NEW SOUTH WALES COURT OF APPEAL

CITATION: Campbelltown City Council v Bussell by his next friend Kay Bussell & Anor [2002] NSWCA 410

FILE NUMBER(S):
40838/01

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PARTIES:
Campbelltown City Council (Appl)
Glen Arthur Bussell (1st Resp)
Samuela Taumalolo (2nd Resp)

JUDGMENT OF: Beazley JA Stein JA McClellan J

LOWER COURT JURISDICTION: District Court

LOWER COURT FILE NUMBER(S): 8061/00

LOWER COURT JUDICIAL OFFICER: Murrell DCJ

COUNSEL:
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CATCHWORDS:
NEGLIGENCE
duty of care
causation
contributory negligence
where negligence was apportioned by trial judge between the first and second defendants and plaintiff
appeal against the apportionment of responsibility

LEGISLATION CITED:

DECISION:
See para 54

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA40838/01
DC 8061/00

BEAZLEY JA
STEIN JA
McCLELLAN J

Date

CAMPBELLTOWN CITY COUNCIL v Glen Arthur BUSSELL by his next friend Kay BUSSELL & ANOR

Judgment

1 **BEAZLEY JA:** I agree with McClellan J.

2 **STEIN JA:** I agree with McClellan J.

3 **McCLELLAN J**: This is an appeal, with the leave of the court, from a decision of Murrell DCJ. On 28 January 1996, the first respondent, Glen Bussell ("Bussell") who was then aged eleven years and six months, was injured when he was riding his bicycle and attempting to cross Minto Road, Campbelltown. He was struck by a motor vehicle driven by the second respondent, Samiuella Taumalolo ("Taumalolo") outside the Campbelltown and District Police Citizens Youth Club ("the Club").

4 The trial judge found that both the appellant, Campbelltown City Council Council ("the Council"), and Taumalolo were liable and apportioned responsibility for Bussell's injuries between them. Her Honour determined that Taumalolo should bear eighty percent of the responsibility and the Council twenty percent. Her Honour also found contributory negligence on behalf of Bussell, which her Honour assessed at twenty percent. The finding against the Council was made because of its role in providing a pedestrian crossing which Bussell was using when the accident occurred.

5 The Council appeals from her Honour's finding that it breached its duty of care, that the breach relevantly caused Bussell's injuries and her Honour's finding with respect to contributory negligence.

6 Leave to bring the appeal was necessary because her Honour has not yet determined the quantum of damages. Taumalolo has not sought to challenge her Honour's findings either in relation to his contribution to the accident or the finding of contributory negligence.

Minto Road and the pedestrian crossing

7 The Council, as the delegate of the Roads and Traffic Authority, had the function of approving and authorising traffic markings and devices at sites such as the accident site. As is common, the Council had constituted a traffic committee which included representatives of the Council, the police, the Roads and Traffic Authority and others. The function of this committee was to give technical advice and make recommendations to the Council.

8 Minto Road is an unusually wide (19.4 metre) minor collector road running east-west. The pavement area, but for the use of some of it for angled parking, would have been capable of accommodating four lanes of traffic. The Club is located on the north side of the road and east of the Minto Railway Station. Minto Road intersected Kent Street just to the west of the Club and further to the west, intersected Surrey Street. To the east of the Club, Pembroke Road, a regional arterial road, entered Minto Road from the south forming a T-intersection with it. That intersection was relatively busy and was controlled by a stop sign facing into Pembroke Road. The speed limit in Minto Road outside the Club, at the time of the accident, was 60 kilometres per hour.

9 Minto Road had been originally configured with angle parking well before any pedestrian facilities were constructed. In July 1991, the Club wrote to the Council, requesting that a marked pedestrian crossing be installed outside the Club, and complaining about the poor street lighting. The Club advised the Council that eighty percent of its members were young persons of school age and stated that there had been some "near misses" involving children crossing the road after dark. The Club was open at night.

10 Apparently, the site did not meet the relevant guidelines for a marked pedestrian crossing. However, after a further request from the Club in March 1994, a committee made a recommendation to the Council that a pedestrian crossing consisting of a pedestrian refuge and associated kerb extensions be constructed. This recommendation was implemented.

11 As a consequence, the configuration of Minto Road adjacent to the Club, on the day of the accident, was as illustrated by the plan which I have attached as an annexure to these reasons. In front of the Club, a ramp connected Minto Road to the footpath. From the ramp, two or three steps led down to the Club entrance. There was also a ramp or pramway leading to the entrance which wound around some bushes east of the steps. Beyond the original kerb in front of the Club were two triangular "kerb extensions" or "blisters". On either side of the kerb extensions there was provision for rear to kerb angle parking. The first two angle spaces on either side of the kerb extension were restricted by signs to disabled parking.

12 Prior to June 1995, the angle parking adjacent to the kerb extension was not allocated to disabled parking on a full time basis. This was altered in June 1995 when the angle parking was allocated to disabled persons twenty four hours a day.

