HIGH COURT OF AUSTRALIA

GLEESON CJ
KIRBY, HAYNE, CALLINAN AND CRENNAN JJ

LEICHHARDT MUNICIPAL COUNCIL APPELLANT

AND

LESLIE MONTGOMERY RESPONDENT

Leichhardt Municipal Council v Montgomery [2007] HCA 6
27 February 2007
S188/2006

ORDER

1. *Appeal allowed;*

2. *Set aside so much of paragraph 1 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 8 December 2005 as dismissed the appeal to that Court;*

3. *Remit the matter to the Court of Appeal of the Supreme Court of New South Wales for further hearing; and*

4. *The appellant to pay the respondent's costs of the appeal to this Court.*

On appeal from the Supreme Court of New South Wales

Representation

P R Garling SC with R S Sheldon for the appellant (instructed by Phillips Fox)

G T W Miller QC with A R Reoch for the respondent (instructed by Teakle Ormsby Conn)

CATCHWORDS

Leichhardt Municipal Council v Montgomery

Torts – Negligence – Duty of care – Roads authority – Independent contractor employed by roads authority to perform work on public road – Work not extra-hazardous – Independent contractor performed work negligently – Road user injured – Whether roads authority owed road user a non-delegable duty of care – Common features of relationships attracting non-delegable duties of care in common law of Australia – Whether existence of non-delegable duty of care consistent with *Brodie v Singleton Shire Council* (2005) 206 CLR 512 – Whether exception to general rule that a party is not liable for the negligence of an independent contractor.

Statutes – Interpretation – *Roads Act* 1993 (NSW) – Nature of powers given to roads authority – Power of roads authority to carry out road work – Right of member of the public to pass along public road – Whether statutory scheme evinced an intention that roads authority owed road user a non-delegable duty of care – Whether statutory scheme inconsistent with existence of a non-delegable duty – Significance of statute for applicable rule of the common law.

Words and phrases – "non-delegable duty of care", "highway rule", "non-feasance rule".

Roads Act 1993 (NSW), ss 5, 7, 71, 145, 146.

1 GLEESON CJ. The appellant Council was the roads authority, within the meaning of the *Roads Act* 1993 (NSW), for Parramatta Road, Leichhardt. That road is one of Australia's oldest and busiest public highways, and passes through densely populated suburbs of Sydney. On both sides of the road there are footpaths which, by definition, are part of the road for the purposes of the *Roads Act*. The *Roads Act* vested the road in the appellant. Section 71 conferred upon the appellant a power to carry out work on the road. The appellant engaged a contractor, Roan Constructions Pty Limited (Roan Constructions), to perform work on the footpath. There is nothing unusual about that. Local councils commonly use their own staff for routine road maintenance, but they also commonly engage outside contractors to undertake substantial road works. The work on the footpath was in progress in April 2001. It was being carried out between 7.30 pm and 5.30 am on four nights per week. No doubt the restricted hours were intended to accommodate, as far as possible, the heavy pedestrian traffic. Part of the specifications for the work provided for artificial grass or carpet to be placed over the top of the disturbed area to provide clean access to commercial properties.

2 On an evening in April 2001, the respondent, Mr Montgomery, was walking along part of the footpath on which Roan Constructions had been working. He walked across some carpet that had been laid by Roan Constructions' employees. The trial judge found that the carpet had been placed carelessly over a telecommunications pit which had a broken cover. The respondent fell into the pit and suffered personal injuries.

3 On the trial judge's finding about the conduct of Roan Constructions' employees, that company was clearly liable to the respondent. The respondent had sued both Roan Constructions and the appellant. The claim against Roan Constructions was compromised before hearing, and the case proceeded against the appellant. This appeal is concerned with the question of the appellant's liability to the respondent. The primary judge found the appellant liable. She assessed damages at an amount in excess of that for which the claim against Roan Constructions had been compromised, and adjusted the damages to allow for the amount received from Roan Constructions.

4 The respondent, in his case against the appellant, set out to establish fault on the part of officers of the appellant. Such alleged fault was not the subject of any finding by the primary judge or, later, by the Court of Appeal. Both courts accepted the respondent's alternative submission, which was recorded by the primary judge as being "that the council owed to the plaintiff a non delegable duty of care, notwithstanding the fact that the footpath reconstruction works ... were being carried out by a contractor ... Roan Constructions Pty Ltd".

5 In the Court of Appeal, there was an unsuccessful challenge to the finding that employees of Roan Constructions had negligently covered the pit with carpet at a time when the pit cover was broken. That issue is not the subject of this appeal. The Court of Appeal agreed with the primary judge that, there having

been negligence on the part of Roan Constructions' employees, the appellant Council was liable without any need for the respondent to show fault on the part of Council officers. Following a line of English authority[1], and earlier decisions of the New South Wales Court of Appeal[2], Hodgson JA, with whom Mason P and McColl JA agreed, said:

> "[W]here a road authority engages a contractor to do work on a road used by the public, such as to involve risk to the public unless reasonable care is exercised, the road authority has a duty to ensure reasonable care is exercised; and the road authority will be liable if the contractor does not take reasonable care. However, the road authority will not be liable for casual or collateral acts of negligence by the contractor."

6 A conclusion that, in given circumstances, a defendant who is sued in negligence owed a duty going beyond a duty to exercise reasonable care to avoid injury (or injury of a certain kind) to a plaintiff, and extending to a duty to ensure that reasonable care to avoid injury to the plaintiff was exercised, is commonly described as a conclusion that a defendant was under a non-delegable duty of care to a plaintiff. It is a proposition of law concerning the nature or content of the duty of care[3]. A duty of this nature involves what Mason J described in *Kondis v State Transport Authority*[4] as "a special responsibility or duty to see that care is taken". Such a duty enables a plaintiff to outflank the general principle that a defendant is not vicariously responsible for the negligence of an independent contractor. The present case provides an example. No one doubted that, if causative negligence on the part of Council employees had been established, the Council would have been liable. No one doubted that the finding of causative negligence on the part of Roan Constructions' employees meant that Roan Constructions was liable. However, there being no suggestion of any fault in the choice of Roan Constructions as a contractor, if it had not been for the special duty held (as a matter of law) to exist, the appellant would not have been liable for an injury caused only by the negligence of Roan Constructions' employees.

---

1 *Hardaker v Idle District Council* [1896] 1 QB 335; *Penny v Wimbledon Urban District Council* [1899] 2 QB 72; *Holliday v National Telephone Company* [1899] 2 QB 392; *Salsbury v Woodland* [1970] 1 QB 324; *Rowe v Herman* [1997] 1 WLR 1390.

2 *Roads & Traffic Authority v Scroop* (1998) 28 MVR 233; *Roads & Traffic Authority (NSW) v Fletcher* (2001) 33 MVR 215.

3 cf *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 585 [106].

4 (1984) 154 CLR 672 at 687.

7 The appellant submits that the primary judge, and the Court of Appeal, erred in law in holding that the appellant was under a special responsibility or duty of the kind described above, and that the appellant's duty was the ordinary duty, that is to say, a duty to take reasonable care to prevent physical injury to the respondent. That duty may have embraced such matters as the terms of any necessary approvals or instructions in relation to the work, undertaking any necessary supervision, warning pedestrians and other road users of hazards, and like matters. There were allegations of failure on the part of the appellant, through its officers, to take reasonable care in relation to some such matters, but those allegations were left unresolved. If the appellant is correct in its argument about the nature of the duty it owed to the respondent it will be necessary for the matter to be remitted for further consideration on that basis.

8 In considering the question of non-delegable duties of care it is convenient to put to one side other questions of law that may arise concerning the nature, or content, of a duty of care. Such questions might arise because of the kind of injury suffered by the plaintiff, or the circumstances of that injury, or the relationship between the parties, or the responsibilities of the defendant. For example, in *Graham Barclay Oysters Pty Ltd v Ryan*[5] actions were brought against a grower of oysters, a distributor of oysters, a local council and the State. As against the grower and the distributor, it was a product liability case. The defendants, who produced and supplied oysters, owed a duty to take reasonable care to avoid injury to consumers. The issue was one of breach; an issue of fact. As against the council and the State, however, the issue was one of law. What would it have meant to say that the State of New South Wales owed a duty to take reasonable care to avoid injury to consumers of oysters? If a duty were formulated in that fashion, what would be the issues of fact to be decided on the question of breach? If there were a trial by jury, what matters would a judge direct a jury to consider? In a broadly political sense, it is plausible to assert that a government owes a duty to take care of its citizens, but when it comes to formulating a duty for the purposes of a claim for negligence, a duty expressed at that level of abstraction would lack practical content. In any action in negligence, a proposition about a duty of care must be capable of being expressed in a manner that would enable a judge to direct a jury how to set about deciding whether there had been a breach. This is not difficult in well established areas such as litigation arising out of industrial accidents, motor vehicle accidents, occupiers' liability or professional negligence. It may be otherwise, however, in cases which lie at the boundaries of the law of negligence. There, the separation of issues of law (affecting duty) from issues of fact (affecting breach) may be more problematic. (In this context I include among issues of fact questions of normative judgment that often affect decisions about reasonableness). The decreasing use of juries in many Australian jurisdictions tends to obscure

---

5 (2002) 211 CLR 540.

distinctions between questions of duty and questions of breach. Questions that would need to be kept separate at a jury trial may merge, or at least overlap, in the reasoning of a judge sitting alone. In this appeal, however, it is clear that we are concerned only with a question of law, that is, the nature of the duty of care owed by the appellant to the respondent.

9 In practice, the difference between a duty to take reasonable care and a duty to ensure that reasonable care is taken matters where it is not an act or omission of the defendant, or of someone for whose fault the defendant is vicariously responsible, that has caused harm to the plaintiff, but the act or omission of some third party, for whose fault the defendant would not ordinarily be vicariously responsible. If a negligent act or omission is that of a defendant, or a person for whose fault the defendant is vicariously responsible (such as an employee), no problem arises. Again, if the nature of a defendant's responsibility is such that it can be discharged lawfully or properly only by the defendant personally, an attempted delegation would be irrelevant. Some responsibilities are non-delegable in the sense that it is of their essence that they be performed by a particular person, perhaps because of trust or confidence reposed in that person. In some cases, a duty to take care involves a duty to act personally. That kind of non-delegability should not be confused with a case where the engagement of a third party to perform a certain function is consistent with the exercise of reasonable care by a defendant, but the defendant's legal duty is not merely to exercise reasonable care but also (if a third party is engaged) to ensure that reasonable care is taken. In such a case, the third party's failure to take care will result in breach of the defendant's duty. The legal consequence is that the circumstance that the third party is an independent contractor does not enable the defendant to avoid liability. It is because of its practical effect of outflanking the general rule that a defendant is not vicariously responsible for the fault of an independent contractor that the identification of this special responsibility or duty is important.

10 In the exercise of statutory functions, non-delegability of the first kind (strict non-delegability) would arise, for example, where a power or duty was conferred in terms, or in a context, such that it had to be performed or exercised personally by the repository of the power or duty or, if the repository were a corporation or other legal entity, by that corporation or entity. Non-delegability of the second kind would arise where there was nothing to prevent the engagement of a third party to perform the function, but it appeared from the terms of the statute that the legislature intended the repository of the power or duty to have a responsibility for ensuring the exercise of reasonable care even if a third party were engaged to perform the function. That would involve a question of statutory construction.

11 In *Brodie v Singleton Shire Council*[6], I attached importance to the consideration that the so-called non-feasance rule of immunity of highway authorities was itself a rule of statutory construction, governing the approach by which courts decided 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 an injured road user. That was in a dissenting judgment, but the relationship between statute and common law in this area of public liability is undeniable. This Court held that the non-feasance rule is no longer part of the common law of Australia. It did not, however, doubt the relevance of statute in determining the existence and nature of a roads authority's duty of care to road users. After *Brodie*, State legislatures reinstated the distinction between misfeasance and non-feasance, while modifying the pre-existing law. For example, in New South Wales (the State with which *Brodie* was concerned) the *Civil Liability Act* 2002 (NSW) by s 45 enacted what the Act described as a "special non-feasance protection for roads authorities". A roads authority is not liable for harm arising from failure to carry out road work unless it had actual knowledge of the particular risk the materialisation of which resulted in the harm. The potential liability of roads authorities to road users, with its implications for government revenues, is a matter of obvious legislative concern. The appellant submits that the reasoning of the majority in *Brodie* has undermined fatally the authorities on which the respondent relied successfully in the present case. In considering whether that is so, the powers and responsibilities conferred on the appellant under the *Roads Act* require examination.

12 There is nothing in the *Roads Act* which makes this a case of what I have called strict non-delegability. Section 71 provides that a roads authority "may carry out road work on any public road for which it is the roads authority". This takes the form of a discretionary power. Having regard to the well-known practice of the engagement by public authorities of independent contractors it would have been surprising to find in the *Roads Act* any express or implied statutory requirement that roads authorities undertake road construction and maintenance only through their own employees. In practice, such a requirement would be absurd. There is nothing in the Act to that effect. It will be necessary to return to the statute in considering the broader concept of non-delegability. Before doing so, however, it is convenient to say something about the special duty of care postulated, and its past application to roads authorities.

---

6 (2001) 206 CLR 512 at 533 [33].

13 In *Kondis v State Transport Authority*[7], Mason J, after describing the various circumstances in which the law imposed a special, non-delegable, duty of care, explained the rationale as follows:

> "The element in the relationship between the parties which generates a special responsibility or duty to see that care is taken may be found in one or more of several circumstances. The hospital undertakes the care, supervision and control of patients who are in special need of care. The school authority undertakes like special responsibilities in relation to the children whom it accepts into its care. If the invitor be subject to a special duty, it is because he assumes a particular responsibility in relation to the safety of his premises and the safety of his invitee by inviting him to enter them. And in *Meyers v Easton* the undertaking of the landlord to renew the roof of the house was seen as impliedly carrying with it an undertaking to exercise reasonable care to prevent damage to the tenant's property. In these situations the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised. As we have seen, the personal duty which has been recognized in the other cases which I have discussed, such as *Dalton v Angus*, may rest on rather different foundations which have no relevance for the present case."

14 The reference to *Dalton v Angus*[8] is significant. In that case, Lord Blackburn had said that "a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor"[9]. Mason J said that it was impossible to regard that statement as having general application to the ordinary case in which a duty of care is owed, and explained *Dalton v Angus* as a case of nuisance where a landowner and a contractor were held liable for the actions of a sub-contractor in carrying out excavations which caused subsidence on adjoining land[10]. Mason J's view that cases like *Dalton v Angus* rested on rather different foundations from those of the cases of non-delegable

---

7 (1984) 154 CLR 672 at 687. It is noteworthy, although presently irrelevant, that Mason J's references to the liability of an invitor preceded *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

8 (1881) 6 App Cas 740.

9 (1881) 6 App Cas 740 at 829.

10 (1984) 154 CLR 672 at 682.

duty referred to earlier in the paragraph ties in with what has been said in England about the responsibility of roads authorities in the area for which they were generally regarded as liable, that is, misfeasance.

15 In *Salsbury v Woodland*[11], Widgery LJ referring to "dangers created in a highway" said:

> "There are a number of cases on this branch of the law, a good example of which is *Holliday v National Telephone Co* ... These, on analysis, will all be found to be cases where work was being done in a highway and was work of a character which would have been a nuisance unless authorised by statute. It will be found in all these cases that the statutory powers under which the employer commissioned the work were statutory powers which left upon the employer a duty to see that due care was taken in the carrying out of the work, for the protection of those who passed on the highway. In accordance with principle, an employer subject to such a direct and personal duty cannot excuse himself, if things go wrong, merely because the direct cause of the injury was the act of the independent contractor."

16 *Holliday v National Telephone Company*[12] was a case about work undertaken by a telephone company laying telephone wires on a street. The Lord Chancellor, Lord Halsbury said[13]:

> "There was here an interference with a public highway, which would have been unlawful but for the fact that it was authorized by the proper authority. The telephone company so authorized to interfere with a public highway are, in my opinion, bound, whether they do the work themselves or by a contractor, to take care that the public lawfully using the highway are protected against any act of negligence by a person acting for them in the execution of the works."

That passage, it may be noted, refers to an obligation "to take care".

17 *Salsbury v Woodland* and *Holliday v National Telephone Company* were among the English authorities cited by Hodgson JA in the Court of Appeal in this case. He also referred to *Hardaker v Idle District Council*[14], which concerned a

---

11 [1970] 1 QB 324 at 338.

12 [1899] 2 QB 392.

13 [1899] 2 QB 392 at 398-399.

14 [1896] 1 QB 335.

district council constructing a sewer under statutory powers, and damaging a nearby house, and *Penny v Wimbledon Urban District Council*[15], which concerned a district council repairing a highway. In the former case, *Dalton v Angus* was applied[16]. In the latter case, the former case was followed[17]. That this line of authority continues to apply in England appears from what was said in 1997 by Simon Brown LJ (with whom Morritt LJ and Sir Brian Neill agreed) in *Rowe v Herman*[18]. His Lordship cited the observations of Widgery LJ in *Salsbury v Woodland* set out above. Evidently, the statutory abolition in the United Kingdom of the non-feasance rule was regarded as irrelevant to this issue.

18 We are not here concerned with the non-delegable duty that arises from the conduct of extra-hazardous activities. When, in *Burnie Port Authority v General Jones Pty Ltd*[19], this Court decided that the rule in *Rylands v Fletcher* should be treated as subsumed in the ordinary law of negligence, part of the justification advanced for that decision was the protection afforded, within the law of negligence, by the concept of non-delegable duty[20]. Road works could in some circumstances involve an extra-hazardous activity, but that is not this case.

