NSW Law Reform Commission REPORT 55 (1987) - COMMUNITY LAW REFORM PROGRAM: LIABILITY OF HIGHWAY AUTHORITIES FOR NON-REPAIR

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Terms of Reference and Participants

New South Wales Law Reform Commission
To the Honourable R J Mulock, LLB, MP,

Attorney General for New South Wales

COMMUNITY LAW REFORM PROGRAM

LIABILITY OF HIGHWAY AUTHORITIES FOR NON-REPAIR

Dear Attorney General,

We make this Report pursuant to the reference from you to this Commission dated 25 September 1985.

Ms Helen Gamble

(Chairman)

Russell Scott

(Deputy Chairman)

Professor Colin Phegan

(Commissioner)

Mr H D Sperling QC

(Commissioner)

December 1987

Terms of Reference

On 25 September 1985, the then Attorney General of New South Wales, the Honourable T W Sheahan BA, LLB, MP, made the following reference to the Commission:

> To inquire into and report on the following matters:
>
> 1. whether the common law rule which denies recovery to a person injured as a result of a failure to repair the highway in an action against the authority in occupation of the highway should be modified or abolished;
>
> 2. any related matter.

Participants

Commissioners

NSW Law Reform Commission: REPORT 55 (1987) - COMMUNITY LAW REFORM PROGRAM: LIABILITY OF HIGHWAY AUTHORITIES FOR NON-REPAIR

For the purpose of this reference a Division was created by the Chairman, in accordance with s12A of the Law Reform Commission Act 1967. The Division when first constituted on 11 October 1985 comprised the following members of the Commission:

Mr Keith Mason QC

Professor Colin Phegan

Russell Scott

Mr H D Sperling QC

The Division was reconstituted on 7 May 1986 to comprise:

Ms Helen Gamble

Mr Keith Mason QC

Professor Colin Phegan

Russell Scott

Mr H D Sperling QC

Mr Mason left the Division on 5 February 1987 upon being appointed Solicitor General of New South Wales.

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NSW Law Reform Commission: REPORT 55 (1987) - COMMUNITY LAW REFORM PROGRAM: LIABILITY OF HIGHWAY AUTHORITIES FOR NON-REPAIR

Ms Dianne Wood

Summary of Recommendations

Principal Reform

1. The nonfeasance rule should be abolished in respect of actions for personal injury or death. (para 5.2)

Duty of Care

2. The duty of care owed by highway authorities should be left to be determined by established common law principles. (para 5.14)

Extension of the Transcover Scheme

3. Claims against highway authorities in respect of accidents arising out of the condition of the highway should be brought within the scheme introduced by the Transport Accidents Compensation Act 1987 (Transcover). (para 5.27)

4. Transcover should also apply to claims made against other public authorities responsible for the maintenance of structures forming part of or on a highway. (para 5.28)

5. Common law actions against employees of these authorities or independent contractors and their employees should be prohibited in cases where the injured party would also have a claim for benefits in respect of the same conduct under the Transcover scheme. (para 5.30)

6. Contributions to the Transcover fund by highway authorities and other authorities affected by our recommendations should be assessed on a premium basis. (para 5.32)

Actions for Property Damage

7. While the Commission believes in principle that the nonfeasance rule should also be abolished in respect of claims for property damage, to enable the financial consequences for highway authorities to be gauged, it recommends that further consideration of abolition in this area should be postponed for a period of five years following the abolition of the rule in respect of claims for personal injury and death. (para 5.38)

1. The Community Law Reform Program and This Reference

I. INTRODUCTION

A. The Community Law Reform Program

1.1 This is the thirteenth report in the Community Law Reform Program. The Program was established by the then Attorney General, the Hon F J Walker, QC, MP, by letter dated 24 May 1982 addressed to the Chairman of the Commission. The letter contained the following statement:

> This letter may therefore be taken as an authority to the Commission in its discretion to give preliminary consideration to proposals for law reform made to it by members of the legal profession and the community at large. The purpose of preliminary consideration will be to bring to my attention matters that warrant my making a reference to the Commission under s10 of the Law Reform Commission Act 1967.

The background and progress of the Community Law Reform Program are described in greater detail in the Commission's Annual Reports since 1982.

B. The Non-Feasance Rule

1.2 This reference is about the rule of law known as the nonfeasance rule which offers highway authorities an immunity from liability in negligence not available to any other public authority. The present law in New South Wales can be summarised in two propositions.

> Highway authorities owe no duty to road users to repair or keep in repair highways under their control and management.
>
> Highway authorities owe no duty to road users to take positive steps to ensure that highways are safe for normal use.

As a result, a person who suffers injury due to the dangerous state of disrepair of a highway will have no claim for damages against the highway authority responsible for that highway. This is true even in circumstances where it can be shown that the highway authority knew of the dangerous condition of the highway and that its failure to remedy the defect or take other precautions to safeguard road users was unreasonable.

C. Background to this Reference

1.3 The liability of highway authorities for nonfeasance was listed for preliminary consideration under the Community Law Reform Program in September 1983 in response to a letter received from a resident of Tenterfield who had suffered facial injuries when she tripped and fell on a footpath which had been raised by the root of a nearby tree. She was advised against suing the local council responsible for the maintenance of the footpath on the ground that her claim would be unsuccessful because of the nonfeasance rule. In her letter she suggested that the law should be reformed in order to expose the council to liability in such circumstances.

1.4 Due to the Commission's limited resources and its commitments in other areas, this matter remained on the waiting list until the middle of 1985. At that time, two factors coincided to suggest that it would be appropriate for the Commission to seek a reference. First, the Attorney General's Department was considering the implementation of certain reforms in the area of occupier's liability. In response to a request from the Department, the Commission prepared a memorandum on occupier's liability in which the problem of the liability of highway authorities was raised. The memorandum suggested that this matter would be better dealt with as a discrete topic. Secondly, the Attorney General had received independent representations from a member of the legal profession on the need for reform of the nonfeasance rule.

1.5 The Commission formally requested a reference on 23 August 1985. By letter dated 25 September 1985 the Attorney General made the following reference to the Commission:

To inquire into and report on the following matters:

1. whether the common law rule which denies recovery to a person injured as a result of a failure to repair the highway in an action against the authority in occupation of the highway should be modified or abolished;

2. any related matter.

II. CONSULTATION

A. The Consultative Paper

1.6 After detailed research, the Commission formed the view that there was no justification in principle for the nonfeasance rule. In September 1986 the Commission issued a consultative paper in which it expressed the view that the rule should be abolished. Copies of this paper were distributed widely and in particular to the public authorities responsible for the maintenance of highways. A list of people and organisations responding to this document appears in Appendix A In addition, articles putting the Commission's view were published in the Law Society Journal, the Bar News and the Local Government and Shires Associations' Bulletin.

1.7 In general, members of the legal profession and their professional associations supported the proposal for abolition. The Department of Main Roads supported the proposal in principle, but expressed the view that some statutory protection would be required to restrict the number of claims against highway authorities and to keep public expenditure within reasonable bounds. The Local Government and Shires Associations made a very full response on behalf of their members in which they strongly opposed abolition of the rule. Individual submissions were also received from 85 local councils. All opposed any change to the nonfeasance rule.

1.8 The principal reason given by local government for the rejection of the proposal to abolish the rule was the financial burden this would impose on highway authorities. That burden would be felt in increased maintenance costs, as well as in the costs involved in defending actions and meeting successful claims. Councils indicated that they would not be able to meet these commitments at a time when their income had been restricted by government policy relating to the collection of rates. They also suggested that the costs of insuring themselves against the increased public liability would be prohibitive and expressed doubt as to whether such insurance would be available to them.

B. The Commission's Response

1.9 The strong opposition expressed by local government bodies prompted the Commission to undertake a series of investigations aimed at assessing the likely financial impact of the abolition of the rule.

Inquiries were made in relation to the effect of abolition in other jurisdictions.

The matter was raised in discussions with several representatives of the insurance industry.

Comments were received from two firms of management consultants with expertise in the area.

Highway authorities were again contacted for details of their objections and for further information upon which the likely economic impact of abolition could be assessed.

1.10 These investigations allowed no real estimate to be made of the likely increase in councils' financial liability following abolition of the rule. They did confirm that local government was operating in a difficult financial climate. While recognising the force of the councils' arguments, the Commission believes that the arguments for abolition of the rule outweigh them, at least in respect to claims for personal injury and death. Accordingly it recommends in this Report that the nonfeasance rule should be abolished. The Commission believes that the package of reforms proposed in this Report will not place an intolerable financial burden on local government. The recommendations have been framed with the position of local councils well in mind. The Commission sees the major solution to the problems raised by councils as lying in its recommendation that actions against highway authorities be included within the Transcover scheme.

