SOUTH AUSTRALIA

FIFTY-FIRST REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE REVIEW AND REAPPRAISAL OF THE TWENTY-FIFTH REPORT OF THIS COMMITTEE ON THE SUBJECT OF MISFEASANCE AND NON-FEASANCE

1986

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

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

THE HONOURABLE MR. JUSTICE WHITE, *Deputy Chairman.*

THE HONOURABLE MR. JUSTICE LEGOE, *Deputy Chairman.*

M. F. GRAY, Q.C., S.-G.

P. R. MORGAN.

D. F. WICKS.

A. L. C. LIGERTWOOD.

G. F. HISKEY, S.M.

The Secretary of the Committee is Mrs H. Lockwood, c/o Supreme Court, Victoria Square, Adelaide 5000.

FIFTY-FIRST REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE REVIEW AND REAPPRAISAL OF THE TWENTY-FIFTH REPORT OF THIS COMMITTEE ON THE SUBJECT OF MISFEASANCE AND NON-FEASANCE

To:

The Honourable C. J. Sumner, M.L.C.,
Attorney-General for South Australia.

Sir,

In 1974 this Committee reported to one of your predecessors in our Twenty-Fifth Report on Misfeasance and Non-feasance. You have asked us to reappraise that report having regard to subsequent developments in this and other jurisdictions and also to reconsider the terms of any legislation considered desirable.

In our Twenty-Fifth Report we made the following recommendations:—

(1) That the distinction between misfeasance and non-feasance be abolished, so that it becomes unnecessary in law for a Court to distinguish between the two situations.

(2) That accordingly the test of liability in all actions against public authorities should be whether the authority has failed to maintain properly, or in some cases at all, the public works under their control. Except in the case of highway authorities 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 man-power 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 man-power honestly and bona fide. Nor should it affect the position where the local government body has been given a statutory discretion whether it will exercise a given power at all.

(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. To which we added that 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) When the plaintiff has made out a prima facie case, the evidential onus should then move to the authority. That will put in issue the reasonableness of the authority's action of or lack of it, having regard to all the circumstances of the particular case. One example is: 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.

(6) That it be generally enacted that where a statute imposes specific duties on a public authority or authorities generally, that authority or those authorities will be liable for unreasonable default in the exercise of those duties or for failure to exercise them at all.

(7) That all notice of claim before action provisions relating to this type of claim be repealed.

(8) That as a matter of Government policy consideration should be given to the question of public bodies procuring insurance against claims under the projected legislation and including in the general rate the premium costs of such insurance. On this matter the Committee expressed no opinion.

At that time we recommended that the most desirable approach to reform would be to amend all legislation giving powers and imposing duties on public bodies by providing for their liability for any damage caused by their negligent failure to perform or negligent performance of such powers and duties. We said that if legislation in relation to highway claims be enacted speedily, it would provide relief in the large majority of cases.

In conclusion we recommended that having regard to the complexity of the topic, that the Act comes into force on a date to be fixed by proclamation.

Recent Australian Case Law

The issue of non-feasance does not appear to be raised frequently. There are few reported Australian cases on the topic. Probably this is due to claimants being advised of the availability of such a defence to local authorities. The distinction between misfeasance and non-feasance goes back to *Russell v. The Men of Devon (1788) 2 T.R. 667 100 E.R. 359* so it is exactly coeval with the founding of this country. There is a short and lucid explanation of the difference between misfeasance and non-feasance in an article in *(1960) 230 L.T.Jo.4.* We will at this stage examine briefly the cases which have arisen in order to ascertain the current attitude of the courts.

In Australia it would appear from the case of *Lynch v. Mudgee Shire Council and Another (1981) 46 L.G.R.A. 203* that the non-feasance doctrine is still being applied by the courts. In that case Rath J. of the Equity Division of the New South Wales Supreme Court held that the fact that the road in question was vested in the council did not give rise to any duty on its part to maintain the road, and cited in support the decisions of The High Court in *Buckle v. Bayswater Road Board (1936) 57 C.L.R. 259* and *Gorringe v. Transport Commission (Tasmania) (1950) 80 C.L.R. 357.*

It should also be noted that the traditional exceptions to the rule are still being used, namely, the source of authority test, the artificial structure test and the outside the power test.

The source of authority test is the most frequently used means of avoiding the non-feasance exemption. Under this device the plaintiff may be able to establish liability if he can show that the relevant authority was acting in a capacity other than as a highway authority. For example, in *Buckle v. Bayswater Road Board* (supra) the authority was held to be acting as a drainage authority.

That the source of authority test is still being utilised is evidenced by the case of *Hayes v. Brisbane City Council (1980) 5 Q.L. 269.* In that case the plaintiff sustained injuries alighting from a council bus at a bus stop because the surrounds had not properly been maintained. Judge

McGuire after examining the history of the general immunity of highway authorities for non-feasance said at page 278:—

> "However, the law of Australia as to the liability of a highway authority for acts of non-feasance being what it is, it follows inevitably that the plaintiff cannot succeed against the Council if the Council were to be held responsible solely in its capacity of a highway authority. But for present purposes the Council is also a transport authority."

and then at page 287

> "I find that the Council through their Transport Department have failed in their duty of care owed to bus passengers in not having detected the depressions and covered them through the implementation of a proper periodic inspectorial system. In other words I find there has been a want of proper maintenance of the bus stop . . .
> . . . On the principle enunciated in the authorities above cited I find that the Council through its Transport Department, which is primarily responsible for city passenger transportation and matters ancillary thereto, was acting in a dual or double capacity, namely as a highway authority and also as a transport authority, that is, that the Council fulfilled more than one purpose. On the strength of those authorities which I have canvassed at length in the course of this judgment, I am of the opinion that the Council can be made liable for misfeasance when acting in the capacity of a transport authority." (i.e. some non-feasance when attributable to an authority other than a highway authority is actionable as a misfeasance).

Likewise the "artificial structure" test still appears to be used to avoid the non-feasance rule. The origin of this device is the decision of the Privy Council in *Borough of Bathurst v. Macpherson (1879) 4 App.Cas. 256,* (an appeal from the Supreme Court of New South Wales). In that case their Lordships when considering liability for a defective drain which the borough had constructed in the road, said at page 265:—

> "The duty was cast upon them of keeping the artificial work they had created in such a state as to prevent it causing a danger to passengers on the highway which but for the artificial construction would not have existed."

The artificial structure distinction was applied in *Buckle v. Baywater Road Board (1936) 57 C.L.R. 259 at 283-284.*
Sawer in an article entitled *Non-feasance Under Fire (1966) 2 N.Z.U.L.R. 115 at page 126* stated that he doubted that the artificial structure escape device was available following *Gorringe v. The Transport Commission (Tasmania) (1950) 80 C.L.R. 357,* where Latham C. J. and Dixon J. continued to ignore the artificial structure concept.

However, this particular test was recently applied by the High Court in *Webb v. The State of South Australia (1982) 56 A. L. J. R. 912.* In that case a pedestrian was injured when he jammed his foot in an open gap between a permanent kerb on the edge of the footpath and a temporary false kerb constructed by the highway authority in an arc around a stobie pole (for non-Australian readers a pole constructed of concrete between two steel clamps, used for carrying high wire electric voltage wires).

Mason, Brennan and Deane J. J. in their joint majority judgment said at page 913:—

> "One other factor should be mentioned. The respondent created the danger by its artificial construction in the highway. In this situation the application of a reasonable standard of care calls for

the elimination of risk of injury to users of the highway presented by that artificial construction the more so where elimination of the risk can be achieved without undue difficulty and expense. It is well established that it is the duty of highway authorities to keep '. . . the artificial work which they (have) 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 . . .' *Borough of Bathurst v. Macpherson (1879) 4 App. Cas. 256 at 265, Thompson v. Mayor and C. Brighton (1894) 1 Q. B. 332 at p 339;* see also *Buckle v. Bayswater Road Board (1936) 57 C.L.R. 259 at pp 283-284).* It would not be right or reasonable for a highway authority to ignore the risk of injury which it has created by its artificial construction in the highway, if it entails a possible risk of injury to pedestrians which, though small, is not fanciful or farfetched.

It is for these reasons that we are of the opinion that the respondent was negligent and that the appeal should be allowed."

The third escape route for plaintiffs is where it can be shown that the authority has travelled outside the bounds of the power; that is, that the negligence or nuisance sued on was not a necessary or inevitable consequence of the exercise of the power. See the judgment of our Full Court in *Dubois v. District Council of Noarlunga (1959 S. A. S. R. 127)* and the New Zealand cases collected in an article: *Local Authorites and Negligence 1976 N.Z.L.J. 541 at 543.*

One recent South Australian case which is of interest for our purposes is *Altschwager v. The District Council of Millicent* a judgment of Cox J. (1982) *Judgment No. 6444.*

In that case the plaintiff had been driving a tractor and wide rake along a courtry road when the end of the rake struck a very large rock hidden in long grass near the carriageway.

Cox J. in holding that the accident was caused by the negligence of the District Council, said that it was to be expected that the road would be used on occasions for the movement of farm machinery, including the kind of combination of tractor and rake that was used in the instant case; and that it was foreseeable that there would be some encroachment upon the grass verge either when large tractors or trucks passed or when as here this was a wide piece of farming machinery. His Honour added that as there were potholes near the place where the accident happened, it was predictable that some drivers would prefer to go around rather than over them.

Cox J. held finally that while there was no need to decide whether the District Council was under an obligation to keep any part of the verge clear of obstructions that might be deposited on it by others, it was enough to say that on the facts as found the Council should not itself, by its servants or agents have placed such large rocks so close to the carriageway that when hidden by long grass, they become a hazard to traffic. The Judge found it unnecessary to consider the plaintiff's alternative claim in nuisance.

The Millicent Council appealed against the judgment in favour of the plaintiff but the appeal was dismissed by the Full Court, see *(1983) 105 L. S. J. S. 336.*

Thus the Courts are willing to grant relief against highway authorities if the facts and an applicable escape device allow. Unfortunately the non-feasance rule may still prevent recovery if it is not possible to hold on the facts that it was a case of misfeasance rather than non-feasance or to utilise the artificial structures device as in *Webb's case;* the source of

authority test as in *Hayes v. Brisbane City Council;* or the breadth of the power test as in *Dubois' case.*

The Committee is of the view that nothing has occurred over the last decade, since we last reported to you on the topic to render reform in respect of the liability of highway authorities unnecessary. We will discuss later in this report whether there is any sufficient reason to alter the recommendations as to the *Recent Recommendations for Reform in other Jurisdictions New Zealand.* Shortly before this Committee reported in our 25th Report, the *Torts and General Law Reform Committee of New Zealand* issued in 1973 a Report relating to the *Exemption of Highway Authorities From Liability for Non-feasance.*

In that Report the Committee recommended the enactment of legislation which would establish statutory liability based on a duty to take such care as in all the circumstances of the case is reasonable to ensure that the particular street, road or highway is reasonably safe for persons using it. Those persons must themselves exercise such degree of care for their own safety as is reasonable and usual in the circumstances. The New Zealand Committee recommended that the onus of proof remain on the plaintiff to show that the authority had failed to exercise reasonable care to maintain or repair the highway in question, and in turn the law relating to contributory negligence would apply to the plaintiff. In this respect they differed from the pattern of the 1961 English legislation referred to at p.13 of our previous report.

The New Zealand Committee also recommended that there be no requirement in relation to notice of claim or notice of action in connection with claims under the new statute and that the legislation should bind the Crown.

Further the Committee recommended that a wide definition of "highway" should be included in the legislation to cover structures such as bridges, culverts, drains, kerbs, gutters, street signs and footpaths. This however leaves open the question of whether the legislation should only apply to public roads or whether it should also apply to private roads.

