

FEASANCE AND NON-FEASANCE – DEVELOPMENTS

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Paper Summary

Stephen's paper will explain the obligations of road authorities following the abolition of the Non-Feasance immunity, discuss pro-active steps which are available to public authorities responsible for roads, footpaths and public thoroughfares so as to protect them from litigation, and consider the potential impact of the Civil Liability Amendment (Personal Responsibility) Bill of 2002 as regards the duty owed by public authorities in relation to pedestrians and road users.

Introduction - What is/was Non-Feasance?

When lawyers speak of non-feasance they speak of an omission or failure to perform an act that is either an official duty or a legal requirement. Also previously in frequent use were the terms 'misfeasance' and 'malfeasance'. In contrast to non-feasance, misfeasance is used to refer to a situation where an official duty or obligation is carried out but is carried out poorly or negligently. Malfeasance refers to misconduct or wrongdoing in a similar context of official duties.

The term 'non-feasance' came to refer primarily to a principle which permitted road authorities to escape liability for injuries or damage caused by neglect or failure to act in respect of the construction, repair or maintenance of roads.

At its extreme the rule meant that a road authority could construct a road (provided that it did so without

negligence) and thereafter leave it to fall into disrepair without incurring civil liability for damage caused by the poor state of the road.

Historical Application of the Rule

Historically road authorities were not liable for non-feasance. They could however be held liable in circumstances where some misfeasance could be established. Somewhat perversely, from a strictly legalistic point of view, the non-feasance defence was such that it was safer for a road authority to do nothing to repair its roads than it was to run the risk of intervening and later being found guilty of misfeasance.

There has been, and remains room for, a great deal of debate as to the origins of the rule. One of its first, and most often referred to appearances in the ancient cases is in a case known as *Russell v The Men of Devon*. That judgment is recorded as having been given on 14 November 1788. Even then the principle was not without

controversy with the decision made by a two to one majority.

The plaintiffs in that case damaged their wagon as a result of a bridge in the County of Devon being in a state of disrepair. The judgment contains no reference to any principle defined or described as being non-feasance. Rather it stands for the proposition that because the highways and bridges of the day were repaired and maintained by the men of the county (and therefore the public at large) the action could not succeed because it was theoretically impossible to bring an action or recover a debt against such a large and changing body of people.

The rule evolved from 1788 onwards and was well enshrined in the English common law at the time it made its first appearance in Australia. Some commentators have suggested that it was from this body of common law that the principle was absorbed into Australian law.

Tracing the development of the rule from 1788 to May 2001 when non-feasance came to an end in Australia could occupy a book of several hundred pages. Indeed there is no doubt that many trees-worth of paper were digested during the course of the *Brodie* litigation.

The competing (and better) view as to the means of adoption of non-feasance into the common law of Australia is that it was a creature of statutory interpretation.

In times before the higher courts of the land were ever described as progressive the assessment of whether or not a public authority owed a duty of care depended entirely upon an interpretation of the statute which vested that authority with its powers.

In the case of road authorities, historically the statutes providing them with power to construct and maintain roads contained nothing which could be

construed as imposing any positive duty to utilise any of those powers. Absent some statutory duty the authority could not then be liable to an injured party for a failure to act.

When the High Court considered *Brodie* there were differing opinions as to which of the two most popular competing theories were correct. Suffice it to say that a review of the statute empowering a particular road authority remains theoretically relevant to the consideration of whether or not it owes a duty of care.

In practice the need to take that step is largely ignored mainly due to an unexplained gap in legal reasoning which appears in the part of the High Court's judgment.

Lower courts applying the High Court's judgment have tended to assume that a duty of care to road users exists and to deal with the balance of the issues by reference to ordinary principles of negligence.

Brodie v Singleton Shire Council - The Facts

The plaintiff, Mr Brodie, drove a laden cement truck across an aged timber bridge. The bridge in question could only be reached by passing over an earlier bridge which had a sign posted "15 tonne load limit".

Mr Brodie's fully laden truck significantly exceeded the load limit. The latter of the two bridges collapsed as Mr Brodie drove across it [see *photographs below*]. The cause of the collapse of the bridge was a condition known as piping, which had significantly weakened timber girders in the bridge's substructure.

