

IT WAS THE ROAD'S FAULT YOUR HONOUR: perspectives on legal liability

Siobhan Hale¹

INTRODUCTION

- 1 As everyone here will be aware, this is the very first International Conference on the Surface Friction of Roads and Runways. So, this is something of a milestone and I understand that Transit New Zealand and WDM (UK) have been planning the conference for at least the last 12 months. For those of you not from New Zealand, I thought I would begin my discussion by giving you a little bit of local context.
- 2 Over the last twelve months, while the organisers have been booking venues, arranging catering and chasing speakers such as myself to submit their papers, the following events took place:
 - taking the most important subject first, Australia beat NZ at rugby, netball and cricket – so not a good year from a sporting perspective;
 - *in politics*, Jonathan Hunt, NZ's longest-serving MP finally left Parliament, taking up a diplomatic post in London;
 - *in the race relations sphere*, Parliament proclaimed NZ's foreshore and seabed to be Crown land and out of the surrounding struggles the Maori Party was born;
 - *in business circles*, dairy farmers held their breath as Fonterra waged an epic battle with San Miguel for control of Australia's National Foods;
 - *in the transport industry*, active planning began for NZ's first toll roads under general (not project-specific) enabling legislation.
- 3 In that same timeframe, 436 people died in accidents on New Zealand roads. Another 9,000-odd were injured in accidents, but survived and in all, there were approximately 27,000 crashes on New Zealand roads.
- 4 Many of these accidents were investigated, either as part of a coronial inquest, or as the inevitable by-product of a claim for damages before the courts. In both forums a familiar cry was often heard – "it was the road's

¹ Thanks to David Cochrane and Rebecca Laing, both of Chapman Tripp, for their help in preparing this paper.

fault Your Honour” – words guaranteed to make road engineers everywhere grind their teeth in frustration. In other cases, the road controlling authority was targeted as the scapegoat and the law in this area has been evolving as the courts have taken a fresh approach to ideas of accountability.

- 5 Accountability will be a major theme of this paper – specifically, the ways in which road controlling authorities can be held accountable (particularly in New Zealand) in respect of the roads under their control. Given that the surface friction of a road is a key indicator of its performance or “success”, it can also be a factor in accidents; shortly I’ll be telling you about Chris and his motorbike and a close encounter with a patch of gravel. In that case and others like it, the surface friction, or lack thereof, is what leads road users to try and hold someone – usually the road controlling authority – accountable.
- 6 In some instances, however, roads and road controlling authorities are held “accountable” in New Zealand in a quasi-legal (or perhaps I should say moral sense) without being given the opportunity to respond to the so-called facts against them. I’m talking here about coroner’s inquests following a road fatality and my discussion today will begin with a look at the coronial system and some of the problems experienced by Transit New Zealand in that forum.
- 7 I’ll then change my focus to New Zealand’s court system and examine some of the sources of potential liability, such as criminal nuisance, negligence and the additional duties owed to certain classes of road users under health and safety legislation. From there I’ll move on to look at the steps that can be taken to manage risks and the implications of the Official Information Act.

THE PROBLEM WITH CORONERS

Blaming the road

- 8 The first problem I want to touch on is the trend in New Zealand coroners’ decisions to blame the road – that’s right, the inanimate strip of chipseal beneath your wheels.
- 9 In this country we seem to have some sort of mental block about where our roads come from. Collectively, we act as if they were signed, sealed and delivered overnight by the tooth fairy – or perhaps I should say *designed*, sealed and delivered by the Transit fairy.
- 10 Except that Transit and our local authorities that are also road controlling authorities are *not* imaginary. When someone involved in a road accident, or a coroner, or a Judge criticises the road, what they are really doing is

criticising the road controlling authority, its staff and its Board or members. In holding the road accountable, they are implicitly blaming the people behind the road.

- 11 Take your average coroner who probably lives and works in the community that has just suffered a road fatality. He conducts a post-mortem and at the inquest is faced with the grieving relatives of one or more victims. Blaming the road may seem like a diplomatic and humane solution, when faced with options that include mention of drugs or alcohol in young Katie's bloodstream. The reality is, however, that someone, somewhere, designed that road, constructed that road, carried out maintenance on that road, put up the signs, etc. Blaming the road does not mean blaming an inanimate strip of chipseal.

