HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

SCOTT MUNN BRODIE & ANOR APPLICANTS

AND

SINGLETON SHIRE COUNCIL RESPONDENT

Brodie v Singleton Shire Council [2001] HCA 29
31 May 2001
S44/1999

ORDER

1. *Application for special leave to appeal granted.*

2. *Appeal allowed with costs.*

3. *Set aside the orders made by the New South Wales Court of Appeal on 16 March 1999.*

4. *Remit the matter to the New South Wales Court of Appeal for determination of the remaining issues on appeal.*

5. *The costs of the appeal to the New South Wales Court of Appeal and of the trial to abide the outcome of that appeal.*

On appeal from the Supreme Court of New South Wales

Representation:

D F Jackson QC with R S Toner SC and J P Berwick for the applicants (instructed by Craddock Murray & Neumann)

F S McAlary QC with L King SC and W S Reynolds and J A Kernick for the respondent (instructed by Moray & Agnew)

Interveners:

R J Meadows QC, Solicitor-General for the State of Western Australia with C F Jenkins intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for Western Australia)

J L B Allsop SC and T H Barrett intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for New South Wales)

M A Dreyfus QC with S M Cohen intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

CATHERINE GHANTOUS APPLICANT

AND

HAWKESBURY CITY COUNCIL RESPONDENT

Ghantous v Hawkesbury City Council
31 May 2001
S69/1999

ORDER

1. *Application for special leave to appeal granted.*

2. *Appeal dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation:

A S Morrison SC with M C Walker for the applicant (instructed by Stacks The Law Firm with Goudkamp Mahony)

P R Garling SC with M T McCulloch for the respondent (instructed by Phillips Fox)

Interveners:

R J Meadows QC, Solicitor-General for the State of Western Australia with C F Jenkins intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for Western Australia)

J L B Allsop SC and T H Barrett intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for New South Wales)

M A Dreyfus QC with S M Cohen intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

CATCHWORDS

Brodie v Singleton Shire Council
Ghantous v Hawkesbury City Council

Negligence – Highways – Injuries to user of highway – Liability of highway authority – Whether immunity under the "highway rule" – Distinction between misfeasance and non-feasance.

Negligence – Duty of care – Statutory authority – Highway authority – Content of duty of care – Relevant considerations.

Negligence and nuisance – Whether nuisance in relation to public authorities subsumed by the law of negligence.

Highways – Negligence and nuisance – Immunity under "highway rule" – Misfeasance and non-feasance – Whether liability subsumed in general principles of negligence.

Precedent – Stare decisis – High Court – Departure from previous decisions – Relevant considerations.

Words and phrases – "highway rule" – "immunity".

Local Government Act 1919 (NSW), ss 220-277B.

1 GLEESON CJ. Two applications for special leave to appeal to this Court from decisions of the Court of Appeal of New South Wales have been referred to a Full Court and heard together. Each case has been fully argued as on an appeal.

2 In both matters, it was contended that this Court should reconsider, and overrule, a line of cases, which establish what is sometimes described as a rule of immunity, concerning the tortious liability of a public authority, responsible for the care and management of a highway, when sued by a road user who suffers damage to person or property in consequence of the condition of the highway. In brief, such an authority may be liable for a negligent act of misfeasance, but is not liable for non-feasance. It will be necessary to be more precise as to the nature and scope of the rule, but that is a sufficient description for introductory purposes.

3 The facts of the two matters, and the provisions of the relevant legislation, are set out in the reasons for judgment of other members of the Court. I will repeat them only to the extent necessary to explain my conclusions. One matter concerns personal injury suffered by a pedestrian using a footpath. The other concerns personal injury and property damage resulting from the partial collapse of a bridge while a heavy truck was crossing it.

4 It is convenient to deal first with the application in the matter of *Ghantous*, which can be decided on an alternative ground unaffected by the rule. The matter of *Brodie*, on the other hand, squarely raises the issue of whether the rule should continue to be regarded as part of the law of Australia.

The matter of *Ghantous*

5 Mrs Ghantous tripped and fell while walking along a concrete footpath. Since the original construction of the footpath, which was not shown to have been negligent in any respect, erosion had resulted in subsidence of the earth in some places, so that the verge was about 50 mm below the concrete. When she stepped aside to allow other pedestrians to pass, the applicant placed her foot so that it was partly on the concrete and partly on the lower verge. This resulted in her fall.

6 In England, the common law rule which the applicants in both matters seek to challenge was abolished by statute in 1961[1]. It then became easier for a pedestrian who was injured by falling on a road or footpath to succeed in an action for damages resulting from failure on the part of the responsible authorities to maintain and repair the road or footpath[2]. Even so, when general

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1 *Highways (Miscellaneous Provisions) Act* 1961 (UK), s 1(1).

2 See Salmond and Heuston, *The Law of Torts*, 21st ed (1996) at 90-91.

principles of negligence, unqualified by any rule of immunity, were applied, the courts insisted that an injured plaintiff had to show that the road or footpath was dangerous. That did not mean merely that it could possibly be an occasion of harm. The fact that there was unevenness of a kind which could result in a person stumbling or falling would not suffice[3]. Not all footpaths are perfectly level. Many footpaths are unpaved. People are regularly required to walk on uneven surfaces on both public and private land.

7 In *Littler v Liverpool Corporation*, Cumming-Bruce J said[4]:

> "Uneven surfaces and differences in level between flagstones of about an inch may cause a pedestrian temporarily off balance to trip and stumble, but such characteristics have to be accepted. A highway is not to be criticised by the standards of a bowling green."

8 I agree with Callinan J that no case of negligence was made out against the respondent.

9 Because the applicant failed at first instance and in the Court of Appeal at least partly on the basis of the rule in question, special leave to appeal should be granted. However, the appeal should be dismissed for reasons which do not depend upon the rule.

The matter of *Brodie*

The non-feasance rule

10 The manner in which the case was conducted, and decided, at first instance and in the Court of Appeal, is to be understood in the light of the law originally developed by English courts, and declared for Australia by two decisions of this Court in *Buckle v Bayswater Road Board*[5], in 1936, and *Gorringe v The Transport Commission (Tas)*[6], in 1950. *Gorringe* was followed by the Full Court of the Supreme Court of New South Wales in *Kirk v Culcairn Shire Council*[7]. As will appear, the present case is very similar to *Gorringe*, and is indistinguishable from *Kirk*.

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3 *Meggs v Liverpool Corporation* [1968] 1 WLR 689; [1968] 1 All ER 1137.

4 [1968] 2 All ER 343 at 345.

5 (1936) 57 CLR 259.

6 (1950) 80 CLR 357.

7 (1964) 64 SR (NSW) 281.

11 The relevant rule is frequently, and conveniently, described as a rule of immunity. However, when considering an argument that it should be discarded by judicial decision, it is necessary to examine more closely the nature of the rule, and the reason for its existence. It is a rule concerning the extent of the legal duty of care owed by a highway authority to individual users of the highway, breach of which may give rise to an action for damages at the suit of a person who suffers damage to person or property as a result of the condition of the highway.

12 The problem which the rule addresses is one particular aspect of the wider problem of the manner in which the law should relate the public responsibilities of persons or bodies invested by statute with a power to manage public facilities, which include the responsibility to apply public funds for that purpose, and the rights of citizens who may be affected by the manner in which those responsibilities are exercised. The resolution of that problem, in varying circumstances, is usually the result of the combined effect of legislation and the principles of the common law. A recent example of the way in which the problem may arise in a novel situation is *Crimmins v Stevedoring Industry Finance Committee*[8]. We are here concerned, not with a novel situation, but with one that has a long history. In earlier times, the question of the responsibility of highway authorities to maintain and repair roads, bridges and paths, and the forms of accountability to which they were subject, which may be legal or political, sometimes arose in the context of potential criminal liability, or gave rise to issues as to forms of action, or the identity of parties to civil proceedings. In more recent times, the question is usually considered in terms of the existence and scope of a duty of care. This change reflects more general trends in the development of legal principle. But the underlying problem remains the same: it is a problem of responsibility, and of the appropriate form of accountability. The problem has both legal and political dimensions. The highway is one of the most common occasions of injury to person or property. The rights and liabilities which exist as between users of the highway are the subject of extensive legislative regulation in most Australian jurisdictions. Issues of road safety are of public concern. Programmes of road maintenance and improvement constitute a major form of the application of public funds. The question of the circumstances in which a public authority, with a statutory power to construct, maintain, repair and improve public roads, will be liable to be sued by a road user who suffers harm in consequence of the state of a road, is one in which, inevitably, legislatures are closely concerned. The non-feasance rule was described by Latham CJ in *Gorringe* as "a well-established legal principle of ... great importance"[9].

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8 (1999) 200 CLR 1.

9 (1950) 80 CLR 357 at 362-363.

13 The rule is intimately related to questions of statutory interpretation. It concerns the manner in which courts understand and apply legislation about the powers and responsibilities of highway authorities.

14 The essence of the rule is that a highway authority may owe to an individual road user a duty of care, breach of which will give rise to liability in damages, when it exercises its powers, but it cannot be made so liable in respect of a mere failure to act. This distinction between misfeasance and non-feasance has been trenchantly, and fairly, criticised. Like many attempts to draw a line, it produces difficult borderline cases. But this line has been a feature of the law relating to the legal liability of public authorities for a long time. The question is whether the law would be better without it and, if so, whether the appropriate way to get rid of it is by decision of this Court. The first part of that question requires a consideration of the possible alternatives; the second part requires a consideration of the relationship between this Court and the parliaments which have, by their legislation, set up the statutory bodies affected by the rule.

15 One of the rule's most forceful critics, Professor Fleming, explained it in this way[10]:

> "This immunity … negates both a general duty to repair (sounding in nuisance) and any specific obligation to exercise care in control and management even with respect to known dangers (negligence). It is, moreover, reinforced by the judicial construction that even a statutory duty to repair does not subject a road authority to liability, unless the legislature has clearly conveyed a contrary intent either expressly or by necessary implication."

16 The distinction between acts and omissions, which is critical to the practical operation of the rule, is, without doubt, productive of uncertainty, and of anomalous differences in the outcomes of particular cases. But it is a distinction which has been influential in the development of the common law of tort, as has been the distinction between doing an act which causes harm to someone and failing to take steps to prevent harm[11]. A legal regime which denies the existence of a duty to keep all roads in such a condition that they expose no user to any real and avoidable risk of injury may be subject to valid criticism, but it cannot fairly be described as irrational. The most obvious justification is the cost of complying with such a duty. Road maintenance and improvement

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10 Fleming, *The Law of Torts*, 9th ed (1998) at 484-485.

11 See, for example, *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 75 ALJR 164; 176 ALR 411.

involves, amongst other things, establishing priorities for the expenditure of scarce resources. Accountability for decisions about such priorities is usually regarded as a matter for the political, rather than the legal, process. Road safety involves issues of upgrading, and improving, as well as repairing, roads. As Mahoney AP pointed out in *Hughes v Hunters Hill Municipal Council*[12], the appropriate response to dissatisfaction with the rule may be, not its abolition, but some modification "so that that which the council must do is more closely and directly accommodated to, for example, its financial resources, the exigencies of time and the competing demands of other works". If such considerations come to depend entirely upon judicial estimation, case by case, of the reasonableness of a council's public works programme, it is at least understandable that governments may think they have cause for concern. Three State governments intervened in the present proceedings to oppose judicial abolition of the non-feasance rule.

17 Another reason for discontent with the non-feasance rule is the arbitrariness of having a special rule for highway authorities; an arbitrariness which is emphasised in cases where the one public body may have two capacities or sources of authority to act. This also is a cogent criticism. Why single highway authorities out for special treatment; especially when the one body may be both a highway authority and, for example, a traffic authority?

18 Another strong criticism is made of the further distinction that has been developed between responsibilities in relation to highways and responsibilities in relation to artificial structures (such as pipes, or grids) placed on the highway[13]. After all, a road is itself an artefact. So, even more obviously, is a bridge[14].

19 The question for decision is what is the appropriate *judicial* response to such criticisms.

20 In deciding that question it is necessary to take into account, not only the policy underlying the rule, but also the legal basis of the rule. The nature, and legal basis, of the rule constrains the manner in which this Court can respond to any sense of dissatisfaction with it. To change the law by abolishing an established rule does not involve reform unless what is left, or what is put in its place, is something better.

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12 (1992) 29 NSWLR 232 at 236.

13 See Fleming, *The Law of Torts*, 9th ed (1998) at 486-487.

14 As to the assimilation of the position of a bridge with that of a road, see *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357 at 379 per Fullagar J, and *Local Government Act* 1919 (NSW), s 236(2).

21 In *Gorringe*, Dixon J referred to "the principle upon which provisions imposing upon highway authorities a duty of repair have been construed". He said[15]:

> "At common law highway authorities have never been subject to a private right of action for neglect to maintain or repair highways under their control notwithstanding the existence of a general duty to repair and maintain. They have been liable only for negligence in the course of the exercise of their powers or the performance of their duties with reference to the maintenance and reparation of highways. Statutes directing such authorities to maintain and repair roads, streets and bridges prima facie are not to be understood as conferring private rights of action in derogation from this principle."

22 The principle was strengthened, as a matter of statutory construction, where the statute did not impose a duty, but merely gave a discretionary power, to maintain and repair a highway. Dixon J went on immediately to contrast the rule of construction of a statute relating to a highway authority with the approach to the construction of a statute concerning a tramway authority[16]. The presently relevant point is not that there is merit in a distinction between highway and tramway authorities, but that, ultimately, the issue was seen as one of discerning, and giving effect to, the meaning and intendment of Acts of Parliament.

23 In the earlier case of *Buckle*, Dixon J explained the rationale underlying the principle of statutory construction. He said[17]:

> "The purpose of giving the road authority property in and control over the road is to enable it to execute its powers in relation to the highway, not to impose upon it new duties analogous to those of an occupier of property. The body remains a public authority charged with an administrative responsibility. It must decide upon what road work it will expend the funds available for the purpose, what are the needs of the various streets and how it will meet them. A failure to act, to whatever it may be ascribed, cannot give a cause of action. No civil liability arises from an omission on its part to construct a road, to maintain a road which it has constructed, to repair a road which it has allowed to fall into disrepair, or to exercise any other power belonging to it as a highway authority."

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15 (1950) 80 CLR 357 at 369.

16 (1950) 80 CLR 357 at 369.

17 (1936) 57 CLR 259 at 281-282.

24 The harm suffered by the applicants resulted from events which occurred in August 1992. They involved the partial collapse of a bridge forming part of a public road vested in the respondent Council. The relevant legislation was Pt IX of the *Local Government Act* 1919 (NSW) ("the Act"). Section 235 of the Act provided that a council *may* provide any public road. Section 240 relevantly provided that a council *may* construct, improve, maintain, protect and repair any public road and *may* construct, improve, maintain and repair the road with such materials and in such manner as the council thinks fit. Section 249 gave a council the care, control and management of public roads. The legislation fell squarely within the principle of construction referred to by Dixon J, bearing also in mind that it was expressed in language conferring a power rather than imposing a duty.

The proceedings at first instance and in the Court of Appeal

25 The first applicant was the driver, and the second applicant was the owner, of a truck which was delivering concrete to a construction site. In order to do so, the driver travelled along a road within the Shire of Singleton. The route took the truck across two timber bridges. The second bridge was known as Forrester's Bridge. On the approach to the first bridge there was a sign "BRIDGE LOAD LIMITED 15T GROSS". The loaded weight of the truck was about 22 tonnes. The first applicant drove safely across the first bridge without looking at, or taking notice of, the sign. As the truck was crossing the second bridge, the bridge partially collapsed, causing injury to the first applicant and damage to the truck. The bridge had been there for at least 50 years. There was no suggestion that it had been negligently designed or constructed. The bridge was supported by girders, which were large timber beams running parallel to the road. They had deteriorated as a result either of dry rot or white ants. This created a condition known as piping. No repairs to the girders had been carried out. On a number of occasions, over several years before the accident, timber planks on the road surfaces of the bridge had been replaced where that was regarded as necessary, but the accident had nothing to do with the condition of the planks. There was a dispute, and some uncertainty, as to the exact load-bearing capacity of the bridge in its condition at the time of the accident. There was expert evidence as to what its load limit should have been. It is not a simple matter to calculate, but figures between 9.3 tonnes and 13.5 tonnes on various assumptions were given. Vehicles of the same weight as, or greater weight than, the applicants' truck had safely crossed the bridge right up until the time of the collapse. The Court of Appeal found that the trial judge exaggerated the extent of the deterioration in the girders. There was also a dispute as to the procedures observed by the Council in relation to inspecting timber bridges for such deterioration. There was documentary evidence that all timber bridges were usually inspected about four times per year. An expert, whose evidence was accepted by the trial judge, said it should have been possible to detect the piping. The bridge was graded by the Council as being in moderately poor condition.

26 The trial judge found that Council staff should have discovered that the girders were substantially affected by piping and that the Council was negligent in failing to take steps to replace the girders.

27 The trial judge was bound by the non-feasance rule. He considered, however, that the case was one of misfeasance, and found for the applicants, making substantial awards of damages in their favour. The basis on which the case was found to be one of misfeasance was said to be the same as that which underlay the decision of the Court of Appeal of New South Wales in *Hill v Commissioner for Main Roads (NSW)*[18]. That was a case in which a highway authority had negligently repaired a roadway, leaving it in a condition in which it was bound to deteriorate in a manner that would cause a hidden danger to users of the highway. The manner in which the authority exercised its power to repair in effect created a trap. The trial judge regarded what had been done in relation to the surface planking of Forrester's Bridge as analogous, and concluded that the case involved misfeasance in the form of negligence in the actual exercise of a power to effect repairs.

28 In the Court of Appeal[19], this analogy was considered, and rejected. Powell JA, who wrote the leading judgment, disagreed with a number of findings of fact made by the trial judge. It is unnecessary to go into those areas of disagreement beyond noting that the findings of fact at first instance were in some respects reversed. Understandably, because the Court of Appeal was itself bound by the non-feasance rule, and because he took the view that the case had been litigated and decided as a case of misfeasance, Powell JA confined his criticisms to the findings relevant to the misfeasance issue. The Court of Appeal held that the replacement of the surface planks from time to time had nothing to do with the collapse of the bridge and that, if there was a close analogy, it was in the facts of *Gorringe* and *Kirk* rather than those of *Hill*. The real cause of complaint, if any existed, was failure to inspect and repair the girders. This was non-feasance. On that ground, the decision of the trial judge was reversed. The question whether, if a case of negligent non-feasance had been available as a matter of law, it had been made out, was not decided because, on the existing state of the law, it did not arise.

29 Leaving to one side the question whether the non-feasance rule is good law, no error has been shown in the reasoning of the Court of Appeal. However, if the non-feasance rule is not good law, then the case was conducted and decided on a false premise. Nobody can be criticised for that. The case was litigated in the light of long-standing decisions of this Court and other courts.

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18 (1989) 9 MVR 45.

19 *Singleton Shire Council v Brodie* [1999] NSWCA 37.

30 It becomes necessary, then, to decide whether this Court should decline to follow the reasoning in *Buckle* and *Gorringe*, overrule the line of authority which establishes the non-feasance rule, and declare that the rule no longer applies. What, if anything, is to be put in its place is a related question. Argument proceeded upon the assumption that, as the rule may be regarded as an exception or qualification to a more general principle, the general principle would then be left to apply to highway authorities, without any such exception or qualification.

Statute and common law

31 The non-feasance rule provides an example of the way in which statutes and principles of common law, as sources of legal rights and obligations, interact. Legislation and the common law are not separate and independent sources of law; the one the concern of parliaments, and the other the concern of courts. They exist in a symbiotic relationship.

32 In its practical operation, much of the law affecting the users of public roads involves a complex interplay of legislation and common law principles. For example, statutory schemes of third party insurance proceed upon the basis of the vicarious liability of owners of vehicles arising from a deemed agency, sometimes in surprising circumstances, such as where the driver of a vehicle has stolen it[20]. In some Australian jurisdictions, there is now legislation limiting the damages which may be recovered in transport accidents[21].

33 The non-feasance rule itself is a rule of statutory construction. It was developed and explained as a rule about the approach to be taken by courts in deciding whether a statute conferring a power, or imposing a duty, to maintain or repair public roads creates, or denies, or is consistent or inconsistent with, civil liability to a road user who suffers damage to person or property as a result of the condition of a road.

34 In *Gorringe*, a truck had been damaged, and the driver killed, when a culvert, which had been built to permit a highway to cross a natural water-course, collapsed. The collapse resulted from deterioration in the timber from which the culvert was constructed. The trial judge directed a verdict for the defendant authority on the basis that, at worst, there was a negligent failure to keep the culvert in good repair. That decision was upheld in the Full Court of the Supreme Court of Tasmania and in this Court. Latham CJ examined the terms of

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20 See Fleming, *The Law of Torts*, 9th ed (1998) at 431-432.

21 eg *Transport Accident Act* 1986 (Vic), Pt 3.

the Tasmanian statutes which empowered the authority to maintain roads. He said[22]:

> "I agree with the learned trial judge and the Full Court that the relevant statutes do not show any intention to alter the law with respect to non-feasance in its application to the Transport Commission as a highway authority."

Dixon J said that statutes directing authorities to maintain and repair roads are not to be understood as conferring private rights of action in the case of non-feasance unless the legislature has used language indicating an intention that liability shall be imposed[23]. Fullagar J referred to a line of English cases as establishing two principles of law. He said[24]:

> "These are (1) that at common law no person or persons, corporate or unincorporate, is or are subject to any duty enforceable by action to repair or keep in repair any highway of which, whether at common law or by statute, he or they or it has or have the management and control, and (2) that if a duty to repair or keep in repair a highway or highways is imposed by statute on any such person or persons, that duty is not enforceable by action unless the statute makes it clear by express provision or necessary implication that the duty is to be enforceable by action at the suit of a person injured by its breach."

35 The decision in *Gorringe* was followed by the Full Court of the Supreme Court of New South Wales in *Kirk*[25]. In that case a heavy truck, crossing a bridge maintained by a shire council, fell through the decking of the bridge. The trial judge accepted evidence that the bridge was in a bad state of repair, sections of it having completely rotted. An attempt was made to argue that certain repair work that had been carried out on other parts of the bridge made the bridge a trap, and constituted actionable misfeasance. That argument was rejected. On the facts, the case was a stronger case than the present for the injured party. In principle, the case is indistinguishable. As was noted above, together with *Gorringe*, it accounts for the way the present case was conducted, and for the way it was decided in the Court of Appeal.

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22 (1950) 80 CLR 357 at 363.

23 (1950) 80 CLR 357 at 369.

24 (1950) 80 CLR 357 at 375-376.

25 (1964) 64 SR (NSW) 281.

36 In New South Wales, which is the jurisdiction with which these proceedings are concerned, the non-feasance rule has been expressly taken up by the legislature. In 1993, the year after the events giving rise to this case, the New South Wales Parliament enacted the *Roads Act* 1993 (NSW) which conferred certain powers of road maintenance upon the Roads and Traffic Authority ("RTA"). Section 65 provides:

> "While exercising the functions of a roads authority under this Division with respect to a road for which it is not the roads authority, the RTA has the immunities of a roads authority with respect to that road."

In earlier legislation relating to the same Authority, which preceded the events giving rise to the present case[26], the legislature provided:

> "The Authority has, and may exercise, in relation to a classified road or a toll work, the functions and immunities of a council in relation to a public road."

37 I am unable to read these provisions as though the words "if any" appeared after "immunities". Bearing in mind that "immunity" is a shorthand reference to a rule of statutory construction, the clear purpose and effect of these provisions is to state that the rule of statutory construction shall apply to legislation relating to the RTA. It would be surprising if this Court, in the interests of removing an anomaly, were to produce the result that the non-feasance rule ceases to apply to local councils and other road authorities but it continues to apply to the RTA. The rights of road users would then depend upon which public road they were using.

38 In *Bropho v Western Australia*[27], this Court modified a common law principle of statutory construction in a certain respect. However, in doing so the Court pointed out that the effect of its decision was not to overturn the settled construction of particular existing legislation[28]. It also pointed out that a judge-made rule of construction may be supplemented by legislative provision[29]. The alteration to the law which this Court is invited to make would overturn the settled construction of particular existing legislation. And supplementing a judge-made rule of construction by legislative provision can have no effect different from repeating and extending the application of the rule by legislative provision.

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26 *State Roads Act* 1986 (NSW), s 12(1).

27 (1990) 171 CLR 1.

28 (1990) 171 CLR 1 at 22.

29 (1990) 171 CLR 1 at 15.

39 In *State Government Insurance Commission v Trigwell*[30] this Court was concerned with an ancient common law rule concerning accidents suffered by road users as a result of animals straying onto the road. It was argued that the rule was ill-suited to modern conditions, and that this Court should reform the law by abolishing the rule. The Court declined the invitation. Mason J, with whom Gibbs, Stephen and Aickin JJ agreed, said[31]:

> "I do not doubt that there are some cases in which an ultimate court of appeal can and should vary or modify what has been thought to be a settled rule or principle of the common law on the ground that it is ill-adapted to modern circumstances. If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the court should be reluctant to engage in such an exercise. The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or enquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature."

40 His Honour went on to say[32]:

> "It is beyond question that the conditions which brought the rule into existence have changed markedly. But it seems to me that in the division between the legislative and the judicial functions it is appropriately the responsibility of Parliament to decide whether the rule should be replaced and, if so, by what it should be replaced. The determination of that issue

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30 (1979) 142 CLR 617.

31 (1979) 142 CLR 617 at 633.

32 (1979) 142 CLR 617 at 634.

requires an assessment and an adjustment of the competing interests of motorists and landowners; it might even result in one rule for urban areas and another for rural areas. It is a complicated task, not one which the court is equipped to undertake."

41 Finally, he added[33]:

"The fact that the United Kingdom Parliament has abolished the rule has no relevance for us, except to confirm my opinion that the question should be left to Parliament."

42 All of those considerations apply with equal force to the present case. But they apply with even greater force when the rule in question is intimately connected with the way in which parliamentary legislation is interpreted, when it is one on the faith of which parliaments have expressed themselves in conferring powers and responsibilities on public authorities, and when the Parliament in the relevant Australian jurisdiction has expressly taken up the rule and extended its application to a particular public authority.

43 The non-feasance rule is a rule about the accountability of public authorities invested by Parliament with the responsibility of applying public funds to the construction, maintenance and improvement of public roads. The common law principle has been that such an issue is to be determined by the will of Parliament expressed in legislation, and the courts have encouraged parliaments to understand that their legislation will be interpreted and applied in a particular fashion. It is clear that parliaments have acted upon the faith of such an understanding. If the rule is to be changed, the change should be made by those who have the capacity to modify it in a manner appropriate to the circumstances calling for change, who may be in a position to investigate and fully understand the consequences of change, and who are politically accountable for those consequences.

Law reform

44 Part of the background to this case is that the Law Reform Commission of New South Wales has already considered, and reported upon, possible changes to the law in relation to the liability of highway authorities for non-feasance[34]. The nature of the recommendations demonstrates the complexity of the problem. The Law Reform Commission regarded the non-feasance rule as unsatisfactory and in need of legislative reform. In coming to that conclusion, it examined the law in

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33 (1979) 142 CLR 617 at 636.

34 New South Wales Law Reform Commission, *Liability of Highway Authorities for Non-Repair,* Report No 55, (1987).

overseas countries and in other Australian jurisdictions. We were taken in argument to that aspect of the Commission's investigations. However, the Commission did not simply propose the abolition of the rule. First, its Report distinguished between actions for personal injury and death, and actions for property damage. That is a distinction which a legislature can make. This Court cannot. There is no principle of tort law by which this Court could legitimately distinguish between a claim for damage to the suspension of a motor car which runs into a pot-hole resulting from a spell of wet weather, and a claim for personal injury to an occupant of the car. In relation to actions for personal injury or death, it was recommended that the non-feasance rule should be abolished[35], that the duty of care owed by highway authorities should be left to be determined by general common law principles[36], but that claims against such authorities should be brought within the scheme of the *Transport Accidents Compensation Act* 1987 (NSW)[37]. That scheme provided for benefits significantly different from common law damages. In relation to actions for property damage, the Report said that, while the Commission believed in principle that the non-feasance rule should be abolished, it would be necessary for the financial consequences of this to be investigated and, to enable that to be done, recommended postponement of further consideration of abolition for five years following the abolition of the rule in respect of claims for personal injury or death[38].

45 The New South Wales Parliament did not act on the recommendations. On the contrary, in 1993 it enacted s 65 of the *Roads Act*.

46 What this shows is that, in this area of the law, the kind of change that might constitute reform is a matter of complexity. This Court has not investigated the financial consequences of the abolition of the rule in relation to property damage, or at all. The step we are invited to take in relation to property damage is a step the New South Wales Parliament was advised by the Law Reform Commission not to take without further investigation. The step we are invited to take in relation to personal injury and death is a step the New South Wales Parliament was advised to take subject to qualifications and it is a step which the Parliament has not taken.

47 These are additional reasons for concluding that it is not appropriate to change the law in the manner proposed by judicial decision.

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35 Par 5.2.

36 Par 5.14.

37 Par 5.27.

38 Par 5.38.

Conclusion

48 In the matter of *Brodie* there should be a grant of special leave to appeal but the appeal should be dismissed.

Orders

49 In each matter, special leave to appeal should be granted but the appeal should be dismissed with costs.

GAUDRON, McHUGH AND GUMMOW JJ.

A. Introduction

50 These applications for special leave to appeal from decisions of the New South Wales Court of Appeal were heard consecutively and raise a fundamental question respecting the common law of Australia. This is the applicability of the principles of the torts of negligence and of nuisance in actions against public authorities on which statute confers powers for the construction, maintenance and repair of public roads, including bridges, culverts and footpaths. In this judgment, it will be convenient to consider together the facts and submissions in both applications.

51 Each action was tried by a judge sitting without a jury. It appears that, at least in New South Wales, claims made by pedestrians who have sustained injuries in trips and falls on footpaths account for the majority of claims made against local government authorities and are the single most expensive cause of public liability claims[39]. *Ghantous* is such a case. The applicant in *Ghantous* sued both in negligence and in nuisance. She failed in her action for damages in respect of injuries suffered on 10 July 1990 when she fell whilst stepping from a concrete footpath to an earthen verge in a street at Windsor. It was admitted on the pleadings that the respondent Council had responsibility for the care, control and maintenance of the footpath and adjacent guttering. The trial judge in the District Court held that the case was one of non-feasance so that the action was bound to fail. An appeal was dismissed by the New South Wales Court of Appeal (Handley, Powell and Giles JJA)[40].

52 The accident which gave rise to the litigation in *Brodie* occurred on 19 August 1992 when the first applicant drove a truck owned by the second applicant onto a bridge constructed some 50 years earlier within the Singleton Shire. The truck weighed 22 tonnes and the bridge was adapted to bear a load of 15 tonnes. The timber girders failed, the bridge collapsed and the truck fell onto the creek bed below. The second applicant's truck was damaged and the first applicant suffered injuries, particularly to his back. The applicants claimed that the accident was caused by the negligence of the respondent Shire Council. At trial in the District Court, the case was held to be one of misfeasance and there were verdicts in favour of both applicants. The first applicant recovered a verdict

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39 Parliament of New South Wales, Public Bodies Review Committee, *Public Liability Issues Facing Local Councils*, November 2000 at 36-37.

40 (1999) 102 LGERA 399.

for $354,316.50. The second applicant recovered $43,880.30, this representing the agreed value of the truck plus interest. An appeal by the Shire Council to the New South Wales Court of Appeal (Handley, Powell and Giles JJA) was successful. It was held there that such actions as the Council may have taken in replacing defective decking planks on the bridge were no more than superficial repairs to the surface and did not remove the case from the category of non-feasance.

53 In this Court, the respondents submit that the applications are foreclosed against the applicants by the holdings, or at least the reasoning, respecting the "immunity" conferred on "highway authorities" in decisions of this Court decided in 1936 and 1950 respectively. They are *Buckle v Bayswater Road Board*[41] and *Gorringe v The Transport Commission (Tas)*[42]. They also submit that the decisions in *Buckle* and *Gorringe* should not be further examined or reviewed, that in each action the Court of Appeal correctly decided that what was involved was a claim for non-feasance and that, even if the law be as the applicants would have it, so that the tort of negligence applied without any "immunity" provided by the "highway rule", any appeal would enjoy no prospects of success.

54 However, the later decision of this Court in *Webb v The State of South Australia*[43] gives an indication of an approach more attuned to that advocated by the present applicants. The plaintiff in that case injured his foot by reason of the defendant's "artificial construction" in the highway, and recovered damages in negligence. Mason, Brennan and Deane JJ said[44]:

> "The question then is: What is the response which the reasonable man, foreseeing the risk, would make to it? Is the risk so small that a reasonable man would think it right to neglect it? In *Wyong* Mason J said[45]:
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> > 'The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and

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41 (1936) 57 CLR 259.

42 (1950) 80 CLR 357.

43 (1982) 56 ALJR 912; 43 ALR 465.

44 (1982) 56 ALJR 912 at 913; 43 ALR 465 at 467-468.

45 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48.

> inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.'
>
> …
>
> The respondent created the danger by its artificial construction in the highway. In this situation the application of a reasonable standard of care calls for the elimination of risk of injury to users of the highway presented by that artificial construction, the more so where elimination of the risk can be achieved without undue difficulty and expense. It is well established that it is the duty of highway authorities to keep:
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> > '… the artificial work which they [have] 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 …'[46].
>
> It would not be right or reasonable for a highway authority to ignore a risk of injury which it has created by its artificial construction in the highway, if it entails a possible risk of injury to pedestrians which, though small, is not fanciful or farfetched."

That treatment of the content of the duty of care was consistent with the well-known passage in the judgment of Mason J in *Wyong Shire Council v Shirt*[47]. However, on existing authority, the general considerations respecting the tort of negligence to which Mason, Brennan and Deane JJ referred only applied because the false kerb (into the gap between which and the permanent kerb the plaintiff took his *faux pas*) was an "artificial construction"; otherwise the "immunity" would have applied to the exclusion of any liability to an action in negligence. The applicants seek the removal from the corpus of the common law in Australia of such restrictions upon what otherwise would be the operation of the tort of negligence.

55 In our opinion, various considerations, taken together, favour the following conclusions. In cases such as those giving rise to the present applications, the liability of the respondents does not turn upon the application of an "immunity" provided by the "highway rule". In so far as *Buckle* and *Gorringe*

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46 *Borough of Bathurst v Macpherson* (1879) 4 App Cas 256 at 265; *Thompson v Mayor, &c, of Brighton* [1894] 1 QB 332 at 339; see also *Buckle v Bayswater Road Board* (1936) 57 CLR 259 at 283-284.

47 (1980) 146 CLR 40 at 47-48.

require the contrary and exclude what otherwise would be the operation of the tort of negligence, they should no longer be followed. Further, it is the law of negligence which supplies the criterion of liability in such cases; the tort of public nuisance in highway cases has been subsumed by the law of negligence.

56 The significant question that remains in these cases is a different one. As Doyle CJ pointed out in *Calvaresi v Beare*[48], with reference to *Crimmins v Stevedoring Industry Finance Committee*[49], the question fixes upon the statutory powers of the relevant public body. In exercising or failing to exercise those powers, was the authority in breach of a duty of care owed to a class of persons which included the plaintiff?

57 In his judgment in *Ghantous*, with apparent reference to the nineteenth century cases denying the existence of actions for breach of duty under various statutes, Powell JA said[50]:

> "[The] immunity is reinforced by the authorities which demonstrate that, even if a duty to repair or to keep in repair a highway or highways is imposed by statute on a road authority, that duty is not enforceable by action at the suit of any person injured as the result of the failure to repair the highway or to keep it in repair until the statute makes it clear by express provision or necessary implication that that duty is to be enforceable by action at the suit of such person."

