

Implications of Recent Legislation for Statutory Road Safety Authorities: A Case Study in Intelligent Speed Control Measures

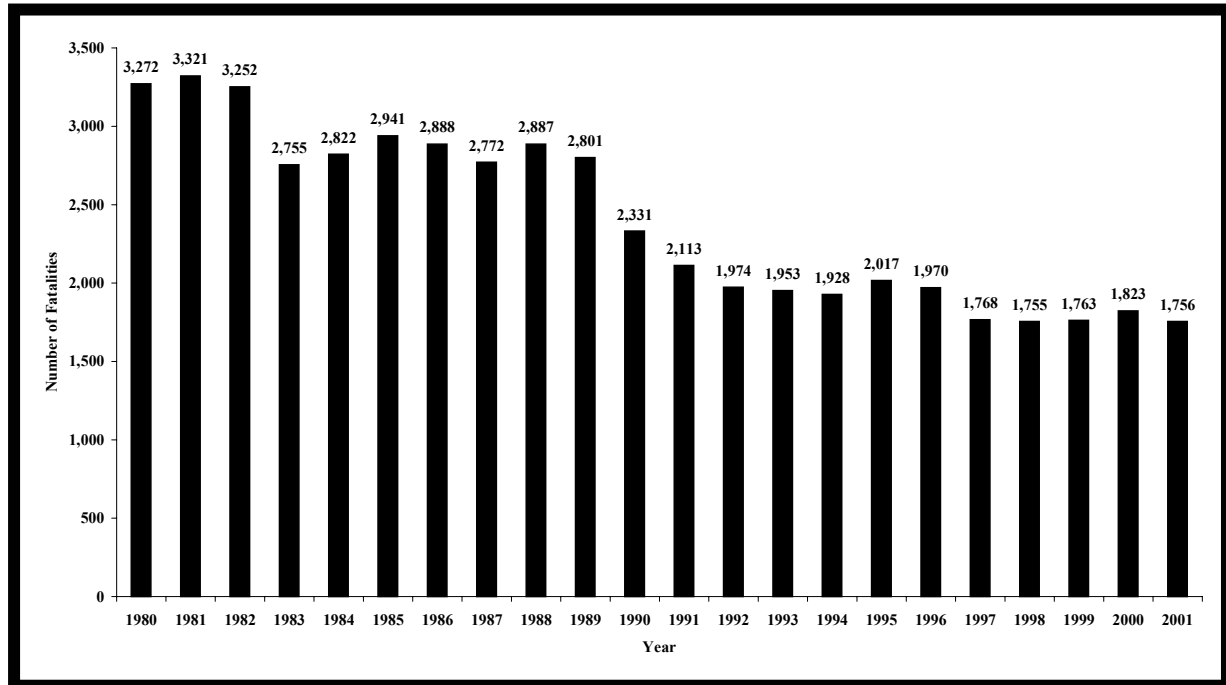
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ABSTRACT

Statutory highway authorities owe a duty of care to provide a safe road environment for operators of motor vehicles. This duty of care is judged against what should be provided by a “reasonable statutory authority”, given the identification of a hazardous situation, and encompasses 1) a decision to act, and 2) the taking of appropriate action. Until recently, while a statutory authority could be held responsible for misfeasance (acting carelessly), it could not be held responsible for nonfeasance (a pure failure to act). However with the recent abolition of the nonfeasance rule in Victoria, the implications are that statutory authorities must take a more proactive approach in the prevention of dangerous actions occurring. This paper examines the implications of this amendment in the law when dealing with high-risk crash sites where excessive vehicle speed is a known contributory factor. A “case study” is used to illustrate that in such an instance the failure to enact known intelligent speed mitigation measures such as policing and speed cameras could potentially render a violation of the duty of care under the nonfeasance ruling. This could have serious implications for the future provision of road safety measures.

INTRODUCTION

Accidents on Australian roads cost the economy over \$15 billion dollars in 1996 (Bureau of Transportation Economics, 2000). Accentuating this problem is the fact that the downward trend in serious accidents and road fatalities of the early 1990s has plateaued – this trend is clearly shown for road fatalities in figure 1. Indications are that this problem is continuing through the first half of 2002. As of the end of June 2002, the number of road fatalities is 851, a 1.2 percent increase on the corresponding period in 2001.