No opportunity to respond to criticism

- 12 A second and related problem is the fact that when a road (or sometimes the road controlling authority) is blamed at an inquest, quite often the road controlling authority in question is not given any chance to respond to the finding. Sometimes, the road controlling authority is not even warned in advance of the negative finding to come.
- 13 As someone who has been thoroughly trained in the niceties of legal etiquette, including the requirements of natural justice, I understand the frustration of roading engineers in these circumstances. Granted, the coroner's bark is worse than his bite. Holding the road liable does not mean that the engineer who designed the road is sent to jail. Nor does it mean that the relevant road controlling authority must pay a fine, or any form of compensation.
- 14 However, under the western legal system, one of our quaint customs is to allow a defendant the opportunity to be heard in response to any allegations before a judge or jury can decide he is guilty. If a driver was accused of killing another driver because of his actions on the road, the accused driver would be given a chance to present his case and prove his innocence. It seems incongruous that this same courtesy is not extended to road controlling authorities when it or the road is blamed for a death.
- 15 This was the case at an inquest in February 2000. The coroner described the road surface of the accident area as "suspect". He also said he accepted that the fundamental cause of the fatality was the dead man's car hitting a slick piece of road and getting out of control. This is clearly a criticism of the road, yet the coroner himself acknowledged that Transit had not been notified of the comments. He stated instead that "I intend to write to the appropriate authorities ... asking what steps have been taken or what steps are going to be taken to make this stretch of road safer".

No account taken of external factors

- 16 A third related problem is that coroners do not have to take into account external considerations when making recommendations and/or comments. The focus of the coronial process is the identification of the circumstances and causes of a death and a sometimes-rigid adherence to this focus means that factors such as funding restraints and the need to prioritise work are not always considered.

Inappropriate recommendations

- 17 Finally on the subject of coroners, I want to mention the status of coronial recommendations. While these are not binding on anyone, they often have a great deal of moral force given the circumstances in which they are made. However, it is not uncommon for a coronial recommendation to be at odds with road engineering expertise. When this occurs, a road controlling authority is in an invidious position. It does not want to take an action that flies in the face of best practice safety measures. Yet, by not implementing the coroner's recommendation, the authority becomes the subject of public blame and ill-will.
- 18 For example, during an inquest into an accident that occurred on May 2000, a recommendation was made that the Code of Temporary Traffic Management, produced under Transit's authority, be amended to require contractors to give advance traffic warning in the case of rolling or semi-static road closures. An example given was to erect warning signs ahead of the closure. The best safety information available to the Transit was that installing advance warning signs would be likely to cause more problems than it would solve; the safety of the contractor's employees in installing the signs was not considered by the coroner.

New Bill

- 19 There is a Coroner's Bill currently before a Parliamentary select committee. Submissions on the Bill closed on 18 March of this year, but a report is not due until 15 June 2005.

POTENTIAL LIABILITY

- 20 Before I start walking you through the various grounds of liability, I need to explain for the benefit of our overseas guests that in New Zealand you cannot sue for personal injury suffered as a result of an accident. About 30 years ago, New Zealand introduced its "no blame" accident compensation scheme. As a result, if you have an accident in this country and physically injure yourself, you cannot sue for damages based on that injury.
- 21 Instead you go to your doctor and fill in an ACC form that asks various questions about the circumstances of the accident and your injury. ACC then assesses your injury, your rehabilitation needs and the overall effect

of the injury on your life and pays some amount in compensation. In some cases, if the injury is not particularly serious, the compensation might simply be a contribution towards your physiotherapy costs. In very serious cases you might qualify for 24-hour care.

