THE KING CAN DO NO WRONG – A CASE OF FALLING INTO A MANHOLE

Navneel Sharma*

This paper discusses the extension of 'Crown immunity' to statutory bodies. It considers the legislation and the recent cases in Fiji which have dealt with the vexed question of the liability of statutory bodies and the like which perform state functions or state-related functions.

Cet article s'intéresse aux textes en vigueur qui aux Fidji encadrent le principe dit de 'l'immunité de la Couronne' et sur la détermination de son champ de compétence matérielle. Ce principe souvent présenté comme une présomption pose la règle selon laquelle une loi ne peut, sauf disposition législative contraire, lier la Couronne ou porter atteinte aux droits de la Couronne. Les réflexions de l'auteur portent sur la manière dont les juridictions Fidjiennes interprètent ce principe s'agissant de se prononcer sur l'éventuelle responsabilité des organes qui exercent directement ou indirectement des fonctions étatiques ou liées à l'État.

I INTRODUCTION

On 10 October 2021, I stepped on a presumedly secure manhole-cover which was flush in the middle of a footpath. My presumption proved false as the manhole-cover buckled. My right leg went straight through the manhole causing my entire bodyweight to come crashing down on my left knee and in the process I fell face forward onto the pavement. I slowly braced myself with both my hands and lifted myself up in agony revealing deep lacerations to my right knee, shin and inner forearms. I was in obvious pain. I tried to continue walking but it proved difficult. I contacted my brother-in-law and asked him to come fetch me as I sat on the curb waiting in agony. He hastily arrived and he took me to my apartment. I was treated by my sister who is a doctor and she luckily ruled out the need for any x-rays. I

* Assistant Lecturer in Law, Discipline of Law, University of the South Pacific. Vinaka vakalevu to Beatrice Tabangcora and Resident Magistrate Supreena Nandita Naidu for your helpful comments and editing assistance on this paper.

smiled while I was being treated and she laughed at me. The source of her laugh stemmed from an evident chip to my front incisor that was also a result from the fall.

I was in pain for the next few days, had difficulty sleeping and was upset as to what had transpired. I had also returned to the scene of the incident to see if there was any sign warning of any danger. There was none. I wrote to the Ministry of Infrastructure and the Fiji Roads Authority advising them of the incident and the unsecured manhole. I also annexed pictures of the scene which clearly showed no warning signs together with pictures of my injuries and an accompanying medical report. The Solicitor-General's Office was copied in.[1]

The phrase that a "The King can do no wrong" is a well-known legal doctrine. It is rooted in the concept of sovereign immunity. Sovereign immunity, or more commonly referred to as 'crown immunity', is a doctrine that holds that a State cannot commit a legal wrong and is immune from suit in its own courts. By extension, a state via its legislative arm can grant exemptions from suit via statute.[2] The latter is of concern and a rigid application of it often brings undesirable results.[3] The phrase is the basis for the belief that the government cannot be guilty of a tort.[4] Often a balance has to be struck between hardships to the citizen and expense to the state.[5] In the modern era, if the government engages in industrial enterprise through legally distinct corporations or boards of trustees, these bodies may be sued for tort[6] as they have their own legal personality.[7]

---

1 Ten months on there has been no formal response to my letter. Informally, I am aware that the matter has been forwarded to the Minister of Infrastructure under s 38A of the Fiji Roads Authority Act.

2 *BBC v Johns* [1965] Ch 32 was one of a line of cases which dealt with the criteria for determining which corporations could enjoy Crown immunity and which could not.

3 The Crown Proceedings statutes were introduced to deal with this issue.

4 JM Maguire "State Liability for Tort" (1916) 21 Harvard Law Review.

5 Above n 5 at 23.

6 Above n 5 at 24.

7 In the New Zealand context this matter was well explained in *The Audit Office Report on Public Sector Companies, Corporations and Statutory Bodies* (The Audit Office, Wellington, 1988) B.29A

The Fiji Roads Authority (FRA) is a 'corporate body' by virtue of s 4 of the Fiji Roads Authority Act (FRA Act).[8] It has its own Board[9] as well a Chief Executive Officer.[10] It relies on an annual government budgetary allocation[11] as its primary source of income. It is tasked with responsibility for all matters pertaining to the construction, maintenance and development of roads in Fiji.[12] The FRA is responsible for pedestrians' safety.

This paper addresses the prospect of successfully claiming against the FRA for compensation for breach of its duties. Falling into a manhole was not an anomaly. In fact, it is quite common in Fiji. The existence of case law of persons seeking compensation is well documented. This paper shows that the pathway to compensation is difficult. To successfully claim for a breach of duty, a nexus needs to be established between a statutory responsibility and a private common law right to claim. In Fiji, a claimant has also to contend with the immunity provision under the FRA Act.