13 The configuration of the spaces included a line which marked the nearest point which a vehicle was intended to occupy closest to the centre of the road. The signage of spaces, other than the disabled spaces, confined lawful parking to vehicles of less than 6 metres in length.

14 Beyond the kerb extensions, a pedestrian refuge was located in the middle of the road. A second kerb extension had been constructed on the southern side of Minto Road, opposite the Club.

15 On the night of the accident, a small bus, measuring 6.99 metres, known as a Coaster, was parked in the space immediately adjacent to the crossing on the western side. This was a regular occurrence, the bus being used by the Club to bring patrons to play bingo. Because of its height and length, the bus obscured the view of a pedestrian using the crossing of vehicles approaching from the west. I have discussed the extent of the obstruction later in these reasons. Since the date of the accident, the Council has moved all disabled parking to the eastern side of the kerb extension. The spaces to the west of the kerb extension have been restricted to "police vehicles only". Because police vehicles include trucks, vans and buses it is doubtful whether the new arrangements are satisfactory.

How the accident occurred

16 On the evening of the accident, Bussell had been visiting his aunt's home at Minto. Sometime after 8.30 pm, Bussell and his cousin, Wade Smith, who was a little older, left the aunt's home and rode their bicycles to the Club. Bussell's mother was at the Club premises apparently playing bingo. It was a Saturday night.

17 The plaintiff was riding a "BMX" bike with an estimated length of 1.45 metres. It had a reflector on the rear and an arc reflector measuring approximately six inches by one inch attached to each wheel, which rotated with the wheel rotation, reflecting to both sides of

the bike.

18 When the boys arrived at the Club, Bussell went inside and Smith remained outside talking with a friend. After a short while, the boys decided to ride to a nearby service station to purchase chocolates for Bussell's cousins, who were at the aunt's home.

19 Bussell left the Club and joined his friends at the front of the building near the stairs. The evidence before the trial judge with respect to the sequence of events which followed was not entirely clear. However, the trial judge accepted the evidence of Smith and made the following findings:

> "I accept the evidence of Wade Smith that he and the plaintiff rode up the steps to the footpath. The plaintiff paused and looked to the east (left). There was a reasonably good view to the left. A car could be seen at the stop sign leading from Pembroke Road. As their view to the west was impeded by the buses, the plaintiff and Wade Smith then found a position on the footpath behind the buses, from which they could obtain some view to the west. From this point, car lights could be seen, apparently turning out of Surrey Street into Minto Road. The plaintiff observed no vehicles to the west other than the Surrey Street vehicle. The plaintiff assessed that he had adequate time to cross Minto Road before the Surrey Street vehicle reached the Club.
>
> The plaintiff intended to ride east towards Pembroke Road. Wade Smith said that the plaintiff rode over the eastern kerb extension and then down to the left (eastern) side of the extension. The plaintiff said that, in accordance with his usual practice, he rode east of the extension, very close to its eastern side. In his police statement of 9 April 1997, Luke Gannon said that the plaintiff was riding at a point past the walkway but before a vehicle parked east of the walkway. Ms Jorgensen and Mr Harrington recalled that the plaintiff rode out from between the two parts of the extension. In relation to the plaintiff's path of travel, I accept the evidence of Wade Smith, as I consider him to be a reliable witness. He was in the best position to see where the plaintiff rode out and his evidence is reasonably consistent with that of the plaintiff and Mr Gannon.
>
> The plaintiff stood on the pedals of his bicycle. Mr Harrington observed that the plaintiff 'rolled out' or 'drifted out' onto the road quite slowly. I accept this aspect of Mr Harrington's evidence, which was not seriously contested by the parties. Mr Harrington said that the plaintiff rode at a reasonable walking speed, ie at about 1.5 metres per second or a little faster. Mr Jamieson said that a walking speed was 1.5 metres per second. Mr Vaughan said that it was a little faster. At paragraph 1.2.2 of the Austroads Guide, an average unimpeded free flow walking speed was said to be 1.35 metres per second.
>
> There is no doubt that, on reaching the extremity of the kerb extension, a prudent person utilising the facility in the manner of a pedestrian would have stopped and looked in both directions. Any loss of pedestrian sight line occasioned by the Club buses would have been irrelevant had the plaintiff stopped at the extremity of the extension and looked both ways. The plaintiff knew that persons using such a pedestrian facility should stop at the extremity of the kerb extension, but he did not do so. He looked to his left (to the east) and observed the vehicle at the stop sign in Pembroke Road. He did not look to his right as he erroneously believed that there was no risk posed by traffic coming from his right. Had he looked to his right from the extremity of the kerb extension directly towards Kent Street, he would have seen any vehicle that was proceeding from Kent Street into Minto Road if its headlights were fully illuminated. Nothing would have impeded his line of sight into Kent Street.
>
> At a time about which he was unclear, the plaintiff heard a 'burnout' or screeching noise, but assumed that it emanated from the Surrey Street vehicle, which he assumed to be still some distance away.
>
> Wade Smith was following the plaintiff on his bike. From the footpath on the northern side of Minto Road, Wade Smith could not see the headlights of a vehicle coming out of Kent Street. As the plaintiff rode out, Mr Smith could hear a vehicle revving. He did not see the first defendant's vehicle until it collided with the

plaintiff's bike.

