

HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

FERDINANDO PUNTORIERO & ANOR

APPELLANTS

AND

WATER ADMINISTRATION
MINISTERIAL CORPORATION

RESPONDENT

Puntoriero v Water Administration Ministerial Corporation [1999] HCA 45
9 September 1999
S141/1998

ORDER

1. *Appeal allowed with costs.*
2. *Orders of the Court of Appeal of New South Wales set aside; and in lieu thereof, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation:

D F Jackson QC with J A Darvall and A A Henskens for the appellants
(instructed by Denniston & Day)

P M Donohoe QC with B M Green and F Kunc for the respondent (instructed
by Department of Land and Water Conservation Corporate Counsel)

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Commonwealth Law Reports.

CATCHWORDS

Puntoriero v Water Administration Ministerial Corporation

Statutory corporations – Exclusion of liability – Negligence – Action for conduct done under statute – Whether statutory provision affords immunity from liability arising from the negligent supply of water containing contaminants.

Negligence – Statutory corporation – Action for conduct done under statute – Whether statutory provision affords immunity from liability arising from the negligent supply of water containing contaminants.

Water, water supply and water courses – Powers, duties and liabilities of statutory authorities – Water supply – Whether statutory provision affords immunity from liability arising from supply of water containing contaminants.

Practice and procedure – Action in negligence – Question of causation – Jury trial – Roles of judge and jury – Appeal to New South Wales Court of Appeal – Whether action should be dismissed – Whether jury verdict could be supported on the evidence.

Words and phrases – "substantial".

Irrigation Act 1912 (NSW), ss 3, 15, 23(2).

Supreme Court Act 1970 (NSW), ss 75A, 102, 108.

Water Administration Act 1986 (NSW), ss 4, 7, 12, 12A, 15, 19.

1 GLEESON CJ AND GUMMOW J. In 1992, the appellants (Mr and Mrs Puntoriero) drew water from irrigation waters supplied by the respondent, the Water Administration Ministerial Corporation ("the Corporation") to irrigate the potato crop under cultivation on their farm. The crop was damaged, allegedly by chemically polluted water supplied by the Corporation. The appellants brought an action in the Supreme Court of New South Wales seeking damages for negligence. They alleged that the Corporation had failed to test the water for chemicals likely to damage crops, had failed to warn them that the water was contaminated, had failed to clear the water of contaminants and had permitted the contaminants to remain in the water by failing to drain the irrigation channel from which the Corporation supplied the appellants.

2 By order of the Chief Judge of the Commercial Division (O'Keefe CJ Com D), the action was tried by a judge (Grove J) and jury. Section 90 of the *Supreme Court Act* 1970 (NSW) obliged the jury to answer any question of fact left to it by the judge. In *McDonnell & East Ltd v McGregor*¹, Dixon J said:

"When a jury answers specific questions, the strict course is to obtain under direction a general verdict in accordance with the findings and to enter judgment upon the verdict. But the formality of requiring the jury to return a verdict may be dispensed with if there be no objection. When a jury answers specific questions and is discharged without giving a general verdict, the jury and the parties are, in the absence of express objection, taken to have authorized the court to enter such verdict and consequent judgment as flows in law from the answers which are given."

At the trial in this matter, the jury answered the questions put by Grove J and their answers included an assessment of the appellants' damages in the sum of \$1,802,562. His Honour then discharged the jury and then dealt with other matters which he identified as relating only to matters of law, the starting point for the consideration of which was to be the findings by the jury. One of these was the reliance by the Corporation upon s 19(1) of the *Water Administration Act* 1986 (NSW) ("the Administration Act") as an entitlement to exclusion of the liability in question. Grove J determined that none of the defences should prevail against the appellants having a judgment pursuant to the verdict of the jury and directed the entry of judgment in the sum of \$2,015,219. The difference between that sum and that found by the jury represented interest.

3 The Court of Appeal (Mason P and Stein JA; Meagher JA dissenting) allowed an appeal by the Corporation, set aside the verdict and judgment in favour of the

1 (1936) 56 CLR 50 at 55-56.

appellants and substituted a verdict for the Corporation². The Court of Appeal did so on the ground that the Corporation was protected from the liability in question by the immunity conferred by s 19(1) of the Administration Act.

4 Accordingly, the principal task is to construe s 19(1). This should be done both by looking at the sub-section in the context of the Administration Act as a whole and on the footing that the immunity conferred by such a provision should not "be carried further than a jealous interpretation will allow", to repeat a statement by Kitto J in *Board of Fire Commissioners (NSW) v Ardouin*³.

5 The objects of the Administration Act are stated as follows in s 4:

"The objects of this Act are:

(a) to ensure that the water and related resources of the State are allocated and used in ways which are consistent with environmental requirements and provide the maximum long-term benefit for the State and for Australia, and

(b) to provide water and related resources to meet the needs of water users *in a commercial manner* consistent with the overall water management policies of the Government." (emphasis added)

6 The Corporation is constituted by s 7 of the Administration Act and, for the purposes of any New South Wales statute, it is "a statutory body representing the Crown" (s 7(2)(e)). It may do and suffer things that a corporation may, by law, do and suffer and that are necessary for or are incidental to the purposes for which it is constituted (s 7(2)(d)). At the relevant time, the Corporation had functions conferred by the Administration Act and other statutes, including the *Irrigation Act* 1912 (NSW) ("the Irrigation Act") and the *Water Act* 1912 (NSW) ("the Water Act")⁴. Reference in the Administration Act to a function "includes a reference to a right, power, authority and duty" (s 3(2)(a)). Further, where the function is a duty, a reference to the exercise of that function includes a reference to the performance of the duty (s 3(2)(b)).

2 *Water Administration Ministerial Corporation v Puntoriero* (1997) 42 NSWLR 676.

3 (1961) 109 CLR 105 at 116.

4 The functions of the Corporation under the Irrigation Act and the Water Act have since been curtailed by s 7 of the *Irrigation Corporations Act* 1994 (NSW), but nothing turns upon this for the present appeal.

3.

7 Sub-sections (1) and (2) of s 12 of the Administration Act vest in the Corporation substantial rights to the use and flow of water. They provide:

"(1) The right to the use and flow, and to the control, of:

- (a) the water in rivers^[5] and lakes,
- (b) the water conserved by any works^[6],
- (c) water occurring naturally on the surface of the ground, and
- (d) sub-surface water,

is vested in the [Corporation] except to the extent that is otherwise provided by this Act or to the extent that the right is divested by the exercise of a function of the [Corporation].

(2) The right conferred by subsection (1) prevails over any authority conferred by or under another Act, including a later Act than this Act."

8 The appellants drew their supply of water from a system of canals and channels which forms part of the Murrumbidgee Irrigation Scheme ("the Scheme"), as defined in s 3 of the Irrigation Act. The Scheme was established under the *Murrumbidgee Irrigation Act* 1910 (NSW)⁷ and is an "irrigation area" for the purposes of the Irrigation Act. The appellants were lessees of Farm No 267 within Yanco No 1 Irrigation Area, and their farm comprised about 60 hectares. The Scheme now covers some 182,000 hectares. In the Court of Appeal, Mason P explained⁸:

"Water flowing down the Murrumbidgee River is diverted at the Berembled Weir into the main canal which runs for 155 kilometres through the Murrumbidgee Irrigation Area. There are 2,350 kilometres of channels which convey the water from the Main Canal to farm boundaries. With minor

5 The term "river" is defined in s 3(1) so as to include a stream of water flowing in an artificial channel which has changed the course of the stream and an affluent, confluent, branch or other stream of water into or from which that stream flows.

6 This term is defined in 3(1) as meaning works connected with or affecting water in respect of which the Corporation has a function.

7 This Act was repealed by the Irrigation Act, s 2(1). Nothing turns on this repeal in the present case.

8 (1997) 42 NSWLR 676 at 680.

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exceptions, water flows to each farm boundary by gravitation. Flows and levels are controlled by regulating structures allowing water to be supplied to each farm and measured through Dethridge outlets. Each outlet is fitted with a Dethridge wheel with a simple revolution counter attached. The wheel passes a known quantity of water as it revolves and the amount of water delivered to each farm can be readily calculated. Water distribution is controlled by channel attendants or bailiffs, who receive farmers' orders for water. The attendants or bailiffs then schedule deliveries and adjust flows in the various channels according to demand.

The rates of diversion from Berembred Weir (and the release upstream from Burrinjuck and Blowering Reservoirs) are arranged to provide the irrigators' anticipated requirements with a minimum of waste. This is a complicated task, as water must be ordered for release from the headwater storages about seven days in advance of being required on the farms."

The calculations to which his Honour referred as made with assistance of the Dethridge wheel were used as the basis for charges made by the Corporation for the water supplied. Each occupier holding land in an irrigation area had a "water right"⁹ to a quantity of one megalitre of water annually and, by agreement with the occupier, the Corporation might allot additional water rights and also supply, on application, additional water at such charges as the Corporation might determine¹⁰.

- 9 A predecessor of the Water Act was the *Water Rights Act* 1896 (NSW) ("the Rights Act"). In *Thorpes Ltd v Grant Pastoral Co Pty Ltd*, while observing¹¹ that the modern legislation was much more elaborate, Fullagar J identified the "real object" of the Rights Act as enabling¹²:

"the Crown, in a country in which water is a comparatively scarce and important commodity, to exercise full dominion over the water of rivers and lakes and to undertake generally the conservation and distribution of water. For the attainment of that object it was not necessary to destroy anybody's rights, but it was necessary to give to the Crown, or to some statutory authority, overriding rights to which private rights must, if need arise, give way."

9 Irrigation Act, s 12.

10 Irrigation Act, s 13.

11 (1955) 92 CLR 317 at 328.

12 (1955) 92 CLR 317 at 331.

5.

The right to the use and flow and to the control of waters vested in the Crown by s 1 of the Rights Act was subjected by that provision to various restrictions¹³. What has happened in the development of the legislation over the last century has been the contraction in private rights by the broadening of an immunity in respect of the exercise of functions and powers conferred by the legislation. At the same time, modern legislation, as the statement of objects in the Administration Act indicates, attempts to base the regulatory regime on a commercial footing.

10 In the Court of Appeal, Mason P referred to ss 4 and 12 of the Administration Act as involving "power to make decisions balancing the rights of one group of stakeholders over another" and decision-making as to a wide range of activities, in which "[f]iscal, operational, equity and environmental factors will inevitably tug in opposite directions"¹⁴. All of this may be accepted, but there remains the point that such decision-making, at least at the level of operations with which this case is concerned, need not destroy or deny the rights of citizens to legal recourse for wrongs inflicted upon them. There remains the occasion for the "jealous interpretation" of s 19(1) of the Administration Act to which reference has been made above.

11 It is convenient now to turn to s 19. Section 19 had a predecessor in

13 These were set out in s 1(II) as follows:

"The said right shall be subject to the following restrictions:-

- (a) It shall not be exercised in contravention of any right conferred on and lawfully exercisable by any person, company, corporation, or board by or under the authority of any Act dealing with mining, or of any public or private statute or of any license granted by the Crown.
- (b) It shall be subject to the rights of the occupiers of land on the banks of rivers or lakes as hereinafter defined.
- (c) It shall be subject to the rights of the holders of licenses under this Act."

14 (1997) 42 NSWLR 676 at 679.

s 4A(2C) of the Water Act, inserted in 1966¹⁵ and since repealed¹⁶. Section 4A vested certain water rights in the Water Conservation and Irrigation Commission established by the Irrigation Act and gave it certain powers of entry in the exercise of those rights. Sub-section (2C) conferred a protection upon that body in respect of actions for compensation or damages suffered in consequence of the exercise of the rights conferred by the section. The sub-section stated:

"Except where otherwise expressly provided in this Act, no claim shall lie or shall be deemed ever to have lain against the Commission for compensation or damages under any Act for any loss or damage suffered in consequence of the exercise of the said right whether or not the right is exercised pursuant to the powers of the Commission to use works for the impounding and control of water therein or the release of water therefrom."

