

THE LIABILITY OF A PUBLIC AUTHORITY FOR THE FAILURE TO CARRY OUT A CAREFUL EXERCISE OF ITS STATUTORY POWERS: THE SIGNIFICANCE OF THE HIGH COURT'S DECISION IN *SUTHERLAND SHIRE COUNCIL v HEYMAN*

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INTRODUCTION

Since the decision of the High Court of Australia in *Sutherland Shire Council v Heyman*¹, general principles apply to determine the negligence liability of Australian public authorities. The High Court's decision means that liability for the failure to protect a plaintiff by carrying out a careful exercise of statutory powers depends upon the existence of a common law duty to perform that function. This has not always been the case. While the common law liability of public authorities for the negligent infliction of harm was established in the nineteenth century, difficulties arose in cases where the public authority merely failed to take adequate steps to protect the plaintiff. The courts focused on the discretionary nature of the authority's powers and the public character of the defendant. The result was the emergence of a special liability and the use of public law concepts to determine the actionability of a public authority's negligence.

The High Court of Australia in *Heyman* rejected previous authority and applied general principles to determine the defendant Council's liability. This paper assesses the significance of the High Court's decision. After detailing the facts of the case and a brief outline of the decision, the High Court's reasoning will be examined in light of earlier English cases, particularly the landmark decision of the House of Lords in *Anns v Merton London Borough Council*.² The High Court's decision as a statement of the liability of public authorities for negligence will then be analysed. Finally, the High Court's decision in *Heyman* will be considered in the light of developments in other common law jurisdictions since *Anns*.

HEYMAN — THE FACTS AND THE DECISION

The defendant Council was, by virtue of the *Local Government Act 1919* (NSW), entrusted with responsibility for building operations in the Shire of Sutherland. The Act required buildings to be erected to the satisfaction of the Council and in conformity with the Act and ordinances and the approved

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¹ (1985) 157 CLR 424. Hereafter cited as *Heyman*.

² [1978] AC 728. Hereafter cited as *Anns*.

plan and specifications.³ The Act and ordinances equipped the Council with powers to ensure compliance with these standards.⁴ Provision was also made in s 317A, for the furnishing of a certificate to the effect that, in the Council's opinion, a building complied with the relevant requirements.

In 1975, without having sought a s 317A certificate, the plaintiffs purchased a house in the Shire of Sutherland. The house had been constructed on inadequate footings which, through subsidence, eventually caused structural damage. By January 1976, cracked walls, distorted floor beams and leaks were apparent. The plaintiffs, having incurred expenses in carrying out remedial work and repairing the damage, sought to recover the cost of their expenditure from the Council. The Council had granted approval for the construction of the house in September, 1968. This approval was made subject to conditions designed to give the Council the opportunity to inspect the work at various stages of the construction process, including the stage when the foundation trenches were open, before the foundations were laid.

Although there was no direct evidence of an inspection at that stage, the trial judge, Robson DCJ inferred that a Council officer had inspected the trenches before the foundations were laid. On this basis, it was held that the Council was liable for the failure to detect the inadequacies. The New South Wales Court of Appeal, however, decided that the conclusion that there had been an inspection before the foundations were laid was not justified.⁵ There was evidence of only one inspection having taken place and that was on 3rd December 1969, upon completion of the framework.⁶ Nevertheless, the Court of Appeal upheld the finding of liability in the court below. Following the decision of the House of Lords in *Anns*, Hope and Reynolds JJA⁷ held that the Council had been negligent either in inspecting the foundations or failing to do so on 3rd December 1969.⁸ The Council appealed to the High Court.

The High Court, for differing reasons, unanimously allowed the appeal and held the Council not liable for the plaintiffs' loss. The Court divided on the question whether the Council owed a duty to the plaintiffs to protect against the loss claimed. On one hand, Gibbs CJ, (with whom Wilson J agreed), followed the reasoning of Lord Wilberforce in *Anns* and held that the Council owed the plaintiffs 'a duty at common law to give proper consideration to the question whether it should exercise its powers, including its powers of inspection.'⁹ On the facts, however, Gibbs CJ held that there was insufficient

³ Section 310 *Local Government Act*, 1919 (NSW).

⁴ For example, s 316 empowered the Council to prohibit the use or occupation of any building until its completion in accordance with the approved plans and specifications.

⁵ [1982] 2 NSWLR 618.

⁶ The evidence consisted of a card held by the Council which referred to the premises, the serial number of the approval and contained an endorsement reading 'Frame O.K. 3/12/69 R.W.P.' The initials were those of an employee of the Council.

⁷ The third member of the court, Mahoney JA, agreed with the orders given.

⁸ As Hope JA pointed out the Council was in a dilemma. An inspection of the footings on 3 December 1969, would have revealed the inadequacies. If it failed to inspect on that date, it was in breach of the duty to ensure compliance with the approved plans and specifications.

⁹ (1985) 157 CLR 424, 447.

evidence to establish the Council's breach of this duty.¹⁰ On the other hand, Mason, Brennan and Deane JJ thought the Council had been negligent but held that it was not liable because no duty of care was owed to the plaintiffs. Central to this reasoning was the distinction between a positive infliction of harm and mere failure to confer a benefit. It was recognised that the Council had merely failed to protect the plaintiffs against harm inflicted by a third party, the builder. The Council's liability was held to depend upon the existence of a common law duty to protect the plaintiffs from the loss suffered. The decision that the Council was not liable was based on the finding that, according to general principles, the circumstances did not give rise to such an obligation.

GENERAL PRINCIPLES APPLIED: THE HIGH COURT'S REJECTION OF A SPECIAL IMMUNITY

A majority of the judges in *Heyman* applied general principles of negligence to determine the liability of the Council. This decision to place authority in the same position, with respect to liability, as any other defendant in a negligence action involved the rejection of a special rule formulated by the House of Lords in *Anns*. This rule limited the liability of a public authority for negligence by affording the intra vires acts and omissions of a public authority immunity from liability.

This section looks at the High Court decision in light of this previous authority. It will show the High Court's departure from the House of Lords' decision and assess the significance of the High Court's rejection of the special immunity.

No Special Treatment for Public Authorities

Mason, Brennan and Deane JJ saw no reason why general principles of negligence could not be applied to a public authority. No significance was attributed to the fact that a public authority exercises statutory powers and functions. As Deane J stated:

... The mere fact that a public body or instrumentality is exercising statutory powers and functions does not mean that it enjoys immunity from liability to private individuals under the ordinary law ...¹¹

Mason J reached a similar conclusion after considering the purpose for which statutory powers are conferred. His Honour pointed out that a public authority is armed with statutory powers in order to attain the objects of the statute. The powers conferred simply give the authority a capacity it would otherwise lack.¹² Mason J concluded that:

¹⁰ Id 447-8. Gibbs CJ also held that there was insufficient evidence to establish that the council officer was negligent in the inspection which was made on 3 December, 1969.

¹¹ (1985) 157 CLR 424, 500.

¹² Id 457.

Viewed in this light statutory powers are not in general mere powers which the authority has an option to exercise or not according to its unfettered choice. They are powers conferred for the purpose of attaining the statutory objects, sometimes generating a public expectation having regard to the purpose for which they are granted that they will be exercised. There is, accordingly, no reason why a public authority should not be subject to a common law duty of care in appropriate circumstances in relation to performing, or failing to perform, its functions . . .¹³

Mason and Deane JJ¹⁴ recognised one exception to the rule that the common law liability of a public authority is unlimited. This exception related to the policy decisions of a public authority. Since the first half of this century, the English courts have spoken of the need to protect decisions of a public authority.¹⁵ The concern expressed in these cases is evident in the following statement by du Parq LJ in *Kent v East Suffolk Rivers Catchment Board*:¹⁶

. . . when Parliament has left it to a public authority to decide which of its powers it shall exercise, and when and to what extent it shall exercise them, there would be some inconvenience in submitting to the subsequent decision of a jury, or judge of fact, the question whether the authority had acted reasonably, a question involving the consideration of matters of policy and sometimes the striking of a just balance between the rival claims of efficiency and thrift.¹⁷

Referring to this statement, Mason J accepted that 'these injunctions' had 'compelling force' in relation to policy-making decisions.¹⁸ His Honour explained the immunity in the following terms:

. . . 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.¹⁹

This suggested immunity for policy matters is not, however, inconsistent with the notion that public authorities are not to be afforded any special treatment. The immunity was not suggested because Mason and Deane JJ attributed significance to the fact that a public authority exercises statutory powers and functions. According to their reasoning, a public authority is subject to the same liability as any other defendant, it is just that there are certain areas where the principles of negligence cannot apply.²⁰

¹³ Ibid.

¹⁴ Brennan J did not deal with the question of whether a public authority is to be afforded special treatment. It is, however, clear from his reasoning that he saw no reason why the liability of a public authority for negligence could not be determined in accordance with ordinary principles.

¹⁵ For example in *Sheppard v Glossop Corporation* [1921] 3 KB 132 and *East Suffolk Rivers Catchment Board v Kent* (1941) AC 74.

¹⁶ [1940] 1 KB 319. Hereafter cited as *Kent*.

¹⁷ Id 338.

¹⁸ (1985) 157 CLR 424, 468.

¹⁹ Id 469.

²⁰ Deane J explained the situation in terms of 'assumed legislative intent': Id 500.

The Special Immunity

The High Court's refusal to afford public authorities special treatment involved an important departure from previous authority. The English court's concern to protect the decision making processes of public authorities resulted in a special rule for determining the actionability of a public authority's conduct. The rule which was formulated by the House of Lords in *Anns* afforded acts and omissions flowing from an intra vires decision protection from liability.

The main feature of this immunity was that it used the public law concept of ultra vires to test the actionability of a public authority's acts and omissions. The first indication that the ultra vires test was to be used in this way came from the House of Lords' decision in *Dorset Yacht Co Ltd v Home Office*.²¹ While the House of Lords²² was prepared to recognise that the Borstal Officers owed a duty of care, their Lordships' speeches suggest that the liability of the Home Office was limited to acts or omissions which fell outside the ambit of its discretion. The intra vires decisions of the Home Office were immune from liability.²³ Lord Diplock, the only member of the House of Lords to explain the reason for the adoption of the ultra vires test, spoke in terms of the need to protect policy based decisions from judicial review.²⁴ Lord Diplock thought the ultra vires test was attractive because it limited the court's role:

Its function is confined in the first instance to deciding whether the act or omission complained of fell within the statutory limits placed upon the department's or authority's discretion.²⁵

In a majority joint judgement delivered by Lord Wilberforce, the House of Lords in *Anns* endorsed the reasoning in *Dorset Yacht Co Ltd v Home Office*.²⁶ The facts of *Anns* were not unlike the facts of *Heyman*. The plaintiffs, the long term lessees of a block of flats, brought an action against the defendant public authority to recover damages for the loss suffered as a result of the flats being constructed on defective foundations. The plaintiffs claimed that the Council was liable in negligence either for approving the inadequate foundations or failing to inspect the foundations. Using ultra vires as the test of actionability, Lord Wilberforce held that the plaintiffs could only recover for the Council's failure to fulfil a duty owed to them in the following circumstances:

- a) With respect to the failure to inspect the foundations, if the plaintiffs could show that the Council did not properly exercise its discretion as to the making of the inspections;
- b) With respect to an inspection, if the plaintiffs could show that the Coun-

²¹ [1970] AC 1004.

²² Viscount Dilhorne dissenting.

²³ Accordingly, the Home Office would not have been liable for damage which was a consequence of the system adopted by the Home Office as conducive to the reformation of trainees.

²⁴ [1970] AC 1004, 1067.

²⁵ Id 1068.

²⁶ [1978] AC 728, 757-8.

cil inspector acted otherwise than in the bona fide exercise of his statutory discretion.²⁷

Lord Wilberforce offered a similar explanation of the immunity to that given by Lord Diplock in *Dorset Yacht Co Ltd v Home Office*, suggesting that policy matters must be 'decided through the ballot box, not in the courts.'²⁸ His Lordship's reasoning, however, shows that protection was not confined to policy decisions. Due to the ambiguous use of the term 'discretion', some debate has arisen as to the precise scope of the immunity.²⁹ On the one hand, Lord Wilberforce drew a distinction between policy decisions and the operational functions of a public authority:

Most, indeed probably all, statutes relating to the public authorities or public bodies, contain in them a large area of policy. The courts call this 'discretion' meaning that the decision is one for the authority or body to make, and not for the courts. Many statutes also prescribe or at least presuppose the practical execution of policy decisions: a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area.³⁰

In this passage, Lord Wilberforce used the term 'discretion' to refer to policy decisions. On the other hand, later in his judgment, Lord Wilberforce used the term in a wider sense to refer to a capacity to make a choice.³¹ As a result, the meaning of the following statement has been questioned:

... for a civil action based on negligence ... to succeed, there must be acts or omissions taken outside the limits of the delegated discretion ...³²

It is suggested, however, that the meaning of this statement is clear: the term 'discretion' was used in the wider sense to extend protection to intra vires decisions outside the policy area.³³ Lord Wilberforce's comments about the Council's duty as regards inspection support this interpretation:

But this duty, heavily operational though it may be, is still a duty arising under ... statute. There may be a discretionary element in its exercise — discretionary as to the time and manner of inspection, and the techniques to be used. A plaintiff complaining of negligence must prove, the burden being on him, that action taken was not within the limits of a discretion bona fide exercised, before he can begin to rely upon a common law duty of care.³⁴

Although Lord Wilberforce explained the immunity as a means of protecting policy decisions, it operated beyond the policy area. A finding of ultra

²⁷ Id 760.