Earlier, in *Gorringe*[51], Dixon J had said that statutes directing authorities "to maintain and repair roads, streets and bridges prima facie are not to be understood as conferring private rights of action in derogation from [the] principle" that "[a]t common law highway authorities have never been subject to a private right of action for neglect to maintain or repair highways under their control notwithstanding the existence of a general duty to repair and maintain".

58 Four points should be made here. First, the common law to which Dixon J referred had spoken at a time before the tort of negligence had been extricated from nuisance. This matter is considered later in these reasons under the heading "Nuisance and negligence". Secondly, in this Court the common law respecting

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48 (2000) 76 SASR 300 at 332-333.

49 (1999) 200 CLR 1.

50 (1999) 102 LGERA 399 at 405.

51 (1950) 80 CLR 357 at 369. See also *Buckle* (1936) 57 CLR 259 at 281-282.

negligence and the exercise of statutory powers has undergone significant development in recent years. This matter is to be considered under the heading "Negligence and statutory powers". Thirdly, the principles respecting the construction of statutes to discern the conferral of a cause of action for breach of statutory duty, for which express words are not required, have been refined in authorities such as *Sovar v Henry Lane Pty Ltd*[52]. Whether the nineteenth century authorities concerning this cause of action would necessarily be decided the same way in the light of cases such as *Sovar* is a subject which does not arise in this litigation. Fourthly, the case for the retention of the "immunity" is not necessarily reinforced by the continuing existence of those nineteenth century authorities. To say of a statute that it does not create a cause of action for breach of the norms it imposes is not necessarily to say that there is no room for the operation of the principles of negligence. Nor is it to the point that the statute in question is not expressed to alter what at the time of its enactment was taken to be the common law on a particular matter.

59 In *Hughes v Hunters Hill Municipal Council*[53], Mahoney AP suggested that, although not formulated as such in *Buckle*, the "highway rule" is a mechanism to accommodate competing interests. His Honour saw these as the cost to the community (or the responsible portion of it) for maintaining highways, the allocation of priorities for expenditure of public moneys, and the interests of individuals in safe use of those highways. To require expenditure sufficient to remove most if not all risks would be too extreme; to abandon citizens to hazardous road conditions also would be unacceptable.

60 Mahoney AP continued by stating, in a passage with which we would agree[54]:

> "It may be that there is a tendency in more recent times to require the adoption of higher standards of care for individuals using public facilities notwithstanding that the adoption of them will require the expenditure of additional moneys or the diversion of moneys to those areas of public activity selected by the courts for such protection. By *L Shaddock & Associates Pty Ltd v Parramatta City Council*[55], councils were required to accept responsibility for answers made by them to

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52 (1967) 116 CLR 397.

53 (1992) 29 NSWLR 232 at 236.

54 (1992) 29 NSWLR 232 at 236.

55 (1981) 150 CLR 225.

> inquiries from the public and, accordingly, to bear such cost as was involved in ensuring the accuracy of those answers. In *Sutherland Shire Council v Heyman*[56], the courts recognised the possible liability of a council in negligence for failing to exercise a statutory right of inspection of building works".

61 To approach in this way the issues thrown up in cases once determined by application of the "highway rule" often may favour or disfavour plaintiffs to a like degree as would have followed from the application of that rule. The outcome in the litigation may be the same. That, however, is not a consideration adverse to placing the common law of Australia on a principled basis.

B. The legislation

62 Each respondent Council at the relevant time owed its corporate character to the operation of Pt 2 (ss 11-15) of the *Local Government Act* 1919 (NSW) ("the LG Act")[57]. This provided for units of local government identified as cities, municipalities and shires. Division 1 of Pt 4 (s 22) provided for the incorporation of the councils of cities, municipalities and shires.

63 Part 9 (ss 220-277B) of the LG Act was headed "PUBLIC ROADS". The terms "road" and "pathway" were defined in s 4 as meaning respectively:

> "road, street, lane, highway, pathway, or thoroughfare, including a bridge, culvert, causeway, road-ferry, ford, crossing, and the like on the line of a road through or over a watercourse";
>
> "a public road provided for the use only of foot passengers and of such classes of vehicles as may be defined by ordinance".

"Public road" meant a road which the public were entitled to use (s 4). The powers and duties conferred or imposed upon a council under Pt 9 applied in respect of each local government area to the council of that area (s 220(b)). Section 240(1) empowered the respondent Councils to "construct improve maintain protect repair drain and cleanse any public road"; in aid of those powers, s 249 gave them "the care control and management of every public road".

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56 (1985) 157 CLR 424.

57 All of the LG Act has now been repealed: *Environmental Planning and Assessment Amendment Act* 1997 (NSW), s 7.

64 The *State Roads Act* 1986 (NSW) ("the RTA Act")[58] stated (in s 12(1)) that the Roads and Traffic Authority ("the RTA") (constituted under the *Transport Administration Act* 1988 (NSW)) had and might exercise, in relation to "a classified road" or "a toll work", the functions of the council of a city, municipality or shire in relation to a public road. The function respecting works of construction and maintenance of those classified roads which were freeways was vested exclusively in the RTA[59]. For other classified roads, agreements between the RTA and the relevant council might divide or allot the carrying out of this work[60]. It was not suggested in either of the present cases that, in respect of the roads in question, the RTA was involved in this way as a responsible actor. That actor, in each case, was the respondent Council.

C. The "highway rule" today

65 The authorities said to establish the "highway rule" in this Court present the problem of the present status of a common law doctrine when the circumstances and assumptions upon which it depended in England never fully applied in Australia and, in any event, have disappeared or significantly changed[61]. For example, federal laws such as the *National Roads Act* 1974 (Cth), the *States Grants (Roads) Act* 1977 (Cth) and the *Roads Grants Act* 1981 (Cth) bear out Professor Fleming's point[62] that the assumption by central governments of significant financial responsibility for road construction and maintenance has deprived of some of its force the argument that the "immunity" always is necessary because all local authorities require it for the protection of the pockets of their ratepayers.

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58 Since repealed by s 265 of the *Roads Act* 1993 (NSW) ("the Roads Act").

59 RTA Act, s 13(3).

60 RTA Act, s 13(4)-(10).

61 cf *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574; *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at 469-470, 476; Lord Roskill, "Law Lords, Reactionaries or Reformers", (1984) 37 *Current Legal Problems* 247 at 255-257.

62 *The Law of Torts*, 9th ed (1998) at 485.

66 In numerous later decisions in State and Territory courts[63], *Buckle* and *Gorringe* have been taken as enshrining the "highway rule". This operates for the benefit of "highway authorities" and involves a distinction between concepts of "misfeasance" and "non-feasance". The latter is said to bring with it an "immunity" from suit.

67 The "highway rule" is said to be that, "by reason of any neglect on its part to construct, repair or maintain a road or other highway", a "road authority" incurs "no civil liability". The terms are those used by Dixon J in *Buckle*[64]. However, the cases develop exceptions and qualifications which so favour plaintiffs as almost to engulf the primary operation of the "immunity"[65]. The interests of public authorities cannot fairly be served by maintaining an "immunity" which functions so poorly.

68 Those who would seek to preserve the status quo represented by the case law cannot describe the content of the common law under the "immunity" regime. That content is dictated by the caprices of unprincipled exceptions and qualifications. Yet it then is said by the respondents that some species of judicial deference to legislative authority[66] disables the courts of common law, and in particular this Court, from seeking to cure this infirmity by the application of principle.

69 Although structures such as drains, sewers and tram-tracks may be thought to be part of the highway, the "immunity" in respect of non-feasance may not apply to them, and, as *Webb v The State of South Australia* illustrates, an action for damages may lie. That is because these are "artificial structures". In *Buckle*, McTiernan J founded his decision against the Road Board on the proposition that the defective drain was "artificial work"[67]. Again, for the "immunity" to apply against the plaintiff, the defect or default complained of must be within the limits of the surface of the highway. Accordingly, an injured

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63 And also in the Federal Court of Australia on appeal from the Supreme Court of the Australian Capital Territory: *McDonogh v Commonwealth of Australia* (1985) 9 FCR 360; *Australian Capital Territory v Badcock* (2000) 169 ALR 585.

64 (1936) 57 CLR 259 at 281.

65 cf *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 544.

66 cf *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 151-155 [39]-[49], 158 [59].

67 (1936) 57 CLR 259 at 300.

pedestrian may succeed and the "highway rule" have no application because the path in question is insufficiently associated with a road to be treated as part of it.

70 Further, the defendant may be a public authority with powers in respect of the highway but may not enjoy the "immunity" because it is not a "highway authority". The decision of this Court in *Thompson v Bankstown Corporation*[68] provides an example. The pole, in the course of climbing which the infant plaintiff received an electric shock, stood on a public highway but had been erected by the defendant in the exercise of its authority under the LG Act to provide for the transmission of electricity[69]. The plaintiff recovered in negligence because the defendant had failed in its duty to road users to take reasonable care in the management of its electricity.

71 Finally, there is the need to distinguish between a neglect or non-feasance and a misfeasance which will attract liability even to a highway authority.

72 An indication of the present position in intermediate appellate courts is provided by the observations made by Priestley JA in *Gloucester Shire Council v McLenaghan*[70]. There, the New South Wales Court of Appeal rejected the submission of the appellant council that at trial no finding of liability should have been made against it. The litigation arose from a car accident in 1992, about 20 kilometres from Nowendoc on the road between Gloucester and Walcha. After referring to *Buckle*, Priestley JA continued[71]:

> "The origin of the rules stated in the case lay far away from Nowendoc both in time and space. That might not matter were it not also the case that between the time of the origin of the rules and 1936 there had been very significant change in the type and volume of road traffic, the building of roads and highways, the ways in which roads and highways were maintained and controlled, and the ways in which highway authorities were constituted and financed. Changes in these matters continued rapidly between 1936 and 1992.
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> The Court in *Buckle* upheld the non-feasance/misfeasance distinction on the basis of a chain of authority, mostly the decisions of

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68 (1953) 87 CLR 619.

69 (1953) 87 CLR 619 at 625, 641.

70 (2000) 109 LGERA 419.

71 (2000) 109 LGERA 419 at 421.

English judges, reaching back to the days of Coke (d 1634), when a common law liability lay upon the inhabitants of parishes or counties to repair roads. This liability was later transferred to local authorities by statute, according to Latham CJ[72]. The liability had been enforceable not by an action for damages but by indictment. Dixon J left open the possibility that in 1936 that was still the position[73]. The relevant decisions were not all consistent and Dixon J exerted his very considerable powers in reconciling the bulk of them and branding an unfortunate few as incorrect and responsible for a departure from principle requiring a process of rehabilitation which proved to be slow[74]. In 1950 Fullagar J described the position reached in regard to the immunity of highway authorities as 'very curious'[75]. Dixon J's rationalisation in *Buckle* of the law as he then saw it seems unpersuasive to many judges today, if the number of cases which this Court sees in which trial courts struggle to evade or limit its reach can be taken as a reliable indication. Right at the beginning of the 20th century there seems to have been some dissatisfaction in England with the position reached by the case law; in *Buckle*[76] McTiernan J mentioned that in 1904 Lord Halsbury had commented adversely on the fact that in some cases non-feasance had been found where the facts really amounted to misfeasance[77].

In the present case the trial judge escaped *Buckle*'s vice-like grip by reliance on a decision of this Court, *Turner v Ku-ring-gai Municipal Council*[78] in which reference was made to the fact that the non-feasance/ misfeasance distinction had no application to negligent omissions by a traffic authority even though it happened also to be the highway authority".

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72 (1936) 57 CLR 259 at 268.

73 (1936) 57 CLR 259 at 292.

74 (1936) 57 CLR 259 at 290.

75 *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357 at 377.

76 (1936) 57 CLR 259 at 301.

77 *Shoreditch Corporation v Bull* (1904) 90 LT 210.

78 (1990) 72 LGRA 60.

73 Evidence was led in *McLenaghan* as to the financial resources of the Gloucester Shire Council; of its significance Priestley JA said[79]:

> "The evidence in the present case shows the following: the population of the Gloucester Shire was approximately 4,900, so that the number of ratepayers would be very considerably lower; the council's area was about 2,900 [square kilometres]; much of the road building and improvement in the Shire was paid for by special grants from the Commonwealth and the State; the council was earnest and persevering in its efforts to complete a fully sealed road between Gloucester and Walcha, but it was simply impossible to do so from its own funds and those otherwise made available to it, any more quickly than by the rather stately rate of progress shown in the evidence.
>
> These features were emphasised in the council's case, on the merits, and also were no doubt symptomatic of the policy background to the non-feasance rule. On the other side of the merits question was the fact that the council actively promoted the use of the road for tourist and commercial purposes, with a view to improving the economic life of the district. This was why the Gloucester/Walcha road was renamed Thunderbolt's Way. The council was thus in the dilemma of wanting traffic on the road to increase but not having sufficient funds to bring it quickly into the state which was planned for it.
>
> Cases more or less like the present one are continually occurring and cause acute problems both for damaged users of the roads and the highway authorities."

D. Relevant considerations

74 We turn now to the various considerations leading us in the present applications to the outcome we have indicated in the introduction to these reasons. These involve (i) the state of the law in other common law jurisdictions as it has developed since *Buckle* and *Gorringe*; (ii) the unprincipled distinctions to which those cases have given rise; (iii) the unsatisfactory dichotomy between misfeasance and non-feasance; (iv) the classification of the "highway rule" as conferring an "immunity"; (v) the development of the law respecting negligence and the exercise of statutory powers; (vi) the role here of precedent; (vii) the clarification of the distinction between nuisance and negligence; and (viii) the relationship between the "immunity" and statute in New South Wales.

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79 (2000) 109 LGERA 419 at 423.

(i) Other jurisdictions

75 Since *Buckle* and *Gorringe* were decided, the law in other common law jurisdictions has moved away from the path said to be dictated by those cases. In Canada the distances are as great as those in Australia but the climate is harsher, even in closely settled areas. The "highway rule" and the distinction between misfeasance and non-feasance in the exercise of statutory powers are not observed. The reasoning in *Anns v Merton London Borough Council*[80] has been influential in the Supreme Court of Canada. The prevailing view in the Supreme Court is that of Cory J in *Just v British Columbia*[81], *Brown v British Columbia (Minister of Transportation and Highways)*[82] and *Swinamer v Nova Scotia (Attorney General)*[83]. This is that there is a general duty of care on a Province to maintain its highways, that the traditional tort law duty of care applies to government agencies in the same way as to individuals and that liability is avoided only by establishing that the particular case falls within a recognised exception to the general duty. In *Swinamer*, Sopinka J was of the contrary view, that the bona fide exercise of a statutory power to maintain highways cannot give rise to a liability on the basis of a private law duty of care[84]. La Forest J concurred with McLachlin J. McLachlin J expressed the governing principles differently from Cory J and emphasised that public authorities have no private duty to individuals capable of founding civil action unless such a duty can be found in the terms of the relevant statute; nevertheless, liability may arise in negligence if the authority elects to exercise a power and does so negligently[85].

76 In the United States, the subject for long has been bedevilled by the distinction between cities and counties as units of government and the treatment of municipal corporations as bodies exercising some governmental functions and thereby entitled, at least to an extent, to governmental "immunity"[86]. Most

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80 [1978] AC 728.

81 [1989] 2 SCR 1228.

82 [1994] 1 SCR 420.

83 [1994] 1 SCR 445.

84 [1994] 1 SCR 445 at 450-451.

85 [1994] 1 SCR 445 at 449-450.

86 Williams, *The Liability of Municipal Corporations for Tort*, (1901), §4; Borchard, "Government Liability in Tort", (1924) 34 *Yale Law Journal* 1 (Pt 1), 129 (Pt 2) at 130-138, 229 (Pt 3) at 229-240.

jurisdictions accept that the construction and maintenance of streets and public ways is not within the immunity[87]. Comment *b* to §349 of the *Restatement (Second) of the Law of Torts* reads:

> "The duty of maintaining a highway in a condition safe for travel is, in some States by statute and in others by common law, placed upon the municipal subdivision which holds the highway open to the public for travel. This duty includes not only a duty to maintain the surface of the highway in a condition reasonably safe for travel, but also a duty of warning the traveling public of any other condition which endangers travel, whether caused by a force of nature, such as snow and ice, or by the act of third persons, such as a ditch dug in the sidewalk or roadway or an obstruction placed upon it."

77 In New Zealand, it has been said that there must be doubt whether any such immunity for highway authorities would now be upheld given the adoption in that country of the reasoning in *Anns v Merton London Borough Council*[88]. However, for the time being, it appears that no New Zealand court has specifically rejected the "immunity"[89].

78 In the United Kingdom, statute deals with the matter. The "rule of law exempting the inhabitants at large and any other persons as their successors from liability for non-repair of highways" was abrogated by s 1(1) of the *Highways (Miscellaneous Provisions) Act* 1961 (UK). Thus, the common law doctrine, inapposite to conditions in the Australian colonies but nevertheless translated there, with the subsequent effort in *Buckle* to rationalise it, has ceased to apply in its country of origin. There, the state of repair of highways now is dealt with by ss 41 and 58 of the *Highways Act* 1980 (UK). A statutory duty is imposed to maintain highways which are maintainable at public expense but, in an action in respect of damage for breach of that duty, it is a defence that the authority took such care as was reasonable to ensure that the relevant part of the highway was not dangerous to traffic[90]. The duty requires the fabric of the highway to be kept in such good repair as to render it safe for ordinary traffic to pass at all seasons of the year, but does not extend to the prevention of ice forming on the highway or

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87 *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 1054; Harper, James and Gray, *The Law of Torts*, 2nd ed (1986), §29.7.

88 [1978] AC 728.

89 Todd, *The Law of Torts in New Zealand*, 2nd ed (1997) at 210-211.

90 See *Stovin v Wise* [1996] AC 923 at 939.

the removal of accumulated snow[91]. What is of particular significance for present purposes is that the statutory duty, by shifting the burden of proof on the issue of reasonable care to the defendant, involves an even more stringent liability for defendants than would apply under ordinary negligence principles[92]. Yet the floodgates do not appear to have collapsed.

(ii) Unprincipled distinctions

79 Decisions at trial and in intermediate appellate courts since *Buckle* and *Gorringe* turn upon distinctions between the highway itself and other infrastructure, such as drains and sewers, between misfeasance and non-feasance, and between road authorities and other bodies with statutory powers exercisable in respect of roads and supporting infrastructure. The decisions both are numerous and depend upon capricious differences in factual circumstances.

80 The maintenance of these distinctions (developed from *Buckle* and *Gorringe*) on the footing, urged by the respondent Councils in the present litigation, that otherwise their financial resources would be strained to the prejudice of other calls upon those resources, may be paradoxical. At the present day the "immunity" serves poorly the interests of public authorities. The distinctions found in the cases are apt to provoke rather than to settle litigation and to lead to expenditure of public moneys in defending struggles over elusive, abstract distinctions with no root in principle and which are foreign to the merits of the litigation. The cases are legion. In the New South Wales Court of Appeal there has been a special list for appeals in cases against highway authorities[93]. But, the cases present a wilderness of single instances because they turn upon what have long been seen as "disputable judicial escape mechanism[s]"[94] which require the drawing of distinctions not the application of principle.

81 The case law produces the result that a tree may be an "artificial structure", the planting of which may be a misfeasance by a highway authority. A plaintiff, injured by a fall caused by the disturbance of a footpath by the roots

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91 *Goodes v East Sussex County Council* [2000] 1 WLR 1356; [2000] 3 All ER 603.

92 McDonald, "Immunities Under Attack", (2000) 22 *Sydney Law Review* 411 at 418-419.

93 *Forbes Shire Council v Jones* [1999] NSWCA 419 at [4].

94 The phrase is that of Professor Sawer, "Non-Feasance Revisited", (1955) 18 *Modern Law Review* 541 at 546, referring to the article by Professor Friedmann, "Liability of Highway Authorities", (1951) 5 *Res Judicatae* 21.

of such a tree, may recover damages in negligence. Yet the defendant will have the "immunity" of the "highway rule" if the tree was self-sown or perhaps if it was planted by another authority[95] and the defendant cannot be said to have adopted and continued a nuisance[96]. What can be said in favour of such a state of affairs?

82 The exception or qualification respecting an "artificial structure" warrants further examination as a striking instance of the unsatisfactory state of authority. The notion, derived from the decision of the Privy Council in *Borough of Bathurst v Macpherson*[97], is that, if an "artificial structure" or "artificial work" is introduced onto a highway and either is dangerous or becomes dangerous through non-repair, then the act of the authority introducing it will be treated as misfeasance; this will be so even if the cause of injury to the plaintiff is solely non-repair of the structure[98]. The scope of this qualification is obscure. That is because, in *Buckle*, Dixon J (in dissent but with whom Latham CJ agreed on this point) excluded from the qualification a structure installed in the authority's "capacity" as a "highway authority", where that structure "forms part of the road construction and is put there to serve a purpose arising out of its character as a highway, as for example to carry off the surface water, or to drain off seepage and protect the road base"; in those circumstances the immunity in respect of non-feasance will apply to that structure unless "in the first instance" the authority "acted improperly in placing it there"[99].

83 This reasoning requires the drawing of distinctions between an authority acting in one "capacity" as against another (if indeed it be possible to separate

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95 See *Donaldson v Municipal Council of Sydney* (1924) 24 SR (NSW) 408; *Grafton City Council v Riley Dodds (Australia) Ltd* [1956] SR (NSW) 53; *Bretherton v The Council of the Shire of Hornsby* [1963] SR (NSW) 334; *Hughes v Hunters Hill Municipal Council* (1992) 29 NSWLR 232; *Threadgate v Tamworth City Council* [1999] NSWCA 32; *Frankston City Council v Eyles* (2000) 108 LGERA 115.

96 See the judgment of McLelland J in *Stephenson v Ku-ring-gai Municipal Council* (1953) 19 LGR 137 at 140.

97 (1879) 4 App Cas 256 at 265-266.

98 *Unger v The President, Council, and Ratepayers of the Shire of Eltham* (1902) 28 VLR 322 at 326-327; *Buckle* (1936) 57 CLR 259 at 298-300.

99 (1936) 57 CLR 259 at 271, 291-292.

them)[100]. It requires decisions as to when a structure will form "part of the road"[101], and presents evidentiary difficulties in showing that a public authority was "acting improperly". Leaving these matters aside, Dixon J's formulation proposes scrutiny of the purpose for which such a structure was installed. That may not be ascertainable. Further, the formulation assumes that structures serve only one purpose. Moreover, no principled reason was offered for the existence or operation of this qualification to the rule respecting artificial structures.

(iii) Misfeasance and non-feasance

84 In *Gorringe*[102], Fullagar J referred to the view of Sir Harrison Moore[103] that the dichotomy between misfeasance and non-feasance had its origin in the development of trespass, case and assumpsit, and said that in relation to public authorities the distinction appears first to have been drawn by Willes J in 1867[104]. Sir Harrison Moore had also pointed to the basic issue which re-emerges in the present litigation, saying[105]:

> "The common law of tort deals with causes which look backwards to some act of a defendant more or less proximate to the actual damage, and

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100 See the distinctions between a "highway authority" on the one hand and, on the other, a "drainage authority" (*Sisson v North Sydney Municipal Council* [1966] 1 NSWR 580 at 581-582); a "traffic authority" (*Turner v Ku-ring-gai Municipal Council* (1990) 72 LGRA 60 at 67); and a "tramways authority" (*Sisson v North Sydney Municipal Council* [1966] 1 NSWR 580 at 584; *Day v Commissioner of Main Roads (WA)* (1989) 9 MVR 471 at 502-503). See also *Frankston City Council v Eyles* (2000) 108 LGERA 115 at 120, where the council was said to have planted a tree acting as "the factotum of all the town".

101 In *Webb v The State of South Australia* (1982) 56 ALJR 912 at 913; 43 ALR 465 at 467-468, a "false kerb" was treated as an artificial structure and the exception was applied. Contrast the views of Latham CJ and McTiernan J with those of Dixon J in *Buckle* (1936) 57 CLR 259 at 273-275, 292-293, 300.

102 (1950) 80 CLR 357 at 375.

103 "Misfeasance and Non-feasance in the Liability of Public Authorities", (1914) 30 *Law Quarterly Review* 276 (Pt 1), 415 (Pt 2) at 278.

104 *Parsons v St Mathew, Bethnal Green* (1867) LR 3 CP 56 at 60.

105 "Misfeasance and Non-feasance in the Liability of Public Authorities", (1914) 30 *Law Quarterly Review* 276 (Pt 1), 415 (Pt 2) at 278.

> looks askance at the suggestion of a liability based not upon such a causing of injury but merely upon the omission to do something which would have prevented the mischief. Where tortious liability arises from some cause other than the commission of an unlawful act it is in general because the defendant has done something or put himself in a position which though lawful in itself does expose the rights of others to risk and danger, unless he shows such care as the circumstances require".

Moreover, in *Woollahra Council v Moody*[106], Isaacs J made the point that it had never been laid down in the highway authority cases simply that there is no responsibility for non-feasance; the phrase was "mere non-feasance" and the force of "mere" should not be overlooked[107].

85 The category of cases with respect to negligent misstatement (which includes failures to provide information or advice, as well as failures to provide information or advice that was accurate[108]) shows both the artificial nature of the distinction between "misfeasance" and "non-feasance" and its diminishing importance. Again, who today, given the line of judgments in this Court commencing with that of Fullagar J in *Commissioner for Railways (NSW) v Cardy*[109], would state the general duty of care which an occupier may owe to a trespasser as limited, in Sir John Salmond's phrase, to "positive acts of negligent misfeasance"[110]? Where the defendant "allows" or "permits" land to become or remain the source of the injurious consequences suffered by the plaintiff, "[h]is sin is nonfeasance rather than misfeasance"[111]. The issue in *Hargrave v Goldman*[112], where the defendant had not originated the fire which later spread to the plaintiff's land, was whether the defendant had suffered the fire to continue without taking reasonably prompt and sufficient means for its abatement (if the

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106 (1913) 16 CLR 353.

107 (1913) 16 CLR 353 at 361.

108 See the observations of Gaudron J in *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 198-199 [29] and see, generally, *Hill v Van Erp* (1997) 188 CLR 159.

109 (1960) 104 CLR 274 at 296-297.

110 Salmond, *The Law of Torts*, 6th ed (1924) at 454.

111 McLaren, "Nuisance in Canada", in Linden (ed), *Studies in Canadian Tort Law*, (1968) 320 at 335.

112 (1963) 110 CLR 40; affd (1966) 115 CLR 458.

action be framed in nuisance)[113] or whether the defendant was negligent in not rendering harmless the fire which spread from the felled tree (if the action be framed in negligence)[114]. On either cause of action, the essential issue concerned a failure by the defendant further to act where action was called for. The same was true of the appellant council in *Pyrenees Shire Council v Day*[115].

86 The persistence of the categories of "misfeasance" and "non-feasance" as part of the "highway rule" continues to give rise to illusory distinctions. This particularly is so respecting the legal consequences of repair or maintenance work. Distinctions are drawn apparently to favour plaintiffs by releasing them from the constriction of the "highway rule" on the footing that they have shown misfeasance rather than non-feasance. It has been said that the misfeasance doctrine applies only where the authority is an active agent in creating or adding to an unnecessary danger[116]. But an authority may leave itself open to a finding of misfeasance if it takes *any* positive action in respect of a road, even if that action is an attempt to remove a danger already existing; that is, if the authority did not leave the road alone[117]. The cases contain statements to the effect that repair work which negligently fails to deal with the danger in question (being one causing injury to the plaintiff) constitutes misfeasance[118]. Equally, it has been held that negligent repair work which caused to recur more quickly than ordinarily the danger that resulted in the plaintiff's injuries, will amount to misfeasance[119]. Yet failure to attempt such repairs would be non-feasance and the plaintiff's action would fall foul of the "highway rule".

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113 (1963) 110 CLR 40 at 51.

114 (1963) 110 CLR 40 at 61.

115 (1998) 192 CLR 330.

116 *City of Melbourne v Barnett* [1999] 2 VR 726 at 729-730; *Barbieri v Fairfield City Council* (1999) 105 LGERA 304 at 308.

117 See the discussion by Latham CJ of the plaintiff's contention in *Gorringe* (1950) 80 CLR 357 at 363.

118 *Buckle* (1936) 57 CLR 259 at 283; *Gorringe* (1950) 80 CLR 357 at 378. This appears to have been the basis of the liability found in *Gold Coast City Council v Hall* [2000] QCA 92.

119 *Marr v Holroyd Municipal Council* (1986) 3 MVR 235 at 242-244 (negligent repair of pot-hole led to the more rapid recurrence of the danger).

87 Moreover, an authority will be responsible for the consequences of new work. In *Woollahra Council v Moody*, Barton ACJ said[120]:

> "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."

This would seem to apply *a fortiori* where "the natural and necessary consequence" of doing work negligently was to leave the part worked upon, and not a portion of road next to it, dangerous[121]. Similarly, where repairs are done in such a way as to continue a dangerous situation in which the plaintiff was injured, the repair work has been held to be misfeasance. This is on the ground that "[a]ctively to maintain a dangerous situation can be as negligent as its original creation"[122]. The true complaint may have been that, in undertaking superficial repairs, an authority did not address the underlying defects in the road – such as poor drainage – which created the source of danger to the plaintiff which resulted in the injury[123].

88 Likewise, there may be misfeasance if the authority has created a false sense as to the security or safety of a road. The authority may have thrown open

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120 (1913) 16 CLR 353 at 358.

121 This appears to be the basis of the finding of liability in *Crombie v Council of the Shire of Livingstone* [2000] QCA 229. In *Woollahra Council v Moody* (1913) 16 CLR 353 at 358, Barton ACJ considered the question to be "[w]hat was the tendency and effect of the work which the appellants did at that spot?"

122 *McDonogh v Commonwealth of Australia* (1985) 9 FCR 360 at 366; *Huon Municipal Corporation v W M Driessen & Sons Pty Ltd* (1991) 72 LGRA 240 at 243. In the latter case, Wright J and Crawford J treated the distinction between misfeasance and non-feasance as still applicable notwithstanding the special provisions of s 21(4) of the *Local Government (Highways) Act* 1982 (Tas).

123 *Hill v Commissioner for Main Roads* (1989) 68 LGRA 173 at 173, 180, 182; *Hodgson v Cardwell Shire Council* [1994] 1 Qd R 357 at 366.

an unsafe road for use as a safe road[124]; its work may have created or maintained a "trap" by creating an appearance of safety, or at least of uniformity, across its surface, which could readily mislead[125]; or its work may have created a new danger or added to the danger[126] by making an unfenced hole[127].

89 In some of these cases, the so-called "misfeasance" appears to consist of omissions to take certain steps while carrying out some positive actions. Indeed, on such a reading, anything done which "has in fact increased the risk of accidents" will be misfeasance[128], even where that risk has been increased solely by omissions to act. This is so although in *Gorringe* Dixon J sought to introduce a criterion of "severability" between what was done and what was left undone[129]. Here, the true determinant seems not to be non-feasance contrasted with misfeasance, but the presence or absence of positive action: if the authority has taken some steps, then its actions are to be examined using the ordinary principles of negligence.

90 Other cases, of which the decision of this Court, shortly after *Buckle*, in *Dundas v Canterbury Municipal Council [No 2]*[130] is an example, suggest that certain anterior activity involving road design and construction requires special consideration. It appears that an authority will be liable if a roadway is

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124 *Gorringe* (1950) 80 CLR 357 at 371-372; *McDonogh v Commonwealth of Australia* (1985) 9 FCR 360; *Hill v Commissioner for Main Roads* (1989) 68 LGRA 173 at 180.

125 *McDonogh v Commonwealth of Australia* (1985) 9 FCR 360 at 364-365; *Gorringe* (1950) 80 CLR 357 at 371-372; *Day v Commissioner of Main Roads (WA)* (1989) 9 MVR 471 at 504; *Grafton City Council v Riley Dodds (Australia) Ltd* [1956] SR (NSW) 53 at 58; *Kirk v Culcairn Shire Council* (1964) 64 SR (NSW) 281 at 288.

126 *Gorringe* (1950) 80 CLR 357 at 363; *Kirk v Culcairn Shire Council* (1964) 64 SR (NSW) 281 at 286-287.

127 *Hatch v Alice Springs Town Council* (1989) 100 FLR 56.

128 *Campbelltown City Council v Crain* unreported, New South Wales Court of Appeal, 23 October 1998 at 5; *City of Melbourne v Barnett* [1999] 2 VR 726 at 729-730.

129 (1950) 80 CLR 357 at 371.

130 (1937) 13 LGR 181.

negligently designed or built so that it is dangerous to those using it[131], unless there is adequate warning (such as by signage) of the dangers[132].

(iv) Immunity

91 Another consideration to which the "highway rule" gives rise concerns the classification of the legal position of the public authorities as the enjoyment of an "immunity". In *Buckle* itself, Dixon J spoke of road authorities as having an "immunity from liability for damage arising from [their] failure to uphold, maintain and repair"[133].

92 It will be observed that Dixon J did not describe the liability of road authorities as "non-justiciable". In Australia, that term and cognate expressions have been used to describe controversies within or concerning the operations of one of the other branches of government which cannot be resolved by the exercise of the judicial power. Examples are the exercise by the Governors of the States of their function under s 12 of the Constitution[134], certain aspects of the conduct by the Executive Government of foreign relations[135] and intergovernment arrangements falling short of contract[136]. The differences of opinion in *Sue v Hill*[137] respecting the exercise by this Court of jurisdiction as the Court of Disputed Returns exemplify the fundamental and difficult issues which are wrapped up in the term "non-justiciable".

93 The term "immunity" may be used in a related sense to identify a liability or remedy which, in England, did not arise or was not available against the

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131 *Turner v Ku-ring-gai Municipal Council* (1990) 72 LGRA 60 at 61-62; *Desmond v Mount Isa City Council* [1991] 2 Qd R 482 at 488, 494; *Blacktown Municipal Council v Scanlon* (1993) 79 LGERA 387 at 388.

132 See, eg, *Desmond v Mount Isa City Council* [1991] 2 Qd R 482 at 488; *Ffrench v Ridley District Council* (1990) 12 MVR 39 (camber and curve).

133 (1936) 57 CLR 259 at 292.

134 *R v The Governor of the State of South Australia* (1907) 4 CLR (Pt 2) 1497.

135 *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 367-373.

136 *South Australia v The Commonwealth* (1962) 108 CLR 130.

137 (1999) 199 CLR 462.

Executive Government, identified as "the Crown"; hence the common law principle of immunity of the Crown from actions in tort and what is now known as the "public interest immunity" against discovery of documents. The public and local authorities set up by statute in England in the nineteenth century did not enjoy that Crown immunity. For example, in *The Mersey Docks Trustees v Gibbs*[138], the Board was liable for the damage occasioned to the plaintiff's ship by a mudbank which blocked the entrance to a dock. Different questions would arise when the authority contended that its statute sufficiently identified it with the Executive Government to bring it within the umbrella of Crown immunity.

94 The term "immunity" also is used in various areas of the law to indicate an immunity to action in respect of rights and duties which otherwise exist in the law. One example is the common law immunity of the Crown to actions for breaches of its contracts; the common law accepted that a contract had been made and a legal wrong committed[139]. The immunity of the barrister, upheld in *Giannarelli v Wraith*[140], assumes, as Mason CJ explained[141], an obligation to exercise reasonable care and skill but sustains the immunity on considerations of public policy. Again, the common law rule which confers a "qualified immunity" from liability in respect of straying animals is an "exception to the ordinary principles of negligence" and, where it operates, "negates the existence of a duty of care"[142]. In recent decisions of the House of Lords respecting the liability in negligence of public authorities, the terms "immunity" and "non-justiciable" have been used, apparently interchangeably, and in the sense of negation of the existence of a duty of care. Examples are found in several of the speeches in *Barrett v Enfield London Borough Council*[143].

95 This appears to be the sense in which Dixon J spoke of "immunity" in *Buckle*. It follows that to determine that the legal basis for this immunity is

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138 (1866) LR 1 HL 93.

