Liability of road authorities takes a further dive

Roads & Traffic Authority NSW v Dederer [2007] HCA 42

By Jeremy Wiltshire

When subsuming the liability of highway authorities into the general law of negligence in *Brodie v Singleton Shire Council*,[1] the High Court was at pains to reassure authorities that it would not open the floodgates. Upholding that promise again (as, for example, in *Leichhardt Municipal Council v Montgomery*[2]), the High Court has narrowly interpreted the scope of the duty of care to deny damages to a (then) 14-year-old boy, who was rendered paraplegic after diving from a bridge into shallow water.

The case has implications for the general analysis of common law negligence, as well as the application of civil liability legislation to obvious risks.

THE FACTS

The plaintiff's family regularly holidayed at Forster – Tuncurry; towns separated by a 632 metre-long bridge over an estuary. The plaintiff had frequently seen youths jumping from the bridge into the water. He was aware that the tide was variable and the sands shifted, but believed that the boating channels were generally deep. He had seen pictograms on the bridge prohibiting diving.

On 31 December 1998, the plaintiff climbed on to the bridge railing intending to jump, as he had twice the previous day. On impulse he dived instead. His head struck sand, causing the injury.

The RTA was responsible for maintaining the bridge, which was constructed by its predecessor in 1959. The local council also had some responsibility. The RTA was aware that the diving prohibition signs were constantly ignored. Enforcement attempts by the council and police had been ineffective. The RTA monitored channel depths and knew the sand shifted and that the depth was variable. The handrail had horizontal railings and a flat top, making it easy to climb and providing a good jumping platform. Nonetheless, no injuries had been reported.

The plaintiff sued the RTA before the commencement of the *Civil Liability Act* 2002 (NSW) (CLA). After the CLA had commenced, the plaintiff joined the council. Consequently, the CLA applied to the council, but not the RTA.

INTERMEDIATE DECISIONS

The trial judge considered this an accident waiting to happen. He found both the council and RTA negligent. Knowing that the warning signs were being ignored and that the depths were variable, they should have erected more explicit signs warning of the nature of the danger. They should also have replaced the handrail with pool-type fencing with vertical bars and a triangular top rail to discourage jumping. He apportioned liability 80:20 between the RTA and the council. He found 25% contributory negligence.

Applying the CLA, he found that diving was a 'dangerous recreational activity' (s5K CLA) but that it did not present an 'obvious risk' (s5F) to a 14-year-old boy who had seen others dive and to whom the water appeared deep, although it might have been obvious to a more mature person. The council therefore could not rely on s5H (no proactive duty to warn of obvious risks) or s5L (no liability for harm from obvious risks in dangerous recreational activities). Nor could it rely on s5M (no duty of care for recreational activity where risk warning), because the existing signs constituted a prohibition, not a warning.

The NSW Court of Appeal found the RTA negligent but overturned the finding against the council. It found diving from any height into water where the bottom was not visible to be an obvious risk, even to a 14-year-old boy. The CLA therefore relieved the council of liability. That finding was not appealed to the High Court.

The Court of Appeal also increased contributory negligence from 25 per cent to 50 per cent.

THE HIGH COURT

The majority (Gummow, Callinan and Heydon JJ) found the RTA not liable (Gleeson CJ and Kirby J dissenting).

In the leading judgment, Gleeson J found that the *Wyong Shire Council v Shirt*[3] formula had been misapplied. He reiterated five principles of assessing liability in negligence:

1. Negligence depends on the existence and scope of a duty of care;
2. Whatever its scope, the duty is to exercise reasonable care, not a duty to prevent potentially harmful conduct;
3. Breach depends on correct identification of the relevant risk of injury;
4. Breach must be assessed prospectively, not retrospectively; and
5. Breach is then assessed by the *Shirt* formulation.

As to 1 and 2: a road authority must exercise reasonable care to ensure that the road is safe for users exercising reasonable care for their own safety (*Brodie*). It is not obliged to ensure it is safe in all circumstances (*Montgomery*). The fact that youths were regularly acting without reasonable care for their own safety (by ignoring warning signs) did not affect the scope of the duty. If a sign was a reasonable response, then it remained so despite being contravened.

As to 3: the lower courts incorrectly identified the risk as one of serious injury from diving from the bridge. In fact, the risk was of impact with shifting sands in potentially shallow water. The bridge itself did not create the risk. The frequency of people jumping made the risk look great but the absence of injury over almost 40 years showed the risk of injury was small. As Handley JA noted in the Court of Appeal (dissenting), if it was an accident waiting to happen, it waited a very long time.

As to 4: the lower courts erred in asking what could have been done to *prevent* the injury, rather than identifying a reasonable response to the risk. Following this approach, if the consequence of an injury exceeds the cost of remedial action, the defendant would almost invariably be found liable. But that divorces the question from standards of reasonableness (*Vairy v Wyong Shire Council*).[4]

As to 5: the risk was clearly foreseeable and the magnitude potentially grave, but the possibility that it would occur was low. The proposed remedial steps were expensive and of doubtful effectiveness. The RTA had installed prohibition signs; this was a reasonable response to the risk and nothing more was required.

Even if the RTA had breached its duty, causation was not established. The plaintiff had ignored the existing prohibition signs. The proposed sign would have told him nothing he did not already know. The proposed railing modifications might have deterred some jumpers, but would not have prevented a tall athletic boy like the plaintiff from diving.

IMPLICATIONS

The High Court has again emphasised that the frequent misapplication of the *Shirt* calculus does not mean it is wrong. The fact that five judges (the trial judge, two judges in the Court of Appeal, and two in the High Court) found the RTA liable and four judges (one in the Court of Appeal, three in the High Court) found it not liable demonstrates the difficulty in applying the formula. The analysis clearly requires more than asking if the risk was 'far-fetched or fanciful'. Justice Gleeson's summary provides a good checklist for assessing breach of duty.

The Court of Appeal found the RTA liable at common law, whereas the 'obvious risk' provisions of the CLA relieved the council of liability. The High Court did not have to consider the CLA, but Justice Gleeson thought that the Court of Appeal was correct in finding the risk obvious, even to a boy. Ultimately, the result in the High Court was the same at common law as it would have been under the CLA.

The concurrence of the common law and the CLA in this case again raises the question of the need for the legislation.

Notes: **1** (2001) 206 CLR 512. **2** (2007) 233 ALR 200. **3** (1980) 146 CLR 40. **4** (2005) 223 CLR 422.

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