DECISION

Reason for Decision

This dispute arises from a claim made by Mr X for the cost of damage done to his vehicle [number] whilst driving on a section of CityLink on 5 October 2006.

Background to the Complaint

Mr X reported to CityLink on 5 October 2006 that at 2.15 pm on 5 October 2006, whilst traveling northbound on the ramp from Flemington Road, the vehicle in front of him ran over a steel plate that was on the road. The vehicle caused the steel plate to "flick up" striking Mr X's vehicle causing over $2,000 in damage. He provided quotations for the cost of repairs.

Mr X contacted CityLink on 5 October 2006 in order to seek compensation for the damages to his vehicle. CityLink explained that it was not liable to compensate him for the damage to his vehicle. CityLink said, in a letter of 12 October 2006:

> *"Thank you for enquiry of 10 October 2006, regarding damage caused to your vehicle as a result of a steel plate on 5 October 2006, while travelling on CityLink on the Tullamarine Freeway near the end of Flemington Road on ramp. We also understand that you again travelled in the same location on 10 October 2006 and saw that the steel plate was still on the side of the road. You advised that you picked up this debris.*
>
> *We have made enquiries with our contractor, Translink Operations Pty Ltd, about this incident. Translink Operations has no record of this incident and furthermore advises that there were no works or traffic management in the area you allege the incident occurred. Translink Operations have also advised that they do not have any knowledge of where the debris came from. It therefore appears that the steel plate which you allege caused damage to your vehicle may have fallen from a third party's vehicle.*
>
> *Translink Operations have advised that if they had received a report on the day of this hazardous debris or if this hazardous debris was in the running lanes it would have been collected immediately. Debris that is not reported as hazardous or not in the running lane is collected by the Rubbish Run and this section of the road was to be done on the night of 10 October 2006.*

As previously advised, neither CityLink Melbourne nor it's [sic] contractors are liable for damage caused by items that fall from other vehicles. I note that, in this situation, the owner or driver of the vehicle that the steel plate may have fallen from, may be liable for the damage. If you are able to identify the vehicle in question, you may be able to seek compensation from the owner or driver. Unfortunately we do not have information that could assist you to identify this party.

Accordingly, CityLink Melbourne declines to offer a compensation payment in this case for the reasons outlined above.

We understand that you may not be happy with this response and would like to suggest that you may contact the Transurban Customer Service Ombudsman."

Mr X made a complaint to the Transurban Customer Ombudsman that was received on 22 February 2007, which read (verbatim):

"I write in reference to the response that I have received from [Name of CityLink Resolution Adviser] regarding an incident that I had on the Tullamarine Freeway on 5 October 2006.

On 5 October 2006 around 2.15pm I was travelling north bound on the on ramp from Flemington Road and vehicle in front of me ran over a steel plate that was on the road, this steel plate flicked up and caused over $2000.00 damage to my vehicle. Citylink has denied all liability and I am not satisfied with the response received, as I pay to use the road at around $90.00 per month and there are no signs on the entrances to these carriageways stating that you drive at your own risk. I find that Citylink is responsible due to a lack of care.

On 5th October 2006 I rang Transurban and spoke to [Given name of L] on contact number [number] to report the incident, she referred me to [Name of CityLink Resolution Adviser] who did not even bother to get the correct details. After waiting a few days for a response which was not forthcoming, I rang [Given name of Resolution Adviser] on Friday 13 October 2006, he informed me a letter had been sent, I then inquired what address was this sent to he told me he had checked the database and informed my that I lived in Brighton, funny that because I live in Glenroy.

This whole matter is a joke as I had reported the incident on the day in question. On the 9 October 2006 back from the City and pulled over in the emergency stopping lane to see if the steel plate was still there and to my horror I found a 600 x 600 steel plate which had sheared through my front bumper still on the carriage way. I know this was the steel that damaged my

car as it had my green metallic paint on it and this was there 4 days later just waiting for someone else to have damage to their car.

