

# **Board of Fire Commissioners (NSW) v Arduouin [1961] HCA 71; (1961) 109 CLR 105 (15 November 1961)**

## **HIGH COURT OF AUSTRALIA**

BOARD OF FIRE COMMISSIONERS (N.S.W.) v. ARDOUIN [\[1961\] HCA 71; \(1961\) 109 CLR 105](#)

Negligence

High Court of Australia  
Dixon C.J.(1), McTiernan(2), Kitto(3), Taylor(4) and Windeyer(5) JJ.

### **CATCHWORDS**

Negligence - Board of Fire Commissioners - Statutory protection from liability for damage caused by bona fide exercise of powers conferred by Act or by-laws - Scope of protection - Liability to person injured by negligent driving of fire-engine proceeding to fire - Fire Brigades Act, 1909-1956 (N.S.W.), ss. 19, 28, 46\*.

### **HEARING**

Sydney, 1961, August 1; November 15. 15:11:1961  
APPEAL from the Supreme Court of New South Wales.

### **DECISION**

November 15.

The following written judgments were delivered:-

**DIXON C.J.** This appeal involves the interpretation of a very ill-drawn appropriately expressed pleadings. The proceeding in the Supreme Court was a demurrer by the plaintiff to a plea. The Supreme Court held the plea bad and gave judgment in demurrer for the plaintiff. The defendant appealed to this Court by leave, undertaking to abide by any order as to costs which the Court might see fit to make. (at p108)

2. The statute is the Fire Brigades Act, 1909-1956 (N.S.W.). The material facts would appear to be that the plaintiff, an infant, riding a motor cycle in a public street was injured by a motor vehicle belonging to the fire brigade. The precise character of the vehicle does not appear, but it was proceeding with all speed to the place of a fire, an alarm having been given. The plaintiff by his next friend brought an action of negligence against the Board of Fire Commissioners and, except that his declaration described the Board as a body corporate created by the Act, pleaded his cause of action in an ordinary count for negligence in the management of a motor vehicle in a public street. By the plea demurred to, the defendant seems to have desired to set up facts which would enable it to reply, perhaps cumulatively, upon three sections of the Fire Brigades Act. The first is s. 19(1) which provides that it shall be the duty of the Board to take all practicable measures for preventing and extinguishing fires and protecting and saving life and property in case of fire in any municipality or shire, or

any part thereof, to which the Act applies. The second is s. 28 which provides that a fire brigade, upon alarm of fire, shall notwithstanding any provision to the contrary in any Act, proceed with all speed to the place where the fire is, and endeavour by all possible means to extinguish the fire, and save such lives and property as may be in danger. The third is s. 46 which provides that the Board, the chief officer, or an officer of the Board, exercising any powers conferred by the Act or the by-laws, shall not be liable for any damage caused in the bona fide exercise of such powers. It adds that any person who obstructs or hinders any such officer in the lawful exercise of such powers shall be liable to a penalty not exceeding fifty pounds. The plea does not traverse the allegation of negligence. For the purposes of bringing into play the provisions to which I have referred it is defective in some respects. For example there appears to be no sufficiently formal allegation of the character of the vehicle or that a brigade or part of a brigade was operating and the references to the exercise of powers which are designed to bring s. 46 into operation do not consist of adequate allegations of fact. But these matters may be passed by. The real point in the case is whether, some degree of negligence being assumed, the statute affords a defence. My conclusion can be briefly stated. **It appears to me that, on the assumption that the motor vehicle was being driven to the site of a conflagration for the purposes of extinguishing it, the driver and his principal, the Board of Fire Commissioners, were under a duty to exercise such due care for the safety of persons using the road and others likely to be endangered as would be reasonable for persons to exercise although performing that public service.** This view is consistent with s. 19(1) and s. 28 and indeed it may be said to be the ordinary legal consequence of such provisions. Section 46, however, was relied upon as meaning that, provided there was good faith, no liability could be imposed on the Board or an officer of the Board by the mere fact that the duty of due care was not exercised and the plaintiff on his motor cycle sustained injury in consequence. In my opinion, upon the proper construction of s. 46 it does not cover the use of the roadway by fire brigade vehicles for the purpose of proceeding to a fire nor does it cover performances of functions of such description of the Board of Fire Commissioners by its servants or agents. When s. 46 speaks of the bona fide exercise of the Board's powers it appears to me to be referring primarily to the exercise of powers which of their nature will involve interferences with persons or property. Of such powers s. 20 par. (e) is perhaps a conspicuous example. This example is conspicuous because it means a plain exercise of statutory power to do what would otherwise be illegal acts. I say that this is primarily the meaning of s. 46 because this is not the occasion to attempt the difficult task of defining the kind of power to which s. 46 is limited exhaustively. But it may be said generally that once a power is found which depends upon the statute and involves detriment or disadvantage to others, either necessarily or in consequence of its improper or faulty exercise, it appears to me that s. 46 is capable of applying: it is not, however, expressed in terms which make it applicable to the doing of things in the course of performing the functions of the Board, which are of an ordinary character involving no invasion of private rights and requiring no special authority. It is a function of the Board under s. 19(1) to attempt to extinguish a fire, to protect and save life. It is no doubt a duty under s. 28 for a brigade, an expression capable of including servants or agents of the Board, to proceed with all speed to the site of a fire and to endeavour to extinguish it and save lives and property. But that involves no specific power to which s. 46 would necessarily attach. Probably the decision in *Board of Fire Commissioners v. Rowland* ([1960 SR \(NSW\) 322](#); (1959) 76 WN 538 applying s. 46 is to be justified on the ground that on the facts there was but an improper exercise of the power conferred by s. 30(c). All I think that can be said in the present case is that s. 46 is not concerned with the use of a highway by fire brigade vehicles to reach the site of a fire and does not exclude a liability for negligence in the course of carrying out that duty or function. (at p110)

