

DIFFERENTIAL SAFETY LIABILITY OF ROAD AND RAIL

BY

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## ***Abstract***

Rail safety is closely controlled, but there is less supervision of the actual road, its construction and condition. Safety is the responsibility of the road user, not the provider. This is a feature of the common law, including the rule that no liability attaches to road omissions, and of legislation governing road and rail. It has its roots in the many centuries of highway development. New Zealand legislation has few safety duties for road owners, but very comprehensive and strict obligations for railways. This is also true internationally, except that in some jurisdictions there are enhanced controls on road. Health and safety laws may not cover the public safety aspects of roads, but they do cover all aspects of railways. The imbalance increases the cost and reduces the effectiveness of rail. Potential reforms of the law are proposed.

## ***Subjects and topics***

Misfeasance, non-feasance

Work health and safety

Railway safety

Road safety

Public safety

Negligence

Nuisance



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## Chapter One: Introduction

### *I Aim*

In New Zealand and other jurisdictions, rail safety is closely controlled, including the safety of the infrastructure - the track, formation, signalling and structures. For roads, on the other hand, there is much less supervision of the actual road, its construction and condition. Safety is the responsibility of the user, not the provider, except in general terms. For example, if a rock falls on a car and kills someone, then the road owner is unlikely to face civil or regulatory action.<sup>1</sup> If the same event happened on rail, then at least regulatory action, involving penalties, is likely.

Rail is an integrated infrastructure and operational business, predominantly handling freight, which in New Zealand is expected to be profitable, and so its performance is typically measured in financial terms. Road (as an infrastructure owner) is not measured as if it were a business, its costs are shared between trucks, buses and cars, and vehicle operation is not the road owner's responsibility. When compared, rail is often at a disadvantage. Rail is often an "easy target" for criticism and regulatory action because of its concentrated ownership, integrated operation, and tradition of being safe, whereas road obligations are largely on the individual driver.

The safety obligations of rail make it more expensive to run than road, which deserves recognition when the two are compared. Rail's safety and environment advantages over road can be seen as of lesser consequence than its financial performance, making it harder to contribute to the economy in the way it should. This dissertation aims to help clarify, and potentially rectify, the imbalance between road and rail in terms of safety obligation. Making road and rail's safety obligations match would give rail a greater chance of assisting the country's ongoing development.

The primary objective of the dissertation is thus to explore the difference in the safety treatment of road and rail in the law, directly and indirectly. A further objective is to show that the law places burdens on rail not shared by road, and a third objective is to propose potential reform.

The main focus is the law that applies in New Zealand, but the case and statute law of other jurisdictions with a common legal heritage is examined to provide the context for the position here, and to see what they can teach us. The safety obligations covered are those arising from tort and nuisance liability, and legislative and regulatory obligations, for personal injury and property damage. General criminal and coroners'

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<sup>1</sup> A real case, where the coroner could only exhort the New Zealand Transport Agency [NZTA] to pay more attention to such risks: *Re Heather Joy Thompson*, Coroners Court, Hamilton, CSU-2014-HAM-000130, 25 September 2014, Coroner Ryan, at [24]. Contrast *Lewis (Guardian ad litem of) v British Columbia* [1997] 3 S.C.R. 1145; *Just v British Columbia* [1989] 2 SCR 1228.

jurisdictions are not covered, except to provide examples. The dissertation concentrates on the law; it is not the place to explore the financial and economic issues in any depth.

The focus will be on road and rail's functions as infrastructure owners, and the interaction of people and vehicles with the infrastructure, and not on vehicle operation itself. There are substantial differences between road and rail vehicle operation, making operations not directly comparable.

## *II Context*

Road accidents are a serious safety problem in New Zealand. In 2014 there were 8882 road accidents, killing 294 people and injuring 11,219.<sup>2</sup> The number killed is much greater than those killed in rail-related incidents (nine),<sup>3</sup> or in all work-related accidents (63).<sup>4</sup> There are also over 226,000 work-related injury claims<sup>5</sup> a year, across all employers, including 106 rail injuries<sup>6</sup>.

New Zealand has stringent laws covering employment health and safety, the Health and Safety at Work Act 2015 (HSWA);<sup>7</sup> and railway safety, the Railways Act 2005 (RA). There are also substantial laws covering road user behaviour and vehicle condition, in the Land Transport Act 1998, regulations and rules. The HSWA and the RA cover rail accidents where the infrastructure was at fault through, for example poor design or maintenance, as well as where individuals were in the wrong. Road user laws cover accidents caused by drivers and vehicles, but there appears to be a dearth of laws covering the responsibilities of the road owner itself, for example for the condition of the road.

A key theme is the distinction between the absence of liability in tort for non-feasance, and liability for misfeasance, between inaction and action. This has been typically applied to roads, and not to rail. The dissertation will claim that even when the non-feasance rule is not explicitly applied, or where other changes have curtailed its effect (for example accident compensation legislation), the law continues to reflect the differential treatment. Even where statutory liability appears to be even handed, as with health and safety legislation, the practical application of that legislation may not be.

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<sup>2</sup> Ministry of Transport [MoT] <[www.transport.govt.nz](http://www.transport.govt.nz)>.

<sup>3</sup> MoT, *Rail Safety Statistics – Six monthly statistics for the period ended 30 June 2015*, August 2015, at 14. There were no rail employee deaths.

<sup>4</sup> WorkSafe New Zealand <[www.business.govt.nz/worksafe](http://www.business.govt.nz/worksafe)>; MoT <[www.transport.govt.nz](http://www.transport.govt.nz)>; excludes work accidents on road.

<sup>5</sup> “Injury Statistics – Work-related Claims: 2014”, Statistics New Zealand <[www.statistics.govt.nz](http://www.statistics.govt.nz)>.

<sup>6</sup> MoT, above n 3, at 14. Most of the injuries were to employees (72).

<sup>7</sup> This dissertation is written as if the Health and Safety at Work Act 2015 (including its amendments to the Railways Act 2005) was in force. It actually comes into force on 4 April 2016.



### *III Highway Authorities' Control Over Their Roads*

The extent to which road owners have control of the use of their roads, and road users, is an important point in considering the liability issues discussed in the following chapters. This introduction concludes by assessing the level of control road owners do have.

Road owners are typically seen as not having control over the users of roads, whereas a railway company has control over all its activities. Our road safety laws assume driver responsibility.<sup>8</sup> Under this assumption, drivers need to be ready to deal with all issues on the road, not just their own behaviour or that of other drivers, but also deficiencies in the road. Road owners have limited, if any, liability. It is a standard international assumption.<sup>9</sup>

This view overlooks the areas where road authorities do have substantial control, like the physical condition of roads, and also substantial influence, like in the setting of road use rules and parameters. Roading authorities have physical control over the sources of harm, and control gives them opportunities to create dangers that others do not have.<sup>10</sup> As a Canadian case observed, “[t]he [roading authority] is in complete control of repair and maintenance and travellers are dependent upon [the authority] for reasonable performance of the work”. Users are in “no position to assess the ... construction and maintenance work”.<sup>11</sup>

Official road accident statistics indicate that roads do at least contribute to accidents. Police Traffic Crash Reports identify the causes of (or contributing factors to) every accident.<sup>12</sup> These include aspects of road condition, such as slipperiness and poor markings, which are largely within the control of the road authority. In 2014, road factors contributed to 10 per cent of fatal crashes, and 11 per cent of injury crashes,<sup>13</sup> similar to the previous nine years back to 2005.<sup>14</sup>

But these figures are likely to underrepresent the accidents where the road authority had some control over the outcome. Road authorities also control other aspects of road use which may contribute to accidents. For example, they set speed limits on road sections, design and maintain signage, and create policies as to what sorts of vehicles can use the road and under what conditions, such as heavy vehicles.

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<sup>8</sup> Steven Penman, *Criminal Cars: Attributing Liability for Crashes Caused by Autonomous Vehicles* (LLM Thesis, University of Auckland, 2012), at 5, n 18.

<sup>9</sup> See the Convention on Road Traffic 1042 UNTS 17 (opened for signature 7 October 1968, entered into force 21 May 1977), arts 8 (5) and 13(1). New Zealand is not a signatory.

<sup>10</sup> *Brodie v Singleton Shire Council* [2001] HCA 29, (2001) 206 CLR 512 at [103] and [283].

<sup>11</sup> *Lewis* above n 1, at [33].

<sup>12</sup> MoT *Motor Vehicle Crashes in New Zealand 2014*, <[www.transport.govt.nz](http://www.transport.govt.nz)>.

<sup>13</sup> MoT, above n 12, Figure 17.

<sup>14</sup> MoT, above n 12, report for the respective years, Figure 17.

In these respects the authorities exercise a substantial degree of control over the safety outcomes. And yet, just as for physical road condition, they are likely to face no sanction if they do it in a deficient way, or fail to do anything.

There is recognition of the role of roads in contributing to road safety in the current official road safety policy, *Safer Journeys*. This “takes a Safe System approach to road safety that works across all elements of the road system — roads and roadsides, speeds, vehicles and road use”.<sup>15</sup> “Safe roads and roadsides” is at the head of a list of 12 key areas of concern. This extends the scope of safer roads to taking measures to prevent some road-user behaviour with serious consequences, such as loss of control, and intersection collisions. “Loss of control” is the single biggest factor contributing to road accidents, involved in 41 per cent of fatal and 28 per cent of injury accidents.<sup>16</sup>

The strategy recognises that there are actions that road authorities could take to address these issues, such as median barriers, skid resistant surfaces, and more appropriate speed limits. It notes that “New Zealand’s roads are not as safe as those in other countries”.<sup>17</sup> These actions are at least partly within the control of roading authorities. It also recognises that responsibility for road safety “is shared between the users and the system designers”. To achieve a safe system “[r]oad controlling authorities have to design, build, and maintain roads and to manage speeds to protect responsible road users”.<sup>18</sup> Recognition is one step, but actual responsibility with appropriate sanctions is needed. There is no consideration given in *Safer Journeys* to making roading authorities legally responsible for the condition of their roads.

On the other hand, rail safety law requires a safety case to be prepared which covers all these aspects. If it turns out that speed limits were improperly set or badly marked, then the rail organisation would be liable to prosecution, just as they would if failure to maintain its track or bridges caused an accident.<sup>19</sup>

Roading authorities claim that they do not have enough money to cover all eventualities.<sup>20</sup> That may be true, but their budgets are very large (\$14b over the three years 2015-2018)<sup>21</sup> and whether they have enough money to improve safety boils down to prioritisation. Priorities are set on a “value for money” criterion.<sup>22</sup> This is defined by the New Zealand Transport Agency as “selecting the right things to do,

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<sup>15</sup> MoT *Safer Journeys New Zealand’s Road Safety Strategy 2010–2020* (2010).

<sup>16</sup> MoT, above n 12, Figure 17.

<sup>17</sup> MoT, above n 15, at 14.

<sup>18</sup> At 10.

<sup>19</sup> See Chapter Three.

<sup>20</sup> NZTA “SH3 Mangaotaki South Fatal Rockfall – 28 March 2014”. Report to Coroner for *Thompson*, above n 1.

<sup>21</sup> NZTA *National Land Transport Program 2015–2018* <[www.nzta.govt.nz](http://www.nzta.govt.nz)>.

<sup>22</sup> New Zealand Government *Government Policy Statement on Land Transport 2015/16–2024/25*, (December 2014), at [45] and [92].

implementing them in the right way, at the right time and for the right price”,<sup>23</sup> which is a weaker criterion than the cost element in the HSWA.<sup>24</sup> Analysis of road safety improvements goes through the same process as any other roading expenditure, based on cost-benefit analysis, discounted at six per cent.<sup>25</sup> There is no additional weighting for safety, so safety can be readily outweighed by cost. This is in contrast to the HSWA standard for rail, examined in Chapter Four.

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<sup>23</sup> NZTA <[www.nzta.govt.nz](http://www.nzta.govt.nz)>.

<sup>24</sup> See Chapter Four.

<sup>25</sup> NZTA *Economic Evaluation Manual*, (1st ed, revised Wellington, 2016) at 2-4, 2-14 and 2-18.



## Chapter Two: Liability and the Non-feasance Rule

### I *Current Status of the Rule*

Highway<sup>1</sup> authorities have for centuries been protected against suit for failure to repair, the so-called non-feasance rule. Such a defence was not available to railways. The rule says that a highway authority is liable for misfeasance (action) but not for non-feasance (inaction or omission). It can be traced back to the 15th century.<sup>2</sup> This chapter charts its development, assesses its current importance, and draws out some themes.

The rule has been a common law feature in the United Kingdom, Australia, and New Zealand. It still applies in all three, despite attempts, some successful, to curtail it.<sup>3</sup> In the United Kingdom it was “abrogated” by legislation in 1961<sup>4</sup>, but later cases reduced the scope of the abrogation. In New Zealand it reached its zenith in the 1960s.<sup>5</sup> There was no action on a call for the abolition of the rule in New Zealand by an official committee,<sup>6</sup> probably because the contemporaneous introduction of accident compensation<sup>7</sup> reduced its practical impact, although it could conceivably still be invoked for property damage (such as to vehicles).

In Australia the High Court sought to abolish the rule in *Brodie v Singleton Shire Council* in 2001.<sup>8</sup> Concerns about the cost implications led to the case being effectively overturned by legislation, so that in all but two states and territories there is a specific legislative defence for inaction.<sup>9</sup>

The rule thus still applies, albeit with curtailed effect in some jurisdictions.

#### A *Foundation Cases*

*Russell v Men of Devon*<sup>10</sup> is usually cited as the modern source of the rule. A defective bridge caused damage to the plaintiff’s wagon, and the plaintiff sued for damages. The action was taken against the “Men of Devon”, an unincorporated and fluctuating

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<sup>1</sup> A highway is broadly defined; it includes bridges and footpaths: Highway Act 1835 (UK) 5 & 6 Will 4 c 50, s 5 (still in force).

<sup>2</sup> AT D[enning] untitled note, (1939) 55 LQR 343. See *Brodie v Singleton Shire Council* [2001] HCA 29, (2001) 206 CLR 512 at [72] and [117].

<sup>3</sup> A House of Lords Select Committee recommended its abolition in 1939. Rees Jeffreys *The King’s Highway* (Batchworth, London, 1949) at 168.

<sup>4</sup> Highways (Miscellaneous Provisions) Act 1961 9 & 10 Eliz II c 63, s 1.

<sup>5</sup> *Hocking v Attorney-General* [1963] NZLR 513 (CA); *Smith v Attorney-General (Ministry of Works)* (1968) 12 MCD 218

<sup>6</sup> Torts and Law Reform Committee *The Exemption of Highway Authorities from Liability for Non-Feasance*, Report to Minister of Justice 1973, at 17; Email from PD McKenzie (member of the Committee) to Murray King regarding action on their recommendations (24 March 2014).

<sup>7</sup> Torts and Law Reform Committee, above n 6, at 16.

<sup>8</sup> *Brodie*, above n 2.

<sup>9</sup> See Section I D, below.

<sup>10</sup> *Russell v Men of Devon* (1788) 2 TR 667, 100 ER 359 (KB).

group. As a result of this fluidity, new and “innocent” residents might have been liable for damages they had no part in causing. If it were to be otherwise, then the county should have incorporated, by legislation.<sup>11</sup> Moreover there was no mechanism for spreading the burden of damages beyond the persons named in the suit.<sup>12</sup> The court agreed with the defendants that an action should not lie for neglect in not repairing the bridge. Allowing the action would “have been productive of an infinity of actions”.<sup>13</sup>

Further mid 19th century cases developed the rule.<sup>14</sup> *M’Kinnon v Penson* involved a fall off a dangerous bridge.<sup>15</sup> Since *Russell*, legislation had been passed that enabled counties to be sued in the name of the surveyor (Penson), thus avoiding the difficulties identified in *Russell*.<sup>16</sup> But this Act did not create a new liability for non-repair, just the same liability transferred, and so *Russell* stood. Furthermore, the only action that could be taken was by the Crown, to enforce the duty, and not by an individual for damages.<sup>17</sup>

In *Young v Davis*<sup>18</sup> the plaintiff fell into an unfilled, unguarded and unlit hole at the end of a footpath. The court followed *M’Kinnon*, but also said that while a parish could be compelled to repair, a traveller ought to be wary of faults and look out for himself. He should adjust his speed according to the conditions.<sup>19</sup> The theme of user self-reliance persists today.<sup>20</sup>

The misfeasance/non-feasance distinction was clarified and cemented in in the late 19th and early 20th centuries. In *Cowley v Newmarket Local Board*,<sup>21</sup> the House of Lords specifically endorsed *Russell* and regarded the law as settled. In a Nova Scotia appeal, the Privy Council held as “settled law” that a “transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of a mere non-feasance”,<sup>22</sup> in the absence of statutory language to the contrary. A new obligation imposed by statute was required for the rule to be avoided.

In 1895 a further case came before the Privy Council, this time from New South Wales.<sup>23</sup> In this case, no duty had been transferred, but equally there was no original duty in any statute to repair roads, and so no ability to sue for “mere non-repair”.

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<sup>11</sup> At 671.

<sup>12</sup> At 673.

<sup>13</sup> At 671.

<sup>14</sup> See also *Gibson v Mayor, Aldermen and Burgesses of Preston* (1879) LR 5 QB 218 (QB)

<sup>15</sup> *M’Kinnon v Penson* (1853) 8 Ex 319, 155 ER 1369 (Exch); aff’d (1854) 9 Ex 609, 156 ER 260 (Exch Ch).

<sup>16</sup> Bridges Act 1803, 43 Geo 3, c 59, s 4.

<sup>17</sup> *M’Kinnon*, above n 15, at 321.

<sup>18</sup> *Young v Davis* (1862) 7 H & N 760, 158 ER 675 (Exch), aff’d 2 H & C 197, 159 ER 82 (Exch Ch).

<sup>19</sup> At 770.

<sup>20</sup> *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057, at [50] [*Gorringe UK*]; *Stovin v Wise* [1996] AC 923.

<sup>21</sup> *Cowley v Newmarket Local Board* [1892] AC 345 (HL).

<sup>22</sup> *Municipality of Pictou v Geldert* [1893] AC 524 (PC), at 527.

<sup>23</sup> *Municipal Council of Sydney v Bourke* [1895] AC 433 (PC).

## B Further Development

In *McClelland v Manchester Corporation* it was held that doing something to a road, but omitting “some precaution”<sup>24</sup> amounted to misfeasance. The corporation had moreover actively created a danger in the road layout.<sup>25</sup> This, a similar case,<sup>26</sup> and the concept of “artificial works” not being part of the road itself, and thus not subject to the rule,<sup>27</sup> represented a desire to draw back from the pure interpretation of the rule, which was characterised as applying only for “mere” non-feasance. On the other hand, letting a road decay or failing to do enough work to stop it was simply non-feasance.<sup>28</sup>

Moreover, a body with additional functions as well as roads, such as a local board of health, could be found liable through a negligent act in using those other powers, such as water or sewerage,<sup>29</sup> land drainage,<sup>30</sup> or even traffic control<sup>31</sup> and utility poles.<sup>32</sup> A number of rather fine distinctions were thus introduced to limit the rule.<sup>33</sup> It applied only for “characteristic highway duties” such as repairing the road.<sup>34</sup> On the other hand Lord Halsbury refused to address the “metaphysical” question of where one capacity ended and another started.<sup>35</sup> The point was still being argued in 2002.<sup>36</sup>

The rule also developed in Australia. In *Buckle v Bayswater Road Board*<sup>37</sup> the broken drain that caused an injury was regarded as an “artificial work”.<sup>38</sup> In *Gorringe v The Transport Commission (Tasmania) (Gorringe AU)*<sup>39</sup>, a truck fell into a hole caused by a faulty repair. Fullagar J considered that no-one was “subject to any duty enforceable by action to repair or keep in repair any highway” they managed, and that a duty to repair a road imposed by statute was not enforceable unless the statute made it clear it was to be enforceable by a person injured by the breach of that duty.<sup>40</sup> In fact, the unenforceability of failure to repair had been extended by cases like *Cowley*,

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<sup>24</sup> *McClelland v Manchester Corporation* [1912] 1 KB 118 (KB) at 127.

<sup>25</sup> *Gorringe v The Transport Commission (Tasmania)* (1950) 80 CLR 357, at 364 [Gorringe AU].

<sup>26</sup> *Mayor and Corporation of Shoreditch v Bull* (1904) 90 LT Rep 210 (HL).

<sup>27</sup> *Borough of Bathurst v MacPherson* (1878) 4 App Cas 256 (PC).

<sup>28</sup> *Wilson v Kingston-upon-Thames Corporation* [1948] 2 All ER 780 (KB), aff'd [1949] 1 All ER 679 (CA); *Burton v West Suffolk County Council* [1960] 2 QB 72 (CA).

<sup>29</sup> *White v Hindley Local Board* (1875) LR 10 QB 219 (QB) (defective road grating); *Newsome v Darton Urban District Council* [1938] 3 All ER 93 (CA) (poor repairs after drain excavation).

<sup>30</sup> *Attorney-General v St Ives Rural District Council* [1960] 1 QB 312 (QB), aff'd [1961] 1 QB 366 (CA).

<sup>31</sup> *Skilton v Epsom and Ewell Urban District Council* [1937] 1 KB 112 (CA) (loose road stud); *Turner v Ku-ring-gai Municipal Council* (1990) 72 LGRA 60, 12 MVR 321 (NSWCA) (absent warning signs).

<sup>32</sup> *Thompson v Bankstown Municipal Council* (1955) 87 CLR 619.

<sup>33</sup> See also W Friedmann, “Liability of Highway Authorities” (1951) 5 Res Jud 21 at 23–25.

<sup>34</sup> *Simon v Islington Borough Council* [1943] 1 KB 188 (CA).

<sup>35</sup> *Shoreditch*, above n 26, at 211.

<sup>36</sup> *Gulliksen v Pembrokeshire County Council* [2002] EWCA Civ 968, [2003] QB 123.

<sup>37</sup> *Buckle v Bayswater Road Board* (1936) 57 CLR 259.

<sup>38</sup> See also *Webb v South Australia* (1982) 43 ALR 465, 56 ALJR 912 (HCA).

