Court of Appeal
Supreme Court
New South Wales

Case Name:	**Weber v Greater Hume Shire Council**
Medium Neutral Citation:	[2019] NSWCA 74
Hearing Date(s):	26, 27 February 2019
Date of Orders:	17 April 2019
Date of Decision:	17 April 2019
Before:	Basten JA at [1]; Gleeson JA at [200]; Sackville AJA at [201]
Decision:	(1) Grant Sharon Patricia Weber leave to appeal from the judgment and orders in the Common Law Division; (2) Allow the appeal and set aside orders made on 14 May 2018; in their place make the following orders – (a) Give judgment for the representative plaintiff, Sharon Patricia Weber, against the defendant, Greater Hume Shire Council, in the amount of $104,400 plus interest; (b) Order that the defendant pay the plaintiff's costs of the trial of the common issues; (c) Remit the proceedings to the Common Law Division to deal with the outstanding issues in the representative proceedings. (3) Order that the respondent pay the appellant's costs in this Court.
Catchwords:	TORTS — negligence — duty of care — duty of care owed by operator of waste disposal tip — escape of fire – whether class to whom duty owed indeterminate TORTS — negligence — standard of care — whether Council exercising special statutory power under *Civil Liability Act 2002* (NSW), s 43A

TORTS — negligence — breach of duty — whether adequate precautions taken to prevent escape of fire – allocation of resources by local council — application of *Civil Liability Act*, s 42 — whether inaction of local council unreasonable — whether financial resources available to take precautions

TORTS — negligence — causation — where multiple possible causes of fire — whether probable causes arising from breaches of duty were sufficient to establish causation — whether precautions would have prevented damage to the plaintiff

Legislation Cited:

Careless Use of Fire Act 1912 (NSW), s 9
Civil Liability Act 2002 (NSW), ss 5B, 5C, 5D, 5H, 5M, 32, 41, 42, 43A, 49; Pt 5
Crown Lands Act 1989 (NSW), ss 92, 98, 100; Pt 5
Crown Lands Management Act 2016 (NSW), Sch 8
Local Government Act 1993 (NSW), ss 24, 48; Ch 6
Protection of the Environment Operations Act 1997 (NSW), ss 5, 48; Sch 1, items 39, 42
Rural Fires Act 1997 (NSW), ss 63, 81, 93, 95, 133

Cases Cited:

Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420; [2009] HCA 48
Agar v Hyde (2000) 201 CLR 552; [2000] HCA 41
Anns v Merton London Borough Council [1978] AC 728
Attorney-General for Quebec v Attorney-General for Canada (1921) 1 AC 401
Bathurst Regional Council as Trustee for the Bathurst City Council Crown Reserve Trust v Thompson [2012] NSWCA 340; 191 LGERA 182
Black v The Christchurch Finance Company Limited [1894] AC 48
Board of Fire Commissioners (NSW) v Ardouin (1961) 109 CLR 105; [1961 HCA 71
Brodie v Singleton Shire Council (2001) 206 CLR 512; [2001] HCA 29
Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520; [1994] HCA 13
Caledonian Collieries Ltd v Speirs (1957) 97 CLR 202; [1957] HCA 14
Caltex Refineries (Qld) Pty Ltd v Stavar (2009) 75 NSWLR 649; [2009] NSWCA 258
City of Perth v Crystal Park Ltd (1940) 64 CLR 153, 162; [1940] HCA 35
Curtis v Harden Shire Council (2014) 88 NSWLR 10; [2014] NSWCA 314
Donoghue v Stevenson [1932] AC 532

	Electro Optic Systems Pty Ltd v State of New South Wales (2014) 10 ACTLR 1; [2014] ACTCA 45 *Fletcher v Rylands* (1866) LR 1 Ex 265 *Hargrave v Goldman* (1963) 110 CLR 40; [1963] HCA 56. *Holroyd City Council v Zaiter* [2014] NSWCA 109; 199 LGERA 319 *Lithgow City Council v Jackson* (2011) 244 CLR 352; [2011] HCA 36 *McInnes v Wardle* (1931) 45 CLR 548; [1931] HCA 40 *Murphy v Brentwood District Council* [1991] 1 AC 398 *Perre v Apand Pty Ltd* (1999) 198 CLR 180; [1999] HCA 36 *Roads and Traffic Authority of New South Wales v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360; [2009] NSWCA 263 *Rylands v Fletcher* (1868) LR 3 HL 330 *Stovin v Wise* [1996] AC 923 *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; [1985] HCA 41
Texts Cited:	M Leeming, *The Statutory Foundations of Negligence* (The Federation Press, 2019) NSW Government Gazette (No 150), 11 November 1994 Reserve No 49,269; NSW Government Gazette (No 153), 24 September 1913 *Review of the Law of Negligence – Final Report* (September 2002)
Category:	Principal judgment
Parties:	Sharon Patricia Weber (Appellant) Greater Hume Shire Council (Respondent)
Representation:	Counsel: Mr P Braham SC / Mr D Birch (Appellant) Mr R Sheldon SC / Mr A Barnett (Respondent) Solicitors: Maddens Lawyers (Appellant) Mills Oakley Lawyers (Respondent)
File Number(s):	2018/180967

Decision under appeal

Court or Tribunal:	Supreme Court
Jurisdiction:	Common Law Division
Medium Neutral Citation:	[2018] NSWSC 667
Date of Decision:	14 May 2018
Before:	Walton J
File Number(s):	2015/368036

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The respondent, Greater Hume Shire Council, operated a waste disposal site on a reserve south-west of Walla Walla ("the Tip"). The appellant resided in Gerogery, 11km from the Tip. On 17 December 2009, a fire ignited in the Tip and quickly spread, reaching Gerogery where it destroyed homes and personal possessions of a number of residents including the appellant.

On 15 December 2015 the appellant commenced representative proceedings in the Supreme Court against the respondent. The appellant claimed that the Council had been negligent in the operation and maintenance of the Tip by failing to reduce the risk of fire and the likelihood of its escape. The appellant contended that the respondent's failure to take precautions had caused the ignition and uncontrollable spread of the fire, which had resulted in the damage suffered by the appellant and other effected residents.

The trial judge found that the respondent owed the appellant a duty of care, and that this duty was breached by the respondent's failure to create a fire management plan, create an effective firebreak, consolidate deposited waste into appropriate areas and remove fuel, including long grass. However, the trial judge found that the appellant had not demonstrated factual causation as the cause of the fire could not be proven, and it was not demonstrated that reasonable precautions would have prevented the escape of the fire. The proceedings were therefore dismissed. The plaintiff appealed.

The main issues raised by the appellant were:

(1) whether causation was established where a sole probable cause of the fire could not be identified, but the likely causes were all due to the respondent's negligence; and

(2) if so, whether a causal link was established between the respondent's failure to take precautions against the risk of fire and the damage suffered by the appellant.

The respondent filed a notice of contention challenging findings adverse to it, namely:

(3) as to duty of care;

(4) as to breach of duty;

(5) rejecting the respondent's defence under s 42 of the *Civil Liability Act 2002 (NSW)*; and

(6) rejecting the respondent's defence under s 43A of the *Civil Liability Act*.

The Court (Basten JA, Gleeson JA and Sackville AJA) **allowed the appeal and held:**

In relation to duty of care:

(1) Subject to the operation of the *Civil Liability Act 2002* (NSW), the liability of a land owner with respect to fire escaping from its land depends on the law of negligence: [15], [25]-[27], [200], [210].

Civil Liability Act 2002 (NSW), ss 5B, 5C, 5M, 42 referred to; *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420; [2009] HCA 48*,* distinguished; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; [1994] HCA 13 applied.

(2) The imposition of a duty of care that extended to those affected by the fire, was not inconsistent with the Council's statutory functions: [42], [200], [210].

Crown Lands Act 1989 (NSW), ss 2 92, 98 and 100; *Local Government Act 1993* (NSW); *Protection of the Environment Operations Act 1997* (NSW), ss 48 and 5, Sch 1; *Careless Use of Fire Act 1912* (NSW), s 9; *Rural Fires Act 1997* (NSW), ss 63, 95, 81 and 133;

Sullivan v Moody (2001) 207 CLR 562; [2001] HCA 59; *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202; [1957] HCA 14 considered.

(3) The existence of a duty of care to prevent the escape of fire is not a novel proposition; nor was the class of persons potentially affected indeterminate; the Council owed a duty of care to the appellant as a person directly affected by the fire: [23]-[27], [200], [207]-[208].

Caltex Refineries (Qld) Pty Ltd v Stavar (2009) 75 NSWLR 649; [2009] NSWCA 258; *Electro Optic Systems Pty Ltd v State of New South Wales* (2014) 10 ACTLR 1; [2014] ACTCA 45 distinguished;

Hargrave v Goldman (1963) 110 CLR 40; [1963] HCA 56; *Perre v Apand Pty Ltd* (1999) 198 CLR 180; [1999] HCA 36 applied.

In relation breach of duty and *Civil Liability Act*, s 42:

(4) In considering if the Council has breached its duty of care by failing to take specific precautions, s 42 allows the Court to consider the availability of unallocated funds, but cannot challenge the general allocation of resources: [99]-[100], [200], [243].

Civil Liability Act 2002 (NSW), ss 5B, 5C, 41 and 42 applied;

Brodie v Singleton Shire Council (2001) 206 CLR 512; [2001] HCA 29; *Stovin v Wise* [1996] AC 923; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; [1985] HCA 41; *Bathurst Regional Council as Trustee for the Bathurst City Council Crown Reserve Trust v Thompson* [2012] NSWCA 340; 191 LGERA 182 considered; *Holroyd City Council v Zaiter* [2014] NSWCA 109; 199 LGERA 319 applied.

Roads and Traffic Authority of New South Wales v Refrigerated Roadways Pty Ltd (2009) 77 NSWLR 360; [2009] NSWCA 263, doubted.

(5) The Council's financial statements indicated that there were sufficient unallocated funds available at the relevant time for it to undertake the precautions necessary to reduce the risk of the ignition or spread of fire at the Tip: [180], [200], [243].

In relation to *Civil Liability Act*, s 43A:

(6) The Council's management of the Tip was not undertaken pursuant to a special statutory power; general law principles applied and s 43A was not engaged: [50], [200], [211].

Local Government Act 1993 (NSW), s 48; *Protection of the Environment Operations Act 1997* (NSW);

Curtis v Harden Shire Council (2014) 88 NSWLR 10; [2014] NSWCA 314; *Refrigerated Roadways*, considered.

In relation to causation:

(Per Basten JA and Gleeson JA):

(7) It was unnecessary for the Court to be satisfied as to the precise cause of the fire if it was more probable than not that the fire was caused by one of the methods of ignition caused by the Council's negligence: [141], [200].

Lithgow City Council v Jackson (2011) 244 CLR 355; [2011] HCA 36, considered.

(Per Sackville AJA):

(8) The relevant question was whether the fire would have escaped from the Tip if the precautions had been taken: [216].

(Per Basten JA, Gleeson JA and Sackville AJA):

(9) Specific precautions which should have been taken by the Council, including compacting and covering the general waste, levelling the ground between waste to allow for slashers and similar machinery, removing long grass, and maintenance of a cleared firebreak would have slowed the spread of the fire: [160], [200], [237].

(10) The precautions which should have been taken would probably have allowed the fire to be controlled before it escaped from the Tip; the breaches of duty therefore caused the appellant's loss: [198], [200], [236].

JUDGMENT

1 **BASTEN JA**: Walla Walla is a town in southern New South Wales some 40km due north of Albury. It is in the local government area of the respondent, the Greater Hume Shire Council ("the Council"). As part of its waste management activities the Council operates a number of waste disposal sites; one was on a reserve some 2km south-west of Walla Walla. It had an area of about 4 hectares. At around 1.30pm on 17 December 2009 a fire was observed in the north-west corner of the tip. Fanned by a hot north-westerly to nor-nor-westerly wind, the fire crossed the tip, a distance of approximately 150 metres, and jumped a fire-break on the south side of the tip.

2 The fire continued to burn, moving rapidly in a generally south-easterly direction for a distance of 11km, reaching the town of Gerogery about one hour after escaping from the tip site. At Gerogery it destroyed a home occupied by the plaintiff, including her personal possessions. The fire continued past Gerogery and was eventually stopped by a wind change, the arrival of rain and the efforts of firefighters and aircraft. The fire burnt some 5,200 hectares.

3 On 15 December 2015, just within the limitation period, the plaintiff commenced representative proceedings in the Supreme Court against the Council, claiming damages on behalf of herself and a class of persons she represented. The class was described as "all persons who suffered loss or damage to property as a result of the fire" and all persons who suffered personal injury (including psychiatric injury) as a result of the fire. Following a trial in April 2017, the primary judge, Walton J, delivered judgment on 14 May 2018, dismissing the proceedings with respect to the plaintiff.[1]

[1] *Weber v Greater Hume Shire Council* [2018] NSWSC 667.

Findings at trial

4 In a carefully structured judgment, the primary judge found that the Council owed the plaintiff (and group members) a duty of care expressed in the following terms:

> "[246] In my view, the plaintiff has established that the defendant owed a duty to the plaintiff (and the group members) to take reasonable care to avoid risk of personal injury or property loss caused by the escape of fire from the Tip."

5 The judge then turned to the question of breach, noting that, in the language of s 5B of the *Civil Liability Act 2002* (NSW), the plaintiff had alleged a number of precautions which she said the Council ought to have taken but failed to take against the risk of harm from fire. They were identified as follows:

> "[262] The 10 precautions the plaintiff alleged the defendant should have taken, … in summary, were to:
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> (a) prepare and implement a fire management plan;
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> (b) create and maintain an effective firebreak;
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> (c) consolidate deposited waste into appropriate areas;
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> (d) remove fuel to prevent dangerous build ups;
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> (e) install and maintain fire fighting equipment;
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> (f) undertake inspection and monitoring of the facility during periods of extreme bush fire risk;
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> (g) ensure different kinds of waste are not mixed together;
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> (h) cover waste with cover material on regular basis;
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> (i) manage green waste piles; and
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> (j) manage combustible material to minimise risk of combustion."

6 Before dealing with breach, the judge sought to identify the cause of the fire. Being unable to do so, he concluded that the Council could not be liable for the fire starting. In dealing with breach he therefore focused on factors relevant to the escape of the fire from the tip. After addressing the precautions individually, he found breach of duty in the following terms:

> "[399] I consider that it was reasonable for a person in the position of the defendant to take the precautions identified in paragraphs (a), (b), (c) and (d) to prevent the spread of fire once ignited in the Tip.
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> [400] The plaintiff has proven, on the balance of probabilities, a breach of duty, with respect to escape, by the failure to sufficiently take those precautions against the risk of harm, namely, in the following areas: prepare and implement a fire management plan; create and maintain an effective firebreak; consolidate deposited waste into appropriate areas and remove fuel to prevent dangerous build ups."

7 Despite these findings favourable to the plaintiff, the proceedings were dismissed on the basis that, in terms of s 5D(1)(a) of the *Civil Liability Act*, she had failed to demonstrate that the breaches of duty caused harm to her, the judge, stating:

> "[408] In my view, the plaintiff has failed to prove, on the balance of probabilities, that the failure by the defendant to take the pleaded steps or precautions to prevent the spread of the fire caused the particular harm suffered by the plaintiff. In other words, the plaintiff has not demonstrated that, if the reasonable precautions were sufficiently taken, that the harm caused to the plaintiff by the spread of the fire would have been avoided. Hence, the plaintiff has failed to show factual causation, namely, the negligence was a necessary condition of the occurrence of the harm."

Issues on appeal

8 The notice of appeal raised two issues. First, it alleged that although a sole probable cause of the fire might not have been established, the likely causes were all within the control of the Council and could have been averted had reasonable precautions been taken. Secondly, it alleged there was error in the finding that the plaintiff had failed to establish causation.

9 In the event that the appeal were to succeed, the plaintiff sought a judgment in an agreed amount, namely $104,400 plus interest. It would then be necessary to remit the matter to the Common Law Division to deal with the claims of group members. Because the judge dealt only with the plaintiff's claim and did not finally dispose of the proceedings, the orders appealed from were interlocutory. Belatedly, the appellant sought leave to appeal, which was not opposed and should be granted.

10 The issues on the appeal were, however, not limited to those raised by the appellant. The Council filed a notice of contention challenging specific findings of the primary judge which were favourable to the plaintiff. Those findings were identified in 34 paragraphs which, taking into account subparagraphs, identified twice that number of alleged errors. Broadly speaking, the contentions constituted challenges to the findings:

(1) that the Council owed the plaintiff a duty of care;

(2) that the Council was in breach of its duty of care;

(3) rejecting the Council's defence under s 42 of the *Civil Liability Act*; and

(4) rejecting the Council's defence under s 43A of the *Civil Liability Act*.

11 The last two sets of contentions were not aptly described as "defences"; the sections identified factors relevant to both the establishment of a duty of care and the question of breach; they will be addressed in those contexts. Because issues relating to causation fell to be determined in accordance with the findings as to the scope and nature of the duty of care, and the basis upon which the Council was found to be in breach of that duty, the hearing of the appeal commenced with senior counsel for the Council addressing the issues raised by the notice of contention. These reasons follow the same order.