The response letter stated that Citylink is not liable for damage caused by items that fall from other vehicles, this steel may have fallen off a car but it was not the car that initially ran over the metal that caused it to flick up off the road and how long was the metal on the road previously. I also note that in the response letter that I rang on 10 October 2006, this is fact a lie as I rang Citylink as soon as the incident occurred and why was it booked in for the rubbish run on 9 October 2006 when it should have been on the night the incident occurred.

I have attached quotes that I have received for the damage to my car, and insist that you look at this matter again, as I fail to get the results then I will be taking this matter further. I also note that you are going to bill the driver of the truck that hit the signs in the Domain Tunnel for the damages that he caused; you should practice what you do to others when their assets are damaged by debris left on your roads. You are very lucky that this matter caused only damaged to my car as had it flicked up any higher and gone through the windscreen it could have caused grievous body damage."

The Transurban Customer Ombudsman referred this complaint to CityLink for response.

CityLink responded directly to Mr X on 1 March 2007, and provided a copy of its response to the Transurban Customer Ombudsman, in the following terms:

"We refer to a letter dated 22 February 2007 by Mr Michael Arnold, Transurban Customer Ombudsman. We note this matter relates to damage caused to your vehicle allegedly as a result of a steel plate on 5 October 2006, while travelling on CityLink on the Tullamarine Freeway.

As previously advised, in a letter sent to you by [Name of CityLink Resolution Adviser], dated 12 October 2006, I re-iterate to you that neither CityLink Melbourne nor its contractors are liable for damage caused by items that fall from other vehicles.

In this situation, the owner or driver of the vehicle that the small object may have fallen from, may be liable for the damage. As previously advised, CityLink is unable to provide you with the driver details of the vehicle.

Accordingly, CityLink Melbourne once again declines to offer a compensation payment in this case."

Outcome and Reasons

The issues in this complaint are whether (a) CityLink owed a duty of care to Mr X as the owner of a vehicle that used a road for which CityLink was responsible; (b) whether CityLink breached that duty of care in respect of Mr X; and (c) whether CityLink is liable for the damage done to Mr X's vehicle.

Duty of Care

CityLink was the responsible road authority for the section of the road on which Mr X's vehicle was damaged on 5 October 2006. It had the lawful authority to care and manage the road to keep it safe in accordance with the Road Management Act 2004. Its civil liability for any damages law in relation to its duty of care is contained in Part 6 Division 2 of this Act.

I have made or am considering decisions in incidents similar to this claim. Since my first decision there has been a discussion of the liability of Victorian Road Authorities, such as CityLink, by Dr Karinne Ludlow, senior lecturer at the Centre for Regulatory Studies, Faculty of Law, Monash University, in the Law Institute of Victoria Journal (May 2007). This paper largely reinforces the position I took in my decision.

Mr X, in particular, asserts that as he pays $90 a month to use the road and as CityLink does not have signs on the entrance to its carriageway stating that you drive at your own risk, that CityLink is responsible to compensate him due to its lack of care.

The History of the law– Pre 2001

It is useful in the context of this claim, to discuss the law in relation to the duty of care owed by a road authority to those who use the roads for which they are responsible. The duty of care owed by a highway authority to a user of the highway was recently discussed in the Supreme Court of Victoria in ***Moyne Shire Council v Pearce*** [2004] VSCA 246 and the decision is relevant in relation to the responsibility of CityLink. The Shire, like CityLink, was a road authority which had been empowered to care for and manage public highways for which it was responsible.

The law in respect of the care and management of roads had been clear in Australia for almost 100 years until 2001. The law provided that a road authority like CityLink, having the care and management of a road, could be the subject of criminal proceedings for non-repair but no proceedings could be brought against it by a person who suffered damage or loss as a result of a failure to maintain the

road. **A road authority was not liable for failing to do anything even where there was a defect that constituted an obvious hidden danger.**

By way of contrast, if a person suffered a damage or loss because of a defect resulting from some act by the road authority, the authority could be liable to compensate for the damage or loss. In simple terms, the road authority was not liable for damage or loss resulting from non-activity but it was so liable if it negligently performed work such as erecting a barrier or a false curb and the damage or loss resulted.

