

ARE IN-GROUND TRAFFIC LIGHTS FOR DISTRACTED PEDESTRIANS A RED LIGHT FOR LOCAL GOVERNMENTS?

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Authorities around the world are becoming increasingly concerned about the distraction smartphones are causing for pedestrians. A recent study conducted by the Queensland University of Technology found that 30% of people admitted having a “near-miss” with a car or other vehicle and 15% identified their phone as a distraction.^[1] The same study also found that:

- (a) 1 in 5 people text while crossing the road at least once per day;
- (b) 1 in 5 people admit making or answering a phone call while crossing the road at least once day; and
- (c) 12% to 15% of people will cross the road while accessing the internet on their mobile device.^[2]

We assume that these statistics are replicated around the world. Therefore, it comes as no surprise that Emergency Room data from the United States shows that visits from distracted smartphone users increased by 124% between 2010 and 2014.^[3]

Authorities have begun to take steps to tackle the increasing issue that distracted pedestrians pose. In Victoria, police are out in force and cracking down with on-the-spot fines for jaywalking.^[4] However, others are investigating more novel approaches, like the Gold Coast City Council which has recently announced that it is considering a trial of in-ground traffic lights on the City’s main roads and tram crossings.^[5] The New South Wales Government has already confirmed plans for a \$250,000 trial of in-ground traffic lights at key pedestrian crossings in central Sydney.^[6] These public authorities have seemingly been inspired by Augsburg, a town in southern Germany, which has decided to trial in-ground traffic lights at two tram crossings. The initiative in Augsburg was implemented in response to the death of a young girl who was struck by a tram while looking at her phone and listening to music.^[7]

So far, the public reaction to the Gold Coast City Council’s announcement appears to be largely negative. Therefore it is timely to consider whether the installation of in-ground traffic lights aimed at distracted pedestrians constitutes a reasonable response to the risk posed by our smartphone obsession. This issue also provides an excellent opportunity to revisit the duty to warn of obvious risks and findings of contributory negligence against distracted pedestrians.

Are the lights a reasonable response to the risk by Council?

The decision of *Skulander v Willoughby City Council*^[8] is an Australian case involving pedestrian distraction. In *Skulander*, a woman was walking through a bus interchange while looking at her mobile phone when she hit her head against an iron cage containing a device that measured exhaust emissions. These devices were

necessarily located at head height and were installed on pillars. Due to vandalism of the devices, Council had installed the cages which protruded by 250mm from the pillars. At first instance the Council successfully defended the claim. However, the New South Wales Court of Appeal found that the trial judge had erred in finding Council did not owe the plaintiff a duty of care. As occupier, Council was required to have regard to the possibility that some pedestrians may be careless for their own safety.^[9] Accordingly, it was held that Council had breached its duty of care because:

- (a) The risk of a pedestrian colliding with the iron cage (which was at head height) “involved a readily foreseeable risk of harm to a pedestrian taking reasonable care for his or her own safety, but who was momentarily distracted or otherwise inadvertent”;
- (b) The risk of harm was significant; and
- (c) Reasonable steps, such as the erection of a simple rail to stop pedestrians from walking under the cage, could have alleviated the risk without unreasonable expense or inconvenience to Council.^[10]

While in isolation this decision may seem to suggest that the introduction of in-ground traffic lights would be a reasonable response to the risk posed by pedestrians distracted by their devices, it appears unlikely. The risk posed by an unusual and unexpected hazard such as the cage is very different to the risk posed by a road or tram line. In *Skulander*, the court noted that the risk posed by the positioning of the cage could have been easily managed or alleviated by Council. We doubt that the same can be said for roads or tram lines.

There is no duty to warn of an obvious risk and a pedestrian will be assumed to be aware of the risk if it is an obvious one.^[11] An obvious risk is defined as a risk which, “in the circumstances, would have been obvious to a reasonable person in the position of the person suffering harm.”^[12] There are various cases in which local governments have been successful in defending claims on the basis that there was an obvious risk.^[13] Although those cases have not involved distracted pedestrians, in our opinion the obvious risk provisions would apply to pedestrians who sustain injury after carelessly stepping on to a road or tram line in to oncoming traffic whilst distracted by their smartphone.

