

Differential safety liability of road and rail

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Abstract

Rail safety is closely controlled, but there is less supervision of actual roads, their construction and condition. Safety is the responsibility of the road user, not the provider. This is a feature of the common law, and of legislation governing road and rail. It has its roots in the many centuries of highway development. New Zealand legislation has few safety duties for road owners, but very comprehensive and strict obligations for railways. This is also true internationally, except that some jurisdictions have enhanced controls on road. Health and safety laws may not cover the public safety aspects of roads, but they do cover all aspects of railways. The imbalance increases the cost and reduces the effectiveness of rail, and the law should be reformed.

1. Aim

In New Zealand and elsewhere, rail safety is closely controlled, including the safety of the infrastructure - the track, formation, signalling and structures. For roads, on the other hand, there is much less supervision of the actual road, its construction and condition. Safety is the responsibility of the user, not the provider, except in general terms. For example, if a rock falls on a car and kills someone, then the road owner is unlikely to face civil or regulatory action (Ryan, 2014). If the same event happened on rail, then at least regulatory action, involving penalties, is likely.

Rail in New Zealand is expected to be profitable, and so its performance is typically measured in financial terms. Road (as an infrastructure owner) is not measured as if it were a business, its costs are shared between trucks, buses and cars, and vehicle operation is not the road owner's responsibility. Rail is often an easy target for criticism and regulatory action because of its concentrated ownership, integrated operation, and tradition of being safe, whereas road obligations are largely on the individual driver. The safety obligations of rail make it more expensive to run than road, which deserves recognition when the two are compared.

The objectives of the paper are thus to explore the difference in the safety treatment of road and rail in the law; to show that the law places burdens on rail not shared by road, and to propose reform.

The focus will be on road and rail's functions as infrastructure owners, and the interaction of people and vehicles with the infrastructure, and not on vehicle operation itself. There are substantial differences between road and rail vehicle operation, making operations not directly comparable.

2. Context

Road accidents are a serious safety problem in New Zealand. In 2015 there were 9737 road crashes, killing 319 people and injuring 12270 (Ministry of Transport (MoT) 2016a). The

number killed is much greater than those killed in rail-related incidents (16) (Ministry of Transport (MoT) 2016b), or in all work-related accidents outside most transport (44) (Worksafe 2017). For all employers, there were also over 230,000 work-related injury claims (Statistics New Zealand 2016), including 99 rail injuries (MoT 2016b).

New Zealand has stringent laws covering employment health and safety, the Health and Safety at Work Act 2015 [HSWA]; and railway safety, the Railways Act 2005 [RA]. These cover rail accidents where the infrastructure was at fault through, for example poor design or maintenance, as well as where individuals were at fault. Road user laws (Land Transport Act 1998, regulations, and rules) cover accidents caused by drivers and vehicles, but there appears to be a dearth of laws covering the responsibilities of the road owner itself, for example for the condition of the road.

3. Highway authorities' control over their roads

Road owners are typically seen as not having control over the users of roads, whereas a railway company has control over all its activities. Our road safety laws assume driver responsibility (Penman 2012). Under this assumption, drivers need to be ready to deal with all issues on the road, not just their own behaviour or that of other drivers, but also deficiencies in the road. Road owners have limited, if any, liability. It is a standard international assumption (Convention on Road Traffic 1977). Road users take the road 'as they find it' (*Stovin v Wise* [1996] AC 923, p. 958).

This view overlooks areas where road authorities do have substantial control, like the physical condition of roads, and also substantial influence, like in the setting of road use rules and parameters. As a Canadian case observed, '[t]he [roading authority] is in complete control of repair and maintenance and travellers are dependent upon [the authority] for reasonable performance of the work'. Users are in 'no position to assess the ... construction and maintenance work' (*Lewis v British Columbia* [1997] 3 SCR. 1145, para. 33).

Official road accident statistics indicate that aspects of road condition, largely within the control of the road authority, such as slipperiness and poor markings, do at least contribute to accidents. In 2015, road factors contributed to 11 per cent of both fatal and injury crashes (MoT 2016a, figure 17).

But these figures are likely to underrepresent the accidents where the road authority had some control over the outcome. For example, road authorities set speed limits, design and maintain signage, and create policies as to what sorts of vehicles can use the road and under what conditions, such as heavy vehicles. In these respects the authorities exercise a substantial degree of control over the safety outcomes. And yet, just as for physical road condition, they are likely to face no sanction if they do it in a deficient way, or fail to do anything.