- 12 Section 19(1) of the Administration Act is in broader terms which nevertheless indicate its origins. The heading of s 19 reads "Exclusion of liability"¹⁷ and the section states:

"(1) Except to the extent that an Act conferring or imposing functions on the [Corporation] otherwise provides, an action does not lie against the [Corporation] with respect to loss or damage suffered as a consequence of the exercise of a function of the [Corporation], including the exercise of a power:

- (a) to use works to impound or control water, or
- (b) to release water from any such works.

(2) Sub-section (1) does not limit any other exclusion of liability to which the [Corporation] is entitled.

(3) No matter or thing done by the [Corporation] or any person acting under the direction of the [Corporation] shall, if the matter or thing was done in good faith for the purposes of executing this or any other

15 By s 3 of the *Irrigation, Water, Crown Lands and Hunter Valley Flood Mitigation (Amendment) Act* 1966 (NSW).

16 By s 3 and Sched 1(3) to the *Water (Amendment) Act* 1986 (NSW).

17 As to the use of such material for the purposes of interpretation, see *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 621.

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Act, subject the Minister or a person so acting personally to any action, liability, claim or demand."

- 13 An example of a provision which "otherwise provides" within the opening terms of s 19(1) is found in s 15 of the Administration Act. Section 15 confers upon the Corporation certain powers of entry and obliges the Corporation to ensure that as little damage as possible is caused by the exercise of powers under the section and to pay compensation for any such damage. An example of exclusion of liability, as identified in s 19(2), is found in s 23(2) of the Irrigation Act. This protects the Corporation against liability for steps taken under power conferred thereunder bona fide for the purpose of reducing or discontinuing the supply of water, by reason, for example, of an actual or threatened shortage of water. Further, s 12(5) of the Administration Act states:

"No action or proceeding may be brought:

- (a) to compel the [Corporation] to supply water, or
- (b) to recover any penalty or damages from the [Corporation] in respect of a failure to supply water."

- 14 It is necessary now to look more closely at the text of sub-s (1) of s 19. The sub-section is directed to litigation of a certain description, namely actions with respect to loss or damage. The loss or damage concerned is not identified as that which is suffered as a consequence of failure to exercise a function of the Corporation. Rather, it is loss or damage suffered as a consequence of the exercise of such functions. This suggests that the sub-section is designed to derogate from the rights of plaintiffs which otherwise would be infringed by positive acts of the Corporation done in exercise of its functions¹⁸. The sub-section itself gives two such examples: the use of works to impound or control water and the release of water from any such works. Section 12(4) empowers the Corporation "for any reason" to release water which is impounded by any works under its control.

- 15 Further, upon the true construction of s 19(1), not all positive acts are within the immunity it confers. The activities of the Corporation extend beyond what, in *Little v The Commonwealth*, Dixon J identified as the "discharging [of] public duties or [the exercise of] authorities or powers of a public nature"¹⁹. It has been this public element which, in the past, has given some support, when construing such provisions, to seeing the conferral as "granted in the general interest [albeit]

18 cf *Australian National Airlines Commission v Newman* (1987) 162 CLR 466 at 471.

19 (1947) 75 CLR 94 at 108.

at the cost of individuals"²⁰. However, as indicated earlier in these reasons, the Corporation is empowered to take part as an actor in affairs of commerce. In particular, it has the power, with the approval of the Governor, to enter into joint ventures (s 11(4)(m)) and into what are identified in s 12A(1) as "commercial operations" and, for the purpose of exercising the powers in s 12A(1), it may form or join in forming companies, partnerships or trusts (s 12A(2)).

16 A power to join in forming a company, partnership, trust or joint venture necessarily carries with it the authority, for example, to perform the terms of the joint venture, partnership or trust. Section 7(2)(d) of the Administration Act, to which reference has been made earlier in these reasons, confirms this concomitant. Likewise, the power in s 11(4)(b) to enter into contracts involves purported observance and performance of such engagements. Conduct which, it transpires, amounts to breach of contract, partnership or trust may inflict loss or damage on others which, in the literal sense of s 19(1), is suffered as a consequence of the exercise of a function of the Corporation. Such conduct would not be stigmatised as ultra vires the Corporation. However, to confer an immunity in respect of such loss or damage, which would not have been suffered if the engagement had been performed in accordance with its terms, would be to stultify the objects of the Act. To read s 19(1) in that fashion would create a significant deterrent to the entry by others into commercial relations with the Corporation.

17 As a practical and legal matter, the appellants were constrained to deal with the Corporation. It may be assumed that, despite the limited room for negotiation, persons in the position of the appellants who were charged for supplies by the Corporation had contracted with it²¹. Section 17A of the Irrigation Act would have exposed the appellants to criminal liability had they taken water vested in the Corporation without its permission. Greater freedom of action may be expected of those with whom the Corporation seeks to form companies, joint ventures or partnerships, and with whom it must deal to construct and maintain works, effect insurance, and the like.

18 These considerations support a jealous construction of s 19(1) to limit what otherwise would be the rights of plaintiffs and to immunise the Corporation from action only in respect of those positive acts in the exercise of functions "which of their nature will involve interferences with persons or property"²². The supply of water by the Corporation to the appellants was not the exercise of a function which

20 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 116.

21 cf *Lismore City Council v Stewart* (1989) 18 NSWLR 718 at 725-726; *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290 at 292.

22 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 109.

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of its nature involved such an interference. Further, the gist of the complaint by the appellants was inactivity by the Corporation in failing to take certain steps anterior to the supply of the water to them.

19 It is convenient now to consider more fully the facts. The appellants' lease of their farm was dated 4 September 1992 but they had been allowed to go into possession at the end of July of that year. They pleaded that they planted a crop of Pontiac, Cocktail and Sebago potatoes on or about 10 August 1992 and that, on 10, 17 and 18 October, the dam on their property was fed by water from the Cudgel Channel which was fed from the Main Canal running for some 155 kilometres through the Murrumbidgee Irrigation Area. The appellants alleged that, in or about November 1992, their crop began to show signs of poisoning, that by the next month it was so damaged as to render it unharvestable and that the cause of the poisoning and stock loss was the presence in the irrigation waters negligently supplied by the Corporation of a phytotoxic substance. The jury answered "yes" to the following questions:

- "1 Was the damage to the [appellants'] crop caused by a phytotoxic substance applied to it with the water from the Cudgel Channel, when the [appellants] irrigated the crop, in October 1992?
- 2 Between November 1991 and 10th October 1992 was it foreseeable to the [Corporation] that the [appellants'] crop could be damaged by the application of contaminants in the irrigation water of the Cudgel Channel?
- 3 Did the [Corporation] fail to exercise reasonable care in any one of the following ways:
 - i by failing to test the water supply for chemicals likely to damage crops;
 - ii by failing to warn the [appellants] that the water was contaminated;
 - iii by failing to take any steps to clear the water supply of contaminants which the [Corporation] knew or ought to have known were in the Cudgel Channel;
 - iv by permitting and/or allowing the contaminants to be and remain in Cudgel Channel?"

20 Grove J's instructions to the jury included the following passage:

"The evidence before you is that if a user draws from the [Corporation's] water it goes through the Dethridge wheel and a bill is forthcoming for the

amount of water used, so that there is this relationship of supplier and user. Arising out of that relationship there is what the law calls a proximity. The duty is imposed upon each of them to take reasonable care in relation to his or its activities for the other.

But the relevant duty upon which this case is founded is that which is imposed upon the [Corporation]; that is to say, the supplier of water. The [Corporation] in this case is required to take reasonable care in relation to its activities so as not to expose the user of the water to unnecessary risks of harm."

21 No objection was taken to approaching the matter in this way or, in particular, to the framing of the questions for the jury on the assumption that affirmative answers to the questions would bring about a result whereby there had been breach of duty and damage.

22 When Grove J later came to deal with the defence based upon s 19(1), he emphasised that the jury had made a specific finding in relation to failure to warn of danger of which the Corporation knew or ought to have known. His Honour added:

"I see nothing in the statute which would exclude the neighbourly or proximal duty which the deliverer of water to a customer ought to be entitled to rely upon."

We agree. The supply of water by the Corporation to the appellants was not the exercise of a function which of its nature involved any interference with the rights of irrigators such as the appellants. Rather, it was a consensual dealing. Further, the gist of the complaint by the appellants was, as pointed out, the failure to warn of danger of which the Corporation knew or ought to have known. In those circumstances, s 19(1) did not operate to deny the action brought by the appellants.

23 There remain certain issues which the Corporation seeks to ventilate on its notice of contention, as sought to be amended at the end of the oral argument in this Court. We would grant leave to amend. It appears that the Corporation seeks now to establish that it was under no duty to the appellants to do any of the matters they alleged it negligently omitted to do. The duty of care propounded by the trial judge in the passages set out earlier in these reasons was founded in the judgment of Lord Atkin in *Donoghue v Stevenson*²³ and was none the worse for it. It was for his Honour to tell the jury what conclusions of fact they had to reach before they could answer the specific questions put to them on the footing that affirmative answers would indicate a breach of a duty of care, the nature of which he had

23 [1932] AC 562 at 580.

outlined to them²⁴. Indeed, as was pointed out in argument in this Court, it appears that the trial was conducted on the assumption that, there being damage to the property of the appellants, then, if it was established that there was foreseeability of risk of damage to their property, there had been a duty of care which had been broken. Subject to s 19, this would entitle the appellants to a verdict in a sum to be found by the jury.

24 This understanding of the method by which the trial was conducted also helps to answer the related complaint by the Corporation that, even if there had been a duty owed by it to the appellants, there had been no breach. The Corporation complains that, on the evidence of causation and a breach of duty, "[a] verdict for the [appellants] was not open" and that, "on the evidence on the issue of causation and breach of duty", the verdict for the appellants was perverse.

25 In dealing with these matters, it is necessary to keep firmly in mind the distinction between the respective roles of judge and jury in dealing with the questions as to breach of duty (Questions 2 and 3) and causation (Question 1) and to appreciate the nature of the proceeding in the Court of Appeal.

26 The appeal to the Court of Appeal, as it arose out of a trial with a jury in the Supreme Court, was not an appeal by way of rehearing as provided by s 75A of the *Supreme Court Act* 1970 (NSW). The authority of the Court of Appeal was conferred by s 102, which deals with applications after a jury trial to set aside a verdict or judgment or for a new trial. The Court of Appeal might order a dismissal of the action if, on the evidence, the verdict for the plaintiff could not be supported (s 108).

27 The difficulties which this places in the path of an appellant are well known and were explained by Dixon J in *Hocking v Bell*²⁵. Scientific evidence was given before Grove J and the jury but that was no less a matter of fact within the province of the jury than the other evidence²⁶.

28 Meagher JA noted²⁷ that counsel for the Corporation had not suggested that there was no evidence to support the jury's findings with respect to breach of duty.

24 *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 220.

25 (1945) 71 CLR 430 at 497-500. This dissenting judgment was approved on a successful appeal to the Privy Council: (1947) 75 CLR 125 at 132.

26 *Hocking v Bell* (1945) 71 CLR 430 at 496.

27 (1997) 42 NSWLR 676 at 686.

His Honour reviewed the matter and concluded that those findings must stand. We agree.

29 Meagher JA dealt fully with the submission then made by the Corporation that there was no evidence to allow a finding of causation or that the finding on causation was perverse. His Honour noted that, whilst the present was the sort of case where a fully reasoned decision would have been desirable, that does not happen in a jury trial and that, in the absence of reasons, and given that they were not required, it was difficult to say that the conclusion on causation was reached as a result of speculation²⁸. Such cases may arise²⁹ but this was not one of them. His Honour concluded that the evidence was such to allow the inference to be drawn that the toxic substance might remain on a river bed for almost a year before being stirred by the process of irrigation and flowing into the dam feeding the central pivot irrigator by which the water was sprayed onto the appellants' crop³⁰. Meagher JA also determined that there was evidence sufficient to support the inference that, had the Corporation discharged its duty of care, the damage could have been avoided. Mason P did not reach these issues, given his conclusion as to the application of s 19(1). Nor was it necessary for Stein JA, the other member of the majority, to do so. However, his Honour did register his disagreement with Meagher JA. This was on the footing that "the evidence does not amount to proof on the balance of probabilities of how the damage to [the appellants'] crop was occasioned"³¹. However, given, as Meagher JA had clearly in mind, the role of the jury rather than a judge as fact-finder, that was not how the matter was to be approached.

