High Court Abolishes Negligence Immunity for Highway Authorities

The High Court’s decision in Brodie v Singleton Shire Council and Ghantous v Hawkesbury City Council on 31 May 2001 removed a long-standing immunity that protected highway authorities from actions in negligence for failing to repair a road, even if serious injury to a person using it was foreseeable.

The liability of highway authorities will now be determined by the application of general negligence principles, bringing those authorities into line with other public authorities exercising various powers and ensuring that victims of negligent failures to repair are compensated.

It is not inevitable, as might be feared, that highway authorities will automatically be held responsible for all non-repairs and imperfect maintenance of roads, but the decision will have financial implications for local, State and Federal Governments. Already, the New South Wales Local Government Association has sought the assistance of the New South Wales Attorney-General to restore the immunity and it is likely that similar moves will be made in other States and Territories.

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1 INTRODUCTION

On 31 May 2001, the High Court took the bold step of removing a long-standing immunity enjoyed by highway authorities in Australia. Until the majority decision in Brodie v Singleton Shire Council and Ghantous v Hawkesbury City Council, highway authorities – ranging from local councils to State or Federal agencies – were not liable in negligence for failing to repair a road, even if damage or serious injury to a person using it was foreseeable. Thus, a council could leave a pothole in a road to grow larger and more lethal to passing motorists without facing liability for any damage that resulted.

The impact of the High Court’s decision is that general negligence principles will apply to a highway authority and the court will now be able to determine whether the elements to establish negligence on the part of the authority are established. Previously, no such evaluation could be made because the immunity applied from the outset.

While the decision will affect all levels of Government in their control and management of highways, it is not inevitable, as might be feared, that highway authorities will automatically be held responsible for all non-repairs and imperfect maintenance of roads. Indeed, the High Court’s unanimous decision that the pedestrian plaintiff in Ghantous could not establish that the defendant Council was negligent, bears that out. However, concerns about an onslaught of negligence actions, against local councils in particular, have prompted calls to State Governments in New South Wales and Queensland to pass legislation to counteract the effects of the new High Court decision.

2 THE IMMUNITY

Normally, to succeed in an action for negligence, a plaintiff must establish to the court’s satisfaction, the following elements –

- that the defendant owed a duty of care to persons in the plaintiff’s position;
- that the duty of care was breached; and
- that the breach caused (in a not too remote way) the damage or injury to the plaintiff.

However, until now, a highway authority did not have to defend a negligence action in relation to failure to repair a highway – defined by the courts as a road, street, bridge, footpath, or other place over which the public has a right to go. Failure to repair was known in the law of torts as 'non-feasance' – an omission to take some positive step. It did not matter that the authority could foresee that damage might occur, provided

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2 As defined by Dixon J in Buckle v Bayswater Road Board (1936) 57 CLR 259 at 281.
it had done nothing to create it. Oddly enough, liability may have existed if the highway authority was negligent in carrying out a repair that caused the damage. This was particularly so if the repair was more than merely superficial and was such as to lead a road user to believe that the road was now safe to use.

The main rationale offered for the immunity was the budgetary constraints upon local authorities, particularly those with sparsely populated shires but whose roads extend for long distances. However, the position these days is that local governments generally receive substantial State and Federal Government financial assistance for maintaining and repairing roads (e.g., the Commonwealth Roads Grant Act 1981), thus lessening the burden on local ratepayers.

The immunity applied in all Australian jurisdictions. That was despite considerable academic and judicial criticism; Law Reform Commissions in New South Wales, Western Australia and South Australia recommending that it be replaced with modified general negligence principles; and the courts qualifying the application of the immunity. It has been abolished in a number of other countries, including England from whose courts the immunity originated.

The special position of highway authorities in relation to non-repair was at odds with the courts’ willingness, in recent years, to find government authorities, including local councils, negligent in an expanding range of situations, such as –

- through occupation or ownership of premises;
- through control over a public place in certain circumstances;
- through failing to provide accurate answers to specific inquiries from the public;
- through failing to exercise a statutory right of inspection of building works; and
- where there is a general dependence by the public on the authority, due to its particular powers it possesses, to prevent or minimise harm in situations where the public has little ability to protect themselves (e.g., safety inspections of aeroplanes).

