Negligence of Highway Authorities

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The High Court has not specifically dealt with the question of negligence by highway authorities for many years. Since 1936 it has never in any way indicated any desire to reconsider *Buckle v. Bayswater Road Board* (1936) 57 C.L.R. 259 which it decided in that year.

The facts of the case were that the Bayswater Road Board had constructed a road and placed some drains on the side of it. One drain pipe was broken by heavy machinery used on the road, and several holes appeared along the side of the road. As the plaintiff walked along the side of the road, he stepped into one of the holes, which was covered by grass, and was injured.

A majority of the High Court specifically approved the rule that highway authorities are immune in relation to damage caused by their nonfeasance, such as allowing a road to fall into disrepair. It was held, however, that the rule applied only to highway authorities in regard to structures which were exclusively part of the roadwork. The rule did not apply in the circumstances of the *Buckle Case* itself, where the drain was laid down for the purpose of the road and adjoining land, and where the defendant was both a highway authority and a drainage authority. The defendant, in its dual capacity, was liable for failing to keep in good repair drains introduced into the roadway.

In addition to affirming the nonfeasance immunity, *Buckle* also illustrates the proposition that the immunity only applies to the highway authority acting in its capacity as such. The immunity does not, for example, extend to railway authorities charged with maintenance of roads, such as approaches to bridges under their control. The exemption does not even appear to cover contractors executing highway works on behalf of a highway authority. Another way of putting it is to say that the immunity does not apply unless the "misfeasance" occurs pursuant to a statutory authority which strictly and solely relates to the construction and repair of highways.

The nonfeasance immunity negates first of all a general duty to repair, and also any specific obligation to exercise care in control and management even with respect to known dangers. The latter does not of course extend to dangers created by the authority - once that stage is reached, it is a case of misfeasance rather than nonfeasance. However, most importantly, the deterioration of work which was safe when constructed is part of the immunity.

Although the High Court has not had occasion to reconsider the highway immunity rule, it has been argued that the Court's approach to negligence generally indicates that it would be likely to do away with the immunity once given the opportunity.

In the last ten years or so the High Court has, as is well-known, emphasised what has become known as the "general duty of care", and has fashioned liability on that basis in several areas in which particular rules previously applied.

Thus in relation to occupier's liability, in *Australian Safeway Stores Pty Ltd. v. Zaluzna* (1987) 162 C.L.R. 479 the Court held that the defendant's activities and liability were to be measured by reference to the general duty of care, rather than by reference to the former particular laws applicable to the measure of duty owed to invitees, licensees and trespassers.

Another example is to be found in *Council of the Shire of Sutherland v. Heyman* (1984)157 C.L.R. 424, where the issue of the liability of a local authority in relation to its exercise of its discretionary powers to inspect the foundations of a house under contract, and the issue whether there had been a careless exercise of those powers, was examined against the question whether the plaintiffs had made out a case of the breach of a general duty of care, with the familiar issue of reliance playing a major role in that inquiry.

Mason J. (as he then was) said:

> "Generally speaking, a public authority which is under no statutory obligation to exercise a power comes under no common law duty of care to do so: see *Revesz v. The Commonwealth* (1951) 51 S.R. (N.S.W.) 63. But an authority may by its conduct place itself in such a position that it attracts a duty of care which calls for exercise of the power. A common illustration is provided by the cases in which an authority in the exercise of its functions has created a danger, thereby subjecting itself to a duty of care for the safety of others which must be discharged by an exercise of its statutory powers or by giving a warning: see, e.g. *Barnes v. Irwell Valley Water Board* [1939] 1 K.B. 21; *Knight v. Sheffield Corporation* [1942] 2 All E.R. 411; *Fisher v. Ruislip-Northwood Urban District Council* [1945] K.B. 584; *Bird v. Pearce; Ex parte Somerset County Council* (1979) 77 L.G.R.

753. That it is the conduct of the authority in creating the danger that attracts the duty of care is demonstrated by *Sheppard v. Glossop Corporation* [1921] 3 K.B. 132. There the highway authority was under no duty of care with respect to lighting, though the danger was foreseeable, because it did not create the danger. Having statutory power to make provision for the lighting of streets, it placed a lamp at a dangerous point in a street, the danger not being of its making, but extinguished the lamp at 9.00 p.m. in accordance with a general resolution applying to all streets in the borough. The authority was held not liable on the footing that the statute imposed no obligation to light, that the authority having begun to light was under no obligation to continue to do so, and that having done nothing to make the street dangerous, it was under no obligation to give warning of the danger. Atkin L.J. [1921] 3 K.B., at p. 151 explained earlier cases in which under the same statute local authorities had been liable for not lighting by stating that the local authority had created the dangers which were responsible for the plaintiffs' injuries." (at p.459-460)

The general duty of care has now been applied to public authorities other than local authorities. In *Nagle v. Rottnest Island Authority* (1993) 177 C.L.R. 423, the majority in the High Court held that public authorities were under a general duty at common law to take reasonable care to avoid foreseeable risks of injury to visitors who used facilities which the authorities managed. In that case, a person was injured when he dived into water at a reserve managed by the Rottnest Island Authority. His head hit a submerged rock. The Authority promoted the reserve for swimming and related recreational purposes. The Court held that the diver's injury was caused by the Authority's failure to warn him of the presence of submerged rocks in breach of its duty of care to him.