30 We agree with the treatment of the evidence bearing upon the question of causation which is detailed in the judgment of Meagher JA and see it as unshaken by anything put to this Court.

31 The appeal should be allowed with costs, the orders of the Court of Appeal set aside, and in place thereof it should be ordered that the appeal to the Court of Appeal be dismissed with costs.

28 (1997) 42 NSWLR 676 at 691.

29 cf *Brooker v Roszykiewicz* (1963) 37 ALJR 246.

30 (1997) 42 NSWLR 676 at 691.

31 (1997) 42 NSWLR 676 at 700.

32 McHUGH J. The question for decision in this case is whether s 19(1) of the *Water Administration Act* 1986 (NSW) protects the respondent from liability for damage caused by releasing water carrying a phytotoxic substance. Section 19(1) relevantly provides that "an action does not lie against the Ministerial Corporation with respect to loss or damage suffered as a consequence of the exercise of a function of the Ministerial Corporation, including the exercise of a power ... to release water from any ... works."

33 In a number of cases³², this Court has read limitation provisions such as s 19 as not covering a governmental function "of an ordinary character involving no invasion of private rights and requiring no special authority."³³ In *Coco v The Queen*³⁴, Mason CJ, Brennan and Gaudron JJ and I said:

"Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language. Indeed, it has been said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorize what would otherwise have been tortious conduct ..."

34 In principle, there is no reason for construing a statutory provision limiting liability for government action differently from a statutory provision authorising government action. The reasons which require provisions of the latter kind to be read narrowly apply to provisions of the former kind. For that reason, provisions taking away a right of action for damages of the citizen are construed "strictly"³⁵, even jealously³⁶.

35 It is one thing to read provisions such as s 19, expressed in general language, as intended to protect a government authority from actions in respect of conduct which might be unlawful even when carried out without negligence. Thus, the release of water or entry onto property may be unlawful and tortious because some statutory condition of its exercise was not fulfilled or because it was void for

32 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105; *Hudson v Venderheld* (1968) 118 CLR 171; *Australian National Airlines Commission v Newman* (1987) 162 CLR 466.

33 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 110 per Dixon CJ.

34 (1994) 179 CLR 427 at 436.

35 *Australian National Airlines Commission v Newman* (1987) 162 CLR 466 at 471 per Mason CJ, Deane, Toohey and Gaudron JJ.

36 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 116 per Kitto J.

breach of a principle of administrative law. Understandably, the legislature might wish to protect the authority from actions which the statute would otherwise have authorised. It is another matter to read such provisions as protecting ordinary actions for breach of contract or negligence where the actions can be carried out without the need for specific legislative authority.

36 In *Coco*³⁷, Mason CJ, Brennan and Gaudron JJ and I also said:

"The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights ..."

37 In terms, s 19(1) does not expressly provide that no action in negligence, nuisance, trespass or contract will lie against the respondent. Given the commercial functions of the respondent, it would be astonishing if s 19(1) was intended to deprive a citizen of the right to recover damages for the respondent's breach of a contract. It seems unlikely therefore that s 19 could have been intended to apply to *every* action brought against the respondent by a citizen who has suffered loss or damage by reason of the respondent's conduct. While the general terms of s 19(1), read literally, cover any action against the respondent, the principles of statutory construction to which I have referred require that the general words of the sub-section be read down so that they do not apply to functions of an ordinary character performed by the respondent and which are done pursuant to agreements with the consent of private citizens.

38 The respondent supplied the water to the appellants in the present case pursuant to a contract. It did not release the water onto the appellants' property pursuant to a statutory authority and against the will of the appellants. That being so, s 19(1) does not cover the case.

39 For the reasons given by Callinan J, none of the other grounds relied on by the respondent can succeed.

37 (1994) 179 CLR 427 at 437.

15.

40 The appeal should be allowed.

41 KIRBY J. This appeal from orders³⁸ of the New South Wales Court of Appeal³⁹ concerns the construction of a statutory provision⁴⁰ affording immunity to the Water Administration Ministerial Corporation of New South Wales (the respondent). Other questions were argued. But in the conclusion which I have reached on the application of the immunity, the other questions do not arise⁴¹. I express no opinion about them.

42 It is not uncommon to have differences of judicial opinion, such as have occurred in this case, about the meaning and operation of such immunities. They have arisen before in this Court⁴² and in the Court of Appeal⁴³. Involved in the judicial task of construing such provisions is the resolution of a competition between the obligation to give effect to a parliamentary purpose to exempt a statutory authority from legal liability otherwise attaching to it and an obligation to construe the statutory language so that it does not extend beyond the extent necessary. The issues in the present appeal illustrate this tension.

Statutory regulation of a State-wide irrigation scheme

43 Most of the facts necessary for my opinion are stated in the reasons of Gleeson CJ and Gummow J. However, it is important to my reasoning to mention some additional facts in order to approach the task of construction presented by the appeal, as I conceive it.

44 Notoriously, beyond the temperate coastline and semi-arid range lands, Australia is an extremely dry continent. This necessitates imperatives of water resource management⁴⁴ and water conservation so as to make the most of the relatively few large river systems traversing areas of low and intermittent rainfall.

38 *Water Administration Ministerial Corporation v Puntoriero* (1997) 42 NSWLR 676 ("Puntoriero") at 700.

39 Mason P and Stein JA; Meagher JA dissenting.

40 *Water Administration Act* 1986 (NSW), s 19 ("the Administration Act").

41 cf *Puntoriero* (1997) 42 NSWLR 676 at 678 per Mason P.

42 See eg *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 ("Ardouin"); *Hudson v Venderheld* (1968) 118 CLR 171 ("Hudson").

43 *Newman v Australian National Airlines Commission* (1985) 2 NSWLR 573. See also the differences in the Supreme Court of New South Wales noted in *Attrill v Richmond River Shire Council* (1995) 38 NSWLR 545 at 547.

44 *Puntoriero* (1997) 42 NSWLR 676 at 679 per Mason P; cf *Thorpes Ltd v Grant Pastoral Co Pty Ltd* (1955) 92 CLR 317 at 331.

This is why, from colonial times, the system of private riparian rights, which had been developed by the common law of England, was viewed as "inadequate when it came to regulating the increasing water needs of a developing and expanding rural economy in the vast, relatively dry expanses of [the] inland"⁴⁵.

45 This was the context in which, in 1896, the New South Wales Parliament enacted the *Water Rights Act* of that year⁴⁶. The Act, whilst preserving some of the ancient riparian rights, significantly limited them. It vested in the Crown, subject to limitations, the use, flow and control of waters in rivers and lakes and generally substituted statutory regulation for the rules of the common law. The 1896 Act was later consolidated into the *Water Act* 1912 (NSW) ("the Water Act"). That Act remains in force, although it has been supplemented by the *Irrigation Act* 1912 (NSW) ("the Irrigation Act") and the Administration Act. It is the last-mentioned Act which creates the respondent and affords it the immunity which it has invoked in this case.

46 Water supply in the very complex system established in 1910 by the Murrumbidgee Irrigation Scheme ("the Scheme")⁴⁷ has to be carefully monitored by the officers of the respondent on its behalf arranging the release of water upstream to meet, with a minimum of waste, the anticipated requirements of the irrigators downstream. The powers of the respondent are not limited to those conferred by the Administration Act. Nor are they confined to the area of the Scheme. Other powers arise as a consequence of functions conferred or imposed by or under other enactments⁴⁸. The most important of these appear in the Irrigation Act which, by s 12, imposes on the respondent a duty "each year, at the times and in the quantities fixed by it, [to] supply water in pursuance of the water rights which are attached to the land of any occupier". The "supply" of such water is obviously made from water so released, all flows of water in the system being under the ultimate control of the respondent.

45 Bond and Farrier, "Transferable Water Allocations – Property Right or Shimmering Mirage?", (1996) 13 *Environmental and Planning Law Journal* 213 at 213. See also Wilcher, "Water Resource Management in New South Wales and the Murray-Darling: Integrating Law and Policy", (1995) 12 *Environmental and Planning Law Journal* 200.

46 The history of the 1896 legislation and its purposes appear in Clark and Renard, "The Riparian Doctrine and Australian Legislation", (1970) 7 *Melbourne University Law Review* 475 cited in *Puntoriero* (1997) 42 NSWLR 676 at 679 per Mason P.

47 *Murrumbidgee Irrigation Act* 1910 (NSW). That Act was repealed and replaced by the Irrigation Act.

48 Such as the *Irrigation Corporations Act* 1994 (NSW).

- 47 Access of Mr and Mrs Puntoriero ("the appellants") to the water in the Cudgel Channel, and thereby to the waters in the Main Canal upstream which feed that channel, was not something which they could turn on or off at pleasure. Their right of access depended upon the release by the respondent to them of water supplied to them in accordance with the Irrigation Act. That Act gave the respondent⁴⁹ "control of any irrigation area and any works within or used in connection with any such area". Unauthorised taking or use of water was a statutory offence⁵⁰.

Entry of contaminants and the jury's findings

- 48 In about November 1991 two properties not far from the property later leased by the appellants suffered crop damage. The damage apparently occurred as a result of the presence of chemical contaminants in the water drawn by the occupiers of the two properties respectively from the Lateral 240 Channel and the Cudgel Channel and released or supplied to them by the respondent. The theory propounded to explain the presence of the contaminants in the water was that a quantity of a herbicide, Atrazine, had been dumped somewhere in the water system, in such a way that it was carried into the two channels.

- 49 In July 1992, the appellants took possession of their property⁵¹. It was served by the Cudgel Channel. At the time, the dam on their property was full of water. The appellants planted potato crops in August 1992. In October 1992 they began to spray such crops with water drawn from the dam. For that purpose they replenished the dam on the property with further water released and supplied to them by the respondent from the Cudgel Channel. In early November 1992, it was noticed that the appellants' potato crops were turning yellow. Soil and water samples were taken from their property. The appellants claim that the presence of the toxic substance in the water damaged their crops and caused long-term sterility to the land which they had leased. They did not suggest that the respondent itself had put the contaminant in the water. Their case was that the respondent knew about the problem because of the earlier manifestation of damage to the two nearby properties and yet had failed to warn them, to test the water and to clear and drain the Cudgel Channel to remove any contaminants from it.

49 Irrigation Act, s 8(a).

50 Irrigation Act, s 17A.

51 The lease was not entered into until 4 September 1992 but nothing turns on this.

50 The trial of the appellants' claim against the respondent was had by jury. Some of the disputes litigated at trial have fallen away⁵². Before the jury, there were significant arguments of fact, some of which are revived, indirectly, by matters raised in the respondent's notice of contention with which I am not concerned. However, for the purpose of considering the argument about the meaning and application of the statutory immunity relied upon by the respondent, it can be assumed that, but for the immunity, the respondent would be liable in law to the appellants. It can also be assumed that, but for any exemption provided by the statutory immunity, the appellants could enforce that liability by an action against the respondent with respect to the loss or damage that they have suffered as a consequence of the exercise by the respondent of its functions.

51 It is safe to proceed upon these assumptions. A jury gives no reasons. A judgment entered pursuant to a jury's verdict can only be set aside in limited and exceptional circumstances⁵³. The conduct of the trial involving the parties followed a particular course. Although the jury was sworn to try the issues of fact, the trial judge (Grove J) did not, at the end of the trial, take a general verdict from the jury. Instead, with the apparent agreement (or at least the acquiescence) of the parties, he asked the jury to answer a number of questions. These questions are set out in the reasons of the other members of the Court. I will not repeat them. The jury answered each of the questions (including the sub-questions) in a way favourable to the appellants (plaintiffs). They found the damages of the appellants in the sum of \$1,802,562.

