Brodie v Singleton Shire Council - [2001] HCA 29

HIGH COURT OF AUSTRALIA

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

SCOTT MUNN BRODIE & ANOR APPLICANTS

AND

SINGLETON SHIRE COUNCIL RESPONDENT

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

ORDER

1. Application for special leave to appeal granted.

2. Appeal allowed with costs.

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

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

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

On appeal from the Supreme Court of New South Wales

Representation:

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

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

Interveners:

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

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

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

HIGH COURT OF AUSTRALIA

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

CATHERINE GHANTOUS APPLICANT

AND

HAWKESBURY CITY COUNCIL RESPONDENT

Ghantous v Hawkesbury City Council
31 May 2001
S69/1999

ORDER

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

2. ***Appeal dismissed with costs.***

On appeal from the Supreme Court of New South Wales

Representation:

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

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

Interveners:

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

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

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

CATCHWORDS

Brodie v Singleton Shire Council
Ghantous v Hawkesbury City Council

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

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

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

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

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

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

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

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

2. **Following paragraph cited by:**

   Hungry Jack's Pty Ltd v Fourtounas (10 December 2020) (Basten and White JJA)

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

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

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

The matter of *Ghantous*

5. **Following paragraph cited by:**

   Hornsby Shire Council v Salman (27 June 2024) (White and Adamson JJA, Basten AJA)

Mrs Ghantous tripped and fell while walking along a concrete footpath. Since the original construction of the footpath, which was not shown to have been negligent in any respect, erosion had resulted in subsidence of the earth in some places, so that the verge was about 50

mm below the concrete. When she stepped aside to allow other pedestrians to pass, the applicant placed her foot so that it was partly on the concrete and partly on the lower verge. This resulted in her fall.

6. **Following paragraph cited by:**

   Bartolo v Owners of Strata Plan No. 10535 and 2 Ors (05 August 2005) (Santow, Tobias and McColl JJA)

In England, the common law rule which the applicants in both matters seek to challenge was abolished by statute in 1961[1]. It then became easier for a pedestrian who was injured by falling on a road or footpath to succeed in an action for damages resulting from failure on the part of the responsible authorities to maintain and repair the road or footpath[2]. Even so, when general principles of negligence, unqualified by any rule of immunity, were applied, the courts insisted that an injured plaintiff had to show that the road or footpath was dangerous. That did not mean merely that it could possibly be an occasion of harm. The fact that there was unevenness of a kind which could result in a person stumbling or falling would not suffice [3] . Not all footpaths are perfectly level. Many footpaths are unpaved. People are regularly required to walk on uneven surfaces on both public and private land.

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

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

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

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7. **Following paragraph cited by:**

   Roads and Traffic Authority of NSW v Palmer (28 March 2003) (Spigelman CJ, Handley and Giles JJA)

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

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

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[4] [1968] 2 All ER 343 at 345.

8. **Following paragraph cited by:**

   Consolidated Broken Hill Ltd v Edwards (11 November 2005)
   Pascoe v Coolum Resort Pty Ltd (23 September 2005) (Jerrard and Keane JJA and Cullinane J,)

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

9. **Following paragraph cited by:**

   Eileen Joan Garvan v Australian Capital Territory (27 February 2003)

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

The matter of *Brodie*

The non-feasance rule

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

[5] (1936) 57 CLR 259 .

[6] (1950) 80 CLR 357 .

[7] (1964) 64 SR (NSW) 281 .

11. The relevant rule is frequently, and conveniently, described as a rule of immunity. However, when considering an argument that it should be discarded by judicial decision, it is necessary to examine more closely the nature of the rule, and the reason for its existence. It is a rule concerning the extent of the legal duty of care owed by a highway authority to individual

users of the highway, breach of which may give rise to an action for damages at the suit of a person who suffers damage to person or property as a result of the condition of the highway.

12. **Following paragraph cited by:**

Director of Public Prosecutions v Downer EDI (29 October 2015) (Maxwell P, Weinberg and McLeish JJA)
Whittlesea City Council v Merie (11 August 2005) (Warren, C.J, Buchanan, J.A and Byrne A.J.A)

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

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[8] (1999) 200 CLR 1 .

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

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

14. **Following paragraph cited by:**

    Eddy v Goulburn Mulwaree Council (07 June 2022) (Bell CJ, Gleeson and Kirk JJA)

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

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

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

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

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

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

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

[12] (1992) 29 NSWLR 232 at 236.

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

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

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

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

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

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

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

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

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[15] (1950) 80 CLR 357 at 369.

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

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[16] (1950) 80 CLR 357 at 369.

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

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

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

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

The proceedings at first instance and in the Court of Appeal

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

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

27. The trial judge was bound by the non-feasance rule. He considered, however, that the case was one of misfeasance, and found for the applicants, making substantial awards of damages in their favour. The basis on which the case was found to be one of misfeasance was said to

be the same as that which underlay the decision of the Court of Appeal of New South Wales in *Hill v Commissioner for Main Roads (NSW)* [18] . That was a case in which a highway authority had negligently repaired a roadway, leaving it in a condition in which it was bound to deteriorate in a manner that would cause a hidden danger to users of the highway. The manner in which the authority exercised its power to repair in effect created a trap. The trial judge regarded what had been done in relation to the surface planking of Forrester's Bridge as analogous, and concluded that the case involved misfeasance in the form of negligence in the actual exercise of a power to effect repairs.

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[18] (1989) 9 MVR 45 .

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

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

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29. **Following paragraph cited by:**

Sheather v Country Energy (24 July 2007) (Hodgson JA; Ipp JA; Tobias JA)

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

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

Statute and common law

31. **Following paragraph cited by:**

Fairfax Media Publications Pty Ltd v Gayle; The Age Company Pty Ltd v Gayle; The Federal Capital Press of Australia Pty Ltd v Gayle (16 July 2019) (Bell P, Gleeson and Leeming JJA)
State of New South Wales v Briggs (09 December 2016) (McColl, Ward and Leeming JJA)
Dionisatos (for the Estate of the late George Dionysatos) v Acrow Formwork & Scaffolding Pty Ltd (17 September 2015) (Basten, Macfarlan and Gleeson JJA)
S v Boulton (23 June 2006) (Black CJ, Jacobson and Greenwood JJ)
C G Maloney Pty Ltd v Hutton-Potts (29 May 2006) (Santow JA; McColl JA; Bryson JA)
State of New South Wales v Paige (19 July 2002) (Spigelman CJ, Mason P and Giles JA)

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

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

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

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

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33. **Following paragraph cited by:**

> The Owners Strata Plan No 84674 v Pafburn Pty Ltd (13 December 2023) (Ward P, Adamson JA and Basten AJA)
> Sutherland Shire Council v Henshaw (10 December 2004) (Sheller, Hodgson and Bryson JJA)
> Newcastle City Council v Lindsay (22 June 2004)
> Hastings Council v Giese (09 July 2003) (Handley, Sheller and Tobias JJA)

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

34. In *Gorringe*, a truck had been damaged, and the driver killed, when a culvert, which had been built to permit a highway to cross a natural water-course, collapsed. The collapse resulted from deterioration in the timber from which the culvert was constructed. The trial judge directed a verdict for the defendant authority on the basis that, at worst, there was a negligent failure to keep the culvert in good repair. That decision was upheld in the Full Court of the Supreme Court of Tasmania and in this Court. Latham CJ examined the terms of the Tasmanian statutes which empowered the authority to maintain roads. He said [22] :

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

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

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

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[22] (1950) 80 CLR 357 at 363.

[23] (1950) 80 CLR 357 at 369.

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

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

[25] (1964) 64 SR (NSW) 281 .

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

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

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

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

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

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

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

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[27] (1990) 171 CLR 1 .

[28] (1990) 171 CLR 1 at 22.

[29] (1990) 171 CLR 1 at 15.

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

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

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[30] (1979) 142 CLR 617 .

[31] (1979) 142 CLR 617 at 633.

40. His Honour went on to say [32] :

> "It is beyond question that the conditions which brought the rule into existence have changed markedly. But it seems to me that in the division between the legislative and the judicial functions it is appropriately the responsibility of Parliament to decide whether the rule should be replaced and, if so, by what it should be replaced. The determination of that issue requires an assessment and an adjustment of the competing interests of motorists and landowners; it might even result in one rule for urban areas and another for rural areas. It is a complicated task, not one which the court is equipped to undertake."

[32] (1979) 142 CLR 617 at 634.

41. Finally, he added [33] :

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

[33] (1979) 142 CLR 617 at 636.

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

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

capacity to modify it in a manner appropriate to the circumstances calling for change, who may be in a position to investigate and fully understand the consequences of change, and who are politically accountable for those consequences.

Law reform

44. Part of the background to this case is that the Law Reform Commission of New South Wales has already considered, and reported upon, possible changes to the law in relation to the liability of highway authorities for non-feasance[34]. The nature of the recommendations demonstrates the complexity of the problem. The Law Reform Commission regarded the non-feasance rule as unsatisfactory and in need of legislative reform. In coming to that conclusion, it examined the law in overseas countries and in other Australian jurisdictions. We were taken in argument to that aspect of the Commission's investigations. However, the Commission did not simply propose the abolition of the rule. First, its Report distinguished between actions for personal injury and death, and actions for property damage. That is a distinction which a legislature can make. This Court cannot. There is no principle of tort law by which this Court could legitimately distinguish between a claim for damage to the suspension of a motor car which runs into a pot-hole resulting from a spell of wet weather, and a claim for personal injury to an occupant of the car. In relation to actions for personal injury or death, it was recommended that the non-feasance rule should be abolished[35], that the duty of care owed by highway authorities should be left to be determined by general common law principles[36], but that claims against such authorities should be brought within the scheme of the *Transport Accidents Compensation Act* 1987 (NSW) [37] . That scheme provided for benefits significantly different from common law damages. In relation to actions for property damage, the Report said that, while the Commission believed in principle that the non-feasance rule should be abolished, it would be necessary for the financial consequences of this to be investigated and, to enable that to be done, recommended postponement of further consideration of abolition for five years following the abolition of the rule in respect of claims for personal injury or death[38].

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

[35] Par 5.2.

[36] Par 5.14.

[37] Par 5.27.

[38] Par 5.38.

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

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

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

Conclusion

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

Orders

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

GAUDRON, McHUGH AND GUMMOW JJ.

A. Introduction

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

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

[39] Parliament of New South Wales, Public Bodies Review Committee, *Public Liability Issues Facing Local Councils*, November 2000 at 3637.

[40] (1999) 102 LGERA 399 .

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52. The accident which gave rise to the litigation in *Brodie* occurred on 19 August 1992 when the first applicant drove a truck owned by the second applicant onto a bridge constructed some 50 years earlier within the Singleton Shire. The truck weighed 22 tonnes and the bridge was adapted to bear a load of 15 tonnes. The timber girders failed, the bridge collapsed and the truck fell onto the creek bed below. The second applicant's truck was damaged and the first applicant suffered injuries, particularly to his back. The applicants claimed that the accident was caused by the negligence of the respondent Shire Council. At trial in the District Court, the case was held to be one of misfeasance and there were verdicts in favour of both applicants. The first applicant recovered a verdict for $354,316.50. The second applicant recovered $43,880.30, this representing the agreed value of the truck plus interest. An appeal by the Shire Council to the New South Wales Court of Appeal (Handley, Powell and Giles JJA) was successful. It was held there that such actions as the Council may have taken in replacing defective decking planks on the bridge were no more than superficial repairs to the surface and did not remove the case from the category of nonfeasance.

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

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[41] (1936) 57 CLR 259 .

[42] (1950) 80 CLR 357 .

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

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

[44] (1982) 56 ALJR 912 at 913; 43 ALR 465 at 467468 .

"The question then is: What is the response which the reasonable man, foreseeing the risk, would make to it? Is the risk so small that a reasonable man would think it right to neglect it? In *Wyong* Mason J said [45] :

'The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.'

…

The respondent created the danger by its artificial construction in the highway. In this situation the application of a reasonable standard of care calls for the elimination of risk of injury to users of the highway presented by that artificial construction, the more so where elimination of the risk can be achieved without undue difficulty and expense. It is well established that it is the duty of highway authorities to keep:

> '… the artificial work which they [have] created in such a state as to prevent its causing a danger to passengers on the highway which, but for such artificial construction, would not have existed, or, at the least, of protecting the public against the danger …' [46] .

It would not be right or reasonable for a highway authority to ignore a risk of injury which it has created by its artificial construction in the highway, if it entails a possible risk of injury to pedestrians which, though small, is not fanciful or farfetched."

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

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[45] *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 4748 .

[46] *Borough of Bathurst v Macpherson* (1879) 4 App Cas 256 at 265 ; *Thompson v Mayor, &c, of Brighton* [1894] 1 QB 332 at 339 ; see also *Buckle v Bayswater Road Board* (1936) 57 CLR 259 at 283284 .

[47] (1980) 146 CLR 40 at 4748 .

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55. **Following paragraph cited by:**

Sutherland Shire Council v Henshaw (10 December 2004) (Sheller, Hodgson and Bryson JJA)

In our opinion, various considerations, taken together, favour the following conclusions. In cases such as those giving rise to the present applications, the liability of the respondents does not turn upon the application of an "immunity" provided by the "highway rule". In so far as *B uckle* and *Gorringe* require the contrary and exclude what otherwise would be the operation of the tort of negligence, they should no longer be followed. Further, it is the law of negligence which supplies the criterion of liability in such cases; the tort of public nuisance in highway cases has been subsumed by the law of negligence.

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

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[48] (2000) 76 SASR 300 at 332333 .

[49] (1999) 200 CLR 1 .

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

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

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

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[50] (1999) 102 LGERA 399 at 405.

[51] (1950) 80 CLR 357 at 369. See also *Buckle* (1936) 57 CLR 259 at 281282 .

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

[52] (1967) 116 CLR 397 .

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

[53] (1992) 29 NSWLR 232 at 236.

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

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

ensuring the accuracy of those answers. In *Sutherland Shire Council v Heyman* [56] , the courts recognised the possible liability of a council in negligence for failing to exercise a statutory right of inspection of building works".

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[54] (1992) 29 NSWLR 232 at 236.

[55] (1981) 150 CLR 225 .

[56] (1985) 157 CLR 424 .

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

B. The legislation

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

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

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63. **Following paragraph cited by:**

O'Meara v Dominican Fathers (05 December 2003)

Part 9 (ss 220277B) of the LG Act was headed "PUBLIC ROADS". The terms "road" and "pathway" were defined in s 4 as meaning respectively:

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

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

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

C. The "highway rule" today

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

[59] RTA Act, s 13(3) .

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

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

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[61] cf *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574; *Milian gos v George Frank (Textiles) Ltd* [1976] AC 443 at 469470, 476 ; Lord Roskill, "Law Lords, Reactionaries or Reformers", (1984) 37 *Current Legal Problems* 247 at 255257.

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

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

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

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

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[64] (1936) 57 CLR 259 at 281.

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

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

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[66] cf *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 151155 [39]-[49], 158 [59] .

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

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

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[67] (1936) 57 CLR 259 at 300.

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

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[68] (1953) 87 CLR 619 .

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

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

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

> "The origin of the rules stated in the case lay far away from Nowendoc both in time and space. That might not matter were it not also the case that between the time of the origin of the rules and 1936 there had been very significant change in the type and volume of road traffic, the building of roads and highways, the ways in which roads and highways were maintained and controlled, and the ways in which highway authorities were constituted and financed. Changes in these matters continued rapidly between 1936 and 1992.
>
> The Court in *Buckle* upheld the nonfeasance/misfeasance distinction on the basis of a chain of authority, mostly the decisions of English judges, reaching back to the days of Coke (d 1634), when a common law liability lay upon the inhabitants of parishes or counties to repair roads. This liability was later transferred to local authorities by statute, according to Latham CJ [72] . The liability had been

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

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

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[70] (2000) 109 LGERA 419 .

[71] (2000) 109 LGERA 419 at 421.

[72] (1936) 57 CLR 259 at 268.

[73] (1936) 57 CLR 259 at 292.

[74] (1936) 57 CLR 259 at 290.

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

[76] (1936) 57 CLR 259 at 301.

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

[78] (1990) 72 LGRA 60 .

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

"The evidence in the present case shows the following: the population of the Gloucester Shire was approximately 4,900, so that the number of ratepayers would be very considerably lower; the council's area was about 2,900 [square kilometres]; much of the road building and improvement in the Shire was paid for by special grants from the Commonwealth and the State; the council was earnest and persevering in its efforts to complete a fully sealed road between Gloucester and Walcha, but it was simply impossible to do so from its own funds and those otherwise made available to it, any more quickly than by the rather stately rate of progress shown in the evidence.

These features were emphasised in the council's case, on the merits, and also were no doubt symptomatic of the policy background to the nonfeasance rule. On the other side of the merits question was the fact that the council actively promoted the use of the road for tourist and commercial purposes, with a view to improving the economic life of the district. This was why the Gloucester/Walcha road was renamed Thunderbolt's Way. The council was thus in the dilemma of wanting traffic on the road to increase but not having sufficient funds to bring it quickly into the state which was planned for it.

Cases more or less like the present one are continually occurring and cause acute problems both for damaged users of the roads and the highway authorities."

D. Relevant considerations

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[79] (2000) 109 LGERA 419 at 423.

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

(i) Other jurisdictions

75. Since *Buckle* and *Gorringe* were decided, the law in other common law jurisdictions has moved away from the path said to be dictated by those cases. In Canada the distances are as great as those in Australia but the climate is harsher, even in closely settled areas. The "highway rule" and the distinction between misfeasance and nonfeasance in the exercise of statutory powers are not observed. The reasoning in *Anns v Merton London Borough Council* [80] has been influential in the Supreme Court of Canada. The prevailing view in the Supreme Court is that of Cory J in *Just v British Columbia* [81] , *Brown v British Columbia (Minister of Transportation and Highways)* [82] and *Swinamer v Nova Scotia (Attorney*

General) [83] . This is that there is a general duty of care on a Province to maintain its highways, that the traditional tort law duty of care applies to government agencies in the same way as to individuals and that liability is avoided only by establishing that the particular case falls within a recognised exception to the general duty. In *Swinamer* , Sopinka J was of the contrary view, that the bona fide exercise of a statutory power to maintain highways cannot give rise to a liability on the basis of a private law duty of care [84] . La Forest J concurred with McLachlin J. McLachlin J expressed the governing principles differently from Cory J and emphasised that public authorities have no private duty to individuals capable of founding civil action unless such a duty can be found in the terms of the relevant statute; nevertheless, liability may arise in negligence if the authority elects to exercise a power and does so negligently [85] .

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[80] [1978] AC 728 .

[81] [1989] 2 SCR 1228 .

[82] [1994] 1 SCR 420 .

[83] [1994] 1 SCR 445 .

[84] [1994] 1 SCR 445 at 450451 .

[85] [1994] 1 SCR 445 at 449450 .

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76. In the United States, the subject for long has been bedevilled by the distinction between cities and counties as units of government and the treatment of municipal corporations as bodies exercising some governmental functions and thereby entitled, at least to an extent, to governmental "immunity"[86]. Most jurisdictions accept that the construction and maintenance of streets and public ways is not within the immunity[87]. Comment *b* to §349 of the *Restatement (Second) of the Law of Torts* reads:

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

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[86] Williams, *The Liability of Municipal Corporations for Tort*, (1901), §4; Borchard, "Government Liability in Tort", (1924) 34 *Yale Law Journal* 1 (Pt 1), 129 (Pt 2) at 130138, 229 (Pt 3) at 229240.

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

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

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[88] [1978] AC 728 .

[89] Todd, *The Law of Torts in New Zealand*, 2nd ed (1997) at 210211.

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78. In the United Kingdom, statute deals with the matter. The "rule of law exempting the inhabitants at large and any other persons as their successors from liability for nonrepair of highways" was abrogated by s 1(1) of the *Highways (Miscellaneous Provisions) Act* 1961 (UK). Thus, the common law doctrine, inapposite to conditions in the Australian colonies but nevertheless translated there, with the subsequent effort in *Buckle* to rationalise it, has ceased to apply in its country of origin. There, the state of repair of highways now is dealt with by ss 41 and 58 of the *Highways Act* 1980 (UK). A statutory duty is imposed to maintain highways which are maintainable at public expense but, in an action in respect of damage for breach of that duty, it is a defence that the authority took such care as was reasonable to ensure that the relevant part of the highway was not dangerous to traffic [90] . The duty requires the fabric of the highway to be kept in such good repair as to render it safe for ordinary traffic to pass at all seasons of the year, but does not extend to the prevention of ice forming on the highway or the removal of accumulated snow [91] . What is of particular significance for present purposes is that the statutory duty, by shifting the burden of proof on the issue of reasonable care to the defendant, involves an even more stringent liability for defendants than would apply under ordinary negligence principles[92]. Yet the floodgates do not appear to have collapsed.

(ii) Unprincipled distinctions

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

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

[92] McDonald, "Immunities Under Attack", (2000) 22 *Sydney Law Review* 411 at 418419.

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

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

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

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

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81. The case law produces the result that a tree may be an "artificial structure", the planting of which may be a misfeasance by a highway authority. A plaintiff, injured by a fall caused by the disturbance of a footpath by the roots of such a tree, may recover damages in negligence. Yet the defendant will have the "immunity" of the "highway rule" if the tree was selfsown or perhaps if it was planted by another authority [95] and the defendant cannot be said to have adopted and continued a nuisance[96]. What can be said in favour of such a state of affairs?

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

[96] See the judgment of McLelland J in *Stephenson v Kuringgai Municipal Council* (1953) 19 LGR 137 at 140.

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

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[97] (1879) 4 App Cas 256 at 265266 .

[98] *Unger v The President, Council, and Ratepayers of the Shire of Eltham* (1902) 28 VLR 322 at 326327 ; *Buckle* (1936) 57 CLR 259 at 298300 .

[99] (1936) 57 CLR 259 at 271, 291292 .

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

(iii) Misfeasance and nonfeasance

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[100] See the distinctions between a "highway authority" on the one hand and, on the other, a "drainage authority" (*Sisson v North Sydney Municipal Council* [1966] 1 NSWR 580 at 581582); a "traffic authority" (*Turner v Kuringgai Municipal Council* (1990) 72 LGRA 60 at 67); and a "tramways authority" (*Sisson v North Sydney Municipal Council* [1966] 1 NSWR 580 at 584 ; *Day v Commissioner of Main Roads (WA)* (1989) 9 MVR 471 at 502503). See also *Frankston City Council v Eyles* (2000) 108 LGERA 115 at 120, where the council was said to have planted a tree acting as "the factotum of all the town".

[101] In *Webb v The State of South Australia* (1982) 56 ALJR 912 at 913; 43 ALR 465 at 467468, a "false kerb" was treated as an artificial structure and the exception was applied. Contrast the views of Latham CJ and McTiernan J with those of Dixon J in *Buckle* (1936) 57 CLR 259 at 273275, 292293, 300.

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

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

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

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[102] (1950) 80 CLR 357 at 375.

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

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

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

[106] (1913) 16 CLR 353 .

[107] (1913) 16 CLR 353 at 361.

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85. The category of cases with respect to negligent misstatement (which includes failures to provide information or advice, as well as failures to provide information or advice that was accurate [108]) shows both the artificial nature of the distinction between "misfeasance" and "nonfeasance" and its diminishing importance. Again, who today, given the line of judgments

in this Court commencing with that of Fullagar J in *Commissioner for Railways (NSW) v Cardy* [109] , would state the general duty of care which an occupier may owe to a trespasser as limited, in Sir John Salmond's phrase, to "positive acts of negligent misfeasance"[110]? Where the defendant "allows" or "permits" land to become or remain the source of the injurious consequences suffered by the plaintiff, "[h]is sin is nonfeasance rather than misfeasance"[111].

The issue in *Hargrave v Goldman* [112] , where the defendant had not originated the fire which later spread to the plaintiff's land, was whether the defendant had suffered the fire to continue without taking reasonably prompt and sufficient means for its abatement (if the action be framed in nuisance) [113] or whether the defendant was negligent in not rendering harmless the fire which spread from the felled tree (if the action be framed in negligence) [114] . On either cause of action, the essential issue concerned a failure by the defendant further to act where action was called for. The same was true of the appellant council in *Pyrenees Shire Council v Day* [115] .

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[108] See the observations of Gaudron J in *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 198199 [29] and see, generally, *Hill v Van Erp* (1997) 188 CLR 159.

[109] (1960) 104 CLR 274 at 296297 .

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

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

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

[113] (1963) 110 CLR 40 at 51.

[114] (1963) 110 CLR 40 at 61.

[115] (1998) 192 CLR 330 .

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

[116] *City of Melbourne v Barnett* [1999] 2 VR 726 at 729730 ; *Barbieri v Fairfield City Council* (1999) 105 LGERA 304 at 308.

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

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

[119] *Marr v Holroyd Municipal Council* (1986) 3 MVR 235 at 242244 (negligent repair of pothole led to the more rapid recurrence of the danger).

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

> "If the authority having the care and maintenance of a road undertakes new work such as this kerbing and guttering, and in carrying out that work leaves a place immediately adjoining in such a condition that the natural and necessary consequence is that the place becomes dangerous, then it is clear to me that there is a misfeasance, and not a mere nonfeasance; and if damage results by reason of that misfeasance, I think the authority is responsible."

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

[120] (1913) 16 CLR 353 at 358.

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

[122] *McDonogh v Commonwealth of Australia* (1985) 9 FCR 360 at 366 ; *Huon Municipal Corporation v W M Driessen & Sons Pty Ltd* (1991) 72 LGRA 240 at 243. In

the latter case, Wright J and Crawford J treated the distinction between misfeasance and nonfeasance as still applicable notwithstanding the special provisions of s 21(4) of the *Local Government (Highways) Act* 1982 (Tas) .

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

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88. **Following paragraph cited by:**

Central Goldfields Shire v Haley & Ors (24 June 2009) (Neave and Redlich JJA and Pagone AJA)

Likewise, there may be misfeasance if the authority has created a false sense as to the security or safety of a road. The authority may have thrown open an unsafe road for use as a safe road [124] ; its work may have created or maintained a "trap" by creating an appearance of safety, or at least of uniformity, across its surface, which could readily mislead [125] ; or its work may have created a new danger or added to the danger [126] by making an unfenced hole [127] .

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[124] *Gorringe* (1950) 80 CLR 357 at 371372 ; *McDonogh v Commonwealth of Australia* (1985) 9 FCR 360; *Hill v Commissioner for Main Roads* (1989) 68 LGRA 173 at 180.

[125] *McDonogh v Commonwealth of Australia* (1985) 9 FCR 360 at 364365 ; *Gorringe* (1950) 80 CLR 357 at 371372 ; *Day v Commissioner of Main Roads (WA)* (1989) 9 MVR 471 at 504 ; *Grafton City Council v Riley Dodds (Australia) Ltd* [1956] SR (NSW) 53 at 58 ; *Kirk v Culcairn Shire Council* (1964) 64 SR (NSW) 281 at 288.

[126] *Gorringe* (1950) 80 CLR 357 at 363 ; *Kirk v Culcairn Shire Council* (1964) 64 SR (NSW) 281 at 286287 .

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

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

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[128] *Campbelltown City Council v Crain* unreported, New South Wales Court of Appeal, 23 October 1998 at 5; *City of Melbourne v Barnett* [1999] 2 VR 726 at 729730 .

[129] (1950) 80 CLR 357 at 371.

90. Other cases, of which the decision of this Court, shortly after *Buckle*, in *Dundas v Canterbury Municipal Council [No 2]* [130] is an example, suggest that certain anterior activity involving road design and construction requires special consideration. It appears that an authority will be liable if a roadway is negligently designed or built so that it is dangerous to those using it [131] , unless there is adequate warning (such as by signage) of the dangers [132] .

(iv) Immunity

[130] (1937) 13 LGR 181.

[131] *Turner v Kuringgai Municipal Council* (1990) 72 LGRA 60 at 6162 ; *Desmond v Mount Isa City Council* [1991] 2 Qd R 482 at 488, 494 ; *Blacktown Municipal Council v Scanlon* (1993) 79 LGERA 387 at 388.

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

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

[133] (1936) 57 CLR 259 at 292.

92. **Following paragraph cited by:**

Petrotimor Companhia de Petroleos Sarl v Commonwealth of Australia (03 February 2003) (Black CJ, Beaumont & Hill JJ)

It will be observed that Dixon J did not describe the liability of road authorities as "nonjusticiable". In Australia, that term and cognate expressions have been used to describe controversies within or concerning the operations of one of the other branches of government

which cannot be resolved by the exercise of the judicial power. Examples are the exercise by the Governors of the States of their function under s 12 of the Constitution [134] , certain aspects of the conduct by the Executive Government of foreign relations[135] and intergovernment arrangements falling short of contract[136]. The differences of opinion in *Sue v Hill* [137] respecting the exercise by this Court of jurisdiction as the Court of Disputed Returns exemplify the fundamental and difficult issues which are wrapped up in the term "nonjusticiable".

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

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

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

[137] (1999) 199 CLR 462 .

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

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[138] (1866) LR 1 HL 93 .

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94. **Following paragraph cited by:**

Hoffmann v Boland (06 June 2013) (Basten and Barrett JJA, Sackville AJA)

The term "immunity" also is used in various areas of the law to indicate an immunity to action in respect of rights and duties which otherwise exist in the law. One example is the common law immunity of the Crown to actions for breaches of its contracts; the common law accepted that a contract had been made and a legal wrong committed [139] . The immunity of the barrister, upheld in *Giannarelli v Wraith* [140] , assumes, as Mason CJ explained [141] , an obligation to exercise reasonable care and skill but sustains the immunity on considerations of

public policy. Again, the common law rule which confers a "qualified immunity" from liability in respect of straying animals is an "exception to the ordinary principles of negligence" and, where it operates, "negates the existence of a duty of care" [142] . In recent decisions of the House of Lords respecting the liability in negligence of public authorities, the terms "immunity" and "nonjusticiable" have been used, apparently interchangeably, and in the sense of negation of the existence of a duty of care. Examples are found in several of the speeches in *Barrett v Enfield London Borough Council* [143] .

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

[140] (1988) 165 CLR 543 .

[141] (1988) 165 CLR 543 at 554555 .

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

[143] [1999] 3 WLR 79 at 9598, 103104; [1999] 3 All ER 193 at 209212, 217219 . See Craig and Fairgrieve, " *Barrett* , Negligence and Discretionary Powers", (1999) *Public Law* 626 at 631633, 647649.

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95. This appears to be the sense in which Dixon J spoke of "immunity" in *Buckle*. It follows that to determine that the legal basis for this immunity is derived from English origins which furnish no reason for its continuance in Australia is not to cast adrift the Australian common law with nothing in the place of what has been left behind; rather, it is to allow the principles of the law of negligence respecting public authorities to operate freed from this artificial constriction.

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

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

[145] (1981) 150 CLR 225 .

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97. Statutory provisions which permit public authorities to engage in what otherwise would be tortious or otherwise legally wrongful conduct are disfavoured; they are "strictly", even

"jealously", construed [146] . So also, surely, what are said to be immunities of this nature provided by the common law itself. In that vein, Lord Cooke of Thorndon recently observed [147] :

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

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

[147] *Darker v Chief Constable of the West Midlands Police* [2000] 3 WLR 747 at 756757; [2000] 4 All ER 193 at 202.

[148] [1974] 1 NZLR 180 at 187.

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

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

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

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99. Are there sufficient reasons of public policy for denial of a remedy against the respondent Councils, if an action otherwise lies against them in negligence? This invites attention to the purposes now served by the "immunity". These purposes plainly are not those served in England in ages past. Even in England those purposes changed over time. When *Russell v The Men of Devon* [150] was decided in 1788, there were no highway authorities as later became understood in Australia. The inhabitants of a parish were a fluctuating body of private individuals [151] , the membership of which was unlikely to correspond at the times of incurrence and discharge of liability, and the common law did not provide for contributions between those concurrently liable [152] . Moreover, the "highways" spoken of in 1788 today

would hardly answer that description. The deficiencies of the English road system had been a common refrain in the recitals of various highway acts. They used terms such as "very dangerous", "ruinous" and "almost impassable"[153]. Section 6 of *The Highway Act* 1835 (UK)[154] required the parish to appoint a surveyor who was to "repair and keep in repair" the highways in the parish. However, the surveyor "was the agent of the inhabitants at large" and "was not liable on indictment or in damages" [155] .

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

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

[152] Ashhurst J made this point in *Russell v The Men of Devon* itself: (1788) 2 TR 667 at 673 [100 ER 359 at 362363].

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

[154] 5 & 6 Will 4 c 50.

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

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

> "It is admitted that the highway on which the disaster occurred was constructed by the appellants in the first instance quite properly. No complaint of misfeasance is made against them. The sole charge is one of nonfeasance: that when the road had fallen into a bad condition, they failed to execute the necessary repairs. If, then, they are liable in the present action, it must be either because that liability has been expressly imposed by some enactment, or because the Legislature has imposed some duty upon them for the breach of which a right of action accrues to any person injured by it."

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[156] *Cowley v Newmarket Local Board* [1892] AC 345 at 355 ; *Municipal Council of Sydney v Bourke* [1895] AC 433 at 439440 .

[157] *Municipal Council of Sydney v Bourke* [1895] AC 433 at 435436 .

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101. These considerations never applied in this country. The responsibilities of municipal and shire corporations with respect to roads were not transferred to those bodies; they were created by statute. Perhaps for what then was good reason, given the ultimate authority of the Privy Council and the prevailing understanding of a unified common law [158] , in *Buckle* the Court kept close to the coastline charted by the English decisions. However, in Australia, a significant issue respects the operation of the principles of liability in negligence in respect of the exercise or failure to exercise statutory powers.

(v) Negligence and statutory powers

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

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102. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
Coffs Harbour City Council v Polglase (23 October 2020) (Basten, Macfarlan and Leeming JJA)
Meyers v Commissioner for Social Housing (07 August 2019) (Elkaim, Loukas-Karlsson and Charlesworth JJ)
Gunns Limited v State of Tasmania (21 September 2016) (Blow CJ and Tennent J)
Australian Capital Territory v Crowley (17 December 2012) (Lander, Besanko and Katzmann JJ)
Warren Shire Council v Kuehne (16 April 2012) (McColl and Whealy JJA, Sackville AJA)
Central Goldfields Shire v Haley & Ors (24 June 2009) (Neave and Redlich JJA and Pagone AJA)
State of NSW v Tyszyk (26 May 2008) (Mason P ; Giles JA ; Campbell JA)
North Sydney Council v Roman (27 February 2007) (McColl JA; Bryson JA; Basten JA)
New South Wales v Godfrey (07 April 2004) (Spigelman CJ, Sheller and McColl JJA)
State of New South Wales v Napier (13 December 2002)

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

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[159] (1985) 157 CLR 424 . See also *Northern Territory v Mengel* (1995) 185 CLR 307 at 352353, 359360, 373.

[160] (1998) 192 CLR 330 .

[161] (1998) 192 CLR 431 .

[162] (1999) 200 CLR 1 .

[163] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551552 .

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103. **Following paragraph cited by:**

Roads and Traffic Authority of NSW v Palmer (28 March 2003) (Spigelman CJ, Handley and Giles JJA)

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

104. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
Roads and Traffic Authority of NSW v Palmer (28 March 2003) (Spigelman CJ, Handley and Giles JJA)

The postulate that, without the "highway rule" and with the principles of negligence, statutory authorities will be subjected to fresh, indeterminate financial hazards which the common law will ignore should not be accepted. First, as has been pointed out earlier in these reasons, expenditure of public funds on litigation turning upon indeterminate and valuedeficient criteria is encouraged, indeed mandated, by the present state of the law. Secondly, financial considerations and budgetary imperatives may fall for consideration with other matters when determining what should have been done to discharge a duty of care [164] . That is the position in Canadian law [165] . It is that advocated in this Court a century ago. In *Miller v McKeon* Griffith CJ said [166] :

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

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

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[164] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 394395 [183]-[184] .

[165] *Just v British Columbia* [1989] 2 SCR 1228 at 12431244 .

[166] (1905) 3 CLR 50 at 60.

[167] See *Hill v Commissioner for Main Roads* (1989) 68 LGRA 173 at 181 ; *Gloucester Shire Council v McLenaghan* (2000) 109 LGERA 419 at 423 ; cf *Woodward v Orara Shire Council* (1948) 49 SR (NSW) 63 at 6567 .

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

106. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

630. Further, in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, it was said by Gaudron, McHugh and Gummow JJ (at [106]):

> Appeals also were made to preserve the “political choice” in matters involving shifts in “resource allocation”. However, citizens, corporations, governments and public authorities generally are obliged to order their affairs so as to meet the requirements of the rule of law in Australian civil society. Thus, it is no answer to a claim in tort against the Commonwealth under s 75(iii) of the Constitution that its wrongful acts or omissions were the product of a “policy decision” taken by the Executive Government; still less that the action is “non-justiciable” because a verdict against the Commonwealth will be adverse to that “policy decision”…

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
State of New South Wales v Williamson (13 October 2005) (Santow and Basten JJA, Simpson J)

Appeals also were made to preserve the "political choice" in matters involving shifts in "resource allocation". However, citizens, corporations, governments and public authorities generally are obliged to order their affairs so as to meet the requirements of the rule of law in Australian civil society. Thus, it is no answer to a claim in tort against the Commonwealth under s 75(iii) of the Constitution that its wrongful acts or omissions were the product of a "policy decision" taken by the Executive Government; still less that the action is "nonjusticiable" because a verdict against the Commonwealth will be adverse to that "policy decision". Local authorities are in no preferred position. Yet it is submitted that those bodies which answer the description "highway authority", distilled from the case law, merit and require a special consideration which only statute may displace. That submission should be rejected.

(vi) Precedent

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

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

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108. **Following paragraph cited by:**

State of New South Wales v Cadia Holdings Pty Ltd (01 July 2009) (Spigelman CJ at 1; Basten JA at 94; Handley AJA at 126)

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

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

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

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

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[169] (1979) 142 CLR 617 at 633.

[170] (1999) 198 CLR 180 .

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

[172] cf *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 2930 per Brennan J.

[173] (1988) 165 CLR 543 .

[174] (1988) 165 CLR 543 at 584.

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

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[175] (1976) 135 CLR 674 .

[176] (1999) 201 CLR 49 at 6669 [38]-[48] .

[177] (1989) 166 CLR 417 at 438439 .

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110. First, *Buckle* cannot be said to "rest upon a principle carefully worked out in a significant succession of cases" [178] . The judgments in *Buckle* ignore the earlier decision of the Court in *Miller v McKeon* [179] . There, the submission had been made that it was the duty of the New South Wales Government which had constructed and dedicated the road in question to make it reasonably safe for all such as were likely to use it and to keep it safe; counsel relied upon the judgment of Brett MR in *Heaven v Pender* [180] . This, as Fullagar J later remarked [181] , was a period in which the law of negligence was undergoing considerable development. The judgment of the Master of the Rolls in *Heaven v Pender* "constituted the first step in the perception of a coherent jurisprudence of common law negligence" [182] ; it went on to provide a significant element in the reasoning of Lord Atkin in *Donoghue v Stevenson* [183] and was "taken up" by Lord Atkin in formulating the general duty in that case [184] . The result was described in *Burnie Port Authority v General Jones Pty Ltd* [185] as being the "emergence of a coherent law of negligence to dominate the territory of tortious liability for unintentional injury to the person or property of another".

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

[179] (1905) 3 CLR 50 .

[180] (1883) 11 QBD 503 at 509.

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

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

[183] [1932] AC 562 at 580581 .

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

[185] (1994) 179 CLR 520 at 544.

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111. **Following paragraph cited by:**

Central Goldfields Shire v Haley & Ors (24 June 2009) (Neave and Redlich JJA and Pagone AJA)

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

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[186] (1905) 3 CLR 50 at 58.

[187] (1915) 15 SR (NSW) 408 .

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

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

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112. **Following paragraph cited by:**

Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia (22 May 2023) (Mortimer CJ; Moshinsky and Banks-Smith JJ)

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

Sawer[191] that, if the dissenting judgment be ignored, *Buckle* lacks a *ratio decidendi* respecting the "highway rule".

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

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

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113. Thereafter, in *Gorringe*, the plaintiff accepted that *Buckle* established "the general proposition that a highway authority is not liable for mere nonfeasance but is liable for misfeasance or malfeasance" [192] . But, rather than challenge *Buckle*, the plaintiff in *Gorringe* sought to sidestep it. He did so by putting his case on the particular ground that s 8(2) of the *Roads and Jetties Act* 1935 (Tas) "imposes a duty to maintain State highways with a correlative right in a person injured by a defect in the highway to complain of the failure in the duty" [193] . The plaintiff thus relied upon the action for damages for breach of statutory duty. This action had succeeded with respect to other statutes in the earlier decisions in this Court in *Municipal Tramways Trust v Stephens* [194] and *South Australian Railways Commissioner v Barnes* [195] .

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[192] (1950) 80 CLR 357 at 362.

[193] (1950) 80 CLR 357 at 368369 .

[194] (1912) 15 CLR 104 . Isaacs J dissented and his judgment was preferred to those of Griffith CJ and Barton J by Dixon J in *Gorringe*: see (1950) 80 CLR 357 at 369370 .

