[2001–02 Gib LR 156]

ALMEDA and EDERY v. ATTORNEY-GENERAL

COURT OF APPEAL (Neill, P., Glidewell and Staughton, JJ.A.): September 18th, 2001

Highways—construction and repair—failure to repair—common law immunity from liability for injury not abrogated by Public Health Ordinance 1950, s.238(2)—no damages against Government for injury caused by defective road—abolition of common law immunity in England not enforceable in Gibraltar through English Law (Application) Ordinance 1962, s.2(1)

The appellants claimed damages in the Supreme Court for personal injury suffered on public roads.

The appellants both sustained injury whilst walking on the highway, which they claimed was caused by the Government's negligence or breach of statutory duty in failing to maintain and repair the highway under s.238(2) of the Public Health Ordinance 1950. In the Supreme Court, the Crown submitted that it had a common law immunity for acts of nonfeasance as successors to the original "inhabitants at large." The appellants submitted that (a) s.238 created a new liability to which the previous immunity did not attach; and (b) s.1(1) of the Highways (Miscellaneous Provisions) Act 1961, which removed the common law immunity in England, was indirectly enforced in Gibraltar by s.2(1) of the English Law (Application) Ordinance 1962. The Supreme Court (Pizzarello, A.J.) held as a preliminary issue that the common law immunity applied in Gibraltar.

For the purposes of the appeal, the two separate actions were consolidated and the appellants repeated their submissions in the Supreme Court.

Held, dismissing the appeal:

(1) The common law immunity from liability for injury caused by the nonfeasance of those with the responsibility for maintenance and repair remained in existence in Gibraltar despite the many administrative changes that had taken place. It was not abrogated by s.238(2) of the Public Health Ordinance 1950, and there was therefore no new remedy in damages for those injured by a failure to repair the road. The 1950 Ordinance did not show a distinct intention on the part of the legislature to create a new liability to persons injured; although it introduced the words "it shall be the duty" (of the Government to maintain all public

highways and other streets) this did not change the nature of the previous duty and remove the immunity (*per* Neill, P., at paras. 100–102; *per* Staughton, J.A., at para. 72; Glidewell, J.A., dissenting, at para. 64).

(2) Moreover, the immunity in Gibraltar had not been indirectly changed by s.1(1) of the Highways (Miscellaneous Provisions) Act 1961, which removed the immunity in England. The Westminster Parliament was not able to legislate for all common law countries by altering the common law without their assent. Section 2(1) of the English Law (Application) Ordinance 1962 could not, therefore, be used to enforce the changed English common law in Gibraltar and the appeal would be dismissed. Nevertheless, the common law immunity was a relic of the past and should be re-considered by the legislature as a matter of urgency (para. 69; para. 73; paras. 103–104).

Cases cited:

(1) *Att.-Gen., ex rel. Ormerod Taylor & Son Ltd.* v. *Todmorden B.C.*, [1937] 4 All E.R. 588, *dicta* of Goddard, J. followed.

(2) *Cowley* v. *Newmarket Local Bd.*, [1892] A.C. 345; (1892), 67 L.T. 486; 8 T.L.R. 788, *dicta* of Lord Hannen and Lord Herschell followed.

(3) *Gibson* v. *Mayor of Preston* (1870), L.R. 5 Q.B. 218, *dicta* of Hannen, J. followed.

(4) *Haydon* v. *Kent C.C.*, [1978] 1 Q.B. 343, *dicta* of Denning, M.R. considered.

(5) *Maguire* v. *Liverpool Corp.*, [1905] 1 K.B. 767; (1905), 21 T.L.R. 278, *dicta* of Vaughan Williams, L.J. considered.

(6) *Pictou (Municipality)* v. *Geldert*, [1893] A.C. 524, *dicta* of Lord Hobhouse followed.

(7) *Russell* v. *Men of Devon* (1788), 2 T.R. 667; 100 E.R. 359, followed.

(8) *Sanitary Commrs. (Gibraltar)* v. *Orfila* (1890), 15 App. Cas. 400, *dicta* of Lord Watson followed.

(9) *Sydney (Municipal Council)* v. *Bourke*, [1895] A.C. 433, followed.

(10) *Wentworth* v. *Wiltshire C.C.*, [1993] Q.B. 654; (1992), 90 L.G.R. 625, *dicta* of Parker, L.J. considered.

(11) *Young* v. *Davis* (1862), 7 H. & N. 760; 158 E.R. 675, *dicta* of Pollock, C.B., Martin, B. and Channell, B.; on appeal, (1863), 2 H. & C. 197; 159 E.R. 82, *dicta* Willes, J. followed.

Legislation construed:

English Law (Application) Ordinance (1984 Edition), s.2(1): The relevant terms of this sub-section are set out at para. 14.

Public Health Ordinance (1984 Edition), s.238: The relevant terms of this section are set out at para. 41.

s.244: The relevant terms of this section are set out at para. 42.

Highways Act 1835 (5 & 6 Will. 4, c.50), s.6: The relevant terms of this section are set out at para. 78.

Highways Act 1959 (7 & 8 Eliz. 2, c.25), s.38(1): The relevant terms of this sub-section are set out at para. 27.
s.44(1): The relevant terms of this sub-section are set out at para. 27.
s.59(1): The relevant terms of this sub-section are set out at para. 27.
s.298: The relevant terms of this section are set out at para. 28.

Highways (Miscellaneous Provisions) Act 1961 (9 & 10 Eliz. 2., c.63), s.1(1): The relevant terms of this sub-section are set out at para. 14.

Public Health Act 1875 (38 & 39 Vict., c.55), s.149: The relevant terms of this section are set out at para. 23.

Sanitary Order in Council 1883, s.161: The relevant terms of this section are set out at para. 33.

Ms. G. Guzman for the appellants;
J.E. Triay, Q.C. and *C. Pitto, Crown Counsel*, for the Crown.

1 **GLIDEWELL, J.A.:**

Preliminary

For many years there was a rule of common law which provided that the body of persons responsible for the repair of a highway were exempt from liability in an action for damages for injury caused by a failure to carry out their duty to repair. I shall call this "the common law immunity." The rule dated at least as far back as the late 18th century: see *Russell* v. *Men of Devon* (7). In England this rule was abrogated by s.1(1) of the Highways (Miscellaneous Provisions) Act 1961, which came into effect on August 3rd, 1964. However, there has been no legislation to the same effect in Gibraltar. The issue in this appeal is whether the common law immunity applies, or still applies, in Gibraltar.

The actions—how the issue arose

Mrs. Edery's action

2 By a writ issued on June 6th, 1997, Mrs. Edery claimed against the Attorney-General, on behalf of the Government, damages for personal injuries and loss suffered on June 8th, 1994, as a result of the negligence or breach of statutory duty of the defendant.

3 By her statement of claim served on February 15th, 2000, Mrs. Edery alleged that on June 8th, 1994, she caught her foot in a pothole in Market Lane, Gibraltar, and fell to the ground. She pleaded that the Government was responsible for the maintenance and repair of that highway and that the accident was caused by the Government's negligence or breach of statutory duty in failing to maintain the road in a good state of repair. The statutory duty alleged was under s.238(2) of the Public Health Ordinance.

Mrs. Edery alleged that she suffered an injury to her left ankle, which restricted her mobility for six weeks.

4 By the defence filed on February 28th, 2000, the Attorney-General denied the facts of the accident, admitted that the Government of Gibraltar is "the entity responsible for the maintenance and repair of the road," denied the allegations of negligence and breach of statutory duty and alleged contributory negligence by Mrs. Edery. The extent of her injuries was not admitted.

