[HIGH COURT OF AUSTRALIA.]

THE COUNCIL OF THE MUNICIPALITY OF WOOLLAHRA . . . . . DEFENDANTS, } APPELLANTS;

AND

MOODY . . . . . PLAINTIFF, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1913.

SYDNEY, *April* 1, 2.

Barton A.C.J., Isaacs and Gavan Duffy JJ.

Local government—Negligence—Maintenance of road—Negligent construction—Misfeasance or non-feasance—Liability of municipal authority.

Where a municipal authority, on a road of which they have the care and management, construct works in such a manner that the natural and probable consequence is that the part of the road immediately adjacent, which they leave untouched, will become dangerous, negligence in respect of such construction may be imputed to the authority for which they will be liable in the event of damage being occasioned by reason of the untouched part of the road having so become dangerous.

The leaving untouched that part of the road which becomes dangerous is not, under such circumstances, a mere non-feasance.

Decision of the Supreme Court of New South Wales: *Moody* v. *Municipality of Woollahra*, 12 S.R. (N.S.W.), 597, affirmed.

APPEAL from the Supreme Court of New South Wales.

Rawson Frederick Thomas Moody brought an action in the Supreme Court against the Council of the Municipality of Woollahra, alleging by the first count of the declaration that the defendants "so wrongfully, negligently and improperly made and

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constituted, kept and maintained a certain public road, street or highway known as the South Head Road, Rose Bay, within the said municipality and also certain kerbings and drains in along and from the said South Head Road, and so wrongfully, negligently and improperly constructed an open drain from which an underground drain was constructed and left the same without proper lighting, fencing or protection that the stonework or masonry of the said open drain was insufficiently, defectively, incompletely and improperly constructed, and the covering thereof exposed above the level of the said road, so that the said drain having broken away and not having been repaired a hole was caused and made into which plaintiff's motor car slipped and fell, and also violently struck the said exposed and projecting stone, and while stuck and unable to get out of the said hole the said motor car was struck by a passing tram, whereby and by reason whereof the said car was broken and completely wrecked and destroyed and was rendered useless and valueless."

By a second count the plaintiff alleged that the defendants "wrongfully and improperly placed upon the said road a certain stone in such a position that the same was dangerous to persons lawfully using the said road, and wrongfully suffered the said stone to remain in the state and position aforesaid, without fence, railing, lighting, or other protection, and also wrongfully and improperly made, or caused to be made, or suffered to be made in the said road, a certain hole which was dangerous to persons lawfully passing along or using the said road," whereby the plaintiff suffered the injuries, loss and damage mentioned in the first count.

The defendants pleaded not guilty.

The facts, so far as material, are stated in the judgments hereunder.

The jury having found a verdict for the plaintiff, the Full Court, on appeal, upheld it: *Moody* v. *Municipality of Woollahra* (1).

From that decision the defendants now appealed to the High Court, on the grounds (*inter alia*) that there was no evidence that the defendants had been guilty of negligence, or had created

(1) 12 S.R. (N.S.W.), 597.

any nuisance, contributing to the injury complained of, that the plaintiff should have been nonsuited, and that the jury should have held that the plaintiff was guilty of contributory negligence.

Ralston K.C. (with him *Windeyer*), for the appellants. The replacing of the original capstone by one which was thinner was not, under the circumstances, either negligence or nuisance; the evidence shows that the accident was wholly caused by the capstone, and was not in any way contributed to by reason of the hole between the end of the stone kerbing and guttering having become eroded. If the capstone caused the accident, the appellants are not liable for what happened afterwards, even if what happened afterwards was due to their negligence: *Metropolitan Railway Co.* v. *Jackson* (1). If the hole was the cause of the accident it was due to a non-feasance of the appellants, and not a misfeasance, and therefore does not impose any liability on the appellants. If part of a road is made, and the consequence of making it is that a dangerous place occurs in the unmade part of the road, that does not give rise to any liability on the part of the appellants: *Benalla Corporation* v. *Cherry* (2); *Miller* v. *McKeon* (3); *Birch* v. *Australian Mutual Provident Society* (4); *Cowley* v. *Newmarket Local Board* (5); *Municipality of Pictou* v. *Geldert* (6); *Municipal Council of Sydney* v. *Bourke* (7); *Gibraltar Sanitary Commissioners* v. *Orfila* (8); *Lambert* v. *Lowestoft Corporation* (9). The respondent having admittedly omitted to have his acetylene lamps lighted, the jury should have been directed to find for the appellants on the ground of contributory negligence.