<sup>39</sup> *Gorringe AU*, above n 25.

<sup>40</sup> At 376.

*Pictou*, and *Bourke*<sup>41</sup> to there being “no duty enforceable by action to be careful in control and management”.<sup>42</sup> The court found for the roading authority, “reaffirm[ing] the non-feasance rule in all its rigidity”.<sup>43</sup>

New Zealand had followed the non-feasance rule since the nineteenth century.<sup>44</sup> In 1963 it was alleged in the Court of Appeal that a washout on a road was caused by inadequate pipes fitted during previous repairs.<sup>45</sup> The “artificial structure” argument was dismissed – the drains were part of the highway.<sup>46</sup> The majority thought liability depended on misfeasance, fitting the wrong pipes. Gresson P, dissenting, thought it was non-feasance, not having enough pipe capacity. Both he and North J referred to the rule as “anomalous” and “archaic”.<sup>47</sup> The case illustrates the niceties of the distinctions that had to be drawn to decide between misfeasance and non-feasance.

### *C Cases Continued in England Even After the Rule Was Abrogated*

The Highways (Miscellaneous Provisions) Act 1961 (UK) “abrogated” the exemption for non-repair.<sup>48</sup>

The rule of law exempting the inhabitants at large and any other persons as their successors from liability for non-repair of highways is hereby abrogated.

Professor Dworkin’s view that the Act was the “death knell” of the non-feasance rule” proved unfounded,<sup>49</sup> as later cases have held that the abrogation was not total.<sup>50</sup> Lord Denning MR in *Burnside v Emerson* drew a distinction between a failure to maintain (which included repair) that was long-lived, and a “transient danger due to elements”.<sup>51</sup> Such short term danger – such as from ice or floods – was “not in itself evidence of a failure to maintain”.<sup>52</sup>

The rule was abrogated only for non-repair.<sup>53</sup> The non-feasance rule still remained for other than non-repair. Non-repair did not include obstructions, unless they also caused damage to the road, nor ice.<sup>54</sup> This was upheld by the House of Lords in 2000, limiting the abrogation to the fabric of the road, including its surface, but not material

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<sup>41</sup> Above nn 21, 22, and 23 respectively.

<sup>42</sup> *Gorringe AU*, above n 25, at 379.

<sup>43</sup> Friedmann, above n 33, at 26.

<sup>44</sup> *Tarry v The Taranaki County Council* (1894) 12 NZLR 467.

<sup>45</sup> Above n 5.

<sup>46</sup> At 540.

<sup>47</sup> At 519 and 532.

<sup>48</sup> Highways (Miscellaneous Provisions) Act 1961 (UK), s 1(1). It came into force 3 years after it was passed, that is, in August 1964: s 1(2).

<sup>49</sup> Gerald Dworkin “Highways (Miscellaneous Provisions) Act, 1961 – The Death Knell of Nonfeasance Immunity for Highway Authorities” (1962) 25 MLR 336.

<sup>50</sup> *Gorringe UK*, above n 20, at [50].

<sup>51</sup> *Burnside v Emerson* [1968] 1 WLR 1480 (CA), at 1494.

<sup>52</sup> At 1494.

<sup>53</sup> *Haydon v Kent County Council* [1978] 1 QB 343 (CA) at 359.

<sup>54</sup> *Hereford and Worcester County Council v Newman* [1975] 1 WLR 901 (CA) at 911 re ice.



on the surface like ice.<sup>55</sup> While in plain language “maintain” was wide enough to include gritting for ice, the 1959 Act was a consolidation, “not a code which sprang fully formed from the legislative head, but was built upon centuries of highway law”.<sup>56</sup> While the duty was originally a common law duty, it became statutory, and those statutes were held not to have introduced new repair liabilities, but only to have passed on common law obligations to other parties. The duty still remained with the inhabitants at large, working through the new bodies.<sup>57</sup>

The House considered it was for Parliament to clarify the extent of the Highways Act abrogation, and Parliament did later add ice and snow to it,<sup>58</sup> in reaction to *Goodes*.<sup>59</sup> The abrogation still does not apply to loose gravel, oil spills, mud and slips.<sup>60</sup> In *Gorringe v Calderdale Metropolitan Borough Council (Gorringe UK)* the House of Lords rejected the plaintiff’s contention that the absence of a warning of a crest (on which she hit a bus) meant the road was out of repair. “The provision of information, whether by street furniture or painted signs, is quite different from keeping the highway in repair.”<sup>61</sup> Thus omitting to maintain a sign was protected by the non-feasance rule. The distinctions drawn are fine: in *Bird v Pearce*,<sup>62</sup> in a similar fact situation to *Gorringe UK*, the court found for the plaintiff.

Fine distinctions were again made in a recent case, where wet concrete spilled on the road was judged to be part of its fabric as it had “hardened and bonded permanently to the surface of the road”.<sup>63</sup> A cyclist who was thrown off his cycle by the concrete was thus able to recover. One commentator now believes that there is no obligation to actively carry out the duty to maintain.<sup>64</sup> The rule hangs on with the help of the judiciary, as it is “so firmly rooted in the common law”.<sup>65</sup> The limited nature of the exclusions “only serves to underline what is the general rule”.<sup>66</sup>

#### D Brodie v Singleton Shire Council

In this 2001 Australian case<sup>67</sup> an unsafe bridge collapsed under an overweight truck. The truck’s driver and its owner sued the bridge owner Council in negligence. Earlier

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<sup>55</sup> *Goodes v East Sussex County Council* [2000] 1 WLR 1356 (HL).

<sup>56</sup> At 1360.

<sup>57</sup> *St Ives*, above n 30; *Gorringe UK*, above n 20.

<sup>58</sup> Railways and Transport Safety Act 2003 (UK), s 111.

<sup>59</sup> *Gorringe UK*, above n 20, at [101].

<sup>60</sup> *Valentine v Transport for London* [2010] EWCA Civ 1358 at [8] and [15].

<sup>61</sup> *Gorringe UK*, above n 20, at [15] per Lord Hoffman. Compare the Australian cases *Turner* above n 31 and *Gloucester Shire Council v McLenaghan* [2000] NSWCA 208, (2000) 109 LGERA 419 (NSWCA).

<sup>62</sup> *Bird v Pearce* [1979] RTR 369 (CA).

<sup>63</sup> *Thomas v Warwickshire County Council* (2011) EWHC 772 (QB) at [74].

<sup>64</sup> Roger Cooper “Update: Personal Injury” (2011) 155 SJ 23 at 24, citing *Gorringe UK*, above n 20.

<sup>65</sup> *Gorringe UK*, above n 20, at [80].

<sup>66</sup> *Valentine*, above n 60, at [15].

<sup>67</sup> Above n 2.

jurisprudence in Australia had followed the non-feasance exemption for liability. By the time of *Brodie* there were calls for reform.<sup>68</sup>

The majority judgments<sup>69</sup> trenchantly criticised the non-feasance rule. It had too many “unprincipled exceptions” and “capricious differences”, and was inconsistently applied.<sup>70</sup> It had “produced countless distinctions, exceptions, qualifications and uncertainties”.<sup>71</sup> The myriad exceptions caused the “immunity” in the rule to work poorly, and to “provoke rather than settle litigation, and lead to ... struggles over elusive, abstract distinctions with no root in principle and which are foreign to the merits of the litigation”.<sup>72</sup> Judges had used the distinctions and complexities as “disreputable escape mechanism” to avoid unjust decisions.<sup>73</sup>

Moreover the distinctions were “illusory” as a bad repair might create a liability yet doing nothing at all would escape liability.<sup>74</sup> On the other hand, omitting a step while actually taking action might be found to be misfeasance.<sup>75</sup> In order to get relief, plaintiffs might seek a “positive action”, involving “a detailed investigation of the authority’s past records”, which might deter meritorious cases.<sup>76</sup> It was unprincipled and unorthodox for the common law to give one type of statutory authority “a special immunity that Parliament has not expressly enacted”.<sup>77</sup>

However valid the rule in the time of *Russell*,<sup>78</sup> where there was no set body of people to sue, today highway authorities were independent legal personalities capable of being sued. The argument that the current legislation merely transferred the original obligations was of no relevance in Australia, where from the beginning highway authorities had been creatures of statute.<sup>79</sup> But, “by a kind of time warp, the English rule came to be applied in Australia”,<sup>80</sup> “simply picked up and applied without any, or any proper, regard to particular Australian statutory contexts”.<sup>81</sup>

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<sup>68</sup> Barbara McDonald “Before the High Court – Immunities under attack: The Tort Liability of Highway Authorities and their immunity from Liability for Non-Feasance, *Brodie v Singleton Shire Council, Ghantous v Hawkesbury City Council* (2000)”, 22 Syd LR 411 at 419–420.

<sup>69</sup> The dissenting judges thought that changing the non-feasance rule should only be done by Parliament: *Brodie*, above n 2, at [43] and [336].

<sup>70</sup> At [68] and [79]–[83].

<sup>71</sup> At [198].

<sup>72</sup> At [67], [80] and [230].

<sup>73</sup> At [199].

<sup>74</sup> At [86] and [135].

<sup>75</sup> At [89].

<sup>76</sup> At [136].

<sup>77</sup> At [231].

<sup>78</sup> Above n 10.

<sup>79</sup> *Brodie*, above n 2, at [99]–[101] and [194].

<sup>80</sup> At [196].

<sup>81</sup> At [232]. Compare *Tarry*, above n 44.

Earlier applications of the rule, such as in *Buckle*,<sup>82</sup> had also ignored Australian decisions applying the law of negligence to highway situations, as early as 1905.<sup>83</sup> *Buckle* had “chok[ed] the development of the common law in Australia” in this area.<sup>84</sup> While *Buckle* had been decided at a time when negligence and nuisance were intertwined, there had been a tendency in more current decisions to include the highway rule immunity as applying in pure negligence cases, introducing unnecessary complexities.<sup>85</sup> It was now appropriate “to treat public nuisance, in its application to highway cases, as ‘absorbed by the principles of ordinary negligence’”.<sup>86</sup>

The non-feasance rule was thus abolished.<sup>87</sup> Highway authorities were under a duty to take reasonable care that what they do or fail to do in exercising their powers “does not create a foreseeable risk of harm”.<sup>88</sup> The duty did not extend to all failures to repair, only those which create a foreseeable risk of harm, and those that do not involve “unreasonable measures” to fix.<sup>89</sup> It would, however, extend to design and construction of the road (with the same limitations).<sup>90</sup>

On the facts of *Brodie*, the danger of the weak bridge could reasonably have been foreseen by the authority. In fact, they had inspected the bridge but negligently failed to notice the problem with the girders.<sup>91</sup> The council held a duty to take reasonable care in maintaining the bridge, and to give warning of its condition.<sup>92</sup>

The reaction was great concern about the extension of liability by the removal of the non-feasance rule, and the “unrealistic” requirements for authorities’ management and maintenance of roads, and on their insurance.<sup>93</sup>

As a result<sup>94</sup> each state (except Northern Territory)<sup>95</sup> passed an Act overturning this aspect of the decision.<sup>96</sup> The New South Wales Civil Liability Act 2002, s 45, was held to be an absolute bar to liability in *Porter v Lachlan Shire Council*.<sup>97</sup> If it had not

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<sup>82</sup> Above n 37.

<sup>83</sup> *Miller v McKeon* (1905) 3 CLR 50.

<sup>84</sup> *Brodie*, above n 2, at [111].

<sup>85</sup> At [124], [127] and [165].

<sup>86</sup> At [129].

<sup>87</sup> At [137]–[138].

<sup>88</sup> At [150].

<sup>89</sup> At [158]–[163] and [165].

<sup>90</sup> At [153]–[157].

<sup>91</sup> At [178].

<sup>92</sup> At [243].

<sup>93</sup> Local Government Association of South Australia, “Civil Liability Reforms (IPP Recommendations Bill) Civil Liability Act 1936 – Circular 17.12” (22 April 2004).

<sup>94</sup> See for example Transport (Highway Rule) Act 2002 (Vic), s 1.

<sup>95</sup> Katrine Ludlow “Spit and Polish: ‘No Action’ is no longer an option for Victorian Road Authorities following the Road Management Act 2004” (Faculty of Law, Monash University, Melbourne Research paper 2007/34, 2009) at 50.

<sup>96</sup> Civil Liability Act 2002 (NSW), s 45(1); Civil Liability Act 2002 (WA), s 5Z; Civil Liability Act 2002 (Tas), s 42; Civil Law (Wrongs) Act 2002 (ACT), s 113; Civil Liability Act 1936 (SA), s 42(1); Civil Liability Act 2003 (Qld), s 37; Transport (Highway Rule) Act 2002 (Vic), s 3.

<sup>97</sup> *Porter v Lachlan Shire Council* [2006] NSWCA 126.

been for s 45, the primary judge would have found the Council liable, and the Court of Appeal agreed.<sup>98</sup>

The case and its reasoning have been largely ignored by the British judiciary. There have been a large number of “highway rule” cases decided in England since *Brodie*, including in superior courts,<sup>99</sup> and they make no mention of the case. The exception is *Almeda v Attorney General for Gibraltar*, in the Privy Council, which noted *Brodie* as of relevance to Australia only, and agreed with the minority that any change was best left to Parliament.<sup>100</sup>

## *II Themes*

We can draw a number of themes from the cases on non-feasance.

### *A Only Public Highway Authorities Qualify*

Highways were originally the responsibility of the citizens of the area, acting without incorporation. So keeping roads repaired was a collective responsibility.<sup>101</sup> Parishioners in theory supplied their own labour and materials, organised by a parish surveyor, but by the early 19th century the use of personal labour had fallen into desuetude, and the obligation was largely commuted to money.<sup>102</sup> In this collective approach lay the seeds of the misfeasance/non-feasance distinction. In *Russell* there was no incorporated body to sue. But when there later was an incorporated body, judges transferred the immunity despite that,<sup>103</sup> as the liability was still taken as being with the public at large.

In early times, the public were truly the public, not represented by intermediary bodies. There was then and later no “special tenderness which the law feels for highway authorities” but simply because there was no action against the “inhabitants at large”.<sup>104</sup> Only the Crown could interfere.<sup>105</sup>

Fullagar J’s<sup>106</sup> view that “no persons” had a duty to keep highways in repair was expressly approved of (despite *Brodie*, as noted above) in *Almeda* – the non-feasance rule also still applies in Gibraltar.<sup>107</sup> Even today, modern statutes are interpreted in the

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<sup>98</sup> At [26] and [37].

<sup>99</sup> For example *Gorringe UK*, above n 20, *Valentine* above n 60.

<sup>100</sup> *Almeda v Attorney General for Gibraltar* [2003] UKPC 81 at [11] and [19].

<sup>101</sup> *Newman*, above n 54, at 911–912.

<sup>102</sup> Douglas Coombs “Highway Use and Control up to 1895” June 1990 RWLR section 1.1, at 5; Sidney and Beatrice Webb, *English Local Government: The Story of the King’s Highway* (Longman Green, London, 1913), at 27–50.

<sup>103</sup> *Griffiths v Liverpool Corporation* [1967] 1 QB 374 (CA) at 390; *Brodie*, above n 2, at [100].

<sup>104</sup> *St Ives*, above n 30, at 323.

<sup>105</sup> Denning, above n 2, at 344.

<sup>106</sup> *Gorringe AU*, above n 25, at 375–376.

<sup>107</sup> Above n 100, at [11].

light of this historical position of public bodies merely taking over the administration of the obligation on the public at large.<sup>108</sup> In New Zealand the rule was also copied,<sup>109</sup> despite the management of roads resting with incorporated councils from a very early time,<sup>110</sup> and is valid even today.<sup>111</sup>

The persistence of the rule is largely due to the argument that the statutes merely transferred the obligation. It has proved to be a mould that is hard to break out of, The High Court of Australia in *Brodie* tried, and failed not only practically in Australia but also intellectually in being unable to persuade the English judiciary to shift their position.

Since the rule only applied to public bodies, it did not apply to railways in Britain. Since they were companies, private bodies, before 1948<sup>112</sup>, they could not benefit. While in Australia and New Zealand public bodies ran railways since their inception, the rule did not benefit them. They were, moreover, never “public” in the “public at large” sense in *Russell*.

Clearly the private railway companies could be (and were) sued in negligence for damages in circumstances alleging inaction. Lord Halsbury noted in 1886 that establishing a negligent omission would be enough to succeed against a railway company.<sup>113</sup> Failure to repair a tunnel made a private railway liable for subsequent injury in New Zealand.<sup>114</sup> Omitting to narrow the slots for rail wheel flanges in a Canadian street (which caused a motorcycle rider to fall off) resulted in liability for the railway, even though it had statutory authority to run along the street.<sup>115</sup> In Australia, failure to have proper systems to prevent children playing in a station also brought liability.<sup>116</sup> Failure to assess risk could also be negligent.<sup>117</sup> So too was failure to provide a fence against a trespassing child.<sup>118</sup>

However, the early developments were in the context of judicial rulings which then drastically limited railways’ liability for worker injury, and so favoured the railways. The combination of rules on common employment (a worker could not sue if the fault lay with an employee of the same company), willing assumption of risk (*volenti non*

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<sup>108</sup> *Goodes*, above n 55, at 1359–1361.

<sup>109</sup> See *Hocking*, above n 5, *Tarry*, above n 44.

<sup>110</sup> For example, Municipal Corporations Ordinance 1842 5 Vict 6.

<sup>111</sup> Kenneth Palmer *Local Authorities Law in New Zealand* (Brookers, Wellington, 2012) at 604; Cherie Booth and Dan Squires *The Negligence Liability of Public Authorities* (Oxford University Press, Oxford, 2006) at [15.33], n 60.

<sup>112</sup> David Wragg, *Signal Failure – Politics & Britain’s Railways* (Sutton Publishing, Stroud, 2004) at 119.

<sup>113</sup> *Wakelin v London and South Western Railway Company* (1886) 12 App Cas 41 (CA) at 44.

<sup>114</sup> *Wellington and Manawatu Railway Company Ltd v McLeod* (1900) 19 NZLR 257 (CA).

<sup>115</sup> *Ryan v Victoria (City)* [1999] 1 SCR 201.

<sup>116</sup> *State Rail Authority v Madden* [2001] NSWCA 252.

<sup>117</sup> *Gilman v UPS* [2013] EWHC 2341 at [144] (QB).

<sup>118</sup> *British Railways Board v Herrington* [1972] AC 877 (HL).

fit injuria), and contributory negligence worked in the 19th century to deprive workers of redress in the courts.<sup>119</sup> On the other hand, judges readily found for the plaintiff when he or she was a passenger.<sup>120</sup>

Railways which owned roadways open to the public were subject to the normal rules of negligence, although some early cases toyed with the idea that railways should have the same immunity as roads.<sup>121</sup> In *Swain v Southern Railway Company*<sup>122</sup> the facts invited an application of the non-feasance rule. A bridge over the railway, owned by the railway but open to the public, was inadequately maintained, injuring the plaintiff. It was argued that the railway was in the same position as a highway authority, as a body doing the work in the place of the parish surveyor. The rule applied to all bodies created by statute. Thus the railway should have the benefit of the non-feasance immunity. The judge disagreed. As the road was not properly maintained, the railway was negligent.

The railway appealed, unsuccessfully. “The Southern Railway Company cannot in any sense be said to represent or stand in the shoes of the inhabitants”.<sup>123</sup> A commercial company could not claim benefits from rules applying to public corporations.<sup>124</sup> “It would be startling”, the Court of Appeal said, “if a railway company, which by failing to repair a bridge caused a hole in a road, was not liable to any person suffering damage thereby”.<sup>125</sup> Thus even on exactly the same facts, a railway would be liable and the highway not, because the historical reason for the highway rule lay in a duty on the inhabitants of a parish to repair, enforceable only by indictment.

The open access nature of highways has also had a bearing on the development of the rule. In *Buckle* Dixon J referred to the common right of highway use, and the establishment of authorities “in order that the public right may be enjoyed to best advantage”.<sup>126</sup> In *Brodie*, Hayne J (dissenting) noted that giving access to all meant that no special responsibility for hazards could be imposed on users, unlike the situation on private land.<sup>127</sup> For this reason, road authorities were not occupiers in the

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<sup>119</sup> Jonathan Morgan “Technological Change and the Development of Liability for Fault in England and Wales” in Miguel Martin-Casals (ed) *The development of Liability in Relation to Technological Change* (Cambridge University Press, Cambridge, 2010) 40 at 53.

<sup>120</sup> RW Kostal *Law and English Railway Capitalism 1825-1875* (Clarendon Press, Oxford, 1994) at ch 7.

<sup>121</sup> *Hankins v The King* (1905) 25 NZLR 787 (CA); *Walsh v International Bridge and Terminal Co* (1918) 45 DLR 701 (ONSC).

<sup>122</sup> *Swain v Southern Railway Company* [1939] 1 KB 77 (KB).

<sup>123</sup> *Swain v Southern Railway Company* [1939] 1 KB 560 (CA), at 574.

<sup>124</sup> See also *Dublin United Tramways v Fitzgerald* [1903] AC 99 (HL) in an Appendix quoted in *Swain* (CA), above n 123, at 575, quoting Palles CB (King’s Bench Ireland).

<sup>125</sup> *Swain* (CA) above n 123, at 575.

<sup>126</sup> *Buckle*, above n 37, at [281].

<sup>127</sup> *Brodie*, above n 2, at [303].

legal sense,<sup>128</sup> with the public right of way reducing the control they have on who might enter their land.<sup>129</sup> On the other hand, a railway is an occupier, with a duty of care.<sup>130</sup> This in itself a differential in treatment relative to roads.