139 *New South Wales v Bardolph* (1934) 52 CLR 455 at 508; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 545.

140 (1988) 165 CLR 543.

141 (1988) 165 CLR 543 at 554-555.

142 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 637.

143 [1999] 3 WLR 79 at 95-98, 103-104; [1999] 3 All ER 193 at 209-212, 217-219. See Craig and Fairgrieve, "*Barrett*, Negligence and Discretionary Powers", (1999) *Public Law* 626 at 631-633, 647-649.

derived from English origins which furnish no reason for its continuance in Australia is not to cast adrift the Australian common law with nothing in the place of what has been left behind; rather, it is to allow the principles of the law of negligence respecting public authorities to operate freed from this artificial constriction.

96 The point may be illustrated as follows. If, before setting off on the journey which took the first applicant in *Brodie* to the bridge which collapsed, he had contacted the Singleton Shire Council and in response to his inquiry had been told by a Shire officer that the bridge was safe for a truck weighing 22 tonnes, the principles of negligent misstatement, developed over the past 40 years, would have applied. Subject to any particular statutory exemption clause[144], what would have been decisive was not the *Buckle* immunity, but the reasoning in authorities such as *Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]*[145].

97 Statutory provisions which permit public authorities to engage in what otherwise would be tortious or otherwise legally wrongful conduct are disfavoured; they are "strictly", even "jealously", construed[146]. So also, surely, what are said to be immunities of this nature provided by the common law itself. In that vein, Lord Cooke of Thorndon recently observed[147]:

> "Absolute immunity is in principle inconsistent with the rule of law but in a few, strictly limited, categories of cases it has to be granted for practical reasons. It is granted grudgingly, the standard formulation of the test for inclusion of a case in any of the categories being Sir Thaddeus McCarthy P's proposition in *Rees v Sinclair*[148], 'The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice …' Many other authorities contain language to similar effect."

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144 See *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290.

145 (1981) 150 CLR 225.

146 *Coco v The Queen* (1994) 179 CLR 427; *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575.

147 *Darker v Chief Constable of the West Midlands Police* [2000] 3 WLR 747 at 756-757; [2000] 4 All ER 193 at 202.

148 [1974] 1 NZLR 180 at 187.

98 It has been well said that the immunity conferred by the "highway rule" has the following features[149]:

> "First, being absolute, it can produce harsh results. Secondly, it has become increasingly anomalous, against the background of the general law of negligence under which bases for liability have expanded rather than decreased. Thirdly, well-meant efforts to contain or avoid the harsh results of the immunity have led to highly technical and difficult distinctions being drawn, which in turn have had the effect of increasing litigation, and uncertainty and unpredictability of outcome."

99 Are there sufficient reasons of public policy for denial of a remedy against the respondent Councils, if an action otherwise lies against them in negligence? This invites attention to the purposes now served by the "immunity". These purposes plainly are not those served in England in ages past. Even in England those purposes changed over time. When *Russell v The Men of Devon*[150] was decided in 1788, there were no highway authorities as later became understood in Australia. The inhabitants of a parish were a fluctuating body of private individuals[151], the membership of which was unlikely to correspond at the times of incurrence and discharge of liability, and the common law did not provide for contributions between those concurrently liable[152]. Moreover, the "highways" spoken of in 1788 today would hardly answer that description. The deficiencies of the English road system had been a common refrain in the recitals of various highway acts. They used terms such as "very dangerous", "ruinous" and "almost impassable"[153]. Section 6 of *The Highway Act* 1835 (UK)[154] required the parish to appoint a surveyor who was to "repair and keep in repair" the highways in the

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149 McDonald, "Immunities Under Attack", (2000) 22 *Sydney Law Review* 411 at 420.

150 (1788) 2 TR 667 [100 ER 359].

151 cf *Verge v Somerville* [1924] AC 496 at 499.

152 Ashhurst J made this point in *Russell v The Men of Devon* itself: (1788) 2 TR 667 at 673 [100 ER 359 at 362-363].

153 See, respectively, the preambles to 14 Car 2 c 6 (1662); 15 Car 2 c 1 (1663); 3 Will & Mary c 12 (1691).

154 5 & 6 Will 4 c 50.

parish. However, the surveyor "was the agent of the inhabitants at large" and "was not liable on indictment or in damages"[155].

100 The notions which had underpinned this old law respecting parishes were, without apparent re-articulation by the courts, treated as "transferred" to the new statutory regimes established in England in the mid-nineteenth century. The liability of corporate public authorities was classified as only a transferred liability, not a liability created by statute[156]. In this period, there developed both the approach to statutory construction which determined the existence of an action for breach of statutory duty and a judicial attitude protective of the funds of public utilities providing the infrastructure for an industrialised society. It would now appear that in 1895 Lord Herschell LC put too narrowly the scope of the common law (particularly by ignoring negligence) in saying[157]:

> "It is admitted that the highway on which the disaster occurred was constructed by the appellants in the first instance quite properly. No complaint of misfeasance is made against them. 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. If, then, they are liable in the present action, it must be either because that liability has been expressly imposed by some enactment, or because the Legislature has imposed some duty upon them for the breach of which a right of action accrues to any person injured by it."

101 These considerations never applied in this country. The responsibilities of municipal and shire corporations with respect to roads were not transferred to those bodies; they were created by statute. Perhaps for what then was good reason, given the ultimate authority of the Privy Council and the prevailing understanding of a unified common law[158], in *Buckle* the Court kept close to the

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155 *Goodes v East Sussex County Council* [2000] 1 WLR 1356 at 1361; [2000] 3 All ER 603 at 608. See also the earlier cases of *Couch v Steel* (1854) 3 El & Bl 402 [118 ER 1193] and *Young v Davis* (1862) 7 H & N 760 [158 ER 675]; (1863) 2 H & C 197 [159 ER 82] discussed by Fullagar J in *Gorringe* (1950) 80 CLR 357 at 374.

156 *Cowley v Newmarket Local Board* [1892] AC 345 at 355; *Municipal Council of Sydney v Bourke* [1895] AC 433 at 439-440.

157 *Municipal Council of Sydney v Bourke* [1895] AC 433 at 435-436.

158 Before *Parker v The Queen* (1963) 111 CLR 610 and *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221; [1969] 1 AC 590.

coastline charted by the English decisions. However, in Australia, a significant issue respects the operation of the principles of liability in negligence in respect of the exercise or failure to exercise statutory powers.

(v) Negligence and statutory powers

102 The decisions of this Court in *Sutherland Shire Council v Heyman*[159], *Pyrenees Shire Council v Day*[160], *Romeo v Conservation Commission (NT)*[161] and *Crimmins v Stevedoring Industry Finance Committee*[162] are important for this litigation. Whatever may be the general significance today in tort law of the distinction between misfeasance and non-feasance, it has become more clearly understood that, on occasions, the powers vested by statute in a public authority may give it such a significant and special measure of control over the safety of the person or property of citizens as to impose upon the authority a duty of care. This may oblige the particular authority to exercise those powers to avert a danger to safety or to bring the danger to the knowledge of citizens otherwise at hazard from the danger. In this regard, the factor of control is of fundamental importance[163].

103 It is often the case that statutory bodies which are alleged to have been negligent because they failed to exercise statutory powers have no control over the source of the risk of harm to those who suffer injury. Authorities having the control of highways are in a different position. They have physical control over the object or structure which is the source of the risk of harm. This places highway authorities in a category apart from other recipients of statutory powers.

104 The postulate that, without the "highway rule" and with the principles of negligence, statutory authorities will be subjected to fresh, indeterminate financial hazards which the common law will ignore should not be accepted. First, as has been pointed out earlier in these reasons, expenditure of public funds on litigation turning upon indeterminate and value-deficient criteria is encouraged, indeed mandated, by the present state of the law. Secondly,

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159 (1985) 157 CLR 424. See also *Northern Territory v Mengel* (1995) 185 CLR 307 at 352-353, 359-360, 373.

160 (1998) 192 CLR 330.

161 (1998) 192 CLR 431.

162 (1999) 200 CLR 1.

163 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551-552.

financial considerations and budgetary imperatives may fall for consideration with other matters when determining what should have been done to discharge a duty of care[164]. That is the position in Canadian law[165]. It is that advocated in this Court a century ago. In *Miller v McKeon* Griffith CJ said[166]:

> "So the Government of a newly-settled country, which undertakes the first formation of a road, whether the soil has or has not been formally dedicated as a highway, is bound to use such care to avoid danger to persons using it as is reasonable under all the circumstances. These circumstances include the nature of the locality, the extent of the settlement, the probabilities as to the persons by whom the road is likely to be used, and the moneys available to the Government for the purpose".

Each element in these sentences merits careful attention. Evidence respecting funding constraints and competing priorities will be admissible[167].

105 The public resources in question are, as indicated earlier in these reasons, provided in part by government grants; the prospect of irate ratepayers left to shoulder the apprehended increased burden is conjectural. Further, it is implicit in the submissions for the interveners that highway authorities carry insurance in respect of their liability for misfeasance and other acts or omissions falling outside the "highway rule". The Attorney-General for Victoria submitted that it should not be assumed that road authorities would be able through insurance to "transfer … the financial burden of increased exposure to claims for compensation if their immunity for non-feasance is removed". Nor should it be assumed that they will be unable to do so.

106 Appeals also were made to preserve the "political choice" in matters involving shifts in "resource allocation". However, citizens, corporations, governments and public authorities generally are obliged to order their affairs so as to meet the requirements of the rule of law in Australian civil society. Thus, it is no answer to a claim in tort against the Commonwealth under s 75(iii) of the Constitution that its wrongful acts or omissions were the product of a "policy

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164 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 394-395 [183]-[184].

165 *Just v British Columbia* [1989] 2 SCR 1228 at 1243-1244.

166 (1905) 3 CLR 50 at 60.

167 See *Hill v Commissioner for Main Roads* (1989) 68 LGRA 173 at 181; *Gloucester Shire Council v McLenaghan* (2000) 109 LGERA 419 at 423; cf *Woodward v Orara Shire Council* (1948) 49 SR (NSW) 63 at 65-67.

decision" taken by the Executive Government; still less that the action is "non-justiciable" because a verdict against the Commonwealth will be adverse to that "policy decision". Local authorities are in no preferred position. Yet it is submitted that those bodies which answer the description "highway authority", distilled from the case law, merit and require a special consideration which only statute may displace. That submission should be rejected.

(vi) Precedent

107 Where, as we have endeavoured to show is the position in Australia with the "highway rule", the case law speaks in terms which can "no longer command an intellectual assent", should this Court acquiesce and refuse to act by reference "directly to basal principle"[168]? If the continuation of that state of affairs, which discredits the Australian legal system, be mandated by precedent, then it is the task of this Court to look into the authorities said to constitute that precedent.

108 This leads to the invocation, particularly by the Singleton Shire Council, of the importance for the legal system of the system of precedent. The Shire Council refers to the well-known statement of Mason J in *State Government Insurance Commission v Trigwell* that this Court "is neither a legislature nor a law reform agency"[169]. That may readily be accepted. However, the present state of the cases respecting the "highway rule" neither promotes the predictability of judicial decision nor facilitates the giving of advice to settle or avoid litigation. Observations by McHugh J in *Perre v Apand Pty Ltd*[170] are in point. Speaking of the area of judge-made law, and in a court of final appeal, his Honour remarked[171]:

> "While stare decisis is a sound policy because it promotes predictability of judicial decision and facilitates the giving of advice, it should not always trump the need for desirable change in the law[172]. In developing the common law, judges must necessarily look to the present and to the future as well as to the past."

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168 *Commissioner for Railways (NSW) v Cardy* (1960) 104 CLR 274 at 285.

169 (1979) 142 CLR 617 at 633.

170 (1999) 198 CLR 180.

171 (1999) 198 CLR 180 at 216 [92].

172 cf *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 29-30 per Brennan J.

Here, the reasons for that "sound policy" do not apply. Observations by Brennan J in *Giannarelli v Wraith*[173] also are apposite. His Honour said[174]:

> "A court is not ordinarily concerned to apply to the resolution of a current case a proposition of common law plucked from a moment in history, though the court will often refer to the history of the common law in ascertaining a principle for contemporary application. In declaring and applying the common law to a current case, a court is bound by earlier decisions of courts above it in the hierarchy, for those decisions state what that court is bound to take the common law to be. But when the court is not so bound, it may undertake its own inquiry into the common law and it may depart from earlier decisions. The doctrine of stare decisis requires no greater adherence to precedent, though curial policy may lead a court to adhere to earlier authority which is merely persuasive."

109 In addition, as it happens, neither *Buckle* nor *Gorringe* is a strong candidate in support of the system of *stare decisis*. The same was true of *Grant v Downs*[175], as was disclosed by the analysis in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*[176] and by the application of the criteria which may justify review by this Court of an earlier decision. Those criteria were discussed in the joint judgment in *John v Federal Commissioner of Taxation*[177].

110 First, *Buckle* cannot be said to "rest upon a principle carefully worked out in a significant succession of cases"[178]. The judgments in *Buckle* ignore the earlier decision of the Court in *Miller v McKeon*[179]. There, the submission had been made that it was the duty of the New South Wales Government which had constructed and dedicated the road in question to make it reasonably safe for all such as were likely to use it and to keep it safe; counsel relied upon the judgment

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173 (1988) 165 CLR 543.

174 (1988) 165 CLR 543 at 584.

175 (1976) 135 CLR 674.

176 (1999) 201 CLR 49 at 66-69 [38]-[48].

177 (1989) 166 CLR 417 at 438-439.

178 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438.

179 (1905) 3 CLR 50.

of Brett MR in *Heaven v Pender*[180]. This, as Fullagar J later remarked[181], was a period in which the law of negligence was undergoing considerable development. The judgment of the Master of the Rolls in *Heaven v Pender* "constituted the first step in the perception of a coherent jurisprudence of common law negligence"[182]; it went on to provide a significant element in the reasoning of Lord Atkin in *Donoghue v Stevenson*[183] and was "taken up" by Lord Atkin in formulating the general duty in that case[184]. The result was described in *Burnie Port Authority v General Jones Pty Ltd*[185] as being the "emergence of a coherent law of negligence to dominate the territory of tortious liability for unintentional injury to the person or property of another".

111 Griffith CJ said in *Miller v McKeon*[186] that the circumstances in which an action will lie had been "well defined" by the Master of the Rolls in *Heaven v Pender*; the question was what was involved in reasonable care and skill in Australian circumstances. In 1915, in *Flukes v Paddington Municipal Council*[187], a decision of the New South Wales Full Court, to which *Miller v McKeon* was cited, Street J[188] and Ferguson J[189] held that a municipal authority, in making an alteration to the existing condition of a thoroughfare, was obliged to exercise such care to avoid danger to persons using it as was reasonable in the circumstances. However, *Buckle* has been taken as silently choking the development of the common law in Australia which began with these earlier authorities.

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180 (1883) 11 QBD 503 at 509.

181 *Gorringe* (1950) 80 CLR 357 at 377.

182 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 541.

183 [1932] AC 562 at 580-581.

184 See *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 487.

185 (1994) 179 CLR 520 at 544.

186 (1905) 3 CLR 50 at 58.

187 (1915) 15 SR (NSW) 408.

188 (1915) 15 SR (NSW) 408 at 414.

189 (1915) 15 SR (NSW) 408 at 415.

112 There are further considerations respecting the value of *Buckle* and *Gorringe* as precedents. There was a difference between the reasons of the Justices constituting the majority in *Buckle*. Latham CJ and Dixon J took similar views of the legal principles at stake. In particular, there was the need to determine whether the Road Board had constructed the drain in exercise of its powers as a drainage authority or a highway authority; if the former, the "highway rule" did not defeat the plaintiff. However, their Honours differed in the result, Dixon J favouring the application of the "highway rule" to the facts of the case. The third member of the Court, McTiernan J, relied solely upon the "artificial structure" distinction, but agreed with Latham CJ as to the outcome. This was that the appeal by the plaintiff from a decision of a judge of the Supreme Court of Western Australia be allowed, with Dixon J dissenting. A binding authority cannot be extracted from an opinion expressed in a dissenting judgment[190]. Hence the statement by Sir George Paton and Professor Sawer[191] that, if the dissenting judgment be ignored, *Buckle* lacks a *ratio decidendi* respecting the "highway rule".

113 Thereafter, in *Gorringe*, the plaintiff accepted that *Buckle* established "the general proposition that a highway authority is not liable for mere non-feasance but is liable for misfeasance or malfeasance"[192]. But, rather than challenge *Buckle*, the plaintiff in *Gorringe* sought to side-step it. He did so by putting his case on the particular ground that s 8(2) of the *Roads and Jetties Act* 1935 (Tas) "imposes a duty to maintain State highways with a correlative right in a person injured by a defect in the highway to complain of the failure in the duty"[193]. The plaintiff thus relied upon the action for damages for breach of statutory duty. This action had succeeded with respect to other statutes in the earlier decisions in

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190 *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 314.

191 "Ratio Decidendi and Obiter Dictum in Appellate Courts", (1947) 63 *Law Quarterly Review* 461 at 467. See also the earlier discussion of *Buckle* to the same effect by Professor Sawer, "Non-feasance in Relation to 'Artificial Structures' on a Highway", (1938) 12 *Australian Law Journal* 231.

192 (1950) 80 CLR 357 at 362.

193 (1950) 80 CLR 357 at 368-369.

this Court in *Municipal Tramways Trust v Stephens*[194] and *South Australian Railways Commissioner v Barnes*[195].

114 Moreover, as appears from the matters already discussed in these reasons under the headings "Unprincipled distinctions" and "Misfeasance and non-feasance", there are unacceptable difficulties and uncertainties about the content of the "highway rule". In turn, these are the product of reluctance of the Australian courts in recent times to apply that "rule" to the exclusion of the ordinary principles dealing with negligence. This state of affairs has some affinity to that identified in *Burnie Port Authority v General Jones Pty Ltd*[196] respecting the rule in *Rylands v Fletcher*[197]. It demonstrates that, rather than achieving a useful result, *Buckle* has "led to considerable inconvenience", the third of the considerations favouring review which were listed in *John v Federal Commissioner of Taxation*[198].

115 Finally, the reasoning upon which the judgments of Latham CJ and Dixon J in *Buckle* appear to rest is outflanked by a fuller understanding of the relationship between nuisance and negligence. To this matter we now turn.

(vii) Nuisance and negligence

116 The roots of the reasoning of Latham CJ and Dixon J in *Buckle* lay in the association between nuisance and the criminal law, and in the blending of principles respecting what now are seen as nuisance, negligence and breach of statutory duty. The decision which often is referred to as indicating that in

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194 (1912) 15 CLR 104. Isaacs J dissented and his judgment was preferred to those of Griffith CJ and Barton J by Dixon J in *Gorringe*: see (1950) 80 CLR 357 at 369-370.

195 (1927) 40 CLR 179 at 192 per Higgins J, 195 per Starke J; Isaacs ACJ based his decision upon public nuisance (at 186). See also, among the numerous Canadian decisions in this period decided upon breach of statutory duty: *The City of Kingston v Drennan* (1897) 27 SCR 46 at 47-48; *City of Vancouver v McPhalen* (1911) 45 SCR 194; *City of Vancouver v Cummings* (1912) 46 SCR 457 at 458-459; *Raymond v Township of Bosanquet* (1919) 59 SCR 452 at 455-456; *Greer v Tp Mulmur* [1926] 4 DLR 132 at 133.

196 (1994) 179 CLR 520 at 548-549.

197 (1868) LR 3 HL 330.

198 (1989) 166 CLR 417 at 438.

England at common law no persons were subjected to any enforceable duty to repair or to keep in repair any highway, even persons with the management and control of a highway, is *Russell v The Men of Devon*[199]; but, as Fullagar J indicated in *Gorringe*[200], the earlier decision had turned upon the absence of a proper defendant.

117 The common law duty to maintain the highways in the parish was based in nuisance not negligence[201]. The duty was enforceable by indictment but a fine was not the only remedy. Writs of distraint might be "awarded *in infinitum*, till we are certified [by the sheriff] that the way is repaired"[202]. Further, long before *Russell v The Men of Devon*, Vaughan CJ, in the course of his lengthy judgment in *Thomas v Sorrell*, said[203]:

> "And note, if a man have particular damage by a foundrous[204] way, he is generally without remedy, though the nusance is to be punisht by the King. The reason is,
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> Because a foundrous way, a decay'd bridge, or the like, are commonly to be repaired by some township, vill, hamlet, or a county who are not corporate, and therefore no action lyes against them for a particular damage, but their neglects are to be presented, and they punish'd by fine to the King.
>
> But if a particular person, or body corporate, be to repair a certain high-way, or portion of it, or a bridge, and a man is endamaged

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199 (1788) 2 TR 667 [100 ER 359].

200 (1950) 80 CLR 357 at 373.

201 *Griffiths v Liverpool Corporation* [1967] 1 QB 374 at 389; *Goodes v East Sussex County Council* [2000] 1 WLR 1356 at 1361-1362; [2000] 3 All ER 603 at 608-609.

202 *R v Inhabitants of Cluworth* (1704) 1 Salkeld 359 [91 ER 313]. The case also is reported 6 Mod 163 [87 ER 920].

203 (1673) Vaugh 330 at 340 [124 ER 1098 at 1104]. See also the summary of the relevant legal history by Mr A T Denning KC in Note, (1939) 55 *Law Quarterly Review* 343.

204 "Foundrous" (also "founderous") had the meaning of "[c]ausing or likely to cause to founder": *Oxford English Dictionary*, 2nd ed (1989), vol 6 at 122.

> particularly by the foundrousness of the way, or decay of the bridge, he may have his action against the person or body corporate, who ought to repair for his damage, because he can bring his action against them; but where there is no person against whom to bring his action, it is as if a man be damaged by one that cannot be known."

118 The propositions in this last paragraph indicate what later became the settled law that a plaintiff sustaining particular or special loss or damage may recover damages in respect of a public nuisance, and, as affirmed in *Boyce v Paddington Borough Council*[205], may have sufficient interest to support a suit for equitable relief[206]. The adaptation of this reasoning to the broader field of equitable intervention in public law matters was described in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd*[207].

119 At common law, explained Windeyer J, "a highway was created when a competent landowner manifested an intention to dedicate land as a public road, and there was an acceptance by the public of the proffered dedication"[208]; a highway was a thoroughfare leading from town to town or village to village, but it became identified, again as Windeyer J put it[209], as "a way over which all members of the public are entitled to pass and repass on their lawful occasions". The tort of nuisance included unlawful interference with a right over or in connection with land, and interference with the safe enjoyment of the public right of way over a highway might constitute an actionable nuisance[210]. In Australia,

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205 [1903] 1 Ch 109.

206 See the judgment of Hardie J in *Smith v Warringah Shire Council* [1962] NSWR 944 at 947-949.

207 (1998) 194 CLR 247.

208 *Permanent Trustee Co of NSW Ltd v Campbelltown Corporation* (1960) 105 CLR 401 at 420. Whether there had been a dedication to the public might properly be left for the jury as a question of fact: *Jarvis v Dean* (1826) 3 Bing 447 [130 ER 585].

209 *City of Keilor v O'Donohue* (1971) 126 CLR 353 at 363; see also the authorities collected by Beaumont J in *Re Maurice's Application; Ex parte Attorney-General (NT)* (1987) 18 FCR 163 at 169 and cf *Director of Public Prosecutions v Jones* [1999] 2 AC 240 at 253-258, 261-264, 268-274, 279-280, 291-292.

210 *Hargrave v Goldman* (1963) 110 CLR 40 at 59.

the vesting by statute in local government authorities of the fee simple in land over which there are public streets leaves the streets dedicated to the public[211]. The authorities hold the fee simple "subject to the rights of the public to use the street for passing and re-passing, except in so far as those rights may be taken away or limited by statute"[212].

120 This notion of a public right of user as an entitlement conferred by the common law marked off highway authorities from occupiers of private land and rendered inapt any analogy which treated users of the highway as entrants to whom there was owed a duty of care formulated on that basis. Dixon J emphasised this in *Buckle*[213], saying that the principles upon which the liability of the road authority depended had "nothing to do with the ownership or occupation of property or the relation between an owner or occupier and persons whose presence he may solicit or suffer". It will be necessary to return to this matter when considering the preferred formulation of the duty of care in highway cases.

121 The public right of user of highways also presented conceptual difficulty in the extension of the tort of nuisance from its original operation to protect the interests in liberty to exercise rights over land to the vindication of the interest of bodily security by recovery of damages for personal injury. In what Neasey J described in 1966[214] as a well-known article, Professor Newark had explained the process of transition[215]. He wrote[216]:

> "Nuisance … lay not only for interference with what have been called natural rights incidental to the occupation of land but also for interference with easements; and in early law the easement most usually

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211 This may be so even in respect of land held under Torrens title: *Vickery v Municipality of Strathfield* (1911) 11 SR (NSW) 354 at 363-364; LG Act, s 232(3).

212 *Attorney-General; Ex rel Australian Mutual Provident Society v The Corporation of the City of Adelaide* [1931] SASR 217 at 229 per Murray CJ; followed by Bray CJ in *Kiosses v Corporation of the City of Henley and Grange* (1971) 6 SASR 186 at 192-193.

213 (1936) 57 CLR 259 at 280-281.

214 *Kraemers v Her Majesty's Attorney-General for the State of Tasmania* [1966] Tas SR 113 at 153.

215 "The Boundaries of Nuisance", (1949) 65 *Law Quarterly Review* 480.

216 "The Boundaries of Nuisance", (1949) 65 *Law Quarterly Review* 480 at 482.

> affected was the right of way. Interference with a private right of way over another's tenement was undoubtedly nuisance. Interference with the public's right of way along a highway was something different: it was a purpresture, an unlawful encroachment against the king, and enquirable of by the king's justices. But men were satisfied by the superficial resemblance between the blocking of a private way and the blocking of a public highway to term the latter a nuisance as well, and thus was born the public nuisance, that wide term which came to include obstructed highways, lotteries, unlicensed stage-plays, common scolds, and a host of other rag ends of the law."

122 The maintenance of actions for personal injuries caused by an obstruction in the highway began early in the nineteenth century with a series of decisions where the plaintiff's declaration was framed as an action on the case for negligence[217]. However, by the mid-nineteenth century, declarations more closely resembled those used in an action for public nuisance and the term "nuisance" began to appear in judgments[218]. The reasons for the change are not readily apparent. However, it may be significant that, as Denning LJ put it[219]:

> "[i]n an action for a public nuisance, once the nuisance is proved and the defendant is shown to have caused it, then the legal burden is shifted on to the defendant to justify or excuse himself. If he fails to do so, he is held liable, whereas in an action for negligence the legal burden in most cases remains throughout on the plaintiff."

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217 *Sly v Edgley* (1806) 6 Esp 6 [170 ER 813]; *Butterfield v Forrester* (1809) 11 East 60 [103 ER 926]; *Leslie v Pounds* (1812) 4 Taunt 649 [128 ER 485]; *Jarvis v Dean* (1826) 3 Bing 447 [130 ER 585]; *Daniels v Potter* (1830) 4 C & P 262 [172 ER 697]; *Proctor v Harris* (1830) 4 C & P 337 [172 ER 729]. *Butterfield v Forrester* was the foundation case for the doctrine of contributory negligence: *Astley v Austrust Ltd* (1999) 197 CLR 1 at 11 [21].

218 See, for example, *Barnes v Ward* (1850) 9 CB 392 at 420 [137 ER 945 at 956]; *Peachey v Rowland* (1853) 13 CB 182 [138 ER 1167]; *Cooper v Walker* (1862) 2 B & S 770 at 779-780 [121 ER 1258 at 1261-1262]; *Robbins v Jones* (1863) 15 CB (NS) 221 at 223 [143 ER 768 at 770]; *Hadley v Taylor* (1865) LR 1 CP 53 at 55.

219 *Southport Corporation v Esso Petroleum Co Ltd* [1954] 2 QB 182 at 197 (revd on other grounds [1956] AC 218). See also the judgments of Walsh J in *Miller Steamship Co Pty Ltd v Overseas Tankship (UK) Ltd* [1963] SR (NSW) 948 at 979-980, and of Burbury CJ in *Kraemers v Her Majesty's Attorney-General for the State of Tasmania* [1966] Tas SR 113 at 125, and Markesinis and Deakin, *Tort Law*, 4th ed (1999) at 460-461.

Thus, availability of the action in nuisance as a remedy for personal injuries was accurately described by Professor Fleming as "a relatively modern development"[220].

123 To Fullagar J in *Gorringe*, the proper sense of "negligence" is to identify a failure to observe reasonable care; there is "actionable negligence" only if there be "a legal duty to take reasonable care"[221]. However, the term "negligence" may be used other than to identify an independent tort. In the sense of inadvertence or carelessness with respect to an act or omission, "negligence" may identify a mode of committing another tort which does not require intentional wrongdoing. Hence the statement by Beven[222] that his work was concerned with an aspect, not a division, of law, and with "defaults in conduct" rather than "any particular class of legal relations".

124 *Buckle* was decided at a time when the tort of negligence had not been extricated from that of nuisance. In *Buckle*, Latham CJ observed[223]:

> "There can be no doubt in this case that the hole in the drain was a nuisance in the highway and that, if there was a duty to repair, there was a negligent failure to perform that duty."

Dixon J said[224]:

> "To speak of the resulting state of the road as a nuisance in the highway may be correct enough. There is, of course, always a risk in applying the word to the physical thing instead of to the act or omission constituting the wrong of nuisance. But, apart from that, the question is not whether a nuisance has been caused. A highway authority might be indictable for a nuisance arising from its failure to repair. But it was not liable for the particular damage which an individual suffered from the indictable

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220 *The Law of Torts*, 7th ed (1987) at 381, n 12.

221 (1950) 80 CLR 357 at 378-379. See also *Watson v George* (1953) 89 CLR 409 at 424-425; *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 at 44; and the article by Thayer, "Public Wrong and Private Action", (1914) 27 *Harvard Law Review* 317 at 324-325.

222 *Negligence in Law*, 3rd ed (1908), vol 1 at 3.

223 (1936) 57 CLR 259 at 273.

224 (1936) 57 CLR 259 at 292.

> nuisance. When the highway authority acts in that capacity the question is whether, by the negligent exercise of its statutory powers or otherwise without statutory justification, it has been the active agency in causing the nuisance."

Earlier, O'Connor J indicated the entanglement of nuisance and negligence in the law as then understood in the following passage from his judgment in *Miller v McKeon*[225]:

> "The plaintiff rests his case upon two grounds, nuisance and negligence. In my view they come to the same thing. The mere construction of a work by the Government upon a public road is not in itself a nuisance, if it is for the more convenient exercise by the public of their right of passage over the road, and if the work is carried out without negligence. If there is any negligence the work is a nuisance, if there is no negligence, there is no nuisance. From whichever point of view we regard the matter the question for determination is the same, namely, is there any evidence that the Government has been guilty of negligence. I propose, therefore, to deal with that question only."

125 Ten years before *Buckle*, Sir Percy Winfield, in his important article "The History of Negligence in the Law of Torts"[226], traced the development of negligence as an independent tort. He observed that, even in 1926, distinguished writers[227] denied the existence of negligence as a distinct tort, and continued[228]:

> "Then, as to nuisance, it might be said until quite recently that there was a hybrid action of nuisance and negligence. Sometimes it looks as if negligence were the substance of the action, and nuisance were an untechnical term; sometimes the exact reverse would be the truth, and then, again, 'negligent' has figured as a persistent term in the declaration

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225 (1905) 3 CLR 50 at 63. In *Woollahra Council v Moody* (1913) 16 CLR 353 at 356, Barton ACJ described the action as "one for negligence and nuisance" and Isaacs J (at 359) said that "[t]he real cause of action in this case … is negligence in the performance of a statutory duty".

226 (1926) 42 *Law Quarterly Review* 184.

227 Beven, Salmond and Jenks.

228 (1926) 42 *Law Quarterly Review* 184 at 197-198 (footnotes omitted). These views were expressly adopted by Lord Simonds in *Jacobs v London County Council* [1950] AC 361 at 374.

> which the Court persistently ignored in deciding on grounds of nuisance. Finally, there are judgments that must have gone on one ground or the other, but on which must remain a secret. Nowadays, however, judges show a strong tendency to exorcise this ghost of action upon the case, and to insist that nuisance is one tort and negligence another."

126 Since *Buckle* was decided, it has become clear, as a result of judgments of Lord Wright, Lord Simonds, Windeyer J, Lord Reid and Lord Wilberforce[229], that (a) there are cases where the same facts will establish liability both in nuisance and negligence; (b) the tort of nuisance comprises a wide variety of situations, in some of which negligence plays no part, in others of which it is decisive; and (c) where the public nuisance is one of creating a danger to persons or property on a highway, fault of some kind, which may be negligence, is essential. Nevertheless, whilst the existence of a duty of care and its breach is essential for the tort of negligence, in nuisance this is unnecessary[230]. As late as 1943, the English Court of Appeal[231] decided as an action in nuisance a claim for damages brought by the mother of a motor-cyclist killed when his cycle ran into the back of a trailer attached to a stationary lorry which had been left unattended and without rear lights; it was unnecessary, on this basis, to consider the question of negligence.

127 Many contemporary Australian decisions have applied the "highway rule", with its complex of exceptions and reservations, to actions brought not in nuisance but in negligence. It appears to have been assumed that the "highway rule" confers an "immunity" where an action in negligence otherwise would lie. There has been little apparent examination of why this is so, or should be so. In part, the prevailing attitude may reflect a tendency to overlook the circumstance that references to "negligence" in some of the earlier cases were made with respect to "negligence" as a factor in certain nuisance actions. In part, it may represent an unconscious reversion to the state of affairs before actions which

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229 Respectively in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903-904; *Jacobs v London County Council* [1950] AC 361 at 374-375; *Hargrave v Goldman* (1963) 110 CLR 40 at 61-62; *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] 1 AC 617 at 639-640; *Goldman v Hargrave* (1966) 115 CLR 458 at 461. See also the remarks of Lord Cooke of Thorndon in *Hunter v Canary Wharf Ltd* [1997] AC 655 at 711.

230 *Hargrave v Goldman* (1963) 110 CLR 40 at 62; see also Winfield, "Nuisance as a Tort", (1931) 4 *Cambridge Law Journal* 189 at 198-199.

231 *Ware v Garston Haulage Co Ltd* [1944] KB 30.

previously would have been pleaded in case were presented as actions in public nuisance.

128 Nor, in many instances, have the contemporary Australian decisions respecting the operation of the "highway rule" in negligence actions directed attention to the central question. This did not arise in the treatment in *Buckle* of the issues in that case. It concerns the circumstances in which, to use the words of Mason J in *Sutherland Shire Council v Heyman*[232], a public authority "may by its conduct place itself in such a position that it attracts a duty of care which calls for exercise of [its statutory] power". One exception is the judgment of Connolly J in *Desmond v Mount Isa City Council*[233] where his Honour considered *Heyman* and *Wyong Shire Council v Shirt*[234]. In other cases, it apparently has been assumed that, for some good reason, the "immunity" does not apply, and the litigation has been determined upon application of the general principles of negligence[235].

129 The time has now come, by parity with the reasoning in *Burnie Port Authority v General Jones Pty Ltd*[236], to treat public nuisance, in its application to the highway cases, "as absorbed by the principles of ordinary negligence"[237]. In any event, as has been indicated above, the intrusion of nuisance into this field in the mid-nineteenth century lacked any firm doctrinal basis.

(viii) The immunity and statute

130 Section 32(1A) of the *Main Roads Act* 1924 (NSW) ("the Main Roads Act")[238] provided that, when the Commissioner for Main Roads carried out

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232 (1985) 157 CLR 424 at 459-460.

233 [1991] 2 Qd R 482 at 494-496.

234 (1980) 146 CLR 40 at 47.

235 Examples appear to be *Hodgson v Cardwell Shire Council* [1994] 1 Qd R 357 at 365-366 and *Roads and Traffic Authority (NSW) v Scroop* (1998) 28 MVR 233 at 238.