3. In my opinion the plea is bad. I think that the appeal should be dismissed with costs. (at p110)

**McTIERNAN J.** The cause of action contained in the plaintiff's declaration is negligence. The damage of which the plaintiff complains occurred in a collision on the highway involving a motor vehicle of the Board and a motor cycle of the plaintiff. He suffered injury and his motor cycle was damaged. The second plea (as amended) of the Board to the declaration contains matters which the Board says prevent the cause of action alleged in the declaration from arising. These matters are in substance that the fire brigade had received an alarm of fire and were proceeding "with all speed" to the place of the fire to extinguish it and that the damage in respect of which the plaintiff sues was caused in the bona fide exercise of the Board's powers under the Fire Brigades Act, 1909- 1956. The plea depends upon s. 46 of the Act. The material words of the section are: "The board, the chief officer or an officer of the board exercising any powers conferred by this Act or the by-laws, shall not be liable for any damage caused in the bona fide exercise of such powers". The plaintiff demurs to the plea, alleging that it is bad in substance for the reason that the cause of action pleaded to is negligence in the control of the Board's motor vehicle by its servants; and the operation of the section is limited by the words "bona fide"; and this condition excludes negligence. The Full Court of the Supreme Court sustained the demurrer. The result of the decision is that the Board cannot rely upon the plea which is in question. (at p111)

2. The Board is a public authority. It was created by the Act, abovementioned, for the purposes, inter alia, of preventing and extinguishing fires. Section 19(1) imposes upon the Board a duty to prevent and extinguish fires. The Board is empowered by s. 20 to organize and equip fire brigades. A fire brigade is required by s. 28, when they receive alarm of fire, "notwithstanding any provision to the contrary in any Act to proceed with all speed" to the place of the fire in order to extinguish it and save life and property. Apart from s. 20, the Act does not expressly confer any powers upon the Board eo nomine to perform the duty created by s. 19(1). Inherent in that duty are all powers reasonably necessary for its performance. These powers, therefore, are impliedly conferred by the Act on the Board. It is also to be noticed that the Act does not confer on a fire brigade eo nomine any powers in relation to the duty created by s. 28. I think that, inherent in that duty are powers reasonably necessary for its performance. Section 28 therefore includes a power to drive a motor vehicle of the Board with all speed regardless of any statutory provision which would interfere with the performance of the duty of a brigade to get to a fire as soon as it is reasonably possible. I think, too, that having regard to the provisions of s. 19(1) and s. 28, there is implied in the Act a power in the Board to direct and authorize a fire brigade to proceed in the manner required by s. 28 to the scene of a fire of which alarm has been given, and that when they respond to such an alarm, they act in the capacity of servants or agents of the Board. The provisions of s. 46 are obscure. A fire brigade is not mentioned in that section. Nor does it speak distinctly of powers conferred on the Board. It refers to "powers conferred by this Act or the by-laws". It extends to damage caused by the Board or any of the persons mentioned while exercising any such powers. I think that it is in accordance with the intention of the Act that the protection from liability which the section gives should extend to damage caused by a fire brigade in exercising any of their powers under the Act, whether expressly or impliedly given. (at p112)

3. The demurrer is drawn on the basis that, apart from the provisions of s. 46, the Act does not exempt the Board, or a fire brigade, from negligence in the discharge of their respective duties under s. 19(1) and s. 28; also, that if, as a consequence of a negligent exercise by a fire

brigade of the power inherent in their duty under s. 28, damage is caused, the Board is not liable for such damage if the exercise of the power is bona fide. (at p112)

4. The Full Court of the Supreme Court decided, in effect, that negligence in the exercise of any power under the Act and the bona fide exercise of such power are inconsistent ideas. They accepted the decision in Vaughan v. Webb ([1902](#)) [2 SR \(NSW\) 293](#); 19 WN 191; where the Court said these two ideas were not compatible. This case was decided upon the Act before s. 46 was introduced into it. In the present case the learned judges of the Supreme Court presumed that the Legislature had in mind the views of the Court in Vaughan v. Webb ([1902](#)) [2 SR \(NSW\) 293](#); 19 WN 191; when s. 46 was enacted in 1909. However, in Board of Fire Commissioners v. Rowland ([1960](#)) [SR \(NSW\) 322](#); (1959) 76 WN 538, the Full Court of the Supreme Court decided that s. 46 could extend to liability for damage caused by the negligent exercise of a power conferred by the present Act. The learned judges of the Full Court decided in the instant case that the interpretation of s. 46 given in Board of Fire Commissioners v. Rowland ([1960](#)) [SR \(NSW\) 322](#); (1959) 76 WN 538 is wrong. In the face of this conflict of judicial opinion the question whether the application of s. 46 is excluded by negligence is necessarily a difficult one. With respect, I think that the decision in the Board of Fire Commissioners v. Rowland ([1960](#)) [SR \(NSW\) 322](#); (1959) 76 WN 538 on s. 46 is to be preferred to that in the instant case. The pleading does not show what the fire brigade operating the motor vehicle did to cause the accident. Negligence may be associated with wanton disregard for the safety of others or the fault may be only some lack of due and reasonable care. I would not be prepared to hold that merely because a fire brigade operated their vehicle when proceeding to a fire at a speed too fast to be considered careful driving, they could not be making a genuine effort to do their statutory duty in the interests of the public. **It is not impossible, of course, that a fire brigade might, in proceeding to a fire, be guilty of conduct that is not only negligence in law but exhibits wanton disregard for the safety of a user of the highway injured by the fire engine.** Such wanton conduct may be cogent evidence of want of good faith. In my view it cannot be said categorically that wherever there is negligence there cannot be good faith in the exercise by the Board or their servants of the powers conferred by the Act. The plea demurred to raises an issue under s. 46 which a jury has to decide, namely, whether even though negligent the Board was exercising its statutory powers in good faith. I think, therefore, that the plea cannot be disposed of by demurrer. **The appeal should be allowed.** (at p113)

