Common Law Liability of Statutory Authorities

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The High Court of Australia has heard argument on appeal from the Victorian Court of Appeal in Pyrenees Shire Council v Day, *a case concerning the liability of statutory authorities in negligence. The Court has yet to deliver judgment, but it is apparent from the transcripts of argument, which are available at the Australasian Legal Information Institute (AustLII) Internet site, that there is a real prospect that the Court will move away from the principles stated a decade ago in* Sutherland Shire Council v Heyman. *This article revisits* Heyman, *describes the post-*Heyman *development of the law relating to the liability of statutory authorities, and speculates about the path that the High Court is likely to take in* Pyrenees.

1. INTRODUCTION

In some respects, statutory bodies such as local authorities are no different from other defendants so far as liability in negligence is concerned. If a statutory authority has actively caused the plaintiff's loss by, for example, negligently making a misleading statement to the plaintiff, [1] or by negligently causing the plaintiff to suffer physical injury,[2] it can be held liable in the same way as any other defendant,

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1. As in *Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)* (1981) 150 CLR 225.
2. As in *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

and by application of the ordinary principles of the law of negligence. Similarly, if a statutory authority is the occupier of premises, it owes entrants on those premises the usual duty to take reasonable care to make the premises safe.[3]

The situation is rather different in cases where the plaintiff complains that the statutory authority failed to protect him or her from a risk created by someone else or from a naturally occurring risk. In cases such as these, statutory authorities have a number of special qualities that may, in some circumstances, require quite different treatment from that given to private individuals. First, there is the fact that they are public bodies created to discharge specified statutory functions. Although the law is, in general, reluctant to impose on a private person a duty to take affirmative action, that reluctance may well seem less appropriate when the defendant is not a private individual but a public body that has been set up, and entrusted with statutory powers and resources, for the public good. A private individual may raise what Lord Hoffmann in *Stovin v Wise* called the 'why pick on me?' argument:

> A duty to prevent harm to others or to render assistance to a person in danger or distress may apply to a large and indeterminate class of people who happen to be able to do something. Why should one be held liable rather than another? In economic terms, the efficient allocation of resources usually requires an activity should bear its own costs. If it benefits from being able to impose some of its costs on other people (what economists call 'externalities') the market is distorted because the activity appears cheaper than it really is.... So there must be some special reason why [a defendant] should have to put his hand in his pocket.[4]

In some cases, the statutory function that a public body is set up to perform may provide the answer to the 'why pick on me?' question — 'Because that is the kind of thing you were set up to do and the public has given you money to do it'. Thus, for example, a fire authority may be under a duty to take positive steps to guard against a risk of fire when a private individual might not be.[5] As Lord Hoffmann put it in *Stovin v Wise*:

> It is certainly true that some of the arguments against liability for omissions do not apply to public bodies like a highway authority. There is no 'Why pick on me?' argument.... The highway authority [in the present case] alone had the financial and physical resources, as well as the legal powers, to eliminate the hazard. But this does not mean that the distinction between acts and omissions is irrelevant to the duties of public bodies or that there are not other arguments, peculiar to public bodies, which may negative the existence of a duty of care.[6]

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3. See *Nagle v Rottnest Island Authority* (1993) 177 CLR 423.
4. [1996] AC 923, 944.
5. *Northern Territory v Deutscher Klub (Darwin) Inc* (1994) 84 LGERA 87.
6. Supra n 4, 946. See also Lord Nicholls 935: 'In some respects the typical statutory

Nevertheless, the fact that statutory authorities are public bodies with statutory functions to perform provides a second distinction between statutory authorities and private individuals, one that militates against the imposition of a duty to act. Just like private individuals, statutory bodies have only limited resources, but they do not have complete freedom of choice about how to spend those resources. A private individual cannot argue that he or she did not have sufficient resources to undertake a particular activity with reasonable care, as the curt response will be that he or she should not then have undertaken that activity at all — 'If you can't make ginger beer with reasonable care, you should be doing something else with your money'. In contrast, statutory authorities have no choice but to perform the statutory functions for which they were created, and their limited resources must be spent in the discharge of those functions. The statutory authority must make policy decisions about how to make the best use of the resources available in the performance of its statutory functions. To hold a statutory body liable for failing to act may amount to a review of a deliberate decision on its part to use its scarce resources elsewhere. Seen in this light, it may amount to an intrusion of the private law of torts into the public law domain. That is the essence of the notorious 'policy/operational distinction', which will be considered in greater detail below.

A third distinction between the legal position of statutory bodies and that of private individuals derives ultimately from the fundamental doctrine of separation of powers. Statutory authorities are usually given a wide discretion about how to perform their statutory functions. The statutes that create public authorities seldom impose positive duties, precisely because the created authorities must operate with limited resources. A duty to act in every case would usually impose an unrealistic burden. As a result, statutes usually define the body's functions, confer powers upon it, create decision-making structures for it, then leave it to the body itself to decide how best to use the powers to perform the functions with the available resources. That being so, it is arguable that the courts should not intervene to impose a common law duty to exercise the body's statutory power. If Parliament did not see fit to impose a duty by statute, why should the courts do otherwise? How can a statutory power be the source of a common law duty? As Lord Romer said in *East Suffolk Catchment Board v Kent*:

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framework makes the step to a common law duty to act easier with public authorities than individuals. Unlike an individual, a public authority is not an indifferent onlooker. Parliament confers powers on public authorities for a purpose. An authority is entrusted and charged with responsibilities for the public good. The powers are intended to be exercised in a suitable case. Compelling a public authority to act does not represent an intrusion into private affairs in the same way as when a private individual is compelled to act.'

