

# Insurance Case Note

June 2007

## *Shire of Toodyay v Walton*

*West Australian Court of Appeal, delivered 10 April 2007*

### Facts

On 17 June 2001 Mrs Walton, the respondent, was driving home from her parents-in-law's with her husband along a gravel road. As the vehicle approached a right hand bend, the respondent lost control of the vehicle and it slid into a tree some 67 metres away. The respondent's husband was killed and she suffered serious injuries.

The respondent was travelling at between 60 to 80 kph while the speed limit was 110 kph. She had either driven or been a passenger while travelling along that road at least five times per year for the last 16 years.

The respondent submitted that the accident was caused by the council's negligence for two primary reasons.

Firstly, the respondent argued the guide post markers at the right hand bend were not placed in accordance with the Australian Standards, (they were 45 metres apart, instead of 20 metres). The respondent was also misled as to her car's position on the road by a driveway marker which looked very much like a road marker.

As a result of misreading her position as being too far left, the respondent overcorrected her car's steering to the right, causing it to lose control and slide for 67 metres.

Secondly, the respondent argued the imperfect and negative camber of the road at the right hand bend (the road tilted to the left) meant that a person driving along the bend thought they needed to correct more to the right than they really did. The District Court Commissioner found the spacing of the guide post markers caused the accident, especially the misleading effect of the driveway marker, which meant the plaintiff thought she was too far left and overcorrected to the right. Additionally the negative camber of the road made it more difficult for the plaintiff to regain control of her car.

The Commissioner found the council was solely responsible for the accident.

### Appeal

The appellant council appealed the decision on two main grounds.

**Ground 1:** The council did not owe a duty to road users to erect guide posts, remove the driveway marker or alter the road's camber. Alternatively, if such a duty were owed, it was not breached in the circumstances.

President Steytler and Buss JA thought it was plain enough that the appellant council, being an authority with statutory powers as outlined in *Brodie v Singleton Shire Council*, owed a duty to the respondent [30].

After reviewing the evidence and the council's arguments, President Steytler was of the opinion the Commissioner was right to conclude that the road's condition was such to create a reasonable risk of harm to road users. [32].

He noted evidence the positioning of the guide posts and drive way marker were unsafe [33] and that the Commissioner was entitled to accept evidence that the road's imperfect camber would have made it more difficult for the respondent to regain control of her car. [35]

The Commissioner could and did accept the magnitude of the risk created by the inadequate guide posts and the imperfect camber was high.

It was especially important that on a gravel road no sudden steering corrections, even small ones, were needed.

**Ground 2:** The respondent was guilty of contributory negligence.

The council was ultimately successful on this ground of appeal, with President Steytler and Buss JA apportioning liability equally between the respondent and the council.

The basis of the finding of contributory negligence was a finding the respondent had driven too fast, at closer to 80 kph, not 60 kph, which they thought would be a safe speed.

They also found the respondent was not driving with the requisite degree of care and attention. This inference was 'overwhelming' given the number of occasions the respondent had driven along the road and her familiarity with it. [46].

Buss JA quoted the recent High Court case of *Leichhardt Municipal Council v Montgomery* [2007], which stated it is not necessary that the authority's negligent act or omission be the sole cause of the plaintiff's damage. Causation will be established if the relevant act or omission materially contributed to the damage.

He thought this was the case in the current circumstances.

## Dissent

Justice Pullen thought the accident was caused solely by the respondent's negligence; that she was driving too fast at close to 80 kph and inattentively, on a road that she was familiar with.

He did not believe the position of the guide posts, driveway marker or imperfect camber of the road contributed to the accident, at least not in a material way.

He also examined the evidence of the respondent and the council and believed it would not have been possible for the council to have erected guide posts in accordance with the Australian Standards on this part of the road. He believed the respondent lost control of her vehicle before the negative camber of the road and so this would also not have contributed to the accident.

## Decision

The majority of the court believed the respondent was guilty of contributory negligence and reduced her damages by 50% accordingly.

All other grounds of appeal were dismissed.

## Application

This case highlights a situation where a council will be liable for deficiencies in its own public road works programs. This will be the case even in a situation where the plaintiff is familiar with the road and is found to be speeding in the circumstances and not paying close enough attention.

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