The council in question was aware of the piping but not of its full extent. The council had a system of inspecting its

timber bridges on a regular basis and had downgraded the bridge in its records on the basis of its age and perceived weakness. The council had also undertaken some minor repair works to replace some of the decking timbers but had not checked the girders or done any work on the substructure of the bridge when repairing the decking.

While Mr Brodie was successful at trial in the District Court, the council successfully relied on the non-feasance rule in the New South Wales Court of Appeal.

The High Court did not finally determine all of the issues between Mr Brodie and the council preferring instead to remit the matter to the Court of Appeal for determination in accordance with the principles set out in the High Court's judgment.

Differences of opinion exist as to the reason for the remittal of the proceedings to the Court of Appeal. It is probable that the matter was remitted to the Court of Appeal because there were other remaining issues that had not been dealt with during the original appeal.

What Replaces Non-Feasance?

The seven judges of the High Court were somewhat divided as to the result in the matter. Three of the seven would have found in the council's favour. Of the remaining four judges one adopted a different approach to the remaining three in setting out to define the obligations of road authorities in the absence of non-feasance.

Whether due to laziness or due to the complexity (and disjointed nature) of the judgment it has become customary to largely ignore the need to consider the statutory powers available to road authorities and to instead jump immediately to several examples contained in the majority judgment. With apologies for including large

swathes of judgment, the (abbreviated) relevant portions are as follows:

"Construction and Design

...The question whether "due care and skill" was taken in design and construction will require consideration of all the circumstances of the case. The circumstances will include the type and volume of traffic expected. Different roads will serve different purposes and need not be constructed to the same standard. Thus, one would not expect all country roads to be sealed. The cost and practicality of an alternative and safer design, if one be available, may be weighed against the funds available to the construction authority. This may involve striking a balance between competing designs or methods of construction.

It may also be that, although a road is in a dangerous condition, the authority will have discharged its duty of care by taking reasonable steps to minimise any danger or to prevent it arising. The authority may have provided adequate warning to users of the road by erecting appropriate signs (so that, if exercising due regard for their own safety, users are able to avoid the danger), or by building into or adding to the road features such as safety devices or fencing which tend to minimise the danger..."

"Repair, Maintenance and Works

A rejection of the "immunity" for "highway authorities"...does not necessarily involve the imposition of an obligation in all cases to exercise powers to repair roads or to ensure they are kept in repair... The discharge of the duty involves the taking by the authority of reasonable steps to prevent there remaining a source of risk which gives rise to a foreseeable risk of harm. Such a risk of harm may arise from a failure to repair a road or its surface, from the creation of conditions during or as a result of repairs or works, from a failure to remove unsafe items in or near a road, or from the placing of items upon a road which create a danger, or the removal of items which protect against danger... Not all failures to repair will create risks to the users of a road, or at least not risks which would, as a matter of the reasonably foreseeable, pose a risk of injury...

The resources available to a road authority, including the availability of material and skilled labour, may dictate the pace at which repairs may be made and affect the order of priority in which they are to be made. It may be reasonable in the circumstances not to perform repairs at a certain site until a certain date or to perform them after more pressing dangers are first addressed."

"Pedestrians

The formulation of the duty in terms which require that a road be safe not in all circumstances but for users exercising reasonable care for their own safety is even more important where, as in Ghantous, the plaintiff was a pedestrian...persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes...

"Inspections

...Where the danger could not reasonably be suspected to exist, or could not be found except 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 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."

Application of the New Test/s

The court, in formulating its replacement for the non-feasance rule placed heavy reliance on a previous decision of the High Court in *Wyong Shire Council v Shirt*. The judgment in *Shirt's* case calls for an assessment in individual cases of a number of factors. Those factors include the magnitude of the risk and the degree of probability that it will occur, the expense, difficulty and inconvenience to the authority in taking the steps described to alleviate the danger and any other competing or conflicting

responsibility or commitments of the authority.

