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HIGH COURT DECISION ON NON-FEASANCE:

Why it is a milestone in the development of asset management for all asset managers

In May, the High Court removed the long standing 'highway immunity'. In doing so they spelt out the negligence rules that will now apply to roads—and, by extension, to all assets!

- It shows that it is asset management – rather than maintenance per se – that will be a defence in the case of accidents involving injury or death
- Reasonable knowledge of asset condition will be required
- Available resources will be taken into account, but resource allocation decisions will need to be justified.

Continued on page 146

This decision has produced a lot of newspaper coverage—and hype. For an example of some of the scare mongering that you will need to contend with, *see page 151-152.*

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* This issue has drawn extensively on a paper by **Peter Bomber, Barristers and Solicitors, Perth**, presented to an AARB "Intelligent Transport Systems and Asset Management" workshop by Natasha Crowe last month. You will find the complete paper on our website, www.amqi.com

THE MAY 31 2001 HIGH COURT DECISION*

The facts of the case

The immunity came before the court in two separate cases:

In **Ghantous -v- Hawkesbury City Council**, Ms Ghantous sued the council for injuries she had sustained when, while walking along a footpath in 1990 she stepped aside to allow other pedestrians to pass and tripped on a 50 mm height difference between the concrete footpath and adjacent grass verge.

Her lawyers argued that the Council were responsible for her injuries as the Council had approved the construction of a near by mall which had increased pedestrian traffic that had in turn eroded the verge. The Council relied on the highway immunity, arguing it had no obligation to inspect or repair a footpath, which had been properly constructed.

In **Brodie -v- Singleton Shire Council** Mr Brodie sued the council for injuries he sustained when he drove a 22 tonne truck on a bridge with a load limit of 15 tonne. The bridge collapsed and Mr Brodie sustained serious injury.

Council had recently performed repairs on the bridge but had failed to conduct some simple tests which would have revealed the timber beams were rotting and the bridge's effective load limit had been reduced to as low as 9 tonnes.

Mr Brodie's lawyers argued Council was negligent for failing to detect the rot and fix the bridge. Council's lawyers replied the non-feasance immunity meant their client owed no duty to inspect and repair the bridge. The repairs which council had performed didn't make the bridge more unsafe

Abolishing the Immunity

In a joint judgement, Justices Gaudron, McHugh and Gummow said the immunity was outdated and unsatisfactory. They said liability of highway authorities should be governed by ordinary principles of negligence.

By their majority, Justices Gaudron, McHugh and Gummow stressed the change in the law need not lead to a deluge of liability claims against road authorities.

They pointed out that the mere reason a road authority has statutory powers it can exercise, in relation to a road, does not automatically impose an obligation on the road authority to exercise those powers in respect to every road and footpath imperfection.

Change in law need not lead to a deluge of liability claims

No automatic obligation on the road authority to remove all imperfections!

Good Asset Management is the key to protecting your agency against litigation— British Waterways recognised this (see Issue 68); in this issue we show now the High Court Decision on non-feasance has made this clear to all road agencies—and by extension to ALL agencies providing public infrastructure.

Non-feasance and mis-feasance explained

THE MAY HIGH COURT DECISION HAS CHANGED THE FACE OF ASSET MANAGEMENT FROM OPTIONAL TO REQUIRED.*

How has the law changed?

On 31 May 2001, The High Court abolished the long standing 'highway immunity'. Also called the 'non-feasance immunity', the rule held road authorities had no duty to pedestrians and motorists to maintain roads, footpaths and nature strips.

In the past road authorities would not be liable because a road or footpath fell into disrepair, but would be liable if the authority caused the danger through poor construction or shoddy repairs.

[This might explain why road authorities have tended to conduct themselves as 'road construction' rather than 'road management' authorities, as observed by the SA Public Accounts Committee in 1985. With liability for mis-feasance only, and not non-feasance, the authorities were safer simply acting as construction authorities. This will now need to change.]

