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Risk management Council's liability for dangerous and other dogs in light of *Pyrenees Shire Council v Day*

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INTRODUCTION

Pyrenees Shire Council v Day is a recent and significant decision of the High Court handed down this year.

This case is of general importance. However, in this monograph the impact of this case is examined on Council's liability in respect of dog attacks that come to its attention.

DISCLAIMER

It should be noted that this monograph is not intended to represent legal advice generally or in any particular case. It is gratuitous and designed only to draw your attention to issues that may arise from the exercise of the Council's powers under the *Domestic (Feral and Nuisance) Animals Act*. Any liability for reliance on it is disclaimed.

FACTS

In August 1988 a fire occurred that drew the Council's attention to a dangerous fireplace in a building used as a shop and residence. The Council advised the tenant (but not the owner) of the dangerous nature of the fireplace and advised that it should not be used. The tenancy changed and the old tenant in fact told the new tenant the fireplace was safe to use. Nearly two years later the building and the building next door were destroyed by fire escaping as a result of the use of the dangerous fireplace.

The fire-prevention powers of the Council were adequate, if fully exercised, to ensure that the defect in the fireplace was remedied and that, until it was remedied, no fire would be lit in that fireplace.

No attempt was made, whether by threatening prosecution or otherwise, to enforce compliance with those directions. No work on the premises for the prevention of fire was carried out or authorised to be carried out by the Council. There were steps which the Council could have taken to prevent the risk to life and property posed by the defective fireplace. It was a serious risk which, if it eventuated, might have seen the destruction of a large part of the township. If the Council was under any statutory or common law duty to take these steps, it was guilty of negligence; if it was not under any such duty, its carelessness does not expose it to liability in damages.

The preventive steps which might have been taken to prevent the occurrence of the plaintiffs' respective losses were:

1. repair of the defects in the fireplace or blocking it up so that it could not be used;
2. informing the new tenant that the fireplace was dangerous and was not to be used; and
3. action which might have been taken by the Council under its statutory powers to eliminate the danger of escape of fire.

THE QUESTION

The question for determination is whether the Council was under a duty the new tenant and/or to the next door

shop, to take some step which it unreasonably failed to take which, if taken, would have avoided the property damage which those parties respectively suffered as the result of the escape of the fire.

ANALYSIS OF THE CASE

No action for breach of statutory duty lies against a Council for failing to exercise its fire prevention powers in such cases. The decision not to exercise those powers would be a lawful exercise of the Council's discretion.

However the Council was found liable in negligence and the decision shows Councils cannot rely on the distinction between duties and powers to avoid liability.

Brennan CJ

Without troubling you his reasoning Brennan CJ was able to conclude:

Thus a duty to exercise a power may arise from particular circumstances, and may be enforceable by a public law remedy. Where a purpose for which a power is conferred is the protection of the person or property of a class of individuals and the circumstances are such that the repository of the power is under a public law duty to exercise the power, the duty is, or in relevant respects is analogous to, a statutory duty imposed for the benefit of a class, breach of which gives rise to an action for damages by a member of the class who suffers loss in consequence of a failure to discharge the duty. The general principles of public law establish the existence of the statutory duty to exercise the power and the statute prescribes the class of individuals for whose benefit the power is to be exercised.

Where the power is a power to control 'conduct or activities which may foreseeably give rise to a risk of harm to an individual' (to use a criterion stated by McHugh JA in *Parramatta City Council v Lutz*) and the power is conferred for the purpose of avoiding such a risk, the awarding of compensation for loss caused by a failure to exercise the power when there is a duty to do so is in accordance with the policy of the statute. An individual who is among the class whose interests are intended to be protected by exercise of the power has both locus standi to seek a public law remedy and a right to compensation for damage suffered as the result of any breach of the duty to exercise the power in protection of that individual's person or property. It was on the basis of a public authority's breach of its statutory duty properly to control a scenic reserve that this Court held in *Schiller v Mulgrave Shire Council* that a visitor to the reserve was entitled to damages for personal injury when struck by the falling of a dead tree.

