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Presenter Paper

Liability of Public Authorities and Section 43A of the Civil Liability Act 2002 (NSW)

For CLE subscribers there is an excellent paper prepared by Hugh for this production. What is Judicial Notice – issues of burden of proof – this is a fascinating discussion.

Discussion Includes

- The application of s 43A Civil Liability Act (2003) NSW and what constitutes a 'special statutory power'
- Distinction between planning/design and implementation – if only implementation requires special statutory authority, is the planning/design done under a "special statutory power"?
- The problems that can arise with hostility drafted legislation introduced as a knee jerk reaction to a misinformed media frenzy
- How to obtain evidence that an act or omission is so unreasonable that no reasonably statutory authority would have done it
- Is section 43A a defence or an extra hurdle for the plaintiff?
- How can plaintiffs deal with the tactics employed by public authorities who fail to act as a model litigant?

SECTION 43A *CIVIL LIABILITY ACT* 2002 (NSW)

CURTIS v HARDEN SHIRE COUNCIL (2014) NSWCA 314 - A CASE STUDY

INTRODUCTION

1 On 13 February last, the High Court refused the Council leave to appeal from the decision of the Court of Appeal, which had overturned the decision of the Trial Judge who had entered a verdict for the Council. In its application for special leave, the Council had wished to argue that the approach taken by the Court of Appeal concerning the construction of s43A had been incorrect, and that it was inconsistent not only with previous decisions of the Court of Appeal, but also with decisions of Courts of the other States and Territories.

2 This decision raises interesting questions for both plaintiffs and defendants as far as future conduct of cases involving this section. Notwithstanding the Judgment of Basten JA, there are some still unresolved issues concerning the construction and scope of the section. Doubtless the Court of Appeal and possibly the High Court may have reason to consider the application and interpretation of the section on some future occasion. I shall refer to those aspects in the second part of this paper.

THE FACTS

3 At midday on 20 August 2004, Ms Paterson was driving her car along the Kingsvale Road, which connected the two NSW rural towns of Young and Harden. It was a rural highway which came under the care and control of the Council. It was subject to a speed limit of 100kph. It was common ground that Ms Paterson was travelling at, or slightly less than, the speed limit at the time she encountered road works which had been undertaken, but not completed by the Council the previous day.

4 The road works involved the laying of bituminous material on the road surface as part of its road maintenance programme. This had been carried out over five discontinuous sections of differing lengths extending over a distance of some five hundred metres. The sprayed road surface was then treated with a

dressing of blue metal gravel (aggregate). This involved the application of an excess of aggregate, most of which would become progressively embedded into the bitumised spray mixture by passing traffic, after which the surplus aggregate was to be swept from the road surface.

5 This sweeping procedure had not yet been carried out by the time Ms Paterson encountered the road works the day following the application of the aggregate to the bitumised surface. There were still loose stones on the road surface, but not to such a degree that was said to have been excessive.

6 Ms Paterson lost control of her vehicle shortly after she entered the road works, the Plaintiffs arguing that control was lost on the first resealed section before leaving the roadway and striking a tree, causing fatal injuries. It was accepted that neither the condition of her vehicle nor the weather conditions had any relevant bearing on the cause of the accident. Additionally, it was not in contest that Ms Paterson had been an experienced and careful driver who had been familiar with the road.

7 There were no witnesses to the accident. The Council did not concede that Ms Paterson lost control of her vehicle on the first resealed section. As consideration of where control was lost involves the question of causation, which is beyond the scope of this paper, it is sufficient to note that the Court of Appeal, by a majority, Basten JA dissenting on this issue, found that control was lost on the first resealed section, thus establishing causation.

8 The Plaintiffs in the Compensation to Relatives action and the nervous shock cases sought to prove that the Council had breached its duty to exercise reasonable care to avoid the risk of foreseeable injury to the users of the roadway, having regard to the changed road conditions by failing to provide for, and erect, signage warning of the recent resurfacing of the road and specifically, the risk of slippage (loss of traction) due to the presence of loose gravel on the road surface, as well as signage reducing the speed limit to 60kph.

9 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 was accepted as authority for the scope of that duty at common law said to be owed by the

Council, who, in turn, properly conceded that it was required, in discharge of that duty, to design a traffic control plan (TCP) providing for signage in advance of the road works warning of the presence of loose gravel and associated changes to the road surface as well as to take reasonable care in the choice and placement of signs to address the foreseeable risk of harm to road users created by the state of the road.

10 The roadworks were controlled by a TCP which had been designed by Mr Stephenson, a Works Manager employed by the Council. It was designed to address the risks associated with or likely to arise from the road works, including the risks associated with the presence of loose gravel on the road surface. However, the TCP did not include any signage advising of the changed nature of the road surface or for a reduction of speed in those circumstances, nor any signage advising of the risk of loss of traction due to the presence of loose gravel. Signs advising of such changes and for speed reduction were commonplace, featuring in the RTA Manual which dealt with such matters.