²⁸ Id 754.

²⁹ M Aronson & H Whitmore, *Public Torts and Contracts* (1982), 101; J A Smillie, 'Liability of Public Authorities for Negligence' (1985) 25 *UW Ont L Rev* 213, 215–20.

³⁰ [1978] AC 728, 754.

³¹ This is illustrated by Lord Wilberforce's statement that 'many "operational" powers or duties have in them some element of "discretion"': Ibid.

³² Id 757.

³³ Smillie, 25 *UW Ont L Rev* 213, 215–20, cf Aronson & Whitmore, 69.

³⁴ [1978] AC 728, 755.

vires was a precondition for negligence liability in any case where the public authority had exercised a statutory discretion.

The conferral of a statutory discretion was therefore equated with the authorisation of any negligence committed in the ultra vires exercise of that discretion. Lord Wilberforce's approach resembled that of Lord Reid in *Dorset Yacht Co Ltd v Home Office* who stated that where Parliament confers a discretion:

Then there may, and almost certainly will, be errors of judgment in exercising such a discretion and Parliament cannot have intended that members of the public should be entitled to sue in respect of such errors.³⁵

The principle laid down in *Geddis v Bann Reservoir Proprietors*³⁶ that public authorities are liable for 'doing that which the legislature has authorised if it be done negligently' was held to have no application where a statute conferred a large measure of discretion on the public authority.³⁷ According to Lord Wilberforce, the application of that principle was confined to powers conferred by a private Act of Parliament.³⁸

The Rejection of the Special Immunity

In *Heyman*, the only endorsement of an immunity for intra vires discretionary decisions is found in the judgment of Gibbs CJ who supported both the use of the ultra vires concept³⁹ and the protection of discretionary decisions at the operational level.⁴⁰ On the other hand, the decision by the majority of the judges in *Heyman* to apply general principles to determine liability left no room for the use of the ultra vires test. A public authority can be subject to a common law duty of care as Mason J stated:

... there is no compelling reason for confining such a duty of care to situations in which a public authority or its officers are acting in excess of power or authority.⁴¹

As indicated earlier, Mason and Deane JJ were only prepared to except policy based decisions from liability. They refused to accord special treatment to a public authority simply because it was exercising a discretion. Mason J was explicit in his refusal, stating that the cogency of the 'injunctions' of du Parq LJ in *Kent* were less 'obvious' when applied to discretionary matters other than policy making decisions.⁴² His Honour concluded it was possible for a duty of care to exist in relation to discretionary decisions which stood outside the policy category.⁴³

³⁵ [1970] AC 1004, 1031.

³⁶ (1878) 3 App Cas 430.

³⁷ [1978] AC 728, 757.

³⁸ Ibid.

³⁹ (1985) 157 CLR 424, 447-8.

⁴⁰ Id 448.

⁴¹ Id 458.

⁴² Id 468.

⁴³ Ibid.

The Significance of the Rejection

The real significance of the High Court's rejection of the immunity formulated by the House of Lords can be seen by looking at the practical and conceptual problems associated with that immunity.⁴⁴ To begin with, the High Court's decision avoids the use of a public law concept as a precondition to negligence liability. The immunity for intra vires decisions was based on a mistaken view of the relationship between public law concepts and private law principles. Lord Diplock was incorrect when he stated in *Dorset Yacht Co Ltd v Home Office*⁴⁵ that the ultra vires test had replaced negligence as the test of liability.⁴⁶ The public law concept of ultra vires should not determine the actionability of a public authority's negligence.⁴⁷ Public law concepts like the ultra vires test are used by the courts to review a public body's administrative action. The ultra vires test determines the validity of a public authority's action. In this public law area, the courts are concerned with the body's responsibility to the public at large for the performance of its public functions. On the other hand, the civil law of negligence is concerned with an individual's right to protection against the negligent infliction of harm. Just as with a private defendant, the general principles of negligence determine whether a public authority has infringed an individual's rights.

A public authority's liability for its negligent acts and omissions is distinct and separate from its public law responsibilities. A statutory body's public law duty to act validly has no bearing on the scope of its common law duty to avoid foreseeable harm. The fact that certain public law responsibilities are imposed on a public authority is not sufficient reason to restrict its liability for negligence. A defendant's potential liability in other areas of the law has never been used to confine its common law duty of care.

The High Court's decision also means that a plaintiff seeking to recover damages in negligence from a public authority no longer faces the onerous burden of proving that the public authority acted in abuse or excess of power. While there is some support for the view that a public authority acts ultra vires if it exercises its discretion in a careless manner,⁴⁸ Lord Wilberforce clearly required the plaintiffs to show that the inspector acted ultra vires in some way

⁴⁴ Considerable academic criticism has been levelled at the immunity formulated in *Anns*: P Craig, 'Negligence in the Exercise of a Statutory Power' (1978) 94 *LQR* 428; S H Bailey and M J Bowman, 'The Policy/Operational Dichotomy — A Cuckoo in the Nest' [1986] *Camb LJ* 430; Smillie, 25 *UW Ont L Rev* 213; Aronson & Whitmore, *op cit*, 99-103.

⁴⁵ [1970] AC 1004, 1067.

⁴⁶ C Harlow, '"Public" and "Private" Law: Definition without Distinction' (1980) 43 *Mod LR* 241, 243.

⁴⁷ 'Ultra vires is not the test of fault and should not be the test of liability': Davis, 3 *Administrative Law Treatise* (1958) 487 (NV) cited by S Todd, 'The Negligence Liability of Public Authorities: Divergence in the Common Law' (1986) 102 *LQR* 370, 401. See also A Rubinstein 'The Liability of Bodies Possessing Statutory Powers for Negligent Failure to Avoid Harm', (1987) 13 *Mon ULR* 75, 99.

⁴⁸ *Dorset Yacht v Home Office* [1970] AC 1004, 1070 per Lord Reid and H W R Wade *Administrative Law*, (5th ed, 1982).

other than carrying out the inspection negligently.⁴⁹ As pointed out elsewhere,⁵⁰ this is not an easy hurdle to overcome because in most cases where the plaintiff is seeking to recover damages for negligence there may only be evidence of a want of care on the authority's part.⁵¹

The High Court's decision also does away with a rule which has no valid foundation. Lord Wilberforce sought to explain the immunity as a means of protecting the policy based decisions of a public authority. There are two reasons why the immunity cannot be justified on this basis. First, it was an inappropriate mechanism for protecting policy decisions as it did not afford a blanket immunity. Instead, it allowed the courts a limited permission to review policy decisions.⁵² The *ultra vires* test of actionability meant that the immunity was confined to *intra vires* decisions. Several commentators have expressed the fear that in determining whether a public authority was negligent in reaching an *ultra vires* decision, the courts could well be adjudicating upon the sorts of matters the House of Lords seemed so keen to have decided at the ballot box.⁵³ Secondly, Lord Wilberforce allowed the protection provided by the immunity to extend beyond policy based decisions. The explanation of the immunity as a means of protecting policy decisions was therefore inappropriate in this context.

Finally, the High Court decision is important because it correctly establishes that public authorities do not enjoy an immunity simply because their functions are discretionary. Without justification, Lord Wilberforce held that the principle laid down in *Geddis v Bann Reservoir Proprietors*⁵⁴ had no application where a statutory discretion was conferred on a public authority.⁵⁵ The conferral of a statutory discretion is not, however, the same as an authorisation of negligence. There is no reason why a public authority cannot be liable for the negligent exercise or non-exercise of a discretion.

Conclusion

In light of previous authority, the High Court's decision to apply general principles to determine the negligence liability of a public authority is important. There were both conceptional and practical problems associated with the immunity formulated in *Anns*. The principles of common law have a separate

⁴⁹ This is evident from his conclusion with respect to the public authority's liability for a failure to inspect. Lord Wilberforce took the view that the Council would not be liable 'unless it were shown (a) not properly to have exercised its discretion as to the making of inspections, and (b) to have failed to exercise reasonable care in its acts or omissions...': [1978] AC 728, 760.

⁵⁰ N Seddon 'The Negligence Liability of Statutory Bodies: Dutton Reinterpreted' [1978] 9 FLR 326, 334.

⁵¹ *Ibid.*

⁵² In both *Dorset Yacht Co Ltd v Home Office* and *Anns*, the House of Lords envisaged a public authority being exposed to liability for an act or omission which flowed from an *ultra vires* policy decision. As Lord Wilberforce stated in *Anns*, the Council's immunity from attack in the event of a failure to inspect 'though great is not absolute': [1978] AC 728, 755.

⁵³ P Craig 94 LQR 428, Aronson and Whitmore, 102-3.

⁵⁴ (1878) 3 App Cas 430.

⁵⁵ Rubinstein, 13 Mon ULR 75, 93-4.

operation from public law. The question of whether a public authority acted ultra vires should have no bearing on its liability for negligence. In addition, leaving aside for now the question of the desirability of protecting policy based decisions, there is no valid reason why an immunity should be extended to any exercise of a statutory discretion. The High Court's decision in *Heyman* correctly confirms that only common law principles are relevant when determining the liability of a public authority for negligence. It also shows that the mere fact that a public authority is exercising a statutory discretion is not sufficient reason to afford an immunity from liability.

LIABILITY FOR THE FAILURE TO CARRY OUT A CAREFUL EXERCISE OF STATUTORY POWERS: THE HIGH COURT'S DECISION

The High Court's decision in *Heyman* means that in a negligence action against a public authority, liability is determined according to ordinary common law principles. With respect to liability for positively inflicted harm, the decision did not break new ground. Since the nineteenth century, the courts have imposed common law liability on public authorities for the positive infliction of harm.⁵⁶ The real impact of *Heyman* relates to the liability of a public authority for the failure to protect a plaintiff by carrying out a careful exercise of its statutory powers. The decision means that this liability depends on the existence of a common law duty to perform the function.

Under this heading the importance of the decision to apply common law principles to determine this liability will be considered. By way of an historical overview, *Heyman* will be examined as a further step in the development of the liability of a public authority for negligence. Specific focus will then be placed on the High Court's departure from the liability which was imposed by the House of Lords in *Anns*.

From an Historical Perspective — A 'Break-Through' Decision

Prior to *Heyman* the development of common law liability for the failure to protect against harm by carrying out a careful exercise of statutory powers was marred by confusion. The courts did not recognise that this liability depended upon the existence of a common law duty. In the English cases decided earlier this century, the courts were not only dealing with less developed common law principles but they were burdened by a pre-occupation with the public character of the defendant. Insufficient emphasis was placed on the distinction between a statutory duty and a common law duty, while unnecessary distinctions were drawn between statutory powers and duties. Later, at a stage when the courts were more familiar with affirmative common law duties, a

⁵⁶ *Mersey Docks Trustees v Gibbs* (1866) LR 1 HL 93 and *Geddis v Proprietors of the Bann Reservoir* (1878) 3 App Cas 430. In *Anns* this liability was made subject to an immunity which protected acts flowing from an intra vires decision.

mistaken view of the relevance of public law considerations meant that a novel liability, at odds with common law principles, was imposed.

The existence of a positive common law duty was not considered by the House of Lords in *East Suffolk Rivers Catchment Board v Kent* (1941).⁵⁷ In that case, the House of Lords decided that the Board which had embarked on the exercise of its statutory powers to repair a flood wall was not liable for the failure to do so as its operations had not added to or increased the damage caused by the flood.⁵⁸ To a certain extent, the fact that an affirmative duty was not a familiar concept in 1941⁵⁹ may explain why the existence of a common law duty to take positive action was not considered.⁶⁰ At the same time, the reasoning of the majority suggests that their Lordships were more concerned with the distinction between statutory powers and statutory duties than the existence of common law liability. A public authority was considered to be liable for a failure to act only if it was under a statutory duty to act.⁶¹ As the Board was not statutorily obliged to repair the wall, it would not have incurred liability if it remained impassive. In circumstances where the Board had embarked on the performance of functions without being statutorily obliged to do so, the House of Lords decided its liability should, in the absence of a positive infliction of harm, be the same as if it remained impassive.⁶² As Mason J pointed out in *Heyman*, Lord Atkin, who dissented in *East Suffolk*, was the only member of the House of Lords who 'correctly drew a distinction between a statutory duty or power and a common law duty of care.'⁶³

It is not surprising that later courts read *East Suffolk* as laying down a limitation on liability based on the distinction between nonfeasance and mis-

⁵⁷ [1941] AC 74. Hereafter cited as *East Suffolk*. None of the previous authorities where an affirmative duty had been found to exist were reviewed by the House of Lords (eg) *Mercer v SE & C Railway* [1922] 2 KB 549. Nor did the court undertake any conscious consideration of the policy factors which might have gone against the existence of such a duty. See M J Bowman and S H Bailey, 'Negligence in the Realms of Public Law — A Positive Obligation to Rescue?' [1984] *Pub Law* 277, 290.

