LIABILITY OF HIGHWAY AUTHORITIES.

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The rule under which highway authorities are liable for misfeasance but not for nonfeasance presents an outstanding example of a legal principle which once had some practical justification, was preserved and even extended, when the reason had long disappeared, and now lingers in the law fortified by history and precedent, yet repugnant to modern principles of jurisprudence and legal policy.

As Fullagar J. pointed out in *Gorringe v. The Transport Commission*[1], the rule developed in four phases. In *Russell v. Men of Devon*[2], the plaintiff sued for damages caused by the lack of repair of a bridge maintainable by the County. The reason for the dismissal of the action was that the County was not a corporation, and there was no corporation fund out of which satisfaction could be made. In the next case of a similar character, *Mackinnon v. Penson*[3], the defendant was a surveyor of County bridges, under a statute which provided that the County might be sued in the name of the surveyor. Although there was a proper defendant in this case, it was held that the statute did not create a new liability, other than a purely procedural provision, under which the surveyor could be sued.

This argument was repeated and reinforced in *Young v. Davis*[4]. Here the statute provided that the surveyor " shall repair and keep in repair the several highways of the said parish." It was held that there was a clear statutory duty, but not one enforceable by an action for damages. A few years earlier, *Couch v. Steel*[5] had decided differently, in the case of a similar statute. But the decision was distinguished on the ground that the statute in *Couch's Case* had established a duty for the benefit of a limited class, whereas the duty in *Young's Case* had been imposed " for the benefit of the public at large."

In *Gibson v. Mayor of Preston*[6], the *Public Health Act* 1848 was under consideration; it vested highways in the local Board of Health (that is, the Corporation of Preston), and put the highways under its management and control. The Court of Queen's Bench refused to deduce any wider obligation from this transfer of powers and duties, and reaffirmed the principle that " no action could be maintained for an injury arising from the non-repair of a highway by the Parish." By transferring the duties to a local authority, the Act had not established a stricter obligation.

The rule was consolidated by the House of Lords in *Cowley v. Newmarket Local Board*[7]. The *Public Health Act* 1875 put the urban authority in the place of the surveyor of highways. It also provided that the urban authority " shall from time to time cause the highway to be levelled, paved, . . . altered, and repaired, as occasion may require." The leading judgment is by Lord Herschell, which established in terms the distinction between misfeasance and nonfeasance. All the

1. [1950] A.L.R. 277.
2. (1788) 2 T.R. 667.
3. (1853) 8 Ex. 319.
4. (1863) 7 H. & C. 760; 2 H. & C. 197.
5. (1854) 3 E. & B. 402.
6. (1870) L.R. 5 Q.B. 218.
7. [1892] A.C. 345.

judgments simply relied on the cases previously quoted, in order to affirm that highway authorities had not been in the past liable for nonfeasance, and that the new statutes could not be presumed to have altered this principle.

Since *Cowley's Case*, the rule may be said to be firmly established. Yet, local government, as well as the development of modern traffic, had meanwhile undergone a revolutionary change. Instead of the inhabitants of the parishes, against whom the duty of repairing highways was enforceable by way of indictment only, there was now an integrated system of local government with local authorities of different kinds and levels, incorporated by statute, with definite budgets and responsibilities, and subject to the general supervision of central government, through the Minister of Health. Developments of analytical jurisprudence as well as considerations of legal policy, made the rule anomalous, even at the time when the House of Lords finally confirmed it. The distinction between misfeasance and nonfeasance is of great importance in English legal history. But as a touchstone of legal liability, it has long been displaced by the modern concept of negligence, based on a duty of care, which may be broken by omission as well as commission. Nor is the distinction any longer of significance in the law of contract[8].

The place and principles of public law in the English legal system are still far from clear. But gradually the liability of public authorities in negligence has been strengthened and extended, except where such liability would interfere with overriding public duties. Overwhelmingly, modern writers criticise the rule[9]. But occasional support is found. Thus Dixon J., in *Buckle v. Bayswater Road Board*[10], says:

> "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 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."

This is similar to one of the reasons given by the majority in the later case of *Kent v. East Suffolk Catchment Board*[11], especially by Lord Simon[12]. (The main reason, however, was that the Catchment Board by negligently executing repair work which it need not have undertaken at all, had not caused any additional damage.) Pyman and Sawer[13] suggest that the difficulties of proving contributory negligence against a plaintiff injured through alleged non-repair of a highway, makes the rule a desirable bar against vexatious actions.