British Columbia

In 1977, the Law Reform Commission of British Columbia issued a report entitled *Tort Liability of Public Bodies.* in that Report the Commission made the following recommendations with respect to highway authorities at pages 24-25.

> 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 an action based on the liability imposed in paragraph 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 to alert users of the road to the relevant danger.

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 highway to which the action related unless it was 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.

The British Columbia Commission had originally proposed in a working paper that a mandatory duty to repair be placed directly on highway authorities, and that such authorities should be liable for any damage sustained by reason of a breach of that duty. However, the Commission concluded that the desired reform could be sufficiently achieved by imposing a liability on highway authorities for damage sustained for non-repair of the highway.

The Commission said of this approach at page 25 of its Report:—

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

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

The Commission recommended that there should be no notice of claim or notice of action requirement in the new legislation. It felt that the potential injustice which could be created by a notice provision, and the undesirability of certain institutions receiving preferred treatment under the law of limitations, out-weighed the benefits which the community might receive from the existence of the notice requirements.

Western Australia

In 1981 the Western Australian Law Reform, Commission issued a Report on the *Liability of Highway Authorities for Non-Feasance.*

The Western Australian Commission in that report examined four ways of imposing a duty of care upon highway authorities:—

1. to impose upon highway authorities a duty to exercise reasonable care to keep their highways in good repair. This is the duty recommended in the English and Ontario reports.

2. to impose upon highway authorities a duty to exercise reasonable care to ensure that their highways are reasonably safe for persons using them. This follows the New Zealand recommendation.

3. to impose upon highway authorities an obligation to compensate persons who suffer injury or damage as a result of the dangerous condition of their highways but to provide that it shall be a defence for an authority to show that it had taken reasonable care to prevent, remove or guard against the danger. This is the solution proposed in the British Columbia report.

4. to impose a duty of care upon the highway authorities to take such care as is reasonable in all the circumstances to safeguard persons using their highways against dangers which make them unsafe for normal use.

This last option was the one finally recommended by the Commission.

The Commission rejected the first alternative (which was substantially the same as the law in England and Wales, Alberta, Ontario and Saskatchewan) on the basis that it would be unduly burdensome on highway authorities.

The second alternative was that recommended by the New Zealand Committee. While of the opinion that the adoption of that alternative would most probably have the same effect as the adoption of the fourth, the Western Australian Commission pointed out that it could be argued that imposing a duty upon highway authorities to ensure that their highways are reasonably safe would have the same effect as imposing upon them a duty to maintain and keep their highways in repair, in which case this alternative as in the case of the first alternative could be to burdensome on highway authorities.

The third alternative was that recommended by the British Columbia Law Reform Commission in 1977. Although of the view that this alternative was similar to the fourth it too was rejected because it was believed that the fourth alternative would be more consistent with the traditional manner in which civil liability for failing to exercise reasonable care arises in Anglo-Australian law, namely, through the breach of duty to exercise such care as is owed by one party to another. This is of course somewhat circular as the real problem here is what is the extent and content of the duty of care.

The Commission explained the consequence of their adoption of option four, in the following way at pages 74-75 of their Report:—

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

as the method adopted by the authority fulfilled the duty of care it would not be liable for any accidents which nonetheless occurred, attributable to the dangerous condition of the highway.

The second consequence is that because highway authorities would be liable for accidents caused by dangers which make the highway unsafe for normal use only if they had been negligent in relation to those dangers, they would not be liable for accidents attributable to the act or omission of a third party, unless, subsequently, they had been negligent themselves in relation to those dangers. Thus, for example, if a danger was created by a third party, or if a third party removed or rendered ineffective measures taken to safeguard persons against a danger, a highway authority would not be liable for any accident caused thereby unless, after the intervention of that third party, it had negligently failed to remove the danger, or safeguard users of the highway, against the danger."

The Commission recommended that when determining whether a highway authority had exercised reasonable care, a court should be entitled to consider, among other matters the following:—

1. the character of the highway.

2. the character and the amount of traffic which could reasonable be expected to use the highway;

3. the precautionary measures appropriate to safeguard persons using a highway of that character, at the time, and in the location, where the accident occurred;

4. the financial and other resources available to the authority for use in connection with the highways for which it is responsible;

5. the condition or state of repair in which a reasonable person would have expected to find the highway;

6. whether the authority knew, or ought reasonably to have known, that a danger had occurred in the highway;

7. whether, before the accident in question happened, the authority could reasonably have been expected to safeguard users of the highway against the dangers which caused the accident.

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

The Commission also recommended that it be made clear that the existing provisions concerning contributory negligence and contribution between persons both guilty of negligence apply to claims brought against highway authorities for breach of duty of care.

In contrast to the conclusion reached by this Committee in our 25th Report, the Western Australian Commission recommended that existing notice requirements and limitation periods applicable to highway authorities should apply to claims brought against them for breach of the recommended duty of care.

The Commission further recommended that the statute implementing its other recommendations should provide specifically that damages be recoverable for breach of the duty of care imposed on highway authorities, and also that the statute creating the statutory duty proposed, expressly

provide that breach of the duty of care is the only ground upon which the highway authorities can be liable in cases of non-feasance.

Finally the Commission recommended that the Act creating the duty do not come into force until a complete financial year had elapsed after the Act has passed, so as to give highway authorities time to comply with the duty of care.

No legislation has been enacted as a result of the recommendations made by the other Law Reform Agencies which have presented reports on this topic.

At this stage there has been no legislation enacted pursuant to the recommendations made by the law reform agencies of New Zealand, British Columbia or Western Australia.

While it is perhaps still too early in the case of Western Australia to infer that reform is unlikely, the New Zealand and British Columbian Reports were made at a substantially earlier date. Apart from this there is one factor common to New Zealand and British Columbia which makes it less likely that their recommendations will be adopted, namely that no fault compensation has been introduced.

The *New Zealand Accident Compensation Act of 1972* was passed after the New Zealand Committee had completed its deliberations. A postscript was added to their report making reference to that fact. While it was still recommended that such a reform be introduced it was pointed out that in practical terms the only claims to which it would be applicable would be those by non-earners for injuries suffered in accidents not connected with the use of motor vehicles, and claims in respect of property.

The Western Australian Law Reform Commission made reference to the situation in British Columbia saying at page 3

> ". . . it should be noted that the need for reform in British Columbia is not as great as it is in Western Australia because of compulsory no-fault motor vehicle insurance scheme exists in the Province, see generally *Insurance Corporation of British Columbia Act—S.B.C. 1973.* Under this scheme, persons who suffer personal injury as a result of a motor vehicle accident will, in most cases, receive certain benefits whether or not the accident can be attributed to another person's fault. Although these are normally less that the damages recoverable in a negligence action they do go part of the way to satisfying the need for compensation, as far at least as personal injury is concerned. . . . ."

Legislation and Case Law in Other Jurisdictions: Canada

As we noted in our 25th Report some of the Canadian provinces have already adopted statutory codes which expressly make highway authorities liable to actions for damages for failure to repair.

For example *section 427 (1) of the Ontario Municipal Act R.S.O. 1970 c.284* 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 the case of default, the corporation . . . is liable for all damages sustained by any person by reason of such default."

Section 178 of the Alberta Municipal Government Act 1970 c.246 is in less absolute terms than the Ontario provision. It provides:—

> "178 Every public road, street, bridge, highway square, alley or other public place that is subject to the direction, management and control of the council including all crossings, sewers, culverts and

approaches, grades, sidewalks and other works made or done therein or thereon by the municipality or any other person with the permission of the council shall be kept in a reasonable state of repair by the municipality, having regard to:

(a) the character of the road, street, bridge, highway square, alley, public place or work made or done therein or thereon, and

(b) the locality in which it is situated or through which it passes,

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

Section 206 (1) of the Rural Municipalities Act of Saskatchewan-S.S. 1972 c. 101 provides:—

"206 (1) Every council shall keep in a reasonable state of repair all public roads, highways, streets and lanes, and also all public bridges, culverts, dams and reservoirs and the approaches thereto that have been constructed or provided by the municipality or by any person with the permission of the council or that have been constructed or provided by the province, having regard to the character of the road, highway, street, lane, bridge, culvert, dam or reservoir and the locality in which it is situated or through which it passes; and if the council fails to do so the municipality shall, subject to the Contributory Negligence Act, be civilly liable for all damages sustained by any person by reason of the failure."

Subsection (2) of section 206 is also of interest for our purposes. It provides:—

"(2) Default under subsection (1) shall not be imputed to a municipality in any action without proof by the plaintiff that the municipality knew or should have known of the disrepair of the road or other thing mentioned in subsection (1)"

It will be noted that this statute imposes liability in relation to construction work done by the province in that area as well as construction work done by the municipality.

A brief examination of the Canadian Abridgment reveals that the courts expect a reasonably high standard of care from highway authorities.

In *Galbiati v. Regina (City) (1972) 2 W.W.R. 40 (Sask)* the plaintiff was driving his car at midnight along an avenue with which he was unfamiliar. The avenue was poorly lit, and unknown to the plaintiff, it ended with an unmarked T-intersection. On the further side of the intersection was a ridge of dirt three feet high, which lay along the edge of the travelled portion of the intersecting street and beyond this was rough ground, the property of the defendant municipality, used by the public for dumping rubbish. The plaintiff was expecting to be able to drive straight down the avenue for another block to join an intersecting street, the light of which he could see. He first became aware of the pile of dirt when it was too late to stop, and struck it. In an action for damages it was held that the defendant was negligent in failing to mark the T-intersection with a clearly visible sign. However the plaintiff was contributorily negligent to the extent of 50 percent in that he drove too fast and failed to keep an adequate look-out bearing in mind his unfamiliarity with the area.

In *Millette v. Cote (1971) 2 O.R. 155 17 D.L.R. (3d) 247, affirmed 27 D.L.R. (3d) 676 (C.A.)* it was held that where a known condition makes

a small portion of a highway dangerous while the highway is in general good condition, the highway authority's failure to remedy the situation where it ought to have known of the existing danger constitutes negligence.

In some instances highway authorities will be held liable for a failure to repair traffic lights. In *Dusablon v. Saskatoon (1983) 23 Sask, R. 295 (Q.B.)* it was held that the statutory duty to repair and maintain extended to traffic lights, and that the municipality knew that the traffic lights were not functioning properly and that it had failed to take all reasonable steps to keep the lights in repair.

It was stressed that highway authorities are not in the position of an insurer in the more recent case of *Kleysen Transport Ltd. v. Government of Saskatchewan (1983) 5 W.W.R. 432.* In that case the defendant has placed five red flags around "frost boil" in a highway. Vandals had removed three of the flags during the night, and the next morning the plaintiff upon seeing the first flag failed to slow down. In an action for damages sustained when the plaintiff drove into a hole, the plaintiff's action was dismissed.

It was held that the plaintiff was negligent in failing to slow his vehicle appreciably after seeing the first flag, that the defendant had taken reasonable steps to warn others of the condition of the road, and the fact that vandals had removed the flags did not make the defendant liable.

The basis of the decision however was that the plaintiff did not give the necessary notice to satisfy the notice condition as to time in the Saskatchewan statute abolishing the distinction between misfeasance and non-feasance and the plaintiff was therefore remitted to his rights at common law which meant he could only sue in misfeasance and this he had failed to prove.

