PARTIES:	NORTHERN TERRITORY OF AUSTRALIA v DEUTSCHER KLUB (DARWIN) INCORPORATED AND BORAL GAS (QLD) PTY LTD (trading as SPEED-E-GAS)
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	COURT OF APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA EXERCISING TERRITORY JURISDICTION
FILE NO:	No. AP of 1992
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HEARING DATES:	22, 23 & 24 September 1993
JUDGMENT OF:	Kearney, Thomas and Priestley JJ

CATCHWORDS:

NEGLIGENCE - general matters - exercise of power of inspection by a public authority - nature of "proximity" as physical, circumstantial or causal - "proximity" criterion determines existence of duty of care - whether "reliance" is necessary to establish "proximity" or is one species of "proximity" - significance of notions of fairness, reasonableness and public policy in determining existence of "proximity" - factors relevant to establishing breach of a duty of care

Sutherland Shire Council v Heyman (1984-85) 157 CLR 424, applied
Jaensch v Coffey (1984) 155 CLR 549, referred to
Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16, referred to

San Sebastian Pty Ltd v The Minister (1986) 162 CLR 340, referred to
Cook v Cook (1986) 162 CLR 376, referred to
Gala v Preston (1991) 172 CLR 243, applied

NEGLIGENCE - general matters - exercise of power of inspection by a public authority - nature of "general reliance" and "specific reliance" - whether "general reliance" a sufficient basis to establish "proximity"

Sutherland Shire Council v Heyman (1984-85) 157 CLR 424, applied (Mason J)

NEGLIGENCE - general matters - exercise of power of inspection by a public authority - ordinary principles of negligence apply, subject to "some adjustment"

Sutherland Shire Council v Heyman (1984-85) 157 CLR 424, applied

NEGLIGENCE - general matters - damage flowing from breach of duty of care - need for evaluative judgment on questions of duty of care and damage flowing from breach - causation - public policy considerations - whether more than one cause may be assigned to particular breach and damage

Law Reform (Miscellaneous Provisions) Act (NT), ss12(4) and 13

March v Stramare Pty Ltd (1991) 171 CLR 506, applied
Fitzgerald v Penn (1954) 91 CLR 268, referred to
Bennett v Minister of Community Welfare (1992) 66 ALJR 550, referred to

REPRESENTATION:

Counsel:

Appellant:	T. I. Pauling QC, with him R. J. Webb
First Respondent:	O. W. Downs
Second Respondent:	G. E. Hiley QC, with him T. F. Coulehan

Solicitor:

Appellant:	Solicitor for the Northern Territory
First Respondent:	Mildrens
Second Respondent:	Waters James McCormack

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No AP 16 of 1992

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Appellant

AND

DEUTSCHER KLUB (DARWIN) INCORPORATED
First Respondent

AND

BORAL GAS (QLD) PTY LTD
trading as SPEED-E-GAS
Second Respondent

CORAM: KEARNEY, THOMAS AND PRIESTLEY JJ

REASONS FOR JUDGMENT

(Delivered 3 February 1994)

KEARNEY J:

The facts of the case, and the matters which give rise to this appeal, are set out in the opinion of Priestley J; it is unnecessary to repeat them. I respectfully concur in his Honour's analysis of the present state of the law in Australia as to the liability in negligence of a public authority; this governs the disposition of the Fire Service's appeal. I also agree

with his Honour's conclusions, for the reasons he states, that the Fire Service was negligent, liability as between Boral and the Club should be varied from 70%/20% to 45%/45%, and the Club's appeal against the apportionment of costs should be dismissed.

I would add some observations on one aspect of the case. Priestley J has discussed the concept of "reliance", at the forefront of the appellant's case. His Honour concludes that to establish the relationship of proximity necessary to found a duty of care in the Fire Service, it was not essential for the plaintiff to establish reliance. I agree; but I consider, like the learned trial Judge, that on the facts of the case the plaintiff could rely on the factor of general reliance to establish the necessary relationship of proximity. I briefly state my reasons for that opinion.

In *Sutherland Shire Council v Heyman* (1984-85) 157 CLR 424 Mason J (as he then was) discussed the concept of reliance, "always - - an important element of a duty of care" (p461). His Honour observed at p462 that in the United States-

> "- - - reliance has been a critical element in liability for negligent failure to exercise a power, especially when it is a power of inspection.
>
> - - -
>
> - - - it has been recognized that where the government has supplanted private responsibility, as in the case of air traffic controllers, general, rather than specific, reliance may be

> sufficient to generate liability: *Clemente v United States* (1977) 567 F. (2nd) 1140 at pp1147-1148." (emphasis mine)

As to what the concept of "reliance" entails, Mason J concluded at p463 from his review of the American authorities that:-

> "The American experience therefore furnishes support for the view that a public authority is liable for negligent failure to perform a function when it foresees or ought to foresee that: (a) the plaintiff reasonably relies on the defendant performing the function and taking care in doing so, and (b) the plaintiff will suffer damage if the defendant does not take care." (emphasis mine)

His Honour noted at pp463-4 that one question "in connexion with the concept of reliance as a sufficient basis for the existence of a duty of care" in the class of case involving the exercise of a power of inspection by a public authority, was -

> "- - whether the concept [of reliance] extends to general reliance or dependence by those in the position of the plaintiff, as distinct from specific reliance by the plaintiff. - - - In the case of a public authority, the foreseeability of the plaintiff's reasonable reliance is a sufficient basis for finding a duty of care, subject to such dispensation as may arise from the special character of a public authority exercising statutory functions - -
>
> If this be accepted, as in my opinion it should be, there will be cases in which the plaintiff's reasonable reliance will arise out of a general dependence on an authority's performance of its function with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of a plaintiff. Reliance or dependence in this sense is in general the product of the grant (and exercise) of powers designed to prevent or minimize a risk of personal injury or disability, recognized by the legislature as being of such

> magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection. This situation generates on one side (the individual) a general expectation that the power will be exercised and on the other side (the authority) a realisation that there is a general reliance or dependence on its exercise of power - - -". (emphasis mine)

In my opinion, against the background of the Fire Service's functions and powers, this case fell within the category of cases last mentioned by Mason J: the plaintiff had a "reasonable reliance" arising out of a "general dependence" that the Fire Service would perform its functions with due care, and the other conditions mentioned by his Honour were also met. That "general reliance - - - on [the Fire Service's] exercise of power", in my opinion, established a relationship of proximity in this case between the plaintiff and the Fire Service sufficient to found a duty of care in the Service to the plaintiff in carrying out its functions, to protect him against independently-created injury, the risk of such injury being clearly reasonably foreseeable in the circumstances. It was not necessary for the plaintiff to establish his actual (or specific) reliance that the Fire Service had properly carried out its functions.

I concur in the orders proposed by Priestley J.

THOMAS J:

This is an appeal from the findings of the Trial Judge as to the apportionment of liability between the Appellant and the First and Second Respondent for an

accident that occurred at the premises of the First Respondent on the 15 February 1982. The Plaintiff in the proceedings before the Trial Judge was Russell William Bray, at the time of the accident a boy aged 11 years, who suffered severe burns from a gas explosion in the kitchen at the First Respondent's premises.

The facts are fully set out in the judgment of Priestley J which I have had an opportunity to read. I respectfully agree with the reasons expressed by Priestley J as to his conclusion. I add a few other brief comments.

For ease of reference I also will refer to the Appellant as the Fire Service, the First Respondent as the Club and the Second Respondent as Boral.

APPEAL BY FIRE SERVICE

The Trial Judge found the Fire Service to be responsible for 10% of the damages for injuries suffered by the Plaintiff.

It was the contention on behalf of the Fire Service on appeal that there was no basis for a finding that the Fire Service had any responsibility for the injuries suffered by the Plaintiff.

