



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 62**

**Liability of Highway Authorities**

**WORKING PAPER**

**MARCH 1978**

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

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## **PREFACE**

The Commission has been asked to consider and report upon whether there should be any change in the law concerning the liability of a highway authority for injury or damage which is occasioned by accidents on the highway, caused by the mere non-feasance of the highway authority.

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms (with reasons where appropriate) on individual issues raised in the working paper, on the paper as a whole or on any other aspect coming within the terms of reference, are invited. The Commission requests that they be submitted by 2 June 1978.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.



## **TERMS OF REFERENCE**

1.1 The Commission has been asked to consider whether there should be any change in the law relating to the liability of a highway authority for injury or damage which is occasioned by accidents on the highway, caused by the condition of the highway. The Commission has interpreted this to mean whether there should be any change to the non-feasance rule.

1.2 This project was referred to the Commission following a complaint to the Parliamentary Commissioner for Administrative Investigations. The complaint was made by a person who alleged that he had suffered injury when he fell over an obstacle in a footpath under the control of a local authority. It appears that the path had been laid by the owner of an adjacent shop and when the road was widened the relevant part of the footpath was taken over by the local authority. According to the Shire Engineer the obstacle developed when some concrete about a Metropolitan Water Supply Sewerage and Drainage Board meter box collapsed. The person had made a claim on the local authority with respect to the injury suffered. The State Government Insurance Office, which held the public liability insurance of the local authority, investigated the matter and declined the claim as it concluded that the injury resulted from mere non-feasance by the local authority. The Parliamentary Commissioner for Administrative Investigations agreed with the decision of the State Government Insurance Office. However, he suggested to the then Minister for Justice that the law in this area warranted consideration by the Law Reform Commission.

## HISTORICAL BACKGROUND

### The development of the law in England

2.1 The person who made the complaint to the Parliamentary Commissioner for Administrative Investigations failed to succeed in his claim against the local authority because of a common law rule (known as the non-feasance rule) to the effect that highway authorities are not liable for omissions to maintain and repair roads or to remove a danger known to exist. This rule developed in England in the eighteenth and nineteenth centuries when the responsibility for repairing roads rested upon the inhabitants of parishes, hundreds and counties.<sup>1</sup>

2.2 Initially the immunity rested on the fact that the inhabitants of parishes, hundreds and counties were not a corporation and could not be sued collectively.<sup>2</sup> Later this technical defect was remedied when it was provided that the inhabitants of a county could be sued in the name of their surveyor.<sup>3</sup> However, it was held that a surveyor of highways was not liable in an action for injuries resulting from a failure to keep a highway in repair because:<sup>4</sup>

"...no action could have been brought against the parish, and that the Act of Parliament requiring the surveyor to keep the roads in repair was not passed for the purpose of creating a new liability, but simply in order to provide machinery whereby the duty of the parish to repair might be conveniently fulfilled".

2.3 Even when a clear statutory duty to "...repair and keep in repair the several Highways in the said Parish..."<sup>5</sup> was imposed on the surveyor it was held that it was not enforceable by an action for damages.<sup>6</sup> Moreover, when the duties and liabilities of the surveyor for the repair of roads were transferred to other bodies, such as public corporations, the principle of immunity for mere non-feasance remained unaltered.<sup>7</sup>

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<sup>1</sup> The development of the immunity is discussed by Fullagar J. in *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357 at 373-379.

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

<sup>3</sup> 43 Geo. 3 c.59, s.4.

<sup>4</sup> *Cowley v The Newmarket Local Board* [1892] AC 345 at 355.

<sup>5</sup> 5 & 6 Will. IV c.50, s.6.

<sup>6</sup> *Young v Davis* 2 H & C 197; 159 ER 82.

<sup>7</sup> *Cowley v The Newmarket Local Board* [1892] AC 345 at 355; *Municipality of Pictou v Geldart* [1893] AC 524.

2.4 The policy behind the immunity of highway authorities for mere non-feasance appears to have rested on the ground that the financial resources of local authorities were inadequate for the proper execution of their functions, coupled with a fear that they would be exposed to a multitude of actions with no available fund for satisfying adverse judgments.<sup>8</sup>

2.5 In the United Kingdom the common law situation has been substantially altered by the *Highways (Miscellaneous Provisions) Act 1961*.<sup>9</sup>

### **The application of the law to Western Australia**

2.6 In Western Australia the history of the responsibility for the repair and maintenance of roads is different from that in England as there never was any civil organisation by parishes, hundreds and counties, the liability being first created by statute.<sup>10</sup> In fact, before statutory responsibilities were created no duty or liability rested on anyone with respect to the repair and maintenance of roads.<sup>11</sup>

2.7 Although the history of highway authorities in Western Australia is different from that in England the immunity of highway authorities for non-feasance which was developed in England, is applicable in Western Australia.<sup>12</sup>

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<sup>8</sup> Fleming, *The Law of Torts* (5th ed. 1977) at 418-419.

<sup>9</sup> See paragraphs 4.1 to 4.11 below.

<sup>10</sup> See *Buckle v Bayswater Road Board* (1936) 57 CLR 259 at 268-269.

<sup>11</sup> See *Municipal Council of Sydney v Bourke* [1895] AC 433 at 444.

<sup>12</sup> *Municipal Council of Sydney v Bourke* [1895] AC 444, *Buckle v Bayswater Road Board* (1937) 57 CLR 259.

## THE PRESENT POSITION IN WESTERN AUSTRALIA

### No liability for non-feasance

3.1 Under the common law rule, if a highway authority merely has a power to maintain a road, it will be under no duty to keep the road in proper repair.<sup>1</sup> It will not be liable for injury or loss caused by its failure to maintain the road in proper repair.<sup>2</sup> Nor will it be under a duty to exercise reasonable care in the control and management of the road even with respect to known dangers.<sup>3</sup> It will not be liable for injury or loss caused by its negligent failure to remove a danger which has arisen in or on the road.<sup>4</sup> The following are some examples of circumstances where a highway authority would not be liable:

where the injury or loss was caused by the authority's failure to repair a pot hole which has been worn into the road;

where the injury or loss was caused by the authority's failure to repair a footpath damaged by a vehicle mounting the kerb or damaged gradually by the roots of an adjacent tree;<sup>5</sup>

where injury or loss was caused by the authority's failure to remove an object, or neutralise a slippery substance, deposited or left by a member of the public on the roadway;

where injury or loss was caused by a failure to erect warning signs when a culvert has collapsed.<sup>6</sup>

The fact that the authority knew or should have known of the danger does not affect the position.<sup>7</sup>

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<sup>1</sup> *Municipal Council of Sydney v Bourke* [1895] AC 444.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Cowley v Newmarket Local Board* [1892] AC 345; judgment of Fullagar J. in *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357.

<sup>4</sup> *Ibid.*

<sup>5</sup> See *Hellyer v The Cwth* [1964] Arg. L.R. 1026, 5 FLR 459.

<sup>6</sup> See judgment of Fullagar J. in *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357 at 377.

<sup>7</sup> See the cases cited in footnote 3 above of this chapter, and in particular the judgment of Fullagar J. in *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357.

3.2 Even a statutory duty to repair does not expose a highway authority to liability, unless the legislature has clearly conveyed the intention, either by express provision or necessary implication, that the duty is to be enforceable by an action at the suit of a person injured by its breach.<sup>8</sup>

### **Limits to the rule**

#### *Liability for misfeasance*

3.3 The immunity can be claimed only for non-feasance, not for accidents caused by misfeasance. To be liable for misfeasance, the road authority must not only have done something to the road but in so doing must have created or added to a danger in the highway.<sup>9</sup> Hence, where a road authority does work by way of repair on a roadway and the work is properly done but not sufficient to remove the danger, the authority will not be liable for injury resulting from the danger.<sup>10</sup> But if the authority carries out repairs negligently in such a way as to create a danger or add to danger, it will be liable to anyone who suffers damage as a consequence.<sup>11</sup> Some of the circumstances in which highway authorities have been held to be liable for damage caused by misfeasance are: where the authority has made an excavation in the road without filling it in;<sup>12</sup> where an authority in the course of repairing a road negligently left a heap of soil on the road unprotected and unlighted after dark,<sup>13</sup> and where the authority removed all but one of a line of trees so as to convert into a trap what was once a self-evident margin of the road.<sup>14</sup> Furthermore, an authority will always be liable for damage caused by its negligence in designing or constructing a road.<sup>15</sup> Hence the authority was held to be liable where a road constructed by it ended abruptly and without warning in an unguarded ravine.<sup>16</sup> But if the operations of the road authority put the highway in a condition which is safe and

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<sup>8</sup> *Young v Davis* (1863) 2 H&C 197; *Cowley v Newmarket L.B.* [1892] AC 345, and the judgment of Fullagar J. in *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357 at 376.