- 22 Of course, you can still sue for any property damage suffered. In some cases, the property damage alone can involve significant sums of money. We were involved in one case last year when a truck jack-knifed on a State highway. A second truck then came along, couldn't stop in time and crashed into the first truck. One of the drivers was killed and the cargo of both trucks was completely destroyed, including several thousand cigarettes. The damages sought were initially in the vicinity of \$1m.
- 23 The first potential source of liability for consideration is criminal nuisance, an offence under section 145 of the Crimes Act 1961.
- 24 On Sunday 16 February 2003, Chris was riding his 1000cc Aprillo twin motorbike in an easterly direction along Route 52 in the North Island. Route 52 is a country road in southern Hawkes Bay and Chris was heading towards a small beachside settlement called Porongohau. He was doing approximately 70-80km an hour in a 100km zone.
- 25 Chris entered a right-hand curve and unexpectedly hit a patch of fine gravel (or loose chip) on the road. His bike went into a skid, crossed the centreline and the opposing lane and hit a tree and a fence. Luckily no cars were around at the time and Chris wasn't seriously hurt – although his bike was written off and his helmet and riding gear were also badly damaged.
- 26 It turned out that the source of the gravel was road controlling authority roadworks on the other side of the road. A patch had been sealed by a contractor about 6 days earlier and the resulting loose gravel had not been swept clear afterwards. Subsequent road use had caused the gravel to migrate to Chris's side of the road and it had heaped slightly in places so that it was about 2.5cm thick. As Chris came round the bend he rode his motorcycle into the thickest area of gravel and this caused him to lose control of his bike.
- 27 None of this was Chris's fault. He was not speeding and had no warning of the roadworks ahead. Whilst the contractor had erected a sign saying "roadworks" for those travelling in a westerly direction, no warning signs had been put up for motorists such as Chris, travelling east.
- 28 Scenarios such as this one are *not* a daily reality in New Zealand. Our road controlling authorities take their responsibilities seriously – as perhaps is evidenced by the small number of cases concerning road maintenance that have come before the Courts (although obviously there may be other

reasons for this also). Whatever the answer, it is fair to say the case law is somewhat sparse.

- 29 Chris, on the other hand, turned out to be a councillor in another district and all too aware of the responsibilities of territorial authorities *vis a vis* roads. No doubt he was annoyed by the loss of his bike and maybe wanted some sort of official acknowledgement that the accident wasn't his fault; that the council in question hadn't done its job properly.
- 30 In other words, what Chris wanted was some *accountability*. He brought a case of criminal nuisance against the local council and the contractor who carried out the roadworks and both were found guilty.
- 31 Chris's was something of a test case. There was no legal precedent for charging a road controlling authority with criminal nuisance and Chris's lawyers (it was a private prosecution) had to rely on a multitude of statutory and common law sources to establish the necessary duty and level of knowledge.
- 32 Section 145 of the Crimes Act provides that:

"Every one commits criminal nuisance who does any unlawful act or omits to discharge any legal duty, such act or omission being one which he knew would endanger the lives, safety, or health of the public, or the life, safety, or health of any individual."

- 33 There are 3 elements to the charge: a relevant legal duty, an omission to discharge that duty, and the requirement of knowledge of danger to the public.
- 34 In Chris's case, the court decided that a duty was owed by a road controlling authority due to a combination of:
- 34.1 section 156 of the Crimes Act, which concerns the duty owed by persons in charge of "dangerous things" (the Judge described the dangerous thing as "the road with the gravel chips on it");
- 34.2 section 353(a) of the Local Government Act 1974, which concerns general safety precautions to be taken by territorial authorities when undertaking roadworks;
- 34.3 regulation 122(3) of the Traffic Regulations 1976, which concerns the use of signs to warn of road hazards; and

- 34.4 the common law duty to take reasonable care when repairing a road (I'll be talking more about this shortly under the heading of negligence).
- 35 Together, all parties agreed these provisions amounted to a duty to either keep the carriageway clear of loose gravel, *or* to have provided appropriate signage to warn oncoming motorists of the hazard presented by the loose gravel.
- 36 The parties also agreed that the 3rd element of the offence, the knowledge of danger to the public in the event of a breach of the duty owed, was established.
- 37 After considering the facts of the case, the Court had no hesitation in deciding that the contractor (and also the Council as a result of statutory duties that had not been transferred) were guilty of criminal nuisance. Key to this decision seems to have been two facts:
- 37.1 first, while work on the patch began on 29 January – some 18 days before Chris's accident – there was no evidence of anyone having seen any signs in place during that period; and
- 37.2 second, a standard-form work report on the patch, which was completed by the subcontractor who did the sealing, had been left blank in the place that required the subcontractor to note whether the necessary signage was in place.
- 38 While the Judge in the case has since publicly said that this case does not have any precedent value for road controlling authorities,² that really remains to be seen. There were no special facts that that made this case a truly "one-off" event. However, no doubt lessons have been learnt. While the council got off relatively lightly with an order to pay \$339 in prosecution costs, the contractor was ordered to pay just under \$10,000.

