Before the High Court

Immunities Under Attack: The Tort Liability of Highway Authorities and their Immunity from Liability for Non-Feasance: *Brodie v Singleton Shire Council, Ghantous v Hawkesbury City Council*

BARBARA McDONALD*

---

1. Introduction

The High Court of Australia is shortly to decide whether it will reconsider the longstanding immunity of highway authorities from liability in negligence or nuisance for non-feasance and, in particular, for the failure to keep a highway in repair. That rule was affirmed and explained by the High Court in two leading cases: *Buckle v Bayswater Road Board*[1] in 1936 and *Gorringe v The Transport Commission (Tasmania)*[2] in 1950. In December 1999, special leave to appeal to the High Court was sought in two cases, *Brodie v Singleton Shire Council* and *Ghantous v Hawkesbury City Council*, heard together, in which the immunity in some form was a critical hurdle to the success of the respective plaintiffs.[3] The court hearing the special leave application, comprising Gaudron, Kirby and Hayne JJ, referred the applications to a full bench of the court, the parties to argue the applications as if on appeal. This unusual procedure no doubt reflects the concern, expressed by Kirby J at the leave application, that any decision to overturn the immunity may have enormous economic ramifications for highway authorities, many of whom are mere local councils, and also perhaps a concern, not expressed, with whether it is appropriate for the court even to consider overturning a long-standing and commonly applied principle, or rather whether such a task should be left to parliament.

This comment will consider five inter-related issues:

1. whether it is appropriate for High Court to reconsider such a long-established rule;
2. the arguments for and against overturning the immunity for non-feasance;

---

* Senior Lecturer, Faculty of Law, University of Sydney.

1 (1936) 57 CLR 259.

2 (1950) 80 CLR 357.

3 In *Brodie v Singleton Shire Council*, the immunity itself was directly challenged, while in *Ghantous* a further challenge was to the application of the immunity to public footpaths as well as roadways. The judgments of the Supreme Court of New South Wales Court of Appeal are as follows: *Singleton Shire Council v Brodie* [1999] NSWCA 37 and *Ghantous v Hawkesbury City Council* [1999] NSWCA 51. The special leave application was heard by the High Court on 10 December 1999. At the time of writing the leave applications were set down to be heard together by the Full Bench of the High Court on 29 August 2000.

3. the legal position of highway authorities should the immunity be overturned;
4. whether it is appropriate for the court to overturn the rule or whether it should leave the matter to parliament;
5. if the immunity is to remain, whether its application should be clarified or narrowed.

But first, a brief explanation is given of the immunity rule itself and how it has been interpreted and applied to date, followed by a brief summary of the facts of the cases in which leave is sought.

2. *The Rule*

> It is well settled that no civil liability is incurred by a road authority by reason of any neglect on its part to construct, repair or maintain a road or other highway.
>
> Dixon J in *Buckle v Bayswater Road Board*[4]

> By 1895 it seems to have been beyond question that a highway authority, if it did anything, must do it carefully, but, if it did nothing, could be indifferent to the consequences of its inaction.
>
> *Fullagar J in Gorringe v Transport Commission* (Tasmania)[5]

The immunity attaches only to '*non-feasance*' by a '*highway authority*' in the care, management and repair of '*highways*'. It exempts the authority from actions in negligence and nuisance. It applies even where a duty to repair a highway is imposed by statute on a highway authority, unless the statute makes it clear by express provision or necessary implication that that duty is to be enforceable at the suit of a person injured by the failure to repair.[6]

A definition can be offered for each element of the rule, but the application of those definitions has yielded a body of case law which is renowned for its complexity and fine distinctions.

'*Non-feasance*' may be defined as a mere or pure omission or failure to take care or to take some specific precaution or step, without any related preceding action. Examples of pure non-feasance would be the failure to repair a pot-hole that has developed over time in a properly constructed roadway, the failure to repair a rotten bridge, or the failure to erect a barrier when a properly constructed roadway is eroded by flooding. Theoretically, it would make no difference that the dangerous condition was known, even well known, to the authority. However, not every omission will be classed as mere non-feasance: if it is an omission in the course of some undertaking or course of conduct it will be treated as misfeasance. It is this distinction between 'pure' omissions and omissions in the course of conduct that is the most difficult to apply.

---

4 Above n1 at 281.
5 Above n2 at 378.
6 Above n1 at 281–282 (Dixon J).

As Professor Fleming wrote, paraphrasing the judgment of Dixon J in *Buckle*, to be charged with 'misfeasance', the authority 'must have been an active agent in creating or adding to an unnecessary danger in the highway ... The improper nature of the original act or intervention of the road authority must always be the foundation of the complaint against it'.[7] Thus it will be misfeasance to construct or repair a road in a way that would lead to an increased danger in the future or to carry out construction or repairs in a way which would create a trap or give a false appearance of safety. The case of *Brodie* involved a very common scenario: the council had carried out some necessary but superficial repairs, but had not detected and repaired a more fundamental problem in the roadway which eventually caused the accident. The question for the court was whether the Council's conduct in failing to repair the fundamental problem amounted to mere non-feasance or to misfeasance: was it a case simply of failure to repair or rather of carrying out repairs negligently?

The trial judge had to decide which of two lines of authority was most appropriate to these facts. The High Court's decision in *Gorringe v The Transport Commission* (Tasmania)[8] is regarded as authority for the proposition that merely carrying out superficial repairs does not attract liability unless it is done so badly as to increase the danger. There the council had repeatedly repaired the surface of a road over a culvert. Subsequently the culvert itself and the road collapsed and the driver of a truck was killed. The High Court held that the plaintiff could not succeed: the failure to ensure the security of the culvert and roadway was a case of non-feasance rather than misfeasance. Dixon J noted that 'Here what was left undone and what was done are not only severable, they are in my opinion unconnected .... it cannot be said that the commission's employees did anything that would amount to throwing an unsafe road open to traffic afresh or providing a place for traffic not otherwise available that was unsafe'.[9] A similar view was taken in *Kirk v Culcairn Shire Council* (1964) 64 SR 281 of the facts in that case.

By contrast, in *Hill v Commissioner for Main Roads,* Samuels JA, with whom Kirby P and Priestley JA agreed, held that the patching of the roadway by the Council in that case 'did no more than, to borrow the words of Dixon J, throw open an unsafe road to traffic afresh. The patching was therefore negligent because it failed to remedy a foreseeable risk which was, as the respondent knew, certain to reappear at some stage in the future with predictable and hazardous consequences to the users of the highway. It seems to me that this amounts to a misfeasance .... It certainly could have refrained entirely from acting in any way. However, once committed to intervention, its duty was to perform the task it had undertaken with proper care and skill. That task was to repair the highway in order to remove the danger. In order to achieve that purpose it was necessary to identify and rectify the fundamental cause of the manifest condition'.[10] Earlier, Samuels JA had

7 John G Fleming, The Law of Torts (9th ed, 1998) at 485–486.

8 Above n2.

9 Id at 371–372.

10 *Hill v Commissioner for Main Roads* (1989) 9 MVR 45 at 52–53.

distinguished *Gorringe* by saying 'The material difference is that in *Gorringe* the work done was designed merely to improve the surface of the road and not to render passable a traffic way which was otherwise impossible to traverse'.[11]

The essential point of difference between the two types of case is that in the first, the superficial problem which is easily and cheaply fixed is judged to have a separate cause to the fundamental structural problem so that the treatment of the problems is regarded as separate, while in the second type of case, both problems share a common cause and merely to deal with the superficial problem is effectively to ignore the fundamental problem. The difficulty of distinguishing mis-feasance from non-feasance has arisen in other cases against other public authorities (although, as will be seen below, the distinction is not necessarily fatal to the success of the plaintiff's case). In *Pyrenees Shire Council v Day*, Gummow J pointed out that it may be difficult to separate an absence of further exercise of interconnected statutory powers from the exercise which has already occurred such that it may then be said to have been performed negligently.[12] But the distinction is a fine and difficult one, and it is probably the aspect of the immunity rule which has been the most productive of litigation.