5 A date for the trial of the action was fixed for March 7th, 2001. On that very day, the Attorney-General made an application in writing to amend the defence so as to allege "that by a rule of law the defendant is not liable for nonfeasance, that such a rule was specifically abolished in England but that it has never been abolished here." It was agreed between the parties that an issue whether the Government was immune from a civil action for damages for injury caused by failure to repair the highway, *i.e.* whether the common law immunity applied in Gibraltar, should be determined as a preliminary point, to be heard on May 14th, 2001.

6 After hearing argument on that preliminary point, on May 22nd, 2001, Pizzarello, A.J. gave judgment in which he concluded that the common law immunity applies in Gibraltar and that the Government could not therefore be made liable in this action. The judge refused leave to appeal against his decision and therefore dismissed the claimant's action.

7 Mrs. Edery wishes to appeal and has filed notice of appeal. At the outset of the hearing before the Court of Appeal, we had to consider whether the appellants required leave to appeal. The appellants wished to contend that leave to appeal was not necessary because the judgment of Pizzarello, A.J. in both actions was in effect a final judgment. Counsel for the Attorney-General on the other hand wished to contend that the judgments remained interlocutory and that leave to appeal was therefore required. Neither party, however, suggested that it was important that the court should reach a conclusion on the matter in order to clarify the law for future cases.

8 In the event, we decided that we should proceed to deal with the substantive appeal without delay and accordingly ruled that if leave were necessary, as to which we expressed no opinion, the case was one in which leave should be given. We, therefore, proceeded on the basis that the appellants had been given leave to appeal. We had noted that at an earlier stage in Mrs. Edery's action, when leave to amend the defence was being sought, counsel for the Attorney-General had contended that the issues raised in the action were matters of public importance.

Mrs. Almeda's action

9 This was commenced by a specially indorsed writ issued on January 18th, 2001. The allegations in the statement of claim endorsed on the writ were similar to those made in Mrs. Edery's action. In brief, it alleged that on September 10th, 1999, Mrs. Almeda tripped over some broken paving stones in a highway, for the maintenance of which the Government is responsible and that the accident was caused by a breach of statutory duty and negligence on the part of the Government in failing to repair the highway. The claimant, then aged 70, fractured both her wrists and required extensive surgery.

10 The Attorney-General's defence in this action filed on February 23rd, 2001, was similar to that in Mrs. Edery's action, but also raised the issue now before us in the following terms:

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

11 On April 23rd, 2001, Pizzarello, A.J. adjourned this action to May 24th, 2001, a date after he had given judgment on the preliminary issue in Mrs. Edery's action. Following his judgment in that action, on May 25th, 2001, the judge also dismissed Mrs. Almeda's action.

12 Mrs. Almeda also sought leave to appeal, an application on which we have reached the same conclusion as in Mrs. Edery's case, *i.e.* we have granted her leave to appeal.

13 For the purposes of this appeal both actions were consolidated by an order made by Schofield, C.J., on August 24th, 2001. Both ladies are now appellants in the one appeal before us.

The case for the Attorney-General in the Supreme Court

14 The argument of Mr. Triay, Q.C. and Mr. Pitto for the Attorney-General in the court below can be summarized as follows:

(a) The common law immunity applies to highway authorities generally.

(b) By s.2(1) of the English Law (Application) Ordinance (1984) Edition:

> "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—

(a) any Order of Her Majesty in Council which applies to Gibraltar; or

(b) any Act of the Parliament of Westminster which applies to Gibraltar, whether by express provision or by necessary implication; or

(c) any Ordinance."

(c) By s.1(1) of the Highways (Miscellaneous Provisions) Act 1961: "The rule of law exempting the inhabitants at large and any other persons as their successors from liability for non-repair of highways is hereby abrogated."

(d) The 1961 Act thus abolished the common law immunity in England from August 3rd, 1964, when it came into force. It did not, however, apply expressly or by necessary implication in Gibraltar. There has been no similar Gibraltar legislation, either by Order in Council or Ordinance.

(e) Therefore, the common law immunity still applies in Gibraltar.

The case for the appellants in the Supreme Court

15 Ms. Guzman for Mrs. Edery made in summary the following points in argument:

(a) The common law immunity was abolished in England by s.1(1) of the Act of 1961. It followed that the immunity had not been part of the common law of England, since the coming into force of that Act. Thus, under the English Law (Application) Ordinance, the common law immunity is not in force in Gibraltar at the present time.

(b) The English authorities which held that surveyors of highways and later highway authorities were entitled to the benefit of the common law immunity, were based upon the wording of English statutes then in force, particularly s.149 of the Public Health Act 1875, which were held to impose no positive obligation to repair but to leave that liability with the inhabitants at large. These authorities are not applicable to the different wording of s.238 of the Public Health Ordinance, which does impose a positive duty on the Government to repair highways.

(c) The differences between the history of highway law in England and Gibraltar should lead to the conclusion that the common law immunity has never applied in Gibraltar.

The judgment of Pizzarello, A.J.

16 The judge, having rehearsed the submissions of the parties, rejected Ms. Guzman's submissions and in essence adopted those of Mr. Triay. He said in para. 9 of his judgment:

> "I am of the opinion that I need not look at the reasons why the rule was established. In my view, it suffices that there was a rule at common law exempting the inhabitants at large and other persons as their successors from liability for non-repair of highways. That rule is incorporated into the law of Gibraltar by virtue of the English Law (Application) Ordinance and previous enactments to that effect (*e.g.* Order in Council of November 17th, 1888, by which the law of England was put in force in Gibraltar 'as far as it may be applicable to the circumstances thereof') and the Privy Council in the *Orfila* case accepted that. It requires clear statutory language to abrogate the rule. It seems to me to be very clear that the Government, as the authority to maintain all public highways, is the successor to the inhabitants at large."

He then set out the relevant statutory provisions in Gibraltar and said at the end of para. 9:

> "There are no clear statutory expressions which can be said to take away the immunity. In these circumstances, I find it impossible to agree with Ms. Guzman's submissions, first, that the Government has assumed any greater duty than had been given to the city council and, secondly, that the expressions used by the legislature intended it to assume any liability where before there was none."

In para. 10 he also rejected Ms. Guzman's submissions on the effect of the English Law (Application) Ordinance.

17 The grounds of appeal of both appellants are identical. Paragraph 1 reads:

> "The learned judge erred in holding that the respondent enjoyed an absolute immunity at common law from liability for nonfeasance. In doing so the learned judge, *inter alia*—
>
> (i) failed to consider the historical origins and reasons for the existence of such an absolute immunity in England, and, in particular, whether the common law reflected a law of local policy adopted solely for England or whether it was a general regulation equally applicable to Gibraltar's circumstances, as one of Her Majesty's colonies, thereby justifying its applicability locally;
>
> (ii) automatically applied the English common law to Gibraltar without addressing (i) above, and, in particular, by not considering the prescribed conditions of applicability of the English common law to Gibraltar as provided for in s.2(1) of the English Law (Application) Ordinance;
>
> (iii) erred in its finding of fact that the respondent is the

> successor to the inhabitants at large and by implication likewise retaining an absolute immunity for nonfeasance as at the pre-1961 English common law position."

Paragraph 2(i) reads:

> "In the alternative to para. 1 above, if such immunity exists under Gibraltar law, the learned judge—
>
> (i) erred in failing to attach any or due weight to the fact that the absolute immunity in England was abrogated in 1961, since which time there has been an effective cause of action available for nonfeasance under English common law . . ."

This is in effect a summary of the following sub-paragraphs of this paragraph. Paragraph 3 reads as follows:

> "The learned judge erred in holding that the respondent was not liable for nonfeasance under s.238 of the Public Health Ordinance."

The issues before this court

18 Following the detailed and careful arguments which have been addressed to us, both in the written submissions and in the oral arguments of counsel, the issues for our decision can be summarized as follows:

(i) What were the nature of and the limitations upon the common law immunity?