<sup>9</sup> *Municipal Council Sydney v Bourke* [1895] A.C. 433; judgments of Latham C.J. and Dixon J. in *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357; *Burton v West Sussex County Council* [1960] 2 All E.R. 26.

<sup>10</sup> *Burton v West Sussex County Council* [1960] 2 All E.R. 26.

<sup>11</sup> *Woollahra Council v Moody* (1913) 16 CLR 353; judgments of Latham C.J. and Dixon J. in *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357; see also the judgment of Dixon J. in *Buckle v Bayswater Road Board* (1936) 57 CLR 259 at 283 and 284.

<sup>12</sup> *The Borough of Bathurst v Macpherson* (1879) 4 AC 256.

<sup>13</sup> *Penny v Wimbledon Urban Council* [1899] 2 QB 72.

<sup>14</sup> *Grafton City Council v Riley Dodds (Australia) Ltd.* (1956) 56 SR (NSW) 53.

<sup>15</sup> *Taylor v Main Roads Commissioner* (1945) 46 SR (NSW) 117.

<sup>16</sup> *McClelland v Manchester Corporation* [1912] 1 KB 118.

proper, no subsequent deterioration of the road surface, due to the inevitable process of wear and tear, will call for affirmative steps to put it right.<sup>17</sup>

### *Artificial structures*

3.4 The "artificial structures" rule may be a further limitation on the immunity of highway authorities for mere non-feasance. Under the artificial structures rule a duty is imposed on the authority to care for artificial structures, as distinct from the actual roadway, and not to let them fall into a dangerous state of disrepair. The exception apparently derives from the case of *Borough of Bathurst v MacPherson*<sup>18</sup> in which the authority was held liable for failing to keep a brick drain in repair.

3.5 In *The Law of Torts*<sup>19</sup> Fleming questions whether the rule is an independent exception to the immunity or "merely represents the germ of an idea that later crystallized into the 'source of authority' test".<sup>20</sup> However, Sawyer suggests:<sup>21</sup>

"...that there was no reason why *both* escape clauses should not operate; there is no inconsistency between them, and assuming a general judicial dislike of the non-feasance doctrine in contemporary circumstances, the maximising of escape clauses would seem to be indicated".

3.6 Although there is no clear definition of what an "artificial structure" is<sup>22</sup> it has been held that seats, lampposts, telephone booths<sup>23</sup> and an open space around a tree planted on a footpath<sup>24</sup> are artificial structures. Bridges<sup>25</sup> and culverts<sup>26</sup> have been treated as part of the actual roadway.

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<sup>17</sup> *Buckle v Bayswater Road Board* (1936) 57 CLR 259 at 284.

<sup>18</sup> (1879) 4 AC 256. The Judicial Committee of the Privy Council said

"...the duty was cast upon them of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway which, but for such artificial construction, would not have existed, or, at the least, of protecting the public against the danger..." :*ibid.*, at 265.

<sup>19</sup> Fleming, *The Law of Torts* (5th ed 1977) at 421.

<sup>20</sup> *Ibid.* The "source of authority" test is discussed in paragraphs 3.8 to 3.11 below.

<sup>21</sup> Sawyer, *Nonfeasance Under Fire* 2 NZUL Rev (1966) 115 at 125.

<sup>22</sup> In *Buckle v Bayswater Road Board* (1936) 57 CLR 259 at 300 McTiernan J. said "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 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>23</sup> *Drake v Bedfordshire C.C.* [1944] 1 All ER 633 at 638.

<sup>24</sup> *Donaldson v Sydney* (1924) 24 SR (NSW) 408.

<sup>25</sup> *Municipality of Pictou v Geldert* [1893] AC 524.

<sup>26</sup> *Gorringer v The Transport Commission (Tas)* (1950) 80 CLR 357.

3.7 Under the artificial structures rule liability for an accident will not attach if the accident is not caused by the artificial structure itself, for example, where a sewer-cover gradually protrudes above the road through wearing away of the surface.<sup>27</sup>

*"Source of authority" test*

3.8 A further method of limiting the immunity of highway authorities for mere non-feasance, is to distinguish highway functions from other functions which may be exercised by the one authority. For example, an authority may be responsible for both highways and drainage.

3.9 The "source of authority" test excludes from the immunity's ambit the maintenance of all structures by a highway authority upon or under the road pursuant to a statutory authority other than that strictly relating to the construction or repair of highways.

3.10 It is logical that the immunity should be availed of only by authorities when they act qua highway authority, and not, for example, when they act qua drain authority. In the latter case an authority which constructs a drain, whether in a road or elsewhere, and fails to keep it in repair should be subject to the same liability as anyone else for negligence or nuisance.

3.11 Fleming points out that:<sup>28</sup>

"As the combination of numerous functions in the hands of the same authority has become so prominent a function of modern administrative organization, the 'separate function' theorem can, not infrequently, be exploited to side-step the immunity".

For instance, the fixing of traffic studs in a highway by an authority has been attributed to the function of the authority as a traffic, not a highway authority.<sup>29</sup> Some cases pose vexing problems of demarcation. In the case of *Buckle v Bayswater Road Board*,<sup>30</sup> Latham C.J. and Dixon J. reached different decisions on the question of whether a drain which had collapsed was within the responsibility of the local authority as a highway authority or as a drainage

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<sup>27</sup> *Thompson v Mayor of Brighton* [1894] 1 QB 332.

<sup>28</sup> Fleming, *The Law of Torts* (5th ed 1977) at 421 and 422.

<sup>29</sup> *Skilton v Epsom & Ewell U.D.C.* [1937] 1 KB 112.

<sup>30</sup> (1936) 57 CLR 259.

authority, the Road Board having responsibility for the maintenance of both roads and drains. Latham C.J. concluded that the function of the drain was primarily ordinary drainage and that therefore the Road Board was liable.<sup>31</sup> Dixon J. considered that the purpose of the drain was to drain the roadway and concluded that the Road Board was not liable.<sup>32</sup>

### **Who are the highway authorities in Western Australia?**

3.12 Three different public bodies have authority to construct and repair roads in Western Australia. They are the Commissioner of Main Roads, local authorities and the Minister for Works. The Acts of Parliament under which these authorities respectively operate are the *Main Roads Act 1930-1977*, the *Local Government Act 1960-1977* and the *Public Works Act 1902-1974*.

3.13 Under the *Main Roads Act 1930*, the Commissioner of Main Roads is empowered to construct, improve and maintain and do all things necessary for or incidental to the proper management of "highways or main roads".<sup>33</sup> The Commissioner may also construct "secondary roads"<sup>34</sup> and may construct or improve a road which has not been declared to be a highway, a main road or a secondary road.<sup>35</sup>

3.14 Under the *Local Government Act 1960*, a local authority may construct roads within its district.<sup>36</sup> A local authority also has the care, control and management of streets within its district,<sup>37</sup> and is empowered to repair roads which are under its care, control and management.<sup>38</sup> The powers of a local authority with respect to roads within its district extend to roads constructed by the Commissioner of Main Roads but the exercise of a local

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<sup>31</sup> Ibid., at 276.

<sup>32</sup> Ibid., at 296.

<sup>33</sup> *Main Roads Act 1930*, s.16(1). The Commission must have the authority of the Governor to construct a highway or main road. Section 14(1) of the *Main Roads Act* provides that "The Governor, on the recommendation of the Commissioner, may authorise and empower the Commissioner to provide highways and to provide main roads...".

<sup>34</sup> *Main Roads Act 1930*, s.24(1). The Commissioner must have the authority of the Governor to construct a secondary road. Section 24(1) of the Act provides that "The Governor, on the recommendation of the Commissioner, may...authorise and empower the Commissioner to provide and construct any secondary road".

<sup>35</sup> *Main Roads Act 1930*, s.27A(1). The provisions of the Act regarding the provision and construction of highways and main roads apply, as far as practicable, *mutatis mutandis* to non-declared roads: s.27A(3).

<sup>36</sup> *Local Government Act 1960*, s.301(a).

<sup>37</sup> Ibid., s.300.

<sup>38</sup> Ibid., s.301(a).

authority's powers in regard to a highway or main road is subject to the control and direction of the Commissioner of Main Roads.<sup>39</sup>

3.15 However, it is the Commissioner of Main Roads who maintains highways and main roads.<sup>40</sup> The task of maintaining footpaths adjoining the actual roadway nearly always passes to the local authority.<sup>41</sup> It is the responsibility of local authorities, and not the Commissioner, to maintain secondary roads and non-declared roads constructed by the Commissioner.<sup>42</sup>

3.16 Under the *Public Works Act 1902*, the Minister for Works may construct or repair any road within the State.<sup>43</sup> The Commission understands that it is now rare for the Minister for Works to construct a road. Under the Act, the Governor by Order in Council, may declare any road to be a "Government road".<sup>44</sup> Government roads are under the exclusive control and management of the Minister for Works.<sup>45</sup> The power to declare a "Government road" has not been exercised for many years.