'*Highway authorities*' are those authorities invested or charged with the power over and control of highways. In Australia, these include federal, state and local authorities and other sundry bodies such as national park authorities in charge of public highways. For many of these authorities, the maintenance of the highways in its jurisdiction is only one of many functions: in these cases the immunity attaches to the highway authority only with respect to its 'highway' functions and not to its other functions, such as sanitary or even traffic functions, even if they are being carried out on the highway.[13] The distinction is not an easy one to apply: the case of *Buckle v Bayswater Road Board*[14] provides an example of how experienced legal minds may differ on the question of which function an authority is performing in relation to a particular structure on a highway, in that case something as common as a drain. Nor does the distinction appear to have a logical basis.[15] Balkin and Davis see it as evidence of the outdatedness of the immunity and of judicial efforts to limit it,[16] while Trindade and Cane comment '[i]t is difficult to construct any rational criterion for deciding whether a particular act is done by an authority in one capacity or another'.[17]

A '*highway*' may be defined widely as any place or way over which there is a public right of passage, thus encompassing roadways, footpaths, and bridges,[18] but

11 Ibid. See also *Day v Commissioner of Main Roads* (NSW) (1989) Aust Torts Reports # 80–260.

12 *Pyrenees Shire Council v Day* [1998] 192 CLR 330 at 392.

13 Above n1 at 273 (Latham CJ).

14 Ibid: Dixon J, dissenting, regarded the drain as part of the Board's highway functions so would have held the Board immune for its failure to repair; Latham CJ regarded it as involving the Board's other functions, so that the immunity did not apply. McTiernan J treated the drain as an 'artificial structure', see below, and thus outside the immunity.

15 See below the comparison between the position of highway and other public authorities.

16 P Balkin & JLR Davis, *Law of Torts* (2nd ed, 1996) at 851.

17 Francis Trindade & Peter Cane, *The Law of Torts in Australia* (3rd ed, 1999) at 712.

18 Dixon J in above n1 at 286 defined a highway as any 'road, street, bridge, footpath, or other place over which there is a public right of passage'.

this may be both too simple and too wide a definition. It may be too simple, because there have been attempts to limit the immunity by excluding from its operation anything which may be categorised as an 'artificial structure'. However, the distinction drawn between 'artificial structures' on the one hand and, presumably, the rest of the highway or 'non-artificial structures' on the other must be one of the most obscure and inexplicable concepts ever formulated in our courts, and, with respect, the explanation by McTiernan J in *Buckle v Bayswater Road Board* only adds to the confusion.[19] As Fleming points out,[20] the 'artificial structure' rule has only ever had limited judicial endorsement and the preferred view appears to be that the immunity is more appropriately limited by reference to whether the authority concerned is acting as a 'highway authority' or not. It may be too wide, because footpaths are arguably outside the definition of 'highways': this is one of the arguments of the plaintiff in *Ghantous*.

3. *The facts in Brodie and Ghantous*

In *Brodie* the first plaintiff was injured in August 1992 when a minor bridge, Forresters Bridge, in the Singleton Shire, collapsed as he drove his loaded truck, weighing 22 tonnes, across it, causing the truck to fall about five-ten metres into a bank beside a small water course. The second plaintiff was the owner of the truck. The bridge was at least 50 years old and the collapse was caused by rotten girders. Evidence showed that the Council was aware of the 'piping' (areas of rotting) in the girders, but was satisfied that the 15 tonne limit in the road would protect the bridge from failure. There was no load limit sign at Forresters Bridge although there was a sign showing a 15 tonne limit at the previous, similar, bridge on the road. No request had been made to the Council for permission to cross the bridge with the load. It appears that the Council had replaced some of the decking planks which ran across the girders over the years prior to 1992, although when and how often it had done so was not certain. Because of the immunity for non-feasance, the only realistic basis for recovery for the plaintiff was if the council's work on the bridge in merely replacing the planks and leaving the rotten girders could be regarded as misfeasance.

The trial judge, Tapsell A-DCJ, held that the conduct of the Council was more analogous to the situation in *Hill v Commissioner for Main Roads* than it was to the situation in *Gorringe,* and he therefore held the Council liable for misfeasance. 'The Council did a band-aid job on the bridge by simply replacing planks. It did nothing about the serious condition of the girders which had deteriorated significantly to the point where the bridge was really in state of

19 According to McTiernan J, the immunity 'should not be applied to a road or a section or a layer of the road or its foundation made of artificial materials or of both artificial and natural materials [rather] [t]he expression ... denotes a structure which is appurtenant or subservient to a road but not a component part of the road fabric... ', ibid at 300.

20 Above n7 at 487, fn 262. Compare Geoffrey Sawer, 'Non-feasance in Relation to 'Artificial Structures' on a Highway'(1938) 12 *AJL* 231.

collapse'.[21] The Court of Appeal took the opposite view: 'There is not the slightest evidence that, before any [decking] boards were replaced, the bridge had become impassable ... it seems to me that such actions as the Council may, from time to time, have taken in replacing defective decking planks are to be regarded as no more than superficial repairs to the road surface and thus – since they do not increase the risks of accidents – did not subject the Council to liability'.[22]

The plaintiff sought special leave to appeal to the High Court, arguing that 'the issue which... merits the grant of special leave is whether the defence [sic] of non-feasance should remain for road authorities or [whether] the test should be simply negligence, in all the circumstances'.[23]

In *Ghantous,* the plaintiff was an elderly pedestrian who was walking in the centre of Windsor, a medium sized historic town on the outskirts of Sydney, along a stretch of narrow cement footpath connecting a pedestrian mall with a major supermarket, other shops and car-parks. The footpath was located between the kerb and the building line, with unsurfaced strips on each side that had become degraded and lower over time. The plaintiff stepped aside to allow other pedestrians walking towards her to be able to pass and, losing her footing on the edge of the footpath, fell to the ground suffering multiple injuries to her face, arms and shoulders. There was no evidence that the original construction of the footpath was done negligently, although there was evidence that development in the mall and nearby areas had increased the foot traffic on the footpath and the rate of erosion. The trial judge, Freeman DCJ, held that the footpath was an area which was covered by the immunity principle, that it was not 'an artificial structure' and concluded as follows:

> 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.[24]

The plaintiff's appeal to the New South Wales Court of Appeal was dismissed.[25] The plaintiff sought special leave to appeal to the High Court, arguing *inter alia* that the immunity for non-feasance should be overturned or that it did not apply to footpaths.

---

21 Tapsell A–DCJ, cited in *Singleton Shire Council v Brodie* [1999] NSWCA 37 by Powell JA, with whom Handley JA and Giles JA agreed, at para 34.

22 *Singleton Shire Council v Brodie* [1999] NSWCA 37 at para 46 (Powell JA).

23 *Brodie & Anor v Singleton Shire Council* s44/1999 (10 Dec 1999) transcript of proceedings at Sydney, 10 December 1999, at 10.32 am, Mr Jackson (counsel for the applicants).

