

# THE NONFEASANCE DECISION – 1 YEAR ON

Stephen Fynes-Clinton ([sfc@kingandcompany.com.au](mailto:sfc@kingandcompany.com.au))  
Consultant, King and Company, Solicitors, Brisbane

## Abstract

The High Court's decision in May 2001 to abolish the historic legal immunity of road authorities for "nonfeasance" raised concerns about the possibility of a new and open ended public liability exposure for road authorities; an exposure which could be uncertain as to its scope, and the management of which would require the expenditure of financial resources beyond any existing budget.

However, the issue was never that simple, and the likely outcome never that pessimistic. While the first aspect of the Court's decision (abolition of the immunity) got most of the publicity, there was a second and just as important aspect by which the High Court recognised that the duty of care owed in respect of roads and other public places by statutory authorities is necessarily a duty of a lesser order than that owed by owners or occupiers of privately owned facilities to which the public are invited. The "new" duty does not require road authorities to "guarantee" that any or all roads will be maintained to any specific standard, and is one which is generally discharged by making reasoned and transparent decisions about the allocation of, and priorities for, the limited resources which are available.

There have been a number of cases decided by lower courts since May 2001 in which the application by those courts of the principles laid down by the High Court has led to more favourable results for the road authority than may have been expected under the previous legal regime.

**Key Words: Roads and public places; duty of care for maintenance and repair; impact of the abolition of the "nonfeasance" immunity**

## Introduction

The purpose of this paper is to examine what the High Court really said and did in its May 2001 decision<sup>1</sup> which abolished the historic immunity of road authorities from legal liability for "nonfeasance", and the real world and practical impact of that decision as it has emerged over the past year or so.

The basic message is that, both in terms of the legal theory as laid out by the High Court in its decision, and in terms of the way in which lower courts have been applying the decision at a practical level, the news is good. While road authorities are required to adopt a new approach to making and documenting their decisions about road maintenance and management issues, their

liability now depends on common sense and readily understandable principles, and far less on legal technicalities, than was the case previously.

The main part of this presentation will examine how and why this is so.

The final part of the paper will provide a brief update on the specific response to the decision by the two statutory road authorities in Queensland - the Main Roads Department, and local governments as represented by LGAQ.

## The previous immunity

The most important point to appreciate in order to properly understand the High Court's decision is that the historic immunity always was an anomaly with no proper foundation in mainstream legal principle.

Many people are under the misapprehension that the principle was developed to recognise the difficulties faced by a statutory authority which has control over large areas of public land, but only limited resources available for management and maintenance expenditure. The belief thus held is that the principle of non-liability for mere failure to maintain represented a considered judicial approach to balancing the inherent conflict between the social desirability of protecting road users, and the financial impossibility of doing so in all circumstances.

However, while arguments of that type were used throughout the last century to justify the continued operation of the principle, its legal origins had nothing to do with considerations of that kind.

The origins of the former immunity go back around 400 years. At that time, there was no law of negligence as we know it today. Essentially, civil legal liability was imposed only in respect of positive acts of one person which caused injury, loss or damage to others. The law of negligence, by which liability may be imposed for accidents or omissions which involve a failure to take "reasonable care", is a 19th-century invention, which did not really settle down as a consistently applied body of law until nearly halfway through the 20th century.

Most public authority functions, as we know them today, are also inventions of the 19th and 20th centuries. Therefore, the creation of what we today see as statutory functions for matters such as sewerage, water supply, public parks and the vast range of approval and regulatory functions undertaken by local governments and other authorities paralleled the development of the law of negligence. Therefore, legal liability issues associated with those statutory or public functions have always been determined by application of the "ordinary" principles of the law of negligence.

While there is an extensive subset of negligence case law which deals with the specific ways in which the basic principles are applied to the particular position of public authorities, there is not and has never been any concept of general immunity from the ordinary law of negligence in respect of any public authority function, other than the road function.

