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TRANSLATING THE PUBLIC LAW "*MAY*" INTO THE COMMON LAW "*OUGHT*":

THE CASE FOR A UNIQUE COMMON LAW CAUSE OF ACTION FOR STATUTORY NEGLIGENCE

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Translating the public law "may" into the common law "ought": The case for a unique common law cause of action for statutory negligence

Scott Wotherspoon*

The law of negligence as it relates to public authorities that fail to exercise statutory powers to prevent harm is complex and important. This article proposes that every inquiry concerning the duty of care question should pass over a four stage analysis, one of which involves asking whether the failure to exercise the power was ultra vires or Wednesbury irrational in a public law sense. If the four stage analysis is followed, it will be possible to resolve negligence cases by reference to criteria of some specificity and in a manner which maintains coherence with an authority's public law obligations. The roots of the proposed test are orthodox and of longstanding. They can be traced from Lord Diplock's speech in Dorset Yacht Club Co Ltd v Home Office [1970] AC 1004 and Gibbs CJ's reasons in Sutherland Shire Council v Heyman (1985) 157 CLR 424.

INTRODUCTION

In Australia, public authorities and public officials administer an immense volume of legislation which influences the behaviour of private individuals and corporations. More than a decade ago a justice of the High Court observed that the degree of control exercised by public authorities over the daily conduct of individual's affairs was a consideration favouring recovery of loss sustained by careless or incompetent administration.[1]

But questions of difficulty arise where a plaintiff contends that a public authority owes a duty of care to him or her for the purposes of the law of negligence. Particular difficulties occur when an authority fails to exercise a statutory power which, if exercised, would have prevented harm or conferred a benefit on a plaintiff. This article describes whether and when a common law duty of care can be owed for failing to exercise statutory power.

After introducing in Part I the past and present control mechanisms utilised by the High Court to answer the duty of care question, Part II describes the significance of the High Court's decision in *Pyrenees Shire Council v Day* (1998) 192 CLR 330. Following *Pyrenees*, it was possible to say that a more demanding principle of liability applied to public authorities which omitted to use their statutory powers than would have been applied to private actors in similar circumstances. Part III considers the utility of the distinction traditionally drawn between misfeasance and non-feasance (or omissions and positive conduct) in relation to public authorities. Part IV focuses on the unique position of public authorities and the approach taken in England with respect to their liability for failing to exercise a statutory power. Part V considers relevant statutory modifications to the common law enacted in some States and Territories and concludes by proposing a four stage analysis to determine the question of duty which seeks coherence between an authority's public law obligations and its private law obligations. The four stage inquiry provides some insight into a unique cause of action.

PART I: THE CONTROL MECHANISMS

Over the past dozen years the High Court has discounted or disregarded the utility of ambiguous and indeterminate language that had come to characterise the duty of care control mechanisms engaged in

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[1] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [124] (Gummow J).

this branch of negligence. Notions of proximity,[2] general reliance,[3] distinctions between policy and operational decisions,[4] and the conception of the reasonable public authority,[5] did not reveal any criteria of liability that were readily intelligible. The concepts lacked normative force. One by one they were discredited. Significant shifts in authority over fairly short periods of time have been noted.[6]

Control

At present one of the more commonly invoked salient features is the concept of public authority "control". Control is emphasised as an important factor in assessing the question of duty. In *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [103], the majority (Gaudron, McHugh and Gummow JJ) said:

> [I]t 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.[7]

The concept of control has a relatively long lineage. In *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 at 391, Lord Denning MR suggested that the basis of the public authority's liability in that case was "control", a notion he said fell between "power" and "duty". This explanation was rejected by Lord Wilberforce in *Anns v Merton London Borough Council* [1978] AC 728 at 754, who said:

> I do not think that a description of the council's duty can be based ... upon merely any such factual relationship as "control" as suggested by the Court of Appeal. So to base it would be to neglect an essential factor which is that the local authority is a public body, discharging functions under statute: its powers and duties are definable in terms of public not private law. The problem which this type of action creates, is to define the circumstances in which the law should impose, over and above, or perhaps alongside, these public law powers and duties, a duty in private law towards individuals such that they may sue for damages in a civil court.

Lord Wilberforce emphasised that a public authority's liability in negligence is premised on different foundations from those of private actors. As will be seen, a public authority's liability is informed by a range of considerations that are often irrelevant to the liability of private actors. It is true that factual circumstances which can aptly be described as "control" of an individual or situation may be an important element in informing the question of foreseeability of harm. However, "control" will not do the work expected of it in relation to public authorities if all that can be said is that control arose out of the conferral of a statutory power on a public authority and the authority had knowledge[8]

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[2] See *Tame v New South Wales* (2002) 211 CLR 317 at [106]-[107] (McHugh J).

[3] Introduced by Mason J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 464; rejected in *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [19] (Brennan CJ), [157]-[165] (Gummow J); *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [307] (Hayne J).

[4] Discussed in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 442 (Gibbs J); rejected in *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [82] (Gummow J).

[5] Introduced in *Crimmins v Stevedoring Committee* (1999) 200 CLR 1 at [90] (McHugh J); criticised in *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [310] (Hayne J).

[6] *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at [65]-[67] per Gummow J.

[7] See also *Crimmins v Stevedoring Committee* (1999) 200 CLR 1 at [166] (Gummow J).

