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ROAD AND PAVEMENT ENGINEERING AND MANAGEMENT CONFERENCE 2006

Legal Issues for Road Managers

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Introductory remarks

1 At the Victorian Road Managers' Conference in April 2005 I concentrated my attention on the abolition by the High Court of Australia in May 2001 of the immunity traditionally enjoyed by road authorities for non-feasance. I dealt at some length with the historical reasons for the existence of the immunity and why the High Court concluded that the immunity should be abolished.

2 At the Australian Small Bridges Conference in October 2005, I concentrated my attention on the trend of litigation in Australian Courts since the abolition of the immunity. I also outlined the legislative response, with particular attention to the introduction of the *Road Management Act* 2004 in Victoria.

3 Using examples from decided cases involving bridges, it was my hope that bridge engineers and managers might gain some valuable insights about ways to minimise risks of liability.

Purpose of this paper

4 In the paper which I am presenting today I have been asked to concentrate on lessons to be learned from recent cases involving:

- footpaths;
- fallen trees; and
- roadworks and in particular the loose gravel hazard.

5 These issues demand constant attention. As road engineers and managers, you are not concerned only with delivering the best possible road facilities to the community; you are not concerned only with protecting yourselves and the organisations you represent from legal liabilities which are costly in both dollar terms and in damage to morale; you are also concerned with doing the very best you can to avoid catastrophic accidents befalling members of the community. As will be seen a little later, two of the recent cases to which I will refer, one relating to a tree which fell across a road and the other relating to the problem of loose gravel following roadworks, involved horrendous injuries to people in their early 20s in which damages were assessed at more than $6 million!

6 Although it is too early in the history of the *Road Management Act* to have any guidance from the Courts on the interpretation of the legislation, I will make some brief comments on the main aspects of the *Road Management Act*, in a way which I hope will provide something of a springboard to Ashay Prabhu's presentation on practical issues in the implementation of the legislation and as a backdrop to what I anticipate will be a very interesting presentation by Barry Collis in the form of Good Practice Case Study from Tasmania.

The basics restated

7 Until the law changed in May 2001, road authorities had immunity for acts of non-feasance, but could be held liable for acts of misfeasance. In essence, **misfeasance** required a road authority to exercise its powers and actively create or add to a danger. This was to be contrasted with the mere failure of a road authority to act, which constituted **non-feasance** only, for which the road authority could not be held liable.

8 In two now well known cases which it heard together, namely *Brodie* and *Ghantous*, the High Court by a majority overruled the immunity and determined that **the liability of road authorities now fell to be determined in accordance with the ordinary principles of negligence**.[1]

9 The High Court made it clear that this would not open the floodgates for claims against road authorities because there would not be imposed a duty which could be discharged only by repairing roads to bring them to a perfect state of repair.

10 Following the abolition of the non-feasance immunity, there has been a proliferation of litigation in all states of Australia, but in particular in New South Wales.

11 In Victoria, the legislature responded by introducing the *Road Management Act* 2004, which for most of purposes with which we are concerned commenced on 1 July 2004 or 1 January 2005. Before I turn to some recent cases involving footpaths, trees and loose gravel at the site of roadworks, I will briefly outline what the *Road Management Act* has attempted to do.

The *Road Management Act* 2004

12 The *Road Management Act* provides:

- a new framework for the allocation of administrative and management responsibility for different classes of roads; and
- a new framework for managing uses of road assets by utilities and other infrastructure managers.

13 While these aspects of the Act are very important, they fall outside the scope of today's topic.

14 Today's focus is on the new liability framework, with codes of practice and road management plans.

15 The *Road Management Act* imposes a statutory duty to inspect, maintain and repair public roads:

- to standards specified in a Road Management Plan; or
- if there is no Road Management Plan, to a standard specified in a policy; or
- if no standard is specified, to a 'reasonable level' having regard to section 101.

Hand in hand with these new obligations go the onerous demands of insurance audits and compliance difficulties.