Members of the Northern Territory Fire Service carried out an inspection of the Club's premises on the morning of the 15 February 1982. The Inspection Report AB/508 (Exhibit P13) states the purpose of the inspection was the "Liquor/Public Entertainment Licence". An integral part of the granting of the licence was that the premises

had to meet a certain standard of safety. This is confirmed by the fact that the report stated inter alia:

> "B. The premises failed to meet the requirements of this department on the points listed hereunder.
>
> You are required to rectify these points.
> A further inspection will be carried out on 1/3/1982.
>
> Kitchen - 1 BCF Extinguisher
> 1 Fire Blanket."

On reading this report it would indicate that so far as the kitchen area was concerned the only matters that required attention to make the kitchen area safe were the two items referred to above. I am satisfied inspectors from the Northern Territory Fire Service should have realised that the cut pipe they saw in the kitchen was in fact a gas pipe. It is clear the inspectors from the Fire Service on inspecting the kitchen:

a. saw a pipe which was cut and there was no stop cock fitted;

b. knew that gas was supplied to the kitchen for cooking purposes;

c. saw two pipes in the kitchen.

The inspectors made an incorrect assumption that the cut pipe was a water pipe. A simple investigation by them would have revealed it was in fact a gas pipe. The inspectors were in the fire safety section of the Northern Territory Fire Service. Evidence was given by the inspectors as to the limited training they had received at

that time. Be that as it may, in my opinion the Club was entitled to rely on their expertise as inspectors with the fire safety section of the Northern Territory Fire Service. The inspectors should have found out the cut pipe was a gas pipe, immediately drawn this to the attention of the Club and taken steps to ensure the gas pipe was plugged or otherwise rendered safe. It was potentially a far greater fire hazard than the requirements listed in the Inspection Report.

I consider the inspection by inspectors of the Fire Service was careless in this regard. The Fire Service had a duty of care to the Club and had carried that duty out negligently. Although not of itself the most significant cause of the explosion and subsequent injury to the Plaintiff, it was in my opinion a contributing cause.

I agree with the reasons expressed by Priestley J and I would dismiss the Appeal.

BORAL'S APPORTIONMENT APPEAL

I have considerable reluctance about interfering with the apportionment arrived at by the Trial Judge. This is on the basis that the Trial Judge clearly considered and took into account all relevant factors.

There is no dispute on the part of Boral that they were negligent and must bear some responsibility for the damages incurred from the injuries suffered by the Plaintiff in the accident. The essence of this appeal is the finding of the Trial Judge that Boral should bear 70%

of the responsibility. It is the submission on behalf of Boral that this apportionment is excessive.

The negligence on the part of Boral occurred when at 4 pm on the 15 February 1982 an 18 year old inexperienced employee, Mr Crooks, turned on the valve of the gas cylinder located outside the kitchen of the Club. Boral had been requested to take a final reading of the amount of the gas in the cylinder. Mr Crooks told his immediate supervisor, Mr Mittermeyer what he had done. Mr Mittermeyer took no action on receipt of this information. No check was made as to why the valve had been turned off. Certainly this action was a contributing cause of the accident as it enabled gas to flow from the gas tank through the opening in the cut gas pipe into the locked kitchen of the Club. Boral were experts in gas.

However, on analysis I respectfully agree with the reasoning of Priestley J as to the actions and comparative liability of the Club.

The Club had the responsibility for ensuring Mr Kok left the kitchen in a safe condition when he removed his wok on the 14 February 1982. Mr Kok did not leave the kitchen in a safe condition. Mr Heilig was a member of the Club. At the request of the President of the Committee of the Club, Mr Heilig had arranged for inspectors from the Fire Service to attend the premises of the Club on the 15 February 1982. Mr Heilig was at that time himself a firefighter with the Northern Territory Fire Service and

had been in that occupation for four years. Mr Heilig did not tell the inspectors from the Fire Service that the gas pipe was a gas pipe. Nobody from the Club took steps to close the open pipe or investigate what should be done to ensure safety. Late on the afternoon of the 15 February 1982 the Plaintiff, Russell Bray, was at the Club with his grandparents, Mr and Mrs Kruse, who were at that time employed by the Club. Russell Bray noticed a smell of gas and told his grandparents. Mr Lutz who was also an employee of the Club at that time opened the window between the kitchen and the restaurant. He put Russell Bray, then an 11 year old boy, through the open window so that the boy could unlock the kitchen door and enable Mr Lutz to enter the kitchen and check the reason for the smell of gas. It was a negligent act by an employee of the Club to place an 11 year old boy into a gas filled room.

I concur with the opinion expressed by Priestley J that the liability of the Club is equal to that of Boral. I would allow the Appeal by Boral and for the reasons stated by Priestley J, agree with the order he has proposed.

THE CLUB'S COSTS APPEAL

In my opinion the Trial Judge took into account all relevant matters and I am not persuaded that the decision he made on the issue of costs miscarried. For the reasons expressed by Priestley J, I would dismiss this appeal.

I respectfully agree with each of the orders proposed by Priestley J in his conclusion.

PRIESTLEY J:

PRELIMINARY.

The nature of the proceedings

This appeal is about an accident which happened in the kitchen of the German Club at Darwin in the late afternoon of Monday, 15 February 1982. Gas in the kitchen exploded, injuring four people. Two died of their injuries soon afterwards. The third died some time afterwards. The fourth, a boy of eleven, survived despite severe injury. He later became the plaintiff in proceedings in which he claimed damages for negligence from Deutscher Klub (Darwin) Incorporated, which conducted the German Club, the first defendant, and from Boral Gas (Qld) Pty Ltd the second defendant. I will call the first defendant the Club and the second defendant Boral. Boral issued third party notices against four third parties, including the Northern Territory of Australia, claiming contribution from them pursuant to s 12 of the Law Reform (Miscellaneous Provisions) Act on the basis that each third party would if sued have been liable to the plaintiff in respect of the same damage.

The case against the Northern Territory was based on actions of two Fire Brigade officers. At the time of the accident the Fire Brigade was organised pursuant to the Fire Brigades Act. That Act was repealed in 1983 and

replaced by the Fire Service Act which established the Fire Service of the Northern Territory. In the argument of the appeal the actions of the officers in question were spoken of as actions of the Fire Service, and for convenience I will refer to the Northern Territory in its role as a third party as the Fire Service.

Judgment for the plaintiff by agreement

The case was heard by Angel J. After it had gone for a number of days the Club and Boral agreed with the plaintiff that judgment should be entered in his favour against them for an amount not disclosed to the trial judge. Thereafter the plaintiff had no interest in the remaining proceedings which continued in order to have resolved the issues of the alleged negligence of the Fire Service and other third parties and of the extent of contribution recoverable from any third party whom the judge found would if sued have been liable. Under s 13 of the Law Reform (Miscellaneous Provisions) Act the amount of any contribution from any person found liable was to be such as was "found by the court to be just and equitable, having regard to the extent of that person's responsibility for the damage".

Angel J's decision

Angel J found that in addition to the Club and Boral, the Fire Service, and no other parties, had been guilty of negligence. He found their responsibility for the

damage to be: the Club 20%; Boral 70%; the Fire Service 10%.

The scope of the appeals

The Fire Service appealed on the ground that the judge erred in finding it had been negligent.

Boral cross-appealed, on the ground only that Angel J's assessment of the extent of its responsibility for the damage to the plaintiff was appealably excessive. Boral also contested the Fire Service's claim that it was not guilty of negligence.

The Club also cross-appealed, but only on a question of costs. Apart from arguing the costs question in the appeal, its position was to resist the Fire Service's appeal and also to resist any change in Angel J's assessment of the extent of apportionment of its responsibility for the damage.

MAIN FACTS

The following outline of the facts material to the case is taken from the reasons of Angel J except where otherwise indicated.

Prior to 14 February 1982

Until the day before the accident Mr Kim Kok had been operating the Club's kitchen and dining room facilities pursuant to a written licence agreement. The kitchen contained two gas appliances. One was a large stove with a number of gas fired rings, called a wok, owned by Mr Kok. The other was a griller. The gas came from a cylinder owned by Boral installed outside the building, near the kitchen. A three quarter inch

copper pipe connected the cylinder with the two appliances. Gas could be turned on or off by a valve on the cylinder, or at either appliance. There were no taps or valves on the gas pipe in the kitchen other than those at the two appliances. Mr Evans, the Darwin manager of Boral, was aware of this. The cylinder had a lid lockable by a padlock. The valve was under the lid, within the lockable area.

