

2020

Private Law Remedies and Public Law Standards: An Awkward Statutory Intrusion into Tort Liability of Public Authorities

Margaret Allars
Sydney Law School

Follow this and additional works at: <https://ecollections.law.fiu.edu/lawreview>



Part of the [Other Law Commons](#)

Online ISSN: 2643-7759

Recommended Citation

Margaret Allars, *Private Law Remedies and Public Law Standards: An Awkward Statutory Intrusion into Tort Liability of Public Authorities*, 14 FIU L. Rev. 5 (2020).

Available at: <https://ecollections.law.fiu.edu/lawreview/vol14/iss1/5>

This Article is brought to you for free and open access by eCollections. It has been accepted for inclusion in FIU Law Review by an authorized editor of eCollections. For more information, please contact lisdavis@fiu.edu.

**PRIVATE LAW REMEDIES AND PUBLIC LAW STANDARDS:
AN AWKWARD STATUTORY INTRUSION INTO TORT
LIABILITY OF PUBLIC AUTHORITIES**

Margaret Allars*

I.	Introduction	5
II.	Common Law and Policy Background	6
III.	<i>Ipp Review</i>	11
IV.	Statutory Limitation of Liability of Public Authorities.....	15
	A. Non-feasance	15
	B. “Policy” Defense.....	16
V.	Conclusion.....	21

I. INTRODUCTION

It has become common for statute to modify the civil liability of public authorities. This development is illustrated in Australia by limitations upon the availability of remedies to enforce common law obligations of public authorities, specifically the duty of care in negligence. Statute now sets a threshold for the liability of public authorities in negligence that is expressed by reference to administrative law standards. Here, statute is “an alien intruder in the house of the common law,”¹ not just because the common law of obligations is disrupted, but also because public law obligations constrain the scope of private law obligations. It is true that the common law already qualified the obligations of public authorities in the law of negligence. However, the special position of public authorities was reinforced and given an ostentatiously administrative law façade by reforms that included a statutory “policy defense.” The reception of this alien statutory intruder has been mixed.

Before and after statutory intervention, the administrative law standards defining the limits of liability of public authorities in negligence have been uncertain in their operation. A key question that emerged in the United Kingdom is whether the action or omission of the public authority claimed to be negligent is so unreasonable no reasonable authority could have reached

* Professor, Sydney Law School, Member, New South Wales Bar.

¹ Andrew Burrows, *The Relationship Between Common Law and Statute in the Law of Obligations*, 128 L.Q. REV. 232, 232 (2012) (quoting Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 15 (1936)).

it. This is the well-known administrative law standard of *Wednesbury* unreasonableness,² developed in judicial review. However, as a threshold for obligations in tort law, the content and operation of the *Wednesbury* standard strayed from its judicial review origins. The administrative law standard was in any event evolving, developing as a more relaxed and diffuse test than the standard that was borrowed to limit the liability of public authorities in tort. This presents the real prospect of a bifurcation of principle, leaving the threshold for the operation of tortious obligations of public authorities quite different from concepts of reasonableness in administrative law.

To appreciate the impact of administrative law standards on private law liability of public authorities, consideration is given in Part II to the common law and policy background into which the statutory intervention intruded. Part III describes the recommendations for reform that led to the introduction of the statutory limitation upon tort liability of public authorities. Part IV examines the key components of the reform in New South Wales, including the “policy” defense. The conclusion in Part V identifies the evolution of the concept of unreasonableness in administrative law, suggesting its implications for the limitation on the tort liability of public authorities.

II. COMMON LAW AND POLICY BACKGROUND

The common law accepts that public authorities may be liable in tort in accordance with the ordinary principles in the same way as a private person in the absence of express statutory authority to engage in the activity harming the other person.³ In Australia, the Commonwealth Constitution requires that the rights of parties shall “as nearly as possible” be the same in any litigation between government and private parties.⁴ This includes tort actions. It is plainly an aspiration which incorporates a recognition that there may be limits to equality in the common law of obligations.⁵ Inherited Crown immunities from tortious liability were removed by statute.⁶ However, there remained an understanding that the nature and responsibilities of government precluded complete equality as to tortious obligations, that limitations upon liability are properly imposed at common law, and that the limitations owe

² *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1948] 1 KB 223 (Eng.).

³ See *Commonwealth v Mewett* (1997) 191 CLR 471 (Austl.); *Stovin v. Wise* [1996] AC 923 (HL) 946; *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 458 (Austl.); *Anns v. Merton London Borough Council* [1978] AC 728 (HL). The tort action of misfeasance in public office is different and for present purposes may be put aside, as it is an action that lies against a public authority but not a private person. Unlawful action under administrative law standards is one element of the tort of misfeasance, but the mental element sets a bar so high that liability is rarely established.

⁴ *Australian Constitution* s 75(iii).

⁵ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 556 (Austl.).

⁶ *Crown Proceedings Act 1988* (Cth) s 5(2) (Austl.); *Claims Against the Government and Crown Suits Act 1912* (Cth) s 2(1) (Austl.), and counterpart legislation in other States and the Territories.

something to principles of public law. The content of the limitations has been a live issue in Australia as in the United Kingdom.

At the least, a public authority should not be liable in tort for doing what parliament has authorised it to do. Thus Lord Diplock in *Home Office v. Dorset Yacht Co Ltd.*⁷ proposed that a court would only have jurisdiction to determine an action in negligence against a public authority (and impliedly there could only be a duty of care) if the act or omission complained of did not fall “within the statutory limits imposed upon the . . . authority’s discretion.”⁸ In *Dorset Yacht*, the House of Lords famously held that officers responsible for the care and custody of young boys who were trainees held at a Borstal authority owed a duty of care to members of the public who suffered loss or damage when the trainees escaped and caused damage to their property. An officer had a duty of care if he or she acted contrary to relevant instructions from the Home Office relating to control of the trainees, since such action would be ultra vires in the narrow sense. If the officer acted within the instructions, the court may still need to consider, without trespassing on the merits, whether the delegate acted ultra vires in that no “reasonable person could bona fide come to the conclusion”⁹ that the officer’s supervision, or the lack thereof, could have benefited the trainees as required by the instructions.