Why then was there a different approach for roads? The answer is that, unlike virtually all other public functions, the construction and maintenance of roads as a public (rather than private sector) function goes back many hundreds of years. As a result, again unlike those other public functions of modern invention, issues about possible legal liability for injury or damage caused by defective roads first emerged in the English courts around 400 years ago. Those issues had to be determined in accordance with the law as it then existed. As just mentioned, the law of negligence as we know it today had not even begun to emerge in the 17th century.

Under the law as it existed at that time, there were two fundamental obstacles to anyone seeking to recover damages for loss caused by non-repair of a road. First, except where it could be shown that a particular person had done some specific and positive act to cause the road damage in question, the law simply did not recognise a legal cause of action based upon any person having failed to carry out repairs or otherwise caused a loss as a result of a failure or omission to do something.

Second, most roads were the responsibility of the local community, but there were no incorporated road authorities of the type we know today. Therefore, a person seeking to recover damages simply had no one to sue in any event - the law did not recognise any ability to bring a civil suit against all members of the local community as an unincorporated group, and the taking of proceedings against such a potentially large and imprecisely identified group would have been quite impractical in any event<sup>2</sup>.

It is those 2 historic legal limitations which led to the development of the principle that the law did not recognise any liability for loss or

damage which was caused by a mere failure of repair of a public road or "nonfeasance", and that liability could only be imposed for positive acts or "misfeasance". Its origins had nothing at all to do with the policy arguments which were later used to justify it under the quite different legal (statutory) road management regime of the 20th century.

However, having been firmly established as a principle of law by the time that the modern law of negligence came to be developed in the 19th and 20th centuries, the courts which were developing those negligence principles did not consider it appropriate at that time to simply overrule and discard a long-standing rule which had already been developed for the particular case of roads. In simple terms, that is how the nonfeasance immunity came to stand as a unique and special exception to the general law of negligence as it applies to public authorities. It was a historic anachronism which survived into the 20th century for no reason other than judicial conservatism.

### **The High Court's decision**

Against that background, the High Court's decision is easy to understand.

The Court simply analysed the history which I have summarised above and came to the view that there is no room in Australian law in the 21st century for a principle which is anomalous and illogical in the sense that it treats one particular public authority function in a different way from all others, which never had a considered or logical policy foundation, and which was developed as a direct result of restrictive limitations in the law as it existed in the 17th century which have long since disappeared and form no part of our law today.

Any argument against the judiciary (rather than Parliaments) making such a superficially radical change was overcome by reference to the myriad of exceptions that lower courts had developed to exclude or evade the principle. Examples included the drawing of a distinction between constructing a drain as part of road construction (in which case the immunity would apply), and constructing the

same drain in the same road as "drainage authority" rather than road authority (in which case it would not apply), and development of the exception for failure to repair or maintain "artificial structures" in the road, which term grew to include even ordinary roadside tree planting. Given this judicial evasion of the so-called rule, overruling it completely was not in fact such a radical change in the law as to be beyond the proper scope for judicial law-making.

For present purposes, that is really all that needs to be said about the first part of the Court's decision.

It is the second part of the decision to which less publicity has been given that is of far more importance for the future. In this part of the decision, the Court noted that there had been a tendency in cases decided over the previous 30 years or so, including in some previous High Court decisions, to treat the duty of care are owed by a statutory authority in relation to a public place under its control as being more or less the same as the duty of care owed by a private owner or occupier of premises to which members of the public are invited for the private or commercial benefit of that owner or occupier.

One of the "high water mark" cases in that regard was a High Court decision in 1993<sup>3</sup> in which a local government was found liable for injuries to a person who had dived head first into a natural rock pool within a reserve controlled by the Council in circumstances where the existence and nature of the rocks was obvious, where the reserve was placed under the Council's control so that it could be managed and maintained in its natural state, and where the Council had done nothing to encourage anyone to dive in such patently dangerous circumstances. The Court nevertheless held that the Council had breached its duty of care and "caused" this accident by failing to erect "no diving" signs. While the nonfeasance decision did not overrule that earlier case, it does not take too much reading between the lines to see that the majority of the 2001 Court considered that the previous decision had gone too far<sup>4</sup>.