3.17 It seems that none of the provisions of the *Main Roads Act 1930*, the *Local Government Act 1960* and the *Public Works Act 1902* expose any of the highway authorities in this State to liability for accidents caused by their failure to maintain roads in proper repair or to remove a danger which has arisen in or on the road. It appears that they all have the benefit of "the non-feasance rule".

3.18 Although the meaning of s.302 of the *Local Government Act* is obscure, it appears to extend the benefit of the non-feasance rule so far as local authorities are concerned.

Section 302 provides:

"(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

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<sup>39</sup> *Main Roads Act 1930*, s.16(2).

<sup>40</sup> The Commissioner is empowered to do this by s.16(1) of the *Main Roads Act*.

<sup>41</sup> This can come about in either of two ways. Firstly, the Governor, on the recommendation of the Commissioner, may by proclamation declare that the footpaths are to be excluded from a highway or main road: *Main Roads Act 1930*, s.13(1). Secondly, the Commissioner under s.16(2) could leave the maintenance of the footpaths to the local authority in which case the local authority's power to maintain the footpaths will be "subject to the control and direction of the Commissioner". Probably, the fact that footpaths are mainly for the benefit of local residents or businesses is the reason why the task of maintaining the footpaths usually passes to the local authority.

<sup>42</sup> *Main Roads Act 1930*, ss. 24(5) and 27A(2).

<sup>43</sup> *Public Works Act 1902*, s.86(1).

<sup>44</sup> *Ibid.*, s.86(2).

<sup>45</sup> *Ibid.*, s.87(1).

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".

An example of the circumstances in which this section perhaps applies is where a person suffers injury as the result of the collapse of a drain alongside a roadway, forming part of the "street or way", which is not interfered with by the authority although the adjacent roadway is either improved or taken over by the authority. If the drain is the authority's responsibility as a highway authority the common law immunity will apply and the authority will not be liable for mere non-feasance.<sup>46</sup> If, however, the drain is the responsibility of the authority in the performance of some other function, the common law immunity will not apply, but it may be that s. 302 will provide an immunity.<sup>47</sup>

3.19 Apart from the public bodies referred to above a number of mining companies are responsible under agreements ratified by the State Parliament for the construction and maintenance of roads associated with their operation.<sup>48</sup> For the purpose of determining whether, and the extent to which, the companies are liable in an action by a person or body corporate in respect of the death or injury of any person or damage to any property, the companies are deemed to be a municipality and the roads are deemed to be streets under the care, control and management of the companies.<sup>49</sup> Consequently, the companies have the same immunity from liability as a municipality.

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<sup>46</sup> See paragraph 3.11 above.

<sup>47</sup> If the section does provide an immunity in these circumstances, the immunity would not apply "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": *Local Government Act 1960*, s.302(2).

<sup>48</sup> See, for example, the *Nickel (Agnew) Agreement Act 1974*, clause 11(1) of the Schedule.

<sup>49</sup> *Ibid.*, clause 11(5).

## REFORM OF THE LAW IN ENGLAND AND CANADA

### England

#### *Highways (Miscellaneous Provisions) Act 1961*

4.1 In England the common law situation has been altered by the *Highways (Miscellaneous Provisions) Act 1961*.<sup>1</sup> Section 1(1) of the Act provides that:

"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".

4.2 Section 1(2) of the Act provides that in an action for damages resulting from an authority's failure to maintain a highway it is a defence for the authority to prove that it took such care as in all the circumstances was reasonably required to ensure that the highway was not dangerous for traffic.

4.3 The courts when giving effect to the defence established by s.1(2) are required to have regard to the character of the highway, the traffic reasonably expected to use it, the standard of maintenance appropriate for such a highway and such traffic, the state of repair in which a reasonable person would have expected to find the highway, whether the authority knew or could have reasonably been expected to know that the condition of the highway was likely to cause danger, and whether warning notices were displayed.<sup>2</sup>

#### *Burnside's Case*

4.4 In *Burnside v Emerson*<sup>3</sup> Lord Denning M.R. examined the operation of s.1 of the *Highways (Miscellaneous Provisions) Act 1961*. Lord Denning said that the Act had to be read with the *Highways Act 1959* and that under those Acts a highway authority has a duty to maintain highways. If they fail in their duty, and if damage results, they may be liable unless they prove that they used all reasonable care in the circumstances.<sup>4</sup>

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<sup>1</sup> 9 & 10 Eliz. II c.63.

<sup>2</sup> Ibid., s.1(3).

<sup>3</sup> [1968] 3 All ER 741.

<sup>4</sup> Ibid., at 742.

4.5 Lord Denning said<sup>5</sup> that an action against a highway authority involved three things -

- (1) "The plaintiff had to show that the road was in such a condition as to be dangerous for traffic. In seeing whether it was dangerous, foreseeability is an essential element. The state of affairs must be such that injury may reasonably be anticipated to persons using the highway."<sup>6</sup>
- (2) "The plaintiff must prove that the dangerous condition was due to a failure to maintain, which includes a failure to repair the highway. In this regard, a distinction is to be drawn between a permanent danger due to want of repair, and a transient danger due to the elements. When there are potholes or ruts in a classified road which have continued for a long time unrepaired, it may be inferred that there has been a failure to maintain. When there is a transient danger due to the elements, be it snow or ice or heavy rain, the existence of danger for a short time is no evidence of a failure to maintain."

[However, other evidence may indicate that a dangerous condition, of a transient nature, due to the elements, is the result of a failure to maintain. In *Burnside v Emerson* there was, in fact, additional evidence that the highway authority had failed to maintain a drainage system for the road.<sup>7</sup>]

- (3) "If there is a failure to maintain, the highway authority is liable prima facie for any damage resulting therefrom. It can only escape liability if it proves that it took such care as in all the circumstances was reasonable; and, in considering this question, the court will have regard to the various matters set out in s.1(3) of the Act of 1961."

The highway authority, therefore, can rely on the fact that it has taken reasonable care as a defence - the onus of establishing this resting on it. In *Burnside v Emerson* the highway authority failed to discharge the burden of proving that it had taken all such care as was reasonably required.<sup>8</sup>

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<sup>5</sup> Ibid., at 742-743.

<sup>6</sup> In *Meggs v Liverpool Corporation* [1968] 1 All ER 1137, the plaintiff caught her foot against the projecting edge of a flagstone, fell and suffered injury. Referring to these facts Lord Denning said at 1139:

"It seems to me, using ordinary knowledge of pavements, that everyone must take account of the fact that there may be unevenness here and there. There may be a ridge half an inch or three-quarters of an inch occasionally, but that is not the sort of thing which makes it dangerous or not reasonably safe".

<sup>7</sup> Ibid., at 743-744.

<sup>8</sup> Ibid., at 744.

*Difficulties of the English legislation*

4.6 There are two crucial differences between a liability in negligence and the statutory liability imposed by s.1 of the *Highways (Miscellaneous Provisions) Act 1961*. The first is that in order for an action for negligence to succeed the plaintiff must prove, amongst other things, that the defendant had been guilty of lack of reasonable care and that such lack of reasonable care was the cause of the injury to him. In an action under the statute he need not prove either of these things in order to succeed. He must, of course, prove that the road was in such a condition as to be dangerous to traffic and that the dangerous condition which caused the accident was due to a failure to maintain the highway. The second difference is that the highway authority has the burden of proving that it took such care as in all the circumstances was reasonable, otherwise the statutory defence under s.1(2) is not available.

4.7 It is noted<sup>9</sup> by Fleming that by shifting the burden of excuse to the highway authority, the Act actually imposes a liability stricter than negligence, and that the highway authority is, in consequence, placed in a worse position than where negligence through misfeasance is pleaded.

4.8 Sawyer criticises<sup>10</sup> the English legislation because it assumes that there was a civil liability for non-repair of highways, but with an immunity where the highway was repairable by "the inhabitants at large" and other persons as their successors.

4.9 Sawyer also criticises the English legislation because the draftsmen:<sup>11</sup>

"...assumed that the non-feasance difficulty arises only in the case of authorities which have 'succeeded' to the inhabitants at large. But it is clearly established that the rule applies just as much to highway authorities newly created by statute which have no sort of relationship to the inhabitants at large, and in respect of highways which have never been repairable by the inhabitants at large at any time".

4.10 In *Burnside v Emerson* the liability of the highway authority was based not on the mere removal of the immunity of highway authorities for non-feasance, but on an express statutory duty to maintain the highway.<sup>12</sup> This duty was based on reading the *Highways Act*

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<sup>9</sup> Fleming, *The Law of Torts* (5th ed. 1977) at 419, footnote 18.

<sup>10</sup> Sawyer, *Nonfeasance Under Fire* (1966) 2 NZULR 115.

<sup>11</sup> Ibid., at 118. See paragraphs 2.6 and 2.7 above.