[8] In *Crimmins v Stevedoring Committee* (1999) 200 CLR 1 at [101]-[102] McHugh J mentioned the possibility of "constructive" knowledge, a term usually associated with general law land conveyancing, being relevant in determining the existence of a duty of care on the part of a public authority.

that harm was likely to follow if it failed to exercise the power in a particular way.[9] Control in this sense might be another "beguiling but deceptively simple term"[10] which has a striking capacity for inconsistent application. In *Brodie*, the majority said:

> The powers vested by the *Local Government Act* in the [public authorities] gave them a measure of control over the safety of the person or property of citizens which was significant and exclusive. In *Pyrenees Shire Council v Day* the powers of the [public authority] were in this category.[11]

But in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [94], McHugh J said: "I do not regard *Pyrenees* as a 'control' case".[12]

Statutory intention

It has also been said that liability on the part of a public authority may be precluded as a matter of assumed legislative intent.[13] Before a duty of care can be said to be owed, a statutory intention must be divined that Parliament intended to confer such a private right against the authority for its failure to exercise a power. Of course legislation constituting a public authority may expressly exclude the possibility of the authority coming under a common law liability for failure to exercise a statutory power. But where Parliament has not in terms done so, it is a serious step to effectively confer an immunity[14] on a public authority as the default position, subject to the plaintiff demonstrating that Parliament intended otherwise. After all, a public authority is a juristic person prima facie subject to the general law. There is no reason why a person suffering harm as a result of a failure to exercise a power should be saddled with the additional obligation of demonstrating that Parliament intended to provide a private right in damages against the authority. There is no such obligation imposed on a person who suffers harm in consequence of the actual exercise of a statutory power.[15]

Whilst proof of such an intention is an essential element in any cause of action for breach of statutory duty, it is not an element in an action for negligence. Unlike an authority which is obliged to discharge a statutory duty, the conferral of a statutory power is premised on the authority coming to its own view as to the manner and extent of its exercise. In *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 459 Mason J said:

> the proposition that a public authority is not liable at the suit of an individual for damages for breach of statutory duty unless the statute on its true construction manifests an intention to confer a civil cause of action has no application to the liability of an authority for breach of a common law duty of care.[16]

Unless the imposition of a private law duty of care is inconsistent with the performance by the public authority of its statutory functions or is otherwise contrary to Parliament's intention, its status as a creature of statute representing the Crown should be no impediment to the possibility of its owing a private law duty of care.

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[9] A duty arising from a public authority's "control" over an individual or situation must be distinguished from the liability that may attach to a public authority who has assumed a responsibility to advise or protect the interests of another. But an assumption of responsibility requires more than a capacity to prevent harm by the exercise of statutory powers. The assumption of responsibility involves an authority undertaking or assuming to take care for and to promote a plaintiff's interests. The fact that a public authority has the power to prevent foreseeable harm to a class of individuals does not mean that the public authority assumed a particular responsibility to protect anyone who might benefit from exercise of the power.

[10] *Hill v Van Erp* (1997) 188 CLR 159 at 229 per Gummow J.

[11] *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [140] per Gaudron, McHugh and Gummow JJ.

[12] See *Crimmins v Stevedoring Committee* (1999) 200 CLR 1 at [46] (McHugh J; with whom Gleeson CJ agreed), [227] (Kirby J), [351] (Callinan J): the public authority in that case was relevantly in a position of control; whereas Gummow J and Hayne J (at [168], [278]) took the opposite view.

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

[14] In the sense of negating a duty of care.

[15] *Caledonian Collieries Ltd v Spiers* (1957) 97 CLR 202.

[16] In *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [58] the majority (Gaudron, McHugh and Gummow JJ) said: "To say of a statute that it does not create a cause of action for breach of its norms is not necessarily to say that there is no room for the operation of the principles of negligence".

PART II: PYRENEES SHIRE COUNCIL V DAY

The 1998 decision of the High Court in *Pyrenees*[17] can now be seen to have marked a decisive turning point for the common law of Australia. In *Pyrenees*, the High Court refused to follow the actual decision of the House of Lords in *Stovin v Wise* [1996] AC 923. The High Court has since applied *Pyrenees* in two subsequent cases – *Crimmins v Stevedoring Committee* (1999) 200 CLR 1 and *Brodie*. The arguments to support an authority owing no duty of care in respect of its statutory powers are well known.[18] But they have not been accepted in Australia. It can safely be said that the holding in *Pyrenees* is part of the fabric of the Australian common law.

The facts in *Pyrenees* were straightforward. A public authority learned of a defective chimney in a property in its municipality. The defect posed a risk of fire to the present and future occupants of the subject property and to neighbouring properties and persons. The authority was endowed with a range of statutory powers "to further the evident legislative purpose of fire prevention".[19] But the statute imposed no general duty on the authority to exercise its fire prevention powers.[20] The authority took certain measures consistent with the exercise of those powers following an initial fire, but failed to take further steps to exercise its powers to prevent the harm that eventuated 21 months later when the defective chimney caused a second fire. All members of the High Court held that the authority owed a duty of care to the neighbours whose premises were destroyed by the second fire. The majority held that the authority also owed a duty of care to the occupier of the premises which housed the defective chimney itself. The reasoning of the majority in *Pyrenees* differed, and since then the High Court has been unable to express a universal principle to be applied in determining such cases.[21]

The public authority in *Pyrenees* did not have ownership or occupation of land, or the use or possession of a chattel. It may be said that the authority's liability arose because it had earlier engaged in the actual exercise of its statutory powers (that is, it had engaged in misfeasance in relation to its statutory powers[22]). But this is not a persuasive basis for the authority's liability given that 21 months had elapsed between the exercise of the statutory power and the second fire. It is difficult to say in such circumstances that a duty of care could be founded on the exercise of statutory power which had occurred almost two years before the event that caused the loss.

Moreover, as is argued in Part III, the misfeasance/non-feasance distinction should not be used as a criterion for determining when a duty of care is owed by a public authority. If the authority's liability in *Pyrenees* cannot be ascribed to misfeasance in relation to its statutory powers, then a duty of care was owed where all that could be said was that (1) the authority could foresee harm if it failed to exercise its statutory powers and (2) the authority had the capacity to avoid the harm by the exercise of those powers. In *Pyrenees* these two elements – foreseeability of harm and a capacity to avoid it - were enough to establish a duty of care.

The holding in *Pyrenees* may mean that a different, and more demanding, principle applied to public authorities armed with statutory powers than private actors. Generally speaking, foreseeability of harm and capacity to avoid it are insufficient to impose a duty of care on a private actor. Private

[17] *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

[18] First, there is the argument that liability distorts sound public policy. Secondly, there is the separation of powers argument. The legislature has delegated discretionary powers to the authority. If the court were to second-guess the exercise of these powers in a negligence action, it would be usurping the delegated legislative powers. The third is the institutional competence argument. Judges are not trained in public administration. Bilateral dispute resolution is an awkward vehicle with which to assess public policy with multilateral implications. The cost of an ad hoc transfer of public administration from public authorities to courts would be astronomical: see Feldthusen B, "Failure to Confer Discretionary Public Benefits: The case for complete negligence immunity" (1997) Tort L Rev 17 at 18-19.

