THE EXEMPTION OF HIGHWAY AUTHORITIES FROM LIABILITY FOR NON-FEASANCE

Report of the Torts and General Law Reform Committee

Presented to the Minister of Justice in FEBRUARY 1973

REPORT

of

THE TORTS AND GENERAL LAW REFORM COMMITTEE

THE EXEMPTION OF HIGHWAY AUTHORITIES FROM LIABILITY FOR NON-FEASANCE

1. INTRODUCTORY

The present Minister of Justice's predecessor directed the Committee to report on the desirability of abolishing the rule of law which exempts highway authorities from liability in respect of accidents caused by their failure to maintain and repair roads and streets under their control. This rule may be called, for short, the "non-feasance rule". It applies not only to "highways" in the popular sense, but also to all roads and streets. The rule is subject to a number of exceptions and refinements but may be broadly stated as follows: highway authorities are not liable, either in nuisance or in negligence, for the consequences of their failing to maintain or repair a highway, but they may be held liable for positive acts which create a danger or increase the risk of accidents occurring. Such acts are distinguished as cases of "misfeasance" (1).

2. Whether the common law rule should be abolished and, if so, whether its abolition should be accompanied by the substitution of a new rule defining the liability of highway authorities, are very controversial questions,

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(1) Perhaps the most helpful general source is Fleming, The Law of Torts (4th ed.), 361-5. The leading New Zealand authority is the decision of the Court of Appeal in Hocking v Attorney-General [1963] N.Z.L.R. 513, allowing an appeal from Barrowclough C.J.'s decision, reported in [1962] N.Z.L.R.118.

with pronounced political overtones. The Committee does not for that reason feel deterred from expressing firm views and making definite recommendations, but it recognises that its proposals involve serious consequences for the highway authorities of this country - the National Roads Board and municipal corporations and county councils - and that the decision whether or not to adopt its recommendations will demand a deliberate adjudication by Government between the interest of the public in safe passage along roads and streets and in adequate compensation for death or personal injury or property damage on the one hand, and the interest of the highway authorities in containing their expenditure and operating efficiently on the other. Throughout its somewhat protracted enquiry the Committee has considered it its duty to consult the leading groups involved and it is indebted to the National Roads Board and to the Municipal Association of New Zealand (Inc.) and the New Zealand Counties Association Inc. for presenting lucid and detailed submissions to it. Those submissions to some extent reiterated arguments advanced to the Law Revision Committee in 1963, before the present Law Revision Commission was established. On that occasion the proposal for reform was allowed to lapse. On the present occasion the Torts and General Law Reform Committee formulated its preliminary views in a working paper which it sent for comment to the three bodies named above, and in addition to the New Zealand Law Society which asked the various District Law Societies to express their views. Each of the three bodies mentioned opposes the abolition of the non-feasance rule. All the District Law Societies which replied favour its abolition. The Automobile Association supports the abolition of the rule, as does the Ministry of Transport.

3. HISTORICAL

The non-feasance rule has its historical origin in the England of the early Middle Ages. The duty to repair the roads then rested upon the adjoining land-holders, or the inhabitants of the parish. It was enforceable by way of indictment, not at the suit of an individual even though he had suffered damage. As time passed the exemption from liability for non-repair and its consequences in injuries thereby caused was transferred from individual parishioners to corporate local authorities. It was brought to New Zealand in the general body of English law. It never had a corresponding historical justification in New Zealand but its effect, arguably very desirable in a pioneer country, was to relieve the responsible local bodies and the Crown of the annoyance of actions for non-repair. It enabled local bodies in difficult times to ignore the need for road repairs other than the most obvious and urgent ones. The immunity was confirmed and further defined by a series of decisions of the House of Lords and the Privy Council at the close of the nineteenth century. (2)