**KITTO J.** The appellant Board, being sued by the respondent in the Supreme Court of New South Wales in respect of injuries alleged to have been caused to him in a road collision due to negligence in the management of one of the Board's motor vehicles, filed a plea to which the respondent demurred. The defence which the plea was designed to raise was that even assuming that the respondent's injuries resulted from negligence attributable to the Board the action could not succeed, because in the circumstances of the collision s. 46 of the Fire Brigades Act, 1909-1956 (N.S.W.) operated to save the Board from liability. The Full Court of the Supreme Court, which heard the demurrer, held that s. 46 did not apply to the case, and its decision is the subject of this appeal. (at p113)

2. The relevant provision of s. 46 is that the Board, the chief officer, or an officer of the Board, exercising any powers conferred by the Act or the by-laws, shall not be liable for any damage caused in the bona fide exercise of such powers. The plea that was demurred to alleged in effect that at the time of the collision, which was between the respondent's motor cycle and a motor vehicle of the Board, the board's vehicle was proceeding with all speed to the place of a fire of which an alarm had been given, in an endeavour by all possible means

and by all practicable measures to extinguish the fire and protect and save such life and property as might be in danger. This, the plea said, was according to the statute in such case made and provided. The reference, plainly enough, was to the provisions of ss. 19 and 28; for s. 19 imposes a duty upon the Board to take all practicable measures for preventing and extinguishing fires and protecting and saving life and property in case of fire, while s. 28 makes it the duty of a fire brigade, upon alarm of fire, and notwithstanding any provision to the contrary in any Act, to proceed with all speed to the place where the fire is, and endeavour by all possible means to extinguish the fire, and save such lives and property as may be in danger. The plea went on to allege that at the time of the grievances in the declaration alleged the Board was exercising bona fide the powers and authorities conferred on it by and under the Act, and that the damage alleged was caused in the bona fide exercise of those powers by the Board in accordance with the statute. (at p114)

3. The Supreme Court held the plea bad, on the ground that the operation of s. 46 is only to give statutory protection to acts done in a bona fide but erroneous belief that they are authorized by the Act or the by-laws. This view of the section was at variance with that which had been taken by the same Court, differently constituted, in the case of Board of Fire Commissioners v. Rowland ([1960 SR \(NSW\) 322](#); (1959) 76 WN 538 In that case as in the present, it was recognized that s. 46 cannot intend its protection to apply only where the damage results from conduct authorized by the Act or the by-laws. This is so because statutory authorization carries its own immunity from liability, and a provision conferring a separate immunity must intend to apply where, but for its enactment, liability would attach. But the section was considered in Rowland's Case ([1960 SR \(NSW\) 322](#); (1959) 76 WN 538 to be concerned with cases where the acts causing the damage would have been within authority if they had been done with due care, but were unauthorized because performed negligently; in such a case, the Court held, the section makes bona fides a sufficient defence. (at p114)

4. Before the enactment of the section - its first appearance was in the Act of 1909 - the Supreme Court had given an important decision in the case of Vaughan v. Webb ([1902 2 SR \(NSW\) 293](#); 19 WN 191 It had held that a superintendent of fire brigades was liable to a person whose property had been damaged by the pulling down of a wall left dangerous by a fire. The question for decision arose out of an arrangement made between the parties that a verdict should be entered for the plaintiff, with liberty to the defendant to move for judgment if the court should be of opinion that, having acted bona fide, he was not liable whether he acted negligently or not. The admission of bona fides was taken to mean without any indirect or improper motive, and the decision was that bona fides in that sense afforded no defence to the action. It is to be observed that the negligence which was considered to entail liability notwithstanding the existence of bona fides was negligence in doing a thing directly within a power specifically conferred by the Act; for by pars. (III) and (VI) of s. 9 of the Fire Brigades Act 1884, 47 Vict. No. 3, (N.S.W.), the superintendent of fire brigades was empowered to cause buildings to be pulled down for the protection of life and property, and to pull down any wall damaged by fire that might be dangerous to life or property. The learned judges who decided the case proceeded on the view, plainly correct, that although in the circumstances of the case the defendant had a discretion to determine that the wall should be pulled down, and the admission of bona fides went to show that the determination to pull down the wall was a valid exercise of that discretion, there was no discretion to pull down the wall otherwise than with due care for the property of neighbours, and to a claim based upon a failure to take such care the admission of bona fides was irrelevant. (at p115)

