benefit the order was made could also be determined. It might be said that if those affected by the order and those for whose benefit

the order is made can be identified, imposing a duty on a public authority to take reasonable care not to injure *those* persons would not distort the proper performance of that quasi-legislative function. I do not accept that this is so. Important as the interests of those two classes may be in deciding what order should be made, there will often be other important considerations that affect that question. To give only one example, the Authority may well have had to consider maintaining industrial peace as part of its obligation of securing expeditious, safe and efficient performance of stevedoring operations[332]. Thus, questions of industrial relations may well have loomed very large in the waterside industry of the 1960s. How would those questions find reflection in the decision to make an order if regard is had only to the interests of those for whose benefit the order is made and those who are affected by it?

---

[332] s 8.

---

295. To impose a common law duty of care on the Authority would have affected the way in which the body went about its task. It would have shifted the Authority's attention from what the general good of the industry required (which, of course, included workplace safety but was not limited to that) to what should be done to avoid the Authority being held responsible for particular breaches of workplace safety by those having primary responsibility for the task – the employers of waterside labour. Whatever may have been the social benefits of having the Authority fulfil that kind of role (and they may now be thought to have been large) it is essential not to lose sight of the fact that this is *not* the role that the Parliament gave it. That being so, the courts should not, indeed cannot, do so.

296. The present case is even clearer. The appellant's complaint is that the Authority made no order. It did not exercise its quasi-legislative power. If the appellant is to succeed then, it is necessary to show that the Authority, exercising reasonable care, was duty bound to exercise its power to make a general order and to exercise that power in a particular way. What I have called the distortion of focus is greater if a common law duty to exercise the power (as opposed to a common law duty affecting *how* the power is exercised) is found to exist. It is greater because the imposition on the Authority of a duty owed to individuals means that the Authority would have been bound to consider the position of those individuals and to do so regardless of what other subjects may have properly required its time and attention in performing the functions given to it by the Act . The Authority's focus would shift from the good of the industry to protection of the Authority from suit. (The distortion of focus would be no less if the duty were cast in terms of a duty to consider making an order, but the appellant did not contend for such a duty.)

297. The Authority did not owe the deceased worker a duty to make an order under s 18 .

Duty to supply equipment or warn?

298. As I have said earlier, much of the weight of the appellant's case was placed on the power to supply equipment. And in this respect the duty alleged stopped short of obliging the Authority to take regulatory or coercive measures. Thus, the argument that the Authority was obliged to provide safety equipment must be dealt with separately from any contention that

the Authority should have prohibited workers unloading asbestos without protection. It is, however, convenient to deal with the alleged duty to warn of danger or encourage safe working practices at the same time as I deal with the alleged duty to supply equipment.

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.

300. In this case the question of duty to take the steps I have identified (warning of danger, or encouraging safe working practices, or supplying respirators) should be resolved against the appellant for other reasons.

301. **Following paragraph cited by:**

Hobson v Attorney-General CA74/05 (17 May 2006)
Attorney-General v Body Corporate 200200 Ca30/05 (01 December 2005)

The particular warning or encouragement which it is said that the Authority should have given, and the particular equipment which it is said it should have supplied, relate to the dangers if workers inhaled asbestos fibres. But waterside work at the time with which this case is concerned was dangerous work for many reasons. Workers were injured when slings were not properly used; they were injured when they fell into ill-lit and uncovered holds; they were injured when they lifted heavy weights without proper assistance. The effects of inhaling asbestos fibres often became apparent only well after the event and it was, for that reason, a risk that was not immediately evident to the worker in the same way as the risk of slipping and falling into a hold. Nevertheless, if the Authority owed a duty of care to warn workers against the risk of inhaling asbestos fibres, there seems no reason to think that it would not also have owed a duty to warn workers of the many other kinds of risk they ran on the waterfront and to encourage safe working practices in these respects as well. And if the Authority owed a common law duty to provide respirators for use by workers (or to provide them if employers did not) the Authority presumably owed a like duty to provide all other necessary safety equipment.

302. Standing alone, the fact that a duty to warn or encourage or a duty to provide equipment would be as wide as I have described, is no reason to say it did not exist. After all, employers owe their employees a duty of care that encompasses *all* of these factors and more. But what the breadth of the asserted duties does is draw attention to the very considerable duplication of duties – the Authority would be under duties that were very like duties owed by the employer to its employees. Again it must be said at once, however, that the bare fact of duplication does not suggest, let alone require, the conclusion that the duties cannot co-exist. Rather the duplication of duties invites attention to whether the two persons said to owe the same kind of

duty (the Authority and the employer) are in such a similar position that like duties should be imposed upon them.

303. It is necessary to recall that the hypothesis for this branch of the argument is that the Authority owed no duty to *require* employers to provide, or employees to use, a safe system of work. If the Authority owed no duty to take coercive measures, any warning or encouragement it gave, any equipment it supplied, would be done in a context where the *employer*, not the Authority, had control over the effect that was given to the warning or encouragement and control over whether the equipment was worn.

304. The absence of control is very significant in deciding whether to hold that the Authority owed a duty of care to warn, encourage or to supply equipment. No doubt the absence of control would also be important in deciding whether any breach of the asserted duty was a cause of the injury of which complaint was made. But its significance is not limited to questions of causal link between breach and damage, it is more radical than that.

305. An employer owes an employee the duty of care it does because the employer not only puts the employee in harm's way but also controls, and is responsible for, the place and system of work to which the employee is exposed. It is that control over the safety of the place and system of work that leads to the conclusion that the employer owes a duty of care to employees about those matters. It is the absence of that control which distinguishes the position of the Authority from that of an employer. If the duty asserted in this case were performed (whether the duty is to supply equipment or warn or encourage) it would be for others, not the party subject to the duty, to determine whether the steps taken by that party were given any effect or were given no, or only limited, effect.

306. **Following paragraph cited by:**

Sydney Water Corporation v Abramovic (14 September 2007) (Mason P; Santow JA ; Basten JA)

The persons responsible for creating the risks to which the deceased worker was exposed, and for avoiding those risks, were the employers of waterside labour. To adopt the expression used by Professor Stapleton, the Authority was a "peripheral" party[333]; its conduct was causally insignificant in the deceased worker's sustaining injury. At its highest, the complaint now made against the Authority is that it did not *control* others – the employers. And for the reasons I have given earlier, I reject the contention that the Authority was duty bound to exercise its order-making power to require modification of the system of work which was used by stevedores. The other complaints made (failure to warn, failure to encourage, failure to supply but not require) are even less causally significant.

---

[333] Stapleton, "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence", (1995) 111 *Law Quarterly Review* 301.

---

307. There are, then, several considerations that affect the decision whether to find that the Authority owed a duty to take these last three kinds of step (warn, encourage or supply).

308. No doubt the Authority would provide a deep pocket defendant to whom an injured worker could look for compensation for the loss sustained. But the financial resources of a party are irrelevant to deciding whether that party owed a duty of care. This consideration should be put to one side.

309. Because employment in the industry changed from day to day, holding the Authority liable would give the injured worker a *single* person to whom to look for satisfaction of the loss sustained because the various places and systems of work under which the worker laboured were unsafe. But it is necessary then to consider the consequences of imposing a duty on the Authority when the duty that is to be imposed is a duty to act, but is not a duty to control the multitude of individual workplaces to which a worker was exposed.

310. Imposing a duty on the Authority would not have deterred those who had primary responsibility for those workplaces from persisting in what are now alleged to be unsafe work practices. Indeed, had the injured worker been able to look to the Authority, rather than the employer, the transient nature of employment would have made it much more likely that claims were directed to the Authority, not the employers. Especially would that have been the case where the worker complained of injury as a result of prolonged or repeated exposure to harmful substances or unsafe systems of work. Far from encouraging safer work practices, imposing a duty on the Authority may well have produced the opposite result because employers may have thought themselves relieved of principal responsibility for the safety of their workers.

311. And what could the Authority have done to warn or to encourage? Is it to be supposed that it was required to post notices at all ports warning of *all* the many kinds of danger to which waterside workers were exposed? And if it did that, would this have persuaded the employer not to cut corners, or to review its methods of work, or to acquire safety equipment? And if the Authority were duty bound to supply equipment which employers did not, why should the courts rather than the Authority decide that the cost of providing a safe system of work for employees fall on the public purse rather than the employer? Even more significantly, why should the burden of compensation for those injured because of the default of employers be shifted from those primarily responsible to a public body?

312. The Authority did not owe the deceased worker a common law duty to warn against dangers or encourage safe working practices, and it owed no common law duty to supply safety equipment.

313. The appeal should be dismissed with costs.

CALLINAN J.

Facts and previous proceedings

314. The appellant, Maureen Crimmins is the widow and executrix of the estate of Brian John Crimmins. He was, at the date of the trial of this case in the Supreme Court of Victoria before

Eames J with a jury in March and April of 1998, aged 61[334]. In or about May 1997 he was diagnosed as suffering from the terminal lung disease of mesothelioma which may be caused by the inhalation of asbestos fibres. It is a disease which tends not to manifest itself by symptoms until many years after the fibres have been inhaled. It is irreversible and causes pain and shortness of breath until death ensues. Mr Crimmins died on 23 July 1998.

---

[334] *Crimmins v Stevedoring Industry Finance Committee* [1998] Aust Torts Rep ¶81-477.

---

315. Between 1961 and 1965 Mr Crimmins worked on the Melbourne waterfront as a wharf labourer. His case was conducted on the basis that he sustained no relevant injury until shortly before the development of symptoms in 1997. The appellant accepted, indeed contended, that the invasion of the plaintiff's pleural cavity by asbestos fibres during the course of his employment on the waterfront created a potential for the fatal injury that later occurred. He died from the effects of the disease while judgment in the respondent's appeal was reserved in the Court of Appeal of Victoria [335] .

---

[335] *Stevedoring Industry Finance Committee v Crimmins* [1999] 1 VR 782.

---

316. The right of a person between 1961 and 1965 to work as a waterside worker depended upon his registration by the Australian Stevedoring Industry Authority ("ASIA"). Mr Neil was the local representative of ASIA in Melbourne from 1956 until 1964-65. His assistant local representative was Mr O'Neill. As a condition of registration, and therefore of an entitlement to work on the waterfront, intending waterside workers were obliged to undergo and pass a medical examination at the Melbourne Bureau of ASIA. In the 1960s there were approximately 5,000 waterside workers registered with ASIA to work at the Port of Melbourne.

317. Stevedoring companies could only operate on the wharves on registration with ASIA. In the relevant period 12 to 15 stevedoring companies were registered at the Port of Melbourne.

318. There was no permanent employment with one employer on the waterfront in the years 1960-65. Evidence was given at the trial that ASIA controlled the "pick up" of waterside workers and allocated them to the ships and wharves upon which they were to work. It exercised a large measure of control over the labour that worked on the wharf. Waterside workers had no choice about where they worked. They worked where ASIA told them to work. When sent by ASIA to work at a particular wharf a waterside worker would there be employed by a stevedoring company. A refusal to attend work as directed by ASIA could lead to disciplinary action by its local representative, Mr Neil. ASIA penalised waterside workers for matters such as not attending work, swearing at a foreman, and drunkenness. The authority of ASIA to discipline waterside workers arguably extended to their behaviour beyond the workplace for work related misconduct.

319. The trial judge in his summing up to the jury summarised the statutory functions of the respondent in this way.

> "By section 17 the functions of the Authority were set out. Among those functions it was to regulate the performance of stevedoring operations; to ensure at each port sufficient waterside workers were available for stevedoring operations; to ensure that the labour of waterside workers is used to the best advantage; to establish and administer employment bureau for waterside workers; to provide first-aid equipment, medical attendance, ambulance facilities, rest rooms, sanitary and washing facilities, canteens, cafeterias, dining rooms and other amenities for waterside workers; to train and arrange for the training of persons in stevedoring operations.
>
> It was also provided that the Authority shall perform its functions under the Act wi th a view to ensuring the speedy, safe and efficient performance of stevedoring operations. It was further provided that for the purpose of the exercise of its powers and the performance of its functions under the Act , the Authority may make such orders and give such directions and do all such things as it thinks fit.
>
> Its functions also included to regulate the conduct of waterside workers in and about employment bureau, wharves and ships; to investigate means of improving and to encourage employers to introduce methods and practices that will improve the expedition, safety and efficiency with which stevedoring operations are performed; to encourage safe working in stevedoring operations and the use of articles and equipment, including clothing designed for the protection of workers engaged in stevedoring operations; and, where necessary, to provide workers with articles and equipment designed for that purpose."

320. There was evidence that the respondent had actually involved its staff in affairs relating to safety. ASIA corresponded with international shipping companies on such safety matters as the stowing of hazardous material safely on ships and threats to withhold dock workers from vessels whose gear did not comply with Australian Standards.

321. ASIA also sometimes involved itself in matters more directly affecting the safety of waterside workers. For example it took steps to provide protective equipment, sought views from local health authorities, and required that precautions be taken in some instances.

322. Furthermore, in a section of the Annual Report of ASIA 1961 concerning the safety of ships' gear and the exposure of waterside workers to chemicals reference was made to "the precautionary measures that should be taken to safeguard the health of the men", including the supply of respirators. The Annual Report of ASIA 1962, noted that waterside workers were issued with industrial clothing, masks and goggles for the handling of hazardous cargoes. And again, the Annual Report of ASIA 1963 recorded that all matters concerning occupational health were to be channelled through the ASIA local representative, and that waterside workers were to be provided with overalls, rubber gloves when handling dangerous cargoes, and, with respect to some cargoes (radioactive) ASIA was to be notified in advance of the arrival of the ship carrying such a cargo and an officer of ASIA was to be present before handling commenced. Mr Neil gave evidence that if he had known of the conditions of exposure to asbestos (described by Mr Crimmins and Mr Fowler, a retired waterside worker)

he would have checked to ensure that the waterside workers were not required to work in such conditions without necessary protection.

323. ASIA conducted safety courses, and in 1960 distributed literature concerning the dangers of inhalation of dust, diseases caused by exposure to dust, and compensation schemes for workers affected by the inhalation of dust, including asbestos dust.

324. There was therefore, a considerable body of evidence upon which the jury would be entitled to find that the plaintiff was exposed to asbestos dust in harmful quantities, and in primitive and unhealthy conditions when the potential for harm by such dust was generally well known and was well within the means of knowledge of the respondent, as it was of the stevedoring companies.

325. Mr Crimmins' exposure to asbestos fibres occurred while he was employed by unidentified stevedoring companies. The fibres came from asbestos cargoes packed in loosely woven hessian bags measuring three feet by two feet and weighing 100 pounds. These bags had to be unloaded from the holds and lockers of ships.

326. A locker was a confined compartment to which access was gained through a small door leading from the hold. The asbestos percolated from the bags which two workers had to manhandle into slings used for lifting a load out of the hold. The asbestos would float around in the atmosphere. In the holds "a mass of fibre was coming down … on [them]". The dust was worse in the lockers where the temperature was higher than in the hold. The younger men, including Mr Crimmins, had to work in the lockers. Sometimes bags were broken; there was spillage of dust into the workplace; "it would spew out". At times the asbestos dust was so pervasive, according to Mr Crimmins, that he needed to blow his nose frequently in an attempt to expel it from his nostrils. Dust accumulated on clothes, in hair and on arms.

327. Sometimes Mr Crimmins stacked bags in the sheds after unloading them from the ship. The dust in the sheds was worse than on the ship. Mr Crimmins worked approximately 20 days a year in asbestos cargoes. It would normally take three or four days to unload such a cargo from a ship.

328. Mr Crimmins was classified as a "floater", which meant that he normally worked inside the ship rather than on the wharf or on deck. He received no warning about the dangers involved in working with asbestos. He was never offered a mask or anything else to prevent the inhalation of asbestos fibres.

329. Waterside workers would complain about working in the dusty conditions unloading asbestos. The consequence of such complaints might be the payment of extra remuneration – "dust money" occasionally allowed by Port Inspectors who were employed by the ASIA.

330. At the trial his Honour directed the jury in these terms:

> "In this case, I direct you that the defendant did owe the plaintiff a duty of care; that is not disputed."

331. The contrary was in fact the case but his Honour's directions in that form are made explicable by reference to the discussion between counsel for the parties and his Honour which took place before he summed up and during which both parties invited the trial judge to follow the

course that he did. The position was that the existence or otherwise of a duty of care was very much in issue and was regarded as an issue for determination by the trial judge. There was urgency about the case because of Mr Crimmins' rapidly deteriorating condition.

332. The jury were asked two questions to which they gave these answers:

> "…was there any negligence on the part of the defendant which was a cause of injury, loss and damage to the plaintiff?
>
> Yes.
>
> In what total sum do you assess the plaintiff's damages?
>
> $833,622."

333. His Honour then went on to consider the question that he had reserved at the request of the parties, whether a duty of care was owed by the respondent to Mr Crimmins. He did so by analysing the evidence which had been called before the jury and held that the respondent did owe such a duty. Accordingly judgment was entered for Mr Crimmins.

334. The respondent appealed to the Court of Appeal of Victoria. The appeal was upheld. President Winneke said this [336] :

> "With respect to this very experienced judge, it seems to me that he has overstated the nature and purpose of the statutory functions invested in ASIA. It is apparent from the material before him that the Act of 1956 was introduced as an endeavour to achieve reform of waterfront activities in the interests of the public by better organising and co-ordinating those activities as between ship-owners, stevedores and waterside workers. The 'peaks and troughs' of demand, the casual nature of the labour, and the number of stevedores had combined to create inefficiencies and industrial dispute which, in turn, had caused freight costs to escalate. The Act whic h created ASIA was the fourth in a series of Acts, introduced since the end of World War II, designed to achieve waterfront reform. In each instance the Parliament had created a statutory body and armed it with powers which were aimed, largely, at achieving industrial harmony, discipline on the wharves, and the efficient allocation of labour to meet the fluctuations in demand for stevedoring services. In each instance the statute expressed that the body was to 'perform its functions with a view to securing the speedy (or expeditious), safe and efficient performance of stevedoring operations'."