Even a highway authority may be liable in negligence if a highway is designed or constructed in a dangerous manner. Also, if the authority has, through its actions, created or increased a danger without issuing any warnings, liability may be attracted. For example, if the authority digs a hole and neglects to fill it in or erect a protective barrier, that may amount to negligence. Those actions are known in the law of torts as ‘misfeasance’ and are actionable.

The courts acknowledge, however, that if an authority has no obligation to exercise a statutory power, it will not necessarily owe a duty of care to any person for failing to exercise it. Its conduct, or its relationship to some members of the public, would have to be such as to give rise to a duty of care calling for the exercise of the power.\(^3\)

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\(^3\) *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 460.
3 ENTRENCHEMENT OF IMMUNITY IN AUSTRALIAN LAW

In a 1936 High Court decision, the ‘well settled’ rule (as established in England and brought to Australia) was explained in this way:

No civil liability arises from an omission on [the part of the highway authority] to construct a road, to maintain a road which it has constructed, [or] to repair a road which it has allowed to fall into disrepair… .

In a later High Court case of Gorringe v Transport Commission (Tasmania), where a truck-driver was killed when a culvert on the highway collapsed caused by a deterioration of the timber from which it was built, the position was put even more bluntly:

By 1895 it seems to have been beyond question that a highway authority, if it did anything, must do it carefully, but, if it did nothing, could be indifferent to the consequences of its inaction.

The High Court found that Gorringe was a case of 'non-feasance' and that damages could not be recovered against the relevant highway authority.

4 EXCEPTIONS TO THE IMMUNITY

Over time, the harshness of the immunity has led the courts to find exceptions and qualifications to the it that have made the operation of the rule very uncertain and difficult. Those qualifications are set out below.

4.1 ARTIFICIAL STRUCTURES

'Artificial structures' are not part of the highway (ie structures whose purpose is unconnected to the purpose of the road). Those have been found to include objects such as a brick sewer drain in the highway or trees on the footpath. Non-maintenance of those structures might constitute negligence. On the other hand, structures that have road purposes are part of the highway – eg a drain to take water off the road. The distinctions are often peculiar. For example, a tree planted by a council, whose roots cause a person to trip, might be found to be an artificial structure founding an action in negligence. However, if the tree was self-sown, it would be merely a case of non-feasance to which the immunity applies.

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^4 Buckle v Bayswater Road Board at 281 by Dixon J.

^5 (1950) 80 CLR 357 at 378, by Fullagar J.
4.2 **Another Capacity**

The immunity applies only when the highway authority is acting in its capacity as a highway authority, not in any other capacity – eg as an electricity authority or a traffic control authority.

For example, in *Buckle* (mentioned above), the Road Board had power to act as both a highway authority and a drainage authority. It was held that its failure to repair an agricultural drain damaged by a third party was an omission in its capacity as a drainage authority and the Road Board was found to be liable in negligence. In another example, a child who received an electric shock when climbing a power pole on a highway was able to recover damages from the local authority because it had failed in its duty to take reasonable care in its exercise of its electricity management functions.

4.3 **Misfeasance**

As noted earlier, repairs to a road that increase a danger may be misfeasance and the immunity will not apply. However, if the repairs are merely superficial, the immunity applies. The distinction is very difficult to apply and there have been cases in which the courts have come to different conclusions on very similar facts.

For example, in *Gorringe* (mentioned earlier) the authority had repaired the surface of the road over a culvert but, later, the culvert itself collapsed, taking the road with it, and a driver was killed. The High Court held that the authority was immune from action because it was the failure to ensure the security of the culvert that resulted in the collapse, not the superficial surface repairs. The opposite conclusion was reached in the later case of *Hill v Commissioner for Main Roads*. The Court found that the efforts by the authority to patch a road were negligent because it failed to fix a foreseeable risk that was certain to reappear at some stage. It did not rectify the fundamental cause of the condition of the road. The Court commented that if the authority had decided to take no action at all it would not have been liable. However, once it committed itself to intervention, it had to perform the task with proper care and skill.