[19] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [175] per Gummow J.

[20] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [16] (Brennan CJ).

[21] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [210]-[211] (Kirby J).

[22] See, eg *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [177] (Gummow J) the authority had "enter[ed] upon the exercise of statutory powers with respect to a particular subject matter", [115] (McHugh J) the authority had "entered the field"; see also at [48]-[49] (Toohey J), [252] (Kirby J).

actors are able to act selfishly. A private person is under no general duty to rescue another or prevent harm to them. In *Hargrave v Goldman* (1963) 110 CLR 40 at 66 Windeyer J said: "The law casts no duty upon a man to go to the aid of another who is in peril or distress, not caused by him."

No general duty to prevent harm

It is axiomatic that under the common law of negligence, as in contract, individuals are taken to be independent and equal actors, concerned primarily with their own self-interest. The common law seeks a balance between enforcing obligations by awarding compensation when those obligations are breached, and preserving optimum freedom for those involved in the relationship in question.[23] The entitlement to pursue self interest is what separates these common law obligations from the obligations equity imposes on a fiduciary.

The self interest paradigm of the common law is tempered by an obligation cast upon a person who undertakes some positive activity. In such a case the law of negligence requires the person to take reasonable care to avoid foreseeable harm. If he or she cannot attain the standard of a reasonable person in carrying on that activity, they should refrain from acting. As Lord Hoffmann said in *Stovin*, "If he does not have the resources to take such steps as are objectively reasonable to prevent such damages he should not undertake that activity at all".[24] But even when a party owes to another a tortious duty of care, that party is not under a duty to suppress self interest entirely.[25]

Even in the law concerning private actors there are rare exceptions to the principle that a person will not be liable for failing to act. In *Smith v Leurs* (1945) 70 CLR 256 the High Court found that a duty of care was owed by a parent to a third party to control the parent's young child in his use and possession of a shanghai. The relationship between parent and young child was an instance of a special relation which was a source of this duty.[26] *Hargrave*, discussed below, is another. In *Heyman*, Mason J referred to examples from other jurisdictions.[27]

It is not necessary to consider whether the occasions on which the court found a special relation to exist in these cases of private actors always involved an additional feature, not present in *Pyrenees*, such as custody or possession of property, a chattel or persons. Nor is it necessary to consider what other conditions which limit liability should be imposed when breach of duty is considered.[28] The bright line rule of the common law concerning private actors is that there is no duty to prevent harm to, or confer a benefit on, another. Foresight of harm and capacity to avoid it is not generally enough to establish a duty of care in a private actor to take action to prevent harm to another. In a competitive market economy, private actors are only required to curb the pursuit of their own self interest for the purposes of the law of negligence, when reasonable care in their actions or their use or possession of property etc. would prevent the infliction of reasonably foreseeable harm. They are otherwise unconstrained in the pursuit of their private interests and aspirations.

If *Pyrenees* is a case where the authority incurred liability because it failed to use its statutory powers, one can immediately see that the liability cast on the public authority in *Pyrenees* was one that

[23] *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at [71] (McHugh, Gummow, Hayne and Callinan JJ).

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

[25] Heydon JD, "Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?" in Degeling S and Edelman J (eds), *Equity and Commercial Law* (Lawbook Co, 2005) p 225-226. See also Birks PBH (ed), *Privacy and Loyalty* (Claredon Press, Oxford, 1997) p v: "Altruism in nature remains an exception. It poses a puzzle, being in prima-facie conflict with the survival of the fittest and most selfish. In human society the market economy similarly works by and large through individual's relentless pursuit of their own interest."

[26] See *Dorset Yacht Club Co Ltd v Home Office* [1970] AC 1004 at 1038H (Lord Morris), 1055F (Lord Pearson): the Borstal Officer's custody of the trainees was another example of a special relation. The special relation arose from continuing power of physical control over the trainees which was derived from statute, which put "The Borstal boys ... under the control of the defendants' officers, and control imports responsibility".

[27] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 468.

[28] One such condition, advanced by Lord Wilberforce in giving the advice of the Privy Council in *Goldman v Hargrave* [1967] 1 AC 645, was that at the level of breach, regard should be had to the skills and resources the defendant actually had at his disposal and not by some general or objective standard.

would not have been imposed on it if it was a private actor. A private actor would not have been required to spend his or her own resources protecting another from harm. In any event, the comparison between private actors and public authorities is imperfect because a private actor had no relevant power to access the defective chimney or give the owner a direction to repair it. As has been said, statutory power on the part of the authority in *Pyrenees* was an essential precondition to the existence of a duty of care. If there were no statutory power to act, there would have been nothing upon which to graft the common law duty of care. The duty could not have arisen independently of the empowering statute. A public authority without fire prevention powers would have been in no different position to any other person in the municipality.

In this sense it is perhaps something of a misnomer to describe the duty of care owed by a public authority as a common law duty. That description tends to divert attention from the primacy of the statutory regime under which the authority is constituted and the public nature of its activities. It may be more appropriate to describe the liability as one involving the statutory negligence of a public authority by omission, which had statutory powers conferred on it and ought to have foreseen that its failure to exercise those powers was likely to give rise to a risk of harm. The liability is unique to public authorities.

Part III: Misfeasance and non-feasance (or omissions and positive acts)

The common law has encouraged self-interested behaviour by excepting from a duty of care the consequences of a defendant's omissions which attract the description "mere" or "pure". It is true that there is a basic difference between causing something and failing to prevent it from happening. While the distinction may be logical and convenient in the context of private actors, its utility in relation to public authorities is more complex. Positive conduct in the exercise of a statutory power by the public authority concerning the subject matter of the risk can certainly assist in informing the question of reasonably foreseeabilty of harm.