A restriction upon liability is imposed by *Section 427 (4) of the Ontario Municipal Act* which provides that except in the case of gross negligence, a municipality is not liable for personal injury caused by snow or ice upon a sidewalk. This subsection was the basic cause of the plaintiff being denied recovery in *Schoenherr v. Ottawa (1971) 1 O.R. 497; 15 D.L.R. (3d) 679-affirmed 17 D.L.R. (3d) 376 (C.A.).* Gross negligence is however a concept peculiar to Canadian jurisprudence in road accident cases. With the possible exception of some cases in bailment based ultimately on Roman law, Australian law takes the same view as English law that gross negligence is merely "negligence with the addition of a vituperative epithet"—see per Rolfe B. in *Wilson v. Brett (1843) 11 M. & W. 115 at 116; 152 E.R. 737 at 739.*

We note that a further restriction is imposed on liability by section *427 (3) of the Ontario Municipal Act* which provides:—

> (3) No action shall be brought against a corporation for the recovery of damages caused by the presence or absence or insufficiency of any wall, fence, guard rail, railing or barrier, or caused by or on account of any construction, obstruction, or erection or any situation, arrangement, or disposition of any earth, rock, tree or other material or object adjacent to or in, along or upon any highway or any part thereof not within the travelled portion of such highway."

Although such a restriction appears to have some merits we are not in favour of the adoption of the provision. We point out that its effect would be to restrict the liability of highway authorities as it presently stands. For example the operation of such a provision would apparently deny recovery in the fact situation of *Altschwager v. The District Council of Millicent (supra).*

Case law in England since the introduction of the Highways (Miscellaneous Provisions) Act 1961 (9 & 10 Eliz. II c.63).

Quite early in the statute's history, the question of the exact nature of the duty imposed by the Act resulted in a sharp difference of opinion in the English Court of Appeal. In *Griffiths v. Liverpool Corporation (1967) 1 Q.B. 374* an elderly female plaintiff, whilst walking along the pavement of a busy highway, tripped over a flagstone which had been left unrepaired and hurt herself. The highway authority was unable to establish the statutory defence under Section 1 (2) of the Act since the flagstone was held to have been dangerous and her action succeeded.

Sellers L.J. took the view that the provisions of the Act make negligence the essential and ultimate basis of a claim against the highway authority, as is the case in respect of misfeasance.

However the majority view of the court was that the section provided an absolute duty of which the defence in section 1 (2) if proved, excused non-performance. Salmon L.J., said at page 394:

> ". . . since the flagstone was dangerous, the defendants were liable to the plaintiff—absolutely and irrespective of any negligence on their part."

The possible effect of this finding was lessened to some extent in that case when it was further held that although section 1 (2) provides that it was a defence for non-repair of the highway only if the responsible authority took such care as was reasonably required within that subsection, it is nevertheless a defence within the latter subsection that through no fault of its own the highway authority was unable to take steps needed to keep the highway in repair due to a shortage of skilled labour.

Thus in *Meggs v. Liverpool Corporation (1968) 1 All E.R. 1137; (1968) 1 W.L.R. 689* the Court of Appeal held that although the highway authority was under a duty to keep the highway in repair, a plaintiff in order to make a prima facie case against the authority, had to show that the highway was not reasonably safe. Lord Denning M.R. said at page 1139 (692 of W.L.R.):—

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

This approach was followed by Cumming-Bruce J. in *Littler v. Liverpool Corporation (1968) 2 All E.R. 343*:—

> "Uneven surfaces and differences in level between flagstones of about an inch may cause a pedestrian temporarily off balance, to trip and stumble but such characteristics have to be accepted. A highway is not to be criticised by the standards of a bowling green."

In *Burnside v. Emerson (1968) 3 All E.R. 741* Lord Denning at pages 742-3 points to three aspects involved in the 1961 Act, namely,:—

> "First: the plaintiff must 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 must reasonably be anticipated to persons using the highway . . .
>
> Second: 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 elements . . .

Third: if there is 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 (3) of the Act of 1961."

In that case the trial judge found that the highway authority had instituted a good system of maintenance but that its workmen had negligently failed to carry it out properly. The position of the highway authority was improved on appeal where the Court of Appeal held that the deceased driver of the other vehicle who negligently drive into the water at speed, injuring the plaintiffs, was two-thirds to blame for the accident.

Nevertheless highway authorities have not always been able to escape liability. In *Bramwell v. Shaw (1971) R.T.R. 167* a truck carrying a large container hit a pot hole and the container broke loose and injured the plaintiff. Ackner J. held that having regard to the matters set out in section 1 (3) of the 1961 Act and particularly to the facts that the road was old and likely to break up and that the part in question was carrying heavy traffic from both directions, that an extremely high standard of maintenance was necessary. Ackner J. further held that a more careful inspection three days before the accident would have revealed the hole which could easily have been filled and that the highway authority could not rely on the defence in section 1 (2) of the Act of 1961 as it had not taken such care as was in all the circumstances reasonable.

In *Rider v. Rider (1973) 1 Q.B. 505* the highway authority contended on appeal that the duty only extended to sufficiently careful users but the appeal was dismissed. Sachs L.J. said at page 514:—

"The highway authority must provide not merely for model drivers but for the normal run of drivers to be found on their highways, and that includes those who make the mistakes which experience and common sense teaches are likely to occur. In these days, when the number and speed of vehicles on the roads is continually mounting and the potential results of accidents due to disrepair are increasingly serious, any other rule would become more and more contrary to public interest."

In *Pitman v. Southern Electricity Board (1978) 3 All E.R. 900* workmen had dug a trench for the prupose of laying electricity cable. At the end of the day they covered a hole in the pavement that had been left for a junction box, with a metal plate which stood one-eighth of an inch above the surrounding pavement. The plaintiff tripped over the metal plate when walking at dusk. In that case the Court of Appeal held that the metal plate by altering the condition and level of the pavement had introduced a new and unexpected hazard which constituted a potential danger to users of the pavement. Accordingly the County Court Judge was entitled to find on the evidence that the defendant's had caused the plaintiff's injury by their negligence.

The highway authority was held liable in *Bird v. Pearce (1979) R.T.R. 369.* In that case the plaintiff was a passenger in a car using a priority road and driven by the second defendant when it collided at an intersection with a car driven by the first defendant. The first defendant should have given way and said that he would have done so had he known that his was not a priority road. However the council had resurfaced the road about a month before the accident, obliterating the relevant

road markings, and pending their replacement had failed to warn motorists of the need to slow down or give way.

The first defendant took third party proceedings against the council. The third party was held liable to contribute to the extent of one third of the percentage of damages payable by the first defendant.

Dismissing an appeal, the Court of Appeal held that the highway authority carrying out re-surfacing owed a duty to all road users to take reasonable care to ensure that a system of traffic flow that it had imposed did not deteriorate so as to create a hazard; that where traffic signs were removed during such operations, the authority was under a duty to prevent injury from the potentially dangerous situation resulting from such removal; that by failing to provide temporary warning signs in a minor road at the approach to a major road while road markings were obliterated, the authority was in breach of the duty owed to a road user. The Court found that there was a causal connection between the absence of a warning sign and the accident and accordingly held that the authority was responsible in part for the accident.

Public authorities other than highway authorities

This Committee in our 25th Report discussed the likelihood that the misfeasance doctrine applies to authorities other than highway and drainage authorities. We cited as authority for this proposition the decision of *Brabant & Co. v. King (1895) A.C. 632* an appeal and cross appeal from the Supreme Court of Queensland where the Privy Council was apparently prepared to recognize a wider scope of immunity.

In that case their Lordships said at page 638:—

> "Cooper J., the dissentient judge, thought that judgment ought at once to be entered for the defendant, being of opinion that the government was under no liability to the appellant company upon the principle recognised by this board in *Sanitary Commissioners of Gibraltar v. Orfila 15 App. Cas. 400,* and more recently in *Municipality of Pictou v. Geldert (1893) A.C. 524,* and in *Municipal Council of Sydney v. Bourke (1895) A.C. 433.*
>
> That principle has in many instances been held to afford protection to commissioners or trustees representing public interests from the consequences of mere non-feasance; but it has, in the opinion of their Lordships, no application to a case like the present in which the parties charged with non-feasance are under obligation to any individual member of the public to perform the duty which they have neglected to his prejudice in consideration of their being remunerated by him for its performance."

What is particularly interesting to note is that as far as can be ascertained from the report of the Queensland Full Court decision in *Vol. 6 Q.L.J.R. 119,* the Privy Council may well have been overstating Cooper J.'s contention. Only one of the cases which the Privy Council had cited was in fact cited by Cooper J., and it appears to have been cited in a slightly different context.

Cooper J. said at page 126:—

> "The rule which governs the liability of the defendants in such a case was, I think, clearly expressed in the Mersey Docks case H.L. 93. In the Sanitary Commissioners of Gibraltar v. Orfila 15 App. Cas. at p. 408, Lord Watson, who delivered the judgment of the Privy Council quotes with approval a passage from the judgment in the Mersey Docks case, and at p.411 says:—"In these circumstances the question arises whether it be according to the intention of the two Orders-in-Council that the commissioners shall be responsible."

> The rights and liabilities of the defendants in this case are defined and controlled by statute law and the cases of Reg. v. Williams 9 App. Cas., and Furnell v. Bowman 12 App. Cas. 643 are authorities to show that the principle of liability for negligence established by the Mersey Docks case is applicable to colonial Governments. In applying that principle to this case, the question arises. What did the legislature intend by Part *VII* of the Navigation Act? Did they intend that the Government should be warehousemen of explosives and subject to all the liabilities of ordinary traders, or that they should be merely custodians of the public safety?"

Also it must be pointed out that their Lordships' comments were obiter and were not necessary for the decision of the case.

The Committee has been unable to find any cases in which the dictum in *Brabant's case* has been utilized in this way. Although in 1895 at the time of *Brabant's case,* there was still seen to be a need to protect public authorities from liability which could arise from the provision of services such as roads and drains, attitudes have changed since that time. See for example *Sawer*, who in an article entitled *Non-feasance Revisited (1955) 18 M.L.R. 541* said at page 555:—

> "The conception of non-feasance in administrative law arose partly from logical considerations connected with the analysis of legal liability, partly from consideration of policy, and partly from the way in which legal problems came before the courts at particular historical periods. Between 1875 and 1900 there was a judical tendency to seek for a common conception of non-feasance applicable to all types of public statutory authorities, and going beyond the necessities of a doctrine which merely denied a 'right' of individuals to advantageous public services. But since 1900 the attempt to construct a general doctrine has been abandoned and the tendency has been instead to expand the liability of public authorities. But a specific dogmatic rule has remained giving a special immunity to road authorities, and another of narrower scope giving a special immunity to drainage authorities;"

To introduce the non-feasance rule with respect to other government functions would seem not to sit well with the fact that one method which has been employed to restrict the effects of the basis non-feasance rule relating to highway authorities, has been to distinguish highway functions from other functions which may be exercised by the same municipal body. For example in *Newsome v. Darton Urban District Council (1938) 3 All E.R. 93.* the court attributed the making of a trench in a highway (for the purpose of executing drainage work) to the sanitation responsibilities of the defendant council rather than to its highway function. In *Skilton v. Epsom Urban District Council 1937 1 K.B. 112* the Court of Appeal regarded traffic studs as having been placed in the road by the council qua traffic authority rather than qua highway authority.

Also it has recently been pointed out by the Western Australian Law Reform Commission that public authorities other than highway authorities can be held liable for damage resulting from non-feasance. The Commission in their *Report on the Liability of Highway Authorities for Non-feasance* said at pages 27-29:—

> "It is well established that if in the exercise of its statutory powers a public authority other than a highway authority creates or assumes control over a source of potential danger or damage then it becomes under a duty to take reasonable steps to prevent the danger or damage materialising, or, in the case of a danger, if it does materialise, to take reasonable steps to prevent it causing injury or damage.