> 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.[7]

Historically, the courts took the view that a statutory body could not be held liable at common law for a failure to exercise its powers (as opposed to injury or loss caused by an active exercise of its powers), even when it had exercised its powers but had done so inadequately.[8] The House of Lords took a historic step away from that position in *Anns v Merton London Borough Council*,[9] only to retreat again in *Murphy v Brentwood District Council*.[10] In Australia, the starting point for discussion of these issues is still (for the moment, at least) *Sutherland Shire Council v Heyman*,[11] in which the High Court of Australia held that there is, in general, no common law duty to exercise a statutory power, *Anns* notwithstanding. Although a majority of the High Court (Mason, Brennan and Deane JJ) held that the local authority in *Heyman's* case owed no duty to exercise its statutory powers, there are extensive and influential obiter dicta in Mason J's judgment setting out the circumstances in which a duty to act might be imposed on a statutory body. Those obiter dicta have been taken up in a series of cases in lower courts, culminating most recently in the decision of the Victorian Court of Appeal in *Pyrenees Shire Council v Day*.[12] An appeal from that decision has been heard by the High Court; the transcripts of argument suggest that the court may be minded to undertake a comprehensive review of the principles stated in *Heyman*.[13]

Heyman's case is considered in section 2 of this paper. The cases between *Heyman* and the *Pyrenees* case are considered in section 3. Section 4 analyses the developing concept of general reliance, with particular reference to the arguments before the High Court in the *Pyrenees* case. Section 5 deals with the policy/operational

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7. [1941] AC 74, 103, quoting du Parcq LJ in the Court of Appeal [1940] 1 KB 319, 338.
8. See eg *East Suffolk Catchment Board v Kent* ibid.
9. [1978] AC 728.
10. [1991] 1 AC 398. *Anns* is, however, still followed in New Zealand: see *Invercargill City Council v Hamlin* [1996] AC 624; in Canada: see *Winnipeg Condominium Corp v Bird Construction Co* [1995] 1 SCR 85.
11. (1985) 157 CLR 424.
12. [1997] 1 VR 218.
13. The transcripts of argument can be read at the Australasian Legal Information Institute (AustLII) Internet site at: http://www.austlii.edu.au/do/disp.pl/au/other/hca/transcripts/1996/M57/1.html (2 Jun 1997) and http://www.austlii.edu.au/do/disp.pl/au/other/hca/transcripts/1996/M57/2.html (3 Jun 1997).

distinction, and section 6 deals briefly with the special position of highway authorities.

2. THE STARTING POINT: HEYMAN'S CASE

In *Sutherland Shire Council v Heyman*,[14] the defendant council approved building plans for a house and issued a building permit in 1968. One of its building inspectors inspected the house during construction. The plaintiffs purchased a house from its first owners in 1975. During 1976 structural defects appeared. These were caused by the subsidence of the footings of the house, which were inadequate. It was not clear from the evidence whether the building inspector had inspected the footings, as his only record of the inspection was the following indorsement on the council's inspection card: 'Frame OK — 3.12.69'. The building plans approved by the council did not show the footings.

When they purchased the house, the plaintiffs were entitled to ask the defendant council for a certificate under the Local Government Act 1919 (NSW), section 317A, confirming that the house complied with all necessary building requirements. They did not do so and they did not make any other inquiries of the council.

The plaintiffs faced a simple, all-too-common problem when they began to consider sources of compensation for the losses they suffered as a result of the subsidence of the footings of the house. The builder had gone out of business and so could not be sued. As a result the plaintiffs sued the Sutherland Shire Council, alleging that it had negligently caused the structural damage to the house by failing to inspect the building properly and/or by failing to make inspections that ought to have been made. Their action squarely raised the issues set out in the introduction to this paper. One of the statutory functions of the defendant council was oversight of the safety of buildings constructed in its area. The council had been given powers of inspection and approval in order to enable it to discharge that function, but it was under no statutory duty to do anything in relation to any particular house. So far as the Heymans' house was concerned, it had exercised its powers to do something but could have done much more. Was it to be held liable for its failure to scrutinise the construction process more rigorously?

The High Court held unanimously that the defendant was not liable to the plaintiffs in negligence, but for differing reasons. The majority (Mason, Brennan and Deane JJ) held that the defendant owed the plaintiffs no duty of care in the circumstances. The minority (Gibbs CJ and Wilson J) held, following *Anns*, that the council did owe the plaintiffs a duty of care but that there was insufficient evidence

14. Supra n 11.

to establish that it had breached that duty.

In considering the question of whether and when a common law duty to exercise a statutory power might arise, Mason J said:

> Generally speaking, a public authority which is under no statutory obligation to exercise a power comes under no common law duty to do so.... But an authority may by its conduct place itself in such a position that it attracts a duty of care which calls for exercise of the power. A common illustration is provided by the cases in which an authority in the exercise of its functions has created a danger, thereby subjecting itself to a duty of care for the safety of others which must be discharged by an exercise of its statutory powers or by giving a warning.... There are other situations in which an authority's occupation of premises or its ownership or control of a structure in a highway or of a public place attracts to it a duty of care.... And then there are situations in which a public authority, not otherwise under a relevant duty, may place itself in such a position that others rely on it to take care for their safety so that the authority comes under a duty of care calling for positive action. Such a relationship has been held to arise where a person, by practice or past conduct upon which other persons come to rely, creates a self-imposed duty to take positive action to protect the safety or interests of another or at least to warn him that he or his interests are at risk.[15]

Mason J expanded on the function of reliance in this context as follows:

> It is positive conduct on the part of the defendant or the plaintiff's acting to his detriment which gives rise to specific, as distinct from general, reliance or dependence. 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. Insistence on conduct contributing to the plaintiff's reliance would conform to a general notion that it is positive conduct on the part of an authority which attracts a duty of care calling for exercise of a statutory power. However, there is no a priori reason why the existence of a duty of care should necessarily be conditioned on the defendant's positive conduct. The same comment may be made about detriment. That the plaintiff has acted to his detriment may strengthen the case for imposing a duty of care, especially if the defendant is aware that the plaintiff has so acted, but there is no underlying reason why it should be regarded as a necessary condition.... If this be accepted, as in my opinion it should be, 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 the defendant or action to his detriment on the part of a plaintiff.[16]

The other two members of the majority, Brennan and Deane JJ, generally agree on very little so far as the law of torts is concerned. *Heyman's* case was no exception. In *Heyman*, they continued their long-running disagreement about the utility of the