16 Section 101 provides that the following principles must be considered in determining whether a road authority, infrastructure manager or works manager has a duty of care or has breached a duty of care in respect of the performance of a road management function:

(a) the character of the road and the type of traffic that could reasonably be expected to use the road;

(b) the standard of maintenance and repair appropriate for a road of that character used by traffic of that type;

(c) the state of repair in which a reasonable person would expect to find a road or infrastructure of that character;

(d) whether the road authority, infrastructure manager or works manager knew, or could reasonably have been expected to have known, the condition of the road or infrastructure at the time of the relevant incident; and

(e) in the case where the road authority, infrastructure manager or works manager could not have reasonably been expected to repair the road or infrastructure to take other preventative measures before the relevant incident, whether the road authority, infrastructure manager or works manager did display, or could be reasonably expected to have displayed, appropriate warnings.

17 As Ashay Prabhu has clearly articulated in a recent article[2], the Act specifies the principles on which road authorities are expected to deliver services, but does not specify what constitutes an appropriate standard of service.

18 What road authorities are doing is articulating standards of maintenance, renewal and new assets in terms of an intervention point (risk or condition at which the authority will repair) and the authorities responsiveness (that is the maximum timeframe within which the authority may respond). Ashay has given the example that intervention might be expected when a pot-hole is 300mm wide and 25mm deep, the response with a permanent asphalt patch being expected within 7 days on an arterial road and within 30 days on a residential street.

19 As Ashay has noted, the question has been asked - 'What will the Courts consider reasonable? - an edge drop at intervention depth of 100mm, repaired each time, on time, or an edge drop at intervention depth 50mm, repaired in 75% of the cases within a reasonable response time.'. When cases start to flow through the legal system there will doubtless be robust argument as to whether standards of achievement of less than 100% are acceptable provided that they are based on a reasonable analysis of the available level of resources and a reasonable evaluation of priorities.

Statutory defences

20 Given that road authorities now have a statutory duty to maintain and repair roads, the Act also provides for statutory defences.

21 Section 102 provides that **a road authority is not liable**, whether for breach of the statutory duty imposed by section 40 or for negligence in respect of any alleged failure to remove a hazard or to repair a defect or deterioration in a road, or give warning of a hazard, defect or deterioration **unless it had actual knowledge of the particular risk the materialisation of which resulted in the harm**. The

road authority is taken to have had actual knowledge if it is proven that the deterioration in the road had been reported in writing to it.

22 Section 103 provides that **a road authority will not be held liable unless a policy decision was so unreasonable that no authority could have made it**. In other words, the policy defence is not absolute. The legislation notes that one of the ways in which a road authority may determine a policy with respect to its road management functions is by means of its Road Management Plan. In addition, pursuant to section 27, a relevant Code of Practice can be used as evidence of the reasonableness of a Road Management Plan.

23 Under section 105, an additional defence is available where a road authority can prove that it took reasonable care. This defence can be established if the road authority:

- had a policy which addressed the issue; and
- complied with the relevant part of the policy.

24 It is too early for cases covered by the new legislation to be coming through the Court system. This is because:

- if the claim is a claim under the *Transport Accident Act* arising out of a transport accident, a claimant must establish 'serious injury' as a precondition to bringing a claim and cannot do so until at least 18 months after the accident;
- if the claim does not arise out of a transport accident, for example a claim by a pedestrian against a road authority in respect of an allegedly defective footpath, there is now a requirement under the *Wrongs Act* that the claimant have a 'significant injury' as a precondition to a claim, which often leads to some delay while injuries are stabilising.

25 When such claims do work their way through the Court system, the road authority will point to its Road Management Plan, which in turn will hopefully be consistent with the relevant Code of Practice. Further, it will be a defence to a civil action for a road authority to establish that it had a Road Management Plan which set a standard in relation to the relevant function and that the authority complied with that standard.

26 As comforting as this may seem, it would be naive to think that attempts will not be made to persuade judges and (in Victoria) juries that there should be a way around this apparent protection of road authorities.