These principles were clearly discussed by Australia's High Court in a case of ***Buckle v Bayswater Road Authority*** *(Buckle's case)* (1936) 57 CLR 259 and were stated by Dixon J at pp 281 and following. He said:

> *"In order that the public right may be enjoyed to best advantage, road authorities are established and armed with powers in relation to the highways. For that purpose a legal authority is given to them to construct, maintain and repair roads and to keep them free of obstruction and in an orderly condition.* ***The existence of such powers gives rise to no civil liability*** *for the consequences of the defective state of a road. …* ***It is well settled that no civil liability is incurred by a road authority by reason of any neglect on its part to construct, repair or maintain a road or other highway."***

He said further at p 282:

> *"A failure to act, to whatever it may be ascribed, cannot give a cause of action. No civil liability arises from an omission on its part to construct the road, to maintain a road which it has constructed, to repair a road which it has allowed to fall into disrepair, or to exercise any other power belonging to it as a highway authority."*

This was known as the road authority immunity rule.

<u>The History of Law – Post 2001</u>

The law on a road authority's duty of care changed briefly after May 2001 when the High Court decided in the case of ***Brodie v Singleton Shire Council*** (2001) 206 CLR 512 that a road authority's immunity from civil legal proceedings for damages resulting from its inactivity or failure to properly maintain a road did not apply. The Victorian Parliament then intervened by way of legislation and restored the road authority immunity from these claims.

This was done by way of the Transport (Highway Rule) Act 2002. Section 37A of that Act provided from 4 November 2002 that a road authority was immune

from liability not only for failing to repair but also for failing to inspect a highway. This again removed liability for damage caused in situations similar to Mr X's incident.

However, the Victorian Parliament again intervened and this law was repealed by the Road Management Act 2004 as at 1 January 2005. This legislation has removed the previous immunity rule and replaced it with other provisions. **This Act applies to any claim for damages resulting from negligence in relation to the performance or non-performance of a road management function regardless of whether the claim is brought in tort, in contract, under statute or otherwise.**

Section 101 of the Act sets out a road authority's duty of care.

As far as CityLink's responsibility to remove litter is concerned, relevantly section 102 in Part 6 of this Act provides:

> *"1) Subject to this section, a road authority* ***is not liable in any proceeding for damages, whether for breach of the statutory duty imposed by section 40 or for negligence, in respect of any alleged failure by the road authority—***
>
> ***(a) to remove a hazard or to repair a defect or deterioration in a road; or***
>
> ***(b) to give warning of a hazard, defect or deterioration in a road.***
>
> *(2) Sub-section (1) does not apply if, at the time of the alleged failure, the road authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.*
>
> *(3) For the purposes of sub-section (2), the road authority is to be taken to have had actual knowledge of the particular risk if it is proven in the proceedings that the deterioration in the road had been reported in writing to the road authority under section 115.*
>
> ***(4) This section does not affect any liability of a road authority arising out of a breach of the duty to inspect a public road imposed by section 40."***

There is no evidence that CityLink had actual knowledge of the particular risk that caused the damage to Mr X's vehicle prior to his accident so that the exceptions in subsections (2) and (3) to section 102(1) do not apply. Mr X reported seeing the material subsequent to the damage to his vehicle and in fact collected the offending material. This does not make CityLink liable for damage caused at the time of his incident. The material may well have been on the road a very short time before the damage was done to his vehicle. Accordingly, at first instance, CityLink is not liable for the damage sustained by Mr X's vehicle by virtue of its failure to keep the road free of litter.

However, consideration should be given to the meaning of subsection (4) and CityLink's responsibility to inspect the road.