15. Ibid, 459-461 (footnotes omitted).
16. Ibid, 463-464.

concept of proximity, a debate which Deane J seemed to have won at the time, but which Brennan CJ (as he now is) seems now be winning after Deane J's departure from the Court.[17] Despite this disagreement on issues of general principle, Brennan and Deane JJ agreed with Mason J that a duty to act might arise if a statutory authority had acted in such a way that the plaintiff had come to rely on it to exercise its statutory powers. Brennan J agreed that a duty might arise in circumstances of what Mason J called 'specific reliance', but he provided no support for the proposition that a duty might arise in circumstances of 'general reliance'. He said:

> 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 the 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, provided that damage was reasonably foreseeable when the omission or inadequate exercise occurred and provided that any special element restricting a cause of action for negligence occasioning damage of that kind is satisfied. That principle might have had some attraction for the [plaintiffs] in the present case, but the evidence did not warrant its invocation.[18]

Similarly, Deane J supported the proposition that there might be a duty if there was 'specific reliance', but he did not clearly support the idea that there might be a duty based on 'general reliance'. He said:

> In any general formulation of the ingredients of a cause of action in negligence, which is intended to encompass cases involving mere omission ... 'proximity' of relationship ... should be seen as a distinct general requirement which must be satisfied before any duty of care to avoid reasonably foreseeable injury will arise.... In such cases, as Mason J demonstrates in his judgment in this appeal, it is likely that the existence of the requisite element of proximity will reflect, among other things, reliance by a 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. [19]

On the facts of the case, none of the majority was of the view that the plaintiffs had relied on the defendant council to exercise its statutory powers, so no duty to act arose.

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17. In *Hill v Van Erp* (1997) 142 ALR 687 a majority of the High Court (Brennan CJ, McHugh and Gummow JJ) endorsed Brennan J's long-held scepticism about the usefulness of proximity as a principle or guide for the existence of a duty of care.
18. *Heyman* supra n 11, 486.
19. Ibid, 507-508.

Several questions were left unanswered by *Heyman's* case. Mason, Brennan and Deane JJ seemed agreed that a duty might arise in cases of 'specific reliance', but it was not clear whether they thought that reliance was *necessary* in order for a duty to arise. The presence of reliance (whether specific or general) might be enough to give rise to a duty, but is its absence fatal? Deane J clearly thought that there could be a sufficient relationship of proximity to give rise to a duty of care, even in the absence of reliance by the plaintiff. In the passage quoted above, Deane J said, 'it is likely that the existence of the requisite element of proximity will reflect, *among other things*, reliance by a plaintiff upon care being taken by the defendant'. Mason J, on the other hand, mentioned only reliance when dealing with the situation where a statutory body is 'not otherwise under a relevant duty' by virtue of such matters as its occupation of premises. Furthermore, it was only Mason J who clearly expressed support for the idea that 'general reliance' could give rise to a duty of care. Nevertheless, it is that aspect of his judgment that has most often been taken up in later cases.

3. GENERAL RELIANCE: FROM PARRAMATTA TO THE PYRENEES

Parramatta City Council v Lutz[20] was the first case after *Heyman* in which an appeal court considered whether there might be a common law duty to exercise a statutory power. The plaintiff, a house owner, repeatedly complained to the defendant council about the derelict condition of a building next to her own. (Kirby J, who sat in *Lutz* as Kirby P, summed up Mrs Lutz's behaviour succinctly when the case was discussed in argument in *Pyrenees Shire Council v Day*: 'She kept making a pest of herself'.[21]) The neighbouring building caught fire and was extensively damaged. The council's health and building surveyor inspected the building after the fire and recommended to the council that it issue a notice under the Local Government Act 1919 (NSW), section 317B, ordering the owner of the building to demolish it, and advising that if the building were not demolished within 60 days, the council would demolish the building itself. The defendant council delayed in making and enforcing the order. After the 60-day period had expired, but before the council had done any demolition work, the derelict building caught fire again. On this occasion, the fire spread to the plaintiff's home causing extensive damage.

The plaintiff sued the council, alleging that the damage to her house had been

20. (1988) 12 NSWLR 293.
21. Internet transcript 2 Jun 1997, supra n 13.

caused by the council's negligent failure to exercise its statutory powers in respect of the demolition of the derelict property. The Court of Appeal of New South Wales held that the council owed the plaintiff a duty to exercise its statutory powers, because the plaintiff had relied on the defendant to do so. Kirby P and Mahoney JA held that the council's conduct and statements in response to the plaintiff's persistent requests had been such that it had specifically led the plaintiff to believe that it would exercise its powers and that she had specifically relied on it to do so. That was clearly enough to give rise to a duty of care on any view of *Heyman's* case.[22]

McHugh JA disagreed that the plaintiff had established specific reliance. He preferred to base the decision in favour of the plaintiff squarely on Mason J's concept of 'general reliance'. After quoting extensively from *Heyman's* case, McHugh JA said:

> I think, however, that this court should adopt as a general rule of the common law the concept of general reliance to which Mason J refers in his judgment.... The introduction of a general reliance category into the law of negligence is a legitimate analogical development of the established category of specific reliance. It is a necessary development in the law of negligence as it applies 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 impracticable for them to protect themselves. Moreover, the imposition of civil liability in these cases enforces the expectation of the legislature that the relevant powers will be used to protect the community in respect of risks recognised as beyond the capacity of individuals to protect themselves adequately.[23]

McHugh JA, too, seems to have changed his mind between *Lutz* and *Pyrenees Shire Council v Day*. As we shall soon see, he no longer seems quite so convinced of the utility of the concept of 'general reliance'.

Even before *Lutz*, there had been support for Mason J's concept of 'general reliance'. Soon after *Heyman*, two cases raised the question whether a statement of claim was defective in pleading general reliance on a defendant to exercise its statutory powers. In both cases, the court refused to strike out the relevant parts of the statement of claim on the basis that it could not be said that an allegation of general reliance disclosed no possible foundation in law for a cause of action.[24]

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22. Incidentally, Kirby J seems subsequently to have changed his mind about his decision on the facts of *Lutz*. After pointing out during argument in *Pyrenees Shire Council v Day* that Mrs Lutz had made a 'pest' of herself to the council, Kirby J went on to say, 'I think that is what led me to believe, erroneously, apparently, that she had established specific reliance'.
23. *Lutz* supra n 20, 330.
24. See *McCauley v Hamilton Island Enterprises Pty Ltd* (1987) Aust Torts Reps ¶ 80-119; *Gordon v James Hardie & Co Pty Ltd (No 2)* (1987) Aust Torts Reps ¶ 80-133.