Source of Data: ATSB, 2001

Figure 1:
The Australian Road Toll

Clearly, the responsibility for driving safely and obeying the law lies with the motorist. However, the *duty of care* to provide a safe road environment lies with the statutory road authorities. The boundaries of this duty of care (*standard of care*) owed are constantly being challenged and extended as the instances of litigation brought against road authorities continue to increase. In part while this reflects an increasingly litigious society, it also reflects increasing expectations on the road authorities to take a more proactive role in preventing potentially hazardous situations from arising.

The last decade has seen a proliferation of “intelligent” technologies (e.g., in-vehicle navigation, speed cameras, red-light cameras) designed to improve the efficiency and safety of existing transportation systems. As yet, no statutory requirements exist for the implementation of such systems from a safety perspective. However, as the road toll plateaus while reported cases of the benefits of such systems increase, road and policing authorities may find themselves under increasing pressure to implement such systems in the future.

A recent change in the law in Victoria threatens to further impact the standard of care requirements for statutory road authorities. This legal change concerns the abolition of the *nonfeasance* rule in 2001¹. Until this change, while a statutory authority in that state could be held responsible for acting carelessly (misfeasance), it could not be held responsible for a simple failure to act (nonfeasance). With this in mind, this paper raises the question of whether a road authority could now face an obligation to implement proactive road safety solutions (including “intelligent” options) at high-risk crash sites. The argument is examined through a failure to install speed cameras at sites where excessive speed is a believed contributory factor. A hypothetical case study is used to facilitate an explanation of the legal ramifications. The paper concludes by considering the wider implications of this ruling for the future implementation of road safety measures.

THE CASE STUDY

¹ Ghantous vs. Hawkesbury City Council, 2001

The Case Study

A motorist (Anne) was driving her car and was hit by a car travelling above the speed limit as she was passing through a well known black-spot. As a result of her accident, Anne became paraplegic, and has been unable to work since the accident took place. She believes the accident has caused her considerable mental trauma and anguish. Anne believes that the installation of a fixed speed camera with extensive signage would have either prevented the accident from occurring, or would have severely lessened the extent of her injuries. As a result, Anne wishes to sue both the driver of the other car and the responsible statutory authority for negligence in failing to install a speed camera near the site of the accident.

Does Anne have a case? To answer this question requires an understanding of, the legal obligations of the parties (Anne, the other driver, the insurance companies and the road authority), the current requirements for a claim, whether the installation of the speed camera would have prevented or significantly reduced the likelihood of the accident from occurring, and the defence options available to the road authority.

RESPONSIBILITIES OF THE PARTIES

Ultimately it is the responsibility of each private individual to obey the law. In this case, assuming the speed limits were appropriate the other driver would clearly be at fault.

Insurance Companies

Personal injury insurance is covered either through public or private insurance agencies. In Victoria, the responsibility for compensation in the case of traffic accidents lies with the Transport Accident Commission (TAC) through the Transport Accident Scheme. The scheme has two main components - the no-fault entitlements and the common law. The no-fault component of the compensation covers the cost of medical expenses only - Section 60 of the Act provides that the TAC will pay the reasonable costs of medical, hospital, nursing, ambulance, rehabilitation and associated expenses. Damages that occur through death or serious injury as the result of a transport accident are limited through legislation in the 1986 Transport Accident Act. The current limits of damages (indexed at July 1st, 2001) are set out in Table 1.

**Table 1:
Current Limits of Damages in Victoria**

<i>No Fault Benefit Payable by TAC</i>	
Maximum no-fault benefit	\$117,140
<i>Common Law Benefits</i>	
Maximum threshold to claim	\$36,030
Maximum pain and suffering	\$360,360
Maximum pecuniary loss	\$810,820

Source: TAC, 2001b

Pecuniary losses include loss of earning capacity as well as medical benefits and pain and suffering. Pain and suffering benefits do not include a benefit for loss of income. In addition, for a benefit to be paid under common law, the compensation payable must be greater than the minimum threshold of \$36,030. The amount of compensation received by the injured party is determined under strict guidelines set by the Australian Medical Association (AMA). The impairment is measured on a scale of percentages. The Transport Accident Act requires that for any compensation to be paid, the level of impairment must be over 10 percent. For every 1 percent over 10 percent, the injured party receives approximately \$470 compensation (Luntz, 2002).