---

[336] *Stevedoring Industry Finance Committee v Crimmins* [1999] 1 VR 782 at 798.

---

335. His Honour thought that there was nothing in the *Stevedoring Industry Act* 1956 (Cth) ("the Act") or the award under which Mr Crimmins was working from which could be inferred an intention to impose on the respondent a common law duty of care to displace or co-exist with

that owed by the employers, the stevedoring companies. The President concluded that the trial judge was in error in determining that a common law duty of the nature and scope alleged by the appellant was owed by the respondent. Buchanan JA was of the same opinion.

336. Tadgell JA did not find it necessary to decide this question. His Honour was of the view that the appeal could be resolved, on what he described as the preliminary point, whether s 14 of the *Stevedoring Industry Acts (Termination) Act* 1977 (Cth) (the "Termination Act") operated to make this respondent liable to the appellant in the circumstances of this case.

337. The respondent was established as a body corporate by s 4 of the *Stevedoring Industry Finance Committee Act* 1977 (Cth) . Section 14 of the Termination Act , vested in the respondent certain rights and property of ASIA. By virtue of the same section the respondent became liable to perform duties and to discharge certain liabilities and obligations of ASIA. ASIA had been established in 1956 as a body corporate by the Act and was to continue in existence until 26 February 1978, the last day of a transitional period fixed by s 5 of the Termination Act . ASIA was therefore in existence throughout the period of Mr Crimmins' employment as a wharf labourer.

338. Tadgell JA dealt with the preliminary point in this way [337] :

> "The evidence in the present case indicates that if the authority had owed the respondent a duty of care, such as that on which he seeks to rely, and had been guilty of acts or omissions in breach of the duty, the breach had caused no loss or damage to the respondent by 26 February 1978. It was not only that by that date there had been no observable or discernible or discoverable bodily injury to the respondent; there was undisputed evidence of medical opinion, which counsel for the respondent accepted before us to be correct, that the deposit of asbestos fibres on lung and pleural surfaces did not constitute injury; and that such a deposit need not lead inevitably to the contraction of mesothelioma; and that in the respondent's case he had sustained no injury until shortly before he developed symptoms of the disease in 1997.
>
> That being the accepted evidence, it was scarcely possible to contend that the authority could have been amenable on or at any time before 26 February 1978 to a claim, let alone a judgment, for the tort of negligence at the suit of the respondent. As regards the effect of s 14 of the Termination Act , attention was directed at the trial and before us chiefly to the ambit of the word 'liabilities' in para (b). It was submitted for the respondent that the word should not be construed as being limited to present, enforceable liabilities but as embracing contingent or potential liabilities. This argument recognised that a cause of action against the authority might not have arisen during its lifetime – ie before the expiration of the transitional period on 26 February 1978 – but contended that a contingent or potential or incipient cause of action, which did have its genesis during the respondent's employment as a waterside worker, has now crystallised and that the appellant is liable upon it."

---

[337] [1999] 1 VR 782 at 811-812 .

339. And later his Honour said [338] :

> "I do not think it is appropriate to say that the word 'liabilities' in s 14 includes 'contingent' or 'potential' liabilities. For one thing, each of these adjectives lacks precision. To say, as the argument for the respondent would have it, that 'potential' liabilities are included is to my mind plainly wrong because a 'potential liability', whatever it may be intended to describe, is the antithesis of a liability that 'existed immediately before the expiration of' the transitional period, as s 14(b) requires. To say that 'contingent liabilities' are included is at best misleading because it cannot be asserted that the phrase 'contingent liabilities' has any settled legal meaning [339] . The imprecision of the word 'liabilities' is magnified when it is coupled with the adjective 'contingent' which, in any event, s 14 does not contain. It is true enough that some liabilities are accurately described as contingent which may also be accurately described as existing: a surety's uncalled liability under an existing guarantee is an obvious instance. The expression 'contingent liabilities' is sometimes found in a statute and must be construed in its context. *Re Sutherland, decd* [340] provides an example. There, it was held by the House of Lords (by a majority) that an existing legal liability was not essential to the creation of a contingent liability within the meaning of s 50(1) of the Finance Act 1940. Lord Guest [341] described the expression as there found as '… a liability which depends for its existence upon an event which may or may not happen'. By comparison, s 14 of the Termination Act not only does not contain a reference to contingent liabilities but the context excludes the concept of contingency. Apart from that, the notion of a contingent liability in negligence seems to me to be a contradiction in terms. A contingent liability pursuant to a contract or referred to as such in a statute is understandable; but I have neither heard of nor been able to find any reference to an existing set of facts as giving rise to a contingent liability in negligence or, indeed, in tort of any kind. The reason, perhaps, is that a liability for most kinds of torts – at any rate for negligence – is dependent upon the infliction of damage to the plaintiff; and, when damage occurs, and not before, tortious liability – if it arises at all – arises immediately. In other words, if a liability in negligence exists, its very nature is such that it is not contingent."

---

[338] [1999] 1 VR 782 at 815-816 .

[339] *Re Sutherland, decd* [1963] AC 235 at 248 per Lord Reid.

[340] [1963] AC 235 .

[341] [1963] AC 235 at 262.

---

340. Accordingly his Honour upheld the appeal on the preliminary point. Both Winneke P and Buchanan JA would have upheld the appeal on this point also. In the result the respondent's appeal to the Court of Appeal was unanimously upheld.

The appeal to this Court

341. The appellant appealed to this Court on a number of grounds including the following:

> 1. The Court of Appeal erred in holding that ASIA did not owe Mr Crimmins a duty of care.
>
> …
>
> 5. The Court of Appeal erred in failing to properly consider the object for which ASIA was to exercise its powers and functions under s 8 of the Act , ie, for "expeditious, safe and efficient performance of stevedoring operations".
>
> 6. The Court of Appeal erred in holding that ASIA did not have a co-existing duty of care with employer stevedoring companies and that it erred in failing to properly consider-
>
> (i) the nature and circumstances of such employment;
>
> (ii) the role of ASIA in directing waterside workers to such employment.
>
> …
>
> 8. The Court of Appeal erred in holding that any liability of ASIA to Mr Crimmins was not a liability of the respondent pursuant to s 14(b) of the Termination Act .
>
> 9. The Court of Appeal erred in holding that the word "liabilities" as referred to in s 14(b) of the Termination Act did not include "contingent" or "potential" liabilities.
>
> 12. The Court of Appeal erred in failing to interpret the word "liabilities" in s 14(b) of the Termination Act in a manner that was consistent with the protection of basic common law rights.

342. I will deal with the issue of the existence of a duty of care first and state my conclusion on that matter immediately. It is that the respondent's predecessor did owe a relevant duty of care to Mr Crimmins. The duty may not have been as extensive as that of the stevedoring companies for whom Mr Crimmins worked on a day to day basis but it was capable, in my opinion, of being extensive enough to require the respondent to adopt some measures for the protection of Mr Crimmins against inhalation of asbestos dust and fibre. Before defining the content of that duty I will state the matters that bring me to the conclusion that it was owed.

343. In doing so it will be necessary to analyse the legislation which established the respondent. In enacting the Act the legislature brought into existence a legal personality capable in law of being sued. Without more the respondent would have been subject to all the liabilities and obligations owed by anybody else capable of being sued. But of course there was more, and that consisted of elaborate provisions which not only defined the place and role of the respondent in the community in which it was to exist, but also provided some measure of its obligations in that community, and the framework for its relationship with others within it.

Those provisions, by stating the functions, powers and obligations of the respondent, operate to modify, mould, and indicate the common law principles which may be applied to the respondent which otherwise would have an unfettered application to it. It is for these reasons that careful consideration must be given to the Act to ascertain the extent to which the common law duties of care may apply to the respondent, and ultimately the respondent's liability or otherwise to the appellant.

344. First, there was the uncontradicted evidence of Mr Fowler that the respondent collected Mr Crimmins' pay and actually paid him, although, by doing so, the respondent may have gone somewhat beyond what it was strictly bound to do pursuant to s 17(1)(c) of the Act .

345. Secondly, the Act as a whole contemplated a role for the respondent of a unique kind, if not as an employer, but as a legal personality with a real capacity, and some obligations, to influence the working conditions of waterside workers. Section 17 states the functions of the respondent. Those functions have to be understood in the context of the Act which both explicitly and implicitly recognises and gives effect to the unusual way (by comparison with other industries) the stevedoring industry was organised. Waterside workers suffered the disadvantage of not having one regular employer and therefore the opportunity for day to day dialogue on working conditions and safety available to regular, full time employees of one employer. Sometimes employees may have had no work at all and an entitlement to attendance money only (s 17(1)(c)). It was the function of the respondent to regulate generally the performance of stevedoring operations (s 17(1)(a)) and in so doing to allocate a particular worker to a particular dock or ship (s 17(d), (e), (f), (g), (h) and (i)).

346. The appellant focuses on the function stated by s 17(1)(o) :

> "to encourage safe working in stevedoring operations and the use of articles and equipment, including clothing, designed for the protection of workers engaged in stevedoring operations and, where necessary, to provide waterside workers with articles and equipment designed for that purpose".

347. It is relevant also to note that the respondent had a function "to train, or arrange for the training of, persons in stevedoring operations" (s 17(1)(k)).

348. Moreover, the respondent was armed with ample power to give effect, pursuant to s 18 of the Act , by orders or otherwise, to functions which it performed under the Act [342] . And s 20(2) provided for a penalty for a contravention or a failure to comply with an order so made.

---

[342] Section 18(1) .

---

349. The respondent seeks to rely upon s 17 of the Act , particularly s 17(2) to found a contention that it is confirmatory of the employers' primary obligations in matters of workplace safety. Se ction 17(2) provided as follows:

> "In regulating the performance of stevedoring operations under this Act, the Authority shall, except to such extent as, in the opinion of the Authority, is

essential for the proper performance of that function, avoid imposing limitations upon employers with respect to their control of waterside workers engaged by them and their manner of performance of stevedoring operations."

350. I would read s 17(2) as requiring no more than that the respondent engage in no non-essential interference with the day to day work, and ordinary relationship of employer and employee between worker and stevedoring company. The sub-section, although it may be taken as intending to confirm, indeed perhaps reinforce the usual incidents of the relationship of employer and employee between a stevedoring company and waterside workers on a daily basis, does not operate to relieve entirely the respondent of, although it may shed some light on, the extent of any duty of care that it may have owed to Mr Crimmins.

351. The matters to which I have referred and s 25 of the Act [343] indicate that the respondent was entitled to exercise a large measure of control over waterside workers and their employers. I do not overlook that s 17 makes provision for functions and not duties, but that the respondent might reasonably be expected to perform those functions from time to time as if they were duties appears from a number of matters. The first is the statutory obligation imposed by s 8 of the Act .

> "The Authority shall perform its functions, and exercise its powers, under this Act with a view to securing the expeditious, safe and efficient performance of stevedoring operations."

---

[343] Section 25 provided as follows:

> "For the purposes of-
>
> (a) ensuring that a sufficient number of waterside workers of the necessary physical fitness, and with the necessary competence and efficiency, are available for the expeditious, safe and efficient performance of stevedoring operations at each port at which stevedoring operations are performed and, in particular, ensuring that the average earnings of waterside workers at each such port will be such as to attract to, and retain in, the stevedoring industry at the port such a number of such waterside workers;
>
> (b) furthering the objective of the decasualization of waterfront labour and ensuring that the labour of waterside workers available for stevedoring operations at each such port is not wasted or used otherwise than to the best advantage; and
>
> (c) promoting industrial peace at each such port,
>
> the Authority shall-
>
> (d) from time to time determine, by instrument in writing, the quota of waterside workers for each such port, that is to say, the number of

waterside workers which, in the opinion of the Authority, is required for the proper and effective conduct of stevedoring operations at the port; and

(e) establish and maintain a register of employers, and a register of waterside workers, at each such port."

---

352. The second is the fact that the Act (s 23) contemplates the appointment of inspectors and the entrusting to them of rights of entry to perform functions of the respondent, and of inspection which, if obstructed, might be visited with a substantial monetary penalty.

353. Thirdly, although the activities referred to in s 17(1)(a) , (b), (c) and (d) are in terms functions, the overall scheme of the Act clearly shows that if they were not in fact performed, the industry could not and would not have been organised and could not have operated in the rather special way that this one did and for which the Act made provision. In short, what are in the paragraphs which I have just mentioned, referred to as functions, are clearly in the nature of duties.

354. The evidence in this case shows that a number of relevant functions were actually performed and that in fact the respondent exercised a large measure of control over waterside workers. Mr Neil, a witness called by the respondent gave this evidence.

> "What powers were delegated to you and to Mr O'Neill?
>
> We had the responsibility for controlling the pick-up centre. We had responsibility for deciding whether a person who for some reason had got off the roster should be rerostered or should be subject to disciplinary action and we had responsibilities to see that work was properly performed at the various vessels and properly performed in every way."

355. Later he said this:

> "What other tasks did you have as the local representative of the authority? Tell us about safety committees; did you have any meetings about safety committees?
>
> Well, the local representative or the authority had port inspectors that were responsible to the local representative. I was in charge of the port inspectors in my two ports and we had to have regular meetings with them to make sure that each port inspector knew what all the other port inspectors knew and that the local representative knew what they knew and they knew what the local representative knew; it was keeping everybody in touch so everybody was working in unity."

356. There was a deal of evidence from the same witness that the respondent actually exercised disciplinary powers over workers and the Act shows that the workers could be deregistered by the respondent in consequence of which a worker might be denied work either temporarily or permanently.

357. The right to control and actual control are important matters in determining whether a duty of care is owed. As Mason J said in *Stevens v Brodribb Sawmilling Co Pty Ltd* [344] :

> "A prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter. It has been held, however, that the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it." (footnotes omitted)

---

[344] (1986) 160 CLR 16 at 24.

---

358. This was a case in which the factual circumstances were quite different from those considered by this Court in *Stevens v Brodribb Sawmilling Co Pty Ltd* [345] but it is true to say here, as Mason J did in that case, that there was a significant measure of "interdependence of … activities … [and a] need for co-ordination" between the stevedoring company and the respondent. For some purposes and in some respects the respondent stood in a similar position to an employer. Although the respondent certainly had a role of a quasi-legislative kind to regulate some aspects of the relationship between the stevedoring companies and the workers (ss 17, 18), the Act manifested an intention and conferred a power upon the respondent to go beyond mere regulation, actually to interfere in the relationship and to interfere to design and require appropriate safety measures.

---

[345] (1986) 160 CLR 16 at 31.

---

359. It is necessary now to consider the nature and extent of the duty of care owed by the respondent to Mr Crimmins in light of the statutory role conferred on it. It is important to remember that s 17(1)(o) speaks in terms of the encouragement of "safe working in stevedoring operations" and that s 18 recognises that a relationship of master and servant exists between the workers and the stevedoring companies. The duty owed by the respondent must take account of and yield to these matters and other contextual indications that the Authority cannot be precisely equated with an employer.

360. **Following paragraph cited by:**

Sydney Water Corporation v Abramovic (14 September 2007) (Mason P; Santow JA ; Basten JA)

That duty I would define as a duty to take such reasonable care for the safety of Mr Crimmins in the workplace as the respondent was reasonably capable of taking as a matter of practicality in the performance of its functions [346] , and which the actual employer could not be expected to, or did not itself have the capacity to take, or was flagrantly failing to take, in circumstances in which measures available to the respondent, if taken, would have been likely to be effective in preventing or alleviating the harm done to Mr Crimmins.

---

[346] cf *Stovin v Wise* [1996] AC 923 at 936 per Lord Nicholls of Birkenhead.

---

361. No argument was addressed to this Court on the question whether the relevant duty of care was breached, and the parties are agreed that if the appeal succeeds the matter will need to go back to the Court of Appeal.

362. The other question is the preliminary question, whether s 14 of the Termination Act preserved any right or entitlement in the appellant to recover damages from the respondent.

363. Any tort committed against Mr Crimmins would only have been complete when he sustained some non-minimal damage [347] . It was common ground that because of the slow onset of mesothelioma Mr Crimmins did not suffer any compensable injury until long after he stopped working in the dusty conditions and the Authority ceased to exist.

---

[347] *Cartledge v E Jopling & Sons Ltd* [1963] AC 758; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 555 per Toohey J.

---

364. Section 14 of the Termination Act provides as follows:

> "On the expiration of the transitional period-
>
> (a) all rights and property that, immediately before the expiration of the transitional period, were vested in the Authority are, by force of this section, vested in the Committee; and
>
> (b) the Committee is, by force of this section, liable to perform all the duties and to discharge all the liabilities and obligations of the Authority that existed immediately before the expiration of that period."

365. **Following paragraph cited by:**

> Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) (26 July 2017) (Warren CJ, Tate and Osborn JJA)

The words in sub-par (b) "that existed immediately before the expiration of [the transitional] period" are certainly open to an interpretation, as Tadgell JA held, that only actual and not contingent or inchoate liabilities are contemplated as being preserved by the section. However having regard to the numerous activities and functions of the Authority and the consequential potential for late or slowly emerging damage or loss, particularly of the kind that was suffered here, it is unlikely that the legislature would have intended that one of its statutory creatures or its successor would be able to escape all liability for insidious, slowly emerging damage or injury. It is equally unlikely that the legislature would have deliberately set out to make futile any grant of an extension of time within which to bring actions pursuant to ss 5 and 23A of the *Limitation of Actions Act* 1958 (Vic) and their analogues enacted in other States before 1977 [348] . It is in the light of these matters that the meaning of "liabilities" as used in the Ter mination Act must be considered.