19 The possibility of a special duty of care falling upon roads authorities extending beyond a duty to take reasonable care to a duty to see that reasonable care is taken, is accepted in North America[21]. In *Lewis v British Columbia*[22], in 1997, the Supreme Court of Canada held that the statutory powers exercised by the British Columbia Ministry of Transportation and Highways, which employed an independent contractor to remove dangerous rocks beside a highway, were such that the Ministry was under a duty to ensure that its independent contractor took reasonable care. The Supreme Court attached importance to a statutory provision that not only placed the contractor's work under the Ministry's control,

---

15 [1899] 2 QB 72.

16 [1896] 1 QB 335 at 345.

17 [1899] 2 QB 72 at 77.

18 [1997] 1 WLR 1390 at 1393.

19 (1994) 179 CLR 520.

20 (1994) 179 CLR 520 at 550-554.

21 *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 511; *Restatement of Torts*, 2d, vol 2, Ch 15, Topic 2: "Harm Caused by Negligence of a Carefully Selected Independent Contractor" at 394 (1965).

22 [1997] 3 SCR 1145.

but also required the Ministry to direct the work[23]. This provision was interpreted to mean that the Ministry was required to conform "to a statutory duty to personally direct [the] works", a duty imposed in the interests of public safety.

20 At the centre of this problem there is a question of statutory construction. The common law should define the duty of care to which a roads authority is subject by reference to the nature of the statutory powers given to the authority, and the legislative intendment discernible from the terms in which those powers are granted, considered in the light of the purposes for which they are conferred.

21 The first object of the *Roads Act*, stated in s 3, is to set out the rights of members of the public to pass along public roads. The first substantive provision of the Act is s 5, which provides that a member of the public is entitled as of right to pass along a public road whether on foot, in a vehicle or otherwise. Roads authorities are provided for by s 7. They are to have the functions conferred on them by the Act. Part 6 of the Act deals with road works. These may be carried out by roads authorities. Roads authorities are required, in certain circumstances, to obtain approval for works from the Roads and Traffic Authority. By definition, road work includes any kind of work, building or structure (such as, for example, a roadway, footway, bridge or tunnel) that is constructed or installed on or in the vicinity of a road for the purpose of facilitating the use of the road as a road. Section 71 empowers a roads authority to carry out road work. Since such work will commonly affect the public right declared by s 5, this provision authorises what otherwise may be a nuisance. Roads authorities may construct tunnels or bridges (s 78). These, of course, may be major works, and often are undertaken by independent contractors who would be expected to apply extensive resources and expertise, including expertise that would not be available to a local council. In the present case we are concerned with a fairly basic form of construction, but operations within the purview of the Act include some which require a high level of technical skill. Section 145 vests a public road in a local government area in fee simple in the appropriate roads authority. Section 146 provides that the dedication of land as a public road does not constitute the owner of the road as an occupier of land.

22 It is consistent with that statutory scheme to conclude that there is a duty in a roads authority to take reasonable care to prevent physical injury to a person such as the respondent from the carrying out of road works. It is also consistent with the statutory scheme to conclude that, if an independent contractor is engaged to perform such works, the roads authority remains under a "personal" duty to take reasonable care to prevent such injury, and that such duty is not discharged *merely* by exercising care in the selection of the contractor. Reasonable care on the part of the roads authority may well involve a certain

---

23 [1997] 3 SCR 1145 at 1161 [25].

level of scrutiny of the contractor's plans and supervision of the contractor's activities. It is a different thing to say that the legislation imposes, or is consistent with the imposition, of a duty to *ensure* that no employee of the independent contractor act carelessly.

23 This raises a more general question concerning non-delegable duties. A "special" responsibility or duty to "see" or "ensure" that reasonable care is taken by an independent contractor, and the contractor's employees, goes beyond a duty to act reasonably in exercising prudent oversight of what the contractor does. In many circumstances, it is a duty that could not be fulfilled. How can a hospital ensure that a surgeon is never careless? If the answer is that it cannot, what does the law mean when it speaks of a duty to ensure that care is taken? It may mean something different. It may mean that there should be an exception to the general rule that a defendant is not vicariously responsible for the negligence of an independent contractor. The present case illustrates the artificiality of attributing to the appellant a duty to ensure that care was taken. The failure to take care consisted in a workman, in the employment of Roan Constructions, placing a carpet over a telecommunications pit that had a defective cover, in circumstances where the workman should have noticed the defect. Thus a trap was created and the respondent fell into it. To speak of a local council having a duty to ensure that such an apparently low-level and singular act of carelessness does not occur is implausible. It is one thing to find fault on the part of council officers where there has been a failure to exercise reasonable care in supervising the work of a contractor, or in approving a contractor's plans and system of work. It is another thing to attribute to the council a legal duty of care which obliges the council to do the impossible: to ensure that no employee of the contractor behaves carelessly. The problem is even more acute if the source of this duty of care is said to be found in statute. One of the things that is special about this duty is that it is a duty to do the impossible. That is unlikely to have been intended by the legislature.

24 If the law were frankly to acknowledge that what is involved is not a breach by the defendant of a special kind of duty, but an imposition upon a defendant of a special kind of vicarious responsibility, a different problem would have to be faced. It would be necessary to identify and justify the exceptions to the general rule that a defendant is not vicariously responsible for the negligence of an independent contractor, and to provide a means by which other exceptions may be identified when they arise. That, in turn, would require an explanation of the general rule so as to account for the circumstances in which it yields to exceptions. It may be difficult to justify those circumstances in terms of fixed categories. Within those categories there may be individual cases some of which may be thought to merit making them an exception and others of which may not.

25 In the passage in *Kondis* quoted above, Mason J indicated that the personal, special duty recognised in the *Dalton v Angus* line of cases, which includes the highway cases, may rest on foundations rather different from the

foundations of the cases he had discussed earlier. In *Salsbury v Woodland*, Widgery LJ said such cases rest on considerations of nuisance and statutory construction.

26 In *Brodie*, the majority in this Court[24] said that the liability of highway authorities should now be treated as covered by the modern law of negligence, into which public nuisance has been absorbed[25]. They formulated a duty of care, to apply in cases of non-feasance as well as misfeasance, being a duty to take reasonable care that the exercise of or failure to exercise the powers by such authorities does not create a foreseeable risk of harm to road users[26]. We are here concerned with a case of misfeasance. The later statutory reinstatement of a measure of protection for non-feasance is irrelevant. For reasons already explained, I do not take *Brodie* to deny the importance of statutory construction. The formulation of the duty of care given in *Brodie*, in its application to cases of misfeasance, and to a case where a roads authority has exercised its powers by engaging an independent contractor, is consistent with what I have already indicated is the construction I would place upon the *Roads Act*. It is not a special duty to ensure anything; certainly not a duty to ensure that no worker behaves carelessly. It is a duty to exercise reasonable care. It is not discharged merely by engaging a reputable contractor. The exercise of reasonable care for the protection of road users, in a case where an independent contractor is engaged, may be affected by the nature of the work involved and the resources respectively available to the roads authority and the contractor. What is required of a local council which engages a major construction company to build a bridge or tunnel may differ from what is required of another council in different circumstances. The content of a requirement of reasonable care adapts to circumstances, unlike the content of a requirement to ensure that care is taken. As was mentioned earlier, in this case there is an unresolved issue about an alleged failure by the appellant's officers to exercise reasonable care.

27 The concept of a non-delegable duty, elaborated as a duty to ensure that care is taken, may have a useful, if not entirely admirable, role in some cases involving the tort of negligence. We are concerned only with roads authorities. We are concerned particularly with the *Roads Act*, and the powers and responsibilities it confers. The appellant had a duty to take reasonable care, a duty that was not discharged merely by engaging the services of Roan Constructions. It did not have a duty to ensure that the employees of Roan Constructions did not behave carelessly. The basis upon which the case was

---

24 Gaudron, McHugh and Gummow JJ, with whom Kirby J agreed.

25 (2001) 206 CLR 512 at 564-570 [116]-[129].

26 (2001) 206 CLR 512 at 577 [150].

decided against the appellant at first instance and in the Court of Appeal was incorrect.

28 The appeal should be allowed. I agree with the consequential orders proposed by Hayne J.

29 KIRBY J. The issue in this appeal is whether the New South Wales Court of Appeal[27] erred in refusing to set aside a judgment of the District Court of that State[28]. By that judgment, the primary judge (Quirk DCJ) upheld the entitlement of Mr Leslie Montgomery ("the respondent") to recover damages for personal injury from the appellant, Leichhardt Municipal Council ("the Council").

30 The respondent's cause of action against the Council was pleaded solely in negligence. His recovery was based on his contention that the Council owed him a "non-delegable duty of care". That contention was based on a line of authority in the Court of Appeal concerning the ambit of the duty owed by roads authorities to users of a road, beginning with that Court's earlier decision in *Roads and Traffic Authority v Scroop*[29]. In that decision, the District Court held that a roads authority, causing or permitting operations on a public road, owed a non-delegable duty of care to road users, including for any negligent act or omission of an independent contractor. The holding in *Scroop* has been followed in several cases[30]. In applying the holding to the respondent's claim, the primary judge conformed to legal authority that was binding on her.

31 The main purpose of this appeal is to afford this Court the opportunity to consider the correctness of the *Scroop* line of cases. That task is not an easy one. The law governing non-delegable duties of care has been described as a "mess"[31], comprising "a random group of cases"[32] giving rise to a basis of liability that is "remarkably under-theorised"[33]. The instances in which a non-delegable duty has

---

27 *Leichhardt Municipal Council v Montgomery* [2005] NSWCA 432.

28 *Montgomery v Leichhardt Municipal Council*, unreported, 1 December 2004 per Quirk DCJ.

29 (1998) 28 MVR 233.

30 *Roads and Traffic Authority (NSW) v Fletcher* (2001) 33 MVR 215; *Roads and Traffic Authority (NSW) v Palmer* (2003) 38 MVR 82; *Ainger v Coffs Harbour City Council* [2005] NSWCA 424; *Coombes v Roads and Traffic Authority (NSW)* [2006] NSWCA 229.

31 Murphy, "The Liability Bases of Common Law Non-Delegable Duties – A Reply to Christian Witting", (2007) 30(1) *University of New South Wales Law Journal* (forthcoming) (hereafter Murphy, "Liability Bases").

32 Deakin, Johnston and Markesinis, *Markesinis and Deakin's Tort* Law, 5th ed (2003) at 597, fn 372.

33 Murphy, "Liability Bases".

been upheld have been variously labelled "an inexplicable rag-bag of cases"[34] comprising an erroneous feature of the "über tort of negligence"[35] and an "embarrassing coda" to judicial and scholarly writings on the scope of vicarious liability for wrongs done by others[36].

32 Judges have been taken to task for their reluctance, or incapacity, to express a clear theory to account for the nature and ambit of non-delegable duties of care[37]. The whole field has been assailed as one involving serious defects[38], containing numerous "aberrations"[39] that have plunged this area of the law of tort into "juridical darkness" and "conceptual uncertainty"[40]. Courts of high authority have been accused of coming to the right result for the wrong reasons; or the wrong result despite adopting the right reasons[41].

33 Special leave was granted in this appeal, in the hope of clarifying the underlying rationale of tort liability for non-delegable duties beyond the somewhat Delphic endeavours offered by this Court in the past, notably by Mason J in *Kondis v State Transport Authority*[42].

---

34 Stevens, "Non-Delegable Duties and Vicarious Liability", in Neyers, Chamberlain and Pitel (eds), *Emerging Issues in Tort Law*, (forthcoming) (hereafter Stevens, "Non-Delegable Duties").

35 Stevens, "Non-Delegable Duties".

36 Stevens, "Non-Delegable Duties". See also McIvor, "The Use and Abuse of the Doctrine of Vicarious Liability", (2006) 35 *Common Law World Review* 268 at 290-296.

37 Murphy, "Juridical Foundations of Common Law Non-Delegable Duties", in Neyers, Chamberlain and Pitel (eds), *Emerging Issues in Tort Law*, (forthcoming) (hereafter Murphy, "Juridical").

38 Murphy, "Juridical".

39 Murphy, "Juridical".

40 Murphy, "Juridical".

41 Stevens, "Non-Delegable Duties".

42 (1984) 154 CLR 672 at 687. The passage is set out in the reasons of Gleeson CJ at [13].

34 Ordinarily, a person is not liable in law for the wrongs done by that person's independent contractors, as distinct from employees[43]. This principle has been repeatedly upheld by this Court[44], including in a case where the independent contractor was, on one view, a "representative agent"[45] or part of the "organisation"[46] of the principal[47]. Clearly, to render one person liable in law for wrongs done by another (or to impose direct and personal liability upon that other) something exceptional is required, either as a matter of established legal authority or on the basis of demonstrated legal principle or policy[48].

35 So far, although this Court has accepted that certain relationships give rise to a non-delegable duty of care, it has not recognised the relationship of roads authority and road user as one which does so. This Court is not bound to do so, either by the *Scroop* line of cases in Australia, challenged in this appeal, or by the collection of English authority to which *Scroop*, and its Australian successors, purport to give effect.

36 In order to decide the present appeal, it is therefore necessary to determine the correctness of *Scroop* and the local cases that have followed it. To do this, we must decide whether that line of decisions fits comfortably into the body of relevant Australian statute and common law. To assist that decision, much attention was paid, in the argument of this appeal, to the suggested reasons of principle that support the imposition of non-delegable duties of care, as a class. If there is no conceptual unity to the recognised instances of non-delegable duties in tort, repeated observations in this Court suggest that the presently recognised categories should not be expanded[49]. These observations would afford a reason for declining to extend the categories to the relationship of roads authority and road user.

---

43 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 26, 35.

44 *Scott v Davis* (2000) 204 CLR 333; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *New South Wales v Lepore* (2003) 212 CLR 511 at 580 [196]; *Sweeney v Boylan Nominees Pty Ltd (t/as Quirks Refrigeration)* (2006) 80 ALJR 900; 227 ALR 46.

45 cf *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41.

46 This was Denning LJ's test. See eg *Stevenson Jordan and Harrison Ltd v Macdonald and Evans* [1952] 1 TLR 101 at 111.

47 *Sweeney* (2006) 80 ALJR 900 at 913 [61]; 227 ALR 46 at 61-62.

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

49 Reasons of Callinan J at [168] fn 240.

37 In my view, the liability of a roads authority to road users does not fit appropriately into the kinds of relationships that have so far been accepted in Australia as giving rise to a non-delegable duty of care. In so far as there are common features of those categories, they are not enlivened by the relationship illustrated by the present case. The appeal must therefore be allowed.

The facts, legislation and common ground

38 *The facts*: The relevant facts are now undisputed. The details are set out in the other reasons[50]. On Saturday evening, 7 April 2001, the respondent, walking three abreast with friends on a busy footpath in Leichhardt, an inner suburb of Sydney, fell into a telecommunications pit whose broken cover had been hidden from view by a carpet placed over it by employees of Roan Constructions Pty Limited ("Roan"). Roan had been engaged by the Council as a contractor to perform work on the footpath. By its employees, Roan did that work negligently. Roan was thus directly liable for such negligence to the respondent.

39 The respondent sued Roan for damages for negligence. He settled that claim for $50,000 inclusive of costs[51]. However, the respondent's statement of claim had named both Roan and the Council as defendants. Following the settlement with Roan, the primary judge proceeded to hear and determine the respondent's claim in negligence against the Council. That claim was framed in the alternative. It was based on the Council's liability for its own negligence, which was alleged to have caused, or contributed towards, the respondent's injury. It was also based on the Council's suggested non-delegable duty of care for the negligent acts of Roan in repairing the footpath. The primary judge found in favour of the respondent on the latter basis. It followed that she did not have to decide the former, alternative, claim. The primary judge adjusted the judgment entered against the Council to allow for the notional net recovery against Roan pursuant to the settlement, so as to prevent double compensation for the same damage[52].

40 Why did the respondent settle against Roan, given that the active agency of the negligence for which he was suing was the conduct of Roan's employee in placing a carpet over a defective covering of a pit situated on a busy suburban

---

50 Reasons of Gleeson CJ at [1]-[7]; reasons of Hayne J at [130]-[135]; reasons of Callinan J at [161]-[164].

51 *Leichhardt Municipal Council v Montgomery* [2005] NSWCA 432 at [5].

52 *Montgomery v Leichhardt Municipal Council*, unreported, 1 December 2004 at 30 per Quirk DCJ.

footpath? Given the seriousness of the respondent's injuries (found to justify a judgment for more than five times that of the settlement with Roan) why did the respondent compromise his claim against the contractor? It was not, presumably, because he wanted to have his legal entitlements considered by this Court, and to assist in the clarification of the law of non-delegable duties in Australia. Nor, by inference was it because Roan was uninsured. The specification for the paving contract between the Council and Roan was in evidence. In a conventional provision, that contract expressly required:

> "The contractor must carry Public Liability insurance with a minimum cover of Ten Million Dollars ($10,000,000)."

41 The contract also contained a provision that inferentially gave rise to the placement of the carpet by Roan's employees, although in a way that was unintended:

> "Access is to be maintained to shopfronts/residences at all times. All commercial properties are to have artificial grass or carpet over the top of the road base to provide clean access."

42 The mysteries of the negotiations that led to the relatively modest settlement between the respondent and Roan are, of course, unknown. The only clues that are offered appear in the published reasons of the primary judge dealing with an aspect of costs[53]. According to those reasons, the settlement against Roan occurred shortly before an arbitration of the matter was heard in which the respondent's claim against the Council was unsuccessful, resulting in the hearing in the District Court. The primary judge noted that[54]:

> "[A]s with all cases involving slips and falls on Council footpaths or roads, or indeed most Occupier cases, a large element of risk is involved, particularly as the state of the law has developed over the past few years."

43 Inferentially, this observation included a reference to the decision of this Court in *Brodie v Singleton Shire Council* and *Ghantous v Hawkesbury City Council* (together, "*Brodie*")[55], the latter adverse to a claim by a pedestrian against a local authority concerning the condition of a suburban footpath. Whatever the reasons, the practical result of the settlement with Roan was that

---

53 *Montgomery v Leichhardt Municipal Council*, unreported, 16 December 2004 at 2 per Quirk DCJ.