Until now, there has been little incentive for highway authorities to embark on repairs of potential hazards if to do so may have resulted in liability for negligent repairs. Why would a highway authority want to know about the condition of a roadway or carry out routine inspections?

5 **Other Jurisdictions**

The English Parliament abolished immunity of highway authorities in 1961 (see *The Highways (Miscellaneous Provisions) Act 1961* (UK), section 1) and imposed a regime of strict liability, the direct

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6 (1989) 9 MVR 45.
opposite to the effect of the immunity rule. Despite this, there has not been a rush of negligence suits against local authorities.

Canada has altered the severity of the immunity in a number of jurisdictions through the common law so that highway authorities are subject general negligence principles. There, the distances are as great as those in Australia and the climate much harsher.

Most jurisdictions in the United States work on the basis that highway authorities have a duty to maintain the highway in a reasonably safe condition and to warn the public of hazards.

It is yet to be seen whether the New Zealand courts will retain the immunity.

6 HIGH COURT REMOVES THE IMMUNITY

The opportunity for the High Court to reconsider the immunity of highway authorities arose in two separate cases, Brodie v Singleton Shire Council (Brodie) and in Ghantous v Hawkesbury City Council (Ghantous). In both cases, special leave to appeal to the High Court was sought from the judgements of the Supreme Court of New South Wales Court of Appeal. The Attorneys-General of Western Australia, New South Wales, and Victoria were permitted to intervene in the hearing of the appeal, due to the financial implications for the states.

6.1 THE FACTS

In Ghantous, an elderly lady was injured when she stepped aside on a concrete footpath to allow other pedestrians to pass. The footpath had apparently been constructed properly but the grass verges either side had become eroded over time so that they had dropped to about 50 mm below the concrete path. When she stepped to one side, Ms Ghantous' foot landed partly on the concrete and partly overhanging the verge. A mall had been constructed nearby which may have increased pedestrian traffic, but only to a minor degree.

In Brodie, Mr Brodie drove a truck, owned by the second applicant, onto a bridge constructed in the Singleton Shire about 50 years earlier. It was designed to carry 15 tonnes and the truck weighed 22 tonnes. Mr Brodie had earlier driven the truck without incident over a similar bridge, signposted as having a 15 tonne carrying capacity. While driving over the second bridge, which had no signpost, the timber girders

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8 Brodie and Ghantous, para 78 by Gaudron, McHugh & Gummow JJ.

9 Brodie and Ghantous, para 75 by Gaudron, McHugh & Gummow JJ.
collapsed causing the truck to be damaged and Mr Brodie to be injured. The planks of the bridge had been replaced periodically and the bridge inspected around four times a year to ascertain if minor components, such as handrails, needed to be replaced. There was evidence that the girders had deteriorated through infestation by dry rot or white ants and consequently failed when the truck was driven over them.

After losing in the courts below, the plaintiffs sought leave to apply to the High Court asking that the immunity rule be abolished.

### 6.2 Reasons for Abolishing the Immunity

Four of the seven High Court justices considered the immunity should be abolished, thus subsuming the liability of highway authorities for failure to repair or maintain roadways within the general law of negligence. The immunity, and the authorities establishing its place in Australian law (*Buckle* and *Gorringe*), were overturned.

The major considerations the majority justices took into account in overturning the immunity include –

- its abolition through statute or the common law in a number of jurisdictions, including England from where it evolved;
- the fact that the immunity was developed in England in a legal and social context quite different from that which has ever existed in Australia;
- funding arrangements and better technology existing today make the ability to keep roads in good repair an easier task than when the rule was formulated;
- at least part of the funding for highways is provided by State and Federal Government grants, lessening the likelihood that local ratepayers have to shoulder increased financial burdens;
- the immunity was received into Australian law and continued to be accepted even though the general law of negligence was taking a different path;
- the myriad of fine distinctions and qualifications to the harshness of the immunity (eg the non-inclusion of ‘artificial structures’, the distinction between misfeasance and non-feasance) have created uncertainty, thus increasing, rather than lessening, litigation;
- public authorities have been found, on occasions (as explained in Section 2, above), to have a duty to exercise powers in a way to avert a danger or bring the danger to the knowledge of citizens, yet authorities having control over highways are in a special position;
- that because taking no action at all to repair a hazard will not attract liability but any attempt to repair may do so, there is strong incentive for highway authorities not to address dangers on the highway that they have not caused;

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10 Although, in *Brodie*, the plaintiff succeeded at first instance but was overturned on appeal.