[195] (1927) 40 CLR 179 at 192 per Higgins J, 195 per Starke J; Isaacs ACJ based his decision upon public nuisance (at 186). See also, among the numerous Canadian decisions in this period decided upon breach of statutory duty: *The City of Kingston v Drennan* (1897) 27 SCR 46 at 4748 ; *City of Vancouver v McPhalen* (1911) 45 SCR 194; *City of Vancouver v Cummings* (1912) 46 SCR 457 at 458459 ; *Raymond v Township of Bosanquet* (1919) 59 SCR 452 at 455456 ; *Greer v Tp Mulmur* [1926] 4 DLR 132 at 133.

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114. Moreover, as appears from the matters already discussed in these reasons under the headings "Unprincipled distinctions" and "Misfeasance and nonfeasance", there are unacceptable difficulties and uncertainties about the content of the "highway rule". In turn, these are the product of reluctance of the Australian courts in recent times to apply that "rule" to the exclusion of the ordinary principles dealing with negligence. This state of affairs has some affinity to that identified in *Burnie Port Authority v General Jones Pty Ltd* [196] respecting the rule in *Rylands v Fletcher* [197] . It demonstrates that, rather than achieving a useful

result, *Buckle* has "led to considerable inconvenience", the third of the considerations favouring review which were listed in *John v Federal Commissioner of Taxation* [198] .

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[196] (1994) 179 CLR 520 at 548549 .

[197] (1868) LR 3 HL 330 .

[198] (1989) 166 CLR 417 at 438.

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

(vii) Nuisance and negligence

116. The roots of the reasoning of Latham CJ and Dixon J in *Buckle* lay in the association between nuisance and the criminal law, and in the blending of principles respecting what now are seen as nuisance, negligence and breach of statutory duty. The decision which often is referred to as indicating that in England at common law no persons were subjected to any enforceable duty to repair or to keep in repair any highway, even persons with the management and control of a highway, is *Russell v The Men of Devon* [199] ; but, as Fullagar J indicated in *Gor ringe* [200] , the earlier decision had turned upon the absence of a proper defendant.

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

[200] (1950) 80 CLR 357 at 373.

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

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

But if a particular person, or body corporate, be to repair a certain highway, 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, because he can bring his action against them; but where there is no person against whom to bring his action, it is as if a man be damaged by one that cannot be known."

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[201] *Griffiths v Liverpool Corporation* [1967] 1 QB 374 at 389 ; *Goodes v East Sussex County Council* [2000] 1 WLR 1356 at 13611362; [2000] 3 All ER 603 at 608609 .

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

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

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

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

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[205] [1903] 1 Ch 109 .

[206] See the judgment of Hardie J in *Smith v Warringah Shire Council* [1962] NSWR 944 at 947949 .

[207] (1998) 194 CLR 247 .

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119. **Following paragraph cited by:**

McGinn v Ashfield Council (06 August 2012) (McColl JA, Sackville AJA and Gzell J)

At common law, explained Windeyer J, "a highway was created when a competent landowner manifested an intention to dedicate land as a public road, and there was an acceptance by the public of the proffered dedication" [208] ; a highway was a thoroughfare leading from town to town or village to village, but it became identified, again as Windeyer J put it [209] , as "a way over which all members of the public are entitled to pass and repass on their lawful occasions". The tort of nuisance included unlawful interference with a right over or in connection with land, and interference with the safe enjoyment of the public right of way over a highway might constitute an actionable nuisance [210] . In Australia, the vesting by statute in local government authorities of the fee simple in land over which there are public streets leaves the streets dedicated to the public [211] . The authorities hold the fee simple "subject to the rights of the public to use the street for passing and repassing, except in so far as those rights may be taken away or limited by statute" [212] .

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

[209] *City of Keilor v O'Donohue* (1971) 126 CLR 353 at 363 ; see also the authorities collected by Beaumont J in *Re Maurice's Application; Ex parte Attorney-General (NT)* (1 987) 18 FCR 163 at 169 and cf *Director of Public Prosecutions v Jones* [1999] 2 AC 240 at 253258, 261264, 268274, 279280, 291292 .

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

[211] This may be so even in respect of land held under Torrens title: *Vickery v Municipality of Strathfield* (1911) 11 SR (NSW) 354 at 363364 ; LG Act, s 232(3) .

[212] *Attorney-General; Ex rel Australian Mutual Provident Society v The Corporation of the City of Adelaide* [1931] SASR 217 at 229 per Murray CJ; followed by Bray CJ in *Kiosses v Corporation of the City of Henley and Grange* (1971) 6 SASR 186 at 192193 .

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

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[213] (1936) 57 CLR 259 at 280281 .

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

> "Nuisance … lay not only for interference with what have been called natural rights incidental to the occupation of land but also for interference with easements; and in early law the easement most usually affected was the right of way. Interference with a private right of way over another's tenement was undoubtedly nuisance. Interference with the public's right of way along a highway was something different: it was a purpresture, an unlawful encroachment against the king, and enquirable of by the king's justices. But men were satisfied by the superficial resemblance between the blocking of a private way and the blocking of a public highway to term the latter a nuisance as well, and thus was born the public nuisance, that wide term which came to include obstructed highways, lotteries, unlicensed stage-plays, common scolds, and a host of other rag ends of the law."

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

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

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

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122. **Following paragraph cited by:**

Wollongong City Council v Williams (09 July 2021) (McCallum JA, Simpson AJA and Adamson J)

> 8. Obviously, a finding of negligence on the part of a defendant does not of itself contradict a finding of contributory negligence on the part of the plaintiff; that would deny the existence of the entire doctrine. As it was put by Lord Ellenborough CJ in *Butterfield v Forrester* (1809) 103 ER 926, which has been described as “the foundation case for the doctrine of contributory negligence” (*Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council* (2001) 206 CLR 512; [2001] HCA 29 at [122] n 217, citing *Astley v Austrust Ltd* (1999) 197 CLR 1; [1999] HCA 6 at [21]):

> "One person being in fault will not dispense with another's using ordinary care for himself."

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

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

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

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[217] *Sly v Edgley* (1806) 6 Esp 6 [170 ER 813]; *Butterfield v Forrester* (1809) 11 East 60 [103 ER 926]; *Leslie v Pounds* (1812) 4 Taunt 649 [128 ER 485]; *Jarvis v Dean* (182 6) 3 Bing 447 [130 ER 585]; *Daniels v Potter* (1830) 4 C & P 262 [172 ER 697]; *Proctor v Harris* (1830) 4 C & P 337 [172 ER 729]. *Butterfield v Forrester* was the foundation case for the doctrine of contributory negligence: *Astley v Austrust Ltd* (1999) 197 CLR 1 at 11 [21] .

[218] See, for example, *Barnes v Ward* (1850) 9 CB 392 at 420 [137 ER 945 at 956]; *P eachey v Rowland* (1853) 13 CB 182 [138 ER 1167]; *Cooper v Walker* (1862) 2 B & S 770 at 779780 [121 ER 1258 at 12611262]; *Robbins v Jones* (1863) 15 CB (NS) 221 at 223 [143 ER 768 at 770]; *Hadley v Taylor* (1865) LR 1 CP 53 at 55.

[219] *Southport Corporation v Esso Petroleum Co Ltd* [1954] 2 QB 182 at 197 (revd on other grounds [1956] AC 218). See also the judgments of Walsh J in *Miller Steamship Co Pty Ltd v Overseas Tankship (UK) Ltd* [1963] SR (NSW) 948 at 979980, and of Burbury CJ in *Kraemers v Her Majesty's Attorney-General for the State of Tasmania* [196 6] Tas SR 113 at 125, and Markesinis and Deakin, *Tort Law*, 4th ed (1999) at 460461.

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

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123. To Fullagar J in *Gorringe*, the proper sense of "negligence" is to identify a failure to observe reasonable care; there is "actionable negligence" only if there be "a legal duty to take reasonable care" [221] . However, the term "negligence" may be used other than to identify an independent tort. In the sense of inadvertence or carelessness with respect to an act or omission, "negligence" may identify a mode of committing another tort which does not

require intentional wrongdoing. Hence the statement by Beven[222] that his work was concerned with an aspect, not a division, of law, and with "defaults in conduct" rather than "any particular class of legal relations".

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[221] (1950) 80 CLR 357 at 378379 . See also *Watson v George* (1953) 89 CLR 409 at 424425 ; *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 at 44 ; and the article by Thayer, "Public Wrong and Private Action", (1914) 27 *Harvard Law Review* 317 at 324325.

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

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

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[223] (1936) 57 CLR 259 at 273.

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

Dixon J said [224] :

> "To speak of the resulting state of the road as a nuisance in the highway may be correct enough. There is, of course, always a risk in applying the word to the physical thing instead of to the act or omission constituting the wrong of nuisance. But, apart from that, the question is not whether a nuisance has been caused. A highway authority might be indictable for a nuisance arising from its failure to repair. But it was not liable for the particular damage which an individual suffered from the indictable nuisance. When the highway authority acts in that capacity the question is whether, by the negligent exercise of its statutory powers or otherwise without statutory justification, it has been the active agency in causing the nuisance."

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

> "The plaintiff rests his case upon two grounds, nuisance and negligence. In my view they come to the same thing. The mere construction of a work by the Government upon a public road is not in itself a nuisance, if it is for the more convenient exercise by the public of their right of passage over the road, and if the work is carried out without negligence. If there is any negligence the work is a nuisance, if there is no negligence, there is no nuisance. From whichever point of

view we regard the matter the question for determination is the same, namely, is there any evidence that the Government has been guilty of negligence. I propose, therefore, to deal with that question only."

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[224] (1936) 57 CLR 259 at 292.

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

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

> "Then, as to nuisance, it might be said until quite recently that there was a hybrid action of nuisance and negligence. Sometimes it looks as if negligence were the substance of the action, and nuisance were an untechnical term; sometimes the exact reverse would be the truth, and then, again, 'negligent' has figured as a persistent term in the declaration which the Court persistently ignored in deciding on grounds of nuisance. Finally, there are judgments that must have gone on one ground or the other, but on which must remain a secret. Nowadays, however, judges show a strong tendency to exorcise this ghost of action upon the case, and to insist that nuisance is one tort and negligence another."

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

[227] Beven, Salmond and Jenks.

[228] (1926) 42 *Law Quarterly Review* 184 at 197198 (footnotes omitted). These views were expressly adopted by Lord Simonds in *Jacobs v London County Council* [1950] AC 361 at 374.

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126. Since *Buckle* was decided, it has become clear, as a result of judgments of Lord Wright, Lord Simonds, Windeyer J, Lord Reid and Lord Wilberforce [229] , that (a) there are cases where the same facts will establish liability both in nuisance and negligence; (b) the tort of nuisance comprises a wide variety of situations, in some of which negligence plays no part, in others of which it is decisive; and (c) where the public nuisance is one of creating a danger to persons or property on a highway, fault of some kind, which may be negligence, is essential. Nevertheless, whilst the existence of a duty of care and its breach is essential for the tort of negligence, in nuisance this is unnecessary [230] . As late as 1943, the English Court

of Appeal [231] decided as an action in nuisance a claim for damages brought by the mother of a motorcyclist killed when his cycle ran into the back of a trailer attached to a stationary lorry which had been left unattended and without rear lights; it was unnecessary, on this basis, to consider the question of negligence.

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[229] Respectively in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903904 ; *Jacobs v London County Council* [1950] AC 361 at 374375 ; *Hargrave v Goldman* (1963) 110 CLR 40 at 6162 ; *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] 1 AC 617 at 639640 ; *Goldman v Hargrave* (1966) 115 CLR 458 at 461. See also the remarks of Lord Cooke of Thorndon in *Hunter v Canary Wharf Ltd* [1997] AC 655 at 711.

[230] *Hargrave v Goldman* (1963) 110 CLR 40 at 62 ; see also Winfield, "Nuisance as a Tort", (1931) 4 *Cambridge Law Journal* 189 at 198199.

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

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

128. **Following paragraph cited by:**

Grills v Leighton Contractors Pty Ltd (27 March 2015) (Beazley P, Barrett and Gleeson JJA)

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

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[232] (1985) 157 CLR 424 at 459460 .

[233] [1991] 2 Qd R 482 at 494496 .

[234] (1980) 146 CLR 40 at 47.

[235] Examples appear to be *Hodgson v Cardwell Shire Council* [1994] 1 Qd R 357 at 3 65366 and *Roads and Traffic Authority (NSW) v Scroop* (1998) 28 MVR 233 at 238.

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

(viii) The immunity and statute

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[236] (1994) 179 CLR 520 .

[237] (1994) 179 CLR 520 at 556.

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130. Section 32(1A) of the *Main Roads Act* 1924 (NSW) ("the Main Roads Act")[238] provided that, when the Commissioner for Main Roads carried out certain work, the Commissioner was to have, for that purpose, "all the powers and immunities of a council under the [LG Act] and any other Acts conferring powers or immunities on a council". The Main Roads Act was repealed in 1986 by the RTA Act [239] but s 12(1) stated that the RTA had in relation to construction and maintenance of a classified road or a toll work the "immunities of a council in relation to a public road". Sections 17 and 18 of the RTA Act used similar expressions with respect to work by the RTA on roads not within the area of a council and on roads other than classified roads. The RTA Act was repealed, after the events giving rise to this litigation, by the Roads Act , but ss 65 and 72 of the Roads Act contain similar provisions.

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

[239] s 103 and Sched 1.

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131. It will be observed that the provisions relevantly in force, those of the RTA Act , did not attempt to specify the content of the "immunity" of councils in relation to public roads. That would have been a difficult task, given the exceptions and qualifications apparent in the case law when the RTA Act was enacted in 1986. What the legislation did was to place the RTA in

the position in which the case law placed councils with respect to construction and maintenance of public roads. That case law then was and had been for a long period in a state of flux.

132. **Following paragraph cited by:**

Gett v Tabet (09 April 2009) (Allsop P ; Beazley JA ; Basten JA)
Gett v Tabet (09 April 2009) (Allsop P ; Beazley JA ; Basten JA)

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

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

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[240] cf *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 5963 [18]-[28] ; Beatson, "The Role of Statute in the Development of Common Law Doctrine", (2001) 117 *Law Quarterly Review* 247 at 264265.

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

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

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

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[242] [1992] 2 AC 443 .

[243] [1992] 2 AC 443 at 487489 .

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

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

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

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

[245] See *Lake Macquarie City Council v Bottomley* (1999) 103 LGERA 77 at 9091 .

[246] *City of Melbourne v Barnett* [1999] 2 VR 726 at 730731 .

[247] *Roads and Traffic Authority (NSW) v Scroop* (1998) 28 MVR 233 at 236238 .

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

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

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

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

139. The relevant considerations in expressing the duty of care that does arise involve the exercise of statutory powers such as those conferred by the LG Act upon the respondents. Those powers have been outlined earlier in these reasons under the heading "Negligence and statutory powers". The content of the duty of care to be owed by public authorities may be outlined by reference both to the fundamentals of the law of negligence and some of the decided cases. Many of these cases would fall to be decided the same way under an approach properly resting upon principles of negligence. In particular, cases imposing liability upon the criterion of "misfeasance" may be given a firmer footing on ordinary considerations of negligence.

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

[250] Roads Act, s 138(1) .

[251] (1998) 192 CLR 330 .

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

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141. **Following paragraph cited by:**

Great Lakes Shire Council v Dederer (05 October 2006) (Handley JA at 1; Ipp JA at 67; Tobias JA at 325)

57. Participation in recreational activity, and particularly where it involves inherent risks, is voluntary. Such activity is of a different character from that undertaken in the work place, on the roads, in the market place and in other areas where people must venture: *Vairy* para [217] (Callinan and Heydon JJ). In the same case Gummow J quoted (para [80]) a statement from the joint judgment in *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [141] that the use of roads is a “basic right and necessity”.

As a matter of history, the public right of user of highways was so important to social and economic intercourse that, at common law, a highway authority might be indictable for a nuisance arising from its failure to repair [253] . The use of public roads remains a matter of basic right and necessity. Reference has been made earlier in these reasons to the discussion by Mahoney AP in *Hughes v Hunters Hill Municipal Council* [254] of the particular competing interests sought to be accommodated by the "highway rule". The balance this struck, as we have sought to demonstrate, has proved unsatisfactory, but the competing interests remain.

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

[254] (1992) 29 NSWLR 232 at 236.

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

earthwire (which had become charged) or to see that it did not become dangerously insecure. S ection 382(1) of the LG Act had empowered the Bankstown Corporation to "construct, extend, protect, maintain, control, and manage … works … for the supply of electricity".

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[255] (1936) 57 CLR 259 at 276277 .

[256] (1950) 80 CLR 357 at 369.

[257] (1953) 87 CLR 619 .

[258] (1953) 87 CLR 619 at 644.

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

144. **Following paragraph cited by:**

Department of Housing and Works v Smith [No 2] (19 February 2010) (Pullin JA, Buss JA, Newnes JA)

It is true, as Gaudron J pointed out in *Romeo v Conservation Commission (NT)* , that the mere existence of powers in an authority does not of itself create a duty of care [259] . However, her Honour subsequently stated in *Crimmins v Stevedoring Industry Finance Committee* [260] :

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

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[259] (1998) 192 CLR 431 at 457458 [64] .

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

[261] *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 220 per Dixon CJ, McTiernan, Kitto and Taylor JJ; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 436 per Gibbs CJ (Wilson J agreeing), 458 per Mason J, 484 per Brennan J, 501 per Deane J; *Stovin v Wise* [1996] AC 923 at 943944 per Lord Hoffmann; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 391392 per Gummow J.

[262] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 443 per Gibbs CJ (Wilson J agreeing), 460461 per Mason J, 479 per Brennan J, 501502 per Deane J; *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 302 per Kirby P, 328 per McHugh JA; *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

[263] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 443445 per Gibbs CJ (Wilson J agreeing), 460461 per Mason J, 478 per Brennan J; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 368369 per McHugh J.

[264] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 368369 per McHugh J. See also *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 460461 per Mason J and the cases there cited.

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145. **Following paragraph cited by:**

Pascoe v Coolum Resort Pty Ltd (23 September 2005) (Jerrard and Keane JJA and Cullinane J,)

In *Aiken v Kingborough Corporation* [265] , Dixon J observed that the general grounds for treating a situation as throwing a duty of care upon a public authority appeared "in the already wellknown statement of Lord Atkin in *Donoghue v Stevenson* [266] ", but that "it is one thing to impute in general terms a duty of care and another to define its measure". *Aiken* concerned the liability of a public authority in respect of its control, management and maintenance of a jetty used by the plaintiff, as a member of the public, to moor his boat. This Court rejected [267] the proposition that the jetty was a highway to which there applied the "immunity" in respect of nonfeasance. The property remained in the Crown but the statutory power of control and management of the structure by the authority spelt occupation by it in its own right [268] . Dixon J concluded that [269] :

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

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[265] (1939) 62 CLR 179 at 206207 .

[266] [1932] AC 562 at 579582 .

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

[268] (1939) 62 CLR 179 at 203204 .

[269] (1939) 62 CLR 179 at 210.

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146. **Following paragraph cited by:**

Pascoe v Coolum Resort Pty Ltd (23 September 2005) (Jerrard and Keane JJA and Cullinane J,)

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

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[270] (1998) 192 CLR 431 at 442443 [17] .

[271] (1987) 162 CLR 479 .

[272] (1993) 177 CLR 423 at 440.

[273] (1998) 192 CLR 431 at 454455 [50]-[52] .

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

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

[274] (1998) 192 CLR 431 at 487488 [152] .

[275] *Aiken* (1939) 62 CLR 179 at 190191 per Latham CJ, 199200 per Starke J, 205206, 209 per Dixon J; *Schiller v Mulgrave Shire Council* (1972) 129 CLR 116 at 120 per Barwick CJ, 124128 per Walsh J, 134 per Gibbs J; *Nagle* (1993) 177 CLR 423 at 428 per Mason CJ, Deane, Dawson and Gaudron JJ.

148. **Following paragraph cited by:**

Consolidated Broken Hill Ltd v Edwards (11 November 2005)
Pascoe v Coolum Resort Pty Ltd (23 September 2005) (Jerrard and Keane JJA and Cullinane J,)
Dungog Shire Council v Babbage (20 May 2004)

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

[276] (1936) 57 CLR 259 at 280281 .

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

F. Content and breach of the duty of care

[277] (1982) 56 ALJR 912 at 913; 43 ALR 465 at 467468 .

[278] (1980) 146 CLR 40 at 4748 .

150. **Following paragraph cited by:**

Collins v Clarence Valley Council (03 September 2015) (McColl, Macfarlan and Emmett JJA)

(2001) 206 CLR 512; [2001] HCA 29 at [150] (Gaudron, McHugh and Gummow JJ) .

Collins v Clarence Valley Council (03 September 2015) (McColl, Macfarlan and Emmett JJA)
Collins v Clarence Valley Council (03 September 2015) (McColl, Macfarlan and Emmett JJA)
Collins v Clarence Valley Council (03 September 2015) (McColl, Macfarlan and Emmett JJA)
Rankin v Gosford City Council (25 August 2015) (Basten, Macfarlan and Simpson JJA)
Stojan (No 9) Pty Ltd v Kenway (12 November 2009) (Ipp, McColl and Basten JJA)
Central Goldfields Shire v Haley & Ors (24 June 2009) (Neave and Redlich JJA and Pagone AJA)
North Sydney Council v Binks (18 September 2007) (Beazley JA ; Santow JA ; Basten JA)
Eutick v City of Canada Bay Council (03 March 2006) (Giles and Ipp JJA, Campbell AJA)
Town of Mosman Park v Tait (04 July 2005) (Steytler P, Wheeler JA, McLure JA)
Greater Shepparton City Council v Davis (20 August 2004) (Winneke, P., Chernov, J. A and Bongiorno, A.J.A)
Roads and Traffic Authority of NSW v Palmer (28 March 2003) (Spigelman CJ, Handley and Giles JJA)
Roads and Traffic Authority of NSW v Jackson (05 March 2003) (Mason P, Stein and Santow JJA)
Richmond Valley Council v Standing (04 November 2002) (Handley, Sheller and Heydon JJA)
Spencer v Maryborough City Council (26 July 2002) (McMurdo P, Jerrard JA and Holmes J,)

The duty which arises under the common law of Australia may now be considered. Authorities having statutory powers of the nature of those conferred by the LG Act upon the present respondents to design or construct roads, or carry out works or repairs upon them, are obliged to take reasonable care that their exercise of or failure to exercise those powers does not create a foreseeable risk of harm to a class of persons (road users) which includes the plaintiff. Where the state of a roadway, whether from design, construction, works or nonrepair, poses a risk to that class of persons, then, to discharge its duty of care, an authority with power to remedy the risk is obliged to take reasonable steps by the exercise of its powers

within a reasonable time to address the risk. If the risk be unknown to the authority or latent and only discoverable by inspection, then to discharge its duty of care an authority having power to inspect is obliged to take reasonable steps to ascertain the existence of latent dangers which might reasonably be suspected to exist.

151. **Following paragraph cited by:**

Greater Shepparton City Council v Davis (20 August 2004) (Winneke, P., Chernov, J. A and Bongiorno, A.J.A)
Dungog Shire Council v Babbage (20 May 2004)

57. *Brodie* itself provides some guidance as to what constitutes reasonable steps in such a context. To quote again from the joint judgment (omitting footnotes) at [151] :

"The perception of the response by the authority calls for, to adapt the statement by Mason J in Wyong Shire Council v Shirt, a consideration of various matters; in particular, the magnitude of the risk and the degree of probability that it will occur, the expense, difficulty and inconvenience to the authority in taking the steps described above to alleviate the danger, and any other competing or conflicting responsibility or commitments of the authority. The duty does not extend to ensuring the safety of road users in all circumstances. In the application of principle, much thus will turn upon the facts and circumstances disclosed by the evidence in each particular case."

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

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[279] (1980) 146 CLR 40 at 4748 .

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

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

152. In dealing with particular cases and in determining factual issues respecting breach of duty, it may be convenient to differentiate between the design and construction of a roadway, between subsequent works done on it and between courses of inspection to ascertain its soundness. These matters are not mutually exclusive and sometimes may overlap.

(i) Construction and design

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

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

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[281] *Turner v Kuringgai Municipal Council* (1990) 72 LGRA 60; *McIntyre v Ridley District Council* (1991) 56 SASR 343; *Blacktown Municipal Council v Scanlon* (1993) 79 LGERA 387.

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

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

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

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

[286] *Cook v Kuringgai Municipal Council* (1936) 13 LGR 45 at 51.

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155. The question whether "due care and skill" was taken [287] in design and construction will require consideration of all the circumstances of the case. The circumstances will include the type and volume of traffic expected. Different roads will serve different purposes and need

not be constructed to the same standard. Thus, one would not expect all country roads to be sealed. The cost and practicality of an alternative and safer design, if one be available, may be weighed against the funds available to the construction authority. This may involve striking a balance between competing designs or methods of construction.

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

156. It may also be that, although a road is in a dangerous condition, the authority will have discharged its duty of care by taking reasonable steps to minimise any danger or to prevent it arising. The authority may have provided adequate warning to users of the road by erecting appropriate signs [288] (so that, if exercising due regard for their own safety, users are able to avoid the danger [289]), or by building into or adding to the road features such as safety devices or fencing which tend to minimise the danger [290] .

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

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

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

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

(ii) Repair, maintenance and works

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

158. A rejection of the "immunity" for "highway authorities" and the recognition of a duty of care in terms expressed above with reference to *Wyong Shire Council v Shirt* does not necessarily involve the imposition of an obligation in all cases to exercise powers to repair roads or to ensure they are kept in repair. An authority may have various statutory powers invested in it and would be under a duty not to use, misuse or fail to use those powers to create a situation of danger which creates a reasonably foreseeable risk of injury to a user of the road.

159. The discharge of the duty involves the taking by the authority of reasonable steps to prevent there remaining a source of risk which gives rise to a foreseeable risk of harm. Such a risk of harm may arise from a failure to repair a road or its surface, from the creation of conditions during or as a result of repairs or works [292] , from a failure to remove unsafe items in or near a road [293] , or from the placing of items upon a road which create a danger [294] , or the removal of items which protect against danger [295] .

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[292] *Greater Bendigo City Council v Miles* (2000) 31 MVR 137 at 137138 .

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

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

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

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160. **Following paragraph cited by:**

Ayre v Swan (16 August 2019) (Basten, Macfarlan and McCallum JJA)
Wynn Tresidder Management v Barkho (16 June 2009) (Tobias JA at 1; McColl JA at 2; Young JA at 114)

> 60. Determining whether the duty had been breached turned upon the probability of the risk occurring, the magnitude of the consequences and the expense or inconvenience of eliminating the risk: *Wyong Shire Council v Shirt* [1980] HCA 12; (1980) 146 CLR 40 (at 47) per Mason J. In the assessment of breach, weight had to be given to the expectation that the respondent would exercise reasonable care for her own safety and also to the possibility of “inadvertence” and “thoughtlessness”. However it must also be accepted that while persons exercising reasonable care will be able to avoid injury in some situations, other situations present “a foreseeable risk of harm” even to persons taking such care: *Brodie v Singleton Shire Council* [2001] HCA 29; (2001) 206 CLR 512 (at [160] , [

163]) per Gaudron, McHugh and Gummow JJ; *Dederer* (at [45] – [46]) per Gummow J.

North Sydney Council v Binks (18 September 2007) (Beazley JA ; Santow JA ; Basten JA)

North Sydney Council v Binks (18 September 2007) (Beazley JA ; Santow JA ; Basten JA)

Ainger v Coffs Harbour City Council (No 2) (16 August 2007) (Mason P; McColl JA; Hunt AJA)

Sutherland Shire Council v Henshaw (10 December 2004) (Sheller, Hodgson and Bryson JJA)

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

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

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

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161. Not all failures to repair will create risks to the users of a road, or at least not risks which would, as a matter of the reasonably foreseeable, pose a risk of injury. Although it has been said many times that the digging of a hole in a roadway constitutes an actionable misfeasance, the size and location of such a hole may vary and must be considered when determining, on the facts of the particular case, whether it will reasonably foreseeably lead to injury or harm to a user of the road. Depending on the conditions of the road, a "hole" caused by removal of a portion of the road surface may not pose any foreseeable risk to cars; signs may provide adequate warning against whatever risks it poses to motorcyclists or cyclists. On the other hand, a trench in the roadway, whether arising from active digging or decay of the road or structures within it, will more readily give rise to a foreseeable risk of injury, particularly where it cannot easily be seen or avoided by a road user. The nature of the defect, and not the question of whether it arose by action or "nonfeasance", should be significant. The court record and the report of *Gorringe* do not disclose sufficient material to enable it now to be said that under this dispensation the plaintiff in *Gorringe* would have recovered in respect of the injury sustained upon the collapse of the "appreciable depression" [298] in the road surface.

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[298] (1950) 80 CLR 357 at 358.

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162. **Following paragraph cited by:**

State of New South Wales v Ibbett (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)

The formulation of the duty of care includes consideration of competing or conflicting responsibilities of the authority. In the circumstances of a given case, it may be shown that it was reasonable for an authority to deal in a particular priority with repairs in various locations. The resources available to a road authority, including the availability of *matériel* and skilled labour, may dictate the pace at which repairs may be made and affect the order of priority in which they are to be made. It may be reasonable in the circumstances not to perform repairs at a certain site until a certain date, or to perform them after more pressing dangers are first addressed. Even so, it may well be reasonable for the authority to exercise other powers including, for example, by erecting warning signs, by restricting road usage or, in extreme cases, by closing the road in question.

(iii) Pedestrians

163. **Following paragraph cited by:**

Hornsby Shire Council v Salman (27 June 2024) (White and Adamson JJA, Basten AJA)
Hornsby Shire Council v Salman (27 June 2024) (White and Adamson JJA, Basten AJA)
Hornsby Shire Council v Salman (27 June 2024) (White and Adamson JJA, Basten AJA)
Blue Op Partner Pty Ltd v De Roma (12 July 2023) (Meagher, Mitchelmore and Kirk JJA)
Russell v Carpenter (08 December 2022) (Meagher, Gleeson and Kirk JJA)
Council of the City of Sydney v Bishop (28 June 2019) (Basten, Macfarlan and Brereton JJA)
Raad v VM & KTP Holdings Pty Ltd (01 August 2017) (Macfarlan and Simpson JJA, Sackville AJA)
Bitupave Ltd t/as Boral Asphalt v Pillinger (30 September 2015) (Ward, Emmett and Gleeson JJA)
Grills v Leighton Contractors Pty Ltd (27 March 2015) (Beazley P, Barrett and Gleeson JJA)
Stojan (No 9) Pty Ltd v Kenway (12 November 2009) (Ipp, McColl and Basten JJA)
Stojan (No 9) Pty Ltd v Kenway (12 November 2009) (Ipp, McColl and Basten JJA)
Stojan (No 9) Pty Ltd v Kenway (12 November 2009) (Ipp, McColl and Basten JJA)
RL & CA Woods Pty Ltd v Pacific National (Victoria) Ltd and Wayne Bruce Kuschert v Pacific National (Victoria) Ltd and Anor (04 November 2009) (Allsop P, Ipp and Young JJA)
Central Goldfields Shire v Haley & Ors (24 June 2009) (Neave and Redlich JJA and Pagone AJA)
Central Goldfields Shire v Haley & Ors (24 June 2009) (Neave and Redlich JJA and Pagone AJA)

Ellis v. Uniting Church in Australia Property Trust (Q) (04 December 2008) (McMurdo P, Fraser JA and Mackenzie AJA,)
Roads and Traffic Authority of NSW v Chandler (11 April 2008) (Mason P at 1; Basten JA at 5; Bell JA at 65)
North Sydney Council v Binks (18 September 2007) (Beazley JA ; Santow JA ; Basten JA)
Skulander v Willoughby City Council (18 May 2007) (Mason P; Beazley JA; Basten JA)
Skulander v Willoughby City Council (18 May 2007) (Mason P; Beazley JA; Basten JA)
Shire of Toodyay v Walton (10 April 2007) (Steytler P)
Brock v Hillsdale Bowling and Recreation Club Ltd (15 March 2007) (Ipp JA ; Tobias JA ; Basten JA)

> 57 The fact that the access to the ground from the veranda could have been constructed differently, and even more safely, does not mean that there was a failure to take reasonable care in maintaining the existing construction: see *Jones v Bartlett* (2000) 205 CLR 166 at [22]-[23] (Gleeson CJ). Further, in considering breach, it is necessary to take into account the risk to persons taking reasonable care for their own safety: *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [163] (Gaudron, McHugh and Gummow JJ) . Finally, it is also important to bear in mind that foreseeability of risk of injury is by no means a sufficient condition for a finding of negligence. As has often been noted, where a risk has materialised, it can rarely be said that the risk itself was unforeseeable in advance.

Shellharbour City Council v Rigby (27 November 2006) (Beazley JA; Ipp JA; Basten JA)
Shellharbour City Council v Johnson (06 April 2006) (Beazley and Tobias JJA, Hunt AJA)
Shellharbour City Council v Johnson (06 April 2006) (Beazley and Tobias JJA, Hunt AJA)
Eutick v City of Canada Bay Council (03 March 2006) (Giles and Ipp JJA, Campbell AJA)
Timberland Property Holdings Pty Ltd v Bundy (30 November 2005) (Handley and Basten JJA, Hunt AJA)
Volman T/a Volman Engineering v Lobb; Mobil Oil Australia Pty Ltd v Lobb (31 October 2005)
Brymount Pty. Limited t/a Watson Toyota (ACN 003 200 459) v Cummins & ANOR.
YOUNG Shire Council v Cummins & Anor (26 November 2004) (Beazley, Ipp and McColl JJA)
A V Jennings Ltd v Thomas (01 November 2004) (Beazley and Bryson JJA, Palmer J)
Greater Shepparton City Council v Davis (20 August 2004) (Winneke, P., Chernov, J. A and Bongiorno, A.J.A)
Greater Shepparton City Council v Davis (20 August 2004) (Winneke, P., Chernov, J. A and Bongiorno, A.J.A)
Greater Shepparton City Council v Davis (20 August 2004) (Winneke, P., Chernov, J. A and Bongiorno, A.J.A)

Greater Shepparton City Council v Davis (20 August 2004) (Winneke, P., Chernov, J. A and Bongiorno, A.J.A)
Wyong Shire Council v Vairy (27 July 2004) (Mason P, Beazley and Tobias JJA)
Hastings Council v Giese (09 July 2003) (Handley, Sheller and Tobias JJA)
Aquilina v Beenleigh Greyhound Race Club Inc (04 July 2003) (McPherson and Jerrard JJA and Atkinson J,)
Gosford City Council v Needs (05 June 2003) (Handley, Ipp and McColl JJA)
Waverley Municipal Council v Swain (03 April 2003) (Spigelman CJ, Handley and Ipp JJA)

The formulation of the duty in terms which require that a road be safe not in all circumstances but for users exercising reasonable care for their own safety is even more important where, as in *Ghantous* , the plaintiff was a pedestrian. In general, such persons are more able to see and avoid imperfections in a road surface. It is the nature of walking in the outdoors that the ground may not be as even, flat or smooth as other surfaces. As Callinan J points out in his reasons in *Ghantous* , persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes. Of course, some allowance must be made for inadvertence. Certain dangers may not readily be perceived because of inadequate lighting or the nature of the danger (as in *Webb v The State of South Australia* [299]), or the surrounding area (as in *Buckle*, where the hole was concealed by grass [300]). In such circumstances, there may be a foreseeable risk of harm even to persons taking reasonable care for their own safety. These hazards will include dangers in the nature of a "trap" or, as Jordan CJ put it, "of a kind calling for some protection or warning"[301]. In *Romeo* , Toohey and Gummow JJ noted in a different context that the care to be expected of members of the public is related to the obviousness of the danger [302] . Kirby J pointed out in the same case that even an occupier of premises "is generally entitled to assume that most entrants will take reasonable care for their own safety" [303] . Each case will, of course, turn on its own facts [304] .

(iv) Inspections

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

[300] (1936) 57 CLR 259 at 266.

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

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

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

[304] *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 253 [198] ; *Avenhouse v Hornsby Shire Council* (1998) 44 NSWLR 1 at 8 ; Stapleton, "Duty of Care Factors: a Selection from the Judicial Menus", in Cane and Stapleton (eds), *The Law of Obligations*, (1998) 59 at 6063.

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164. **Following paragraph cited by:**

North Sydney Council v Roman (27 February 2007) (McColl JA; Bryson JA; Basten JA)

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

[305] *Hodgson v Cardwell Shire Council* [1994] 1 Qd R 357; cf *Kirk v Culcairn Shire Council* (1964) 64 SR (NSW) 281 at 288289 .

165. **Following paragraph cited by:**

Shire of Toodyay v Walton (10 April 2007) (Steytler P)
Leichhardt Municipal Council -v-Green (20 May 2004)

Where the danger could not reasonably be suspected to exist, or could not be found except by taking unreasonable measures, generally there will be no breach of duty by the authority. On the other hand, there will be a breach of duty where an authority fails to take reasonable steps to inspect for such dangers as reasonably might be expected or known to arise, or of which the authority has been informed or made aware [306] , and, if they are found, fails to take reasonable steps to correct them. In the cases, the danger usually manifests itself in decayed beams or supports of bridges, or drains or culverts, or other structures supporting a road or its surface. The reports of *Macpherson* [307] , *Buckle* and *Gorringe* all disclose insufficient facts to determine the reasonableness of the inspections which did take place or of the failure to inspect and ascertain the existence of the danger which caused the injury to the plaintiffs in those cases.

G. The facts in *Ghantous*

[306] *Hodgson v Cardwell Shire Council* [1994] 1 Qd R 357 at 362363 .

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

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

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

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

H. The facts in *Brodie*

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

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

170. On the morning of 19 August 1992, Mr Brodie picked up a load of concrete ordered by or on behalf of the New South Wales Water Resources Commission for work it was undertaking at the Glennies Creek Dam. Four loads of concrete were required and the first three trucks set off before Mr Brodie. He had been told that Pioneer had been engaged to finish off a job at the dam in place of Boral because the Boral trucks were "too big". The Boral trucks were 2830 tonnes with a full load, whilst Mr Brodie's truck was 22 tonnes fully loaded.

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

a message over the radio from one of the other Pioneer drivers that the bridge was "rickety". This Mr Brodie understood to mean that the bridge had some loose planks and he did not take the message as indicating that the bridge was in any way unstable.

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

173. The expert evidence was that the load limit of the bridge with solid timber girders was between 10.6 tonnes and 13.5 tonnes, but that the load limit of the bridge with timbers containing "piping", ie the rotting out of the centre of the timbers because of either dry rot or white ants, was between 9.3 tonnes and 11.9 tonnes.

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

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

176. **Following paragraph cited by:**

North Sydney Council v Roman (27 February 2007) (McColl JA; Bryson JA; Basten JA)

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

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

fundamental problem which made the bridge unsafe, namely the piping in the structural members.

178. **Following paragraph cited by:**

North Sydney Council v Roman (27 February 2007) (McColl JA; Bryson JA; Basten JA)

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

179. Mr Brodie did not see the sign at the first bridge and his failure to do so is not to be attributed to any want of proper attention on his part. What was decisive of the question of whether he had taken ordinary care in seeking to drive his load across Forrester's Bridge was the inference of safety which ordinarily would arise from the earlier passage that day across the bridge of similarly burdened trucks.

180. **Following paragraph cited by:**

TNT Australia Pty. Ltd. v Wills (13 December 2004) (Hodgson JA, Pearlman AJA and Windeyer J)

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

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[309] (1989) 68 LGRA 173 at 181.

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181. In these circumstances, if there be put aside considerations arising from the "immunity" in respect of "nonfeasance", the decision in favour of the applicants is supportable by application of the ordinary principles of negligence to the facts as found; there has been as yet no

challenge in the Court of Appeal to these findings, in so far as this approach to the case is concerned.

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

183. In addition to contesting liability, the Shire Council disputed the correctness of the award of damages made to the first applicant for general damages, future medical expenses and future economic loss. In the event, it was unnecessary for the Court of Appeal to deal with those issues. It must now be given the opportunity to do so.

I. Orders

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

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

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

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

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

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

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[312] The comment of Denning LJ in *Greene v Chelsea Borough Council* [1954] 2 QB 127 at 138 on the immunity formerly enjoyed by landlords in relation to certain claims of their tenants: *Cavalier v Pope* [1906] AC 428 at 433 ; cf *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 90 ; *Jones v Bartlett* (2000) 75 ALJR 1 at 3839 [230]; 176 ALR 137 at 187.

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

The three basic questions

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

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

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

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

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[314] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 8687 [100] ("*Esso*").