There was a dispute about where on the road the impact occurred. The damage to the first defendant's vehicle occurred to the front right side. It appeared to Mr Harrington that, when the plaintiff was hit, he was in the middle of the eastbound lane. Mr Harrington was the first person to reach the plaintiff after the impact. He said that the plaintiff was lying in the east bound lane of Minto Road, almost in the centre of the road and 20 to 25 feet (six to eight metres) past the central pedestrian refuge. I consider that evidence to be indicative rather than accurate as to the distance past the central pedestrian refuge. I accept the evidence of position after the impact vis a vis the centre of the road. It is consistent with the evidence of Wade Smith that the plaintiff was almost to the middle of the road when he was hit. I find that the plaintiff was almost at the middle of the road when he was hit.

I find that, when he passed the extremity of the kerb extension, the plaintiff proceeded to 'roll out' fairly slowly towards the eastern end of the central pedestrian refuge. He very nearly reached the middle of the road at the eastern end of the eastern part of the central pedestrian refuge. The plaintiff intended to stop at that point in order to check whether it was safe to proceed further, having regard to the vehicle which he had previously observed at the Pembroke Road stop sign. The back wheel of the plaintiff's bike was still in the east bound lane of Minto Road.

The front right side of the first defendant's vehicle impacted with the rear wheel of the plaintiff's bike. The right side of the plaintiff's head hit the vehicle. The plaintiff was thrown a distance of between 6 and 15 metres. Having regard to Mr Harrington's evidence as to the distance, it was probably towards the lower end of that range. The plaintiff hit the left side of his head on the road. He lost consciousness in hospital. Thereafter, he had no recall of events until he regained consciousness in hospital. He remained in hospital for 12 days. The principal visible signs of injury to the plaintiff's body were on the left side of his body, including injuries to the left buttock and left knee areas."

The trial judge's finding in relation to the duty of care

20 Her Honour made the following remarks in relation to the duty of care of the Council:

"The duty of a road authority is less extensive and less onerous than that owed by a school authority to its pupils and that owed by an employer to an employee. Such authorities owe a very high and non-delegable duty: David Jones v Bates [2001] NSWCA 223. In comparison, the duty of care of a road authority is to take reasonable care that its exercise of statutory powers or failure to exercise statutory powers does not create a foreseeable risk of harm to road users. Hindsight should not be substituted for reasonable foresight. Where there is a risk, the authority's duty is to take reasonable steps by the exercise of its powers within a reasonable time to address the risk. In considering what are reasonable steps, factors such as the magnitude of the risk, the degree of probability that it will occur and the expense, difficulty and inconvenience in addressing the risk are to be taken into the account. The authority need not ensure that the road is safe in all circumstances, but only that it is safe to road users exercising reasonable care for their own safety. In relation to pedestrians, an allowance must be made for inadvertence: Ghantous v Hawkesbury Shire Council [2001] HCA 29, David Jones v Bates, supra.

In relation to the standard of care required of a road authority in the design of roads, design standards must be judged by the standard of road construction applying at the time that the structure was built and in the circumstances then prevailing: Lake Macquarie City Council v Bottomley (unreported, NSWCA, 3 March 1999).

I accept the second defendant's submission that a pedestrian refuge was the most appropriate treatment of the area and that the pedestrian refuge area was designed to an appropriate standard in accordance with Australian Standard AS1742.10 and the Austroads Guide to Engineering Practice Pt 13. There is little doubt that the installation of a marked pedestrian crossing outside the Club was not justified. Contemporary design standards indicated that a pedestrian refuge/kerb extension facility was an appropriate treatment of the site because Minto Road was an unusually wide collector road. Kerb extensions narrow the trafficable part of a road and a refuge provides pedestrian protection in the middle of the road. The narrowing of a road slows or "calms" vehicular traffic. The issue is whether, in association with the installation of the particular pedestrian facility comprising a pedestrian refuge and associated kerb extensions, the second defendant should have taken steps to provide for a better driver/pedestrian sight line by prohibiting all parking for some distance west of the northern kerb extension.

I accept the second defendant's submission that design standards did not expressly require sight lines from or to the footpath or to any point other than the place at which the pedestrian would cross, ie in this case, either the edge of the kerb extension or the white line marking the intended edge of the vehicle lane. Unfortunately, the design standards did not clearly deal with sight lines for a kerb extension/pedestrian refuge facility, and certainly did not deal with sight lines where such a facility was to be used by children.

