NEGLIGENCE CASES against PUBLIC AUTHORITIES

Practical tips for lawyers

By Hugh Marshall SC

In NSW in recent years, there has been an increased reliance upon Part 5 of the *Civil Liability Act* by lawyers acting on behalf of public authorities. As a consequence, there have been court decisions which, to a large extent, explain how these sections are, and may in future, be interpreted. This article outlines some of the more salient decisions and what has been said about each of the sections in Part 5. These have also produced helpful indications for plaintiff lawyers in contemplating commencing, and conducting, cases against public authorities. Despite the predictions of ruinous outcomes for plaintiffs (anecdotal), this article provides suggestions on how to avoid becoming another notch on a claims manager's belt. >>

Part 5 of the *Civil Liability Act* 2002 (NSW) (CLA) deals with the tortious liability of public authorities. It applies also to cases brought against a public authority where damages are sought in *'an action for breach of contract or any other action'* (s40(2)). It does not apply to the exclusions listed in s3B.[1] To my knowledge, the breadth of the expression *'any other action'* has not yet been tested.

In considering bringing an action against a public authority, it would be profitable to consider what the Act's provisions contemplate as deserving of protection for public authorities. Section 41 defines what a public authority is. It lines up the usual suspects, including the Crown, a government department, a public health organisation within the meaning of the *Health Services Act* 1997, a local council or any public or local authority constituted by or under an Act. It also includes persons acting in a public official capacity, and persons or bodies defined as an authority by regulation.

It would require careful consideration of the legislation before commencing an action, or joining a public authority, in order to determine whether the prospective defendant has available to it the various protections afforded by Part 5.

Section 42 appears to restate common law principles relating to a determination as to whether a duty of care exists, or whether a breach of that duty occurred. For example, the financial resources of the authority are relevant (s42(a)), but not the general allocation of those resources (s42(b)). Recourse is required to the *'broad range of its activities'*, and not just to the activity the subject of the claim (s42(c)), and it may rely upon evidence of its compliance with general procedures and applicable standards as proof of the proper exercise of its functions (s42(d)).

When met with a defence citing s42, it would be prudent for the practitioner to seek detailed particulars (much in the same prolix fashion sought by defendants' solicitors). It would not be sufficient, in my view, for an authority simply to produce its annual report in response to a proper request for particulars.

These are much the same particulars that were formerly requested by plaintiffs' lawyers seeking to establish breach of duty in accordance with the *'Mason calculus:'*[2]:

> 'The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.'

It should not be thought that the mere recitation of s42 in a defence reverses the traditional onus of proof carried by plaintiffs. That onus still remains in the sense that the plaintiff has to establish both duty and breach.

However, an evidential onus shifts to the defendant once the section is pleaded in a defence to show why, having regard to the subsections of s42, either no duty, or no breach has occurred. Usually, it has access to this information and, if it is not produced at trial, it will allow a plaintiff to raise a *Jones v Dunkel* inference that would, in all probability, defeat the defendant's reliance upon the section.[3]

In that sense, it is fair to say that there is a shifting onus. Hence, there is much to be gained by ascertaining well in advance of the trial what facts and evidence the defendant will seek to prove or adduce to satisfy the evidential or persuasive requirements of the defence.

Both s43 and s43A superimpose an additional requirement upon the common law duty of care owed by a public authority. That is to say, not only must a plaintiff prove a case at common law, but no public authority can be held to be liable unless the plaintiff can establish that the public authority had acted unreasonably, or in the case of a failure to act, that such failure was unreasonable. This is referred to as *'Wednesbury unreasonableness' test*[4].

Various decisions have been referred to by Giles JA in *Allianz Australia Insurance v RTA*[5] as illustrative of the range of judicial interpretation of what that means. From Lord Greene noting that *'something overwhelming'*[6] is required, to Brennan J in *Attorney General of New South Wales v Quin*[7] that the action could not be reviewed unless it amounted to *'an abuse of power'* and that the basis for judicial review *'is extremely confined'*. In *Bromley London Borough Council v Greater London Council*,[8] Lord Diplock described such an unreasonable decision as one *'so devoid of plausible justification that no reasonable body of persons could have reached it'* and, similarly, he said in *Council of Civil Service Unions v Minister for the Civil Service*,[9] in relation to a decision *'... which is so outrageous in its defiance of accepted moral standards that no sensible person who applied his mind to the question could have arrived at it'*. In *Secretary of State v Education & Science v Tameside Municipal Borough Council*[10] he described conduct *'... which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt'*.

