government or council or public authority, the claimant may well succeed in an action in tort for misfeasance in public office.

There may also be remedies under the Fair Trading Acts or equivalent in various jurisdictions and the principle of misfeasance in public office could extend to employees of the Principal such as the Superintendent.

- Philip Davenport

Negligence - Local Authority - Duty of Care
Egger v Gosford Shire Council, unreported decision of New South Wales Court of Appeal, 10 March, 1989.

This case involved the plaintiff claiming negligence against the local council arising from the destruction of her beach-front house following a severe storm. In 1968, the Council had approved the plaintiff's Development Application to erect a three storey building on the frontal dune of an ocean beach. Storm activity and wave action threatened the safety of the building, resulting in the owner carrying out emergency protection works in 1974. The emergency works, being the erection of a sea wall, were allowed to remain until a severe storm of 20 June, 1978 eroded the sand dune to such an extent that the house collapsed. The trial judge was satisfied that the protection works had interacted with the waves, resulting in additional erosion in the area of the house and leading to its destruction and that it would not have collapsed but for the sea wall.

The plaintiff claimed the Council was negligent in having given approval to build the house in 1968, in 1974 when it acquiesced to the protection works and in allowing emergency works to remain until the catastrophy in 1978 occurred.

The Court unanimously held that, assuming a duty of care existed, the danger to the plaintiff's property was not reasonably foreseeable and hence there was no breach of duty. One member of the appellate Court, Mr Justice Clarke, held that the Council was not under any relevant duty of care toward the plaintiff in respect either of its acts or its failure to take action.

Perhaps the most useful aspect of the case is the discussion by Clarke J. concerning the duty of care concept. His Honour traced its development both here and in England since Lord Atkins famous judgment in *Donaghue v Stephenson* more than fifty years ago. Mr Justice Clarke noted that although the approaches in England and Australia may differ in relation to the test to be applied in determining whether the requisite proximity of relationship has been established, the proposition that a duty of care will only arise in the event that the dual tests of foreseeability and proximity are satisfied has been accepted in both countries. The proximity concept is then examined including the criticism it has attracted from Mr Justice Brennan in the High Court cases of *Sutherland Shire Council v Heyman* 157 CLR 4244 and *Hawkins v Clayton* 62 ALJR 240.

His Honour then formulated the following proposition in approaching the question of whether a duty of care exists:

1. A duty of care will not be found to arise unless the requisite proximity is established.
2. In determining whether proximity is established it is necessary to have regard to the processes of induction and deduction (referred to by Lord Diplock in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 and Deane J. in *Sutherland Shire Council v Heyman)* and where necessary to have recourse to notions of what is fair and reasonable considerations of public policy.
3. The first step, however, is to analyse earlier authorities and to search for the answer by the ordinary process of legal reasoning. If the application of those processes to the available body of case law provides the answer then there is no need to go further. If, however, they do not then it is necessary to have recourse to notions of fairness, justice and reasonableness and considerations of public policy.

- John Buttner, Senior Associate, Feez Ruthning, Solicitiors, Brisbane.
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Rejection of a Referee's Report
Xuereb & Anor v Viola & Ors 27 November 1989, Supreme Court of New South Wales, Commercial Division No 11404 of 1984, Cole J.

This case concerned the rejection of a report prepared by a Referee appointed pursuant to Part 72 of the NSW Supreme Court rules.

The plaintiffs, Antonio and Carmella Xuereb, were the owners of land upon which a dam was constructed. The defendants were the occupiers of an adjacent property, upon which there existed a small dam downstream from but near to the plaintiffs' dam.

As a result of work done in enlarging the Viola dam, the plaintiffs alleged loss of support to the Xuereb dam, resulting in loss of water from the Xuereb dam requiring remedial works. The plaintiffs claimed the cost of carrying out this remedial work of some $25,000 plus a further amount of $20,000 being the estimated cost of further remedial works required.

In 1983, an action was brought in Equity seeking a mandatory order that Viola carry out rectification work to the Xuereb dam. Pursuant to an application, the action was transferred to the Construction List in the New South Wales Supreme Court late in 1989. An order was made by consent pursuant to Part 72, Rule 2 referring various technical questions to Professor J M Antill for enquiry and report. Part 72, Rule 8(2), subject to the direction of the Court, permits the Referee to conduct proceedings under the reference in such manner as he or she thinks fit, and further that the Referee is not bound by the rules of