(ii) Were persons called or who could properly be described as "the inhabitants at large" of Gibraltar ever liable for the maintenance of highways here?

(iii) If not, did the common law immunity ever apply in Gibraltar?

(iv) Alternatively, if the common law immunity did at one time apply in Gibraltar, did it continue to apply to the duty imposed by s.237(2) of the Public Health Ordinance 1950, which is now s.238(2) of the current edition of the Ordinance?

(v) If the common law immunity applied in Gibraltar at the time when s.1(1) of the Highways (Miscellaneous Provisions) Act 1961 came into force, did it continue to apply thereafter?

19 Consideration of the first four of these deceptively simple questions requires a fairly detailed analysis of the development of the law relating to the maintenance and repair of highways, including the relevant authorities, both in England and Gibraltar, a subject which some might describe as arcane. To this I now turn.

The law of England

20 I have already referred to *Russell* v. *Men of Devon* (7), which established the common law immunity rule. The case concerned the failure to repair a bridge which the men of the county, as opposed to the inhabitants at large of the parish, were liable to repair, but the principle was the same. There were two reasons for the decision that the defendants were not liable. These were, to quote the judgment, (i) that finding in favour of the claimants "would have been productive of an infinity of actions," in other words, the floodgates argument; and (ii) that the men of the county were not a corporate body and that therefore there was no corporate fund out of which any damages awarded against them could be paid.

21 In *Young* v. *Davis* (11), the defendant was the surveyor of highways for a parish. The Highways Act 1835 required a parish to appoint a surveyor, and s.6 required him to repair and keep in repair the highways "liable to be repaired by the parish." Pollock, C.B. said (7 H. & N. at 771; 158 E.R. at 680):

> "My judgment is founded on this: that the legislature never intended to create this personal responsibility in a surveyor of highways. I admit the technical ground upon which Mr. Mellish contended—a surveyor of highways is appointed 'in ease of the parish' and as their officer to represent them; but, as Mr. Mellish pointed out, the act of parliament contemplates that the duty formerly belonging to the parish still remains in them, and that the surveyor acts strictly as their officer."

Martin, B. said (*ibid.*, at 774; at 681):

> "The obligation to repair still remains in the parish. The surveyor has certain duties imposed upon him, and the consequence of not performing those duties is that he is subject to a penalty. There is nothing in the Act to justify us in holding that he is personally responsible, and that in the event of accident arising from the non-repair of the road, the person injured may maintain an action against him."

Finally, Channell, B. said (*ibid.*, at 776; at 682):

> "Then does the 5 & 6 Wm. 4, c. 50, create such a duty on the part of a surveyor of highways, that by reason of a breach of that duty he is liable to an action? I agree that it imposes on him a duty, but not such a duty as exposes him to this liability. I think that the intention of the legislature was to enable the parish, through the instrumentality of a surveyor, to do that which it was their duty to do; and that the parish still remains liable for the non-repair of the road. It seems

to me that the object was to give facility to the parish to perform their work and do their duty through the assistance of a surveyor not to cast upon him the liability now sought to be imposed."

22 In *Gibson* v. *Mayor of Preston* (3) the Queen's Bench Divisional Court went further. By the Public Health Act 1848, all highways within a district were vested in and under the management and control of the local board of health and it was provided that the local board of health (L.R. 5 Q.B. at 220) "shall exclusively execute the office of surveyor of highways, and have all such powers, duties and liabilities as any surveyor is now or may be hereafter invested with or liable to." Giving the judgment of the court, Hannen, J. said (*ibid.*, at 223):

"The enactment that the streets shall 'vest in' the local board, whatever meaning may be assigned to that expression, does not seem to us to enlarge the liability resulting from the following words, that they shall be 'under the management and control of the local board,' language similar to that used in the statute under consideration in *Rex* v. *St. George, Hanover Square*, where it was held, that the imposing of the duty of repairing on a person or body other than the parish did not, by implication, exempt the parish from liability to indictment; and while this liability remains, the cases above referred to, *Young* v. *Davis* and *Parsons* v. *St. Mathew, Bethnal Green*, established that no right of action is created against those to whom the management and control of the roads is given.

For these reasons we are of opinion that the legislature did not intend by the Public Health Act, 1848, to give to a person in the position of the plaintiff a right of action which did not previously exist, and our judgment must, therefore, be for the defendants."

23 That decision was followed and expressly approved by the House of Lords in *Cowley* v. *Newmarket Local Bd.* (2). By that time, the Public Health Act 1875 was in force. By s.144 of that Act, every urban authority was to execute the office of surveyor of highways and to exercise and be subject to all the powers, duties and liabilities of surveyors. Section 149 of that Act provided so far as is material that—

"all streets, being or which at any time become highways repairable by the inhabitants at large within any urban district . . . shall vest in and be under the control of the urban authority.

The urban authority shall from time to time cause all such streets to be levelled paved metalled flagged channelled altered and repaired as occasion may require; they may from time to time cause the soil of any such street to be raised lowered or altered as they think fit, and may place and keep in repair fences and posts for the safety of foot passengers."

24 In his speech, Lord Herschell cited *Russell* v. *Men of Devon* (7), *Young* v. *Davis* (11) and *Gibson* v. *Mayor of Preston* (3), which, as I have said, he expressly approved. Lord Hannen, as he had then become, said ([1892] A.C. at 355):

> "This is a subject which has engaged the attention of the Courts on many occasions. The governing principle was stated in the Exchequer Chamber as long ago as 1863 in the case of *Young* v. *Davis*, that the surveyor of highways was not liable to be sued for damage resulting from the highway being out of repair because no action could have been brought against the parish, and that the Act of Parliament requiring the surveyor to keep the roads in repair was not passed for the purpose of creating a new liability, but simply in order to provide machinery whereby the duty of the parish to repair might be conveniently fulfilled.
>
> This principle is equally applicable where the duties and liabilities of the surveyor have been transferred to other bodies, unless a distinct intention on the part of the Legislature can be inferred from the particular statute under consideration to create a new liability. This was laid down in 1870 in the case of *Gibson* v. *Mayor of Preston*, where the previous authorities were considered; and, unless this House is prepared to overrule that case, it governs the present. After careful attention to the arguments which have been addressed to your Lordships, I adhere to the judgment given in the case of *Gibson* v. *Mayor of Preston*, and I therefore think that the judgment appealed from should be affirmed."

25 A passage in the judgment of Goddard, J. in *Att.-Gen., ex rel. Omerod Taylor & Son Ltd.* v. *Todmorden B.C.* (1), was cited in the judgment of Pizzarello, A.J. I do not need to repeat that passage. I comment only that when Goddard, J. said ([1937] 4 All E.R. at 593): "[T]he local boards or councils, who have, by virtue of one Act or another, become in later years the highway authority, and liable to maintain the roads," he was stating the practical but perhaps not strictly the legal effect of the earlier decisions.

26 Since it was not possible to bring an action against either the inhabitants at large or the surveyor or highway authority which succeeded him for damage caused by a failure to maintain a highway, the only means by which the obligation to maintain it could be enforced was by way of an indictment of the inhabitants, or later by complaint to the magistrates.

27 So matters remained until on January 1st, 1960, the Highways Act 1959 came into force. The following subsections are relevant for our purposes:

> "38. (1) After the commencement of this Act no duty with respect to the maintenance of highways shall lie on the inhabitants at large of any area.
>
> . . .
>
> 44. (1) The authority who are for the time being the highway authority for a highway maintainable at the public expense shall, subject to the following subsection, be under a duty to maintain the highway."

The effect of s.295(1) is that "maintain" includes "repair."

> "59. (1) After the commencement of this Act, no indictment shall be preferred in respect of neglect to maintain a highway."