After *Lutz*, the concept of 'general reliance' slowly gathered momentum. In *Casley-Smith v F S Evans & Sons Pty Ltd (No 5)*,[25] Olsson J of the Supreme Court of South Australia held that a local authority owed a duty to home owners in the Adelaide Hills, who had generally relied on it to exercise its statutory powers of regulation and supervision of the rubbish dump from which the Ash Wednesday bush fires started. At first instance in *Nagle v Rottnest Island Authority*,[26] one of the reasons that Nicholson J gave for finding that the Rottnest Island Authority owed Nagle a duty to exercise its statutory powers was general reliance on the part of swimmers such as Nagle. Nicholson J said: 'As I understand the authorities, while evidence of actual reliance is clearly relevant to assessment of proximity, absence of it does not mean a relationship of proximity cannot be found. General reliance is open to be found from all the relevant circumstances even in the absence of specific reliance'.[27] Of course, Nicholson J's decision on duty was overturned on appeal to the Full Court and restored by the High Court on different grounds,[28] but it remains significant in the present context.

Other cases followed. In *Alec Finlayson Pty Ltd v Armidale City Council*,[29] Burchett J of the Federal Court used the concept of general reliance as the basis for his decision that a local council owed a duty of care in granting development approvals. In *Northern Territory v Deutscher Klub (Darwin) Inc*,[30] Kearney J relied on the concept of general reliance in holding that the Northern Territory Fire Service owed a duty of care to take action to guard against a risk of fire, saying:

> The plaintiff had a 'reasonable reliance' arising out of a 'general dependence' that the Fire Service would perform its functions with due care.... That 'general reliance ... on [the Fire Service's] exercise of power', in my opinion, established a relationship of proximity in this case between the plaintiff and the Fire Service sufficient to found a duty of care in the service of the plaintiff in carrying out its functions.[31]

In *Hicks v Lake Macquarie City Council (No 2)*[32] and *Romeo v Conservation*

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25. (1988) 67 LGRA 108.
26. (1989) Aust Torts Reports ¶ 80-298.
27. Ibid 69,245.
28. As pointed out in the introduction to this paper, the High Court in *Nagle v Rottnest Island Authority* supra n 3 held that the defendant statutory authority owed the plaintiff a duty simply because it was the occupier of the relevant 'premises' (the Basin at Rottnest) and had encouraged people to go there to swim.
29. (1994) 51 FCR 378.
30. Supra n 5.
31. Ibid, 89. The other two members of the NT Court of Appeal, Thomas and Priestley JJ, based their decision on other grounds.
32. (1992) 77 LGRA 269.

Commission of the Northern Territory,[33] the Supreme Court of New South Wales and the Supreme Court of the Northern Territory respectively recognised that general reliance could give rise to a duty of care, but held that it did not do so in the circumstances of the cases before them.

Some support for the concept of general reliance can also be found in New Zealand, principally in dicta of Cooke P (now Lord Cooke)[34] and in the recent decision of the House of Lords in *Stovin v Wise*.[35] In *Stovin*, the House of Lords held by a majority of three to two that a highway authority did not owe road users a duty to exercise its statutory powers to reduce the height of a mound of earth that hampered visibility at a road intersection within its jurisdiction. Although no duty was found on the facts of the case, Lord Hoffmann, speaking for the majority (Lords Hoffmann, Goff and Jauncey), undertook an extensive and apparently approving analysis of the concept of general reliance,[36] quoting from Mason J's judgment in *Heyman*. Lord Hoffmann did end on a cautionary note, however:

> I do not to propose to explore further the doctrine of general reliance because...I think that there are no grounds upon which the present case can be brought within it. I will only note in passing that its application may require some very careful analysis of the role which the expected exercise of the statutory power plays in community behaviour. For example, in one sense it is true that the fire brigade is there to protect people in situations in which they could not be expected to be able to protect themselves. On the other hand, they can and do protect themselves by insurance against the risk of fire. It is not obvious that there should be a right to compensation from a negligent fire authority which will ordinarily enure by right of subrogation to an insurance company. The only reason would be to provide a general deterrent against inefficiency. But there must be better ways of doing this than by compensating insurance companies out of public funds.[37]

The kind of careful analysis called for by Lord Hoffmann can be found in the judgment of Brooking JA of the Victorian Court of Appeal in *Pyrenees Shire Council v Day*.[38] It is the most careful and detailed analysis of the concept of general reliance

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33. (1994) 123 FLR 71. An appeal in *Romeo's* case was dismissed on different grounds: see (1994) 123 FLR 84.
34. See *Brown v Heathcote County Council* [1986] 1 NZLR 76, Cooke P 81; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282, Cooke P 297.
35. Supra n 4.
36. Ibid, 954-955. A distinguished English torts scholar, Professor Horton Rogers, has commented that 'Lord Hoffmann's judgment in *Stovin* probably amounts to a recognition of general reliance in the English common law': see H Rogers 'Negligence, Powers, Duties and Omissions: An English Answer' (1996) 4 Torts L Journ 204, 209.
37. Ibid.
38. Supra n 12.

to date, and the court's decision may be regarded as the high water mark of the application of the concept. It may also be the swan song, however, for reasons that will appear shortly.