In the present case, although there was no public expectation that the Council would exercise its powers to enforce compliance with the requirements set out in Mr Walschots' letter, nor was any reliance placed by the respective plaintiffs on the Council's doing so, the Council was under a public law duty to enforce compliance with the requirements in Mr Walschots' letter. The risk of non-compliance was extreme for lives and property in the neighbourhood of the defective chimney and there was no reason which could have justified the Council's failure to follow up the letter, even to the extent of prosecuting for any default. It is unnecessary to determine whether the Council would have been under a duty itself to rectify the defects in the fireplace if the owners and occupiers all failed or refused to do so. The likelihood is that no more would have been needed to be done than to ensure that the owners and occupiers knew of the danger and to ensure that they knew of the request to remedy the latent defect which Mr Walschots' inspection had revealed. The Council failed to exercise its powers with the care and diligence demanded by the circumstances and, as a result, Mr Stamatopoulos lit the fire which escaped and destroyed Eskimo's premises and damaged the Stamatopoulos' property and the Days' Shop.

Brennan CJ rejected liability founded on general reliance al la *Sutherland v Heyman* preferring instead an approach based on a reading of the statute.

Toohey J

Toohey J preferred the general reliance and proximity approach and arrived at the same result as Brennan for the neighbouring property.

The Shire had statutory power to deal with the danger constituted by the defective chimney. Through the exercise of that power it could have ensured that the danger was removed. It was a danger, not only to 70 Neill Street but also to adjoining buildings. Indeed, if a fire broke out, it was almost certain to extend beyond 70 Neill Street, having regard to the age and construction of the buildings. The danger was necessarily unknown to adjoining owners and occupiers. In any event, had they known, the remedies available to them were, as Brooking JA said, “slow and expensive”. In those circumstances it is but a short step to hold that there was a general reliance by neighbours, such as the Days, that the Shire would take steps to remove the danger of which the Shire was aware and which it had the power to remove. Because the Shire did nothing further after the letter of 12 August 1988, there was a breach of the duty of care which the Shire owed to Mr and Mrs Day. No issue of causation arose on the arguments presented to the Court.

However under the reliance and proximity approach the tenants and owner of the defective chimney did not place any general reliance on the Council.

McHugh J

McHugh also opted for general reliance or dependency. He usefully set out the limitations as:

First, the doctrine only applies in limited situations 'of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection'. Thus, it applies only in those situations where individuals are vulnerable to harm from immense dangers which they cannot control or understand and often enough can not recognise. Controlling air traffic, fighting fires and inspecting the safety of aircraft are the examples that Mason J gave. In these and similar situations, I do not think that it is a fiction to conclude that members of the community rely on the relevant public authority, often endowed with extensive powers, to protect them from harm. At all events, I do not think such reliance is a fiction when an authority provides a service in that area, particularly where the authority 'has supplanted private responsibility, as in the case of air traffic controllers' and in cases such as fire control. In the case of aircraft inspections, for example, individuals who travel on planes are aware that their safety is dependent on the aircraft being maintained in accordance with standards laid down by governmental regulatory bodies. They rely on those bodies to regularly examine aircraft to ensure that they comply with those standards.

Second, the public authority must know or ought to know that the plaintiff will suffer damage unless care is taken. A public authority incurs no liability under the general reliance doctrine unless it has knowledge or imputed knowledge of the danger. In many cases where the doctrine applies, the public authority will already have a public duty, enforceable by *mandamus*, to consider whether it should exercise its power or perform its function. In some cases, its knowledge may be such that, though the power or function may be discretionary, it nevertheless has a public duty to act.

Third, the fact that the authority owes a common law duty of care because it is invested with a function or power does not mean that the total or partial failure to exercise that function or power constitutes a breach of that duty. Whether it does will depend upon all the circumstances of the case including the terms of the function or power and the competing demands on the authority's resources.

This led his Honour to impose liability on the Council for damage to the neighbours.

Given the extensive powers of the Council, its entry into the field of inspection on this occasion, if not other occasions, its actual knowledge of the danger to the health and property of the occupiers of Neill Street and, at the least, its imputed knowledge that residents of the shire generally relied on it to protect them from the dangers arising from the use or condition of premises, the Council owed a duty of care to Mr and Mrs Day.

Again it follows that the owners and occupiers of the building in which the defective chimney was located failed.

Gummow J

Gummow J rejected general reliance as a sound doctrine and as I read his judgment he held the Council liable to all parties on the basis of negligently exercising its power ie. it had commenced to use its power and therefore was under a duty to do it properly.

Kirby J

Kirby J forcefully rejected reliance as a doctrine. He accepted I would therefore adopt as the approach to be taken in Australia the three-stage test expressed by the House of Lords in *Caparo*

To decide whether a legal duty of care exists the decision-maker must ask three questions:

1. Was it reasonably foreseeable to the alleged wrongdoer that particular conduct or an omission on its part would be likely to cause harm to the person who has suffered damage or a person in the same position?
2. Does there exist between the alleged wrongdoer and such person a relationship characterised by the law as one of 'proximity' or 'neighbourhood'?
3. If so, is it fair, just and reasonable that the law should impose a duty of a given scope upon the alleged wrongdoer for the benefit of such person

This necessitated liability of the Council to all parties.

