A two-step highway authority negligence test?

Rickard & Ors V Allianz & Ors [2009] NSWSC 1115 and [2010] NSWCA 328

By Michal Horvath

You could be forgiven for thinking that you do not have to know about administrative law while working as a personal injuries lawyer. But you would be wrong. The *Civil Liability Act* (in its various state forms) utilises the Wednesbury unreasonableness test[1] when it comes to highway authority decisions. The New South Wales case of *Rickard & Ors v Allianz & Ors*[2] and the subsequent appeal[3] illustrates the point.

THE FACTS

In rural NSW, a highway runs next to a farm. It had been raining for several days, but not the day of the accident. Water was pooling at the entrance to the farm and spilling over the highway. It created a pool across the highway about 5cm deep. It is a 100km per hour zone. A line of traffic was heading east and it included a bus, followed by a truck. A passenger vehicle (a Commodore), with three occupants, was heading west. The bus driver saw the Commodore hit the puddle and got out of the way. The truck driver could not avoid the Commodore and they collided head on. The driver of the Commodore and one of the passengers were killed. The truck driver and the remaining passenger in the Commodore were badly hurt.

Four claims were brought, with each plaintiff (except the Commodore driver's wife), claiming against the driver, the RTA and the owners of the farm. The defendants cross-claimed against each other.

This case summary focuses on the claims against the RTA. The driver's negligence, however, became relevant to any breach by the RTA, and will therefore also be discussed.

Several hours before the accident, a passer-by called the council to warn of the water on the road. The council had used up its signs so it called the RTA for help. Two RTA workers then attended the site and erected a 'water over road' sign. They put it about 900m east of the accident site.

THE TRIAL

Hoeben J at first instance made a number of relevant findings. An approaching driver could have seen the puddle at least 125m before reaching it, which was enough time to slow down if paying attention. A driver should have slowed down to 60kph (the car must have been doing about 90kph because it aquaplaned, which would have taken at least that speed to occur). A sign at anywhere between 150m and 300m from the puddle would have been an effective warning (if the driver was paying attention). A sign at 900m from the puddle was deemed not to be effective.

The trial judge was highly critical of the RTA staffs' evidence. They tried to say the sign was placed between 150m and 300m from the puddle. The judge rejected that evidence (there was a photo of it at the 900m mark) saying they were either attempting to cover up their mistake or to protect the RTA. They also suggested that the sign was placed where it was because another hazard was developing further down the road. The judge also rejected this argument, saying if that were the case, the sign would have faced the other way, as the hazard first developed from the west. The judge considered the evidence 'a web of deceit', an 'incomprehensible' decision, and as one 'straining credulity'.[4]

His Honour applied the two tier test proposed by Campbell JA in *RTA v Refrigerated Roadways*[5]. Firstly, negligence needs to be established under the ordinary rules. The next stage is to apply the Wednesbury test[6] by asking whether any reasonable decision-maker could have made such a decision (basically, according to the trial judge, the test was whether the decision was irrational). The judge found that the RTA had breached its duty.

However, causation was not established. The judge found the driver liable for either reacting too slowly to the danger or ignoring it. The judge said both the scenarios were equally probable and therefore he could not pick one. As against the Commodore driver it did not matter, both scenarios amounted to negligence. As against the RTA, causation could not be established because in only one of the scenarios would a sign in the right place have made a difference.

THE APPEAL

The insurer for the Commodore driver appealed in its cross-claim against the RTA. Giles JA wrote the leading judgment on appeal. His Honour pointed out that the application

of the test is objective and any focus on the motives or reasoning of the actual people putting the sign in place is dangerous. Although the placement of the sign was not in the preferred or correct location, the placement was still comprehensible.

Because the parties did not challenge the two-step approach, the case did not consider the scope of operation of s43A; whether it changed the extent of the duty or whether it was a defence. Those were left for another day. The judge agreed that there was a problem in transposing an administrative law test to a negligence case, because whereas in administrative cases the question is whether a decision should be interfered with, in personal injury cases the question is whether there was a reasonable response to a foreseeable risk of injury. His Honour cautioned against substituting one's own tests instead of applying the language of the legislation before concluding that the placement of the sign was not in breach of the duty.

His Honour went further to consider how the trial judge arrived at the finding that the RTA witnesses were misleading before deciding that the finding was not well-founded (a police officer had said that he got the impression that the witnesses were not being truthful when being interviewed).

Finally, there was the issue of causation. There were various complicated submissions about what may or may not have occurred and whether the sign had been seen. Giles JA considered that when looking at causation (not breach), the issue is for how long would the sign that was placed at 900m have an effect on the driver. In this case, the judge said that a sign at 150m to 300m would not have changed the driving or it was at best speculative whether it would have. Causation was therefore not established.

The only conclusion I can arrive at is that it seems nearly impossible to win one of these cases against a council or a road authority. The test has long been criticised in administrative law circles. It now appears that it will also get the opportunity to be criticised in tort circles as well.

Notes: **1** The test comes from the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. For an applicant to be successful, he or she has to show that the decision was so unreasonable that no reasonable decision-maker would make it. **2** *Rickard & Ors v Allianz & Ors* [2009] NSWSC 1115. **3** [2010] NSWCA 328. **4** *Rickard & Ors v Allianz & Ors* [2009] NSWSC 1115, at [125] - [127]. **5** *RTA v Refrigerated Roadways* [2009] NSWCA 263. **6** Section 43A NSW CLA.

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