PETER TAYLOR SC, NSW

The future of public authority liability

Peter Taylor SC is a Barrister, St James Hall
PHONE 02 9223 0155 **EMAIL** peter.taylor@stjames.net.au

The amendments in the *Civil Liability (Personal Responsibility) Bill* 2002 (NSW), and in particular sections 40 to 46 of the *Civil Liability Act* 2002 (NSW), are intended to clarify the principles governing, and partly to limit, the tort liability of public authorities.[1] Assessing whether the amendments are apt for either purpose requires an understanding of the existing law.

Applying ordinary common law principles to public authorities is complicated by the diversity of their entrepreneurial, administrative or legislative functions. At a basic level, some entrepreneurial powers and functions are in the nature of commercial trade. At more complex levels, administrative and legislative functions involve the exercise of specific statutory powers (for example, service of notices authorised by specific statutory powers, or the promulgation of delegated legislation). What typically characterises all these functions is a broad general legislative intention that the authorities' functions and powers are intended to be exercised for the public benefit.

With the diversity of its functions, a public authority may owe a relevant common law duty of care where it has:

- exercised a relevant statutory power in relation to the hypothesised risk, but has failed to act with the required care and diligence: *Parramatta City Council v Lutz*[2]; *Crimmins v Stevedoring Industry Finance Corporation*[3];
- decided to exercise a relevant statutory power in relation to the hypothesised risk, but has neglected to do so in a timely or effective manner: *Pyrenees Shire Council v Day*[4];
- undertaken responsibility for the hypothesised risk – for example, by providing an assurance that it would act to ameliorate it: *Parramatta City Council v Lutz*[5];
- actual control, analogous to that of an owner or occupier, over land where the hypothesised risk exists: *Nagle v Rottnest Island Authority*[6]; *Romeo v Conservation Commission of the NT*[7]; *Brodie v Singleton Shire Council*[8].

These alternative scenarios suggest two basic categories of potential liability, where the public authority either:

- is the principal 'actor' – either because of its status as 'owner', 'occupier' or 'risk creator'; or
- possesses actual knowledge of the nature of the risk and actually adverts to the desirability of acting to reduce or eliminate it.

The illustrations prompting such a categorisation, and the analysis which underlies it, suggest profound limitations on recognising a common law duty to exercise a particular statutory power. Such a duty:

- will rarely arise from the mere existence of available statutory powers; ▶

ORTHOPAEDIC MEDICO-LEGAL ASSESSMENTS

DR R. L. THOMSON & ASSOCIATES

Dr Ron Thomson

Medical Director

Phone (02) 9959 5004

Fax (02) 9929 4592

Email rlthomson@bigpond.com.au

www.orthopaedicmedicolegal.com

Most personal injuries are orthopaedic in nature and our Practice has three Consultant Orthopaedic Surgeons and one Consultant General Surgeon.

The Practice also handles medical negligence/malpractice cases and Dr Thomson is a professional member of APLA, and also a member of the Medical Negligence Special Interest Group of APLA.

The rooms are located at **3 Bruce Street, Crows Nest, Sydney**, close to major railway stations, with ample car parking nearby, and there are also regular attendances at Parramatta, Newcastle and Wollongong.

We also visit NSW country and interstate centres.

There is currently little waiting time, urgent assessments can be reported same or following day, and block bookings are available.

CROWS NEST ✦ PARRAMATTA ✦ NEWCASTLE ✦ WOLLONGONG

ECONOMIC LOSS REPORTS

NO WIN / NO FEE INJURY LAWYERS NOTE!

We are a specialised company with highly qualified accounting and other professional personnel with significant litigation experience at all levels.