54 *Montgomery v Leichhardt Municipal Council*, unreported, 16 December 2004 at 3 per Quirk DCJ.

55 (2001) 206 CLR 512 at 581-583 [163]-[168], 605-607 [244]-[248].

the respondent was confined in the litigation to his legal entitlements against the Council. In the District Court, the Council was refused a belated application to join Roan in the proceedings as a cross-defendant[56].

44 All of the plaintiff's eggs were therefore in the basket labelled *Scroop*. But the problem with *Scroop* was the novelty of the legal principle which it endorsed and the attempt it afforded, against repeated decisions of this Court, to bring home liability to the Council in a case where the causative agent of the negligence relied on was not an employee of the Council but an independent contractor, Roan. Truly, if the respondent's action against the Council could succeed, it would afford the respondent a means of "outflanking the general rule" of the common law in Australia that a principal is not liable for wrongs done to a third party by an independent contractor[57].

45 *The legislation*: Two Acts of the New South Wales Parliament need to be considered. The first is the Act, which deals with roads in the State. The relevant provisions of that Act are set out in other reasons[58].

46 Reference must also be made to the *Civil Liability Act* 2002 (NSW) now affording a special non-feasance protection to roads authorities[59]. However, the latter provision has no direct application to the present case because it was enacted in 2002, after the respondent's injuries occurred. Nor does it alter, retrospectively or at all, the doctrinal shift in the liability of highway and roads authorities for negligence, expressed by this Court in *Brodie* for the whole of Australia.

47 In so far as the content of the common law is concerned, the *Civil Liability Act* does not affect the issues to be decided in this appeal. In this instance, the roads authority in question (the Council) had not failed to carry out road work or to consider doing so. On the contrary, the Council had decided to perform such work to the relevant portion of the "road" (the Leichhardt footpath) and had engaged Roan as its contractor to carry out such work. This was not therefore a case of "non-feasance", whether under the former common law or under provisions such as those in the new enactment. On any view, the old classification is immaterial.

---

56 *Montgomery v Leichhardt Municipal Council*, unreported, 16 December 2004 at 3 per Quirk DCJ.

57 cf reasons of Gleeson CJ at [9]. See also *Dalton v Angus* (1881) 6 AC 740.

58 See reasons of Callinan J at [171]-[173], referring to the Act, ss 3, 5, 6, 71, 145 and 146(1).

59 See reasons of Callinan J at [174]-[177].

48 *Common ground*: By the time these proceedings reached this Court, there was much common ground between the parties. Thus, it was agreed that:

- The Council was a "roads authority" for the purposes of the *Roads Act* 1993 (NSW) ("the Act"), in which the relevant "road", including the portion of footpath in question, was vested in the Council by virtue of the Act. An earlier contest, suggesting that the Roads and Traffic Authority of New South Wales was the relevant "roads authority", fell away. It need not be explored;

- The plaintiff was injured in the course of exercising a right, expressed in s 5(1) of the Act, entitling him "as of right, to pass along a public road … on foot";

- The case was not concerned with issues that may sometimes be presented by involvement of a party in extra-hazardous activities. The works undertaken by the Council and by Roan could not be so classified. That issue can likewise be put to one side[60];

- An original dispute, also litigated in the Court of Appeal, concerning the state of the lid over the pit in the footpath when the carpet was laid over it, was not pursued further. Thus, carelessness of the employees of Roan could no longer be disputed because the placement of a carpet over such a defective lid constituted a clear act of negligence on Roan's part;

- There was no suggestion in the evidence that, simply by its choice of Roan as a contractor, the Council was itself negligent. Roan was an apparently reputable and competent independent contractor and nothing in the evidence suggested otherwise; and

- Both parties accepted the change in the expression of the common law with respect to the liability of highway and roads authorities stated by this Court in *Brodie*[61]). Neither argued for a return to the former common law rule differentiating between the liability of such authorities for "misfeasance" and "non-feasance". In any event, this was not a case where a roads authority had done nothing. The Council had embarked on a project to upgrade the relevant stretch of a public road, namely, the footpath. It had engaged Roan as a contractor to perform the work. In the event, that work was performed negligently, in a way that caused the respondent's injuries.

---

60 cf reasons of Gleeson CJ at [18].

61 (2001) 206 CLR 512.

49 This narrowing of the factual issues allows this Court to address the legal issue thus presented. In the given circumstances, is the Council liable in law for the acts and omissions on the part of Roan and its employees? Does such liability exist on the basis that the Council owes a non-delegable duty of care to the respondent by reason of the relationship between a public roads authority and a road user?

Defining the bases of liability

50 *Five potential bases of liability*: Potentially, five bases of liability are presented for determining whether, in accordance with the applicable law, the Council owed a duty of care to the respondent which it breached, resulting in his injuries. They are:

(1) *Statutory liability of the Council*: There is no provision in the Act, whether in express language or by necessary implication, that would warrant a conclusion that, in circumstances such as the present, the Council was rendered liable to the respondent by statute. It is true that, in its objects, the Act contemplates the conferral of functions on roads authorities such as the Council, including in carrying out road work[62]. Moreover, the Act vests a relevant "road" in an authority such as the Council, in fee simple[63]. However, these provisions do not impose any identified legal liability on the authority, as the road owner, beyond that of merely being "a person having the care, control and management of the road"[64]. The power to carry out road work provided by the Act[65] is no more than that. It affords the authority to perform what, in the case of a public road, would otherwise constitute a nuisance at common law. However, it does not expressly state any particular standard of performance to be observed by the Council, its employees or contractors.

No doubt, in accordance with ordinary principles, the conferral by the Act of the power to "carry out road work" would imply the grant of all privileges, discretions and capacities reasonably necessary to discharge that purpose. However, the respondent did submit that the grant of the power requires or implies perfection, or any like standard, in the carrying out of the work envisaged. At most, the grant of power implied that the roads authority in question would carry out the road work in a way that

---

62 The Act, s 3(f).

63 The Act, s 145.

64 The Act, s 146(1)(a).

65 The Act, s 71.

was reasonable for such an authority acting within the statutory grant: fairly, reasonably and not arbitrarily. One such way to do this, common in Australia, is by the use of the authority's employees. Another is by the engagement of independent contractors, including highly specialised contractors with skills for particular work which a roads authority does not itself have, and would not reasonably be expected to possess, amongst its own employees.

It is not unknown in other countries for the legislature to enact provisions imposing particular standards of care on roads authorities for the performance of designated road works. Thus, in England, by s 41 of the *Highways Act* 1980 (UK), Parliament imposed on a designated highway authority an express duty to maintain the highway. It is a defence to a claim for damages for a failure to maintain the highway in accordance with this provision for the highway authority to show that it took such care as, in all the circumstances, was reasonably required to ensure that the highway was not dangerous to traffic[66]. That defence, in turn, is not established merely by proving that the highway authority arranged for an apparently competent person to carry out or supervise the work[67]. A like duty of care has been read into Canadian highway legislation[68].

However the Act applicable to the Council's operations in New South Wales falls far short of affording a statutory basis for imposing an affirmative duty on the Council to ensure that road work is carried out without causing injury to persons such as the respondent. A statutory basis for liability in the Council is therefore unavailable.

(2) *Organisational liability*: A second possible basis for holding the Council liable for injury occasioned to a pedestrian by road works on a road within its designated responsibility would be to revive Lord Denning's attempt to explain the ambit of vicarious liability in terms of responsibility for persons working for and within the organisation of the defendant's business[69]. In his reasons in *Kondis*, Murphy J sought to rationalise the instances of non-delegable duty, identified in that case, by reference to

---

66 *Highways Act* 1980 (UK), s 58. See Stevens, "Non-Delegable Duties".

67 *Highways Act* 1980 (UK), s 58(2).

68 *Lewis (Guardian ad litem of) v British Columbia* [1997] 3 SCR 1145, considering *Ministry of Transportation and Highways Act* RSBC 1979 c 280, ss 14, 48. See also *City of Vancouver v McPhalen* (1911) 45 SCR 194 and reasons of Gleeson CJ at [19].

69 *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248 at 295.

what he called "the developing organization test". He thought that this was a conceptualisation that would "provide another basis of liability"[70]. However, so far, despite the imperfections of the conventional doctrinal underpinnings of vicarious liability, the organisation test has not gathered many supporters in Australia. Indeed, in *Stevens v Brodribb Sawmilling Co Pty Ltd*[71], this Court appears to have rejected it. As in other recent cases[72], this notion of liability was not revived by the parties to the present appeal, it can likewise be ignored.

(3) *Representative agent liability*: Nor did the respondent make any attempt to propound a basis for the vicarious liability of the Council for the torts of Roan and its employees on the footing of a "broader doctrine" of vicarious liability, such as McHugh J repeatedly expressed in this Court, including in *Hollis v Vabu Pty Ltd*[73]. In the light of the negative response to this suggestion, evident in the joint reasons in this Court in *Sweeney v Boylan Nominees Pty Ltd (t/as Quirks Refrigeration)*[74], the failure of the respondent to advance such an argument in this appeal was understandable. One day, this Court may return to McHugh J's observation in *Hollis* that "[i]f the law of vicarious liability is to remain relevant in the contemporary world, it needs to be developed and applied in a way that will accommodate the changing nature of employment relationships"[75]. The great expansion in recent years of the use by public authorities of contractors, and the "out-sourcing" to agents in the place of employees, suggests the possible need to reconceptualise the foundations of vicarious liability. But the present is not the case in which to do so[76].

(4) *Causative negligence of the Council*: The fourth way in which the liability of the Council to the respondent could be enlivened would be to prove that the respondent's injuries were directly caused, or materially contributed to, by the acts or omissions of the Council itself or those of its

---

70 (1984) 154 CLR 672 at 690. See also *Bazley v Curry* [1999] 2 SCR 534 at 548-549 [22].

71 (1986) 160 CLR 16 at 22-29, 35-36.

72 eg *Sweeney* (2006) 80 ALJR 900 at 913 [61]; 227 ALR 46 at 61-62.

73 (2001) 207 CLR 21 at 60-61 [101]-[102] per McHugh J.

74 (2006) 80 ALJR 900; 227 ALR 46.

75 (2001) 207 CLR 21 at 54 [85]. See also at 50 [72].

76 cf *Sweeney* (2006) 80 ALJR 900 at 920 [104]-[105]; 227 ALR 46 at 71.

own employees. Such a claim was made in the respondent's pleadings. It was also the subject of written submissions, and of a notice of contention, in the Court of Appeal[77]. The respondent defensively revived that issue in this Court.

Although the Council contested the availability of the submission, I am satisfied that it was raised below. Having regard to the bases on which the primary judge and the Court of Appeal decided the respondent's entitlements, the liability of the Council for its own negligence did not have to be determined. Various ways in which such liability might have been argued were canvassed in the parties' submissions. Certainly, an officer of the Council made a number of inspections of the work being performed by Roan. Whether Roan's operations should have been roped off by the Council to prevent pedestrian access; whether such isolation would have been compatible with the need to retain customer access to the adjoining businesses; whether the Council's designated system of laying down carpet was likely to occasion the damage that arose; or whether some other system of placing boards over the disrupted footpath should have been implemented by the Council itself, are all questions that have never been decided.

Because it cannot be said that the direct liability of the Council on this footing is bound to fail, or that such arguments are futile, it is just, as the other reasons in this Court conclude, to remit the proceedings, if necessary, for determination of this as yet undecided aspect of the respondent's case. However, the exploration of all of the foregoing issues would be unnecessary if the respondent could maintain the exceptional basis upon which he succeeded at trial and in the Court of Appeal.

(5) *Non-delegable duty liability*: The respondent's success below was based on the conclusion, derived from *Scroop*, that the Council owed him a duty of care in the performance of road work on a public road rendering the Council liable if a contractor such as Roan did not take reasonable care, save where the injury to the road user was occasioned by some "casual or collateral acts of negligence by the contractor"[78]. The qualification by reference to "casual or collateral acts of negligence by the contractor" was derived by Hodgson JA from the reasons of the English Court of Appeal in *Penny v Wimbledon Urban Council*[79]. In that case, the roads authority's

---

77 Reasons of Callinan J at [165], [169].

78 *Leichhardt Municipal Council v Montgomery* [2005] NSWCA 432 at [23] per Hodgson JA; Mason P concurring at [1], McColl JA concurring at [37].

79 [1899] 2 QB 72 at 76.

contractor had negligently left a heap of soil on the road, unlighted and unprotected, causing injury to a person who walked along the road after dark. The Council there was held liable and the exception inapplicable. By inference, the same conclusion was reached, by analogy, in the present case[80].

51 *Basis of the decisions below*: Having concluded that the respondent was entitled to recover against the Council on the basis of its non-delegable duty of care, and that the *Scroop* line of authority was applicable and accurately expressed the Australian common law, it was unnecessary for the Court of Appeal, any more than for the primary judge, to explore any other foundation for the Council's liability. Thus, the primary issue in this appeal is the correctness of that conclusion and the legal principle to which it gives effect.

The issues

52 It is convenient to subdivide the issue thus presented by this appeal by reference to a number of sub-issues that can be expressed in the form of three questions:

(1) *The statutory consistency issue*: Is the suggested liability of the Council on the basis of a non-delegable duty of care consistent with the statutory provisions governing the duties and liabilities of the Council in the performance of road work on a road used by the public?

(2) *The highway liability issue*: Is the suggested liability of the Council consistent with the restatement by this Court of the general liability of highway authorities at common law, as explained in this Court's decision in *Brodie*?

(3) *The non-delegable duty issue*: Is the suggested liability of the Council otherwise consistent with Australian authority on the liability of parties for non-delegable duties? Alternatively, is it consistent with an extension of that authority warranted by past decisions concerning other relationships together with applicable arguments of legal principle and policy?

53 A fourth issue of causation was argued by the Council. However, that issue would only arise for decision if the respondent were to secure favourable answers to each of the previously stated questions.

---

80 [2005] NSWCA 432 at [28].

The issue is not resolved by the statute

54 *The primacy of statutory law*: Where, as in this case, the legislature has enacted a law that is relevant, in any way, to the power and duty of the propounded defendant, a public authority, it is essential to begin the search for any duty of care owed by that defendant under the common law by examining the language and purpose of the statute. Where public law has been enacted, it necessarily enjoys priority over common law rules. No principle of the common law could be accepted by this Court that was in conflict, or inconsistent, with enacted law. That is self-evident. But it is very common for the arguments of parties, and the analysis of courts, to overlook the correct starting point for the elucidation of the governing rule[81].

55 Where the legislature has spoken, the applicable law is expressed in the text of its enactment. In the present case, that means the Act. I therefore agree with Gleeson CJ that, in a particular case, the common law defines "the duty of care to which a roads authority is subject by reference to the nature of the statutory powers given to the authority"[82]. No statement of common law liability of such an authority could be expressed that was incompatible, or inconsistent, with the language of the Act or its intended operation.

56 *The relevant silence of the statute*: The Act does not contain any express provisions stating a particular standard of care that is to be attained by a roads authority, such as the Council, in the performance of road works necessary to maintain and repair a public road (including a footpath). Still less does the Act impose on a roads authority an express duty to perform particular road works in an identified manner or to ensure that employees, contractors or agents attain particular standards.

57 Given that a roads authority is, by definition, an artificial person which can only act through human agents, it may be inferred that the statutory empowerment of a local government authority, such as the Council, to perform road works, was intended to be fulfilled by human beings such as employees, contractors or other agents. Nothing in the Act is inconsistent with that postulate. Certainly, the Act does not forbid the use of non-employee contractors or agents. Nor does it specify the qualifications of such contractors or agents, or, where they exist, of their employees. Upon all of these matters, the Act is silent. No

---

81 *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 80 ALJR 1509 at 1527 [77]-[82]; 229 ALR 1 at 21-22, citing *Brodie* (2001) 206 CLR 512 at 602 [231].

82 Reasons of Gleeson CJ at [20]; cf *Brodie* (2001) 206 CLR 512 at 602 [231]-[232].

particular standards may be implied, of necessity, from the silence of the Act or from its express provisions.

58 It is a fair comment for the Council to argue that, had it been the purpose of the New South Wales legislature to impose particular standards on the performance of road works by a roads authority (such as the Council) it might have been expected that this would have been stated in the Act[83]. There are such provisions in overseas statutes. However, they are not part of the legislation applicable to the Council[84]. Had it been the legislature's purpose to provide for the attainment of particular standards, and to affix liability on an authority where such standards had not been attained, the legislature could have enacted such provisions. After all, the imposition of such standards, and the enforcement of such liability against a roads authority, would have clear economic implications for the raising of revenue from the public.

59 Upon such subjects, the Act is silent. It contents itself with dealing with the roads authority's power to perform road works which might otherwise, by the common law, constitute an actionable public nuisance.

60 In *Brodie*[85] the highway and roads authorities relied upon statutory provisions the terms of which were far more explicit than those under consideration in these proceedings. Those provisions were said to express a parliamentary acceptance of the immunity for non-feasance previously accepted as part of the common law[86]. However, in the majority's conclusions in *Brodie*, the relevant statutory provisions were held not to prevent the restatement of the common law so as to abolish the erstwhile immunity of such authorities and to subsume their liabilities within the general principles of the law of negligence.

61 The present is an even stronger case. Here, the scope of the legislation is limited to the power of roads authorities, such as the Council, to perform road works. The legislation has wholly omitted reference to the consequences for civil liability of a case where the statutory power has been exercised, not by the Council itself, nor by its employees, but by a contractor and its employees, in a way which has been held negligent. Thus, the Act has not conferred an express immunity from liability on the Council (an issue in *Brodie*). Yet neither has it

---

83 cf reasons of Gleeson CJ at [23].

