HAYDEN STEPHENS, WA

Public liability claims against statutory bodies

This article examines the liability of statutory authorities, with a particular focus on the oyster poisoning case of *Ryan v Great Lakes Council*. Hayden Stephens looks at the often controversial issue of why it seems public authorities can often be immune to prosecution for negligence.[1]

Introduction

The imposition of liability upon statutory authorities has always been an uneasy and controversial issue for the courts and for society at large. Statutory authorities, by their very nature, have been charged with the responsibility of governing the affairs of the community. It has been viewed traditionally as unpalatable to prosecute a statutory authority in circumstances where it was seen that very challenge could well undermine the ability of the authority to properly perform its duties and responsibilities for which it was created.

In contrast to this view is the need to properly compensate people who were injured as a consequence of the negligent acts or omissions of the operation of the authority. Why is an authority immune from prosecution where a private entity may otherwise be found negligent in similar circumstances?

Various tests have been proposed and different terminology has been utilised, but the essential difficulties in determining whether or not a statutory authority owes a duty of care remain.

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Crimmins v Stevedoring Industry Finance Committee[2]

The most recent authority on the liability of statutory authorities for nonfeasance is *Crimmins v Stevedoring Industry Finance Committee*. Brian Crimmins worked as a waterside worker at the Port of Melbourne from 1961 to 1965. Many years later he was diagnosed as suffering from mesothelioma, caused by his exposure to asbestos whilst unloading cargoes at the port.

At the time that Brian Crimmins worked on the waterside, the Stevedoring Industry Authority (which preceded the Stevedoring Industry Finance Committee) was required by the *Stevedoring Industry Act 1956* (Cth) ("the Act") to regulate stevedoring functions throughout Australia. The statutory functions of the Authority, as expressed in section 17 of the Act, included regulating the conduct of waterside workers; training personnel; investigating methods to improve the efficiency and safety of the stevedoring industry; encouraging safety in stevedoring operations; and, where necessary, providing clothing and equipment designed to protect workers' safety. All waterside workers were registered with the Authority and the Authority assigned workers to work in accordance with employer needs.

The plaintiff's case was that from 1956 to 1977, the Authority was under a continuing duty of care to exercise its powers, duties and functions to take reasonable care to avoid foreseeable risks of injury to the health of the plaintiff and other waterside workers.[3]

A majority of the High Court held that the Authority did come under a duty of care to take measures to prevent injury to waterside workers.

In coming to this conclusion, Kirby J utilised the three-stage Caparo test[4]. McHugh J, with whom Gleeson CJ agreed, formulated a six-point test. The six questions posed by McHugh J may be paraphrased as follows:

1 Was the injury reasonably foreseeable?
2 Did the defendant have power under statute to protect a particular class including the plaintiff, rather than the public as a whole?
3 Was the plaintiff vulnerable and unable to adequately protect him or her self?
4 Did the defendant have knowledge of the risk of harm?
5 Would the duty impose liability on the policy making functions of an authority (in which case the duty will not arise)?
6 Are there any other relevant policy considerations?

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McHugh J held that the six-point test was satisfied in *Crimmins*. He stated that the fact that the Authority exercised control over waterside workers by directing them to their place of work was a strong indication that a duty of care should arise.[5] This and other features of the relationship between the Authority and waterside workers made the workers "especially vulnerable to harm" unless the authority took action to avoid it.[6]

Issues concerning the vulnerability of the person who suffers injury on the one hand, and the degree of control, power and knowledge of the statutory authority upon the other, have emerged from the judgments in *Crimmins* as common themes in determining whether or not a duty of care exists.

Kirby J, for example, held that the most important policy considerations in favour of accepting that a duty of care existed in *Crimmins* were the particular vulnerability of waterside workers (who lacked the opportunity to protect themselves when allocated to employers) as opposed to the knowledge, power and resources available to the Authority.[7]

Issues of vulnerability and control have also been raised in subsequent cases including *Brodie & Another v Singleton Shire Council* and *Ghantous v Hawkesbury City Council*[8] (discussed in more detail below) where Gaudron, McHugh and Gummow JJ stated:

"...it has become more clearly understood that, on occasions, the powers vested by statute in a public authority may give it such a significant and special measure of control over the safety of the person or property of citizens as to impose upon the authority a duty of care. This may oblige the particular authority to exercise those powers to avert a danger to safety or to bring the danger to the knowledge of citizens otherwise at hazard from the danger. In this regard, the factor of control is of fundamental importance."[9]

Thus, whilst there remains today little consensus on the principles or tests to be applied in determining whether a statutory authority comes under a duty

of care in relation to non-feasance, factors of vulnerability, knowledge and control appear to be at the forefront of judicial deliberation.