12 The statutory scheme under which the tip was managed at the date of the fire included the *Crown Lands Act 1989* (NSW). That Act was repealed, with effect from 1 July 2018, by the *Crown Lands Management Act 2016* (NSW), Sch 8. The changes are not relevant to the determination of this case; these reasons address the law in effect in 2009.

Duty of care

(a) relevant considerations

13 The Council's challenge to the finding that it owed a duty of care to the plaintiff was said to depend on eight separate errors made by the trial judge. These

were that the judge erred (i) in holding that this was not a novel class of case; (ii) in holding that the operation of the tip was a dangerous activity; (iii) in identifying the risk of harm; (iv) in identifying a risk that was reasonably foreseeable; (v) in quantifying the significance of the risk; (vi) in assessing the extent of the Council's control of the tip; (vii) in identifying the relationship between the Council and the plaintiff, and (viii) in disregarding the indeterminacy of the class of persons to whom the putative duty was owed.

14 Underlying these grounds were a number of contestable assumptions. The first was that questions of duty were to be resolved in accordance with general law principles, rather than having regard to the *Civil Liability Act*. That assumption was incorrect if stated in unqualified terms. The assumption is sometimes taken to follow from statements by the High Court in *Adeels Palace Pty Ltd v Moubarak*[2] that the heading to ss 5B and 5C of the *Civil Liability Act*, namely "Duty of care" is "apt to mislead."[3] After setting out the provisions, the Court noted that both sections "are evidently directed to questions of breach of duty."[4]

15 That conclusion does not, however, mean that the operation of the *Civil Liability Act* may be disregarded when considering whether, in a particular case, a duty of care is owed to a plaintiff. Thus, ss 5H and 5M deny the existence of a duty of care in circumstances to which they apply (being warning of obvious risks, and liability for recreational activity where a risk warning is given). Further, the Act identifies factors to be considered in determining whether a duty of care arises. Relevantly with respect to public authorities such as the Council, s 42 identifies principles to be taken into account in determining whether a public authority owes a duty of care.[5] Other provisions identify circumstances in which a person "does not incur a liability", which may be ambivalent as to whether it operates with respect to duty,

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2 (2009) 239 CLR 420; [2009] HCA 48.
3 *Adeels Palace* at [13].
4 Ibid.
5 See also s 32 (dealing with the duty not to cause mental harm), and s 49 (dealing with the effect of intoxication on both the existence of a duty and its scope).

breach, or both. Furthermore, while factors in s 5B are directed to the question of breach, they may also be relevant to identifying a duty of care.

16 A second assumption was that particular principles apply in determining a "novel case". This may derive from language adopted by Allsop P in *Caltex Refineries (Qld) Pty Ltd v Stavar*.[6] If misunderstood, this language is apt to suggest that there is a special approach to be adopted towards novel cases. That would be inconsistent with well-established principle, expressed by Brennan J in *Sutherland Shire Council v Heyman*[7] in the following terms:

> "It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed'."

17 Importantly for present purposes, the non-exclusive list of "salient features" set out in *Stavar* at [103] do not include that feature which may be critical in the present case, namely the scope of the statutory duties imposed on a public authority.

18 The third assumption behind the Council's submissions was that a duty defined at a high level of generality should not encompass persons who may be at an undefinable distance and in an unknown direction from the place where the Council's conduct occurred. Gerogery, where the plaintiff lived, was some 11km from the Council tip; further, had the wind been blowing in a different direction, quite a different group of people and associated property would have been at risk. Yet the duty envisaged by the primary judge appeared to be unconstrained by such considerations and hence, according to the Council, failed to identify a determinate class of persons to whom the duty was owed.

19 In the course of oral submissions in this Court, the Council conceded that, as the occupier of property on which a fire may ignite, it owed a duty to

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6 (2009) 75 NSWLR 649; [2009] NSWCA 258 at [102].
7 (1985) 157 CLR 424 at 481; [1985] HCA 41.

neighbours (in the sense of those persons who lived or owned land in the proximity of the tip) to take reasonable care to prevent the ignition of a fire and to prevent its spread.[8] The submissions thus stressed the limiting effect of "indeterminacy" on the extent of the class to whom such a duty would be owed.

20 "Indeterminacy", as a criterion for limiting the imposition of a duty of care was derived from the reasoning of the High Court in *Perre v Apand Pty Ltd*.[9] It is true that a duty of care should not be imposed by reference to an indeterminate class of persons. Indeed, such a step would undermine the principle that the law does not recognise an abstract duty not to harm any person by one's carelessness, as opposed to a duty owed to identifiable individuals.[10]

21 However, *Perre v Apand* was a case involving pure economic loss. The defendant in the proceedings was the supplier of seed potatoes to growers in South Australia, some of whom expected to export their crops, or part of their crops, to Western Australia. The seed potatoes supplied to a particular farmer in South Australia were infected by bacterial wilt. The plaintiffs were the owners of surrounding properties. None of their crops were affected by bacterial wilt, but they were unable to export their potatoes to Western Australia because a Western Australian regulation prohibited imports from farms within 20km of a property suffering bacterial wilt. The control devices required with respect to claims for pure economic loss, beyond the element of foreseeability, operate somewhat differently from the constraints on identifying a duty of care in cases of personal injury or physical damage to property. Further, as noted by Hayne J in *Perre v Apand*, the concept of "indeterminacy" means more than that the class is large or extensive, but rather that the persons who may fall within it cannot readily be identified.[11]

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8 Tcpt, 26/02/19, p 11(5).
9 (1999) 198 CLR 180; [1999] HCA 36.
10 *Agar v Hyde* (2000) 201 CLR 552; [2000] HCA 41 at [67] (Gaudron, McHugh, Gummow and Hayne JJ).
11 *Perre v Apand* at [336].

22 Nevertheless, in *Electro Optic Systems Pty Ltd v State of New South Wales* (*Canberra Bushfires Case*)[12] a Full Court of the ACT Supreme Court considered the scope of a duty said to be owed to a class described as "those persons who may suffer loss and damage from the spread of fire, in NSW or, in this case, the ACT". Jagot J stated:

> "[352] … As NSW submitted, such a duty is a duty owed to a class of persons the membership of which can be determined only after fire damage has been sustained. The fire could have spread from the Park in any direction. As with the Bendora fire to the south in the present case, having spread from the Park, the fire could have joined up with any fire and travelled in any direction, depending on the spread of that other fire. Properties to the north, south, east and west of the Park could have sustained damage as a result of the fire. The extent of the potential fire spread would have some practical limits, but those limits are unknown …. The duty of care posited by the primary judge is limited only by the potential for fire to damage properties in all directions radiating out from the Park for an unknown and perhaps unknowable distance.
>
> [353] … It is not simply that the individual members of the class cannot be identified. The class itself is indeterminate. Membership may extend to property owners who are located in all directions from the Park to an unknowable extent depending on factors outside the defendant's control …. The class may change from moment to moment depending on those other uncontrollable factors. These considerations also weigh heavily against the existence of the posited duty of care."

23 This reasoning was reflected in the Council's submissions in the present appeal. However, it is fallacious to argue that a duty of care cannot arise if the members of the class to whom it is owed cannot be identified before the harm eventuates. There is no doubt that a motorist owes a duty of care to other road users; on the other hand, the membership of that class will be constantly changing. The same may be said of a manufacturer of bottled ginger beer and the manufacturer of chemicals who allows a polluting substance to leach into a groundwater system.

24 If it were necessary to be able to predict in advance who might be affected by a wild fire, it is doubtful that any duty of care would arise. Yet, as explained

[12] (2014) 10 ACTLR 1; [2014] ACTCA 45 (Murrell CJ, Jagot and Katzmann JJ).

by Windeyer J in *Hargrave v Goldman*,[13] the law has long imposed a duty to exercise reasonable care on the owner of land upon which there is a fire of which the owner knows or ought to know, "if by the exercise of reasonable care it can be rendered harmless or its danger to his neighbours diminished."[14] Windeyer J continued:[15]

> "Of course, if the fire were brought by him upon his land – in the sense of being started or intentionally kept alight there by him or anyone for whose acts he was responsible – his duty would not be merely to take reasonable care: it would be the strict duty of *Rylands v Fletcher*."

The mere fact that it is not possible to predict in advance how far, or in what direction, a fire may spread is not the kind of indeterminacy which prevents the imposition of a duty of care.

25 It follows that, in so far as the Council (correctly) conceded that it owed a duty of care to landowners in the proximity of the tip with respect to the escape of fire from the tip, the question of remoteness was to be assessed as an element in considering (i) the precautions which should be taken (pursuant to ss 5B and 5C of the Act), (ii) whether factual causation was established and, if so, (iii) whether it was appropriate for the scope of the negligent person's liability to extend to the harm so caused, pursuant to s 5D(1)(b).

26 A fourth assumption concerned the relevance of the proposition that the operation of a waste tip was a "dangerous activity". The question whether the operation of the tip was correctly characterised as a dangerous activity depended on the legal significance of that characterisation.

27 In *Burnie Port Authority v General Jones Pty Ltd*[16] the High Court identified two propositions of law which are significant in the present context. The first was that "any special rule relating to the liability of an occupier for fire escaping from his premises has been absorbed into, and qualified by, more

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[13] (1963) 110 CLR 40; [1963] HCA 56.
[14] *Hargrave* at 71.
[15] *Hargrave* at 71-72.
[16] (1994) 179 CLR 520; [1994] HCA 13.

general rules or principles."[17] Secondly, the principle commonly sourced to the English decision of *Rylands v Fletcher*,[18] as with special rules relating to fire, "should now been seen, for the purposes of the common law of this country, as absorbed by the principles of ordinary negligence."[19] It follows that there is no separate principle depending on a finding that a dangerous substance has escaped from premises, or a dangerous activity has been carried on on premises, which has caused harm to the plaintiff. The nature of the substance or the activity may well affect the standard of care required of the occupier, and may give rise to a non-delegable duty of care.[20] That analysis, nevertheless, takes place within the confines of the law of negligence. It therefore follows that, so far as presently relevant, it will be governed by the *Civil Liability Act*.

28 Consistently with this approach, the liability of public authorities in negligence, and the relevant control mechanisms, are addressed in Pt 5 of the *Civil Liability Act*. As noted above, s 42 deals with the approach to be taken with respect to the financial and other resources that were reasonably available to the Council for the purpose of exercising its functions. Although s 42 expressly applies to a determination that a public authority owes a duty of care, the Council's reliance upon its operation was directed to questions of breach; that appears to be correct in the circumstances of this case and the section will be addressed in that context.

(b) statutory functions of Council

29 Subject to one qualification, a public authority will owe duties of care in carrying out its statutory functions. The qualification is that a common law duty of care cannot be imposed if it would conflict with the statutory scheme under which the respondent operates. So much was explained in *Caledonian Collieries Ltd v Speirs*,[21] which involved liability for a collision at a level crossing between runaway rail trucks and the respondent's motor vehicle.

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17 *Burnie Port Authority* at 530-531, 534.
18 *Fletcher v Rylands* (1866) LR 1 Ex 265; affirmed, *Rylands v Fletcher* (1868) LR 3 HL 330.
19 *Burnie Port Authority* at 556.
20 *Burnie Port Authority* at 555.
21 (1957) 97 CLR 202; [1957] HCA 14.

The railway was constructed under statutory authority. Upholding the liability of the appellant railway operator, the majority in the High Court stated:[22]

> "At least there is nothing in the Acts which can be interpreted as giving statutory authority for the precise state in which the appellant's line was at the material time. It is not and could not be suggested that the absence of all provision for the protection of the Lambton Road level crossing from the irruption of runaway trucks was sanctioned by Parliament. On the assumption stated, the well-settled principle applies that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered …."

30 This principle was restated more recently in *Sullivan v Moody*,[23] the High Court stating:

> "[60] The circumstance that a defendant owes a duty of care to a third party, or is subject to statutory obligations which constrain the manner in which powers or discretions may be exercised, does not of itself rule out the possibility that a duty of care is owed to a plaintiff. People may be subject to a number of duties, at least provided they are not irreconcilable. … [W]hen public authorities, or their officers, are charged with the responsibility of conducting investigations, or exercising powers, in the public interest, or in the interests of a specified class of persons, the law would not ordinarily subject them to a duty to have regard to the interests of another class of persons where that would impose upon them conflicting claims or obligations."

31 An inconsistency between a statutory power and the imposition of a common law duty of care in its exercise, may arise not merely from the language of the statute in question, but also from the nature of the power being conferred. It is therefore necessary to consider the nature of the Council's interest in the land and the statutory provisions governing its use of the land.

32 The tip, with an area of 10 acres, was created on Crown land reserved from sale on 24 September 1913, "for night-soil and rubbish depot".[24] On 11 November 1994 the reserve trust was dissolved and a new reserve trust created under s 92 of the *Crown Lands Act 1989* (NSW).[25] The trust was

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[22] *Caledonian Collieries* at 219-220 (Dixon CJ, McTiernan, Kitto and Taylor JJ).
[23] (2001) 207 CLR 562; [2001] HCA 59.
[24] Reserve No 49,269; NSW Government Gazette (No 153), 24 September 1913, p 5927.
[25] NSW Government Gazette (No 150), 11 November 1994, p 6703-6704.

named Culcairn Shire Council Crown Reserves Reserve Trust ("Reserve Trust") and the Culcairn Shire Council was appointed trustee and "charged with the care, control and management" of the reserve.[26] (The trustee was later changed to the respondent, when the respondent replaced Culcairn Shire Council as the local government authority for the area including the tip.)

33 The Reserve Trust was constituted as a corporation under s 92(2) of the *Crown Lands Act* and had all the functions of a council under the *Local Government Act 1993* (NSW) in relation to public reserves.[27] The Reserve Trust was, for the purposes only of Pt 5 of the *Crown Lands Act*, the owner of an estate in fee simple in the reserve.[28] It therefore had the powers of a landowner, but qualified by the purpose for which the estate was conferred.[29]

34 Turning to the provisions of the *Local Government Act*, s 24 empowers a council to provide such services and facilities and carry out such activities as are appropriate to the current and future needs of the local community. As the introductory notes to Ch 6 of the *Local Government Act* indicate, that will extend to waste removal services. It was not submitted that there was anything in the *Crown Lands Act* or *Local Government Act* which otherwise constrained the manner in which such services should be provided. Further, although there are licensing requirements with respect to "waste disposal" and "waste storage" under the *Protection of the Environment Operations Act 1997* (NSW) ("Protection of the Environment Act"), it was common ground that those provisions did not apply to the Council with respect to the Walla Walla tip because of the limited nature of the operations at the tip.[30] (Although it would appear that the Reserve Trust was a statutory corporation representing the Crown in right of New South Wales, no proceedings were taken against the State pursuant to the *Crown Proceedings Act 1988* (NSW).)

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[26] *Crown Lands Act*, s 92(5).
[27] *Crown Lands Act*, s 98(1).
[28] *Crown Lands Act*, s 100(1).
[29] *Attorney-General for Quebec v Attorney-General for Canada* (1921) 1 AC 401, 409; *City of Perth v Crystal Park Ltd* (1940) 64 CLR 153, 162 (Rich ACJ), 168 (Williams J); [1940] HCA 35.
[30] Protection of the Environment Act, s 48, s 5 ***scheduled activities*** and Sch 1, items 39 and 42.

35 There is a long history of statutory controls of fire on land in this State. More than 100 years ago, Parliament enacted the *Careless Use of Fire Act 1912* (NSW). Whilst imposing controls with respect to the use of fire on occupiers of land, the Act preserved "the right of any person to sue for and recover, at common law or otherwise, compensation for or in respect of any damage or injury occasioned by the reckless or negligent use of fire."[31] That legislation has been repealed and replaced, the current provisions being found in the *Rural Fires Act 1997* (NSW). Relevantly, that Act provides:

> **63 Duties of public authorities and owners and occupiers of land to prevent bush fires**
>
> (1) It is the duty of a public authority to take the notified steps (if any) and any other practicable steps to prevent the occurrence of bush fires on, and to minimise the danger of the spread of a bush fire on or from:
>
> (a) any land vested in or under its control or management, or
>
> (b) any highway, road, street, land or thoroughfare, the maintenance of which is charged on the authority.
>
> …
>
> (3) A public authority or owner or occupier is liable for the costs incurred by it in performing the duty imposed by this section.
>
> (4) The Bush Fire Co-ordinating Committee may advise a person on whom a duty is imposed by this section of any steps (whether or not included in a bush fire risk management plan) that are necessary for the proper performance of the duty.
>
> (5) In this section:
>
> ***notified steps*** means:
>
> (a) any steps that the Bush Fire Co-ordinating Committee advises a person to take under subsection (4), or
>
> (b) any steps that are included in a bush fire risk management plan applying to the land.

36 Further, controls are imposed on any person, including a public authority, lighting fires. However, special rules apply to a public authority:

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[31] *Careless Use of Fire Act*, s 9.

95 Permit not required for fires lit by public authorities

(1) Nothing in this Division requires a public authority or a person acting under the direction of a public authority to hold a permit to light a fire.