COUNCIL'S POSITION AND SUBMISSIONS ON S43A

11 S43A:

> "**43A Proceedings against public or other authorities for the exercise of special statutory powers**
>
> (1) This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a public or other authority's exercise of, or failure to exercise, a 'special statutory power' conferred on the authority.
>
> (2) A **special statutory power** is a power:
>
> (a) that is conferred by or under a statute, and

(b) that is of a kind that persons generally are not authorised to exercise without specific statutory authority.

(3) For the purposes of any such proceedings, an act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.

(4) [Not relevant to this case]"

12 Council submitted that it was a statutory authority exercising a special statutory power, and as such, it could not be held liable unless, viewed objectively, no statutory authority having that power could have considered it necessary to provide the additional signage.

13 Council argued that the signage it had deployed was adequate and that a reasonable person, charged with the responsibility of deciding whether to include in the design those additional signs, would not have done more than that which had been included in the design of the TCP in the first place, and which had in fact been deployed.

THE EVIDENCE RELEVANT TO S43A

14 The Plaintiff called Mr Coffey who had been Mr Stephenson's supervisor at the time. He did not review the TCP before the accident but had been required by Council to undertake an investigation of its suitability after Ms Paterson's accident. He concluded, and gave evidence to that effect, that the TCP designed by Mr Stephenson was "seriously deficient" in not making provision for the additional signage. In the course of his investigation he had asked Mr Stephenson for an explanation for the omission of that signage from the TCP but had received no explanation, despite repeated requests.

15 Mr Coffey's evidence went further. He said that the slippery road sign was essential to warn of the risk of loss of traction in circumstances where a driver would otherwise be entitled to expect good traction. He described the road surface in its unswept condition as like "walking on marbles". As to the reduced speed sign, he said that its purpose was to warn as to the likelihood of encountering something different from the ordinary driving environment requiring the reduction of speed. He went on, critically, to describe the absence of those signs from the TCP as "making no sense at all".

16 Mr Stephenson was not called to give evidence by the Council.

17 Expert evidence was given by two traffic accident reconstruction experts, who ultimately agreed with the proposition that the additional signage ought to have been included, and that the absence of such signage in the TCP meant that the signage provided was inadequate.

TRIAL JUDGE'S FINDINGS

18 The learned Trial Judge found Mr Coffey's evidence to be compelling. She found that this view was "reinforced" by the *Jones v Dunkel* (1959) 101 CLR 298 inference which had been urged upon her by the Plaintiffs.

19 On that evidence Her Honour was satisfied that the onus on the Plaintiff to prove those matters required of them by s5B(1) and (2) of the *Civil Liability Act* had been discharged and that, as a consequence, there had been a breach of the duty of care at common law owed by the Council. Her Honour then turned her attention to the application of s43A. She had adopted the 'two-tiered' approach which had been applied by Hoeben J (as His Honour then was) in *Rickard v Allianz Insurance Limited* (2009) NSWSC 1115 and which was not the subject of any adverse comment by the Court of Appeal in that case - see *Allianz Australia Limited v RTA* (2010) NSWCA 328. This 'two-tiered' approach had its genesis in the Judgment of Campbell JA in *RTA v Refrigerated Roadways Pty Limited* (2009) 77 NSWLR 360, where His Honour, whilst not determining the point, it being unnecessary to do so, had evinced an inclination towards the 'two-tiered' approach.

20 Despite her finding that there had been an unacceptable departure from what would have been expected of other Councils exercising similar areas of responsibility, which Her Honour regarded as the implicit view of Mr Coffey, she nonetheless determined that the test of "Wednesbury unreasonableness" as required by s43A(3) had not been discharged. She regarded this process as being judged from an objective viewpoint, although an analysis of Her Honour's assessment does not exactly bear this intention out. Nonetheless, Her Honour's reason for this conclusion was that "minds may differ" as to the need for additional signage, and accordingly the Plaintiff was unsuccessful before her. She also decided that the harm suffered was not established to have been causally related to the breach of duty - s5D(1) *Civil Liability Act*.

21 The Plaintiffs appealed from Her Honour's decision, both as to the determination that s43A applied, together with its imposition of a more onerous test for determining breach of duty, and as to Her Honour's conclusion concerning causation.

THE COURT OF APPEAL (2014) NSWCA 314

22 The appeal was heard by Bathurst CJ, Beazley P and Basten JA. All three Judges reversed the Trial Judge's conclusion concerning s43A. Both the Chief Justice and the President expressly adopted the analysis and conclusions expressed by Basten JA concerning s43A. On that issue Basten JA, said of the s43A(3) test:

> "[It] assumes the existence of a duty of care and identifies the standard to be applied in determining whether there had been a breach." (Paragraph 234)

23 Any questions that might have been awaiting a resolution of the 'unitary' as opposed to the 'two tiered' approach were not disappointed. Not that the result in this case would have been any different whichever approach had been adopted. The section clearly mandates that the question of the application of s43A be determined before the question of breach is considered, according to Basten JA. This is because s43A(3), if it applies, provides the standard (Wednesbury unreasonableness) by which any breach

of duty is to be adjudged. It must be determined after the question of duty has been resolved as, according to Basten JA, s43A(3) assumes the existence of a duty.