Decisions such as *Zaluzna*, *Heyman* and *Nagle* have led some people to contend that, when it does have occasion to reconsider the nonfeasance rule in relation to highway authorities, the High Court can be expected to sweep it away. As I shall indicate, I do not share that view. In any event, it is apparent that the nonfeasance rule still applies until the High Court does sweep it away. As I shall indicate, relatively recent authorities of both the Full Court of the Supreme Court of Queensland and the Queensland Court of Appeal recognise that this is so. I therefore intend to make some observations about the nonfeasance rule, and the extent to which it has been accorded operation in recent cases.

There is no doubt that the nonfeasance immunity originated from the realisation that the financial resources of local communities, which of course in England and subsequently in Australia built the roads, were notoriously inadequate. There has also been a fear of "opening the floodgates", and that people who in truth bring about their own injuries as a result of a one-vehicle motor accident will blame the designer of the road. Probably combined with the latter is a fear that the driver, who in many cases would be alone, would give false evidence as to, for example, the speed at which he or she was travelling, and that such evidence could not be contradicted in any serious way.

The "financial resources of local communities" issue has lost a lot of its force since central governments have, in general, assumed financial responsibility for road construction and maintenance, and since governments have, in general, assumed financial responsibility for their torts. In other areas, injuries created by tortious conduct on the part of public authorities are generally compensable. The other features supporting the continued existence of the rule remain in full force however.

The nonfeasance rule was revoked by legislation in England in 1961, and it has been attacked by commentators and Judges. However, to date it has survived, and although its survival has been accompanied by judicial attempts to contain its scope, and to classify as "misfeasance" what might previously have been classified as "nonfeasance", it still serves the purpose of avoiding the multiplicity of claims which would undoubtedly occur if an unrestricted "general duty of care" were to be applied to highway authorities. Because it still serves such purpose, I would expect the High Court to continue to apply it, and to leave any change to the legislature.

The major problem left by the distinction between nonfeasance and misfeasance is however as to where to draw the line. This arises mainly in circumstances in which the road authority has carried out certain repairs, but has not thereby increased the risk of accidents. In general, the Courts have held that, to be guilty of misfeasance, the authority must have been the active agent in creating or adding to an unnecessary danger in the highway, as by making an excavation without filling it in, creating an obstruction, raising the surface so as to weaken a retaining wall, or constructing a road that ends abruptly in an unguarded trap.

In 1950, the High Court held, in an authority which

also has not subsequently been questioned, that the making of superficial repairs by a transport authority which did not go towards causing the actual danger to the plaintiff, did not occasion liability on the ground that the superficial repairs had elevated the "nonfeasance" into "misfeasance".

In that case, the plaintiff's employee drove his truck into a large hole on a highway which was caused by the collapse of a culvert through which a natural watercourse ran. The employee had no chance of avoiding the hole and, as a result of the accident, was killed. The defendant's employees had repeatedly filled in a large depression in the road, but the filling was repeatedly washed or worn away.

The High Court found that the culvert had been constructed well before the highway was vested in the defendant, and the legislature had not made the defendant liable for mere nonfeasance. It continued to enjoy the immunity of a highway authority. The danger had arisen from the defendant failing to do adequate repairs to the culvert, and, as this was an act of nonfeasance, it was not liable to the plaintiff. This conclusion had not been altered by the fact that the defendant did make superficial repairs to the culvert, since these did not go towards causing the death of the plaintiff's employee. (*Gorringe v. Transport Commission* (1950) C.L.R. 357).

How the courts approach the nonfeasance-misfeasance dichotomy is well illustrated by the case of *Desmond v. Mt. Isa City Council* (1991) 2 Qd.R. 482. The plaintiff was riding his motor cycle in the streets of Mt. Isa. There had been a heavy storm some seventeen days earlier. The motor cycle came on to a deposit of gravel on a bitumen surface of an intersection, and he then lost control of his motor cycle, fell off and sustained serious injury. He brought action against the Mt. Isa City Council, the highway authority, alleging negligence in the design, construction and maintenance of the relevant part of the road system. The plaintiff also sued the engineers who designed and supervised the construction of the roadway system.

The storm which deposited the gravel was one of incredible intensity. The intensity had been estimated as having a frequency of one in 50 years. When the roadway in the area had been constructed, the surfaces in the area had been bituminised to the extent of laying a strip of bitumen, but with natural gravel shoulders and table drains with no kerbing or channelling. This was in accordance with the Council's then policy.

It was recognised, by both the engineers and the Council, that, in such circumstances, storms of great intensity would cause significant quantities of gravel to be washed downhill and to come to rest at and upon intersections such as the one in question. The Council proposed to deal with this at the location of the intersection in question, as with similar events around the Shire, by means of a clean up programme and warnings. In this instance, however, the clean-up crew had not reached the intersection seventeen days after the storm had deposited the gravel on the bituminised intersection, and no warnings had been provided.