11 Joint judgement of Gaudron, McHugh and Gummow JJ and the separate judgement of Kirby J.
that there seemed to be no public interest in retaining an immunity which caused the burden of loss to fall on the victims of neglect, even gross and outrageous neglect, by highway authorities;

- the precedents (especially Buckle) which have been taken to establish the immunity for Australia are not strong ones; and
- the offence to the fundamental notion of equality of parties before the law.12

### 6.3 Arguments Against Abolishing the Immunity

Three members of the Bench (Gleeson CJ, Hayne and Callinan JJ) considered, in separate judgements, that the immunity should not be abolished. Justice Hayne thought that the immunity should not always apply but it was up to Parliament to abolish it, not the Court. In addition to the reasons given by the dissenting justices, the defendant Councils and the intervening Attorneys-General offered a number of arguments for retaining the immunity of highway authorities which can be summarised as follows –

- the immunity was well adapted to a country the size of Australia with its climatic variations and its small and dispersed population served by a vast network of roads;
- there were significant cost implications if the immunity was removed, including the need to divert funds to compensating successful plaintiffs. That cost may be passed on as an increased rates burden on local ratepayers or upon taxpayers generally;
- the rule had survived for a long time and local councils and State authorities had ordered their affairs on the basis of its correctness;
- despite recommendations to do so by law reform bodies in three states, no legislature in Australia had yet removed or limited the immunity. Moreover, those recommendations did not propose abolition of the immunity alone but also suggested measures that would ameliorate the concerns of local governments;
- the reasonableness of a road maintenance programme should not depend upon judicial estimation on a case by case basis;
- that to remove the immunity may be an interference with the policy and decision making functions of public authorities (an area in which, due to regard for separation of powers, the courts are loathe to intervene); and
- it is for the legislatures to change the law, not the courts, as it is the former which provide for the powers, duties and resources of the authorities and can most readily regulate the extent to which they will be liable.

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12 See also B McDonald, 'Immunities Under Attack:…' (cited earlier).
7 HOW NEGLIGENCE LAWS MAY APPLY TO HIGHWAY AUTHORITIES

The consequence of taking away the immunity for non-feasance enjoyed by highway authorities will not mean that they now have a duty to keep roads in a perfect state of repair or else face liability in negligence.

The joint judgement of Gaudron, McHugh and Gummow JJ said that the duty of a highway authority to take reasonable care in exercising statutory powers regarding control and management of highways will not extend to ensuring the safety to all road users in all circumstances. Liability of a highway authority for non-repair would be determined according to whether the authority, with relevant duties and powers, has a duty to take reasonable care to users of the highway and whether it has breached that duty of care.

7.1 FORMULATING THE CONTENT AND BREACH OF THE DUTY OF CARE

The joint judgement formulated the duty owed by a highway authority and how it must be discharged in the following way –

Where the state of the roadway, whether from design, construction, works, or non-repair, poses [a foreseeable risk of harm to road users], then, to discharge its duty of care, an authority with power to remedy the risk is obliged to take reasonable steps by the exercise of its powers, within a reasonable time, to address the risk. If the risk be unknown … or latent and only discoverable by inspection, then to discharge its duty of care, an authority having power to inspect must take reasonable steps to inspect to ascertain the latent dangers which it might reasonably suspect to exist.13

Determining what is reasonable will depend on a number of matters such as the magnitude of the risk; the degree of probability that it will occur; the expense, difficulty and inconvenience to the authority in taking steps to alleviate the danger; and any other competing or conflicting responsibilities or commitments of the authority.14

Justice Kirby (also in the majority overturning the immunity) agreed that the liability of highway authorities would now be determined by ordinary principles of negligence law as applied to a statutory authority with relevant duties and powers.