(2) However, a public authority:

(a) must not light a fire in any area of an authority (or part of such an area) if it has been notified that a determination referred to in section 93(b) has been made in respect of the area,[32] and

(b) must not light a fire in any rural fire district unless the fire control officer for the district has been advised that it is to be lit, and

(c) must not light a fire on land in any fire district unless the officer in charge of the fire station that is nearest to the land has been advised that it is to be lit.

37 Reference was made in the *Canberra Bushfires Case* to the operation of s 63. Jagot J (Murrell CJ and Katzmann J relevantly agreeing) held that s 63 was concerned with circumstances *before* a bushfire started.[33] That case was concerned with fires started by an electrical storm and allegations of negligence on the part of the Rural Fire Services, and the State through the actions of its "incident controllers", in attempting to subdue and extinguish the fires. Reliance by the claimants on s 63 was held to be misplaced. By contrast, s 63 imposes duties which are engaged in the present case. However, there was no claim in the present case for damages based on a breach of statutory duty, as opposed to a breach of a common law duty of care. Nevertheless, the statute demonstrates that there is no inconsistency in principle between the proposed common law duty of care and the statutory functions exercised by the Council.

38 The Council raised an issue as to the scope of the duty, and thus the persons to whom it was owed, by reference to the weather conditions on the day in question. It was, as described by the trial judge, a day of "extreme" fire

[32] Section 93(b) refers to a determination of a fire authority that because of the seriousness of the bush fire danger, no permits will be issued.

[33] *Canberra Bushfires Case* at [177]-[178], [181]-[182].

danger.[34] At about the time the fire was first observed, the weather station at Albury Airport (33km south of the tip) recorded a temperature of 38.6ºC, 11% humidity and nor-nor-west winds at 35kph with gusts up to 54kph. An hour later (2.32pm) the conditions were almost identical; however, 14 minutes later (2.46pm) the temperature had dropped to 29.3ºC, but the winds had increased to 76kph with gusts up 107kph.

39 The Council did not suggest that, although it was a day of extreme fire danger, the conditions were unexpected in December. It is to be recalled that there is a statutory "bush fire danger period" in New South Wales which commences on 1 October of any given year and ends on 31 March in the following year.[35] The risk was undoubtedly foreseeable and significant.

40 There must also be a reasonable expectation that a fire would travel fast in such conditions. To the south of the tip lay a disused golf course, with long grass, beyond which were farmlands. Once it escaped from the tip, the risk of the fire travelling to Gerogery (11km) and beyond could not be described as other than foreseeable. If support were needed for such a conclusion, it might be found, at least by inference, in the power conferred on an authorised fire fighting officer to enter land within 8km of the land for which the officer is responsible, in order to suppress or prevent the spread of a bushfire from that land.[36] One local resident who saw the fire at the tip immediately rang a friend in Gerogery to warn him. Given the well-understood propensity of a fire to spread across lands covered with trees and dried grass in hot windy conditions, there is no reason to limit the duty of care of the Council to an area less than that covered by the fire in question.

41 The Council itself carried out burning operations at the tip in appropriate conditions to reduce the load of green waste and thus reduce the risk of fire. Indeed, the fact that there was a firebreak surrounding the tip was an acknowledgment of the possibility that a fire at the tip, if not contained, would cause damage to surrounding lands.

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[34] Primary judgment at [24].
[35] *Rural Fires Act*, s 81.
[36] *Rural Fires Act*, s 133.

42 The Council's challenge to the finding that it owed a duty of care to persons in the position of the plaintiff who lost property as a result of the fire must be rejected.

Standard of care: s 43A

43 Before addressing issues of breach, it is necessary to identify the standard of care required of the Council. The Council sought to invoke the high level of unreasonableness prescribed by s 43A of the *Civil Liability Act*, which provides as follows:

> **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 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.

44 The first issue is whether s 43A is engaged in the present case. That involves two steps.

45 The first step is to identify the basis of the liability relied on by the plaintiff. That liability depended upon the failure of the Council to undertake identified precautions in the management of the tip. Those precautions included grading an appropriate firebreak around the tip, reducing the fuel load within the tip by levelling areas and removing long grass, and, with respect to the

general waste dump, compacting the dump and covering it with soil from time to time.

46 The second step is to determine whether these activities involved the exercise of a power conferred by statute, of a kind that persons generally are not authorised to exercise without specific statutory authority.

47 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.[37] Such a distinction, important for determining the extent of a statutory immunity from suit,[38] was noted by Campbell JA in *Refrigerated Roadways*.[39] 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.

48 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.

49 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

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37 *Curtis v Harden Shire Council* (2014) 88 NSWLR 10; [2014] NSWCA 314 at [254].
38 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105; [1961 HCA 71.
39 *Roads and Traffic Authority of New South Wales v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360; [2009] NSWCA 263 at [376] (Campbell JA, McColl JA agreeing and Sackville AJA agreeing with further reasons).

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.

50 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.

Breach of duty – legal principles

(a) statutory scheme

51 On the basis that the Council's duty was to take reasonable steps to prevent unintended fires at the tip, and to prevent the spread of fire from the tip, being a duty owed to the owners and occupiers of land in surrounding areas, it is then necessary to identify the precautions which a reasonable person in the Council's position would have taken to prevent the harm materialising.

52 For this purpose, regard must be had to the matters identified in ss 5B and 5C of the *Civil Liability Act*, which provide:

> **5B General principles**
>
> (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.

5C Other principles

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.

53 The risk of harm, the foreseeability of the risk, and whether the risk was not insignificant, have all been addressed in the preceding discussion with respect to duty. It must be accepted that the likely seriousness of the harm from an escaped fire was unpredictable but potentially very serious. Uncontrolled bush fires in south-eastern rural Australia are an annual occurrence; they may involve loss of life, the destruction of property and significant environmental damage.

54 Section 5B(2)(d) requires that the court assessing the relevant precautions have regard to the "social utility" of the activity that creates the risk of harm. The plaintiff did not submit that the tip should have been closed because of the risk of fire. Accordingly there was no need to assess the consequences of such a step, although it was in fact taken following the fire.

55 Importantly in this case, s 5B(2)(c) requires the Court to consider "the burden of taking precautions to avoid the risk of harm". In undertaking that task, the

court must consider the burden of taking precautions to avoid similar risks of harm for which the defendant may be responsible: s 5C(a). In the case of a public authority, there will often be a range of precautions which can be taken to minimise the risk of harm, at varying levels of cost to the authority and hence to the community. A reasonable council would assess the burden of particular precautions against the likely cost (not merely financial) of an escaped fire.

56 In addressing the burden of taking precautions, regard must be had to the terms of s 42 of the Act, which 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.

57 The following terms are defined in Pt 5 of the Act, which covers ss 40-46:

> **41 Definitions**
>
> In this Part:
>
> ***exercise*** a function includes perform a duty.
>
> ***function*** includes a power, authority or duty.

public or other authority means:

…

(d) a local council, ….

58 Generally speaking, the principles identified in s 42 will be relevant to the question of breach of duty, and probably less relevant to the existence of the duty. It is in the context of breach that s 42 is engaged for present purposes. However, there are a number of difficulties in applying that provision.

59 The drafting of s 42(a) is awkward. It is surely the resources available for the exercise of functions which are limited, not the functions themselves. The section appears to have been so understood in the cases discussed below. No alternative reading was proposed in this case.

60 The Council contended that the burden of taking precautions (for the purposes of s 5B(2)(c)) was to be assessed by reference to "the broad range" of the Council's activities, as "the functions required to be exercised by the authority": s 42(c). The Council read s 42(c) as requiring regard to be had to fire precautions on all land owned, managed or controlled by the Council across the 6,000 square kilometres of its local government area. This construction was said to gain support from the identification of the burden in s 5C(a) as including the burden of taking precautions to avoid "similar risks of harm" for which the Council may be responsible. It submitted that the risk of harm thus identified is the risk of escape of fire from any (and thus all) lands owned, occupied or controlled by the Council.

61 In one sense, that reading imposed a contextual limitation on the general language of s 42(c), because it limited the inquiry to the necessary precautions to address a single risk of harm, rather than "similar risks of harm", as described in s 5C(a). Nevertheless, it also had the potential to expand significantly the scope of enquiry required in any negligence claim involving a public authority, beyond the circumstances of the plaintiff's case.

62 The problems raised by the combined operation of ss 5B(2), 5C and 42 do not end there. In assessing the burden of particular precautions, the court is required to work on the principle that the performance of the duty of care is "limited by the financial and other resources that are reasonably available to [the Council]": s 42(a). On one reading, the court is permitted (or required) to consider what resources are "reasonably available" in the particular case. However, that exercise is constrained by the principle that "the general allocation of those resources by the authority is not open to challenge": s 42(b). This meant, the Council submitted, that the resources available to manage the tip were those in fact allocated by the Council in its budget. It was not open to the Court, the submission continued, to consider whether other funds available to the Council could reasonably have been allocated to meeting the cost of any necessary precautions.

(b) extrinsic materials

63 Given a degree of obscurity in establishing a coherent operation of these provisions, reference may be made to relevant extrinsic material. Broadly speaking, the *Civil Liability Act* gave effect to the *Review of the Law of Negligence – Final Report* (September 2002) ("Panel Report").[40] Chapter 10 of the Panel Report, headed "Public Authorities", addressed "the principles applied in negligence to limit the liability of public authorities." The problem was identified in the following terms:

> "10.3 The problem arises from the fact that the authority will have a limited budget at its disposal for the performance of its functions, and will have various calls on that budget. For this reason, it may want to argue, in answer to a negligence claim, that it made conscious, carefully considered decisions about the allocation of the budget between its various functions, and that without allocating more to the function in question, it could not have made the relevant place any safer than it was."

64 The tension created by the requirement to have regard to available resources and the consequent need to assess what resources were available had been

[40] Prepared for the Minister for Revenue and Assistant Treasurer by a panel chaired by the Hon David Ipp ("the Panel").

identified in *Brodie v Singleton Shire Council*.[41] That case involved a challenge to the general law principle that a road authority was not liable for nonfeasance, that is, for not repairing a defective roadway. Gleeson CJ (in dissent) noted the following consideration as weighing against the abandonment of the rule and the imposition of a duty to repair.

> "[16] … The most obvious justification is the cost of complying with such a duty. Road maintenance and improvement involves, amongst other things, establishing priorities for the expenditure of scarce resources. Accountability for decisions about such priorities is usually regarded as a matter for the political, rather than the legal, process. Road safety involves issues of upgrading, and improving, as well as repairing, roads. As Mahoney AP pointed out in *Hughes v Hunters Hill Municipal Council*[42], the appropriate response to dissatisfaction with the rule may be, not its abolition, but some modification "so that that which the council must do is more closely and directly accommodated to, for example, its financial resources, the exigencies of time and the competing demands of other works". If such considerations come to depend entirely upon judicial estimation, case by case, of the reasonableness of a council's public works programme, it is at least understandable that governments may think they have cause for concern. …

65 Implicit in that statement was the possibility that a roads authority should be able to justify its inactivity on the basis of its limited resources. So much was accepted by the majority in rejecting the general law immunity from liability for nonfeasance. The joint reasons of Gaudron, McHugh and Gummow JJ, noting that the change in the law would not subject roads authorities to "indeterminate financial hazards", said that "financial considerations and budgetary imperatives may fall for consideration with other matters when determining what should have been done to discharge a duty of care."[43] However that step, as noted by Lord Hoffmann in *Stovin v Wise*,[44] "would inevitably expose the authority's budgetary decisions to judicial inquiry." There would be consequences, identified by Lord Hoffmann in the following terms:[45]

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41 (2001) 206 CLR 512; [2001] HCA 29.
42 (1992) 29 NSWLR 232 at 236.
43 *Brodie* at [104].
44 [1996] AC 923 at 958.
45 Ibid.

> "This would distort the priorities of local authorities, which would be bound to try to play safe by increasing their spending on road improvements rather than risk enormous liabilities for personal injury accidents. They will spend less on education or social services."

66 In fact, this dilemma applied generally with respect to the exercise by public authorities of functions which were not the subject of a relevant immunity from the consequences of inaction. On the one hand, they should be allowed to justify their inaction on the basis of limited resources; on the other hand, they should not, by taking that course, expose their resource allocation decisions to judicial review. Part 5 of the *Civil Liability Act*, and in particular s 42, was a legislative response to that dilemma.[46]

67 The remedy proposed was to make a good faith decision by the Council about the allocation of resources unchallengeable on a negligence claim; not to prevent the Council relying upon such a decision. That approach adopted a principle explained by Mason J in *Sutherland Shire Council v Heyman* in the following terms:[47]

> "The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness."

68 The Panel Report identified a passage in the joint reasons of Gaudron, McHugh and Gummow JJ in *Brodie v Singleton Shire Council*[48] as leading to "some undesirable consequences that need to be addressed."[49] The troubling passage suggested that, in considering whether the authority had taken reasonable steps in the discharge of its duty of care, regard should be had to "any other competing or conflicting responsibility or commitments of the

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[46] See also M Leeming, *The Statutory Foundations of Negligence* (The Federation Press, 2019), p 32.
[47] (1985) 157 CLR 424 at 469; [1985] HCA 41.
[48] Footnote 41 above, at [151].
[49] Panel Report, par 10.6.

authority." The problem, however, was not that the authority should be entitled to rely upon competing claims for resources, but rather that its decisions with respect to its allocation of resources should not be open to be questioned. The Panel Report concluded:

> "10.11 In the view of the Panel, the canvassing in a negligence action of the sorts of issues raised in these examples is undesirable in at least three respects. First, courts are not well qualified, either in terms of expertise or procedure, to adjudicate upon the reasonableness of decisions that are essentially political in nature. Secondly, courts are inappropriate bodies to consider the reasonableness of such decisions because they are neither politically representative nor politically responsible. Thirdly, proper consideration of the reasonableness of such decisions may be very expensive and time consuming."

69 Despite these propositions, the Panel did not recommend that such policy decisions would "give immunity from liability."[50] Rather, it adopted a standard that where the alleged negligence consisted of the exercise of a public function and the authority pleaded that its failure to take appropriate precautions was the result of a decision about the allocation of scarce resources, "liability can be imposed only if the decision was so unreasonable that no reasonable authority in the defendant's position could have made it." Thus, while the proposed standard of unreasonableness was to be raised to a high level, the issue was not sought to be removed from the scope of a negligence claim.

70 The recommendation made by the Panel, however, reversed that language so that, instead of referring to what was in substance a defence, it referred to a claim based on the negligent performance of a public function, the principle being expressed in the following terms:[51]

> "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."

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[50] Panel Report, par 10.26.
[51] Panel Report, recommendation 39, p 158.

71 This recommendation was potentially difficult to apply because a standard claim in negligence, such as the present one, does not plead a "policy decision" to support a finding of negligence; rather, it identifies a precaution which might have been taken to avoid a specific risk of harm. Part 5 of the *Civil Liability Act* did not adopt the Panel's recommendation 39, which invoked the concept of a "policy decision", but rather applied the high standard (so unreasonable that no reasonable authority could have so acted) in relation to the exercise of "special statutory powers": s 43A. It then created a new provision with respect to the allocation of resources, now found in s 42. Thus, while the broad thinking behind the Panel Report can be seen in the language of s 42, the Report itself provided no direct assistance in understanding the inter-relationship of ss 5B, 5C and 42.

72 The question is whether s 42 was intended to reflect the principle explained by Mason J in *Heyman*, or qualified it in some respect. It seems unlikely from the legislative history that s 42 was intended to expose public authorities to greater liability than they had previously faced. The better view is that it was intended to encapsulate the existing immunity, but did so in terms which failed to reflect the rationale underlying the principle.

(c) case law

73 The operation of s 42 of the *Civil Liability Act* (and equivalent provisions in other jurisdictions) has been considered in a number of cases. It is inevitable, however, that statements as to the operation of the provision will tend to reflect the nature of the particular case, the evidence adduced at trial and the manner in which each party presented its case. The judgment most commonly cited in subsequent authorities is *Refrigerated Roadways*.[52] The facts involved the death of an employee of Refrigerated Roadways caused by four men dropping 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. The issue was whether the roads authority (RTA) was negligent in failing to construct screens along the

[52] Footnote 39 above.

overhead bridge to prevent objects falling (or being dropped or thrown) from the bridge onto the freeway below.

74 With respect to s 42(a), Campbell JA noted that the RTA had a budget for the care, control and management of freeways which was "so large that any expenditure that would have been involved in earlier screening of the Glenlee Bridge, or indeed in earlier screening of all overpasses on freeways would have been well within its budget."[53] Secondly, Campbell JA held that s 42(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", for the purposes of s 42(b).[54]

75 Given these findings, other aspects of the analysis of s 42 were not necessary for the determination of the points in issue.