Footpaths

27 Since the abolition of the non-feasance immunity, there has been a huge amount of litigation, in particular in New South Wales, arising out of injuries sustained on footpaths. For those of you with an interest in understanding the reaction of the Courts in more detail, I commend to you an article by Carolyn Coventry entitled 'You had better watch out: liability of public authorities for obvious hazards in footpaths' which has been published only in recent weeks.[3]

28 A majority of the High Court in *Ghantous* emphasised the expectation that pedestrians will take reasonable care for their own safety. As the author of the article to which I have referred so aptly puts it:

> *'A considerable division has since appeared over the application of these ordinary principles, particularly whether the need for pedestrians to take reasonable care for their own safety is relevant to the definition of the duty of care or the breach of that duty.'*

29 There is no settled definition of what constitutes an obvious hazard. In footpath cases it is often stated that uneven pavers, tree roots, holes and subsidence are obvious hazards.[4]

30 Importantly for the purposes of today's discussion, a finer **distinction that has been drawn is** the difference **between footpaths and other road surfaces**. For example, in *Parramatta City Council v Watkins*[5], the plaintiff tripped over part of a manhole cover that had dropped 50mm below the level of the road surface. It was held that:

> *'Sudden variations in level of this magnitude may generally be expected at the edge of footpaths, transitions between different paths or surfaces, and even between footpath slabs in the vicinity of trees; and also between paved and unpaved areas of road. However, the same may not be true within the paved surface of an apparently well-maintained road.'*

31 Similarly in *Georgopoulous v Telstra Corporation Ltd*[6], the plaintiff tripped on an uneven corner of a cover of a Telstra installation in a footpath that was otherwise well maintained. A comment was made that the hazard may have constituted a trap because:

> *'It appeared to be in sound condition and reasonably uniform in its flatness of surface. In fact it was neither ... Arguably this situation is distinguishable from the commonly encountered height differentials that occur between slabs of concrete footpath or are caused by the activities of tree roots and/or subsidence.'*

32 The Courts have also found hazards to be obvious if the circumstances demand that pedestrians take extra care. In *Rallis v Pang*[7], the New South Wales Court of Appeal held that the plaintiff should have been alerted to the need to take extra care when traversing a grass verge due to the poor state of the footpath caused by construction works. Further, in *Temora Shire Council v Stein*[8], it was held that pedestrians should take care going around blind corners and that pedestrians who did not observe hazards because they were hugging the corner and limiting their field of vision were not taking reasonable care for their own safety.

33 However, as Coventry in her recent article clearly articulates, the New South Wales Court of Appeal appears recently to have moved away from characterising many hazards as posing obvious risks of injury. In *Timberland Property Holdings v Bundy*[9], (not a road case) a patch of oil or grease on the floor of a car park was not found to be an obvious hazard despite the fact that the substance was darker than the surrounding concrete and that there was evidence from a witness that the substance could be seen without the aid of a torch. Similarly, in *Langham v Connells Point Rovers Soccer Club*[10], the New South Wales Court of Appeal held that a low strung rope approximately 10cm from the ground that was suspended between two poles in an unsealed car park for a football field was not an obvious hazard. The Court cited with approval the following observation made by Kirby J in *Neindorf v Junkovic*:

> *'Most people do not normally walk, even on unfamiliar surfaces, looking constantly at their feet. The fact that there was a division in the slabs of the concrete in the appellant's driveway was obvious, but the distinct unevenness in surface levels of the adjoining slabs may not have been obvious to a person like the respondent, who had no warning of it and no reason to anticipate it.'*[11]

34 *Neindorf v Junkovic* was not a road case; in that case the plaintiff was injured when she tripped on an uneven surface in the driveway of the defendant's home while attending a garage sale.

35 As Coventry in her article states:

> '*Footpaths are used in many ways and it is common for people to walk and jog on footpaths. It is also foreseeable that people may be walking dogs or pushing prams of other objects that can partially obscure their view of the footpath. To suggest that such uses of footpaths involve risky activities and that whoever engages in these practices is not taking reasonable care for their own safety is inconsistent with common, everyday practice. What is reasonable must be judged in accordance with community standards.*'

