



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 62**

**The Liability of Highway Authorities  
for Non-Feasance**

**REPORT**

**MAY 1981**

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972-1978*.

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In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972-1978*, I am pleased to present the Commission's report on liability of highway authorities for non-feasance.

(Signed) D K Malcolm, QC  
Chairman

5 May 1981

# CONTENTS

Paragraph

## CHAPTER 1 - SUMMARY OF REPORT

1.	THE COMMISSION'S TERMS OF REFERENCE	1.1
2.	THE SPECIAL IMMUNITY OF HIGHWAY AUTHORITIES	1.3
3.	WHY REFORM IS NEEDED	1.5
4.	THE COMMISSION'S RECOMMENDATIONS FOR REFORM	1.7
	(a) Two guiding principles	1.7
	(b) Summary of the Commission's main recommendations	1.9
	(c) Other recommendations	1.10
	(d) Settling in period	1.11
5.	CONCLUSION	1.12

## CHAPTER 2 - INTRODUCTION

1.	THE NON-FEASANCE RULE	2.1
2.	THE ORIGINS OF THE NON-FEASANCE RULE	2.3
3.	THE MEANING OF "HIGHWAY"	2.6
4.	THE DISTINCTION BETWEEN "NON-FEASANCE" AND "MISFEASANCE"	2.8
5.	THE WORKING PAPER	2.12

## CHAPTER 3 - HIGHWAY AUTHORITIES IN WESTERN AUSTRALIA

1.	THE COMMISSIONER OF MAIN ROADS	3.2
2.	LOCAL GOVERNMENT COUNCILS	3.6
3.	OTHER HIGHWAY AUTHORITIES	3.9
4.	SUMMARY	3.14

## CHAPTER 4 - THE LIABILITY OF PUBLIC AUTHORITIES GENERALLY

1.	CIVIL LIABILITY FOR MISFEASANCE	4.2
2.	CIVIL LIABILITY FOR NON-FEASANCE	4.6
	(a) Public authorities other than highway authorities	4.6
	(b) Highway authorities	4.9
3.	CIVIL LIABILITY FOR NON-PERFORMANCE OF STATUTORY DUTIES	4.11
	(a) Public authorities generally	4.11
	(b) Highway authorities	4.12
4.	CONCLUSION	4.13

## CHAPTER 5 - THE POSITION IN OTHER JURISDICTIONS

1.	THE LAW IN OTHER JURISDICTIONS	5.1
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(a)	Scotland	5.1
(b)	England and Wales	5.2
(c)	Canada	5.7
(d)	The United States of America	5.12
(e)	Other jurisdictions in Australia	5.14
2.	RECOMMEDATIONS FOR REFORM IN OTHER JURISDICTIONS	5.15
(a)	British Columbia	5.15
(b)	New Zealand	5.19
(c)	South Australia	5.21

## **CHAPTER 6 - WHY REFORM IS NEEDED**

1.	INTRODUCTION	6.1
2.	THE NEED FOR COMPENSATION	6.2
3.	DEFECTS IN THE PRESENT LAW	6.7
(a)	The non-feasance, misfeasance distinction	6.8
(i)	Distinguishing non-feasance from misfeasance	6.9
(ii)	The merits of the distinction	6.15
(b)	The restriction of the non-feasance rule to highway authorities	6.19
(i)	Applying the restriction	6.22
(ii)	The merits of the restriction	6.23
(c)	The artificial structures exception	6.25
(i)	Uncertainties surrounding the exception	6.26
(ii)	Merits of the exception	6.27

## **CHAPTER 7 - THE ARGUMENTS IN FAVOUR OF RETAINING THE RULE**

1.	INTRODUCTION	7.1
2.	THE ARGUMENTS AND THE COMMISSION'S RESPONSE	7.2
(a)	The lack of power in a local authority to close a public highway	7.2
(b)	It is for the highway authority to determine how to allocate the funds available to it among the various demands competing for them	7.5
(c)	Abolition of the non-feasance rule would impose an undesirable financial burden upon highway authorities	7.9
(i)	The payment of compensation to successful claimants	7.13
(ii)	The payment of insurance premiums	7.15
(iii)	Expenditure associated with efforts to reduce the number of accidents	7.19
(iv)	Administrative costs associated with processing claims	7.21
(d)	Highway authorities are in a unique position	7.22

## **CHAPTER 8 - RECOMMENDATIONS FOR REFORM**

1.	INTRODUCTION	8.1
2.	THE MAIN RECOMMENDATIONS	8.4

(a)	The non-feasance rule be abolished	8.4
(b)	Highway authorities be required to take reasonable care	8.6
(i)	The alternatives considered by the Commission	8.7
(ii)	The consequences of imposing this duty of care	8.11
(c)	When determining whether a highway authority had exercised reasonable care, a court be entitled to consider, among others, certain specified criteria	8.20
(d)	The burden of proving that a highway authority failed to exercise reasonable care be upon the person seeking damages	8.23
(e)	The existing provisions concerning contributory negligence and contribution between persons guilty of negligence apply to claims brought against highway authorities for breach of the duty of care	8.25
(f)	The existing notice requirements and limitation periods applicable to highway authorities apply to claims brought against them for breach of the duty of care	8.27
3.	<b>OTHER RECOMMENDATIONS</b>	8.30
(a)	Persons who suffer injury or damage as a result of a breach of the duty of care be entitled to recover damages from the highway authority	8.30
(b)	Breach of the duty of care be made the only ground upon which highway authorities can be liable in cases of non-feasance	8.31
(c)	The above reforms apply to the Crown	8.33
(d)	Responsibility for Forests Department roads be clarified	8.34
4.	<b>SETTLING IN PERIOD</b>	8.35

**APPENDIX I - COMMENTATORS ON THE WORKING PAPER**

**APPENDIX II - LEGISLATION IN WESTERN AUSTRALIA RELEVANT TO THE LIABILITY OF HIGHWAY AUTHORITIES**

**APPENDIX III - LEGISLATION GOVERNING THE LIABILITY OF HIGHWAY AUTHORITIES IN CERTAIN OTHER JURISDICTIONS**

# CHAPTER 1

## SUMMARY OF REPORT

### 1. THE COMMISSION'S TERMS OF REFERENCE

1.1 The Commission was asked to consider and report upon whether there should be any change in the law governing the liability of highway authorities for accidental injury or damage caused by the condition of the highways under their care, control and management. These terms of reference have been interpreted as requiring the Commission to report upon whether there should be any change to an old common law rule known as "the non-feasance rule". According to this rule, except in respect of dangers they have created or where there is a statutory provision to the contrary, highway authorities are under no duty to undertake active measures to safeguard persons using their highways against dangers which make them unsafe for normal use.<sup>1</sup>

1.2 In 1978, the Commission released a working paper describing and evaluating the operation of the non-feasance rule in Western Australia and certain other jurisdictions, and calling for public comment on the issues raised and discussed in the paper.<sup>2</sup>

### 2. THE SPECIAL IMMUNITY OF HIGHWAY AUTHORITIES

1.3 As a result of the non-feasance rule, highway authorities in Western Australia possess, at common law, an immunity from civil liability not enjoyed by other public authorities.<sup>3</sup> The origins of this rule can be traced to medieval England. It developed because of the social and administrative conditions that existed in England before the system of local government was reformed in that country in the nineteenth century.<sup>4</sup> Although these conditions never existed in Western Australia,<sup>5</sup> the non-feasance rule was automatically introduced into this State, as

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<sup>1</sup> See also paras 2.1 and 2.2 below.

<sup>2</sup> Referred to in this report as the "Working Paper". The Working Paper and the submissions received in response to it are described further in paras 2.12 to 2.15 below.

<sup>3</sup> An immunity from certain forms of civil liability has been given to a small number of authorities by statute. See generally footnote 2 p 24 below.

<sup>4</sup> Prior to these reforms, the inhabitants of parishes and counties were responsible for local amenities. The origins and development of the non-feasance rule are outlined in paras 2.3 to 2.5 below.

<sup>5</sup> In Western Australia, responsibility for highways was never imposed upon private individuals. It was at the outset imposed upon public authorities by statute, before the passage of which, no duty or liability in respect of maintenance or repair rested upon anyone. See generally, *Buckle v Bayswater Road Board* (1936) 57 CLR 259, 268-269.

part of the English common law, when the colony was settled in 1829. The rule was abolished in England in 1961.

1.4 The nature and extent of the special immunity possessed by highway authorities is shown by the following examples based on cases decided in Australia. Because of the non-feasance rule, in each of these examples the highway authority involved would not be liable to pay damages in respect of the injury, death or damage described, even though they occurred as the result of fault on the highway authority's part. On the other hand, in comparable situations within their areas of responsibility, other public authorities such as sewerage, drainage and energy authorities would be liable to pay damages to the accident victims involved or their families.

- \* Personal injury caused to a motorist by the defective condition of a bridge forming part of the highway which the highway authority had negligently allowed to fall into a state of disrepair and in respect of which it had done nothing by way of warning or repair.<sup>6</sup>
  
- \* A double fatality caused by a motor truck crashing into a chasm which the highway authority knew had developed in the highway, the chasm having earlier caused another double fatality, but in respect of which the highway authority had nevertheless done nothing to safeguard persons using the highway.<sup>7</sup>
  
- \* Severe personal injury suffered as a result of tripping over a concrete paving slab situated in a suburban street that had, for a considerable time, been raised above its normal level by a tree root growing under it.<sup>8</sup>
  
- \* Property damage caused by a dangerous tree adjacent to a suburban highway falling on to a motor vehicle parked on the highway, about which danger the highway authority had been warned, but in respect of which it had done nothing before the tree fell several days later.<sup>9</sup>

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<sup>6</sup> *Murphy v The Murray Roads Board* (1906) 8 WALR 45.

<sup>7</sup> *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357, 377.

<sup>8</sup> *Hellyer v Commonwealth of Australia* [1964] ALR 1026.

<sup>9</sup> *Hornsby Shire Council v Bretherton* [1964] NSW 85.

### **3. WHY REFORM IS NEEDED**

1.5 The Commission believes that the law governing the liability of highway authorities for accidental injury or damage caused by the condition of the highways under their care, control and management is in need of reform. The Commission has reached this conclusion because -

- \* most importantly, the immunity created by the non-feasance rule prevents the recovery of damages in the kind of deserving cases described in paragraph 1.4 above, with the result that serious financial loss may be suffered by accident victims and their families;
- \* the non-feasance rule is in practice unsatisfactory because the distinctions drawn in connection with it are exceedingly difficult to apply or justify.

1.6 Although the Commission has concluded that there is a need for reform it emphasises that, in responding to this need, account has been taken of the arguments advanced in favour of retaining the present law. Thus in a number of important respects the Commission has framed its specific recommendations to avoid the difficulties highway authorities could experience if the immunity created by the non-feasance rule were simply abolished without some compensating measures being adopted.

### **4. THE COMMISSION'S RECOMMENDATIONS FOR REFORM**

#### **(a) Two guiding principles**

1.7 In formulating its recommendations for reform the Commission has been guided by two principles, namely that -

- \* the law governing the liability of highway authorities should, as far as is practical, be the same as the law governing other public authorities;

- \* the law should be reformed in a manner that will overcome the hardship and inequities caused by the immunity created by the non-feasance rule without at the same time placing an undue burden upon the limited financial resources of highway authorities.

1.8 Reform of the law in accordance with these principles would result in highway authorities being required to take reasonable care to safeguard persons using their highways against dangers which make them unsafe for normal use. The precise manner in which the duty was performed, however, would be a matter for each highway authority to determine having regard to all the circumstances of the particular case. As long as the method adopted was appropriate to fulfil the duty of care, the authority would be able to choose between, for example, erecting warning signs or safety barriers, repairing or maintaining the highway or temporarily closing dangerous sections thereof.

**(b) Summary of the Commission's main recommendations**

1.9 The Commission recommends that -

- (i) the non-feasance rule be abolished and highway authorities required to take such care as is reasonable in all the circumstances to safeguard persons using their highways against dangers which make them unsafe for normal use, so that persons who suffer injury or loss as a result of a breach of that duty can recover damages;
- (ii) in determining whether a highway authority has fulfilled this duty of care a court should be entitled to consider, among other matters -
  - (a) the character of the highway;
  - (b) the character and the amount of traffic which could reasonably be expected to use the highway;
  - (c) the precautionary measures appropriate to safeguard persons using a highway of that character, at the time, and in the location, the accident occurred;

- (d) the financial and other resources available to the authority for use in connection with the highways for which it is responsible;
  - (e) the condition or state of repair in which a reasonable person would have expected to find the highway;
  - (f) whether the authority knew, or ought reasonably to have known, that a danger had occurred in the highway;
  - (g) whether, before the accident in question happened, the authority could reasonably have been expected to remove, or provide safeguards against, the danger in the highway which caused the accident.
- (iii) the burden of proving that a highway authority failed to fulfil the duty of care be upon the person claiming damages for breach of that duty;
- (iv) the present law concerning contributory negligence, and concerning contribution between persons liable in negligence to the person claiming damages, apply to claims brought against highway authorities for breach of the duty of care;
- (v) the present law concerning giving notice to highway authorities of claims to be brought against them, and concerning the time within which those claims can be brought, apply to claims for breach of the duty of care.

**(c) Other recommendations**

1.10 The Commission also recommends that -

- (i) breach of the duty of care recommended above be made the only ground upon which highway authorities can be liable to pay damages in cases of non-feasance;
- (ii) the duty of care recommended above apply to the Crown when it is a highway authority;
- (iii) responsibility for Forests Department roads be clarified.

**(d) Settling in period**

1.11 To give highway authorities time to comply with the duty of care recommended above, and to take such other measures as they consider are necessary, the Commission recommends that the Act creating the duty not come into force until a complete financial year has elapsed after it is passed.

**5. CONCLUSION**

1.12 Implementation of these recommendations would be an important reform of the law governing the liability of highway authorities. It would allow damages to be recovered by accident victims or their families in a number of deserving cases in which they are not presently recoverable and would remove a number of anomalous defects in the existing law. There is no reason to believe that this reform would prove to be unduly burdensome to highway authorities. Although it is likely to involve highway authorities in certain additional costs, these should not be of a magnitude that would have a prejudicial effect on their primary functions and responsibilities, nor be too high a price to pay for the benefits that will result from reform.

## CHAPTER 2 INTRODUCTION

### 1. THE NON-FEASANCE RULE

2.1 The special immunity<sup>1</sup> from civil liability for negligence enjoyed by highway authorities<sup>2</sup> exists because of the non-feasance rule. According to this rule,<sup>3</sup> except in respect of dangers they have created or where there is a statutory provision to the contrary,<sup>4</sup> highway authorities are under no duty to undertake active measures to safeguard persons using their highways<sup>5</sup> against, dangers which make them unsafe for normal use.

2.2 The effect of the non-feasance rule is to prevent persons who suffer injury or loss due to the dangerous condition of a highway<sup>6</sup> recovering damages from the highway authority responsible for the highway, except where the authority or its servants actively caused the danger, even though by exercising reasonable care the authority could have prevented or removed the danger or safeguarded persons against it and yet failed to do so.<sup>7</sup> For the reasons

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<sup>1</sup> The immunity is not complete. The situations in which highway authorities **are** liable for negligence are described in paras 4.2 to 4.4 and 4.10 below.

<sup>2</sup> The highway authorities in Western Australia are described in paras 3.2 to 3.13 below.

<sup>3</sup> The non-feasance rule really encompasses two separate sub-rules, namely, the rule stated in the text and the rule that in the absence of a statutory provision to the contrary, highway authorities are not subject to any duty, enforceable by civil action, to keep in repair or maintain their highways (*Buckle v Bayswater Road Board* (1936) 57 CLR 259, esp 281; *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357, esp, 375-376). As a result of this second rule no action for nuisance, for example, will lie against a highway authority for the inconvenience and expense caused by a highway being in an impassable condition. This rule is not unique to highway authorities insofar as an equivalent appears to apply, at common law, to all public authorities. The Commission has recommended the retention of this rule (see generally, para 8.32 and footnote 1 on p 70 below) and has concentrated in this report upon the first rule which, for convenience, it has called the "non-feasance rule".

<sup>4</sup> The effect of a statutory provision imposing a duty to maintain or repair a highway is discussed in para 4.12 below. Briefly, the rule is that even if a statutory duty to maintain a highway or keep it in repair is imposed on a highway authority, the authority will nevertheless not be liable to anyone who suffers injury or damage because of its failure to perform that duty unless the statute expressly or by necessary implication confers such a right of action. This rule is also sometimes regarded as a sub-rule of the non-feasance rule (see for example, *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357, esp, 376). However, the Commission is of the view that this rule is more accurately seen as being merely an adjunct to the two rules referred to in footnote 3 above.

<sup>5</sup> "Highway" is defined, for the purposes of this report, in para 2.6 below.

<sup>6</sup> There is authority for the view that the rule applies only to the highway itself and not to artificial structures erected in connection with the highway. It has been held that in relation to such structures a highway authority can be made liable in cases of non-feasance; see generally paras 6.25 to 6.28 below.

<sup>7</sup> *Buckle v Bayswater Road Board* (1936) 57 CLR 259; *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357. Examples of the operation of the non-feasance rule are given in para 1.4 above.

given below,<sup>8</sup> the Commission is of the opinion that this rule should be abolished and it recommends accordingly.<sup>9</sup>

## 2. THE ORIGINS OF THE NON-FEASANCE RULE

2.3 The origins of the non-feasance rule<sup>10</sup> can be traced to a case decided in 1466.<sup>11</sup> In this case, the court held that no action lay for damage caused by the non-repair of the highway on the ground that, because the obligation to repair was owed to the public at large, no individual could maintain an action for breach of it. The effect of this decision was modified towards the end of the following century, however, to allow an action to be brought by a person who suffered special damage over and above that suffered by other members of the public. At first this was allowed only against a third person where that person had created the danger which caused the damage complained of.<sup>12</sup> Later, it was established that an action could also be brought against an individual or corporation upon whom a duty to repair the highway had been imposed by the terms of a grant of land, where that duty had been broken and the plaintiff had suffered special damage as a result.<sup>13</sup>

2.4 For procedural reasons only, the latter development was not applied where the duty to repair the highway was imposed not on a particular person or corporation but upon the individuals living within the county or parish through which the highway passed.<sup>14</sup> In such cases it was said that civil liability could not arise because those individuals were not a corporation and they could not be sued collectively.<sup>15</sup> In addition, the courts reasoned that an action should not be allowed in such cases as it would be difficult to apply in practice since a successful plaintiff would have to attempt to collect damages from every member of the community responsible for repairing the highway in question.<sup>16</sup> In the eighteenth century these procedural difficulties ossified into a substantive rule of law that civil liability could not arise at common law for non-feasance in respect of a highway. As a result, when these

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<sup>8</sup> Paras 6.1 to 6.28 and paras 7.1 to 7.26 below.

<sup>9</sup> The Commission's recommendations are set out in detail in paras 8.1 to 8.35 below.

<sup>10</sup> Although the term "non-feasance" is not used in the earlier cases, it is convenient to use it throughout.

<sup>11</sup> For a discussion of the origins and development of the non-feasance rule see Holdsworth, *A History of English Law*, esp Vol X 310-322.

<sup>12</sup> *Williams' Case* (1594) 5 Co Rep 72b, 73a; 77 ER 163, 164; *Maynell v Saltmarsh* (1666) 1 Keble 847; 83 ER 1278.

<sup>13</sup> *Thomas v Sorrell* (1674) Vaugh 330, 340; 124 ER 1098, 1103-1104; *McKinnon v Penson* (1853) 8 Ex 319, 327; 155 ER 1369, 1372-1373.

<sup>14</sup> *Russell v Men of Devon* (1788) 2 TR 667; 100 ER 359.

<sup>15</sup> *Thomas v Sorrell* (above); *Russell v Men of Devon* (above) 671-672; 362.

<sup>16</sup> *Russell v Men of Devon* (above) 671-673; 362-363.

difficulties were removed in the nineteenth century by statutes allowing the individuals within a county or parish to be sued in the name of the surveyor, or creating municipal corporations to control and maintain highways, it was held that the rule still applied.<sup>17</sup> The statutes were treated by the courts as effecting procedural reforms only and therefore as not intended to alter the substantive law.<sup>18</sup>

2.5 The non-feasance rule was confirmed by the House of Lords in 1892<sup>19</sup> and applied in Australia by the Privy Council in 1895.<sup>20</sup> It has remained unchanged since then and has been largely unaffected by the considerable developments in the law of negligence which have occurred in the twentieth century and which have affected almost every other area of government and non-government activity. The rule was abolished in England in 1961.<sup>21</sup>

### 3. THE MEANING OF "HIGHWAY"

2.6 At common law the word "highway" is understood to mean all those portions of land over which all members of the public may lawfully pass.<sup>22</sup> "Highways" are therefore not confined to roads popularly known as highways but include, for example, any roadways for vehicular traffic, tracks and footpaths.<sup>23</sup> As so defined, the essential characteristic of a highway is that all members of the public have a right to use it for the appropriate kind of traffic, subject to restrictions applying to all persons alike.<sup>24</sup> Consequently, if only particular individuals or a limited class of the public have a right of passage, or if the owner of the land is entitled to close it off to the public, the land will not be a highway.

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<sup>17</sup> *McKinnon v Penson* (above) (surveyor); *Young v Davis* (1862) 7 H & N 760; 158 ER 675 (surveyor); *Gibson v Mayor of Preston* (1870) LR 5 QB 218 (corporation).

<sup>18</sup> In *Young v Davis* above it was also noted that if actions were allowed against municipal surveyors it would become difficult to find persons willing to act as such.

<sup>19</sup> *Cowley v Newmarket Local Board* [1892] AC 345.

<sup>20</sup> *Municipal Council of Sydney v Bourke* [1895] AC 433.

<sup>21</sup> *Highways (Miscellaneous Provisions) Act 1961*, s 1(1). This provision is reproduced in Appendix III, p 103 below.

<sup>22</sup> *Commissioner for Railways v Dangar* (1943) 15 LGR 101; *City of Keilor v O'Donohue* (1971) 126 CLR 353, 363. There can be highways by water as well as by land. These are outside the Commission's terms of reference and have therefore not been dealt with in this report.

<sup>23</sup> When used in connection with land formally dedicated as a highway or roadway, "highway" includes not only the travelled part of the way but also the adjacent verges within the highway reserve. See generally *Stroud's Judicial Dictionary*, (4th ed 1972) Vol 2, 1240.

<sup>24</sup> *Halsbury's Laws of England* Vol 19 (3rd ed 1957) para 9. This definition does not correspond to the definition of "highway" adopted in the *Main Roads Act 1930-1980*. However, it is very similar to the definition of "road" in that Act. Both definitions are reproduced on p 94 below.

2.7 When used in connection with the non-feasance rule "highway" is given its common law meaning. Therefore, this meaning was adopted in the Working Paper and is used in this report.

#### 4. THE DISTINCTION BETWEEN "NON-FEASANCE" AND "MISFEASANCE"

2.8 The terms "non-feasance" and "misfeasance" are frequently used in discussions concerning the liability of highway authorities. "Non-feasance" is a term used to describe a person's omission to do something which, had it been done, would have been beneficial<sup>25</sup> to another person, or would have prevented or reduced the likelihood of that person being injured, or his property being damaged, by something that operated independently of any act or omission on the part of the former. "Misfeasance" on the other hand is a term used to describe a person's act, which occurred in breach of a civil duty, and which caused injury or damage to another person. Misfeasance is not itself, however, a specific head of tortious liability and therefore anyone seeking to obtain a remedy on the basis of another's act must establish that one of the recognised torts has been committed by that person.

2.9 It is important to emphasise that certain kinds of omission amount to misfeasance and that therefore not every omission can properly be described as an instance of non-feasance. The determining factor in each case is whether or not the omission was in substance a wrongful way of doing something rather than an omission to do anything at all.<sup>26</sup> If it was, then the omission will be regarded as misfeasance. If, however, it was not, the omission will be regarded as non-feasance. Thus, for example, if a highway authority dug a hole in a highway and omitted to erect a protective barrier around it at night, this would be misfeasance in relation to users of the highway.<sup>27</sup> If on the other hand the hole was created by natural causes, the authority's failure to erect a barrier would be characterised as non-feasance.<sup>28</sup>

2.10 The distinction between non-feasance and misfeasance is relevant to the liability of all individuals, corporations and public authorities. However, the distinction is particularly important in relation to the liability of highway authorities because in cases of non-feasance the effect of the non-feasance rule is to confer upon highway authorities a degree of immunity

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<sup>25</sup> For example, removing an obstruction so that a highway can be used again see generally, footnote 3, p 11 above.

<sup>26</sup> The difficulties associated with drawing this distinction, in relation to highway authorities, and the merits thereof, are discussed in paras 6.9 to 6.18 below.