The difficulty with the application of any such test is that it will always be applied after an accident has occurred. With 20/20 hindsight the degree of probability that an accident will occur will always be perceived as higher than it might have if you had asked the same question before the accident had actually occurred. Despite protestations to the contrary, it is clear that in the face of evidence that an accident has already occurred it will always be more difficult to reach a conclusion that an accident could not have been foreseen. An assessment of the magnitude of the risk tends in practice to encompass as matters which must be attended to all but the most trivial of risks.

A consideration of the expense, difficulty and inconvenience of taking remedial action is similarly always performed in circumstances where the court is comparing those factors with the fact of the injuries suffered by an injured plaintiff. One of the methods adopted by courts to circumvent the proper analysis of cost versus outcome is by divining an alternate treatment method by which the accident might theoretically have been avoided. This is frequently observed in cases where the court decides that a single warning sign was likely to have prevented an accident from occurring.

In seeking to assess a road authority's other competing or conflicting responsibilities or its commitments courts have often failed to correctly approach the application of resources and funds across an authority's entire network. Rather than focussing upon improving an entire network to a given standard the court will, again with the benefit of 20/20 hindsight, tend to focus incorrectly on the precise cost of alleviating the precise risk which caused the accident. In any event it

will be quite rare that any road authority other than particularly resource-poor road authorities will be in a position to lead evidence about the effect of funding constraints. Again, courts will tend to find a theoretical cheaper solution to circumvent the need to explore competing resources and the like.

Signage and Road Marking

In most cases the construction and maintenance of roads, footpaths and public thoroughfares is not the only financial concern of a road authority.

Even within the resources allocated to maintenance of roads and footpaths budgetary constraints dictate that all work cannot be undertaken at once and repair of some less urgent (but potentially dangerous) defects must be deferred, sometimes for years. Simply there is never enough money to go around.

In the post *Brodie* world the road authority is obliged to take steps to identify these hazards and further, within the bounds of fiscal reality, take appropriate steps to identify to the road user or pedestrian the hazard so that the hazard can be avoided.

In general the identification of the hazard could be chiefly and effectively highlighted by the presence of appropriate signage. For example an irregularity in a footpath could be highlighted by the application of some bright "fluorescent" paint until it could be repaired. Control of road users by signage could also discharge the duty owed by the road authority. This paper will now turn to consider some cases relevant to signage.

Fitzgerald v Inverell Shire Council

This case proceeded in the New South Wales Court of Appeal in February 1999 before the decision in *Brodie*. It

sought to rely upon an exception to non-feasance based on the fact that the council in question was carrying out roadworks.

The trial judge found that the council had placed the following signs before the roadworks in question:- "Roadwork Ahead Reduce Speed", "Prepare to Stop", "Road Works Ahead" and "Soft Edges". He also found that the plaintiff was aware that roadworks were being carried out (she passed that way each day on the way to work) and that a water truck and scraper were standing by the side of the road with amber revolving warning lights operating.

The plaintiff drove through the site of the roadworks and attempted to negotiate a bend at a speed of 100 kilometres per hour. Perhaps not surprisingly she crashed her vehicle.

The matter proceeded to trial and to the Court of Appeal on the basis of an assertion by the plaintiff that she had observed a sign which indicated "Flagman Ahead" and that having placed that sign on the roadway the council was negligent in not having made a flagman available. It seems the plaintiff asserted that she assumed that the flagman would be in place to make it clear to road users when they should slow down because the road was dangerous.

The plaintiff was ultimately unsuccessful based firstly on a finding that the council had done all that it could do in the circumstances and secondly on a finding that the plaintiff had been the primary cause of her own misfortune.

While this case serves as an example of one of the few successfully defended by road authorities, it is particularly relevant as being one of the first of a series of cases involving accidents during roadwork.

RTA v Fletcher & Leighton Contractors

The decision of the New South Wales Court of Appeal in this matter was delivered on 26 March 2001 (ie. approximately 2 months prior to the decision in Brodie).

The Plaintiff in question was a motorcyclist heading south on the Hume Highway near Jugiong. At the point of the eventual accident the Hume Highway took a bend to the right. On the same alignment as the Hume Highway (and beyond or behind the bend) ran a local road by the name of Benangaroo Road. Benangaroo Road ran along the Old Highway, the new bend having been constructed in connection with a nearby bridge.