⁵⁸ The House of Lords took the view that had the Board caused or increased the plaintiff's damage it would have been liable on the basis of the principle laid down in *Geddis v Proprietors of the Bann Reservoir* (1878) 3 App Cas 430.

⁵⁹ Earlier in *Sheppard v Glossop Corporation* [1921] 3 KB 132 the defendant Corporation was held not liable for the failure to exercise its statutory power to light as it did not create the danger which caused the plaintiff's harm. The existence of a common law duty to protect against such independently created harm was not considered by the Court of Appeal.

⁶⁰ Nevertheless, the actual decision in *East Suffolk* would be the same today. The Board's liability as a 'volunteer' would be limited to fresh or additional damage in the absence of a positive common law duty to complete the work which would depend upon evidence of reliance. While Bowman and Bailey [1984] *Pub Law* 277, 291 suggest that there was some evidence that the plaintiff had been deprived of alternative means of assistance, it appears that the House of Lords accepted that there was no evidence of reliance; [1941] AC 74, 105 per Lord Porter.

⁶¹ Id 84, 95, 98, 107.

⁶² Their Lordships appear to have justified this reasoning by pointing to the need to protect the decision making processes of a public authority: Id, 86, 106. Perhaps it was the court's concern to protect local authorities with limited resources against such burdens which led their Lordships to overlook the evidence in this case which suggested that the defendant authority may have 'added to' the existing damage. See the judgment of Mackinnon LJ Id 330-2.

⁶³ (1985) 157 CLR 424, 470.

feasance. The reasoning in that case suggested that a public authority could be liable for the positive infliction of harm in the exercise of its statutory powers but not a mere failure to avert harm by carrying out a careful exercise of those powers.⁶⁴ This interpretation of the *East Suffolk* case stifled the development of the common law liability of a public authority for an omission.

For instance, in *Dutton v Bognor Regis Urban District Council*,⁶⁵ rather than consider the existence of a common law duty to take positive action, two members of the Court of Appeal⁶⁶ argued that the Council had 'caused' the plaintiff damage by its 'positive act', the negligent inspection of the foundations. Whatever distinctions may be drawn between the Board's operations in *East Suffolk* and a negligent inspection of building foundations,⁶⁷ the Council in *Dutton* did not positively inflict harm on the plaintiff.⁶⁸ It merely failed to exercise its powers carefully so that the plaintiff was protected against harm inflicted by a third party, the negligent builder. The correct way to approach the Council's liability was therefore to consider whether it owed the plaintiff a positive duty to exercise its powers so that the damage suffered was avoided. Lord Denning MR was the only member of the Court to impose liability on this basis. He found that the 'control' entrusted to the local authority with respect to building work was so extensive that it carried with it a duty to take positive steps to ensure building by-laws were complied with.⁶⁹ For example, Lord Denning thought the Council was under an obligation to do the following:

They must appoint building inspectors to examine the work in progress. Those inspectors must be diligent and visit the work as occasion requires. They must carry out their inspection with reasonable care to ensure the byelaws are complied with.⁷⁰

While the High Court in *Heyman* did not endorse the 'control' concept as a determinant of liability, Lord Denning's judgment is the closest an earlier court came to recognising that the liability of a public authority for a mere failure to confer a careful exercise of its powers depends upon the existence of a common law duty to perform that function.

Although the House of Lords in *Anns* held that the public authority could be liable for a negligent inspection or a failure to inspect, this liability was not based upon the existence of a specific common law duty to carry out a careful inspection. Instead, a novel form of liability founded upon the statutory re-

⁶⁴ As pointed out in *Heyman* what was thought until *Anns* 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': *Id* 437, per Gibbs CJ, citing Lord Romer in *East Suffolk* [1941] AC 74, 102.

⁶⁵ [1972] 1 QB 373. Hereafter cited as *Dutton*.

⁶⁶ Sachs and Stamp LJ.

⁶⁷ For example, unlike *East Suffolk*, the damage in *Dutton* was not already in existence: [1972] 1 QB 373, 413 per Stamp LJ; M G Bridge 'Governmental Liability' (1978) 24 *McGill LJ* 277, 279; also that the Council in *Dutton* had greater control over the situation than the Board in *East Suffolk*: Bridge, 24 *McGill LJ* 277, 279.

⁶⁸ As Gibbs CJ pointed out in *Heyman* (1985) 157 CLR 424, 445 there is a difference between causing something and failing to avert it.

⁶⁹ [1972] 1 QB 373, 392.

⁷⁰ *Ibid*.

sponsibilities and public law duties of the public authority emerged. According to Lord Wilberforce's reasoning, the Council's liability for a failure to carry out a careful inspection would arise when it was in breach of a broader duty to exercise reasonable care to ensure compliance with the building by-laws. This broad duty of care formulated by Lord Wilberforce was virtually co-extensive with the Council's statutory powers. It was not founded upon common law concepts such as proximity and reliance but was a product of the court's assessment of the statutory background to the case.⁷¹

Lord Wilberforce's treatment of the question whether the council could be liable for a failure to inspect shows that the existence of a specific common law duty to carry out a careful inspection was not canvassed. In order to refute the argument that the Council was under no duty to inspect, Lord Wilberforce looked to the Council's public law responsibilities rather than common law principles and pointed to the fact that a public authority can face an administrative law challenge for a failure to exercise its discretion properly. His Lordship concluded:

Thus, to say that councils are under no duty to inspect is not a sufficient statement of the position. They are under a duty to give proper consideration to the question whether they should inspect or not.⁷²

On this view, if the Council failed to exercise its discretion properly it would be exposed to liability for a breach of its duty to ensure compliance with the by-laws.

As a further step in the development of the common law liability of public authorities, *Heyman* is a 'breakthrough' decision. Although the reasoning varied, all five members of the High Court recognised that a public authority can be liable in a negligence action for the failure to carry out a careful exercise of its statutory powers. The fact that the public authority is not under a statutory duty to act was considered irrelevant as Mason J stated:

Except in so far as the statute creates a civil cause of action for breach of duty, the distinction between a statutory power and a statutory duty, generally speaking, has limited relevance to civil liability arising out of performance or non-performance of statutory functions.⁷³

Further, Mason, Brennan and Deane JJ indicated that liability for the failure to carry out a careful exercise of a statutory power depends upon the existence of a specific common law duty to perform that function;⁷⁴ this duty being founded upon common law concepts such as proximity of relationship and reliance.⁷⁵ Only Gibbs CJ (with whom Wilson J agreed) thought liability

⁷¹ [1978] AC 751, 758. The Council's powers of inspection were seen as having been granted for the purpose of securing compliance with the by-laws. Lord Wilberforce took the view that the Council's duty of care must be closely related to this legislative purpose.

⁷² *Id* 755.

⁷³ (1985) 157 CLR 424, 457.

⁷⁴ See below p 305.

⁷⁵ See below p 303.

would arise from a breach of Lord Wilberforce's broad duty to ensure compliance with statutory regulations.⁷⁶

By this majority of three to two, the High Court also recognised that the public law responsibilities of a public authority have no bearing on its civil liability. Lord Wilberforce's 'duty to give proper consideration to the question whether they should inspect or not' was based on a misconception, as Mason J pointed out:

... although a public authority may be under a public duty, enforceable by mandamus, to give proper consideration to the question whether it should exercise a power, this duty cannot be equated with or regarded as a foundation for imposing, a duty of care on the public authority in relation to the exercise of the power. Mandamus will compel proper consideration by the authority of its discretion, but that is all.⁷⁷

In light of previous authority, the mere fact that the High Court applied common law principles in a case involving a failure to carry out a careful exercise of a statutory power is important. So is the High Court's recognition that the private law obligations of a public authority stand apart from its public law duties and responsibilities.

The Departure from the Liability Imposed in *Anns*

Apart from being a 'break-through' decision establishing the common law liability for a public authority for the mere failure to carry out a careful exercise of its statutory powers, *Heyman* has a further significance which can be seen in a comparison of the liability imposed in *Anns* with the common law liability applied by the High Court. To begin with, the High Court, unlike the House of Lords, appreciated the distinction between a positive infliction of harm and the mere failure to confer a benefit. The High Court decision resurrected the traditional principles governing liability for omissions. It thereby avoided the problems arising from the House of Lord's failure to distinguish between positive acts and omissions. Secondly, the High Court's decision involved a shaft in the court's focus when determining liability. Emphasis is now on the parties' relationship than the statutory background to the case. The result is a far different liability from that imposed by the House of Lords.

The Positive Act/Omission Distinction Recognised

The liability imposed by the House of Lords was at odds with traditional common law principles: it ignored the distinction between positive acts and omissions. In circumstances where the Council had not positively inflicted harm on the plaintiffs but merely failed to exercise its statutory powers of inspection carefully so as to protect the plaintiffs against damage, Lord Wilberforce applied the following test for liability:

⁷⁶ (1985) 157 CLR 424, 447.

⁷⁷ *Id* 465.

First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is any sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any 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 or the damages to which a breach of it may give rise.⁷⁸

This two stage test meant that in the area where the special immunity did not operate, a public authority owed a duty determined in accordance with the first stage enquiry. Lord Wilberforce's reasoning shows that this first stage test merely involved a test of foreseeability of harm.⁷⁹ The 'sufficient relationship of proximity or neighbourhood' was found in the fact that the damage would have been 'in the reasonable contemplation of the defendant Council.'⁸⁰ Drawing on the statutory background to the case, Lord Wilberforce concluded that his first stage test had been satisfied:

It must be in the reasonable contemplation not only of the builder but also of the local authority that failure to comply with the byelaws' requirement as to foundations may give rise to a hidden defect which in the future may cause damage ...⁸¹

As a result, the Council was found to owe a duty to exercise reasonable care to ensure compliance with the by-laws.⁸² In considering the content of this duty, Lord Wilberforce refused to limit it to a duty to avoid causing extra or additional damage:⁸³ it could be breached by either a failure to inspect or a negligent inspection.

Lord Wilberforce thus imposed liability for the mere failure to confer a benefit solely on the basis of foreseeability of harm. In doing so, Lord Wilberforce made no concession to the traditional distinction between positive acts and omissions.⁸⁴ To hold a defendant liable for a failure to act means that a duty is imposed on the defendant to confer some benefit on the plaintiff. The courts have refused to take this step merely on the basis of the foreseeability test: special circumstances have always been required.⁸⁵ As Lord Wil-

⁷⁸ [1978] AC 728, 751–2.

⁷⁹ Nevertheless, as Gibbs CJ pointed out in *Heyman* (1985) 157 CLR 424, 440, 442, there has been some difference of opinion as to what Lord Wilberforce intended by this first stage test. Gibbs CJ rejected the view that the first stage test was merely a test of foreseeability of harm. His view was accepted by the Privy Council in *Yeun Kun Yeu v Attorney General for Hong Kong* [1988] 1 AC 175.

⁸⁰ [1978] AC 728, 753. Brennan and Deane JJ both took the view that the first stage enquiry merely involved a test of foreseeability. Mason J did not express an opinion on this point.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Id* 754.

⁸⁴ See J C Smith and P Burns '*Donaghue v Stevenson* — The Not So Golden Anniversary' (1983) 46 *Mod LR* 147.

⁸⁵ For example, a special relationship such as employer/employee or the defendant's right to control persons or property. See JG Fleming. *The Law of Torts* (7th ed, 1987) 133, 134.

berforce intended his test of foreseeability to be of universal application, it involved a radical departure from traditional principles.

The High Court's decision in *Heyman* is important because it represents a return to the traditional distinction between a positive infliction of harm and a mere failure to act. Unlike Lord Wilberforce, none of the High Court judges completely ignored this distinction. Even Gibbs CJ who supported much of Lord Wilberforce's reasoning heeded the distinction⁸⁶ and all five members of the Court rejected foreseeability of harm as the sole test of liability.⁸⁷ In particular, the judgments of Brennan and Deane JJ contain an explicit rejection of the reasoning in *Anns*.⁸⁸ Their Honours pointed out that foreseeability has never been applied as an exhaustive test to determine the existence of a duty to take positive action. As Deane J stated:

The common law imposes no general duty to avoid loss or injury to another merely because it is reasonably foreseeable that one's actions or omissions are likely to cause it.⁸⁹

Factors which, in addition to foreseeability of harm, would establish the existence of a duty to take positive action were outlined by the High Court. While these additional requirements were not formulated in identical terms, some common threads run through the judgments. For instance, Mason, Brennan and Deane JJ identified reliance as a factor which, in addition to foreseeability of harm, could indicate the existence of a duty to take positive action.⁹⁰ Recent decisions of the High Court indicate that this requirement of reliance is an application of the proximity test.⁹¹

The High Court's recognition of the distinction between positive acts and omissions also means that a fundamental error made by the House of Lords in relation to causation is avoided. Lord Wilberforce's reasoning was based on the mistaken premise that an omission can cause harm in the same way as a positive act.⁹² In circumstances where there was no positive infliction of

⁸⁶ Gibbs CJ recognised that 'as a general rule, a failure to act is not negligent unless there is a duty to act'. However, Gibbs CJ focused on Lord Wilberforce's duty to give proper consideration to argue that *Anns* was consistent with traditional principles: (1985) 157 CLR 424, 443-5.

