COLLEGE OF LAW

Claims against Government; and defences that can be raised by Government

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[10] Overview of lecture

In this lecture, I will survey some of the main pieces of legislation to consider where there are claims against government, including Councils ; consider the doctrine of corporate knowledge; consider milestone cases in the development of the judicial view of liability of government; consider the integers in the equation of claims against government for pure economic loss; claims against government in nuisance; and the "good faith" defence government can advance , and its limits.

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[20] Legislation

NSW Civil Liability Act 2002

5B General principles

(1) A person is not negligent in failing to take precautions against a risk of harm unless:

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

(b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,
(d) the social utility of the activity that creates the risk of harm.

40 Application of Part

(1) This Part applies to civil liability in tort.

(2) This Part extends to any such liability even if the damages are sought in an action for breach of contract or any other action.

(3) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

41 Definitions

In this Part:
"exercise" a function includes perform a duty.
"function" includes a power, authority or duty.
"public or other authority" means:

(a) the Crown (within the meaning of the *Crown Proceedings Act 1988*), or

(b) a Government department, or

(c) a public health organisation within the meaning of the *Health Services Act 1997* , or

(d) a local council, or

(e) any public or local authority constituted by or under an Act, or

(e1) any person having public official functions or acting in a public official capacity (whether or not employed as a public official), but only in relation to the exercise of the person's public official functions, or

(f) a person or body prescribed (or of a class prescribed) by the regulations as an authority to which this Part applies (in respect of all or specified functions), or

(g) any person or body in respect of the exercise of public or other functions of a class prescribed by the regulations for the purposes of this Part.

42 Principles concerning resources, responsibilities etc of public or other authorities

The following principles apply in determining whether a public or other authority

has a duty of care or has breached a duty of care in proceedings for civil liability to which this Part applies:

(a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions,

(b) the general allocation of those resources by the authority is not open to challenge,

(c) the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate),
(d) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.

43 Proceedings against public or other authorities based on breach of statutory duty

(1) This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a breach of a statutory duty by a public or other authority in connection with the exercise of or a failure to exercise a function of the authority.

(2) For the purposes of any such proceedings, an act or omission of the authority does not constitute a breach of statutory duty unless the act or omission was in the circumstances so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.
(3) In the case of a function of a public or other authority to prohibit or regulate an activity, this section applies in addition to section 44.

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 for civil liability to which this Part applies to the extent that the liability 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 plaintiff.

(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.

45 Special non-feasance protection for roads authorities

(1) A roads authority is not liable in proceedings for civil liability to which this Part applies for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.

(2) This section does not operate:

(a) to create a duty of care in respect of a risk merely because a roads authority has actual knowledge of the risk, or

(b) to affect any standard of care that would otherwise be applicable in respect of a risk. (3) In this section:
"carry out road work" means carry out any activity in connection with the construction, erection, installation, maintenance, inspection, repair, removal or replacement of a road work within the meaning of the *Roads Act 1993* .
"roads authority" has the same meaning as in the *Roads Act 1993* .

46 Exercise of function or decision to exercise does not create duty

In proceedings to which this Part applies, the fact that a public or other authority exercises or decides to exercise a function does not of itself indicate that the authority is under a duty to exercise the function or that the function should be exercised in particular circumstances or in a particular way.

NSW Local Government Act 1993

220 Legal status of a council

(1) A council is a *body politic* of the State with perpetual succession and the legal capacity and powers of an individual, both in and outside the State.

(2) A council is not a body corporate (including a corporation).

(3) A council does not have the status, privileges and *immunities* of the Crown (including the State and the Government of the State).
(4) A law of the State applies to and in respect of a council in the same way as it applies to and in respect of a body corporate (including a corporation).

731 Liability of councillors, employees and other persons

A matter or thing done by the Minister, the Director-General, a council, a councillor, a member of a committee of the council or an employee of the council or any person acting under the direction of the Minister, the Director-General, the council or a committee of the council does not, if the matter or thing was done *in good faith* for the purpose of executing this or any other Act, and for and on behalf of the Minister, the Director-General, the council or a committee of the council, subject a councillor, a member, an employee or a person so acting personally to any action, liability, claim or demand.

Section 733(1) declares that:

"A council does not incur any liability in respect of:

...

(b) anything done or omitted to be done *in good faith* by the council in so far as it relates to the likelihood of land being flooded or the nature or extent of any such flooding."

NSW Environmental Planning and Assessment Act 1979

145B Exemption from liability-contaminated *land*

(1) A planning authority does not incur any liability in respect of anything done or omitted to be done in good faith by the authority in duly exercising any planning function of the authority to which this section applies in so far as it relates to contaminated land (including the likelihood of land being contaminated land) or to the nature or extent of contamination of land.

(2) This section applies to the following planning functions:

(a) the preparation or making of an environmental planning instrument, including a planning proposal for the proposed environmental planning instrument,

(b) the preparation or making of a development control plan,

(c) the processing and determination of a development application and any application under Part 3A,

(d) the modification of a development consent,

(d1) the processing and determination of an application for a complying development certificate,

(e) the furnishing of advice in a certificate under section 149,

(f) anything incidental or ancillary to the carrying out of any function listed in paragraphs (a)-(e).

(3) Without limiting any other circumstance in which a planning authority may have acted in good faith, a planning authority is (unless the contrary is proved) taken to have acted in good faith if the thing was done or omitted to be done substantially in accordance with the contaminated land planning guidelines in force at the time the thing was done or omitted to be done.

Interpretation Act 1987

50 Statutory corporations

(1) A statutory corporation:

(a) has perpetual succession,
(b) shall have a seal,
(c) may take proceedings and be proceeded against in its corporate name,
(d) may, for the purpose of enabling it to exercise its functions, purchase, exchange, take on lease, hold, dispose of and otherwise deal with property, and
(e) may do and suffer all other things that bodies corporate may, by law, do and suffer and that are necessary for, or incidental to, the exercise of its functions.