Negligence

- 39 The second potential source of liability for road controlling authorities that I want to examine is that of negligence. I intend to look primarily at the position in New Zealand and Australia, but I will also touch briefly on the UK, Canada and the United States.

The position in New Zealand

- 40 Historically, road controlling authorities in New Zealand have been immune to claims for negligence and nuisance in respect of neglect or failure to

² "Criminal nuisance conviction for roading contractor after crash", *New Zealand Herald*, 13 July 2004.

construct, maintain, or repair a road (known as the non-feasance rule), but liable for positive acts which causes damage or loss (the misfeasance rule). The position was established over 40 years ago, in a case called *Hocking*³ where the Judge said that:

...while a roading authority is immune from liability to users of the highway who are injured as the result of the unsafe or dangerous state of the highway so long as it adopts a merely passive role, once it decides to reconstruct or repair a road, then it is obliged, like anyone else, to exercise reasonable care in the performance of its self-imposed task.

41 *Hocking* is considered the last significant reported case in New Zealand on the issue of a road controlling authority's common law liability (i.e. negligence and private nuisance – as opposed to criminal nuisance which is now codified under statute).

42 The concept of non-feasance in relation to the exercise of statutory powers has been the subject of criticism since *Hocking*. In a case called *Lavis v Kent County Council*,⁴ for example, it was stated that:

The notion that found fruit in some areas that a public authority may be liable for damages for misfeasance if it does something in the exercise of a power and in some way or other does the wrong thing, but can never be liable for non-feasance if for whatever the reason, it simply fails to exercise an available power, does not strike ordinary people as logically satisfactory.

43 However, New Zealand courts have continued to recognise the difference between the concepts of misfeasance and non-feasance,⁵ and *Hocking* remains the law – in New Zealand – for now – at least.

44 Other jurisdictions, however, (most notably Australia) have moved on and the distinction between non-feasance and misfeasance has been eroded. It seems likely that New Zealand will follow this trend, and that road controlling authorities will be potentially liable for negligent omissions as well as negligent actions.

The position in Australia

45 So what is the position in Australia?

46 Historically, the Australian courts took the same view as New Zealand. However, in May 2001 in a case called *Brodie v Singleton Shire Council*,⁶ the High Court of Australia removed the common law immunity for non-

³ *Hocking v Attorney General* [1963] NZLR 513, 532.

⁴ *Lavis v Kent County Council* (1993) 90 LGR 416.

⁵ *Mee v DWD Hotels & Ors* [1974] 1 NZLR 260 and *Palmer v Danes Shotover Rafts Ltd* (1999) 14 PRNZ 57.

⁶ *Brodie v Singleton Shire Council* [2001] 180 ALR 145.

feasance. What happened was this: Mr Brodie drove his truck over a bridge in the council district. While he was crossing the bridge, the beams supporting the bridge gave way, the bridge collapsed and the truck fell to the creek bank below. It turned out that termites had hollowed out the beams, and although the bridge had been visually inspected, very simple tests that would have shown the defect has not been carried out.

47 Not actually a case about road surfacing obviously – but it has important implications for all actions/omissions of a road controlling authority, including in relation to road surfacing.

48 As a result of *Brodie*, statutory authorities in Australia are now subject to the ordinary principles of negligence. As explained by the High Court:

Where the state of a roadway, whether from design, construction, works or non-repair, poses a risk to that class of persons, then, to discharge its duty of care, an authority with power to remedy the risk is obliged to take reasonable steps by the exercise of its power within a reasonable time to address the risk.

49 The Court observed that public authorities were obliged to exercise their statutory powers where those powers gave it “such a significant and special measure of control over the safety of persons” as to impose upon the authority a duty of care.

50 Liability is, therefore, likely to depend on whether a road controlling authority’s actions or omissions were consistent with those of a reasonable road controlling authority in the particular circumstances. The terms, scope, and purpose of the relevant statutory power will be very important in determining what a reasonable authority would have done. Questions of costs, practicability and other funding priorities will also be relevant to this assessment.