The following cases illustrate the scope of this duty and the consequences of failing to fulfil it.

In *Buckle v. Bayswater Road Board (1936) 57 C.L.R. 259* the defendant laid and excercised control over a pipe drain which ran along the side of Garratt Road. This drain was broken by vehicles used by the Commissioner of Main Roads during the construction of the Garratt Road Bridge. The defendant knew that the pipe had been broken but negligently failed to repair it or take other steps to protect members of the public from the danger. In the High Court, Latham C.J. held the defendant liable for injuries suffered by the plaintiff as a result of stepping into a hole created by the broken pipe, on the basis that:

'if a public authority is empowered to construct and maintain drains and, having constructed a drain under that power . . . fails to keep it in proper repair, and that failure amounts to negligence, a person who is injured in consequence of such negligence has a right of action for damages against the public authority.' See page 271.

In *Aiken v. The Municipality of Kingborough (1939) 62 C.L.R. 179* the defendant was vested with the control, management and maintenance of a jetty which was damaged by a vessel during heavy weather. The defendant knew that the jetty had been damaged and that it was in a dangerous condition but did nothing to guard against or warn of the danger. Whilst using the jetty the plaintiff was seriously injured. The High Court held that the defendant was under a duty to take reasonable care to keep the jetty in good repair or to warn or otherwise safeguard users where it had been unable to do so. As it had failed to do either of these things, the defendant was held liable to pay damages to the plaintiff.

In *Frencham v. Melbourne and Metropolitan Board of Works (1911) V.L.R. 363* the defendant constructed a sewer under the highway with a shaft leading to the surface thereof. The opening was covered by an iron grid which formed part of the surface of the highway. The grid fell into disrepair and the plaintiff was injured as a result. It was held that the defendant was under a duty to keep the grid in repair and that it was liable to the plaintiff for its negligent failure to do so.

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

Although pursuant to the *Brabant case* Australian courts may possibly be able to extend the application of the non-feasance immunity, this is unlikely to happen. This conclusion has been reached after an examination of the restrictions upon immunity imposed by more recent cases which in turn evidence the general trend towards holding public authorities, especially if they are not acting as highway authorities, liable for injuries resulting from dangers which they have either created or of which they have assumed control.

Also it appears that in more recent times there has been a move away from determining liability on the basis of the misfeasance/non-feasance dichotomy. Instead the courts have been concerned with the question of whether the acts or omissions were relevant to some duty which the authority owed to members of the public and which in breach of that duty, it failed to carry out. Accordingly it is still important in the view of this Committee, mark out the metes and bounds of such duty.

However, we will look at drainage authorities later in this report as it appears that they may still have a recognised, although limited, immunity with respect to non-feasance.

The effect of Anns v. Merton London Borough Council and the "operational" Distinction.

In the ten years which have passed since first reporting on this topic there have been developments in the field of governmental liability which are relevant to this topic and which we now examine.

Fleming on Torts (6th Edition 1983) at pages 144-5 explains the new developments thus:—

> "The distinction between misfeasance and non-feasance was also long ago thought to be the clue to the liability of public authorities for harm caused to private individuals in exercising, or failing to exercise, statutory powers. While it had long been accepted that public authorities did not enjoy a blanket immunity for negligence in the performance of statutory powers, a distinction was drawn between positive injury caused by an active exercise of their powers and a mere failure to exercise them at all or adequately in a manner that would have averted injury. An extreme illustration was *East Suffolk Catchment Board v. Kent (1941) A.C. 74*, where the plaintiff's lands had been flooded by a bursting river and the defendants had undertaken to repair the dike, but carried it out so inefficiently that the land remained flooded unnecessarily long. Still they were excused because their statutory *power* did not create a legal *duty* to come to the plaintiff's assistance; they had merely failed to benefit the plaintiff, not made his condition worse, e.g. through additional flooding.
>
> More lately, however, it has come to be realised that the real crux is not any formal distinction between action and inaction but between administrative error on the 'policy' and 'operational' level. It would be highly impolitic to allow legal challenges in negligence actions, of decisions by public bodies typically involving a conscious choice in the allocation of scarce resources, or a deliberate balancing between claims of efficiency and thrift, or a decision how best to implement a discretionary power entrusted by statute. On the other hand, it is not invidious to subject to scrutiny the manner in which the policy thus determined is actually carried out, whether by commission or omission, by making the plaintiff's condition worse or merely failing to improve it."

This distinction between policy and operational powers was used in the recent case of *Anns v. Merton London Borough Council (1978) A.C. 728*; however the term "discretion" was used rather than policy. Lord Wilberforce referred to the distinction between discretion and operational power when he said at page 754:—

> "Most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area or policy. The courts call this 'discretion' meaning that the decision is one for the authority or body to make, and not for the courts. Many statutes also prescribe or at least presuppose that practical execution of policy decisions: a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area. Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many 'operational' powers of duties have in them some element of 'discretion'. It can safely be said that the more 'operational' a power or duty may be, the easier it is to superimpose upon it a common law duty of care."

Anns' case (supra) concerned a building which had subsided because its foundations were too shallow. If the builder had complied with the by-laws, the foundations would have been three feet deep; instead they were only two and a half feet deep. The plaintiffs were not sure whether the inspector had actually exercised his power to inspect or whether he had decided not to inspect, so the claim was pleaded in the alternative, alleging the council's liability either for careless inspection or for failing to inspect: Lord Wilberforce said that on the assumption than an inspection of the foundations was actually made, and on the further assumption that the inspector's failure to detect the breach of by-laws was not attributable to an immune intra vires policy decision of the council, the council would be vicariously liable for the inspector's carelessness.

If on the other hand the council had failed to make any inspection, it could still in certain circumstances be liable. He went on to say at page 755:—

> "Thus, to say that councils are under no duty to inspect, is not a sufficient statement of the position. They are under a duty to give proper consideration to the question whether they should inspect or not. Their immunity from attack, in the event of failure to inspect, in other words, though great is not absolute."

He added at page 758:—

> "It is irrelevant to the existence of this duty of care whether what is created by the statute is a duty or a power; the duty of care may exist in either case. The difference between the two lies in this, that, in the case of a power, liability cannot exist unless the act complained of lies outside the ambit of the power."

We take it that in the last quoted sentence, His Lordship was intending to include cases where bodies are liable to exercise an admitted grant of power according to its terms, as well as cases where the act complained of was on a proper construction of the grant of power, outside the terms of the grant.

By advocating the ultra vires prerequisite combined with the policy/operational dichotomy Lord Wilberforce's speech in *Anns' Case* has produced substantial changes in the law governing claims in negligence against public authorities. Of particular importance from our point of view is the use of the operational/policy dichotomy.

This method of determining the liability of public bodies has been used for some time in the United States. Even in Commonwealth countries it was being recommended by certain writers prior to *Anns'case* that the approach would be more suitable than the non-feasance/misfeasance distinction generally used by the courts. For example *Phegan* in an article entitled *Public Authority Liability in Negligence (1976) 22 McGill L.J. 605* said at page 617:—

> "The need to insulate administrative discretion from the law of negligence has certainly not eluded Commonwealth courts. However, their solution has been far less satisfactory than that adopted by the courts of the United States. Rather than attempt to formulate a basic rule peculiarly appropriate to public responsibility they have resorted to the much abused and often unintelligible distinction between misfeasance and non-feasance."

and then at pages 624-5:—

> "It has already been suggested that a more appropriate solution to the problems associated with the judicial control of administrative action can be found in the planning/operational distinction. To subject these problems to that distinction would not mean that all

cases in which non-feasance has protected the public authority in the past would be decided in the plaintiff's favour. If the experience in the United States can be relied upon as a guide there will continue to be many examples of non-feasance of the planning variety. However, there are indications that some of the best known illustrations of non-feasance providing immunity from liability will be subjected to re-examination. It has been decided for example, that a city authority can be liable for failure to supply water to fight a fire.

It is not suggested that adoption of the planning/operational distinction will free this area of the law from difficulty. Already American courts have produced borderline decisions which are difficult to reconcile. The virtue of the approach lies, not so much in its simplicity of application, but in the fact that it comes closer to a realistic definition of the proper limits on judicial control of administrative action in the context of damage suits than does the more artificial misfeasance/non-feasance distinction."

The policy/operational dichotomy in Anns' case raises its own problems—see a careful discussion by Craig: *Negligence in the exercise of a statutory power (1978) 94 L.Q.R. 429 at 447-452* and in the last paragraph on page 456.

This policy/operational distinction has been accepted in English cases concerning highway authorities for example in *Haydon v. Kent County Council (1978) 1 Q.B. 343* Lord Denning M.R. said at pages 360-361:—

"It was suggested that the highway authority had a general power to make highways safe by putting sand and grit on them: and that they were under a duty to use reasonable care in the exercise of that power. Reliance was placed on *Anns v. Merton London Borough Council (1977) 2 W.L.R. 104.* But that is miles away. That care was concerned with powers, not duties. Here the statute prescribes the duty and the only task of the courts is to define the scope of the statutory duty. In any event, if there was any error in the highway authority, it was an error which lay within the policy area, and not the operational level.

Lord Denning's judgment pinpoints the difficulties inherent in relying on the dichotomy in Anns rather than in setting up a positive duty as recommended in our Twenty-fifth report. Goff L.J. said at page 363:—

". . . It seems to me that the plaintiff cannot succeed because this lies within the discretionary field. It would have to be shown that in deciding to leave the footpaths and concentrate on the roads, the defendants had not properly exercised their discretion."

Likewise the operational and policy distinction adverted to in *Ann's case* appears to have been accepted in Canada. For example in *Barratt v. District of North Vancouver (1980) 114 D.L.R. (3d) 577* the Supreme Court of Canada held that a highway authority having a power and not a duty to inspect and repair its roads was under no duty of care in deciding how often it would inspect a particular road for potholes. That was said to be a policy matter, a question of balancing thrift and efficiency.

In *Malat v. Bjornson (No. 2) (1978) 5.W.W.R. 429* the question arose whether the Department of Highways was in breach of its duty by creating a real risk of harm in having an eighteen inch median strip which to the Department's knowledge would not prevent vaulting and warranted replacement by a thirty inch median strip. It was held by the British Columbia Supreme Court that having taken an operational step in installing an eighteen inch barrier, the department had a duty to take reasonable care for the safety of highway users. The Department of Highways had

the continuing obligation to study, to redesign and to search continually for better and safer highways and to make those already constructed better and safer when and where needed for the law-abiding, reasonable users of the highway.

In actual fact there is an Australian case adopting the American labels distinguishing between the planning and operational levels which preceded *Ann's case.* In *L. v. Commonwealth (1976) 19 A.L.R. 269* the plaintiff was a remand prisoner in Darwin's Fanny Bay Gaol. Whilst there, he had to share a cell with two convicted prisoners, both of whom had known violent propensities and one of whom had been suspected of committing sexual assaults on other prisoners. One night the plaintiff was brutally assaulted and raped by his cell mates. He sued the Commonwealth alleging its vicarious liability for the negligence of the gaoler and warders. Ward J. in giving judgment said that the prison was obsolete, over-crowded and grossly inadequate for the functions it should have fulfilled. In particular, he thought that the failure of the authorities to build a prison large enough to allow both for the segregation of the remand prisoners from the convicted prisoners, and for single cell accommodation, was a major factor contributing to the attack on the plaintiff.

His Honour said however, that it was not possible to find the defendant liable on these grounds alone. He accepted the distinction drawn by text writers between the planning and operational levels of government in determining whether there can be an action for negligence against the Crown, and said that the physical inadequacies in the prison were deficiencies at the planning level. Nevertheless he was able to find for the plaintiff on the basis that to some extent at least his injuries were also attributable to acts or omissions at the operational level.