III. TRANSCOVER

1.11 Throughout its work on this reference, the Commission has been aware of Government plans to introduce a traffic accident compensation scheme. It was clear to the Commission that any proposals made in relation to the liability of highway authorities would need to be reconciled with that scheme. The Commission therefore determined that work on a final report should be delayed until details of the scheme became available. These details became available when the Transport Accidents Compensation Act 1987 was passed in May 1987. The Act, which came into operation on 1 July 1987, creates an accident compensation scheme referred to as "Transcover".

1.12 Transcover only applies to claims against owners and drivers of motor vehicles. Claims against highway authorities will continue to be made through court proceedings and damages will be assessed according to common law principles. This has left highway authorities in a vulnerable position as they are likely to become a target for claims by those seeking common law damages rather than the benefits payable under Transcover. For this and the other reasons set out in Chapter 5, the Commission recommends in this Report that the liability of highway authorities be brought within the Transcover scheme. As the scheme relies on common law negligence principles in order to determine eligibility for benefits, an express abolition of the nonfeasance rule will still be required. The effect of placing the liability of highway authorities within the scheme will be that the damages payable to successful claimants will be assessed within the scheme and not at common law. The Commission has discussed this proposal with the manager of the Transcover scheme, Mr Denis Mockler, and members of his legal staff. They stated that they could see no major practical difficulties in administering the scheme on this expanded basis.

IV. ACKNOWLEDGMENTS

1.13 The Commission expresses its thanks to Mr James Hirshman, Senior Legal Officer with the Commission, who had the carriage of most of the research and writing on this reference. Thanks are also due to Dr Chris Hall who provided advice on the economic implications of changes to the nonfeasance rule and to Dr Peter Handford, Research Director of the Law Reform Commission of Western Australia, who provided a copy of a very useful paper he had prepared on the nonfeasance rule. The Commission also records its appreciation to Mr Don Colagiuri of Parliamentary Counsel who prepared the draft legislation which appears in Appendix B.

2. The Non-Feasance Rule

I. HISTORICAL DEVELOPMENT

2.1 History shows that the nonfeasance rule arose more by accident than design. The origins of the rule lie in the England of the middle ages where the rule developed from procedural difficulties experienced in suing those responsible for the maintenance of highways. Until the nineteenth century, it was the inhabitants of the local counties who had responsibility for the maintenance of highways. Then, as now, there was no mechanism available for bringing proceedings against such a group collectively. Individual actions were prohibited because of the multiplicity which would have resulted.[1] As often happens in law, the rule outlived the procedural difficulties upon which it was based and was applied even after responsibility for the maintenance of highways had passed into the hands of public corporations.[2] Although it has been argued that the rule took hold because of a concern on the part of the courts that visiting civil liability on those responsible for the maintenance of highways would impose impossible or intolerable burdens on them, the cases themselves provide little evidence to support that view.

2.2 It should also be noted that the nonfeasance rule emerged before the development of the modern rules of negligence. It developed as a defence to an absolute duty to maintain imposed by the early law of nuisance Under that law the persons or bodies charged with the maintenance of highways were liable for accidents caused by defects in the highway, whether or not they could reasonably have been expected to have identified and remedied the defects.[3] The rule was later applied to claims in negligence. Whether it should have been is questionable, as in negligence cases defendants will only be liable if it can be shown that they have failed to take reasonable care having regard to all the circumstances of the case.[4]

II. THE RULE

2.3 No matter what view is taken of the history of the rule, there is little doubt that it is firmly established and that it applies in Australia.[5] It exempts highway authorities from all civil liability, whether the action be brought in "nuisance, negligence, or a special form of negligence such as breach of the duty of an occupier".[6]

2.4 The classic statement of the rule is made by Dixon J (as he then was) in *Buckle v Bayswater Road Board:*

> It is well settled that no civil liability is incurred by a road authority by reason of any neglect on its part to construct, repair or maintain a road or other highway. Such a liability may, of course, be imposed by statute. But to do so a legislative intention must appear to impose an absolute, as distinguished from a discretionary, duty of repair and to confer a correlative private right.[7]

The distinction made by Dixon J between duties arising at common law and under statute is fundamental. The rule that a statutory duty enforceable by civil action will only arise where there is a clear legislative intention to impose it is of general application. It is not peculiar to highway authorities and should not be confused with the nonfeasance rule which applies to highway authorities only and offers complete immunity from all civil liability.

2.5 In Chapter 1 we stated that the present law in New South Wales could be summarised in two propositions.

> Highway authorities owe no duty to road users to repair or keep in repair highways under their control and management.
>
> Highway authorities owe no duty to road users to take positive steps to ensure that highways are safe for normal use.

The first proposition is a result of the rule of general application concerning statutory duties. In New South Wales, the statutes assigning responsibility for the repair of highways are expressed in permissive rather than mandatory terms: they give a power to repair but do not impose a duty to do so. Therefore, as presently drafted, there can be no question of a statutory duty to repair being imposed on highway authorities. It is the second proposition which describes the operation of the nonfeasance rule and it is the immunity so conferred with which this Report is concerned. This immunity covers not only failures to repair but also other failures to safeguard road users.

Under the nonfeasance rule, highway authorities incur no civil liability for injuries or damage caused by their failure to maintain or repair a highway. Nor are they liable for failing to act in other ways, such as failing to signpost or fence off dangers occurring on or near the highway, or not removing obstructions. The gravamen of the nonfeasance rule is that highway authorities can never be liable for such failures, even if it can be shown that the exercise of reasonable care on their part would have demanded some action. All other public authorities exercising control over public facilities (and persons in control of land generally) are liable to persons injured by their failure to repair or make safe those facilities if a lack of reasonable care can be shown.

III. LIMITS OF THE RULE

2.6 Because the concession afforded to highway authorities by the nonfeasance rule is anomalous, the courts have adopted a number of devices to confine its ambit of operation. The key terms “nonfeasance”, “highway authority” and “highway” have been construed narrowly. As a result it is necessary to make three somewhat nebulous distinctions when applying the rule:

> the distinction between mere nonfeasance and conduct on the part of a highway authority which is capable of being construed as misfeasance;
>
> the distinction between a highway authority acting in that capacity and acting in some other capacity, for instance as a drainage authority (the ‘source of authority’ test); and
>
> the distinction between works which are artificial structures and works which are part of the roadway itself.

The complexity and uncertainty introduced into the law by these distinctions is itself a strong argument for reform.

A. Non-Feasance and Misfeasance

2.7 Highway authorities, like other public authorities and individuals, are liable for their tortious acts (misfeasance):

> ...while a road authority owes to the-members of the public using a highway no duty to undertake active measures whether of maintenance, repair, construction or lighting in order to safeguard them from its condition, on the other hand it possesses no immunity from liability for civil wrong. It is, of course, a civil wrong to cause particular damage by obstructing a highway, or by making it unsafe or dangerous. Interferences with a highway which in themselves would be unlawful in a stranger are as a rule authorized acts when done by a road authority. But a road authority in doing them must take due care for the safety of those using the highway and is not protected if it creates dangers which reasonable care and skill could avoid. Because the road is under its control, it necessarily has an opportunity denied to others for causing obstructions and dangers in highways. But when it does so, the road authority is liable, not, I think, under any special measure of duty which belongs to it, but upon ordinary principles.[8]

2.8 Clear examples can be given of both nonfeasance and misfeasance, but the dividing line between the two can become very difficult to determine in certain situations, particularly where the highway authority in question has done some work on the highway on which the accident occurred.