[30] Milestone cases in tort liability against Government

[40] Roads , bridges culverts and footpaths: the highway rule

Up and until *Brodie* HC [2001], a highway authority (which can be a local council) did not incur civil liability '... by reason of any neglect on its part to construct, repair or maintain a road or other highway': *Buckle v Bayswater Road Board* (1936) 57 CLR 259 .

The immunity operated for the benefit of "highway authorities" and involves a distinction between concepts of "misfeasance", “malfeasance” and "non-feasance,", with the latter attracting the "immunity" from suit.

But the case law developed so many exceptions and qualifications , which so favoured plaintiffs as to almost neuter the immunity.

For example, although structures such as drains, sewers and tram-tracks may be thought to be part of the highway, the "immunity" in respect of non-feasance may not apply to them, and, as *Webb v The State of South Australia* illustrates, an action for damages may lie. That is because these are "artificial structures".

Further, the defendant may be a public authority with powers in respect of the highway but may not enjoy the "immunity" because it is not a "highway authority". Eg *Thompson v Bankstown Corporation.*

But the High Court abolished this immunity in *Brodie v Singleton Shire Council* [2001] 206 CLR 512. A bridge collapsed when a heavy truck drove over it. The court abolished the highway rule, holding it had been subsumed into the ordinary principles of negligence. The court criticised the rule because it had developed in a way that gave rise to 'illusory distinctions'. They were referring to the differences between non-feasance and misfeasance, and their consequences.

It was noted by the plurality that blanket immunities infringe upon the rule of law and any immunity granted to a statutory undertaker is to be strictly construed : paras [96] ff .

Key paragraphs are [134] ff.

The plurality endorsed an approach which asks: What is the response which the reasonable man, foreseeing the risk, would make to it? Is the risk so small that a reasonable man would think it right to neglect it? '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.' [para 54].

The plurality said at para [56] that the significant question in these cases "fixes upon the statutory powers of the relevant public body. In exercising or failing to exercise those powers, was the authority in breach of a duty of care owed to a class of persons which included the plaintiff?"

[50] Councils

In *L Shaddock & Associates Pty Ltd v Parramatta City Council* [1981] HCA 59; (1981) 150 CLR 225., PCC was required to accept responsibility for answers made by it to the public and, accordingly, to bear such cost as was involved in ensuring the accuracy of those answers.

In *Sutherland Shire Council v Heyman* [1985] HCA 41; (1985) 157 CLR 424., the courts recognised the possible liability of a council in negligence for failing to

exercise a statutory right of inspection of building works.

[60] Actions against the Police

Can an action in negligence arise under the general law in respect of the exercise by police of their investigative functions? see *Tame v New South Wales* [2002] HCA 35; 211 CLR 317; *Wilson v State of New South Wales* [2001] NSWSC 869; 53 NSWLR 407; *Cran v State of New South Wales* [2004] NSWCA 92; 62 NSWLR 95.

Basten J, delivering judgment for a unanimous Court of Appeal in Wang v State of NSW [2009] NSWCA 340 said at para [18]:

"There is a clear distinction between the availability of a cause of action in negligence and a claim based on an intentional tort, in respect of the liability of the State for actions of police officers: *Darker v Chief Constable of West Midlands Police* [2000] UKHL 44; [2001] 1 AC 435. Further, a distinction may need to be drawn between the conduct of police in carrying out prosecutorial functions and those involving administrative or investigative functions: see *Cran* at [63] (Santow JA) and at [81] (Ipp JA) (McColl JA agreeing with both)."

[70] Case law on Sec 45 Civil Liability Act

In *North Sydney Council v Roman [2007] NSWCA 27*, the headnote reads (case references removed).

Maria Christina Roman, the respondent, was injured at night when she fell in a pothole half a metre wide and about four to five inches deep in Princes Street, McMahon's Point on 16 October 2001. She brought proceedings against North Sydney Council, the appellant, alleging, in substance, that it had been negligent in failing to maintain the road by repairing the pothole. The appellant defended the proceedings, in part, on the basis that it did not have actual knowledge of the pothole as required by s 45 of the *Civil Liability Act* 2002.

The evidence established that Council street sweepers regularly swept the gutters in Princes Street in the vicinity of the hole into which the respondent stumbled. The street sweepers were instructed as part of their induction to identify hazards which needed attention and report them to their supervisor. The respondent argued at trial that the street sweepers' actual knowledge of the pothole could be inferred from the regularity of those duties and from their obligation to identify hazards which needed attention. She also argued that their knowledge was attributable to the appellant.

The appellant did not call any street sweeper. It did call evidence from their supervisor and from people responsible for repairing potholes. All said they had not known of the pothole. They said that if they had they would have regarded it as a hazard. By the time of the trial the pothole had been repaired. None of the appellant's witnesses was aware of how it had come to be repaired, nor did the appellant produce any records relating to its repair.

The primary judge inferred the street sweepers had actual knowledge of the pothole and that, for the purposes of s 45, their knowledge could be attributed to the appellant. She also found the appellant had breached its duty of care by leaving the pothole in a place where a person getting into or out of a car might reasonably be expected to step. She awarded the respondent $475,485 damages.

On appeal the appellant submitted that to find "actual knowledge" for the purpose of s 45 it was necessary that there be a connection between the person with actual knowledge of the particular risk and the person able to, but who failed to, carry out the roadwork which would have avoided the harm which materialised. It argued that even if it was assumed a street sweeper had actual knowledge of the pothole, such knowledge was not sufficient because street sweepers did not carry out repairs.

Held, allowing the appeal, per Basten JA (Bryson JA agreeing):

1. For the purposes of s 45 actual knowledge must be found in the mind of an officer within the council having delegated (or statutory) authority to carry out the necessary repairs.

2. The evidence demonstrated that no Council officer at a decision-making level had "actual knowledge" of the particular pothole and therefore the appellant did not have such knowledge. Accordingly, the exception to s 45 was not engaged and the statutory immunity prevailed.

