SOUTH AUSTRALIA

TWENTY-FIFTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

—

ON REFORM OF THE LAW RELATING TO MISFEASANCE AND NON-FEASANCE

1974

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

B. R. COX, Q.C., S.-G.

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TWENTY-FIFTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA ON REFORM OF THE LAW RELATING TO MISFEASANCE AND NON-FEASANCE

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

Your predecessor referred to us the question of the reform of the law relating to misfeasance and non-feasance. We have considered the matter and now report as follows:—

PART A—POSITION IN SOUTH AUSTRALIA

The present position in South Australia regarding the law relating to misfeasance and non-feasance is a very complicated one and it is regrettable that it is not possible to state concisely the principles on which an action for damages can be sustained against a local authority for a breach of a statutory duty or a failure to exercise a statutory power.

It is thought that many of the problems existing in South Australia today have arisen either directly or indirectly from the assumption by our Courts (not necessarily well founded but too well entrenched today to be altered otherwise than by legislation) that the common law applied in the altered conditions in Australia and from attempts made by our Courts to overcome the common law doctrine of non-liability for failure to repair a highway. The case of *Russell* v. *Men of Devon* (1788) 2 T.R. 667 marked the recorded beginning of this doctrine that a highway authority will not be held liable in civil proceedings if damage is caused by its failure to repair a road provided it has done no positive act, because the proper remedy was to indict the hundred or county in whose area the road was foundrous and upon whom the duty to repair lay. In short, there is no civil liability at common law for non-feasance by a local authority. As we have no civil organization by parishes hundreds and counties in South Australia and never have had, there was no compelling reason why the law should have been transplanted in its English form but transplanted it was and we have so inherited it.

How much of this doctrine has survived, in which cases it is applicable and in whom the immunity exists today is uncertain but what does appear certain is that our Courts still recognize the existence of the doctrines of misfeasance and non-feasance and have applied certain stringent tests in dealing with them.

The principles governing the liabilities of statutory bodies in the exercise of both their powers and duties in relation to what might be termed as "misfeasance proper" appear to be settled. In *Mersey Docks*

and Harbour Board Trustees v. *Gibbs* 1866 L.R. 1 H.L. 93 at 118 Blackburn J. delivering the opinion of all the Judges called in to advise the House said:—

> ". . . in every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created. And if the true interpretation of the statutes is that a duty is cast upon the incorporated body, not only to make the works authorized, but also to take proper care, and use reasonable skill that the works are such as the statute authorizes, or, as in the present case, to take reasonable care that they are in a fit state for the use of the public who use them, there is, with great deference to Lord Cottenham, nothing illogical or inconsistent in holding that those injured by the neglect of the statutable body to fulfil the duty thus cast by the statute upon it, may maintain an action against that body, and be indemnified out of the funds vested in it by the statute."

Here His Lordship was referring to works actually undertaken under a statutory duty and to a liability which might be incurred by a body corporate or by a natural person such as a surveyor acting under the orders of an unincorporated body, but he appeared to place no restriction on the type of works to which such principles would apply.

It also appears to be settled that for a plaintiff to succeed in an action for misfeasance where a statute does not in its terms impose upon a public body an absolute duty, it is necessary for him to show negligence or nuisance not authorized by statute, or a lack of reasonable care in executing what is authorized by statute, by that body. Such a body will not be responsible for damage which results as a natural consequence of the construction of an undertaking authorized by statute or the making and working of such an undertaking: see *East Fremantle Corporation* v. *Annois* 1902 A.C. 213. Therefore, such construction, maintenance and working must be conducted with reasonable care and skill and strictly in pursuance of the statutory authority given and if default is made in the exercise of reasonable care and skill or the authority bestowed does not cover the cause of action sustained, a person injured by such default or lack of authority has a right of action for misfeasance. This will be so whether the lack of reasonable care and skill or want of authority has arisen in the original construction or in the subsequent maintenance and working: see *Baldwin's Limited* v. *Halifax* (1916) 85 L.J.K.B. 1769 at 1771 per Atkin J. (as he then was).

It is therefore possible to conclude that in relation to "misfeasance proper" there are no limitations as to who may be liable, for what works they may be liable, and the extent of their liability.

The position in relation to the doctrine of non-feasance and in relation to the peripheral area where our Courts have chosen to characterize seemingly non-feasance situations as misfeasance or have attempted to find liability in other ways, is by no means clear and the historical development of the doctrine in relation to roads has been a part of social development in which practical problems have been solved as they occurred by reference to policy considerations supported by a minimum of doctrinal reasoning.

In the case of *The Municipality of Pictou* v. *Geldert* 1893 A.C. 524 at page 527 Lord Hobhouse delivering the advice of the Board expressed his view of the doctrine of non-feasance when he said:—

> "By the common law of England which is also that of Nova Scotia, public bodies charged with the duty of keeping public roads and bridges in repair, and liable to an indictment for a breach of this duty, were nevertheless not liable to an action for damages at the suit of a person who had suffered injury from their failure to keep the roads and bridges in proper repair."

It appears from this, therefore, that an obligation to repair does not of itself render a corporation for example liable in an action in respect of "mere non-feasance", a term used by Isaacs J. in *Woollahra Council* v. *Moody* (1913) 16 C.L.R. 353 at 361 when he found that the real cause of action in such cases was not the non-performance of the duty but its negligent performance. A cause of action, therefore, for mere non-feasance could only arise if the legislature uses clear terms indicating that liability shall be imposed for non-performance of a duty.

A view which may be taken in the light of these earlier views of the doctrine is that were a municipality, for example, is given a statutory power to do certain things, the exercise of which is discretionary, then it can probably not be held liable for the non-performance of that power—a matter on which Gavan Duffy J. expressly reserved his opinion in the Woollahra case and concerning which Lord Romer said in the case of *East Suffolk Rivers Catchment Board* v. *Kent* 1941 A.C. 74 at 102:—

> "Where a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power."

The extent to which this doctrine of non-feasance is applicable in South Australia today is not clear. It is also not clear to whom the doctrine is applicable. The earliest and still by far the most important case is the liability of public road authorities for the various kinds of dangerous road conditions—inherited, caused by the elements, caused by third parties, or caused by the authority or its servant and contractors—and it has been suggested that the doctrine of non-feasance is only applicable now to highway authorities and also to drainage authorities. Certainly the rule has been applied to both local and central road authorities, and to departments of the Crown as well as to autonomous statutory corporations. The restricted view however appears untenable at least in this country in the light of the decision of *Brabant & Co.* v. *King* 1895 A.C. 632 an appeal from Queensland where the Privy Council was apparently prepared to recognize a wider immunity. Although the application of the doctrine failed in that case, their Lordships assumed that it would have been applicable had not the Government been under an obligation to an individual member of the public to perform a duty in consideration of its being remunerated by him for its performance (to the Committee's knowledge this case has never been argued as an authority in support of the proposition that payment of rates of all types may be regarded as sufficient consideration to give rise to a general Governmental duty to repair and maintain public works).