24 That standard imposed an additional burden on plaintiffs requiring them to prove a breach of duty of care on an administrative law standard of unreasonableness (Wednesbury unreasonableness) compared to the common law standard. Basten JA made no mention whatsoever of the 'two-tiered' approach and, whilst reference was made to the Judgment of Giles JA in *Allianz Australia Limited v Rickard*, it was not in the context of any comment concerning the application of the 'two-tiered' approach. It is implicit in the approach adopted by Basten JA, and with which both Bathurst CJ and Beazley P agreed, that it is not necessary to approach the application of s43A(3) in the structured way that had been proposed by Campbell JA in *Refrigerated Roadways*, or applied by Her Honour, the Trial Judge in *Curtis*.

25 It had been unsuccessfully submitted at trial (and in the Court of Appeal) that s43A did not apply. Those arguments appear later in this paper, dressed slightly differently under the guise of 'matters yet to be resolved'. Accordingly, the finding that s43A applied to the Council's acts or omissions meant that to succeed in their action the Plaintiffs had to satisfy the more onerous test of Wednesbury unreasonableness. The fact that they satisfied the onus at that higher standard meant that the Council had failed in its reliance upon s43A(3), in circumstances that surprised some commentators. Indeed, the Chief Justice's observation that it would be difficult to see how any liability in negligence could arise in circumstances where the public authorities' powers were exercised properly (paragraph 5) is to the point.

26 There were several reasons why Basten JA considered that the decision of the Trial Judge had been incorrect. Firstly, he noted that the statutory test did not require the Trial Judge to form her own view about the matter. What was required was whether:

> "No road authority properly considering the selection of road signs could have adopted the solution adopted by Mr Stephenson."

27 Both the Chief Justice and the President stressed that they were not reviewing Council's decision. They were not engaging in a merits based review. The Chief Justice (at 6) remarked that what was required by a reviewing tribunal was a consideration of whether the authority could properly consider that what was done was in fact a reasonable exercise of the power. That being so, no liability would ensue. The President (at paragraph 224), indicated her agreement with Basten JA's analysis, noting that it was not for the Court to adjudge the decision as reasonable or unreasonable: it was whether "no authority could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power". Basten JA makes this point very clear at 278 where he stated:

> "It means that the Court must view the matter through the eyes of a responsible public authority, having particular expertise and functions."

As the Council had chosen not to adduce any evidence, in particular, not calling Mr Stephenson, Basten JA concluded that there was no evidence which expressly supported the Council's contention that the omission of the impugned signage was not an unreasonable exercise of its powers in the circumstances. Beazley P had arrived at the same conclusion referring to the dictum of Lord Diplock in in *Secretary of State of Education & Science v Tameside Municipal Borough Council* (1977) AC 1014 at page 1064, as to what constituted unreasonable conduct, namely:

> "Conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt."

28 Secondly, the evidence of Mr Coffey was significant, given that he was Mr Stephenson's supervisor at the time. This was evidence which was uncontroverted and which the Trial Judge had found compelling. The Chief Justice based his conclusion relying upon the evidence of Mr Coffey and the mandate prescribed in the RTA Manual which specified when the omitted signs were to be incorporated in the TCP. Basten JA concluded that there ought to have been more weight given to this evidence by the Trial Judge.

29 Thirdly, he noted that the Trial Judge had found the decision of Mr Stephenson to omit the signs was not so unreasonable because the decision was one upon which 'minds might differ'. In fact, there was no evidence of any view contrary to that put forward by Mr Coffey. Thus, there was no evidence of any minds adopting a contrary approach and, accordingly, there could not have been a reasonable alternative. Implicitly then, the decision must have been unreasonable.

30 Finally, Basten JA concluded that the approach which Mr Coffey advocated was one which accorded with common sense, and one about which Mr Stephenson would have had training to appreciate and apply. Again, implicitly, the fact that he didn't either appreciate and/or apply such common sense bespoke 'unreasonableness'.

31 Basten JA adopted a very straight forward approach to the determination of the standard of care required by s43A(3) to establish a breach of duty. It was simply necessary, in his view, to have regard to the words of s43A(3) and determine ultimately, whether that 'act or omission was so unreasonable that no authority could properly consider it to be reasonable' (paragraph 277). Implicit in His Honour's view is that if there is proof of that degree of unreasonableness, then the protection afforded to public authorities by virtue of s43A(3) is of no assistance. He expressed the view that the s43A test could not be satisfied where expert evidence of value suggested a range of opinion.

32 Basten JA did not express any particular preference for a definition of unreasonableness, although he cited from the same authority as relied upon by the President. He did refer to the Judgment of Gleeson CJ, McHugh and Hayne JJ in *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 which provides support for His Honour's inclination to "... characterise the decision, in a particular way, rather than analyse the process of reasoning".

33 In *Eshetu*, the definitional construction favoured was:

> "So unreasonable that no reasonable tribunal acting within jurisdiction and according to law, would have come to such a conclusion."

Thus analysed, there does not seem to be any real difference in the approach to what constitutes "unreasonableness" as between the President and Basten JA.

