# Common Law Division
# Supreme Court
## New South Wales

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| Case Name: | **Doyle's Farm Produce Pty Ltd as trustee for Claredale Family Trust v Murray Darling Basin Authority** |
| Medium Neutral Citation: | [2021] NSWSC 369 |
| Hearing Date(s): | 9 April 2021 |
| Date of Decision: | 13 April 2021 |
| Jurisdiction: | Common Law |
| Before: | Adamson J |
| Decision: | (1) Strike out the following paragraphs of the defence to the further amended statement of claim:<br>a. paragraph 6A(c);<br>b. paragraph 6B(c);<br>c. paragraph 6C(c);<br>d. paragraph 86(b)-(l);<br>e. paragraph 187, from the words "and in further answer" to the end of the paragraph;<br>f. paragraph 190, from the words "and in further answer" to the end of the paragraph;<br>g. paragraph 192, from the words "and in further answer" to the end of the paragraph;<br>h. paragraph 195, from the words "and in further answer" to the end of the paragraph;<br>i. paragraph 197, from the words "and in further answer" to the end of the paragraph;<br>j. paragraph 198A(g);<br>k. paragraph 202, from the words "and in further answer" to the end of the paragraph;<br>l. paragraph 203, from the words "and in further answer" to the end of the paragraph; |

m. paragraph 204, from the words “and in further answer” to the end of the paragraph; and

n. paragraph 205, from the words “and in further answer” to the end of the paragraph.

(2) Order the defendants to pay the plaintiffs’ costs of the notice of motion filed on 14 December 2020.

(3) Make no order as to the costs of the Attorney General for the State of South Australia.

Catchwords:

NEGLIGENCE — Duty of care — Public authorities — Statutory construction — Whether the Murray Darling Basin Authority, its delegates or the Commonwealth is a “public or other authority” within the meaning of s 41 of the *Civil Liability Act 2002* (NSW)

CIVIL PROCEDURE — Interlocutory proceedings — Summary determination of the question of statutory construction — Give effect to the overriding purpose of *Civil Procedure Act 2005* (NSW), s 56 — Need to read general statements in judgments by reference to the circumstances of the case

CIVIL PROCEDURE — Originating process — Pleading discloses no reasonable defence — Meaning of “no reasonable defence” — Order to strike out part of a pleading under the Uniform Civil Procedure Rules 2005 (NSW), r 14.28

CONSTITUTIONAL LAW — Commonwealth and State relations — Alleged inconsistency of laws — General principles – Unnecessary to decide

Legislation Cited:

*Civil Liability Act 2002* (NSW), ss 3, 4, 5M, 5N, 6P, 26L, 41, 42, 43A, 44, 46
Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW)
*Civil Liability Amendment Act 2003* (NSW)
Civil Liability Amendment Bill 2003 (NSW)
*Civil Procedure Act 2005* (NSW), Pt 10, s 56
Commonwealth Constitution, s 109
*Crown Proceedings Act 1988* (NSW), s 3
*Interpretation Act 1987* (NSW), ss 5, 12, 13, 15, 21, 34, 65, 66
*Judiciary Act 1903* (Cth), ss 64, 78B, 79
*Local Government Act 1995* (NSW), Dictionary
*Patents Act 1952* (Cth), ss 125, 132
Uniform Civil Procedure Rules 2005 (NSW), rr 14.28,

28.2, 42.1
*Water Act 2007* (Cth), ss 18E, 171, 176, 199
*Water Management Act 2000* (NSW)

Cases Cited:

*AGU v Commonwealth of Australia (No 2)* (2013) 86 NSWLR 348; [2013] NSWCA 473
*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27; [2009] HCA 41
*Botany Municipal Council v Federal Airports Authority* (1992) 175 CLR 453; [1992] HCA 52
*DRJ v Commissioner of Victims Rights (No 2)* [2020] NSWCA 242; (2020) 383 ALR 517
*Ekes v Commonwealth Bank of Australia* [2014] NSWCA 336; (2014) 313 ALR 665
*General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125; [1964] HCA 69
*Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8
*Leerdam v Noori* [2009] NSWCA 90; (2009) 255 ALR 553
*Lepcanfin Pty Ltd v Lepfin Pty Ltd* (2020) 102 NSWLR 627; [2020] NSWCA 155
*Long Forest Estate Pty Ltd v Singh* [2020] VSC 604
*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18
*Precision Products (NSW) Pty Limited v Hawkesbury City Council* [2008] NSWCA 278
*State of New South Wales v Williams* [2014] NSWCA 177; (2014) 242 A Crim R 22
*Wickstead v Browne* (1992) 30 NSWLR 1
*Wickstead v Browne* (1993) 10 Leg Rep SL 2

Texts Cited:

Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (September 2002)
Explanatory Note to the Civil Liability Amendment Bill 2003 (NSW)
New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 13 November 2003

Category:

Procedural rulings

Parties:

Doyle's Farm Produce Pty Ltd (ACN 119 734 539) as trustee for Claredale Family Trust (First Plaintiff)
John Gerard Doyle (Second Plaintiff)
Coobool Downs Pastoral Co Pty Ltd (ACN 002 806 617) as trustee for the Dunn Family Trust (Third Plaintiff)
Rodney James Dunn (Fourth Plaintiff)
Valerie Jeanette Dunn (Fifth Plaintiff)
Murray Darling Basin Authority (First Defendant)