That said, it is important to bear in mind that the particular circumstances of a case may mean that the risk of being struck by traffic is not obvious. For example, where the configuration of an intersection is alleged to be confusing (see: *Curry v Brisbane City Council* [2010] QDC 148). Nonetheless, in such cases it will remain open to Council to rely on other statutory protections afforded to them under the various civil wrongs acts in order to defend such claims. Civil wrongs legislation throughout Australia requires courts to consider the wide range of responsibilities of the particular public authority when considering whether there has been any breach of duty and prohibits challenges with respect to the allocation of an authority’s limited resources.^[14]

Prior to the enactment of the civil wrongs legislation, in *Romeo v Conservation Commission of the Northern Territory*^[15] the High Court held that the defendant public authority was not liable for injuries sustained by the 16 year old plaintiff who was injured when she fell 6.5m from the top of a cliff on to a beach in Darwin. In so finding the High Court determined that the defendant authority was not obligated to fence or barricade the entire cliff as doing so was unreasonable. It was also noted that public authorities have limited resources and that demanding expenditure in one area “necessarily diverts resources from other areas of equal or possibly greater priority.”^[16]

The decision in *Romeo* and the enactment of civil wrongs legislation providing partial and complete defences to public authorities reflects a clear appreciation for the limitation of modern government.^[17]

At the present time we see no reason why in-ground traffic lights would be any different. Indeed the burden of installing this technology at even just major intersections would be significant. Accordingly, it remains unlikely that a local government could be held liable for breaching its duty of care to pedestrians by failing to install in-ground traffic lights.

Pedestrians and Contributory Negligence

The law demands that people take proper care for their own safety.^[18] Take for example the recent case of *Pangallo v Smith*

[19] in which the plaintiff sued the driver of a vehicle after being hit crossing the road while listening to music with his headphones in. The court held that the plaintiff's obligation to take reasonable care of his own safety encompassed "looking and listening for vehicles on the road that have the potential to cause harm." [20] Although the plaintiff's lack of attention and use of earphones amounted to a failure to take reasonable care, it was not the principal cause of the accident. The defendant was driving a large Toyota Landcruiser and should have had a good view of the intersection as he approached. Even though an oncoming car had just passed, the defendant ought to have been aware of the possibility of a pedestrian being on the road and of being unable to see that pedestrian in the headlights. [21] The court therefore ultimately found that the plaintiff's contributory negligence was 20% when compared to the breach by the driver.

Similarly, a man who was struck by a car crossing the road while eating a hamburger was found to be 50% responsible for contributory negligence in *Steen v Senton*. [22] The man had failed to keep a proper look out and take adequate care of his own safety. The court held that he had failed to stop at the centre line of the road, and if he did he would have seen the headlights of the vehicle approaching at between 11 and 16km/h. Despite this, the plaintiff had crossed the road from a well lit area and it had taken some time for him to reach the centreline. Accordingly, the court found that he was plainly there to be seen, and accordingly the defendant was equally responsible. [23]

In the decision of *Skulander* (discussed above) the plaintiff was found to be 50% responsible for the accident. The court held that if she had stopped walking while using her mobile phone she would not have collided with the cage and even if she had only looked down momentarily, she was careless in failing to observe the cage. [24]

These cases evidence that courts are prepared to make significant findings of contributory negligence against distracted pedestrians. While in each of the above instances the court found negligence on behalf of the defendant, it is important to remember that contributory negligence can also defeat a claim. [25]

Impact of in-ground traffic lights on liability risk

We do not believe the innovation of in-ground traffic lights will alter the liability risk of a public authority or other potential defendants to a claim, such as drivers. Perhaps in-ground traffic lights will prove an effective preventative tool; however that remains to be seen after the completion of the trial period.

In terms of distracted pedestrians, the data cannot be denied. The statistics clearly suggest that the risk posed by distracted pedestrians to themselves and other road users is growing. Nonetheless, an established and effective legal framework exists to protect defendants, including public authorities, from liability in this regard.

