



GREENWAY CHAMBERS

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CIVIL LIABILITY ACT 2002

SECTIONS 42 AND 43A

A PAPER PRESENTED AT A CPD SEMINAR AT GREENWAY CHAMBERS  
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## PART 5, CIVIL LIABILITY ACT 2005

### UPDATE ON SECTIONS 42 AND 43A

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## INTRODUCTION

1. In proceedings where a public authority is alleged to have acted negligently, ss 42 and 43A of the *Civil Liability Act 2002* (**CLA**) will often be raised by the public authority as a defence to a plaintiff's claim.
2. Where a public authority invokes s42 in defence of contentions that it owed a duty of care to the plaintiff or that it breached a duty of care, the section's operation is to be considered in the context of ss5B and 5C of the CLA.
3. Where, however, s43A is relied upon, usually there will be first have been a finding of negligence, with the plaintiff required to then satisfy a separate, not inconsistent, statutory test.
4. The inter-relationship of s42, s5B and s5C, and the reach of s 43A, was recently considered in *Weber v Greater Hume Shire Council* [2019] NSWCA 74 (**Weber**). Although Basten JA in *Weber* set out a number of propositions that apply in the operation of s42 (read in the context of s5B and s5C), his Honour lamented the difficulties in establishing a coherent operation of s5B, 5C and s42 and raised a number of issues concerning the meaning and application of s42.
5. This paper discusses *Weber*, and its treatment of the reasoning in earlier decisions of the NSW Court of Appeal regarding s 42.
6. The paper also reviews the reasoning about s 43A in *Weber* and in an earlier decision of a differently constituted NSW Court of Appeal in *McKenna v Hunter and New England Local Health District* [2013] NSWCA 476.

## SECTION 42

### Inter-relationship of s5B, s5C and s42 CLA

7. The proper resolution of an action in negligence depends upon the existence (and scope) of the relevant duty of care.<sup>1</sup> The CLA does not define when a duty exists between parties. Accordingly, the common law applies in determining the existence and scope of a duty of care. That question is beyond the scope of this paper.
8. Where a duty of care is held to have been owed, regard must be had to ss5B and 5C of the CLA to determine whether that duty has been breached.
9. Section 5B provides:
  - (1) *A person is not negligent in failing to take precautions against a risk of harm unless:*
    - (a) *the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and*
    - (b) *the risk was not insignificant, and*
    - (c) *in the circumstances, a reasonable person in the person's position would have taken those precautions.*
  - (2) *In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):*
    - (a) *the probability that the harm would occur if care were not taken,*
    - (b) *the likely seriousness of the harm,*
    - (c) *the burden of taking precautions to avoid the risk of harm,*
    - (d) *the social utility of the activity that creates the risk of harm.*
10. Section 5B governs the assessment of breach. In relation to s5B:
  - (a) the first step is to identify the risk of harm with respect to which there was a failure to take precautions;
  - (b) a person is not negligent in failing to take precautions against a particular risk of harm unless there was a foreseeable risk, which was not insignificant, and which, in the circumstances, was such that a reasonable person would have taken those precautions; and

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<sup>1</sup> *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42 at [18].

- (c) s5B(2) specifies the matters to be taken into account in determining whether a reasonable person would have taken precautions against a risk of harm, including the “*burden of taking precautions to avoid the risk of harm*”.

11. Section 5C provides:

*In proceedings relating to liability for negligence:*

- (a) *the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and*
- (b) *the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and*
- (c) *the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.*

12. For the purposes of s5C(a), the court must consider the burden of taking precautions to avoid “*similar risks of harm*” for which the defendant may be responsible. In addressing “*the burden of taking precautions to avoid the risk of harm*” in claims against a public or other authority, regard must also be had to s42.

13. Section 42 provides:

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

*The following principles apply in determining whether a public or other authority has a duty of care or has breached a duty of care in proceedings for civil liability to which this Part applies:*

- (a) *the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions,*
- (b) *the general allocation of those resources by the authority is not open to challenge,*
- (c) *the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate),*
- (d) *the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.*

14. The principles set out in s42 are applied when determining whether a public authority has a duty of care or has breached a duty of care in proceedings for civil liability to which Part 5 of the CLA applies.<sup>2</sup>

***Weber v Greater Hume Shore Council [2019] NSWCA 74***

15. In *Weber* a fire started in a tip at Walla Walla NSW that was operated by the Council. The fire spread 11km to Gerogery NSW where it destroyed the plaintiff's and others' properties. The plaintiff (and other group members) commenced representative proceedings for damages, alleging the Council had failed to take reasonable steps to prevent the fire initiating within, and spreading beyond, the tip.
16. For the purposes of s5B CLA, the plaintiff alleged that the relevant risk of harm was a risk of fire escaping the tip, when a fire had ignited in the tip. The plaintiff claimed the Council failed to take certain precautions (**the precautions**) to prevent the spread of the fire including:
- a. prepare and implement a fire management plan;
  - b. create and maintain an effective firebreak;
  - c. consolidate deposited waste into appropriate areas;
  - d. remove fuel to prevent dangerous build ups; and
  - e. install and maintain firefighting equipment.
17. The trial judge held that the Council owed a duty of care to the plaintiff to take reasonable care to avoid risk of personal injury or property loss caused by the escape of the fire from the tip, and that the Council breached that duty by failing to take the precautions to prevent the spread of the fire from the tip. However, the plaintiff's claim was dismissed on causation grounds, the trial judge finding that the plaintiff had failed to demonstrate:
- a. factual causation, because the cause of the fire could not be proven, and
  - b. that reasonable precautions would have prevented the escape of the fire.
18. The Council relied on s42 in denying breach, contending that:
- a. the risk of harm was the risk of fire escaping from the Council's lands;
  - b. sections 5C(a) and 42(c) required consideration of Council's expenditure priorities, given it operated 10 waste disposal site facilities and bore the costs of addressing similar risks at other land owned or occupied by it;

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<sup>2</sup> Section 40(1) of the CLA provides that Part 5 of that Act applies to civil liability in tort, and extends to any such liability even if the damages are sought in an action for breach of contract or any other action.