> If a highway authority, therefore, leaves a road alone and it gets out of repair, there is, of course, no doubt that no action can be brought, although damage ensues. But this doctrine has no application to a case where the road authority have done something, made up or altered or diverted a highway, and have omitted some precaution, which, if taken, would have made the work safe instead of dangerous.
>
> You cannot sever what was omitted or left undone from what was committed or actually done, and say that because the accident was caused by the omission therefore it was nonfeasance. Once establish that the local authority did something to the road, and the case is removed from the category of nonfeasance. If the work was imperfect and incomplete it becomes a case of misfeasance and not nonfeasance, although damage was caused by an omission to do something that ought to have been done. The omission to take precautions to do something that ought to have been done to finish the work is precisely the same thing in its legal consequence as the commission of something that ought not to have been done, and there is no

> similarity in point of law between such a case and a case where the local authority have chosen to do nothing at all.[9]

2.9 To give a relatively simple example, if a highway authority in the course of carrying out repair work digs a hole in a highway but omits to erect a protective barrier around it at night, this would be misfeasance in relation to users of the highway.[10] It is misfeasance because the omission to fence off the hole or take other measures to safeguard users means that the repairs were carried out carelessly. If, on the other hand, the hole in the highway had been caused by natural deterioration or by the actions of a third party, the failure of the highway authority to repair it or to erect a protective barrier would be nonfeasance.[11]

2.10 To take another example, assume that a highway authority sets out to remedy a defect in the road but, either because it fails to appreciate fully the nature of the problem or because of the inadequacy of the method of repair adopted, it fails to remedy that defect fully. Is this misfeasance or nonfeasance? If it can be shown that the highway authority was "negligent" in failing to appreciate the nature of the defect or in adopting an inappropriate method of repair, misfeasance is arguable in that the highway authority clearly did something and did it in a negligent manner.[12] The courts have, however, resisted the argument that merely because a highway authority has done something to the road, the case is necessarily one of misfeasance. A highway authority will only be liable if it has by its action created a new or additional danger that did not exist previously and which the exercise of reasonable care would have avoided.[13] The mere fact that a highway authority makes some repairs to a road but fails to remedy a pre-existing defect will not expose it to liability. Such cases are sometimes distinguished as cases of "inadequate amelioration",[14] for which no liability attaches. However, some qualification of these principles might be necessary following the recent decision of Clarke J in *Marr v Holroyd Municipal Council*.[15] In that case, the plaintiff suffered severe leg injuries (eventually requiring the amputation of one leg below the knee) when he fell off his motorcycle as a result of having struck a pot-hole in the road. There was expert evidence, which was accepted by Clarke J, that the peculiar shape of the pot-hole indicated that it had recently been repaired and repaired badly, causing the fill to be eroded more quickly than would have been the case had the repair been done properly. There was no suggestion that the repairs had made the original pot-hole more dangerous or created a new danger. On these facts, Clarke J held that there had been misfeasance on the part of the council. This finding was based on the fact that the reappearance of the pot-hole which caused the plaintiff Is accident was not due to mere wear and tear but was a consequence of the negligent repairs undertaken by the council.[16]

2.11 The distinction between misfeasance and nonfeasance has not proved easy to apply in practice. This is demonstrated by the' large number of reported cases in which this distinction has been the principal issue in dispute and by the often acute differences of opinion between individual judges hearing such cases either in the same court or at different levels of the appellate hierarchy.[17] Unanimity of opinion is rare even among judges hearing the same facts and it is impossible to discern any general guidelines taken from the body of cases as a whole. As a result, the likely outcome in any particular fact situation is extremely uncertain. Ultimately, the result will depend on the facts of each case and, in borderline cases, upon the degree of ingenuity the court is willing to exercise in finding some conduct on the part of the highway authority that can be said to have created a new or additional danger. An examination of the decisions in particular cases does little to elucidate the distinction. Three are given as examples.[18]

> In *Tickle v Hastings Shire Council*,[19] the plaintiff Is truck was damaged as a result of the collapse of a bridge forming part of a highway. The defendant council had previously replaced the top decking of the bridge, but had done nothing to repair its base which was rotting and dangerous. On appeal, the Supreme Court of New South Wales upheld the jury's decision that in these circumstances the defendant was liable for misfeasance. The view was taken that if the defendant had done nothing, the bridge would have become impassable at some time well before the plaintiff Is accident. By redecking the bridge, but not remedying the defects in its base, the defendant had created a danger in the highway. The action of redecking the bridge was negligent because the defendant should have foreseen that heavy vehicles would pass over the bridge.
>
> In *Culcairn Shire Council v Kirk*,[20] on facts very similar to those in *Tickie*, the opposite result was reached. In that case, the defendant had partially repaired a wooden bridge by replacing its central longitudinal tracks while leaving the transverse decking below unrepaired. The bridge was only safe for the passage of heavy vehicles if they remained on the longitudinal tracks and the repair work which was done had merely

> maintained this situation. A heavy truck being driven across the bridge left the longitudinal tracks, fell through the transverse decking and was damaged. The Full Court of the Supreme Court found in favour of the defendant council holding that it was not guilty of misfeasance in repairing the bridge. As its repairs had not created a new danger, but had improved what otherwise might have been, it could not be liable for its failure to repair the whole bridge. This could only amount to nonfeasance. Although the Court distinguished *Tickle*, the distinction is "if not illusory, at the very least, undesirably fine".[21]
>
> In *McDonogh v Commonwealth*,[22] the plaintiff was injured when the tanker he was driving overturned on an unsealed road maintained by the Commonwealth. The road was of a "cut and fill" design and its edge was inadequate to carry the tanker's weight. No measures had been taken to warn vehicles about the soft edges of the road. Blackburn CJ, sitting at first instance, found for the Commonwealth. His Honour held that when the Commonwealth carries out the construction or maintenance of roadworks it is entitled to rely on the nonfeasance rule and that in this case no more than nonfeasance had been shown. Given the time of its construction (the exact date of which was not known), it had not been negligent to construct a road of cut and fill design. When the Commonwealth later became aware of heavier vehicles using the road, its failure to strengthen the road or take other protective measures was nonfeasance and therefore not actionable. On appeal to the Full Bench of the Federal Court, a majority of the Court found that there was misfeasance and that therefore the Commonwealth was liable. Misfeasance was found in the way regular maintenance work had been done by the Commonwealth. By grading and levelling the road and by compacting only some of the fill at the side of the road the Commonwealth had given the road the appearance of safety and uniformity across its surface. The Commonwealth had created and maintained a trap, and having done nothing to warn road users, was liable in negligence. Neaves J dissented, holding that there was no evidence that the maintenance work had been carried out negligently, nor that it "made the road unsafe or dangerous or concealed or contributed to the concealment of a dangerous situation that otherwise existed".

B. Source of Authority

2.12 The nonfeasance rule applies only to highway authorities and not to other public authorities, such as sewerage or drainage authorities, which may be called upon to maintain structures upon or under a roadway. Further refinement of this distinction is necessary where a single authority has multiple functions, including the construction and maintenance of highways. The immunity will only apply to a highway authority when acting in its capacity as such and not in respect of things omitted to be done in some other capacity.[23]

2.13 As it is somewhat fanciful to talk of the capacity in which an authority has failed to act, the courts have preferred to concentrate on the source of the danger for which liability is alleged. If the structure constituting the danger was placed upon or under the road for highway purposes, then the immunity will apply, but if the structure was placed there for some other purpose - such as drainage or traffic control - the immunity will not apply and the authority will be liable if it negligently fails to keep the structure in proper repair. As Fleming points out:

> As the combination of numerous functions in the hands of the same authority has become so prominent a feature of modern administrative Organisation, the "separate function" theorem can, not infrequently, be exploited to sidestep the immunity.[24]

For example, the fixing of traffic studs in a highway has been attributed to the function of a defendant authority as a traffic, not a highway, authority.[25]

2.14 Determining the authority under which a particular structure is placed in the highway is often difficult. This is demonstrated by the differences of opinion between Latham CJ and Dixon J (as he then was) in *Buckle v Bayswater Road Board*.[26] In that case, the plaintiff suffered injury as a result of treading in a hole caused when a drainpipe at the side of a road was damaged. The defendant Board was the statutory authority charged with repairing roads, but also had general drainage powers in the locality. The Board was responsible for the original construction of the drainpipe. Latham CJ and Dixon J applied the source of authority test and considered that liability depended upon the statutory power exercised by the defendant in the construction of the drain. Latham CJ found that the drain was constructed for a dual purpose - both for general drainage purposes and as part of the road construction plan - and held that in these circumstances the nonfeasance rule would not apply. Dixon J took a different view on the facts of the case and concluded that the drain had been built merely to drain the road

foundation and that therefore the nonfeasance rule applied. The remaining judge, McTiernan J, held for the plaintiff on slightly different grounds.[27]

C. Artificial Structures

2.15 The protection offered by the nonfeasance rule does not apply to artificial structures in or on the highway. This exception derives from the decision of the Privy Council in *Borough of Bathurst v MacPherson*.[28] In that case, the Borough had constructed a brick drain in the highway which over time had become defective, causing a hole to form in the road. The Borough had the care, control and management of the road and had the power to fix the drain, but had not done so. Their Lordships advised that in these circumstances:

> ... the duty was cast upon them of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway which, but for such artificial construction, would not have existed, or, at the least, of protecting the public against the danger, when it arose, either by filling up the hole or fencing it.[29]

2.16 There is no easily workable definition of what constitutes an artificial structure for the purposes of the exception. In the ordinary sense of the term, the highway surface itself is an artificial structure. Some explanation is offered by McTiernan J:

> The criterion for determining whether anything placed in the road is an artificial work must be the nature of the thing itself. It seems clear that the term should not be applied to a road or a section or a layer of road or its foundation made of artificial materials or of both artificial and natural materials ... The expression, as I understand it, denotes a structure which is appurtenant or subservient to a road but not a component part of the road fabric.[30]

Later cases considering the scope of the exception would seem to indicate that the barrel drain in issue in *Borough of Bathurst v MacPherson* would not now be treated as an artificial structure.[31]

2.17 The theoretical basis for the exception is also uncertain. It has been said that the failure to maintain an artificial structure is itself a species of misfeasance. For example, in *Municipal Council of Sydney v Bourke*, it was said of *Borough of Bathurst v MacPherson*:

> The ratio decidendi was that the defendants had caused a nuisance in the highway. It was entirely independent of the questions whether there was an obligation to keep the highway in repair, and whether any person injured by the breach of such a duty could maintain an action. The case was not treated as one of mere nonfeasance, and indeed it was not so. The defendants had created a nuisance. Having made the drain, and failed to keep it in such a condition that the road would not fall into it, they were just as much liable as if they had made the excavation without constructing the drain, and the road had consequently subsided and become founderous.[32]

This rationale for the exception seems to take a strained view of the notion of misfeasance, even by reference to the standard set in highway cases. If a structure is properly constructed in the first place and becomes dangerous only through subsequent failure to repair, it is very difficult to see how this can be treated as misfeasance. A more logical explanation for the exception would be as follows. Artificial structures are by definition structures which do not form part of the highway and are therefore not within the ambit of the nonfeasance rule. In the absence of the nonfeasance rule, the normal common law rules of negligence will apply. Applying general principles, the position of control over the artificial structure enjoyed by the highway authority is such that the authority is under a duty to take reasonable steps to prevent its constituting a danger to the public. Both these justifications for the exception were discussed by the New South Wales Supreme Court in *Grafton City Council v Riley Dodds (Australia) Ltd*.[33] The question is of some importance as, on the f irst view, a local authority will only be under a duty to maintain artif icial structures which it actually places in the highway. On the second view, a local authority would be responsible for maintaining all artif icial structures on the highway,[34] or at least all artificial structures over which it had previously exercised its powers of control.[35] The court in *Grafton City Council* chose to leave this point undecided.[36]

2.18 More fundamental are the doubts that exist as to whether the artificial structure exception is still available in Australia. Dixon J in *Buckle v Bayswater Road Board*[37] seemed to reject the exception, but it was applied by McTiernan J in the same case. It was ignored in *Gorringe v The Transport Commission (Tas)*[38] by Latham CJ and Dixon J, but accepted by Fullagar J. Professor Sawer,[39] writing in 1966, expressed doubts as to whether the exception was available to Australian courts. However, the High Court in the recent case of *Webb v The State of South Australia*[40] appeared to treat the exception as law, although its application was not strictly necessary for the decision in that case.

D. Successive Authorities

2.19 Special problems are created by the application of the nonfeasance rule in situations where successive authorities are responsible for the maintenance of the same road. if highway authority A is responsible for misfeasance in the construction or repair of a road, but the control of the road then passes to highway authority B, it has been held that only the authority actually guilty of the misfeasance alleged can be sued and that it can only be sued for so long as it continues to be responsible for the highway in question.[41] Furthermore, because of the nonfeasance rule, B cannot be liable for failure to remedy the defect resulting from the misfeasance of A, even if the defect is apparent. Accordingly, a plaintiff might be left without a remedy even though misfeasance can be shown on the part of the original authority. A similar consequence might follow where an artificial structure constructed by one authority passes into the control of another. This will depend on the view taken of the basis for the artificial structure exception (see para 2.17). Sawer argues that the exercise of control by a subsequent authority over an artificial structure will be enough to impose a civil duty of care on that authority.[42]

IV. THE AUTHORITIES TO WHOM THE RULE APPLIES

2.20 The nonfeasance rule applies to authorities “exercising powers for the construction, maintenance, repair and control of highways”.[43] For the purposes of the rule, “highway” is given its common law meaning. The essential characteristic of a highway at common law is that it be open to all members of the public.[44] Provided this requirement is satisfied, the expression will encompass remote and seldom used roads and ways as well as major roads considered highways in that term’s everyday sense. Furthermore, at common law, a highway need not be open to all classes of traffic. Thus the expression will include public footpaths, cycle-ways and bridlepaths, whether or not adjacent to roadways for motorised traffic.

A. The Commissioner for Main Roads and Local Councils

2.21 The principal highway authorities in New South Wales are the Commissioner for Main Roads and the respective local government authorities for various parts of the State. The powers and responsibilities of local councils in respect of public roads[45] are contained in Part IX of the Local Government Act 1919.[46] Power to construct, improve and maintain roads is conferred by s240 of the Act. Section 249 provides that “the council shall have the care control and management of every public road” and lists a number of specific powers relating to the control and use of roads.[47] Various other powers are conferred by Part IX covering a wide range of matters. These include power to stop traffic and take any other measures to protect the public from accidents while work is being carried out on a road[48] and power to erect posts or barriers on footpaths to prevent improper traffic or give warning of any danger.[49]

2.22 The State Road Act 1986 is concerned with the control and management of classified roads. Classified road means a road declared under s4 of the Act to be a main road, a secondary road, a State highway, a tourist road, a State work, a freeway or a controlled access road.[50] In general, classified roads are major roads carrying through traffic between various local government areas or between various parts of the State. Section 12 of the Act confers on the Commissioner for Main Roads the functions and immunities of a council in respect of a public road. In addition, many of the powers conferred on councils by the Local Government Act 1919 are specifically conferred on the Commissioner,[51] as are some additional powers.[52]

2.23 The result is that the Commissioner and local councils have concurrent powers in respect of classified roads.[53] The division of responsibility for the making of decisions as to what works of construction or maintenance are to be carried out on classified roads and for the carrying out of these works is provided for by s13 of the State Roads Act 1986. Responsibility for freeways, State works and toll roads is exclusively with the

Commissioner.[54] The Commissioner also has sole responsibility for making decisions as to what works are to be carried out on metropolitan main roads, State highways and other classified roads for which the Commissioner is responsible for the carrying out of the work.[55] Responsibility for the carrying out of work on classified roads can be divided between the Commissioner and local councils by agreement between them.[56] Failing agreement, the Commissioner may be authorised to carry out works in respect of a particular road by the Minister responsible for the administration of the Act.[57] Otherwise the road is under the care, control and management of the council.[58] Where a council carries out work on a classified road, the Commissioner may agree to provide financial or other assistance to the council in respect of that work.[59]

B. Other Authorities

2.24 A number of other statutory bodies construct and maintain public roads within public areas of which they have care, control and management. These include:

roads in national parks under the control of the Director of National Parks and Wildlife;

roads in State forests under the control of the Forestry Commission;

walking tracks on Crown land under the administration of the Department of Lands; and

roads within reserves or State recreation areas vested in trustees appointed under the Crown Lands Consolidation Act 1913 or the National Parks and Wildlife Act 1974 respectively.

The Commission is not aware of any cases in which any of these bodies has sought to rely on the nonfeasance rule, but it would appear that the immunity is available to them in respect of public roads under their authority.[60]

FOOTNOTES

1. *Russell v The Men of Devon* (1788) 2 TR 667, 100 ER 359.

2. *McKinnon v Penson* (1853) 8 Ex 319, 155 ER 1369; *Young v Davis* (1862) 7H & N 760, 158 ER 675; *Gibson v The Mayor of Preston* (1870) LR 5 QB 218.

3 *Griffith v Liverpool Corporation* [1966] 2 All ER 1015 at 1021 per Diplock.

4. Fullagar J described the extension of the rule to claims in negligence as “curious”: *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357-at 376-7.

5. *Bourke v Municipality of Sydney* [1895] AC 433 is usually quoted as authority for the introduction of the rule in Australia. Although the Commission has some doubts as to whether this case has been correctly interpreted on this point, the application of the rule to Australia has been put beyond doubt by later authority: *Buckle v Bayswater Road Board* (1936) 57 CLR 259.

