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The Abolition of Non-Feasance Immunity *for* Highway Authorities

In *Brodie & Anor v Singleton Shire Council* and *Ghantous v Hawkesbury City Council*[1], the majority in the High Court sounded the death knell of the immunity of highway authorities for non-feasance.

In *Brodie*, the accident occurred on 19 August 1992 when the plaintiff drove a 22-tonne truck onto a 50-year-old bridge adapted to bear a load of 15 tonnes. The timber girders failed, the bridge collapsed, the truck fell and the plaintiff suffered injury. At first instance the case was held to be one of mis-feasance and the plaintiff succeeded (as did the truck owner for property damage). However, on appeal the New South Wales Court of Appeal held that the council's actions in replacing defective decking planks on the bridge were no more than superficial repairs and did not change non-feasance into mis-feasance.

In *Ghantous*, the 63-year-old plaintiff fell on 10 July 1990 when she stepped off a 1.2 metre wide footpath in Windsor to avoid pedestrians coming the other way. Traffic, wind and water had eroded the dirt beside the footpath by approximately 50 millimetres and she fell on this drop. The footpath had been constructed about 40 years earlier and its construction was not criticised. Rather, the criticism was of the council's development of a pedestrian mall at one end, and the approval of a shopping centre and car park at the other, on this narrow stretch of suburban footpath which was almost the only stretch left in the central business district. At first

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instance the trial judge found:

'The Council simply failed to maintain the connecting section of footpath. It is regrettable that the Council's program of maintenance did not operate to keep the footpath in less hazardous condition but that failure to maintain is, by definition, non-feasance. The Council enjoys immunity for non-feasance and consequently the plaintiff fails.'

On appeal, the New South Wales Court of Appeal rejected an argument that what had occurred was mis-feasance and concluded that the immunity of highway authorities extended to the whole of the road reserve.[2]

The joint judgment in the High Court of Gaudron, McHugh and Gummow JJ is illuminating. This is not least because McHugh JA during submissions appeared to be the most vehement opponent of any change to the doctrine. Clearly his Honour was persuaded and the reasoning for his change in opinion is as follows.

Despite *Borough of Bathurst v MacPherson*[3], the doctrine was well entrenched in Australia by *Buckle v Bayswater Road Board*[4]. That decision, subsequently applied in the High Court in *Gorringe v The Transport Commission (TAS)*[5] remained the law. In the United Kingdom, the rule of law exempting the inhabitants at large and any other persons as their successors from liability for non-repair of highways was abrogated by Section 1(1) of the *Highways (Miscellaneous Provisions) Act 1961*. In other common law countries, such as Canada, the distinction has been eroded.

Buckle itself involved a fine distinction in that the immunity did not extend to a situation where the highway authority was also a drainage authority. Other similar distinctions reducing the efficacy of the defence are to be found in cases such as *Gloucester Shire Council v McLenaghan & Anor*[6] and *Turner v Kuring-gai Municipal Council*[7], in which it was clear that the defence did not extend to signage which should have been erected by a traffic authority even though it happened to also be the highway authority.

The artificial structure distinction derived from *Borough of Bathurst v MacPherson*, eliminating the use of the defence in respect of errant tree roots (see *Hughes v Hunters Hill Municipal Council*[8]), is a further example of the fine and illogical distinctions which have pervaded the application of the doctrine.

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Moreover, there is real difficulty in establishing what is mis-feasance and what is non-feasance. See for example the comments of Isaacs J in *Woollahra Council v Moody*[9].

The joint judgment concludes that historically the legal basis for the immunity is derived from English origins which furnish no reason for its continuance in Australia. This is because the immunity was not designed for the protection of highway authorities but was designed for the protection of individual citizens who, in England, had once held responsibility for repair of local roads but who never had such responsibility in Australia. The past immunities of their unincorporated predecessors was extended to local government by statute in England, whereas local government in Australia had no individuals or organisations as predecessor to look to for highway repair. The basis for the immunity in Australia was wanting.

The joint judgment concluded that the immunity could produce harsh results. It has become increasingly anomalous against the background of the general law of negligence under which bases for liability have expanded rather than increased. In any event, well-meaning attempts to contain or avoid the harsh results of the immunity have led to highly technical and difficult distinctions being drawn, which has had the effect of increasing litigation, uncertainty and unpredictability of outcome.