II LEGISLATIVE PROVISIONS

The definition of 'road' is not limited to vehicle pavements. The definition incorporates a wider civil infrastructure that includes 'footpaths'.[13] The FRA Act however does not define 'footpath' or 'manhole'. It is commonly understood that a 'footpath' is a "path for people to walk on"[14] while a 'manhole' is a "large hole in a road or path, which is covered by a metal plate (commonly referred to as a 'manhole cover') that can be removed for workers to climb down".[15] Given that manhole covers

---

8 "This section establishes the Fiji Roads Authority, as a corporate body with perpetual succession and a common seal, and the Authority may—

(a) sue and be sued;
(b) acquire, hold and dispose of property;
(c) enter into contract, agreement or other transactions; and
(d) do all other acts that may be done in law by a body corporate."

9 Section 5(1) FRA Act.

10 Above at 5(2).

11 The Fiji Government, *The Fijian Government 2019-2020 Budget Highlight* (2019) https://www.fijiroads.org/wp-content/uploads/2020/08/FRA-Budget-Estimates-2020-2021.pdf (Accessed 08 October 2022).

12 Section 6 FRA Act.

13 Section 2(e) FRA Act.

14 Collins 'Footpath' (2022) https://www.collinsdictionary.com/dictionary/english/footpath (Accessed 05 September 2022).

15 Collins 'Manhole' (2022) https://www.collinsdictionary.com/dictionary/english/manhole (Accessed 30 August 2022).

are essential to "facilitate…the movement of…pedestrians" on footpaths, it is arguable that it forms part of the footpath and thus, the "civil infrastructure" referred to in s 2 of the FRA.[16] FRA has a responsibility for the safety of pedestrians while they are using footpaths. The common argument for pedestrians seeking compensation is that the FRA failed to institute or enforce an adequate system of maintenance of manhole covers situated on footpaths.

Previously the Department of National Roads and municipalities were responsible for roads in Fiji. In 2012, Decree No 2[17] (the Act)[18] transferred the responsibility to the FRA.[19] Section 6 of the FRA Act outlines the responsibilities of the FRA which include responsibility for road safety, and the maintaining and management of roads.

There exist two key provisions. These are ss 4[20] and 38A of the FRA Act.

Section 38A states:[21]

> **38A (1)** Neither the Committee, the Authority nor any officer, servant, workman or labourer employed or engaged by the Committee, or the Authority shall be liable for any action, suit, proceeding, dispute or challenge in any court, tribunal or any other adjudicating body for or in respect of any act or omission done in the exercise or non-exercise of the powers conferred by or duties prescribed under the provisions of this Act or any other written law.
>
> **(2)** Notwithstanding anything contained in subsection (1), the Minister may on an ex-gratia basis grant compensation to any person who has suffered any injury or damage to property, caused either directly or indirectly by any act or omission done in the exercise or non-exercise of the powers conferred by or duties prescribed under the provisions of this Act or any other written law.

There is an obvious conflict between the two sections. On the one hand the FRA may be sued and on the other it is given immunity in respect of the exercise or non-exercise of its duties. An evaluation will now be made of the tortious liability under the FRA Act utilizing the existing case law.

---

16 Section 2 FRA Act.

17 Fiji Roads Authority Decree 2012 (Decree No 2 of 2012).

18 Section 1 FRA Act - s 1 am Decree 46 of 2012 s 2, effective 14 May 2012.

19 Above n17 at s 7.

20 See above n8.

21 Section 38 A(1) FRA Act.

III CASE LAW

In *Vunivutu v Permanent Secretary, Ministry of Works*[22] the plaintiff brought a claim for the injuries suffered as a result of falling into an open air-valve chamber (also referred to an uncovered manhole). The plaintiff suffered injury. This incident occurred in 2007 – before the implementation of the FRA Act. The plaintiff alleged a breach of a statutory duty against the Ministry of Works asserting certain failures by the Ministry of Works that resulted in her injuries.[23]

Justice Tuilevuka stated that the starting-point in addressing a compensation claim was to assess the terms of the statute. Tuilevuka referred to this as the 'modern view'.[24] A private law cause of action will arise only if it can be shown, as a matter of statutory construction, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private action for breach of duty.[25] In this case, reference to the limited class would be to 'pedestrians'. However, the plaintiff had not pleaded the specific provision of the statute that had been breached.[26]

Prior to the announcement of the term 'modern view' in *Vunivutu*, the Fiji High Court made preliminary observations on claims for breach of statutory duty in *Prasad v Suva City Council.*[27] In this case, the plaintiff fell and injured herself as a result of an uneven footpath. The plaintiff alleged that the injuries were a result of the Council's failure to warn pedestrians of the possible danger that resulted in the injuries. The incident occurred in 2001 well before the passing of the 2012 FRA Act when municipal councils were still responsible for footpaths.[28] It however is still useful to understand Fiji's judicial approach (at least from 2001) in respect of attributing tortious liability in respect of such incidents to the public travelling along public infrastructure. Singh J found the City Council liable. Justice Singh, in making

---

22 *Vunivutu v Permanent Secretary, Ministry of Works* [2018] FJHC 955.