236 (1994) 179 CLR 520.

237 (1994) 179 CLR 520 at 556.

238 Inserted by s 15 of the *Main Roads (Amendment) Act* 1936 (NSW) and amended by s 2 of the *Main Roads and Local Government (Amendment) Act* 1957 (NSW).

certain work, the Commissioner was to have, for that purpose, "all the powers and immunities of a council under the [LG Act] and any other Acts conferring powers or immunities on a council". The Main Roads Act was repealed in 1986 by the RTA Act[239] but s 12(1) stated that the RTA had in relation to construction and maintenance of a classified road or a toll work the "immunities of a council in relation to a public road". Sections 17 and 18 of the RTA Act used similar expressions with respect to work by the RTA on roads not within the area of a council and on roads other than classified roads. The RTA Act was repealed, after the events giving rise to this litigation, by the Roads Act, but ss 65 and 72 of the Roads Act contain similar provisions.

131 It will be observed that the provisions relevantly in force, those of the RTA Act, did not attempt to specify the content of the "immunity" of councils in relation to public roads. That would have been a difficult task, given the exceptions and qualifications apparent in the case law when the RTA Act was enacted in 1986. What the legislation did was to place the RTA in the position in which the case law placed councils with respect to construction and maintenance of public roads. That case law then was and had been for a long period in a state of flux.

132 The legislation does not present an occasion for the analogical use of statute law to develop the common law[240]. Rather, the Singleton Shire Council submits that the effect of the legislation is to freeze the development of the common law, apparently to its state as understood in New South Wales in 1986. There are obvious difficulties in subjecting the common law of Australia to paralysis by reason of the provisions of a State law giving particular protection to the activities of a public authority of that State. Moreover, the RTA Act did not attempt to declare what the relevant common law was before the RTA Act; this can only be ascertained from the relevant decided cases, and, in the words of Roskill LJ in *Henry v Geoprosco International Ltd*, in such a situation[241]:

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239 s 103 and Sched 1.

240 cf *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 59-63 [18]-[28]; Beatson, "The Role of Statute in the Development of Common Law Doctrine", (2001) 117 *Law Quarterly Review* 247 at 264-265.

241 [1976] QB 726 at 751. The litigation concerned the enforcement in England of foreign judgments and the *Foreign Judgments (Reciprocal Enforcement) Act* 1933 (UK).

"[o]ne cannot ascertain what the common law is by arguing backwards from the provisions of the statute".

133 The Shire Council relied heavily upon a decision subsequent to *Geoprosco*. But in the argument in this later case, *Geoprosco* appears not to have been cited. The case, *Owens Bank Ltd v Bracco*[242], turned upon the construction of s 9 of the *Administration of Justice Act* 1920 (UK). This denied registration to judgments rendered in Commonwealth and Empire courts where they had been "obtained by fraud". In *Bracco*, the statute was treated by the House of Lords as adopting and re-enacting the common law on that subject, as understood at 1920, to the exclusion of any later development of the common law respecting recognition of foreign judgments[243]. On the other hand, the provisions of the RTA Act are so drawn as to place the RTA in like position to councils in so far as they enjoy an "immunity" under the common law. The legislation attracts to the RTA such immunity as is available from time to time to councils; it does not entrench the immunity of councils such as the present respondents with a content as understood from an examination of the case law in 1986.

E. What should replace *Buckle* and *Gorringe*?

134 It is apparent that the "highway rule" as it has developed in Australia is an unsatisfactory accommodation of the competing interests. First, the rule operates capriciously and denies equal protection of the law by barring absolutely a remedy to victims of the negligent omissions of highway authorities while other victims of negligent omissions of other public authorities, or of highway authorities in some other legal persona, are compensated in analogous circumstances. Moreover, in the latter class of case, limitation of funds affords no answer by the defendant.

135 Secondly, a result of the growth of the misfeasance rule (and that respecting "artificial structures") is that an authority will escape liability if it has never attempted to repair some danger on a road or bridge but thereafter may become liable if it attempts, even perfunctorily, to repair it. The practical consequence is to abrogate the immunity once an authority takes any remedial action and to open up its actions to scrutiny according to the usual principles of negligence. This state of affairs provides a strong incentive to an authority not to address a danger on a roadway.

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242 [1992] 2 AC 443.

243 [1992] 2 AC 443 at 487-489.

136 Thirdly, the operation of the "highway rule" is to make some "positive" action, in effect, the determinant of the litigation. A corollary is the necessity to make "the most detailed investigation of the authority's past records, in order to determine what, if any, positive work the authority has carried out on the defective roadway"[244]. Such an inquiry may be impractical or impossible for the plaintiff for reasons wholly within the defendant's control[245]. These concerns may increase when work previously performed by a public authority is "outsourced"[246] to an independent contractor[247]. There may also be cases where it is impossible to obtain evidence of any work either due to effluxion of time or because a defendant authority has succeeded (sometimes not even directly) the body which first did the work[248]. To hold that a plaintiff must fail for want of evidence of positive action taken at some time in the past which discloses "when, or by whom, or by which, the relevant work [was] carried out"[249] is apt to exclude meritorious cases.

137 We conclude that the common law of Australia did not give rise to the "immunity" spoken of in the "highway rule" pleaded in *Brodie* and relied upon in *Ghantous*. *Buckle* and *Gorringe* should not be taken as placing any impediment in the path of what otherwise would be a right to a judgment in negligence.

138 The abolition of the "immunity" would not move the law from the extreme of non-liability to the other extreme of liability in all cases. There would not be imposed a duty which can be discharged only by repairing roads to bring them to a perfect state of repair. The opposite of "non-repair" is not "perfect repair".

139 The relevant considerations in expressing the duty of care that does arise involve the exercise of statutory powers such as those conferred by the LG Act upon the respondents. Those powers have been outlined earlier in these reasons under the heading "Negligence and statutory powers". The content of the duty of

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244 *City of Melbourne v Barnett* [1999] 2 VR 726 at 728.

245 See *Lake Macquarie City Council v Bottomley* (1999) 103 LGERA 77 at 90-91.

246 *City of Melbourne v Barnett* [1999] 2 VR 726 at 730-731.

247 *Roads and Traffic Authority (NSW) v Scroop* (1998) 28 MVR 233 at 236-238.

248 See *Florence v Marrickville Municipal Council* [1960] SR (NSW) 562 at 565; *Lake Macquarie City Council v Bottomley* (1999) 103 LGERA 77.

249 *Lake Macquarie City Council v Bottomley* (1999) 103 LGERA 77 at 90.

care to be owed by public authorities may be outlined by reference both to the fundamentals of the law of negligence and some of the decided cases. Many of these cases would fall to be decided the same way under an approach properly resting upon principles of negligence. In particular, cases imposing liability upon the criterion of "misfeasance" may be given a firmer footing on ordinary considerations of negligence.

140 There may remain the apprehension that to put aside the "immunity" in respect of the exercise or failure to exercise statutory powers such as those conferred by the LG Act upon the respondents, particularly those of road maintenance, offers no discrimen whereby to some but not others of the wide range of permissive powers vested in various statutory authorities there attaches the "ought" of the duty of care. Such an apprehension would be excessive. The powers vested by the LG Act in the respondents gave them a measure of control over the safety of the person or property of citizens which was significant and exclusive. In general, road users in New South Wales are not empowered to manage or change the features of public roads. Without the consent of the relevant authority, a person must not erect a structure or carry out work in, or over, a public road, dig up or disturb its surface or remove or interfere with a structure, work or tree upon it[250]. The result, as indicated earlier in these reasons under the heading "Negligence and statutory powers", is that the powers vested in road authorities give them a significant and special measure of control over the safety of the person and property of road users. This may make it incumbent upon the authority to exercise its powers, whether by averting the danger to safety or by bringing it to the notice of persons in the situation of the plaintiff. In *Pyrenees Shire Council v Day*[251], the powers of the appellant were in this category[252].

141 As a matter of history, the public right of user of highways was so important to social and economic intercourse that, at common law, a highway authority might be indictable for a nuisance arising from its failure to repair[253]. The use of public roads remains a matter of basic right and necessity. Reference has been made earlier in these reasons to the discussion by Mahoney AP in

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250 Roads Act, s 138(1).

251 (1998) 192 CLR 330.

252 See *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 61 [166].

253 *Buckle* (1936) 57 CLR 259 at 292.

Hughes v Hunters Hill Municipal Council[254] of the particular competing interests sought to be accommodated by the "highway rule". The balance this struck, as we have sought to demonstrate, has proved unsatisfactory, but the competing interests remain.

142 It is significant that, the "highway rule" apart, this Court in various circumstances has favoured the imposition of a duty of care requiring the exercise of statutory powers affecting the safety of users of public roads. In *Buckle* itself[255], Latham CJ held that it was the duty of the Road Board to keep the drain in proper order so as to prevent it from becoming a danger to the public and that the Board negligently failed to carry out that duty. In *Gorringe*[256], Dixon J said that "[t]he presumption" in the case of a tramway authority is "that it will incur a civil responsibility for a negligent failure to repair and maintain in a condition of safety the rails and surface of its tramway". Reference has been made earlier in these reasons to *Thompson v Bankstown Corporation*[257]. What is of present significance is the conclusion by Kitto J[258] that, on any view of the evidence, the situation in which the accident occurred had arisen through the council's omission either to remove altogether the earthwire (which had become charged) or to see that it did not become dangerously insecure. Section 382(1) of the LG Act had empowered the Bankstown Corporation to "construct, extend, protect, maintain, control, and manage … works … for the supply of electricity".

143 Many of the large number of decisions in other Australian courts where, despite reliance upon non-feasance, the plaintiff succeeded because one or other of the exceptions or qualifications to the "highway rule" applied, proceeded on the tacit or express assumption that statutory powers rather than duties engendered a duty of care.

144 It is true, as Gaudron J pointed out in *Romeo v Conservation Commission (NT)*, that the mere existence of powers in an authority does not of itself create a

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254 (1992) 29 NSWLR 232 at 236.

255 (1936) 57 CLR 259 at 276-277.

256 (1950) 80 CLR 357 at 369.

257 (1953) 87 CLR 619.

258 (1953) 87 CLR 619 at 644.

duty of care[259]. However, her Honour subsequently stated in *Crimmins v Stevedoring Industry Finance Committee*[260]:

> "It is not in issue that a statutory body, such as the Authority, may come under a common law duty of care both in relation to the exercise[261] and the failure to exercise[262] its powers and functions. Liability will arise in negligence in relation to the failure to exercise a power or function only if there is, in the circumstances, a duty to act[263]. What is in question is not a statutory duty of the kind enforceable by public law remedy. Rather, it is a duty called into existence by the common law by reason that the relationship between the statutory body and some member or members of the public is such as to give rise to a duty to take some positive step or steps to avoid a foreseeable risk of harm to the person or persons concerned[264]."

145 In *Aiken v Kingborough Corporation*[265], Dixon J observed that the general grounds for treating a situation as throwing a duty of care upon a public authority

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259 (1998) 192 CLR 431 at 457-458 [64].

260 (1999) 200 CLR 1 at 18 [25].

261 *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 220 per Dixon CJ, McTiernan, Kitto and Taylor JJ; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 436 per Gibbs CJ (Wilson J agreeing), 458 per Mason J, 484 per Brennan J, 501 per Deane J; *Stovin v Wise* [1996] AC 923 at 943-944 per Lord Hoffmann; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 391-392 per Gummow J.

262 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 443 per Gibbs CJ (Wilson J agreeing), 460-461 per Mason J, 479 per Brennan J, 501-502 per Deane J; *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 302 per Kirby P, 328 per McHugh JA; *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

263 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 443-445 per Gibbs CJ (Wilson J agreeing), 460-461 per Mason J, 478 per Brennan J; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 368-369 per McHugh J.

264 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 368-369 per McHugh J. See also *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 460-461 per Mason J and the cases there cited.

265 (1939) 62 CLR 179 at 206-207.

appeared "in the already well-known statement of Lord Atkin in *Donoghue v Stevenson*[266]", but that "it is one thing to impute in general terms a duty of care and another to define its measure". *Aiken* concerned the liability of a public authority in respect of its control, management and maintenance of a jetty used by the plaintiff, as a member of the public, to moor his boat. This Court rejected[267] the proposition that the jetty was a highway to which there applied the "immunity" in respect of non-feasance. The property remained in the Crown but the statutory power of control and management of the structure by the authority spelt occupation by it in its own right[268]. Dixon J concluded that[269]:

> "the public authority in control of such premises is under an obligation to take reasonable care to prevent injury to such a person through dangers arising from the state or condition of the premises which are not apparent and are not to be avoided by the exercise of ordinary care".

146 In *Romeo*[270], Brennan CJ pointed out that this formulation by Dixon J had reflected what, at the time, was seen as the duty owed by an occupier to an invitee. The duty owed by an occupier of private land to various classes of entrant is now comprehensively formulated in *Australian Safeway Stores Pty Ltd v Zaluzna*[271]. What, for present purposes respecting authorities dealing with roads, follows from that development of the law? Is the measure of the duty of care imposed upon bodies such as the respondent Councils to be found in the formulation in *Aiken*, in that in *Zaluzna*, or in a reconciliation between the two along the lines indicated by Brennan J in *Nagle v Rottnest Island Authority*[272], and by Toohey and Gummow JJ in *Romeo*[273]? Are highways such an essential part of the national infrastructure and the respective positions of highway authorities and users so *sui generis* as to render inapt any analogy which sees users as entrants or visitors and authorities as occupiers?

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266 [1932] AC 562 at 579-582.

267 (1939) 62 CLR 179 at 189, 197.

268 (1939) 62 CLR 179 at 203-204.

269 (1939) 62 CLR 179 at 210.

270 (1998) 192 CLR 431 at 442-443 [17].

271 (1987) 162 CLR 479.

272 (1993) 177 CLR 423 at 440.

273 (1998) 192 CLR 431 at 454-455 [50]-[52].

147 In *Romeo*, Hayne J, speaking of the position of the respondent which, by statute, occupied, used, managed and controlled parks, reserves and sanctuaries in the Northern Territory, remarked[274]:

> "It has now long been held by this Court that the position of an authority, such as the Commission, which has power to manage, and does manage, land which the public use as of right is broadly analogous to that of an occupier of private land[275]. It is the management of the land by the authority which provides the necessary relationship of proximity between authority and members of the public."

148 In *Buckle*, Dixon J had disavowed any analogy between the position of a highway authority and that of the ownership or occupation of private property[276]. Nevertheless, as indicated above, that view of the matter did not inhibit Dixon J in *Aiken* in framing a duty of care analogous to that of an occupier and invitee where that which the authority "occupied" was not a highway. The formulation of the content of the duty of care in this field should not further pursue any analogy between occupation of privately owned land and the management and control by statutory bodies of lands set aside for public use and enjoyment. The rights involved in this litigation are different in nature and degree to those enjoyed by visitors or entrants to or upon the scenic coastal reserve in *Romeo*, or the Basin swimming area at Rottnest Island.

149 The better course is that indicated in the passage from *Webb v The State of South Australia* set out earlier in these reasons. The Court there[277] gave to the duty of care of the highway authority a content reflecting what had been said by Mason J in *Wyong Shire Council v Shirt*[278].

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274 (1998) 192 CLR 431 at 487-488 [152].

275 *Aiken* (1939) 62 CLR 179 at 190-191 per Latham CJ, 199-200 per Starke J, 205-206, 209 per Dixon J; *Schiller v Mulgrave Shire Council* (1972) 129 CLR 116 at 120 per Barwick CJ, 124-128 per Walsh J, 134 per Gibbs J; *Nagle* (1993) 177 CLR 423 at 428 per Mason CJ, Deane, Dawson and Gaudron JJ.

276 (1936) 57 CLR 259 at 280-281.

277 (1982) 56 ALJR 912 at 913; 43 ALR 465 at 467-468.

278 (1980) 146 CLR 40 at 47-48.

F. Content and breach of the duty of care

150 The duty which arises under the common law of Australia may now be considered. Authorities having statutory powers of the nature of those conferred by the LG Act upon the present respondents to design or construct roads, or carry out works or repairs upon them, are obliged to take reasonable care that their exercise of or failure to exercise those powers does not create a foreseeable risk of harm to a class of persons (road users) which includes the plaintiff. Where the state of a roadway, whether from design, construction, works or non-repair, poses a risk to that class of persons, then, to discharge its duty of care, an authority with power to remedy the risk is obliged to take reasonable steps by the exercise of its powers within a reasonable time to address the risk. If the risk be unknown to the authority or latent and only discoverable by inspection, then to discharge its duty of care an authority having power to inspect is obliged to take reasonable steps to ascertain the existence of latent dangers which might reasonably be suspected to exist.

151 The perception of the response by the authority calls for, to adapt the statement by Mason J in *Wyong Shire Council v Shirt*[279], a consideration of various matters; in particular, 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 above to alleviate the danger, and any other competing or conflicting responsibility or commitments of the authority. The duty does not extend to ensuring the safety of road users in all circumstances[280]. In the application of principle, much thus will turn upon the facts and circumstances disclosed by the evidence in each particular case.

152 In dealing with particular cases and in determining factual issues respecting breach of duty, it may be convenient to differentiate between the design and construction of a roadway, between subsequent works done on it and

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279 (1980) 146 CLR 40 at 47-48.

280 The result, in broad terms, may not differ from the recommendation as to the obligations of local government bodies by the Public Bodies Review Committee of the New South Wales Parliament in its report, *Public Liability Issues Facing Local Councils*, November 2000, Recommendation 9 at 10:

> "That the principle of non feasance for the repair of roads remain in place or that statutory immunity from liability for the repair of roads should be provided subject to councils meeting a reasonable standard of maintenance agreed by an external authority."

between courses of inspection to ascertain its soundness. These matters are not mutually exclusive and sometimes may overlap.

(i) Construction and design

153 Issues may arise as to whether there was a foreseeable risk of harm arising from the design or the method of construction employed and whether, in choosing or performing the design and construction or in failing to take preventative measures or to put into place warning signs, the authority responsible failed to exercise reasonable care.

154 There will be variations respecting the manner in which a road, as designed and constructed, may be dangerous and likely to cause injury. The laws of physics may dictate that an ordinary road user is subject to forces making use of the road dangerous. For example, the road may be improperly cambered on a curve[281], or the road, its sides or shoulders may be inadequate to support vehicles which may reasonably be expected to stop or travel upon it[282]. The pattern and path of the road may present a danger, often as a result of the terrain through which it must pass, from sharp curves, a steep incline or the like. The design of the road may be such that natural forces or elements may create a danger. For example, natural watercourses may make the road surface slippery or uneven[283], or the design of the road may allow natural forces to deposit dangerous quantities of gravel upon it[284]. The road markings may create, conceal or mislead as to the existence of a danger in the road surface[285], or the design of the road or structures on it may present a concealed danger[286].

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281 *Turner v Ku-ring-gai Municipal Council* (1990) 72 LGRA 60; *McIntyre v Ridley District Council* (1991) 56 SASR 343; *Blacktown Municipal Council v Scanlon* (1993) 79 LGERA 387.

282 *McDonogh v Commonwealth of Australia* (1985) 9 FCR 360; *Huon Municipal Corporation v W M Driessen & Sons Pty Ltd* (1991) 72 LGRA 240.

283 *Hill v Commissioner for Main Roads* (1989) 68 LGRA 173.

284 *Desmond v Mount Isa City Council* [1991] 2 Qd R 482.

285 *Roads and Traffic Authority (NSW) v Scroop* (1998) 28 MVR 233 (bollards misled as to position of edge of road).

286 *Cook v Ku-ring-gai Municipal Council* (1936) 13 LGR 45 at 51.

155 The question whether "due care and skill" was taken[287] 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.

156 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[288] (so that, if exercising due regard for their own safety, users are able to avoid the danger[289]), or by building into or adding to the road features such as safety devices or fencing which tend to minimise the danger[290].

157 The safety of a road may be altered by changes to the ground over which it passes. These changes may produce a source of danger which requires the taking of reasonable steps to remove or minimise it. Thus, for example, if a ravine is cut alongside a road, or exposed by the removal of natural scrub, it might well be incumbent on an authority having the management of that road to install fencing to prevent users of the road too easily falling into the ravine[291].

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287 The phrase used by Windeyer J in *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 85.

288 See, eg, *Ffrench v Ridley District Council* (1990) 12 MVR 39 (camber and curve) and cf *McIntyre v Ridley District Council* (1991) 56 SASR 343, where the warning signs were inadequate and *Turner v Ku-ring-gai Municipal Council* (1990) 72 LGRA 60, where an issue as to negligent failure to erect an advisory speed sign was wrongly withdrawn from the jury.

289 *Day v Commissioner of Main Roads (WA)* (1989) 9 MVR 471 (roadworks creating dusty conditions); *Bitupave Ltd v Bollington* (1998) 28 MVR 223 (inadequate signage); *Roads and Traffic Authority (NSW) v Scroop* (1998) 28 MVR 233; *Roads and Traffic Authority (NSW) v Snape* (1999) 28 MVR 423.

290 *Flukes v Paddington Municipal Council* (1915) 15 SR (NSW) 408; cf *Coucher v The Corporation of Newcastle* (1869) 8 SCR (L) 309.

291 *Miller v McKeon* (1905) 3 CLR 50; *Flukes v Paddington Municipal Council* (1915) 15 SR (NSW) 408.

(ii) Repair, maintenance and works

158 A rejection of the "immunity" for "highway authorities" and the recognition of a duty of care in terms expressed above with reference to *Wyong Shire Council v Shirt* 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. An authority may have various statutory powers invested in it and would be under a duty not to use, misuse or fail to use those powers to create a situation of danger which creates a reasonably foreseeable risk of injury to a user of the road.

159 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[292], from a failure to remove unsafe items in or near a road[293], or from the placing of items upon a road which create a danger[294], or the removal of items which protect against danger[295].

160 In dealing with questions of breach of duty, whilst there is to be taken into account as a "variable factor" the results of "inadvertence" and "thoughtlessness"[296], a proper starting point may be the proposition that the persons using the road will themselves take ordinary care[297].

161 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. Although it has been said many times that the digging of a hole in a roadway constitutes an actionable misfeasance, the size and location of such a

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292 *Greater Bendigo City Council v Miles* (2000) 31 MVR 137 at 137-138.

293 An issue adverted to by Hayne J in *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 488 [153]. See, eg, *Stovin v Wise* [1996] AC 923; cf *Weir v Commissioner for Main Roads* (1947) 17 LGR 1; *Vale v Whiddon* (1949) 50 SR (NSW) 90.

294 *Thompson v Bankstown Corporation* (1953) 87 CLR 619.

295 *Flukes v Paddington Municipal Council* (1915) 15 SR (NSW) 408.

296 *Smith v The Broken Hill Pty Co Ltd* (1957) 97 CLR 337 at 343.

297 *Miller v McKeon* (1905) 3 CLR 50 at 60.

hole may vary and must be considered when determining, on the facts of the particular case, whether it will reasonably foreseeably lead to injury or harm to a user of the road. Depending on the conditions of the road, a "hole" caused by removal of a portion of the road surface may not pose any foreseeable risk to cars; signs may provide adequate warning against whatever risks it poses to motor-cyclists or cyclists. On the other hand, a trench in the roadway, whether arising from active digging or decay of the road or structures within it, will more readily give rise to a foreseeable risk of injury, particularly where it cannot easily be seen or avoided by a road user. The nature of the defect, and not the question of whether it arose by action or "non-feasance", should be significant. The court record and the report of *Gorringe* do not disclose sufficient material to enable it now to be said that under this dispensation the plaintiff in *Gorringe* would have recovered in respect of the injury sustained upon the collapse of the "appreciable depression"[298] in the road surface.

162 The formulation of the duty of care includes consideration of competing or conflicting responsibilities of the authority. In the circumstances of a given case, it may be shown that it was reasonable for an authority to deal in a particular priority with repairs in various locations. The resources available to a road authority, including the availability of *matériel* 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. Even so, it may well be reasonable for the authority to exercise other powers including, for example, by erecting warning signs, by restricting road usage or, in extreme cases, by closing the road in question.

(iii) Pedestrians

163 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. In general, such persons are more able to see and avoid imperfections in a road surface. It is the nature of walking in the outdoors that the ground may not be as even, flat or smooth as other surfaces. As Callinan J points out in his reasons in *Ghantous*, 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. Of course, some allowance must be made for inadvertence. Certain dangers may not readily be perceived because of

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298 (1950) 80 CLR 357 at 358.

inadequate lighting or the nature of the danger (as in *Webb v The State of South Australia*[299]), or the surrounding area (as in *Buckle*, where the hole was concealed by grass[300]). In such circumstances, there may be a foreseeable risk of harm even to persons taking reasonable care for their own safety. These hazards will include dangers in the nature of a "trap" or, as Jordan CJ put it, "of a kind calling for some protection or warning"[301]. In *Romeo*, Toohey and Gummow JJ noted in a different context that the care to be expected of members of the public is related to the obviousness of the danger[302]. Kirby J pointed out in the same case that even an occupier of premises "is generally entitled to assume that most entrants will take reasonable care for their own safety"[303]. Each case will, of course, turn on its own facts[304].

(iv) Inspections

164 Cases respecting inspections for dangerous conditions have been determined by the dichotomy between misfeasance and non-feasance. A "highway authority" was not liable if it failed to conduct inspections but, seemingly, was liable if it began remedial work in response to the discovery by inspection of defects[305] or, possibly, even once it discovered the existence of those defects. These cases usually involved "non-feasance", as an inspection typically discloses a situation which is unsafe and needs repair. Allied to them are cases in which a danger first manifests itself when the road surface, or a structure, collapses or gives way either under the plaintiff or shortly before it is crossed.

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299 (1982) 56 ALJR 912; 43 ALR 465.

300 (1936) 57 CLR 259 at 266.

301 *Searle v Metropolitan Water, Sewerage and Drainage Board* (1936) 13 LGR 115 at 117.

302 (1998) 192 CLR 431 at 455 [52].

303 (1998) 192 CLR 431 at 478 [123].

304 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 253 [198]; *Avenhouse v Hornsby Shire Council* (1998) 44 NSWLR 1 at 8; Stapleton, "Duty of Care Factors: a Selection from the Judicial Menus", in Cane and Stapleton (eds), *The Law of Obligations*, (1998) 59 at 60-63.

305 *Hodgson v Cardwell Shire Council* [1994] 1 Qd R 357; cf *Kirk v Culcairn Shire Council* (1964) 64 SR (NSW) 281 at 288-289.

165 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[306], and, if they are found, fails to take reasonable steps to correct them. In the cases, the danger usually manifests itself in decayed beams or supports of bridges, or drains or culverts, or other structures supporting a road or its surface. The reports of *Macpherson*[307], *Buckle* and *Gorringe* all disclose insufficient facts to determine the reasonableness of the inspections which did take place or of the failure to inspect and ascertain the existence of the danger which caused the injury to the plaintiffs in those cases.

G. The facts in *Ghantous*

166 The facts are considered by Callinan J on the footing that an action in negligence would lie against the Hawkesbury City Council for failure to maintain or improve the footpath in question and to keep or make it safe. His Honour concludes that there was no failure in that regard because the footpath was not unsafe for a person taking ordinary care.

167 We agree with his Honour's analysis of the facts and with his conclusion that there was no breach of duty by the Council, either in the construction of the footpath or in the failure to keep level the concrete strip and verges.

168 That conclusion also means that, putting the "immunity" to one side, the Council neither created nor negligently continued a nuisance, within the sense of the authorities considered earlier in these reasons[308]. As explained earlier in these reasons, *Ghantous* exemplifies the cases where the cause of action in nuisance is subsumed by that in negligence. However, it is apparent that the applicant's alternative nuisance claim would have failed in any event.

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306 *Hodgson v Cardwell Shire Council* [1994] 1 Qd R 357 at 362-363.

307 *Borough of Bathurst v Macpherson* (1879) 4 App Cas 256.

308 See also *Cartwright v McLaine & Long Pty Ltd* (1979) 143 CLR 549.

H. The facts in *Brodie*

169 The primary judge made clearly stated findings of fact to the following effect. The second applicant ("Londay") is the family company of Mr Brodie and his wife. It owned the chassis of the truck used by Mr Brodie in his trucking business. Pioneer Concrete (NSW) Pty Ltd ("Pioneer") owned the mixer attached to the chassis. Londay conducted its operations under contract with Pioneer.

170 On the morning of 19 August 1992, Mr Brodie picked up a load of concrete ordered by or on behalf of the New South Wales Water Resources Commission for work it was undertaking at the Glennies Creek Dam. Four loads of concrete were required and the first three trucks set off before Mr Brodie. He had been told that Pioneer had been engaged to finish off a job at the dam in place of Boral because the Boral trucks were "too big". The Boral trucks were 28-30 tonnes with a full load, whilst Mr Brodie's truck was 22 tonnes fully loaded.

171 On the way with his load of concrete, Mr Brodie passed two of the three other trucks as they were returning from the dam site. Mr Brodie had been told to go to the dam by following the Old Carrowbrook Road. Mr Brodie's evidence in cross-examination was that he had not used that road before. He passed over one bridge, called Frank's Bridge, which had a sign before it stating "15 tonne max", that is to say 7 tonnes less than Mr Brodie's truck. However, on the same day, three other trucks of 22 tonnes already had gone over Frank's Bridge. By inference, the much larger Boral trucks had done the same on other occasions. There was no finding that Mr Brodie ignored the warning posted before Frank's Bridge. To the contrary, the trial judge accepted that Mr Brodie did not see the sign before Frank's Bridge because, at the relevant time for doing so, he was concentrating on a car coming in the opposite direction. He did hear a message over the radio from one of the other Pioneer drivers that the bridge was "rickety". This Mr Brodie understood to mean that the bridge had some loose planks and he did not take the message as indicating that the bridge was in any way unstable.

172 The next bridge was Forrester's Bridge. There was no sign before it. Mr Brodie started the passage across the bridge at a speed of about 10 kilometres per hour when the girders supporting the bridge between the spans gave way, the bridge collapsed and the truck with the load of concrete fell 10 metres onto the creek bank.

173 The expert evidence was that the load limit of the bridge with solid timber girders was between 10.6 tonnes and 13.5 tonnes, but that the load limit of the bridge with timbers containing "piping", ie the rotting out of the centre of the

timbers because of either dry rot or white ants, was between 9.3 tonnes and 11.9 tonnes.

174 In the applicants' case, a number of documents were tendered from the files of the Shire Council indicating that it had been aware of the poor condition of the bridge and that, within the recent past before the accident, it had carried out some repairs on it. The bridge had been inspected in 1991 for the purpose of determining whether permission be given for crossing by a 20 tonne crane. Approval was given and the crane crossed and re-crossed without incident. Earlier, on 17 April 1986, the Shire Council had given permission for a vehicle to cross the bridge carrying pipes and having a gross weight of 40 tonnes. However, it was not clear what type of vehicle had been used.

175 On six occasions between March 1986 and July 1991, the Shire Council had carried out rectification work to the planks running perpendicularly across the girders, which were large timber beams running parallel to the road. The work had involved replacement of a significant number of planks on the bridge. All timber bridges were inspected four times a year by experienced leading hand bridge carpenters and others. The inspection consisted of a visual appraisal of all timbers, but the expert evidence was that this was insufficient to detect piping.

176 The primary judge held that, at the time the rectification work was carried out, the Shire Council staff should have discovered that the girders were substantially affected by piping, the deterioration being caused either as a result of dry rot or white ants. His Honour also found that, whilst this state of affairs might not be visible to the naked eye, it would have been quickly detectable by the action of hitting the girders with a hammer or driving a spike into them.

177 These findings bear out the conclusion for which the applicants contended in their written submissions at the trial that, by patching the bridge to make it capable of bearing traffic, the Shire Council had created a superficial appearance of safety without attacking the fundamental problem which made the bridge unsafe, namely the piping in the structural members.

178 This was not a case where the danger presented by the deteriorated condition of Forrester's Bridge could not reasonably have been suspected by the Shire Council to exist, nor was it a danger that could not have been ascertained except by taking unreasonable measures. Rather, this was a case which, on the evidence, involved the conduct of periodic inspections but the failure to take in the course of those inspections reasonable steps to look for such dangers as might reasonably be expected to arise.

179 Mr Brodie did not see the sign at the first bridge and his failure to do so is not to be attributed to any want of proper attention on his part. What was

decisive of the question of whether he had taken ordinary care in seeking to drive his load across Forrester's Bridge was the inference of safety which ordinarily would arise from the earlier passage that day across the bridge of similarly burdened trucks.

180 In their Reply, the applicants had pleaded that "[t]he doctrine of non-feasance is no longer good law". The Shire Council led no evidence as to liability. In particular, it did not lead evidence to rebut any inference otherwise arising from the applicants' case that it knew the bridge was in a dangerous condition. Nor did it lead evidence of reasons why it could not or did not carry out further work on the bridge. As Samuels JA put it, giving the judgment of the New South Wales Court of Appeal in *Hill v Commissioner for Main Roads*[309], "there was at least an evidentiary onus on the defendant to bring into contention the assertion that there were exculpatory economic circumstances which it might adopt as a shield".

181 In these circumstances, if there be put aside considerations arising from the "immunity" in respect of "non-feasance", the decision in favour of the applicants is supportable by application of the ordinary principles of negligence to the facts as found; there has been as yet no challenge in the Court of Appeal to these findings, in so far as this approach to the case is concerned.

182 The appeal by the Shire Council to the Court of Appeal was decided on the footing that, contrary to one basis upon which the applicants had run their case at trial, the "immunity" conferred by the doctrine of "non-feasance" was good law. However, as matters presently stand, there has been no determination by the Court of Appeal of any grounds challenging the findings at trial which, as we have indicated, would support a finding of liability under the ordinary principles of negligence. It may be that, as presently framed, the grounds of appeal would require expansion for that challenge to be made. We express no conclusion upon that question. Any necessary application to amend would have to be made to the Court of Appeal. What is of immediate importance is that this Court should not foreclose these issues by making an order with the effect of restoring the judgment at trial in favour of the applicants. The matter must be returned to the Court of Appeal.

183 In addition to contesting liability, the Shire Council disputed the correctness of the award of damages made to the first applicant for general damages, future medical expenses and future economic loss. In the event, it was

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309 (1989) 68 LGRA 173 at 181.

unnecessary for the Court of Appeal to deal with those issues. It must now be given the opportunity to do so.

I. Orders

184 In *Ghantous*, the application for special leave should be granted but the appeal should be dismissed with costs.

185 In *Brodie*, the application for special leave should be granted, the appeal should be allowed with costs, and the orders of the Court of Appeal set aside. The matter should be remitted to the Court of Appeal for the determination of the remaining issues on the appeal. Questions of costs of the appeal to the Court of Appeal and at the trial should be for determination by the Court of Appeal in the light of its final disposition of the appeal to that Court.

186 KIRBY J. These applications, referred to a Full Court[310], concern the so-called "highway rule". For many years it has been accepted in Australia that the common law provides "highway authorities" with an immunity from legal liability for negligence and nuisance, if the claim against them concerns some element of the "highway" and arises out of the failure ("nonfeasance") of the authority to exercise its powers (as distinct from a "misfeasance" or negligent exercise)[311]. Such immunity arises not from any express conferral of that privileged position by statute but as a result of judge-made law.

187 The applicants submit that this Court should re-express the common law. It should remove the immunity as a "relic" of an "out-worn fallacy"[312] which is "logically indefensible"[313]. It should absorb the liability of a highway authority within the mainstream of legal doctrine governing the liability of statutory authorities generally when sued for tortious performance of, or failure to perform, their statutory powers. Alternatively, if the immunity is maintained, the applicants contend that it did not, in their cases, operate to exempt the authorities concerned from liability otherwise attaching to them.