84 See above these reasons at [50(1)]. See also at [46].

85 (2001) 206 CLR 512.

86 See *Brodie* (2001) 206 CLR 512 at 570-571 [130], 598 [222], including s 32(1A) of the *Main Roads Act* 1924 (NSW), as amended by s 2 of the *Main Roads and Local Government (Amendment) Act* 1957 (NSW).

imposed liability on the Council to ensure that contractors perform road works without negligently causing damage to third parties (an issue in these proceedings). In both circumstances, by inference, Parliament has left it to the common law to develop and express the extent of any legal liability of the roads authority in a case such as the present.

62 Whilst, for these reasons, the absence of express provisions in the Act, imposing a non-delegable duty on a roads authority such as the Council, for which the respondent contended, tends to militate against the existence of such a duty in this case, as part of the common law, the statute is not decisive. It applies in one State only, whereas the common law must be stated for the whole of Australia. Moreover, the silence of the Act is compatible with a parliamentary purpose to leave issues concerning the liability of roads authorities, such as the Council, to be decided in accordance with general principles of the common law of tort, applicable throughout the nation.

63 *Statute does not forbid a duty*: It follows that the issue as to whether a non-delegable duty at common law exists in the Council is not decided by the terms of the Act. Nor, by its provisions, does the Act forbid the operation of a non-delegable duty, if that duty is otherwise required by the application of common law principles.

The issue is not resolved by the reasoning in *Brodie*

64 *Suggested inconsistency with Brodie*: An important part of the Council's argument before this Court comprised an attack on the Court of Appeal's decision in *Scroop* and the other cases that have endorsed the imposition of a non-delegable duty of care upon road and highway authorities.

65 Part of this attack invoked repeated indications by members of this Court of the need for special care in enlarging the relationships to which a non-delegable duty of care will apply[87]. However, because such cases have not hitherto involved the liability of roads authorities, they do not squarely address the issue now presented for decision.

66 The Council nonetheless argued that this Court's decision in *Brodie*, and the way in which the majority in that case reasoned, was fundamentally inconsistent with the proposition now advanced by the respondent. The Council pointed out that the Court of Appeal's decision in *Scroop* preceded *Brodie* by

---

87 See eg *Scott v Davis* (2000) 204 CLR 333 at 416-417 [248] per Gummow J. See also *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 333 per Brennan CJ, 345-346 per Dawson J, 403 of my own reasons; cf 351 per Toohey J, 368 per McHugh J.

three years. It submitted that the *Scroop* line of authority was fundamentally inconsistent with the decision of the majority in *Brodie*, which, it said, was designed to subsume the liability of roads and highway authorities within the general law of negligence – by inference removing not only exceptional immunities (as expressed in the former highway rule) but also exceptional liability (as contained in the non-delegable duty principle propounded by the respondent).

67 In particular, the Council latched on to the following passage in the joint reasons in *Brodie* of Gaudron, McHugh and Gummow JJ[88]:

> "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 [Local Government] 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."

In my reasons in *Brodie*[89] I agreed with the joint reasons that the former immunity conferred on highway and roads authorities by the common law, as expressed in such earlier decisions as *Buckle v Bayswater Road Board*[90] and *Gorringe v Transport Commission (Tas)*[91], should no longer be followed. I went on[92]:

---

88 (2001) 206 CLR 512 at 577 [150].

89 (2001) 206 CLR 512 at 604 [238].

90 (1936) 57 CLR 259.

91 (1950) 80 CLR 351.

92 (2001) 206 CLR 512 at 604 [239] (footnote omitted).

> "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."

68 *Subsuming within negligence*: It is a fair comment[93] that the apparent intention of the majority in *Brodie*, expressed in the foregoing passages, was to treat the special position of past judicial authority as anomalous and to absorb the anomaly in "the principles of ordinary negligence" as the Court had earlier done[94] with the former common law rule of liability in *Rylands v Fletcher*[95]. I can therefore understand the argument that the re-expression of the law in *Brodie*, read together with later decisions of this Court[96], gives little support to the submission for the respondent that *Brodie* had not only abolished the long-time immunity previously thought to attach to highway and roads authorities in Australia but had laid the ground for the substitution of an additional, enhanced liability in the form of a non-delegable duty for the negligent performance of road works by an independent contractor.

69 *The holding in Brodie*: Nevertheless, if *Brodie* is correctly analysed, it does not, in my opinion, say anything about the issues now before this Court. The reasons given in that appeal, and the record of argument, contain no specific mention of non-delegable duties. It is a fundamental mistake to assume that a court, which has not been asked to address an issue, has tackled and decided it *sub silentio*, when addressing another issue that has been fully presented[97].

70 In *Brodie*, the issue before this Court was the measure of any legal immunity afforded to roads and highway authorities by the non-feasance immunity rule. It is that rule which the majority reasons tackled, analysed and overruled. Accordingly, as a matter of binding authority, that is what *Brodie* stands for. At least as a matter of legal reasoning, the removal by *Brodie* of the particular immunity leaves it open to the courts, declaring the common law, to uphold the imposition of a non-delegable duty, if it were otherwise applicable to the relationship of roads authority and road user, by analogy with other relationships in which a non-delegable duty has been upheld.

---

93 Reasons of Gleeson CJ at [26]; reasons of Hayne J at [148]-[150].

94 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 556.

95 (1866) LR 1 Ex 265; affd (1868) LR 3 HL 330.

96 eg *Scott v Davis* (2000) 204 CLR 333; *New South Wales v Lepore* (2003) 212 CLR 511.

97 *New South Wales v The Commonwealth* (2006) 81 ALJR 34 at 144 [489]; 231 ALR 1 at 132.

71 Certainly, one scholar advances the proposition that the breach of a non-delegable duty is a separate and independent tort of strict liability[98]. According to this view, such liability constitutes a tort with its own elements, capable of being distinguished from negligence liability in a number of ways. If such a view of the ambit of a non-delegable duty of care were adopted, it would indeed be difficult to reconcile the recognition of such a duty in the case of roads authorities, in the face of the conclusion in *Brodie*, that the applicable liability should be expressed in terms of the general principles of the law of negligence.

72 However, the majority view that has so far been taken concerning the features and scope of a non-delegable duty in tort has been a different one[99]. In effect, the prevailing view in Australia has rationalised such duties as comprising "something other than a discrete tort"[100]:

> "… [W]hile the courts may not always have said exactly what they think a non-delegable duty is; they have at least been consistent in refraining from any claim that it is a freestanding tort. … [N]on-delegable duties have in common *only* the fact that they are all premised upon an affirmative duty arising out of an assumed responsibility … and that their *necessary* juridical connections end there."

73 According to this approach to non-delegable duties, which I accept, they exist as "sub-species" within particular torts. They may thus be seen as special instances in which, in the given circumstances, "liability is truly strict while in others it is, at least theoretically, fault-based"[101].

74 *Brodie is not determinative*: On this footing, the determination in *Brodie* that the former immunity of roads and highway authorities should be abolished leaves open the argument that the substitution of the general common law, to express the liability of such authorities, might import a non-delegable duty of care in particular relationships. By inference, once the liability of the authorities is assigned to the generality of the common law, all of the principles of the common law that are not inconsistent with any provision of the law enacted, will be given effect. And this will include a principle supporting the existence of non-delegable duties of care in particular relationships.

---

98 See eg Witting, "Breach of the Non-Delegable Duty: Defending Limited Strict Liability in Tort", (2006) 29(3) *University of New South Wales Law Journal* 33.

99 Murphy, "Liability Bases".

100 Murphy, "Liability Bases" (emphasis in original).

101 Murphy, "Liability Bases".

75 It follows that, whilst such a rapid move from legal immunity to the acceptance of non-delegable duties would seem an unlikely one for the common law to take[102], there is no necessary inconsistency with the proposition, at least as a matter of logic.

76 Of course, it is one thing to hold that a roads authority, such as the Council, might in principle owe a non-delegable duty of care to a person such as the respondent, notwithstanding the provisions of the Act and the decision of this Court in *Brodie*. It is quite another to conclude that this outcome represents the correct or preferable conclusion on the state of the common law in a case such as the present. This is the decisive issue in the appeal.

The basis for a roads authority's non-delegable duty

77 *A long line of decisions*: The foundation for the respondent's argument that the Council was liable in negligence for the defects in the footpath that caused the respondent's injuries was a long line of decisional authority in England. This was said to sustain the holding of the Court of Appeal in *Scroop*, which was followed in the present case. The relevant authorities are explained and described in other reasons[103]. The authorities appear to have attracted some support in Canada[104], although the position there has been complicated by the imposition on the roads authority of affirmative statutory obligations[105].

78 In his influential attempt in *Kondis*[106] to describe, categorise and explain the common elements of the non-delegable duties of care accepted by Australian law, Mason J did not expressly include the relationship of roads authority and road user. Nevertheless, he did acknowledge the existence of relationships resting on different foundations. Specifically, Mason J mentioned *Dalton v Angus*[107]. That is one of the cases on which the respondent relied in these proceedings to support the proposition that a non-delegable duty of care arises in

---

102 cf *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 399-400; *Jones v Bartlett* (2000) 205 CLR 166 at 239 [249].

103 Reasons of Gleeson CJ at [13]-[18]; reasons of Hayne J at [143]-[148]; reasons of Callinan J at [178]-[187].

104 *Lewis (Guardian ad litem of) v British Columbia* [1997] 3 SCR 1145, cited in reasons of Gleeson CJ at [19].

105 *Lewis (Guardian ad litem of) v British Columbia* [1997] 3 SCR 1145 at 1161 [25].

106 (1984) 154 CLR 672 at 687.

107 (1881) 6 AC 740. See *Kondis* (1984) 154 CLR 672 at 687. See also *Bower v Peate* (1876) 1 QB 321 at 326-327, in reasons of Hayne J at [143].

the case of road works where "a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor"[108].

79 Legal texts and encyclopaedias published in England in the decades before the attempt was made in *Donoghue v Stevenson* to provide a universal conceptualisation of the tort of negligence[109], certainly appear to have treated *Dalton v Angus* as upholding the direct liability on the part of a roads authority for work done on the road, even by an independent contractor[110]. Once this category of direct liability appeared in the case-books, and was endorsed by the textbooks, it seems to have gained acceptance in later English decisions. Such decisions have stretched from the latter part of the nineteenth century[111] to much more recent times[112].

80 Because of the generally unquestioning acceptance of English judicial authority, during the nineteenth and most of the twentieth century, the leading Australian text on the law of torts, in successive editions, described the exceptional liability of roads authorities for the torts committed by their independent contractors as expressing the applicable law[113]. Right up to the last (ninth) edition of his text, *The Law of Torts*[114], the late Professor John Fleming, by reference to the English case law, described the cases in which "non-delegable duties" had been recognised.

---

108 *Dalton v Angus* (1881) 6 AC 740 at 829 per Lord Blackburn. See reasons of Hayne J at [143].

109 [1932] AC 562 at 580-581 per Lord Atkin. An earlier attempt had been made by Brett MR in *Heaven v Pender* (1883) 11 QB 503 at 509. See *Burnie Port Authority* (1994) 179 CLR 520 at 541-542.

110 See reasons of Hayne J at [145], citing Charlesworth, *Liability for Dangerous Things* (1922) at 5 and reasons of Callinan J at [178], citing Halsbury's *Laws of England*, 2nd ed, vol 16 at 337 [456].

111 eg *Holliday v National Telephone Company* [1899] 2 QB 392 at 398; *Penny v Wimbledon Urban District Council* [1899] 2 QB 72.

112 eg *Salsbury v Woodland* [1970] 1 QB 324 at 338; *Rowe v Herman* [1997] 1 WLR 1390 at 1393. See reasons of Gleeson CJ at [15]-[17]; reasons of Callinan J at [185]-[186].

113 Fleming, *The Law of Torts*, 1st ed (1957) at 383; Fleming, *The Law of Torts*, 3rd ed (1965) at 361; Fleming, *The Law of* Torts, 9th ed (1998) at 436-437.

114 Fleming, *The Law of Torts*, 9th ed (1998) at 435.

81 Fleming included what he called "… instances of strict liability, such as those relating to … providing lateral support for adjacent land, and the near-strict duty to maintain premises abutting the highway in sound repair …"[115]. For the first of these instances, he cited *Dalton v Angus*, and for the second, *Tarry v Ashton*[116]. Nevertheless, the categories of road maintenance and repair appear in a compilation described by Fleming as "controversial" and "perplexing" because of "the apparent absence of any coherent theory to explain when, and why, a particular duty should be so classified" and "whether the resulting uncertainty and complexity of the law is matched by any corresponding advantages"[117].

82 Fleming was inclined to view the so-called "non-delegable duties" as a "fictitious guise" for vicarious liability[118] and to attribute "[t]he very reason for importing strict liability [to] a special concern to ensure safety or else compensation"[119]. Without doubt Fleming's treatment of the subject displays his dissatisfaction with the performance of the courts on this topic. He noted the fact that "Australian courts have lately become more sensitive [to the harsh outcomes] and reluctant to follow English and American precedents unreservedly"[120].

83 Other writers have criticised the statements (sometimes repeated in this Court, including by me) that "[l]iability on the basis of non-delegable duties has … been described as a 'disguised form of vicarious liability'"[121]. Such writers have castigated judges who fail "to keep separate the issues of whether there is vicarious liability or the breach of non-delegable duty". They accuse such judges of introducing incoherence into both concepts[122]. Certainly, non-delegable duties are personal to the duty-holder. They are not derivative, as from a duty which the law imposes on the principal for the acts or omissions of an employee, contractor or agent. To this extent Fleming's critical explanation of some of the categories of non-delegable duties of care is a justifiable one.

---

115 Fleming, *The Law of Torts*, 9th ed (1998) at 435.

116 (1876) 1 QB 314.

117 Fleming, *The Law of Torts*, 9th ed (1998) at 434.

118 Fleming, *The Law of Torts*, 9th ed (1998) at 434.

119 Fleming, *The Law of Torts*, 9th ed (1998) at 435.

120 Fleming, *The Law of Torts*, 9th ed (1998) at 434.

121 *New South Wales v Lepore* (2003) 212 CLR 511 at 608 [290] citing Fleming, *The Law of Torts*, 9th ed (1998) at 434. See also at 599 [257] per Gummow and Hayne JJ.

122 Stevens, "Non-Delegable Duties". See also Murphy, "Juridical".

84 The respondent latched on to this criticism. He urged that this Court should adhere to the long-standing body of decisional authority. He pointed to the line of cases in England and to the emerging principle that roads authorities had imposed on them, at common law, a non-delegable and direct duty for the reasonable safety of the roadway and its users. The respondent submitted that, unless Parliament, in clear language, were to abolish that principle, protective of persons such as himself[123], this Court should give effect to it. In doing so, it would do no more than uphold a legal duty described in the respected English text, *Salmond on Torts*[124], as "well established at common law".

85 The respondent relied on the fact that the English authority had been accepted in a more recent, but equally consistent, line of Australian authority in the New South Wales Court of Appeal, beginning with *Scroop*[125]. According to the respondent, the mere fact that, in *Kondis*[126], Mason J had not listed the roads authority and road user relationship as one in which a non-delegable duty exists, was immaterial. His Honour was not purporting to state the applicable categories exhaustively, but to illustrate those that had already been recognised, and to suggest elements of a coherent theory.

86 Thus, from first to last, the chief foundation for the respondent's arguments was the state of legal authority recognised in the textbooks, derived from English judicial decisions over the course of a hundred years, and applied more recently in New South Wales.

87 *Suggested statutory coherence*: Although the Act does not, as such, impose any particular duty of care upon users of a public road, owed by a roads authority such as the Council (still less a non-delegable duty and/or strict liability for the acts and omissions of independent contractors) the respondent submitted that the Act was entirely consistent with the acceptance of the common law principle of non-delegable duty on the part of a roads authority.

---

123 *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Coco v The Queen* (1994) 179 CLR 427 at 437; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [30]; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11], 562-563 [43].

124 21st ed (1996) at 464, citing Palles CB's survey of authority in *Clements v Tyrone County Council* [1905] 2 IR 415, 542.

125 (1998) 28 MVR 233.

126 (1984) 154 CLR 672 at 687.

88 If, at common law, disturbance of the condition of a public road, even for maintenance or repair, would amount to an actionable public nuisance, it was the Act, in permitting the roads authority to "carry out road work on any public road … under its control", that exempted the Council, as a roads authority, from what would otherwise have been its liability at common law[127]. It was the Act that affirmed the pedestrian's entitlement as a "member of the public" to pass upon a public road, such as a footpath, "as of right"[128]. It was also the Act that vested the relevant road in an authority such as the Council[129], bringing with that vesting such duties as belong to "a person having the care, control and management of the road"[130].

89 By this statutory route, the lawfulness of the disturbance of the public road by any other person (such as Roan) was ultimately derived from the exemption from common law liability for nuisance, afforded by Parliament. Parliament did not expressly exempt independent contractors of the Council from liability for a public nuisance. In such circumstances, so the respondent argued, in so far as the Council made use of an independent contractor, the scheme of the legislation envisaged the ongoing liability of the Council to a road user. To the extent that the Council used anyone other than its own employees to perform road works, it did not obtain protection from the Act. It was thus exposed to a liability at common law that preceded and survived the Act, namely, a non-delegable duty that the Council did not discharge merely by engaging an apparently reputable and competent independent contractor.

90 *Considerations of policy*: In *New South Wales v Lepore*[131], I suggested that:

> "When a final court is called upon to respond to a new problem … it is inevitable that, as in the past, the common law will give an answer exhibiting a mixture of principle and pragmatism. … In any re-expression of the common law in Australia, it is normal now[132] to have regard to

---

127 The Act, s 71.

128 The Act, s 5(1).

129 The Act, s 145.

130 The Act, s 146(1)(a).

131 (2003) 212 CLR 511 at 611-612 [300].