The highway non-feasance cases include those dealing with trips and falls on footpaths, where the relevant authority has neglected to repair out of level flagstones, manhole covers, and the like.<sup>131</sup> When such a slip or fall occurs on railway premises, the liability picture is different. In a number of cases involving slips on station platforms or access roads, with a danger caused by inaction, the railway as an occupier had a duty of care, although it had not always failed to discharge that duty.<sup>132</sup>

Over time the rule was limited so non-road public bodies were not normally given its benefit. It only applied to highways.<sup>133</sup> Jetty and pier authorities were not given the same immunity, even though a pier is largely the same structure as a bridge.<sup>134</sup>

### *B Public Law Alternatives*

The rule only applied to persons privately seeking compensation, usually for personal injury. A public body could still be brought to account by indictment<sup>135</sup> involving penal sanctions,<sup>136</sup> and in more modern terms judicial review through writs calling on it to perform its function.<sup>137</sup>

Historically, it was an offence against the King to fail to maintain his highway. Since the King's subjects could not pass freely<sup>138</sup> if the road was out of repair, the justices had a duty to enforce repair. The indictment forced the parish, and later local councils, to do their duty and repair the roads (but not to improve them).<sup>139</sup> The remedy for non-repair was a fine, which became used for maintaining the roads; or at least forgiven if the roads were later put into repair. The Webbs called the indictment a "device", by which parishes were held to account for the state of their roads, and in effect for levying rates.<sup>140</sup>

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<sup>128</sup> *McGeown v Northern Ireland Housing Executive* [1995] 1 AC 233 (HL); *Whiting v Hillingdon London Borough Council* (1970) 68 LGR 437 (QB).

<sup>129</sup> *Stovin*, above n 20, at 945.

<sup>130</sup> *Herrington*, above n 118.

<sup>131</sup> *Gascoyne v Wellington City Corporation* [1942] NZLR 315 (SC); *Griffiths*, above n 103.

<sup>132</sup> For example, *State Rail Authority of New South Wales v Wynn* [2003] NSWCA 209 (liable); *Tomlinson v Railway Executive* [1953] 1 All ER 1 (CA) (not liable).

<sup>133</sup> *Pride of Derby and Derbyshire Angling Association v British Celanese* [1953] 1 Ch 149 (CA).

<sup>134</sup> *Lyme Regis v Henley* (1834) 8 Bligh NS 690, 5 ER 1097 (HL).

<sup>135</sup> See *Russell*, above n 10; *Gorringe UK*, above n 20.

<sup>136</sup> *Bourke*, above n 23, at 443; *Cowley*, above n 21, at 353; *Valentine*, above n 60, at [11].

<sup>137</sup> See *Gorringe UK* above n 20 at [19]; *R (Westropp) v County of Clare* [1904] 2 IR 569 (CA).

<sup>138</sup> *Newman*, above n 54, at 911.

<sup>139</sup> See *Webbs*, above n 102, at 58; *Stovin*, above n 20.

<sup>140</sup> *Webbs*, above n 102, at 23, 53–54.

From the 17th to the 19th centuries this process was well used, with many reported cases.<sup>141</sup> A number of cases in the 20th century referred to indictment as the proper method for getting public bodies to act on poor repair, but actual cases were much less numerous than in earlier years. The indictment route remained law in England until the duty to maintain on the inhabitants at large was abolished in 1959.<sup>142</sup>

The current law in England and Wales is the Highways Act 1980 (UK). Section 56 is the statutory embodiment of the old indictment.<sup>143</sup> This route for holding roading authorities to account for repair is now a civil action to compel authorities to do their duty.<sup>144</sup> There have however been few reported cases.<sup>145</sup> The remedy is an order to put the road in repair, which limits its usefulness. A person suffering loss from non-repair wants compensation, not merely rectification of the problem.

### *C The Interplay of Nuisance and Negligence*

How the liabilities in negligence and nuisance interact is an important theme. The boundaries between negligence and nuisance can be fine; and actions can be taken in both on the same facts. Nuisance in the highway context is public nuisance, and in the highway situation there became little difference in outcome between suing in one or the other.<sup>146</sup> The distinctions became so fine that the two torts have been effectively merged in this area,<sup>147</sup> and compensation is better sought through negligence.<sup>148</sup>

Diplock LJ points out that the non-feasance rule originated in nuisance, and was a concession (to highway authorities) from the otherwise absolute duty to maintain.<sup>149</sup> But the highway liability was not purely developed in nuisance. There were a number of early 19th century cases essentially in negligence.<sup>150</sup> And while in England and New Zealand the rule developed in nuisance, in Australia an early High Court case<sup>151</sup> started a local strand in negligence, ultimately a strand that was overwhelmed by the English approach.<sup>152</sup>

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<sup>141</sup> For example, *R v The Inhabitants of Netherthong* (1818) 2 B & Ald 179, 106 ER 332 (KB).

<sup>142</sup> Highways Act 1959 (UK) 7 & 8 Eliz 2, c 25, ss 38(1) and 59(1).

<sup>143</sup> *Wentworth v Wiltshire County Council* [1993] QB 654 (CA) at 661.

<sup>144</sup> At 658.

<sup>145</sup> For example *Wentworth*, above n 143, *Newman*, above n 54.

<sup>146</sup> JR Spencer “Public nuisance – A Critical Examination” (1989) 48 CLJ 55 at 81.

<sup>147</sup> *Brodie*, above n 2; at [129]. See also Bill Atkin “Nuisance” in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at 567.

<sup>148</sup> John Murphy *The Law of Nuisance* (Oxford, Oxford University Press, 2010) at [7.53].

<sup>149</sup> *Griffiths*, above n 103, at 389–390.

<sup>150</sup> *Brodie*, above n 2, at [122].

<sup>151</sup> *Miller*, above n 83, citing *Heaven v Pender* (1882) 11 QBD 503 (CA).

<sup>152</sup> Railways are authorised by statute, and thus have a defence against nuisance actions. See New Zealand Railways Corporation Restructuring Act 1990, s 29. But authorisation is just for the railway itself (and impliedly for its operations), not for any fault or negligence: Atkin, above n 147, at 549; *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 at 1011; *Hankins*, above n 121, at 798 and 801; *Ryan*, above n 115, at [50]. Roading would also be able to claim the same defence.



The action in nuisance for failure to repair a road originates much further back than *Russell*. Nuisance in this situation derived from interference with a right of access to private land,<sup>153</sup> but the “superficial resemblance between the blocking of a private way and blocking of a public highway” led to the latter being called a nuisance, “and thus was born the public nuisance”.<sup>154</sup>

In fact early 19th century cases in England were in negligence,<sup>155</sup> and nuisance was not named as a cause of action until about 1840.<sup>156</sup> The “intrusion of nuisance ... lacked any firm doctrinal basis”.<sup>157</sup> In a number of mid to late 20th century cases, the interplay of the two torts was examined. In the particular case of damage on highways, “fault of some kind, which may be negligence, is essential”.<sup>158</sup> However, the use of nuisance as a cause of action may have been chosen more widely because it did not need proof of a duty of care nor its breach, and the burden of proof to justify a nuisance was on the defendant.<sup>159</sup>

After *Brodie*, in Australia now there is a hybrid of an action in negligence, with only “a duty to take reasonable care to maintain”,<sup>160</sup> subject to the statutory imposition of a defence arising from a situation of absolute liability in nuisance. In effect, highway authorities are better off after *Brodie*, because plaintiffs have to prove all the elements of negligence in terms of making a case for culpable action, and yet cannot claim for non-repair.

Even in *Gorringe UK*, where the case was brought in both nuisance and negligence, Lord Hoffman rejected the negligence claim, as inconsistent with the traditional limitations on liability, which arise from nuisance.<sup>161</sup> By *Yetkin v Mahmood* however, despite extensive discussion of *Gorringe UK*, the analysis and decision were only about negligence.<sup>162</sup>

One might now argue that neither tort is now particularly relevant in safety issues in New Zealand, for either injury compensation or attribution of fault. The accident compensation regime removes any relevance for personal injury,<sup>163</sup> and in terms of other damage, and deterrence, it may be simpler and more effective to prosecute for a health and safety breach. For such breaches the duty is in the statute, and no duty of

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<sup>153</sup> *Brodie*, above n 2, at [119].

<sup>154</sup> At [121], quoting F H Newark, “The Boundaries of Nuisance” (1949) 65 LQR 480 at 482.

<sup>155</sup> *Brodie*, above n 2, at [122]; Newark, above n 154, at 484.

<sup>156</sup> Newark, above n 154, at 485.

<sup>157</sup> *Brodie*, above n 2, at [129].

<sup>158</sup> At [126].

<sup>159</sup> At [122] and [126].

<sup>160</sup> *Griffiths*, above n 103, at 389.

<sup>161</sup> *Gorringe UK*, above n 20, at [17].

<sup>162</sup> *Yetkin v Mahmood* [2010] EWCA Civ 776, [2011] QB 827 (CA) at [33]. Large plants impeded visibility, which was considered a misfeasance (planting the wrong plants) rather than a failure to trim them.

<sup>163</sup> *Atkin*, above n 147, at 567.

care has to be found; and the statutory defences create high hurdles, high enough to make liability close to absolute.<sup>164</sup> Private prosecutions are possible, and restoration or reparations can be ordered.<sup>165</sup> The problem is though that the health and safety legislation might not apply to road owners. This is further discussed in Chapter Four.

#### *D Relationship Between Negligence and Statutory Duties*

A further theme arises from inability of some parties in recent years to establish their case under the common law or statute.<sup>166</sup> They have consequently tried to derive a duty of care from a failure to use a power. This has its origins in *Stovin v Wise*<sup>167</sup> (failure to remove a bank), which was followed by *Larner v Solihull Metropolitan Borough Council*<sup>168</sup> (failure to mark a road).

*Gorringe UK* also concerned road markings. The statutory duty to maintain did not apply as the issue was not about the surface of the road structure itself. On the basis of *Larner*, it was argued that the statutory power and public law duty to promote road safety (under the Road Traffic Act 1988 s 39(2)) gave rise to a parallel common law duty of care to take appropriate road safety measures, including a warning of a crest. The House of Lords rejected that submission. Lord Hoffman found it “difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has a power (or a public law duty) to provide”.<sup>169</sup> Lord Steyn noted that the relationship between negligence and statutory duties and powers is a subject of great complexity and very much an evolving area of law.<sup>170</sup>

Despite the beating it was given in *Gorringe UK*, a duty derived from a power may still develop into a means of holding road owners to account. For example, in *Rice v Secretary of State for Trade and Industry*, a case involving asbestos injury, the Court of Appeal decided a duty of care was possible – there was a specific employment duty to an individual rather than a “broad target power or duty directed at the public at large”.<sup>171</sup> This outcome is somewhat at odds with the *Gorringe UK*, and reinforces Lord Steyn’s view that the matter is complex and as yet not settled.

Cases like *Hamlin*<sup>172</sup> have extended the scope of duties of care to bodies on which people rely on, through the bodies’ superior knowledge of the subject. It might be

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<sup>164</sup> Public nuisance as a protector of public health and safety has been overtaken by statute in a number of areas: Spencer, above n 146, at 76.

<sup>165</sup> Health and Safety At Work Act 2015, ss 144, 151(2), and 154; Sentencing Act 2002, s 32.

<sup>166</sup> Especially Highways Act 1980 (UK), s 41. See Chapter Three.

<sup>167</sup> Above n 20.

<sup>168</sup> *Larner v Solihull Metropolitan Borough Council* [2001] RTR 469 (CA).

<sup>169</sup> *Gorringe UK*, above n 20, at [32].

<sup>170</sup> At [2].

<sup>171</sup> *Rice v Secretary of State for Trade and Industry* [2007] EWCA Civ 289, at [44].

<sup>172</sup> *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA), aff’d [1996] 1 NZLR 513, [1996] AC 624 (PC).

expected that people could rely on roading authorities, which thus might have similar obligations. However, given the strong statements from Lord Hoffman in *Stovin* and *Gorringe* about road users not being able to rely on roading authorities, but having to look out for themselves,<sup>173</sup> and take the road “as they find it”,<sup>174</sup> it is doubtful that a general reliance argument would hold much sway in the highway environment outside of creating a “trap”.<sup>175</sup> Even what constitutes a “trap” is open to interpretation.<sup>176</sup> Even though the law may still be developing in this area, it is likely that *Gorringe* has blocked another potential route for holding road authorities to account. It has “made it all but impossible to establish liability where the authority has not performed a positive act”.<sup>177</sup>

### *E Cost*

A major theme running through the cases is the burden excessive claims would put on public bodies.<sup>178</sup> Judges sought to protect public authorities’ limited funds so they could continue to contribute to development.<sup>179</sup> Even as far back as *Russell Ashhurst J* said “it is better that an individual should sustain an injury than that the public should suffer an inconvenience”.<sup>180</sup> To direct authorities to pay for inadvertence would add an unreasonable burden.<sup>181</sup> This theme continues to the present.<sup>182</sup> That is not a consideration that was taken into account for private firms. Nor is it language that fits well with the modern “reasonably practicable”<sup>183</sup> view of safety.

An early New Zealand case noted that Councils should “do the best with the means at their disposal to ensure safety”.<sup>184</sup> The magistrate at first instance in another case<sup>185</sup> referred to insufficient funds as excusing failure to maintain. An English council that had a discretion to light a road turned off the lights at night to save money, but was not liable for the plaintiff’s fall and injury.<sup>186</sup>

Statutory bodies’ financial position even justified a lower standard, so that what might for others be “unjustifiably risky” could “be condoned as well-meant error of

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<sup>173</sup> *Stovin*, above n 20, at 958; *Gorringe UK*, above n 20, at [12].

<sup>174</sup> *Stovin*, above n 20, at 958.

<sup>175</sup> *Gorringe UK*, above n 20, at [43].

<sup>176</sup> Piles of gravel caused by one defendant’s poor sweeping may have created a trap, even though the case against the other defendant was rejected because the gravel was simply on the surface: *Valentine*, above n 60.

<sup>177</sup> *Booth and Squires*, above n 111, at [15.33].

<sup>178</sup> *McDonald*, above n 68, at 424.

<sup>179</sup> *Brodie*, above n 2, at [100].

<sup>180</sup> *Russell*, above n 10, at 673.

<sup>181</sup> *Cowley*, above n 21, at 349.

<sup>182</sup> *Mills v Barnsley Metropolitan Borough Council* [1992] PIQR 291 (CA) at 295; *Simson v London Borough of Islington* [2013] EWHC 2527 (QB).

<sup>183</sup> HSWA, s 22.

<sup>184</sup> *Inhabitants of the Featherston Road District v Tate* (1898) 17 NZLR 349 (CA), at 355.

<sup>185</sup> *Tarry*, above n 44, at 468.

<sup>186</sup> *Sheppard v Glossop Corporation* [1921] 3 KB 132 (CA).

judgment”.<sup>187</sup> Public bodies should face a “less exacting standard” than ordinarily imposed.<sup>188</sup> They should not become “a sort of insurer of every person who travelled on the road”.<sup>189</sup>

The modern expression of this point is Lord Hoffman’s speeches in *Stovin*<sup>190</sup> and *Gorrington UK*.<sup>191</sup> He thought judges examining a body’s budgetary decisions could distort its priorities. Rather than spending on social services, they might “play safe” by spending more on roads to avoid “enormous liabilities”.<sup>192</sup> That is exactly what railways are expected to do, save that the liabilities are now HSWA sanctions. Road safety budgets might be used up in defending litigation.<sup>193</sup> Being rated for roads was burden enough without that.<sup>194</sup> So too in a more recent case: inspections to identify and avert danger “would have substantial economic implications for local authorities”.<sup>195</sup> Academics have criticised the indiscriminate cost argument as “paltry justification”<sup>196</sup> and anomalous compared with other analogous fault liabilities.<sup>197</sup>

The costs do not just disappear if the highway authority does not bear them; they are reallocated, usually to individual users. As Kirby J put it:<sup>198</sup>

... a burden of loss distribution is imposed on the victims of the neglect of such authorities. The immunity obliges those victims to bear the economic, as well as personal, consequences, even of gross and outrageous neglect and incompetence.

The personal consequences can be severe, as Mrs Gorrington found out when unable to claim for her serious injuries.<sup>199</sup> Even in New Zealand where personal injury is covered by accident compensation, there can still be property damage falling on the defendant.

The issue of justiciability has also been raised, about the courts’ capability to judge allocations between scarce resources. Booth and Squires note that it is for the legislature to make choices between, for example, workplace safety, education, and improving highway safety.<sup>200</sup> The legislature when it makes such choices, can make them inconsistently. This dissertation argues that that has occurred in the balance between road and rail safety. And when the courts do act, they do so conservatively

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<sup>187</sup> *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 (HL), at 95–96.

<sup>188</sup> At 95.

<sup>189</sup> *Young*, above n 18.

<sup>190</sup> *Stovin*, above n 20.

<sup>191</sup> *Gorrington UK*, above n 20.

<sup>192</sup> *Stovin*, above n 20.

<sup>193</sup> *Gorrington UK*, above n 20, at [33].

<sup>194</sup> At [12].

<sup>195</sup> *Ali v Bradford Metropolitan District Council* [2010] EWCA Civ 1282, [2012] 1 WLR 161, at [39].

<sup>196</sup> JG Fleming *The Law of Torts* (9th ed, Law Book Company, Sydney, 1998) at 485, quoted in McDonald, above n 68, at 426.

<sup>197</sup> McDonald, above n 68, at 425 and 426.

<sup>198</sup> *Brodie*, above n 2, at [235].

<sup>199</sup> *Gorrington UK*, above nn 20 and 61.

<sup>200</sup> Booth and Squires, above n 111, at [2.91].

and reinforce the imbalance. Thus they offer very little constraint on roading authorities in terms of safety.

### *III Conclusion*

The long-standing non-feasance rule is still alive, and still gives highway authorities a concession, albeit (ostensibly) with reduced importance. However, the English courts have limited the statutory exemptions, and in Australia the legislatures have firmly re-imposed the rule after a well-reasoned attempt to overrule it in *Brodie*. In New Zealand the rule still applies, though practically it is of limited effect. The themes and arguments over the rule's long history are likely to have affected authorities' attitude to safety, for example arguments about cost.

Thus road authorities have long derived advantages from the common law. Few such advantages were given to railways, which have been subject to the full force of the law on negligence, even for omission.



## Chapter Three: New Zealand road and rail safety legislation

### *I Introduction*

This chapter examines the treatment of road and rail safety in New Zealand statute law. It shows the intensive supervision of rail, and the dearth of legislation on safety liability for roading authorities. It also makes international comparisons. How the Health and Safety at Work Act 2015 extends to impose road and rail safety obligations is discussed in Chapter Four.

### *II Roads*

#### *A Municipal Corporations and Counties Acts*

Roading was historically a local government function in New Zealand. Early national legislation gave the local councils general powers to construct roads,<sup>1</sup> and gave county councils the “care and management of all county roads”, but powers were not specified in detail.<sup>2</sup> Each successive Act specified the powers more closely. But these were powers and rights, as distinct from duties and obligations. In the Municipal Corporations Act 1876 (MCA) a new section was included, which gave municipalities some responsibilities to others for keeping the roads safe:<sup>3</sup>

The Council shall take all sufficient precautions to prevent accidents during the construction or repair of any street ....

Note, however, that this obligation was confined to the circumstance of road works. There remained no general obligation to keep roads safe. From 1876 to 1954 on the words of s 212 were repeated in each new MCA. Not until the final Counties Act (CA) in 1956 were the same responsibilities extended to counties.<sup>4</sup> Counties were nevertheless liable in negligence and nuisance for not maintaining their roads properly, subject to the non-feasance rule.<sup>5</sup>

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<sup>1</sup> Municipal Corporations Ordinance 1842 5 Vict 6, cl 5. Municipalities (urban authorities) were subject to Municipal Corporations Acts [MCA] from then on, and rural “counties” to the Counties Acts (CA) from 1856.

<sup>2</sup> CA 1876, s 185.

<sup>3</sup> MCA 1876, s 212.

<sup>4</sup> CA 1956, s 194.

<sup>5</sup> For example, *Tarry v Taranaki County Council* (1894) 12 NZLR 467 (CA); *Hokianga County v Parlane Brothers* [1940] NZLR 315 (SC).

## *B Local Government Act 1974*

In 1978 the MCA 1954 and CA 1956 were repealed and the obligations section was incorporated into the Local Government Act 1974 (LGA) as s 353.<sup>6</sup> But some introductory words were added, which arguably significantly widened its scope. The section now reads, and still reads:

### **353 General safety provisions as to roads**

The council shall take all sufficient precautions for the general safety of the public and traffic and workmen on or near any road, and in particular shall –

(a) Take all reasonable precautions to prevent accidents during the construction or repair ... of any road ....

The rest of the section deals with obligations on adjacent landowners.

Paragraph (a) retains the specific words relating to road works (albeit amended) but the new introductory words apply to “any road”. The clause was represented in the explanatory note to the Bill as a mere re-enactment of previous law, with “no major changes”,<sup>7</sup> but in reality it added a much more concrete obligation. The words “sufficient precautions” were left unaltered by the select committee, whereas the same words in paragraph (a) were altered to “reasonable precautions”.<sup>8</sup> This suggests a separate meaning, and effectively a stronger meaning for “sufficient precautions”, if intention is to be read into the words. The alternative is to suggest it was poor drafting to change one instance and not the other.

The use of somewhat unspecific words like “the general safety” might make the introductory words just a “target” obligation,<sup>9</sup> one that can be striven for but need not be fully achieved if the policies and budgets of the authority have other priorities. On the other hand, the words aim to protect the “public”, not just a subsection like workers, akin to the obligations on rail operators.

As well, some cases have considered this section in terms of a power, not a duty.<sup>10</sup> “The purpose of s 353 is to empower the council to erect safety precautions”, and “to enable the council to warn users of the highway of a danger”.<sup>11</sup> Paragraphs (b) and (c) are indeed expressed as powers (or at least a duty to exercise a power).

The introductory words and paragraph (a) are however clearly expressed as duties. There is no specific penalty on a council for breaching these duties. However, they are

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<sup>6</sup> Local Government Amendment Act 1978, s 2 inserting new s 353.

<sup>7</sup> Local Government Amendment (No 4) Bill 1977 (171-1), (explanatory note, re Part XXI).

<sup>8</sup> Local Government Amendment (No4) Bill 1977, (171-2), cl 2 inserting new section 353.

<sup>9</sup> *Larner v Solihull Metropolitan Borough Council* [2001] RTR 32 (CA) at [8], *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057 at [29] and [90].

