1. The policy only covered accidental damage;
2. The policy required the insured to take all reasonable precautions to prevent accidents;
3. The policy excluded damage due to weakening of support to land;
4. The policy forbade the insured from negotiating, admitting or settling any claim.

The insurance company argued that to fall within the policy the damage must be accidental in the sense that it was unintended and that here the cause was the intended act of the contractor in excavating as he did. The judge rejected that argument and found that although the contractor was negligent and knew that there was some risk in leaving the wall unsupported, the contractor's conduct was not so hazardous and culpable as to deny that it was accidental.

The judge found that the contractor failed to take precautions which he could reasonably have taken. However, relying on two previous cases in which such a condition had been considered, the judge found that mere negligence was not failure to take reasonable precautions within the meaning of the condition in the policy. The insurance company would have had to prove "reckless failure" or "courting of danger".

The provision in the policy excluding damage due to weakening of support did apply. However, the judge found that the contractor had made known to the insurance company the nature of the insurance policy which the contract required and the judge held that the insurance company had a duty of care towards the contractor to issue a policy of the type which the contractor required. Since the policy issued contained this exclusion clause, it did not protect the contractor and hence the insurance company had breached its duty of care and was negligent. The contractor was entitled to recover damages.

After the collapse of the wall, the contractor agreed with the neighbour that the contractor would do certain buttressing, backfilling and compacting to protect the neighbour's building and the contractor agreed to rebuild a path which was destroyed in the collapse. The judge decided that in doing these things, the contractor had not breached the requirements of the insurance policy forbidding negotiation, admission or settlement of any claim.

The final outcome of the case was that the contractor could not recover under the insurance policy, because the insurer was entitled to rely on the condition excluding damage due to weakening of support but, nevertheless, the judge awarded the contractor damages arising from the insurer's negligence in issuing to the contractor a policy which included such a condition. The amount of the damages was the same amount as would have been recoverable under the policy, had it not been for the condition relied upon by the insurer to avoid the policy.

- Philip Davenport

20. Insurance - Reinstatement, Recovery of Extra Costs of Complying with Authorities' Requirements.

Colonial Mutual General Insurance Company Ltd v Daloia (1989) VR 161.

This case involved the interpretation of an Insurance Policy which provided for the reinstatement of buildings destroyed, or damaged, by fire, and certain other events.

The respondent was the owner of a property at 34 Park Street, Moonee Ponds. There were 5 buildings erected on the property. A total of 16 residential units were contained within these buildings. Two of the buildings were brick and 3 were weatherboard. A fire occurred in one of the weatherboard buildings. This building contained 5 residential units. These units were not self contained.

As a result of changes to various controls which existed over the property the respondent was not permitted to rebuild a building of a similar type to the one destroyed. Indeed, the relevant controls required the demolition of the building to the rear of the one that was destroyed and a further building containing two residential units, before any redevelopment could take place. The current building regulations required a brick building to be erected and for the units to be fully self contained. The planning scheme required car parking to be provided, landscaping to be carried out and the additional buildings to be demolished.

The respondent claimed the sum of $244,259.68, being the cost of the redevelopment. It was acknowledged that the works carried out by the respondent were the minimum works which were required in order to obtain the relevant permits.

The insurance policy provided that the insurer would bear the cost of reinstatement of any building which was destroyed. No deduction was to be made to take into account the depreciation of the building which had been destroyed.

In addition, the policy had two further relevant provisions. These provided as follows:

1. Any extra costs of reinstatement necessarily incurred to comply with statutory building regulations or municipal or local authority by-laws were recoverable by the insured; and
2. Where the reinstatement of the building is limited or restricted by a relevant statutory control, the insurer would make cash payment to the insured, being the difference of the actual cost of reinstatement and estimated cost of reinstatement, had it been permitted.

The essential question which was raised by this case was whether the redevelopment, which had been carried out by the insured, amounted to reinstatement within the terms of the policy. The trial judge concluded that the redevelopment was reinstatement, within the expanded meaning given to it in the insurance policy. In coming to this conclusion, the judge considered that as the insurer had carried out the minimum development required to obtain the necessary permits, and had constructed the same number of residential units as existed previously, the

insurer had only reinstated what was previously there.