---

[348] *Limitation Act* 1969 (NSW) s 60G(2) ; *Limitation of Actions Act* 1936 (SA) s 48 (1)(c) ; *Limitation Act* 1935 (WA) ss 38A, 38B ; *Limitation of Actions Act* 1974 (Qld) s 31 .

---

366. As Kitto J makes clear in *Scala v Mammolitti* [349] the word "liability" does not always have "concrete signification".

---

[349] (1965) 114 CLR 153 at 157.

---

367. In *Walters v Babergh District Council* [350] Woolf J had to decide whether an action could be brought against a local authority that had replaced one that had ceased to exist. The provision under consideration in that case, as noted by his Honour, was this[351]:

> "The Secretary of State or any appropriate Minister may at any time by order make such incidental, consequential, transitional or supplementary provision as may appear to him – (*a*) to be necessary or proper … and nothing in any other provision of this Act shall be construed as prejudicing the generality of this subsection. (2) An order under this section may in particular include provision – (*a*) with respect to the transfer … of property (whether real or personal) and the transfer of rights and liabilities; …"

---

[350] (1983) 82 LGR 235.

[351] (1983) 82 LGR 235 at 239.

---

368. An order for which the section provided was made in this form[352]:

> "(*a*) all property and liabilities vested in or attaching to an authority described in column (1) of Part I or II of Schedule 4 (or of any extension thereof effected by any further order under section 254 of the Act made before 1 April 1974) shall by virtue of this order be transferred to and vest in or attach to the authority specified in respect of such authority in column (2); …"

Of this order Woolf J said[353]:

> "The whole tenor of the order is designed to ensure that the reorganisation would not effect events which would otherwise have occurred further than is absolutely necessary because of that reorganisation. That the public should be able to look to the new authority precisely in respect of those matters which it could look to the old authority; that the public's position should be no better or no worse. If the draftsman has not used words which are appropriate to cover potential liabilities it can only be because he was so crassly incompetent as not to appreciate that for actions in tort it is not sufficient to have a breach of duty; you must also have damage.
>
> It is always dangerous to look to decisions on similar words in different Acts of Parliament as aids to interpretation. However, I am fortunate in this case to have general assistance as to the approach to the problem in a decision of Megarry J in *Bromilow & Edwards Ltd v Inland Revenue Commissioners* [354] . … A very different problem was before Megarry J from that which is before me. However, in the course of his judgment Megarry J considered the words 'a liability' and he said [355] :
>
> 'There is a further consideration, namely, the ambit of the word "liability". I refrain from any detailed attempt to explore the various possible meanings of this word. All that I need say is that I have looked at the entry under that word and under "liable" in *Words and Phrases* (1944) and in *Stroud's Judicial Dictionary* (1952), 3rd ed, and that it seems plain that "liability" is a word capable of some amplitude of meaning. I say this without discussing the meaning that that word bears in the celebrated classification in Hohfeld's *Fundamental Legal Conceptions* (1932), where it is the correlative of "power" and the opposite of "immunity". I do not think that the meaning of the word can be limited, as Mr Heyworth Talbot would have me limit it, to a present, enforceable liability, excluding any contingent or potential liability. Used simpliciter, the word seems to me to be fully capable of embracing the latter form of liability, as in a surety's liability for his principal before there has been any default. … Given a choice, and, as it seems to me, a fair choice, I have no hesitation in choosing the interpretation which makes sense and makes this part of the subsection work, as against one which reduces it to dust. In any case, I consider that the meaning which I prefer is the primary and natural meaning of the words in the context in which they appear.'
>
> I would respectfully agree with the general statements made by Megarry J in that judgment and apply them word for word to the context here under consideration. I regard the word 'liabilities' as capable of having amplitude of meaning. In the

context of this case I consider that it is wide enough to apply to contingent or potential liabilities. It appears to me that I have a fair choice between the meaning submitted by Mr O'Brien and the meaning submitted on behalf of the plaintiff by Mr Macleod. Having that choice I have no hesitation in choosing an interpretation which makes, in my view, sense of this part of the order, rather than leaving a large gap between obligations and causes of action which have accrued."

---

[352] (1983) 82 LGR 235 at 239.

[353] (1983) 82 LGR 235 at 242-243.

[354] [1969] 1 WLR 1180; [1969] 3 All ER 536.

[355] [1969] 1 WLR 1180 at 1189-1190; [1969] 3 All ER 536 at 543-544 .

---

369. Save for any suggestion of gross incompetence on the part of the draftsperson of this legislation, the reasoning which I have quoted I would generally adopt and apply to this case. Liabilities in this case should be taken to include a contingent liability for an injury of the kind suffered by Mr Crimmins if the appellant is able to establish her case against the respondent that there has been a breach of the duty of care as I have defined it.

370. I would allow the appeal with costs. The case should be remitted to the Court of Appeal of Victoria so that that Court may deal with the two outstanding issues, whether there was a breach of the relevant duty of care and damages.

Cited by:

Karpik v Carnival plc (The Ruby Princess) [2025] FCAFC 96 -
Footscray Football Club Limited (ACN 005 226 595) v Adam Kneale [2024] VSCA 314 -
Footscray Football Club Limited (ACN 005 226 595) v Adam Kneale [2024] VSCA 314 -
Footscray Football Club Limited (ACN 005 226 595) v Adam Kneale [2024] VSCA 314 -
Footscray Football Club Limited (ACN 005 226 595) v Adam Kneale [2024] VSCA 314 -
HNOE Limited v Angus & Julia Stone Pty Ltd [2024] NSWCA 271 -
HNOE Limited v Angus & Julia Stone Pty Ltd [2024] NSWCA 271 -
Bird v DP (a pseudonym) [2024] HCA 41 -
Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2024] HCA 25 -
Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2024] HCA 25 -
Sherrington v ICAC & Ors [2023] NTCA 11 -
Sherrington v ICAC & Ors [2023] NTCA 11 -
Coalroc Contractors Pty Ltd v Matinca (No 2) [2023] NSWCA 127 -
Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2023] QCA 24 (28 February 2023) (Morrison and Bond JJA; Williams J)

291. A similar point was recognized in *Howard Smith & Patrick Travel Pty Ltd v Comcare* , when Basten JA (with whom Beazley P and Sackville AJA agreed), made the following observations at [36] : [224]

> "The statements of principles to be applied in determining whether a defendant owes a plaintiff a duty of care have undergone a degree of linguistic metamorphosis over the last two decades. It is now common in this country to require reference to the "salient features" of the relationship between the plaintiff and the defendant. In *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258; 75 NSWLR 649, Allsop P provided a list or catalogue of some 17 salient features, described as "a non-exhaustive universe of considerations of the kind relevant to the evaluative task of imputation of the duty and the identification of its scope and content": at [103] and [104] . However, the value of such a catalogue is limited. As noted by McHugh J in *Crimmins* at [77] :
>
> > 'Since the demise of any unifying principle for the determination of the duty of care and the general acknowledgment of the importance of frank discussion of policy factors, the resolution of novel cases has increasingly been made by reference to a 'checklist' of policy factors. The result has been the proliferation of 'factors' that may indicate or negative the existence of a duty, but without a chain of reasoning linking these factors with the ultimate conclusion. Left unchecked, this approach becomes nothing more than the exercise of a discretion ... There will be no predictability or certainty in decision-making because each novel case will be decided by a selection of factors particular to itself. Because each factor is only one among many, few will be subject to rigorous scrutiny to determine whether they are in truth relevant or applicable.'"

Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2023] QCA 24 -
Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2023] QCA 24 -
Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2023] QCA 24 -
Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2023] QCA 24 -
Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2023] QCA 24 -
Seiffert v The Prisoners Review Board [2023] WASCA 15 (01 February 2023) (Buss P; Mazza and Beech JJA)

Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59 ; (1999) 200 CLR 1

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)

23. But a statutory authority may, by its conduct, assume a responsibility to exercise the power [9] . In that case, the statutory authority may owe a common law duty which requires it to exercise a power which it is under no statutory obligation to exercise. The approach to whether a statutory authority has assumed responsibility to exercise a power, such that it can be tortiously liable for an omission to exercise that power, has sometimes been considered by reference to notions of "control" [10] .

via

[10] See, eg, *Pyrenees* (1998) 192 CLR 330 at 347 [25], 376 [124], 389 [168] ; *Crimmins* (1999) 200 CLR 1 at 24-25 [43]-[46] , 4243 [104]-[107] , 61 [166] , 82 [227] , 104 [304]-[305] , 116 [357] ; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 558-559 [102] ; *Graham Barclay* (2002) 211 CLR 540 at 598-599 [150]

-[152] ; *Stuart* (2009) 237 CLR 215 at 254 [113][114], 262 [138] . See also *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551-552 .

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 -
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)

301. In *Shirt* 146 CLR at 44 , Mason J referred to foresight that carelessness may be likely *to cause* damage to the plaintiff. See also the expression of the matter by Glass JA in *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 at 639–640 ; and Lord Reid in *Dorset Yacht* [1970] AC at 1027. As McHugh J expressed it in *Crimmins* 210 CLR at 32 [72]:

> Basic to that determination [as to whether there was a duty of care], as always, is the question: was the harm which the plaintiff suffered a reasonably foreseeable result of the defendant's acts or omissions?

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

783. The primary judge treated the case presented by the respondents at trial as inviting the court to find the existence of a "novel" duty of care. A novel duty of care may be distinguished from a duty arising from accepted categories of relationship, such as road users, employer and employee, occupier and entrant to premises, suppliers of professional services and clients, and manufacturers of goods and consumers, where there are settled principles of legal responsibility. Those upon whom statutory powers are conferred may have a duty of care because they operate within one of these established categories: *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; 200 CLR 1 (***Crimmins***) at [61] (McHugh J, Gleeson CJ at [3] agreeing). Outside the established categories where a duty of care has been held to arise, the common law generally develops by increments, where the legal question whether a duty of care is to be recognised is answered by using the common law technique which looks to precedent, which reasons analogically, and by reference to principles and policy underlying earlier decisions: *Crimmins* at [73]-[78] (McHugh J, Gleeson CJ at [3] agreeing). Those principles include that there be a close examination of any relevant legislative regime where a decision under a statute is involved, which is of particular importance to this case: *St uart v Kirkland-Veenstra* [2009] HCA 15; 237 CLR 215 at [112] (Gummow, Hayne and Heydon JJ). The principles also include, to the extent appropriate, the "salient features" analysis referred to in *Graham Barclay Oysters* at [149] (Gummow and Hayne JJ, Gaudron J agreeing).

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

836. The starting point is to examine the relationships, if any, established by the legislative scheme. This feature of the matter gives rise to two principal overlapping issues. The first is whether the legislation establishes a relationship between the Minister, and the respondents and those whom they represent, such that by reason of that relationship the common law recognises a duty to be careful to avoid the risk of injury as a result of the effects of climate change, the breach of which sounds in damages. This issue directs attention to questions of control and consistency with the legislative scheme. The second issue is whether an allegation of breach in the circumstances of this case could ever be a suitable matter for trial by a court, which is an aspect of coherence. This issue has other dimensions. In order to establish a breach of duty, there is an onus on a claimant to show what course of conduct

reasonable care required. It would be insufficient simply to show, for instance, that if the Minister had refused the approval of the Extension Project, injury would have been avoided: *Vozza v Tooth & Co Ltd* [1964] HCA 29; 112 CLR 316 at 318-319 (Windeyer J). It would have to be shown that what the Minister did was unreasonable measured against some standard of reasonable care that the claimants would have to establish. This raises a question of fact for trial, and which would require the formulation of practical content involving complex considerations of national politics, national economic considerations, Commonwealth/State relations, international relations, and the balancing of competing considerations of public interest. Difficulties in formulating the practical content of a standard of care would tell against recognition of the duty: *Crimmins* at [5] (Gleeson CJ) . And the suitability of such issues for trial by a court is an important issue that directs attention to the separate roles of the courts and executive government.

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

673. Now reference has been made to the concept of a plaintiff being *especially* vulnerable. And such an intensifier has been used from time to time, particularly and rightly by McHugh J in *Crimmins* . Of course, vulnerability is not focusing on members of the public generally or everyone who may be alive in the relevant period who may be exposed to climate change. And so, the target of *especially* re-inforces the notion that one is focused and must be focused on a narrower set of individuals. But what narrower set?

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

783. The primary judge treated the case presented by the respondents at trial as inviting the court to find the existence of a "novel" duty of care. A novel duty of care may be distinguished from a duty arising from accepted categories of relationship, such as road users, employer and employee, occupier and entrant to premises, suppliers of professional services and clients, and manufacturers of goods and consumers, where there are settled principles of legal responsibility. Those upon whom statutory powers are conferred may have a duty of care because they operate within one of these established categories: *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; 200 CLR 1 (***Crimmins***) at [61] (McHugh J, Gleeson CJ at [3] agreeing). Outside the established categories where a duty of care has been held to arise, the common law generally develops by increments, where the legal question whether a duty of care is to be recognised is answered by using the common law technique which looks to precedent, which reasons analogically, and by reference to principles and policy underlying earlier decisions: *Crimmins* at [73]-[78] (McHugh J, Gleeson CJ at [3] agreeing). Those principles include that there be a close examination of any relevant legislative regime where a decision under a statute is involved, which is of particular importance to this case: *St uart v Kirkland-Veenstra* [2009] HCA 15; 237 CLR 215 at [112] (Gummow, Hayne and Heydon JJ). The principles also include, to the extent appropriate, the "salient features" analysis referred to in *Graham Barclay Oysters* at [149] (Gummow and Hayne JJ, Gaudron J agreeing).

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

Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Top Hut Banoon Pastoral Co Pty Ltd t/as Trustee for the Wakefield Family Trust v Walker [2021] NSWCA 296 -
Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206 -
Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206 -
Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206 -
Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206 -
Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206 -
Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206 -
Kalsbeek v The Commonwealth of Australia [2021] WASCA 142 -
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
Viscariello v Legal Profession Conduct Commissioner [2021] SASCFC 24 (14 May 2021) (Lovell and Hughes JJ; Tilmouth AJ)

35. Reference was made during the course of the appeal to *Yarra City Council v Metropolitan Fire and Emergency Services Board and Others* [22] for the proposition that the word “liabilities” in the transitional provisions encompasses prospective and inchoate liabilities. In *Yarra City Council* , the Victorian Court of Appeal held that a statutory transfer of “liabilities” from one local Council to another following Council restructuring included liability for the acts done by the predecessor Council in breach of environmental laws giving rise to compensation claims by occupiers of polluted properties. Relying on the decision of the High Court in *Crimmins v Stevedoring Industry Finance Committee* , [23] it was argued in *Yarra City Council* that the words “all liabilities of the former Councils are liabilities of the Yarra City Council” contained in an Order in Council effecting the restructuring process included prospective and inchoate liabilities of the former Council. Applying *Crimmins* , the Court held that “the word ‘liability’ may include contingent, prospective, and inchoate liabilities”. [24] In ruling as it did, the Court reasoned: [25]

> … The contingent liability that Richmond had incurred, at the time of the transfer to Yarra, to comply with a clean up notice under s 62A of the Act in respect of pollution it had caused, was a liability which the Order in Council succeeded in transferring to Yarra. In effect, the breadth of cl 18(b), construed in the context of the whole of the Order of Council, and consistently with the context and purpose of the Order in Council, has had the consequence that, at law, Yarra has become ‘the person who caused or permitted the pollution to occur’ …. It is rather that the legal effect of the Order in Council is, relevantly, that for the purposes of s 62A(1)(b) , Yarra occupies

the role of Richmond; it is the person to whom the EPA has the authority to direct compliance with a clean up notice.

Viscariello v Legal Profession Conduct Commissioner [2021] SASCFC 24 -
Viscariello v Legal Profession Conduct Commissioner [2021] SASCFC 24 -
Viscariello v Legal Profession Conduct Commissioner [2021] SASCFC 24 -
Viscariello v Legal Profession Conduct Commissioner [2021] SASCFC 24 -
Viscariello v Legal Profession Conduct Commissioner [2021] SASCFC 24 -
Viscariello v Legal Profession Conduct Commissioner [2021] SASCFC 24 -
Viscariello v Legal Profession Conduct Commissioner [2021] SASCFC 24 -
Viscariello v Legal Profession Conduct Commissioner [2021] SASCFC 24 -
Viscariello v Legal Profession Conduct Commissioner [2021] SASCFC 24 -
Coffs Harbour City Council v Polglase [2020] NSWCA 265 -
Brocklands Pty Ltd v Tasmanian Networks Pty Ltd [2020] TASFC 4 -
Kay v KRM (Vic) Pty Ltd;; Classic Bet (NSW) Pty Ltd v Kay [2020] NSWCA 92 (12 May 2020) (Meagher, Gleeson and White JJA)

> Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1 per McHugh J at 52-53; [1999] HCA 59

Kay v KRM (Vic) Pty Ltd;; Classic Bet (NSW) Pty Ltd v Kay [2020] NSWCA 92 -
Kay v KRM (Vic) Pty Ltd;; Classic Bet (NSW) Pty Ltd v Kay [2020] NSWCA 92 -
Kay v KRM (Vic) Pty Ltd;; Classic Bet (NSW) Pty Ltd v Kay [2020] NSWCA 92 -
Kay v KRM (Vic) Pty Ltd;; Classic Bet (NSW) Pty Ltd v Kay [2020] NSWCA 92 -
FRM17 v Minister for Home Affairs [2019] FCAFC 148 -
FRM17 v Minister for Home Affairs [2019] FCAFC 148 -
FRM17 v Minister for Home Affairs [2019] FCAFC 148 -
FRM17 v Minister for Home Affairs [2019] FCAFC 148 -
FRM17 v Minister for Home Affairs [2019] FCAFC 148 -
FRM17 v Minister for Home Affairs [2019] FCAFC 148 -
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 -
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 -
Fuller-Wilson v State of New South Wales [2018] NSWCA 218 -
Hevilift Limited v Towers [2018] QCA 89 -
Berhane v Woolworths Ltd [2017] QCA 166 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 (26 July 2017) (Warren CJ, Tate and Osborn JJA)

> 91. The MFESB submitted before the judge that the word ‘liabilities’ in the Order in Council included prospective and inchoate liabilities. In this regard the MFESB relied on the High Court’s decision in *Crimmins v Stevedoring Industry Finance Committee*. [44]

Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 (26 July 2017) (Warren CJ, Tate and Osborn JJA)

> 148. In our view, the liability with which we are concerned was, at the date of the transfer to Yarra, contingent in the same sense as the liabilities at issue in *Crimmins*.

Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 (26 July 2017) (Warren CJ, Tate and Osborn JJA)

> 143. McHugh J said:

The second question in the appeal is whether, assuming that the Authority would have been liable to the plaintiff, s 14 of the *Termination Act* makes the respondent liable to the plaintiff. That section provides:

> On the expiration of the transitional period —
>
> > (a) all rights and property that, immediately before the expiration of the transitional period, were vested in the Authority are, by force of this section, vested in the Committee; and
> >
> > (b) the Committee is, by force of this section, liable to perform all the duties and to discharge all the liabilities and obligations of the Authority that existed immediately before the expiration of that period.

The plaintiff contends that the word 'liabilities' in s 14(b) is wide enough to embrace 'potential, contingent or inchoate' liabilities. Alternatively, given the ambiguity of the provision, the term 'liabilities' should be construed to give effect to the evident purpose of the section, namely, that the Committee was to assume fully the entire spectrum of legal rights and liabilities possessed by the Authority. Any other result, so the plaintiff contends, would be 'capricious and unjust'. The respondent, on the other hand, contends that the words 'that existed' necessarily limited the meaning of 'liabilities' to rights that had accrued or vested as at 26 February 1978. In my opinion, the contention of the plaintiff is correct.

Given that both parties accept that the damage for which the plaintiff seeks to recover damages occurred shortly before symptoms were diagnosed in 1997, Tadgell JA was plainly right when he said that it is 'scarcely possible to contend that the authority could have been amenable on or at any time before 26 February 1978 to a claim, let alone a judgment, for the tort of negligence at the suit of the [plaintiff]'. The tort of negligence is derived from the action on the case. Damage is the gist of that action and is an essential element of the cause of action. To say that the plaintiff did not have a complete cause of action as at 26 February 1978, however, does not end the matter. In two cases involving this very question and legislation, two judges have expressed their opinion that 'liabilities' includes 'potential' or 'contingent' liabilities. It is therefore necessary to determine whether the view of the Court of Appeal judges should be preferred to that of the trial judge in this case and those two judges.

The precise meaning to be given to the word 'liabilities' depends on its context. In *Tickle Industries Pty Ltd v Hann*, Barwick CJ pointed out:

> The use of the word 'liable' can cause difficulty in construction because of the various senses in which the word is or has been from time to time employed. The word takes its particular significance, however, from the context in which it appears and the subject matter and evident policy of the legislation in which it is found.

This is so, even though some judges have expressed the opinion that the 'ordinary or natural meaning' of the word is limited to 'actual' (rather than 'potential') liability.

In some contexts, the meaning of 'liabilities' will be wide enough to embrace a 'contingent' or 'inchoate' liability. Thus, *Jowitt's Dictionary of English Law* defines 'liability' as:

> ... the condition of being actually or *potentially subject to an obligation*, either generally, as including every kind of obligation, or, in a more special sense, to denote *inchoate, future, unascertained or imperfect obligations*, as opposed to

> > debts, the essence of which is that they are ascertained and certain. Thus when a person becomes surety for another, he makes himself liable, though it is unascertained in what obligation or debt the liability may ultimately result.
>
> ...
>
> In *Bromilow & Edwards Ltd v Inland Revenue Commissioners*, Megarry J denied 'that the meaning of [liabilities] can be limited ... to a present, enforceable liability, excluding any contingent or potential liability'. His Lordship held that the word 'must bear this extended meaning'. [82]

via

[82] Ibid 51–3 [134]–[140] (emphasis in original) (citations omitted).

Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -

Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Yarra City Council v Metropolitan Fire and Emergency Services Board and Ors (according to the attached Schedule) [2017] VSCA 194 -
Julia Wedding ATF the Julia Wedding Super Fund v Attorney General for NSW on behalf of State of NSW Government [2017] NSWCA 70 -
Govier v The Uniting Church in Australia Property Trust (Q) [2017] QCA 12 -
Bankstown City Council v Zraika [2016] NSWCA 51 (22 March 2016) (Gleeson, Leeming and Simpson JJA)

> *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; 200 CLR 1 , *Dansar Pty Ltd v Byron Shire Council* [2014] NSWCA 364; 89 NSWLR 1, applied

Bankstown City Council v Zraika [2016] NSWCA 51 -
R v Moore [2015] NSWCCA 316 (15 December 2015) (Bathurst CJ, Simpson JA and Bellew J)

> 70. Similarly, persons other than employers have been held, in particular circumstances, to owe a duty akin to the duty of an employer to provide a safe system of work. In *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; 200 CLR 1 (*Crimmins*), a majority of the High Court held that the respondent, which had various responsibilities for regulating the stevedoring industry, owed a common law duty to the appellant to take reasonable care to protect him from a reasonably foreseeable risk of injury arising from his employment by registered stevedores. The majority held that the duty arose as the respondent had knowledge of the special risks to which the members of the class, which included the appellant, were subject, was in a position to control and manage those risks, and the appellant was vulnerable to injury because of the casual and hazardous nature of his employment.

R v Moore [2015] NSWCCA 316 -
R v Moore [2015] NSWCCA 316 -
R v Moore [2015] NSWCCA 316 -
R v Moore [2015] NSWCCA 316 -
R v Moore [2015] NSWCCA 316 -
R v Moore [2015] NSWCCA 316 -

R v Moore [2015] NSWCCA 316 -
Hammond v State of New South Wales [2015] NSWCA 304 (30 September 2015) (Emmett and Gleeson JJA)

30. The powers conferred on the Commonwealth by the Constitution , insofar as they are relevant, are conferred for the benefit of the public generally and not for the protection of a specific class of persons. The claim by the Hammonds founders on the test posed in *Crimmins* in that there is no allegation that the Commonwealth had the power to protect a specific class that included them, rather than the public at large, from a risk of harm. The primary judge was correct in holding that the test in *Crimmins* was not satisfied. There is no legally enforceable duty on the Commonwealth to review decisions made by judicial officers of the Commonwealth. A process aimed at such a review, outside the ordinary appeal processes of the judicial system, would be inconsistent with the separation of powers effected by the Cons titution . [13] The primary judge was correct in holding to that effect.

Hammond v State of New South Wales [2015] NSWCA 304 (30 September 2015) (Emmett and Gleeson JJA)

21. All parties accepted that the test to apply in determining whether the Commonwealth or the State owed a duty of care was that laid down in *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; 200 CLR 1 (***Crimmins***) at [93] . The primary judge concluded that the application of that test resulted in there being no duty of care owed by the Commonwealth or the State to the Hammonds as alleged in the Statement of Claim. [8] Her Honour considered that there were overwhelming policy reasons for denying the existence of a duty of care, since to impose such a duty would facilitate dissatisfied litigants bringing actions against the Crown for damages because they were aggrieved by decisions of judicial officers. [9]

Hammond v State of New South Wales [2015] NSWCA 304 -
Hammond v State of New South Wales [2015] NSWCA 304 -
Hammond v State of New South Wales [2015] NSWCA 304 -
Waller v James [2015] NSWCA 232 -
Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 -
Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 -
Swick Nominees Pty Ltd v Leroi International Inc (No 2) [2015] WASCA 35 -
Swick Nominees Pty Ltd v Leroi International Inc (No 2) [2015] WASCA 35 -
Swick Nominees Pty Ltd v Leroi International Inc (No 2) [2015] WASCA 35 -
Hunter and New England Local Health District v McKenna [2014] HCA 44 -
Hunter and New England Local Health District v McKenna [2014] HCA 44 -
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 -
Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 -
Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 -
Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 -
Curtis v Harden Shire Council [2014] NSWCA 314 -
Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd [2014] VSCA 165 -
Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd [2014] VSCA 165 -
Howard Smith & Patrick Travel Pty Ltd v Comcare [2014] NSWCA 215 (03 July 2014) (Beazley P, Basten JA and Sackville AJA)

Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59; 200 CLR 1 ; *Graham Barclay Oysters v Ryan* [2002] HCA 54; 211 CLR 540 applied.

Howard Smith & Patrick Travel Pty Ltd v Comcare [2014] NSWCA 215 -
Howard Smith & Patrick Travel Pty Ltd v Comcare [2014] NSWCA 215 -
Howard Smith & Patrick Travel Pty Ltd v Comcare [2014] NSWCA 215 -
Howard Smith & Patrick Travel Pty Ltd v Comcare [2014] NSWCA 215 -
Howard Smith & Patrick Travel Pty Ltd v Comcare [2014] NSWCA 215 -
Howard Smith & Patrick Travel Pty Ltd v Comcare [2014] NSWCA 215 -
Howard Smith & Patrick Travel Pty Ltd v Comcare [2014] NSWCA 215 -
Howard Smith & Patrick Travel Pty Ltd v Comcare [2014] NSWCA 215 -
Allianz Australia insurance Ltd v Mercer [2014] TASFC 3 -
Allianz Australia insurance Ltd v Mercer [2014] TASFC 3 -
Apache Energy Ltd v Alcoa of Australia Ltd [No 2] [2013] WASCA 213 (17 September 2013) (McLure P, Buss JA, Newnes JA)

134. Since ***Perre*** , determining whether a duty of care exists in a novel category of case requires a 'multifaceted inquiry' or 'salient features' analysis, with a close examination and evaluation of the facts pertinent to the relationship between the plaintiff and the defendant. As Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ observed in ***Sullivan*** :

> Different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care. Sometimes the problems may be bound up with the harm suffered by the plaintiff, as, for example, where its direct cause is the criminal conduct of some third party (eg, ***Modbury Triangle Shopping Centre Pty Ltd v Anzil*** (2000) 205 CLR 254). Sometimes they may arise because the defendant is the repository of a statutory power or discretion (eg, ***Crimmins v Stevedoring Industry Finance Committee*** (1999) 200 CLR 1 ; ***Brodie v Singleton Shire Council*** (2001) 206 CLR 512). Sometimes they may reflect the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits (eg, ***Perre v Apand Pty Ltd*** (1999) 198 CLR 180). Sometimes they may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships (eg, ***Hill v Van Erp*** (1997) 188 CLR 159 at 231, per Gummow J). *The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle* [50]. (emphasis added)

See also ***Graham Barclay Oysters Pty Ltd v Ryan*** [2002] HCA 54; (2002) 211 CLR 540 [149] (Gummow & Hayne JJ).

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 -
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 -
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 -
Lloyd v Ryan Borg by his Tutor NSW Trustee and Guardian [2013] NSWCA 245 -
SBEG v Commonwealth [2012] FCAFC 189 (20 December 2012) (Keane CJ, Lander & Siopis JJ)

71. In *Crimmins* at [270]-[271] , Hayne J explained:

> The fact that the Authority is a statutory body given statutory discretions does not prevent the application of ordinary principles of the law of negligence. But the courts have often found the task of identifying the duty of care that is owed by a statutory body to be difficult. To whom is the duty owed? What is the content of the duty?
>
> There are several reasons why the task is difficult. As Gummow J pointed out in *Pyrenees Shire Council v Day*, 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 distinction between non-feasance and misfeasance

relevant? Does it matter that the constituting statute gives a body some statutory duties and then, in different language, gives it some statutory powers? Is the body to be liable in negligence when it does not use the powers it was given but was under no statutory duty to use them (or perhaps even to consider their use)? All these, and more, are questions that may arise.
(Footnotes omitted.)

SBEG v Commonwealth [2012] FCAFC 189 (20 December 2012) (Keane CJ, Lander & Siopis JJ)
Crimmins v Stevedoring Committee (1999) 200 CLR 1 discussed

SBEG v Commonwealth [2012] FCAFC 189 (20 December 2012) (Keane CJ, Lander & Siopis JJ)

40. The primary judge noted that the appellant did not seek relief by way of a residence determination under s 197AB of the Act. His Honour held that on the proper construction of the definition of immigration detention in s 5(1)(b)(v) of the Act, the powers implicit in that definition could not be used to achieve the benign form of accommodation contemplated by s 197AB of the Act. In this regard, his Honour said at Reasons [111]-[113]:

> 111 First, the power in paragraph (b)(v) could not be exercised in a way which had an effect similar to a residential determination under s 197AB . They are two different powers. One involves a form of immigration detention, or holding by, or on behalf of, an officer (that is, paragraph (b)(v)), whereas the other involves residence at a place with (subject to some exceptions) the Act and regulations applying as if the person is being kept in immigration detention (s 197AB).
>
> 112 Secondly, I do not think the "other place" within paragraph (b)(v) need be a formal institutional place like MITA. While it may be something different from that, it must still be a place where a person can be said to be held by, or on behalf of, an officer. To the extent that the Commonwealth submitted that the place for the purposes of paragraph (b)(v) must be a formal institutional place (to be fair to the Commonwealth, I am not sure it went that far), I reject the argument. I do accept the Commonwealth's submission that a person in a place approved under paragraph (b)(v) would need to be guarded, and in view of the adverse security assessment, the extent of the security measures would be a matter for the Commonwealth.
>
> 113 Thirdly, I think the nature of the power in paragraph (b)(v) and the considerations relevant to its exercise, are such that the Commonwealth (or the Minister) would not be in breach of any duty of care for failing to exercise the power. Many considerations might be relevant to the exercise of the power, including cost considerations, the ready availability of other services in a residential setting, and security considerations associated with an adverse security assessment. As far as cost considerations are concerned, it is not a matter of the Court declining to make the order sought by the applicant because Mr Kelly's rather general evidence was that it would be a good deal more costly to house the applicant in the manner he seeks rather than at a place like MITA. The significant matter is that cost considerations are relevant to the exercise of the power in paragraph (b)(v). It seems to me that it is not possible to formulate the practical content of a duty to exercise the power in paragraph (b)(v) *(Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 13 [5] per Gleeson CJ).

SBEG v Commonwealth [2012] FCAFC 189 -
MM Constructions (Aust) Pty Ltd v Port Stephens Council [2012] NSWCA 417 -
Australian Capital Territory v Crowley [2012] ACTCA 52 (17 December 2012) (Lander, Besanko and Katzmann JJ)
Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1 , cited

Australian Capital Territory v Crowley [2012] ACTCA 52 -
Lederberger v Mediterranean Olives Financial Pty Ltd [2012] VSCA 262 -
Re Willmott Forests Limited [2012] VSCA 202 -
Re Willmott Forests Limited [2012] VSCA 202 -

Re Willmott Forests Limited [2012] VSCA 202 -
Re Willmott Forests Limited [2012] VSCA 202 -
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 -
Karatjas v Deakin University [2012] VSCA 53 (28 March 2012) (Nettle and Hansen JJA and Kyrou AJA)

26. *Chomentowski* was decided when reasonable foreseeability was still conceived of as the principal criterion of duty. Later, there was a period in which the High Court focused greater attention on what Brennan J described in *Hawkins v Clayton* [14] as the 'Delphic criterion' of proximity.[15] Later still, the High Court discarded the idea of proximity as a principle. Now, according to more recent pronouncements, the test is 'whether it is reasonable to require a person to have in contemplation the risk of injury that has eventuated'. [16] In turn, that entails the application of what different members of the High Court have variously described as 'principle and policy', [17] 'the totality of the relationship between the parties', [18] a 'fact-value complex', and 'questions of fairness, policy, practicality, proportion, expense and justice'. [19] At the same time, a majority of the High Court have rejected the idea that those tests are synonymous with the English criteria of 'fair, and just and reasonable', [20] albeit recognising that they may lead to the same result. [21]

via

[17] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 32 [73] (McHugh J) .

Kudrin v City of Mandurah [2012] WASCA 65 -
Kudrin v City of Mandurah [2012] WASCA 65 -
Kudrin v City of Mandurah [2012] WASCA 65 -
Amaca Pty Ltd v King [2011] VSCA 447 -
Amaca Pty Ltd v King [2011] VSCA 447 -
Amaca Pty Ltd v King [2011] VSCA 447 -
Commissioner of Taxation v Byrne Hotels Qld Pty Ltd [2011] FCAFC 127 -
Commissioner of Taxation v Byrne Hotels Qld Pty Ltd [2011] FCAFC 127 -
Commissioner of Taxation v Byrne Hotels Qld Pty Ltd [2011] FCAFC 127 -
Miller v Miller [2011] HCA 9 -
Federal Commissioner of Taxation v H [2010] FCAFC 128 -
Federal Commissioner of Taxation v H [2010] FCAFC 128 -
Meshlawn P/L v State of Qld [2010] QCA 181 (20 July 2010) (McMurdo P, Chesterman JA and Fryberg J,)

102. It may be this feature of the judgment which explains why *Rowling* has not been influential in this aspect of the law of negligence. As far as I can see, the judgment, although referred to with some frequency, has not been considered in detail by the High Court, nor by any intermediate appellate court. There has been no attempt, that I have found, to describe what attributes governmental activity must have for the activity to be relevantly "unsuitable". There is general agreement that "quasi-legislative activity of public authorities such as zoning prescriptions and ... inter-governmental dealings" are in that category. That point was made, and the authorities reviewed, by Gummow J in *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 393-394 . His Honour cited *Rowling* as authority for the proposition that:

> "... the class of case to which Deane J referred in *Heyman* is not cognisable by the tort of negligence ...".