132 Contrast *Rootes v Shelton* (1967) 116 CLR 383 at 386-387 per Kitto J.

considerations of legal principle and policy, as well as any relevant legal authority[133]."

91 I proposed that this approach was "all the more relevant" where the focus was upon the imposition of legal liability for the acts of others, a category of liability which the law, at least in the context of vicarious liability, has always been accepted as being based on considerations of legal policy[134].

92 The respondent emphasised the role of this Court in giving effect to established principles of the common law; the suggested injustice of altering those principles with retrospective operation affecting him; and the desirability of leaving any such alteration to the legislature, possibly assisted by a law reform body with the capacity to consult widely and to weigh social, economic and like factors[135].

93 Various other policy arguments have been advanced in cases involving non-delegable duties. The following are relevant to the relationship of roads authority and road user.

94 The ordinary road user (including a pedestrian, such as the respondent) will be unaware of the internal arrangements by which a roads authority, such as the Council, engages employees or independent contractors to perform road works that present risks to such users[136]. The roads authority is the body in the superior position to ensure that care is taken in the performance of such road works. Moreover, the authority is in a position to secure a contractual indemnity. It is entitled to sue for a statutory indemnity for any tortious wrongs done by a contractor. It is entitled to (and in this case, did) insist on the procurement of public liability insurance indemnity by contractors such as Roan. The view is therefore open that such internal management arrangements should not be a burden on road users injured as a result of carelessness in the performance of the

---

133 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252; *Northern Territory v Mengel* (1995) 185 CLR 307 at 352; cf Feldthusen, "Vicarious Liability for Sexual Abuse", (2001) 9 *Tort Law Review* 173 at 178.

134 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 37-38 [33]-[35]; *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 243-244 [65]-[66].

135 The respondent relied in this respect on *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 663 and *Dow Jones & Co v Gutnick* (2002) 210 CLR 575 at 614-615 [75]-[77]. See also *Sweeney* (2006) 80 ALJR 900 at 921 [108]-[111]; 227 ALR 46 at 72-73.

136 The dangers for plaintiffs in this connection may be illustrated by *Sweeney* (2006) 80 ALJR 900 at 921-922 [114]-[117]; 227 ALR 46 at 73-74.

road works. Recognition of a non-delegable duty on the part of the roads authority would leave it to that authority, in its own proceedings, to pursue its rights against its own contractors whilst ensuring that the injured road user was fully compensated for actionable wrongs involving lawful use of the road.

95 As illustrated by the circumstances of the cases in which a non-delegable duty on the part of the roads authority has been upheld, the risks to road users, in modern conditions, can be quite substantial. Contractors may not, in fact, be insured or adequately insured. Recognition of a non-delegable duty of care would have the merit of enhancing the likelihood that an innocent victim of someone's carelessness (such as the respondent) could recover from a solvent defendant[137]. Although this supposed justification for non-delegable duties in the law has been questioned and doubted[138], most roads authorities, at least in Australia, will be public authorities, potentially providing a "deep pocket" from which the negligently injured road user can recover. These circumstances will leave it to the roads authority, in its own proceedings, to claim any entitlement that it might have to contractual or other indemnity from a more immediate wrong-doer that is to blame for the defects in the road that caused injury to the road user.

96 *Conclusion: an arguable point*: I have taken the trouble to explain the arguments for the non-delegable duty of care for which the respondent contended because they are obviously not meritless. The application of English case law might sustain his arguments. The Court of Appeal's approach in *Scroop*, and in the cases which followed, is not without force. In recent times, including in respect of the liability of road and highway authorities, legislators have enacted provisions[139] designed to diminish protections otherwise afforded by the common law to injured persons, such as the respondent. As well, courts, including this Court, have cut back the recovery of other plaintiffs in ways that have reversed the trend even of recent authority[140]. In such circumstances, it is tempting to accept the respondent's arguments and to affirm *Scroop* and its progeny as stating

---

137 cf McKendrick, "Vicarious Liability and Independent Contractors – A Re-examination", (1990) 53 *Modern Law Review* 770 at 772-774; Feldthusen, "Vicarious Liability for Sexual Torts" in Mullany and Linden (eds), *Torts Tomorrow: A Tribute to John Fleming*, (1998) at 221.

138 Murphy, "Juridical".

139 See eg *Civil Liability Act* 2002 (NSW), s 45, set out in the reasons of Callinan J at [175].

140 eg *Neindorf v Junkovic* (2006) 80 ALJR 341 at 359-360 [84]-[85]; 222 ALR 631 at 653; *Sweeney* (2006) 80 ALJR 900 at 919 [100]; 227 ALR 46 at 70.

the law of Australia. Ultimately, however, I have reached the contrary conclusion. I must therefore explain why.

A non-delegable duty is not established

97 *The defects in the authority*: The defects of the decisional authority upon which the respondent relied, both in England and in the Australian cases decided since *Scroop*, are explained in other reasons[141]. Essentially, the cases accept a principle of non-delegability in a factual context where the relationship between the parties is far from uniform, and in which the use of independent contractors by the roads authority is normal and of long standing, at least in Australia.

98 The use of non-employee contractors has greatly expanded in Australia in recent times, due to the privatisation of many activities formerly performed by governments and their agencies, and the resulting "out-sourcing" of functions to independent contractors that operate for their own profit. The general rule is that the principal is not liable for the wrongs done by an independent contractor or its employees. It is not easy to see why an exception should be specifically carved out allowing the person injured to recover from a roads authority in addition to the normal rights that the person enjoys against the independent contractor posited as the effective cause of the wrong. In particular, it is difficult to see why the general policy of the law that the economic cost of the wrong should be borne by the legal entity immediately responsible for it should not be enforced in this case given the strong reasons of economic principle and social policy that lie behind that rule.

99 Once the early English decisions on the direct and personal liability of the roads authority were delivered, they were simply followed in kindred cases bearing factual similarities. Before *Donoghue v Stevenson*, that is basically the way in which tort liability, when framed in negligence, was determined. To discover whether liability existed at law, it was necessary to look for a case on the given relationship (or judicial authority bearing some similarity). In this sense, as a matter of legal technique, the late nineteenth century decisions on the liability of roads authorities in England should cause no surprise. They grew out of particular decisions.

100 The English authorities also responded to factual circumstances significantly different from those applicable to the activities of roads authorities in Australia. In England, public roads of various kinds had existed, in many forms, since Anglo-Saxon and Roman times. In Australia, from colonial times, the building and maintenance of public roads were substantially the

---

141 Reasons of Gleeson CJ at [14]; reasons of Hayne J at [146]-[149]; reasons of Callinan J at [181]-[187].

responsibility of government. This difference in the "circumstances and assumptions upon which" previous common law doctrine in respect of road works depended, in England and Australia respectively[142], was one of the chief considerations in *Brodie* that led to the re-expression of the common law highway rule in Australia.

101 As well, the statutory context, including the enactment of State Acts, such as the Act in question in this case, and other federal legislation[143], was held in *Brodie* to[144]:

> "… bear out Professor Fleming's point[145] 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".

The typical village and county responsibilities for road works in England, reflected in the late nineteenth century cases cited by the respondent, produced a legal environment that was quite different from that which generally obtained in Australia in relation to the repair and maintenance of roads.

102 This Court has not hitherto recognised an exceptional non-delegable duty of care owed by roads authorities to road users, as expressed in the English cases. Whilst the omission of that category of relationships from those accepted as giving rise to non-delegable duties, stated in the reasons of Mason J in *Kondis*[146], is not determinative of the central issue in this appeal, it is not insignificant. When *Kondis* was decided in 1984, the relationship of roads authority and road user was not one that had been universally recognised in Australia as giving rise to a non-delegable duty of care. The issue remained to be decided by Australian courts according to the principles of the Australian common law. However, so far as this Court was concerned, it was still left as an open question.

103 In earlier times, when this Court's judgments were subject to appeal to the Privy Council, conformity with English judicial authority was usually

---

142 *Brodie* (2001) 206 CLR 512 at 543 [65].

143 eg *National Roads Act* 1974 (Cth); *States Grants (Roads) Act* 1977 (Cth); and *Roads Grants Act* 1981 (Cth).

144 *Brodie* (2001) 206 CLR 512 at 543 [65] per Gaudron, McHugh and Gummow JJ.

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

146 (1984) 154 CLR 672 at 687.

unquestioned. Today, a higher standard of adherence to legal principle is applied. Whilst respect is still shown for English authority, when that authority is questioned, as it has been in this appeal, this Court's duty is to satisfy itself that the propounded authority expresses the common law of Australia. The fulfilment of that duty requires consideration of questions which were often ignored by Australian courts in the nineteenth and twentieth centuries because of the then amenability of Australian decisions to appeal to the Privy Council, overwhelmingly constituted by English judges applying English authority[147].

104 *The authority is exceptional*: On the face of things, the line of English authority, copied in New South Wales in *Scroop* and in subsequent cases up to the present, amounts to an exception to the general principle of tort liability recognised by the common law of Australia. Thus, it departs:

- From the "deep-rooted"[148] notion that persons should not ordinarily be liable to others in tort without fault of some kind on their own part;

- From the general principle that where the causative agent of the acts or omissions occasioning damage is an independent contractor, the party suffering damage must normally establish its claim against that contractor and cannot look to the principal to recover its damage[149];

- From the common features of the particular relationships in which a party has been held liable for the acts and defaults of an independent contractor, on the basis of a non-delegable duty of care. Such cases are exceptional. They exist in well-established categories that are recognised by the law. So far, in Australia, the relationship of roads authority and road user has not been one of those well recognised categories; and

- From the general trend of contemporary tort law, to limit exceptional categories, and to reject new ones except on the basis of a clear analogy to a recognised class and then only for compelling reasons of legal principle and policy[150]. Moreover, as Callinan J has pointed out[151], the propounded

---

147 An example may be seen in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 80 ALJR 1509 at 1531-1532 [104]-[109]; 229 ALR 1 at 28-29.

148 Atiyah, *Vicarious Liability in the Law of Torts*, (1967) at 12.

149 See *Sweeney* (2006) 80 ALJR 900 at 903-904 [12], 918 [92]; 227 ALR 46 at 49-50, 68.

150 *Jones v Bartlett* (2000) 205 CLR 166 at 239 [249].

151 Reasons of Callinan J at [179].

category in this case constitutes not only an exception to the general rule of tort liability but one which is itself subject to an indeterminate qualification in the case of casual or collateral acts of negligence, and one which would introduce a source of costly litigation akin to that which this Court's majority decision in *Brodie* was designed to terminate.

105 When these considerations of legal principle are given weight, they do not sustain the suggested inclusion of the relationship of roads authority and road user amongst the limited categories recognised by the Australian common law as giving rise to a non-delegable duty to the road user on the part of a roads authority.

106 *Statute and common law*: Whilst the applicable provisions of the Act and the decision on the "highway rule", which this Court expressed in *Brodie*, do not decide the present case, they certainly afford a legal context that is unfavourable to the proposition accepted by the Court of Appeal and urged by the respondent.

107 The Act is silent on the precise duty owed by a roads authority, such as the Council, to a pedestrian, such as the respondent. But nothing in the Act suggests an adoption of strict obligations such as a non-delegable duty would import. By providing that a roads authority, such as the Council, should have the "care, control and management of the road"[152], the Act plainly envisages that the Council might discharge its responsibilities by the use both of employees and independent contractors. Had it been envisaged that the Council would, exceptionally, be liable in law for acts done or omitted to be done by an independent contractor, the financial implications of such liability would (one might expect) have suggested the need for a specific statutory provision to that effect. In this sense, the absence of such a provision, whilst not decisive, undoubtedly tells against the imposition of such an exceptional liability by techniques of the common law.

108 Likewise, to accept a non-delegable duty on the part of a roads authority, where, until recently, the "highway rule" afforded it a large immunity, postulates an effective enlargement of its legal liability to a dramatic extent. This enlargement appears all the more radical because of the substantial immunity that previously obtained under the common law, and which has now been largely restored in New South Wales by legislation[153].

---

152 The Act, s 146(1)(a).

153 *Civil Liability Act* 2002 (NSW), s 45. As previously stated, the section does not apply to the present case. See above these reasons at [46].

109 So far as the pre-existing law of public nuisance is concerned, it is worth noting that the respondent only sued in negligence. Whilst it is true that this was also a feature of some of the English cases relied on by the respondent[154], nuisance is ordinarily a tort of strict liability. But different considerations arguably arise where the claimant confines the proceedings to an action in negligence. The supposition of a non-delegable duty does not alter the content of the tort sued for, nor does it substitute a different and free-standing tort. It does no more than to affirm the imposition of personal liability on the duty-holder, which cannot be discharged, as otherwise it would, by selecting an apparently reputable and competent contractor[155].

110 *A non-analogous category*: But what of the respondent's submission that the relationship of roads authority and road user is analogous to the categories of relationship involving non-delegable duties, already acknowledged by the common law of Australia? Those relationships are employer/employee[156]; hospital/patient[157]; school authority/pupil[158]; and occupier/contractual entrant in circumstances involving extra-hazardous activities[159].

111 In the nature of a coherent legal doctrine, it would be surprising if this odd collection of particular instances represented the entire class of relationships in which a non-delegable duty existed at common law[160]. Judges and scholars have therefore undertaken a search for the common elements that link the various categories and give guidance when an attempt is made to add another relationship to the non-delegable duties that are recognised. Why, for instance, did the

---

154 eg *Penny v Wimbledon Urban District Council* [1899] 2 QB 72 and *Salsbury v Woodland* [1970] 1 QB 324.

155 *Lepore* (2003) 212 CLR 511 at 608-609 [291]-[292].

156 *Stevens* (1986) 160 CLR 16 at 44.

157 *Gold v Essex County Council* [1942] 2 KB 293 at 304; *Cassidy v Ministry of Health* [1951] 2 KB 343 at 363; *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542; *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553.

158 *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 269-273, 274-275.

159 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550-554, 556-557; cf *Stevens* (1986) 160 CLR 16 at 29-30.

160 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 395; Swanton, "Non-Delegable Duties: Liability for the Negligence of Independent Contractors", (1991) 4 *Journal of Contract Law* 183 at 183-184.

relationship of landlord/tenant ultimately fail to join the select categories[161]? Would the relationship of prisoner/prison authority qualify[162]? Why are some relationships recognised and not others?

112 Amongst the suggested criteria for the acceptance of a non-delegable duty, some have proved recurrent. One of these has been the importance of assuring compensation for the innocent victim of a wrong from a defendant who is assumed to be able to pay adequate damages if they are awarded[163]. However, as Mr John Murphy has pointed out, this is an inadequate and unsatisfying rationale for the principle of non-delegable duties[164]. As illustrated by the present case, the arrangements now typically instituted between principals and independent contractors include the requirement to demonstrate the procurement of adequate insurance. In any case, many independent contractors are in at least as good a position to meet a verdict for their own wrongs (and those of their employees) as the principal may be. Without convincing economic data, it would be difficult for this Court to draw any inferences as to the overall danger to plaintiffs of leaving liability to fall on the independent contractors engaged by roads authorities to perform road maintenance and repairs. In the typical case, as here, it would appear that both the roads authority and the contractor would normally be in an equal position to meet any verdict.

113 Nor is deterrence, sometimes also advanced as a ground for imposing a non-delegable duty upon the principal, a persuasive reason[165]. If the criminal law could not operate as a deterrent in a case such as *Lepore*, there is obvious force in the comment of Gummow and Hayne JJ that the imposition of a non-delegable duty in tort will hold little deterrent value[166]. Furthermore, to shift the economic cost of negligent acts and omissions from the independent contractor with primary responsibility, to a roads authority, liable because of a legal fiction of non-delegability, has the potential to impede the deterrence of the person whose conduct is most in need of influence.

---

161 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 399-404; *Jones v Bartlett* (2000) 205 CLR 166 at 221 [191]-[193], 237-238 [244], 250 [284].

162 cf *New South Wales v Bujdoso* (2005) 80 ALJR 236 at 244-245 [44]-[47]; 222 ALR 663 at 672-674. The point did not need to be decided in that case.

163 cf *Limpus v London General Omnibus Co* (1862) 1 H & C 526 at 539 [158 ER 993 at 998] per Willes J.

164 Murphy, "Juridical".

165 *Lepore* (2003) 212 CLR 511 at 534 [36].

166 (2003) 212 CLR 511 at 587-588 [219].

114 I therefore agree with the conclusion expressed by Mr John Murphy[167] that "any *general* theory of non-delegable duty … cannot sensibly be founded on arguments about deterrence or deep pockets, and any such thinking ought to be rejected".

115 In *Kondis*[168], as earlier in *The Commonwealth v Introvigne*[169], Mason J contented himself by saying that "the law has, for various reasons imposed a special duty on persons in certain situations to take particular precautions for the safety of others". (The duty was later extended to the property of other persons). However, the explanation given for the non-delegable relationship was very general - no more than the existence of "some element" that "makes it appropriate" to impose on the defendant a duty to ensure that the safety of the person and property of others is observed - a duty not discharged merely by securing a competent contractor.

116 This elusive "element in the relationship" suggests the need for close attention to the common characteristics of those categories that the common law has so far accepted in Australia as giving rise to non-delegable duties. What is it that the employee in the workplace, the patient in the hospital, the pupil in the school premises and the occupier/contractual entrant on premises where extra-hazardous activities are carried out, have in common? There are obvious dangers here in elevating historical categories into a *genus* that is no more than a retrospective rationalisation. However, the categories that I have mentioned are recognised not only in Australia but also in many Commonwealth countries. They continue to attract the support of final appellate courts.