Accordingly, in abolishing the previous immunity and stating that road authorities are

now under an "ordinary" duty of care to take reasonable care to ensure that roads are maintained such that they will not constitute a risk of injury to road users, the Court nevertheless pointed out that:-

- the scope of the duty falls well short of requiring a road authority to guarantee that all sections of a road network will be repaired and maintained to any particular standard, or to otherwise ensure that hazards caused by roads being out of repair will not exist;
- while the duty of care are generally does include a duty to have an inspection program in place for the purpose of identifying instances of predictable and remediable defects, the scope of that inspection obligation in relation to any particular Council will be determined by the length and geographical spread of the road network and the resources reasonably available to the Council, with the Council having no liability for defects not actually known to the Council and which would not otherwise have been revealed by a reasonable inspection process;
- the Council, having regard to its available resources and the nature and condition of its road network, is both entitled and required to make policy decisions about the financial resources available for road repair and maintenance generally, and the priorities for allocation of the available funds to work which needs to be done, and will not generally be held to be in breach of its duty of care for failing to maintain or repair any particular road section if that is simply a result of other work being given higher priority under the Council's roads program.

These observations were not limited specifically to roads, and apply generally to the issue of public authority duty of care for large area public places. They reflect recognition by the Court of three key differences between such public authorities and private landowners.

First, the areas involved are generally very much larger and very much more

geographically dispersed than land owned or controlled by any private sector entity for private purposes. The simple logistics of management and maintenance are inherently different for that reason.

Second, public authorities have little or no ability to restrict or prevent public access to and use of these areas, and the public enter and use these areas for their own benefit and pursuant to a public law right, rather than for the benefit of the authority responsible for management and control.

Third, road and similar authorities have limited or no ability to charge individual owners on a "user pays" basis to meet the costs of maintaining the area to any particular standard, and must instead rely upon other public funding sources which are necessarily limited and the subject of a broad range of competing priorities.

Therefore, what comes out of the second part of the High Court's decision is that, while the simple immunity has certainly been lost, the basic legal regime is much simpler than before. Road authorities to have a duty to take reasonable care to maintain and repair their roads so as to remove avoidable hazards to road users, but that duty will generally be discharged in full by making and transparently documenting properly considered decisions about:-

- the level of funding available for road repair and maintenance;
- the application of part of those resources to inspection programs;
- the setting of priorities (in terms of the identification of intervention levels or the programming over time of specific works, or a combination of both) for the expenditure of the funds available;
- having a process in place to give proper consideration and provide for flexible response - though not necessarily to give an instant or any particular response - to unexpected and potentially dangerous hazards which are actually brought to the Council's attention through the inspection

process or by notification from some other source.

This is really nothing more than what would have been regarded by most road authorities as desirable or best practice in any event prior to the High Court's decision. In reality, I believe that the High Court's decision has done nothing more than say to road authorities that their legal duty of care simply requires them to act diligently and competently as a professional road manager.

I will now turn to an examination of some of the cases decided by lower courts since the High Court decision which I believe to confirm and support that conclusion.

### Subsequent cases

The Queensland Court of Appeal, on appeal from decisions of the District Court, has looked at the principle twice since the High Court's decision.

Once case<sup>5</sup> dealt with a standard footpath trip and fall. An elderly lady tripped over a slightly raised concrete footpath slab. The lip was found to be about 10mm. There was no evidence of negligent construction so, under the old law, the case would have undoubtedly have involved a nonfeasance defence by the Council, and attempts by the plaintiff to artificially get around that by calling evidence of previous inspections of the footpath (which had occurred a few years earlier), and trying to argue that failing to pick up the "defect" at that time was misfeasance. The Council would probably have gone down<sup>6</sup>.

With the abolition of the immunity, the Court did not have to get into any of that. The issue was simply whether, given that the Council did not actually know of the "defect", it ought nevertheless to be held liable on the basis that it had failed to take reasonable care in the identification and management of such situations – that is, primarily a duty of inspection issue. The key question was thus: "What was it that actually was required of the Council" (in the discharge of its road management duties for this section of footpath)?