In *Pyrenees*, the Victorian Country Fire Authority was called to a fish and chip shop in the small country town of Beaufort to respond to what appeared to be a fire in the chimney. After the immediate problem had been attended to, the VCFA reported the incident to the local shire council, which sent a building inspector to inspect the premises. The inspector pointed out to the tenant that there were defects in the chimney and warned him that no fires should be lit. The inspector and the shire surveyor subsequently wrote a letter to the same effect to both tenant and owner. The tenant then transferred the lease to the first plaintiffs, saying nothing about the problems with the fireplace. Some time later, the first plaintiffs lit a fire which then burned down the shop and a neighbouring video shop owned by the second plaintiffs. The plaintiffs sued the former tenant and the shire council. At first instance, the new tenants (the first plaintiffs) succeeded against the former tenant but failed against the shire. The owners of the neighbouring video shop (the second plaintiffs) succeeded against both defendants. The new tenants appealed against the decision in favour of the shire and the shire appealed against the decision in favour of the owners of the neighbouring video shop. The Court of Appeal dismissed both appeals. Both parts of the decision — that the shire owed a duty to the neighbouring shop and that it owed no duty to the new tenants — were based on the concept of general reliance.

Brooking JA (with whom Ormiston and Charles JJA agreed) undertook an extensive analysis of the concept of general reliance, citing decisions from Australia, New Zealand, England and the USA, before concluding:

> In my opinion these appeals are to be resolved by use of the notion of general reliance, first put forward by Mason J in *Heyman*, developed by McHugh JA in *Lutz* and applied or at least recognised in a number of other decisions. The Shire had undoubted power under section 695(1a) of the Local Government Act to require the dangerous defect in the chimney to be eliminated. For very many years municipalities in Victoria have had and exercised extensive powers given by statute, and by-laws authorised by statute, whereby they have discharged functions of control over land and buildings within their respective municipal districts for the purpose of reducing dangers to safety or health which may arise from the use or condition of properties within the municipal district. These functions and powers have extended to fire prevention and control since an early stage. It has long been the position that those who own or occupy premises in a municipality look to the council and to municipal officers to rid them of dangers or inconveniences or other detriments arising from the use or condition of neighbouring buildings within the municipality. The existence of the powers and their exercise have, as is natural, led to a general expectation that the powers will be exercised.... It might have been — but in fact was not — argued that in rural Victoria owners and occupiers of neighbouring properties place their reliance not on the Shire but on the Country

> Fire Authority as regards not only the fighting of fires but also fire prevention measures of this kind; or it might have been — but again was not — argued that reliance is placed by many persons on some unspecified public authority in this regard. But even if it could be said that some neighbouring owners or occupiers would rely on the Shire while others would rely on the Country Fire Authority, and that others again might place reliance on one or the other indifferently, this would in my view not prevent a duty of care from arising. General reliance may be on an unidentified public authority.[39]

No duty was owed to the new tenants, however, because they had possession of the premises with the defective chimney. They had the ability to inspect the chimney and the means to protect themselves against the risk, either by not lighting a fire or by remedying the defect in the chimney. Brooking JA said:

> It is reasonable to expect the owners and occupiers of a building to assume responsibility for taking reasonable steps to safeguard neighbouring buildings against dangers from a defect of this kind, and I do not think that the occupiers of a building with a defect of this kind may be said to rely or depend on the municipality to take reasonable care to safeguard them against loss of the kind here in question, or that any such reliance could be said to be reasonable.[40]

4. AN ANALYSIS OF GENERAL RELIANCE IN THE LIGHT OF ARGUMENTS BEFORE THE HIGH COURT IN PYRENEES

We have all felt and probably expressed the sentiment that They should do something to remedy a situation that concerns us. We are not always clear about who They are, but we feel sure that someone in some position of authority must be responsible for rectifying the problem. This, in essence, is what general reliance amounts to, particularly if, as the Victorian Court of Appeal held in *Pyrenees*, general reliance on an *unidentified* public body is enough to give rise to a duty on the body that actually has statutory power to remedy the situation.

Specific reliance is both more familiar as a basis for duty and relatively uncontroversial. If the defendant statutory authority has engaged in positive conduct that has induced the plaintiff actually to rely on the exercise of its statutory powers, there seems little doubt that a duty should be owed. A general expectation that They should do something seems very different — so different, in fact, that during argument on the appeal in the *Pyrenees* case, members of the High Court wondered out loud whether it was not a fiction that should be abandoned. Although it is

39. Ibid, 237-238.
40. Ibid, 240.

always dangerous to place too much emphasis on interventions from the Bench during argument, the following exchanges between McHugh J and counsel are significant because McHugh J makes essentially the same point to both, suggesting that there is something more than devil's advocacy in his comments. McHugh J's comments are also significant when one remembers that he was one of the very first adherents to the concept of general reliance, in *Lutz*.

> McHUGH J (to Mr Bongiorno QC, counsel for the shire council): It may be that the notion of general reliance was a fiction invented to bridge the gap between the authorities on specific reliance and there being no duty to take affirmative action, but perhaps the time has come, to use the words of Sir Owen Dixon, to boldly disregard this fiction and imply a duty on public authorities when it seems reasonable to impose a duty on them in situations where they are given powers for the general protection of the community. In the area of legitimate expectation now, this Court has in effect said you can have a legitimate expectation even though you do not know anything about the matter that is the subject of the expectation. It is a question of what is reasonable in the community's eyes. So, if you have a council which has powers and there may be arguably a duty under section 694 to prevent fires, why should they not have a duty of care to certain people at least?[41]

> McHUGH J (to Mr Ritter QC, counsel for the new tenants and the video shop owners): You are relying on it [general reliance] as a matter of authority and the source of the doctrine is Mason J in *Heyman* and I adopted it when I was on the Court of Appeal, but the argument we heard yesterday and my own thinking about it makes me wonder whether or not it is a doctrine that ought not now to be buried.[42]

McHugh J was not alone in his apparent scepticism about the utility of the concept of general reliance, as the following exchange shows:

> BRENNAN CJ: It is not reliance at all, is it? As appears from his Honour's statement there [meaning McHugh J in *Lutz*], 'Mrs Lutz did not rely on the statement of the Council to her detriment'. There was not any reliance. I mean, we can use the words 'general reliance' but it must mean that there is a wider duty of care.
>
> MR BONGIORNO QC: A wider duty, that in some way the concept of duty of care was imposed by — in this instance McHugh J has called it general reliance, Mason J has called it general reliance, but included in the bag of things that gave rise to the duty of care was inevitably the interaction between Mrs Lutz and the council, whether it was ...