76 For example, Campbell JA assumed that "s 42 is a matter that a defendant must plead".[55] Although a defendant may be well advised to plead the facts and the inferences it seeks to draw for the purposes of s 42 from any relevant facts, the most important matter is the burden, at least with respect to adducing evidence, of the relevant factual material. Section 42 is not expressed in language creating a defence. This is consistent with the later statement in *Refrigerated Roadways* that "s 42 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".[56]

77 Secondly, Campbell JA construed the expression "functions required to be exercised" by the authority as referring to the requirements of the law of

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[53] *Refrigerated Roadways* at [395].
[54] *Refrigerated Roadways* at [401].
[55] *Refrigerated Roadways* at [385].
[56] *Refrigerated Roadways* at [389].

negligence. That was to be compared with a "requirement in the nature of a statutory duty".[57]

78 This reading is open to doubt. The implication is that par (a) should have read "the precautions required to be taken against a risk of harm in the exercise of any function of the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of complying with its duty of care". That is not what par (a) states; a similar displacement of the language would be required also with respect to par (c). This construction of the "functions" referred to in pars (a) and (c) tends to limit the expansive definition of "function", and "exercise" of a function, in s 41. There is a further reason for doubting its correctness: 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.

79 The fact that "the functions required to be exercised" are stated, in par (c), to be determined by reference to the broad range of the authority's activities suggests that the function, in the present case, is waste management.

80 Thirdly, 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."[58] This statement is not entirely consistent with the approach adopted above. 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. On the other hand, so far as it applies with respect to determination of a breach of duty, it must be read coherently with ss 5B and 5C of the Act. That appears to be the approach adopted by Sackville AJA in *Refrigerated Roadways* in the following passage:

> "[449] Subject to the effect of ss 42 and 43A of the *Civil Liability Act*, I see no compelling reason in the present case, whether deriving from distinctions sometimes drawn between policy and operational matters or otherwise, for the Court to shy away from undertaking the

[57] Ibid.
[58] *Refrigerated Roadways* at [388].

> assessment contemplated by s 5B, in particular weighting up the matters identified in s 5B(2). This requires the Court to determine whether a reasonable person in the position of the RTA would have fenced the Glenlee Bridge notwithstanding competing claims on its resources to address similar risks of serious injury elsewhere."

81 Fourthly, 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 resources with respect to the construction of screens along overpasses on freeways.[59]

82 There is no doubt that the scope of the phrase "the general allocation of those resources" is unclear. On one view, s 42(b) and (c) are directed squarely to the constraining effect of the imprecise dichotomy between policy and operational decision-making referred to by Sackville AJA in the passage set out above.[60] There would be a difficulty in abandoning this distinction whilst preserving the ability of a public authority to rely upon its limited resources.

83 Although it is true that the passages considered above in *Refrigerated Roadways* were cited with approval by this Court in *Bathurst Regional Council as Trustee for the Bathurst City Council Crown Reserve Trust v Thompson*,[61] it was only in support of the proposition that evidence was required before the Court could engage with the principles in s 42. The present considerations were immaterial in that context.

84 More directly on point was the decision in *Holroyd City Council v Zaiter*.[62] Those proceedings involved a claim by a child who had ridden a bicycle into a concrete drainage channel at a sports ground controlled by the appellant Council. The Council was aware of the risk and had, prior to the accident, identified the desirability of a fence along the channel to prevent such an accident. The Council called evidence as to the limited financial resources

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59 *Refrigerated Roadways* at [401].

60 See *Anns v Merton London Borough Council* [1978] AC 728, a distinction abandoned in *Murphy v Brentwood District Council* [1991] 1 AC 398.

61 [2012] NSWCA 340; 191 LGERA 182 at [48]-[50] (Hoeben JA, Meagher JA and Tobias AJA agreeing).

62 [2014] NSWCA 109; 199 LGERA 319 (Hoeben, Emmett and Gleeson JJA).

available to it in order to resist a finding that it was in breach of its duty of care. The Council failed for three reasons.[63]

85 The first reason involved a denial of the proposition that there could be a challenge to the allocation of funds for improvements to the sports ground, such a step being contrary to s 42(b). After setting out a lengthy passage from the reasoning of Campbell JA in *Refrigerated Roadways*, Hoeben JA stated:

> "[97] The analysis by Campbell JA is contrary to 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, that was a 'general allocation of resources' which could not be challenged. In accordance with the reasoning of Campbell JA (and I might add the clear meaning of the section), such a decision by the appellant was properly to be looked at as 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. As I read the judgment of Campbell JA and the section, 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 s 42(b) and is subject to challenge."

86 The second basis in *Zaiter* for rejecting the Council's reliance upon s 42 was that the decision of the Council, as recorded in a documented policy, was that the revenue from the particular source was to be directed solely to the sports ground, but not that it would be the *only* source of revenue for the sports ground.[64] (That reasoning has application in the present case.)

87 The third ground was that the financial statements of the Council in evidence revealed that "ample funds were available within various general allocations to pay for this fence". Alternatively, at best for the Council, the evidence failed to show that funds were not available.

88 The second two grounds (based on the evidence) would have been sufficient to dispose of the appeal on this point, and appear to have been the only

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[63] *Zaiter* at [97]-[100].
[64] *Zaiter* at [99].

grounds relied upon by Emmett JA.[65] The first ground depended upon a narrow construction of s 42(b), namely that the "general allocation" of resources by an authority is to be understood, either as the separate functions of the authority identified by its activities, or according to the characterisation of the separate functions in such financial statements of the authority as are in evidence.

89 There is an available alternative approach to the statutory language. If "general" in relation to an allocation of funds is intended to be contrasted with "specific" allocations, the purpose of the provision is obscure. If, as explained by Mason J in *Heyman*, and by the reasoning in the Panel Report, the purpose 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.

90 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 did establish that situation, the plaintiff would be precluded from challenging the basis of the allocations. No such issue arose in *Zaiter*; nor did it arise in *Refrigerated Roadways*.

91 The decision of the Council in *Zaiter* was located in the minute of a Council motion which commenced:[66]

> "That Council pronounce as policy, that all income derived from the commercial pole sign located at the Holroyd Sportsground be directed at …."

A challenge to that decision would have involved the allocation of the identified income to a different purpose; that was not the point in issue in *Zaiter*. Rather, as the Court found, the question was whether there were sufficient *unallocated* funds available to meet the cost of the fencing. The

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65 *Zaiter* at [115].
66 *Zaiter* at [98].

conclusion that there were such funds involved no challenge to a policy decision of the Council, whether general or specific.

92 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.[67] The reasoning in *Refrigerated Roadways* was based on a hypothetical pleading.

93 Whether these dicta in *Refrigerated Roadways* should be followed should await a case in which the answer will be dispositive. In this case, as in *Zaiter's* case, the evidence did not disclose that there were insufficient unallocated funds to undertake the relevant precautions at the tip, as discussed below.

(d) summary of principles

94 Against this background, it is convenient to reconsider the operation of the provisions of the *Civil Liability Act* set out above. The following propositions may be accepted.

95 First, 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).

96 Secondly, 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: s 5C(a).

97 Thirdly, in determining whether it would be reasonable to require the taking of additional precautions, the court must apply as a principle the assumed fact

[67] *Refrigerated Roadways* at [401].

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 s 5C(a).

98 Fourthly, 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). 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.

99 Fifthly, 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). There is, of course, no reallocation of resources as a result of the court's order; rather, the defendant authority will be required to pay damages to compensate the plaintiff's loss. What is prohibited, however, 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.

100 Sixthly, 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.

101 If this understanding of the operation of s 42 (read in the context of ss 5B and 5C) is correct, it is less likely, in comparison with than a broader reading, that its application will disrupt the efficient disposal of the plaintiff's negligence claim. In any event, the purpose of s 42(b) is to prevent, rather than encourage, the tender of large volumes of accounting material by a public authority, as occurred in the present case.

102 Thus, the Council tendered evidence at trial from its general manager, Mr Steven Pinnuck, and an officer involved in preparing Council's accounts, Mr David Smith. Their statements annexed or exhibited more than 1,400 pages of financial reports. Of those, fewer than 250 were included in the appeal books. Even when questioned by the Court, a very small proportion even of those pages were referred to in the course of submissions.

(e) reasoning of trial judge

103 The trial judge gave detailed consideration to the issue of breach, including a thorough explanation of the submissions of the parties and the relevant evidence, both lay and expert.[68] He identified the precautions particularised by the plaintiff, as set out at [5] above, but restricted his consideration to those relevant to the spread of an existing fire. He approached the issue of breach on that basis because he was unable to identify the cause of the fire. The primary judge noted (and rejected) submissions by the Council before him as to how the statutory scheme operated:

> "[287] The defendant submitted that, by reason of the broad range of its responsibilities and the number of tips controlled by the defendant, any suggested response to the risk needed to be evaluated by reference to the number of tips run by the defendant.
>
> [288] It was submitted that any additional cost for one tip must be allocated to each tip and there was no reason, for example, why the presence of a person to manage the tips could be restricted to daylight hours as fires may start in the night. It was contended fires do not occur only on days of elevated danger. The Tip was not the only public land managed by the defendant.

[68] Primary judgment at [248]-[400].

> [289] The defendant also submitted that the finding of a duty, let alone its content, would establish a precedent whereby all councils will owe a duty, which is at large, having an absorbent demand on resources to guard against a risk which infrequently comes home and does not eliminate the risk.
>
> [290] Pitched at that level of generality, I do not consider the submissions of the defendant may be accepted. I do not consider the general activities of the defendant across the breadth of its services and functions are applicable to the present consideration *vis-à-vis* a burden of the precautions. The words 'similar risks of harm' in s 5C(a) direct attention to the risks associated with various activities or functions of the defendant and not simply those activities having similar geographical or physical characteristics; except to the extent those characteristics inform the question of risks. There is no evidence here to suggest, for example, parks represent a similar risk to tips and evidence may suggest the contrary is the case. The 10 tips operated by the defendant are, however, relevant as by their nature they have similar, although not identical, risks."

104 The Council challenged that approach in this Court,[69] submitting in writing:[70]

> "Most if not all land owned, managed and/or controlled by the respondent is susceptible to similar risks of harm. In the Greater Hume Shire fires can start (and spread) anywhere at any time. Certain of the identified precautions (for example, *'remove fuel to prevent dangerous build ups'* and *'undertake inspection and monitoring of the facility during periods of extreme bushfire risk'*) would involve a prohibitive demand on the respondent's resources if it were required to adopt those precautions in relation to all similar risks across 6,000 square kilometres."

105 Further consideration of these issues should await identification of the precautions which should be accepted as precautions which, in principle, a reasonable council should have considered. With those precautions in mind, it will be possible to address the likely financial and other resources involved and the evidence as to the availability of those resources.

Breach of duty – specific precautions

(a) issues on appeal

106 Questions of breach of duty and causation involve factual determinations in the circumstances of a particular case. They are addressed separately and discretely because questions of breach require a prospective assessment of

[69] Notice of contention, ground 14.
[70] Council's written submissions on notice of contention, 11 February 2019, par 54.

what a reasonable council would have done in the circumstances which existed prior to the fire, whilst causation involves a retrospective assessment of whether the breach of duty caused the harm suffered by the plaintiff. Nevertheless, each will inform the other. There is no reason to consider a complaint of failure to take a specific precaution if the precaution could have had no effect on the outcome. Thus, particular (e) (having fire-fighting equipment available at the tip) was simply irrelevant. As the trial judge noted, by the time those seeking to fight the fire arrived, it had crossed the tip and was about to escape. Furthermore, those who attended had their own fire-fighting equipment.[71]

107 The trial judge accepted that the reasonable precautions which should have been taken were to have a fire management plan (particular (a)), to create and maintain an effective fire-break (particular (b)), to consolidate deposited waste in appropriate areas (particular (c)), and to remove fuel to prevent dangerous build-ups (particular (d)).[72] The last three factors were, in one sense, encompassed within the first precaution, namely the preparation and implementation of a fire management plan.[73] It will be convenient to address them separately from the proposed plan.

108 The trial judge rejected inspection and monitoring of the facility during periods of extreme bushfire risk (particular (f)) as not having been shown to have any causal connection with the outbreak or spread of the fire.[74] That finding was not challenged and, as with particular (e), no further attention need be paid to it. The other precautions (particulars (g)-(j)) were identified by the trial judge as relevant to ignition, rather than the spread of the fire. The trial judge concluded that he was unable to determine the cause of the fire and, as a result, disregarded those precautions which went to preventing ignition.

109 The plaintiff raised four grounds of appeal. Grounds 1 and 2 challenged the failure of the trial judge to identify a relevant cause of ignition and thus the

[71] Primary judgment at [365].
[72] Primary judgment at [399].
[73] Primary judgment at [323]-[332].
[74] Primary judgment at [368].

failure to find that the fire was caused by the Council's negligence. Grounds 3 and 4 challenged the judge's finding that even had the precautions relied upon by the plaintiff been taken prior to the fire, the fire would nevertheless have escaped from the area of the tip and the failure to take precautions against the escape of the fire was therefore not a relevant cause of the harm suffered by the plaintiff.

110 It may thus be seen that there are two broad issues raised by the appellant on the appeal; if she were to succeed in establishing error in relation to the spread of the fire, it would follow that she had established a relevant causal connection between precautions designed to minimise the spread of the fire and the harm suffered. That is, she would succeed on grounds 3 and 4. In that event, grounds 1 and 2 would not need to be addressed. Nevertheless, the ignition issue arises before any question as to the spread of the fire and it is necessary in any event in considering the spread to identify where ignition took place and how it may have come about. Accordingly, it is convenient to address, and address first, the question of ignition (grounds 1 and 2).

111 The Council sought to uphold the finding of the trial judge that the cause of ignition is simply unknown, and therefore cannot be identified as the responsibility of the Council. It further supported the finding as to causation, namely that the fire would have escaped in any event and any negligence on its part did not cause the harm suffered by the plaintiff. However, by its notice of contention, it also challenged the findings of negligence with respect to the specific precautions upheld by the trial judge.

(b) cause of ignition

112 The trial judge dealt with the cause of the fire at some length.[75] He commenced with his conclusions:

> "[111] There were six causes identified as the possible source of ignition of the fire, namely, dry lightning, spontaneous combustion, residual burn[,] deliberate ignition, batteries and glass. However, following the conclave, the consensus reached by all experts was that 'the actual

[75] Primary judgment at [111]-[165].

> cause or probable cause of ignition cannot be identified'. The concurrent evidence that was called did nothing to disturb that conclusion. I accept this conclusion and will now demonstrate that, with respect to the causes therein identified, with some being easier to dispense with than others."

113 The remainder of the discussion explained, sequentially, why each of the six possible causes was not established on the balance of probabilities. However, the appellant submitted that the correct approach would have separated the potential causes into two groups, namely those which could have eventuated from negligence on the Council's part and those which could not. Those which could not include dry lightning and the act of an arsonist. Dry lightning depended upon particular meteorological conditions which simply did not exist.[76] Arson was a theoretical possibility, but there was no acceptable evidence of any person in the vicinity of the tip at the relevant time, let alone a person who might commit arson. It was dismissed as an entirely theoretical possibility.[77]

114 That left four possibilities, all of which depended upon conditions within the tip. These were (i) spontaneous combustion, (ii) residual burn, (iii) an arcing battery and (iv) the lensing effect of glass in dry material. If the cause of the fire was probably one of the potential causes which should not have occurred, absent negligence on the part of the Council, the Council can be held responsible for the ignition.

115 The Council argued that this approach was inconsistent with the reasoning of the High Court in *Lithgow City Council v Jackson*.[78] Mr Jackson suffered severe head injuries whilst walking his dogs, late at night and whilst inebriated, in a park managed by the Council. He was found at the bottom of a large, broad concrete drain. The trial judge found that Mr Jackson had not established that he had fallen over a vertical face, as distinct from stumbling down one of the sloping sides.[79] The possibility that he had stumbled down the sloping side was consistent with Mr Jackson being aware of the presence

[76] Primary judgment at [130], [134].
[77] Primary judgment at [154]-[156].
[78] (2011) 244 CLR 352; [2011] HCA 36.
[79] *Lithgow City Council* at [8].

of the drain and failing to negotiate it safely. Accordingly the question was whether he had established a fall in circumstances where he had not seen the drain, which was unmarked and unguarded. There were, thus, two hypotheses, one consistent with negligence on the part of the Council, the other not. It was necessary for the plaintiff to establish on the balance of probabilities the event consistent with negligence. Neither the finding nor the reasoning of the High Court suggested that, if both reasonable possibilities had been consistent with negligence on the part of the Council, the plaintiff would still have lost if he could not establish which eventuated.

116 The appellant's approach should be accepted, so long as the possible causes could be characterised as dependent on a breach of duty by the Council. For this purpose, conduct should not be narrowly compartmentalised; indeed, as will appear below, there was no clear dichotomy between steps necessary to prevent ignition and steps necessary to prevent a fire spreading.

117 Of the four possible causes, (ii) was readily dismissed, namely, a flare up of an incompletely extinguished earlier fire (or possibly an unextinguished cigarette butt), referred to as a "residual burn".[80] While the Council had carried out a controlled burn to dispose of green waste some two months before the bush fire, there had been rain and regular attendance at the tip of both Council employees and persons dumping waste since that time, and no indication of any unextinguished fire. There was no evidence of the dumping of incompletely burned material which might still be alight. The trial judge readily dismissed this as merely a theoretical possibility; no challenge was made to this finding on the appeal.[81] It is therefore sufficient to focus on the precautions relied on by the plaintiff which might have removed the risk of spontaneous combustion, arcing of a battery or the lensing effect of glass.