In the absence of specific guidelines, it is necessary to consider the general guidelines and expert evidence and to apply common sense to determine what the second defendant should have done to discharge its duty to take reasonable care.

Common sense supports the view that motorists must have sufficient sight distance to a pedestrian facility to respond to the presence of a pedestrian. Pedestrians must be able to see approaching vehicles. The requirement of adequate pedestrian sight distance is particularly important in circumstances (such as the pedestrian refuge situation) where the onus is on the pedestrian to give way to vehicle traffic. While a prudent adult pedestrian may always treat the extremity of a kerb extension as the edge of the road and may therefore stop at that point and look both ways, allowances must be made for imprudent and irrational conduct, particularly on the part of children. A pedestrian facility outside a youth club which is fulfilling its design function will act as an invitation or enticement to children to use it, and irrational or imprudent child behaviour should be expected. Vehicles parked in the vicinity may obstruct the ability of pedestrians, particularly children, to observe oncoming traffic. In the case of a pedestrian facility outside a youth club, it is desirable that motorists have a substantial clear view of the kerb departure point and environs. It is desirable that motorists be able to see the 'congregating area' (in this case, the footpath and ramp) as well as the extended kerb itself, for the purpose of assessing pedestrian presence and behaviour. Conversely, it is desirable that child pedestrians have a substantial clear view of approaching traffic from the kerb departure point and environs. Where the pedestrian facility places the onus on the child pedestrian to give way to vehicle traffic, the importance of both child pedestrian and driver having a clear view over a substantial distance is obvious.

In the present case, the exercise of reasonable care required that the Council take into consideration that the pedestrian facility would primarily be used by children and would often be used after dark, when visibility would be adversely affected. The second defendant should have considered that the nature of the facility which was chosen would place the onus on child pedestrians to see and respond to the presence of vehicles. The facility would entice children to cross at that location, potentially channelling them to a location which was immediately behind a wall of vehicles.

It was submitted that the Club had a strong requirement for marked parking and disabled parking at the Club entrance. Relying in part on the Austroads Guide at 3.3.4, the second defendant submitted that this factor should be weighed up in determining whether it was reasonable to retain on-street parking near the entrance. I accept that, in designing the facility, the second defendant had to balance the competing needs of road users and adjacent land users. However, the parking needs of club patrons, including the needs of disabled patrons,

could readily have been addressed despite the sacrifice of several parking spaces to the west of the northern kerb extension. Alternative parking arrangements were implemented very soon after the accident.

I find that, as the pedestrian crossing facility was constructed to meet the needs of children and was a facility which placed the onus on child pedestrians to see and respond to the presence of vehicles, the exercise of reasonable care required that the second defendant ensure a clear pedestrian sight line from well within the extension. A no standing zone of about 12 metres to the west of the kerb extension would have ensured such a sight line."

The trial judge's finding in relation to causation

21 In relation to causation her Honour found:

> "The second defendant submitted that there was no causal nexus between the accident and any act or omission of the Council, asserting that the performance of the duty would not have averted the accident. I reject this submission. Had there been no parked vehicles west of the kerb extension, the first defendant's conduct would have been much the same. The first defendant's fault was the speed at which he was driving, and a clear view to the footpath would not have enabled him to slow his vehicle from 60 kilometres per hour in time to avoid a significant impact with the plaintiff. However, the plaintiff would have behaved differently. In the absence of vehicles parked immediately to the west of the western kerb extension, he would have looked for oncoming vehicles while within the kerb extension, he would not have detoured to obtain a lookout point, he would have seen the first defendant's vehicle approaching the Kent Street intersection and he would not have ridden out onto the road."

22 Although the Council challenged her Honour's findings, I am satisfied that they were appropriate. It is apparent that Bussell did look to the west at a time when his view was obscured by the bus and, but for the presence of the bus, would have observed the car which collided with him. Her Honour's finding is consistent with evidence which Smith gave orally and in his police record of interview which was tendered. The oral evidence of Smith included the following:

> "When Glen came out we got on our bikes and Glen was ahead of me. At that time I saw two police boys buses parked in the spaces right next to the pedestrian island towards Minto Railway Station and angle parked and I could not see past them. Glen rode onto the roadway. I was near the steps. I then saw Glen come from the direction where the buses were parked then he rode out and onto the road and stopped his bike near the first island. He then looked to his right and I could then hear a car or something coming towards us from the Minto Railway direction. I then saw him ride out to cross over the street and I stopped my bike. I then saw a white coloured van hit Glen's bike when it was almost to the centre island. Glen's bike was still moving when the van hit it. The impact pushed the bike and Glen towards the stop signs at Ingleburn Road."

23 In his record of interview, which was tendered in evidence, Smith said:

> Q. This one – you point to the left one – right. Now when you gave your evidence before you said that he rode out and he looked down to his left towards a stop sign?
> A. Yeah.
>
> Q. Right? Is that correct?
> A. Yeah.
>
> Q. And before you said he didn't look to his right?