Per McColl JA (dissenting)

As to liability,

3. For the purposes of s 45, the knowledge of those persons who, acting within the scope of their duties, learn of the particular risk under an obligation to report it as part of the roads authority's system of maintaining the roads under its jurisdiction, should be attributed to the roads authority.
4. On the facts of this case, such people were sufficiently "relevantly connected" with discharging the appellant's responsibility for carrying out road work to hold it prima facie liable in tort where it could be found, whether by direct proof, or

inference, that they had actual knowledge of the particular risk which materialised in harm to the plaintiff.
5. Attributing those persons' knowledge to the roads authority is consistent with the language of s 45, the context in which it appears and the policy discernible in its enactment.6. The primary judge had not erred in concluding the appellant had breached its duty of care.

McColl JA

"51 The use of the expression "actual knowledge" in s 45 was plainly intended to prevent a roads authority being found civilly liable merely because it had constructive knowledge of a risk. This had been the outcome in *Brodie v Singleton Shire Council*; *Ghantous v Hawkesbury Shire Council* [2001] HCA 29; (2001) 206 CLR 512, decided the year before the introduction of the *Civil Liability Act*.

52 In *Brodie* the first applicant was injured when he drove a truck owned by the second applicant onto a bridge constructed some 50 years earlier within the Singleton Shire. The truck weighed 22 tonnes and the bridge was adapted to bear a load of 15 tonnes. The timber girders failed, the bridge collapsed and the truck fell onto the creek bed below. At trial the applicants tendered evidence from the Council's files "indicating that it had been aware of the poor condition of the bridge" and had "within the recent past before the accident ... carried out some repairs on it": *Brodie* (at [174]). The primary judge found that Council staff should have discovered that the girders on the bridge were "substantially affected by piping" at the time these repairs were carried out: *Brodie* (at [176]). He held that the evidence disclosed a case of misfeasance in the exercise of the power to repair and found for the applicants on the ground that the council had been negligent in failing to take steps to replace the girders.

53 Gaudron, McHugh and Gummow JJ concluded that the evidence disclosed "the conduct of periodic inspections but the failure to take in the course of those inspections reasonable steps to look for such dangers as might reasonably be expected to arise": *Brodie* (at [178]).

54 The Council had led no evidence as to liability and, in particular, did not lead evidence to rebut any "inference arising from the applicants' case that it knew the bridge was in a dangerous condition" or any "evidence of reasons why it could not or did not carry out further work on the bridge". Gaudron, McHugh and Gummow JJ concluded the primary judge's decision in favour of the applicants was supportable by the application of ordinary principles of negligence to the facts as found: *Brodie* (at [180] – [181]). Kirby J agreed: Brodie (at [249])

55 It is a reasonable inference that s 45 was intended to prevent roads authorities from being held liable in *Brodie* circumstances merely for failing to

take reasonable steps to look for such risks as might reasonably be expected to arise. On the other hand, s 45 presupposes a system of inspection by which a roads authority can acquire actual knowledge of particular risks. That system of inspection must exist as an essential adjunct to the roads authority's obligation to keep roads in a reasonable state of repair at least implicit, if not expressed, in its function of carrying out road work.

56 Section 45, in my view, indicates a legislative intent to strike a balance between the community's legitimate expectation, that public roads will be reasonably safe to traverse, and the extreme consequences which would flow, in revenue terms, if a roads authority could be found prima facie liable for injuries arising from risks of which it had only constructive knowledge. So much, at least, is evident from the structure of the provision and the Second Reading Speech.

57 Nothing in s 45, in my view, precludes the conclusion that the actual knowledge which will be attributed to the roads authority will at least be that of those relevantly involved in the authority's system of inspecting roads who have a duty to report their knowledge of a particular risk and/or who have a responsibility for repairing the road, or to consider repairing the road, if such a risk is brought to their attention.

58 This is not a case where the "directing mind or will" concept should apply to designate the person or persons whose actual knowledge will be attributed to the appellant. …

…

60 In my view, for the purposes of s 45, the knowledge of those persons who, acting within the scope of their duties, learn of the particular risk under an obligation to report it as part of the roads authority's system of maintaining the roads under its jurisdiction, should be attributed to the roads authority. On the facts of this case, such people were sufficiently "relevantly connected" with discharging the appellant's responsibility for carrying out road work to hold it prima facie liable in tort where it can be found, whether by direct proof, or inference, that they had actual knowledge of the particular risk which materialised in harm to the plaintiff. Attributing those persons' knowledge to the roads authority is consistent with the language of s 45, the context in which it appears and the policy discernible in its enactment.

61 This interpretation of s 45 should not be taken to exhaust the identity of persons whose knowledge will be attributed to a roads authority. *The outcome may* differ, depending upon the *organisational structure* of the *relevant roads* authority. It is sufficient, however, to dispose of this case.

…

…

…

…

73 Accordingly, in my view, in the *absence of evidence from the street* repair *workers*, and having regard to the evidence about the length of time the pothole had existed in the street, and in the *absence of evidence from the relevant street* sweepers *responsible for that area*, the primary judge was entitled to infer that the street sweepers knew of the pothole: *Hampton Court Ltd v Crooks* [1957] HCA 28; (1957) 97 CLR 367 (at 371-372)."

[80] Action for damages for breach of a statutory duty

There are circumstances where a statute requires a statutory undertaker to take care in the performance of a duty eg build a road; and upon a true construction of the statute , it can be said that the duty is owed to a class of persons of whom the plaintiff is one: See *Brodie* para [113].

[85] Duty to know and observe limits of statutory power?

Councils are potentially liable in the tort of negligence: see generally JJ Doyle, *Tort Liability for the Exercise of Statutory Powers* in PD Finn (ed), *Essays on Torts* (Law Book Co, 1989) p 203; *Symons Nominees Pty Ltd v Roads & Traffic Authority (NSW)* (1996) 25 MVR 174; [1997] Aust Torts Reports 63,824 (81-413).