5. It seems to me that with the decision in Vaughan v. Webb (1) before it the Legislature could hardly have had any other intention when enacting s. 46 than to provide the protection which had been shown in that case to be lacking. The learned judges of the Supreme Court who decided the present case took the expression "bona fides" to refer to a state of mind as to the availability of a power which in fact is not available in the circumstances, whereas in Vaughan v. Webb ([1902 2 SR \(NSW\) 293](#); 19 WN 191 it had been used by parties and judges alike to refer to the motives or purposes of the exercise of a power which was available but did not extend to negligent acts done in a purported exercise of it. It is hardly to be supposed that the Legislature, when enacting a provision which, from its terms, appears to go straight to the point of controversy in a recently decided case and to be dealing with the subject of decision in that case, was intending to deal with a different topic and to use "bona fide" in a different sense. It is, I think, impossible to place the judgments in Vaughan v. Webb ([1902 2 SR \(NSW\) 293](#); 19 WN 191 side by side with s. 46 and fail to perceive that the business of the section is to ensure that such cases as that will in future be decided in accordance with the argument which the Board had there unsuccessfully advanced. It is true that s. 32, in enacting that damage to property caused by the chief officer or any fire brigade officer shall be deemed to be damage by fire within the meaning of a policy of insurance against fire covering the property so damaged, stipulates that the officer must have been "purporting bona fide to exercise any power conferred or to perform any duty imposed on him by this Act". But ss. 32 and 46 are not correlative to one another; and the terms of the former provision, far from assisting the construction of the latter which prevailed in the Supreme Court, present a clear contrast with it, observing the distinction between purporting bona fide to exercise a power and exercising a power bona fide. (at p115)

6. But granting, as I think it should be granted, that the operation of s. 46 in the cases to which it applies is to extend every power conferred by the Act or the by-laws by removing the otherwise inherent limit of due care provided only that the exercise is really for the purpose for which the power exists, the question remains, in what cases does it apply. If the decision in Board of Fire Commissioners v. Rowland ([1960 SR \(NSW\) 322](#); (1959) 76 WN 538 was correct, they are a very wide range of cases indeed. In that case, the Board was sued by reason of damage to a theatre caused by the negligent use of a naked flame near an inflammable curtain, and s. 46 was held to protect it from liability because the officer who committed the act of negligence did so in the course of inspecting a screen in the exercise (so it was considered) of the power in s. 30(c) to "enter any theatre . . . to ascertain whether the provisions of any Act, ordinances, regulations, or by-laws for the prevention of fire or for the safety of the public have been contravened or have not been complied with". But whether that case was rightly decided depends on the ambit of the expression "damage caused in the bona fide exercise of such powers". The crucial word in the expression is the preposition "in". As found in some contexts, it is equivalent to "in the course of"; but where that is so it is because the nature of the provision requires an interpretation more liberal than the literal sense of the word would justify. By contrast, the protective nature of the provision made in s. 46, assuming that its purpose is to displace Vaughan v. Webb ([1902 2 SR \(NSW\) 293](#); 19 WN 191 as an authority on the Act, is such that a most strict interpretation of its words is plainly demanded. The consequences for the property, the health, the lives, of individuals affected by a negligent exercise of power under the Act may be of the most serious; yet the section takes away all remedy, if only good faith exist. And the Act, be it noted, makes no provision of its own for compensation. As already mentioned it does, in s. 32, enable damage caused to property by an officer in the circumstances there mentioned to be deemed damage by fire for the purposes of a fire policy; but that provision covers only a limited class of cases, and even where it applies all it does is to transfer the burden of the loss from the owner of the property

to the insurer. Section 46 operates, the, to derogate, in a manner potentially most serious, from the rights of individuals; and a presumption therefore arises that the Legislature, in enacting it, has chosen its words with complete precision, not intending that such an immunity, granted in the general interest but at the cost of individuals, should be carried further than a jealous interpretation will allow. (at p116)

7. What, then, is the strict meaning that should be given to the description of the damage which may be caused with immunity from liability? It is limited to damage caused "in" the bona fide exercise of powers. In my opinion the meaning is that the 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. It will be observed that the benefit of the section is confined to the Board, the chief officer or an officer. The Board may have in its service not only officers, but also firemen, clerks, servants or employees (see s. 27), and any of them may cause damage while doing things, such as the driving of vehicles, which may need to be done in the course of or incidentally to the exercise of powers of the Board. But of these persons only the chief officer and officers receive by the Act direct grants of power: see ss. 29 and 30; and the fact that out of all the persons in the service of the Board, the recipients of such grants are selected for the protection of s. 46 adds strength to the conclusion that the protection is intended only in respect of damage caused in doing things actually within the direct authorization of the Act or the by-laws. (at p117)

8. A construction similarly restricted was placed upon a differently worded provision in the case of *Marriage v. East Norfolk Rivers Catchment Board* ([1950](#)) [1 KB 284](#). That case is no authority on the meaning of s. 46, but I mention it for an illustration which was taken by Jenkins L.J. (as he then was) in order to make clear the distinction I am drawing. The Act under consideration in that case gave a drainage board a power which extended to heightening the banks of watercourses. A section of the Act made its own provision for compensation, and consequently excluded resort to the courts, in cases of injury sustained "by reason of the exercise of a drainage board of any of its powers under this section". His Lordship construed the description as applying 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". "For example", his Lordship said, "an injury caused by flooding on one side of the river due to 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". (at p118)

9. If the limited construction of s. 46 which has been indicated had been applied in *Board of Fire Commissioners v. Rowland* ([1960](#)) [SR \(NSW\) 322](#); (1959) 76 WN 538 the section would not have been held to exonerate the Board from liability in that case; for clearly the negligent management of the naked light was not itself authorized by s. 30(c). On the other hand, if s. 46 had been in force at the time of *Vaughan v. Webb* ([1902](#)) [2 SR \(NSW\) 293](#); 19 WN 191 the superintendent would have been held protected from liability; for, since the pulling down of the wall was itself the subject of a grant of power by the Act, the resulting damage was caused "in" the bona fide exercise of the power. (at p118)

