

Statewide Mutual
Risk Management Conference
22 August 2024

“We’re on a Road to Nowhere”: Footpath Inspections, Actual Knowledge and AI

Kieran O’Brien, Partner, DLA Piper



Topics for discussion

- **Duty to inspect**
- **“Actual knowledge”**
- **New South Wales v. Victoria**
- **How might artificial intelligence (AI) affect current precedent?**
- **How will the Courts approach this?**

We're on a Road to Nowhere...

*“Well, we know where we're goin'
But we don't know where we've been
And we know what we're knowin'
But we can't say what we've seen...”*



Footpaths and New South Wales



The situation in NSW

Section 45 of the *Civil Liability Act 2002* (NSW) says:

A Council is not liable for harm arising from a failure to carry out/not carry out road works unless at the time Council had actual knowledge of the risk/hazard that caused the harm.

If a Council does not have a statutorily mandated reactive footpath inspection plan (aka a “road management plan”), unlike in Victoria, then a Council only has to discharge its common law duty to act reasonably given the foreseeability of the risk and all of that Council’s conflicting responsibilities: *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

Footpaths and Victoria



Road Management Act 2004 (Vic)

- The *Road Management Act 2004 (the RMA)* prescribes 2 levels of duty:
 - The common law duty akin to that owed by Councils in NSW to act reasonably;
 - The more draconian statutory duty to proactively inspect, maintain and repair roads to a self-prescribed standard (in a Road Management Plan) that may or may not be held reasonable by a Court.
- The draconian statutory duty is a significant differentiator between Victoria and NSW.
- This has been judicially tested, but not yet satisfactorily: *Kennedy v Shire of Campaspe* [2015] VSCA 215

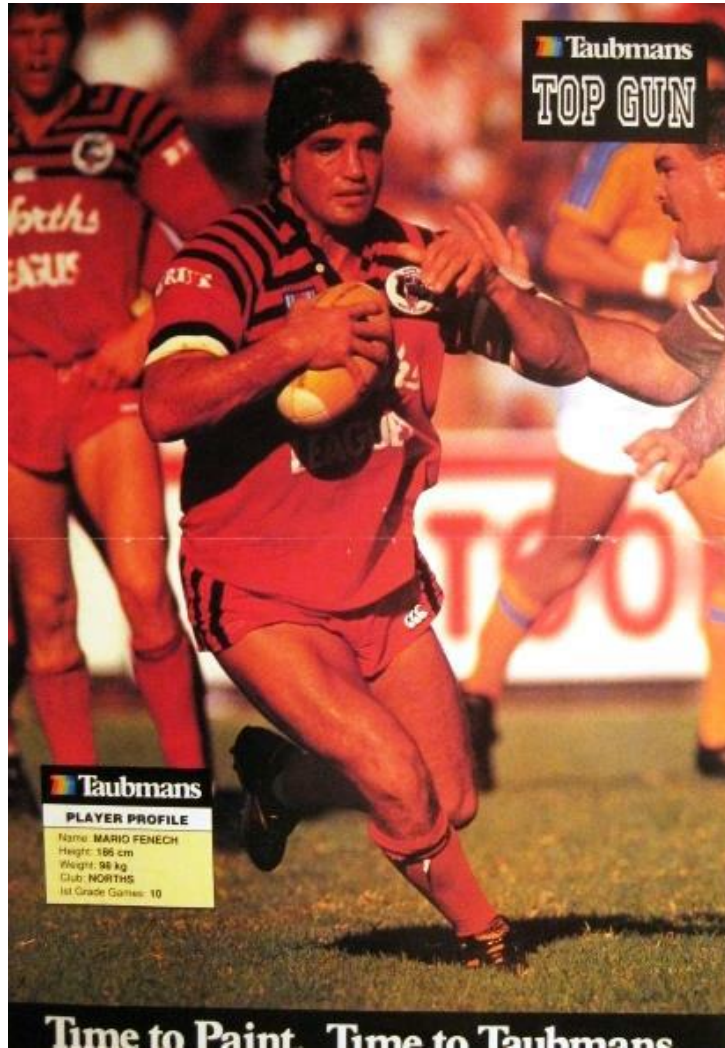
Road Management Plans

- Formulated by each Council subject to that Council's road network, road hierarchy, traffic volumes, rate base and other conflicting responsibilities.
- For defending trip and fall claims, the key elements are:
 - Inspection frequencies: (eg high activity areas 6 monthly, high activity areas 12 monthly);
 - Intervention levels: 25mm (see *Lombardi v Holroyd City Council & Anor* [2002] NSWCA 252);
 - Response times (eg high activity areas 6 monthly, high activity areas 12 monthly).

Artificial Intelligence (AI)

- Use of AI in inspecting roads and footpaths, rating defects, programming works for, supervising and managing roads and footpaths.
- Efficient and cost-effective.
- Uniform application: less margin for inconsistency of approach or outcomes?
- Secure and accessible repository of records
- Takes human error out of the process...or does it?
- Will it interfere with or require an adaptation of some of the more useful precedents?

North Sydney v Roman



***North Sydney Council v Roman* [2007] NSWCA 27**

- What does AI do to the concept that a Council does not have a central repository and cannot know what each distinct service unit “knows”? Why would the Courts be passive about technology that can give everybody “knowledge” at the push of a button?
- If AI knows everything, how does one Council unit “un-know” what the whole of Council knows? If AI purports to “know everything”, how does the truck driver not know what the risk manager knows?
- The risk with AI is that “with a push of a button” what Council did not know is now known...or ought to have been known.

Leichhardt v Montgomery



Leichhardt Municipal Council v Montgomery **[2007] HCA 6**

- Contracting out essential services, the associated risk and the potential delegable duty defence depends on “arm’s length” procedures.
- *Montgomery* has always been clear that a Council cannot delegate its contractual supervisory duties.
- AI can muddy those waters. If AI purports to “know everything”, how do you not know what your contractor knows? Isn’t it now all accessible? Do you even have to ask for information under the contract? Isn’t it just a service offering?

Wyong Shire Council v Shirt (1980) 146 CLR 40

- Could AI unwind the “Mason calculus”:
 - Foreseeability
 - Magnitude of the risk
 - Degree of the probability of its occurrence
 - Expense, difficulty and inconvenience of taking alleviation action and any other conflicting responsibilities
- Resources defences are notoriously difficult: Section 83 of the *Wrongs Act 1958* (Vic).
- How can one assert that AI increases efficiency and reduces cost and still argue a “resources defence”?

What do you do? What will the Courts do?

- Can Councils confidently put forward AI as a panacea?
- Do you want to? Do you need to?
- Can a Council ever discharge its duty of care without “people”?
- Why would the Courts be passive about technology that can give everybody “knowledge” at the push of a button?
- How have Courts viewed technological advances in the past?
- What about the Court’s processes for dealing with AI and admitting AI into evidence?

Questions?