⁸⁷ Gibbs CJ (with whom Wilson J agreed) applied Lord Wilberforce's first stage test but saw it not as a mere test of foreseeability but as a composite test encompassing a requirement of proximity: Id 441. Mason, Brennan and Deane JJ refused to apply Lord Wilberforce's first stage test of foreseeability.

⁸⁸ Id 481, per Brennan; Id 505 per Deane J. While Mason J did not expressly question the first stage test, he certainly did not apply it. In fact, Mason J's judgment contains no mention of Lord Wilberforce's two stage test of liability. Mason J did, however, reject foreseeability as the sole test of liability for a failure to exercise a statutory function. He also stated that 'it is evident from what I have written that I am unable to accept all that Lord Wilberforce said in his speech': Id 465.

⁸⁹ Id 495.

⁹⁰ Id 461, per Mason J; Id 486, per Brennan J, Id 508, per Deane J.

⁹¹ *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340; *Hawkins v Clayton & Ors* (1988) 164 CLR 539; D K Derrington 'The Limits of Awards of Economic Loss Through the Cases' (1989) 63 ALJ 13; S Quinlan and D Gardiner, 'New Developments with Respect to the Duty of Care in Tort' (1988) 62 ALJ 347.

⁹² While it may not have been appropriate in considering a preliminary point of a law for the House of Lords to have discussed the question of causation on the facts, the court

harm, liability was tested by asking whether there was a 'sufficient relationship of proximity between the parties such that, as in the contemplation of the Council, carelessness on its part, may be likely to cause damage' to the plaintiffs.⁹³ On the basis of this test, Lord Wilberforce concluded that the defendant Council owed the 'normal' duty of care to avoid causing harm to those likely to be affected.⁹⁴ However, the defendant Council would only have caused the plaintiff's harm if it positively inflicted the damage:⁹⁵ an omission merely fails to avert harm inflicted on the plaintiff by another party or some accidental occurrence.⁹⁶ Nevertheless, Lord Wilberforce rejected the notion that the duty to avoid 'causing harm' would be limited to fresh or additional damage inflicted by the Council in the exercise of its powers.

It has been suggested that Lord Wilberforce's duty to give proper consideration to the question whether to inspect or not could forge a causal link between a public authority's failure to inspect and a plaintiff's damage.⁹⁷ It was said that if the plaintiff can show the damage suffered would have been prevented by exercising the power in certain ways, the causal connection between the breach of the duty to give proper consideration and the damage will be established.⁹⁸ This reasoning is, however, of little assistance to a plaintiff in a defective foundation case:

How could they [the plaintiffs] possibly establish a causal connection between their damage and the decision? Would the insufficiency of the foundations have been detected if the council had resolved to inspect every second house . . .⁹⁹

In addition, apart from the practical difficulties involved, it is undesirable to use a duty founded upon public law responsibilities to forge a causal link between the defendant's omission and the plaintiff's damage.

The High Court's decision requiring a duty to take positive action avoids these problems. An omission, if in breach of a duty to take positive steps to avoid damage, will be causally relevant to the damage suffered.¹⁰⁰

A Shift in the Court's Focus

The High Court's departure from the reasoning in *Anns* has also resulted in a shift in the focus of the Court. In the earlier decision, the House of Lords emphasised the statutory background to the case. When applying the reasonable foreseeability test, Lord Wilberforce concentrated on the legislative pur-

should have taken this important distinction between acts and omissions into account when imposing a liability for a failure to act.

⁹³ [1978] AC 728, 751.

⁹⁴ *Id* 754.

⁹⁵ As Smith and Burns, 46 *Mod LR* 147, 154 point out the inspector did not cause the damage to the structure. The damage was caused by the builders who negligently built the foundations. The inspectors merely allowed or failed to prevent this damage from happening.

⁹⁶ Bowman and Bailey, [1984] *Public Law*, 277, 278.

⁹⁷ D Baker 'Maladministration and the Law of Torts' (1986) 10 *Adel L Rev* 207, 225.

⁹⁸ *Ibid*.

⁹⁹ M Aronson and H Whitmore, *Public Torts and Contracts* (1982), 74.

¹⁰⁰ (1985) 157 CLR 424, 467-8 per Mason J.

pose to provide for the health and safety of owners and occupiers by setting standards allowing for the supervision and control of building operations. Particular attention was focused on the by-laws relating to foundation work. As seen already, the House of Lords founded liability on the defendant's statutory powers and responsibilities. The actual circumstances of the case, including the plaintiffs' position and the damage suffered were of little consequence in determining the existence and scope of the relevant duty.

The High Court's decision, however, indicates that the actual circumstances of a case are now of crucial import in demanding a public authority's liability. Proximity of relationship is the key to liability. Focus is therefore placed on the relationship between the defendant public authority and the plaintiff's damage. The statutory background which preoccupied the House of Lords is only relevant, if at all, in an indirect way.¹⁰¹ Statutory provisions do not, however, decisively determine liability.

In *Anns*, the House of Lords' emphasis on the statutory background to the case resulted in a static duty to ensure compliance with by-laws. This duty was virtually superimposed on certain types of statutory powers. It was a wide liability: a public authority could be liable even though there was no causal connection between its omission and the plaintiff's damage. Perhaps this explains the immunity formulated by the House of Lords: if a public authority is liable for damage it did not cause, any valid exercise of its discretion should be protected. While the common law liability applied by the High Court removed the need to protect the *intra vires* decisions of a public authority, the common law duty is not predictable. Its existence cannot be taken for granted nor does the scope of the duty remain constant. It depends on the particular circumstances of each case.

Conclusion

The High Court's decision in *Heyman* must be welcomed after what Mason J referred to as a 'myriad of decided cases' which did not 'furnish clear and unqualified answers.'¹⁰² By deciding that the liability of a public authority for a failure to carry out a careful exercise of its statutory powers depends upon the existence of a positive common law duty, the High Court gave the clear and logical answer that previous courts failed to provide.

Compared to the novel liability imposed in *Anns*, the High Court's decision is also important because it means public authorities cannot be liable for damage which they did not cause. It thereby avoids the need to protect *intra vires* decisions. That is not to say that the liability imposed by the House of Lords was totally without merit. Public authorities are responsible for the supervision and control of building work. The public knows that local authorities carry out inspections of building foundations and that they can prevent a building being constructed on defective foundations. The public also ex-

¹⁰¹ The provisions of the empowering legislation could perhaps be relevant as one of the circumstances to be taken into account determining whether a plaintiff's reliance on a public authority's performance of its statutory function was reasonable.

¹⁰² (1985) 157 CLR 424, 457.

pects that local authorities will perform these functions properly. There is, therefore, a solid basis for imposing liability for a failure to carry out a careful inspection of building foundations.¹⁰³ The attraction of the common law principles applied by the High Court is that they have sufficient scope to allow the imposition of such liability and at the same time, they avoid the conceptual problems associated with the novel liability imposed in *Anns*.

HIGH COURT'S DECISION AS A STATEMENT OF THE AUSTRALIAN POSITION

After the decision in *Heyman* no Australian court would apply the test of liability formulated in *Anns*.¹⁰⁴ Under this heading the value of the High Court's decision as a statement of the Australian position will be assessed. The lack of unanimity in the judgments will be examined. In relation to how the general principles of negligence operate to determine the liability of a public authority, the case raises more questions than it answers. Some of the issues raised can be resolved by an analysis of the judgments and subsequent High Court decisions. These issues are discussed in the first part of this section. The second part deals with the outstanding issues raised by the decision which await determination by the High Court.

The Issues Resolved in *Heyman* or Subsequent Decisions

The Additional Requirement — Proximity of Relationship

Although Mason, Brennan and Deane JJ rejected Lord Wilberforce's two stage enquiry, they did not provide a uniform statement of an alternative test of liability. Their Honours agreed that foreseeability alone would not determine liability for a mere failure to act but they did not formulate the additional requirement for liability in identical terms.

Deane J looked for a relationship of proximity between the parties.¹⁰⁵ Reiterating his comments in *Jaensch v Coffey*,¹⁰⁶ Deane J stated that proximity of relationship was a distinct and separate requirement to be satisfied, in addition to foreseeability of harm, before a duty of care arose.¹⁰⁷ The proximity test was seen as the 'touchstone' or 'control of the categories of case in which the common law [principles] of negligence will admit the existence of a duty of care'.¹⁰⁸ In cases involving the positive infliction of physical harm, one

¹⁰³ The circumstances in which the High Court held such liability would arise and the content of the public authority's duty of care will be considered in the next section.

¹⁰⁴ Before *Heyman*, *Anns* was applied in a number of Australian cases including *Clarke v The President Councillors and Ratepayers of the Shire of Gisborne* [1984] VR 971, 974.

¹⁰⁵ (1985) 157 CLR 424, 495 Deane J had the support of Gibbs CJ (with whom Wilson J agreed) on this point although Gibbs CJ thought Lord Wilberforce's first stage test encompassed a requirement of proximity.

¹⁰⁶ (1984) 155 CLR 549, 578-85.

¹⁰⁷ (1985) 157 CLR 424, 495.

¹⁰⁸ *Id* 495.

of 'the more settled areas of the law of negligence', Deane J recognised that the existence of the requisite degree of proximity was well established.¹⁰⁹ However, in cases involving the negligent infliction of economic loss or omissions; 'less developed' areas of the law of negligence, proximity was regarded as the real determinant of liability.¹¹⁰ Accordingly, Deane J decided that the defendant Council's liability depended upon the existence of the requisite relationship of proximity which would reflect 'among other things':

reliance by the plaintiff upon care being taken by the defendant to avoid or prevent injury, loss or damage to the plaintiff or his property in circumstances where the defendant had induced or encouraged such reliance or (depending upon the particular combination of factors) was or should have been aware of it.¹¹¹

Brennan J on the other hand, objected to the formulation of a general requirement which would, in addition to foreseeability, indicate the existence of a duty of care.¹¹² He preferred that the law develop 'incrementally and by analogy with established categories'.¹¹³ After reviewing the established categories of case where a positive duty was found to exist, Brennan J outlined the circumstances in which a public authority would come under a duty to carry out a careful exercise of its statutory functions.¹¹⁴

Unlike Brennan J, Mason J did not object to the formulation of a general concept which would determine liability for foreseeable harm.¹¹⁵ However, while his reasoning was not inconsistent with Deane J's proximity concept,¹¹⁶ Mason J did not formulate the additional requirement in terms of proximity. Clearly influenced by the decisions of the United States courts, Mason J concluded:

If there is a firm foundation for a duty of care in this case, it is to be found in reliance or dependence rather than mere foreseeability.¹¹⁷

Thus, while foreseeability was not accepted as the sole determinant of liability for a mere failure to act there was no uniformity in the statement of the additional test. This matter has since been resolved in favour of Deane J's formulation. In subsequent decisions, the High Court has endorsed the proximity test.¹¹⁸ Deane J's reasoning in *Heyman* now represents the orthodox

¹⁰⁹ Ibid.

¹¹⁰ Id 507.

¹¹¹ Id 508.

¹¹² Id 481.

¹¹³ In later cases, Brennan J reiterated his objections to the proximity test: *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340, 368-9 and *Hawkins v Clayton & Ors*, (1988) 164 CLR 539, 545-7.

¹¹⁴ *Infra* fn 138.

¹¹⁵ Mason J saw the reliance factor as performing this function: Id 466.

¹¹⁶ Mason J identified the reasoning of Stephen J in *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529, 574-5 and Deane J in *Jaensch v Coffey* (1984) 155 CLR 549 as involving a degree of reliance: (1985) 157 CLR 424, 461.

¹¹⁷ Id 466.

¹¹⁸ *San Sebastian v The Minister* (1986) 162 CLR 340; *Hawkins v Clayton & Ors* (1988) 164 CLR 539. The proximity test was supported by majorities of four to one in both cases. Brennan J remains 'isolated' from his brother judges on this point: M Davies, 'San Sebastian Revisited' (1987) 17 UWALR 150, 158-9.

view as to the ingredients of a common law duty of care.¹¹⁹ These refined common law principles, of course, apply to public authorities. The distinction drawn by Deane J between the positive infliction of harm and omissions and physical damage and economic loss is relevant to both private and public defendants. This means that the liability of a public authority for the positive infliction of physical harm is determined by the foreseeability test. It also means that a public authority, like any other defendant, can be liable for the negligent infliction of economic loss or a negligent omission provided the requisite relationship of proximity is established.

A Duty to Protect Against Independently Created Damage

As pointed out in an earlier section, the High Court by a majority of three to two held that liability for a failure to protect a plaintiff by carrying out a careful exercise of statutory powers depends upon the existence of a common law duty to perform that function. However, in determining the nature of this duty and the circumstances in which liability will arise, the High Court judges failed to reach a unanimous decision.