In their desire to do justice the Courts have evolved a number of exceptions to the general principles of the doctrine or more precisely the scope of the rule has been narrowed by judicial escape mechanisms. A well-established method is to attribute the dangerous condition to a state of affairs in the road or other structure resulting from the exercise of powers other than the powers to build and maintain the road or structure (for example, the power to drain the surrounding countryside—*Newsome* v. *Darton Urban District Council* 1938 3 A11 E.R. 93; or to direct traffic—*Skilton* v. *Epsom and Ewell Urban District Council* 1937 1 K.B. 112). A more disputable method is to hold the authority more fully responsible for "artificial" structures in a highway, as distinguished from the "highway proper". This second method has the advantage of providing a wider escape clause than the "source of authority" rule since the authority would be liable for drains, culverts, bridges, etc., constructed wholly or mainly for road purposes. The doctrine has been approved in dicta of Australian, New Zealand and Canadian Judges but the High Court of Australia at least by implication rejected it in *Gorringe* v. *The Transport Commission* (*Tas.*) (1950) 80 C.L.R. 357. Where it has been used, many cases turn on fine distinctions of characterization.

In evaluating the extent of the doctrine today it is useful to consider a statement of Lush J. in *McClelland* v. *Manchester Corporation* 1912 1 K.B. 118 at page 127 where he said:—

> "If a highway authority leaves a road alone and it gets out of repair, there is, of course, no doubt that no action can be brought, although damage ensues. But this doctrine has no application to a case where the road authority have done something, made up or altered or diverted a highway, and have omitted some precaution, which, if taken, would have made the work safe instead of dangerous. You cannot sever what was omitted or left undone from what was committed or actually done, and say that because the accident was caused by the omission therefore it was non-feasance. Once establish that the local authority did something to the road, and the case is removed from the category of non-feasance. If the work was imperfect and incomplete it becomes a case of misfeasance and not non-feasance, although damage was caused by an omission to do something that ought to have been done. The omission to take precautions to do something that ought to have been done to finish the work is precisely the same thing in its legal consequence as the commission of something that ought not to have been done, and there is no similarity in point of law between such case and a case where the local authority have chosen to do nothing at all."

It could be said as a natural extension of this dictum that while public bodies are liable for misfeasance, they are not liable for mere non-feasance in regard to statutory duties and powers unless the legislature expressly makes them so liable.

The next case to consider is the decision of the High Court of Australia in *The City of Essendon* v. *McSweeney* (1914) 17 C.L.R. 524. In this case the Essendon municipality, under their statutory powers, without negligence constructed a drain to carry off surface drainage from a portion of its municipality. The drain when constructed was, so far

as was then known, sufficient to carry off all water which might reasonably be expected to flow into it. In time this drain became insufficient to carry off all the water and damage was caused to the plaintiff's land some 30 years after the construction of the drain. This case appears to be the classic one of non-feasance where the municipality would not be held liable for mere inaction following a non-negligent construction of the drain. Indeed Griffith C.J. went to great pains to preserve the non-feasance doctrine in his judgment while still holding the municipality liable in damages. He said at page 530:—

> "No other authority has been cited in support of the argument that when a work authorized by Statute is carried out by a public body without negligence either in design or execution, it can become actionable as against the constructors by reason of subsequent events over which they have no control.
>
> Such a contention is, indeed, negatived both by principle and authority. When a public body undertakes in the exercise of statutory powers to construct a work of public utility, it is bound to use reasonable care both as to design and execution, and if from want of such care injury is caused to an individual he can maintain an action for damages. But in the absence of such negligence the construction of the work is a lawful act, which cannot afterwards become unlawful as against the constructors except by reason of their own subsequent unlawful acts or omissions. They are not liable for mere inaction, or, as it is called, non-feasance, unless the legislature has imposed upon them the duty of action. The remedy, if any, in such a case is to be found in the Statute which authorized the work. If none is to be found there, the persons injuriously affected have no cause of action, whatever other means may be open to them of obtaining redress."

After saying this the Chief Justice then said that if there were no more to the case, he would have no alternative than to dismiss the plaintiff's claim. However, he found that a mass which had accumulated in the drain over 30 years had reduced the efficacy of the construction and the resulting obstruction in the drain had caused the damage complained of. He then said at page 531 that the municipality was "bound to maintain the drain as originally constructed in efficient condition and clear of obstructions so as to allow, to the extent of its capacity, the flow of such water as they knew was actually likely under existing circumstances to flow into it, no matter whence it came." Although he then said that the municipality would not be liable for damage which would have occurred had the drain not been obstructed, it is difficult to see how he could support such a distinction in light of his prior unqualified support of the non-feasance doctrine. This decision does appear to extend the doctrine to the point that a municipality will be liable for failure to maintain a public work which it has constructed without negligence in its original state for an indefinite period of time, as one may assume that the same decision would have been reached had the "obstruction" arisen from the collapse of the drain. If this assumption is correct then it would appear that an inconsistency exists in the Chief Justice's judgment.

It is suggested that this case is supported by neither earlier nor later decisions but, if it does nothing else, it serves to illustrate the desire of

the Courts to overcome the non-feasance doctrine, and to do justice where it feels that a public body could have done more to protect the person and property of its citizens. It does also perhaps illustrate that Judges appear to be evolving a special set of rules when dealing with situations involving damage caused by water.

The case of *Pride of Derby and Derbyshire Angling Association Ltd. & anor.* v. *British Celanese Ltd. & anor.* 1953 Ch. 149 also produced some interesting aspects of the non-feasance doctrine. In this action the plaintiffs claimed an injunction to restrain the pollution of the River Derwent because the various defendants were pouring injurious effluents into it. Negligence was not alleged and the plaintiffs based their action in nuisance. Nuisance is an act or omission which is an interference with, disturbance of, or annoyance to, a person in the exercise of his ownership or occupation, of land or other right used or enjoyed in connection with land. The success of the plaintiffs in this case clearly demonstrated that the Court considered that different considerations arise in an action based on nuisance, whereby a plaintiff may have a right of action if he suffers injury through nuisance, even though it is brought about through an authority's inactivity.

Both Evershed M.R. and Denning L.J. (as he then was) had no hesitation in rejecting the necessity to distinguish between misfeasance and non-feasance in this case; Evershed M.R. saying at page 176 that "in regard to nuisance, . . . I think that the question of non-feasance, as distinct from misfeasance, has no real relevance". Denning L.J. went further when he said at page 188 that "the distinction between misfeasance and non-feasance is valid only in the case of highways repairable by the public at large. It does not apply to any other branch of the law".