Councils may be subject to the same general principles that apply to individuals for a wide range of conduct, including that which involves what was *formerly* referred to as operational as opposed to policy decisions: see *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 458, 468-469 per Mason J; at 495, 500 per Deane J; *Alec Finlayson Pty Ltd v Armidale City Council* (1994) 51 FCR 378; 84 LGERA 225.

It follows that there "may be circumstances, perhaps very many circumstances, where there is a duty of care on governments to avoid foreseeable harm by taking steps to ensure that their officers and employees know and observe the limits of their power.": see *Northern Territory v Mengel* (1995) 185 CLR 307 at 353 per the majority (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ); see also Brennan J at 358.

[90] Duty of care to avoid causing pure economic loss in the exercise of statutory functions

This would be an argument in the alternative to any claim there might be in contract, because to assert a breach of a statutory duty carries implicit in it the proposition that statutory powers were being exercised; and this drives the Government to raise statutory immunity; possibly leaving the thrust of the plaintiff's case to be argued in reply, viz whether there was an absence of good faith.

Any contract would form part of the setting in which it can be said that the relevant Department had knowledge of the loss and harm which the Plaintiff might suffer, if the services were not performed with due skill and care, and thus not in accordance with the appropriate yardstick.

Various courts have at times given nuancedly different tests for whether a public authority owed a plaintiff a duty of care in the exercise of its powers, *especially in a circumstance not previously recognized*. The following list is an amalgam of the considerations, articulated in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [84] to [85] per McHugh J and *State of New South Wales v West* [2008] ACTCA 14, paras [21] ff:

(i) the legislation and positions occupied by the parties ie the purpose to be served by the exercise of the power. This comes down to whether the person asserting the duty of care is a person whose welfare or safety is to be protected by the exercise of the power;

(ii) Was the authority in a position of control and did it have the power to control the situation that brought about the harm to the injured person?

(iii) the degree of vulnerability of those who depend on the proper exercise by the authority of its powers , in the sense that the injured person could not reasonably be expected to adequately safeguard himself or herself or those interests from harm?

(iv) the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute ie would the imposition of a duty of care distort the functions of the statutory body?

(v) Did the public authority know, or ought it to have known, of an existing risk of harm to the plaintiff or, in some cases, to a specific class of persons who included the plaintiff (rather than a risk to the general public)?

(vi) Would the imposition of the duty of care impose liability with respect to the

defendant’s exercise of “core policy-making” or “quasi-legislative” functions?

(vii) Is there any supervening policy reason that denies the existence of a duty of care?

[100] Nuisance and councils

An action in nuisance can lead to three distinct remedies: (a) an action at common law for damages; (b) abatement without recourse to legal procedure; and (c) equitable relief. See generally *Conti v Chenery* [2001] WASC 107.

When exercising equitable jurisdiction, courts may, in circumstances where they have the power to award an injunction or order specific performance, also award damages in addition to or in substitution for the injunction or specific performance. See s 68 of the *Supreme Court Act 1970* (NSW), which reproduces Lord Cairns's Act. This is also reproduced in other jurisdictions, see for example the *District Court Act 1973* (NSW) s 46; the *Land and Environment Court Act 1979* (NSW), ss 22, 23.

It would seem that a court will award damages if the following criteria are met:

the injury to the plaintiff's right is small;

the injury is capable of being estimated in money;

the plaintiff is adequately compensated by a small money payment; and

to grant an injunction would be oppressive to the defendant. See *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287; *Kennaway v Thompson* [1981] QB 88, [1980] 3 All ER 329. For an illustration of damages being refused, and a mandatory injunction being granted to demolish a house impeding a view of the ocean, see *Wakeham v Wood* (1982) 43 P & CR 40 (UK CA).

On the above principles, a prospective nuisance may lead to a damages award in lieu of an injunction. See Lord Selborne LC in City of London Brewery Co v Tennant *(1873) LR 9 Ch App 212 at 219 and Hall VC in* Lady Stanley of Alderley v Earl of Shrewsbury *(1874-75) LR 19 Eq 616 at 622. In this respect, an action in nuisance may protect rights that an action in negligence may not, given that at common law, damages will only be assessed up until the date of issuing proceedings. See* Shadwell v Hutchinson *(1831) 2 B & Ald 97;* Battishall v Reed *(1856) 18 CB 696.*

These provisions extend even to an award of damages in place of an injunction where the plaintiff has moved quia timet and before any wrong has been committed. The damages are awarded "in respect of an injury which is still in the

future": Bankstown City Council v Alamdo Holdings Pty Ltd *[2005] HCA 46; (2005) 223 CLR 660; (2005) 221 ALR 1; (2005) 79 ALJR 1511 (7 September 2005) citing* Leeds Industrial Co-operative Society Ltd v Slack [1924] AC 851 at 860.

In other respects also, damages for nuisance may protect a wider range of interests than negligence. For example, while nuisance will protect interests such as comfort and convenience, negligence has a strict requirement of material injury: *Bone v Seale* [1975] 1 WLR 797; *Oldham v Lawson (No 1)* [1976] VR 654 at 658-659.

[110] Conditions of liability for nuisance

Kaye J summarised the conditions of liability for damage consequent upon a nuisance, in *Richmond City Council v Scantelbury* [1991] 2 VR 38 as follows:

- “Conditions necessary for liability for damage caused by nuisance depend upon whether the defendant was the creator of the nuisance or whether the nuisance, for which it is sought to make him liable, was inherited by him or created on his land by an intruder.”: see *Richmond City Council v Scantelbury* [1991] 2 VR 38 at 39.

- “The general rule is that a defendant is liable for nuisance if he or a person for whose conduct he is liable created the nuisance … Thus as the creator of a nuisance from which damage is suffered or threatened, the defendant may be strictly liable.”: *Richmond City Council v Scantelbury* [1991] 2 VR 38 at 40.