The narrowest liability was proposed by Brennan J who required antecedent conduct on the part of the Council which created or increased the risk of injury.¹²⁰ Brennan J limited the liability of a public authority for the failure to exercise its statutory powers to circumstances where the public authority had induced reliance on the subsequent performance of its functions.¹²¹ This antecedent conduct on the authority's part could create or increase the risk of damage if the function were discontinued without notice.¹²²

I would not doubt that a public authority, which adopts a practice of so exercising its powers that it induces a plaintiff reasonably to expect that it will exercise them in the future, is liable to the plaintiff for a subsequent omission to exercise its powers, or a subsequent inadequate exercise of its powers, if the plaintiff has relied on the expectation induced by the authority and has thereby suffered damage . . .¹²³

Brennan J however, concluded that the structural damage which resulted from the builder's negligence could not be attributed to the Council. According to Brennan J, the only antecedent act done by the Council was its approval of the plans and specifications which did not create or increase the risk of structural damage.¹²⁴

Mason J envisaged a wider liability which could arise where the public authority had merely failed to protect against independently created damage.¹²⁵ While Brennan J saw reliance as conduct which might cause or increase

¹¹⁹ D K Derrington, 'The Limits of Awards of Economic Loss Through the Cases' (1989) 63 ALJ 13, 14; S Quinlan and D Gardiner, 'New Developments with Respect to the Duty of Care in Tort' (1988) 62 ALJ 347.

¹²⁰ (1985) 157 CLR 424, 485.

¹²¹ Id 486.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Id 488.

¹²⁵ Id 467.

the plaintiffs' damage, Mason J thought reliance provided a 'firm foundation' for a duty to protect against damage which was attributable to a third party's negligence.¹²⁶ Where such a duty arose, Mason J saw no difficulty in establishing a causal connection between a defendant's omission and independently created damage.

Where there is a duty to take a precaution against damage occurring to others through the default of third parties or through accident, breach of the duty may be regarded as materially causing or materially contributing to that damage, should it occur, subject of course to the question whether performance of the duty would have averted the harm.¹²⁷

In addition, Mason J, unlike Brennan J, did not treat contributing conduct on the part of the public authority as a prerequisite to liability. Liability was not limited to circumstances where the defendant had induced the plaintiff's reliance. Mason J indicated that in some cases a duty could be based on a plaintiff's 'general' reliance or dependence upon the performance of a statutory function.¹²⁸

The judgment of Deane J is less explicit on this point. His reasoning is, however, consistent with the wider view expressed by Mason J that a public authority can owe a duty to protect against independently created damage. Deane J thought that a duty 'to take reasonable care to secure avoidance of a reasonably foreseeable but independently created risk of injury' could arise in a 'special' or 'exceptional' case.¹²⁹ The existence of this duty was, of course, held to depend upon the satisfaction of the proximity test. Deane J also rejected the prerequisite of contributing conduct on the part of the public authority. In outlining the factors which would indicate a sufficient relationship of proximity, Deane J did not limit liability to circumstances where the defendant had induced or encouraged the plaintiff's reliance.¹³⁰ 'Depending upon the particular combination of factors', Deane J indicated that liability could arise where the defendant 'was or should have been aware of' the plaintiff's reliance.¹³¹

Despite the lack of uniformity in the court's reasoning, it is suggested that a public authority's liability is wider than that envisaged by Brennan J.¹³² A public authority can owe a duty to protect against independently created damage. The subsequent endorsement of Deane J's proximity test means that this liability will depend upon the existence of the requisite relationship. Both Mason and Deane JJ indicated that conduct on the part of the public auth-

¹²⁶ Id 466.

¹²⁷ Id 467.

¹²⁸ Id 463-4.

¹²⁹ Contra Fleming who stated that both Brennan and Deane JJ denied a duty for non-feasance: J G Fleming, *The Law of Torts* (7th ed, 1987) 142.

¹³⁰ (1985) 157 CLR 424, 508.

¹³¹ Ibid.

¹³² Brennan J was the only member of the court to base liability on antecedent conduct which created or increased the risk of damage. In addition, the reasoning behind this narrow liability — that the law should develop 'incrementally' has since been rejected by the High Court: *San Sebastian Pty Ltd v The Minister* (1986) 62 CLR 340; *Hawkins v Clayton & Ors* (1988) 164 CLR 539.

ority which induces or contributes to the plaintiff's reliance is not an essential element of this relationship.

The Classification of the Plaintiffs' Damage — Economic Loss

Another issue upon which there was a lack of unanimity was the classification of the plaintiffs' damage. Gibbs CJ, following the reasoning in *Anns*, held that the plaintiffs' loss could be classified as 'material physical damage'.¹³³ Wilson J, who agreed with the reasoning of Gibbs CJ in all other respects, reserved his assent on this point.¹³⁴ Without deciding, Wilson J said that it was arguable that the source of the loss was the weakened foundations of the house in ignorance of which the [plaintiffs] paid more for its purchase than they would otherwise have done.¹³⁵ On the other hand, Mason J thought the classification of the plaintiffs' damage had no bearing on the question of liability.¹³⁶

The other two members of the Court, Brennan and Deane JJ drew attention to the problems associated with the House of Lords' characterisation of the loss as 'material physical damage'. For instance, as Deane J pointed out, because a building constructed on inadequate foundations has never been anything but a defectively built structure, it has not been subjected to 'material physical damage'.¹³⁷ Brennan J recognised that even if the 'damage' occurred when the building was constructed on inadequate foundations, nothing else happens to the structure but its deterioration due to the passing of time and the forces of nature.¹³⁸ This means that a subsequent owner or occupier would not have a cause of action, as only a person who had an interest in the property at the time it was damaged could recover for the loss.¹³⁹ Brennan J, however, refused to commit himself to a classification of the plaintiffs' damage.¹⁴⁰

Only Deane J was prepared to identify the plaintiffs' loss as economic, and, once again, his position has been vindicated by a subsequent decision of the High Court. While Deane J was unsupported by his brother judges in *Heyman*, there are indications in the recent case of *Hawkins v Clayton & Ors*¹⁴¹ that the High Court has accepted his classification of the loss.¹⁴² A distinction must therefore be drawn between loss which flows from the inadequate foundations (including any structural damage to the building's superstructure) and physical damage caused to property other than the defec-

¹³³ (1985) 157 CLR 424, 447.

¹³⁴ Id 471.

¹³⁵ Ibid.

¹³⁶ Id 466. In the view of the High Court's subsequent endorsement of Deane J's distinction between economic loss and physical damage, this reasoning is incorrect.

¹³⁷ Id 504.

¹³⁸ Id 490.

¹³⁹ Id 490, per Brennan J, 504, per Deane J.

¹⁴⁰ Id 493.

¹⁴¹ (1988) 164 CLR 539.

¹⁴² With the agreement of Mason CJ and Wilson J, Deane J reiterated his classification: Id 261. Gaudron J also adopted the classification: Id 266-7.

tively constructed building.¹⁴³ The former loss is economic and therefore liability will depend upon the existence of the requisite relationship of proximity.

The Ingredients of a Sufficient Relationship of Proximity

The High Court's decision provides no easy answer to the question of what constitutes a relationship of proximity sufficient to give rise to a duty to carry out a careful exercise of statutory powers. It might be thought that because Deane J applied the proximity test, his reasoning in *Heyman* would provide a useful guide on this point. His judgment is, however, only of limited assistance. In order to support his conclusion that there was insufficient proximity to give rise to liability, Deane J merely listed, in negative form, a number of factors which were absent from the case.¹⁴⁴ It is not clear whether any one of these factors, if present, would have been sufficient or whether a combination of these factors was required. Although Mason J did not apply the proximity test, his explicit reasoning in relation to the circumstances in which liability would arise is more helpful. The difficulty is in deciding whether his statements can be reconciled with the slightly ambiguous comments made by Deane J. At most, the judgments of Mason and Deane JJ provide an outline of the proximity requirement in a case where the facts are similar to those which arose in *Heyman*.

Mason J was the only member of the court to expressly state that liability depends upon the plaintiff's 'reasonable' reliance.¹⁴⁵ There is, however, little doubt that the reliance referred to by Deane J as a factor indicating proximity involved reliance that was reasonable in the circumstances.¹⁴⁶ The judgment of Mason J shows that when testing the reasonableness of a plaintiff's reliance it is important to consider the plaintiff's ability to guard against the dangers suffered. In the case of the *Heymans*, Mason J pointed out a number of ways they could have protected themselves:

An intending purchaser of a building can apply for a certificate under s.317A and make enquiries of a council for information concerning the erection of a building and the inspections of it which the council has made. He can, if he wishes, retain an expert to inspect the building and check its foundations — a task which I assume to be within the competence of an appropriate expert.¹⁴⁷

In these circumstances, Mason J held that general reliance or dependence on the Council exercising its statutory powers would not be reasonable. Liability would only arise if the plaintiffs had actually relied upon the authority's performance of its function.¹⁴⁸ According to Mason J., the plaintiffs' case failed because of the lack of evidence of any actual reliance on their part.

¹⁴³ (1985) 157 CLR 424, 511-2.

¹⁴⁴ Id 510-1.

¹⁴⁵ Id 463-4.

¹⁴⁶ If reliance is going to indicate proximity it must be reasonable in the circumstances: *Derrington*, 63 ALJ 13, 16.

¹⁴⁷ (1985) 157 CLR 424, 471.

¹⁴⁸ Mason J used the term 'specific' reliance: Id 463.

The respondents neither sought a certificate under s.317A nor made any enquiry of the appellant relating to the condition of the building or its compliance with the Act and the ordinances. For that matter the respondents did not give evidence that they relied on the appellant having satisfied itself of these matters or the stability of the foundations.¹⁴⁹

It appears that Deane J also saw actual reliance as a prerequisite to liability in this case. Listing in negative form the factors which indicated an absence of proximity, Deane J stated:

There was no contact at all between the Council and the respondents prior to the respondents' purchase of the house . . . The approach of the previous owners, their builder and the respondents was, plainly enough, to ignore rather than to rely upon the Council with respect to the erection or the condition of the house . . .¹⁵⁰

The judgments of Mason and Deane JJ show that in a situation like *Heyman* where the court finds that the plaintiff could have taken adequate steps for his or her own protection, the requisite relationship of proximity will only exist if the plaintiff actually relied on the public authority's performance of its functions. It also appears that liability will not arise in such a case unless there was conduct on the part of the defendant authority which contributed to the plaintiff's reliance. If the plaintiff could have taken adequate steps for his or her own protection, actual reliance on the performance of a statutory function will not, on its own, be reasonable. In such a case, the defendant public authority could not be expected to know of the plaintiff's reliance. As Mason J pointed out:

Contributing conduct on the part of the defendant is an element in the vast majority of cases simply because without it the plaintiff would fail to establish reasonable reliance.¹⁵¹

Mere communication by the plaintiff of his or her reliance would not be enough. The public authority would have to encourage the reliance or in some way assume responsibility for the danger.¹⁵²

The requirement of actual reliance in a case where the plaintiff can take steps for his or her own protection limits the liability of a public authority for the loss suffered by subsequent (as opposed to original) owners or occupiers of a defective structure. It is unlikely that a public authority would, in such a case, owe a subsequent owner or occupier a duty to carry out a careful inspection of a building's foundations. For such a duty to arise, the plaintiff must have actually relied upon the subsequent performance of the particular function. Only a person who, at the time the foundations were laid, owned the structure or knew he or she would own or occupy the structure at some later time could rely on a council inspection before the foundations were covered

¹⁴⁹ Id 470.

¹⁵⁰ Id 510.

¹⁵¹ Id 463.

¹⁵² In circumstances where a plaintiff can take adequate steps for his or her own safety, a public authority would not come under an obligation to protect the plaintiff merely because it was informed of the plaintiff's reliance; Id 464.

in.¹⁵³ The Heymans, who purchased the house several years after it was completed, could not claim that they had actually relied on the Council's inspection of the footings. As Mason J pointed out:

It is clear enough that this was not a case in which the respondents specifically relied on the appellant's exercise of its power.¹⁵⁴

The defendant public authority could only have been liable to the Heymans for negligent misstatement. Mason, Brennan and Deane JJ indicated that the Heymans could have recovered if they had sought and obtained a s 317A certificate of compliance.¹⁵⁵ In those circumstances, the Council's liability would have been determined in accordance with the principles laid down in *Hedley Byrne v Heller*.¹⁵⁶ Like the defendant in *Shaddock v Parramatta City Council*,¹⁵⁷ the Sutherland Shire Council, as the exclusive repository of information concerning the building's compliance with statutory standards, would have owed the plaintiffs a duty to exercise care in collating and communicating the information which was contained in the certificate.

The Outstanding Issues

The General Reliance Concept

In *Heyman*, Mason J suggested that in some cases liability can be based on a plaintiff's general reliance or dependence upon the public authority's performance of its functions. His Honour stated:

there will be cases in which the plaintiff's reasonable reliance will arise out of a general dependence on an authority's performance of its function with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of a plaintiff.¹⁵⁸

The question of whether this general reliance concept will be adopted by the High Court as an appropriate proximity factor remains outstanding. If the concept is adopted, a further question arises as to the scope of its application.

The general reliance concept was applied by McHugh JA in the New South Wales Court of Appeal case, *Parramatta City Council v Lutz*¹⁵⁹ to impose liability on a council for its failure to exercise its statutory power to demolish an unoccupied and fire damaged structure. According to McHugh JA:

The introduction of a general reliance category into the law of negligence is a legitimate analogical development of the established category of specific

¹⁵³ As the relevant duty is based on actual reliance, reasoning of Deane J in *Hawkins v Clayton & Ors* (1988) 164 CLR 539 with respect to a relationship of proximity between a defendant and a class of persons who are identified by some future characteristic or capacity they do not yet have is not applicable.