Statutory Road Authorities

Whether the statutory authority is at fault requires proving they were *negligent*. Negligence falls under the law of torts, which derives from French meaning a “civil wrong” (Davies, 1999). Negligence can be defined as:

“Negligence is the omission to do something which the reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do”

(Blyth v Birmingham Waterworks Co, 1856)

In order to claim negligence, Anne must prove the statutory authority owed a duty of care, failed to act reasonably and caused the damage that was suffered. A duty of care is an obligation that a statutory authority owes to ensure that their actions or omissions do not cause a loss to the people that they are responsible for. In

terms of legal rules, a statutory authority will owe a duty even if it is not enacted specifically in statute because of the reliance that the general public places on the statutory authority to ensure their safety. In addition, because the statutory authority assumes this responsibility, it is only rarely that a statutory authority will not have a duty of care for those under its authority.

The failure to act reasonably is judged against how the “reasonable person” would have acted. In this case, the actions of the statutory authority are measured against those that a “reasonable” statutory authority would have taken. The actions could be measured against other authorities with similar responsibilities throughout the world that have faced similar situations, or could be measured against relevant standards and guidelines (Kneebone, 1997). Expert witnesses are often called in order to present standards, and to give expert evidence in regards to the action of the statutory authority.

Under these criteria, it appears reasonable to assume a “reasonable statutory authority” would owe a duty of care to Anne as a road user. Anne must then prove the content of the duty included a duty to install fixed speed cameras in the area. For this, Anne will need evidence that the area was a recognised accident black-spot under either a Statewide or National Black-spot Programs, and that excessive speed was considered to be a primary factor causing its black-spot status. This will prove that the road authority had knowledge of the risk of accidents occurring in the area, and possibly knew of prior accidents that had occurred.

THE RIGHT TO SUE

If the injured party believes that their injuries affected them more than simply through medical costs, they can sue any party they believe played a part in the causation of their injuries for negligence. In most cases, this is the driver of the other vehicle, but successful cases have been mounted against local councils and state authorities^{2,3}.

To pursue a common law action arising from a traffic accident, the injury to the person must fall in the category of “serious” injuries. The extent of an injury is strictly determined using a “points” system devised by the Australian Medical Association (AMA). This system “rates” the seriousness of each impairment. Section 93(3) of the Transport Accident Act deems an impairment of 30 percent or more to be a serious injury. If, however the injury produces an impairment of less than 30 percent, a fuller description of serious injury can be consulted. This is contained in Section 93(17) of the Transport Accident Act, which states that serious injury means:

- (a) Serious long term impairment or loss of a body function,
- (b) Permanent serious disfigurement,
- (c) Severe long term mental or severe long-term behavioural disturbance or disorder; or
- (d) Loss of a foetus.

In the case presented here, Anne can clearly claim she is more than 30 percent incapacitated plus she has a serious long-term impairment. This gives her the right to launch a medical claim and/or sue the driver of the other vehicle and the statutory authority.