Lord Diplock appeared to refer not just to the *Wednesbury* standard, namely whether a decision is so unreasonable no reasonable authority could have reached it. The reference was to “the limits of the discretion”¹⁰ given by statute to the officer. This would cover the entire gamut of grounds of review, including all the principles of narrow and broad ultra vires, or abuse of power, such as failing to take into account relevant considerations, taking into account irrelevant considerations, acting for an improper purpose, and acting on the basis of no evidence.

A co-existing limitation upon the obligations of public authorities was introduced in *Anns v. Merton Borough Council*.¹¹ Lord Wilberforce introduced a two-stage test. First, one asks whether there is a prima facie duty of care based on foreseeability of harm. The second question is whether there are reasons of public policy for excluding or restricting any such prima facie duty. In most cases, one goes quickly to the second question. Lord Wilberforce distinguished between the area of policy-making by public authorities, where a duty of care should not be imposed, and the operational

7 [1970] AC 1004 (HL).

8 *Id.* at 1067–68.

9 *Id.* at 1068.

10 *Id.* at 1069.

11 *Anns v. Merton London Borough Council* [1978] AC 728 (HL).

area, where it is easier to impose a common law duty of care.¹² Accepting Lord Diplock's approach in *Dorset Yacht*, he held that if an inspector decided to exercise a discretion to inspect the foundations of a development, but acted "otherwise than in the bona fide exercise of any discretion under the statute," the inspector was exercising power at the operational level and had a duty of care to ensure that by-laws setting standards for the foundations were complied with.¹³ The policy/operational distinction often proved elusive in its practical application, attracted criticism, confinement, and ultimately rejection.¹⁴

Another way of dealing with the issue is to say that if an exercise of power involves policy-making, the court cannot adjudicate on those matters and, therefore, cannot reach a conclusion that the decision is ultra vires, with the consequence that there is no duty of care in exercising the power.¹⁵ This is consistent with the limits of ultra vires in judicial review: the court is not to trespass on the merits of the decision but should simply apply the grounds of review which are tests of its legality. A discretionary decision as to the allocation of scarce resources is a good example of the merits component of a decision.¹⁶

The deployment in the law of obligations in regard to negligence of administrative law concepts as to whether a decision is ultra vires did not garner universal enthusiasm. In *X (Minors) v. Bedfordshire County Council*,¹⁷ Lord Browne-Wilkinson expressly rejected a preliminary test of *Wednesbury* unreasonableness to determine whether a duty of care existed, preferring to focus on whether the exercise of the statutory discretion was unsuitable for judicial determination.¹⁸ However, the *Wednesbury* test apparently prevailed in *Stovin v. Wise*.¹⁹ A highway authority had omitted to exercise a statutory, discretionary power to require a landowner to remove a mound obscuring motorists' vision at an intersection where an accident occurred. By a narrow majority, the authority was held not to have a duty of care to undertake the remedial work.

Where a public authority takes positive action, its liability in tort is, in principle, the same as that of a private person but may be restricted by its statutory powers and duties. In *Stovin*, in the case of a failure to act, the

¹² *Id.* at 754.

¹³ *Id.* at 760.

¹⁴ See *Robinson v. Chief Constable of W. Yorkshire Police* [2018] AC 736 (HL) 774; *Stovin v. Wise* [1996] AC 923 (HL) 938–39, 951–52; *Murphy v. Brentwood Dist. Council* [1991] 1 AC 398 (HL) 438.

¹⁵ *X (Minors) v. Bedfordshire Cty. Council* [1995] 2 AC 633 (HL) 738–39.

¹⁶ See *id.* at 738 (quoting *Rowling v. Takaro Props. Ltd.* [1988] AC 473 (HL) 501).

¹⁷ *Id.*

¹⁸ *Id.* at 736.

¹⁹ *Stovin* [1996] AC at 953.

limitation question was posed by reference to irrationality. Lord Hoffmann asked whether, in the circumstances of the case, it would have been “irrational for the council not to have exercised the power, so that there was in effect a public law duty to act.” A second precondition to raising a duty of care of a public authority was that exceptional grounds existed for holding that the policy of the statute requires compensation to be paid to a person who suffers loss because the power was not exercised.²⁰ Applying the first requirement, it would not have been irrational for the council not to do the work. Therefore, the inaction was within the council’s discretion. There was no duty in public law to do the work, and there was no common law duty of care to do so. In any event, the second precondition, based on exceptional grounds, was not met, as a duty of care should not be imposed in relation to an exercise of a discretionary power involving budgetary considerations.

Stovin was not entirely consistent with *Dorset, Yacht*, and *Anns*. It at least raised a question as to whether the exceptional grounds precondition assumed that some pure policy-making is the subject of a duty of care.²¹ The meaning of irrationality could be gauged by referring to a judicial review decision of the House of Lords, *Council of Civil Service Unions v. Minister for the Civil Service*²² (“*QCHQ*”), decided after *Dorset Yacht*, and *Anns*, and before *Stovin*. Lord Diplock deployed the term “irrationality” as part of a threefold classification of grounds of review. Irrationality meant *Wednesbury* unreasonableness, which is established where a “decision . . . is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”²³

In Australia, the United Kingdom tests for qualifying the obligations of public authorities were followed, and also critiqued, and started to lose their attraction. The policy/operational distinction was criticised as being unhelpful, possibly to be relegated to the breach stage rather than the duty stage.²⁴ In *Sutherland Shire Council v Heyman*,²⁵ which introduced a general reliance test for a public authority’s duty of care, Judge Mason said that there is no compelling reason for confining a duty of care of a public authority to a situation where it acts in excess of power.²⁶ Moreover, where a public authority is under no duty to exercise a discretionary power, it may place itself in a position that attracts a duty of care which calls for the exercise of

²⁰ *Id.* (Hoffmann, L.J.) (Goff, L.J. and Jauncey, L.J., concurring) (Nicholls, L.J. and Slynn, L.J., dissenting).

