Following a new highway code

by DOUG JONES

"IF A MAN make a trench across the highway, and I come riding that way by night, and I and my horse together fall in the trench so that I have great damage and inconvenience in that, I shall have an action against him who made the trench across the road."

Or so thought Justice Fitzherbert way back in 1535.

But under the law of Australia prior to 31 May 2001, if he and his horse had fallen because of a failure to maintain the highway, Justice Fitzherbert would probably have been left without a remedy, no matter how rutted the road and how negligent the council or road authority involved.

In an era of rapidly expanding liabilities under the laws of negligence, one highly anomalous bastion of 17th century English law has long stood firm: the protection afforded to local councils and road authorities in Australia by the so-called "highway rule".

In lawyer-speak, the "highway rule"—originally intended to protect the inhabitants of parishes with common law responsibilities for the earliest highways in England—hinged on the difference between "misfeasance" and "nonfeasance".

If councils and other road authorities did what they were supposed to do, and *exercised* their statutory powers—and in some cases duties—to repair and maintain roads and footpaths under their management and control, they clearly had a duty of care to road users. So if they repaired a road or footpath negligently, and someone was hurt, they could well find themselves liable.

But if they *failed* to exercise their powers, simply did nothing and left their roads or footpaths in a state of disrepair, they were immune from liability, even if highly unsafe conditions were the result.

As explained in a 1673 case, it all depended on how a person "foundered" on a highway:

"A foundrous way, a decay'd bridge, or the like, are commonly to be repaired by some township, vill, hamlet, or a county who are not corporate, and therefore no action lyes against them for a particular damage ...

"But if a particular person, or body corporate, be to repair a certain high-way, or portion of it, or a bridge, and a man is endamaged particularly by the foundrousness of the way, or decay of the bridge, he may have his action against the person or body corporate, who ought to repair for his damage."

The "highway rule" protection afforded to local parishes in 17th century England was imported wholesale into Australia, even though the conditions were entirely different, with roads built and maintained by statutory authorities.

Throughout the 20th century Australian courts upheld the "misfeasance"/"nonfeasance" distinction—ever wondered why there are so many pot-holes?—but added a bewildering array of qualifications to ameliorate the inherent harshness of the rule.

Elaborate attempts were made to convert "nonfeasances" into "misfeasances", the "highway rule" protected "highway" authorities but not "traffic", tramway, water, sewerage and electricity authorities—even if they were the same organisation—and the protection extended to roads, footpaths and bridges but not to "artificial structures" such as tram tracks, drains, temporary barriers or (in some cases) trees!

But no more. On 31 May, the High Court voted 4:3 to scrap the "highway rule" in its entirety, effectively putting councils and other road authorities in the same position, as far as the law of negligence is concerned, as everyone else.

The High Court was considering two appeals: *Brodie v Singleton Shire Council*, in which a pedestrian had sued after falling on an uneven footpath, and *Ghantous v Hawkesbury City Council*, in which a driver had sued after a rotted bridge had collapsed under his truck.

Even the minority judges did not attempt to defend the rationality or fairness of the "highway rule". They felt, however, that a change to such a long-settled rule was "political" and should be made by parliaments, not the courts.

Old rule scrapped

The majority, on the other hand, decided that the *judge-made* "highway rule" could and should be overturned by the courts, to reflect current Australian conditions.

In the restrained language of the High Court, they described the rule, introduced in Australia "by a kind of time-warp", as "capricious", without "logic or justice", and providing "a strong incentive to an authority not to address a danger on a roadway".

Further, the rule was "dictated by the caprices of unprincipled exceptions and qualifications", which were "apt to provoke rather than settle litigation" and led to publicly funded "struggles over elusive, abstract distinctions with no root in principle".

In place of the "highway rule", the majority judges decided that general negligence law principles should apply.

They said this means:

Authorities with statutory powers to design, construct or repair roads or carry out works on them must take care that their exercise or failure to exercise their powers does not create a foreseeable risk of harm to road users.

If the state of a roadway poses a risk to road users—whether from design, construction, works or non-repair—the authority must take reasonable steps, by exercising its powers, to address the risk within a reasonable time.

If a risk is not known to the authority or is latent and only discoverable by inspection, an authority with a power to inspect must take reasonable steps to ascertain the existence of any latent dangers which might reasonably be suspected to exist.

The court stressed that the duty of care "does not extend to ensuring the safety of road users in all circumstances", and that the law was not moving from "the extreme of non-liability to the other extreme of liability in all cases". ("The opposite of 'non-repair' is not 'perfect repair'.")

The factors to be taken into account in each case should include, in particular, the magnitude and probability of the risk, the authority's expense, difficulty and inconvenience in alleviating the danger, and any other "competing or conflicting responsibility or commitments of the authority".

More specifically, for design and construction works, the court referred to circumstances such as traffic, the purposes of the road, the costs and practicalities of different designs and the erection of warning signs, safety devices and fencing on dangerous sections of road.

For repair and maintenance, the court said there was not necessarily "an obligation in all cases" for an authority to exercise its powers to repair roads or ensure they are kept in repair. There was no requirement that a road should be safe in all circumstances; instead, a "proper starting point" might be that road users will themselves take ordinary care.

Competing priorities and resource limitations were expressly acknowledged: "It may be reasonable in the circumstances not to perform repairs at a certain site until a certain date, or to perform them after more pressing dangers are first addressed."

For footpaths, uneven surfaces were inevitable—as one judge put it, "the world is not a level playing field"—although some allowance should be made for inadvertence by pedestrians.

In addition, all the usual hurdles facing plaintiffs in negligence cases will continue to apply. One of the appellants found this out to her cost, when she was unable to prove any negligence by the council.

So although there may be anguished cries from councils and state road authorities about the "opening of the flood-gates", there is unlikely to be any great surge in litigation.

This has certainly been the experience in England, where the rule was abolished—even though it has been replaced there by laws which impose liabilities on road authorities much more stringent and difficult to defend than the ordinary negligence liabilities now applying in Australia.

Indeed, there may be *less* litigation and greater certainty for councils and road authorities, because all the complex exceptions encrusting the "highway rule" have been swept away.

Welcome to the real world. And happy maintaining.

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PEOPLE

❑ Bonfiglioli Transmission (Australia) has appointed a NSW sales manger, **Simon Jamieson**, to expand sales of its industrial drives, mechanical power transmissions and motors. Jamieson has been an area manger with the company. He has had more than a decade of experience in engineer-

❑ ***Byron Cox**, a former financial services manager, has won two state medals from TAFE in NSW for the highest average marks in building and quantity surveying. Cox says his skills from the finance sector, such as administration, finance, risk management and client services, will complement the skills which will be required of him in the building industry.*

out of a merger between Mannesmann Dematic and Siemens Production and Logistics Systems.

Dietmar Straub

❑ Commercial flooring company Inter-

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