4. THE HARDSHIP CREATED

The Committee thinks it unnecessary to offer numerous examples of the hardship which the non-feasance rule has occasioned. Members of the Committee know of several cases in their professional experience where the rule obviously applied and claims were not made or having been made, had to be abandoned. The practical

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(2) Cowley v Newmarket Local Board [1892] A.C. 345; Municipality of Pictou v Geldert [1893] A.C. 524; Municipal Council of Sydney v Bourke [1895] A.C.433.

operation of the rule is not adequately reflected by the small number of reported New Zealand decisions. One case, however, that went to the Supreme Court was Gascoyne v Wellington City Corporation [1942] N.Z.L.R. 562. A woman was seriously injured when the bitumen pavement on which she was walking broke away under her feet. The jury found that the footpath was a source of danger to pedestrians at the time of the accident, and that the defendant Corporation had been negligent in not discovering and remedying the defects caused by the subsidence. The Corporation nevertheless escaped liability by successfully pleading the non-feasance rule. We think it plain that this result was unjust and that the plaintiff in that case should not have been denied a remedy in tort against a wealthy corporation which had at least a moral duty to take reasonable care to eliminate traps and which could easily have insured against any legal liability ensuing fron non-repair. Indeed, the advent of liability insurance at the end of the nineteenth century demolished what is generally agreed to be the original historical justification for the rule, namely the notoriously inadequate financial resources of early local bodies. In Attorney-General v. St Ives R.D.C. (3) Salmon J. condemned the rule as an archaic and anomalous survival into modern times, without any sound reason to justify it. If the law is changed as we recommend highway authorities will be able to insure against the risk of liability, so that any loss that they suffer will be effectively spread. We believe that any hardship caused to highway authorities by the change which we recommend will be considerably less than the hardship suffered by individual road users under the present law.

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(3) [1960] 1 Q.B. 312, 323.

5. UNCERTAINTIES IN THE RULE

The rule, as we have already said, is subject to exceptions and refinements. The distinction between non-feasance and misfeasance, if intelligible at all, is subtle and obscure and in a borderline case such as Hocking v Attorney-General (4) is likely to lead to elaborate appellate argument. There is an obscure exception known as the "artificial structure" rule. No-one is quite certain what objects rank as "artificial structures". Drains and grids have been so classified but ordinary bridges and culverts are probably to be treated as part of the highway itself with the consequence that the non-feasance rule is capable of applying to them. There is probably an obligation to take reasonable care not to let an artificial structure fall into a dangerous state of disrepair. Even this cannot be stated with confidence for the "artificial structure" rule "lacks modern endorsement by English courts and has been lately questioned, if not actually repudiated, by the High Court of Australia." (5) Then there is the "source of authority" test which excludes from the ambit of the immunity the maintenance of all structures by a highway authority upon or under the road pursuant to a statutory authority other than that strictly relating to the construction and repair of highways. In addition to these complexities there is the changing and elusive distinction between the torts of negligence and nuisance. Both these torts may usually be invoked in cases where the plaintiff alleges that a defect in the highway caused or contributed to his accident. The non-

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(4) Note 1, supra.
(5) Fleming, op. cit., 364, citing Buckle v Bayswater Road Board (1936) 57 C.L.R. 259 and Gorringe v Transport Commission (1950) 80 C.L.R. 357. In Hocking's case the status of the "artificial structure" rule was left indeterminate: cf. Gresson P. at 519-21; North J. at 532; Turner J at 540.

feasance rule is an answer to liability under either head; but, if the non-feasance rule can be surmounted the parties face other complexities, including questions about the possible effect of various statutory provisions such as the definition of "main highway" in s.2 of the National Roads Act 1953. The Committee considers that this degree of complexity and uncertainty is indefensible and constitutes a further reason for recommending the abolition of the non-feasance rule.