- c. it had no significant funds available to it to spend on the 10 waste disposal sites under its control; and
  - d. a finding that it ought to have allocated additional resources to that function would have involved a challenge to the general allocation of financial resources contained in its budgets, an approach forbidden by s42(b).
19. Of Council's reliance on s42, the trial judge held (*Weber v Greater Hume Shire Council* [2018] NSWSC 667 at [302] to [313]):
- a. the effect of s42(a) is that what the defendant can be required by the law of negligence to do is limited by the financial and other resources that are reasonably available to the defendant for carrying out the care, control and management of tips that are under its care, control and management;
  - b. s42(b) prohibits a challenge to the general allocation of resources by the defendant to the care, control and management of tips;
  - c. although the general allocation of resources by the defendant is not open to challenge, the plaintiff is able to address the specific allocation of resources available to the defendant;
  - d. from the above principles, the mandated approach to s42 is to recognise that the defendant had responsibility for 10 tips, that each tip had issues and that it was necessary to approach the reasonableness of a suggested action or precaution on the basis of it being repeated across all of the 10 tips;
  - e. the s42 defence was not made out as the case did not concern whether the defendant should have spent money on some other piece of infrastructure because it is perceived as being of more need, but whether the defendant had funds sufficient to meet precautions within its waste budget; and
  - f. the s42 defence was not made out because at the time of the fire in December 2009, the Council had a waste management reserve of \$51,000 in its General Fund which could have been spent on the precautions.
20. The plaintiff successfully appealed the trial judge's finding that the plaintiff had failed to prove that the breach of the duty of care caused the harm.
21. On the plaintiff's appeal from the trial judge's dismissal of her claim, the Council filed a notice of contention which challenge to the trial judge's finding that the s42 defence had not been made out.

## Obscurity in establishing a coherent operation of s5B, 5C and s42

22. In the course of considering the Council's contentions in regard to s42, Basten JA referred to there being a degree of obscurity in establishing a coherent operation of s5B, 5C and s42. His Honour identified at [59] to [62] the following difficulties in applying s42:<sup>3</sup>
- a. an awkward aspect of the drafting of s42, in that although 42(a) provides that "*the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available*", it is surely the resources available for the exercise of functions which are limited, and not the functions themselves;
  - b. uncertainty as to how the "*burden of taking precautions*" in s5B(2)(c) was to be assessed. His Honour noted that the Council contended that the burden of taking precautions is to be assessed by reference to "*the broad range*" of the Council's activities, as "*the functions required to be exercised by the authority*" (sic): s42(c). That, so the argument goes, required regard to be had to fire precautions on *all* land owned, managed and controlled by the Council, against the risk of escape of fire from those lands. Of that reading, his Honour observed:
    - i. the Council sought to support it by pointing to the reference in s5C to precautions necessary to avoid "*similar risks of harm*" for which the Council may be responsible;
    - ii. the reading imposed a contextual limitation on the general language of s42(c), because it limits the inquiry to the necessary precautions to address a *single* risk of harm (the risk of escape of fire), rather than "*similar risks of harm*", as described in s 5C(a);
    - iii. the reading also had the potential to expand significantly the scope of inquiry required in any negligence claim involving a public authority, beyond the circumstances of the plaintiff's case;
  - c. in assessing "*the burden of a public authority taking particular precautions to avoid a risk of harm*" (for the purposes of ss5B(2)(c) and 5C(a)), the court is required to apply the principle that the performance of the duty of care is "*limited by the financial and other resources that are reasonably available to the public authority*": s42(a). Although the court is permitted to consider what resources are "*reasonably available*" in the particular case, that exercise is constrained by the principle that "*the general allocation of those resources by the authority is not open to challenge*": s42(b).

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<sup>3</sup> Basten JA's statement as to the obscurity in establishing a coherent operation of s5B, 5C and s42 reflected his Honour's earlier comment in *Kempsey Shire Council v Five Star Medical Centre Pty Ltd* [2018] NSWCA 308 at [54]: "*The provisions of Pt 5 do not demonstrate a coherent and straightforward approach to dealing with the civil liability of public and other authorities.*"



As to the last difficulty, the Council argued that the proper interpretation of the prohibition in respect of the general allocation of resources was that the resources available to manage the tip were those *in fact* allocated by the Council in its budget (by way of a general allocation of funds), such that it was not open to the court to consider whether *other* funds available to the Council could reasonably have been allocated to meeting the costs of any necessary precautions.

**i. Purpose of s42**

23. Having identified the difficulties in applying s42, Basten JA in *Weber* turned to its purpose. His Honour noted at [66] that the CLA gave effect to the relevant recommendations of the Ipp Committee's *Review of the Law of Negligence – Final Report* (September 2002) (**Panel Report**)<sup>4</sup> and that Part 5 and s42 in particular, was a legislative response to the dilemma between a public authority being allowed to justify its inaction on the basis of limited resources, whilst not exposing its resource allocation decisions to judicial review. The remedy proposed in the Panel Report was to make a good faith decision by a Council about the allocation of resources unchallengeable, not to prevent the Council relying upon such a decision.
24. Basten JA noted in *Weber* at [67] that this approach adopted the distinction explained by Mason J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; [1985] HCA 41 between a public authority being under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints, but may be under a duty where action or inaction is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.
25. His Honour concluded that the Panel Report provided no direct assistance in understanding the inter-relationship of ss5B, 5C and 42 and queried whether s42 was intended to reflect the principle explained by Mason in *Heyman* or qualified it in some respect: *Weber* at [72]. However, he stated that it seems unlikely s42 was intended to expose public authorities to greater liability than they had previously faced and that s42 was intended to encapsulate the existing immunity, but did so in terms which failed to reflect the rationale underlying the principle.