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| | The Commonwealth of Australia (Second Defendant)<br>Attorney-General for the State of South Australia (Intervener) |
| Representation: | Counsel:<br>N Hutley SC / S Hartford Davis (Plaintiffs)<br>S Nixon SC / T Prince (Defendants)<br>M Wait SC / P Stirling (Intervener)<br><br>Solicitors:<br>Banton Group (Plaintiffs)<br>Ashurst (Defendants)<br>Crown Solicitor's Office (South Australia) (Intervener) |
| File Number(s): | 2019/150651 |

## JUDGMENT

### Introduction

1 By further amended statement of claim filed on 1 December 2020, Doyle's Farm Produce Pty Ltd, John Doyle, Coobool Downs Pastoral Co Pty Ltd, Rodney Dunn and Valerie Dunn (the plaintiffs) claim damages against the Murray Darling Basin Authority (the Authority), the first defendant, and the Commonwealth of Australia, the second defendant, for alleged negligence in the exercise of the Authority's powers and functions under the *Water Act 2007* (Cth).

2 The proceedings are representative proceedings under Part 10 of the *Civil Procedure Act 2005* (NSW). Each of the plaintiffs is a representative of the Group Members, who are persons who conducted irrigated farming in the NSW Central Murray region for all or part of the period between 1 July 2016 and 30 June 2019, using water entitlements derived from the *Water Management Act 2000* (NSW). The proceedings were commenced on 14 May 2019. Since that time, the pleadings have been amended substantially and the plaintiffs have changed their legal representation.

3 In summary, the plaintiffs allege that the Authority or its delegates owed them a duty of care which it breached by releasing water from the Menindee Lakes and the Hume and Dartmouth Dams to effect "overbank transfers" through the Barmah-Millewa Forest in the periods between 4 October 2017 and 27 December 2017; and 5 September 2018 and 2 January 2019.

4 The Commonwealth is a party to the proceedings on the basis that it is vicariously liable for those to whom the Authority has delegated some or all of its functions and powers under s 199 of the *Water Act*.

5 On 11 December 2020, the defendants filed a defence to the further amended statement of claim in which they denied that they owed a duty of care to the plaintiffs. They also relied on ss 42, 43A, 44 and 46 of the *Civil Liability Act 2002* (NSW). These provisions are contained in Part 5 of the Act, which limits

the liability of public and other authorities. These provisions will only apply to the Authority, its delegates or the Commonwealth if each is a "public or other authority" within the meaning of s 41 of the *Civil Liability Act*.

6 By notice of motion filed on 14 December 2020, the plaintiffs seek an order striking out those paragraphs of the defence on which reliance is placed on provisions of Part 5 of the *Civil Liability Act*.

7 There are two principal issues between the parties which arise from the strike-out motion: first, whether the defendants are entitled to the benefit of the provisions alleged in Part 5 of the *Civil Liability Act*; and, second, whether the question is apt for determination on a summary basis or whether the matter ought be left for determination at trial.

8 The plaintiffs, for whom Mr Hutley SC and Mr Hartford Davis appeared, submitted that the defendants do not fall within the definition in s 41 of the *Civil Liability Act*. Mr Hutley submitted that, as the question was one of statutory construction and, accordingly, could not be affected by evidence, it would be at odds with principle to defer the determination of the question to the trial and that it could, appropriately, be determined in the course of a strike-out application. He relied on *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125; [1964] HCA 69 (*General Steel*) where an action for alleged patent infringement was struck out on the basis of a summary determination that the Commissioner for Railways (NSW) was a public authority.

9 The defendants, for whom Mr Nixon SC and Mr Prince appeared, submitted that, as a matter of statutory construction, they are entitled to the benefit of the provisions of Part 5 because the Authority and its delegates fall within the definition of "public authority". Mr Nixon accepted that the question was one of law and admitted of only one correct answer. However, he contended that, because the defendants' position is reasonably arguable, the question ought not be determined on a strike-out application but ought await the determination of all issues at trial. Mr Nixon, too, relied on *General Steel*, but

for the general statements about the inadvisability of determining complex questions pre-trial in the course of strike-out applications.

10 For the reasons which follow, I am persuaded that the construction of s 41 of the *Civil Liability Act* for which the plaintiffs contended is the correct one: that is, the Authority, its delegates and the Commonwealth do not fall within the definition in that section. I am also persuaded that this ought lead to the paragraphs of the defence which rely on Part 5 of the *Civil Liability Act* being struck out.

11 I propose to address the construction issue first before turning to the question whether the issue is apt for an order under r 14.28(1)(a) of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR), which relevantly permits the Court to order that the whole or any part of a defence be struck out if the defence discloses no reasonable defence.