<sup>12</sup> See Denning M.R. in *Burnside v Emerson* [1968] 3 All ER 741 at 742, and Diplock L.J. at 744.

1959 and s.1 of the *Highways (Miscellaneous Provisions) Act 1961* together.<sup>13</sup> Consequently, the duty existed irrespective of whether the highway authority succeeded to the inhabitants at large or was newly created by statute.

4.11 In Western Australia highway authorities are not under a statutory duty to maintain roads, but are merely empowered to do so.<sup>14</sup> For this reason it would appear that any reforming legislation in Western Australia would have to do more than merely abrogate the immunity of highway authorities for non-feasance and would have to impose a positive civil liability on highway authorities for injuries or damage due to mere non-feasance.

## Canada

### *General*

4.12 In several of the Canadian provinces including Ontario and Saskatchewan, the immunity of highway authorities has been abolished.

### *Ontario*

4.13 Section 427(1) of the Ontario *Municipal Act 1970*<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".

The provision is couched in positive language and avoids the historical approach taken in England. On its face, the Ontario provision appears to impose strict liability on municipal bodies so long as the stringent notice and limitation requirements set out later in the section are met. However, it has been held that the nature of the duty imposed does not make a municipality an insurer, but only imposes upon it the duty to keep the highway in a state reasonably fit to accommodate the traffic which passes or might be expected to pass along it,

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<sup>13</sup> See paragraph 4.4 above.

<sup>14</sup> See paragraphs 3.12 to 3.17 above.

<sup>15</sup> RSO 1970, c.284.

and where there is no negligence there is no breach of duty.<sup>16</sup> Speaking of the subsection as it appeared in the same wording in an earlier Act, Evans J.A. in *Dubois et al v City of Sault Ste. Marie*<sup>17</sup> said that it:

"...attaches liability to a municipality for non-repair of a highway and, when damages for non-repair are established, the municipality in order to escape liability must show that adequate precautions were taken, and the question then arises as to whether what was done by the municipality was adequate under the circumstances to protect the public".

4.14 The liability under s.427(1) of the Ontario enactment is limited in a number of ways. A municipality is not liable for damage or loss -

- (a) caused by the presence or absence or insufficiency of any wall, fence, guard rail, railing or barrier;<sup>18</sup>
- (b) caused by a construction, obstruction, earth, rock, tree or other material or object not within the "travelled" portion of the highway;<sup>19</sup>
- (c) caused by the act or omission of a person acting in the exercise of any power or authority conferred upon him by law and over which the municipality had no control, unless the corporation was a party to the act or omission or had authorised it;<sup>20</sup>
- (d) unless the plaintiff's loss or damage is particular to him and not such as all users of the highway suffer in common.<sup>21</sup>

Except in the case of gross negligence, a municipality is not liable for a personal injury caused by snow or ice on a sidewalk.<sup>22</sup>

4.15 The Ontario provision also contains very exacting limitation and notice requirements. An action cannot be brought against the municipality after the expiration of three months from the time when the damage or loss was sustained.<sup>23</sup> This applies whether the want of

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<sup>16</sup> *Domanski v Hamilton* (1959) 18 DLR (2d) 765 (CA).

<sup>17</sup> (1970) 15 DLR (3d) 564 at 567.

<sup>18</sup> *Municipal Act 1970* (Ont), s.427(3).

<sup>19</sup> *Ibid.*, s.427(3).

<sup>20</sup> *Ibid.*, s.427(8).

<sup>21</sup> *Ibid.*, s.427(9).

<sup>22</sup> *Ibid.*, s.427(4).

<sup>23</sup> *Ibid.*, s.427(2).

repair was the result of non-feasance or misfeasance.<sup>24</sup> Furthermore, an action cannot be brought unless written notice of the claim and of the alleged loss or damage is served on the municipality, in the case of a county or township within ten days, and in the case of an urban municipality within seven days, of the time when the damage or loss was sustained.<sup>25</sup> Failure to give or insufficiency of the notice is not a bar to the action, if the court before which the action is tried is of the opinion that the municipality in its defence was not prejudiced (by the want or insufficiency of notice) and that to bar the action would be an injustice.<sup>26</sup> In the case of the death of the person injured, failure to give notice cannot be a bar to the action.<sup>27</sup>

### *Saskatchewan*

4.16 In Saskatchewan, municipalities operate under either the *Rural Municipalities Act 1972*<sup>28</sup> or the *Urban Municipality Act 1970*.<sup>29</sup> Section 206(1) of the *Rural Municipalities Act* provides:

"Every council shall keep in a reasonable state of repair all public roads...and also all public bridges...that have been constructed or provided by the municipality...or provided by the province, having regard to the character of the road [or] bridge ...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".

Liability is limited in two ways. Firstly, the Act provides that the municipality will not be liable unless the plaintiff proves that the municipality knew or should have known of the disrepair of the road.<sup>30</sup> (This is a limitation which does not appear in the Ontario legislation.) Secondly, a municipality is not liable for damage or loss caused by a construction, obstruction, earth, rock, tree or other material or object not within the "travelled" portion of the road.<sup>31</sup> This is the same as one of the exceptions in Ontario's *Municipal Act 1970*, but apart from this, the exceptions contained in the Ontario enactment do not appear in Saskatchewan's *Rural Municipalities Act 1972*.

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid., at s.427(5).

<sup>26</sup> Ibid., at s.427(6).

<sup>27</sup> Ibid.

<sup>28</sup> S.S.1972, c.101.

<sup>29</sup> S.S.1970, c.78.

<sup>30</sup> *Rural Municipalities Act 1972* (Sas) s.206(2).

<sup>31</sup> Ibid., s.373.

4.17 The limitation period under the Saskatchewan Act is six months<sup>32</sup> and written notice of the claim and the alleged loss must be given within one month of the time when the damage or loss was sustained.<sup>33</sup> Failure to give or insufficiency of the notice is not a bar to the action, if the court before which the action is tried is of the opinion that there is reasonable excuse for that failure or insufficiency and that the municipality was not prejudiced in its defence.<sup>34</sup> In the case of death, failure to give notice cannot be a bar to the action.<sup>35</sup>

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<sup>32</sup> Ibid., s.374(1). Furthermore, the writ must be served within the six months.

<sup>33</sup> Ibid., s.374(2).

<sup>34</sup> Ibid., s.375(1).

<sup>35</sup> Ibid., s.375(2).

## PROPOSALS FOR REFORM ELSEWHERE

### South Australia

5.1 In 1974 the Law Reform Committee of South Australia reported to the Attorney General of South Australia on the reform of the law relating to misfeasance and non-feasance.<sup>1</sup> The Report has not, as yet, been implemented.

5.2 The Committee acknowledged that legislation in this field would be strongly influenced by government policy. However, it suggested that consideration be given to abolishing the distinction between misfeasance and non-feasance and that *all* actions against public authorities be on the basis that they have failed to maintain properly or at all the public works under their control.<sup>2</sup> The Committee recommended this approach because it saw one of the fundamental difficulties with the English legislation as being that it is "...still necessary for a Court to distinguish between non-feasance situations and misfeasance situations".<sup>3</sup>

5.3 The Committee suggested that:<sup>4</sup>

"...the basis of all actions against public authorities be on the footing that they have failed to maintain properly or at all the public works under their control".

The Committee therefore favoured the approach taken by the Municipal Act of Ontario, rather than the historical approach taken in England.<sup>5</sup>

5.4 The Committee considered that the onus of proof to establish a prima facie case against the authority should be on the plaintiff. Once established the evidential onus would shift to the authority to show that it acted in a reasonable manner, the authority being responsible for:<sup>6</sup>

"...all *unreasonable* defaults in the exercise of its powers and duties thus encouraging road users to look after themselves as much as possible".

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<sup>1</sup> Twenty-fifth Report, *Report of Reform of the Law Relating to Misfeasance and Non-feasance*.

<sup>2</sup> *Ibid.*, at 19.

<sup>3</sup> *Ibid.*, at 14.

<sup>4</sup> *Ibid.*, at 19.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, at 20.

The Committee recommended that all provisions requiring notice of action relating to the type of claim dealt with by the report be repealed because they are only a trap for the unwary.<sup>7</sup>

## New Zealand

5.5 In February 1973 the New Zealand Torts and General Law Reform Committee reported to the New Zealand Minister of Justice on the desirability of abolishing the rule of law exempting highway authorities from liability in respect of accidents caused by their failure to maintain and repair roads and streets under their control.<sup>8</sup> The report, has not, as yet, been implemented.

5.6 The Committee recommended the enactment of legislation which would -<sup>9</sup>

- (a) specifically abrogate the non-feasance rule;
- (b) impose a duty on highway authorities to take such care as in all the circumstances is reasonable to ensure that each highway for which they are responsible is reasonably safe for persons using it;
- (c) declare that the onus of proof will lie on the plaintiff;
- (d) prescribe that in deciding whether a highway authority has taken sufficient care the court will treat the defendant as entitled to anticipate that users will use such care for their own safety as is reasonable and normal in the particular circumstances, and
- (e) preserve the defence of contributory negligence.