118 Although the actual point of ignition was unknown, the descriptions by the first persons to see the fire located the ignition point in the north-west corner of the tip. As indicated by the aerial photograph which is annexure "A" to these

[80] There was some doubt as to what this term meant: Tcpt, 19/04/17, p 464(40)-(45) (Mr Nystrom).
[81] Primary judgment at [151]-[153].

reasons, and has been marked (as it was in evidence) with an indication of where dumping of particular matter occurred, it may be inferred that the fire started on the north-western side of the large area identified as "general waste" and described as "the bund".

(c) precautions against ignition

119 The plan of the tip indicated the categories of waste which, according to the management of the tip, were meant to be separated. Thus "glass" was located to the left as one entered the tip, in the north-eastern corner. Green waste was located in the centre of the tip, towards the southern boundary. It is clear that the fire did not start in either of these locations; evidence of contamination of green waste was therefore irrelevant. However, the Waste Management Strategy prepared in 2004 stated, in relation to Walla Walla tip, that "[w]astes have been dumped at the landfill in inappropriate areas and often mixed loads." Further, it was said that "the level of waste separation and the attention to detail and professionalism being shown by the current recycling contractors/waste facility supervisors is very poor." These issues were not addressed in the 2007 strategy, which identified the "life expectancy of the facility" as "no more than five years." The judge concluded that the same problems existed at the date of the fire, based on photographs taken on 1 October 2009 and the evidence of two witnesses as to the state of the tip.[82] The judge concluded that there was "contamination of waste" and further that the defendant was in that respect in breach of its duty of care.[83] It is not clear whether that breach of duty contributed to the spread of the fire; there was no consideration of whether it contributed to ignition. For present purposes there are two further questions to be answered, namely (i) whether the state of the general waste area contributed to ignition and (ii) if it did, whether steps reasonably available to the Council would have prevented that occurring.

120 The evidence at the trial included separate statements and a joint report from four experts. The plaintiff called evidence from Mr Fabian Crowe, who had

[82] Primary judgment at [341], [344], [345] and [349].
[83] Primary judgment at [352].

experience and expertise in bushfire investigations, fire behaviour and fire suppression. Mr Crowe's original report provided limited assistance with respect to how the fire may have started.

121 The plaintiff also called evidence from Mr Murray Nystrom who had extensive experience in forensic investigations of fires, including a period of 14 years with the Queensland Police Department. In a report dated 15 December 2011, Mr Nystrom stated:[84]

> "So, in my opinion, the fire was most probably the result of spontaneous ignition of green waste or ignition by way of inappropriately dumped rubbish, for example broken glass in dry vegetation, or electrical interaction from a dumped car battery. The nexus between the prevailing weather conditions and the outbreak of fire, however, mitigates against the latter possibility in favour of the other two possibilities."

122 Ms Danielle O'Toole also prepared a report for the plaintiff. Ms O'Toole had extensive experience in mining, civil and environmental infrastructure projects including waste dumps. Ms O'Toole did not express an opinion in her original report as to the cause of ignition, but agreed with the other experts in relation to the likely causes in a joint report and in oral evidence.

123 Dr Anthony Green gave evidence for the Council. Dr Green had extensive experience and expertise in areas associated with fires, explosions, emergency planning and catastrophic risk assessment. His academic qualifications were in chemistry. In his initial report of 4 November 2016, he cast doubt on the likely causes of the fire suggested by Mr Nystrom, favouring dry lightning. The trial judge rejected that opinion and there was no suggestion he was wrong to do so.

124 The four experts prepared a joint report in February 2017. In considering whether there were fire risks present at the tip on 17 December 2009, the three experts called for the plaintiff agreed that there were, Dr Green disagreeing on the basis that the physical condition of the tip showed it was

[84] Panel Report at 6.8.

"adequately managed." The trial judge rejected Dr Green's opinion in that respect. That rejection is not challenged.

125 Further, all four experts agreed that reasonable fire precautions that could have been taken were:

> "a. Separating and isolating deposits of different types of rubbish that constituted fuel loads within the tip.
>
> b. Creating and maintaining fuel free zones or areas including access roads between such deposits.
>
> c. Covering waste with dirt or inert material."

126 Three experts also agreed that removal of grass, foliage and trees within the tip was a reasonable precaution, Dr Green expressing the opinion that "the grass etc need only be kept at a manageable minimum condition." The joint report continued:

> "All four experts agree that none of those precautions would prevent the starting of a fire by lightning or deliberate ignition. So far as other possible sources of ignition are concerned, the precautions would have reduced the risk of ignition."

127 The expert evidence at trial explained in more detail the mechanisms by which spontaneous combustion, the lensing effect of glass and the possibility of arcing across battery terminals could arise and lead to a fire. As between these effects, the trial judge found that none was shown on the evidence to be the probable cause of the fire. The weight of the expert opinion was, however, that they provided the range of likely causes, with the likelihood in descending order from spontaneous combustion to the lensing effect of glass to an arc across battery terminals.

128 So far as precautions were concerned, Ms O'Toole recognised that there had been efforts to manage the tip by separating waste and burning green waste

once a year. In her view other steps should have been taken to minimise the risks of fire:[85]

> "We talk about the compaction of the waste. When you look at the photos, there's quite a large, open face, now, it's not compacted and more importantly it's not covered, so you've got this very large face of combustible mixed material that is neither compacted nor covered and it's the covering with dirt that, that really is, it's best practice, it should be done at the end of each day and it's that covering of dirt that inhibits not, not only the oxygen but the … so I believe that, that by not covering that waste on a daily basis that it led to a risk of fire."

129 Other evidence indicated that compaction would reduce the risk of spontaneous combustion, and that covering waste which included broken glass would prevent the lensing effect of glass. Ms O'Toole also noted that while the amount of material which would be needed to cover the tip face was large, the face itself being about five metres high and 20 metres wide, the amount would have been smaller if, as should have happened, the tip was operated with a smaller face.

130 Although the trial judge was not satisfied that spontaneous combustion was, more probably than not, the cause of the fire, that finding was challenged by the appellant. Of the three experts who considered the likely cause of the fire, both Mr Nystrom and Mr Crowe supported the likelihood that it was spontaneous combustion.[86] However, the judge discounted the evidence of Mr Nystrom because, in the course of concurrent evidence, he had "conceded that 'spontaneous combustion' was only identified as 'likely' because it 'appealed to him the most'."[87] The appellant challenged that finding on the basis that the language of "the one that most appealed" was that of counsel, with which the witness merely agreed.

131 Although this Court did not have the benefit of hearing the evidence, there appears to be substance in the submission that this did not constitute a concession on the part of Mr Nystrom. More importantly, the reason why it "appealed" was explained in the course of the evidence: it appealed because,

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[85] Tcpt, 19/04/17, p 499(25)-(35).
[86] Primary judgment at [145], [146].
[87] Primary judgment at [147].

assessing on a scientific basis the various possible causes, it was indeed more likely to have been the cause than others. There is no error in that process of reasoning. For example, it was entirely appropriate for the experts to reject dry lightning on the basis that the known conditions were not conducive to that event, based on an assessment of the metrological evidence.

132 Further, Dr Green justified his opinion that there was no evidence to support an outbreak of spontaneous combustion because the photographs showed only "one small pile of green waste in the foreground" which would not normally be sufficient for spontaneous combustion. Mr Nystrom agreed that that was all that appeared from one photograph taken weeks before the fire, but stated :[88]

> "The photograph doesn't really depict sufficient to conclude that there is a hazard of spontaneous combustion. I think you'd need better information. We don't know how deep this pile really is and we don't know what's underneath it. But in the photograph there is nothing to overly suggest that hazard."

133 However, what the photograph did indicate was that there was very poor separation of materials which were dumped in the general waste area. The appropriate inference was that there could be other green waste within the dump in a form conducive to spontaneous combustion, although that could not be seen on the photographs. As noted above, the experts agreed that better separation of waste, together with compacting and covering the general waste, would have reduced the risk of ignition by spontaneous combustion, lensing or indeed arcing from a battery. The inference sought to be drawn by the appellant from the expert evidence was that the three possible causes of the fire would all probably have been prevented had the precautions identified by the unanimous view of the experts been adopted. That submission should be accepted.

[88] Tcpt 19/04/17, p 457(20)-(25).

134 As noted above, the judge accepted that the Council had failed adequately to ensure that different kinds of waste were not mixed together.[89] He then considered the complaint that there had been a failure to cover the waste with inert material on a regular basis. Although the judge ultimately made no specific finding as to whether there was negligence in this respect, given that the particular went only to the issue of ignition, he appears to have accepted that there was a relevant breach of duty, with one qualification, relating to the possible cost of taking precautions.

135 The judge referred to the evidence of four witnesses as to the condition of the tip, being Messrs Davies, Peach, Jacob and Mansfield. Mr Jacob was a local farmer and contractor who was employed by the Council to conduct "a weekly push of the rubbish at a number of tips in the local area" including Walla Walla. He described "pushing" the rubbish as involving machinery "to push all the scattered rubbish and waste into the landfill itself and make the 'dumping' areas tidy and free of waste." He said that "[d]irt is then pushed up to the edge to prevent the waste from spilling out or into unwanted areas."[90]

136 Mr Mansfield was employed part-time by the Council as a "landfill attendant". His duties included working at the Walla Walla tip. He was conscious of the need to ensure there was not cross-contamination of waste in different areas. He stated:[91]

> "The Walla Tip has gotten better in that there is not as much waste being dumped in the wrong areas. For example, people with mixed loads of general and green waste would dump it all in the general waste rather than separating it out. Therefore there is green waste with the general waste. I find it's only 1% of the people that are too lazy that do this and the majority are very good at sorting."

137 The period to which he was referring as indicating earlier practice was unclear; he commenced working at Walla Walla in 2007.[92] Mr Mansfield agreed that, particularly in 2009, "there was a lot of rubbish that wasn't

[89] Primary judgment at [370] and [352].
[90] Statement, 18 March 2010, par 4.
[91] Statement, 2 February 2010, par 8.
[92] Tcpt, 11/04/17, p 296(45).

properly pushed up".[93] He agreed that it was "building" in the months before the fire. He also agreed that there was no soil to put on top of the rubbish at that time.[94] He was asked if he now knew that there should be covering. He said:[95]

> "It should be spread out so it's nice and level, you run over your rubbish five or six times to get a nice compaction and then you, and then you tip that on and run over it again."

138 In considering the scope of the duty of care owed by the Council to surrounding property owners, the judge summarised important evidence as to the knowledge and understanding of Council officers as to the risks involved. Mr Davies was, at the time of the fire, the Council's Director of Environment and Planning. He stated that in 2008 Mr Peach took over direct responsibility for the waste facilities. The judge concluded:

> "[207] Mr Davies was familiar with the risk of spontaneous combustion of cut grass, and the potential for waste deposited at the tip to spontaneously combust; and that pushing green waste piles would spread it out, which would also reduce the risk of ignition by spontaneous combustion. He conceded that cover of general refuse at the tip with soil would reduce the risk of a fire started at the Tip from spreading. He understood grasses cure toward the end of spring into the early summer, and become quite flammable."

139 The officer directly responsible for waste management in 2009 was Mr Peach, whose evidence the judge summarised in the following terms:

> "[223] Mr Peach gave evidence that:
>
> (1) fires occurring in tips were a particular concern of local government authorities;
>
> (2) there are special risks with tips regarding fire;
>
> (3) the incidence of fires in tips is greater than in open broad acres;
>
> (4) in the management of the tip one of the risks the Shire ought to try and control was fires occurring, and if a fire did occur, prevention of such a fire spreading; and

[93] Tcpt, p 310(10).
[94] Tcpt, p 310(24).
[95] Tcpt, p 310(35)-(40).

(5) a major concern in terms of the management of the tip was fire."

140 Other evidence demonstrating actual appreciation by Council officers of what needed to be done to minimise risk of fire will be addressed below in dealing with the risk of spread.

141 In submissions the Council focused on the lack of soil available to cover the pile of general waste from time to time, and the cost of importing soil for the task. However, although the Council had accepted the need to cover the waste from time to time, it provided no evidence as to the cost of that exercise. It was therefore merely a factor to be addressed when considering the overall cost of precautions. If the possible anticipated expenses were not sufficient to render the precautions unreasonable, then this Court should make the following findings:

(a) the most likely cause of the fire was spontaneous combustion in or at the back of the area referred to as "general waste";

(b) it is not necessary for the Court to be satisfied on the balance of probabilities that spontaneous combustion was the cause of the fire because the only other significant possibilities were the lensing effect of broken glass and the possible arcing of an abandoned vehicle battery: it is more probable than not that one of these was the cause of the fire;

(c) a fire resulting from any of these causes would probably have been prevented had the Council taken steps to compact and cover with soil the area of general waste;

(d) although in the second half of 2009 the area of general waste was large and would have required a large volume of soil, had the Council taken reasonable precautions, it would not have allowed that situation to arise and, to the extent that it had arisen, it should have been

reduced over a reasonable period prior to the commencement of the bushfire season;

(e) so long as the expense involved was not unreasonable, the Council was negligent in failing to take precautions to prevent the fire which in fact ignited from occurring.

(d) precautions against escape from tip

142 This topic may be dealt with more briefly because the trial judge found that the Council was negligent in not taking a number of precautions to prevent the spread of the fire, once it ignited. Nevertheless, it is necessary to understand why, having made those findings, the judge was not satisfied that they would probably have been effective to prevent the escape of the fire from the tip before the fire fighters arrived.

143 The precautions which the judge accepted should have been taken may be addressed in three categories, namely (i) steps to reduce the "fuel load" within the tip; (ii) levelling parts of the tip to allow access to fire fighters, and (iii) constructing and maintaining an adequate firebreak around the tip.

144 The evidence relied on by the trial judge included correspondence emanating from senior Council officers, on behalf of the general manager, in 2000, 2001 and 2002. First, on 31 August 2000, Mr Robert Crawford, Manager Environmental & Community Services, wrote on behalf of the Council's general manager to the Captain, Culcairn North West Fire Brigade regarding the Council's "plans for fire safety at Council Waste Depots." The letter read:

> "Council is currently awaiting a quote to spray an extensive perimeter around all three (3) sites, the work planned to take place as soon as possible.
>
> Plans have also been made to create a bare-earth firebreak around the sites with a grader, this work to take place as soon as the sprayed grass is dead and the sites are dry enough to give access."

145 A second letter, on 21 February 2001, was sent to MD & VC Jacob, with respect to a tender for weekly services to be provided at Culcairn, Henty and

Walla Walla waste depots. The letter sought assurances that the contractors had the necessary equipment. The weekly services included:

> "f) Carry out ongoing program of levelling and covering rubbish mounds with soil, as and when directed or as is considered necessary."

146 Thirdly, on 13 May 2002 Mr Crawford's successor, Mr Williams wrote to Messrs A W & M E Singe in Henty in the following terms:

> "Reference is made to your recent letter to Council, and discussions with Council staff in relation to the Henty Waste Depot and the potential fire risk it may pose to your property.
>
> …
>
> Council will carry out the following works during August of each year, weather permitting:
>
> - Maintain graded fire break along existing alignment
> - Spray all weeds and vegetation within the fire-break
> - Spray noxious weeds within the Waste Depot
> - Spray grassed area between fire break and north-west boundary
> - Spray vegetation along western boundary fence."

147 The trial judge also noted (and implicitly accepted) evidence that there had been a fire at the Henty tip in 2006, and a fire at the Walla Walla tip in 2003 or 2004.[96]

148 The judge then considered whether there had been a failure to create and maintain an effective firebreak.[97] The judge noted the submissions by the plaintiff that the firebreak was "totally inadequate" and, indeed, "was not a firebreak."[98] The conclusion reached by the judge was expressed in the following terms:

> "[339] Whilst the defendant created and maintained a firebreak, the adopted means of maintenance was unsatisfactory for the purposes of hazard

[96] Primary judgment at [225], [226].
[97] Primary judgment at [333]-[339].
[98] Primary judgment at [337].

> reduction. A firebreak must be bare earth, wide and graded. Further, it would appear that the firebreak should be wider, although the defendant submitted this step was limited by physical dimensions of the reserve on which the Tip was located. In light of the evidence above, I accept the plaintiff's submission that the maintenance was deficient for the purpose of maintaining an effective firebreak at the Tip and that insufficient precautions were taken in that respect."

149 The judge also found that the firebreak was a track approximately 3-5 metres wide, which, at the time of the fire, was "uneven, [including] tall, uncut or burnt and fully cured grasses, as well as refuse of the nature of concrete and steel throughout it. The land could not be traversed by machinery so as to cut it."[99] The description of the evidence (implicitly accepted) included that of Mr Seidel, who lived a short distance from the tip and used it frequently. He described the state of the tip in a statement which was tendered and not the subject of cross-examination, in the following terms:[100]

> "The Tip was in an appalling state, including in the period before the fire. There was often tall grass within the tip and around the perimeter of the Tip. There was a narrow firebreak around the perimeter of the Tip. There were also trees in the middle of the firebreak with long grass growing around the trees.
>
> … Whenever I was there, there was paper waste against the perimeter fence."