<sup>27</sup> *Clarke v Borough of North Sydney* (1893) 14 LR (NSW) 499.

<sup>28</sup> *Hancock v Weddin Shire Council* (1949) 17 LGR 192.

from civil liability not enjoyed at common law by other public authorities,<sup>29</sup> individuals or companies.

2.11 The distinction between non-feasance and misfeasance is discussed further and set in the context of the liability of public authorities generally in Chapter 4. The difficulties arising from the distinction are discussed in Chapter 6.

## **5. THE WORKING PAPER**

2.12 The Commission issued a working paper<sup>30</sup> in March 1978 which was circulated widely within Western Australia and elsewhere. In this paper the Commission described the origins of the non-feasance rule and its application in Western Australia and analysed the reforms and proposals for reform adopted or made in other jurisdictions. It also outlined the arguments advanced for and against the rule and invited comment on a number of important questions.

2.13 The Commission received a number of very helpful submissions in response to the Working Paper which assisted it to formulate the recommendations made in this report.<sup>31</sup> These included submissions from several local authorities responsible for highways, the Main Roads Department, the Department of Local Government, municipal planners and engineers, a number of private individuals, a judge of the Supreme Court and the Law Society of Western Australia.

2.14 Of the twenty-one commentators who responded to the Working Paper, Mr Justice Wallace, the City of Melville, the Town of Cockburn, the City of Fremantle, the Royal Automobile Club of WA (Incorporated), Mr J E Thew, Mrs M J Lorriman, the Law Society of Western Australia (Inc), Mr J A D Treloar and Mr LH Wills (the City Planner and the City Engineer of the City of Melville, respectively) said that the non-feasance should be abolished. The Department of Local Government said municipal councils should not be able to avoid liability where it is proved that they had been negligent. The Local Government Engineers Association of Western Australia made a similar comment in relation to highway authorities. In both cases this would involve abolishing the non-feasance rule. Only five commentators, namely, the Esperance Shire Council, the Executive Committee of the Local Government

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<sup>29</sup> A small number of statutory immunities exist; see generally footnote 2 p 24 below.

<sup>30</sup> Copies of the Working Paper can be obtained from the Commission.

<sup>31</sup> A list of the commentators appears as Appendix I.

Association of Western Australia (Inc), the Main Roads Department, the Shire of Wanneroo and the Motor Vehicle Insurance Trust said that the non-feasance rule should be retained. Four commentators expressed no view on this issue.

2.15 Broadly speaking, the commentators who dealt with the other issues raised for consideration in the Working Paper, expressed views that accord with the reforms recommended by the Commission in this report.<sup>32</sup>

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<sup>32</sup> On individual issues there is some divergence. For example, Mr Thew said that highway authorities should be under a duty to repair roads, and the Main Roads Department said that contributory negligence should be a complete defence to a claim brought against a highway authority.

## CHAPTER 3

### HIGHWAY AUTHORITIES IN WESTERN AUSTRALIA

3.1 A highway authority is “... an authority exercising powers for the construction, maintenance, repair and control of highways”.<sup>1</sup> In Western Australia the principal highway authorities are the Commissioner of Main Roads, local government councils and the Minister for Works. Their powers and responsibilities are described below.

#### 1. THE COMMISSIONER OF MAIN ROADS

3.2 The Commissioner of Main Roads is empowered by the *Main Roads Act 1930-1980*<sup>2</sup> to make, form, improve and maintain, all “highways” and “main roads” and do all things necessary for or incidental to the proper management thereof.<sup>3</sup> To facilitate the exercise of these powers, the Commissioner is given the care, control and management of the land over which a highway or main road is declared, and the property in the materials of all highways and main roads and, inter alia, in all erections, structures, timber and vegetation thereon.<sup>4</sup>

3.3 The effect of these provisions is to make the Commissioner of Main Roads a highway authority in respect of all highways and main roads as defined in the *Main Roads Act*.

3.4 The Commissioner may also provide, construct or improve “roads” or parts of roads for the development of an area or for any other purpose, even though they have not been declared to be a highway, main road or secondary road<sup>5</sup> and may be empowered by the Governor to construct any “secondary road”.<sup>6</sup> However, as the Act makes each local authority responsible for maintaining, within its district, the secondary roads and roads constructed pursuant to section 27A(1) thereof, the authority, and not the Commissioner, is the highway authority in relation to those roads.

3.5 The Commissioner has the power to close or partially close any highway or main road to traffic generally, or to traffic of a particular class, where the Commissioner is of the

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<sup>1</sup> *Buckle v Bayswater Road Board* (1936) 57 CLR 259, 286 per Dixon J.

<sup>2</sup> The principal sections of the Act, including the definitions of “highway”, “main road”, “road” and “secondary road”, are reproduced in Appendix II, pp 94 to 97 below.

<sup>3</sup> *Main Roads Act 1930-1980*, s 16(1).

<sup>4</sup> Id, s 15(2) and (3).

<sup>5</sup> Id, s 27A(1).

<sup>6</sup> Id, s 24(1)(b).

opinion that it has become unsafe.<sup>7</sup> However, the consent of the Minister is required to close a highway or main road for any period of more than twenty-eight consecutive days or for periods aggregating more than twenty-eight days in the space of one year.<sup>8</sup>

## 2. LOCAL GOVERNMENT COUNCILS

3.6 The *Local Government Act 1960-1980*<sup>9</sup> provides that a local government council<sup>10</sup> has the care, control and management of, inter alia, the "streets",<sup>11</sup> bridges and culverts within its district (or which although not within its district, are placed or are regarded as being within its district) except where and to the extent that under an Act of Parliament another authority has that care, control and management.<sup>12</sup> To enable councils to carry out this responsibility they are empowered by the Act to make, improve, repair, maintain and keep in good order and condition those streets, bridges and culverts.<sup>13</sup>

3.7 As the *Main Roads Act* makes the Commissioner for Main Roads responsible for all highways and main roads as defined in that Act, local government councils are highway authorities only in relation to the secondary<sup>14</sup> and non-declared<sup>15</sup> roads and adjoining footpaths within their districts, and possibly the footpaths adjoining highways and main roads for which in practice they are made responsible.<sup>16</sup>

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<sup>7</sup> Id, s 16A(1). In addition, under s 92(1) of the *Road Traffic Act 1974-1979* the Minister responsible for that Act may close any unsafe road for such period as he thinks necessary. Sections 5(1) and 92 of the *Road Traffic Act* are reproduced in Appendix II, p 100 below.

<sup>8</sup> Id, s 16A(2).

<sup>9</sup> The principal sections of the Act relating to highways are reproduced in Appendix II, pp 90 to 93 below.

<sup>10</sup> The *Local Government Act* s 9(5)(e) provides that the council on behalf of, and in the name of the municipality, may exercise the powers conferred, and shall discharge the obligations imposed, by law upon the municipality or the council.

<sup>11</sup> A street is defined in s 6 of the *Local Government Act* to include a highway and a thoroughfare which the public are allowed to use.

<sup>12</sup> *Local Government Act* s 300.

<sup>13</sup> Id, s 301(a).

<sup>14</sup> *Main Roads Act 1930-1980*, s 24(5).

<sup>15</sup> Id, s 27A(2).

<sup>16</sup> This may come about in either of two ways. First, the Governor, on the recommendation of the Commissioner of Main Roads, may by proclamation under s 13(1) of the *Main Roads Act 1930-1980* declare that the footpaths are to be excluded from a highway or main road. Secondly, the Commissioner under s 16(2) could leave the maintenance of the footpaths to the local authority but in this case the local authority's power to maintain the footpaths will be "subject to the control and direction of the Commissioner". The fact that footpaths are mainly for the benefit of local residents or businesses is probably the reason why the task of maintaining the footpaths usually falls to the local authority.

3.8 Local government councils have the power to close all or part of a street or bridge during such time as it is being repaired<sup>17</sup> or if it is unsafe for public traffic.<sup>18</sup>

### 3. OTHER HIGHWAY AUTHORITIES

3.9 Under the *Public Works Act 1902-1979*,<sup>19</sup> the Minister for Works may construct or repair any "road" within the State.<sup>20</sup> The Commission understands, however, that it is rare for the Minister to construct a road.

3.10 The *Public Works Act* also empowers the Governor, by order in Council, to declare that any road or part thereof shall be a Government road.<sup>21</sup> Government roads are under the exclusive control and management of the Minister for Works<sup>22</sup> who therefore would be a highway authority in relation to them. The power of the Minister to make by-laws in respect of Government roads is the same as that possessed by a local government council in relation to roads within its districts.<sup>23</sup> The Commission understands that the power to declare a "Government road" has not been exercised for many years.

3.11 Roads are also constructed by the Forests Department in the exercise of its general power to control and manage State Forests and timber reserves.<sup>24</sup> These roads are constructed mainly for fire protection although some of them also serve to link towns, service tourist attractions and provide access to farms. They vary considerably in standard. Members of the public are allowed to use all Forests Department roads except in those areas which have been placed under quarantine.

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<sup>17</sup> *Local Government Act 1960-1980*, s 301(b); the council cannot close a street or bridge under this provision for a longer period than 28 days or for periods aggregating more than 28 days in any period of twelve months without the previous permission of the Minister; see s 301(d).

<sup>18</sup> *Road Traffic Act 1974-1980*, s 92(2). Also, under s 92(1) of this Act the Minister may close any unsafe road for such period as he considers necessary. A local authority can close an unsafe road under s 92(2) for a period of one month only, although the Minister may approve an extension of this period.

<sup>19</sup> The principal sections of the Act relevant to highways including the definition of "road" are reproduced in Appendix II, pp 98 and 99 below.

<sup>20</sup> *Public Works Act 1902-1979*, s 86(1).

<sup>21</sup> *Id*, s 86(2).

<sup>22</sup> *Id*, s 87(1).

<sup>23</sup> *Id*, s 87(2).

<sup>24</sup> *Forests Act 1918-1976*, s 7(2)(b). The principal sections of the Act relevant to highways are reproduced in Appendix II, p 88 below.

3.12 Roads constructed by the Forests Department are deemed to be Crown land<sup>25</sup> and there are dicta to the effect that in relation to those roads, the non-feasance rule applies to the Crown regardless of whether they are highways or not.<sup>26</sup> Nevertheless, the position in relation to Forests Department roads is uncertain as doubts exist concerning who is responsible for maintaining them,<sup>27</sup> whether some or all of them are highways at common law,<sup>28</sup> and whether the non-feasance rule would apply in relation to those Forests Department roads that are not highways at common law.<sup>29</sup>

3.13 Finally, under certain mining agreements ratified by the State Parliament the mining company involved is made responsible for the construction and maintenance of the private roads to be used by the company in its operations and the public roads needed in the approved towns established by the company.<sup>30</sup> As the private roads are not highways the company is not a highway authority in relation to them and therefore would not, at common law, enjoy the immunity created by the non-feasance rule. It is also possible that as the company is not a public authority it would not enjoy this immunity in relation to public roads either. However, the non-feasance rule may still avail the company because such agreements commonly provide that for the purpose of determining liability in relation to any accident arising out of the use of any of the roads for the maintenance of which the company is responsible, the company shall be deemed to be a municipality and the roads deemed to be streets under its care, control and management.<sup>31</sup> As municipalities enjoy the benefit of the non-feasance rule in relation to their streets, that benefit would appear to pass to the company under such a provision.

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<sup>25</sup> *Forests Act 1918-1976*, s 69.

<sup>26</sup> *Van Kann v The Conservator of Forests* (unreported) W.A. Supreme Court V2/1966.

<sup>27</sup> For example, in *Van Kann v The Conservator of Forests* (above), Negus J suggested that local government council may have the power to repair Forests Department roads within its district.

<sup>28</sup> Forests Department roads may become dedicated as highways at common law. This will occur when members of the public have been permitted to use the road in circumstances from which it can be inferred that the Crown intended to dedicate the road as a highway. See generally, *Halsbury's Laws of England* Vol 19 (3rd ed 1957) 44-56.

<sup>29</sup> It is arguable that in relation to Forests Department roads that have not been dedicated as highways at common law or otherwise, the liability of the Crown for injury or loss suffered by persons using the road and attributable to its dangerous condition, would be determined in accordance with the law governing the liability of public authorities in control of land or premises to persons entering thereon as of right. This is the same as the liability the Commission proposes be imposed upon highway authorities in relation to highways. See generally *Schiller v Council of The Shire of Mulgrave* (1972) 129 CLR 116.

<sup>30</sup> For example, the *Nickel (Agnew) Agreement Act 1974*, clauses 11(1) and 18(1)(a)(ii) and (iv) of the Schedule. The Commission has not considered in this report the effect implementation of its recommendations would have on the liability of the mining companies that have entered into agreements containing such provisions. This appears to the Commission to be a matter for the companies concerned and the State Government.

<sup>31</sup> For example, the *Nickel (Agnew) Agreement Act 1974*, clause 11(5) (a) and (b).

#### 4. SUMMARY

3.14 The following table shows the different categories into which highways are divided in Western Australia, the total length of sealed and unsealed roadway within each category as at 30 June 1980<sup>32</sup> and the body responsible for maintaining the highways within each category.

HIGHWAY CLASSIFICATION	LENGTH (KM)	BODY RESPONSIBLE FOR MAINTENANCE
Highways		Commissioner of Main Roads
sealed	7,262.19	<i>Main Roads Act</i> s.16(1)
unsealed	<u>454.33</u>	
total	7,716.52	
Main Roads		Commissioner of Main Roads
sealed	5,351.12	<i>Main Roads Act</i> s.16(1)
unsealed	<u>2,230.55</u>	
total	7,581.67	
Secondary Roads		Local authority in whose district the road is situated.
sealed	5,267.69	
unsealed	<u>3,466.15</u>	<i>Main Roads Act</i> s.24(5)
total	8,733.84	
Non-declared Roads		Local authority in whose district the road is situated.
sealed	16,822.46	
unsealed	<u>96,814.96</u>	<i>Main Roads Act</i> s.27A(2)
total	113,637.42	
Forest Department Roads		Crown <sup>33</sup>
sealed	16	
unsealed	<u>25,306</u>	
total	25,322	
Mining Company Roads	(not known)	Mining Company

<sup>32</sup> The figures for the length of sealed and unsealed roadway within each category have been provided by the Main Roads Department. No figures are available for mining company roads. The assistance of the Department in providing information for use in this report is gratefully acknowledged.

<sup>33</sup> But see para 3.12 above.

## CHAPTER 4

### THE LIABILITY OF PUBLIC AUTHORITIES GENERALLY

4.1 To place the non-feasance rule in the context of the law governing the civil liability of public authorities generally, this chapter contains a brief summary of the civil liability of public authorities, including highway authorities, for misfeasance, for non-feasance and for failing to perform their statutory duties. The non-feasance rule does not affect the liability of highway authorities for misfeasance, which is the same as that of other public authorities. However, it gives highway authorities a special protection from civil<sup>1</sup> liability for non-feasance not generally enjoyed by other public authorities<sup>2</sup> and influences the manner in which the rules governing liability for the non-performance of statutory duties are applied.

#### 1. CIVIL LIABILITY FOR MISFEASANCE

4.2 Public authorities, including highway authorities, must exercise their statutory powers and perform their statutory duties with reasonable care. If an authority, or in certain circumstances its servants and independent contractors, does not do so then, in the absence of a statutory immunity,<sup>3</sup> it will be liable to pay damages to anyone who suffers injury or damage as a result. Thus, for example, liability has arisen where an electricity authority negligently supplied a customer with electrical current below its normal standard,<sup>4</sup> a transport

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<sup>1</sup> The Commission notes that a highway authority may become criminally liable under s 207 of the *Criminal Code 1913-1980*. Although there is no authority on this point, it appears to the Commission to be arguable that one of the effects of s 207(2) of the Code is to impose upon highway authorities a duty to keep their highways in a reasonably safe condition for the users thereof. If the section does have this effect, then failure to perform the duty will be a common nuisance under s 207(1) and the authority guilty of a misdemeanour. Breach of the duty, however, will probably not confer a civil right of action on anyone injured as a result.

<sup>2</sup> No other public authority enjoys, at common law, the protection the non-feasance rule gives to highway authorities. However, a small number of authorities are given statutory protection in terms which may protect them from civil liability in situations broadly analogous to those in which the non-feasance rule protects highway authorities. Thus s 101 of the *Road Traffic Act 1974-1980* confers an immunity from liability in respect of matters or things "omitted to be done". On the other hand, no statutory protection analogous to that conferred by the non-feasance rule is given to the Metropolitan Water Supply, Sewerage and Drainage Board or the Western Australian Government Railways Commission (cf *Government Railways Act 1904-1980* s 40(1) ) or the State Energy Commission. It is true that in the last case the *State Energy Commission Act 1979*, s 122, protects the Crown, members of the Commission, and its officers and servants from liability for certain omissions, but this protection is not extended to the Commission itself.

<sup>3</sup> As to statutory immunity, see *Halsbury's Laws of England, Australian Commentary on Administrative Law* (1980).

<sup>4</sup> *Birch v Council of the Central West County District* (1969) 119 CLR 652.

authority failed to take reasonable care for the safety of its passengers,<sup>5</sup> and a local authority negligently misrepresented that a valid building approval had been given.<sup>6</sup>

4.3 As a result of the existence of this duty of care, if a highway authority negligently designs or executes new roadworks it will be liable to anyone injured or who suffers damage as a result.<sup>7</sup> Similarly, if it negligently carries out repairs to the highway, liability may arise. For example, liability has been found to exist where materials were left on the road without adequate lighting to warn motorists of the obstruction,<sup>8</sup> where unsuitable materials were used to repair a hole in the road,<sup>9</sup> where no adequate warning was given of the presence of a grader operating on the road<sup>10</sup> and where a grating covering a sump in a roadway was negligently and insecurely fixed so that it could be removed by strangers, thereby leaving the sump unguarded.<sup>11</sup>

4.4 In addition to being under a duty to exercise their statutory powers and perform their statutory duties with reasonable care, public authorities must also take reasonable steps to guard against any dangers which are created as a result of the exercise of those powers or performance of those duties. Should an authority fail to do so, it will be liable in negligence to anyone who suffers injury or damage as a result.<sup>12</sup> Thus, for example, highway authorities have been held liable where roadworks, although carried out properly in themselves, have nevertheless rendered the highway dangerous. So in *Municipality of Woollahra v Moody*<sup>13</sup> the municipality was held liable because the new work left the immediately adjoining part of the road in such a condition that the natural and necessary consequence was that it became dangerous. Similarly, in *Grafton City Council v Riley Dodds (Australia) Ltd*<sup>14</sup> the Council was held liable for the injuries the plaintiff sustained when his car collided with a tree because, by earlier removing all the other trees, the Council had created a danger of which it

<sup>5</sup> *Public Transport Commission of New South Wales v Perry* (1977) 14 ALR 273.

<sup>6</sup> *Hull v Canterbury Municipal Council* [1974] 1 NSWLR 300; *G J Knight Holdings Pty Ltd v Warringah Shire Council* [1975] 2 NSWLR 796.

<sup>7</sup> *Turner v Borough of Goulburn* (1903) 3 SR (NSW) 91; *McClelland v Manchester Corporation* [1911-13] All ER Rep 562; *Cook v Ku-ring-gai Municipal Council* (1936) 13 LGR 45; *Buckle v Bayswater Road Board* (1936) 57 CLR 259, 292; *Taylor v Commissioner for Main Roads* (1945) 46 SR (NSW) 117.

<sup>8</sup> *Hann v Kogarah Municipal Council* (1947) 16 LGR 164; *Penny v Wimbleton Urban District Council* [1899] 2 QB 72.

<sup>9</sup> *Meeling v Vestry of St Mary, Newington*, (1893) 10 TLR 54.

<sup>10</sup> *Grantham v State of South Australia and Industrial Sales and Service* (1975) 12 SASR 74

<sup>11</sup> *Wootton v Sydney Municipal Council* (1938) 13 LGR 221

<sup>12</sup> *Fisher v Ruislip-Northwood Urban District Council and Country Council of Middlesex* [1945] 2 All ER 458; *Bird v Pearce*, *Somerset County Council Third Party* [1979] RTR 369.

<sup>13</sup> (1913) 16 CLR 353. The *Local Government Act 1960-1980*, s.302, appears to put this decision into a statutory form.

<sup>14</sup> (1956) 56 SR (NSW) 53.

had not adequately warned motorists.<sup>15</sup> Inaction in cases such as these is classified as a form of misfeasance because the authority's failure to exercise its statutory power, rather than being merely an omission, has the effect of making wrongful the manner in which the initial power was exercised.

4.5 One of the reasons the present law governing the liability of highway authorities is unsatisfactory is that it is often difficult to determine whether a particular accident was the result of misfeasance or non-feasance on the part of the highway authority and hence whether the authority is liable or not to the person suffering injury or damage. The problems created by the distinction between misfeasance and non-feasance, and the merits of this distinction, are discussed in Chapter 6 below.

## 2. CIVIL LIABILITY FOR NON-FEASANCE

### (a) Public authorities other than highway authorities

4.6 It is well established that if in the exercise of its statutory powers a public authority, other than a highway authority, creates or assumes control over a source of potential danger or damage then it becomes under a duty to take reasonable steps to prevent the danger or damage materialising, or, in the case of a danger, if it does materialise, to take reasonable steps to prevent it causing injury or damage.<sup>16</sup> The following cases illustrate the scope of this duty and the consequences of failing to fulfil it.<sup>17</sup>

<sup>15</sup> See also *Clarke v Borough of North Sydney* (1893) 14 LR (NSW) 499 (excavation left unguarded); *Bird v Pearce, Somerset County Council Third Party* [1979] RTR 369 (obliteration of white lines in a highway without warning steps being taken).

<sup>16</sup> Drainage authorities enjoy a limited immunity not enjoyed by other public authorities. As a result of this immunity they are not liable for damage caused by their failure to remedy the inadequacies of drainage systems which were either inherited from their predecessors or which have become inadequate because of the growth of the areas they service: *Glossop v Heston & Isleworth Local Board*, [1874-80] All ER Rep 836; *AG v Dorking Union* [1881-5] All ER Rep 320; *Hesketh v Birmingham Corporation* [1922] All ER Rep 243; *Robinson v Workington Corporation*, [1897] 1 QB 619; *Essendon Corporation v McSweeney* (1914) 17 CLR 524; *Madell v Metropolitan Water Board* (1935) 36 SR (NSW) 68. The immunity does not apply, however, if the authority is in some way responsible for overloading the drainage system or for failure to maintain existing drains: *Hawthorn Corporation v Kannuluik* [1905] All ER Rep 1422; *Campisi v The Water Conservation and Irrigation Commission* (1936) 36 SR (NSW) 631; *Buckle v Bayswater Road Board* (1936) 57 CLR 259, 271.

<sup>17</sup> Other examples include *Unger v Shire of Eltham* (1902) 28 VLR 322 (failure of a local authority to maintain a bridge); *Thompson v Bankstown Corporation* (1952) 87 CLR 619 (failure to take reasonable care to keep its electric power system in a safe condition); *Hams v City of Camberwell* (1946) ALR (CN) 568 (failure to remove a dangerous tree branch); *Donaldson v Municipal Council of Sydney* (1924) 24 SR (NSW) 408 (failure to fill a depression surrounding a tree planted on the edge of a footpath); *Campisi v The Water Conservation and Irrigation Commission* (1936) 36 SR (NSW) 631 639-640 (failure to

- \* In *Buckle v Bayswater Road Board*<sup>18</sup> the defendant laid and exercised control over a pipe drain which ran along the side of Garratt Road. This drain was broken by vehicles used by the Commissioner of Main Roads during the construction of the Garratt Road bridge. The defendant knew that the pipe had been broken but negligently failed to repair it or take other steps to protect members of the public from the danger. In the High Court, Latham CJ held the defendant liable for injuries suffered by the plaintiff as a result of stepping into a hole created by the broken pipe, on the basis that:

"if a public authority is empowered to construct and maintain drains and, having constructed a drain under that power, ...fails to keep it in proper repair, and that failure amounts to negligence, a person who is injured in consequence of such negligence has a right of action for damages against the public authority."<sup>19</sup>

- \* In *Aiken v The Municipality of Kingborough*<sup>20</sup> the defendant was vested with the control, management and maintenance of a jetty which was damaged by a vessel during heavy weather. The defendant knew that the jetty had been damaged and that it was in a dangerous condition but did nothing to guard against or warn of the danger. Whilst using the jetty the plaintiff was seriously injured. The High Court held that the defendant was under a duty to take reasonable care to keep the jetty in good repair or to warn or otherwise safeguard users where it had been unable to do so. As it had failed to do either of these things, the defendant was held liable to pay damages to the plaintiff.
- \* In *Frencham v Melbourne and Metropolitan Board of Works*<sup>21</sup> the defendant constructed a sewer under the highway with a shaft leading to the surface thereof. The opening was covered by an iron grid which formed part of the surface of the highway. The grid fell into disrepair and the plaintiff was injured

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maintain drainage system); *Schiller v Council of The Shire of Mulgrave* (1972) 129 CLR 116 (failure to deal with a tree adjacent to track passing through a scenic reserve).