²¹ *Id.*

²² *Council of Civil Serv. Unions v. Minister for the Civil Serv.* [1985] 1 AC 374 (HL).

²³ *Id.* at 410.

²⁴ *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 333–34 (Gummow J) (Austl.).

²⁵ *Sutherland Shire Council v Heyman* (1984) 157 CLR 424 (Austl.).

²⁶ *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 458 (Mason J) (Austl.).

the power because the plaintiff generally depends upon the authority to perform its functions with due care.²⁷ Disagreeing with Lord Wilberforce in *Anns*, Judge Mason said that a public authority may have a duty to give proper consideration to exercising its discretionary statutory power, enforceable by mandamus, although this is not of itself a foundation for a duty of care.²⁸

Administrative law standards remained a component of the test as to whether a duty of care arises. In *Pyrenees Shire Council v Day*,²⁹ Chief Justice Brennan agreed with Lord Hoffmann's irrationality test on the basis that if a decision not to exercise a statutory discretionary power were rational, then there should not be a common law duty of care to exercise the power.³⁰ The underlying reasoning is that the common law of negligence should not be inconsistent with the statute. This also means that where the circumstances enliven a duty at common law to exercise the statutory discretion, enforceable by a public law remedy such as mandamus, it is consistent with the legislative intention that there be a common law duty of care. It is not necessary to find a private statutory right to sue for breach of statutory duty. Further, according to Chief Justice Brennan, the standard of care is "no greater than the measure of the public law duty to exercise the power."³¹

The differing views of Judge Mason in *Heyman* and Chief Justice Brennan in *Pyrenees* reflected persisting disagreement within the Court as to the relationship between administrative law standards and the duty of care. Further, Judge McHugh expressly disagreed with the test of Lord Hoffmann in *Stovin*, taking the view that public law concepts of duty and private law notions of duty are informed by differing rationales.³² A statutory authority should not be immune from liability simply because its decision is *intra vires*, nor should it be in breach of a duty of care simply because its decision is *ultra vires*.³³ Specifically, Judge McHugh rejected the project of "directly incorporating public law tests into negligence."³⁴

Despite the view of Chief Justice Brennan, rejection of the importation of the *ultra vires* test dominated. In 2001, the High Court, by majority, overturned a long-standing discrete principle that an authority with power to construct and maintain highways could only owe a road user a duty of care in a case where it exercised its power and had no duty of care in a case of

²⁷ *Id.* at 464.

²⁸ *Id.* at 465.

²⁹ *Pyrenees Shire Council* (1998) 192 CLR 330 (Austl.).

³⁰ *Id.* at 346 (Brennan CJ).

³¹ *Id.* at 347–48 (Brennan CJ).

³² *Crimmins v Stevedoring Indus Fin Comm* (1999) 200 CLR 1, 35 (McHugh J) (Austl.).

³³ *Id.* at 35–36 (agreeing with the view expressed by Doyle QC (as he then was) in "Tort Liability for the Exercise of Statutory Powers," in P. D. FINN, *ESSAYS ON TORT LAW* 235 (P. D. Finn ed. 1989)).

³⁴ *Id.* at 36.

non-feasance.³⁵ In *Brodie v Singleton Shire Council*,³⁶ highway authorities lost their special immunity for non-feasance and were held to have a duty of care to road users to take reasonable steps within a reasonable time to address a risk, including with regard to latent dangers.³⁷ By that stage, a general test for the existence in a novel case of a duty of care was settled in the United Kingdom based on what is fair, just, and reasonable.³⁸ The High Court rejected that test.³⁹ Coherence in the law required that a duty in the law of obligations should be compatible with other legal duties, including those to be observed in exercising a statutory power.⁴⁰ Therefore, a duty of care should not be owed by a public authority or its officers so as to create an obligation that conflicted with existing duties in exercising statutory power.⁴¹

The test of whether a public authority owed a novel duty of care evolved and depended upon the presence of a loose group of salient features. These are: the foreseeability of harm to the plaintiff; the extent of the authority's power or control over the risk of harm to the plaintiff; whether the plaintiff is vulnerable in the sense of reasonably being able to protect himself or herself against the harm in question; the authority's knowledge of the risk of harm to the plaintiff; whether a duty would encroach upon the authority's core policy making or quasi-legislative functions; and whether a duty would be incompatible with the terms, purpose, or scope of the statute conferring the power exercised; or whether the case is concerned with pure economic loss and the application of principles in that field deny the existence of a duty.⁴² The last feature, along with the element of control, has been directly operative in excluding a duty of care where the intervention of the law of obligations is incompatible with the authority's obligations and relationship with the plaintiff.⁴³

III. IPP REVIEW

In 2002, a panel was established to review the law of negligence in Australia. When addressing the tort liability of public authorities, the panel

³⁵ *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 513 (Austl.).

³⁶ *Id.* at 514.

³⁷ *Id.* at 513.

³⁸ *Caparo Indus. PLC v. Dickman* [1990] 2 AC 605 (HL) 617–18.

³⁹ *Sullivan v Moody* (2001) 207 CLR 562, 579–80 (Austl.).

⁴⁰ *Id.* at 579–81.

⁴¹ *Id.* at 582.

⁴² Key salient features in a summary by Allsop P. in *Caltex Refineries (Qld) Pty Ltd v Stavara* (2009) 75 NSWLR 649, 676 (Austl.) (referring to High Court development of the features, in *Crimmins v Stevedoring Indus Fin Comm* (1999) 200 CLR 1, 39 (Austl.)). See also *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 254, 261–62, 266 (Austl.); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 596–97, 577–78 (Austl.).

⁴³ *Sullivan* (2001) 207 CLR at 582; *Graham Barclay Oysters* (2002) 211 CLR at 596–600.

focussed on a perceived need to deal with *Brodie*,⁴⁴ which had exposed highway authorities to liability for non-feasance. Its report, the *Ipp Review*, recommended statutory regulation of the liability of public and other authorities. The discussion in the *Ipp Review* referred generally to the need for a “policy defense” and particularly discussed *Stovin* in that context. However, only Recommendation 39 was in terms a “policy defense,” in that it expressly referred to policy-making decisions. This recommendation weaved in a *Wednesbury* test. Other recommendations did not specifically refer to policy-making decisions.

