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Hey, Watch Where You're Walking, Dude

A new Austroads report tells us that one in three 18-30 year olds are text-walkers. They use their smart phones while crossing the road. And, the report concludes, pedestrians distracted by mobile phones are at increased risk of serious accident. So what's news?

Well, the report goes on to discuss countermeasures: things a road authority might do to protect people too irresponsible to protect themselves. Signs on the pavement, revised traffic signal sequences, lower speed limits – even electronic interventions which blank out the screen of the offending device. Good thinking, Austroads.

But there's the rub (as Hamlet might have texted): if road managers have preventative measures available, are they obliged to deploy them?

'*Your Honour, Council should have protected me from walking into the traffic while I was texting…*'

The prospect of such legal action would seem absurd were it not for the continuing stream of claims from injured footpath-trippers.

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Best Value from Community-Use Land

In an era of rate capping, local government needs to constantly monitor the governance arrangements for community facilities, whether they are on freehold land or Crown land.

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The Aboriginal Heritage Act will celebrate its tenth birthday in May. And, politics permitting, it will get a very substantial birthday present: ***enforceability***.

The Aboriginal Heritage Act gets some teeth

As we noted in *Terra Publica* of July 2013 the Act sets up major penalties for destruction of Aboriginal heritage, but there have been no prosecutions. The impediment has been due to one word in the Act – 'knowingly.'

All that is about to change. Amendments will re-categorise the destruction of Aboriginal Heritage from a 'state of mind' offence to a 'strict liability' offence. It seems almost certain that prosecutions will follow.

Spring Street, 2016 – the Aboriginal flag flies over Parliament House.

In the coming months we'll be getting around the State running half-day training courses on how the reinvigorated Act will affect Councils, CMAs and Government agencies. Wherever possible, we'll be joined by the RAP concerned.

Half-Day Training Courses

- In Wurundjeri country (Melbourne) Thursday 5 May, at the Koorie Heritage Trust, Federation Square

And on dates to be fixed…

- In Gunditj Mirring country (Port Fairy)
- In Barengi Gadjin country (Horsham)
- In Gunaikurnai country (Warragul)
- In Watherung country (Ballarat)
- In Dja Dja Wurrung country (Bendigo)

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Continued: Watch Where You're Walking…

Watch Out in South Perth

People stumble on irregularities in footpaths. Countermeasures are available. Do councils have a duty of care to smooth out such hazards? A recent case in Western Australia provides us with an extensive review of the relevant common law.

In March 2012 a pedestrian tripped on a 25mm lip in a South Perth pavement. The case ended up in the Supreme Court of WA Court of Appeal. In rejecting the claim the court quoted a series of precedent cases, all involving trip hazards which the injured parties believed should have been ameliorated by the relevant council. The best known is the 2001 Ghantous case in the High Court.

Watch Out in Newcastle

Quoting from the Ghantous judgement:

- *The plaintiff was a pedestrian. In general, such persons are more able to see and avoid imperfections in a road surface. It is the nature of walking in the outdoors that the ground may not be as even, flat or smooth as other surfaces.*
- *Persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes.*
- *There was no concealment of the difference in height. It was plain to be seen. The world is not a level playing field. It is not unreasonable to expect that people will see in broad daylight what lies ahead of them in the ordinary course as they walk along. No special vigilance is required for this.*
- *It was reasonable to expect the plaintiff to have seen what lay ahead of her as she walked along in broad daylight: what was there was obvious and called for no special vigilance.*

But there certainly exist more serious and less obvious trip-hazards which a pedestrian could not reasonably be expected to see and avoid. Two Victorian cases (Perovic and Haley) illuminate the common law in such circumstances, but they arise from pre-2004 accidents, and tell us nothing about the defences under the *Road Management Act 2004*.

Watch Out in Echuca

In fact, when we try to find legal interpretations of the Road Management Act we find a deafening silence. In Victoria, such claims are settled out of court – or have been up until Kennedy v Campaspe Shire Council. This case revolves around the defences provided to road authorities by the *Road Management Act 2004* – a Victorian Act which has no equivalent in Western Australia.

The RM Act requires a road authority to inspect, maintain and repair a public road in accordance with a standard. If the authority has a plan, then that plan becomes the standard; if there is no plan, then it may have a policy – which then becomes the standard; if it has neither a plan nor a policy then it must inspect, maintain and repair to a 'reasonable level.'

In the Kennedy case, the County Court found in favour of Campaspe. Council had, in effect, complied with its Road Management Plan despite an 18-month inspection period having been exceeded by two days. On this basis, there was no need to consider whether Council's actions met the common law 'reasonable' test.

On appeal to the Supreme Court, this was overturned: the two-day breach rendered the RM Act defences unavailable, and the case was remitted to the County Court for re-consideration against the common law. But before it had a chance to descend the judicial ladder, Campaspe's legal advisers pushed it further up that ladder – by seeking leave to take it to the High Court in Canberra. We await the outcome.

Watch Out: Roads are Workplaces!

Meanwhile, another road-related case has been bouncing back and forth along William Street. In DPP v Downer and VicRoads the County Court has been considering roads as workplaces. The defendants had argued that the *Road Management Act 2004* somehow over-rode their obligations under the *Occupational Health and Safety Act 2004*, and that therefore the penalty they faced was $7000 rather than $1.1 million.

Her Honour Judge Davis pre-empted a possible appeal by referring certain matters of law up to the Supreme Court of Victoria Court of Appeal. The higher court conducted an extensive review of Victorian legislation and its policy basis, and dismissed as 'wholly misconceived' the notion that the RM Act somehow renders void the OH&S Act.

The case, thus illuminated from above, is now back in the County Court. Once again, we await the outcome.

As the text-walkers might put it:
OMG 4COL LOL B4N. ■

Coming soon… *A new one-day professional development course*

The Law Relating to Road Works

- *Who is responsible for which roads*
- *The powers and obligations of service utilities*
- *The Road Management Act and the OH&S Act*
- *Lessons from Kennedy v Campaspe*
- *'Works on Roads' permits*
- *What other permits may be required*

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