<sup>18</sup> (1936) 57 CLR 259. The reasons why, even though it was a highway authority, the defendant was held liable in this case are explained in para 6. 22 below.

<sup>19</sup> *Ibid*, 271. The other member of the High Court who found in favour of the plaintiff did so on other grounds. The third member dissented.

<sup>20</sup> (1939) 62 CLR 179.

<sup>21</sup> [1911] VLR 363.

as a result. It was held that the defendant was under a duty to keep the grid in repair and that it was liable to the plaintiff for its negligent failure to do so.

4.7 These cases are examples of non-feasance because in each of them the danger in question arose independently of any act of the authority. The authority did not cause the danger, rather it negligently failed to exercise the power it possessed to prevent the danger arising or to remove, or guard against that danger after it had arisen.

4.8 A duty to take affirmative action in respect of a danger or potential source of danger or damage which it has not created will not arise, however, merely because the authority has the power and the resources to do so. It is a precondition to such a duty arising that the public authority must have either created the danger, or have created or assumed control over the potential source of danger or damage.<sup>22</sup> If this is not the case, the authority would not be liable. Thus, in *Sisson v North Sydney Municipal Council*<sup>23</sup> the defendant was held not to be liable for the personal injuries suffered by the plaintiff as a result of the defective condition of a drain in a footpath, even though it had the power to remedy the defect, because it had not previously exercised its powers to assume control of the drain and did not own or control the drain in its capacity as a drainage authority or in any other capacity which would impose upon it a duty to act.<sup>24</sup>

**(b) Highway authorities**

4.9 The effect of the non-feasance rule is to relieve highway authorities alone from liability in the kind of situations illustrated in paragraph 4.6. The situations analogous to these in which highway authorities are not liable are described in paragraph 1.4 above.

4.10 However, although the non-feasance rule will operate to protect a highway authority against civil liability in most cases where it has failed to safeguard persons using their highways against dangers which make them unsafe for normal use, this protection is not total. In the first place there is authority for the view that the rule does not apply to "artificial

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<sup>22</sup> In *Buckle v Bayswater Road Board* (1936) 57 CLR 259, 287 Dixon J said that the reason sewage, gas and other similar authorities were liable for the defective condition of the parts of their undertakings forming part of the highway was to be found in their ownership or control of the undertaking or in implications from the statute authorising its construction.

<sup>23</sup> [1966] 1 NSW 580.

<sup>24</sup> The defendant had not constructed the drain.

structures"<sup>25</sup> in the highway so that a highway authority can be liable for injury or damage caused by such a structure where the authority has been guilty of non-feasance in relation to it. Of greater importance is the fact that many authorities, as well as being a highway authority, are also, for example, a drainage or sewerage authority. The non-feasance rule, however, applies to them only in their capacity as a highway authority so that if they control the source of danger in some other capacity they can be liable in cases of non-feasance.<sup>26</sup>

### 3. CIVIL LIABILITY FOR NON-PERFORMANCE OF STATUTORY DUTIES

#### (a) Public authorities generally

4.11 If a statutory duty is imposed upon a public authority, including a highway authority,<sup>27</sup> failure to perform that duty will make the authority liable in damages to anyone injured as a result, provided the statute imposing the duty expressly or by implication confers such a right of action.<sup>28</sup> The statute must reveal a legislative intention to impose an absolute, as distinguished from a discretionary duty of repair and to confer a correlative private right.<sup>29</sup> Whether or not it does so is a matter of statutory interpretation in each case. As a general rule, if the duty is imposed for the benefit of the public or a class thereof, the right to claim damages for failing to perform the duty will not be found to exist in the absence of an express provision to the effect.<sup>30</sup>

#### (b) Highway authorities

4.12 The rules described in paragraph 4.11 apply to statutes imposing upon highway authorities a duty to keep their highways in good repair. In practice, however, in the case of highway authorities the courts appear to require more explicit language to be used in the statute before holding that it creates a private right of action, than they require in statutes imposing duties on other public authorities. Thus, for example, whereas it has been held that a

<sup>25</sup> Discussed further in paras 6.25 to 6.28 below.

<sup>26</sup> *Buckle v Bayswater Road Board* (1936) 57 CLR 259. This issue is discussed further in paras 6.19 to 6.24 below.

<sup>27</sup> For a statement of the rule in relation to highway authorities see *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357, 376.

<sup>28</sup> *Municipality of Pictou v Geldert* [1893] AC 524; *Campisi v The Water Conservation and Irrigation Commission* (1936) 36 SR (NSW) 631; *Hornsby Shire Council v Bretherton* [1964] NSW 85

<sup>29</sup> *Buckle v Bayswater Road Board* (1936) 57 CLR 259, 281.

<sup>30</sup> *O'Connor v S P Bray Limited* (1937) 56 CLR 464; *Cutler v Wandsworth Stadium Ltd* [1949] 1 All ER 544; *Bennett and Wood Ltd v Orange City Council* (1967) 67 SR (NSW) 426; *Calf v Sydney County Council* [1972] 2 NSWLR 521.

statute, which required a municipal tramways trust to keep certain parts of a roadway "in good condition and repair", "at its own expense, at all times", imposed a duty for breach of which the authority was liable,<sup>31</sup> it has been held that a statute providing that a highway authority "shall from time to time cause all such streets to be repaired....as occasion shall require...." did not.<sup>32</sup> This difference in attitude is a result of the belief on the part of the courts that when imposing statutory duties upon highway authorities, the parliaments did not intend to impose upon them a liability that had not previously existed at common law.<sup>33</sup> The statutes were seen as merely providing administrative machinery for the carrying out of road works. Nevertheless, when clear language has been used, breach of a statutory duty to keep highways in repair has been held to give a right of action to persons who have suffered injury or damage as a result.<sup>34</sup>

#### 4. CONCLUSION

4.13 From the foregoing it is apparent that highway authorities enjoy a significant immunity from civil liability for non-feasance. The extent to which this immunity is possessed by highway authorities in other jurisdictions, and the problems caused by it are discussed below.<sup>35</sup>

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<sup>31</sup> *Municipal Tramways Trust v Stephens* (1912) 15 CLR 104.

<sup>32</sup> *Cowley v Wandsworth Newmarket Local Board* [1892] AC 345.

<sup>33</sup> *Municipal Council of Sydney v Bourke* [1895] AC 433 esp, 444.

<sup>34</sup> *Royle v Shire of Avon* (1870) 1 VR (L) 225; *Shire of Barrabool v Torr* (1871) 2 VR (L) 65.

<sup>35</sup> In Chapters 5 and 6 respectively.

## CHAPTER 5

### THE POSITION IN OTHER JURISDICTIONS

#### 1. THE LAW IN OTHER JURISDICTIONS

##### (a) Scotland

5.1 The non-feasance rule has never applied in Scotland.<sup>1</sup> Therefore a highway authority in that country is liable to pay damages to persons who suffer injury or damage as a result of its negligent failure to maintain a highway, for which it is responsible, in a reasonably safe condition. Thus for example, liability may arise where an authority fails to remove a heap of stones that has collected on the highway<sup>2</sup> or where the surface of a highway has been allowed to remain in a treacherous condition for some time after the authority became aware of this<sup>3</sup> or indeed in any of the kind of situations described in the Summary of Report.<sup>4</sup>

##### (b) England and Wales

5.2 The non-feasance rule was abolished in England and Wales by section 1(1) of the *Highways (Miscellaneous Provisions) Act 1961*<sup>5</sup> which came into force on 3 August 1964. This Act does not codify the law governing the liability of highway authorities and must be read in conjunction with section 44(1) of the *Highways Act 1959*<sup>6</sup> which imposes a duty upon highway authorities to maintain their highways and keep them in repair.

5.3 As a result of the combined effect of these provisions, persons who suffer injury or damage because of the condition of the highway are able to recover damages from the highway authority if -

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<sup>1</sup> See generally, D M Walker, *The Law of Delict in Scotland*, 607-617.

<sup>2</sup> *Cromar v Western District Committee of Haddingtonshire County Council* (1902) 9 SLT 437. It was argued in this case that the authority deposited the stones. However, no finding of fact appears to have been in this respect and the case was decided on the basis of the defendant's non-feasance.

<sup>3</sup> *W Alexander & Sons v Dundee Corporation* [1950] SC 123.

<sup>4</sup> Para 1.4 above.

<sup>5</sup> The text of s 1 and of the other important sections of the Act are reproduced in Appendix III, pp 103 to 106 below.

<sup>6</sup> The text of s 44 and of the other important sections of the Act are reproduced in Appendix III, pp 101 and 102 below.

- \* the highway was in a dangerous condition, so that it was not reasonably safe for normal use;<sup>7</sup>
- \* the dangerous condition arose from a failure on the part of the authority to repair or maintain the highway;<sup>8</sup>
- \* the injury or damage was a reasonably foreseeable consequence of the condition of the highway;<sup>9</sup> and
- \* the authority cannot prove that it had taken reasonable care "... to secure that the part of the highway to which the action relates was not dangerous for traffic".<sup>10</sup>

5.4 There are three notable features about the above legislation. First, the burden of proof in relation to the issue of whether or not reasonable care has been exercised by the highway authority is placed upon the authority itself, and not, as is normally the case in civil actions for damages, upon the claimant. As a result, once a prima facie case has been established against a highway authority the authority, if it wishes to avoid liability, must prove that it has not been negligent. If it is unable to do so, the claimant will succeed in the claim.

5.5 The second is that section 1(3) of the *Highways (Miscellaneous Provisions) Act 1961*<sup>11</sup> provides that when determining whether a highway authority has exercised reasonable care, the court shall have regard to a number of specified matters. The apparent object of this provision is to ensure that certain factors which could be favourable to highway authorities in connection with this issue are considered by the court.

5.6 The third notable feature of the legislation is that the obligation imposed upon highway authorities by section 44(1) of the *Highways Act 1959* is to "maintain " the highway rather than to safeguard persons against dangers occurring in it. Consequently it appears to be mandatory for highway authorities to keep their highways in repair and open for passage by the kinds of traffic normally using them,<sup>12</sup> at least where they are reasonably able to do so. As

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<sup>7</sup> *Meggs v Liverpool Corporation* [1968] 1 All ER 1137; *Burnside v Emerson* [1968] 3 All ER 741; *Rider v Rider* [1973] 1 All ER 294.

<sup>8</sup> *Burnside v Emerson* (above).

<sup>9</sup> *Ibid* .

<sup>10</sup> *Highways (Miscellaneous Provisions) Act 1961*, s 1(2).

<sup>11</sup> The text of this provision is reproduced in Appendix III , p 103 below.

<sup>12</sup> *Haydon v Kent County Council* [1978] 2 All ER 97,105 and 109.

a result, in some cases, it may be a breach of duty for a highway authority merely to barricade off dangers in the highway, or to close the highway altogether, rather than repair it.<sup>13</sup>

(c) **Canada**

5.7 The non-feasance rule has been replaced in the Provinces of Alberta, Ontario, Manitoba and Saskatchewan by statutory provisions which require highway authorities to keep their highways in a reasonable state of repair and which specifically make them liable for injury or damage sustained by persons as a result of their failure to do so.<sup>14</sup> Thus, for example, section 427(1) of the *Ontario Municipal Act*<sup>15</sup> provides:

"Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it or upon which the duty of repairing it is imposed by this Act, and in case of default, the corporation....is liable for all damages sustained by any person by reason of such default".

5.8 Despite the unqualified terms in which the duty to repair is expressed in these provisions, it has been held that they do not impose strict liability upon highway authorities but require them only to take reasonable care to keep their highways in repair.<sup>16</sup>

5.9 In Alberta, Ontario and Saskatchewan the legislation imposing a duty upon highway authorities to keep their highways in repair contains a number of relatively unimportant limitations on the right of a person to bring an action for breach of this duty. However a notable limitation is imposed by section 427(3) of the *Ontario Municipal Act 1970*<sup>17</sup> which provides:

"No action shall be brought against a corporation for the recovery of damages caused by the presence or absence or insufficiency of any wall, fence, guard rail, railing or barrier, or caused by or on account of any construction, obstruction or erection or any situation, arrangement, or disposition of any earth, rock, tree or other material or

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<sup>13</sup> Ibid.

<sup>14</sup> *City Act* (Alberta) s 293, *Municipal District Act* s 240 and *Municipal Government Act RSA 1970 C 246* s 178; (Manitoba) RSM 1950 C 243 ss 453 and 454; *Municipal Act RSO 1970* (Ontario) C 284 s 427; (Saskatchewan) *Rural Municipalities Act SS 1972* (Saskatchewan) C 101 s 206 and *Urban Municipality Act SS 1970 C 78* ss 161 and 162. These provisions are reproduced in Appendix III, pp 107 to 116 below. The Commission understands that in Quebec, highway authorities have never been immune from liability for nonfeasance - *Civil Code*, art 1054.

<sup>15</sup> RSO 1970 C 284. The full text of s 427 is reproduced in Appendix III, pp 107-108 below.

<sup>16</sup> *Patterson v County of Halton* [1955] 1 DLR 295; *Domanski v Hamilton* (1959) 18 DLR (2d) 765.

<sup>17</sup> A similar provision is contained in the *Municipal Government Act* Alberta s 178(6) and the *Saskatchewan Rural Municipalities Act* s 373; see Appendix III, pp 110, 111 and 113 respectively.

object adjacent to or in, along or upon any highway or any part thereof not within the travelled portion of such highway. "

5.10 Each of the Acts requires a claimant to give written notice of the claim within one month, and in some cases a shorter period, of the date on which the cause of action arose<sup>18</sup> and imposes a short limitation period.<sup>19</sup> Provision is made, however, for a court to allow a claim to proceed even though the notice requirements have not been complied with.

5.11 When conducting research into the financial burden abolition of the non-feasance rule would impose upon highway authorities in British Columbia, the Law Reform Commission of British Columbia made various inquiries in the Provinces in which the rule no longer operated. According to the Commission;<sup>20</sup>

"While those inquiries were neither complete nor exhaustive, the answers that we received have emboldened us to conclude that both insurance costs and claims experience have not resulted in an intolerable situation. No municipal authority that we have contacted has found its burden of highway maintenance and repairs, or its claims settlement liability, or insurance costs, in any way intolerable".

**(d) The United States of America**

5.12 In those jurisdictions<sup>21</sup> in which the general immunity of the state from liability in tort has been abolished by statute, the state both where it is directly a highway authority and where it is indirectly a highway authority through an independent corporation or authority is thereby rendered liable for non-feasance in relation to its highways.<sup>22</sup> Counties and towns enjoy a general immunity, similar to the states, from tortious liability. However, in many jurisdictions liability for injury and damage caused by the dangerous condition of the highway

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<sup>18</sup> *Alberta Municipal District Act* s 242(1); *Ontario Municipal Act* s 427(5); *Saskatchewan Rural Municipalities Act* s 374(1) and *Municipality Act* s 410(2).

<sup>19</sup> The *Alberta Municipal District Act* s 242(1) and the *Saskatchewan Rural Municipalities Act* s 373 impose a limitation period of six months. The *Ontario Municipal Act* s 427(2) imposes a limitation period of three months.

<sup>20</sup> *Report on Civil Rights : Part V, Tort Liability of Public Bodies*, 22. The report is discussed paras 5.15 to 5.18 below.

<sup>21</sup> Such as, for example, Alaska, Connecticut, California, Hawaii, Idaho, Maine, Michigan, Minnesota, Nebraska, New Hampshire, Oklahoma, Oregon, Rhode Island, South Carolina, Texas, Utah, Wisconsin and the Federal Government. See generally 39 Am Jur 2d ss 342-356.

<sup>22</sup> *Fuller v State Highway Commission* 38 P 2d 99 (1934) *Easley v New York State Thruway Authority* 135 NE 2d 572 (1956).

is imposed upon them expressly or by necessary implication.<sup>23</sup> As a result they too are rendered liable for non-feasance.

5.13 Municipalities in the United States are immune from liability in tort only in relation to their governmental functions and duties. In some jurisdictions the functions of a highway authority are regarded as being governmental and therefore, at common law, the immunity will protect an authority against liability. However, in many jurisdictions it has been held that when carrying out the functions of a highway authority a municipality acts in a private and corporate capacity, rather than as a government authority, and can therefore be liable for non-feasance in relation to dangers arising in the highway.<sup>24</sup> In addition, many States have passed statutes expressly making municipalities liable to persons who suffer injury or damage as a result of the dangerous condition of the highway.<sup>25</sup>

**(e) Other jurisdictions in Australia**

5.14 The non-feasance rule applies in all Australian jurisdictions.

**2. RECOMMENDATIONS FOR REFORM IN OTHER JURISDICTIONS**

**(a) British Columbia**

5.15 In 1977 the Law Reform Commission of British Columbia<sup>26</sup> recommended that where a public body<sup>27</sup> fails to maintain and keep in repair a highway for which it is responsible it should be liable for damage suffered by a person as a result thereof.<sup>28</sup> The Commission thought, however, that it should be a defence for the public body to prove that it had taken reasonable care to keep the highway “in repair and in a safe condition”.<sup>29</sup> When determining this issue, the Commission recommended that the court should, in addition to other relevant

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<sup>23</sup> 39 Am Jur 2d s 346. Furthermore, the statutory waiver of the state’s immunity from civil liability for tort has been held to have the effect of waiving any similar immunity possessed by the civil subdivisions of the state such as counties and towns: *Ibid*.

<sup>24</sup> *Johnston v East Moline* 91 NE 2d 401 (1950); *District of Columbia v Armes* 107 US 519; *Nelson v Duquesne Light Co* 12 A 2d 299 (1940).

<sup>25</sup> See for example, *Thomas v Board Township Trustees of Salem* 582 P 2d 271 (1978).

<sup>26</sup> *Report on Civil Rights: Part V, Tort Liability of Public Bodies* (the “British Columbian Report”).

<sup>27</sup> The British Columbian Report is not limited to highway authorities.

<sup>28</sup> British Columbian Report, 24 recommendation 1.

<sup>29</sup> *Id*, recommendation 2.

considerations, have regard to a number of specified matters<sup>30</sup> similar in nature to those listed in section 1(3) of the *Highways (Miscellaneous Provisions) Act 1961* of the United Kingdom.<sup>31</sup>

5.16 A notable feature of the Commission's recommendations is that the burden of proof in relation to the issue of whether a public body had exercised reasonable care is placed upon the body itself. The Commission favoured this view because it considered that the public body would have better access to the kind of information relevant to that issue.

5.17 Finally, the Commission recommended that claimants should not be required to notify the public body of their intention to bring a claim against it.<sup>32</sup> The Commission made this recommendation, even though the Parliament of British Columbia had previously rejected a similar proposal in the Commission's report on limitations,<sup>33</sup> because the Commission was of the view that notice provisions have a potential for causing injustice which outweighs the benefit which may flow from their existence.

5.18 These recommendations have not been implemented. However, it should be noted that the need for reform in British Columbia is not as great as it is in Western Australia because a compulsory no-fault motor vehicle insurance scheme exists in the Province.<sup>34</sup> Under this scheme, persons who suffer personal injury as a result of a motor vehicle accident will, in most cases, receive certain benefits whether or not the accident can be attributed to another person's fault. Although these are normally less than the damages recoverable in a negligence action, they do go much of the way to satisfying the need for compensation, as far at least as personal injury is concerned, described in paragraphs 6.2 to 6.6 below.

## **(b) New Zealand**

5.19 In 1973 the New Zealand Torts and General Law Reform Committee<sup>35</sup> recommended that the non-feasance rule be abolished and that a duty be imposed upon highway authorities requiring them "...to take such care as is reasonable in all the circumstances to ensure that

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<sup>30</sup> Id, recommendation 3.

<sup>31</sup> Discussed in para 5.5 above and reproduced in Appendix III, p 103 below.

<sup>32</sup> British Columbian Report, 26.

<sup>33</sup> *Report on Limitations: Part II, General* (LRC 15, 1974) 115-116.

<sup>34</sup> See generally, *Insurance Corporation of British Columbia Act*, SBC 1973.

<sup>35</sup> Report on *The Exemption of Highway Authorities From Liability For Non-feasance* (the "New Zealand Report").

each 'highway' for which they are responsible is reasonably safe for persons using it".<sup>36</sup> The Commission recommended that the burden of proof on the issue of whether reasonable care had been taken be upon the plaintiff and that the rules relating to contributory negligence apply to claims brought against highway authorities.<sup>37</sup> However, the Commission argued against requiring claimants to notify highway authorities of their intention to bring a claim against them.<sup>38</sup>

5.20 These recommendations have not been implemented. However, the significance of the non-feasance rule in New Zealand was subsequently diminished considerably by the passage of the *Accident Compensation Act 1972-1979* which came into effect in 1974. This Act provides for the payment of compensation to anyone who suffers personal injury as a result of an accident in New Zealand,<sup>39</sup> including accidents caused by the condition of the highway, and prevents such persons bringing civil proceedings for damages in respect thereof.<sup>40</sup>

**(c) South Australia**

5.21 In 1974 the South Australian Law Reform Committee<sup>41</sup> recommended that the distinction between non-feasance and misfeasance be abolished and replaced by a statutory provision which imposes upon public authorities<sup>42</sup> a duty properly to maintain all the public works under their control.<sup>43</sup> The Committee further recommended that the burden of establishing a prima facie case against an authority be on the claimant. The Committee said that once this had been established, the onus should then shift to the authority to show that it had acted in a reasonable manner, the authority being liable only for " ...unreasonable default in the exercise of [its statutory duties] or in its failure to exercise them."<sup>44</sup>

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<sup>36</sup> New Zealand Report, para 18 recommendations (i) and (ii).

<sup>37</sup> New Zealand Report, para 18 recommendations (iii) and (v).

<sup>38</sup> Id, paras 13 and 14.

<sup>39</sup> *Accident Compensation Act 1972-1980*, s 4(2).

<sup>40</sup> Id, s 5(1).

<sup>41</sup> Twenty-Fifth Report, *Report on Reform of the Law Relating to Misfeasance & Non-feasance* (the "South Australian Report").

<sup>42</sup> The South Australian Report was not limited to highway authorities but expressed generally so that it would cover all public authorities.

<sup>43</sup> South Australian Report, p 19 recommendations 1, 2 and 3.

<sup>44</sup> Id, p 20 recommendations 4, 5 and 6.

5.22 The Committee agreed with the view expressed in the New Zealand Report that claimants should not be required to notify public authorities of their intention to bring a claim against them.<sup>45</sup>

5.23 The recommendations in this report have not yet been implemented.

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<sup>45</sup> Id, p 20 recommendation 7.

## CHAPTER 6

### WHY REFORM IS NEEDED

#### 1. INTRODUCTION

6.1 In the Summary of Report<sup>1</sup> the Commission outlined the reasons why the law governing the liability of highway authorities is in need of reform. Each is discussed in more detail below.<sup>2</sup> The immunity created by the non-feasance rule has been the subject of considerable criticism<sup>3</sup> and the view that reform is needed is widely held.<sup>4</sup>

#### 2. THE NEED FOR COMPENSATION

6.2 Almost without exception<sup>5</sup> anyone<sup>6</sup> who by a deliberate or careless act causes a person injury or damage will be liable to pay that person compensatory, and in some cases punitive, damages. The principal means by which liability is enforced is by use of the various common law actions,<sup>7</sup> which have been rendered more effective in a number of instances by statutory reforms.<sup>8</sup>

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<sup>1</sup> Para 1.5 above.

<sup>2</sup> In paras 6.2 to 6.28.

<sup>3</sup> See for example, W Friedmann, *Liability of Highway Authorities* (1951) 5 Res Judicatae 21; J G Fleming, *The Law of Torts* (5th ed 1977) ("Fleming") 418-422; H Whitmore, *Principles of Australian Administrative Law* (5th ed 1980) ("Whitmore") 271; P W Hogg, *Liability of the Crown* ("Hogg") 90 fn 50; J J Hockley, *Liability of Highway Authorities: Non-feasance Revisited* [1980] Law Institute Journal 261-264; *Guilfoyle v Port of London Authority* [1931] All ER Rep 365, 370; *Pride of Derby v British Celanese Ltd* [1953] 1 All ER 179, 202; *Attorney-General v St Ives Rural District Council* [1959] 3 All ER 371; *Hocking v Attorney-General* [1962] NZLR 118, 129. But compare G Sawyer, *Nonfeasance Under Fire* (1966) 2 NZULR 115, esp 129.