The *Ipp Review* specifically recommended that roads and park authorities should be free of any duty of care when they make budgetary decisions about management of roads and parks, since proper performance of their functions may require them to make facilities available in the public interest rather than withdraw them for fear of liability in negligence.⁴⁵ Having accepted this, the same qualified immunity should be extended to other public authorities, such as prison authorities and air-traffic control authorities when performing their public functions. While a distinction between public and private functions could not be attempted, the limitation upon liability should be available in relation to any function requiring the balancing of the interests of individuals against a public interest, or the taking into account of competing demands on the authority’s resources. A public authority’s decision about expending resources on maintaining its fleet of vehicles to proper standards would not be an exercise of a public function. The limitation upon liability should be available not just to public authorities but to any entity exercising or failing to exercise a public function.⁴⁶ This would cover, for example, corporations exercising or failing to exercise public functions outsourced to them by government.

This reasoning prompted the central recommendation that Australia should “follow the lead” of the United Kingdom in *Stovin*. An exercise or non-exercise by a public or other authority of a public function based on a “policy decision,” being a decision about the allocation of scarce resources or financial, economic, political, or social considerations as to the public interest, does not sound in liability unless the decision was so unreasonable that no reasonable decision-maker in the defendant’s position could have made it.⁴⁷ This was not to negate a duty of care, but rather to lower the standard of care required in the exercise of public functions, to a threshold defined by the administrative law standard of *Wednesbury*

⁴⁴ DAVID A. IPP ET AL., REVIEW OF THE LAW OF NEGLIGENCE: FINAL REPORT 157 (Commonwealth of Australia, Canberra, 2002) [hereinafter IPP REVIEW].

⁴⁵ *Id.* at 155.

⁴⁶ *Id.* at 156–57.

⁴⁷ *Id.* at 157.

unreasonableness.⁴⁸ There was a degree of ambiguity in this recommendation. The formal recommendation was that the limitation was only to apply where an authority actually made a decision, and the decision was based substantially on resource allocation constraints or some other political or policy consideration.⁴⁹

This was not the only recommendation for limiting the liability of public and other authorities. As mentioned above, the common law already required that in order to establish a novel duty of care certain “salient features” must be present.⁵⁰ One is that the imposition of the duty would not impose upon a public authority liability with respect to the exercise of core policy-making functions.⁵¹ Other salient features are that no duty of care is imposed in relation to decisions which involve or are dictated by financial, economic, social, or political factors or constraints,⁵² and that the duty of care be compatible with the terms, purpose, or scope of the statute conferring the power.⁵³ The *Ipp Review* referred to the last mentioned salient feature and recommended that it be made a statutory precondition to liability of a public authority for tortious exercise or non-exercise of statutory public functions.⁵⁴

By time of the *Ipp Review*, United Kingdom courts had reiterated the doubts expressed by Lord Hoffmann in *Stovin* as to the adequacy of the policy-operational distinction.⁵⁵ The theme in *X (Minors)* of the clash of public law concepts introduced into the law of negligence had also been taken up by other members of the House of Lords. It was recognized⁵⁶ that *Stovin* was confined to the issue of liability in a case of an omission or non-feasance by a highway authority, not positive conduct, and that the common law treats omissions differently (as Lord Hoffmann had noted in *Stovin*).⁵⁷ The mere fact that a public authority exercised a discretionary statutory power was not

⁴⁸ *Id.* at 157.

⁴⁹ *Id.* at 158.

⁵⁰ See *supra* text accompanying notes 42, 43.

⁵¹ See *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 393–94 [182] (Austl.); *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 500 (Austl.).

⁵² *Sutherland Shire Council* (1985) 157 CLR at 469.

⁵³ See *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649, 676 [102]–[103] (Austl.); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 577–78 [84] (McHugh J), 597–80 [146] (Gummow J) (Austl.); *Sullivan v Moody* (2001) 207 CLR 562, 579–80 [50] (Austl.).

⁵⁴ IPP REVIEW, *supra* note 44, Recommendation 41, at 160 [10.36]–[10.37]. Not considered here is the *Ipp Review* recommendation with regard to breach of statutory duty, dealt with in Recommendation 42, at 163.

⁵⁵ *Barrett v. Enfield London Borough Council* [2001] 2 AC 550, 571–72 (HL); *Phelps v. Hillingdon London Borough Council* [2001] 2 AC 619, 658, 665, 673–74 (HL). Division had also emerged as to outcomes of the application to a public authority of the fair, just, and reasonable test: *Barrett* [2001] 2 AC at 586.

⁵⁶ *Barrett* [2001] 2 AC at 586.

⁵⁷ *Stovin v. Wise* [1996] AC at 953 (HL).

enough to preclude a duty of care.⁵⁸ In a case of alleged negligence of a local authority as to the manner in which it exercises its statutory duty or power, there was no preliminary test based on the *Wednesbury* standard. Rather, attention was given to whether imposing a duty of care would interfere with performance by the public authority of its statutory duty or discharge of its statutory power,⁵⁹ and whether the decision was unsuitable for judicial determination.⁶⁰

Soon after the *Ipp Review*, Lord Hoffmann, the author of the rationality test in *Stovin*, clarified the limited operation it was intended to have in *Gorringe v. Calderdale Metropolitan Borough Council*.⁶¹ First, *Stovin* reaffirmed the common law principle that where the empowering statute does not on its proper construction give a private right of action, it cannot generate a duty of care in private law.⁶² Secondly, the discussion of irrationality in *Stovin* was only in the alternative, or obiter, referring to what would have been the nature of the duty if there had been a duty of care. The obiter answer was that the authority would not have been liable. It would not have been irrational in a public law sense not to exercise the statutory power to do the work.⁶³ So characterised, irrationality is a test of the standard of care, not a test as to whether a duty of care exists. The obiter in *Stovin* raised a test of irrationality only with regard to non-feasance, where an authority omits to exercise a statutory power or makes a decision to not exercise the power.⁶⁴

Nonetheless the *Ipp Review*'s recommendation to follow the lead of *Stovin*, understanding *Stovin* to have introduced a general rationality threshold for tortious liability in respect of the exercise of a function involving a "policy decision" was implemented. Legislation, described below, was drafted to give that understanding statutory force. Irrationality meant acting in a manner that was *Wednesbury* unreasonable. The *Wednesbury* test was to apply not just to highway authorities but to all public or other authorities. It was to apply not just to non-feasance but to any exercise of a statutory power. The recommendations of the *Ipp Review* did not just follow *Stovin* but extended the dictum in *Stovin* to cover a vast field of administrative action and inaction, given that a policy decision cannot

⁵⁸ *Barrett* [2001] 2 AC at 586; *Phelps* [2001] 2 AC at 653.