117 Amongst the proposed explanations, and justifications, for the exceptional imposition of a non-delegable duty, two stand out. In the words of Mr John Murphy[170]:

> "These are: first, that the defendant's enterprise carried with it a substantial risk … and secondly, that the defendant assumed a particular responsibility towards the claimant. … [T]hese justifications seemed to emerge quite independently of one another in the classic non-delegable duty cases. Accordingly, they tend to create the impression that they are alternative theoretical bases for the imposition of such a duty. … [H]owever, I shall contend that both features can in fact be collapsed into

---

167 Murphy, "Juridical" (emphasis in original; footnote deleted).

168 (1984) 154 CLR 672 at 687.

169 (1982) 150 CLR 258 at 271.

170 Murphy, "Juridical".

> one central concern: the assumption of responsibility. … [T]he creation of a substantial risk carries with it a necessary assumption (or imputation) of responsibility, and that they therefore represent not rival bases for non-delegable duties, but rather two different stages of the inquiry (risk creation preceding the assumption of responsibility)."

118 As Mr John Murphy points out, many of the decisions in this field, including in this Court[171] and in the House of Lords[172] recognise the special vulnerability of persons in the particular class that includes the claimant and hence the increased enterprise risk that is necessary to meet an exceptional "risk", "danger" or "peril".

119 Gaudron J captured this consideration in her Honour's reasons in *Lepore*[173]:

> "[C]ertain relationships have been identified as giving rise to duties which have been described as 'non-delegable' or 'personal' … The relationships [all involve] … a person being so placed in relation to another as 'to assume a particular responsibility for [that other person's] safety' because of the latter's 'special dependence or vulnerability'".

120 Gaudron J went on to suggest that the feature of the "relationship between the parties"[174] that singled out instances where a non-delegable duty applied is the existence of clear affirmative duties to control either a dangerous person or a dangerous thing and to protect the claimant's person, property or legal affairs as a result. Normally, the common law does not impose affirmative duties to act in relation to another person. But it does so in the context of particular relationships. Where such a relationship exists it is exceptional. The duty imposed is then non-delegable. As Gaudron J said in *Lepore*[175]:

> "There is another feature of the duty arising out of the particular relationships that have been identified as giving rise to a non-delegable duty of care which should be stressed. It is that the relevant duty can be

---

171 He refers to *Lepore* (2003) 212 CLR 511 at 534 [36], 560 [129], 581-582 [199], 621 [327]. See Murphy, "Juridical".

172 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 250 [83] per Lord Millett. See Murphy, "Juridical".

173 *Lepore* (2003) 212 CLR 511 at 551 [100] (footnotes omitted).

174 *Lepore* (2003) 212 CLR 511 at 552-553 [104].

175 *Lepore* (2003) 212 CLR 511 at 552-553 [104].

> expressed positively and not merely in terms of a duty to refrain from doing something that involves a foreseeable risk of injury … Once the relevant duty is stated in those terms it is readily understandable that the duty should be described as non-delegable."

121 In his analysis, Mr John Murphy concludes that this is the elusive element in the relationship between the parties that, in the language of *Kondis*, "makes it appropriate to impose on the defendant a duty to ensure that reasonable care and skill is taken for the safety of the persons [or property] to whom the duty is owed"[176].

122 *Policy and conclusions*: When this criterion is applied to the relationship now propounded as one involving a non-delegable duty of care, as I consider that it should be, there are many reasons why roads authorities and road users are not to be so classified.

123 It is true that there is often a significant dependence of road users on roads authorities. However, there is not such a relationship as involves the kind of particular vulnerability and special dependence that exists in the categories of relationship where non-delegability has been accepted. The dependence that exists in this relationship does not rise to the level of particular vulnerability or *special* dependence evident in relationships such as hospital/patient, employer/employee and school authority/pupil.

124 Moreover, the circumstances of mishaps and casual acts of negligence in carrying out maintenance and repair of public roads are virtually infinite in variety and potential triviality and seriousness as highways, roads, lanes and footpaths are different from one another. Employees, patients, pupils (and possibly prisoners in relation to prison authorities) substantially constitute closed, identifiable categories. Their members are known or ultimately ascertainable in advance. The duties owed to them are personal because of their particularly high degree of dependence and vulnerability. The relationship itself, and the work that it entails, often involves those party to it to extra-hazardous risks. This is why such relationships commonly constitute exceptions to the "no-duty-to-act rule"[177].

125 On the other hand, users of roads are normally unknown and unknowable to roads authorities. They do not represent a closed category. Their identities and number are not typically known in advance. They comprise pedestrians,

---

176 (1984) 154 CLR 672 at 687.

177 Murphy, "Juridical", citing Deakin, Johnston and Markesinis, *Markesinis and Deakin's Tort Law*, 5th ed (2003) at 247.

truck and car drivers, motor cyclists, bicyclists, scooter-riders, skate-board users, runners, walkers and a great variety of other persons. Their individual needs are infinite in their variety. In such circumstances, to recognise a non-delegable duty in respect of them, would be extremely burdensome and costly. It would be such that the duty could not readily be met by reasonably adapted preventive measures.

126 The present case can be taken as an instance in point. If the true cause of the respondent's fall into the carpet covered pit in the footpath was (as was found) the carelessness of an employee of Roan in placing the carpet over the obviously defective lid of the pit, how, by the adoption of reasonable care, could the Council possibly have discharged the supposed direct liability under a non-delegable duty? It could not feasibly have been present at all times that Roan and its employees were working on the site, without destroying the essential value of the relationship between the Council and Roan, viz that of principal and independent contractor. It could not have anticipated every minor and unpredictable act of carelessness on the part of any of Roan's employees without effectively, or actually, performing the work itself, using its own employees. It could not have taken over the control and performance of the work by Roan without interfering with Roan's legitimate entitlement to direct its own employees and the way they worked. In many cases (although not in this) the independent contractor will have been engaged by the roads authority precisely because it enjoys technical expertise or a special capacity which would make the interference of the roads authority completely inappropriate – at least as a general rule.

127 To render the Council directly liable, notwithstanding the acts and omissions of Roan and its employees, would therefore be unreasonable, given that the essential purpose of engaging Roan as an independent contractor was to delegate that responsibility to Roan under conditions that rendered Roan liable in law for its own acts and omissions and ensured that it could meet its liability by procuring appropriate insurance. These conclusions of legal policy reinforce the opinion reached after analysis of legal authority and legal principle. The relationship of roads authority and road user is not one that attracts a non-delegable duty of care.

128 The Court of Appeal therefore erred in these proceedings in concluding otherwise. To the extent that English authority suggested the contrary conclusion, it should not have been followed. That authority does not represent the common law of Australia. The line of decisions in the Court of Appeal, beginning with *Scroop*[178], should be overruled. The judgment of the District Court in favour of the respondent should be set aside.

---

178 (1998) 28 MVR 233.

Orders

129 I agree in the orders proposed by Hayne J.

130 HAYNE J. Towards the end of 2000 Leichhardt Municipal Council ("the Council") engaged Roan Constructions Pty Ltd ("Roan") to reconstruct the footpath, and install a traffic barrier, beside part of Parramatta Road. The work was to be done at night, between the hours of 7.30 pm and 5.30 am, Sunday to Thursday. The specification for the work required Roan to maintain access to shops and houses abutting the footpath, and to provide clean access to all commercial properties abutting the work area, by laying artificial grass or carpet over the top of the road base.

131 On Saturday, 7 April 2001, the respondent, Mr Montgomery, in company with others, walked along the footpath on which Roan had been working during the previous week. Carpet had been laid on the ground. Mr Montgomery walked closest to the shop fronts. As he walked, the carpet suddenly gave way under his feet, and his leg went into a Telstra pit. The cover of the pit, over which the carpet had been laid, was found to have been broken before the carpet was laid over it. Mr Montgomery injured his knee.

132 Mr Montgomery sued Roan and the Council, in the District Court of New South Wales, for damages for personal injury. He compromised his claim against Roan but proceeded against the Council, alleging that the Council had itself been negligent. At all stages the litigation has been conducted on the basis that Mr Montgomery alleged that the Council either had itself failed to act with reasonable care, or had failed to ensure that its contractor, Roan, acted with reasonable care. This second way of putting the case, described in argument as an allegation of a non-delegable duty, was not articulated with stark clarity in the amended statement of claim filed in the District Court, but nothing was said to turn on this.

133 At trial, Mr Montgomery obtained judgment against the Council for $264,450.75, with costs. The trial judge held that the Council owed Mr Montgomery a non-delegable duty of care, and that that duty had been breached.

134 The Council appealed to the Court of Appeal of New South Wales. It alleged that the primary judge had erred in holding that the Council owed Mr Montgomery a non-delegable duty of care. It further alleged that the primary judge should not have found, as she did, that the lid covering the pit into which Mr Montgomery fell had been broken before carpet was laid over it. Finally, the Council challenged the amount of damages awarded to Mr Montgomery. The Council's appeal was dismissed[179]. The Court of Appeal held, conformably with

---

179 *Leichhardt Municipal Council v Montgomery* [2005] NSWCA 432.

earlier decisions of that Court[180], that the Council owed road users a non-delegable duty of care. It was not necessary for the Court of Appeal to consider whether Mr Montgomery could rely upon a notice of contention that the judgment in his favour should be supported on the basis that the Council had itself failed to exercise reasonable care.

135 By special leave, the Council now appeals to this Court on grounds confined to whether the Council owed a non-delegable duty of care. The question of fact about the state of the pit lid when carpet was laid over it, and the question of assessment of damages, are not in issue in this Court. As a condition for granting leave, the Council agreed to pay the costs of the appeal to this Court in any event, and not to disturb the costs orders made in Mr Montgomery's favour.

136 The Court of Appeal should have held that the Council did not owe Mr Montgomery a non-delegable duty of care. The decisions of that Court holding to the contrary[181] should be overruled. Whether Mr Montgomery may rely upon his notice of contention in the Court of Appeal, and if he may, whether the judgment of the primary judge may be supported on the bases alleged in that notice, are questions which the Court of Appeal has not considered. The appeal to this Court should be allowed, the orders of the Court of Appeal (apart from its costs orders) should be set aside, and the matter remitted to that Court for consideration of the questions concerning reliance on the notice of contention and, if necessary, the consequential issues that would then arise.

137 Any consideration of what duty the Council owed road users must begin with the relevant statutory provisions, particularly with certain provisions of the *Roads Act* 1993 (NSW) as that Act stood at the time of the events giving rise to Mr Montgomery's claim. It is essential to begin at this point lest sight be lost of the fact that the action brought against the Council is an action brought against a statutory body whose functions and powers are to be found in the relevant legislation. At the time of the events giving rise to this litigation, the Council of a local government area, subject to some presently irrelevant exceptions, was "the roads authority" for all public roads within its area[182] and had such functions

---

180 *Roads and Traffic Authority v Scroop* (1998) 28 MVR 233; *Roads and Traffic Authority of New South Wales v Fletcher* (2001) 33 MVR 215; *Roads and Traffic Authority of New South Wales v Palmer* (2003) 38 MVR 82 and *Ainger v Coffs Harbour City Council* [2005] NSWCA 424.

181 Including *Scroop* (1998) 28 MVR 233; *Fletcher* (2001) 33 MVR 215; *Palmer* (2003) 38 MVR 82 and *Ainger* [2005] NSWCA 424.

182 *Roads Act* 1993 (NSW), s 7(4).

as were conferred on it by the *Roads Act* or by any other Act or law[183]. Parramatta Road is a public road. A "road" includes what the *Roads Act* then, and now, describes as the "footway" – a term defined[184] as "that part of a road as is set aside or formed as a path or way for pedestrian traffic (whether or not it may also be used by bicycle traffic)". It follows that Mr Montgomery suffered his injury on a public road.

138 Section 5(1) of the *Roads Act* provided that: "[a] member of the public is entitled, as of right, to pass along a public road (whether on foot, in a vehicle or otherwise) and to drive stock or other animals along the public road". It was expressly provided[185] that the right conferred by s 5(1) did not derogate from any right of passage conferred by the common law, but the sub-section went on to say that "those [common law] rights are subject to such restrictions as are imposed by or under this or any other Act or law". It was not contended that there was any restriction relevant to the present matter. Mr Montgomery was injured in the course of his exercising his right to pass along a public road.

139 The *Roads Act* provided that public roads within a local government area (other than freeways and Crown roads) were vested in fee simple in the appropriate roads authority[186]. The nature of the ownership of public roads for which the Act thus provided was amplified by s 146 of the Act. In particular, s 146(1) provided that:

> "Except as otherwise provided by this Act, the dedication of land as a public road:
>
> (a) does not impose any liability on the owner of the road that the owner would not have if the owner were merely a person having the care, control and management of the road, and
>
> ...
>
> (d) does not constitute the owner of the road as an occupier of the land".

---

183 s 7(5).

184 s 4 and Dictionary.

185 s 5(2).

186 s 145(3).

Part 6 of the Act (ss 71-90) regulated the carrying out of road work. Section 71 provided that: "[a] roads authority may carry out road work on any public road for which it is the roads authority and on any other land under its control".

140 The form and content of these provisions of the *Roads Act* about ownership of roads, and about road work, may be properly understood only if account is taken of those historical features of the common law concerning the liability of highway authorities that were traced in detail in *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council*[187]. (It is convenient to use the expression "highway authority" to embrace all bodies that are responsible for the construction or maintenance of public roads, and to use the statutory expression, "roads authority", to apply to the particular highway authorities with which the *Roads Act* deals.)

141 Two of these matters of history are of particular importance to the proper understanding of those provisions of the *Roads Act* to which reference has been made. First, the common law duty to maintain highways in a parish was based in nuisance not negligence[188]. Secondly, although the analogy between the position of a highway authority and that of ownership or occupation of private land had been disavowed by Dixon J in *Buckle v Bayswater Road Board*[189], subsequent developments in the law of negligence of public authorities, with respect to structures other than highways[190], may have suggested the drawing of such an analogy in the case of roads or highway authorities. Thus, s 71 of the *Roads Act* may be understood as empowering a roads authority to do what would otherwise constitute an actionable nuisance. And s 146(1)(a) and (d) of the *Roads Act* may be understood as denying the imposition on a roads authority of the duties of an occupier of land.

142 The proposition that a highway authority owes road users a non-delegable duty of care invites close attention to the nature and content of the "duty" postulated. When it is observed that the "duty" is a duty to ensure a particular result (that an independent contractor engaged by the highway authority to perform work on the road, perform that work with reasonable care) it is apparent

---

187 (2001) 206 CLR 512 at 547-577 [74]-[149] per Gaudron, McHugh and Gummow JJ, 588-591 [193]-[202] per Kirby J.

188 *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council* (2001) 206 CLR 512 at 564 [117].

189 (1936) 57 CLR 259 at 280-281.

190 *Aiken v Kingborough Corporation* (1939) 62 CLR 179 at 206-207. See also *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.

that the postulated duty is both a form of strict liability and a form of vicarious liability. That is, the contention that a highway authority owes a road user a non-delegable duty of care is no more than a different expression of the proposition that the highway authority is to be vicariously liable for the negligence of its independent contractors. On examination, however, it will be seen that not only does a proposition framed in terms of "non-delegable duty" have no sound doctrinal foundation, it is a proposition which cannot stand with the restatement of the common law of negligence in its application to highway authorities made by this Court in the *Brodie* and *Ghantous* cases.

143 As noted earlier, the liability of highway authorities was originally rooted in the law of public nuisance. Interference with the safe enjoyment of a public right of way over a highway might constitute a public nuisance[191]. And it was in the context of one particular aspect of the law of nuisance (namely, that aspect of the law of private as distinct from public nuisance which concerned the rights of support from adjoining land) that two unduly influential generalisations were uttered. First, in 1876, Cockburn CJ said[192] that:

> "a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is *bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else* – whether it be the contractor employed to do the work from which the danger arises or some independent person – to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury, resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise." (emphasis added)

---

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

192 *Bower v Peate* (1876) 1 QBD 321 at 326-327.

The second generalisation was that of Lord Blackburn in *Dalton v Angus*[193] that:

> "Ever since *Quarman v Burnett*[194] it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, *a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor*. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it". (emphasis added)

On their face, these statements that a person cannot "escape" from responsibility by "delegating" responsibility to a contractor or by "employing someone else" are propositions that deny a central tenet of the law that has developed about vicarious liability – that a person may be liable for the negligence of an employee but, at least generally, will not be liable for the negligence of an independent contractor.

144 By the second decade of the twentieth century, before *Donoghue v Stevenson* had been decided, Lord Blackburn's dictum in *Dalton v Angus* had come to be understood as supporting the proposition that "[i]f something dangerous is done on the highway, the person ordering it to be done is liable whether he does it himself or employs an independent contractor"[195]. And two of the three cases cited by Lord Blackburn as supporting the proposition[196] that delegation of a task "the doing of which casts on [the person delegating it] a duty, cannot escape from the responsibility attaching on him of seeing that duty performed" were, or were analogous to, highway cases: *Hole v Sittingbourne and Sheerness Railway Company*[197] (construction of a bridge obstructing navigable waters) and *Tarry v Ashton*[198] (lamp projecting over a footpath not properly repaired).

---

193 (1881) LR 6 App Cas 740 at 829.

194 (1840) 6 M & W 499 [151 ER 509].

195 Charlesworth, *Liability for Dangerous Things*, (1922) at 52.

196 *Dalton v Angus* (1881) 6 App Cas 740 at 829.

197 (1861) 6 H & N 488 [158 ER 201].

198 (1876) 1 QBD 314.

145 But the rule enunciated by Lord Blackburn was seen in the 1920s as but one aspect of a wider set of rules governing liability for dangerous things. Dangerous things were then classified[199] as things dangerous in themselves (which engaged the rule in *Rylands v Fletcher*[200]), things dangerous by reason of their position (namely, dangers in the highway), and things dangerous because defective (dangerous premises and dangerous chattels). The first of these categories (things dangerous in themselves) engaged what was expressly stated as a form of strict liability: the rule in *Rylands v Fletcher*. But the second and third categories engaged the notions spoken of by Lord Blackburn in *Dalton v Angus*: notions of "non-delegable duties".