The Committee thought that no special provision was desirable in the legislation about the effect of warning notices on the liability of highway authorities.<sup>10</sup>

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<sup>7</sup> Ibid.

<sup>8</sup> Report of the New Zealand Torts and General Law Reform Committee on *The Exemption of Highway Authorities from Liability for Non-feasance*.

<sup>9</sup> Ibid., at paragraph 18.

<sup>10</sup> Ibid., at paragraph 17.

5.7 The Committee said that one of the merits of its recommendations was that they would bring highway cases into a category similar to that of the negligence claim at common law to which the legal system was thoroughly accustomed, and it did as little violence as possible to that system.<sup>11</sup>

5.8 The Committee also gave consideration to whether or not a notice requirement should be introduced. It noted that highway authorities felt that a notice requirement would protect them against late claims and be of practical value because information about the accident could be collected and preserved while still fresh.<sup>12</sup> The Committee recommended that there should be no notice requirement (subject to close scrutiny of the initial operation of legislation implementing the Committee's recommendations) because it felt that a provision for notice was not necessary as it was likely that a road accident would become quickly known and be widely reported and publicised.<sup>13</sup>

5.9 The Committee also recommended that a wide definition of "highway" be included in the legislation. Bridges, culverts, drains, curbs, gutters, street signs and footpaths should be expressly included but in addition the definition should be so drawn to include everything associated with a modern road, whether a fixture or not. However, the Committee recommended a narrow definition of "highway authority" so as to exclude from the operation of the legislation individual owners of private roads.<sup>14</sup>

## **British Columbia**

5.10 In 1977, the Law Reform Commission of British Columbia issued a report entitled *Tort Liability of Public Bodies*.<sup>15</sup> One of the topics on which the Commission made recommendations in this report was that of liability of highway authorities.

5.11 With regard to the liability of highway authorities, the Commission recommended that:<sup>16</sup>

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<sup>11</sup> Ibid., at paragraph 11.

<sup>12</sup> Ibid., at paragraph 13.

<sup>13</sup> Ibid., at paragraph 14.

<sup>14</sup> Ibid., at paragraph 17.

<sup>15</sup> This was Part V of the Law Reform Commission of British Columbia's project on *Civil Rights*.

<sup>16</sup> The Law Reform Commission of British Columbia's report on *Civil Rights – Part V - Tort Liability of Public Bodies* at 24 and 25.

- "1. Where a public body fails to maintain and keep in repair a highway of which it has the custody, care and management it should be liable (subject to the provisions of the *Contributory Negligence Act*) for damage sustained by a person by reason of such default.
2. In any action based on the liability imposed in (1) it should be a defence to prove that the public body had taken such care, as in all the circumstances was reasonable, to keep the highway to which the action relates in repair and in a safe condition.
3. For the purposes of a defence under Recommendation (2), in determining whether a public body has taken such care, as in all the circumstances was reasonable, the court should in addition to any other relevant considerations have regard to such of the following matters as may be relevant:
  - (a) the character of the highway and the traffic which could reasonably be expected to use it;
  - (b) the standard of maintenance appropriate for a highway of that character and used by such traffic;
  - (c) the condition or state of repair in which a reasonable person would have expected to find the highway;
  - (d) whether the public body 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 public body could not reasonably have been expected to repair that part of the highway before the cause of action arose, what warning notices had been displayed;

but it should not be relevant to prove that the public body 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".

5.12 These recommendations are modelled on the English provisions. They do not follow the Ontario legislation.

5.13 In relation to recommendation 1, the Commission originally proposed in a working paper that a mandatory duty to repair should be placed directly on highway authorities, and that such authorities should be liable for any damage sustained by reason of a breach of this duty. However, the Commission concluded that the desired reform could be achieved merely by imposing a liability on highway authorities for damage sustained by non-repair of the highway. This approach, it said in its report:<sup>17</sup>

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<sup>17</sup> Ibid., at 25.

"...does not statutorily compel municipalities and other highway authorities to carry out highway repairs. If the resources of a municipality are limited, and there are other projects competing for the public purse, which the municipality may regard as having a higher priority than road maintenance, it will be free to allocate funds to such projects rather than to road maintenance without fear of being derelict in the performance of a statutory duty. We adhere to the view, however, that if a municipality makes such a choice, and in consequence someone suffers damage as a result of the road being left in disrepair, the municipality should be held liable".

5.14 The British Columbia Commission pointed out that under the Ontario provision it is not a defence (as it is under the English legislation) to prove that the highway authority had taken reasonable care to secure that the part of the highway to which the action related was not dangerous. Instead, the Ontario legislation listed a number of exceptions (e.g. damage caused by the absence of a guard rail) to the duty to keep the highway in a reasonably fit state.<sup>18</sup> The Commission said:<sup>19</sup>

"The exceptions [in the Ontario legislation] seem aimed at limiting liability only to those claims arising out of non-repair of the road surface itself. It seems to have been thought that the exceptions covered areas in which highway authorities would not be able to protect themselves and, therefore, liability should not be imposed. We appreciate the force of arguments in favour of relaxed liability in these circumstances but have concluded that they can be accommodated on a fairer basis by following the English example and making reasonable [care] on the part of a highway authority a defence to all claims including surface non-repair. Specific exclusions, however reasonable they may be when introduced, can rapidly become dated. In our view a "reasonableness" defence when wedded to the direct imposition of liability will produce a fair and flexible rule. The courts have for many years had experience in determining the standard of reasonable care, and we do not share the view expressed by some respondents to our working paper that the use of a criterion of reasonableness will introduce into the law a degree of uncertainty any greater than that in any other branch of the law in which that standard is employed, or otherwise result in an intolerable situation".

5.15 The Commission said that a consequence of its proposals would be to relieve the plaintiff of the necessity to prove that the municipality's failure to maintain and repair was negligent. The burden would be on the municipality (as it is in England) to show that it had taken such care as in all the circumstances was reasonable. The Commission favoured this approach because it considered that the municipality would have better access to the kind of information that would enable a court to determine whether it had taken reasonable care.<sup>20</sup>

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<sup>18</sup> Ibid., at 23 and 24.

<sup>19</sup> Ibid., at 24.

<sup>20</sup> Ibid., at 25.

5.16 The Commission recommended that there should be no notice requirement in the new legislation. It felt that the potential injustice which could be created by a notice provision, and the undesirability of certain institutions receiving preferred treatment under the law of limitations, outweighed the benefits which the community might receive from the existence of the notice requirements.<sup>21</sup>

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<sup>21</sup> Ibid., at 26.

## DISCUSSION

### Arguments for and against

6.1 The non-feasance rule is an anomaly in the common law. The policy behind the rule seems to have principally rested on the ground that local authorities had insufficient revenue to meet the compensation which would otherwise be payable. This reasoning has lost much of its force because of the advent of public liability insurance. Furthermore, the Commonwealth Government has assumed much of the financial responsibility for road construction and maintenance.

6.2 In principle, the existence of the immunity is socially undesirable. The proposition that all persons should be equal before the law is fundamental to our system of justice and only clear and very compelling reasons could justify an exception to the proposition.

6.3 At present, the community no doubt benefits from lower rates and taxes payable by reason of the immunity and the fact that the burden falls upon the person injured. However, to shift the loss from the injured party to the community in the form of the ratepayers and taxpayers seems fairer. Furthermore, the change would be likely to be productive of social benefit in the shape of improved highway maintenance. This would be consistent with the emphasis which is now placed on road safety.

6.4 The arguments for abolishing the non-feasance rule were summed up in 1951 in an article written by W. Friedman when he said:<sup>1</sup>

"The rule under which highway authorities are liable for misfeasance but not for non-feasance presents an outstanding example of a legal principle which once had some practical justification, was preserved and even extended, when the reason had long disappeared, and now lingers in the law fortified by history and precedent, yet repugnant to modern principles of jurisprudence and legal policy".

6.5 In modern times, legal commentators and judges alike have expressed their distaste for the non-feasance rule. Sawyer has been an exception in this regard. In an article published in the *New Zealand Universities Law Review* in 1966, he said:<sup>2</sup>

"Those who attack [the non-feasance rule] have never shown sufficient realization that it is, analytically considered, simply a part of the general rule concerning private

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<sup>1</sup> Friedman, *Liability of Highway Authorities* (1951), 5 Res. Jud. 21.

<sup>2</sup> Sawyer, *Nonfeasance Under Fire* (1966) 2 NZULR 115 at 129.

remedies for breach of statutory duties owed to the public in general, nor have they mounted any strong assault against the latter doctrine. The highway application of the general rule appears more offensive mainly because it looks more like government privilege in relation to other general duties concerning occupiers, or concerning careful conduct in public places; it does not *feel* like a mere refusal to provide a private remedy for breach of a public duty...