The facts, legislation and common ground

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

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

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

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

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

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

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191. It follows that, in neither case, was there evidence of a specific kind as to the reasons why each respondent, as a road authority, could not, and did not, repair the particular section of "road" alleged to have been dangerous [319] . Each respondent pleaded, relied upon and, in the result, succeeded in its defence based on the immunity belonging to a highway authority. In Mrs Ghantous's case, she failed at trial on the basis of a finding that the immunity was applicable. In Mr Brodie's case, although he succeeded at trial [320] , he lost that judgment on appeal. The Court of Appeal dismissed Mrs Ghantous's appeal [321] . It upheld Singleton Shire Council's appeal in Mr Brodie's case [322] . It rejected both claims as

unsustainable in law having regard to the highway rule, binding on the Court of Appeal, as established by this Court's decisions in *Buckle v Bayswater Road Board* [323] ("*Buckle*") and *Gorringe v The Transport Commission (Tas)* [324] ("*Gorringe*").

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

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

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

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

[323] (1936) 57 CLR 259 .

[324] (1950) 80 CLR 357 .

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

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

The highway rule is unsustainable in principle

193. I am relieved of the obligation to examine, at any length, the first question that I have identified. Such examination appears in the joint reasons in terms that I accept. Their Honours have examined the sources in the law of England from which the immunity of highway authorities was developed. They have indicated how the highway rule was originally devised in a legal context quite different from that of the Australian colonies into which the common law of England was received [326] . Although, from the start, the building of public highways and roads in Australia was a responsibility of government, and eventually of statutory bodies (and not of parishes or the men thereof as in England [327]), the transfer of the rule of the English common law to Australian law occurred without regard to three considerations that we can now see as legally critical.

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

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

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

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

[329] (1883) 11 QBD 503 at 509.

[330] [1932] AC 562 at 580581 .

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195. The immunity of highway authorities arose in England and was received into Australian law before the tort of negligence was fully developed [331] . In recent decades, the reconceptualisation of that tort in *Donoghue v Stevenson* has influenced many developments in the law of negligence in this Court[332]. However, the emergence of a coherent law of negligence [333] had not occurred when *Buckle* fell to be decided in this Court in 1936. The analysis of the liability of the highway authority in that case (including that of Dixon J who was there in dissent) was not challenged in *Gorringe*. That decision represents the last occasion on which the immunity of highway authorities was considered by this Court.

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[331] The joint reasons at [127].

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

[333] The joint reasons at [116].

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196. The result of *Buckle* and *Gorringe*, perhaps harmonious to a time when this Court's decisions were subject to appeal to the Privy Council, has been the importation into Australian law of a

rule of dubious applicability to Australian conditions[334]; traceable to peculiarities of early English roadbuilding responsibilities; sustained in part by particularities of the law of nuisance; indifferent to the distinct local statutory provisions governing Australian highway authorities; and overtaken by profound developments of the tort of negligence, not earlier considered by this Court. Thus, by a kind of timewarp, the English rule came to be applied in Australia. Earlier authority of this Court [335] which, left to itself, might have developed a suitable local rule, was ignored. Instead a rule was expressed conferring a large immunity on Australian statutory highway authorities. At common law they were not liable for "nonfeasance". They were only liable for "misfeasance".

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[334] McDonald, "Immunities Under Attack: The Tort Liability of Highway Authorities and their Immunity from Liability for NonFeasance", (2000) 22 *Sydney Law Review* 411 at 419, 421422 ("McDonald").

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

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

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[336] *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at 593598 [56][66] .

[337] *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at 583584 [16][18] ; *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 236 [129]; 167 ALR 575 at 611.

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

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198. Thus, the definition of a "highway", for the purpose of the immunity, was restricted so as to exclude socalled artificial "constructions", "works" and "structures"[339]. Being a doctrine of the common law of Australia, particular statutory definitions of a "road" or "highway" could not control the ambit of the common law rule in this regard. The "structures" which were held to fall outside the immunity merely served to highlight the anomalies of the basic rule[340]. Moreover, the designation of particular statutory bodies as "highway authorities", such as

enjoyed the immunity, and the determination of whether such bodies had acted, or failed to act, in a capacity as a highway authority, have led to other seemingly capricious results[341]. There appears to be no logic or justice in a rule of the common law that affords immunity to a "highway authority" but denies it to a sanitary, electricity or other authority with statutory powers, the exercise or neglect of which might just as readily affect the safety of persons on a "highway"[342].

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[339] The joint reasons at [81]-[82]; cf McDonald, (2000) 22 *Sydney Law Review* 411 at 414415.

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

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

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

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

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[343] The joint reasons at [72], [84]-[90]; cf *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 391392 [174][177] per Gummow J.

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

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

[346] The joint reasons at [114].

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

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

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

[350] Sawer, "NonFeasance Revisited", (1955) 18 *Modern Law Review* 541 at 546; see also Sawer, "Nonfeasance Under Fire", (1966) 2 *New Zealand Universities Law Review* 1 15.

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

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

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

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[352] One of these was Sawer, "NonFeasance Revisited", (1955) 18 *Modern Law Review* 541.

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

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

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

The general approach to change in rules of the common law

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

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

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

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

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[355] See eg Mason J in *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633634 ; *McKinney v The Queen* (1991) 171 CLR 468 at 481482 per Brennan J (diss); my own reasons in *Northern Sandblasting* (1997) 188 CLR 313 at 400.

[356] See eg *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 289290 per Mason CJ and Deane J; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 38 43 per Brennan J; cf *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26 per my own reasons at 3541 ; Kirby, "Judging: Reflections on the Moment of Decision", (1999) 18 *Australian Bar Review* 4 at 12.

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

206. Confronted by the second question [357] , I remind myself that in a number of recent decisions where this Court was invited to alter an accepted rule established by past authority, I sometimes acceded to the request. Sometimes I rejected it, concluding that any change considered necessary must come from the relevant Parliament and not from the Court. Sometimes I was a member of the majority and sometimes in dissent. By reexamining the criteria which led me to these earlier decisions, I may not only ensure (so far as possible) that my response to the present applications is consistent with past decisions. I may also help to disclose those considerations which, in my view, should be taken into account when faced with submissions of the kind presented in the present applications[358].

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[357] See above at [188].

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

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

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

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

[360] eg in the common law choice of law rule in Australia: *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 11301132 [119][123]; 172 ALR 625 at 656657 ; and Ch III of the Constitution and the common law rule concerning judicial bias: *Ebner v Official Trustee in Bankruptcy* (2000) 75 ALJR 277 at 289290 [79][82], 295296 [113][117] ; 176 ALR 644 at 661662, 669671 .

[361] *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 380383 [149][154] ; cf *Spring v Guardian Assurance Plc* [1995] 2 AC 296 at 326.

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209. Secondly, where large changes in the statement of the common law have earlier been adopted by this Court, especially if influenced by fundamental civil rights [362] , the task of the Court in subsequent cases is to reexpress the common law in a consistent way. It must follow through the "logical consequences" of the previous shift in law [363] . When the law has taken a new direction, it is normally pointless to yearn for a return to the past. Thus, after the decision in *Donoghue v Stevenson* [364] , many aspects of the law of negligence were in need of reconsideration.

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[362] eg *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 per Brennan J; cf *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657658 ; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 422425 [66], 427428 [66] .

[363] *Wik Peoples v Queensland* (1996) 187 CLR 1 at 250251 ; *Esso* (1999) 201 CLR 49 at 8788 [101] .

[364] [1932] AC 562 .

210. Thirdly, it is the undoubted function of a court such as this to contribute to the simplification of legal concepts, replacing categories with principles that will permit a more coherent and efficient application of the common law [365] . In this regard, this Court has functions in relation to the unified common law in Australia different from those of other final courts, such as the Supreme Court of the United States [366] . In discharging its functions, this Court, when asked, can and should reconsider the common law if, on analysis, that law appears to be out of harmony with altered social conditions [367] . Or if it contains anachronistic categories that invite abolition or modification [368] . Or if, effectively, it derogates unjustifiably from the principle of equality before the law [369] . One consideration that may encourage reexpression of the common law by the Court is a call for an established principle to be reconsidered by judges who have the responsibility of applying it and who identify defects occasioning confusion, uncertainty or injustice [370] .

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[365] eg *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 at 20, 38 ; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 484488 ; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 544550 ; *Northern Sandblasting* (1997) 188 CLR 313 at 395396 .

[366] *Lipohar v The Queen* (1999) 200 CLR 485 at 500 [24], 505 [43], 551552 [167] .

[367] *Esso* (1999) 201 CLR 49 at 8687 [100] .

[368] *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 235240 [125][142]; 167 ALR 575 at 609616 .

[369] *Esso* (1999) 201 CLR 49 at 8889 [102][103] concerning the ability of independent courts to secure the evidence essential to do justice according to law.

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

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211. Fourthly, whilst the legislature has the primary role, and responsibility, in reforming the common law (and is nowadays assisted by law reform and like bodies) that fact does not relieve this Court of its own responsibilities to repair clearly demonstrated defects of judgemade law. Where legislatures have failed to act, despite having weaknesses and injustices in the common law drawn to their notice, it cannot be expected that the courts will indefinitely ignore such weaknesses and injustices [371] . The Constitution envisages that the courts for which it provides will continue to play a function in renewing the common law as courts of their character have been doing for centuries. In the field of liability for negligence alone, history, including recent history, demonstrates that this Court's decisions have reexpressed the content of the common law quite often[372]. Sometimes the reexpression may erase outmoded rules or immunities [373] . Sometimes it may uphold a policy more in

tune with contemporary social values [374] . Sometimes it may correct the apparent failure of earlier decisions to take into account a crucial consideration, such as the statutory context within which a common law rule must operate.

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[371] See *Lipohar v The Queen* (1999) 200 CLR 485 at 561 [193] ; *Esso* (1999) 201 CLR 49 at 8990 [105] .

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

[373] *Northern Sandblasting* (1997) 188 CLR 313 at 339340, 342343, 347348, 365366, 400 ; cf *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 238240 [137][142]; 167 ALR 575 at 613616 ; *Jones v Bartlett* (2000) 75 ALJR 1 at 3839 [230]; 176 ALR 137 at 187.

[374] *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 307310, 313314 ; cf *Liftronic Pty Ltd v Unver* [2001] HCA 24 at [87][89] .

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212. *Rejecting alteration*: As against the foregoing considerations which may tend to encourage a court to abolish or reexpress an old rule of the common law, a number of others may suggest that the law should be left unchanged. Even if convinced that a rule of the common law is defective or results in injustice, this Court might, in a given case, conclude that it should leave any reexpression to the relevant legislature [375] .

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

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

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

[377] *Esso* (1999) 201 CLR 49 at 8687 [100] . Persistence of a legal rule or practice for a very long time can sometimes indicate its utility, suggesting the need for restraint before abolishing it: *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121 at 168 [124] .

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

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[378] *Esso* (1999) 201 CLR 49 at 8687 [100] .

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

[380] *Northern Sandblasting* (1997) 188 CLR 313 at 400, 402 ; cf *Jones v Bartlett* (2000) 75 ALJR 1 at 4243 [249][252]; 176 ALR 137 at 192194 .

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

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[381] *Ha v New South Wales* (1997) 189 CLR 465 at 503504 ; cf *McKinney v The Queen* (1991) 171 CLR 468 at 476.

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

[383] *Jones v Bartlett* (2000) 75 ALJR 1 at 43 [250][251]; 176 ALR 137 at 193194 .

[384] This was a consideration in *Northern Sandblasting* (1997) 188 CLR 313 at 402 an d *Jones v Bartlett* (2000) 75 ALJR 1 at 43 [250][251]; 176 ALR 137 at 193194 ; cf *Bankst own Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 307309, 313314 .

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

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

[386] (1999) 201 CLR 49 at 8990 [105] .

[387] *Lipohar v The Queen* (1999) 200 CLR 485 at 561562 [194] ; *R v McDonnell* [1997] 1 SCR 948 at 974975 [33] .

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217. *Securing balance*: Deciding whether, in the particular case, considerations such as the foregoing (and other factors that may be relevant) require retroactive alteration of the common law, or a reaffirmation of past authority, obviously necessitates evaluation and judgment [388] . The decision is not susceptible to a mechanical solution. That is why judges often reach different conclusions about what should be done in a particular case.

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[388] *Baker v Campbell* (1983) 153 CLR 52 at 103 ; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 130 ; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438439 ; *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 1129 [113]; 172 ALR 625 at 654 ; the joint reasons at [114]-[115].

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

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[389] *Candler v Crane, Christmas & Co* [1951] 2 KB 164 at 178 per Denning LJ referred to in *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447 at 468469, 471.

[390] Kirby, "Judging: Reflections on the Moment of Decision", (1999) 18 *Australian Bar Review* 4 at 910; *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 137 [60] .

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

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[391] *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 528529, 540, 552 ; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 398401 ; see generally *Durham Holdings Pty Ltd v New South Wales* (2001) 75 ALJR 501; 177 ALR 436.

[392] eg *Northern Sandblasting* (1997) 188 CLR 313; *Lipohar v The Queen* (1999) 200 CLR 485; *Esso* (1999) 201 CLR 49; *Jones v Bartlett* (2000) 75 ALJR 1 at 4243 [249][252] ; 176 ALR 137 at 192194 .

The arguments against abolition of the highway rule

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

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

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

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

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

[396] The rule was recently applied in *City of Melbourne v Barnett* [1999] 2 VR 726 at 727728 . It was there recognised that any change could only be effected by Parliament or by decision of this Court.

222. Secondly, much emphasis was laid by the respondents upon the enactment of what they said was relevant legislation. It was submitted that this precluded reexpression of the common law on this subject. As long ago as 1957, legislation was enacted by the Parliament of New South Wales [397] which, on one view, expressed a parliamentary acceptance that a measure of "immunity" existed for highway authorities in that State. Similar provisions continue to the present time. It was said to be relevant in two respects. It provided a specific statutory "endorsement" of the common law and prevented judicial modification such as would challenge the hypothesis upon which Parliament had acted. But, also, it was relevant to the statutory context in which any common law liability would have to be fashioned. A plaintiff would not only have to convert a statutory "power" to a "duty". He or she would have to do so in a milieu in which the statute contemplated an "immunity" at least to some extent. Even if the derivation of common law duties from statutory powers was not to be approached (as Brennan CJ favoured) by searching for the implications to be imputed to the statute itself [398] , the creation of a common law duty would still have to run the gauntlet of a statutory "immunity" of undefined content.

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

[398] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 347 [24][25] per Brennan CJ; cf *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 442446 per Gibbs CJ; *Crimmins* (1999) 200 CLR 1 at 7778 [216] .

223. Thirdly, the respondents placed emphasis on the policy advantages of retaining a special rule for the liability of highway authorities in a country the size of Australia. Whatever might have been the different circumstances of rural England centuries ago when the immunity, for different reasons, was developed, it was, so this Court was told, a principle well adapted to a country of continental size such as Australia, with its sparse population and remote areas to be served by a vast network of roads. Such roads were inevitably prone to deterioration. This was particularly so in the harsh climatic conditions typical of some parts of Australia. A specific rule of the common law, which treated highway authorities as *sui generis*, might

offend some legal theorists. But it contributed, so it was claimed, to certainty in the law and thus to the prevention of needless litigation [399] . Application of the ordinary law of negligence would expose highway authorities and plaintiffs unexpectedly and retrospectively to liability for "nonfeasance" long regarded as inapplicable to such matters.

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[399] See *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 215216 [88][92] per McHugh J .

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224. Fourthly, the respondents emphasised the cost implications of any change of the law. Whilst accepting that this would not be a conclusive argument, given that other reexpressions of the common law by the Court necessarily had large economic consequences [400] , the respondents submitted that the Court was not well placed to estimate the likely costs of added litigation, presently discouraged or defeated by the highway rule. Although tendered for the purpose of supporting the applications of a number of the States to intervene in the interests of the respondents, it is perhaps permissible (as these proceedings constitute applications for special leave, and not appeals [401]) to take into account the evidence of State officials. Their affidavits recount the huge extent of highways, roadways and pathways throughout the nation and the very large funds already devoted to their expansion, upkeep and improvement. It needs no evidence to make the point that the removal of an immunity, formerly established by law, would have economic consequences. Unless reversed by statute, it would, to the extent required, divert some resources of the highway authorities from current priorities to include a new priority: compensating the victims of negligent acts and omissions that could be proved against highway authorities, presently falling within the immunity.

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

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

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225. Fifthly, a special reason for restraint was said to be the fact that, despite reports of law reform bodies in three Australian States recommending reform of the applicable common law, the respective legislatures had failed, or refused, to enact a change[402]. This was the more telling because similar recommendations had been adopted in parts of Canada [403] . In England, from whose law the immunity rule had been derived, the law had been changed; not by the courts but by Parliament [404] . The respondents urged that this was the correct path to which this Court should adhere. What was involved was not a matter of procedural law, as such, specially apt to judicial alteration [405] . It was a longstanding rule of substantive law upon the basis of which, for a very long time, local authorities and others throughout Australia had ordered their affairs [406] .

[402] New South Wales Law Reform Commission, *Liability of Highway Authorities for NonRepair*, Report No 55 (1987); Law Reform Commission of Western Australia, *Report on the Liability of Highway Authorities for NonFeasance*, Report No 62 (1981); Law Reform Committee of South Australia, *Report on Reform of the Law Relating to Misfeasance and NonFeasance*, Report No 25 (1974); Law Reform Committee of South Australia, *Report Relating to the Review and Reappraisal of the TwentyFifth Report of this Committee on the Subject of Misfeasance and NonFeasance*, Report No 51 (1986): see also Luntz and Hambly, *Torts: Cases and Commentary*, 4th ed (1995) at 447. A report was also made by the New Zealand Torts and General Law Reform Committee, *The Exemption of Highway Authorities From Liability for NonFeasance* (197 3). The report of the New South Wales Law Reform Commission was tabled in the New South Wales Parliament in September 1989 but its recommendations have not so far been adopted.

[403] Balkin and Davis, *Law of Torts*, 2nd ed (1996) at 826. The immunity has been abolished by statute in several Provinces of Canada: *Municipal Government Act* 1968 (Alberta), c 68, s 178 ; *Urban Municipality Act* 1970 (Saskatchewan), c 78, ss 161162; *Mu nicipal Institutions of Upper Canada Act* 1866, c 51, s 339; *Municipal Act* 1970 (Ontario), c 284, ss 427428 .

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

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

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

The immunity should be abolished and the common law reexpressed

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

227. First, criticism of the present rule is almost universal. It is assailed by almost all who have considered it save those who benefit from its anomaly, namely governments and highway authorities. The criticisms of the rule, collected in the joint reasons[407], demand the conclusion that it is unprincipled and anomalous in character and elusive and disputable in operation. It does not even have the merit of certainty, as the respondents incorrectly claimed. The highway rule is so riddled with exceptions and qualifications as to justify the complaint that it is one of the "most obscure and inexplicable concepts ever formulated in our courts" [408] . This is not, therefore, a rule that has simply been overtaken by social change or other advances in legal doctrine. It is a rule, dubious in its origins, never truly applicable to Australian conditions, adopted in this Court with apparent disregard for earlier formulations [4

09] and so seriously unjust as to occasion countless judicial efforts to confine the ambit of its operation by reference to notions that are undesirably complex.

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

[408] McDonald, (2000) 22 *Sydney Law Review* 411 at 415. See also *Gloucester Shire Council v McLenaghan* (2000) 109 LGERA 419 at 420421 [4][6]; 31 MVR 340 at 341 ; the joint reasons at [72]-[73].

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

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228. Secondly, the rule exists as an exception to the general liability of tortious wrongdoers in the law of negligence which this Court, and other courts, have developed and reexpressed in many significant ways in recent years [410] . The immunity enjoyed by highway authorities is wholly out of harmony with so many other decisions of this Court in the field of negligence that the only substantial argument for adhering to it is respect for established legal authority. Yet that consideration, whilst of paramount importance, is not the sole factor to be given weight in the face of the present applications. Considerations of legal principle and legal policy must also be given due weight [411] . They argue powerfully for change.

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[410] The joint reasons at [85].

[411] *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252254 ; *Northern Territory v Mengel* (1995) 185 CLR 307 at 347.

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

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

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

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

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

[415] Contrast for example the outcomes in the present cases with *Hill v Commissioner for Main Roads (NSW)* (1989) 68 LGRA 173; 9 MVR 45; *Hughes v Hunters Hill Municipal Council* (1992) 29 NSWLR 232; *Gloucester Shire Council v McLenaghan* (200 0) 109 LGERA 419; 31 MVR 340.

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

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

233. The unprincipled and special classification of highway authorities for a common law immunity which the legislature has not granted is impossible to reconcile with the applicable statutory provisions. In so far as the New South Wales Parliament has referred to an assumed "immunity", but not specifically enacted or defined it, its provision does not significantly advance the debate. It will always be open to the Parliament of any State or legislature of a Territory, if it so chooses, to confer a special immunity on highway authorities (and to withhold such immunity from sewerage, gas, electricity or other authorities). However, if this

were now done by legislation it would enjoy at least two advantages. It might be expected to define with greater precision and certainty the scope of any such immunity and any exceptions to it. And such immunity would then rest on the authority of elected representatives, not on an anomalous and dubious judgemade rule whose deficiencies are so manifest.

234. Sixthly, also critical to my conclusion, is recognition of the fact that the immunity in question is exceptional. Immunities from legal liability, such as that accorded to highway authorities, represent a departure from the ordinary principle that a person, natural or legal, is accountable in the Australian courts for wrongs done to another member of society [416] . Usually, such accountability is determined by reference to principles of law that apply without discrimination. In *Roy v Prior* [417] , Lord Wilberforce remarked: "Immunities conferred by the law in respect of legal proceedings need always to be checked against a broad view of the public interest." That is what must now be done.

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

[417] [1971] AC 470 at 480 ; see also *Darker v Chief Constable of the West Midlands Police* [2000] 3 WLR 747 at 767774; [2000] 4 All ER 193 at 212219 .

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

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[418] eg the immunity of landlords: *Jones v Bartlett* (2000) 75 ALJR 1 at 4243 [245][251]; 176 ALR 137 at 192194 .

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

[420] McDonald, (2000) 22 *Sydney Law Review* 411 at 420421.

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236. Where there is doubt about the contemporary content of the common law, it is also appropriate, in my view, to have regard to the fundamental principles of universal human rights [421] . A principle within that body of law states that "[a]ll persons shall be equal before the courts and tribunals"[422]. Of course, there will be exceptions to such absolute equality. But I do not regard the peculiar immunity of highway authorities in Australia as properly falling into such a class.

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

[422] Art 14.1, International Covenant on Civil and Political Rights, done at New York on 19 December 1966; (1980) *Australia Treaty Series* No 23 (entered into force 13 November 1980); (1976) 999 *United Nations – Treaty Series* 171; (1967) 6 ILM 368.

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

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[423] Spigelman, "Access to Justice and Human Rights Treaties", (2000) 22 *Sydney Law Review* 141 at 141143 referring to *Osman v Ferguson* [1993] 4 All ER 344 and *Osman v United Kingdom* (2000) 29 EHRR 245 at 316 [150][151] . See also *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010 at 10361037; [1999] 4 All ER 609 at 634635 ; Hoffmann, "Human Rights and the House of Lords", (1999) 62 *Modern Law Review* 159 at 164.

The issues of duty and breach

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

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[424] The joint reasons at [137].

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

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[425] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 442446 ; cf *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 739.

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240. In my opinion, this course is not required. In each proceeding, the applicants recorded their intentions to rely on ordinary principles of negligence (and, in the case of Mrs Ghantous's action, the law of nuisance) freed from the immunity. In such circumstances, the respondents were obliged to consider the eventuality that has now occurred. They elected to call no evidence to justify their respective failures to attend to the suggested defects in the surface and surrounds of the road bridge and path in question in their cases. Retrial would obviously be expensive and inconvenient. In my view, it is open to this Court, in each case, to reconsider the evidence at trial, judging it by reference to the ordinary principles that govern the existence and scope of a duty of care of a statutory body having the powers respectively enjoyed by the present respondents.

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

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[426] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 419420 [244] ; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 476 [117] ; *Crimmins* (1999) 200 CLR 1 at 7980 [221][222] .

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

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

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243. For reasons that are adequately explained in the joint reasons by reference to like concepts[428] , I do not doubt that, both in Mrs Ghantous's case and in that of Mr Brodie, the respective Councils owed the applicants a duty of care. In the former case that duty was to construct the footpath in question and to keep it reasonably safe for ordinary use. In the latter case it was, relevantly, to afford specific warnings of the capacity of the bridge on which Mr Brodie was injured and the truck damaged, and to take reasonable care in the maintenance and upkeep of the bridge including periodic inspections involving reasonable steps to look for such dangers as might reasonably be expected to arise in its use[429].

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

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

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

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

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

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

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247. It could not reasonably be expected in these circumstances that a local government authority in the position of the Hawkesbury City Council, exercising its powers reasonably, would be aware of particular dangers inherent in the verge to the footpath off which Mrs Ghantous momentarily stepped before she fell. I would not rest my conclusion in her case upon any enlarged assumptions about a pedestrian's need for vigilance for his or her own safety. I do not agree in the latterday enthusiasm for the notion of contributory negligence that is abroad [431] . It goes against the steady trend of common law authority in this Court and indeed in Australian courts back to colonial days[432] to exaggerate the expectations that manifest themselves in various forms of disqualification for suggested contributory negligence [433] . Pedestrians and other highway users exist in every variety of physical and mental ability and acuity. Roadways and footpaths are used in every condition of light and all circumstances of weather. The reason Mrs Ghantous fails, in my view, is not any lack of attention on her own part. I respectfully regard that explanation as unconvincing and unreasonable. The real reason she fails is that no breach of duty is shown on the part of the local authority which she sued.

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

[432] Kercher, *An Unruly Child – A History of Law in Australia* (1995) at 136137.

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

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248. **Following paragraph cited by:**

Percy v Noosa Shire Council (19 July 2002) (Williams JA, White and Wilson JJ)

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

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

powers [434] . I agree with the reasoning contained in the joint reasons and with the result that follows.

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[434] The joint reasons at [181].

Orders

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

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

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

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[435] (1936) 57 CLR 259 .

[436] (1950) 80 CLR 357 .

Early English developments

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

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[437] *R v Great Broughton* (1771) 5 Burr 2700 at 2701 per Aston J [98 ER 418 at 418]. See also *R v Sheffield* (1787) 2 TR 106 at 111 per Ashhurst J [100 ER 58 at 61]; *Cubitt v Lady Caroline Maxse* (1873) LR 8 CP 704 at 717718 per Grove J.

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

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

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

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254. Bridges were treated a little differently. At common law no one was obliged to make a bridge and the common law in this respect was affirmed by *Magna Carta* [441] . The liability to repair bridges fell upon the county, not the parish [442] . Again, however, the obligation to repair was enforced by criminal proceedings on indictment: "A parish as to highways and a county as to bridges are on precisely the same footing." [443]

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

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

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

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

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

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

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

[447] *The Highway Act* 1835, s 96.

[448] *The Highway Act* 1835, s 96.

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256. By the nineteenth century (if not before) it was clear that interfering with free passage over a public highway was a common nuisance punishable on indictment. The crime of common nuisance, so far as it related to highways, was of two kinds: positive by obstruction, and negative by want of reparation, that is, for want of repair[449]. Procedures by indictment, however, afforded no remedy to a person who suffered injury because of the state of the highway or bridge, so it is necessary to look at the development of the civil, not criminal, law in this regard. Many of the nineteenth century cases in which claims for damages were made by those injured as a result of conditions on or near a highway made allegations of negligence, and the discussion in the judgments is of issues of negligence and vicarious responsibility [450] . Not all of the cases of that time were, however, framed in that way. Over time, claims for personal injury because of alleged obstruction on or near a highway, brought against persons other than the relevant highway authority, came to be framed more often in nuisance [451] .

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

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

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

Nuisance

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

with rights incidental to the occupation of land and, among other things, for interference with easements.

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

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

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

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

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

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[454] YB 27 Hen 8 Mich pl 10.

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

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

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259. **Following paragraph cited by:**

Deepcliffe Pty Ltd v Council of the City of Gold Coast (31 August 2001) (McMurdo P, Williams JA and Helman J,)

However this may be, by the late nineteenth century it was accepted that, because it was a common or a public nuisance unreasonably to obstruct or hinder free passage of the public along the highway, a private individual had a right of action in respect of that nuisance upon proof of particular damage beyond the general inconvenience and injury suffered by the public [457] . The decisions all concerned cases of obstruction [458] ; none was a case of nuisance by want of reparation. This was despite the fact that, in 1834, it had been held [459] that a

declaration disclosed a sufficient cause of action against a corporation when it alleged: first, that the corporation was under a legal obligation to repair a pier and certain sea banks; secondly, that the obligation was a matter of so general and public concern that an indictment would lie against the corporation for nonrepair; thirdly, that the works were out of repair; and lastly, that the plaintiff had suffered special damage. Yet this was not applied to highway authorities. Despite the general availability of an action in what now would be seen as nuisance, those responsible for repair of highways were treated separately. It is necessary to say something about how and why this developed.

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

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

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

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

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

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

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261. Later in the nineteenth century, as statutes created corporate highway authorities, it was held that those corporations were not liable for damages for injury resulting from a want of repair [4

62] . By the late nineteenth century the principle was expressed in terms of "nonfeasance". It was said to be that [463] :

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

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

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

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

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

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

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

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

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[465] (1879) 4 App Cas 256 .

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

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

[467] (1879) 4 App Cas 256 at 265.

[468] (1879) 4 App Cas 256 at 269.

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265. For a time the decision was taken to stand for a general proposition that an action in nuisance would lie against a highway authority for any obstruction to, or interference with, a highway no matter whether it resulted from misfeasance or nonfeasance[469], notwithstanding that earlier decisions had maintained the distinction between misfeasance and nonfeasance[470]. T his understanding of the case, therefore, represented a very sharp departure from earlier authority. Moreover, *Borough of Bathurst* was later to be seen as depending upon a distinction drawn in the decision between the highway and artificial works introduced to the highway [471] . The basis of this distinction between the highway, and artificial works introduced on to the highway, is obscure. It has been invoked from time to time [472] but it is a distinction that is by no means easy to draw.

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

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

[471] (1879) 4 App Cas 256 at 265.

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

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

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

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

[475] *South Australian Railways Commissioner v Barnes* (1927) 40 CLR 179; *White v Hindley Local Board* (1875) LR 10 QB 219; *Blackmore v Vestry of Mile End Old Town* (1 882) 9 QBD 451; *Thompson v Mayor &c of Brighton* [1894] 1 QB 332; *Skilton v Epsom and Ewell Urban District Council* [1937] 1 KB 112.

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

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[476] (1936) 57 CLR 259 at 290291 .

Application of highway law in Australia

268. Given the historical basis of the English law relating to highways, it now seems obvious that application of that law to the colonies in Australia was not inevitable. Colonial conditions

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

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

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

[478] (1905) 3 CLR 50 .

[479] (1905) 3 CLR 50 at 58.

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

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[480] (1905) 3 CLR 50 at 60.

[481] (1905) 3 CLR 50 at 60.

The decisions in *Buckle* and *Gorringe*

270. The decisions in both *Buckle* and *Gorringe* must be understood against the background of the historical matters I have mentioned. In *Buckle*, all three members of the Court who sat in the case accepted that a public authority having powers of care and maintenance of highways is

not, by reason merely of the existence of those powers, liable for damages resulting from nonfeasance [482] . Despite accepting this general proposition, the Court divided in its application to the particular case. It is important to identify the nature and bases of those differences.

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

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271. The majority (Latham CJ and McTiernan J) held that the plaintiff should recover. Their Honours reached that conclusion by different paths and this presents real difficulties in the way of identifying the ratio of the case[483]. Latham CJ held [484] that the liability of the defendant depended upon the source of the authority that the defendant had for constructing the drain (the breakage in which caused the hole in to which the plaintiff fell). His Honour concluded that if the defendant acted, wholly or partly, as a drainage authority rather than as a highway authority, it owed a duty to individuals to keep the drain in repair. McTiernan J, by contrast, based his conclusion on *Borough of Bathurst* , and the distinction said to be drawn in that case between the highway and other artificial structures in or on the highway [485] . He concluded that the defendant owed a duty to repair the drain as an artificial structure. Both Latham CJ and McTiernan J treated it as clear that, but for the immunity rule, the defendant would be held liable. Each focussed upon the application of what were seen as exceptions to the general immunity.

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[483] Paton and Sawer, "Ratio Decidendi and Obiter Dictum in Appellate Courts", (1947) 63 *Law Quarterly Review* 461 at 466469.

[484] (1936) 57 CLR 259 at 271273 .

[485] (1936) 57 CLR 259 at 300.

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

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

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[486] (1936) 57 CLR 259 at 281.

[487] (1936) 57 CLR 259 at 281.

[488] (1911) 45 SCR 194 .

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

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[489] (1936) 57 CLR 259 at 283.

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

Thus the focus of the reasons of Dixon J was upon what was the duty of a highway authority, and whether a breach of that duty was demonstrated. In particular, was it shown that the defendant had been "the active agent in causing an unnecessary danger in the highway" [490] o r had been in breach of some positive duty to repair? As to the former of these considerations, his Honour said [491] :

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

As to the second question, of breach of positive duty, Dixon J distinguished between the position of a road authority "in relation to the defective condition of a road, street, bridge, footpath, or other place over which there is a public right of passage" and "the position of a water, sewerage, gas and other like authority" [492] in relation to the defective condition of

parts of its undertaking that were maintained by legislative authority in a highway so as to form part of the road. In accordance with the then accepted understanding of the position of highway authorities, he concluded that a highway authority owed an individual road user no duty to repair the road. Of the other kinds of authority he said [493] :

> "The liability of such a body depends, of course, ultimately on the effect of the statute under which it acts. But if its powers of interference with the roadway extend to maintenance and repair of the object it has placed there, then, as a rule, it will be liable for the consequences if that object is negligently allowed to fall into disrepair. *The reason for this liability in the case of such a body may be found in its ownership or control of the structure in the highway, or in the implications discoverable in the statute*." (emphasis added)

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

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[490] (1936) 57 CLR 259 at 284.

[491] (1936) 57 CLR 259 at 284285 .

[492] (1936) 57 CLR 259 at 286.

[493] (1936) 57 CLR 259 at 286287 .

[494] (1936) 57 CLR 259 at 293.

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

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

[496] (1950) 80 CLR 357 at 367368 per Dixon J.

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275. The contention that the Commission was under a duty to maintain the highway, with a correlative right in a person injured by a defect in the highway to complain of the failure in the duty, was seen as depending upon the provisions of s 8 of the *Roads and Jetties Act* 1935 (Tas) . That section provided that State highways were vested in the Crown, but were under the control and direction of the Transport Commission. It further provided, by subs (2), that

except as otherwise provided, the Commission should cause all State highways and subsidiary roads to be maintained "as it shall direct". The Court held that this provision imposed no duty on the Commission which would found a cause of action at the suit of the plaintiff. Although the action was framed in negligence, much of the argument and the reasons of the members of the Court was expressed in terms redolent of a claim for breach of statutory duty. It will be necessary to return to these issues.

276. Latham CJ construed s 8 of the *Roads and Jetties Act* as imposing no duty on the Commission, in part because the words "as it shall direct" "show that it intended to confer upon the commission authority to maintain roads in such measure, degree and manner as the commission shall determine" [497] . Dixon J said [498] that to interpret s 8(2) as imposing a duty with a correlative right to sue for damages:

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

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[497] (1950) 80 CLR 357 at 363.

[498] (1950) 80 CLR 357 at 369.

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

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

This, as his Honour implied, is to misstate the effect of the cases, which established two principles [500] :

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

provision or necessary implication that the duty is to be enforceable by action at the suit of a person injured by its breach."

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[499] (1950) 80 CLR 357 at 375.

[500] (1950) 80 CLR 357 at 375376 .

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278. The two rules Fullagar J identified did not themselves exclude liability for negligence in control and management of roads. Notwithstanding the development of the law of negligence in the late nineteenth century, particularly in *Heaven v Pender* [501] , that further step was taken [502] . As Fullagar J said [503] , "[t]he theorem that there was no duty to repair enforceable by action acquired a corollary. There was no duty enforceable by action to be careful in control and management." But as Fullagar J also pointed out [504] , it seemed to be accepted that the rules applied only to highway authorities (not authorities responsible for matters such as drainage, sewerage or tramways) and applied "even to a highway authority only in respect of the actual roadway itself and such artificial structures in and about the roadway as can fairly be considered 'part of the road' or 'made for road purposes' or 'made for roadway purposes'".

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[501] (1883) 11 QBD 503 .

[502] *Sanitary Commissioners of Gibraltar v Orfila* (1890) 15 App Cas 400; *Cowley v Newmarket Local Board* [1892] AC 345; *Municipality of Pictou v Geldert* [1893] AC 524; *Municipal Council of Sydney v Bourke* [1895] AC 433.

[503] (1950) 80 CLR 357 at 378.

[504] (1950) 80 CLR 357 at 379.

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279. In neither *Buckle* nor *Gorringe* was there any challenge to the proposition that, absent specific statutory provision to the contrary, a highway authority is not liable for damage resulting from nonfeasance. But as the judgments of Dixon J in both *Buckle* and *Gorringe* and the judgment of Fullagar J in *Gorringe* reveal, the questions which lie behind that general proposition about immunity are in fact questions about the duties of a highway authority. These questions include whether the statute which governs the activities of the authority imposes any relevant duty on the authority to perform work (as opposed to giving it powers to do so) and whether, if there is a statutory duty to do work or maintain the roads, breach of that statutory duty will found a private action at the suit of an individual who has suffered loss.

280. The answers which were given to these questions were seen, in *Gorringe*, to be affected by the existence of the general rule about immunity. That rule was seen as providing a presumption against construing the relevant statute as creating a private right of action. As

Latham CJ said [505] of the provisions in question in *Gorringe*, "one would expect much clearer language if Parliament intended to alter … a wellestablished legal principle of such importance". In this respect highway authorities were seen as occupying a special position, the presumption in the case of a body like a tramway authority being, in the words of Dixon J [506] , "that it will incur a civil responsibility for a negligent failure to repair and maintain in a condition of safety the rails and surface of its tramway" [507] .

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[505] (1950) 80 CLR 357 at 362-363 .

[506] (1950) 80 CLR 357 at 369.

[507] See also *Municipal Tramways Trust v Stephens* (1912) 15 CLR 104.

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281. Subject to one qualification, these are questions which would arise in considering the application of wellaccepted principles governing whether an action for breach of statutory duty will lie [508] . They were seen as questions that turned on the construction of the statute which regulated the conduct of the relevant authority. The qualification which must be recognised, however, is that the immunity was treated as providing a sufficient basis for finding that no action for breach of statutory duty would lie.

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[508] *O'Connor v S P Bray Ltd* (1937) 56 CLR 464 at 477478 per Dixon J; *Henwood v Municipal Tramways Trust (SA)* (1938) 60 CLR 438; *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405 per Kitto J; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 424-426 per Brennan CJ, Dawson and Toohey JJ, 457462 per McHugh and Gummow JJ.

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282. The proposition that a highway authority owes no common law duty, enforceable by action at the suit of an injured party, to be careful in its control and management of the roads was obviously problematic at the time *Gorringe* was decided. When this proposition was established in the late nineteenth century, negligence was, as Fullagar J noted, undergoing considerable development. That development continued at increasing speed throughout the twentieth century. Especially is that so in relation to statutory authorities. Both the theorem, of no duty to repair which is enforceable by action, and the corollary, of no duty to be careful in care and management which is enforceable by action, must be reconsidered against those developments.

Duty of care in exercising statutory powers

283. Of the many developments in the law of negligence that have occurred in the course of the nineteenth and twentieth centuries, it is necessary to consider those that most directly concern public authorities. In 1878, Lord Blackburn said, in *Geddis v Proprietors of Bann Reservoir* [509] :

"I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but *an action does lie for doing that which the legislature has authorized, if it be done negligently*." (emphasis added)

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[509] (1878) 3 App Cas 430 at 455-456 .

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284. Thus, it is not disputed that a highway authority owes a duty of care in the actual exercise of its powers. In that respect a highway authority does not stand apart from any other repository of statutory powers: "[W]hen statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered" [510] .

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[510] *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 220 per Dixon CJ, McTiernan, Kitto and Taylor JJ.

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285. The duty to act carefully in the exercise of statutory powers was, for a time, assumed, without any close examination being given to its source. In *Miller v McKeon* [511] , the members of the Court appear to have considered it to be selfevident that, if the government of New South Wales undertook work, it was duty bound to do so carefully and, if it did not, a person suffering injury as a result had a right of action [512] . In this, and perhaps some other cases of the time, the assumption may stem from the provisions of the relevant legislation providing for suits against the Crown or government which said that the rights of parties "shall as nearly as possible be the same … as in an ordinary case between subject and subject" [513] . But not all cases against public authorities can be understood in this way because in many of them, Crown suits legislation was not engaged.

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[511] (1905) 3 CLR 50 .

[512] (1905) 3 CLR 50 at 58 per Griffith CJ, with whom Barton J agreed, 63-64 per O'Connor J.

[513] *Claims against the Government and Crown Suits Act* 1897 (NSW), s 4 .

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286. The question in the present cases is whether a highway authority should now be held to owe a common law duty of care to those who suffer injury because it did *not* exercise its

powers. Whether a duty of that kind should be found raises other questions: when is such a duty to be found; what is its scope? The question is not, and never has been, whether a highway authority, guilty of a breach of a duty which prima facie is enforceable by action, should be entitled to defend that claim by saying that the fault was one of omission rather than commission.