146 Professor Glanville Williams rightly said[201] of these notions that they left "the law fundamentally incomprehensible". He continued[202]:

> "Almost the greatest danger that can be created on the highway is to drive an automobile along it; yet there is no vicarious liability for the negligence of a contractor in his manner of driving. Were it otherwise, a person who posted a letter would be liable for the negligent driving of the Post Office employee who is carrying the letter; and the passengers on a bus would be vicariously liable for their driver. Thus the rule relating to dangers on the highway must be arbitrarily limited to dangers of some degree of permanence. (But even if the bus or Post Office van were habitually driven with improper brakes there would be no vicarious liability of this kind.)"

And although the highway cases might be explained on the basis that there is vicarious liability for independent contractors in all cases of nuisance[203], actions against highway authorities came to be framed in negligence. As the line between negligence and nuisance was blurred, the proposition that there is vicarious liability for independent contractors in cases of nuisance became

---

199 Charlesworth, *Liability for Dangerous Things*, (1922) at 5.

200 (1866) LR 1 Ex 265; (1868) LR 3 HL 330.

201 "Liability for Independent Contractors", (1956) *Cambridge Law Journal* 180 at 185.

202 "Liability for Independent Contractors", (1956) *Cambridge Law Journal* 180 at 185.

203 cf *Matania v National Provincial Bank Ltd* [1936] 2 All ER 633; *Spicer v Smee* [1946] 1 All ER 489.

entangled with a distinction drawn between "casual" or "collateral" negligence, and negligence in what the contractor was employed to do[204].

147 In addition to noticing the consequences for the law of nuisance, later translated into the law of negligence, attached to the statements of Cockburn CJ in *Bower v Peate* and Lord Blackburn in *Dalton v Angus*, it is important to notice one other important feature of the law of nuisance. As Denning LJ pointed out in *Southport Corporation v Esso Petroleum Co Ltd*[205]:

> "In 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."

These considerations of burden of proof, or the two generalisations earlier identified, may, perhaps, go some way to explaining the change identified in the joint reasons in *Brodie* and *Ghantous*[206], which had occurred by the mid-nineteenth century, in which plaintiffs framed actions for personal injuries caused by an obstruction in the highway as an action for public nuisance rather than as an action on the case for negligence.

148 Be this as it may, the liability of a highway authority to a road user who suffered injury as a result of the condition of the road was wholly founded in that complex of rules, described as "the highway rule", which formed part of the common law of Australia until this Court restated the common law in the *Brodie* and *Ghantous* cases. In *Brodie* and *Ghantous*, the common law rule under which a highway authority was liable for misfeasance, but not for non-feasance, which underpinned this Court's decisions in *Buckle v Bayswater Road Board*[207] and *Gorringe v The Transport Commission (Tas)*[208], was discarded. In *Brodie* and *Ghantous* the Court held[209] that the test for determining a highway authority's

---

204 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 575 per Brennan J.

205 [1954] 2 QB 182 at 197 (reversed on other grounds *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218).

206 (2001) 206 CLR 512 at 567 [122].

207 (1936) 57 CLR 259.

208 (1950) 80 CLR 357.

209 (2001) 206 CLR 512 at 572-577 [134]-[149] per Gaudron, McHugh and Gummow JJ, 604 [239] per Kirby J.

liability was not whether the case was one of misfeasance rather than non-feasance, it was the ordinary test of liability in negligence.

149 Subsequent legislative intervention, with the evident intention of reinstating an immunity for highway authorities for non-feasance[210] is not to be understood as negating the fundamental doctrinal shift effected by the Court's decision in the *Brodie* and *Ghantous* cases. Further, it should be noted that it was not contended that the particular legislative provision effecting reinstatement of the non-feasance rule with respect to roads authorities had any direct application in the present matter. It is therefore not necessary to consider any question about the meaning or effect of that statutory provision.

150 But there is a further aspect of the decision in *Brodie* and *Ghantous* that is of critical importance. The Court held[211] that the time had come "to treat public nuisance, in its application to the highway cases, 'as absorbed by the principles of ordinary negligence'[212]." It follows that if any principle of non-delegable duty is now to be applied to highway authorities, it must now find its roots elsewhere than in the law of public nuisance.

151 No doubt it was with this in mind that much of the argument in the present appeal focused upon what was said about non-delegable duties of care in *Kondis v State Transport Authority*[213], a case concerning the non-delegable duty of care owed by an employer to employees. In *Kondis*, Mason J, who delivered the leading judgment, explained[214] the adoption of a rule, that an employer's duty of care to employees was a "personal" or "non-delegable" duty, was founded in the exclusive responsibility that an employer has for the safety of the appliances, the premises and the system of work to which the employer subjects an employee, and in the fact that the employee has no choice but to accept and rely on the employer's provision and judgment in relation to those matters. As Mason J said[215]:

---

210 *Civil Liability Act* 2002 (NSW), s 45; see also *Road Management Act* 2004 (Vic), s 102; *Civil Liability Act* 1936 (SA), s 42; *Civil Liability Act* 2003 (Q), s 37; *Civil Liability Act* 2002 (WA), s 5Z; *Civil Liability Act* 2002 (Tas), s 42.

211 (2001) 206 CLR 512 at 570 [129].

212 *Burnie Port Authority* (1994) 179 CLR 520 at 556.

213 (1984) 154 CLR 672.

214 (1984) 154 CLR 672 at 687-688.

215 (1984) 154 CLR 672 at 688.

> "The consequence is that in these relevant respects the employee's safety is in the hands of the employer; it is his responsibility. The employee can reasonably expect therefore that reasonable care and skill will be taken. In the case of the employer there is no unfairness in imposing on him a non-delegable duty; it is reasonable that he should bear liability for the negligence of his independent contractors in devising a safe system of work."

152 Whether similar considerations can be seen to be in play in two other examples of non-delegable duty given by Mason J in *Kondis*[216], namely, the duty owed by a hospital to its patients and the duty owed by a school authority to pupils attending the school, need not be decided. It may be noted, however, that in the case of both the hospital and the school, the party that owes the duty has control of the circumstances to which the beneficiary of the duty is exposed, and the beneficiary of the duty, in the one case because of infirmity and in the other because of age, is unable to assert any independent control over the way in which he or she is treated[217]. But as Gummow J noted in *Scott v Davis*[218], the criteria identified may explain at least some cases where a non-delegable duty has been held to exist, and thus be "historically descriptive", but it is greatly to be doubted that such criteria are "normatively predictive".

153 Further, it may also be noted that Mason J gave a third example of non-delegable duty in *Kondis* – the liability owed by an occupier of land to those who were then classified as invitees. Classification of entrants, as invitees, licensees or trespassers, has since been discarded as a consideration relevant to the definition of the content of the duty of care owed by an occupier of land to entrants to the land[219]. Whether, or in what circumstances, this particular form of non-delegable duty survives this re-expression of the occupier's duty of care to entrants are questions that do not arise directly in the present matter. Nor do similar questions about the nature or extent of duties owed by hospitals to patients or by school authorities to pupils arise. It is sufficient to notice that decisions of this Court after *Kondis*, in particular *Scott v Davis*[220] and *New South Wales v Lepore*[221], point out the many difficulties that lie behind adopting

---

216 (1984) 154 CLR 672 at 685-686.

217 cf *Burnie Port Authority* (1994) 179 CLR 520 at 550-551 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

218 (2000) 204 CLR 333 at 416-417 [248].

219 *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

220 (2000) 204 CLR 333.

221 (2003) 212 CLR 511.

principles cast in terms of non-delegable duties. Not least of these difficulties is that a non-delegable duty is a form of strict liability and *Burnie Port Authority v General Jones Pty Ltd*, in its treatment of the rule in *Rylands v Fletcher*, shows the disfavour with which strict liability is now viewed[222].

154 It was decided in *Brodie* and *Ghantous* that a highway authority owes a road user a duty of care and that the principles of negligence are to be applied, not principles of public nuisance. It is necessary to consider whether the rules developed before that re-expression of the common law, which may be understood as having had the same effect as imposing a non-delegable duty, should now be reformulated as such a non-delegable duty.

155 First, the doctrinal roots of non-delegable duties are anything but deep or well established. Professor Glanville Williams went so far as to say[223] that imposition of non-delegable duties represents the reaching of a desired result "by devious reasoning and the fictitious use of language". Whether that particular form of criticism is merited, it is clear that the doctrine was introduced to cases concerning the liability of an employer in order to avoid the mischief of the doctrine of common employment. Though cast in terms of "duty" the principle is one of strict liability for the conduct of another. It is, therefore, nothing but an exception to ordinary rules of vicarious liability.

156 It may readily be accepted that vicarious liability is itself a doctrine, or series of doctrines, lacking any single unifying and principled explanation[224]. But whatever deficiencies there are in the law relating to vicarious liability, the identification of certain duties (said to be duties of care) as "non-delegable duties" serves only to add to those difficulties. That should not be done where there is no sound doctrinal basis for the notion, and there is no pressing practical reason for doing so.

157 There is no reason for adding the liability of a highway authority to road users to an otherwise limited number of cases where a non-delegable duty has been held to be owed. If a highway authority acts without reasonable care, absent particular statutory provision to the contrary, it will be liable to the road user who is injured as a result. If the highway authority acts with reasonable care in appointing and supervising the work of an independent contractor, but that

---

222 *Scott v Davis* (2000) 204 CLR 333 at 417-418 [250].

223 Glanville Williams, "Liability for Independent Contractors", (1956) *Cambridge Law Journal* 180 at 190.

224 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *New South Wales v Lepore* (2003) 212 CLR 511.

contractor is negligent, the contractor will ordinarily be liable (as Roan was here) to the road user who suffers injury in consequence.

158 Those who undertake contracts to execute road works will ordinarily not be small enterprises: road work is usually large and expensive. But whether in a particular case the work concerned is large or small, and whether the contractor that undertakes the work is a large or small enterprise, there is no basis for concluding that particular and different rules about vicarious liability should be applied to a highway authority which contracts for the performance of road work from the generally applicable rules of vicarious liability. To apply a special rule to highway authorities performing such work would be to reinstate a part of that complex of rules called "the highway rule" that the Court discarded in *Brodie* and *Ghantous*. And it would do that despite the rule having no sufficient foundation and being unable any longer to command intellectual assent. That step should not be taken.

159 The appeal should be allowed. So much of the orders of the Court of Appeal of New South Wales made on 8 December 2005 as dismissed the appeal to that Court should be set aside and the matter remitted to the Court of Appeal. Consistent with the terms on which special leave to appeal was granted, the Council should pay the respondent's costs of the appeal to this Court.

160 CALLINAN J. The question in this appeal is whether a local government authority of New South Wales owes a non-delegable duty of care to road users, here, to pedestrians on footpaths.

Facts

161 The appellant is the local authority for the municipality of Leichhardt ("the Council"). Parramatta Road is a major road passing through the municipality. There are shops facing on to the footpaths forming part of the road[225]. There was telephonic equipment underneath the footpath accessible by a pit covered by a removable lid close to the frontage of the shops. In the course of excavating the footpath, a contractor, Roan Constructions Pty Ltd ("Roan"), removed the cover, in all probability broke it, replaced it in its broken state and covered it and an adjoining section of the footpath with carpet. In doing so Roan created what used to be called in law a concealed trap[226] giving rise to a high duty of care on the part of the person responsible for it. Such contractual documents in respect of Roan's work as found their way into evidence required Roan to maintain reasonable pedestrian access to the shops facing the footpath, and, to that end, to place carpet or synthetic grass over the footpath until the work was completed. Roan was initially to restrict its work to daylight hours on Mondays to Fridays, and on Saturday mornings. These hours were subsequently altered but no work was done on Saturday nights. The specifications for the work also required that Roan effect public liability insurance of $10,000,000.

162 On a Saturday night in 2001, the respondent, and two others were walking along the footpath to an hotel to celebrate his birthday. They walked abreast, the respondent closest to the shops. In consequence, he walked on the carpet covering the broken lid and injured himself by falling into the pit.

163 The respondent sued the appellant and Roan in the District Court of New South Wales in negligence. In his statement of claim he made no separate allegations against Roan and the appellant. Those that he did make were made with some generality, for example, of a failure, by both, to take adequate precautions for his safety, and of exposing him to a risk of injury which could have been "avoided by the exercise of reasonable care". The respondent's claim

---

225 See the definition of "footway" in the dictionary for the Act.

226 See the definition of "trap" in *Latham v Johnson* [1913] 1 KB 398 at 415 per Hamilton LJ. See also *Bird v Holbrook* (1828) 4 Bing 628 at 641-642 per Best CJ, at 643-644 per Park J, at 645 per Burrough J [130 ER 911 at 916, 917, 917-918]; *Lipman v Clendinnen* (1932) 46 CLR 550 at 556, 568 per Dixon J; *Commissioner for Railways (NSW) v Cardy* (1960) 104 CLR 274 at 281-282, 286-287 per Dixon CJ, 300 per Fullagar J, 302 per Menzies J, 327 per Windeyer J.

against Roan was settled for $50,000. The matter then proceeded to trial against the appellant. The principal basis of the respondent's claim was that the appellant owed him a non-delegable duty of care, and was therefore liable to him, notwithstanding that the works were carried out, and the danger created by Roan, its independent contractor.

164 The trial judge (Quirk DCJ) accepted the respondent's contention to that effect, held that the appellant had failed to discharge its duty, and awarded damages in excess of $200,000 after bringing into account the sum of $50,000 payable by Roan. The case at trial had been conducted upon the further basis that the liabilities of Roan and the appellant were several as well as joint.

The appeal to the New South Wales Court of Appeal

165 The appellant appealed to the Court of Appeal of the Supreme Court of New South Wales on several grounds. The only one of present relevance is that the trial judge erred in holding that the appellant owed the respondent a non-delegable duty of care. Rejecting that ground, the Court of Appeal (Mason P, Hodgson and McColl JJA) unanimously dismissed the appeal. It was accordingly not necessary for it to deal with the question whether the appellant had failed to discharge any other duty of care that it might independently and separately have owed to the respondent[227]. Hodgson JA, who wrote the leading judgment, affirmed that the appellant owed a non-delegable duty of care to the respondent, and had failed to discharge that duty.

166 It is understandable that the Court of Appeal on the state of the authorities as they then stood should so conclude. Its decision followed earlier authority of that Court of which *Roads and Traffic Authority (NSW) v Scroop*[228] is an example[229]. There, a motor vehicle accident had occurred as a result of road works negligently carried out by an independent contractor. Fitzgerald AJA, with whom Handley and Beazley JJA agreed, said in that case[230]:

> "[The Road and Traffic Authority's ("RTA")] argument that it had delegated its duty of care to road users to [the independent contractor] was

---

227 As to the approach of courts to different issues see *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* [2006] HCA 55 at [172] per Callinan J.

228 (1998) 28 MVR 233.

229 See also *Roads and Traffic Authority of New South Wales v Fletcher* (2001) 33 MVR 215; *Roads and Traffic Authority of New South Wales v Palmer* (2003) 38 MVR 82 and *Ainger v Coffs Harbour City Council* [2005] NSWCA 424.

230 (1998) 28 MVR 233 at 237-238.

> founded on an article published in 1991[231]. However, there is an extensive body of English case law against RTA on this point[232]. A conclusion that a highway authority causing or permitting operations on the highway has a non-delegable duty of care to highway users also seems to me required by recent pronouncements of the High Court[233]."

167 In discussing the principle that "a highway authority causing or permitting operations on a highway"[234] owes a non-delegable duty of care to highway users Hodgson JA also referred to a body of English authority[235]. His Honour then turned to the judgment of Mason J in *Kondis v State Transport Authority*[236], acknowledging that while "[t]he circumstance of a road authority undertaking work on a highway was not specifically mentioned in Mason J's analysis ... that circumstance could be considered as within the general principle"[237] laid down in this passage[238]:

> "The element in the relationship between the parties which generates a special responsibility or duty to see that care is taken may be found in one or more of several circumstances. The hospital undertakes the care, supervision and control of patients who are in special need of care. The school authority undertakes like special responsibilities in relation to the children whom it accepts into its care. If the invitor be

---

231 Swanton, *Non-delegable Duties: Liability for the Negligence of Independent Contractors* (1991) 4 *Journal of Contract Law* 183.

232 See, eg the cases referred to in *Fleming on Torts*, 9th ed, (1998) at 437; *Clerk and Lindsell on Torts*, 16th ed, (1989) at 231; *Salmond and Heuston on the Law of Torts*, 20th ed, (1992) at 475.

233 See, eg *Kondis v State Transit Authority* (1984) 154 CLR 672; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

234 *Leichhardt Municipal Council v Montgomery* [2005] NSWCA 432 at [22].

235 *Hardaker v Idle District Council* [1896] 1 QB 335; *Penny v Wimbledon Urban District Council* [1899] 2 QB 72; *Holliday v National Telephone Co* [1899] 2 QB 392; *Salisbury v Woodland* [1970] 1 QB 324 and *Rowe v Herman* [1977] 1 WLR 1390.

236 (1984) 154 CLR 672.

237 *Leichhardt Municipal Council v Montgomery* [2005] NSWCA 432 at [24].

238 (1984) 154 CLR 672 at 687.

> subject to a special duty, it is because he assumes a particular responsibility in relation to the safety of his premises and the safety of his invitee by inviting him to enter them. And in *Meyers v Easton* the undertaking of the landlord to renew the roof of the house was seen as impliedly carrying with it an undertaking to exercise reasonable care to prevent damage to the tenant's property. In these situations the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised."