10. The section being construed in this manner, the question in the present case is whether damage caused by the driving of one of the Board's motor vehicles on a public street on the way to a fire is damage caused by an act which, in the absence of negligence, would have been within, as distinguished from being incidental to, the exercise of some power conferred by a provision other than s. 46. The answer offered by the plea demurred to is that ss. 19 and 28 create duties, and therefore powers, and the Board is exercising these powers whenever one of its vehicles is being driven in an endeavour "by all practicable measures" (s. 19) and "with all speed" (s. 28) to get to a fire for the purposes which the sections mention. There is no difficulty in finding in the creation of a duty an implied grant of power. But the implication, arising as it does from necessity, must be limited by the extent of the need. There can be no implication of a grant of power to do, in the performance of the duty, what is in any case lawful. To drive a vehicle on a public street, for the purpose of dealing with a fire or for any other purpose, needs no grant of power. For that reason, neither s. 19 nor s. 28 can be said to confer a power to drive on a public street; and accordingly damage caused by an officer of the Board in driving on a public street is not damage caused in the exercise of a power conferred by either of those sections. It is caused in the exercise of the right of way which anyone may exercise in virtue of the public character of the highway. A variety of specific powers is conferred by ss. 20, 29 and 30, but the driving of a vehicle to a fire, incidental though it may be to an exercise of some of these powers, is not itself an exercise of any of them, and damage which it causes is therefore, in my opinion, not caused "in" the exercise of any of them. (at p119)

11. At times during the argument of the appeal it seemed to be suggested that the corporate capacities of the Board were all to be considered powers conferred by the Act, in the sense in which s. 46 uses the expression. The suggestion cannot be accepted, for the section operates in favour of the chief officer and an officer of the Board, and in relation to them the word "powers" cannot refer to capacities; it must mean authorities to derogate from the legal rights of individuals. (at p119)

12. For these reasons I am of opinion that the facts alleged in the plea do not show that the cause of action sued upon is one to which s. 46 affords a defence. It should perhaps be added that in the argument of the appeal reference was made to the words in which s. 28 describes the duty of the Board as being to proceed to the place of a fire "with all speed". If this meant in disregard of the safety of persons lawfully on the highway, it would provide a defence to the action apart altogether from s. 46; but plainly that interpretation is not open. The words "notwithstanding any provision to the contrary in any Act" are added, no doubt, in order to exclude statutory restrictions on speed; but the expression "with all speed" means no more than with all the speed that practical and legal considerations permit, and it has no reference at all to the topic of care. The general duty prescribed by the section, as indeed the general nature of a fire brigade's function in an emergency, may affect the application of the general test of negligence to the particular circumstances of the collision that occurred; but that is another matter. (at p119)

13. **I would dismiss the appeal. (at p119)**

**TAYLOR J.** In this appeal from a judgment for the respondent in demurrer the appellant seeks to invoke the provisions of s. 46 of the Fire Brigades Act, 1909-1956 (N.S.W.) in answer to a claim by the respondent for damages for personal injuries alleged to have been caused by the negligent driving of a motor vehicle belonging to the appellant. That section provides that the Board, the chief officer, or an officer of the Board, exercising any powers

conferred by the Act or by the by-laws, shall not be liable for any damage caused in the bona fide exercise of such powers. The Full Court was of the opinion that this provision did not render the Board immune from the consequences of negligence in the exercise of its statutory powers but this decision is in direct conflict with an earlier decision of the same Court which held that it did (Board of Fire Commissioners v. Rowland [\(1960\) SR \(NSW\) 322](#); [\(1959\) 76 WN 538](#)) (at p120)

2. As will be seen the question upon which the appellant seeks a decision is of a general character but it is only too clear that its plea is demurrable for more particular reasons. The Board is constituted as a body corporate by s. 7 of the Act. It is the duty of the Board to take all practicable measures for preventing and extinguishing fires and protecting and saving life and property in case of fire in any municipality or shire, or any part thereof, to which the Act applies. For the purposes of carrying out the provisions of the Act it may establish and maintain permanent fire brigades, authorize the constitution of volunteer fire brigades, provide for fire brigades suitable premises and the requisite fire engines, ladders, reels, carts, waggons, horses, accoutrements, plant, tools, implements and other appliances, pay subsidies to volunteer fire brigades and by its officers, servants, or agents enter any land, building or vessel where any fire has occurred, retain possession thereof and of any property therein for a reasonable time, or until an inquest has been held on the fire. It has extensive by-law making powers (s. 21) and by s. 29 the chief officer present at the fire has wide powers to take what may be regarded as emergency steps in dealing with a fire. In particular, he may cause any street or public place in the vicinity of a fire to be closed to traffic during the continuance of the fire, he may without payment use any water mains, pipes and hydrants and all water therein and cause water to flow into or to be shut off from any main or pipe for the purpose of extinguishing or controlling a fire, he may during a fire take possession of any buildings or vessels and cause such buildings to be pulled down or destroyed and cause such vessels to be removed or sunk so as to control, extinguish or prevent the spread of the fire, he may at the time of a fire or immediately thereafter pull down, destroy, or shore-up any building damaged or rendered insecure by the fire which may be dangerous to life or property, he may cause to be shut off or disconnected the supply of gas, electricity or other illuminant to any premises adjacent thereto, he may remove or cause to be removed any person, vehicle, or thing, the presence of whom or which at or near a fire might, in his opinion, interfere with the work of any fire brigade and he may take such measures as he thinks proper for the protection and saving of life and property and for the control and extinguishing of a fire. Finally reference should be made to s. 28, upon which the appellant relied to establish that the negligence of which the respondent complained occurred in the exercise of a power conferred by the Act. That section provides that a fire brigade, upon alarm of fire, shall notwithstanding any provision to the contrary in any Act, proceed with all speed to the place where the fire is, and endeavour by all possible means to extinguish the fire, and save such lives and property as may be in danger. (at p121)

