

## **ROMAN v. NORTH SYDNEY COUNCIL (S403/2007)**

Court appealed from: New South Wales Court of Appeal

Date of judgment: 27 February 2007

Date of grant of special leave: 3 August 2007

This appeal involves the interpretation of s.45 of the *Civil Liability Act 2002* (NSW) and the question of whether the relevant authority had "actual knowledge" of the existence of a pothole and could be sued in negligence.

The appellant was injured in 2001 when she fell into a pothole in the roadway at McMahons Point. She sued North Sydney Council alleging that the pothole must have been known to Council as its employees regularly swept the street and were required to report such hazards to their supervisor. The Council called evidence from its supervisors and others responsible for repairs, none of whom knew about the pothole or how it had come to be subsequently repaired. No street sweepers were called.

The trial judge (Ainslie-Wallace DCJ) concluded that the street sweepers would have been aware of the pothole and, despite the absence of any record, so too was the Council. Damages of \$475,485.00 were awarded.

The Court of Appeal, by majority (Bryson and Basten JJA, McColl JA dissenting) allowed the appeal, holding that "actual knowledge" must be found in the mind of an officer having authority to carry out the repair. The evidence showed that no officer at that level had actual knowledge and consequently neither did the Council. McColl JA would have dismissed the appeal, holding that the knowledge of persons who, acting within the scope of their duties learn of a risk and are required to report it, should be attributed to the Council.

The grounds of appeal include:

The New South Wales Court of Appeal was in error:

- In holding that Section 45 of the Civil Liability Act, New South Wales, protected the respondent unless it could be shown that an officer of the respondent having delegated or statutory authority to carry out necessary repairs to roads had actual knowledge of the risk.
- When it purported to apply principles of corporate criminal or quasi criminal responsibilities to acts done or not done by employees of the respondent within the scope of their employment for which the respondent should have been held civilly liable.
- When it overturned the trial judge's finding that the respondent had the relevant knowledge for the purposes of Section 45 of the Civil Liability Act, New South Wales, whilst apparently accepting her finding that employees of the respondent who were part of the respondent's road maintenance system had knowledge of the hazard.