23 Above n 22 para 41.

24 Above n 22 at para 50.

25 Above n 22 at para 50. This was consistent with Lord Browne-Wilkinson's position in *X (Minors) v Bedfordshire County Council* [1995] 3 All ER 353, 364.

26 Above n18 at para 42.

27 *Prasad v Suva City Council* [2003] FJHC 331; HBC0291.2002 (19 November 2003).

28 Section 108 – Local Government Act 1972. The Local Government Act is still in effect. Under s 108 of the Local Government Act, Councils are responsible for the care, maintenance, repair and control of streets within a municipality. The definition of 'street' under s 2 of the Local Government Act includes any road and footpath. The distinction is that the FRA Act is applicable only to footpaths adjacent to a vehicle pavement. Municipal councils therefore still currently have the responsibility for footpaths that are not adjacent to vehicle pavements.

his award, essentially read-in that a private right of action should exist. This showed his readiness to hold a common law private right to sue where the statute imposed an obligation for the safety of people. Justice Singh's viewpoint, albeit indirectly, was that the failure to keep footpaths in a 'reasonable state of repair' and to comply with with 'adopted practice or a procedure' to ensure pedestrian safety, was possibly indicative of the position that if the duty were breached a person would retain the private common law right to sue. Justice Singh made reference to the harm that it would cause pedestrians if a Municipal Council did not properly comply with its responsibility, but the decision did not directly or clearly address the nexus between a breach of a statutory duty and a private common law right to sue as announced in the *Vunivutu* decision.

The case of *Mereoni v Fiji Roads Authority*[29] involved the plaintiff falling into an uncovered manhole resulting in personal injuries. The incident occurred in 2014 after the implementation of the FRA Act. Unlike *Vunivutu v Permanent Secretary, Ministry of Works,* the claim of the plaintiff specifically pleaded a breach of s 6 of the FRA Act.[30] This effectively allowed for the Judge to engage in a comprehensive discussion of the current position of the law.

The High Court held as a starting-point that the consequences of a breach of statutory duties were diverse (as well as confusing[31]) in respect of establishing a private law right for the breach. Reliance was placed on cases such as *Kent v East Suffolk Rivers Catchment Board*[32] and *Gorringe v Calderdale Metropolitan Borough Council.*[33] The High Court held that a court must be satisfied that Parliament intended, via the statute, to create a private law right to sue the public body for breach of statutory duty. It stated that the mere existence of statutory duties or responsibilities did not automatically create a private law right of action against the statutory body for breaches of its stipulated responsibilities.[34] Master Azhar cited Lord Wilberforce in the landmark decision of *Anns v Merton London Borough Council*[35] in which it was stated to be:[36]

---

29 *Mereoni v Fiji Roads Authority* HBC 199 of 2015.

30 Above n 29.

31 Above n 29 at para 17.

32 *Kent v East Suffolk Rivers Catchment Board* [1940] 1 KB 319.

33 *Gorringe v Calderdale Metropolitan Borough Council* [2004] 2 All ER 326.

34 Above n 29 at para 18.

35 *Anns v Merton London Borough Council* [1978] AC 728.

36 Above n 29 cited in *Anns v Merton London Borough Council* [1978] AC 728 paras 751-752.

> … necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

There was also reliance on the House of Lords decision in *Gorringe v Calderdale Metropolitan Borough Council*[37] where it was held that it was necessary to see if the statute imposed a duty and that it was equally necessary to ascertain if it created a private right of action. Again, the mere existence of statutory powers did not give the private common law right to sue for resulting harm.[38] Both are essentially Justice Tuilevuka's 'modern view'.

It was well explained by Master Azhar that exclusion clauses in a statute (such as s 38A(1) of the FRA Act) is the clear reflection of intention in the statute to negate any private law right. In such a situation, the task of the court to ascertain the policy of the statute would easily be discharged.[39] If however s 38A(1)were not in existence, an analysis on the policy of the FRA Act would be necessary and this would often involve an analysis of the background of the statute. Master Azhar went further and stated that in the event that an immunity provision were not in the FRA Act the policy considerations in terms of the FRA Act would disallow a private common law right to sue. In this case, policy consideration hinged on the 'floodgates' argument as it was seen as a threat to the FRA's being able to perform its role unhindered. If it were allowed, Master Azhar stated that it would cripple its essential public role[40] as well as create a society bent on litigation.[41] The above exemplifies the factors which limit a private law right to sue for breaches of statutory duties. A notable paradox is that on the one hand legislation creates a duty but on the other prevents a claim from being made if policy considerations rule out Common Law actions.