The basis of the Court's decision in this case was stated by Evershed M.R. when he said at page 163 that "it is clear that if a public authority so exercises any of its functions as to cause a private nuisance to any person, the authority is liable in consequence to be sued . . ., as any other subject is liable, unless it can rely upon some statute as providing, by express language or necessary or proper inference, a defence to such an action".

It is submitted that although this case was correctly decided on nuisance, on the Court's own admission the doctrine of non-feasance had no relevance to it. However it does appear to allow a good cause of action where otherwise there may be none. The legislation in point in this case gave the defendants the power to maintain sewerage works and a variety of other powers and in the light of the dicta of Denning, L.J., that Judge at least would have found liability in the municipality had the action been brought in negligence and it had been established that the municipality had done nothing to avert the damage caused to the plaintiff although he doubted at page 189 whether the doctrine of *Rylands* v. *Fletcher* L.R. 3 H.L. 330 applied in all its strictness to cases where a local authority, acting under statutory authority, builds sewers which afterwards overflow, or sewerage disposal works which later pour out a polluting effluent, for the reason that the use of land for drainage purposes by the local authority in such a case is proper for the general "benefit of the community", and is on that ground exempt from the rule in *Rylands* v. *Fletcher*. However, if negligence could be proved by the municipality's failure to do anything

which it should have done then presumably Lord Denning would hold it liable for such damage even if the action was not brought in nuisance. Certainly this is so if the failure is a failure in maintenance: see *Geddis* v. *Proprietors of the Bann Reservoir* 3 App. Cas. 430.

It is interesting to note that the New Zealand Supreme Court has held that the doctrine of *Rylands* v. *Fletcher* applied to the case of water carried by a Corporation in pipes under the street (*Irvine & Company Limited v. Dunedin City Corporation* 1939 N.Z.L.R. 741) but this would be doubtful having regard to the limitations now imposed on the "escape" doctrine by *Read* v. *Lyons* 1947 A.C. 156. It would appear from these and other cases that the Courts have been attempting to confine the doctrine of non-feasance as much as possible and they seem to have directed their attempts primarily at sewage and drainage authorities and have attempted to draw up special rules in this sphere.

The case of *Dubois* v. *District Council of Noarlunga* 1959 S.A.S.R. 127 was one where a drainage authority was held liable in damages under section 316 of the Local Government Act 1934-1958. The non-feasance doctrine was not discussed by the Court in its judgment although much time was spent on it in argument and it formed the main ground of the Magistrate's judgment which was reversed by the Full Court. The case was decided on ordinary principles of negligence and nuisance and upon statutory interpretation. However, it is important to note the terms of section 316 when considering this case, as the section provides that compensation be paid as agreed between the authority and the owner or occupier, or as is awarded by a Court of competent jurisdiction in the absence of agreement, yet the Full Court held that Miss Dubois was not restricted to compensation and was entitled to common law damages.

In the New Zealand case of *Vile* v. *New Plymouth City Corporation* 1954 N.Z.L.R. 1218 the defendant corporation, under statutory powers, constructed and maintained a pipeline which crossed a stream on a special pipe bridge. Flood waters from the stream caused damage to the plaintiff's house and land and the plaintiff contended that the bridge was an obstruction to the natural flow of flood waters in the stream and therefore the construction was negligent and outside the corporation's statutory authorization. The Supreme Court of New Zealand held in this case that not only was the bridge poorly designed, but in the way it was built, it constituted an unnecessary nuisance in that the limited waterway which was provided produced a consequence which could readily be avoided; and that a consequence which could be so readily avoided was not within the corporation's statutory indemnity, whether the nuisance was public or private and therefore, as an unnecessary nuisance had been established, the plaintiff was entitled to succeed.

However, in the same year the Supreme Court held that apart from some special statutory provision, a sewage or drainage authority is not liable in nuisance for the dangerous state of sewers in a highway unless (*a*) it has constructed them; or (*b*) it is the owner of them; or (*c*) it has the control and management of them. Furthermore, the Court said that a discretionary power as distinct from provisions imposing duties fall short of showing that the drain was under the control and management of the Corporation: see *Petone Borough* v. *Daubney* 1954 N.Z.L.R. 305.

The New Zealand Supreme Court again considered the matter in *Hocking* v. *Attorney-General* 1962 N.Z.L.R. 118. In this case two culverts were installed in a roadway which were repaired from time to time and although there was no doubt that a better and more permanent repair could have been effected Barrowclough C.J. said at page 128 that "While it (the roading authority) has power to repair and no doubt prevent, as best it can, the development of a state of disrepair it is under no duty to repair or to prevent disrepair—no duty for the breach of which it is answerable in an action for damages".

In an interesting dictum on page 129 His Honour expressed his tacit approval of the non-feasance doctrine when he said that—

> "Whatever may be the grounds of the doctrine it seems to me that in a new country like New Zealand, suffering as it still does from the effects of forest denudation and excessive flooding, bridges and culverts which could cope with all foreseeable intensities of rainfall would be very costly luxuries and well beyond the financial and other resources of most roading authorities. Many culverts of inadequate capacity . . . and likely to result in washed out and therefore dangerous roads will often be better than no culverts at all. It may well be that we should accept that there may be unexpected hazards on our roads and that the retention of the doctrine of no-liability for mere non-feasance is really in the public interest."

An appeal in this matter was allowed by the Court of Appeal, 1963 N.Z.L.R. 513, where the majority of the Court held that if in the course of the repair of a road already built a roading authority installs a culvert which proves to be of insufficient capacity to prevent flooding and the erosion of the road, that act is not an act of non-feasance and the roading authority may be liable in damages to a person injured by a washout at the site of the culvert. Such liability will depend on whether the work was done negligently.

The Court of Appeal in New South Wales adopted consideration similar to those adopted by the Supreme Court of New Zealand in the Petone Borough Case in its decision in *Sisson* v. *North Sydney Municipal Council* 1966 1 N.S.W.R. 580. In this case it was assumed that the dangerous condition of a drain-pipe and kerbing which caused the damage was probably due to a deterioration in the natural course of time. Here the Court of Appeal held that the municipality was not liable either in negligence or nuisance either as a highway authority or a drainage authority since there was no evidence that it had constructed the drain, nor was it liable either as the owner of a highway vested in it on which an artificial structure was situate, or as the occupier of the land on which the drain was situate.