If the public authority has actually chosen to exercise its statutory powers in a particular instance, it will often be easier to conclude, as in *Pyrenees*, that it ought reasonably to have concluded that its continued exercise of the power was necessary to avert harm. But there will be other situations, of which *Kirkland-Veenstra v Stuart* [2008] Aust Torts Reports 81-936; [2008] VSCA 32[29] is a recent example, where there was no exercise of the relevant statutory power. In that case police officers spoke to a man for 15 minutes about his recently contemplated suicide. The officers did not exercise a statutory power to apprehend him. The man's wife suffered psychiatric harm when she found his dead body later that day. The trial judge found that no duty of care was owed either to the man or his wife. The decision was reversed by majority in the Victorian Court of Appeal, who concluded that the officers had sufficient "control" over the situation to justify the imposition of a duty of care.[30]

If it is accepted that "control" is not a valuable test of liability, one is left with the misfeasance/non-feasance dichotomy. As has been said, there was no exercise of a statutory power in *Kirkland-Veenstra*. It would be perverse if the law excluded a duty of care when a public authority failed to use the powers it was given, but imposed a duty in circumstances where the authority had commenced to exercise those powers.

In *Hargrave*, the High Court held that the owner and occupier of a 600-acre grazing property had a duty to take reasonable steps to extinguish a fire started by lightning striking a tree on his land, so as to prevent it from spreading to his neighbour's land. After the owner had the burning tree cut down (which was found to be a reasonable response to the risk) he left the tree to smoulder rather than extinguish it completely. The following day a hot wind blew up and ignited the smouldering tree. The owner was held liable for the damage caused to neighbouring farms.

The High Court in *Hargrave* might have sought to justify the imposition of a duty of care on the owner by moving the area of discourse from omissions to positive conduct. The court might have done

[29] An appeal from the Victorian Court of Appeal's decision to the High Court was heard on 3, 4 December 2008 and judgment was reserved.

[30] *Kirkland-Veenstra v Stuart* [2008] Aust Torts Reports 81-936; [2008] VSCA 32 at [88] (Warren CJ), [101] (Maxwell P).

so on the basis that the owner, in cutting down the tree, had acted positively. Such a conclusion would have taken the case out of the pure omission category. But the High Court did not reason in that way. Windeyer J said

> It seems to me impossible to say that, because the respondent did something to control the fire, he incurred a liability that he would not have incurred had he done nothing. If that were the law, a man might be reluctant to try to stop a bush fire lest, if he failed in his endeavours, he should incur a liability that he would not incur if he remained passive.[31]

This is a particularly pertinent consideration for a public authority. Given their powers and resources, the law should encourage rather than discourage their socially valuable interventions. There are several additional reasons why it is preferable that the distinction between acts and omissions not be used as a determinant of duty. First, early in the development of negligence, Baron Alderson in *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781 at 784; 156 ER 1047 at 1049 recognised that negligence included omissions as well as positive conduct. This definition has endured and was recently cited by Gleeson CJ in *New South Wales v Fahy* (2007) 232 CLR 486 at [7]; 81 ALJR 1021. Secondly, the omission/positive act dichotomy is too imprecise to carry the weight of a legal rule. In *Brodie*, the majority observed that "the distinctions found in the cases are apt to provoke rather than settle litigation".[32] The conditions necessary to bring about an event always consist of a combination of acts and omissions and it may be quite accidental as to whether this positive conduct involved the exercise of a statutory power. So the categorisation could easily depend upon how broadly one looks when deciding whether the omission is a "pure" omission or is part of a larger course of positive conduct of the public authority. The facts of both *Hargrave* and *Smith* could plausibly be described as either.

The problem is exemplified by *Stovin*, a highway case in which a public authority failed to improve the condition of a dangerous intersection. In the Court of Appeal Kennedy LJ (with whom Nourse LJ agreed) found that the case was not one of pure omission because the public authority had acted positively in deciding to improve the intersection and negotiating with a third party 12 months prior to the accident. Lord Hoffmann found this reasoning unconvincing.[33] He said that one must have regard to "common sense principles of causation" and that when one did, Mr Stovin's injuries were not caused by the "negotiations between the council and British Rail or anything else which the council did". But it is not edifying to mix factual questions of causation with questions of law designed to determine whether a duty of care is owed. The "common sense" Lord Hoffmann spoke of fails to supply some criterion of sufficient specificity to ground a principle of liability. It is revealing that, despite citing widely from Windeyer J's reasons in *Hargrave*, Lord Hoffmann did not refer to Windeyer J's passage which deprecated the distinction between acts and omissions.

Hargrave and *Smith* show that vis-a-vis private actors, it is an error to seek a bright line rule in the act/omission dichotomy. That dichotomy is inappropriate when applied to public authorities, which are invariably given a range of powers to promote the public interest. It may be said that the failing in the reasoning of the majority in *Stovin* was that the act/omission distinction was the primary tool they offered for defining when a duty of care was owed by a public authority concerning the exercise of its statutory power. Following the High Court's decision in *Brodie*, it is unlikely that the same mistake will be made in Australia.

Part IV: Public Authorities

Parliament confers powers on public authorities to give them the capacity they would otherwise lack, to achieve objectives in the public interest and for the public good. Unlike the individual, there is no issue of the public authority's own self interest to be considered in determining the content of its legal obligations. Compelling a public authority to act does not impinge upon its interests in the same manner as when an individual is compelled to act. As Mason J said in *Heyman*:

[31] *Hargrave v Goldman* (1963) 110 CLR 40 at 65.

[32] *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [79]-[80].

[33] *Stovin v Wise* [1996] AC 923 at 945.

> It scarcely needs to be mentioned that the reasons which lie behind the common law's general reluctance to require an individual to take positive action for the benefit of others have no application to a public authority with power to take positive action for the protection of others by avoiding a risk of injury to them.[34]

Public authorities are faced with a range of competing interests and considerations in determining whether to exercise their statutory powers. These include budgetary constraints and the interests of other persons who are entitled to call on the public authority's assistance. Unlike a private actor, a public authority cannot readily withdraw from providing its services. To do so would be inconsistent with its public responsibilities.[35]

To some extent the disparate demands placed on a public authority are presently taken into account when questions of duty and breach are considered, under the well known "conflicting responsibilities" principle.[36] But where, as in *Pyrenees* and *Kirkland-Veenstra*, there are no conflicting responsibilities owed to others which preclude the exercise of the power, nor any question of budgetary constraints raised, the question remains what test should be applied to determine when a duty of care is owed by a public authority which fails to exercise a statutory power to avert reasonably foreseeable harm to others. The House of Lords decision in *East Suffolk River Catchment Board v Kent* (1941) AC 74 provides one approach.