- Personnel with over 30 years experience
- Rapid reporting service
- No Win / No Fee – subject to acceptance of instructions

Let us assist you today

- **Economic Loss Reports for MVA, Work Related Accidents, Negligence Claims of all types**
- Loss of Business Income
- Business Valuations
- Financial and Other Investigations

PERSONAL INJURY SUPPORT PTY LIMITED

Po W Mar & **John C Malouf**

B.Com,M.Tax,FCA,ASIA — *BA,CPA*

Sydney City — Sydney & Parramatta

Tel (02) 9221 2577 — Tel (02) 9630 1155

Fax (02) 9223 1243 — Fax (02) 9630 9513

- may arise from the combination statutory function, available statutory powers, and the conduct of the statutory authority if, when taken together, they involve the authority having undertaken to act in a particular way;
- may arise, in an exceptional, and contentious, category of cases, where the public authority's powers give it a 'special/unique' control capacity, or where the authority has equipped itself with knowledge that reasonably required the exercise of its powers – having regard to the practical inability of (potentially) affected persons to effectively protect themselves from the operative risk.[9]

The preceding propositions imply that mere 'constructive knowledge' of an hypothesised risk (that is, knowledge that it could, or even 'ought' to have had) cannot afford a basis for subjecting a public authority to a common law duty of care in relation to the hypothesised risk.[10]

Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW)

Against the preceding brief outline, some aspects of the proposed Part 5 of the Civil Liability Act 2002 have an obscure purpose and uncertain future. Part 5 applies to public and 'other authorities', an expression which, as the definition in section 41 shows, will include prescribed entities performing public interest administrative functions, and is consistent with one of the recommendations in the 30 September 2002 Ipp Report.

Despite apparently widespread concerns, heightened since the High Court's decision in *Brodie v Singleton Shire Council*[11], the kinds of policy and resource issues that characteristically confront public authorities have always been accepted as relevant in determining the content of, and compliance with, a common law duty to take reasonable care. Given that acceptance, the purpose of section 42 of the Amendment Bill is obscure. The section expressly declares four 'principles' to be applied in

determining 'whether a public or other authority has a duty of care or has breached a duty of care'.

The first obscurity in the section is that it applies to both issues of duty and breach. The conceptual distinction between 'duty' and 'breach', and its potential use to restrict the unprincipled extension of common law liability, has been central to the agonising debate about 'proximity', 'reliance', 'general reliance', 'vulnerability' and 'control', and even 'fairness and reasonableness'. Perhaps section 42 reflects frustration that the debate has not produced a meaningful analytical criterion. Perhaps it also acknowledges that the concepts of duty and breach become almost inextricably intertwined in difficult cases – such as *Crimmins* – where questions of 'power and capacity' cannot readily be separated from aspects of the authority's actual conduct. And in that regard, it may be that section 42 was specifically intended to confront the suggestion, made at least tentatively by Gleeson CJ and McHugh J in *Crimmins*, that policy and resource issues were only relevant to breach of duty questions.

But, at a more fundamental level, and despite its apparent purpose in limiting the potential liability of public authorities, section 42 appears unlikely to have any significant impact. This is partly because the section operates at a high level of generality, and partly because it provides only limited protection. It is directed to the 'functions required to be exercised by the authority'. It renders only the 'general allocation' of resources immune from challenge. And in relation to the actual exercise of functions, it is merely permissive in declaring that an authority may rely on compliance with general procedures and applicable standards 'as evidence of the proper exercise of its functions'.

These provisions clearly do not provide an authority with a conclusive defence based on either resource issues or general standards. But they do permit both of those matters to be treated as issues in the proceedings. Moreover, by expressly protecting only general resource allocations, the section implicitly encourages forensic examination of resource allocation to particular functions, and it permits that examination at both the level of breach of duty and at the level of duty of care. It is not difficult to envisage an appropriately creative litigant seeking to use these permissive provisions to justify the creation of a duty of care, where none would exist under the general law. The section raises the possibility that an authority may be subjected to a duty of care to exercise in an appropriate way particular 'functions' for which it has 'reasonably available resources'. At the very least, by providing an implied statutory justification for litigious examination of

a public authority's resource allocation, section 42 may well encourage it to occur.

But if section 42 of the Bill is curious, section 43 is even more puzzling. Its terms imply an intention to significantly limit the potential liability of public authorities.