The conclusion of the Court was expressed on page 581 where it said that "If the defendant council owned the drains in a capacity of drainage authority, then it would be obliged to keep the drain in repair, and would be liable if a person was injured through its failure to keep the drain in repair. However, we do not think that the defendant council either owned or had control of the drain in question in its capacity as a drainage authority". The Court arrived at this conclusion when it said that the council, having been given a general power of control and

regulation, could not thereby be said to be a drainage authority in relation to the particular drain in this case.

Although many of the cases cited above appear to be conflicting, it is not unreasonable to suggest that the majority of them not only appear to lay down special rules for sewage and drainage authorities but they have also attempted to translate statutory powers into duties for the breach of which they will be held liable. In the *Dubois case* Mayo J. said on page 139 that "the right to exercise powers given by Section 316 has associated with it a duty. It may be expressed this way: the draining must not be unnecessarily and unreasonably burdensome to the person in possession of the adjoining land into or through which the water is to pass" and also on page 138 he said that "statutory permission, like any other licence or indulgence granted, presupposes a prudent and reasonable exercise". Whether these statements were prompted by the fact that Section 316 provides for compensation is not clear but certainly the New Zealand Supreme Court in *Vile's case* took the view that a negligent construction was outside the corporation's statutory authorization.

It is not certain if Mr. Justice Mayo would have taken the same view on all sections of Division V of Part XVII of our Local Government Act but it is certainly arguable that he may have done so. If this is so it would appear that the non-feasance doctrine may have little relevance at least in sewage and drainage situations as it must be remembered that the non-feasance doctrine in its early form made no distinction between powers and duties of public bodies and in practically all cases of escape of water it is possible to declare in nuisance instead of in negligence.

Furthermore it was said by Lord Blackburn in *Julius* v. *Lord Bishop of Oxford* (1880) 5 App. Cas. 214 that words conferring a power are merely making that legal and possible which there would otherwise be no right or authority to do. Their natural meaning is permissive and enabling only and enabling words are always compulsory where there are words to effectuate a legal right. This view would indeed support Mr. Justice Mayo's view of Section 316 and it is submitted that today both his view and the view of the Supreme Court of New Zealand in *Vile's case* is tenable when considering legislation imposing powers on public bodies.

It is also interesting to note the Victorian case of *Edgar* v. *Seymour* 1922 V.L.R. 218 where it was suggested that words such as "the Municipal Council shall maintain the roads in its own municipal district" do not cast an absolute duty upon the municipality concerned but merely indicate which body shall do the work.

However, in *Birch* v. *Central West County District Council* 1970 A.L.R. 307 at page 310 Barwick C.J. approved the view of the trial Judge to the effect that "persons exercising statutory powers or duties must use all reasonable diligence to prevent their operations from causing damage to others" which is in effect the same test as Napier C.J. applied in Dubois' case. His Honour the Chief Justice added at page 312 that "there was a duty at common law resting on the respondent (Council), unconnected with its statutory authority, or any duty derived from it constating statute. That duty derived from the fact and

circumstances of the supply and the nature of the substance supplied." Although in this case the substance supplied was electricity and as such, in the Chief Justice's view, was by its very nature dangerous and capable of causing harm to persons and property, it is perhaps arguable that the view of the High Court in this case should, in this modern age, be extended to other public bodies.

In contrast to all the decisions discussed above the non-feasance immunity was widened by the case of *Burton* v. *West Suffolk County Council* 1960 2 A11 E.R. 26 where it was stated that "the properly carried out, yet inadequate, drainage work done by the defendants was not misfeasance; failure to do further work to drain the road properly was non-feasance for which there is no liability".

Whether this case can be properly cited to support such a position in a South Australian Court today is extremely doubtful as it has been distinguished on various grounds in many later cases.

PART B—NECESSITY FOR REFORM

It has been said earlier and it can no doubt be seen from the previous part that it is not possible to state concisely the principles on which an action for damages can be sustained against a public body for the breach of a statutory duty or failure to exercise a statutory power. However, it is suggested that it is true to say that in the law of South Australia today the doctrine of non-feasance still exists albeit in a limited form.

The justification for the principles of the doctrine was found in policy reasons, including the administrative and financial difficulties faced by public authorities in the United Kingdom and in most parts of the British Empire in the nineteenth century when developing modern systems of sewerage and drainage. However, it is now suggested by commentators and legal bodies that however justifiable the non-feasance rules might have been during the nineteenth century the policy justifying them has become steadily less defensible in the twentieth century, though they may not have entirely disappeared.

Furthermore, although it is not unreasonable to suppose that the administrative and financial problems of local authorities, the probability of numerous claims and the desirability of encouraging a high standard of self-help among road users were present in the minds of most of the Judges in the series of cases ending with *Sydney* v. *Bourke* 1895 A.C. 433, in which the Privy Council finally adopted the non-feasance rule in Australia, it is also not unreasonable to say that the doctrine was adopted in Australia in spite of the quite different history of road maintenance in this country.

The doctrine in relation to sewerage and drainage authorities appears to have been reduced to minimal proportions but it has appeared to some Courts to have some relevance. Certainly it must be conceded that highway authorities still enjoy the immunity offered to them by the doctrine although there have been attempts by the Courts to limit this immunity. Not only do the principles of the doctrine appear to be anomalous, they often lead to grave injustices and appear to be the one case where authorities escape liability for breaches of their statutory duties or failure to act reasonably in exercise of the statutory powers.

Salmon J. (as he then was) said: the doctrine "no doubt has the soundest historical justification. It is, however, an archaic and anomalous survival into modern times. It would be difficult indeed to think of any sound reason why today highway authorities should enjoy this immunity" (*Attorney-General* v. *St. Ives Rural District Council & anor.* 1959 3 A11 E.R. 371 at page 376).

However, the policy considerations which originally justified the special rules of the non-feasance doctrine have not altogether disappeared. Their significance, however, varies greatly from place to place in the several jurisdictions where they apply and the remedies available to the Courts are not adequate to provide a satisfactory adjustment to their operation.

It would appear therefore that the liability of at least highway authorities needs to be redefined, and as this task appears to be beyond the scope of judicial adaptation, legislation is required.

Furthermore, the mere fact that it is not possible to state concisely the principles of the non-feasance doctrine, suggests that legislative reform is required to avoid the undesirable accumulation of special sub-categories, split decisions and successful appeals.

If Government policy is against drastic reforms in this area it is nevertheless suggested that legislation is necessary to properly define in what cases immunity will be available to which bodies. This will be discussed further in Part D.

Part C—Reforms in Other Jurisdictions

1. *English Reforms*

Following the decision in *Burton* v. *West Suffolk County Council,* the English legislature passed the Highways (Miscellaneous Provisions) Act 1961, a copy of the relevant sections of which is annexed hereto. Under this Act public authorities were allowed the period of three years beginning with the passing of the Act in order to "put their houses in order". The Act came into force on 3rd August, 1964.