Accordingly, section 40 of the Act becomes relevant and it provides:

> *"**40. Statutory duty to inspect, maintain and repair public roads***
>
> *(1) Subject to Part 6, a road authority has a statutory duty to inspect, maintain and repair a public road-*
> *(a) to the standard specified in the road management plan for that public road or a specified class of public roads which includes that public road; or*
> *(b) if paragraph (a) does not apply, to the standard specified in a policy in respect of that public road; or*
> *(c) if no standard is specified for that public road or in relation to a particular matter, to a reasonable level having regard to the matters specified in paragraphs (a) to (e) of section 101(1).*
>
> *Note: Section 101 sets out principles for determining whether there is a duty of care and if there is a duty of care, the standard of care.*
>
> *(2) The statutory duty imposed by sub-section (1) does not create a duty to upgrade a road or to maintain a road to a higher standard than the standard to which the road is constructed.*
>
> *(3) The statutory duty to inspect applies to any part of a public road which is-*
> *(a) a roadway;*
> *(b) a pathway;*
> *(c) a shoulder;*
> *(d) road infrastructure."*

This section read with section 102 imposes a duty of care on CityLink to inspect, manage and repair a public road but not to have the public road clear of all litter from the road at all times.

In order to assess CityLink's obligation under subsection 102(4) it is necessary to examine section 103 which provides:

> **"Policy defence**
> *For the purposes of any proceeding to which this Division applies, an act or omission which is in accordance with a policy—*
> *(a) determined by the relevant road Minister under section 22 does not constitute a wrongful exercise or failure unless the*

policy is so unreasonable that no Minister in that Minister's position acting reasonably could have made that policy;

(b) determined by the relevant road authority under section 39 does not constitute a wrongful exercise or failure unless the policy is so unreasonable that no road authority in that road authority's position acting reasonably could have made that policy.

Note 1: One of the ways in which a road authority may determine a policy with respect to its road management functions is by a road management plan: see section 52.

Note 2: Section 27 enables a relevant Code of Practice to be used as evidence of the reasonableness of a road management plan."

CityLink, in this regard, has previously provided evidence that it did have a management plan in place through Translink Operations Limited, details of which were set out in my first Decision.

Discussion

Was there a breach of the duty of care?

CityLink's duty of care owed to Mr X is contained within the provisions of Division 6 section 2 of the Road Management Act 2005 as outlined above. This legislation provides that a road authority such as CityLink is not liable for damages caused by the failure to remove a hazard such as litter. The rationale behind this is that it would be impossible for CityLink or any road management authority to constantly keep the roadway free of litter at all times.

CityLink is required to have in place a management plan that will reduce the likelihood of such damage happening. Such a plan should ensure that a road authority has taken such care in all the circumstances that could be reasonably required to ensure that the relevant part of the public road was not dangerous for traffic. I have examined the piece of metal that caused the damage to Mr X's vehicle. It is dark in colour and approximately 60cms by 60cms in dimension but narrow in breath. It is a piece of metal that may not be easily discovered without close inspection.

CityLink has previously provided to me details of aspects of that management plan that related to the process of its contractor, Translink Operations Limited. This indicated a comprehensive inspection and maintenance procedure as required in the CityLink Operations and Maintenance Manual, which includes the regular inspection of CityLink for, and the removal of, debris. This clearly establishes in my view that it has complied with the provisions of section 103 of the Road Management Act 2004.

I am accordingly satisfied that CityLink has not breached the duty of care that it owed at law to Mr X as a road authority and is not in that sense liable for the damage done to his vehicle.

Is CityLink different from any other responsible road authority?

Mr X submits that CityLink should be responsible because it charges tolls and does not have a warning on its carriageway that motorists drive at their own risk. This is, in essence, an argument that CityLink, as a privatised infrastructure asset and service, and because of its tolling, is in a different position from other responsible road authorities.

However, this is not reflected in the Road Management Act 2004, in any other legislation or under any agreement with the State. Significantly, Dixon J in *Buckle's case* went on to say that at common law no civil liability arose by reason of the road authority being a body corporate or being capable of being sued. Further, it was not liable even though the soil of the highway was vested in it by statute or the highway was under its management and control. I note that the Road Traffic Authority, which is a responsible road authority, does not have warnings on its roadways that motorists drive at their own risk.