¹⁵⁴ (1985) 157 CLR 424, 470.

¹⁵⁵ *Id* 471 per Mason J 494, per Brennan J 510, per Deane J.

¹⁵⁶ [1964] AC 465.

¹⁵⁷ (1981) 150 CLR 225.

¹⁵⁸ (1985) 157 CLR 424, 464.

¹⁵⁹ (1988) 12 NSWLR 293.

reliance. It is a necessary development in the law of negligence as it applied to public authorities. The development is justified by the failure of the traditional categories to give protection to individual members of the community from harm in situations where it is impractical for them to protect themselves.¹⁶⁰

There are a number of grounds for suggesting that the High Court might also be prepared to accept the general reliance concept. To begin with, the reasoning in *Heyman* and subsequent decisions allows for the application of this concept. Provided the requisite relationship of proximity exists, a public authority can owe a duty to protect against independently created damage. Liability need not depend upon contributing conduct on the part of the public authority. A duty can arise even though the public authority has not induced the plaintiff's reliance.¹⁶¹ Secondly, there are indications in the recent case of *Hawkins v Clayton & Ors*¹⁶² that the High Court is prepared to be flexible in its formulation of the proximity test. In particular, the judgment of Gaudron J in that case gives effect to the principle espoused by Deane J in *Heyman* that 'the identity and the relative importance of the factors which are determinative of an issue of proximity are likely to vary'.¹⁶³ In circumstances where there was an absence of actual reliance on the plaintiff's part, Gaudron J was prepared to identify a new proximity factor based on the plaintiff's reasonable expectation.¹⁶⁴

The High Court's decision in *Heyman* suggests, however, that this general reliance concept cannot be applied to establish liability for a failure to carry out a careful inspection of building foundations. To begin with, Mason J indicated that the general reliance concept would only apply where an individual 'cannot, or may not, take adequate steps for their own protection'.¹⁶⁵ With respect to prospective purchasers or tenants, Mason J took the view that they can take adequate steps to protect themselves against a loss arising from defective foundations. According to Mason J, the Heymans could have not only protected themselves by seeking expert advice or obtaining a certificate of compliance, they could have also made enquiries of the Council 'for information concerning the erection of a building and the inspections of it which the council has made'.¹⁶⁶

In addition, Mason J limited the application of the general reliance concept

¹⁶⁰ Id 330-1.

¹⁶¹ S Todd 'The Negligence Liability of Public Authorities: Divergence in the Common Law' [1986] 102 *LQR* 370, 382 suggests that there is no room for the general reliance concept because the defendant must induce the plaintiff's reliance otherwise there will be no causal connection between the omission and the damage. It is submitted that in light of subsequent decisions of the High Court, this view is incorrect. Liability depends upon proximity which can arise even where the plaintiff's reliance is not induced. In such a case, the causal connection between the defendant's failure to act and the plaintiff's damage is established in the manner explained by Mason J in *Heyman* (1985) 157 CLR 424, 467.

¹⁶² (1988) 164 CLR 539.

¹⁶³ (1985) 157 CLR 424, 498.

¹⁶⁴ (1988) 164 CLR 539, 564.

¹⁶⁵ (1985) 157 CLR 424, 464.

¹⁶⁶ Id 471.

to circumstances where the plaintiff suffers personal injury.¹⁶⁷ Even if the High Court was prepared to apply this concept to allow recovery of economic loss,¹⁶⁸ it would be unlikely to assist a plaintiff in a case like *Heyman* as Mason J also required the relevant statutory power to be conferred with the purpose of providing protection against the sort of loss suffered.¹⁶⁹ In *Heyman*, the purpose of the empowering legislation was not seen as extending to the protection of homeowners against economic loss:

It is . . . impossible to discern in the relevant provisions of the Act and Ordinances anything which would warrant the conclusion that there had been included among the purposes for which those powers and functions were conferred a general purpose of protecting owners of premises from sustaining economic loss by reason of defects in buildings which they or their builders might erect or which they might purchase after erection.¹⁷⁰

Further, the actual decision in *Heyman* is inconsistent with the application of the concept of general reliance upon the performance of a statutory power to inspect building foundations. Instead of imposing liability on the Council for the failure to carry out a careful exercise of its powers, the onus was placed on the plaintiffs to make enquiries and seek representations. Brennan J explained the Heymans' position:

The Council is responsible for the information furnished in a s.317A certificate, but it is not liable for miscalculations of value in buying and selling when those miscalculations are based on other information. A private purchaser in the market place cannot look to public funds to underwrite the information on which he makes his purchase except in circumstances which attract the operation of the principle in *Shaddock* or where a certificate is furnished pursuant to s.317A.¹⁷¹

The High Court must reconsider the requirement of actual reliance as the basis of liability for the failure to carry out a careful inspection. When Mason J spoke of general reliance, he referred to a situation where there is generated:

. . . 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 general reliance or dependence on its exercise of power . . .¹⁷²

It is suggested that there can be general reliance or dependence by individual members of the community on a public authority's performance of its statutory power to inspect building work. This general reliance is not a 'prod-

¹⁶⁷ Id 464.

¹⁶⁸ In *Parramatta City Council v Lutz* (1988) 12 NSWLR 293, 330-1 McHugh JA applied the concept to allow recovery for property damage on the basis that the relevant statutory power was conferred on the Council to 'protect a small and easily ascertainable class' against danger to their property and person posed by dilapidated buildings.

¹⁶⁹ Mason J suggested that this general reliance is 'the product of a grant (and exercise) of powers designed to prevent or minimize a risk of personal injury or disability . . .' (1985) 157 CLR 424, 464.

¹⁷⁰ Id 509 per Deane J.

¹⁷¹ Id 494.

¹⁷² Id 464.

uct of the grant'¹⁷³ of these statutory powers: it arises from the practice adopted by public authorities in exercising these powers. If a public authority adopts the practice of inspecting all building sites then that practice will generate, on one side (the individual), the general expectation that the power will be exercised. It will also generate, on the other side, the realisation that there is general reliance or dependence on its exercise of the power.

An individual's general reliance on a public authority's practice of performing its statutory power of inspection with respect to all building sites could provide a sufficient basis for imposing a common law duty to carry out a careful exercise of those powers so as to protect the individual against third party's negligence.¹⁷⁴ There will be cases where this general reliance or dependence is not unreasonable. A prospective purchaser or lessee of a building cannot always take adequate steps for his or her own protection. If a defect is latent it may not be detected even upon an inspection by an expert.¹⁷⁵ The relevant legislation may not always provide for the obtaining of a certificate of compliance. It is unreasonable to suggest that a prospective purchaser or lessee can adequately protect himself or herself by making enquiries of the relevant local authority.¹⁷⁶ In circumstances where a local authority is not under a statutory duty, it would probably refuse to divulge this sort of information.¹⁷⁷

In addition, an individual's general reliance upon council practice would not be unreasonable simply because the relevant statutory power was not conferred with the purpose of protecting against the loss suffered. General reliance upon the exercise of a statutory power of inspection can be reasonable even though the power was conferred merely for the purpose of protecting against personal injury. If a public authority adopts a practice of performing a power which was conferred with the purpose of protection against personal injury, this may raise a reasonable expectation among individual members of the public that this power will always be performed to protect against any type of loss.

If the High Court did decide to apply the general reliance concept to defective foundation cases, a subsequent owner or occupier of a building would have little difficulty in establishing a relationship of proximity with the relevant local authority. As Deane J pointed out in *Hawkins v Clayton & Ors*,¹⁷⁸ a

¹⁷³ *Ibid.*

¹⁷⁴ In *Heyman*, Brennan J spoke of liability being imposed where a public authority adopts a practice of so exercising its powers that it induces a reasonable expectation as to its continued performance of the function: *Id* 486. However, this liability did not extend to a duty to protect against independently created damage — it would only arise where the public authority had created or increased the risk of damage.

¹⁷⁵ In *Heyman*, Mason J seemed to act on the assumption that an inspection by an expert would have revealed the defects in the footings: *Id* 471.

¹⁷⁶ The reality of the situation is that because most prospective purchasers or lessees know or expect that the relevant building has undergone council inspection and approval they do not make enquiries or seek representations from the council. Compare Todd, 102 LQR 370, 382.

¹⁷⁷ See T Faunce 'Municipal Councils and Defective Structures: Proposed Reforms to Section 317A.' [1986] *L Soc J* 28.

¹⁷⁸ (1988) 164 CLR 539.

duty of care can be owed to a party to be identified by some future characteristic:

a relationship of proximity can exist with, and a duty of care can be owed to, a class of persons which includes members who are not yet born or who are identified by some future characteristic or capacity which they do not have. Cases involving damage by reason of a latent defect in property demonstrate the point. Thus, a relationship of proximity ordinarily exists between an architect or builder of a residential building (e.g. a maternity hospital) and the members of the class of persons who will in future years be born or housed in it.¹⁷⁹

Certainly, there were strong policy considerations behind the decision to deny the Heymans' claim. The chief concern expressed by the court was that the general body of ratepayers should not have to bear the economic loss suffered by a person who purchases a structure built on inadequate foundations.¹⁸⁰ It is, however, in the best interests of ratepayers for liability to be imposed on public authorities for the failure to carry out a careful exercise of their statutory powers of inspection. To begin with, in most cases, it will be a ratepayer who suffers this sort of economic loss. Secondly, it is in the interest of every ratepayer to see that public officials carry out their functions in accordance with community expectations.¹⁸¹

In reaching the conclusion that the plaintiffs rather than the general body of ratepayers should bear the loss, the court attributed significance to the legislature's intention in this regard. Not only was focus placed on the purpose for which the relevant statutory power was conferred but Deane J also pointed out:

The provisions of the Act and Ordinances have traditionally never been seen as intended to place upon a local government council the duty or burden of protecting an owner of premises from mere economic loss sustained by reason of the negligent erection, by someone other than the council, of a building upon his or her land.¹⁸²

This emphasis upon legislative intention is inconsistent with the High Court's decision to apply general principles to determine the common law liability of the Council.¹⁸³ A common law duty to act arises because the harm suffered was foreseeable and the parties share a proximate relationship: its existence has nothing to do with the legislature's determination as to what is an appropriate burden or responsibility.¹⁸⁴

There is no good reason why a public authority cannot be liable to a subsequent owner or occupier of a building for the failure to carry out a careful inspection of its foundations. The public authority would not face a suc-

¹⁷⁹ Id 256.

¹⁸⁰ (1985) 157 CLR 424, 494 per Brennan J; 511 per Deane J.

¹⁸¹ See *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641, 681 and Todd, 102 LQR 370, 393.

¹⁸² (1985) 157 CLR 424, 511.

¹⁸³ As Todd, 102 LQR 370, 396, points out, it makes the action look like one for a breach of a statutory duty.

¹⁸⁴ Ibid.

cession of claims with respect to one particular building. According to the reasoning of Deane J in *Heyman*¹⁸⁵ and later in *Hawkins v Clayton & Ors*,¹⁸⁶ only the person who owned or occupied the property when the defects became manifest has a cause of action. The liability of public authorities for this sort of economic loss would not be indeterminate.¹⁸⁷ Their liability would only be as great as the number of defective structures they have negligently allowed to be completed.¹⁸⁸ In addition, in circumstances where the defect could not have been detected by the plaintiff prior to purchasing the property, it is only fair and just that the party which could have acted to avert the harm should bear the loss.

The Policy Immunity

As pointed out earlier, Mason and Deane JJ were prepared to allow one exception to the rule that the common law liability of public authorities is unlimited. This exception related to the policy based decisions of a public authority which Mason and Deane JJ suggested should be immune from liability. Deane J stated that these decisions enjoy an immunity from common law principles because:

The existence of liability on the part of a public governmental body to private individuals under those principles will commonly, as a matter of assumed legislative intent, be precluded in cases where what is involved are actions taken in the exercise of policy-making powers and functions of a quasi-legislative character . . .¹⁸⁹

Mason J on the other hand, who adopted the policy/operational distinction took the view that these decisions are immune from liability because:

The standard of negligence applied by the courts in determining whether a duty of care has been breached cannot be applied to a policy decision, but it can be applied to operational decisions.¹⁹⁰

There was a similar lack of uniformity in the reasoning of the other members of the court. Gibbs CJ (with whom Wilson J agreed) followed *Anns* and only afforded intra vires policy decisions protection from liability,¹⁹¹ while Brennan J did not canvass the possibility of an immunity.

Due to the lack of unanimity, this issue of whether the policy decisions of a public authority should be protected from liability remains outstanding. When the High Court does determine this matter, it will, no doubt, follow the

¹⁸⁵ (1985) 157 CLR 424, 505.

¹⁸⁶ (1988) 164 CLR 539, 560.

¹⁸⁷ It could only be indeterminate in time. However, in a case where the defect was latent it is only fair and just that liability be imposed on the public authority when the cause of action may arise many years after the council's negligent failure to act. Unlike a private defendant, a public body keeps (or should keep) records which would assist in its defence.