<sup>4</sup> Ibid; see also paras 2.14 and 2.15 above.

<sup>5</sup> A small number of defences exist: see Fleming, Chps 5 and 12. In addition liability may be excluded in certain cases by notice or by agreement between the parties: see for example *Birch v Thomas* [1972] 1 All ER 905. Such notices or agreements are, however, interpreted restrictively by the courts and before they will be effective liability must have been excluded in clear and unambiguous language: see for example, *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71. Liability may also be excluded by statute: see for example, the *Government Railways Act 1904-1980* s 40(1) and generally *Halsbury's Laws of England, Australian Commentary on Administrative Law* (1980) C200. Protection is also given to judicial and quasi-judicial officers by the common law and by statute: see generally *Halsbury* (above) C206-300.

<sup>6</sup> In other words private individuals, bodies corporate, public authorities and the Crown.

<sup>7</sup> The most important by far is that of negligence; others include trespass, nuisance, breach of contract and misfeasance in a public office.

<sup>8</sup> For example, the *Crown Suits Act 1947-1954* s 5 (which allows the Crown to be sued); the *Motor Vehicle (Third Party Insurance) Act 1943-1976* (which requires owners of motor vehicles to insure against liability in respect of death or bodily injury caused by the negligent use thereof); the *Trade Practices Act 1974-1980* (Cth) s 68 (which limits the effectiveness of exception clauses in certain cases).

6.3 In addition to liability for positive acts, liability can also arise because of a person's failure to act. Although the law does not impose a general duty upon persons to take positive action for the benefit of others,<sup>9</sup> a duty to do so, by taking reasonable care, is imposed in certain cases because of the relationship between the person under the duty and the person to whom it is owed.<sup>10</sup> A common element in all these cases is that the persons upon whom the duty is imposed are in a better position to safeguard the interests of the persons to whom the duty is owed than those persons themselves, with the result that the latter are entitled to rely upon the former to do so.

6.4 The liability of highway authorities for injury or damage caused by their acts is unexceptional.<sup>11</sup> However, the non-feasance rule gives them a special immunity at common law from liability for failing to act not enjoyed by other public authorities and wider than that possessed by private persons. As a result of this immunity, the accident victims described in the Summary of Report<sup>12</sup> would be unable to recover damages in respect of the personal injury or property damage they had suffered, even though they were not in any way responsible for the accident which occurred. Likewise, the dependants of the accident victims who were killed would be unable to recover damages for their loss of the support the deceased had provided them with before death.<sup>13</sup> This is in complete contrast to what would have been the position had the death, injury or damage been attributable to, for example, the fault of another motorist, the non-feasance of another authority, or to the misfeasance of the highway authority in control of the highway. In any of these cases the accident victims or their dependants would have received substantial damages.

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<sup>9</sup> See generally, W V HRogers, *Winfield and Jolowicz on Tort*, (11th ed 1979) 77-80; Fleming, 142-152 and A L Armitage and R W M Dias, *Clerk and Lindsell on Torts* (14th ed 1975) para 864.

<sup>10</sup> For example, occupiers of land must take reasonable care to prevent hazards occurring naturally on their land causing injury to their neighbours (*Goldman v Hargrave* [1966] 2 All ER 989; *Leakey v National Trust For Places of Historic Interest or Natural Beauty* [1980] 1 QB 485), and to their lawful visitors (*Lipman v Clendinnen* (1932) 46 CLR 550; *Aiken v Kingborough Corporation* (1939) 62 CLR 179), and, where common humanity requires it, to persons trespassing on their land *British Railway Board v Herrington* [1972] 1 All ER 749; *Cooper v Southern Portland Cement Ltd* (1972) 46 ALJR 302). Similarly the relationship of employer and employee (*Kasapis v Laimos* [1959] 2 Lloyd's Rep 378), and that of passenger and carrier (*Horsley v MacLaren* (1971) 22 DLR (3d) 545) have been held to impose a duty to take affirmative action. The effect, in this respect, of the relationship of parent and child is unclear in Australia: see for example *Hahn v Conley* (1971) 45 ALJR 631.

<sup>11</sup> Their liability for careless acts (misfeasance) is described in paras 4.2 to 4.4 above.

<sup>12</sup> Para 1.4 above.

<sup>13</sup> The *Fatal Accidents Act 1959-1973* only permits damages to be recovered in respect of a person's accidental death if that person would have been able to recover damages for personal injury from the person responsible for the accident, had death not ensued.

6.5 The inability to recover damages in the kind of situations described in the Summary of Report<sup>14</sup> can, and in many cases<sup>15</sup> will, impose a substantial financial burden on the accident victims and their dependants. Even where only property damage is suffered, the consequences may still be very serious, especially if the property damaged or destroyed was an important income producing item such as a small carrier's motor truck or a farmer's tractor.<sup>16</sup> In the Commission's opinion the non-feasance rule should be abolished so that, by allowing accident victims or their dependants to claim damages in these kind of situations, this burden can be passed on to the authority whose non-feasance was responsible for the accident. It would also bring the law governing the liability of highway authorities into line with that governing the liability of other public authorities and make it accord with the basic norms of accident compensation which require those responsible for accidents to bear the loss occasioned by them.<sup>17</sup>

6.6 The Commission acknowledges that it is possible for individuals to protect themselves against the burdens described above by purchasing an appropriate insurance policy, and that many people in fact do so. The Commission also acknowledges that many employees are protected, in varying degrees, against the financial consequences of becoming partially or totally disabled through their membership of superannuation and similar schemes, and by workers' compensation schemes. However, for the following reasons the Commission does not consider that these considerations lessen the need for reform.

- \* For many people the cost of obtaining the kind of personal injury<sup>18</sup> insurance necessary adequately to protect themselves and their family would be prohibitively expensive. In this connection it must be remembered that in

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<sup>14</sup> Para 1.4 above

<sup>15</sup> The Commission has been informed by the Road Traffic Authority that in 1978-1980 inclusive, 7 people were killed and 288 injured as a result of motor vehicle accidents categorised by the Authority as caused by the vehicle involved being "out of control due to road conditions". There is no indication available, however, of the number of these accidents in which the dangerous condition of the highway was attributable to misfeasance on the part of the highway authority or a third party, or to the authority's non-feasance, or to natural causes where no one was at fault. At present, the highway authority would be liable in the first case, the third party would be liable in the second case and no damages would be recoverable in the other two cases. The only way in which damages could be made recoverable in all four cases would be by the introduction of a compulsory no-fault motor vehicle accident insurance scheme.

<sup>16</sup> The motor truck and trailer in *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357, for example, were used in the plaintiff's haulage business.

<sup>17</sup> Such a reform would incidentally place the burden of the accident on the party who, in many cases, would be better able to bear that loss, or to insure against liability for it, thereby distributing the loss throughout the community as a whole. This was the reason the City of Fremantle favoured the reform proposed by the Commission and one of the reasons given in favour of it by the Law Society.

<sup>18</sup> The Commission acknowledges that the cost of property damage insurance is, generally speaking, much less expensive and more widespread

family groups separate cover would need to be obtained in respect of children and dependant spouses.

- \* At present only approximately forty percent of the State's workforce are members of a superannuation scheme.<sup>19</sup> In addition, because superannuation schemes are not designed to provide accident insurance as such, even people who are members cannot regard membership as a completely satisfactory substitute for insurance. For example, the members of such schemes will usually receive only a pension, equivalent to part of their current salary at the time of the accident, in the event of being retired from employment because of their injuries.<sup>20</sup> Nothing will be payable for medical expenses or in respect of injuries which do not necessitate premature retirement, and, although provision is made for the payment of a pension to a widow and to dependent children, often no pension is payable to a widower.
  
- \* Workers' compensation is payable only in respect of personal injury suffered as a result of an accident arising out of or in the course of employment or whilst the employee is acting under the employer's instructions.<sup>21</sup> The protection workers' compensation provides therefore, is not comprehensive and would need to be supplemented by private insurance.
  
- \* Even in cases where the accident victim was fully compensated by an insurer, the burden caused by the accident would fall upon a person or organisation that was unable to adopt measures to prevent or reduce the risk of accidents happening. On the other hand, one of the salutary effects of the reform the Commission proposes is that by imposing liability upon the party in a position to take precautionary measures, an incentive would be created either directly or through pressure from that party's insurer, to do so.

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<sup>19</sup> This figure was provided to the Commission by the Australian Bureau of Statistics.

<sup>20</sup> For example, the maximum entitlement under the State Superannuation Scheme is approximately 65% of the member's salary as at the date of retirement.

<sup>21</sup> *Workers' Compensation Act 1912-1979*, s 7. This includes injury suffered while the worker is travelling between his place of residence and place of employment.

### 3. DEFECTS IN THE PRESENT LAW

6.7 Because highway authorities **are** liable for misfeasance<sup>22</sup> and perhaps for non-feasance in relation to artificial structures,<sup>23</sup> and because the non-feasance rule only applies to highway authorities,<sup>24</sup> the existence of that rule makes the law governing liability for accidents caused by the condition of the highway highly complex, confusing and bedevilled by irrational distinctions.

#### (a) The non-feasance, misfeasance distinction

6.8 One of the principal reasons why the non-feasance rule is unsatisfactory is that it makes the liability of a highway authority for an accident depend upon whether the accident can be attributed to misfeasance on the part of the authority or to its non-feasance. This distinction, as well as being extremely difficult to draw in practice, is inherently without merit.

##### (i) Distinguishing non-feasance from misfeasance

6.9 Although indisputable examples of both can be given, there is nevertheless no clear or sharp dividing line between non-feasance and misfeasance. As Lush J pointed out in *McClelland v Manchester Corporation*:<sup>25</sup>

"You cannot sever what was omitted or left undone from what was committed or actually done, and say that because the accident was caused by the omission, therefore, it was non-feasance. Once establish [sic] that the local authority did something to the road the case is removed from the category of non-feasance."

6.10 As a result, where a highway authority has engaged in some activity at the site of an accident attributable to the condition of the highway, it will often be difficult to determine whether the accident is properly characterised as being the result of non-feasance or as being

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<sup>22</sup> See generally, paras 4.2 to 4.4 above.

<sup>23</sup> See generally, paras 6.25 to 6.28 below.

<sup>24</sup> See generally, paras 6.19 to 6.24 below.

<sup>25</sup> [1911-1913] All ER Rep 562, 567. The Commission is mindful of the warning by Latham CJ in *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357, 364 that these remarks do not purport to state a general principle that if a highway authority does anything at all to a road then it will become liable for damage arising from the non-repair of the highway.

the result of misfeasance.<sup>26</sup> This will have the effect of making the liability of the highway authority uncertain which in turn will necessarily make the determination of its liability expensive for both the authority and for the accident victim seeking compensation.

6.11 In view of the difficulty caused by the distinction between non-feasance and misfeasance, it is not surprising that there are a number of reported cases in which it has been the principal issue in dispute. Although the courts have formulated a clear rule to the effect that the highway authority will be liable only if it has created a new or additional danger that did not previously exist,<sup>27</sup> this rule has not proved easy to apply in practice as the following cases show.

6.12 In both *Tickle v Hastings Shire Council*<sup>28</sup> and *Culcairn Shire Council v Kirk*<sup>29</sup> the defendant highway authority partially repaired an old wooden bridge. In the former case the bridge collapsed and in the latter case it partially collapsed, whilst a heavily laden motor truck was being driven across the bridge. However, whilst in the former case it was held that the authority had created a trap and therefore was guilty of misfeasance, in the latter the court concluded that the authority had not created a new danger on the bridge but had merely failed to make it completely safe.

6.13 Although in the latter case the court distinguished the former the distinction appears to the Commission to be, if not illusory, at the very least, undesirably fine. It is arguable, as Professor Sawyer has pointed out,<sup>30</sup> that the Culcairn Shire Council had created a danger by only partially repairing the wooden bridge because drivers might well proceed more cautiously across a bridge that is obviously in need of repair than they would when crossing one that has apparently been recently repaired. The appearance of new repairs may give a false impression that the whole bridge has been examined, repaired and made safe.<sup>31</sup> This was apparently the view of the judge at first instance who decided in favour of the plaintiff.

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<sup>26</sup> Examples of the kinds of situations in which liability for misfeasance can arise are given in paras 4.2 to 4.4 above.

<sup>27</sup> *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357, 363-364; *Culcairn Shire Council v Kirk* [1964-5] NSW 909, 912.

<sup>28</sup> (1954) 19 LGR 256

<sup>29</sup> [1964-5] NSW 909.

<sup>30</sup> *Nonfeasance Under Fire* (1966) 2 NZULR 115, 124.

<sup>31</sup> An identical argument was used by North J in *Hocking v Attorney General* [1963] NZLR 513, 538 (discussed in para 6.14 below) to reject the non-feasance argument advanced in that case.

6.14 The difficulty of deciding whether a highway authority has been guilty of misfeasance or of non-feasance is also well illustrated by the differences of opinion expressed in *Hocking v Attorney General*.<sup>32</sup> In this case the highway authority, after the collapse of an old culvert in the highway, constructed new culverts in 1952 and 1956. The combined capacity of these culverts was less than that of the old culvert and they were inadequate to deal with the quantity of water which might from time to time be expected to pass down the stream and through them. The authority was warned that the culverts were inadequate but decided to persevere with them as a temporary measure. In 1959, after unusually heavy rains, the new culverts proved inadequate and the stream washed away the roadway leaving a deep chasm. The plaintiff's husband was killed when his truck, without negligence on his part, fell into the chasm. Four judges heard the case. Two, the judge at first instance and the President of the Court of Appeal, were of the opinion that the authority's actions were properly characterised as non-feasance and that it was protected by the non-feasance rule. On the other hand, the other two members of the Court of Appeal were of the opinion that the authority's actions amounted to misfeasance and that therefore its liability for the accident was governed by the ordinary law of negligence.

(ii) The merits of the distinction

6.15 The difficulty of distinguishing non-feasance and misfeasance arguably would not be a reason for abolishing the non-feasance rule if there was something about the conduct of persons injured as a result of a highway authority's non-feasance which made them undeserving of compensation or if there was something about non-feasance itself which made it less culpable than misfeasance or if there was a combination of these. The Commission is of the opinion, however, that there is no such justification and that this can be demonstrated by reference to the cases outlined above.

6.16 In *Culcairn Shire Council v Kirk*<sup>33</sup> it was found as a matter of fact that there had been no contributory negligence on the part of the plaintiff. This means that the accident was in no legal sense caused by a failure on his part to take reasonable care of himself and there appears to have been nothing else about his conduct that made him less deserving of compensation than, for example, the deceased in *Hocking v Attorney General*,<sup>34</sup> or which would otherwise

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<sup>32</sup> [1962] NZLR 118 (SC); [1963] NZLR 513 (CA).

<sup>33</sup> [1964-5] NSWR 909, 915.

<sup>34</sup> [1962] NZLR 118; see para 6.14 above.

justify denying him compensation whilst awarding it in the latter case. The only explanation for the different result is simply that, fortuitously for the plaintiff in *Hocking*, misfeasance was established in that case.<sup>35</sup>

6.17 These cases show also that non-feasance is not inherently less blameworthy than misfeasance. For example, in *Hocking v Attorney General* if the highway authority, knowing that the old culvert had collapsed and that the road was in a highly dangerous condition, had nevertheless deliberately done nothing to replace the culvert or warn motorists of the danger, even though it could easily have done so, it would not have been liable to anyone who suffered injury as a result of the condition of the highway. This would clearly have been non-feasance and liability would therefore not have arisen.<sup>36</sup> For the same reason, had the Culcairn Shire Council not attempted to repair the bridge, but simply left it without warning in a dilapidated condition, it would not have been possible for the plaintiff to argue that the Council was liable for the loss he suffered. To the Commission, however, it is beyond question that such conduct on the part of the authority, and on the part of the Shire Council, would have been no less blameworthy than their inadequate efforts to replace the culvert, and to repair the bridge, respectively. Although liability will only arise in cases of misfeasance if the attempts to repair are in some way negligent, as these examples show, this conduct is not necessarily more reprehensible than the deliberate refusal to undertake repairs or to warn users of the highway of dangers in it. Indeed, the reverse can easily be the case.

6.18 These cases are not isolated examples of the fact that the non-feasance/misfeasance distinction also has the undesirable effect of penalising highway authorities only when they attempt to keep their highways in good repair.<sup>37</sup> Although the Commission has no evidence that highway authorities actually succumb to this temptation, by drawing a distinction between liability for non-feasance and liability for misfeasance, the existing law might tempt highway authorities to avoid the risk of being found liable for misfeasance by not undertaking repairs at all.

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<sup>35</sup> Compare also *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357.

<sup>36</sup> *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357, 377

<sup>37</sup> Other examples include *Steele v Mayor of Essendon* (1891) 17 VLR 239; *Municipality of Woollahra v Moody* (1913) 16 CLR 353; *Taylor v Commission for Main Roads* (1945) 46 SR (NSW) 117.

**(b) The restriction of the non-feasance rule to highway authorities**

6.19 The courts have restricted the operation of the non-feasance rule to highway authorities<sup>38</sup> and have not applied it to other public authorities such as sewerage or drainage authorities which, as an incident of their principal functions, control something forming part of, or associated with, the highway.<sup>39</sup> The liability of such authorities in relation to those parts of their undertakings which are maintained in, or which are associated with, a highway depends ultimately upon the terms of the statute authorising<sup>40</sup> the undertaking, although as a general rule they will be liable to anyone who is injured or who suffers damage as a result of their non-feasance.<sup>41</sup>

6.20 The distinction, for purposes of the application of the non-feasance rule, between highway authorities and other public authorities applies also where a single authority is both a highway authority and another kind of authority.<sup>42</sup> In such cases, the rule will apply to the authority only in relation to its highway activities. As Fullagar J has pointed out<sup>43</sup> this distinction involves “... the somewhat unreal question whether it failed to do something in its capacity of highway authority or in its capacity of drainage authority...” upon which may depend the whole question of whether a plaintiff is entitled to recover damages for injury or damage suffered.

6.21 This restriction on the scope of the rule is particularly significant in Western Australia because most of the highways<sup>44</sup> in this State are under the control of local government authorities which, as well as being highway authorities, have the power to act in other capacities. As a result, there may be scope for a plaintiff who was injured whilst travelling along the highway to argue that the defendant was responsible for the danger causing the

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<sup>38</sup> Another way of phrasing this proposition is to say that the non-feasance rule applies only to a highway authority in respect of the highway itself (*Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357, 379). The more common way of expressing the proposition, however, is that used in the text; this expression assumes, for purposes of the rule, that if an authority which is otherwise a highway authority, does something not relating to a highway then, whilst doing so, it was not a highway authority.

<sup>39</sup> *Frencham v Melbourne and Metropolitan Board of Works* [1911] VLR 363; *Buckle v Bayswater Road Board* (1936) 57 CLR 259; *Skilton v Epsom and Ewell Urban District Council* [1937] 1 KB 112; *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357, 379; *Hayes v Brisbane City Council* (1979) 5 QL 269.

<sup>40</sup> As to statutory authorisation see generally *Halsbury's Laws of England, Australian Commentary on Administrative Law* (1980) C200.

<sup>41</sup> See generally para 4.6 above and *Buckle v Bayswater Road Board* (1936) 57 CLR 259, 287.

<sup>42</sup> *Buckle v Bayswater Road Board* (1936) 57 CLR 259, 287.

<sup>43</sup> *Gorringe v The Transport Commission (Tas)* (1957) 80 CLR 357, 379.

<sup>44</sup> See para 3.14 above.

injury in some capacity other than that of highway authority. This possibility is a cause of uncertainty because in practice it is often difficult to determine the capacity in which the defendant acted in relation to the danger in question.

(i) Applying the restriction

6.22 The uncertainty caused in practice by the restriction is epitomised by the judgments in *Buckle v Bayswater Road Board*.<sup>45</sup> In this case Latham CJ decided that the defendant was liable because his Honour interpreted the evidence as establishing that the defendant had laid the defective drain, not in its capacity as a highway authority, but in its capacity as a drainage authority. On the other hand Dwyer J at first instance and Dixon J on appeal concluded on the same evidence that the drain was laid by the defendant in its capacity as a highway authority and that therefore the rule applied. Fortunately for the plaintiff, the third Justice in the High Court agreed with the Chief Justice, on other grounds, that the plaintiff's appeal should be allowed.<sup>46</sup>

(ii) The merits of the restriction

6.23 In the Commission's opinion the difference between the liability of highway authorities and the liability of other public authorities for accidents attributable to non-feasance in respect of dangers in or near the highway, caused by the restriction of the non-feasance rule to highway authorities, is anomalous and without merit.<sup>47</sup> The difference has not been justified in any of the cases, or in any of the submissions made to the Commission.<sup>48</sup> In the Commission's opinion it cannot be justified. Thus the Commission is unaware of any reasons which explain why, for example, the liability of the Bayswater Road Board to Mr Buckle should have depended upon whether it controlled the defective drain as a highway authority or as a drainage authority.<sup>49</sup> It is unlikely that the Board would have behaved differently had it controlled the drain as a highway authority and indeed, having regard to the

<sup>45</sup> (1936) 57 CLR 259. The material facts of this case are summarised in para 4.6 above.

<sup>46</sup> Other cases: showing how difficult the restriction is to apply in practice include *Unger v Shire of Eltham* (1902) 28 VLR 322 (as interpreted by Latham CJ & Dixon J in *Buckle v Bayswater Road Board* (1936) 57 CLR 259, 271 and 291) when compared to *Crouch v Municipality of Huon* (1912) 8 Tas LR 107.

<sup>47</sup> The merits of the difference, *generally*, between the liability of highway authorities and the liability of other public authorities is considered in para 7.22 to 7.26 below.

<sup>48</sup> The Main Roads Department has argued that the provision of a highway system differs from the provision of any other public service and that this is a reason for giving highway authorities a special immunity. This argument is dealt with in paras 7.22 to 7.26 below.

<sup>49</sup> *Buckle v Bayswater Road Board* (1936) 57 CLR 259, 291.

conflicting ways in which the evidence was interpreted, it is unlikely that the Board was either aware of or gave any thought to the capacity in which it had that control.

6.24 The Commission is therefore of the view that a person's right to obtain compensation for injury or damage suffered as a result of the defective condition of the highway should not depend upon the otherwise irrelevant consideration of whether the authority responsible for that part of the highway was, or was not, a highway authority. It is absurd, for example, that persons injured because of the dilapidated condition of a bridge should be able to recover damages if the bridge was the responsibility of an authority other than a highway authority,<sup>50</sup> but not if it was the responsibility of a highway authority.<sup>51</sup> Adoption of the reforms recommended by the Commission would remove this absurdity by allowing damages to be recovered in both cases, if the person injured could prove that the authority responsible for the bridge had been negligent in relation to its condition.

**(c) The artificial structures exception**

6.25 In a number of cases it has been said that the non-feasance rule does not apply to "artificial structures" placed in the highway.<sup>52</sup> According to the judges who have expressed this view, a highway authority in control of such a structure is under a duty to take reasonable care to keep the structure in a safe condition<sup>53</sup> with the result that the authority will be liable to pay damages to anyone who suffers injury or loss as a result of its failure to do so.

**(i) Uncertainties surrounding the exception**

6.26 The possibility that the non-feasance rule will not apply to artificial structures adds considerable uncertainty to the law governing the liability of highway authorities.

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<sup>50</sup> *Unger v Shire of Eltham* (1902) 28 VLR 322, as interpreted by Latham CJ & Dixon J in *Buckle v Bayswater Road Board* (1936) 57 CLR 259, 271 and 291.

<sup>51</sup> For example, *Murphy v Murray Roads Board* (1906) 8 WALR 45; *Crouch v Municipality of Huon* (1912) 8 Tas LR 107; *Culcairn Shire Council v Kirk* [1964-5] NSW 909.

<sup>52</sup> *The Borough of Bathurst v Macpherson* (1879) 4 AC 256; *South Australian Commissioner v Barnes* (1927) 40 CLR 179, 186; *Donaldson v Municipal Council of Sydney* (1924) 24 SR (NSW) 408; *Buckle v Bayswater Road Board* (1936) 57 CLR 259, 300-301; *Grafton City Council v Riley Dodds (Australia) Ltd* (1956) 56 SR (NSW) 53. See generally, G Sawyer *Non-Feasance in Relation to 'Artificial Structures' on a Highway* (1938) 12 ALJ 231.

<sup>53</sup> Although in these cases language is used which suggests that highway authorities must keep the artificial structure in repair, the Commission is unaware of any case in which it has been held that a highway authority cannot avoid liability by taking precautionary measures in relation to a dangerous artificial structure, rather than repairing it.