Briefly, Section 1 subsection (1) abrogates the rule of law exempting public bodies from liability for non-repair of highways. Section 1 subsection (2) provides for an action against the highway authority. But the highway authority can escape liability if they prove that they took all reasonable care to see that the highway was safe, having regard to the various matters set out in Section 1 subsections (2) and (3) of the Act. At the outset, however, in order to make a prima facie case, the plaintiff must show that the highway was not reasonably safe. That is, that it was "dangerous to traffic".

An action under the English Act involves therefore three things as enumerated by Lord Denning in the later case of *Burnside* v. *Emerson* 1968 3 A11 E.R. 741. First, the plaintiff must show that the road was in such a condition as to be dangerous for traffic and here foreseeability is an essential element. The state of affairs must be such that injury may reasonably be anticipated to persons using the highway. Secondly, he 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. And thirdly, 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 Section 1 subsection (3) of the Act.

The English Act has been criticized on the ground that it appears to relate only to situations where the non-feasance doctrine may arise. Therefore, on the interpretation of the statute, in such situations the burden of disproving negligence or proving there was no negligence will be on the defendant authority. In misfeasance situations, however, the ordinary rules of negligence will apply and the burden of proof will be on the plaintiff.

It is further suggested that the fundamental difficulty thus arising is that it is still necessary for a Court to distinguish between non-feasance situations and misfeasance situations. Furthermore, it would seem that the authority was placed in a worse position where non-feasance is pleaded than it is when misfeasance is pleaded. This distinction may be of little importance if all claims are for "failure to maintain" or alternatively "failure to maintain properly or at all".

The fact that the highway authority may have acted reasonably in delegating the work to a competent contractor will not provide a defence. They are under a personal non-delegable duty, and will only avoid liability if it can be shown that the contractors were not negligent and also where necessary that the authority was not negligent in the plans and specifications it provided or the instructions which it gave to the contractor. This, however, would probably not apply in misfeasance situations.

From the above it is to be regretted that the legislation was not introduced in such a way as to abolish clearly the necessity for the distinction between misfeasance and non-feasance. Furthermore, it is suggested that the English legislation is unsatisfactory as it implies the existence of a civil obligation and its basis by removing a supposed immunity instead of positively stating an obligation. As the basis of the obligation is not clear and has not been made clear by the English Act it has been suggested by some commentators that this basis be stated positively in any reforming legislation.

Apart from the above criticisms of the English legislation, there is the more fundamental one that it has not gone far enough in that it has only legislated for highway authorities. But perhaps the English legislators felt that it was only in this area that the non-feasance doctrine had survived and hence they need only legislate in this area. Whether this is true or not is doubtful in England but *Brabant's case* was an appeal from Queensland and therefore binding on Australian Courts, and it is unfortunate that the English Act did not attempt to legislate more fully in this somewhat confused area of the law.

It is interesting to note that some statistics following the English legislation. In the three years after August 1964, there was a large volume of claims against highway authorities for non-feasance. Nationally the number of claims ran into thousands and of this number

some local authorities reported that 95 per cent of claims were made by pedestrians as distinct from vehicular traffic. Many arose from pavement defects and many were for small or trivial amounts (one claim was for 4s. 3d. for mud-spattered stockings) and the tendency was to pay these. However, the statistics of one local authority revealed that their insurers successfully contested liability in a great majority of cases. Even so the insurance premiums in some cases were rising alarmingly. However more recent statistics are not available to us and the number of reported cases does not suggest any great increase in this type of litigation in more recent years so that it might be prudent to seek more recent information than the Committee has been able to obtain.

2. *Canadian Reforms*

In Canada several provinces have adopted statutory codes which expressly made road authorities liable to actions for damages for failure to repair, but the liability is restricted in ways which vary from province to province.

In Manitoba, for example, the code requires that damaged vehicles must be produced to the clerk of the road authority within 48 hours, or left at the scene for inspection, as a condition of action. In Quebec, no general immunity for non-feasance has been deduced from fault liability, but the responsibility of municipal authorities is tempered in accordance with their wealth and manpower.

Most of the Canadian Acts dealing with this subject have avoided the historical approach of England and instead have adopted positive language referring to present situations.

Such an Act is the Municipal Act of Ontario (Revised Statutes 1960), a copy of which is unavailable. Section 443 subsection (1) of that Act states:—

> "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."

Other subsections require prompt notice of action and establish a three months' time limit on claims, exempt authorities from any liability in respect of walls, fences, guard-rails, railings and barriers, and in respect of any portion of the highway which is not "travelled", and specify that the plaintiff's loss or damage shall be particular to him and not such as all users of the highway suffer in common.

This legislation was considered by the Ontario Court of Appeal in *Dubois etc. al* v. *City of Sault Ste. Marie* (1970) 15 D.L.R. (3d.) 563 where at page 567 Evans J.A. said that—

> "Section 443 of the Municipal Act 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."

The Ontario legislation has, however, been criticized by commentators on its literal terms. It seems to impose strict liability on the corporation. However, it has in fact been interpreted as requiring only reasonable care (*Patterson* v. *County of Halton* 1955 1 D.L.R. 295 and *McCarroll* v. *Powell* 1955 4 D.L.R. 631).

Professor Sawer suggests that a better precedent on this aspect is to be found in Alberta's City Act 1955 Section 293, a copy of which is also unavailable to us.

It has also been suggested that the English list of exempting factors should be included as there is good sense in requiring the defendant authorities to establish such matters, since knowledge of the steps taken and those open to them is peculiarly theirs. It has also been suggested any provisions made should supersede all other possible bases of liability and extend to all possible causes of harm.

Another Act which adopts positive language is the *Rural Municipality Act* (1960) C.50 of Saskatchewan. This Act was the subject of litigation in the case of *Bozak* v. *Rural Municipality of Eagle Creek* (1965) 53 D.L.R. (2d.) 170. In this case the plaintiff's son was killed when the car in which he was riding as a passenger turned over when it struck a ridge of dirt which had been thrown up by the defendant's road grader and which, unmarked and unlighted, extended into the traffic lane. The Saskatchewan Court of Appeal found the defendants liable in damages under Section 235 of their 1960 Act for failure to keep the road in a reasonable state of repair.

The jury found that the road in question was not in a reasonable state of repair at the time of the accident, having regard to the locality of the road and the locality through which it passed and its condition contributed to the upsetting of the vehicle. The state of non-repair was caused by negligence of the municipality in leaving a gravel ridge protruding into the south lane of traffic causing a hazard and in not leaving any flares or lights at the west end of this gravel ridge to warn oncoming traffic.