168 Counsel for the appellant in the Court of Appeal had submitted that his Honour's approach was inconsistent with the recent reformulation of the common law duty of highway authorities to highway users, of this Court in *Brodie v Singleton Shire Council*[239], and the caution offered subsequently to *Kondis*, by other judges of this Court against any extension of the categories of non-delegable duties[240]. Hodgson JA dealt with that submission in this way[241]:

> "I do not think *Brodie* stands against this approach. The general duty of road authorities is to take reasonable care; but in the particular circumstance where the road authority undertakes work involving risk to road users, a circumstance not considered in *Brodie*, that general duty is overlaid by the more extensive duty that arises because of the risk created by the undertaking of those works. In my opinion, until the High Court says otherwise, this Court should follow *Scroop*, *Fletcher*, *Palmer* and *Ainger*, and apply that principle."

169 As to a submission in this Court by the appellant that the respondent did not earlier raise any question of independent or other liability of the appellant, it is sufficient to say that although the former was certainly not at the forefront of the respondent's case, it was open on the general allegations of negligence pleaded by him, which were not, as they might perhaps have been, the subject of a request for particulars by the appellant. It was, in any event, an issue with which the written submissions of the respondent had dealt at the trial, and had at least touched upon in his notice of contention filed in the Court of Appeal.

---

239 (2001) 206 CLR 512.

240 See, eg, *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 394-404 per Kirby J; *Scott v Davis* (2000) 204 CLR 333 at 456-458 [352]-[353] per Callinan J; *Jones v Bartlett* (2000) 205 CLR 166 at 239 [249] per Kirby J, 250-252 [284]-[288] per Callinan J.

241 *Leichhardt Municipal Council v Montgomery* [2005] NSWCA 432 at [26].

The appeal to this Court

170 The appellant makes these submissions in this Court. First, it submits that the Court of Appeal erred in holding that the duty of care owed to the respondent by the appellant was a non-delegable one. Secondly, it contends that the Court of Appeal ought to have held that the duty of care owed by the appellant was a duty to take reasonable care to ensure that the exercise of its statutory powers did not create a foreseeable risk of harm to the respondent as a road user. And, thirdly, it submits that the Court of Appeal erred in holding that there was breach of any duty that the appellant may have owed to the respondent.

171 The common law of negligence applicable to this case is by no means unaffected by the legislation governing the obligations and rights of road authorities and road users. It is necessary therefore to have regard to the *Roads Act* 1993 (NSW) ("the Act"). Both ss 5 and 6 of it represent slight qualifications of the common law which requires that the public, and occupiers of abutting properties be allowed egress to and from, and passage along public thoroughfares[242]:

> "**5 Right of passage along public road by members of the public**
>
> (1) A member of the public is entitled, as of right, to pass along a public road (whether on foot, in a vehicle or otherwise) and to drive stock or other animals along the public road.
>
> (1A) The right conferred by this section extends to the right of passage of members of the public in a light rail or other railway vehicle.
>
> (2) The right conferred by this section does not derogate from any right of passage that is conferred by the common law, but those rights are subject to such restrictions as are imposed by or under this or any other Act or law.
>
> (3) For example, those rights are subject to such restrictions as are imposed:
>
> (a) by or under the road transport legislation within the meaning of the *Road Transport (General) Act 1999*, or
>
> (b) by or under section 72 of the *Crown Lands Act 1989* (**Cultivation of enclosed roads**).

---

242 See *Dabbs v Seaman* (1925) 36 CLR 538. See also the discussion in Butt, *Land Law*, 5th ed (2006) at 440 [1645], 782-783 [2093].

6 Right of access to public road by owners of adjoining land

(1) The owner of land adjoining a public road is entitled, as of right, to access (whether on foot, in a vehicle or otherwise) across the boundary between the land and the public road.

(2) The right conferred by this section does not derogate from any right of access that is conferred by the common law, but those rights are subject to such restrictions as are imposed by or under this or any other Act or law."

172 That there should be rights of passage also appears from the objects of the Act stated in s 3:

"**3 Objects of Act**

The objects of this Act are:

(a) to set out the rights of members of the public to pass along public roads, and

(b) to set out the rights of persons who own land adjoining a public road to have access to the public road, and

(c) to establish the procedures for the opening and closing of a public road, and

(d) to provide for the classification of roads, and

(e) to provide for the declaration of the RTA and other public authorities as roads authorities for both classified and unclassified roads, and

(f) to confer certain functions (in particular, the function of carrying out road work) on the RTA and on other roads authorities, and

(g) to provide for the distribution of the functions conferred by this Act between the RTA and other roads authorities, and

(h) to regulate the carrying out of various activities on public roads."

173 Section 145 of the Act vests a relevant road in fee simple in an authority such as the appellant. Section 146(1) provides that the dedication of a public road does not of itself impose liability upon the authority:

"**146 Nature of ownership of public roads**

(1) Except as otherwise provided by this Act, the dedication of land as a public road:

(a) does not impose any liability on the owner of the road that the owner would not have if the owner were merely a person having the care, control and management of the road

…"

Section 71 should be noticed:

"**71 Powers of roads authority with respect to road work**

A roads authority may carry out road work on any public road for which it is the roads authority and on any other land under its control."

174 Before *Brodie*, it was well settled that a highway or a road authority was not, at common law, liable for acts of non-feasance as opposed to misfeasance. Despite some reasonable, but far from destructive criticisms of the distinction between these, it had sound underpinnings, both pragmatic and intellectual: pragmatic in that it obviated the need for any searching and expensive juridical inquiry into the finances and priorities of an authority in performing its public functions; and pragmatic and intellectual in preserving a separation between the political activities of raising and spending taxes, and the purely judicial work of the courts. It was not surprising therefore that after *Brodie*, which swept away the distinction, various States and relevantly here, New South Wales, largely restored it by provisions which also, in part at least, met the most pervasive criticism of it, that the distinction was not always an easy one to make.

175 The provisions in question appear in s 45 of the *Civil Liability Act* 2002 (NSW) which provides as follows:

"**45 Special non-feasance protection for roads authorities**

(1) A roads authority is not liable in proceedings for civil liability to which this Part applies for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.

(2) This section does not operate:

(a) to create a duty of care in respect of a risk merely because a roads authority has actual knowledge of the risk, or

(b) to affect any standard of care that would otherwise be applicable in respect of a risk.

(3) In this section:

'carry out road work' means carry out any activity in connection with the construction, erection, installation, maintenance, inspection, repair, removal or replacement of a road work within the meaning of the *Roads Act 1993*.

'roads authority' has the same meaning as in the *Roads Act 1993*."

176 There can be no question that had the appellant been undertaking the work itself, the breaking of the lid, its replacement, and concealment by carpet, would have constituted misfeasance. It is also clear that the appellant did not, indeed it could only have done so in certain circumstances, and on certain conditions, give Roan any exclusive use, occupation and control of the footpath[243]. Whilst it is true that since *Australian Safeway Stores Pty Ltd v Zaluzna*[244] the law of negligence in relation to occupiers has been altered[245] by the abolition of the imposition of a special duty upon them, rights and obligations of occupation, and therefore also of control, remain circumstances relevant to the existence and content of their duties of care.

177 This case is, because the relevant events occurred before the insertion of s 45 into the *Civil Liability Act*, governed by the common law, save of course to the extent that it may already have been modified or influenced by statute. That common law, despite the long historical understanding to the contrary, now is as reformulated in *Brodie*. The particular relevant aspects of statute law capable of affecting that common law here are the provisions to which I have referred concerning the power of the appellant to do road works (s 71), the control, and the occupation that the appellant had (ss 3, 5, 6, 145 and 146), and was obliged to maintain, at least partially, during the works on the footpath. These are matters to which I will return.

178 The principle which the Court of Appeal applied here certainly does appear to have been well accepted, although, as will appear, has shifting

---

243 See, for example, Pt 4 of the Act which prescribes procedures for the closure of public roads.

244 (1987) 162 CLR 479.

245 See the discussion of the occupiers' liability cases culminating in *Zaluzna* in Balkin and Davis, *Law of Torts*, 3rd ed, (2004) at 242-250 [7.37]-[7.40].

foundations. In the second edition of *Halsbury's Laws of England* this statement appears[246]:

> "An authority which employs a contractor to carry out work involving interference with a highway does not thereby absolve itself of its duty towards other persons. Although not responsible for his negligence or that of his servants, so long as such negligence is merely 'casual' or 'collateral,' the authority is responsible if the contractor fails to do or to get done what it is its duty to do or to get done, *ie*, to take the necessary precautions to protect the public from the danger which its operations entail. Thus, where a contractor is employed to repair a road, or to lay a sewer therein, the highway authority will not be liable if one of his men negligently leaves a tool lying on the highway, but it will be if the road is improperly made up, or the trench is improperly filled in, or a gas main is broken by negligent excavation, or heaps of excavated soil are left unguarded on the highway, for the excavation and safe handling of such soil is an essential part of the work to be done." (footnotes omitted)

179 The principle is open, I think, to a similar, even stronger, criticism than the ones to which the distinction between misfeasance and non-feasance was subjected. It is that the identification of what should be regarded as merely casual or collateral is an exceedingly difficult one to make. In his reasons for judgment the Chief Justice describes the creation here of the concealed trap as an "apparently low-level and singular act of carelessness"[247], an equally apt description of which would be, to use the language of *Halsbury*, a "merely 'casual' or 'collateral'" act of negligence. That the distinction is an uncertain one, and further, that some of the cases said to ground the principle can be explained on other bases will be apparent from an examination of several of the cases which I will undertake shortly. But before doing that I would point out that the fact that this Court was prepared to sweep away in *Brodie* the distinction at common law between misfeasance and non-feasance, and in *Zaluzna*, the exceptional duty owed by occupiers, provides reason for a similar initiative to reformulate the law with respect to road authorities to render any distinction between casual and collateral, or non-casual and non-collateral, no longer decisive.

180 For that reason and for the reasons which follow, a road or highway authority, an expression still apt to describe a Council responsible for road works should be taken not to owe to road users a non-delegable duty of care.

---

246 *Halsbury's Laws of England*, 2nd ed, vol 16 at 337 [456].

247 Reasons of Gleeson CJ at [23].

181 I turn now to some of the English cases on the topic. The principle of non-delegability was referred to by Cockburn CJ in *Bower v Peate*[248]:

> "The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else - whether it be the contractor employed to do the work from which the danger arises or some independent person - to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."

182 In *Hardaker v Idle District Council*[249], A L Smith LJ, after quoting that passage, said that it "should be noted that in *Hughes v Percival*[250] Lord Blackburn doubted whether that duty was not too broadly stated"[251].

183 One matter that is important to notice however is that in *Bower v Peate*, Cockburn CJ stated the principal as applying to injurious consequences *in the natural course of things which must be expected to arise*, thereby suggesting something in the nature of an hazardous or extra-hazardous activity to which a special rule already applied. Indeed, another case, which is also said to lend support to the principle, *Black v Christchurch Finance Co*[252], was one of escape of fire, that is, again, an event which the law had historically regarded as one in respect of which special duties are owed. The same view might well be taken of the activity in question in *Hardaker* which involved work in the close vicinity of a main in which potentially explosive gas was stored and transmitted.

184 Another authority cited in *Halsbury, Pendlebury v Greenhalgh*[253], does not advance the matter. There, Lord Cairns LC, with whom Lord Coleridge CJ,

---

248 [1876] 1 QB 321 at 326. Cockburn CJ delivered the judgment of the Court (Cockburn CJ, Mellor and Field JJ).

249 [1896] 1 QB 335.

250 (1883) 8 App Cas 443.

251 [1896] 1 QB 335 at 347.

252 [1894] AC 48.

253 [1875] 1 QB 36.

Bramwell B and Brett J agreed, regarded it as important that the defendant, who was the surveyor of highways appointed by the vestry of a parish, himself superintended and coordinated, on behalf of the committee, the different works upon a highway. The work was of a complex kind and consisted of four components. The materials were to be supplied by the vestry. No contract was let for the fencing and lighting of the work, and the duty to undertake those remained in the defendant. At the conclusion of his judgment, Lord Cairns LC was careful to emphasize that he was not laying down any general rule, and that the case turned entirely upon its own circumstances[254]. That reasoning does not suggest that a highway authority should be under any non-delegable duty of care as a highway authority. Nor is it immediately apparent why the negligence of the contractor for which the defendant was held responsible in *Pickard v Smith*[255] should not have been regarded as merely casual or collateral.

185 Notwithstanding the special features of the cases which I have so far discussed, and other relevant cases, it does seem that in time a hard principle, subject to the uncertain exception referred to in *Halsbury*, of non-delegability evolved. In *Penny v Wimbledon Urban Council* Bruce J said this[256]:

> "It was contended by Lord Coleridge, who argued the case for the plaintiff, that, even if [the defendant] was to be regarded as an independent contractor, still, upon the principle of *Hardaker v Idle District Council*, the District Council in this case was liable. In that case of the Idle District Council the works which were being executed were being executed by the contractor of the Local Board pursuant to the powers of the same section of the Public Health Act 1875, s 150, as applied in the present case, and I find it difficult to draw a distinction between the two cases. *Pickard v Smith* is another case that closely resembles the present. In that case the defendant was the lessee of refreshment-rooms and a coal-cellar, and there was an opening for putting coals into the coal-cellar on the arrival platform at a railway station. The defendant employed a coal merchant to put coals into the cellar, and the coal merchant's servants, while putting coals into the cellar, left the hole insufficiently guarded. The plaintiff, whilst passing in the usual way out of the station, fell into the coal-cellar and was injured. It was held that the defendant was liable. The principle of the decision, I think, is this, that when a person employs a contractor to do work in a place where the

---

254 [1875] 1 QB 36 at 41.

255 (1861) 10 CB (NS) 470 [142 ER 535]. See the summary of *Pickard* in the extract of *Penny v Wimbledon* below.

256 [1898] 2 QB 212 at 217-218.

> public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor. *Pickard v Smith* is an authority for the proposition that no sound distinction in this respect can be drawn between the case of a public highway and a road which may be, and to the knowledge of the wrongdoer probably will in fact be, used by persons lawfully entitled so to do. The District Council employed the contractor to do work upon the surface of a road, which they knew was being used by the public, and they must have known that the works which were to be executed would cause some obstruction to the traffic, and some danger, unless means were taken to give due warning to the public. The duty of affording protection to the public was in the circumstances incurred by the District Council, and the District Council could not avoid the obligation of that duty by entering into a contract with [the defendant]." (footnotes omitted)

186 Examples of cases having special features but nonetheless said to support the principle of non-delegability can be multiplied. In *Holliday v National Telephone Co*[257] the defendant engaged a plumber to connect tubes in a trench designed to hold telephone wires. The trench was excavated in a pavement. The connection was to be made with lead and solder *to the satisfaction of the defendant's foreman*. The plumber dipped a benzoline lamp into a cauldron of melted solder which was placed over a fire on the footway unprotected by any screen or tent. A safety valve on the lamp was defective. It exploded. The plaintiff, who was passing by, was splashed with molten solder. Not surprisingly the defendant company was held liable. That liability did not need to depend upon the failure to exercise a non-delegable duty. The defendant was obviously in breach of duty for two other reasons: it was actually participating in doing the work by its foreman who was supervising it, and by another of its employees who was actually physically assisting the plumber; and, again, the materials and tools being used were self evidentially dangerous.

187 Enough has been said, I think, to question whether there has ever been an entirely sound basis for a principle of non-delegability, or a principle of non-delegability as far reaching as, or of the kind, to which *Halsbury*, and some of the cases referred to and upon which the Court of Appeal relied here and earlier.

188 In any event, recent authority of this Court leans strongly against non-delegability and absolute liability in tort cases. *Northern Sandblasting Pty Ltd v*

---

257 [1899] 2 QB 392.

Harris[258], which might suggest otherwise, has almost certainly been at least impliedly overruled by *Jones v Bartlett*[259], and *Soblusky v Egan*[260], which appeared to impose, by means of a special and oppressive form of vicarious liability, non-delegability in substance, has at least to be doubted as a result of the reasoning of this Court in *Scott v Davis*[261].

189 In *Burnie Port Authority v General Jones Pty Ltd*[262] five members of this Court spoke of the emergence, subsequent to *Rylands v Fletcher*[263], "of a coherent law of negligence to dominate the territory of tortious liability for unintentional injury to the person or property of another"[264]. Although their Honours went on to hold that the Authority there owed a non-delegable duty, they stressed that any special rule relating to the liability of an occupier for the escape of fire from its premises, had been absorbed into, and qualified by more general rules or principles[265].

190 I have already pointed out that *Brodie* also swept away old principles of liability of highway authorities. The unanimous judgment of this Court in *Sullivan v Moody* speaks of the necessity for coherence in the law[266]. All of this is to suggest that this Court should scrutinise with great care, and generally reject the imposition of non-delegable duties, unless there are very special categories warranting an exception, as to which nothing further need be said here. On any view this case does not fall within a necessary exception.

---

258 (1997) 188 CLR 313.

259 (2000) 205 CLR 166.

260 (1960) 103 CLR 215.

261 (2000) 204 CLR 333.

262 (1994) 179 CLR 520.

263 (1868) LR 3 HL 330.

264 (1994) 179 CLR 520 at 544 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

265 (1994) 179 CLR 520 at 534.

266 (2001) 207 CLR 562 at 580 [50] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.

191 Even though the majority in *Brodie* disapproved statements of principle in relation to non-feasance and misfeasance by his Honour, the following proposition stated by Dixon J in *Buckle v Bayswater Road Board* holds true[267]:

> "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.*"

192 The appellant was empowered under the Act, but not obliged, to undertake road works. It was not inappropriate that it engage contractors to repair the footpath on Parramatta Road. The appellant did not thereby bring itself under any non-delegable obligation of care to the respondent. Whether however, it failed to discharge some other duty remains to be considered. I would accordingly join in the orders proposed by Justice Hayne.

---

267 (1936) 57 CLR 259 at 283.

193 CRENNAN J. The appeal should be allowed. I have nothing to add to the reasons of Gleeson CJ and Hayne J, with which I agree. I agree with the consequential orders proposed by them.