In February 1982, Mr Kok decided to bring his licence to an end. He gave notice of termination to the Club and advised he would be removing his equipment from the kitchen by 14 February. The Club made arrangements for its manager and caretaker, Mr Lutz, to be present when Mr Kok left. The Club president asked Mr Trummer, a member with some knowledge of the gas installation in the kitchen at an earlier stage, to ensure that when Mr Kok left he was careful, especially with the gas. These preparations were made in the expectation that Mr Kok would leave on Friday, 12 February. Also, the Club asked Mr Heilig, one of its members who was a Fire Service officer, to arrange for a Fire Service inspection of the premises. The Club's liquor licence had been suspended and a Fire Service inspection and approval of the premises were needed before the licence could be reinstated.

On the basis of expert evidence before him Angel J was satisfied that had a gasfitter been asked to remove the wok, he would in all probability have turned the gas supply off at the cylinder, undone the nut connecting the gas line with the inlet to the wok, plugged that line and then turned

on the gas supply to enable the remaining gas appliance to operate.

14 February 1982

Things turned out differently from what had been planned. Mr Kok did not move out until Sunday, 14 February 1982. He then went to the Club with four or five men to remove his equipment. Angel J said that Mr Lutz was present, but whether he meant actually in the kitchen or simply on the premises is not clear. Mr Trummer was not able to be present at the Club. There was no direct evidence of what happened in the kitchen, but on the available evidence Angel J inferred, and it was not challenged in the appeal, that Mr Kok or one of his men forced open the lid to the gas cylinder and cut off the gas into the pipe into the kitchen by turning off the valve at the head of the cylinder; the connection between the gas pipe and the inlet to the wok was not undone; Mr Kok or one of his men then cut the gas pipe inside the kitchen with a hacksaw near the junction on the pipe from which one branch of the pipe went to the wok and the other to the gas griller. This left a hole in the gas pipe. The wok was taken away. No note was left at the cylinder directing people not to turn it on.

15 February 1982: Boral

Mr Evans, with whom Mr Kok had arranged for the wok to be installed, and who knew of Mr Kok's account with Boral for the supply of gas to the kitchen, was told by Mr Kok, on

the morning of Monday, 15 February, that he was closing his account.

15 February 1982: Fire Service inspection

At 11 am Superintendent Ravenscroft and Senior Station Officer Stubbs of the Fire Service inspected the Club premises, including the kitchen. The two officers were in the kitchen with Mr Heilig. All noticed a gap where the wok had been. Mr Heilig was asked what had been there and told Mr Stubbs that there had been a wok there. Although Mr Heilig knew it had been a gas wok he did not say so to the Fire Service officers. All three men saw the cut pipe. They thought it was a water pipe. There was a water pipe on the wall which had provided water necessary for the operation and cleaning of the wok. Both the Fire Service officers knew there was a gas supply to the kitchen. Nothing was said about gas during the inspection of the kitchen. Angel J noted that both officers gave evidence that had they known the cut pipe was a gas pipe, they would have required it to be plugged.

Angel J stated that at the end of the inspection Messrs Ravenscroft and Stubbs made certain requisitions relating to the provision of fire blankets and the like, but none relating to the open pipe. Not mentioned by his Honour, but not open to dispute on the evidence, was that the requisitions were contained in a form entitled Inspection Report (AB 2/508), which contained a printed line saying "Purpose of Inspection" next to which the words "Liquor/Public

Entertainment Licence" were filled in by hand, and below which was printed:

> "An inspection was carried out by the Fire Safety Department of the premises named above on / /19 in accordance with:-
>
> 1) FIRE BRIGADES ACT, PART II, section 13
>
> 2) PLACES OF PUBLIC ENTERTAINMENT ACT, section 8
>
> A) The premises met the requirements of this department.
>
> B) The premises failed to meet the requirements of this department on the points listed hereunder.
>
> You are required to rectify these points.
>
> A further inspection will be carried out on / /19 ."

The blank for the date of inspection was filled in by hand to read "15/2/1982"; "A)" and its following sentence were struck out; and the date for further inspection was filled in by hand to read "1/3/1982". The "requirements ... listed hereunder" were also done by hand, and, in regard to the kitchen said that a fire extinguisher and blanket were to be supplied. No mention was made of the pipe with the hole in it.

This report form was signed by Mr Stubbs. After it was given to Mr Heilig, Messrs Ravenscroft and Stubbs left.

15 February 1982: Boral

At 4 pm two employees of Boral went to the Club on the instructions of Mr Evans to take a final reading of the amount of gas in the cylinder. Such a task was part of the

ordinary routine of the two employees, who were Mr Mittermier, the driver of Boral's gas tanker supply truck, and Mr Crooks, his assistant. When they got to the Club Mr Crooks went to the cylinder while Mr Mittermier stayed in the truck. Mr Crooks saw the valve on the cylinder was turned off and turned it on again. He took no step to find out why the valve was turned off or what the consequences of turning it on might be. He was inexperienced and had received little training from Mr Mittermier or Boral. He told Mr Mittermier what he had done. Mr Mittermier took no step either to check on or reverse what Mr Crooks had done.

At the time when Mr Crooks turned the cylinder valve on, the door leading from the main hall of the Club into the dining area and kitchen was locked.

15 February 1982: the accident

Not long after Mr Mittermier and Mr Crooks had gone, the plaintiff, who was seated with his grandparents, Mr and Mrs Kruse, in the main hall of the Club, smelled gas. He told Mr Kruse, who told Mr Lutz. The two men and the plaintiff (and according to the plaintiff's evidence, his grandmother also) went to the kitchen. The internal door to the kitchen was locked. Mr Lutz asked the plaintiff to climb through a servery window to unlock the door. The plaintiff did this and then the plaintiff, his grandfather and Mr Lutz went into the kitchen where all saw the open gas pipe. The plaintiff heard gas rushing out. Messrs Lutz and Kruse went outside to turn off the gas. The plaintiff stayed in the kitchen. Messrs Lutz and

Kruse came back into the building after turning off the gas. At this stage, according to the plaintiff's evidence, he was at the doorway of the kitchen with his grandmother. It was then that the gas exploded, and all four persons either fatally or very severely injured. Angel J found that the gas was probably sparked into explosion by the cutting in of an electric motor of a fridge or freezer in the kitchen.

TRIAL JUDGE'S FINDINGS

Negligence of three parties

Although, following upon their agreement to judgment in the plaintiff's favour, neither Boral nor the Club disputed in the appeal that it had been guilty of negligence, I need to summarise Angel J's findings concerning their negligence because they are relevant to Boral's appeal against the extent of the contribution it was required to make to the judgment sum.

Negligence of the Club

Angel J held that the Club was negligent in a number of respects.

One was in failing to ensure the safety of the kitchen premises on the day of the explosion. The Club should have seen to it that Mr Kok's wok was safely removed from the kitchen and should have checked the kitchen after its removal. The Club by its servants was aware of the open pipe left in the kitchen and should have plugged or otherwise made it safe.

Mr Lutz who had been instructed to ensure that Mr Kok removed his equipment safely failed either to do that or to arrange for it to be done.

Mr Heilig should have alerted but did not alert the Fire Service officers on the Monday morning to the fact that the pipe in which the hole had been newly made was a gas pipe.

Once the presence of the gas in the kitchen became known to Mr Lutz, the Club was aware of an obvious danger on its premises. Mr Lutz and the Club, in causing the plaintiff to go into the gas affected area and then letting him remain in the kitchen, were in breach of the Club's duty to act as a prudent and reasonable occupier.