51 Importantly, the Court observed that “the opposite of ‘non-repair’ is not ‘perfect repair’ ”.⁷ This statement recognises that the duty to keep the highways safe, does not mean in all circumstances; it means safe for road users exercising reasonable care for their own safety.

52 Another case, heard and decided at the same time as *Brodie* due to the similar issues raised, demonstrates the point about people exercising reasonable care for their safety. In *Ghantous v Hawkesbury City Council*,⁸ Mrs Ghantous was suing the council after tripping and falling on a concrete footpath within the council’s jurisdiction.

⁷ *Brodie v Singleton Shire Council* [2001] 180 ALR 145, at para 138.

⁸ *Ghantous v Hawkesbury City Council* [2001] 180 ALR 145.

53 The High Court of Australia dismissed the case, finding that there was no negligence on the part of the council in the construction of the footpath, or in not keeping the concrete strip and verges level. The Judges made it plain that pedestrians can be expected to exercise sufficient care by looking where they are going and avoiding obvious hazards. As stated by Justice Gaudron:⁹

The formulation of the duty in terms which require that a road be safe not in all circumstances but for users exercising reasonable care for their own safety is even more important where, as in Ghantous, the plaintiff was a pedestrian. In general, such persons are more able to see and avoid imperfections in a road surface. It is the nature of walking in the outdoors that the ground may not be as even, flat or smooth as other surfaces. As Callinan J points out in his reasons in Ghantous, persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes.

54 The scope of *Brodie* has since been discussed by the High Court of Australia in *Graham Barclay Oysters Pty Ltd v Ryan*.¹⁰ In that case, Chief Justice Gleeson questioned the propriety of the courts stepping in and second-guessing governmental spending priorities. He was clearly uncomfortable about the courts assessing the reasonableness of political funding decisions.

55 So take comfort - it's not open season on road controlling authorities. While *Brodie* represents a clear change in the legal duty owed by these bodies, judicial examination of that duty has been placed under a tight rein. The courts are never enthusiastic about cases involving "political" matters; it being a case of where angels fear to tread...

56 It was also noted in *Barclay Oysters* that it may be a very large step to go from foreseeability of harm, to the imposition of a legal duty to take steps to prevent the occurrence of harm in the case of a governmental authority.

The position in the United Kingdom

57 Turning now to the UK, I don't want to say all that much about the position there, because it has developed quite differently to Australia and New Zealand. In England, the common law immunity for non-feasance was abolished by statute in 1961.¹¹ There is now a duty imposed on the relevant body under statute¹² to maintain highways in such good repair as to render it safe for ordinary traffic to pass at all seasons of the year.

58 According to the House of Lords, the duty as defined does *not* include a duty to take reasonable care to secure that a highway is not dangerous to

⁹ *Ghantous v Hawkesbury City Council* [2001] 180 ALR 145, at para 163

¹⁰ *Graham Barclay Oysters Pty Ltd v Ryan* [2001] 194 ALR 337.

¹¹ Section 1(1) of the Highways (Miscellaneous Provisions) Act 1961 (UK).

¹² See sections 41 and 58 of the Highways Act 1980 (UK).

traffic.¹³ It has also previously been held that the duty or repair did not extend to the prevention of ice forming on the highway or the removal of accumulated snow.¹⁴ However, the British Parliament was clearly not impressed with this outcome and it has since been clarified by statute that ice removal is part and parcel of the duty.¹⁵

Canada & the US

59 Turning to Canada and the United States, neither observes any distinction between misfeasance and non-feasance in the exercise of statutory powers.

60 The prevailing view in the Canadian Supreme Court¹⁶ is that there is a general duty of care on a province to maintain its highways, and the traditional law of negligence applies to government agencies in the same way as to individuals. There are some exemptions, one of which is if the decision arose as a result of a policy decision. Generally, decisions concerning budgetary allotments or inspection routines are classified as policy decisions.

61 In the US, the duty (which changes from State to State) usually includes not only a duty to maintain the surface of the highway in a condition reasonably safe for travel, but also a duty of warning the traveling public of any other condition which endangers travel, whether caused by a force of nature, such as snow and ice, or by the act of third persons, such as a ditch dug in the sidewalk or roadway or an obstruction placed upon it.

