Privy Council Appeal No. 57 of 2002

Leta Almeda

Appellant

v.

Her Majesty's Attorney General for Gibraltar

Respondent

FROM

THE COURT OF APPEAL FOR GIBRALTAR

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 24th November 2003

Present at the hearing:-
Lord Steyn
Lord Rodger of Earlsferry
Sir Martin Nourse
Sir Andrew Leggatt
Sir Philip Otton
*[Delivered by **Lord Rodger of Earlsferry**]*

The appellant is Mrs Leta Almeda who raised an action of damages for personal injuries against the Attorney General, in right of the Government of Gibraltar, in the Supreme Court of Gibraltar. Mrs Almeda sued the government as the authority responsible for the highway or street known as Line Wall Road just off the town centre. In her action she alleges that on 10 September 1999, as she was walking along the pavement of Line Wall Road, she tripped over some broken paving stones and fell. In consequence she sustained fractures to both wrists and an injury to her right foot. The injuries to her wrists required extensive surgery followed by physiotherapy.

Section 238 of the Public Health Ordinance 1950 ("the 1950 Ordinance") as amended provides:

> "(1) Subject to the provisions of this Part, all public highways and other streets in Gibraltar, other than reserved

ways, shall be held by the Governor on behalf of Her Majesty.

(2) It shall be the duty of the Government to maintain all public highways and other streets and all such culverts and water channels as may be necessary to carry off the surface water therefrom, and all walls, retaining walls, and parapet walls situate thereon or pertaining thereto and which are requisite for their support, or for the safety of passengers and ordinary traffic thereon."

So far as relevant, section 244 is in these terms:

> "The Government shall from time to time cause all public highways to be levelled, paved, metalled, flagged, channelled, altered and repaired as they may think fit, and may make and keep in repair pavements or footways for the use of passengers in or on the sides of any public highway."

In her claim form the appellant alleged that the government had failed adequately or at all to repair and/or maintain the pavement along Line Wall Road, that they had failed to institute or maintain any or any adequate regime for the inspection of the condition of the road, that they had failed to fence off or guard the defect and that they had failed to provide any warning of the existence of the defect. The claimant also pleaded that the defect constituted a nuisance that the government had caused or permitted. However formulated, her claim was not that the government had done something that had led to her injury but, rather, that the government had failed to do something and that this failure had led to her injury. In other words she alleged non-feasance rather than misfeasance on the part of the government. Paragraph 5 of the Attorney General's defence was in these terms:

> "Further the breach of statutory duty alleged in paragraph 6 and nuisance alleged in paragraph 7 is by way of nonfeasance by the defendant. Under sections 238 and 244 of the Public Health Ordinance the defendant is not liable in law in respect of matters of non-feasance and, accordingly, the particulars of claim disclose no cause of action."

It so happened that there was another similar action of damages for personal injuries against the Attorney General in the Supreme Court at the same time. The claimant in that action, Mrs Mary Edery, alleged that she had sustained injuries when, on leaving premises on Market Lane, she stepped on to the road, put her foot into a pothole and fell to the ground. Mrs Edery also relied on the government's statutory duties to maintain and repair the public

highways and roads. The Attorney General amended his defence to that action so as to take the same point as to there being no liability for non-feasance. Pizzarello J accordingly adjourned Mrs Almeda's action until after he had given judgment on the issue raised by the amended defence in Mrs Edery's action. On 22 May 2001 he gave judgment dismissing that action and, on 25 May 2001, he also dismissed Mrs Almeda's action.

Both Mrs Edery and Mrs Almeda appealed to the Court of Appeal for Gibraltar and the two appeals were consolidated. By a majority (Neill P and Staughton JA, Glidewell JA dissenting) the Court of Appeal dismissed the appeal. Mrs Almeda appeals to the Board from that decision.

It is clear from the judgments in the courts below, as well as from the way the appeal was argued before the Board, that the Attorney General has not sought to distinguish between the two cases. In particular he has attached no importance to the fact that Mrs Edery alleges that she fell when she stepped into a pothole on the road, whereas Mrs Almeda says that she fell when she tripped on the pavement. Section 238(2) of the 1950 Ordinance lays on the government a "duty … to maintain all public highways and other streets …" and section 244 says that the government "shall from time to time cause all public highways to be … repaired as they may think fit". Both of these provisions, relating to the highways and streets, are conceived in terms of a duty on the government, whereas, when section 244 deals with pavements, it simply says that the government "may make and keep in repair pavements or footways for the use of passengers in or on the sides of any public highway …". In other words the government are under a duty to maintain and to level and repair the highway or street on which Mrs Edery fell but are merely given a power to make and keep in repair the pavement or footway on which Mrs Almeda fell. The Attorney General did not base any argument on this possible distinction between the cases. This was consistent with his overall approach, which was that, even if there were a duty to repair the pothole in the street, the government were no more liable to Mrs Edery for not performing that duty than they were liable to Mrs Almeda for not exercising their power to keep the pavement in repair. Therefore, although only Mrs Almeda has appealed to the Board, their Lordships think it right to consider the general point of principle raised by the consolidated appeal to the Court of Appeal for Gibraltar.