There follows from s.59(2) onwards a detailed procedure by which, if there is a dispute as to whether a road or other way is a highway, or whether a highway has not been properly maintained, those matters may be decided by a court.

28 Section 298 expressly preserved the immunity from liability for non-repair, but converted it from a common law immunity against liability for failure to carry out the obligations under previous legislation, into a new statutory immunity against liability for failure by the highway authority to carry out the duty imposed by s.44.

> "298. Subject to subsection (1) of section eighty-nine of this Act, nothing in this Act with respect to the duty of highway authorities to maintain highways maintainable at the public expense shall be construed as affecting any exemption from liability for non-repair available to a highway authority immediately before the commencement of this Act as the successor to the inhabitants at large."

29 Section 1(1) of the Highways (Miscellaneous Provisions) Act 1961 had the effect that after August 3rd, 1964, when the 1961 Act came into effect, a person injured by a highway authority's failure to carry out its duty under s.44 of the 1959 Act could bring an action.

30 The latest English authority to which we have been referred is *Wentworth* v. *Wiltshire C.C.* (10). The issue in that appeal was whether, following the 1961 Act, the claimant could claim damages for economic loss to his business caused by failure to repair a highway. The case is not directly relevant; however, there is a short but helpful passage in the judgment of Parker, L.J., where he said ([1993] Q.B. at 661):

> "[I]n my judgment the intention of Parliament, to be gathered from the wording of the two Acts and the pre-existing state of law, is clear. It is (1) to replace the remedy for non-repair by way of

indictment by the new remedy under section 59 of the Act of 1959, and (2) to replace the previous exemption from civil liability for damage resulting from non-repair by an action for damage to the person or property of a road user from the dangerous condition of a highway, subject only to the statutory defence . . .”

Law of Gibraltar

31 It seems that from the time when Gibraltar was annexed to the British Crown in the early 18th century, its streets and highways were vested in and under the control of the Government, *i.e.* the Crown. By an Order in Council of December 30th, 1815, a “Paving and Scavengers Rate” was levied within His Majesty’s Garrison and Town of Gibraltar, for the purpose of paving, repairing and cleansing the streets, *etc.* The rate was to be assessed on the occupiers of all houses, shops, warehouses and other hereditaments within Gibraltar and collected by collectors appointed by the Governor or Lieutenant Governor, to whom it was to be paid over. The money so collected “shall be applied in the payment of the expenses already incurred, or which may hereafter be incurred, in the paving, repairing and cleansing the streets, *etc.*”

32 This provision remained in force for 50 years. In 1865 there was a severe outbreak of cholera in Gibraltar, which resulted in an Order in Council of December 20th of that year, which established a body of Sanitary Commissioners for the town. The 1815 Order in Council was repealed. Amongst other matters, the management of highways was entrusted to these Commissioners.

33 On September 15th, 1883, a further Sanitary Order in Council came into operation. By it the Commissioners were constituted as a body with perpetual succession, which was entitled to sue and be sued. The Order included a definition of “public highways” which extended over two pages and named and identified such highways in great detail. Section 161 dealt with the maintenance of public highways and provided that:

“Subject to such rules and regulations as may be made by the Governor under this order, the commissioners shall be the surveyors of all the public highways in Gibraltar, and shall, for the purposes of this order, 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 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."

34 The Privy Council decision in *Sanitary Commrs. (Gibraltar)* v. *Orfila* (8), which was concerned with the proper interpretation of the 1883 Sanitary Order in Council, is the one major authority on the law of Gibraltar relating to the maintenance of highways to which we have been referred. In that case, Mr. Orfila owned property adjoining but below the road leading up to the Moorish Castle. On his boundary, the road was supported by a retaining wall. After a period of heavy rain, the wall gave way and part of it collapsed on to and damaged the claimant's property. Mr. Orfila sued the Sanitary Commissioners, claiming that under the Ordinance they were under a duty to him to maintain the road and retaining wall in a stable condition, and that they negligently failed in that duty. The allegation was based in part on an alleged failure to maintain in breach of s.161 of the Order. At first instance, the Chief Justice found for the claimant but the Privy Council allowed the appeal and reversed that decision. Part of the case for the Commissioners at the hearing of the appeal was that they were not liable for acts of nonfeasance, but only for misfeasance. There was no specific reference to the common law immunity, nor to the *Men of Devon* (7) case, but *Gibson* v. *Mayor of Preston* (3) was cited.

35 Giving the judgment of the Judicial Committee, Lord Watson said (15 App. Cas. at 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 nonfeasance. 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 nonfeasance 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."

He said (*ibid.*, at 412):

"The only duty expressly laid upon them with respect to retaining walls is to maintain and repair them for the safety of passengers and ordinary traffic. And, lastly, it is expressly provided that, in executing the order, they must conform to any rules and regulations which the Governor may think fit to make.

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."

36 At this point, it is convenient to refer to another decision of the Privy Council which, though not concerned directly with the law of Gibraltar, is relevant. This is the case of the *Pictou (Municipality)* v. *Geldert* (6). The committee which heard that appeal included Lord Watson and Sir Richard Couch, who had been members of the committee which decided *Orfila* (8), and Lord Halsbury and Lord Macnaghten, who had been part of the constitution of the House of Lords in *Cowley* (2). The three cases were all heard and decided within the space of three years.

37 Mr. Pictou claimed that he suffered injury when he tripped as a result of the disrepair of a highway over a bridge, for which the municipality was responsible. His allegation was that the defendant had failed properly to maintain or repair the highway. The municipality claimed the protection of the common law immunity and the Judicial Committee ruled in its favour. After referring to the *Men of Devon* (7) case and to *Cowley* (2), Lord Hobhouse, giving the judgment of the Committee, said ([1893] A.C. at 527):

"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.'

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."

38 Returning to Gibraltar, the Order in Council of 1883 was in time superseded by the Public Health Ordinance of 1907. The Ordinance in its

original form referred to the Sanitary Commissioners, but after the Council was created in 1921, the wording was amended. As so amended, ss. 216 and 217 read:

> "216. Subject to such rules as may be made by the Governor under this Ordinance the Council shall be the surveyors of all the public highways in Gibraltar and shall for the purposes of this Ordinance control, manage and maintain the public highways, 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 or ordinary traffic thereon.
>
> 217. The Council shall from time to time cause all such 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 . . ."

39 I make two observations about this wording. First, the initial words of s.216 repeat the first part of s.161 of the 1883 Order, including the reference to the Council being the surveyors of public highways. Secondly, the side note to s.217 in the official version of the Ordinance refers the reader to s.149 of the Public Health Act 1875, to which its wording is very similar.

40 The 1907 Ordinance was in turn superseded and replaced by the Public Health Ordinance 1950. This is the Ordinance currently in force, although it has been substantially amended as time has passed. As originally enacted, s.237(1) read: "Subject to the provisions of this Part of this Ordinance all public highways in Gibraltar shall be vested in and under the control and management of the Council."

41 This has now become s.238(1) and was amended in 1970 after the Constitution came into force. Section 237(2) was amended to a lesser extent. Following these amendments the whole of s.238 now reads:

> "(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."

42 The Ordinance also contains s.244, the first part of which provides:

> "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 . . ."

The 1950 text was identical, except for the change from "the Council" to "the Government." The side note to this provision also refers to s.149 of the Public Health Act 1875.

43 It is of course, s.238(2) which imposes on the Government the duty which both appellants allege they have failed to carry out.

Discussion

44 I now return to the five questions I posed at para. 18, referring, where appropriate, to the submissions of counsel.

(i) *What were the nature of and the limitations upon the common law immunity?*

45 It is clear that initially it was the inhabitants at large of a parish or county who had immunity from being sued for injury or damage to an individual caused by their failure to repair a highway. A major, though not the sole reason for their immunity, was that not being a corporation they had no corporate funds out of which to pay any damages which might be awarded.