6. ARGUMENTS FOR RETENTION

The National Roads Board frankly rests its opposition on the ground of additional expenditure in a roading programme which is still in a state of development and necessary expansion. The most detailed submissions have been those of the Municipal Association which has emphasised the higher *per capita* road mileage in New Zealand, the lower standard of roading, the lower density of population, and the younger geological structure of our country which predisposes to greater damage from erosion and earth movement. All these arguments have a certain validity in relation to the administrator's duty to keep public expenditure within reasonable bounds; but have they any bearing on the question whether justice in the community is served by the retention of the rule? They sound like an echo from the past in a society which has moved irrevocably from laissez-faire individualism to an all-embracing welfare state. The Committee does not find the arguments advanced for retaining the non-feasance rule convincing and is unanimously of the view that the rule should be abrogated.

7. ABOLITION OR REPLACEMENT

It is always tempting to the common law reformer to consider whether the matter might be left to be dealt with by the powerful action of the ordinary rules of negligence and/or nuisance, and there is no reason to suppose that in the long run, and after a substantial period of case law refinement, this would necessarily be an unsatisfactory prescription. The difficulty is that, without any statutory guidance, a dramatic change from one rule to its opposite could result in a period of experimentation and uncertainty of undue length. Moreover this would occur at a period of some complexity, in that rapid developments are taking place in the physical condition of New Zealand highways, and a change of historical proportions is about to occur in the legal remedy for personal injury.

8. THE ENGLISH REFORM

In England the non-feasance rule was abrogated as from 1964 by the Highways (Miscellaneous Provisions) Act 1961 (U.K.) s.1. It may be convenient to set out the more important subsections of section 1:-

"1. Civil liability for non-repair of certain highways and bridges:

(1) The rule of law exempting the inhabitants at large and any other persons as their successors from liability for non-repair of highways is hereby abrogated.

(2) In an action against a highway authority in respect of damage resulting from their failure to maintain a highway maintainable at the public expense, it shall be a defence (without prejudice to any other defence or

the application of the law relating to contributory negligence) to prove that the authority had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic.

(3) For the purposes of a defence under the last foregoing subsection, the Court shall in particular have regard to the following matters, that is to say -

(a) The character of the highway, and the traffic which was reasonably expected to use it;

(b) The standard of maintenance appropriate for a highway of that character and used by such traffic;

(c) The state of repair in which a reasonable person would have expected to find the highway;

(d) Whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway;

(e) Where the highway authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, what warning notices of its condition had been displayed;

but for the purposes of such a defence it shall not be relevant to prove that the highway authority had arranged for a competent person to carry out or supervise the maintenance of the part of the highway to which the action

relates unless it is also proved that the authority had given him proper instructions with regard to the maintenance of the highway and that he had carried out the instructions.

(4) .... For the avoidance of doubt it is hereby declared that, by virtue of subsection (1) of section fifteen of this Act, any reference to a highway in this section includes a reference to a bridge.

(5) This section shall bind the Crown."

9. The broad effect of the legislation was simply stated by Lord Denning M.R. in Meggs v Liverpool Corporation [1968] 1 All E.R. 1137 at 1139:

> "What is the effect of the abolition? It means that the highway authority are under a duty to maintain the highway and keep it in repair. If it is in a dangerous condition so that it is not reasonably safe for people going along it, then prima facie there is a breach of the obligation to maintain and keep it in repair: and any person who suffers particular damage on account of it can bring an action against the highway authority. But the highway authority can escape liability if they prove that they took all reasonable care to see that it was safe, having regard to the various matters set out in Section 1(2),(3) of the Act of 1961. At the outset, however, in order to make a prima facie case, the plaintiff must show that the highway was not reasonably safe, i.e., that it was dangerous to traffic."

And again in Burnside v Emerson [1968] 3 All E.R. at 742-3:

> "First: the plaintiff must show that the road was in such a condition as to be dangerous to traffic. In seeing whether it was dangerous, foreseeability is an essential element. The state of affairs must be such that injury may reasonably be anticipated to persons using the highway ....