**Whether the defendants fall within the definition in s 41 of the *Civil Liability Act***

*The defendants*

12 The statutory framework within which the Authority managed the water in the Murray River need not be addressed in any detail for the purposes of determining the plaintiffs' primary argument, which depends on the interpretation of s 41 of the *Civil Liability Act*. It is sufficient to note that the Authority is established under the *Water Act* as a body corporate with perpetual succession: ss 171 and 176. It exercises functions under the *Water Act*, the Murray-Darling Basin Agreement (the Agreement) and the Basin Plan in the operation of the Dartmouth Dam, the Hume Dam and the Menindee Lakes (the upper River Murray storages).

13 The Authority, relevantly, exercises the following functions:

(1) River Operations Functions (under the Agreement and s 18E(1) of the *Water Act*) concerning the operation and maintenance of works associated with the upper River Murray storages, which include a

power to give directions to release water from the upper River Murray storages (the release power); and

(2) Environmental Water Functions (under ss 18E(1) and 172(1)(a)(i), (e) and (f) of the *Water Act*) concerning the co-ordination and delivery of environmental water, including by exercising the release power, to achieve environmental objectives such as ecosystem function, biodiversity, water quality and water resources health.

14 The Authority has power to delegate its functions and powers: s 199 of the *Water Act*. The Authority alleges that it delegated, for example, its release power to its Executive Director and denies that it is responsible for the exercise of that power by its delegate. It is common ground the Commonwealth is responsible for any negligence on the part of those to whom the Authority has delegated its powers. As referred to above, this explains the Commonwealth's joinder to the proceedings as second defendant.

*Part 5 of the Civil Liability Act*

**The legislative history of Part 5 and the extrinsic materials**

15 The *Civil Liability Act* was enacted in New South Wales following recommendations made by a panel chaired by Justice Ipp. The panel's terms of reference required it to examine "a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death".

16 Its terms of reference included, in paragraph 3:

> "In conducting this inquiry, the Panel must:
>
> (a) address the principles applied in negligence to limit the liability of public authorities…"

17 Chapter 10 of the report, *Review of the Law of Negligence: Final Report*, 2002 (the Ipp Report), dated 30 September 2002, dealt with public authorities. It said, of present relevance:

> "10.25 Our proposal is, then, that in a claim for negligently-caused personal injury or death where the alleged negligence arises out of the exercise or non-exercise of a public function, the functionary (that is, the person or bod performing the public function) should be able to plead the policy defence. This raises the question of what the effect of that defence would be.
>
> 10.26 It has sometimes been suggested that certain policy decisions (such as 'quasi-legislative' or 'regulatory' decisions) are 'non-justiciable'. This means that the decision cannot be challenged in a court or provide the basis for legal liability. The Panel's firm view is that the policy defence should not operate in this way to give immunity from liability. Rather, we think that Australian law should follow the lead of English law in this respect (see *Stovin v Wise*) by providing that in a claim for negligently-caused personal injury or death against a public functionary, where the alleged negligence consists of the exercise or non-exercise of a public function, and the public functionary pleads that the failure to take precautions to avoid the relevant risk was the result of a decision about the allocation of scarce resources or was based on some other political or social consideration, liability can be imposed only if the decision was so unreasonable that no reasonable authority in the defendant's position could have made it.
>
> 10.27 This test of 'unreasonableness' is taken from public law where it is known as the test of 'Wednesbury unreasonableness' after the case in which Lord Greene MR invented it. 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)."

18 These considerations gave rise to the following recommendations:

> "**Recommendation 39**
>
> The Proposed Act should embody the following principle:
>
> In any claim for damages for personal injury or death arising out of negligent performance or non-performance of a public function, a policy decision (that is, a decision based substantially on financial, economic, political or social factors or constraints) cannot be used to support a finding that the defendant was negligent unless it was so unreasonable that no reasonable public functionary in the defendant's position could have made it.
>
> …

**Recommendation 40**

In the Proposed Act, the term 'public functionary' should be defined to cover both corporate bodies and natural persons."

19 The Ipp Report proposed that its recommendations be "incorporated (in suitably drafted form) in a single statute (that might be styled the *Civil Liability (Personal Injuries and Death) Act* ('the Proposed Act') to be enacted in each jurisdiction."

20 The Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW) (the Bill), which included what became Part 5, was introduced to the New South Wales Parliament on 23 October 2002. It received Royal Assent on 28 November 2002. Other States of Australia have implemented some or all of the recommendations of the Ipp Report. The Commonwealth did not implement the recommendations of the Ipp Report and, to date, has not enacted legislation adopting the model provisions.

**Other extrinsic materials**

21 It was common ground that neither the Explanatory Memorandum nor the Second Reading Speech to the Bill which became the *Civil Liability Act* provided any indication as to whether "public authority" in s 41 included other polities, their instrumentalities or their officers. The only aspect of the extrinsic material which bears one way or the other on the argument is the recommendation referred to above that "each jurisdiction" (the States, the Territories and the Commonwealth) enact legislation in accordance with the template in the Ipp Report. Mr Hutley submitted that this recommendation would appear to be premised on the proposition that, in order to protect its own public authorities, the Commonwealth would need to enact its own legislation and could not rely on such protection as was conferred on the public authorities of a State by State legislation.