The three basic questions

188 Upon my analysis, three basic questions are presented by the applications. They are:

1. Is the highway rule a defensible rule of the common law in Australia, as viewed in the context of contemporary understandings of applicable legal principles and as judged in the setting of contemporary social conditions[314]?

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310 By order of Gaudron, Kirby and Hayne JJ, 10 December 1999.

311 Since *Buckle v Bayswater Road Board* (1936) 57 CLR 259 and *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357.

312 The comment of Denning LJ in *Greene v Chelsea Borough Council* [1954] 2 QB 127 at 138 on the immunity formerly enjoyed by landlords in relation to certain claims of their tenants: *Cavalier v Pope* [1906] AC 428 at 433; cf *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 90; *Jones v Bartlett* (2000) 75 ALJR 1 at 38-39 [230]; 176 ALR 137 at 187.

313 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 340 per Brennan CJ ("*Northern Sandblasting*").

314 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 86-87 [100] ("*Esso*").

2. If not, should this Court now re-express the common law as applicable to claims against highway authorities in terms that eliminate the immunity and subsume the liability of such authorities to that of other statutory authorities in the mainstream of applicable legal doctrine? Or should the Court refrain from disturbing the present expression of the common law upon the basis that any reformulation of that law is a matter for a legislature and not for a court?

3. If the common law should be re-expressed to abolish the immunity hitherto enjoyed by highway authorities, did a duty of care of a relevant scope apply to the authorities in question in the present proceedings? If so, was each applicant's respective damage caused by the breach of such duty so as to give rise to recovery in either matter?

The facts, legislation and common ground

189 The facts of the two cases before the Court are set out in the reasons of other members of the Court[315]. So is the applicable legislation in New South Wales empowering the respective respondents to perform functions in respect of public roads[316] and expressing an assumption that a council, in relation to a public road, enjoys "immunities" as well as "functions"[317]. I will not repeat those details.

190 At trial, each of the applicants formally submitted that the distinction between "nonfeasance" and "misfeasance" no longer represented the criterion by which the liability of the respective respondents was to be determined[318]. Neither respondent called evidence directed to the processes of its decision-making in respect of the "road" in question, the limitations on available resources or competing priorities. In Mr Brodie's case, the respondent called no evidence at all in respect of the issue of its liability. In Mrs Ghantous's case the only

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315 As to *Ghantous v Hawkesbury City Council*, see the reasons of Gaudron, McHugh and Gummow JJ at [51], [166]-[167] ("the joint reasons"); and reasons of Callinan J at [340]-[351]. As to *Brodie v Singleton Shire Council* see the joint reasons at [52], [169]-[183]; and reasons of Callinan J at [367]-[368].

316 Notably *Local Government Act* 1919 (NSW) (since repealed), ss 220, 226, 227, 229, 232, 235, 236, 240, 249, discussed in the reasons of Callinan J at [371].

317 *State Roads Act* 1986 (NSW) (since repealed), ss 12(1), 17, discussed in the reasons of Callinan J at [374]-[375]; cf *Roads Act* 1993 (NSW), ss 65 and 72.

318 See the reasons of Callinan J at [349], [370] with respect to *Ghantous v Hawkesbury City Council*, and the applicants' submissions in reply with respect to *Brodie v Singleton Shire Council*.

evidence called by the respondent was that of an engineer qualified to give expert testimony of a general character.

191 It follows that, in neither case, was there evidence of a specific kind as to the reasons why each respondent, as a road authority, could not, and did not, repair the particular section of "road" alleged to have been dangerous[319]. Each respondent pleaded, relied upon and, in the result, succeeded in its defence based on the immunity belonging to a highway authority. In Mrs Ghantous's case, she failed at trial on the basis of a finding that the immunity was applicable. In Mr Brodie's case, although he succeeded at trial[320], he lost that judgment on appeal. The Court of Appeal dismissed Mrs Ghantous's appeal[321]. It upheld Singleton Shire Council's appeal in Mr Brodie's case[322]. It rejected both claims as unsustainable in law having regard to the highway rule, binding on the Court of Appeal, as established by this Court's decisions in *Buckle v Bayswater Road Board*[323] ("*Buckle*") and *Gorringe v The Transport Commission (Tas)*[324] ("*Gorringe*").

192 Although it was not open to the Court of Appeal to question or review any rule established by the foregoing decisions of this Court[325], it is open to this Court to do so. The applicants have submitted that this should be done. In the circumstances, this Court is required to consider and rule upon that submission.

The highway rule is unsustainable in principle

193 I am relieved of the obligation to examine, at any length, the first question that I have identified. Such examination appears in the joint reasons in terms that I accept. Their Honours have examined the sources in the law of England from

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319 cf *Hill v Commissioner of Main Roads (NSW)* (1989) 68 LGRA 173 at 181 per Samuels JA; 9 MVR 45 at 53.

320 As did Londay Pty Ltd, the family company of Mr Brodie and his wife, the second applicant in those proceedings. See the joint reasons at [169].

321 *Ghantous v Hawkesbury City Council* (1999) 102 LGERA 399 per Powell JA (Handley and Giles JJA concurring).

322 *Singleton Shire Council v Brodie* [1999] NSWCA 37 per Powell JA (Handley and Giles JJA concurring).

323 (1936) 57 CLR 259.

324 (1950) 80 CLR 357.

325 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403 [17].

which the immunity of highway authorities was developed. They have indicated how the highway rule was originally devised in a legal context quite different from that of the Australian colonies into which the common law of England was received[326]. Although, from the start, the building of public highways and roads in Australia was a responsibility of government, and eventually of statutory bodies (and not of parishes or the men thereof as in England[327]), the transfer of the rule of the English common law to Australian law occurred without regard to three considerations that we can now see as legally critical.

194 The first of these was the detailed statutory regime which, in Australia, came quickly to govern the powers and duties of highway authorities in respect of the construction, repair and maintenance of highways and roads[328]. The second, connected with the first, concerned the identification of a defendant competent to be sued in nuisance. Once a statutory corporation was identified as liable to be sued this problem disappeared. The third consideration was the general development of the law of negligence following *Heaven v Pender*[329] and *Donoghue v Stevenson*[330].

195 The immunity of highway authorities arose in England and was received into Australian law before the tort of negligence was fully developed[331]. In recent decades, the reconceptualisation of that tort in *Donoghue v Stevenson* has influenced many developments in the law of negligence in this Court[332]. However, the emergence of a coherent law of negligence[333] had not occurred when *Buckle* fell to be decided in this Court in 1936. The analysis of the liability

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326 See Friedmann, "Liability of Highway Authorities", (1951) 5 *Res Judicatae* 21 at 28 ("Friedmann"); *Hughes v Hunters Hill Municipal Council* (1992) 29 NSWLR 232 at 235.

327 *Russell v The Men of Devon* (1788) 2 TR 667 [100 ER 359]; cf *Cowley v Newmarket Local Board* [1892] AC 345.

328 The joint reasons at [62]-[64], [102], [130]-[131].

329 (1883) 11 QBD 503 at 509.

330 [1932] AC 562 at 580-581.

331 The joint reasons at [127].

332 See eg the common law liability to trespassers, to other entrants onto land, for negligent mis-statement and for pure economic loss: the joint reasons at [85], [146].

333 The joint reasons at [116].

of the highway authority in that case (including that of Dixon J who was there in dissent) was not challenged in *Gorringe*. That decision represents the last occasion on which the immunity of highway authorities was considered by this Court.

196 The result of *Buckle* and *Gorringe*, perhaps harmonious to a time when this Court's decisions were subject to appeal to the Privy Council, has been the importation into Australian law of a rule of dubious applicability to Australian conditions[334]; traceable to peculiarities of early English road-building responsibilities; sustained in part by particularities of the law of nuisance; indifferent to the distinct local statutory provisions governing Australian highway authorities; and overtaken by profound developments of the tort of negligence, not earlier considered by this Court. Thus, by a kind of time-warp, the English rule came to be applied in Australia. Earlier authority of this Court[335] which, left to itself, might have developed a suitable local rule, was ignored. Instead a rule was expressed conferring a large immunity on Australian statutory highway authorities. At common law they were not liable for "nonfeasance". They were only liable for "misfeasance".

197 By clear provision, a statute otherwise within power may afford immunity to a person or body named[336]. However, any such immunity will be strictly, even jealously, confined in the terms of the statute. This is because immunity represents a departure from the ordinary rule of civil liability and accountability upheld by the law[337]. A judicial distaste for the common law immunity provided to highway authorities quickly became evident in the decisions of Australian courts bound to apply the highway rule as established in *Buckle* and *Gorringe*. As the joint reasons point out[338], every element of that rule has given rise to difficulty as judges sought to confine the ambit of the immunity to the narrowest terms consistent with authority binding on them.

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334 McDonald, "Immunities Under Attack: The Tort Liability of Highway Authorities and their Immunity from Liability for Non-Feasance", (2000) 22 *Sydney Law Review* 411 at 419, 421-422 ("McDonald").

335 *Miller v McKeon* (1905) 3 CLR 50; *Woollahra Council v Moody* (1913) 16 CLR 353; see the joint reasons at [87].

336 *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at 593-598 [56]-[66].

337 *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at 583-584 [16]-[18]; *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 236 [129]; 167 ALR 575 at 611.

338 The joint reasons at [68]-[76], [79]-[83].

198 Thus, the definition of a "highway", for the purpose of the immunity, was restricted so as to exclude so-called artificial "constructions", "works" and "structures"[339]. Being a doctrine of the common law of Australia, particular statutory definitions of a "road" or "highway" could not control the ambit of the common law rule in this regard. The "structures" which were held to fall outside the immunity merely served to highlight the anomalies of the basic rule[340]. Moreover, the designation of particular statutory bodies as "highway authorities", such as enjoyed the immunity, and the determination of whether such bodies had acted, or failed to act, in a capacity as a highway authority, have led to other seemingly capricious results[341]. There appears to be no logic or justice in a rule of the common law that affords immunity to a "highway authority" but denies it to a sanitary, electricity or other authority with statutory powers, the exercise or neglect of which might just as readily affect the safety of persons on a "highway"[342].

199 The distinction between "nonfeasance" and "misfeasance" is also highly disputable and contentious[343]. Little wonder that the immunity from liability provided only to highway authorities should be so troubling to judges[344]. Not surprisingly it has produced countless distinctions, exceptions, qualifications and uncertainties. The result has been a body of law that can only be described as unprincipled[345], unacceptably uncertain[346] and anomalous[347], resting on an

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339 The joint reasons at [81]-[82]; cf McDonald, (2000) 22 *Sydney Law Review* 411 at 414-415.

340 McDonald, (2000) 22 *Sydney Law Review* 411 at 420, 433.

341 Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 712.

342 McDonald, (2000) 22 *Sydney Law Review* 411 at 422.

343 The joint reasons at [72], [84]-[90]; cf *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 391-392 [174]-[177] per Gummow J.

344 McDonald, (2000) 22 *Sydney Law Review* 411 at 420.

345 The joint reasons at [79]-[83].

346 The joint reasons at [114].

347 McDonald, (2000) 22 *Sydney Law Review* 411 at 420.

incongruous doctrine[348] and obscure and inexplicable concepts[349] and giving rise to disputable escape mechanisms[350] utilised by judges struggling to avoid conclusions so apparently unjust and repugnant to the normal policy of the law[351].

200 In such circumstances, with very few defenders[352] (and those offering "paltry"[353] and unconvincing justifications for the immunity), it would seem, on the face of things, that the highway rule is ripe for judicial re-expression in this Court. As is the nature of the common law, what the judges having the authority have made, they can unmake. They may do so when the rule previously established is shown to have many weaknesses both as a matter of legal authority and of legal principle and policy.

201 However, the respondents urged this Court to adhere to the highway rule as expressed in *Buckle* and *Gorringe*. They argued that such a rule of substantive law, having entered into the accepted body of the common law of Australia, should not be changed by this Court. Making such a change would constitute a legislative and not a judicial act. Any change should be left to the relevant Parliament. A legislature, if it saw fit, could enact an alteration of the law. The function of courts is to apply, and not to change, the law, at least a rule of law as well established as that affording highway authorities the immunity upon which the respondents relied for their defence.

202 The Court is unanimous, although for different reasons, that the proceedings brought by Mrs Ghantous fail. However, the Court is closely divided in Mr Brodie's case which therefore presents the crucial question for decision. On that question, I have reached the same conclusion as do the joint reasons. This Court can and should re-express the applicable law. I must therefore explain my reasons for concluding this way.

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348 Fleming, *The Law of Torts*, 9th ed (1998) at 485.

349 McDonald, (2000) 22 *Sydney Law Review* 411 at 415.

350 Sawer, "Non-Feasance Revisited", (1955) 18 *Modern Law Review* 541 at 546; see also Sawer, "Nonfeasance Under Fire", (1966) 2 *New Zealand Universities Law Review* 115.

351 Friedmann, (1951) 5 *Res Judicatae* 21 at 21.

352 One of these was Sawer, "Non-Feasance Revisited", (1955) 18 *Modern Law Review* 541.

353 Fleming, *The Law of Torts*, 9th ed (1998) at 485.

The general approach to change in rules of the common law

203 *Principled and consistent decisions*: It is obvious that the rules of the common law are in a constant process of alteration and re-expression. Far from this being a weakness of the legal system, its capacity to change is one of its greatest strengths. In *Kleinwort Benson Ltd v Lincoln City Council*, Lord Goff of Chieveley remarked[354]:

> "It is universally recognised that judicial development of the common law is inevitable. If it had never taken place, the common law would be the same now as it was in the reign of King Henry II; it is because of it that the common law is a living system of law, reacting to new events and new ideas, and so capable of providing the citizens of this country with a system of practical justice relevant to the times in which they live."

204 Judges of final courts of appeal, when invited to alter an accepted rule of the common law, may in one case give powerful expression to the call for restraint[355]. Yet in another case, the same judges may accept that a change in the expression of the law is essential. They may then support an alteration despite its having large consequences for the parties and for others[356].

205 To prevent judicial decisions in such matters from becoming nothing more than idiosyncratic or personal responses to the circumstances of particular cases, some guidance should be derived from earlier decisions on like questions to ensure that the resolution of such issues is as principled and consistent as the varying circumstances of different cases permit.

206 Confronted by the second question[357], I remind myself that in a number of recent decisions where this Court was invited to alter an accepted rule established

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354 [1999] 2 AC 349 at 377; cf McHugh, "The Law-making Function of the Judicial Process", (1988) 62 *Australian Law Journal* 15 and 116.

355 See eg Mason J in *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633-634; *McKinney v The Queen* (1991) 171 CLR 468 at 481-482 per Brennan J (diss); my own reasons in *Northern Sandblasting* (1997) 188 CLR 313 at 400.

356 See eg *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 289-290 per Mason CJ and Deane J; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 38-43 per Brennan J; cf *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26 per my own reasons at 35-41; Kirby, "Judging: Reflections on the Moment of Decision", (1999) 18 *Australian Bar Review* 4 at 12.

357 See above at [188].

by past authority, I sometimes acceded to the request. Sometimes I rejected it, concluding that any change considered necessary must come from the relevant Parliament and not from the Court. Sometimes I was a member of the majority and sometimes in dissent. By re-examining the criteria which led me to these earlier decisions, I may not only ensure (so far as possible) that my response to the present applications is consistent with past decisions. I may also help to disclose those considerations which, in my view, should be taken into account when faced with submissions of the kind presented in the present applications[358].

207 *Supporting alteration*: A number of considerations are relevant when evaluating a submission to a final court that the common law should be changed despite the fact that doing so will affect the rights of parties and others.

208 First, in a legal system such as that of Australia, there can be no expression or re-expression of the common law that is incompatible with the Constitution[359]. The content of the common law adapts itself to the Constitution. Where an express provision or implication of the Constitution has been overlooked in the past[360], this Court has brought the law into conformity with the Constitution. Considerations of inconvenience, the existence of longstanding authority and cost must bend to the Constitution's requirements[361].

209 Secondly, where large changes in the statement of the common law have earlier been adopted by this Court, especially if influenced by fundamental civil

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358 Taylor, "Why is there no Common Law Right of Privacy", (2000) 26 *Monash University Law Review* 235 at 238-240; Kirby, "In Praise of Common Law Renewal: A Commentary on P S Atiyah's 'Justice and Predictability in the Common Law'", (1992) 15 *University of New South Wales Law Journal* 462 at 482.

359 *Breavington v Godleman* (1988) 169 CLR 41 at 135; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 140; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566; *Lipohar v The Queen* (1999) 200 CLR 485 at 557 [180]; *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 1135 [142]; 172 ALR 625 at 662.

360 eg in the common law choice of law rule in Australia: *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 1130-1132 [119]-[123]; 172 ALR 625 at 656-657; and Ch III of the Constitution and the common law rule concerning judicial bias: *Ebner v Official Trustee in Bankruptcy* (2000) 75 ALJR 277 at 289-290 [79]-[82], 295-296 [113]-[117]; 176 ALR 644 at 661-662, 669-671.

361 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 380-383 [149]-[154]; cf *Spring v Guardian Assurance Plc* [1995] 2 AC 296 at 326.

rights[362], the task of the Court in subsequent cases is to re-express the common law in a consistent way. It must follow through the "logical consequences" of the previous shift in law[363]. When the law has taken a new direction, it is normally pointless to yearn for a return to the past. Thus, after the decision in *Donoghue v Stevenson*[364], many aspects of the law of negligence were in need of reconsideration.

210 Thirdly, it is the undoubted function of a court such as this to contribute to the simplification of legal concepts, replacing categories with principles that will permit a more coherent and efficient application of the common law[365]. In this regard, this Court has functions in relation to the unified common law in Australia different from those of other final courts, such as the Supreme Court of the United States[366]. In discharging its functions, this Court, when asked, can and should reconsider the common law if, on analysis, that law appears to be out of harmony with altered social conditions[367]. Or if it contains anachronistic categories that invite abolition or modification[368]. Or if, effectively, it derogates unjustifiably from the principle of equality before the law[369]. One consideration that may encourage re-expression of the common law by the Court is a call for an established principle to be reconsidered by judges who have the responsibility of

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362 eg *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 per Brennan J; cf *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-658; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 422-425 [66], 427-428 [66].

363 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 250-251; *Esso* (1999) 201 CLR 49 at 87-88 [101].

364 [1932] AC 562.

365 eg *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 at 20, 38; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 484-488; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 544-550; *Northern Sandblasting* (1997) 188 CLR 313 at 395-396.

366 *Lipohar v The Queen* (1999) 200 CLR 485 at 500 [24], 505 [43], 551-552 [167].

367 *Esso* (1999) 201 CLR 49 at 86-87 [100].

368 *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 235-240 [125]-[142]; 167 ALR 575 at 609-616.

369 *Esso* (1999) 201 CLR 49 at 88-89 [102]-[103] concerning the ability of independent courts to secure the evidence essential to do justice according to law.

applying it and who identify defects occasioning confusion, uncertainty or injustice[370].

211 Fourthly, whilst the legislature has the primary role, and responsibility, in reforming the common law (and is nowadays assisted by law reform and like bodies) that fact does not relieve this Court of its own responsibilities to repair clearly demonstrated defects of judge-made law. Where legislatures have failed to act, despite having weaknesses and injustices in the common law drawn to their notice, it cannot be expected that the courts will indefinitely ignore such weaknesses and injustices[371]. The Constitution envisages that the courts for which it provides will continue to play a function in renewing the common law as courts of their character have been doing for centuries. In the field of liability for negligence alone, history, including recent history, demonstrates that this Court's decisions have re-expressed the content of the common law quite often[372]. Sometimes the re-expression may erase outmoded rules or immunities[373]. Sometimes it may uphold a policy more in tune with contemporary social values[374]. Sometimes it may correct the apparent failure of earlier decisions to take into account a crucial consideration, such as the statutory context within which a common law rule must operate.

212 *Rejecting alteration*: As against the foregoing considerations which may tend to encourage a court to abolish or re-express an old rule of the common law, a number of others may suggest that the law should be left unchanged. Even if convinced that a rule of the common law is defective or results in injustice, this

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370 As Mahoney AP did in *Hughes v Hunters Hill Municipal Council* (1992) 29 NSWLR 232 at 236.

371 See *Lipohar v The Queen* (1999) 200 CLR 485 at 561 [193]; *Esso* (1999) 201 CLR 49 at 89-90 [105].

372 The joint reasons at [85], [110], [125]-[126], [146]-[148]; Taylor, "Why is there no Common Law Right of Privacy", (2000) 26 *Monash University Law Review* 235 at 238-240.

373 *Northern Sandblasting* (1997) 188 CLR 313 at 339-340, 342-343, 347-348, 365-366, 400; cf *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 238-240 [137]-[142]; 167 ALR 575 at 613-616; *Jones v Bartlett* (2000) 75 ALJR 1 at 38-39 [230]; 176 ALR 137 at 187.

374 *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 307-310, 313-314; cf *Liftronic Pty Ltd v Unver* [2001] HCA 24 at [87]-[89].

Court might, in a given case, conclude that it should leave any re-expression to the relevant legislature[375].

213 First, it is appropriate for the Court to take into account the extent to which the challenged rule is established by longstanding authority[376] and whether it has recently been reaffirmed and applied by this Court[377]. If the rule reflects long-established authority and is frequently applied, a sudden change of direction may be seen as an act legislative, rather than judicial, in character. It may undermine not only the authority of the substituted rule but also respect for established legal principles, which it is the duty of this Court to defend.

214 Secondly, the scope and implications of any change must be weighed. Although there are exceptions, where a proposed alteration of course is indisputably substantial, judges will ordinarily pause before taking that step. The common law usually progresses in a modest fashion, by incremental steps, relying on analogous reasoning[378]. It avoids large and rapid leaps (eg from legal immunity to strict liability[379]). The greater the social, economic and political implications of any alteration of decisional authority, the more likely is it that a court will leave the change to a legislature. The Parliaments can effect change after notice to the public, appropriate debate and an opportunity for expert advice on the ramifications of any change[380].

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375 This Court has made it clear that it will only reconsider a previous decision "with great caution and for strong reasons": *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554.

376 eg *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 ("*Crimmins*"); *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

377 *Esso* (1999) 201 CLR 49 at 86-87 [100]. Persistence of a legal rule or practice for a very long time can sometimes indicate its utility, suggesting the need for restraint before abolishing it: *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121 at 168 [124].

378 *Esso* (1999) 201 CLR 49 at 86-87 [100].

379 *Northern Sandblasting* (1997) 188 CLR 313 at 400.

380 *Northern Sandblasting* (1997) 188 CLR 313 at 400, 402; cf *Jones v Bartlett* (2000) 75 ALJR 1 at 42-43 [249]-[252]; 176 ALR 137 at 192-194.

215 Thirdly, because, under the Constitution, courts in Australia may not declare that a change will have prospective operation only[381], a factor militating against re-expression of the common law is the extent to which any such change will affect a wide variety of public and private interests: exposing to liability those who previously may reasonably have assumed that they were not liable, or who may have arranged their affairs on the basis of established authority[382]. In such cases, it is relevant to take into account the capacity of those affected to meet the enlarged liability and whether they have (or would be able in the future to procure) suitable insurance[383]. The wider and more varied the class affected by any change, the greater the need for caution by a court invited to re-express the law[384].

216 Fourthly, it is relevant to consider whether the legislature has overlooked the defects in the law in question or whether it has intervened, but withheld change of the particular kind urged upon the Court. These were considerations relevant to my own conclusions in *Lipohar v The Queen*[385] and *Esso*[386]. The fact that, in the former, on one view, a retrospective alteration of the law affecting criminal liability was involved was another consideration that led me to resist the proposed re-expression of the law. Such retroactive alteration of rules affecting criminal liability should rarely, if ever, be attempted by a court[387].

217 *Securing balance*: Deciding whether, in the particular case, considerations such as the foregoing (and other factors that may be relevant) require retroactive alteration of the common law, or a reaffirmation of past

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381 *Ha v New South Wales* (1997) 189 CLR 465 at 503-504; cf *McKinney v The Queen* (1991) 171 CLR 468 at 476.

382 *Jones v Bartlett* (2000) 75 ALJR 1 at 43 [250]; 176 ALR 137 at 193.

383 *Jones v Bartlett* (2000) 75 ALJR 1 at 43 [250]-[251]; 176 ALR 137 at 193-194.

384 This was a consideration in *Northern Sandblasting* (1997) 188 CLR 313 at 402 and *Jones v Bartlett* (2000) 75 ALJR 1 at 43 [250]-[251]; 176 ALR 137 at 193-194; cf *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 307-309, 313-314.

385 (1999) 200 CLR 485 at 561 [193]; see *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 1127 [101]; 172 ALR 625 at 651.

386 (1999) 201 CLR 49 at 89-90 [105].

387 *Lipohar v The Queen* (1999) 200 CLR 485 at 561-562 [194]; *R v McDonnell* [1997] 1 SCR 948 at 974-975 [33].

authority, obviously necessitates evaluation and judgment[388]. The decision is not susceptible to a mechanical solution. That is why judges often reach different conclusions about what should be done in a particular case.

218 Even if judges agree that a common law rule has become encrusted with false categories occasioning apparent injustices[389], different judges at different times and in different cases may, like their courts, show more or less willingness to revise and re-express that established authority[390]. Obviously, the greater the apparent affront to justice and the more confused, anachronistic and unprincipled the current law appears to be, the more likely is it that a judge with authority to do so will eventually feel obliged to attempt a re-expression of the law. On the other hand, the greater the antiquity of the rule, the larger the implications of change, the more interests that are affected and the closer the occasions of legislative attention, the less likely will it be that the judge will feel authorised to disturb past authority.

219 The natural and proper judicial inclination in such matters is towards restraint. This is the judicial approach common to our governmental system[391]. It is one to which I have often given effect[392]. On the other hand, there can be no contest that in certain circumstances this Court will be driven, even in large matters, to abandon discredited authority so as to place the law on a footing that

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388 *Baker v Campbell* (1983) 153 CLR 52 at 103; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 130; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439; *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 1129 [113]; 172 ALR 625 at 654; the joint reasons at [114]-[115].

389 *Candler v Crane, Christmas & Co* [1951] 2 KB 164 at 178 per Denning LJ referred to in *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447 at 468-469, 471.

390 Kirby, "Judging: Reflections on the Moment of Decision", (1999) 18 *Australian Bar Review* 4 at 9-10; *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 137 [60].

391 *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 528-529, 540, 552; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 398-401; see generally *Durham Holdings Pty Ltd v New South Wales* (2001) 75 ALJR 501; 177 ALR 436.

392 eg *Northern Sandblasting* (1997) 188 CLR 313; *Lipohar v The Queen* (1999) 200 CLR 485; *Esso* (1999) 201 CLR 49; *Jones v Bartlett* (2000) 75 ALJR 1 at 42-43 [249]-[252]; 176 ALR 137 at 192-194.

is more principled and just. Such has always been the case in every common law legal system. It is no different in Australia today. Why is this such a case?

The arguments against abolition of the highway rule

220 The respondents invoked a number of specific arguments to resist the applicants' submission that this Court should now depart from the immunity rule protecting highway authorities and the distinction between "nonfeasance" and "misfeasance" adopted in *Buckle* and *Gorringe*.

221 First, they laid emphasis on the fact that the rule had survived for a very long time. According to Fullagar J in *Gorringe*, it was settled in England by 1895[393]. Any argument that the rule was not suitable to Australian conditions, and so not inherited as part of the common law in Australia, was determined beyond reasonable dispute by the decisions in *Buckle* and *Gorringe*. Consequently it was argued that it was too late to reopen that controversy. Similarly, even if, in *Buckle*, this Court might have overlooked some earlier decisions[394] that fact could not undermine the authority of the rule established in that decision and reaffirmed in *Gorringe*. Even critics of the current law had not doubted its status as the law. Indeed, on the footing of its authority, the critics complain that there was no suggestion of doubt in *Gorringe* that the law was as expressed in *Buckle*[395]. Hence, they have pinned their hopes on alteration of the law by the legislature or by this Court[396].

222 Secondly, much emphasis was laid by the respondents upon the enactment of what they said was relevant legislation. It was submitted that this precluded re-expression of the common law on this subject. As long ago as 1957, legislation was enacted by the Parliament of New South Wales[397] which, on one view, expressed a parliamentary acceptance that a measure of "immunity" existed for highway authorities in that State. Similar provisions continue to the present time. It was said to be relevant in two respects. It provided a specific statutory

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393 *Gorringe* (1950) 80 CLR 357 at 378.

394 eg *Miller v McKeon* (1905) 3 CLR 50; cf *Woollahra Council v Moody* (1913) 16 CLR 353; the joint reasons at [110]-[111].

395 Friedmann, (1951) 5 *Res Judicatae* 21 at 26.

396 The rule was recently applied in *City of Melbourne v Barnett* [1999] 2 VR 726 at 727-728. It was there recognised that any change could only be effected by Parliament or by decision of this Court.

397 *Main Roads Act* 1924 (NSW), s 32(1A) as amended by the *Main Roads and Local Government (Amendment) Act* 1957 (NSW), s 2; see the joint reasons at [130].

"endorsement" of the common law and prevented judicial modification such as would challenge the hypothesis upon which Parliament had acted. But, also, it was relevant to the statutory context in which any common law liability would have to be fashioned. A plaintiff would not only have to convert a statutory "power" to a "duty". He or she would have to do so in a milieu in which the statute contemplated an "immunity" at least to some extent. Even if the derivation of common law duties from statutory powers was not to be approached (as Brennan CJ favoured) by searching for the implications to be imputed to the statute itself[398], the creation of a common law duty would still have to run the gauntlet of a statutory "immunity" of undefined content.

223 Thirdly, the respondents placed emphasis on the policy advantages of retaining a special rule for the liability of highway authorities in a country the size of Australia. Whatever might have been the different circumstances of rural England centuries ago when the immunity, for different reasons, was developed, it was, so this Court was told, a principle well adapted to a country of continental size such as Australia, with its sparse population and remote areas to be served by a vast network of roads. Such roads were inevitably prone to deterioration. This was particularly so in the harsh climatic conditions typical of some parts of Australia. A specific rule of the common law, which treated highway authorities as *sui generis*, might offend some legal theorists. But it contributed, so it was claimed, to certainty in the law and thus to the prevention of needless litigation[399]. Application of the ordinary law of negligence would expose highway authorities and plaintiffs unexpectedly and retrospectively to liability for "nonfeasance" long regarded as inapplicable to such matters.

224 Fourthly, the respondents emphasised the cost implications of any change of the law. Whilst accepting that this would not be a conclusive argument, given that other re-expressions of the common law by the Court necessarily had large economic consequences[400], the respondents submitted that the Court was not well placed to estimate the likely costs of added litigation, presently discouraged or defeated by the highway rule. Although tendered for the purpose of supporting the applications of a number of the States to intervene in the interests of the

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398 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 347 [24]-[25] per Brennan CJ; cf *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 442-446 per Gibbs CJ; *Crimmins* (1999) 200 CLR 1 at 77-78 [216].

399 See *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 215-216 [88]-[92] per McHugh J.

400 eg *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301; *Rogers v Whitaker* (1992) 175 CLR 479; *Wik Peoples v Queensland* (1996) 187 CLR 1; *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

respondents, it is perhaps permissible (as these proceedings constitute applications for special leave, and not appeals[401]) to take into account the evidence of State officials. Their affidavits recount the huge extent of highways, roadways and pathways throughout the nation and the very large funds already devoted to their expansion, upkeep and improvement. It needs no evidence to make the point that the removal of an immunity, formerly established by law, would have economic consequences. Unless reversed by statute, it would, to the extent required, divert some resources of the highway authorities from current priorities to include a new priority: compensating the victims of negligent acts and omissions that could be proved against highway authorities, presently falling within the immunity.

225 Fifthly, a special reason for restraint was said to be the fact that, despite reports of law reform bodies in three Australian States recommending reform of the applicable common law, the respective legislatures had failed, or refused, to enact a change[402]. This was the more telling because similar recommendations had been adopted in parts of Canada[403]. In England, from whose law the immunity rule had been derived, the law had been changed; not by the courts but by Parliament[404]. The respondents urged that this was the correct path to which

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401 eg *Mickelberg v The Queen* (1989) 167 CLR 259; *Eastman v The Queen* (2000) 74 ALJR 915; 172 ALR 39.

402 New South Wales Law Reform Commission, *Liability of Highway Authorities for Non-Repair*, Report No 55 (1987); Law Reform Commission of Western Australia, *Report on the Liability of Highway Authorities for Non-Feasance*, Report No 62 (1981); Law Reform Committee of South Australia, *Report on Reform of the Law Relating to Misfeasance and Non-Feasance*, Report No 25 (1974); Law Reform Committee of South Australia, *Report Relating to the Review and Reappraisal of the Twenty-Fifth Report of this Committee on the Subject of Misfeasance and Non-Feasance*, Report No 51 (1986): see also Luntz and Hambly, *Torts: Cases and Commentary*, 4th ed (1995) at 447. A report was also made by the New Zealand Torts and General Law Reform Committee, *The Exemption of Highway Authorities From Liability for Non-Feasance* (1973). The report of the New South Wales Law Reform Commission was tabled in the New South Wales Parliament in September 1989 but its recommendations have not so far been adopted.

403 Balkin and Davis, *Law of Torts*, 2nd ed (1996) at 826. The immunity has been abolished by statute in several Provinces of Canada: *Municipal Government Act* 1968 (Alberta), c 68, s 178; *Urban Municipality Act* 1970 (Saskatchewan), c 78, ss 161-162; *Municipal Institutions of Upper Canada Act* 1866, c 51, s 339; *Municipal Act* 1970 (Ontario), c 284, ss 427-428.

404 *Highways (Miscellaneous Provisions) Act* 1961 (UK), s 1(1); *Highways Act* 1980 (UK), ss 41, 53; see the joint reasons at [78].

this Court should adhere. What was involved was not a matter of procedural law, as such, specially apt to judicial alteration[405]. It was a longstanding rule of substantive law upon the basis of which, for a very long time, local authorities and others throughout Australia had ordered their affairs[406].

The immunity should be abolished and the common law re-expressed

226 I accept the force of the foregoing arguments for adhering to this Court's past authority. However, in my view the Court should now remove the anomalous immunity, re-express the common law in Australia and subsume the liability of highway authorities in negligence and nuisance within the general law governing all other statutory bodies. My reasons are as follows.

227 First, criticism of the present rule is almost universal. It is assailed by almost all who have considered it save those who benefit from its anomaly, namely governments and highway authorities. The criticisms of the rule, collected in the joint reasons[407], demand the conclusion that it is unprincipled and anomalous in character and elusive and disputable in operation. It does not even have the merit of certainty, as the respondents incorrectly claimed. The highway rule is so riddled with exceptions and qualifications as to justify the complaint that it is one of the "most obscure and inexplicable concepts ever formulated in our courts"[408]. This is not, therefore, a rule that has simply been overtaken by social change or other advances in legal doctrine. It is a rule, dubious in its origins, never truly applicable to Australian conditions, adopted in this Court with apparent disregard for earlier formulations[409] and so seriously unjust as to occasion countless judicial efforts to confine the ambit of its operation by reference to notions that are undesirably complex.

228 Secondly, the rule exists as an exception to the general liability of tortious wrong-doers in the law of negligence which this Court, and other courts, have developed and re-expressed in many significant ways in recent years[410]. The

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405 *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26 at 39.

406 eg *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 at 675.

407 The joint reasons at [74]-[133].

408 McDonald, (2000) 22 *Sydney Law Review* 411 at 415. See also *Gloucester Shire Council v McLenaghan* (2000) 109 LGERA 419 at 420-421 [4]-[6]; 31 MVR 340 at 341; the joint reasons at [72]-[73].

409 The joint reasons at [110] referring to *Miller v McKeon* (1905) 3 CLR 50.

410 The joint reasons at [85].

immunity enjoyed by highway authorities is wholly out of harmony with so many other decisions of this Court in the field of negligence that the only substantial argument for adhering to it is respect for established legal authority. Yet that consideration, whilst of paramount importance, is not the sole factor to be given weight in the face of the present applications. Considerations of legal principle and legal policy must also be given due weight[411]. They argue powerfully for change.