Section 1 of the Order in Council dated 2 February 1884 provided:

> "Except in respect of matters which are now or hereafter

> may be provided for by any Order in Council or local Ordinance for the time being in force in Gibraltar, or by any Act of Parliament expressly, or by necessary inference, extending to Gibraltar, or by any proclamation or other instrument issued under the authority of such Order in Council, local Ordinance, or Act of Parliament, the law of England, as it existed on the 31st day of December 1883, shall hereafter be in force in Gibraltar, so far as it may be applicable to the circumstances thereof."

That provision was superseded by section 2(1) of the English Law (Application) Ordinance 1962, which governs the situation at present:

> "The common law and the rules of equity from time to time in force in England shall be in force in Gibraltar, so far as they may be applicable to the circumstances of Gibraltar and subject to such modifications thereto as such circumstances may require, save to the extent to which the common law or any rule of equity may from time to time be modified or excluded by-
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> (a) an order of Her Majesty in Council which applies to Gibraltar; or
> (b) any Act of Parliament at Westminster which applies to Gibraltar, whether by express provision or by necessary implication; or
> (c) any Ordinance."

The contention for the Attorney General is that, at least since 1884, the rule of English law that a highway authority is not liable for non-feasance has been part of the law of Gibraltar. Counsel for the appellant submits that, since that rule was never applicable to the circumstances of Gibraltar, it never applied in Gibraltar, even if it applied in England before being abrogated by section 1(1) of the Highways (Miscellaneous Provisions) Act 1961. In *Russell v Men of Devon* (1788) 2 TR 667 the King's Bench Division had held that, while the duty to repair a bridge could be enforced by indictment, the men of the county were not liable in damages for failing to repair it. One of the main reasons for that decision was that the men of the county were not a corporate body and therefore there was no corporate fund out of which any damages awarded against them could be paid. By contrast, in Gibraltar the responsibility for repairing the roads had vested successively in various bodies, all with funds out of which any damages could be paid.

Even if one went as far back as 30 December 1815, said counsel for the appellant, an Order in Council provided for a rate to be levied for the purpose of paving, repairing and cleansing the streets that were vested in, and under the control of, the Crown. Following an outbreak of cholera in 1865, an Order in Council established a body of Sanitary Commissioners. Section 27 vested the public highways in them so far as necessary for the purposes of carrying out the Order. In 1883 the Sanitary Order in Council, Gibraltar was made, section 161 of which provided that the Sanitary Commissioners were, for the purposes of the Order, to

> "control, manage, and maintain the public highways, and also all such culverts and water channels as may be necessary to carry off the surface water therefrom, and all walls, retaining walls and parapet walls situate thereon or pertaining thereto and which are requisite for their support, or for the safety of passengers or ordinary traffic thereon, and whenever necessary shall cause the same to be paved, flagged or repaired, and the ground or soil thereof to be raised, lowered, or altered, in such manner and with such materials as they shall think proper, and they shall also pave or make, and repair with such materials as they shall think fit, any causeways, pavements, or footways, for the use of passengers in or on the sides of any public highway in Gibraltar."

The Public Health Ordinance Gibraltar 1907 originally referred to the Sanitary Commissioners but, after the Council were created in 1921, the wording was altered so that under section 217, for the purposes of the Ordinance, the Council were to control, manage and maintain the public highways. By section 217 the Council were from time to time to cause all public highways to be repaired as they might think fit, and they might make and keep in repair pavements or footways for the use of passengers in or on the sides of any public highway. In due course the 1907 Ordinance was superseded by the 1950 Ordinance, which is currently in force in a somewhat amended form. Originally it too referred to the Council but this was changed, after the Gibraltar Constitution Order 1969 came into force, so that section 238(1) now provides that the public highways and other streets, other than reserved highways, are to be held by the Governor on behalf of Her Majesty and the duty of repairing them, and the power to keep pavements or footways in repair, vest in the government.