8. It still has limited significance in the law of nuisance, where misfeasance creates strict liability, but liability for continuation of a nuisance is dependent on negligence. Cf. Friedmann, 59 L.Q.R. 63.
9. Cf. Salmond, *Torts*, 10th ed., Stallybrass, pp. 274-275: Winfield, *Law of Tort*, 3rd ed., p. 448: Cf. also Denning, in 55 L.Q.R. 343.
10. 57 C.L.R. at p. 281.
11. [1941] A.C. 74.
12. *Res Judicatae*, vol. II., No. 1, p. 88.
13. 12 A.L.J. 231.

Neither of these reasons seems convincing. Proof of contributory negligence is a matter of fact, and no more difficult in this than in many other cases. *Res ipsa loquitur* will provide the answer in many cases. If, for example, the plaintiff, as in *Gorringe's Case*, plunges at night into a deep cavity, the question of contributory negligence can be quickly solved. The argument that public authorities have vast responsibilities on a limited budget is more weighty. But it should apply equally to the many other functions which local authorities exercise, in their capacity as drainage or sanitary authorities, traffic authorities, education or housing authorities. Yet the rule is by common consent, and with the support of Dixon J. himself, limited to the highway function. Nobody would seriously advocate today a general principle of immunity of public authorities from common law liability. Their exemption in a particular field is offensive to legal logic as well as to the sense of justice. If resources prove insufficient for the adequate execution of public duties, the central government must increase its grant, or new revenues must be raised, at the expense of the citizens at large rather than at that of the individual who comes to grief when using the highway on legitimate business.

Although the strict rule was, after *Cowley's Case*, affirmed in a number of decisions[14], judicial uneasiness about the logic and justice of the rule has found increasing expression in more recent decisions. By a number of partly genuine, partly ingenious, distinctions, the English Courts have gradually whittled down the scope of the rule, as they have done with some other rules no longer in accordance with modern legal thought[15]. The following five ways of avoiding the application of the nonfeasance rule may be distinguished.

(1) The distinction between misfeasance and nonfeasance is a fluid one. The commission of certain actions means often the omission of others. As soon as some action has been taken at some time, for example, by executing repairs on the road, or by putting up rails, it becomes possible to link the accidents with the misfeasance rather than the subsequent nonfeasance. The best known of the decisions which have boldly used this approach is that of Lush J., in *McClelland v. Manchester Corporation*[16]. The Corporation had taken over a public road, and made it up, but it had not fenced it in, although it ended in a ravine. Although there has been some discussion on the *ratio decidendi* of this case, the following passage from the judgment of Lush J., is unambiguous :

> " You cannot sever what was omitted or left undone from what was committed or actually done, and say that because the accident was caused by the omission therefore it was nonfeasance. Once establish that the local authority did something to the road, and the case is removed from the category of nonfeasance. If the work was imperfect and incomplete it becomes a case of misfeasance and not nonfeasance, although damage was caused by an omission to do something that ought to have been done."

14. E.g. *Municipality of Pictou v. Geldert*, [1893] A.C. 524 ; *Municipality of Sydney* v. *Bourke*, [1895] A.C. 433.
15. Cf. for example, the development of the rule of common employment before its legislative abolition, and of the defence of *volenti non fit iniuria*.
16. [1912] 1 K.B. 118.

In a more recent decision[17], the action of the Council in failing to repair a gap in railings adjoining a footpath which had been damaged by a collision, was regarded by Cassels J. with particular reference to *McClelland's Case*, as misfeasance.

(2) Some cases seem to exempt any "artificial structure." This was one, though probably not the only, reason for the decision of the Privy Council in *Borough of Bathurst v. Macpherson*[18]. The Borough was held liable for the defects of a brick drain, which they had constructed in the road, and which, on becoming defective, caused a hole to open in it. "The duty was cast upon them of keeping the artificial work they had 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[19]." This test was applied by McTiernan J. in *Buckle v. Bayswater Road Board*[20], where the majority of the High Court held the plaintiff entitled to recover damages from the Board for injuries caused by a broken pipe-drain, laid on one side of the road. But neither Latham C.J. nor Dixon J.—who dissented and denounced the artificial "structure" test in the Bathurst case—applied it[21].