COUNCIL APPLIES FOR SPECIAL LEAVE

34 In its draft Notice of Appeal Council contended that the Court of Appeal had not construed s43A(3) correctly and that its decision to reverse the Trial Judge's finding concerning the omission to erect the impugned signage as being "so unreasonable", thus satisfying the test in s43A(3) was also incorrect. Council also appealed on the causation findings of the majority in the Court of Appeal, as well as contending that the Court of Appeal had exceeded its jurisdiction, otherwise expressed that it had failed to apply the restraints imposed upon it by the operation of s75A(5) of the *Supreme Court Act* 1970.

35 The special leave point however was said to be that the Court of Appeal decision on s43A was inconsistent with its own earlier decisions, in particular *Allianz Australia Limited v Rickard*, as well as being inconsistent with the interpretation favoured by Courts in other States and Territories.

36 The Respondents challenged this assertion of inconsistency in their written submissions. It was only New South Wales that had legislated in terms of s43A, which had been introduced as a reaction to the perceived public outcry, substantially inflamed by certain sections of the media, to the decision of Adams J in *Presland v Hunter Area Health Service* (2003) NSWSC 754, a decision subsequently reversed in the Court of Appeal, but not before the New South Wales Parliament had introduced s43A.

37 There were many other significant differences in the legislation enacted by the other States and Territories which somewhat diluted the public interest component in Council's submissions. In addition to the absence of an equivalent to s43A, other differences included the absence of any reference to a special statutory power and the absence of the word 'power' as the focus for the consideration of what a public authority does; the other jurisdictions preferring 'function' as determinative. The decisions of Courts of Appeal and

at first instance, were not on point as there was no equivalent section in their legislation. Reference was made to *Civil Liability Act* 2003 (Qld), *Wrongs Act* 1958 (Vic), *Civil Liability Act* 2002 (WA), *Civil Law (Wrongs) Act* 2002 (ACT) and *Civil Liability Act* 2002 (Tas). In any event, the High Court had acknowledged that legislation introduced in the other States and Territories had not been uniform. see *Sydney Water Corporation v Turano* (2009) 239 CLR 51. That, taken as an understatement, infers that there are significant differences in the legislative approaches taken in each of the jurisdictions.

38 However, we shall not know what the High Court considers to be the scope of s43A until another opportunity raises itself for consideration. In dismissing the Council's application for leave, the Court (French CJ and Bell J) simply said:

> "The test for liability in respect of the exercise of a special statutory power is that set out in section 43A of the statute. We are not satisfied the Court of Appeal has done other than applied the text of that section. As to the application of section 43A and also the question of causation we do not consider that the application has sufficient prospects of success, were special leave to be granted, to warrant the grant of special leave. Special leave will be refused with costs."

The Respondents were not called on.

SECTION 43A - UNRESOLVED ISSUES?

39 *Curtis* was an important decision, but not from the point of view of plaintiffs. It does little to assist plaintiffs, other than clarifying when the test of unreasonableness was to be applied, and possibly some definitional clarification as to what it entails. *Curtis* was a case determined on its facts and any assistance that plaintiffs can derive from it comes down to the importance of having a witness whose evidence was as compelling as that provided by Mr Coffey.

40 It is, however, significant for defendants in that it identifies the need, firstly, to ensure that it properly pleads the section so as to clearly identify reliance upon it, as well as the facts giving rise to the engagement of the section

(Basten JA at 244) and, secondly, if it has evidence that touches on the question of the reasonableness of the decision, then it needs to adduce that evidence. Whilst it was not articulated as determinative by the Court of Appeal, it is clear to me at least, that the failure of the Council to call Mr Stephenson to justify or explain his decision was a significant factor in permitting a finding that the unreasonableness standard had been satisfied. It meant that there was no counterpoise to Mr Coffey's 'trenchant criticism' of the decision not to include the signs on the TCP.

41 In future cases plaintiffs who wish to engage the arguments concerning a restricted application of s43A would be well advised to know in advance of the trial what the defendant says as to the specific power it is alleged was exercised and where that power is alleged to have been derived, in other words, its legislative pathway. Obviously the decision impugned needs to be carefully identified and investigated.

42 Perhaps in subsequent cases we will see defendants adducing evidence as to what decisions are made by other Councils exercising similar powers or functions. This may mean that similar issues that arise in cases involving s5O of the *Civil Liability Act* may require determination. Issues such as 'widely accepted by peer professional opinion as competent professional practice' (s5O(1)) or the application of similar comparative protocols such as were applied in *Bolam v Friem Hospital Management Committee* (1957) 1 WLR 582. The Chief Justice indirectly alluded to this possibility at [6].

43 One of the interesting omissions from the Court of Appeal Judgment concerns the onus of proof involved in the application of s43A, although much was said about the standard of proof, particularly where it concerned circumstantial evidence and proof concerning the issue of causation. However, as s43A(3) specifically involves a standard of care, a burden traditionally discharged by plaintiffs in the consideration of breach of duty. The general proposition that a plaintiff has to satisfy the onus to establish duty, breach and consequential damage is considered to be unchanged.

44 Although not a defence strictly speaking, defendants are required to plead the matters said to give rise to the application of s43A in their Defence before they can rely upon its provisions. At paragraph 244 Basten JA said of it:

> "While section 43A does not merely identify a defence, there is no doubt that a defendant must plead, not the terms of the provision as such, but the facts giving rise to its engagement. The plaintiff will then have to establish negligence to the statutory standard to succeed."