6. *McDonogh v Commonwealth* (1985) 61 ACTR 22 at 24 per Blackburn CJ.

7. (1936) 57 CLR 259 at 281.

8. *Buckle v Bayswater Road Board* (1936) 57 CLR 259 at 283 per Dixon J.

9. *McClelland v Manchester Corporation* [1912] 1 KB 118 at 127 per Lush J.

10. *Clarke v Borough of North Sydney* (1893) NSWR 499.

11. *Hancock v Weddin Shire Council* (1949) 17 LGR (NSW) 192.

12. Support for such an argument can be found in the judgment of Fullagar J in *Gorringe v Transport Commission (Tas)* (1950) 80 CLR 357 at 380.

13. *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357; *Kirk v Culcairn Shire Council* [1964-5] NSWR 909.

14. See G Sawer “Non-feasance Under Fire” (1966) 2 NZULR 115 at 123 and the cases there cited.

15. Unreported, Supreme Court of New South Wales, 23 June 1986. The decision was on appeal at the time of writing (December 1987).

16. Clarke J relied on the dissenting judgment of Herron J (as he then was) in Florence v Marrickville Municipal Council (1960) SR (NSW) 562. He disapproved dicta of Owen T-in the same case which suggested that the inadequate repair of a pot-hole would not expose a highway authority to liability for misfeasance.

17. See for example, *Hocking v Attorney General* [1962] NZLR 118 and, on appeal, [1963] NZLR 513.

18. For further examples see *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357; *Hocking v Attorney General* [1963] NZLR 513; *Travis v Vanderloos* (1984) 54 LGRA 268; *Taylor v The Council of the Municipality of Marrickville* (Unreported) 11 April 1986, Supreme Court of New South Wales; Hill v the Commissioner for Main Roads (Unreported) 19 August 1987, Supreme Court of New South Wales.

19. (1954) 19 LGR (NSW) 256.

20. [1964-5] NSWR 909.

21. Law Reform Commission of Western Australia, *Report on the Liability of Highway Authorities for Non-Feasance* (Project No 62, 1983) at 48.

22. (1985) 61 ACTR 22.

23. *Buckle v Bayswater Road Board* (1936) 57 CLR 259.

24. J G Fleming *The Law of Torts* (6th ed Law Book Co 1983) at 406.

25. *Skilton v Epsom and Ewell Urban District Council* [1937] 1 TB KB 112.

26. (1936) 57 CLR 259.

27. McTiernan J treated the drain as an artificial structure, see paras 2.15-2.18.

28. (1879) 4 AC 256.

29. *Id* at 265.

30. *Buckle v Bayswater Road Board* (1936) 57 CLR 259 at 300.

31. See *Gorringe v Transport Corporation (Tas)* (1950) 80 CLR 357; *Hocking v Attorney General* [1963] NZLR 513.

32. [1895] AC 433 at 441.

33. (1956) SR (NSW) 53 at 60-62.

34. Note 14 at 128.

35. See *Sisson v North Sydney Municipal Council* [1966] 1 NSWR 580.

36. (1956) SR (NSW) 53 at 62.

37. (1939) 57 CLR 259 at 290-291.

38. (1950) 80 CLR 357.

39. Note 14 at 126.

40. (1982) S6 ALJR 912 at 913.

41. *Baxter v Stockton-on-Tees Corporation* [1959] 1 QB 441; *Florence v Marrickville Municiple Council* (1960) SR (NSW) 562.

42. Note 14 at 127.

43. *Buckle v Bayswater Road Board* (1936) CLR 259 at 286 per Dixon J.

44. Consequently, if a way can only legally be used by a limited section of the public, such as quarry workers, it is not a highway: *Leckhampton Quarries Co Ltd v Ballinger and Cheltenham Rural: District Council* (1904) 68 JP 464.

45. Section 4 of the Local Government Act 1919 includes the following definition:

"Public road" means road which the public are entitled to use, and includes any road dedicated as a public road by any person or notified, proclaimed or dedicated as a public road under the authority of any Act, including this Act, or classif ied as a main road in the Gazette of the thirty-first day of December, one thousand nine hundred and six.

46. Section 17 of the State Roads Act 1986 extends to the Commissioner for Main Roads the functions and immunities of a council in respect of roads not within a council area. This relates to the unincorporated area in the west of the State.

47. Section 249(a)-(cc).

48. Section 250(l).

49. Section 250(2).

50. The State Road Act 1986 replaced the previous legislation governing classified roads, the Main Roads Act 1924. Other classifications recognised by the earlier Act, for example trunk roads, have lapsed and these are now treated as ordinary main roads.

51. See ss18-25, 28-30, 3 2 , 34, S6, 62, 63, 66, 67, 71, 72, 87, 105. For example s29 confers on the Commissioner the powers enjoyed by local councils in respect of stoppage of traffic (see para 2.21).

52. For example s65 dealing with the removal of certain unattended vehicles. This power is more comprehensive than the corresponding power under the Local Government Act 1919 which only allows removal of abandoned vehicles.

53. The relationship between the powers of local councils and those conferred on the Commissioner for Main Roads by the predecessor to the State Roads Act 1986, the Main Roads Act 1924, was examined by the Supreme Court of New South Wales in *Commissioner for Main Roads v BP Australia Ltd & Anor* (1964) 82 WN (Pt 2) (NSW) 27. The case decided that the powers of councils were diminished to the extent necessary to give effect to any statutory right, power, duty or obligation conferred on the Commissioner. It is noted that local councils would not have authority to exercise powers in respect of freeways, the property in which is vested in the Commissioner by s40 of the State Roads Act 1986. This is because s221 of the Local Government Act 1919 provides that councils' powers shall not apply to a public road which is by law vested in any public body other

than a council. This section also means that councils would not have powers over roads in national parks, State forests or State recreation areas (see para 2.24).

54. Section 13(2) and (3).

55. Section 13(2).

56. Section 13(4).

57. Section 13(5).

58. Section 13(8).

59. Section 16.

60. Contacts made by the Commission with some of these authorities in the course of its consultation program received a mixed response. The Forestry Commission argued against the abolition of the nonfeasance rule with respect to roads under its control on the basis that to do so would have serious economic consequences and would prejudice its ability to carry out its functions under the Forestry Act 1916. Quite a different response was received from the Director of National Parks and Wildlife, who supported the abolition of the rule.

3. Public Authority Liability

I. INTRODUCTION

3.1 This chapter examines the liability for nonfeasance of public authorities other than highway authorities. Such an examination allows the scope of the immunity currently enjoyed by highway authorities to be placed in context and provides a basis upon which to assess the extent of liability that would be imposed on highway authorities if the nonfeasance rule were to be abolished.

II. GENERAL PRINCIPLES OF LIABILITY FOR NON-FEASANCE

3.2 Although liability in negligence can be based on either a negligent act or a negligent failure to act, the distinction between positive acts and mere omissions has traditionally been of considerable importance. Negligence can form the basis of a legal action only if shown to be in breach of a legal duty owed to the person injured. While the courts are ready to imply a duty to take reasonable care not to harm others by positive conduct, they are reluctant to imply a duty to take positive steps to protect others from injury.[1] As expressed by Lord Diplock, the general principle at common law is that no one has a legal duty to be a good Samaritan.[2] Accordingly, a doctor is under no duty to aid an injured stranger, nor is a good swimmer under a duty to go to the aid of someone who is drowning.[3]

3.3 Despite the general principle, a duty of affirmative care will be implied where a special relationship between the parties is found to justify it. Such a special relationship exists, for example, between parent and child, master and servant, occupier and entrant and carrier and passenger. Inherent in these relationships is the control that one party can exercise over the other or over the source of potential danger. Reliance is placed on the controlling party to act with due regard for the safety of others. In these circumstances it is thought reasonable to place the controlling party under a duty of care requiring affirmative action to safeguard others.

III. PUBLIC AUTHORITIES

A. Background

3.4 The application of these general principles to government authorities entrusted with the performance of public functions has presented some difficulties. Two special considerations arise when assessing the liability of public authorities.

> Because public authorities exercise discretionary powers given by statute, the courts are cautious when asked to review whether or not they have acted negligently.
>
> It is doubtful to what extent the reasons which lie behind the common law's general reluctance to require an individual to take positive action for the benefit of others have application to a public authority charged with exercising public functions.