**ii Refrigerated Roadways**

26. In *Weber*, Basten JA reviewed the case law that has considered s42, in particular the leading decision of Campbell JA in *Roads and Traffic Authority of NSW v Refrigerated Roadways Pty Ltd* [2009] NSWCA 263 (**Refrigerated Roadways**).
27. In *Refrigerated Roadways*, four men dropped a block of concrete from an elevated bridgeway (Glenlee Bridge) over a freeway, which smashed through the windscreen of a truck on the freeway, causing the death of the driver. An issue

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<sup>4</sup> Prepared for the Minister for Revenue and Assistant Treasurer by a panel chaired by the Hon David Ipp ("the Panel").

was whether the roads authority (the RTA) was negligent in failing to construct screens along the overhead bridge to prevent objects falling onto the freeway.

28. It was held that the RTA did not breach its duty of care under the general law by failing to screen the Glenlee Bridge at the time of its construction because it was not shown that it failed to take a step that a reasonable roads authority would have taken: *Refrigerated Roadways* at [186].
29. In relation to s42 CLA, in *Refrigerated Roadways* Campbell JA held:
  - a. the effect of s42(a) is that what an authority can be required by the law of negligence to do is limited by the financial and other resources that are reasonably available to it for carrying out the functions required to be exercised by it: at [395].
  - b. when s42(b) uses the expression “*those resources*” it is referring to the “financial and other resources” the subject of section 42(a). Section 42(b) protects from challenge the “*general allocation*” by the RTA of those resources reasonably available to it for the purpose of the care, control and management of freeways and other roads under its care, control and management: at [396];
  - c. s42(a) is concerned with the resources reasonably available to the authority, while s42(b) is concerned with the allocation of those resources by the authority. That is, s42 starts with the position that certain resources are reasonably available to the authority, and considers the allocation of those resources that is made by the authority: at [397];
  - d. the effect of the word “*general*” in s42(b) seems to be to draw a distinction between the general and the specific such that in considering any particular allocation of resources, the court must consider whether it was a decision about the general or about the specific allocation of resources: at [398];
  - e. the force of the words “*is not open to challenge*” in s42(b) is to prohibit the manner of contending that a public or other authority is under a duty of care or has breached the duty. Where a breach of duty of care is alleged, the application of s42(b) needs to be carried out bearing in mind each particular manner in which it is alleged a breach of a duty of care has been alleged: at [399];
  - f. if one allegation had been that the RTA misapplied well-established principles and made careless factual errors in the way it prioritised overpasses for screening, the challenge would have been to the allocation of resources that the RTA had made to bridge screening and not to the general allocation of the resources reasonably available to the RTA for the purpose of exercising its functions: at [401]; and
  - g. s42(b) was not engaged to the extent that the claim concerned “*the allocation of resources that the RTA had actually allocated to bridge*”

screening”, on the basis that such a challenge would not be a challenge to the “*general allocation of resources reasonably available to the RTA*”.

30. Many subsequent decisions have followed and applied the decision of Campbell in *Refrigerated Roadways* in relation to the meaning and application of s42.<sup>5</sup>
31. In *Weber Basten JA* referred to Campbell’s J’s decision in *Refrigerated Roadways* and noted that:
  - a. Campbell JA construed the expression “*functions required to be exercised*” in s42(a) by the authority as referring to the requirements of the law of negligence, as compared with a “*requirement in the nature of a statutory duty*”. Basten JA at [78] considered Campbell J’s reading of the expression “*functions required to be exercised*” in s42(a) is open to doubt because:
    - i. s42(a) refers to “*for the purpose of exercising those functions*” not “*for the purpose of complying with its duty of care*”;
    - ii. the reading tends to limit the expansive definition of “*function*”, and “*exercise*” of a function, in s41<sup>6</sup>; and
    - iii. it would make little sense to identify the legal standard of taking reasonable care as a principle to be applied in determining whether there is a duty of care;
  - b. Campbell JA stated that “*s 42 presupposes the existence of the law of negligence*” and “*is in the nature of a supplement or corrective to the pre-existing law of negligence, not a replacement for it or any part of it.*”

Basten JA at [80] considered that this statement is not entirely consistent because:

- i. on the one hand, to the extent that the determination of the existence of a duty of care is a matter for consideration under the common law, s 42 must be applied in its terms; and
  - ii. on the other hand, so far as s42 applies with respect to determination of a breach of duty, it must be read coherently with ss 5B and 5C of the Act.
- c. Campbell JA considered that it was open to the Court, without undertaking a challenge to the “*general allocation*” of resources by the RTA, to consider a negligent exercise of its functions in fixing priorities for the allocation of its

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<sup>5</sup> In *Holroyd City Council v Zaiter* [2014] NSWCA 109 Hoeben JA noted at [96] that *Refrigerated Roadways* remains the leading case in relation to s42.

<sup>6</sup> The expansive definition of “*functions*” in s42 was adopted by the Court of Appeal in *Kempsey Shire Council v Five Star Medical Centre Pty Ltd* [2018] NSWCA 308 discussed below.

resources with respect to the construction of screens along overpasses on freeways. Basten JA stated that:

- i. there is no doubt that the scope of the phrase “*the general allocation of those resources*” is unclear”: *Weber* at [82];
  - ii. if “*general*” in relation to an allocation of funds is intended to be contrasted with “*specific*” allocations, the purpose of the provision is obscure and if the purpose of s42 is to exclude from judicial review in a tort claim financial decisions based on policy grounds, the distinction between general and specific policy decisions is misconceived: *Weber* at [89].
  - iii. the better understanding of s 42(b), consistently with its underlying policy, is that the Council may rely upon the limited resources available to it based on evidence that, at the relevant time, there were insufficient (or no) funds which had not been allocated to other purposes. If the evidence established as much, the plaintiff would be precluded from challenging the basis of the allocations: *Weber* at [90].
- d. the proposition in *Refrigerated Roadways* that a court could consider whether the authority had “*made careless factual errors in the way it prioritised overpasses for screening*”, so that absent such errors the bridge in question would probably have been screened before the incident occurred, would only have arisen “if” that allegation had been made. As the allegation was not made in *Refrigerated Roadways*, Campbell J’s reasoning was based on a hypothetical pleading: *Weber* at [92].
32. Basten JA concluded at [93] that whether these dicta in *Refrigerated Roadways* should be followed should await a case in which the answer will be dispositive.