24 *Ghantous v Hawkesbury City Council,* District Court of New South Wales, Freeman DCJ (21 November 1996).

25 *Ghantous* above n3 (Powell JA, with whom Handley JA and Giles JA agreed).

4. *Should the High Court Give Special Leave: Is it Appropriate for the High Court to Review Such a Long-established Common Law Rule?*

There would seem little doubt that it is appropriate for the High Court to *consider* the legitimacy and continued justification of the immunity of highway authorities, whether or not it ultimately decides to overturn it or affirm it. The last time that the immunity was considered by the High Court was in *Gorringe v Transport Commission (Tasmania)* in 1950,[26] although Professor Friedmann notes[27] that there was not 'even the hint of a doubt as to its justification' in that case. As there has been considerable development since then both in the general law of negligence and the law relating to public authorities, it would seem appropriate for the Court to consider whether or not the highway authority immunity has been overtaken by or rendered inconsistent with those other developments.[28]

The special protection given by any immunity tends to attract criticism and other immunities have also been challenged. Until recently, four or five immunities had arguably survived the development of negligence principles since *Donoghue v Stevenson*:[29] those of the armed services, advocates, landlords, vendors, and highways authorities, but increasingly they have come under attack. In *Northern Sandblasting Pty Ltd v Harris*[30] it was conceded by the appellant in the High Court that the landlords' immunity established in *Cavalier v Pope*[31] was inconsistent with the modern law of negligence and that concession was accepted as correct by a majority of the court.[32] The immunity of armed forces is of limited relevance in peacetime.[33] The immunity of advocates was thoroughly considered

26 Above n2.

27 W Friedmann, 'Liability of Highway Authorities' 5 *Res Judicatae* 21 (1951) at 26.

28 As it did in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, when the High Court by a majority held that developments in the law of negligence rendered the rule in *Rylands v Fletcher* (1868) LR 3 HL 330 obsolete. If the highway immunity is inconsistent with general developments, the case for abolishing it seems much stronger than the case for eradicating the rule in *Rylands v Fletcher* which was not after all an exclusionary rule and which could have continued to exist as an alternative, albeit narrower, basis of liability to negligence. Relevantly, the two main reasons for its demise were the uncertainties of its content and application as well as the fact that 'ordinary negligence has progressively assumed dominion in the general territory of tortious liability for unintended physical damage' *Burnie Port Authority* at 541. See also *Northern Territory of Australia v Mengel* (1995) 185 CLR 307. Below at n79.

29 [1932] AC 562.

30 (1997) 188 CLR 313.

31 [1906] AC 428.

32 (1997) 188 CLR 313: 'rightly conceded' at 342 (Dawson J); 'properly made' at 364 (McHugh J), affirming *Parker v South Australian Housing Trust* (1986) 41 SASR 493 at 516–517 (King CJ); at 358 (Gaudron J). Brennan CJ described the landlords' immunity as an 'anomaly [which] is logically indefensible and is to be accounted for by social conditions that have long since passed' at 340.

33 *Groves v The Commonwealth* (1982) 150 CLR 113; *Commonwealth v Connell* (1986) 5 NSWLR 218.

in *Giannarelli v Wraith*[34] and although the immunity was upheld by a majority,[35] the principles and distinctions set out there have proved difficult to apply in practice. The High Court was recently asked, in *Boland v Yates Property Corporation Pty Ltd*,[36] to review the immunity but its decision, that there had in any event been no negligence by the advocates and legal representatives proved by the plaintiff, made it unnecessary for it to do so. On that occasion however there was some indication that, given the opportunity in the future, some members of the court might review the immunity.[37] Many of the comments of Kirby J concerning the immunity of advocates are apposite here:

> First, an immunity from liability at law, to the extent that it exists, is a derogation from the normal accountability for wrong-doing to another which is an ordinary feature of the rule of law and fundamental civil rights...
>
> ... Potentially, the immunity has a significant economic effect on justifiable loss distribution in a generally inelastic market. To the extent that a legal immunity survives for advocates at common law, it needs to be fully justified by considerations of binding legal authority and incontestable arguments of legal policy. To the extent that legal authority is uncertain, the immunity, being anomalous, should not be expanded. The scope of the immunity rather than being enlarged, should be confined to essentials.
>
> Secondly, the immunity of barristers from suit has derived from historical, social and professional circumstances many of which have since changed markedly. The changes that have occurred suggest the need to reconsider the foundations, or at least the scope, of the immunity.[38]

In July of this year the House of Lords in conjoined appeals, overturned the immunity of advocates in civil cases.[39] This important decision will no doubt encourage a further challenge to the immunity in Australia when a suitable case arises.

The highway immunity has not survived in England where it was abolished by statute in 1961,[40] with the legislature rather surprisingly creating a much stricter liability than under ordinary negligence principles by shifting the burden of proof

---

34 *Giannarelli v Wraith* (1988) 165 CLR 543.

35 For Deane J at 588 in the minority, the fact that the barristers' immunity absolved a barrister from any 'negligence, however gross and callous in its nature or devastating in its consequences' was a significant factor in his dissenting opinion that the barristers' immunity should be overruled.

36 (1999) 74 ALJR 209.

37 Gaudron J expressly stated at 230 that she would have given leave to re-open *Giannnarelli* if the question of immunity had arisen. Gleeson CJ and Gummow J were non-committal but Gummow J at 230–231 referred to a number of issues left unresolved by *Giannarelli*.

38 *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 236–237.

39 *Arthur JS Hall & Co v Simons* (AP), *Barratt v Ansell & Ors* (Trading as Woolf Seddon (A Firm) and *Harris v Schofield Roberts and Hill* (Conjoined Appeals) 20 July 2000, House of Lords.

40 *The Highways (Miscellaneous Provisions) Act* 1961, (UK), s1, replaced by the *Highways Act* 1980 (UK), s58.

on the issue of reasonable care to the defendant in these cases.[41] The reforms only deal with the condition of the highway and do not apply for example to traffic matters where the authority is subject to the general principles of negligence as they apply to public authorities.[42] The immunity has also been abrogated in many Canadian jurisdictions.[43] The abolition of the rule was recommended in New Zealand[44] before the introduction of the general accident compensation scheme there.

None of the three Australian state law reform commissions who have considered the highway immunity has recommended its retention. All recommended its replacement with varying statutory provisions supplementing the general common law.[45]

Elsewhere, the highway immunity has long been both criticised and keenly defended. Most of the current leading Australian texts on negligence law either expressly support abolition of the rule in favour of assimilating the position of highway authorities with that of other public authorities with regard to liability in tort[46] or impliedly do so.[47] Such criticism is not new: commenting on *Gorringe* in 1951, Professor Friedmann described the immunity as:

> An outstanding example of a legal principle which once had some practical justification, was preserved and even extended, when the reason had long disappeared, and now lingers in the law fortified by history and precedent, yet repugnant to modern principles of jurisprudence and legal policy.[48]

---

41 See *Griffiths v Liverpool Corp* [1967] 1 QB 374 at 386.

42 *Stovin v Wise* [1996] AC 923.

43 Alberta, Manitoba, Ontario and Saskatchewan. For details of the legislation, see above n16 at 826, fn 36.

44 Torts and General Law Reform Committee (New Zealand) *The Exemption of Highway Authorities from Liability for Non-Feasance* (1973).