- \* In the first place, uncertainty exists because there is disagreement about whether there is an exception to the rule at all in relation to artificial structures. Although support for the existence of the exception can be found in the decision of the Privy Council in *The Borough of Bathurst v MacPherson*,<sup>54</sup> and although it has been relied upon or spoken of with approval in a number of other cases,<sup>55</sup> there is authority to the effect that no such exception exists.<sup>56</sup> Thus Professor Sawyer who in 1938<sup>57</sup> wrote that "... *Macpherson's* case cannot be disregarded by Australian courts ..." felt obliged to say in 1966,<sup>58</sup> "After *Gorrings's* case (1950), I doubt whether it [the artificial structures exception] is available..." to Australian courts.
- \* Closely allied to the above is uncertainty concerning the real basis or nature of the exception assuming that it does exist. It has been said, for example, that the failure to repair an artificial structure is not mere non-feasance at all,<sup>59</sup> which suggests that a person seeking to rely upon the exception would need to establish some form of misfeasance on the part of the highway authority before recovery against it would be possible. Similarly, it has been suggested that the artificial structures exception is no more than an application of the restriction of the non-feasance rule to highway authorities.<sup>60</sup> If either of these explanations is correct, the existence of the exception will compound the problems described above.<sup>61</sup>
- \* Finally, despite the attempt by McTiernan J in *Buckle v Bayswater Road Board*<sup>62</sup> to define "artificial structures", uncertainty has remained as to the

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<sup>54</sup> (1879) 4 AC 256.

<sup>55</sup> The principal cases are listed in footnote 3 of p 54 above.

<sup>56</sup> *Crouch v Municipality of Huon* (1912) 8 Tas LR 107. In *Buckle v Bayswater Road Board* (1936) 57 CLR 259, 291 Dixon J said of *Macpherson's* case that "A case with such a history cannot be regarded as providing a safe link in any chain of legal reasoning".

<sup>57</sup> *Non-Feasance in Relation to 'Artificial Structures' on a Highway* (1938) 12 ALJ 231, 233.

<sup>58</sup> *Nonfeasance Under Fire* (1966) 2 NZULR 115, 126.

<sup>59</sup> *South Australian Railway Commissioner v Barnes* (1927) 40 CLR 179, 186; *Donaldson v Municipal Council of Sydney* (1924) 24 SR (NSW) 408, 411; *Grafton City Council v Riley Dodds (Australia)* (1956) 56 SR (NSW) 53, 58.

<sup>60</sup> Fleming, 421.

<sup>61</sup> Paras 6.9 to 6.14 and 6.22.

<sup>62</sup> (1936) 57 CLR 259, 300. According to his Honour "The criterion for determining whether anything placed in the road is an artificial work must be the nature of the thing itself. It seems clear that the term should not be applied to a road or a section or a layer of road or its foundation made of artificial materials

scope of the exception. It appears to be possible therefore to do no more than merely list examples of the situations in which the rule has, and has not, been applied.<sup>63</sup>

(ii) Merits of the exception

6.27 In so far as the Commission is of the view that the non-feasance rule should be abolished entirely, the Commission acknowledges that the artificial structures exception is, in the present law, a valuable "escape clause"<sup>64</sup> and "a deserving device for further eroding the nonfeasance immunity".<sup>65</sup> However, the Commission is unaware of any explanation for the existence of the exception, other than a reluctance on the part of the courts to extend the immunity, as there seems to be nothing about artificial structures which explains why a duty of care should exist in relation to them, but not in relation to the highway itself. Thus, it has not been suggested that artificial structures are less difficult or expensive than the highway to keep in repair or that if they fall into disrepair they will necessarily be more dangerous than would the highway in such a condition.

6.28 The absence of any satisfactory explanation for the artificial structures exception, other than that suggested in the previous paragraph, and the absurd results the exception can produce, are well illustrated by the cases dealing with the liability of highway authorities for trees. These cases establish that while a highway authority must, because of the exception, take reasonable care to prevent a tree from causing injury or damage if it was planted by the authority,<sup>66</sup> no such duty exists if the tree was self-sown.<sup>67</sup> In the Commission's opinion this distinction could be justified only if there was a correlation between the danger a tree may create and whether or not it was self-sown, or between the distinction and the burden imposed upon highway authorities. However, there appears to be no evidence of either.<sup>68</sup>

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or of both artificial and natural materials... The expression, as I understand it, denotes a structure which is appurtenant or subservient to a road but not a component part of the road fabric".

<sup>63</sup> See generally Fleming 420; P F P Higgins, *Elements of Torts in Australia* ("Higgins") 552-553.

<sup>64</sup> G Sawyer, *Nonfeasance Under Fire* (1966) 2 NZULR 115, 125.

<sup>65</sup> Fleming, 421; see generally W Friedmann, *Liability of Highway Authorities* 5 Res Judicatae 21.

<sup>66</sup> *Donaldson v Municipal Council of Sydney* (1924) 24 SR (NSW) 408; *Hams v City of Camberwell* (1946) ALR (CN) 568; contra G Sawyer *Nonfeasance Under Fire* (1966) 2 NZULR 115, 125.

<sup>67</sup> *Hornsby Shire Council v Bretherton* [1964] NSW 85.

<sup>68</sup> The Commission has been advised by a member of the Botany Department of the University of Western Australia that when all the variables have been considered, planted trees are no more or less likely to be dangerous than self-sown trees. The Commission has also been informed that in the financial year ending 30 June 1980 the Perth City Council, for example, planted approximately 30,000 trees, although most of these were planted in parks and reserves.

## **CHAPTER 7**

### **THE ARGUMENTS IN FAVOUR OF RETAINING THE RULE**

#### **1. INTRODUCTION**

7.1 Four principal arguments have been advanced from time to time in favour of retaining the immunity created by the non-feasance rule. These arguments, and the Commission's response to them, are set out below. Briefly, the Commission is of the view that none of these arguments either separately, or in conjunction with each other, justifies retaining the non-feasance rule and, as indicated above, the Commission has reached the conclusion that this rule should be abolished.

#### **2. THE ARGUMENTS AND THE COMMISSION'S RESPONSE**

##### **(a) The lack of power in a local authority to close a public highway**

7.2 In an article published in 1971 entitled "The Tort Liability of Local Government Bodies"<sup>1</sup> Burt CJ argued that the application of the non-feasance rule to local authorities could be justified on the ground that they lacked the power to close the highways for which they were responsible. This argument was brought to the attention of the Commission in a submission made by Mr N P Hasluck. Although advanced only in relation to local authorities, the Commission has considered, as well, the relevance of this argument to other highway authorities.

7.3 However, the basis for this argument appears to have since been removed by the passage of the *Road Traffic Act 1974-1980*<sup>2</sup> which gives a local authority the power to close, for a period of one month, any road under its control where that road is considered by the authority to be unsafe.

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<sup>1</sup> (1971-1972) 10 West Aust L Rev 99, 108-111.

<sup>2</sup> s 92(2); this provision is reproduced in Appendix II, p 100 below.

7.4 In 1975 the same power was also given to the Commissioner of Main Roads in relation to highways and main roads, by an amendment to the *Main Roads Act 1930-1980*.<sup>3</sup> Although a local authority and the Commissioner of Main Roads can only close a road, highway or main road on their own initiative for a limited period, provision is made in both Acts for this period to be extended by the appropriate Minister.<sup>4</sup>

**(b) It is for the highway authority to determine how to allocate the funds to it among the various demands competing for them**

7.5 In *Buckle v Bayswater Road Board*<sup>5</sup> Dixon J explained the existence of the non-feasance rule on the basis that highway authorities were public bodies to which had been given the administrative responsibility of deciding how best to spend the funds made available to them for road works.<sup>6</sup> According to his Honour:<sup>7</sup>

"It [a highway authority] must decide upon what road work it will expend the funds available for the purpose, what are the needs of the various streets and how it will meet them.....No civil liability arises from an omission on its part to construct a 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".

7.6 Generally speaking,<sup>8</sup> a member of the public has no civil right of action against a public authority because it has failed to provide a service it is empowered to, or because it has not provided that service in the most beneficial manner possible.<sup>9</sup> For example, a decision by a public health authority not to build a new hospital will not give rise to a private right of action even in the case of persons adversely affected by the authority's decision, as this is a matter in respect of which the authority has a discretion concerning the exercise of its

<sup>3</sup> The *Main Roads Act Amendment Act, 1975* s 15 added s 16A to the principal Act; the new provision is reproduced in Appendix II, p 95.

<sup>4</sup> *Road Traffic Act 1974-1979* s 92(1); *Main Roads Act 1930-1980* s 16A(2).

<sup>5</sup> (1936) 57 CLR 259.

<sup>6</sup> This argument is also reflected in the submission made by the Main Roads Department.

<sup>7</sup> (1936) 57 CLR 259, 281-282.

<sup>8</sup> There are two principal qualifications to this statement. First, administrative law remedies may be available if the authorities decision was actuated by bad faith or for an improper purpose or on the basis of irrelevant considerations. If one or more of these can be established the decision may be set aside. See generally Whitmore and Hogg. In addition if the particular official responsible for the decision made it maliciously, damages may be recoverable from the official for the tort of misfeasance in a public office: *Henley v The Mayor of Lyme* (1828) 130 ER 995; *Campbell v Ramsay* [1968] 1 NSW 425. Secondly, the effect of the decision in *Anns v Merton London Borough Council* [1977] 2 WLR 1024 may be to impose some limit on the immunity described. In connection with the effect of this decision upon the liability of highway authorities, see *Barratt v District of North Vancouver* (1979) 89 DLR (3d) 473.

<sup>9</sup> *East Suffolk Rivers Catchment Board v Kent* [1940] 4 All ER 527; *Administration of the Territory of Papua and New Guinea v Leahy* (1961) 105 CLR 6.

powers.<sup>10</sup> Similarly, whether a new road is built, and if it is to be built, how many lanes it is to have, is a matter for the highway authority alone.

7.7 The Commission does not seek to impose any additional civil liability upon highway authorities in relation to decisions of this kind and emphasises that implementation of the reforms it proposes will not do so.<sup>11</sup> However, because highway authorities should remain free, generally speaking, from civil liability in respect of those decisions, it does not follow that they should also be free from liability for failing to safeguard persons using a highway against dangers which make it unsafe. A distinction is drawn between these two kinds of situations in relation to the liability of other public authorities and the Commission believes that it should also be drawn in relation to highway authorities.

7.8 As outlined above,<sup>12</sup> in certain circumstances, public authorities, other than highway authorities, are liable to pay damages to persons who suffer injury or damage as a result of their non-feasance. It has not been suggested to the Commission that this liability places undue fetters on the administrative discretions of those authorities and in the Commission's opinion there is no reason to suppose that it would do so in the case of highway authorities.

**(c) Abolition of the non-feasance rule would impose an undesirable financial burden upon highway authorities.**

7.9 The main argument against the abolition of the non-feasance rule advanced by those commentators<sup>13</sup> on the Working Paper who thought that the law should remain unchanged, and who gave reasons for this view, was that it would lead to the imposition of an additional and unnecessary financial burden upon highway authorities. According to the Main Roads Department, if this was not offset by an increase in the funds made available for roadworks it would result in highway authorities diverting their resources from highway construction to maintenance. This was said to be undesirable because it:

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<sup>10</sup> See generally, Hogg 85-87.

<sup>11</sup> It should be noted in this respect that in para 8.32 below, the Commission recommends that the only duty giving rise to civil liability to which highway authorities should be subject is a duty to take reasonable care to safeguard persons using their highways against dangers which make them unsafe for normal use. Therefore, provided the method chosen is sufficient to fulfil this duty, they will be able to choose between repairing the highway, guarding against the danger in it, warning motorists of that danger or closing the dangerous parts of the highway.

<sup>12</sup> Paras 4.6 and 4.7.

<sup>13</sup> Namely, the Main Roads Department, the Esperance Shire Council, The Motor Vehicle Insurance Trust and The Local Government Association of Western Australia (Inc).

“ ..would definitely slow down or even halt many very high priority road projects in important areas of the State such as the Pilbara and Kimberley regions. Furthermore, there would be a reluctance to open up new roads by stage construction methods<sup>14</sup> in outback areas. Any action along these lines would have very serious consequences in terms of both the social and economic development of this State.”<sup>15</sup>

7.10 While acknowledging that severe demands are already being placed upon the financial resources of highway authorities, the Commission remains of the view, for the reasons given below, that the law governing the liability of highway authorities for non-feasance should be reformed. However, wherever possible the Commission has formulated its detailed recommendations so as to minimise the cost of reform. Thus, the following recommendations<sup>16</sup> in particular were largely motivated by this consideration, namely that -

- \* a highway authority only be made liable to pay damages in respect of injury or damage caused by the dangerous condition of the highway, if it has been negligent in relation to that danger;<sup>17</sup>
- \* the statute giving effect to the reforms proposed by the Commission make it clear that a highway authority is only to be liable to pay damages to a person suffering injury or damage as a result of the dangerous condition of a highway if the authority failed to exercise reasonable care in relation thereto.<sup>18</sup>
- \* the burden of proving that a highway authority has been negligent be placed upon the person claiming compensation;<sup>19</sup>
- \* negligence criteria be incorporated into the statute reforming the law;<sup>20</sup>
- \* persons intending to bring a claim for damages against a highway authority be required to notify the highway authority of their intention to do so within the

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<sup>14</sup> "Stage construction" is the process by which a road is progressively developed according to the traffic demands placed upon it and the availability of funds.

<sup>15</sup> Main Roads Department submission, para 15.

<sup>16</sup> These recommendations are dealt with in more detail below.

<sup>17</sup> Discussed further in paras 8.6 to 8.19 below.

<sup>18</sup> Discussed further in paras 8.31 and 8.32 below.

<sup>19</sup> Discussed further in paras 8.23 and 8.24 below.

<sup>20</sup> Discussed further in paras 8.20 and 8.21 below.

period of time currently applicable to claims against the authority involving misfeasance.<sup>21</sup>

7.11 The Commission has identified the following areas as those in which highway authorities may incur new or additional expense as a result of the abolition of the non-feasance rule -

- \* the payment of compensation to successful claimants ;
- \* alternatively, the payment of insurance premiums where the authority considered it expedient to insure against liability;
- \* expenditure associated with efforts to reduce the number of accidents by, for example, inspecting, repairing and maintaining highways, erecting warning signs and barricading off areas of danger;
- \* the administrative costs associated with processing claims made against the authority.

7.12 As climatic and demographic conditions in Western Australia are different from those existing in the jurisdictions in which the law governing the liability of highway authorities for non-feasance has been reformed, and because the reforms adopted elsewhere are different in important respects from those proposed by the Commission, it must be emphasised that it has not been possible to obtain any precise indication of what implementation of those reforms would cost highway authorities in this State. Nevertheless, as explained below, there are good reasons for believing that reform would not prove to be unreasonably expensive for them.<sup>22</sup>

- (i) The payment of compensation to successful claimants

7.13 Neither the Department of Main Roads nor the Commissioner of Main Roads insures against liability to members of the public for misfeasance arising in connection with the highways for which the Commissioner is a highway authority. Instead, the cost of successful claims of this nature is met from the Department's own resources. If this continued to be the

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<sup>21</sup> Discussed further in paras 8.27 to 8.29 below.

<sup>22</sup> See also para 5.11 above

practice after the implementation of the reforms recommended by the Commission, satisfying successful claims for negligence would almost certainly consume a greater proportion of the Department's resources than has previously been the case.

7.14 On the figures available to the Commission, however, the burden currently imposed by claims made against the Commissioner is small. Thus, in the 1979-1980 financial year only 76 such claims were made for an estimated total of \$61,840 and in that year only \$4,496.52 was paid by the Department in settlement or satisfaction of claims.<sup>23</sup> By way of comparison, in the previous financial year the Department spent \$20,776,000 on road maintenance and \$70,973,000 on road construction.<sup>24</sup> As there is no evidence that highway authorities take less care to avoid negligent omissions than they do to avoid negligent acts<sup>25</sup> this claims experience provides no reason for believing that additional burden implementation of the Commission's recommendations would impose upon highway authorities would be unduly onerous to them, or out of proportion to the benefits that would flow therefrom.<sup>26</sup>

(ii) The payment of insurance premiums

7.15 The Commission has been informed by the State Government Insurance Office that on 30 June 1980 of the 138 local government authorities in Western Australia, 122 were insured with it against public liability, and that the total of the premiums paid by them for this insurance cover was \$125,803.12. This sum represents less than one tenth of one percent of the annual receipts of those authorities.<sup>27</sup> Similarly, the Forests Department<sup>28</sup> also insures against public liability with the State Government Insurance Office (SGIO). On the other hand, neither the Minister for Works nor, as mentioned above, the Commissioner of Main

<sup>23</sup> These figures do not include claims for personal injury made in respect of accidents arising out of the use of the Department's motor vehicles. Such claims are handled by the Motor Vehicle Insurance Trust.

<sup>24</sup> Main Roads Department, 1978-79, *52nd Annual Report*, 13

<sup>25</sup> On the contrary, the Department of Main Roads, in para 25 of its submission, said that every precaution was taken by it to avoid accidents occurring on the highways for which it was responsible. See also para 7. 19 below.

<sup>26</sup> Although for the reasons given below (para 7.17) the Commission does not believe that the experience of highway authorities in the United Kingdom since 1964 (when liability for non-feasance first arose) can be related directly to Western Australia, it notes with interest that the company insuring approximately 70% of all public liability risks for local authorities in the United Kingdom has estimated that the highway claims (for **both** non-feasance **and** misfeasance) it received in 1977 are likely eventually to cost it approximately \$7.7 million only. In 1977 the population of the United Kingdom was approximately 47 times that of Western Australia.

<sup>27</sup> The figures needed to enable the Commission to calculate the exact percentage are not available to it. The most recent figures available show that in the 1977-1978 financial year the total receipts of **all** 138 local government authorities was \$202,447,200.

<sup>28</sup> The Forests Department has a policy which provides public liability cover up to \$5 million. It has been estimated that in the 1980-1981 financial year this will cost the Department \$18,000

Roads as far as roads are concerned, are insured against this kind of liability but act, in effect, as their own insurer.

7.16 As a public liability insurance policy would provide local authorities, and other highway authorities, with an indemnity in the event of being held liable to pay damages arising out of their non-feasance in relation to the control and management of a highway, it would be unnecessary for those authorities already having such a policy to purchase any additional insurance because of the implementation of the Commission's recommendations. However, the Commission would expect the premiums for the public liability insurance policies of highway authorities to increase in response to the incidence of claims made against them for non-feasance.

7.17 When attempting to estimate what the increase in public liability insurance premiums would be for highway authorities, the Commission sought the assistance of the SGIO and the British Insurance Association. The Commission approached the latter because the non-feasance rule was abolished in England and Wales in 1961<sup>29</sup> and it was thought that subsequent insurance experiences in those countries might provide a useful guide for Western Australia. However, for the reasons given in paragraph 7.12 above and especially because the reforms proposed by the Commission are considerably less onerous to highway authorities than the reforms adopted in England and Wales,<sup>30</sup> it has not been possible to use the claims experience of highway authorities in those countries to predict what the claims experience of highway authorities in Western Australia might be. Therefore, the Commission does not believe that the estimate by the Assistant Secretary of the British Insurance Association that the insurance premium of a department responsible for highways would need to be increased five fold can be applied in Western Australia.

7.18 A more appropriate figure was provided by the then Acting Deputy General Manager of State Government Insurance Office who said that he would expect premiums "...to more than double in a matter of a few years..." if the non-feasance rule were abolished. If this were to occur it would mean that local authorities, for example, would still only have to allocate approximately two tenths of one percent of their annual revenue to public liability insurance.

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<sup>29</sup> *Highways (Miscellaneous Provisions) Act, 1961* (UK). The Act came into force on 4 August 1964.

<sup>30</sup> The provisions that are more onerous in England and Wales are described in paras 5.4 and 5.6 above.

## (iii) Expenditure associated with efforts to reduce the number of accidents

7.19 Highway authorities already spend considerable amounts of money repairing and maintaining their highways<sup>31</sup> and submissions received by the Commission indicate that, generally speaking at least, it is already their policy to take reasonable steps to monitor the condition of their highways and remove or guard against dangers arising in them. Thus according to the Main Roads Department<sup>32</sup> it “...makes every effort to advise motorists of potential problems by signs and road condition reports and to repair the road as soon as possible.” It must be kept in mind that implementation of the reforms proposed by the Commission would only require highway authorities to take reasonable care to safeguard persons using their highways against dangers which make them unsafe for normal use. Generally speaking therefore, they would be able to avoid liability by, for example, erecting suitable warning signs or barricades or by closing the dangerous section of a highway. Repair would only be necessary if there was no other way in which the duty of care could be fulfilled.<sup>33</sup>

7.20 For these reasons the Commission believes that the reforms it proposes would not require a substantial re-allocation of funds from highway construction to maintenance. Although it may prove necessary for some highway authorities to devote a greater proportion of their funds to highway maintenance, there is every reason to believe that authorities adopting repair, maintenance and warning practices similar to those now adopted by the Main Roads Department will not find this increase prejudicial to their construction programmes.

## (iv) Administrative costs associated with processing claims

7.21 Although it has been suggested by a number of commentators that abolition of the non-feasance rule would lead to an increase in the administrative costs of highway authorities, the Commission has been unable to obtain any details of what these might be. Nevertheless, the Commission agrees that implementation of the reforms it has proposed could be expected to increase the administrative workload, at least, of highway authorities. However, as claims

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<sup>31</sup> For example, in the 1978-1979 financial year the Main Roads Department spent \$20,766,000 on road maintenance which amounted to 15.7% of the Department's total expenditure: Main Roads Department, 1978-79, *52nd Annual Report*, 13. In the 1979-1980 financial year the Department spent \$26,055,000 on road maintenance.

<sup>32</sup> Submission, para 19.

<sup>33</sup> See generally para 8.11 below.

by pedestrians are likely to be proportionately lower in Western Australia than, for example, in the United Kingdom, and because the Commission has recommended that the burden of proving negligence be placed upon the plaintiff, it believes that the additional administrative tasks that would be generated by implementation of its proposals are unlikely to impose a significant burden upon highway authorities.

**(d) Highway authorities are in a unique position**

7.22 In its submission the Main Roads Department argued that a highway system was different from any other public amenity and that this was therefore a reason for highway authorities being given an immunity not enjoyed by other public authorities. Thus, according to the Department,<sup>34</sup> highway authorities are not able to exercise the same detailed control over the highway that other authorities are able to exercise over the utilities for which they are responsible and have not the same ability that they do to restrict public access to the service they provide.

7.23 The Commission accepts that there may be differences in certain respects between the responsibilities associated with controlling and maintaining a highway system and maintaining other public services. However, it does not agree that these provide any basis for granting highway authorities a special immunity.

7.24 Although the size of a highway system is such that the sites of potential dangers are many and varied the same is also true of the water, sewerage and electricity systems. There are over 21,000 kilometres of water mains<sup>35</sup> and 58,000 kilometres of electrical power lines<sup>36</sup> in use in Western Australia and having regard to the frequent proximity of electrical power lines to roads and footpaths and other public areas, the risks associated with the electrical power system in particular, seem to the Commission to be analogous to those associated with the highway system. Nevertheless, should a defect develop in any part of these systems and a

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<sup>34</sup> Submission, paras 6, 7, 8 and 9.

<sup>35</sup> There are 7,820 km of water mains in the Perth metropolitan area and 13,293 km in country areas. The authorities responsible are either the Minister for Works, the local Water Board or the Metropolitan Water Supply, Sewerage and Drainage Board. See generally, *Country Areas Water Supply Act 1947-1980*, *Water Boards Act 1904-1979*, and *Metropolitan Water Supply, Sewerage, and Drainage Act 1909-1980*.

<sup>36</sup> There are 12,500 km of electrical power lines in the Perth metropolitan area and 45,866 km in country areas under the control of the State Energy Commission.

person suffer injury or damage as a result of the non-feasance of the responsible authority, the authority would be liable to pay damages to that person.<sup>37</sup>

7.25 The Commission also does not accept that members of the public have unique expectations about their use of the highway system. Although restrictions on the right of access to highways are no doubt unwelcome, so are cuts to the supply of water and electricity which repair and maintenance sometimes demands.

7.26 Finally, to the extent that the nature and range of the liabilities of highway authorities are different to those of other public authorities, the courts will no doubt make appropriate adjustments when determining the standard of care to be expected of them. In this respect it is to be noted that the Commission has recommended the enactment of negligence criteria to draw attention to the kind of factors that may be especially relevant to highway authorities.<sup>38</sup>

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<sup>37</sup> *Walmsley v Kalgoorlie Electric Tramways Ltd* (1903) 5 WALR 49; *Harrison v Sydney Municipal Council* (1931) 10 LGR 116; *Buckle v Bayswater Road Board* (1937) 57 CLR 259; *Thompson v Bankstown Municipal Council* (1953) 87 CLR 619.