It is clear that not all judges in Australia have shared the extreme language used by Lord Diplock. In *Minister for Immigration and Cultural Affairs v Eshetu*,[11] the court commented that:

> 'Someone who disagrees strongly with someone else's process of reasoning on an issue of fact may express such disagreement by describing the reasoning as "illogical" or "unreasonable", or even "so unreasonable that no reasonable person could adopt it". If these are merely emphatic ways of saying that the reasoning is wrong, then they may have no particular legal consequence.'

In other words, something unreasonable in that no reasonable person could adopt it is not sufficient. In the same case, the court approved the following passage from the judgment of Lord Brightman in

Puhlhofer v Hillingdon London Borough Council:[12]

> 'Where the existence or non-existence of a fact is left to the judgement and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case **where it is obvious that the public body, consciously or unconsciously are acting perversely**.' [Author's emphasis]

Academia appears to have taken the view that *'only the grossest unreasonableness will invalidate the exercise of a statutory discretion'*.

Notwithstanding the criticism that has been made of the application of an administrative law criteria to a negligence action by Campbell JA in *RTA v Refrigerated Roadways Pty Limited*;[13] Hoeben J in *Rickard v Allianz Australia Limited*[14] and by Giles JA in *Rickard v Allianz Australia Limited*,[15] it appears that where a plaintiff pleads a breach of a statutory duty under either s43 or s43A, there will be a need to prove, in addition to the common law requirements, an additional requirement of unreasonableness.

Given that difficulty, together with the uncertainness as to the precise level required to establish Wednesbury unreasonableness, my advice to prospective plaintiffs' practitioners is that, unless it is absolutely essential, a statutory count should not be included.

When confronted with a pleading invoking the application of s43A, a number of additional matters ought to be considered. It is clear that a public authority pleading s43A has an evidentiary onus to prove the particular facts that permit it to rely upon that defence: see *RTA v Refrigerated Roadways*.[16]

Additionally, the public authority must plead the section. It is insufficient for a public authority simply to aver that it relies on Part 5 of the CLA. In *Bellingen Shire Council v Colavon Pty Limited*,[17] the Court of Appeal rejected the authority's entitlement to rely on s43A when, after the close of submissions, it purported to rely upon that defence, and, while s43A was not specifically pleaded, the defendant had nonetheless pleaded an 'umbrella' defence relying on 'Part 5' of the CLA.

In rejecting the Council's purported reliance on s43A, Beazley JA made these observations:

- That the plaintiff had brought a case at common law, relying upon those principles rather than any statutory obligation cast upon the defendant council and, thus, s43A had no application.
- Because the defence had been raised after the evidence had concluded, the plaintiff was prejudiced in that he was denied any adequate opportunity to consider his position.
- As to whether s87 of the *Roads Act* 1993 (NSW) concerned a special statutory power, Her Honour observed:

'There does not appear to be any rule that could or should be applied generally or uniformly to determine whether an entity acts pursuant to a special statutory power.'

- While it did not form part of the *ratio decidendi* of the case, Her Honour concluded that because the council owned the road and had the same rights as a property owner with regard to the road, that it was *'difficult to see that its entitlement to install guide posts is pursuant to a special statutory power'*.[18]

The special statutory power needs to be carefully considered. Its ambit, in my view, is not as wide as has been postulated. If we consider a road authority, for example, its statutory remit to effect roadworks arises out of various pieces of legislation, such as the *Roads Act* 1993 (NSW) and the >>

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Road Transport (Safety & Management) Act 1999 (NSW). Roads authorities have argued, not always successfully, that everything concerning actions performed under a power, as far as roadworks are concerned, is covered by this special statutory exemption. I do not consider that, for example, a failure to warn, or the use of a warning sign, or a failure to inspect, necessarily involve the application of a special statutory power. For that matter, I do not consider that any activity relating to the exercise of a public authority's statutory powers is an activity likely to be regarded as an exercise of a 'special statutory power'. There are a number of reasons for this view:

1. In *Refrigerated Roadways*, Campbell JA attached significance to the words *'is based'* as a reason for excluding or restricting the application of s43A. Where a plaintiff makes no mention of any statutory power, or of any negligence associated with the exercise of any statutory power, and runs its case purely based on common law, then *'I do not see how the alleged liability could be "based on" the RTA's exercise of, or failure to exercise, any special statutory power';*[19]
2. The authors of the Ipp Report specifically rejected a suggestion that a public authority should have a defence in answer to *'any claim for negligence in the performance of a statutory function'*.[20] The authors reasoned, citing an example of an employee of a public authority causing an accident by driving negligently in the course of the performance of some statutory function of the authority, that *'the mere fact that an accident occurred in the course of the performance of the statutory function should not displace the operation of the ordinary rules of liability and allow the policy defence to be pleaded;'*
3. The historical context of the insertion of s43A in 2003 is important to note. Campbell JA in *Refrigerated Roadways* observed that s43A was a direct legislative reaction to the judgment of Adams J in *Presland v Hunter Area Health Service*.[21] In that case, Adams J awarded damages to a mentally disordered person whom the defendant had failed to detain in a psychiatric facility, and who, within hours of his unfortunate release, had killed somebody about whom he had a delusion.

The fact that the Court of Appeal reversed the decision of Adams J is not to the point. The power of a medical superintendent to detain a mentally disordered person, specifically conferred by the *Mental Health Act* 1990 (NSW), is a clear example of a *'special statutory power'*. Campbell JA in *Refrigerated Roadways* cites it as an example and, in that case, rejected the RTA's submission that s120 of the *Roads Act* conferred upon the RTA a special statutory power.

It is worth noting that the High Court has contemplated but not definitively determined the application of s43A. It said in *Sydney Water Corporation v Turano* that the section had an *'uncertain reach'*.[22]

The High Court did not have to make any determination as to the ambit or application of s43A as the defence had not been relied upon in that case. However, *in obiter*, the Court referred to – perhaps as an indication of its thinking:

- 'Professor Aronson has written of s43A that it is important to understand its scope, ...
- 'We know from *Hansard* that the section was intended to apply to doctors performing certification roles under the mental health legislation. By analogy and equally unfortunately, it may also apply in the context of police watch houses and prisons, but nothing is certain.
- 'Professor Aronson refers to the definition of special statutory power noting that the section refers to "power" and "authority" separately.
- 'The idea appears to have been to distinguish statutory authority *per se* ... from statutes permitting coercive acts or non-consensual depriving acts. If that is correct, then one of the limits to the section's scope is that the defendant must have received statutory authority to act in a way that changes, creates or alters people's legal status or rights or obligations without their consent.'[23]

It is more than curious, without any need to refer to that opinion, why the High Court did so.

My view of this, with some trepidation, is that it is an indication that the High Court will not give s43A the broad scope or application, nor indeed the definition that public authorities have sought to have applied.

Beazley JA in *Bellingen Shire Council v Colavon* did not need to decide what the breadth of s43A entailed, it was not necessary for her decision; only the question of whether a defendant ought be permitted to amend its defence to refer to s43A after the evidence had been completed. She did comment, however:

'...the meaning of "special statutory power" is unclear.'

While it is my view that the meaning of *'special statutory power'* ought to be read down in the manner suggested by Professor Aronson, it would still be necessary for practitioners to seek detailed particulars of the way in which a public authority alleges it has

derived its *'special statutory power'*.

Section 44 applies to circumstances where the plaintiff has alleged that the public authority has failed to exercise a regulatory power. Although I have suggested that a plaintiff ought to avoid pleading a case citing a regulatory count, preferring instead a common law cause of action, there may be circumstances that mandate a regulatory count.

Like s43A, my view is that s44 has a limited application. Section 44(2), although prefaced with the words *'... without limiting what constitutes a function to regulate an activity ... a function to issue a licence, permit or other authority'*, it may be successfully argued, as in *Rickard v Allianz Insurance Limited*,[24] that the intention of s44 was to limit the scope of the defence to council's power to issue licences, etc. Its application to road cases was specifically rejected by Hoeben J in that case.