> In applying this test after the Act of 1961, the Courts at first were too much inclined to find a danger when there was none, or, at any rate, none that could reasonably be foreseen ...."
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> Second: the plaintiff must prove that the dangerous condition was due to a failure to maintain, which includes a failure to repair the highway. In this regard, a distinction is to be drawn between a permanent danger due to want of repair, and a transient danger due to the elements. When there are potholes or ruts in a classified road which have continued for a long time unrepaired, it may be inferred that there has been a failure to maintain. When there is a transient danger due to the elements, be it snow or ice or heavy rain, the existence of danger for a short time is no evidence of a failure to maintain .... So I would say that an icy patch in winter or an occasional flooding at any time is not in itself evidence of failure to maintain. We all know that in times of heavy rain our highways do from time to time get flooded. Leaves and debris and all sorts of things may be swept in and cause flooding for a time without any failure to repair at all.
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> Third: if there is a failure to maintain, the highway authority is liable prima facie for any damage resulting therefrom. It can only escape liability if it proves that it took such care as in all the circumstances was reasonable; and, in considering this question, the Court will have regard to various matters set out in s.1(3) of the Act of 1961."

So far as one can tell from the few reported cases, these rules have worked satisfactorily in the United Kingdom.(6) Of course the reported cases must be a very small proportion of the cases actually tried since 1964.

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(6) Cf. also Griffiths v Liverpool Corporation [1967] 1 Q.B. 374 (C.A.) and Littler v Liverpool Corporation [1968] 2 All E.R. 343.

10. THE FORM OF LEGISLATION IN NEW ZEALAND

In New Zealand we have had the advantage of observing the operation of the English Act in this period, and of judging whether a suitable expedient would be the adoption of similar legislation here. There is no doubt that this is a possibility and the district Law Societies which commented have accepted that it would be a natural course to follow. However further reflection suggests that it could give rise to certain problems in New Zealand. Its form is rather complicated and it is doubtful whether the same degree of elaboration is necessary or desirable in New Zealand. The reversal of the onus of proof would of course be in conflict with the views advanced by bodies representing highway authorities, and might seem to be unduly hard on them in the less developed roading conditions prevalent in New Zealand. In addition there is the complication that New Zealand has as yet no equivalent to s.44 of the Highways Act 1959 (U.K.) which imposes a statutory duty on the authorities to maintain highways, though this could of course be remedied by yet another legislative advance.

11. A middle course which would be more suitable, and we think more acceptable in New Zealand conditions, would be the enactment of special legislation of a type similar to the Occupiers Liability Act 1962 which would establish a statutory liability, based on a duty to take <u>such care as in all the circumstances of the case is reasonable</u> to ensure that the particular street, road or highway is reasonably safe for persons using it; who must themselves exercise such degree of care for their own safety as is reasonable and usual in the circumstances. Under such a formulation the onus of proof would remain on the plaintiff to show that the authority had failed to exercise reasonable care to maintain or repair, and in turn the law relating to contributory negligence would apply to the plaintiff. The Court in its infinite

experience of judging the standard of reasonable care in all the circumstances of the case would be able to take into account all such matters as are set out in the English legislation (character of highway, standard of maintenance appropriate, opportunity of repair, etc.) without being fettered in any way by explicit particularisation, and both highway authorities and the general public ought to feel confident that legislation of this generalised and uncomplicated nature would be fairly and reasonably applied.

One of the merits of this solution is that it brings highway cases into a category similar to that of the negligence claim at common law to which our legal system is thoroughly accustomed, and it does as little violence as possible to that system. Obviously a key feature is the retention of the onus of proof upon the plaintiff. Another merit of this solution is that it precludes the possibility of an alternative cause of action in nuisance.