150 Another local resident, Mr Hunter gave evidence as to the condition of the tip prior to the fire. (Mr Hunter had also assisted in the fire fighting exercise, protecting the clubhouse on the abandoned golf club land.) In his oral evidence he described driving around the firebreak when scavenging for vehicle parts. The following question and answer were given in the course of re-examination:[101]

> "Q. What was the general condition of the firebreak as you drove around it?
> A. Well, … it wasn't very well maintained, I never actually saw when it had been graded, and there was quite often lots of rubbish fallen, small branches and sometimes even large branches and leaves and grass and stuff scattered across it."

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[99] Primary judgment at [22].
[100] Statement of John Eric Seidel, 18 July 2016, pars 7-8.
[101] Tcpt, 05/04/17, p 176(10).

151 It was suggested to Mr Hunter in cross-examination that the firebreak was about "two grader blades wide", a proposition which he denied.

152 Mr Nystrom gave evidence (which was not challenged) in relation to the firebreak in the following terms:[102]

> "… the thing that is described as being a firebreak is in my opinion not a firebreak, it's really just a track and the reason I say it's just a track is because it doesn't provide a separation between areas that can burn. It's, well, it's only 3 or 4 metres wide, in some places it separates into two tracks and then most areas it's covered by trees and over track as I observed and you can certainly see it in the aerial Google map, you can see that the track around or firebreak as it's called around is covered by trees which then gives you burning, sorry, gives you leaves and sticks and so on that land on it and they'll add to the risk of a fire passing straight through it regardless of the size of the fire."

153 Mr Nystrom also gave evidence as to the appropriate width saying "it should be wide enough for the passage of a two vehicles so they can pass each other and in my view something of the order of about 10 metres would be preferable to something of, to something that is of the order of 3 to 4 metres."[103] Dr Green agreed that "[o]bviously 10 metres is better than three or four" and agreed that it should be totally cleared of material, including trees.[104]

154 Again summarising (and implicitly accepting) the evidence, the judge stated:[105]

> "Mr Nystrom stated that short grass is going to burn substantially more slowly than tall grass. A firebreak is an effective tool. He considered the firebreak on the southern side of the Tip was ineffective because there were trees over the firebreak dropping timbers, leaves and bark. A firebreak should be ideally 10 metres and would be clear."

155 So far as the area within the tip was concerned, two precautions were required, which were not taken. The first was the reduction of fuel load. There was evidence that until it had dried out (it being entirely dry or "cured"

[102] Tcpt, 19/04/17, p 498(20).
[103] Tcpt, p 521(40).
[104] Tcpt, p 521-522.
[105] Primary judgment at [407(4)].

at the time of the fire) the grass within the tip and surrounding the areas where waste had been dumped was up to a metre high, or the height of a 44 gallon drum.

156 Dr Green gave evidence of the significance of the fuel load in terms of the height of the flames and the speed at which the fire would spread, stating:[106]

> "… If you take something like 4 tonnes per hectare of grassland … that would tend to be about knee height equivalent of an area. It will give a flame that's probably about 2 and a half metres high. …
>
> As the wind increases, that flame tilts towards the ground …."

157 The judge accepted the evidence of Mr Jacob that in the south-east corner "there was vegetation, phalaris and rye grass and 'all sorts of stuff up to waist high' which was dry or cured, the vegetation was heavy, with exceptional growth in 2009. Photographic evidence of the grass alongside 44 gallon drums was also relied upon as an indicator of height."[107] The judge noted evidence that "material to the south and the east of the bund was mainly long grass in October to December 2009" and "there was nothing to stop a fire going south from the bund towards the south-eastern area of the reserve within the netting fence before the firebreak".[108] With respect to the evidence of Mr Davies the judge noted:

> "[358] As to the presence of fuel, generally, within the Tip the following evidence was provided by Mr Davies:
>
> (1) He confirmed there was nothing done by way of fuel reduction of the grass in any area of the Tip other than the burn of green waste, of any of the vegetation depicted in the photographs shown to the witness.
> (2) There was no difference in the grass in the eastern end of the tip, and the golf course, in addition there was phalaris in the tip which when it is dry burns.
> (3) He conceded concern with a high level of fuel at the Tip that, if a fire starts and is a running fire by the time it gets to a firebreak, the firebreak is quite ineffective unless it is very wide.

[106] Tcpt, 19/04/17, p 468(25)-(35).
[107] Primary judgment at [355].
[108] Primary judgment at [356].

(4) He recalled it was very difficult to slash close to the waste in the land fill area of the Tip without conducting landscaping works.
(5) He confirmed the area to the south of the bund to the golf course had long grass within it in most spring seasons."

158 The evidence consistently given by the witnesses and uncontested was that there was long grass both between the various dumps within the area of the tip, within the areas where there were bottles and scrap metal and between the dumps and the fence; no steps had been taken either to cut the grass or to apply pesticide. The judge reached the following conclusions:

> "[364] In summary, the expert evidence was that fuel load will be an important factor in the spread of fire. … The removal of combustible material including the cured grass will retard the expansion of fire and permit a greater opportunity for intervention of fire crews. There was evidence as to the difficulties of slashing in the Tip due to the state of the land but there was no evidence to the effect that slashing was not possible or attempts to slash was ineffective. The evidence was that the defendant made no real attempt to reduce fuel as the Tip including by chemical means. There was a significant failure to take a reasonable fire precaution, in this respect, in accordance with the defendant's duty of care."

159 Despite the finding that slashing, at least in some areas was possible, the judge also noted the plaintiff's contention that "[p]hotographs taken after the fire show a representation of the terrain underneath the long grass and vegetation before the fire, and illustrate the work required of a bulldozer if employed prior to the fire to flatten the ground on the southern side".[109] The Council had in part conceded that slashing was difficult, the judge noting a submission that "it was not practical to slash between the waste by virtue of debris and topographical impediments".[110] It is also apparent from the photographs that there were a number of trees within the area of the tip, as well as along the firebreak.

160 Importantly in terms of causation, the following steps which were not taken by the Council would, if taken, have significantly impeded the progress of the fire and therefore slowed its escape from the tip, namely (i) compacting and covering the bund created by the general waste; (ii) levelling the ground in the

[109] Primary judgment at [393].
[110] Primary judgment at [362].

areas between the piles of waste so as to allow access for slashers and similar machinery; and (iii) slashing or otherwise killing the long grass between the piles of waste and between the waste and the fence. If those steps had been taken, the additional step of providing a firebreak of graded clear dirt, with no tree cover, to a width of approximately 10 metres around the tip, would on the evidence, have been effective at least to slow the spread of any fire and thus to reduce greatly the risk of the fire escaping. As the trial judge found, those steps should have been taken in the exercise of the Council's duty of care.

161 It remains to consider whether that finding should be rejected because the cost involved, and the lack of resources available to the Council, rendered such precautions beyond those which a reasonable manager in the position of the Council would have undertaken.

(e) cost of precautions

162 The Council sought to demonstrate, on the basis of its budgets for the 2008-2009 and 2009-2010 financial years that there were no significant funds available to it which would have allowed further expenditure on the 10 waste disposal sites under its control. It also contended that the allocation of further resources to that function would have been a challenge to the general allocation of financial resources contained in the budgets, being the exercise forbidden by s 42(b). The consideration of expenditure across all 10 waste disposal sites, it submitted, was required pursuant to s 5C(a) and s 42(c). In addition, as noted above, the Council identified the risk of harm as a risk of fire escaping from its lands and therefore submitted that these provisions required consideration of the cost of addressing similar risks at other land owned or occupied by the Council, including "broad acreage".

163 The appellant submitted that all that could sensibly be required was a consideration of the burden of adopting appropriate precautions at the waste disposal sites operated by the Council. There was evidence from a relevant Council officer that there are "special risks with tips regarding fire", and that

the incidence "of fires in tips is greater than in … open broad acres".[111] For the purposes of that more limited inquiry, the appellant noted that the Court had available two waste management strategies prepared for the Council and its predecessor, one prepared in 2004[112] and a second prepared in November 2006.[113] This material revealed that the Council operated 10 waste disposal facilities, each having somewhat different characteristics and methods of operation. One was licensed under the Protection of the Environment Act.

164 The appellant's approach should be accepted for two reasons. First, there was no evidence as to what precautions were needed with respect to land not used for waste management purposes, let alone as to the costs of carrying out such precautions. Secondly, whatever may be the scope of the "general allocations" which cannot be challenged pursuant to s 42(b), 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. 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. Further, that approach is to be preferred on the basis that the intention of Pt 5 of the *Civil Liability Act* was in part to constrain the cost of litigation; 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.

165 On this basis the exercise required identification of (i) the costs involved in the precautions at the tip found to be reasonably necessary, (ii) the actual precautions required at other waste facilities operated by the Council, and (iii) the costs which would be involved overall.

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[111] Tcpt, 10/04/17, p 235(10)-(15).
[112] Culcairn Shire Waste Management Strategy 2004.
[113] Waste Management Strategy 2007-2010.

166 The evidence as to the costs involved in carrying out the precautions required at the tip was quite limited. That was in part because quite limited steps had been taken by the Council with respect to such precautions. Thus, on 28 October 2009 the Council issued an order to Jindera Bobcat & Machinery Services for "slashing/mowing & firebreak" at the tip (and at five other sites on Council land). There was an invoice in evidence from Jindera Bobcat dated 26 October 2009, for work done on 20 October at the Walla Walla tip, which was described as "slash drive and clean up fire break around tip." The work apparently took 10 hours and the bill with GST was $990. (This Court was taken to no invoices for any other tip.)

167 There was a lack of direct evidence as to the cost of the proposed precautions, no doubt in part because, as the draft Waste Management Strategy 2010-2015 (March 2010) noted with respect to Walla Walla tip, "[a]ll the putrescible waste has been covered as a result of the fire of 17th December 2009 and the facility is closed to the public." It was proposed that the site be permanently closed and the land rehabilitated. Significantly, however, there was little in this report which indicated the need for fire prevention precautions at any other waste disposal site within the Council's area. There was reference to the fact that, at the Henty landfill, "[a] fire in 2007 cost $10,000 to extinguish". Other evidence indicated that a fire intended to eliminate green waste had spread into the general waste tip; the precaution had been to isolate the area where green waste was dumped and surround it by a gravel firebreak. There was no indication as to the cost incurred for this work, nor did it appear that similar precautions had been deemed necessary at any other site. It followed that no costings were available from this source. The proper inference is that the relevant assessment of costs may properly be restricted to those which would have been undertaken at the Walla Walla tip prior to the fire in December 2009. Notably, there was no estimate of the cost of carrying out the work proposed in 2001-2002, but not undertaken.[114]

[114] See [144]-[146] above.

(f) reasonably available resources

168 The general manager, Mr Pinnuck, identified the expenditure and income in relation to "[t]he financial performance of waste management".[115] Thus, for the financial year 2008/2009, expenditure on the Walla Walla tip was $25,108 and income "in relation to" the tip was $6,431. By contrast, the total expenditure with respect to "waste operations of the Council" in that financial year was $869,000, total income being $616,000. Mr Pinnuck stated that "there was no immediate reason for the Council to allocate further resources to the tip in the period prior to the fire", based upon "(a) lack of complaints regarding the tip [and] (b) financial performance of the tip and waste management generally."[116] Mr David Smith provided details of the Council's budgets for the same financial years and confirmed that in each year "it was expected that waste management would run at a loss" and that, in each year, "waste management did in fact run at a loss." He also stated that he did not recall "any complaint about the budget allocations for waste management or in relation to Walla Walla tip."[117] Apart from the final comment that waste management in fact ran at a loss, all of the material attached to Mr Smith's statements was in the form of budgets for particular financial years.

169 The lack of complaints is of no immediate relevance; it is unclear in what sense "complaints" would affect the reasonable precautions to prevent the spread of fire. The evidence demonstrated that concerns as to fire risk in 2001 and 2002 were raised, as discussed above, including by the Rural Fire Service. The reference to "financial performance" is also obscure. It may have referred to the fact that, in each of the five financial years referred to in the evidence, the income "in relation to" the tip was approximately 25% of expenditure. The service was not expected to break even; the source of the additional funds was not explained. It is therefore necessary to explore the Council's financial statements in more detail.

[115] Statement, S J Pinnuck, 8 September 2016, pars 33-35.
[116] Statement, pars 38 and 46 (sic).
[117] Statement, DJ Smith, 8 September 2016, pars 42-44.

170 The Council's balance sheet for the year ended 30 June 2009 recorded net assets of $244.5m, which included "cash and cash equivalents" of $2.32m and investments of $15.95m; these amounts totalled $18.27m. The notes to the balance sheet explained that of the $18.27m, $3m was not subject to restrictions. Mr Pinnuck failed to identify this sum as an available financial resource in his evidence.[118]

171 The income statement for the year ended 30 June 2009 recorded a net operating result of $4.6m and a net operating result before grants and contributions provided for capital purposes of $826,000. As to the grants, totalling $9.29m, there were tied specific purpose grants of $3.83m; further, two untied general purpose grants totalling $2.02m were allocated to local roads and pensioner rate subsidies. However, there remained a general component of untied grants of $3.44m available for operating purposes.

172 The net operating result of $4.6m reflected an increase in net assets as at 30 June 2009, when compared with the previous year.

173 The budget for the waste management fund for 2009/2010 to 2011/2012, adopted by Council on 24 June 2009, forecast an operating loss for 2009/2010 of $253,790. However, that figure said very little about the Council's financial resources, as it ignored forecast capital grants and contributions and the Council's overall financial resources recorded in the balance sheet.

174 In addition to immediately available financial resources, the notes to the Council's 2009 financial report recorded that the Council maintained a waste management fund (or reserve) which had a closing balance on 30 June 2009 of $51,000.[119] It may be inferred that this fund was only available for waste management.

[118] Statement, SJ Pinnock, 8 September 2016, pars 30-32.
[119] Note 6c, Restricted Cash, Cash Equivalents and Investments, subheading "Internal Restrictions".

175 According to the Consolidated Management Plan 2009/2010 to 2011/2012, the Council had planned to expend $25,000 from the waste management reserve by 30 June 2009. In fact, only $18,000 was spent by 30 June 2009.

176 Accepting that the plaintiff cannot challenge the general allocation of $51,000 to this reserve, there was no evidence about the specific allocation of the reserve in the 2009/2010 year to particular projects within the Council's waste management functions. The summary of forecasts of estimated transfers to and from reserves for 2009/2010 suggested that no transfer from the waste management reserve was forecast as at 24 June 2009.

177 Nor did the Council adduce evidence as to how the waste fund of $51,000 was in fact expended, or in what amounts and at what times in the 2009/2010 financial year, other than that by 30 June 2010, the waste management reserve of $51,000 had been fully expended.

178 This evidence supports the following conclusions as to the financial resources of the Council in 2009:

(i) there were $51,000 in funds already allocated to waste management reserve as at 30 June 2009;

(ii) the estimated expenditure of the waste management fund as at 30 June 2009 was $7,000 less than had been budgeted;

(iii) the unallocated grants for operating purposes as at that date exceeded $3.4 million; and

(iv) the amount of unallocated cash or cash equivalents and investments as at 30 June 2009 was in excess of $3 million.

179 Compliance with the duty of care identified above would have involved expenditure over more than one financial year, which might have reduced the available funds at the beginning of the 2009 financial year, but would have reduced the amount required in that year for additional works. However, even

if all the precautions identified above were taken in calendar year 2009, before the commencement of the summer months at the end of that year, there were ample funds available for such works. If more than the waste management fund had been required, it would seem likely that 1% or 2% of the unrestricted cash and investments would have sufficed. There was no evidence that the cash and investments were at an unreasonably low level.

180 Accordingly, there was no financial constraint, on the evidence available in this Court, which would have precluded a reasonable Council from taking the precautions identified at [160] above.

Causation

181 The appellant failed before the trial judge for two reasons: first, although the judge accepted that there had been a breach of duty with respect to the precautions needed to control the spread of fire from the tip, he was not satisfied that those precautions would, in the circumstances that existed on 17 December 2009, have prevented the spread of the fire beyond the tip to the long grass on the golf course, and hence its ultimate spread to the plaintiff's property at Gerogery. The appellant's case was that, had the relevant steps been taken, the spread of the fire within the tip would have been far slower, with the result that, on the balance of probabilities, it would have been contained within the tip. For reasons explained below, that submission should be accepted.

182 The second reason that the plaintiff failed at trial was that the judge did not accept that there were precautions which should have been taken to control the outbreak of fire, on the basis that it was not possible to determine the cause of the outbreak. For the reasons set out above, that finding was in error. The appellant submitted that, had the relevant precautions been taken, there would probably have been no fire, but that if there were a fire, it would have been greatly reduced in its ferocity and, for that reason, the combination of those precautions, together with additional precautions to prevent the spread of the fire, would have allowed it to be controlled before it escaped

from the Council tip. That submission should also be accepted. Nevertheless, it is appropriate to address the issue of causation in respect of the spread of the fire, which constituted grounds 3 and 4 of the appeal.

183 The appellant contended that the trial judge erred in two respects. First, he abrogated his fact-finding role by deferring to certain opinions expressed by the experts, which did not determine the issue before the Court. Secondly, in considering the lay evidence, the judge wrongly determined the issue by a finding (factually correct) that the first person to arrive at the tip to fight the fire was already too late to prevent its escape. The proper approach, the appellant submitted, required an estimation of the progress of the fire had the relevant precautions been taken, a question which was not answered simply by reference to the actual progress of the fire.