However, if modification or repeal of the doctrine is considered, some of the policy behind the old doctrine should be kept in mind. It is still desirable that road users should be encouraged to look after themselves, and that the funds of road authorities should not be frittered away in meeting frivolous claims. The English Act of 1961 is too big a jump into liability for Australian and New Zealand authorities, especially those in the outback with vast mileages to look after and limited funds; the special protections as well as the substantive liability provisions of Canadian legislation provide better models for Australasian draftsmen. Consideration should also be given to compulsory insurance rather than the chances of litigation as an answer to this aspect of the road-injury problem".

6.6 The Commission is aware of the fact that the abolition of the non-feasance rule might result in some fraudulent claims being made against highway authorities. However, in many types of insurance (e.g. insurance of chattels against fire and theft) the insurer is equally open to fraudulent claims. The insurer always at least has the practical advantage of being able to deny liability to the injured person and leaving it to him to establish his claim in a court of law.

### **The cost**

6.7 The Commission does not believe that those using streets and roads will look after themselves less carefully if the non-feasance rule is abolished. However, in deciding whether the non-feasance rule should be abolished, one has to consider whether the likely cost to highway authorities would be too heavy for them to carry. The Commission assumes that if the non-feasance rule is abolished in Western Australia, highway authorities will insure against liability arising from non-feasance. Therefore, the cost to the authorities would be in the form of an increase in insurance premiums. It occurred to the Commission that help in this regard could be derived from the English experience. However, as far as the Commission is aware no statistics were prepared on a national basis to indicate the increase in insurance premiums caused by the abolition of the rule. Very little information about the increase in insurance premiums due to the reform seems to be available. This is understandable because the abolition having been effected, there was no particular incentive to work out the cost to highway authorities. The only information which the Commission has been able to get is

contained in an article<sup>3</sup> by L.G. Sweeney in *The New Law Journal* in August 1967. In the article, Mr. Sweeney said:<sup>4</sup>

"...That rule of law [the non-feasance rule] was abrogated by s.1(1) of the *Highways (Miscellaneous Provisions) Act 1961* and from August 3, 1964 (s.1(8)), a three years' delay presumably to give the authorities time to take necessary action, they became liable for non-feasance, i.e. for failure to repair a highway, as opposed to misfeasance, i.e. negligent repair.

Perhaps because of the paucity of case law on the subject, it may not be generally realised that there has been a heavy volume of claims since August 1964 against highway authorities for non-feasance. The writer has canvassed a small number of local authorities, including one large seaside resort having some millions of visitors in a season; a large provincial city; and a small county borough of 80,000 inhabitants and has found that nationally the number of claims runs into many thousands and that the great majority of claims - as high as 95 per cent. in some cases - are made by pedestrians as distinct from vehicular traffic. Understandably, the authorities concerned wished to preserve their anonymity and detailed information was given in confidence. Many of the claims appear to arise from pavement defects produced by such heavy traffic as lorries, coaches, and the like, mounting the pavements where they are unable to park on the road on the narrower highways. As a full-scale road-widening programme is not feasible, one authority can see little prospect of avoiding liability except to experiment with a different kind of pavement surfacing: it is less likely that a dip in, e.g. macadam, will cause a fall than a ridge or "trip" on a flagstone. Certainly the incidence of claims has risen considerably as the word has spread. Many are for small or trivial amounts (one, 4s. 3d., was for mud-spattered stockings) and the tendency in a number of cases was to meet these. The increased liability of authorities to embrace non-feasance naturally resulted in an increase in their insurance premiums. However, the statistics of one authority show that their insurers have successfully contested liability in a great majority of cases. Nonetheless, it seems clear that insurance premiums on this score are rising - and in some cases alarmingly".

6.8 As mentioned earlier in this paper, the Law Reform Commission of British Columbia has recently recommended that the immunity for non-feasance be abolished and that the Province enact legislation modelled on England's *Highways (Miscellaneous Provisions) Act 1961*.<sup>5</sup> The Commission made enquiries as to the cost to the authorities if its recommendations were implemented. The Commission reported on these enquiries as follows:<sup>6</sup>

"We have made inquiries of the insurance industry as to the costs of insurance in the light of our proposals. These inquiries were, perforce, hypothetical, and not surprisingly, evoked little in the way of useful response. We also made some inquiries

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<sup>3</sup> Entitled *Highway Authorities and Non-feasance*.

<sup>4</sup> (1967) 117 New L.J. at 879.

<sup>5</sup> See paragraphs 5.11 and 5.12 above.

<sup>6</sup> The Law Reform Commission of British Columbia's report on *Civil Rights - Part V – Tort Liability of Public Bodies* at 22.

in other Provinces concerning experience with legislation comparable to that which was suggested in our working paper and long since in force in those Provinces. 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.

We have no doubt that enactment of our recommendations will increase the economic burden on the municipalities and may (we put it no higher) result in higher municipal taxes. We cannot persuade ourselves, however, that this result is anything other than sensible and fair".

6.9 In Western Australia, local authorities in practice insure with the State Government Insurance Office (SGIO), although not required by law to insure with that insurer. The SGIO has informed the Commission that total premiums paid to it by local authorities and cemetery boards for public liability insurance for the year ending 30 June 1977 were \$88,772. This amount was paid by 134 local authorities and five cemetery boards. The average of the premiums for this insurance was \$638.65. The total paid to the office by these 139 authorities for the same period for insurance (excluding workers compensation) was \$1,369,844.<sup>7</sup>

6.10 Local Government Statistics 1975/76 which are an appendix<sup>8</sup> to the Department of Local Government's Annual Report 1976 show that in the year ended 30 June 1975, the total revenue of local authorities in Western Australia was \$129,283,845, made up as follows -

(a)	Rates collected	\$49,663,930
(b)	Road grants <sup>9</sup>	20,356,281
(c)	Other receipts	<u>59,263,634</u>
		<u>\$129,283,845</u>

<sup>7</sup> The total of all insurance premiums paid by these authorities was much larger, as compulsory third party motor vehicle insurance is paid not to the State Government Insurance Office but to the Motor Vehicle Insurance Trust.

<sup>8</sup> Appendix 6 to the Department's *Annual Report 1976*.

<sup>9</sup> These grants were paid through the Main Roads Department but had two sources: Commonwealth Grants and State funds.

The expenditure of the Main Roads Department for the year ended 30 June 1977 was \$110,092,697: Main Roads Department 1977 *Annual Report* at 46. In that year, 57% of the Department's revenue comprised grants from the Commonwealth and 43% comprised State funds: *ibid*. The most significant sources of State funds are motor vehicle licence fees, payment under the *Road Maintenance (Contribution) Act 1965*, and the half of driver's licence fees which goes to the Department: *ibid*. National highways and rural local roads are the only roads in respect of which Commonwealth Grants may be allocated for maintenance: see *State Grants (Roads) Act 1977* (Cwth), ss.6, 7 and 12. Of the Department's total expenditure of \$110,092,697, the amount of \$25,104,442 was paid by the Department to local authorities in grants: Main Roads Department 1977 *Annual Report* at 10. Most of the \$25,104,442 was money which had come to the Department from Commonwealth Grants: see the Financial Statement which appears in the Report at 46.

6.11 These figures would indicate that the aggregate of the premiums for public liability insurance being paid each year by local authorities in Western Australia is less than 0.1% of the aggregate of their revenue.

6.12 The English experience indicates that if the non-feasance rule is abolished, there will be many claims made on local authorities but most of them will be for comparatively small amounts. This suggests that the insurer's administration costs will be higher than in some other types of insurance, particularly as some of the claims would have to be investigated. In addition, public risk insurance is a field where it is prudent for the insurer to aim to build up some reserves in case there is an unexpectedly large claim.

6.13 Abolition of the non-feasance rule would certainly mean an increase in public risk insurance premiums for highway authorities in Western Australia. However, the Commission considers that it is unlikely that the average increase for local authorities would exceed 100% (i.e. on the figures for the year ended 30 June 1977, it is unlikely that aggregate premiums would rise to \$177,544 - twice \$88,772<sup>10</sup>). The figures given earlier in this Chapter would indicate that this would still be less than 0.2% cent of the total revenue of local authorities in Western Australia. Probably some local authorities would be called on to pay premiums at a higher rate than others because of the poorer state of repair of their roads or footpaths. The Commission is aware of the fact that local authorities in this State and the Main Roads Department are all forced to exercise tight budgetary control. However, these monetary considerations have to be weighed against the social desirability of reforming what appears to be an historical anomaly with a potential for injustice and it is difficult to see that the former consideration should prevail in this case.

### **Different approaches to reform**

(a) *England: onus on local authority*

6.14 In England, liability for non-feasance was imposed by abrogating the common law immunity rule and imposing a duty to keep the highway in a reasonably safe condition.<sup>11</sup> No

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<sup>10</sup> The \$88,772 actually includes premiums paid by five cemetery boards for public liability insurance: see paragraph 6.9 above. Premiums paid by the local authorities for public liability insurance would have been a little less than \$88,772.