### The s42 propositions

33. In *Weber* Basten JA set out the following propositions at [95] to [100] that may be accepted in relation to the operation of s42 (read in the context of ss 5B and 5C):
- a. the requirement in ss 5B(2)(c) and 5C(a) that the court consider “*the burden of taking precautions*” refers, in relation to a public authority, to the allocation of necessary financial and other resources, additional to those already deployed, to achieve the precautions that would have been taken by a reasonable council, for the purposes of s 5B(1)(c);
  - b. that assessment must take into account the additional burden which would be required to avoid “*similar risks of harm*” in other activities conducted by the authority;
  - c. in determining whether it would be reasonable to require the taking of additional precautions, the court must apply as a principle the assumed fact that such financial and other sources as are reasonably available are

*“limited”*: s 42(a). That is not to say that the court cannot find that an additional allocation of resources was reasonably required to meet the risk of harm, so long as the broader inquiry, extending beyond the circumstances of the plaintiff’s case, is undertaken in accordance with s5C(c);

- d. the reference to *“functions required to be exercised by the authority”* in s 42(a) is to be understood as referring to functions which may involve similar risks of harm, so as to operate coherently with s 5C(a). For example, the phrase *“the broad range of its activities”* in s 42(c) would not, in the present case, require reference to the activities of the Council in maintaining libraries, roads or other services with no direct relationship to the operation of waste management sites. Nor would it include management of Council lands not used for waste disposal;
- e. the court is not permitted to allow a plaintiff to *“challenge”* the general allocation of *“those resources”*, being the resources that are reasonably available for the exercise of the functions identified in s 42(a), as understood in accordance with the broad range of activities identified in s 42(c). What is prohibited is the conclusion that additional resources should have been made available, although they had, at the relevant time, been allocated to the exercise of other functions; and
- f. while there can be no challenge to the general allocation of the resources so identified, the court can conclude that more unallocated resources should have been provided. No claim in negligence against a public authority can succeed unless the plaintiff establishes that there were precautions available which a reasonable public authority in the position of the defendant would have taken. In most cases that will involve the putative allocation of resources at a time prior to the point at which the risk of harm materialised.

34. After identifying the propositions, Basten JA stated at [101] that *“If this understanding of s42 (read in the context of ss 5B and 5C) is correct, it is less likely, in comparison with a broader reading, that its application will disrupt the efficient disposal of the plaintiff’s negligence claim”* and that the purpose of s 42(b) is to prevent, rather than encourage, the tender of large volumes of accounting material by a public authority.

35. Basten JA rejected the Council’s appeal in respect of s42 on these bases:

- a. whatever may be the scope of the “general allocations” which, pursuant to s 42(b), cannot be challenged, there would be an inherent tension in permitting the Council to require the Court to have regard to the use of resources in areas of activity unrelated to the kind of activity which caused harm to the plaintiff, whilst precluding any challenge to the allocation of resources across the range of such activities;
- b. the tension between allowing the Council to rely upon the limited resources available to it, whilst limiting the challenges which could be made to the

general allocation of those resources, should be resolved by adopting a narrower, rather than a broader, construction of the activities which must be taken into account.

- c. that approach is to be preferred on the basis that the intention of Pt 5 of the CLA was in part to constrain the cost of litigation and the broader construction would tend to open up areas of inquiry into the activities of the public authority well beyond those otherwise the subject of a claim in negligence for damage to a particular individual; and
  - d. the s42 defence was not made out because at the time of the fire in December 2009, the Council had a waste management reserve of \$51,000 in its General Fund which could have been spent on the precautions.
36. Sackville AJA at [243] agreed with Basten JA that the Council's reliance upon s42 was misplaced as the evidence justified a finding that the cost of the measures that the Council should have taken to minimise the risk of fire escaping from the tip would have been modest and would have absorbed only a relatively small proportion of the reserve in 2009-2010.

### **General and Specific allocations**

37. In *Weber* Basten JA noted that there is no doubt that the scope of the phrase "*the general allocation of those resources*" used in s 42 is unclear. His Honour referred to *Holroyd City Council v Zaiter* [2014] NSWCA 109 (**Zaiter**), in which the plaintiff was injured when he rode a bicycle down a grassed slope and fell into a concrete drainage channel at the Holroyd Sports Ground. A pole with an advertising sign stood on the sports ground. That advertising sign was a source of revenue for the appellant. A fence was erected after the accident at a cost to Council of \$20,000.
38. The trial judge held there was a foreseeable risk that a child riding a bike could fall into the channel, the risk of injury was not insignificant and Council breached the duty of care, on the basis that acting reasonably, Council ought to have appreciated the risk and erected the fence prior to the accident.
39. As to s42:
- a. the Council submitted that it had decided that only the income from the advertising pole sign at the sports ground was to be used for improvements to the ground. Pursuant to s42(b) CLA this was not open to challenge;
  - b. the trial judge held that s42(b) did not apply as the financial records of themselves, without explanation, did not satisfy the court that s42 applied to the case.
40. On appeal the Court of Appeal upheld the trial judge's findings in respect of foreseeable risk and the Council's breach of duty of care. The Council challenged the trial judge's finding in respect of s42 and submitted:



- a. the primary judge obscured the circumstance that the resources available to the appellant were limited;
  - b. his Honour's approach inevitably challenged the "*general allocation*" of resources because it required that money from other sources ought to have been allocated at the general level of allocation so as to have enabled the building of the fence;
  - c. the appellant had determined to fund improvements to the sports ground on a priority basis from the revenue from the advertising pole sign;
  - d. implicit in his Honour's finding was the proposition that the appellant was not entitled to rely upon that sole source of funding as the "resource" from which the ground was to be upgraded, but that money was to be allocated from elsewhere, which conflicted with s42(b); and
  - e. examination of its financial records in the years leading up to the date of the accident showed that it had no reasonably available resources from its annual revenue to allocate to the construction of the fence.
41. In dealing with the Council's s42 appeal, Hoeben JA referred to the decision of Campbell JA in *Refrigerated Roadways* and held at [97] to [98] that:
- a. the appellant's submission, that once it had determined that the sole source of funding for improvements to the sports ground was to be the revenue from the advertising pole sign was a "*general allocation of resources*" that could not be challenged, was contrary to Campbell JA's analysis of s42;
  - b. the decision was part of the "general allocation" under either the heading of "public order and safety health" or "recreation and culture" which were the headings used by the appellant in its financial statements;
  - c. the general allocation of monies by the appellant to such functions cannot be challenged, but the allocation within those functions can. In other words, the reasonableness of a decision that the revenue from the advertising pole sign is to be the sole source of funding for the sports ground is not protected by the provisions of s42(b) and is subject to challenge.
42. It is submitted that, given the reasoning in *Weber* and *Zaiter*, when determining whether a public authority has breached its duty of care by failing to take specific precautions, s42 allows the Court to consider the availability of unallocated funds, but no challenge may be made to the general allocation of resources.

### **Functions of a public authority**

43. The definitions of various terms used in Part 5 CLA, including "*exercise a function*", "*function*" and "*public or other authority*" are extracted at [55] – [56] below.
44. In *Refrigerated Roadways*, Campbell JA noted at [390] and [391] that:

- a. the whole topic of s42 concerns the manner in which the public or other authority exercises its “*functions*”;
  - b. the definition of “*function*” in s41 is only an inclusive one, but s42 must be able to work in a way that makes sense by reference to at least situations where a function is a power, a function is an authority, and a function is a duty; and
  - c. there may be room for an argument that the “*functions*” of a public authority, within the meaning of s42, concern those activities or responsibilities that are conferred on or entrusted to it by legislation, and that those “*functions*” do not cover absolutely everything that the authority can do.
45. That view was not adopted in *Kempsey Shire Council v Five Star Medical Centre Pty Ltd* [2018] NSWCA 308 (***Kempsey***). In *Kempsey* an aircraft owned by the respondent company collided with a kangaroo as the aircraft attempted to land at Kempsey Aerodrome. The respondent commenced proceedings to recover the cost of damage to the aeroplane.
46. The trial judge held that the Council owed and had breached its duty of care in failing to erect a 1.8 metre high fence around the aerodrome to prevent kangaroos entering the airfield and that:
- a. s42(a) was not engaged because it was concerned with “the functions a council is ‘required’ to perform and did not apply because there was no obligation in the *Local Government Act 1993* (NSW) for the Council to operate the aerodrome;
  - b. “*functions*” was limited to broadly defined functions such as the provision of “roads, water, drainage and sewage” into which generic category provision of an aerodrome might fall;
  - c. as s42(a) was not engaged, s42(b) was not engaged.
47. The Council’s appeal was upheld, Basten JA holding that s42(a) was engaged because:
- a. the trial judge erred in focusing on the functions a council “*is required to perform*”;
  - b. the principle in s42(a) is not limited to functions that public or other authorities are legally required to exercise. In the case of Councils, it extends to functions exercised in response to requirements imposed by the needs of the community as understood by the Council (in that case under the *Local Government Act 1993* (NSW) s24) [55]).
48. In *Weber*, Basten referred at [78] to the expansive definition of “*function*” in s42(a).



## Pleading s42 as a defence

49. In *Refrigerated Roadways*, Campbell JA noted that s42 is a matter that a defendant must plead, and once it has been pleaded, the principles in s42 must be taken into account in deciding whether there has been a breach of a duty of care: at [385].
50. In *Weber Basten* JA noted at [76] that Campbell JA assumed that s42 is a matter that a defendant must plead, although s 42 is not expressed in language creating a defence. Nevertheless, his Honour observed that a defendant may be well advised to plead the facts and the inferences it seeks to draw for the purposes of s42 from any relevant facts.
51. Although s42 is not expressed in language creating a defence, but instead deals quite generally with the way one should proceed in deciding whether a public or other authority has a duty of care or has breached a duty of care (*Weber* at [76]), the relevant authorities establish that:
  - a. a defence should indicate reliance on s42 otherwise procedural unfairness will arise;<sup>7</sup>
  - b. s42 ought to be pleaded as a defence and the defence should give particulars of the facts which were said to give rise to consideration of s42;<sup>8</sup>
  - c. by simply pleading the language of s42 without pleading any of the underlying facts, the pleading is defective;<sup>9</sup>
  - d. s42 is not available as a stand-alone defence to a plaintiff's claim where a claim is not concerned with a breach of a duty of care, such as where a claim for nuisance is made;<sup>10</sup>
  - e. s42(b) may be pleaded as a defence even if s42(a) is not engaged or relied upon because s42(b) does not depend on the engagement of s42(a) but merely refers back to s42(a) to identify the source of the resources to which it applies, namely "*the financial and other resources of the authority*";<sup>11</sup>

## The evidence required to support s42

52. Basten JA noted in *Weber* at [76] the importance of the evidentiary burden borne by the public authority.
53. As to the nature of the evidence required to support a s42 defence, the authorities establish that:

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<sup>7</sup> *Port Stephens Council v Theodorakakis* [2006] NSWCA 70 Bryson JA [with whose reasons Giles and Ipp JJA agreed] included (at [15])

<sup>8</sup> *Ibid*

<sup>9</sup> *Watches of Switzerland Pty Ltd v Transport for NSW* [2018] NSWSC 1256

<sup>10</sup> *Gales Holdings Pty Limited v Tweed Shire Council* [2011] NSWSC 1128

<sup>11</sup> *Kempsey Shire Council v Five Star Medical Centre Pty Ltd* [2018] NSWCA 308 at [58]