Ann's case has recently been considered in this State by Prior J. in *Delaney v. F.S. Evans and Sons Pty. Ltd, and the District Council of Stirling. Judgment No. 7683 delivered 6th August 1984.*

In that case a fire which burnt the plaintiff's property started at the Heathfield Dump, during the Ash Wednesday bushfire in 1980. The dump was run by the first defendants on licence by the Council.

Prior J. in holding that the council owed the plaintiff a duty of care with respect to the operations of the first defendant at the dump said at pages 7-10:—

> "In my judgment, the duty denied by Mr. Angel must be found to exist in this case. The House of Lords' decision of *Anns v. Merton London Borough Council* (1978) A.C. 728 does not deny this view, given the Council's existing and exercised statutory powers and its conduct of encouraging the use of the dump by all residents whilst reserving to itself a power of supervision and control. Events up to and including 20 February 1980 disclose a clear neglect of the power to supervise and control.
>
> I consider the application of Lord Wilberforce's approach in *Ann's case* (1978) A.C. 728 at 751-758. As between the plaintiff and the Council there was a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the Council, carelessness on its part with respect to the continued operation of the dump might be likely to cause damage to him so that a prima facie duty of care arose. There was, in my view, no consideration which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed, or the damages to which a breach of it may give rise.
>
> Lord Wilberforce's approach in *Anns' case* has been referred to by both the High Court and the Full Court of the Supreme Court of

Victoria (see, for example, Mason J. in *Wyong Shire Council v. Shirt* (1979) 146 C.L.R. 40 at 44; *Searle v. Perry and Anor.* (1982) V.R. 193 especially at 197 and 227-231). I therefore proceed to consider whether the preliminary questions with respect to duty of care being answered, there is anything special to deny the impositon of a duty of care upon the Council, given its powers and duties are defined in terms of public, not private law. I do not find that the action taken by the Council in permitting the first defendant to operate the rubbish dump was "within the limits of a discretion bona fide exercised." The Council indisputably had a discretion to permit or prohibit the defendant from using the land at Heathfield as a rubbish dump. The exercise of the discretion was not proper but in breach of the duty of care to the plaintiff since the failures I have already particularised are other than a due exercise of the discretionary power here involved.

The duty of care owed by the Council to the plaintiff could be said to arise out of the exercise of the Council's statutory power, but the damage arising plainly went beyond what might be expected to arise from the exercise of the power given that the garden refuse fire alone is to blame for Mr. Delaney's loss. The exercise of the power may have contemplated some nuisance or annoyance to nearby residents but it did not necessarily involve the acquiescence and inactivity of the Council in permitting the continuing presence of a potential fire risk on a site plainly dangerous in days of high fire danger, given the known absence of supervision and water in the immediate area of the garden refuse. On the face of it, there is negligence "independent of the exercise of this statutory power which, if causing the injury, is actionable at the suit of a private individual"; Lord Wilberforce in *Anns' case* (1978) A.C. at 760 and cf. Hodgson J., *Sasin v. The Commonwealth* (1984) 52 A.L.R. 299 at 311-315).

I indicated to counsel that I doubted whether the statutory powers invoked in this case of necessity involved all circumstances under consideration in *Anns' case.*

The Council exercised its statutory power to permit the use of the Company's land as a rubbish dump. It chose to insist on a right to inspect, direct or prohibit the activities at the dump. It inspected the activities through the actions of Mr. Thiem. Those inspections were too accepting of the status quo. In carrying out the inspections, compliance with by-laws was involved as was the possible exercise of powers reserved to the Council when permitting the use of the land as a dump. However, I do not see the Council's powers in this case as the only basis upon which a duty of care arose. The acts of the Council were negligent in the manner of the exercise of those powers and in the failure to exercise reasonable care with respect to the dumping of inflammable material in the exposed garden refuse area during days of extreme fire danger, and after a fire on 5 February 1980. There were acts or omissions outside the limits of the discretion to permit or prohibit the use of the land as a dump. In this sense the harm causing activity was one which, though authorised by legislation in one sense, was not the subject matter of detailed legislative enactment. In this situation the ordinary rules of negligence alone may well apply. The harm causing activity was operational rather than discretionary. If there were some patently significant and detailed elements of discretion involved, I can not identify them. In any event the Council has not shown that the activity was carried out with due care or that the harm suffered was unavoidable (cf.

Seddon: The Negligent Liability of Statutory Bodies: Dutton re-interpreted (1978) 9 F.L. Rev. 326 especially at 346, 347).

On either approach of the special tests identified and relied upon in *Anns' case* or in negligence at common law, I am satisfied that the Council owed a duty of care to the plaintiff. At the end of the case I am also satisfied that it was in breach of it and that the plaintiff is entitled to recover from both the Council and the Company, not only in negligence but also in nuisance."

Delaney's case went on apeal to the Full Court which on 1st May 1985 dismissed the appeal. King C.J. in his judgment at pp. 7-9 formulated five principles in this area of law as follows:—

1. The powers and duties of the Council, being a public body discharging functions under statute, are definable in terms of public law not private law, but there may exist, in appropriate circumstances, alongside the public law duties, a duty in private law towards individuals for breach of which they may sue for damages.

2. A distinction is to be made between those functions of Council which relate to policy and discretion and those which are operational in nature.

3. The reasonableness of the Council's decisions and actions in the area of policy or discretion is not examinable in the courts and, generally speaking, no action for damages for negligence will lie in respect of such discretionary decisions and actions. There is, however, an actionable breach of duty towards those who are in a situation of sufficient proximity to be likely to be adversely affected by carelessness, even in the area of policy and discretion, if *(a)* there is no proper exercise of the discretion and *(b)* there is a failure to exercise reasonable care in the acts or omissions occurring in consequence of there being no proper exercise of the discretion.

4. In the operational area not involving policy or discretion, the Council owes the same duty of care as other persons to those who are in a situation of sufficient proximity to be likely to be affected adversely by want of care in relation to the Council's activities.

5. Even where the decision as to whether to undertake a particular course of action is a matter of policy or discretion, the course of action, if undertaken, is subject to the ordinary duty of care.

However, it is obvious from the judgments that the policy/operational dichotomy is far from easy to apply in practice. This Committee adheres to its previous view that a duty carefully defined and set down will enable parties to assess their likelihood of success in an action more easily and that settlements will thereby be facilitated.

Reform

Whether or not reform is instituted which affects the liability of public authorities generally, the Committee adheres to the view that reform is badly needed in relation to the liability of highway authorities for non-feasance. This being so, the Committee will now examine the actual form that the reforming legislation should take.

A draft bill is annexed to this report. However we would like to stress at the outset that the bill has been prepared purely on the basis that it will be used as a guide by parliamentary counsel as to our basic recommendations, from which he can prepare the final bill.

Definition of Highway

The New Zealand Torts and General Law Reform Committee recommended in their report that a very wide definition of "highway" should be included in the legislation.

They said at page 17 of the Report:—

> "Everything associated with a modern road should be included, whether a fixture or not. Bridges, culverts, curbs, gutters, street signs and footpaths should be expressly included."

This Committee agrees that a wide definition is desirable, and tentatively puts forward the following:—

> "highway" includes (without limiting the generality thereof)—roads, streets, alleys, lanes, squares, bridges, culverts, drains, curbs, gutters, street signs, street lights, median strips, traffic islands, traffic studs, footpaths, and other ancillary works.

Private Roads

One difficulty which arises, is what should be the position with respect to private roads?

The New Zealand Torts and General Law Reform Committee in their report, when touching on this question, said at page 17:—

> " . . . a narrow definition of highway authority should be enacted. We do not intend that individual owners of private roads should be in any way affected by the legislation. Their liability should continue to be governed by the Occupiers Liability Act 1962. There should be no overlapping between that Act and the new legislation, and we leave it to the draftsmen of the legislation to devise a suitable formula to secure this result."

Canadian legislation abolishing the non-feasance rule has in many cases dealt with private roads by including a provisions along the following lines:—

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

(*Section 178 (2) of the Municipal Government Act of Alberta 1970 c. 246*)

The Committee holds the view that private roads should be expressly excluded from the operation of the Act. As a result we have drafted the following provision:—

> "This Act does not apply to any place otherwise coming within the definition of highway, which was made or laid out by a private person, unless it has become a public road either by dedication or by statute or by the passing of a resolution under Section 303 of the Local Government Act 1934.

The principal ways in which a road becomes a public road are set out in an annexure to this report.

Positive statement of the existence of a civil obligation

In our Twenty-fifth Report we concluded that the positive language of the *Municipal Act* of Ontario and of the New Zealand Report was to be preferred to the historical approach of the English Act. We now examine ways to draft legislation which will do this in a satisfactory manner.

A good example of legislation positively stating the existence of a civil obligation is provided by section 427 (1) of the *Municipal Act of Ontario (1970) c.284* which provides:

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

One difficulty with this provision is that the duty may be stated too positively. As we stated in our Twenty-fifth Report, the provision appears to impose strict liability on the authority.

Despite the fact that as we have already stated earlier in this report, in practice it has been held that the section only requires the highway authorities to take reasonable care to keep their highways in repair we have decided that it may be prudent to make it clear in our legislation that it is not intended to impose strict liability.

Section 178 (1) of the Municipal Government Act of Alberta (1970) c. 246 imposes a somewhat less absolute duty by providing:—

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

(a) the character of the road, street, bridge, highway, square, alley, public place or work made or done therein or thereon, and

(b) the locality in which it is situated or through which it passes

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

Unfortunately as we have said, no legislation or even draft legislation resulted from the recommendations of the New Zealand Torts and General Law Reform Committee, so that all we have to guide us from that quarter is their recommendation that legislation 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.

Although not enacted, the Law Reform Commission of British Columbia did in its Report draft the form of the proposed legislation. They recommended a provision along the following lines to be placed in their *Municipal Act*:—

"(1) Where a highway of which a municipality has the custody, care and management is not maintained or kept in repair, the municipality is liable, subject to the provisions of the Contributory Negligence Act, for damage sustained by any person by reason of such default.

(2) In any action based on the liability imposed by subsection (1) it is a defence to prove that the municipality has 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 subsection (2) a court shall 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 that traffic,

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

(d) whether the municipality 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 municipality could not reasonably have been expected to repair that part of the highway to which the action relates before the cause of action arose, whether or what warning notice of its condition had been displayed.

but it shall not be relevant to prove that the municipality 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 municipality had given him proper instructions with regard to the maintenance of the highway and that he had carried out the instructions."

The Western Australian Law Reform Commission has recently recommended a slightly different way of imposing a duty of care namely that the highway authorities be required to take such care as is reasonable in all the circumstances to safeguard persons using their highways against dangers which make them unsafe for normal use. The Commission also recommended that in determining whether a highway authority had exercised reasonable care, a court should be entitled to consider among others, certain specified criteria. In drafting the criteria the Western Australian commission drew to a large extent from the criteria laid down in the *English Highways (Miscellaneous Provisions) Act 1961* and the criteria recommended by the British Columbia Commission.

In our Twenty-fifth Report we recommended at page 20 that where a statute imposes specific duties on a public authority, that that authority be liable for unreasonable default in the exercise of such duties or in its failure to exercise them. We expressed the view that by imposing a duty in those terms, road users would be encouraged to look after themselves as much as possible, and it might avoid the multitude of claims it was feared would be made under the English Act.

In the decade since that recommendation was made certain matters have emerged which have led this committee to reassess its recommendation.