184 In dealing with causation, the trial judge summarised, accurately, the submissions of the parties,[120] followed by reference to particular evidence of the experts, as set out in their joint report[121] and a summary of their oral evidence, given concurrently.[122]

185 The correct approach was identified by the primary judge in stating his conclusions, namely:

> "[408] In my view, the plaintiff has failed to prove, on the balance of probabilities, that the failure by the defendant to take the pleaded steps or precautions to prevent the spread of the fire caused the particular harm suffered by the plaintiff. In other words, the plaintiff has not demonstrated that, if the reasonable precautions were sufficiently taken, that the harm caused to the plaintiff by the spread of the fire would have been avoided. Hence, the plaintiff has failed to show factual causation, namely, the negligence was a necessary condition of the occurrence of the harm."

The challenge by the appellant was not to the form of the key finding, but to the reasoning which supported it.

186 In dealing with the evidence of the experts, the judge noted:

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[120] Primary judgment at [401] and [402].
[121] Primary judgment at [403].
[122] Primary judgment at [407].

> "[411] … The highest the opinion of the experts reached as to the spread of the fire, assuming (contrary to the evidence) that the prevailing conditions did not cause a quick spread of the fire, was that 'the slowing effect of the other measures might have bought sufficient time for the fire fighters to successfully intervene'. It follows, as the defendant submitted, that persons eminent in the field in considering the questions as to ignition and spread of fire, were not prepared to express an opinion that it was more likely than not that the measures would have slowed the fire to such an extent as to provide sufficient time for fire fighters to successfully intervene."

187 It was true that the joint expert report expressed the particular opinion in guarded terms. It is also true that there was other evidence which provided a basis for assessing the strength of this conclusory statement. The judge did not refer to other aspects of the expert evidence, but continued in the following terms:

> "[413] Further, there is nothing in the totality of the evidence before the Court which would warrant a different conclusion. As I have earlier found, Mr Grosse was the first to arrive at the fire. He found that, at that time (about 1.45pm), the fire had already travelled through the perimeter fence of the Tip on the southern side and was moving quickly towards Walla Walla-Jindera Road. There was very tall grass within the dumping area and in the grass area outside the perimeter of the Tip. Mr Grosse abandoned the fire fight at the Tip due to the topographical and access difficulties. He moved to fight the fire from a different vantage point. However, the fire advanced sufficiently rapidly across the golf course. He retreated the Walla Walla-Jindera Road. By the time he reached that location the fire had already jumped the road.
>
> …
>
> [415] It follows that the submission by the defendant that the evidence of Mr Grosse supports or is consistent with the opinion of the experts must be accepted. The earliest person to arrive at the Tip to fight the fire was too late to prevent the escape of the fire and, in the result, it cannot be found, on the balance of probabilities, that the fire may have been stopped by the measures taken.
>
> [416] It is true that the evidence reveals that by the various measures the risk of the spread of the fire might have been slower in the circumstances but it is another matter altogether to say that the progress of the fire may have been slowed to such an extent as to meet the time of the arrival of the first fire fighter who could have arrested the fire at the Tip."

188 The facts as described at [413] were not in dispute. The questions which should have been asked, however, were whether the fire would have escaped before Mr Grosse was able to obtain access to the tip, had the waste been

compacted and covered with soil, had the load of dry long grass been removed and had there been a properly cleared and graded firebreak. As the appellant submitted, the reasoning at [415] should not have been adopted. The fact that Mr Grosse arrived too late in the actual circumstances of the fire does not provide any answer to the counterfactual question, namely would he have arrived too late had the relevant precautions been taken.

189 The experts were questioned at some length about three specific topics, namely (i) the effective fuel load resulting from long grass on the tip site, (ii) the strength of the fire at the uncovered bund, and (iii) the effectiveness of a firebreak. Dr Green, who concluded, contrary to the views of the other witnesses and the findings of the judge, that the tip was adequately managed, had calculated from the photographs that the grass gave rise to a fuel load of about four tonnes per hectare.[123] He was taken through evidence which suggested that the grass was in fact significantly higher than the knee height which he had assumed. He then doubled his estimate of the fuel load to about eight tonnes per hectare, which cast doubt on other aspects of his opinions.[124]

190 Mr Crowe stated:[125]

> "It's fully cured, if there's been accumulation of thatch from previous year's growth over that period then the quantity of fuel is a lot more than is originally perceived because there's a lot at ground level that is dead fuel and therefore available to burn and, and very volatile, [ready to] ignite with the smallest of ignition."

191 Maintaining short grass had a further benefit in that, according to Mr Crowe's evidence, it would not have "potential to spot".[126] Dr Green agreed that there was "little prospect of spotting" if the grass were slashed and kept to a height of six inches.[127]

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[123] Tcpt, 19/04/17, p 500(35).
[124] Tcpt, p 503(18).
[125] Tcpt, p 504(10)-(15).
[126] Tcpt, p 504(40).
[127] Tcpt, p 513(12)-(16).

192 With respect to the fire within the tip, Dr Green was of the view, based on damage to the trees, that along the bund the flames "could be 30 metres in length".[128] Dr Green also agreed that if waste were stored without being covered and sealed, it "can create an enormous bonfire".[129] The solution, Dr Green stated, was to "cover it if you can."[130]

193 Following the exchange between counsel for the plaintiff and Dr Green, Mr Crowe added:[131]

> "The source of fire on one side of the break … where fire is burning, if the fuel is reduced, and if we're talking about grass, if that is cut grass then you are dramatically … decreasing the opportunity for a fire to cross a break and irrespective of wind strength because the spotting, the source of spotting, isn't there, it isn't material that is separated from a plant, whether it be a tree or … grass to carry across … the break."

Mr Nystrom and Ms O'Toole agreed with the points which had been made.[132]

194 When the witnesses came to discuss the effectiveness of a firebreak under the hypothesised conditions, namely a greatly reduced fuel base and short grass, combined with a wide clear firebreak, there appeared to be general agreement that a firebreak was, as Mr Nystrom said, "a tool that is effective under the conditions, can be effective under the conditions, with short grass it's far more effective than with tall grass."[133] Mr Nystrom said that an appropriate width of an effective firebreak would be about 10 metres, in preference to the actual uncleared firebreak which was in the order of 3-4 metres.[134] Dr Green agreed that 10 metres was better than 3 or 4 and that it should be totally clear of material, including trees over it.[135]

195 There was no challenge to the questioning of the experts on the basis that reasonable precautions would have involved the grass in the tip slashed to six

[128] Tcpt, pp 515(35)-516(25).
[129] Tcpt, p 517(1)-(5).
[130] Tcpt, p 517(10).
[131] Tcpt, p 519(22)
[132] Tcpt, p 519(33)-(35).
[133] Tcpt, p 521(15).
[134] Tcpt, p 521(40).
[135] Tcpt, pp 521-522.

inches in length, covering of the bund with soil from time to time, and the removal of a fully cured (that is dried) fuel load of dry grass estimated at some eight tonnes per hectare. Further, it was the Council's expert (Dr Green) who hypothesised that the waste in the tip burnt with flames up to 30 metres in length.

196 Importantly, all agreed with the assumption that spotting would have been greatly reduced, if not eliminated, by maintaining short grass and a covered waste area. They also agreed that a 10 metre firebreak cleared of trees, debris and grass would have been appropriate. Further, there was agreement that the speed of spread depended significantly on the length of the flames which, absent exposed waste and long grass, would have been much reduced.

197 Although it was true that Mr Grosse, and the second fire crew, arrived only after the fire had jumped from the tip to the golf course, they arrived about 15 minutes after the fire was first observed and, presumably, was well established. The evidence of the various local residents who saw or smelled the fire and responded, demonstrated that, had the fire been less fierce and had they arrived even a few minutes earlier, they would probably have been able to prevent its spread beyond the ineffective firebreak. It was common ground that the speed with which the fire spread was a function of the fuel load, the length of the flames and the amount of spotting. As the appellant submitted, it was necessary to assess the cumulative effect of the various precautions deemed reasonable. That did not occur. The appropriate inference on the evidence summarised above is that the fire fighters would probably have arrived in time to contain a more subdued burn within the confines of the tip. The hot wind would probably have had less to work with and could not have spread a fire with limited exposed fuel as fast as in fact it did.

198 Even if there were doubt in this regard, the additional factor of the reduction in likelihood of the fire commencing, or at least a large fire commencing, meant that the plaintiff's case has been established.

Conclusions

199 The appeal should be allowed and the following orders made:

(1) Grant Sharon Patricia Weber leave to appeal from the judgment and orders in the Common Law Division;

(2) Allow the appeal and set aside orders made on 14 May 2018; in their place make the following orders –

(a) Give judgment for the representative plaintiff, Sharon Patricia Weber, against the defendant, Greater Hume Shire Council, in the amount of $104,400 plus interest;

(b) Order that the defendant pay the plaintiff's costs of the trial of the common issues;

(c) Remit the proceedings to the Common Law Division to deal with the outstanding issues in the representative proceedings.

(3) Order that the respondent pay the appellant's costs in this Court.

200 **GLEESON JA**: I agree with Basten JA.

201 **SACKVILLE AJA**: I agree with the orders proposed by Basten JA. I prefer to state my own reasons. However, in doing so I shall identify the matters on which I agree with Basten JA's reasons.

Duty of care

202 The respondent (**Council**) placed at the forefront of its submissions the proposition that the appellant was seeking to establish a novel duty of care. The primary Judge's rejection of this proposition was said to have led his Honour into error, in that his Honour ignored or impermissibly lessened the significance of factors relevant to the existence of a novel duty of care.

203 Nearly 90 years ago the High Court in *McInnes v Wardle*[136] applied a principle formulated 37 years earlier by the Privy Council in *Black v The Christchurch Finance Company Limited*,[137] as follows:

> "The lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property … And if he authorizes another to act for him he is bound, not only to stipulate that such precautions shall be taken, but also to see that these are observed, otherwise he will be responsible for the consequences".

204 In *McInnes v Wardle* a contractor engaged by the defendant lit a fire in December 1925 on a property near Bordertown in South Australia, with the intention of "fumigating rabbits". The fire escaped to the plaintiff's neighbouring property and caused damage. The High Court upheld a judgment in the plaintiff's favour founded on the defendant's negligence. Gavan Duffy CJ and Starke J pointed out that grass and scrub are usually very dry during the Australian summer and that fires spread with great rapidity. Their Honours observed that the statutory prohibitions against lighting fires during the summer months demonstrated that the defendant should have foreseen and guarded against the danger of burning ferns and undergrowth as a means of controlling rabbits.

205 In *Burnie Port Authority v General Jones Pty Ltd*,[138] a majority of the High Court held that for the purposes of the common law of Australia the so-called rule in *Rylands v Fletcher*,[139] which imposed a form of strict liability on occupiers who conducted dangerous activities on their land, had been absorbed by the general principles of negligence. The facts of *Burnie* were similar to those of *McInnes v Wardle*, in that a fire was started in the defendant's building by the negligence of a contractor and caused damage to another section of the same building occupied by a licensee. The majority judgment cited *Black v The Christchurch Finance Company Limited* and

[136] (1931) 45 CLR 548; [1931] HCA 40 at 550 (Gavan Duffy CJ and Starke J), at 552 (Evatt J).
[137] [1894] AC 48 at 54 (Lord Shand).
[138] (1994) 179 CLR 520; [1994] HCA 13.
[139] *Rylands v Fletcher* (1868) LR 1 Ex 265; (1868) 3 HL 330.

McInnes v Wardle as decisions founded on the ordinary principles of the law of negligence which recognise that an occupier of land in some circumstances may be subject to a non-delegable duty of care.[140]

206 In all three cases the plaintiff occupied land or premises adjoining the property on which the fire began. In each case, therefore, the plaintiff was literally the defendant's neighbour. But since the celebrated judgment of Lord Atkin in *Donoghue v Stevenson,*[141] if not earlier, a person's "neighbour" for the purposes of the law of negligence is not to be understood literally:[142]

> "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

207 If a fire is negligently lit on, or allowed to escape from, land and the fire causes damage to another property, there is no principled reason to limit a right to recover damages to an adjoining occupier as distinct from an occupier of more distant land. Particularly is this the case in Australia, where fire is an "exceptional hazard".[143]

208 As the facts of the present case demonstrate, an uncontrolled bush fire has a capacity to travel extraordinarily rapidly and destructively over considerable distances. The appellant's property was located some eleven kilometres from the Walla Walla Waste Recycling Depot (**Tip**) but the fire travelled that distance after escaping the south-eastern boundary of the Tip in barely one hour, fanned by hot north-westerly winds. Clearly it was foreseeable that a fire at the Tip could move rapidly to the south east, particularly as the Council

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[140] *Burnie* at 552-553 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).
[141] [1932] AC 532 at 580.
[142] *Donoghue v Stevenson* at 580.
[143] *Burnie* at 534. As the Court pointed out, although conditions in medieval England were vastly different to conditions in Australia, the escape of domestic fire was often a cause of general catastrophe, as with the Great Fire of London in 1666.

was well aware of the flammable condition of the vegetation in the area between the Tip and the town of Gerogery.

209 This does not mean that the escape of fire from land exposes the occupier to unlimited liability for losses attributable to the fire. The plaintiff must establish the existence of a duty of care and a breach by the defendant of that duty.[144] The law provides other control mechanisms. The plaintiff must also prove that the defendant's negligence caused the loss, a concept that incorporates normative considerations as to whether it is appropriate to attribute responsibility to the defendant for the harm sustained by the plaintiff.[145] Special statutory provisions limit the circumstances in which a public authority is subject to a duty of care in relation to the exercise of its functions or on which it will be held to have breached that duty.[146] In addition, legislation limits the circumstances in which certain classes of defendants can be held liable for the negligent exercise of powers or regulatory functions.[147]

210 I agree with Basten JA that the mere fact that it is not possible in advance to identify precisely the members of the class who may suffer damage by reason of the defendant's negligence does not mean that the potential liability is indeterminate, such that no duty of care arises. The observations of the Court of Appeal of the Australian Capital Territory[148] which Basten JA has quoted[149] must be understood in the context of the very different facts of that case.

211 As Basten JA has explained,[150] the Council placed no reliance on s 42 of the *Civil Liability Act 2002* (NSW) (**Civil Liability Act**) on the question of whether it owed a duty of care to the appellant. I agree with Basten JA's reasons for concluding that s 43A of the *Civil Liability Act* was not engaged in this case.

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[144] See *Civil Liability Act 2002* (NSW), ss 5B, 5C.
[145] *Civil Liability Act 2002* (NSW), s 5D(1)(b), (4).
[146] See, for example, *Civil Liability Act 2002* (NSW), s 42.
[147] *Civil Liability Act 2002* (NSW), ss 43A-46.
[148] *Electro Optic Systems Pty Ltd v New South Wales* [2014] ACTCA 45 at [352]-[353] (Jagot J, Murrell CJ agreeing).
[149] See at [22] above.
[150] See at [28] above.

212 Accordingly I would reject the Council's challenge to the primary Judge's finding that it owed the appellant a duty to exercise reasonable care. The duty was to take reasonable care:

- to prevent the ignition of a fire on the Tip; and
- to prevent any fire that was ignited on the Tip from spreading beyond the boundaries of the Tip.

Breach

213 In my view it is only necessary to consider the primary Judge's finding that the Council breached its duty to take reasonable care to prevent the spread of fire beyond the boundaries of the Tip. After considering the general principles stated in s 5B of the *Civil Liability Act*[151] the primary Judge made the following findings in relation to breach:

(i) The Council had no or no adequate fire management plan to prevent either the ignition or spread of fire.[152]

(ii) The Council's maintenance of the firebreak at the perimeter of the Tip was deficient in that it took insufficient precaution to ensure that the firebreak was suitable for the purposes of hazard reduction.[153]

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[151] Primary Judgment at [251]ff, [317]ff. Section 5B of the *Civil Liability Act* provides as follows:
"(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."

[152] Primary Judgment at [332].

[153] Primary Judgment at [339].

(iii) The Council's management of the separation of different types of rubbish on the Tip was deficient.[154]

(iv) The Council made no real attempt to reduce fuel at the Tip, whether by slashing or chemical means and this constituted a significant failure to take a reasonable fire precaution.[155]

(v) It was reasonable for a person in the position of the Council to take the following precautions to prevent the spread of a fire ignited at the Tip:

- separating and isolating deposits of different types of rubbish that constituted fuel loads within the Tip;
- creating and maintaining fuel free zones or areas including access roads between the isolated deposits;
- covering waste with dirt or inert material; and
- removal of grass, foliage and trees within the Tip.[156]

214 The primary Judge summarised his findings as follows:[157]

> "The plaintiff has proven, on the balance of probabilities, a breach of duty, with respect to escape, by the failure to sufficiently take those precautions against the risk of harm, namely, in the following areas: prepare and implement a fire management plan; create and maintain an effective firebreak; consolidate deposited waste into appropriate areas and remove fuel to prevent dangerous build ups."