The Full Court disagreed with the conclusion of the trial judge. The Full Court drew distinction between the additional requirements which the new building had to satisfy in order to comply with the building controls and further matters which the insured was required to attend to but which were not associated with building control. The planning control exercise over the property was such a matter and did not necessarily relate to building control.

By way of example, the requirements that the new building be constructed of brick, possibly have more sophisticated foundations and plumbing and electrical connections, and be self contained were building controls and the cost of constructing the buildings to comply with these requirements were recoverable. However, costs which might be said to flow from planning policy, or any planning scheme unrelated to reinstatement within the policy, are to be excluded.

The Full Court observed that the policy contemplated that reinstatement might not be possible and provided a mechanism for compensating the insured if this was the case. The Court concluded that the respondent was entitled to payment representing the cost of constructing a building to comply with the relevant building controls had that building been permitted. The respondent could not recover the additional cost of carrying out works necessary to comply with planning controls.

The Court did not specifically assess the amount which the respondent was entitled to recover and referred the matter to a single judge for further consideration.

- Phillip Greenham, Partner, Minter Ellison, Solicitors, Melbourne. Reprinted with permission from the Building Dispute Practitioners' Society Newsletter.

21. Negligence Of Highway Authority - Misfeasance And Non-Feasance

The case of *Hill v The Commissioner for Main Roads NSW*, NSW Court of Appeal 20/6/89 (1989) Aust. Torts Reports 80-260, concerned an action by a motorcycle rider against the Commissioner for Main Roads in which it was alleged that the Highway Authority was responsible for causing or permitting a road upon which the rider had been travelling to fall into disrepair, thus causing an accident in which *Hill* sustained severe injuries. The disrepair was a form of surface deformation called "shoving" which resulted in waviness or a series of undulations in the bitumen. Prior to the accident, *Main Roads* had carried out repairs and carried out further repairs after the accident occurred.

The trial judge found for *Main Roads* on the basis that the acts which the motorcycle rider complained of amounted only to non-actionable non-feasance, a doctrine which had for many years served to protect Highway Authorities against actions for negligence arising from failure to maintain roads.

In the appeal, *Hill* contended that the distinction between misfeasance and non-feasance should no longer be recognised and that the ordinary principles of negligence should be applied to Highway Authorities, as in the case of other public authorities. Alternatively, *Hill* submitted that what had occurred constituted negligent misfeasance for which an action for damages would lie.

There was evidence which was accepted in the original trial that a drain was inadequate to dispose of water, with the result that moisture percolated from the drain under the bitumen surface into the road base and which resulted in irregularities called shoving through ordinary traffic wear.

Hill contended that the doctrine of immunity for non-feasance can no longer be availed of by a highway authority, as it has been overtaken by more recent developments in the law of negligence and particularly by the decision of the High Court in *Council of the Shire of Sutherland v Heyman & Anor.* (1984-1985) 157 C.L.R. 424. It was further contended that the facts established that what had occurred was not a failure to act but an example of active intervention performed without proper care and skill giving rise to a dangerous condition of the highway which brought about the injury.

It was held (Kirby P., Samuels and Priestley JJ. A.):

1. It is not possible to use the reasoning in *Council of the Shire of Sutherland v Heyman* to construct an argument capable of abolishing a rule of law which is now so deeply entrenched.
2. *Main Roads* knew prior to the accident that shoving would recur, as a consequence of inadequate drainage, and that the patching carried out was a superficial expedient which was neither designed nor likely to cure the basic cause of the condition.
3. The patching carried out by *Main Roads* was negligent because it failed to remedy a foreseeable risk which was certain to reappear at some stage in the future with predictable and hazardous consequences to users of the highway. This amounted to a misfeasance. The essence of the active intervention, negligent in character, was the conversion of an unsafe carriageway into an apparently safe carriageway - one which would remain safely negotiable for a period, but which would inevitably deteriorate into a danger.
4. *Main Roads* could have refrained entirely from acting in any way. However, once committed to intervention, its duty was to perform the task it had undertaken with proper care and skill. That task was to repair the highway in order to remove the danger. In order to achieve that purpose, it was necessary to identify and rectify the fundamental cause of the condition. *Main Roads*, having acted - but without grappling with or remedying the essential problem, was guilty of an actionable misfeasance.
5. *Main Roads* had not established in evidence its assertion that there were exculpatory economic circumstances which it might adopt as a shield.

The appeal was allowed and Hill was awarded damages with costs.

- John Tyrril