See also McHugh J in *Crimmins* at 37 and Gleeson CJ in *Graham Barclay Oysters* at 557.

Meshlawn P/L v State of Qld [2010] QCA 181 -
Meshlawn P/L v State of Qld [2010] QCA 181 -
CSL Australia Pty Ltd v Formosa [2009] NSWCA 363 -
CSL Australia Pty Ltd v Formosa [2009] NSWCA 363 -
Doumit v Jabbs Excavations Pty Ltd [2009] NSWCA 360 -
Doumit v Jabbs Excavations Pty Ltd [2009] NSWCA 360 -
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)

> 374. Such a duty has also been recognised by McHugh J (with whom Gleeson CJ agreed) in ***Crimmins*** at [62] ff. However, a reading of the Statement of Claim shows that the plaintiff made no mention of any statutory power, or of negligence in the exercise of any such statutory power, in the way it put its case. Rather, the acts of negligence alleged were those that I have set out at para [107] above. When the way the plaintiff puts its case for the liability of the RTA makes no mention of any special statutory power of the RTA, I do not see how that alleged liability could be *"based on"* the RTA's exercise of, or failure to exercise, any special statutory power. The distinction between a case asserting negligent exercise of a statutory power, and a case that a statutory authority had an affirmative obligation to take reasonable steps to prevent harm to a plaintiff is recognised by McHugh J in ***Crimmins*** at [62]-[70] .

Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 (22 September 2009) (McColl and Campbell JJA, Sackville AJA)

> 271. The task of deciding whether reasonable care has been taken can become more problematic concerning activities that are of a type that private individuals do not carry out. However, sometimes, an activity that only a statutory authority carries out can be sufficiently analogous to activities carried on by private individuals or corporations to enable the standards applicable to private individuals in that analogous activity to be drawn on and adopted to the statutory authority. Such a situation arose in ***Crimmins*** , where the statutory authority's role as a co-ordinator of labour was analogous to that of an employer or co-ordinator of labour in private industry (I say this recognising that the debate in ***Crimmins*** in the High Court concerned existence of duty of care, not breach).

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 -
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 -
Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 (31 August 2009) (Allsop P at 1; Basten JA at 149; Simpson J at 242)

> 73 The President then turned to *Sydney Water Corporation v Abramovic* [2007] NSWCA 248; 5 DDCR 570. This was a decision in which Basten JA (with whom Mason P agreed) examined the circumstances in which a principal might owe a duty of care to an employee of a sub-contractor. In that case, Mr Abramovic was employed by independent contractors retained by Sydney Water to excavate trenches. The work involved drilling sandstone which, if carried on without water dampening equipment and respirators, could give rise to inhalation of silica dust by those drilling. In a careful discussion of *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; 200 CLR

1, Basten JA sought to distil what was said by the members of the Court in that case into a framework for application. Basten JA said at 591 [92] of his reasons, cited by the President at [88] of his reasons:

> "[92] If that duty [that is the duty to control work of its contractors] is not to arise in all cases involving independent contractors additional elements, as in *Crimmins* , must be established. These appear to be that:
>
> (a) the principal had knowledge of the risks which was not shared by the employer, or
>
> (b) the principal created the risk through directions given to the employer, or
>
> (c) the principal knew or at least ought to have known that the employer was not, or was not capable of, instituting a safe system of work."

Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
S v State of New South Wales [2009] NSWCA 164 -
S v State of New South Wales [2009] NSWCA 164 -
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 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

[102] (1999) 200 CLR 1 .

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 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]

Stuart v Kirkland-Veenstra [2009] HCA 15 (22 April 2009) (French CJ,Gummow, Hayne, Heydon, Crennan and Kiefel JJ)

113. Evaluation of the relationship between the holder of the power and the person or persons to whom it is said that a duty of care is owed will require examination of the degree and nature of control exercised over the risk of harm that has eventuated [112] , the degree of vulnerability of those who depend on the proper exercise of the relevant power [113] , and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute [114] . Other considerations may be relevant [115] .

via

[113] *Graham Barclay Oysters* (2002) 211 CLR 540 at 597 [149] . See also *Burnie Port Authority* (1994) 179 CLR 520 at 551 ; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 2425 [44][46] , 3839 [91][93] , 4041 [100] ; [1999] HCA 59 .

Stuart v Kirkland-Veenstra [2009] HCA 15 (22 April 2009) (French CJ,Gummow, Hayne, Heydon, Crennan and Kiefel JJ)

130. The common law duty in question is to be distinguished from one arising under the statute which provides the public authority's powers. The action for breach of statutory duty, although itself a tort, is regarded as distinct from the tort of negligence. It will be necessary to return to the elements of this action in more detail later in these reasons. In a case where a general duty of care is alleged, it is said that the statute cannot itself be regarded as the source of the duty; rather it is the foundation or setting for it [141] . The duty of care is said to arise independently of the statute [142] . The existence of statutory powers is necessary, but not sufficient, to give rise to a duty of care [143] .

via

[141] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 434 per Gibbs CJ, 459460 per Mason J; and see *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 60 [163] per Gummow J .

Stuart v Kirkland-Veenstra [2009] HCA 15 (22 April 2009) (French CJ,Gummow, Hayne, Heydon, Crennan and Kiefel JJ)

131. No guiding principle, by which an authority might be considered to be obliged to exercise its powers at common law, has been identified; the search continues [144] . There is agreement that the statutory powers in question must be directed towards some identifiable class or individual, or their property, as distinct from the public at large [145] .

via

[145] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 40 [99] per McHugh J ; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 633 [326] per Hayne J; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 562 [32] per Gleeson CJ, 575 [79] per McHugh J.

Stuart v Kirkland-Veenstra [2009] HCA 15 (22 April 2009) (French CJ,Gummow, Hayne, Heydon, Crennan and Kiefel JJ)

115. The present case stands in sharp contrast to *Crimmins v Stevedoring Industry Finance Committee* [117] . In that case the Court held that the Australian Stevedoring Industry Authority owed a waterside worker a common law duty to take reasonable care to protect him from reasonably foreseeable risks of injury arising from his employment by registered stevedores. The conclusion reached by the majority of the Court was founded on considerations that were identified as finding close analogy with those which lead to an employer being responsible for providing a safe system of work and a safe place of work. The Authority had or should have had knowledge of the special risks to which the workers were subject and could control (or at least minimise) those risks by the exercise of its statutory powers. And it was the Authority that put the workers at risk of harm because it was the Authority that assigned the workers to particular stevedores. The Authority was held to control the source of the risk of harm to the workers.

Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Precision Products (NSW) Pty Ltd v Hawkesbury City Council [2008] NSWCA 278 -
Precision Products (NSW) Pty Ltd v Hawkesbury City Council [2008] NSWCA 278 -
Precision Products (NSW) Pty Ltd v Hawkesbury City Council [2008] NSWCA 278 -
Precision Products (NSW) Pty Ltd v Hawkesbury City Council [2008] NSWCA 278 -
New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
Imbree v McNeilly [2008] HCA 40 -

State of NSW v Tyszyk [2008] NSWCA 107 -
State of NSW v Tyszyk [2008] NSWCA 107 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

50. The trial judge considered the approach for determining whether a duty of care exists in a novel case, noting the incremental approach by way of analogy and then considering McHugh J's six questions as set out in *Crimmins* . *[55]* His Honour concluded that only question 2 was answered in the positive. That is, that the respondents could have exercised control or had the power to protect Mr Veenstra.

Kirkland-Veenstra v Stuart [2008] VSCA 32 (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

70. The appellant's case as to duty, in order to fall within *Pyrenees* and *Crimmins* , was argued on four bases. First, that there is a relevant power under the *Mental Health Act* that points to the existence of a duty of care. Secondly, there was control capable of being exercised by the relevant power under the Act over the risk of which the police officers were aware. Thirdly, there was foreseeability of a risk of harm if no action was taken. Fourthly, there was no issue of public policy that cut across the police officers' decision. [69]

via

[69] Save that articulated in *Pyrenees* (1998) 192 CLR 330, 424 (Kirby J) and *Crimmins* (1999) 200 CLR 1 , 38 (McHugh J) .

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

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

Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
New South Wales v Rogerson [2007] NSWCA 346 -
New South Wales v Rogerson [2007] NSWCA 346 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -

Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Ballantyne v Workcover Authority of NSW [2007] NSWCA 239 (11 September 2007) (Beazley JA; Ipp JA; Basten JA)

> *GRE Workers' Compensation Insurance (NSW) Ltd v Nohil Pty Ltd* (1996) 13 NSWCCR 74; *Raniere Nominees Pty Ltd v Daley* (2005) 66 NSWLR 594; *Raniere Nominees Pty Ltd v Daley* [2006] NSWCA 235 applied.

> *Ogden Industries Pty Ltd v Lucas* (1967) 116 CLR 537; *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 considered.

Ballantyne v Workcover Authority of NSW [2007] NSWCA 239 (11 September 2007) (Beazley JA; Ipp JA; Basten JA)

> *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1
> *Dranichnikov v Minister for Immigration and Multicultural Affairs*

Ballantyne v Workcover Authority of NSW [2007] NSWCA 239 -
CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
Randwick City Council v T & H Fatouros Pty Ltd [2007] NSWCA 177 (20 July 2007) (Giles JA; Ipp JA; Tobias JA)

> 53 *Crimmins* was a "control" case of a unique kind. As Callinan J observed in *Graham Barclay Oysters* (at 663, [317]):

> > "What distinguished the powers and functions [of the authority in *Crimmins*] was that if they were not in fact exercised, then the industry which was a uniquely organised one, would hardly have been able to function at all, or with any degree of efficiency ..."

Randwick City Council v T & H Fatouros Pty Ltd [2007] NSWCA 177 (20 July 2007) (Giles JA; Ipp JA; Tobias JA)

> 48 In *Amaca Pty Ltd v The State of New South Wales* (2004) 132 LGERA 309, I drew (at 325, [64]) the following propositions 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."

Randwick City Council v T & H Fatouros Pty Ltd [2007] NSWCA 177 (20 July 2007) (Giles JA; Ipp JA; Tobias JA)

46 Courts must be cautious in imposing affirmative common law duties of care on statutory authorities (see, in particular, McHugh J - with whom Gleeson CJ agreed - in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 34 , [79]).

Randwick City Council v T & H Fatouros Pty Ltd [2007] NSWCA 177 -
Randwick City Council v T & H Fatouros Pty Ltd [2007] NSWCA 177 -
Randwick City Council v T & H Fatouros Pty Ltd [2007] NSWCA 177 -
Randwick City Council v T & H Fatouros Pty Ltd [2007] NSWCA 177 -
Randwick City Council v T & H Fatouros Pty Ltd [2007] NSWCA 177 -
New South Wales v Fahy [2007] HCA 20 -
New South Wales v Fahy [2007] HCA 20 -
CSR Ltd v Amaca Pty Ltd [2007] NSWCA 107 (08 May 2007) (Mason P; Hodgson JA ; Young CJ in Eq)

35. There is no question but that the liability was one that was incurred by the firm or a partner of the firm in the ordinary course of its business and that a claim for contribution will lie. The principal defence appeared to be that the liability as at the date of dissolution of the firm was inchoate and that the sections of the **Partnership Act** to which I have referred only apply in a case where the liability is completely established as at the date of the dissolution. The submission gets no support in the authorities. What authorities there are say that it just does not matter that the liability was not complete as at the date of dissolution; see **Bartels v Behm** (1990) 19 NSWLR 257 and **Crimmins v Stevedoring Industry Finance Committee** (1999) 200 CLR 1, 13-14 and 51-56 .

CSR Ltd v Amaca Pty Ltd [2007] NSWCA 107 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Deputy Commissioner of Taxation v Bluebottle UK Ltd [2006] NSWCA 360 (14 December 2006) (Mason P; Santow JA; Basten JA)
Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1

Deputy Commissioner of Taxation v Bluebottle UK Ltd [2006] NSWCA 360 -
Deputy Commissioner of Taxation v Bluebottle UK Ltd [2006] NSWCA 360 -
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 -
Great Lakes Shire Council v Dederer [2006] NSWCA 101 -
Patrick Operations Pty Ltd v Comcare [2006] NSWCA 142 -
Wright v New South Wales [2006] NSWCA 152 -
Berowra Holdings Pty Ltd v Gordon [2006] HCA 32 -
Coote v Forestry Tasmania [2006] HCA 26 -

Coote v Forestry Tasmania [2006] HCA 26 -
Hobson v Attorney-General CA74/05 [2006] NZCA 409 -
Harriton v Stephens [2006] HCA 15 -
Harriton v Stephens [2006] HCA 15 -
Edson v Roads and Traffic Authority [2006] NSWCA 68 (07 April 2006) (Beazley JA at 1; Ipp JA at 2; Hunt AJA at 170)

> 72 These authorities lay down that a statutory body may come under a common law duty of care both in relation to the exercise and the failure to exercise its powers and functions. The common law duty is not a statutory duty of the kind enforceable by a public law remedy. As Gaudron J said in ***Crimmins*** at 18 , "the statute pursuant to which the body is created and its powers conferred operates 'in the milieu of the common law'. ... And the common law applies to that body unless excluded". See also ***Sutherland Shire Council v Heyman*** at 460 where Mason J observed that "the statute facilitates the existence of a common law duty of care." Whether the legislation expressly or impliedly excludes the operation of the common law is a matter of statutory construction.

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 -
Edson v Roads and Traffic Authority [2006] NSWCA 68 -
Edson v Roads and Traffic Authority [2006] NSWCA 68 -
A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 -
A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 -
State of New South Wales v Ibbett [2005] NSWCA 445 (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)

> 63 No issue of coherence arises. I have indicated in other judgments the basis upon which issues of coherence can lead to the courts developing the law of torts by restricting its application in certain respects. (See in particular *State of New South Wales v Paige* (2002) 60 NSWLR 371 at [93]-[94] and *Hunter Area Health Service v Presland* [2005] NSWCA 33 at [20]-[21] .) The imposition of a duty of care may be inconsistent with some aspect of the scheme or, if not directly inconsistent, may be otherwise inappropriate by reason of the scope and purpose of the legislation. However, all of the authorities refer to some impact of liability in tort upon the efficacy or operation of a statutory scheme. I repeat my summary of the cases in *Presland* at [21] :
>
> · liability in tort may 'distort [the] focus' of the statutory decision-making process; (*Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 101 [292])
>
> · the decision may be made in a 'detrimentally defensive frame of mind'; (*Hill v Chief Constable of West Yorkshire* [1989] AC 53 at 63D)
>
> · a common law duty should not be imposed if it 'would ... have a tendency to discourage the due performance of ... statutory duties'; (*X v Bedfordshire County Council* [1995] 2 AC 633 at 739E)
>
> · the imposition of a duty of care may 'undermine the effectiveness of the duties imposed by the statute'; (*Graham Barclay Oysters* supra at 574 [78])
>
> · 'a common law duty could distort the performance of the functions of the statutory body'. (*Crimmins* supra at 77 [216])"

State of New South Wales v Ibbett [2005] NSWCA 445 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
Neindorf v Junkovic [2005] HCA 75 -
Attorney-General v Body Corporate 200200 Ca30/05 [2005] NZCA 296 -
Attorney-General v Body Corporate 200200 Ca30/05 [2005] NZCA 296 -
Attorney-General v Body Corporate 200200 Ca30/05 [2005] NZCA 296 -
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] .

Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Mulligan v Coffs Harbour City Council [2005] HCA 63 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Mulligan v Coffs Harbour City Council [2005] HCA 63 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
State of New South Wales v Williamson [2005] NSWCA 352 (13 October 2005) (Santow and Basten JJA, Simpson J)

8 The State of New South Wales was sued pursuant to s 5(1) of the *Crown Proceedings Act* 1988 (NSW) . According to s 5(2):

> 5(2) Civil proceedings against the Crown shall be commenced in the same way, and the proceedings and rights of the parties in the case shall as nearly as possible be the same, and judgment and costs shall follow or may be awarded on either side, and shall bear interest, as in an ordinary case between subject and subject.

In assessing what steps should reasonably have been taken to avoid risk of injury,

where the employer is the State rather than a "subject", the State must demonstrate some characteristic or quality which would allow departure from the norm on the basis that exact equivalence in approach is not "possible". This would seem to be the statutory context in which reliance was placed upon *Brodie* and *Crimmins* .

State of New South Wales v Williamson [2005] NSWCA 352 (13 October 2005) (Santow and Basten JJA, Simpson J)
Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1
Jarratt v Commissioner of Police (NSW)

State of New South Wales v Williamson [2005] NSWCA 352 -
State of New South Wales v Williamson [2005] NSWCA 352 -
State of New South Wales v Williamson [2005] NSWCA 352 -
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)

83. The test of exercise of a statutory power with reasonable care has been noted or adopted, sometimes the course of determining whether there was a duty of care, in relation to a stevedoring authority's power to regulate the performance of stevedoring operations (*Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [5] , [34]-[35] , [62] , [360]), a council's exercise of a power to require that work be done upon premises to make them safe (*Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [120], [177], [423]), and a council's power to inspect buildings in the course of erection (*Sutherland Shire Council v Heyman* (1985) 157 CLR 424, at 436-7, 458-9, 484, 509). In *Voli v Inglewood Shire Council* (1963) 110 CLR 74 a council was held liable for negligence in the examination and approval of plans and specifications for a building (although it was the building owner). In *Wollongong City Council v Fregnan* [1982] 1 NSWLR 244 a council was held liable for negligence in granting building approval; the negligence was approving without informing the applicant of a danger of slippage, the land being in the council's slippage register, and it was said that the council failed to take proper care in performance of its duty to consider the danger of slippage (at 248; see also 253).