52 It seems inherent in the procedure adopted at the trial, and in particular in the finding of damages in favour of the appellants, that the jury were acting on the footing that the appellants were entitled to recover a verdict leading to judgment in their favour. That is the way a court would ordinarily approach what the jury did⁵⁴. Although it appears that a similar course was followed in the trial which gave rise to the appeal to this Court in *Australian National Airlines Commission v Newman*⁵⁵, I regard the procedure which was followed as irregular. It leaves it to the court to draw inferences that will fill the gaps that lie between the answers given by the jury to the specific questions presented to them and the judgment ultimately entered by the trial judge on the basis of later rulings of a legal character

52 Such as the argument that the respondent was released from liability by a special condition attaching to the grant of the lease to the appellants. See *Puntoriero* (1997) 42 NSWLR 676 at 687-688 per Meagher JA; Stein JA agreeing at 700.

53 *Supreme Court Act* 1970 (NSW), ss 102, 108; cf *Naxakis v Western General Hospital* (1999) 73 ALJR 782 at 792-796; 162 ALR 540 at 553-559.

54 *McDonnell & East Ltd v McGregor* (1936) 56 CLR 50 at 56.

55 (1987) 162 CLR 466 ("*Newman*") at 469 where the conduct of that trial is described.

which depend, in part, upon further factual determinations which the judge – and not the jury – must then make.

53 The orthodox, and in my view correct, approach where a trial is had by a jury is to take a general verdict from the jury which will support the judgment eventually entered by the court. Accordingly, in a case such as the present, it is to instruct the jury on the applicable law relevant to the defence of statutory immunity, such as was pleaded by the respondent. Only if this is done, will the correct differentiation be maintained between the respective roles of the judge and the jury. Moreover, only if that differentiation is observed, will the jury resolve, as is their province, all disputed issues of fact to which the claim for statutory immunity may give rise⁵⁶.

54 As it happens, there was a dispute of fact relevant to the statutory immunity pleaded, upon which it would have been appropriate, in my view, to take the verdict of the jury. I refer to the question whether the "loss or damage suffered" by the appellants was "a consequence of the exercise of a function" of the respondent, including the exercise of its power "to release water from any such works"⁵⁷. The decision about the causation of the appellants' loss or damage, and how it was to be classified for the purposes of the statutory immunity, raised an issue of fact bound up with how the contaminant came to be in the water with which the appellants irrigated their potato crop. We will never know how the jury might have concluded that factual issue because they were neither asked a specific question that was relevant nor were they asked to give a general verdict after express directions of law as to the meaning and operation of the statutory immunity. Instead, a kind of hybrid trial was conducted.

55 No issue about this possible defect in the conduct of the trial was raised in the Court of Appeal. None can now be permitted in this Court. This Court is constrained to approach the immunity pleaded on the footing that the parties agreed, or at least acquiesced, in the procedure by which Grove J ruled on the matter as one of law. For any factual questions inherent in the ultimate resolution of the point, it is necessary for the Court to draw inferences, as Grove J did, from the manner in which the parties conducted their respective cases before the jury and from the particular answers which the jury gave to the questions submitted to them.

56 cf *Newman v Australian National Airlines Commission* (1985) 2 NSWLR 573 at 575 per Samuels JA; *Otis Elevators Pty Ltd v Zitis* (1986) 5 NSWLR 171; *Quinn v Rocla Concrete Pipes Ltd* (1986) 6 NSWLR 586; *Cousins v Bradford Kendall Foundries Pty Ltd* (1986) 7 NSWLR 428; *Bromley v Tonkin* (1987) 11 NSWLR 211.

57 Administration Act, s 19(1).

Approach to a statutory immunity

56 It is useful to collect a number of general propositions which inform the approach to be taken when a court is faced with a contested invocation of a statutory immunity such as that provided to the respondent by s 19(1) of the Administration Act.

57 First, it is necessary to understand the work which such a statutory immunity performs. In *Metropolitan Water, Sewerage and Drainage Board v O K Elliott Ltd*, Starke J remarked⁵⁸:

"Statutory powers must be exercised 'with reasonable regard to the rights of other people,' and if an act is done in excess of the statutory power, or carelessly or negligently, then the person injured can put in force the ordinary legal remedy by action in the Courts of law".

This principle was elaborated in *Ardouin* by Windeyer J when he said⁵⁹:

"[A]n officer expressly empowered to do something can decide, not only that it is to be done, but how it is to be done – and his actions, directions and decision cannot, if bona fide, be later canvassed before a jury on the ground that they were imprudent or that what was done was done in a negligent manner."

58 If a statutory body, such as the respondent, adheres strictly to the performance of functions committed to it by its statute and does so in accordance with the authority of law, that will be warrant enough for the legality of what it has done. A statutory immunity, such as that in question here, is only needed when it is established that, in some particular way, the statutory body in question has exercised its powers in a manner that would otherwise give rise to an action to enforce legal rights against it. So there is no point complaining that the immunity takes away legal rights. That is the very purpose for which it has been enacted.

59 Secondly, it has been stated in a series of decisions in this Court that immunity provisions, such as the one in question here, will be construed jealously⁶⁰ or strictly⁶¹ so as to confine the scope of the immunity conferred⁶². The

58 (1934) 52 CLR 134 at 144.

59 (1961) 109 CLR 105 at 128.

60 *Ardouin* (1961) 109 CLR 105 at 116 per Kitto J.

61 *Newman* (1987) 162 CLR 466 at 471.

62 cf *Jamieson v The Queen* (1993) 177 CLR 574 at 596 per Gaudron J.

reason for this attitude on the part of courts is not, ostensibly, to defeat the purposes of the legislature. It is no function of courts to do that. Rather, it is to ascertain the true purpose of the provision upon an hypothesis, attributed by the courts to Parliament, that legislators would not deprive a person of legal rights otherwise enjoyed against a statutory body, except by the use of clear language⁶³. A similar rule applies in the construction of legislation defensive of liberty⁶⁴. A like approach is taken to the construction of legislation said to deprive the individual of procedural fairness⁶⁵.

- 60 To some extent, in recent times, there has been a retreat from the observance of particular rules of statutory construction of this kind. An example is the rule which formerly governed the approach to legislation imposing taxation⁶⁶. Recent authority has tended to emphasise the duty of courts simply to construe every statute according to its terms. However, in this case the respondent did not contest the strict approach required by past authority. Obviously, to deny legal rights to a person which that person would otherwise enjoy, ostensibly because of some wider social purpose which appeals to the legislature, in effect obliges that person to underwrite (at its economic cost) the achievement of such objectives deemed beneficial to many. In particular circumstances, such deprivation of rights may constitute an effective acquisition of property from the person affected⁶⁷. Even

63 See eg *Potter v Minahan* (1908) 7 CLR 277 at 304; *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 339.

64 *Piper v Corrective Services Commission (NSW)* (1986) 6 NSWLR 352 at 361.

65 *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180 at 194-195 [143 ER 414 at 420]; *The Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395; *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 109; *Ackroyd v Whitehouse* (1985) 2 NSWLR 239 at 246; *Macksville & District Hospital v Mayze* (1987) 10 NSWLR 708; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 652; *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635-636; *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687 at 699.

66 Contrast eg *Commissioner of Taxes v Executors of Rubin* (1930) 44 CLR 132 at 148-149 with *John v Federal Commissioner of Taxation* (1989) 166 CLR 417. See also *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304-305, 321; *Deputy Commissioner of Taxation v Chant* (1991) 24 NSWLR 352 at 356-357.

67 *Attrill v Richmond River Shire Council* (1995) 38 NSWLR 545 at 551; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297; *NSW v McMullin* (1997) 73 FCR 246; cf *Wik Peoples v Queensland* (1996) 187 CLR (Footnote continues on next page)

where such a course is constitutionally unimpeachable, it does not seem unreasonable to insist that Parliament should be clear as to its purpose in enacting legislation having such potentially drastic and unjust consequences. Obviously, to discover whether this was indeed Parliament's purpose, it is not sufficient to focus exclusively on the immunity provision in question. It is necessary to consider that provision in its legislative context, bearing in mind the apparent objective which lay behind its enactment.

- 61 Thirdly, a series of decisions of this Court, addressed to statutory immunities, has drawn a distinction between the conferral of an immunity for performing functions which the statutory body in question requires legislation to permit and performing those functions for which no special statutory power is conferred by the Act and for which none is needed because such functions are authorised by the general law⁶⁸. An English case in which this distinction was made was *Marriage v East Norfolk Rivers Catchment Board*⁶⁹. There, Jenkins LJ confined a statutory immunity, which limited a claimant to compensation under the statute rather than to rights at law, to operation only to an injury "the product of an exercise of the board's powers as such, as opposed to the product of some negligent act occurring in the course of some exercise of the board's powers but not in itself an act which the board are authorized to do"⁷⁰. His Lordship gave an example, later endorsed and applied by Kitto J in *Ardouin*⁷¹:

"[A]n injury caused by flooding on one side of the river due to the heightening by the board of the bank on the other side would be a proper subject of compensation, as opposed to action in the courts; but an injury caused by the negligent driving of one of the board's lorries bringing materials to the site would be actionable in the ordinary way."

- 62 This distinction became the foundation of the majority view in *Ardouin*⁷². This Court held in that case that s 46 of the *Fire Brigades Act* 1909 (NSW) did not protect the Board of Fire Commissioners from liability for damage resulting from

1 at 155, 185, 247-249; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 660-661.

68 *Ardouin* (1961) 109 CLR 105 at 127 per Windeyer J; cf *Little v The Commonwealth* (1947) 75 CLR 94 at 108 per Dixon J.

69 [1950] 1 KB 284; cf *Firestone Tire and Rubber Co (SS) Ltd v Singapore Harbour Board* [1952] AC 452 at 463-464.

70 [1950] 1 KB 284 at 309.

71 (1961) 109 CLR 105 at 117-118.

72 (1961) 109 CLR 105.

the negligent driving of a fire engine upon a public highway whilst on its way to a fire. For such driving, no specific statutory authority was required. Only in respect of the actionable performance of statutory functions would the statutory immunity provided by Parliament come into play.

63 The occasional difficulty of classification according to this approach was acknowledged in *Ardouin* by Taylor J. His Honour stated⁷³: "[T]he Board owes its existence solely to the statute and every power which it possesses may, in one sense, be said to be conferred by the statute." However, Taylor J insisted on the "significant distinction" between what he called the "general authority and capacity to function as a statutory body" and the "special powers conferred ... by the Act in relation to the prevention and control of fires"⁷⁴. In the end, although this distinction has persisted through later cases in this Court⁷⁵, each case depends, as statutory construction ultimately must, upon the ascertainment of the meaning of the particular immunity provision in question.

64 Fourthly, it has been suggested in some of the observations in this Court that a distinction may be drawn between the wording of an immunity provision expressed in terms of positive acts done in the performance of functions and the exercise of powers and one expressed in terms of omission to act⁷⁶. Sometimes, apparently to put this point beyond contest, the legislative provision in question will expressly mention omissions⁷⁷. It does not do so in the present case. This was a line of reasoning which appealed to Meagher JA in the Court of Appeal⁷⁸ and to Gleeson CJ and Gummow J in the present appeal⁷⁹. It was urged upon this Court by the appellants. I do not take the distinction to have been adopted by this Court, whether in *Ardouin* or any of the later cases, as a universal rule for the construction of immunity provisions. Indeed, it was expressly left open in

73 (1961) 109 CLR 105 at 121.

74 (1961) 109 CLR 105 at 121.

75 See *Hudson* (1968) 118 CLR 171 at 175; *Newman* (1987) 162 CLR 466.

76 *Newman* (1987) 162 CLR 466 at 471 citing Dixon CJ in *Ardouin* (1961) 109 CLR 105 at 109-110.