Rolin K.C. (with him *E. A. Barton*), for the respondent. There was evidence that the construction of the stone kerbing and guttering, and the leaving untouched the five feet between the end of the kerbing and guttering and the gully shaft, was an unreasonable mode of carrying out the work. There is also evidence that the construction of the kerbing and guttering

(1) 3 App. Cas., 193.
(2) 12 C.L.R., 642.
(3) 3 C.L.R., 50.
(4) 4 C.L.R., 324.
(5) (1892) A.C., 345, at p. 353.
(6) (1893) A.C., 524.
(7) (1895) A.C., 433.
(8) 15 App. Cas., 400.
(9) (1901) 1 Q.B., 590.

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necessarily caused the surface of the five feet to become more dangerous. There is ample evidence that what happened to the respondent's car was not merely the result of the non-feasance in leaving the five feet untouched, but was the result of the misfeasance in improperly making the kerbing and guttering: See *Geddis* v. *Proprietors of Bann Reservoir* (1); *McClelland* v. *Manchester Corporation* (2). There is also ample evidence that there was negligence which caused the car to hit the capstone and so to get into the hole. The substitution of a capstone three inches thick for one nine inches thick is evidence of negligence, for the substituted capstone could not be so easily seen.

Ralston K.C., in reply.

BARTON A.C.J. I am of opinion that this appeal must be dismissed. The action is one for negligence and nuisance. [His Honor briefly stated the pleadings.]

It appears that on the night in question the respondent, who had been over the road several times before, was driving his motor car along the South Head Road from Watson's Bay towards Ocean Street, that is, towards the city, and was approaching Rose Bay. He said that he was guiding himself by the footway on his left or near side and the tramline on the other side. At the place in question, opposite the house of a Mr. Ward, there is a length of about 127 ft. 9 in. of stone kerbing and guttering which had been constructed by the appellants, by arrangement with Ward at a time when the appellants had taken over the road from the New South Head Road Trust, and no question of law as to the respective liability of the appellants and the Trust in regard to that transfer is now raised. At the western end of this kerbing and guttering there is a space of about 5 ft. 1 in. not kerbed or guttered, a gutter of earth leading to a gully shaft covered by a capstone. These gully shafts and capstones are contrivances which appear at several other points along the road. This particular capstone is 3 ft. 6 in. in its extension from the footway towards the tramway, and it is supported by two stones. Underneath is a gully shaft leading the water away under the

(1) 3 App. Cas.. 430, at p. 455. (2) (1912) 1 K.B., 118.

road. The space of 5 ft. 1 in. between the end of the kerbing and guttering and the gully shaft has been untouched by the appellants. There is evidence that in that space the water-table was deeper and wider than it was before the kerbing and guttering were constructed, and was deeper and wider than on the west side of the gully shaft, where the water-table was untouched by the appellants. That space is the hole referred to in the declaration.

The respondent came along at a speed of six or eight miles an hour, about 11 o'clock at night, steering, as has been mentioned, by the tramway and the footway. He had oil lamps lit, but his acetylene lamps were unlit. The night was dark. A lamp which formerly threw light upon the place had been removed by the council. He says that he came upon the projecting capstone without having previously seen it. The result was that his near front wheel struck the capstone near its outer edge, that the steering wheel was wrenched out of his hands, that the near front wheel went diagonally across the capstone towards the western side, that then the near hind wheel struck, but did not pass over, the capstone, and that the car then fell or lurched sideways into the hole. On that happening, the car was quite immovable, and one at least of its hind wheels projected on to the tramway, and a tram car coming along shortly afterwards crashed into the motor car and virtually destroyed it.

The respondent then sued the appellant council for the damage to his property done by the tram car, alleging that it arose by reason of the negligence of the appellants, and the nuisance they created, all that negligence and nuisance being in respect of the capstone and the hole. A verdict for that damage was given him by the jury, and the Supreme Court, on appeal, upheld it. Hence the appeal to us.