287. Early in the development of negligence, it was recognised that acts of omission could be every bit as significant as acts of commission. In 1856, Alderson B said that [514] :

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

Yet the classification of events as misfeasance or nonfeasance, especially in cases involving public authorities, remained important. The influence of the distinction can be seen clearly in the dictum of Scrutton LJ in *Sheppard v Glossop Corporation* [515] that "it is not negligent to abstain from doing a thing unless there is some duty to do it". It can also be seen in the decision of the House of Lords in *East Suffolk Rivers Catchment Board v Kent* [516] . There, the statutory authority, which had power but no statutory duty to perform certain works, was held not liable for carrying out those works. This was despite the works being carried out so inefficiently that the inundation of the plaintiffs' land was prolonged beyond what would have happened if the work had been done properly (as the inundation did not endure beyond what would have happened had the authority done nothing at all).

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[514] *Blyth v The Birmingham Waterworks Co* (1856) 11 Ex 781 at 784 [156 ER 1047 at 1049].

[515] [1921] 3 KB 132 at 145.

[516] [1941] AC 74 .

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288. At the most basic level, the distinction between misfeasance and nonfeasance can be seen as a particular reflection of the fact that "[f]rom the time of the Year Books the common law has drawn a distinction between damage which is the result of a positive act and damage which is the consequence of a failure to act" [517] . Thus, in cases of omission, the question which must always be asked is why was there a duty to act? At least since *Sutherland Shire Council v Heyman* [518] it has been clear that the ordinary principles of the law of negligence apply to public authorities with the result that [519] :

> "they are liable for damage caused by a negligent failure to act *when they are under a duty to act*, or for a negligent failure to consider whether to exercise a power conferred on them with the intention that it should be exercised if and when the public interest requires it". (emphasis added)

But that leaves unanswered the questions when and why should a duty to act be found? Those are the underlying questions in these cases.

[517] *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 326 per McHugh JA. See also *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 368 [101] per McHugh J.

[518] (1985) 157 CLR 424 .

[519] (1985) 157 CLR 424 at 445 per Gibbs CJ. See also at 456457 per Mason J, 471 per Wilson J, 484 per Brennan J.

A duty to act?

289. There can be no duty to act in a particular way unless there is authority to do so. Power is a necessary, but not a sufficient, condition of liability. But the *power* to act in a particular way, and the fact that, if action is not taken, it is reasonably foreseeable that damage will ensue, have hitherto not been held sufficient to give rise to a duty to take that action. It is, however, far from clear what more must be added to power and foresight to found a conclusion that a statutory authority owes a duty of care, the satisfaction of which requires it to take positive action.

290. Of course, the inquiry must begin from a consideration of the legislation which regulates the activities of an authority. The consideration of that legislation will often reveal that there is no statutory duty to take the positive action in question. Even if there is a statutory duty to take action, there may be no private action for damages for breach of that statutory duty. If that is so, when and why should the common law supply that duty?

291. Because the ordinary principles of the law of negligence apply to statutory authorities, a duty of care requiring positive action will be found in those cases where a private person would be under such a duty, for example, as employer or manufacturer of goods. Difficulties emerge, however, when it is sought to find a duty of care requiring a statutory authority to take positive action in cases where the relationship between authority and plaintiff is only analogous to some recognised relationship giving rise to such a duty.

292. Thus a duty to act will be found to exist if the authority and the injured plaintiff stood in the relationship of occupier and entrant as would be the case when someone visited its offices. But arguing for the existence of a duty of care in different circumstances, said to be analogous to those of occupier and entrant, requires attention to the closeness of the analogy which it is sought to draw. The imposition of a duty on a private occupier to act to avoid foreseeable risk of injury owes much to the control which the occupier has not only over the state of the land, but also over whether (or over the terms on which) a person may enter and remain on the land. An authority will often not have that latter kind of control over its facilities even if it does have the former. Indeed there will be cases where it has neither.

293. Similarly, if an authority makes a negligent misstatement to an inquirer, it may be that the authority will be seen to have had a duty to take reasonable care about its statement [520] . Th e imposition of a duty in this kind of case owes much to the reliance which the recipient

places upon the maker of the statement. Again, analogies may be drawn in other circumstances where it might be said that a user of a public facility relied on an authority. Again, however, care must be taken in relying on such analogies.

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[520] *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 and on appeal (1970) 122 CLR 628; [1971] AC 793 ; *Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]* (1981) 150 CLR 225; *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340.

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294. Finally, the special dependence and vulnerability of an injured person upon a party alleged to owe a duty of care has also been held to give rise to a special, nondelegable, duty to ensure that care is taken [521] . Again, it may be said that questions of special dependence or vulnerability are relevant in considering the position of a statutory authority [522] . Again, however, the analogy with private persons must be examined. It may not always be wholly apt.

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[521] *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686687 per Mason J; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550551 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

[522] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.

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295. In all of the respects in which I have said analogies may be drawn between the position of a private person owing a particular kind of duty and the position of a statutory authority, the difficulties with such analogies largely stem from two features. First, statutory authorities are bodies of limited powers, established for the performance of functions or the provision of services to which all, or large sections, of the community may resort. Second, they are bodies of finite financial resources, yet they cannot readily withdraw from their central activity of performing particular functions or providing particular services.

Analogies with occupiers

296. It is clear that there are some circumstances in which a statutory authority which has the control and management of land will owe a duty of care to those who use it. So much was held in *Nagle v Rottnest Island Authority* [523] and not disputed in *Romeo v Conservation Commission (NT)* [524] . What remains open to debate is not only the source and the extent of that duty of care, but also the circumstances in which a duty arises.

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[523] (1993) 177 CLR 423 .

[524] (1998) 192 CLR 431 .

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297. In *Aiken v Kingborough Corporation* [525] , the Court held that a statutory authority, in which "the control and management" of a jetty was statutorily vested [526] , was liable for damages for personal injuries because it did not take reasonable steps to warn of a cavity between a pile and the decking into which the plaintiff fell. Three members of the Court (Latham CJ, Starke and McTiernan JJ) considered themselves bound by the decision of the Privy Council in *R v Williams* [527] to hold the authority liable for negligence.

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[525] (1939) 62 CLR 179 .

[526] *Roads and Jetties Act* 1935 (Tas), s 53 .

[527] (1884) 9 App Cas 418 .

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298. For my own part, I doubt that *R v Williams* stood for a proposition that required that conclusion. The question before the Judicial Committee in *R v Williams* was described [528] a s being "whether there was a breach on the part of the Executive Government of that duty which the law would have cast upon private persons maintaining the staiths or wharf and inviting ships to visit them in the same manner in which the Executive Government are shewn to have done". The formulation of the question owes much to the provisions of the *Crown Suits Act* 1881 (NZ) which required that a claim against the Executive Government be founded upon or arise out of a wrong done in, upon, or in connection with a public work for which cause of action a remedy would lie if the person against whom it could be enforced were a subject [529] . It was, therefore, a case that turned upon the provisions of the *Crown Suits Act* and the obligation which a *private* operator of a wharf would owe to a user. It did not hold that, apart from the *Crown Suits Act*, the Executive Government owed a duty of care which required it to act to remove dangers to users of the facilities.

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[528] (1884) 9 App Cas 418 at 427.

[529] (1884) 9 App Cas 418 at 432433 .

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299. In *Aiken* , Dixon J treated the statutory authority as occupier of the jetty: "[t]he control and management of such a structure spells occupation" [530] . His Honour expressed the relevant principle in very general terms. He said [531] :

> "The nature of the body as well as of the place must be considered, but, speaking generally, unless some other intention can be collected from the statute, a duty of care for the safety of those using the place must, I think, be cast upon the

> corporation or trustees by the very situation in which the statute has put them. They are in charge of a structure provided for the use of people who must, in using it, rely upon its freedom from dangers which the exercise of ordinary care on their own part would not avoid. Unless measures are taken to prevent it falling into disrepair or dilapidation or becoming defective, or if it does so, to warn or otherwise safeguard the users from the consequent dangers, it will become a source of injury. The body to which the statute has confided the care and management of the place alone has the means of securing the users against such injury, the risk of which arises from continuing to maintain the premises as a place of public resort and from the reliance which is ordinarily placed upon an absence of unusual or hidden dangers by persons making use of structures or other premises provided for public use."

If the principle which is to be applied were as broad as this, a highway authority having care and management of a road would, subject to questions of breach and causation, be liable for failure to repair it. More recent cases have, however, approached the problem differently.

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[530] (1939) 62 CLR 179 at 203.

[531] (1939) 62 CLR 179 at 205-206 .

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300. In *Schiller v Mulgrave Shire Council* [532] , Barwick CJ identified the source of the duty as the "statutory power and duty of care, control and management and not merely the occupation of land". But it is only in *Schiller* that the existence of a statutory power to take steps which would have avoided the harm which the plaintiff suffered was seen as reason enough to impose a duty of care on the authority to take those steps. In the other cases, some further factor was identified as necessary to the conclusion that a duty should be found. In *Aiken* , that further factor was the analogy drawn with the position of a private occupier of land.

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[532] (1972) 129 CLR 116 at 120.

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301. In *Nagle* , it was said that [533] :

> "the basis for holding that the Board came under a duty of care may be simply stated: the Board, by encouraging the public to swim in the Basin, brought itself under a duty of care to those members of the public who swam in the Basin" [534] .

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[533] (1993) 177 CLR 423 at 430 per Mason CJ, Deane, Dawson and Gaudron JJ.

[534] See also *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 456459 [61][67] per Gaudron J.

302. The reference in *Nagle* to the encouragement which the Board gave to the public to swim in the Basin must be understood in the context in which it appears. Consonant with the then state of authority, the majority in *Nagle* was concerned to identify whether there was a relationship of proximity between the Board and those who lawfully visited the island and resorted to the Basin for swimming. Their Honours concluded [535] that there was a generalised duty of care to take reasonable steps to avoid foreseeable risk of injury. The duty was held to be owed to members of the public who resorted to the Basin to swim. The majority based this conclusion upon a combination of factors: classifying the Board as occupier of the Reserve; the Board's statutory duty to manage and control the Reserve for the benefit of the public; and the encouragement which the Board gave to members of the public to resort to the Basin to engage in the activity in the course of which the plaintiff sustained injury. The concession that the respondent in *Romeo* owed a duty of care reflects the fact that the same features were present in that case.

[535] (1993) 177 CLR 423 at 430.

303. **Following paragraph cited by:**

Shellharbour City Council v Rigby (27 November 2006) (Beazley JA; Ipp JA; Basten JA)

The analogy between a statutory authority having care and management of a structure or facility, and the private occupier of land, is imperfect. Both have power to control the state of the place to which others resort. Both may, in that sense, be said to have the care and management of the place and it may very well be that it is *only* the owner or the statutory authority that has power to remedy any defects in, or remove hazards from, the place or facility in question. But unlike the private owner, the statutory authority cannot wholly bar access to the facility it controls. The public commonly have access to it as of common right. The statutory authority can warn of hazards but, unlike the private occupier, the statutory authority cannot shift responsibility for the detection and avoidance of hazards by exacting special terms from those who enter. The private occupier of land, whether for reasons of economy or ease of mind, may choose permanently to bar access to a dilapidated building rather than repair it. But that choice is denied to the public authority. It cannot permanently bar access to the facility it controls, or at least it cannot do so as readily as can the private owner.

304. Moreover, in most cases the private owner of land will be relatively easily able to inspect that land for sources of danger to likely entrants. The occupier of large remote areas of land confronts much less likelihood of entry by others than the occupier of smaller areas in more frequented parts of the country. But a statutory authority, particularly a highway authority, may be responsible for the care and management of a diverse group of facilities that are spread widely. Although it will ordinarily have employees, they may not be numerous or skilled enough to detect risks. The task of inspecting all of the facilities for possible sources of danger will often be very large. Thus, if analogies are to be drawn, they are even less apt in the case of roads than they may be in relation to a confined, relatively small, structure like a jetty. Roads cannot readily be enclosed. Inspection of roads is a much larger task than inspecting a jetty. Moreover, it cannot be assumed that an authority will always be provided with money enough to employ those who would be needed to carry out the necessary inspections and it, unlike the impecunious private owner of land, cannot resolve the difficulty by selling the facility.

305. Account must be taken of these differences from the position of a private occupier of land in deciding what duty of care a statutory authority owes.

Reliance and vulnerability

306. Reference has been made in some cases to the reliance which a plaintiff, or a class of which the plaintiff was a member, may be supposed to have placed in a defendant taking reasonable care [536] . Reference has also been made to the plaintiff's vulnerability and incapacity to take steps to prevent injury [537] .

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[536] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 464 per Mason J; *Pyrenees* (1998) 192 CLR 330 at 343344 [18] per Brennan CJ, 385388 [157][165] per Gummow J, 408412 [225]-[232] per Kirby J; *Crimmins* (1999) 200 CLR 1 at 2324 [42][43] per Gaudron J.

[537] *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 194 [10]-[11] per Gleeson CJ; *Crimmins* (1999) 200 CLR 1 at 2425 [44] per Gaudron J, 4243 [104] per McHugh J (with whom Gleeson CJ agreed).

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307. **Following paragraph cited by:**

Swan & Baker Pty Limited v Marando (24 July 2013) (McColl and Leeming JJA, Sackville AJA)

For my part, I consider that the concept of "general reliance" is not useful in considering whether a statutory authority owes a duty of care to take positive steps in the exercise of its powers which will serve to prevent injury to persons. In this context (divorced as it is from

the context of negligent misstatements, where *particular* reliance does find a useful place) general reliance is, as Gummow J demonstrates in *Pyrenees Shire Council v Day* [538] , a legal fiction. Everyone "relies", to a greater or lesser extent, on others in society doing what they should. Whenever anyone resorts to facilities which are provided by or at the direction of government, such as water, electricity, gas, roads, or the airways, they rely on the relevant authorities to do their work properly. Few, if any, test the water before drinking it, test the bridge before driving over it, or ask the pilot of the aircraft to challenge every instruction given by air traffic control. To say that in these ways individuals rely on those who provide these services or facilities is to state an observable fact. But to conclude from this observable fact that "therefore" the authority concerned not only is liable to exercise any powers it does exercise with reasonable care, but also is bound to prevent harm to others by positively exercising powers which otherwise it has not chosen to exercise, is to take a much larger step.

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[538] (1998) 192 CLR 330 at 385388 [157][165] .

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308. Nor do I consider that special dependence or vulnerability provides a useful test in deciding whether a statutory authority owes a duty of care. Many statutory authorities are monopolies. Often members of the public have no real choice about whether they use the services provided by an authority. In the sense in which I have just explained "reliance", members of the public very often "rely" on an authority to provide services which they can use safely and they are vulnerable to the consequences if the services provided are not safe to use. In the end, however, the question is whether the fact of reliance or vulnerability is relevant to the inquiry about duty of care. I would reject general reliance and vulnerability as useful analytical tools. Either they are no more than legal fictions or they are descriptions of the nature of the relationship between a statutory authority and a user of the facility or service it provides which add nothing to the conclusion that statutory authorities provide facilities and services to which the public resort as of course and often as of right.

Duty of care or breach of duty?

309. **Following paragraph cited by:**

Amaca Pty Ltd v Werfel (21 December 2020) (Kourakis CJ; Nicholson and Livesey JJ)
Swan & Baker Pty Limited v Marando (24 July 2013) (McColl and Leeming JJA, Sackville AJA)
Caltex Refineries (Qld) Pty Ltd v Stavar (31 August 2009) (Allsop P at 1; Basten JA at 149; Simpson J at 242)
Adeels Palace Pty Ltd v Moubarak (26 February 2009) (Beazley JA; Giles JA ; Campbell JA)
Amaca Pty Ltd v AB & P Constructions Pty Ltd (29 August 2007) (Giles JA; Ipp JA ; Basten JA)

It might be said that the various considerations which I have mentioned as difficulties in drawing analogies between a statutory authority and private occupier should be taken into account in deciding whether there has been a breach of a duty of care, rather than in deciding whether there is a duty. In choosing between an outcome based in breach rather than duty it is as well to remember, however, that experience suggests that dealing with factors tending against the imposition of liability at the level of breach rather than duty will lead more often than not to a finding of liability. In hindsight, the steps which could (and, it will be said, should) have been taken by a defendant appear so much more obvious than they might have, had the matter been considered as a hypothetical future possibility. For that reason alone, shifting the focus to breach rather than duty will inevitably shift the balance in favour of plaintiffs and against defendants. That is not reason enough to refuse to take the step, but it is a consequence which must be recognised.

310. There are some further matters, special to statutory authorities, which make it inappropriate to deal with factors tending against the imposition of liability at the level of breach rather than duty. Curial review of decisions made by bodies performing public duties is based on a considerable level of deference to the decisionmaker. The nature of the review which courts may undertake is itself a question of law. In itself this suggests that deciding how those decisions are to be examined in an action for negligence is a question about duty of care, not a factual and evidentiary question about breach. In public law, decisions may be examined for error of law but, statute apart, there is no review of the merits of decisions made by such bodies. The closest the courts come to such a review is what is usually called *Wednesbury* unr easonableness [539] , where the test is whether the decision is so unreasonable that no reasonable decisionmaker could have made it. What the *Wednesbury* test reflects is that the courts are not well placed to review decisions made by such bodies when, as is often the case, the decisions are made in the light of conflicting pressures including political and financial pressures. The *Wednesbury* test is very different from the test which must be applied in an action for negligence. The content of the objective standard which negligence requires, by its reference to "reasonable" care, is not readily identifiable in the case of a public body exercising public functions. It is not enough to say that the standard of care is that of the "reasonable authority in a similar position". That does not offer any guidance about how the court is to resolve the competition between the various factors which a statutory authority could properly take into account, for example, in ordering its priorities or allocating its budget.

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[539] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

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311. It might be said that this competition need not be resolved. That is, it might be said to be enough to demonstrate negligence, to show that the failure to take action did not follow from any of a range of reasonably available ways in which an authority might order its priorities. But that invites attention to the identification of the matters which properly can be taken into account by a public authority. In particular, can the courts, or as I would rather put it, should the courts, attempt to resolve issues which often enough are resolved by the application of *political* not *legal* considerations? It is important to recognise that most (if not

all) questions about a *failure* to exercise powers will invite attention to issues of the kind just mentioned. Almost invariably the question why did an authority *not* exercise its powers in a particular respect will be met by an answer that the authority had chosen to allocate its available resources in some other way or to some other activity. Whether it was reasonable, as opposed to patently unreasonable, for the authority to do that would then require examination of, and adjudication upon, what I have described as political considerations. The fact that these questions would arise very frequently and could not be avoided in considering any question of breach of a duty of a statutory authority to exercise its powers, are further powerful reasons to address the problem at the level of duty, not breach.

312. So, for example, to examine the way in which a highway authority (or any statutory authority) chooses to deploy its resources in performance of some or all of its various functions necessarily involves examining the choices made by that authority. Those choices may be between repairing one section of road rather than another, between building a new road rather than inspecting or repairing others, or between spending money on libraries or services for home care of the aged rather than on the roads of the municipality. How are the courts to decide whether the choice made by one authority was reasonable? What is meant, in this context, by reasonable? What kind of authority is to be taken as the benchmark? Is it relevant to know what political pressures an elected body, such as a local council, faced when it prepared its budget? Does it matter if the authority receives much of the money it spends on roads from funds provided by the federal government under State grants legislation? These are questions which lie behind the distinction which it has been sought to draw between operational and policy matters [540] . Their importance goes much deeper, however, than any such distinction. They are important questions because of the public or community nature of the functions which authorities like highway authorities perform.

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[540] *Pyrenees* (1998) 192 CLR 330 at 393 [182] per Gummow J; *Crimmins* (1999) 200 CLR 1 at 101 [292] per Hayne J.

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313. A claim for damages for breach of some duty owed to an individual invites attention to the particular and often peculiar circumstances of that individual. By contrast, the performance of *public* duties will almost always call for the making of broad judgments about which individuals may differ. The two kinds of duty, one particular and owed to an individual, and the other general and calling for assessment of myriad competing pressures, do not readily coexist, *except* in the case where the authority chooses to exercise its powers. Then, it is possible to accommodate the two duties. By contrast, however, the imposition of a duty to act in relation to a particular case where, as events turn out, failure to act has affected an individual, does not find any easy accommodation with the general obligation of an authority to fulfil its public obligation of providing, as best it can, a service or facility for communal use.

314. The various matters I have mentioned invite attention to the role duty of care should play in the tort of negligence. Duty of care is an important control mechanism in providing "symmetry, consistency and defined bounds" [541] to the law of negligence. It is one of the "major premises [of this area of law] which, if unqualified, may extend liability beyond the bounds of social utility and economic sustainability" [542] . As Professor Stapleton has

pointed out, duty of care "allows courts to signal … relevant systemic factors going to the issue of liability"[543]. If there are factors that operate generally to deny liability, they should be taken into account at the stage of deciding whether there is a duty. The duty concept should not be discarded as if it were no more than a fifth wheel on the coach [544] .

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[541] *Hargrave v Goldman* (1963) 110 CLR 40 at 63 per Windeyer J.

[542] *Pyrenees* (1998) 192 CLR 330 at 376 [125] per Gummow J.

[543] "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence", (1995) 111 *Law Quarterly Review* 301 at 303.

[544] *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 75 ALJR 164 at 182 [99]; 176 ALR 411 at 436.

Finding a duty of care

315. The tort of negligence is not intended to provide universal protection against the consequences of injury. The basic purposes of the law in this area include promoting reasonable conduct and reflecting fundamental notions of individual responsibility. But the pursuit of those purposes, in the case of statutory authorities, must accommodate not only the fact that authorities are the creature of legislation, but also the fact that authorities of this kind fulfil public functions.

316. It can readily be accepted that the search for a principled basis, or bases, upon which a duty of care will be found to exist is a search that continues. We have seen the rise and fall of notions of proximity, and of general reliance. We have seen reference to vulnerability, to encouragement, and to openended statements of conclusion like the threepart incantation said to derive from *Caparo Industries Plc v Dickman* [545] . None has proved a satisfactory explanation of what it is that has moved the debate in a particular case to the conclusion that was reached. We have, at least for the moment, retreated to what is thought to be the safe haven of incremental development, perhaps hoping that, in time, a unifying principle or principles will emerge [546] .

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[545] [1990] 2 AC 605 at 618.

[546] *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

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317. The incremental approach to ascertaining the existence of a duty of care has two consequences. First, there is a temporal consequence. As Gummow J pointed out in *Crimmins v Stevedoring Industry Finance Committee* [547] , recovery becomes an accident of history dependent upon when, in the development of the common law, the claim falls for

consideration. That might be said to be no more than an inevitable consequence of the common law's adoption of reasoning by analogy. Second, however, there is an expansionary consequence. The process of incremental development is, essentially, one of extending the range of circumstances in which a duty will be found to exist. Further, if the process of finding a duty of care in novel circumstances depends upon drawing analogies with existing cases, there is a question about what it is that makes the case in question sufficiently analogous to past cases to warrant finding a duty. Even incremental steps require implicit reference to some general principles.

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[547] (1999) 200 CLR 1 at 59 [160] .

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318. **Following paragraph cited by:**

Talbot & Olivier (A Firm) v Witcombe (26 May 2006) (Steytler P)

As I have said, however, the search for some unifying principle or principles which will explain why an analogy has been drawn with previous authority in some cases but not others has so far proved unsuccessful. All that emerges is that foresight of harm, and capacity to avoid it, has been said not to be enough. "Something more" must be found. If, however, the expansion of duty of care continues on its current path, foresight of harm and capacity to avoid it will become the only criteria which underpin the imposition of a duty of care. In that event, duty of care would serve no purpose in identifying the cases in which liability is to be found. The only questions would be whether a defendant in fact acted without reasonable care, or failed to act when it would be reasonable to do so, and whether that act or omission was a cause of the plaintiff's loss or damage.

319. The hope that an incremental approach will reveal some unifying principle or principles may, therefore, very well prove ill founded. If it does, it will be because the roots which lie beneath the development of this area of the law are so ill defined that they do not enable the growth of sturdy branches, only a mass of little twigs which give no suitable shape to the plant. Those roots can be seen in necessarily diffuse notions of individual responsibility and deterrence. The difficulty is compounded by the fact that, diffuse as these notions are, they must compete with other notions also said to lie beneath this field, such as loss distribution.

320. The choice which now must be made is whether foresight of harm and capacity to avoid it are to be held sufficient to found a duty of care, or whether more must be shown. Are we now to conclude that the possession of *power* in a statutory authority, coupled with reasonable foresight of harm, will suffice to oblige it to exercise its powers if, viewed with the clarity of hindsight, it was reasonable for it to do so to avoid the harm which has befallen a plaintiff?

321. That would be a coherent and readily intelligible principle for the ascertainment of a duty of care. On its face it would seem, however, to be a principle of general application, applying

not only to statutory authorities but to all persons. It would, therefore, be a duty which would oblige the passerby to rescue others from harm if they could reasonably do so. In the biblical allusion of Lord Atkin, no longer could one pass by on the other side. The courts have always resisted taking this step. I do not consider that we should take it now.

A different approach for statutory authorities?

322. Perhaps it might be said that such a step could, and should, be taken in the case of statutory authorities, and confined in its application to bodies of that kind. But that assumes that statutory authorities are, because of their statutory origin or public functions, not only to be treated differently from private persons, but are to be subjected to wider duties of care than private persons (notwithstanding the absence of a statutory basis for this wider liability, and the wide range of policy issues such authorities have to consider).

323. I can readily accept that the duties of care of statutory authorities may be different from those of private persons. The statutory origins and public nature of the functions of statutory authorities are important distinguishing features. But effect is not to be given to those distinguishing features by imposing on statutory authorities a duty to act whenever there is power to act and foresight of harm, and it would be reasonable to act. The imposition of such a duty should be a legislative decision made in relation to each particular statutory authority, not a judicial decision applying to all such authorities.

324. To impose a duty to act would depart from what has hitherto been generally accepted to be the common law, not only in relation to highway authorities but statutory authorities generally. It may be readily accepted that the common law in relation to highway authorities has been anything but clear and that its foundations in principle are, at best, obscure. I do not accept, however, that this requires or permits the recasting of the common law by imposing on a highway authority a duty to act whenever there is power to act and foresight of harm, and it would be reasonable to act. There can be little doubt that some State Parliaments have acted on the basis that, whatever may be the obscurity of the present law, highway authorities are, in general, not liable for failing to exercise their powers, but are liable if they exercise their powers negligently. Inquiries by State law reform agencies have been commissioned but their reports have not been implemented[548]. In these circumstances, the development of the common law in relation to authorities of this kind should accommodate that understanding of the law as far as it is possible to do so. That accommodation must, of course, take account of any statutory provision to the contrary. As a general rule, however, the duty which a highway authority will owe is a duty to take reasonable care when it exercises its powers. So long as the common law stops short of imposing a duty of care on any person who has power to act and foresight of harm, and for whom it would be reasonable to act, no such duty of care should be found to be owed by a highway authority.

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[548] New South Wales, Law Reform Commission, *Liability of Highway Authorities for NonRepair*, Report No 55, (1987); Western Australia, Law Reform Commission, *Repo rt on the Liability of Highway Authorities for NonFeasance*, Project No 62, (1981); South Australia, Law Reform Committee, *Twenty-fifth Report of the Law Reform Committee of South Australia to the AttorneyGeneral on Reform of the Law Relating to Misfeasance and NonFeasance*, (1974).

Negligence and breach of statutory duty

325. It is desirable to say something further at this point about the intersection between asking whether a statutory authority owes a common law duty to act, and the inquiries that underpin a finding that a private action will lie for breach of statutory duty. If a statutory authority has a duty, imposed by statute, to perform some function or carry on some activity, it will usually be readily apparent that the function or activity is to be performed for the advantage of some or all members of the community. As McHugh and Gummow JJ pointed out in *Byrne v Australian Airlines Ltd* [549] , deciding whether a breach of a statutory duty gives rise to a civil remedy for damages at the suit of an individual is not assisted by references to the "intention" of the legislature. Nor, as Kitto J pointed out in *Sovar v Henry Lane Pty Ltd* [550] , can a finding of private right be made by judges giving effect to their own ideas of policy which then are to be imputed to the legislature.

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[549] (1995) 185 CLR 410 at 458459 .

[550] (1967) 116 CLR 397 at 405.

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326. Rather, reference must be made [551] to "the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, *the preexisting state of the law*, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation" (emphasis added). Ordinarily, the more general the statutory duty and the wider the class of persons in the community who it may be expected will derive benefit from its performance, the less likely is it that the statute can be construed as conferring an individual right of action for damages for its nonperformance. In particular, a statutory provision giving care, control and management of some piece of infrastructure basic to modern society, like roads, is an unpromising start for a contention that, properly understood, the statute is to be construed as providing for a private right of action.

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[551] *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405.

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327. The conclusion that a particular statute does not provide for a private action for failure to perform some statutory duty is itself a powerful reason for pausing before finding that there is a common law duty to exercise that power. The several considerations which may lead to the conclusion that no private action should lie for breach of statutory duty seem to me to suggest in many, perhaps most, cases that there is not that degree of particular contemplation of the position of individuals, of whom the injured plaintiff is one, which should be necessary before finding that there is a common law duty of care.

A highway authority's duty of care

328. As I have said above, a highway authority, like any other repository of statutory powers, owes a duty of care in the actual exercise of its powers. It should not be held that it does not owe a common law duty of care to those who suffer injury because it did *not* exercise its powers.

329. Formulating the duty of care in a way which distinguishes between an authority exercising its powers and it failing to do so carries some difficulties with it that must be addressed. When it is recognised that the relevant inquiry is about duty of care, not about breach or immunity from liability, at least some of those questions may prove to be irrelevant.

330. One apparent difficulty which should be addressed is what Fullagar J identified in *Gorringe* as the corollary to the theorem of no duty to repair: that a highway authority owes no duty to individuals to be careful in care and management of its highways. Provisions that a highway authority "shall have the care, control and management" of certain roads are not uncommon [552] .

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[552] For example, *Local Government Act* 1919 (NSW), s 249 .

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331. Provisions of that kind might be construed as imposing a statutory duty of care and management and, if that is so, why should the authority not be found to owe a duty to take reasonable care in the way in which it manages the roads under its control? Moreover, should not considerable weight be given to the fact that a highway authority *does* control the state of the roads under its management [553] ?

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[553] cf *Modbury* (2000) 75 ALJR 164; 176 ALR 411.

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332. On analysis, however, considering the power, or duty, of a highway authority to care for and manage its roads is to consider the problem at too broad or abstract a level of inquiry. In order to understand the content of the duty which it is alleged has been broken, it is necessary to examine exactly what it is said that the authority is alleged to have done, or not done, in caring for and managing the particular road, or section of road, in issue. Only then can the content of the duty be identified [554] . Examining the matter at the more general level of care and management of all its roads may serve only to obscure the fact that the authority has *n ot* exercised any power in relation to the road or section of road in issue.

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[554] *Modbury* (2000) 75 ALJR 164; 176 ALR 411.

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333. Given the way the law in relation to highway authorities has developed, it may be thought that there remains some question about whether an authority is to be taken to have acted as a highway authority or in some other capacity. But that, on examination, can be seen to be irrelevant. If an authority having responsibility for drainage and for road making, installs a drain cover in a road and, over time, the surrounding road surface is eroded to such an extent that an accident is caused, the authority will be liable for failure to repair if, and only if, it owed a duty to the individual road user to exercise its power to repair. If that inquiry begins, as I consider it should, from the proposition that the authority owes no common law duty to individual road users to repair the highway, what is it that would lead to imposition of a duty to repair the surrounds of the drain cover? A statutory duty of care and management, whether of the road, the drain, or generally the infrastructure in the area, will not found such a duty of care.

334. Further, if the focus is on negligent exercise of power, the same nicety of distinction between misfeasance and nonfeasance as has been exhibited in the past course of authority may not persist. The question will be what is the power which has been exercised and exercised without reasonable care. It is not a more abstract question cast in terms of misfeasance and nonfeasance that is divorced from identification of a power upon which the authority is alleged to have acted in a particular way.

335. No different result should follow from casting the claim as a claim in nuisance rather than negligence. There is much to be said for the view that nuisance should be confined to claims alleging interference with a plaintiff's enjoyment of rights over land, and not applied to secure enforcement of public duties. It may well be, however, that it is now too late to attempt to confine nuisance in that way. Nevertheless, there is certainly no occasion to extend the reach of nuisance. No action for nuisance should lie where the plaintiff's complaint is founded upon the failure of a statutory authority to exercise its powers and an action for breach of statutory duty or negligence would not lie.

336. Despite directing attention to the identification of the duty which it is said has been broken, the law relating to the liability of highway authorities may well remain uncertain in its application at trial level because of the difficulty of distinguishing between actions and omissions. The solution to that problem lies in the hands of the legislatures, not the courts. It is the legislatures which create the authorities. It is they who provide for the powers, duties and resources of the authorities. It is they who can most readily regulate when and to what extent individuals who suffer injury may recover from the authorities concerned.

337. I turn then to deal with the particular applications.

Scott Munn Brodie & Anor v Singleton Shire Council

338. In this matter the question of the respondent's breach of duty of care would turn on whether it had exercised its power to repair the bridge without reasonable care. It is, however, not necessary to resolve that question. The difficulty which the applicants face is that, despite a warning sign to the contrary, the first applicant drove a heavily laden truck over the bridge immediately before the one which gave way under the load. While he did so because he had seen that other similar trucks had passed over it safely, it is still the case that he failed to observe the warning which was posted there. That being so, I do not accept that he

demonstrated that any want of care on the part of the respondent was a cause of what happened. It follows that in this matter I would grant special leave to appeal, but order that the appeal be dismissed with costs.

Catherine Ghantous v Hawkesbury City Council

339. I agree with Callinan J that no arguable case of want of care by the respondent was established. I would again grant the application for special leave, but order that the appeal be dismissed with costs.

CALLINAN J.

Catherine Ghantous v Hawkesbury City Council

Case history

340. The applicant, a woman of 63 years of age, on 10 July 1990, fell, after stepping from a concrete footpath on to an earthen verge in Kable St at Windsor in New South Wales. The concrete footpath was 1.2 m wide. The areas on either side of it had been earlier turfed. Traffic, wind and water had eroded the verges so that the earthen surface had subsided to a level about 50 mm or so below the level of the concrete strip. The applicant had seen two other women walking toward her. To allow them to pass she stepped to her right. She then fell "because her foot landed partly on the concrete strip and partly overhanging the lower earth surface". She suffered injuries in the fall in respect of which she claimed damages in the District Court of New South Wales.

341. A footpath had first been constructed in the location of the current one about 40 years earlier. No complaint had been made about it or the state of the concrete strip and verges which replaced it.

342. In 1984 the respondent Council, in whose local government area Windsor is situated, closed George St just around the corner from Kable St to create a pedestrian mall, and extended the paving of the new mall a short distance down Kable St. That paving extended from kerb to building alignment for some 2.5 m. A shopping centre and parking lot were also constructed at the other end of the footpath in Kable St and were opened for business a year later in 1985.

343. There was evidence that the stretch of narrow concrete was almost the only narrow stretch left in the central business district of Windsor. The shopping centre and the mall inevitably generated some increased pedestrian traffic but that had occurred to a relatively limited extent only.

344. In the originating proceedings the applicant sued the architects and landscape designers who were responsible for the design of the mall as well as the respondent Council. The case against the last was put principally upon the basis that it had failed to ensure that the design and construction of the mall were not such as to cause soil erosion of the kind that had occurred. The other two defendants were alleged to have been similarly negligent in designing, and in the case of the landscape designers, in the construction also of the mall. One particular of negligence alleged against the respondent was in this form:

> "The [respondent] … [k]new or should have known that the redesign and reconstruction work involved in the Shopping Centre, Mall and consequent reconstruction of the Footpath and Guttering would lead to increased pedestrian usage of the area of the Footpath in question and its surrounds."

345. The applicant also pleaded that the respondent had committed a nuisance in causing or allowing the verges to deteriorate. The respondent denied that it had been negligent in any way and that the applicant was entitled to the relief sought. The respondent also pleaded that the applicant's injuries were caused or contributed to by her own negligence, in failing, in effect, to look where she was walking.

346. The case against the other defendants at the trial was shown to be unsustainable: it was clearly established and accepted by the applicant that there was no such increase in water flowing from the mall as to cause erosion of the verge where the applicant fell. Judgment was entered for those defendants.

347. The trial judge found that the combination of erosion and increased foot traffic between the mall and the parking station and the shopping centre acted upon the grass verges of the footpath to cause weathering and the subsidence that had taken place on either side of the concrete strip.

348. An expert called by the respondent at the trial gave evidence that it was poor maintenance to allow the surfaces alongside the concrete strip to deteriorate to the extent to which they had, and that in their current condition they were a hazard to a person stepping, as the applicant did, to one side.

349. The applicant submitted at the trial (to preserve her rights on appeal) that there was no longer, or there should no longer be, a distinction between non-feasance and misfeasance and that as a highway authority the respondent should be liable for both.

350. In argument at the trial the applicant had submitted that the mall generated additional foot traffic to the extent that the natural and necessary consequence of that traffic was the erosion of verges giving rise to the difference in levels which was the hazard to which the applicant fell victim. The trial judge posed for himself this question: "Could Council's failure to keep the [verges] in adequate repair or, with foresight to avoid such degeneration by laying an adequate footpath be said to be a misfeasance?"

351. His Honour declined to distinguish between a footpath and the vehicular carriageway. The former was part of the road. It was unnecessary for his Honour to deal with the respondent's case that it had not been negligent and that the applicant's fall was caused by her own negligence. His Honour answered the question that he had posed for himself by holding that this was a case of non-feasance and he was accordingly bound to dismiss the applicant's action.

In the Court of Appeal of New South Wales

352. An appeal to the Court of Appeal of New South Wales (Handley, Powell and Giles JJA) was dismissed[555]. Powell JA (with whom the other members of the Court agreed) did not doubt that the works on the footpath were carried out in a proper and workmanlike manner [556] . H is Honour noted that there was no obligation upon road authorities to monitor roads and that an immunity in this respect negated a general duty to repair, and further, any specific

obligations to exercise care with respect even to known dangers. His Honour's reasons included this [557] :

> "[T]he law is clear that, in order that it might be charged with misfeasance, a road authority must have been an active agent in creating, or adding to, an unnecessary danger in the highway (see, for example, *Buckle v Bayswater Road Board* [558] ; *Bretherton v Hornsby Shire Council* [559]) and the findings of fact made by Freeman DCJ demonstrate clearly that the respondent has taken no action in relation to the footpath at the site of the accident which created or added to an unnecessary danger."

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[555] (1999) 102 LGERA 399 .

[556] (1999) 102 LGERA 399 at 402.

[557] (1999) 102 LGERA 399 at 420.

[558] (1936) 57 CLR 259 .

[559] (1963) 63 SR (NSW) 334 .

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353. The applicant had also argued on the appeal as she had at the trial, that the footpath was not part of the road and that any immunity that a road authority enjoyed did not extend to it. The submission was made without reference to the *Local Government Act* 1919 (NSW) ("the Act"). It was rejected on the basis that authority [560] supported the conclusion that a footpath formed part of the road reserve and that an immunity for non-feasance extended to it. The appeal was dismissed and a cross-appeal on an issue as to costs with which this Court is not concerned was upheld.

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[560] *Buckle v Bayswater Road Board* (1936) 57 CLR 259; *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357; *Grafton City Council v Riley Dodds (Australia) Ltd* (1955) 56 SR (NSW) 53.

The application to this Court

354. An application for special leave was made to this Court.

355. **Following paragraph cited by:**

Warren v District Council of the Lower Eyre Peninsula (21 August 2025) (Livesey P; Bleby and David JJ)

Hornsby Shire Council v Salman (27 June 2024) (White and Adamson JJA, Basten AJA)
Hornsby Shire Council v Salman (27 June 2024) (White and Adamson JJA, Basten AJA)
Aluabaid v Kilani (24 June 2022) (Loukas-Karlsson and Rangiah JJ; McWilliam AJ)
Malone Obh of Western Kangaulu People v State of Queensland (01 October 2021) (Rangiah, White and Stewart JJ)
Wollongong City Council v Williams (09 July 2021) (McCallum JA, Simpson AJA and Adamson J)

> 61. Mr Sexton argued that the step could be seen and that, accordingly, a person in the respondent's position who was taking reasonable care for his or her own safety would have detected the step and would not have fallen. He submitted that a pedestrian in the respondent's position who was taking reasonable care for his or her own safety would do more than merely survey the path from the carpark and assume that it sloped steadily as if it were a ramp rather than a stepped pathway. He contended that such a person would review the state of the pathway at regular intervals to ascertain whether there were steps or other hazards in the immediate path, particularly in circumstances where part of the pathway was in shade. He submitted that the question was to be determined as a matter of fact which did not require expert evidence. He argued that the trial judge was not obliged to accept the expert evidence in circumstances where the presence of a step was a matter of "ordinary observation" and not one which called for expert opinion: *Brodie* at [355] (Callinan J) .