Against this background the joint judgment considered whether there were sufficient reasons of public policy for denial of a remedy if an action ▶

otherwise lay in negligence.

Whereas when *Buckle* was decided, and there was a distinction between nuisance and negligence, there was no longer a rational basis to draw such a distinction.

The sequence of decisions in *Sutherland Shire Council v Heyman*[10], *Pyrenees Shire Council v Day*[11], *Romeo v Conservation Commission (NT)*[12] and *Crimmins v Stevedoring Industry Finance Committee*[13], all indicated that control was of fundamental importance in respect of the duty of public authorities to avert injury to citizens.

It is to be noted that the abolition of special categories in negligence has progressively been abolished. See *Australian Safeway Stores Pty Ltd v Zaluzna*[14] and *Burnie Port Authority v General Jones Pty Ltd*[15].

The court concluded that the decision in *Buckle* could not be said to 'rest upon a principle carefully worked out in a significant succession of cases' and was accordingly not a strong candidate for the application of the doctrine of stare decisis.

The joint judgment concludes that the highway rule is an unsatisfactory accommodation of competing interests. It operates capriciously and denies equal protection of the law by barring a remedy to victims of negligent omissions, whilst other victims of negligent omissions by other public authorities in other legal persona are compensated. The limited funds available to public authorities afford no defence in that circumstance. The growth of the mis-feasance rule in respect to artificial structures provides a strong incentive to an authority not to address a danger on a roadway.

However, the abolition of the immunity does not move the law to a position where road authorities are required to ensure a perfect state of repair. They need only do what is reasonable. The duty of care is in substance set out by Mason J in *Wyong Shire Council v Shirt*[16]. Whilst 'a risk which is not far-fetched or fanciful is real and therefore foreseeable' the response need

only be what is reasonable, giving regard to a variety of factors. These include:

'The magnitude of the risk and the degree of probability that it will occur, the expense, difficulty and inconvenience to the authority in taking the steps described above to alleviate the danger, and any other competing or conflicting responsibility or commitments of the authority. The duty does not extend to ensuring the safety of road users in all circumstances. In the application of principle, much thus will turn upon the facts and circumstances disclosed by the evidence in each particular case.'[17]

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Accordingly, Gaudron, McHugh and Gummow JJ found that the doctrine was not part of the law of Australia. In a separate judgment, Kirby J reached a similar conclusion, namely that the immunity should be abolished and the common law re-expressed.

Gaudron, McHugh and Gummow JJ concluded that the plaintiff in *Ghantous* should fail because the footpath was safe for a person taking ordinary care. Kirby J was not convinced that the plaintiff established a breach of duty in her case. Gleeson CJ, who would have upheld the doctrine, agreed with Callinan J that no negligence was made out. Callinan J, like Hayne J, would have retained the doctrine. Hayne J was also of the view that no want of care was established.

In *Brodie*, Gaudron, McHugh and Gummow JJ found that the finding supported the conclusion that by patching the bridge to make it capable of bearing traffic, the Shire Council had created a superficial appearance of safety without attacking the fundamental problem which made it unsafe. The orders of the Court of Appeal should be set aside and the matter remitted to the Court of Appeal for determination of the remaining issues. Kirby J agreed with the joint judgment in this regard.

Interestingly, Kirby J did not join in any criticism of Mrs Ghantous in respect of contributory negligence (an aspect never even run or argued at first instance) and which was not the subject of any appeal or cross-appeal. He said the reason she failed was not because of any lack of attention on her part, but because no breach of duty was shown on the part of the local authority which she sued. He criticised the latter-day enthusiasm for the notion of contributory negligence which ran against the steady trend of common law authority in this Court over a long period.

Conclusion

Despite the views expressed on foreseeability and duty of care in *Modbury Triangle Shopping Centre Pty Ltd v Anzil*[18], the duty of care in Australia in respect of negligence can clearly be traced back to the comments of Lord Atkin in *Donoghue v Stevenson*[19], and in particular his dictum:

'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'

This must be read in the light of the dictum of Mason J in *Wyong Shire Council v Shirt*[20]:

'A risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable.'

However, regard must be given in determining the reasonableness of the response to:

'The magnitude of the risk and the degree of the probability of its occurrence along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities that the defendant may have.'

Injury by a third party aside, it seems clear that the majority in the High Court has reverted to fundamental doctrine and that the process of removing special categories and defences from the common law in Australia continues apace.