The answer was that the duty did not extend to having a system in place which would be guaranteed to identify and rectify 10 mm (or less) gaps because:-

- the "defect" was readily apparent to anyone keeping a reasonable lookout;
- the "defect" was not actually known to the Council;
- while the risk of trips over a gap of that height was foreseeable, it was not a risk of high magnitude, given that most adults clear the ground by more than that when walking normally – the risk was limited to the very elderly or others with severe impediments to the way they walk – a numerically small group within the overall community;
- the ordinary consequences of footpath trips over such a small gap are not serious – in this case there was a fractured hip because the plaintiff was frail due to age, but that was not a common consequence of such a minor trip;
- having regard to those matters which go directly to magnitude of the (admittedly quite foreseeable) risk, and bearing in mind that any duty of care imposing higher levels of inspection and repair sufficient to have guaranteed that this "defect" would have been identified would have had to apply equally to all 26 km of the Council's paved footpaths, the duty of care alleged by the plaintiff would have involved "a use of resources which is not rational in relation to the risk posed"<sup>7</sup>.

The plaintiff failed.

A similar case occurred at Noosa<sup>8</sup>. The Council had constructed a paved footpath and, between the pavement and the edge of the carriageway, there was an unpaved strip, and logs erected about 1 metre from the kerb edge as a further separation between the area intended for pedestrians, and the area not so intended.

The plaintiff went to cross the road and ran along the unpaved area adjacent to the kerb

edge outside the log barrier. He tripped over a partly obscured tree root, and was injured.

The allegation against the Council was that it had failed to properly mow and maintain the area where the fall occurred, and that the root would have either been removed, or at least made visible by closer mowing, if it had done so. Again, in the old days it would have been a non-feasance case, and this one would have been a clear win for the Council under the old rules. But the new rules produced no different outcome.

The Council had a works program in place for regular mowing of the strip, and a defects notification system in place by which hazards noted by employees or reported by the public were recorded and, where relevant, given a priority for the remedial action required.

Again, the consequence of the plaintiff's argument that an "adequate" maintenance and inspection system would have picked up and remedied this defect was that the Council was under a duty of care to identify and remedy any similar hazard anywhere in its footpath network.

The Council put forward the relevant evidence – an urban road network involving 225 km of roads with constructed footpaths; 1000 km of roads overall, limited resources and a necessity to prioritise expenditure etc, all in accordance with the factors identified as relevant by the High Court. Evidence was accepted that the cost of ensuring removal of all such roots would have been astronomical.

The trial judge had noted that there was an obvious difference between what was reasonably to be expected in relation to the paved area where pedestrians are positively encouraged to walk (and where the Council concentrates its inspection and maintenance resources), and areas where walking is actively discouraged by barrier. The Council's duty of care is lower for such areas, and the individual's responsibility to keep a careful look out is correspondingly higher.

The Council's maintenance program and inspection systems were reasonable, and by complying with those it met its duty of care. The plaintiff failed.

The third and last example comes from NSW<sup>9</sup>. A serious accident occurred when the driver of an eastbound vehicle on a major highway near Sydney lost control of the vehicle, resulting in its crossing a median strip and impacting head on with a westbound vehicle on the other side of the median.

A claim was made against the RTA, as relevant road authority, on the basis that its failure to erect a crash barrier within the median strip (which would have prevented the eastbound vehicle crossing over into the westbound lane) was a breach of its post-*Brodie* duty of care.

The evidence from the Authority was that it had a detailed program of criteria and priorities for the carrying out of that kind of work. The subject site had been identified as one where the erection of a median barrier was not justified based on RTA's "benefit-cost ratio" methodology for determining works priorities, having regard to the relatively low risk of cross-median collisions which was assessed to exist.

The Court found no basis upon which to determine that either the Authority's allocation of resources or determination of priorities was unreasonable. Therefore, even though the risk of the accident, and the desirability of having a median barrier to prevent such accidents, had been specifically identified by the Authority, the adoption and implementation of the program which it had formulated discharged its duty of care, and it was not liable to the plaintiff.