First it has become apparent that despite the fact that on its face the English legislation (and also some of the Canadian legislation) may seem to be unduly favourable to plaintiffs, the courts in recent years have not been demanding as much from highway authorities as they were in the early days of the legislation.

Secondly a number of law reform agencies have recommended the introduction of a duty of reasonable care to keep highways in a safe condition. Further to this we have noted the criticisms of the Western Australian Law Reform Commission in their Working Paper when they said at pages 38-39:—

"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."

Due to the recent attitude of the English Courts, it appears that we need not be so concerned about the effect of similar legislation being enacted here, as we were in 1974. However we still believe it best to make it clear that the duty imposed on highway authorities is not absolute. On the other hand it is most probably not necessary to attempt to protect highway authorities in the manner recommended in our earlier report, namely that they only be liable for unreasonable defaults in the exercise of their powers and duties.

We feel that a duty of care along the lines of that suggested recently by the Western Australian Law Reform Commission will deal adequately with the matter.

In order to make it clear that the intention is that highway authorities are civilly liable for damages sustained as a result of a breach of duty of care, we recommend that a provision be inserted to that effect, as is the case in some of the Canadian provinces.

As a result the Committee recommends a provision along the following lines:—

1. The rule of law that highway and other authorities are not liable for non-feasance in relation to the carrying out of their powers and duties is hereby abrogated.

2. Every relevant authority shall take such care as is reasonable in all the circumstances to safeguard persons using the highways against dangers which make a highway unsafe.

3. Where an authority has committed a breach of the duty imposed by subsection 2, it shall be civilly liable for damages sustained by any person by reason of that default.

4. Nothing in this section affects the operation of Sections 24 to 27a inclusive of the Wrongs Act 1936.

Liability for Natural Dangers

It is obvious that motorists and pedestrians may be subject to injuries other than ones resulting from defects in the highway itself. Where the dangers are the result of activities of certain persons or authorities then recovery of damages is likely.

However what is the position where the injury is caused by a natural danger? Presumably there will be no liability when the danger was not known. However, what would the position be if the danger was known or should reasonably have been known.

One factor in favour of imposing a duty and consequently liability is that other authorities appear to be liable in similiar conditions. In *Schiller v. Council of the Shire of Mulgrave (1972) 129 C.L.R. 116* the shire

council was trustee of a scenic reserve. The reserve consisted mainly of dense rain forest, through which ran a creek which was a local tourist attraction. The council had maintained a picnic area beside the creek and a track from that area down to a part of the creek called The Boulders. A rough bush track, not maintained by the council, ran from The Boulders to a pool further downstream and with the knowledge of the council this track had been used by a significant number of people. A tourist was injured on the lower track when a large dead tree, which had been standing 35 feet into the forest from the track, fell on him without warning. The trial judge found that the council knew or ought to have known of the propensity of such trees in rain forests to fall but made no finding as to whether it knew or ought to have known of the existence of the tree which fell.

On appeal to the High Court, the Court held that the council had been in breach of its duty of care. Walsh J. said at page 132:—

> "Upon consideration of all the circumstances, I think it is proper to find that the respondent did fail to exercise reasonable care to prevent damage from the danger that existed on the land under its control, by neglecting to make any inspection in the relevant part of the reserve and by taking no step to discover or to deal with any dead tree standing near the lower part of the track."

Gibbs J. came to a similiar conclusion. He said at page 135:—

> ". . . the evidence does not show that the elimination of the risk would have been beyond the capacity of the Council or would have put it to undue expense. The tree that fell had no leaves and this could have been seen by an employee of the Council if he had been sent to walk along the track and had kept his eyes open."

The *Schiller case* did present special circumstances, in that in the tropic area in question it is well known that fungi could quickly invade a dying tree, and result in a danger that the tree would fall. However cases in relation to trees on private properties impose similar duties on the landowner in relating to anyone injured by falling trees or branches see *Fleming on the Law of Torts 6th Edition (1983) pp 398-9* and there seems no reason why highway and other authorities should not exercise reasonable care in relation to trees which by proper inspection or knowledge of their habits would be known to be dangerous.

The Western Australian Law Reform Commission, when examining the question of liability for natural dangers, came to the conclusion that highway authorities should be liable for injury or damage caused by their negligent failure to remove or guard against natural dangers. The Commission said at page 77:—

> "As far as the statutory duty recommended is concerned, there is no logical difference between such dangers and dangers forming part of the actual highway itself, and unless highway authorities are liable in the kind of situations under consideration, compensation will not always be recoverable by the accident victims involved."

The Commission also envisaged that the highway authority could be held liable where a third party had control over or was responsible for the natural danger.

If damages were recovered from a highway authority for breach of duty of care, the authority would if the act or omission of the third party contributed to the damage, be able to obtain contribution or indemnity from that person.

The Commission further recommended that, to enable highway authorities to perform this duty of care, the authorities should be empowered

to direct the third party to remove the natural danger, or to execute the necessary work themselves at that party's expense.

This Committee agrees that in appropriate circumstances liability should arise for injury caused by a highway authority's negligent failure to take precautionary measures in relation to potential dangers which exist on or adjacent to the highway and which are capable of causing injury to users of the highway. Thus authorities should be held to have a duty to take reasonable measures to guard against foreseeable injuries from landslides, drifting sand, water flooding and injuries from trees which either over hang the highway or fall on to the highway.

As a result we have added to the basic section imposing liability on highway authorities the following words

> "including natural dangers which exist adjacent to the highway"

So that section now provides:—

> "Every highway authority shall use such care as is reasonable in all the circumstances to prevent injury or damage to persons or property of those using the highway against dangers (including natural dangers) which exist on or adjacent to the highway which make it unsafe."

Criteria for determining whether reasonable care has been exercised

In our Twenty-fifth Report we expressed the view that a public authority's action or lack of it should be put in issue having regard to all the circumstances of the particular case, including notice of the danger and the exempting factors enumerated in section 1 (3) of the English legislation.

The Committee has not altered its views since then, and we note that both the British Columbia and Western Australian Law Reform Commissions have recently made similar recommendations.

In drafting the relevant criteria we have drawn from section 1 (3) of the *English Highways (Miscellaneous Provisions) Act (1961)* and also the criteria recommended by the British Columbia and Western Australian Law Reform Commissions. The only specific criteria which we propose to comment on relate to the availability of finances and manpower.

Defence of insufficient money or manpower

In our Twenty-fifth Report we recommended 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 the money and use the manpower honestly and bona fide. However, it was recommended that the defence not be available in the case of highway authorities.

It was therefore with considerable interest that we noted that the Western Australian Law Reform Commission had recommended, that in determining whether a highway authority had exercised reasonable care, a court should be entitled to consider

> "The financial and other resources available to the authority for use in connection with the highways for which it is responsible."

This committee has as a result decided to re-examine the conclusion it reached relating to this matter in our earlier report.

It would appear from examination of cases such as *Miller v. McKeon (1905) 3 C.L.R. 50, Wenham v. Council of Municipality of Lane Cove*

(1918) 18 S.R. N.S.W. 90, and *Woodard v. Orara Shire Council (1948) 49 S.R.(N.S.W.) 63* that Australian courts have at least in instances of "pioneering" roadworks been prepared to take into consideration the financial resources of highway authorities. For example in *Woodard's case (supra)* Jordan C.J. said at page 66:—

> "A less close approach to perfection is all that can reasonably be expected if the body is breaking a trail in an area of wild bush than if it is reforming a street in a populous suburb. It is for this reason that in the case of local government bodies it has been held to be legitimate to take into account the nature of their areas and the moneys at their disposal indetermining the standards of road-making that reasonably may be required of them: *McAleer v. Municipality of Huntville (1891) 12 N.S.W. L.R. 165 AT 166. Wenham v. Council of Municipality of Lane Cove (1918) 18 S.R. 90.* I think however, that evidence on these lines is properly admissible only when a local government body is genuinely seeking to justify substandard road-making or repairs on the ground that the nature of the locality and the means at its disposal did not reasonably call for anything better then it in fact provided."

Although it is envisaged that a majority of highway authorities should and would not be able to reply on a "cry of poverty", particularly in these days of State and Commonwealth grants, the Committee is of the view that in some instances, the authority may have severe financial restrictions and could reasonably have less expected of it.

Nevertheless we draw attention the careful analysis of the East Suffolk case by Lord Wilberforce in his speech in *Anns' case* at pp 756-758. His Lordship's analysis shows that there are two duties involved: one a duty in carrying out the power according to its terms in which case policy decisions are relevant and the other a duty at common law outside the area of legitimate discretion or policy. We therefore recommend that the following criterion be added:—

> "In assessing any policy decision made by the authority, it shall be relevant to consider the financial and other resources available to the authority."

Contributory Negligence

The English legislation and also some of the Canadian legislation on this topic expressly state that existing provisions concerning contributory negligence apply to claims brought against highway authorities for breach of duty of care. As some of the law reform agencies which have looked at the liability of highway authorities have made similar recommendations, the Committee decided to consider whether such a provision would be desirable in the legislation proposed for this State.

The New Zealand Torts and General Law Reform Committee recommended that the proposed legislation preserve the defence of contributory negligence.

The British Columbia Law Reform Commission in 1977 recommended that the following subsection be inserted into the proposed legislation:—

> "(1) Where a highway of which a municipality has the custody care and management is not maintained or kept in repair, the municipality is liable, subject to the provisions of the Contributory Negligence Act, for damage sustained by any person by reason of such default."

The Western Australian Law Reform Commission when discussing this aspect of the topic said at page 81 of their report:—

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

The contributory negligence provisions are found in this State in *section 27a of the Wrongs Act 1936 (as amended)*, and the question which is raised at this stage is whether it is necessary to state expressly in the proposed legislation that those provisions apply to proceedings brought for breach of the duty of care owed by highway authorities.

The Committee has come to the conclusion that it would be best to make express reference to contributory negligence in the Act. As it is intended that it be possible to raise contributory negligence by way of defence it is better to make certain that it will in fact be allowed.

It is for this reason that we added subsection (4) to our proposed section set out at page 45.

Should the deliberate or negligent act of a stranger be a defence?

It appears that even under the fairly onerous duty placed on highway authorities by the English *Highways (Miscellaneous Provisions) Act 1961* the highway authorities may not be liable for the malicious act of a stranger. For example Diplock C.J. said in *Griffiths v. Liverpool Corp. (1966) 2 A11 E.R. 1015 at 1022*:—

"Furthermore, although it may be that the highway authority could have escaped liability by proving that the danger was caused by inevitable accident or the malicious act of a stranger, it would have been no defence to them merely to prove that they had in fact taken all reasonable care to prevent the existence of the danger."

The Western Australian Law Reform Commission when discussing the effect of act of a stranger said that because under their recommendations highway authorities would be liable for accidents caused by dangers which make the highway unsafe for normal use only if they had been negligent in relation to those dangers; they would not be liable for accidents attributable to the act or omission of a third party unless subsequently, they had been negligent themselves in relation to the danger thus created by the act of the stranger. This would occur if after the intervention of a third party the authority had negligently failed to remove or safeguard users of the highway against the danger.

The Western Australian Commission looked into the possibility of exempting highway authorities from liability where injury resulted from the act of a third person. However the commission decided against it on the following grounds:—

"1. in cases in which the act or omission of the third party was not tortious, exempting the highway authority from the consequences of its own negligence would prevent persons who suffer injury or loss obtaining the damages they would otherwise be entitled to.

2. in cases in which the act or omission of the third party was tortious, that person would, as a concurrent tortfeasor, be liable to contribute to the damages awarded against the highway authority and perhaps even to indemnify it completely.

3. In many cases it may be difficult to determine whether or not the danger was attributable to the act or omission of a third party. This issue could then become the subject of a costly dispute between the highway authority and the claimant."