<sup>38</sup> Described in para 8.21 below.

## **CHAPTER 8**

### **RECOMMENDATIONS FOR REFORM**

#### **1. INTRODUCTION**

8.1 As foreshadowed, the Commission is of the opinion that the law governing the liability of highway authorities is in need of reform. The Commission's reasons for holding this opinion, and for being unpersuaded by the arguments advanced in favour of the present law, are set out above.<sup>1</sup> The Commission's detailed recommendations are set out below.

8.2 The Commission believes that, in principle, the law governing the liability of highway authorities should be the same as that governing other public authorities,<sup>2</sup> and that as far as possible consistent with this belief, the liability of highway authorities for non-feasance should be the same as it is currently for misfeasance. The Commission holds this belief because if the law were reformed in accordance with it, damages would be recoverable in a number of deserving cases in which they cannot be recovered at present,<sup>3</sup> the defects in the law described in Chapter 6 of this report would be removed, and because there are no convincing reasons why the law governing the liability of highway authorities should be special in any respect. However, as also indicated above,<sup>4</sup> the Commission believes that the law should be reformed in a manner that will overcome the hardship and inequities caused by the non-feasance rule without at the same time placing an undue burden upon the limited financial resources of highway authorities.

8.3 The following recommendations have been framed in accordance with these principles. Briefly, their implementation would make the liability of highway authorities for non-feasance the same as it is at common law for other public authorities. It would, however, leave unaltered the law governing their liability for decisions<sup>5</sup> of the kind described in paragraph 7.6 above and would not make it mandatory for them to keep their highways in

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<sup>1</sup> Chapters 6 and 7 respectively.

<sup>2</sup> See generally para 1.7 above.

<sup>3</sup> For example, those described in para 1.4 above.

<sup>4</sup> Para 1.7.

<sup>5</sup> Thus if a highway authority decides not to construct a new highway, or not to bituminise an existing gravel road no private right of action will arise, even in the case of persons peculiarly adversely affected by that decision.

good repair<sup>6</sup> except where this is the only way in which the duty of care proposed by the Commission could be fulfilled.

## 2. THE MAIN RECOMMENDATIONS

### (a) The non-feasance rule be abolished

8.4 The principal reforms required in order to meet the need for compensation described above in paragraphs 6.4 to 6.6, and to remove the defects in the present law described above in paragraphs 6.7 to 6.28, are the abolition of the non-feasance rule and its replacement by an obligation to pay damages in certain cases.

8.5 As mentioned previously, the non-feasance rule prevents persons who suffer injury or damage as a result of the dangerous condition of a highway recovering damages for that injury or damage.<sup>7</sup> Abolition of this rule is therefore necessary in order to allow the recovery of damages in such cases. This would remove the special immunity from liability for non-feasance enjoyed by highway authorities and, when coupled with the following recommendations, would also remove the differences currently existing between the liability of highway authorities for misfeasance and for non-feasance in relation to dangers occurring in the highway causing accidents,<sup>8</sup> between the liability of highway authorities and the common law liability of other authorities for non-feasance, and between the liability of highway authorities for non-feasance in relation to artificial structures and their liability for

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<sup>6</sup> If a public authority, including a highway authority, provides a service or benefit it will not, at common law, be liable merely because as a result of neglect or carelessness the service or benefit subsequently becomes less valuable than it would otherwise have been. In the case of a highway authority, this rule is expressed in the form of the second sub-rule set out in footnote 3 on p 7S above. For example, a highway authority is not liable for economic loss suffered by a carrier as a result of being unable to use a particular road due to its dilapidated condition. In certain cases this freedom from liability is confirmed by statute (see for example, the *Metropolitan Water Supply, Sewerage and Drainage Act 1909-1980* s 46 and the *State Energy Commission Act 1979*, s 58). However, a duty to continue to provide a service is imposed by statute in certain cases (see for example the *Electricity Act 1945-1979* s 25(1)). Cases of this kind must be distinguished from those in which additional damage is caused to a member of the public as a result of the manner in which the service is provided as occurred in *Birch v Council of the Central West County District* (1969) 119 CLR 652.

<sup>7</sup> Paras 1.4 and 6.4.

<sup>8</sup> A difference will continue to exist in respect of economic loss suffered as a result of a highway being impassable. If the highway is impassable because of misfeasance on the part of the highway authority it may be liable in nuisance to persons who suffer particular damage as a result, over and above the general inconvenience suffered by the general public. This would not be the case if the highway became impassable because of the highway authority's non-feasance. The equivalent distinction exists at common law in respect of other public authorities.

non-feasance in relation to the highway itself. It would then no longer be necessary to draw the unsatisfactory distinctions discussed in paragraphs 6.8 to 6.28 above.

**(b) Highway authorities be required to take reasonable care**

8.6 If the ordinary law of negligence is to govern the liability of highway authorities for non-feasance, it is necessary that they be required to exercise reasonable care. Therefore, as doubts exist as to whether a duty to take reasonable care would arise automatically upon abolition of the non-feasance rule,<sup>9</sup> the Commission recommends that such a duty be specifically imposed upon highway authorities.<sup>10</sup> Precisely, the Commission recommends that highway authorities be required to take such care as is reasonable in all the circumstances to safeguard persons using their highways against dangers which make them unsafe for normal use.

**(i) The alternatives considered by the Commission**

8.7 When considering what was the most appropriate recommendation to make in this respect, the Commission examined four alternative ways of imposing upon highway authorities the necessary duty to take reasonable care.<sup>11</sup> These were -

- \* to impose upon highway authorities a duty to exercise reasonable care to keep their highways in good repair;
- \* to impose upon highway authorities a duty to exercise reasonable care to ensure that their highways are reasonably safe for the persons using them;
- \* to impose upon highway authorities an obligation to compensate persons who suffer injury or damage as a result of the dangerous condition of their

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<sup>9</sup> See for example G Sawyer, *Nonfeasance Under Fire*, (1966) 2 NZULR 115, 117-118.

<sup>10</sup> The Commission recommends that whether this duty is delegable, in the sense that a highway authority could avoid liability for breach of the duty of care proposed by engaging an independent contractor to carry out roadworks, be determined in accordance with the prevailing common law. At present it appears that highway authorities cannot avoid liability in this way; see generally, Fleming, 379-380

<sup>11</sup> The Commission did not adopt the approach to reform recommended in the South Australian Report as that approach does not accord with the first of the guiding principles set out in para 1.7 above insofar as the report proposes the imposition of a new duty upon public authorities and that the burden of proof be reversed.

highways, but provide that it shall be a defence for an authority to show that it had taken reasonable care to prevent, remove or guard against the danger;

\* to impose the duty it has in fact recommended.

8.8 Implementation of the first alternative would make the law in Western Australia substantially the same as the law in England<sup>12</sup> and Wales<sup>13</sup> and in the Canadian Provinces of Alberta,<sup>14</sup> Ontario<sup>15</sup> and Saskatchewan.<sup>16</sup> The Commission rejected this alternative, however, because it grants legal recognition to only one of the methods by which highway authorities can act to protect users of the highway. This, the Commission thought, would be unfair to highway authorities and undesirably burdensome to them in practice.<sup>17</sup> As the Main Roads Department pointed out in its submission,<sup>18</sup> due to the size of the highway network in Western Australia and the severe climatic conditions which sometimes prevail in parts of the State, it may often be impossible or impractical for a highway authority to repair a highway immediately it falls into disrepair. For example, if it could be anticipated that repairs would soon be rendered useless by causes beyond the authority's control, it might be considered wasteful to carry out those repairs.<sup>19</sup> In such cases especially, it should, generally speaking, be sufficient for an authority to safeguard users of the highway against dangers arising in it by erecting suitable warning signs, or by suitably barricading or closing off the dangerous parts of the highway, or by taking other similar measures. Finally, this alternative was rejected because it is a no more satisfactory way of effecting the reforms the Commission thinks are desirable, or of protecting users of the highways from injury or damage, than adoption of the fourth alternative.

8.9 The second alternative is that recommended by the New Zealand Report.<sup>20</sup> The Commission believes that in practice, adoption of this alternative would probably have the same effect as the adoption of the fourth. However, it could be argued that imposing a duty upon highway authorities to ensure that their highways are reasonably safe would have the

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<sup>12</sup> Discussed in paras 5.2 to 5.6 above.

<sup>13</sup> Ibid.

<sup>14</sup> Discussed in para 5.7 to 5.11 above.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> As to the effect, in this respect, of implementation of the Commission's recommendations, see para 8.11 below.

<sup>18</sup> Mr A R Chamberlain made the same point in his submission.

<sup>19</sup> In its submission, the Main Roads Department gave as an example carrying out repairs to a highway when further rains were expected which would destroy them.

<sup>20</sup> Discussed in paras 5.19 and 5.20 above

same effect as imposing upon them a duty to maintain and keep their highways in repair. This appears to have been the view of the New Zealand Torts and General Law Reform Committee.<sup>21</sup> If this view, about which the Commission has doubts, is correct then the second alternative would be open to the same objection as the first.

8.10 The third alternative was adopted in the British Columbian Report<sup>22</sup> and the effect of implementing it would theoretically be the same as implementing the fourth. The Commission rejected this alternative, however, in favour of the fourth, because the latter would be more consistent with the traditional manner in which civil liability for failing to exercise reasonable care arises in Anglo Australian law, namely, through the breach of a duty to exercise such care owed by one party to the other. In the Commission's opinion, it would be advantageous for any new civil liability to harmonise as far as possible with the existing law.

(ii) The consequences of imposing this duty of care

8.11 In addition to permitting the recovery of damages in certain deserving cases, the imposition of the duty recommended would have three important consequences. The first is that highway authorities would not be automatically obliged to repair their highways once they fell into disrepair nor would they have to remove dangerous obstacles immediately they were discovered. Although to avoid liability, highway authorities would find it necessary to adopt reasonable measures to monitor the condition of their highways, once an authority became aware that a highway was in a dangerous condition it would be free to select an appropriate method of safeguarding users of the highway against that condition. It would be able to choose between, for example erecting warning signs or safety barriers, repairing or maintaining the highway, temporarily closing dangerous sections thereof, removing the source of danger, or any combination of these. As long as the method adopted by the authority fulfilled the duty of care it would not be liable for any accidents which nonetheless occurred, attributable to the dangerous condition of the highway.

8.12 The second consequence is that because highway authorities would be liable for accidents caused by dangers which make the highway unsafe for normal use only if they had been negligent in relation to those dangers, they would not be liable for accidents attributable

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<sup>21</sup> New Zealand Report, para 11. The two concepts are also linked together in a similar manner in recommendations 1 and 2 of the British Columbian Report, 24.

<sup>22</sup> Discussed in paras 5.15 to 5.18 above

to the act or omission of a third party unless, subsequently, they had been negligent themselves in relation to those dangers. Thus, for example, if a danger was created by a third party,<sup>23</sup> or if a third party removed or rendered ineffective measures taken to safeguard persons against a danger, a highway authority would not be liable for any accident caused thereby unless, after the intervention of that third party, it had negligently failed to remove, or safeguard users of the highway against, the danger.<sup>24</sup>

8.13 The Commission carefully considered whether or not a special provision should be made exempting highway authorities from liability in the kind of situations described in the previous paragraph. It concluded that such a provision should not be made because it would be anomalous to exempt highway authorities from liability where they had been negligent, and because it would be undesirable as -

- \* in cases in which the act or omission of the third party was not tortious, exempting the highway authority from the consequences of its own negligence would prevent persons who suffer injury or loss obtaining the damages they would otherwise be entitled to;
- \* in cases in which the act or omission of the third party was tortious, that person would, as a concurrent tortfeasor, be liable to contribute to the damages awarded against the highway authority<sup>25</sup> and perhaps even to indemnify it completely;<sup>26</sup>

<sup>23</sup> For example, by damaging the surface of the highway, by placing or leaving a dangerous substance such as broken glass or oil on the highway, or by obstructing the highway. The Commission notes that generally, if another public authority wishes to interfere with a highway it must, except in cases of emergency, give advance notice of its intention to the local authority having jurisdiction in the area in question and must not interfere except under the supervision of the local authority. The authority must also reinstate the highway as soon as possible, and in the meantime cause it to be fenced or guarded: See, for example, *Land Drainage Act 1925-1978* ss 66, 67, 68 and 69; *Country Towns Sewerage Act 1948-1980* ss 18, 19 and 20; *Country Areas Water Supply Act 1947-1979* ss 21, 22 and 23. While it appears that the State Energy Commission does not have to notify the highway authority of its intention to interfere with the highway, it is required to reinstate the highway as soon as possible and fence or guard it in the meantime. In addition, the Commission is required to indemnify the highway authorities in relation to any claims, cost or expenses arising out of its failure to do any of these things: *State Energy Commission Act 1979* s 53. See also the *Telecommunications Act 1975-79* (Cth) s 16(5) and (6).

<sup>24</sup> *Subiaco Municipal Council v Walmsley* (1930) 32 WALR 49. This is, generally speaking, the position in the United States of America, in those jurisdictions in which highway authorities are liable for non-feasance, see 39 Am Jur 2d s 354.

<sup>25</sup> *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947*, s 7.

<sup>26</sup> *Semtex Ltd v Gladstone* [1954] 2 All ER 206. Although the plaintiff company in this case obtained a complete indemnity, the Commission notes that the defendant's negligence was the sole cause of the accident in respect of which the company had been required to pay the damages it then sought to recover from the defendant. Whether a complete indemnity would ever be recoverable by a highway authority

- \* in many cases it may be difficult to determine whether or not the danger was attributable to the act or omission of a third party. This issue could then become the subject of a costly dispute between the highway authority and the claimant. The reform proposed by the Commission would minimise this kind of dispute.

8.14 The Commission recommends, however, that highway authorities be empowered to direct the third party responsible for the existence of a danger to, for example, remove the danger, or, at that party's expense, carry out the necessary work themselves.<sup>27</sup>

8.15 The third consequence is that highway authorities could be liable for injury or damage sustained as a result of their negligent failure to remove or guard against "natural"<sup>28</sup> dangers not forming part of the actual highway itself but which nevertheless made using the highway dangerous. Liability could arise, for example, for injury caused by a highway authority's negligent failure to take precautionary measures in relation to a dangerous tree adjacent to or over-hanging the highway, or in relation to sand drifting, water flooding, or a tree that had fallen across the highway.

8.16 At present, highway authorities are liable for injury or damage caused by dangers of this kind only if in some way they were responsible for the dangers coming into existence.<sup>29</sup> Thus for example, whilst authorities are under a duty to take reasonable care to keep the trees they have planted reasonably safe, and will be liable for injury or damage caused by their failure to do so,<sup>30</sup> they are under no such duty in relation to self-sown trees.<sup>31</sup>

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where it has itself been negligent is unclear. There may be policy justifications which would warrant the enactment of a special provision to enable a highway authority to obtain a complete indemnity from the third party; see for example the *Saskatchewan Urban Municipality Act* s 415, reproduced in Appendix III, p 116 below. Under s 53(2) of the *State Energy Commission Act 1979*, a highway authority is entitled to an indemnity from the State Energy Commission in respect of claims made against it as a result of the Commission's failure to comply with subsection 1 of that section.

<sup>27</sup> A similar, though more limited provision exists in the *Highways Act 1959* (UK) s 128, reproduced in Appendix III p 101 below. The Commission notes that the *Road Traffic Act 1974-1980* s 84(1) already makes the owner of a motor vehicle liable for damage caused to a highway by the use of the motor vehicle. In addition, s 84(2) requires a person in charge of a vehicle that has caused a bridge or culvert to become hazardous to (i) place a conspicuous sign or mark on or near the bridge warning persons of the hazard and (ii) notify the nearest police station or office of the highway authority of the hazard.

<sup>28</sup> A "natural" danger in this context means a danger that has arisen through the operation of the forces of nature.

<sup>29</sup> See for example, *Lerm v Collie Road Board* (1934) 37 WALR 48.

<sup>30</sup> *Hams v City of Camberwell* (1946) ALR (CN) 568.

<sup>31</sup> See for example, *Hornsby Shire Council v Bretherton* [1964] NSW 85.

8.17 In the Commission's opinion highway authorities should be liable for injury or damage caused by their negligent failure to remove or guard against natural dangers.<sup>32</sup> As far as the statutory duty recommended is concerned, there is no logical difference between such dangers and dangers forming part of the actual highway itself, and unless highway authorities are liable in the kind of situations under consideration, compensation will not always be recoverable by the accident victims involved.

8.18 In certain cases a third party will be responsible for, or have control over, the natural danger. For example, dangerous trees within the boundary of land adjacent to the highway are the responsibility of the owner or occupier of the land and such persons are already liable for any injury or damage they cause to users of the highway.<sup>33</sup> In these cases, if damages were recovered from a highway authority for breach of the duty of care recommended by the Commission, the authority would, if the act or omission of the third party in relation to the natural danger was tortious, be able to obtain a contribution or indemnity from that party.<sup>34</sup>

8.19 To enable highway authorities to perform the duty of care recommended in the kind of situations described in the previous paragraph, the Commission recommends that highway authorities be empowered to direct the third party to remove the natural danger, or to execute the necessary work themselves at that party's expense.<sup>35</sup>

**(c) When determining whether a highway authority had exercised reasonable care, a court be entitled to consider, among others, certain specified criteria**

8.20 The United Kingdom *Highways (Miscellaneous Provisions) Act 1961*<sup>36</sup> provides that when deciding whether a highway authority has taken reasonable care, the courts shall have regard to a number of specified matters. The adoption of a similar approach was

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<sup>32</sup> Other authorities are liable in similar situations, see *Schiller v Council of the Shire of Mulgrave* (1972) 129 CLR 116.

<sup>33</sup> *Cull v Green* (1924) 27 WALR 62; *Quinn v Scott* [1965] 2 All ER 588.

<sup>34</sup> *Law Reform (Contributory Negligence & Tortfeasors' Contribution) Act 1947*, s 7. See generally footnote 26 on p 61 above, especially the suggestion that consideration could be given to enacting a special provision to enable a highway authority to recover a complete indemnity from a tortious third party.

<sup>35</sup> A similar, though more limited power is given to highway authorities in the UK by the *Highways Act 1959* ss 130 and 134, reproduced in Appendix III below. Under s 516A of the *Local Government Act 1960-1980* a local authority already possesses the power, in certain circumstances, to require a dangerous tree to be rendered safe.

<sup>36</sup> S 1(3); see generally paras 5.2 to 5.6 above, and Appendix III, below.

recommended in the British Columbian Report.<sup>37</sup> On the other hand it has been argued that doing this undesirably fetters a court called upon to determine whether or not a highway authority has broken the duty of care imposed upon it.<sup>38</sup>

8.21 The Commission agrees that the courts should be left free to take into account all the matters traditionally considered by them when hearing and determining negligence actions. Nevertheless, the Commission believes that it would be helpful to highway authorities to draw attention to the kind of matters that would be relevant in any determination of their liability. Therefore the Commission recommends that when determining whether a highway authority had exercised reasonable care, a court should be entitled to consider, among other matters, the following,<sup>39</sup> namely,

- (i) the character of the highway;
- (ii) the character and the amount of traffic which could reasonably be expected to use the highway;
- (iii) the precautionary measures appropriate to safeguard persons using a highway of that character, at the time, and in the location, the accident occurred;
- (iv) the financial and other resources available to the authority for use in connection with the highways for which it is responsible;<sup>40</sup>
- (v) the condition or state of repair in which a reasonable person would have expected to find the highway;
- (vi) whether the authority knew, or ought reasonably to have known, that a danger had occurred in the highway;

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<sup>37</sup> Report, 24, discussed in para 5.15 above.

<sup>38</sup> See, for example, the New Zealand Report, para 11.

<sup>39</sup> The matters listed for consideration are largely taken from the *Highways (Miscellaneous Provisions) Act*, (UK) s 1(3), reproduced in Appendix III, below, and the British Columbian Report, 29.

<sup>40</sup> As to the relevance of financial resources, see generally, *Miller v McKeon* (1906) 3 CLR 50; *Wenbam v Council of Municipality of Lane Cove* (1918) 18 SR (NSW) 90; *Woodward v Orara Shire Council* (1948) 49 SR (NSW) 63; *Leakey v National Trust* [1980]1 QB 485

- (vii) whether, before the accident in question happened, the authority could reasonably have been expected to safeguard users of the highway against the danger which caused the accident.

8.22 The Commission emphasises that in making this recommendation it is not its intention to introduce into the law governing the liability of highway authorities considerations that would be unique thereto, or which would in any way fetter the courts.

**(d) The burden of proving that a highway authority failed to exercise reasonable care be upon the person seeking damages**

8.23 In accordance with its belief that, as far as possible, the law governing the liability of highway authorities for accidents attributable to their acts or omissions should be the same as that governing the liability of other public authorities and private persons and organisations, the Commission recommends that the burden of proving that a highway authority has broken the duty of care proposed above be placed upon the person claiming damages for breach of that duty.

8.24 The Commission acknowledges that, in practice, one effect of this recommendation will be to give highway authorities a certain advantage over persons claiming damages in cases of non-feasance, as they will generally have better access to information concerning matters relevant to the issue of whether or not they have fulfilled their duty of care.<sup>41</sup> However, this is also the case with other public authorities and the Commission is of the view that having been dispossessed of an immunity, highway authorities should not then be placed in a more disadvantaged position than that occupied by other authorities. In addition, having to prove their case will have the advantage of discouraging persons from making frivolous claims for damages and this in turn will lessen the cost of reform to highway authorities.

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<sup>41</sup> The doctrine of *res ipsa loquitur* may assist claimants where the tribunal of fact is entitled to think that an accident would have been unlikely to occur without the highway authority having failed to take reasonable care. In such a case an inference of negligence may be drawn (*Government Insurance Office of NSW v Fredrichberg* (1968) 118 CLR 403).

**(e) The existing provisions concerning contributory negligence and contribution between persons guilty of negligence apply to claims brought against highway authorities for breach of the duty of care**

8.25 In the Working Paper<sup>42</sup> the Commission raised the issue of whether contributory negligence should be a complete defence to a claim brought against a highway authority based on its non-feasance, or whether the damages recoverable should merely be reduced in proportion to the extent to which the claimant was responsible for the accident in respect of which the claim was being made. Seven commentators dealt with this issue in their submissions. Only the Main Roads Department suggested that contributory negligence by the claimant should be a complete defence to the claim. All the other commentators agreed that the damages which would otherwise have been awarded to the claimant should merely be reduced in proportion to the claimant's responsibility for the accident. This is currently the position in relation to claims brought against other public authorities and against highway authorities based on misfeasance.

8.26 The Commission considers the latter approach to be the more fair. It therefore recommends that any legislation implementing the recommendations made above should expressly provide that where a claimant is guilty of contributory negligence the provisions of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947*, should apply to the claim.<sup>43</sup> This would avoid making the law governing the liability of highway authorities for breach of the statutory duty described above different from their liability for misfeasance and from the law applying to other persons and authorities. It would also be in accordance with the approach to reform taken elsewhere.

**(f) The existing notice requirements and limitation periods applicable to highway authorities apply to claims brought against them for breach of the duty of care**

8.27 The *Limitation Act 1935*<sup>44</sup> requires persons intending to make a claim against a public authority, such as the Commissioner of Main Roads and the Minister for Works, to give the authority written notice of their intention to do so as soon as practicable after, and to commence their action within one year of, the date upon which their cause of action arose.

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<sup>42</sup> Paras 6.25 and 7.1.

<sup>43</sup> Strictly such a provision may not be necessary because in s 3 of the Act "negligence" is defined to include breach of statutory duty. However it would make the position beyond doubt. The relevance of the tortfeasors' contribution provisions of the Act to highway authorities is discussed in paras 8.13 and 8.18 above.

<sup>44</sup> S 47A(1) and (4)(a). The relevant provisions of the Act are reproduced in Appendix II, below.

Provision is made in the Act for the authority and the Court<sup>45</sup> to extend the latter period, whether or not notice has been given, and allow an action to be brought at any time before the expiration of six years from the date upon which the cause of action arose. Substantially similar provisions regarding the giving of notice and the commencement of proceedings are contained in the *Crown Suits Act* in relation to claims brought against the Crown<sup>46</sup> and in the *Local Government Act*<sup>47</sup> in relation to claims brought against local government authorities.<sup>48</sup> However, unlike public authorities, and the Attorney General on behalf of the Crown, local government authorities cannot consent to proceedings being brought if those provisions have not been complied with. Leave to proceed in such cases can only be given by a judge.<sup>49</sup>

8.28 These provisions currently apply to actions for misfeasance brought against the Commissioner of Main Roads, the Minister for Works, the Crown and local government authorities in their capacity as highway authorities. Unless otherwise provided, they would apply to actions based on non-feasance when the reforms recommended above are implemented.