45 Law Reform Commission of Western Australia, *Report on the Liability of Highway Authority for Non-Feasance* Project 62 (1981); New South Wales Law Reform Commission, *Liability of Highway Authorities for Non-Repair*, 13th report (1987); Law Reform Committee of South Australia, *Report on Reform of the Law Relating to Mis-feasance and Non-feasance* 25th report (1974) and *Report Relating to the Review and Reappraisal of the Twenty-Fifth Report* 51st report (1986). In South Australia highway authorities may be subject to the ordinary rules of negligence as occupiers by virtue of Part 1 B (ss 17b-e) of the *Wrongs Act* 1936 (SA), amended by the *Wrongs Act Amendment Act* 1987 (SA): Harold Luntz & David Hambly, *Torts: Cases and Commentary* (4th ed, 1995) at 447.

46 Above n17 at 713. Luntz and Hambly, above n45 at 443, make no express or implied criticism of the rule and while implying that a 'High Court attack' upon it is inevitable, they do not attempt to predict the outcome.

47 Fleming, above n7 at 485 describes it as an 'incongruous doctrine'. Balkin & Davis, above n16 at 831 write: 'It is difficult to resist the view that the immunity of a highway authority for mere non-feasance is no more than an outdated legacy of earlier decisions' and describe it as 'anomalous' at 833.

48 Above n27 at 21.

Many commentators interpret the development of the technicalities and fine distinctions in this area of the law as an indication of judicial unhappiness with the primary rule.[49]

Defence has predictably come mainly from highway authorities themselves, particularly local councils,[50] although notably the New South Wales Department of Main Roads supported abolition in principle to the New South Wales Law Reform Commission.[51] Professors Sawyer and Pyman may have been rare academic supporters.[52]

Like all immunities, the highway immunity has three features. First, being absolute, it can produce harsh results. Secondly, it has become increasingly anomalous, against the background of the general law of negligence under which bases for liability have expanded rather than decreased. Thirdly, well-meant efforts to contain or avoid the harsh results of the immunity have led to highly technical and difficult distinctions being drawn, which in turn have had the effect of increasing litigation, and uncertainty and unpredictability of outcome.

Such features are common to all absolute rules,[53] but most have either been abolished or diminished by statute or abandoned or avoided by the common law itself.[54] The highway immunity has arguably been confined as far as possible short of a complete reversal,[55] but even so confined, it still has the potential to bar a remedy even in a case of the most gross or culpable negligence resulting in the most serious personal injury or death to an otherwise innocent victim. In view of this, a review by the High Court of the continuing justification for the immunity is warranted.

---

49 Friedmann, above n27 at 23; Fleming, above n7 at 485 and 487; Balkin & Davis, above n16 at 826. See also *Hughes v Hunters Hill Municipal Council* (1992) 29 NSWLR 232 at 236; *Pride of Derby v British Celanese* [1953] Ch 149 at 188.

50 See above n45 for example, the NSW Law Commission Report at 4, which summarises the submissions of local councils. See also Department of Immigration and Local Government, *The Liability of Local Authorities. Options for Reform: A Report to the Local Government Ministers of Australia and New Zealand* (Canberra: AGPS, 1988).

51 NSW Law Reform Commission Report, above n45 at 4.

52 Geoffrey Sawer 'Non-Feasance Revisited'(1955) 18 *Mod LR* 541 and 'Non-feasance Under Fire'(1966) 2 *NZULR* 115; TA Pyman 'Legal Liability of Highway Authorities' (1939) *II Res Judicatae* 85 at 88.

53 For example, the defence of contributory negligence, the defence of common employment, the rule against contributon between tortfeasors, landlords' immunity and advocates' immunity. Outside the field of tort law but also with such features was the supposed rule denying recovery of payments made under a mistake of law: see the discussion by Lord Goff of Chieveley in *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 at 372 where he noted that the rule had produced 'capricious' results and had became 'uncertain and unpredictable in its application' because of 'the difficulty in some cases of drawing the distinction between mistakes of fact and law, and the temptation for judges to manipulate that distinction in order to achieve practical justice in particular cases ....'

54 For example the development of non-delegable duties, the reinterpretation of cases thought to bar recovery of payments made under mistake of law and the rejection of the landlords' immunity.

55 Particularly if highways do not include footpaths, as argued by the plaintiff in *Ghantous*.

It may be suggested that neither of the two cases is one of gross negligence or the most serious injury and that the review should wait for such a serious case to come before the court. However, our courts have never let the imposition of civil liability (as opposed to damages) rest on either degrees of fault or degrees of injury and the plaintiffs' injuries could not be described as so trifling as not to justify the attention of the court at all.

5. *Arguments For and Against the Overturning of the Immunity*

The arguments commonly cited in support of overturning the immunity are numerous. The most significant[56] can be summarised as follows:

A. The Distinction between Non-Feasance and Misfeasance in this Context has Proved in Practice to be a Highly Technical Distinction and one that is very Difficult to Apply

Legal rules and distinctions which are difficult to apply should not in general be maintained unless clearly justifiable, because they encourage litigation, increasing legal costs and taking up valuable court and administrative time. Further they tend to render decisions unpredictable[57] or apparently inconsistent and difficult to reconcile, which in turn leaves a sense of injustice to unsuccessful plaintiffs who feel that they have lost their claims on a technicality rather than after a consideration of the substantive issues. Unjustifiable technicalities bring the law into disrepute. It may be commented here of course that the distinction between non-feasance and misfeasance would still be drawn even if the immunity were abolished so there would be no significant gain from its abolition, but it will be seen, below, that in other cases the distinction is not nearly so decisive.

B. The Immunity is an Anachronism

The immunity was developed over a century ago and had its origins in earlier times in England[58] when social arrangements, responsibility and funding for the maintenance of the roads, were very different from the conditions which prevail in Australia today.[59] Originally the rationale lay both in the poor resources of local

56 There is also the argument that the immunity encourages inaction as a highway authority will certainly escape liability if it does nothing but will become subject to a duty of care once it embarks upon action. The NSW Law Reform Commission, above n45 at 62, pointed out that 'while there is no evidence to suggest that highway authorities succumb to this temptation, it is undesirable that the temptation exists'.

57 Friedmann's analysis of the High Court's decision in *Gorringe*, above n27 at 27, concludes that 'it can at least be said that the analytical grounds on which the High Court could have found for the plaintiff were at least as powerful as those which it used in favour of the defendant'.

58 There is also an argument made in *Ghantous* that the rule was in any event not a rule that existed in England in 1823 or 1828 and that there is therefore no legal basis for it to apply in New South Wales. It seems likely however that the explicit acceptance and application of the rule by High Court in *Buckle* and *Gorringe* would preclude such an argument.