The development of the law in this area has seen the courts attempting to strike an appropriate balance between these competing considerations. This task has not proved easy and has produced a complex body of case law which has shifted the balance from time to time.[4] A mingling of principles taken from public and private law has tended to confuse the development of the law[5] and it now appears that different principles may apply in Australia and England.[6] The Commission has decided not to include a comprehensive discussion of this process in this Report because the detailed analysis involved is not necessary to an understanding of the position highway authorities would be in following the abolition of the nonfeasance rule. An internal background paper has been prepared which traces the development of the case law in England and Australia in some detail.[7] What follows is a summary of the law in Australia relevant to determining the liability that would be imposed on highway authorities if the nonfeasance rule were abolished.

B. General Approach

3.5 The rules applying to public authorities reflect the general principles of liability for nonfeasance discussed at paras 3.2-3.3. The mere fact that a public authority has a statutory power to act will not of itself place it under a common law duty of care. Generally speaking, a person who suffers injury that could have been prevented by the reasonable exercise of powers vested in a public authority, will have no claim for damages against the authority.[8] However, this proposition is a starting point only and it is clear that in certain situations the conduct of a public authority, or the relationship between it and members of the public, will attract a common law duty of care to the authority. When this duty of care arises, it exposes public authorities to liability in negligence for failing to exercise their powers when it is reasonable to expect them to do so.

3.6 There has been some disagreement amongst members of the High Court as to the underlying principles governing the imposition of the duty of care. The leading authority is the case of *Heyman v Sutherland Shire Council*,[9] decided in 1985. In *Heyman*, two members of the High Court (Gibbs CJ, with whom Wilson J agreed) adopted the approach taken by the House of Lords in England in the case of *Anns v Merton Borough Council*.[10] In *Anns*, Lord Wilberforce (with whom all members of the House, other than Lord Salmon, agreed) stated that the question of whether a duty of care arises in a particular situation has to be approached in two stages:

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations 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.[11]

However, a majority of the High Court in *Heyman* (Mason J, as he then was, Brennan and Deane JJ) rejected this approach. Referring to the first tier of Lord Wilberforce's test of duty, they stated that mere foreseeability of harm is not a sufficient basis on which to make a finding of proximity for the purpose of establishing a prima facie duty of care, particularly where the duty sought to be imposed is a duty to take action to prevent harm.[12] All of the judges in the "majority" stressed the fact that at common law a duty to act only arises in special circumstances. Thus Brennan J stated:

> Some broader foundation than mere foreseeability must appear before a common law duty to act arises. There must also be either the undertaking of some task which leads another to rely on its being performed, or the ownership, occupation or use of land or chattels to found the duty. (Cf Windeyer J in *Hargrave v Goldman)*.[13]

Mason J agreed that the concept of reliance is crucial in displacing the general rule that a public authority which is under no statutory obligation to exercise a power is under no common law duty to do so.[14]

3.7 In fact the difference between the two principal approaches taken by the High Court in *Heyman* may not be as great as at first appears as Gibbs CJ also expressed reservations as to the possible scope of the first tier of Lord Wilberforce's test. In particular he said that something more than foreseeability of harm is necessary in order to establish the proximity necessary to give rise to a duty of care.[15]

C. Authorities in Control of Public Facilities

3.8 It is well established that an authority's ownership or control of a public structure or place (other than a highway) attracts to it a duty of care owed to members of the public using the facility.[16] The basis for the imposition of this duty is the reliance which members of the public place in the authority to keep the facility safe for use. This is made clear in the following passage taken from the leading judgment of Dixon in *Aiken v Kingborough Corporation*.

> Parks, gardens, playgrounds, shelters, swimming-pools, public picture galleries and public libraries are examples of places which are not highways but to which members of the public may go as of right. More often than not the care and management of, if not the property in, such places have been vested by or under statute in a corporation or in trustees who are obliged to give free access to the public, but who have full powers of maintenance and repair, as well as of management. The nature of the body as well as of the place must be considered, but, speaking generally, unless some other intention can be collected from the statute,

> a duty of care for the safety of those using the place must, I think, be cast upon the corporation or trustees by the very situation in which the statute has put them. They are in charge of a structure provided for the use of people who must, in using it, rely upon its freedom from dangers which the exercise of ordinary care on their own part would not avoid. Unless measures are taken to prevent it falling into disrepair or dilapidation or becoming defective, or if it does so, to warn or otherwise safeguard the users from the consequent dangers, it will become a source of injury. The body to which the statute has confided the care and management of the place alone has the means of securing the users against such injury, the risk of which arises from continuing to maintain the premises as a place of public resort and from the reliance which is ordinarily placed upon an absence of unusual or hidden dangers by persons making use of structures or other premises provided for public use.[17]

The weight of authority is such that it would not now be necessary for a trial judge to refer to an examination of general principles in order to establish the imposition of a duty of care in any like case.

3.9 Until very recently, some confusion existed as to whether the duty owed to persons entering public areas as of right depended upon the application of special principles relating to occupiers of land or upon ordinary principles of negligence.[18] Doubts also existed as to the precise formulation of the duty of care owed.[19] For example, in Aiken, Dixon J suggested that the duty imposed "an obligation to take reasonable care to prevent injury... through dangers arising from the state or condition of the premises which are not apparent and are not to be avoided by the exercise of ordinary care".[20] In a later case, Walsh J suggested that the better view was that the standard to be applied was the same as that owed by an occupier of land to an invitee, but added that the adoption of the Dixon formulation would make little practical difference.[21] It is not necessary to discuss these matters further as the whole area of occupier's liability and its relationship with ordinary negligence principles has now been rationalised by the High Court in the recent case of *Australian Safeway Stores Pty Ltd v Zaluzna*.[22] Following that decision, it is now clear that the principles to be applied in establishing the imposition of the duty are ordinary negligence principles and that the standard of care owed is simply the common law duty to take reasonable care having regard to all the circumstances of the case.

3.10 While the outcome of the inquiry as to whether reasonable care was taken in a particular case will depend solely on the facts of the case, some guidance as to the general approach taken by the courts can be obtained from examining the decisions in other cases. Two are discussed below.

3.11 In *Aiken v Kingborough Corporation*,[23] the Corporation was vested with the care, control and management of a jetty which was damaged during a storm, causing a dangerous gap between the pile and the decking of the jetty. The Corporation knew of the dangerous state of the jetty but did nothing to repair it. The plaintiff suffered injury when he fell down the gap in the decking while using the jetty at night. The judges of the High Court hearing the case on appeal observed that the duty owed was not a duty to repair, but a duty to safeguard users of the jetty from injury. Therefore the Corporation could have discharged its duty to safeguard users by adopting measures other than repair such as guarding or warning of the hole. Having done none of these things the Corporation was liable.

3.12 In *Schiller v Council of the Shire of Mulgrave*,[24] the Council was trustee of a scenic reserve which the public was entitled to enter as of right. Again, the court held that in the circumstances of the case the Council owed a duty of care to members of the public using the reserve. The plaintiff was injured while walking down a rough bush track in the reserve when a dead tree, which stood some 35 feet into the forest from the track, fell on him without warning. The track was not maintained by the Council, but the Council knew of it and of its use by the public. The court held that the Council knew, or should have known, of the danger posed by dead trees. While the Council may not have known of the particular tree which f ell and injured the plaintiff, the Council had failed to exercise reasonable care by neglecting to make any inspection of the area surrounding the track and by taking no steps to discover or to deal with any dead trees standing near the track. Accordingly, the Council was liable to compensate the plaintiff for his injuries.

3.13 These are clearly cases in which liability has been found to exist for nonfeasance. In each case, the authority had done nothing to create or contribute to the danger in question. Nevertheless, the authority was liable for negligent failure to protect members of the public from danger.

D. The Discretionary Function Immunity

3.14 In *Anns v Merton Borough Council*, Lord Wilberforce recognised that some decisions of public authorities were not to be made the subject of a duty of care. This exception to liability is sometimes referred to as the discretionary function immunity. Although doubting the decision in other respects, the members of the High Court in *Heyman* did approve of the immunity as defined by Lord Wilberforce in Anns.[25] Consideration of the immunity depends upon drawing a distinction between administrative error on the policy and operational levels. The meaning of these terms was explained by Lord Wilberforce.