**The effect of Part 5**

22 In substance, Part 5 makes it substantially more difficult for plaintiffs to succeed against defendants who are public authorities within the meaning of

s 41. It converts a requirement that the plaintiff prove damage as a result of want of reasonable care (imported from the common law of negligence into the *Civil Liability Act*) into a requirement that the plaintiff prove that no reasonable person in the defendant's position would have acted as the defendant did. Allsop P described the effect of Part 5 of the *Civil Liability Act* as being to impose a "more attenuated [test] for legitimate activity than by reference to a fixed standard of reasonable care": *Precision Products (NSW) Pty Limited v Hawkesbury City Council* (2008) 74 NSWLR 102; [2008] NSWCA 278 at [176] (Beazley and McColl JJA agreeing). The forensic consequences of the application of Part 5 are, accordingly, significant.

**The legislative text**

23 In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27; [2009] HCA 41 (*Alcan*), the plurality (Hayne, Heydon, Crennan and Kiefel JJ) said at [47], "[t]he language which has actually been employed in the text of legislation is the surest guide to legislative intention." Accordingly, it is necessary to address the wording of the legislation as well as its context within the *Civil Liability Act*.

24 Section 41 of the *Civil Liability Act*, the definition section in Part 5, provides:

> "**Definitions**
>
> In this Part—
>
> ***exercise*** a function includes perform a duty.
>
> ***function*** includes a power, authority or duty.
>
> ***public or other authority*** means—
>
> (a) the Crown (within the meaning of the *Crown Proceedings Act 1988*), or
>
> (b) a Government department, or
>
> (c) a public health organisation within the meaning of the *Health Services Act 1997*, or
>
> (d) a local council, or
>
> (e) any public or local authority constituted by or under an Act, or

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

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

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

25 Since its enactment, s 41 has only been relevantly amended once. The *Civil Liability Amendment Act 2003* (NSW) added a paragraph, (e1), to s 41 to make it clear that the protections in Part 5 would extend to persons with public official functions or acting as a public official even though such persons might also exercise functions which were not public official functions.

26 In the Second Reading Speech for the Civil Liability Amendment Bill 2003 (NSW), the then Minister for Health, the Honourable Morris Iemma, explained the reasons for the amendment (New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 13 November 2003) at 4992:

> "The first case that the bill seeks to address is known as the Presland case. Kevin Presland, a mentally ill patient, killed his brother's fiancée after he was discharged from James Fletcher Hospital. Mr Presland was found not guilty of the woman's murder by reason of insanity. He sued the hospital for negligently discharging him, and was awarded $225,000 damages for the pain and suffering he experienced as a result of killing the woman plus $85,000 for lost earnings during his three years of detention as a forensic patient.
>
> The community rightly was outraged about the court decision because it allowed Kevin Presland to benefit, even though he had caused the death of his brother's fiancée."

27 Mr Iemma also said, at 4993:

> "The Presland 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."

28 The Explanatory Note to the Civil Liability Amendment Bill 2003 said:

> "The amended definition will include, for example, a medical practitioner who is authorised to detail mentally ill persons under the *Mental Health Act 1990*."

**The effect of the *Interpretation Act 1987* (NSW)**

29 The definition section, s 3 of the *Civil Liability Act*, contains the following note:

> "**Note**. The *Interpretation Act 1987* contains definitions and other provisions that affect the interpretation and application of this Act."

30 The note did not form part of the Act. However, s 34(2)(a) of the *Interpretation Act 1987* (NSW) provides that such a note may be taken into account as extrinsic material because it appears in the document as printed by the Government Printer. Whether or not a note appears in legislation, the *Interpretation Act* applies in terms to New South Wales legislation (s 5(1) of the *Interpretation Act*), except to the extent to which "a contrary intention appears in [the *Interpretation Act*] or in the Act … concerned": s 5(2).

31 The following provisions of the *Interpretation Act* are relevant and tend to support the plaintiffs' contention that the defendants fall outside the definition of public authority in s 41 of the *Civil Liability Act*:

(1) s 12(1)(a), which provides that a reference to an officer, office or statutory body is a reference to such officer, office or statutory body in and for New South Wales;

(2) s 13(b), which provides that a reference to the Crown is a reference to the Crown in right of New South Wales;

(3) s 21(1), which provides that "Government" means "Government of New South Wales" and "local council" means a council within the meaning of

the *Local Government Act 1995* (NSW), which, in turn, defines council as being a council of an area within New South Wales (see Dictionary and Pt 1 of Ch 9 in the *Local Government Act*);

(4) s 65, which provides that an Act passed by Parliament or by an earlier legislature of New South Wales may be referred to by the word "Act" alone; and that a Commonwealth Act may be referred to its short title together with a reference to the Commonwealth.