59 Fullagar J in *Gorringe* [1950] 80 CLR 357 at 373–378 traces the development of the rule which began with *Russell v Men of Devon* (1788) 2 TR 667 and was consolidated by the House of Lords in *Cowley v Newmarket Local Board (1892)* AC 345.

communities who were responsible for the condition of local roads and also the lack of collective entities as suitable defendants. It could also be said that the state of technological expertise and means of surveying and communication are now so different from those of earlier times as to make the task of highway authorities a very different one. If the conditions for the law have changed, so should the law. Some might argue that Australia's size is another justification for the immunity. However the fact that some areas of the country are remote and sparsely populated does not logically justify an immunity to all highways including those in densely populated areas: such factors are better taken into account when assessing the balancing considerations that a reasonable person or authority in the defendant's position would have taken.[60]

C. *The Immunity is Anomalous within the Modern Law of Negligence Generally, and More Specifically, within the Modern Law Relating to Other Public Authorities*

The immunity was created long before *Donoghue v Stevenson*[61] and its notions of neighbourhood and proximity, which are the basis for a much wider responsibility than that previously based on isolated categories of duty, on those whose actions closely affect others, particularly in cases of personal injury and property damage. Further, as affirmed by the High Court in *Sutherland Shire Council v Heyman*,[62] all other public bodies are subject to the general principles of negligence and there is an emerging body of principle specifically concerned with the tort liability of public authorities.[63] As a general rule, like cases should be treated alike. It is anomalous and confusing for highway authorities to be singled out for special treatment or exemptions. Although they may argue that the vastness of their responsibilities for public highways justifies their special treatment, there are many other authorities for whom the vastness or dangerous nature of their responsibilities does not provide a blanket excuse: electricity authorities, gas authorities, railway authorities, maritime authorities, water authorities and national parks authorities.[64] Again the extent of responsibility is a factor better taken into account when assessing whether any duty either exists or has been reasonable discharged, as it was in *Romeo v Northern Territory Conservation Commission*.[65]

D. *The Immunity Produces some Unjust, Harsh Results*

The immunity is by its nature absolute and absolves highway authorities not only from minor cases of negligence but also from cases of gross, culpable negligence

60 See *Council of the Shire of Wyong v Shirt* (1980) 146 CLR 40, at 47–48 (Mason J); *Romeo v Northern Territory Conservation Commission* (1998) 192 CLR 431.

61 [1932] AC 562. See also the discussion of the former immunity of landlords in above n30.

62 (1985) 157 CLR 424.

63 Above n62; Above n12; *Parramatta City Council v Lutz* (1988) 12 NSWLR 293; *Crimmins v Stevedoring Industry Finance Committee* [1999] 167 ALR 1.

64 Friedmann, above n27 at 28: 'Limitation of funds would be an argument against any liability of a public authority, which depends on either rates or central government grants, or both'.

65 (1998) 192 CLR 431.

resulting in serious personal injury or death (or property damage). Paradoxically, this is the sort of damage which usually attract the most easily satisfied criteria for recovery and the most ready protection of the law of tort.[66]

E. There is no Need for an Absolute Rule in Order to Provide Protection from an Excessive Burden of Liability as the General Law already Provides Sufficient Protection

First the current law does not require a guarantee of safety and only requires a person or authority to exercise reasonable care in the circumstances: the decision as to what is reasonable will take into account a number of balancing considerations including the probability of damage, the gravity of the risk in terms of damage, the cost of taking precautions, and other countervailing factors such as the defendants' other responsibilities.[67]

Second, the current law already includes a caveat against the too-ready imposition of duties of affirmative action. Although traditional formulations of negligence refer both to negligence by conduct and negligence by omission,[68] the distinction between non-feasance and misfeasance is well established in the law of negligence,[69] particularly in the case of public authorities invested with statutory powers. In general liability for failure to act will only be imposed where there is a clear duty to act and the mere existence of a statutory power will not by itself impose a duty.[70] The position of highway authorities should the immunity be overturned is discussed further below.

F. The Application of the Rule has become Undesirably Complex and Uncertain in all Respects

Quite apart from the difficult distinction between misfeasance and non-feasance, the other elements of the rule have also been subject to highly technical and complex arguments as courts and litigants attempt to avoid the harshness of the

66 For example in *Jaensch v Coffey* (1984) 155 CLR 549 at 581–582, Deane J referred to the fact that it was more straightforward to establish a duty of care in negligence in relation to personal injury or property damage than in relation to nervous shock or purely economic loss: in the former case it was sufficient, to satisfy the requirement of 'proximity', to prove reasonable foreseeability of such harm to the plaintiff. From its very beginnings, tort law provided protection from intentional infliction of personal injury and property damage by the action in trespass.

67 *Council of the Shire of Wyong v Shirt* (1980) 146 CLR 40; *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd (The Wagon Mound)* [1967] 1 AC 617 (PC); *Romeo v Northern Territory Conservation Commission* (1998) 192 CLR 431.

68 See the judgment of Gibbs CJ, above n62 at 443 citing B Alderson in *Blyth v Birmingham Waterworks Co Ltd* (1856) 11 Ex 781 at 784: 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.'

69 Deane J in *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424 at 502: '... the distinction between a failure to act and positive action remains a fundamental one.' Mason J in the same case at 457 referred to the unsatisfactory distinction between misfeasance and non-feasance having a 'significant influence' in that branch of the law of negligence. See also Gummow J in *Pyrenees Shire Council v Day,* above n12 at 391.

70 Gibbs CJ, above n62 at 435.

absolute immunity. The 'artificial structure' concept, the 'source of authority' distinction and the definition of 'highways' are all sources for argument. The maintenance of highly technical distinctions on these points leads to the same undesirable effects as those set out in point A above and it is likely that without very clear guidance from the High Court, the immunity will continue to provoke similar attempts to contain and distinguish it.

In contrast to the litany of arguments against the immunity, the arguments in favour of the immunity tends to centre on one, albeit forceful, point:

A. The Immunity Avoids the Imposition of a Crippling or at Least an Intolerable Financial Burden Directly on Highway Authorities and Indirectly on Ratepayers or Taxpayers

(i) Direct Financial Burden on Highway Authorities

Highway authorities, particularly local authorities charged with the responsibility of municipal or shire roads, are almost universally opposed to the overturning of the immunity, the latter on the grounds that it will lead to an intolerable financial burden on an often small roll of local ratepayers. The increased financial burden would, it is said,[71] arise in three ways:

1. the costs of increased road maintenance to avoid claims;
2. increased compensation payouts because of the rise in the number of successful claims;
3. increased legal and administrative costs because of the inevitable increase in both worthy and vexatious claims.

There seems little doubt that the lifting of the immunity would indeed result in increased financial costs to road authorities in these three ways, although it seems arguable that the expenditure under the first head may well reduce the burden under the second. Further any increase in claims may well only be severe initially because a change in the common law may prompt a more comprehensive legislative reform[72] which could, for example, discourage minor claims or abolish claims for property damage.[73] As to the third head of increased costs, it could be argued that the immunity only partially discourages litigation at present and that abolishing the immunity with its fine and difficult distinctions and bringing highway authorities into line with the general law may be less productive of protracted litigation and appeals than is currently the case.

It can hardly be said that increased expenditure on *necessary* road maintenance is a bad thing: it may in the long run be an efficient allocation of community

71 See NSW Law Reform Commission, above n45 at 63.

72 For example, after the High Court in *L Shaddock & Associates Pty Ltd v Council of the City of Parramatta* (1981) 150 CLR 225, decided that local councils could be liable in negligence for negligent mis-statement, the NSW Parliament enacted legislation exempting councils from liability in certain cases. See *Environmental Planning and Assessment Act* 1979 (NSW) s149 (6).

73 See further discussion of such a limitation below.

resources to work on the prevention of road accidents rather than a 'cure'. It is trite to recognise that the prospect of liability generally prompts the taking of greater precautions and those who argue the 'positive deterrent' line would argue that improved safety standards and a consequent reduction of accidental injuries are positive benefits of a fault-based system of compensation.

In any event an increase in financial costs to the class to whom the defendant belongs has never in itself been an automatic or sufficient answer to liability for negligence. It is no complete answer to a claim of negligence against a particular doctor or lawyer that recognising a duty of reasonable care towards his/her patients or clients would lead to increased costs to the medical or legal profession as a whole; or to an increase in the charges to the consumer in order to provide for greater but reasonable precautions, the meeting of successful claims in cases of unreasonable behaviour, and the legal costs of defending or processing worthy and vexatious claims. Rather, the direct and indirect costs,[74] of requiring a particular standard or mode of conduct is a factor to be taken into account when assessing whether or not the doctor or lawyer has taken reasonable care.[75] And, as in all contexts, courts must be wary of turning what is professed to be a fault based system into one that is effectively a system of strict liability by an unrealistic or overly demanding assessment of what is reasonable care in the circumstances.

