HUGHES v. COUNCIL OF THE MUNICIPALITY OF HUNTERS HILL[1]

Sometimes the law's popular image of being out of date and cloaked in antiquated jargon seems fully deserved. Doris Hughes, waiting for her bus in Hunters Hill in 1988 had probably never heard of parish responsibilities for bridge repair in Devon in 1788, the legal differences between 'nonfeasance' and 'misfeasance', or how a tree could be seriously defined as an 'artificial structure'. But when she fell and injured herself and sued the local council these directly affected her chances of winning compensation.

THE FACTS

The facts are simple. Doris Hughes was waiting at a bus stop. To see whether the bus was coming she went to the kerb, onto an area of footpath covered with asphalt, which had been cracked by the roots of a nearby tree. The broken and uneven asphalt caused her to fall and injure herself. She sued the local council, which was responsible for the footpath and its condition, in negligence. The council denied that it had a duty of care in respect of the footpath. The trial judge ruled for the defendant; but the Court of Appeal unanimously allowed the plaintiff 's appeal.

THE LAW GOVERNING THE CASE

The law is far from simple. The plaintiff had to establish that the council owed her a duty of care in respect of the state of the footpath. The council admitted that they had known, for years, that the footpath was in need of repair; but claimed immunity since the footpath was part of a highway, and it was well established law that highway authorities could not be held liable for mere nonfeasance (failure to act) but only for misfeasance (positive action involving lack of care). Failure to repair the footpath was mere nonfeasance and therefore not actionable.

This doctrine of the immunity of highway authorities for nonfeasance is now well established in Australian common law. Historically, English parishes, hundreds and counties were unincorporated authorities with limited local funds, responsible for the maintenance of local roads. Courts were therefore reluctant to hold them liable for failure to maintain or repair.[2] In the later 19th century, their

[1] (1992) Aust. Torts Reports 81-198.

[2] The history, going back to *Russell v. Men of Devon* (1788) 2 T.R. 667, is set out in textbooks (Balkin, R.P. and Davis, J.R.L., *The Law of Torts* (1991) 882-3); articles (Friedmann, W., 'Liability of Highway Authorities' (1951) 5 *Res Judicatae* 21, Sawer, G., 'Non-feasance in Relation to "Artificial Structures" on a Highway' (1938) 12 *Australian Law Journal* 231, Sawer, G., 'Non-Feasance Revisited' (1955) 18 *Modern Law Review* 541, Hockley, J.J., 'Liability of Highway Authorities: Nonfeasance Reviewed' (1980) 54 *Law Institute Journal* 261) and judgments (*Buckle v. Bayswater Road Board* (1937) 57 C.L.R. 259, 268 *per* Latham C.J. and 281 *per* Dixon J., *Gorringe v. The Transport Commission (Tas.)* (1950) 80 C.L.R. 357, 373 *per* Fullagar J.).

functions were taken over by councils and statutory authorities and the courts continued this policy of civil immunity — a rule given the final sanction of the House of Lords in 1892.[3] Although Australian local government developed quite differently, Australian courts adopted the same rule for highway authorities — affirmed by the High Court in 1937 and 1950.[4] The result was civil immunity for highway authorities against actions for failure to repair or maintain their roads.

However, this doctrine of immunity of highway authorities for nonfeasance has come under increasing academic criticism for its inappropriateness to modern conditions. Modern roads and traffic, modern local authorities and the modern law of negligence in tort all bear little resemblance to their 19th century English counterparts. Friedmann called it:

> 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.

Balkin and Davis term it 'an outdated legacy of earlier decisions' and an 'anomalous immunity'.[5] Judges have also been critical of this rule, and have sought ways around it. Some have tried to find the authority liable for misfeasance, rather than nonfeasance; for example, if they had done some repairs but had done them negligently, thus creating a dangerous situation.[6] They have particularly resorted to two legal devices to limit its application:[7]

(1) *Source of Authority.* The 'highway' (as opposed to other local) authorities are uniquely immune; since local authorities are now often responsible for more than one function, the judge can rule that the omission was the work of the body in some other capacity (e.g. as drainage or traffic authority) and therefore carries no immunity.[8]

(2) *Artificial Structure.* While the authority enjoys full immunity for any nonfeasance relating to the highway proper, it enjoys no such immunity for an 'artificial structure' which it introduced onto the highway. This takes its origin

[3] *Cowley v. Newmarket Local Board* [1892] A.C. 345.