Brodie and *Ghantous*

The historical reluctance of courts to impose liability upon statutory authorities, particularly with respect to non-feasance, was exemplified by the "highway rule". This rule stated that whilst a highway authority may be held liable in negligence for acts amounting to misfeasance, no duty of care could arise in relation to nonfeasance – or the failure of a highway authority to exercise its powers.[10] In the joint decisions of *Brodie* and *Ghantous* a majority of the High Court recently held that the highway immunity for non-feasance no longer forms part of the common law of Australia.

In place of the immunity, the High Court majority formed the opinion that the modern law of negligence would operate to provide sufficient safeguards to protect statutory authorities against indeterminate liability, whilst upholding the rights of injured persons.

The majority emphasised that the abolition of the highway immunity did not mean that highway authorities were required to maintain roads in a perfect state of repair.[11] A highway authority would not be liable for every personal injury caused by a defect in the road.[12] Rather, in accordance with the general principles of negligence, an authority would only be required to do what is reasonable in all of the circumstances.

The minority in *Brodie* and *Ghantous* (Gleeson CJ, Hayne and Callinan JJ) believed that the highway immunity should be left intact unless parliament chose to abolish it. Hayne J questioned the appropriateness of the courts imposing a common law duty of care upon a statutory body:

"It is the legislatures which create the authorities. It is they who provide for the powers, duties and resources of the authorities. It is they who can most readily regulate when and to what extent individuals who suffer injury may recover from the authorities concerned."[13]

It has been argued that the imposition of liability upon statutory authorities by the courts is an infringement of the doctrine of the separation of powers.[14] In the course of his judgment in *Brodie* and *Ghantous*, Gleeson CJ recognised that highway authorities were constantly called upon to establish priorities for the expenditure of scarce resources. He said: "Accountability for decisions about such priorities is usually regarded as a matter for the political, rather than the legal process."[15] Where parliament has conferred a discretion upon an authority, is it the place of the court to comment upon how that discretion should be exercised?

Certain policy considerations have also been raised against the imposition of a duty of care upon statutory bodies. Statutory authorities are often charged with broad powers, but they must fulfil their functions within budgetary constraints. A statutory authority's first duty may be seen to be to the public at large and not to an individual who suffers damage as a result of the authority's action or inaction.

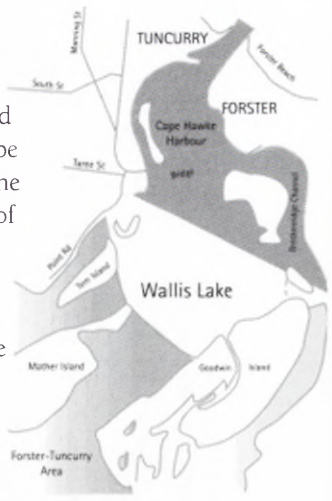
The majority and minority judgments in *Brodie* and *Ghantous* highlight the tensions that plague the law concerning the public liability of statutory authorities. These tensions have made it difficult for the courts to establish a concrete set of principles governing the circumstances in which a duty of care may arise.

Ryan v Great Lakes Council[16]

So where to now? The process by which a statutory body can be held to owe a duty of care has been subject to trends often reflecting the period at which time injury occurred and, of course, the composition of the High Court at the relevant time.

Two broad considerations relevant to all cases concerning the liability of statutory authorities can be identified. These are:

1 The legislative scheme which governs the powers of functions of the statutory body; and
2 The relationship between the statutory authority and the injured plaintiff.



These two broad considerations can be considered within the context of the case of *Ryan v Great Lakes Council,* a case currently under consideration by the High Court, in which argument focused on whether the statutory body owed a duty of care.