(3) Sometimes certain artificial portions of the highway are distinguished from the highway proper. In *Guilfoyle v. Port of London Authority*[22], a swing-bridge was not regarded as part of the highway, for the purposes of the rule. But generally bridges are part of the Highway[23]. The rule was not applied to an accident on an ordinary bridge in *Swain v. Southern Railway*[24], but the decision rests mainly on another point.

In *Buckle v. Bayswater Road Board*[25], Dixon J. regards as part of the highway "a road, street, bridge, footpath, or other place over which there is a public right of passage." In *Gorringe v. Transport Commission*[26], a culvert constructed for the purpose of carrying the road over a natural stream, was regarded as "plainly part of the road[27]."

(4) By far the most important and popular way of avoiding the application of the nonfeasance rule, is the "functional" test, which distinguishes highway functions from others exercised by the same authority. Where, as in England, the highway authority is normally a local authority which exercises a multitude of other functions, this distinction can be carried to considerable length. Among other examples are: *Newsome v. Darton Urban District Council*[28], where the court attributed the making of a trench in a highway for the purpose of executing drainage work, to the sanitary, not to the highway functions of the defendant; *Skelton v. Epsom Urban District Council*[29], where the Court of Appeal regarded traffic studs placed in the road under powers granted

17. *Drake* v. *Bedfordshire County Council*, [1944] K.B. 620.
18. (1897) 4 A.C. 256.
19. (1879) 4 A.C., at p. 265.
20. (1936) 57 C.L.R., 259, at p. 298.
21. Both the authority of the case, and McTiernan J.'s application of it, are supported by Sawer, 12 A.L.J., at p. 233, who also gives some further examples.
22. [1932] 1 K.B. 336.
23. *Municipality of Pictou v. Geldert*, [1895] A.C. 524.
24. [1939] 2 K.B. 560.
25. 57 C.L.R. p. 286.
26. [1950] A.L.R. 277.
27. per Latham C.J., at p. 279; cf. also Fullagar J., at p. 289.
28. [1938] 3 All E.R. 93.
29. [1937] 1 K.B. 112.

by the *Road Traffic Act* 1930 as pertaining to the functions of the defendant as Traffic authority, not as Road authority; *Simon v. Islington Borough Council*[30], where the plaintiff was fatally injured by a bicycle accident in a disused tramway track. The Court of Appeal awarded damages because the Borough Council, having taken over the Tramway equipment from the London Passenger Transport Board with intention to make good the surface of the road, had acted as a tramway authority, not as a highway authority. The majority of the High Court in *Buckle v. Bayswater Road Board*[31] regarded an agricultural drain-pipe laid beside the road as being an exercise not of highway but of agricultural functions.

(5) In some cases, an obligation higher than liability for misfeasance has been placed upon a highway authority through the construction of statutory provisions. As pointed out earlier, most decisions have rejected this approach; they have refused to see in the statutory transfer of highway functions to a special authority a strengthening of legal duties. This view has recently been reinforced by the High Court in *Gorringe v. Transport Commission*[32], where it was held that the Tasmanian *Transport Commission Act* 1938 by transferring highway duties to the Commission and directing it to "cause all State highways and subsidiary roads to be maintained as it should direct," did not impose a stronger duty than existed under the common law. Some older decisions are to the contrary[33]; a recent decision of the Court of Appeal[34] did construe a liability for nonfeasance as well as misfeasance from the *Railways Clauses Consolidation Act* 1845. But the main ground for the decision of the court was that the Southern Railway Company could not be said to stand in the shoes of the inhabitants of a County; they were not a public authority, but a Company carrying on business for profit, which was subjected by statute to obligations with reference to bridges and the approaches thereto, as one of the terms upon which it was given power to make its line. A stronger authority for the interpretation of statutory duties of a public authority in derogation from the common law nonfeasance rule, is a decision of the High Court in *Municipal Tramways Trust v. Stephens*[35]. The Act provided that the Trust

> "shall, at its own expense at all times, keep in good condition authority shall direct, and to its satisfaction, so much of any and repair, with such materials and in such manner as the road road whereon any tramway belonging to the Trust is laid as lies between the rails of the tramway . . . and so much of the road as extends 18 inches beyond the rails on each side of such tramway."