77 See eg *Local Government Act* 1919 (NSW), s 582A considered in *Attrill v Richmond River Shire Council* (1995) 38 NSWLR 545 at 549-555.

78 *Puntoriero* (1997) 42 NSWLR 676 at 686-687.

79 Reasons of Gleeson CJ and Gummow J at [14].

*Newman*⁸⁰. In considering the point, it is essential to have close regard to the language of the provision in question. There is, for example, a substantial difference between a section granting immunity for "anything done"⁸¹ and the provision applicable in this case, referring to "the exercise of a function"⁸². Functions may be exercised by affirmative conduct but also by restraint, inaction and non-conduct. To ascertain what the "functions" are, it is necessary to look elsewhere in the Act to find whether they are of such a kind as contemplate actions and omissions; obligations and discretionary decisions⁸³. Mason P, in the Court of Appeal⁸⁴, correctly remarked on the unsatisfactory features of the distinction between "acts of commission and acts of omission". He continued: "It would probably be possible to characterise practically any activity of the [respondent] in positive or negative terms. The scope of the immunity cannot turn upon which side of the same coin faces the decision-maker." I agree.

65 Fifthly, the former distinction between a statutory authority's liability for harm flowing from negligence in the exercise of its statutory powers⁸⁵ and negligent failure to exercise discretionary powers conferred by statute has not survived either in England⁸⁶ or in Australia⁸⁷.

66 Sixthly, there is the ultimate duty of a court in a case involving, as this one does, the meaning of an immunity provision. This is to construe the provision by reference to its language and in order to achieve its apparent legislative purpose. The task of statutory construction is rarely easy, at least in the cases that reach appellate courts. The ambiguities and choices which judges must decide are now

80 (1987) 162 CLR 466 at 471. See also *Larkin v Capricornia Electricity Board* [1995] 1 Qd R 268 at 270.

81 The phrase considered in *Newman* (1987) 162 CLR 466 and in *Larkin v Capricornia Electricity Board* [1995] 1 Qd R 268.

82 Administration Act, s 19(1).

83 Administration Act, ss 11 and 12.

84 *Puntoriero* (1997) 42 NSWLR 676 at 680.

85 *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 at 102.

86 *Anns v Merton London Borough Council* [1978] AC 728; *Stovin v Wise* [1996] AC 923 at 953 per Lord Hoffmann.

87 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 469-470.

more candidly acknowledged⁸⁸. A court may narrow the operation of an immunity provision. It may adopt a jealous and strict approach to its meaning. It may require that the provision be read in context. But its overriding duty is to ascertain the meaning and to apply that meaning to the facts of the particular case. If the meaning is clear or sufficiently clear, a court has no authority to deny effect to the provision because it considers that the policy of the provision is misguided or will result in an unfair application of the provision. Upon such matters different views may often be held, as the cases show. Subject to any constitutional limitations (none of which are applicable here) the resolution of such differences is for Parliament, not the courts⁸⁹.

Meaning of the immunity provision

67 When precise attention is paid to the language of s 19(1) in the Administration Act the breadth of its operation becomes much clearer. The sub-section applies with certain specified exceptions. The fact that exceptions are provided for indicates an apparent legislative consideration of exemptions from the operation of the general immunity. Parliament has considered such exemptions and specifically provided for them. The sub-section then provides that "an" action does not lie. It does not specify the type of action. It might be one in tort, contract or otherwise. All that is required is that it be an action "with respect to loss or damage suffered as a consequence of the exercise of a function". No reference to decisional authority is needed to demonstrate that the words "with respect to" are words of the widest connection. So is the phrase "as a consequence of". It is not necessary to show that the loss or damage in question was suffered as *the* consequence of the exercise of a function. It is enough that it was *one of several* consequences.

68 The phrase "the exercise of a function" incorporates⁹⁰, in the case of this legislation and this respondent, "a reference to a right, power, authority and duty". In the case of a duty, it includes a reference to the performance of the duty. As so elaborated, it is clear that the legislative purpose was to provide an extremely wide immunity to the respondent. This is confirmed when regard is had to all of the many functions which are set forth in s 11 and to the rights contained in s 12 of the Administration Act. The latter are in many cases discretionary. Necessarily, they

88 cf *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 189 CLR 407 at 441; *Deredge Pty Ltd v Sinclair* (1993) 30 NSWLR 174 at 175; *Attrill v Richmond River Shire Council* (1995) 38 NSWLR 545 at 551.

89 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 305 applying *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 130.

90 Administration Act, s 3(2).

contemplate that acts will be done and that acts will be omitted to be done in the exercise by the respondent of its particular functions. Thus, under s 12(3) of the Act, in the exercise of the right to control the water in "rivers" (including an "artificial channel"⁹¹), the respondent is empowered to take "such measures as [it] thinks fit" for the "conservation, replenishment and supply of water", the "protection of water from pollution and the improvement of its quality" and "environmental protection".

69 The very number and variety of the functions assigned by Parliament to the respondent, combined with the size, scope and operation of irrigation schemes for which it is responsible throughout the State of New South Wales, would potentially expose the respondent, unless relieved by statutory immunity, to enormous liability. Clearly, it was open to Parliament to conclude that it would not be economic or feasible for the respondent to be rendered liable in law, in effect to guarantee the quality of all water in all such waterways against the kind of irresponsible and apparently deliberate dumping of contaminants that is postulated as the original cause of the pollution which, in turn, occasioned damage to the appellants' land and crops. Indeed, the very elaborate list of "functions" included in the Administration Act would appear to demand either very substantial charges to users of water to offset the potential legal exposure of the respondent or an immunity provision to exempt it from such liability in certain cases. The legislature opted for the second solution. It is impermissible for a court to construe the resulting provision so as, in effect, to erase s 19(1) from the Act or to deprive it of real meaning and effect. In the context of the activities of this statutory corporation, the enactment of a provision affording a large exclusion of liability, such as that found in s 19(1), is not entirely surprising. And in any case, it is what the Parliament of New South Wales enacted.

70 Even if I apply to the provisions of s 19(1) of the Administration Act the jealous and strict construction required by *Ardouin*, *Hudson* and *Newman*, I find it impossible to hold that, in this case, the factual findings inherent in the answers of the jury do not fairly attract the immunity. The appellants pleaded their claim by averring that their farm was in an irrigation area "supplied with water by and under the control of" the respondent; that in consideration of rates and charges the respondent "would supply water to the" appellants; and that in October 1992 they "irrigated the said crop with water drawn from the [respondent's] supply pursuant to the agreement or in the alternative pursuant to the [respondent's] statutory powers and obligations". These are the preconditions to the liability of the respondent pleaded by the appellants.

71 The jury found that the damage to the appellants' crop was caused by the contaminant "applied to it with the water from the Cudgel Channel" when the appellants irrigated their crop in October 1992. The only authority of the

91 Administration Act, s 3(1).

respondent to supply such water from the Cudgel Channel to the appellants' property was that conferred upon the respondent as one of its functions under the Administration Act. This was not, otherwise, something which the respondent was authorised to do by the general law. On the contrary, releasing water and supplying water were amongst the very things which the Act empowered the respondent to do and required that it perform in accordance with its statutory provisions.

72 No comfort can be drawn by the appellants from the suggested distinction between the "release" of water from the works and the "supply" of water to the appellants. The express reference to an immunity for the exercise of a power to "release water from any such works" in s 19(1)(b) of the Administration Act is an instance of the immunity expressed in general terms by the opening words of s 19(1). That the paragraphs, including par (b), are not comprehensive and exclusive is made clear ("including"). The opening words extend the immunity to the exercise of a "function" of the Ministerial Corporation. By s 3(2) of the Act, this includes a "reference to a right, power, authority [or] duty" of the Corporation. By s 12(3)(a), amongst the "rights" of the Ministerial Corporation is included the "supply of water". Therefore the "supply of water" is within the terms of the opening words of s 19(1) of the Administration Act, even if the suggested juxtaposition between "supply" and "release" has the consequence that s 19(1)(b) is inapplicable.

73 Releasing or supplying the water otherwise than in accordance with the statute was illegal both to the respondent and to anyone else. If, then, one were classifying the case in the manner required by *Ardouin*, *Hudson* and *Newman*, the matters upon which the appellants sued the respondent were not analogous to activities which happen to be performed by a statutory corporation but which neither arise out of, nor depend upon, that body's statutory authority. As Stein JA put it⁹², the "very thing" which the Act gave power for the respondent to do was to supply water. Without such supply, the appellants would, on their own case as pleaded and presented at trial, not have irrigated their land and crops with water contaminated by the pollutant substance.

74 Of course, it might be said that the loss or damage suffered by the appellants was a consequence of various other acts and defaults by other actors, including the polluter, and by the respondent. But it is most unpersuasive to suggest that the loss or damage (claimed by the appellants and found by the jury) was not "a consequence" of the exercise of a function of the respondent, including the exercise of its power to release water from any of the works under its control into the dam on the appellants' property from which they then drew the water supplied by the respondent about which they complained in their action. It might have been different if the statute had been expressed in terms of *the* consequence, necessitating a characterisation of "the" cause of the loss or damage suffered. But

92 *Puntoriero* (1997) 42 NSWLR 676 at 699-700.

it is enough to attract the immunity to show that the exercise of the function in question was one of the causative elements, potentially one amongst many.

75 In my respectful opinion, this is where Meagher JA fell into error in his reasons in the Court of Appeal. He said⁹³: "True it is that the release of water is the very thing which the Act gave power to do. But is that what the jury found had *the* consequence of causing the [appellants] damage? Only in a sense." By substituting the definite article ("the") for the indefinite article ("a") – the word used in the Act – his Honour fell into error. By accepting that "in a sense" it was inherent in the jury's findings that the appellants' damage was *the* consequence of the respondent's exercise of its functions, his Honour acknowledged, in effect, that "a" consequence of causing the loss or damage was the exercise by the respondent of its statutory function of releasing water. The immunity therefore applied. Liability was excluded.

76 Three further points about s 19(1) of the Administration Act help to confirm this conclusion. First, the opening words acknowledge statutory exceptions to the exclusion of liability which the sub-section otherwise enacts. One of these is specifically mentioned in the preceding section where it is provided that if, for the purposes of exercising its functions, the respondent acquires land or an interest in land this is to be done in accordance with the *Lands Acquisition (Just Terms Compensation) Act* 1991 (NSW). By inference, any acquisition of other property rights which s 19(1) effects (such as of a chose in action that a person might otherwise have against the respondent) is not expressly provided for. Accordingly, it is not excepted. Consequently, the exclusion of liability in the Act applies to it. Secondly, it is relevant to contrast the provisions of sub-ss (1) and (3) of s 19. Sub-section (3) is designed to exclude from liability the Minister or a person acting under the direction of the respondent in any "action, liability, claim or demand" but on condition that the matter or thing was "done in good faith for the purposes of executing this or any other Act". There is no such requirement to exempt the respondent under sub-s (1). That juxtaposition emphasises the very broad scope of sub-s (1). Thirdly, the history of the legislation, and specifically of the earlier exemption afforded by statute to the respondent's predecessor⁹⁴, is set out in the reasons of Gleeson CJ and Gummow J. A contrast between the two provisions shows an apparently deliberate purpose of Parliament to expand and recast the exclusion of liability afforded to the respondent. Against the background of this legislative history (and accepting that there is no other available explanation for it) orthodox canons of statutory construction oblige this Court to give effect to the enlargement of the exclusion of the respondent's liability. Whatever may be the case with respect to other statutory immunities, s 19(1) of the Administration Act

93 *Puntoriero* (1997) 42 NSWLR 676 at 687 (emphasis added).

94 The Water Conservation and Irrigation Commission. See Water Act, s 4A(2C), set out in the reasons of Gleeson CJ and Gummow J at [11].

is a deliberately broad provision. Courts have no authority to negate what Parliament, within its powers, has enacted.