⁵⁹ *Phelps* [2001] 2 AC at 653.

⁶⁰ *Barrett* [2001] 2 AC at 586.

⁶¹ *Gorringe v. Calderdale Metro. Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057 (HL).

⁶² *Id.* at [23], [25]–[26]; see also *Michael v. Chief Constable of S. Wales Police* [2012] EWCA Civ 981 [111] (Eng.).

⁶³ *Gorringe* [2004] UKHL 15, [2004] 1 WLR 1057 [26].

⁶⁴ *Gorringe* was a case of nonfeasance by failure to paint a "Slow" sign on a hill on a roadway. *Id.* The council had not made the road more dangerous by some positive act. *Id.* It was not liable for injury to a motorist who had an accident when she stopped suddenly at the crest of the hill. *Id.*

readily be distinguished from other decisions that might be described as operational.

IV. STATUTORY LIMITATION OF LIABILITY OF PUBLIC AUTHORITIES

The recommendations of the *Ipp Review* relating to public and other authorities were implemented, in whole or in part but not in a uniform manner, in all but two jurisdictions in Australia.⁶⁵ In New South Wales, Part 5 of the *Civil Liability Act 2002* (NSW) (“*CL Act*”) expressly and directly limited the civil liability of public or other authorities, save for liability for certain intentional torts and certain claims covered by a statutory scheme.⁶⁶ The expression “public or other authority” was carefully defined.⁶⁷ The reform implemented the recommendation of the *Ipp Review* that “other authorities,” being private sector entities exercising outsourced governmental functions, should enjoy the limitation upon liability.

A. *Non-feasance*

Section 45 of the *CL Act* gives road authorities immunity from liability in respect of non-feasance.⁶⁸ This is the answer to *Brodie*. Section 44(1) is also important with regard to non-feasance and applies to any public authority or other authority. The authority is not liable in proceedings for civil liability to the extent that the liability is based on the authority’s failure to exercise, or to consider exercising, a 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. A function of regulating an activity includes a power to issue a license, permit or other authority in respect of an activity, or to register or authorize a person in connection with an activity.⁶⁹

To require that the authority “could not have been required to exercise the function in proceedings instituted by the plaintiff” appears to mean that the plaintiff could not have obtained mandamus in judicial review

⁶⁵ *Civil Liability Act 2003* (Qld) ch 2 pt 3 div 1 (Austl.); *Civil Liability Act 2002* (NSW) (“*CL Act*”) ss 3B, 3C, 40–46 (Austl.); *Civil Liability Act 2002* (WA) pt 1C (Austl.); *Civil Liability Act 2002* (Tas) pt 9 (Austl.); *Civil Law (Wrongs) Act 2002* (ACT) ss 108–114 (Austl.); *Wrongs Act 1958* (Vic) pt XII (Austl.). In South Australia and the Northern Territory, the IPP REVIEW recommendations were not implemented.

⁶⁶ *CL Act* s 3B (workers compensation and in part motor accidents).

⁶⁷ *CL Act* s 41. The definitions of “public authority” in other States and Territories differ: *Wrongs Act 1958* (Vic) s 79 (Austl.).

⁶⁸ *CL Act* s 45.

⁶⁹ *CL Act* s 44(2).

proceedings to compel the authority to exercise the function. Section 44 identifies a true non-feasance case at common law. A failure by a consent authority to attach conditions to a grant of development consent has been held not to be a failure to which Section 44 applies.⁷⁰ In that context, the “function” of the consent authority is simply the function of assessing and determining the development application. The power to impose conditions on the consent is referred to in the same section as the power to grant or refuse consent and cannot be treated as a separate power where non-feasance may occur.⁷¹ Thus, where a consent authority granted development consent and imposed conditions but not a condition of the kind claimed to be required, there was no non-feasance, and section 44 did not apply.⁷²

Section 44 works with another limitation applying generally (introduced to implement general recommendations of the *Ipp Review* not directed specifically to public authorities). This is that a defendant does not owe a duty of care to another person to warn of an obvious risk to the plaintiff, where the risk in the circumstances would have been obvious to a reasonable person in the position of that person.⁷³

Section 44 makes the availability of a remedy in public law a condition for the liability of a public or other authority in private law, and, hence, exposure to the private law remedy of damages. In judicial review proceedings, a public authority can be compelled to perform a statutory duty or to exercise a discretionary power whose exercise has been enlivened by the issue of mandamus or a mandatory injunction. Thus, in case of failure to act, the availability of a public law remedy is a precondition to imposing liability in negligence upon a public authority.

B. “Policy” Defense

Sections 42 and 43A of the *CL Act* are the provisions properly described as a “policy defense.”⁷⁴ Section 42 states “principles” to be applied, rather than setting a standard of conduct. Section 42(b) provides that it is a “principle” that the general allocation by an authority of financial and other

⁷⁰ *Bankstown City Council v Zraika* (2016) 94 NSWLR 159, 180–81 [107] (Austl.).

⁷¹ *Id.* at [96].

⁷² *Id.* at [98]–[99].

⁷³ *CL Act* ss 5H, 5F.