The plaintiff sued for damages suffered through the wearing out of the macadamized surface of the road, as a consequence of which the rails projected to a height of several inches. The jury found that the relevant

30. [1943] K.B. 197.
31. (1936) 57 C.L.R. 259.
32. [1950] A.L.R. 277.
33. *Couch v. Steel*, [1854] 3 E. & B. 402: *Hartnell v. Ryde Commissioners*, [1863] 4 B. & S. 361.
34. *Swain v. Southern Railway Co.*, [1939] 2 K.B. 560.
35. (1912) 15 C.L.R. 104.

part of the road had not been maintained in good condition, and repair. Judgment for the plaintiff was confirmed by the High Court, consisting of Griffiths C.J., Barton and Isaacs JJ., on the ground that the Trust had broken the statutory duty imposed by the *Municipal Tramways Trust Act*. But Isaacs J. dissented from the majority. He held that the alleged neglect was in respect of part of the road and not of the tramway itself, and that the statute imposed no absolute, unconditional duty on the Trust[36].

The all but unanimous trend of recent decisions, both English and Australian, thus seemed to be a whittling-down of the nonfeasance rule by one of the alternative means discussed above. It did not seem unreasonable to think that, given a reasonable chance to apply one of the distinctions, the High Court would follow this trend. The recent decision in *Gorringe v. Transport Commission*[37], however, reaffirms the nonfeasance rule in all its rigidity, and without even the hint of a doubt as to its justification.

The plaintiff's employee had been killed by falling into a hole in a Tasmanian public highway, about 14 feet by 6 feet, and 9 feet deep. Under that part of the road, a natural watercourse ran through a culvert. Above the culvert, the road had been built up with filling and earth, to a height of 12 feet above the surface of the decking. At the time of the accident, the stream was more powerful than usual, and as a result of water action, the decking of the culvert had collapsed. Depressions in the road above the water stream had occurred frequently, and the defendant had from time to time filled up the hole with loose gravel or binding. The deceased was fatally injured through his truck plunging into the hole and catching fire. It was agreed that he had had no opportunity of avoiding the accident.

Both Latham C.J. and Dixon J. interpreted this situation as one of pure nonfeasance on the part of the defendant. Both learned judges refused to apply the observations of Lush J. in *McClelland's Case*[38], and to deduce misfeasance from the fact that the defendant had from time to time attempted to repair the hole. On this point, however, Fullagar J. came to a different conclusion :

> " If the defendant did nothing to remedy the state of affairs, there would only be " nonfeasance," and the defendant could not be made liable. But it did do something. It filled up the depressions in the road surface. It saw something which called for action in the way of repairs, and it proceeded to execute repairs. The repairs which it executed were inappropriate and inadequate, because it failed to appreciate what should have been clear to it. There was a " feasance," and it was a negligent " feasance," and therefore a " misfeasance " and actionable[39]."

Yet the Court unanimously found for the defendant. Having held that there was nonfeasance only, Latham C.J. and Dixon J. only had to meet the contention that the Tasmanian *Transport Commission Act* 1938 imposed a positive duty on the defendant. This Act transferred

36. For some further observations on this decision, see below, p. 27.
37. [1950] A.L.R. 277.
38. See above.
39. [1950] A.L.R. 289.

the maintenance of State highways to the Crown, but brought them " under the control and direction of the Transport Commission." It also enacted that " except as otherwise provided, the Transport Commission should cause all State highways and subsidiary roads to be maintained as it should direct." Both learned judges dismissed the contention that this implied a wider statutory duty with reference to the earlier cases quoted[40]. Dixon J. alone referred to the *Municipal Tramways Trust Case*[41], and distinguished it on the ground that the defendant there had been held liable as a tramway authority, not as a highway authority. Fullagar J. agreed with the decision on the ground that there was not sufficient evidence of negligence on the part of the defendants. Otherwise, it appears, he would have found for the plaintiff on the ground of misfeasance.

This decision shows again how precarious a purely analytical approach can be. The Court was certainly justified in regarding the defects both of the culvert and of the road as part of the highway. But on two grounds, it would have been open to the Court to find for the plaintiff. One was the interpretation of the conduct of the Transport Commission as misfeasance. This commended itself to Fullagar J.[42], and apart from *McClelland's Case*, *Drake v. Bedfordshire County Council* could have been quoted in support. If failure to repair a gap in railings was misfeasance, the inadequate filling of a depression in the road was so *a fortiori*.