Negligence of Boral

Angel J held that Boral was vicariously liable for what Mr Crooks did in turning on the gas without checking as to the consequences of doing that. He noted that Boral knew that Mr Kok was not in need of gas, which Mr Crooks also knew, as he was at the premises to take a final reading. Turning on the gas as he did was a negligent act. Mr Mittermier's lack of supervision and failure to correct Mr Crooks's action were also negligent conduct. In the circumstances as known to the two men, it was unsafe to turn on the gas without enquiry.

Negligence of the Fire Service

Angel J's primary reasons for finding the Fire Service also guilty of negligence, were, in summary: Mr Stubbs knew, when inspecting the kitchen on the Monday morning, that a wok had been recently removed from the kitchen, that gas was

supplied to the kitchen, and that there were two unplugged pipes in the space where the wok had been; he ought to have known that one of these was a gas pipe and the other a water pipe. Mr Stubbs later acknowledged the situation on the Monday morning had been "highly dangerous". Angel J amplified these reasons to some extent when dealing with the set of arguments relied on by the Fire Service.

THE FIRE SERVICE'S ARGUMENTS BEFORE ANGEL J

Angel J noted that for the Fire Service it had been argued that it had owed no duty of care to the plaintiff; neither the requisite proximity nor foreseeability had been established; to establish proximity against a public authority with statutory powers the use of which could have protected the plaintiff from risk but which had not by positive conduct created or contributed to the relevant risk, reliance was an important factor; there was no evidence of reliance by the plaintiff on anything done, said or omitted to be done or said by the Fire Service; reliance on the inspection, given that it was for Liquor Act purposes, even if it could be shown, would not be reasonable; from the point of view of the Fire Service it was not reasonably foreseeable that Mr Crooks would do what he did or the plaintiff would go into a gas filled kitchen in the way that he did.

Angel J rejected these arguments. He noted that in putting the "reliance" argument the Fire Service had referred to the High Court's decision in *Sutherland Shire Council v*

Heyman (1985) 157 CLR 424. He thought that case distinguishable because it had not there been shown the Council had inspected the footings which caused the damage, whereas the Fire Service had inspected and seen the open gas pipe from which, some hours later, the gas had come which exploded, damaging the plaintiff.

It followed, in Angel J's view, that the plaintiff had to satisfy him only of general reliance upon non negligent performance, and, implicitly, he held such reliance established. The Fire Service had had the power to inspect and give notice to remedy the open gas pipe. The power was exercised and was exercised carelessly. There was proximity both of time and place and the event which needed to be reasonably foreseeable was that of risk of injury from explosion which in the judge's view was indeed reasonably foreseeable. The duty of care was thus established. In the judge's view if the Fire Service had not been careless but had given the Club notice of the need to plug the open pipe, the Club would have seen to it that the pipe was plugged. In his view therefore negligence against the Fire Service was established.

ARGUMENTS ON APPEAL

Main heads of argument

On the appeal counsel for the Fire Service repeated and elaborated the arguments which had been put to Angel J. He submitted that on the materials before Angel J:

1. There had not been the requisite proximity between the plaintiff and the Fire Service.
2. Looked at from the viewpoint of the Fire Service, the explosion was not reasonably foreseeable.
3. If the Fire Service had been under a duty of care to the plaintiff, there was no breach of it.
4. The Fire Service did not in any relevant sense cause the explosion.
5. If any act or omission of the Fire Service should be regarded as a cause of the explosion for legal purposes, actions by other persons after the act or omission of the Fire Service had been subsequent causes which should be regarded as the only effective causes of the explosion for legal purposes.

The submissions put to the court on behalf of the Fire Service were very detailed and thorough, as were those of the other parties. My reasons do not deal with all the ways in which the various arguments were put, but are intended to indicate my opinion on the material matters of substance in the Fire Service's submissions. For example, I do not specifically refer either to *Hurling v Haines* (1987) ATR 80-103 or *Parramatta City Council v Lutz* (1988) 12 NSWLR 34 because although they are instructive cases in the general area relevant to the Fire Service's appeal, they do not seem

to me to require discussion when the quite different circumstances of the present case are borne in mind together with the views I have formed as to the way the present case should be treated. Anyone sufficiently interested should be able to understand from reading my reasons and the two cases together why I do not think it would be particularly useful to anyone for me to go into any greater detail than I have.

Duty of care

Submissions 1 and 2 were both relevant to the question whether the Fire Service was under a duty of care to the plaintiff. It was not contested that the Fire Service was, for the purposes of the case, in the category of a public authority. When the liability of a public authority for negligence is in question, it was submitted that a material factor in deciding whether the authority owed a duty of care in the circumstances is that of reliance. Without showing reliance, a plaintiff could not show proximity or a duty of care. *Heyman* was said to justify this proposition. For the Fire Service it was contended that the application of *Heyman*, properly understood, to the facts of the case, meant the plaintiff must fail against the Fire Service.

It is therefore necessary to see what was decided in *Heyman*.

Heyman: purpose of following discussion

The individual reasons of the judges in *Heyman* covered a lot of territory, not all of which is relevant for present purposes. What follows is not intended by any means to

be an exhaustive discussion of the case, but an attempt to gather together the elements most important for consideration in the present appeal. These include not only those relevant to the Fire Service's submissions, but also the discussion in the case of the proper approach to deciding whether or not a duty of care is present in any particular set of circumstances. *Heyman* is a significant case in a sequence of decisions by the High Court on this topic.

Heyman prior to reaching the High Court

The case came from the New South Wales Court of Appeal ((1982) 2 NSWLR 618) which had upheld a trial judge's decision in favour of plaintiffs against the Sutherland Shire Council.

The plaintiffs in 1975 had bought a house in the Council's area built in 1968 with inadequate footings. Council officers had inspected the house when under construction. The inadequate footings were not detected. In 1976, damage, due to subsidence caused by the inadequate footings, became apparent.

The plaintiffs' case against the Council was that the Council when inspecting the footings had negligently failed to detect their inadequacy.

The trial judge had found that an inspection had been made while the foundation trenches were open. The Court of Appeal held this finding was not justified on the evidence, and the appeal was decided on the basis that only one inspection was proved, after the frame of the house had been constructed, and the footings covered over; and that there was

no evidence that there had earlier been an inspection of the foundations and footing. The court took the view that if there had been an inspection it must have been a negligent one; if there had not, the failure to inspect was negligent.

This conclusion was based on the view that the decision of the House of Lords in *Anns v Merton London Borough Council* (1978) AC 728 established that a public authority would be liable for (i) not properly exercising its discretion as to the making of inspections, (ii) not using reasonable care (whether by act or omission) in securing that legal requirements applicable to foundations were complied with and (iii) its inspector not using reasonable care in securing that legal requirements application to foundations were complied with, *if* the inspector had assumed the duty of inspecting the foundations *and* was not acting in the bona fide exercise of a statutory or regulatory discretion: see Hope JA at 627, and, implicitly, Reynolds JA at 633, 634.

Heyman in the High Court

Five judges sat in Heyman. Gibbs CJ, Mason J, Brennan J and Deane J each wrote fully considered opinions. Wilson J wrote a short agreement with Gibbs CJ in which he reserved his opinion on one point. All five agreed to order reversal of the decisions of the courts below. Judgment was entered for the Council.

In one sentence, the reason for their decision followed from their conclusion that the law stated in *Anns* should not be adopted in Australia. However, this conclusion

was reached only after the reasoning in *Anns*, and many aspects of the law of negligence were thoroughly reviewed in each of the four opinions.

Such review involved consideration of a number of topics: the basis of the common law duty of care; the parts played in deciding whether a duty of care existed in a particular case by the concepts of reasonable foreseeability and proximity; the particular position of public authorities in regard to these matters, and in this connection (i) the relevance of the distinction between acts and omissions and (ii) the concept of reliance; and the different approaches in negligence doctrine to claims for loss from damage to property, and economic loss.

All judges accepted as correct the same factual basis as to inspection as had been reached by the Court of Appeal.