⁷⁴ Section 43(2) provides that an act or omission of a public or other 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. *CL Act* s 43(2). The impact of implementation of the *Ipp Review* recommendations in relation to actions for breach of statutory duty, in particular, the impact of section 43, is not considered here. Nor is further consideration given to *CL Act* section 46, which provides that a positive decision by a public authority to exercise or not to exercise a function does not of itself indicate a duty to exercise the function in particular circumstances or in a particular way. *CL Act* s 46.

resources is “not open to challenge.”⁷⁵ More generally under section 42(a), it is a principle that in determining whether there is a duty of care or a breach of a duty of care, the functions required to be exercised by an authority are limited by the financial and other resources reasonably available to the authority for exercising those functions.⁷⁶

For example, the operation of an airport is a function limited by the financial and other resources reasonably available to the airport authority. As a consequence, the local council, which owned and controlled Kempsey Aerodrome, owed no duty of care to the owner of an aircraft that collided with a kangaroo when landing. The principles in section 42(a) and (b) were engaged. Any standard of care was not breached for failure to build a 1.8 metre kangaroo-proof fence around the airport boundary or failure to warn users of the aerodrome that kangaroo incursions had increased to dangerous levels.⁷⁷

Section 43A was inserted into the *CL Act* later, in 2003.⁷⁸ Although the *CL Act* was not intended to create any cause of action,⁷⁹ section 43A assumes that there is a duty of care in exercising some statutory powers. Section 43A(3) makes *Wednesbury* unreasonableness a precondition to establishing liability in negligence. Section 43A applies where liability in proceedings is based on a public or other authority’s exercise of, or failure to exercise, a “special statutory power.” A special statutory power is defined as a power conferred by or under a statute and of a kind that persons generally are not authorized to exercise without specific statutory authority. This is a broad test, which captures most statutory powers, but probably not those that confer a capacity to act similar to a capacity of a natural person. Section 43A provides that 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

⁷⁵ *CL Act* s 42(b). This covers functions that public or other authorities are required to exercise and extends to functions exercised in response to requirements imposed by the needs of the community under local government legislation: *Kempsey Shire Council v Five Star Med Centre Pty Ltd* [2018] NSWCA 308 (Austl.). Counterpart provisions to *CL Act* section 42 are: *Civil Liability Act 2003* (Qld) s 35 (Austl.); *Civil Liability Act 2002* (WA) s 5W (Austl.); *Civil Liability Act 2002* (Tas) s 38 (Austl.); *Civil Law (Wrongs) Act 2002* (ACT) s 110 (Austl.); *Wrongs Act 1958* (Vic) s 83 (Austl.).

⁷⁶ *CL Act* s 42(a).

⁷⁷ *Kempsey* [2018] NSWCA at [55]–[65].

⁷⁸ The insertion of the additional section appears to have been triggered by the decision in *Presland v Hunter Area Health Serv* [2003] NSWSC 754 (Austl.). See *Precision Prods (NSW) Pty Ltd v Hawkesbury City Council* [2008] NSWCA 278 [167] (Austl.).

⁷⁹ *MM Constrs (Aust) Pty Ltd v Port Stephens Council* (2012) 191 LGERA 292, 346–47 [214] (Basten JA) (Austl.).

exercise, its power. In a case of a special statutory power to prohibit or regulate an activity, section 43A(3) applies in addition to section 44.⁸⁰

Section 43A was based on the reasoning in the *Ipp Review*, apparently intended to give statutory form to *Stovin*.⁸¹ Since section 43A applies to any act or omission by a public authority that involves an exercise of, or failure to exercise, a special statutory power, and adopts the *Wednesbury* test, the ambit of section 43A is broader than the principles in play in *Stovin* or *Gorringe*. *Stovin* was concerned with whether there was a duty of care, but section 43A assumes that there is a duty of care and sets a standard of care, of not acting *Wednesbury* unreasonable. Later, in *Gorringe*, irrationality is characterized not as a threshold test for the existence of a duty of care but as part of the standard of care and, hence, an indicator of breach of duty.⁸² Perhaps it was a fluke that section 43A, enacted before *Gorringe* was decided, set a standard of care instead of attempting to regulate the generation of a duty of care. Section 43A goes further than *Stovin* in another respect. The discussion of irrationality in *Stovin* was confined to the context of non-feasance. Section 43A(3) applies to acts or omissions. Moreover, *Stovin* and *Gorringe* spoke of irrationality. Section 43A contains a *Wednesbury* test, rather than the more general concept of irrationality which would demand a higher standard of conduct.

Section 43A has been described as conferring a qualified immunity on an authority, and at the same time is about the standard of care rather than the duty of care.⁸³ Once it is established that the decision-maker exercised a special statutory power and that its liability is “based on” that power, the remaining question is the alteration, by force of section 43A, of the applicable standard of care. In a case where section 43A is raised, meeting the *Wednesbury* hurdle may appear to be the weakest link in the plaintiff’s case. The Court may be encouraged and agree to focus on section 43A, even though it has not yet formed a view as to whether the authority has a novel duty of care.⁸⁴ The dynamics of a tort action against a public authority are transformed so that the standard of care displaces the duty of care as the centerpiece of the proceedings and interrogation of that standard imports administrative law standards. Thus, section 43A presented a bar to the proceedings in *Precision Products (NSW) Party Ltd v Hawkesbury City*

⁸⁰ *CL Act* s 43A(4); *Bankstown City Council v Zraika* (2016) 94 NSWLR 159 (Austl.).

⁸¹ Compare *Civil Liability Act 2002* (WA) s 5X (Austl.), with *Civil Liability Act 2003* (Qld) s 36 (Austl.) (containing no exact counterpart in the other jurisdictions that implemented IPP REVIEW recommendations).

⁸² *Gorringe v. Calderdale Metro Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057, 1065–66 (HL); see also *Curtis v Harden Shire Council* [2014] 88 NSWLR 10, 71 [272] (Basten, JA) (Austl.).

⁸³ *Road & Mar Servs v Grant* [2015] NSWCA 138 [57] (Austl.).

⁸⁴ E.g., *Zraika* (2016) 94 NSWLR at 180–81 [107].

Council.⁸⁵ The Court of Appeal held that the issue of a clean-up notice, although it was disproportionate to the pollution incident and stopped the recipient's business, was conduct that was not *Wednesbury* unreasonable. The standard of care was not breached and therefore the proceedings were precluded by section 43A(3).