45 In *RTA v Refrigerated Roadways Pty Limited* (2009) 77 NSWLR 360, Campbell JA said of the requirement of proof concerning s43A, that the defendant bore an evidentiary onus to prove the particular facts that permit reliance on its provisions. (See paragraphs 316-317.) In the 7th Australian edition of Cross on Evidence the complexities of evidential and shifting burdens of proof are discussed at pps 265 – 271. Such a discussion is beyond the scope of this paper.

46 Thus, without overcomplicating the way in which civil Trials are run in New South Wales, it seems that, without ever being confident of whether the standard of care required to be proven to establish breach of duty is at a common law level, or at the more demanding level evidently required by s43A(3), a plaintiff must be in a position to meet this higher level before his or her case closes, should the defendant be able, either through evidence adduced in its case, or by way of submissions, as was unsuccessfully attempted in *Curtis*, to establish that the higher standard of care had not been met by the plaintiff. This may in some cases produce unfairness. This is a matter for Trial Judges in each case to address.

SECTION 43A - WHAT WAS INTENDED BY ITS INTRODUCTION?

47 In *Presland*, Adams J awarded damages to a plaintiff who had succeeded in establishing that the decision to release him from a mental facility had been negligent and as a consequence he had suffered damage. A medical practitioner had certified that, following his examination of Mr Presland, he was fit to be released. Unfortunately, upon his release Mr Presland, in a delusional state, committed murder.

48 Before referring to what is recorded in Hansard, it is worthwhile remembering that the Ipp Report, which had recommended the introduction of the Wednesbury unreasonableness test in relation to a breach of statutory duty (s43), had stated:

> "The effect of the test is to lower the standard of care. It does not provide the defendant with **an immunity against liability**, but it does give the defendant more leeway for choice in deciding how to exercise its functions than would the normal definition of negligence (in terms of reasonable care)."

49 At paragraph 10.21 (page 56) the authors of the Report specifically rejected a suggestion that a public authority should have a defence in answer to **ANY** claim for negligence in the performance of a statutory function. In citing the example of an employee of a public authority causing an accident by driving negligently in the course of performing some statutory function of the authority, they reasoned that:

> "The mere fact that an accident occurred in the course of the performance of the statutory function should not displace the operation of the ordinary rules of liability and allow the "policy defence" to be pleaded."

50 In fact, in introducing Part 5 - Liability of Public and other Authorities (Sections 40-46), the New South Wales Parliament decided against introducing a "policy defence", unlike Western Australia which did - see s5X. However, nothing turned on this in Curtis, other than perhaps to illustrate the Respondents' contention in response to the special leave argument that as between States and Territories there was not a consistent or uniform legislative approach to the issue of the liability of public authorities following the introduction of the *Civil Liability Act* 2002 (NSW).

51 Thus, until the introduction of s43A, following *Presland*, the proscription of the higher onus of Wednesbury unreasonableness only applied to matters which were based upon a breach of a statutory duty. Otherwise, the common law

provided the standard upon which the acts or omissions of a public authority came to be judged.

52 It has been said that the introduction of s43A has been a severe overreaction to the situation perceived to be created by the decision of Adams J in *Presland*. On the other hand, if it was intended to be interpreted as the Minister for Health had introduced it to Parliament, it then only had a limited application. It appears it was never intended to have the wide ranging impact exonerating much of the liability of public authorities. Hansard records the then Minister for Health, the Honourable Morris Iemma, as having said:

> "The first case that the Bill seeks to address is known as the *Presland* case. ... it raises important issues that deserve to be put beyond doubt in legislation. ... the Government has, however, decided to take further steps to ensure that there will not be a repeat of this kind of decision made in the *Presland* case. In addition, we are making changes to the *Civil Liability Act* to clarify the treatment of other situations where mentally ill people may benefit from actions that would otherwise be considered a crime."

53 The Minister continued with the Government's justification for the amendment explaining that:

> "The present case has highlighted also the difficulties faced by people who have statutory decision-making powers - such as doctors or psychiatrists. On the one hand, the law gives them a broad discretion to exercise their decision-making powers. However, despite those people having a broad discretion, negligence laws can constrain the exercise of those powers. This was highlighted in the *Presland* case, where a doctor was found to be negligent for the way he exercised the discretion given to him under the *Mental Health Act* to detain a mentally ill patient. In exercising that discretion a doctor has to balance a whole range of factors, including the safety of the community on the one hand and the right of the patient to be free on the other. These are very difficult decisions and doctors - as well as other decision-makers - must

be able to use their statutory discretion without the fear of litigation hanging over them.

We are all aware of the extraordinary pressures doctors are facing at this time. The last thing we want the Courts to be doing is adding to those pressures. In the mental health context, the *Presland* case has created the risk that doctors will behave too conservatively, detaining patients unnecessarily, out of fear that they can be sued by the patient for anything he or she does if not detained. Other decision-makers may be similarly constrained when trying to decide how to exercise their powers in the public interest. Therefore, the Bill inserts a new s43A that applies to the exercise of, or failure to exercise, a "special statutory power". This will apply to powers that persons generally could only exercise with specific authority, such as the power of a medical officer to detain a person under the *Mental Health Act*."