Section 45 refers only to road authorities and requires the plaintiff to prove that the authority had *'actual knowledge of the particular risk'* before liability can attach for their failure to act. If raised as a defence, care needs to be taken to ascertain, either through particulars, interrogatories or discovery, or a combination of all three, as to what the road authority's *'actual knowledge'* was. Practitioners should bear in mind what the Court of Appeal said in *North Sydney Council v Roman*[25] *'... that constructive or imputed knowledge is insufficient and that the 'actual knowledge' has to be of the particular officer of the authority who has the authority to effect the remedy, defect or repairs'*.

CONCLUSION

While Keith Rewell SC took the view, in a paper presented to the Australian Lawyers Alliance on the 'Liability of Occupiers and Road Authorities' in November 2011, that the commencement of cases against public authorities is *'not for the fainthearted'*. While I endorse that opinion, I do not consider that courts in the future will be likely to apply the apparently severe restrictions that appear to the extent that once were thought, apart from s45.

There are a number of precautions that can be taken to eliminate or diminish the risk of a successful Part 5 defence. These include:

(a) Consider firstly whether the proposed defendant is a *'public authority'* within the definition set out in s41;

(b) Prudent practitioners ought to take care to avoid pleading a *'statutory'* cause of action where possible; the preference being for a common law cause of action;

(c) As with all defences, but particularly those that plead Part 5 defences, it is important to ensure that the defendant specify exactly what section or sections of Part 5 upon which they rely and what particulars entitle them to reliance or protection;

(d) Particulars ought be sought so as to:
   (i) inform as to the facts and allegations said to give rise to the defence; and to
   (ii) limit the defendant's reliance at trial only to those matters which they have particularised.

(e) If a s43A defence is raised, and, after particulars of what the defendant alleges give rise to a *'special statutory power'* have been received, consideration ought be given to an application to strike out that part of the defence that raises the s43A defence. ■

Notes: **1** These include intentional torts, dust diseases, tobacco related injuries, motor accidents, workers' compensation, for example. **2** *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at pp47-8. **3** (1959) 101 CLR 298. **4** In *Associated Provincial Picture Houses Limited v Wednesbury Corporation* (1948) 1 KB 223, Lord Greene MR determined that:

> 'If a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something quite overwhelming ...'

5 *Allianz Australia Insurance v RTA* (2010) NSWCA 328. **6** *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1KB 223. **7** *Attorney-General of New South Wales v Quin* (1990) 171 CLR 1 at p36. **8** *Bromley London Borough Council v Greater London Council* (1983) 1 AC 768. **9** *Council of Civil Service Unions v Minister for the Civil Service* (1985) AC 374 at p410. **10** *Secretary of State v Education & Science v Tameside Municipal Borough Council* (1977) AC 1014. **11** *Minister for Immigration and Cultural Affairs v Eshetu* (1999) 197 CLR 611. **12** *Puhlhofer v Hillingdon London Borough Council* (1986) AC 484 at p518. **13** *RTA v Refrigerated Roadways Pty Limited* (2009) NSWCA 263. **14** *Rickard v Allianz Australia Limited* (2009) NSWSC 1115. **15** *Rickard v Allianz Australia Limited* (2010) NSWCA 328. **16** *RTA v Refrigerated Roadways* (2009) NSWCA 263, paras 316-17. **17** *Bellingen Shire Council v Colavon Pty Limited* (2012) NSWCA 34. **18** *Ibid*, para 38. **19** *RTA v Regrigerated Roadways Pty Ltd* (2009) NSWCA 263 at para 374. **20** At para 10.21 (p156). **21** *Presland v Hunter Area Health Service* (2003) NSWSC 754. **22** *Sydney Water Corporation v Turano* (2009) 239 CLR 51 at p65. **23** M Aronson, 'Government Liability in Negligence' (2008), *Melbourne University Law Review* 44, pp78-9. Professor Aronson is a well-respected authority on this and other subject matters. The fact that the High Court has chosen to cite his arguments extensively in its judgment is testament to the weight of his authority. **24** *Rickard v Allianz Insurance Limited* (2009) NSWSC 145. **25** *North Sydney Council v Roman* (2007) 69 NSWLR at 240.

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