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41. Internet transcript 2 Jun 1997, supra n 13.
42. Internet transcript 3 Jun 1997, supra n 13.

> GUMMOW J: There seems to be no Australian authority at appellate level which actually finds for a plaintiff on this foundation.
>
> MR BONGIORNO QC: No, that is so, your Honour. That is certainly our submission, that there is nothing we have been able to find.
>
> KIRBY J: It sounds awfully like a fiction. You are not actually relying, but you are deemed to rely.[43]

What will happen if the High Court abandons the concept of general reliance as the basis for the existence of a duty on public bodies to exercise their statutory powers? There seem to be two possibilities. The Court could say that a duty cannot be founded on general reliance or, to put it another way, that there can be no duty without specific reliance. Alternatively, the Court could say that it is time to depart from *Heyman*, to go beyond the fiction of general reliance, and to impose a general duty on public bodies to act 'in situations where they are given powers for the general protection of the community' (to quote McHugh J), much as the House of Lords did in *Anns*. It is equally possible, of course, that both views will eventually appear in the High Court judgments in *Pyrenees*. If so, the crucial question will be, which view will prevail?

If general reliance is to be abandoned in favour of a general duty, there must obviously be some factors limiting the scope of the duty, enabling the court to impose a duty only when it is reasonable to do so. Until recently, one might have been inclined to say that the concept of proximity could do the work of limiting the scope of the duty, taking into account a range of factors. That is how counsel for the new tenants and the owners of the neighbouring video shop put the argument in the High Court in *Pyrenees*, saying that reliance is not necessary for the existence of a duty of care but that a duty could be found to exist because the Shire had actual knowledge of the defect, because the defect endangered public safety, involving imminent risk to person and property, and because the Shire had the power to remedy the defect without any cost to the community (presumably by getting the new tenants to remedy the defect). However, as pointed out above, in *Hill v Van Erp*,[44] a majority of the High Court (Brennan CJ, McHugh and Gummow JJ) endorsed Brennan CJ's long-held scepticism about the usefulness of proximity as principle or guide for the existence of a duty of care. In that context, the following exchange in argument in *Pyrenees* is both amusing and, perhaps, indicative of what the future might hold:

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43. Internet transcript 2 Jun 1997, supra n 13.
44. Supra n 17.

MR RITTER QC: We say that the relationship of proximity which ...

BRENNAN CJ: Can you do it for my sake — and perhaps I am idiosyncratic in this — without using the word 'proximity' to encompass it all?[45]

5. THE POLICY/OPERATIONAL DISTINCTION

Even if a duty to exercise statutory powers can be based upon the general feeling that They ought to have done something (as it can, for the moment at least, particularly in Victoria), the fact still remains that They may have deliberately chosen to do nothing because They elected to spend Their scarce resources on matters to which They gave higher priority. In *Anns v Merton London Borough Council*,[46] the House of Lords distinguished between 'policy' and 'operational' decisions and actions, saying that, in general, liability could attach to the latter, but not the former. Although the High Court did not follow *Anns* in *Heyman's* case, three of the four judgments make reference to the policy/operational distinction, while acknowledging that the distinction may be troublesome to implement in practice. Again, the strongest support can be found in the judgment of Mason J, who said:

> 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. Accordingly, it is possible that a duty of care may exist in relation to discretionary considerations which stand outside the policy category in the division between policy factors on the one hand and operational factors on the other.... The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognise that 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. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.[47]

It is not entirely clear from this passage whether the policy/operational distinction is relevant to the existence of a duty of care or to the question whether a duty has been breached. The difference is largely semantic, however. There is not a great deal of difference between saying that a public body has no duty to act when

45. Internet transcript 2 Jun 1997, supra n 13.
46. Supra n 9.
47. *Heyman* supra n 11, 468-469.

it has made a policy decision not to do so and saying that it may have a duty because of reliance by the public (whether specific or general), but it cannot be held to have breached that duty if it has made a policy decision to expend its resources elsewhere. The latter characterisation seems to be the more natural one, but little turns upon the issue of characterisation because the effect of the distinction is quite clear. Policy decisions — those that 'involve or are dictated by financial, economic, social or political factors or constraints' — cannot be reviewed using the principles of the tort of negligence.

Although it can prove troublesome in its application, as Mason J acknowledged, the policy/operational distinction has been adopted in Canada[48] and it has been applied in several Australian cases since *Heyman*. As with the concept of 'general reliance', the most significant post-*Heyman* decision is *Parramatta City Council v Lutz*.[49] As noted above, the court held that the council owed Mrs Lutz a duty to exercise its statutory powers: Kirby P and Mahoney JA because of specific reliance on her part, McHugh JA because of general reliance on her part. In considering whether the council had breached that duty, Kirby P asked:

> Did the Council breach its duty of care by not ensuring, pursuant to its statutory powers, that the remains of the dwelling at 19 New York Street were demolished within a reasonable time and before the fire caused damage to Mrs Lutz?...The Council submitted that failure to enter the property at 19 New York Street and to demolish it was, in fact, a policy decision and therefore, in accordance with authority, that the delay was not to be regarded as a breach of its duty. Some authorities suggest that a public authority is not liable for damage arising out of a policy decision as opposed to an operational decision.[50] The principle appears to have been accepted by the High Court of Australia in *Sutherland Shire Council v Heyman*. Assuming that this distinction is drawn by that law (sic), in the particular circumstances of the present case, I am of the opinion that it does not apply to provide the Council with immunity for a breach of its duty to Mrs Lutz. Any exercise of the powers conferred by section 317B of the Act necessarily involved a combination of policy and operational decisions. When a duty of care is found to exist, a failure to exercise a statutory power said to be relevant to the cause of negligence in the operational process is not to be excused merely because the ultimate decision to exercise the power may be classified as a policy one.[51]

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48. See *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641. For an extra-judicial analysis of the liability of public authorities by a judge of the Supreme Court of Canada, including a consideration of the policy/operational distinction: see J Sopinka 'The Liability of Public Authorities: Drawing the Line' (1993) 1 Tort L Rev 123.
49. Supra n 20.
50. See JG Fleming *The Law of Torts* 6th edn (Sydney: Law Book Co, 1983) 145, 402.
51. Supra n 20, 309-310.