215 In my opinion, subject to the Council's reliance on s 42 of the *Civil Liability Act*,[158] the evidence amply supports the primary Judge's findings as to breach

[154] Primary Judgment at [352].
[155] Primary Judgment at [364].
[156] Primary Judgment at [399], referring to Primary Judgment at [317].
[157] Primary Judgment at [400]. See also at [321].
[158] See at [238] below.

of the duty to exercise reasonable care to prevent the escape of fire from the Tip.

Causation

216 I agree with Basten JA that the primary Judge erred in his approach to causation. The correct question to ask was whether on the balance of probabilities the fire would have been contained within the boundaries of the Tip had the Council taken the precautions required in the exercise of reasonable care.

217 The Council submitted that even if the correct question is asked the appellant cannot succeed on the issue of causation. According to Mr Sheldon SC, who appeared with Mr Barnett for the Council, the evidence does not justify a finding that the Council's failure to take precautions against the spread of fire was a necessary condition of the occurrence of the harm suffered by the appellant.[159] Mr Sheldon relied in particular on the equivocal answer given in the joint report of the experts as to whether the precautions that should have been taken by the Council were likely to have prevented the spread of the fire.

218 The experts were asked to identify which of the measures that should have been employed would have stopped the fire from spreading. The joint report recorded the experts' view that in the absence of fire fighting equipment on site:

> "the other measures would have slowed the development of the fire, but the particular wind conditions at any time would be very important. If the prevailing wind conditions did not cause a quick spread of the fire, the slowing effect of the other measures might have bought sufficient time for fire fighters to successfully intervene."

219 The significance of this equivocal response by the experts in the joint report is diminished by two factors. The first is that the experts were apparently not asked to make any assumption about the speed with which the fire fighters

[159] *Civil Liability Act* s 5D(1)(a).

would have arrived at the Tip, once the fire had started and had been reported to the authorities.

220 The primary Judge found that Mr Pumpa, who owned a property to the immediate north of the Tip, saw smoke coming from the Tip at 1.35 pm on the day of the fire.[160] Mr Grosse, who was working in Walla Walla, around three kilometres north of the Tip, saw smoke at about the same time. He reported the fire to the Fire Control Centre in Albury at 1.38 pm and at 1.40 pm Mr Grosse received a circular message on his telephone alerting all Rural Fire Service members of the fire at the Tip.[161] Mr Grosse immediately drove to the Fire Station in Walla Walla. He and Captain Jacob of the Walla Walla Fire Brigade drove in a fire truck to the Tip arriving at the road gate at or about 1.45 pm.[162] This was about ten minutes after Mr Grosse had first noticed smoke.

221 The primary Judge described what then happened:[163]

> "Mr Grosse was the first to arrive at the Tip, together with Captain Jacob, to undertake fire fighting duties; they had a truck and fire fighting equipment. The road gate was locked. At this stage, Mr Grosse could not see where the fire had progressed to. Captain Jacob used bolt cutters to cut the lock (this took approximately 30-60 seconds) and they drove down to the tip entrance, being approximately 500 metres down the dirt road. Mr Grosse gave evidence that '[w]e were the only fire unit fighting the fire within the confines of the Tip. The other Walla Walla fire unit went to the opposite side of the fire to us".

222 His Honour was comfortably satisfied that upon arriving at the Tip Mr Groose observed that the fire had escaped the Tip and was heading at a rapid pace through the tall grass within the neighbouring disused golf course towards the Walla Walla-Jindera Road.[164] This had required the fire to travel from the north-west section of the Tip, where the fire had started, across about 150 metres to the south east boundary of the Tip.

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[160] Primary Judgment at [28].
[161] Primary Judgment at [32].
[162] Primary Judgment at [33].
[163] Primary Judgment at [38].
[164] Primary Judgment at [45].

223 The records of the Walla Walla Fire Brigade show that two other fire trucks left the Fire Station at approximately 1.55 pm and 2.05 pm. His Honour found that further fire units "arrived" after 2.00 pm but they apparently did not proceed directly to the Tip. Instead they joined residents in defending the properties adjacent to the Tip because the fire had already escaped.[165]

224 The evidence suggests that once the fire had been detected at least one fire fighting unit would have arrived at the Tip within ten to fifteen minutes. Had the fire not already spread and demanded attention from fire fighters beyond the boundaries of the Tip, other fire fighting units would have arrived at the Tip a short time later.

225 The second matter diminishing the force of the joint experts' report is the oral evidence given by the experts when the issue was revisited at length during the trial. Their evidence indicates that the relatively simply precaution of slashing the cured grass and removing dead timber so as to minimise the fuel load would have made a very substantial difference to the progression of the fire, regardless of how it started. The primary Judge found on the basis of the expert evidence that fuel load is an important factor in the spread of fire and that the removal of combustible material including cured grass[166] retards the expansion of fire, thereby allowing fire crews a greater opportunity to intervene.[167] It is convenient to refer to some of the evidence underpinning this finding.

226 Dr Green, the Council's expert, said that in order for a fire to spread there had to be combustible material in its path. The fire can spread either by "spotting", as it jumps from one combustible area to another, or by radiation if the fire is hot enough. He said that flame length and fuel load is important for fire spread between different areas. Since conditions within land used as a tip are likely to vary:

[165] Primary Judgment at [49].
[166] That is, dried out grass with a heightened potential for fire to ignite or spread.
[167] Primary Judgment at [364].

"You do want to keep the loads down as much as possible and have good separation".

227 Dr Green also gave the following evidence:

"TOBIN: Once it got up there, its radiant heat or its connection by combustible material would then cause it to continue?

WITNESS GREEN: Yes.

TOBIN: If it were a grass fire, it would run quicker than if it were a refuse fire, is that correct?

WITNESS GREEN: That's correct, yes.

TOBIN: That's because the grass leans over with the wind and it's high flammability or combustibility, I suppose?

WITNESS GREEN: It still depends on the amount of grass and the height of grass. I mean there is a **vast difference between something that's knee height and something that's 2 metres in height in the, in the rate of spread because you've got vastly different fuel loads**.

TOBIN: Then once it gets from that point into the grass, the rate of which it will spread in the grass is dependent upon a number of factors but in particular the combustibility of the grass and the volume of the grass?

WITNESS GREEN: Well, it tends to be determined in terms of fuel weight. In a, in a lot of—

TOBIN: When you say "fuel weight"—

WITNESS GREEN: That is the amount of fuel per hectare.

TOBIN: But it's not only the - it's the condition of it?

WITNESS GREEN: Yes, whether it's dry or whether it's wet and things like that.

TOBIN: When you have various forms of grasses, certain grasses are much more flammable than other grasses, aren't they?

WITNESS GREEN: Only in the sense that the combustibility depends on their dryness.

…

TOBIN: Dr Green, **with the reduction of fuel**, grass fuel, whether it be by a way of slashing, controlled burning or chemical reduction, **the rate and intensity of spread will lessen; is that correct**?

WITNESS GREEN: **You'd expect so, yes**.

TOBIN: The prospect of it spotting will also lessen?

WITNESS GREEN: It depends on the type of grass as you've already indicated.

TOBIN: **If the grass is slashed, there's no heads and it's 6 inches long you've heard what Mr Crowe says about the heads being the source of the spotting, there'd be little prospect of spotting**?

WITNESS GREEN: **Yes**." (Emphasis added.)

228 Dr Green estimated on the basis of photographs taken at the Tip that the fuel load in the form of long grass was about four tonnes per hectare. He accepted in his cross-examination, however, that his estimate was based on grass being about knee high and being new grass for that season. He also accepted that if the grass was in fact a metre tall and included thatch from previous seasons, the fuel load would be much greater, probably leading him to double his previous estimate. Basten JA has referred to the evidence describing the extent and nature of the vegetation at the time of the fire, with cured grass in parts of the Tip up to waist high.[168]

229 When Dr Green was asked about the effectiveness of the firebreak, the following exchange occurred:

"TOBIN: A fire that is running in short grass is a fire that a firebreak is more effective against than a fire that is in long grass; is that correct?

WITNESS GREEN: It depends on the width of the firebreak but in principle, yes.

TOBIN: It's more effective, it may not be totally effective. **There's more chance, even if it's only 1 metre wide, if the grass is short than if the grass is long; is that correct**?

WITNESS GREEN: **Yes**.

TOBIN: The firebreak has to be a clear firebreak?

WITNESS GREEN: Well, it has to be a non-continuous fuel between one side and the other." (Emphasis added.)

[168] See at [157] above.

230 Mr Crowe, an expert in bushfire investigations, was asked to elaborate on the differences of opinion among the experts as to the risk of fuel igniting and spreading. His response was that:

> "my view and I think Mr Nystrom's as well … was that the presence of grass alone provided the wick for a fire to travel from one zone to another and then ultimately out of the tip area. The fact that it was present on a windy day and with burning on a windy day aided that process and I think I don't change my, my view of that, that at all."

231 Mr Crowe gave the following evidence:

> "TOBIN: Mr Crowe, in relation to the fuel at the tip, what was the potential for the fuel that you understood existed at the tip to cause or spread fire? Firstly, in relation to grasses, you've seen the photographs … those on 1 October. The evidence is that there is phalaris, wild oats, barley grass and wire grass and the evidence also is that there has been no interference with the growth area except, perhaps, the fire in 2003/2004. What would you say as to that being a fuel for the propagation and spread of fire?
>
> WITNESS CROWE: **Ideal**. It's where all the ducks line up, if you wish. **It's fully cured, if there's been accumulation of thatch from previous year's growth over that period then the quantity of fuel is a lot more than is originally perceived because there's a lot at ground level that is dead fuel and therefore available to burn and, and very volatile, readily ignite with the smallest of ignition**.
>
> TOBIN: If it does ignite by way of, let's say, some form of spotting, does it immediately develop into a large fire or does it take time to develop?
>
> WITNESS CROWE: The time factor is a factor of fuel moisture content, which is, in turn, connected with relevant humidity and exposure to wind and the like. So the thatch itself may well be more moist than the standing grass but in the context of that, it's seconds in most circumstances rather than minutes.
>
> TOBIN: If you were to compare the capacity of that fuel to ignite and to propagate a fire compared with cut grass, so let's assume it was even bale in the end of November, what would the chance if something fell onto cut grass be for the propagation of a fire?
>
> WITNESS CROWE: Once again, if cured it would light - ignite and the rate of spread would be less because the height of the grass in a natural state, for want of a better term, not grazed, not cut, not treated, contributes to flame height, whereas the cut grass would be less.
>
> TOBIN: If it were cut grass - so if it is - the grass, as you understand it, if it does ignite, does that have a potential to spot?
>
> WITNESS CROWE: With the seeds intact, yes, short distance spotting.

TOBIN: **Would cut grass have the potential to spot**?

WITNESS CROWE: **No, no**." (Emphasis added.)

232 Mr Nystrom, a former police officer with extensive experience in fire investigations, gave similar evidence:

> "WITNESS NYSTROM: I think Cheney and McArthur's work focuses on grassland fires as opposed to rubbish tip fires so we're not talking, here, so much about grass being on fire, other than the grass which was fuelled within the tip, which, in my view, was the problem. If there was no fuel between the piles of material over the distance of - I think it was about a couple of hundred metres in length of the tip, then a fire starting in the pile of general waste might never have spread out of the tip because it didn't have anything to burn beyond the actual mound of general waste itself.
>
> By removing the combustible matter from around the general waste and creating a sufficient clear area, all you're really doing is buying time, so that when people are aware from the smoke column that there is a fire, there is time, then, for the emergency service to arrive and try to put out the fire. An ember that is lifted up from an incipient fire in rubbish, well, it - embers are not lifted up from an incipient fire, it does take time for the smoke - I beg your pardon, for the column to actually create the convective current that's required to uplift anything out of that, so that does take time. Once it is uplifted, the target downstream here would be concrete, glass, tyres, none of which is going to be ignited by a single ember uplifted from a plume out of general waste, albeit cardboard or paper. **The problem is that if there is green - sorry, if there is dead vegetation around it, dry grass or leaves and so on, those things will be uplifted when they catch fire and create their own fire, their own fire weather**.
>
> …
>
> WITNESS NYSTROM: I think that the, the fuel issue is a, a, quite a consideration. My view is that there shouldn't be grass and trees in dump sites simply because of the, the, the hazard that it poses.
>
> TOBIN: If there were but the grass were short, from your experience in the behaviour of fires, what's the prospect of that being inhibited by a well designed firebreak?
>
> WITNESS NYSTROM: **Short grass is going to burn in a substantially more slowly than is tall grass. A firebreak is a tool that is effective under the conditions, can be effective under the conditions, with short grass it's far more effective than with tall grass**." (Emphasis added)

233 There is much to be said for the proposition that slashing or removing long grass between the piles of waste and the perimeter of the Tip at or shortly before the start of summer would have been enough of itself to have prevented the fire escaping from the Tip. The evidence of the experts

strongly suggests that drastically reducing the combustible fuel load would have been likely to show the progress of any fire to a very considerable extent. Given that the alert members of the Fire Brigade would have arrived at the Tip within ten to fifteen minutes of the alarm being raised (with other units to follow shortly thereafter), it would seem quite likely that the fire could have been prevented from escaping the boundaries of the Tip and reaching highly flammable vegetation to the south east.

234 As has been seen, the primary Judge found that the exercise of reasonable care required the Council to take other precautions as well to prevent the escape of fire from the Tip. These included:

- covering waste with inert material at regular intervals; and
- keeping the firebreak clear and maintaining it in reasonable condition.

235 The primary Judge found that by December 2009 the firebreak at the perimeter of the Tip was "cured and dry and totally inaccessible to vehicles".[169] His Honour appeared to accept the evidence of Mr Hunter, a resident of Walla Walla who was familiar with the Tip, as to the condition of the firebreak. Mr Hunter said that the firebreak had a lot of vegetation scattered across it, together with fallen "rubbish", small branches and even large branches.[170]

236 If the Council had taken the extra precautions identified by the primary Judge, the conclusion that the fire probably would not have escaped the Tip is reinforced. The oral evidence of the experts supports this conclusion as does the evidence of the rapid response of the fire fighters when the alarm was raised.

[169] Primary Judgment at [334].
[170] Primary Judgment at [334(5)].

237 In my opinion the appellant has established on the balance of probabilities that if the Council had:

- slashed or removed the long grass between the piles of waste and the perimeter of the Tip;
- covered waste with inert material at regular intervals; and
- kept the firebreak clear and maintained it in reasonable condition,

a fire ignited on the Tip would not have escaped the boundaries of the Tip.

Civil Liability Act s 42

238 The Council invoked s 42 of the *Civil Liability Act* in support of its contention that it did not breach the duty of care owed to the appellant.[171]

239 In assessing the burden that taking these actions would have imposed on the Council it is necessary to bear in mind that the Council's breaches of duty were longstanding. For example, Mr Davies, the Council's former Director of Environment and Planning, accepted that the firebreak at the Tip should have been graded along its existing alignment in about August of each year. Had that been done, the work required to grade the firebreak in August 2009 would have been straightforward and modest in scope.

240 Much the same can be said about covering inert waste. Mr Davies explained that there was a lack of fill at the Tip itself because of the waste buried but near the surface. Thus soil had to be obtained "opportunistically" from other sources, for example from roadworks. Had the Council planned for regular covering of inert material, it is fair to infer that the problem (and cost) of locating fill would have been minimised.

[171] Section 42 of the *Civil Liability Act* is reproduced at [56] above.

241 There was evidence that the unevenness of the ground in some areas of the Tip impeded vehicular access and restricted the Council's capacity to slash the long grass. However Mr Davies acknowledged that there were no stone or rock barriers to clearing the ground. He accepted that there would not be "that big a cost" in putting a bulldozer into the Tip to flatten out an area of, say, 60 metres by 30 metres. Moreover, had the Council fulfilled its duty of care it would have undertaken at least part of the necessary work earlier and would not have been forced to undertake the work wholly within the 2009-2010 financial year.

242 As Basten JA has pointed out, the Council had a waste management reserve of $51,000 as at 30 June 2009.[172] The evidence justifies 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. The primary Judge made no finding that the cost of the measures would have been any greater. Nor did he make a finding that the cost would have materially adversely affected the Council's conduct of other waste management depots. Indeed there was evidence that the budget for the maintenance of the Council's waste management depots had been underspent in the 2008-2009 financial year.

243 In these circumstances I consider the Council's reliance on s 42 of the *Civil Liability Act* to be misplaced. The Council itself allocated funds to the waste management reserve. Looking to that reserve as a source of funds for the precautions reasonably required in no way challenges the "general allocation of [financial and other] resources" by the Council.[173] The precautions could and should have been taken within the resources reasonably available to the Council for the purpose of discharging waste disposal functions.[174] The taking

[172] See at [174] above.
[173] *Civil Liability Act* s 42(b).
[174] *Civil Liability Act* s 42(c).

of the precaution would not have had a significant or even minor impact on the Council's broad range of activities.[175]

244 I should add that the evidence to which I have referred supports the primary Judge's finding that the precautions required to avoid the risk of harm did not impose an undue burden on the Council.

245 It will be apparent that I do not think that it is necessary in this case to undertake a detailed analysis of the construction of s 42 or its relationship with s 5B of the *Civil Liability Act*.

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[175] *Civil Liability Act* s 42(a).