This Committee agrees that it would be undesirable to make an act or omission of a third person a defence where the highway authority has itself been negligent in not remedying the danger. There is of course already a means by which the highway authority could obtain contribution from the third party, namely the use of Section 25 (1) *(c)* of the Wrongs Act 1936 and this should cover the case.

Burden of Proof

This Committee in our 25th Report made the following recommendations with respect to the burden of proof at page 20:—

"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."

Other Law Reform Agencies have come to varying conclusions on this question of where the burden of proof should lie. The New Zealand Torts and General Law Reform Committee recommended that the burden of proof on the issue of whether reasonable care had been taken be upon the plaintiff.

On the other hand, one notable feature of the Report of the British Columbia Law Reform Commission was the recommendation that the burden of proof in relation to the issue of whether a public body had exercised reasonable care, be placed upon the body itself. The Commission favoured this view because it considered that the public body would have easy access to the kind of information relevant to the issue and the plaintiff would not. This in many cases would be decisive as to the success or failure of the plaintiff's action.

The Western Australian Law Reform Commission in their 1981 report came to a similar conclusion to the New Zealand Torts and General Law Reform Committee. In commenting upon this recommendation the Commission said at page 80 of their report:—

"The Commission acknowledges that in practice, one effect of this recommendation will be to give highway authorities a certain advantage over persons claiming damages in cases of non-feasance, as they will generally have better access to information concerning matters relevant to the issue of whether or not they have fulfilled their duty of care. However, this is also the case with other public authorities and the Commission is of the view that having been dispossessed of an immunity, highway authorities should not then be placed in a more disadvantaged position than that occupied by other authorities.

> In addition having to prove their case will have the advantage of discouraging frivolous claims for damages and this in turn will lessen the costs of reform to highway authorities."

This recommendation was in contrast to the English legislation which has shifted the burden to the highway authority of proving that it took such care as in all the circumstances was reasonable. Given that the form of our final recommendation differs from that in the English legislation we accept the criticisms of the New Zealand and Western Australian reports and recommend that there be no reversal of the burden of proof.

Should the operation of the Act be delayed to allow public authorities time to comply with the duty of care?

When the non-feasance rule was abolished in England and Wales, the highways authorities were given time to get their highways in order before the act came into force. *Section 1 (1) of the Highways (Miscellaneous Provisions) Act of 1961* provided that the Act would not come into force until 3 August 1964.

When making recommendations with respect to the liability of highway authorities for non-feasance, the Western Australian Law Reform Commission also came to the conclusion that the highway authorities should have a "settling in period". The Commission recommended that the Act creating the duty not come into force until a complete financial year has elapsed after the Act is passed.

While we recognise that it is possible that some people may be adversely affected due to the delayed impositon of a duty of care, the Committee believes that possibly it may be desirable to give highway authorities some period of time after the passing of the legislation to "get their house in order".

However the Committee does not have strong views as to this necessity, and we point out that it may be sufficient merely to make authorities aware beforehand, that this reform is likely to be introduced in the near future.

Notice Requirements

In our 25th Report we recommended that all notice of action provisions relating to the type of claim under consideration, be repealed.

While we still adhere to that view, it may be that repeal would not be essential, in the light of section 50 of the *Limitation of Actions Act 1936 (as amended)* which empowers the Court to dispense with any requirement to give notice. More importantly *section 11 (2) of the Crown Proceedings Act 1972* provides:—

> "Notwithstanding the provisions of any other Act, but subject to this act, no notice of claim, or notice of proceedings in any case of tort or contract shall be required in the case of an action between subject and subject."

This of course only applies where the action is against the Crown and not, as in most cases we are discussing, against municipal and other statutory authorities. We reaffirm our recommendation at p.20 of our previous report that a similar section to section 11 (2) of the Crown Proceedings Act be enacted with regard to actions against municipal and other statutory authorities.

Power to direct third parties to remove dangers

The Western Australian Law Reform Commission recommended that highway authorities be empowered to direct the third party responsible for the existence of a danger to remove the danger, or, at that party's expense, carry out the necessary work themselves. The Commission also

recommended that highway authorities be empowered to direct a third party to remove a natural danger (such as an overhanging tree) or to execute the necessary work themselves at that partys expense.

This Committee agrees that highway authorities need such powers in order to be able to carry out the duty of care recommended in this Report. We have therefore drafted the following provision for consideration.

> 1. Where a person has created or is in control of a potential danger to users of the highway, the highway authority may by notice in writing require that person to remove that danger.
>
> 2. If a requirement made under subsection (1) has not been complied with within the time limited by the notice or it is impracticable by reason of impending danger to make such a requirement; the highway authority may proceed to remedy the danger, and subsequently recover the costs thereof from the person responsible for or with control over that danger.

Drainage Authorities

Highway authorities have not been the only ones to benefit from the non-feasance rule. Drainage authorities have also been given limited protection.

The early English drainage cases of *Glossop v. Henston and Isleworth L.B. (1879) 12 Ch. D. 102* and *Attorney-General v. Dorking Union (1882) 20 Ch. D. 595* granted the local authority in each case exemption from liability for an inherited nuisance caused by drainage problems.

The protection offered is not as extensive as that which applies to highway authorities as drainage authorities will be held liable for careless failure to repair or clean a drain which decays or becomes blocked.

In *Hesketh v. Birmingham Corporation (1924) 1 K.B. 260* the Court of Appeal established an exemption for drainage authorities from liability for drainage inadequacy occurring in response to "natural growth". This exemption has been applied in Australia in *Essendon v. McSweeney (1914) 17 C.L.R. 524* and *Madell v. Metropolitan Water, Sewage and Drainage Board (1935) 36 S.R. (N.S.W.) 68.*

In *Mc Sweeney's case* McSweeney sought damages in respect of injury caused to her goods and chattels and premises by the overflow of water from a drain constructed by the City of Essendon. At trial it was found that the drainage system was inadequate to deal with the increased load and also that the drain was partially blocked, and as a result the defendants were held liable.

However on appeal the High Court held that the municipality was merely bound to maintain the drain in efficient condition and clear of obstruction so as to allow, to the extent of its capacity, the flow of water coming through from the whole of the drainage area. It was held that while the drain was maintained in this way it was not liable for damage occasioned by the overflow of water caused by the drain being insufficient to carry off all the water which flowed into it.

With respect to the damage which would have occurred even if the drain had not been obstructed, the municipality was held to be not liable and accordingly the High Court reduced the plaintiff's damages from £100 to £50.

It is clear from cases such as *McSweeney* and *Buckle v. Bayswater Road Board (1936) 57 C.L.R. 259*, that there will be no immunity in the case of failure to maintain drains. In *Buckle's case* Latham C.J. said at page 271:—

"If a public authority is empowered to construct and maintain drains and, having constructed a drain under that power, whether in a road or elsewhere, fails to keep it in proper repair, and that failure amounts to negligence, a person who is injured in consequence of such negligence has a right of action for damages against the public authority."

Thus, as has already been stated, the immunity of drainage authorities is by no means as extensive as that presently allowed to highway authorities.

The Committee has considered whether this more limited immunity of drainage authorities that is, for inherited nuisance, and with respect to drainage inadequacy as a result of natural growth should be abrogated and has come to the conclusion that in consonance with modern thinking the immunity should go and drainage authorities should be subject to the same duty of care as we have already recommended in the case of other authorities. We have drawn our clause 6 in the attached draft bill accordingly.

Summary of Recommendations

1. The Committee still holds the basic views expressed in our Twenty-fifth Report.

2. The rule of law that highway and other authorities are not liable for non-feasance in relation to the carrying out of their powers and duties should be abrogated.

3. Authorities should be required to take such care as is reasonable in all the circumstances to safeguard persons using highways against dangers which make a highay unsafe.

4. Reforming legislation should include a braod definition of "highway", but expressly exclude private roads.

5. Authorities should also be liable in appropriate circumstances for natural dangers which exist on or adjacent to the highway and which are capable of control by the authority either in fact or as set out in clause 8 of these recommendations.

6. Criteria should be laid down for determining whether reasonable care has been exercised along the lines of those placed in the English legislation. In assessing any policy decision made by the authority the court should be entitled to consider the financial and other resources available to the authority to discharge the duty in question.

7. Authorities should be entitled to require a person who has control over or has created a potential danger to users of the highway to remove it; and in appropriate circumstances the authority should be empowered to remove the danger itself and recover costs from the persons responsible for such danger.

8. A provision in similar terms to section 11 (2) of the Crown Proceedings Act 1972, should be enacted, so that all provisions requiring notice of action or action to be brought within short periods of limitation should be repealed or declared generally to be no longer in force.

Draft Bill

1. This Act may be cited as the Liability of Highway Authorities Act 1985.

2. This Act shall come into operation on a day to be fixed by proclamation.

3. This Act binds the Crown.

4. In this Act unless the contrary intention appears:—

"authority" means—the Crown, any Municipal or District council, and any statutory corporation or any other statutory authority, in whom the highway or other public works is vested, or which at the relevant time had control thereof

"highway" includes (without limiting the generality thereof)— roads, streets, alleys, lanes, bridges, culverts, drains, kerbs, gutters, street signs, street lights, traffic lights, median strips, traffic islands, traffic studs, footpaths and other ancillary works.

5. This Act does not apply to any place otherwise coming within the definition of highway which was made or laid out by a private person unless it has become a public road either by dedication or by statute or by the passing of a resolution under section 303 of the Local Government Act 1934.

6. The rule of law that highway, drainage and other authorities are not liable for non-feasance in relation to the carrying out of their powers and duties is hereby abrogated.

7. (1) Every relevant authority shall take such care as is reasonable in all the circumstances to prevent injury or damage to persons or property of those using the highway against dangers (including natural dangers) which exist on or adjacent to the highway which may make a highway unsafe.

(2) Where an authority has committed a breach of the duty imposed by subsection (1) hereof an action shall lie against the authority for damages sustained by any person by reason of that breach.

(3) Nothing in this section affects the operation of sections 24 to 27a inclusive of the Wrongs Act 1936.

8. When determining whether an authority has exercised reasonable care, the court may, in addition to any other relevant considerations, have regard to such of the following matters as may be relevant:—

(1) the character of the highway

(2) the character and amount of traffic which could reasonably be expected to use the highway

(3) the precautionary measures appropriate to safeguard persons using a highway of that character at the time, and in the location of where the damage was sustained

(4) the condition or state of repair in which a person would reasonably have expected to find the highway

(5) whether the 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

(6) whether before the incident giving use to the cause of action in question happened, the authority could reasonably have been expected to safeguard users of the highway against the danger which caused the damage complained of.

(7) the financial and other resources available to the authority.

Division II Notice to Remove Danger

(1) Where a person has created or is in control of a potential danger to users of the highway, the highway authority may by notice in writing require that person to remove that danger.

(2) If a requirement made under subsection (1) has not been complied with within the time limited by the notice or it is impracticable by reason of impending danger to make such a requirement; the highway authority

may proceed to remedy the danger, and subsequently recover the cost thereof from the person responsible for or having control over that danger.

We have the honour to be:

Howard Zelling

J. M. White

Christopher J. Legoe

M. F. Gray

D. F. Wicks

A. L. C. Ligertwood

G. F. Hiskey

Law Reform Committee of South Australia.

31st May, 1985.