229 Thirdly, whilst it is true that a re-expression of the common law would have significant cost implications, imposed retrospectively on an unknown number of highway authorities including the respondents, such implications ought not to be exaggerated. It would still remain for the authority to argue, in the case of its particular statute, that the imposition of civil liabilities is incompatible with its particular statutory functions[412]. Or it could argue that to hold that a duty exists in the particular case is unwarranted in the evidence concerning the resources and obligations of the authority, the steps it has taken to discharge its functions and the alternative priorities faced by it. Or that breach of any duty has not been proved. The re-expression of the liability of highway authorities, simply to remove the anomalous immunity conferred on them, would not impose liability for every personal injury caused, or contributed to, by a defect in a road brought to light by an accident. So far as the tort of negligence is concerned, the only change would be to substitute a duty to take reasonable care[413]. In many cases, the chances of recovery, particularly in a matter involving the non-exercise of statutory powers, would be small[414]. Yet recovery or failure would depend not on a legal immunity or the disputable category of "nonfeasance", but on the ordinary principles of negligence, governing virtually everyone else in society, applied to a statutory body having relevant statutory functions rather than duties.

230 Fourthly, in determining the effect of a change of legal doctrine, the serious inefficiencies inherent in the current law need to be taken into account. Far from discouraging proceedings or promoting certainty or settlement of claims, that law is now so complex as to encourage litigation, the outcome of which turns on elusive points in the evidence and contestable distinctions[415].

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411 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252-254; *Northern Territory v Mengel* (1995) 185 CLR 307 at 347.

412 *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

413 Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 712.

414 cf *Stovin v Wise* [1996] AC 923 at 958 per Lord Hoffmann.

415 Contrast for example the outcomes in the present cases with *Hill v Commissioner for Main Roads (NSW)* (1989) 68 LGRA 173; 9 MVR 45; *Hughes v Hunters Hill*

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231 Fifthly, and I regard this as critical, the duty of a court is to the law. If a valid statute is enacted with relevant effect, that duty extends to giving effect to the statute, not ignoring it. No principle of the common law can retain its authority in the face of a legislative prescription that enters its orbit with relevant effect. The proper starting point for the ascertainment of the legal duties of a body established by statute is the statute. For the common law to confer upon one form of statutory authority (but not others with like functions and powers) a special immunity that Parliament has not expressly enacted, involves an unprincipled departure from the proper and orthodox legal approach to ascertaining that body's statutory and common law duties.

232 This, in my respectful opinion, was the basic legal flaw in the reasoning in *Buckle* and *Gorringe*. An English rule of the common law was simply picked up and applied without any, or any proper, regard to particular Australian statutory contexts. Because the duty of this Court is now (as indeed it was in 1936 and 1950) to accord primacy to the requirements of, and implications in, statutes enacted by Australian Parliaments creating highway (or other) authorities, it is necessary to respond to the applicants' submission with this obligation in mind. It cannot simply be swept aside.

233 The unprincipled and special classification of highway authorities for a common law immunity which the legislature has not granted is impossible to reconcile with the applicable statutory provisions. In so far as the New South Wales Parliament has referred to an assumed "immunity", but not specifically enacted or defined it, its provision does not significantly advance the debate. It will always be open to the Parliament of any State or legislature of a Territory, if it so chooses, to confer a special immunity on highway authorities (and to withhold such immunity from sewerage, gas, electricity or other authorities). However, if this were now done by legislation it would enjoy at least two advantages. It might be expected to define with greater precision and certainty the scope of any such immunity and any exceptions to it. And such immunity would then rest on the authority of elected representatives, not on an anomalous and dubious judge-made rule whose deficiencies are so manifest.

234 Sixthly, also critical to my conclusion, is recognition of the fact that the immunity in question is exceptional. Immunities from legal liability, such as that accorded to highway authorities, represent a departure from the ordinary principle that a person, natural or legal, is accountable in the Australian courts for

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Municipal Council (1992) 29 NSWLR 232; *Gloucester Shire Council v McLenaghan* (2000) 109 LGERA 419; 31 MVR 340.

wrongs done to another member of society[416]. Usually, such accountability is determined by reference to principles of law that apply without discrimination. In *Roy v Prior*[417], Lord Wilberforce remarked: "Immunities conferred by the law in respect of legal proceedings need always to be checked against a broad view of the public interest." That is what must now be done.

235 There are undoubtedly some activities which, of their very nature, justify the provision of a legal immunity from suit. However, they are, and should be, closely confined. When challenged, they should be capable of being fully justified by more than an appeal to legal history and past legal authority. When examined, some immunities have been rejected as unsustainable[418]. Others have been questioned and elsewhere overruled[419]. To the extent that an immunity to liability for negligence and nuisance is afforded, exceptionally, to highway authorities, a burden of loss distribution is imposed on the victims of the neglect of such authorities. The immunity obliges those victims to bear the economic, as well as personal, consequences, even of gross and outrageous neglect and incompetence. The survival of the immunity must be tested, not simply by the facts of the present cases but by any circumstance, however extreme and culpable, where a highway authority hides behind the highway rule and claims an immunity from liability for its "nonfeasance"[420].

236 Where there is doubt about the contemporary content of the common law, it is also appropriate, in my view, to have regard to the fundamental principles of universal human rights[421]. A principle within that body of law states that "[a]ll persons shall be equal before the courts and tribunals"[422]. Of course, there will be

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416 cf *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 236 [129]; 167 ALR 575 at 611; *Arthur J S Hall & Co v Simons* [2000] 3 WLR 543; [2000] 3 All ER 673.

417 [1971] AC 470 at 480; see also *Darker v Chief Constable of the West Midlands Police* [2000] 3 WLR 747 at 767-774; [2000] 4 All ER 193 at 212-219.

418 eg the immunity of landlords: *Jones v Bartlett* (2000) 75 ALJR 1 at 42-43 [245]-[251]; 176 ALR 137 at 192-194.

419 eg of advocates: *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 236 [129]; 167 ALR 575 at 611; *Arthur J S Hall & Co v Simons* [2000] 3 WLR 543; [2000] 3 All ER 673.

420 McDonald, (2000) 22 *Sydney Law Review* 411 at 420-421.

421 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.

422 Art 14.1, International Covenant on Civil and Political Rights, done at New York on 19 December 1966; (1980) *Australia Treaty Series* No 23 (entered into force

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exceptions to such absolute equality. But I do not regard the peculiar immunity of highway authorities in Australia as properly falling into such a class.

237 The main impact of the principles of universal human rights upon the development of tort law in this country, as in England and elsewhere, lies in the future[423]. But, in the present case, the offence to fundamental notions of equality of parties before the law, which the anomalous immunity invoked by the respondents occasions, reinforces my conclusion that such immunity can no longer rest on a rule made by the judges.

The issues of duty and breach

238 *Approach to duty and breach*: The foregoing leads me to my conclusion that neither of the respondents is entitled to rely on the immunity invoked by it by reason of its status as a highway authority. I agree with the joint reasons[424] that, to the extent that *Buckle* and *Gorringe* support the existence of such an immunity, they should no longer be followed. To the extent that leave is required, it should be given to permit the reconsideration and overruling of *Buckle* and *Gorringe*.

239 These conclusions leave the liability of the respondents to be determined by the ordinary principles of negligence law as applied to a statutory authority with relevant duties and powers[425]. Because this represents a shift in the understanding of the law from that which prevailed at the time of the trials of the respective actions now before this Court, a question arises as to whether fairness requires that the proceedings be returned for retrial in accordance with the law as so expressed.

240 In my opinion, this course is not required. In each proceeding, the applicants recorded their intentions to rely on ordinary principles of negligence

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13 November 1980); (1976) 999 *United Nations – Treaty Series* 171; (1967) 6 ILM 368.

423 Spigelman, "Access to Justice and Human Rights Treaties", (2000) 22 *Sydney Law Review* 141 at 141-143 referring to *Osman v Ferguson* [1993] 4 All ER 344 and *Osman v United Kingdom* (2000) 29 EHRR 245 at 316 [150]-[151]. See also *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010 at 1036-1037; [1999] 4 All ER 609 at 634-635; Hoffmann, "Human Rights and the House of Lords", (1999) 62 *Modern Law Review* 159 at 164.

424 The joint reasons at [137].

425 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 442-446; cf *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 739.

(and, in the case of Mrs Ghantous's action, the law of nuisance) freed from the immunity. In such circumstances, the respondents were obliged to consider the eventuality that has now occurred. They elected to call no evidence to justify their respective failures to attend to the suggested defects in the surface and surrounds of the road bridge and path in question in their cases. Retrial would obviously be expensive and inconvenient. In my view, it is open to this Court, in each case, to reconsider the evidence at trial, judging it by reference to the ordinary principles that govern the existence and scope of a duty of care of a statutory body having the powers respectively enjoyed by the present respondents.

241 It will be apparent from earlier reasons considering analogous questions that I am of the opinion that, in determining whether a duty of care exists in the case of a statutory authority, it is necessary to answer three questions and to do so by reference to, amongst other things, the authority's statutory charter. Those questions are set out in earlier cases[426]. They follow, substantially, the approach taken in the three other major common law jurisdictions with which Australian lawyers are most familiar, namely England, New Zealand and Canada.

242 There is, in my view, no incompatibility between the recognition of a private right of action in persons such as the applicants and the legislation affording powers and duties to the respondents of a relevant kind[427]. The issues to be decided, having regard to the statutory powers of the respondent concerned, are therefore: (1) Was the damage to the applicant reasonably foreseeable? (2) Was the relationship between the applicant and the respondent sufficiently proximate? (3) Is it just and reasonable to impose a duty of care in the circumstances of the case?

243 For reasons that are adequately explained in the joint reasons by reference to like concepts[428], I do not doubt that, both in Mrs Ghantous's case and in that of Mr Brodie, the respective Councils owed the applicants a duty of care. In the former case that duty was to construct the footpath in question and to keep it reasonably safe for ordinary use. In the latter case it was, relevantly, to afford specific warnings of the capacity of the bridge on which Mr Brodie was injured and the truck damaged, and to take reasonable care in the maintenance and

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426 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 419-420 [244]; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 476 [117]; *Crimmins* (1999) 200 CLR 1 at 79-80 [221]-[222].

427 See *Crimmins* (1999) 200 CLR 1 at 79 [219].

428 The joint reasons at [150]-[152].

upkeep of the bridge including periodic inspections involving reasonable steps to look for such dangers as might reasonably be expected to arise in its use[429].

244 *Ghantous v Hawkesbury City Council*: Accepting the existence of such a duty of care, of the stated scope, I am not convinced that the evidence called for Mrs Ghantous established a breach of that duty in her case. Mrs Ghantous did not establish that the original construction of the footpath was negligent; that its design or state at the time of the accident was in any way inappropriate or a cause of her accident or that the respondent's exercise of its planning powers was defective.

245 A body such as the Council has little effective control over the use by pedestrians of a footpath and its surrounds, once created. Such structures do not have an infinite lifespan. They are subject to deterioration by reason of the weather, of ordinary traffic use, of subterranean changes, of public utilities that lawfully disturb them and other persons who unlawfully do so. The rate of deterioration will vary. Necessarily it is unpredictable and largely out of the control of a body such as the respondent.

246 Whereas Mrs Ghantous alleged that the area beside the footpath was rendered "hazardous" by a combination of erosion and increased foot traffic, something more than the fact that she fell would be necessary to convert the powers which the respondent Council enjoyed into a duty to safeguard a pedestrian such as Mrs Ghantous, rendering the Council liable to her because she momentarily took a false step. That "something" might be evidence of poor original design, a history of previous accidents or complaints or deterioration that was judged manifestly dangerous. None of these elements was established in Mrs Ghantous's case. Nor did the primary judge's remark that "[i]t is regrettable that the Council's program of maintenance did not operate to keep the footpath in less hazardous condition"[430] represent a finding of negligence by the Council. It was no more than a comment that, in retrospect and with the wisdom of hindsight, it was a pity that the subsidence next to the path had not been noticed and cured before Mrs Ghantous took the step that led to her fall.

247 It could not reasonably be expected in these circumstances that a local government authority in the position of the Hawkesbury City Council, exercising its powers reasonably, would be aware of particular dangers inherent in the verge to the footpath off which Mrs Ghantous momentarily stepped before she fell. I would not rest my conclusion in her case upon any enlarged assumptions about a

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429 The joint reasons at [177]-[178].

430 *Ghantous v Hawkesbury City Council* unreported, District Court of New South Wales, 21 November 1996 at 14 per Freeman DCJ.

pedestrian's need for vigilance for his or her own safety. I do not agree in the latter-day enthusiasm for the notion of contributory negligence that is abroad[431]. It goes against the steady trend of common law authority in this Court and indeed in Australian courts back to colonial days[432] to exaggerate the expectations that manifest themselves in various forms of disqualification for suggested contributory negligence[433]. Pedestrians and other highway users exist in every variety of physical and mental ability and acuity. Roadways and footpaths are used in every condition of light and all circumstances of weather. The reason Mrs Ghantous fails, in my view, is not any lack of attention on her own part. I respectfully regard that explanation as unconvincing and unreasonable. The real reason she fails is that no breach of duty is shown on the part of the local authority which she sued.

248 Local authorities are not insurers for the absolute safety of pedestrians or other users of roads and footpaths. To recover, a person in the position of Mrs Ghantous must establish a want of reasonable care causing his or her injuries. Her mishap was simply an accident. Her damage was not shown to be the result of negligence on the part of the respondent. No other basis was made out upon which she could succeed.

249 *Brodie v Singleton Shire Council*: So far as Mr Brodie and his company are concerned, I agree with the conclusion of the joint reasons that the primary judge's decision, holding the Singleton Shire Council liable, is readily supportable by the application to the facts of the ordinary principles of negligence viewed in the context of the Council's applicable statutory powers[434]. I agree with the reasoning contained in the joint reasons and with the result that follows.

Orders

250 It follows that I concur in the orders proposed in the joint reasons.

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431 cf *Liftronic Pty Ltd v Unver* [2001] HCA 24 at [87]-[88].

432 Kercher, *An Unruly Child – A History of Law in Australia* (1995) at 136-137.

433 *Liftronic Pty Ltd v Unver* [2001] HCA 24 at [85]-[86] referring to *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 314 and other decisions.

434 The joint reasons at [181].

251 HAYNE J. The facts and circumstances giving rise to these applications are set out in the reasons of Callinan J. I need not repeat them.

252 The central question said to be raised by the applications is whether the Court should reconsider the common law immunity of highway authorities from civil suit in cases of non-feasance. More particularly, should the Court now depart from its earlier decisions in *Buckle v Bayswater Road Board*[435] and *Gorringe v The Transport Commission (Tas)*[436]? As these reasons will seek to demonstrate, describing the question by reference to "immunity", and only by reference to highway authorities, obscures some important questions. At its heart, the question is one about the duties of statutory authorities to exercise their powers and when such duties are to be found. To get to that question, it is necessary to examine the so-called "immunity".

Early English developments

253 The nature and extent of what is said to be the immunity of highway authorities can only be understood against its historical background. That history can be traced to English common law principles about the repair of highways, most importantly the principle that "[b]y common law and of common right, the inhabitants of the parish at large are bound to repair the highways"[437]. This obligation to repair was enforced by criminal proceedings on indictment[438] because the failure to repair was a common law misdemeanour[439]. The indictment was not preferred against named individuals but against the inhabitants of the parish generally[440].

254 Bridges were treated a little differently. At common law no one was obliged to make a bridge and the common law in this respect was affirmed by

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435 (1936) 57 CLR 259.

436 (1950) 80 CLR 357.

437 *R v Great Broughton* (1771) 5 Burr 2700 at 2701 per Aston J [98 ER 418 at 418]. See also *R v Sheffield* (1787) 2 TR 106 at 111 per Ashhurst J [100 ER 58 at 61]; *Cubitt v Lady Caroline Maxse* (1873) LR 8 CP 704 at 717-718 per Grove J.

438 See, for example, *R v Sheffield* (1787) 2 TR 106 [100 ER 58]; *R v Brightside Bierlow* (1849) 13 QB 933 [116 ER 1520].

439 *Archbold's Criminal Cases*, (1822) at 1.

440 *Archbold's Criminal Cases*, (1822) at 7.

Magna Carta[441]. The liability to repair bridges fell upon the county, not the parish[442]. Again, however, the obligation to repair was enforced by criminal proceedings on indictment: "A parish as to highways and a county as to bridges are on precisely the same footing."[443]

255 As the needs of English society changed, particularly in the nineteenth century, the legislature intervened to make further provision for the repair of highways. Of the several Acts which dealt with highways[444], reference need be made to only *The Highway Act* 1835 (UK) 5 & 6 Wm 4 c 50. Its long title described it as "[a]n Act to consolidate and amend the Laws relating to Highways in that Part of Great Britain called England". By that Act[445] provision was made for summary proceedings for enforcement of the obligation to repair (if the obligation was not disputed)[446]. These summary proceedings were criminal in nature but led to an order for repair. If the obligation to repair was disputed, a bill of indictment was to be preferred[447]. A fine imposed upon conviction was to be applied to the repair of the highway[448].

256 By the nineteenth century (if not before) it was clear that interfering with free passage over a public highway was a common nuisance punishable on indictment. The crime of common nuisance, so far as it related to highways, was of two kinds: positive by obstruction, and negative by want of reparation, that is,

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441 McKechnie, *Magna Carta*, 2nd ed (1914) at 299, referring to *Magna Carta* 1215; *Magna Carta* 1297, 25 Edw 1 c 15.

442 *The Statute of Bridges* 1530 (UK) 22 Hen 8 c 5; *The Bridges Act* 1702 (UK) 1 Anne c 12; *The Bridges Act* 1741 (UK) 14 Geo 2 c 33; *The Bridges Act* 1803 (UK) 43 Geo 3 c 59; *The Bridges Act* 1815 (UK) 55 Geo 3 c 143; *R v Surrey* (1810) 2 Camp 455 [170 ER 1216]; *R v Oxfordshire* (1825) 4 B & C 194 [107 ER 1031].

443 *R v Oxfordshire* (1825) 4 B & C 194 at 199 per Littledale J [107 ER 1031 at 1033].

444 See, for example, 6 Geo 1 c 6 (1719); 14 Geo 2 c 33 (1741); 24 Geo 2 c 43 (1751); 30 Geo 2 c 22 (1757); 13 Geo 3 c 78 (1773); 34 Geo 3 c 64 (1794); 34 Geo 3 c 74 (1794); 54 Geo 3 c 109 (1814); 55 Geo 3 c 68 (1815).

445 *The Highway Act* 1835 (UK), s 94.

446 *Ex parte Bartlett* (1860) 30 LJ (MC) 65; *R v Farrer* (1866) LR 1 QB 558.

447 *The Highway Act* 1835, s 96.

448 *The Highway Act* 1835, s 96.

for want of repair[449]. Procedures by indictment, however, afforded no remedy to a person who suffered injury because of the state of the highway or bridge, so it is necessary to look at the development of the civil, not criminal, law in this regard. Many of the nineteenth century cases in which claims for damages were made by those injured as a result of conditions on or near a highway made allegations of negligence, and the discussion in the judgments is of issues of negligence and vicarious responsibility[450]. Not all of the cases of that time were, however, framed in that way. Over time, claims for personal injury because of alleged obstruction on or near a highway, brought against persons other than the relevant highway authority, came to be framed more often in nuisance[451].

Nuisance

257 Despite the radical difference between criminal proceedings to punish an act or omission which was a matter of *public* concern, and civil proceedings to recover damages for *private* loss, the language of nuisance was used in both contexts. It is, nevertheless, important to recall that the crime of common or public nuisance and the tort of nuisance were and are distinct. There can be no automatic transposition of the learning in one area to the other. It has been said that the tort of nuisance was set on the wrong track by "an incautious obiter dictum which was let fall in the Common Pleas in 1535"[452]. In its origins, nuisance was a tort "directed against the plaintiff's enjoyment of rights over land"[453]. It lay for interference with rights incidental to the occupation of land and, among other things, for interference with easements.

258 In 1535, in an action for blocking a highway, Fitzherbert J gave an illustration which was to be taken by later generations as warranting the conclusion that an action for nuisance can be maintained if personal injury is sustained as a result of an obstruction in a public highway. His Lordship said[454]:

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449 *Archbold's Criminal Pleading*, 19th ed (1878) at 967.

450 See, for example, *Foreman v Mayor of Canterbury* (1871) LR 6 QB 214. See also *Hartnall v The Ryde Commissioners* (1863) 4 B & S 361 [122 ER 494].

451 See, for example, *Hadley v Taylor* (1865) LR 1 CP 53; Newark, "The Boundaries of Nuisance", (1949) 65 *Law Quarterly Review* 480 at 485.

452 Newark, "The Boundaries of Nuisance", (1949) 65 *Law Quarterly Review* 480 at 482.

453 Newark, "The Boundaries of Nuisance", (1949) 65 *Law Quarterly Review* 480 at 482.

454 YB 27 Hen 8 Mich pl 10.

> "As if a man make a trench across the highway, and I come riding that way by night, and I and my horse together fall in the trench so that I have great damage and inconvenience in that, I shall have an action against him who made the trench across the road because I am more damaged than any other man."

When, and how, this dictum was taken up and applied in actions for nuisance is traced in articles by Newark[455] and Spencer[456].

259 However this may be, by the late nineteenth century it was accepted that, because it was a common or a public nuisance unreasonably to obstruct or hinder free passage of the public along the highway, a private individual had a right of action in respect of that nuisance upon proof of particular damage beyond the general inconvenience and injury suffered by the public[457]. The decisions all concerned cases of obstruction[458]; none was a case of nuisance by want of reparation. This was despite the fact that, in 1834, it had been held[459] that a declaration disclosed a sufficient cause of action against a corporation when it alleged: first, that the corporation was under a legal obligation to repair a pier and certain sea banks; secondly, that the obligation was a matter of so general and public concern that an indictment would lie against the corporation for non-repair; thirdly, that the works were out of repair; and lastly, that the plaintiff had suffered special damage. Yet this was not applied to highway authorities. Despite the general availability of an action in what now would be seen as

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455 "The Boundaries of Nuisance", (1949) 65 *Law Quarterly Review* 480.

456 "Public Nuisance – A Critical Examination", (1989) 48 *Cambridge Law Journal* 55.

457 *Benjamin v Storr* (1874) LR 9 CP 400; *Fritz v Hobson* (1880) 14 Ch D 542; *Vanderpant v Mayfair Hotel Co* [1930] 1 Ch 138.

458 See the cases cited in argument in *Benjamin v Storr* (1874) LR 9 CP 400: *Fineux v Hovenden* (1599) Cro Eliz 664 [78 ER 902]; *Maynell v Saltmarsh* (1664) 1 Keb 847 [83 ER 1278]; *Hart v Basset* (1681) Jones T 156 [84 ER 1194]; *Paine v Partrich* (1691) Carth 191 [90 ER 715]; *Iveson v Moore* (1699) 1 Ld Raym 486 [91 ER 1224]; *Rose v Miles* (1815) 4 M & S 101 [105 ER 773]; *Chichester v Lethbridge* (1738) Willes 71 [125 ER 1061]; *Greasly v Codling* (1824) 2 Bing 263 [130 ER 307]; *Wilkes v Hungerford Market Co* (1835) 2 Bing NC 281 [132 ER 110]; *Rose v Groves* (1843) 5 Man & G 613 [134 ER 705]; *Simmons v Lillystone* (1853) 8 Ex 431 [155 ER 1417]; *Ricket v The Metropolitan Railway Co* (1865) 5 B & S 156 [122 ER 790]; *Winterbottom v Lord Derby* (1867) LR 2 Ex 316.

459 *Lyme Regis v Henley* (1834) 8 Bligh NS 690 [5 ER 1097].

nuisance, those responsible for repair of highways were treated separately. It is necessary to say something about how and why this developed.

260 In 1788 it had been held that an individual could not bring an action on the case against the inhabitants of a county for an injury sustained in consequence of a county bridge being out of repair[460]. To modern eyes the decision owes much more to the difficulties seen in bringing a civil action against an unincorporated group of unidentified individuals sued only as "The Men dwelling in the County of Devon" than it does to any proposition about the position of highway authorities. Nevertheless in later cases, where there was no difficulty about parties, *Russell v The Men of Devon* was taken to decide that no action would lie against a highway authority for injury suffered from a bridge or highway being in disrepair[461].

261 Later in the nineteenth century, as statutes created corporate highway authorities, it was held that those corporations were not liable for damages for injury resulting from a want of repair[462]. By the late nineteenth century the principle was expressed in terms of "non-feasance". It was said to be that[463]:

> "It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere non-feasance. In order to establish such liability it must be shewn that the legislature has used language indicating an intention that this liability shall be imposed."

Three years earlier, the Privy Council had said[464]:

> "[I]n the case of mere nonfeasance no claim for reparation will lie except at the instance of a person who can shew that the statute or ordinance under which they act imposed upon the Commissioners a *duty toward himself* which they negligently failed to perform." (emphasis added)

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460 *Russell v The Men of Devon* (1788) 2 TR 667 [100 ER 359].

461 *M'Kinnon v Penson* (1853) 8 Ex 319 [155 ER 1369]; affirmed (1854) 9 Ex 609 [156 ER 260]; *Young v Davis* (1862) 7 H & N 760 [158 ER 675]; affirmed (1863) 2 H & C 197 [159 ER 82].

462 *Parsons v St Mathew, Bethnal Green* (1867) LR 3 CP 56; *Cowley v Newmarket Local Board* [1892] AC 345.

463 *Municipality of Pictou v Geldert* [1893] AC 524 at 527.

464 *Sanitary Commissioners of Gibraltar v Orfila* (1890) 15 App Cas 400 at 411.

262 It can be seen, then, that the rule about non-feasance was one which depended upon the conclusion that, in the absence of specific statutory provision, a statutory authority owed no duty *to an individual* to exercise its powers to avoid injury to the individual. Other considerations arose if the authority exercised its powers but did so in a way which caused injury.

263 Perhaps it was the developments in claims against persons other than highway authorities which led to the decision, in 1879, in *Borough of Bathurst v Macpherson*[465]. A claim for damages for personal injuries alleging negligence and nuisance was made against the borough. The Privy Council dismissed an appeal against the decision of the Full Court of the Supreme Court of New South Wales. It decided that the claim in nuisance could be maintained. The advice of the Privy Council contains many statements which were later to be seized on by those making claims for personal injuries suffered as a result of the state of a road or of works on or near a road.

264 The basis of the decision in the case is not entirely clear. Much attention was given in later cases to explaining it[466]. Perhaps the better view is that the Privy Council took two steps in reasoning to the conclusion reached. First, it decided that, the borough having the care and management of the roads of the municipality and power to repair them, it was under a duty to keep the works it created in such a state as to prevent their causing a danger to passengers on the highway[467]. Secondly, it followed, so their Lordships concluded, that the corporation being obliged to repair the roads, it was "liable not only to be indicted for a breach of that duty, but to be sued by anybody who could shew that by reason of such breach of duty he had sustained particular and special damage"[468].

265 For a time the decision was taken to stand for a general proposition that an action in nuisance would lie against a highway authority for any obstruction to, or interference with, a highway no matter whether it resulted from misfeasance or non-feasance[469], notwithstanding that earlier decisions had maintained the

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465 (1879) 4 App Cas 256.

466 *Municipality of Pictou v Geldert* [1893] AC 524; *Thompson v Mayor &c of Brighton* [1894] 1 QB 332; *Municipal Council of Sydney v Bourke* [1895] AC 433; *Clarkbarry v Mayor etc of South Melbourne* (1895) 21 VLR 426.

467 (1879) 4 App Cas 256 at 265.

468 (1879) 4 App Cas 256 at 269.

469 See, for example, *Scott v Mayor &c of Collingwood* (1881) 7 VLR(L) 280 at 291.

distinction between misfeasance and non-feasance[470]. This understanding of the case, therefore, represented a very sharp departure from earlier authority. Moreover, *Borough of Bathurst* was later to be seen as depending upon a distinction drawn in the decision between the highway and artificial works introduced to the highway[471]. The basis of this distinction between the highway, and artificial works introduced on to the highway, is obscure. It has been invoked from time to time[472] but it is a distinction that is by no means easy to draw.

266 A more frequently applied distinction that might be seen to support the result at which the Privy Council arrived in *Borough of Bathurst* came to be drawn between the capacities in which an authority having highway and other functions acted[473]. Originally the liability of an authority, like a water or sewerage authority, which installed part of its undertaking in a highway, depended upon its owning or controlling the structure, or upon an implication discovered in the particular statute which permitted it to install the structure[474]. Such an authority was treated as committing or continuing a public nuisance obstructing the highway. The distinction was, however, seen to depend upon the difference in functions performed, not upon the separate identity of those who performed them. Accordingly, it became important to identify the capacity in which an authority acted in introducing a structure in or near the road[475]. Perhaps it is this distinction which found imperfect echoes in the distinction between the highway and artificial structures.

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470 See, for example, *Ryan v Mayor &c of Malmsbury* (1870) 1 VR(L) 23; *Reed v Mayor of Fitzroy* (1873) 4 AJR 109; *Phillips v Mayor &c of Melbourne* (1875) 1 VLR(L) 74.

471 (1879) 4 App Cas 256 at 265.

472 *Buckle v Bayswater Road Board* (1936) 57 CLR 259 at 298 per McTiernan J; *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357 at 379 per Fullagar J. See also *Webb v The State of South Australia* (1982) 56 ALJR 912; 43 ALR 465; *Bretherton v Hornsby Shire Council* [1963] SR (NSW) 334; *Hughes v Hunters Hill Municipal Council* (1992) 29 NSWLR 232; *Guilfoyle v Port of London Authority* [1932] 1 KB 336.

473 *Buckle* (1936) 57 CLR 259 at 289 per Dixon J.

474 *Buckle* (1936) 57 CLR 259 at 286-287 per Dixon J.

475 *South Australian Railways Commissioner v Barnes* (1927) 40 CLR 179; *White v Hindley Local Board* (1875) LR 10 QB 219; *Blackmore v Vestry of Mile End Old Town* (1882) 9 QBD 451; *Thompson v Mayor &c of Brighton* [1894] 1 QB 332; *Skilton v Epsom and Ewell Urban District Council* [1937] 1 KB 112.

267 *Borough of Bathurst* should be seen as anomalous and standing altogether apart from any coherent development of the law in this area. In *Buckle*[476], Dixon J said "[f]ew decisions have proved the source of so much error" and "[a] case with such a history [as *Borough of Bathurst*] cannot be regarded as providing a safe link in any chain of legal reasoning". This is because there are at least two difficulties that may be presented by the reasoning in *Borough of Bathurst*. The first lies in the conclusion that the borough was under a duty to repair the road (or perhaps the drain which it had built). It by no means automatically follows from the fact that a statutory authority has *power* to do something that it has a *duty* to exercise that power, yet the distinction between power and duty may be thought to have been elided in that case. Secondly, the apparently universal proposition that an action for damages lies against a public authority which has failed to perform its public duty at the suit of anyone who has suffered special damage may be cast too widely.

Application of highway law in Australia

268 Given the historical basis of the English law relating to highways, it now seems obvious that application of that law to the colonies in Australia was not inevitable. Colonial conditions were very different from those which obtained in England, both when the colonies were established, and in earlier centuries. In the early twentieth century, however, the importance of those differences may have been much less obvious. Whether or not that is so, the nineteenth century decisions in Australia, and in the Privy Council on appeal from decisions of the Australian colonies, proceeded from the premise that the English law relating to highways and the liability of highway authorities should be applied here[477]. It is necessary in this regard, however, to notice one of the earliest decisions of this Court, *Miller v McKeon*[478], for it might be thought to have challenged that premise. Griffith CJ said that[479]:

> "Reference was made during argument to a great number of cases dealing with the law relating to highways in England and the doctrines that were to be applied to them. There is certainly an identity in name between highways in England and highways in this country, but the similarity is to a great extent in name only".

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476 (1936) 57 CLR 259 at 290-291.

477 See, especially, *Municipal Council of Sydney v Bourke* [1895] AC 433.

478 (1905) 3 CLR 50.

479 (1905) 3 CLR 50 at 58.

269 Upon closer examination, however, it can be seen that the decision in *Miller v McKeon* did not challenge the general premise I have identified. Rather, the case concerned the nature and extent of the duty which a highway authority owes, when first building a road, to make it safe to use. In his reasons, Griffith CJ, with whom Barton J agreed, referred to the distinction between misfeasance and non-feasance[480] and concluded that the plaintiff's complaint in the case concerned the way in which the road was originally laid out and built. It was not a complaint about anything later done (or not done) to that road. The question raised in the case was, therefore, seen to be whether in *building* the road the government had used "such care to avoid danger to persons using it as is reasonable under all the circumstances"[481]. That question was resolved against the injured plaintiff.

The decisions in *Buckle* and *Gorringe*

270 The decisions in both *Buckle* and *Gorringe* must be understood against the background of the historical matters I have mentioned. In *Buckle*, all three members of the Court who sat in the case accepted that a public authority having powers of care and maintenance of highways is not, by reason merely of the existence of those powers, liable for damages resulting from non-feasance[482]. Despite accepting this general proposition, the Court divided in its application to the particular case. It is important to identify the nature and bases of those differences.

271 The majority (Latham CJ and McTiernan J) held that the plaintiff should recover. Their Honours reached that conclusion by different paths and this presents real difficulties in the way of identifying the ratio of the case[483]. Latham CJ held[484] that the liability of the defendant depended upon the source of the authority that the defendant had for constructing the drain (the breakage in which caused the hole in to which the plaintiff fell). His Honour concluded that if the defendant acted, wholly or partly, as a drainage authority rather than as a highway authority, it owed a duty to individuals to keep the drain in repair. McTiernan J, by contrast, based his conclusion on *Borough of Bathurst*, and the distinction said to be drawn in that case between the highway and other artificial

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480 (1905) 3 CLR 50 at 60.

481 (1905) 3 CLR 50 at 60.

482 (1936) 57 CLR 259 at 268 per Latham CJ, 281 per Dixon J, 300 per McTiernan J.

483 Paton and Sawer, "Ratio Decidendi and Obiter Dictum in Appellate Courts", (1947) 63 *Law Quarterly Review* 461 at 466-469.

484 (1936) 57 CLR 259 at 271-273.

structures in or on the highway[485]. He concluded that the defendant owed a duty to repair the drain as an artificial structure. Both Latham CJ and McTiernan J treated it as clear that, but for the immunity rule, the defendant would be held liable. Each focussed upon the application of what were seen as exceptions to the general immunity.

272 Dixon J, who dissented, took a different path. He accepted that "[i]t is well settled that no civil liability is incurred by a road authority by reason of any neglect on its part to construct, repair or maintain a road or other highway"[486]. It is often overlooked, however, that his Honour based this conclusion not upon some immunity from liability, but upon the proposition that a road authority owed no duty to undertake active measures, whether of maintenance, repair, construction or lighting. Immediately after stating the general proposition that I have set out, he went on to say[487]:

> "Such a liability may, of course, be imposed by statute. But to do so a legislative intention must appear to impose an *absolute*, as distinguished from a discretionary, duty of repair and to confer a correlative private right (Cf *City of Vancouver v McPhalen*[488])." (emphasis added)

273 Further, a little later in his reasons, Dixon J said[489]:

> "But while a road authority owes to the members of the public using a highway no duty to undertake active measures whether of maintenance, repair, construction or lighting in order to safeguard them from its condition, on the other hand *it possesses no immunity from liability for civil wrong*." (emphasis added)

Thus the focus of the reasons of Dixon J was upon what was the duty of a highway authority, and whether a breach of that duty was demonstrated. In particular, was it shown that the defendant had been "the active agent in causing

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485 (1936) 57 CLR 259 at 300.

486 (1936) 57 CLR 259 at 281.

487 (1936) 57 CLR 259 at 281.