The Court further held that the defendants could not avail itself of the provisions of Section 235 (2) of the Act which states that "Default under subsection (1) shall not be imputed to a municipality in any action without proof by the plaintiff that the municipality knew or should have known of the disrepair of the road or other thing mentioned in subsection (1)" as it said that that subsection applied only where the disrepair is caused by other than the servant or agent of the municipality. These findings were upheld by the Supreme Court of Canada (1967) 62 D.L.R. (2d.) 64.

It must be noted, however, that not all Canadian provinces have legislated to make road authorities liable for failure to repair. In fact by the city charter the City of Vancouver was expressly liable only for acts of misfeasance and not for nuisance or negligence resulting from non-feasance so that it was held by the British Columbia Court of Appeal that the planting of trees by the roadside without any plans made for future lopping was not a negligent act or nuisance. The nuisance arose through the omission of the city to take steps to remove the impediment when it developed and this was non-feasance for which the city was not liable: *Millar & Brown Ltd.* v. *City of Vancouver* (1966) 59 D.L.R. (2d.) 640.

Furthermore, in 1969, the Appeal Division of the Supreme Court of Nova Scotia held that a municipality is not liable, either at common law or under statute, for damage resulting from failure to repair a highway, which is non-feasance, but only for damage resulting from repairing a highway improperly, which is misfeasance. The Court here was prepared to base its decision on purely English concepts as it cited *Pictou's case* with approval; distinguished *McClelland's case* and said that that case must be "confined to its facts"; and based its decision on *Burton's case*: *Cox et al.* v. *Town of Sydney Mines et al.* (1969) 4 D.L.R. (3d.) 241.

It is interesting to note, however, that in some provinces where there is no legislation regarding the doctrine of non-feasance Canadian Courts are acting in the same way that English and Australian Courts are, at least in the realm of sewerage and drainage authorities. An example of this appears in the case of *Beaulieu* v. *Village of Riviere—Verte et. al.* (1970) 13 D.L.R. (3d.) 110 where the New Brunswick Supreme Court (Appeal Division) held that a district with capacity and power to provide and maintain a sewerage system within the district has a duty to take reasonable care in so doing.

3. *American Reforms*

Although certain legislation in America may not be directly concerned with misfeasance and non-feasance it is helpful to consider this legislation which deals with governmental immunity. What appears to be a reasonably typical example is the Oregon Tort Claims Act of 1967 (Oregon Revised Statute sections 30.260-30.300) a copy of which is annexed.

This Act waives governmental immunity to tort liability in some areas, but it retains that immunity in others. It is said that the Act merely rearranges the government's tort responsibility.

Similarly the Washington Revised Code section 4.92.090 (1963) states that: "The State of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation."

Section 30.265 of the Oregon Tort Claims Act sets out the scope of liability of public bodies for torts by providing:

> "(1) Subject to the limitations of O.R.S. 30.260 to 30.300, every public body is liable for its torts and those of its officers, employes and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function."

Subsection (2) sets out a number of exceptions and restores immunity in certain areas by making subsection (1) inapplicable in certain areas.

This legislative approach of making the government generally "liable with exceptions" is what the American commentators refer to as the "open end" approach as opposed to the "closed end" approach preferred by the Californian legislature. Here legislation has been enacted making the government generally "immune with exceptions". It is suggested that the "open end" approach is preferable.

It is important to note that the Oregon legislature has defined "public body" in its Act. In the Act "public body" "means the State and any department, agency, board or commission of the State, any city, country, school district or other political subdivision or municipal or public corporation and any instrumentality thereof". This is perhaps the widest of the definitions in the American Acts on this subject as the Minnesota Act is limited to lower municipalities and does not include the State nor any of its immediate agencies and departments whereas the Washington Act declares that the State is liable but makes no mention of lower municipalities.

The Oregon Act came into effect on the 1st July, 1968 and it made provision for claims arising before that date. Such claims were to be enforced just as though the Act has not been adopted and thus problems of retroactivity were solved.

Briefly, other provisions of the Act limit the monetary liability of a public body or in other words it restores governmetal immunity beyond certain maximum claims. It provides that generally written notice of claims must be given "within 45 days after the alleged loss or injury". It authorizes public bodies to purchase liability insurance and to levy a tax for the premiums. And it allows public bodies to defend and indemnify its elected and appointed agents.

It is said by an American commentator that the Oregon Act is a responsible enactment. However prior to the Act much had already been done by case law to allay the severity of the "sovereign immunity" doctrine which in the United States applies to the States if they care to claim it. Whether the Oregon Act would be a further step by way of inroad would, it was said, depend on judicial construction.

It was said earlier that this legislation may not cover the misfeasance and non-feasance situations that we have been considering although it appears to do so at least in the case of misfeasance. This is seen by Section 30.265 (2) (*e*) which states that subsection (1) of the same section does not apply to "any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused". It has been suggested that this subsection is to be construed narrowly so as not to render subsection (1) ineffective and so is to be interpreted as meaning a legislative or executive policy or planning decision made at high level in the public body and not at the "operational level" of decision-making.

Furthermore, section 30.265 (2) (*f*) makes a public body immune whenever any Oregon Statute outside the O.T.C.A. limits the public body's liability. Accordingly, most cities are immune from liability for damages in excess of $100 caused by defective sidewalks, streets, public grounds, public buildings, etc. The State highway commission can pay no more than $500 for damage claims arising out of highway accidents and counties are immune from liability for damages in excess of $10 000 caused by defective country roads or bridges.

Therefore, although the O.T.C.A. probably does not cover the sort of non-feasance situations that we have been considering and possibly not the misfeasance situations, it is useful to consider it, and note that Oregon at least has legislation providing compensation for damage caused by defective public works and that the Oregon legislature has recognized the need to restrict the sovereign immunity doctrine.

PART D—REFORM IN SOUTH AUSTRALIA

It has been suggested in this report that there is a need for reform in South Australia of the law relating to misfeasance and non-feasance and as this task is beyond the scope of judicial adaptation, legislation is required.

It has also been suggested that the minimum requirement in such reform is to properly define the bounds of State and local government immunity in this area.

There appear to be two basic approaches which may be adopted to achieve this reform. First, new legislation could be adopted to cover all situations where the doctrines of misfeasance and non-feasance might arise. Alternatively, existing legislation could be amended to provide liability in all those situations where it does not now exist; in other words, to amend all Acts giving public bodies powers and duties and providing for their liability in damages in specific circumstances. Because of the uncertainty of the present law in this area it is suggested that the later approach perhaps commends itself more than the former. In general a majority of this Committee favours a solution most nearly approximating to that recommended in the English report on this topic.