4. Modern approaches to road owner's responsibilities

Absolute driver responsibility is softening somewhat with the 'safe system' approach, developed in Sweden and by the World Bank and the International Transport Forum, with their 'zero road deaths' goal (OECD 2008 & 2016).

A safe system involves a 'forgiving' approach, focussing on the contribution of the roads themselves to road safety. It calls for a rebalancing of the effort on the key areas influencing road safety, behaviour, design, and vehicles, with increasing the share of resources devoted to design from 20% to 40%, to match that for vehicles, increased themselves from 10%, and reducing the emphasis on behavioural aspects, from 70% to 20%. (Brodie 2016).

This approach takes a view that persuading road owners will get to the desired end, that is, it is entirely voluntary. For historical reasons, that has not been the approach to rail; it has been

compelled to build rigorous safety standards into all its infrastructure and operations, and take full responsibility for all that goes on in them. This paper advocates extending the 'safe system' approach to the development of laws that will oblige road owners to have safe roads.

The current NZ official road safety policy, *Safer Journeys*, recognises of the role of roads in contributing to road safety. It takes the safe system 'across all elements of the road system — roads and roadsides, speeds, vehicles and road use'. 'Safe roads and roadsides' is at the head of a list of 12 key areas of concern (Ministry of Transport 2010). This extends the scope of safer roads to taking measures to prevent some road-user behaviour with serious consequences, such as loss of control, and intersection collisions. 'Loss of control' is the single biggest factor contributing to road accidents, involved in 34 per cent of fatal and 28 per cent of injury accidents (MoT 2016a).

Recognition is one step, but actual responsibility with appropriate sanctions is needed (a view supported by Tingvall (2005)). There is no consideration given in *Safer Journeys* to making roading authorities legally responsible for the condition of their roads.

On the other hand, the RA requires a safety case to be prepared which covers all these aspects. If it turns out that speed limits were improperly set or badly marked, then the rail organisation would be liable to prosecution, just as it would if failure to maintain its track or bridges caused an accident.

5. Historical

Keeping the roads in repair was originally a collective responsibility, of parish citizens acting without incorporation as a separate body. Parishioners in theory supplied their own labour and materials, but by the early 1800s personal labour was largely commuted to money (Coombs 1990). In those times, the public were truly the public, and were not represented by intermediary bodies. But even later, when there were incorporated councils, the liability was still taken as being with the public at large, and judges transferred the immunity to councils despite incorporation. The law 'felt no special tenderness ... for highway authorities', but simply reflected the fact that the 'inhabitants at large' could not be sued (*Attorney-General v St Ives Rural District Council* [1960] 1 QB 312 p. 323).

Courts were disposed from early days to favour public bodies over private interests, even the interests of users. The reasons included husbanding of scarce funds, concerns over the economic implications for public bodies of high standards, and justiciability concerns over courts' competence to query policies and priorities. Public bodies could expect a 'less exacting standard' than private ones (*East Suffolk Rivers Catchment Board v Kent* [1941] AC 74, p. 95).

Thus was born the 'non-feasance' rule, which favoured roading authorities. While they could be sued for deficient action ('misfeasance') they were immune from suit for omissions or inaction ('non-feasance'). This rule protected authorities in many cases, with increasingly fine distinctions being drawn. For example, where an overtaxed culvert caused a washout, damaging a car, there was much discussion as to whether it was misfeasance – the choice of the wrong pipes in the culvert – or non-feasance, doing nothing about the pipes' insufficient capacity (*Hocking v Attorney-General* [1963] NZLR 513).

The rule was abrogated by legislation in England in 1961, but the judges continue to be influenced by it, construing the abrogation narrowly as only affecting the structure of the road. Loose gravel, or a failure to have appropriate signs or vegetation control, continue to have immunity. The rule continues in force in New Zealand (of less relevance because of the accident compensation system), and in Australia, where it was reintroduced by legislation after the High Court of Australia abolished it in *Brodie v Singleton* [2001] HCA 29.

On the other hand, rail has been found liable in near-identical circumstances. When a person was injured crossing a poorly maintained railway-owned road overbridge, the railway had to pay. It could not claim the protection of the rule: it could not be said to 'stand in the shoes of the inhabitants' (*Swain v Southern Railway* [1939] 1 KB 560, p. 574). A New Zealand private railway had to pay up when an employee was injured by material falling off a tunnel (*Wellington and Manawatu Railway Company v McLeod* (1900) 19 NZLR 257). Footpaths were a frequent source of action against local councils, which were immune under the rule, but railway-owned footpaths did not qualify.