<sup>10</sup> *Police v Abbott* [2009] NZAR 705 (CA) at [20] and [22].

<sup>11</sup> *Abbott v Police* [2008] NZAR 285 (HC) at [18] and [20].



not merely target obligations, as shown by the (albeit scant) case law. In *Parkin v Tararua District Council*<sup>12</sup> paragraph (a) of the section was used to found a private action for criminal nuisance. Mr Parkin’s motor cycle slid on loose gravel at road works, extensively damaging it, and he successfully argued that the council should have cleaned the gravel up.

These cases focus on the “in particular” paragraphs of the section, and do not identify the introductory words as a discrete obligation. Indeed, *Parkin* the judge conflated the two in “translat[ing] this convoluted section” as giving an obligation only in the context of road works.<sup>13</sup> The facts of that case were just about road works, so this reading can be distinguished as applying only to those facts.

The case does cast some doubt on the reading of the introductory words as applying outside the circumstances covered in the paragraphs. Nevertheless the plain meaning of the introductory words is that they cover all roads, not just those under repair or in need of protection from external danger, and form a separate obligation to those in the following paragraphs of the section.

### *C State Highways*

The LGA applies only to local roads, which account for 88 per cent of New Zealand’s 95,000km of public roads,<sup>14</sup> but only 52 per cent of the traffic.<sup>15</sup> The more densely trafficked state highways (11,000km), are administered by the New Zealand Transport Agency (NZTA) and are governed in respect to safety by the Government Roading Powers Act 1989 (GRPA) and the Land Transport Management Act 2003 (LTMA).

From 1953 the National Roads Board, which managed main highways, was subject to “powers, rights, duties and obligations vested in or imposed on any local authority”.<sup>16</sup> From the amendment to the LGA in 1978 until it was replaced by Transit New Zealand, the National Roads Board had the obligations in LGA s 353.

Ostensibly the powers and obligations of LGA s 353 were carried over into the Transit New Zealand Act 1989 (successor to the National Roads Act, and now the GRPA) by s 61(2) of that Act. However the vesting of the powers and duties is worded differently to that in the National Roads Act. The heading of s 61 is “Powers and duties of Agency in relation to State highways” (the Agency is now NZTA). But subsection (2) is worded so that only the rights and powers of s 353 are applicable to state highways, and not the duties and obligations:<sup>17</sup>

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<sup>12</sup> *Parkin v Tararua District Council* [2004] DCR 882.

<sup>13</sup> At [17].

<sup>14</sup> New Zealand Transport Agency [NZTA] <[www.nzta.govt.nz](http://www.nzta.govt.nz)>.

<sup>15</sup> Ministry of Transport <[www.transport.govt.nz](http://www.transport.govt.nz)>.

<sup>16</sup> National Roads Act 1953, s 13.

<sup>17</sup> Government Roading Powers Act 1989, s 61(2) [GRPA].

All rights and powers vested in any local authority under sections 331, 332, 334, 335, 337 to 341, and 353 of the Local Government Act 1974, and all rights and powers vested in any local authority in relation to roads under any other Act, may in respect of any State highway be exercised by the Agency.

This may be a simple drafting error, or it may be deliberate, but as it stands its meaning has to be derived “from its text and in the light of its purpose”<sup>18</sup>. Its text is unambiguously not about obligations. The use of “exercised” supports this interpretation, since a duty is not typically “exercised”. Even though the headings can now be prayed in aid of interpretation of the body of the text,<sup>19</sup> it is difficult to see how the “obligations” in the heading can help read that word into the clear rights and powers schema of the subsection. Moreover there are other subsections of s 61 that could be interpreted as duties,<sup>20</sup> so the use of “duties” in the heading is meaningful without applying it to subsection (2). Thus the true reading of the section is that Parliament’s intention was to exempt state highways from the safety duties borne by local roads.

The Transit New Zealand Act 1989 did not have an explicit purpose section. The authority (Transit New Zealand) was given a “principal objective” of promoting policies and allocating resources “to achieve a safe and efficient land transport system that maximises national economic and social benefits”.<sup>21</sup> To some extent this can be viewed as indicating the purpose of the Act, but the multiple and potentially conflicting parts of the objective make its role as a safety objective no better than a target one.

The LTMA altered Transit’s objective to “operat[ing] the State highway system in a way which contributes to an integrated, safe, responsive, and sustainable land transport system”,<sup>22</sup> a change which did not alter the target nature of the objective. Moreover, it only had to contribute to a safe system, not actually achieve one.

The title of the Transit New Zealand Act was changed to the GRPA in 2008,<sup>23</sup> but still does not have an explicit purpose. What provisions remain are reflective of its new title; “powers” to make the process of making roads easier. Hence if a purpose was to be derived from the Act, it would not support the inclusion of safety obligations to other parties.

The objective of NZTA (Transit’s successor) is similar to Transit’s, to contribute to an effective, efficient, and safe land transport system.<sup>24</sup> Its functions are similarly

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<sup>18</sup> Interpretation Act 1999, s 5(1).

<sup>19</sup> Section 5(2) and (3).

<sup>20</sup> GRPA, s 61 (5A) and (7).

<sup>21</sup> Transit New Zealand Act 1989, s 5.

<sup>22</sup> Land Transport Management Act 2003, s 77(1) (as originally enacted).

<sup>23</sup> Land Transport Management Amendment Act 2008, s 50(1).

<sup>24</sup> Land Transport Management Act, s 94.

unspecific in relation to safety, and it too has to have social and environmental sensibility.<sup>25</sup> In fact, the whole purpose of the LTMA is expressed in the same general terms.<sup>26</sup>

The Land Transport Act 1998 is the principal road safety legislation in New Zealand. This Act does introduce general responsibilities for participants in the land transport system (largely excluding rail), defined as those who do anything for which a “land transport document” is required.<sup>27</sup> They must ensure they carry out their activities safely and in accordance with safety standards.<sup>28</sup> The NZTA is the body that issues, revokes, and otherwise deals with land transport documents.<sup>29</sup> Similarly, the Minister can make rules about safety<sup>30</sup>, and must consider risk and safety in making any rule.<sup>31</sup> Rules can set out design standards,<sup>32</sup> but there appear to be few rules about the safety of the actual roads applying to the owners of those roads. Indeed, The NZTA itself drafts and administers many of the rules.<sup>33</sup>

#### *D International Comparisons*

The rules about highway authority liability overseas are not consistent, although there are some useful models that might be used to improve the position in New Zealand. They range from no liability through to having to take reasonable care.

In Australia, a number of states place no express safety responsibility on road owners.<sup>34</sup> Indeed in Queensland there is a forthright statement that high levels of safety are not compatible with roading efficiency.<sup>35</sup> In New South Wales the Act refers, in judging whether a public body has breached a duty of care, to the limits to the resources such a body has, and the “general allocation of these resources is not open to challenge”.<sup>36</sup> The authority can rely on complying with its general procedures and standards.<sup>37</sup> Furthermore an act or omission by the authority must be so unreasonable that no similar authority would consider it reasonable.<sup>38</sup>

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<sup>25</sup> Sections 95 and 96.

<sup>26</sup> Section 3.

<sup>27</sup> Land Transport Act 1998, s 2, definition of “participant”.

<sup>28</sup> Section 4.

<sup>29</sup> Land Transport Management Act 2003, s 95(3).

<sup>30</sup> Land Transport Act 1998, s 152.

<sup>31</sup> Section 164(1)(a) and (c).

<sup>32</sup> Section 157 (b).

<sup>33</sup> Two of those rules do impose specific obligations on roading authorities: Land Transport Rule: Setting of Speed Limits 2003; Land Transport Rule: Traffic Control Devices 2004. There are no sanctions in them for non-compliance, other than audit and being subject to Agency directions.

<sup>34</sup> Roads Act 1993 (NSW); Highways Act 1926 (SA); Main Roads Act 1930 (WA).

<sup>35</sup> Transport Operations (Road Use Management) Act 1995 (Qld), s 4.

<sup>36</sup> Section 42(b).

<sup>37</sup> Section 42(d).

<sup>38</sup> Section 43. This is in fact the *Wednesbury* test: *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (CA).

In Victoria, on the other hand, and in England and Wales, there is a statutory duty to maintain the roads.<sup>39</sup> People can sue for damages. In England and Wales, an authority can defend an action for failure to maintain by showing it took such care as was reasonable in the circumstances.<sup>40</sup> The criteria for assessing reasonableness are specified,<sup>41</sup> including the “character of the highway” and its traffic, the appropriate standard of maintenance for such a highway, the “state of repair which a reasonable person would have expected to find such a highway”, whether the authority knew (or “could reasonably have been expected to know”) that the highway’s condition was dangerous, and whether warning notices had been posted.<sup>42</sup> Actions against an authority in Victoria are judged against the same criteria.<sup>43</sup>

These provisions are a great advance on New Zealand’s absence of a statutory safety obligation for main highways. However Victoria’s safety obligations are heavily qualified, and there is ample room for an authority to escape liability even if its roads were deficient. The principles in the Wrongs Act 1958, s 83, are included by reference,<sup>44</sup> including consideration of the resources available.<sup>45</sup> Even though this is a wide exemption, it is further broadened by there being no liability for a breach of statutory duty unless the authority acted unreasonably, in *Wednesbury* terms.<sup>46</sup>

The onus is on the authority to prove it had “taken such care as in all the circumstances was reasonably required to ensure that the relevant part of the public road was not dangerous for traffic”.<sup>47</sup> A policy which addressed the relevant matter would be a sufficient defence.<sup>48</sup> A policy could be written to cover any reasonable level of repair the authority wanted to limit itself to.<sup>49</sup>

In England, even though the statute says that the reasonable care provisions are a defence, and early cases maintained that the liability was otherwise absolute,<sup>50</sup> more recent cases have put hurdles in the way of plaintiffs, making them prove a danger before the reasonable care defence comes into play, despite danger in the statute being only an element in the defence.<sup>51</sup>

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<sup>39</sup> Road Management Act 2004 (Vic), s 40 [RMA (Vic)]; Highways Act 1980 (UK), s 41.

<sup>40</sup> Highways Act 1980 (UK), s 58(1).

<sup>41</sup> Section 58(2).

<sup>42</sup> Section 1(3).

<sup>43</sup> RMA (Vic), s 101.

<sup>44</sup> Section 101(1).

<sup>45</sup> Wrongs Act 1958 (Vic), s 83(a).

<sup>46</sup> Section 84. See Katrine Ludlow “Spit and Polish: ‘No Action’ is no longer an option for Victorian Road Authorities following the Road Management Act 2004” (Faculty of Law, Monash University, Melbourne Research paper 2007/34, 2009), at 52; *Wednesbury*, above n 39.

<sup>47</sup> RMA (Vic) s 105(1).

<sup>48</sup> Sections 103 and 105(3).

<sup>49</sup> Ludlow, above n 46, at 52.

<sup>50</sup> *Griffiths v Liverpool Corporation* [1967] 1 QB 374 (CA), at 389.

<sup>51</sup> *Mills v Barnsley Metropolitan Borough Council* [1992] PIQR 291 (CA).

A recent development is the devolution of highways to corporate bodies. In New Zealand, the Transmission Gully Motorway is to be built and managed by a public-private partnership.<sup>52</sup> In England, all 7,000km<sup>53</sup> of trunk roads are now administered by a state-owned company, Highways England.<sup>54</sup> In both cases substantial safety obligations, with monetary penalties, have been placed on the new body.<sup>55</sup> If such conditions can be placed on roads under corporate control, it raises the question of why they cannot also be placed on public roading authorities.

Highways England is monitored by the Office of Road and Rail (ORR). The ORR also administers United Kingdom railway safety, and some of its rail experience might transfer to roads. However early experience suggests that is not so – a lower level of safety supervision is applied to roads than to rail.<sup>56</sup>

In Ontario there are maintenance obligations for both provincial and local highways. Principal provincial highways “shall be maintained and kept in repair” by the Ministry of Transportation.<sup>57</sup> The Crown is liable for “all damage” for default.<sup>58</sup> A municipality “shall keep [its highways and bridges] in a state of repair that is reasonable in the circumstances, including the character and location of the highway or bridge”.<sup>59</sup> It too is liable for “all damages” sustained as a result of default.<sup>60</sup> It is a defence if the municipality did not know (or could not reasonably be expected to know) about the road’s state of repair, or it took reasonable steps to prevent the default.<sup>61</sup> No action can be brought for action or inaction that “results from a policy decision” of the municipality.<sup>62</sup>

Similar legislative provisions to those in Ontario are found in a number of other Canadian provinces.<sup>63</sup> However, in British Columbia, the legislation gives powers to

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<sup>52</sup> NZTA <[www.nzta.govt.nz](http://www.nzta.govt.nz)>.

<sup>53</sup> 4300 miles: Highways England <[www.gov.uk/government/organisations/highways-england](http://www.gov.uk/government/organisations/highways-england)>.

<sup>54</sup> Infrastructure Act 2015 (UK), s 1; Highways England, above n 53.

<sup>55</sup> NZTA Transmission Gully motorway public-private partnership agreement, <[www.nzta.govt.nz](http://www.nzta.govt.nz)>; Department for Transport “Highways England: Licence – Secretary of State for Transport statutory directions and guidance to the strategic highways company” (April 2015), at [4.2], [5.15] and [8.2].

<sup>56</sup> Office of Road and Rail “Highways Monitor Six month review of Highways England’s performance, April – September 2015”; “ORR’s Enforcement Policy for Highways England” (December 2015); <[www.orr.gov.uk](http://www.orr.gov.uk)>; contrast the level of rail supervision on that website.

<sup>57</sup> Public Transportation and Highway Improvement Act RSO 1990 c P50, s 33(1).

<sup>58</sup> Section 33(2).

<sup>59</sup> Municipal Act SO 2001 c 25, s 44(1).

<sup>60</sup> Section 44(2).

<sup>61</sup> Section 44(3).

<sup>62</sup> Section 450. This reflects the common law in Canada: *Just v British Columbia* [1989] 2 SCR 1228. The distinction between policy and operational decisions is not made in New Zealand law: Michael Underdown “Surveys and Negligence” (2004) 18 MLAANZ Journal 24 at 28.

<sup>63</sup> For example, Manitoba, Saskatchewan, and Alberta: Highways and Transportation Act RSM 1987 c H40, s 8; Municipal Act SM 1996 c 58, ss 293, 294, 386; Highways and Transportation Act SS 1997 c H-3.01, s 9 (note exclusion for damage by rocks, s 9(5)(c)); Municipalities Act SS 2005 c M36.1, s 343 (also exempt for damage by rocks s 345(b)); Highways Development and Protection Act SA 2004 c H-8.5, s 42.

roading authorities, rather than duties, in a similar way to New Zealand legislation.<sup>64</sup> The courts, including the Canadian Supreme Court, have still found the authorities liable for failure to maintain, citing a common law duty to take reasonable care when exercising a discretionary power.<sup>65</sup>

### *III Rail*

#### *A As a Government Department*

Since they began in New Zealand in 1863, railways have been governed by legislation. From the beginning, like road, legislation gave powers in the safety area to prevent damage and to prosecute those who endangered the railway.<sup>66</sup> But, unlike roads, there were specific safety obligations to protect the public who used rail.<sup>67</sup> This mirrored the situation in Britain, where a regulator, the Board of Trade, was appointed as early as 1840,<sup>68</sup> and legislation imposed safety control, initially of a basic kind, covering level crossings, fences, accident reporting,<sup>69</sup> accident investigation, and inspections,<sup>70</sup> but later extending to the use of block signalling, interlocking, and continuous brakes, all features of the modern railway.<sup>71</sup> Safety regulation developed stepwise as major accidents occurred.<sup>72</sup>

Government Railways Acts (GRA) were enacted in 1887, 1894, 1900, 1908, 1926, and 1949, and they were frequently amended as well. The railway could be sued at common law (without the misfeasance/non-feasance rule)<sup>73</sup>, but there were no specific statutory duties to the public about safety. The Railways Department was self-regulating. This was taken seriously, and since no level of safety was specified, a high level was assumed, and it also reflected the lessons of accidents. This was reinforced by Ministerial Inquiries into serious accidents set up under the GRA 1949.<sup>74</sup>

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<sup>64</sup> Transportation Act SBC 2004 c 44, ss 2 and 47; Local Government Act RSBC 1996 c 23, ss176 and 796.

<sup>65</sup> *Lewis (Guardian ad litem of) v British Columbia* [1997] 3 SCR 1145, at [18]. Contrast *Stovin v Wise* [1996] AC 923 (HL) at 955.

<sup>66</sup> Railway Offences Act 1865.

<sup>67</sup> These involved government inspection of lines, accident reporting, and government powers to make changes: Railways Regulation and Inspection Act 1873, Railway Companies Act 1875, Railways Construction and Land Act 1881.

<sup>68</sup> Railway Regulation Act 1840 (UK) 3 & 4 Vict c 97, s 5.

<sup>69</sup> Railways Regulation Act 1842 (UK) 5 & 6 Vict c 55, ss 8, 9 and 10.

<sup>70</sup> Railways Regulation Act 1871 (UK) 35 & 35 Vict, c 78, ss 3 and 6.

<sup>71</sup> Regulation of Railways Act 1889 (UK) 52 & 53 Vict c 57, s 1.

<sup>72</sup> LTC Rolt *Red for Danger* (Pan, London, 1960).

<sup>73</sup> See Chapter Two.

<sup>74</sup> Government Railways Act 1949, s 68.

## *B New Zealand Railways Corporation*

In a major reform, the New Zealand Railways Corporation was set up in 1982.<sup>75</sup> A scheme for (internal) setting and maintaining standards for railway operations was specified.<sup>76</sup> The person at the head of the major engineering sections of the Corporation had to report annually on the safety of those sections.<sup>77</sup> These marked a move away from general, target obligations to more direct accountability for safety, but were still not particularly specific. And while safety was “of prime importance”,<sup>78</sup> it was not expressed as the “primary” goal, and there were others that had to be met, such as financial goals.<sup>79</sup>

## *C As Private Company*

When the railway was incorporated as a limited liability company (still a state-owned enterprise) in 1990, it was with a view to privatisation. It was felt that leaving public safety to an independent, and potentially private, company was inappropriate. Thus a new safety regime was introduced.<sup>80</sup>

This regime much more thorough going than the one applying to railways previously, and than that for roads. It provided for independent supervision of safety, through the Ministry of Transport, and later the Land Transport Safety Authority. This was through a licensing regime, and before a licence was granted the railway had to have an approved safety system.<sup>81</sup>

This safety system had to cover standards and procedures to ensure safety and compliance, management structures, systems for reporting accidents and incidents, driver training and standards, and audit.<sup>82</sup> There was a specific obligation to report accidents and incidents.<sup>83</sup> The principal sanction was suspension<sup>84</sup> and even revocation<sup>85</sup> of the licence, so a rail operator had to be demonstrably safe to remain in business.

Clearly some of these measures have their counterpart in laws relating to vehicle condition, traffic regulation and driver qualification for road traffic. But the rail legislation did not confine itself to vehicles, as while the Act referred to the operation

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<sup>75</sup> New Zealand Railways Corporation Act 1981

<sup>76</sup> Section 46(2).

<sup>77</sup> Section 46(3)–46(5).

<sup>78</sup> Section 46(1).

<sup>79</sup> State-Owned Enterprises Act 1986, s 4 – being “a successful business”, including profitability, was the “principal objective” of a state-owned enterprise, which the Corporation became when that Act was passed.

<sup>80</sup> Transport Services Licensing Amendment Act (No 3) 1992.

<sup>81</sup> Transport Services Licensing Act 1989, s 6A(2).

<sup>82</sup> Section 6B(2).

<sup>83</sup> Section 39A.

<sup>84</sup> Section 39D.

<sup>85</sup> Section 39B(c)(ii).

of a vehicle, the infrastructure it operated on needed to be safe for that vehicle operation to be safe, and so track, signalling and the like were also covered by the licence – even though simple provision of railway lines by itself was exempt.<sup>86</sup> Coverage of infrastructure distinguishes the treatment of rail from the treatment of road, since although road infrastructure also needs to be safe for the vehicles to be safe, the law does not extend to making this safety an obligation on the road owner, save as noted above.

The current law on railway safety is the Railways Act 2005 (RA). It provides for more intensive safety management and duties than the Transport Services Licensing Act. Infrastructure owners are specifically covered, including simple railway line owners.<sup>87</sup>

This Act provides for laws more aligned to the Health and Safety at Work Act 2015 (HSWA). Its general “so far as reasonably practicable” regime has been copied into the RA.<sup>88</sup> Prosecutions could be taken under either, although they have only been taken under health and safety legislation to date. The RA extends the HSWA rules with more railway specific ones.

The RA imposes a general duty on all rail participants,<sup>89</sup> that they:<sup>90</sup>

... must ensure, so far as is reasonably practicable, that none of [its] rail activities ... causes, or is likely to cause, the death of, or serious injury to, individuals.

Furthermore the first purpose of the Act is to:<sup>91</sup>

(a) Promote the safety of rail operations by –

(i) Stating the duty of rail participants to ensure safety.

The penalty for breach of the s 7 duty is a \$500,000 fine for a corporate.<sup>92</sup> There is a corresponding duty on individuals, with a fine of \$50,000, and/or 6 months imprisonment.<sup>93</sup> Liability extends to employers and principals, and to directors.<sup>94</sup>

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<sup>86</sup> Section 2(1), definition of “rail service”.

<sup>87</sup> Railways Act 2005, s 4, definitions of “infrastructure owner” and “railway infrastructure”. Private sidings are now covered [RA].

<sup>88</sup> Section 5.

<sup>89</sup> Section 4, definition of “rail participant” includes a wide range of bodies engaged in various aspects of the railway business.

<sup>90</sup> Section 7(1).

<sup>91</sup> Section 3.

<sup>92</sup> Section 61(1)(b).

<sup>93</sup> Sections 7(2) and 61(1)(a).

<sup>94</sup> Sections 65 and 66.



The licensing regime continued,<sup>95</sup> and compliance with it became expressed as a duty.<sup>96</sup> The right of revocation was clarified,<sup>97</sup> but specific fines were also provided for.

