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Insurance Law E-alert

Footpath falls - should highway authorities be concerned?

The Survival of Non Feasance

In 2001 the High Court decided in *Brodie –v– Singleton Shire Council* and *Ghantous –v– Hawkesbury City Council* that the non feasance defence should no longer be available to highway authorities. This occurred decades after it was abolished in other common law jurisdictions. At the time there were serious concerns that this could expose highway authorities to a flood of litigation. As a result the defence was restored in Victoria by the *Transport (Highway Rules) Act 2002*. That particular piece of legislation was intended to be an interim measure pending the rationalisation of laws relating to highway authorities in Victoria. This rationalisation took place with the implementation of the *Road Management Act 2004*.

The *Road Management Act* introduced certain statutory defences based upon reasonable care and compliance with reasonable policies along with section 102 of the *Road Management Act* which in some ways effectively operates as an extension of the non feasance principle. It states:-

“102. Limitations on liability of road authority

1. Subject to this section, a road authority is not liable in any proceeding for damages, whether for breach of the statutory duty imposed by section 40 or for negligence, in respect of any alleged failure by the road authority –
 - (a) to remove a hazard or to repair a defect or deterioration in a road; or
 - (b) to give warning of a hazard, defect or deterioration in road.
2. Sub-section (1) does not apply if, at the time of the alleged failure, the road authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.
3. For the purposes of sub-section (2), the road authority is to be taken to have had actual knowledge of the particular risk if it is proven in the proceedings that the deterioration in the road had been reported in writing to the road authority under section 115.”

As will be seen from the above, the defence provided by section 102 does not apply if actual knowledge existed of the risk that caused the harm. Sub-section 3 goes on to say that a report in writing to the Road Authority constitutes actual knowledge. However, it does not exclude the possibility of actual knowledge having been obtained by other means. What these other means may be remains unclear. Similarly it is not clear who has to acquire the relevant knowledge.

To date there have been no decisions in Victoria dealing with this particular issue. However, there have been three recent decisions in the New South Wales Court of Appeal that may provide us with some guidance.

Section 45 of the *Civil Liability Act (New South Wales)* states:

- (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:
 - (A) **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*.
 - (B) **roads authority** has the same meaning as in the *Roads Act 1993*.”

Section 45 of the *Civil Liability Act* is of a similar nature to section 102 of the *Road Management Act*. In particular, these provisions allow a defence in situations where a highway authority has failed to undertake road work which has arguably resulted in an injury. In both cases the defence does not apply if the "road authority had actual knowledge of the (particular) risk". In *North Sydney Council –v– Roman 2007 (NSWCA 27)* the majority of the Court of Appeal decided that the defence was directed to those persons within the authorities organisation whose function it was to carry out road work or consider carrying out road work. In dissent, McColl JA thought that the term actual knowledge should encompass "the knowledge of those persons who, acting within the scope of their duties, learn of the particular risk under an obligation to report it as part of the road authorities system of maintaining the roads under its jurisdiction."

It had been thought the High Court would provide some guidance as to which was the preferable approach. However, Roman's case was ultimately settled before the High Court had an opportunity to consider the issue. Accordingly, when the same issue came before the New South Wales Court of Appeal again in both *Angel –v– Hawkesbury City Council* and *Blacktown City Council –v– Hocking* the Chief Justice of the Supreme Court of New South Wales directed that the appeals in both these cases be heard by a bench of five justices to ensure consistency in decision making.

Surprisingly, after having gone to the time and effort of constituting a court of appeal comprising 5 justices of appeal, the situation has yet to be clarified. In *Angel –v– Hawkesbury City Council* the Court decided that regardless of which test was applied from Roman's case, the Council had actual knowledge of the risk hence the statutory exclusion did not apply.

In *Blacktown City Council –v– Hocking*, all of the judges decided that there was no evidence of negligence on part of the Council either in relation to the construction or inspection of a damaged Telstra pit. Accordingly, there was no need to consider whether or not the defence in section 45 may have applied. The only judge to consider the issue was Tobias JA, who in dissent agreed that there was insufficient evidence to suggest the Council had been negligent in failing to detect that a pit was defective at the time the footpath was constructed. However, he thought that the Council should have been able to detect that the pit was hazardous and that the Council had actual knowledge of the risk which meant that the defence provided by section 45 of the *Civil Liability Act* (the equivalent to our section 102 of the *Road Management Act*) did not apply. In reaching this conclusion he said that he preferred the opinion of the dissenting member of the Court in Roman's case. This means that he thought that once a council officer with a duty to inspect roads and report their observations of particular risks to those responsible for repairing the road or considering whether the road should be repaired became aware of the risk "actual knowledge" had been acquired. Accordingly the defence created by section 45 of the *Civil Liability Act* would no longer be available.

Conclusions

While the law is not settled in New South Wales and there have been no decisions of the Supreme Court in Victoria, we doubt that the restrictive interpretation of the exclusion to the operation of section 102 of the *Road Management Act* will apply in Victoria. We suspect that in all likelihood the Victorian Court of Appeal will prefer the approach taken by McColl JA in *Roman –v– North Sydney Council* and Tobias JA in *Blacktown City Council –v– Hocking*. This means that the section 102 defence will not operate in those circumstances where a Council acquires knowledge of a risk through its normal system of inspection and that knowledge would normally be reported to those officers responsible for repairing the roads or footpaths or those officers responsible for making decisions as to whether repairs should take place.

Further Comments

In *Angel –v– Hawkesbury City Council* the New South Wales Court of Appeal decided that a tripping hazard caused by a concrete slab on a footpath being 4 – 5cms higher than an adjoining slab was not an obvious hazard because it was obscured by a shadow cast by a nearby tree. In some ways this is inconsistent with earlier decisions and in particular the Victorian Court of Appeals decision in *Boorondarah City Council –v– Cattanach*. This may be an indication that courts will adopt a more sympathetic approach towards pedestrians than they have exhibited in the last few years.

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