[4] *Buckle v. Bayswater Road Board* (1937) 57 C.L.R. 259; *Gorringe v. The Transport Commission (Tas.)* (1950) 80 C.L.R. 357.

[5] Friedmann, W., *op.cit.* 21; Balkin, R.P. and Davis, J.R.L., *op. cit.* n.2, 887, 889. The *Australian Law Journal* ('The Defence of Non-feasance' (1960) 34 *Australian Law Journal* 34) described it in 1960 as 'the now absurd proposition'. Fleming refers to it as 'this incongruous doctrine' (Fleming, J., *The Law of Torts* (8th ed. 1992) 436). Trindade and Cane see 'no good reason why highway authorities should be treated differently from any other public authority so far as liability in tort is concerned' (Trindade, F. and Cane, P., *The Law of Torts in Australia* (1985) 504). Even Professor Sawer, who was prepared to offer some justification for the modern rule, said in 1955 that 'a special dogmatic rule has remained giving a special immunity to road authorities' (Sawer, G., 'Non-Feasance Revisited' *op. cit.* n.2, 555.

[6] This argument frequently relies on a dictum of Lush J. in *McLelland v. Manchester Corporation* [1912] 1 K.B. 118, 127: 'Once established that the local authority did something to the road then 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.' However, the High Court, in *Gorringe's* case, rejected the plaintiff 's attempt to rely on this dictum.

[7] These devices are discussed in: Friedmann, W., *op. cit.* n.2, 23-6, Sawer, G. 'Nonfeasance Under Fire' (1966) 2 *New Zealand Universities Law Review* 115, 124-6, Fleming, J., *op. cit.* n.5, 436-8 and Balkin, R.P. and Davis, J.R.L., *op. cit.* n.2, 884-9.

[8] This was the reasoning employed by Latham C.J. in *Buckle's* case (272-7), to hold the defendant liable; he argued that the road board which had allowed the drainage pipe to become broken had been acting in its capacity as a drainage authority and therefore did not enjoy the immunity of the highway authority.

from a somewhat dubious Privy Council decision in which a barrel drain in the road was held to be an 'artificial construction' and not part of the highway itself.[9] This offered another possible escape from the immunity rule. The New South Wales courts have held that a tree planted by a council is an artificial structure under this rule,[10] though a self-sown tree is not.[11]

Since the Court of Appeal treated as settled law the normal immunity of highway authorities for nonfeasance, Ms. Hughes had to resort to two of these devices. She argued two grounds to hold the council liable: (1) misfeasance — the council had planted the tree, and asphalted the area around it, in a negligent way; (2) the tree planted by the council was an 'artificial structure' brought upon the highway by them. The court rejected the first argument but accepted the second, and followed *Donaldson's* case in ruling that a planted tree was an artificial structure. Accordingly, the council did owe a duty of care to Ms. Hughes in relation to the tree and the damage which its roots had done to the pavement.

It is interesting to note how easily the court arrived at this conclusion. In 1966, Professor Sawer concluded that '[i]t may be doubted whether a tree can be regarded as an ''artificial structure'', even when deliberately planted.'[12] In 1964, a plaintiff injured in similar circumstances to Ms. Hughes (tripping over a concrete pavement slab raised by a tree root) had failed to recover.[13] The tree in that case was not planted by the defendant and the plaintiff did not even attempt the 'artificial structure' argument; she argued and lost on the grounds of misfeasance by the defendant in negligently constructing the footpath leading to the accident. The judge commented, '[i]t is curious that there are no English, Australian or New Zealand authorities on the liability of a highway authority for damage occasioned by the roots of trees', and had to resort to two Canadian authorities.[14] However, this case was not even referred to in the *Hughes* judgment. Between the 1960's and 1992, the 'artificial structure' argument had been revived by a 1982 High Court decision,[15] in which a bare majority of the High Court (3–2) held the highway authority liable on the ground that the temporary false kerb which they had placed in the roadway was an 'artificial construction' which created a danger.[16]

9 *Borough of Bathurst v. Macpherson* (1879) 4 App. Cas. 256. It is highly unlikely that the Australian courts would now make such a finding — in *Gorringe*'s case, the court treated a culvert as part of the highway.

10 *Donaldson v. Municipal Council of Sydney* [1924] 24 S.R. (NSW) 408.

11 *Bretherton v. The Council of the Shire of Hornsby* [1963] 63 S.R. (NSW) 334; see also the discussion — deliberately left inconclusive — of this point in *Grafton City Council v. Riley Dodds (Australia) Ltd* [1955] 56 S.R. (NSW) 53, 60-62.

