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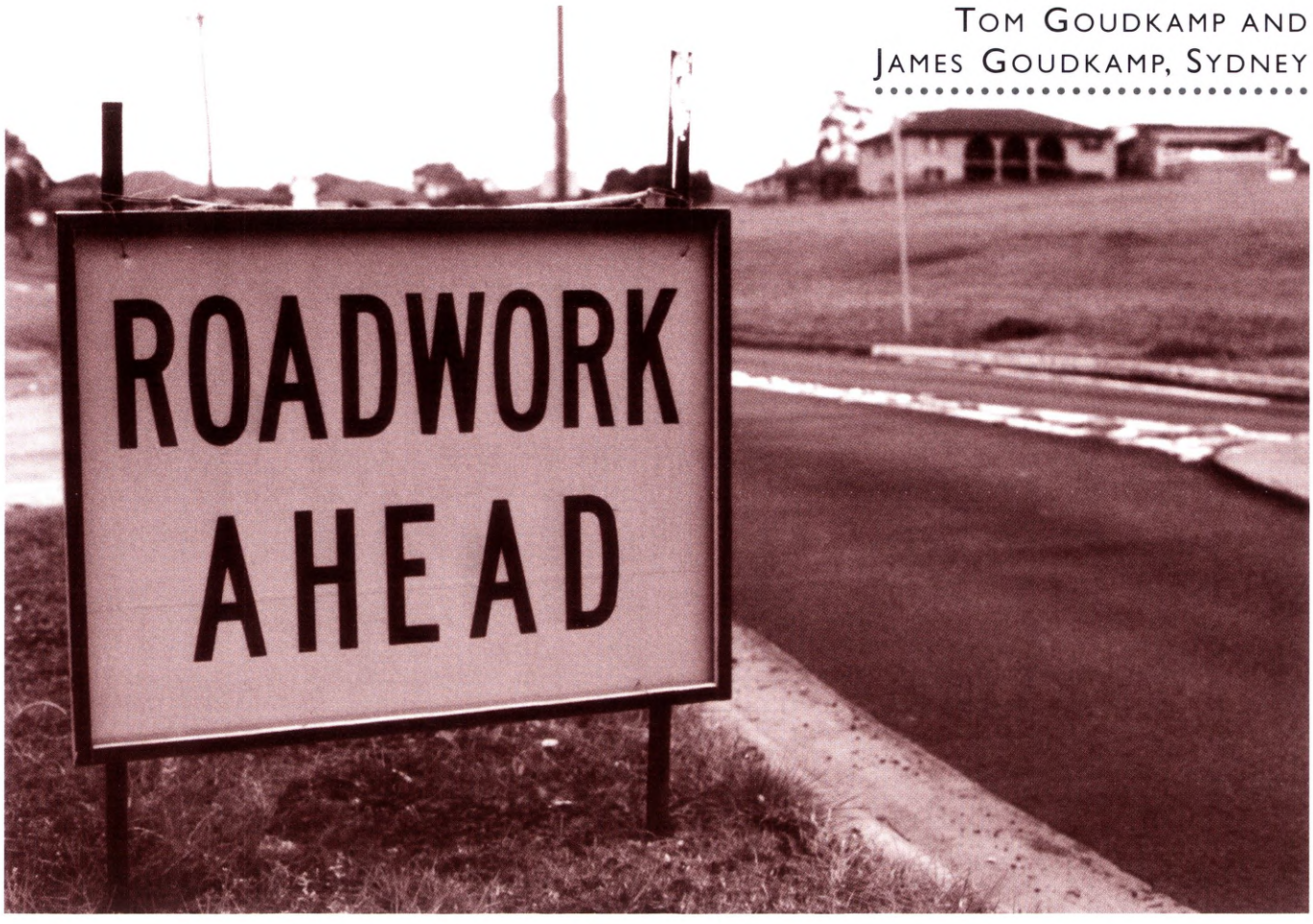

Implications of the Abolition of the Immunity of Highway Authorities for Nonfeasance

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In the recent conjoined decisions in *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council*[1] a majority[2] of the High Court held that the so-called 'highway rule' no longer forms part of the common law of Australia. The rule, which had an uncertain status in Australia until it was firmly established by the decisions in *Buckle v Bayswater Road Board*[3] and *Gorringe v Transport Commission (Tasmania)*[4] entitled highway authorities to immunity from liability in negligence and nuisance for nonfeasance (i.e. pure omissions) as opposed to misfeasance (i.e. positive conduct). The decisions in *Brodie* and *Ghantous* have absorbed the liability of highway authorities for nonfeasance into the general principles of negligence. ▶

Facts in *Brodie*

In *Brodie* the first applicant was injured within the Shire of Singleton when he drove a 22 tonne truck owned by the second applicant onto a timber bridge that collapsed. The bridge, which had been constructed some 50 years ago, was designed to withhold a load of around 15 tonnes. However, with the passage of time the bridge girders had deteriorated. Consequently, its weight limit at the time of the accident had been reduced to between 9.3 and 13.5 tonnes. There was no load limit sign posted at the bridge. However, there was a 15 tonne load limit sign posted on a similar previous bridge. From time to time the respondent had inspected the bridge and replaced the planks which ran over the girders. At first instance, Tapsell A-DCJ held that this was a case of misfeasance and found the Council liable. The Council appealed on liability and the finding of misfeasance. The NSW Court of Appeal reversed the decision, finding nonfeasance.[5] The High Court allowed an appeal, and remitted the matter to the Court of Appeal to reconsider the Council's appeal on liability.