Alternatively, the High Court's own decision in the *Municipal Tramways Trust Case* could have been applied. The statute imposed obligations in similar terms—the word used is " shall . . . (maintain)." Dixon J. distinguished the case on the ground that the Municipal Tramways Trust had been held liable as the tramways authority, not as a highway authority, but it is difficult to support this view. The Trust was by statute erected to maintain a certain part of the highway " with such materials and in such manner as the road authorities shall direct, and to its satisfaction." It was made the agent of the Municipality as the road authority, for certain purposes. Moreover, its duty extended to the maintenance of parts of the highway proper, and the accident was not caused by a defect of the tramway installations, but of the road itself. Griffith C.J.[43] and Isaacs J.[44] specifically confirmed that the Trust was acting as a highway authority, nor did Barton J. suggest any differentiation between highway and tramway functions. Possibilities of distinction still remain. It was possible to argue that the duties transferred by statute to the Tasmanian Transport Commission were not as strict as those given to the Municipal Tramways Trust. The possibilities of distinguishing the facts or the *ratio decidendi* of one case from another are almost infinite. It can at least be said that the analytical grounds on which the High Court could have found for the plaintiff were at least as powerful as those which it used in favour of the defendant.

40. Cf. above, p. 23.
41. Cf. above, p. 25.
42. Cf. above, p. 26.
43. (1912) 15 C.L.R. at p. 114.
44. (1913) 15 C.L.R. at p. 123.

In such circumstances—which apply to a number of outstanding common law problems[45]—surely the only reasonably clear guide for a decision can be found in conditions of justice and legal policy, unless they too are controversial. As indicated earlier, there should be little doubt on what kind of decision would correspond to contemporary legislative policy. The rule of law in a democratic society demands the utmost degree of equality before the law, which is compatible with the carrying out of public duties. Local and other incorporated public authorities are generally held liable in Tort and Contract, and for breach of statutory duties, like private persons. This is different only where such liability would interfere with overriding public duties[46]. No such reason of public policy exists here. Limitation of funds would be an argument against any liability of a public authority, which depends on either rates or central government grants, or both. And it is repugnant to our values of justice that exemptions from liability should be made at the expense of the individual rather than the community. This is no less unfair than the countenancing of tax evasions, which has been roundly condemned in a recent decision of the House of Lords[47]. It may also be timely to reconsider the distinction which the Court of Appeal drew in *Swain v. Southern Railway*[48], between public authorities and private companies equipped with statutory powers, but operating for profit. The Court used the distinction in order to escape from the precedents which had held that the common law duties of highway authorities were not widened by statute. But it is becoming questionable whether the distinction between public authorities and profit-making companies still holds good at a time when an increasing number of Public corporations operate transport services on behalf of the Crown. The British Transport Commission, as *Tamlin v. Hannaford*[49] confirmed, is not entitled to any legal privileges of a public authority, other than a shortened period of limitation. The Tasmanian Transport Commission is very similarly constructed. It derives its revenue from twelve different sources, which include licensing fees, petrol tax, and charges for public vehicles. It operates three separate accounts: a trading account, a profit and loss account, and an account of assets and liabilities. Like many other public corporations operating services on a commercial basis, the Commission has a dual status in public and private law[50]. The legal liability of these bodies should therefore be treated separately from their status as public authorities.

The development of the common law, in particular of the law of tort, in the present century, is largely due to this adaption of precedent to new social conditions and principles of legal policy.

The legislator cannot be expected to carry the whole burden of law reform, especially in fields which are traditionally within the common law.

For all these reasons it is much to be regretted that the High Court has infused new life into a rule which was on the way to well-deserved extinction.

45. Cf. among others, the present author's article on the "*Shield of the Crown*," 24 A.L.J.
46. Cf. for example, *Ransom and Luck v. Surbiton Borough Council*, [1949] Ch. 180.
47. *Latilla* v. *Inland Revenue Commissioners*, [1943] A.C. 377.
48. [1939] 2 K.B. 560.
49. [1950] K.B. 58.
50. For a fuller discussion of this problem, see Friedmann, "*Legal Status of Incorporated Public Authorities*," 22 A.L.J. p. 7: "*The Shield of the Crown*," 24 A.L.J. p. 275.