State Governments have entered into contracts with companies to construct and be responsible for the management of public roads under tolling arrangements as opposed to borrowing funds and using taxpayers' money to repay the loans. Such arrangements are not deemed under the law to impose greater liability upon them than other road authorities. Accordingly, CityLink's obligation to the users of its road is no greater than those of other responsible road authorities.

Is this fair and reasonable?

Leaving aside the provision of the Road Management Act 2004, CityLink cannot, like any road authority, be strictly liable for all damage done to vehicles travelling on its roads at any time. This would mean that it would virtually be required to guarantee that all vehicles that travel on its roads would not or could not suffer damage. This would be an impossible risk management situation and not one that could be reasonably expected of CityLink or any responsible road authority.

CityLink has an obligation to develop and maintain a road management plan that met reasonable requirements to ensure that the relevant section of CityLink was not dangerous to traffic. It has done this in accordance with its duty of care and obligation under the legislation.

I note that in addition to its management plan, that CityLink has undertaken public campaigns in relation to the encouragement of vehicles to maintain loads in order to reduce the litter on its roads. (A copy of the press release is attached). This is a positive step that will further assist in the limitation of damage to the vehicles using its roads.

Decision

The complaint is not upheld.

Michael Arnold
Transurban Customer Ombudsman

Dated: 16 July 2007

MEDIA RELEASE

DATE **EMBARGOED:**
Thursday 26th May

LOCK DOWN THAT LOAD!

CityLink and VicRoads have joined forces to tackle a highly dangerous issue that regularly causes traffic chaos and threatens motorists' safety on Victoria's roads.

The two organisations have come together to launch '*Lock Down That Load',* a driver awareness campaign aimed at professional carriers, tradesmen, farmers and any driver who uses a trailer to move house or take rubbish to the tip.

Citylink's road response teams say they could build a small flat, and then furnish it with the debris they collected from the toll road in 2004.

'In 12 months we collected enough wood, bricks, roof tiles, rocks and steel to build a home," said CityLink's Senior Traffic Control Officer, Scott Cain.

'And we would have had plenty of tradesmen's tools plus 10 ladders for the job,' Mr Cain added.

He said the flat could have been comfortably furnished with other items falling off trucks, utes and roof racks including:

1 air conditioner, 1 bath, multiple pieces of carpet, 7 chairs, multiple cushions, 1 desk, 1 fridge
3 mattresses and pillows, 1 set of pine drawers, 1 rug and 1 table.

CityLink CEO, Mr Brendan Bourke, said CityLink was regularly forced to close traffic lanes while response teams collected on-road debris and lost loads. Around 40 tonnes of debris is picked up from the 22 kilometres of CityLink road every month.

During 2004, CityLink lane closure times for debris collection were as short as one minute, and as long as 49 minutes.

'But the major concern is the danger falling loads represent to other vehicles and drivers on the road, and then the risk to staff who have to go into moving traffic to retrieve the debris,' Mr Bourke said.

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MEDIA RELEASE

DATE **EMBARGOED:**
Thursday 26th May

Manager of VicRoads Traffic Control Centre Keith Weegberg said several hundred incidents were reported last year where vehicles collided with debris that had fallen from another vehicle's load.

'While clearing debris comes at a cost to both VicRoads and CityLink, the community pays a significant cost in lane closures and delays due to congestion when there's a piece of debris on the road,' Mr Weegberg said.

'Under Victoria's Road Safety Regulations it is an offence to fail to secure a load,' Mr Weegberg said.

'Individuals can face fines of up to $1,000 and corporations up to $5,000 if they're travelling with unsecured or inappropriately secured loads.'

More than 150 penalty notices are issued by VicRoads each year, however Mr Weegberg emphasized this message is not about fines, but about raising awareness of the issue and making all roads across Victoria safer.

Statistics show December and January are the worst months for lane closures caused by debris, suggesting that holiday makers also have to hear this message.

If you are on CityLink and spot any debris, call **13 26 29**. On other roads across the state call VicRoads on **13 11 70** to report the incident.

100,000 'Lock Down That Load' stickers will be distributed through VicRoads, CityLink, the Transport Workers' Union and the Victorian Transport Association.

Ends.

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