54 Whatever else may be inferred from what the Minister said, it is reasonably clear that the intention was to stop mentally deficient people bringing claims and to permit doctors to exercise their statutorily provided coercive powers of detention or restraint under the *Mental Health Act* without risk of litigation. Thus, the introduction of 43A specifically dealt with doctors needing to be able to exercise their coercive powers of restraint in the public interest without concern as to whether their decisions will be reviewable by a Court in actions seeking damages for negligence.

55 Whilst it is of little or no assistance in the interpretation of the section, it is pellucidly clear that it was the Government's intention that only those statutory functions which permitted coercive acts or non-consensual rights - depriving acts would be affected by s43A. That is to say, the power that enables the statutory authority to act in a way that changes, creates or alters people's legal status, rights or obligations without their consent, only ought be afforded the protection of s43A.

SECTION 43A - AN IMMUNITY FOR PUBLIC AUTHORITIES?

56 As can readily be appreciated, what was in fact enacted had a much broader application than what the Minister said was intended. It readily applies to that situation which the Ipp Report had warned would **not** be appropriate. As the Chief Justice observed in *Curtis*, it would be virtually impossible for a plaintiff to succeed where the authority had exercised its powers properly. Thus stated, it seems to be a wide ranging immunity which, if applied without check in that manner, would permit a public authority to behave with impunity as far as accountability for its tortious actions or omissions are concerned.

57 The consequences of the application of s43A, as interpreted by Basten JA, are wide-ranging. What follows is not an exhaustive list by any means, but it includes:

(i) Public authority decisions are unreviewable as to their merits.

(ii) No protection is afforded to the public; in effect there is no fairness, nor equality in the process.

(iii) Public authorities are not accountable: they cannot be held to be responsible for the consequences of their decisions.

(iv) If left unchecked, the powers afforded by the strict construction and application of s43A, will condone, and by that, will encourage the continuation of, and perhaps proliferation of negligent or substandard performance with respect to their operational decisions with unfortunate consequences to the victims thereof.

(v) It defeats the purpose of civil actions to compensate for fault caused damage. It is arbitrary and capricious in its application to citizens suffering injury, loss and damage consequential upon fault occasioned during operational activities.

(vi) The greater evil in not requiring accountability is the probable increase in deaths and injuries from operational activities because there is neither encouragement, reward nor other detrimental consequence for negligently performed activities. Standards will drop on account of complacency. This cannot be of any public benefit.

(vii) The cases involving the application of 'Wednesbury unreasonableness' in administrative law are so unlike any that have arisen at common law. Consequently, the application of that standard at common law will give rise to many conflicting applications and interpretations. The law will become vague and inconsistent and that is not in the public benefit.

58 However, given an appropriate case, the Courts may consider adopting the approach advocated by Professor Aronson in his article "Government Liability in Negligence" (2008) 32 Melbourne University Law Review 44. To my knowledge, the first curial reference to Professor Aronson's views came in a case in which s43A had not been pleaded. It was not argued at trial or in the Court of Appeal and its disposition by the High Court did not require any reference to the section. Nonetheless, the High Court in *Sydney Water Corporation v Turano* (2009) 239 CLR 51 at page 65 had said of s43A that it possessed an 'uncertain reach', referring specifically to Professor Aronson's article. Nothing further appears to have been said by the High Court as to the scope, meaning, construction or application of s43A in the years that followed.

59 Professor Aronson concludes his article by expressing the view that:

> "It is difficult to understand what possessed the Parliaments to grant government entities generic permissions to be careless, or careless to a degree not permissible to their private sector analogues."

60 Professor Aronson opines that in the interpretation of s43A Courts should prefer a restricted application to the section. He expresses the view that it should be restricted to those decisions involving coercive acts or non-consensual rights-depriving acts. In other words, the scope of the section ought be limited to circumstances where the statutory authority has been given power to act in a way that changes, creates or alters people's legal

status or rights or obligations without their consent. He draws an analogy with the scope of the *Administrative Decisions (Judicial Review) Act* 1977 which applies only to decisions under an enactment - s3 - *Griffith University v Tang* (2005) 221 CLR 99. This approach differentiates between the interpretation of 'power' and 'authority'. To this, perhaps the word 'function' can also be added.

61 The other basis for reading down the section is of longstanding origin. In *Potter v Minehan* (1908) 7 CLR 277 at page 304, O'Connor J said:

> "One of the principles of statutory construction is that it is improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness."

62 Much later, the High Court revisited this theme in *Coco v R* (1994) 179 CLR 427 at page 436:

> "Statutory authorities (immunity) to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakeable and unambiguous language. Indeed, it has been said that the presumption is that, in the absence of express provision to the contrary, the legislation did not intend to authorise what would otherwise have been tortious conduct."