At first impression, sub-section 43(2) adopts the standard of care formulated by the House of Lords in *Stovin v Wise*[12] and later adopted by Brennan J in *Pyrenees*. Despite the rejection of that approach by at least three members of the High Court in *Crimmins* – Gleeson CJ, McHugh and Kirby JJ – the reasoning underlying Brennan J's view had not been wholly discarded. In *Central Coast Leagues Club Limited v Gosford City Council*[13], Giles J had addressed the question of a council's alleged negligence in the exercise of a statutory power in terms of whether the authority's conduct was 'so unreasonable' that no reasonable equivalent authority could have so acted. And, at least arguably, that way of formulating the standard of care is consistent with the approach suggested by various judgments in *Crimmins* and *Brodie*.

However, the curious aspect of section 43 is that it only applies to proceedings 'based on an alleged breach of statutory duty ... in connection with the exercise or failure to exercise a function' – an expression in which the wording seems to preclude 'breach of statutory duty' from being regarded as merely synonymous with 'failure to exercise a function'. Conversely, it is difficult to accept that section 43 is confined to the types of 'statutory duty' that arise, characteristically, in health and safety legislation. That difficulty arises for at least two reasons. The first is that if a provision did impose a 'statutory duty', in the strict sense that expression is used in such cases, breach of the statutory obligation could hardly be regarded as 'reasonable' conduct. The second is that there is no discernible justification for imposing a different standard of care between claims based on breach of statutory duty and those based on breach of a common law duty of care.

The implication is that section 43 uses the expression 'statutory duty' in a special, but obscure, sense. The special implied meaning is simply that of a 'duty, imposed by statute, where the circumstances exist for its performance'. But if 'statutory duty' is given that special meaning, it becomes immediately apparent that section 43 has a potential role in expanding, rather than reducing, the liability of public and 'other' authorities. This is because the immunity provided by sub-section 43(2) of the Bill for reasonable conduct, at least implies a corollary liability for unreasonable conduct. In effect, sub-section 43(2) of the Bill could provide a basis for a new species of tort based on unreasonable administrative conduct. ▶

That implication, though remarkable at first impression, is fostered by section 44 of the Bill. Section 44 seems to address the prospect of a 'regulatory function' liability for public authorities – something that would have been regarded as quite improbable under the common law.

'44 When public or other authority not liable for failure to exercise regulatory functions:

(1) A public or other authority is not liable in proceedings to which this Part applies to the extent that the claim is based on the failure of the authority to exercise or to consider exercising any function of the authority *to prohibit or regulate* an activity if the authority could not have been required to exercise the function in proceedings instituted by the claimant.

(2) Without limiting what constitutes a function to regulate an activity for the purposes of this section, a function to issue a licence, permit or other authority in respect of an activity, or to register or otherwise authorise a person in connection with an activity, constitutes a function to regulate the activity.'

If sub-section 44(2) was an exclusive definition, the 'regulatory' concept to which the section applies might be confined to the kind of licensing and approval functions commonly, but not invariably, regarded as capable of attracting a common law duty of care. But the sub-section's inclusive language, when added to the disjunctive expression 'to prohibit or regulate' in sub-section 44(1), implies an extended application of the section to 'regulatory' functions – such as those typified by the existence of a power to make regulations affecting a relevant subject matter. And on this view, section 44 raises the prospect that the kind of regulatory power that the High Court in *Crimmins* regarded as incapable of giving rise to a common law duty of care, might be the subject of a new species of administrative tort duty. This would be so if firstly, the failure to exercise the power was 'unreasonable' in the sense envisaged by section 43 and secondly, the plaintiff could establish the standing required by section 44.

Section 45 of the Bill overcomes part of the effect of the decision in *Brodie*. It does so by accepting the view of McHugh J in *Crimmins*, that a public authority ought not be subject to a common law duty of care merely as a consequence of 'constructive knowledge' of a relevant risk. In this sense, the section is uncontroversial, and will limit the potential consequences of *Brodie*'s abolition of the highway immunity rule.

Section 46 of the Bill is remarkable for its banality. The provision may be entirely declaratory of the common law position – in which case it is wholly superfluous. Alternatively, the section fosters the possibility, engendered by the earlier provisions in sections 43 and 44, of a new species of 'unreasonable action' administrative tort liability, and makes evidence of the (partial or intended) exercise of statutory functions, admissible in proceedings of that kind.