6. Current legislation

Acts of Parliament are a second possible source of liability on road owners. But in New Zealand they put very little obligation on road owners.

Since a 1978 amendment to the Local Government Act 1974 [LGA] a duty formerly confined to road works has been widened beyond them, to give a duty on local roading authorities to take 'all sufficient precautions' for safety (s. 353). The extent of this provision appears clear, but some cases treat it as a power not a duty, and cases tend to be confined to road works sites.

It might be expected that the more heavily used state highways would face a safety obligation. From 1978 to 1989 all powers and duties of relevant sections of the LGA also applied to state highways, but from 1989 only the rights and powers applied, and not duties. Thus there are no direct safety obligations imposed on the state highways' owner. Certainly, there is a general obligation to operate in a way that contributes to an 'effective, efficient, and safe land transport system in the public interest' (Land Transport Management Act 2003 s. 94), but that is no more than a target obligation, one that can be striven for but need not be fully achieved if the policies and budgets of the authority have other priorities (*Gorringe v Calderdale Metropolitan District Council* [2004] UKHL 15, para. 29, para. 90). Moreover, the objectives of 'effective, efficient and safe' may conflict, and a court would probably find any argument about them non-justiciable.

The contrast with rail is stark. Railways in New Zealand were subject to regulation of safety standards in the 19th century, but later developed a self-regulatory system. With the creation of New Zealand Rail Limited in 1990 (a private company but owned by the state) a more comprehensive safety regime was introduced. The railway had to develop, get approved, and comply with a safety system, and there were extensive procedures to ensure compliance. (Transport Services Licensing Act 1989, as amended in 1992).

The RA in 1995 applied the health and safety standards to rail. By that time the railway was privately owned, although the infrastructure had reverted to the Crown. The Act applied to infrastructure equally. Now rail's duty was to take all reasonable steps to ensure safety, since modified by the Health and Safety at Work Act 2015 [HSWA] to ensuring, so far as is reasonably practicable, that no death or serious injury is caused by rail activities.

One of the purposes of the RA is to promote the duty to ensure safety. The Act provides for large fines and imprisonment. Employers, directors, and principals are liable. Compliance with the licensing regime is now a duty. An approved safety case is required, and there is a long list of matters to be covered. The RA imposes a significant obligation not shared by road.

6.1. Health and safety law in New Zealand

The New Zealand health and safety legislation clearly applies to rail infrastructure, but less clearly to road infrastructure, with a consequence that a much higher standard is applied to

rail than road. This theme has been fully developed elsewhere and will only be outlined here (King 2016).

Department of Labour v Berryman [1996] DCR 121 held that the Health and Safety in Employment Act 1992 [HSEA] did not apply to a bridge, and thus not to roads. The Act was interpreted as not having a public safety role, but was only to protect workers from harm. The same is likely to be true of the HSWA, but it is less clear, as the HSWA's first purpose is to protect both workers and 'other persons' from harm from work.

'Workplace' is a key issue. In the HSWA, this is a place where work is being carried out or is customarily carried out. A road is clearly a workplace for a road worker actually maintaining the road. However, does it remain a workplace when the worker is not there? While the road is a result of work, this might have been done months or years before, and the definition is very much in the present tense. And road work is not frequent enough to meet 'customarily carried out', unless the facility is only designed as a workplace (which a road patently is not).

As well, *Berryman* described a road user's occupation of a particular road space as 'transitory', with the duration too short to meet the implications of a 'place'. The HSEA was amended to remove this point, but the HSWA is less clear. A 'transitory' argument may still appeal. On the other hand, if a place is a workplace for one person (say a person in a work vehicle), then it is a workplace for the purposes of duties on another person 'who manages and controls' that workplace (s. 37(1)).

An important road: rail distinction is that a road is intended to be used by third parties, without an employee of the roading authority being present. There is usually a rail employee present when an incident occurs, and so rail is readily caught. If there are cases of third party rail users that are analogous to road, the RA duties would remain as they do not make any use of 'workplace'.