In the light of this brief history, and leaving aside the question of Crown immunity, their Lordships accept that, since at least 1815, the highways of Gibraltar have been vested in authorities who would indeed have been able to pay damages for injuries caused by

any failure to repair them. This is not, however, critical. Whatever the original rationale may have been, the rule that bodies responsible for highways are not liable for injuries caused by non-feasance on their part took root in English law and, as Lord Hobhouse pointed out in *Municipality of Pictou v Geldert* [1893] AC 524, 527, it continued to be applied even when the original difficulty had been removed by enabling a public officer to sue and be sued on behalf of the county. The same conclusion had been arrived at where the obligation to repair had been transferred to corporations.

Rather than analyse the relevant cases for themselves, their Lordships respectfully adopt Fullagar J's statement of the law, which they could not hope to emulate, far less to better. In *Gorringe v The Transport Commission (Tasmania)* (1950) 80 CLR 357 his Honour examined *Russell v Men of Devon* (1788) 2 TR 667, *M'Kinnon v Penson* (1853) 8 Ex 319, *Young v Davis* (1863) 2 H & C 197 and *Gibson v Mayor of Preston* (1870) LR 5 QB 218. He then said, at pp 375-376:

> "I think that the 'tetralogy' of cases which I have been considering finally established two principles of law. These are (1) that at common law no person or persons, corporate or unincorporate, is or are subject to any duty enforceable by action to repair or keep in repair any highway of which, whether at common law or by statute, he or they or it has or have the management and control, and (2) that if a duty to repair or keep in repair a highway or highways is imposed by statute on any such person or persons, that duty is not enforceable by action unless the statute makes it clear by express provision or necessary implication that the duty is to be enforceable by action at the suit of a person injured by its breach."

Their Lordships are, of course, aware that the High Court of Australia overruled the *Gorringe* case in *Brodie v Singleton Shire Council* [2001] HCA 29; (2001) 206 CLR 512 on the view that the principles stated by Fullagar J ought never to have formed part of the law of Australia. But that does not touch the accuracy of his statement of those principles.

Fullagar J distilled these principles from four cases, of which the latest was decided in 1870. The principles therefore already formed part of English law on 31 December 1883 and so became part of the common law of Gibraltar under the 1884 Order in Council on the application of English law. No local legislation has since abrogated the common law of Gibraltar in this regard. Mr Kelly QC boldly submitted, however, that, since under section 2(1) of the English Law (Application) Ordinance 1962, the common law

"from time to time in force in England shall be in force in Gibraltar", it was necessary to look at the position in England today. In England the common law rule had been abrogated by section 1(1) of the Highways (Miscellaneous Provisions) Act 1961 and the position was now regulated by section 58 of the Highways Act 1980. So, since there was no such rule in the common law of England today, there was no such rule in the common law of Gibraltar today either. The Court of Appeal unanimously rejected that argument. Their Lordships do so too. The 1962 Ordinance shows that the common law is to apply save to the extent that it is modified or excluded by legislation that applies locally, including any Act of Parliament at Westminster which applies to Gibraltar, whether by express provision or necessary implication. Section 17(3) of the 1961 Act defined its extent with great precision and left no room for any implication that section 1(1) was intended to extend to Gibraltar – indeed it did not even extend to London. The 1961 Act is therefore irrelevant to the situation in Gibraltar. Which is only to be expected since, when enacting the 1961 Act, Parliament would have taken account of the situation in England, but certainly not the situation in Gibraltar. The non-feasance rule as described by Fullagar J therefore continues to form part of the law of Gibraltar.

This conclusion is amply fortified by two decisions of the Board when they are read together.

The first is *Sanitary Commissioners of Gibraltar v Orfila* (1890) 15 App Cas 400. The plaintiffs were the owners of land and buildings at the foot of a steep rocky cliff in Gibraltar. Some 45 feet above their property, the Castle Road ran along the face of the cliff. On its outer side the road was bounded by a parapet wall that rested on soil kept in position by a retaining wall. In a period of heavy rain part of the retaining wall gave way and as a result the plaintiffs' property was badly damaged. The plaintiffs sued the Sanitary Commissioners for damages for the damage caused by the Commissioners' failure to discharge the duties imposed on them by section 161 of the 1883 Sanitary Order. In particular they alleged that the section cast on the Commissioners the duty of maintaining the road and retaining walls in a stable condition, with a view to the safety and protection of the plaintiffs' property. The appellants had negligently failed to perform that duty. At the trial it emerged that the Commissioners had not constructed either the road or the retaining wall, which had both existed from a period beyond human memory. Moreover, the collapse revealed that the retaining wall had all along been attended with danger due to structural defects in its foundation. After trial, in the light of the answers given by the jury to certain questions, the Chief Justice held that

the retaining wall had vested in the Commissioners for the purposes of the Sanitary Order. He also in effect held that the protection of the plaintiffs' premises from the original defects in the wall constituted one of these purposes, or at all events that it was the Commissioners' duty to maintain the wall in such a condition as to prevent injury to the plaintiffs' premises.

