LEGAL UPDATE

Great ~~Lakes~~ Scott! Sections 43A and 45 to the rescue for public authorities

***Mansfield v Great Lakes Council* [2016] NSWCA 204**

27 SEPTEMBER 2016

IMPLICATIONS

Mansfield v Great Lakes is the most recent case to highlight the difficulties plaintiffs have to circumvent the immunity from liability offered by s43A **Civil Liability Act 2002** (NSW) (**CLA**), which applies to public authorities, and s45 CLA, which applies to road authorities.

Establishing that an act or omission was so unreasonable that no authority could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power under s43A continues to be a high threshold for plaintiffs to overcome. Plaintiffs will need to show that the public authority's conduct was grossly inadequate or manifestly unreasonable.

The decision also highlights the nature of the knowledge that must be held, and by whom it must be held in order to overcome the immunity offered by s45. Ironically in this case, the engineer – who may have had the authority to carry out works to repair the defect – did not have the specific knowledge of the risk. The person at the front desk – who was unlikely to have the authority to carry out works to repair the defect – had some knowledge of the defect although that knowledge was not sufficiently specific.

FACTS

The plaintiff claimed that on 1 January 2010, while he was driving a truck over a culvert, the embankment gave way, causing his truck to roll over into the water course. The plaintiff suffered personal injuries as a result. He commenced proceedings in the District Court of NSW against the Great Lakes Council (**Council**) as the roads authority responsible for the care and maintenance of the road.

The trial judge in the District Court found the plaintiff had failed to establish liability on the Council's part as it was able to rely on sections 43A and 45 of the CLA. The plaintiff appealed to the Court of Appeal.

ISSUES

There were three broad issues determined by the Court of Appeal:

1) whether the failure to carry out the road works was "so unreasonable" that no roads authority would consider the omission to be a proper exercise of, or failure to exercise, its statutory powers, under s43A CLA;

2) whether road signs may have prevented the harm; and

3) whether the Council was immune from liability from a failure to carry out road works, absent "actual knowledge" in its officers under s45 CLA.

DECISION

Basten JA gave the leading judgment (with Beazley P and Leeming JA concurring).

First Issue

In dealing with s43A CLA, it was not in issue that the Council was empowered to carry out "road work" under s71 **Roads Act 1993** (NSW). This included the plaintiff's claim of the Council's alleged failure to build a sufficiently large culvert with head walls, which would have prevented the erosion and collapse of the embankment. Basten JA considered that the plaintiff needed to establish the inspections carried out by the Council's engineer were so manifestly inadequate that no roads authority could properly have thought them adequate. However, the cross-examination of the engineer in this case failed to elicit any concession that his conduct was inadequate, let alone grossly inadequate.

Further, the appellant's expert evidence went no further than stating that the collapse was "foreseeable". That did not support a conclusion that there was manifest unreasonableness. Accordingly, Basten JA held that the trial judge was correct not to be satisfied that the Council's failure to replace the culvert with a larger pipe and a head wall was an omission so unreasonable for the purpose of s43A.

Second Issue

Basten JA held the s43A defence did not extend to signs as the defence only referred to "road work", which excluded a "traffic control facility" – i.e. signs. On a causation basis though, Basten JA found the trial judge was correct to hold the plaintiff would have failed as he did not articulate the precise terms of the sign and did not identify how that sign would have prevented him from using the road on the incident date.

Third Issue

Basten JA noted s45(1) has given rise to differing views on the relevant officer(s) within a roads authority who must have "actual knowledge" for the purpose of this provision. This issue was dealt with at some length in ***Nightingale v Blacktown City Council*** [2015] NSWCA 423 (see our earlier article – "What is sufficient knowledge for the purpose of a road authority's immunity from civil liability?").

Here, the evidence established that knowledge in question could only have been held by two officers:

1. the person who worked on the front desk at the Council; and
2. the Council engineer.

The front desk officer had allegedly received complaints from another road user about the embankment. However, Basten JA considered that even on the broadest view, she would not fall within the class of officers that has "knowledge" for the purpose of s45(1). Even if she had passed on that complaint, the lack of particularity meant she did not have actual knowledge of the relevant risk.

With regard to the engineer, nothing in the cross-examination showed he knew the relevant risk, being the risk of the embankment's batter walls eroding. It was insufficient that the engineer had, prior to the incident, prepared a report which identified the culvert as defective. Basten JA also commented on whether a negligent inspection falls within the protective ambit of s45. In reaffirming His Honour's opinion reached in ***Nightingale*** on this issue, Basten JA again rejected the appellant's submission that s45 did not provide immunity to negligent inspections.

LOOKING AHEAD

Recent cases, such as ***Nightingale*** and ***Mansfield***, highlight the difficulties plaintiffs have to circumvent a s45 defence. Plaintiffs must demonstrate knowledge of the defect by the employee or agent of the defendant with authority to carry out repairs. In this case, that was the engineer, not the person working in the front desk.

Further, this case reaffirms the high bar imposed in the ***Wednesbury*** unreasonableness wording in s43A for plaintiffs to overcome; that the authority's action was so manifestly inadequate that no authority could properly have thought them adequate.

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