46 When a parish appointed a surveyor of highways to oversee and arrange for the carrying out of repairs on their behalf, it was logical for the immunity to be extended to prevent the surveyor being sued in his personal capacity. If he had been held liable, this would have gone far to render the immunity of the inhabitants of the parish a useless shield.

47 When, as a result of 19th century legislation, highway authorities took over the responsibility for the maintenance and repair of highways, it was not so obvious why they should also have been entitled to the immunity. They were corporate bodies with funds out of which they might pay damages at their disposal, so that must have ceased to be the reason for the application of common law immunity to protect them. The reason, I understand from the authorities to have been this: the duty to maintain and repair highways remained, at all times before January 1st, 1960, on the inhabitants at large of the parish. However much it might seem in practice that the highway authorities were assuming the liability, in legal theory they repaired, or failed to repair, highways on behalf of the inhabitants, just as the surveyors had done. Therefore, they had the same

immunity as the surveyors to whose duties and liabilities under s.144 of the 1875 Act, they were subject. Put another way, using the language of Lord Hannen in *Cowley* (2), they had imposed on them an obligation to repair highways, not in order to create a new liability on them, but ([1892] A.C. at 355) "simply in order to provide machinery whereby the duty of the parish to repair might be conveniently fulfilled."

48 It is apparent that, as the years passed, the gap between the practice whereby highway authorities undertook the repairs and the legal theory that they could not be sued by a person injured as a result of a failure to repair grew wider. But the legal theory remained in force to support the common law immunity, until it was replaced by the brief-lived statutory immunity provided by s.298 of the Highways Act 1959. This gap between theory and practice explains, for instance, the reference by Goddard, J. in the *Omerod Taylor* case (1) to the highway authority being "liable to maintain the road."

(ii) ***Were persons called or who could properly be described as "the inhabitants at large" of Gibraltar ever liable for the maintenance of highways here?***

49 Ms. Guzman submits that the whole concept of the "inhabitants at large" was unknown in Gibraltar because of its history. There is no reference to them in any of the legislation. The roads were vested in and repaired by the Government. Thus Pizzarello, A.J. was in error when he said in para. 9 of his judgment that: "It seems to me to be very clear that the Government as the authority to maintain all public highways is the successor to the inhabitants at large."

50 In reply, Mr. Triay refers to the order for the levying of the "Paving and Scavengers Rate," which I have summarized at para. 31. The fact that the occupiers of all properties in Gibraltar were liable to be assessed to the rate, the proceeds of which were to be expended on paving, repairing and cleansing the streets, means, he submits, that the occupiers were made liable for the repair of highways and thus were the equivalent of the inhabitants at large, though not so called.

51 I do not accept Mr. Triay's submission on this point. There is, in my judgment, a fundamental difference between a body of people being required to do repairs themselves, and a group of people, not necessarily the same people, being subject to a rate to provide funds out of which the responsible authority, in this case the Crown, would pay for the repair of highways. I agree with Ms. Guzman that in Gibraltar there was no body of persons who were or could properly be described as the inhabitants at large and who were thus liable to maintain the highways.

(iii) ***Did the common law immunity rule ever apply in Gibraltar?***

52 Ms. Guzman argues with force that since in Gibraltar the liability to repair highways is not imposed on the inhabitants at large, there is no basis for the application of the common law immunity here. She submits, accurately, that the English Law (Application) Ordinance 1962 is the successor to an earlier similar Ordinance of 1884, which also provided that the law of England should be enforced in Gibraltar "so far as may be applicable to the circumstances thereof." The circumstances of Gibraltar, *i.e.* the fact that there were no inhabitants at large and that the responsibility for repairing streets and highways was on the Crown, meant that the common law immunity rule did not apply in Gibraltar.

53 As to the decision in *Orfila* (8), Ms. Guzman further submits that that decision was not based on the applicability of common law immunity. There is no reference in the judgment to this immunity. She argues that there were two other reasons which led to the decision in that case:

(i) the nature of the damage, *i.e.* the 1883 Ordinance, s.161 was to be construed as requiring the commissioners to maintain the public highways for the safety of passengers and traffic on the road, not to protect the adjoining property;

(ii) that the commissioners were vested by the 1883 Ordinance only with administrative powers, subject to the control of the Government, and there was no intention in the wording of the Ordinance to make the commissioners directly responsible to persons injured as a result of failure to repair.

54 Mr. Triay argues that *Orfila* (8) did decide that the Sanitary Commissioners, who were the successors to the Governor as highway authority in Gibraltar, had immunity from liability for damage resulting from nonfeasance. Where the judgment in *Orfila* referred to (15 App. Cas. at 413) "any liability, which did not exist before," it must be taken to have been referring to the immunity. Certainly, there were specific references in the arguments of counsel in that case to *Gibson* v. *Mayor of Preston* (3), which was at that time the latest English decision on the common law immunity rule.

55 Moreover, submits Mr. Triay, the decision of the Privy Council in *Pictou* (6) specifically referred and followed the decision in Orfila (8), which clearly their Lordships in the later case regarded as a decision based upon common law immunity.

56 If we were considering the decision in *Orfila* alone, without reference to any decision which followed it, I would see great force in Ms. Guzman's submission that the *ratio* of the decision was, to refer back

to the judgment of Lord Watson, that the Government remained the principal upon whom responsibility for the maintenance of the wall rested and that the commissioners were merely (15 App. Cas. at 413) "a body through whom its administration may conveniently be carried on." There was no discussion in that case of whether the Government itself had immunity, and on what principle. At that time, long before the Crown Proceedings Act 1947 came into force in England, or the Crown Proceedings Ordinance 1951 in Gibraltar, the Crown, *i.e.* the Government, could not be held liable directly in an action in tort. So any discussion of whether it also had the same immunity as the inhabitants at large in England was unnecessary.

57 However, we cannot disregard the decision in *Pictou* (6). In my view their Lordships, who constituted the Judicial Committee in that case, clearly regarded the decision in *Orfila* (8) as one of the group of cases concerned with common law immunity and indeed in a sense together with the decision in *Cowley* (2), as forming part of a coherent trilogy of cases. In my view, we must therefore conclude that the common law immunity rule, as I have sought to explain it, did apply in Gibraltar.

(iv) ***Did the common law immunity continue to apply to the duty imposed by s.237(2) of the Public Health Ordinance 1950, which is now s.238(2) of the current edition of the Ordinance?***

58 Ms. Guzman's argument is that, unlike the earlier Gibraltar legislation, s.238(2) of the Public Health Ordinance imposes a positive duty on the Government to maintain all public highways and other streets. That duty is imposed on the Government as principal, as it was on the Council before 1970. There is nothing in the legislation of Gibraltar equivalent to s.298 of the Highways Act 1959. Therefore, the Government is liable for a failure to maintain, which includes a failure to repair, a highway.

59 Put another way, Ms. Guzman submits that s.238(2) does, on a proper interpretation, impose on the Government a duty towards the appellants which, if the facts alleged in the statement of claim are proved, it failed to perform, to adopt the language of Lord Watson in *Orfila* (8) (15 App. Cas. at 411).

60 Mr. Triay accepts that a failure to maintain is a failure to repair, but otherwise he rebuts Ms. Guzman's submissions. He submits that both s.238 and s.244 of the current Ordinance, set out in paras. 41 and 42 above, are derived from s.149 of the Act of 1875. Therefore, the English decisions on the immunity of a highway authority from liability under that section, including *Cowley* (2), are still in point, and lead to the conclusion that the Government continues to enjoy the same immunity.