CAUSATION

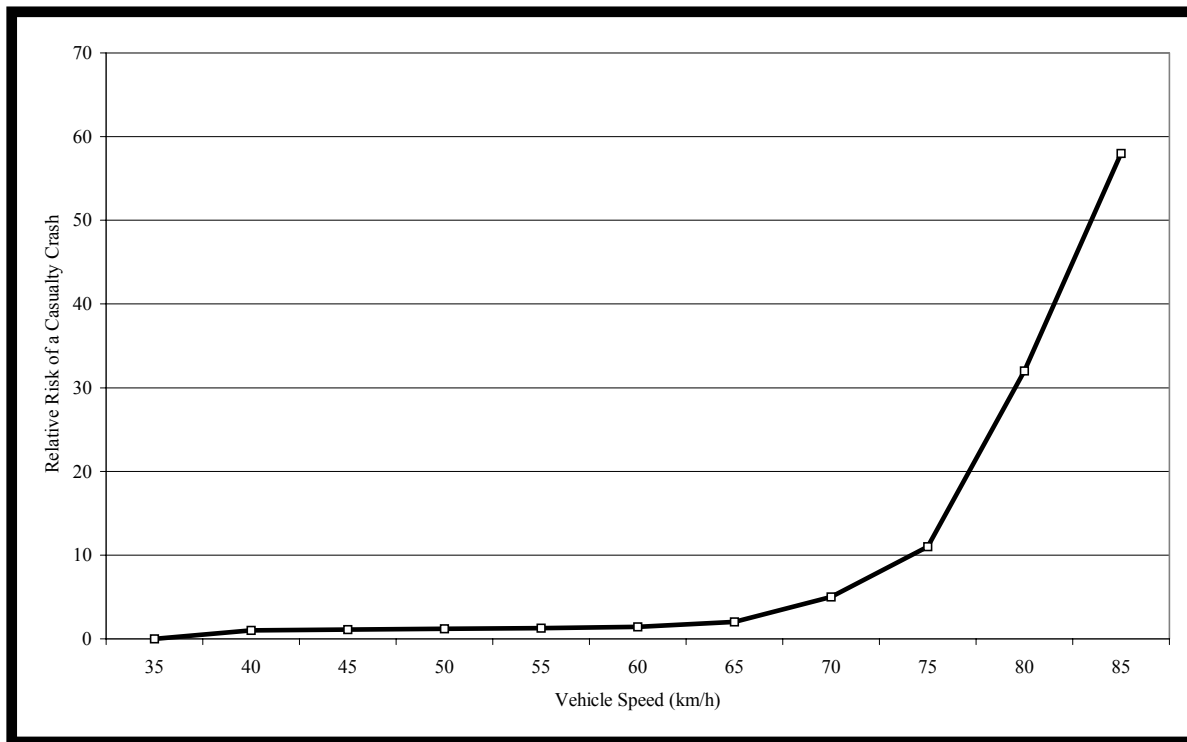
It must then be proved that the actions (or lack of action) of the statutory authority caused or contributed in a major way to the incident. In the current case, Anne will first have to prove that it was reasonably foreseeable that a driver driving at excessive speed was likely to cause the accident. She will then have to prove that the presence of a fixed speed camera would have prevented the accident from occurring.

Speed/Accident Correlation

Despite the belief of many motorists to the contrary (e.g., Corbett and Simon, 1999), it is well documented that speed is a critical factor in both the likelihood and severity of collisions. For example, Finch et al., (1993) in a British study, concluded that one-third of all fatal road accidents are speed-related. In the same study, the authors showed that every 1 mph reduction in speed correlates to a five percent reduction in collisions - this figure was corroborated in a recent study by Taylor et al., (2000). In a study in Adelaide, Kloeden et al., (1997) concluded that 100 percent compliance with speed limits could potentially reduce the number of collisions by 28.6 percent and that a 10km/h reduction in the mean travelling speed could reduce the number of crashes by 41.5 percent. In the same study, Kloeden et al., showed that the risk of a casualty crash increased exponentially when travelling at speeds in excess of 60 km/h in a 60 km/h zone as shown in Figure 2. Results of similar magnitudes are reported in a recent study by the Monash University Accident Research Centre, who found that a 10 percent reduction in average speeds could reduce the number of fatalities by 40 percent (MUARC, 2002).