488 (1911) 45 SCR 194.

489 (1936) 57 CLR 259 at 283.

an unnecessary danger in the highway"[490] or had been in breach of some positive duty to repair? As to the former of these considerations, his Honour said[491]:

> "*The improper nature of the original act of the road authority must always be the foundation of the complaint against it.* Cases in which but for continual subsequent safeguards the work actively done by the road authority would make the highway dangerous must be distinguished from the very different class of case in which the operations of the road authority put the highway in a condition perfectly proper and safe, but liable in the course of time through wear and tear and deterioration to become unsafe. Whenever an artificial road surface is provided, neglect to maintain it is likely to result in its destruction by wear and weather. Its last condition may be expected to be worse than its first. But these considerations do not throw upon the road authority which fails to maintain a road any civil liability for the consequences, although at the time of construction they might have been foreseen. If, judged according to the standards of the time and the circumstances then prevailing, the design and execution of the work were not improper or unsafe, the development of a defective or dangerous condition of the highway is to be attributed to the failure to maintain or repair, which involves no civil liability for particular damage. It cannot be regarded as a dangerous condition 'caused by', because necessarily resulting from, the original construction of the roadway." (emphasis added)

As to the second question, of breach of positive duty, Dixon J distinguished between the position of a road authority "in relation to the defective condition of a road, street, bridge, footpath, or other place over which there is a public right of passage" and "the position of a water, sewerage, gas and other like authority"[492] in relation to the defective condition of parts of its undertaking that were maintained by legislative authority in a highway so as to form part of the road. In accordance with the then accepted understanding of the position of highway authorities, he concluded that a highway authority owed an individual road user no duty to repair the road. Of the other kinds of authority he said[493]:

> "The liability of such a body depends, of course, ultimately on the effect of the statute under which it acts. But if its powers of interference with the roadway extend to maintenance and repair of the object it has placed

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490 (1936) 57 CLR 259 at 284.

491 (1936) 57 CLR 259 at 284-285.

492 (1936) 57 CLR 259 at 286.

493 (1936) 57 CLR 259 at 286-287.

> there, then, as a rule, it will be liable for the consequences if that object is negligently allowed to fall into disrepair. *The reason for this liability in the case of such a body may be found in its ownership or control of the structure in the highway, or in the implications discoverable in the statute.*" (emphasis added)

Dixon J held in *Buckle*[494] that the drain was made for roadway purposes and installed in exercise of the defendant's powers as a highway authority with due care and skill and without negligence in design or execution of the work. It followed, in his Honour's view, that the defendant had breached no duty it owed the plaintiff.

274 The plaintiff in *Gorringe* did not challenge the general proposition that a highway authority is not liable for non-feasance[495]. He put his case in three ways[496]: that the defendant Transport Commission was under an absolute duty to maintain the highway, and that a case of misfeasance was established on either of two bases. The detail of the contentions about misfeasance is not important, as all three members of the Court rejected them.

275 The contention that the Commission was under a duty to maintain the highway, with a correlative right in a person injured by a defect in the highway to complain of the failure in the duty, was seen as depending upon the provisions of s 8 of the *Roads and Jetties Act* 1935 (Tas). That section provided that State highways were vested in the Crown, but were under the control and direction of the Transport Commission. It further provided, by sub-s (2), that except as otherwise provided, the Commission should cause all State highways and subsidiary roads to be maintained "as it shall direct". The Court held that this provision imposed no duty on the Commission which would found a cause of action at the suit of the plaintiff. Although the action was framed in negligence, much of the argument and the reasons of the members of the Court was expressed in terms redolent of a claim for breach of statutory duty. It will be necessary to return to these issues.

276 Latham CJ construed s 8 of the *Roads and Jetties Act* as imposing no duty on the Commission, in part because the words "as it shall direct" "show that it intended to confer upon the commission authority to maintain roads in such measure, degree and manner as the commission shall determine"[497]. Dixon J

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494 (1936) 57 CLR 259 at 293.

495 (1950) 80 CLR 357 at 362 per Latham CJ.

496 (1950) 80 CLR 357 at 367-368 per Dixon J.

497 (1950) 80 CLR 357 at 363.

said[498] that to interpret s 8(2) as imposing a duty with a correlative right to sue for damages:

> "would be contrary to the principle upon which provisions imposing upon highway authorities a duty of repair have been construed. At common law highway authorities have never been subject to a private right of action for neglect to maintain or repair highways under their control notwithstanding the existence of a general duty to repair and maintain. They have been liable only for negligence in the course of the exercise of their powers or the performance of their duties with reference to the maintenance and reparation of highways. Statutes directing such authorities to maintain and repair roads, streets and bridges prima facie are not to be understood as conferring private rights of action in derogation from this principle."

277 Fullagar J traced the development of the general principle that a highway authority is not liable for non-feasance. His Honour noted[499] that:

> "in certain cases the argument that the defendant has been guilty of no more than non-feasance has been put as if it were an affirmative defence – as if it were open to a highway authority to say: 'I admit that I have been guilty of a breach of a legal duty which is prima facie enforceable by action, but my fault was that I omitted to do something and that excuses me.'"

This, as his Honour implied, is to misstate the effect of the cases, which established two principles[500]:

> "(1) that at common law no person or persons, corporate or unincorporate, is or are subject to any duty enforceable by action to repair or keep in repair any highway of which, whether at common law or by statute, he or they or it has or have the management and control, and (2) that if a duty to repair or keep in repair a highway or highways is imposed by statute on any such person or persons, that duty is not enforceable by action unless the statute makes it clear by express provision or necessary implication that the duty is to be enforceable by action at the suit of a person injured by its breach."

278 The two rules Fullagar J identified did not themselves exclude liability for negligence in control and management of roads. Notwithstanding the

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498 (1950) 80 CLR 357 at 369.

499 (1950) 80 CLR 357 at 375.

500 (1950) 80 CLR 357 at 375-376.

development of the law of negligence in the late nineteenth century, particularly in *Heaven v Pender*[501], that further step was taken[502]. As Fullagar J said[503], "[t]he theorem that there was no duty to repair enforceable by action acquired a corollary. There was no duty enforceable by action to be careful in control and management." But as Fullagar J also pointed out[504], it seemed to be accepted that the rules applied only to highway authorities (not authorities responsible for matters such as drainage, sewerage or tramways) and applied "even to a highway authority only in respect of the actual roadway itself and such artificial structures in and about the roadway as can fairly be considered 'part of the road' or 'made for road purposes' or 'made for roadway purposes'".

279 In neither *Buckle* nor *Gorringe* was there any challenge to the proposition that, absent specific statutory provision to the contrary, a highway authority is not liable for damage resulting from non-feasance. But as the judgments of Dixon J in both *Buckle* and *Gorringe* and the judgment of Fullagar J in *Gorringe* reveal, the questions which lie behind that general proposition about immunity are in fact questions about the duties of a highway authority. These questions include whether the statute which governs the activities of the authority imposes any relevant duty on the authority to perform work (as opposed to giving it powers to do so) and whether, if there is a statutory duty to do work or maintain the roads, breach of that statutory duty will found a private action at the suit of an individual who has suffered loss.

280 The answers which were given to these questions were seen, in *Gorringe*, to be affected by the existence of the general rule about immunity. That rule was seen as providing a presumption against construing the relevant statute as creating a private right of action. As Latham CJ said[505] of the provisions in question in *Gorringe*, "one would expect much clearer language if Parliament intended to alter … a well-established legal principle of such importance". In this respect highway authorities were seen as occupying a special position, the presumption in the case of a body like a tramway authority being, in the words of

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501 (1883) 11 QBD 503.

502 *Sanitary Commissioners of Gibraltar v Orfila* (1890) 15 App Cas 400; *Cowley v Newmarket Local Board* [1892] AC 345; *Municipality of Pictou v Geldert* [1893] AC 524; *Municipal Council of Sydney v Bourke* [1895] AC 433.

503 (1950) 80 CLR 357 at 378.

504 (1950) 80 CLR 357 at 379.

505 (1950) 80 CLR 357 at 362-363.

Dixon J[506], "that it will incur a civil responsibility for a negligent failure to repair and maintain in a condition of safety the rails and surface of its tramway"[507].

281 Subject to one qualification, these are questions which would arise in considering the application of well-accepted principles governing whether an action for breach of statutory duty will lie[508]. They were seen as questions that turned on the construction of the statute which regulated the conduct of the relevant authority. The qualification which must be recognised, however, is that the immunity was treated as providing a sufficient basis for finding that no action for breach of statutory duty would lie.

282 The proposition that a highway authority owes no common law duty, enforceable by action at the suit of an injured party, to be careful in its control and management of the roads was obviously problematic at the time *Gorringe* was decided. When this proposition was established in the late nineteenth century, negligence was, as Fullagar J noted, undergoing considerable development. That development continued at increasing speed throughout the twentieth century. Especially is that so in relation to statutory authorities. Both the theorem, of no duty to repair which is enforceable by action, and the corollary, of no duty to be careful in care and management which is enforceable by action, must be reconsidered against those developments.

Duty of care in exercising statutory powers

283 Of the many developments in the law of negligence that have occurred in the course of the nineteenth and twentieth centuries, it is necessary to consider those that most directly concern public authorities. In 1878, Lord Blackburn said, in *Geddis v Proprietors of Bann Reservoir*[509]:

> "I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to

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506 (1950) 80 CLR 357 at 369.

507 See also *Municipal Tramways Trust v Stephens* (1912) 15 CLR 104.

508 *O'Connor v S P Bray Ltd* (1937) 56 CLR 464 at 477-478 per Dixon J; *Henwood v Municipal Tramways Trust (SA)* (1938) 60 CLR 438; *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405 per Kitto J; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 424-426 per Brennan CJ, Dawson and Toohey JJ, 457-462 per McHugh and Gummow JJ.

509 (1878) 3 App Cas 430 at 455-456.

anyone; but *an action does lie for doing that which the legislature has authorized, if it be done negligently*." (emphasis added)

284 Thus, it is not disputed that a highway authority owes a duty of care in the actual exercise of its powers. In that respect a highway authority does not stand apart from any other repository of statutory powers: "[W]hen statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered"[510].

285 The duty to act carefully in the exercise of statutory powers was, for a time, assumed, without any close examination being given to its source. In *Miller v McKeon*[511], the members of the Court appear to have considered it to be self-evident that, if the government of New South Wales undertook work, it was duty bound to do so carefully and, if it did not, a person suffering injury as a result had a right of action[512]. In this, and perhaps some other cases of the time, the assumption may stem from the provisions of the relevant legislation providing for suits against the Crown or government which said that the rights of parties "shall as nearly as possible be the same … as in an ordinary case between subject and subject"[513]. But not all cases against public authorities can be understood in this way because in many of them, Crown suits legislation was not engaged.

286 The question in the present cases is whether a highway authority should now be held to owe a common law duty of care to those who suffer injury because it did *not* exercise its powers. Whether a duty of that kind should be found raises other questions: when is such a duty to be found; what is its scope? The question is not, and never has been, whether a highway authority, guilty of a breach of a duty which prima facie is enforceable by action, should be entitled to defend that claim by saying that the fault was one of omission rather than commission.

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510 *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 220 per Dixon CJ, McTiernan, Kitto and Taylor JJ.

511 (1905) 3 CLR 50.

512 (1905) 3 CLR 50 at 58 per Griffith CJ, with whom Barton J agreed, 63-64 per O'Connor J.

513 *Claims against the Government and Crown Suits Act* 1897 (NSW), s 4.

287 Early in the development of negligence, it was recognised that acts of omission could be every bit as significant as acts of commission. In 1856, Alderson B said that[514]:

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

Yet the classification of events as misfeasance or non-feasance, especially in cases involving public authorities, remained important. The influence of the distinction can be seen clearly in the dictum of Scrutton LJ in *Sheppard v Glossop Corporation*[515] that "it is not negligent to abstain from doing a thing unless there is some duty to do it". It can also be seen in the decision of the House of Lords in *East Suffolk Rivers Catchment Board v Kent*[516]. There, the statutory authority, which had power but no statutory duty to perform certain works, was held not liable for carrying out those works. This was despite the works being carried out so inefficiently that the inundation of the plaintiffs' land was prolonged beyond what would have happened if the work had been done properly (as the inundation did not endure beyond what would have happened had the authority done nothing at all).

288 At the most basic level, the distinction between misfeasance and non-feasance can be seen as a particular reflection of the fact that "[f]rom the time of the Year Books the common law has drawn a distinction between damage which is the result of a positive act and damage which is the consequence of a failure to act"[517]. Thus, in cases of omission, the question which must always be asked is why was there a duty to act? At least since *Sutherland Shire Council v Heyman*[518] it has been clear that the ordinary principles of the law of negligence apply to public authorities with the result that[519]:

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514 *Blyth v The Birmingham Waterworks Co* (1856) 11 Ex 781 at 784 [156 ER 1047 at 1049].

515 [1921] 3 KB 132 at 145.

516 [1941] AC 74.

517 *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 326 per McHugh JA. See also *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 368 [101] per McHugh J.

518 (1985) 157 CLR 424.

519 (1985) 157 CLR 424 at 445 per Gibbs CJ. See also at 456-457 per Mason J, 471 per Wilson J, 484 per Brennan J.

> "they are liable for damage caused by a negligent failure to act *when they are under a duty to act*, or for a negligent failure to consider whether to exercise a power conferred on them with the intention that it should be exercised if and when the public interest requires it". (emphasis added)

But that leaves unanswered the questions when and why should a duty to act be found? Those are the underlying questions in these cases.

A duty to act?

289 There can be no duty to act in a particular way unless there is authority to do so. Power is a necessary, but not a sufficient, condition of liability. But the *power* to act in a particular way, and the fact that, if action is not taken, it is reasonably foreseeable that damage will ensue, have hitherto not been held sufficient to give rise to a duty to take that action. It is, however, far from clear what more must be added to power and foresight to found a conclusion that a statutory authority owes a duty of care, the satisfaction of which requires it to take positive action.

290 Of course, the inquiry must begin from a consideration of the legislation which regulates the activities of an authority. The consideration of that legislation will often reveal that there is no statutory duty to take the positive action in question. Even if there is a statutory duty to take action, there may be no private action for damages for breach of that statutory duty. If that is so, when and why should the common law supply that duty?

291 Because the ordinary principles of the law of negligence apply to statutory authorities, a duty of care requiring positive action will be found in those cases where a private person would be under such a duty, for example, as employer or manufacturer of goods. Difficulties emerge, however, when it is sought to find a duty of care requiring a statutory authority to take positive action in cases where the relationship between authority and plaintiff is only analogous to some recognised relationship giving rise to such a duty.

292 Thus a duty to act will be found to exist if the authority and the injured plaintiff stood in the relationship of occupier and entrant as would be the case when someone visited its offices. But arguing for the existence of a duty of care in different circumstances, said to be analogous to those of occupier and entrant, requires attention to the closeness of the analogy which it is sought to draw. The imposition of a duty on a private occupier to act to avoid foreseeable risk of injury owes much to the control which the occupier has not only over the state of the land, but also over whether (or over the terms on which) a person may enter and remain on the land. An authority will often not have that latter kind of control over its facilities even if it does have the former. Indeed there will be cases where it has neither.

293 Similarly, if an authority makes a negligent misstatement to an inquirer, it may be that the authority will be seen to have had a duty to take reasonable care about its statement[520]. The imposition of a duty in this kind of case owes much to the reliance which the recipient places upon the maker of the statement. Again, analogies may be drawn in other circumstances where it might be said that a user of a public facility relied on an authority. Again, however, care must be taken in relying on such analogies.

294 Finally, the special dependence and vulnerability of an injured person upon a party alleged to owe a duty of care has also been held to give rise to a special, non-delegable, duty to ensure that care is taken[521]. Again, it may be said that questions of special dependence or vulnerability are relevant in considering the position of a statutory authority[522]. Again, however, the analogy with private persons must be examined. It may not always be wholly apt.

295 In all of the respects in which I have said analogies may be drawn between the position of a private person owing a particular kind of duty and the position of a statutory authority, the difficulties with such analogies largely stem from two features. First, statutory authorities are bodies of limited powers, established for the performance of functions or the provision of services to which all, or large sections, of the community may resort. Second, they are bodies of finite financial resources, yet they cannot readily withdraw from their central activity of performing particular functions or providing particular services.

Analogies with occupiers

296 It is clear that there are some circumstances in which a statutory authority which has the control and management of land will owe a duty of care to those who use it. So much was held in *Nagle v Rottnest Island Authority*[523] and not disputed in *Romeo v Conservation Commission (NT)*[524]. What remains open to

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520 *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 and on appeal (1970) 122 CLR 628; [1971] AC 793; *Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]* (1981) 150 CLR 225; *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340.

521 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686-687 per Mason J; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550-551 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

522 *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.

523 (1993) 177 CLR 423.

524 (1998) 192 CLR 431.

debate is not only the source and the extent of that duty of care, but also the circumstances in which a duty arises.

297 In *Aiken v Kingborough Corporation*[525], the Court held that a statutory authority, in which "the control and management" of a jetty was statutorily vested[526], was liable for damages for personal injuries because it did not take reasonable steps to warn of a cavity between a pile and the decking into which the plaintiff fell. Three members of the Court (Latham CJ, Starke and McTiernan JJ) considered themselves bound by the decision of the Privy Council in *R v Williams*[527] to hold the authority liable for negligence.

298 For my own part, I doubt that *R v Williams* stood for a proposition that required that conclusion. The question before the Judicial Committee in *R v Williams* was described[528] as being "whether there was a breach on the part of the Executive Government of that duty which the law would have cast upon private persons maintaining the staiths or wharf and inviting ships to visit them in the same manner in which the Executive Government are shewn to have done". The formulation of the question owes much to the provisions of the *Crown Suits Act* 1881 (NZ) which required that a claim against the Executive Government be founded upon or arise out of a wrong done in, upon, or in connection with a public work for which cause of action a remedy would lie if the person against whom it could be enforced were a subject[529]. It was, therefore, a case that turned upon the provisions of the *Crown Suits Act* and the obligation which a *private* operator of a wharf would owe to a user. It did not hold that, apart from the *Crown Suits Act*, the Executive Government owed a duty of care which required it to act to remove dangers to users of the facilities.

299 In *Aiken*, Dixon J treated the statutory authority as occupier of the jetty: "[t]he control and management of such a structure spells occupation"[530]. His Honour expressed the relevant principle in very general terms. He said[531]:

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525 (1939) 62 CLR 179.

526 *Roads and Jetties Act* 1935 (Tas), s 53.

527 (1884) 9 App Cas 418.

528 (1884) 9 App Cas 418 at 427.

529 (1884) 9 App Cas 418 at 432-433.

530 (1939) 62 CLR 179 at 203.

531 (1939) 62 CLR 179 at 205-206.

> "The nature of the body as well as of the place must be considered, but, speaking generally, unless some other intention can be collected from the statute, a duty of care for the safety of those using the place must, I think, be cast upon the corporation or trustees by the very situation in which the statute has put them. They are in charge of a structure provided for the use of people who must, in using it, rely upon its freedom from dangers which the exercise of ordinary care on their own part would not avoid. Unless measures are taken to prevent it falling into disrepair or dilapidation or becoming defective, or if it does so, to warn or otherwise safeguard the users from the consequent dangers, it will become a source of injury. The body to which the statute has confided the care and management of the place alone has the means of securing the users against such injury, the risk of which arises from continuing to maintain the premises as a place of public resort and from the reliance which is ordinarily placed upon an absence of unusual or hidden dangers by persons making use of structures or other premises provided for public use."

If the principle which is to be applied were as broad as this, a highway authority having care and management of a road would, subject to questions of breach and causation, be liable for failure to repair it. More recent cases have, however, approached the problem differently.

300 In *Schiller v Mulgrave Shire Council*[532], Barwick CJ identified the source of the duty as the "statutory power and duty of care, control and management and not merely the occupation of land". But it is only in *Schiller* that the existence of a statutory power to take steps which would have avoided the harm which the plaintiff suffered was seen as reason enough to impose a duty of care on the authority to take those steps. In the other cases, some further factor was identified as necessary to the conclusion that a duty should be found. In *Aiken*, that further factor was the analogy drawn with the position of a private occupier of land.

301 In *Nagle*, it was said that[533]:

> "the basis for holding that the Board came under a duty of care may be simply stated: the Board, by encouraging the public to swim in the Basin,

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532 (1972) 129 CLR 116 at 120.

533 (1993) 177 CLR 423 at 430 per Mason CJ, Deane, Dawson and Gaudron JJ.

brought itself under a duty of care to those members of the public who swam in the Basin"[534].

302 The reference in *Nagle* to the encouragement which the Board gave to the public to swim in the Basin must be understood in the context in which it appears. Consonant with the then state of authority, the majority in *Nagle* was concerned to identify whether there was a relationship of proximity between the Board and those who lawfully visited the island and resorted to the Basin for swimming. Their Honours concluded[535] that there was a generalised duty of care to take reasonable steps to avoid foreseeable risk of injury. The duty was held to be owed to members of the public who resorted to the Basin to swim. The majority based this conclusion upon a combination of factors: classifying the Board as occupier of the Reserve; the Board's statutory duty to manage and control the Reserve for the benefit of the public; and the encouragement which the Board gave to members of the public to resort to the Basin to engage in the activity in the course of which the plaintiff sustained injury. The concession that the respondent in *Romeo* owed a duty of care reflects the fact that the same features were present in that case.

303 The analogy between a statutory authority having care and management of a structure or facility, and the private occupier of land, is imperfect. Both have power to control the state of the place to which others resort. Both may, in that sense, be said to have the care and management of the place and it may very well be that it is *only* the owner or the statutory authority that has power to remedy any defects in, or remove hazards from, the place or facility in question. But unlike the private owner, the statutory authority cannot wholly bar access to the facility it controls. The public commonly have access to it as of common right. The statutory authority can warn of hazards but, unlike the private occupier, the statutory authority cannot shift responsibility for the detection and avoidance of hazards by exacting special terms from those who enter. The private occupier of land, whether for reasons of economy or ease of mind, may choose permanently to bar access to a dilapidated building rather than repair it. But that choice is denied to the public authority. It cannot permanently bar access to the facility it controls, or at least it cannot do so as readily as can the private owner.

304 Moreover, in most cases the private owner of land will be relatively easily able to inspect that land for sources of danger to likely entrants. The occupier of large remote areas of land confronts much less likelihood of entry by others than the occupier of smaller areas in more frequented parts of the country. But a

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534 See also *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 456-459 [61]-[67] per Gaudron J.

535 (1993) 177 CLR 423 at 430.

statutory authority, particularly a highway authority, may be responsible for the care and management of a diverse group of facilities that are spread widely. Although it will ordinarily have employees, they may not be numerous or skilled enough to detect risks. The task of inspecting all of the facilities for possible sources of danger will often be very large. Thus, if analogies are to be drawn, they are even less apt in the case of roads than they may be in relation to a confined, relatively small, structure like a jetty. Roads cannot readily be enclosed. Inspection of roads is a much larger task than inspecting a jetty. Moreover, it cannot be assumed that an authority will always be provided with money enough to employ those who would be needed to carry out the necessary inspections and it, unlike the impecunious private owner of land, cannot resolve the difficulty by selling the facility.

305 Account must be taken of these differences from the position of a private occupier of land in deciding what duty of care a statutory authority owes.

Reliance and vulnerability

306 Reference has been made in some cases to the reliance which a plaintiff, or a class of which the plaintiff was a member, may be supposed to have placed in a defendant taking reasonable care[536]. Reference has also been made to the plaintiff's vulnerability and incapacity to take steps to prevent injury[537].

307 For my part, I consider that the concept of "general reliance" is not useful in considering whether a statutory authority owes a duty of care to take positive steps in the exercise of its powers which will serve to prevent injury to persons. In this context (divorced as it is from the context of negligent misstatements, where *particular* reliance does find a useful place) general reliance is, as Gummow J demonstrates in *Pyrenees Shire Council v Day*[538], a legal fiction. Everyone "relies", to a greater or lesser extent, on others in society doing what they should. Whenever anyone resorts to facilities which are provided by or at the direction of government, such as water, electricity, gas, roads, or the airways, they rely on the relevant authorities to do their work properly. Few, if any, test

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536 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 464 per Mason J; *Pyrenees* (1998) 192 CLR 330 at 343-344 [18] per Brennan CJ, 385-388 [157]-[165] per Gummow J, 408-412 [225]-[232] per Kirby J; *Crimmins* (1999) 200 CLR 1 at 23-24 [42]-[43] per Gaudron J.

537 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 194 [10]-[11] per Gleeson CJ; *Crimmins* (1999) 200 CLR 1 at 24-25 [44] per Gaudron J, 42-43 [104] per McHugh J (with whom Gleeson CJ agreed).

538 (1998) 192 CLR 330 at 385-388 [157]-[165].

the water before drinking it, test the bridge before driving over it, or ask the pilot of the aircraft to challenge every instruction given by air traffic control. To say that in these ways individuals rely on those who provide these services or facilities is to state an observable fact. But to conclude from this observable fact that "therefore" the authority concerned not only is liable to exercise any powers it does exercise with reasonable care, but also is bound to prevent harm to others by positively exercising powers which otherwise it has not chosen to exercise, is to take a much larger step.

308 Nor do I consider that special dependence or vulnerability provides a useful test in deciding whether a statutory authority owes a duty of care. Many statutory authorities are monopolies. Often members of the public have no real choice about whether they use the services provided by an authority. In the sense in which I have just explained "reliance", members of the public very often "rely" on an authority to provide services which they can use safely and they are vulnerable to the consequences if the services provided are not safe to use. In the end, however, the question is whether the fact of reliance or vulnerability is relevant to the inquiry about duty of care. I would reject general reliance and vulnerability as useful analytical tools. Either they are no more than legal fictions or they are descriptions of the nature of the relationship between a statutory authority and a user of the facility or service it provides which add nothing to the conclusion that statutory authorities provide facilities and services to which the public resort as of course and often as of right.

Duty of care or breach of duty?

309 It might be said that the various considerations which I have mentioned as difficulties in drawing analogies between a statutory authority and private occupier should be taken into account in deciding whether there has been a breach of a duty of care, rather than in deciding whether there is a duty. In choosing between an outcome based in breach rather than duty it is as well to remember, however, that experience suggests that dealing with factors tending against the imposition of liability at the level of breach rather than duty will lead more often than not to a finding of liability. In hindsight, the steps which could (and, it will be said, should) have been taken by a defendant appear so much more obvious than they might have, had the matter been considered as a hypothetical future possibility. For that reason alone, shifting the focus to breach rather than duty will inevitably shift the balance in favour of plaintiffs and against defendants. That is not reason enough to refuse to take the step, but it is a consequence which must be recognised.

310 There are some further matters, special to statutory authorities, which make it inappropriate to deal with factors tending against the imposition of liability at the level of breach rather than duty. Curial review of decisions made by bodies performing public duties is based on a considerable level of deference to the decision-maker. The nature of the review which courts may undertake is

itself a question of law. In itself this suggests that deciding how those decisions are to be examined in an action for negligence is a question about duty of care, not a factual and evidentiary question about breach. In public law, decisions may be examined for error of law but, statute apart, there is no review of the merits of decisions made by such bodies. The closest the courts come to such a review is what is usually called *Wednesbury* unreasonableness[539], where the test is whether the decision is so unreasonable that no reasonable decision-maker could have made it. What the *Wednesbury* test reflects is that the courts are not well placed to review decisions made by such bodies when, as is often the case, the decisions are made in the light of conflicting pressures including political and financial pressures. The *Wednesbury* test is very different from the test which must be applied in an action for negligence. The content of the objective standard which negligence requires, by its reference to "reasonable" care, is not readily identifiable in the case of a public body exercising public functions. It is not enough to say that the standard of care is that of the "reasonable authority in a similar position". That does not offer any guidance about how the court is to resolve the competition between the various factors which a statutory authority could properly take into account, for example, in ordering its priorities or allocating its budget.

311 It might be said that this competition need not be resolved. That is, it might be said to be enough to demonstrate negligence, to show that the failure to take action did not follow from any of a range of reasonably available ways in which an authority might order its priorities. But that invites attention to the identification of the matters which properly can be taken into account by a public authority. In particular, can the courts, or as I would rather put it, should the courts, attempt to resolve issues which often enough are resolved by the application of *political* not *legal* considerations? It is important to recognise that most (if not all) questions about a *failure* to exercise powers will invite attention to issues of the kind just mentioned. Almost invariably the question why did an authority *not* exercise its powers in a particular respect will be met by an answer that the authority had chosen to allocate its available resources in some other way or to some other activity. Whether it was reasonable, as opposed to patently unreasonable, for the authority to do that would then require examination of, and adjudication upon, what I have described as political considerations. The fact that these questions would arise very frequently and could not be avoided in considering any question of breach of a duty of a statutory authority to exercise its powers, are further powerful reasons to address the problem at the level of duty, not breach.

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539 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

312 So, for example, to examine the way in which a highway authority (or any statutory authority) chooses to deploy its resources in performance of some or all of its various functions necessarily involves examining the choices made by that authority. Those choices may be between repairing one section of road rather than another, between building a new road rather than inspecting or repairing others, or between spending money on libraries or services for home care of the aged rather than on the roads of the municipality. How are the courts to decide whether the choice made by one authority was reasonable? What is meant, in this context, by reasonable? What kind of authority is to be taken as the benchmark? Is it relevant to know what political pressures an elected body, such as a local council, faced when it prepared its budget? Does it matter if the authority receives much of the money it spends on roads from funds provided by the federal government under State grants legislation? These are questions which lie behind the distinction which it has been sought to draw between operational and policy matters[540]. Their importance goes much deeper, however, than any such distinction. They are important questions because of the public or community nature of the functions which authorities like highway authorities perform.

313 A claim for damages for breach of some duty owed to an individual invites attention to the particular and often peculiar circumstances of that individual. By contrast, the performance of *public* duties will almost always call for the making of broad judgments about which individuals may differ. The two kinds of duty, one particular and owed to an individual, and the other general and calling for assessment of myriad competing pressures, do not readily co-exist, *except* in the case where the authority chooses to exercise its powers. Then, it is possible to accommodate the two duties. By contrast, however, the imposition of a duty to act in relation to a particular case where, as events turn out, failure to act has affected an individual, does not find any easy accommodation with the general obligation of an authority to fulfil its public obligation of providing, as best it can, a service or facility for communal use.

314 The various matters I have mentioned invite attention to the role duty of care should play in the tort of negligence. Duty of care is an important control mechanism in providing "symmetry, consistency and defined bounds"[541] to the law of negligence. It is one of the "major premises [of this area of law] which, if unqualified, may extend liability beyond the bounds of social utility and economic sustainability"[542]. As Professor Stapleton has pointed out, duty of care

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540 *Pyrenees* (1998) 192 CLR 330 at 393 [182] per Gummow J; *Crimmins* (1999) 200 CLR 1 at 101 [292] per Hayne J.

541 *Hargrave v Goldman* (1963) 110 CLR 40 at 63 per Windeyer J.

542 *Pyrenees* (1998) 192 CLR 330 at 376 [125] per Gummow J.

"allows courts to signal … relevant systemic factors going to the issue of liability"[543]. If there are factors that operate generally to deny liability, they should be taken into account at the stage of deciding whether there is a duty. The duty concept should not be discarded as if it were no more than a fifth wheel on the coach[544].

Finding a duty of care

315 The tort of negligence is not intended to provide universal protection against the consequences of injury. The basic purposes of the law in this area include promoting reasonable conduct and reflecting fundamental notions of individual responsibility. But the pursuit of those purposes, in the case of statutory authorities, must accommodate not only the fact that authorities are the creature of legislation, but also the fact that authorities of this kind fulfil public functions.

316 It can readily be accepted that the search for a principled basis, or bases, upon which a duty of care will be found to exist is a search that continues. We have seen the rise and fall of notions of proximity, and of general reliance. We have seen reference to vulnerability, to encouragement, and to open-ended statements of conclusion like the three-part incantation said to derive from *Caparo Industries Plc v Dickman*[545]. None has proved a satisfactory explanation of what it is that has moved the debate in a particular case to the conclusion that was reached. We have, at least for the moment, retreated to what is thought to be the safe haven of incremental development, perhaps hoping that, in time, a unifying principle or principles will emerge[546].

317 The incremental approach to ascertaining the existence of a duty of care has two consequences. First, there is a temporal consequence. As Gummow J pointed out in *Crimmins v Stevedoring Industry Finance Committee*[547], recovery becomes an accident of history dependent upon when, in the development of the common law, the claim falls for consideration. That might be said to be no more than an inevitable consequence of the common law's adoption of reasoning by

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543 "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence", (1995) 111 *Law Quarterly Review* 301 at 303.

544 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 75 ALJR 164 at 182 [99]; 176 ALR 411 at 436.

545 [1990] 2 AC 605 at 618.

546 *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

547 (1999) 200 CLR 1 at 59 [160].

analogy. Second, however, there is an expansionary consequence. The process of incremental development is, essentially, one of extending the range of circumstances in which a duty will be found to exist. Further, if the process of finding a duty of care in novel circumstances depends upon drawing analogies with existing cases, there is a question about what it is that makes the case in question sufficiently analogous to past cases to warrant finding a duty. Even incremental steps require implicit reference to some general principles.

318 As I have said, however, the search for some unifying principle or principles which will explain why an analogy has been drawn with previous authority in some cases but not others has so far proved unsuccessful. All that emerges is that foresight of harm, and capacity to avoid it, has been said not to be enough. "Something more" must be found. If, however, the expansion of duty of care continues on its current path, foresight of harm and capacity to avoid it will become the only criteria which underpin the imposition of a duty of care. In that event, duty of care would serve no purpose in identifying the cases in which liability is to be found. The only questions would be whether a defendant in fact acted without reasonable care, or failed to act when it would be reasonable to do so, and whether that act or omission was a cause of the plaintiff's loss or damage.

319 The hope that an incremental approach will reveal some unifying principle or principles may, therefore, very well prove ill founded. If it does, it will be because the roots which lie beneath the development of this area of the law are so ill defined that they do not enable the growth of sturdy branches, only a mass of little twigs which give no suitable shape to the plant. Those roots can be seen in necessarily diffuse notions of individual responsibility and deterrence. The difficulty is compounded by the fact that, diffuse as these notions are, they must compete with other notions also said to lie beneath this field, such as loss distribution.

320 The choice which now must be made is whether foresight of harm and capacity to avoid it are to be held sufficient to found a duty of care, or whether more must be shown. Are we now to conclude that the possession of *power* in a statutory authority, coupled with reasonable foresight of harm, will suffice to oblige it to exercise its powers if, viewed with the clarity of hindsight, it was reasonable for it to do so to avoid the harm which has befallen a plaintiff?

321 That would be a coherent and readily intelligible principle for the ascertainment of a duty of care. On its face it would seem, however, to be a principle of general application, applying not only to statutory authorities but to all persons. It would, therefore, be a duty which would oblige the passer-by to rescue others from harm if they could reasonably do so. In the biblical allusion of Lord Atkin, no longer could one pass by on the other side. The courts have always resisted taking this step. I do not consider that we should take it now.

A different approach for statutory authorities?

322 Perhaps it might be said that such a step could, and should, be taken in the case of statutory authorities, and confined in its application to bodies of that kind. But that assumes that statutory authorities are, because of their statutory origin or public functions, not only to be treated differently from private persons, but are to be subjected to wider duties of care than private persons (notwithstanding the absence of a statutory basis for this wider liability, and the wide range of policy issues such authorities have to consider).

323 I can readily accept that the duties of care of statutory authorities may be different from those of private persons. The statutory origins and public nature of the functions of statutory authorities are important distinguishing features. But effect is not to be given to those distinguishing features by imposing on statutory authorities a duty to act whenever there is power to act and foresight of harm, and it would be reasonable to act. The imposition of such a duty should be a legislative decision made in relation to each particular statutory authority, not a judicial decision applying to all such authorities.