63 On one view, s43A arbitrarily alters the rights and liabilities of individuals by altering the common law. In essence, it has created a virtual immunity, to use the expression adopted by the Chief Justice in *Curtis*. To the extent that it provides immunity, the approach of the High Court in *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 105 should be applied. In that case the Court struck down the immunity provision so that it only applied to special or extraordinary powers to do what would otherwise be an illegal act. In that case it was determined that no special power was needed to hurriedly drive to a fire. The rationale was that it could never have been intended that an immunity would be given for acts or omissions which were part of the everyday function of the public authority and that the immunity should only apply to the exercise of extraordinary powers. Kitto J suggested that the

immunity should only apply to powers which entitled the public authority to do things that would otherwise be illegal and then it only applied to the integral part of the exercise of those powers ... not those aspects which were merely incidental.

64 The decision in *Ardouin* and its rationale have been widely applied in Courts in Australia thereafter. In *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575, the High Court again was considering the question of immunity and the violation of fundamental rights. There, as in *Curtis*, it was dealing with the construction of the words 'special statutory power'. McHugh J expressed the view that when the violation of fundamental rights is associated with the granting of immunity, it should only be upheld in the context of whether the power actually required specific statutory authority apart from that which constituted its more general powers, already in existence. As was said in *Australian National Airlines Commission v Newman* (1987) 162 CLR 466 at page 471, citing *Ardouin* to the effect that:

> "Provisions taking away a right of action for damages of the citizen are to be construed strictly, even jealously."

65 It was argued in *Curtis* that it was intended that immunity be provided for only those acts and omissions which did not form part of the everyday functions of the public authority. This argument was not accepted by Basten JA, although the reasons that he has provided for the rejection of this and other arguments are not as clear as might be (see paragraphs 254-256).

66 The concept that governments are to be held accountable in 'ordinary' Courts according to the principles of 'ordinary' law was stated as an inviolable principle by Dicey in his treatise 'Introduction to the Study of the Law of the Constitution' (10th Ed 1959 at page 193), save for notable exceptions. The constitutional intent was the creation of a level playing field for citizens and governments alike. Other than that special treatment afforded to public authorities in Part 5, the *Civil Liability Act* does not differentiate between government or private individuals.

67 There have been many attempts by governments to dilute that parity principle, some more successful than others. As Gleeson CJ said of the principle:

> "That formula reflects an aspiration to equality before the law embracing governments and citizens, and as a recognition that perfect equality is not attainable. Although the first principle is that the tortious liability of governments, as completely as possible, assimilated to that of citizens, there are limits to the extent to which that is possible. They arise from the nature and responsibilities of governments. In determining the existence and content of a duty of care, there are differences between the concerns and obligations of governments, and those of citizens." *Graham Barclay Oysters Pty Limited v Ryan* (2002) 211 CLR 540 at page 556.

68 The Chief Justice also recognised that there were some actions of government which were not justiciable according to common law negligence principles simply because Courts have no practical basis upon which to assess their reasonableness. There were also other enactments which may have been introduced for political imperatives. For Courts to interfere with the latter may involve infringing upon the doctrine of separation of powers.

69 Whilst not determining whether the section should be read down in the way that the Appellant argued, Basten JA dismissed this and other related arguments (to which I will refer shortly) as having no direct application. This was because there was in place a statutory prohibition against any person installing such signs as were involved in this case coupled with a statutory authority allowing for the undertaking of such activity. This was interpreted by Basten JA to mean that it must come under the umbrella of a special statutory power.

70 It may be that these arguments would be better suited to, or better developed in different factual scenarios than that which arose in *Curtis*. Basten JA said as much at 256:

> "This case must be resolved by reference to its own facts and the relevant statutory provisions and not by reference to dicta in other cases involving different facts and different statutory provisions."

71 As to the dicta in other cases, His Honour was there referring to the Plaintiffs' reliance upon obiter remarks made by Campbell JA in *Roads & Traffic Authority of New South Wales v Refrigerated Roadways Pty Limited* (2009) 77 NSWLR 360 and Beazley JA (as Her Honour then was) in *Bellingen Shire Council v Colavon Pty Limited* (2012) NSWCA 34.

72 The plaintiffs had argued that s43A was not engaged because the claim as to liability was not 'based on' any exercise of a special statutory power exercised by the Council. Instead, they argued that, according to the Statement of Claim, it was based on a breach of a common law duty to warn of dangers created by the carrying out of the roadworks. The genesis of that argument came from obiter remarks made by Campbell JA (with the agreement of McColl JA and 'in general', Sackville AJA) in *Refrigerated Roadways*).

73 Apart from considering obiter remarks of no persuasive authority, Basten JA at 244 took the view that the argument was too restrictive. In his view, the words 'based on' should not be distanced from their statutory context and restrictively interpreted in the way pleaded in the Statement of Claim. His Honour considered that it was the acts or omissions which gave rise to a cause of action and thus the question for consideration by the Court was whether any act or omission gives rise to a civil liability. Thus, once the act or omission has been identified, consideration can be given as to whether it involves the exercise, or failure to exercise, a special statutory power. In that way, the words 'based on' have a much broader application.