12 Sawer, G., *op. cit.* n.7, 125. He reached this conclusion on the basis of *Gorringe's* case and a New Zealand case, *Hocking v. Attorney-General* [1962] N.Z.L.R. 118 (S.C.); [1963] N.Z.L.R. 513 (C.A.). Professor Sawer is regarded as an authority on this area; his 1938 article (*op. cit.* n.2) was cited approvingly in *Bretherton v. The Council of the Shire of Hornsby* [1963] 63 S.R. (NSW) 334, 337 and in *Grafton City Council v. Riley Dodds (Australia) Ltd* [1955] 56 S.R. (NSW) 53, 60.

13 *Hellyer v. The Commonwealth* [1964] 5 F.L.R. 459

14 *Ibid.* 464.

15 *Webb v. The State of South Australia* (1982) 56 A.L.J.R. 912.

16 *Ibid.* 913. The majority judgment seems to have legally rehabilitated *Borough of Bathurst v. Macpherson*, which had been looking distinctly shaky in the references to it in judgments and academic articles. Luntz and Hambly point out the peculiarity of the ruling in *Webb's* case: the trial judge, all three members of the Full Court of the Supreme Court of South Australia and two of the five members of the High Court found for the defendant; yet the plaintiff succeeded because, while only three of the nine judges found for him, those three happened to comprise a bare majority on the High Court (Luntz, H. and Hambly A.D., *Torts. Cases and Commentary* (3rd ed., 1992) 186.

In *Webb's* case, the majority also found that, although the danger posed by the false kerb was obvious, this did not make the risk so small that the reasonable person could neglect it. Following Mason J's statement in *Wyong Shire Council v. Shirt*, that the risk need only be one which is not 'far-fetched or fanciful',[17] they found that the defendant had breached its duty of care to the plaintiff. The court in *Hughes'* case closely followed this reasoning on the issue of causation, holding the council responsible for the broken asphalt which caused the plaintiff 's fall. The fact that the dangers presented by the broken asphalt were obvious did not remove their liability.

COMMENTARY

There is some absurdity about the artificial concepts into which the decision of this case had to be forced. Is this a rational framework, in the 1990's, within which the courts should decide cases of injury due to the alleged negligence of a public authority? The arbitrary factors affecting a plaintiff's chances of success include: whether an omission is deemed a nonfeasance or misfeasance, whether a footpath is considered part of the highway, whether the highway authority could be said to be acting in any other capacity, and whether a tree could be defined as an 'artificial structure' (unlike the highway itself, which is presumably natural!). Understandably, academic criticism has focused on the cause of these absurdities — the doctrine of civil immunity for highway authorities.[18] The obvious solution is for legislation to remove it. It is ironic that England, the historical source of this doctrine, adopted legislation to remove the automatic immunity of highway authorities as early as 1961; and most Canadian provinces have done the same. In Australia, reports from law reform bodies in Western Australia, South Australia and New South Wales have all recommended such legislation, but none of them have been acted upon.[19] So, our law in this area continues to represent the end-product of the untidy accumulation of decisions ever since Russell tried to sue the men of Devon two centuries ago. If we injure ourselves on the footpath or the road owing to the failure of the appropriate highway authority to make necessary repairs, we are unlikely to succeed in suing them unless we can invoke one of the artificial devices discussed above. There is much criticism of the general adequacy of the law of torts as a mechanism for dealing with injury and compensation;[20] but the rule of the immunity of highway authorities for nonfeasance must surely stand out today as a particularly irrational inheritance from the historical development of our common law.

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17 *Wyong Shire Council v. Shirt* (1980) 146 C.L.R. 40, 47.

18 *Supra* n.5.

19 See Sawer, G., 'Non-feasance Revisited', *op. cit.* n.2, and 'Non-feasance Under Fire', *op.cit.* n.7, 115-20; Hockley, J.J., *op. cit.* n.2, 262-3, and 'The Defence of Non-feasance' and 'Non-feasance Again' (1960) 34 *Australian Law Journal* 34, 65; Luntz, H. and Hambly, A.D., *op. cit.* n.16, 491-2; Balkin, R.P. and Davis, J.R.L. *op. cit.* n.2, 881; Fleming, J., *op. cit.* n.5, 436; and Trindade, F. and Cane, P., *op. cit.* n.5, 504.

20 See Luntz, H. and Hambly, A.D., *op. cit.* n.16, Ch.1.

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