A. Didn't look to his right. Well he rode back.

Q. Yes but that was before wasn't it?
A. Like he was here and then he rode back, had a look, seen a car coming out of a street right up this way and then he just looked to his left and just rode out – straight out."

24 Later, her Honour said:

> "I accept the second defendant's submission that it was not responsible for the illegal acts of a third party and had no power to prevent the deliberate illegal parking of Club buses. The second defendant submitted that, if it was prepared to park illegally in a disabled parking zone, the Club may have parked illegally in a 'no standing' zone. One can understand the Club utilising part of a disabled parking zone when alternative disabled parking was available east of the pedestrian facility and the Club was transporting patrons to the Club's own bingo night and the Club was using vehicles of substantial size which were more conveniently parked in a larger space. It would have been quite another matter to flout a 'no standing' zone which had been installed to address safety issues."

The trial judge's finding in relation to contributory negligence

25 The trial judge considered the conduct of Bussell and assessed the extent of his contributory negligence as twenty percent. Her Honour's discussion of this aspect of the matter included the following:

> "The ability of children to identify the existence of a risk, fully appreciate the scope of the risk and exercise mature judgment by appropriately responding to the risk varies according to the age of the child. Very young children may have difficulty in identifying a risk, while older children will identify the risk, may well appreciate the scope of the risk and yet lack the mature prudence required to appropriately respond to the risk: Kaperonis v GIO New South Wales (unreported, NSWSC 15 June 1996).
>
> In the present case, the plaintiff identified the risk posed by vehicle traffic. He responded to that risk by finding a location from which he thought that he could see approaching traffic, by looking out for traffic from the footpath area behind the buses, by identifying the risk posed by the Pembroke Street vehicle, by discounting the risk posed by the Surrey Street vehicle and by crossing slowly to the protection of the central refuge. That was not a sufficient response because the plaintiff knew that he should stop and look west as well as east from the end of the kerb extension. However, having regard to his age, while negligent, the plaintiff's default in lookout also involved a lack of mature prudence. It is also relevant to note Mr Keramides' view that, in a quieter traffic environment such as Minto Road, both drivers and pedestrians would, in general, be more relaxed and less alert.
>
> No explanation was advanced as to the plaintiff's failure to wear a helmet. No argument was advanced that, in all the circumstances, it was reasonable that the plaintiff not wear a helmet. I consider that the plaintiff's failure to wear a helmet was negligent and contributed to the injuries which he sustained. The plaintiff's unexplained failure to wear a helmet did constitute a significant failure to exercise reasonable care. However, it too must be judged in the context of the plaintiff's age. An ordinary child of the plaintiff's age could not be expected to fully appreciate the level of the risk associated with the failure to wear a helmet. At the time of the accident, the plaintiff was taking some alternative steps to protect his own safety by crossing at the pedestrian facility."

Evidence in relation to the design of the pedestrian facility.

26 Considerable evidence was tendered relating to the safety of the pedestrian facility where the accident occurred. The Council tendered the Austroads Guide to Traffic Engineering Practice Part 13 1995 which is an elaboration on Australian Standard 1742.10-1990. In the introduction to the Guide, some particular problems relating to pedestrians are referred to. There is particular mention of young children which is in the following terms:

> "1.3.2 Young Children
>
> A child's physical size limits their ability to be seen and to see from the kerb. This is particularly so when there are parked cars or plantations along the verge of the road. It is important to recognise however, that there are additional factors which significantly contribute to the vulnerability of children in the road environment.
>
> Children have been considered by some designers to be 'miniature adults', in terms of traffic engineering design. This is an inappropriate assumption as in addition to their physical size, their intellectual, psychological and sensory capacities are limited by virtue of their age and stage of development. Hoffman (1978) has shown experimentally that children do not reach an adult level of performance in traffic, ie do not have the perceptual and cognitive capacity to make sound judgments about traffic safety, until about 12 years of age.
>
> Several studies in the United States have shown that understanding and integrating traffic information is a basic problem for children. Even the protection offered by signalised crossings is undermined, (which is also common to the elderly), where a false sense of confidence and security contributes to the lack of attention and higher risk taking at these points.
>
> Therefore traffic devices and treatments need to be reviewed from the child's perspective and appropriate measures taken to ensure their applicability in some situations. In order to maximise their safety, primary school age children generally need to be supervised."

27 Chapter 3 of the Guide deals with the appropriate facilities for pedestrians when crossing roads. It identifies a pedestrian refuge, footpath kerb extension and related road narrowings and indented parking as appropriate on a collector road. Minto Road was a collector road. The Guide also considers various design considerations and under the section dealing with sight distance says:

> "Pedestrian crossing facilities should be located where there is a clear view between approaching motorists and pedestrians on the crossing or waiting to cross the roadway. … It is essential to ensure that motorists have sufficient site distance available after noticing the presence of the crossing to enable them to react to the presence of a pedestrian on or about to enter the crossing and stop their vehicle before entering the crossing. …
>
> In addition to providing satisfactory stopping sight distance, it is necessary to ensure that the pedestrian can see approaching traffic in sufficient time to judge a safe gap and cross the roadway."