In order to get or maintain a licence, an operator must now submit (and have approved) a “safety case”.<sup>98</sup> The list of what must be included is 13 paragraphs long, with additional subparagraphs.<sup>99</sup> Amongst the matters the safety case has to cover are safety policy and objectives, management and organisation arrangements to promote safety, systems to assess risk and control it, arrangements to ensure assets and working practices are fit for purpose, safety critical tasks are identified, training and competence is up to scratch, staff are fit for duty and not impaired, and monitoring and reporting of safety issues. The list makes no distinction between the infrastructure and operations.

This is a significant obligation not shared by road. KiwiRail’s Safety Case is nearly 70 pages long.<sup>100</sup> It may not be varied without further approval.<sup>101</sup> A variation may be compelled by NZTA, which is responsible for oversight of rail safety.<sup>102</sup> Compliance with it is subject to audits, called “safety assessments”,<sup>103</sup> as part of the wider assessment as to whether the safety obligations are being met.<sup>104</sup>

There is a long list of matters that the Minister can make rules about, which is new in this Act.<sup>105</sup> So far no significant rules have been made for standard railways,<sup>106</sup> but the scope of the powers to make rules does stress the overall desire to closely supervise railway safety.

Railways ceased to be an independent private concern in 2008 (earlier for infrastructure) and reverted to public ownership, as a state-owned enterprise. As noted above, one of the reasons for the intensive safety supervision of rail was the separation from government ownership, but this was not reversed when public ownership was resumed.

Railways are also subject to the Transport Accident Investigation Commission’s (TAIC) scrutiny of accidents and incidents.<sup>107</sup> Incidents are occurrences without

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<sup>95</sup> Section 15.

<sup>96</sup> Section 11.

<sup>97</sup> Section 24.

<sup>98</sup> Section 29.

<sup>99</sup> Section 30.

<sup>100</sup> *KiwiRail Safety Case 2013*.

<sup>101</sup> RA, s 32.

<sup>102</sup> Section 34.

<sup>103</sup> Part 2, Subpart 4.

<sup>104</sup> Section 40.

<sup>105</sup> Part 2, Subpart 5.

<sup>106</sup> The Railways Regulations 2008 cover exemptions for some tourist lines, mining and forestry railways, and fees.

<sup>107</sup> Transport Accident Investigation Commission [TAIC] *Railway Occurrence Reports*, various dates.

casualties, but which expose people to risk and which may be precursors to accidents.<sup>108</sup> TAIC “determine[s] the circumstances and causes of accidents and incidents with a view to avoiding similar occurrences in the future”.<sup>109</sup> While they do not “ascribe blame”<sup>110</sup> they do make recommendations, and monitor rail companies’ actions on them.<sup>111</sup> No aspect of road activity is subject to TAIC’s scrutiny.<sup>112</sup>

#### *D International Comparisons*

The rules for railway safety responsibility are consistently strict across the three jurisdictions studied, and are similar to those in New Zealand.

In Australia a model Railway Safety National Law has been passed in all jurisdictions except Queensland.<sup>113</sup> The law is in the schedule to the Rail Safety National Law (South Australia) Act 2012 (SA). Its objects include effective management and control of rail risks, safe operations, continuous improvement of rail safety, and the promotion of public confidence in safe rail passenger and freight transport.<sup>114</sup> It requires risks to be eliminated so far as reasonably practicable, or to minimise them if elimination is not possible.<sup>115</sup> “Reasonably practicable” is defined in the same terms<sup>116</sup> as in the Australian Model Work Health and Safety Act, including the cost of avoiding the risk needing to be “grossly disproportionate to the risk”.<sup>117</sup>

Duties are placed on rail operators, infrastructure providers, rolling stock operators, designers, manufacturers, suppliers, installers, and freight loaders to ensure safety as far as reasonably practicable.<sup>118</sup> These duties are not confined to employees or to a workplace, but are of general application. Safety covers workers, passengers, crossing users, other users, and the general public.<sup>119</sup>

The model law provides for a system of compulsory accreditation of railway operators.<sup>120</sup> This involves having a safety management system, similar to the New

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<sup>108</sup> RA, s 4(1), definition of “incident”.

<sup>109</sup> Transport Accident Commission Act 1990, s 4 [TAICA].

<sup>110</sup> Section 4.

<sup>111</sup> TAIC “Outstanding Safety Recommendations”, [www.taic.org.nz](http://www.taic.org.nz).

<sup>112</sup> TAICA, s 13.

<sup>113</sup> Rail Safety National Law (South Australia) Act 2012 (SA), Rail Safety (Adoption of National Law) Act 2012 (NSW), Rail Safety (National Uniform Legislation) Act 2012 (NT), Rail Safety National Law (Tasmania) Act 2012 (Tas), Rail Safety National Law Application Act 2013 (Vic), Rail Safety National Law (ACT) Act 2014 (ACT), Rail Safety National Law (WA) Act 2015 (WA). See Office of the National Rail Safety Regulator <[www.onrsr.com.au](http://www.onrsr.com.au)>.

<sup>114</sup> Rail Safety National Law (Aust) (Schedule to Rail Safety National Law (South Australia) Act 2012 (SA), s 3.

<sup>115</sup> Section 46.

<sup>116</sup> Apart from deleting references to “health”.

<sup>117</sup> Rail Safety National Law (Aust), s 47; Model Work Health and Safety Act (Aust), s 18.

<sup>118</sup> Sections 52–54.

<sup>119</sup> Section 4, definition of “safety”.

<sup>120</sup> Section 62.

Zealand safety case.<sup>121</sup> This system has to cover compliance with risk management obligations, identify and assess safety risks, specify the controls for managing them, and include procedures for monitoring, reviewing, and revising those controls. It also needs to include plans for health and fitness, drug and alcohol management, and fatigue management.<sup>122</sup> There are fines of up to \$500,000 for not having any of these or not implementing them.<sup>123</sup> The system must be implemented and complied with (without reasonable excuse), or face fines of up to \$1.5 million.<sup>124</sup>

This is a very extensive and far reaching law (over 140 pages and 265 sections long), giving tight regulation of the rail industry throughout Australia. While framed in risk management terms, it does give the regulator wide powers to control rail safety. Even though some of its provisions relate to the equivalent of driver and vehicle on roads, the contrast with the minimal regulation of road infrastructure is stark.

A federal law, the Railway Safety Act, applies to railways in Canada.<sup>125</sup> As in Australia, this too is an extensive statute. Its objectives also include the safety and security of workers and the public, as well as the protection of property and the environment. It also relies on safety management systems,<sup>126</sup> which have to cover similar matters to those in Australia and New Zealand.<sup>127</sup> Fines of up to \$1 million can be imposed against a corporation for breaches of the act.<sup>128</sup>

In 1993 the Railways Act 1993 (UK) transferred all rail safety regulation to the Health and Safety at Work etc. Act 1974 (UK).<sup>129</sup> Railway coverage was initially administered by the same body as for all industries, the Health and Safety Executive, but was later transferred to ORR.<sup>130</sup> Coverage included the general public, whether or not passengers, as well as employees and oversight of construction and operation of systems and vehicles.<sup>131</sup> Specialist regulations complement the general Act.<sup>132</sup>

Thus in Britain the railway system is subject to the stringent “ensuring” safety “as far as reasonably practicable” standard, covering both employees and others.<sup>133</sup>

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<sup>121</sup> Section 64.

<sup>122</sup> Section 99.

<sup>123</sup> Sections 112–116.

<sup>124</sup> Section 101.

<sup>125</sup> Railway Safety Act RSC 1985 c 32 (4th Supp).

<sup>126</sup> Section 3. A “safety management system” is defined in s 4 as “a formal framework for integrating safety into day-to-day railway operations and includes safety goals and performance targets, risk assessments, responsibilities and authorities, rules and procedures, and monitoring and evaluation processes”.

<sup>127</sup> Railways Safety Management System Regulations SOR/2001-37, reg 2.

<sup>128</sup> Section 41.

<sup>129</sup> Railways Act 1993 (UK), s 117(1).

<sup>130</sup> Railways Act 2005 (UK), s 2.

<sup>131</sup> Schedule 3, cl 2.

<sup>132</sup> Principally the Railways and Other Guided Transport Systems (Safety) Regulations 2006 (UK).

<sup>133</sup> Health and Safety at Work etc Act 1974 (UK), ss 2(1) and 3(1).

#### *IV Conclusion*

New Zealand local roads are covered by a specific safety duty, but not the more heavily used state highways. On the other hand rail is subject to specific and intensive safety obligations, which are actively monitored and enforced. Internationally the situation for rail is similar, as it is for road in some jurisdictions. However, other jurisdictions have imposed safety obligations on roads, which while an advance on those in New Zealand, are still subject to restrictions and qualifications that do not apply to the rail safety rules.

## Chapter Four: Health and Safety at Work Act 2015

### *I Introduction*

Safety on road and rail might be thought to be covered by health and safety legislation, just as all other parts of the economy are. Work is required to produce both, and deficiencies in that work can cause harm. In most industries that would create a liability under the Health and Safety at Work Act 2015 (HSWA). However, while it is clear that the HSWA does cover railways,<sup>1</sup> it is less clear that it covers roads in the sense of the actual roading infrastructure. If it did cover roads, the safety discipline would become much stricter, and have a higher priority, than at present. That should lead to improved safety performance and fewer casualties.

This Chapter explores whether the HSWA does cover roads and roading authorities. While the Health and Safety in Employment Act 1992 (HSEA) has been superseded, jurisprudence on it will be considered where relevant, as it is likely to be used in HSWA cases, especially where the wording is similar in each.

### *II Not Public Safety Legislation*

Coverage of roading would give the HSWA a “public safety” role, and it has been argued that on a purposive interpretation that its predecessor the HSEA did not have that role.<sup>2</sup> Its purpose was to protect workers from harm and only incidentally to protect those around the work place, such as members of the public.<sup>3</sup> Nor is health and safety legislation “directed at general product liability” once work has finished.<sup>4</sup>

The same is purported to be true of the Australian Model Bill and Act (“Model Act”)<sup>5</sup>, and so the HSWA which is based on it. “The [Australian Model] Bill is not intended to extend such protection in circumstances that are not related to work”. Harm has to be work related, although those harmed need not be workers.<sup>6</sup> The Model Act “is not intended to have operation in relation to public health and safety more broadly, without the necessary connection to work”.<sup>7</sup> A review preceding the Model

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<sup>1</sup> Railways Act 2005, s 8 [RA]. For example, see *Worksafe New Zealand v KiwiRail Holdings Ltd* [2015] NZDC 18904.

<sup>2</sup> *Department of Labour v Berryman* [1996] DCR 121 at 132 and 135.

<sup>3</sup> Health and Safety in Employment Act 1992, s 5 [HSEA].

<sup>4</sup> *Inspector Campbell v James Gordon Hitchcock* [2004] NSWIRComm 87 at [304], cited in *Telstra v Smith* [2008] FCA1859 (Middleton J) at [26]. [*Telstra* Middleton J].

<sup>5</sup> Model Work Health and Safety Bill (Aust) (revised draft 23 June 2011) Safe Work Australia <[www.safeworkaustralia.gov.au](http://www.safeworkaustralia.gov.au)>. This is variously called a Bill and an Act. In this dissertation it is referred to as an Act, following the Health and Safety at Work Act 2015 [HSWA] usage, except where direct quotations use “Bill”.

<sup>6</sup> Safe Work Australia, “Explanatory Memorandum – Model Work Health and Safety Bill”, at [60] <[www.safeworkaustralia.gov.au](http://www.safeworkaustralia.gov.au)>.

<sup>7</sup> At [61].

Act was at pains to recommend to limit the application of occupational health and safety (OHS) laws to public safety, by drafting the Act to “avoid giving it a reach that is inconsistent with” “protection of all persons from work related harm”.<sup>8</sup> But according to Johnstone and Tooma, “[t]he drafting of the Model Act does not, however, reflect any such caution. On its language it applies to public health and safety as much as traditional workplace health and safety situations.”<sup>9</sup> They observe that “where work ends and public health and safety begins is not easily ascertainable in a modern work context”.<sup>10</sup>

The non-application to public safety is not, in any case, an inescapable interpretation. In England and Wales, the Health and Safety at Work etc. Act 1972 (UK) is the principal safety regulation instrument for railways and has been extended to cover their public safety aspects,<sup>11</sup> albeit now administered for “railway purposes” by a specialist rail body.<sup>12</sup> It could be possible to do the same in New Zealand, and thus not have the complication of the same duties as the HSWA being repeated in the Railways Act.<sup>13</sup> It could also be extended in a similar manner to cover roading.

The Australian Review’s desire to limit the scope of the Model Act has to be tempered by the need to cover third parties against work-related harm. Even in their report they include “all persons”, so it is inevitable that some public safety is included, as it is in ss 3(1)(a) and 36(2) of the HSWA. The “core issue” according to the review is “not whether OHS laws should protect public safety ... but how wide the protection should be”.<sup>14</sup> The key question is how close the connection with work is in time and space. Hence road safety in the sense of road user behaviour would not be expected to be covered by OHS laws (leaving aside the vehicle itself as a workplace),<sup>15</sup> but it is not so clear that work activities in building and maintaining a road are automatically excluded.

### *III Key Sections*

This part considers key sections of the Act, and examines them to see how far they might apply to roads, and how that differs from the application to rail.

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<sup>8</sup> Australian Government, *National Review into Model Occupational Health and Safety Laws, Second Report to the Workplace Relations Minister’s Council* (Commonwealth of Australia, Canberra, January 2009) Rec 77 at 26, and discussion at 18–26 [Second Review Report].

<sup>9</sup> Richard Johnstone and Michael Tooma, *Work Health and Safety Regulation in Australia. - The Model Act* (Federation Press, Sydney, 2012), at 16.

<sup>10</sup> Johnstone and Tooma, above n 9, at 90.

<sup>11</sup> Railways Act 1993 (UK), s 117. *Railtrack plc v Smallwood* [2001] EWHC 78 (Admin), [2001] ICR 714 discusses the public safety aspects of a prohibition order.

<sup>12</sup> Railways Act 2005 (UK), s 2.

<sup>13</sup> RA, ss 5, 7 and 9.

<sup>14</sup> Second Review Report, above n 8, at 25.

<sup>15</sup> HSWA s 20(2)(a).

A *Reasonably Practicable, s 22.*

Section 22 defines “reasonably practicable” to mean what could reasonably be done in the light of likelihood and consequence of a risk, what was or ought to have been known about it, how it might be minimised or eliminated, and cost. It is the cost element that creates a significant difference between road and rail. It requires a “gross disproportion” between costs and benefits before costs outweigh safety factors.<sup>16</sup> This factor was part of the common law but is now made explicit.<sup>17</sup> “Grossly disproportionate” is not defined in the Act, nor has it been judicially defined,<sup>18</sup> but “grossly” does not admit of a small difference.

This has been applied to rail only recently, and never to road. The Land Transport Act 1993 defined a cost as reasonable “if the value of the cost to the nation [was] exceeded by the value of the resulting benefit to the nation”.<sup>19</sup> This is much the same as the current perspective on road infrastructure spending on safety. At the time, rail was also only expected to achieve safety at reasonable cost, through its safety system,<sup>20</sup> and the stricter standards of the HSEA did not apply if rail complied with the safety system.<sup>21</sup> This proved contentious and was repealed after a Ministerial Inquiry.<sup>22</sup>

Both the Land Transport Act provisions and the primacy of rail’s safety system have been repealed.<sup>23</sup> Rail safety became much stricter, but the safety criterion for road infrastructure has relaxed.<sup>24</sup> In practice, as discussed in Chapter One, road still takes a cost-benefit approach like the “reasonable cost” one, in which a project is worthwhile if the ratio of benefits to cost exceeds one.

Rail operators are now compelled to prioritise safety by the high standard of “reasonably practicable”, including the “grossly disproportionate” ratio. Economists commenting on railway safety have pointed out the distortionary impact of this rule. It effectively mandates projects with benefit: cost ratios less than one (one would be “proportionate” in their eyes).<sup>25</sup> Thus for industries subject to the HSWA, it might be

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<sup>16</sup> HSWA s 22(e).

<sup>17</sup> *Edwards v National Coal Board* [1949] 1 KB 704 (CA) at 712. *Department of Labour v De Spa* DC Christchurch CRI-30090213/93 8 October 1993. See Johnstone and Tooma, above n 9, at 71–73.

<sup>18</sup> Office of the National Rail Safety Regulator *Meaning of Duty to Ensure Safety So Far as is Reasonably Practicable Guideline* (Adelaide 2014) at 12 [ONRSR].

<sup>19</sup> Land Transport Act 1993, s 16(2). Re-enacted in the Land Transport Act 1998, s 189(2).

<sup>20</sup> Transport Services Licensing Act 1989, s 6C(b) [TSLA]. There was a similar approach for aircraft and ships, now covered by HSWA ss 9 and 10.

<sup>21</sup> TSLA s 6H.

<sup>22</sup> WM Wilson QC *Report of the Ministerial Inquiry into Tranz Rail Occupational Safety and Health* (Wellington, August 2000).

<sup>23</sup> By, respectively, the Land Transport Amendment Act 2004, s 11; and RA, Schedule 1.

<sup>24</sup> The Land Transport Act provisions were replaced by even softer, more general provisions in the Land Transport Management Act 2003 [LTMA], ss 3 and 68(1), as amended by the Land Transport Management Amendment Act 2004. The equivalent provisions in the LTMA today are its purpose, s 3, and the New Zealand Transport Agency’s functions, s 94.

<sup>25</sup> Andrew W Evans “The economics of railway safety” (2013) 43 *Research in Transportation Economics* 137 at 141 and 142.

necessary to spend \$3 or even \$10 to achieve a safety benefit worth \$1, to comply with the Act.<sup>26</sup>

### *B Workplace, s 20*

The principal case on whether a road is a place of work (now a “workplace”) is *Department of Labour v Berryman*.<sup>27</sup> Mr Berryman was charged under the HSEA in relation to a beekeeper (not a Berryman employee) who died when his vehicle fell through a suspension bridge that Mr Berryman owned. The prosecution alleged that the bridge was a place of work, and had been allowed to decay and become unsafe. If this prosecution had been successful then it would have opened up liability for road owners generally, as it would have been difficult to distinguish a bridge from another deficient part of a road.

The definition of workplace in the HSWA is similar to that in the HSEA. For a road to be a workplace, it now needs to meet the HSWA definition:

#### **20 Meaning of workplace**

(1) In this Act, unless the context otherwise requires, a workplace—

(a) means a place where work is being carried out, or is customarily carried out, for a business or undertaking; and

(b) includes any place where a worker goes, or is likely to be, while at work.

(2) In **subsection (1)**, **place** includes—

(a) a vehicle, vessel, aircraft, ship, or other mobile structure; and

(b) any waters and any installation on land, on the bed of any waters, or floating on any waters.

A place includes “any installation on land” which would include a road. A road is clearly a workplace for an employee when that person is in fact working on it, for example, repairing or maintaining it. Mr Berryman was not at the time working on the bridge. The judge thus focussed on the “customarily works” element of the HSEA definition (similar to HSWA s 20(1)(a)). In his view “customarily” “denotes some degree of frequency rather than mere intermittent activity over a number of years”.<sup>28</sup> He agreed that “the carrying out of maintenance work on a structure on an intermittent basis does not mean that the structure could be a ‘place of work’ for all time”.<sup>29</sup> Nor did mere responsibility for maintenance mean it became a place of work. As regards Mr Berryman, then, the bridge was not a place of work. By the same reasoning, periodic maintenance on a road would not make it a workplace with respect to the road

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<sup>26</sup> ONRSR, above n 18, at 12.

<sup>27</sup> *Berryman*, above n 2.

<sup>28</sup> At 132.

<sup>29</sup> At 132.



owner, if work was not actually being done at the time. As well, a person “customarily” working involves an element of frequency – repetitive working over the course of a year, for example. Random repairs or maintenance are unlikely to be “customarily” enough to bring it into the definition.

The beekeeper’s crossing of the bridge was to be brief, and the judge thought that “place” connoted one “where a person is working in more than a transitory sense”. “Merely passing while at work” was not enough. The HSEA was amended to remove the transitory point, by including “any place a person moves through”,<sup>30</sup> but a transitory argument might still appeal on the HSWA wording in s 20(1)(b).

The way the wording of subsection (1)(a) is phrased reinforces the present nature of the work – “is being” carried out, not “has been” or “will be” nor even simply “is”. This definition is slightly different from the Australian Model Act, s 8, as the definition uses the Review Committee’s stronger emphasis on the present tense, adding “being”, rather than simply “is carried out”.<sup>31</sup> That committee specifically thought making a place a workplace at all times to be undesirable.<sup>32</sup> This is however not the interpretation of the Model Act by Safe Work Australia.<sup>33</sup> Tooma though is firm that workplace is limited to the present tense.<sup>34</sup> The present tense of the definition makes it unlikely that it would work for the potentially many years that could elapse between the design or construction of a road and a deficiency causing harm. This is discussed below.

But on the reading in *Berryman*, a person only has to own or occupy (now “manage or control”)<sup>35</sup> a workplace, which can be a workplace by virtue of another party’s work there, and does not have to be his or her own workplace.<sup>36</sup> HSWA s 37(1) is still open to this reading. So the road could be made into a workplace by its user being in a work-related vehicle and the roading authority therefore made liable under s 37.<sup>37</sup>

A recent Australian case extends the “workplace” tantalisingly close to one that might include roads – but stops short. It provides some extension to the “transitory” interpretation in *Berryman*. In *Telstra Corporation Ltd v Smith*<sup>38</sup> a pedestrian fell into

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<sup>30</sup> HSEA s 2(3) substituted by the Health and Safety in Employment Amendment Act 2002, s 4(12).

<sup>31</sup> Second Review Report, above n 8, Recommendation 94, at 98. Changes in the House reinforced the HSWA section’s present tense focus. In the first draft of the Bill the clause simply read “where work is carried out”, a formulation less clearly limited to the present tense: Health and Safety Reform Bill 2014 (192-1), cl 15.

<sup>32</sup> At 97.

