

Liability of Highway Authorities for Non-Feasance

Terms of Reference

In 1975 the Commission was given a reference to advise whether there should be any change in the common law rules concerning the liability of a highway authority for injury or damage which is occasioned by accidents on the highway, and if so, what changes should be made.

Background of Reference

The Commission interpreted these terms of reference as requiring to report on whether there should be any change to the common law rule known as “the non-feasance rule”.¹ According to this rule, 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, except in respect of dangers they have created or where there is a statutory provision to the contrary. Reform of the non-feasance rule was perceived to be necessary because:

- (a) the rule prevents the recovery of damages in some deserving cases; and
- (b) the rule is in practice unsatisfactory because the distinctions drawn in connection with it are difficult to apply or justify.

The Commission released a working paper in 1978 describing and evaluating the operation of the non-feasance rule in Western Australia and certain other jurisdictions, and called for public comment on the issues raised and discussed in the paper.

Nature and Extent of Consultation

Twenty-one commentators responded to the working paper. These included relevant government authorities, municipal planners and engineers, private individuals, the Law Society of Western Australia and a senior judicial officer. Of those that provided submissions, only five believed that the non-feasance rule should be retained. The Commission delivered its final report in May 1981.²

Recommendations

The Commission recommended that:

1. The non-feasance rule should be abolished through legislation.
2. When determining whether a highway authority has fulfilled the duty of care, a court should be entitled to consider, among other matters, a number of specific criteria.
3. 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;
4. The present law concerning contributory negligence, and concerning contribution between persons claiming damages, apply to claims brought against highway authorities for breach of that duty of care.
5. 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 that duty.
6. Breach of the duty of care be made the only ground upon which highway authorities can be liable for non-feasance.

¹ The non-feasance rule dates back to medieval England. It was first applied in Australia in *Municipal Council of Sydney v Bourke* [1895] AC 433.

² Law Reform Commission of Western Australia, *Liability of Highway Authorities for Non-Feasance*, Project No 62 (1981).

7. The duty of care recommended above apply to the Crown when it is a highway authority.
8. Responsibility for Forests Department's roads be clarified.
9. The Act of Parliament creating the duty of care not come into force until a complete financial year had elapsed after it was passed.

Legislative or Other Action Undertaken

Although, in 1985 the final report was acknowledged by the Attorney-General as being under consideration,³ no specific legislation has resulted.

Currency of Recommendations

The High Court of Australia has recently overturned the common law non-feasance rule.⁴ This effectively renders the Commission's primary recommendation (Recommendation 1) defunct. However, the remaining recommendations are relevant and desirable to limiting the liability of highway authorities in the absence of the non-feasance rule.

Action Required

Implementation of the regime recommended by the Commission requires legislative action. This will necessitate the amendment of several Acts as specified in appendix II of the final report.⁵

Priority – Medium

It is particularly desirable that rights and responsibilities in this area of law be clarified to ensure that highway authorities are not unduly burdened by the effect of the High Court's recent abrogation of the non-feasance rule.

³ Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 September 1985, 1630 (Mr JM Berinson, Attorney-General).

⁴ *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council* [2001] HCA 29 (31 May 2001).

⁵ With regard to the Acts listed in appendix II, it should be noted that the *Local Government Act 1960–1980* (WA) was repealed by the *Local Government Act 1995* (WA) and the *Forests Act 1918–1976* (WA) was repealed by the *Conservation and Land Management Act 1984* (WA).