3. Substantially what the appellant says is that when a fire brigade, "upon an alarm of fire", is, pursuant to s. 28, proceeding "to the place where the fire is", the Board is not answerable for damage occasioned by any negligent act in the course of so proceeding. The section, it may be observed, contains no direction concerning the means which a brigade is to employ in getting to the scene of a fire; this, of course, is an organizational matter and is solely a matter to be determined by the Board itself. The section enacted, as it was in 1909, replaced a not dissimilar section of the Fire Brigades Act of 1884, but no doubt at the time of its enactment it was contemplated that fire brigades in places to which the Act applied would, generally at least, be equipped with some kind of motor vehicle. But even if, as is contended, s. 46 confers

immunity upon the Board in respect of claims based upon negligence on the part of a fire brigade proceeding by motor vehicle to the scene of a fire the plea does not in terms allege that this was such a case. However, in the circumstances, it is desirable to pass by the particular difficulties which the form of the plea raises and to consider the substantive matters which were argued before us. (at p121)

4. Much of the difficulty in the case results from the somewhat confused language of s. 46. In terms it protects the Board against claims for damages occasioned by the exercise of the powers conferred upon it by the Act or the by-laws. But, according to one suggestion, it may be said, literally, to confine the area of protection to the bona fide exercise of such powers. This, however, is a matter of words only for, in the absence of bona fides, the purported exercise of any such power would not constitute an exercise of the power at all. At the most it would be nothing more than a pretended exercise. Again, the 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. But there is a significant distinction between its general authority and capacity to function as a statutory body and the special powers conferred upon it by the Act in relation to the prevention and control of fires. (at p121)

5. It is probable that the reference in s. 46 to the "bona fide" exercise of the Board's powers found its way into the Act after, and, in some curious way, as a consequence of, the form of the question which was propounded for the opinion of the Full Court in *Vaughan v. Webb* ([1902\) 2 SR \(NSW\) 293](#); 19 WN 191 In that case it appeared that the superintendent of fire brigades had acted negligently in demolishing a wall which fire had rendered dangerous to life and property. The superintendent had acted pursuant to s. 9 of the Act of 1884 but this Act did not contain any provision excluding liability for the consequences of the exercise of the board's statutory powers. At the trial it was agreed that the jury should find a verdict for the plaintiff for a stated amount "with leave reserved to the defendant to move the Court to enter a verdict for the defendant, if the Court should be of opinion that the defendant, having acted bona fide, is not liable whether he acted negligently or not". The Court was of the opinion that the defendant was liable for negligence in the course of the exercise of its statutory powers and in their reasons the members of the Court adverted to the confusion caused by the introduction of the concept of "bona fides" into the field of negligence. As Pring J. said, the words "bona fide when used to qualify a negligent act are quite meaningless. A negligent act is one which a man exercising ordinary care and prudence would not commit. The element of bad faith has manifestly no place in such a definition. A man may act with the most perfect bona fides and yet be guilty of imprudence or carelessness" ([1902\) 2 SR \(NSW\)](#), at p 307 That being so, his Honour, as did the other members of the Court, treated the case simply as one of negligence and since the liability of the defendant for negligent acts was not excluded by any statutory provision it was held that the plaintiff was entitled to recover. (at p122)

6. Within a few years s. 46 was enacted in its present form and in Rowland's Case ([1960\) SR \(NSW\) 322](#); (1959) 76 WN 538, the question arose whether it excluded liability for negligence. In that case the Full Court held that it extended "to protect the board and its officers from liability in doing negligently what they are authorized to do by statute, provided they have acted bona fide in purported pursuance of the statute" ([1960\) SR \(NSW\) 322](#), at p 326; (1959) 76 WN 538, at p 541 This conclusion proceeded from the view that there was no legislative necessity to afford protection in respect of acts within the statutory authority of the Board and which were, therefore, lawful; if s. 46 did that and no more then "it would be unnecessary" ([1960\) SR \(NSW\)](#), at p 326; (1959) 76 WN, at p 541 Accordingly, their

Honours then concluded that the provision must have intended to protect the Board against liability for negligent acts in the course of the exercise of its statutory powers. (at p123)

7. This view was rejected by the Full Court in the present case. Having regard to the observations in Vaughan v. Webb ([1902](#)) [2 SR \(NSW\) 293](#); 19 WN 191, their Honours saw in s. 46 an attempt to confer protection, not only in respect of acts done in the execution of any statutory power, but also in respect of acts done in the bona fide, but mistaken, belief that they were within statutory authority. It having been pointed out in Vaughan v. Webb ([1902](#)) [2 SR \(NSW\) 293](#); 19 WN 191 that, when used to qualify a negligent act, the words "bona fide" are quite meaningless, it seemed to their Honours in the last degree unlikely that s. 46 should be construed as having anything to do with a case of negligence. Accordingly, and for other special reasons which appealed to their Honours, they held that although the area of protection extended in the manner already mentioned, it provided no answer to a claim founded in negligence. That privative provisions not unlike s. 46 in their general character may extend beyond acts in fact authorized by statute is clear (see for instance, G. Scammell & Nephew Ltd. v. Hurley ([1929](#)) [1 KB 419](#), at p 427, Hamilton v. Halesworth [[1937](#)] [HCA 69](#); [[1937](#)] [58 CLR 369](#), at pp 380, 381 and Little v. The Commonwealth [[1947](#)] [HCA 24](#); [[1947](#)] [75 CLR 94](#), at pp 108-112), but whether s 46 should be so understood is, in view of the express terms of the section, open to doubt. (at p123)