The general duty on a person who manages and controls a workplace includes ensuring that nothing arising from the workplace is without risk to anyone (in or out of the workplace). Thus an office, clearly a workplace, might be involved in creating a policy with safety implications. That policy would 'arise' from the workplace without too forced a reading.

There are as well new specific duties in the HSWA for designers, manufacturers, importers, suppliers and installers of plant or structures (including a road). They must ensure that the plant is without risk to anyone at a workplace or in the vicinity. There is no doubt that a vehicle can be a workplace, and the structure (road) can affect it, even if the road itself is not a workplace. These are inherently prospective duties, not present ones. A design for example is largely without risk until actually built sometime later. The duty arises when the work is done, and crystallises later, potentially a lot later.

There is nevertheless still room for doubt, and the road owner's liability remains unclear.

Duties under the HSWA are subject to a 'so far as is reasonably practicable' test, and in particular to the relationship of the costs of dealing with the risk, whether the cost is 'grossly disproportionate' to the risk. This rule effectively mandates expenditure where the benefit: cost ratio is less than one (one would be 'proportionate'). Thus for industries subject to the HSWA, it might be necessary to spend \$3 or even \$10 to achieve a safety benefit worth \$1, to comply with it (Office of the National Rail Safety Regulator 2016, p 11). On the other hand, roading expenditure is evaluated on the basis of achieving benefits that simply exceed costs, without a weighting for safety. Thus rail has a financial burden not shared by road, unless road authorities become actively subject to the Act.

6.2 The differential also exists in similar jurisdictions

The current English Highways Act 1980 provides a duty to maintain roads. Roading authorities have a special 'reasonable care' defence available to them. In assessing this defence, courts

are to take account of reasonable maintenance standards and other criteria. This statutory duty to maintain is often the subject of court action, and can result in an award of damages for personal injury. A plaintiff still has hurdles to overcome, such as restrictive interpretation of 'maintain', the need to show there was a danger, because of a failure to maintain, and the injury resulted from that.

In Australia the road regimes are state based. As well as the statutory re-imposition of the non-feasance rule, their statutes often protect roading authorities in other ways. For example, under the New South Wales Roads Act 1993, an act (or omission), to be challenged, has to be so unreasonable that no similar authority would consider it reasonable (s.43). The Queensland Transport Operations (Road Use Management) Act 1995, s.4, declares high levels of safety to be incompatible with roading efficiency.

The Victorian Road Management Act 2004 on the other hand imposes some responsibilities on authorities. They have to seek to ensure roads are as safe for users as reasonably practicable, and principles as to whether a duty of care has been breached are set out, in a list similar to the English one. But there are still restrictions - an authority can still shelter behind its policy, resources available must be taken into account, and the same unreasonableness test applies there also.

In Canada, municipalities and the Crown have maintenance obligations for local and provincial highways. In Ontario, as an example, a municipality is liable for damages for default, although it is a defence that it did not know (objectively) about the state of repair, or that it took reasonable steps to prevent default. Policy decisions are exempt (Municipal Act SO c 25, s 44).

Rail obligations in all three countries are similar to those in New Zealand, and as strict. In Britain safety supervision of railways is through the Health and Safety at Work etc Act 1974 and subject to the 'reasonably practicable' test and its judicial interpretations. In Australia the Rail Safety National Law (e.g. Rail Safety National Law (South Australia) Act 2012) also applies the reasonably practicable test in the same terms as the health and safety legislation, including the 'grossly disproportionate' ratio of costs to risks. The model law requires accreditation, including a safety management system of wide scope. In Canada federal law imposes similarly extensive rail supervision.

7. Proposed reforms

7.1 Overview

To balance the safety treatment of road and rail, there will need to be legislation, both to counter established jurisprudence, and to change some current legislative positions. The changes could be quite minor (although not in impact) or more extensive.

Making road and rail obligations more equal could be achieved either by reducing rail's obligations or by increasing road's. A reduction in safety standards on any mode is unlikely to be tolerated, so the likely changes would involve increasing road's obligations.

There are a number of ways to increase road's obligations.

7.2 Make duty on local road owners apply to state highways.

The LGA, s 353 imposes safety obligations on local authorities. The provision applying s 353 to the New Zealand Transport Agency [the Agency] covers rights and powers, but not duties. The simplest way of improving road's obligations would be to make the duties in s 353 apply to state highways.

7.3 A broader ‘reasonable care’ obligation.

But this duty is rather generally worded, and the dearth of cases on it suggest it is not very effective as a duty. So a stronger formulation could be considered, making it a duty to use reasonable care to ensure the roads are safe.