Port Stephens Shire Council v Booth [2005] NSWCA 323 (27 September 2005)

90. As was pointed out by Gaudron J in *Crimmins v Stevedoring Industry Finance Committee* at [34] , a common law duty in relation to the exercise or non-exercise of a body's powers "only imposes a duty to take those steps that a reasonable authority with the same powers and resources would have taken in the circumstances in question". Subject to any statutory overlay, however, discharge of the duty requires that the authority act with reasonable care. The test for negligence in the Council's approval of the development application and the building application is not *Wednesbury* unreasonableness.

Port Stephens Shire Council v Booth [2005] NSWCA 323 -
Bankstown City Council v Alamdo Holdings Pty Ltd [2005] HCA 46 -
Bankstown City Council v Alamdo Holdings Pty Ltd [2005] HCA 46 -
Chotiputhsilpa v Waterhouse [2005] NSWCA 295 (02 September 2005) (Beazley, Giles and Ipp JJA)

52 The trial judge next set out the passage from the judgment of McHugh J in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 39 where his Honour posed a series of questions relevant to the determination of whether a statutory authority owed a duty of care in the following terms:

"1. Was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise its statutory powers, would result in injury to the plaintiff or his or her interests? If no, then there is no duty.
2. By reason of the defendant's statutory or assumed obligations or control, did the defendant have the power to protect a specific class

including the plaintiff (rather than the public at large) from risk or harm? If no, then there is no duty.
3. Was the plaintiff or were the plaintiff's interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or those interests from harm? If no, then there is no duty.
4. Did the defendant know, or ought the defendant to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? If no, then there is no duty.
5. Would such a duty impose liability with respect to the defendant's exercise of 'core policy making' or 'quasi-legislative' functions? If yes, then there is no duty.
6. Are there any supervening reasons in policy to deny the existence of a duty of care (eg, the imposition of a duty is inconsistent with the statutory scheme, or the case is concerned and the application of principles in that field deny the existence of a duty)? If yes, then there is no duty.
If the first four questions are answered in the affirmative, and the last two in the negative, it would ordinarily be correct in principle to impose a duty of care on the statutory authority.

Chotiputhsilpa v Waterhouse [2005] NSWCA 295 -
Chotiputhsilpa v Waterhouse [2005] NSWCA 295 -
Chotiputhsilpa v Waterhouse [2005] NSWCA 295 -
Chotiputhsilpa v Waterhouse [2005] NSWCA 295 -
Chotiputhsilpa v Waterhouse [2005] NSWCA 295 -
Chotiputhsilpa v Waterhouse [2005] NSWCA 295 -
Chotiputhsilpa v Waterhouse [2005] NSWCA 295 -
Eastland Technology Australia Pty Ltd v Whisson [2005] WASCA 144 -
Town of Mosman Park v Tait [2005] WASCA 124 (04 July 2005) (Steytler P, Wheeler JA, McLure JA)

Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1

Berrigan Shire Council v Ballerini [2005] VSCA 159 (22 June 2005) (Callaway, Chernov and Nettle, Jj.A)

27. In any event, the scale of promotional activities and other encouragement is not the sole criterion of an authority's duty to those who make use of facilities under its management and control. There are a number of cases in which it has been held that the mere fact of providing a recreational facility can be enough to impose a duty to guard against attendant foreseeable risk. While each case involves questions of fact and degree, and therefore cannot be used as a precedent, [13] the reasoning is instructive. One such case in which the reasoning is instructive is *The Public Trustee as Administrator of the Estate of the late Peter Saroukas v Sutherland Shire Council [14]* . The council there had the care, control and management of a park beside a bay and also of tidal baths that were separated from the bay by a walkway constructed by the council. The walkway had a rail fence around the outside of it but it was possible to climb through or over the fence and to dive from it into the bay, in which the depth of the water varied and was difficult and frequently impossible to assess. The council had installed signs to warn of the danger of diving into the baths and of the variable depth of the water in the baths but did not erect signs to warn of the risk of diving from the walkway into the bay. The plaintiff dived from the walkway into water after losing his shoe into it. Unbeknown to him, the water was only three feet deep at that point and he hit the bottom and was rendered quadriplegic. Gleeson, C.J., with whom Priestley and Handley, JJ.A. agreed, held that the council owed a duty to persons diving from the walkway into the bay and that it breached the duty by failing to erect an appropriate pictorial sign warning of the danger of diving from the walkway into the bay. As Gleeson, C. J. explained:

"Whilst it is true to say that the Council did not intend that people should dive from the walkway into the Bay outside the baths, nevertheless the Council provided a recreational facility which made that possible, and the risk that a person might dive out into Gunnamatta Bay from the walkway and suffer injury as a consequence was foreseeable...the necessary relationship of proximity between the respondent and the deceased existed, and the learned trial judge was correct in concluding that the respondent was under a duty to warn those using the walkway of the dangers of diving into variable depth tidal waters.

...The very existence of the Council's walkway going out into the bay creates the possibility that people will jump or dive from it and once it is accepted as a possibility that the Council's recreational facility will be used in that way then it would be taking far too narrow an approach to limit the Council's obligation to an obligation to give a warning to people who intend to jump or dive in one direction rather than in another."

via

[13] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR at 32 [73].

Berrigan Shire Council v Ballerini [2005] VSCA 159 (22 June 2005) (Callaway, Chernov and Nettle, Jj.A)

29. I also do not overlook that foreseeability is not a sufficient basis for the

imposition of a duty to guard against a particular risk - it is plain that it is not [15] - and that there is also some uncertainty as to whether *Saroukas* would be decided today as it was thirteen years ago. The course of authority has not been consistent:

1) In the passage from Gleeson, C.J.'s judgment in *Saroukas* which is set out above, there is reference to "the necessary relationship and proximity". It resonates with the centrality which the High Court at the time accorded to the concept of proximity. [16]

2) Later, in *Sullivan v Moody,* the majority of the High Court said that:

"...Notwithstanding the centrality of that concept, for more than a century, in this area of discourse, and despite some later decisions in this Court which emphasised that centrality, 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. It expresses the nature of what is in issue, and in that respect gives focus to the inquiry, but as an explanation of a process of reasoning leading to a conclusion its utility is limited. The present appeals provide an illustration of the problem. To ask whether there was a relationship of proximity ... might be a convenient short-hand method of formulating the ultimate question in the case, but it provides no assistance in deciding how to answer the question. That is so, whether it is expressed as the ultimate test of a duty of care, or as one of a number of stages in an approach towards a conclusion on that issue." [17]

3) In *Pyrenees Shire Council v Day* [18] Kirby, J. proposed the adoption of the three part test [19] of reasonable foreseeability, proximity and whether it is fair, just and reasonable, and his Honour reprised that conception in *Romeo v Conservation Commission of the Northern Territory* [20] .

4) Later, in *Sullivan v Moody [21]* , all members of the High Court except Kirby, J. rejected that idea, saying:

"What has been described as the three-stage approach of Lord Bridge of Harwich in *Caparo Industries Plc v Dickman* does not represent the law in Australia. Lord Bridge himself said that concepts of proximity and fairness lack the necessary precision to give them utility as practical tests, and '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'. There is a danger that judges and practitioners, confronted by a novel problem, will seek to give the *Caparo* a pproach a utility beyond that claimed for it by its original author. There is also a danger that, the matter of foreseeability (which is often incontestable) having been determined, the succeeding questions will be reduced to a discretionary judgment based upon a sense of what is fair, and just and reasonable as an outcome in the particular case. The proximity question has already been discussed. The question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle. The concept of policy, in this context, is often ill-defined. There are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision-making in individual cases."

5) In *Crimmins v Stevedoring Industry Finance Committee* [22] McHugh, J. with whom Gleeson, C.J. agreed, said that there is no longer any general test for determining whether a duty of care exists and that the correct approach now is to commence by ascertaining whether the case comes within a factual category where duties of care have been held to arise. His Honour added, however, that while a statutory authority may frequently be held to owe a duty of care because the facts of the case fall within one of those categories, it is not enough to look for factual similarities in decided cases. In novel cases it is necessary to examine the precedent cases to reveal their bases in "principle and policy" and thus to determine whether fact A in the instant case is truly analogous to fact B in the precedent case.

6) More recently, in *Graham Barclay Oysters Pty Ltd v Ryan* [23] , Glees on, C.J. spoke in terms of the "the total relationship between the parties". On one view of the matter, "the total relationship between the parties" is proximity by another name.

7) More recently still, in *Swain v Waverley Municipal Council,* McHugh, J stated that the identification of a duty of care is dependent upon a "fact-value complex" in which are inherent "questions of fairness, policy, practicality, proportion, expense and justice". [24] With respect that looks like the test of "fair, just and reasonable" advocated by Kirby, J. in *Romeo* a nd rejected by the majority in *Sullivan v Moody* .

Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Hunter Area Health Service v Presland [2005] NSWCA 33 (21 April 2005) (Spigelman CJ, Sheller and Santow JJA)

21 The imposition of a duty of care may be inconsistent with some aspect of the scheme or, if not directly inconsistent, may be otherwise inappropriate by reason of the scope and purpose of the legislation:

· liability in tort may "distort [the] focus" of the statutory decision-making process; (*Crimmins* supra at [292])

· the decision may be made in a "detrimentally defensive frame of mind"; (*Hill v Chief Constable of West Yorkshire* [1989] AC 53 at 63D)

· a common law duty should not be imposed if it "would ... have a tendency to discourage the due performance of ... statutory duties"; (*X v Bedfordshire County Council* [1995] 2 AC 633 at 739E)

· the imposition of a duty of care may "undermine the effectiveness of the duties imposed by the statute"; (*Graham Barclay Oysters* supra at 574 [78])

· "a common law duty could distort the performance of the functions of the statutory body". (*Crimmins* supra at 77 [216])

The Statutory Scheme

Hunter Area Health Service v Presland [2005] NSWCA 33 (21 April 2005) (Spigelman CJ, Sheller and Santow JJA)

8 Mr B Walker SC, who appeared for the Respondent, submitted that this Court should apply the reasoning of McHugh J in *Crimmins* at 39 [93] . Although his Honour's reasons are instructive, I do not believe that they represent the ratio of *Crimmins* . In any event, the subsequent judgments in *Graham Barclay Oysters* must also be taken into account.

Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
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 -
BHP Billiton Ltd v Schultz [2004] HCA 61 (07 December 2004) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

106. The judge constituting the Supreme Court of New South Wales who decided the instant case (Sully J) would have known the foregoing. It has also become known to Australian litigants, sick with various dust diseases and to the legal practitioners advising them. It is of the nature of many such diseases that they do not manifest themselves quickly but have a long lead time. This too is well known. The general courts are regularly obliged to consider cases involving dust diseases as relevant to issues before them. This Court had to do so in *Crimmins v Stevedoring Industry Finance Committee* [94] . Mr Crimmins died whilst awaiting the final

determination by the courts of his legal entitlements. This is a common feature of the law as it affects litigants who make claims in respect of dust diseases. The facility of a specialist tribunal has sometimes also been useful and convenient to defendants. Inevitably, the facilities and procedures of the Tribunal have attracted litigants, including some from outside New South Wales.

via

[94] (1999) 200 CLR 1 at 44-45 [111] , 65 [183] .

BHP Billiton Ltd v Schultz [2004] HCA 61 -
Port Stephens Shire Council v Tellamist Pty Ltd [2004] NSWCA 353 (27 September 2004) (Giles, Santow and Ipp JJA)
Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1
Davies v Powell Duffryn Associated Collieries Ltd

Port Stephens Shire Council v Tellamist Pty Ltd [2004] NSWCA 353 -
Port Stephens Shire Council v Tellamist Pty Ltd [2004] NSWCA 353 -
Bankstown City Council v Alamdo Holdings Pty Ltd [2004] NSWCA 325 -
Edwards v Attorney General [2004] NSWCA 272 (06 August 2004) (Spigelman CJ, Mason P and Young CJ in Eq)
Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1
Customs & Excise Commissioners v Hedon Alpha Ltd

Edwards v Attorney General [2004] NSWCA 272 -
Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs [2004] HCA 36 -
Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs [2004] HCA 36 -
Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs [2004] HCA 36 -
Amaca Pty Ltd v The State of New South Wales [2004] NSWCA 124 (17 May 2004) (Mason P, Ipp and McColl JJA)

138 The relevance of the difference between actual and imputed knowledge was discussed by McHugh J in *Crimmins* where his Honour said (at 42 , [102]):

> "In my opinion, however, one must be very careful about using constructive knowledge in this area. Pyrenees , for example, would have taken on a very different complexion if the shire council did not have actual knowledge of the risk. Speaking generally, I think it is unlikely that a plaintiff could succeed because of the authority's constructive knowledge of an area of risk, unless it can be said that the defendant authority had an obligation to seek out the requisite knowledge in all the circumstances, including cases where the defendant authority already possesses certain actual knowledge, but fails to look further. It would be a far-reaching step to impose affirmative obligations on a statutory authority merely because it could have or even ought to have known that the plaintiff was, or was a member of a class which was, likely to suffer harm of the relevant kind."

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)

40 I turn now to ***Crimmins*** . Mr Crimmins, a registered waterside worker, was employed between 1961 and 1965 by various stevedoring entities which were registered employers in the port of Melbourne. In 1997 he was diagnosed as suffering from mesothelioma caused by inhalation of asbestos fibres. During the period of his employment he was exposed to asbestos dust. He claimed damages from the successor to the liabilities and obligations of the Australian Stevedoring Industry Authority. He contended that the Authority was under a continuous duty from 1956 to 1977 in the exercise of its statutory functions, duties and powers to take reasonable care to avoid foreseeable risks of injury to his health.

Amaca Pty Ltd v The State of New South Wales [2004] NSWCA 124 (17 May 2004) (Mason P, Ipp and McColl JJA)

3. The judgments in *Pyrenees Shire Council v Day* (1998) 192 CLR 330, *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 and *Graham Barclay Oysters Pty Limited v Ryan* (2003) 211 CLR 540 refine and expand the general propositions stated by Mason J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, and adapt them to the particular circumstances of the cases concerned. In particular, the following propositions can be drawn from the judgments:

Amaca Pty Ltd v The State of New South Wales [2004] NSWCA 124 (17 May 2004) (Mason P, Ipp and McColl JJA)

144 The control exercised by the State in this case came nowhere near the extraordinary degree of control exercisable by the Authority in ***Crimmins*** . The two are not comparable. The State had no power to direct Mr Hay where to work, and did not direct Mr Hay to work in a transient and casual employment – factors regarded in ***Crimmins*** as being of great importance. Mr Hay was not working in an industry that was a "uniquely organised one" (per Callinan J in ***Graham Barclay Oysters*** at 663, [317]).

Amaca Pty Ltd v The State of New South Wales [2004] NSWCA 124 (17 May 2004) (Mason P, Ipp and McColl JJA)

18 The determination whether the State owed Mr Hay a duty of care as asserted by James Hardie depends upon a proper understanding (and the application) of the principles laid down in ***Pyrenees Shire Council v Day*** (1998) 192 CLR 330, ***Crimmins v Stevedoring Industry Finance Committee*** , ***Graham Barclay Oysters Pty Limited v Ryan*** (2003) 211 CLR 540 and other decisions dealing with the negligent performance of statutory duties.

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 -
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 -
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 -
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 -
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 -
New South Wales v Godfrey [2004] NSWCA 113 -
New South Wales v Godfrey [2004] NSWCA 113 -
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)

18. Secondly, the decision in *Bryan v Maloney* depended upon the view [30] that "the overriding requirement of a relationship of proximity represents the conceptual determinant and the unifying theme of the categories of case in which the common law of negligence recognizes the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another". It was the application of this "conceptual determinant" of proximity that was seen as both permitting and requiring the equation of the duty owed to the first owner with the duty owed to the subsequent purchaser. Decisions of the Court after *Bryan v Maloney* [31] reveal that proximity is no longer seen as the "conceptual determinant" in this area.

via

[31] *Hill v Van Erp* (1997) 188 CLR 159 at 176179 per Dawson J, 189 per Toohey J, 210 per McHugh J, 237239 per Gummow J; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 360361 [76] per Toohey J, 414 [238] per Kirby J; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 209210 [74][76] per McHugh J, 284 [281][282] per Kirby J, 302 [333] per Hayne J; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 13 [3] per Gleeson CJ, 3233 [73] , 3334 [77] per McHugh J, 56 [149] per Gummow J, 80 [222] per Kirby J, 9697 [270][274] per Hayne J ; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 275 [61] per Kirby J; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 630631 [316] per Hayne J; *Sullivan v Moody* (2001) 207 CLR 562 at 578579 [48] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ; *Tame v New South Wales* (2002) 211 CLR 317 at 355356 [104]-[107] per McHugh J, 409 [268] per Hayne J; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 583 [99] per McHugh J, 624625 [234][236] per Kirby J.

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 -
Harvey v PD [2004] NSWCA 97 (30 March 2004) (Spigelman CJ, Santow and Ipp JJA)

106 Beyond raising it as a possible argument, the trial judge did not accept the argument that the damage was relevantly "caused by" FH. I prefer the reasons I have earlier stated for that conclusion, based on the appellants' failure in **pre-test** counselling and its consequences in rendering PD in trusting FH vulnerable to FH's deceit. Vulnerability is an important factor if not a

prerequisite for the protection afforded by the law of negligence, as is made clear by a long line of High Court decisions, such as *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 24-6 , 39-41 , 43 per McHugh J and 85 per Kirby J . In particular I consider that the appellants ought not escape the consequences of their negligence by reason of FH's deceit, when it was itself not unforeseeable. I do so, applying the second limit of the test of causation adopted in *Ruddock v Taylor* [2003] NSWCA 262 at [87] . The normative question to be asked is ought the defendant be held liable for the harm sustained, to which the answer remains yes.