8. However the proposition that s. 46 extends to cover not only acts within statutory authority but also acts done in the bona fide belief that they are within such authority has nothing to say with respect to the question whether the section extends to protect the Board from liability for the consequences of negligence in the performance of any such act. In other words to identify the general character of the acts with which the section is concerned in no way solves the problem whether the protection extends to the consequences of any such act when it is performed negligently. And, since the section must be taken to be concerned primarily with the "exercise of any powers conferred by this Act", it is pertinent to enquire what protection is conferred by the Act in such cases unless it protects the Board when the execution of any such power is accompanied by negligence. (at p123)

9. Before answering this enquiry it is, I think, desirable in the circumstances of the case to pay some attention to the expression in s. 46 "any powers conferred by this Act". The claim which is made by the declaration is for damages which are said to have resulted from the negligent driving on a public road of a motor vehicle belonging to the Board. The "act" with which negligence is said to have been associated is the driving of the vehicle and, that being so, we must ask ourselves whether, within the meaning of s. 46, that "act" was something done in the exercise of a power conferred by the Act. To my mind it is beyond doubt that it was not. It is, in my view, quite erroneous to treat the expression "powers conferred by this Act" as including the aggregate of the capacities which the Board enjoys as a body corporate constituted by s. 7 of the Act; that expression is appropriate only to specify what may be described as the extraordinary powers conferred upon the Board in order that it may properly and effectively fulfil its functions. Some of these have already been referred to and I do not think that the appellant's argument really contraverted this proposition. What it asserted was, as already mentioned, that the provisions of s. 28 operated to confer a specific emergency power and that the plea in answer to the declaration alleged sufficient to establish that the driving of the Board's vehicle occurred in the course of the execution of that power. It was, of course, readily conceded that the section is primarily concerned with imposing a duty upon fire brigades but it was asserted that the imposition of the duty invested the Board with a corresponding power. I am unable to see any force in this argument. Clearly enough the

Board had sufficient corporate capacity, quite apart from s. 28, to operate vehicles and employ drivers; its drivers needed no statutory authorization to drive its vehicles on the public streets and it would be quite artificial to treat s. 28, even though it may be taken to exempt fire brigades from the operation of some unspecified motor traffic regulations, as inferentially conferring a power recognizable as one of the "powers conferred by this Act" within the meaning of s. 46. (at p124)

10. This is sufficient to dispose of the demurrer but in view of the conflict of opinion in the Full Court I return to enquire whether, in relation to "acts" to which it applies, s. 46 protects the Board against liability for the consequences of negligence. As already pointed out the section is, at least, primarily concerned with affording protection in case of damage resulting from acts done in the exercise of powers conferred by the Act. But in the case of such acts no question of liability could arise in the absence of negligence. If, therefore, the section is to have any operation in such cases it must be taken to extend to damage resulting from the negligent performance of such acts. It is true that the section does not expressly excuse the Board from the consequences of negligence but on general principles it should be so understood. This conclusion is, I think, cogently supported by a consideration of the character of the powers with which the section is concerned. They are, in the main, special powers designed to enable the Board to deal with emergencies and it is inconceivable that, in those circumstances, s. 46 was not intended to confer protection in respect of their negligent exercise. In the result I am of the opinion that the view expressed in *Board of Fire Commissioners v. Rowland* ([1960 SR \(NSW\) 322](#); (1959) 76 WN 538 that s. 46 extended to protect the Board from the consequences of negligence was correct but that **the appeal should be dismissed on the ground that the act complained of did not fall within the ambit of that section.** (at p125)

**WINDEYER J.** The plea which is the subject of the demurrer is framed on the assumption that ss. 19, 28 and 46 of the Fire Brigades Act, 1909-1956 (N.S.W.) provide an answer to an action for negligence in the driving and management of a fire brigade vehicle going on a public street to a fire. (at p125)

2. Section 28 appears in the Act under the heading "Duties and powers". It imposes a duty on a fire brigade to go with all speed to a fire. The performance of that duty is now aided by the provisions of the Motor Traffic Act, 1909-1957, (N.S.W.), s. 4A (7), (which makes certain speed limits inapplicable to fire engines and similar vehicles whilst proceeding to a fire), and by Traffic Regulation 132 (which makes various traffic regulations inapplicable to such vehicles). Quite apart from any statute, a fire engine going to a fire may go at a speed and take risks in traffic that the driver of another vehicle could not justify. The urgency of the errand can be taken into account in determining what speed is reasonable and what risks may be justified for its performance: see e.g. *Daborn v. Bath Tramways Motor Co. Ltd.* ([1946 2 All ER 333](#)) **But this does not mean that it is permissible to drive a fire engine, or any other fire brigade vehicle, in a negligent manner. It means only that whether there was negligence is a question of fact to be determined having regard to the circumstances. To drive a fire engine without sounding the warning siren or bell when a warning was wanted would be negligent. To drive it without keeping a proper look out would be negligent. In some circumstances it might be negligent to drive it through a red traffic light; when, as Lord Denning, then Denning L.J., put it "the risk is too great to warrant the incurring of the danger.** It is always a question of balancing the risk against the end": *Watt v. Hertfordshire County Council* [[1954\] EWCA Civ 6\[1954\] EWCA Civ 6;](#) ; ([1954\) 2 All ER 368](#), at p 371 The appellant's answer to all this was to point to the words in s. 28 requiring that a fire brigade