28 The Guide also provides a table from which an acceptable sight distance can be identified in an urban zone. In a 60 kilometre area the approach sight distance is identified as 55 metres.

29 The Guide places particular stress upon the need to be mindful of the visual obstruction which can result from parked vehicles. This is particularly the case when children are likely to be using the crossing. The following is said:

> "Particular attention needs to be given to parked vehicles which can pose visual obstructions, especially for

children, wheelchair occupants or individuals of small stature. As a minimum, parking is generally prohibited within the statutory distances (18 metres in most States) of a crossing. However, the actual distances over which standing is prohibited shall be determined by site conditions. At those locations where there is strong requirement by adjoining land uses to retain legal on-street parking, consideration should be given to extending the footpath."

30 At the site of this accident, the footpath had been effectively extended by the facilities which were constructed. Those facilities provided an area of road pavement, which was protected from vehicles, in which pedestrians could move and congregate before entering the traffic lane. However, the protected area did not extend as far as the end of the area marked as a vehicle parking bay. The extremity of that bay was less than a metre from the edge of the traffic lane. The consequence was that someone using the crossing, with a vehicle parked in the marked parking bay, would be partially obscured until he or she had proceeded almost to the edge of the traffic lane. If the vehicle in the parking bay was a van or similar vehicle the person would be entirely obscured until they had moved to the very edge of the traffic lane. Whatever be the benefits of the extension of the footpath, they were almost entirely taken away by the parking controls, which allowed vehicles to park immediately adjacent to the pedestrian facility. The effect, if such a vehicle was parked in the identified space, was a crossing with little or no sight distance to a vehicle approaching from the west.

31 When the Guide talks of extending the footpath, this is obviously for the purpose of providing a safe refuge from which a clear view of oncoming traffic is available. Any facility which does not do what is reasonably possible to ensure this occurs, must be inadequate. Because the intention is to encourage pedestrians to use the facility, with the expectation that it is safe, a failure to provide adequate sight distances is likely to increase the danger to pedestrians over that which would exist if no facility was provided and pedestrians were left to cross without any apparent protection.

32 The Guide contains a discussion of pedestrian refuges and diagrammatic representation of how they may be provided. The diagram contemplates a no standing area adjacent to the refuge of at least nine metres with a no standing area of eighteen metres being appropriate outside a school. No doubt this greater distance is recommended because of the prospect of an increased usage of the facility by children.

33 A diagram is also provided of an extended kerb which shows the kerb extending out beyond cars parked parallel to the kerb. Although this diagram does not include a dimensioned set back of car parking from the pedestrian facility it must be read having regard to the text, which makes plain that appropriate sight lines should be provided.

34 Expert evidence was called in relation to the design of the crossing at the trial. Each of the experts accepted that the Guide did not clearly require a "no standing" area on the approach to a kerb extension/pedestrian crossing facility. However, two of the experts considered that it was desirable for there be a "no standing" zone of at least nine metres and possibly twelve to eighteen metres, in accordance with the standards expressly provided in relation to a marked pedestrian crossing or pedestrian refuge facility.

35 The Council's expert accepted that any requirement for "no standing" zones was because of the need to establish effective sight lines. It was his view that if there was a kerb extension, the sight line was addressed by this means and there was no need for parking restrictions. This view could no doubt be accepted in circumstances where the extension was designed so that there was adequate opportunity for both the pedestrian and the driver of any vehicle, to observe each other. However, unless the facility has been designed in this manner, the prohibition of parking is the only way a safe facility can be provided.

The appeal

36 The Council filed a notice of appeal with eight grounds. Many matters were addressed in detailed written submissions. The complaints which the Council makes may be considered under the headings, duty of care, causation and contributory negligence.

Duty of Care

37 Although questioned by McHugh J in **Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd** (2002) 191 ALR 449, the fundamental principle which this Court must apply is that stated by Mason J in **Wyong Shire Council v Shirt** (1980) 146 CLR 40, where his Honour said at pp 47-48:

> "In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expenses, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to the ascribed to the reasonable man placed in the defendant's position.
>
> The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors."

38 It could hardly be doubted that by providing a pedestrian crossing outside the Club, the Council created a situation which, unless appropriately designed, posed a risk to safety, especially to children using the crossing. Pedestrians were encouraged to use the facility to cross the road and many would assume that their journey was made safer because of it.