<sup>33</sup> Safe Work Australia, above n 6, at [48]-[50].

<sup>34</sup> Michael Tooma, *Tooma’s Annotated Work Health and Safety Act 2011* (Lawbook, Sydney 2012), at 25.

<sup>35</sup> HSWA, s 37.

<sup>36</sup> *Berryman*, above n 2, at 131.

<sup>37</sup> The Select Committee report on the 2002 HSEA amendment recognised that a road could be a place of work for the vehicle owner. Health and Safety in Employment Amendment Bill 2001 (163-2) (Commentary) at 4.

<sup>38</sup> *Telstra v Smith* [2009] FCAFC 103, (2009) 177 FCR 577; (Full Court) [*Telstra FC*].

a Telstra-owned manhole when its cover collapsed, and was injured. Telstra challenged a finding of liability under the Occupational Health and Safety Act 1991 (Cth), s 17,<sup>39</sup> which was similar to HSWA s 37.

The question was whether the manhole cover was a workplace, which was very generally defined essentially as a place where contractors or employees worked.<sup>40</sup> Applying the logic in *Berryman* one might think that the interaction with the manhole cover by both Telstra and the injured party was too transitory for Telstra to be liable. Clearly the injured party would have been “at” (on) the manhole cover only very briefly, if it had not collapsed. The last time the pit was used by Telstra (by a contractor) was over two months before the accident.<sup>41</sup>

Telstra in fact contended at first instance that to be a workplace, work had to be going on at the time.<sup>42</sup> They also referred to the objects of the Act, which included protection to third parties “*arising out of the activities of such employees at work*”.<sup>43</sup> They referred to a number of cases where work on infrastructure was intermittent, and because of that the relevant places were not workplaces at all times. It was argued that there was a “temporal”<sup>44</sup> aspect to the definition.<sup>45</sup> In one of these cases:<sup>46</sup>

[n]or could the fact that at one time, the defendant had there performed work on the pipes, thereafter make that place the defendant’s place of work.

The situation with a road is closely analogous. In fact, on appeal the Full Court commented that “[t]here is no reason to think that an employer is not liable under s 17 if an employee creates a dangerous situation in the workplace whilst at work and the non-employee is injured after the employee has ceased work”.<sup>47</sup> This is on all fours with a deficiency in a road causing an injury in the absence of road authority employees, at least where the deficiency is caused by an employee’s action, for example design.

“There is no need to give workplace a meaning which requires a temporal connection between the place or premises and the work to be performed.”<sup>48</sup> The manhole is designed only to enable work to be done. “There is no reason to limit a workplace to a place where work is being performed at any particular time. A

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<sup>39</sup> At [12].

<sup>40</sup> Occupational Health and Safety Act 1991 (Cth), s 5; *Telstra FC*, above n 38, at 585.

<sup>41</sup> *Telstra FC*, above n 38, at [16].

<sup>42</sup> *Telstra* Middleton J, above n 4, at [19].

<sup>43</sup> *Telstra* Middleton J, above n 4, at [20] – judge’s emphasis.

<sup>44</sup> *Telstra FC*, above n 38, at [47].

<sup>45</sup> See *WorkCover Authority of NSW (Inspector Paine) v Boral John Perry Industries Pty Limited t/as Boral Elevators* (unreported, Industrial Relations Commission NSW, 8 August 1996) and *WorkCover Authority of New South Wales (Inspector Maltby) v AGL Gas Networks Limited* [2003] NSWIRComm 370, both analysed in *Telstra* Middleton J, above n 4, at [22]–[29].

<sup>46</sup> *AGL*, above n 45, at [168], quoted in *Telstra* Middleton J above n 4 at [28].

<sup>47</sup> *Telstra FC*, above n 38, at [55].

<sup>48</sup> At [49].

workplace is a place where work is performed from time to time”.<sup>49</sup> Even a woolshed used only a few weeks in the year remains a workplace outside those times.<sup>50</sup>

In a recent New Zealand case,<sup>51</sup> a place of work was interpreted clearly in the present tense, where work is being carried out. It “can only be a place where a reasonable person would appreciate that work is being undertaken”, as shown by signs or “other external indications”.<sup>52</sup> In that case, the work place was limited to the actual site on the house where the roofing work was being done (along with relevant scaffolding).<sup>53</sup> The adjacent driveway where the person was injured was not in the place of work. This analysis applies even more strongly under the HSWA definition of “workplace” (HSWA), with its “being carried out” wording.

On this analysis a road is not a workplace for the authority unless some physical work is actually going on at the time.

In HSWA, s 20(1)(b), there is a potentially prospective phrase, “is likely to be”. This would be likely to cover the *Telstra* situation,<sup>54</sup> but not help with the roading issue, as a roading authority employee might be unlikely to visit a particular section of road very often, so is not “likely” to be there. A vehicle can be a workplace<sup>55</sup> and so for work use of a vehicle, a road is also likely to be a workplace under s 20(1)(b), since that is a “place where a worker goes”. The language of the HSEA s 2(3), about a place a “person moves through”, has been dropped.

The distinction between a road and a railway is that the road is intended to be used by third parties, without the presence of an employee of the roading authority. While its deficiencies may be the result of work (or inaction) by such an employee, he or she is not present at the time a deficiency causes problems. On the other hand, rail activities with third parties (for example passengers) usually involve a railway staff member (or a contractor), and the railway is readily made liable under the HSWA.

There may be circumstances where the affected party on a railway is in a similar position to a road user. Where track is provided by one railway for another rail operator to use (as occurs with suburban and rail enthusiast trains), a situation analogous to a road might arise. That is, a latent deficiency of the track caused by its owner’s staff might harm one of the second operator’s staff or passengers long after the deficiency was caused, and the nexus between the incident and the track owner’s staff could be

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<sup>49</sup> At [49].

<sup>50</sup> At [50].

<sup>51</sup> *Alliance Roof Solutions Ltd v Ministry of Business, Innovation and Employment* [2014] NZHC 2625, (2014) 12 NZELR 204.

<sup>52</sup> At [41].

<sup>53</sup> At [56(a)].

<sup>54</sup> *Telstra FC*, above n 38.

<sup>55</sup> HSWA, s 20(2)(a).

as remote as on road. In this situation the track owner could also claim (if prosecuted under the HSWA) that the site of the incident was not a workplace (with respect to it).

However the provisions of the Railways Act 2005 (RA) do not rely on the workplace point, and the track owner would probably be liable for not ensuring safety “as far as reasonably practicable”.<sup>56</sup> Section 7 makes it clear that coverage is not limited to workers or incidental activities related to work, but to the function of operating a railway<sup>57</sup> and the safety of all individuals. Section 9(1) puts duties to keep all individuals safe on all persons on the railway, not just staff. These sections are reinforced by one of the purposes of the RA in s 3(a)(i), to ensure safety of rail operations, not just the safety of those working for the railway. This is clearly one reason for having a separate railway safety Act, even though its duties mirror those in the HSWA.

The same gap exists with respect to roading, but there is no Roads Act to fill it.

### *C PCBU duty to third parties, s 36(2)*

Section 36(2) provides that a person conducting a business or undertaking (PCBU):

... must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

A road is designed, built, and maintained as part of the “conduct of the business or undertaking”. If any of these things are deficiently done, then prima facie that could cause harm and the roading authority may not have done all that was reasonably practicable to prevent it. Note that failure to do something is equally culpable under the section as doing something badly. Nor is there any temporal restriction in the wording of this section. As long as the risk flows from the “conduct of the business” then the duty applies. It does not have to be an immediate consequence of a particular action or inaction.

As with the similar HSEA s 15, this has no locational constraints – harm caused anywhere by work will be caught. As long as the work is “carried out” [somewhere] “as part of the ... undertaking”, it is caught. Nor would an objection that roading is not a business succeed – it is clearly an undertaking (and even the fact it is not required to make a profit is irrelevant).<sup>58</sup> Section 36(2) reflects the Australian reform committee’s view that some interpretations of “workplace” had limited its scope. They

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<sup>56</sup> RA, s 5

<sup>57</sup> Including its infrastructure: RA, s 4(3).

<sup>58</sup> HSWA, s 17(1)(a)(ii).

thought that any activity and consequence “resulting from the conduct of the business or undertaking” should be caught.<sup>59</sup>

There are subtle differences in wording between s 36(2) and HSEA s 15. The latter section focuses on the employee’s action or inaction “while at work”. HSWA s 36(2) focuses on “work carried out”. While the HSEA section arguably has no temporal constraint, the HSWA section appears even clearer in this regard. Work carried out at any time or in any place could put a person at risk at any other time or place. Clause 36(2) may well create obligations on roading authorities.

In *R v Mara*<sup>60</sup> the English Court of Appeal considered the “third party” provision in their health and safety legislation. An employee of another company used and was killed by faulty equipment owned by Mara’s company for its business. Mara allowed employees of the first company to use it, without any of Mara’s employees being present. The equipment was simply left for the employees of the other company to use.

The court held that Mara was rightly convicted and dismissed the appeal. The United Kingdom section imposed a duty to ensure “that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety”.<sup>61</sup> It corresponds to HSWA s 36(2). The provision would arguably apply to those who provide roads that affect others and expose them to risk. As noted, it does apply to railways for all purposes in the United Kingdom, including public safety.

In an Australian case preceding the Model Bill it was held that an undertaking was still being conducted when a scaffolding blew down even though work on erecting it had finished.<sup>62</sup> The intervening period was however short, and the principle may not extend to a roading situation. Foster notes a case where an authority responsible for approving the construction of a structure was held liable under health and safety laws for its collapse some years later, injuring third parties. He observes that today the prosecution would likely have been under the Model Law equivalent of s 36(2).<sup>63</sup> A prosecution would be possible “so long as the ‘causal chain’ between the business or undertaking and the harm was not too long”.<sup>64</sup> He means long in the sense of remote,

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<sup>59</sup> Australian Government, *National Review into Model Occupational Health and Safety Laws, First Report to the Workplace Relations Minister’s Council* (Commonwealth of Australia, Canberra October 2008) Recommendation 17, at 72.

<sup>60</sup> *R v Mara* [1987] 1 WLR 87 (CA).

<sup>61</sup> Health and Safety at Work etc. Act 1974 (UK), s 3(1).

<sup>62</sup> *Inspector Maltby v Harris Excavations and Demolition Pty Ltd* (Industrial Relations Commission of New South Wales, Cahill VP, 2 May 1997). Cited in Richard Johnstone, Elizabeth Bluff and Alan Clayton, *Work Health and Safety Law and Policy*, (3th ed, Lawbook, Sydney 2012), at 225-226.

<sup>63</sup> Neil Foster *Workplace Health and Safety Law in Australia* (Lexis Nexis Butterworths, Sydney 2012), at 369; citing *R v Mayor, Councillors, and Citizens of the City of Dandenong and Noel Bailey* (County Court of Victoria, Stott J, 8 November 1991); facts set out in *Director of Public Prosecutions Ref No 1 of 1992* [1992] 2 VR 405 (VCCA).

<sup>64</sup> Foster, above n 63, at 368.

many links in the chain, but the same comment probably applies to long in time. There is a clear analogy to road work – the authority does work (or should have) and sometime after an accident occurs that can be attributable to that work (or inaction).

A further avenue of escape for a roading authority might be whether its actions or inactions can be said to create risks to someone. Tooma notes that the Model Law equivalent is broad, but nevertheless there has to be “sufficient proximity to the person which makes the possibility of danger real and not too remote or fanciful”.<sup>65</sup> “Proximate” here again appears to mean close in causation terms, not necessary in time. The concern with this dissertation is that even obvious lapses by a roading authority attract no sanction, and borderline causality is not of critical importance.

#### *D Section 37*

This section provides:

##### **37 Duty of PCBU who manages or controls workplace**

- (1) A PCBU who manages or controls a workplace must ensure, so far as is reasonably practicable, that the workplace ... and anything arising from the workplace are without risks to the health and safety of any person.

...

Again, if a road is a workplace, then this would impose a duty with respect to road users. A road authority owns the road so would control it. It controls the road not only in the sense of how it is made and maintained, but also in the case of New Zealand Transport Agency, controls those who use it, through licensing, and through its contract with the Police for enforcement of road rules.

But the duty need not require the road itself to be a workplace. The office where decisions are taken on design, construction, and maintenance is clearly a workplace, and the decisions fall within “anything arising from the workplace”. This might be narrowly interpreted to cover only the direct risks of anything physical arising, like fumes or noise; but the section is not narrowly worded, and decisions certainly arise from a workplace. They may contain risks (albeit latent ones which might take some time to manifest themselves).<sup>66</sup> This interpretation is reinforced by the specific coverage of design in s 39.

Moreover the width of s 37 would cover policies, for example those on heavy vehicle mass and dimensions, which might have safety consequences independently of the road itself. This section could be an important tool in the safety management of

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<sup>65</sup> Michael Tooma, *Tooma's Annotated Work Health and Safety Act 2011* (Lawbook, Sydney 2012), at 42.

<sup>66</sup> For example, decisions on road markings – *Re Angus George Johnson Donald*, Coroners Court, Wellington, CSU-2014-WGN-000262, 7 December 2015, Coroner Evans.

roads – if not curtailed by a purposive interpretation that the context of the harm has to be a direct work context. The purpose of the Bill, as noted earlier, does include coverage of people who are not workers, on equal footing, in the same subsections.<sup>67</sup> Johnstone and Tooma note that the “Model Act is only intended to protect persons who are not workers from hazards and risks *arising from work carried out as part of the business or undertaking*”.<sup>68</sup> Whether the risks arising from roading are as a result of work “carried out” should not be in doubt, but the HSWA now reads “being carried out”, which adds some doubt.

They go on to note that the Model Act is not built round employment or workplaces. The primary duty (in s 36 of the HSWA):<sup>69</sup>

is triggered by risks to all people – ‘workers’ and ‘others’ arising from work of any kind, carried out by all kinds of workers in all kinds of work arrangements for all kinds of business organisations.

And:<sup>70</sup>

The laws are not limited to workplaces and operate to capture any risk to health and safety arising from work in the conduct of any business or undertaking.

They believe its scope to be so broad as to allow actions against tobacco companies for public health consequences.<sup>71</sup> The harm arises from the work in making, distributing, and selling cigarettes, not from any direct impact of work in the narrow sense in the factory. On this reading, it should also apply to a roading organisation. Work in making and maintaining the road, if not properly done, gives rise to risks to safety. If the costs of avoiding those risks is high, just as it would be for a tobacco company, that is not relevant unless it is “grossly disproportionate”<sup>72</sup> to the risk.

There is a “farmers” exception in s 37(3). The HSWA duties do not apply to a part of a farm unless work “is being carried out” there “at the time”. The wording of s 37(3)(b)(ii) identifies the issue with respect to roads, that while they are a product of work, they may not be a workplace unless actual roading work is taking place: most of the time, work is not being carried out on roads. In farming terms, persons who are not working but who are injured by previous work not being adequately done (for example, on a farm bridge) or not done at all (such as no protection against falls from paths or structures) would not result in the farmer being liable. In roading terms, if such an exemption applied, persons (not working) injured by poor maintenance, construction or design equally might not have a case against roading authorities. But

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<sup>67</sup> HSWA, s 3(1)(a) and 3(2).

<sup>68</sup> Johnstone and Tooma, above n 9, at 62. Their emphasis.

<sup>69</sup> At 77.

<sup>70</sup> At 90.

<sup>71</sup> At 88–90.

<sup>72</sup> HSWA s 22(e).

the absence of a similar provision for roads implies that work does not have to be actually being carried out at the time for roads to be caught.

Whether s 37 would make a road owner liable still ultimately turns on the definition of workplace, and while it is now arguable that a road is a workplace, it is likely to be looked at through the present tense and employment focussed lens of somebody working there. A roading authority is unlikely to be prosecuted, let alone convicted.

#### *E Specific Duties for Particular Work, ss 38-43*

Section 38 provides that a PCBU must “as far as reasonably practicable, ensure that ... fixtures, fittings or plant ... are without risks to ... any person”. Similar phrases are included in ss 39 (design of plant, substances or structures),<sup>73</sup> 40 (manufacture), 41 (imports), 42 (supply) and 43 (installation, construction, or commissioning). They also extend the duty to those in the vicinity of a workplace.

Sections 38-43 are inherently prospective, in that the actions of design, manufacture, and so on take place over a short time and then the risks from them run. They apply to structures “to be used” as or at a workplace.<sup>74</sup> There appears to be no time limit on their application.

Section 39 (design) in particular can only be prospective. There are no significant risks in the design process except those that result from deficiencies in the design itself, once built and used, so there is no point in having the section unless it is prospective in effect. The duty arises when the work is done, but the crystallisation of that duty may be a long way off in time. Nor is there much point if the design duty is limited to the workplace it was created in. By definition, it will be likely to be used in another place.

This still requires that the structure is or is used at a workplace (or could reasonably be expected to be used).<sup>75</sup> So if the road is a workplace for the roading authority, then the duty is clear. But if it is not a workplace for the authority, it is still arguably a workplace for many users who drive vehicles in the course of their work. Sections 39-43 provide for a duty to be owed by persons in one workplace to those in another, of which a road could be an example. If the road itself is not a workplace, then for commercial vehicles, which are workplaces (including cars driven for work purposes), the designer and builder of the road could be caught by ss 39(2)(f) and 40(2)(f), which cover duties owed to those “at or in the vicinity of a workplace and who are exposed to the ...structure” at the workplace.

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<sup>73</sup> A “structure” includes “anything that is constructed”, which would include a road: HSWA s 16.

<sup>74</sup> HSWA ss 39(1)(c), 40(1)(c), 41(1)(c), 42(1)(c), 43(1).

<sup>75</sup> HSWA s 39(1)(c).



Indeed s 39(2)(a) and s 40(2)(a) could be read in the same manner: the designer or manufacturer owes duties to those:<sup>76</sup>

- (a) Who, at a workplace, use the ... structure for a purpose for which it was designed or manufactured.

The vehicle is a workplace for some, and there is nothing to say that the structure referred to has to be part of the same workplace. While the drafters may have thought that the circumstances would usually involve a structure in the same workplace, they have not said so, and so have created a liability to ensure the safety of commercial users of the structure (road).

This does however suffer from the disadvantage of only impacting on a subset of the vehicle users, and so is not of general application. Those using the road for non-commercial purposes would not be covered, although the specific exemption for those using a facility for leisure is not carried over from HSEA s 16. It would be an unsatisfactory position to have the law only protect a part of those who use the road, and this may in itself indicate a forced reading of it. It would be much more satisfactory to make it clear that the duties are held in respect of all users, through a roading equivalent of the RA.

#### *F Personal Duty of Workers and All Persons to Others, ss 45, 46*

As well as the PCBU, any worker must take reasonable care to avoid adversely affecting their own and others' safety.<sup>77</sup>

The phrase "reasonable care" is not defined. It is arguably a lesser obligation than s 36's duty to ensure safety "so far as is reasonably practicable".<sup>78</sup> It nevertheless is not limited by time, and a worker (widely defined)<sup>79</sup> for a roading authority could be liable for careless acts or omissions.

Under s 46, any person (including a PCBU or a worker) at a workplace has to take reasonable care to avoid harm to anyone else, inside or outside the workplace, and at any time. According to Foster, the Australian equivalent, s 29, is a new and untested provision, going beyond workplace safety into the area of public safety, though his examples are of members of the public who are in readily identifiable workplaces such as shopping centres or public libraries.<sup>80</sup>

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<sup>76</sup> Sections 40(2)(a); s 39(2)(a) are in similar terms.

<sup>77</sup> HSWA s 45.

<sup>78</sup> Foster, above n 63, at 410.

<sup>79</sup> HSWA s 19.

<sup>80</sup> Foster, above n 63, at 411.

#### *IV Summary*

The HSWA applies to rail, but is not so clear that it applies to roads. While a purposive argument could be made about restricting its application to situations closely linked to employment, it also includes a purpose to protect others (other than employees) within the first objective (which has been referred to as the “primary duty”).<sup>81</sup> Its provisions are not all restricted to a workplace, and indeed the protection for “others” is expressed in wide terms. It is capable of supporting a prosecution of a roading authority, especially in relation to a work-use vehicle, though again the issue will be whether the authority will want to take that action. The authorities administering the HSEA have not taken action to prosecute roading authorities for road deficiencies under that Act, and it has been over 10 years since the HSEA was amended to counter the implications of *Berryman*.<sup>82</sup>

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<sup>81</sup> Section 3(1)(a). Johnstone and Tooma, above n 9, at 62.

<sup>82</sup> *Berryman* is discussed above at 48–50.

## *Chapter Five: Conclusions, Scenarios and Proposals for Reform*

### *I Introduction*

This dissertation has considered the relative safety burden on road and rail from a number of perspectives. The thesis is that there is a major difference in the way safety is treated for the two modes, a difference rooted in the law. Road and rail should be on an even footing to ensure each contributes to the economy most efficiently, with the least risk. The dissertation has sought to analyse this differential treatment, and to propose solutions.

This chapter draws together the main conclusions and illustrates them by reference to scenarios. These scenarios are hypothetical, although some are based on actual events. Even if they are hypothetical, they are nevertheless realistic.

The chapter then considers a number of proposals for reform, to better balance the safety treatment of road and rail.

### *II The Scenarios*

The scenarios each take a different perspective on how safety might be affected, through physical deficiencies in the infrastructure, deficiencies in managing it, changes in fundamental parameters of operations, and ownership. They are all set in New Zealand, and New Zealand law applies.

The prime focus of the dissertation is on road's and rail's functions as infrastructure owners, the interaction of people and vehicles with the infrastructure, and not on vehicle operation itself. The scenarios reflect this focus. They are:

#### *A Physical Deficiencies: Rock Falls, Holes, Slips and Similar Events.*

Scenario One: a large rock falls from the hillside by the road or railway line. It lands on a car or train and kills a passenger on a non-work trip.<sup>1</sup> As a variation, the passenger was on a work trip.

#### *B Management Deficiencies: Signals and Signs, Speed Limits, Policies.*

Scenario Two: a person is killed because a speed limit for a particular section of road or railway has been carelessly set, in a general manner without regard to the particular dangers of that section.

