

Brodie v Singleton Shire Council

By Justin Gleeson S.C.

On 31 May 2001 the High Court delivered judgment in *Brodie v Singleton Shire Council* and in the related matter of *Ghantous v Hawkesbury City Council*.

In these cases, the High Court by a majority of 4-3 (Gleeson CJ, Hayne and Callinan JJ dissenting) overturned what was known as the highway rule. Under that rule, a public authority, responsible for the care and management of a highway, when sued by a road user who suffers damage to personal property in consequence of the condition of the highway, may be liable for a negligent act of misfeasance, but is not liable for non-feasance.

The highway rule was originally developed by English Courts and declared for Australia by decisions of High Court in *Buckle v Bayswater Road Board* in 1936 and *Gorringe v The Transport Commission (Tas)* in 1950.

In the joint judgment of Gaudron, McHugh and Gummow JJ (with which Kirby J generally agreed) the following considerations were identified as requiring a change in the law:

(a) in other common law jurisdictions the highway rule has either been abolished or is of doubtful status. It has been overtaken by common law in Canada and most parts of the United States. Its status is doubtful in New Zealand. In England it was abolished by statute in 1961;

(b) the cases have either applied or circumvented the highway rule in a manner which has given rise to unprincipled distinctions;

(c) the distinction between misfeasance and non-feasance is itself artificial and of diminishing importance in other areas of the law of negligence;

(d) the highway rule created an immunity to action in respect of rights and duties which otherwise exist in the law. It is an immunity in the same sense as the immunity of the barrister, upheld in *Giannarelli v Wraith*, which assumes an obligation to exercise reasonable care and skill but sustains the immunity on considerations of public policy. Because the English origins from which the immunity was originally derived provide no reason for its continuance in Australia, the Court should focus squarely on whether there are sufficient reasons of public policy today for denying a remedy against the defendant councils if an action would otherwise lie against them in negligence;

(e) it is the law in Australia following the High

Court decisions in *Sutherland Shire Council v Heyman*, *Pyrenees Shire Council v Day*, *Romeo v Conservation Commission* (NT) and *Crimmins v Stevedoring Industry Finance Committee* that, on occasions, the powers vested by statute in a public authority may give it such a significant and special measure of control over the safety of the personal property of the citizens as to impose upon the authority a duty of care. This may oblige the particular authority to exercise those powers to avert a danger to safety or to bring the danger to the knowledge of citizens otherwise at hazard from the danger. The factor of control is of fundamental importance;

(f) the decisions in *Buckle* and *Gorringe* were not strong candidates in support of the system of stare decisis. *Buckle* had ignored the earlier decision of the High Court in *Miller v McKeon*. There was a difference between the reasons of the Justices constituting the majority in *Buckle*. In *Gorringe* no square challenge was raised to the decision in *Buckle*. The decisions have produced unacceptable difficulties and uncertainties about the content of the highway rule. Further, the reasoning of Latham CJ and Dixon J in *Buckle* was heavily influenced by a blending of the principles of nuisance, negligence and breach of statutory duty in a way which has been overtaken in other areas of the law. The time has now come to treat public nuisance, in its application to highway cases, as absorbed by the ordinary principles of negligence.

Accordingly, under the joint judgment, the law may now be stated that authorities having statutory duties to design or construct roads, or carry out works or repairs upon them, are obliged to take reasonable care that their exercise of, or failure to exercise, those powers does not create a foreseeable risk of harm to a class of persons (road users) which includes the plaintiff. Where the state of a roadway, whether from design, construction, works or non-repair, poses a risk to that class of persons, then, to discharge its duty of care, an authority with power to remedy the risk is obliged to take reasonable steps by the exercise of its powers within a reasonable time to address the risk. If the risk be unknown to the authority or latent and only discoverable by inspection, then to discharge its duty of care an authority having power to inspect is obliged to take reasonable steps to ascertain the

presence of latent dangers which might reasonably be suspected to exist: para 150.

Gleeson CJ delivered a powerful dissent to the effect that reform of the rule should be left to Parliament. This was particularly so when Parliaments had acted on the faith of the rule in conferring powers and responsibilities on public authorities and Parliament in New South Wales had expressly taken up the rule and extended its application to a particular public authority. To abolish the rule would require an investigation of the financial consequences which had not been done and could not be done in the High Court. It was a step which the Law Reform Commission had advised the New South Wales Parliament to take subject to qualifications and Parliament had not done so: paras 42 – 46.

Hayne J adopted the view that a public authority owes a duty to take reasonable care in the exercise of its powers but is generally not liable for their non-exercise: paras 327 – 334. Callinan J also dissented: paras 362 – 5.

The following may be noted about the judgment, from the position of counsel:

(1) a claim by a road user against an authority responsible for the construction or maintenance of the road should be pleaded by way of allegations of material facts giving rise to a duty of care, breach of duty and damage in accordance with the ordinary principles of negligence. An alternative count in nuisance may be included for caution;

(2) the facts which will need to be pleaded to give rise to the duty of care will commonly be those identified in para 150 of the joint judgment referred to above. The crucial factor will be the element of control exercised by the authority over the condition of the highway and thus the safety of those using it;

(3) in determining whether there is a breach of duty, the Court will consider the classic balancing exercise identified by Mason J in *Wyong Shire Council v Shirt*, i.e. the magnitude of the risk, the degree of probability that it will occur, the expense, difficulty and inconvenience to the authority in taking the steps identified as necessary to alleviate the danger and any competing or conflicting responsibilities or commitments of the authority: para 151;

(4) this renders admissible evidence respecting funding constraints and competing priorities for the public authority (joint judgment para 104). This in turn opens up a broad ambit of discovery of documents in the proceedings.

The judgment is also interesting for indicating the approach of the current High Court to reformulation of the common law. The joint judgment illustrates the type of reasoning which might be employed to produce a change in the law.

A caution should also be sounded. The courts below were bound by the previous law. The plaintiff had signalled in its pleading a challenge to that law. The defendants did not call evidence to indicate the costs which would have been incurred in satisfying

the alleged duty or evidence as to competing financial responsibilities. The High Court did not award a new trial, ruling that each party had a sufficient opportunity to present its case at trial: paras 180 – 182, 190 – 191 and 240. If counsel is conducting a case in an area where a challenge to High Court or intermediate appellate authority has been flagged, it is thus necessary to lead or attempt to lead the evidence which might be relevant only if the law is subsequently altered at appellate level.