It seems clear that the High Court in changing the doctrine wanted to send a message that the 'floodgates' were not opening for litigation. It may be that Mrs Ghantous, whose claim failed despite the comments of the trial judge quoted above, was the victim of a need to send this message.

The change in doctrine was in the view of the majority likely to reduce rather than increase litigation. That seems to accord with commonsense. ▶

Both plaintiffs and defendants are more likely to know where they stand. The hardline against increasing the duty of care and what is meant by 'reasonable care,' evidenced in *Romeo* and in *Modbury Triangle*, is continued. Whilst the reaction of highway authorities, such as councils, was predictably a cry for legislative restoration of the immunity, it is by no means clear that such a move would be to anyone's advantage. Moreover, such legislative intervention would in practice be very difficult. Since, as the majority made clear, the extent of the immunity and its application cannot be clearly stated even by its advocates, any attempt to reinstate it by legislation would raise the issue as to what was being reinstated. The courts would be refilled with litigation over whether the injury was caused by misfeasance or non-feasance, whether it was in the capacity of a highway authority as a highway authority or in some other capacity, whether an artificial structure was involved, and whether the immunity extended to the whole of the road reserve or only to the 'road qua road' or road surface proper. These issues would have to be re-litigated at length, a step which, at the very least, would seem retrograde. My feeling is that legislative intervention is not as likely as some would suggest and certainly is not necessary.

In *Pyrenees*[21], Kirby J postulated the following test for the duty of care:

'I would therefore adopt as the approach to be taken in Australia the three-stage test expressed by the House of Lords in *Caparo*. To decide whether a legal duty of care exists the decision-maker must ask three questions:

1. Was it reasonably foreseeable to the alleged wrongdoer that particular conduct or an omission on its part would be likely to cause harm to the person who has suffered damage or a person in the same position?
2. Does there exist between the alleged wrongdoers and such person a relationship characterised by the law as one of "proximity" or "neighbourhood"?
3. If so, is it fair, just and reasonable that the law should impose a duty of a given scope upon the alleged wrongdoer for the benefit of such person?'

It seems clear that Kirby J was equating proximity with neighbourhood in the sense Lord Atkin would understand it. Hence, Kirby J in *Modbury Triangle*[22] when applying this criteria, determined that it was 'fair, just and reasonable' that the law should impose a duty of care upon the occupiers of the shopping centre and, dissenting, would have rejected the occupiers' appeal.

McHugh J in *Jones v Bartlett*[23], seems to have applied a not dissimilar test. There was a reasonably foreseeable risk of injury of which the landlord ought to have known. There was a means of avoiding the risk of harm and the cost would have been relatively cheap. In those circumstances McHugh J, dissenting, would have upheld the plaintiff's appeal.

The majority judgments in *Jones v Bartlett* and in *Modbury Triangle* are concerned with not unreasonably extending the duty of care upon occupiers. That reasonable minds can differ as to the limits of the duty is illustrated by the fact that Kirby J in *Jones v Bartlett* formed part of the majority.

In some respects, the decision in *Brodie* and *Ghantous* reflects a return to basic principle. It still leaves unanswered difficulties relating to the extent of the duty in respect of landlords and occupiers. However, it is consistent in approach with the dictum of Kirby J in *Pyrenees* quoted above. PL

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Footnote:

1. (2001) 75 ALJR 992 (HCA).
2. per Powell JA.
3. (1879) 4 App. Cas. 256.
4. (1936) 57 CLR 259.
5. (1950) 80 CLR 357.
6. (2000) 109 LGERA 419 (CA).
7. (1990) 72 LGERA 60 (CA).
8. (1992) 29 NSWLR 232.
9. (1913) 16 CLR 353.
10. (1985) 157 CLR 424.
11. (1998) 192 CLR 330.
12. (1998) 192 CLR 431.
13. (1999) 200 CLR 1.
14. (1987) 162 CLR 479.
15. (1994) 179 CLR 520.
16. (1980) 146 CLR 40 at 47-48.
17. *Brodie* and *Ghantous* (2001) 75 ALJR 992 (HCA) page 1024.
18. (2000) 75 ALJR 164.
19. [1932] AC 562 at 580.
20. (1980) 146 CLR 40 at 47-48.
21. (1998) 72 ALJR 152 at 201.
22. (2000) 75 ALJR 164 at 178.
23. (2000) 75 ALJR 1 at 18.