Heyman: common law duty of care

All the judges approached the question of the common law duty of care by considering the rightness or wrongness of the view, adopted by some courts in reliance on what Lord Wilberforce had said in *Anns*, that reasonable foreseeability that carelessness on the part of D will cause damage to P, prima facie raises a duty of care owed by D to P, which might however be negatived, in particular cases, on policy grounds. All the High Court judges rejected this view.

Heyman: proximity

In two of the opinions (those of Gibbs CJ and Deane J) emphasis was placed on the concept of proximity.

Gibbs CJ thought the first question in deciding whether a duty of care existed (in cases not falling into a category already recognised as attracting such a duty) was whether there was a relationship of neighbourhood or proximity between P and D (at 441).

Mason J did not consider proximity in the same way as Gibbs CJ, and mentioned it only in his discussion of reliance (at 461). In his reasons he examined the possibility that reliance was the major determinant of the existence of a duty of care.

Brennan J did not deal directly with proximity either. After stating, in common with the other judges, that mere foreseeability was not enough to found a duty of care, he said "there must also be either the undertaking of some task which leads another to rely on its being performed, or the ownership, occupation or use of land or chattels to found the duty" (at 479). In his view the law of negligence should develop not by reference to some general principle (difficult to state) and subject to policy limitations (equally difficult to state) but by adding new categories of cases giving rise to a duty of care "incrementally and by analogy with established categories" (at 481).

Deane J examined the relation between "reasonable foreseeability" and "proximity" at length. He saw "proximity",

despite some ambiguities and difficulties which the general notion involved, as a control of the circumstances in which a duty of care to avoid reasonably foreseeable injury should be found to exist (at 496, 497). He explained his understanding of the general notion of proximity as follows:

> "The requirement of proximity is directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff. It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and what may (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connexion or relationship between the particular act or course of conduct and the loss or injury sustained. It may reflect an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another or reliance by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance. Both the identity and the relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of case. That does not mean that there is scope for decision by reference to idiosyncratic notions of justice or morality or that it is a proper approach to treat the requirement of proximity as a question of fact to be resolved merely by reference to the relationship between the plaintiff and the defendant in the particular circumstances. The requirement of a relationship of proximity serves as a touchstone and control of the *categories* of case in which the common law will adjudge that a duty of care is owed. Given the general circumstances of a case in a new or developing area of the law of negligence, the question what (if any) combination or combinations of

> factors will satisfy the requirement of proximity is a question of law to be resolved by the processes of legal reasoning, induction and deduction. On the other hand, the identification of the content of that requirement in such an area should not be either ostensibly or actually divorced from notions of what is 'fair and reasonable'... or from the considerations of public policy which underlie and enlighten the existence and content of the requirement." (at 497-498)

Heyman: public authorities

In regard to public authorities, all the judges were substantially in agreement that the ordinary principles of negligence apply but subject to some adjustment: Gibbs CJ at 442-3, 445; Mason J at 456; Brennan J at 484, 485 and generally 482 and following; Deane J at 500. However what I have called "adjustment" (borrowing from Mason J at 456) was dealt with somewhat differently in the various opinions.

Gibbs CJ pointed out, in effect, that the circumstances in which a public authority would be held to be under a duty of care could be more limited than in the case of other persons. Although in his view acts of omission could give rise to liability (at 443) that would only be so where the authority was under a *duty* to act (at 443-5). He also suggested that it might be difficult in some cases for a plaintiff to establish against an authority that the authority's negligent failure to act caused the damage complained of by the plaintiff (at 445-6). A *duty* to act might exist because of the terms of the statute relevant to the authority's operations; on the other hand the relevant statute

would sometimes confer *powers* to act which did not impose duties.

The adjustment Mason J saw as necessary to the application of common law principles of negligence to public authorities was that policy making, and perhaps, discretionary decisions, would be excepted, (at 457-8); however, an authority not under a statutory obligation to exercise a power would not generally come under a common law duty of care to use it, unless by its conduct it attracted a duty of care calling for the exercise of the power (at 459-60). He then identified situations exemplifying this and went on to suggest that there were further situations where an authority under no duty to exercise a power nevertheless attracted a duty of care to others who could be treated as relying on past practice or conduct of the authority (at 461).

Brennan J, after recognising that a public authority engaged in the performance of statutory functions may be under a general duty of care said that such a duty could not extend to exercising the statutory power to prevent injury to another unless either Parliament had imposed such a duty or the authority had itself created or increased the risk of injury of that kind (at 485). He then discussed "reliance" situations.

Deane J's comment on this point was that common law liability for negligence is precluded in regard to actions taken in the exercise of policy-making powers and functions of a quasi legislative character (at 500).

As to the action/omission distinction he said first that omissions just as much as acts could be breaches of the duty of care but the distinction between the two categories of conduct remained important at the earlier stage of deciding whether a duty of care existed. Prima facie there was no general duty to take reasonable care that another person does not sustain loss or injury; such a duty arises only in exceptional cases such as (i) where in the circumstances an obligation is apparent or the relationship is such that the obligation is implicit and (ii) cases involving reliance upon care being taken by an authority acting under statute or pursuant to office or because of the possession or occupation of property (at 501-502).

Heyman: economic loss

Gibbs CJ would not have characterised the damages claim as being one for pure economic loss (at 447). Mason J does not appear to have committed himself, because in his view it did not matter whether the damage was characterised as economic loss or physical damage, in the circumstances of the case (at 466). Wilson J reserved the question of the proper characterisation of the loss (at 471). Brennan J, like Mason J, does not appear to have thought it necessary to categorise the nature of the damage for the purposes of the case (see 493-494). Deane J thought the damage claimed was for economic loss (at 504). For him, it followed from this that there would need to be special circumstances or a special

relationship before a duty to take care to avoid such pure economic loss could arise (at 502-503).

The ground of decision in each opinion

Gibbs CJ's reasoning was that (1) the Council had no statutory duty to inspect the building at any time before completion; (2) nor was there anything in the relationship between the Council and the building owners or in the circumstances giving rise to a duty to inspect; (3) the Council had a power of inspection; (4) the Council had a discretion as to how and when it should exercise its power to inspect; (5) the Council's duty was to consider how and when it should exercise its powers; (6) therefore the plaintiffs had had to show that the Council was in breach of its duty to consider how to exercise those powers; (7) (a) the plaintiffs had not sought to make such a case at the trial; (b) there was no evidence in the record upon which such a breach could be found; (8) the duty alleged had not been proved; a different and lesser duty had been proved, but there had been no breach of it, and therefore the plaintiffs had not established all the ingredients of a cause of action.

Mason J had asked himself the question:

> "In what circumstances, if at all, is a public authority liable in negligence for loss or damage suffered by another through the fault of a third party, when the authority fails to perform a statutory function which has as its object the prevention or mitigation of loss or damage of that kind." (at 456)

His answer was that there were several categories of circumstances in which the public authority would be liable.

One of these was the category of situations in which a public authority, not otherwise under a relevant duty, by practice or past conduct placed itself in such a position that others relied on it to take care for their safety with the result that the authority came under a duty of care calling for positive action to protect the safety or interests of another or at least to warn the other of personal danger or that the other's interests were at risk (at 461). Reliance could be specific or general.

After considering the reliance category and the other categories of circumstances in which his question would be answered yes, Mason J came to the conclusion that the only one arguably present and requiring consideration in the instant case was that of reliance (at 466). Later, he said for the judgment in favour of the plaintiffs to be sustained it would have to be

> "on the footing that the appellant was in breach of a duty of care based on a general reliance or dependence on the appellant having investigated the building and having satisfied itself that the building complied with the Act and Ordinances." (at 470)

It would have to be general because the plaintiffs could not establish any specific reliance on the Council's powers of inspection. But no case of general reliance had ever been put forward by the plaintiffs. He added that such a case would have encountered difficulties. The case for general reliance not having been advanced at any stage of the

proceedings, the Council had not owed the plaintiffs a duty of care.

