Tortious Liability of Roads Authorities
One of the benefits of CCSG Legal’s broad insurance practice is our frequent encounters with unusual accidents and insurable events. From road accidents involving cows, chickens, trees, electrical wires, storm debris, pot holes and road signage, the claims we see go far beyond straightforward collisions between two or more vehicles. One of the more common (albeit unusual) accident scenarios we see is where a large vehicle suffers catastrophic damage whilst being driven at high speeds on a road that is in a minor state of disrepair. Poorly maintained shoulders, pot holes, asphalt degradation, black ice and oil slicks are all capable of causing irreparable damage to heavy and expensive vehicles; the end result being that they will often need to be replaced. The question however, is who pays the bill?

Roads Authorities

Typically, a roads authority (a local council/Vic Roads etc) will be responsible for a particular aspect of public infrastructure, from the road itself to the footpath or an adjacent nature-strip or overhanging foliage. Often, identifying the relevant public authority is not difficult, however, prosecuting a successful claim against these statutory bodies is. In most of these matters a ‘bare bones’ claim in negligence can be identified from the outset, i.e.:

- that a duty of care exists between the roads authority and the user of its public infrastructure
- that it is reasonably foreseeable that should a road fall into a state of disrepair, that this will pose a foreseeable risk of harm or damage to road users; and
- that an accident caused by a dilapidated roadway, and absent driver fault, will constitute a breach of that duty.

The Statutory Regime

Notwithstanding the above, roads authorities have an extensive degree of statutory protection and immunity from common law claims in negligence. Public authorities are inherently creatures of statute; their resources, decision making power, and processes for exercising an executive function are limited by the political allocation of the often scarce resources they are provided to carry out their public duties. As a result, the legislation has developed to provide these public authorities with immunity for actions or omissions which constitute nonfeasance: in the case of public roads, a failure to regularly carry out inspections and/or repairs.
Notwithstanding the above, Plaintiffs remain well aware that the government represents a particularly well resourced and deep pocketed Defendant, and is therefore an ideal target to pursue for all kinds of calamity. It follows that these sorts of proceedings are inevitably still commenced.

**Current Status of the Law**

The current statutory protections (which will not be outlined in any great detail here) afforded to public authorities were enacted in response to the decision of the High Court *Brody -v- Singleton Shire Council* ("Brodie"). In *Brodie* the Court found that a highway authority was negligent for failing to inspect or repair a public bridge and that its nonfeasance amounted to an actionable claim in negligence. The reaction of the legislature to the decision in *Brodie* was to, in short, create a statutory defence whereby an authority will not be liable where:

- it has no actual knowledge of a hazard;
- it has a plan for carrying out inspections and repairs that is reasonable in all of the circumstances; and
- that any such plan has been implemented and followed.

The statutory defences make prosecuting these sorts of claims a high risk activity, however, and especially in the case of large claims, the otherwise result that a faultless driver is unable to recover is often not an acceptable outcome for our clients.

**Recent Developments**

It is not surprising that this tension is regularly played out in the courts. Recently these issues were ventilated in the Victorian Supreme Court of Appeal in *Kennedy -v- Shire of Campaspe* ("Kennedy"). Ms Irene Kennedy tripped on a raised lip of a footpath and suffered a significant personal injury. On the evidence it was apparent that the relevant roads authority responsible for the footpath (the local council) had performed limited inspections and had failed to carry out repairs. Notwithstanding this the roads authority was successful at first instance pursuant to the relevant provisions of the *Roads Management Act 2004* (Vic) which contains the statutory defences referred to above. However, and on appeal, the decision was overturned, with findings that even though the council had in place a policy and plan for carrying out the relevant inspections, it had failed to implement this plan to the policy standard required.
Therefore, and in the absence of a statutory defence, the issues in dispute were essentially limited to whether or not the Ms. Kennedy could establish a traditional common law claim in negligence. As that issue had not been argued or resolved in the court of first instance or the appellate court, the proceedings were remitted to the Trial Judge in the County Court for a limited re-hearing (which has yet to be determined).

**Take Away**

This decision, at least in Victoria, adds to the significant jurisprudence that has developed around the tension between the executive policy in protecting public authorities from speculative litigation as against the rights of a blameless injured Plaintiff to be compensated. Further, the Supreme Court of Victoria has made it clear that the statutory defences by no means provide an absolute immunity, and that a Roads Authority has a positive duty to regularly carry out inspections and repairs where the cost of doing so is not prohibitive. In other words, CCSG will continue to watch this space with interest.

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2. *Irene Kennedy -v- Shire of Campaspe* [2015] VSCA 215
3. Sections 102 and 103

Benjamin Fry
Associate
benjaminfry@ccsglegal.com.au