32 The Court of Appeal has cautioned against attributing undue importance to provisions of the *Interpretation Act*, describing them as "at best a starting point" which "may be readily rebutted": *DRJ v Commissioner of Victims Rights (No 2)* [2020] NSWCA 242; (2020) 383 ALR 517 at [33] (Bell P). However, for the reasons that follow, I consider that the provisions set out above, tend to fortify the conclusion which a close textual analysis of s 41 leads to in any event. The *Interpretation Act* is undoubtedly relevant to the task of statutory construction, as exemplified by the approach taken by the High Court to the definition of "public authority" in *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453 at 466-467 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); [1992] HCA 52. The Court concluded that, in view of ss 12, 15, 65 and 66, it was "impossible to bring the [Federal Airports Corporation] within the statutory concept of 'public authority' in the [*Environmental Planning and Assessment Act 1979* (NSW)]". This conclusion supports the interpretation of s 41 of the *Civil Liability Act* for which the plaintiffs contended and their reliance on the same provisions of the *Interpretation Act*.

33 Although there is no reference to the Commonwealth in s 41, other provisions of the *Civil Liability Act*, such as ss 5M(7) and 5N(6) ("written law of the State of Commonwealth"), s 6P(5) ("*Corporations Act 2001* of the Commonwealth") and s 26L(3) ("enactment of the State or the Commonwealth") refer expressly to the Commonwealth. These examples provide some textual indication that the legislature did not intend Commonwealth public authorities to be included within ss 41(e) or (e1), since if it had, it could have said so. There is no

express displacement of the general rule of construction which would confine the terms of a State statute to State matters: see Basten JA's summary of the authorities in *AGU v Commonwealth of Australia (No 2)* (2013) 86 NSWLR 348; [2013] NSWCA 473 at [22]. The related principle, that a State statute is not intended to bind the Crown in right of other polities in the Federation unless the contrary intention is explicit (*Long Forest Estate Pty Ltd v Singh* [2020] VSC 604 at [171] (Dixon J)), also favours the construction for which the plaintiffs contended.

34 The text of s 41 indicates (by the use of the word "means" and the disjunctive "or") that the list is exhaustive. The limitation in s 41(a) that the Crown is limited to the Crown in right of New South Wales (being the definition in s 3 of the *Crown Proceedings Act 1988* (NSW)) is significant because it displaces s 4(1) of the *Civil Liability Act* which provides that the Act is to bind "the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities."

35 The definition of "Crown" in s 3 of the *Crown Proceedings Act* is as follows:

> "***Crown*** means the Crown in right of New South Wales, and includes:
>
> (a) the Government of New South Wales, and
>
> (b) a Minister of the Crown in right of New South Wales, and
>
> (c) a statutory corporation, or other body, representing the Crown in right of New South Wales."

36 The definition of Crown in s 3 of the *Crown Proceedings Act* (which has been incorporated into s 41 of the *Civil Liability Act*) serves to indicate a legislative intention that the governmental emanations of New South Wales are to be the (only) beneficiaries of the protections in Part 5.

37 It is difficult to conceive of a rational legislative purpose which would confine the conferral of certain protections to *the Crown* in right of New South Wales but grant such protections to any *Government department* or *public official*, whether Federal or from another State or Territory. Yet this is the

consequence of the interpretation for which Mr Nixon contended on behalf of the defendants. Thus, on the defendants' construction, the Department of Immigration would have the protection of Part 5 but the Commonwealth would not, although Commonwealth Departments have no separate legal personality from the Commonwealth. Absurd outcomes are to be avoided when construing a statute.

38 If s 41 is given the construction for which the plaintiffs contended, the legislative purpose is evident: it confers protection on public authorities created by New South Wales law (and funded by revenues generated by the New South Wales Government) with a view to limiting their liability to those who might be injured by their conduct. It is difficult to understand what interest the New South Wales Government would have in protecting the polities of the other States or Territories or the Commonwealth from the liability to which other persons would be subject. I reject Mr Nixon's submission that Part 5 is focussed on torts committed in New South Wales and that therefore as long as the public authority (of whatever polity) operates in New South Wales, it is entitled to the protection of Part 5.

39 The most powerful indication in favour of the defendants' submissions is that the express words of ss 41(e) and (e1) (on which Mr Nixon relied to support the defendants' contention that the Authority, its delegates and the Commonwealth are public authorities within s 41) are unconstrained by any specific limitation to New South Wales. The Authority is, as a matter of ordinary English, a public authority which, either through its delegates or on its own account, exercises public functions. The Authority and each delegate is a "person", whether natural or otherwise. However, it does not follow that they fall within s 41.

40 Although the task of statutory interpretation gives primacy to the actual words used (see *Alcan* above), the words must be read in context. Thus, it would be erroneous to read ss 41(e) and (e1) as if they were not included in the exhaustive list in s 41. Indeed, most, if not all, of the other subparagraphs of s 41 would appear to be entirely otiose if a broad reading were given to ss 41(e)

and (e1). When the subparagraphs are read in context, as illuminated by the purpose identified in the Ipp Report, it is evident that the subparagraphs (e) and (e1) are to be read as being confined to New South Wales public authorities and those public officials who are exercising authority and functions conferred by New South Wales. The relevant nexus is the *polity* (New South Wales public authorities) not the *territory* (public authorities of whatever polity committing torts in New South Wales).

41 For the reasons given above, subparagraphs (e) and (e1) of s 41 of the *Civil Liability Act* (being the subparagraphs relied on by Mr Nixon as entitling the Authority and its delegates to the protection in Part 5) do not extend to the Authority or its delegates.