The Board held that the Commissioners' appeal should be allowed. Having examined the relevant provisions of the 1883 Sanitary Order, Lord Watson said this, at p 411:

> "In these circumstances, the question arises whether it be according to the intention of these two Orders in Council that the Commissioners shall be responsible to the proprietors of premises adjoining the retaining walls of a roadway in respect of such injuries to their property as occurred in this case. In dealing with that question, it is a material consideration that the injury complained of arose, not from any act of the Commissioners or their servants, but from their non-feasance. Their Lordships do not wish to suggest that Commissioners or other public trustees who have no pecuniary interest in the trust which they administer can escape liability when they are negligent in the active execution of the trust. It is an implied condition of statutory powers that, when exercised at all, they shall be executed with due care. But in the case of mere non-feasance no claim for reparation will lie except at the instance of a person who can shew that the statute or ordinance under which they act imposed upon the Commissioners a duty toward himself which they negligently failed to perform."

Lord Watson went on to note, at p 412, that "the only duty expressly laid upon them [sc the Commissioners] with respect to retaining walls is to maintain and repair them for the safety of passengers and ordinary traffic." He gave the Board's conclusion on the principal argument in these words, at p 413:

> "Their Lordships are, in that state of the facts, unable to resist the conclusion that the Government, in so far as regards the maintenance of retaining walls belonging to it, remains in reality the principal, the Commissioners being merely a body through whom its administration may be conveniently carried on. They do not think that it was the intention of the Crown, in giving the sanitary body administrative powers subject to the control of the Governor, to impose upon it any liability, which did not exist before, in respect of original defects in the structure of the retaining wall which supported the Castle Road."

Lord Watson does, of course, specifically draw attention to the fact that the plaintiffs' case was based on the alleged non-feasance of the Commissioners. But the critical point appears to have been that under section 161 of the 1883 Sanitary Order any duty of the Commissioners to control, manage and maintain the retaining wall related to the safety of passengers or ordinary traffic, not to the safety of adjoining premises. In these circumstances the Board readily concluded that, when giving the Commissioners their administrative powers, the Crown had not intended to impose on them any liability which had not previously existed in respect of original defects in the structure of the retaining wall. Therefore, as Mr Dingemans QC readily acknowledged, if the *Orfila* case had stood alone, it would not have cast much light on the present problem.

But in fact the *Orfila* case has to be read along with the decision of the Board in *Municipality of Pictou v Geldert* [1893] AC 524. Two members of the Board in the *Orfila* case, Lord Watson and Sir Richard Couch, also sat in this case, decided some three years later. The plaintiff sued the municipality who were in possession of, and had the management and control of, the public way over a bridge. He alleged that, due to their failure to maintain and repair the bridge, he had suffered injuries. At first instance and before the Court of Appeal of Nova Scotia the plaintiff succeeded. The Board allowed the municipality's appeal, however. Lord Hobhouse pointed out that by the common law of England, which was also the law of Nova Scotia, public bodies charged with the duty of keeping public roads and bridges in repair were not liable to an action for damages for a breach of this duty at the suit of a person who had suffered injury from their failure to keep the roads and bridges in proper repair. Citing the decision of the House of Lords in *Cowley v Newmarket Local Board* [1892] AC 345, Lord Hobhouse said this, at pp 527-528:

> "It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere non-feasance. In order to establish such liability it must be shewn that the legislature has used language indicating an intention that this liability shall be imposed.
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> The law was laid down by this Board in the case of *Sanitary Commissioners of Gibraltar v Orfila*, thus: 'In the case of mere non-feasance no claim for reparation will lie except at the instance of a person who can shew that the statute or ordinance under which they act imposed upon the

> Commissioners a duty towards himself which they negligently failed to perform.'
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> The question then is, whether any statute has given to private persons the right of action now claimed against this municipality which does not exist at common law."

The decision of the Board in the *Municipality of Pictou* appeal in 1893 shows that the decision in the *Orfila* case in 1890 must be read along with the decision of the House of Lords in the *Cowley* case two years later. When interpreted as one member of this trilogy, the *Orfila* case is to be regarded as applying the non-feasance rule for highways as part of the law of Gibraltar. For the reasons that their Lordships have already given, the rule remains part of the common law of Gibraltar.