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<sup>1</sup> The road scenario is based on the facts in *In the matter of Heather Joy Thompson*, Coroners Court, Hamilton, CSU-2014-HAM-000130, 25 September 2014, Coroner Ryan.

### *C Fundamental Changes in Operating Parameters for Vehicles Permitted on the Network.*

Scenario Three: The infrastructure owner establishes a new general policy on vehicle length. This is unsuited to some stretches of road or rail. On one such section a collision occurs because the vehicle cannot make its way around a bend without encroaching on an adjacent lane or track, with fatalities, serious injuries, and property damage.

### *D Ownership: Does the Status as a Public or Private Body Matter?*

Scenario Four: Collisions kill people on a public road, a private road, and a railway line. Are the consequences different for each of the infrastructure owners just because of their ownership status?

## *III Summary and Conclusions*

The dissertation has considered road and rail safety and their relationship, and there are four broad conclusions:

- The common law of negligence and nuisance has favoured road and continues to do so. It makes few concessions for rail.
- Specific safety legislation in New Zealand applies with much greater force to rail than to road.
- The New Zealand health and safety legislation clearly applies to rail infrastructure, but less clearly to road infrastructure, with a consequence that a much higher standard is applied to rail than road.
- The differential also exists in the three main international jurisdictions reviewed: England and Wales, Australia and Canada, but in some it is less stark.

### *A The Common Law Favours Road*

The law relating to highways has its roots many centuries ago in England. The local justices had a duty to see that the King's subjects could pass freely. Local inhabitants had to maintain the roads, by contribution of labour and resources originally, but later by money. They could be indicted for failure to maintain them. While the indictment remained law until 1959, it was not much used after the mid 19th century.

The liability to maintain roads was an absolute one. A party injured by the road could sue in nuisance or negligence for damages. However, because of the absolute nature of the nuisance liability, courts conceded an exemption for damage caused by

omission, for example, by a simple failure to repair, even by allowing a road to decay. This became entrenched as the “non-feasance” rule. Despite the liability for road maintenance being increasingly a statutory one, courts continued to exempt highway authorities for non-feasance, claiming that the statutes merely transferred the obligation on the people at large to a body like a council, which simply stood in the shoes of the citizens. Even in colonial countries like Australia and New Zealand, where the maintenance obligation for roads was only ever with local bodies, and not the citizenry at large, the rule was applied. Scenario One, rockfall on a road, would be protected by this rule, even if the roading authority could have done something to prevent it.

The jurisprudence developed into a web of somewhat intricate and contradictory distinctions about what was non-feasance and what was misfeasance (an act of commission which was liable), what was repair or maintenance and what was not, and whether the authority concerned was acting as a highway authority or in some other capacity and not subject to the protection of the rule. The latter would be the likely position if the failure to set the right limit in Scenario Two was regarded as an omission, making the authority liable. If it was a positive act, the authority would be open to liability for misfeasance regardless of how the organisation’s function was looked at.

The concept of highways being maintainable by the public at large was abolished in England and Wales in 1959, and with effect from 1964 the non-feasance rule was “abrogated” there for non-repair. But the courts have remained influenced by the historical rule, and have put restrictions around what exactly was abolished. There has been close focus on precisely what “non-repair” covered and what might lie outside that and thus still be covered by the rule. Repair was statutorily defined to include “maintenance” so that was clear, but beyond that some fine distinctions again came into play. The abrogation was held only to concern the fabric of the road and its surface. Removal of an obstruction was not repair. Nor was removal of ice and snow (since reversed by legislation). Nor was other material on the surface of the road, like mud and gravel, unless it had “bonded” with the surface. Nor was the absence of markings or signs.

The non-feasance rule was partly justified in the cases by the fact that highways were publicly owned, community assets. Courts were disposed from early days to favour public bodies over private interest, even over the interest of users. The reasons included husbanding of scarce funds and concerns over the economic implications for public bodies of high standards, and justiciability concerns over courts’ competence to query policies and priorities. Public bodies could expect a less exacting standard than private ones. That could influence a decision on all the scenarios, for roads, but not for rail.

In the context of the continuing judicial restriction of the “abrogation” of the non-feasance rule, it is not surprising that attempts were made to identify duties in the exercise of powers in other parts of the Highways Act 1980 (UK) or other laws, such as those concerning road safety. This has been suggested in Australia, and is the practice in British Columbia. But this has been unsuccessful in England and Wales. In 2004 the House of Lords ruled out such an approach.<sup>2</sup> Many duties in statutes were broad, “target”, duties owed to the public at large and which do not give individuals a right of action for breach of statutory duty. Performance of such duties can be subject to an authority’s resources and priorities. They are unlikely to give rise to a common law duty of care (supporting a claim for damages). Ultimately a road user should not rely on the authority for his or her safety, but on themselves. In Scenarios Two and Three this principle might allow the road authority to escape liability, but not the railway. Failure to carry out a function in either scenario would not give rise to a duty for road.

A further argument in support of lower standards for road authorities was that of control – they had less control over users, through the open access requirement and users self-reliance. This attitude is still current in the courts, and is in fact built into the road safety law, which proceeds from the assumption of driver responsibility. Yet today the access to highways, at least for motor vehicles, is tightly controlled, and the driver is not necessarily in control of his or her destiny amongst other drivers, and with respect to road conditions.

In Australia the non-feasance rule was trenchantly criticised in *Brodie*,<sup>3</sup> which held that it should be abolished. Authorities, it said, had a duty to take reasonable care to ensure what they did or did not do did not create a foreseeable risk of harm. Most jurisdictions in Australia enacted legislation to restore the non-feasance rule. The case has been largely ignored. The rule still applies in New Zealand, although with accident compensation its impact is likely to be small.

Although some early cases examined the idea that the railway might also enjoy an immunity for non-feasance, this was firmly rejected by the 1930s. All railways in Britain were privately owned until 1948, and so were never public bodies to which the non-feasance rule might have attached. The fact that their authority originated in statute was not enough. Because a railway company had not inherited its rights to the road from “the inhabitants at large” the historical position did not apply and so nor did the non-feasance rule. Railways have only ever been repairable by the incorporated owners. In fact, the rule did not even apply to a pier, rather closer in concept to a road than a railway.

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<sup>2</sup> *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057.

<sup>3</sup> *Brodie v Singleton Shire Council* [2001] HCA 29, (2001) 206 CLR 512.

Over time, many cases have been reported involving omissions by railways in a wide range of fact situations. For example, slips and falls on highways were protected by the rule, but not the same events on a platform or railway-owned access road. Most of the railway cases were concerned with occupiers' liability. Such liability did not accrue to highways because of their open access nature; they were there for the public to use and their owners or controllers were never "occupiers" of the road in a legal sense. The fact that the railway was treated as an occupier for the purposes of liability is in itself a differential in treatment relative to roads.

Failure to maintain a tunnel led to liability in an early New Zealand case. Maintenance of slopes above the railway (Scenario One) is a similar situation. In 2013 the British railway infrastructure owner was held to have a duty of care to investigate and to minimise the consequences of road vehicle incursion onto railways. It had done nothing to prevent such an incursion, but non-feasance played no part in the decision.<sup>4</sup>

These cases have all been regarded as open to a finding of negligence (or nuisance), although on the facts such a finding has not always been made. Omissions have also lead to health and safety prosecutions. In the first and second scenarios the railway would be likely to be liable.

### *B Specific Road and Rail Legislation in New Zealand*

Since an amendment to the Local Government Act 1974 (LGA) in 1978 a duty formerly confined to road works has been widened beyond them, to give a duty on local authorities as roading authorities to take "all sufficient precautions" for safety. The extent of this provision is clear on its face, but some cases treat it as a power not a duty, and cases tend to be confined to road works sites. Scenario One should be covered by this section for a local road, although on English jurisprudence,<sup>5</sup> an inspection plan with reasonable frequencies might satisfy the "all sufficient precautions" requirement of the LGA.

There are many more kilometres of local road than state highways, managed by the New Zealand Transport Agency (NZTA), but state highways are much more heavily trafficked, with nearly half of all traffic. It might be expected that there would be a safety obligation on them. From 1978 to 1989 all powers and duties of relevant sections of the LGA also applied to state highways, but from 1989 only the "rights and powers" applied, and not "duties". Thus there are no direct safety obligations imposed on the owner of the state highways. Certainly, there is a general obligation to operate in a way that "contributes to an effective, efficient, and safe land transport system in

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<sup>4</sup> *Gilman v UPS, Network Rail Infrastructure* [2013] EWHC 2341 (QB). The railway was however not liable, because any investigation would have shown that defending against incursions was low priority.

<sup>5</sup> *Bramwell v Shaw* [1971] RTR 167 (QB); *Wilkinson v City of York Council* [2011] EWCA Civ 207; *Gilman*, above n 4.

the public interest”,<sup>6</sup> but that is no more than a target obligation. Moreover, the objectives of “effective, efficient and safe” may be in conflict, and a court would probably find any argument about the objective non-justiciable.

The NZTA is responsible for administering the road safety system through the supervision of “land transport documents” under the Land Transport Management Act 2003, such as permits and licences. There are no rules about the safety of actual roads applying to the owners of these roads except rules on setting speed limits, and traffic control devices. The speed limit rule could have been breached in Scenario Two, but the rule itself has no sanctions.

The contrast with rail is stark. Railways in New Zealand were subject to regulation of safety standards in the 19th century, but later developed a self-regulatory system. The railway could be sued for negligence and was. In 1982 with the creation of the New Zealand Railways Corporation some general safety goals were added, but no specific or punishable duties. With the creation of New Zealand Rail Limited in 1990 (a private company but owned by the state) a more comprehensive safety regime was introduced. The railway had to develop, get approved, and comply with a safety system, and there were extensive procedures to ensure compliance. At the time the safety standard was “reasonable cost”, the same as applied to road. Provided rail complied with its safety system, the Health and Safety in Employment Act 1992 (HSEA) did not apply to it, again comparable to the position with road.

With the Railways Act 2005 (RA) the health and safety standards were applied to rail. By that time the railway was a private company, although shortly beforehand the infrastructure had reverted to the Crown.<sup>7</sup> The Act applied to infrastructure equally. Now the duty of rail was to take all reasonable steps to ensure safety, since modified by the Health and Safety at Work Act (HSWA) to ensuring, so far as reasonably practicable, that no death or serious injury is caused by rail activities. In all scenarios the RA would apply, and in all the railway would be liable.

One of the purposes of the RA is to promote the duty to ensure safety. The Act provides for large fines and imprisonment. Employers, directors, and principals are liable. Compliance with the licensing regime is now a duty. An approved safety case is required, and there is a long list of matters to be covered. In scenarios 2 and 3, the safety system would apply. The RA imposes a significant obligation not shared by road.

It is hard to find obligations on road owners to have and keep their assets safe to use. There are only general target obligations for the NZTA. On the other hand rail

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<sup>6</sup> Land Transport Management Act 2003, s 3.

<sup>7</sup> The whole undertaking was taken back by the Crown in 2008, and so the private company rationale for the control was no longer relevant, but it remained nevertheless.



obligations are extensive and onerous. In legislative terms at least there is a differential safety obligation between road and rail.

### *C Health and Safety Law in New Zealand*

The New Zealand health and safety legislation clearly applies to rail infrastructure, but less clearly to road infrastructure, with a consequence that a much higher standard is applied to rail than road.

It has been held that the HSEA does not apply to a bridge, and thus not to roads.<sup>8</sup> Although that Act was written in wide terms that suggest a road could be a workplace, on a purposive interpretation it was not. The HSEA did not have a public safety role, but was only to protect workers from harm. The same is likely to be true of the HSWA, although some of its provisions more strongly suggest coverage of roads.

“Workplace” is a key issue. In the HSWA, this is a place where work is being carried out or is customarily carried out. A road is clearly a workplace for a road worker actually maintaining the road. However, the question is whether it remains a workplace when the worker is not there. While the road is a result of work, this might have been done months or years before, and the definition is very much in the present tense. This present tense focus was confirmed judicially for the HSEA, and the addition of “being” to the definition in the HSWA makes the present tense nature stronger. And road work is not frequent enough to meet “customarily carried out”, unless the facility is only designed as a workplace (which a road patently is not). Under the HSEA “intermittent” use was not enough, and “customarily” implies a greater frequency of use is necessary.

As well, a road user’s occupation of a particular road space has been described as “transitory”, with the duration too short to meet the implications of a “place”. The HSEA was amended to remove this point, but the HSWA is less clear. A “transitory” argument may still appeal. On the other hand, if a place is a workplace for one person (say a person in a work vehicle), then it is a workplace for the purposes of duties on another person “who manages and controls” that workplace.

The distinction between road and rail is that a road is intended to be used by third parties, without an employee of the roading authority being present. There is usually a rail employee present when an incident occurs, and so rail is readily caught. If there are cases of third party rail users that are analogous to road, the RA duties would remain as they do not make any use of “place”. In Scenarios One and Two, the road would most likely not be a workplace, but the railway would be, and the events would have been the result of “railway activities”, giving liability under the RA.

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<sup>8</sup> *Department of Labour v Berryman* [1996] DCR 121.

There is a clear duty to third parties (non-employees) in both the HSEA and HSWA. In the HSWA, s 36(2), there is a duty not to put “other persons” at risk from work carried out. Harm caused anywhere by the work will be caught - there are no location constraints. A person could also be prosecuted after he or she had left the work so long as the causal chain between the business and the harm is not too remote. There are Australian cases involving a considerable lapse of time, even years.

The general duty on a person who manages and controls a workplace in the HSWA, s 37(1), includes ensuring that nothing arising from the workplace is without risk to anyone (in or out of the workplace). Thus an office, clearly a workplace, might be involved in creating a policy with safety implications. That policy would “arise” from the workplace without too forced a reading. The same is true of designs. This section could well apply to Scenario Three, for road.

There are as well new specific duties in the HSWA for designers, manufacturers, importers, suppliers and installers of plant or structures (including a road). These parties must ensure that the plant is without risk to anyone at a workplace or in the vicinity. There is no doubt that a vehicle can be a workplace, and the structure (road) can affect it, even if the road itself is not a workplace. These are inherently prospective duties, not present ones. A design for example is largely without risk until actually built sometime later. The duty arises when the work is done, and crystallises later, potentially a lot later.

On a purposive view even under the HSWA extending the coverage to public safety areas where there is no active employment at the time of an incident might stretch its employment focus too far. Such a view would leave roads out of its ambit, in all the scenarios. It is however less clear than in the HSEA, as the HSWA’s first purpose is to protect both workers and “other persons” from harm from work. Some Australian commentators believe that their Model Act (which the HSWA is based on) does cover public safety. It may boil down to a willingness on the part of the administering authority to take such a wide view of the scope of the Act.

Duties under the HSWA are subject to an “as far as is reasonably practicable” test, and in particular to the relationship of the costs of dealing with the risk, whether the cost is “grossly disproportionate” to the risk. This rule effectively mandates expenditure where the benefit: cost ratio of less than one (one would be “proportionate”). Thus for industries subject to the HSWA, it might be necessary to spend \$3 or even \$10 to achieve a safety benefit worth \$1, to comply with it. On the other hand, roading expenditure is evaluated on the basis of achieving benefits that exceed costs. Thus rail has a financial burden not shared by road, unless road authorities become actively subject to the Act.

*D The Differential Also Exists in Other Common Law Jurisdictions.*

The current Highways Act 1980 (UK) provides a framework for the liability of road authorities in England and Wales. That act provides a duty to maintain. In an action for damage from failure to maintain, roading authorities have a special “reasonable care” defence available to them. In deciding on whether reasonable care has been taken, courts are to take account of reasonable maintenance standards and other criteria. This statutory duty to maintain is often the subject of court action, and can result in an award of damages for personal injury. A plaintiff still has hurdles to overcome, such as restrictive interpretation of “maintain”, the need to show there was a danger, because of a failure to maintain, and the injury resulted from that. The existence of a statutory duty in New Zealand is much less clear.

A route to compel repair through the courts remains in Britain today, but is not often used. It is now a civil action. The remedy is an order to repair the roads, which is perhaps not as useful to an injured plaintiff as damages, except in particular circumstances. There have been few cases since 1959.

Recently, the Infrastructure Act 2015 (UK) created a company, Highways England, to take over main highways. This has the promise of redressing the balance with rail, since it has safety objectives and is supervised by the same body that supervises rail safety, but the evidence so far is not that encouraging, with a lower level of safety oversight than for rail.

In Australia the road regimes are state based. As well as the statutory re-imposition of the non-feasance rule, their statutes often protect roading authorities in other ways. For example, in New South Wales an act (or omission), to be challenged, has to be so unreasonable that no similar authority would consider it reasonable. In Queensland the law declares high levels of safety to be incompatible with roading efficiency.

Victoria on the other hand has sought to impose some responsibilities on roading authorities. They have to seek to ensure roads are as safe for users as reasonably practicable, and principles as to whether a duty of care has been breached are set out, in a list similar to the English one. But there are still restrictions - an authority can still shelter behind its policy, resources available must be taken into account, and the same unreasonableness test applies there also.

In Canada, municipalities and the Crown have maintenance obligations for local and provincial highways. In Ontario, as an example, the authorities are liable for damages for default, although it is a defence that they did not know (objectively) about the state of repair, or that they took reasonable steps to prevent default. Policy decisions are exempt.

Rail obligations in all three are similar to those in New Zealand, and as strict. In Britain the safety supervision of railways is through the health and safety legislation,

and subject to the “reasonably practicable” test and its judicial interpretations. In Australia the Model Railway Safety Law also applies the reasonably practicable test in the same terms as the health and safety legislation, including the “grossly disproportionate” ratio of costs to risks. The model law requires accreditation, including a safety management system of wide scope. In Canada a federal law imposes similarly extensive rail supervision.

The rules for railway safety responsibility are consistently strict across the jurisdictions, and are similar to those in New Zealand. On the other hand, safety obligations on roads in these three countries vary in strictness, from very minimal to requiring reasonable care, but do not go beyond an even balancing of care and cost. Even so, some obligations go well beyond what is required in New Zealand.

### *E The Impact on the Scenarios*

#### *1 Scenario One: a rockfall kills a car or train passenger*

At present, there is no obligation on the roading authority to have carried out pre-emptive work to prevent such an event. Not doing the work is an omission, and so the non-feasance rule would apply. There is no duty that arises from the power to construct and maintain roads. It would be highly likely that there is a policy about prioritising such work, and cases have held that inspection frequencies can be reasonable, so if the authority has an inspection plan and is implementing it, then it may escape liability even if misfeasance is argued. The defence of an action simply being “policy” is though not part of New Zealand law. If however it was a local road and not a state highway, a case could be argued that the LGA s 353 duty has been breached. There is no such duty for state highways. Duties for them are merely target obligations.

Under the HSWA, there may be liability for failure to deal with the risk as far as reasonably practicable, but its application is uncertain for roads. A passenger on a non-work trip would only be covered if the road itself was a workplace, which is debatable. Their presence at a point on the road is likely to be too transitory for the authority to incur liability. On a work trip, the vehicle is a workplace, and the road it is on could also be, but a purposive reading may not support that.

For rail the same arguments could be made, but at the point of the accident, the train will also be a workplace because railway employees are on it. Even though the hillside, which may not have been a workplace, was at fault, harm still arose at a workplace. Whether or not the passenger was on a work trip does not matter. Then the question would be whether everything that was reasonably practicable was done. Given the current attention by the regulator to the relatively remote risks of fires in

tunnels,<sup>9</sup> the railway is likely to be under close scrutiny, and probably liable, for having a dangerous bank. In any case the RA eliminates the need to consider the workplace question: the question is simply whether the railway had ensured, as far as reasonably practicable, that its activities did not cause the death of the passenger. The outcome would be the same.

## *2 Scenario Two: a person dies because a speed limit is carelessly set.*

Such a case could be seen as an omission (failure to set the appropriate limit) or commission (setting the wrong one). In any case it could be argued that this was not a failure to maintain a road, but a failure of some other function like a traffic authority. In an extreme case, the road authority might be found negligent. Even if the LGA duty on a local authority might apply, it would argue, with substantial judicial support, that the road user should have driven to the conditions, and it was his or her responsibility. In terms of the HSWA, the arguments about a road not being a workplace would also apply. The authority could though be in breach of the Setting of Speed Limits rule.

Again, on rail such an accident would only occur to a train, with at least a driver, a worker. The HSWA would apply; if the person killed was the driver that position would be even clearer. The RA would still apply, and since the cost of setting a proper speed limit would not be “grossly disproportionate” to the risk, it would be liable. Similarly if an accident occurred by simple failure to maintain a speed limit sign on a curve. Both elements are covered by the mandatory safety case.

## *3 Scenario Three: a vehicle length policy is inappropriate and causes a collision*

While the authority might be negligent, and the act is one of commission, a New Zealand court might be convinced that the issue was not justiciable. It might also be arguable that this is an omission to set the right length, and thus non-feasance. Again, that their functions and powers include making such policies would not found a duty. The most likely liability for a road authority would be if the HSWA, s 37(1) applies: the policy will be “something arising” from a workplace (office) and would not be “without risks” to the safety of someone. More clearly, in terms of the general duty in s 36(2) the policy would put someone at risk from “work carried out” by the authority. Even more so, since the development of such policy is one of the major products of a national roading authority. However, both these sections are subject to the overall purpose of the HSWA, which as noted, may not extend to general public safety. Property damage is not covered by the HSWA.

There would be no doubt about the liability of a railway authority under either the HSWA or RA. Under the latter, the operator’s safety system should cover major

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<sup>9</sup> Andrew Hunt (Professional Head Mechanical, KiwiRail Engineering Services), email to Murray King on hi-rail vehicle tunnel fire risk (3 February 2016).

parameters like vehicle length and clearances. It is unthinkable, given the stringency of these requirements, that the system would permit such an error. The system would need to be complied with. The RA definition of “reasonably practicable” specifically covers property damage, applying the same criteria as for serious injury or death. However the duty not to cause property damage is not a duty on the operator or its employees, but one on third parties.<sup>10</sup>

#### *4 Scenario Four: Differences between a public road, a private road, and a railway.*

On a public road a collision might be the result of a failure of the roading authority, but the consequences are only likely to be sheeted home in the circumstances above. In particular, the non-feasance rule applies to public roads.