77 The appellants pointed to the statutory injunctions that require the respondent to meet the needs of water users "in a commercial manner"⁹⁵. They pointed out that the statutory function of the respondent includes the construction or maintenance of works or buildings⁹⁶, entering into contracts⁹⁷ and, with the approval of the Governor, entering into joint ventures⁹⁸. They argued that the potential of such activities to give rise to disputes and claims of legal liability made it unlikely that the immunity afforded by s 19(1) was as large as the respondent urged. If the respondent were indeed to provide water in a commercial manner and to perform commercial types of functions, it could hardly be expected to enjoy an uncommercial statutory immunity of large ambit.

78 There is force in this submission. But too much should not be read into the object about providing water and related resources "in a commercial manner". In part, this appears to be political rhetoric. In part, it is already confined by the general requirements of the Act and the specific requirement that it be "consistent with the overall water management policies of the Government"⁹⁹. And, in part, the provision appears to refer to the kinds of commercial operations specifically provided for in s 12A of the Act which seem to envisage new activities over and beyond those basic functions of the respondent contemplated by the Act.

Conclusion: The immunity applied

79 In any case, a jealous or strict construction of s 19(1) of the Administration Act would always require that it be shown that the loss or damage suffered was "a consequence of the exercise of a function". In a case truly of a commercial character, such a characterisation might be inapplicable. But where, as here, the release of water from the works controlled by the respondent and its supply to the appellants were amongst the "very things" that the Act empowered the respondent to do in the ordinary performance of its essential statutory functions, it involves a distortion of language and of the meaning of the words used to hold that s 19(1)

95 Administration Act, s 4(b), set out in the reasons of Gleeson CJ and Gummow J at [5].

96 Administration Act, s 11(4)(a).

97 Administration Act, s 11(4)(b).

98 Administration Act, s 11(4)(m).

99 Administration Act, s 4(b).

did not apply, notwithstanding the way the appellants pleaded and fought their claim and the jury's answers to the questions asked by the trial judge.

80 In the end, this was not a case of the respondent driving on the highway or doing some other thing which every person, natural or corporate, may lawfully do. It was a case of the respondent performing the precise functions which it was empowered and authorised to do under the Act. The loss or damage suffered by the appellants was, on the assumptions adopted, "a" consequence of the performance of those functions – namely release and supply of water which happened on this occasion to contain a contaminant. The statutory immunity applied. The Court of Appeal was correct so to hold. Jealous and strict constructions of unloved exemption provisions do not justify defeating the object of Parliament as signified in the words of its enactment¹⁰⁰.

Orders

81 The appeal should be dismissed with costs.

¹⁰⁰ cf *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.

- 82 CALLINAN J. The principal question raised in this case is whether, by reason of a statutory provision barring certain actions, a State authority is entitled to escape liability for the supply for money, for irrigation purposes, of water which carried toxic contaminants that destroyed a family's crop of potatoes.

Facts and earlier proceedings

- 83 The appellants cultivated their crop on a property that they leased at Cudgel. The Cudgel Channel was fed with water from the main canal of the Murrumbidgee Irrigation Area and flowed past the appellants' farm. The appellants and about 20 other farmers from time to time used water for which they paid the respondent, drawn from the Cudgel Channel to irrigate their properties. The channel formed part of the extensive Murrumbidgee Irrigation Area. The respondent managed, and was responsible for the conservation, flow and use of waters carried by the Cudgel Channel and other streams and dams in the vicinity of it. The activities of the respondent were authorised and regulated by the *Irrigation Act* 1912 (NSW) and the *Water Administration Act* 1986 (NSW).

- 84 After irrigating their crop in October 1992 damage to it appeared in the next month, and, in due course the crop failed. The appellants sued the respondent. Their case was tried by Grove J and a jury. The jury found that the failure was caused by phytotoxic substances carried in the water which had been drawn from the Cudgel Channel.

- 85 In the previous year, in November, damage to their crops had been suffered by farmers Parr, Ainsworth and Donaldson. The Donaldson property was irrigated by water from the adjacent Lateral 240, a nearby channel; the Parr-Ainsworth property was irrigated by water drawn from the Cudgel Channel itself. The water that was used flowed from the Main Canal (also controlled by the respondent) in a westerly direction past Lateral 240 and into the Cudgel Channel. The respondent was aware from 1991 of the likelihood of the presence of the toxic substance in the water flowing in and from the Channel.

- 86 The respondent is a statutory corporation established under the *Water Administration Act*¹⁰¹.

101 Sections 7(1) and (2) provide:

"(1) There is constituted by this Act a corporation with the corporate name 'Water Administration Ministerial Corporation'.

(2) The Ministerial Corporation:

(a) has perpetual succession,

(Footnote continues on next page)

87 The questions that were left to the jury and the answers that they gave to them were as follows.

"1 Was the damage to the plaintiffs' crop caused by a phytotoxic substance applied to it with the water from the Cudgel Channel, when the plaintiffs irrigated the crop, in October 1992?

Yes.

2 Between November 1991 and 10th October 1992 was it foreseeable to the defendant that the plaintiffs' crop could be damaged by the application of contaminants in the irrigation water of the Cudgel Channel?

Yes.

3 Did the defendant fail to exercise reasonable care in any one of the following ways:

(i) by failing to test the water supply for chemicals likely to damage crops;

Yes.

(ii) by failing to warn the plaintiffs that the water was contaminated;

Yes.

(iii) by failing to take any steps to clear the water supply of contaminants which the defendant knew or ought to have known were in the Cudgel Channel;

Yes.

(b) shall have a corporate seal,

(c) may take proceedings, and be proceeded against, in its corporate name,

(d) may do and suffer all other things that a corporation may, by law, do and suffer and that are necessary for or incidental to, the purposes for which it is constituted, and

(e) is, for the purposes of any Act, a statutory body representing the Crown."

34.

(iv) by permitting and/or allowing the contaminants to be and remain in Cudgel Channel?

Yes.

4 In what sum do you assess the plaintiffs' damages?

\$1,802,562.00."

88 At the trial, and in the Court of Appeal, matters which were not pursued in this Court were argued: for example, the appellants' claims in contract, nuisance and for breach of statutory duty. Although the appellants' claim in contract was not pursued in this Court, it is relevant to note that the appellants pleaded, and the respondent admitted, that there was an agreement between the parties that the respondent supply water to the appellants pursuant to a contract between them at prices fixed by the respondent. Indeed, the respondent set up in its defence an exemption clause which was contained in an agreement in writing which the respondent contended, governed the contractual relations between the appellants and the respondent. No reliance was sought to be placed upon that clause by the respondent in the appeal to this Court. Although therefore this Court does not have to construe, or give effect to any contractual terms, that there were contractual arrangements between the parties is of significance and serves to show that the activity of the respondent in supplying water to the appellants for irrigation purposes was an activity of a commercial kind.

89 The respondent's principal argument in all courts was that the appellants' claim was barred by s 19(1) of the *Water Administration Act*. Section 19 provides as follows:

"Exclusion of liability

- (1) Except to the extent that an Act conferring or imposing functions on the Ministerial Corporation otherwise provides, an action does not lie against the Ministerial Corporation with respect to loss or damage suffered as a consequence of the exercise of a function of the Ministerial Corporation, including the exercise of a power:
 - (a) to use works to impound or control water, or
 - (b) to release water from any such works.
- (2) Subsection (1) does not limit any other exclusion of liability to which the Ministerial Corporation is entitled.
- (3) No matter or thing done by the Ministerial Corporation or any person acting under the direction of the Ministerial Corporation shall, if the

matter or thing was done in good faith for the purposes of executing this or any other Act, subject the Minister or a person so acting personally to any action, liability, claim or demand."

90 The trial judge rejected the respondent's argument based on s 19(1) and judgment was entered for the appellants on the answers given by the jury to the questions asked of them. An appeal by the respondent to the Court of Appeal of New South Wales was upheld (Mason P and Stein JA, Meagher JA dissenting)¹⁰². The basis upon which the majority upheld the respondent's appeal was that the supply of water, albeit that it contained toxic substances, was an act that the respondent was empowered to perform and that it therefore attracted the protection afforded by s 19(1) of the Act.

The appeal to this Court

91 In this Court the two matters of substance which were argued were the effect of s 19(1) of the *Water Administration Act* and whether the appellants had failed to prove causative negligence on the part of the respondent.

92 Section 19(1) needs to be placed in context and the context is not confined to the *Water Administration Act*. There are provisions in the *Irrigation Act* which are also relevant to the activities of the respondent but I will deal with the *Water Administration Act* first.

93 The objects of the Act are stated in s 4, and for present purposes it is sufficient to notice that one of them is to ensure that water is used in ways which are consistent with environmental requirements, and another is the provision of water to meet the needs of users "*in a commercial manner*":

"The objects of this Act are:

- (a) to ensure that the water and related resources of the State are allocated and used in ways which are consistent with environmental requirements and provide the maximum long-term benefit for the State and for Australia, and
- (b) to provide water and related resources to meet the needs of water users in a commercial manner consistent with the overall water management policies of the Government."

94 The supply of water carrying toxins is the antithesis of the provision of water to meet the needs of water users in a commercial manner. The reference to commerciality should not be taken as a mere exhortation. It is relevant to the

102 *Water Administration Ministerial Corporation v Puntoriero* (1997) 42 NSWLR 676.

proper construction of the Act generally. Provisions in legislation for the "corporatisation" or "privatisation" either in whole or in part of government bodies designed to put activities of such bodies on a business footing should be read in such a way, if possible, as to give real efficacy to them so that people with whom they might otherwise deal will not be discouraged from doing so for fear of being confronted with a wall of statutory immunity should disputes arise.

95 The respondent is a statutory corporation representing the Crown¹⁰³ but s 5 provides that the Act binds the Crown in right of the State and in all its other capacities.

96 Section 11 of the Act relevantly provides as follows:

"(1) The Ministerial Corporation has, and may exercise:

- (a) the functions specified in subsection (4), and
 - (b) any other functions conferred or imposed on it by or under this or any other Act.
- (2) A function conferred or imposed on a public authority by or under an Act that is administered by the Minister and is specified in Schedule 1 may be exercised by the Ministerial Corporation instead of by the public authority.
- (3) The Governor may, by order published in the Gazette, amend Schedule 1.
- (4) Without affecting the generality of section 7 (Constitution of the Ministerial Corporation) the Ministerial Corporation may:
- (a) construct or maintain works or buildings,
 - (b) enter into contracts,
 - (c) effect and maintain insurances,
 - (d) purchase, exchange, take on hire or lease, hold, dispose of, manage, use or otherwise deal with real or personal property,
 - (e) undertake and support research,

103 Section 7(2)(e).

37.

- (f) collect, record and assess information relating to water resources and publish any of it,
 - (g) evaluate present and future requirements for water in the State,
 - (h) plan and carry out the development of water resources,
 - (i) co-ordinate the activities of persons having functions with respect to water resources,
 - (j) integrate the management of water resources with the management of other natural resources,
 - (k) review, and monitor the efficiency of, proposals and projects relating to the development or use of water resources,
 - (l) co-ordinate the implementation of water policies with authorities of the Commonwealth and other States,
 - (m) with the approval of the Governor, enter into joint ventures,
 - (n) provide assistance to mitigate the effects of flood, drought, fire or other emergency or hardship including assistance with funds, personnel or equipment, or by the operation of works,
 - (o) develop and manage water catchment areas as sources of water supplies and co-ordinate:
 - (i) development schemes for water catchment areas, and
 - (ii) the management of water catchment areas, and
 - (p) carry out surveys, investigations, boring, drilling and excavations, whether or not for the purpose of assisting in the exercise of any other function.
- (5) A function of the Ministerial Corporation may be exercised:
- (a) by the Minister, whether or not in the name, or under the seal, of the Ministerial Corporation,
 - (b) in accordance with a delegation by the Ministerial Corporation, or the Director, under section 14,
 - (c) by the Director, on behalf of the Minister, in accordance with directions given from time to time by the Minister, or

- (d) by an officer with the authority of, and on behalf of, the Director."