² Pyrenees Shire Council v Day [1998] 192 CLR 330

³ Ghantous v Hawkesbury City Council [2001] 75 ALJR 992

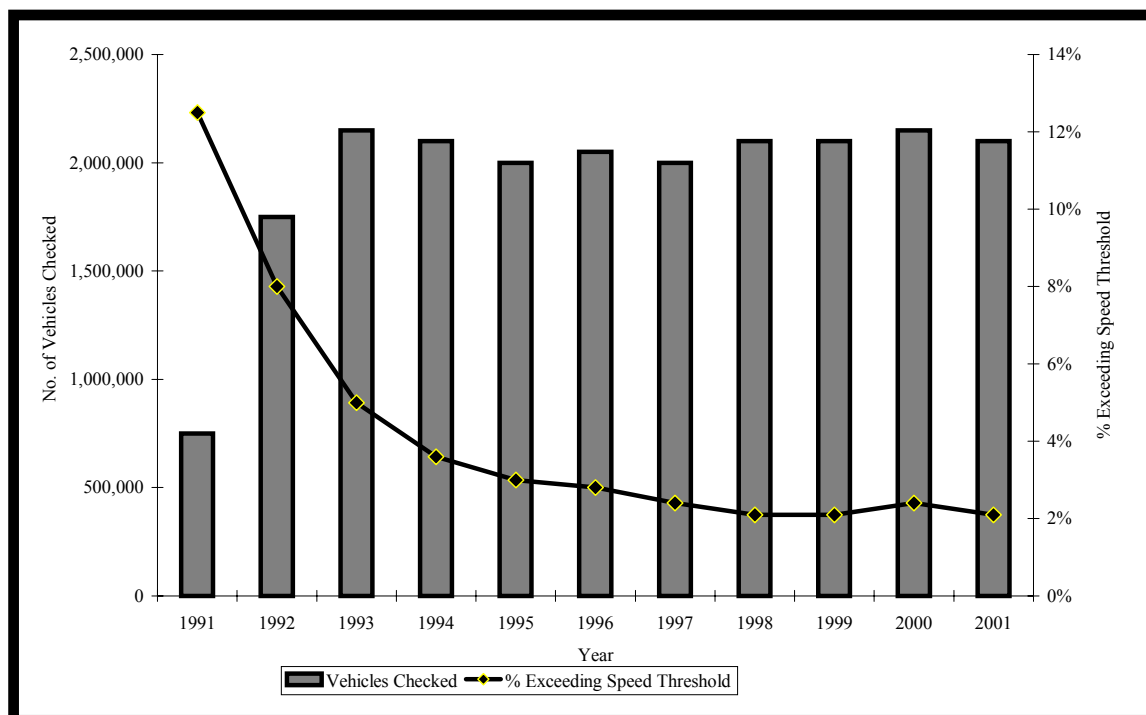


Source of Data: Kloeden, 1997

Figure 2:
Risk of Crash Involvement with Increasing Speed

Speed Camera Programs

Despite the negative public reaction, speed camera programs have generally been associated with a reduction in the number of speeding infringements. For instance, in Victoria, 54 speed cameras were introduced in 1990 followed by a further 60 laser speed cameras in 1996. The effect of this is shown in Figure 3, where the percentage of vehicles checked that were over the threshold of speeds at speed camera sites (speed plus allowed tolerance) reduced from 14 percent in 1990 to just over 2 percent in 1997 where it has remained (TAC, 2002).



Source of Data: TAC Road Safety Report, May 2002

Figure 3:
Vehicles Checked and Percentage Over Speed Threshold (June for last 11 years)

In New South Wales, the Road and Traffic Authority (RTA) conducted an evaluation of infringements for 20 of its speed camera sites (RTA, 2002). They report a 35 percent reduction in vehicles travelling above the posted speed limit at speed camera sites and a 15 percent reduction in the number of vehicles travelling more than 10 km/h above the speed limit.

Speed cameras are used extensively in the UK and this has subsequently been where much of the research in 'before and after installation' studies has occurred. A recent study completed by the Department for Transport (DfT, 2001) found that after the installation of over 100 fixed site speed cameras, the speeds of vehicles and the number of crashes decreased significantly. On average the percentage of drivers exceeding the speed limit at speed camera sites reduced from 55 percent to 16 percent, and the percentage of drivers exceeding the speed limit by more than 15mph at camera sites was reduced from an average of five percent before enforcement to one percent afterwards. The average speed at camera sites decreased by 5.6mph. In addition, there were 35 percent fewer collisions at camera sites, with 47 percent fewer people killed and seriously injured at the camera sites.