12. RES IPSA LOQUITUR

The question then arises whether, in enacting the new legislation, the deliberate step should be taken of negativing the application of the res ipsa loquitur defence in cases arising under the statute. That maxim, on one view of it, casts an onus of disproof upon the defendant. If that view is correct it would be contrary to the scheme propounded above, and would put the highway authority in a position resembling that of its English counterpart under the Highways Act. However, practical experience has shown that the maxim res ipsa loquitur is one of very limited application. The number of negligence cases in which it is successfully pleaded is extremely small. "It can rarely happen when a road accident occurs that there is no other evidence, and if the cause of the accident is proved, the maxim res ipsa

loquitur is of little moment" - Barkway V South Wales Transport Co. [1950] 1 All E.R. 392, 399 per Lord Normand. (7) It is , after all, a feature of the law of negligence with a recognised but limited part to play in the scheme of the law, and on the whole it seems unnecessary to eliminate it artificially from any particular class of case.

13. A NOTICE REQUIREMENT?

Of greater moment, perhaps, is the question whether a requirement that notice be given to the highway authority should be introduced into the new legislation. Highway authorities tend to feel that this would protect them against late claims, and serve the practical purpose of enabling information about an accident to be collected and preserved while still fresh. There are of course strong arguments in favour of a notice requirement in all kinds of accident claims, and such arguments may indeed be more cogent in relation to industrial accidents than in relation to road accidents. Be that as it may, a notice requirement limited to claims against highway authorities would plainly be a partial revival of s.23 of the Limitation Act 1950. (8) This provision required a claimant against the Crown or public authority to give notice in writing providing reasonable information about his claim as soon as reasonably practicable after the accrual of the cause of action, (which in most cases meant as soon as reasonably practicable after the accident), AND to commence his action within one year from the date on which the cause of action accrued. These requirements were subject to a discretionary power in the Court to grant leave to bring the action up to 6 years if default were due to mistake or reasonable

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(7) Cf., however, Swan v Salisbury Construction Co.Ltd [1966] 2 All E.R. 138 (P.C.)

(8) For the complexities to which this section gave rise see an article by Dr G.P. Barton in (1960-2) 3 V.U.W. Law Review, 133.

cause, or the defendant was not materially prejudiced thereby.

14. In practice these rather stringent rules as to notice and commencement time proved rather burdensome, and possibly caused some injustice in a small number of cases. The reported decisions on s.23 of the Act show that the Court exercised its discretion liberally. Nevertheless the majority of practitioners who had occasion to make frequent use of the section, whether for plaintiffs or defendants, would have some recollection of a case or cases where the section was used "tactically" against a claim. An increasing recognition of the stringency of the section, and perhaps also the liberal interpretation applied by the Courts, led to its total abolition in 1962, and it could be truthfully said to have passed away unlamented. To revive similar provisions now would scarcely be a popular step, and indeed might be regarded as an anachronism in legislation the objective of which will be to remove an anomaly from the law. But the real question is whether provisions for notice in highway cases are necessary in modern conditions of improved communication systems and highway patrols. The Committee accepts that there are many miles of lower grade roading in remote areas of the country. Observation and experience nevertheless suggest that the occurrence of a road accident quickly becomes known and is widely reported and publicised. No doubt this is assisted by the intense concentration now being directed to road safety campaigns engendered by road toll statistics which have reached epidemic proportions, and it must be remembered that a hoped-for result of the proposed legislation may be some improvement in road safety. In all the circumstances, and subject as always to close scrutiny in the initial stages, it is recommended that there be no requirement in relation to notice in connection with claims under the new statute.