Justice Hayne (although not agreeing that it was up to the Court to overturn the immunity) said that as a general rule, a highway authority will owe a duty to take reasonable care when it exercises its powers. His Honour noted that it should not be held that [such authority] will not owe a duty of care … because it does not exercise its powers.15 However, he considered that the difficulties in formulating how the duty of care operates should be resolved by the legislature, not the courts.

13 Brodie and Ghantous paras 150-151.


15 Brodie and Ghantous, para 328.
7.1.1  Inspections and Failures to Repair

The joint judgement split up the various powers of highway authorities in determining when an authority would be in breach of a duty of care. It first considered construction and design of roadways then it looked at repair, maintenance works, and inspections. The Court then considered the position of a highway authority in relation to plaintiff pedestrians which will be discussed in the next heading.

In relation to repair, maintenance, inspections and works, the joint judgement approached the issue of breach of duty from the starting point that –

- road users will, themselves, take ordinary care for their own safety; and
- not all failures to repair will create a reasonably foreseeable risk of harm to road users taking reasonable care. Much will depend on the nature of the defect and how easily it can be seen and avoided by a road user.

The joint judgement noted that the competing and conflicting responsibilities of the highway authority have to be considered – for example, the authority may have a priority order of repairs in a number of locations; it may have limited financial resources and skilled labour dictating the speed of repair; it might have to address more pressing dangers (although, in the latter case, it may have a duty to put up warning signs or closing the road).16

The joint judgement said that a highway authority may be in breach of duty if it fails to take reasonable steps to inspect for defects as reasonably might be expected or known to arise, or of which it has been made aware (as opposed to dangers that could not have been found except by taking unreasonable measures). It will also be in breach if, when found, the authority does not take reasonable steps to repair the defect.

In the case of Brodie their Honours considered that the case was not one of failing to inspect but one of failure to take, during periodic inspections, reasonable steps to look for such dangers that might reasonably be expected to arise – eg dry rot or white ants. Also, the Council had patched the bridge giving it a superficial appearance of safety. 17 However, while a four judge majority found that the Council was in breach of its duty owed to users of the bridge, the matter was returned to the Court of Appeal for final determination. That was because there were some outstanding issues arising from abolition of the immunity.

7.1.2  Pedestrians

The result in Ghantous should provide some comfort to those who fear that the High Court decision will result in a flurry of suits against highway authorities. The entire Court held that while there was a duty of

16 Brodie and Ghantous paras 161-162.

17 Justice Kirby agreed with the joint judgement’s comments regarding discharge of the duty owed to users of the bridge. See para 243.
care owed to pedestrians to construct and keep the footpath reasonably safe for ordinary use, there was no breach of duty by the Council in its construction of the path nor in the failure to keep the path level with the grass verges. Something more than taking a false step was necessary to result in the Council being found negligent, for example, evidence of poor design, history of earlier accidents or dangerous deterioration. The joint judgement noted that an aspect of walking outdoors is that the ground may not be even and that pedestrians are more able to see and avoid imperfections in a road surface, such as tree roots or uneven paving stones, than are other road users.

Despite the existence of the immunity until now, claims by pedestrians injured using footpaths appear to account for the majority of claims against councils in NSW.

8 POSSIBLE LIMITS ON DUTY OWED

It is very likely that the courts will impose limits on the extent of the duty owed by a highway authority. For example, it may be found that the duty will not always extend to engaging in repairs where a warning sign or other preventative measure would suffice. It is also inevitable that a highway authority will only owe a duty in relation to dangers of which they were aware or ought to have been aware. For example, if the time elapsing between the danger emerging and the injury resulting is very slight, it is less likely that the authority will be held liable.

In addition, all the circumstances of each case must be considered in light of the relevant context in which they arise. Where a decision by an authority involves allocation of financial priorities, it is less likely that a court will interfere but more likely if, in implementing a programme or a decision, the authority is negligent.