upon alarm of fire, shall notwithstanding any provision to the contrary in any Act, proceed with all speed. The duty of a member of a fire brigade to go to a fire with all speed is thus paramount among statutory duties. Probably the words "notwithstanding any provision to the contrary" were meant to relate to provisions in the Motor Traffic Act, 1909, which, enacted six weeks earlier, authorized speed limits and required motor vehicles to stop after accidents and so forth. Section 28 by casting upon fire brigades a positive duty to go with all speed does more than merely exempting them from restrictions would do. For this reason, cases such as Ward v. London County Council ([1938](#)) 2 All ER 341; Hine v O'Connor ([1951](#)) [SASR 1](#); and the observations of Latham C.J. in South Australian Ambulance Transport Incorporated v. Wahlheim [[1948](#)] HCA 32; ([1948](#)) 77 CLR 215, at pp 219, 220 are not directly in point and need not be considered here. Nevertheless a duty to go at all speed freed of statutory restraints does not mean that care need not be exercised in doing so. The duty to use a degree of care appropriate to the task in hand arises at common law, and nothing in s. 28 removes it. The Board of Fire Commissioners is, I have no doubt, vicariously liable for the negligence of members of a fire brigade acting in the course of their duties. The contrary was not argued before us, although it was in the Supreme Court. On this aspect, reference may well be made to the interesting judgments of The Lord President, Lord Cooper and of Lord Keith in Kilboy v. South Eastern Fire Area Joint Committee ([1952](#)) SC 280 (at p126)

3. But the appellant relied upon s. 46, the words of which are incorporated in the plea. That section provides that: "The board, the chief officer or an officer of the board, exercising any powers conferred by this Act or the by-laws, shall not be liable for any damage caused in the bona fide exercise of such powers . . .". Section 28 does not confer a power. It merely imposes a duty for the due performance of which no grant of power express or implied was necessary. As the law stood before 1909 - under the Act of 1902 - the Superintendent of Fire Brigades was required "with all possible speed" to proceed to the place of a fire and there to control and direct the working of the fire brigade. The Act of 1902 said nothing about the duty of a fire brigade to go to a fire or to make haste. That went without saying; and there was no need to confer a power upon the fire brigades to perform their obvious duty. Why? Because any citizen may go to a fire; and, subject to the directions of fire officers and police, he may endeavour to put it out. No special power is conferred by the Act and none is needed to enable members of a fire brigade to go to a fire or to enable a fireman to drive a fire engine upon a highway to the place of a fire. But, said the appellant, there is a power conferred by the Act to disregard speed limits and traffic regulations. But only by what I think is a mistaken use of language can such exemptions from rules that apply to other persons be described, in this context, as conferring powers. A person who avails himself of an immunity does not in such a case as this exercise a power. Moreover, s. 46 relates expressly to powers conferred upon the Board, the chief officer and an officer of the Board. It says nothing about firemen. The Act distinguishes between officers and firemen (ss. 27, 27B). The section obviously refers to those powers that are expressly conferred - upon the Board, by s. 20; and upon the Chief Officer and other officers, by ss. 29-31. Most of these are powers to do acts, or to authorize the doing of acts, that in the absence of statutory authority would be trespasses - although in some cases the power is to do acts that might perhaps, by common law, be justified by the emergency: see Cope v. Sharpe (No. 2) ([1912](#)) 1 K.B. 496. (at p127)

4. For these reasons, I think s. 46 has no application at all to the present case. The plea is therefore misconceived. The Supreme Court was right in allowing the demurrer. But the reasons their Honours gave were, I respectfully think, mistaken. They took it that s. 46 applied, and then considered at length its scope and operation. As I think s. 46 does not apply, most of the matters discussed in their judgment are, in my view, immaterial here. I shall

therefore do no more than indicate my opinion briefly on them. The question, I think, comes to this: Does s. 46, in cases where it does apply, merely enunciate a general principle of the law or does it modify it? The general rule may be stated as Starke J. expressed it in *Metropolitan Water Sewerage & Drainage Board v. O.K. Elliott Ltd.* (1934) [52 CLR 134](#) He said: "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" (1934) 52 CLR, at pp 143, 144 I am inclined to think that the correct view is that s. 46 modifies this, and that, where the section applies, it protects the person it refers to from liability for damage resulting from acts which are done in good faith and directly in the exercise of a power that the statute conferred and whether they are done skilfully or negligently. In other words, an 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. The powers to which s. 46 relates are powers that may often have to be exercised by the officer in control on the spot in an emergency, according to his judgment, and without his being restrained by considering what other persons might perhaps think about the matter afterwards. It may be that, as my brother Kitto suggests, s. 46 was enacted deliberately to overcome the effect of the decision in *Vaughan v. Webb* ([1902](#)) [2 SR \(NSW\) 293](#); 19 WN 191 If so, it was a somewhat tardy response by the legislature; and this is the more striking because within a month of the decision the legislature had re-enacted the then law, without alteration, as the Fire Brigades Act, 1902. But, whatever led to the introduction of s. 46 in 1909, *Vaughan v. Webb* ([1902](#)) [2 SR \(NSW\) 293](#); 19 WN 191 was decided before it was enacted and the decision in that case does not govern this case. However, the procedure of a demurrer ought not, I think, be used to enable questions of law to be decided that do not emerge directly from the pleadings; and I prefer to express no concluded opinion about what might be the operation of s. 46 in other cases. The plea in this case does not answer the declaration. **The appeal should be dismissed.** (at p128)

## **ORDER**

**Appeal dismissed with costs.**