> Most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of 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 the practical execution of policy decisions: a convenient description of this is to say that in addition to the area of polic or discretion, there is an operational area.[26]

The importance of the distinction is that a common law duty of care cannot arise in relation to acts and omissions which reflect the policy-making and discretionary elements involved in the exercise of statutory functions. The reasons for this are explained well by Fleming:

> 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 Is condition worse or merely failing to improve it.[27]

3.15 As is noted by Lord Wilberforce, the distinction is not always clear cut:

> 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 or 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.[28]

The mere fact that the decision in question is taken by a workman in the field does not prevent it from being a policy decision. “Higher policy organs of government may delegate their policy-making powers to those charged with dealing with problems on a day-to-day basis”.[29] Further guidance in making the distinction is provided by Mason J in *Heyman*:

> The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognise that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.[30]

IV. APPLICATION TO HIGHWAY AUTHORITIES

A. Imposition of a Duty of Care

3.16 The abolition of the nonfeasance rule would allow the liability of highway authorities to be determined on the same basis as that of all other public authorities. This would result in highway authorities coming under a common law duty of care to users of the highway. The imposition of this duty of care is justified by reference to cases in which a duty of care has been imposed on other public authorities in charge of public facilities (paras 3.8-3.13) and is clear as a matter of general principle. As discussed above, reliance is central to the relationship of proximity necessary to establish the imposition of a common law duty of care to take action to prevent harm to others. Aronson and Whitmore have commented on the reliance placed by members of the public in highway authorities. They state:

> Motorists, for example, depend on the authorities to provide hazard warnings, and drive accordingly. Their dependence is justifiable, as the authorities are capable of giving the warnings, possess superior information of the hazards, and generally do give warnings.[31]

They continue, in a note to the text:

> It is clear that there is in fact a “special relationship” between motorists and highway authorities, such that if one were to apply the normal principles of negligence law, the authorities would often be liable for omissions.[32]

Indeed, driving is probably the most hazardous activity that people commonly engage in, and it is difficult to conceive of a situation in which greater reliance is placed on others to act responsibly.[33]

3.17 The imposition of a duty of care on highway authorities would be subject to the discretionary function immunity, discussed above (paras 3.14-3.15). The significance of the immunity is that policy decisions, that is, decisions involving the exercise of a policy discretion conferred by the legislature or involving the conscious allocation of resources, cannot become the subject of a duty of care reviewable by the courts in negligence actions. Highway authorities are entrusted with the care, control and management of highways for the public benefit and are given powers to act rather than duties to do so.[34] A discretion is vested in the authorities as to when and how they will exercise their powers. They are required to work under strict budgetary constraints and must determine how best to allocate their limited funds among the many projects competing for their attention. The combination of these factors suggests that, not infrequently, highway authorities could rely on the discretionary function immunity.[35] The immunity is important as it would allow highway authorities to make planning decisions and set financial priorities free from the prospect of liability in negligence. Two Canadian cases involving highway authorities illustrate the way in which the immunity might be applied in particular situations.[36]

3.19 In *Barratt v District of North Vancouver*,[37] the plaintiff was injured when his bicycle ran into a large pothole containing water. The court noted that the municipality would be liable only if it knew or should have known of the existence of the pothole. As the municipality did not have actual knowledge of the pothole, to succeed the plaintiff had to be able to show that the municipality should have known of its existence by making more frequent inspections than it had. This involved an examination of the reasonableness of the municipality’s inspection program. The trial judge in the case found the inspection program to be inadequate and held that the municipality had failed to take reasonable care to safeguard road-users and was therefore liable to compensate the plaintiff for his injuries. This finding was reversed on appeal to the British Columbia Court of Appeal. Delivering the judgment of the Court of Appeal, Robertson JA suggested that the trial judge had fallen into error in failing to give proper recognition to the fact that the defendant was a public authority discharging public functions. Referring to the principles stated by the House of Lords in *Anns*, his Honour held that the frequency with which inspections should be made was a policy matter for the municipality to determine in the light of its budgetary constraints. Therefore the decision could not be made the subject of a duty of care owed to the plaintiff. Whether or not the authority’s decision was ‘reasonable’, it could not form a basis for finding the municipality liable in negligence. This approach was approved on appeal to the Supreme Court of Canada.[38]

3.20 In *Just v R in the Right of British Columbia*,[39] the plaintiff was seriously injured when a boulder fell from a bluff onto his car while he was travelling along a highway maintained by the Crown. The Crown had established a rock-scaling crew, whose function was to deal with dangers arising from cliff faces throughout the Province. Apart from times when particular dangers were brought to its attention, the crew developed and followed its own work program. The plaintiff alleged that, had the crew exercised reasonable care, it would have discovered and removed the boulder which caused his accident. Furthermore, the plaintiff contended that, while the decision to establish the crew was a policy decision, whether or not the crew chose to inspect or work on a particular site was an operational function. This contention was rejected by the court. McLachlin J noted that the authority delegated to the crew gave wide discretion as to the areas to be inspected and the work to be carried out. The exercise of the discretion involved the crew in planning inspection programs, in deciding how best to utilise its resources and in determining the standards to which it would work, all of which suggested a policy, as opposed to an operational, function.[40] Accordingly, it was concluded that the decision complained of fell within the policy area and the plaintiff’s claim was dismissed.

3.21 Not all functions which involve the exercise of discretion fall within the policy area. As the Supreme Court pointed out in Barratt, although the formulation of an inspection program is a policy matter, the implementation of the program is predominantly an operational function.[41] Therefore a highway authority could be held liable for the negligent failure of its employees to adhere to its inspection program. An authority might also be liable for the failure of its inspectors to discover defects which the inspections made should have revealed.

B. Nature of the Duty and Matters Relating to Breach

3.22 The duty imposed on highway authorities would be a duty to take reasonable care in the circumstances of the case. The question whether reasonable care has been taken in a particular case will depend solely on a consideration of the facts of the case . It is not possible, therefore, to state in abstract what obligations the duty will impose. However, some observations can be made on the extent of the duty and the likely general approach of the courts to the question of breach.

3.23 First, the duty will be concerned only with the protection of road-users from personal injury or damage to their property. The duty owed will not be a duty to repair and could be discharged by employing measures other than repair.[42] The measures which might be taken include placing a warning sign or protective barrier adjacent to the dangerous area or employing a roadworker to direct traffic around the affected area. Whether the steps taken are sufficient to satisfy the standard of reasonable care will be a question of fact to be decided in each case. A warning sign will not suffice if it is of no practical use. For example, on the facts in *Schiller* (see para 3.18), Gibbs J stated that once the Council had become aware of the existence of the dead tree it should have removed the tree or closed the nearby track. He continued:

> It would, in my opinion, have served no good purpose merely to warn persons using the track; if the tree fell it might, as the event showed, come down so suddenly that a person on the track could not escape it, and the fact that he was warned of the possibility of danger would not help him.[43]

3.24 A second point arises, closely related to the first. An action for breach of the duty will only lie in respect of claims for personal injury or property damage. The duty under discussion is not concerned with the protection of whatever other interests members of the public might have in the maintenance of an efficient highway network, for example, economic interests. Therefore, a highway authority that carelessly allows a road to fall into an impassable state will not find itself liable to compensate truck operators who suffer economic loss because they can no longer use the road to conduct their businesses.[44]

3.25 Thirdly, highway authorities will only be liable for dangers to public safety of which they knew or ought to have known.[45] If, for instance, through no fault of the authority in control, a portion of a highway collapses and a driver is injured, the highway authority will not be liable unless it can be shown that it acted unreasonably in not discovering the defect and in not taking measures to protect the public. if the time between the danger arising and the accident is very short, or if the highway in question is in a remote country area, it may be difficult for a person who is injured to show a breach of the duty of care.

3.26 Finally, as stated above, the question of breach of a highway authority's duty to road-users will be considered in the light of all the circumstances of the case in question. In *Miller v McKeon*,[46] a case in which negligent construction of a highway was alleged, Griffith CJ set down the factors which he thought might have particular relevance to dangers on highways. He said:

> (T)he Government of a newly-settled country, which undertakes the first formation of a road, whether the soil has or has not been formally dedicated as a highway, is bound to use such care to avoid danger to persons using it as is reasonable under all the circumstances. These circumstances include the nature of the locality, the extent of the settlement, the probabilities as to the persons by whom the road is likely to be used, and the moneys available to the Government for the purpose; it being always assumed that the persons using the road will themselves take ordinary care.[47]

It is open to the courts to take a very flexible approach to determining liability. The quality of care and supervision expected of a country council in respect of a remote country lane will be very different from that required of the Commissioner for Main Roads in respect of a major freeway. The decision in *Miller v McKeon* illustrates this point. In that case, the plaintiff was injured when he fell into a cutting at the side of a little used country road. He

alleged that the Government of New South Wales, which had constructed the road, had been negligent in not fencing off the cutting. The cutting had remained unprotected for 20 years or more, without any previous accident being recorded. On these facts, and taking into account the locality of the road, the High Court held that there was no sufficient evidence of negligence to allow the matter to go before a jury.