97 It can be seen that the stated functions include matters both of high policy, such as the evaluation of present and future requirements for water in the State and the integration of the management of water resources with the management of other natural resources, and routine activities such as the construction and maintenance of buildings, contracting with others, the effecting of insurance, the hiring and leasing of property and the embarkation upon joint ventures (with the consent of the Governor). (There is no reference in s 11 to the supply of water for reward as a function of the respondent.) To a similar effect to parts of s 11 is s 12A which I set out below, and which authorises the respondent to engage (with the Governor's approval) in a variety of commercial operations, including the formation of companies and participation in partnerships and trusts.

"(1) With the approval of the Governor, the Ministerial Corporation may enter into commercial operations with respect to:

- (a) any services developed in connection with the exercise of its functions,
- (b) any products or by-products resulting from the exercise of those functions,
- (c) without limiting the above, any intellectual property resulting from the exercise of those functions, or
- (d) any other prescribed matters.

(2) With the approval of the Governor, the Ministerial Corporation may form, or join in forming, a company, partnership or trust for the purpose of exercising its powers under this section."

98 Section 12 not only confers upon the respondent very extensive powers in respect of water virtually howsoever occurring, whether lying, subterranean, flowing or conserved, but also contains, in sub-s (5) its own specific statutory exemption from liability for a failure to supply water, an activity which would normally (as is apparent from the contractual arrangements which existed in this case and from some provisions of the *Irrigation Act*) be carried out pursuant to a contract. The language of s 12(1) is broad. There may well be a degree of overlap between some provisions, not only of s 12(1) and par (o) of s 11(4), but also between those two provisions and s 12(3) of the *Water Administration Act*, as there also appears to be between s 12(5) of that Act and s 23(2)(d) of the *Irrigation*

*Act*¹⁰⁴. It should also be noticed in respect of s 12(3) that the respondent is given power, but no stated obligation, to take such measures as it thinks fit, for, among other things, the beneficial use of water (par (c)) and the protection of water from pollution and the improvement of its quality (par (d)). The whole of s 12 should be set out.

"(1) The right to the use and flow, and to the control, of:

- (a) the water in rivers and lakes,
- (b) the water conserved by any works,
- (c) water occurring naturally on the surface of the ground, and
- (d) sub-surface water,

is vested in the Ministerial Corporation except to the extent that is otherwise provided by this Act or to the extent that the right is divested by the exercise of a function of the Ministerial Corporation.

- (2) The right conferred by subsection (1) prevails over any authority conferred by or under another Act, including a later Act than this Act.
- (3) In the exercise of the right conferred by subsection (1) or of any other function, the Ministerial Corporation may take such measures as the Ministerial Corporation thinks fit for:
 - (a) the conservation, replenishment and supply of water,
 - (b) the equitable distribution of water,
 - (c) the beneficial use of water,
 - (d) the protection of water from pollution and the improvement of its quality,
 - (e) preventing any unauthorised interference with the flow or availability of water,
 - (f) preventing any unauthorised obstruction of a river or any change of its course,

104 See below at [106].

- (g) preventing the unauthorised erection or use of works,
 - (h) flood control and mitigation, or
 - (i) environmental protection.
- (4) The Ministerial Corporation may, for any reason, release water impounded by any works under its control.
- (5) No action or proceeding may be brought:
- (a) to compel the Ministerial Corporation to supply water, or
 - (b) to recover any penalty or damages from the Ministerial Corporation in respect of a failure to supply water."

99 Section 15 authorises the respondent to enter land "for the purpose of exercising its functions". Section 15(3) provides as follows:

"The Ministerial Corporation must ensure that as little damage as possible is caused by the exercise of powers under this section and must pay compensation for any such damage."

100 The respondent argues that the presence of s 15(3) in the *Water Administration Act* in this form reinforces its contention that s 19(1) should be accorded an otherwise unrestricted operation: that s 15(3) is intended to provide a statutory exception to s 19(1) to operate to impose a liability upon the respondent from which it would otherwise be exempted by s 19. In other words, the respondent argues, if the appellants' contention that s 19(1) does not have the broad application which, on its face, and taken alone it might appear to have, a provision such as s 15(3) would be unnecessary.

101 Section 20 confers an advantage upon the respondent in respect of claims that it might make in litigation.

"(1) A charge, fee or money due to the Ministerial Corporation under this or any other Act may be recovered in a court of competent jurisdiction as a debt due to the Ministerial Corporation.

(2) A certificate of the Minister stating that a specified amount of money is payable to the Ministerial Corporation for water rates and charges by a named person is, in any proceedings, evidence of the matter stated."

102 I come now to the *Irrigation Act*. By definition (s 3 of the *Irrigation Act*) the respondent is a Ministerial Corporation. Section 8 of that Act is in a part of the

Act that has the heading "Powers and Duties of Ministerial Corporation" and provides:

"The Ministerial Corporation, in addition to the powers, authorities, duties and functions conferred or imposed expressly on it by or under this Act:

- (a) shall, subject to this Act and any regulations made under this Act, have control of any irrigation area and any works within or used in connection with any such area ..."

103 Section 8AA empowers the respondent to fix prices for water rights to irrigation farms of which the appellants' was one.

104 Section 12 is concerned with the details of the supply and price of water to farmers. Supply of water to a farm for irrigation purposes may be taken to be something different from the release of water from works within the meaning of s 19(1)(b) of the *Water Administration Act*. Section 12 of the *Irrigation Act* provides as follows:

"(1) The Ministerial Corporation shall each year, at the times and in the quantities fixed by it, supply water in pursuance of the water rights which are attached to the land of any occupier:

- (a) to the boundary of any land held by any one person bona fide in his own interest; and
- (b) to such other points as may be agreed upon.

(1A) While any part of water rates and charges relating to any land, or any interest that has accrued on them, is due and unpaid, the Ministerial Corporation may, without affecting the liability to pay the rates, charges or interest, discontinue until payment has been made the supply of water to the land.

(2) The charge in respect of such water rights as are a fixed charge on the land at the price fixed shall commence to be payable from the date of notification by the Ministerial Corporation to the occupier that water is available, and shall be paid by the occupier whether the water is or is not taken by him, unless (except where the supply has been discontinued under subsection (1A)) he proves that the water was not available: Provided that any such notification shall be deemed to be duly served if posted by ordinary course of post to the address last known to the Ministerial Corporation of such occupier.

..."

105 Section 15 of the *Irrigation Act* imposes the obligation of payment upon the occupier of the land and makes provision for interest on unpaid amounts, and s 23 provides that nothing in the *Irrigation Act* is to be deemed to oblige the respondent to supply water, if, in the opinion of a Ministerial Corporation such as the respondent, by reason of drought, accident or other cause, it is impracticable to do so.

106 Section 23 which includes an exculpatory provision in sub-s (2)(d) is as follows.

"(1) Nothing in this Act shall be deemed to render it obligatory on the Ministerial Corporation to supply water to any area or person if by reason of drought, accident, or other cause, the Ministerial Corporation is of the opinion that it is impracticable to do so.

(2) (a) Without prejudice to the effect of subsection (1) the Ministerial Corporation may, if it is satisfied that by reason of an actual or threatened shortage of water or for any other sufficient cause it is necessary or expedient so to do, determine that:

- (i) the quantity of water which the Ministerial Corporation is required by or under this or any other Act or otherwise howsoever to supply to any area or person shall be reduced; or
- (ii) such supply shall be discontinued.

(b) Any such determination may be made in relation to all water, or to water used for any purpose or class of purposes, and may apply to and in respect of all areas and persons, or may apply to and in respect of any particular area or person specified in the determination, or to and in respect of any class of areas or persons so specified.

(c) Every determination made under this subsection may be carried into effect by the Ministerial Corporation.

(d) No matter or thing done by the Ministerial Corporation or by any person whomsoever acting under the direction of the Ministerial Corporation shall, if the matter or thing was done bona fide for the purpose of carrying this subsection into effect, subject the Ministerial Corporation or any such person to any action, liability, claim or demand whatsoever."

107 I will return to this section later.

108 The appellants argue that s 19(1) is protective of the respondent in respect of the exercise of a function, that is to say the performance of an activity, and has nothing to say about omissions. This was the opinion of Meagher JA in dissent in

the Court of Appeal with respect particularly to a failure of the respondent to warn the appellants of the presence of the contaminants: that the words of immunity should be construed to relate only to positive acts and not the omissions of the respondent to test for, warn of, and clear the waters of contaminants, which the jury found.

109 This Court has fairly consistently construed statutory provisions of the kind of which s 19 is one in a strict manner and has done so in times when there was less, or no statutory emphasis upon the need for commerciality in the activities of statutory corporations.

110 In *Australian National Airlines Commission v Newman*¹⁰⁵ the question was whether a statutory immunity in respect of "anything done or purporting to have been done under [the] Act"¹⁰⁶ protected the Commission against liability to one of its employees. Mason CJ, Deane, Toohey and Gaudron JJ, without finally deciding the point inclined to regard the provision there as referable to acts rather than omissions¹⁰⁷. Their Honours said¹⁰⁸:

"The absence of any reference to omissions in s 63(1) provides some ground for thinking that the provision should be confined in its operation. A limitation provision, because it derogates from the ordinary rights of individuals, should be strictly construed. In its context, the reference to acts, unaccompanied by a corresponding reference to omissions, may suggest that the sub-section was intended to apply to positive acts done in the performance of functions and the exercise of powers of such a nature that they involve a special risk of interference with persons or property, eg, the risks associated with the flying of aircraft in the course of carrying on an airline business. In that regard, there is much to be said for the view that the remarks of Dixon CJ in *Board of Fire Commissioners (NSW) v Ardouin*¹⁰⁹ are in point here notwithstanding that they were directed to the operation of a differently worded provision. It is unnecessary however that we pursue that question or

105 (1987) 162 CLR 466.

106 Section 63(1) of the *Australian National Airlines Act* 1945 (Cth) provided:

"All actions against the [Australian National Airlines] Commission or against any person for or arising out of anything done or purporting to have been done under this Act, shall be commenced within two years after the act complained of was committed."

107 See also (1987) 162 CLR 466 at 476 per Brennan J.

108 (1987) 162 CLR 466 at 471.

109 (1961) 109 CLR 105 at 109-110.

that we determine the extent, if at all, to which s 63(1) is to be read as applying to omissions as well as to acts of commission."

- 111 In *Board of Fire Commissioners (NSW) v Ardouin*¹¹⁰ the clause to be construed referred to "damage caused in the bona fide exercise of [the] powers [of a fire brigade]." Kitto J said¹¹¹:

"[T]he immunity attaches in respect only of damage resulting from an act which, if it had not been negligent, would have been the very thing, or an integral part of or step in the very thing, which the provisions of the Act other than s 46 or the by-laws gave power in the circumstances to do, as distinguished from an act which was merely incidental to, or done by the way in the course of, the exercise of a power."

- 112 Dixon CJ in *Ardouin*¹¹² said that an immunity provision would not be construed to cover a function which was "of an ordinary character involving no invasion of private rights and requiring no special authority."

- 113 Both cases demonstrate that to gain a statutory protection against liability for an omission under an immunity provision, the provision should not only ordinarily so provide in express terms, but also that such provisions should generally be strictly construed.

- 114 Before any need to consider the possible, direct application of *Newman's* and *Ardouin's* cases to this case arises, I should decide whether, in its terms s 19(1) can apply to what occurred in this case. At the time the respondent was acting, by supplying water for payment by the appellants, pursuant to the *Irrigation Act* rather than under or directly under the *Water Administration Act*. However s 19(1) is capable of application to functions performed or powers exercised under another Act such as the *Irrigation Act*. What occurred was the failure of the appellants' crop because of the introduction of phytotoxic substances to it. The water was the means of conveyance of the toxic substances. (For present purposes I am assuming causation in this way, a matter with which I will deal subsequently.) What s 19(1) does is provide that (subject to provision otherwise) an action does not lie with respect to loss or damage suffered as a consequence of the exercise of a function of the respondent including the exercise of a power to control or release water. The question is whether it was the release of water from any of the respondent's works, the exercise of any other power by the respondent or the performance of any of its functions (pursuant to either Act) which actually caused the damage.