Brennan J's reasoning was that (1) although a public authority engaged in the performance of statutory functions not inherently dangerous may be under a general duty of care, the duty of care can only be to act to prevent injury to another where either Parliament has imposed such a duty or the authority has itself created or increased the risk of injury of that kind (at 485), or has adopted a practice of so exercising its powers that it induces reasonable expectation of continuing the practice (at 486); (2) the statutory provisions did not impose such a duty; (3) the Council had not itself created or increased the risk of the injury that occurred; (4) the plaintiffs could not invoke the reliance idea; (5) the Council was therefore under no duty to act to prevent the consequences of the builder's negligence and their case had to fail.

Deane J's reasoning ran: (1) there is no prima facie general duty of care to take positive action to prevent reasonably foreseeable injury being sustained by another or to avoid causing mere economic loss (at 510); (2) a duty of care to the plaintiffs could only be found if there were factors additional to foreseeability involved in the relationship between the plaintiffs and the Council; (3) in his view, the relevant factors were all negative: there was no contact between the plaintiffs and the Council before the house was bought; there was nothing to suggest the Council had assumed

any special duty or obligation to any of the builder, the previous owners or the plaintiffs; there was nothing in the evidence to suggest that the plaintiffs or anyone else placed any reliance upon exercise by the Council of statutory powers; (4) thus no duty of care arose, and the plaintiffs must fail; (5) the scope of his decision was explicitly confined; his conclusion that there was no relevant duty of care owed by the Council was "based to no small extent on the particular combination of factors involved in the case including the nature of the damage" (at 512); his conclusion "could not be directly applied" either in a case of reliance or one of ordinary physical injury sustained following collapse or partial collapse of a building due to inadequate foundations; and, had there been a duty of care, he would have agreed with the trial judge's finding of negligence (at 512).

The Fire Service's Reliance Argument

For the Fire Service it was argued that for it to have been liable for negligence if sued by the plaintiff, the plaintiff would have had to show specific or general reliance upon the Fire Service's practice of inspecting the Club's premises for, putting it in my own general words, safety purposes. It was submitted that it was obvious that there had been no evidence of specific reliance and it was further submitted that there was no basis in the evidence for any finding of general reliance either.

On the basis of my understanding of the lines of reasoning of the judges in *Heyman* I do not accept the Fire

Service's submission that it was essential in the present case for the plaintiff to prove reliance in order to succeed.

The idea of reliance did not play any significant part in the way Gibbs CJ reached his conclusion (and thus also Wilson J).

The remaining three judges did each refer to reliance. Neither Brennan J nor Deane J gave particular attention to the concept. Mason J did. All three indicated that if the plaintiffs in *Heyman* had been able to prove reliance the result would have been different.

I do not think however that any of the three indicated that proof of reliance was the *only* way in which a plaintiff claiming damages for negligence from a public authority could succeed.

It is possible the detailed attention Mason J gave to reliance carried a suggestion he might be prepared in later cases to consider whether the reliance notion might not be a better criterion for deciding whether a duty of care existed in a particular case than the proximity notion. However, in *Heyman*, he did no more, at most, than indicate such a possibility for future consideration, and neither Brennan J nor Deane J gave any similar indication.

I do not consider that *Heyman* has the conclusive effect in favour of the Fire Service which was claimed for it. That is, I do not think that in deciding whether the Fire Service was negligent as against the plaintiff the only way in which the question can be answered is by holding affirmatively

that the plaintiff relied, specifically or generally, upon the Fire Service in the way earlier mentioned.

I reach this conclusion not only on the basis of what was said by the various judges in *Heyman* itself but also in the light of later explanations by the High Court of what are the relevant matters for courts to take into account in deciding whether a duty of care arises in particular cases.

The proximity debate

The principal decisions after *Heyman* (which was preceded by *Jaensch v Coffey* (1984) 155 CLR 549) are *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340; *Cook v Cook* (1986) 162 CLR 376 and *Gala v Preston* (1991) 172 CLR 243. *Gala*, the latest of these cases, is of particular significance because in it a majority of the court (Mason CJ, Deane, Gaudron and McHugh JJ) said, in a joint opinion, that it had been established by previous decisions of the court

> "that a relevant duty of care will arise under the common law of negligence only in a case where the requirement of a relationship of proximity between the plaintiff and the defendant has been satisfied. ... The requirement of proximity constituted the general determinant of the categories of case in which the common law of negligence recognises the existence of the duty to take reasonable care to avoid a reasonably foreseeable and real risk of injury." (at 252-253)

The fact that four members of the court joined in the explicit adoption of the proximity criterion is significant because, beginning with *Jaensch*, the cases in the

series had evoked considerable interest and comment, some of it critical. Brennan J in the earlier cases had rejected the notion of proximity in its extended sense as a working criterion of liability; he maintained his opinion in *Gala*: see at 261. McHugh J, had, extra curially, expressed doubt about the usefulness of the proximity criterion: in "Neighbourhood, Proximity and Reliance" published in *Essays on Tort* (1989) ed P. Finn, pp 5-42.

The criticism of the proximity criterion continued, notwithstanding that in *San Sebastian* four judges had relied on it. Thus, the statement in *Gala* in 1991, by four members of the court jointly of the validity of the criterion, with McHugh J as one of the four, would seem to be the most definite possible indication that the court was asserting authoritatively the validity of the proximity criterion, and putting to rest the controversy about it, until such time, if ever, as the High Court thought fit to permit it to be reopened.

Relation of proximity and reliance

There seem to me to be two consequences of the position now established by the High Court which are relevant for the purposes of the present appeal. One is that courts in Australia should abide by what was said by the High Court concerning proximity in the abovementioned cases; I think this has the result that the passage from Deane J's reasons in *Heyman* at 497-498 set out earlier in these reasons (at pp 28-29 above) should be adopted and applied by Australian courts

in cases to which it is relevant. The other consequence is, I think, that the reliance criterion discussed in particular by Mason J in *Heyman*, and mentioned in other opinions and cases, falls into place as a species of proximity; that is, if reliance can be shown, then it must follow, I think, that the relevant requirement of proximity is likewise established. Proximity however can be established by other means than by showing reliance.

Application of proximity criterion in present case

I return to the passage from Deane J's reasons in *Heyman*, at 512, which I referred to earlier (see p35 above). As I understand the passage, he was there making clear that his conclusion that no relevant duty of care had been owed by the Council in *Heyman* would not necessarily be applied in a case brought against a public authority claiming damages for physical injury following collapse or partial collapse of a building due to inadequate foundations. From this I take it that in a case of physical injury of whatever kind, allegedly caused by a public authority, the question whether the authority owed the plaintiff a duty of care would turn on whether one or more of the kinds of proximity described by him at 497-498 of *Heyman* (pp 28-29 above) were thought by the court to have been shown. The question thus would be whether there had been shown one or more of: physical proximity in the sense of space and time, circumstantial proximity such as an overriding relationship of some kind; and causal proximity in

the sense of the closeness or directness of the causal connection between the government authority and the injury.

In the present case the physical facts concerning proximity in space and time were that the two Fire Service Officers were in the Club kitchen within six hours of the explosion. All the ingredients of the subsequent explosion were in place. All that remained to happen was the turning on of the gas from outside the kitchen, the accumulation of gas and a spark. The officers saw the hole in the gas pipe. Had the inspection preceded the explosion by a week, then the distance in time between the Fire Service and the plaintiff would have been greater and, depending on the other circumstances, for in such an event they would necessarily have been at least to some extent different, a court might be reluctant to say there was proximity in time. Had the inspection preceded the explosion by an hour, it would be very difficult as a simple matter of fact, to deny proximity. As to proximity of space, the inspection was, inter alia, of the kitchen, the place of the accident.

It seems to me to be within the bounds of ordinary language to conclude that as a matter of fact, between the officers of the Fire Service and the plaintiff, there was proximity of space and time. Deane J makes clear, however, in *Heyman* at 498 and elsewhere, that a finding of physical proximity of space and time is not merely a question of fact. An evaluative step by the court is necessarily involved. In deciding whether this kind of proximity exists the court must

have in mind what is fair and reasonable and considerations of public policy.