Harvey v PD [2004] NSWCA 97 -
Cran v State of New South Wales [2004] NSWCA 92 -
Cran v State of New South Wales [2004] NSWCA 92 -
Scott v Pedler [2004] FCAFC 67 -
Scott v Pedler [2004] FCAFC 67 -
Scott v Pedler [2004] FCAFC 67 -
Kschammer v R W Piper & Sons Pty Ltd [2003] WASCA 298 -
Orica Ltd v CGU Insurance Ltd [2003] NSWCA 331 (11 November 2003)

127. The starting point in the analysis is to identify the relevant context, for "liability" takes its meaning from context; *Crimmins v Stevedoring Industry Finance Committee* (supra) per McHugh J at 52 [137-8]. In *Crimmins* that context was legislation providing for a successor waterside authority to assume the liabilities of its predecessor. Unless the successor did take over all liabilities, including merely potential ones, those with inchoate claims at the time of succession would be left without remedy when they crystallised. There, context favoured a very wide reading of "liability" to include potential or inchoate liabilities. McHugh J explains the importance of context in these passages:

> [137] The precise meaning to be given to the word "liabilities" depends on its context. In *Tickle Industries Pty Ltd v Hann*, Barwick CJ pointed out:
>
> 'The use of the word "liable" can cause difficulty in construction because of the various senses in which the word is or has been from time to time employed. The word takes its particular significance, however, from the context in which it appears and the subject matter and evident policy of the legislation in which it is found.'
>
> This is so, even though some judges have expressed the opinion that the "ordinary or natural meaning" of the word is limited to "actual" (rather than "potential") liability
>
> [138] In some contexts, the meaning of "liabilities" will be wide enough to embrace a "contingent" or "inchoate" liability. Thus, Jowitt's Dictionary of English Law defines "liability" as:
>
> '... the condition of being actually or *potentially subject to an obligation*, either generally, as including every kind of obligation, or, in a more special sense, to denote *inchoate, future, unascertained or imperfect obligations*, as opposed to debts, the essence of which is that they are ascertained and certain. Thus when a person becomes surety for another, he makes himself liable, though it is unascertained in what obligation or debt the liability may ultimately result.' [footnotes omitted]

And at [147] he adds

> "... The case would be different if the respondent was to be liable only for **causes of action** that existed immediately before the expiration of that period. But the legislature has chosen [liability] a more ambiguous term. ..." [emphasis added]

Orica Ltd v CGU Insurance Ltd [2003] NSWCA 331 -
Orica Ltd v CGU Insurance Ltd [2003] NSWCA 331 -
Orica Ltd v CGU Insurance Ltd [2003] NSWCA 331 -
Orica Ltd v CGU Insurance Ltd [2003] NSWCA 331 -
Orica Ltd v CGU Insurance Ltd [2003] NSWCA 331 -
Orica Ltd v CGU Insurance Ltd [2003] NSWCA 331 -
Orica Ltd v CGU Insurance Ltd [2003] NSWCA 331 -
Orica Ltd v CGU Insurance Ltd [2003] NSWCA 331 -
Orica Ltd v CGU Insurance Ltd [2003] NSWCA 331 -
Orica Ltd v CGU Insurance Ltd [2003] NSWCA 331 -
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 (18 June 2003) (Spigelman CJ, Mason P and Sheller JA)

49 This approach was further explicated by Gaudron J in *Crimmins* at [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, between policy and operational decisions and between powers and duties. 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.”

Newcastle City Council v Shortland Management Services [2003] NSWCA 156 (18 June 2003) (Spigelman CJ, Mason P and Sheller JA)
Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1
Dalton v Angus

Newcastle City Council v Shortland Management Services [2003] NSWCA 156 -
Newcastle City Council v Shortland Management Services [2003] NSWCA 156 -
Newcastle City Council v Shortland Management Services [2003] NSWCA 156 -
Newcastle City Council v Shortland Management Services [2003] NSWCA 156 -
Newcastle City Council v Shortland Management Services [2003] NSWCA 156 -
Newcastle City Council v Shortland Management Services [2003] NSWCA 156 -
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 -
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 -
TNT Australia Pty Ltd v Christie [2003] NSWCA 47 -
TNT Australia Pty Ltd v Christie [2003] NSWCA 47 -
Mensinga v Director of Public Prosecutions [2003] ACTCA 1 (21 February 2003)

25. The High Court cases *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 and *Pyrenees Shire Council v Day* (1998) 192 CLR 330 were relied on extensively by the appellants in their written submissions to the Master. Those cases demonstrate different approaches by justices of the High Court in determining whether statutory bodies have a common law duty

to exercise their powers and as to the existence of a duty of care in particular (see the discussion by Professor Martin Davies "Common Law liability of statutory authorities: *Crimmins v Stevedoring Industry Finance Committee* (2000) 8 Torts LJ 133").

Mensinga v Director of Public Prosecutions [2003] ACTCA 1 -
Mensinga v Director of Public Prosecutions [2003] ACTCA 1 -
Mensinga v Director of Public Prosecutions [2003] ACTCA 1 -
Mensinga v Director of Public Prosecutions [2003] ACTCA 1 -
State of New South Wales v Napier [2002] NSWCA 402 (13 December 2002)

15. The significance of vulnerability as a factor in determining the existence of a duty of care has been emphasised in a number of different contexts. (See e.g. *Perre v Apand Pty Ltd* (1999) 198 CLR 180 esp at [104]-[105], [118], [125]-[129] ; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 esp at [100] .)

State of New South Wales v Napier [2002] NSWCA 402 (13 December 2002)

80. It is unnecessary to go further, but if it were, I would hold that the relationship between the appellants and the appellant was sufficiently analogous to that of employer and employee as to generate a commensurate duty of care, extending (in light of ***Tame***) to a duty to exercise reasonable care to protect against psychiatric injury (see my judgment in ***Seedsman*** . See also ***Tame*** at [139]-[140] per McHugh J (Diss) and ***Patrick Stevedores (No 1) Pty Ltd v Vaughan*** [2002] NSWCA 275.) The appellants had the power to direct and control the respondent (cf ***Crimmins v Stevedoring Industry Finance Committee*** (1999) 200 CLR 1); through the Centre's Governor and ACM's industries manager they supervised and approved the management activities of the respondent; and they had the right of control over the population of the Centre including correctional officers, prisoners and entrants generally. The appellants had actual knowledge of the risk of injury, the threats that had been made and the (limited) measures taken in response to them.

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 (05 December 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

94. The judgment of Gummow and Hayne JJ refers to the relevant legislation under which the Executive acted or could act [60] . In a political sense and for public law purposes, this legislation enabled the State to supervise and manage all fisheries in New South Wales and to control fisheries through the issuing of leases. However, supervision, management or control in this sense or for this purpose is different from the sorts of control that, in other cases concerning public authorities, have caused courts to hold that a duty of care existed. In *Brodie* , the legislation empowered the Council to design or construct roads and to carry out works or repairs upon them, powers that councils had frequently used. In those cases, councils had complete control over the state of the roads. They also had power to attend to any defects that would expose road users to injury. It was this combination of power, direct control and the undertaking of functions in accordance with their powers that gave rise to a duty of care. In *Crimmins* , the object of the powers vested in the Authority was to secure the expeditious, safe and efficient performance of stevedoring operations. The Authority could make whatever orders it saw fit including the regulation of stevedoring operations to encourage safe working conditions. The Authority had power to bring proceedings against any employer who did not comply with the provisions requiring safe working practices. But most important of all, the Authority had used its powers to direct waterside workers to places of work that contained reasonably foreseeable risks of injury to the workers. This last point alone was sufficient to create a duty of care although the case was not conducted on that basis. I do not regard *Pyrenees* as a "control" case. Rather it is a case where the Council came under a duty of care because it knew of the risk of harm to specific individuals, it had power to take steps to eliminate the risk and importantly, at an earlier stage, had given directions to eliminate the risk.

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 (05 December 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

314. I will put to one side for the time being the decision of this Court in *Crimmins* [291] and go to the more recent case of *Brodie v Singleton Shire Council* [292] in which this Court effectively abolished the distinction between nonfeasance and misfeasance on the part of road authorities upon which the "highway rule" was based. There, Gaudron, McHugh and Gummow JJ in adopting a test of control, said this [293] :

> "The decisions of this Court in *Sutherland Shire Council v Heyman* [294] , *Pyrenees Shire Council v Day* [295] , *Romeo v Conservation Commission (NT)* [296] and *Crimmi ns v Stevedoring Industry Finance Committee* [297] 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 [298] .
>
> It is often the case that statutory bodies which are alleged to have been negligent because they failed to exercise statutory powers have no control over the source of the risk of harm to those who suffer injury. Authorities having the control of highways are in a different position. They have physical control over the object or structure which is the source of the risk of harm. This places highway authorities in a category apart from other recipients of statutory powers."

via

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

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 (05 December 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

185. It may readily be accepted that public authorities, armed with statutory powers to compel, prevent or punish conduct, frequently exercise informal and noncoercive influence or persuasion over those persons and organisations against whom they are empowered formally to act. So much follows from the existence of an organised system of sanctions beneath which there is interaction between public authorities and industry participants. But the exercise or potential exercise of powers of supervision or persuasion of this type provides an insecure basis for a duty of care enforceable by the common law. This is so particularly where the duty allegedly is owed not to industry participants but to the ultimate consumer. That the practical content of any such duty would be elusive supports the conclusion that it does not exist [125] . As counsel for the State asked rhetorically during argument, is such a duty to be described as a duty to be persuasive, especially persuasive or successfully persuasive?

via

[125] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 13 [5] .

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 (05 December 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

225. In *Crimmins v Stevedoring Industry Finance Committee* [164] I pointed out that the first question to be decided, in considering whether the provisions of legislation are compatible with the imposition by the common law of a duty of care on individuals, is the ascertainment of whether the two forms of legal liability can co-exist. This is a problem that can arise in any area of the law, including cases having nothing whatever to do with claims for damages in negligence [165] . If, for example, it is clear that a legislature, with full constitutional powers to do so, has, in effect, completely and exhaustively covered the applicable subject matter of legal regulation, it will not be competent for a court to add to the legislative design additional and inconsistent legal duties which the court attributes to general principles of the common law. In such a case, the statutory provisions will expel the common law's capacity to so prescribe.

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Victorian WorkCover Authority v Kenman Kandy Pty Ltd & Ors [2002] VSCA 190 -
Lloyd Russell Jones v Commissioner of Main Roads [2002] WASCA 307 -
Lloyd Russell Jones v Commissioner of Main Roads [2002] WASCA 307 -
Hot Holdings Pty Ltd v Creasy [2002] HCA 51 -
Rundle v State Rail Authority of New South Wales [2002] NSWCA 354 -
Rundle v State Rail Authority of New South Wales [2002] NSWCA 354 -
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 -
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 -
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 -
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)

250. "Neighbourhood" [275] , "proximity" [276] , the socalled "tripartite" test said to be derived from Lord Bridge's speech in *Caparo Industries Plc v Dickman* [277] , "vulnerability" [278] , "general reliance" [279] are all different attempts that have been made to identify a satisfactory means of describing or defining the circumstances in which a duty of care should be found to exist. At least some of these tests have now been rejected [280] as either being insufficiently informative or being inadequate to provide coherence in this area of the law. None has proved to be an allembracing explanation for the way in which the law has developed and is developing. But despite these difficulties, what has not been rejected is a more fundamental proposition. As five members of the Court have recently held [281] , foresight of harm does *not* suffice to establish the existence of a duty of care. Or, to put the same proposition in another way, the common law does *not* provide a remedy for all who suffer negligently inflicted harm, even if the actor could reasonably foresee that carelessness may cause harm of the kind which in fact is suffered. The common law confines recovery to those to whom a duty of care is owed. That is why "the major problem for any general statement of a negligence principle [is] ... that there are large areas in which careless conduct causing injury to innocent parties is not actionable."[282]

via

[278] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; *Hill v Van Erp* (1997) 188 CLR 159 at 186 per Dawson J, 216 per McHugh J; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 372373 [116] per McHugh J, 421 [247] per Kirby J; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 194195 [13] per Gleeson CJ, 202 [42] per Gaudron J, 236 [149]-[151] per Kirby J, 328 [416] per Callinan J; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 24 [43] per Gaudron J .

Tame v New South Wales [2002] HCA 35 -
Patrick Stevedores (No 1) Pty Limited v Vaughan [2002] NSWCA 275 -
State of New South Wales v Paige [2002] NSWCA 235 (19 July 2002) (Spigelman CJ, Mason P and Giles JA)
Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1

State of New South Wales v Paige [2002] NSWCA 235 (19 July 2002) (Spigelman CJ, Mason P and Giles JA)

93 When considering the issue of coherence it is necessary to give close consideration to the statutory scheme: specifically whether a common law duty is “inconsistent” or “incompatible” with the statute and, relevantly in this case, the regulations. (See e.g. *Crimmins* at [3] , [18] , [93 at 6], [114], [203]-[213]; *Sullivan v Moody* at [60] .) However, issues of coherence may arise even if there is no direct inconsistency. It may be enough if the effect of imposing civil liability is to “distort [the] focus” of the statutory decision-making process. (*Crimmins* at [292] per Hayne J.)

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 -
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 -
Canterbury Municipal Council v Taylor [2002] NSWCA 24 -
Canterbury Municipal Council v Taylor [2002] NSWCA 24 -
Canterbury Municipal Council v Taylor [2002] NSWCA 24 -
Canterbury Municipal Council v Taylor [2002] NSWCA 24 -
Canterbury Municipal Council v Taylor [2002] NSWCA 24 -
New South Wales Land and Housing Corporation v Watkins [2002] NSWCA 19 -
Frost v Warner [2002] HCA 1 -
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 (12 December 2001)

25. In its case against the State, James Hardie submit that his Honour was wrong to find that NSW lacked governmental control over the construction of the power station at Wallerawang. On the contrary, it had the power to control the risk producing activity and its inspectors were subject to control by the State. The case was decided by his Honour prior to the High Court decision in *Crimmins v SIFC* (1999) 74 ALJR 1 and the later case of *SIFC v Gibson* [2000] NSWCA 179 in the Court of Appeal. James Hardie submits that, in accordance with *Crimmins* and *Gibson* , the knowledge of the inspectors could be imputed to the State, or at the least, it ought to have known of the dangers at Wallerawang and that this was sufficient to create a duty of care.

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 -
Re National Parks and Nature Conservation Authority [2001] WASCA 368 -
Agius v New South Wales [2001] NSWCA 371 -
Agius v New South Wales [2001] NSWCA 371 -
Sullivan v Moody [2001] HCA 59 -
Sullivan v Moody [2001] HCA 59 -
Reynolds v Katoomba RSL All Services Club Ltd [2001] NSWCA 234 (20 September 2001) (Spigelman CJ, Powell and Giles JJA)

47 The discussion of vulnerability in the judgments in *Perre v Apand* and *Crimmins* , and the authorities cited therein, place considerable emphasis on the practical inability of the injured party to take steps to protect him or her or itself, whether because of ignorance of the risk or otherwise. There was no such practical inability in the present case.

Reynolds v Katoomba RSL All Services Club Ltd [2001] NSWCA 234 -
Reynolds v Katoomba RSL All Services Club Ltd [2001] NSWCA 234 -
McDonald v State of New South Wales [2001] NSWCA 303 -
Deepcliffe Pty Ltd v Council of the City of Gold Coast [2001] QCA 342 (31 August 2001) (McMurdo P, Williams JA and Helman J,)

43. A public authority may be subject to a common law duty of care when it exercises a statutory power or performs a statutory duty with consequential damages for negligence: *Caledonian Collieries Ltd v Speirs* ,[51] *Benning v Wong* ,[52] *Sutherland Shire Council v Heyman* ,[53] *Crimmins v Stevedoring Industry Finance Committee* [54] and *Brodie v Singleton Shire Council* . [55]

Deepcliffe Pty Ltd v Council of the City of Gold Coast [2001] QCA 342 (31 August 2001) (McMurdo P, Williams JA and Helman J,)

96. Finally counsel for the appellant made extensive reference to the reasoning of the High Court in *Pyrenees Shire Council v Day* (1998) 192 CLR 330 and *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 . The members of the court in those cases revisited the

requirements of the law of negligence in general, but I can discern nothing therein which indicates that the appellants here, on the evidence, established a viable cause of action in negligence against the respondents. In particular it appears to me that the learned trial judge correctly applied *Pyrenees Shire Council v Day* and *Sutherland Shire Council v Heyman* in arriving at his conclusion.

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 -
Deepcliffe Pty Ltd v Council of the City of Gold Coast [2001] QCA 342 -
Desmond v Cullen [2001] NSWCA 238 -
Desmond v Cullen [2001] NSWCA 238 -
Brodie v Singleton Shire Council [2001] HCA 29 (31 May 2001) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

312. So, for example, to examine the way in which a highway authority (or any statutory authority) chooses to deploy its resources in performance of some or all of its various functions necessarily involves examining the choices made by that authority. Those choices may be between repairing one section of road rather than another, between building a new road rather than inspecting or repairing others, or between spending money on libraries or services for home care of the aged rather than on the roads of the municipality. How are the courts to decide whether the choice made by one authority was reasonable? What is meant, in this context, by reasonable? What kind of authority is to be taken as the benchmark? Is it relevant to know what political pressures an elected body, such as a local council, faced when it prepared its budget? Does it matter if the authority receives much of the money it spends on roads from funds provided by the federal government under State grants legislation? These are questions which lie behind the distinction which it has been sought to draw between operational and policy matters [540] . Their importance goes much deeper, however, than any such distinction. They are important questions because of the public or community nature of the functions which authorities like highway authorities perform.

via

[540] *Pyrenees* (1998) 192 CLR 330 at 393 [182] per Gummow J; *Crimmins* (1999) 200 CLR 1 at 101 [292] per Hayne 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

[260] (1999) 200 CLR 1 at 18 [25] .