- a. a court is unable to apply the principles in s42 unless there is evidence of:<sup>12</sup>
  - i. the financial and other resources that are available to the authority;
  - ii. the general allocation of those resources by the authority;
  - iii. the range of the authority's activities;
- b. if a public authority adduces evidence as to its budget, the state of its assets, its budgetary allocations, the expenditure in the year that an accident occurred and the predicted cost of having carried out the works that would have avoided the risk of harm to the plaintiff, it is necessary for the court to engage in some analysis of the evidence for the purposes of s42;<sup>13</sup>
- c. where s42 depends on a particular interpretation of a series of financial statements in relation to the financial affairs of the public authority, if the financial statements are not explained, are ambiguous and fail to unequivocally show that there was insufficient funds within the relevant categories (to pay for the precautions deemed necessary to remove a risk of harm) the public authority will not make out s42(b);<sup>14</sup> and
- d. the tender of large volumes of accounting material and financial records should be avoided if that material does not go to unequivocally show that there was insufficient funds within the relevant categories.

## SECTION 43A CIVIL LIABILITY ACT (NSW) 2005

54. Section 43A reads:

***43A Proceedings against public or other authorities for the exercise of special statutory powers***

- (1) *This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a public or other authority's exercise of, or failure to exercise, a special statutory power conferred on the authority.*
- (2) *A special statutory power is a power:*
  - (a) *that is conferred by or under a statute, and*
  - (b) *that is of a kind that persons generally are not authorised to exercise without specific statutory authority.*
- (3) *For the purposes of any such proceedings, any act or omission involving an exercise of, or failure to exercise, a special statutory*

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<sup>12</sup> *Bathurst Regional Council v Thompson* [2012] NSWCA 340; (2012) 191 LGERA 182 at [46] Hoeben JA

<sup>13</sup> *Council of the City of Liverpool v Turano & Anor* [2008] NSWCA 270 at [152]

<sup>14</sup> *Holroyd City Council v Zaiter* [2014] NSWCA 109 per Hoeben JA [100]; Emmett JA at [115]

*power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.*

55. By s 40, Part 5 applies to civil liability in tort<sup>15</sup>

*“even if the damages are sought in an action for breach of contract or any other action.”*

56. Section s 41 defines the terms used in s 43A:

***“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.*

### **A two step enquiry**

57. The section imposes the statutory test seen in the concluding words of subs (3):

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

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<sup>15</sup> Section 3B excludes from the reach of the Act civil liability for or relating to certain acts etc.

58. By those words, the section contemplates that, before it does any work, there will have been a negligent exercise of, or a negligent failure to exercise, a power.
59. Usually<sup>16</sup>, the section would be invoked *after* a finding of negligence, and operate as a defence to ‘civil liability’.
60. Application of the section thus involves a ‘two-stepped approach’, requiring a plaintiff to make out negligence by reference to s 5B, and then satisfy a further, not inconsistent, statutory test.

### **Two appellate decisions**

61. Section 43A has received much consideration at first instance and appellate level, but as to the latter, it has not been considered by the High Court of Australia<sup>17</sup>.
62. In what follows, two decisions of the NSW Court of Appeal are considered: **Weber**<sup>18</sup> and **McKenna v Hunter & New England Local Health District**<sup>19</sup>.
63. **Weber** provides the most recent appellate consideration of s 43A. The facts in **Weber** are set out above in the discussion of the NSW Court of Appeal’s treatment of s42 of the Act.
64. Relevantly as to s 43A, in **Weber**, Gleeson JA (at [200]) and Sackville AJA (at [211]) agreed with Basten JA that:
  - a. the Council’s management of the Tip was not undertaken pursuant to a special statutory power;
  - b. general law principles applied; and
  - c. s 43A was not engaged.
65. His Honour arrived at the last conclusion in two steps:
  - a. First, by identifying the basis of the liability relied on by the plaintiff as “*the failure of the Council to undertake identified precautions in the management of the tip*” (such precautions comprising constructing firebreaks, reducing fuel loads and compacting fill placed over the dumped refuse)<sup>20</sup>;

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<sup>16</sup> But not always: see *Bankstown City Council v Zraika* (2016) NSWLR 159 where the NSW Court of Appeal held it was not necessary to determine the duty owed by the Council, because it was clear that the high test in s 43A could not be made out

<sup>17</sup> The section arose in *Sydney Water Corp v Turano* (2009) 239 CLR 51, but although the High Court cited the legislation’s history and referred to some academic commentary on it, the court held (at [23]) that it was not the occasion to consider its operation. Similarly, in *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270 the High Court decided (at [12]) that it was not necessary to consider the s 43A appeal ground, because it held that the authority, a public hospital, owed no relevant duty of care and upheld the appeal on that ground.

<sup>18</sup> *Weber v Greater Hume Shire Council* [2019] NSWCA 74

<sup>19</sup> [2013] NSWCA 476 (overturned, but not as to s 43A, by the High Court in *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270

<sup>20</sup> At [45]

- b. Secondly, by determining that those activities did not involve the exercise of a power conferred by a statute “of a kind that persons generally are not authorised to exercise without specific statutory authority.”<sup>21</sup>