An evaluative element is also present in deciding whether there is causal proximity. By bringing the notion of causality into the question whether the necessary proximity for the existence of a duty of care exists, Deane J was bringing into view the close connection between the first and third of the three elements which have been accepted as necessary for a plaintiff to establish in a case of negligence: duty of care, breach of duty, and damage flowing from the breach.

The continued use of this tripartite approach to negligence cases is an indicator that it has been and remains generally workable in practice. However it tends to obscure the fact that what is decided in each negligence case in court is whether D is to pay damages to P because of one happening. In the general run of cases, P brings proceedings against D because P has suffered damage and D is in some way connected with the happening of the damage. The court is always looking at damage that has already happened to P. The question asked is always whether D should pay P for what D did, and it is always asked in the situation where P has suffered damage and D has been connected with it. That is, trying to state in a compact way what in fact has happened all at once, the court is looking at a D-connected damaging-to-P event.

The first and third steps in the accepted approach raise issues about this one event which may be expressed, in

regard to the first step, what was D's relation to P in connection with the event, and in regard to the third, what was D's relation to the damage suffered by P. In the general run of cases, the prevailing understanding of the law means that there is little dispute about the answers: as for example in cases of motor car collisions. In the more difficult cases, a judgmental evaluation is involved in the third step, just as much as in the first.

Matters relevant to the third step were recently dealt with by the High Court in *March v Stramare Pty Ltd* (1991) 171 CLR 506. In this case, Mason CJ recognised that value judgment has a part to play in resolving causation as an issue of fact (at 515); in indicating this he recalled that Dixon CJ, Fullagar and Kitto JJ had said in *Fitzgerald v Penn* (1954) 91 CLR 268 that causation was "not susceptible of reduction to a satisfactory formula" (at 278). Mason CJ also recognised in *March* that there will be some instances where between the careless act of D and the occurrence of the damage to P there will be another careless act by another person being a more immediate and direct cause of the damage than D's careless act but that D will nevertheless be liable to P. *March* itself was such a case, Mason CJ saying that D's careless act was "properly to be regarded as a cause of the consequence because there is no reason in common sense, logic or policy for refusing to so regard it" (at 519).

Deane J took a similar view:

> "For the purposes of the law of negligence, the question of causation arises in the context of the attribution of fault or responsibility whether an identified negligent act or omission of the defendant was so connected with the plaintiff's loss or injury that, as a matter of ordinary common sense and experience, it should be regarded as a cause of it. ..." (at 522)

Toohey J agreed with Mason CJ. Gaudron J agreed with both Mason CJ and Deane J.

Both Mason CJ and Deane J had dealt in some detail with what was called the "but for" test of causation. They did not think it should be used as a definitive test, although it could be a useful aid (per Deane J at 522).

McHugh J argued in favour of the "but for" test on the basis that it reduced the area of value judgment involved in the test adopted by the majority. However, having made his point in *March*, in the subsequent case of *Bennett v Minister of Community Welfare* (1992) 66 ALJR 550 he recognised the authority of the decision in *March* and used the majority rule in that case in his own opinion (see at 558).

It may be that it would be appropriate to use the *March* test of causation in considering the causal proximity described by Deane J. However, I will defer consideration of causality until I reach the third step in the usual way of looking at the cause of action.

Returning then to the proximity question as being a question of proximity in the sense of space and time, and having earlier said that in a mere physical sense it seems to me that there was the necessary proximity in this case, the further question must be answered whether the same conclusion

should be arrived at after taking into account the notions of fairness, reasonableness and public policy which Deane J said should not be divorced from consideration of the question. That is, as a matter of judgment, should the court say that there was a duty of care in the present case based on proximity of space and time.

In my opinion the court should take that step. The factors which I identify as leading me to that opinion are, in addition to the factual matters already mentioned, those matters bearing on why the Fire Service officers were at the Club on the Monday morning, what their duties required them to do and what, in my view, general community expectation is of what is done by such officials. In this connection, to describe them as public servants seems to me to be appropriate.

Mr Stubbs handed to the Club immediately after the inspection a report saying the inspection had been carried out in accordance with s 13 of the Fire Brigades Act and s 8 of the Places of Public Entertainment Act.

Section 13 of the Fire Brigades Act gave authorised members of the Fire Service a number of powers. It was not suggested for the Fire Service that their officers were not duly authorised at the time of the inspection. The powers included power at any time to enter a building used for public entertainment or public gathering to see whether statutory provisions relating to the prevention of fire or the protection of the public from danger arising from fire had

been complied with; power to enter premises where any explosive or inflammable matter was present to ascertain whether the statutory provisions relating to the storage or keeping of explosives or inflammable matter had been complied with; power to enter buildings to examine the state of repair of the building and the arrangement and condition of contents; power, when an opinion was formed of direct or indirect danger by fire to life or property from the state of repair, the arrangement or condition of a building or its contents or inflammable matter, to give notice in writing requiring the owner or occupier to take action for eliminating or reducing the danger of fire. Failure to comply with the requirements of the notice was an offence. Section 14 of the Act gave a person served with a notice a right of appeal to the Minister.

Section 8 of the Places of Public Entertainment Act empowered the Minister to refuse to issue a licence under that Act unless he was satisfied that proper arrangements had been made inter alia against risk from fire and for the safety of the public.

It seems to me that the statutory powers were such, when exercised, as went to safety generally of the Club premises, within the parameters of the subject matter of the particular powers. It seems to me that the duty of the Fire Service officers was to inspect the Club premises, including the kitchen, with a view, inter alia, to making reasonably sure, within the parameters referred to, that the state of the premises was safe for the various users of the premises. The

actions of the officers and their evidence indicate that they took the same view of their function. One example of this is the requirement on the inspection report that particular steps were to be taken in the kitchen in the interests of fire safety.

In my opinion the Fire Service in carrying out the inspection was under a duty to do so with reasonable care, such duty being owed to the Club and to the class of persons who would in the ordinary course of affairs be upon the Club premises. In my opinion this class included the plaintiff.

Breach of duty

It was contended for the Fire Service that the inspection conducted by the officers was not a careless one. Although they saw the open gas pipe they did not realise that it was a gas pipe and therefore that it had a potential for danger. It was said that it was the fault of the Club, through Mr Heilig, who knew the situation, that the officers remained unaware of the significance of the hole in the pipe.

I agree that the Club contributed to the continuance of the dangerous situation by not telling the officers of the nature of the pipe, but it does not seem to me that that answers the claim that the officers were careless in their failure to enquire about the nature of the pipe.

It was said on behalf of the Fire Service that had the officers enquired further, they would only have got to the same state of knowledge of the situation in the kitchen as that already possessed by the Club.

Again, that seems to me to be correct, but not an answer to the claim. Both officers gave evidence that had they realised the pipe was a gas pipe they would have seen to it that the gap was plugged.

Against this, it was argued for the Fire Service that the officers had no power to compel the plugging of the pipe. All they could have done was to tell the Club, whether by notice or otherwise something which (so it was argued) it already knew. It could therefore not be inferred that notice or warning by the Fire Service officers would have changed what happened.

I do not agree with this view of the probabilities. Even leaving aside the question whether Mr Stubbs could have given written notice to fix the pipe, it seems to me highly probable that had the officers told Mr Heilig that the gap should be plugged something would have been done about it. Mr Heilig may well have known, without paying much attention to it at the time, that the open pipe was a gas pipe. Had the inspecting officers, whose favourable report the Club was anxious to obtain in order to have its licence restored, made a specific request, it must have had the double effect of making Mr Heilig immediately and specifically aware of the desirability of plugging the hole and of giving the Club an immediate incentive to do so in order to satisfy the officers.

After allowing for the advantages of hindsight, it still seems to me fairly obvious that for officers, inspecting a kitchen with a gas fired griller still in it, and observing

that other equipment had just been removed, leaving a pipe with a freshly made hole in it, it would have been no more than ordinary prudence to ask for an explanation of the open pipe. The failure to ask that question seems to me to mark the inspection as in that respect a careless one.