The 'Public Authority' Provisions In Context

The major impact of the *Civil Liability Amendment (Personal Responsibility) Bill* 2002 (NSW) on the liability of public authorities is likely to result from the impact of measures other than those in sections 42 to 47. In particular, the following measures in the Bill are likely to have a fundamental impact:

- the re-expression of the standard of care in section 5B
- the introduction of concepts of 'factual' and 'scope of liability' causation in section 5D
- the curtailment of liability for 'obvious risks' through the combined effect of sections 5F to 5H
- the introduction of 'proportionate liability' through the operation of sections 35 and 36.

Section 5B of the Bill directs courts to determine the standard of care by enquiring whether a risk is 'foreseeable' in the sense that it is one 'of which the person knew or ought to have known' and whether 'a reasonable person' in the defendant's circumstances 'would have taken those [that is, the hypothesised] precautions'. Even though this formulation is similar to the discussion of 'foreseeability' in both *Overseas Tankship (UK) Ltd v Miller Steamship Co Ltd (The Wagon Mound (No 1))*[14] and *Wyong Shire Council v Shirt*[15], the form of the

section, as well as the explanatory discussion in the NSW Attorney-General's Department's position paper, and paragraphs 7.14 to 7.18 of the Ipp Report, suggest the section is intended to mark a significant change in emphasis. Under the common law principles, the content of the standard of care is often informed by an abstract enquiry as to what reasonable care is required. That form of enquiry makes it difficult to resist findings of breach of duty, at least when the problem presents itself in the scenario of an exceptionally unlikely, but materialised, risk of catastrophic injury arguably avoidable by inexpensive precautions. As McHugh J said in *Tame v New South Wales*[16], the powerful influence of Mason J's reasons for judgment in *Wyong Shire Council v Shirt*, and its uncritical application, has tended to diminish the emphasis that ought to be placed on the basic propositions that firstly, the mere foreseeability of harm is not a sufficient basis to recognise either duty or breach and secondly, there is a critical practical question as to whether the impugned defendant's conduct departs from a standard of reasonable care.

Sub-section 5B(2) of the Bill certainly does not eschew comparison between the nature of the risk and the burden of the precautionary conduct. To that extent the considerations addressed in *Shirt's* case will have a continued relevance. But the mere fact that the subsection directs the court to determine whether 'a reasonable person would have taken' the particular precautions requires a more concrete, and potentially limiting, enquiry as to what 'a reasonable person' would be likely to have done in similar circumstances.

The change of emphasis discernible in sub-section 5B of the Bill is consistent with an emerging trend in appellate decisions, legal commentaries and public sentiment, for 'firmer control devices' in the application of negligence principles that had become 'nebulous, and difficult to evaluate and apply'.[17] That trend has been towards a more sceptical approach in determining whether conduct falls short of the benchmark standard of reasonable care. Part of the problem in applying the 'reasonable care' criterion, and one that has never been entirely satisfactorily resolved, is whether the standard of 'reasonable care' permits a range of responses – with the result that only conduct outside the range of reasonable behaviour can give rise to liability.

The debate about this point in the field of professional liability, which had culminated in the High Court's decisions in *Rogers v Whitaker*[18] and *Naxakis v Western General Hospital*[19], will be resolved, by section 50 of the proposed amendments, in favour of the proposition that compliance with current standards is a defence to a claim for breach ▶

help your clients make the most of their

compensation

Compensation clients, many of whom will never work again, need financial planning to ensure they make the most from their compensation money. Unfortunately, few know where to find such financial advice – which means their hard-won gains may just slip away.

Give your clients some more good advice

While your clients do not expect you to be a financial planner, they will appreciate you referring them to someone reputable, such as **ipac**. They will also appreciate the reduced fees – a benefit they receive due to **ipac's** ongoing relationship with APLA.