Facts in *Ghantous*

In *Ghantous*, the applicant, an elderly pedestrian, tripped whilst walking on a concrete footpath. The earth adjacent to the footpath had subsided over time. The plaintiff fell as she placed her foot partly on the footpath and partly over the lower earth surface. The applicant proceeded in negligence and public nuisance. The trial judge, Freeman DCJ, construed the facts as involving nonfeasance and accordingly found for the Council. An appeal to the NSW Court of Appeal was dismissed.[6] Despite abolishing the nonfeasance immunity, the High Court dismissed an appeal on the ground that the applicant failed to establish negligence.

Implications for Councils

Before the High Court, the respective respondents argued that it was imperative to retain the highway rule else an intolerable financial burden would be imposed on councils. However, it seems that this argument is logically indefensible as it is premised on both an ignorance of the nature of the immunity, and an ignorance of the fundamental principles of the law of negligence.

At the outset, it is observed that the scope of the immunity was so narrow[7] that it afforded councils very little protection.[8] As Gardiner and McGlone comment, there are very few cases in recent decades in which a highway authority has been shielded by the immunity.[9] Indeed, Justices Gaudron, McHugh and Gummow observe the rule is so permeated by exceptions that the primary operation of the immunity is almost engulfed.[10] This raises the question, why did the High Court overturn the highway rule if it was so limited? The majority judges provided numerous reasons for dismissing the rule. However, two reasons in particular directly refute the argument that the highway rule is necessary to prevent councils from being financially crippled. These two reasons are delineated.

(i) The rule was uncertain and thus productive of litigation

The first reason is the fact that the rule was so uncertain and unprincipled that it was extremely productive of litigation. As Justice Kirby astutely noted:

> "[The rule] does not even have the merit of certainty, as the respondents incorrectly claimed. The highway rule is ... one of the most obscure and inexplicable concepts ever formulated in our courts."[11]

It is well accepted that litigation increases with a corresponding decrease in the certainty of the law.[12] As Justices Gaudron, McHugh and Gummow pointed out:

> "The postulate that, without the 'highway rule', ... statutory authorities will be subjected to fresh, indeterminate financial hazards ... should not be accepted. ... [The] expenditure of public funds on litigation turning upon indeterminate and value-deficient criteria is

encouraged, indeed mandated, by the present state of the law."[13]

Indeed, their honours went so far as to assert that the 'highway rule' might in fact be economically detrimental to councils:

> "The maintenance of [the highway rule] ... 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 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."[14]

The uncertainty of the highway rule stems from three conditions which must be satisfied before immunity is conferred:

1. That the public authority in question is a highway authority acting in its capacity as a highway authority.
2. That the accident was caused by a defect on the highway proper[15] (as opposed to 'artificial structures' on or adjacent to the highway).
3. That the highway authority's conduct involved nonfeasance (as opposed to misfeasance).

These qualifications "... can only be described as unprincipled, unacceptably uncertain and anomalous[.]"[16] The first (and perhaps most contemptible) qualification attempts to distinguish highway authorities acting in their capacity as a highway authority as opposed to acting in some other capacity, such as a traffic authority,[17] a drainage authority,[18] or a tramway authority.[19] Apart from lacking a logical base,[20] this distinction is incapable of sensible principled application.[21] With respect to the second qualification, it is far from clear what exactly differentiates an 'artificial structure' from the rest of the highway or 'non-artificial structures'.[22] The third qualification is equally incapable of precise demarcation. The matter of *Brodie* demonstrates how different minds can reach different conclusions as to whether particular conduct constitutes misfeasance or nonfeasance. The trial judge found that due to replacing the planks on the bridge, the Council was liable for misfeasance. Whereas on appeal, Powell JA[23] asserted that "... such action... [is] to be regarded as no more that superficial repairs to the road surface and thus..."[24] constituting nonfeasance.

(ii) Other limitations on liability to sufficiently protect councils

The second reason for overturning the rule is that it was quite unnecessary considering the modern law of negligence. The immunity was developed in the 18th century, long before negligence emerged as a separate tort.[25] Today, a whole host of more appropriate limitations are imposed to delimit liability for negligence. The majority judges were at pains to stress that the removal of the highway rule would not give rise to strict liability.[26] Plaintiffs must still prove the existence of a duty of care and a ▶