Causation

In my opinion the careless inspection of the kitchen was, in the legal as well as merely physical sense, *a* contributing cause to the explosion. It is true that the explosion would not have happened in the way it did had it not been for Mr Crooks's turning on of the gas. That action and then the subsequent actions of the Club in dealing with the gas filled kitchen were obviously much more directly causative of the plaintiff's damage than the careless inspection. However, it seems to me probable that the damage would not have occurred had there been a reasonably careful inspection by the fire officers.

If the court were in a position where it was obliged to say what was *the* cause of the explosion, it would not be right to say that the Fire Service was the cause. Courts formerly had to decide, in a case between P and a sole D, whether D was *the* cause of P's damage when D was raising contributory negligence on the part of P as a defence to P's claim. P could only succeed if the court held that D was the cause of the damage. This meant that in cases where, on an ordinary language approach, P was partly the cause of the damage as was D, D escaped liability altogether. This

situation came to be recognised as unsatisfactory both because it was thought to be unfair to plaintiffs and, less obviously, because it frequently put courts in the position of assigning a single cause to an event when it was unrealistic to do so.

Once the law reached the position of recognising that in some circumstances it is appropriate to assign more than one cause to a particular happening it necessarily followed that the number of situations in which the novus actus interveniens rule would enable a defendant to avoid all liability would become significantly fewer. As Mason CJ said in *March*, in which he discussed these matters in some detail:

> "These days courts readily recognise that there are concurrent and successive causes of damage on the footing that liability will be apportioned as between the wrongdoers." (at 512)

This approach indeed seems to be required by s 12(4) and s 13 of the Law Reform (Miscellaneous Provisions) Act. In my opinion it is appropriate in the present case. Adopting the words of Deane J in *March* at 522, my view is that the connection of the careless inspection of the Fire Service to the plaintiff's loss was such that the Fire Service should be regarded as a cause of it.

FIRE SERVICE APPEAL: CONCLUSION

I agree with Angel J's conclusion that negligence of the Fire Service was established. In my opinion the Fire Service's appeal should be dismissed.

BORAL'S APPORTIONMENT APPEAL

Decisions as to the extent of the different tort feasors' responsibility for the plaintiff's damage in circumstances such as those of the present case are decisions upon which minds can reasonably differ. Accordingly, an appellate court will not uphold an appeal from a trial judge in order to make a minor adjustment to the trial judge's finding, or indeed, to interfere with the first instance decision at all, unless it sees that the judge made some mistake of law or principle or misunderstood the facts in some material way; this is subject to the qualification that there are some situations where although none of the foregoing defects appears to be present, the result arrived at below is so out of line with what the appellate court would have expected, that it will conclude that an error must have been made.

In the present case I can see no obvious error in Angel J's approach to the question of apportionment. There is however not much explanation of why he thought Boral should bear three and a half times the responsibility of the Club for the accident. I can see nothing in what Angel J says on this subject which compels or otherwise leads to the conclusion that the two defendants should be treated so differently.

Without going into detail, three matters seem to me to be of importance in regard to the Club's responsibility (as they did to Angel J). One is that the Club appreciated the need to see that Mr Kok left the kitchen in a safe condition,

but failed to meet that need. Another is that Mr Heilig did not tell the Fire Service officers that the open pipe was a gas pipe. The Club should both have taken steps itself to close the open pipe and should also have made the situation known to the Fire Service officers when the open pipe was noticed during the inspection. The last matter is the way in which the dangerous situation was handled when it became known; the Club's manager should not, in my opinion, have allowed an eleven year old boy to go into a gas filled kitchen.

Boral's fault, broadly speaking, was in leaving Mr Crooks, an inexperienced person, supervised by Mr Mittermier who neither trained nor supervised him properly, in a job where, through ignorant thoughtlessness rather than anything else, he did a careless act for which Boral was responsible. Boral was also aware that there was no stop cock intervening between the tap at the cylinder end of the gas pipe and the two appliances inside the kitchen.

My own evaluation of the comparative responsibilities of the Club and Boral, taking into account, I think, all the matters considered by Angel J, is that it is very difficult to tell them apart in point of responsibility. My own reaction to the facts is that the Club and Boral should bear equally the ninety per cent of the damages the judge attributed to them overall. The difference between this conclusion and that reached by Angel J is sufficiently large to require me to state my own opinion, in the absence of my

being able to identify any persuasive reason why the responsibility of Boral should be regarded as so much greater than that of the Club.

In my view therefore the percentages stated in orders 1, 2 and 3 made by Angel J should be altered; to enable this to be done, those three orders should be formally set aside and in their stead, the following orders made:

1. In satisfaction of the plaintiff's judgment the first Defendant contribute 45%, the second defendant contribute 45% and the fourth Third Party contribute 10%.
2. There be judgment for the first Defendant against the second Defendant for 45% of the Plaintiff's judgment.
3. There be judgment for the second Defendant against the First Defendant for 45% of the Plaintiff's judgment.

THE CLUB'S COSTS APPEAL.

Order 10 made by Angel J was that:

> "As between the Defendants with respect to the Plaintiff's costs, the costs be borne equally up to 19 October 1987 and thereafter be borne 40% by each Defendant and 20% by the fourth Third Party."

Two submissions were made on behalf of the Club concerning this order. The first was that the costs should have been apportioned between the Club and Boral in the same ratio as that between the different extent of their responsibility found by Angel J.

The transcript of the argument before Angel J concerning costs was included in the appeal papers. It shows, in my opinion, that the considerations his Honour said he would take into account in making his costs orders were appropriate ones; there is no sign of any misapprehension of principle or fact in what he indicated he was going to do. For those reasons, I would not in any event have thought it appropriate to vary an order so much in the trial judge's discretion as the costs order. Further, in light of the opinion I have reached concerning the extent of the responsibility of the Club and Boral for the damage, the costs order seems to me to be appropriate.

The second submission concerning order 10 had two parts. The first was that Angel J had wrongly refused to allow into evidence the contents of an affidavit filed on behalf of the Club. The affidavit set out details concerning negotiations preceding the agreement eventually reached pursuant to which judgment was entered against the two defendants in favour of the plaintiff. It was said that without the material in the affidavit the judge did not have all the necessary facts before him upon which to decide the costs argument. However, upon a reading of the transcript of the argument, it appeared that although the affidavit itself was rejected, all the points from it salient to the judge's costs decision were mentioned in argument and taken into account by him. Nothing therefore turns upon the rejection of the affidavit evidence.

The other aspect of this submission was the claim that the judge had not given sufficient weight to the fact that the offer eventually accepted by the plaintiff was close to the amount offered a significant time previously by the defendants. It was conceded that because the amount accepted was greater than that offered, even although only by a comparatively small amount, that the defendants could not bring themselves within Part 20 of the Supreme Court Rules which would have given them a costs advantage had the offer accepted been of an amount no greater than that previously offered. It was argued however that although the defendants could not get the advantage of Part 20, the judge should have taken into account that the substance of the relevant rules had been complied with and should have moderated the costs order accordingly. However, the rule was not complied with, and although (as we were told) the amount of the offer of compromise fell short by only a comparatively small figure of that eventually accepted, nevertheless the difference was not insignificant. This left Angel J with a wide discretion. Again, a reading of the transcript of the argument does not show any sign, in my opinion, of the judge taking or failing to take any matter into account which would indicate that his exercise of discretion had miscarried.

I therefore am of the opinion that the Club's costs appeal should be dismissed.

CONCLUSION

In regard to the Fire Service's appeal, it should in my opinion be dismissed with costs.

In regard to Boral's appeal, in my opinion orders 1, 2 and 3 made by the judge should be set aside and in their stead the orders 1, 2 and 3 earlier set out should be made. The Club should bear Boral's costs of its appeal concerning orders 1, 2 and 3.

In regard to the Club's appeal concerning costs, in my opinion it should be dismissed with costs.

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