8.29 In keeping with its view that the law governing the liability of highway authorities for non-feasance should be the same as that governing the liability of other public authorities, and, as far as possible, the same as that governing their liability for misfeasance the Commission recommends that no special provision be made concerning giving notice of claims against highway authorities for non-feasance or concerning the time within which those claims can be brought. The provisions described above in paragraph 8.28 would then apply to such claims. The Commission considers that requiring persons who suffer injury or damage as a result of the dangerous condition of the highway to notify the responsible highway authority of their intention to claim damages in respect thereof would also be desirable because it would provide the authority with a greater opportunity to inspect the

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<sup>45</sup> S 47A(3)(b) of the Act provides that the Court may grant leave to bring an action, subject to any conditions it thinks fit to impose, if it considers that failure to give the notice or the delay in bringing the action was occasioned by mistake or by any other reasonable cause or that the authority had not been materially prejudiced in its defence or otherwise by the failure or delay.

<sup>46</sup> *Crown Suits Act 1947-1957* s 6(1), reproduced in Appendix 11, below.

<sup>47</sup> *Local Government Act 1960-1980* s 660(1), reproduced in Appendix II, below.

<sup>48</sup> The *Local Government Act* differs from the others in that (a) the Act specifies what information is to be contained in the notice; (b) provision is made for claimants to be medically examined in the case of personal injury claims and for their damaged property to be examined in the case of claims for property damage; and (c) provision is made for claimants to answer questions relating to the cause of action put to them by the authority – s 660(1)(b)(c)(d) (e)(f), Appendix II below.

<sup>49</sup> S 660(2) and *Interpretation Act 1918-1975*, s 4.

scene of the accident for the purpose of obtaining evidence concerning it,<sup>50</sup> and would in addition, enable the authority to take action to safeguard other persons against the danger.

### 3. OTHER RECOMMENDATIONS

#### (a) **Persons who suffer injury or damage as a result of a breach of the duty of care be entitled to recover damages from the highway authority**

8.30 For the reasons given above,<sup>51</sup> the Commission believes that persons who suffer injury or damage as a result of the dangerous condition of the highway should be able to recover damages in respect of that injury or damage. However, as the duty of care the Commission has recommended be imposed upon highway authorities would of necessity be a statutory duty, a person would be able to recover damages for breach of it only if the statute involved expressly or by implication conferred such a right.<sup>52</sup> Therefore, the Commission recommends that the statute implementing its other recommendations specifically provide that damages be recoverable for breach of the duty of care imposed upon highway authorities.<sup>53</sup>

#### (b) **Breach of the duty of care be made the only ground upon which highway authorities can be liable in cases of non-feasance**

8.31 It has been suggested that but for the existence of the non-feasance rule highway authorities would be under an absolute duty to repair and maintain their highways.<sup>54</sup> If this is correct, it would mean that claimants who could prove that they had suffered injury or loss as a result of the highway being out of repair would recover damages from the highway authority responsible for that highway, even though the authority had fulfilled the duty of care proposed by the Commission.<sup>55</sup>

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<sup>50</sup> This recommendation, together with the Commission's recommendation that the burden of proving that a highway authority has been negligent be upon a claimant (paras 8.23 and 8.24 above), will make it extremely difficult for persons to make fraudulent claims against highway authorities. In this connection the Commission also notes that it is the policy of the Road Traffic Authority to visit the scene of all serious accidents and compile a report on the causes of the accident.

<sup>51</sup> Paras 6.4 and 6.5.

<sup>52</sup> See generally paras 4.11 and 4.12 above.

<sup>53</sup> The Commission acknowledges that such a provision is possibly unnecessary as a right to recover damages would probably be inferred in any case from the nature of the statutory duty. However, implementation of the recommendation in question would put the matter beyond doubt.

<sup>54</sup> *Griffiths v Liverpool Corporation* [1966] 2 All ER 1015, 1021-1022.

<sup>55</sup> *Griffiths v Liverpool Corporation* [1966] 2 All ER 1015, 1021-1022.

8.32 In the Commission's opinion this would impose far too great a burden upon highway authorities and is something, therefore, against which they should be protected. Consequently, although it is far from certain that the imposition of such an absolute duty **would** automatically follow from the abolition of the non-feasance rule,<sup>56</sup> the Commission recommends that the statute creating the statutory duty proposed above put the matter beyond doubt by expressly providing that highway authorities can be liable in cases of non-feasance only if they do not fulfil that duty.<sup>57</sup>

**(c) The above reforms apply to the Crown**

8.33 The Commission believes that the rules applying to other highway authorities in relation to their highways should also apply to the Crown in its capacity as a highway authority. Therefore, to ensure that the reforms described above apply to the Crown the Commission recommends that the statute giving effect to them expressly bind the Crown. This is necessary because, without such a provision, they might otherwise not do so.<sup>58</sup>

**(d) Responsibility for Forests Department roads be clarified**

8.34 As pointed out above,<sup>59</sup> a doubt exists concerning which authority is presently responsible for the control and management of Forests Department roads. The Commission recommends that this doubt be resolved and that the duty of care proposed above be imposed upon the authority made responsible for these roads.

**4. SETTLING IN PERIOD**

8.35 To give highway authorities time to comply with the duty of care recommended above, and to take such other measures they consider are necessary, the Commission recommends that the Act creating the duty not come into force until a complete financial year has elapsed after the Act is passed.

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<sup>56</sup> See generally, G Sawyer, *Nonfeasance Under Fire* (1966) 2 NZULR 115, 117 and para 8.6 above.

<sup>57</sup> This would have the effect of retaining the second rule described in footnote 3 on p 7 above.

<sup>58</sup> See generally, *Australian Commentary on Halsbury's Laws of England, Administrative Law* C195.

<sup>59</sup> Para 3.12.

(Signed) David K Malcolm , QC  
Chairman

Eric Freeman  
Member

H H Jackson  
Member

C W Ogilvie  
Member

L L Proksch  
Member

5 May 1981

## **APPENDIX I**

### **COMMENTATORS ON THE WORKING PAPER**

Mr A R Chamberlain , Senior Engineer of the City of Canning

The City of Fremantle

The City of Melville

The City of Perth

The Executive Committee of the Country Shire Councils Association of WA

The Department of Local Government

The Esperance Shire Council

Mr N P Hasluck

The Law Society of Western Australia (Inc)

The Local Government Association of Western Australia (Inc)

The Local Government Engineers Association of Western Australia

Mrs M J Lorriman

The Main Roads Department

The Motor Vehicle Insurance Trust

The Royal Automobile Club of WA (Incorporated)

The Shire of Wanneroo

Mr J E Thew

The Town of Cockburn

Mr J A D Treloar, City Planner of the City of Melville

Mr Justice Wallace

Mr L H Wills, City Engineer of the City of Melville

## APPENDIX II

### LEGISLATION IN WESTERN AUSTRALIA RELEVANT TO THE LIABILITY OF HIGHWAY AUTHORITIES

#### CROWN SUITS ACT, 1947-1954

- s 6. (1) Subject to the provisions of subsections (2) and (3) of this section, no right of action lies against the Crown unless -
- (a) the party proposing to take action gives to the Crown Solicitor, as soon as practicable or within three months (whichever of such periods is the longer), after the cause of action accrues, notice in writing giving reasonable information of the circumstances upon which the proposed action will be based and the name and address of the party and his solicitor or agent; and
  - (b) the action is commenced before the expiration of one year from the date on which the cause of action accrued,

and for the purposes of this section where the act, neglect, or default on which the proposed action is based is a continuing one, no cause of action in respect of the act, neglect or default accrues until the act, neglect or default has ceased but the notice required by paragraph (a) of this subsection may be given and an action may thereafter be brought while the act, neglect or default continues.

(2) The Attorney General may on behalf of the Crown consent in writing to the bringing of an action against the Crown at any time before the expiration of six years from the date on which the cause of action accrued whether or not the notice as required by subsection (1) of this section has been given.

(3)(a) Notwithstanding the foregoing provisions of this section application may be made to the Court having jurisdiction to hear the action when the application is granted for leave to bring an action at any time before the expiration of six years from the date on which the cause of action accrued, whether or not notice as required by subsection (1) of this section has been given to the Crown.

(b) Where the Court considers that the failure to give the notice or the delay in bringing the action as the case may be, was occasioned by mistake or by any other reasonable cause or that the Crown is not materially prejudiced in its defence or otherwise by the failure or delay, it may if it is just to do so, grant leave accordingly subject to such conditions as it thinks it is just to impose.

(c) Before an application is made under the provisions of paragraph (a) of this subsection the party intending to make the application shall give notice in writing of the proposed application and the grounds on which it is to be made to the Crown Solicitor, at least fourteen days before the application is made.

**FORESTS ACT 1918-1976**

s 7. (2) The department shall have the exclusive control and management of -

(b) all State forests and timber reserves, and the forest produce of other Crown lands;

s 43. The Governor, on the recommendation of the Conservator, may make regulations for all and any of the following purposes: -

(28) Regulating traffic through State forests and timber reserves, and for the prevention of trespass in any portion of a State forest or timber reserve which is the subject of planting or regeneration.

69. Roads within State forests and timber reserves, and such other roads as the Governor may by notice in the *Gazette* declare that this section shall apply to, shall for the purposes of this Act be deemed Crown land; and, notwithstanding section [three hundred and four of the *Local Government Act, 1960*], the timber thereon shall not vest in the [Council of a Shire] in which such roads are situated:

Provided that the [Council of a Shire] may fell timber in the process of clearing such roads, and may sell and dispose of the timber so felled, and may fell timber growing on roads within its district for use by the [shire] in the construction and repair of buildings, bridges, culverts, fences, and other works.

## LIMITATION ACT 1935-1978

### Actions Against Public Authorities

47A. (1) Notwithstanding the foregoing provisions of this Act but subject to the provisions of subsections (2) and (3) of this section, no action shall be brought against any person (excluding the Crown) for any act done in pursuance or execution or intended execution of any Act, or of any public duty or authority, or in respect of any neglect or default in the execution of the Act, duty or authority, unless -

- (a) the prospective plaintiff gives to the prospective defendant, as soon as practicable after the cause of action accrues, notice in writing giving reasonable information of the circumstances upon which the proposed action will be based and his name and address and that of his solicitor or agent, if any; and
- (b) the action is commenced before the expiration of one year from the date on which the cause of action accrued,

and for the purposes of this section, where the act, neglect, or default is a continuing one, no cause of action in respect of the act, neglect, or default accrues until the act, neglect or default ceases but the notice required by paragraph (a) of this sub-section may be given and an action may thereafter be brought while the act, neglect or default continues.

(2) A person may consent in writing to the bringing of an action against him at any time before the expiration of six years from the date on which the cause of action accrued whether or not the notice as required by subsection (1) of this section has been given.

(3)(a) Notwithstanding the foregoing provisions of this section application may be made to the Court which would but for the provisions of this section have jurisdiction to hear the action, for leave to bring an action at any time before the expiration of six years from the date on which the cause of action accrued, whether or not notice as required by subsection (1) of this section has been given to the prospective defendant.

(b) Where the Court considers that the failure to give the required notice or the delay in bringing the action as the case may be, was occasioned by mistake or by any other reasonable cause or that the prospective defendant is not materially prejudiced in his defence or otherwise by the failure or delay, the Court may if it thinks it is just to do so, grant leave to bring the action, subject to such conditions as it thinks it is just to impose.

s 47A(c) Omitted.

(4) (a) In this section "person" includes a body corporate, Crown agency or instrumentality of the Crown created by an Act or an official or person nominated under an Act as a defendant on behalf of the Crown.

(b) This section is to be construed so as not to affect the provisions of the *Crown Suits Act, 1947*.

48. Except as therein expressly provided, the preceding provisions of this Act do not bind or affect the Crown.

## LOCAL GOVERNMENT ACT 1960-1980

s 6. (1) In this Act, unless the context requires otherwise -

"road" has the same meaning as street;  
"street" includes -

a highway; and a thoroughfare;  
which -  
the public are allowed to use ;

and includes every part of the highway or thoroughfare, and other things including bridges and culverts, appurtenant to it .

s 300. A council has the care, control, and management of public places, streets, ways, bridges, culverts, fords, ferries, jetties, drains and, subject to the *Rights in Water and Irrigation Act, 1914*, the *Water Boards Act, 1904* and any direction in writing of the Minister for Works, water courses, which are within the district, or, which although not within the district, are by this Act placed under the care, control, and management, of the council, or are to be regarded as being within the district, except where and to the extent that under an Act, another authority has that care, control, and management.

s 301. A council -

- (a) may make, form, alter, level, grade, pave, improve, repair, maintain, light, water, cleanse, and keep in good order and condition the streets, ways, and other public places, and bridges, culverts, fords, ferries, jetties, drains, water courses, and other things and places which are under the care, control, and management of the council, and do such acts and things as are necessary for or incidental to the proper care, control, and management of them;
- (b) may during such time as the whole or part of a street or other public place, is under repair or alteration, or during the making, altering, or repairing of a bridge, or drain, or other necessary work in a street or other public place, prevent the passing of vehicles and animals by causing such fences and barriers to be placed on or across the street or place as the council thinks fit; but so that during the time that the fences or barriers continue to be so placed, the council shall cause them to be indicated every night from sunset to sunrise by such lights as are sufficient to warn persons using the street and where needed and practicable, shall cause passable and suitable side tracks to be provided;
- (c) shall observe such directions, as the Minister thinks fit to issue and is authorised by this paragraph to issue, for the purpose of preventing undue or avoidable restriction of traffic;
- (d) shall not in exercise of the power conferred by this section, close or cause a street to be closed to traffic for a longer period than twenty-eight days, or for periods aggregating more than twenty-eight days in any period, of twelve months without the previous permission of the Minister.

s 301(3) to (h) Omitted,

s 302. (1) A person is not entitled to recover damages against a municipality in respect of loss or injury sustained either to himself or to another person or to property by reason of a mishap upon or while using a portion of a street or way in the district of the municipality or under the care, control, and management of its council, which portion has not been interfered with by the council, merely because some other portion of that street or way, whether distant laterally or longitudinally, has been taken over or improved by the council.

(2) Subsection (1) of this section does not relieve a municipality from liability where the mishap is caused by the negligence of the council in the execution of works then in progress, or which have been completed by the council in a street or way.

s 303. No person may bring action against a municipality in respect of works carried out or constructed under or by virtue of this Part, or in respect of damage or injury arising out of the carrying out or constructing of those works, by reason only that the municipality carried out or constructed the works or caused them to be made or constructed, without exercising a power created or conferred by this Act.

s 304. The property in -

- (a) materials of, and matters and things appurtenant to, public streets, ways, and other public places, bridges, culverts, fords, ferries, wharves, jetties and drains;
- (b) buildings, fences, gates, posts, boards, stones and erections placed upon a street, way, bridge, culvert, ford, ferry, wharf, jetty, drain or other public place by a person for the time being having the care, control, or management of the street, way, bridge, culvert, ford, ferry, wharf, jetty, drain or other public place; and
- (c) the scrapings, soils, sand, and materials of public streets, and ways and other public places,

in, or regarded under this Act as being in, a district may, in proceedings brought by the council of the municipality in relation to the property, be alleged to be the property of the municipality, and where so alleged may for the purposes of the proceedings be regarded as the property of the municipality.

s 660. (1) Subject to subsection (2) of this section no action is maintainable against -

a municipality; or

a member, officer, or servant, of a council of a municipality in his capacity as member, officer, or servant, of the council,

in respect of a tort, the provisions of section forty-seven A of the *Limitation Act, 1935* notwithstanding,

- (a) unless the action is commenced within twelve months after the cause of action arose;
- (b) unless at least thirty-five days before the action is commenced a notice in writing stating,
  - (i) particulars of the cause of action;
  - (ii) the claim; and
  - (iii) the name and address of the party about to sue;

is served on the council by delivering to the clerk in person or by posting it addressed to the clerk by prepaid registered letter post; nor

- (c) unless as soon as practicable after the cause of action arose a notice in writing setting forth so far as the particulars can then be reasonably supplied,
  - (i) particulars of the cause of action;
  - (ii) where personal injury is claimed to have been sustained, particulars of the injury and the name and address of the person injured;
  - (iii) where damage to property is claimed to have been sustained, particulars of the property and the damage;
  - (iv) particulars of the claim being made or about to be made; and
  - (v) an intimation, if such is the case that action is about to be commenced against the municipality, member, officer or servant;

is so served;

- (d) where personal injury is claimed to have been sustained, unless the person claiming to have been injured submits himself when required by the council at reasonable times to medical examination by a medical practitioner or medical practitioners nominated by the council;
- (e) where damage to property is claimed to have been sustained, unless the owner or person having control of the property permits the property to be examined when required by the council at reasonable times by a person or persons nominated by the council; and
- (f) unless the person claiming or about to claim against the municipality, member, officer, or servant, when required by the council at reasonable times answers in writing such reasonable inquiries relating to the cause of the action and the claim as are addressed to him by or on behalf of the council, member, officer or servant.

(2) Notwithstanding -

- (a) that an action has not been commenced within the period prescribed in paragraph (a) of subsection (1) of this section; or
- (b) the failure to serve any notice as required to be served by subsection (1) of this section, within the period prescribed by this section for its service,

application may be made at any time before the expiration of six years from the date on which the cause of action arose to a judge for leave to commence the action and if the judge considers that the failure -

- (c) to commence the action within the prescribed period; or
- (d) the failure to give the notice within the prescribed period,

was occasioned by mistake or by other reasonable cause or that the prospective defendant is not materially prejudiced in his defence or otherwise, by the failure, the judge may if he thinks it just to do so, grant leave to bring the action, subject to such conditions as the judge thinks it is just to impose.

## MAIN ROADS ACT 1930-1980

s 6. In this Act, subject to the context -

“declared road” means a road declared to be a highway, main road or secondary road under this Act, and includes any part of any such road;

“highway” means a road declared by proclamation to be a highway for the purposes of this Act, and includes any part thereof;

“main road” means a road declared by proclamation to be a main road for the purposes of this Act, and includes any part thereof;

“road” means any thoroughfare, highway or road that the public is entitled to use and any part thereof, and all bridges (including any bridge over or under which a road passes), viaducts, tunnels, culverts, grids, approaches and other things appurtenant thereto or used in connection with the road;

“secondary road” means a road declared to be a secondary road for the purposes of this Act, and includes any part thereof.

s 9. For the purposes of this Act the Commissioner shall be a body corporate under the name of the “Commissioner of Main Roads,” and shall have perpetual succession and a common seal, and power to acquire, hold and dispose of real and personal property, and to sue and be sued, and to do and exercise all such acts and powers as may, in the opinion of the Minister, be necessary or convenient for carrying into effect any of the purposes or objects of this Act.

s 15. (1) The absolute property in the land over which a highway or main road is declared shall vest in the Crown.

(2) The Commissioner shall have the care, control and management of the land over which a highway or main road is declared.

(3) The property in -

(a) the materials of all highways and main roads, and all live and dead timber and vegetation thereon, and all matters and things appurtenant thereto; and

(b) all buildings, fences, gates, posts, boards, stones, erections, and structures placed upon any highway or main road; and

(c) the scrapings of any highway or main road and all gravel, sand, and other material on any highway or main road,

shall vest in the Commissioner.

s 16. (1) The Commissioner may -

- (a) make, form, level, grade, pave, improve and maintain all highway or main roads, and do all things necessary for or incidental to the proper management thereof;
- (b) exercise in regard to any highway or main road any power which a local authority could exercise in regard thereto if such road were within its district.

s 16.(3) to (5) Omitted.

s 16A. (1) Where in the opinion of the Commissioner -

- (a) a highway or main road or a part thereof has become unsafe for traffic generally or traffic of any particular class; or
- (b) a highway or main road or part thereof would be damaged by the passage of traffic generally or traffic of any particular class;

the Commissioner may cause that highway, main road or part to be closed to traffic generally or to traffic of any particular class, and may from time to time authorise the re-opening of that highway, main road or part to traffic generally or to traffic of any particular class.

(2) The Commissioner shall not cause a highway or main road or part thereof to be closed for any period of more than twenty-eight consecutive days, or for periods aggregating more than twenty-eight days in the space of one year, unless the consent of the Minister has first been obtained but may with that consent authorise the closure for any greater period or periods.

(3) Where a highway or main road or a part thereof is closed pursuant to this provision, the Commissioner shall cause signs to be erected at each end of that highway, main road or part; and a person who, without the authority of the Commissioner, interferes with any such sign commits an offence.

Penalty: Two hundred dollars.

(4) Every person who, without the authority of the Commissioner, drives a vehicles [sic] or causes a vehicle to be driven on a highway or main road or a part thereof that is closed to traffic generally, or drives a vehicle of any class or causes a vehicle of any class to be driven on a highway or main road or a part thereof that is closed to that class of vehicle, commits an offence.

Penalty: Two hundred dollars.

s 24. (1) The Governor, on the recommendation of the Commissioner, may -

- (a) declare any road to be a secondary road for the purposes of this Act;
- (b) authorise and empower the Commissioner to provide and construct any secondary road.

(2) A declaration made under this section may be revoked or varied by the Governor on the recommendation of the Commissioner.

(3) In considering whether to make any recommendation to the Governor that any road should be declared to be a secondary road, the Commissioner shall take into account -

- (a) the funds available or likely to be available for secondary roads;
- (b) whether the road is or will be in the near future a feeder route connecting producing areas with a highway or main road or with their market outlets or connecting centres of population;
- (c) whether the road is, or will be, the main means of access to a national park, scenic reserve or site, or seaside resort, and

before making any recommendation the Commissioner shall consult with the local authority.

(4) The powers of a local authority over a secondary road shall not be deemed to be taken away by this Act and the Commissioner may enter into agreements with local authorities for the construction of secondary roads or any parts of a secondary road.

(5) A local authority in whose district a secondary road or any part of a secondary road is situated shall be responsible for maintaining such a secondary road or part; but where a secondary road, or part of a secondary road, follows the common boundary of two districts, the cost of the maintenance shall be apportionable between the local authorities of those districts and the Commissioner may determine the respective liabilities of each local authority.

(6) Where a local authority fails to maintain to the satisfaction of the Commissioner any construction works carried out by the Commissioner on a secondary road, the Commissioner may, by notice in writing, direct the local authority to carry out the works of maintenance specified in the notice within the period limited by the notice.

(7) Where a local authority fails to comply with a direction given under subsection (6) of this section, the Commissioner may carry out such works and any expenses so incurred by the Commissioner shall be repaid by the local authority to the Commissioner, and, if not repaid within three months after demand by the Commissioner, shall be deemed a debt due and payable to Her Majesty enforceable in the name of Her Majesty against the local authority and the revenues of the local authority.

(8) All moneys repaid by, or recovered from a local authority under this section shall be placed to the credit of the Main Roads Trust Account.

s 27A. (1) The Commissioner may provide, construct or improve roads or parts of roads for the development of an area or for any other purpose, and any such road need not be declared to be a highway, a main road or a secondary road.

(2) Before commencing the construction of any road pursuant to this section, the Commissioner shall consult with the local authority and when that road, or any part thereof, has been constructed or any work executed thereon, that road or part shall be the responsibility of the local authority in whose district it is situated and shall be maintained by that local authority.

(3) The Commissioner and officers acting under this Act shall have the same powers with regard to the provision and construction of roads under this section as are by this Act conferred on them regarding highways and main roads, and the provisions of this Act regarding the provision and construction of highways and main roads shall, as far as practicable, apply *mutatis mutandis* to any such roads.

### **PUBLIC WORKS ACT 1902-1979**

- s 5. (3) The Minister of the Crown or the time being administering this Act shall for the purposes of this Act become and continue to be a body corporate under the name of the "Minister for Works" with perpetual succession and a Common Seal; and by that name shall be capable of suing and being sued, acquiring, holding, letting and taking land on lease, and alienating real and personal property, and of doing and suffering all such other acts and things as may be necessary or expedient for carrying out the purposes of this Act.
- s 84. Throughout this Act, the word "road" means a public highway, whether carriage-way, bridle-path, or footpath, and unless repugnant to the context, includes all roads which have been or may hereafter be set apart, defied, proclaimed, or declared roads under any law or authority for the time being in force, and all bridges, culverts, drains, ferries, fords, gates, buildings, and other things thereto belonging, upon, and within the limits of the road, and includes arable soil of every road.
- s 85. The soil of all roads is hereby declared to be and is hereby vested in Her Majesty, including, in the case of Government roads, all materials and things of which such roads are composed, or which are capable of being used for the purpose thereof, and are placed or laid upon any such roads.
- s 86. (1) The Minister may construct or repair any road within any part of the State, but such road shall not, by reason of such construction or repair, become a Government road if at the time of such construction or repair it is within the limits of a municipality or road board district.
- (2) The Governor may, by Order in Council duly gazetted, declare that any road or part thereof shall be, or cease to be, a Government road, and such road, or part thereof shall become or, as the case may be, shall cease to be a Government road accordingly.
- (3) The Governor may in like manner declare that any Government road or any part thereof shall be under the control of any municipal council or road board, and thereupon such road or part thereof shall cease to be a Government road.
- (4) The powers hereby conferred may be exercised from time to time, and any Order in Council made hereunder may be revoked or altered, and any road declared to be a Government road may again be declared to be within the control of a municipal council or road board, and any such road may again be declared to be a Government road, as often as occasion shall require.
- (5) For the purpose of making or repairing any Government or other road the Minister shall have all the powers and authorities which, by the *Roads Act, 1902*, are given to or conferred upon a road board, and shall also have power to close any road pending repairs or in the interests of public safety.
- s 87. (1) Government roads shall be under the exclusive control and management of the Minister.