In a detailed study of how drivers' respond to speed camera programs, Corbett and Simon (1999) suggest that this response is related to the particular attitudes and driving style of the motorist. Perhaps not surprisingly, those groups that tend to speed more are most likely to deny the link between speed and accident risks and have the strongest negative attitude to the merits of camera programs. The authors of the study conclude that while speed cameras do raise awareness of the dangers of speeding, broader publicity campaigns are needed to cause an attitudinal change to speeding. This is an increasingly critical part of speed control programs such as the "wipe off 5" campaign in Victoria.

Based on this evidence, it is likely that Anne will be able to prove that the accident was a reasonably foreseeable outcome of the driver travelling at excessive speeds. She will also be able to prove that the installation of a speed camera would have led to a reduced probability of travelling in excess speed and therefore a reduced probability of an accident. She will find it tough, however, to prove that a fixed speed camera in the black-spot would have *prevented* the accident from occurring through instituting a behavioural change from the offending motorist.

Liability

From all of the elements discussed above, it seems that the road authority could be held liable for failing to install a speed camera in the location of the black-spot. However, the following defences are available.

DEFENCES AVAILABLE TO THE STATUTORY AUTHORITY

Operational vs. Policy

Anne must prove that the installation of speed cameras was an operational decision rather than one of a high-level policy decision. Operational decisions are reviewable in court while policy decisions are left to the discretion of the statutory authorities. The use of speed cameras in general is a policy issue, but the installation of speed cameras in specific sites would most likely to be an operational issue, and thus the authority could be held liable. Anne must then prove that the speed camera would have been more useful in preventing accidents in the area of her accident than elsewhere. To do this, expert evidence is often called, and the method by which speed cameras are allocated to locations will be questioned.

Contributory Negligence

It is not intended that the act or omission of the statutory authority should lessen the responsibility of the driver to act for his or her own safety. Contributory negligence examines the contribution the plaintiff may have made to their accident, and reduces the amount of compensation given according to the degree to which the plaintiff failed to act reasonably for their own safety. It also takes into account the manner in which the accident took place. In this case, if the statutory authority can show that Anne contributed to the cause of her injury by driving recklessly, the amount of compensation paid to Anne could be reduced.

Abolition of Nonfeasance

Previously, before the abolition of the nonfeasance rule, if the statutory authority had done nothing to improve the situation of the black-spot they would not have been held liable for any damage that occurred because of this omission. However, since this immunity has been taken away, nonfeasance is no longer an applicable defence. This is potentially where Anne could attempt to seek compensation for a pure failure to install a speed camera because of the evidence to suggest the speed camera would have reduced the probability of a speed infringement.

DISCUSSION/CONCLUSIONS

The case study demonstrates that it is plausible a statutory road authority could be sued for the failure to implement fixed speed camera programs with extensive signage at known accident black-spots. However,

whether such a lawsuit would be successful is questionable for two major reasons. First, while increased speeds were shown to correlate with an increased probability of both the incidence and severity of accidents, it would have to be proven on a case-by-case basis as to the extent to which excessive speed “caused” the accident. In reality, other factors such as alcohol, fatigue, road condition, and weather may also have contributed to the accident.

Second, is the problematic issue of proving that the speed camera program would have caused the offending motorist to reduce their speed. The evidence suggests that in the aggregate, such programs do lead to an overall reduction in infringements and average speeds, but a small percentage of motorists continue to defy them. Ultimately, the choice to speed is that of the individual and while behavioural change can be encouraged through publicity campaigns and speed camera programs, it is unlikely a statutory authority could be held liable for an individual’s refusal to obey the law.

It is probable however, that as “intelligent” technologies become more mainstream and further studies are conducted to prove their road safety benefits, that statutory authorities will come under increased pressure to implement such systems. This pressure is likely to come foremost from insurance agencies, which ultimately bear the brunt of personal accident claims. The full implications of the removal of nonfeasance immunity remain to be seen. However, it seems likely that all those with the responsibility for providing a safe road-operating environment will face even greater social and legal challenges in the future.

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