74 Another argument that did not find a receptive audience from Basten JA was that, in reading down s43A, such immunity as may have been granted, ought to have been restricted to activities which are reliant for their lawfulness on a statutory power, and as such should not be extended to those activities which can be undertaken in accordance with the general law. Viewed in that way, the Council was not exercising its rights to place the signs where it did

pursuant to a statutory authority; it was placing the signs where it did because it could do so as a landowner. In that regard, it was exercising the ordinary proprietary powers applicable to those owning land to do with their land as they reasonably chose. This was an argument that relied upon admittedly obiter observations of Beazley JA (with whom Whealy JA and Sackville AJA agreed) in *Bellingen Shire Council v Colavon*. That was a case involving the installation of guide posts along the side of a road. The observations were not part of the ratio of the decision because the Court of Appeal refused the Council leave to rely upon s43A, it not having been pleaded nor had it been raised until submissions following the close of the evidence.

75 In addition to referring to Her Honour's remarks as obiter, Basten JA distinguished that case because Kingsvale Road was not an unclassified road whereas the road was an unclassified road in *Bellingen Shire Council v Colavon*. As yet, I am unable to fully appreciate the distinction between the classifications of road, where it involves responsibility for the placement of road signage. That argument may yet live to fight another day.

76 The final major argument advanced in *Curtis* was that s43A was not engaged because the act of negligence was not the placement of the signs, rather, it was the negligent drafting of the TCP which had omitted reference to the specific signs and about which the evidence specifically related.

77 The placing of the signs, however, did involve the exercise of a special statutory power as determined by Basten JA at 253.

78 Whilst there was no doubt that the primary allegation was about the physical placement of the signs at trial, as well as on appeal, it was nonetheless a part of the Plaintiffs' case, both at Trial and in the Court of Appeal, that s43A was not engaged because the impugned negligent activity involved the design of the TCP, a function which was not a special statutory power and hence there could be no engagement of s43A. It appears that Basten JA regarded this as substantially irrelevant. He took a robust view that it was the inadequate signage on the road which was the cause of the accident and which involved the breach of duty.

79 With respect, this seems to overlook two difficulties that arise on account of that reasoning. Firstly, the procedure whereby signs are actually placed in the ground alongside roadways in circumstances such as existed in *Curtis* was not elaborate. The designer of the plan incorporates features which he or she considers appropriate for the circumstances, substantially following RTA Guidelines, although permitting for a discretion to meet particular exigencies. The plan is then provided to the road gang who implement it. It is a mandatory implementation as far as the workers are concerned. They place the signs in the ground at the places where they are directed to by the TCP.

80 At paragraph 247 His Honour refers to the general prohibition concerning the placement of signs on a roadway. S123 of the *Road Transport Act* (formerly s52 of the *Transport Administration Act*) prescribed:

> "**52 Unauthorised prescribed traffic control devices**
>
> (1) A person must not, without appropriate authority:
>
> (a) install or display a prescribed traffic control device on, above or near a road or road related area, or
>
> (b) interfere with, alter or remove any prescribed traffic control device installed or displayed on, above or near a road or road related area.
>
> (2) A person must not install or display on, above or near a road or road related area any sign, signal, marking, structure or other device that might reasonably be mistaken to be a prescribed traffic control device."

81 At paragraph 248 His Honour observed that only someone with authority therefore could place a sign on the roadway and that there was a sound reason for this. His Honour said:

> "Questions of judgement are concerned: unnecessary signs can cause confusion."

82 With respect, His Honour may have conflated the process of designing a TCP and the physical implementation of it which involved the placement of the signs. Whilst it was undoubtedly true that the design process involved questions of judgement, it cannot be said that the erection of the signs, that is, the physical act of putting them in the ground is in the same classification. It is evident that the first part of the process did not engage s43A, whereas the second did. It was to the first part of the process that the evidence was directed in Curtis. The second aspect did not involve any judgement, independent thought or decision making at all. There was no prohibition directed against the designing of TCPs.

83 Secondly, the emphasis on the solitary cause for the harm (see paragraph 240 "assuming that the inadequate signage was **the** cause of the accident") was, with respect, an error. All that is required was that it be **a material cause** - *Strong v Woolworths Limited* (2012) 246 CLR 182, *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Limited* (2013) HCA 10.

84 However, Basten JA did acknowledge that the design and implementation of the TCP was not an activity that came within the definition of a special statutory power as provided for in s43A(2). He also acknowledged the consequence of such a finding, were it to have been made, namely, that s43A would not have been engaged. The standard of care upon which breach of duty then fell to be determined would be that generally applied at common law.

85 Whilst His Honour refers to these matters at 240, he did not determine the question. Presumably, he felt he did not have to, although it is conceivable that there may have been an issue of causation that posed an impediment to the success of this argument. On the facts found in *Curtis*, I am not sure what this might have been. In any event, it, too, lives for another day.

86 In the final analysis, *Curtis* was decided on the facts. There was an absence of appropriate or adequate signage on the approach to the roadworks. Such signage as was in place was mandated by the TCP designed by Mr Stephenson, no other signage having been included in the TCP. Accordingly,

no other signs had been deployed. Their absence from the TCP (and hence the roadway) was considered the only admissible expert evidence available to the Court, as being "seriously deficient", and (that) "made no sense".

87 On the facts, no other conclusion was available to the question of whether the absence of the signage constituted a breach of duty when subjected to the blowtorch of Wednesbury unreasonableness. The Plaintiff had succeeded in establishing that the absence of the signage was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.

HUGH MARSHALL SC

Jack Shand Chambers

11 March 2015