- An occupier of land is liable for the continuance of a nuisance created by a third party provided he knew or ought to have known of its existence: see *Richmond City Council v Scantelbury* [1991] 2 VR 38 at 41-42.

- “Knowledge of the nuisance, whether actual or presumed, does not by itself render an occupier liable for damage created by it. Arising out of such knowledge, there is a duty borne by the occupier to take steps to eliminate the risk of damage from the nuisance which is reasonably foreseeable.”: see *Richmond City Council v Scantelbury* [1991] 2 VR 38 at 45. To be foreseeable, the risk of damage must be “a real as opposed to a mere theoretical risk” in relation to which a reasonable person, in the position of the defendant and in the circumstances, would have considered that positive action is necessary to eliminate the nuisance: *Richmond City Council v Scantelbury* [1991] 2 VR 38 at 46.

- The person injured by a nuisance who takes steps to abate the nuisance is unable to recover the costs of the abatement as damages, but he may

be able to recover damages for any harm suffered before the abatement. As the act of abating a nuisance has the effect of removing it, the claimant is not thereafter entitled to damages for nuisance: *Richmond City Council v Scantelbury* [1991] 2 VR 38 at 48.

[120] Nuisance arising out of the negligent execution of public works

Claims against councils arising out of the execution of public works is an area in which the action of nuisance has been traditionally utilised in preference to an action in negligence: *Allen v Gulf Oil* [1981] AC 1001 at 1011; *Tate & Lyle Industries v Greater London Council* [1983] 2 AC 509. This is because under *Local Government Acts*, and other special legislation, a council which has been negligent in its work, may invoke the defence of good faith. The common law is encapsulated in cases such as *Hammersmith and City Railway Co v Brand* (1869-70) LR 4 HL 171 at 215 per Lord Cairns; and *Geddis v Bann Reservoir Proprietors* (1877-78) LR 3 App Cas 430 at 455 per Lord Blackburn. So, for example, a decision by a council to construct a footbridge over a busy road is almost certainly within the sphere of “policy” and thus not actionable in the law of negligence. However, any unnecessary blasting by workers; unnecessary delay to completion; excessive noise and dust and so forth, may be actionable in nuisance by affected residents. See, for example, Street CJ in *Fisher v Codelfa Construction (Aust) Pty Ltd* (unreported, Supreme Court of NSW, 28 June 1972).

However, to invoke the defence of good faith, the authority (“undertaker”) must act without “negligence” in the sense that the undertaker must carry out the work and conduct the operations with *all reasonable regard and care for the interests of other persons*: *Allen v Gulf Oil* [1981] AC 1001 at 1011 per Lord Wilberforce in the majority. The council must prove the defence by showing that the harm was the *inevitable result of the exercise of the power*: at 1013 and 1015. See generally Kneebone, *Tort Liability of Public Authorities* (1998), Chapter 5.

This may provide an opportunity for a plaintiff who has been affected by the execution of a public work, to claim damages in negligence in circumstances where nuisance is not capable of protecting their interests. Take, for instance, a bridge which is so constructed to block out Mrs Smith's delightful views over a valley. Her views supported a high pre-building value and as a consequence the value of her house plummets. By the exercise of due diligence, the council could have constructed the bridge three meters higher, thereby not obstructing her views. In these circumstance she would not be able to bring an action in nuisance given that it is well established that nuisance does not protect *aesthetic values* such as an unobstructed (see *William Aldred's Case* (1611) 9 Co Rep 57b; 77 ER 816 at 58b (Co Rep), at 820 (ER); *St Pierre v Ontario* [1987] 1 SCR 906; unless, perhaps it is parasitic to some independent tort: *Campbell v Paddington Corp* [1911] 1 KB 869 and *Craig v East Coast CC* [1986] 1 NZLR

99). See generally, R Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes* (1987) 48 Ohio St LJ 141. While there is no clear statement of authority suggesting that a claim in negligence would be available in these circumstances, the case of *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509 provides some indication that it may be.

In *Allen v Gulf Oil Refining Ltd* [1981] AC 1001, Lord Edmund-Davies, agreeing with the majority orders but giving his own reasons, stated clearly at 1015 that the burden was on the plaintiff to prove "nuisance or negligence", the burden then shifting to the defendant to show that the harm was inevitable and that it had proceeded with reasonable care and that the trial should proceed "upon the issues of (1) nuisance ('inevitable' or otherwise) and (2) negligence." The other Law Lords spoke in terms of nuisance only.

Cohen J in *Van Son v Forestry Commission (NSW)* (1995) 86 LGERA 108, referring to *Allen v Gulf Oil Refining Ltd* [1981] AC 1001, said that Lord Wilberforce's dicta set out above was accepted in *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509 at 538 as referring to an action in nuisance as well as negligence. While Cohen J is correct, there seems no support for his Honour's assertion at the page cited in *Tate & Lyle*. However, a textual analysis of *Tate & Lyle* shows that the plaintiffs pleaded their action in negligence as well as nuisance.

A basic understanding of the facts, arguments and pleadings in *Tate & Lyle* is necessary in order to understand why the claim in negligence failed. The claim in *Tate & Lyle* centred around two ferry jetties on the Thames constructed by the Greater London Council pursuant to statutory power. The design of the two jetties resulted in a reduction of depth of water at certain points in the river and affected the jetties which Tate & Lyle operated. As such, Tate & Lyle incurred substantial dredging costs to keep its jetties operational. These costs were the subject of their action.

Tate & Lyle did not own the jetties they operate, they merely built them and used them under licence from the Port of London Authority. Those rights were categorised as being a chattel and not capable of attracting riparian rights: at 534. For that and certain other reasons, Tate & Lyle did not have *any private rights* that enabled them to insist on any particular depth of water in connection with the operation of their licensed jetties: at 536. For the same reason, the claim based on *private nuisance* also failed. The claim based on public nuisance was, however, substantially successful, based on *the public right of navigation on the Thames*.