RELEVANCE OF ALL THIS TO SAVAGE DOGS

Whatever difficulties this case raises generally at least its application to dangerous or savage dogs in a municipality is clear no matter which test is applied.

Dog attack is a serious problem and often results in serious injury to the victim and occasionally even death. The likely size of a damages award against a Council is undoubtedly sufficient incentive to cause victims or their lawyers to investigate the Council's knowledge of the existence of the savage dog and what the Council did once it acquired the knowledge. It is clear that if the Council has no knowledge or ought not to reasonably had knowledge of the existence of the savage dog then no liability arises.

The problem for the Council arises when it becomes aware of the existence of the dog. This will usually be by way of a complaint by a resident of either an attack on a person or other animal or a chase or worrying.

The question is what is Council's liability to any person subsequently attacked by the same dog and does any liability change if the victim is the dog's owner or member of the owner's family or otherwise knows of the propensity of the dog.

The first and perhaps most important thing to note is that the Domestic (Feral and Nuisance) Animals Act is unusual in that (apart from police officers) only Council officers can file charges under the Act — see S 92. It cannot therefore be left to the aggrieved person to prosecute the matter. As such the Council's position is considerably more onerous than was the position in the *Pyrenees* case. Beyond that the Act is clearly intended to protect the safety and well being of the public, it provides and indeed was intended by Parliament to provide a

quick and effective method of controlling savage dogs. Again the Council is likely to be the only body with both the knowledge and power to act in the matter. All other factors that were present in the *Pyrenees* case are present to some degree in the matter of savage dogs.

In the case of savage dogs it doesn't matter which approach is used the result is liability on the Council if it does not act adequately once it becomes aware of a savage dog. Clearly the public at large is reliant and dependent on the Council enforcing the Act and removing the risk. On this approach there is unlikely to be liability to the owner or family members although children of the owner may well be different. On the other approach of Brennan CJ and Kirby at least there is also likely to be liability to the owner's family and perhaps even the owner (but a reduction for contributory negligence would be expected).

WARNING — A SLEEPER THREATENS TO AWAKE

Council's liability to victims of dog attack is a sleeping issue at the moment but that state cannot be relied upon to continue and measures should be put in place to reduce possible exposure. Of course these measure will also protect potential victims which is really the most important goal.

Certainly if I was acting for an attack victim I would do an FOI application as a matter of course and perhaps even some form of pre-trial discovery as well. I seek to establish if the Council was a possible defendant even more so when the owner is impecunious.

Therefore this is not a matter where a Council can let sleeping dogs lie! (sorry I couldn't resist it)

POSSIBLE SOLUTIONS

Of course the possibilities that give rise to negligence are endless but some steps can be taken to reduce the risk.

The most important thing a Council must do is to be pro-active when it comes to using its near *exclusive* powers to control savage dogs. The Act provides many powers to control this problem which include seizure prosecution, destruction and declaring a dog dangerous.

A policy and procedures for handling dangerous dogs should be developed and responsible staff well trained in both the policy and the Act and associated matters employed. No longer can this area be left to untrained or semi-trained staff. For those Councils that have CT'ed this area out the fact that this area is not handled by the Council's employed staff will not affect liability for how the Council exercises its powers in this area. Further the Council will be accountable for its supervision of its contractors and whether it has policies and protocols in place.

Every report must be promptly followed up and each step of the follow up well documented. Where a dog cannot be located efforts to find it should be made.

Any victim will be able to obtain convincing expert evidence that once a dog has attacked it has shown a dangerous propensity so that any subsequent attack is foreseeable. (In fact I have often led this evidence on behalf of Council's in support of destruction orders). Regard must be had to this reality in assessing the course that the Council will take. Obviously an attack by a German Shepherd is different to an attack by pug.

Prosecution and seeking of destruction orders or dangerous dog declarations may be seen as the proper response to most attacks.

Auditing to see that policies and procedures are being complied with. This is important as a failure by staff to follow Council's own guidelines is likely to be a serious problem should the worst happen.

Procedures for inspecting compliance for declared dangerous dogs should be in place. For example once a dog is declared dangerous what follow up by the Council, if any, takes place?

Finally proper and provable training is essential.

CONCLUSION

The above is by no means exhaustive. Its' aim is more modest. It is to alert you to potential pitfalls in relation to savage or dangerous dogs.

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