That is sufficient by way of examples for present purposes. While there are a couple of decisions from southern courts<sup>10</sup> which show some resistance to fully accepting the new approach by which a road authority's duty of care is determined having specific regard to its full range of responsibilities, its policy decisions about relative priorities, and the availability of resources, the clear thrust of the majority of the lower court decisions since May 2001 shows that what the High Court said has been properly appreciated, and is being properly applied.

In my view, and despite the fact that a little more work now needs to be done in some cases where a simple "nonfeasance" defence may previously have been available, the post-*Brodie* position involves a clear improvement for road authorities in terms of their duty of care now depending far less upon the application of complex and arguably inconsistent case law to the facts of the case, but rather depending primarily on the application of a simple common sense principle about whether the authority has documented and implemented its construction and maintenance programs in a manner which can be shown to be both professionally competent and generally reasonable by the usual standards of the roads management profession. If so, the legal duty is met.

Overall, I see the news as definitely good.

## MRD and LGAQ Response

Both Main Roads Department and LGAQ have put a lot of time and resources into considering the implications of the decision, and the appropriate response to it.

I will not say much about MRD because its response has not yet been made public, at least as far as I know at the time of writing. Suffice to say that its analysis is generally consistent with the exercise I have carried out in this paper. To the best of my knowledge, it does not see a need for any legislative response.

LGAQ has taken a different approach. The initial call from LGAQ member Councils was, predictably, to lobby for legislation to restore the immunity. However, from an early stage LGAQ recognised the potential for more good than bad to come out of the decision, and sought to build on and reinforce the good points of the decision by legislation which would secure the positives and remove some of the potential negatives.

The model we came up with was one which accepted that basic premise that a road authority would discharge its duty of care by making and implementing a properly considered road management strategy, but

which rejected the notion that the courts should be able to rule on the adequacy or otherwise of a Council's strategy, after the event and with the benefit of hindsight (and possibly, even if unconsciously, influenced by subjective sympathy for an injured party).

The LGAQ model therefore proposes that road authorities will have the option to follow a process similar to a local law or planning scheme making process to formally adopt a detailed risk management strategy for roads and other public places. Subject to following the required statutory process, an adopted statement would exhaustively define the Council's duty of care. If it followed its own documented strategy, it was conclusively presumed to have discharged its duty of care. If it failed to follow its own strategy, except for reasons related to unforeseen emergencies and the like, that would be evidence of a breach of duty and, all other things being equal, the Council would be liable.

The role of the courts would be limited to determining whether or not the Council has complied with its own adopted strategy – and would not extend, as it does now under the *Brodie* principle, to determining whether the Council's strategy represented a reasonable balance between public safety, limited resources and competing priorities. An affirmative answer to that question would be taken as a "given".

While the final fate of the submission is not known, the general feedback from government is that it is a bit too radical. There is a concern about conclusively legislating the courts out of any role in assessing whether the Council has acted reasonably in allocating resources to inspections and maintenance. To be fair, the experience of actual Court decisions since *Brodie* reduces the force of the LGAQ argument that these matters are not appropriate for determination by a Court.

The current position is that it is probably unlikely that the LGAQ legislative proposal will receive government support unless there is an adverse change in the way the courts apply the *Brodie* principles which enables a stronger argument to be made that

adjudication on the reasonableness or otherwise of decisions about competing priorities and the allocation of resources is something which needs to be taken out of the hands of the Courts.

Therefore, the short answer to the question of government responses is that, at least for the present, government shares the view that there is no evidence of actual or likely adverse financial impacts for road authorities on a wide scale, and that road authorities should be encouraged at a policy and administrative level to accept and work with the decision. This involves more transparently justifying and documenting their policy decisions about applying resources to road maintenance, and trusting that the courts will recognise that adoption and implementation of a fully considered strategy discharges the new duty of care.