324 To impose a duty to act would depart from what has hitherto been generally accepted to be the common law, not only in relation to highway authorities but statutory authorities generally. It may be readily accepted that the common law in relation to highway authorities has been anything but clear and that its foundations in principle are, at best, obscure. I do not accept, however, that this requires or permits the recasting of the common law by imposing on a highway authority a duty to act whenever there is power to act and foresight of harm, and it would be reasonable to act. There can be little doubt that some State Parliaments have acted on the basis that, whatever may be the obscurity of the present law, highway authorities are, in general, not liable for failing to exercise their powers, but are liable if they exercise their powers negligently. Inquiries by State law reform agencies have been commissioned but their reports have not been implemented[548]. In these circumstances, the development of the common law in relation to authorities of this kind should accommodate that understanding of the law as far as it is possible to do so. That accommodation must, of course, take account of any statutory provision to the contrary. As a general rule, however, the duty which a highway authority will owe is a duty to take reasonable care when it exercises its powers. So long as the common law stops

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548 New South Wales, Law Reform Commission, *Liability of Highway Authorities for Non-Repair*, Report No 55, (1987); Western Australia, Law Reform Commission, *Report on the Liability of Highway Authorities for Non-Feasance*, Project No 62, (1981); South Australia, Law Reform Committee, *Twenty-fifth Report of the Law Reform Committee of South Australia to the Attorney-General on Reform of the Law Relating to Misfeasance and Non-Feasance*, (1974).

short of imposing a duty of care on any person who has power to act and foresight of harm, and for whom it would be reasonable to act, no such duty of care should be found to be owed by a highway authority.

Negligence and breach of statutory duty

325 It is desirable to say something further at this point about the intersection between asking whether a statutory authority owes a common law duty to act, and the inquiries that underpin a finding that a private action will lie for breach of statutory duty. If a statutory authority has a duty, imposed by statute, to perform some function or carry on some activity, it will usually be readily apparent that the function or activity is to be performed for the advantage of some or all members of the community. As McHugh and Gummow JJ pointed out in *Byrne v Australian Airlines Ltd*[549], deciding whether a breach of a statutory duty gives rise to a civil remedy for damages at the suit of an individual is not assisted by references to the "intention" of the legislature. Nor, as Kitto J pointed out in *Sovar v Henry Lane Pty Ltd*[550], can a finding of private right be made by judges giving effect to their own ideas of policy which then are to be imputed to the legislature.

326 Rather, reference must be made[551] to "the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, *the pre-existing state of the law*, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation" (emphasis added). Ordinarily, the more general the statutory duty and the wider the class of persons in the community who it may be expected will derive benefit from its performance, the less likely is it that the statute can be construed as conferring an individual right of action for damages for its non-performance. In particular, a statutory provision giving care, control and management of some piece of infrastructure basic to modern society, like roads, is an unpromising start for a contention that, properly understood, the statute is to be construed as providing for a private right of action.

327 The conclusion that a particular statute does not provide for a private action for failure to perform some statutory duty is itself a powerful reason for pausing before finding that there is a common law duty to exercise that power. The several considerations which may lead to the conclusion that no private action should lie for breach of statutory duty seem to me to suggest in many,

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549 (1995) 185 CLR 410 at 458-459.

550 (1967) 116 CLR 397 at 405.

551 *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405.

perhaps most, cases that there is not that degree of particular contemplation of the position of individuals, of whom the injured plaintiff is one, which should be necessary before finding that there is a common law duty of care.

A highway authority's duty of care

328 As I have said above, a highway authority, like any other repository of statutory powers, owes a duty of care in the actual exercise of its powers. It should not be held that it does not owe a common law duty of care to those who suffer injury because it did *not* exercise its powers.

329 Formulating the duty of care in a way which distinguishes between an authority exercising its powers and it failing to do so carries some difficulties with it that must be addressed. When it is recognised that the relevant inquiry is about duty of care, not about breach or immunity from liability, at least some of those questions may prove to be irrelevant.

330 One apparent difficulty which should be addressed is what Fullagar J identified in *Gorringe* as the corollary to the theorem of no duty to repair: that a highway authority owes no duty to individuals to be careful in care and management of its highways. Provisions that a highway authority "shall have the care, control and management" of certain roads are not uncommon[552].

331 Provisions of that kind might be construed as imposing a statutory duty of care and management and, if that is so, why should the authority not be found to owe a duty to take reasonable care in the way in which it manages the roads under its control? Moreover, should not considerable weight be given to the fact that a highway authority *does* control the state of the roads under its management[553]?

332 On analysis, however, considering the power, or duty, of a highway authority to care for and manage its roads is to consider the problem at too broad or abstract a level of inquiry. In order to understand the content of the duty which it is alleged has been broken, it is necessary to examine exactly what it is said that the authority is alleged to have done, or not done, in caring for and managing the particular road, or section of road, in issue. Only then can the content of the duty be identified[554]. Examining the matter at the more general level of care and management of all its roads may serve only to obscure the fact

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552 For example, *Local Government Act* 1919 (NSW), s 249.

553 cf *Modbury* (2000) 75 ALJR 164; 176 ALR 411.

554 *Modbury* (2000) 75 ALJR 164; 176 ALR 411.

that the authority has *not* exercised any power in relation to the road or section of road in issue.

333 Given the way the law in relation to highway authorities has developed, it may be thought that there remains some question about whether an authority is to be taken to have acted as a highway authority or in some other capacity. But that, on examination, can be seen to be irrelevant. If an authority having responsibility for drainage and for road making, installs a drain cover in a road and, over time, the surrounding road surface is eroded to such an extent that an accident is caused, the authority will be liable for failure to repair if, and only if, it owed a duty to the individual road user to exercise its power to repair. If that inquiry begins, as I consider it should, from the proposition that the authority owes no common law duty to individual road users to repair the highway, what is it that would lead to imposition of a duty to repair the surrounds of the drain cover? A statutory duty of care and management, whether of the road, the drain, or generally the infrastructure in the area, will not found such a duty of care.

334 Further, if the focus is on negligent exercise of power, the same nicety of distinction between misfeasance and non-feasance as has been exhibited in the past course of authority may not persist. The question will be what is the power which has been exercised and exercised without reasonable care. It is not a more abstract question cast in terms of misfeasance and non-feasance that is divorced from identification of a power upon which the authority is alleged to have acted in a particular way.

335 No different result should follow from casting the claim as a claim in nuisance rather than negligence. There is much to be said for the view that nuisance should be confined to claims alleging interference with a plaintiff's enjoyment of rights over land, and not applied to secure enforcement of public duties. It may well be, however, that it is now too late to attempt to confine nuisance in that way. Nevertheless, there is certainly no occasion to extend the reach of nuisance. No action for nuisance should lie where the plaintiff's complaint is founded upon the failure of a statutory authority to exercise its powers and an action for breach of statutory duty or negligence would not lie.

336 Despite directing attention to the identification of the duty which it is said has been broken, the law relating to the liability of highway authorities may well remain uncertain in its application at trial level because of the difficulty of distinguishing between actions and omissions. The solution to that problem lies in the hands of the legislatures, not the courts. It is the legislatures which create the authorities. It is they who provide for the powers, duties and resources of the authorities. It is they who can most readily regulate when and to what extent individuals who suffer injury may recover from the authorities concerned.

337 I turn then to deal with the particular applications.

Scott Munn Brodie & Anor v Singleton Shire Council

338 In this matter the question of the respondent's breach of duty of care would turn on whether it had exercised its power to repair the bridge without reasonable care. It is, however, not necessary to resolve that question. The difficulty which the applicants face is that, despite a warning sign to the contrary, the first applicant drove a heavily laden truck over the bridge immediately before the one which gave way under the load. While he did so because he had seen that other similar trucks had passed over it safely, it is still the case that he failed to observe the warning which was posted there. That being so, I do not accept that he demonstrated that any want of care on the part of the respondent was a cause of what happened. It follows that in this matter I would grant special leave to appeal, but order that the appeal be dismissed with costs.

Catherine Ghantous v Hawkesbury City Council

339 I agree with Callinan J that no arguable case of want of care by the respondent was established. I would again grant the application for special leave, but order that the appeal be dismissed with costs.

CALLINAN J.

Catherine Ghantous v Hawkesbury City Council

Case history

340 The applicant, a woman of 63 years of age, on 10 July 1990, fell, after stepping from a concrete footpath on to an earthen verge in Kable St at Windsor in New South Wales. The concrete footpath was 1.2 m wide. The areas on either side of it had been earlier turfed. Traffic, wind and water had eroded the verges so that the earthen surface had subsided to a level about 50 mm or so below the level of the concrete strip. The applicant had seen two other women walking toward her. To allow them to pass she stepped to her right. She then fell "because her foot landed partly on the concrete strip and partly overhanging the lower earth surface". She suffered injuries in the fall in respect of which she claimed damages in the District Court of New South Wales.

341 A footpath had first been constructed in the location of the current one about 40 years earlier. No complaint had been made about it or the state of the concrete strip and verges which replaced it.

342 In 1984 the respondent Council, in whose local government area Windsor is situated, closed George St just around the corner from Kable St to create a pedestrian mall, and extended the paving of the new mall a short distance down Kable St. That paving extended from kerb to building alignment for some 2.5 m. A shopping centre and parking lot were also constructed at the other end of the footpath in Kable St and were opened for business a year later in 1985.

343 There was evidence that the stretch of narrow concrete was almost the only narrow stretch left in the central business district of Windsor. The shopping centre and the mall inevitably generated some increased pedestrian traffic but that had occurred to a relatively limited extent only.

344 In the originating proceedings the applicant sued the architects and landscape designers who were responsible for the design of the mall as well as the respondent Council. The case against the last was put principally upon the basis that it had failed to ensure that the design and construction of the mall were not such as to cause soil erosion of the kind that had occurred. The other two defendants were alleged to have been similarly negligent in designing, and in the case of the landscape designers, in the construction also of the mall. One particular of negligence alleged against the respondent was in this form:

> "The [respondent] … [k]new or should have known that the redesign and reconstruction work involved in the Shopping Centre, Mall and consequent reconstruction of the Footpath and Guttering would lead to

increased pedestrian usage of the area of the Footpath in question and its surrounds."

345 The applicant also pleaded that the respondent had committed a nuisance in causing or allowing the verges to deteriorate. The respondent denied that it had been negligent in any way and that the applicant was entitled to the relief sought. The respondent also pleaded that the applicant's injuries were caused or contributed to by her own negligence, in failing, in effect, to look where she was walking.

346 The case against the other defendants at the trial was shown to be unsustainable: it was clearly established and accepted by the applicant that there was no such increase in water flowing from the mall as to cause erosion of the verge where the applicant fell. Judgment was entered for those defendants.

347 The trial judge found that the combination of erosion and increased foot traffic between the mall and the parking station and the shopping centre acted upon the grass verges of the footpath to cause weathering and the subsidence that had taken place on either side of the concrete strip.

348 An expert called by the respondent at the trial gave evidence that it was poor maintenance to allow the surfaces alongside the concrete strip to deteriorate to the extent to which they had, and that in their current condition they were a hazard to a person stepping, as the applicant did, to one side.

349 The applicant submitted at the trial (to preserve her rights on appeal) that there was no longer, or there should no longer be, a distinction between non-feasance and misfeasance and that as a highway authority the respondent should be liable for both.

350 In argument at the trial the applicant had submitted that the mall generated additional foot traffic to the extent that the natural and necessary consequence of that traffic was the erosion of verges giving rise to the difference in levels which was the hazard to which the applicant fell victim. The trial judge posed for himself this question: "Could Council's failure to keep the [verges] in adequate repair or, with foresight to avoid such degeneration by laying an adequate footpath be said to be a misfeasance?"

351 His Honour declined to distinguish between a footpath and the vehicular carriageway. The former was part of the road. It was unnecessary for his Honour to deal with the respondent's case that it had not been negligent and that the applicant's fall was caused by her own negligence. His Honour answered the question that he had posed for himself by holding that this was a case of non-feasance and he was accordingly bound to dismiss the applicant's action.

In the Court of Appeal of New South Wales

352 An appeal to the Court of Appeal of New South Wales (Handley, Powell and Giles JJA) was dismissed[555]. Powell JA (with whom the other members of the Court agreed) did not doubt that the works on the footpath were carried out in a proper and workmanlike manner[556]. His Honour noted that there was no obligation upon road authorities to monitor roads and that an immunity in this respect negated a general duty to repair, and further, any specific obligations to exercise care with respect even to known dangers. His Honour's reasons included this[557]:

> "[T]he law is clear that, in order that it might be charged with misfeasance, a road authority must have been an active agent in creating, or adding to, an unnecessary danger in the highway (see, for example, *Buckle v Bayswater Road Board*[558]; *Bretherton v Hornsby Shire Council*[559]) and the findings of fact made by Freeman DCJ demonstrate clearly that the respondent has taken no action in relation to the footpath at the site of the accident which created or added to an unnecessary danger."

353 The applicant had also argued on the appeal as she had at the trial, that the footpath was not part of the road and that any immunity that a road authority enjoyed did not extend to it. The submission was made without reference to the *Local Government Act* 1919 (NSW) ("the Act"). It was rejected on the basis that authority[560] supported the conclusion that a footpath formed part of the road reserve and that an immunity for non-feasance extended to it. The appeal was dismissed and a cross-appeal on an issue as to costs with which this Court is not concerned was upheld.

The application to this Court

354 An application for special leave was made to this Court.

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555 (1999) 102 LGERA 399.

556 (1999) 102 LGERA 399 at 402.

557 (1999) 102 LGERA 399 at 420.

558 (1936) 57 CLR 259.

559 (1963) 63 SR (NSW) 334.

560 *Buckle v Bayswater Road Board* (1936) 57 CLR 259; *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357; *Grafton City Council v Riley Dodds (Australia) Ltd* (1955) 56 SR (NSW) 53.

355 In my opinion the application should fail at the outset. The respondent has not abandoned its contention that it was not negligent, whether as a highway authority or otherwise[561]. Even if I were to assume that an action in negligence lay against the respondent for any failure to maintain or improve the footpath to keep or make it safe, whether as a matter of misfeasance or otherwise, I would conclude that there was no failure in that regard because the footpath was not, despite what the expert witness was allowed to say, unsafe. The case of the applicant in negligence was that a differential in height between the concreted part of the footpath and the earthen part of it created a dangerous situation. A court is not obliged to accept an expert, especially when his or her evidence is evidence purportedly resolving and concluding an issue of the kind which arose here[562]. A court is not bound to accept that a matter of ordinary observation such as the readily apparent state of the footpath is a matter calling for expert opinion. But in any event the expert's opinion (uncontradicted as it was) did not go so far as to say that the "poor maintenance" which caused the "hazard" actually caused one of such a nature that to leave it unrectified was negligent. There was no concealment of the difference in height. It was plain to be seen. The world is not a level playing field. It is not unreasonable to expect that people will see in broad daylight what lies ahead of them in the ordinary course as they walk along. No special vigilance is required for this. The applicant herself admitted in cross-examination that she knew before the day of the accident that the earthen surface was lower than the concrete surface. The photographs tendered at the trial clearly show that there was a discernible difference between the kerb and the earthen verges. There was no negligence on the part of the respondent either in the construction of the footpath or in not keeping the concrete strip and verges level.

356 In deference to the other arguments of the applicant I will say something briefly about them. The first of these was again that the footpath was an area apart from the road and was not something to which the law relating to road

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561 Respondent's submissions, pars [4] and [5].

562 *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 306 [110], fn 137.

authorities applied. The inclusive definitions in s 4 of the Act, however, of "Pathway"[563], "Road"[564] and "Public road"[565] provide a complete answer to this.

357 The legal question that was argued was that the respondent owed a duty to the applicant to make the footpath safe (on the assumption that it was unsafe at the material time).

358 The applicant submitted that although the respondent pursuant to s 240(1)(a)[566] of the Act had power to, but was not obliged to construct and maintain roads, *Buckle v Bayswater Road Board*[567] stands as authority for the proposition that a positive obligation may be inferred from statutory provisions apparently permissive in language. However, the sections of the Act upon which the applicant relies in this case are the same as those referred to by the applicant in *Brodie v Singleton Shire Council*[568]. They do not, as I point out in that case, have the effect for which the applicant here contends. Both *Buckle* and *Gorringe v The Transport Commission (Tas)*[569] have been consistently applied in

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563 "'**Pathway**' means a public road provided for the use only of foot passengers and of such classes of vehicles as may be defined by ordinance."

564 "'**Road**' means road, street, lane, highway, pathway, or thoroughfare, including a bridge, culvert, causeway, road-ferry, ford, crossing, and the like on the line of a road through or over a watercourse."

565 "'**Public road**' means road which the public are entitled to use, and includes any road dedicated as a public road by any person or notified, proclaimed or dedicated as a public road under the authority of any Act, including this Act, or classified as a main road in the Gazette of the thirty-first day of December, one thousand nine hundred and six."

566 "**Power to construct and improve roads**

240(1) The council may construct improve maintain protect repair drain and cleanse any public road, and in particular and without limitation of any other power conferred by this Act the council may in respect of any public road:

(a) construct improve maintain repair and cleanse the road with such materials and in such manner as the council thinks fit …"

567 (1936) 57 CLR 259.

568 See *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357.

569 (1950) 80 CLR 357.

all the States[570]. I do not think that it is for this Court to devise a different rule which could have financial and other ramifications far beyond those of which this Court might be aware.

359 The applicant also submitted that she was a person within the class of persons to whom a duty was owed as formulated in *Pyrenees Shire Council v Day*[571].

360 In support of this proposition the applicant relied in particular on a passage in the judgment of Gummow J[572]:

> "The general rule is that 'when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered'[573]. A public authority which enters upon the exercise of statutory powers with respect to a particular subject matter may place itself in a relationship to others which imports a common law duty to take care which is to be discharged by the continuation or additional exercise of those powers[574]. An absence of further exercise of the interconnected statutory powers may be difficult to separate from the exercise which has already occurred and that exercise may then be said to have been performed negligently[575]. These present cases are of that kind. They illustrate the broader proposition that, whatever its further scope,

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570 See, in Queensland – *Commissioner of Main Roads v O'Ryan* (1992) 78 LGERA 387; ACT – *Watts v Australian Capital Territory* (1997) 139 FLR 8; Victoria – *Transport Accident Commission v Shire of Corangamite* unreported, Supreme Court of Victoria, 29 April 1998; South Australia – *McIntyre v Ridley District Council* (1991) 56 SASR 343; Western Australia – *Hennessey v City of Fremantle* (1995) 12 SR (WA) 360; Northern Territory – *Hatch v Alice Springs Town Council* (1989) 100 FLR 56.

571 (1998) 192 CLR 330.

572 (1998) 192 CLR 330 at 391-392 [177].

573 *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 220; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 436, 458, 484.

574 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 459-460.

575 cf *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 479; *Fellowes v Rother District Council* [1983] 1 All ER 513 at 522; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 763.

> Lord Atkin's formulation in *Donoghue v Stevenson*[576] includes 'an omission in the course of positive conduct ... which results in the overall course of conduct being the cause of injury or damage'[577]."

In my opinion *Pyrenees* cannot be regarded as an authority governing this case. It was not concerned with the use and maintenance of roads. No matter what might be thought of the singling out for special treatment in law of what road authorities may or may not do in relation to roads, without rendering them liable to users of them, the distinction between roads and other works is very well entrenched in this country. Legislatures in expressing the powers and duties of road authorities to construct and maintain roadworks must have been well aware of this. As Latham CJ said in *Buckle*[578]: "[T]he rule of non-liability for non-feasance in the case of a highway authority must be regarded as fully established." And Dixon J in the same case said[579]: "But the existence of such powers gives rise to no civil liability for the consequences of the defective state of a road."

361 There are further real points of distinction between this case and *Pyrenees*: the statutory framework governing the Council's powers in issue there as summarised by McHugh J[580] was quite different from the way in which Councils' powers in respect of roads are expressed and have been understood and construed in the cases. Furthermore the Council there had actual knowledge of the dangers that the premises which had been inspected by it presented.

362 In *Buckle*, Dixon J re-examined many of the earlier cases in which the extent of a highway authority's obligations and the availability of a defence of non-feasance were considered. Some of these cases might be properly regarded as cases of nuisance rather than of negligence. Indeed *Buckle* itself may have been such a case, although the narrative in the report refers in terms to negligence[581]. Their Honours who decided *Buckle* would have been alive to the different elements of the torts. The statements of principle were, however, unqualified and establish that a highway authority will not be liable for non-feasance for roadworks whether what has occurred has resulted from negligence or nuisance properly so called.

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576 [1932] AC 562 at 580.

577 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 501.

578 (1936) 57 CLR 259 at 269.

579 (1936) 57 CLR 259 at 281.

580 (1998) 192 CLR 330 at 371-372 [112].

581 (1936) 57 CLR 259 at 260.

363 It is true that the distinction between non-feasance and misfeasance has often been criticised. Some of these criticisms were echoed in the submissions[582] of the applicants in *Brodie v Singleton Shire Council* which was argued at the same time as this case, that the distinction between misfeasance and non-feasance has led to the drawing of fine distinctions between roadworks and other works on or about them. So much may be accepted but that is no more than to say that such cases[583] are no different from many other cases in tort, in which difficult questions of fact have to be answered. It should not be overlooked that in this country road authorities are called upon to construct and maintain roads over vast distances and at great cost, roads whose use is not necessarily confined to those who pay for them. This is no doubt a powerful policy consideration operating on the minds of legislators in enacting legislation in respect of road authorities.

364 That the rule and the distinction may have been heavily criticised does not avail the applicant. The legislature here has not chosen to abolish or change the rule as has occurred, for example, in the United Kingdom where the Parliament there passed the *Highways Act* 1980 (UK) to impose a duty to maintain highways at public expense (s 41) upon road authorities, and to prescribe the conditions for a successful defence to an action by such an authority (s 58). This is a case of deterioration over time of works which were not originally improperly designed or executed and of a kind to which Dixon J referred in *Buckle*[584] as not giving rise to any civil liability on the part of the respondent.

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582 *Buckle*, it was argued, ultimately turned on whether the drain in question was related to the road or had both a road and non-road function. See also *Tickle v Hastings Shire Council* (1954) 19 LGR 256, a decision of the Supreme Court of New South Wales upholding a jury verdict on facts similar to this case. In *Kirk v Culcairn Shire Council* (1964) 64 SR (NSW) 281, a different conclusion on not dissimilar facts was reached. See further Law Reform Commission of Western Australia, *Report on the Liability of Highway Authorities for Non-feasance*, Project No 62, (1981) at 48.

583 See, for example, *Tickle v Hastings Shire Council* (1954) 19 LGR 256; *Kirk v Culcairn Shire Council* (1964) 64 SR (NSW) 281; *McDonogh v Commonwealth of Australia* (1985) 9 FCR 360; *Hill v Commissioner for Main Roads* (1989) 68 LGRA 173 at 179-180 per Samuels JA; Law Reform Commission of Western Australia, *Report on the Liability of Highway Authorities for Non-feasance*, Project No 62, (1981) at 48; New South Wales Law Reform Commission, *Liability of Highway Authorities for Non-Repair*, Report No 55, (1987), par 2.11.

584 (1936) 57 CLR 259 at 284-285.

365 Non-feasance by a Council empowered, but not obliged, to monitor roadworks as the respondent was, is not actionable by a person injured as a result of it in this country.

366 I would allow the application for special leave to appeal and dismiss the appeal with costs.

Scott Munn Brodie and Anor v Singleton Shire Council

Case history

367 This and the application for special leave in *Ghantous v Hawkesbury City Council* were argued at the same time. The facts may be shortly stated. On 19 August 1992, the first applicant drove a truck which was owned by the second applicant on to a bridge constructed within the respondent's locality some 50 years earlier. It was designed to bear a load of 15 tonnes. The truck weighed 22 tonnes. The first applicant a short time before approaching the bridge in question had safely driven the truck across another bridge on the same road which had been signposted as having a capacity of 15 tonnes only. The timber girders of the second bridge failed and it collapsed. The truck fell to the creek bank below. The truck was damaged and the first applicant injured. The applicants sued in the District Court of New South Wales. The case was heard by Tapsell ADCJ who held the case to be one of misfeasance and awarded the applicants a total of almost $400,000 in damages.

368 The history of the bridge was that the planks in it had been replaced from time to time. In the ordinary course, in recent times it would have been inspected about four times a year and "minor components" in it such a decking or hand railings, if found to be defective, replaced. The trial judge made a finding that the planking was repaired six times between March 1986 and July 1991. An inspection of the bridge had been made in 1991 for the purpose of determining whether a crane of 20 tonnes might safely cross over it. It was so determined and a crane of that weight crossed the bridge without incident. His Honour held that, in July 1991, on the last occasion of the repair of planking, the respondent should have discovered the defects that led to the collapse of the bridge, although it was not the planking of the bridge but the supporting girders that were defective and failed. For these reasons he gave judgment for the applicants.

The appeal to the Court of Appeal of New South Wales

369 An appeal to the Court of Appeal of New South Wales (Handley, Powell and Giles JJA) was upheld. Powell JA, with whom the other members of the Court agreed, analyzed the evidence upon which the primary judge relied for his

findings as to misfeasance. His Honour stated his conclusions on that evidence in this passage[585]:

> "At best, the evidence, insofar as it was relevant, demonstrated that, from time to time over the years, the Council replaced decking boards which appeared to require replacement. There is not the slightest evidence that, before any such boards were replaced, the bridge had become impassable. Given the unqualified evidence of Mr Brand that the bridge decking in no way affected the structural integrity of the bridge itself; the absence of any evidence indicating when, if at all, the Council had carried out work on the structural members of the bridge; the absence of any evidence as to the state of the bridge at any time when decking planks may have been replaced; the evidence of Mr Brand to which I have earlier referred as to the weight carrying capacity of the bridge even in the state in which it was immediately prior to the accident; and such evidence as there was as to the user of the bridge both prior to and on the day of the accident; it seems to me that to attempt, as Tapsell A-DCJ did, to describe the bridge as 'impassable', and, having done so, to apply by analogy the observations of Dixon J in the passage from his Judgment in *Gorringe v The Transport Commission (Tas)*[586] to which I have earlier referred was totally insupportable. With respect to those who may be of another view, it seems to me that such actions as the Council may, from time to time, have taken in replacing defective decking planks are to be regarded as no more than superficial repairs to the road surface and thus – since they did not increase the risks of accidents – did not subject the Council to liability."

The application to this Court

370 The applicants applied for special leave to appeal to this Court. Their first submission was that the distinction between non-feasance and misfeasance and the consequences attaching to it were illogical, the subject of much justifiable criticism, outmoded, misconceived, historically nonsensical in principle, unjustified, and should, in any event, be discarded on policy grounds. Alternatively they submitted that this was a case in which, in any event, misfeasance had been proved. The applicants also submitted that on a proper examination of the relevant legislation governing the responsibility of the respondent for roads within the shire, the respondent was under a continuing duty to ensure that a road, of which a bridge was part, was safe.

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585 *Singleton Shire Council v Brodie* [1999] NSWCA 37 at [46].

586 (1950) 80 CLR 357.

371 It is with the last submission that I will deal first. Attention was drawn to s 220[587] of the *Local Government Act* 1919 (NSW) ("the Act") which refers in general terms to the powers and duties conferred upon cities and shires in respect of the subject matter of Pt IX of the Act, "Public Roads". Section 226 makes provision for the classification of roads. The mandatory language of ss 227 and 229 prescribes the widths of roads within each classification. Section 230 also uses the word "shall" but neither s 232[588], s 235[589], s 236[590], s 240[591] nor s 249[592]

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587 "**Application**

Subject to the provisions of this Act:

(a) this Part shall apply to municipalities and shires; and

(b) the powers and duties conferred and imposed upon a council under this Part shall apply in respect of each area to the council of the area."

588 "**Fee-simple**

(1) Except where otherwise expressly provided **[by this Act, the Crown and Other Roads Act 1990 or any other Act]**, every public road, and the soil thereof, and all materials of which the road is composed, *shall* by virtue of this Act vest in fee-simple in the council, and the council, if it so desire, shall by virtue of this Act be entitled to be registered as the proprietor of the road under the provisions of the Real Property Act 1900.

(2) The vesting in fee-simple under this section *shall* be deemed to be not merely as regards so much of the soil below and of the air above as may be necessary for the ordinary use of the road as a road, but so as to confer on the council subject to the provisions of this Act the same estate and rights in and with respect to the site of the road as a private person would have if he were entitled to the site as private land held in fee-simple with full rights both as to the soil below and to the air above.

(3) Unless otherwise expressly provided nothing in this section *shall* be deemed:

…

(4) This section *shall* bind the Crown." (emphasis added)

589 "**Power to provide roads**

(1) The council *may* provide any public road, and in particular and without limitation of this or any other power conferred by this Act the council may:

(Footnote continues on next page)

(a) make surveys for the laying out of a new public road;

(b) lay out, construct, and open a new public road;

(c) extend and widen a public road;

(d) divert or alter the course of a public road;

(e) determine what proportion of the width of a public road shall be devoted to carriage-way, bicycle-way, footway, tree-planting, gardens, grass-plots, island refuges, public conveniences, street lamps, fountains, monuments, statues, and the like;

(f) widen a public road to or beyond the width or widths applicable to the road under section 229(2) or to a width or widths less than that width or those widths.

(2) Any land required for the purposes of this section may be acquired in any mode authorised by this Act." (emphasis added)

590 "Bridges, road-ferries etc.

(1) The power of the council to provide any public road shall include the power to provide:

(a) any bridge, causeway, and the like over any water or depression crossing the line of the road;

…

(2) For the purposes of any other power of the council in respect of a public road any bridge, causeway, road-ferry, ford, or the like provided by the council in accordance with this section shall be deemed to be a public road."

591 "Power to construct and improve roads

(1) The council *may* construct improve maintain protect repair drain and cleanse any public road, and in particular and without limitation of any other power conferred by this Act the council *may* in respect of any public road:

(a) construct improve maintain repair and cleanse the road with such materials *and in such manner* as the council thinks fit …" (emphasis added)

which, the applicants submit, implies an obligation rather than confers a mere power, does so, except in a limited way which has nothing to say about the imposition of any positive obligation to keep a road in repair. Section 233(2) is concerned with the vesting of property in the Council. Section 235 by contrast makes clear that a Council *may* provide a public road, and s 236 enacts that a Council shall have *power*, but, it may be observed, not a duty, to provide, among other things, a bridge. Section 240 provides that a Council *may* repair a public road and s 249 that a Council *shall* have the care, control and management of every known road. It is to this last provision in particular that the applicants point for this limb of their argument. But to provide that a Council shall have the care, control and management of a road or a bridge is not to say how, when, and in what circumstances, at what expense, and in what order of priorities repairs are to be made, or indeed that repairs must be made at all.

372 As Dixon J said in *Buckle v Bayswater Road Board*[593]:

> "The purpose of giving the road authority property in and control over the road is to enable it to execute its powers in relation to the highway, not to impose upon it new duties analogous to those of an occupier of property."

The legislation may be contrasted with that which was considered by this Court in *Crimmins v Stevedoring Industry Finance Committee*[594]. There what were described as functions and powers enacted by the *Stevedoring Industry Finance Committee Act* 1977 (Cth) could, indeed, in my opinion, should be construed as being in the nature of duties to give the legislation any reasonable degree of efficacy at all[595]. On the other hand, a local authority may, indeed must, function in a less than perfect world of roads within its boundaries of various classifications, various degrees of use, and in various states of deterioration and repair. The Act does not have the meaning for which the applicants contend. It does not impose any statutory obligation to keep roads (and bridges) within the shire in good repair.

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592 "**Care control and management of roads**

> The council shall have the care control and management of every public road, and in particular and without limitation of this or any other power conferred by this Act the council may in respect of any public road …"

593 (1936) 57 CLR 259 at 281.

594 (1999) 200 CLR 1.

595 (1999) 200 CLR 1 at 116-117 [365]-[369] per Callinan J.

373 As to the other argument of the applicants, that the distinction between misfeasance and non-feasance is not founded on principle, and is, in any event, ripe for reconsideration and should be discarded, I would add only a few observations to what I have said in *Ghantous* in rejecting the same argument there.

374 It was suggested in argument that the word "immunity" which was used in the courts below, in this Court, in other jurisdictions and by the respondents and interveners in this case and *Ghantous* interchangeably with the defence of non-feasance, was a misnomer, and overstated the position of road authorities. That may be so. Its use is probably explicable on the grounds that historically the causing of an obstruction or a danger on a road was likely to constitute a public nuisance and therefore a criminal offence[596], and that it was immunity in respect of this that a local authority and its officers needed to avoid conviction for it. Nuisance, either public or private, may sometimes involve negligence and at other times not[597]. The word "immunity" was, however, adopted by the legislature in terms in s 12(1) of the *State Roads Act* 1986 (NSW). Section 12(1) provided as follows:

> "The Authority has, and may exercise, in relation to a classified road or a toll work, the functions and immunities of a council in relation to a public road."

375 Section 17 of the *State Roads Act* used the word "immunities" also. It is highly likely that the legislature in using the word was not only using it in the same sense as the courts frequently have, as a synonym for a defence of non-feasance, but also, and of more importance, as making a very deliberate decision not to respond to the criticism of the rule of no liability for non-feasance on the part of road authorities, by abolishing or amending it. Indeed the enactment may be taken as a very strong affirmation of it.

376 It remains to deal with the applicants' alternative case that this was a case of misfeasance and properly so found by the primary judge.

377 The applicants' submission was that misfeasance relevantly occurs when a road authority exercises its powers negligently. The applicants submitted that the respondent was guilty of misfeasance and acted negligently in that regard by covering the bridge with new planking in circumstances where the bridge underneath was not safe and carrying out inspections negligently in the sense of

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596 See *Archbold Criminal Pleading, Evidence and Practice*, (1994), vol 2, par 31-40.

597 See *Goldman v Hargrave* [1967] 1 AC 645 at 657 per Lord Wilberforce.

not appreciating that the bridge was so rotten underneath in its girders, on the one hand, and, on the other, to take no action by way of signposting or otherwise.

378 In *Buckle* Dixon J put the obligations of a road authority in this way[598]:

> "But a road authority in doing [works on a roadway] must take due care for the safety of those using the highway and is not protected if it creates dangers which reasonable care and skill could avoid. Because the road is under its control, it necessarily has an opportunity denied to others for causing obstructions and dangers in highways. But when it does so, the road authority is liable, not, I think, under any special measure of duty which belongs to it, but upon ordinary principles."

379 It is in the applicants' formulation and proof of particulars that their misfeasance case runs into difficulty.

380 I deal first with the contention that it was misfeasance to fail to cover the bridge with new planking. The answer to that is that it was not the planking that failed but, as was accepted on both sides, rather the timber girders because of piping in them which I take to be a loss of body and strength by reason of age. It is certainly likely that from time to time planking was removed and replaced. It is unnecessary, however, to resolve the difference between the primary judge and the Court of Appeal as to the occasions when this occurred by attempting to analyze the documents in evidence as the Court of Appeal did. The girders were not touched, and by replacing planks the respondent did not, to use the language of Dixon J in *Buckle*[599], undertake active measures of repair to safeguard the applicants from the condition of the girders, and created no dangers in respect of them. On this particular the applicants' case fails at the threshold. There was no misfeasance in relation to the girders, the part of the structure that failed.

381 I turn to the other particular. Of itself an inspection would achieve nothing. Indeed the respondent was aware that there was piping in the girders. The second particular therefore asserts a positive obligation that the respondent did not have. The respondent would only be liable if it had been bound (as it was not) to rectify deteriorating roads and bridges in the shire. It was no more obliged to do that than it was to convert the bridge from one with a capacity of 15 tonnes when constructed to a bridge of a capacity of 22 tonnes which was the weight of the truck.

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598 (1936) 57 CLR 259 at 283.

599 (1936) 57 CLR 259 at 283.

382 I would grant the application for special leave to appeal and dismiss the appeal with costs.