In our view, it will be community expectation and social utility that may eventually result in the widespread installation of in-ground traffic lights, and not because of tortious liability risk.

[1] *Digital distraction: Pedestrians admit near-misses when crossing the road* (17 February 2015) Queensland University of Technology <<https://www.qut.edu.au/news/news?news-id=85198>>.

[2] *Ibid.*

[3] Geoffrey A Fowler, 'Smombies - zombies on smartphones - are walking into accidents', *The Australian* (online), 2 March 2016 <<http://www.theaustralian.com.au/life/smombies--zombies-on-smartphones--are-walking-into-accidents/news-story/8836ae43fbc574ea8a2053567b599561>>.

[4] Craig Butt, 'Fatal distraction: Pedestrians urged to ignore the phone and focus on the road ahead', *The Age* (online), 20 January 2016 <<http://www.theage.com.au/victoria/pedestrians-urged-to-ignore-the-phone-and-focus-on-the-road-ahead-20160119-gm9n41.html>>.

[5] Andrew Potts, 'Gold Coast City Council considers intersection safety lights to stop smartphone users from being hit by trams', *Gold Coast Bulletin* (online), 2 May 2016 <<http://www.goldcoastbulletin.com.au/news/council/gold-coast-city-council-considers-german-intersection-safety-lights-for-smartphone-users/news-story/3126b465d35ec19af85a638b28a36ae6>>.

[6] Dominica Sanda, 'Sydney's in-ground traffic light trial to save mobile phone zombies from themselves', *Sydney Morning Herald*

(online), 29 May 2016 <<http://www.smh.com.au/nsw/sydneys-inground-traffic-light-trial-to-save-mobile-phone-zombies-from-themselves-20160529-gp6hfz.html>>.

[7] 'German town introduces in-ground traffic lights for pedestrians glued to their phones', *ABC News* (online), 27 April 2016 <<http://www.abc.net.au/news/2016-04-27/german-town-introduces-in-ground-traffic-lights-for-pedestrians/7363414>>.

[8] [2007] NSWCA 116 (18 May 2007).

[9] *Ibid* [7].

[10] *Ibid* [97]-[99].

[11] See *Civil Liability Act 2002* (NSW) ss 5G-5H; *Civil Liability Act 2003* (Qld) ss 14-15; *Civil Liability Act 1936* (SA) ss 37-38; *Civil Liability Act 2002* (Tas) ss 16-17; *Wrongs Act 1958* (Vic) s 54; and *Civil Liability Act 2002* (WA) s 50.

[12] See, eg. *Civil Liability Act 2003* (Qld) s 13.

[13] See eg. *Amos v Brisbane City Council* (Unreported, Magistrates Court of Queensland, 7 March 2005); *Jaber v Rockdale City Council* [2008] NSWCA 98 (28 May 2008) [39]; *Saad v Gosford City Council* [2007] NSWSC 643 (28 June 2007); or *Percy v Noosa Shire Council* [2002] QCA 245 (19 July 2002).

[14] See eg. *Civil Liability Act 2002* (NSW) ss 40-46; *Civil Liability Act 2003* (Qld) ss 34-37; and *Wrongs Act 1958* (Vic) ss 79-87.

[15] (1998) 192 CLR 431.

[16] *Ibid* 480 [129].

[17] Claire Wallom, 'Romeo v Conservation Commission of the Northern Territory' (1999) 3 *Newcastle Law Review* 121.

[18] See, eg. *Civil Liability Act 2002* (NSW) ss 5R-5S; *Civil Liability Act 2003* (Qld) ss 23-24; and *Wrongs Act 1958* (Vic) s 26.

[19] [2015] ACTSC 313 (28 July 2015).

[20] *Ibid* [20].

[21] *Ibid* [23].

[22] [2015] ACTCA 57 (6 November 2015).

[23] *Ibid* [42].

[24] *Skulander v Willoughby City Council* [2007] NSWCA 116 (18 May 2007) [102].

[25] See, eg. *Civil Liability Act 2002* (NSW) s 5S; *Civil Liability Act 2003* (Qld) s 24; and *Wrongs Act 1958* (Vic) s 63.

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