I do not think we need be troubled much by the capstone. It was three inches thick, and replaced one which had been placed there by the Trust, and which was nine inches thick. I am at a loss to see how, in the circumstances described, the substitution of a capstone three inches thick for one nine inches thick could increase the danger in any way. The question is whether the fact that the hole had become sixteen inches deep instead of the less depth which would have existed had the conditions

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remained unaltered, is due to a misfeasance or a mere non-feasance on the part of the appellants. That turns upon the answer to the question, What was the tendency and effect of the work which the appellants did at that spot? According to the respondent's witnesses, whose testimony the jury obviously accepted, the necessary consequence of the kerbing and guttering was to increase the volume and accelerate the speed of the water, and so to wear away the surface of the 5 ft. space which was left untouched by the appellants, and the result, as seen, is that the depth of the depression was increased. Against this necessary consequence of their undertaking, the defendant municipality made no provision. If the authority having the care and maintenance of a road undertakes new work such as this kerbing and guttering, and in carrying out that work leaves a place immediately adjoining in such a condition that the natural and necessary consequence is that the place becomes dangerous, then it is clear to me that there is a misfeasance, and not a mere non-feasance; and if damage results by reason of that misfeasance, I think the authority is responsible. That, it appears, is the simple state of this case, and the remaining question is whether this alteration in the 5 ft. space caused the damage to the respondent's car. The depression was a nuisance, I think. But I think also that, if the evidence for the respondent is believed—and it was open to the jury to believe or reject it,—the depression was caused by the negligence of the appellants. There being negligence, did the accident result from that negligence? I do not think it can be said that the accident happened otherwise than from the position into which the car got. Here I eliminate the factor of contributory negligence, because, although it was relied on at the trial, and, as we are told, before the Full Court, this Court granted special leave to appeal on grounds which had no relation to contributory negligence, and on this appeal it was scarcely argued with any seriousness by the appellants. I may say, too, that, so far as that matter has been discussed here, there was evidence on which the jury were justified in taking the view that there was no contributory negligence. The front wheel of the car having crossed the capstone, and the hind wheel having got into the hole, the motor car, as I have said, became immov-

able to this extent, that it could not be got out of the way before the tram car struck it. It is plain to my mind that, if the jury chose to take the view that the car got into that position through the existence of the hole and the fact of its depth being greater than it would have been but for the misfeasance, they were at liberty to do so. In that view the thing which was *à priori* negligent was found, and justifiably found, to be also the cause of the damage.

It is not necessary to cite any of the cases, now familiar, which negative the responsibility of a municipal authority for mere non-feasance. The only real questions are: First, was the leaving the 5 ft. space, under the conditions created by the appellants, non-feasance? To that I think we may answer—No. Next, was the position into which the motor car fell caused by the things which were done, negligently, as the jury found, by the appellants; and was the damage to the car proximately caused by its getting into that position? On that point the jury were entitled to find either way. Having found as they did, the judgment of the Full Court upholding their verdict cannot be disturbed, and the appeal must be dismissed.

ISAACS J. read the following judgment:—The real cause of action in this case, and that upon which the jury have found in favour of the respondent, is negligence in the performance of a statutory duty. It is not the non-performance of a duty—but its negligent performance.

The position with reference to the argument is made quite clear by a short statement of the material facts.

Before the road was vested in the municipality of Woollahra, it was in the care and control of a Road Trust, and at the time of its transfer by statutory proclamation to the appellant municipality, a gully shaft had been constructed with two supporting stones on each side of the shaft, and across these stones rested a capstone the thickness of which was nine inches. There was a sheer vertical dip from the top of the capstone to the level of the sill of the shaft. This shaft received the storm water coming from the east along the south side of the road, which was unkerbed, and was skirted by an irregular line formed by the

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natural undisturbed soil rising at an incline from the southern side of the road. Close by the shaft was a street lamp, the light of which afforded a real protection from the undoubted danger caused by the presence of the shaft.

This was the condition of the spot in question as taken over by the appellant municipality.

The road itself is a much frequented throughfare, one of the main outlets of Sydney, and is of varying width. At the point in question it is narrow, which of course increases the danger.