East Suffolk Rivers Catchment Board v Kent

In *East Suffolk* Lord Romer said (at 102):

> where a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power.

The case was applied by McTiernan and Kitto JJ in *Administration of Papua & New Guinea v Leahy* (1961) 105 CLR 652, and Lord Romer's passage was cited with approval by Brennan J in *Heyman*.[37] The ratio of the case was applied by his Honour in allowing the public authority's appeal against the decision below that it had been negligent.[38] However, in *Heyman*, Brennan J was the only member of the *Heyman* High Court to "adhere to such uncompromising orthodoxy".[39] It is noteworthy that 13 years later Brennan CJ was one of the majority in *Pyrenees*.

Returning to the facts of the *East Suffolk case* itself, the plaintiffs held interests in marsh land on a river close to its estuary, which was used for farming. About 50 acres had been flooded in a tidal storm. The storm had damaged a sea wall owned by one of the plaintiffs. At each high tide salt water came into the pasture, causing damage to the land. The plaintiffs immediately notified the East Suffolk Rivers Catchment Board about the breach in the wall. The statute under which the Board was constituted gave it a statutory power to to keep the plaintiff's wall in good and effective repair. The following day officers from the Board undertook the task of repairing the breach in the wall, together with about 30 other breaches which had occurred in the area.

The Board exercised its statutory powers, but did so carelessly. It took 178 days to repair the wall. The trial judge found that a competent authority would have repaired the wall within 14 days and thereby relieved the plaintiffs of the adverse consequences of the daily tidal flooding much sooner than it did. The plaintiffs succeeded at first instance in obtaining an order for an inquiry as to the extent of damage incurred to the plaintiffs' land and farming products in consequence of the Board's negligent exercise of its statutory powers. By majority, the Court of Appeal affirmed the trial judge's decision.

The Board's appeal to the House of Lords was, by majority, successful. Each of the Law Lords agreed that, having commenced to exercise the power, the Board owed a duty of care to the plaintiffs.

[34] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 468.

[35] *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [295] (Hayne J).

[36] *Sullivan v Moody* (2001) 207 CLR 562 (duty); *New South Wales v Fahy* (2007) 232 CLR 486; 81 ALJR 1021 (breach).

[37] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 483.

[38] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 489.

[39] *Stovin v Wise* [1996] AC 923 at 951 per Lord Hoffmann.

But the difference in the content of the postulated duty lay in the nature of the damage that the Board was expected to protect the plaintiffs from suffering. Viscount Simon LC said that the Board was only duty bound to avoid causing "fresh injury" to the plaintiffs' land and interests.[40] Lord Romer was more sophisticated in his analysis. As has been noted, his Lordship said first that a statutory authority entrusted with a mere power could not be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power. Lord Romer then reasoned:

> If in the exercise of their discretion they embark upon an execution of the power, the only duty they owe to any member of the public is not thereby to add to the damages that he would have suffered had they done nothing.[41]

Essential to the reasoning of the majority was that a public authority had no obligation to confer a benefit on a private individual by the exercise of a statutory power.[42] Lord Romer said that if the public authority had no obligation to consider the exercise of its statutory powers in order to confer a benefit or prevent harm, the public authority could delay exercising its powers or even commence to exercise them and then withdraw without liability. It was then a short step to conclude that the Board was not liable for the "harm" suffered by the plaintiffs by reason of their being kept from their land for some five months.

East Suffolk bears the mark of its time. It has recently been said that the case placed the law on "solid foundations".[43] It did no such thing. The approaches of Viscount Simon LC and Lord Romer require a court to construct a test, after the event, and assess the nature of the damage caused by the public authority's intervention. Only if it can be said that the public authority intervention has added to a plaintiff's damage will the plaintiff have a cause of action in negligence. Under this test much will turn on the nature of the harm suffered.

There are several criticisms that can be made of this reasoning. First, such a test is inconsistent with the forward looking nature of the reasonable foresight test advocated in Australia. Secondly, the test is inconsistent with the principle that, at the duty stage, the court is to have regard to the general nature of the damage likely to be incurred by reason of the defendant's act or omission. Thirdly, success in the litigation is determined by the arbitrary and artificial circumstance that "fresh injury" has been caused by the authority's intervention. Finally, and perhaps most importantly, it is impossible to reconcile the holding in *East Suffolk* with the holding in *Pyrenees*. In *Pyrenees* no "fresh injury" or "additional damage" was caused by the authority. Nothing was done by the authority to create or increase the risk of harm.[44] The authority simply had knowledge of a risk of harm arising in its municipality and had the power to prevent it. The particular negligence alleged against the authority in *Pyrenees* was an omission to exercise or inadequate exercise of its powers in relation to what it knew was a dangerous situation.[45] But that was enough to sustain a duty of care on the part of the authority. Had the holding of *East Suffolk* been applied by the High Court in *Pyrenees*, the public authority's appeal would have been successful and the plaintiffs' claims would have failed.

East Suffolk can be seen as an early, but unsatisfactory, attempt to articulate a restrictive test of liability in negligence of public authorities exercising statutory powers. It is difficult to disagree with the statement of Mason J in *Heyman* that "the reasoning of the majority in *East Suffolk* should no

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[40] *East Suffolk River Catchment Board v Kent* (1941) AC 74 at 88.

[41] *East Suffolk River Catchment Board v Kent* (1941) AC 74 at 102.