36 Coventry goes on to say:

> '*Further, it can easily be foreseen that pedestrians taking reasonable care for their own safety might not be able to avoid hazards in all circumstances, which may be obstructed by glare, shade, grass, rubbish or poor weather conditions (such as heavy rain or fog). In certain areas it is arguably foreseeable that pedestrians will be looking at places other than the footpath, such as at shop windows or traffic. In other circumstances a pedestrian may be unable to avoid a hazard due to the presence of other pedestrians on the footpath.*'

37 Coventry cites as an extreme example of misinterpretation of the High Court's decision the decision of the Victorian Court of Appeal in *Boroondara City Council v Cattanach*[12]. In that case, part of the footpath under the control of the local Council was cracked and had an uneven surface. The plaintiff fell while jogging with two dogs. The plaintiff conceded that the dogs obscured her view of the path immediately in front of her. The Court concluded that pedestrians who are elderly, intoxicated, disabled or running must exercise a higher degree of vigilance for their own safety in relation to hazards that are obvious to the ordinary pedestrian. Many people would agree with Coventry's comment that this definition of an ordinary pedestrian is so narrow that it is unclear how many people in society would fit within it or whether those excluded are able to exercise the degree of care called for by the Victorian Court of Appeal.

38 More recently, the New South Wales Court of Appeal has made greater allowances for these variables. In *Sutherland Shire Council v Henshaw*[13], Bryson JA stated that:

> '[W]*hat is foreseeable about a hypothetical able-bodied fully-sighted sober pedestrian at a walking pace in daylight serene weather is inadequate as a test of the duty of care of a highway authority.*'

39 In keeping with this softening approach, in *RTA v McGregor*[14], the plaintiff was injured when her foot became caught in a damaged section of a footpath. The New South Wales Court of Appeal did not disturb the finding of the trial Judge that the footpath was not an obvious hazard, despite the plaintiff's concession that the damaged section of the footpath was obvious in daylight. The Court took this commonsense view because the plaintiff's accident occurred with the presence of other variables, namely that it occurred at night time and in weather conditions which were windy causing leaves to blow across the footpath.

40 As Bryson JA observed in *Sutherland Shire Council v Henshaw*, it is almost paradoxical to suggest that no duty of care is owed only where a hazard is so obvious that pedestrians taking reasonable care for their own safety would avoid it, although, if the highway authority has not allowed the footpath to deteriorate to such an extent, then a duty of care would be imposed. This would create an incentive for road authorities to allow roads and footpaths to fall into a major state of disrepair and take us back to the 'bad old days' of the non-feasance immunity.

41 I have tried to briefly refer to a number of recent footpath cases in order to give you some idea as to how Australian Courts continue to struggle to strike the right balance between the rights and responsibilities of pedestrians on the one hand and road authorities on the other. While in many circumstances' the obviousness of a hazard may well turn out to be a dominant consideration in the determination of the liability issue, ultimately, under the common law of negligence, every case must be determined on its own facts.

Concluding remarks about footpath liability issues

42 I can do no better than repeat Coventry's concluding remarks:

- the liability of road authorities to pedestrians injured on footpaths remains far from settled;
- there is an increasing expectation that pedestrians will take reasonable care for their own safety and avoid obvious hazards;
- however, in most circumstances a duty of care should be found to exist and the obviousness of the hazard should be considered in determining whether there has been a breach of that duty; and
- courts should not apply the expectation of personal responsibility too strictly because the principles of contributory negligence allow for fair consideration of a pedestrian's lack of ordinary care.

43 Within the next year or two we are likely to have some guidance from Victorian Courts as to whether the *Road Management Act* has made it any easier to confidently predict the outcome of any given case.

Liability for falling trees

44 The difficult issue of liability for falling trees is not one faced only by road authorities. In *Department of Natural Resources and Energy v Harper*[15], the plaintiff was injured by a tree falling in gusty winds while camping in a national park. The Victorian Court of Appeal reversed the trial Judge's decision in favour of the plaintiff, taking into account the obviousness of the danger and the endemic risk of such accidents in outdoor recreational activities in State reserves. The burden of placing warning signs throughout the reserve was held to be disproportionate to the remote risk of injury.