Now, we have not in this case to consider how far the appellant municipality started, so to speak, with any responsibility. The case was conducted—and the parties are bound by that—on the basis that no negligence or other fault was suggested anterior to the advent of the municipality of Woollahra, and it was assumed that if the conditions under which the road came to the municipality had been maintained, there would have been no responsibility for the respondent's accident.

But the case raised is that the appellants actively interfered with the road, and brought about a more dangerous condition; that this result was the outcome of negligence on the part of the appellants, and that this negligence was the direct and natural cause of the harm which the respondent sustained.

The jury found for the respondent on all these points, and awarded him £200 damages. Only by special leave could this appeal be brought, and leave was given to settle what is said to be a general and important question of law.

It is urged by Mr. *Ralston* that the conduct complained of is non-feasance, and that the authorities are settled that for non-feasance a municipality is not liable. The respondent's case is that the conduct complained of is, first, the construction of a line of kerbing which straightened up the line of travel taken by the storm-water, and the necessary levelling of the adjoining surface of the road; the carrying of that line only to a point five feet from the gully shaft and leaving for that five feet the old irregular natural outline; and abolishing the lamp which indicated the exact situation of the shaft and capstone. The constructional work referred to naturally brought the water more rapidly—how much more rapidly, was a question for the jury—

to the mouth of the shaft, or, in other words, more water was brought in a given time—and in dealing with storm-water the problem always is to provide for quantity in relation to time.

The natural result of the more rapid discharge of the greater volume and weight at a given moment must be to deepen and widen the channel of natural earth at the end of the kerbing, and beating against the irregular natural outline of the soil remaining would have a tendency to still further increase the width of the cavity. This was found to have actually happened. It is a fair question for a jury whether this should have been foreseen and provided against. One simple and inexpensive way, the jury may have thought, was to continue the kerbing for the remaining five feet. And the jury may have thought also, that if the desirability of doing so did not occur to the municipality at first, it became manifest during the two years the alteration existed. Then, with an increased danger, the abolition of the lamp decreased the protection of the public against incurring it. All this is said to be non-feasance, and, as I have said, it is claimed that the law is that there is no liability for non-feasance.

But the fallacy is—that there is no such law. It has never been laid down simply that there is no responsibility for non-feasance. The law in such cases is that there is no responsibility for "mere non-feasance," and it is by overlooking the force of that little word "mere" that the error in the appellants' contention arises. *Bourke's Case* (1) is the leading authority.

In *Bourke's Case* (2) Lord *Herschell* L.C., for the Judicial Committee, said :—"The sole charge is one of non-feasance : that when the road had fallen into a bad condition, they failed to execute the necessary repairs." But there, though the municipality had previously made the road, they had not in any way added to its danger.

The distinction is shown by Lord *Herschell* (3) between that case and the *Bathurst Case* (4), in the passage quoted from that case. The important question is (5) :—"Their Lordships are of opinion that, under these circumstances, the duty was cast upon

(1) (1895) A.C., 433.
(2) (1895) A.C., 433, at p. 435.
(3) (1895) A.C., 433, at p. 440.
(4) 4 App. Cas., 256.
(5) 4 App. Cas., 256, at p. 265.

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them of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway which, but for such artificial construction, would not have existed, or, at the least, of protecting the public against the danger, when it arose, either by filling up the hole or fencing it . . . there would seem to be no substantial difference in the liability between a hole which had been directly made by them, and one which is the indirect but natural consequence of the artificial work they had created and had not properly kept." His Lordship then says (1):—"The case was not treated as one of mere non-feasance, and indeed it was not so." Again (2), he quotes from the *Pictou Case* (3):—"In the opinion of their Lordships, it is impossible to find in any of the legislative provisions the indication of an intention on the part of the legislature that a person injured by the mere non-repair of a road or bridge should be entitled to sue the municipality for damages in respect thereof." In *Brabant & Co.* v. *King* (4) Lord *Watson* for the Privy Council, speaking for the principle contended for, says:—"That principle has, in many instances, been held to afford protection to commissioners or trustees representing public interests from the consequences of mere non-feasance." In *Shoreditch Corporation* v. *Bull* (5) Lord *Halsbury* L.C. says:—"Under those circumstances it becomes an ordinary case of interference with the road, the non-return of it into its normal condition, and an accident happening in the course of events, which but for that alteration in the normal condition of the road would not have happened. That seems to me, therefore, to be a sufficient chain of events to show that the person who interfered with the normal condition of the road is responsible for it until its return to a safe condition." Those words are quite as applicable here. The extra depth and width were directly referable to the active construction of the kerbing higher up, and cannot be regarded as mere non-feasance.