Section 43A expressly adopts the language of the *Wednesbury* test. Applying ordinary principles of interpretation, it would be erroneous to place a gloss on the statutory provision, interpreting the test as one of "irrationality."⁸⁶ However, after living with section 43A for ten years, the Court of Appeal has balked at applying the strict administrative law standard of *Wednesbury* to limit the tort liability of public authorities. In *Curtis v. Harden Shire Council*,⁸⁷ a motorist was killed when she lost control of her vehicle on loose gravel on a section of roadway that was being resurfaced. It was accepted that the local council with the function of road maintenance owed a duty of care to road users in carrying out maintenance work, including the placement of appropriate warning signs. This was a case of misfeasance, the responsible council officer having made a decision that a warning sign was not needed. Since the council's powers with respect to road maintenance were "special statutory powers," section 43A set the standard of care.

The Court of Appeal acknowledged that the tests in section 43A had its origins in the *Wednesbury* case, with a veiled comment that the difficulties experienced in applying the test to public law must be magnified when the test is transported to private law.⁸⁸ The Court noted that while judicial review cases "may inform"⁸⁹ consideration of the application of section 43A, and that the terms of section 43A "are said to find inspiration"⁹⁰ in the *Wednesbury* ground of review in administrative law, the remedies in each context are quite different.⁹¹ In the context of judicial review, *Wednesbury* provides a basis for intervention to declare an exercise of power invalid, while in the context of a negligence action the power is assumed to have been exercised and the remedy is liability to pay damages. For the purposes of tort law, it is immaterial whether the exercise of power was valid or invalid.

Ultimately, in *Curtis*, the Court did not impose the high standard of the *Wednesbury* test applied in judicial review. The primary judge had asked

⁸⁵ *Precision Prods (NSW) Pty Ltd v Hawkesbury City Council* (2008) 74 NSWLR 102, 142–79 (Austl.).

⁸⁶ *Allianz Austl Ins Ltd v Roads & Traffic Auth of NSW* [2010] NSWCA 328, 388 (Austl.).

⁸⁷ *Curtis* [2014] 88 NSWLR 10; *see also* [2015] HCATrans 14 (the High Court refused special leave to appeal).

⁸⁸ *Curtis* [2014] 88 NSWLR at 14 [5] (Bathurst, CJ) (Austl.); *see also id.* at 68 [257] (Basten, JA).

⁸⁹ *Id.* at 14 [6] (Bathurst CJ).

⁹⁰ *Id.* at 69 [262] (Basten JA).

⁹¹ *Id.*

whether minds might differ as to the need for additional signage, and on answering that question in the affirmative, concluded that the *Wednesbury* test was not met. Applying section 43A, the council had not failed to meet the standard of care. Allowing the appeal, the Court of Appeal did not ask whether the council's failure to install the signs was so unreasonable no reasonable authority could have so acted. Instead, the Court asked whether the council *could* properly consider its exercise of power was a reasonable exercise of power.⁹² That is, within the range of possible opinions as to what would be a reasonable action or omission, is it the case that no public authority properly considering the issue could place the decision within that range? After all, section 43A(3) uses the words "could properly consider the act or omission to be . . . reasonable." While *Wednesbury* poses an objective standard for a court to apply in judicial review, the awkward attempt to achieve a statutory formulation left open an interpretation of the test as a question of whether any authority could reasonably regard the act or omission as a reasonable exercise or failure to exercise the power.

Instead of forming its own view, the court is to apply the view of an objective reasonable authority, probably one with similar functions similar to those of the defendant council. Justice Basten in *Curtis* suggested that this test is like the fair-minded observer test applied when a court asks in judicial review whether apprehended bias has been established.⁹³ However, the fair-minded observer is a lay observer who has only a certain level of information as to the circumstances and the applicable law. By contrast, the objective public authority observer is familiar with exercising the function, and indeed is an expert in that regard.

This is dramatically illustrated in *Curtis*, in that the Court admitted evidence from authority officers and other experts as to what they thought was a reasonable approach to the issue of signage. The traffic control plan the council officer selected for the section of road was appropriate, but according to the manual that plan required a slippery road sign to remain in place until loose aggregate had been removed, along with either a reduce speed sign or a lower speed limit. The responsible officer's superior officer, who no longer worked for the council, gave evidence that the decision to omit the signs made no sense. The view of the former superior officer prevailed over other expert evidence.

The upshot in the appeal in *Curtis* was that the plaintiff satisfied the onus of establishing that no authority could have considered reasonable the decision not to provide the signage. Therefore, the standard in section 43A was not met and the council had breached the standard of care.

⁹² *Id.* at 14 [6] (Bathurst CJ); *see also id.* at 72 [277] (Basten JA).

⁹³ *Id.* at 72 [278].

Even the *Curtis* test of the objective reasonable authority seems to be controversial, at least as to its application in differing cases. In *Bankstown City Council v Zraika*,⁹⁴ the primary judge sought to apply a test of the “hypothetical responsible authority” in order to determine whether a council breached the section 43A standard of care by failing to impose a condition claimed to be appropriate in a development consent. This condition would have required different signage at an intersection, less conducive to an accident. That was the wrong test.⁹⁵ Confident that it was adopting the *Curtis* test, the Court of Appeal held that the primary judge had erred because it had not been shown that no reasonable council could properly have approved the development application without imposing the condition claimed to be appropriate.⁹⁶ Even if the council owed a duty of care, there was no breach of the duty, applying the section 43A standard.⁹⁷

The outcome of application of the *Curtis* objective reasonable authority test will be unpredictable, turning upon the evaluation of expert evidence. Moreover, the test seems far removed from the *Wednesbury* test. In a judicial review action evidence is ordinarily confined to the material that was before the decision-maker when the decision was made, and only in an exceptional case is expert evidence admitted to establish the *Wednesbury* ground.⁹⁸ The section 43A test is no longer an administrative law standard of conduct.