15. MODE OF TRIAL

We must now deal with the question whether the proposed statute should contain any special provision relating to trial by jury or judge alone. This is a large question indeed. In modern conditions, where the content of accident cases is often highly technical and complicated, the trial of such cases before a common jury sometimes seems to be unnecessarily clumsy and time-consuming. A trial that could be neatly and conveniently despatched before a Judge alone in 2 days may well take 3 or 4 before a jury, and the possibility of a disagreement at the end of that time is always present. These undesirable features, and to some extent a manpower problem, led to the abolition of the jury years ago in England in all civil damages claims apart from a restricted group. Its abolition brought many benefits, particularly in regard to the rationalisation of damages. In New Zealand, however, we have retained the common jury mode of trial for civil claims, and cases in which a plaintiff elects trial before a judge alone are still rare. In this situation it smacks of special pleading to submit, as some interested parties have, that claims arising under the Highways statute should not be tried by juries. If this proposal were followed, the risk of inconsistency in awards as between judge alone and jury cases could arise, and the better view surely is that so long as the civil jury system is retained in accident claims, there should be no differentiation simply because a plaintiff alleges that a defendant failed to use reasonable care when repairing or maintaining a highway. In support of this view it may also be pointed out that if either party had the right to elect trial by judge alone in this one class of case considerable practical difficulties would arise when, for example, the plaintiff alleges some "active" negligence by one defendant together with the unsatisfactory condition of the road due to the fault of that defendant or of a second defendant.

16. RELATIONSHIP TO THE ACCIDENT COMPENSATION ACT 1972

This Act, which finally passed through Parliament after the Committee completed its deliberations on the non-feasance rule, will greatly reduce the number of claims that would otherwise be brought under the new legislation that we recommend. In practical terms the only claims that will survive the exclusion of common law and statutory remedies by s.5 of the 1972 Act will be claims by non-earners for injuries suffered in accidents not connected with the use of a motor vehicle, and claims in respect of damage to property. The 1972 Act does not extend to either of these categories. In consequence the 1972 Act at once reduces the significance of the reform that we recommend and mitigates the financial effects of it upon highway authorities. We recommend that the legislation which we propose be made to come into force on 1 October 1973, which is the announced date of commencement of the substantive provisions of the Accident Compensation Act 1972.

17. MISCELLANEOUS

The legislation which we propose should bind the Crown. It should expressly extend to property damage although we contemplate that the existence of knock-for-knock agreements will reduce litigation solely on the score of damage to motor vehicles to a trickle. We think that the proposed legislation should contain no special provision about the effect of warning notices on the liability of highway authorities. In some circumstances the erection of a suitably worded notice will almost certainly discharge the highway authority's duty to take reasonable care. In other circumstances a notice will not be sufficient to discharge the highway authority. The effect of erecting a warning notice at the site of a wash-out on a back country road must

depend on all the circumstances, and no special rule is desirable. There are, in any event, so many different kinds of warning notice erected along our roads. A very wide definition of "highway" should be included in the legislation. Everything associated with a modern road should be included, whether a fixture or not. Bridges, culverts, drains, curbs, gutters, street-signs and footpaths should be expressly included. By contrast a narrow definition of "highway authority" should be enacted. We do not intend that individual owners of private roads should be in any way affected by the legislation. Their liability should continue to be governed by the Occupiers Liability Act 1962. There should be no overlapping between that Act and the new legislation, and we leave it to the draftsman of the legislation to devise a suitable formula to secure this result.

18. SUMMARY OF RECOMMENDATIONS

The Committee recommends the enactment of legislation:

(i) specifically abrogating the non-feasance rule;

(ii) imposing a duty on highway authorities to take such care as in all the circumstances is reasonable to ensure that each "highway" for which they are responsible is reasonably safe for persons using it;

(iii) declaring that the onus of proof shall lie on the plaintiff;

(iv) prescribing that in deciding whether a highway authority has taken sufficient care the Court shall treat the defendant as entitled to anticipate that users will use such care for their own safety as is reasonable and normal in the particular circumstances;

(v) preserving the defence of contributory negligence; and

(vi) dealing with the incidental matters referred to in paragraph 17 of this report.

This legislation should not come into force prior to 1 October 1973, being the date of commencement of the Accident Compensation Act 1972.

(I.L. McKay)
Chairman
for the Committee

MEMBERS:

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