**Whether the paragraphs of the defence which rely on Part 5 ought be struck out**

42 As referred to above, Mr Nixon contended that all that I was required to do was to determine whether it was reasonably arguable that the Authority, its delegates and the Commonwealth were public authorities within the meaning of s 41 of the *Civil Liability Act*. If I were to so determine, he urged me to dismiss the motion with costs and defer determination of that question until the final hearing. I regard this submission as contrary to authority as well as inimical to s 56 of the *Civil Procedure Act* which requires me, when interpreting or exercising a power given by the rules of court, to give effect to the "overriding purpose", namely "to facilitate the just, quick and cheap resolution of the real issues in the proceedings."

43 There is a real issue whether the defendants are entitled to the benefit of the protections in Part 5 of the *Civil Liability Act*. This question is accepted to be one of law and to admit of a single, correct answer. I have heard full argument on it. If it is decided now, the parties will know, before discovery and the preparation of evidence, whether the plaintiffs need to prove negligence to the usual standard or to the higher standard of legal unreasonableness (in the sense in which that term is used in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 at [68] (Hayne, Kiefel and Bell JJ)).

The defendants will also be in a position to make forensic decisions based on a firm foundation of the applicable standard, including, for example, whether to call the responsible person (so as to avoid a *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8 inference, if the usual standards apply) or not to call such a person (so as to make it more difficult for the plaintiffs to discharge their onus of proving legal unreasonableness). The parties may also be more likely to resolve the proceedings by agreement.

44 If I declined to do other than acknowledge (as I do) that Mr Nixon's arguments were reasonably arguable, the parties will be none the wiser as to the standard which applies to the defendants. They will have to prepare the case on two alternative bases, one of which will be entirely unnecessary.

45 Mr Nixon further submitted that the correct procedure, rather than to apply by motion for an order under UCPR, r 14.28, would be for the plaintiffs to apply to the Court for the determination of a separate question pursuant to UCPR, r 28.2. He contended that, in that event, the Court would be constrained by the authorities which caution against separate determination and fragmentation of proceedings.

46 It is difficult to see what additional benefit would accrue to the parties or to the Court if the plaintiffs sought to have this matter determined as a preliminary question, rather than to have it determined on a strike-out motion. The plaintiffs are entitled to conduct their case, subject to directions of the Court and the requirements of the *Civil Procedure Act* (which include a requirement to assist the Court to achieve the overriding purpose set out above: s 56(3)), as they see fit. They have invoked this Court's power under UCPR, r 14.28. It is, accordingly, my responsibility to address the application which has been brought.

47 Rule 14.28(1)(a) of the UCPR relevantly provides that the court may at any stage of the proceedings order that the whole or any part of a pleading be struck out if the pleading discloses no reasonable defence. In the present context, the effect of the rule is that if I consider that the defendants are not

public authorities within s 41, they do not have the benefit of the defences under Part 5 of the *Civil Liability Act*. In this event, the defences must fail, irrespective of any evidence adduced at trial.

48 The words in r 14.28, "no reasonable defence" mean, in the present context, "a defence which is not available at law". Thus, if the defendants are not public authorities under s 41, any defence under Part 5 will be unavailable to them at law and they will thus have "no reasonable defence" in so far as they alleged such a defence. I reject Mr Nixon's submission that "no reasonable defence" means a defence which is reasonably arguable although it might not, once determined as a matter of law, be available.

49 The authorities are redolent with admonitions against trial judges striking out pleadings or summarily dismissing claims or defences where there is an "issue to be tried". The reasons for these admonitions are obvious. Many questions will be affected by facts, as established by evidence. The trial is the appropriate forum for such issues to be determined. However, the present issue stands in stark contrast to these. It is that rare thing, a question of law alone since it depends on no evidence at all and can be answered solely by reference to legislation and authority. I will be in no better position to determine this question, which is pre-eminently one of statutory construction, at the conclusion of the eventual trial of these proceedings, than I am now after considering the detailed written and oral submissions of the parties. Indeed, it is significant that Mr Nixon was able to address the question of statutory construction fully both orally and in writing, although he contended that I ought not determine it.

50 I accept Mr Hutley's submission that the admonitions must be read with careful attention to the circumstances of the cases in which they appear, lest the Court refrain from deciding that which it could and should properly decide.

51 The need to read general statements in judgments by reference to the circumstances of the case is powerfully illustrated by *General Steel* itself,

which is frequently cited for the following statement from the judgment of Barwick CJ at 129:

> "… The test to be applied [before a matter is summarily dismissed] has been variously expressed; 'so obviously untenable that it can·not possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the Court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them (the pleadings) 'to stand would involve useless expense'.
>
> At times the test has been put as high as saying that the case must be so plain and obvious that the court can say at once that the statement of claim, even if proved, cannot succeed; or 'so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument'; 'so to speak apparent at a glance'."

52 Barwick CJ continued at 130:

> "On the other hand, I do not think that the exercise of the jurisdiction should be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff's claim. Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed."