39 It was plainly foreseeable that if adequate sight lines were not provided between drivers of motor vehicles and users of the crossing, the safety of pedestrians would be put at risk. It hardly needed the advice of the Guide to reach this conclusion. The obvious purpose in extending the footpath was to allow pedestrians to move to a point within the roadway where they were visible to cars and could make an informed decision as to whether or not to cross. This required more than a capacity to prop at the edge of the trafficable lane. It required sufficient sight distance to enable the pedestrian to obtain an appreciation of the traffic situation as he or she approached the trafficable lane so that both the approaching car and the pedestrian would be able to view each other and respond effectively to each other's actions.

40 If it was not obvious that effective sight distances were necessary, the position is made plain by the relevant section of the Guide. And, where as here, children are likely to be users of the facility in significant numbers, the Guide makes plain that a more conservative design is required.

41 The evidence disclosed that a simple means of ensuring that satisfactory sight lines were available was to exclude parking in the two bays adjoining the footpath extension. Instead of doing this, the Council provided for the parking of disabled vehicles in these spaces, without any restriction as to length. In this event, it was entirely foreseeable that vehicles using the spaces lawfully may include large wagons, vans or buses parked in a manner which obscured the view of oncoming traffic until the pedestrian was virtually in the trafficable lane. It was also foreseeable that the spaces would be occupied, both legally and illegally, by vehicles of the type which were parked there on the night of the accident. The Council could have excluded parking for the minimum distance necessary to allow satisfactory sight lines. By not doing so, it provided no indication that to park adjacent to the crossing was unsafe and did nothing to alert any driver contemplating using the disabled space, contrary to the notice, that, he or she might be endangering the lives of pedestrians.

42 The common law has in recent years considered the difficulties inherent in the role of highway authorities in providing and maintaining roadways. The decision in **Brodie v Singleton Shire Council** (2001) 206 CLR 512 removed the distinction between

misfeasance and non-feasance which had previously guided the law, and confirmed that the ordinary law of negligence is to be applied in all circumstances.

43 In relation to pedestrians utilising footpaths this Court has recently considered **Brodie** in **Richmond Valley Council v Standing** [2002] NSWCA 359; **Burwood Council v Byrnes** [2002] NSWCA 343; and **Roads and Traffic Authority of New South Wales v McGuinness** [2002] NSWCA 210. In the context of a user of a footway, it is clear that the duty of the provider of the footway is to make the road safe "for users exercising reasonable care for their own safety." However, as the joint judgment in **Brodie** makes plain, the nature of the public facility and any particular inadequacy in it, must always be considered when determining the content of a duty of care.

44 In the present case the discussion in the joint judgment of Mason, Brennan and Deane JJ in **Webb v The State of South Australia** (1982) 43 ALR 465 is of particular relevance, both because of the consideration to be given to the plaintiff's conduct and the circumstances where the road authority has, by its conduct, actually created the danger. Their Honours said:

> "The primary judge found that the false kerb and the intervening space was 'a very obvious feature'. And so it was. The primary judge also found that the false kerb was not dangerous. This finding seems to have been based on its obviousness and on the circumstance that in the seven years that elapsed since its construction there was no record of any previous accident. But obviousness and the absence of accident over this period does not mean that the construction presented no risk of injury. As the false kerb was adjacent to a bus stop there existed the distinct possibility that a pedestrian, because he was in a hurry to catch a bus or was intent on observing an approaching bus or because his attention was distracted for some other reason, would fail to take sufficient care to avoid injury to himself. The happening of the accident demonstrated, if demonstration be needed, that the construction had the potential to cause injury.
>
> Of course a pedestrian could avoid the possibility of injury by taking due care. However, the reasonable man does not assume that others will always take due care; he must recognise that there will be occasions when others are distracted by emergency or some other cause from giving sufficient attention to their own safety. It seems to us that the courts below gave undue emphasis to the circumstance that injury could be avoided by a pedestrian who took reasonable care for his own safety.
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> The question then is: What is the response which the reasonable man, foreseeing the risk, would make to it? Is the risk so small that a reasonable man would think it right to neglect it? In **Wyong** Mason J said (at p 285):
>
> > 'The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.'
>
> Here the risk of significant personal injury was obvious; the occurrence of such an injury was a distinct possibility. To determine liability in the present case, one must postulate the reasonable man's response to the risk of occurrence of personal injury arising from the construction and maintenance of the false kerb, a risk which might lead to injury in a variety of ways. It is not necessary to postulate a response to the risk that personal injury would arise in the precise way in which the appellant actually sustained his injury – by jamming his foot in the intervening space.
>
> The risk could have been eliminated without undue difficulty or expense. The primary judge acknowledged as much in his judgment. He referred to the evidence of Mr Dempsey, a civil engineer, who said that the respondent could have eliminated all possible risk by filling the space between the false kerb and the permanent kerb. The witness said that a consequential surface drainage problem would be created by this action. He suggested two alternative means of coping with that problem, both of which he described as

