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*.

The Commissioners are -

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The Executive Officer of the Commission is Mr. C.W. Ogilvie, and the Commission's offices

CONTENTS

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.[1]

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.[2] 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.[3] 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:[4]

> "...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…[5] was imposed on the surveyor it was held that it was not enforceable by an action for damages.[6] 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.[7]

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1 The development of the immunity is discussed by Fullagar J. in *Gorringe v The Transport Commission (Tas)*

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.[1] It will not be liable for injury or loss caused by its failure to maintain the road in proper repair.[2] 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.[3] 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.[4] 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;
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> 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;[5]
>
> 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;
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> where injury or loss was caused by a failure to erect warning signs wen a culvert has collapsed.[6]

The fact that the authority knew or should have known of the danger does not affect the position.[7]

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1 *Municipal Council of Sydney v Bourke* [1895] AC 444.
2 Ibid.
3 *Cowley v Newmarket Local Board* [1892] AC 345; judgment of Fullagar J. in *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357.
4 Ibid.
5 See *Hellyer v The Cwth* [1964] Arg. L.R. 1026, 5 FLR 459.
6 See judgment of Fullagar J. in *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357 at 377.
7 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.[8]

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.[9] 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.[10] 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.[11] 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;[12] where an authority in the course of repairing a road negligently left a heap of soil on the road unprotected and unlighted after dark,[13] 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.[14] Furthermore, an authority will always be liable for damage caused by its negligence in designing or constructing a road.[15] Hence the authority was held to be liable where a road constructed by it ended abruptly and without warning in an unguarded ravine.[16] But if the operations of the road authority put the highway in a condition which is safe and

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8 *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.

9 *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 Su4e82rePTf -0*

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.[17]

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*[18] in which the authority was held liable for failing to keep a brick drain in repair.

3.5 In *The Law of Torts*[19] 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". [20] However, Sawer suggests:[21]

> "...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[22] it has been held that seats, lamposts, telephone booths[23] and an open space around a tree planted on a footpath[24] are artificial structures. Bridges[25] and culverts[26] have been treated as part of the actual roadway.

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

18 (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.

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

20 Ibid. The "source of authority" test is discussed in paragraphs 3.8 to 3.11 below.

21 Sawer, *Nonfeasance Under Fire* 2 NZUL Rev (1966) 115 at 125.

22 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.

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.[27]

"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 th

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.[31] Dixon J. considered that the purpose of the drain was to drain the roadway and concluded that the Road Board was not liable.[32]

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".[33] The Commissioner may also construct "secondary roads"[34] and may construct or improve a road which has not been declared to be a highway, a main road or a secondary road.[35]

3.14 Under the *Local Government Act 1960*, a local authority may construct roads within its district.[36] A local authority also has the care, control and management of streets within its district,[37] and is empowered to repair roads which are under its care, control and management.[38] 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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31 Ibid., at 276.

32 Ibid., at 296.

33 *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...".

34 *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".

35 *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).

36 *Local Government Act 1960*, s.301(a).

37 Ibid., s.300.

38 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.[39]

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

3.16 Under the *Public Works Act 1902*, the Minister for Works may construct or repair any road within the State.[43] 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".[44] Government roads are under the exclusive control and management of the Minister for Works.[45] 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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39 *Main Roads Act 1930*, s.16(2).

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

41 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.

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

43 *Public Works Act 1902*, s.86(1).

44 Ibid., s.86(2).

45 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.
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> (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.[46] 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.[47]

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.[48] 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.[49] Consequently, the companies have the same immunity from liability as a municipality.

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46 See paragraph 3.11 above.

47 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).

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

49 Ibid., clause 11(5).

REFORM OF THE LAW IN ENGLAND AND CANADA

4.5 Lord Denning said[5] 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."[6]

(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.[7]]

(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.[8]

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5 Ibid., at 742-743.