BIBLIOGRAPHY

Reports

Law Reform Commission of British Columbia:
Tort Liability of Public Bodies 1977

Law Reform Commission of Western Australia:
Liability of Highway Authorities (Working Paper 1978)

Law Reform Commission of Western Australia:
Liability of Highway Authorities for non-feasance 1981

New Zealand Torts and General Law Reform Committee:
The Exemption of Highway Authorities from Liability for non-feasance 1973

Law Reform Committee of South Australia:
Misfeasance and Non-feasance 25th Report 1974

BOOKS

Shapo: The Duty to Act

Halsbury's Laws of England 4th Edition Volume 21 para 227

Winfield and Jolowicz: Tort 11 Edition

Salmond and Heuston: Torts 18th Edition

Luntz, Hambly and Hayes: Tort: cases and commentary

Street: Torts 5th Edition

Clerk and Lindsell: Torts 15th Edition

Charlesworth: Negligence 6th Edition

Fleming: The Law of Torts 6th Edition

White: Local Government Law and Practice (N.S.W.)

ARTICLES

Griffiths:	Liability for Non-repair of the Highway 1959 J.P. 88
Dworkin:	Nonsense and Non-feasance—Reaction and Reform 23 M.L.R. 574
Dworkin:	Highways (Miscellaneous Provisions) Act 1961 25 M.L.R. 336
Sawer:	Non-feasance revisited 18 M.L.R. 541
Harrison-Moors:	Misfeasance and Non-feasance in the Liability of public Authorities 30 L.Q.R. 276 and 415
Banakas:	Defective Premises—Shall the Ratepayer Foot the Bill 1977 C.L.J. 245
Stanton:	Negligence and Local Authorities 93 L.Q.R. 488
Craig:	Negligence in the exercise of a Statutory Power 94 L.Q.R. 428
Phegan:	Public Authority Liability in Negligence 22 McGill L.J. 605
Bridges:	Governmental liability and Anns v. Merton London Borough Council 24 McGill C.J. 277
Phegan:	Public Authorities: Non-feasance Breach of Statutory Duty 11 U.B.C.L.R. 187

ANNEXURE

The ways in which land may be dedicated as, or otherwise become a public road are as follows:—

1. *At common law*

The common law as to dedication of land as a public road was inherited by us when the then Province of South Australia was founded on 28th December 1836.

The manner of dedication at common law is set out in the judgment of Way C.J. in *Metters v. District Council of West Torrens (1910) S.A.L.R. 1 at 7* and more shortly in the judgment of Napier J. (as he then was) in *Bouquey v. the District Council of Marion (1932) S.A.S.R. 32 at 35.*

Cotton C.J. said in *Spedding v. Fitzpatrick (1888) 38 Ch.D. 410 at 414*:—

> "A highway becomes such by being dedicated to the public, and proof of user by the public is in general sufficient evidence of dedication, unless it is shown that during the period of user there was no person who could dedicate the land to the public. But dedication to the public may be proved in another way, by proof of acts and declarations of the owner."

2. *By statute*

(a) The City of Adelaide

All roads within the City of Adelaide are vested in the Corporation of the City of Adelaide by ordinance 4 of 1840 section II.

(b) The Roads Act 1852

By section 2 of that Act all public roads were placed under the care, control and management of Commissioners. The Central Board of Main Roads set up under the provisions of the Act were to be the Commissioners for the care, control and management of main roads and the relevant District Council was to fulfil the same office in relation to district roads within the district council area. There are no vesting or dedication provisions in the Act relating to roads. All erections and buildings on roads and the road making materials are vested in the Commissioners pursuant to Section 59.

Nevertheless the Commissioners could close and sell roads (Section 54) and could acquire land for new or altered roads (Section 47-52).

(c) The Main Roads Act 1874

By Section 22 all main roads are vested in the Commissioner of Main Roads until Local Boards of Main Roads are appointed and thereafter in the relevant Local Board

(d) The Real Property Act Amendment Act 1878

Section 61 of that Act required a proprietor subdividing land with allotments for sale to deposit with the Registrar-General a plan showing (inter alia) all roads streets passages and thoroughfares certified by a licensed surveyor.

It was held by the Full Court in *Born v. Huntley (1886) 20 S.A.L.R. 33* that where such a plan was deposited, the roads and ways shown on it were thereby dedicated to the public. The section is now Section 101 of the present Real Property Act 1886 and the decision in Born v. Huntley would apply equally to a plan deposited with the Registrar-General under Section 101.

(e) The Rights of Way Act 1881

By Section 12 of that Act, public rights of way were not to be affected or interfered with by a registered proprietor of land. The corresponding section of the 1886 Real Property Act is Section 86.

(f) The Roads Act 1884

Sections 6 and 7 of this Act are in the same terms as Section 22 of the 1874 Act.

(g) The District Councils Act 1887

By section 278 all streets in a township which are dedicated to the public (of which dedication five years uninterrupted user after the opening or laying out of the township shall be evidence) are public roads vested in the relevant District Council.

By Section 279 private roads may conveyed or transferred to the Council and then become public roads.

(h) The Municipal Corporations Act 1890

Section 111 gave power to the Supreme Court to vest public roads in a Corporation.

(i) The District Council Act 1914

By Section 275 the Supreme Court was given power to vest a public road in the Council.

By Section 276 an owner of abutting land on which there was a private road paved by the owner could request the Council to declare it a public road and by Section 279 any private road could be transferred to the Council and then become a public road.

(j) The Town Planning Act 1920

By Section 35 when the Town Planner has approved a plan of subdivision and it has been deposited in the Lands Titles Office or General Registry Office all roads, streets and rights-of-way shown on the plan are vested in the Council of the area.

(k) The Municipal Corporations Act 1923

Section 157 is on the same terms as Section 111 of the 1890 Act and Section 158 is in the same terms as Section 276 of the District Councils Act 1914.

By Section 171 the Town Clerk is to keep a register of public streets and copies of or extracts from the register are evidence by Section 520.

(l) The Highways Act 1926

By Section 8 the Commissioner of Highways is declared to be a body corporate.

By Section 20b the Commissioner may acquire land for the purpose of opening, widening, altering, diverting or extending any road.

By Section 27a the Commissioner may acquire land to widen or for a deviation of any main road and has for this purpose all the powers of Council under the Roads (Opening and Closing) Act 1932.

By Section 27b (5) the Commissioner may acquire land between the old and the new boundary of a road.

By Section 27ca all public roads outside a district and everything affixed thereto erected thereon, are vested in the Minister of Local Government.

(m) The Town Planning Act 1929

Section 14 provides that the roads in every deposited plan, unless the plan specifies that they are vested in someone else, are on the deposit of the plan vested in the council of the area.

(n) The Irrigation Act 1930

By Section 54 all roads in an irrigation area are vested in the Minister of Irrigation.

(o) The South Eastern Drainage Act 1931

By section 72 the South Eastern Drainage Board may make roads over land authorised to be taken by it. The land is held by the Board as a body corporate under Section 8.

(p) The Local Government Act 1934

Section 301 defines public streets and roads in great detail.

By Section 303 the Council has power to declare streets and roads to be public streets and roads.

Section 306 vests in the council the fee simple of every public street or road and ancillary works and fixtures.

By Section 308 wrong alignments boundaries surveys and descriptions of roads can be corrected

By Section 312 and 313 the chief executive officer keeps a register of public streets and roads and by Section 738 copies of or extracts from the register are evidence.

(q) The Crown Lands Act 1939

By Section 5 (d) the Governor may by proclamation dedicate any Crown lands for public roads. The delineation of any public road in a public map is in itself a dedication of the road to the public use.

(r) The Planning and Development Act 1966

By Section 48, when any plan of subdivision has been accepted by the Registrar-General every road, street or thoroughfare becomes vested in the council of the area.

By Part VII the State Planning Authority, a body corporate under Section 8, may itself acquire land and develop it any roads in any land so developed would presumably be vested in the Authority.

(s) The West Lakes Development Act 1969

By Section 12b provision is made for roads and streets within the West Lakes area. It is not clear in whom such roads and streets are vested but it would seem by reason of the assimilation of the Regulations in the Fifth Schedule to the Indenture to regulations made under Sections 36 and 79 of the Planning and Development Act that upon the deposit of the development plan the roads and streets vested in the Woodville Corporation under Section 48 of that Act.

(t) The Real Property Act Amendment Act 1982

Where an application is made for division of land under Division II of Part XIX A B of the Act and the plan of division is registered, then under Section 223*(e)* of the Act all roads, streets and thoroughfares vest in the council if the land is within a council area, in a prescribed authority if one is prescribed where land it outside a council area, and otherwise in the Crown.

(u) The Roads (Opening and Closing) Amendment Act 1985

This provides for the opening and closing of roads by the Highways Commissioner, a Council, or the South Australian Planning Commission set up under the Planning Act 1982. It further provides that stock routes are not to be closed under this Act. Where the road is outside a district, the relevant order is to be made by the Commissioner.

HIGHWAYS (MISCELLANEOUS PROVISIONS) ACT 1961

s 1.

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

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

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

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

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

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

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

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

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

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

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

(5) This section shall bind the Crown.

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

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

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

2. *Ontario*

MUNICIPAL ACT RSO 1970 C284

s 427.

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

(2) No action shall be brought against a corporation for the recovery of damages occasioned by such default, whether the want of repair was the result of non-feasance or misfeasance, after the expiration of three months from the time when the damages were sustained.

(3) No action shall be brought against a corporation for the recovery of damages caused by the presence or absence or insufficiency of any wall, fence, guard rail, railing or barrier, or caused by or on account of any construction, obstruction or erection or any situation, arrangement, or disposition of any earth, rock, tree or other material or object adjacent to or in, along or upon any highway or any part thereof not within the travelled portion of such highway.

(4) Except in case of gross negligence, a corporation is not liable for a personal injury caused by snow or ice upon a sidewalk.

(5) No action shall be brought for the recovery of the damages mentioned in subsection 1 unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered mail to the head or the clerk of the corporation, in the case of a county or township within ten days, and in the case of an urban municipality within seven days after the happening of the injury, nor unless, where the claim is against two or more corporations jointly liable for the repair of the highway or bridge, the prescribed notice was given to each of them within the prescribed time.

(6) In the case of the death of the person injured, failure to give notice is not a bar to the action and, except where the injury was caused by snow or ice upon a sidewalk, failure to give or insufficiency of the notice is not a bar to the action, if the court or judge before whom the action is tried is of the opinion that the corporation in its defence was not prejudiced by the want or insufficiency of the notice and that to bar the action would be an injustice, notwithstanding that reasonable excuse for the want or insufficiency of the notice is not established.

(7) This section does not apply to a road, street or highway laid out or to a bridge built by a private person or by a body corporate until it is established by by-law of the council or otherwise assumed for public use by the corporation.

(8) Nothing in this section imposes upon a corporation any obligation or liability in respect of any act or omission of any person acting in the exercise of any power or authority conferred upon him by law, and over which the corporation had no control, unless the corporation was a party

to the act or omission, or the authority under which such person acted was a by-law, resolution or licence of its council.

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

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

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

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

3. *Alberta*

CITY ACT

s 293.

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

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

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

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

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

s 178.

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

(a) the character of the road, street, bridge, highway, square, alley, public place or work made or done therein or thereon, and

(b) the locality in which it is situated or through which it passes,

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

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

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

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

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

(a) without proof by the plaintiff that the municipality knew or should have known of the disrepair of the road or other work, or

(b) if the municipality proves that it had not actual or constructive notice of the disrepair or that it took reasonable means to prevent the disrepair arising.

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

(a) by the presence of absence or insufficiency of any wall, fence or guardrail, railing, curb, pavement markings, traffic control device, illumination device or barrier adjacent to or in, along or upon the highway, or

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

s 240.

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

(a) by the municipal district,

(b) by a person with the permission of the council,

or

(c) by the Province and have been transferred to the control of the council by written notice,

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

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

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

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

s 242.

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

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