45 In *Timbs v Shoalhaven City Council*[16], Mr Timbs was killed while sleeping in his bed when a tree blown over by very strong winds fell on to the roof of his house. The tree was the subject of a tree preservation order which required the Council's consent to be cut down. The evidence established that Mr Timbs had in fact requested advice from Council about the health of the trees in fear for the safety of himself and his family. A Council officer had attended the property on two occasions and inspected the trees, including the one that killed Mr Timbs and advised the family that the trees were healthy and safe and could not be cut down. The trial Judge found that the Council had exercised reasonable care in inspecting the trees which had a healthy, normal appearance and that the advice given and the refusal to allow them to be cut down did not amount to negligence. However, the New South Wales Court of Appeal overruled the trial Judge's decision. The Council's liability was based partly on the 'significant and special measure of control over the safety of homeowners who brought to the Council's attention their fears that 'overhanging trees were dangerous'.

46 The Court of Appeal held that the Council officers' expressed opinion amounted to a representation by him of his capacity to advise whether the trees were dangerous. There should have been more than a

routine visual inspection, or advice should have been given that an inspection and independent advice by an expert should be obtained in order to support an order that the tree could be cut down. Expert evidence indicated a number of factors such as water logged soil and a decayed root system which would have been revealed by a more thorough inspection.

47 A very interesting judgment on the liability of a road authority for fallen trees may be seen in a sad case of *Dungog Shire Council Babbage*[17]. A 21 year old woman suffered very serious injuries when her car collided with a tree which had fallen across the road during an exceptionally severe wind storm. There was evidence that the tree was 'sickly' by reason of partial ring-barking and a depleted canopy. The trial Judge found that the Council owed a duty of care as the highway authority and concluded that there were two distinct breaches of duty, each of which was in a legal sense a cause of the accident. The first of these was called a specific or ad hoc breach and consisted in the Council's road workers failing to take any steps in relation to the particular tree when 'showing obvious signs that its stability was compromised'. The second was called a system breach, namely failing to have a pro-active system to inspect and remove diseased trees. The trial Judge had concluded that such a system would have identified the particular tree as requiring removal.

48 The long and detailed judgment of the Court of Appeal deals with a large volume of expert arboreal evidence and evidence as to the enormous cost which would be incurred by a thinly populated shire such as the Shire of Dungog (7,632 inhabitants accordance to the 1996 Census) if it had to conduct audits of the health of all trees on road reserves within the area for which it was responsible. The judgment contains a very interesting discussion of the practicality and feasibility of having a pro-active system to inspect and remove diseased trees in the country road setting of a local shire. In short, the Court of Appeal overturned the trial Judge's decision and held that the Council had not been negligent.

49 In terms of lessons to be learned, from a Victorian perspective, I suggest that it will be most important for a road authority to include in its Road Management Plan a regime for inspection of trees within road reserves consistent with the authority's financial resources and the competing demands on those resources.

Roads works issues - loose gravel at site of road works

50 Over the years there have been many loose gravel cases decided by the Courts, often involving disputes between the road authority and its contractor. Often these claims involve fatality or at least gross injuries which translate into huge damages. A recent example of such a case, from which I would like to think that some lessons can be learned, is the case of *Copmanhurst Shire Council v Watt*[18], a decision of the New South Wales Court of Appeal of 26 July 2005. The plaintiff was just short of his 20th birthday at the time of the subject accident on 24 March 1998, when he was driving on the Summerland Way from Casino to Grafton. He was severely injured when his car skidded after braking to avoid a kangaroo which jumped out in front of his car. His car hit an embankment and rolled over. Damages were agreed at $6.5 million, subject to reduction for contributory negligence. The local Council was carrying out roadwork in the vicinity of the accident. The trial Judge held that the plaintiff skidded in loose gravel on the roadway, that the Council was in breach of its duty of care in failing to clear the loose gravel off the roadway and to warn by adequate signage of its presence, and that the Council's negligence was causative of the accident. He reduced the plaintiff's damages by one-third for contributory negligence.