[42] *East Suffolk River Catchment Board v Kent* (1941) AC 74 at 85: Viscount Simon LC said the Board could have abandoned their efforts to repair the breach altogether or withdrawn from the area with impunity, even though the result might have been to leave the plaintiffs land indefinitely flooded. Viscount Simon said that this entitlement showed "how different is the relation between the catchment board and individual owners or occupiers, and the relation between a contractor employed by the respondents to mend the wall":

[43] Stevens R, *Torts and Rights* (Oxford University Press, 2007) p 221.

[44] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [65] (Toohey J), [98] (McHugh J).

[45] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [133] (Gummow J).

longer be accepted".[46] Lord Romer's statement in *East Suffolk* that an authority cannot be made liable for harm sustained by reason of a failure to exercise a statutory power should no longer be followed in Australia.

So far "control", the "misfeasance/non-feasance" dichotomy, as well as the "no liability in a public authority for failing to confer a benefit" rule established in *East Suffolk*, have been criticised for failing to offer a path for the principled development of the common law. It now remains to describe a control mechanism which can take its place alongside reasonable foreseeability of harm and power to avoid that harm which will provide a coherent principle upon which to erect a duty of care and explain *Pyrenees*. As it happens, the solution was given in Australia by Gibbs CJ almost 25 years ago.

PART V: GIBBS CJ IN SUTHERLAND SHIRE COUNCIL V HEYMAN

In *Heyman*, Gibbs CJ (with whom Wilson J agreed) was the only judge to have found that a duty of care was owed by the public authority. His Honour said:

> Long before the decisions in *Dorset Yacht Co v Home Office* and *Anns v Merton London Borough Council* the law recognized that persons acting under statutory powers (as well as persons performing statutory duties) might at common law be under a duty of care towards persons likely to suffer damage as a result of their carelessness. What was thought, however, until *Anns v Merton London Borough Council* decided the contrary, was that "where a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power": per Lord Romer in *East Suffolk Rivers Catchment Board v Kent*.[47]

Gibbs CJ continued:

> Once it is accepted, as it must be, that the ordinary principles of the law of negligence apply to public authorities, it follows that they are liable for damage caused by a negligent failure to act when they are under a duty to act, or for a negligent failure to consider whether to exercise a power conferred on them with the intention that it should be exercised if and when the public interest requires it.[48]

For the first time in Australia it was recognised that, in effect, a private law duty of care could be owed with respect to a public authority's consideration of its statutory powers. In *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [311] Callinan J recognised that Gibbs CJ's statement was "potentially far-reaching". His Honour noted (at [312]) that it "had not been adopted or applied in this Court since *Sutherland*". Whilst it is correct that it has not been adopted or applied, Hayne J referred to Gibbs CJ's statement in *Brodie*,[49] and proceeded to ask: "when and why should a duty to act be found?" For Hayne J the answer lay in finding analogous situations where the authority, if a private person, would owe a duty of care and then considering whether a duty of care was consistent with the fact that authorities "are bodies of finite financial resources, yet they cannot readily withdraw from their central activity of performing particular functions or providing particular services".[50]

The approach proposed in this article seeks to align an authority's private law obligations with its public law obligations. Unless an omission is ultra vires in a public law sense, the authority's conduct is lawful and should not be open to question in a civil court. As Hayne J said in *Brodie*, in public law there is no general right to review the merits of decisions of public authorities:

> The closest the courts come to such a review is what is usually called *Wednesbury* unreasonableness (*Associated Provincial Picture House Ltd v Wednesbury Corp* [1948] 1 KB 223) where the test is whether the decision is so unreasonable that no reasonable decision-maker could have made it. What the

[46] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 470.

[47] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 436-437.

[48] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 445.

[49] *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [288].

[50] *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [295].

> *Wednesbury* test reflects is that the courts are not well placed to review decisions made by such bodies when, as is often the case, the decisions are made in the light of conflicting pressures including political and financial pressures.[51]

Wednesbury unreasonableness is often equated with irrationality.[52] In applying *Wednesbury* unreasonableness, the court does not decide what a reasonable public authority would do, but only what no reasonable public authority could do.[53] A court cannot hold that a public authority's decision to decline to exercise a power or not to consider its exercise was unlawful just because the court does not agree with it. When a court is required to consider the failure to exercise a statutory power – whether it be in proceedings seeking judicial review or in a common law action for damages – the reasonableness of its exercise does not depend upon the views which the judge would attribute to the man on the Clapham omnibus, or some other legal incarnation of reasonableness such as the reasonable public authority. It depends upon whether the authority's omission was ultra vires, or unreasonable in the *Wednesbury* sense. It has been said that, applied literally, the *Wednesbury* test is "so stringent that unreasonable decisions in this sense are likely to be a very rare occurrence in real life".[54] Whether or not this will be so will depend upon the facts of the particular case. But the application of *Wednesbury* unreasonableness is an appropriate limitation, or control mechanism, given the undemanding nature of other elements that determine the existence of a duty of care on the part of public authorities.

The calling up of public law principles in determining whether a duty of care is owed to exercise the power or consider its exercise seems clear by Gibbs CJ's reference to *Dorset Yacht Club Co Ltd v Home Office* [1970] AC 1004. This case involved the exercise of the Borstal officers' statutory powers to detain and reform wayward youths. The officers exercised their powers by bringing the youths onto an island, where they constituted a foreseeable risk to boat owners in the vicinity who might suffer damage if the youths endeavoured to escape. Lord Diplock described the process of reasoning to be adopted in determining whether a duty of care was owed by the Borstal officers. He said (at 1068):

> In a civil action which calls in question an act or omission of a subordinate officer of the Home Office on the ground that he has been "negligent" in his custody and control of a Borstal trainee who has caused damage to another person the initial inquiry should be whether or not the act or omission was ultra vires.[55]

Since Gibbs CJ's decision in *Heyman*, the only member of the High Court to accept the public law overlay advanced by Lord Diplock has been Brennan CJ in *Pyrenees*.[56] For Brennan CJ, the failure of the authority to exercise its statutory powers of fire prevention was not rational. The public law consequence of that finding was that the authority's failure to exercise its powers would have been amenable to judicial review. The private law consequence of his finding was that the authority came under a duty of care to consider exercising its statutory powers with respect to those persons who

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[51] *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [310].