The bend in the Hume Highway was indicated by firstly, the painted centre lines on the road, secondly, the painted edge or fog line on the left hand side of the road, thirdly, by a speed advisory sign which depicted a right hand curve and finally, by the presence of a series of white guide posts on the left edge of the road. Each of the guide posts was fixed with a red reflector in the usual way.

At the time of the accident Leightons had commenced works on the eastern side of the road behind the road. The works had advanced to the point where a ditch had been dug. In an effort to screen that ditch from the road Leightons erected orange webbing supported by star pickets. The webbing and the star pickets was erected between the road and the white guide posts and served to obscure the red reflectors.

On the night in question the Plaintiff and a colleague proceeded on their motorcycles along the Hume Highway southbound. At the time they were approaching the bend a local driver was driving towards the Plaintiff on Benangaroo Road with her head lights on. The effect of those head lights on

the Plaintiff and his colleague was to lull them into a conclusion that the highway did not bend to the right but rather proceeded straight along. The Plaintiff rode his motorcycle straight through the orange webbing and into the ditch. He sustained quite serious injuries.

The orange webbing was found by the Court of Appeal to be in a dusty state and to have been draped over the star pickets in such a fashion as to obscure any retro reflective capabilities of the nearby reflectors.

The Court of Appeal was divided on the issue of contribution by Leightons to the RTA but was unanimous in finding in favour of the Plaintiff against both the RTA and Leightons.

The following paragraph is extracted from the Court of Appeal's judgment and perhaps provides some indication of what road authorities and those who carry out works on their behalf are up against:

"In the circumstances it is difficult to see what was the main cause of the accident except the illusion that Benangaroo Road was an extension of the highway. Her Honour so held, and I cannot see that any alternative was open to her. However, for a person in Mr Fletcher's position to suffer from that illusion, he had to be oblivious of a number of warning signs. He could not have understood the significance of the line marking the side of the road or of the centre line marking. However, he must have been blind to a "curve" sign on the side of the road, with a speed sign underneath it (indicating that drivers should proceed at a speed of not less than 85 or 95 kph). Further, the significance of the fact that orange webbing on star picket fencing ran along side the road to his left must have escaped him. He hardly paid any conscious attention to these signals of danger: he must have been so absorbed by the oncoming lights that he forgot to consider what the signs meant, if he noticed them at all. With respect to all the submissions to the contrary, that does not seem to be extraordinary. This is particularly so when none of the signs impacted on Mr Clarke's consciousness, except that when he noticed

his friend crashing through the webbing he noticed the existence of that webbing....The Defendant ought to have realised that such an emergency might arise, and taken the precaution of erecting chevron signs (which are normally of sufficient size to seize the attention of the most distracted driver) in order to deal with it. I can see no reason to tamper with Her Honour's 10% figure for contributory negligence."

Perhaps of even greater concern to road authorities and those who work for them is the following quote from His Honour Mr Justice Handley (in dissent):

"The RTA, as a Highway Authority which had authorised that the carrying out of work on or near the Highway, had what has been referred to as a non-delegable duty to users of the highway and could not avoid this duty by delegating its performance to a competent independent contractor. A Highway Authority is therefore vicariously responsible for the negligence of its independent contractor. An innocent employer vicariously liable for the negligence of an independent contractor is entitled to be indemnified by the contractor against his liability to a third party".

The indemnity did not arise in Fletcher's case because the RTA was not "an innocent employer". Fortunately the possibility that the New South Wales Court of Appeal views it as settled law that road authorities owe a non-delegable duty of care in circumstances where works are being carried out has yet to reach the legal knowledge of mainstream plaintiff's solicitors.

Berryman v Joslyn and Wentworth Shire Council v Joslyn

This is again a judgment of the New South Wales Court of Appeal handed down about seven weeks before the decision in Brodie.

The Plaintiff was a passenger in his own motor vehicle which left the road while attempting to negotiate a dangerous bend.