9 RESTORATION OF THE IMMUNITY

It appears that local government associations may request State Governments to pass legislation reinstating the immunity of highway authorities from liability in negligence. Indeed, one of the majority justices in Brodie and Ghantous considered that it was open for the Parliament of any State or Territory to take this

18 Brodie and Ghantous para 167 (Gaudron, McHugh & Gummow JJ) and para 246 (Kirby J).


course. However, as His Honour noted, that could have at least two advantages. Firstly, Parliament may define the scope of the immunity, and any exceptions to it, more precisely than the common law has done; and secondly, the immunity would be conferred by elected representatives, not by judges.22

One instance where legislation has been passed to ameliorate the effects of a change in the common law is following the High Court’s decision that local councils could be liable for negligent misstatement. The NSW Parliament passed a law exempting local councils from liability when providing advice in relation to land in a planning certificate issued under section 149 of the *Environmental Planning and Assessment Act 1979* (NSW). In relation to the highway authority immunity, Parliament may decide that the immunity should be restored; should be allowed in certain instances; or it may move to cap the amount of damages recoverable or to discourage vexatious claims.23

When the NSW Law Reform Commission considered changes to the law in relation to the liability of highway authorities, it did not propose that the immunity be abolished without other measures being adopted. It considered that liability for *personal injury* should be determined by common law negligence principles (the immunity having been abolished) but within the Transcover scheme. Transcover places a limit on amounts that can be recovered by imposing a system of benefits rather than damages.24 However, in relation to *property damage*, it recommended that the cost implications of abolition of the immunity should be investigated by the Government before action was taken.25

10 CONCLUSION

The High Court’s decision removing the 213 years old immunity protecting highway authorities and allowing liability to be determined according to general negligence principles brings those authorities into line with other public authorities and ensures that victims of negligent failures to repair are compensated.

The decision will have financial implications for local, State and Federal Governments, particularly when it has been estimated that claims against NSW councils have more than doubled in recent years and the damages recovered have grown.26 Already, the NSW Local Government Association has sought the

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22 Brodie and Ghantous para 233 per Kirby J.
23 Information in this paragraph was taken from B McDonald, 'Immunities Under Attack…’ (cited earlier), p 424 and pp 432-433.
24 The *Transport Accident Compensations Act 1987* (NSW) operates instead of the common law in relation to personal injuries arising from motor vehicle collisions. ‘Transcover’ is the name given to the administrative system that the legislation created.
26 Linda Morris, ‘Council found liable for driver’s injuries’.
assistance of the NSW Attorney-General to restore the immunity and it is likely that similar moves will be made in other States and Territories.
A truck driver who suffered back injuries when a wooden bridge collapsed under his vehicle has won a $350,000 damages suit against a NSW council in a High Court judgment that has ramifications for local government across Australia.

A majority of the High Court found Singleton Shire Council was liable for the man's injuries, incurred in August 1992, because it had failed to maintain the bridge properly.

The court was told the wooden structure holding up the bridge was rotten and the council had only to bang on wooden girders with a hammer to find that out.

The 150-page judgment effectively abolishes councils' long-standing immunity from certain damages claims.

To date, councils have been liable only for injuries incurred as a result of accidents on roads, footpaths and nature strips if they were negligent.

Now lawyers say councils can be sued whether they create the danger or not.

Late yesterday the NSW Local Government Association said it would take the matter up with the Attorney-General, Mr Debus, to restore immunity via legislative changes.

The case of Mr Scott Brodie was run simultaneously with another in which a woman injured after tripping over a footpath sought to sue Hawkesbury Shire Council.

In finding for the council, the High Court abolished the council's defence that they were protected from liability.

Phillips Fox partner Mr Michael Down said the decision was likely to be an expensive one for councils.

Craddock Murray Neumann partner Mr Dominic Wilson, who represented Mr Brodie, said the High Court judgment effectively overturned 200 years of common law.

"We still have not had time to read the judgment and appreciate what it says but it's certainly a big decision," he said.

"The plaintiff was a decent bloke injured through no fault of his own and we thought it worthwhile running the case.

"It started in 1992, we tried to settle it with council and we could have settled for less than the costs bill."

President of the NSW Local Government Association, Councillor Peter Woods, said the ruling had critical implications for local, State and Federal governments.

The decision comes at a time when the cost of claims to NSW councils has more than doubled and the size of claims has grown substantially.

The average payout for a trip and fall is about $38,000.

Claims of between $10,000 and $100,000 now comprise 25 per cent of all claims, compared with 6 per cent in 1998.
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