¹⁸⁸ In fact, the imposition of liability could well have the effect of reducing the number of claims: *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641, 681 per Wilson J.

¹⁸⁹ (1985) 157 CLR 424, 500.

¹⁹⁰ Id 468-9.

¹⁹¹ Id 448.

approach taken in *Giannarelli v Wraith*,¹⁹² a case dealing with a legal advocate's immunity from liability. The High Court's reasoning in that decision shows that the existence of an immunity from common law liability rests on public policy considerations. It also shows that the granting of an exception from the 'ever-expanding'¹⁹³ tort of negligence is not a step that will be taken lightly. A defendant seeking to rely on an immunity bears a heavy burden justifying his or her claim.¹⁹⁴

There are several reasons why the policy based decisions of a public authority should not be afforded an immunity. To begin with, such protection is unwarranted. It is said that the policy based decisions of a public authority should be shielded from judicial review: such matters are to be decided 'through the ballot-box' rather than in the courtroom. However, due to the way the general principles of negligence operate, policy matters involving political, social or financial considerations will only be relevant in a limited number of cases. For instance, in a case where reliance is the relevant proximity factor, the public authority's common law duty could be discharged without the need to perform the relevant statutory function. All that may be required is a notification of the authority's intention to refrain from exercising its power.¹⁹⁵ The determination of whether it was reasonable for a public authority to withdraw its services to a plaintiff without warning, even a telephone call, is hardly a 'thrift and efficiency' political matter.¹⁹⁶ On the other hand, there are a limited number of cases where political, social and financial considerations may be relevant. For instance, in a case where liability depends upon the public authority's control of property or persons and it has a discretion as to the degree and nature of the control adopted,¹⁹⁷ political considerations could well dictate its relevant act or omission. There is, however, no reason why protection should be afforded in such a case. In a negligence action, the court's task is to assess the reasonableness of the defendant's conduct. As pointed out elsewhere,¹⁹⁸ fears of judicial intervention based on lack of judicial competence are overstated. The courts are quite capable of taking into account a public authority's limited resources and conflicting demands. They have demonstrated this ability when determining the breach issue.¹⁹⁹

Apart from being unwarranted, an immunity for the policy-based decisions of a public authority is undesirable as it would lessen the impact of *Heyman*. That decision is important because it swept away the conceptual confusion which marred earlier decisions. The High Court recognised that the public

¹⁹² (1988) 81 ALR 417.

¹⁹³ *Id* 613.

¹⁹⁴ *Id* 623.

¹⁹⁵ Such notification would make the plaintiff's reliance upon the authority's performance of its power unreasonable.

¹⁹⁶ E Galy 'Civil Liability of Public Authorities.' (1986) 136 *New Law Journal* 435, 495.

¹⁹⁷ As in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004.

¹⁹⁸ J A Smillie, 'Liability of Public Authorities for Negligence' (1985) 25 *UW Ont L Rev* 213.

¹⁹⁹ As in *Goldman v Hargrave* [1967] AC 645, 663 and *Leakey v National Trust* [1980] QB 485. See also M J Bowman and S H Bailey, 'Negligence in the Realms of Public Law — A Positive Obligation to Rescue?' [1984] *Pub Law* 277, 302.

law responsibilities of a public authority are separate and distinct from its private law duties. With respect to negligence liability, the High Court decided that the same general principles which apply to a private defendant apply to a public authority. *Heyman* shows that a public authority is not to be afforded special treatment simply because of its public character.

The introduction of an immunity for policy based decisions would mean that once again a special set of rules apply to determine the common law liability of a public body. The general principles which determine the existence of a common law duty of care would not be the sole test of liability. There would be an additional test for determining whether a decision is policy based and therefore immune from liability.

The suggested immunity for policy based decisions is based on the policy/operational distinction. This distinction is borrowed from United States' cases interpreting the 'discretionary function exception' in the United States' *Federal Tort Claims Act*.²⁰⁰ The attempt by Mason J²⁰¹ to justify the adoption of this distinction on the ground that the Australian statutory framework is analogous to the United States' legislation was, with respect, ill-founded.²⁰² Section 64 *Judiciary Act* 1903 cannot be equated with an express and specific grant of immunity as provided by the United States statute. Section 64 provides:

In any suit to which the Commonwealth or a State is a party, the rights of the parties shall, as nearly as possible, be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

While the words 'as nearly as possible' suggest that there is room for recognition of the peculiar characteristics of a public defendant, they do not require the application of an immunity for policy based decision. Such an immunity would not take a public authority's liability 'as near as possible' to that of a private defendant. This can only be achieved by an application of the general principles of negligence which provide sufficient protection for the decision-making processes of a public authority.

If the High Court does refuse to grant an immunity for policy based decisions it does not mean that it has failed to appreciate that public authorities make decisions based on financial, political and social considerations. What it will mean is that the High Court has recognised that the application of the general principles of negligence will not involve an unwarranted interference with these decisions. It will also mean that an unnecessary complication of the test for determining the negligence liability of a public authority has been avoided.

²⁰⁰ 28 USC (1982).

²⁰¹ (1985) 157 CLR 424, 469 per Mason J.

²⁰² Smillie, 25 *UW Ont L Rev* 213, 218; A Rubinstein, 'The Liability of Bodies Possessing Statutory Powers for Negligent Failure to Avoid Harm', (1987) 13 *Mon ULR* 75.

Conclusion

No doubt the impact of the *Heyman* decision would have been greater if there had been more uniformity in the High Court's reasoning. Certainly, the divergence in opinion means that the High Court judgments provide only limited guidance as to how the application of general principles affects a public authority. On a number of issues, it is impossible to discern a clear statement of principle. As a result, the decision in *Heyman* must be regarded as merely providing a starting point for the development of the liability of public authorities for omissions. In order to fully understand a public authority's position in this regard it is necessary to look beyond this decision. Some of the questions raised by *Heyman* are answered by the High Court in subsequent decisions. There are other outstanding issues which await further determination by the High Court.

When considering these outstanding issues the High Court should re-examine the decision to deny a public authority's liability to a subsequent owner or occupier of a building for the failure to carry out a careful inspection of the building's foundations. The actual reliance requirement should be removed. General reliance or, to use Gaudron J's proximity factor, 'a reasonable expectation' would provide a more suitable basis for liability in such a case. In many cases, because the defect in the foundations is latent, expert assistance cannot protect the plaintiff. It is unrealistic to suggest that public authorities will, in response to the High Court's decision, encourage enquiries as to inspection and approval of building work. The subsequent owner or occupier may be unable to take any steps for his or her own protection. At the same time, this subsequent owner or occupier may know that the practice of the relevant local authority is to inspect all building work and he or she may expect that an inspection has taken place. In these circumstances, it is only fair, there being no good reason to deny liability, that the public authority, the party who could have protected the plaintiff against economic loss flowing from the defective foundations, should bear the loss.

THE HIGH COURT'S DECISION COMPARED WITH DECISIONS IN OTHER JURISDICTIONS

To be complete, this assessment of the significance of the High Court's decision in *Heyman* must take into account the developments in England, New Zealand and Canada since *Anns*. In these other common law jurisdictions, the liability imposed by the House of Lords has received a more favourable reception. Until the recent decision of the House of Lords in *Murphy v Brentwood District Council* (1990),²⁰³ there had been nothing to match the High Court's decision to reject Lord Wilberforce's reasoning and apply general principles. In order to highlight the importance of the High Court's decision, this section looks at the relevant case law in England, New Zealand

²⁰³ [1990] 2 All ER 908. Hereafter cited as *Murphy*.

and Canada. It also considers whether the High Court's decision will enjoy a further significance by providing a lead for the courts in the other common law jurisdictions to follow.

How *Anns* was Received in Other Jurisdictions

England

In *Murphy*, the House of Lords overruled *Anns*²⁰⁴ and all decisions subsequent to that case which purported to follow it. Prior to *Murphy*, the House of Lords' approach to *Anns* had fallen short of an outright rejection of Lord Wilberforce's reasoning. Instead, the House of Lords had undertaken a gradual and tentative retreat from *Anns*, dealing with the earlier decision in two ways. First, Lord Wilberforce's two stage test of liability was regarded with reservation, the House of Lords warning against following this test too closely. For instance, while Lord Wilberforce clearly intended this test to be of universal application, Lord Keith in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd*²⁰⁵ suggested that the temptation to treat it as a definitive statement should be avoided.²⁰⁶ In *Curran v NI Housing Association*,²⁰⁷ Lord Bridge, aware of the criticism that had been levelled at Lord Wilberforce's reasoning, also treated the two stage test of liability with some reservation. His Lordship warned against any extension of the principle applied in *Anns* whereby:

Although under no statutory duty, a statutory body may be held to owe a common law duty of care to exercise its statutory powers to control the activities of third parties in such a way as to save harmless those who may be adversely affected by those activities if they are not effectively controlled.²⁰⁸

Later, in *Yuen Kun Yeu v Attorney General of Hong Kong*,²⁰⁹ their Lordships sitting as the Privy Council, rejected Lord Wilberforce's two stage formulation as a general test of liability:

In view of the direction in which the law has since been developing, their Lordships consider that for the future it should be recognised that the two-stage test in *Anns v Merton London Borough Council* [1978] A.C. 728, 751–752 is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care.²¹⁰

Secondly, the English courts have also placed limits on Lord Wilberforce's duty to ensure compliance with council regulations. In *Peabody*, the House of Lords held that the local authority did not owe the plaintiff a duty to ensure

²⁰⁴ Pursuant to a practice statement (26.7.66) which allowed the House to depart from a previous decision of its own if it so chooses ([1966] 3 All ER 77).

²⁰⁵ [1985] 1 AC 210. Hereafter cited as *Peabody*.

²⁰⁶ *Id* 240.

²⁰⁷ [1987] 1 AC 718. Hereafter cited as *Curran*.

²⁰⁸ *Id* 726.

²⁰⁹ [1988] 1 AC 175. Hereafter cited as *Yuen Kun Yeu*.

²¹⁰ *Id* 785.

that a drainage system complied with approved plans so as to avoid foreseeable economic loss. The local authority had approved plans for a flexible system of drainage for a housing development on a site owned by the plaintiff. However, the plaintiff's building contractors, on the instruction of its architect, installed a different, rigid design. This departure from the approved plan came to the knowledge of a council drainage inspector but no action was taken. Two years later, the plaintiff incurred a substantial loss when the development was delayed while reconstruction work on the drainage system was undertaken. The House of Lords distinguished *Anns* on the basis that the local authority's powers were not conferred for the purpose of protecting against the type of loss suffered by the plaintiff.²¹¹ According to the House of Lords, the purpose of the empowering statute was to safeguard occupiers of houses and the public generally against dangers to their health from defective installations.²¹² These powers were not conferred to protect developers against the loss suffered by their failure to comply with approved plans.²¹³

A similar distinction was also drawn in *Curran* to deny liability on the basis of a duty to ensure compliance with statutory requirements. In that case, the plaintiffs purchased a house to which a defective extension had been added. The defendant public authority had funded the extension. The House of Lords rejected the plaintiffs' claim that the defendant owed them a duty of care to ensure that the extension paid for with a grant was free from defect. With respect to the defendant's power to withhold a grant if the work was unsatisfactory, Lord Bridge thought it was clear that its purpose was to protect public revenue, not the recipients of the grant or their successors in title.²¹⁴ The following requirement was seen as an element fundamental to the ratio of the decision in *Anns*:

The statutory power which the authority is alleged to have negligently failed to exercise or have exercised in a negligent way must be specifically directed to safeguarding the public, or some section of the public which the plaintiff asserting the duty of care is a member, from the particular danger which has resulted . . .²¹⁵

During this pre-*Murphy* period, the House of Lords heeded developments in Australia. Until the House of Lords' decision in *Murphy*, however, the legacy of *Anns* remained. Although the ratio of that decision had been confined in subsequent cases, it appeared that Lord Wilberforce's duty would still avail a plaintiff in circumstances where the relevant statutory power was conferred with the purpose of protecting a class of persons which included the plaintiff against the loss suffered.²¹⁶ While the Privy Council's judgment in

²¹¹ [1985] 1 AC 210, 242.

²¹² Ibid. See Todd, *Negligence Liability*, 391.

²¹³ Lord Keith took the view that it would be neither 'reasonable or just' to allow Peabody to recover as it was under a statutory obligation to ensure the drains complied with the plan approved by the council. [1985] 1 AC 210, 241.

²¹⁴ [1987] 1 AC 718, 728.

²¹⁵ Ibid.

²¹⁶ In other words, a plaintiff could recover for 'material physical damage' where the relevant statutory power was conferred for the purpose of protecting public health and safety.