The Plaintiff and the driver of the vehicle had attended a party the night before. The female driver of the vehicle was thought to have consumed the best part of a bottle of scotch the night before the accident. On the day of the accident the Plaintiff (who had also been very drunk until the early hours of the morning) drove his Toyota Hilux to Mildura for breakfast at McDonalds. On the way back to the party the Plaintiff appeared to be falling asleep at the wheel. His female companion agreed to drive. It was established that both the Plaintiff and the driver knew that each other had been drinking the night before. The Plaintiff and the driver knew that each other had had only a very small amount of sleep. Both the Plaintiff and the driver knew that the driver did not have a driver's licence. Both the Plaintiff and the driver knew that the speedometer in the vehicle was not working and the Plaintiff knew that the vehicle had a propensity to roll due to its high ground clearance.

The bend in question was described as a compound curve. Evidence from local residents and expert witnesses was to the effect that the curve was extremely dangerous. The maximum speed at which the curb could be negotiated was said to be 75 kilometres an hour whereas the prudent speed at which a driver should attempt to negotiate the bend was 45 to 50 kilometres per hour. The area where the bend existed was speed limited at 100 kilometres per hour.

Expert evidence suggested that the driver entered the bend travelling between 60 and 70 kilometres per hour but that the handling characteristics of the vehicle combined with her sleep deprived and alcohol affected driving performance was such that she had little or no chance of negotiating the bend.

The Council was held liable. The Court of Appeal found that the Council was under a duty to either provide a sign indicating that a curve would soon be

encountered or to otherwise control the speed limit in such a way as to ensure that vehicles did not enter the curve at other than a safe speed.

While the description of the bend in question suggests that as a matter of course the Court should have found the Council obliged to sign post the road, there are some problems with the causal link between the failure to sign post and the driver's obviously negligent driving on the morning of the accident.

In passing it is worth noting that traditionally the area of sign posting was regarded as one of the few exceptions to nonfeasance. The basis of the exclusion of sign posting activities from nonfeasance was said to lie in the distinction between activities of road authorities that were strictly related to roads and activities that were performed in the role of "traffic authorities".

In a decision of the New South Wales Court of Appeal in *Gloucester v McLenaghan* the Court characterised a failure to sign post as an act of misfeasance in the construction of the road. The reasoning was that at the time of constructing the road it was negligent of the Council to not erect sign posting warning of the characteristics of the road that had just been constructed.

Palmer v RTA

This is a single Judge decision of His Honour Mr Justice Wood of the New South Wales Supreme Court. Justice Wood is the Chief Judge of the Common Law Division of the Court. It is fair to say that the level of damages in this case makes it one of the more expensive road accident cases ever seen in New South Wales.

The judgment is a particularly sizeable judgment and the issues in the case are many. I hope that I do not do it injustice in the following summary.

The Plaintiff lost control of her vehicle while negotiating what was described in the judgment as a broken back bend. She did so in circumstances where she encountered gravel on the roadway.

The road while theoretically under the control of either the Council or the RTA was found by the Court to be under the control of both. Works had been carried out by Pioneer on resurfacing the road with Pioneer's contract being managed by the Council. Funding for the works was provided by the RTA. It appears that the RTA's involvement in the matter was fairly narrowly confined to funding, and to a lesser extent, to control of the activities of the Council.

Aside from a failure to adequately signpost the presence of the roadworks the main contributing factor in the accident was found to be the fact that Pioneer and the Council had allowed a 75 kilometre per hour speed advisory sign to remain present on the bend.

His Honour summarised the available evidence and expert opinion in the following terms:

- "(a) *The signposts warning of the work, its nature and dangers, were seriously adequate;*
- (b) *The "reduce speed sign" located in a 100 km/h zone was, in the absence of any indication of a safe speed for the roadworks, of no value whatsoever;*
- (c) *There should have been more stone warning signs as well as "slippery" surface signs repeated at regular intervals;*
- (d) *There should have been a road works 60 km/h limit for the entire section of road;*
- (e) *The 75 km/h sign was misleading and dangerous in that it that:*
 - (i) *it suggested that even in normal conditions the safe speed for the two bends was the same, when clearly there was a proper*

differential between them of 15 to 20 km/h;