(2) In respect of all Government roads, and of all bridges and other public works connected therewith, the Minister may make all such by-laws as any road board may for the time being have power to make in connection with any road within its district, and may impose a penalty not exceeding Forty dollars for the neglect or breach of any such by-law.

**ROAD TRAFFIC ACT 1974-1980**

s 5. (1) In this Act, unless the contrary intention appears -

“road” means any highway, road or street open to, or used by, the public and includes every carriageway, footway, reservation, median strip and traffic island thereon.

s 92. (1) The Minister may, if he considers any road unsafe for public traffic, cause the same to be closed for such period as he considers necessary.

(2) A local authority for a period of one month may exercise a similar power with regard to any road under its control, but the exercise of such power shall not extend beyond such period, except with the approval in writing of the Minister.

(3) No person shall drive, take, or use any vehicle on to or on any road while such road is closed under this section.

## **APPENDIX III**

### **LEGISLATION GOVERNING THE LIABILITY OF HIGHWAY AUTHORITIES IN CERTAIN OTHER JURISDICTIONS**

#### **1. England and Wales**

##### **HIGHWAYS ACT 1959**

s 44. Duty to maintain highways maintainable at public expense.

(1) The authority who are for the time being the highway authority for a highway maintainable at the public expense shall ... be under a duty to maintain the highway.

s 44(2) Omitted.

s 128 Removal of things so deposited on highways as to be a nuisance.

(1) If any thing is so deposited on a highway as to constitute a nuisance, the highway authority for the highway may by notice require the person who deposited it there to remove it forthwith and, if he fails to comply with the notice, the authority may make a complaint to a magistrates' court for an order under this section.

(2) A magistrates' court may, on a complaint made under this section, make an order authorising the complainant authority, to remove the thing in question and to dispose of it and, after payment out of any proceeds arising therefrom of the expenses incurred in the removal and disposal, to apply the balance, if any, of the proceeds to the maintenance of highways maintainable at the public expense by them.

(3) If the thing in question is not of sufficient value to defray the expenses of removing it, the authority may recover from the person who deposited it on the highway the expenses, or the balance of the expenses, reasonably incurred by them in removing it.

(4) A magistrates' court composed of a single justice may hear a complaint under this section.

s 129 Duty to remove snow, soil, etc, which has fallen on highway.

(1) If an obstruction arises in a highway from accumulation of snow or from the falling down of banks on the side of the highway, or from any other cause, the highway authorities for the highway shall remove the obstruction.

(2) If a highway authority fail to remove an obstruction which it is their duty under this section to remove, a magistrates' court may, on a complaint made by any person, by order require the authority to remove the obstruction within such period (not being less than twenty-four hours) from the making of the order as the court thinks reasonable, having regard to all circumstances of the case.

s 129(3) and (4) Omitted.

s 130 Prevention of soil, etc, being washed into street.

(1) The appropriate authority may, by notice to the owner or occupier of any land adjoining a street, being a highway maintainable at the public expense, require him, within twenty-eight days from the date of service of the notice, to execute such works as will prevent soil or refuse from that land from falling, or being washed or carried, on to the street or into any sewer or gully in it in such quantities as to obstruct the street or choke the sewer or gully.

(2) A person aggrieved by a requirement of an authority under this section may appeal to a magistrates' court.

(3) Subject to any order made on appeal, if a person on whom a notice is served under this section fails to comply with the notice within the period specified in subsection (1) of this section, he shall be guilty of an offence and shall be liable in respect thereof to a fine not exceeding five pounds, and, if the offence in respect of which he was convicted is continued after the conviction, he shall be guilty of a further offence and shall be liable in respect thereof to a fine not exceeding twenty shillings for each day on which the offence is so continued.

s 130(4) Omitted.

s 134 Lopping of vegetation overhanging highways and certain other roads and paths.

(1) Where a hedge, tree or shrub overhangs a highway or any other road or footpath to which the public has access so as to endanger or obstruct the passage of vehicles or pedestrians, or to obstruct or interfere with the view of drivers of vehicles or the light from a public lamp, the appropriate authority may, by notice either to the owner of the hedge, tree or shrub or to the occupier of the land on which it is growing, require him within fourteen days from the date of service of the notice so to lop or cut it as to remove the cause of the danger, obstruction or interference.

(2) A person aggrieved by a requirement of an authority under the foregoing subsection may appeal to a magistrates' court.

(3) Subject to any order made on appeal, if a person on whom a notice is served under subsection (1) of this section fails to comply with it within the period specified in that subsection, the appropriate authority may carry out the work required by the notice and recover the expenses reasonably incurred by them in so doing from the person in default.

s 134(4) Omitted.

## HIGHWAYS (MISCELLANEOUS PROVISIONS) ACT 1961

s 1. Civil liability for non-repair of certain highways and bridges.

(1) The rule of law exempting the inhabitants at large and any other persons as their successors from liability for non-repair of highways is hereby abrogated.

(2) In an action against a highway authority in respect of damage resulting from their failure to maintain a highway maintainable at the public expense, it shall be a defence (without prejudice to any other defence or the application of the law relating to contributory negligence) to prove that the authority had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic.

(3) For the purposes of a defence under the last foregoing subsection, the court shall in particular have regard to the following matters, that is to say -

- (a) the character of the highway, and the traffic which was reasonably to be expected to use it;
- (b) the standard of maintenance appropriate for a highway of that character and used by such traffic;
- (c) the state of repair in which a reasonable person would have expected to find the highway;
- (d) whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway;
- (e) where the highway authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, what warning notices of its condition had been displayed;

but for the purposes of such a defence it shall not be relevant to prove that the highway authority had arranged for a competent person to carry out or supervise the maintenance of the part of the highway to which the action relates unless it is also proved that the authority had given him proper instructions with regard to the maintenance of the highway and that he had carried out the instructions.

(4) ...for the avoidance of doubt it is hereby declared that, by virtue of subsection (1) of section sixteen of this Act, any reference to a highway in this section includes a reference to a bridge.

(5) This section shall bind the Crown.

(6) The following provisions (which relate to the rule of law abrogated by this section) are hereby repealed, that is to say -

- (a) in section forty of the *Crown Proceedings Act, 1947*, paragraph (e) of subsection (2);
- (b) in subsection (1) of section eighty-nine of the principal Act, the words from "and they" onwards;

- (c) section two hundred and ninety-eight of the principal Act;

and the provisions of any enactment other than a public general enactment shall cease to have effect so far as they exempt a highway authority from liability for non-repair of a highway maintainable by the authority.

(7) This section shall not apply to damage resulting from breaking or opening or tunnelling or boring under a street by way of code-regulated works, being damage resulting from an event which occurred -

- (a) before the completion of the reinstatement or making good of the relevant part of the street in pursuance of the obligation imposed on the undertakers by subsection (2) of section seven of the *Public Utilities Street Works Act, 1950*; or
- (b) where the relevant part of the street is the subject of an election under the Third Schedule to that Act (which with minor exceptions, limits the obligation of undertakers to the execution of interim restoration), during the period mentioned in sub-paragraph (a) of paragraph 3 of that Schedule;

and expressions used in this subsection and in the said Act of 1950 have the same meaning as in that Act.

(8) This section shall come into force on the expiration of the period of three years beginning with the passing of this Act, and shall not apply to damage resulting from an event which occurred before the expiration of that period.

ss 2, 3, 4, 5 Omitted.

s 6. Power to fill in roadside ditches etc.

(1) If it appears to the highway authority for any highway that a ditch on land adjoining or lying near to the highway constitutes a danger to users of the highway, the authority may -

- (a) if they consider the ditch unnecessary for drainage purposes and any occupier of the land known to the authority agrees in writing that it is unnecessary for those purposes, fill it in; or
- (b) place in the ditch, or in land adjoining or lying near to it, such pipes as they consider necessary in substitution for the ditch, and thereafter fill it in.

s 6(2), (3), (4), (5), Omitted.

s 7. Omitted.

s 8. Removal of dangerous things deposited on highways.

(1) If the highway authority for any highway have reasonable grounds for considering-

- (a) that any thing unlawfully deposited on the highway constitutes a danger (including a danger caused by obstructing the view) to users of the highway; and
- (b) that the thing in question ought to be removed without the delay involved in giving notice or obtaining a removal order from a magistrates' court under section one hundred and twenty-eight of the principal Act,

the authority may remove the thing forthwith and recover from the person by whom it as deposited on the highway, or from any person claiming to be entitled to it, any expenses reasonably incurred by the authority in removing it.

s 8(2) Omitted.

s 9. Supplementary provisions as to removal of obstructions from highways.

(1) The highway authority or other person having a duty under section one hundred and twenty-nine of the principal Act to remove an obstruction from a highway may -

- (a) take any reasonable steps (including the placing of lights, signs and fences on the highway) for the purpose of warning users of the highway of the obstruction;
- (b) sell any thing removed in carrying out the duty aforesaid, unless the thing is claimed by its owner before the expiration of seven days from the date of its removal;
- (c) recover from the owner of the thing which caused or contributed to the obstruction, or where the thing has been sold under the last foregoing paragraph, from its previous owner, the expenses reasonably incurred as respects the obstruction in carrying out the duty aforesaid and in exercising any powers conferred by this subsection, so however that no such expenses shall be recoverable from a person who proves that he took reasonable care to secure that the thing in question did not cause or contribute to the obstruction.

(2) Where the highway authority or any other person sell any thing in exercise of their powers under the foregoing subsection, then -

- (a) if any expenses are recoverable under that subsection by the authority or person from the previous owner of the thing, they may set off the expenses against the proceeds of sale (without prejudice to the recovery of any balance of the expenses from the previous owner) and shall pay over any balance of the proceeds to the previous owner; and
- (b) if no expenses are so recoverable, they shall pay over the whole of the proceeds of sale to the previous owner.

s 10. Cutting or felling of dangerous trees etc near roads or footpaths.

(1) Where it appears to the appropriate authority for any highway, or for any other road or footpath to which the public has access, -

- (a) that any hedge, tree, or shrub is dead, diseased, damaged or insecurely rooted; and
- (b) that by reason of its condition it, or part of it, is likely to cause danger by falling on the highway, road or footpath;

the authority may, by notice either to the owner of the hedge, tree or shrub or to the occupier of the land on which it is situated, require him within fourteen days from the date of service of the notice so to cut or fell it as to remove the likelihood of danger.

(2) Sub, sections (2) to (4) of section one hundred and thirty-four of the principal Act (which relate to the interpretation of that section and to appeals from, and the enforcement, of notices under subsection (1) of that section requiring the cutting of vegetation which overhangs roads and footpaths) shall have effect as if references to that section and subsection (1) of that section included references to the foregoing subsection; and section two hundred and fifty-six of the principal Act (which confers powers of entry) shall have effect for the purposes of this section as if this section were a provision to which that section applies and as if the purposes mentioned in subsection (1) of that section included the purpose of ascertaining whether any hedge, tree or shrub is dead, diseased, damaged or insecurely rooted.

ss 11 to 17. Omitted.

### MUNICIPAL ACT RSO 1970 C284

- s 427. (1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it or upon which the duty of repairing it is imposed by this Act and, in case of default, the corporation, subject to *The Negligence Act*, is liable for all damages sustained by any person any reason of such default.
- (2) No action shall be brought against a corporation for the recovery of damages occasioned by such default, whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained.
- (3) No action shall be brought against a corporation for the recovery of damages caused by the presence or absence or insufficiency of any wall, fence, guard rail, railing or barrier, or caused by or on account of any construction, obstruction or erection or any situation, arrangement, or disposition of any earth, rock, tree or other material or object adjacent to or in, along or upon any highway or any part thereof not within the travelled portion of such highway.
- (4) Except in case of gross negligence, a corporation is not liable for a personal injury caused by snow or ice upon a sidewalk.
- (5) No action shall be brought for the recovery of the damages mentioned in subsection 1 unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered mail to the head or the clerk of the corporation, in the case of a county or township within ten days, and in the case of an urban municipality within seven days after the happening of the injury, nor unless, where the claim is against two or more corporations jointly liable for the repair of the highway or bridge, the prescribed notice was given to each of them within the prescribed time.
- (6) In the case of the death of the person injured, failure to give notice is not a bar to the action and, except where the injury was caused by snow or ice upon a sidewalk, failure to give or insufficiency of the notice is not a bar to the action, if the court or judge before whom the action is tried is of the opinion that the corporation in its defence was not prejudiced by the want or insufficiency of the notice and that to bar the action would be an injustice, notwithstanding that reasonable excuse for the want or insufficiency of the notice is not established.
- (7) This section does not apply to a road, street or highway laid out or to a bridge built by a private person or by a body corporate until it is established by by-law of the council or otherwise assumed for public use by the corporation.
- (8) Nothing in this section imposes upon a corporation any obligation or liability in respect of any act or omission of any person acting in the exercise of any power or authority conferred upon him by law, and over which the corporation had no control, unless the corporation was a party to the act or omission, or the authority under which such person acted was a by-law, resolution or licence of its council.
- (9) A corporation is not liable for damages under this section unless the person claiming the damages has suffered by reason of the default of the corporation a

particular loss or damage beyond what is suffered by him in common with all other persons affected by the want of repair.

(10) Where a bridge that it is the duty of a corporation to repair is destroyed or so damaged that it is necessary to rebuild it, the Municipal Board may, upon the application of the corporation, relieve it from the obligation to rebuild the bridge, if the Board is satisfied that it is no longer required for the public convenience or that the rebuilding of it would entail a larger expenditure than would be reasonable having regard to the use that would be made of the bridge if it were rebuilt.

(11) The relief may be granted on such terms and conditions as the Board considers just, and such notice of the application shall be given as the Board may direct.

(12) Subsections 10 and 11 do not affect the costs of any pending action.

3. **Alberta**

**CITY ACT**

s 293. (1) Every public road, street, bridge, highway, square, alley or other public place that is subject to the direction, management and control of the council, including all crossings, sewers, culverts and approaches, grades, sidewalks and other works made or done therein or thereon by the city or by any person with the permission of the council, shall be kept in a reasonable state of repair by the city, having regard to the character of the road, street, bridge, highway, square, alley, public place or work made or done therein or thereon, and the locality in which it is situated or through which it passes, and if the city fails to keep the same in such reasonable state of repair, the city is civilly liable for all damage sustained by any person by reason of its default, in addition to being subject to any punishment provided by law.

(2) This section does not apply to any road, street, bridge, alley, square, crossing, sewer, culvert, sidewalk or other work made or laid out by a private person until it has been established as a public work by by-law or otherwise assumed for public use by the city.

(3) The city is not liable for damages under this section unless the person claiming the same has suffered by reason of the default of the city in a particular loss or damage beyond what is suffered by him in common with all other persons affected by the want of repair.

(4) Nothing herein contained casts upon the city any obligation or liability in respect of acts done or omitted by persons exercising powers or authorities conferred upon them by law, and over which the city has no control, where the city is not a party to such acts or omissions and where the authority under which such persons proceed is not a by-law, resolution or licence of the council.

(5) Default under this section shall not be imputed to the city in any action if the city proves that it had not actual or constructive notice of the disrepair of the highway or other thing in this section mentioned or that it took reasonable means to prevent the disrepair arising.

**MUNICIPAL GOVERNMENT ACT  
RSA 1970 C 246**

s 178. (1) Every public road, street, bridge, highway, square, alley or other public place that is subject to the direction, management and control of the council including all crossings, sewers, culverts and approaches, grades, sidewalks and other works made or done therein or thereon by the municipality or any other person with the permission of the council shall be kept in a reasonable state of repair by the municipality, having regard to

- (a) the character of the road, street, bridge, highway, square, alley, public place or work made or done therein or thereon, and
- (b) the locality in which it is situated or through which it passes,

and if the municipality fails to keep it in reasonable state of repair, the municipality is civilly liable for all damages sustained by any person by any reason of its default, in addition to being subject to any punishment provided by law.

(2) This section does not apply to any road, street, bridge, alley, square, crossing, culvert, sidewalk or other work made or laid out by a private person until it has been established as a public work by by-law or otherwise assumed for public use by the municipality.

(3) The municipality is not liable for damages under this section unless the person claiming them has suffered by reason of the default of the municipality a particular loss or damage beyond what is suffered by him in common with all other persons affected by the want of repair.

(4) Nothing contained in this section casts upon the municipality any obligation or liability in respect of acts done or omitted by persons exercising powers or authorities conferred upon them by law, and over which the municipality has no control, where the municipality, is not a party to those acts or omissions and where the authority under which those persons proceed is not a by-law, resolution or licence of the council.

(5) Default under this section shall not be imputed to a municipality in any action

- (a) without proof by the plaintiff that the municipality knew or should have known of the disrepair of the road or other work, or
- (b) if the municipality proves that it had not actual or constructive notice of the disrepair or that it took reasonable means to prevent the disrepair arising.

(6) No action shall be brought against a municipality for the recovery of damages caused

- (a) by the presence or absence or insufficiency of any wall, fence or guardrail, railing, curb, pavement markings, traffic control device,

illumination device or barrier adjacent to or in, along or upon the highway, or

- (b) by or on account of any construction, obstruction or erection or any situation, arrangement or disposition of any earth, rock, tree or other material or thing adjacent to or in, along or upon the highway that is not on the roadway.

## MUNICIPAL DISTRICT ACT

s 240. (1) All roads, bridges, culverts and sidewalks that have been constructed or provided

- (a) by the municipal district,
- (b) by a person with the permission of the council, or
- (c) by the Province and have been transferred to the control of the council by written notice,

shall be kept by the council in a reasonable state of repair having regard to the locality in which such works are situated.

(2) When the council does not keep the works referred to in subsection (1) in repair, the municipal district is liable for all damages sustained by any person by reason of the default of the council.

(3) Default under this section shall not be imputed to a municipal district in any action without proof by the plaintiff that the municipal district knew or should have known of the disrepair of the road or other work hereinbefore mentioned.

(4) The provisions of this section and of section 234 extend to all roads and road diversions surveyed for the purpose of opening a road allowance as a diversion from the road allowance on the south or west boundary of the district, although such roads and road diversions lie outside the boundaries of the municipal district.

s 242. (1) No action shall be brought under the provisions of section 240 except within six months from the date on which the cause of action arose and unless notice in writing of the cause of the action has been mailed to or served upon the secretary-treasurer of the municipal district within one month after the date on which the cause of action arose.

(2) When a person injured as a result of the alleged default of the council under section 240 dies, or when the court or judge before whom the action is tried considers that there is a reasonable excuse for the absence or insufficiency of the notice and that the defendant council has not thereby been prejudiced in its defence, the absence or insufficiency of the notice is no bar to the maintenance of the action.

#### 4. Saskatchewan

##### RURAL MUNICIPALITIES ACT SS 1972 C101

- s 206. (1) Every council shall keep in a reasonable state of repair all public roads, highways, streets and lanes, and also all public bridges, culverts, dams and reservoirs and the approaches thereto that have been constructed or provided by the municipality or by any person with the permission of the council or that have been constructed or provided by the province, having regard to the character of the road, highway, street, lane, bridge, culvert, dam or reservoir and the locality in which it is situated or through which it passes; and if the council fails to do so the municipality shall, subject to *The Contributory Negligence Act*, be civilly liable for all damages sustained by any person by reason of the failure.
- (2) Default under subsection (1) shall not be imputed to a municipality in any action without proof by the plaintiff that the municipality knew or should have known of the disrepair of the road or other thing mentioned in subsection (1).
- (3) Notwithstanding anything in subsection (1), the municipality is not responsible for any damages sustained by any person by reason of the disrepair or non-repair of:
- (a) a provincial highway as defined in *The Highways Act*;
  - (b) a public highway closed or fenced off under *The Highways Act*;
  - (c) a highway or road while closed pursuant to section 211, where the municipality has posted and maintained a conspicuous notice at each end of the highway or road closed to the effect that the highway or road is closed;
  - (d) a road established under subsection (3) of section 39 of *The Forest Act*.
- s 373. No action shall be brought against a municipality for the recovery of damages caused by or on account of any construction, obstruction or erection or any situation, arrangement or disposition of any earth, rock, tree, brush, shrub or other material or object in, along or upon any part of a highway not within the travelled portion of the highway.
- s 374. (1) No action shall be brought against a municipality for the recovery of damages occasioned by default in its duty of repair as mentioned in section 206, whether the want of repair was the result of non-feasance or misfeasance, after the expiration of six months from the time when the damages were sustained and no such action shall be continued unless service of the writ of summons is made within the said six months.
- (2) No action shall be brought for the recovery of such damages unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered mail to the reeve or secretary within one month after the happening of the injury.
- s 375. (1) Failure to give or insufficiency of the notice shall not be a bar to the action, if the court or judge before whom the action is tried is of the opinion that there is reasonable

excuse for the want or insufficiency of the notice and that the municipality was not thereby prejudiced in its defence.

(2) In case of the death of the person injured, failure to give the notice shall not be a bar to the action.

**URBAN MUNICIPALITY ACT  
SS 1970 C 78**

- s 161. (1) Every public road, street, bridge, highway, square, alley or other public place subject to the direction, management and control of the council, including all crossings, sewers, culverts and approaches, grades, sidewalks and other works made or done therein or thereon by the municipality or by any person with the permission of the council, shall be kept in a reasonable state of repair by the municipality, having regard to the character of the road, street, bridge, highway, square, alley, public place or work made or done therein or thereon, and the locality in which it is situated or through which it passes, and on default, of the municipality keeping it in such reasonable state of repair, the municipality, besides being subject to any punishment provided by law, shall be civilly responsible for all damage sustained by any person by reason of the default.
- (2) This section does not apply to any road, street, bridge, alley, square, crossing, sewer, culvert, sidewalk or other work made or laid out by a private person until it has been established as a public work by bylaw or otherwise assumed for public use by the municipality.
- (3) Default under subsection (1) shall not be imputed to a municipality in any action without proof by the plaintiff that the municipality knew or should have known of the disrepair of the road or other thing mentioned in subsection (1).
- (4) The municipality shall not be liable for damages under this section unless the person claiming damages has suffered by reason of the default of the municipality a particular loss or damage beyond what is suffered by him in common with all other persons affected by the want of repair.
- (5) Nothing in this section casts upon the municipality any obligation or liability in respect of acts done or omitted by persons exercising powers or authorities conferred upon them by law, and over which the municipality has no control, where the municipality is not a party to the acts or omissions and where the authority under which those persons proceed is not a bylaw, resolution or licence of the council.
- s 410. (1) No action shall be brought against the municipality for the recovery of damages occasioned by default in its duty of repair as mentioned in section 161, whether the want of repair was the result of non-feasance or misfeasance, after the expiration of three months from the time when the damages were sustained and no such action shall be continued unless service of the writ of summons is made within the said three months.
- (2) No action shall be brought for the recovery of such damages unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered post to the mayor or clerk within seven days after the happening of the injury.
- s 411. (1) Failure to give or insufficiency of the notice shall not be a bar to the action, if the court or judge before whom the action is tried is of the opinion that there is reasonable excuse for the want or insufficiency of the notice and that the municipality was not thereby prejudiced in its defence.

(2) In case of the death of the person injured, failure to give the notice shall not be a bar to the action.

- s 412. Subsections (2), (4) and (5) of section 161 and sections 162, 410 and 411 apply to all actions against the municipality occasioned by the presence of any nuisance on a highway.
- s 415. (1) Where an action is brought to recover damages sustained by reason of an obstruction, excavation or opening in or near a highway, street, bridge, alley, square or other public place, placed, made, left or maintained by a person other than a servant or agent of the municipality, or by reason of a negligent or wrongful act or omission of a person other than a servant or agent of the municipality, the municipality shall have a remedy over against the other person for, and may enforce payment accordingly of, the damages and costs, if any, that the plaintiff in the action may recover against the municipality.