Yuen Kun Yeu indicated that in most cases the liability of a public authority will be determined by ordinary principles, some issues remained outstanding. For instance, the Privy Council did not deal directly with the question of whether public authorities should enjoy an immunity from liability. As seen above, Lord Wilberforce, in answer to the second stage enquiry of his test, concluded that a public authority's liability should be confined to ultra vires acts or omissions. When dealing with this second stage of Lord Wilberforce's test, the Privy Council merely stated:

The second stage of Lord Wilberforce's test in *Anns v Merton London Borough Council* [1978] A.C. 728, 752 is one which will rarely have to be applied. It can arise only in a limited category of cases where, notwithstanding that a case of negligence is made out on the proximity basis, public policy requires that there should be no liability.²¹⁷

The House of Lords' decision to overrule *Anns* in *Murphy* means that in England, as in Australia, Lord Wilberforce's two stage formulation is no longer relevant as a general test of liability nor as a special test for determining the duty of care used by a public authority. The House of Lords' reasoning in *Murphy* mirrors the High Court's decision in *Heyman* in three important areas. First, the House of Lords agreed that *Anns* was wrongly decided as regards the scope of a public authority's private law duty of care to take steps to ensure compliance with building by-laws and regulations.²¹⁸ Secondly, the House of Lords endorsed the High Court's classification of the type of loss suffered in a case like *Anns* as economic loss.²¹⁹ Lord Keith, with whom the six other members of the House agreed, quoted at length from the judgment of Deane J in *Heyman*.²²⁰ His Lordship described Deane J's reasoning with respect to the classification of the loss suffered in this type of case as 'incontrovertible'.²²¹ Finally, the House of Lords' decision seems to leave the English plaintiff in the same position as his or her Australian counterpart. Their Lordships' reasoning in *Murphy* indicates that economic loss flowing from a defectively built structure will only be recoverable if a special relationship of proximity involving an element of actual reliance can be established between the aggrieved homeowner and the defendant public authority. On this point, Lord Keith again expressly the High Court's reasoning:

In *Sutherland Shire Council v Heyman* (1985) 60 A.L.R. 1 the critical role of the reliance principle as an element in the cause of action which the plaintiff sought to establish is the subject of close examination, particularly in the judgment of Mason J. The central theme of his judgment, and a subordinate theme in the judgments of Brennan and Deane J., who together with Mason J., formed the majority rejecting the *Anns* doctrine, is that a duty of care of a scope sufficient to make the authority liable for a damage of the kind suffered can only be based on the principle of reliance, and there is nothing in the ordinary relationship of a local authority, as a statutory

²¹⁷ [1988] 1 AC 175, 193.

²¹⁸ [1990] All ER 908, 923, 930, 937, 941.

²¹⁹ Id 918, 929-30, 932.

²²⁰ Id 919-20.

²²¹ Ibid.

supervisor of building operations, and the purchaser of a defective building a capable of giving rise to such a duty.²²²

New Zealand

The House of Lords' decision in *Anns* has been greeted with more enthusiasm by the New Zealand courts.²²³ The Court of Appeal has applied the decision and has indicated its intention to continue to follow Lord Wilberforce's reasoning despite developments in Australia and England. For instance in 1986, after *Heyman* and *Peabody* were decided, the New Zealand Court of Appeal reaffirmed its support for Lord Wilberforce's reasoning.²²⁴ Woodhouse P went so far as to state that if *Peabody* was intended to restrict the application of the principles laid down in *Anns* then he would:

Respectfully adhere to the several earlier decisions of the court and disagree with it.²²⁵

Woodhouse P also indicated that in making this statement, he had not overlooked the views expressed by the High Court of Australia in *Heyman*.²²⁶

Underlying the Court of Appeal's independent stance is the belief that the New Zealand position is unique. The judgments show that the court is conscious of the fact that it has allowed liability for the negligent infliction of economic loss to develop on a different basis from that laid down by its English counterpart. As Woodhouse P stated:

As purely economic loss arising from negligence is now recoverable in New Zealand I would think that if economic consequences of the kind discussed in the *Peabody* case were a likely and foreseeable outcome of a careless exercise of statutory responsibility then at least there would be a prima facie duty owed by the authority concerned.²²⁷

In a trilogy of building control cases decided in 1986, the New Zealand Court of Appeal has also indicated that it perceives the functions of a New Zealand public authority as being different from those of its English counterparts. For instance in *Brown v Heathcote County Council*,²²⁸ Cooke J suggested that New Zealand local bodies responsible for subdivisions and development of land were not only concerned with matters of public health and safety but also the preservation of community building and living standards, property values and amenities.²²⁹ Accordingly, the Court of Appeal

²²² [1990] 2 All ER 908, 930. See Duncan Wallace in 'Anns Beyond Repair' (1991) 107 LQR 228, 238-9.

²²³ See S Todd, 'Public Authorities' Liability: the New Zealand Dimension' (1987) 103 LQR 19.

²²⁴ *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22. Hereafter cited as *Takaro Properties*.

²²⁵ Id 57.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ [1986] 1 NZLR 76.

²²⁹ Id 80. Similar views were expressed in *Porirua City Council v Stieller* [1986] 1 NZLR 84 and *Craig v East Coast Bays City Council* [1986] 1 NZLR 99. See also Todd, 103 LQR 19.

distinguished *Peabody* on the basis that it was decided in the context of the English legislation.²³⁰ That case was therefore seen as not preventing the imposition of Lord Wilberforce's duty in a case where the plaintiff had suffered a purely economic loss.²³¹

Canada

The Supreme Court of Canada also followed the House of Lords' decision in *Anns*. In *City of Kamloops v Neilson*,²³² a majority of three to two held that the City was under a duty to enforce its by-laws. Liability was imposed on the basis of the City's failure to give proper consideration to whether legal proceedings should have been brought with respect to a house constructed on defective foundations. A stop work order had been placed on the building when an inspection revealed that the foundations were inadequate. However, the building owner ignored the order and the house was completed. No further inspections were made and in breach of by-laws the house was occupied even though no occupancy permit was granted. When the foundations subsided, the plaintiffs, subsequent owners of the property, brought an action against the City for the cost of the repairs. Applying the reasoning of Lord Wilberforce in *Anns*, Wilson J (who delivered the majority judgment) held that the City's failure to consider whether to prosecute or seek an injunction amounted to a breach of its duty to enforce the by-laws.²³³

'Following the path charted by Lord Wilberforce',²³⁴ Wilson J applied the two stage test of liability and allowed recovery for a failure to act on the basis of the foreseeability test.²³⁵ The City's duty to give proper consideration to a course of action was seen as providing a causal link between its omission and the plaintiffs' loss which was brought about by a third party's negligence.²³⁶

In earlier cases, the Supreme Court of Canada, influenced by United States' decisions, had allowed a complete immunity for policy decisions.²³⁷ In *Kam-*

²³⁰ [1986] 1 NZLR 76, 80.

²³¹ For example, in *Porirua City Council v Stieler* [1986] NZLR 84, the local authority which had negligently inspected a house was liable to the plaintiff homeowners for the cost of replacing substandard weatherboards which had become twisted and deformed.

²³² (1984) 10 DLR (4th) 641. Hereafter cited as *Kamloops*.

²³³ Id 673. The dissenters, McIntyre and Estey JJ took the view that the exercise of the discretion by the City regarding enforcement proceedings in court did not involve considerations of negligence because it was not subject to a restriction by private law duty of care.

²³⁴ Id 663. The only divergence from Lord Wilberforce's 'path' was in relation to the classification of the plaintiffs' loss which Wilson J treated as economic. In fact, *Anns* itself was seen as a case involving economic loss: Id 679. The Supreme Court of Canada has continued to apply *Anns* in actions against public authorities for negligence: *Just v The Queen in Right of British Columbia* [1989] 2 SCR 1228; *Rothfield v Monolagos* [1989] 2 SCR 1259. See L N Klar 'The Supreme Court of Canada: Extending the Tort Liability of Public Authorities' (1990) 28 *Atta L Rev* 648. As G McLennan points out, it is difficult to predict what impact the decision of *Murphy* will have on the direction of Canadian tort law: (1991) 70 *Can Bar Rev* 175, 179.

²³⁵ Id 673.

²³⁶ Id 666.

²³⁷ *Wellbridge Holdings Ltd v Greater Winnipeg* (1970) 22 DLR (3d) 470, 477.

loops, however, the court used Lord Wilberforce's ultra vires test of actionability. Even though the decision whether to act or not would have been taken at the policy level, Wilson J decided that the plaintiff could recover because the City had acted ultra vires:²³⁸

... inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the bona fide exercise of discretion.²³⁹

Will the High Court Lead a Return to the Common Law?

While the English courts may be headed in the same direction as the High Court, the same cannot be said of its counterparts in the other common law jurisdictions. The New Zealand Court of Appeal has continued to apply Lord Wilberforce's reasoning in the face of the Australian developments. Although *Kamloops* was decided before *Heyman*, the Canadian Supreme Court also indicated that it was prepared to apply Lord Wilberforce's test of liability even in the case of an omission.²⁴⁰ The New Zealand and Canadian courts may, however, face some pressure to follow the line taken by their Australian and English counterparts. In spite of their determination to 'hew their own way',²⁴¹ the New Zealand Court of Appeal is aware of the problem. Referring to the English and Australian decisions, Somers J in *Takaro Properties*,²⁴² stated:

We are not bound by those decisions although they obviously represent a formidable body of opinion not lightly to be disregarded in an area in which social conditions in New Zealand do not seem to be very different.²⁴³

Perhaps the Canadian and New Zealand courts should heed the advice given by the Privy Council when it considered the Minister's appeal in *Takaro Properties*:²⁴⁴

... all common law jurisdictions can learn much from each other, because apart from exceptional cases, no sensible distinction can be drawn ... between the various countries and special conditions existing in them. It is incumbent upon the courts in different jurisdictions to be sensitive to each other's reactions ...²⁴⁵

The negligence liability of public authorities is hardly a domestic matter which should develop along different lines in different countries.²⁴⁶ As

²³⁸ As Lord Wilberforce stated in *Anns*, the council's immunity at this level though great was not absolute: [1978] AC 728.

²³⁹ (1984) 10 DLR (4d) 641, 673. The evidence gave rise to a 'strong inference' that there was inaction for an improper reason — because one of its aldermen was involved.

²⁴⁰ The more recent cases of *Rothfield v Monolakas* [1989] 2 SCR 1259 and *Just v The Queen in Right of British Columbia* [1989] 2 SCR 1228 show that the Supreme Court is unlikely to depart from its stand in *Kamloops*. In those cases, the court refused to follow the House of Lords' decision in *Peabody* [1985] 1 AC 210.

²⁴¹ *Brown v Heathcote County Council* [1986] 1 NZLR 76.

²⁴² [1986] 1 NZLR 22.

²⁴³ *Id* 73.

²⁴⁴ [1987] 2 NZLR 700.

²⁴⁵ *Id* 709.

²⁴⁶ Todd, (1987) 103 LQR 19, 25.

Somers J pointed out in the New Zealand Court of Appeal, social conditions in New Zealand (or Canada) are not so different to warrant this divergence in the common law.²⁴⁷ While the High Court's reasoning in *Heyman* has, on occasions, been dismissed due to its lack of uniformity,²⁴⁸ subsequent decisions have made the Australian position clearer. If the New Zealand and Canadian courts are 'sensitive' to these developments then the result could well be a return to a 'common' law for determining the negligence liability of a public authority.

Conclusion

In view of the conceptual and practical difficulties associated with the liability imposed in *Anns*, it is to be expected that the High Court's decision to reject Lord Wilberforce's reasoning and apply common law principles would have some impact in other jurisdictions. The English courts have followed the High Court's lead. As further decisions make the Australian position clearer, the New Zealand and Canadian courts will find it harder to justify this divergence in the common law.

CONCLUSION

It is easy to undervalue the significance of the High Court's decision in *Heyman*. It could be said that there were so many problems associated with the reasoning in *Anns* that any departure from that case would be important. Certainly, the High Court's rejection of the liability imposed by the House of Lords would have had greater impact if the judges had been unanimous in presenting their alternative. Too much emphasis can, however, be placed on the lack of uniformity in the High Court's reasoning. While the High Court did not provide a definitive statement of the circumstances in which a public authority will owe a duty to exercise a statutory function, *Heyman* establishes that common law principles determine the issue. It thereby swept away the confusion of the past. A public authority should not be afforded special treatment simply because it performs statutory functions. Public law concepts do not determine the actionability of a public authority's negligence. The private law duties of a public authority are not based on its public law responsibilities.

The High Court's decision represents the starting point of the common law liability of public authorities for the failure to carry out a careful exercise of a statutory function. Some of the questions raised by *Heyman* have been answered in subsequent decisions. As the common law develops, the rules which determines the negligence liability of public authorities will become clearer.

While there is good reason to welcome the High Court's decision to apply

²⁴⁷ [1986] 1 NZLR 22, 73.

²⁴⁸ J G Fleming, *The Law of Torts* (7th ed, 1987) 142; D Baker, 'Maladministration and the Law of Torts' (1986) 10 *Adel L Rev* 207, 228-30.

common law principles to determine liability, other aspects of the decision are less commendable. A majority of the judgments in *Heyman* suggest that actual reliance on the plaintiff's part is essential before a public authority will be liable for a failure to carry out a careful inspection of building foundations. No doubt, this decision has been welcomed by public authorities in Australia, but as far as subsequent owners and occupiers of defective structures are concerned it is neither fair nor just. The general principles of negligence would allow a wider liability based on another proximity factor such as general reliance or a reasonable expectation. If the High Court is to complete its task of resolving the problems which have arisen in this area of the law, it must reconsider the requirement of actual reliance as the basis of a public authority's liability in a defective foundation case.