- (ii) it indicated that the safe speed during the roadworks was the same as under normal conditions;
 - (iii) it failed to advise that the roadworks continued round the bend, and that the safe speed was substantially less than 60 km/h; and
 - (iv) it should have been covered up until the gravel was removed.
- (f) The adjoining embankment added to the hazard by reason of the potential drop off and the proximity of the newly widened shoulder to it;
- (g) The broken back bend was inherently dangerous because of the tight radius of the second bend which was covered by the same advisory speed as that for the first bend;
- (h) The normal friction between the wheels of the Plaintiff's car and the road surface, which determines the speed at which a bend can be safely taken, was significantly reduced by the presence of loose aggregate on the newly sealed surface;
- (i) The loose aggregate was not evenly spread, by the morning of the accident, having been accumulated, in sections, into mounds;
- ...
- (j) The Plaintiff had not driven over this section or road during the re-sealing and hence was not to know what was its condition in the area of the broken back bends;
- ...
- (k) The Plaintiff had safely traversed this section of roadway on many previous occasions, but came to grief on the one occasion where there was gravel on the road;
- (l) Other motorists had found the bend and the gravel difficult to negotiate."

As was the case in *Fletcher* which is discussed above the Court found that the duty of the RTA was a non-delegable duty. In *Palmer's* case however it was considered that the RTA's liability to the Plaintiff was only vicarious through the negligence of the Council and or Pioneer. The RTA was therefore granted a complete indemnity and the ultimate liability was equally shared between the Council and Pioneer.

The ultimate judgment totalled \$16,347,477.91. It is understood that Pioneer's claim for indemnity against one of its insurers, QBE Insurance Limited, was unsuccessful. The Council was insured by HIH.

Legislative Change

The so-called "insurance crisis" is highly topical both in the media and in government.

It is true that New South Wales is a highly litigious province and awards of damages are reasonably substantial. The collapse of insurance companies and the "tightening" of the insurance industry generally has resulted in a number of categories of "defendant" having substantial difficulty in obtaining affordable insurance, or indeed insurance at all. It is not news to anyone in this room that the insurance premiums being quoted to road authorities have substantially increased. Further, in general, road authorities such as local Councils have a finite financial base from which to draw funds to enable payment of premiums. As such legislative reform is welcome news.

Having said that I have doubts that the legislative reform will have significant impact on the level of insurance premiums. I say that because aggressive underwriting created a very significant competition between insurers for market share causing an artificial reduction in the premium cost

by comparison to claims exposure. In short competition kept the price of insurance too low.

Whilst not everybody agrees with that view there is a fair indication from statements made by senior people within the insurance industry that premiums are not going to drop in the near future.

Nonetheless, under fairly significant pressure at least the New South Wales government has taken some steps for tort reform. The reforms are in two areas: firstly the quantum of damages, and secondly questions of liability.

Civil Liability Act 2002

The Civil Liability Act was introduced to operate from 18 March 2002 and, in essence, imposes a statutory scheme to limit the recovery of damages in most personal injury type cases.

The scheme is largely untested but it is clear that the intention of parliament was to, to a degree, abolish the entitlement to most forms of damages in small/trivial type cases, fairly significantly rationalise the amount of damages to be recovered in modest to moderate cases, and contain the amount of damages which can be recovered in catastrophic cases.

Pressure has also been exerted upon plaintiff lawyers in considering the utility of commencing proceedings in smaller cases by imposing a limitation on the amount of costs which can be recovered in smaller cases.

Discussion of this legislation is the subject of a separate paper but some feel for the impact of the legislation can be gained by considering one commonly awarded head of damage, being damages for domestic assistance.

Historically an injured person has been entitled to recover damages from a tortfeasor for gratuitously provided domestic and nursing assistance necessitated by the accident. The usual method of calculating the value of that domestic service has been by reference to the commercial cost, which would have been incurred had the services been provided by a commercial service provider, and, to the extent to which the services were provided in the past, interest was payable on the past services.

The type of items contemplated by this rule included not only services provided to the injured person but also services provided to the family of the injured person, which ordinarily would have been undertaken by that injured person.

There are a number of aspects of this entitlement, which were difficult to understand for the layman (and indeed of some occasions the lawyers).

Perhaps most difficult was the definition of what constituted gratuitous provision of assistance. The calculation was made on the injured person's need for services. As such the entirety of the services provided after the accident were used as the basis for calculation of damages regardless of the fact that some (or on some occasions all) of the services which were provided had been provided gratuitously before the accident.