According to this view, policy decisions that are part of the 'operational process' may give rise to liability in negligence, presumably because they are part of the exercise of the statutory authority's powers and so are, essentially, operational decisions rather than purely policy decisions.

Another way of putting the distinction made by Kirby P in *Lutz* is to say that some policy decisions are high-level ones involving the kind of political or social factors described by Mason J in *Heyman*, while others are low-level ones that are essentially administrative. The former are 'true' policy decisions beyond review by the tort of negligence, the latter are not. For example, a statutory authority may make a policy decision that it will not inspect any houses under construction in its area in a particular year because it wishes instead to upgrade safety facilities at parks and playgrounds. Having made the larger policy decision to allocate its resources to the safety of parks and playgrounds rather than to houses under construction, it must still make decisions about how to put the general policy into effect. Where will it begin the safety upgrade? Will it spend some money on all parks and playgrounds or will it concentrate only on the ones most heavily used?

Although this may be a helpful way of putting the question, it does not help much in finding the answer. In the example just given, it would seem that a house owner could not succeed in an action against the council for failing to inspect the construction of his or her house because the absence of inspection was the result of a policy decision. But what of the parents of a child who has been injured at a playground that was left out of the council's safety upgrade because it was seldom used? Was the decision to focus on the more heavily-used parks and playgrounds a policy decision beyond the scrutiny of the court or was it a policy decision 'in the operational process' of implementing the earlier policy decision?

The policy/operational distinction was considered in terms of the level of decision-making in *South Australia v Wilmot*.[52] The plaintiff was injured while riding her trail bike in the bush, on a government reserve known as Redbanks. She and her sister fell into a crevasse when they failed to negotiate a sharp turn in the path, which occurred just past the crest of a hill. There was no sign warning of a sharp turn or of the presence of the crevasse. The plaintiff sued the State of South Australia, alleging that it had negligently failed to erect warning signs. The Full Court of the Supreme Court of South Australia distinguished *Nagle v Rottnest Island Authority*,[53] holding that the defendant had done nothing to encourage or attract trail bike riders to Redbanks or to indicate to any visitor that it was exercising any management or supervision of the area. The court held that the defendant's duty of care as occupier

52. (1993) 62 SASR 562.
53. Supra n 3.

of Redbanks did not extend to putting up warning signs, particularly in view of the fact that the Redbanks area was very large and would have required hundreds of signs.

The defendant had argued that the decision not to close off the reserve from the public or to convert it into a managed area for off-road vehicles was a policy decision involving consideration of environmental matters, the wishes of the community and of off-road recreational vehicle users and financial resources. The court took this into account in holding that the defendant was not liable. Cox J (with whom Debelle J agreed) described the economic and policy considerations that had been taken into account by officers of the defendant when considering sealing off Redbanks or establishing a managed trail bike park, then said:

> These questions were considered and in effect rejected at a relatively senior level, sufficiently, in my view, to identify them as policy or planning decisions actually made by an officer having authority to make them, and not mere administrative or operational decisions. They were not decisions, which, in my opinion, the [plaintiff] may relevantly question in these proceedings.[54]

In agreeing with this conclusion, Duggan J said:

> There is no reason why a policy decision of the type spoken of must necessarily be made by Cabinet or a minister responsible for a particular department, but the level at which the decision is made may be a relevant factor in deciding whether it comes within the realm of policy.[55]

The policy/operational distinction was also used by Burchett J of the Federal Court in *Alec Finlayson Pty Ltd v Armidale City Council*.[56] Although Burchett J did not speak in terms of levels of decision-making, that idea is implicit in the distinction he made in the following passage:

> A development approval, to use words which Mason J used in *Sutherland Shire Council v Heyman*, is 'the product of administrative direction, expert or professional opinion [and] technical standards'. It is an operational decision. And it is not perplexed by the kind of 'very delicate choice' which forbad the application of the ordinary law of negligence in *Yuen Kun Yeu v Attorney-General (Hong Kong)*.[57] Indeed, in this particular case, the evidence does not suggest that any policy considerations intruded in any way into the development approvals which were granted. But a decision to re-zone an industrial area of Armidale, in order to concentrate industrial activity in a particular quarter of the city, although that

54. *Wilmot* supra n 52, 569-570.
55. Ibid, 577.
56. (1994) 51 FCR 378.
57. [1988] 1 AC 175, 195.

> involves relocation of some industries, is plainly a policy decision; and the extent to which resources are committed or not committed to the investigation of the suitability of every part of the land involved to be utilised for the purposes to be permitted by the new zoning, without the imposition of some, perhaps stringent, conditions, is also a policy decision. Accordingly, I think the applicant's case fails, so far as it fastens upon the decision to re-zone the area including the subject land for residential purposes.[58]

The Victorian Court of Appeal made no reference in *Pyrenees Shire Council v Day*[59] to the policy/operational distinction. Counsel for the new tenants and the neighbouring video shop owner did, however, make several rather apologetic references to the distinction in argument before the High Court, pointing out that 'if one looks to that [meaning the nature of the decision to act or not to act], we fit — and I hate to say this again — at the operational end of the spectrum'.[60] Thus, it is distinctly possible that this aspect of the common law liability of statutory authorities will also be restated by the High Court in the *Pyrenees* case.

6. HIGHWAY AUTHORITIES

Whatever happens in the High Court in *Pyrenees Shire Council v Day*, it is unlikely to affect the special immunity that statutory authorities enjoy in their capacity as highway authorities. There is clear and longstanding authority for the proposition that highway authorities are not liable for nonfeasance.[61] In *Hughes v Hunters Hill Municipal Council*,[62] the Court of Appeal of New South Wales confirmed that the *Buckle/Gorringe* rule had survived the restatement of the general principles governing the liability of statutory authorities in *Heyman's* case. Even if the High Court were to depart from *Heyman* in *Pyrenees*, it seems unlikely that any restatement of the general principles governing the liability of statutory authorities would be sufficiently broad to remove the highway immunity, particularly as it is not at issue in *Pyrenees*.