(ii) Indirect Financial Burden on Taxpayers or Ratepayers

It is inevitable that highway authorities *will* pass on these increased costs to those from whom they derive their income: the higher public-funding body or their direct taxpayers or ratepayers. Supporters of the immunity invariably ask the question: why should the general body of ratepayers, which may be very small in a particular area, or the larger body of taxpayers, shoulder the costs of the individuals who suffer injury?

At the first hearing of the special leave application, Kirby J indicated some sympathy with this concern, firstly in response to counsel for the plaintiff in *Brodie*:

> In the end, though, somebody has to pay. It may not be the ratepayers but it is the taxpayers.[76]

And secondly, perhaps in response to the suggestion by counsel for the (plaintiff) applicant in *Ghantous* that even if the immunity were to remain, it should not apply to footpaths or perhaps in response to the wider argument that the immunity should not be applied in any form:

> The argument that you advance would have the effect of extending the liability of

74 Including, for example, the danger that services will become unobtainable or prohibitively expensive if an unreasonable standard of care is required.

75 In cases of direct relationships at least; compare with cases concerning liability to third parties where this may be a factor relevant to whether a duty of care exists at all. See *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241.

76 Above n23 at 3.

> ratepayers enormously, potentially, but that [may be] a matter for the Full Court and I can repeat my concerns in that respect.[77]

In answer to the question above it can be said that the cost of injury would be shifted to ratepayers or taxpayers only where *negligence* by their elected or representative body is proved by the injured party and it is difficult to see why the innocent victim of negligence should bear the loss in a society where another's fault is generally the basis for liability. Again Kirby J's comments in *Boland v Yates Property Corporation Ltd*, quoted above, bear repeating:

> ... an immunity from liability at law, to the extent that it exists, is a derogation from the normal accountability for wrong-doing to another which is an ordinary feature of the rule of law and fundamental civil rights ... [78]

Thus the immunity is anomalous not only within the modern law of negligence as discussed above but also, in a broader context, within the modern law of tort where the clear trend is towards liability based on fault[79] rather than a spectrum ranging from immunities at one end to strict liability at the other. In academic writing there is little support for the view that lifting the immunity would place an intolerable burden on taxpayers. Fleming states that 'the inadequacy of revenues provides ... but a paltry justification for denying redress to a victim of negligence merely in order to spare the community at large from a slightly higher impost of rates or taxes.'[80] Further, it is difficult to see why foreseeable victims of highway authorities' negligence should be completely barred from claiming compensation by the general body of ratepayers while victims of others' or other authorities' negligence may be compensated in closely analogous circumstances. As Friedmann says, 'Limitation of funds would be an argument against any liability of a public authority, which depends on either rates or central government grants or both. And it is repugnant to our values of justice that exemptions of liability should be made at the expense of the individual rather than the community.'[81] Trindade and Cane[82] argue that lack of resources does not justify a blanket immunity but is rather one factor that would be taken into account when deciding whether reasonable care was taken.

---

77 Id at 5.

78 Above n38 at 236 (para 129).

79 *Northern Territory v Mengel* (1995) 185 CLR 307, where the High Court stated, in overturning *Beaudesert Shire Council v Smith* (1966) 120 CLR 145 at 341, that 'the recent trend of legal development, here and in other common law countries, has been to the effect that liability in tort depends on either the intentional or the negligent infliction of harm. That is not a statement of law, but a description of the general trend.' (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ). See also the general discussion at 341–343.

80 Above n7 at 485.

81 Above n27 at 28.

82 Above n17 at 712.

B. Other Arguments in Favour of the Immunity

Professor Sawer[83] puts forward some lesser arguments in favour of the immunity, such as the argument that it encourages a degree of self-help among road users. Such an argument is reminiscent of Lord Denning's exhortations to self-help when rejecting a claim for compensation for purely economic loss caused by the disruption of power supply or essential services in *Spartan Steel & Alloys Ltd v Martin and Co (Contractors) Ltd.*[84] However much sympathy one may have with the underlying sentiments in cases of undeserving claims, in the current legal context of accountability of public bodies and the rapid expansion of liability for negligence such quaint notions seem to have been left behind.

It is also suggested that the rule can be justified as allowing highway authorities the freedom to decide how, where and when they will allocate their resources for road maintenance and that the imposition of liability will interfere with this decision – making process. But the courts have already shown themselves to be acutely aware of and sympathetic to this line of argument in many cases involving public authorities and as will appear below, there is a clear judicial reluctance to allow tort law to encroach into the administrative, policy and economic decision-making functions of such bodies. There does not appear to be any reason why highway authorities would be treated less sympathetically.

6. The Legal Position of Highway Authorities: Should the Immunity be Overturned?

If the special immunity of highway authorities for non-feasance were to be overturned by the High Court, those authorities would then be subject to the general principles of nuisance[85] and negligence as they apply to public authorities charged with the exercise of statutory powers.[86] The action for breach of statutory duty has not been a productive source of liability towards individuals injured in road accidents because of the difficulty of finding in the relevant legislation an

83 Sawer, above n52.

84 [1973] QB 27 at 38

85 This comment does not consider in any detail the effect of lifting the immunity for non-feasance on possible nuisance actions against highway authorities but would note that the distinction between non-feasance and mis-feasance has always been an important factor in nuisance actions, with liability for non-feasance generally requiring proof of fault rather than being strict. Further, Fleming states that the 'mere failure to provide a service or benefit, even pursuant to statutory authority, would ordinarily confer no private cause of action on persons who thereby suffer loss. This overriding policy applies alike to actions for negligence and nuisance.' Above n7 at 483–484. Therefore it seems that there would be no particular advantage in a plaintiff suing in nuisance rather than negligence were the immunity to be overturned.

86 There is a voluminous amount of academic discussion on the principles of negligence relating to public authorities. Recent material includes Stephen Todd, 'Liability in Tort of Public Bodies', in Nicholas J Mullany & Allen M Linden (eds) *Torts Tomorrow: A Tribute to John Fleming* (1998) at 36; BS Markesinis, J-B Auby, D Coester-Waltjen & SF Deakin, *Tortious Liability of Statutory Bodies* (1999); Martin Davies, '"Common Law" Liability of Statutory Authorities: *Crimmins v Stevedoring Industry Finance Committee*' (2000) *Torts Law Journal* 133.

implied intention[87] on the part of the legislature to confer a private right of action, and it would not be expected that lifting the immunity would have any effect on this area of the law. As noted above, the general law of negligence already provides some protection from an excessive burden of liability on statutory authorities, and although some would argue that it has not been enough to stem the expansion of liability in recent years,[88] it can be said with certainty that were the immunity to be overturned, liability on highway authorities would not ensue routinely or simply because an accident was caused by the defective condition of a highway under the jurisdiction of the defendant.

To begin with, cases involving public authorities raise not only the usual policy considerations such as the floodgates argument, the fear of discouraging initiative or the provision of services and the fear of imposing an unfair burden on the defendant, but also, as noted above, the controversial issue of whether and to what extent the courts should interfere in the decision-making processes and discretionary functions of public administration. There have been, and remain, a number of judicial approaches to this issue. On the one hand was the strict approach of Lord Romer in *East Suffolk Rivers Catchment Board v Kent.*[89]

> ... [w]here a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by reason of a failure to exercise that power.