61 Mr. Triay has also referred us to a sentence in the judgment of Lord Denning, M.R. in *Haydon* v. *Kent C.C.* (4), where he said ([1978] 1 Q.B. at 356): "Coming now to section 44 of the Act of 1959, it seems to me that it puts in modern form the duty at common law of the inhabitants of a parish to repair and keep in repair the highways." So too, submits Mr. Triay, the 1950 Ordinance s.238(2) simply puts into modern form the obligation imposed on the Commissioners by the 1883 Order in Council, to which the immunity applied.

62 I do not accept Mr. Triay's submissions on either of these points. As to the first, he has compiled for our assistance a schedule which compares the wording of s.161 of the Sanitary Order in Council 1883 with that of s.238 of the Public Health Ordinance, as well as that of s.149 of the Public Health Act 1875 and s.44 of the Highways Act 1959. This schedule to my mind makes it abundantly clear that, while s.238(1) contains language similar to that used in s.149 of the Act of 1875, that Act did not contain the same wording as s.238(2) of the Ordinance, nor indeed any other wording containing a direct, positive duty to maintain. The part of s.149 which referred to an urban authority causing all streets to be repaired as occasion may require, is reproduced in very similar words in s.244 of the Ordinance. In my judgment, s.238(2) has no statutory ancestor in either the 1875 Act or the 1883 Order in Council.

63 As to the reference to the sentence in Lord Denning's judgment in *Haydon* (4), the issue in that case was whether "maintain" had a meaning wider than "repair," and if so whether a duty to maintain included removing ice and snow from a footpath. It was in that context that his Lordship was comparing the wording of s.44 of the 1959 Act with the obligation at common law. I do not accept that he meant that the new legislation had in every respect the same effect as the pre-existing law, nor that the duty under s.44 was subject to common law immunity, when the Act itself contained in s.298 a provision which continued by statute an immunity which had hitherto existed at common law in England.

64 In my judgment, Ms. Guzman's submissions on this issue are correct. Before the 1950 Ordinance came into effect, the Council was under the same duties in relation to highways as the Sanitary Commissioners had been, an obligation imposed by the Ordinance on the Commissioners and then on the Council in their successive capacities as the surveyors of highways. That was the capacity which the Privy Council in *Orfila* (8) described (15 App. Cas. at 413) as "being merely a body through whom its [the Government's] administration may be conveniently carried on." It was for that reason that no liability was imposed on the Commissioners. But the duty in s.238(2) is not imposed on the Government in that capacity at all. It is imposed directly. For that reason, the former common law immunity does not apply to it.

65 I was at one time minded to consider also whether s.44 of the Highways Act 1959 had the same effect but, although I am of the opinion that it did, it is not necessary for the purposes of this judgment to set out my reasoning in relation to the English Act.

(v) ***If the common law immunity applied in Gibraltar at the time when s.1(1) of the Highways (Miscellaneous Provisions) Act 1961 came into force, did it continue to apply thereafter?***

66 I have read in draft the judgments prepared by Neill, P. and Staughton, J.A. Since neither of them agrees with my opinion on the fourth issue, it is necessary to answer this fifth question also. I can do so quite briefly.

67 Section 1(1) of the Highways (Miscellaneous Provisions) Act 1961 provided: "The rule of law exempting the inhabitants at large and any other persons as their successors from liability for non-repair of highways is hereby abrogated."

68 The effect of this was that the rule giving highway authorities immunity from being sued for failure to repair was no longer part of the common law in England. Ms. Guzman argues that although the 1961 Act could have no direct application to the law of Gibraltar, nevertheless it did alter the common law here indirectly. The English Law (Application) Ordinance provides that it is "the common law . . . from time to time in force in England" which shall be in force in Gibraltar. When the appellants suffered their accidents, the common law in force in England did not include the immunity rule, therefore, the rule did not then and does not now apply in Gibraltar.

69 In my judgment, the common law is a general body of law in force in all former British Colonies and Dominions, except where a part of it has been altered or repealed by specific legislation applying to an individual member state of the Commonwealth. Where that happens, the repeal or alteration effects only the law of that particular state. This is the position even when the legislature of the particular member state is the Parliament at Westminster. If that were not so, Parliament could legislate for all common law countries by altering the common law without their assent. As Mr. Triay submits, that cannot be the effect of s.1(1) of the 1961 Act, and I am confident that it is not. I, therefore, reject Ms. Guzman's submission on this issue.

70 **STAUGHTON, J.A.:** It was, in my judgment, established law in Gibraltar at least by the time of the *Pictou* case (6) that those responsible for maintaining the highways could not be held liable in damages for nonfeasance. That was not because they did not owe a duty to maintain and repair: in the *Pictou* case itself Lord Hannen, in a passage already

quoted by the President, referred to "the duties and liabilities of the surveyor." The reason was simply that a suit for damages was not an available remedy for the breach of that duty.

71 By 1893, and if not then certainly by 1937, the original notion that the immunity belonged to the inhabitants at large and was therefore available to their delegates, had in my opinion lapsed. It was simply the immunity of those obliged to maintain highways as a public office. The critical point is whether in 1950 the law of Gibraltar was changed by s.237(2) of the Public Health Ordinance. That section provided "it shall be the duty of the Council to maintain all public highways and other streets . . ." The immediately preceding legislation had said: "the Council shall be the surveyors of all the public highways in Gibraltar and shall for the purposes of this Ordinance control, manage and maintain the public highways . . ."

72 Was there such a change there as to remove the old immunity, and provide a new remedy to those injured by failure to mend the road? Lord Hannen had said in the *Pictou* case (6) that the principle of immunity was equally applicable "unless a distinct intention on the part of the legislature can be inferred from the particular statute under consideration to create a new liability." In my judgment, the 1950 Ordinance did not meet that requirement. It used the word "duty" expressly when it was already implied, but revealed no distinct intention to create a new liability. In my judgment, there continued to be no remedy in damages for nonfeasance in mending the highways.

73 It was also argued that the law of Gibraltar on this topic was changed by a United Kingdom statute, the Highways (Miscellaneous Provisions) Act 1961. I agree with Neill, P. and Glidewell, J.A. that this argument fails, for the reasons given by them.

74 **NEILL, P.:** I have had the advantage of reading in draft the judgment of Glidewell, J.A. and I gratefully adopt his account of the matters that arise for our consideration. I would also express my respectful agreement with his conclusion as to the proper interpretation of the decision of the Privy Council in *Sanitary Commrs. (Gibraltar)* v. *Orfila* (8). I too am satisfied that the Privy Council accepted that the "common law immunity" applied in Gibraltar. Moreover, it seems to me that the matter is put beyond doubt by the decision of the Privy Council three years later in *Pictou (Municipality)* v. *Geldert* (6). In delivering the judgment of the board, Lord Hobhouse said ([1893] A.C. at 527):

> "By the common law of England, which is also that of Nova Scotia, public bodies charged with the duty of keeping public roads and bridges in repair, and liable to an indictment for a breach of this duty, were nevertheless not liable to an action for damages at the suit

> of a person who had suffered injury from their failure to keep the roads and bridges in proper repair.
>
> . . .
>
> The latest English case is that of *Cowley* v. *Newmarket Local Board*, decided in the House of Lords. 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 shown that the legislature has used language indicating an intention that this liability shall be imposed.
>
> 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.'"

75 It is clear that the board in the *Pictou* case (6) regarded the decision in *Orfila* as a recognition by the board of the same immunity from suit as that considered by the House of Lords in *Cowley* (2).

76 I regret to say, however, that I feel bound to differ from my Lord as to the meaning and effect of s.237(2), now s.238(2), of the Public Health Ordinance 1950. In order to explain the reasons for reaching a different conclusion, I must first say something about the relevant law in England.