[52] "Irrationality" was the word adopted by Lord Hoffmann in *Stovin v Wise* [1996] 923 at 957. In *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [22], Brennan CJ said that if an authority's decision not to exercise a statutory power was a rational decision, there could be no duty imposed by the common law to exercise the power.

[53] Cane P, *Administrative Law* (4th ed, Oxford University Press, 2004) p 250.

[54] Cane P, n 53, p 250.

[55] The application of public law concepts of ultra vires to a private law action for trespass to the person occurred in the 1984 House of Lord's decision of *Holgate-Mohammed v Duke* [1984] AC 437. In that case the House of Lords considered that in litigation concerning the exercise of a police officer's statutory power of arrest, be it for in proceedings seeking judicial review or in a common law action for damages, the reasonableness of its exercise depended upon the application of *Wednesbury* principles.

[56] No other member of the High Court has approved it, and McHugh J in *Crimmins v Stevedoring Committee* (1999) 200 CLR 1 at [82] and perhaps also Mason J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 465 have rejected it.

might foreseeably be harmed by the failure to exercise the power. Brennan CJ said: "The measure of the duty owed to members of the relevant class is no greater that the measure of the public law duty to exercise the power."[57]

Relying on the statements of Gibbs CJ in *Heyman* and Brennan CJ in *Pyrenees*, it can be said that if a public authority's failure to exercise a power is ultra vires in a public law sense, then the authority's omission is unlawful. The unlawfulness of the omission in public law provides the basis of its actionability in private law. Unlawfulness provides the justification for imposing a common law duty of care on the authority towards a class of persons who may be foreseeably harmed by the authority's omission.

In October 2002, the Ipp Committee recommended the adoption of the *Wednesbury* principle in certain instances of public authority negligence.[58] That recommendation was implemented in different ways in some of the States and Territories. For example, s 43A(3) of the *Civil Liability Act 2002* (NSW) provides:

> For the purposes of any [proceedings for civil liability in tort, other than torts arising in respect of intentional acts intended to cause injury], any act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.[59]

The special statutory power referred to in s 43A(3) is defined as a statutory power which persons generally are not authorised to exercise without specific statutory authority.[60]

Section 44 of the *Civil Liability Act 2002* (NSW) provides a further immunity in civil proceedings for public authorities. Authorities who fail to exercise, or to consider exercising, any power to prohibit or regulate an activity are immune from civil suit unless the person affected by the failure would have been able to successfully seek judicial review of the authority's decision.

The Ipp Committee recommendations concerning public authorities and the ultra vires exercise of power were not implemented throughout Australia. South Australia and the Northern Territory did not relevantly adopt the Ipp Committee recommendations in any form. Victoria[61] and Western Australia[62] did modify the common law by legislation following the Ipp Committee recommendations, although no equivalents to ss 43A and 44 of the *Civil Liability Act 2002* (NSW) were enacted. Tasmania[63] and the Australian Capital Territory[64] have no s 43A equivalent, although they have each passed a provision comparable to s 44. Queensland[65] has enacted a provision somewhat comparable with s 43A of the New South Wales Act, but has no s 44 equivalent.

Irrespective of the manner and extent of a State legislature's intervention, an understanding of the common law as discussed in this article remains critical, if only to appreciate the mischief each State's and Territory's legislation is seeking to address. In those jurisdictions where the common law has been

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[57] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [27] per Brennan CJ. See also *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at [18] (Brennan CJ).

[58] Commonwealth of Australia, *Review of the Law of Negligence: Final Report*, Canberra, 2002 (Ipp Review Committee Report) p 157.

[59] Section 43A of was inserted into the principal Act by the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW).

[60] For a discussion of *Civil Liability Act* (NSW), s 43A, see Watson GS, "Section 43A of the Civil Liability Act 2002 (NSW): Public Law Styled Immunity for the Negligence of Public and Other Authorities?" (2007) 15 *Tort Law Journal* 153.

[61] See generally *Wrongs Act 1958* (Vic), Pt XII.

[62] See generally *Civil Liability Act 2002* (WA), Pt 1C.

[63] See *Civil Liability Act 2002* (Tas), s 41.

[64] See *Civil Law (Wrongs) Act 2002* (ACT), s 112.

[65] *Civil Liability Act 2003* (Qld), s 36.

preserved,[66] an appreciation of the implications of Gibbs CJ's statement in *Heyman* is especially pressing. But even in New South Wales the legislature has not sought to enact a comprehensive code concerning a public authority's liability. Rather, it has sought by enactment to repair the failings of the common law as they were perceived to be. The common law has not been wholly excluded. For instance, s 3A(1) of the *Civil Liability Act 2002* (NSW) provides that that Act does not limit the protection of public authorities from civil liability given by other laws.

If the arguments advanced in this article are accepted, the common law properly understood already requires consideration of ultra vires and *Wednesbury* unreasonableness in determining whether a private law duty of care is owed by a public authority which fails to exercise statutory power to prevent foreseeable harm. This conclusion may have the effect of rendering the legislative modifications adopted in certain of the States and Territories somewhat otiose.

It is appropriate now to describe a methodology to determine when a public authority can be said to owe a common law duty of care with respect to its failure to exercise statutory powers. That methodology should incorporate existing integers of duty, such as relevant legislative intention and reasonable foresight that the omission would give rise to a risk of harm. These concepts are long established and relatively stable, and provide informative markers in determining the duty question. But on their own they fail to accommodate the conflicting financial and political pressures public authorities are subject to. In these circumstances it is critical to have regard to the public law concept of ultra vires, and in particular *Wednesbury* unreasonableness, in determining whether an authority's omission is actionable in negligence.

In my opinion a four-step analysis should be undertaken in determining the duty question in relation to public authorities:

(1) did the public authority have a statutory power to prevent the harm which eventuated?
(2) should the authority have foreseen the likelihood of harm if it failed to exercise the power?
(3) was the failure to exercise the power, or consider its exercise, ultra vires or irrational in a public law sense? and
(4) is the putative duty of care inconsistent with the performance of the authority of its statutory functions or otherwise contrary to Parliament's intention?