Health & safety legislation

62 The last potential source of liability I want to consider arises under the Health and Safety in Employment Act 1992.¹⁷

63 The Act imposes obligations on road controlling authorities as employers,¹⁸ as persons who control a place of work,¹⁹ and as principals.²⁰

¹³ See *Gorringe v Calderdale Metropolitan Borough Council* [2004] 2 All ER 326.

¹⁴ *Goodes v East Sussex County Council* [2000] 1 WLR 1356 (HL).

¹⁵ Section 111 of the Railways and Transport Safety Act 2003 added the removal of ice and snow to the "duty to repair".

¹⁶ See the judgments of Justice Cory in *Just v British Columbia* [1989] 2 SCR 1228; *Brown v British Columbia (Minister of Transportation and Highways)* [1994] 1 SCR 420; and *Swinamer v Nova Scotia (Attorney-General)* [1994] 1 SCR 445.

¹⁷ Road controlling authorities are not exempt from the application of the Health and Safety in Employment Act 1992 and nor are they distinguished in any way from other persons who control a place of work under that Act.

¹⁸ See sections 6, 7 and 15.

¹⁹ See section 16.

²⁰ See section 18.

- 64 As employers, road controlling authorities must take all practicable steps to ensure the safety of their employees while at work.²¹ This includes the safety of employees working at that authority's business premises and roadworks sites, as well as the safety of employees when *passing through* a place under the control of their employer to reach a place of work.²²
- 65 As employers, road controlling authorities must also ensure that there are effective methods for identifying hazards in place.²³ The hazards that are identified must then be eliminated, isolated or minimised.²⁴
- 66 Road controlling authorities also have a duty to the general public, as employers to non-employees to "take all practicable steps to ensure no action or inaction of any employee while at work harms any other person".²⁵
- 67 The duty of care owed is to ensure that no hazard, known or unknown, causes harm to any person in a place of work, which includes all road users, working or otherwise.²⁶ There is an exception to the effect that road controlling authorities do not owe a duty of care to any person in a place of work solely for the purpose of recreation or leisure.²⁷
- 68 The group of people able to claim a road is their "place of work" is potentially much greater than just an authority's employees and contractors. The group could also include the police, emergency workers, utility operators (and their employees) who have statutory rights regarding works on roads, salespeople, commercial drivers and transport/freight companies (and their employees). Furthermore, workers who are outside the section of the road contained between an "advanced warning" sign and an "end of works" sign may still be in a "place of work" for the purposes of the Health and Safety in Employment Act.
- 69 This is because the definition of "place of work" in that Act includes a place where a person is working in a transitory sense (e.g. driving in the course of employment).²⁸ Amending legislation has since clarified that one of the

²¹ See section 6.

²² Due to the definitions of "at work" and "place of work" in the HSE Act.

²³ See section 7.

²⁴ See sections 8 to 10.

²⁵ See section 15.

²⁶ See section 16(1).

²⁷ See section 16(4).

²⁸ Section 2(3) of the Health and Safety in Employment Act provides that:

(3) *To avoid doubt, a person is in a place of work whenever and wherever the person performs work including in a place that—*
(a) *the person moves through; or*

purposes of the Act is to confirm that persons who are mobile while they work are covered by the legislation.²⁹

- 70 The duty of care owed as a principal is to take all practicable steps to ensure that no contractor or subcontractor (or an employee of a contractor or subcontractor) is harmed while doing any work (other than residential work) that the contractor was engaged to do.³⁰
- 71 Most of the case law we are aware of concerns actions taken by employees against subcontractors (or LATEs as a local authority equivalent), rather than directly against the road controlling authority itself.³¹

MANAGING RISK

- 72 That then was an overview of the primary risks a road controlling authority faces in New Zealand in terms of liability. However, there are ways of managing risk and some straightforward steps will help you demonstrate that you have not breached any duty owed.

Signs

- 73 Obviously, use warning signs. No matter what way you look at it, road controlling authorities have a duty to warn road users about hazards on the road.
- 74 The importance of warning signs was recently highlighted in a case involving a motorcyclist traveling through the central North Island at night-time and during bad weather. Ted rounded a corner and unexpectedly hit a number of quite large potholes. He skidded and both his bike and his helmet were damaged in the resulting accident. Ted filed a claim with the Disputes Tribunal and the referee found in his favour because no signs had been erected in an area that had been prone to pothole problems for some months prior.