**‘basis of liability’**

66. Discerning the basis of liability on which the plaintiff / appellant relied in **Weber** was reasonably simple, and seemingly before the Court of Appeal, it was common ground that it was as Basten JA described it.
67. In most cases, as in **Weber**, the task will involve consideration of the particulars of negligence and precautions against the risk of harm propounded by the plaintiff on the pleadings.
68. However, what of cases where the pleadings arguably conceal the true nature of the case advanced? Should the task of discerning the basis of liability relied upon by the plaintiff involve resort to only the express words of the pleaded case, or is it permissible to go beyond the words, to stand back from the pleadings, in order to ascertain the substantive manner in which the defendant authority’s acts or omissions are impugned?
69. **McKenna** provides, it is submitted, a good example of this last issue. There, the defendant, a local health district responsible for a regional NSW hospital, was alleged to be liable in negligence for the decision of one of its employed psychiatrists to discharge a psychiatric patient, Mr Pettigrove. Mr Pettigrove had, some 36 hours earlier, been admitted and compulsorily detained at the hospital by the same psychiatrist, the psychiatrist being of the opinion that he was a mentally disordered person within the meaning of the Mental Health Act, and that compulsory detention under that Act was necessary for Mr Pettigrove’s own protection from serious physical harm. Mr Pettigrove, who came from Victoria had been camping for some weeks in the NSW hinterland with his friend, Mr Rose. Mr Rose became concerned about Mr Pettigrove’s erratic behaviour at the campsite and, aware that Mr Pettigrove had endured a long history of psychosis when living in Victoria, brought him to the nearest hospital for urgent treatment. While admitted Mr Pettigrove was medicated, his symptoms eased, and after a little more than a day in the hospital, during which a conference was held between the psychiatrist and other hospital staff, with Mr Pettigrove, Mr Rose and Mr Pettigrove’s mother participating via speaker from the family home in Victoria, it was resolved that Mr Pettigrove’s best interest lay in him returning to the care of his mother and his treating doctors in Victoria. Mr Rose, who had a vehicle, offered to drive him home. The compulsory detention was lifted, and Mr Pettigrove discharged into Mr Rose’s care. With a half hour of departure, Mr Pettigrove strangled Mr Rose.
70. Mr Rose’s mother and siblings sued the local health district, alleging that the psychiatrist’s decision to discharge Mr Pettigrove was negligent. The particulars of negligence included these:

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<sup>21</sup> At [46]

*Failing to detain Pettigrove until he was properly medicated.*

*Discharging Pettigrove on 21 July 2004 notwithstanding that condition or behaviour.*

*Discharging Pettigrove when he was in a condition that represented a significant risk to himself and others.*

*Discharging Pettigrove into the sole care of Mr Rose when they then faced an overnight journey alone together to Victoria.*

71. The defendant pleaded, *inter alia*, s 43A. It relied on 35(3) of the Mental Health Act, which provided that where the medical superintendent

*“is of the opinion that the person is not a mentally disordered person or a mentally ill person or that other care of a less restrictive kind is appropriate and reasonably available to the person, the person must not ... be further detained in the hospital.”*

72. The defendant argued that the discharge was mandated by that provision, because the psychiatrist formed the view that Pettigrove’s best interests lay in him returning to the care of his mother and his long term treaters in Victoria. The defendant contended that, despite the express words of the pleading, and the absence of any reference in it to the Mental Health Act, the plaintiffs’ case was, in substance, based on its exercise of a special statutory power to discharge under s 35(3) of the Mental Health Act, or alternatively, was based on a failure of the hospital to detain under s 21 of that Act (being the very section under which Mr Pettigrove was first detained). Whichever alternative was preferred, the defendant argued, the plaintiffs’ case impugned the exercise of, or failure to exercise, a special statutory power. The defendant argued that any such act or omission could not give rise to civil liability because the high bar established by s 43A(3) had not been met.
73. The plaintiffs’ case at first instance, and on appeal, was that neither the exercise, nor any failure to exercise, a special statutory power was involved. They argued that s 43A was not engaged because their case was a simple one based on common law negligence by the hospital in its actions in discharging Mr Pettigrove into Mr Rose’s care. Consistently with that, perhaps, the pleaded case did not expressly refer to the Mental Health Act or otherwise engage with the source of the hospital’s power to detain a patient.
74. Thus **McKenna** provides an example where mere resort to the pleaded case risks obscuring the true basis of the liability propounded. As the defendant argued in **McKenna**, no pleading device should be permitted to thwart the reach of s 43A where, as a matter of substance, the circumstances for its application to the actions of the defendant impugned in the proceedings are otherwise in play.
75. The trial judge rejected the s 43A defence<sup>22</sup>. He held that s 43A was not engaged because the ‘special statutory power’ on which the defendant relied (s35(3)) was inapplicable because, he found, Mr Pettigrove continued to be mentally ill and the

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<sup>22</sup> But upheld other defences, including under s 50, the competent professional practice ‘defence’



purpose of the discharge was not to transfer Mr Pettigrove to “other care of a less restrictive kind [which] is appropriate and reasonably available”. His Honour added that in any event, there was no evidence that Mr Pettigrove would not have remained in the hospital voluntarily, with the consequence that there was no exercise of a power to detain or not to detain.

76. On appeal by the plaintiffs, the defendant argued, by Notice of Contention, that the trial judge should have upheld its s 43A defence.
77. Macfarlan J (with Whom Beazley P agreed) accepted the defendant’s submission that, contrary to the finding of the primary judge, s 35(3) did confer a power and that the power was a ‘special statutory power’ within the meaning of s 43A. However, his Honour held that s 35(3) was not the source of power utilised here, because the psychiatrist who made the discharge decision was not acting as a ‘medical superintendent’ at the time. His Honour held:

*The basis upon which I consider the plaintiffs to have established a liability of the Health Service is that there was a failure of the Hospital to continue to detain Mr Pettigrove. The Hospital’s power and obligation to detain him did not arise from s 35(3). It arose from s 21, Mr Pettigrove’s certification as a mentally ill person and the taking of the steps referred to in ss 29, 32 and 33 (see [11] above). A finding that the Hospital should have exercised, but failed to exercise, the power to discharge conferred by s 35(3) would not have been a finding as to an element of the Health Service’s liability for discharging Mr Pettigrove. The plaintiffs’ case was in fact to the contrary, namely, that the s 35(3) power to discharge was not and should not have been exercised.*

*For these reasons, the Health Service is not entitled to the protection of s 43A of the Civil Liability Act. Mr Pettigrove’s discharge did occur but it did not occur as a result of an exercise or purported exercise of a special statutory power, namely that conferred by s 35(3) of the Mental Health Act. It was, simply, unauthorised, because the power to discharge that might conceivably have authorised it (s 35(3)) was not utilized ...*