Highway authorities in England

77 The common law in England provided that once a highway had been dedicated as a public highway, the obligation to repair it was placed on the inhabitants of the parish or other area through which the highway passed. This obligation was enforceable by indictment, but a failure to repair did not give rise to an action for damages at the suit of anyone who might be injured as the result of such failure. This immunity from a civil action was recognized in *Russell* v. *Men of Devon* (7), where two reasons were given for the immunity—(1) the fact that if an action lay there would be "an infinity of actions" and (2) the fact that the inhabitants were not an incorporated body and there was no corporate fund against which any award could be enforced. Lord Kenyon, C.J. referred to the fact that, whereas the Statute of Winton, passed in the reign of Edward I, gave a right of action against the hundred for a failure to comply with the obligation to maintain hue and cry, there was no comparable statute relating to the obligation to maintain highways.

78 Surveyors of highways were appointed under the Highways Act 1835. By s.6 of the Act, the inhabitants of every parish maintaining its

own highways were required in every year to elect one or more persons to serve the office of surveyor, "which Surveyor shall repair and keep in repair the several Highways in the said Parish for which he is appointed." If the surveyor neglected to keep the highway in repair, he became liable to pay a penalty of £5. In *Young* v. *Davis* (11), however, it was held that the surveyor was not liable to a civil action for a failure to repair the highway because, as Pollock, C.B. explained (7 H. & N. at 773; 158 E.R. at 680), the Act contemplated that the duty formerly belonging to the parish still remained with them and the surveyor acted strictly as the officer of the parish. Martin, B. in the same case was also impressed by the fact that although surveyors of highways had been appointed since the middle of the sixteenth century, there had never been an action against a surveyor. He added (*ibid.*, at 773; at 680):

> "I should require a cogent argument to satisfy me that the action lies. It would lead to endless litigation; for parish roads are not generally speaking kept in very good repair, and every person whose horse or donkey was injured on the road would bring an action against the surveyor."

79 It is also to be noted that both Martin, B. and Channell, B. agreed that the parish, though immune from an action for damages, remained liable for the non-repair of a highway and that the surveyor was merely the instrument that enabled the parish to carry out its duty.

80 Later, when *Young* v. *Davis* went to the Court of Exchequer Chamber, Willes, J. said (2 H. & C. 198; 159 E.R. at 83):

> "[T]his act of parliament, so considered, appears not to have been passed for the purpose of creating a new liability either in the parish or any other persons, but simply in order to provide machinery whereby the existing duty of the parish to repair may be conveniently fulfilled."

81 I come next to the case of *Gibson* v. *Mayor of Preston* (3). By s.68 of the Public Health Act 1848, it was provided that all highways in any district should vest in and be under the management and control of the local board of health. By a later statute, it was provided that the term highway in s.68 should mean any "highway repairable by the inhabitants at large."

82 By s.117 of the 1848 Act, it was provided that the local board of health should execute the office of surveyor of highways and have all such powers, duties and liabilities "as any surveyor is now or may be hereafter invested with or liable to."

83 It was argued on behalf of the claimant, who had fallen and broken his leg while walking along a public footway that was out of repair, that

the effect of s.68 was to take away liability, not only from the surveyor but also from the parish and transfer it to the local board and that, as the local board was a corporation, an action could be maintained. This argument was rejected, however, and, the court concluded that, while the liability of the parish to proceedings by way of indictment remained, no right of action had been created against those to whom the management and control of the roads had been given by statute.

84 In 1875, the 1848 Act was replaced by the Public Health Act 1875. By s.144 of the 1875 Act, it was provided that an urban authority should execute the office of and be the surveyor of highways and should have and be subject to all the powers, authorities, duties and liabilities of surveyors of highways under the law for the time being in force. Section 149 provided that highways should vest in and be under the control of the urban authority and it is set out at para. 23 of Glidewell, J.A.'s judgment.

85 In 1892 the liability of an urban authority for allowing a highway to be out of repair was considered by the House of Lords in *Cowley* v. *Newmarket Local Bd.* (2). I should refer first to a passage in the opinion of Lord Herschell ([1892] A.C. at 353):

> "It was argued in *Gibson* v. *Mayor of Preston* that the Public Health Act 1848 did something more than impose upon the corporation the duties and subject them to the liabilities of surveyors of highways, and that under the provisions of that statute they were liable to a person suffering through the non-repair of a highway. The Queen's Bench, however, in a considered judgment rejected this argument, and held that the defendants were not liable. The provisions of the Public Health Act 1875, on which the appellant now relies, are precisely similar to those upon which the judgment in *Gibson* v. *Mayor of Preston* proceeded. Your Lordships are asked to overrule that decision. I am not prepared to do so. The Legislature in 1875 re-enacted unaltered the provisions upon which this construction had been placed, and I cannot think that it was intended by the Legislature to impose the liability now contended for."

86 I should also refer to the opinion of Lord Hannen, who, as Hannen, J. had delivered the judgment of the Court of Queen's Bench in *Gibson* (3), 22 years before. He said at (*ibid.*, at 354–355):

> "The question, therefore, is reduced to this, whether the defendants in whom the powers and liabilities of surveyors of highways are vested by statute have thereby imposed upon them a liability to be sued for a cause of action which could not have been maintained against the surveyor of highways. This is a subject which has engaged the attention of the Courts on many occasions. The governing principle was stated in the Exchequer Chamber as

long ago as 1863 in the case of *Young* v. *Davis*, that the surveyor of highways was not liable to be sued for damage resulting from the highway being out of repair because no action could have been brought against the parish, and that the Act of Parliament requiring the surveyor to keep the roads in repair was not passed for the purpose of creating a new liability, but simply in order to provide machinery whereby the duty of the parish to repair might be conveniently fulfilled.

This principle is equally applicable where the duties and liabilities of the surveyor have been transferred to other bodies, unless a distinct intention on the part of the Legislature can be inferred from the particular statute under consideration to create a new liability."

87 *Cowley* (2) was one of a catena of cases considered by the Law Lords in the period between 1890 and 1895. In addition to *Orfila* (8) (to which I have already referred) the Privy Council was also concerned with the law of highways in the cases of *Pictou (Municipality)* v. *Geldert* (6) and *Sydney (Municipal Council)* v. *Bourke* (9). I have found these cases and the later case of *Maguire* v. *Liverpool Corp.* (5) in the Court of Appeal in England, of assistance in understanding the true effect of Cowley as it was regarded by contemporary opinion.

88 It is clearly arguable that, as it was the liabilities of the surveyor that were transferred to the local board (by the 1848 Act) and later to the urban authority (by the 1875 Act), the primary liability to repair remained throughout with the inhabitants at large and that the immunity of the surveyor, the local board and the urban authority was given because each of them in turn was merely carrying out the duties of the inhabitants of large. The immunity on this hypothesis only existed as a derivative immunity. It seems to me, however, to be clear that by 1905 at the latest it was established as part of the common law that any person or authority charged with responsibility for the upkeep of public highways was entitled to immunity from suit for nonfeasance and that this immunity did not depend on the continuing liability, if any, of the inhabitants at large.

89 I should cite some passages from the cases to which I have referred. In *Pictou* (6) Lord Hobhouse said ([1893] A.C. at 527):

"By the common law of England . . . public bodies charged with the duty of keeping public roads and bridges in repair, and liable to an indictment for a breach of this duty, were nevertheless not liable to an action for damages at the suit of a person who had suffered injury from their failure to keep the roads and bridges in proper repair.

This was first held in a case in which the inhabitants of a county

were sued, and as they were not a corporation there was a technical difficulty in suing them; but that the decision did not rest on this technical difficulty alone, but on the substantial ground of non-liability, was subsequently decided when the difficulty had been removed by enabling a public officer to sue and be sued on behalf of the county. And the same conclusion has been arrived at where the obligation to repair has been transferred to corporations."