Accordingly, it is quite clear that the House of Lords would have allowed the claim in negligence, as long as Tate & Lyle had title to the jetties and water beneath. As such, it would seem that negligence might be useful, in some circumstances, to a plaintiff who has been affected by the execution of public

works where nuisance cannot protect their interests.

[130] Claims for loss of profits

What happens if the plaintiff has lost the opportunity to complete a lucrative development and has thus lost profits due to a council's negligence in, for example, misrepresenting the zoning or in not processing applications with due diligence?

The general rule is clear. Plaintiffs are entitled to recover only that which they have lost and not that which they might have gained had the development gone forward. However, in claims in tort, damages resembling expectation loss, being the profit that might have been gained in a venture but for the breach of duty, can be awarded. This measure is, in fact, as regards reliance loss being the prejudice and disadvantage which the plaintiff has suffered in consequence of the plaintiff altering its position in reliance upon the misrepresentation. This is dealt with in the chapter on Trade Practices Act 1974 damages from [7.10].

In *Kyogle Shire Council v Francis* (1988) 13 NSWLR 396 the defendant purchased a property that it intended to subdivide based upon statements of the local council. In fact the defendant was unable to subdivide the land and sued the council for its negligent misstatements with regard to the possibility of subdivision.

Mahoney JA held at 414:

In some cases, it may appear that, had the negligent misstatement not been made, the plaintiff would without more have derived profits and that, because of the misstatement, he altered his position so that the [profits] he would otherwise have derived were not derived. In such a case, he should have the damages he lost.

His Honour concluded, however, that in this case the plaintiff was not entitled to damages that included loss of profits at 414:

If the council had not misstated the zoning, the plaintiff would not have proceeded with the contract. In that sense, he would have been in the position of not buying the land and so of not earning the profits. He therefore should not be awarded damages that include them. This does not mean that in no case can a plaintiff in such a case recover for loss of profits.

Note that Clarke JA's judgment was to the same effect: at 417, citing the majority judgment of Mason, Wilson and Dawson JJ in *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 13 and citing *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 at 820-821, 828-829; *Doyle v Olby (Ironmongers) Ltd*

[1969] 2 QB 158.

Kirby ACJ, in the minority, found that the loss suffered by the respondent by reason of its reliance on the council's advice, included anticipated profit on the sale of the four blocks as subdivided. He stated at 407 that it would work a “serious injustice” on the plaintiff to limit it to the lower measure.

Avenhouse v Hornsby Shire Council [1995] Aust Torts Reports 62,521 (81-351) (and this aspect was not overturned on appeal, noted at [6.4130]) provides a more recent example. The plaintiff relied on representations by the council that land it proposed purchasing was zoned for subdivision. Subsequent to purchase, the council, in negligent breach of its duty, did not act with due diligence and within a reasonable time in processing the application and certifying the linen plans required under the *Local Government Act 1919* (NSW). Its undue delay caused Avenhouse loss including the loss of the development and also becoming embroiled in litigation with the vendor. The council conceded before the Court of Appeal that lost profits were recoverable and this aspect was remitted for further hearing. The council sought declarations that the lost profits were only recoverable within certain narrow limits, but this was rejected.

[140] Nuisance: damages assessed by reference to diminution in value to land

In *Stockwell v State of Victoria* [2001] VSC 497 Stockwell claimed in nuisance against the state of Victoria arising out wild dog attacks on sheep for damages for the value of the sheep killed, loss of income, abatement and inconvenience, medical expenses and lost opportunity; and aggravated and exemplary damages. It was held that so long as the nuisance existed and continued to cause loss there was a separate cause of action each time a loss was suffered. In saying this, Gillard J held that the loss was continuing and Stockwell was able to recover damages for the diminution in value of the land. Gillard J also stated *Stockwell v State of Victoria* [2001] VSC 497 at [496] that as a general proposition the right to recovery for damages depends upon the State having notice of the problem and a reasonable opportunity to abate it. This requirement was held satisfied.

In terms of abatement and inconvenience, it was held *Stockwell v State of Victoria* [2001] VSC 497 at [482] – [484] that such recovery may be classified as non-pecuniary loss and regarded as part of the normal measure of damages. Stockwell failed to recover aggravated damages, absent proof of contumelious disregard of his rights: see *Stockwell v State of Victoria* [2001] VSC 497 at [614].

[150] Claims for vexation and psychological harm

The lapse into arrogance and ineptitude of local councils and government departments is not unknown. Many people react with frustration and worse. Is this compensable? If consequent upon other economic loss, the answer is yes. *Avenhouse v Hornsby Shire Council* (1998) 44 NSWLR 1; [1998] Aust Torts Reports 65,209 (81-484). This aspect is dealt with more fully in my chapter in Commercial Damages, *Damages and egregious conduct* from [3.10].

In addition, some causes of action support a component for general damages, whose object is, inter alia, to compensate for inconvenience and aggravation. Thus, for example, in *Kempsey Shire Council v Lawrence* [1996] Aust Torts Reports 63,141 (81-375) (NSWCA) (Kirby P, Clarke and Sheller JJA) on appeal from *Lawrence v Kempsey Shire Council* (1995) 87 LGERA 49; [1995] Aust Torts Reports 62,443 (81-344) (Young J, as his Honour then was) the plaintiff sued the council in nuisance arising from the seepage of effluent from the council's treatment plants, onto the plaintiff's land. The damages award was as follows:

reinstatement: $20,000;

general damages: $10,000;

decrease of the capacity of the plaintiff's land to carry animals: $26,190.

To the above, interest was added. Their Honours were of the view that the general damages component was sustainable on the basis that the nuisance had caused bogging of animals: see [1995] Aust Torts Reports 62,443 (81-344) at 63,150 per Clarke JA, Kirby P and Sheller JA agreeing.

[160] Good faith defence

Good faith, in an administrative law context, is not the opposite of bad faith : rather, it relates to an effort to understand and deal with the issues in the discharge of the statutory function : see *Roberts v Hopwood* [1925] AC 578, 603; *Timwin Construction v Facade Innovations* [2005] NSWSC 548 [para 38].