Working with **ipac** can bring both you and your clients a range of benefits. To find out more about the specific advantages of working with **ipac**, call today on **1800 262 618**

ipac securities limited ABN 30 008 587 595 Licensed Securities Dealer

of a common law duty of care. The cumulative effect of these amendments will encourage the view that, depending on the nature of the task confronting a particular authority, breach of duty cannot be established unless the authority's impugned conduct was 'unreasonable' before common law liability can arise.

Section 5D of the Bill modifies the concept of causation by introducing 'factual causation' and 'scope of liability' causation. The principal effect of the Bill's requirements in relation to 'factual causation' is to minimise the significance of a finding that conduct made a 'material contribution' to the damage. Such a finding is not sufficient to establish 'factual causation' unless 'in an exceptional case' the conduct should be considered a 'necessary condition of the occurrence of the harm'. Clearly this amendment has considerable potential to reduce the liability of public authorities where their impugned conduct consists either of a failure to detect or prevent a third party's damage causing misdeed, or is either merely facultative (for example, licensing of an activity that incidentally causes harm).

The concept of 'scope of liability' causation is dealt with very shortly in the Bill, in sub-section 5D(4). This sub-section explicitly requires courts to determine 'whether or not and why' responsibility 'should' be imposed on 'the negligent party'. This provision has probably been influenced by observations that the law's concept of causation essentially involves selecting from logically causative events, those that are either the most potent in causing the harm or those that are most material to the relationship between the parties. Its potential importance is that it separates that impressionistic assessment from its origin as part of the evaluation of 'causation in fact', and elevates it into a factor that will now require explicit consideration as an issue of 'responsibility'. The most significant aspect of this development is that the question of 'responsibility' is additional to the question of causation in fact, and will only arise for consideration in circumstances where the court is satisfied that the defendant's conduct was a 'necessary condition of the occurrence of the harm'.

It is impossible to make any confident prediction about the effect that the 'scope of liability' question will have. Plainly, it is intended to limit the situations where liability will be found to exist. It is arguable that it will find its greatest application in those situations where the claim involves a novel duty of care allegation. In that context, the section may have a particular role to play in complementing the provisions of the Bill relating to the liability of public authorities – and in particular, section 42. Section 42 on its own can be criticised for its apparent facile generality. However, when sections 5D(4) and 42 are read together, they arguably provide a formidable obstacle to the recognition of any duty of care where any substantial question arises about the allocation of resources to the exercise of a public authority's functions.

Conclusion

As is obvious to anyone with even a passing interest in tort law and its reform, the Bill promises major changes. In so far as those changes potentially affect public authorities, however, their overall effect offers the prospect of a significant reduction in their risk exposures. However, having regard to the contents of sections 42 to 46 of the Bill, that reduction will come from the general reforms, rather than from the specific provisions of the Bill relating to public authorities. Indeed, the specific provisions of the Bill relating to public authority liability seem to have little real practical effect – apart from firstly, the uncertain effect of the obscurely expressed section 43 and secondly, the operation of section 45 in partly reversing the abolition of the highway immunity rule. PL

Footnotes:

1. The NSW Attorney-General's Department's September 2002 Position Paper on the *Civil Liability (Personal Responsibility) Bill* 2002 (NSW).
2. (1988) 12 NSWLR.
3. (1999) 200 CLR 1.
4. (1998) 192 CLR 330.
5. (1988) 12 NSWLR 293.
6. (1993) 177 CLR 423.
7. (1998) 192 CLR 431.
8. (2000) 180 ALR 145.
9. see *Crimmins v Stevedoring Industry Finance Corporation* (1999) 200 CLR ! and *Brodie v Singleton Shire Council* (2001) 206 CLR 512; *Graham Barclay Oysters Pty Ltd v Ryan* (S258/2001).
10. see *Crimmins*.
11. (2001) 206 CLR 512.
12. (1996) AC 923.
13. NSWSC 9 June 1998.
14. (1967) 1 AC 617.
15. (1980) 146 CLR 40.
16. (2002) HCA 35.
17. The NSW Attorney-General's Department's September 2002 Position Paper, pp. 6-7.
18. (1992) 175 CLR 479.
19. (1999) 197 CLR 269.