In contrast was the acceptance as early as 1880 that a power coupled with a discretion could still give rise to a duty in some situations: Earl Cairns LC in *Julius v Lord Bishop of Oxford:*[90]

> ... there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.

A modern approach has been to draw distinctions between policy and operational matters, although this distinction has often proved difficult to apply in practice. In *Pyrenees Shire Council v Day*, Brennan CJ stressed the link between public and private law concepts, by making the 'justiciability' of decisions depend on whether they were made *ultra vires* or *intra vires*, and whether they were so unreasonable

87 Justice Gummow of the High Court of Australia, writing extra judicially, has emphasized that this is not a matter of discerning 'the actual intention of the legislators' but that inference which arises 'on a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation', quoting Kitto J in *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405. WMC Gummow, *Change and Continuity: Statute, Equity and Federalism* (1999) at 32.

88 PS Atiyah, *The Damages Lottery* (1997) at 78–95.

89 (1941) AC 74 at 102.

90 (1880) 5 App Cas 214 at 222–223.

as to be 'irrational'.[91] However that approach also does not have widespread support: it was recently expressly rejected by McHugh J in *Crimmins v Stevedoring Industry Finance Committee.*[92]

Gummow J in *Pyrenees* preferred to describe the sort of case where the private law of negligence had no place as involving:

> ... quasi-legislative activity of public authorities such as zoning prescriptions .... On the other hand, questions of resource allocation and diversion, and budgetary imperatives should fall for consideration along with other factual matters to be "balanced out" when determining what should ... have been done to discharge a duty of care.[93]

Apart from the nature of the function under scrutiny, a further important consideration is whether a duty of care in negligence and consequent civil liability is compatible with the purposes for which the statutory power or duty was passed.[94] The notion of *compatibility* is easier for a plaintiff to satisfy than the requirement of showing an implied *intention* on the part of the legislature that an individual should have a private right of action, and indicates a more liberal approach than that taken by Dixon J in *Buckle v Bayswater Road Board* where, for example, he stressed that the purpose of giving an authority the control of the highway was to enable it to exercise its powers, not to impose upon it new duties.[95]

Assuming that the function under scrutiny is accepted as justiciable by the court and that a private right of action is not incompatible with the purposes of the statutory power, any case involving pure non-feasance will require the plaintiff to prove that the authority had a positive duty to act. In *Heyman,*[96] Mason J referred to a number of circumstances which might call for the exercise of statutory powers: the authority might have created or increased a risk of danger, it might have assumed or undertaken a responsibility,[97] it might have placed itself in a position where others rely on it to take care for their safety[98] or its ownership, occupation

---

91 Above n12 at 345–346.

92 See McHugh J in *Crimmins v Stevedoring Industry Finance Committee* (2000) 74 ALJR 1 at 17 who rejects the use of public law concepts to determine the existence of a duty of care.

93 Above n12 at 394.

94 Id at 344, 346 (Brennan CJ). For an example of where it was effectively held that the imposition of a duty of care in tort would be incompatible with the performance of public duties see *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53.

95 Above n1 at 281.

96 Above n62 at 460–462.

97 For example, as later in *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 326–330, where there is an extensive discussion by McHugh J of the circumstances when a duty of positive action will be imposed.

98 Reliance may only be a sufficient basis now for a positive duty where the plaintiff specifically has relied on the defendant to take action. The notion of 'general reliance' formulated by Mason J in *Heyman* in above n68 was disapproved by a majority of the court in *Pyrenees,* above n12. See also *Stovin v Wise,* above n40. But it is arguable that the notion of general reliance is no more vague or objectionable than the notion of 'reasonable expectations' which has been a factor in finding duties in other cases of negligence.

or control of premises or structures or public places might attract a duty of care.[99] More recent cases such as *Pyrenees Shire Council v Day*[100] and *Crimmins v Stevedoring Industry Finance Committee*[101] have emphasized factors such as the plaintiff's vulnerability on the one hand, and the knowledge, control and power of the defendant on the other as a basis for finding a positive duty. The defendant's knowledge may be particularly significant if it is not shared by those likely to be affected.[102] In view of the increasing number of examples, it can no longer be said that it is unusual for Australian courts to find a duty of positive action,[103] but nevertheless in each case there were significant factors in addition to the mere existence of a statutory power.

It is submitted that these factors will provide an ample basis for the courts to decide in the case of highway authorities what they have for decades had to decide with respect to other public authorities: whether or not a duty was owed by the authority to take positive steps to avoid a certain danger. But recognising a duty of care will not be the end of the matter; the plaintiff must still get over the substantial hurdle of proving that the steps taken by the authority did not amount to reasonable care in the circumstances. All the factors enumerated in *Council for the Shire of Wyong v Shirt*[104] must be considered. Where an authority has extensive responsibilities, this will be a relevant factor in the assessment of whether the duty has been breached, as it was in *Romeo*.[105] The question may not be whether they have a duty to take reasonable care that highways in their jurisdiction are navigable and safe for use (for that is exactly a purpose of or at least entirely consistent with a purpose of investing them with responsibility) but whether they have discharged that duty.

---

99 For example, *Romeo v Northern Territory Conservation Commission* (1998) 192 CLR 431 and *Nagle v Rottnest Island Authority* (1993) 177 CLR 423. However, *Romeo* shows that the mere fact that a plaintiff can prove that an authority is the occupier of an area, and that he or she is a lawful entrant, will not necessarily be sufficient to prove a duty of positive action or that the failure to take a precaution amounts to a breach of duty.

100 Above n12.

101 Above n92.

102 See above n12 (Gummow J).

103 The position may be different in England where it has been said that '[o]verall, the inescapable conclusion from Lord Hoffmann's speech [in *Stovin v Wise*, above n40] is that the chances of succeeding in a negligence action in respect of the non-exercise of powers by a public authority will be at best modest': MC Harris, 'Powers Into Duties – A Small Breach in the *East Suffolk* Wall?' (1997) 113 *LQR* 398 at 402. See also Rt Hon Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62 *Mod LR* 159 at 163. But that situation may be changing: see SH Bailey & MJ Bowman, 'Public Authority Negligence Revisited' (2000) 59 *Camb LJ* 85 and Elizabeth Palmer, 'Resource Allocation, Welfare Rights – Mapping the Boundaries of Judicial Control in Public Administrative Law'(2000) 20 *OJLS* 63. See also *Phelps v Hillingdon LBC*, House of Lords, 27 July 2000.

104 Above n67.

105 Above n67.

7. *Should the High Court Overturn the Highway Immunity for Non-Feasance or Should it Leave Such a Significant Step to Parliament?*

It will no doubt be put that reform of this area of the law would be more appropriately carried out by parliament than by the High Court. A number of arguments might be made in support of this view: first, the rule is long-standing and entrenched in our common law, and is frequently and perennially applied; secondly, the Court is not equipped with either the power or the means to make the sort of survey and study that parliaments can do of the economic and other effects of a decision to overturn the immunity; thirdly, governments in three Australian states have received recommendations from law reform bodies that the rule be abolished but have not acted upon them, from which it can be inferred that parliaments in those states do not support the proposals; fourthly, the courts cannot 'legislate' to deal comprehensively with all the expected ramifications of the change in the law in the same way as parliament.