The Full Court held that the Council was liable. It had permitted subdivision on the basis of a road layout which inevitably had the dangerous features that materialised in this case unless it either sealed, kerbed and channelled the side of the road leading to the intersection, or took appropriate steps by warning the public and cleaning the intersection as early as practicable to guard against the hazard. The designing engineers, on the other hand, were not liable as they could not have provided for full-width surface sealing contrary to the policy of the Council, and they were entitled to rely on timely and efficient clean up and on proper setting up of warning devices.

As will be evident, the Full Court declined to acquit the Council of negligence on the ground of nonfeasance and held that, in the circumstances of the case, it was a case of misfeasance. Connolly J. said (at p.496-7):

> "The Council then, having required the construction of the intersection in a way which was potentially hazardous, was under an obligation to take reasonable steps at least to minimise the hazard. This it might have done by sealing the eastern side of Park Avenue or by a system of warning coupled with timely removal of the gravel. It would seem to have chosen the latter, though limiting its operations to clean-up without warning. As to clean-up, his Honour considered that the case was one where there was a failure to maintain a road surface which had been properly constructed and held that such a failure is not actionable.
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> With all respect, this view is answered by the passage from *Buckle* at 284 to which I referred earlier. The potential danger of the road system as constructed might have been made relatively harmless by guarding or lighting until the obstructing material could be removed. It was indeed contemplated by the designing engineers that the inevitable accumulation of gravel would be removed by the local authority's road maintenance service. If that had been done promptly the danger would have been obviated and warning

devices such as signs or lights could have been employed as interim measures. In the event this obstruction remained in the intersection without any warning device for seventeen days before the plaintiff sustained his injuries.

In my judgment the plaintiff's appeal against the Council should be allowed and there should be judgment for the plaintiff against the Council for the damages found by the learned trial judge.

So far as the other respondents are concerned I am of the opinion that the findings of the learned judge mean that the design was satisfactory for their purpose which, relevantly, was the disposal of storm water. The likelihood of gravel finding its way onto the intersection was obvious enough but all road surfaces are likely to be made unsafe by the accumulation of debris unless it is constantly removed. The designing engineers could not have provided for the sealing of the surface of Park Avenue contrary to the policy of the Council for the evidence is that the Council would not have paid for the work.

Their position cannot, in my opinion, be compared with that of the architects in *Voli v. Inglewood Shire Council* (1963) 110 C.L.R. 74, which was a case of a structural defect in a building which therefore remained potentially dangerous whenever it was substantially filled by spectators, there being no steps open to the owner and occupier to obviate the hazard. The architects in Voli had not under-designed in reliance on their principal's limiting the use of the structure in a manner or to an extent which would have made it safe. They had simply incorporated a faulty member in the building. Here, on the contrary, the engineers were entitled to rely on timely and efficient clean-up and on properly setting up of warning devices had experience shown this to be necessary."

Another instructive Queensland case is *O 'Ryan v. Commissioner of Main Roads* (1992) 17 MVR 169. In that case, the plaintiff lost control of his vehicle when he struck water to a depth of three or four inches on a floodway. He was travelling at a reasonable speed at the time. He claimed damages against the Commissioner of Main Roads for being negligent in the design of the floodway, and against the Council for being negligent in the construction of the floodway.

The trial Judge had held that both authorities were negligent of misfeasance in the design and construction of the floodway, in that the floodway should have been constructed about six inches higher. The circumstances were that rain had fallen about 3 days earlier but, by the time of the accident, all of the water had not removed itself from the floodway.

The floodway in question had been initially constructed in 1965, and had been reconstructed in 1964, 1976 and 1977. The accident occurred in 1980. The trial Judge held, and the Full Court confirmed, that if the floodway had been constructed some six inches higher than it was, ponding would not have remained on the floodway to the same extent after rain of the kind which had occurred, and, in particular, there would not have been the 3 to 4 inches of water on the floodway which the plaintiff encountered on the night of his accident.

The trial Judge and the Full Court held that it was not a case of nonfeasance. Rather, it was a simple case of liability of a highway authority for negligence in construction of a road or a structure on it. The Full Court said that:

> "when a highway authority, having power to do so, embarks upon the construction of a road or a structure on it, ordinary principles of negligence apply to that construction."

In summary, the nonfeasance rule continues to be part of the law of Queensland. In the *Desmond Case*, Counsel for the plaintiff argued unsuccessfully that cases like *Zaluzna* and *Sutherland* show that the High Court considers that the immunity no longer exists.

CONCLUSION

Recent cases show a continuing tendency to overcome the effect of the "highway immunity" by classifying borderline cases as misfeasance rather than nonfeasance, and finding methods of characterising the highway authority's conduct in such a way as to enable a finding of misfeasance to be sustained.

In clear-cut cases of nonfeasance by a highway authority, however, the immunity can be expected to continue to be applied unless the High Court holds otherwise, and I do not share the view by some to the effect that that will inevitably occur the next time the High Court has occasion to examine this area of the law.