Council of the City of Sydney v Bishop (28 June 2019) (Basten, Macfarlan and Brereton JJA)
Eutick v City of Canada Bay Council (03 March 2006) (Giles and Ipp JJA, Campbell AJA)
Pascoe v Coolum Resort Pty Ltd (23 September 2005) (Jerrard and Keane JJA and Cullinane J,)
Sutherland Shire Council v Henshaw (10 December 2004) (Sheller, Hodgson and Bryson JJA)
Sutherland Shire Council v Henshaw (10 December 2004) (Sheller, Hodgson and Bryson JJA)
Makita (Australia) Pty Ltd v Sprowles (14 September 2001) (Priestley, Powell and Heydon JJA)

> 89. In the course of argument on the appeal, attention tended to be directed to particular aspects of Professor Morton's evidence in isolation. Though Professor Morton's views often go to ultimate issues, they are not on that ground inadmissible: *Evidence Act* 1995 (NSW) s 80 . However, even though Professor Morton's evidence was uncontradicted, the trial judge was not bound to accept it, and nor is this Court, particularly where it was on ultimate issues: *Brodie v Singleton Shire Council* (2001) 75 ALJR 992 at [355] per Callinan J . Counsel for the plaintiff correctly said that an assessment of the merits of Professor Morton's evidence called for consideration of it in detail and as a whole.

David Jones Ltd v Bates (20 July 2001) (Heydon JA, Davies AJA and Young CJ in Eq)

In my opinion the application should fail at the outset. The respondent has not abandoned its contention that it was not negligent, whether as a highway authority or otherwise[561]. Even if I were to assume that an action in negligence lay against the respondent for any failure to maintain or improve the footpath to keep or make it safe, whether as a matter of misfeasance or otherwise, I would conclude that there was no failure in that regard because the footpath was not, despite what the expert witness was allowed to say, unsafe. The case of the applicant in negligence was that a differential in height between the concreted part of the footpath and the earthen part of it created a dangerous situation. A court is not obliged to accept an expert, especially when his or her evidence is evidence purportedly resolving and concluding an issue of the kind which arose here [562] . A court is not bound to accept that a matter of ordinary observation such as the readily apparent state of the footpath is a matter calling for expert opinion. But in any event the expert's opinion (uncontradicted as it was) did not go so far as to say that the "poor maintenance" which caused the "hazard" actually caused one of such a nature that to leave it unrectified was negligent. There was no concealment of the difference in height. It was plain to be seen. The world is not a level playing field. It is not unreasonable to expect that people will see in broad daylight what lies ahead of them in the ordinary course as they walk along. No special vigilance is required for this. The applicant herself admitted in cross-examination that she knew before the day of the accident that the earthen surface was lower than the concrete surface. The photographs tendered at the trial clearly show that there was a discernible difference between the kerb and the earthen verges. There was no negligence on the part of the respondent either in the construction of the footpath or in not keeping the concrete strip and verges level.

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[561] Respondent's submissions, pars [4] and [5].

[562] *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 306 [110] , fn 137.

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356. In deference to the other arguments of the applicant I will say something briefly about them. The first of these was again that the footpath was an area apart from the road and was not something to which the law relating to road

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[563] "'**Pathway**' means a public road provided for the use only of foot passengers and of such classes of vehicles as may be defined by ordinance."

[564] "'**Road**' means road, street, lane, highway, pathway, or thoroughfare, including a bridge, culvert, causeway, road-ferry, ford, crossing, and the like on the line of a road through or over a watercourse."

[565] "'**Public road**' means road which the public are entitled to use, and includes any road dedicated as a public road by any person or notified, proclaimed or dedicated as a public road under the authority of any Act, including this Act, or classified as a main road in the Gazette of the thirty-first day of December, one thousand nine hundred and six."

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authorities applied. The inclusive definitions in s 4 of the Act , however, of "Pathway"[563], "Road"[564] and "Public road"[565] provide a complete answer to this.

357. The legal question that was argued was that the respondent owed a duty to the applicant to make the footpath safe (on the assumption that it was unsafe at the material time).

358. The applicant submitted that although the respondent pursuant to s 240(1)(a) [566] of the Act h ad power to, but was not obliged to construct and maintain roads, *Buckle v Bayswater Road Board* [567] stands as authority for the proposition that a positive obligation may be inferred from statutory provisions apparently permissive in language. However, the sections of the Act upon which the applicant relies in this case are the same as those referred to by the applicant in *Brodie v Singleton Shire Council* [568] . They do not, as I point out in that case, have the effect for which the applicant here contends. Both *Buckle* and *Gorringe v The Transport Commission (Tas)* [569] have been consistently applied in all the States [570] . I do not think that it is for this Court to devise a different rule which could have financial and other ramifications far beyond those of which this Court might be aware.

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[566] "**Power to construct and improve roads**

240(1) The council may construct improve maintain protect repair drain and cleanse any public road, and in particular and without limitation of any other power conferred by this Act the council may in respect of any public road:

(a) construct improve maintain repair and cleanse the road with such materials and in such manner as the council thinks fit …"

[567] (1936) 57 CLR 259 .

[568] See *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357.

[569] (1950) 80 CLR 357 .

[570] See, in Queensland – *Commissioner of Main Roads v O'Ryan* (1992) 78 LGERA 387; ACT – *Watts v Australian Capital Territory* (1997) 139 FLR 8; Victoria – *Transport Accident Commission v Shire of Corangamite* unreported, Supreme Court of Victoria, 29 April 1998; South Australia – *McIntyre v Ridley District Council* (1991) 56 SASR 343; Western Australia – *Hennessey v City of Fremantle* (1995) 12 SR (WA) 360; Northern Territory – *Hatch v Alice Springs Town Council* (1989) 100 FLR 56.

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359. The applicant also submitted that she was a person within the class of persons to whom a duty was owed as formulated in *Pyrenees Shire Council v Day* [571] .

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[571] (1998) 192 CLR 330 .

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360. In support of this proposition the applicant relied in particular on a passage in the judgment of Gummow J [572] :

> "The general rule is that 'when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered' [573] . A public authority which enters upon the exercise of statutory powers with respect to a particular subject matter may place itself in a relationship to others which imports a common law duty to take care which is to be discharged by the continuation or additional exercise of those powers [574] . An absence of further exercise of the interconnected statutory powers may be difficult to separate from the exercise which has already occurred and that exercise may then be said to have been performed negligently [575] . These present cases are of that kind. They illustrate the broader proposition that, whatever its further scope, Lord Atkin's formulation in *Donoghue v Stevenson* [576] includes 'an omission in the course of positive conduct ... which results in the overall course of conduct being the cause of injury or damage' [577] ."

In my opinion *Pyrenees* cannot be regarded as an authority governing this case. It was not concerned with the use and maintenance of roads. No matter what might be thought of the singling out for special treatment in law of what road authorities may or may not do in relation to roads, without rendering them liable to users of them, the distinction between roads and other works is very well entrenched in this country. Legislatures in expressing the powers and duties of road authorities to construct and maintain roadworks must have been well aware of this. As Latham CJ said in *Buckle* [578] : "[T]he rule of non-liability for non-feasance in the case of a highway authority must be regarded as fully established." And Dixon J in the same case said [579] : "But the existence of such powers gives rise to no civil liability for the consequences of the defective state of a road."

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[572] (1998) 192 CLR 330 at 391-392 [177] .

[573] *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 220 ; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 436, 458, 484.

[574] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 459-460 .

[575] cf *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 479 ; *Fellowes v Rother District Council* [1983] 1 All ER 513 at 522 ; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 763.

[576] [1932] AC 562 at 580.

[577] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 501.

[578] (1936) 57 CLR 259 at 269.

[579] (1936) 57 CLR 259 at 281.

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361. There are further real points of distinction between this case and *Pyrenees* : the statutory framework governing the Council's powers in issue there as summarised by McHugh J [580] w as quite different from the way in which Councils' powers in respect of roads are expressed and have been understood and construed in the cases. Furthermore the Council there had actual knowledge of the dangers that the premises which had been inspected by it presented.

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[580] (1998) 192 CLR 330 at 371-372 [112] .

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362. In *Buckle*, Dixon J re-examined many of the earlier cases in which the extent of a highway authority's obligations and the availability of a defence of non-feasance were considered. Some of these cases might be properly regarded as cases of nuisance rather than of negligence. Indeed *Buckle* itself may have been such a case, although the narrative in the report refers in terms to negligence [581] . Their Honours who decided *Buckle* would have been alive to the different elements of the torts. The statements of principle were, however, unqualified and establish that a highway authority will not be liable for non-feasance for roadworks whether what has occurred has resulted from negligence or nuisance properly so called.

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[581] (1936) 57 CLR 259 at 260.

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363. It is true that the distinction between non-feasance and misfeasance has often been criticised. Some of these criticisms were echoed in the submissions [582] of the applicants in *Brodie v Singleton Shire Council* which was argued at the same time as this case, that the distinction between misfeasance and non-feasance has led to the drawing of fine distinctions between roadworks and other works on or about them. So much may be accepted but that is no more than to say that such cases [583] are no different from many other cases in tort, in which difficult questions of fact have to be answered. It should not be overlooked that in this

country road authorities are called upon to construct and maintain roads over vast distances and at great cost, roads whose use is not necessarily confined to those who pay for them. This is no doubt a powerful policy consideration operating on the minds of legislators in enacting legislation in respect of road authorities.

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[582] *Buckle*, it was argued, ultimately turned on whether the drain in question was related to the road or had both a road and non-road function. See also *Tickle v Hastings Shire Council* (1954) 19 LGR 256, a decision of the Supreme Court of New South Wales upholding a jury verdict on facts similar to this case. In *Kirk v Culcairn Shire Council* (19 64) 64 SR (NSW) 281, a different conclusion on not dissimilar facts was reached. See further Law Reform Commission of Western Australia, *Report on the Liability of Highway Authorities for Non-feasance*, Project No 62, (1981) at 48.

[583] See, for example, *Tickle v Hastings Shire Council* (1954) 19 LGR 256; *Kirk v Cul cairn Shire Council* (1964) 64 SR (NSW) 281; *McDonogh v Commonwealth of Australia* (1985) 9 FCR 360; *Hill v Commissioner for Main Roads* (1989) 68 LGRA 173 at 179-180 per Samuels JA; Law Reform Commission of Western Australia, *Report on the Liability of Highway Authorities for Non-feasance*, Project No 62, (1981) at 48; New South Wales Law Reform Commission, *Liability of Highway Authorities for Non-Repair*, Report No 55, (1987), par 2.11.

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364. That the rule and the distinction may have been heavily criticised does not avail the applicant. The legislature here has not chosen to abolish or change the rule as has occurred, for example, in the United Kingdom where the Parliament there passed the *Highways Act* 1980 (UK) to impose a duty to maintain highways at public expense (s 41) upon road authorities, and to prescribe the conditions for a successful defence to an action by such an authority (s 58). This is a case of deterioration over time of works which were not originally improperly designed or executed and of a kind to which Dixon J referred in *Buckle* [584] as not giving rise to any civil liability on the part of the respondent.

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[584] (1936) 57 CLR 259 at 284-285 .

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365. Non-feasance by a Council empowered, but not obliged, to monitor roadworks as the respondent was, is not actionable by a person injured as a result of it in this country.

366. I would allow the application for special leave to appeal and dismiss the appeal with costs.

Scott Munn Brodie and Anor v Singleton Shire Council

Case history

367. This and the application for special leave in *Ghantous v Hawkesbury City Council* were argued at the same time. The facts may be shortly stated. On 19 August 1992, the first applicant drove a truck which was owned by the second applicant on to a bridge constructed within the respondent's locality some 50 years earlier. It was designed to bear a load of 15 tonnes. The truck weighed 22 tonnes. The first applicant a short time before approaching the bridge in question had safely driven the truck across another bridge on the same road which had been signposted as having a capacity of 15 tonnes only. The timber girders of the second bridge failed and it collapsed. The truck fell to the creek bank below. The truck was damaged and the first applicant injured. The applicants sued in the District Court of New South Wales. The case was heard by Tapsell ADCJ who held the case to be one of misfeasance and awarded the applicants a total of almost $400,000 in damages.

368. The history of the bridge was that the planks in it had been replaced from time to time. In the ordinary course, in recent times it would have been inspected about four times a year and "minor components" in it such a decking or hand railings, if found to be defective, replaced. The trial judge made a finding that the planking was repaired six times between March 1986 and July 1991. An inspection of the bridge had been made in 1991 for the purpose of determining whether a crane of 20 tonnes might safely cross over it. It was so determined and a crane of that weight crossed the bridge without incident. His Honour held that, in July 1991, on the last occasion of the repair of planking, the respondent should have discovered the defects that led to the collapse of the bridge, although it was not the planking of the bridge but the supporting girders that were defective and failed. For these reasons he gave judgment for the applicants.

The appeal to the Court of Appeal of New South Wales

369. An appeal to the Court of Appeal of New South Wales (Handley, Powell and Giles JJA) was upheld. Powell JA, with whom the other members of the Court agreed, analyzed the evidence upon which the primary judge relied for his findings as to misfeasance. His Honour stated his conclusions on that evidence in this passage [585] :

> "At best, the evidence, insofar as it was relevant, demonstrated that, from time to time over the years, the Council replaced decking boards which appeared to require replacement. There is not the slightest evidence that, before any such boards were replaced, the bridge had become impassable. Given the unqualified evidence of Mr Brand that the bridge decking in no way affected the structural integrity of the bridge itself; the absence of any evidence indicating when, if at all, the Council had carried out work on the structural members of the bridge; the absence of any evidence as to the state of the bridge at any time when decking planks may have been replaced; the evidence of Mr Brand to which I have earlier referred as to the weight carrying capacity of the bridge even in the state in which it was immediately prior to the accident; and such evidence as there was as to the user of the bridge both prior to and on the day of the accident; it seems to me that to attempt, as Tapsell A-DCJ did, to describe the bridge as 'impassable', and, having done so, to apply by analogy the observations of Dixon J in the passage from his Judgment in *Gorringe v The Transport Commission (Tas)* [586] to which I have earlier referred was totally insupportable. With respect to those who may

be of another view, it seems to me that such actions as the Council may, from time to time, have taken in replacing defective decking planks are to be regarded as no more than superficial repairs to the road surface and thus – since they did not increase the risks of accidents – did not subject the Council to liability."

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[585] *Singleton Shire Council v Brodie* [1999] NSWCA 37 at [46] .

[586] (1950) 80 CLR 357 .

The application to this Court

370. The applicants applied for special leave to appeal to this Court. Their first submission was that the distinction between non-feasance and misfeasance and the consequences attaching to it were illogical, the subject of much justifiable criticism, outmoded, misconceived, historically nonsensical in principle, unjustified, and should, in any event, be discarded on policy grounds. Alternatively they submitted that this was a case in which, in any event, misfeasance had been proved. The applicants also submitted that on a proper examination of the relevant legislation governing the responsibility of the respondent for roads within the shire, the respondent was under a continuing duty to ensure that a road, of which a bridge was part, was safe.

371. It is with the last submission that I will deal first. Attention was drawn to s 220 [587] of the *Local Government Act* 1919 (NSW) ("the Act") which refers in general terms to the powers and duties conferred upon cities and shires in respect of the subject matter of Pt IX of the Act , "Public Roads". Section 226 makes provision for the classification of roads. The mandatory language of ss 227 and 229 prescribes the widths of roads within each classification. Section 230 also uses the word "shall" but neither s 232 [588], s 235 [589], s 236 [590], s 240 [591] nor s 249 [592] which, the applicants submit, implies an obligation rather than confers a mere power, does so, except in a limited way which has nothing to say about the imposition of any positive obligation to keep a road in repair. Section 233(2) is concerned with the vesting of property in the Council. Section 235 by contrast makes clear that a Council *may* provide a public road, and s 236 enacts that a Council shall have *power*, but, it may be observed, not a duty, to provide, among other things, a bridge. Section 240 provides that a Council *may* repair a public road and s 249 that a Council *shall* have the care, control and management of every known road. It is to this last provision in particular that the applicants point for this limb of their argument. But to provide that a Council shall have the care, control and management of a road or a bridge is not to say how, when, and in what circumstances, at what expense, and in what order of priorities repairs are to be made, or indeed that repairs must be made at all.

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[587] "**Application**

Subject to the provisions of this Act:

(a) this Part shall apply to municipalities and shires; and

(b) the powers and duties conferred and imposed upon a council under this Part shall apply in respect of each area to the council of the area."

[588] "**Fee-simple**

(1) Except where otherwise expressly provided **[by this Act, the Crown and Other Roads Act 1990 or any other Act]**, every public road, and the soil thereof, and all materials of which the road is composed, *shall* by virtue of this Act vest in fee-simple in the council, and the council, if it so desire, shall by virtue of this Act be entitled to be registered as the proprietor of the road under the provisions of the Real Property Act 1900 .

(2) The vesting in fee-simple under this section *shall* be deemed to be not merely as regards so much of the soil below and of the air above as may be necessary for the ordinary use of the road as a road, but so as to confer on the council subject to the provisions of this Act the same estate and rights in and with respect to the site of the road as a private person would have if he were entitled to the site as private land held in fee-simple with full rights both as to the soil below and to the air above.

(3) Unless otherwise expressly provided nothing in this section *shall* be deemed:

…

(4) This section *shall* bind the Crown." (emphasis added)

[589] "**Power to provide roads**

(1) The council *may* provide any public road, and in particular and without limitation of this or any other power conferred by this Act the council may:

(a) make surveys for the laying out of a new public road;

(b) lay out, construct, and open a new public road;

(c) extend and widen a public road;

(d) divert or alter the course of a public road;

(e) determine what proportion of the width of a public road shall be devoted to carriage-way, bicycle-way, footway, tree-planting, gardens, grass-plots, island refuges, public conveniences, street lamps, fountains, monuments, statues, and the like;

(f) widen a public road to or beyond the width or widths applicable to the road under section 229(2) or to a width or widths less than that width or those widths.

(2) Any land required for the purposes of this section may be acquired in any mode authorised by this Act." (emphasis added)

[590] "**Bridges, road-ferries etc.**

(1) The power of the council to provide any public road shall include the power to provide:

(a) any bridge, causeway, and the like over any water or depression crossing the line of the road;

…

(2) For the purposes of any other power of the council in respect of a public road any bridge, causeway, road-ferry, ford, or the like provided by the council in accordance with this section shall be deemed to be a public road."

[591] "**Power to construct and improve roads**

(1) The council *may* construct improve maintain protect repair drain and cleanse any public road, and in particular and without limitation of any other power conferred by this Act the council *may* in respect of any public road:

(a) construct improve maintain repair and cleanse the road with such materials *and in such manner* as the council thinks fit …" (emphasis added)

[592] "**Care control and management of roads**

The council shall have the care control and management of every public road, and in particular and without limitation of this or any other power conferred by this Act the council may in respect of any public road …"

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372. As Dixon J said in *Buckle v Bayswater Road Board* [593] :

> "The purpose of giving the road authority property in and control over the road is to enable it to execute its powers in relation to the highway, not to impose upon it new duties analogous to those of an occupier of property."

The legislation may be contrasted with that which was considered by this Court in *Crimmins v Stevedoring Industry Finance Committee* [594] . There what were described as functions and powers enacted by the *Stevedoring Industry Finance Committee Act* 1977 (Cth) could, indeed, in my opinion, should be construed as being in the nature of duties to give the legislation any reasonable degree of efficacy at all [595] . On the other hand, a local authority may, indeed must, function in a less than perfect world of roads within its boundaries of various classifications, various degrees of use, and in various states of deterioration and repair. The Act does not have the meaning for which the applicants contend. It does not impose any statutory obligation to keep roads (and bridges) within the shire in good repair.

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[593] (1936) 57 CLR 259 at 281.

[594] (1999) 200 CLR 1 .

[595] (1999) 200 CLR 1 at 116-117 [365]-[369] per Callinan J.

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373. As to the other argument of the applicants, that the distinction between misfeasance and non-feasance is not founded on principle, and is, in any event, ripe for reconsideration and should

be discarded, I would add only a few observations to what I have said in *Ghantous* in rejecting the same argument there.

374. It was suggested in argument that the word "immunity" which was used in the courts below, in this Court, in other jurisdictions and by the respondents and interveners in this case and *Ghantous* interchangeably with the defence of non-feasance, was a misnomer, and overstated the position of road authorities. That may be so. Its use is probably explicable on the grounds that historically the causing of an obstruction or a danger on a road was likely to constitute a public nuisance and therefore a criminal offence[596], and that it was immunity in respect of this that a local authority and its officers needed to avoid conviction for it. Nuisance, either public or private, may sometimes involve negligence and at other times not [597] . The word "immunity" was, however, adopted by the legislature in terms in s 12(1) of the *State Roads Act 1986 (NSW)* . Section 12(1) provided as follows:

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

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[596] See *Archbold Criminal Pleading, Evidence and Practice*, (1994), vol 2, par 31-40.

[597] See *Goldman v Hargrave* [1967] 1 AC 645 at 657 per Lord Wilberforce.

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375. Section 17 of the *State Roads Act* used the word "immunities" also. It is highly likely that the legislature in using the word was not only using it in the same sense as the courts frequently have, as a synonym for a defence of non-feasance, but also, and of more importance, as making a very deliberate decision not to respond to the criticism of the rule of no liability for non-feasance on the part of road authorities, by abolishing or amending it. Indeed the enactment may be taken as a very strong affirmation of it.

376. It remains to deal with the applicants' alternative case that this was a case of misfeasance and properly so found by the primary judge.

377. The applicants' submission was that misfeasance relevantly occurs when a road authority exercises its powers negligently. The applicants submitted that the respondent was guilty of misfeasance and acted negligently in that regard by covering the bridge with new planking in circumstances where the bridge underneath was not safe and carrying out inspections negligently in the sense of not appreciating that the bridge was so rotten underneath in its girders, on the one hand, and, on the other, to take no action by way of signposting or otherwise.

378. In *Buckle* Dixon J put the obligations of a road authority in this way [598] :

> "But a road authority in doing [works on a roadway] must take due care for the safety of those using the highway and is not protected if it creates dangers which reasonable care and skill could avoid. Because the road is under its control, it

necessarily has an opportunity denied to others for causing obstructions and dangers in highways. But when it does so, the road authority is liable, not, I think, under any special measure of duty which belongs to it, but upon ordinary principles."

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[598] (1936) 57 CLR 259 at 283.

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379. It is in the applicants' formulation and proof of particulars that their misfeasance case runs into difficulty.

380. I deal first with the contention that it was misfeasance to fail to cover the bridge with new planking. The answer to that is that it was not the planking that failed but, as was accepted on both sides, rather the timber girders because of piping in them which I take to be a loss of body and strength by reason of age. It is certainly likely that from time to time planking was removed and replaced. It is unnecessary, however, to resolve the difference between the primary judge and the Court of Appeal as to the occasions when this occurred by attempting to analyze the documents in evidence as the Court of Appeal did. The girders were not touched, and by replacing planks the respondent did not, to use the language of Dixon J in *Buc kle* [599] , undertake active measures of repair to safeguard the applicants from the condition of the girders, and created no dangers in respect of them. On this particular the applicants' case fails at the threshold. There was no misfeasance in relation to the girders, the part of the structure that failed.

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[599] (1936) 57 CLR 259 at 283.

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381. I turn to the other particular. Of itself an inspection would achieve nothing. Indeed the respondent was aware that there was piping in the girders. The second particular therefore asserts a positive obligation that the respondent did not have. The respondent would only be liable if it had been bound (as it was not) to rectify deteriorating roads and bridges in the shire. It was no more obliged to do that than it was to convert the bridge from one with a capacity of 15 tonnes when constructed to a bridge of a capacity of 22 tonnes which was the weight of the truck.

382. I would grant the application for special leave to appeal and dismiss the appeal with costs.

Cited by:

Warren v District Council of the Lower Eyre Peninsula [2025] SASCA 93 -
Warren v District Council of the Lower Eyre Peninsula [2025] SASCA 93 -
Commonwealth of Australia v Yunupingu [2025] HCA 6 -
MT v Se [2025] SASCA 8 -
MT v Se [2025] SASCA 8 -
Transport for NSW v Hunt Leather Pty Ltd; Hunt Leather Pty Ltd v Transport for NSW [2024] NSWCA 227 -
Hornsby Shire Council v Salman [2024] NSWCA 155 (27 June 2024) (White and Adamson JJA, Basten AJA)

24. The fact that the Council had received that advice about the specific playground at which Ms Salman fell distinguishes this case from *Ghantous v Hawkesbury City Council* (2001) 206 CLR 512; [2001] HCA 29 , and *Blue Op Partner Pty Ltd v De Roma* [2023] NSWCA 161, to which Basten AJA has referred.

Hornsby Shire Council v Salman [2024] NSWCA 155 -
Hornsby Shire Council v Salman [2024] NSWCA 155 -
Hornsby Shire Council v Salman [2024] NSWCA 155 -
Hornsby Shire Council v Salman [2024] NSWCA 155 -
Hornsby Shire Council v Salman [2024] NSWCA 155 -
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Hornsby Shire Council v Salman [2024] NSWCA 155 -
Hornsby Shire Council v Salman [2024] NSWCA 155 -
Hornsby Shire Council v Salman [2024] NSWCA 155 -
Hornsby Shire Council v Salman [2024] NSWCA 155 -
WCL (QLD) Albert St Pty Ltd v Orb Holdings Pty Ltd & Ors [2023] QCA 263 -
WCL (QLD) Albert St Pty Ltd v Orb Holdings Pty Ltd & Ors [2023] QCA 263 -
WCL (QLD) Albert St Pty Ltd v Orb Holdings Pty Ltd & Ors [2023] QCA 263 -
WCL (QLD) Albert St Pty Ltd v Orb Holdings Pty Ltd & Ors [2023] QCA 263 -
WCL (QLD) Albert St Pty Ltd v Orb Holdings Pty Ltd & Ors [2023] QCA 263 -
The Owners Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWCA 301 -
The Owners Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWCA 301 -
The Owners Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWCA 301 -
Vanderstock v Victoria [2023] HCA 30 -
R v Marshall [2023] SASCA 105 -
R v Marshall [2023] SASCA 105 -
Blue Op Partner Pty Ltd v De Roma [2023] NSWCA 161 -
Blue Op Partner Pty Ltd v De Roma [2023] NSWCA 161 -
Blue Op Partner Pty Ltd v De Roma [2023] NSWCA 161 -
Blue Op Partner Pty Ltd v De Roma [2023] NSWCA 161 -
Blue Op Partner Pty Ltd v De Roma [2023] NSWCA 161 -
Townsville City Council v Hodges [2023] QCA 136 -
Townsville City Council v Hodges [2023] QCA 136 -
Townsville City Council v Hodges [2023] QCA 136 -
Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia [2023] FCAFC 75 -
Russell v City of Melbourne [2023] VSCA 97 -
Seiffert v The Prisoners Review Board [2023] WASCA 15 -
Seiffert v The Prisoners Review Board [2023] WASCA 15 -
Russell v Carpenter [2022] NSWCA 252 -

Electricity Networks Corporation v Herridge Parties [2022] HCA 37 -
Electricity Networks Corporation v Herridge Parties [2022] HCA 37 -
Electricity Networks Corporation v Herridge Parties [2022] HCA 37 -
Electricity Networks Corporation v Herridge Parties [2022] HCA 37 -
Aluabaid v Kilani [2022] ACTCA 31 -
Aluabaid v Kilani [2022] ACTCA 31 -
Aluabaid v Kilani [2022] ACTCA 31 -
Eddy v Goulburn Mulwaree Council [2022] NSWCA 87 -
Eddy v Goulburn Mulwaree Council [2022] NSWCA 87 -
Eddy v Goulburn Mulwaree Council [2022] NSWCA 87 -
Eddy v Goulburn Mulwaree Council [2022] NSWCA 87 -
Eddy v Goulburn Mulwaree Council [2022] NSWCA 87 -
Eddy v Goulburn Mulwaree Council [2022] NSWCA 87 -
Eddy v Goulburn Mulwaree Council [2022] NSWCA 87 -
Minister for the Environment v Sharma [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

> 248. The fundamental question of legality aside, it is not the function of the Judicial branch to rule upon any lack of adequacy or any lack of wisdom of government policy by reference to the law of torts. These matters of policy are not ones merely of resource allocation, funding and other such matters to which statutory authorities often must direct themselves, dealt with in cases such as *Brodie* . The matters of policy here involve considerations drawn from the gravity and seriousness of the international subject matter: the risk of catastrophe for the world and humanity. These considerations and the policy response involve scientific, social, economic and political factors and choices to inform the appropriate national and State responses to a world problem the subject of international discussion and agreement, conformable with the maintenance and advancement of the well-being, including health and safety, and social and economic circumstances of the people of Australia (for the Commonwealth) and of New South Wales (for New South Wales).

Minister for the Environment v Sharma [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

> 866. To lay down a test that distinguishes between “policy” and “operational” decisions has the potential to be unhelpful unless it is understood that those labels do not themselves state the applicable legal test, but rather serve as reference points to the underlying principles that are involved. To deduce legal results from a label is to “allow linguistics to determine legal rights”: *Brooks v Burns Philp Trustee Co Ltd* [1969] HCA 4; 121 CLR 432 at 458 (Windeyer J), cited with approval in *Hollis v Vabu Pty Ltd* [2001] HCA 44; 207 CLR 21 at [37] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). Contrary to what was suggested by the primary judge, the underlying principles have not “largely been discredited”: see, PJ [387]. Mason J in *Heyman* re cognised that the distinction between policy and operational decisions was not easy to formulate, but referred to the inability to apply a standard of care as a characteristic of a policy decision. In *Graham Barclay Oysters* , Gleeson CJ likewise referred at [15] to the absence of a criterion by reference to which a court can determine reasonableness of conduct as indicating that the reasonableness or unreasonableness of government inaction was not a legitimate subject for curial decision. That there are some types of government decisions that are not susceptible to the imposition of a duty of care is not in doubt. As *Brodie* illustrates, there have been differences of opinion, now resolved, as to whether particular decisions about resource allocation and financial expenditure by government are capable of falling into that category. Whether that is so in a particular case will turn on the facts, and on the nature of the power being exercised in its legislative context.

Minister for the Environment v Sharma [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

630. Further, in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, it was said by Gaudron, McHugh and Gummow JJ (at [106]):

> Appeals also were made to preserve the "political choice" in matters involving shifts in "resource allocation". However, citizens, corporations, governments and public authorities generally are obliged to order their affairs so as to meet the requirements of the rule of law in Australian civil society. Thus, it is no answer to a claim in tort against the Commonwealth under s 75(iii) of the Constitution that its wrongful acts or omissions were the product of a "policy decision" taken by the Executive Government; still less that the action is "non-justiciable" because a verdict against the Commonwealth will be adverse to that "policy decision"...

Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
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Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Hobart International Airport Pty Ltd v Clarence City Council [2022] HCA 5 -
Hobart International Airport Pty Ltd v Clarence City Council [2022] HCA 5 -
Doyle's Farm Produce Pty Ltd v Murray Darling Basin Authority (No 2) [2021] NSWCA 246 -
Malone Obh of Western Kangaulu People v State of Queensland [2021] FCAFC 176 -
Fairfax Media Publications Pty Ltd v Voller [2021] HCA 27 -
Fairfax Media Publications Pty Ltd v Voller [2021] HCA 27 -
Wollongong City Council v Williams [2021] NSWCA 140 (09 July 2021) (McCallum JA, Simpson AJA and Adamson J)

8. Obviously, a finding of negligence on the part of a defendant does not of itself contradict a finding of contributory negligence on the part of the plaintiff; that would deny the existence of the entire doctrine. As it was put by Lord Ellenborough CJ in *Butterfield v Forrester* (1809) 103 ER 926, which has been described as "the foundation case for the doctrine of contributory negligence" (*Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council* (2001) 206 CLR 512; [2001] HCA 29 at [122] n 217, citing *Astley v Austrust Ltd* (1999) 197 CLR 1; [1999] HCA 6 at [21]):

> "One person being in fault will not dispense with another's using ordinary care for himself."

Wollongong City Council v Williams [2021] NSWCA 140 (09 July 2021) (McCallum JA, Simpson AJA and Adamson J)

61. Mr Sexton argued that the step could be seen and that, accordingly, a person in the respondent's position who was taking reasonable care for his or her own safety would have detected the step and would not have fallen. He submitted that a pedestrian in the respondent's position who was taking reasonable care for his or her own safety would do

more than merely survey the path from the carpark and assume that it sloped steadily as if it were a ramp rather than a stepped pathway. He contended that such a person would review the state of the pathway at regular intervals to ascertain whether there were steps or other hazards in the immediate path, particularly in circumstances where part of the pathway was in shade. He submitted that the question was to be determined as a matter of fact which did not require expert evidence. He argued that the trial judge was not obliged to accept the expert evidence in circumstances where the presence of a step was a matter of "ordinary observation" and not one which called for expert opinion: *Brodie* at [355] (Callinan J) .

Wollongong City Council v Williams [2021] NSWCA 140 -
Wollongong City Council v Williams [2021] NSWCA 140 -
Wollongong City Council v Williams [2021] NSWCA 140 -
Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788 [2021] FCAFC 121 -
Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T [2021] VSCA 72 -
Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T [2021] VSCA 72 -
Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T [2021] VSCA 72 -
Amaca Pty Ltd v Werfel [2020] SASCFC 125 -
Hungry Jack's Pty Ltd v Fourtounas [2020] NSWCA 325 -
Hungry Jack's Pty Ltd v Fourtounas [2020] NSWCA 325 -
Hungry Jack's Pty Ltd v Fourtounas [2020] NSWCA 325 -
Bauer Media Pty Ltd v Khedrlarian [2020] NSWCA 288 -
Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd [2020] QCA 250 -
Coffs Harbour City Council v Polglase [2020] NSWCA 265 -
Orb Holdings Pty Ltd v WCL (Qld) Albert St Pty Ltd [2020] QCA 198 -
Orb Holdings Pty Ltd v WCL (Qld) Albert St Pty Ltd [2020] QCA 198 -
Orb Holdings Pty Ltd v WCL (Qld) Albert St Pty Ltd [2020] QCA 198 -
Orb Holdings Pty Ltd v WCL (Qld) Albert St Pty Ltd [2020] QCA 198 -
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Orb Holdings Pty Ltd v WCL (Qld) Albert St Pty Ltd [2020] QCA 198 -
Orb Holdings Pty Ltd v WCL (Qld) Albert St Pty Ltd [2020] QCA 198 -
Goondiwindi Regional Council v Tait [2020] QCA 119 (05 June 2020) (Morrison and McMurdo JJA and Burns J)

128. On the facts and circumstances of this case, which are hardly unusual, the existence and content of the duty of care ought to have been clear. Its basis was the common law as stated by the majority in *Brodie* .

Goondiwindi Regional Council v Tait [2020] QCA 119 (05 June 2020) (Morrison and McMurdo JJA and Burns J)

93. Because of the RMPC the Council had control over the highway, and control over its condition. That control creates the duty of care under which the Council was obliged to exercise reasonable care to avert a danger to safety or bring that danger to the knowledge of road users who might be at risk from it. [63]

via

[63] *Brodie v Singleton Shire Council* (2001) 206 CLR 512; [2001] HCA 29, at 559 [102]-[103] .

Goondiwindi Regional Council v Tait [2020] QCA 119 -
Goondiwindi Regional Council v Tait [2020] QCA 119 -
Goondiwindi Regional Council v Tait [2020] QCA 119 -
Goondiwindi Regional Council v Tait [2020] QCA 119 -
Goondiwindi Regional Council v Tait [2020] QCA 119 -

Goondiwindi Regional Council v Tait [2020] QCA 119 -
Goondiwindi Regional Council v Tait [2020] QCA 119 -
Ayre v Swan [2019] NSWCA 202 -
Ayre v Swan [2019] NSWCA 202 -
Ayre v Swan [2019] NSWCA 202 -
Meyers v Commissioner for Social Housing [2019] ACTCA 19 -
Fairfax Media Publications Pty Ltd v Gayle; The Age Company Pty Ltd v Gayle; The Federal Capital Press of Australia Pty Ltd v Gayle [2019] NSWCA 172 -
Council of the City of Sydney v Bishop [2019] NSWCA 157 -
Council of the City of Sydney v Bishop [2019] NSWCA 157 -
Council of the City of Sydney v Bishop [2019] NSWCA 157 -
Council of the City of Sydney v Bishop [2019] NSWCA 157 -
Council of the City of Sydney v Bishop [2019] NSWCA 157 -
Hutchinson v State of New South Wales [2019] NSWCA 91 -
Weber v Greater Hume Shire Council [2019] NSWCA 74 -
Weber v Greater Hume Shire Council [2019] NSWCA 74 -
Weber v Greater Hume Shire Council [2019] NSWCA 74 -
Weber v Greater Hume Shire Council [2019] NSWCA 74 -
State of Queensland v Baker Superannuation Fund Pty Ltd; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd [2018] QCA 168 -
MONASH UNIVERSITY Applicant and SHEILA SAVAGE First Respondent and PROGRAMMED MAINTENANCE SERVICES LTD Second Respondent [2018] VSCA 156 (19 June 2018) (Osborn, Priest and Niall JJA)

104. The trial judge was entitled to have regard to the observations of Mr Percy. As Callinan J observed in *Brodie v Singleton* , [32] a Court is not bound to accept that a matter of ordinary observation such as the readily apparent state of a footpath is a matter calling for expert opinion.

via

[32] (2001) 206 CLR 512 , 639 [355] .

MONASH UNIVERSITY Applicant and SHEILA SAVAGE First Respondent and PROGRAMMED MAINTENANCE SERVICES LTD Second Respondent [2018] VSCA 156 -
MONASH UNIVERSITY Applicant and SHEILA SAVAGE First Respondent and PROGRAMMED MAINTENANCE SERVICES LTD Second Respondent [2018] VSCA 156 -
South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312 -
South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312 -
South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312 -
Anderson v City of Stonnington [2017] VSCA 229 (01 September 2017) (Warren CJ, Maxwell P and Kyrou JA)

40. A public highway is created at common law when two requirements are satisfied. First, a competent landowner must have manifested an intention to dedicate the land as a public highway, and secondly, there must be an acceptance by the public of that dedication. [15] In this context, 'dedication' means 'that the owner of the land intends to divest himself of any beneficial ownership of the soil, and to give the land to the public for the purposes of a highway.' [16]

via

[15] *Permanent Trustee Co of New South Wales Ltd v Campbelltown Municipal Council* (1960) 105 CLR 401, 420 ('*Campbelltown*'); *Brodie* (2001) 206 CLR 512, 565 [119] ; *Newington v Windeyer* (1985) 3 NSWLR 555, 558 ('*Newington*'); *Calabro v Bayside City Council* [1999] 3 VR 688, 693–5 [22]–[28] ('*Calabro* ').

Anderson v City of Stonnington [2017] VSCA 229 -
Raad v VM & KTP Holdings Pty Ltd [2017] NSWCA 190 -
Raad v VM & KTP Holdings Pty Ltd [2017] NSWCA 190 -
Raad v VM & KTP Holdings Pty Ltd [2017] NSWCA 190 -
State of New South Wales v Briggs [2016] NSWCA 344 -
Director of Public Prosecutions (Cth) v Thomas, Director of Public Prosecutions (Cth) v Wu [2016] VSCA 237 -
Gunns Limited v State of Tasmania [2016] TASFC 7 -
AS v Minister for Immigration and Border Protection [2016] VSCA 206 -
Coffs Harbour City Council v McLeod [2016] NSWCA 94 -
Rankilor v City of South Perth [2016] WASCA 29 -
Rankilor v City of South Perth [2016] WASCA 29 -
Rankilor v City of South Perth [2016] WASCA 29 -
Rankilor v City of South Perth [2016] WASCA 29 -
Nightingale v Blacktown City Council [2015] NSWCA 423 -
Nightingale v Blacktown City Council [2015] NSWCA 423 -
Nightingale v Blacktown City Council [2015] NSWCA 423 -
Nightingale v Blacktown City Council [2015] NSWCA 423 -
Director of Public Prosecutions v Downer EDI [2015] VSCA 287 -
Director of Public Prosecutions v Downer EDI [2015] VSCA 287 -
Director of Public Prosecutions v Downer EDI [2015] VSCA 287 -
Director of Public Prosecutions v Downer EDI [2015] VSCA 287 -
Director of Public Prosecutions v Downer EDI [2015] VSCA 287 -
Director of Public Prosecutions v Downer EDI [2015] VSCA 287 -
Director of Public Prosecutions v Downer EDI [2015] VSCA 287 -
Bitupave Ltd t/as Boral Asphalt v Pillinger [2015] NSWCA 298 -
Dionisatos (for the Estate of the late George Dionysatos) v Acrow Formwork & Scaffolding Pty Ltd [2015] NSWCA 281 -
Dionisatos (for the Estate of the late George Dionysatos) v Acrow Formwork & Scaffolding Pty Ltd [2015] NSWCA 281 -
Dionisatos (for the Estate of the late George Dionysatos) v Acrow Formwork & Scaffolding Pty Ltd [2015] NSWCA 281 -
Collins v Clarence Valley Council [2015] NSWCA 263 (03 September 2015) (McColl, Macfarlan and Emmett JJA)

(2001) 206 CLR 512; [2001] HCA 29 at [150] (Gaudron, McHugh and Gummow JJ) .