> 'relatively simple'. It is not necessary to recount those two alternatives here. The primary judge was prepared to assume that either of these alternatives would have been effective. It is sufficient for us to say that each alternative was a satisfactory solution to what was a comparatively simple engineering problem.
>
> One other factor should be mentioned. The respondent created the danger by its artificial construction in the highway. In this situation the application of a reasonable standard of care calls for the elimination of risk of injury to users of the highway presented by that artificial construction, the more so where elimination of the risk can be achieved without undue difficulty and expense. It is well established that it is the duty of highway authorities to keep:
>
> > '… the artificial work which they [have] created in such a state as to prevent its causing a danger to passengers on the highway which, but for such artificial construction, would not have existed, or, at the least, of protecting the public against the danger … '
>
> (**Borough of Bathurst v Macpherson** (1879) 4 App Cas 256, at p 265; **Thompson v Mayor, & C., of Brighton**, [1894] 1 QB 332, at p 339; see also **Buckle v Bayswater Road Board** (1936) 57 CLR 259 at pp 283-284). It would not be right or reasonable for a highway authority to ignore a risk of injury which it has created by its artificial construction in the highway, if it entails a possible risk of injury to pedestrians which, though small, is not fanciful or farfetched."

45 It is submitted by the Council that by providing a space between the extremity of the footpath extension and the trafficable lane the Council had discharged its obligation to users of the crossing. However, that space was wholly inadequate. It was less than a metre in width and required any pedestrian who may be infirm, pushing a child in a stroller or, as happened, a child on a bicycle, if a vehicle was parked so as to obscure his or her view, to prop on the very edge of the traffic lane to observe whether there was oncoming traffic. The design of the crossing merely recreated the very situation which the footpath extension was designed to avoid. The pedestrian would be excluded from view by parked vehicles just as he or she would be if no extension had been provided.

46 It is increasingly common to find pedestrian facilities similar to those constructed in this case. It is obviously intended that pedestrians use them in the expectation that a safe road crossing will be available. However, adequate safety levels can only exist if acceptable sight distance is provided – a matter over which the relevant constructing body has control. In most cases, this must mean excluding all vehicles from parking for a minimum distance adjoining the facility. Although not everyone will obey a parking sign it can be expected that most will. Others, who might otherwise breach the regulation, would be unlikely to disregard it when the obvious purpose is to provide for pedestrian safety.

47 By failing to exclude parking adjacent to the crossing, which effectively acknowledged that this was a safe practice, the Council breached its duty of care. It was undoubtedly foreseeable that larger vehicles would park, both legally and illegally, in the space and obstruct the pedestrians' view of oncoming vehicles. Reasonable measures were required to avoid this occurring. In the circumstances of this case it would have been a simple matter to provide a no standing or other sign which excluded parking.

Causation

48 The trial judge relied on the evidence of Smith and rejected the evidence of Bussell, where there was conflict. There can be no doubt that this course was open to her Honour. The evidence, which her Honour accepted, makes plain that Bussell behaved in a manner which, at least initially, reflected a concern about the possibility of vehicles coming from the west. He manoeuvred close to the road to try and see around the bus. Although he performed this manoeuvre, he did not see the oncoming car which, having proceeded from Kent Street into Minto Road, was obscured from his view until he had virtually made it to the trafficable lane. This circumstance was created by the bus being parked immediately adjacent to the pedestrian crossing in the marked parking space.

49 By creating the circumstance where a vehicle would be likely to park in a manner which obscured Bussell's view as he

approached the trafficable lane, the actions of the Council relevantly caused Bussell's injuries (**March v E & M H Stramare** (1991) 171 CLR 506; **Chappel v Hart** (1998) 195 CLR 232. Obviously, the action of the bus driver in parking the bus and the failure of Bussell to again look to his right played a significant part in the outcome, but, the inadequacies of the pedestrian facility were no less important.

50 Bussell's actions, in attempting to see around the parked bus, make plain that, if adequate sight distances had been provided, he would have seen the approaching car and probably avoided the accident.

Contributory negligence

51 The trial judge assessed Bussell's contributory negligence as twenty percent. There is no doubt that Bussell's failure to stop and look again to the west, when he had a clear sight beyond the parked bus, together with his failure to wear a protective safety helment, justified her Honour's finding. It is also apparent that Bussell was mindful of the need to look for oncoming traffic; so much is apparent from his attempt to see around the bus. However, he failed to appreciate that the view which he had obtained did not allow him to see all of the relevant section of Minto Road. The critical section where Taumalolo's vehicle was located was obscured.

52 Bussell's assumption that it was safe for him to cross is an understandable reaction from an eleven year old boy who is likely to be less cautious than an adult in the same situation. However, both by his failure to look and to wear a safety helmet he was clearly negligent for his own safety.

53 For my own part, a finding which attributed a greater contribution by Bussell to his injuries may have been open. However, I am satisfied that her Honour's finding is justifiable and should not be disturbed on appeal.

Orders

54 In my opinion the Council's appeal should be dismissed with costs.

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