Example of the impact of the changed law

A practical example will help illustrate how the law has changed:

Previously, if a truck accidentally deposited oil on the road, the relevant road authority would be under no obligation to remove the oil. A motorist or pedestrian injured slipping on the oil could not establish liability with the road authority for not cleaning up the spill. The rule simply said a road authority owed no duty to remove dangers that were not of its own making. ***This was called non-feasance.***

However, if the road authority itself spilled the oil or in attempting to clean it up made the area more slippery and that caused the accident, it would be liable. ***This was called misfeasance.***

Now, as a result of the High Court decision, depending on the circumstances, a road authority may owe a legal duty of care to motorists and pedestrians to clean up the spill.

Your protection?

- If you can show that you have done the best you can with your limited resources (see Issue *)
- If you can show that you could not have reasonably been expected to know of the causal factors for the incident
- this defence will be less acceptable if your standards of information and management are less than those generally applicable in the industry.

MITIGATING LIABILITY FOR ACCIDENTS

Good Asset Management is Your Best Defence!

The duty of care doesn't automatically mean the road authority is liable if a person or property suffers harm from the spill. A court would need to weigh up four considerations:

1. The road authority's resources
2. Whether the road authority was aware of the spill
3. How soon after the spill the road authority should have found out
4. What should the road authority have done in response to the spill: removed it altogether; put up warning signs or something else.

Justices Gaudron, McHugh and Gummow then considered the potential for liability of highway authorities in three circumstances:

1. Repair, maintenance and works
2. Pedestrians
3. Inspections of roads and footpaths

New! User Responsibility

With respect to repair, the majority emphasised that in establishing whether there had been a breach of duty of care, a proper starting point was that *road users would take reasonable care of themselves*.

For example, when considering a hole in the roadway, the size and location of such a pothole needs to be considered when determining whether it will be reasonably foreseeable to the road authority that the hole would lead to injury or harm.

In relation to pedestrians, Justices Gaudron, McHugh and Gummow emphasised such persons are more able than motorists to see and avoid imperfections in the road surface.

Regarding inspections, the majority acknowledged that by removing the immunity they were exposing road authorities to liability for failing to inspect for dangers. However the court emphasised that:

'where the danger could not reasonably be expected to exist, or could not be found expect by taking unreasonable measures, generally there will be no breach of duty by the authority. On the other hand, there will be a breach of duty where an authority fails to take all reasonable steps to inspect for such dangers as reasonably might be expected or known to arise or of which the authority has been informed or made aware and if they are found, fails to take reasonable steps to correct them.'

General Application

By extension, the High Court ruling—with its focus on

- User responsibility
- Asset management
- Reasonableness

will apply to non-road assets too.

HIGH COURT RULING APPLICABLE TO ALL PUBLIC INFRASTRUCTURE

Ordinary principles of negligence apply

Justice Kirby said the liability of highway authorities must now be determined by the ordinary principles of negligence law as applied to other statutory authorities with relevant duties and powers. He said three issues were to be decided:

1. Was the danger foreseeable?
2. Was the relationship between the injured person and the road authority sufficiently proximate?
3. Is it just and reasonable to impose a duty of care in the circumstances of the case?

Road authorities now owe a legal duty of care to users of roads and footpaths. Where a road or footpath poses a foreseeable risk of injury, of which the authority was or should have been made aware, steps must be taken to remove or minimise the risk within a reasonable time and to a reasonable standard.

The timeframe and standard of the repairs required are ascertained by analysing:

1. The risk, degree and probability of injury
2. The inconvenience to the authority in removing the risk; and
3. The conflicting responsibilities or commitments of authorities

Roads and footpaths don't need to be always completely safe for all people.

Significantly, the judgements contain strong statements about the duties of users of roadways and footpaths, particularly pedestrians, to take close and careful care for their own safety. Ms Ghantous failed to establish negligence against the Council even though she presented evidence of a significant trip hazard which had existed for some time.

Councils and other road authorities can take comfort from the strong statements of the Court that 'the world is not a level playing field' and that *there is a duty on road users to take care of their own safety.*

Time will tell how the courts will treat the abolition of the immunity rule and its replacement with the common law test for negligence. At this early stage, it appears reasonable to hope that any potential increase in liability exposure might be offset by the courts strong statement regarding the duties of road users to take care of their own safety.

WHY THE HIGH COURT DECISION REQUIRES ASSET MANAGEMENT PLANNING

Take the first consideration that the Courts must take into account (p. 148) - the authority's resources.