110 (1961) 109 CLR 105.

111 (1961) 109 CLR 105 at 117.

112 (1961) 109 CLR 105 at 110.

The respondent argued that it was, that it was the release or supply of the water from the Cudgel Channel which happened to be carrying the contaminants that destroyed the crop. Because the Acts refer to both the release and supply of water I take them to be different. In this case the water was not released. It was supplied for payment, an activity not within the specific language of s 19(1)(b) of the *Water Administration Act*. And because provisions of this kind should be strictly construed what happened cannot be regarded as an activity within the more general language of s 19(1). The destruction of the appellants' crop was a consequence of the accumulation of phytotoxins in Cudgel Channel and the application of them to it and not the supply of water as such. The respondent had no power or function, actual or incidental, of accumulating and distributing toxins. It was not argued by the respondent, and nor do I think it could be, that the damage to the crop was a consequence of an imperfect exercise of a power or a function of protecting the water from pollution, or of improving its quality pursuant to s 12(3)(d) of the *Water Administration Act*. There was no evidence of any attempts in that respect. No one would suggest that the respondent could be expected, let alone compelled to maintain the absolute purity of water in its works and streams. But the accumulation and distribution of highly toxic as opposed to benign contaminants are entirely different matters. An analogy may be drawn between the respondent's functions and the functions of, for example, a statutory authority empowered to supply petrol. If it were to supply petrol which contained a sufficient quantity of sugar to damage an internal combustion engine, then it would be right to say that it had exceeded its powers by supplying both petrol and sugar. The emphasis which various sections of the Act place upon the need for the respondent to conduct its affairs in a commercial manner, and the commercial nature of the arrangements between the respondent and the appellants argue in favour of the strict view which should be taken of s 19(1).

- 115 There are some highly persuasive reasons why s 19(1) should not be given a universal application to the exercise of the functions and powers of the respondent. If it were it could provide a defence to a claim upon a contract entered into in pursuance of its function as defined by s 11(4)(b) of the *Water Administration Act*. Paragraph (c) of that sub-section provides for the effecting and maintaining of insurances. It is unthinkable that the respondent would be able to escape liability at the suit of an insurance company which had paid out a claim by the respondent as insured and which the insurer sought to recoup on the subsequent discovery of a lack of *uberrimae fidei* on the part of the respondent. As I have pointed out, the respondent may, does, and did in this case, fix the price of the water supplied to the appellants pursuant to ss 8AA and 12 of the *Irrigation Act* and had a contract with them. If s 19(1) were to be given the breadth for which the respondent contends, then it might be successfully invoked to defeat a claim by a joint venturer, a beneficiary of a trust or a partner with whom the respondent had entered into arrangements pursuant to s 12A of the *Water Administration Act*. If s 19(1) were to operate in that way then the respondent would represent to any joint venturer or partner an extremely undesirable, indeed dangerous legal personality

with whom to do business, or to join in any activity in which money or property might change hands.

116 Because it was no part of the respondent's functions and not within its power to accumulate and introduce phytotoxins to crops it came under an ordinary duty of care in respect of such substances, to warn or prevent their introduction to a crop, and the failure of it to do so constituted negligence of the kind alleged in the appellants' particulars, being a failure to warn or to clear the contaminants out of the water.

117 It is unnecessary to consider the possibility that the respondent might have been liable if the view were taken that there were two concurrent causes of the damage: the supply of water (a consequence of the exercise of a function or power) and the accumulation and application of toxins. Could it then be said that the damage was a consequence of a protected activity? I would be inclined to think not, rather that what occurred was not, as it needed to be to gain the statutory immunity, exclusively a consequence of the function of supplying water¹¹³.

118 What I have so far said is sufficient to dispose of the first issue raised in favour of the appellants. However, in deference to the arguments of the respondent, I will say something about s 15(3) of the *Water Administration Act*. Initially, I was in some doubt whether the existence of this provision dictated a broad construction of s 19(1) so as to protect the respondent against liability here. But on reflection I do not think that this is so. The presence of s 15(3) in the *Water Administration Act* is explicable on the basis that a trespass upon land or to other property under cover of statutory authorisation is such a special and gross intrusion, particularly if accompanied by statutory authorisation to damage property if necessary, that explicit provision for compensation should be made and put beyond any doubt.

119 The presence of s 12(5) in the *Water Administration Act* and s 23(2)(d) in the *Irrigation Act* certainly do not assist the respondent.

120 Section 23(1) of the *Irrigation Act* is designed to ensure that the respondent should not be obliged to supply water if it is in its opinion impracticable to do so. Section 23(2) probably adds little to sub-s (1) and spells out in express terms that the respondent may reduce or withhold the supply of water to particular persons, areas or classes of areas, and persons. It is only in respect of a determination in that regard that the immunity in par (d) of s 23(2) is expressed to operate. I would take s 23 to be a particular code dealing with the non-supply or reduction of the supply of water and having no operation except with respect to those matters. Indeed it and s 12(5) of the *Water Administration Act* with which it has features in

113 cf *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1998) 72 ALJR 1592 at 1638; 158 ALR 1 at 64.

common and overlaps, may perhaps even be regarded as statutory indications of the only liability (arising out of commercial arrangements for the supply of water) from which the respondent should be exempted. If s 19 had an absolute operation then it is difficult to see the need for s 12(5) of the *Water Administration Act* and s 23(2)(d) of the *Irrigation Act*.

121 Perhaps there may be two respectable ways of looking at s 19(1). But the one which pays due regard to the statutory expectation that the respondent is to act commercially, and is given some limited express immunities only in its commercial dealings, as well as extraordinary powers which would be denied to any ordinary person or corporation, invites the rejection of the untrammelled operation of the section that the respondent urged upon the Court. The fact that the statutes under consideration are not by any means perfectly drawn or unambiguous as the overlapping of several of their provisions indicates, requires that recourse be had to the objects and purposes of them, including the commercial objects and arrangements for which they make provision, for their construction and application.

122 Because of the conclusion that I have reached on this aspect of the case it is unnecessary for me to deal with the other grounds upon which the appellants brought their appeal. If however, contrary to the view I have formed, what happened in this case should be regarded as a consequence of an omission in the sense referred to by Gleeson CJ and Gummow J, I would adopt their Honours' reasoning and conclusions in that regard.

123 I now turn to the issues of causation and duty of care on which the respondent urges the appellants must fail.

124 The respondent has filed a notice of contention which raises those matters:

- "1. The [r]espondent was not under a duty to the [appellants] to do any of the matters that they alleged it negligently omitted to do.
2. A verdict for the [appellants] was not open on the evidence of causation.
3. A verdict for the [appellants] was perverse in the relevant sense on the evidence on the issue of causation."

125 In this case the trial judge proceeded in accordance with s 90 of the *Supreme Court Act* 1970 (NSW)¹¹⁴ and settled the questions which should be answered by

114 The section provides:

"It shall be the duty of a jury to answer any question of fact that may be left to the jury by the presiding Judge at the trial."

the jury and which I have earlier set out. The first of these dealt specifically with causation and was answered favourably to the appellants. His Honour had earlier directed the jury in these appropriate terms:

"Let me take you to the first question that is contained on that sheet. It is, as I am sure you are conscious at this point, the question upon which the parties are upon total collision course. It is, of course, critical to the outcome of this case and the question I have formulated is in these terms: 'Was the damage to the plaintiffs' crop caused by a phytotoxic substance applied to it with the water from the Cudgel channel when the plaintiffs irrigated the crop in October 1992.' Your answer to that is simply, 'Yes' or, 'No'. I am sure that you recognise therein is the issue of fact which has been debated before you by the evidence over the past two weeks and focused upon in the submissions by Mr Donahue and Mr Foord in the last two days. As I expect is also obvious to you, that if your answer is, 'No' there is no need to further answer any further questions because, Mr Foord acknowledged, it is critical to the plaintiffs' whole case that the damage to the crop had to be caused by water contaminated which came through the irrigator system. That is the first question to answer, it is a pure question of fact and it does not contain within it any of the nuances of negligence about which I was speaking just before I handed you these documents."

126 There was evidence upon which the jury might answer the questions in the way in which they did. A well qualified expert Mr Salvestrin called by the appellants said he was in no doubt at all that the damage to the appellants' crop was caused by some phytotoxic material that had been introduced to the appellants' crop through the irrigation system after it had accumulated in works or channels controlled by the respondent.

127 At the trial the respondent sought the withdrawal from the jury of any question of the failure on the part of the respondent to warn the appellants that the water was contaminated. The argument was that there was no evidence of the way in which the appellants would have responded had they been warned, and accordingly there was no case that a failure to warn had caused the damage to the crop, to go to the jury. In respect of that submission the trial judge said this:

"I do accept, however, that the evidence is overwhelming that this jury would be entitled to infer that any irrigation farmer warned that there was toxin in water from which he intended to draw in order to irrigate his crops would react in any way other than by placing such water on the crops.

I regard this case in these circumstances, as distinguishable from those mostly in the area of industrial accident and reliance upon behaviour by Local Government authorities where the proposition advanced by Mr Donahue is articulated. I do not propose to supplement the directions which I have given to the jury."

128 In my opinion his Honour's ruling was correct.

129 The other contention is that the respondent owed no relevant duty of care to the appellants. An examination of the trial judge's directions shows that his Honour regarded the case as a classical *Donoghue v Stevenson*¹¹⁵ type of case, as indeed, subject to any relevant statutory provisions, it was. His Honour properly instructed the jury that they had to be satisfied that the damage was foreseeable and as to the need for a sufficient degree of proximity to give rise to a duty of care. Question 2 was expressly concerned with the former and was answered in favour of the appellants.

130 The respondent submitted that the trial judge should have decided the issue of proximity. It seems to me that in this case there could be little doubt that the relationship between the parties was sufficiently proximate to give rise to a duty of care on the part of the respondent. The respondent argued that this was a legal question and one which should not have been left to the jury or left to the jury alone. That submission misconceives the function of the jury in a negligence case. In *Caledonian Collieries Ltd v Speirs*, Dixon CJ, McTiernan, Kitto and Taylor JJ said¹¹⁶:

"Jordan CJ accurately stated the function of the judge in relation to the question of duty in a negligence case, when he said in *Alchin v Commissioner for Railways*¹¹⁷: 'If the facts are such that it is clear that a duty to be careful did or did not exist, the judge should so rule; but there may be cases in which it is open to question whether in the particular circumstances a reasonable man would take care. If so, it is for the judge to determine whether the facts are such as to admit of a finding by the jury that care was called for, and, if he so determines, it is for the jury to decide whether it was in fact called for'¹¹⁸."

131 Guided by such sound directions from the trial judge as were given here the jury were entitled to decide whether the respondent failed to exercise reasonable care. This they did, and, I think, answered the question affirmatively as must have been the inevitable answer in the circumstances.

115 [1932] AC 562.

116 (1957) 97 CLR 202 at 221.

117 (1935) 35 SR (NSW) 498.

118 (1935) 35 SR (NSW) 498 at 501, 502.

132 There was some debate about whether the trial judge was entitled to enter judgment on the basis of the several questions asked and answered. As Dixon J in *McDonnell & East Ltd v McGregor*¹¹⁹ said:

"When a jury answers specific questions and is discharged without giving a general verdict, the jury and the parties are, in the absence of express objection, taken to have authorized the court to enter such verdict and consequent judgment as flows in law from the answers which are given."

133 Dixon J was also prepared to accept that the answers of the jury "under the direction of the learned Judge" gave rise to implications that the plaintiff should succeed. The same may, in view of the matters to which I have referred, be said of this case.

134 It follows that I would allow the appeal with costs and order that the respondent pay the appellants' costs of the trial and the appeal to the Court of Appeal.

119 (1936) 56 CLR 50 at 56.