Grant Ryan was one among many people who, in January 1997, fell seriously ill as a result of consuming a contaminated oyster taken from Wallis Lake, situated within the Shire of the Great Lakes in New South Wales. A few days after falling ill, Mr Ryan was diagnosed with infective hepatitis. The cause of that infection, it was agreed, was as a result of consuming the contaminated oyster.

The contamination of the oysters with the hepatitis A virus arose from human faecal material entering the lake as a consequence of heavy rainfall. Faecal contamination emanated from multiple points within the shire including septic tanks, pit toilets, pumping stations and the like.

In total there were some 444 cases of viral hepatitis due to consumption of oysters grown in the lake at that time. The lake was and remains one of the largest oyster growing areas in Australia.

Mr Ryan commenced proceedings in the Federal Court against the Great Lakes Council and others including the companies who prepared and distributed the oysters.

Mr Ryan was successful at first instance against the Great Lakes Council. The Full Court of the Federal Court overturned that decision and found that the council did not owe a duty of care to Mr Ryan. Lingdren J's decision that the council did not owe Mr Ryan a duty of care was supported by three main propositions:

a) Council owed a duty of care not to an identifiable class of individuals "but to the consuming public general"; ▶

b) The duty propounded by Mr Ryan "is not a duty to exercise powers in respect of one particular place but in the case of the Council, in respect of all places from which faecal matter might emanate to pollute the Lake"; and

c) The duty propounded by Mr Ryan was to "minimise" pollution rather than to "prevent" it and "the notion of minimisation is too vague and uncertain a concept to found a duty".

Keifel J concluded also that the council did not owe Mr Ryan a duty of care and supported this proposition by stating:

"There was no . . . statutory provision which had its apparent purpose the prevention of contamination of oysters, the water in which they were grown or the protection of consumers and which required the Council to use one or more of its powers in a given circumstance to achieve those ends".[17]

Mr Ryan was successful in obtaining special leave and the appeal before the Full Bench of the High Court in *Ryan v Great Lakes Council* was heard in March 2002. Judgment has been reserved.

The legislative scheme which governs the statutory body

A number of questions may be relevant when examining the legislative scheme governing a statutory body. These include:

- Does the public authority have power under the statute to protect the plaintiff?[18]
- If a duty of care is recognised, would it be compatible or consistent with the statutory purpose of the public authority or [put another way] would recognition of the duty cut across or distort that purpose?[19]
- To what extent is the class of persons for which the plaintiff is a member, specified or identified by the statute?[20]
- Is the statutory authority's alleged negligent act or omission conduct recognised as legislative or quasi legislative? For example, does the conduct form part of the policy operations of the authority or rather does it have a private or individual focus? (the latter more likely to assist in arguing a duty of care exists).

In *Ryan*, particular attention was given to the powers of the council under the *Local Government Act 1993* (NSW) and clauses under the *Local Government (Water, Sewerage and Drainage) Regulation 1993* (NSW).

It was submitted on behalf of Ryan that the council clearly had power to protect him. For example, under provisions of the *Local Government Act*, the council clearly had power to carry out a sanitary survey of Wallis Lake. Further under Section 124 of that same Act, the council had power to order persons to do or refrain from doing things, or take such action as was necessary to fix the problem, if sources of pollution have been identified.

What then of the purpose of these powers? An express purpose of the council's powers under Section 124 of the *Local Government Act* was, in relation to matters within its powers, to prevent threats to public health[21] and to provide an "environmentally responsible" system of local government[22]. It was submitted that the purpose to prevent threats to public health was similar to the purpose of power under consideration in *Pyrenees Shire Council v Day*[23], namely preventing fires. Further, submissions in *Ryan* went further to say that "regardless of the express statutory purpose, it is evident that the council was given responsibilities for the care and management of sewerage and storm water systems in their area because of the danger to public health if these systems were not properly maintained"[24].

Would imposing a duty on the council "cut across" the legislative scheme under which the Great Lakes Council operated? On this point in *Ryan*, it again turned to the "flavour" of the legislation. The legislation had provided the council with a number of responsibilities and powers. It was submitted that one set of these responsibilities focused on sewerage and given that such sewerage problems constituted a danger to public health, imposed a duty in respect of persons injured in a context which would not be inconsistent with the legislative scheme.