53 His Honour proceeded to address and determine the argument put on behalf of the Commissioner for Railways (NSW) that he was an authority of the State of New South Wales within the meaning of ss 125 and 132 of the *Patents Act 1952* (Cth) and that therefore no action could be brought against him for patent infringement in connection with the use of railway carriages since they were being used for the service of the State. After hearing detailed argument on the question, Barwick CJ determined, at 134, that the Commissioner was an authority of the State within the meaning of ss 125 and 132 of the *Patents Act* and that the use of the invention was a use for the service of the State. His Honour said, at 137-138:

> "Order 26, r. 18, authorizes me to strike out a pleading which does not disclose a reasonable cause of action. I am satisfied that the plaintiff's statement of claim does not do so. It seeks to restrain an infringement of the plaintiff's letters patent in stated circumstances which preclude the plaintiff having such a cause of action against any of the defendants. Accordingly, I strike out the whole of the plaintiff's statement of claim.
>
> Rule 18 further authorizes me, if I consider it just so to do, to stay or to dismiss the plaintiff's action. This is not a case in which the plaintiff by

> amendment of the pleading could improve its position. I have been mindful throughout my consideration of this matter of the principles to which I have called attention and which govern the exercise of the power summarily to terminate an action. I have reached the firm conclusion that consistently with those principles I ought to intervene by order under this rule to prevent further proceedings in the action, as, in my opinion, to use one of the expressions which I have quoted, the plaintiff's claim is 'manifestly groundless' and that to allow it to proceed 'would involve useless expense'. In my opinion the proper course is to dismiss the plaintiff's action, which I now do.'"

54 The need to have regard to the circumstances of the case at hand is also evident from a comparison between two decisions of the Court of Appeal: one relied on by Mr Hutley and the other by Mr Nixon.

55 Mr Nixon relied on *Ekes v Commonwealth Bank of Australia* [2014] NSWCA 336; (2014) 313 ALR 665 in which the Court of Appeal (Bathurst CJ, Beazley P and Emmett JA) at [88] approved the following summary of the principles in the judgment of Emmett JA (Macfarlan JA and Simpson J agreeing) in *State of New South Wales v Williams* [2014] NSWCA 177; (2014) 242 A Crim R 22 at [71]:

> "The requirement for establishing that there is no triable issue is a demanding one and the power to strike out a pleading on the basis that it discloses no reasonable defence, or is an abuse of process, should be exercised only in plain and obvious cases. The power should not be exercised in cases of doubt or difficulty or where the pleading raises a debatable question of law. Once it appears that there is a real issue, whether of fact or law, and that the rights of the parties depend upon it, a court should not dismiss a defence raising such an issue, either on the basis that no reasonable defence is disclosed or as an abuse of process (see *Dey v Victorian Railways Commissioners* [1949] HCA 1; 78 CLR 62 at 91; *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69; 112 CLR 125 at 129-130; *Commonwealth v Griffiths* [2007] NSWCA 370; 70 NSWLR 268 at [11]-[12] and *Spencer v Commonwealth* [2010] HCA 28; 241 CLR 118 at 139-140)."

56 In response, Mr Hutley cited *Leerdam v Noori* [2009] NSWCA 90; (2009) 255 ALR 553 at [74]-[76] where Macfarlan JA (Spigelman CJ and Allsop P agreeing) said:

> "[74] The primary judge disposed of the appellants' motion for summary dismissal, or alternatively strike out, of the claims against them by concluding that it was reasonably arguable that the pleaded causes of action were maintainable and that the appellant could not defeat the claims by relying upon principles of advocates' immunity. As the

> causes of action are in my view clearly not maintainable and the trial which would otherwise take place would be a lengthy one (4–6 weeks in the primary judge's estimate: judgment at [149]), I consider that the appropriate course is to summarily dismiss the proceedings against the appellants.
>
> [75] Such a course should only be taken in a clear case. Descriptions of the test to be applied have included such phrases as "so obviously untenable that it cannot possibly succeed" and 'manifestly groundless': *General Steel Industries Inc v Cmr for Railways* (NSW) (1964) 112 CLR 125 at 129; [1965] ALR 636 at 638 (*General Steel*). Particular caution is required where factual questions are involved as it is difficult to predict in advance of a final hearing the precise manner in which the evidence will unfold. While caution is also required where, as here, the application turns on questions of law and there is no reasonable prospect that deficiencies in what is pleaded will be able to be cured by amendment, opportunities to summarily dismiss or strike out claims will arise more frequently.
>
> [76] *General Steel* was a case which turned on questions of law. The view I have of the present case mirrors that taken by Barwick CJ in that case …"

57 Two points arise from these passages. First, it does not follow that if there is a question of law about which there are at least two reasonable arguments, summary dismissal is inappropriate. In *Lepcanfin Pty Ltd v Lepfin Pty Ltd* (2020) 102 NSWLR 627; [2020] NSWCA 155 the Court of Appeal at [96]-[98] (Bell P, Payne and McCallum JJA agreeing) upheld the primary judge's decision to dispose of the matter, which involved the construction of a contract, on a summary basis.

58 Secondly, even if the question of law can be decided by the court on an application for strike-out or summary dismissal, a further evaluative judgment may be required: what, if any, are the benefits of striking out or dismissing the matter pre-trial as opposed to allowing the matter to go to trial.