51 The principal issue in the appeal was whether the trial Judge had erred in finding that there was a deposit of loose gravel on the bitumen surface at the point where the plaintiff braked following the sudden appearance of the kangaroo. Much of the judgment deals with issues involving inconsistent evidence by a police officer. Further issues in the appeal were whether the Council had fulfilled its duty

of care because the reduction in the speed limit to 60 kilometres per hour amounted to a sufficient response to the hazard presented by the presence of loose gravel; whether the Council's negligence was not causative of the accident because the plaintiff would have lost control of his car in any event; and whether the plaintiff should have been found contributorily negligent to a greater extent.

52 The leading judgment in the Court of Appeal stated:

> '*The Judge said that, mindful of the expert evidence, he was satisfied on the balance of probabilities 'that the presence of loose gravel encountered as described caused a loss of traction sufficient to cause the plaintiff to lose control of his vehicle'. Immediately beforehand he had referred to the gravel 'at the location where the plaintiff sought to change direction and to brake in order to avoid a kangaroo'. He was plainly alive to the injection into what occurred of the reaction to the appearance of the kangaroo, and on the balance of probabilities considered that the presence of loose gravel made the difference between retention of control of the car and loss of control. In my opinion, this reasoning cannot be faulted.*'

53 The Court of Appeal dismissed the appeal, refusing to accept the Council's argument that the plaintiff's failure to observe or obey the warning signs requiring him to reduce his speed to 60 kilometres per hour should have been regarded as a 'significant and … overwhelming contributor to the accident such that apportionment of at least two-thirds (that is, against the plaintiff) was required'.

54 I will do no more than say that in my opinion the plaintiff in this case was very lucky to do as well as he did. That said, it is highly desirable that road authorities and their contractors make every effort to minimise the presence of loose gravel on new roadworks and that signage warning of the presence of loose gravel be optimal. In line with my earlier comment that the plaintiff in this case was fortunate to achieve the result he did, I add the comment that in most such cases I would expect the road authority to achieve a better outcome.

55 I state the obvious when I say that the injuries suffered in such loose gravel cases will often be life-ruining if not fatal; in contrast with footpath accidents, which more often than not involve relatively minor injuries.

56 This being so, in the context of the *Road Management Act* it will be interesting to see how Victorian Courts deal with issues involving the priorities to be given to such road site activities. As I am sure Ashay Prabhu and Barry Collis will tell you, the road authority's optimal position depends on having well-defined service standards which reflect an appropriate response to the competing priorities and on adhering to those standards.

Conclusion

57 As I have indicated on several occasions, we do not yet have the benefit of interpretation by Victorian Courts of the provisions of the *Road Management Act*.

58 What I can say emphatically is that in my experience engineers much prefer having to comply with objective standards than to feel at the mercy of sometimes hard to grasp notions of the law of negligence involving a consideration of whether they have by their conduct 'done enough' to meet the standard of care required of them.

59 Although I appreciate that implementation of the regime imposed by the *Road Management Act* has been, and will continue to be, a very demanding exercise, there is in my opinion good reason to be

optimistic that, in time, the *Road Management Act* will lead to better outcomes for both road authorities and the community at large.

[1] *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council (2001) 206 CLR 512.*

[2] Ashay Prabhu: How Councils have handled the *Road Management Act*, Roads Magazine October/November 2005 35.

[3] Carolyn Coventry: You had better watch out: Liability of public authorities for obvious hazards in footpaths (2006) 14 Torts Law Journal 81.

[4] See *Richmond Valley Council v Standing* (2003) 127 LGERA 237 (NSW CA) at 255; *Byrnes v Burwood Council* (2003) HCA Trans 462 and *Boroondara City Council v Cattanach* (2004) 1 VR 109 (CA).

[5] (2001) 35 MVR 102 (NSW CA).

[6] (2004) NSW CA 266.

[7] (2003) NSW CA 202.

[8] (2004) 134 LGERA 407.

[9] (2005) NSW CA 419.

[10] (2005) NSW CA 361.

[11] (2005) HCA 75.

[12] (2004) 10 PR 109.

[13] (2004) NSW CA 386.

[14] (2005) NSW SCA 388.

[15] (2000) 1 VR 133.

[16] (2004) NSW CA 81.

[17] (2004) NSW CA 160.

[18] (2005) NSW CA 245.

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