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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

4.5 Highways (Miscellaneous Provisions) Act 1961 s.1 25 0 1 /F.0578 Tc 0Highwc 25 Highways lacndancon.7 Miscrst Misc

1959 and s.1 of the *Highways (Miscellaneous Provisions) Act 1961* together.[13] 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.[14] 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*[15] 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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13 See paragraph 4.4 above.
14 See paragraphs 3.12 to 3.17 above.
15 RSO 1970, c.284.

and where there is no negligence there is no breach of duty.[16] 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*[17] 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;[18]

(b) caused by a construction, obstruction, earth, rock, tree or other material or object not within the "travelled" portion of the highway;[19]

(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;[20]

(d) unless the plaintiff's loss or damage is particular to him and not such as all users of the highway suffer in common.[21]

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

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.[23] This applies whether the want of

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16 *Domanski v Hamilton* (1959) 18 DLR (2d) 765 (CA).
17 (1970) 15 DLR (3d) 564 at 567.
18 *Municipal Act 1970* (Ont), s.427(3).
19 Ibid., s.427(3).
20 Ibid., s.427(8).
21 Ibid., s.427(9).
22 Ibid., s.427(4).
23 Ibid., s.427(2).

4.17 The limitation period under the Saskatchewan Act is six months[32] 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.[33] 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.[34] In the case of death, failure to give notice cannot be a bar to the action.[35]

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[32] Ibid., s.374(1). Furthermore, the writ must be served within the six months. T

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.[1] 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.[2] 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".[3]

5.3 The Committee suggested that:[4]

> "...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.[5]

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:[6]

> "...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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1 Twenty-fifth Report, *Report of Reform of the Law Relating to Misfeasance and Non-feasance.*
2 Ibid., at 19.
3 Ibid., at 14.
4 Ibid., at 19.
5 Ibid.
6 Ibid., at 20.

The Committee recommended that all provisions requiring notice of action relating to the type

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.[11]

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.[12] 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.[13]

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.[14]

British Columbia

5.10 In 1977, the Law Reform Commission of British Columbia issued a report entitled *Tort Liability of Public Bodies*.[15] 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:[16]

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11 Ibid., at paragraph 11.
12 Ibid., at paragraph 13.
13 Ibid., at paragraph 14.
14 Ibid., at paragraph 17.
15 This was Part V of the Law Reform Commission of British Columbia's project on *Civil Rights*.
16 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:[17]

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17 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 th

DISCUSSION

Arguments for and against

> 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.[7]

6.10 Local Government Statistics 1975/76 which are an appendix[8] 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[9]	20,356,281
(c)	Other receipts	59,263,634
		$129,283,845

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[7] 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 InIn1 Tc -0.TD /F1 i6athe Motylia, l09 The tot8tot -59cem016 ($49,6A0 -14.2 6 are an appendix) 'nue of l2(Road grant/F2athe Moty

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.[12] 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

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.[16] Where the plaintiff is guilty of contributory negligence, his damages will be reduced in proportion to his own degree of fault for the accident.[17]

(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.[18] 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 respecg carj 51.25 this 8gx that the onu25 -2

6.17 t471g carelnm

dangerous situation where on

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).[22] 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.[23] However, the corresponding provision in Western Australia,[24] 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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22 Fleming, *The Law of Torts* (5th ed. 1977) at 418.

23 See the *Law Reform (Contributory Negligence) Act 1945*

Notice requirements and limitation period

In relation to public authorities

6.26 Under Western Australia's *Limitation Act 1935*,[25] 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.[26]

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.[27] 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.[28] 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.[29]

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 negativing or

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25 No. 35 of 1935.
26 *Limitation Act 1935* (WA), s.47A(1).
27 Ibid., s.47A(2).
28 Ibid., s.47A(3)(a).
29 Ibid., s.47A(3)(b).

altering them. In this State, the Minister for Works can also construct and repair roads

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)

(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)