For example a person who could not use his arm to make a sandwich, would be entitled to recover damages for the need for his wife to make sandwiches for him, despite the fact that he hadn't cooked a meal or made a sandwich in his life, or a person with a back injury rendering her unable to mow the lawns would be entitled to compensation even if she had a child that mowed the lawns for pocket money anyway.

The Act imposes a number of alterations on the entitlement to his recovery. In essence the Act abolishes the entitlement to interest, imposes a threshold so that small amounts of assistance provided for a relatively short period of time are not compensable at all, changes the definition of what is in fact compensable to discount services which were provided in any event before the accident, and reduces the base amount from which assistance is calculated from the commercial provision of assistance (which can be very high) to an amount calculated by reference to the ABS average weekly earnings figure, and further limits the amount of the recovery to a 40 hour per week calculation even if the assistance is provided for more than 40 hours per week.

The last alteration is the one that will have a substantial impact on catastrophic injury cases because persons injured with high level brain damage, quadriplegia, or other substantial physical injury often obtain damages to compensate them on the basis of a need for assistance well beyond 40 hours per week.

In summary this Act will have some impact and relief upon road authorities because it will reduce the damages payable in smaller type cases which are generally within or substantially within excesses and deductibles held by road authorities personally and further may ultimately impact upon the risk structure thereby reducing overall premium costs.

The Civil Liability Amendment (Personal Responsibility) Bill 2002

Aside from quantum relief the New South Wales government has promised "liability relief". That is relief from liability at all for certain categories of potential defendants.

At this stage the Bill has not been passed into law and, at the writing of this paper, had not been introduced into Parliament. A "consultation draft" has been prepared.

Bills of this type tend to be somewhat "moving feast" and so rather than analyse the draft provisions relevant to public authorities in any detail I will look at the types of concepts the government proposes introducing. Naturally, after all the debates are over and the Bill is passed into law, close examination of the relief will be necessary from the resultant Act.

The Bill does include a Part, purportedly to provide relief for public authorities and, inside that, in respect of their responsibilities as road authorities.

The Bill proposes a legislative reinstatement of the highway authority immunity. At the start of this paper I said that the better view for the source of the highway authority immunity was the wording of the particular statutes giving road authorities power to undertake road construction and maintenance duties. Almost exclusively the statutes providing that power using the adverb "may". That is a road authority may undertake road maintenance. The Bill proposes a provision to the effect that a road authority cannot be held liable unless the legislative source of its power compels rather than provides it with a discretion to do something.

Also the Bill, in a statutory form, requires the Court to consider the relevant road authority's financial situation and take into account whether it can afford to do the type of work required to make a particular road or footpath safe.

That goes back to sign marking and warnings. The road authority might be able to establish that it simply doesn't have the resources to undertake road repairs but, faced with that situation, it

will be required to take some steps in its capacity as a traffic control authority which steps might be to install appropriate warning signage and speed control signage.

The Bill also introduces limitations and statutory required contributory negligence components for persons intoxicated by alcohol or affected by drugs and as such some relief by way of a reduction in the nature of an "apportionment" between the injured person and the negligent road authority might also be available.

If past in this format the Bill would improve the potential for road authorities to defend a number of cases commonly encountered.

A Final Caveat

While this paper can be regarded as reasonably accurate in its statements in the areas it traverses, it should not be regarded as a replacement for conclusive advice on the subject. Nor does it attempt to traverse all of the available case law in the area. Given the developments in the area the paper is likely to become "out of date" within a very short time span. Notwithstanding all of the foregoing, the author of this paper would be happy to answer any general enquiries from conference participants at a later date.

Author Biography

Steve Taylor-Jones commenced practice as a solicitor in 1988 and is a Partner of Moray & Agnew solicitors specialising in defendant litigation.

Steve specialises in defending public authorities including Local Councils in cases ranging from the more routine occupiers liability cases to the more complex and unusual catastrophic injury and Dust Diseases matters.

Steve acted for Singleton Shire Council in the recent High Court proceedings of *Brodie v Singleton Shire Council* and successfully defended Sydney City Council in the leading Limited Act authority of *Zegarac*.

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