On a private road the non-feasance rule does not apply, so the likelihood of a successful suit is greater. The liability would be as an occupier, since there is no right of access to diffuse the responsibility. However, a private road’s purpose might need to be examined. A major private road (such as in a forest) exists only for work purposes. A collision on that road might be more clearly subject to the HSWA, since its only function is as a workplace. Moreover, so will the vehicle be a workplace.<sup>11</sup> The arguments about not covering public safety have no weight, since it is private situation. Thus the road owner could be subject to the “reasonably practicable” test. A private road that the public customarily have access to (such as access to a ferry terminal) might be considered more akin to a public road.<sup>12</sup>

Of course *Berryman*<sup>13</sup> involved a farm road and bridge, both private with no access as of right. The deceased was an independent worker who was permitted to be there, not an employee. That case found no liability, but under subsequent HSEA amendments and the HSWA it is likely that the farm owner would be liable, even if a public road owner was not.

On the railway ordinary negligence principles would apply. There is no protection for non-feasance for a railway, even for a road owned by it. As noted above, the HSWA and the RA would apply with full force, whether the railway was publicly or privately owned.

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<sup>10</sup> Railways Act 2005, s 9. Regulatory action can also take property damage into account – ss 24 and 28 for example [RA].

<sup>11</sup> Leaving aside trespassers.

<sup>12</sup> *Bugge v Taylor* [1941] 1 KB 198 (KB); Land Transport (Road User) Rule 2004, r 1.6, definition of “road” includes (e) “a place to which the public have access, whether as of right or not”.

<sup>13</sup> Above n 8.

## *IV Proposed reforms*

### *A Overview*

This chapter so far has summarised the differential treatment of road and rail. To balance the safety treatment of road and rail, there will need to be legislation, both to counter established jurisprudence, and to change some current legislative positions. The changes could be quite minor (although not in impact) or more extensive. This part sets out some options.

Making road and rail obligations more equal could be achieved either by reducing rail's obligations or by increasing road's. Both are considered below, but a reduction in safety standards on any mode is unlikely to be tolerated, so the likely changes would involve increasing road's obligations. This rather neatly illustrates the point of the dissertation, that rail is treated more severely, and that there is a gap in road's safety coverage.

### *B Reducing Rail's Safety Obligations.*

The focus on road and rail in this dissertation has been on the infrastructure and not on the operations. Thus any reduction in the safety obligation of rail to match road's would need to be confined to infrastructure.

#### *1 Limiting the application of health and safety laws on "workplace"*

One option is to reduce rail's HSWA (and RA) obligations to situations where actual work on the infrastructure is going on. This is akin to the farmer's defence in s 37(3), that the general duty to third parties in s 37(1) does not apply to farms (apart from buildings) "unless work is being carried out at the time".<sup>14</sup>

Section 37(3) does however not specify that it must be farming work (nor the farmer's work) that is being carried out, so other work (such as forestry) not carried out by the farmer may mean the farmer is caught, on the reasoning in *Berryman*.<sup>15</sup> That case said it did not have to be the property owner's (or occupier's) work; that person could be liable when the place is made a workplace by some other party's work.<sup>16</sup> The wording is different in the HSWA, but still puts a duty on a person who "manages or controls"<sup>17</sup> a workplace, so the argument is still likely to apply.

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<sup>14</sup> Section 37(3)(b)(ii)).

<sup>15</sup> Above n 8, at 131.

<sup>16</sup> See Chapter Four.

<sup>17</sup> HSWA 2015, s 37(1).

To make the clause work in terms of rail infrastructure, it would need to reduce obligations to those sites where actual infrastructure work (as opposed for example to driving trains) is being carried out.<sup>18</sup> A new subsection could be added to section 37.

(4) For the purposes of subsection (1), if the PCBU is conducting a rail infrastructure business or undertaking, the duty owed by the PCBU under that subsection applies only to a part of that infrastructure when infrastructure work is being carried out on that part at the time.

For the avoidance of doubt, a similar subsection could be included to apply to road in the same terms. This would cover the situation of the presence of a work vehicle of any sort turning the road itself into a workplace with respect to the roading authority.

However, even if the HSWA did not apply to railway infrastructure, the railway infrastructure operator would still be caught by the RA imposing similar duties. It would be difficult and potentially inconsistent with the scheme of the HSWA to single out infrastructure operators in a general way, but the next section proposes one possible specific change.

## 2 *Reducing the “grossly disproportionate” ratio of costs to benefits.*

The “grossly disproportionate” cost standard in HSWA, s 22(e) applies to rail, both through the HSWA and the RA,<sup>19</sup> On the other hand, the standard adopted for roading works and maintenance is a reasonable cost one, where benefits are expected to exceed costs, or in the terms used in the HSWA, benefits are at least proportionate with the costs.

One potential option to bring rail on to the same footing as road is to delete “grossly” from paragraph (e) – so it simply reads “disproportionate”, or even “whether the cost is proportionate to the risks”. Going further, the section would still work if it stopped at “minimising the risk”, leaving the ratio of costs and risks unstated, but implicitly in balance. Another option would be to revise paragraph (e) so it simply referred to “whether the costs of eliminating or avoiding the risks are reasonable”. What is reasonable in terms of costs could be defined as it once was in the Land Transport Act 1998.<sup>20</sup> Either way, that would place road and rail on an even footing.

To be consistent, a change would need to be limited to rail infrastructure, so that operations continued to be treated like any other industry, including operation of road vehicles in a work situation. It would be difficult to do this in a neat way in the HSWA, which creates general rather than industry-specific law, but it could be done in the RA, by leaving s 5 unchanged, including “grossly disproportionate”, apart from adding an extra subsection:

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<sup>18</sup> RA, s 4 already defines “railway infrastructure”.

<sup>19</sup> Section 5, as amended by HSWA, Schedule 5.

<sup>20</sup> Section 189(2), as originally enacted.



(f) In the case of work involving railway infrastructure, subsection (e) is to be read as if the word “grossly” had been deleted.

Rather than single out railway infrastructure in the HSWA, s 35 of that Act could then be prayed in aid of avoiding the application of “grossly disproportionate” to rail infrastructure cases. Section 35 provides for a person or court to take account of the provisions of other laws in determining compliance with the Act. That nevertheless may not be sufficient as the section is phrased in terms of determining whether a duty under the Act has been complied with, not whether such a duty needs to be complied with.

Using “grossly disproportionate” is a distortion that affects the whole of workplace safety, biasing expenditure towards that use compared with other uses. It would be logical to address this, and doing so would help balance the obligations of road and rail without the difficulties identified above. But changing the health and safety legislation for all industries is not the point of this dissertation.

Changing the law to reduce rail’s obligations may be difficult. And, apart from amending “grossly disproportionate” in general, a lessening of rail’s safety oversight is not an easy case to advocate, nor one that on balance would be in society’s interests. These changes may not be possible to achieve.

### *C Increasing Road’s Obligations*

What this dissertation is dealing with is the relative burden of compliance on road and rail. Thus an increase in road’s safety obligations is also an option.

#### *1 Make duty on local road owners apply to state highways.*

The LGA, s 353 imposes safety obligations on local authorities. The provision applying s 353 to NZTA covers rights and powers, but not duties. The simplest way of improving road’s obligations would be to make the duties in s 353 apply to state highways.

To do this without impacting on a number of other sections mentioned in s 61 of the Government Rounding Powers Act (GRPA) requires some redrafting. Leaving s 353 in the existing list of rights and powers in s 61, and specifying its duties in another subsection, would be the least disruptive change:<sup>21</sup>

(2AA) The duty in section 353 of the Local Government Act 1974 to take all sufficient precautions for the safety of the public, traffic, and road workers also applies to the Agency.

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<sup>21</sup> The existing subs (2A) determines this numbering, as the new subsection should follow immediately after subs (2).

## 2 A broader “reasonable care” obligation.

But this duty is rather generally worded, and the dearth of cases on it suggest it is not very effective as a duty. So a stronger formulation could be considered, making it a duty to use reasonable care to ensure the roads are safe.

This would be the position if the non-feasance rule did not apply in New Zealand.<sup>22</sup> As discussed in Chapter Two, it is probable that the rule does still apply here. Examples of legislation applying “reasonable care” can be drawn from English, Victorian, and Canadian statutes. The example given here is based on the Highways Act 1980 (UK), ss 41 and 58; but it has been adapted to overcome the historical restrictions imposed by the jurisprudence on road maintenance. It is also adapted by using the “reasonably practicable” test, following modern New Zealand practice, rather than the “steps that are reasonably required” in the United Kingdom Act. Case law in England suggests that their test is less stringent than “so far as reasonably practicable”.<sup>23</sup>

It would be possible to simply abolish the non-feasance rule, but that would not overcome the historical restrictions, as the English and Australian jurisprudence would still be called upon by road authorities. It should nevertheless be done. The restrictions can be overcome by an inclusive definition of road.

Much of the English jurisprudence (and some of New Zealand’s) concern footpaths because they meet the definition of highway. The proposed definition is of “road” rather than “highway”; footpaths do not impact on the road: rail imbalance, and with accident compensation, they should not need to be covered to provide personal injury relief.

A new section should be inserted in the GRPA:<sup>24</sup>

### **60A Duty to maintain highways**

- (1) The rule of law exempting the Agency from liability for non-repair of highways is hereby abrogated.<sup>25</sup>
- (2) The Agency is under a duty to maintain all roads under its control.<sup>26</sup>
- (3) To discharge this duty, the Agency shall as far as is reasonably practicable, ensure the roads are not dangerous for traffic.<sup>27</sup>
- (4) An action may be taken against the Agency in respect of damage resulting from its failure to maintain the road.

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<sup>22</sup> *Brodie*, above n 3.

<sup>23</sup> *Pridham v Hemel Hempstead Corporation* (1970) 69 LGR 523 (CA).

<sup>24</sup> Footnotes within proposed legislation are for clarification and not intended to be part of the legislation.

<sup>25</sup> Compare Highways (Miscellaneous Provisions) Act 1961 (UK) 9 & 10 Eliz II c 63, s 1(1)

<sup>26</sup> Compare Highways Act 1980 (UK) s 41(1) [UKHA].

<sup>27</sup> Compare UKHA s 58(1).

- (5) **Maintain** includes repair and inspection.
- (6) **Road** for the purposes of the duty to maintain includes:
- (a) The surface of the road;
  - (b) Material, fixed or loose, on the surface of the road;
  - (c) The structure, fabric and formation of the road;
  - (d) Works designed protect the road, including walls and drains;
  - (e) Works designed to protect road users, including barriers between lanes and on the edges of the road;
  - (f) Warnings, markings, signs, and signals;
  - (g) Vegetation encroaching on the carriageway or interfering with safety of road users;
  - (h) A bridge or ford which a road crosses;
  - (i) A tunnel which a road goes through; and
  - (h) A cycleway: but
    - (i) does not include
      - (i) a footpath; or
      - (ii) any road that the public does not have access to as of right.

As in England and Wales and Victoria,<sup>28</sup> some guidance should be given about the standard and level of maintenance:<sup>29</sup>

**60B Matters taken into account in determining whether the duty has been discharged**

- (1) In determining whether the duty to maintain in section 60A has been discharged, the Agency and the court shall in particular have regard to the following matters:
- (a) The character of the road, and the traffic that could reasonably be expected to use it.
  - (b) The standard of maintenance appropriate for a road of that character and used by such traffic.
  - (c) The state of repair in which a reasonable person would expect to find the road.
  - (d) Whether the Agency knew, or could reasonably have been expected to know, that the condition of the road was likely to cause danger to users of the road.

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<sup>28</sup> See Chapter Three.

<sup>29</sup> Compare UKHA s 58(2); Road Management Act 2004 (Vic), s 101.

- (e) Where the Agency could not reasonably have repaired the road or taken other preventative measures before a particular incident, what warning notices of its condition had been displayed.

Similar sections should replace s 353 of the LGA. Section 353 would have the content of s 60A, above. The existing subsections of s 353 should be retained as a new s 353A on particular safety duties round road works. Section 60B would become s 353B.

### *3 Make health and safety legislation apply to roads*

The health and safety legislation is where safety rules have the most impact in New Zealand, rather than in general tortious duties, given the accident compensation regime and inability to sue for personal injury. If it is good enough for rail and all other undertakings to meet the “reasonably practicable” test, then should be good enough for road. Then we would have a common standard for safety legislation.

It is clear that the HSWA applies to rail, and it also applies to road vehicles. As discussed in Chapter Four, it is less clear that the provision of roads comes within the Act.

One way of addressing this problem is to include a section directly declaring roads to be covered by the HSWA. There are precedents for such a provision, in HSWA ss 9 (aircraft) and 10 (ships). A similar approach to s 10 could be taken for roads, simply declaring that the Act applies to roads, whether or not the work is actually taking place at the time (see discussion on s 20, below):

#### **9A Application of Act to roads and other infrastructure**

- (1) This Act applies to roads, whether or not work is currently taking place on the road.
- (2) Roads includes bridges and tunnels the road crosses or goes through; and all ancillary works and equipment such as signs and signals.
- (3) This Act does not apply to drivers and owners of vehicles on a road when the vehicle is not being used for work.

The section could cover wider infrastructure than roads, along the lines of the amendments proposed below to s 20(1)(c) of the 2015 Act. It may be that that paragraph would not then be necessary, but leaving the present tense wording of s 20 untrammelled would invite later argument about the contradiction between the two. For the avoidance of doubt, both should remain, or at least s 20(1)(c) made subject to s 9A.

A further issue is the definition of workplace, which has a present tense emphasis, with its use of “is being carried out”. A road will be a workplace for someone working on it, including a driver or occupant of a vehicle engaged on work activities. This may

well make it a workplace in itself, but it would be better to make it clear (and as well protect the non-work users). The simplest way to address these issues would be to define a road as a workplace with respect to the road controlling authority. Adding a paragraph (c) to subsection (2), which already lists places that are included as workplaces, would be deceptively simple. But in doing that the road would still be subject to the language in subsection (1), which defines workplace in the present, where work is actually going on.

Changing the definition for all parties is unlikely to be acceptable. But there is a class of place where work can create hazards some time after the work has taken place, and their users deserve the HSWA's protection. In these cases the interval between the work creating the danger and its crystallisation into an accident may be too long to be characterised in the present tense terms used in s 20. It could be months or even years. Thus a new subsection (c) to section 20(1) should be included to apply to roads:

(c) includes a road, road bridge or road tunnel, even if work is not currently taking place there.

Potentially it could apply to all such places:

(c) includes a road, bridge, wharf, tunnel, railway, runway, taxiway, electricity transmission line, pipeline or similar infrastructure, even if work is not currently taking place there.

The concept of such a place (and the doubt over its status) has been recognised in the farming exemption in s 37, discussed above. A farm was potentially a workplace at times outside those where work was taking place. The amendment made it clear it was not a workplace in those circumstances. Equally the position with infrastructure can be clarified, in the opposite way. The motivations for the farming change are unlikely to apply to infrastructure.<sup>30</sup>

If this is done, then road and rail would be on an equal footing.

#### *4 Dealing with the “public safety” obligation*

One of the aspects that sets rail and road apart from the bulk of workplaces is the presence of a “public safety” obligation, that is an obligation to people who use their infrastructure or are in the vicinity of it, but are not workers there, and who may be exposed to risk from the activities. Since the HSWA is arguably not intended to be a “public safety” statute, these activities may be outside its scope.<sup>31</sup> The distinction is doubtful in the case of rail, since the obligations to protect others at or near a workplace will only crystallise when work (such as driving a train) is actually going on (and so

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<sup>30</sup> The changes were in response to farmers not wanting to be responsible for accidents to walkers using their land – Health and Safety Reform Bill 2014 (192-2), as reported from the Transport and Industrial Relations Committee (commentary) at 8.

<sup>31</sup> See Chapter Four.

public safety is covered by the presence of work), but it is clearer in the case of road unless the amendment suggested in the previous section is made.

In Britain this has been recognised with respect to rail, and the Railways Act 1993 (UK), s 117, provides for all safety oversight to be done through their Health and Safety at Work etc. Act 1974. It is a brief provision and the process of including public safety coverage is simple. Certain statutory provisions about rail safety are deemed to be within the coverage of and enforced through the Health and Safety at Work etc. Act, including provisions about construction of railways and rail vehicles and the protection of the general public. The purposes of that Act are expanded to cover construction and:<sup>32</sup>

(2)(b) protecting the public (whether passengers or not) from personal injury and other risks arising from the construction and operation of transport systems to which this section applies.

Such an approach could be taken for road here, to simply say that the public safety aspects of road operation are covered by the HSWA. The amendment already suggested to s 20 may suffice, along with simply including the HSWA's purpose statement a paragraph that covers construction of infrastructure assets, and protecting the public. Section 3(1) of the HSWA could be amended by adding after paragraph (a):

(aa) protecting the public from personal injury and other risks arising from the construction, maintenance and operation of transport and other infrastructure activities.

This would need a definition of "infrastructure assets", along the same lines as the s 20(1)(c) amendment. It would also cover rail, but not vehicles, which in both road and rail are operational assets and reasonably equally covered now.

##### *5 A special Act to cover roading obligations*

Another approach would be to take the model for other dangerous activities (like gas, electricity, and railways) and create specific health and safety obligations in a Roothing Act. In the RA, s 5 defines "reasonably practicable" in exactly the same terms as s 22 of the HSWA, apart from the introductory words that tailor the section to rail; and extend its coverage to include property damage. Section 7 sets out the duties of a rail participant, which are similar to those in the HSWA, with the important difference that they do not confine the duties to a workplace, but rather relate them to the rail activities per se. Section 8 makes it clear that the HSWA still applies.

Applying these to roading, the first clauses in an Act could read:

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<sup>32</sup> Railways Act 1993 (UK) s 117(2)(b).

## **1 Title**

This Act is the Roothing Act 2016.

## **2 Commencement** – [allow a long lead in for adjustment, say a year.<sup>33</sup>]

## **3 Meaning of reasonably practicable**

In this Act, unless the context otherwise requires, **reasonably practicable**, in relation to a duty to ensure health and safety or to protect property, means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety or the protection of property, taking into account and weighing up all relevant matters, including [paragraphs (a) to (e) from HSWA, s 22].<sup>34</sup>

## **4 Interpretation**

**Road** has the meaning given to it in the Local Government Act 1974, section 315, except that it includes a motorway and a private road; and also includes [elements set out for s 60A, GRPA, above].

**Road controlling authority** means a regional or territorial local authority, the New Zealand Transport Agency, or any other person in charge of a road to which the public have access as of right.

## **5 General safety duties of road controlling authorities and persons working for them<sup>35</sup>**

(1) A road controlling authority must ensure, so far as is reasonably practicable, that none of the roading activities for which it is responsible causes, or is likely to cause, the death of, or serious injury to individuals.

(2) No road controlling authority or persons working for it may do or omit to do anything in respect of roading infrastructure if he or she knows or reasonably ought to know that act or omission will cause, or will be likely to cause the death of, or serious injury to, individuals.

## **6 Relationship with Act to Health and Safety at Work Act 2015<sup>36</sup>**

Nothing in this Act limits the Health and Safety at Work Act 2015.

## **7 General safety duties of other persons<sup>37</sup>**

(1) Every person on or near a road, other than a driver of a non-work vehicle, commits an offence who fails to ensure, so far as reasonably practicable, that no individual dies or is seriously injured, and that no property is significantly damaged, as a result of any act or omission of that person.

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<sup>33</sup> The Highways (Miscellaneous Provisions Act 1961 (UK), above n 14, which abrogated the non-feasance rule, did not come into force for three years after it was passed.

<sup>34</sup> Compare RA, s 5.

<sup>35</sup> Compare RA, s 7.

<sup>36</sup> Compare RA, s 8.

<sup>37</sup> Compare RA, s 9.

- (2) [specific prohibitions on interfering with or damaging a road transferred from other legislation].

These sections could be part of both the GRPA and the LGA, in a new part of each headed “Duties of road controlling authorities”,<sup>38</sup> instead of a new, stand-alone, Roothing Act.

#### *D Supervision of Safety Performance*

Adding serious safety duties to roading authorities calls into question the current self-regulation of the NZTA and local bodies with respect to roading. It would be inappropriate for them to be judges of their own performance, let alone making decisions on requiring improvement or even on prosecution. It would also be anomalous for the country’s primary roading agency, NZTA, to continue to be the rail safety regulator. For those aspects governed by the HSWA, WorkSafe, a division of the Ministry of Business, Innovation and Employment, would have that oversight.

But the proposed reforms include duties beyond the health and safety legislation. These also need oversight. As well, given the specialist nature of road and rail safety, the health and safety oversight could be devolved to an independent body, as is done in Britain through the Office of Road and Rail. A new body, recreating the rail oversight functions of the former Land Transport New Zealand, along with new road oversight powers, could be created to provide the oversight.

#### *V Final Comment*

In New Zealand and other jurisdictions, rail safety is closely controlled, including the safety of the infrastructure - the track, formation, and structures. For roads, on the other hand, there is much less supervision of the actual road, its construction and condition. Safety is the responsibility of the user, not the provider, except in general terms. For example, in the scenarios above, the road owner is unlikely to face civil or regulatory action. If the same event happened on rail, then at least regulatory action, involving penalties, is likely. The result is that rail has to go to much greater lengths, and expenditure, to ensure it complies.

This chapter has presented a spectrum of reforms that would bring road’s obligations in line with rail’s. While these could include reducing rail’s obligations, such measures are unlikely to be acceptable, so adding to road’s obligations is the appropriate way to proceed. This should have the added benefit of better safety performance by road, reducing death and injury.

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<sup>38</sup> The GRPA may need to be renamed to reflect the inclusion of substantial duties, for example to “The Government Roothing Act”



There are a number of ways this could be done, with greater or lesser change from the status quo. On balance, giving roading authorities an enforceable duty to maintain roads safely, and extending the coverage of the health and safety legislation to infrastructure assets where work might only take place infrequently, would achieve a worthwhile change with limited legislative amendment.



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