**Your best defence—
Asset Management
Strategy**—demonstration
of rationale for resource
allocation.

It is unlikely that 'insufficient resources' will be a satisfactory defence, UNLESS the authority can show that it has **allocated all of its resources wisely** across the entire spectrum of its responsibilities. This is particularly important for councils where road responsibilities compete with other council needs.

Take the second and third considerations, whether, and when, the authority had (and could have had) knowledge of the situation leading to the liability incident. Well resourced large and medium sized authorities will be hard pressed to defend themselves if they have not taken steps to understand their assets and conduct regular condition audits—and to use the information in their decision making. However, small authorities with geographically widespread assets (eg rural councils) may, in conjunction with the 'resources' argument be able to mount a defence. Again the best defence is to have this spelt out clearly in the Asset Management Strategy and Asset Management Plan.

**Your best defence—
Asset Management
Strategy**— demonstration
of an action plan
appropriate to asset
condition and available
resources.

The fourth consideration—action taken. Lack of a good asset management strategy to cover poor asset condition may act against all authorities.

IMPACT OF INTELLIGENT TRANSPORT SYSTEMS

The impact of Intelligent Transport Systems on the legal liability of road authorities is, potentially, significant. Intelligent Transport Systems impact on asset managers will depend on the extent to which the new technology is implemented and the institutional and social framework in which implementation occurs. *[SAM will look at the significance of the newer 'intelligent asset systems' for asset managers in a future issue.]*

STOP THE PANIC!

High Court Decision
is positive

The High Court Decision should be seen as a positive because:

- it emphasises user responsibility and
- wise asset management will likely meet the 'four considerations' as a defence in case of litigation

EXCESSIVE maintenance and service standards are NOT required

The response of Westpool, the mutual insurer for six Western Sydney councils depicted in the following should be seen for what it is -

For amusement only—read this excerpt from the SMH.

Avoid the panic
and hype

**This article fails completely to understand the import of the High Court Decision
But if your staff or elected members believe it—
you need to take educational action!**

"

Councils count cost of losing legal shield"

By Leonie Lamont Sydney Morning Herald 17 August 2001

It started nearly 10 years ago, when Scott Brodie drove his truck, laden with concrete - about 22 tonnes - over a 15-tonne maximum-load bridge in Singleton. The half-century old bridge had dry rot, and collapsed.

The case made its way to the High Court, and ended recently with the overturning of 200 years of common law. The court found that councils could no longer rely on the rule of nonfeasance - which amounts to an immunity from being sued for non-maintenance of roads, footpaths and bridges.

Now, a paper from Westpool, the mutual insurer for six of the councils in western Sydney, has outlined some of the effects of such a shift in responsibility.

"The result will be a dramatic slowdown in the provision of new and improved services to ratepayers," it says in its submission to the NSW Parliamentary Public Bodies Review Committee, which is examining the High Court decision.

Forget about new capital works developments - council money is going to be soaked up maintaining existing facilities.

And forget about unsealed roads - the potential for litigation will make them

COMMENTS?

Your comments on this article in the SMH, or any other aspect of this issue may be sent to <penny@amqi.com>

too dangerous, and the public will have to wait until the funds are available to put in sealed roads.

And every time there is a road accident the insurers will be out looking for potholes and other potential hazards, trying to move some of their costs onto councils.

Councils, the paper says, will face parlous times as they will be unable to organise reasonable insurance coverage. While the lag time between incident and settlement means no recent accurate figures are available, by 1995-96 the cost of public liability and professional indemnity claims against NSW councils was \$25 million.

Westpool says: "In general terms a council could not be held liable for damages if the cause of those damages was the result of normal wear and tear of the road, footpath, bridge. This of course presumes the road was built correctly in the first case. That immunity has now been removed, and future claims will be argued purely on the basis of negligence."

Westpool is calling for the immunity to be returned by legislation, and argues Parliament should set a standard for what is a reasonable standard of repair.

Otherwise, it asks, how could councils judge what is a "reasonable height for a footpath slab to lift before it needs maintenance - is it one cm or two cm?" And do roads near shopping centres need to be inspected once, twice, or four times a month, and how does that affect residential streets? And what about recreational areas?

A report to Fairfield City Council last week warned that solicitors had been delaying claims against councils, waiting for the High Court outcome.

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