Collins v Clarence Valley Council [2015] NSWCA 263 -
Collins v Clarence Valley Council [2015] NSWCA 263 -
Collins v Clarence Valley Council [2015] NSWCA 263 -
Collins v Clarence Valley Council [2015] NSWCA 263 -
Collins v Clarence Valley Council [2015] NSWCA 263 -
Collins v Clarence Valley Council [2015] NSWCA 263 -
Collins v Clarence Valley Council [2015] NSWCA 263 -
Rankin v Gosford City Council [2015] NSWCA 249 -
Rankin v Gosford City Council [2015] NSWCA 249 -
Rankin v Gosford City Council [2015] NSWCA 249 -
Rankin v Gosford City Council [2015] NSWCA 249 -
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Rankin v Gosford City Council [2015] NSWCA 249 -
Rankin v Gosford City Council [2015] NSWCA 249 -
Rankin v Gosford City Council [2015] NSWCA 249 -
Kennedy v Shire of Campaspe [2015] VSCA 215 -
Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 -
Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 -
Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 -
Hunter and New England Local Health District v McKenna [2014] HCA 44 -
Hunter and New England Local Health District v McKenna [2014] HCA 44 -
Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Curtis v Harden Shire Council [2014] NSWCA 314 -
Commonwealth Bank of Australia v Barker [2014] HCA 32 -
Commonwealth Bank of Australia v Barker [2014] HCA 32 -
Commonwealth Bank of Australia v Barker [2014] HCA 32 -
Commonwealth Bank of Australia v Barker [2014] HCA 32 -
State of Queensland v Kelly [2014] QCA 27 -
State of Queensland v Kelly [2014] QCA 27 -
Botany Bay City Council v Latham [2013] NSWCA 363 -
Apache Energy Ltd v Alcoa of Australia Ltd [No 2] [2013] WASCA 213 -
Apache Energy Ltd v Alcoa of Australia Ltd [No 2] [2013] WASCA 213 -
Apache Energy Ltd v Alcoa of Australia Ltd [No 2] [2013] WASCA 213 -
Apache Energy Ltd v Alcoa of Australia Ltd [No 2] [2013] WASCA 213 -
Apache Energy Ltd v Alcoa of Australia Ltd [No 2] [2013] WASCA 213 -
Lloyd v Ryan Borg by his Tutor NSW Trustee and Guardian [2013] NSWCA 245 -
Swan & Baker Pty Limited v Marando [2013] NSWCA 233 -
Swan & Baker Pty Limited v Marando [2013] NSWCA 233 -
Hoffmann v Boland [2013] NSWCA 158 -
R v Banhelyi [2012] QCA 357 -
Australian Capital Territory v Crowley [2012] ACTCA 52 -
Australian Capital Territory v Crowley [2012] ACTCA 52 -
McGinn v Ashfield Council [2012] NSWCA 238 -
McGinn v Ashfield Council [2012] NSWCA 238 -
PGA v The Queen [2012] HCA 21 -
Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16 (20 April 2012) (French CJ, Gummow, Hayne, Crennan and Kiefel JJ)

108. Shortly after the enactment of the Imperial Act, Harrison Moore, in a passage referred to in *Brodie v Singleton Shire Council* [118] by Gaudron, McHugh and Gummow JJ, wrote [119]:

> "The cases in which men are liable in tort for pure omissions are in truth rare, as has been recently emphasized by Mr Jenks[120]. The common law of tort deals with causes which look backwards to some act of a defendant more or less proximate to the actual damage, and looks askance at the suggestion of a liability based not upon such a causing of injury but merely upon the omission to do something which would have prevented the mischief. Where tortious liability arises from some cause other than the commission of an unlawful act it is in general because the defendant has done something or *put himself in a position which though lawful in itself does expose the rights of others to risk and danger, unless he shows such care as the circumstances require*". (emphasis added)

Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16 -
Warren Shire Council v Kuehne [2012] NSWCA 81 -
Warren Shire Council v Kuehne [2012] NSWCA 81 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -

Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
Slaveski v Smith [2012] VSCA 25 -
Horne v Cranney [2011] QCA 149 -
Horne v Cranney [2011] QCA 149 -
Horne v Cranney [2011] QCA 149 -
Fugro Spatial Solutions Pty Ltd v Cifuentes [2011] WASCA 102 -
Fugro Spatial Solutions Pty Ltd v Cifuentes [2011] WASCA 102 -
Miller v Miller [2011] HCA 9 -
Stephens v Giovenco; Dick v Giovenco [2011] NSWCA 53 -
Allianz Australia Insurance Ltd v Roads and Traffic Authority of New South Wales [2010] NSWCA 328 -
Meshlawn P/L v State of Qld [2010] QCA 181 -
Meshlawn P/L v State of Qld [2010] QCA 181 -
Meshlawn P/L v State of Qld [2010] QCA 181 -
Meshlawn P/L v State of Qld [2010] QCA 181 -
Meshlawn P/L v State of Qld [2010] QCA 181 -
Meshlawn P/L v State of Qld [2010] QCA 181 -
Meshlawn P/L v State of Qld [2010] QCA 181 -
Meshlawn P/L v State of Qld [2010] QCA 181 -
Department of Housing and Works v Smith [No 2] [2010] WASCA 25 -
Department of Housing and Works v Smith [No 2] [2010] WASCA 25 -
Department of Housing and Works v Smith [No 2] [2010] WASCA 25 -
Department of Housing and Works v Smith [No 2] [2010] WASCA 25 -
Department of Housing and Works v Smith [No 2] [2010] WASCA 25 -
Department of Housing and Works v Smith [No 2] [2010] WASCA 25 -
Department of Housing and Works v Smith [No 2] [2010] WASCA 25 -
Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 -
Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 -
Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 -
Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 -
Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 -
Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 -
RL & CA Woods Pty Ltd v Pacific National (Victoria) Ltd and Wayne Bruce Kuschert v Pacific National (Victoria) Ltd and Anor [2009] NSWCA 298 -
RL & CA Woods Pty Ltd v Pacific National (Victoria) Ltd and Wayne Bruce Kuschert v Pacific National (Victoria) Ltd and Anor [2009] NSWCA 298 -
Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 (22 September 2009) (McColl and Campbell JJA, Sackville AJA)

> ***Brodie v Singleton Shire Council*** [2001] HCA 29; (2001) 206 CLR 512 applied, ***Modbury Triangle Shipping Centre Pty Ltd v Anzil*** [2000] HCA 61; (2000) 205 CLR 254 distinguished, ***Ashrafi Persian Trading Co Pty Ltd v Ashrafinia*** [2001] NSWCA 243; [2002] Aust Torts Reports ¶81-636 (68,314) distinguished.

Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 (22 September 2009) (McColl and Campbell JJA, Sackville AJA)

116. In ***Brodie v Singleton Shire Council*** [2001] HCA 29; (2001) 206 CLR 512 at 577 [150] , Gaudron, McHugh and Gummow JJ held that, under the common law of Australia, public authorities who had statutory powers of the nature of those conferred by the ***Local Government Act 1919*** upon the local councils involved in ***Brodie*** :

> "... 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." (emphasis added)

Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 (22 September 2009) (McColl and Campbell JJA, Sackville AJA)

Brodie v Singleton Shire Council [2001] HCA 29 ; (2001) 206 CLR 512

Buckle v Bayswater Road Board

Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 -

62. At trial, counsel for the hoteliers had supported the Council's submission that the principle in *Brodie* extended to any occupier of the highway including the hoteliers. On appeal, for obvious forensic reasons, the hoteliers changed their position. They did not seek to impugn any aspect of the jury verdict and now supported the plaintiff's contention that the principle did not extend to any occupier who was not solely exercising a highway authority function.

Central Goldfields Shire v Haley & Ors [2009] VSCA 101 (24 June 2009) (Neave and Redlich JJA and Pagone AJA)

45. It was not in issue that the concept of a 'structure' that was 'not part of the highway' within the meaning of s 37(2) was intended to replicate the 'artificial structure' qualification to the highway rule under the law prior to *Brodie* . But the term 'artificial structure' in relation to a highway at common law has never been clearly defined. Seats, lamp posts, pillar boxes, directions and signs have been treated as artificial structures. [35] On the other hand bridges, culverts, footpaths and any other place over which there is public right of passage and which forms part of the road surface has been treated as being part of a highway.[36] In *Buckle* , McTiernan J discussed the concept of 'artificial work' or an 'artificial structure'. His Honour said: [37]

> The criterion for determining whether anything placed in the road is an artificial work must be the nature of the thing itself. It seems clear that the term should not be applied to a road or a section or a layer of road or its foundation made of artificial materials or of both artificial and natural materials. The expression, as I understand it, denotes *a structure which is appurtenant or subservient to a road but not a component part of the road fabric*.[38]

The majority in *Brodie* made these observations about the 'artificial structures' rule:

> The notion, derived from the decision of the Privy Council in *Borough of Bathurst v Macpherson*, is that, if an 'artificial structure' or 'artificial work' is introduced on to a highway and either is dangerous or becomes dangerous through non-repair, then the act of the authority introducing it will be treated as misfeasance; this will be so even if the cause of injury to the plaintiff is solely non-repair of the structure. The scope of this qualification is obscure. That is because, in *Buckle* , Dixon J (in dissent but with whom Latham CJ agreed on this point) excluded from the qualification a structure installed in the authority's 'capacity' as a ' highway authority', where that structure 'forms part of the road construction and is put there to serve a purpose arising out of its character as a highway, as for example to carry off the surface water, or to drain off seepage and protect the road base'; in those circumstances the immunity in respect of non-feasance will apply to that structure unless 'in the first instance' the authority 'acted improperly in placing it there'. [39]

Central Goldfields Shire v Haley & Ors [2009] VSCA 101 (24 June 2009) (Neave and Redlich JJA and Pagone AJA)

27. Much of the Council's argument in support of the grounds of appeal rests upon the principles formulated by the High Court in *Brodie* . Until the decision in *Brodie* , a breach of the highway authority's duty of care would not give rise to a liability in damages to an injured road user for failure to maintain or repair (nonfeasance) the highway. But a highway or road authority had no immunity for a civil wrong where it had through the exercise of its powers created or increased a danger on the highway. *Buckle v Bayswater Road Board;* [19] *Gor ringe v Transport Commission (Tas).* [20]

Central Goldfields Shire v Haley & Ors [2009] VSCA 101 (24 June 2009) (Neave and Redlich JJA and Pagone AJA)

68. The joint judgment in *Brodie* regarded the common law notion of a public right of user as marking off highway authorities from occupiers of private land and rendering inapt any analogy between occupation of privately owned land and the management and control by statutory bodies of lands set aside for public use and enjoyment. [77]

via

[77] *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 576-8 .

Central Goldfields Shire v Haley & Ors [2009] VSCA 101 (24 June 2009) (Neave and Redlich JJA and Pagone AJA)

85. The joint reasons in *Brodie* recognised that decisions such as *Sutherland Shire Council v Heyman,* [99] *Pyrenees Shire Council v Day,* [100] *Romeo v Conservation Commission (NT)* [101] *an d Crimmins v Stevedoring Industry Finance Committee* [102] were important because they reflected an underlying principle that the powers vested by statute in a public authority may give it such a significant and special measure of control over the safety of the person or property of citizens as to impose upon the authority a duty of care which may oblige the authority to exercise those powers to avert a danger. [103] The joint reasons in *Brodie* recognis e that the powers vested in road authorities are an example, involving the safety of the person and property of road users. [104] The formulated duty in *Brodie* which required the road to be safe for users exercising reasonable care for their own safety [105] was informed by these considerations. In *Leichhardt Municipal Council v Montgomery* [106] the High Court rejected the proposition that the council owed a non-delegable duty of care to such users when engaging an independent contractor to perform road works. As Hayne J stated, such a proposition could not stand with the restatement in *Brodie* and *Ghantous* of the common law of negligence in its application to highway authorities. [107]

via

[104] (2001) 206 CLR 512 , [139]-[140] .

Central Goldfields Shire v Haley & Ors [2009] VSCA 101 (24 June 2009) (Neave and Redlich JJA and Pagone AJA)

121. The Council also submitted that the trial judge fell into error by inviting the jury to take into account the age of the plaintiff when considering duty and breach. Certainly *Brodie* as applied in *Cattanach* [172] and the New South Wales cases [173] to which Chernov JA referred in his reasons, stand for the propositions that the duty of care of a council is to be resolved by reference to a reasonable pedestrian, of ordinary physical capacity and that the particular characteristics of the plaintiff are not relevant for the purpose of determining if the Council owed a duty. At common law the Council would not owe any higher duty to elderly pedestrians when assessing whether the Council's response to the risk of injury was reasonable. But s 14B(3) and (4) did not fall for consideration in *Cattanach* as the council was not sued as occupier and they were not raised for consideration in *Cehner* . The question arises whether the approach taken in those cases to duty and breach requires modification in light of s 14B(4) . I am inclined to think that the formulated duty in *Brodie* would require some modification to allow for the matters enumerated in s 14B(4) but in the absence of argument I do not regard it as necessary or desirable to express any concluded view on this question.

Central Goldfields Shire v Haley & Ors [2009] VSCA 101 (24 June 2009) (Neave and Redlich JJA and Pagone AJA)

85. The joint reasons in *Brodie* recognised that decisions such as *Sutherland Shire Council v Heyman,* [99] *Pyrenees Shire Council v Day,* [100] *Romeo v Conservation Commission (NT)* [101] *and Crimmins v Stevedoring Industry Finance Committee* [102] were important because they reflected an underlying principle that the powers vested by statute in a public authority may give it such a significant and special measure of control over the safety of the person or property of citizens as to impose upon the authority a duty of care which may oblige the authority to exercise those powers to avert a danger. [103] The joint reasons in *Brodie* recognise that the powers vested in road authorities are an example, involving the safety of the person and property of road users. [104] The formulated duty in *Brodie* which required the road to be safe for users exercising reasonable care for their own safety [105] was informed by these considerations. In *Leichhardt Municipal Council v Montgomery* [106] the High Court rejected the proposition that the council owed a non-delegable duty of care to such users when engaging an independent contractor to perform road works. As Hayne J stated, such a proposition could not stand with the restatement in *Brodie* and *Ghantous* of the common law of negligence in its application to highway authorities. [107]

Central Goldfields Shire v Haley & Ors [2009] VSCA 101 -

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Central Goldfields Shire v Haley & Ors [2009] VSCA 101 -
Central Goldfields Shire v Haley & Ors (No 2) [2009] VSCA 203 -
Central Goldfields Shire v Haley & Ors [2009] VSCA 101

Wynn Tresidder Management v Barkho [2009] NSWCA 149 (16 June 2009) (Tobias JA at 1; McColl JA at 2; Young JA at 114)

60. Determining whether the duty had been breached turned upon the probability of the risk occurring, the magnitude of the consequences and the expense or inconvenience of eliminating the risk: *Wyong Shire Council v Shirt* [1980] HCA 12; (1980) 146 CLR 40 (at 47) per Mason J. In the assessment of breach, weight had to be given to the expectation that the respondent would exercise reasonable care for her own safety and also to the possibility of "inadvertence" and "thoughtlessness". However it must also be accepted that while persons exercising reasonable care will be able to avoid injury in some situations, other situations present "a foreseeable risk of harm" even to persons taking such care: *Brodie v Singleton Shire Council* [2001] HCA 29; (2001) 206 CLR 512 (at [160] , [163]) per Gaudron, McHugh and Gummow JJ; *Dederer* (at [45] – [46]) per Gummow J.

Wynn Tresidder Management v Barkho [2009] NSWCA 149 -
Shire of Gingin v Coombe [2009] WASCA 92 (25 May 2009) (Martin CJ)

70. As Callinan and Heydon JJ pointed out in ***Mulligan*** , in ***Ghantous v Hawkesbury City Council*** [2001] HCA 29; (2001) 206 CLR 512 (which was heard together with ***Brodie v Singleton Shire Council***), five members of the High Court regarded obviousness as the decisive factor in the case ([8] per Gleeson CJ (agreeing with Callinan J), [163] per Gaudron, McHugh and Gummow JJ and [355] per Callinan J). In this court, in ***Prast v Town of Cottesloe*** [2000] WASCA 274; (2000) 22 WAR 474, Ipp J considered obviousness to be a significant factor [37] (see also ***Romeo*** at [50] per Brennan CJ).

Shire of Gingin v Coombe [2009] WASCA 92 -
Shire of Gingin v Coombe [2009] WASCA 92 -
Shire of Gingin v Coombe [2009] WASCA 92 -
Shire of Gingin v Coombe [2009] WASCA 92 -
Shire of Gingin v Coombe [2009] WASCA 92 -
Shire of Gingin v Coombe [2009] WASCA 92 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
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Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Gett v Tabet [2009] NSWCA 76 -
Gett v Tabet [2009] NSWCA 76 -
Gett v Tabet [2009] NSWCA 76 -
Gett v Tabet [2009] NSWCA 76 -
Adeels Palace Pty Ltd v Moubarak [2009] NSWCA 29 -
Adeels Palace Pty Ltd v Moubarak [2009] NSWCA 29 -
Ellis v. Uniting Church in Australia Property Trust (Q) [2008] QCA 388 -
Ellis v. Uniting Church in Australia Property Trust (Q) [2008] QCA 388 -
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Ellis v. Uniting Church in Australia Property Trust (Q) [2008] QCA 388 -
Ellis v. Uniting Church in Australia Property Trust (Q) [2008] QCA 388 -
Ellis v. Uniting Church in Australia Property Trust (Q) [2008] QCA 388 -

Shire of Leonora v Cooper [2008] WASCA 247 (02 December 2008) (Wheeler JA)
Brodie v Singleton Shire Council (2001) 206 CLR 512
Lujans v Yarrabee Coal Co Pty Ltd

Shire of Leonora v Cooper [2008] WASCA 247 -
Shire of Leonora v Cooper [2008] WASCA 247 -
Anderson v Gold Coast City Council [2008] QCA 353 (05 November 2008) (Keane and Holmes JJA and White AJA,)
Brodie v Singleton SC (2001) 206 CLR 512; [2001] HCA 29 , applied

Anderson v Gold Coast City Council [2008] QCA 353 -
Council of the City of Liverpool v Turano [2008] NSWCA 270 -
Council of the City of Liverpool v Turano [2008] NSWCA 270 -
Precision Products (NSW) Pty Ltd v Hawkesbury City Council [2008] NSWCA 278 -
Council of the City of Liverpool v Turano [2008] NSWCA 270 -
Precision Products (NSW) Pty Ltd v Hawkesbury City Council [2008] NSWCA 278 -
Nguyen v Cosmopolitan Homes [2008] NSWCA 246 -
Nguyen v Cosmopolitan Homes [2008] NSWCA 246 -
New South Wales v West [2008] ACTCA 14 (05 September 2008) (Higgins CJ, Penfold and Graham JJ)

220. In his judgment Gleeson CJ referred to his judgment in *Brodie v Singleton Shire Council* (2001) 206 CLR 512 ('Brodie'). In *Graham Barclay Oysters* his Honour said at [7] in relation to the issues raised in *Brodie* :

> *... Raising and spending money for road repairs involves setting priorities, not only between parts of the road system, but also between all the claims upon an authority's resources, and between the interests of taxpayers and those of road users. My view remains that setting priorities by government for the raising of revenue and the allocation of resources is essentially a political matter, and that, if the reasonableness of such priorities is a justiciable issue, that can be so only within limits. ...*

New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
Imbree v McNeilly [2008] HCA 40 -
Imbree v McNeilly [2008] HCA 40 -
Imbree v McNeilly [2008] HCA 40 -
Hearne v Street [2008] HCA 36 -
Angel v Hawkesbury City Council [2008] NSWCA 130 -
Angel v Hawkesbury City Council [2008] NSWCA 130 -
Blacktown City Council v Hocking [2008] NSWCA 144 -
Blacktown City Council v Hocking [2008] NSWCA 144 -
Blacktown City Council v Hocking [2008] NSWCA 144 -
Blacktown City Council v Hocking [2008] NSWCA 144 -
Blacktown City Council v Hocking [2008] NSWCA 144 -
Angel v Hawkesbury City Council [2008] NSWCA 130 -
Blacktown City Council v Hocking [2008] NSWCA 144 -
Blacktown City Council v Hocking [2008] NSWCA 144 -
State of NSW v Tyszyk [2008] NSWCA 107 -
State of NSW v Tyszyk [2008] NSWCA 107 -
Roads and Traffic Authority v Royal [2008] HCA 19 -
Roads and Traffic Authority v Royal [2008] HCA 19 -
Roads and Traffic Authority v Royal [2008] HCA 19 -
Roads and Traffic Authority v Royal [2008] HCA 19 -
Roads and Traffic Authority of NSW v Chandler [2008] NSWCA 64 -
Roads and Traffic Authority of NSW v Chandler [2008] NSWCA 64 -
Roads and Traffic Authority of NSW v Chandler [2008] NSWCA 64 -

Roads and Traffic Authority of NSW v Chandler [2008] NSWCA 64 -
Roads and Traffic Authority of NSW v Chandler [2008] NSWCA 64 -
Roads and Traffic Authority of NSW v Chandler [2008] NSWCA 64 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

131. I add for completeness that, in my view, the control and vulnerability of the person to whom a duty is said to be owed of which Gummow and Hayne JJ spoke in *Graham Barclay Oysters*, and that existed in cases such as *Pyrenees Shire Council v Day* [130] and *Brodie v Singleton Shire Council* , [131] did not exist in the present case. [132] To the extent that it could be said that the police officers here had control in respect of the relevant risk, such control was of a limited nature. In considering the question of control, it is relevant to compare the nature of the harm that potentially might have been prevented and the power that, it is said, ought to have been exercised by the police officer. The power to take the person to a medical practitioner does not operate directly to prevent any risk of harm posed to or by that person. And it is not insignificant that the nature of the harm here is one that is self- inflicted, which raises questions about the degree to which it is possible to assume control over such a risk, particularly, as s 10(1) itself implicitly contemplates, a person to whom such a duty is said to be owed might not appear to be mentally ill. It is not apparent here, for example, that, given the deceased's conduct in deceiving the police and the appellant, the exercise of power could have removed the risk to the deceased. Similarly, I think that there was no relevant vulnerability or dependence by the deceased on the police officers. The lack of effective control and the lack of dependence by the deceased on the police officers is to be contrasted with the situation in *Cran v State of New South Wales,* [133] where the claimant was incarcerated for an unduly prolonged period because of a police officer's failure to complete the paperwork necessary for his release and, as a result, he suffered a psychiatric illness. The relevant risk in that case would have been removed had the police officer completed the paperwork.

via

[131] (2001) 206 CLR 512 .

Kirkland-Veenstra v Stuart [2008] VSCA 32 -
TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd [2008] NSWCA 9 -
TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd [2008] NSWCA 9 -
TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd [2008] NSWCA 9 -
Brighton le Sands Amateur Fishermen's Association Ltd v Vasilios Koromvokis [2007] NSWCA 331 -
Brighton le Sands Amateur Fishermen's Association Ltd v Vasilios Koromvokis [2007] NSWCA 331 -
North Sydney Council v Binks [2007] NSWCA 245 -
North Sydney Council v Binks [2007] NSWCA 245 -
North Sydney Council v Binks [2007] NSWCA 245 -
North Sydney Council v Binks [2007] NSWCA 245 -
North Sydney Council v Binks [2007] NSWCA 245 -
North Sydney Council v Binks [2007] NSWCA 245 -
North Sydney Council v Binks [2007] NSWCA 245 -
North Sydney Council v Binks [2007] NSWCA 245 -
North Sydney Council v Binks [2007] NSWCA 245 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -

Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Amaca Pty Ltd v AB & P Constructions Pty Ltd [2007] NSWCA 220 -
Amaca Pty Ltd v AB & P Constructions Pty Ltd [2007] NSWCA 220 -
Greenwood v Papademetri [2007] NSWCA 221 (27 August 2007) (Tobias JA; Campbell JA ; Young CJ in Eq)

Brodie v Singleton Shire Council (2001) 206 CLR 512
Cartwright v McLaine & Long Proprietary Limited

Greenwood v Papademetri [2007] NSWCA 221 -
Ainger v Coffs Harbour City Council (No 2) [2007] NSWCA 212 -
Ainger v Coffs Harbour City Council (No 2) [2007] NSWCA 212 -
Ainger v Coffs Harbour City Council (No 2) [2007] NSWCA 212 -
Green v Hanson Construction Materials Pty Ltd [2007] QCA 260 (10 August 2007) (Jerrard JA, White and Atkinson JJ, Judgment of the Court)

24. Mr Morgan also referred to the decision in *Ghantous v Hawkesbury City Council* (2001) 206 CLR 512 , and in particular to the observations in the joint judgment of Gaudron, McHugh and Gummow JJ, [17] agreeing with Callinan J, that:

> "Persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes."

Those remarks accord with what Callinan J wrote [18] in that judgment, that:

> "The world is not a level playing field. It is not unreasonable to expect that people will see in broad daylight what lies ahead of them in the ordinary course as they walk along. No special vigilance is required for this."

Allied to that submission about judicial recognition of the obligation on pedestrians to take care for their own safety, and the expectation that pedestrians will do so on stairs (those being self evidently an appropriate place for self care by pedestrians), were references by Mr Morgan to the extent of past usage of that very set of stairs by many other people without mishap. The defendant led evidence from Mr Fenner that up to 12 or more concrete trucks would come to the plant each day, and up to 20 tippers delivering sand and gravel, and the drivers would all need to come to the office (up and down the stairs), and that:

> "There is no problem of having 30 trips up the stairs and 30 trips down, quite regularly."[19]

Mr Fenner calculated that there were literally thousands of such occasions without incident. His evidence included:

> "Well, over a period of two years, if you had somewhere between about 15 to 20,000 transactions and no incidents, you know, it is like Murphy's Law. Why fix it if it works?"

CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
St Mark's Orthodox Coptic College v Abraham [2007] NSWCA 185 -

CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
St Mark's Orthodox Coptic College v Abraham [2007] NSWCA 185 -
Sheather v Country Energy [2007] NSWCA 179 -
Sheather v Country Energy [2007] NSWCA 179 -
Sheather v Country Energy [2007] NSWCA 179 -
Sheather v Country Energy [2007] NSWCA 179 -
Sheather v Country Energy [2007] NSWCA 179 -
Sheather v Country Energy [2007] NSWCA 179 -
Sheather v Country Energy [2007] NSWCA 179 -
Sheather v Country Energy [2007] NSWCA 179 -
Sheather v Country Energy [2007] NSWCA 179 -
Sheather v Country Energy [2007] NSWCA 179 -
Randwick City Council v T & H Fatouros Pty Ltd [2007] NSWCA 177 -
Randwick City Council v T & H Fatouros Pty Ltd [2007] NSWCA 177 -
John Fairfax Publications Pty Ltd v Gacic [2007] HCA 28 -
New South Wales v Fahy [2007] HCA 20 -
New South Wales v Fahy [2007] HCA 20 -
New South Wales v Fahy [2007] HCA 20 -
Skulander v Willoughby City Council [2007] NSWCA 116 -
Skulander v Willoughby City Council [2007] NSWCA 116 -
Skulander v Willoughby City Council [2007] NSWCA 116 -
Skulander v Willoughby City Council [2007] NSWCA 116 -
Shire of Toodyay v Walton [2007] WASCA 76 -
Shire of Toodyay v Walton [2007] WASCA 76 -
Shire of Toodyay v Walton [2007] WASCA 76 -
Shire of Toodyay v Walton [2007] WASCA 76 -
Shire of Toodyay v Walton [2007] WASCA 76 -
Shire of Toodyay v Walton [2007] WASCA 76 -
Shire of Toodyay v Walton [2007] WASCA 76 -
Cornwell v The Queen [2007] HCA 12 -
Cornwell v The Queen [2007] HCA 12 -
Brock v Hillsdale Bowling and Recreation Club Ltd [2007] NSWCA 46 (15 March 2007) (Ipp JA ; Tobias JA ; Basten JA)

> 57 The fact that the access to the ground from the veranda could have been constructed differently, and even more safely, does not mean that there was a failure to take reasonable care in maintaining the existing construction: see *Jones v Bartlett* (2000) 205 CLR 166 at [22]-[23] (Gleeson CJ). Further, in considering breach, it is necessary to take into account the risk to persons taking reasonable care for their own safety: *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [163] (Gaudron, McHugh and Gummow JJ) . Finally, it is also important to bear in mind that foreseeability of risk of injury is by no means a sufficient condition for a finding of negligence. As has often been noted, where a risk has materialised, it can rarely be said that the risk itself was unforeseeable in advance.

Brock v Hillsdale Bowling and Recreation Club Ltd [2007] NSWCA 46 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 (27 February 2007) (Gleeson CJ; Kirby, Hayne, Callinan and Crennan JJ)

> 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.

Leichhardt Municipal Council v Montgomery [2007] HCA 6 (27 February 2007) (Gleeson CJ; Kirby, Hayne, Callinan and Crennan JJ)

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.

Leichhardt Municipal Council v Montgomery [2007] HCA 6 (27 February 2007) (Gleeson CJ; Kirby, Hayne, Callinan and Crennan JJ)

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.

via

[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) .

North Sydney Council v Roman [2007] NSWCA 27 (27 February 2007) (McColl JA; Bryson JA; Basten JA)

51 The use of the expression “actual knowledge” in s 45 was plainly intended to prevent a roads authority being found civilly liable merely because it had constructive knowledge of a risk. This had been the outcome in *Brodie v Singleton Shire Council* ; *Ghantous v Hawkesbury Shire Council* [2001] HCA 29; (2001) 206 CLR 512, decided the year before the introduction of the *Civil Liability Act* .

North Sydney Council v Roman [2007] NSWCA 27 (27 February 2007) (McColl JA; Bryson JA; Basten JA)

52 In *Brodie* the first applicant was injured when he drove a truck owned by the second applicant onto a bridge constructed some 50 years earlier within the Singleton Shire. The truck weighed 22 tonnes and the bridge was adapted to bear a load of 15 tonnes. The timber girders failed, the bridge collapsed and the truck fell onto the creek bed below. At trial the applicants tendered evidence from the Council’s files “indicating that it had been aware of the poor condition of the bridge” and had “within the recent past before the accident ... carried out some repairs on it”: *Brodie* (at [174]). The primary judge found that Council staff should have discovered that the girders on the bridge

were "substantially affected by piping" at the time these repairs were carried out: *Brodie* (at [176]). He held that the evidence disclosed a case of misfeasance in the exercise of the power to repair and found for the applicants on the ground that the council had been negligent in failing to take steps to replace the girders.

Leichhardt Municipal Council v Montgomery [2007] HCA 6 (27 February 2007) (Gleeson CJ; Kirby, Hayne, Callinan and Crennan JJ)

149. Subsequent legislative intervention, with the evident intention of reinstating an immunity for highway authorities for nonfeasance [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 nonfeasance 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.

Leichhardt Municipal Council v Montgomery [2007] HCA 6 (27 February 2007) (Gleeson CJ; Kirby, Hayne, Callinan and Crennan JJ)

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.

North Sydney Council v Roman [2007] NSWCA 27 (27 February 2007) (McColl JA; Bryson JA; Basten JA)

Tesco Supermarkets Ltd v Nattrass [1972] AC 153 applied; *Brodie v Singleton Shire Council* ; *Ghantous v Hawkesbury Shire Council* [2001] HCA 29; (2001) 206 CLR 512 discussed.

Leichhardt Municipal Council v Montgomery [2007] HCA 6 (27 February 2007) (Gleeson CJ; Kirby, Hayne, Callinan and Crennan JJ)

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.

Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
North Sydney Council v Roman [2007] NSWCA 27 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -

Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
North Sydney Council v Roman [2007] NSWCA 27 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
North Sydney Council v Roman [2007] NSWCA 27 -
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Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
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Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
North Sydney Council v Roman [2007] NSWCA 27 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
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Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Carey v Lake Macquarie City Council [2007] NSWCA 4 -
Carey v Lake Macquarie City Council [2007] NSWCA 4 -
Carey v Lake Macquarie City Council [2007] NSWCA 4 -
Carey v Lake Macquarie City Council [2007] NSWCA 4 -
Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 (19 January 2007) (Martin CJ)

> Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council (2001) 206 CLR 512
> Bryant v Fawdon Pty Ltd (1993) A Tort Rep 81-204

Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 -
Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 -
Clayton v The Queen [2006] HCA 58 -
Sutherland Shire Council v Becker [2006] NSWCA 344 (12 December 2006) (Mason P; Giles JA; Bryson JA)

> 65 The power to approve subdivisions and impose conditions, which a local government authority has a statutory duty to exercise on application, and does not involve continuing exercise of control over the regulated activity after its exercise, has characteristics which make attribution of a duty of care in its exercise a very different matter from attribution of a duty of care in the exercise of statutory or public powers which require or enable continuing intervention in some continuing activities. In this respect the power is quite different to the powers of road authorities considered in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, powers relating to the supervision of circumstances affecting public health in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, and very markedly different from the circumstances of control over employment in *Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1.* The power is not at all like powers vested by statute in public authorities which give such a significant and special measure of control over the safety of persons or of property as to impose a duty of care, or to oblige the authority to exercise those powers to avert a danger to safety or to bring the danger to the knowledge of citizens otherwise at hazard from a danger; that is, it is not a power of the kind referred to in *Brodie v Singleton Shire Council* by Gaudron, McHugh & Gummow JJ at 588-599 [102].

Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Shellharbour City Council v Rigby [2006] NSWCA 308 -
Shellharbour City Council v Rigby [2006] NSWCA 308 -
Shellharbour City Council v Rigby [2006] NSWCA 308 -
Shellharbour City Council v Rigby [2006] NSWCA 308 -
Shellharbour City Council v Rigby [2006] NSWCA 308 -
Shellharbour City Council v Rigby [2006] NSWCA 308 -

Great Lakes Shire Council v Dederer [2006] NSWCA 101 (05 October 2006) (Handley JA at 1; Ipp JA at 67; Tobias JA at 325)

> 225. The RTA's predecessor (in whose shoes it stood) had created the danger. A road authority's responsibility for original construction is well recognised: see *Webb v South Australia* (1982) 56 ALJR 912 where Mason, Brennan and Deane JJ said (at 913):
>
> "The respondent created the danger by its artificial construction in the highway. In this situation the application of the reasonable standard of care calls for the elimination of risk of injury to users of the highway presented by that artificial construction, the more so where elimination of the risk can be achieved without undue difficulty and expense. It is well established that it is the duty of highway authorities to keep:
>
> > '... the artificial work which they [have] created in such a state as to prevent its causing a danger to passengers on the highway which, but for such artificial construction, would not have existed, or, at the least, of protecting the public against the danger ...'
>
> It would not be right or reasonable for a highway authority to ignore a risk of injury which it has created by its artificial construction in the highway, if it entails a possible risk of injury to pedestrians which, though small, is not fanciful or farfetched."
>
> See also *Brodie* at 539 , [54] where reference with apparent approval is made to *Webb* . See also *Ainger v Coffs Harbour City Council* [2005] NSWCA 424 at [81] to [84] per McColl JA.

Great Lakes Shire Council v Dederer [2006] NSWCA 101 (05 October 2006) (Handley JA at 1; Ipp JA at 67; Tobias JA at 325)

> 57. Participation in recreational activity, and particularly where it involves inherent risks, is voluntary. Such activity is of a different character from that undertaken in the work place, on the roads, in the market place and in other areas where people must venture: *Vairy* para [217] (Callinan and Heydon JJ). In the same case Gummow J quoted (para [80]) a statement from the joint judgment in *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [141] that the use of roads is a "basic right and necessity".

Great Lakes Shire Council v Dederer [2006] NSWCA 101 -
Great Lakes Shire Council v Dederer [2006] NSWCA 101 -
Great Lakes Shire Council v Dederer [2006] NSWCA 101 -
Great Lakes Shire Council v Dederer [2006] NSWCA 101 -
Great Lakes Shire Council v Dederer [2006] NSWCA 101 -
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Great Lakes Shire Council v Dederer [2006] NSWCA 101 -
Great Lakes Shire Council v Dederer [2006] NSWCA 101 -
Great Lakes Shire Council v Dederer [2006] NSWCA 101 -
Campbelltown City Council v Linknarf Limited (Formerly Franklins Ltd) [2006] NSWCA 242 -
Campbelltown City Council v Linknarf Limited (Formerly Franklins Ltd) [2006] NSWCA 242 -
Central Bayside General Practice Association Ltd v Commissioner of State Revenue [2006] HCA 43 -
Central Bayside General Practice Association Ltd v Commissioner of State Revenue [2006] HCA 43 -
S v Boulton [2006] FCAFC 99 -
Batistatos v Roads and Traffic Authority of New South Wales [2006] HCA 27 -
Batistatos v Roads and Traffic Authority of New South Wales [2006] HCA 27 -

Batistatos v Roads and Traffic Authority of New South Wales [2006] HCA 27 -
Batistatos v Roads and Traffic Authority of New South Wales [2006] HCA 27 -
Batistatos v Roads and Traffic Authority of New South Wales [2006] HCA 27 -
Batistatos v Roads and Traffic Authority of New South Wales [2006] HCA 27 -
Batistatos v Roads and Traffic Authority of New South Wales [2006] HCA 27 -
The Finance Brokers Supervisory Board v Van Stokkum [2006] WASCA 97 (31 May 2006) (Steytler P)
Brodie v Singleton Shire Council (2001) 206 CLR 512
Broom v Morgan

The Finance Brokers Supervisory Board v Van Stokkum [2006] WASCA 97 -
C G Maloney Pty Ltd v Hutton-Potts [2006] NSWCA 136 -
C G Maloney Pty Ltd v Hutton-Potts [2006] NSWCA 136 -
C G Maloney Pty Ltd v Hutton-Potts [2006] NSWCA 136 -
Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 -
Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 -
Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 -
Sweeney v Boylan Nominees Pty Ltd [2006] HCA 19 -
Harriton v Stephens [2006] HCA 15 -
Harriton v Stephens [2006] HCA 15 -
Waller v James [2006] HCA 16 -
Harriton v Stephens [2006] HCA 15 -
Edson v Roads and Traffic Authority [2006] NSWCA 68 -
Edson v Roads and Traffic Authority [2006] NSWCA 68 -
Edson v Roads and Traffic Authority [2006] NSWCA 68 -
Edson v Roads and Traffic Authority [2006] NSWCA 68 -
Edson v Roads and Traffic Authority [2006] NSWCA 68 -
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Edson v Roads and Traffic Authority [2006] NSWCA 68 -
Edson v Roads and Traffic Authority [2006] NSWCA 68 -
Edson v Roads and Traffic Authority [2006] NSWCA 68 -
Shellharbour City Council v Johnson [2006] NSWCA 67 -
Shellharbour City Council v Johnson [2006] NSWCA 67 -
Shellharbour City Council v Johnson [2006] NSWCA 67 -
Shellharbour City Council v Johnson [2006] NSWCA 67 -
Randwick City Council v Muzic [2006] NSWCA 66 -
Randwick City Council v Muzic [2006] NSWCA 66 -
Shellharbour City Council v Johnson [2006] NSWCA 67 -
Randwick City Council v Muzic [2006] NSWCA 66 -
Shellharbour City Council v Johnson [2006] NSWCA 67 -
Marsden v Ydalia Holdings (WA) Pty Ltd [2006] WASCA 52 -
Marsden v Ydalia Holdings (WA) Pty Ltd [2006] WASCA 52 -
Marsden v Ydalia Holdings (WA) Pty Ltd [2006] WASCA 52 -
Marsden v Ydalia Holdings (WA) Pty Ltd [2006] WASCA 52 -
Marsden v Ydalia Holdings (WA) Pty Ltd [2006] WASCA 52 -
R v Spero [2006] VSCA 58 -
R v Spero [2006] VSCA 58 -
Eutick v City of Canada Bay Council [2006] NSWCA 30 -
Eutick v City of Canada Bay Council [2006] NSWCA 30 -
Eutick v City of Canada Bay Council [2006] NSWCA 30 -
Eutick v City of Canada Bay Council [2006] NSWCA 30 -
Eutick v City of Canada Bay Council [2006] NSWCA 30 -
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Eutick v City of Canada Bay Council [2006] NSWCA 30 -
Eutick v City of Canada Bay Council [2006] NSWCA 30 -
Eutick v City of Canada Bay Council [2006] NSWCA 30 -
Booksan Pty Ltd v Wehbe [2006] NSWCA 3 -
Guides Australia Inc v McMartin [2006] NSWCA 20 (16 February 2006) (Handley JA, Young CJ in Eq and Campbell AJA)

> 96 I should note that Judge Rolfe referred to Mr Crittle handing up *Brodie* , however, it was clear that this was a reference to two cases heard together *Brodie* and *Ghantous v Hawkesbury Shire Council* (2001) 206 CLR 512, of which the latter is the more relevant to the issues in this matter.