SCRIM testing

- 75 Until something better comes along, SCRIM testing is likely to continue to be an important risk-management strategy. I'm no engineer, as you've probably gathered, but I think I'm on pretty safe ground when I say this is the machine that analyses a road and produces skid-resistance data.

(b) *itself moves.*

²⁹ See section 3(a)(ii) of the Health and Safety in Employment Amendment Act 2003.

³⁰ See section 18.

³¹ *Health & Safety Inspector v Fulton Hogan Ltd* (1999) 5 NZELC 98,565; and *Health & Safety v Citiworks* (1999) 5 NZELC 98,564.

- 76 Regular SCRIM tests are highly advisable for a road controlling authority as a means of showing that the roads under its jurisdiction are regularly and reliably monitored for problems and that actions taken are commensurate with what is known about the problem. Obviously, actions taken will also be governed by other factors, such as funding, but – as the case law has shown – funding is a legitimate concern.
- 77 SCRIM testing will become particularly important if our courts eventually go down the same path as *Brodie* in Australia. In other words, if (or when) the immunity of road controlling authorities for failure to take action disappears, SCRIM data will be a key tool for responding to situations where there are allegations that the road controlling authority has been negligent in deciding *not* to act.

Document issues & strategies

- 78 Another suggestion for managing risk is to document problems on a particular road, together with strategies (even quite simple ones) to address the issue – including reasons why that strategy was chosen.
- 79 Even if the strategy is nothing more than “keep under review” or “undertake additional SCRIM tests” it shows that the road controlling authority has observed the problem and turned its mind to addressing it. It will also be important to record the reasons for selecting any given strategy because, as some of the case law canvassed earlier showed, budgetary constraints are a legitimate consideration.
- 80 If the New Zealand courts decide to follow *Brodie*, this type of documentation will be particularly important in situations where the road controlling authority decides *not* to act. So long as the authority has put its reasons on the record, it will have a good basis on which to say to a court, “we have not breached our duty of care; we saw that X was a problem; however, we did not act because Y”. The reason could be funding-related, or it may be that determining the right course of action required further analysis. The key is to say so – and to remember the words of Justice Gaudron: the opposite of non-repair is not perfect repair.

Official Information Act requests

- 81 Some of these risk management strategies have an obvious risk and that is requests to a road controlling authority by potential litigants for the release of information generated by SCRIM testing, or as a result of SCRIM testing under either the Official Information Act, or the Local Government Official Information and Meetings Act.
- 82 We have noticed an increasing trend towards such requests, particularly by insurance companies.

- 83 The risk is more subtle than it sounds; it is not simply about release of the information into the public arena. Release can be an important educative tool if the information is properly managed. The risk is more that the information will be interpreted wrongly. SCRIM testing in particular produces highly sophisticated data that requires considerable skill and experience to interpret. Hence, it should only ever be released with careful explanatory notes and appropriate cautions about the conclusions that can be drawn.
- 84 In relation to risk management strategies, release should not be a problem so long as those strategies are properly implemented – i.e. they contain a full record of issues, proposed actions and reasons,, they are regularly updated and the actions that are subsequently taken accord with those recorded.

CONCLUSION

- 85 I would like to end my discussion with some quick thoughts on the overall theme of this conference, which is “improving safety through assessment and design”.
- 86 First of all, I hope my musings up here on stage have highlighted for you all that safety isn’t solely tied up with assessment and design; there is also a need for ongoing road surface testing, sensible use of signage and some careful planning work, balancing what is needed against what can be funded. Thus, I might alter the theme slightly, so that it reads “improving safety through assessment and design over the life of the project”.
- 87 Secondly, I would like to point out that the reference to “safety” shouldn’t be interpreted solely as a reference to the safety of road users – important though that is. If we can get the “assessment and design over the life of the project” part right, then “safety” can also be interpreted as a reference to the position of road controlling authorities and by that I mean, safety from legal proceedings, safety from adverse court decisions, safety from unfounded criticism during a coroner’s inquest.
- 88 Thank you very much.

Siobhan Hale of Chapman Tripp is a Senior Solicitor in the team that is the principal legal adviser to Transit New Zealand.