Did the plaintiff belong to a class of persons contemplated by the legislation? On Mr Ryan's part it was submitted that he did belong in such a class given that the wording of the legislation related to persons generally who may be affected by a threat to public health. Although it was conceded that the power under consideration here was more focused than the power under consideration in *Brodie*[25], it was noted that the criteria of defining a "specific class" was a guide only and not determinative. As McHugh J expressed in *Crimmins*, "where powers are given for the removal of risks to personal property, it will usually be difficult to exclude a duty of care on the grounds that there is no specific class".[26]

On the issue of whether the council had acted in its legislative or quasi legislative capacity, it was contended in *Ryan* that none of its functions relevant to identifying sources of pollution or carrying out the relevant sanitary surveys involved carrying out its policy making functions. It was considered that although these considerations may have involved an allocation of council's resources, matters of this kind did not constitute a "policy decision" that was non justiciable under the law of negligence[27]. In other words, as was the case in *Brodie*, if the public authority was aware of the risk of injury caused by a road, a decision not to fix the problem or choose to do nothing should not be regarded as a core policy function.

The relationship between statutory authority and plaintiff

An examination of the relationship between plaintiff and statutory authority involves consideration of the following:

- Looking at the statutory authority's position of control;
- Seeing whether the plaintiff was "vulnerable".
- Looking at the statutory authority's knowledge of the risk of injury to the plaintiff if its powers to prevent harm were not exercised.

In short, it was argued in *Ryan* that the Great Lakes Council was clearly in a position of control. It had power to minimise the danger (namely faecal contamination) which caused Mr Ryan's injuries. It was submitted in *Ryan* that the council was in a position of control in two ways. First, the faecal pollution of Wallis Lake that, on the finding of Willcox J, caused Ryan's injury "came from multiple points, predominantly land based. All was subject to Council control"[28]. The council had the power to carry out sanitary survey and "trace the source[s] of the pollution"[29]. Once the sources of pollution were identified, the council had power to "take whatever steps were necessary to ensure the problem was fixed"[30], thus whether the faecal pollution came from creeks and rivers, storm water drains, foreshore areas, an island in Wallis Lake, boats or other sources, the council had power under the *Local Government Act and Clean Waters Act* to trace the pollution and fix the problem.[31]

It was also contended on behalf of Mr Ryan that he was vulnerable to injury. He had no knowledge of the impending danger, nor did he necessarily have access to information concerning the danger of sewerage and ensuing problems. Evidence placed before the trial judge and again in the appellate courts confirmed that the council was aware of the impending sewerage problems prior to the incident involving Mr Ryan. Reference was made to numerous reports, correspondence and other documentation which referred to the problems concerning the management of sewerage within the shire. Willcox J at first instance concluded:

"The Council at all material times knew" [that] "within the Lake catchment area there were numerous facilities (septic tanks, pit toilets, pumping stations, water craft and the like) that constituted potential sources of human faecal contamination of the waters of the Lake" and that it "had extensive statutory powers to control pollution from the facilities"[32].

It was submitted that it was clearly in the realm of council knowledge that if it did not exercise its power in correcting these problems, then a class of persons including Mr Ryan would be injured.

Submissions filed on behalf of Mr Ryan also made reference to common law analogies which recognised a duty of care. The court was directed to one example where an authority has power to regulate the safety of a work environment such as that which was recognised in *Crimmins*. Similarly but in a different context, reference was also made to the situation where a manufacturer owes a duty of care to consumers because it controls a risk of danger. By analogy, it was submitted in *Ryan* that the growing and harvesting of oysters was a process of manufacturing. The council clearly had a degree of control of the quality of the waters in which that manufacturing process took place ▶

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and therefore owed a duty of care to those consuming the oysters.

Conclusion

Given that *Ryan v Great Lakes Council* is currently before the High Court, it would be inappropriate at this time to "weigh up" the submissions and in some way predict an outcome. This article has sought to identify broad considerations relevant to the determination of whether a duty of care is owed by a statutory body.