Guides Australia Inc v McMartin [2006] NSWCA 20 -
Guides Australia Inc v McMartin [2006] NSWCA 20 -
Guides Australia Inc v McMartin [2006] NSWCA 20 -
Guides Australia Inc v McMartin [2006] NSWCA 20 -
Guides Australia Inc v McMartin [2006] NSWCA 20 -
R v Lovett [2006] VSCA 5 -
R v Lovett [2006] VSCA 5 -
R v Lovett [2006] VSCA 5 -
Langham v Connells Point Rovers Soccer Club Inc [2005] NSWCA 461 -
Langham v Connells Point Rovers Soccer Club Inc [2005] NSWCA 461 -
Langham v Connells Point Rovers Soccer Club Inc [2005] NSWCA 461 -
Langham v Connells Point Rovers Soccer Club Inc [2005] NSWCA 461 -
Langham v Connells Point Rovers Soccer Club Inc [2005] NSWCA 461 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
Neindorf v Junkovic [2005] HCA 75 (08 December 2005) (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ)

> 36. In his dissenting reasons, Doyle CJ accepted that the appellant owed the respondent a duty of care of some kind [41] . He also accepted that *Ghantous* was a special case, delivered concurrently with *Brodie v Singleton Shire Council* [42] , and addressed fundamentally the previously anomalous immunity of highway authorities for nonfeasance in respect of the upkeep of highways [43] .

via

[42] (2001) 206 CLR 512 .

Neindorf v Junkovic [2005] HCA 75 -
Leichhardt Municipal Council v Montgomery [2005] NSWCA 432 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
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Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Leichhardt Municipal Council v Montgomery [2005] NSWCA 432 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -

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Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Leichhardt Municipal Council v Montgomery [2005] NSWCA 432 -
Leichhardt Municipal Council v Montgomery [2005] NSWCA 432 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Bernasconi v Newcastle City Council [2005] NSWCA 422 -
Bernasconi v Newcastle City Council [2005] NSWCA 422 -
Bernasconi v Newcastle City Council [2005] NSWCA 422 -
Bernasconi v Newcastle City Council [2005] NSWCA 422 -
Bernasconi v Newcastle City Council [2005] NSWCA 422 -
Bernasconi v Newcastle City Council [2005] NSWCA 422 -
Timberland Property Holdings Pty Ltd v Bundy [2005] NSWCA 419 -
Timberland Property Holdings Pty Ltd v Bundy [2005] NSWCA 419 -
Timberland Property Holdings Pty Ltd v Bundy [2005] NSWCA 419 -
Timberland Property Holdings Pty Ltd v Bundy [2005] NSWCA 419 -
Timberland Property Holdings Pty Ltd v Bundy [2005] NSWCA 419 -
Timberland Property Holdings Pty Ltd v Bundy [2005] NSWCA 419 -
Timberland Property Holdings Pty Ltd v Bundy [2005] NSWCA 419 -
Roads and Traffic Authority v McGregor [2005] NSWCA 388 -
Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380 -
Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380 -
Roads and Traffic Authority v McGregor [2005] NSWCA 388 -
Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380 -
Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind" [2005] QCA 405 -
Volman T/a Volman Engineering v Lobb; Mobil Oil Australia Pty Ltd v Lobb [2005] NSWCA 348 -
Volman T/a Volman Engineering v Lobb; Mobil Oil Australia Pty Ltd v Lobb [2005] NSWCA 348 -
Volman T/a Volman Engineering v Lobb; Mobil Oil Australia Pty Ltd v Lobb [2005] NSWCA 348 -
Mulligan v Coffs Harbour City Council [2005] HCA 63 (21 October 2005) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

77. And in *Ghantous v Hawkesbury City Council* [64] five judges of this Court stressed, and treated obviousness as a decisive factor [65] .

Mulligan v Coffs Harbour City Council [2005] HCA 63 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Mulligan v Coffs Harbour City Council [2005] HCA 63 -
Mulligan v Coffs Harbour City Council [2005] HCA 63 -
Mulligan v Coffs Harbour City Council [2005] HCA 63 -
Mulligan v Coffs Harbour City Council [2005] HCA 63 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Mulligan v Coffs Harbour City Council [2005] HCA 63 -
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Mulligan v Coffs Harbour City Council [2005] HCA 63 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Wynne v Pilbeam [2005] WASCA 200 -
State of New South Wales v Williamson [2005] NSWCA 352 -
State of New South Wales v Williamson [2005] NSWCA 352 -
State of New South Wales v Williamson [2005] NSWCA 352 -
State of New South Wales v Williamson [2005] NSWCA 352 -
State of New South Wales v Williamson [2005] NSWCA 352 -
State of New South Wales v Williamson [2005] NSWCA 352 -
State of New South Wales v Williamson [2005] NSWCA 352 -
McNamara v Consumer Trader and Tenancy Tribunal [2005] HCA 55 -

McNamara v Consumer Trader and Tenancy Tribunal [2005] HCA 55 -
Pascoe v Coolum Resort Pty Ltd [2005] QCA 354 -
Pascoe v Coolum Resort Pty Ltd [2005] QCA 354 -
Pascoe v Coolum Resort Pty Ltd [2005] QCA 354 -
Pascoe v Coolum Resort Pty Ltd [2005] QCA 354 -
Pascoe v Coolum Resort Pty Ltd [2005] QCA 354 -
Pascoe v Coolum Resort Pty Ltd [2005] QCA 354 -
Pascoe v Coolum Resort Pty Ltd [2005] QCA 354 -
Pascoe v Coolum Resort Pty Ltd [2005] QCA 354 -
State of New South Wales v Watzinger [2005] NSWCA 329 -
Pascoe v Coolum Resort Pty Ltd [2005] QCA 354 -
Pascoe v Coolum Resort Pty Ltd [2005] QCA 354 -
Pascoe v Coolum Resort Pty Ltd [2005] QCA 354 -
Pascoe v Coolum Resort Pty Ltd [2005] QCA 354 -
Pascoe v Coolum Resort Pty Ltd [2005] QCA 354 -
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Pascoe v Coolum Resort Pty Ltd [2005] QCA 354 -
Pascoe v Coolum Resort Pty Ltd [2005] QCA 354 -
Pascoe v Coolum Resort Pty Ltd [2005] QCA 354 -
Salamastrakis v Rockdale City Council [2005] NSWCA 313 -
Salamastrakis v Rockdale City Council [2005] NSWCA 313 -
Salamastrakis v Rockdale City Council [2005] NSWCA 313 -
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Salamastrakis v Rockdale City Council [2005] NSWCA 313 -
Salamastrakis v Rockdale City Council [2005] NSWCA 313 -
Salamastrakis v Rockdale City Council [2005] NSWCA 313 -
Lynch v Kinney Shoes (Australia) Ltd [2005] QCA 326 -
Shire of Wakool v Walters [2005] VSCA 216 -
Whittlesea City Council v Merie [2005] VSCA 199 (11 August 2005) (Warren, C.J, Buchanan, J.A and Byrne A.J.A)

10. The appeal before us was conducted on the basis that the council had a statutory authority to carry out works on footpaths within the municipality. The majority of the High Court *Brodie v Singleton Shire Council [4]* declared the duty of care owed by such local authorities in these terms:

> "Authorities having statutory powers of the nature of those conferred by the [Local Government Act 1919 (N.S.W.)] 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." [5]

In the case where the duty in question is directed to pedestrians, it is not to all pedestrians using the footpath that such a duty is owed: it is only to those pedestrians exercising reasonable care for their own safety. [6]

via

[6] (2001) 206 C.L.R. 512 at 581 [163] , per Gaudron, McHugh, Gummow JJ .

Whittlesea City Council v Merie [2005] VSCA 199 (11 August 2005) (Warren, C.J, Buchanan, J.A and Byrne A.J.A)

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[4] (2001) 206 C.L.R. 512 .

Whittlesea City Council v Merie [2005] VSCA 199 -
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Whittlesea City Council v Merie [2005] VSCA 199 -
Bartolo v Owners of Strata Plan No. 10535 and 2 Ors [2005] NSWCA 256 (05 August 2005) (Santow, Tobias and McColl JJA)

22 The trial judge's conclusions and reasoning I have attempted to set out below, in summary form, adding the relevant citations:

> (a) In a general sense there could be "a foreseeability" that somebody might trip (Judgment, Red, 17R). However, the appellant was required to show that the driveway was dangerous. That did not merely mean that it could possibly be an occasion of harm. People are regularly required to walk on uneven surfaces on both public and private land: *Ghantous* (supra) per Gleeson CJ at 526 (Red, 19S).
>
> (b) Pedestrians are generally more able to see and avoid imperfections in a road surface: *Ghantous* per Gaudron, McHugh and Gummow JJ at 581 (Red, 20E).
>
> (c) Pedestrians are ordinarily required to exercise reasonable care for their own safety by keeping a proper lookout, and thereby perceiving and avoiding obvious hazards such as uneven paving stones, tree roots or holes: *Ghantous* per Gaudron, McHugh and Gummow JJ at 581 (Red, 20E); *Richmond Valley Council v Standing* (2002) NSWCA 359 per Heydon JA at [54] (Red, 21O).
>
> (d) The imperfections in the driveway were of a kind which were obvious and common across the country. It was reasonable to expect the appellant to have seen the imperfections as he walked along in daylight: *Richmond Valley Council v Standing* (2002) NSWCA 359 per Heydon JA at [54] (Red, 21R-V),

(e) There was no breach of duty because the concrete lip "*was there, it was obvious, it was to be seen*" (Red, 22G). This was not a case where the danger was not readily perceived because of inadequate lighting or the nature of the danger or the surrounding area (as in *Buckle v Bayswater Road Board* (19 36) 57 CLR 259 where the hole was concealed by grass), where there may be a foreseeable risk of harm even to persons taking reasonable care for their own safety (Red, 20Q, citing *Ghantous* per Gaudron, McHugh and Gummow JJ at 581).

(f) While no express finding was made as to whether the appellant was exercising reasonable care for his own safety (appellant's submissions, Orange, 8O), a finding that the appellant was **not** exercising reasonable care may be inferred from the judgment, but, I interpolate, based only on the propositions earlier set out as derived from highway cases; see Red, 20-22.

Bartolo v Owners of Strata Plan No. 10535 and 2 Ors [2005] NSWCA 256 -
Bartolo v Owners of Strata Plan No. 10535 and 2 Ors [2005] NSWCA 256 -
State of New South Wales v Heins [2005] NSWCA 258 -
Bartolo v Owners of Strata Plan No. 10535 and 2 Ors [2005] NSWCA 256 -
Bartolo v Owners of Strata Plan No. 10535 and 2 Ors [2005] NSWCA 256 -
Bartolo v Owners of Strata Plan No. 10535 and 2 Ors [2005] NSWCA 256 -
Bartolo v Owners of Strata Plan No. 10535 and 2 Ors [2005] NSWCA 256 -
Ridis v Strata Plan 10308 [2005] NSWCA 246 -
Ridis v Strata Plan 10308 [2005] NSWCA 246 -
Town of Mosman Park v Tait [2005] WASCA 124 -
Town of Mosman Park v Tait [2005] WASCA 124 -
Town of Mosman Park v Tait [2005] WASCA 124 -
Town of Mosman Park v Tait [2005] WASCA 124 -
Town of Mosman Park v Tait [2005] WASCA 124 -
Fingleton v The Queen [2005] HCA 34 -
Fingleton v The Queen [2005] HCA 34 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Aiello v Marrickville Council [2005] NSWCA 194 -
Aiello v Marrickville Council [2005] NSWCA 194 -
Aiello v Marrickville Council [2005] NSWCA 194 -
Commissioner of Main Roads v Jones [2005] HCA 27 (20 May 2005) (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ)

40. Where the state of a highway or main road created such a risk, the Commissioner was obliged to take reasonable steps to alleviate the danger. But what was reasonable in this case? On that subject, the following was said in the joint judgment in *Brodie* [16] :

> "The perception of the response by the authority calls for, to adapt the statement by Mason J in *Wyong Shire Council v Shirt* [17] , a consideration of various matters; in particular, the magnitude of the risk and the degree of probability that it will occur, the expense, difficulty and inconvenience to the authority in taking the steps described above to alleviate the danger, and any other competing or conflicting responsibility or commitments of the authority. The duty does not extend to ensuring the safety of road users in all circumstances. In the application of principle, much thus will turn upon the facts and circumstances disclosed by the evidence in each particular case."

> Counsel for the Commissioner emphasised the propositions in these last two sentences as particularly important for the present appeal. Counsel also emphasised the "localised" nature of the response pleaded by the respondent as that which ought to have been given by the Commissioner. A fundamental problem with the case for the respondent has been its reliance upon broadly expressed evidence.

via

[16] (2001) 206 CLR 512 at 577578 [151] (footnote omitted).

Commissioner of Main Roads v Jones [2005] HCA 27 -
Commissioner of Main Roads v Jones [2005] HCA 27 -
Commissioner of Main Roads v Jones [2005] HCA 27 -
Commissioner of Main Roads v Jones [2005] HCA 27 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Apex Holiday Centre (Inc) v Lynn [2005] WASCA 58 -
Apex Holiday Centre (Inc) v Lynn [2005] WASCA 58 -
Brymount Pty Ltd v Cummins (No 2) [2005] NSWCA 69 (17 March 2005) (Beazley, Ipp and McColl JJA)

> 17 The case against the Council was argued on the basis that the principles in *Brodie* and *Ghantous* a pplied. The trial judge dealt with it on that basis although, on this Court's judgment, his Honour made a number of findings of fact in aid of his conclusion on liability that were considered unsustainable on the evidence. In particular, the Court found that, contrary to the trial judge's conclusion, there was no shadowing in the laneway that obscured its uneven surface. The Court concluded the state of the road was obvious. Mrs Cummins had agreed in cross-examination that had she been looking at the ground in front of her she would have seen its uneven surface. Further, Mrs. Cummins had not been able to prove that the depression in the road in which she had fallen had been caused by the Council. Rather, it was caused by work undertaken by some other public utility. In all the circumstances the Court held that the trial judge had erred in finding the Council had breached its duty of care.

Brymount Pty Ltd v Cummins (No 2) [2005] NSWCA 69 -
Brymount Pty Ltd v Cummins (No 2) [2005] NSWCA 69 -
Brymount Pty Ltd v Cummins (No 2) [2005] NSWCA 69 -
Brymount Pty Ltd v Cummins (No 2) [2005] NSWCA 69 -
Roads and Traffic Authority v Ryan; Blue Mountains City Council v Ryan [2005] NSWCA 34 (15 March 2005) (Mason P, Sheller and Bryson JJA)

> 29 Mr Joseph submitted, during argument, that, unlike counsel for the RTA, Mr Davies SC, the Council never admitted breach of duty in the High Court. It was submitted that Dunford J's determination that a simple lack of maintenance gave rise to a breach of a duty of care was wrong in law either before the decision in *Brodie* or after it. Further, it was submitted that, if the claim was in non-feasance, the Council had not been allowed to tender evidence in respect of its resources and therefore was prevented from running the defence which *Brodie* would have permitted.

Roads and Traffic Authority v Ryan; Blue Mountains City Council v Ryan [2005] NSWCA 34 -
Roads and Traffic Authority v Ryan; Blue Mountains City Council v Ryan [2005] NSWCA 34 -
Roads and Traffic Authority v Ryan; Blue Mountains City Council v Ryan [2005] NSWCA 34 -
Roads and Traffic Authority v Ryan; Blue Mountains City Council v Ryan [2005] NSWCA 34 -
Roads and Traffic Authority v Ryan; Blue Mountains City Council v Ryan [2005] NSWCA 34 -
Roads and Traffic Authority v Ryan; Blue Mountains City Council v Ryan [2005] NSWCA 34 -
Roads and Traffic Authority v Ryan; Blue Mountains City Council v Ryan [2005] NSWCA 34 -
Roads and Traffic Authority v Ryan; Blue Mountains City Council v Ryan [2005] NSWCA 34 -
Roads and Traffic Authority v Ryan; Blue Mountains City Council v Ryan [2005] NSWCA 34 -

D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12 -
D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12 -
D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12 -
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D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12 -
D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12 -
Smith v Eurobodalla Shire Council [2004] NSWCA 479 (02 March 2005) (Mason P, Santow JA and McClellan AJA)

> Ghantous v Hawkesbury Shire Council (2001) 206 CLR 512
> Lustre Hosiery Ltd v York

Smith v Eurobodalla Shire Council [2004] NSWCA 479 (02 March 2005) (Mason P, Santow JA and McClellan AJA)

> 98 However, the role of proximity, specific and general reliance, foreseeability, and the obligations of a public authority to efficiently mobilise its limited resources have proved fertile grounds for judicial and academic discussion: see *Heyman; Brodie v Singleton Shire Council, Ghantous v Hawkesbury Shire Council* (2001) 206 CLR 512 ; *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Parramatta City Council v Lutz* (1988) 12 NSWLR 293; *San Sebastian Pty Ltd v Minister Administering Environmental Planning Act* (1986) 162 CLR 340 .

Smith v Eurobodalla Shire Council [2005] NSWCA 89 -
Smith v Eurobodalla Shire Council [2005] NSWCA 89 -
Smith v Eurobodalla Shire Council [2005] NSWCA 89 -
Smith v Eurobodalla Shire Council [2004] NSWCA 479 -
Swain v Waverley Municipal Council [2005] HCA 4 -
Moyne Shire Council v Pearce [2004] VSCA 246 -
Moyne Shire Council v Pearce [2004] VSCA 246 -
Moyne Shire Council v Pearce [2004] VSCA 246 -
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Moyne Shire Council v Pearce [2004] VSCA 246 -
TNT Australia Pty. Ltd. v Wills [2004] NSWCA 455 -
TNT Australia Pty. Ltd. v Wills [2004] NSWCA 455 -
Sutherland Shire Council v Henshaw [2004] NSWCA 386 (10 December 2004) (Sheller, Hodgson and Bryson JJA)

11 The appeal was upheld with the result that the verdict and judgment for the respondent pedestrian was set aside. In that sense, as Bryson JA has pointed out, Giles JA's remarks might be regarded as obiter. Hodgson JA agreed with the orders proposed by Giles JA and "substantially with his reasons." His Honour having said that "the determination of what the duty requires in a particular case is a question of fact to be considered when addressing the question of breach", continued:

> "58 However, this question of fact is one which is to be determined in accordance with legal requirements, in particular the requirement that regard be had to the competing considerations referred to by Mason J in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 . One thing that must be considered is the magnitude of the risk of injury to the plaintiff or to a class of persons including the plaintiff, that a reasonable person in the defendant's position would have foreseen his or her conduct involved. Also, *Brodie v Singleton Shire Council* (2001) 206 CLR 512 shows that, in relation to road users generally and pedestrians in particular, the relevant risks to which road authorities should have regard are the risks of injury to persons exercising reasonable care for their own safety."

Pearlman AJA agreed with Giles JA.

Sutherland Shire Council v Henshaw [2004] NSWCA 386 (10 December 2004) (Sheller, Hodgson and Bryson JJA)

76 *Temora Shire Council v. Stein* [2004] NSWCA 236 relates to a fall on a footpath which was not sealed or paved, at a junction with a raised concrete driveway crossing the footpath, and the edge of the driveway where the plaintiff tripped was approximately 30 to 40mm above the footpath. The plaintiff fell and was injured when she was delivering brochures at about 11pm. She was aware of the raised driveway because she had tripped on it about a year earlier. In my respectful view Giles JA made a much closer examination of *Brodie* and subsequent cases, and a much closer consideration of what in principle is involved than has appeared in any other judgment. Giles JA examined closely at [20] to [30] passages in *Brodie* which deal with content and breach of duty of care in the context of liability to pedestrians. Giles JA said, after referring to *Brodie* :

> [31] The later decisions are legion, but firmly establish that the content or breach of the duty of care of a council (or other entity responsible for a public area) involves regard to the obviousness of the risk to a pedestrian exercising reasonable care for his or her own safety. I refer only to illustrative cases.

and went on to examine *Byrnes* , *Standing* and *Newcastle City Council v. Lindsay* [2004] NSWCA 198.

Sutherland Shire Council v Henshaw [2004] NSWCA 386 (10 December 2004) (Sheller, Hodgson and Bryson JJA)

57 In the leading judgment in *Brodie* at 581 [163] Gaudron, McHugh and Gummow JJ also said:

> [163] The formulation of the duty in terms which require that a road be safe not in all circumstances but for users exercising reasonable care for their own safety is even more important where, as in *Ghantous* , the plaintiff was a pedestrian. In general, such persons are more able to see and avoid imperfections in a road surface. It is the nature of walking in the outdoors that the ground may not be as even, flat or smooth as other

surfaces. As Callinan J points out in his reasons in *Ghantous* , persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes. Of course, some allowance must be made for inadvertence. Certain dangers may not readily be perceived because of inadequate lighting or the nature of the danger (as in *Webb v. The State of South Australia* [(1982) 56 ALJR 912; 43 ALR 465.]]), or the surrounding area (as in *Buckle* , where the hole was concealed by grass [(19 36) 57 CLR 259 at 266.]). In such circumstances, there may be a foresee able risk of harm even to persons taking reasonable care for their own safety. These hazards will include dangers in the nature of a "trap" or, as Jordan CJ put it, "of a kind calling for some protection or warning"[*Searle v Metropolitan Water, Sewerage and Drainage Board* (1936) 13 LGR 115 at 117.]. In *Romeo* , Toohey and Gummow JJ noted in a different context that the care to be expected of members of the public is related to the obviousness of the danger[302]. Kirby J pointed out in the same case that even an occupier of premises "is generally entitled to assume that most entrants will take reasonable care for their own safety"[(1998) 192 CLR 431 at 455 [52] .]. Each case will, of course, turn on its own facts[304].

(Their Honours' reference to *Searle v. Metropolitan Water, Sewerage and Drainage Board* (1936) 13 LGR 115 was made for the illustration furnished by Jordan C.J.'s use of language, not as a source of law: *Searle* did not relate to a highway authority or to maintenance or repair of a highway, but to active operations of a water authority which had lawful authority to dig a trench in which to place copper pipes; during the work a copper pipe was left across the footpath: it would seem, pending placing the pipe in the trench.)

Sutherland Shire Council v Henshaw [2004] NSWCA 386 (10 December 2004) (Sheller, Hodgson and Bryson JJA)

60 The disposition of *Ghantous* in the leading judgment was not produced and was not influenced by their Honours' decision to abandon the distinction between misfeasance and mere nonfeasance. In their Honours' view there was no breach of duty. The terms of para [167] show clearly that this was the ground of decision, and so too do the terms of Callinan J's judgment at [355] . Gleeson CJ, who dissented in *Brodie* on the misfeasance and nonfeasance test, was of the opinion, agreeing with Callinan J, that no case of negligence was made out against the Hawkesbury City Council: see p525-526 [5-8]. Gleeson CJ did not adopt the reasons given by Callinan J, and the Chief Justice's reasons do not refer to an assumption that pedestrians will take reasonable care for their own safety. Kirby J reached a similar conclusion that no breach of duty was shown on the part of the highway authority; see 605-606 [244-248]. Paragraph [247] shows that not only was his Honour not of the view that there was any contributory negligence of Mrs *Ghantous* , but also that his Honour was of the view that the highway authority's duty of care was not affected by any assumption about the care to be taken by pedestrians: "I would not rest my conclusion in [the plaintiff's] case upon any enlarged assumptions about a pedestrian's need for vigilance for his or her own safety. I do not agree in the latter-day enthusiasm for the notion of contributory negligence that is abroad. Cf *Liftronic Pty Ltd* v. *Unver* (2001) 75 ALJR 867 at 884 – 885 [87] – [88] ." (In *Liftronic* Kirby J collected many authorities in the law of employer's liability relating to allowance for inadvertence, misjudgement or inattention by an employee. *Pelley v. The Maitland Benevolent Society* [2004] NSWCA 323 at [18] sh ows the continuing vitality of this consideration.) Hayne J agreed with the reasons of Callinan J for disposition of *Ghantous* ; see 636 [339].

Sutherland Shire Council v Henshaw [2004] NSWCA 386 -
Sutherland Shire Council v Henshaw [2004] NSWCA 386 -
Sutherland Shire Council v Henshaw [2004] NSWCA 386 -
Sutherland Shire Council v Henshaw [2004] NSWCA 386 -
Sutherland Shire Council v Henshaw [2004] NSWCA 386 -

Sutherland Shire Council v Henshaw [2004] NSWCA 386 -

> "[t]he duty [of care] is not confined to one owed to those who are careful for their own safety, but it is relevant to take into account that plaintiffs are themselves expected to act reasonably and take care for their own safety when determining what is reasonable."

Liverpool City Council v Millett & Anor; Liverpool City Council v WadeLiverpool City Council v Millett & Anor [2004] NSWCA 340 -
Liverpool City Council v Millett & Anor; Liverpool City Council v WadeLiverpool City Council v Millett & Anor [2004] NSWCA 340 -

Liverpool City Council v Millett & Anor; Liverpool City Council v WadeLiverpool City Council v Millett & Anor [2004] NSWCA 340 -

A V Jennings Ltd v Thomas [2004] NSWCA 309 -
A V Jennings Ltd v Thomas [2004] NSWCA 309 -
Clarke v Coleambally Ski Club Inc [2004] NSWCA 376 -
Clarke v Coleambally Ski Club Inc [2004] NSWCA 376 -
Clarke v Coleambally Ski Club Inc [2004] NSWCA 376 -
Leichhardt Municipal Council v Green [2004] NSWCA 341 -
Leichhardt Municipal Council v Green [2004] NSWCA 341 -
Bankstown City Council v Alamdo Holdings Pty Ltd [2004] NSWCA 325 -
Bathurst City Council v Cheesman [2004] NSWCA 308 -
Bathurst City Council v Cheesman [2004] NSWCA 308 -
Lake Macquarie City Council v Holt [2004] NSWCA 305 (03 September 2004) (Sheller, Ipp and Tobias JJA)

> 17 With due respect, his Honour misunderstood the nature of the defendant Council's duty. The Council was entitled to expect that persons on the cycleway would ordinarily exercise sufficient care by looking where they were going and perceiving and avoiding obvious hazards such as an uneven surface at the edge of the cycleway. It was not enough to impose a duty on the basis adopted by his Honour, namely, that an accident such as that which befell the plaintiff was foreseeable. The trial Judge's misunderstanding of what had been said in the critical passage in *Ghantous* , which his Honour regarded as being distinguishable because the cycleway path was not like a suburban footpath, led his Honour into error. The Council was entitled to expect that the plaintiff would, in the way I have described, take reasonable care for his own safety. Had he done so he would not have fallen on the edge of the cycleway. Accordingly, the defendant Council was not in breach of its duty of care to the plaintiff as a user of the cycleway.

Lake Macquarie City Council v Holt [2004] NSWCA 305 -
Lake Macquarie City Council v Holt [2004] NSWCA 305 -
Lake Macquarie City Council v Holt [2004] NSWCA 305 -
Lake Macquarie City Council v Holt [2004] NSWCA 305 -
Lake Macquarie City Council v Holt [2004] NSWCA 305 -
Lake Macquarie City Council v Holt [2004] NSWCA 305 -
Lake Macquarie City Council v Holt [2004] NSWCA 305 -
Lake Macquarie City Council v Holt [2004] NSWCA 305 -
Lake Macquarie City Council v Holt [2004] NSWCA 305 -
Lake Macquarie City Council v Holt [2004] NSWCA 305 -
Lake Macquarie City Council v Holt [2004] NSWCA 305 -
Turnbull v Alm [2004] NSWCA 173 -
Turnbull v Alm [2004] NSWCA 173 -
Turnbull v Alm [2004] NSWCA 173 -
Turnbull v Alm [2004] NSWCA 173 -
Martin v Wagga Wagga City Council [2004] NSWCA 289 -
Greater Shepparton City Council v Davis [2004] VSCA 140 (20 August 2004) (Winneke, P., Chernov, J.A and Bongiorno, A.J.A)

> 16. His Honour then turned to what he described as "the duty of care". He noted that the plaintiff's claim was in negligence, even though the respondent had initially alleged a breach of occupier's liability under the *Wrongs Act*. The respondent's case was conducted on the basis that there had been a breach by the appellant of its duty as explained by the High Court in *Brodie & Anor. v. Singleton Shire Council/Ghantous v. Hawkesbury City Council* (supra). His Honour noted that the High Court, in those cases, had removed the so-called "highway immunities rule". It was accepted at trial that the principles explained in those cases were the applicable principles governing the respondent's claim, notwithstanding that the Victorian Parliament had subsequently sought to re-introduce the "highway immunities rule" by the introduction of s. 37A of the *Transport (Highway Rule) Act 2002* , the provisions of which have subsequently been re-enacted in Part 12 of the *Wrongs Act* 2004. As his Honour said:

> "That does not matter here. It is common ground that, given the timing of this proceeding, the duty of care set out in *Brodie* applies."
>
> It was also common ground that the scope and content of the relevant duty and standard of care were those stated in paragraphs 150 to 165 (pp. 577-582) of the joint judgment of Gaudron, McHugh and Gummow, JJ. in *Brodie* . His Honour then referred to several passages in the joint judgment at paragraphs 150, 151, 159, 160 and 162, 163 and 164. In particular, his Honour referred to the joint judgment at paragraph 163 where their Honours referred (in terms to which I will later return) to the formulation of the authority's duty to pedestrians.

Greater Shepparton City Council v Davis [2004] VSCA 140 (20 August 2004) (Winneke, P., Chernov, J.A and Bongiorno, A.J.A)

> 24. His Honour then directed his attention to the issue of contributory negligence, and said that he could find none. He referred in particular to his finding that the respondent could not have been expected to know that the hole was where it was – that is across a proposed route to the car. Furthermore he referred to his finding that the hole was dangerous and presented a foreseeable risk of harm even to a person taking reasonable care for his or her own safety. Further, the hole was "not obvious" in the sense referred to in *Brodie's* case.

Greater Shepparton City Council v Davis [2004] VSCA 140 (20 August 2004) (Winneke, P., Chernov, J.A and Bongiorno, A.J.A)

> 28. In relation to those aspects which had to be taken into account in formulating the duty of care, the majority judges in the cases of *Brodie* and *Ghantous* made it clear that the formulation of the duty in terms requiring a road to be safe "not in all circumstances but for users exercising reasonable care for their own safety" was even more important where the plaintiff was a pedestrian [4] . The significance of these principles relevant to formulating the duty owed by road authorities to pedestrians has been explained by Chernov, J.A. in *Boroondara City Council v Cattanach* [5] at paragraphs [9] to [14] inclusive of his reasons for judgment. I gratefully adopt what his Honour has there said.

Boroondara City Council v Cattanach [2004] VSCA 139 (20 August 2004) (Winneke, P., Chernov, J.A and Bongiorno, A.J.A)

> 13. In *Ghantous* , the plaintiff was a 63 year old woman who fell from a concrete path on to an abutting earthen verge when she stepped aside to allow others to pass and, as a result, "... her foot landed partly on the concrete step and partly overhanging the lower earth surface". [11] Traffic, wind and water had eroded the verges so that the earth and surface had subsided to a level that was approximately 50 mm below the level of the concrete strip. The plaintiff suffered injuries in the fall in respect of which she claimed damages in the proceeding against, inter alia, the local council for negligence in not properly maintaining the footpath. The judge below effectively dismissed her case on the basis that the defect in the path was the result of non-feasance, and an appeal from that decision was dismissed by the New South Wales Court of Appeal.

Boroondara City Council v Cattanach [2004] VSCA 139 (20 August 2004) (Winneke, P., Chernov, J.A and Bongiorno, A.J.A)

> 8. In the course of his reasons his Honour noted that it was common ground that the criteria for determining whether a local council owes a duty to pedestrians who use footpaths in its municipality that have a fault in their surface, and the content of that duty and whether there has been breach, are set out at paragraphs [150] to [165] of the joint judgment of Gaudron, McHugh and Gummow, JJ. in *Brodie v. Singleton Shire Council* and *Ghantous v. Hawkesbury City Council* [2] (" *Brodie*"). The learned judge then referred to a number of

passages in their Honours' judgment and noted that he had also considered a number of other authorities, to which he was referred by counsel, that exemplified the application of the principles stated in *Brodie*. After dealing with the evidence, which I have summarised, and the respective submissions of the parties, his Honour found that the defect in question was a "real and significant danger", the true level of which would not have been necessarily apparent for a "jogger approaching in the plaintiff's circumstances". Having also found that the appellant knew or ought to have known of the damage to the footpath and noting that the repairs to it were feasible and not unduly costly, his Honour concluded that, in the circumstances, the appellant was negligent. The trial judge said that it "was foreseeable to the [appellant] that the path would be used in the way in which the respondent did [and that the defect] was such that there was a foreseeable risk of harm to a reasonably careful pedestrian using it in the manner in which she did".

Boroondara City Council v Cattanach [2004] VSCA 139 -
Boroondara City Council v Cattanach [2004] VSCA 139 -
Boroondara City Council v Cattanach [2004] VSCA 139 -
Greater Shepparton City Council v Davis [2004] VSCA 140 -
Boroondara City Council v Cattanach [2004] VSCA 139 -
Greater Shepparton City Council v Davis [2004] VSCA 140 -
Greater Shepparton City Council v Davis [2004] VSCA 140 -
Greater Shepparton City Council v Davis [2004] VSCA 140 -
Greater Shepparton City Council v Davis [2004] VSCA 140 -
Greater Shepparton City Council v Davis [2004] VSCA 140 -
Boroondara City Council v Cattanach [2004] VSCA 139 -
Greater Shepparton City Council v Davis [2004] VSCA 140 -
Greater Shepparton City Council v Davis [2004] VSCA 140 -
Greater Shepparton City Council v Davis [2004] VSCA 140 -
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Greater Shepparton City Council v Davis [2004] VSCA 140 -
Greater Shepparton City Council v Davis [2004] VSCA 140 -
Boroondara City Council v Cattanach [2004] VSCA 139 -
Greater Shepparton City Council v Davis [2004] VSCA 140 -
Greater Shepparton City Council v Davis [2004] VSCA 140 -
Greater Shepparton City Council v Davis [2004] VSCA 140 -
Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji [2004] HCA 38 -
Georgopoulos v Telstra Corporation Ltd [2004] NSWCA 266 -
Hill v Chiaverini [2004] NSWCA 265 -
Georgopoulos v Telstra Corporation Ltd [2004] NSWCA 266 -
Georgopoulos v Telstra Corporation Ltd [2004] NSWCA 266 -
Edwards v Attorney General [2004] NSWCA 272 -
Georgopoulos v Telstra Corporation Ltd [2004] NSWCA 266 -
Edwards v Attorney General [2004] NSWCA 272 -
Georgopoulos v Telstra Corporation Ltd [2004] NSWCA 266 -
Boyded Industries Pty Ltd v Canuto [2004] NSWCA 256 -
Boyded Industries Pty Ltd v Canuto [2004] NSWCA 256 -
Wyong Shire Council v Vairy [2004] NSWCA 247 (27 July 2004) (Mason P, Beazley and Tobias JJA)

155 Although his Honour did not suggest that the above list was exhaustive, it is clear that he that considered that the obviousness or hidden nature of the risk was but one of the considerations required to be taken into account. It should further be noted that his Honour was speaking in the

context of the liability of a private occupier of premises rather than the position of a public authority to which, according to Hayne J in *Brodie* (at 625-626 [303]-[305]), different considerations apply in deciding the scope of the duty of care owed by such an authority.

Wyong Shire Council v Vairy [2004] NSWCA 247 -
Wyong Shire Council v Vairy [2004] NSWCA 247 -
Wyong Shire Council v Vairy [2004] NSWCA 247 -
Wyong Shire Council v Vairy [2004] NSWCA 247 -
Wyong Shire Council v Vairy [2004] NSWCA 247 -
Wyong Shire Council v Vairy [2004] NSWCA 247 -
Wyong Shire Council v Vairy [2004] NSWCA 247 -
Wyong Shire Council v Vairy [2004] NSWCA 247 -
Wyong Shire Council v Vairy [2004] NSWCA 247 -
Temora Shire Council v Stein [2004] NSWCA 236 (21 July 2004) (Giles and Hodgson JJA, Pearlman AJA)

28 Specifically referring to pedestrians, their Honours said (at [163]) -

> "163 The formulation of the duty in terms which require that a road be safe not in all circumstances but for users exercising reasonable care for their own safety is even more important where, as in *Ghantous* , the plaintiff was a pedestrian. In general, such persons are more able to see and avoid imperfections in a road surface. It is the nature of walking in the outdoors that the ground may not be as even, flat or smooth as other surfaces. As Callinan J points out in his reasons in *Ghantous* , persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes. Of course, some allowance must be made for inadvertence. Certain dangers may not readily be perceived because of inadequate lighting or the nature of the danger (as in *Webb v South Australia*), or the surrounding area (as in *Buckle* , where the hole was concealed by grass). In such circumstances, there may be a foreseeable risk of harm even to persons taking reasonable care for their own safety. These hazards will include dangers in the nature of a 'trap' or, as Jordan CJ put it, 'of a kind calling for some protection or warning'. In *Romeo* , Toohey and Gummow JJ noted in a different context that the care to be expected of members of the public is related to the obviousness of the danger. Kirby J pointed out in the same case that even an occupier of premises 'is generally entitled to assume that most entrants will take reasonable care for their own safety'. Each case will, of course, turn on its own facts."

Temora Shire Council v Stein [2004] NSWCA 236 -
Temora Shire Council v Stein [2004] NSWCA 236 -
Temora Shire Council v Stein [2004] NSWCA 236 -
Temora Shire Council v Stein [2004] NSWCA 236 -
Temora Shire Council v Stein [2004] NSWCA 236 -
Temora Shire Council v Stein [2004] NSWCA 236 -
Temora Shire Council v Stein [2004] NSWCA 236 -
Temora Shire Council v Stein [2004] NSWCA 236 -
Temora Shire Council v Stein [2004] NSWCA 236 -
Dunn v Star City Pty Limited [2004] NSWCA 223 -
Ryde City Council v Saleh [2004] NSWCA 219 -
Ryde City Council v Saleh [2004] NSWCA 219 -
Ryde City Council v Saleh [2004] NSWCA 219 -
Ryde City Council v Saleh [2004] NSWCA 219 -
Ryde City Council v Saleh [2004] NSWCA 219 -
Ryde City Council v Saleh [2004] NSWCA 219 -

Ryde City Council v Saleh [2004] NSWCA 219 -
Newcastle City Council v Lindsay [2004] NSWCA 198 -
Newcastle City Council v Lindsay [2004] NSWCA 198 -
Newcastle City Council v Lindsay [2004] NSWCA 198 -
Newcastle City Council v Lindsay [2004] NSWCA 198 -
Newcastle City Council v Lindsay [2004] NSWCA 198 -
Penrith City Council v Parks [2004] NSWCA 201 (21 June 2004) (Giles JA at 1; Cripps AJA at 8; McClellan AJA at 12)

21 The claimant emphasised the comments of the High Court in Ghantous v Hawkesbury City Council (2001) 206 CLR 512 in relation to the typical physical characteristics of footpaths when considering whether a public authority owed a duty of care and whether it had been breached. In that case, Gleeson CJ referred (at CLR 525-526) to the fact that:

> "... when general principles of negligence, unqualified by any rule of immunity, were applied, the courts insisted that an injured plaintiff had to show that the road or footpath was dangerous. That did not mean merely that it could possibly be an occasion of harm. The fact that there was unevenness of a kind which could result in a person stumbling or falling would not suffice (Meggs v Liverpool Corporation [1968] 1 WLR 689; [1968] 1 All ER 1137). Not all footpaths are perfectly level. Many footpaths are unpaved. People are regularly required to walk on uneven surfaces on both public and private land."

Penrith City Council v Parks [2004] NSWCA 201 -
Folkes v Calabaro [2004] NSWCA 191 (16 June 2004) (Giles and Tobias JJA, Cripps AJA)
Brodie v Singleton Shire Council (2001) 206 CLR 512 ;

Folkes v Calabaro [2004] NSWCA 191 -
Folkes v Calabaro [2004] NSWCA 191 -
Folkes v Calabaro [2004] NSWCA 191 -
Folkes v Calabaro [2004] NSWCA 191 -
Discount Brands Limited v Northcote Mainstreet Incorporated CA30/04 [2004] NZCA 383 -
Burns v State of Queensland [2004] QCA 199 -
Burns v State of Queensland [2004] QCA 199 -
Burns v State of Queensland [2004] QCA 199 -
Burns v State of Queensland [2004] QCA 199 -
Anne Leonore Warrener v Australian Capital Territory [2004] ACTCA 9 -
Anne Leonore Warrener v Australian Capital Territory [2004] ACTCA 9 -
Lockhart Shire Council v King [2004] NSWCA 169 -
Lockhart Shire Council v King [2004] NSWCA 169 -
Dungog Shire Council v Babbage [2004] NSWCA 160 (20 May 2004)

57. *Brodie* itself provides some guidance as to what constitutes reasonable steps in such a context. To quote again from the joint judgment (omitting footnotes) at [151] :

> "The perception of the response by the authority calls for, to adapt the statement by Mason J in Wyong Shire Council v Shirt, a consideration of various matters; in particular, the magnitude of the risk and the degree of probability that it will occur, the expense, difficulty and inconvenience to the authority in taking the steps described above to alleviate the danger, and any other competing or conflicting responsibility or commitments of the authority. The duty does not extend to ensuring the safety of road users in all circumstances. In the application of principle, much thus will turn upon the facts and circumstances disclosed by the evidence in each particular case."