Under reference to the decision of the High Court of Australia in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, Mr Kelly suggested that, even if the Board had once taken that view of the law, their Lordships should revisit the matter today and, following the lead of the High Court, overrule these earlier decisions and restate the law. Their Lordships are not minded to follow that path. They have, of course, studied the judgments in the *Brodie* case with care and interest. The High Court reached their decision by the narrowest of majorities. The three judges who dissented all considered that, if the non-feasance rule were going to be abolished, this should be done by legislation of the State parliaments, rather than by the judges, who were not in a position to assess all the implications of any change. When the decision of the High Court was announced, it met with considerable criticism for just the kinds of reasons that had persuaded the minority judges that the matter should be left to the State legislatures. More importantly, their Lordships notice that at least three State parliaments have since enacted legislation, in effect restoring the non-feasance rule in relation to highways: section 3 of the Transport (Highway Rule) Act 2002, No 54 of 2002 (Victoria); section 45 of the Civil Liability Amendment (Personal Responsibility) Act 2002, No 92 of 2002 (New South Wales) and section 37 of the Civil Liability Act 2003, No 16 of 2003 (Queensland). This experience suggests to their Lordships that in Gibraltar, just as in England, any abrogation or modification of the rule is best left to the legislature which can, if so advised, craft a suitable provision to balance the interests of victims, on the one hand, and of the government as the highway authority, on the other.

Subject to the constitutional point to which their Lordships will turn shortly, the Board must therefore deal with the appeal on the

basis that the non-feasance rule applies in Gibraltar. The question then is whether there is anything in the terms of section 238(2) of the 1950 Ordinance to indicate an intention to impose a liability on the government to pay damages to those, such as the appellant, who suffer injury as a result of their failure to repair the highways and streets.

In the Court of Appeal Glidewell JA found such an indication in the fact that, before the 1950 Ordinance, the duty had been imposed on the Council as the surveyors of highways and, as such, "merely a body through whom its [sc the Government's] administration may be conveniently carried on" - in the words of Lord Watson in the *Orfila* case, 15 App Cas 400, 413. This, Glidewell JA considered, was the reason why no liability was imposed on the Commissioners. Since the duty under section 238(2) was imposed on the government directly, he held that the common law immunity did not apply to it.

Like Neill P and Staughton JA, their Lordships reject that reasoning. Although there was a change in the wording between sections 216 and 217 of the Public Health Ordinance 1907 and section 238 of the 1950 Ordinance, section 238(2) simply says that "It shall be the duty of the Government to maintain all public highways and other streets ...". Applying the test as formulated by the Board in *Municipality of Pictou v Geldert* and, more fully, by Fullagar J in *Gorringe v The Transport Commission*, their Lordships find nothing in those words taken by themselves and nothing in the rest of the subsection or elsewhere in the Ordinance to indicate, either expressly or by necessary implication, an intention to impose any liability on the government to pay damages to those who might be injured if the government failed to maintain the public highways and streets.

Mr Kelly advanced a further argument that had not been deployed in the Gibraltar courts. He submitted that, if the non-feasance rule did indeed form part of the law of Gibraltar and had the effect that Mrs Almeda could not sue the government for damages for her injuries resulting from their failure to carry out their duty, this violated her right to the "protection of the law" under articles 1(a) and 8(8) of the Constitution of Gibraltar. Article 8(8) provides:

> "Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing

within a reasonable period of time."

Article 8(8) is similar to article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Article 8(8) affords certain procedural guarantees. It does not provide any guarantee as to the substantive content of the law. Although Mr Kelly sought to suggest otherwise, their Lordships have no doubt that the non-feasance rule falls to be regarded as a rule of the substantive law of Gibraltar. By reason of that rule Mrs Almeda has no right to damages from the government for her injuries. This is not, accordingly, a rule barring her from enforcing a right to damages which she actually enjoys under the law. To paraphrase Lord Hoffmann in *Matthews v Ministry of Defence* [2003] UKHL 4; [2003] 2 WLR 435, 450, para 43, a rule that people should not be entitled to compensation out of public funds for loss suffered on account of a failure of the government to maintain the public highways and streets poses no threat to the rule of law. It may or may not be fair as between victims of such failures and victims of failures by the government to carry out other statutory duties, but that is not a question of constitutional rights. There is no infringement of the appellant's rights under either article 1(a) or article 8(8) of the Constitution.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. As proposed by counsel for the Attorney General, their Lordships find the appellant liable to the Attorney General in the costs of the appeal, but assess her liability at nil.