

Duty of care to exercise statutory powers – Two recent decisions

Two recent decisions of the Courts of Appeal of Western Australia and New South Wales have provided important confirmation of the law relating to the duty of care to exercise statutory powers – and a stark illustration of the breadth of issues that local governments may face.

Local Government Update

On 27 March 2012, the Court of Appeal of the Supreme Court of Western Australia delivered its decision in **Kudrin v City of Mandurah** [2012] WASCA 65, dismissing an appeal by Mr & Mrs Kudrin from a decision of the District Court, striking out their action for negligence against the City in relation to a non-compliant retaining wall constructed by their neighbour.

On 16 April 2012, the New South Wales Court of Appeal published its decision in **Warren Shire Council v Kuehne** [2012] NSWCA 81, involving the tragic case of a young girl attacked and mauled to death by pig-hunting dogs when she wandered unattended onto a neighbour's property.

The Kudrin decision

The **Kudrin** matter has a long history, but in short Mr & Mrs Kudrin claimed that the City owed them a duty of care to exercise its statutory powers under section 401 of the *Local Government (Miscellaneous Provisions) Act 1960* (WA), to compel their neighbours to either bring the retaining wall into compliance with the approved plans and specifications, or remove it. They claimed to have suffered loss and damage described as inconvenience, vexation, worry and emotional distress, as well as the cost of survey reports and other consultants engaged over the years.

The case provided an opportunity for the Court of Appeal to confirm the application in Western Australia of decisions by the High Court of Australia and in other jurisdictions dealing with the existence of a duty of care on the part of statutory authorities in relation to the exercise of statutory powers.

Who does this affect?

- Statutory bodies
- Local Governments
- Residents
- Dog owners

Article Highlights

- Local Governments are not obliged to enforce their statutory powers on building construction specifications unless they prove a duty of care safety issue to their members.
- Statutory bodies could be liable for breaches of their duty of care of their members if they fail to maintain their "dangerous dogs" list under the *Companion Animal Act 1998*

Justice Newnes delivered the judgment of the Court of Appeal and applied the law as set out in decisions such as **Pyrnees Shire Council v Day** (1998) 192 CLR 330, **Crimmins v Stevedoring Industry Finance Committee** (1999) 200 CLR 1, **Graham Barclay Oysters v Ryan** (2002) 211 CLR 540 and **Stuart v Kirkland-Veenstra** (2009) 237 CLR 215. It is now clear that the law is as follows:

- The mere existence of a statutory power is not sufficient to give rise to a duty of care to exercise that power.
- Neither is it sufficient that it is reasonably foreseeable that some form of harm or damage will follow if action is not taken to exercise the statutory power.
- A duty of care to exercise a statutory power will only arise where there is some form of relationship between the statutory body and a member or members of the public, which requires a positive step to be taken by the statutory body to avoid a foreseeable risk of the kind of harm or damage that is suffered.

This begs the question, of course, as to what types of factors will be relevant in determining whether or not such a relationship exists. The Court of Appeal referred to the following:

- Ordinarily, the law only imposes a duty on a person to protect another person from a risk of harm if the first person has in some way created or contributed to the risk. In Mr & Mrs Kudrin's case, the City was not responsible in any way for the construction of the retaining wall by the neighbours, and was not in a position to have prevented the construction.
- It is important to consider the purpose of the statutory provisions in question, which in this case was to regulate the construction and alteration of buildings. The provisions of section 401 of the Act contain a general power to enforce compliance with approved plans and specifications for the construction of a building, but this is not specifically addressed to the protection of neighbouring or nearby landowners – particularly from the kinds of loss and damage claimed by Mr & Mrs Kudrin.
- The power under section 401 of the Act is a discretionary power, in the sense that the City was under no obligation to exercise the power in any or every case of a non-compliant building.
- Specifically in relation to the complaint by Mr & Mrs Kudrin that the retaining wall encroached onto their land, this was not a case in which action by the City was the only means by which the encroachment could be remedied. Mr & Mrs Kudrin had their own remedies that they could pursue against the neighbours to rectify the encroachment.

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Justice Newnes summarised the position by saying – “A duty of care on the [City] to take action in respect of an encroachment on [Mr & Mrs Kudrin’s] land caused by the non-compliant building work of the neighbours was not capable of arising simply because it was more convenient to [Mr & Mrs Kudrin] that the [City] bore the burden of such action”.

The Kuehne decision

In **Kuehne**, the Warren Shire Council appealed a decision in the NSW District Court in which the Shire was found liable to the father of the deceased young girl for having failed to exercise its powers under the *Companion Animals Act 1998 (NSW)* to declare the dogs in question to be “dangerous dogs”. A declaration under the Act would have resulted in various controls as to the manner in which the dogs were kept, which would likely have averted the tragic outcome.

The NSW Court of Appeal upheld the Shire’s appeal. The principal finding was that, prior to the attack, there was no basis for the dogs to have been declared as dangerous, having regard to the particular definition of “dangerous dog” in the Act (which has since been amended). The Court of Appeal also considered, however, if there had been a basis to declare the dogs as dangerous, whether the Shire would have been under a duty of care to exercise its statutory powers – and found that it would have been.

The NSW Court of Appeal applied the same decisions of the High Court as the WA Court of Appeal, referred to above. In considering whether the *Companion Animals Act* created the required relationship between the Shire and persons such as the Keuhnes, the Court emphasised the degree of control given to the Shire under the Act to deal with dangerous dogs and the level of vulnerability of members of the public –

If there had been credible material before the Council to warrant the making of a declaration, it is clear that its failure to do so would throw up a real concern for the safety of persons likely to be affected by reason of that failure. It may properly be said that the legislation provided the Council with the power to control the source of the risk of harm that would likely flow to people in the vulnerable position of the respondents and other nearby residents. That power was not available to the class of persons of which the respondents were members, nor was it available to members of the public generally. ... [I]t may properly be said that the respondents belonged to a class which, of necessity, relied upon the Council as the principal repository of powers under the Companion Animals Act to protect them by controlling the Wilsons and their dogs.

These two decisions are important for the confirmation of the legal position set out in the earlier cases referred to above, and the application of the principles



in those cases to common examples of the broad spectrum of statutory powers exercised by local governments. The distinctions between the two cases should be carefully considered by Local Governments and other public authorities exercising statutory powers. There is a particular warning for local governments in the **Keuhne** decision in relation to the exercise of the equivalent powers over dangerous dogs under the *Dog Act 1976* (WA).

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