In answer to these arguments, it may be said, first, that the High Court is often asked to overturn principles, fictions and rules of the common law which may have been long-standing and of pervasive influence in the development of the law. It has not shirked the task.[106] It is interesting to note that the case described by Fullagar J in *Gorringe*[107] as the first step in the development of the highway immunity rule, *Russell v Men of Devon,*[108] was decided in 1788, the same year that Captain Arthur Phillip was establishing the first European settlement in Australia in Sydney Cove, a settlement that expanded throughout Australia on the basis of the doctrine of 'terra nullius' which was recently and famously rejected by the High Court. Such radical changes in the common law have been made against the background of spirited debate over whether judges 'make' or 'declare' the common law, but it is generally accepted that the declaratory theory of judicial decisions is unrealistic and there can be little doubt that judges do in fact develop the common law, which does not exist in the same state as it has been since 'time immemorial'.[109] Lord Goff of Chieveley reflected commonly held views when he said recently:

> It is universally recognised that judicial development of the common law is inevitable. If it had never taken place, the common law would be the same now as it was in the reign of King Henry II; it is because of it that the common law is a living system of law, reacting to new events and new ideas, and so capable of providing the citizens of this country with a system of practical justice relevant to the times in which they live.[110]

---

106 Above 26.

107 Above n2.

108 (1788) 2 TR 667.

109 This expression was used by Sir George Jessel MR, when contrasting the fluid development of equitable rules with the 'supposed' nature of common law rules, in *In re Hallett's Estate; Knatchbull v Hallett* (1879) 13 Ch D 696. See WMC Gummow, above n87 at 42.

110 *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 at 377. See also Justice Michael McHugh, 'The Law-Making Function of the Judicial Process' (1988) 62 *ALJ* 15 (Part I), 116 (part II).

The call for practical and relevant justice should not of course be seen as a call for unprincipled justice and the challenge for courts as they develop the common law is to do so within a coherent framework.[111] Thus any review of the highway immunity rule must take into account the modern development of the law of torts and of the principles of negligence, both generally and as they apply to statutory authorities. But the High Court is of course fully capable of fulfilling this task. It should not be argued that the High Court should decline to review, reformulate or overturn a common law rule, which is widely criticised as anachronistic, anomalous, often unjust and difficult to apply, merely because it is one that is long-standing.

As to the second argument, it is true that the Court is unable to do the same sort of empirical survey and widespread study as Parliament before enacting legislation. However, courts frequently take into account arguments as to the social and economic ramifications of their decisions, particularly in novel cases of negligence.[112]And the High Court in these cases could draw comfort from the fact that none of the three Australian law reform commissions which have considered the issue, after thorough investigation and consultation with relevant groups, was in favour of retaining the immunity.

The third argument is one that is both easy to assert and difficult to disprove, but in any event it is not an argument that easily withstands changes in the political arm of government.

The fourth argument is probably of more concern than all the others.[113] It is true that all the law reform bodies which have considered the issue recommended, in response to the submission of highway authorities, not a simple abolition of the immunity, but rather a package of legislative reforms which would go some way to allaying the fears of those bodies of an intolerable or unworkable financial burden. But it is submitted that, first, this should not mean that the courts need draw back from their function of developing and applying the common law in a rational, consistent and fair manner. As Professor Friedmann put it, 'the legislator cannot be expected to carry the whole burden of law reform, especially in fields which are traditionally within the common law.'[114]

Further, any step by the courts does not preclude the legislature from performing its role. This might involve legislative action to reimpose the immunity, or, as is more likely in view of the recommendations of the law reform bodies, to enact changes to the law to spread the loss in a more acceptable way[115] or to reduce liability by the exclusion of trivial or minor claims, the capping of

111 WMC Gummow, above n87 at 45.

112 See for example, above n75.

113 Lord Browne Wilkinson had a similar reason for dissenting in *Kleinwort Benson*, above n53 at 362.

114 Friedmann, above n27 at 28.

115 For example, the NSW Law Reform Commission in 1987 recommended drawing accidents caused by the condition of the highway into the then Transcover Scheme in New South Wales. See above n45.

damages, and the discouragement of vexatious or unmeritorious claims, as has been done in various ways in relation to other motor accidents. Such reforms would presumably cover both misfeasance and non-feasance claims so that in the long run the authorities may be in a better position than they are now where claims in respect of misfeasance are unlimited.

8. *If the Immunity is Retained, Should its Application be Clarified or Narrowed ?*

If the immunity is to be retained, there are at least two issues which arise commonly in cases against highway authorities and about which clarification by the High Court would be welcome: whether the immunity applies to public footpaths as well as to all forms of public roadways, and whether the distinction between 'artificial structures' and other structures on the roadway should be retained. More generally, guidance would be helpful as to how the principles enunciated in recent cases like *Pyrenees*[116] in relation to the classification of conduct as mis-feasance or non-feasance, should apply in cases dealing with repairs to the highway.

Between the complete overturning of the immunity and the mere clarification of the principles surrounding its content and application, there is another possible, albeit radical, route which the High Court might take. The two cases before the court both involve claims for personal injury, although the case of *Brodie v Singleton Shire Council*[117] also includes a claim by the owner of the truck for the damage to it. Generally, claims for personal injury and property damage are afforded equal protection by the law of negligence, and it is only claims for nervous shock or purely economic loss which have had to overcome additional hurdles to succeed.[118]

However, there is much to be said for the suggestion of Professor Luntz[119] that the time has come, in the context of expanding liability and widely held views that public bodies with their deep pockets and permanent status are too-easy targets for claims, for the common law to draw a distinction between property damage and personal injury.[120] Property is commonly insured by the owner against accidental loss or damage anyway (or at least readily insurable at a reasonable cost) and there is no particular justification in shifting the loss, or the risk of it, from the insurers, who can calculate the risk when setting their premiums, to the public body.[121]

---

116 Above n12.

117 Above n3.

118 See for example *Jaensch v Coffey* (1984) 155 CLR 549 at 581 where Deane J draws a distinction between 'ordinary physical injury to a person or his property' on the one hand and other types of loss in the context of the requirements for establishing a duty of care.

119 Harold Luntz, 'Liability of statutory authorities for omissions' (1998) 6 *Torts LJ* 107, commenting on the contrasting results in *Pyrenees,* above n12 and *Romeo,* above n67.

120 The New South Wales Law Reform Commission noted that the hardship caused by the immunity rule is significantly less in relation to property damage claims than it is in cases of personal injury or death: above n45.

121 *Stovin v Wise*, above n40.

Motor vehicle property insurance for both private and commercial vehicles, such as the truck in *Brodie*, is common and the cost regarded by the owner as either a sensible precaution or just another necessary business cost. In contrast, first party personal accident insurance is both uncommon and beyond the means of many people so that accident victims, if unable to claim against the negligent party, may often have to cope with minimal social security or public health assistance in the face of serious injuries.

Admittedly it would be a significant step for the High Court to draw a distinction between personal injury claims and property damage, but distinctions between liability for different types of damage are already made in the principles concerning duties of care. And it may not be illogical or unreasonable for the Court to take the step of overturning the immunity only with respect to personal injury or death claims in order to avoid hardship and injustice in these cases, leaving the risk of property damage with property owners and their insurers.

9. Conclusion

There is no doubt that a decision overturning the immunity of highway authorities would be a landmark in the development of the law of torts in Australia. It might even prompt governments to think again about the introduction of a more comprehensive motor accident compensation system. But for all that, it must be said that the lifting of the immunity would not make highway authorities insurers or guarantors of road safety. Liability for non-feasance would be no easier to prove than it is against any other public body invested with public powers. But at least litigants would be subject to a consistent, rather than a conflicting, body of principles as to the liability of public authorities.