V. CONCLUSION

It is not surprising that the awkward intruder, section 43A, has been criticized.⁹⁹ If *Stovin* had indeed provided the lead, a more general and lower standard of irrationality could have been adopted in order to limit the liability of public authorities, rather than the *Wednesbury* standard. In judicial review, the *Wednesbury* ground is rarely established. Other grounds of judicial review, which are more readily established, are not in terms framed as tests of irrationality or unreasonableness, but in substance are concerned with it. Examples are failing to take into account relevant considerations, taking into account irrelevant contains and acting on the basis of no evidence. These are also standards that might have contributed to setting a standard of care that is to operate as a threshold for bringing negligence proceedings against a public authority.

⁹⁴ *Bankstown City Council v Zraika* (2016) 94 NSWLR 159, 182 [111] (Austl.).

⁹⁵ *Id.* at 182–83 [116].

⁹⁶ *Id.* at 185 [127].

⁹⁷ *Id.*

⁹⁸ *Australian Retailers Ass'n v Reserve Bank of Austl* (2005) 148 FCR 446, 566 (Austl.).

⁹⁹ Justine Bell-James & Kit Barker, *Public Authority Liability for Negligence in the Post-Ipp Era: Sceptical Reflections on the “Policy Defence”*, 40 MELB. U. L. REV. 1, 34–35 (2016); Mark Aronson, *Government Liability in Negligence*, 32 MELB. U. L. REV. 44, 76–81 (2008).

In any event, since 2013, another test of reasonableness or rationality has emerged that may in time result in the relaxation or replacement of the *Wednesbury* test or simply leave it redundant. This is the test in *Minister for Immigration and Citizenship v Li*.¹⁰⁰ By a presumption of law, any statutory discretionary power is taken to be required to be exercised reasonably.¹⁰¹ This is a legal standard of reasonableness indicated by the true construction of the statute and has support in the common law predating *Wednesbury*.¹⁰² An exercise or failure to exercise a power fails the *Li* unreasonableness test if it “lacks an evident and intelligible justification.”¹⁰³ In *Li* itself, a tribunal’s refusal to grant an adjournment to an applicant was held to be *Li* unreasonable and therefore invalid.

Li left confusion in its wake as to how this apparently more relaxed standard of reasonableness differed from *Wednesbury*, in particular since two members of the Court in *Li* concluded that it was the *Wednesbury* standard that had been breached, while maintaining that *Wednesbury* is established only in a rare case.¹⁰⁴ The *Wednesbury* standard has sometimes also been described as a product of statutory implication, but now a decision-maker is required to meet the implied *Li* standard of reasonableness as well. It seems unlikely that two standards of reasonableness will persist.¹⁰⁵ It will take time for the initial caution¹⁰⁶ and uncertainty¹⁰⁷ in the application of *Li* unreasonableness to subside and for the fate of *Wednesbury* unreasonableness to be resolved.

It was only after the *Ipp Review* reforms that the High Court has articulated that *Wednesbury* was neither the starting point nor the end point for the standard of reasonableness.¹⁰⁸ This is not lost on the Court of Appeal as it struggles to apply section 43A.¹⁰⁹ The *Wednesbury* test enshrined in section 43A of the *CL Act* already resembles an artifact of an earlier era of administrative law, washed up on the shores of a private law domain, wary of uncontrolled tort liability of public authorities. The current position is that

¹⁰⁰ *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332, 349–52 (Austl.).

¹⁰¹ *Id.* at 362, 363–64.

¹⁰² *Id.* at 363.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 351–52, 373, 376–78.

¹⁰⁵ See *Minister for Immigration & Border Prot v SZVFW* (2018) 92 ALJR 713, 740 [135] (Austl.) (Edelman J) (stating that there is only one test of reasonableness).

¹⁰⁶ Compare *Minister for Immigration & Border Prot v Singh* (2014) 231 FCR 437, 445, 450 (Austl.), and *Huynh v Minister for Immigration & Border Prot* (2015) 232 FCR 497, 529 (Austl.), with *Minister for Immigration & Border Prot v Stretton* (2016) 237 FCR 1, 9, 72, 31–32 (Austl.) and *Minister for Immigration & Border Prot v Eden* (2016) 240 FCR 158, 180 (Austl.).

¹⁰⁷ See *SZVFW* (2018) 92 ALJR 713 (reversing Full Federal Court decision involving an evaluative decision as to whether *Li* unreasonableness standard was met).

¹⁰⁸ *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332, 364 (Austl.).

¹⁰⁹ *Bankstown City Council v Zraika* (2016) 94 NSWLR 159 (Austl.).

where a public authority's act or omission is not invalid for *Wednesbury* unreasonableness but is invalid for *Li* unreasonableness, or on the basis of some other ground of review, the remedies of administrative law will be available, but the authority will not have failed to meet the required standard of care in tort law.

The United Kingdom approach now, consolidating what Lord Hoffmann said in *Gorringe*, is that public authorities should be subject to the same general principles of the common law of negligence as private individuals without broad limitations upon liability justified by reference to public policy.¹¹⁰ There is a limitation, which is expressed in a more precise way. A duty of care may be excluded if inconsistent with the statutory scheme under which the public authority exercises power.¹¹¹

This is not far removed from the approach in Australia of identifying a novel duty of care. A duty of care is not established if it would impose upon a public authority liability with respect to the exercise of core policy-making functions or decisions that involve or are dictated by financial, economic, social, or political factors or constraints. This consideration is part of the salient feature requirement that a duty of care be compatible with the terms, purpose, or scope of the statute conferring the power.¹¹² Limitations upon the tort liability of public authorities already exist in the principles governing the imposition of a duty of care. Statutory limitations imposed via a standard of care, such as section 43A, may be not only awkward but also unnecessary intruders in the private law of obligations.

¹¹⁰ *Poole Borough Council v. GN* [2019] UKSC 25, [64]–[65], [75] (Eng.); *Robinson v. Chief Constable of W. Yorkshire Police* [2018] 2 AC 736, 736–748 [31]–[42] (Eng.).

¹¹¹ *Poole Borough Council* [2019] UKSC at [64]–[65], [75].

¹¹² *See supra* notes 42, 43, 51–53 and accompanying text.