Examples applying ‘reasonable care’ can be drawn from English, Victorian, and Canadian statutes. The example below is based on the Highways Act 1980 (UK), s. 41 and s. 58; but the soft ‘steps that are reasonably required’ test has been replaced by the ‘reasonably practicable’ test, following modern New Zealand practice.

A new section should be inserted in the Government Roading Powers Act 1989:

60A Duty to maintain highways

- (1) The rule of law exempting the Agency from liability for non-repair of highways is hereby abrogated.
- (2) The Agency is under a duty to maintain all roads under its control.
- (3) To discharge this duty, the Agency shall so far as is reasonably practicable, ensure the roads are not dangerous for traffic.
- (4) An action may be taken against the Agency in respect of damage resulting from its failure to maintain the road.

As in England and Wales and Victoria, there should be some guidance about the standard and level of maintenance.

7.4 Make health and safety legislation apply to roads

The health and safety legislation is where safety rules have the most impact in New Zealand, given the accident compensation regime and inability to sue for personal injury. If it is good enough for rail and all other undertakings to meet the ‘reasonably practicable’ test, then it should be good enough for road. Then we would have a common standard for safety legislation.

The HSWA clearly applies to rail, and also to road vehicles used for work. As discussed above, it is less clear that the provision of roads comes within the Act. One way of addressing this problem is to include a section directly declaring that the HSWA covers roads, as is already done for aircraft and ships (see King 2016, p. 637).

A further issue is the present tense definition of workplace. A road will be a workplace for someone working on it, including a driver or occupant of a vehicle used for work. This may well make it a workplace in itself, but it would be better to make it clear (and as well protect the non-work users). The simplest way to do this would be to define a road as a workplace with respect to the road controlling authority, through new subsection (c) to section 20(1):

- (c) includes a road, road bridge or road tunnel, even if work is not currently taking place there.

7.5 Dealing with the ‘public safety’ obligation

One of the aspects that sets rail apart from the bulk of workplaces is the presence of a ‘public safety’ obligation, that is an obligation to people who use its infrastructure or are in the vicinity of it, but are not workers there, and who may be exposed to risk from the activities. The same obligation should apply to roads. Since the HSWA is arguably not intended to be a ‘public safety’ statute, these activities may be outside its scope.

The purpose of the HSWA (s. 3(1)) could be amended to simply say that the public safety aspects of road operation are covered, following the approach that the British Health and Safety at Work etc. Act 1974 takes for rail:

(aa) protecting the public from personal injury and other risks arising from the construction, maintenance and operation of transport and other infrastructure activities.

7.6 A special act to cover roading obligations

Another approach would be to take the model for other dangerous activities (like gas, electricity, and railways) and create specific health and safety obligations in a Roading Act along the lines of the RA sections 5 and 7.

1. [Title]

2. [Commencement]

3 Meaning of reasonably practicable

In this Act, unless the context otherwise requires, **reasonably practicable**, in relation to a duty to ensure health and safety or to protect property, means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety or the protection of property, taking into account and weighing up all relevant matters, including [paragraphs (a) to (e) from HSWA, s. 22].

4 General safety duties of road controlling authorities and persons working for them

(1) A road controlling authority must ensure, so far as is reasonably practicable, that none of the roading activities for which it is responsible causes, or is likely to cause, the death of, or serious injury to individuals.

(2) No road controlling authority or persons working for it may do or omit to do anything in respect of roading infrastructure if he or she knows or reasonably ought to know that act or omission will cause, or will be likely to cause the death of, or serious injury to, individuals.

5 Relationship with Act to Health and Safety at Work Act 2015

Nothing in this Act limits the Health and Safety at Work Act 2015.

8. Conclusion

In New Zealand and other jurisdictions, rail safety is closely controlled, including the safety of the infrastructure. For roads, on the other hand, there is much less supervision of the actual road, its construction and condition. Safety is the responsibility of the user, not the provider, except in general terms. The result is that rail has to go to much greater lengths, and expenditure, to ensure it complies.

This position could be reformed in a number of ways, with greater or lesser change from the status quo. On balance, giving roading authorities an enforceable duty to maintain roads safely, and extending the coverage of the HSWA to infrastructure assets where work might only take place infrequently, would achieve a worthwhile change with limited legislative amendment.

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