In addressing the inconsistency between ss 4 and 38A(1) of the FRA Act, Master Azhar held that s 4 was applicable only for duties and obligations that may arise out of any transactions, other than the powers or duties (in this case s 6) conferred by the Act or any other written law.[42] This would capture matters such as contractual breaches, employee matters, labour standards and administrative and financial matters that would arise out of the body's normal day to day operations. The right

---

37 Above n 33.

38 Above n 29 at para 35.

39 Above n 29 at para 36.

40 Above n 29 at para 38.

41 Above n 29 at para 38.

42 Above n 29 at para 16.

to a private common law right to sue pertaining to a core public role under s 6 of the FRA is however clearly excluded. This serves as a clear announcement that public money must not be utilised for private relief. There is in fact a similarity between what the FRA is legislatively mandated to do and the comment in the Australian decision of *Farnell v Bowman* where it was stated:[43]

> It must be borne in mind that the local governments in the Colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other words for the construction of which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that 'the king can do no wrong' were applied to Colonial governments in the way now contended for by the appellants, it would work much greater hardship…

Counsel for the plaintiff attempted to argue that the FRA Act did in fact create a private law common law duty of care by virtue of s 38A(2) of the FRA Act. This subsection allowed the Minister to grant an ex gratia compensatory payment. The High Court however dismissed this notion stating that the subsection only created a moral obligation, not a legal right. The discretion to grant ex gratia compensation is given to the respective Minister and it has nothing to do with the Authority which is independent in its function from the Minister. Though the board members are appointed by the Minister, the functions are carried out by the Authority under the statute and decision to grant an ex gratia payment is a purely ministerial discretion which is amenable to judicial review.[44] Certainly a more liberal stance finds support in Lord Atkin's dissent in the landmark decision of *Liversidge v Anderson* and the cases that adopted his reasoning.[45] The recent *Ex gratia* Payments*:* A Guide for New Zealand Government Lawyers,[46] similarly holds that a person may seek a review of a refusal to make an ex gratia payment (or amount of that payment) by the Courts. However, in New Zealand whether the decision is justiciable will further turn on whether there is a legal framework or yardstick, or a context akin to a framework of

43 *Farnell v Bowman* (1887) LR 12 AC, 643, 649.

44 Above n 29 at para 38.

45 *Liversidge v Anderson* [1941] UKHL 1.

46 Crown Law, "Ex Gratia Payments: A Guide for Government Lawyers (2022)" https://www.crownlaw.govt.nz/assets/Uploads/Opinions/Proactive-Release-Ex-Gratia-Payments_-A-Guide-for-Government-Lawyers.PDF (Accessed 27 October 2022).

law, by which the legality of the decision can be assessed[47] especially in respect of prerogative ex-gratias as opposed to statutory ex-gratias.

JM Maguire, commenting on the state liability in the Harvard Law Review in 1916 stated that a persistent claimant who is barred from the courts goes to the legislature which is often generous with other people's money as they are unrestrained by legal rules as to admissibility of evidence or amount of damages.[48] It knows no statute of limitations. It applies no principle of res judicata. It is exceedingly unlikely to draw with any precision the line between satisfying a liability and making a gift. Candidly, JM Maguire stated that often the proper procedure is meekly to beg for relief which often pays dividends.[49]

IV CONCLUSION

Mereoni is the most recent statement of the law concerning the right to sue the FRA. Cases prior to the FRA Act affirmed a similar stance. The 'modern view' as stipulated by Tuilevuka J involves analysing statutory intention vis-à-vis policy considerations. Absent exclusion clauses, the policy consideration applied in this case appear to rely on the fact that though the FRA has statutory autonomy, it is not in the business of profiteering, it is still largely funded by government and fills an essential public role. Hence it should be protected. The phrase 'The King can do no wrong' applies to the FRA and hence it cannot be sued for breaches of its core responsibilities under the FRA Act – somewhat tantamount to a child that can now walk but still cannot carry its own weight.

47 *McLellan v Attorney-General* [2015] NZHC 3218, [2016] NZAR 859 at [59] and *Pora v Attorney-General* [2017] NZHC 2081, [2017] 3 NZLR 683.

48 This is a paraphrase of above n 4 at 23.

49 Above n 4 at 23.