59 As to the latter point, Mr Nixon relied on the decision of the High Court in *Wickstead v Browne* (1993) 10 Leg Rep SL 2 in which the High Court set aside the Court of Appeal's dismissal of a claim in negligence brought by a beneficiary of a trust against the trustee (*Wickstead v Browne* (1992) 30 NSWLR 1). The basis for the Court of Appeal's decision (Handley and Cripps JJA, Kirby P *contra*) was that a trustee did not owe a duty of care to a beneficiary and, accordingly, the claim in negligence would be bound to fail at

trial. The High Court decided that the claim in negligence ought be permitted to go to trial, notwithstanding the evident legal difficulty associated with the claim. Their Honours (Deane, Toohey and Gaudron JJ) took into account the circumstance that the action against the respondent would be proceeding to trial in any event. Mr Nixon contended that, as the trial between the parties would go ahead, it was not appropriate for the defendants to be prevented from litigating the defences alleged at trial.

60 I reject this submission for the reasons given above: namely, that there will be considerable utility in the fate of the Part 5 defences being determined at an early stage since they will plainly affect the course of the trial and its preparation in a substantial way. Furthermore, despite the breadth of the statements in *Wickstead v Browne*, it is important to recall the context in which they were made. The categories of negligence are not closed. Having regard to the distinctions between common law and equitable remedies, the question whether someone acting on behalf of a trustee is subject to a duty of care to a beneficiary is not to be determined by reference to general principles. It was plainly a matter which could be affected by evidence since the determination of whether a duty of care arises and whether it has been breached is almost invariably dependent on the factual circumstances.

61 The present case is far removed from *Wickstead v Browne*. I regard the present case as being in a similar category to *General Steel* and *Leerdam v Noori*. The question of law can conveniently be decided on the strike-out application, thereby obviating the need for the parties to incur "useless expense" in litigating an issue which is not, on proper legal analysis, an issue at all because the defendants are not public authorities within the meaning of s 41 of the *Civil Liability Act*.

62 The legal position is as I have found above. There is considerable utility in the point being determined as part of the plaintiff's application. The defences alleged are not available to the Authority or its delegates as a matter of law and ought, accordingly, to be struck out.

**Further issues**

63 The plaintiffs argued, in the alternative, that if the Authority, its delegates and the Commonwealth were regarded as falling within the definition of public authority in s 41, Part 5, if it applied of its own force, would be inoperative as it would be inconsistent with s 64 of the *Judiciary Act 1903* (Cth) by reason of s 109 of the Constitution. They argued further that if Part 5 did not apply of its own force, it would not be picked up by s 79 of the *Judiciary Act*.

64 The defendants accepted that the Authority was the Commonwealth for the purposes of s 64 of the *Judiciary Act*. However, they argued that there was no relevant inconsistency because the Authority, its delegates and the Commonwealth were exercising peculiarly government functions and that, accordingly, s 64 did not operate to invalidate Part 5.

65 Because the issues raised by the plaintiffs in their alternative case raised constitutional issues, the plaintiffs served notices under s 78B of the *Judiciary Act*. The Attorney General for the State of South Australia, for whom Mr Wait SC, the Solicitor General, and Ms Stirling, appeared, intervened on the question whether the Authority was the Commonwealth for the purposes of s 64 of the *Judiciary Act*.

66 The parties agreed that the principle of restraint required me to refrain from deciding a constitutional question, unless it is necessary to do so in order to decide the issues between the parties. For the reasons given above, I do not consider the Authority, its delegates or the Commonwealth to be public authorities within the meaning of s 41 of the *Civil Liability Act*. Accordingly, it is unnecessary to determine the alternative arguments put on behalf of the plaintiffs or to adjudicate on the issue raised by the Attorney General for South Australia.

**Costs**

67 The parties accepted that there was no reason to depart from the general rule that costs follow the event: UCPR, r 42.1. Neither sought costs from the

Attorney General for the State of South Australia, who did not seek costs against any party.

**Orders**

68 For the reasons given above, I make the following orders:

(1) Strike out the following paragraphs of the defence to the further amended statement of claim:

a. paragraph 6A(c);

b. paragraph 6B(c);

c. paragraph 6C(c);

d. paragraph 86(b)-(l);

e. paragraph 187, from the words “and in further answer” to the end of the paragraph;

f. paragraph 190, from the words “and in further answer” to the end of the paragraph;

g. paragraph 192, from the words “and in further answer” to the end of the paragraph;

h. paragraph 195, from the words “and in further answer” to the end of the paragraph;

i. paragraph 197, from the words “and in further answer” to the end of the paragraph;

j. paragraph 198A(g);

k. paragraph 202, from the words “and in further answer” to the end of the paragraph;

l. paragraph 203, from the words “and in further answer” to the end of the paragraph;

m. paragraph 204, from the words “and in further answer” to the end of the paragraph; and

n. paragraph 205, from the words “and in further answer” to the end of the paragraph.

(2) Order the defendants to pay the plaintiffs’ costs of the notice of motion filed on 14 December 2020.

(3) Make no order as to the costs of the Attorney General for the State of South Australia.

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