In *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129, Brereton J elaborated on good faith (in the context of the *Security for Payment* legislation):

“good faith as a condition of validity of the exercise of an adjudicator’s power to make a determination requires more than mere honesty. It requires faithfulness to the obligation. It requires a conscientious effort to perform the obligation. And it does not admit of capriciousness.”

A good example of how reasonable minds can differ on the issue of good faith, in

the context of the issue being raised by a Council to defend a Sec 149 Certificate that was patently wrong is the Full Federal Court decision in *Mid Density Developments Pty Ltd v Rockdale MC* (1993) 116 ALR 460.

The case concerned the absence of any adequate system for the council to respond, when issuing certificates under s 149 of the EPA Act, to questions by the vendor and later the purchaser respecting the flooding of the particular land under contract.

The relevant development consent therefore issued with such stringent conditions that the development was uneconomic, to the tune of almost $1m.

The primary judge had held the Council was honestly inept, but not in bad faith. This defence was swept aside on appeal with the Full Federal Court holding that the Council , whilst not dishonest, had not acted in good faith . There had been no attempt to supply information actually held in the Council's records and there was no system in operation for doing so. Indeed, the council officer whose responsibility it was to deal with the requests for information had consciously ignored the very records which would have supplied it.

Per the Full Court:

"29. The concept of " good faith " as understood in various fields of the general law provides further examples. For example, an administrative decision may involve an improper exercise of power on the footing that it is unreasonable in the Wednesbury sense, without there being mala fides. Likewise, the whole doctrine of constructive notice which was developed in equity as appendant to the bona fide purchaser principle, operates by reference to what would have come to the knowledge of the purchaser if he had conducted his activities in the ordinary way; see Consul Development Pty Limited v DPC Estates Pty Limited [1975] HCA 8; (1975) 132 CLR 373 at 412-3.

30. In the present case, it will be wrong to assume that when used in the relevant legislation the phrase "anything done or omitted to be done in good faith " (in sub-s. 582A (1) of the Local Government Act) and "in respect of any advice provided in good faith " (in sub-s. 149 (6) of the E.P.A. Act) operate to leave the respondent liable only in respect of dishonesty.

31. These provisions, on their face, are designed to strike a balance between (i) the interests of the authority which is funded by public not private funds and which, pursuant to statute, provides the information, and (ii) the interests of the recipient of the information and others reasonably acting upon it where, in the ordinary course, those persons may be expected to incur substantial liability on the faith of what is disclosed by the authority. Is the individual interest to yield to what might be called the wider public interest unless the conduct of the authority

may be stigmatised as dishonest? In our view, the statutes do not bring about that result.

32. A council is reasonably to be expected to respond to an application for information of a character of the obvious significance of that sought here by recourse to its records. If the council represents that it has done so ("The above information has been taken from the Council's Records . . .") then it still may have been acting in good faith " if a real attempt has been made, even though an error was made in the inspection or the results of the inspection were inaccurately represented in the certificate which is issued. It is unnecessary to decide that question on the present appeal.

33. However, in our view, in the circumstances of the present case, a party in the position of the respondent cannot be said to be acting in good faith within the meaning of the E.P.A. Act and the 1985 Act, if it issues s. 149 certificates where no real attempt has been made to have recourse to the vital documentary information available to the council, and the council has no proper system to deal with requests for information of the type in question. Indeed, in the present case, as counsel for the appellant emphasised, the council officer whose responsibility it was to deal with the request for information consciously ignored the very records which would have supplied it.

34. The statutory concept of " good faith " with which the legislation in this case is concerned calls for more than honest ineptitude. There must be a real attempt by the authority to answer the request for information at least by recourse to the materials available to the authority. In this case there was a failure to meet that standard.

35. Accordingly, we would reach a different conclusion on this branch of the case to that of the primary Judge."

Section 241 of the *Local Government Act 1919* (NSW) is headed "Power to make drains on public of private land". It gives power to do just that, but says that if the property of the Crown or public body or person is damaged by the exercise of the power, there shall be a claim against the council for the damage so sustained.

This section has been held not to prevent a claim for a continuing nuisance and has been narrowly construed to relate only to a claim for compensation for the loss caused by the works, not for the result of the works by eg causing land to flood: see the discussion in *Melaleuca Estate Pty Ltd v Port Stephens Council* (2006) 143 LGERA 319; [2006] NSWCA 31 at [62] ff.

Section 733 of the *Local Government Act 1993* (NSW) is headed "Exemption from liability-flood liable land and land in coastal zone" and provides a good faith defence for advice furnished in good faith by a council relating to the likelihood of

any land being flooded, and anything done or omitted to be done in good faith by a council in so far as it relates to the likelihood of land being flooded or the nature and extent of such flooding.

In the Second Reading Speech in the Legislative Assembly on the Bill for that statute, the responsible Minister said that a principal purpose of the Bill was:

"to indemnify councils and other public authorities and their staff from liability from decisions taken in respect of flood liable land, provided that such decisions are made in accordance with government policy at the time".

The Minister added that, without that protection, councils might continue to

"adopt an unnecessarily conservative approach that sometimes leads to unnecessary refusal of development applications or the application of unnecessary and costly development and building conditions".

See New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 April 1985 at 6025.

This section was held in *Bankstown City Council v Alamdo Holdings Pty Ltd* (2004) 135 LGERA 312; [2004] Aust Torts Reports 81-770; [2004] NSWCA 325 at [43] to be able to provide a defence to a claim for an injunction.

The operative paragraphs are 33 ff which read as follows :

“Is the perceived need of the Council for protection any the lesser where it is faced with an injunctive order requiring substantial expenditure for compliance than it would be if, in its discretion under s 68 of the Supreme Court Act, the Supreme Court had, in lieu of injunctive relief, awarded damages in a similarly significant sum? The answer must be in the negative. The legislation is concerned in s 733 with matters of substance and not merely with matters of legal or procedural form.