78. Macfarlan JA concluded by observing that:

*For completeness, I add that the plaintiffs, in my view for good reason, did not contend that if the Health Service’s liability was in fact based on the exercise of, or a failure to exercise, a “special statutory power” that the negligence of the Health Service was of a sufficiently high level to reach the threshold referred to in s 43A (see *Precision Products (NSW) Pty Ltd v Hawkesbury City Council* [2008] NSWCA 278 ; 74 NSWLR 102 at [175]–[177] and *Patsalis v New South Wales* [2012] NSWCA 307 at [88]).*

79. Garling J, in dissent, would have upheld the s 43A defence. His Honour’s reasoning is instructive, and it is respectfully submitted, to be preferred to that of Macfarlan JA, with whom Beazley P agreed. Justice Garling wrote<sup>23</sup>:

*In order to exercise the powers of involuntary detention, there needs to be a factual threshold established that a patient is mentally ill or mentally disordered. Relevantly here, on 20 July 2004, Mr Pettigrove was determined by a number of doctors who examined him, including the*

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<sup>23</sup> [283] – [286]

*Medical Superintendent, to be mentally ill. The appellants' case was that Mr Pettigrove continued to be mentally ill at the time of his discharge. In those circumstances, it was open to the hospital to exercise the powers which existed under the Act.*

*As Macfarlan JA points out, it was not contended by the appellants, either on appeal or at trial, that the conduct of the respondent which amounted to a failure to detain Mr Pettigrove as an involuntary patient was of a kind which would have justified a finding of unreasonable conduct to the level required by s 43A of the CL Act.*

*Accordingly, unless there was a finding of fact, reasonably based, by the trial judge that Mr Pettigrove would have remained as a voluntary patient, the essence of liability in this case must arise as a consequence of a failure by the Hospital through the medical superintendent to exercise the special statutory powers. Such a failure, or omission, is caught by s 43A of the CL Act.*

*The trial judge made no finding that Mr Pettigrove would have remained in hospital voluntarily had he been so advised by the doctors. No ground of appeal raised the failure of the trial judge to make such a finding. This court was not asked to make such a finding.*

80. Thus, despite the plaintiffs' pleading making no reference to the statutory power to detain, Garling J would have upheld the defendant's point that the plaintiffs' case was premised upon the hospital having failed to exercise that power. In that regard, the minority decision in **McKenna** supports the proposition that the first s 43A enquiry identified by Basten JA in **Weber** (see [65.a] above), i.e. what is the 'basis of liability' of the defendant, may not always be answered by considering the text of the pleaded case alone. **McKenna** is a salient reminder that practitioners should examine whether a special statutory power lies at the heart of the pleaded case, even if not cited in it. In short, can it be said that, in the words of subs 43A(1), "the liability is based on a public or other authority's exercise of, or failure to exercise, a special statutory power conferred on the authority ...".
81. As has been noted (footnote 17 above), the defendant in **McKenna** obtained special leave to appeal to the High Court on the Court of Appeal's s 43A reasoning, and on several other aspects of the majority decision, but the High Court upheld the appeal on other grounds and held it was unnecessary to consider the s 43A challenge.

***Is the power "of a kind that persons generally are not authorised to exercise without specific statutory authority"?***

82. As has been observed ([65] above), the second step in the process of reasoning by which the Court in **Weber** held that s 43A was not engaged in the circumstances of that case was by determining that the Council activities impugned in the proceedings did not involve the exercise of a power conferred by a statute "of a kind that persons generally are not authorised to exercise without specific statutory authority."



83. Of that issue, Basten JA's reasons are captured in four paragraphs<sup>24</sup>:

*On the one hand, it might be said that councils, as creatures of statute, have no powers other than those expressly or impliedly conferred by statute. However, there is a distinction to be drawn between activities which are reliant for their lawfulness on a statutory power and those which can be undertaken in accordance with the general law. Such a distinction, important for determining the extent of a statutory immunity from suit, was noted by Campbell JA in Refrigerated Roadways. Thus, a council officer requires no statutory authority to drive a vehicle on a public road beyond the licensing requirements applicable to all drivers; whereas statutory authority is required for the erection of signs along a roadway, an activity which is prohibited except by or with the consent of the relevant roads authority. In the present case, the steps required to be taken on the tip were steps which could readily be taken by the owner or a person having management of the land for waste disposal purposes, without any specific statutory authority.*

*The same reasoning would operate with respect to s 48 of the Local Government Act, which confers powers of control on the Council with respect to public reserves. That provision conferred no specific authority with respect to conduct on the reserve, although the creation of the reserve would have restricted the activities which the Council could undertake on the land.*

*A third possibility is that the exercise by the Council of waste management functions might be governed by the licensing provisions of the Protection of the Environment Act. Again, it may be doubted that the conferral of authority to use the land in a particular way pursuant to a licence would engage a power with respect to the precautions identified above. The point need not be considered further, as it was common ground that the licensing requirements under the Protection of the Environment Act did not apply to the Walla Walla tip.*

*It follows that the precautions which the Council failed to undertake, upon which the liability identified above was based, did not involve the failure to exercise any special statutory power conferred on the Council. Accordingly, s 43A, and the special standard of care which it imposed, was not engaged in the present case.*

84. The underlined words in the extract bring into stark relief the distinction between the mental health legislation, and the facts, considered in **McKenna**, and the matters that arose in **Weber**. Whereas the detention of a mentally ill patient could only lawfully occur pursuant to the legislation, as Garling J found in the former, in the latter, the same could not be said of the impugned activities of the Council in its capacity as an operator of a tip.
85. **Weber** reminds practitioners that it is unsafe to assume that all activities undertaken by a "public or other authority" will involve a special statutory power. In every case, the issue turns on the nature of the impugned activity and whether it can be said that the power to engage in that activity derives from statute, as in **McKenna**, or whether the authority, although vested with statutory powers, was engaged in activities open to it and others under the general law.

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<sup>24</sup> *Weber*, at [47] – [50], footnotes omitted; emphasis added

RICHARD CHENEY SC AND JUSTIN O'CONNOR  
GREENWAY CHAMBERS

11 MARCH 2020