Although it is realized that any legislation in this field will be strongly influenced by government policy it is suggested that the following be considered in any such legislation:—

1. That the distinction between misfeasance and non-feasance be abolished so that it becomes unnecessary for a Court to distinguish between the two situations. It has been seen from the English Act that legislation affecting non-feasance alone gives rise to certain problems which could be avoided by abolishing the distinction.

2. As a corollary to this, that 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. Except in the case of highway authorities we recommend that there should continue to be available the separate defence, based on such cases as *East Suffolk Rivers Catchment Board* v. *Kent* 1941 A.C. 74, that where a statutory body finds it has not sufficient money or manpower or both to do all the work that needs to be done in a given situation, it is not liable if it has exercised its discretion to expend money and use manpower honestly and *bona fide*. Nor should it affect the position where the local government body has a statutory discretion whether it will exercise a given power at all: see *Cairns—Law of Tort in Local Government* Second Edition page 61 and following pages.

3. That the positive language of the Municipal Act of Ontario and of the New Zealand Report be preferred to the historical approach of the English Act. The Ontario Act states positively the existence of a civil obligation on a public authority for the breach of which it will be liable in damages. Nothing in the amending legislation should take away any remedy now given by law.

4. That 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 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.

5. Having established a *prima facie* case, that the evidential onus moves 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 the English Act section 1 (3); in other words, that a public body will be responsible for all *unreasonable* defaults in the exercise of its powers and duties thus encouraging road users to look after themselves as much as possible and hopefully avoiding the multitude of claims being made under the English Act.

6. It could perhaps be generally enacted that where a Statute imposes specific duties on public authorities, that authority will be liable for unreasonable default in the exercise of such duties or in its failure to exercise them.

7. For the reasons spelt out in paragraphs 13 and 14 of the New Zealand report we recommend that all notice of action provisions relating to this type of claim be repealed. They are only a trap for the unwary.

8. As a matter of Government policy it should be considered whether power be given to public bodies to procure insurance against claims under the projected legislation and that they may include in the general rate the premium costs of such insurance. On this matter the Committee expresses no opinion.

It has been suggested above that in order to reform the law relating to misfeasance and non-feasance it may be desirable to amend all legislation giving public bodies powers and duties by providing for their liability for any damage caused by their negligent failure to perform or negligent performance of such powers and duties. Taken with the considerations enumerated above it is suggested that this is the most desirable approach for two primary reasons. Firstly, it would enable the legislature to legislate for each specific situation where powers and duties are involved and thus avoid what will be in many cases the unfortunate position of having legislation covering a wide area of situations in which widely varying considerations may apply. Thus the legislature will be able to use precise words for each statutory power and duty. And secondly this approach will make it possible for the legislature to consider each power and duty separately and enact the necessary reforming legislation in stages, possibly commencing with the liability or otherwise of highway authorities.

Adopting this course of reform would, of course, mean that the doctrines of misfeasance and non-feasance would necessarily survive until reforming legislation had been enacted in all the applicable areas, and this must be weighed against the clamant existing need for relief

for injured persons who are denied relief by the historical idiosyncrasies of the present law. If legislation in relation to highway claims were enacted speedily it would provide relief in the large majority of cases.

Having regard to the complexity of this topic, we recommend that the Act come into force on a date to be fixed by proclamation.

PART E—THE FOLLOWING HAVE BEEN USED IN PREPARING THIS REPORT

1. Collins & Meaden on Local Government Law 2nd Edn.
2. An article by Geoffrey Sawer "Nonfeasance under Fire" 2 N.Z.U.L.R. 115.
3. An article by Geoffrey Sawer "Nonfeasance Revisited (1955) 18 M.L.R. 541.
4. An article by G. Dworkin "Highways (Miscellaneous Provision) Act 1961" (1962) 25 M.L.R. 336.
5. An article by G. Dworkin "Nonsense and Non-feasance—Reaction and Reform" (1960) 23 M.L.R. 574.
6. An article by Ronald B. Lansing "King can do no wrong. The Oregon Tort Claims Act" (1968) 47 Ore. L.R. 357.
7. An article by L. G. Sweeney "Highway Authorities & Non-feasance" (1967) 117 New L.J. 879.
8. An article by Lawrence Griffiths "Liability for non repair of highways" (1959) 123 Justices of the Peace 88.
9. Principles of Local Government by Cross.
10. An article by Sir William Harrison Moore "Misfeasance and Non-feasance in the liability of Public Authorities" (1914) 30 L.Q.R. 276, 415.
11. An article "Highway authorities and non-feasance" (1959) 227 L.T. 256, 284.
12. An article "Liability of municipality for dangerous conditions" (1958) 75 S.A.L.J. 259.
13. An article "Local authorities and highways. What is misfeasance" (1960) 230 L.T. 4.
14. An article "Misfeasance" (1960) 104 Sol. Jo. 480.
15. An article "Nonfeasance and Misfeasance" (1960) 76 L.Q. Rev. 342.
16. An article "Liability for injuries sustained on the Highway" (1956) 221 L.T. 46, 68.
17. An article "Highways and Non-feasance" (1964) 235 L.T. 691.
18. An article by G. N. Benson "Non-feasance relating to Highways" (1969) 113 Sol. Jo. 615.

We express our indebtedness to those who compiled the English and New Zealand Law Reform Reports on this subject. As will be seen from a perusal of this report, we have not always agreed with their conclusions, but the discussions of the problems in these reports have assisted us greatly in our consideration of the topic.

We have the honour to be

HOWARD ZELLING

B. R. COX

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Law Reform Committee of South Australia.

Mr. J. F. Keeler took an active part in the preparation of this report but was absent in England at the time of signature.

8th May, 1974.

CHAPTER 63
ARRANGEMENT OF SECTIONS

Section

An Act to make certain amendments to the law relating to highways, streets and bridges in England and Wales

[3rd August, 1961]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

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

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

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

(*a*) the character of the highway, and the traffic which was reasonably to be expected to use it;

(*b*) the standard of maintenance appropriate for a highway of that character and used by such traffic;

(c) the state of repair in which a reasonable person would have expected to find the highway;

(*d*) whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway;

(*e*) where the highway authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, what warning notices of its condition had been displayed;

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

(4) In the application of this section to highways in London repairable by the inhabitants at large, references to the highway authority are references to the council responsible for the maintenance of the highway; and for the avoidance of doubt it is hereby declared that, by virtue of subsection (1) of section sixteen of this Act, any reference to a highway in this section includes a reference to a bridge.

(5) This section shall bind the Crown.