Brodie v Singleton Shire Council [2001] HCA 29 (31 May 2001) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

306. Reference has been made in some cases to the reliance which a plaintiff, or a class of which the plaintiff was a member, may be supposed to have placed in a defendant taking reasonable care [536] . Reference has also been made to the plaintiff's vulnerability and incapacity to take steps to prevent injury [537] .

via

[537] *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 194 [10]-[11] per Gleeson CJ; *Crimmins* (1999) 200 CLR 1 at 2425 [44] per Gaudron J, 4243 [104] per McHugh J (with whom Gleeson CJ agreed).

Brodie v Singleton Shire Council [2001] HCA 29 (31 May 2001) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

306. Reference has been made in some cases to the reliance which a plaintiff, or a class of which the plaintiff was a member, may be supposed to have placed in a defendant taking reasonable care [536] . Reference has also been made to the plaintiff's vulnerability and incapacity to take steps to prevent injury [537] .

via

[536] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 464 per Mason J; *Pyrenees* (1998) 192 CLR 330 at 343344 [18] per Brennan CJ, 385388 [157][165] per Gummow J, 408412 [225]-[232] per Kirby J; *Crimmins* (1999) 200 CLR 1 at 2324 [42][43] per Gaudron J .

Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
O'Doherty v Birrell [2001] VSCA 44 -
Rosenberg v Percival [2001] HCA 18 -
McCann & ANOR v BUCK [2001] WASCA 78 (15 March 2001) (Kennedy, Ipp and Owen JJ)
Crimmins v Stevedoring Industry Finance Committee (2000) 74 ALJR 1
F v R

McCann & ANOR v BUCK [2001] WASCA 78 -
The Commonwealth of Australia v TransAdelaide [2001] NSWCA 52 -
The Commonwealth of Australia v TransAdelaide [2001] NSWCA 52 -
The Commonwealth of Australia v TransAdelaide [2001] NSWCA 52 -
The Commonwealth of Australia v TransAdelaide [2001] NSWCA 52 -
The Commonwealth of Australia v TransAdelaide [2001] NSWCA 52 -
The Commonwealth of Australia v TransAdelaide [2001] NSWCA 52 -
The Commonwealth of Australia v TransAdelaide [2001] NSWCA 52 -
The Commonwealth of Australia v TransAdelaide [2001] NSWCA 52 -
The Commonwealth of Australia v TransAdelaide [2001] NSWCA 52 -
Slivak v Lurgi (Australia) Pty Ltd [2001] HCA 6 -
North Sydney Municipal Council v Harrison [2001] NSWCA 4 (02 February 2001) (Powell, Beazley and Giles JJA)

75 The general nature of the Council's attack on Kuner A-DCJ's finding that there had been a breach by Council of its duty of care is disclosed by the following passage in the Council's Written Submissions:

> *"25. In determining whether a failure on the part of a statutory authority constitutes a breach of their duty, all of the circumstances of the case, including the terms of the function or power and the competing demands on the authority's resources, need to be examined (see* ***Pyrenees Shire Council v. Day*** *(1998) 192 CLR 330 at 371 per McHugh J; 394-395 per Gummow J) the relevant test in formulating a duty of care referable to a statutory authority is to formulate what a reasonable authority would have done (or not done) in all the circumstances of the case: see McHugh J in* ***Crimmins v. Stevedoring Industry Finance Committee*** *(1999) HCA 59 para. 89, 90* see also now 74 ALJR 1 , 18 ; 167 ALR 1, 23-24 .
> *26. The trial judge seems to have directed himself (para. 114 - Red 67) to the classic statement on breach of duty to be found in* ***Shirt's*** *case. However, in so doing he seems to have ignored that part of the statement where His Honour poses the balancing issue by asking what the other conflicting responsibilities, which the defendant may have, are and noting that they are to be taken into account. The trial judge seems to have overlooked this. This is notwithstanding that he had evidence on the general nature of the Council's obligations, the size and extent of them and the system which was in place to deal with them. He had no evidence generally speaking which suggested the system was inadequate. Para. 119 at Red 68 seems to involve no discussion of the kind contemplated by the test in* ***Shirt's*** *case but merely sets out a statement of findings."*

Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 372 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 372 -
Wentworth v Wentworth [2000] NSWCA 350 (15 December 2000)

Further obstacles arise from the nature of the duty alleged. It appears to take one of three forms. First, so far as the submission postulates only a duty on the part of the Crown to employ a skilled and able person, there is no finding that the Taxing Officer was not skilled and able; the finding is only that in this instance he acted so as to give an appearance of bias. Hence there is no finding of a breach of duty. Secondly, to some extent the submission alleges a breach of duty on the part of the Crown in failing to respond to the appellant's alleged complaints in 1992 and 1993. The appellant referred to *Stevens v Brodribb Saw Milling Co Pty Ltd* (1986) 160 CLR 16; *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; and *Crimmins v Stevedoring Industry Finance Committee* (1999) 74 ALJR 1 . The difficulty with this aspect of the submission is that there are no findings of fact to support the breach. Thirdly, so far as the submission urges the recognition of a non-delegable duty - a duty not merely

to employ a skilled and able person, but to ensure and guarantee a particular result, it is urging an extreme position rarely found in the common law. The liability contended for would be a duty of absolute obligation, not a duty of reasonable care. It would be a duty more extreme than the type of non-delegable duty of care recognised in *Commonwealth of Australia v Introvigne* (1982) 150 CLR 258. That liability, if contended for, would raise a serious question of legal policy. Whether or not that kind of liability should be recognised would have to be examined in properly structured and pleaded proceedings designed to establish it. The application to Santow J for costs against the Crown was not structured or pleaded in that fashion.

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 -
Jones v Bartlett [2000] HCA 56 (16 November 2000) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

172. This does not exceed the content of statutory requirements in various Australian jurisdictions [111] , many of which were enacted to overcome the perceived deficiencies of the rule in *Cavalier v Pope* . The present is not a case such as *Crimmins v Stevedoring Industry Finance Committee* [112] where the existence of a regime established by statute is essential to the formulation of a duty of care, breach of which is relied upon for an action in tort. However, the trend apparent in statute law is a relevant matter in considering the state of development of the common law [113] . In the present field, affecting the daily lives and transactions of a very large proportion of the population, the Court should be slow to hold that the content of a common law duty rises above that which has been imposed by statute in various Australian jurisdictions.

via

[112] (1999) 74 ALJR 1 ; 167 ALR 1 .

Smith v ANL Ltd [2000] HCA 58 (16 November 2000) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

15. At the time Mr Smith was injured, ANL was a body corporate established and constituted by s 7 of the *Australian Shipping Commission Act* 1956 (Cth) ("the Principal Act") under the name of the "Australian Shipping Commission" [8] . The Commissioners of the body corporate were appointed by the Governor-General (s 8) and in significant respects the discharge of its functions and the exercise of its powers were subject to the direction or control of the Minister [9] . The capital of ANL was repayable to the Commonwealth (s 28) and the Treasurer, on behalf of the Commonwealth, was empowered by s 30 to lend ANL moneys out of parliamentary appropriations for that purpose. Provision was made in s 36 for ANL not to be subject to State taxation. Clearly if Mr Smith had sued ANL forthwith, this would have been an action to which the Commonwealth was a party within the meaning of s 75(iii) of the Constitution [10] .

via

[10] *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334; *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 232 ; *Crimmins v Stevedoring Industry Finance Committee* (1999) 74 ALJR 1 at 29 [152]-[153] ; 167 ALR 1 at 38-39 .

Stevedoring Finance Committee v Henderson [2000] VSCA 216 -
Jones v Bartlett [2000] HCA 56 -
Stevedoring Finance Committee v Henderson [2000] VSCA 216 -

26 Applying *Brodribb* to the instant facts it is apparent that none of the factors enumerated by Mason J are present. There was no interdependence, in the sense explained by his Honour, between the operations of the SRA and the activities of the plaintiff cutting and dressing sleepers in the forest. There was no need for the SRA to co-ordinate the activities of the plaintiff with those of others. There was no need for the SRA to give the plaintiff directions as to when and where he was to work. All it did was to give him a specification and a quota. The plaintiff decided where he would work and when he would work, so long as he was able to produce the required quota of sleepers. The SRA did not create the risk of injury in the sense discussed by Brennan J. 27 It was unnecessary for the SRA to retain any control of the plaintiff's working system. It did not purport to do so and the system was a matter entirely under the plaintiff's own control without any hint of supervision. I cannot see how a duty of care was owed by the appellant, even of the limited nature urged by the plaintiff involving a duty to warn or to insist on the wearing of hearing protection or to test for hearing loss. In some ways the relationship demonstrated by the facts is more in the nature of vendor and purchaser of goods. The involvement of the SRA was little higher than specifying the quality and quantity of sleepers it required the plaintiff to supply. It had no involvement in the conduct of the activity by the plaintiff which caused the injury. Nor is the plaintiff's 'deemed employment' for the purposes of the *Workers Compensation Act* 1987 of any significant materiality in defining the nature of the relationship between the parties and the question of whether a duty of care arose from the circumstances of that relationship. The fiction, however, operates only for the purposes of the Act and does not affect the deemed employer's liability at common law. 28 Senior Counsel for the respondent submitted that *Brodribb* did not stand for any legal principle but was merely an illustration of the existence of a duty found on an examination of a particular factual context. In my opinion, the factors discussed by their Honours in *Brodribb*, particularly by Mason J, are of assistance in examining any particular principal /contractor factual matrix to determine the existence of a duty and its content. The factors have relevance in deciding whether a duty of care exists where the relationship is one of principal and independent contractor. 29 Reference was made to *Crimmins v Stevedoring Industry Finance Committee* (1999) 74 ALJR 1, in particular the focus of some of their Honours upon the plaintiff's vulnerability to injury by reason of the hazardous nature of the employment and his lack of ability to protect his own interest. In this respect, reference was made to the casual nature of the employment and the power of the Authority to direct waterside workers as to when and where they must work. 30 While the SRA had some knowledge of the risk, it did not direct sleeper cutters when, where and how they were to work. I do not see that the plaintiff was vulnerable in the sense discussed in *Crimmins* . 31 In examining the particular connections or relations between the parties (as per *Apand*) I am unable to see that it can be concluded that the appellant owed a duty of care to the plaintiff. The fact of the matter is that the SRA had no active involvement in the work performed by the plaintiff. It gave no directions, nor did it co-ordinate activities or organise the work. 32 Counsel for the respondent also submitted that the facts of the case were such as to make it appropriate to adopt an incremental approach to a novel category or situation, see Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 481. However, I do not see that this is a novel case which dictates an incremental approach. In any event, what is suggested on behalf of the respondent goes beyond a mere increment. It belies caution in the extension of duties of care owed by principals to independent contractors who do not fall within the indicia discussed in *Brodribb*. Such an extension would clearly have a significant effect on existing business relationships. The situation is by no means analogous to *Crimmins* , which was a novel and unique case on its facts and focussed on a failure of the statutory authority to exercise statutory powers and functions.

33 In my opinion, the appeal should be allowed with costs and the verdict and judgment entered by the District Court should be set aside. The respondent should receive a certificate under the *Suit ors' Fund Act* 1951 , if otherwise qualified.

State Rail Authority of New South Wales v Gudgeon [2000] NSWCA 165 -
State Rail Authority of New South Wales v Gudgeon [2000] NSWCA 165 -
State Rail Authority of New South Wales v Gudgeon [2000] NSWCA 165 -
City of Rockingham v Curley [2000] WASCA 202 -
City of Rockingham v Curley [2000] WASCA 202 -
City of Rockingham v Curley [2000] WASCA 202 -
Agar v Hyde [2000] HCA 41 (03 August 2000) (Gleeson CJ,Gaudron, McHugh, Gummow, Hayne and Callinan JJ)

124. The case can be sharply contrasted with *Crimmins v Stevedoring Industry Finance Committee* [84] which was decided in a context in which duties were imposed, and functions conferred by legislation upon a statutory body occupying a special, supervisory position over workers and their employees in a uniquely organised industry. But some of the questions there posed, and indeed the answers to them, serve to demonstrate how far this case is from a case in which a relevant duty of care may be established. There Gaudron J asked [85] :

> "first, whether the powers and functions conferred on the Authority are compatible with the existence of that duty; and secondly, whether there was a relationship between the Authority and Mr Crimmins of a kind that gave rise to such a duty".

Here such powers and functions as these appellants possessed were entirely voluntary and not compatible with any duty to the respondents. As Gaudron J said in *Crimmins* [86] , "[l] iability will arise in negligence in relation to [a] failure to exercise a power or function only if there is, in the circumstances, a duty to act [87] ". No such duty can be discerned here.

via

[86] (1999) 74 ALJR 1 at 6 [25] ; 167 ALR 1 at 7.

Agar v Hyde [2000] HCA 41 -
Agar v Hyde [2000] HCA 41 -
Agar v Hyde [2000] HCA 41 -
Agar v Hyde [2000] HCA 41 -
Austral Pacific Group Ltd (In liq) v Airservices Australia [2000] HCA 39 -
Agar v Hyde [2000] HCA 41 -
Agar v Hyde [2000] HCA 41 -
Bomford v Commissioner of Main Roads [2000] WASCA 187 -
Bomford v Commissioner of Main Roads [2000] WASCA 187 -
Bomford v Commissioner of Main Roads [2000] WASCA 187 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 (21 July 2000) (Mason P, Stein and Heydon JJA)
44 Such a conclusion might well have provided a short headnote for ***Crimmins*** , which was to be decided 17 months later. 45 As SIFC points out in its written submissions, his Honour's findings in relation to the Authority's duty of care were based on the following analysis of what the Authority could have done but did not do (RB 123F, 125S, 130L):

Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 (21 July 2000) (Mason P, Stein and Heydon JJA)
49 Portions of SIFC's submissions attempted to challenge the learned judge's conclusions on duty of care, by reference to alleged failure to advert to various limitations on the Authority's statutory powers (Appellant's Outline of Submission Part II pars 7ff). At times the submission was bolstered

by reference to dissenting judgments in *Crimmins* . The submissions have not been overlooked, but they merit no further attention in this judgment. In the main they depend upon pure conjecture or they constitute veiled attempts to undermine the central propositions for which *Crimmins* now stands as authority and which were correctly applied by the primary judge. 50 Another submission designed to qualify the scope of the duty as established in *Crimmins* was based upon the arbitral powers conferred upon Boards of Reference under the Waterside Workers' Award. Safety issues could be referred to a Board of Reference for settlement, with a right of appeal to the Commonwealth Conciliation and Arbitration Commission. The submission is entirely unpersuasive in light of *Crimmins* . In any event, as indicated above, it elides the worker's capacity to address safety issues through industrial action under the Award against an employer with the Authority's obligation to address them in accordance with the duty of care enunciated in *Crimmins* . The award no more qualified the Authority's duty of care than it would have qualified that of the stevedoring employers.

Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 (21 July 2000) (Mason P, Stein and Heydon JJA)

46 This analysis is entirely consonant with *Crimmins* and, for reasons developed later, provides a more than ample springboard for the conclusions as to breach, causation and apportionment.
47 It is true that there is an earlier portion of the judgment (RB 124) which describes the duty as a statutory duty. But the passage in context makes it plain that the judge was referring to a specific formulation of duty in a case regarded as inapt for analogy with the position of the Authority (***Hill v Chief Constable of West Yorkshire*** [1989] AC 53). The duty which the Authority was found to have breached was not directly a statutory one, although it stemmed from the concatenation of statutory functions and powers imposed on the Authority by the 1956 Act. The particular passage complained of cannot be read as suggesting the contrary. 48 The matter becomes crystal clear in the following summation by Judge Curtis (RB 135):

Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
Stevedoring Industry Finance Committee v Gibson [2000] NSWCA 179 -
State of New South Wales v Seedsman [2000] NSWCA 119 -
State of New South Wales v Seedsman [2000] NSWCA 119 -
Morgan v Tame [2000] NSWCA 121 -
State of New South Wales v Seedsman [2000] NSWCA 119 -
Schellenberg v Tunnel Holdings Pty Ltd [2000] HCA 18 (13 April 2000) (Gleeson Cj,gaudron, McHugh, Kirby and Hayne JJ)

101. *Basic principles of liability:* Before considering the maxim *res ipsa loquitur*, it is appropriate to state a number of general propositions, applicable to the present case, which I do not take to

be in dispute. First, it is the duty of an employer at common law to take reasonable care to avoid exposing an employee to unnecessary risk of injury [117] . That duty includes the provision of a safe system of work; a safe place of work; and proper plant, equipment and appliances. The duty is not delegable. It is personal to the employer. It extends to taking reasonable steps in accident prevention and not waiting for accidents to happen before safeguarding the health and safety of employees [118] . The concept of the employer's duty is not a static one. Although the same verbal formulae have been used in the cases, there can be no dispute that the scope of the duty expanded with every decade of the twentieth century. In part, this may reflect an interaction between the common law of negligence and the growing network of statutory duties imposed on employers for the protection of their employees [119] . In part, it may reflect increased awareness of the necessities of accident prevention and an unwillingness to tolerate the imposition of unreasonable burdens on employees injured whilst contributing to the profits of their employers. The relationship between the parties which defines the duty of care applicable in the present case was that of employer and employee. That relationship was uncontested. There was accordingly no need to invoke the maxim of *res ipsa loquitur* either to establish a duty of care or to define its general content [120] .

via

[119] *Cotogno v Lamb (No 3)* (1986) 5 NSWLR 559 at 570-572 ; *Lamb v Cotogno* (1987) 164 CLR 1 at 11-12 ; cf *Crimmins v Stevedoring Industry Finance Committee* (1999) 74 ALJR 1 at 30-31 per Gummow J; 167 ALR 1 at 40 ; Gummow, *Change and Continuity: Statute, Equity, and Federalism*, (1999) at 11-18.

Schellenberg v Tunnel Holdings Pty Ltd [2000] HCA 18 -