However, regardless of where the courts may go in their reasoning as to whether a duty of care extends to statutory authorities, the pragmatic advocate should not lose sight that overcoming this hurdle is simply the first of many in the race. One must always be alive to the fact that once it is established a duty is owed to an individual, that person must then prove the requisite breach, establish causation and succeed in proving damage. PL

Footnotes:

1. This is an edited version of a paper presented by Hayden Stephens at the APLA WA State Conference in May 2002.
2. *Crimmins v Stevedoring Industry Finance Committee* [1999] 200 CLR 1.
3. *Crimmins* para 112, per Kirby J.
4. A three-part test taken from *Caparo Industries Plc v Dickman* [1990] 2 AC 605 to determine whether or not a duty of care arose.
5. *Crimmins* para 104.
6. *Crimmins* para 108.
7. *Crimmins* paras 232 – 233.
8. *Brodie & Another v Singleton Shire Council* and *Ghantous v Hawkesbury City Council* [2001] HCA 29 (31 May 2001)
9. *Brodie* and *Ghantous* para 102.
10. The highway immunity was established as law in Australia in the decisions of *Buckle v Bayswater Road Board* [1936] 57 CLR 259; and *Gorringe v The Transport Commission (Tas)* [1950] 80 CLR 357.
11. *Brodie* and *Ghantous* para 138 per Gaudron, McHugh and Gummow JJ.
12. *Brodie* and *Ghantous* para 229 per Kirby J.
13. *Brodie* and *Ghantous* para 336.
14. Mashinsky, Nathan QC. 'The Liability in Negligence of Councils and Public Authorities.' In *Plaintiff* August 2000, p.7.
15. *Brodie* and *Ghantous* para 16.
16. S259 of 2002, High Court of Australia, decision pending.
17. Appeal Judgment at 593.
18. *Crimmins* per Gleeson CJ and McHugh J at 93, and Gaudron J at 18.
19. See *Crimmins* per Gleeson CJ and McHugh J at 99 and 130, Gaudron J at 18 and 28, Kirby J at 213 to 222 and 234.
20. See for example Waterside Workers in *Crimmins*.
21. Section 124(15) and (25).
22. See Section 7(a).
23. *Pyrenees Shire Council v Day* [1998] 192 CLR 330.
24. Appellant's Submissions at paragraph 20 page 9.
25. See Appellant's Submissions at paragraph 22 page 10.
26. See McHugh J in *Crimmins* at 99.
27. See *Brodie*.
28. Trial Judgment at 297.
29. Trial Judgment at 299.
30. Trial Judgment at 299.
31. Appellant's Submissions at paragraph 26 pages 10 and 11.
32. Trial Judgment at 291.

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Dr Keith Tronc, Barrister-at-Law and an APLA member of long standing, who has been invited to speak at the last six APLA National Conferences, is a former teacher, school principal, TAFE teacher, university lecturer, solicitor and Associate Professor of Education. He assists numerous Australian law firms in educational litigation involving personal injuries, discrimination, bullying, sex abuse, breaches of contract, and TPA matters. Dr Tronc appears frequently in court in several States providing independent expert opinion on matters concerning education and the law. Dr Tronc has published four national textbooks and looseleaf services on schools, teachers and legal issues.

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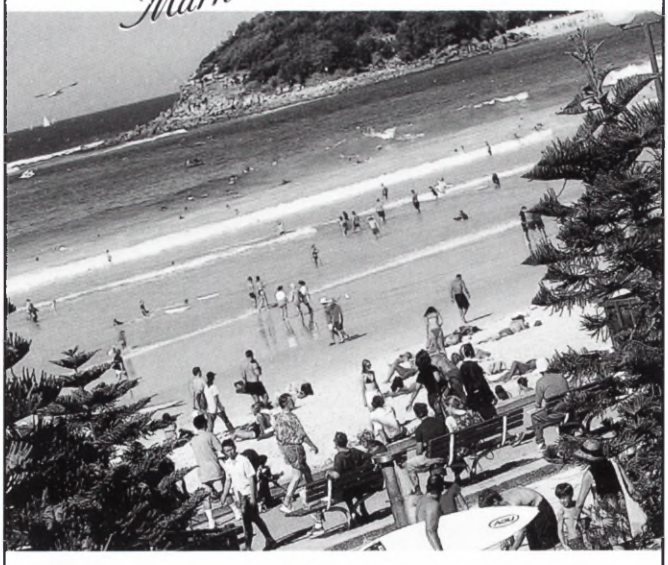

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