The justification usually given for the immunity is that it would be ruinous to impose on a highway authority a duty to take positive steps to keep roads under repair, given that there may be thousands of kilometres of roads within the authority's jurisdiction (particularly in Australia). The immunity is, however, a controversial

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58. *Finlayson v Armidale City Council* supra n 56, 404-405.
59. Supra n 12.
60. Internet transcript 3 Jun 1997, supra n 13.
61. See *Buckle v Bayswater Road Board* (1936) 57 CLR 259; *Gorringe v Transport Commission (Tas)* (1950) 80 CLR 357.
62. (1992) 29 NSWLR 232.

one. It has been removed by statute in the UK,[63] and three Australian State Law Reform Commissions have recommended its removal.[64] Despite all this prompting, no Australian parliament has enacted legislation to remove the immunity, which remains part of the common law.

The courts have done their part to express the general antipathy to the immunity by confining it very narrowly. The immunity applies to any authority responsible for the upkeep of highways, whether or not it is created specifically as a highway authority, but it applies only where the authority is operating exclusively in its highway capacity. For example, in *McDonogh v Commonwealth*,[65] Neaves J said:

> It is usual for the principle to be expressed in terms of a highway authority, this being explicable by the circumstance that the cases have been universally concerned with the situation of a public authority which is established by statute and derives its powers in relation to roads from that source. But the principle underlying the rule depends not upon the nature of the body having the power but upon the subject-matter of the power, namely a road over which the public generally has the right of passage.... The underlying principle that it is the nature of the function being performed that is crucial is also illustrated by the distinction which is drawn between acts done by a public authority in its capacity as the body having the care and management of a public road and the carrying out upon public roads of functions such as those entrusted to water, drainage, sanitary, gas, electricity and tramway authorities. As Dixon J said: 'The distinction rests on the difference in the nature of functions and does not depend on the separate identity of the bodies that perform them'.[66]

If the authority is carrying out on public roads one of the other functions listed by Neaves J, the immunity does not apply: that was the result in *Buckle* itself.

Furthermore, the immunity applies only to instances of 'pure' nonfeasance, where the authority has simply done nothing at all in relation to the roads under its jurisdiction, which have then fallen into disrepair. If it has done anything at all to add to the risk posed by the road, the courts have been eager to classify its actions as constituting misfeasance rather than nonfeasance, thus attracting liability. This has been true even where the defect in question has arisen because of a failure of

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63. Highways Act 1980 (UK) s 58. Without this statutory removal of the highway immunity, the case of *Stovin v Wise* supra n 4, would not have found its way to the House of Lords at all, as it concerned the liability of a statutory highway authority.
64. WA Law Reform Commission *Report on the Liability of Highway Authorities for Non-Feasance* (Project No 62, 1981); NSW Law Reform Commission *Liability of Highway Authorities for Non-Repair* (Report No 55, 1987); SA Law Reform Commission *Report on Misfeasance and Non-feasance* (Report No 25, 1974).
65. (1985) 9 FCR 360, 371-372.
66. *Buckle v Bayswater Road Board* supra n 61, 287.

maintenance by the authority. For example, in *McDonogh v Commonwealth*,[67] the highway authority graded and levelled a road, but compacted only some of the fill. The plaintiff was injured when the wheels of the tanker he was driving sank into the uncompacted part of the road, causing the tanker to leave the road. The Full Court of the Federal Court held that the accident had been caused by misfeasance, not nonfeasance. The partial completion of the road works gave a dangerously misleading impression which had 'created and actively continued' the risk, so the immunity was not available.

Similarly, in *Hill v Commissioner of Main Roads (NSW)*,[68] the Court of Appeal of New South Wales held a highway authority liable for misfeasance in failing to remedy a foreseeable danger created by decay of previous repairs, and in *Day v Commissioner of Main Roads (WA)*,[69] the Supreme Court of Western Australia held a highway authority liable for misfeasance in failing to protect against a foreseeable risk caused by repair work to the road. In *Desmond v Mount Isa City Council*,[70] a highway authority was held liable for misfeasance in the negligent design of a road even though the defect that caused the accident came about because of disrepair.

Moreover, the rule does not apply if the nonfeasance is in relation to an 'artificial structure' brought onto the highway by the authority that cannot fairly be considered part of the road or made for road purposes. In *Hughes v Hunters Hill Municipal Council*,[71] the Court of Appeal of New South Wales held that a tree planted on a public footpath was an 'artificial structure' for the purposes of this exception to the immunity: the authority's failure to do anything to remedy a defect in the highway caused by tree roots was held not to fall within the immunity.

Narrowly-confined and unpopular though the highway immunity may be, it seems clearly to have a separate life of its own outside the general principles that govern the liability of statutory authorities in other respects. The High Court in *Pyrenees* will presumably leave it to parliaments to end that separate life, despite the fact that Australian parliaments have to date shown little appetite for that task.

7. CONCLUSION

There is an apocryphal story about a conversation between F Scott Fitzgerald and Ernest Hemingway, in which Fitzgerald is said to have commented, dreamily, 'The rich are different from us', to which Hemingway supposedly replied, 'Yes —

67. Supra n 65.
68. (1989) 68 LGRA 173; (1989) Aust Torts Reports ¶ 80-260.
69. Aust Torts Reports ibid, ¶ 80-299.
70. [1991] 2 Qd R 482.
71. Supra n 62.

they have more money'. At the moment, statutory authorities *are* different from other defendants, and not just because they have more money than most. The forthcoming decision of the High Court in *Pyrenees Shire Council v Day* will tell us just how different they are. We will see whether they are like Fitzgerald's vision of the rich — creatures apart, to whom the ordinary rules do not apply — or whether Hemingway's tough-mindedness is more appropriate in this context — they are the same as the rest of us, but just more able to pay. Although torts lawyers have previously waited with bated breath for the High Court to make a comprehensive restatement of the law in a particular area, only to be disappointed by a narrowly-confined decision, it seems most unlikely that the High Court can find a way of disposing of the *Pyrenees* appeal without dealing head on with the concept of general reliance and the policy/operational distinction.