Elements (1), (2) and (4) are drawn from existing authorities and are not controversial.[67] Element (3) draws on the reasoning of Gibbs CJ in *Heyman* and Brennan CJ in *Pyrenees*, as considered in this Part. I believe that the four-step analysis should be followed because it identifies the integers of duty in a clear and sequential fashion. The four-step analysis isolates the ultra vires element from the other elements and its separate consideration will assist in emphasising the unique position of public authorities in the law of negligence.

It would be under the third element that a court would consider the inconsistent duties doctrine, questions of resource allocation, compliance with applicable procedures and standards and the range of other salient features such as a plaintiff's vulnerability and the authority's physical or practical "control" over the situation.[68]

The analysis proposed in this article may assist in conferring coherence between a public authority's public law obligations to act in particular circumstances and its private law obligations to pay damages when its failure to act has caused harm. An example will help illustrate the point. Suppose there is a public authority with statutory powers of management and control of vehicles and pedestrians on bridges in a particular locality. Suppose also that one such bridge is regularly used by

[66] The ACT, NT, Vic, WA, SA, Tas and Qld continue to rely primarily or exclusively on the common law. In Victoria eg, *Wrongs Act 1958* (Vic), s 82 expressly preserves the common law relating to the negligence liability of public authorities except as it has been modified by the Act.

[67] For element (1) see *Pyrenees Shire Council v Day* (1998) 192 CLR 330; for element (2) see *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; for element (4) see *Crimmins v Stevedoring Committee* (1999) 200 CLR 1.

[68] *Civil Liability Act 2002* (NSW), s 42; *Wrongs Act 1958* (Vic), s 83; *Civil Liability Act 2003* (Qld), s 35; *Civil Liability Act2002* (WA), s 5W; *Civil Liability Act 2002* (Tas), s 38; *Civil Law (Wrongs) Act 2002* (ACT), s 110, all require courts to consider certain of these matters "in determining whether a public authority has a duty of care or has breached a duty of care".

pedestrians as a platform from which to attempt suicide by jumping into the water below, and that nearby residents have suffered psychiatric harm as a result of observing the attempts and their aftermath. If, following the issue of a prerogative writ of mandamus, the residents were unsuccessful in their attempts to have the public authority reconsider the use of its powers so as to close the bridge, or erect fences, or engage guards etc, then it would be incoherent if the law permitted those same residents to successfully bring an action in negligence for failing to exercise its statutory power to close the bridge, etc and thereby prevent the residents from suffering foreseeable psychiatric harm.

A question arises as to whether the ultra vires inquiry in element (3) should be considered as part of the duty of care inquiry, or at the breach stage. Lord Diplock in *Dorset Yacht Club* considered the issue at the duty stage.[69] Gibbs CJ in *Heyman* considered it as part of breach.[70] In my opinion it should be considered at the duty stage, given that the consideration by a court as to whether a public authority has acted ultra vires is a question of law. In *Brodie*, Hayne J said that being a question of law "suggests that deciding how those decisions are to be examined in an action for negligence is a question about duty of care, not a factual and evidentiary question about breach".[71]

The question whether a duty of care is owed is itself an important control mechanism on liability in negligence. Considering the question of ultra vires as part of duty avoids the tendency toward hindsight bias associated with consideration of breach.[72] It also avoids the court approaching the question of breach from the position that, ex hypothesi, the public authority has been found to owe the person harmed a duty of care with respect to its consideration of its statutory powers. A further reason for considering the ultra vires question as part of duty is that the existing formulations with respect to breach of duty are settled. In *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 Mason J said:

> In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.

The continuing authority of Mason J's statement of principle in *Shirt* would be undermined if the question of ultra vires was to be considered at the breach stage.

The inquiry concerning breach of duty is a question of fact.[73] The same factual matters leading a court to conclude at the duty stage that an authority's failure to exercise power was irrational will also be relevant in determining whether there has been a breach of duty. In this sense the circumstances sustaining the irrationality finding at the duty stage will be applied again when an assessment of breach is made, albeit in the context of a broader factual inquiry necessitated by *Shirt*. There is nothing illogical in this approach. Factual matters going to reasonable foreseeability of the risk of harm inform three elements of the tort of negligence: duty, breach and remoteness of damage. The critical point is that any inquiry into a public authority's alleged negligence address each element of the tort in a coherent and principled fashion.

CONCLUSION

The circumstances in which a duty of care might arise in a public authority are so diverse that it may be unwise to be too dogmatic about any hard and fast rules in this area. Courts will be called on to

[69] *Dorset Yacht Club Co Ltd v Home Office* [1970] AC 1004 at 1068F.

[70] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 447-449. The Ipp Committee also seemed to consider that the ultra vires inquiry be undertaken at the breach stage, saying that "The effect of the [*Wednesbury* unreasonableness] test is to lower the standard of care." Ipp Review Committee Report, n 58, p 157.

[71] *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [310]

[72] *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at [79], [105], [126], [160].

[73] *Roads Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330 at [65] (Gummow J).

consider legislative and factual circumstances of almost infinite variety. And there is not, as Mason J pointed out in *Heyman*,[74] a complete identity between a public authority's public law obligations – enforceable by one of the prerogative writs such as mandamus– and its private law obligations. Mandamus requires the future consideration of the exercise of a power, whereas an action for negligence looks to what the authority ought to have done after the harm has been suffered.

But if the four elements set out in Part V above are satisfied, then there will at least be a certain level of consistency between the two branches of public and private law insofar as it is sought to impose a common law duty of care on a public authority for failing to exercise a statutory power. If an authority's failure to exercise a statutory power was so unreasonable that it acted as no reasonable authority could have done, the authority's omission would be actionable where the failure to act has foreseeably caused harm. Conversely, if an authority's omission was not irrational, the authority's conduct could not be challenged in a civil court because the failure to act would not have been unlawful.

The four-step approach, in my opinion, is basic and transparent, and would confer greater coherence upon a difficult branch of private law. Legal advice to commence, settle or avoid civil litigation involving public authorities could be given by reference to criteria of some specificity, or at any rate by reference to criteria that have existed in the public law for more than 60 years.

[74] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 465.