<sup>11</sup> See paragraphs 4.1 and 4.4 above.

exceptions are set out but it is a defence for the authority to prove that it took 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.<sup>12</sup> Section 1(3) of the Act provides that for the purposes of the defence, the court is to have regard in particular to the following matters -

- (a) the character of the highway, and the traffic reasonably expected to use it;
- (b) the standard of maintenance appropriate for such a highway and 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.<sup>13</sup>

6.15 It has already been observed that under English legislation, provided the plaintiff shows road or footpath was in such a condition as to be dangerous to traffic and that that condition was due to a failure to maintain, the authority is liable *prima facie* for any resulting damage.<sup>14</sup> It can only escape liability if it can establish the defence set out in the Act namely that it took such care as in the circumstances was reasonably required to secure that the part of the highway concerned was not dangerous for traffic.<sup>15</sup> Under the English legislation, the plaintiff is relieved of the necessity to prove that the authority's failure to maintain and repair was actually negligent. Once the plaintiff shows that the road was dangerous and that the

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<sup>12</sup> *Highways (Miscellaneous Provisions) Act 1961* (Eng), s.1(2).

<sup>13</sup> For the purposes of the defence under s.1(2), it is of no assistance to the authority to prove that it had arranged for a competent person to carry out or supervise the maintenance of the part of the highway concerned unless it also proves that it gave him proper instructions with regard to the maintenance of the highway and that he carried out the instructions: *Highways (Miscellaneous Provisions) Act 1961* (Eng), s.1(3).

<sup>14</sup> See paragraphs 4.4 to 4.7 above.

<sup>15</sup> See paragraph 4.5 above.

condition was due to a failure to maintain, the burden is on the authority to show that it was not negligent. This is a reversal of the normal order of things.

6.16 The rule of contributory negligence applies to the English legislation. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might hurt himself; and in his reckonings he must take into account the possibility of others being careless.<sup>16</sup> Where the plaintiff is guilty of contributory negligence, his damages will be reduced in proportion to his own degree of fault for the accident.<sup>17</sup>

(b) *New Zealand: onus on plaintiff*

6.17 As has already been noted, the New Zealand Torts and General Law Reform Committee has recommended in a report presented in 1973 that legislation be enacted to specifically abrogate the nonfeasance rule and to impose a duty on highway authorities to take such care as in all the circumstances is reasonable to ensure that each "highway" for which they are responsible is reasonably safe for persons using it.<sup>18</sup> However, the New Zealand Committee recommended that the onus of proving that the authority failed to take reasonable care should be on the plaintiff, not the authority. Hence, in this respect it did not follow the English approach. The Committee recommended that, as in England, the law of contributory negligence should apply.

(c) *South Australia: default must be unreasonable*

6.18 The South Australian Law Reform Committee in its report on the law relating to misfeasance and non-feasance adopted a third approach. It recommended that the basis of all actions against public authorities should be on the footing that they failed to maintain properly or at all the public works under their control.<sup>19</sup> It also recommended that.<sup>20</sup>

- (a) the onus of proof be on the plaintiff to establish a prima facie case against a municipal authority, having regard, for example, to the existence of a

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<sup>16</sup> See the judgment of Denning L.J. in *Jones v Livox Quarries Ltd.* [1952] 2 KB 608 at 615.

<sup>17</sup> *Law Reform (Contributory Negligence) Act 1945* (Eng), s.1(1).

<sup>18</sup> See paragraphs 5.5 and 5.6 above.

<sup>19</sup> Twenty-fifth Report, *Report on Reform of the Law Relating to Misfeasance and Non-feasance* at 19.

<sup>20</sup> *Ibid.*, at 20.

dangerous situation where one would not expect one, awareness of such danger by the authority and by the plaintiff, the existence of a civil obligation on the defendant authority and the negligent inactivity or activity of the particular authority.

- (b) Having established a prima facie case, that the evidential onus would move to the authority and that the reasonableness of the authority's action or lack of it be put in issue having regard to all the circumstances of the particular case; for example, notice of the danger and those exempting factors enumerated in section 1(3) of the English Act; in other words, that a public body would be responsible for all **unreasonable** defaults in the exercise of its powers and duties.

The Committee said that the proposal that public bodies would be responsible only for unreasonable defaults in the exercise of their powers and duties would encourage road users to look after themselves as much as possible and hopefully avoid the multitude of claims being made under the English Act.<sup>21</sup>

6.19 Although not expressly stated in the report, it can be assumed from its report that the South Australian Committee intended that if its recommendations were implemented the law of contributory negligence should apply.

### **Which approach to adopt?**

6.20 Basically, therefore, the three different approaches to the onus of proof of negligence are as follows -

- (a) the English approach under which once the plaintiff has shown that the highway was dangerous and that that condition was due to a failure to maintain, it can only escape liability if it can show that it took reasonable care;
- (b) the approach of the New Zealand Committee under which the plaintiff must show that the authority failed to take reasonable care; and

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<sup>21</sup> Ibid.

- (c) the approach advocated by the South Australian Committee under which the authority will escape liability if it can show that its default was not unreasonable.

Assuming that it is considered desirable to impose some liability on local authorities for non-feasance, the question arises as to which approach to the onus of proof should be adopted.

6.21 The position under the English legislation with regard to the onus of proof of negligence is a reversal of the normal order of things. However, in some cases because of the difficulty of obtaining evidence on the question of how long the part of the footpath or road concerned had been in disrepair, it would be difficult for an injured party to prove that the authority had been negligent in its failure to repair, even though in fact it had been. It is arguable that a departure from the normal rule is warranted because it is likely that the authority will have better access to the kind of information that goes into a determination of the reasonableness of its behaviour. The adoption of the English provision would be conducive to certainty of interpretation as the English case law which has evolved around the provision would be applicable.

6.22 Under the New Zealand recommendations, the onus of proving that the authority failed to take reasonable care is on the injured person. This brings non-feasance cases into a category similar to that of the orthodox negligence claim at common law, and it can be argued that this is desirable because it will mean that there is not a variance with the fundamental principles of our law. On the other hand, in an action based on non-feasance, it will normally be the highway authority which has better access to the kind of information which determines whether its behaviour was reasonable. If the New Zealand recommendations were implemented, the practical difficulties which the plaintiff would face in proving negligence would give the authority an advantage, because much of the information relevant to whether it took reasonable care would be within its possession, and not the plaintiff's possession. While it is true that the plaintiff can require sworn answers to interrogatories issued to the highway authority before the trial and can even call officers of the authority to give evidence at the trial on behalf of the injured plaintiff, the authority would in practice often have a considerable tactical advantage over the plaintiff. In some cases where the authority had been negligent, the mere existence of this advantage would deter an injured party from pressing his claim.

6.23 Probably what the South Australian Committee is aiming at in its proposal that authorities should only be responsible for unreasonable default is some reduction of the standard of care required of authorities. Under their proposals, if the authority could show that the default was minor, that it did not have notice of the defect and that at the time its financial resources did not allow it to check for and repair minor defects, it might escape liability, whereas under the English provisions it would be more likely to be found to be liable on the ground that it had not exercised reasonable care.

6.24 The concept of "reasonable care" which is used in the English legislation is one with which our legal system is thoroughly familiar, as "reasonable care" is the standard of care required under the law of negligence. The expression "unreasonable default" is not one which is at present in use in our legal system and would require judicial interpretation before the provision could be interpreted with a considerable degree of certainty. The fact that the expression "unreasonable default" does not at present have a clearly defined meaning in the law is a drawback to the South Australian Committee's proposal.

6.25 The existing immunity for non-feasance negates both a general duty to repair (which would otherwise support an action for the tort of nuisance) and any specific obligation to exercise care in control and management even with respect to known dangers (negligence).<sup>22</sup> In England, the provision that where a plaintiff is guilty of contributory negligence, his damages will be reduced in proportion to his own degree of fault for the accident applies not only where the defendant is liable in negligence but also in nuisance.<sup>23</sup> However, the corresponding provision in Western Australia,<sup>24</sup> only applies where the defendant is liable in negligence. If the defendant in this State is only liable in nuisance, the plaintiff's contributory negligence is a complete defence and the plaintiff's claim will fail completely. The Commission's view at this stage is that if legislation is to be enacted in this State removing the immunity for non-feasance, the legislation should expressly apply the apportionment provisions so that there will be no possibility of a claim being completely defeated because the plaintiff has been guilty of contributory negligence.

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<sup>22</sup> Fleming, *The Law of Torts* (5th ed. 1977) at 418.

<sup>23</sup> See the *Law Reform (Contributory Negligence) Act 1945*, s.1(1) and s.4. "Apart from negligence cases, it applies in breaches of statutory duty, nuisance, conversion and trespass, in so far as this rests on negligence, and possibly in other branches as well": *Clerk and Lindsell on Torts* (14th ed. 1975) at paragraph 992.