An instructive instance of liability is found in *Lamley* v. *East Retford Corporation* (6), where the Court of Appeal held the

(1) (1895) A.C., 433, at p. 441.
(2) (1895) A.C., 433, at p. 445.
(3) (1893) A.C., 524, at p. 529.
(4) (1895) A.C., 632, at p. 638.
(5) 90 L.T., 210, at p. 212.
(6) 55 J.P., 133.

highway and lighting authority liable under these circumstances: they erected a post in the centre of a footpath to prevent cattle straying up the footpath, and near the post they placed a lamp; they left the lamp unlighted, and in consequence of the darkness the plaintiff fell against the post and was injured. "Clearly," says the Master of the Rolls, "an action lies against the corporation." In his charge to the jury in the present case, *Ferguson* J. included among the circumstances to be considered by them the darkness of the road. It is undeniable that precautions sufficient in broad daylight may be quite insufficient for the hours of darkness, and want of lighting is charged.

As I have said, the lamp previously there had been for some months prior to the accident removed. It is not only a natural precaution to take that a dangerous spot should be lighted, but the legislature itself recognizes this, and expressly, by sec. 73 sub-sec. (iii.) of the *Local Government Act* 1906 empowers and requires the local body to perform the duty of making provision of lights at dangerous points on roads. So far as that enactment goes, it may or may not be a purely discretionary duty for omission of which an action lies. As to this I say nothing. But the enactment has an important effect from another aspect. As *Brett* J., as he was then, said in *Blamires* v. *Lancashire and Yorkshire Railway Co.* (1):—"It is right to use the Act as some evidence of what is due and ordinary care under the circumstances of this case." And see *per Blackburn* J. (2). If the legislature thinks it reasonable, it cannot be unreasonable for a jury to think likewise.

There was, in my opinion, abundant evidence of negligence; and, if there had been a lamp, it is quite possible the car would not have struck the capstone at all, and the jury must be taken to have considered this possibility.

Then, says Mr. *Ralston*, the increased danger is not shown to have been the cause of the harm arising to the respondent. He says there is nothing to show the same result would not have happened if the hole had not been deepened and widened. Now, it is clear that the motor car not only went back into the hole, but "was thrown sideways into the hole."

(1) L.R. 8 Ex., 283, at p. 289.

(2) L.R. 8 Ex., 283, at p. 288.

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The car was placed in such a situation that it could not be extricated, and the tram car struck it and did the injury complained of. There is, therefore, ample evidential connection in the causation, and of a direct and proximate kind, so that the jury were quite justified in finding that the damage was attributable to the negligence.

I therefore think the appeal should be dismissed.

GAVAN DUFFY J. I desire to abstain from expressing a final opinion as to whether any Act of Parliament makes the appellants liable for non-feasance as well as for misfeasance. It is enough to say that in this case the jury were justified in finding, as they did, that the injury complained of was caused by negligence of the appellants in respect of work actually done by them.

Appeal dismissed with costs.

Solicitors, for the appellants, *Dowling & Tayler.*
Solicitor, for the respondent, *E. J. Peterson.*

B. L.

Appl *Love & Peters v A-G (NSW)* 64 ALJR 175

Cons *Love v A-G (NSW)* 169 CLR 307

[HIGH COURT OF AUSTRALIA.]

DONOHOE . . . . . APPELLANT;
INFORMANT,

AND

CHEW YING . . . . . RESPONDENT.
DEFENDANT,

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ON APPEAL FROM A POLICE MAGISTRATE OF NEW SOUTH WALES.

SYDNEY, *March* 26.

Griffith C.J., Barton, Isaacs and Gavan Duffy JJ.

Practice—Summons upon information for offence against Commonwealth Statute—Issue of summons by justice of the peace for a State—Form of summons—Persons before whom defendant called on to appear—Judicial exercise of jurisdiction—Appeal—Case stated—Notice of appeal not given within prescribed time—Special leave to appeal—Judiciary Act 1903 (*No.* 6 *of* 1903), *sec.* 39—