## Conclusion

The High Court's decision was, in my opinion, a logical and common sense development which removed an unprincipled anomaly in the law that, while it was certainly beneficial to road authorities, did not have the weight of benefit sometimes attributed to it because of the constant (and sometimes equally unprincipled) efforts of the lower courts to find exceptions to it or other ways around it.

The new approach, by which liability for failure to repair and maintain roads is determined by the same basic principles as apply to any other public place, can be demonstrated as a matter of theory, and shown by reference to subsequent case law as a matter of practice, to involve a simpler and more common sense approach to the issue, which harmonises with real world practice by professional road designers and managers.

Any legislative response which does emerge from the work done by MRD and LGAQ since the decision was handed down will be aimed at reinforcing and refining the basis of the decision, and making the legal regime even more certain – not at reversing or otherwise

changing the substance of what the High Court decided.

I believe that the road design and management industry should treat the abolition of the nonfeasance immunity as a welcome and forward looking development, involving markedly more positives than negatives. It has produced an outcome which is sustainable into the future.

## References

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<sup>1</sup> *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council*, now reported at (2001) 206 CLR 512. The judgement was delivered on 31 May 2001.

<sup>2</sup> The community's obligations were enforced by public means rather than private action – the King could and would raise additional taxes on a community that refused to maintain its roads, until it did so.

<sup>3</sup> *Nagle v Rottnest Island Authority* (1993) 177 CLR 423.

<sup>4</sup> A view which is also less than subtle in *Romeo v Conservation Commissioner NT* (1998) 192 CLR 431, a case concerning a drunk person who fell/jumped off a cliff, and which, with *Brodie*, forms part of a series of recent cases in which the Court of the late 1990s/early 2000s has attempted to bring public authority duties of care back to more intellectually honest and realistically workable levels.

<sup>5</sup> *Spencer v Maryborough City Council*, [2002] QCA 250, 26 July 2002

<sup>6</sup> At trial, before the District Court in September 2001, the Council did go down, despite it being a post-*Brodie* matter. Major changes in the law start with the High Court, and spread fairly quickly to the State Appeal Courts whose judges are usually of similarly high calibre, but sometimes take time to be properly appreciated and applied by lower level courts. That said, even the Court of Appeal decision in favour of the Council, which was a clearly correct and uncomplicated application of *Brodie* (at least in my view), was only by a 2-1 majority.

<sup>7</sup> Per Holmes J in the majority judgement, para [36]

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<sup>8</sup> *Percy v Noosa Shire Council* [2002] QCA 245, 19 July 2002

<sup>9</sup> *Fisk v RTA (NSW) and others* [2001] NSWSC 1134, NSW Supreme Court, 14 December 2001.

<sup>10</sup> For example, *Parramatta City Council v Watkins* [2001] NSWCA 364, a case concerning a trip on a 50 mm lip between a manhole cover and the surrounding road pavement, though that was a

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case where there was evidence that the Council had caused the existence of the danger by carrying out substandard road resurfacing work. The Council was not found liable on the basis of defects in its subsequent inspection and maintenance program. *Hawkesbury City Council v Ryan* [2001] NSWCA 212 is another post-*Brodie* case with a similar outcome.

## Author Biography



Stephen Fynes-Clinton is a consultant to, and former senior partner of, King and Company, Solicitors where he has spent the majority of his 21 year legal career. Local governments are the firm's primary client base, and Stephen provides specialist advice to the firm's Council clients, effectively in the capacity of in-house counsel, on all aspects of local government law. He is also principal legal adviser to the Local Government Association of Queensland.

Stephen is the author of loose leaf legal commentaries on the *Local Government Act 1993*, *Environmental Protection Act 1994* and *Integrated Planning Act 1997*, all of which are widely used and referred to within the local government industry.

He is also a member of the Boards of Management of LGM Queensland and Local Government WorkCare.

**Postal Address:** Stephen Fynes-Clinton, c/- King and Company, Solicitors, GPO Box 758, Brisbane, Qld 4001.

**E-mail:** [sfc@kingandcompany.com.au](mailto:sfc@kingandcompany.com.au)