90 In *Sydney (Municipal Council)* v. *Bourke* (9), the Lord Chancellor referred to a number of earlier cases and added ([1895] A.C. at 443):

"In the series of cases ending with *Cowley* v. *Newmarket Local Board*, in which it has been held that an action would not lie for non-repair of a highway, the duty to repair was unquestionable, and it was equally clear that those guilty of a breach of this duty rendered themselves liable to penal proceedings by indictment or otherwise; the only question in controversy was whether an action could be maintained. The ground upon which it was held that it could not—even where the duty of keeping the roads in repair had been in express terms imposed by statute on a corporate body—was, that it had long been settled that though a duty to repair rested on the inhabitants, subjecting them to indictment in case of its breach, they could not be sued, and there was nothing to shew that the Legislature in transferring the duty to a corporate body had intended to change the nature or extent of their liability."

91 I should also refer to the decision of the Court of Appeal in England in *Maguire* v. *Liverpool Corp.* (5). The case was concerned with an Act relating to the repair of roads in Liverpool, but detailed consideration was given in the course of the argument to the cases on the general law. Vaughan Williams, L.J. said ([1905] 1 K.B. at 784):

"Now I should like . . . to say a word or two upon what was the ground of the decision in *Cowley* v. *Newmarket Local Board*. I observe that both Lord Halsbury L.C. and Lord Herschell assume that under the Public Health Act of 1875 a primary obligation to repair was imposed by the Public Health Act upon the urban authority, and they assume that notwithstanding the fact that in s.144 that which is said to be imposed upon the local board are the offices and duties of a surveyor of highways just as it is under this Act of 1846."

92 It may well be that a stricter analysis of the wording of the relevant statutes would have led to the conclusion that the transfer of liability to the various highway authorities was limited to the transfer of the secondary obligations of the surveyors of highways, but in cases of high authority and of long standing it seems to have been accepted that

immunity from a civil action for nonfeasance attached to any person or body responsible for the upkeep of public highways. One can, therefore, understand the summary of the law by Goddard, J. in *Att.-Gen., ex rel. Ormerod Taylor & Son Ltd.* v. *Todmorden B.C.* (1) where he said ([1937] 4 All E.R. at 593):

> "[I]t has been the law for a great number of years that one can bring no action against a highway authority, whether that highway authority be the inhabitants at large, as they were before the Act of 1835, so that one can say they were the persons liable to repair, or the Surveyor of Highways after 1835, or the local boards or councils, who have, by virtue of one Act or another, become in later years the highway authority, and liable to maintain the roads."

93 Having considered the cases to which I have made reference and the other authorities that were brought to our attention by the industry of counsel, I would venture to state the law in England prior to the Highways Act 1959 relating to the repair of public highways as follows:

(1) Before 1835 the responsibility for repair was placed on the inhabitants of the parish or area through which the highway ran.

(2) After 1835 the repair of highways became the responsibility of the surveyors of highways who acted on behalf of the parish that appointed them.

(3) After 1848 the repair of highways became the responsibility of successive corporate public bodies appointed by statute. At first it was recognized that these bodies succeeded merely to the liabilities of the surveyors, but in course of time the courts seem to have accepted that the public bodies had primary responsibilities as well.

(4) The old responsibility of the inhabitants at large probably remained, at least in legal theory. It was formally abolished by s.38(1) of the Highways Act 1959.

(5) Throughout the whole period of their responsibility to maintain the public highways, the inhabitants at large were entitled to immunity from liability for nonfeasance.

(6) After 1835 the surveyors of highways became entitled to a similar immunity for nonfeasance, on the basis that they were carrying out the duties of the inhabitants at large.

(7) After 1848 when the duties and liabilities of the surveyors were transferred by statute to successive corporate public bodies, these bodies also were entitled to immunity for nonfeasance. At first it seems that they stood in the shoes of the surveyors, but the authorities of a century ago suggest that in course of time the bodies responsible for the maintenance of highways enjoyed their own rather than a derivative immunity.

(8) The cases recognized, however, that a new duty to maintain, to which the common law immunity did not apply, could be created by statute, but that the creation of such a liability would have to depend on clear words in the statute.

The law in Gibraltar

94 I have dealt with the law in England at some length because the cases decided in England throw light on the nature and extent of the common law immunity. I can therefore approach the position in Gibraltar on the basis:

(a) *Prima facie* any person or body that is responsible for the maintenance of public highways is entitled to immunity from an action for damages by a third person who has been injured as the result of a defect in a highway caused by a neglect to maintain. The immunity is one for nonfeasance.

(b) Historically, this immunity was based on the special position of the inhabitants at large, on whom the responsibility for the maintenance of public highways rested alone, until 1835.

(c) This immunity is available to all those responsible for the maintenance of highways, whether their liability is primary or as agents, unless it can be inferred from the particular statute whereby their responsibility arose that the legislature intended to create a new liability.

95 I come therefore to consider the position in Gibraltar before 1950. It was provided by s.161 of the Sanitary Order in Council 1883 as follows:

> "Subject to such rules and regulations as may be made by the Governor under this order, the commissioners shall be the surveyors of all the public highways in Gibraltar, and shall, for the purposes of this order, control, manage and maintain the public highways . . ."

The reference to "surveyors" in the Order in Council would seem to suggest that any liability of the Commissioners was as agents rather than as principals, but in any event they were entitled to immunity from suit for nonfeasance for the reasons explained in *Orfila* (8).

96 In 1950 the Public Health Ordinance 1950 came into force. This Ordinance has been much amended since, but for the purposes of this appeal it is sufficient to refer to the wording of the current Ordinance. It has not been suggested that the amendments are of any significance in this case.

97 Section 238 of the current Ordinance provides as follows:

> "(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."

98 I should also refer to s.244:

"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."

99 It will be seen that there is close correspondence between s.238(1) and s.244 of the 1950 Ordinance on the one hand and s.149 of the Public Health Act 1875 on the other. But s.238(2), which contains the provisions on which the appellants rely, is expressed in different language. It provides in terms: "It shall be the duty of the Government to maintain all public highways . . ."

100 The crucial question for decision, therefore, is whether it is to be inferred that s.238(2) was intended to create a new liability that was more extensive than the previous liability of those responsible for the maintenance of highways in Gibraltar, to which the previous immunity would not attach.

101 I am unable to draw this inference. It seems to me to be clear that before 1950 the Commissioners were under a duty to maintain the highways. This duty was probably owed as agents of the Crown, but it was a duty nevertheless. The 1883 Order in Council did not contain the words "it shall be the duty . . ." but the duty existed all the same. I am not persuaded that the introduction of the words "it shall be the duty" in the 1950 Ordinance created a new liability. The liability was expressed in different language and placed on a different body, but it did not change its nature.

102 I am, therefore, unable to say that the common law immunity for nonfeasance has been repealed or abrogated. I have not overlooked the similarities between s.238(2) and s.44 of the Highways Act 1959, but I do not consider that this later legislation in England throws any real light on the intention of those who framed the 1950 Ordinance.

The Highways (Miscellaneous Provisions) Act 1961

103 I agree with Glidewell, J.A. that, for the reasons set out in paras. 68 and 69 of his judgment, the common law immunity of highway

authorities in Gibraltar has not been affected either directly or indirectly by s.1(1) of the 1961 Act.

Conclusion

104 I would therefore dismiss the appeal. I have reached this conclusion with great regret because the common law immunity is a relic of the past and in my view should be looked at by the legislature as a matter of urgency. The relevant sections in the Highways (Miscellaneous Provisions) Act 1961 show that a sensible scheme can be devised to protect highway authorities from frivolous claims. But I do not feel able to infer that the common law immunity has been swept away *sub silentio* by the provisions of s.238(2).

Appeal dismissed.