Dungog Shire Council v Babbage [2004] NSWCA 160 -
Dungog Shire Council v Babbage [2004] NSWCA 160 -

Dungog Shire Council v Babbage [2004] NSWCA 160 -
Dungog Shire Council v Babbage [2004] NSWCA 160 -
Dungog Shire Council v Babbage [2004] NSWCA 160 -
Leichhardt Municipal Council -v-Green [2004] NSWCA 139 -
Dungog Shire Council v Babbage [2004] NSWCA 160 -
Leichhardt Municipal Council -v-Green [2004] NSWCA 139 -
Dungog Shire Council v Babbage [2004] NSWCA 160 -
Dungog Shire Council v Babbage [2004] NSWCA 160 -
Leichhardt Municipal Council -v-Green [2004] NSWCA 139 -
Dungog Shire Council v Babbage [2004] NSWCA 160 -
Dungog Shire Council v Babbage [2004] NSWCA 160 -
Amaca Pty Ltd v The State of New South Wales [2004] NSWCA 124 -
New South Wales v Godfrey [2004] NSWCA 113 -
New South Wales v Godfrey [2004] NSWCA 113 -
Timbs v Shoalhaven City Council [2004] NSWCA 81 (01 April 2004)

47. At 597-9 Gummow and Hayne JJ, with whose reasons Gaudron J agreed, said:

> "149 An evaluation of whether a relationship between a statutory authority and a class of persons imports a common law duty of care is necessarily a multi-faceted inquiry. Each of the salient features of the relationship must be considered. The focus of analysis is the relevant legislation and the positions occupied by the parties on the facts as found at trial . It ordinarily will be necessary to consider the degree and nature of control exercised by the authority over the risk of harm that eventuated; the degree of vulnerability of those who depend on the proper exercise by the authority of its powers; and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute. In particular categories of cases, some features will be of increased significance. For example, in cases of negligent misstatement, such as *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1 at 16-17 [47], 23-24 [76] , reasonable reliance by the plaintiff on the defendant authority ordinarily will be a significant factor in ascertaining any relevant duty of care.
>
> 150 The factor of control is of fundamental importance in discerning a common law duty of care on the part of a public authority. It assumes particular significance in this appeal. This is because a form of control over the relevant risk of harm, which, as exemplified by *Agar v Hyde* (2000) 201 CLR 552 at 562, is remote, in a legal and practical sense, does not suffice to found a duty of care.
>
> 151 In *Brodie* , the council exercised physical control over the condition of the roads which it was empowered by statute to maintain and which themselves constituted the direct source of harm to road users. The council's measure of control over the safety of the person or property of citizens was 'significant and exclusive'. So, too, the fact of control over, and knowledge of, land or premises has been significant in identifying the duty of care owed to users of land or premises by a statutory authority which controls and manages that land or premises. Again, in *Pyrenees Shire Council v Day* , the Shire held a significant and special measure of control over the safety from fire of persons and property at the relevant premises. That degree of control was the touchstone of the Shire's duty to safeguard others from the risk of fire in circumstances where the Shire had entered upon the exercise of its statutory powers of fire prevention and it alone among the relevant parties knew of, and was responsible for, the continued existence of the risk of fire. It will be recalled that, in *Pyrenees* , the only other party with that knowledge was the former tenants. They had not communicated it to the subsequent tenants or adjoining occupiers, who were the relevant parties in this Court.

> 152 The Council in the present appeal, by contrast, exercised a much less significant degree of control over the risk of the harm that eventuated. At no stage did the Council exercise control, let alone significant or exclusive control, over the direct source of harm to consumers, that is, the oysters themselves."

In this case the Council held a significant and special measure of control over the safety of homeowners who brought to the Council's attention their fears that overhanging trees were dangerous. This was particularly so if the Council opted to advise the particular homeowner about whether the trees in question were dangerous.

Timbs v Shoalhaven City Council [2004] NSWCA 81 -
Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16 -
Newcastle City Council v Mason [2004] NSWCA 108 -
Newcastle City Council v Mason [2004] NSWCA 108 -
Newcastle City Council v Mason [2004] NSWCA 108 -
Woollahra Municipal Council v Juric [2004] NSWCA 101 -
Woollahra Municipal Council v Juric [2004] NSWCA 101 -
Bashford v Information Australia (Newsletters) Pty Ltd [2004] HCA 5 -
Ah Tong v Wingecarribee Council [2003] NSWCA 381 -
Ah Tong v Wingecarribee Council [2003] NSWCA 381 -
Nambucca Shire Council v Revell [2003] NSWCA 367 -
Nambucca Shire Council v Revell [2003] NSWCA 367 -
Nambucca Shire Council v Revell [2003] NSWCA 367 -
Thompson v Woolworths (Q'land) P/L [2003] QCA 551 -
Thompson v Woolworths (Q'land) P/L [2003] QCA 551 -
Thompson v Woolworths (Q'land) P/L [2003] QCA 551 -
Thompson v Woolworths (Q'land) P/L [2003] QCA 551 -
Thompson v Woolworths (Q'land) P/L [2003] QCA 551 -
Thompson v Woolworths (Q'land) P/L [2003] QCA 551 -
Parsons v Randwick Municipal Council [2003] NSWCA 171 -
Parsons v Randwick Municipal Council [2003] NSWCA 171 -
Parsons v Randwick Municipal Council [2003] NSWCA 171 -
Parsons v Randwick Municipal Council [2003] NSWCA 171 -
Parsons v Randwick Municipal Council [2003] NSWCA 171 -
Parsons v Randwick Municipal Council [2003] NSWCA 171 -
Parsons v Randwick Municipal Council [2003] NSWCA 171 -
Parsons v Randwick Municipal Council [2003] NSWCA 171 -
Parsons v Randwick Municipal Council [2003] NSWCA 171 -
Parsons v Randwick Municipal Council [2003] NSWCA 171 -
Parsons v Randwick Municipal Council [2003] NSWCA 171 -
Parsons v Randwick Municipal Council [2003] NSWCA 171 -
Parsons v Randwick Municipal Council [2003] NSWCA 171 -
Parsons v Randwick Municipal Council [2003] NSWCA 171 -
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Parsons v Randwick Municipal Council [2003] NSWCA 171 -
Parsons v Randwick Municipal Council [2003] NSWCA 171 -
Parsons v Randwick Municipal Council [2003] NSWCA 171 -
Parsons v Randwick Municipal Council [2003] NSWCA 171 -
Kogarah Council v Maas [2003] NSWCA 334 (05 December 2003) (Meagher JA at 1; Giles JA at 2; Wood CJatCL at 16)

> Ghantous v Hawkesbury City Council (2001) 206 CLR 512
> Hastings Council v Giese

Kogarah Council v Maas [2003] NSWCA 334 -
O'Meara v Dominican Fathers [2003] ACTCA 24 -
O'Meara v Dominican Fathers [2003] ACTCA 24 -

O'Meara v Dominican Fathers [2003] ACTCA 24 -
Kogarah Council v Maas [2003] NSWCA 334 -
O'Meara v Dominican Fathers [2003] ACTCA 24 -
Smith v Advanced Electrics Pty Ltd [2003] QCA 432 -
Wellington Shire Council v Steedman [2003] VSCA 115 -
Suvaal v Cessnock City Council [2003] HCA 41 -
Bradley Vance v Daramalan College Limited [2003] ACTCA 13 -
Suvaal v Cessnock City Council [2003] HCA 41 -
Suvaal v Cessnock City Council [2003] HCA 41 -
Rallis v Pang [2003] NSWCA 202 (31 July 2003) (Beazley, Hodgson and Tobias JJA)

18 Having referred to the decision of the High Court in *Ghantous v Hawkesbury City Council* (2001) 206 CLR 512 and citing from [6], [153], [249] and [356] thereof and after referring to what is known as the *Shirt* calculus (*Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48), the primary judge summarised his findings in the following terms:

> "Here there was a hard irregularity under some grass, it not being known how long the grass was. What that hard irregularity was is unknown. Indeed there is no evidence to link what it was to either defendant. It could have been something discarded by a complete stranger, we just do not know..... No one has been criticised for allowing the grass to grow and as to how much of it would have grown between the date the photographs were taken and 6 January, I am not prepared to speculate on. No one suggests that the defendants should have remade the path in some fashion each day."

Rallis v Pang [2003] NSWCA 202 -
Rallis v Pang [2003] NSWCA 202 -
Cattanach v Melchior [2003] HCA 38 (16 July 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

178. One writer has argued that the House of Lords decision in *McFarlane* reflects a particular factual context in the United Kingdom whereby most patients in this class of case bring their claim, in effect, against the local authority representing the National Health Service[295], not, as in Australia, against an individual physician or surgeon or healthcare facility legally responsible for the legal wrong. Concern to protect the viability of the National Health Service at a time of multiple demands upon it might indeed help to explain the invocation in the House of Lords in *McFarlane* of the notion of "distributive justice" [296] . But such a consideration has no part to play in the identification of an applicable Australian public policy. In other recent cases, this Court has insisted upon following the star of legal principle. It has not diverted from that course because of concerns that legislatures, for their own purposes and within their own much larger powers of law-making, might later modify or reverse the exposition of the common law as offered by this Court [297] .

via

[297] See eg *Brodie* (2001) 206 CLR 512 ; *Tame* (2002) 76 ALJR 1348; 191 ALR 449; *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33.

Cattanach v Melchior [2003] HCA 38 -
Cattanach v Melchior [2003] HCA 38 -
Cattanach v Melchior [2003] HCA 38 -
Cattanach v Melchior [2003] HCA 38 -
Cattanach v Melchior [2003] HCA 38 -
Cattanach v Melchior [2003] HCA 38 -

Avanes v Club Marconi of Bossley Park Social Recreational and Sporting Centre Ltd [2003] NSWCA 184 -
Avanes v Club Marconi of Bossley Park Social Recreational and Sporting Centre Ltd [2003] NSWCA 184 -
Avanes v Club Marconi of Bossley Park Social Recreational and Sporting Centre Ltd [2003] NSWCA 184 -
Hastings Council v Giese [2003] NSWCA 178 -
Hastings Council v Giese [2003] NSWCA 178 -
Hastings Council v Giese [2003] NSWCA 178 -
Hastings Council v Giese [2003] NSWCA 178 -
Hastings Council v Giese [2003] NSWCA 178 -
Hastings Council v Giese [2003] NSWCA 178 -
Hastings Council v Giese [2003] NSWCA 178 -
Hastings Council v Giese [2003] NSWCA 178 -
Aquilina v Beenleigh Greyhound Race Club Inc [2003] QCA 270 -
Aquilina v Beenleigh Greyhound Race Club Inc [2003] QCA 270 -
Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 (18 June 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne and Callinan JJ)

90. Although the appellants here did not claim to have relied upon any specific assurances by the respondent as to their father's safety from harm, the relationship between the parties to this litigation otherwise shares important characteristics with the relationship at issue in *Anne tts* [102] . The appellants here had no way of protecting themselves against the risk of psychiatric harm which eventuated. The respondent controlled the conditions under which Mr Gifford worked and held a significant, perhaps exclusive, degree of control over the risk of harm to him and the risk of consequent psychiatric harm to the appellants. The respondent's control over the risk of harm was, in a legal and practical sense, direct rather than remote [103] . Moreover, there is no inconsistency between the existence of a duty of care to the appellants and the legitimate pursuit by the respondent of its business interests [104] . The respondent's duty of care to the appellants to exercise reasonable care to avoid causing them psychiatric injury as a consequence of their father's death in the course of his employment would be, at most, coextensive with the tortious and express or implied contractual duties that it owed Mr Gifford directly as his employer. The law requires an employer in the position of the respondent so to order its affairs as to avoid causing injury or death to its employees.

via

[103] cf *Agar v Hyde* (2000) 201 CLR 552 at 562 [16], 564 [21], 581582 [81]-[83] ; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 558559 [102] .

Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 -
Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 -
Joslyn v Berryman [2003] HCA 34 -
Cehner v Borg [2003] VSCA 72 (12 June 2003) (Batt, Chernov and Eames, Jj.A)

11. In answering the second part of the second question, her Honour considered that, on the evidence, it could not be said that the Borgs owed the appellant a duty of care in relation to the sewerage pit. The most that could be put against them in that regard, said the judge, was that they might have had foresight of harm from the fact that the shaft was open and that it might have been reasonable for them to act. But mere foresight of harm, said her Honour, was not sufficient to give rise to a duty of care and she referred to the observations on this issue of Hayne, J. in *Brodie v. Singleton Shire Council [12]* and by Gleeson C.J., Gaudron, McHugh, Hayne and Callinan, JJ. in *Sullivan v. Moody* [13] . Consequently, the learned judge concluded that the second part of the second question should also be answered in the negative.

30. I agree with Chernov, J.A., for the reasons he gives, that the evidence before the magistrate did not establish that the Borgs were occupiers of the shaft or pipe

which were involved in the appellant's injury, nor was it contended that they were the occupiers of the footpath. However, had the Borgs owed a duty of care as occupiers I do not share his Honour's confidence that the evidence in this case would, in any event, have fallen short of demonstrating that the injury occurred because there had been a breach of that duty. In my view, the decision of the High Court in *Brodie v. Singleton Shire Council* and *Ghantous v. Hawkesbury City Council [23]* (which were decided together), and the subsequent appellate cases in which its principles had been applied with respect to the liability of public authorities where pedestrians tripped on footpaths under the control of the authority, would not necessarily have imposed a barrier to the establishing of liability.

Cehner v Borg [2003] VSCA 72 -
Cehner v Borg [2003] VSCA 72 -
Cehner v Borg [2003] VSCA 72 -
Cehner v Borg [2003] VSCA 72 -
Cehner v Borg [2003] VSCA 72 -
Cehner v Borg [2003] VSCA 72 -
Cehner v Borg [2003] VSCA 72 -
Cehner v Borg [2003] VSCA 72 -
Cehner v Borg [2003] VSCA 72 -
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Cehner v Borg [2003] VSCA 72 -
Cehner v Borg [2003] VSCA 72 -
Cehner v Borg [2003] VSCA 72 -
Cehner v Borg [2003] VSCA 72 -
Smyth v Shire of Murrindindi [2003] VSCA 75 -
Gosford City Council v Needs [2003] NSWCA 144 -
Gosford City Council v Needs [2003] NSWCA 144 -
Gosford City Council v Needs [2003] NSWCA 144 -
Fox v Percy [2003] HCA 22 -
Fox v Percy [2003] HCA 22 -
Veitch v State of Qld [2003] QCA 144 -
Veitch v State of Qld [2003] QCA 144 -
Veitch v State of Qld [2003] QCA 144 -
Veitch v State of Qld [2003] QCA 144 -
Veitch v State of Qld [2003] QCA 144 -
Veitch v State of Qld [2003] QCA 144 -
Waverley Municipal Council v Swain [2003] NSWCA 61 -
Waverley Municipal Council v Swain [2003] NSWCA 61 -
Waverley Municipal Council v Swain [2003] NSWCA 61 -
Roads and Traffic Authority of NSW v Palmer [2003] NSWCA 58 -
Roads and Traffic Authority of NSW v Palmer [2003] NSWCA 58 -
Roads and Traffic Authority of NSW v Palmer [2003] NSWCA 58 -
Roads and Traffic Authority of NSW v Palmer [2003] NSWCA 58 -
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Roads and Traffic Authority of NSW v Palmer [2003] NSWCA 58 -
Roads and Traffic Authority of NSW v Palmer [2003] NSWCA 58 -
Roads and Traffic Authority of NSW v Palmer [2003] NSWCA 58 -
Roads and Traffic Authority of NSW v Palmer [2003] NSWCA 58 -
Barns v Barns [2003] HCA 9 -
Ryde City Council v Wendy Joyce Smith [2003] NSWCA 57 -
Ryde City Council v Wendy Joyce Smith [2003] NSWCA 57 -
Ryde City Council v Wendy Joyce Smith [2003] NSWCA 57 -
Ryde City Council v Wendy Joyce Smith [2003] NSWCA 57 -
Roads and Traffic Authority of NSW v Jackson [2003] NSWCA 40 (05 March 2003) (Mason P, Stein and Santow JJA)

> 33 Also pertinent is the decision of the Court of Appeal in *Richmond Valley Council v Standing* [2002] NSWCA 359. In examining the existence of the duty of care Heydon JA, with whom Handley and Sheller JJA agreed, referred to the joint judgment of Gaudron, McHugh and Gummow JJ in *Brodie* where it was stated that 'not all failures to repair will create risks to the users of a road, or at least not risks which would, as a matter of the *reasonably* foreseeable, pose a risk of injury'. Accordingly, the duty must be assessed in part by reference, *not* to any requirement for the footpath to be safe in all circumstances, but to the position of 'users exercising reasonable care for their own safety' [para 163 in *Brodie*]. As earlier mentioned, their Honours emphasised the importance of this standard with regard to pedestrians.

Roads and Traffic Authority of NSW v Jackson [2003] NSWCA 40 -
Roads and Traffic Authority of NSW v Jackson [2003] NSWCA 40 -
Roads and Traffic Authority of NSW v Jackson [2003] NSWCA 40 -
Roads and Traffic Authority of NSW v Jackson [2003] NSWCA 40 -
Roads and Traffic Authority of NSW v Jackson [2003] NSWCA 40 -
Eileen Joan Garvan v Australian Capital Territory [2003] ACTCA 4 -
Eileen Joan Garvan v Australian Capital Territory [2003] ACTCA 4 -
Eileen Joan Garvan v Australian Capital Territory [2003] ACTCA 4 -
Eileen Joan Garvan v Australian Capital Territory [2003] ACTCA 4 -
Mensinga v Director of Public Prosecutions [2003] ACTCA 1 -
RTA v Welling & AnorRTA v Comerford & Ors [2003] NSWCA 14 -
RTA v Welling & AnorRTA v Comerford & Ors [2003] NSWCA 14 -
RTA v Welling & AnorRTA v Comerford & Ors [2003] NSWCA 14 -
RTA v Welling & AnorRTA v Comerford & Ors [2003] NSWCA 14 -
RTA v Welling & AnorRTA v Comerford & Ors [2003] NSWCA 14 -
Petrotimor Companhia de Petroleos Sarl v Commonwealth of Australia [2003] FCAFC 3 -
Petrotimor Companhia de Petroleos Sarl v Commonwealth of Australia [2003] FCAFC 3 -
Petrotimor Companhia de Petroleos Sarl v Commonwealth of Australia [2003] FCAFC 3 -
Petrotimor Companhia de Petroleos Sarl v Commonwealth of Australia [2003] FCAFC 3 -
Petrotimor Companhia de Petroleos Sarl v Commonwealth of Australia [2003] FCAFC 3 -
Campbelltown City Council v Bussell by his next friend Kay Bussell [2002] NSWCA 410 -
Campbelltown City Council v Bussell by his next friend Kay Bussell [2002] NSWCA 410 -
Campbelltown City Council v Bussell by his next friend Kay Bussell [2002] NSWCA 410 -
Inverell Shire Council v Keith Lloyd Johnson [2002] ACTCA 11 -
State of New South Wales v Napier [2002] NSWCA 402 -

State of New South Wales v Napier [2002] NSWCA 402 -
Dow Jones & Co Inc v Gutnick [2002] HCA 56 -
Dow Jones & Co Inc v Gutnick [2002] HCA 56 -
Dow Jones & Co Inc v Gutnick [2002] HCA 56 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 (05 December 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

236. *Possible resolution*: During the past five years, after "foreseeability", "proximity" and "general reliance" were rejected by this Court as concepts sufficient to establish a duty of care, a contest emerged as to what would replace them. As I view the cases, at least two approaches or "methodologies" for discerning the existence of a duty of care emerged in this Court's decisions. They were locked in mortal combat, intellectually speaking. They were:

(1) The adoption in this country of the three-stage test proposed in England in *Caparo* . This is the approach that I have consistently adopted, in *Pyrenees Shire Council v Day* [187] ; *Romeo v Conservation Commission (NT)* [188] ; *Perre v Apand Pty Ltd* [189] ; *Crimmins v Stevedoring Industry Finance Committee* [190] ; *Brodie v Singleton Shire Council* [191] , and other cases. The approach has attracted academic favour[192]; but alas, no judicial support where it mattered; and

(2) The adoption of a notion that a range of other factors, sometimes called "salient factors", must be considered in order to determine the existence of a duty of care in a particular case [193] . A cornucopia of verbal riches has been deployed to identify what, in given proceedings, these "salient features" will be. Some of them appear in the Court's decision in *Perre v Apand Pty Ltd* [194] . Many of them are helpfully collected by Callinan J in these appeals ("vulnerability, power, control, generality or particularity of the class, the resources of, and demands upon the authority", the "core, or ... non-core" functions or relation to "a matter of policy or executive action" and so on)[195] .

via

[191] (2001) 206 CLR 512 at 604-605 [241] .

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 (05 December 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

144. By analogy to this reasoning, counsel for the Barclay companies envisaged a duty of care, owed by the Council to oyster consumers, to take reasonable care to identify and to remedy sources of pollution at Wallis Lake and its tributaries. Adopting and adapting the terms used in *Brodie* , the Barclay companies asserted a duty on the part of the Council to take reasonable care that the exercise of or failure to exercise its powers to carry out works and repairs on sewerage installations did not create a foreseeable risk of harm to a class of persons (consumers of produce from the lake, or, more narrowly, consumers of oysters) which included Mr Ryan and the other applicants in the Federal Court. Two factors in particular were said to justify a duty in these terms. These were that (i) the Council was the only party with actual knowledge of the progressive deterioration of the sewerage infrastructure which imperilled the purity of the waters of Wallis Lake, and (ii) the Council had extensive statutory powers to prevent or to redress that deterioration and to mitigate the effects of any pollution.

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -

approaching this pit and cover, in the course of ordinary use of the footpath. The protrusion in the corner could reasonably be regarded as a "trap" for a person exercising reasonable care for his or her own safety. Because there would be no reason to approach the metal surface with any particular care or at reduced walking speed, a trip over this hazard could well produce more than a mere stumble and recovery; it could result in a heavy and dangerous fall.

RTA v McGuinness [2002] NSWCA 210 (04 November 2002) (Mason P, Handley JA and Foster AJA)

29 All this is made clear by the judgments in *Ghantous* (2001) 206 CLR 512 . In that case the drop from the concrete footpath to the surrounding dirt surface was about 50 mm, approximately 2". The plaintiff lost her balance when she moved to step onto the dirt surface but caught her heel on the edge of the concrete. Gleeson CJ referred to the abolition of the non-feasance rule in England by statute and continued [paras 6-7]:

> *"... when general principles of negligence, unqualified by any rule of immunity, were applied, the courts insisted that an injured plaintiff had to show that the road or footpath was dangerous. That did not mean merely that it could possibly be an occasion of harm. The fact that there was unevenness of a kind which could result in a person stumbling or falling would not suffice. Not all footpaths are perfectly level. Many footpaths are unpaved. People are regularly required to walk on uneven surfaces on both public and private land. In Littler v Liverpool Corporation [1968] 2 All ER 343, 345 Cumming-Bruce J said: 'Uneven surfaces and differences in level between flagstones of about an inch may cause a pedestrian temporarily off balance to trip and stumble, but such characteristics have to be accepted . A highway is not to be criticised by the standards of a bowling green'."* (emphasis supplied)

Burwood Council v Byrnes [2002] NSWCA 343 -
RTA v McGuinness [2002] NSWCA 210 -
Richmond Valley Council v Standing [2002] NSWCA 359 -
Richmond Valley Council v Standing [2002] NSWCA 359 -
RTA v McGuinness [2002] NSWCA 210 -
RTA v McGuinness [2002] NSWCA 210 -
Burwood Council v Byrnes [2002] NSWCA 343 -
Richmond Valley Council v Standing [2002] NSWCA 359 -
Burwood Council v Byrnes [2002] NSWCA 343 -
Burwood Council v Byrnes [2002] NSWCA 343 -
Richmond Valley Council v Standing [2002] NSWCA 359 -
RTA v McGuinness [2002] NSWCA 210 -
Richmond Valley Council v Standing [2002] NSWCA 359 -
RTA v McGuinness [2002] NSWCA 210 -
Burwood Council v Byrnes [2002] NSWCA 343 -
RTA v McGuinness [2002] NSWCA 210 -
Burwood Council v Byrnes [2002] NSWCA 343 -
RTA v McGuinness [2002] NSWCA 210 -
RTA v McGuinness [2002] NSWCA 210 -
Richmond Valley Council v Standing [2002] NSWCA 359 -
Ku-Ring-Gai Municipal Council v Bonnici [2002] NSWCA 313 -
Ku-Ring-Gai Municipal Council v Bonnici [2002] NSWCA 313 -
Royal and Sun Alliance Insurance Australia Limited v Betta Industries Pty Limited; Harlander Pty Limited (in liq) v State of New South Wales [2002] NSWCA 323 -
Royal and Sun Alliance Insurance Australia Limited v Betta Industries Pty Limited; Harlander Pty Limited (in liq) v State of New South Wales [2002] NSWCA 323 -
Tame v New South Wales [2002] HCA 35 -
Tame v New South Wales [2002] HCA 35 -
Tame v New South Wales [2002] HCA 35 -
Minister for Local Government v South Sydney City Council [2002] NSWCA 288 -

Minister for Local Government v South Sydney City Council [2002] NSWCA 288 -
Griggs v Beaudesert Shire Council [2002] QCA 328 -
Griggs v Beaudesert Shire Council [2002] QCA 328 -
Gondoline Pty Ltd v Hansford [2002] WASCA 214 (14 August 2002) (Murray J, Wheeler J, Miller J)

Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council (2001) 75 ALJR 992

Gondoline Pty Ltd v Hansford [2002] WASCA 214 -
Gondoline Pty Ltd v Hansford [2002] WASCA 214 -
Gondoline Pty Ltd v Hansford [2002] WASCA 214 -
Wilson v Anderson [2002] HCA 29 -
Wilson v Anderson [2002] HCA 29 -
Lombardi v Holroyd City Council [2002] NSWCA 252 -
Spencer v Maryborough City Council [2002] QCA 250 (26 July 2002) (McMurdo P, Jerrard JA and Holmes J,)

Brodie v Singleton Shire Council (2001) 180 ALR 145 , followed
Buckle v Bayswater Road Board (1936) 57 CLR 259, followed
Littler v Liverpool Corporation [1968] 2 All ER 343, considered
Nelson v John Lysaght (1975) 5 ALR 289, considered
Romeo v Conservation Commission (1998) 192 CLR 438 , considered
Webb v South Australia (1982) 43 ALR 465, considered

Spencer v Maryborough City Council [2002] QCA 250 (26 July 2002) (McMurdo P, Jerrard JA and Holmes J,)

15. The joint judgment helps to define what **will** constitute reasonable steps and reasonable care by posing the question "what is the response which the reasonable person, foreseeing the risk, would make to it? Is the risk so small that a reasonable person would think it right to neglect it?" [4] The joint judgment also posed the question in another way, namely, in exercising or failing to exercise those powers, was the authority in breach of a duty of care owed to a class of persons which included the plaintiff?. [5]

via

[4] See *Webb v South Australia* (1982) 43 ALR 465 at 467-8 in the judgment of Mason Brennan and Deane JJ, cited at paragraph 54 of the joint judgment in *Brodie v Singleton* .

Spencer v Maryborough City Council [2002] QCA 250 -
Spencer v Maryborough City Council [2002] QCA 250 -
Spencer v Maryborough City Council [2002] QCA 250 -
Spencer v Maryborough City Council [2002] QCA 250 -
Spencer v Maryborough City Council [2002] QCA 250 -
State of New South Wales v Paige [2002] NSWCA 235 (19 July 2002) (Spigelman CJ, Mason P and Giles JA)

91 The determination of whether a common law duty of care exists with respect to the exercise of statutory powers is not the subject of authoritative guidance from the High Court. A number of different approaches is discernible in recent authority. (See *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Brodie v Singleton Shire Council* (2001) 75 ALJR 992 .) The joint judgment in *Sullivan v Moody* does not reconcile the different approaches, save by rejecting the three stage test previously applied by Kirby J.

Percy v Noosa Shire Council [2002] QCA 245 -
Percy v Noosa Shire Council [2002] QCA 245 -

Percy v Noosa Shire Council [2002] QCA 245 -
State of New South Wales v Paige [2002] NSWCA 235 -
State of New South Wales v Paige [2002] NSWCA 235 -
Percy v Noosa Shire Council [2002] QCA 245 -
Squillacioti v Roads & Traffic Authority of New South Wales & Anor [2002] NSWCA 133 -
Squillacioti v Roads & Traffic Authority of New South Wales & Anor [2002] NSWCA 133 -
SGH Ltd v Federal Commissioner of Taxation [2002] HCA 18 -
SGH Ltd v Federal Commissioner of Taxation [2002] HCA 18 -
Owners - Strata Plan No 13218 v Woollahra Municipal Council [2002] NSWCA 92 (08 April 2002)

13. In their joint Judgment, Gaudron, McHugh and Gummow JJ, having concluded that the common law of Australia did not give rise to the "immunity" which had been pleaded, wrote 75 ALJR 1024 ; 180 ALR 189 :

"F. CONTENT AND BREACH OF THE DUTY OF CARE

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

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

[152] In dealing with particular cases and in determining factual issues respecting breach of duty, it may be convenient to differentiate between the design and construction of a roadway, between subsequent works done on it and between courses of inspection to ascertain its soundness. These matters are not mutually exclusive and sometimes may overlap."

(Their Honours then proceeded to consider those matters separately, and, in the course of dealing with questions of repair, maintenance and work in the course of which they wrote 75 ALJR 1026; 180 ALR 192):

"(iii) Pedestrians

[163] The formulation of the duty in terms which require that a road be safe not in all circumstances but for users exercising reasonable care for their own safety is even more important where, as in ***Ghantous*** , the plaintiff was a pedestrian. In general, such persons are more able to see and avoid imperfections in a road surface. It is the nature of walking in the outdoors that the ground may not be as even, flat or smooth as other surfaces. As Callinan J points out in his reasons in ***Ghantous*** persons ordinarily will be expected to exercise sufficient care by

> looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes. Of course, some allowance must be made for inadvertence. Certain dangers may not readily be perceived because of inadequate lighting or the nature of the danger (as in ***Webb v. South Australia***), or the surrounding area (as in ***Buckle*** , where the hole was concealed by grass). In such circumstances, there may be a foreseeable risk of harm even to persons taking reasonable care for their own safety. These hazards will include dangers in the nature of a 'trap' or as Jordan CJ put it, "*of a kind calling for some protection or warning*'. In ***Romeo*** , Toohey and Gummow JJ noted in a different context that the care to be expected of members of the public is related to the obviousness of the danger. Kirby J pointed out in the same case that even an occupier of premises 'is generally entitled to assume that most entrants will take reasonable care for their own safety'. Each case will, of course, turn on its own facts."

Owners - Strata Plan No 13218 v Woollahra Municipal Council [2002] NSWCA 92 (08 April 2002)

101. His Honour, nextly, dealt with the responsibility of a council for nuisance caused by trees planted by it in the road or on the footpath, and referred to the various authorities in relation to that. He noted that the highway immunity rule had been recently upheld in this Court in *Ghantous v Hawkesbury City Council* and *Brodie v Singleton Shire Council* . He was aware that those cases were the subject of applications for Special Leave to Appeal to the High Court, and said that, as he understood it, success in any appeal would involve a change in the law for Australia. He continued:

> "In any event the hearing was expedited on the application of the plaintiff and a decision should be given on the law as it stands".

Owners - Strata Plan No 13218 v Woollahra Municipal Council [2002] NSWCA 92 -
Owners - Strata Plan No 13218 v Woollahra Municipal Council [2002] NSWCA 92 -
Owners - Strata Plan No 13218 v Woollahra Municipal Council [2002] NSWCA 92 -
Owners - Strata Plan No 13218 v Woollahra Municipal Council [2002] NSWCA 92 -
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Owners - Strata Plan No 13218 v Woollahra Municipal Council [2002] NSWCA 92 -
Owners - Strata Plan No 13218 v Woollahra Municipal Council [2002] NSWCA 92 -
Owners - Strata Plan No 13218 v Woollahra Municipal Council [2002] NSWCA 92 -
Regie Nationale Des Usines Renault SA v Zhang [2002] HCA 10 -
Royal Botanic Gardens and Domain Trust v South Sydney City Council [2002] HCA 5 -
Waverly Municipal Council v Wagner [2002] NSWCA 10 -
Waverly Municipal Council v Wagner [2002] NSWCA 10 -
Roman Catholic Bishop of Broome v Watson [2002] WASCA 7 -
Roman Catholic Bishop of Broome v Watson [2002] WASCA 7 -
Roman Catholic Bishop of Broome v Watson [2002] WASCA 7 -
City of Ballarat v Perovic [2001] VSCA 222 (13 December 2001) (Ormiston and Callaway, Jj.A and O'Bryan, A.J.A)

2. The difficulties raised by this litigation appear from the judgments of the other members of the Court and the proper disposition of the appeal has been rendered the more difficult because the original trial in this matter took place before the High Court restated the law as to the liability of highway authorities in *Brodie v. Singleton Shire Council; Ghantous v. Hawkesbury City Council [1]* decided earlier this year. The originally successful attempt made at the trial to establish a case based on misfeasance, so as to avoid the then understood rule preventing recovery for non-feasance, has now failed, in that we have held that the

respondent was not entitled to succeed on the case she then made, as was ably demonstrated by counsel for the appellant and which is discussed further in the other judgments. That might technically have brought the respondent's claims to an end, in so far as no claim based on non-feasance was pleaded or sought to be made out, but the appellant City of Ballarat and their legal advisers have very properly and fairly conceded that, subject to one matter, the case should be remitted for a new trial and that that new trial should not be confined to the bases relied upon at the original trial. That particular procedural difficulty has been overcome.

City of Ballarat v Perovic [2001] VSCA 222 (13 December 2001) (Ormiston and Callaway, Jj.A and O'Bryan, A.J.A)

62. *Eyles* was decided before the decision of the High Court in *Brodie* [48]. The Court was not asked to decide whether s. 205(2)(c) provides a defence by statute to a negligence claim against a highway authority based on misfeasance. Brooking, J.A. concluded that paragraph (c) simply made it clear that the duty and power imposed and conferred by paragraphs (a) and (b) respectively impose no duty to do any of the things mentioned in paragraph (c). His Honour's view was that paragraph (c) is concerned to assist in delineating the public law obligations of councils and may indirectly affect their private law obligations.

via

[48] (2001) 75 A.L.J.R. 992 .

Shoalhaven City Council v Smith [2001] NSWCA 469 -
City of Ballarat v Perovic [2001] VSCA 222 -
City of Ballarat v Perovic [2001] VSCA 222 -
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City of Ballarat v Perovic [2001] VSCA 222 -
City of Ballarat v Perovic [2001] VSCA 222 -
Re Minister for Local Government; [2001] WASCA 380 -
Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63 -
Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63 -
Kaldor v Woollahra Municipal Council & Anor [2001] NSWCA 414 (07 November 2001)

6. In the draft notice of appeal and written submissions it was sought to contend that her Honour erred in the view to which she came in relation to misfeasance. It was submitted that the correct approach was to put aside the distinction between non-feasance and misfeasance consequent upon the decision of the High Court in *Brodie v Singleton Shire Council* (2001) HCA 29 , a decision given a few weeks after her Honour's decision. However, it will be apparent from what I have said that the non-feasance/misfeasance distinction was not significant to her Honour's decision. We have been provided with the claimant's statement of claim in its final form, and it alleged generalised negligence as distinct from misfeasance. That was clearly the way her Honour first approached the matter, when she found that she was not satisfied that the claimant had shown that either the local council or the Roads and Traffic Authority was negligent. It was only after she so found that she went on to state her view in relation to misfeasance.

Parramatta City Council v Watkins [2001] NSWCA 364 -
Parramatta City Council v Watkins [2001] NSWCA 364 -
Commonwealth v Yarmirr [2001] HCA 56 (11 October 2001) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

257. There is a further reason that reinforces this conclusion. The common law of Australia may not defy, or conflict with, the Constitution [334] . Neither may it be inconsistent with valid federal legislation [335] . The common law adapts itself to the Constitution and to such legislation [336] . The residue of the common law may be re-expressed, deleting any former parts that cannot stand with the constitutional or legislative provisions or the assumptions inherent in them. So much follows, if from nothing else, from the requirement of the Constit ution that there is but one law applicable to, and binding upon, all the people of Australia. The content of that law may occasionally be in doubt. It may sometimes require the application of legal reasoning to discover the rule to be observed and to exclude laws that are invalid. But, ultimately, a single governing law is discoverable and enforceable, if necessary in this Court.

via

[335] *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 324 [97] ; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 92 [112] ; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 66 [60]; 176 ALR 219 at 238 ; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889 at 928 [212]; 179 ALR 238 at 291 ; *Brodie v Singleton Shire Council* (2001) 75 ALJR 992 at 1038 [231] ; 180 ALR 145 at 209.

Allan v TransUrban City Link Ltd [2001] HCA 58 -
Sullivan v Moody [2001] HCA 59 -
Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305 (14 September 2001) (Priestley, Powell and Heydon JJA)

89. In the course of argument on the appeal, attention tended to be directed to particular aspects of Professor Morton's evidence in isolation. Though Professor Morton's views often go to

ultimate issues, they are not on that ground inadmissible: *Evidence Act* 1995 (NSW) s 80 . However, even though Professor Morton's evidence was uncontradicted, the trial judge was not bound to accept it, and nor is this Court, particularly where it was on ultimate issues: *Brodie v Singleton Shire Council* (2001) 75 ALJR 992 at [355] per Callinan J . Counsel for the plaintiff correctly said that an assessment of the merits of Professor Morton's evidence called for consideration of it in detail and as a whole.

Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305 (14 September 2001) (Priestley, Powell and Heydon JJA)

Brodie v Singleton Shire Council (2001) 75 ALJR 992 , referred to.

Deepcliffe Pty Ltd v Council of the City of Gold Coast [2001] QCA 342 -
Deepcliffe Pty Ltd v Council of the City of Gold Coast [2001] QCA 342 -
Deepcliffe Pty Ltd v Council of the City of Gold Coast [2001] QCA 342 -
Deepcliffe Pty Ltd v Council of the City of Gold Coast [2001] QCA 342 -
Deepcliffe Pty Ltd v Council of the City of Gold Coast [2001] QCA 342 -
Thomas v State of Queensland [2001] QCA 336 (24 August 2001) (McMurdo P, Thomas JA and Holmes J, Judgment of the Court.)

11. When the application was heard and determined, the High Court decision in *Brodie v Singleton Shire Council* [1] had not been delivered. The common law rules in relation to non-feasance and mis-feasance have now been "re-expressed" and of course the further conduct of the action including, in retrospect, this particular pleading application, must be decided according to what is now recognised as the duty of a road making authority, at least as to the ambit of the duties of care that may now be pleaded without earlier inhibitions in relation to non-feasance.

Thomas v State of Queensland [2001] QCA 336 -
Thomas v State of Queensland [2001] QCA 336 -
David Jones Ltd v Bates [2001] NSWCA 233 (20 July 2001) (Heydon JA, Davies AJA and Young CJ in Eq)

58 The authorities are replete with statements that many premises contain objects or structures which could cause injury, that nowhere can any place be made completely safe, and that the occupier of the premises can reasonably assume that people will take reasonable and due care for their own safety; see eg **Phillis v Daly** (1988) 15 NSWLR 65, 72 ; **Jones v Bartlett** (2000) 75 ALJR 1, 6 ; **Ghantous v Hawkesbury City Council** [2001] HCA 29; (2001) 75 ALJR 992 .

David Jones Ltd v Bates [2001] NSWCA 233 -
David Jones Ltd v Bates [2001] NSWCA 233 -
David Jones Ltd v Bates [2001] NSWCA 233 -
The Council of the City of Grafton v Musall [2001] NSWCA 228 -
Hawkesbury City Council v Ryan [2001] NSWCA 212 (05 July 2001) (Meagher and Heydon JJA, Rolfe AJA)

(4) An argument based on nonfeasance could not be made out since it was agreed by the parties that the pavement had been laid only four or five years before the respondent's accident. For this reason, this case is unaffected by the decision in *Brodie v Singleton Shire Council* [2001] HCA 29 .

Hawkesbury City Council v Ryan [2001] NSWCA 212 (05 July 2001) (Meagher and Heydon JJA, Rolfe AJA)

74 In his oral submissions Mr Deakin relied heavily upon the decision of the High Court in *Ghantous v Hawkesbury City Council* [2001] HCA 29 . In that case, of course, judgment was given at the same time in *Brodie v Singleton Shire Council* , which removed the immunity for nonfeasance.

Hawkesbury City Council v Ryan [2001] NSWCA 212 -
Hawkesbury City Council v Ryan [2001] NSWCA 212 -
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Hawkesbury City Council v Ryan [2001] NSWCA 212 -
Coffs Harbour City Council v Backman [2001] NSWCA 202 -
Coffs Harbour City Council v Backman [2001] NSWCA 202 -
State of New South Wales v Steed [2001] NSWCA 178 -
State of New South Wales v Steed [2001] NSWCA 178 -