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

(*a*) in section forty of the Crown Proceedings Act, 1947, paragraph (*e*) of subsection (2);

(*b*) in subsection (1) of section eighty-nine of the principal Act, the words from "and they" onwards;

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

and the provisions of any enactment other than a public general enactment shall cease to have effect so far as they exempt a highway

authority from liability for non-repair of a highway maintainable by the authority.

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

(*a*) before the completion of the reinstatement or making good of the relevant part of the street in pursuance of the obligation imposed on the undertakers by subsection (2) of section seven of the Public Utilities Street Works Act, 1950; or

(*b*) where the relevant part of the street is the subject of an election under the Third Schedule to that Act (which, with minor exceptions, limits the obligation of undertakers to the execution of interim restoration), during the period mentioned in sub-paragraph (*a*) of paragraph 3 of that Schedule;

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

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

APPENDIX

OREGON TORT CLAIMS ACT
TORT ACTIONS AGAINST PUBLIC BODIES

30.260 *Definitions for* 30.260 *to* 30.300. As used in ORS 30.260 to 30.300, unless the context requires otherwise:

(1) "Governing body" means the group or officer in which the controlling authority of any public body is vested.

(2) "Public body" means the state and any department, agency, board or commission of the state, any city, county, school district or other political subdivision or municipal or public corporation and any instrumentality thereof.

[1967 c.627 §1]

Note: ORS 30.260 to 30.300 take effect July 1, 1968.

30.265 *Scope of Liability of public body for torts.* (1) Subject to the limitations of ORS 30.260 to 30.300, every public body is liable for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function.

(2) Subsection (1) of this section does not apply to:

(*a*) Any claim for injury to or death of any person or injury to property resulting from an act or omission of an officer, employe or agent of a public body when such officer, employe or agent is immune from liability.

(*b*) Any claim for injury to or death of any person covered by the Workmen's Compensation Law.

(*c*) Any claim in connection with the assessment and collection of taxes.

(*d*) Any claim based upon an act or omission of an officer, employe or agent, exercising due care, in the execution of a valid or invalid statute, charter, ordinance, resolution or regulation.

(*e*) Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.

(*f*) Any claim against a public body as to which the public body is immune from liability or its liability is limited by the provisions of any other statute.

(3) As to any claim enumerated in subsection (2) of this section, a public body shall be liable only in accordance with any other applicable statute.

(4) ORS 30.260 to 30.300 do not apply to any claim against any public body arising before July 1, 1968. Any such claim may be presented and enforced to the same extent and subject to the same procedure and restrictions as if ORS 30.260 to 30.300 had not been adopted.

[1967 c.627 §§2, 3, 10]

30.27 *Amount of Liability.* (1) Liability of any public body on any claim within the scope of ORS 30.260 to 30.300 shall not exceed:

(*a*) $25,000 when the claim is one for damage to or destruction of property and $50,000 to any claimant in any other case.

(*b*) $300,000 for any number of claims arising out of a single occurrence.

(2) No award for damages on any such claim shall include punitive damages. The limitatiion imposed by this section on individual claimants includes damages claimed for loss of services or loss of support arising out of the same tort.

(3) Where the amount awarded to or settled upon multiple claimants exceeds $300,000, any party may apply to any circuit court to apportion to each claimant his proper share of the total amount limited by subsection (1) of this section. The share apportioned each claimant shall be in the proportion that the ratio of the award or settlement made to him bears to the aggregate awards and settlement for all claims arising out of the occurrence.

[1967 c.627 §4]

30.275 *Content of Notice of Claim; who may present claim; time of notice; time of action.* (1) Every person who claims damages from a public body for or on account of any loss or injury within the scope of ORS 30.260 to 30.300 shall cause to be presented to the governing body of the public body within 45 days after the alleged loss or injury a

written notice stating the time, place and circumstances thereof, and the amount of compensation or other relief demanded. Failure to state the amount of compensation or other relief demanded does not invalidate the notice; but, in such case, the claimant shall furnish full information regarding the nature and extent of the injuries and damages within 30 days after written demand by the public body.

(2) When the claim is for death, the notice may be presented by the personal representative, surviving spouse or next of kin, or by the consular officer of the foreign country of which the deceased was a citizen, within one year after the alleged injury or loss resulting in such death. However, if the person for whose death the claim is made has presented a notice that would have been sufficient had he lived, an action for wrongful death may be brought without any additional notice.

(3) No action shall be maintained unless such notice has been given and unless the action is commenced within one year after such notice. The time for giving such notice does not include the time, not exceeding 90 days, during which the person injured is incapacitated by the injury from giving the notice.

[1967 c.627 §5]

30.280 *Insurance against liability; effect of insurance; payment of premiums.* (1) The governing body of any public body may procure insurance against liability of the public body and its officers, employes and agents.

(2) Such insurance may include coverage for the claims specified in subsection (2) of ORS 30.265. The procurement of such insurance shall not be deemed a waiver of immunity.

(3) If the public body has authority to levy taxes, it may include in its levy an amount to pay the premium costs for such insurance.

[1967 c.627 §6]

30.285 *Public body may indemnify public officers.* (1) The governing body of any public body may defend, save harmless and indemnify any of its officers, employes and agents, whether elective or appointive, against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring in the performance of duty.

(2) The provisions of subsection (1) of this section do not apply in case of malfeasance in office or wilful or wanton neglect of duty.

(3) This section does not repeal or modify ORS 243.510 or 243.620.
[1967 c.627 §7]

30.290 *Settlement of claims; approval of court if settlement more than* $2,500. The governing body of any public body may, subject to the provisions of any contract of liability insurance existing, compromise, adjust and settle tort claims against the public body for damages under ORS 30.260 to 30.300 and may, subject to procedural requirements imposed by law or charter, appropriate money for the payment of amounts agreed upon. When the amount of settlement exceeds $2,500, the settlement shall not be effective until approved by the circuit court, unless such settlement is not to be paid from public funds.

[1967 c.627 §8]

30.295 *Payment of judgment or settlement; remedies for nonpayment; tax levy for payment.* When a judgment is entered against or a settlement is made by a public body for a claim within the scope of ORS 30.260 to 30.300, payment shall be made and the same remedies shall apply in case of nonpayment as in the case of other judgments or settlements against the public body. If the public body has the authority to levy taxes and the judgment or settlement is unpaid at the time of the annual tax levy, the governing body shall, if it finds that other funds are not available for payment of the judgment, levy a tax sufficient to pay the judgment or settlement and interest accruing thereon to the expected time of payment, subject to any levy for debt service and within any limits imposed by law.

[1967 c.627 §9]

30.300 *ORS* 30.260 *to* 30.300 *exclusive.* ORS 30.260 to 30.300 is exclusive and supersedes all home rule charter provisions and conflicting laws and ordinances on the same subject.
[1967 c.627 §11]