<sup>24</sup> *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA), s.4.

## Notice requirements and limitation period

### *In relation to public authorities*

6.26 Under Western Australia's *Limitation Act 1935*,<sup>25</sup> a person may not bring an action against a public authority, such as the Commissioner of Main Roads, unless -

- (a) he gives to the authority, as soon as practicable after the cause of action arose, written notice giving reasonable information of the circumstances on 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 when the cause of action arose.<sup>26</sup>

However, the Act provides that the authority may consent in writing (whether or not the notice was given) to an action being brought against it at any time before the expiration of six years from when the cause of action arose.<sup>27</sup> In addition, the Act provides that application may be made to the court for leave to bring the action (whether or not the notice was given) at a time which is before the expiration of six years from when the cause of action arose.<sup>28</sup> Presumably such an application would only be made by a prospective plaintiff where the authority had first refused to give its consent in writing. The court may grant leave (subject to any conditions it thinks just to impose) to bring the action, if it considers that failure to give the notice or delay in bringing the action, as the case may be, was occasioned by mistake or other reasonable cause or that the authority is not materially prejudiced in its defence or otherwise by the failure or delay.<sup>29</sup>

6.27 If the immunity of the Commissioner of Main Roads for non-feasance were abolished, then the notice requirements and limitation period referred to in the previous paragraph would apply to claims against the Commissioner in the absence of a special provision negating or

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<sup>25</sup> No. 35 of 1935.

<sup>26</sup> *Limitation Act 1935* (WA), s.47A(1).

<sup>27</sup> *Ibid.*, s.47A(2).

<sup>28</sup> *Ibid.*, s.47A(3)(a).

<sup>29</sup> *Ibid.*, s.47A(3)(b).

altering them. In this State, the Minister for Works can also construct and repair roads<sup>30</sup> and the same comment would apply<sup>31</sup> if his immunity for non-feasance were abolished.

*In relation to local authorities*

6.28 If the immunity of local authorities for nonfeasance were abolished, then the notice requirements and limitation period set out in s.660 of the *Local Government Act 1960* would apply to claims against local authorities in the absence of a special provision negating or altering the provisions of that section. Under s.660(1), a person may not bring an action in tort against a local authority unless -

- (a) the action is commenced within twelve months from when the cause of action arose;
- (b) at least thirty-five days before the action is commenced written notice is given to the local authority stating -
  - (i) particulars of the cause of action;
  - (ii) the claim; and
  - (iii) the prospective plaintiff's name and address;
- (c) unless as soon as practicable after the cause of action arose, written notice is given to the local authority, stating so far as the particulars can then be reasonably supplied -
  - (i) particulars of the cause of action;
  - (ii) particulars of any personal injury and the name and address of the prospective plaintiff;
  - (iii) particulars of any property damaged and of the damage sustained;
  - (iv) particulars of the claim of the prospective plaintiff;
  - (v) an intimation that action is about to be commenced against the authority.

If there is a failure to commence the action within the twelve months or to serve one of the notices within the prescribed time, application may be made to a judge at any time before the expiration of six years from when the cause of action arose for leave to commence the

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<sup>30</sup> See paragraph 3.16 above.

<sup>31</sup> See *Limitation Act 1935* (WA), s.47A(4) and (1) and *Public Works Act 1902* (WA), s.5(3).

action.<sup>32</sup> The judge may grant leave (subject to any conditions he thinks just to impose) to bring the action, if he considers that the failure was occasioned by mistake or other reasonable cause or that the local authority is not materially prejudiced in its defence or otherwise by the failure.<sup>33</sup> The *Local Government Act*, however, does not contain a provision which permits the failure to be overcome by the local authority simply consenting to an action being brought against it.

#### *Notice requirement and limitation in other jurisdictions*

6.29 Even shorter limitation periods operate under Ontario's *Municipal Act 1970* and Saskatchewan's *Rural Municipalities Act 1972*. It has already been observed that under the former Act, the action must be brought within three months and under the latter within six months.<sup>34</sup> There is no provision in the legislation enabling a prospective plaintiff to obtain leave to bring an action after this time expires. Under Ontario's *Municipal Act 1970*, written notice of the claim and of the alleged loss or damage must be served on the municipality, in the case of a county or township within ten days, and in the case of an urban municipality within seven days of the accident.<sup>35</sup> Under Saskatchewan's *Rural Municipalities Act*, notice must be served within a month.<sup>36</sup> However, under both enactments, failure to give or insufficiency of the notice is not a bar to the action, if the court before which the action is tried is of the opinion that there is reasonable excuse for the failure or insufficiency and that the municipality was not prejudiced in its defence.<sup>37</sup>

6.30 Although the reports of the Law Reform Committee of South Australia, the New Zealand Torts and General Law Reform Committee and the Law Reform Commission of British Columbia all recommended that there should be no notice requirements,<sup>38</sup> they did not discuss the question of what should be the period within which an action must be commenced.

6.31 When a prospective plaintiff wishes to sue a private citizen in a claim founded on tort, he does not have to fulfil any notice requirements before he can commence the action. Furthermore, he can commence the action at any time within six years after the cause of

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<sup>32</sup> *Local Government Act 1960* (WA), s.660(2).

<sup>33</sup> *Ibid.*

<sup>34</sup> See paragraphs 4.15 and 4.17 above.

<sup>35</sup> See paragraph 4.15 above.

<sup>36</sup> See paragraph 4.17 above.

<sup>37</sup> See paragraphs 4.15 and 4.17 above.

<sup>38</sup> See paragraphs 5.4, 5.8 and 5.16 above.

action arose.<sup>39</sup> It would seem to be undesirable for public bodies such as highway authorities to receive preferred treatment. Also, notice requirements and limitation periods which are shorter than those generally operating in the legal system are often a trap for the unwary which result in injustice. However, where the defendant in an action founded on tort is a private citizen, he will usually know of the incident giving rise to the action as soon as the incident occurs. If the immunity of highway authorities for non-feasance is removed, most of the accidents which could give rise to claims would not come to the notice of the highway authority until it was informed of them by the claimants. If a claimant lets a long period of time go by before he informs the authority of his claim, the authority could be prejudiced because of inability to secure evidence which it could have obtained if it had known of the accident earlier. For example, the state of part of the road or footpath concerned could have altered because of further use over a period of time or because of the effects of the weather. Or the authority might be unable to track down a person who was a witness to the accident.

6.32 If some liability for non-feasance is to be imposed on road authorities, then the Commission welcomes comment on whether -

- (a) (i) there should be any notice requirement;
- (ii) the limitation period should be that applying in actions between citizens namely six years.
  
- (b) If the answer to (a) (i) is "yes", then should the notice provisions be those already applying under the *Limitation Act* and the *Local Government Act*, and if not, what should they be.
  
- (c) If the answer to (a)(ii) is "no", then should the limitation provisions be those already applying under the *Limitation Act* and the *Local Government Act*, and if not, what should they be.

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<sup>39</sup> *Limitation Act 1935* (WA), s.38(1)(c)(vi).

## QUESTIONS AT ISSUE

7.1 The Commission invites comment on the issues raised in this paper or on any other matters within the terms of reference. In particular, the Commission invites answers to the following questions. It would be helpful if reasons were given, where appropriate, for the views expressed.

- (1) Should the immunity of road authorities for non-feasance be abolished?  
(paragraphs 6.1 to 6.13)
- (2) If so, then should the approach to be adopted be -
  - (a) the English approach under which, once the plaintiff has shown that the highway was dangerous and that that condition was due to a failure to maintain, the road authority can only escape liability if it can establish that it took reasonable care;  
(paragraphs 4.1 to 4.7, 6.14 to 6.16, 6.21 and 6.24)
  - (b) the approach advocated by the New Zealand Torts and General Law Reform Committee under which the plaintiff must also show that the road authority failed to take reasonable care;  
(paragraphs 5.5 to 5.7 and 6.17 and 6.22)
  - (c) the approach advocated by the South Australian Law Reform Committee under which the authority can escape liability if it can establish that its default was not unreasonable, or  
(paragraphs 5.1 to 5.4, 6.18 and 6.19, 6.23 and 6.24)
  - (d) some other approach?
- (3) Should any new enactment list matters to which the court should have regard in determining whether the road authority took reasonable care, and if so, what should these matters be?  
(paragraphs 4.3, 5.6(d) , 5.11, 5.15 and 6.14)

- (4) If any liability for non-feasance is to be imposed on road authorities, should the plaintiff's contributory negligence be a complete defence to his action or should his damages be reduced in proportion to his own degree of fault for the accident?

(paragraph 6.25)

- (5) If any liability for non-feasance is to be imposed on road authorities -

- (a) should there be any notice of claim requirement?
- (b) what should the limitation period be?

(paragraphs 6.26 to 6.32)