Given the past conduct of the Council, to which reference has been made in the discussion of par (b) of s 733(1), there was incurred liability "in respect of" that conduct. The Council was liable to the exercise of the equity jurisdiction of the Supreme Court, together with its statutory jurisdiction conferred by s 68 of the Supreme Court Act. Events had occurred which would authorise the Supreme Court to exercise its jurisdiction, albeit with discretion as to the grant and form of relief. Whether or not Alamdo may have been then entitled to recover damages on a cause of action for past invasion of its common law rights, it had an equity in the sense described by Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [15].

The susceptibility of the Council to the adjudication of that equity was a liability which it had encountered, run into, or fallen upon and so one which, but for s 733(1), it had incurred [16]. To the equity suit commenced against it by Alamdo, the Council pleaded an immunity conferred by that provision. Subject to resolving in its favour any question of good faith that was a good plea."

The section also received detailed comment in *Melaleuca Estate Pty Ltd v Port Stephens Council* at [62] ff.

Exception to the good faith defence: where the statutory undertaker is not exercising statutory powers and functions.

[165] Things done by government without any need of statutory power

A number of High Court cases have held, in relation to provisions granting immunity to statutory bodies for a thing done under a statute that the immunity did not extend to things able to be done without any need of statutory power.

Thus, in *Board of Fire Commissioners (NSW) v Ardoiun* (1961) 105 CLR the Board of Fire Commissioners was held not entitled to rely on an immunity for damage caused in good faith in exercise of its powers. This was because the damage was caused by a fire truck speeding on a public road on the way to a fire; and it was held that no special statutory power was required by the Fire Brigade to use public roads.

Dixon CJ emphasized that where the Act referred to the bona fide exercise of powers, it was referring to the exercise of powers which in their nature would interfere with person or property (p109).

Kitto J said the immunity applied only to the very things which the Act empowered, and not incidental things (117). The driving of a vehicle to a fire was incidental ; and no special power was needed to drive a vehicle on a public road , an activity which was in any event lawful (p118); and accordingly the damage was not caused "in " the exercise of the power.

Taylor J emphasised the difference between the Board's special and extraordinary powers conferred under the Act and its general authority (pp 121-124).

Ardouin's case was applied by the High Court in *Hudson v Venderheld* [1968] 171. In *Hudson*, a council employee was driving a truck back to the depot . It collided with the plaintiff's car, and injured her. Sec 580 of the Local Government

Act provided that no action could be instituted for anything done under the Act until the expiry of one month's notice in writing. It was held that the council worker, in driving along a public road, even though under instruction for his superiors, , was only doing what in any event was lawful and that such driving was not done "under" the Act. Hence, the notice provision did not apply to defeat the claim.

The above cases were cited by Kirby J (in the minority) in *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 paras [61-63]; and Callinan J (in the majority) cited *Ardouin's* case at paras [111 ff]. Kirby J also referred to *Australian National Airlines v Newman* (1987) 162 CLR 466.

In *Newman's* case, the relevant Act provided that any action against the Australian National Airlines Commission, arising out of anything done or purported to be done under the Act, had to be commenced within two years. The Plaintiff was injured when she slipped on grease in a kitchen operated by the airline.

The majority held that the failure to provide a safe system of work was not done under the Act; because the Act made no reference to failure to provide a safe system of work.

Brennan J , in a separate judgment concurring with the majority, noted that the Commission required no statutory authority to conduct a kitchen –that was an activity which could lawfully be engaged in without authority; and also noted that "freedom under the common law to engage in conduct requires no grant of statutory power to confirm it ……".

In *Firestone Rubber and Tyre Co v Singapore Harbour Board* [1952] AC 452 , the relevant statute provided that where an action was commenced against any person for any act done in pursuance of any public duty or authority, no such action would lie unless commenced within 6 months.

Firestone alleged that 17 of its tyres unloaded by the Harbour Board under its statutory monopoly powers, had not been returned to it . Notice of the claim was not given. The question was thus whether the Harbour Board was acting in pursuance of any public duty . It was held that the Board was so acting.

In the course of so holding, the Privy Council articulated a number of tests to determine whether conduct of a public authority was done pursuant to a statute (pp464-465).

First, the act must be in the discharge of a public duty or in the exercise of a public authority.

Second, in determining whether the duty is public, it is relevant to consider whether it arises out of, or is imposed by , a contract voluntarily entered into by the public authority with an individual with whom it is under no obligation to contract with.

Third, the presence or absence of a contract is not decisive

Fourth, the word "authority" excludes obligatory, as opposed to permissive, powers.

The Privy Council distinguished between powers done in substance under the relevant legislation, and that which was merely incidental, such as carrying on trade.

On the facts of *Firestone*, the Privy Council held the presence of contract not decisive, and held that despite a contract, the conduct was done under the Act.

[170] Extra territorial application of Commonwealth statutes

Sec 21 of the Acts Interpretation Act (1901) (Cth) provides that prima facie , Commonwealth Acts are to be interpreted as applying to matters, things or persons both in and out the Commonwealth.

There is a presumption that statutes do not have extra territorial application : Pearce and Geddes Statutory Construction in Australia (5th ed) para [5.3].This presumption is reflected in sec 21 of the Acts Interpretation Act (Cth).

On the other hand, s. 3 of the Statute of Westminster enacts that the Parliament of a Dominion has full power to make laws having an extra-territorial operation. Since the adoption of the Statute of Westminster by Act No. 56 of 1942 it can be no objection to the validity of a law of the Commonwealth that it purports to operate outside Australia.

[180] Local councils and the Trade Practices Act 1974

The operations of councils are generally not sufficiently within trade or commerce to bring them within the *Trade Practices Act 1974* and the *Fair Trading Act 1987* (NSW), so long as they stick to those obligations imposed on them by statute: see *Mid Density Development v Rockdale Municipal Council* (1992) 39 FCR 579.