3.27 One of the factors of particular interest referred to by Griffith CJ was the finance available for road-work. Generally speaking, the financial resources of a wrongdoer are not relevant in determining whether there has been negligence.[48] Allowing such evidence in relation to highway cases gives recognition to the fact that the construction of highways is undertaken for the public benefit and that constructing authorities must do the best they can with limited resources. The purpose of the inquiry into an authority's financial resources is not to ensure that the authority has made a reasonable allocation of its available resources. Later cases have made it clear that evidence relating to the availability of funds will be accepted in general terms only, and solely for the purpose of throwing light on the question of the condition of roads in the neighbourhood and the standards of perfection that can reasonably be expected of a road-making authority in the locality.[49] Better protection is now afforded by the discretionary function immunity.

FOOTNOTES

1. As to liability for omissions generally see Smith and Burns "*Donoghue v Stevenson* the Not So Golden Anniversary" (1983) T6 MLR 147.

2. *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 at 1060.

3. J G Fleming The Law of Torts (6th ed Law Book Co 1983) at 138 and the authorities there cited.

4. Compare *Mersey Docks v Gibbs* (1866) 11 HLC 686; *East Suffolk Catchment Board v Kent* [1941] AC 74; *Dorset Yatch Co Ltd v Home Office* [1970] AC 1004; *Sutherland Shire Council v Heyman* 59 ALJR 564, (l985) 60 ALR 1.

5. *Dorset Yatch Co Ltd v Home Office* [1970] AC 1004; *Anns v Merton Borough Council* [1978] AC 728.

6. Compare *Sutherland Shire Council v Heyman* (1985) 59 ALJR 564, (1985) 60 ALR 1 with *Anns v Merton Borough Council* [1978] AC 728 and *Peabody Donation Fund v Sir Lindsay Parkinson Ltd* [1984] 3 WLR 953.

7. Hirshman "Public Authority Liability" March 1987 (internal Commission research paper).

8. *East Suffolk Catchment Board v Kent* [1941] AC 74; *Revesz v Commonwealth of Australia* (1951) 51 SR (NSW) 63; *Administrator of Papua New Guinea v Leahy* (1961) 105 CLR 6.

9. (1985) 59 ALJR 564, (1985) 60 ALR 1.

10. [1978] AC 728.

11. *Id* at 751-752.

12. (1985) 59 ALJR 564 at 597, (1985) 60 ALR 1 at 59 (Deane J), at 587, 42 (Brennan J).

13. *Id* at 587, 42; *Hargrave v Goldman* [1967] 1 AC 645.

14. *Id* at 579, 29. In Mason J's view, the reliance could be specific, that is induced by the previous conduct of the defendant, or it could be in the nature of general reliance by the public as a whole on the exercise of the power by the authority. It is not clear whether Brennan and Deane JJ regarded general reliance by the public as sufficient to found the liability (Brennan J at 590, 47; Deane J at 600, 65).

15. *Id* at 570, 14.

16. *Buckle v Bayswater Road Board* (1936) 57 CLR 259; *Aiken v Kingborough Corporation* (193-9) 62 CLR 179; *Schiller v Council of the Shire of Mulgrave* (1972) 129 CLR 116.

17. (1939) 62 CLR 179 at 205-206.

18. Compare the judgments of Barwick CJ and Walsh J in *Schiller v Council of the Shire of Mulgrave* (1972) 129 CLR 116.

19. *Barr v Manly Municipal Council* (1967) 70 SR (NSW) 119.

20. *Aiken v Kingborough Corporation* (1939) 62 CLR 179 at 210.

21. *Schiller v Council of the Shire of Mulgrave* (1972) 129 CLR 116. Compare the position at common law in England, where the approach has been to treat entrants as of right as if they were licensees: *Pearson v Lambeth Borough Council* [1950] 2 KB 353. The matter is now governed by statute: see Occupiers' Liability Act 1957 (UK). The Act provides for a common duty of care applicable to all categories of lawful entrants: s1(1).

22. (1987) 61 ALJR 180.

23. (1939) 62 CLR 179.

24. (1972) 129 CLR 116.

25. (1985) 59 ALJR 564 at 570, (1985) 60 ALR 1 at 14 (Gibbs CJ); at 582, 34-35 (Mason J); at 596, 57-58 (Deane J).

26. [1978] AC 728 at 754.

27. Note 3 at 145.

28. [1978] AC 728 at 754.

29. *Just v R in the Right of British Columbia* [1985] 5 WWR 570 at 576 per McLachlin J.

30. (1985) 59 ALJR 564 at 582, (1985) 60 ALR I at 34-35.

31. Aronson and Whitmore *Public Torts and Contracts* (Law Book Co 1982) at 108.

32. *Id* at 108, fn 36.

33. For the sake of completeness it is necessary to mention a point raised by the Law Reform Commission of Western Australia: *Report on the Liability of Highway Authorities for Non-Feasance* (project 62, 1981). The Commission referred to doubts existing as to whether a duty to take care would arise automatically upon abolition of the rule. Accordingly, the Commission felt it advisable to recommend that such a duty be specifically imposed upon highway authorities by statute. The Commission's comments were based on the views expressed in an article written by Professor Geoffrey Sawer ("Non-Feasance Under Fire" (1966) 2 NZULR 115) in which he suggested that, even in the absence of the nonfeasance rule, grave doubts existed as to whether there was any substantive basis for imposing civil liability on highway authorities in the nonfeasance situation. In reaching this conclusion, he argued that Acts imposing duties or powers to repair highways were made for the benefit of the public at large and that in these circumstances "the presumption would be that no individual suffering injury from the breach of the statutory duty would be entitled to recover in a civil action for damages" (page 117). It is submitted that this argument fails to distinguish adequately between the special rules relating to common law actions for breach of duties imposed by statute and the general principles concerned with the imposition of a common law duty of care. Significantly, Professor Sawer was writing before the decisions in *Anns* and *Heyman*. As Mason J points out in *Heyman*, the presumption referred to above has no application to the liability of an authority for breach of a common law duty of care. Therefore, despite Professor Sawer's comments, the Commission is of the view that a common law duty of care would arise upon the abolition of the nonfeasance rule.

34. See paras 2.21-2.23.

35. The immunity has been applied to highway authorities in cases in England and Canada: see *Haydon v Kent County Council* [1978] 2 All ER 97 and *Allison v Corby District Council* [1980] RTR 111. The English cases must be addressed with some caution as, in England, highway authorities are under a statutory duty to maintain highways. Although there is some difference of opinion as to what the scope of the duty to maintain is (see *Haydon v Kent County Council* [1978] 2 All ER 97 at 105 per Denning MR, compare Gott LJ at 106), it would seem that the policy immunity will only become relevant when considering actions based on liability arising at common law and only in respect of failures to act falling outside the ambit of the statutory duty to maintain: see Goff LJ at 108.

36. British Columbian cases have been chosen because the law in that Province most closely resembles the position that would arise in New South Wales upon a simple abolition of the nonfeasance rule. Unlike other jurisdictions examined by the Commission (eg England and other Canadian provinces), which impose statutory duties to repair on highway authorities, the liability of highway authorities in British Columbia has fallen to be determined solely by the application of common law principles.

37. (1978) 89 DLR (3rd) 473 (British Columbia Court of Appeal).

38. (1980) 114 DLR (3d) 577 (Supreme Court of Canada).

39. [1985] 5 WWR 570.

40. *Id* at 575-576.

41. *Id* at S76.

42. For example, in *Aiken* the defendant authority was not required to repair t e jetty. It could have discharged the duty by simply erecting safety barriers.

43. (1972) 129 CLR 116 at 135.

44. Although financial loss of the type suggested might well be said to be foreseeable, it is clear that "the reasonable foreseeability of a real risk of such loss does not of itself suffice to give rise to a prima facie duty to take care to avoid it": *Sutherland Shire Council v Heyman* (1985) 59 ALJR 564 at 597, (1985) 60-ALR 1 at 59 per Deane J. Recovery of economic loss requires the plaintiff to show a much closer relationship of proximity than mere foreseeability of loss. The defendant must have knowledge of the plaintiff as a specific individual rather than as a member of a general class: *Caltex Oil (Aust) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529. Moreover, the general reasoning which lies behind the refusal to allow recovery for economic loss in other than exceptional cases, the concern with "endless indeterminable liability" (*Sutherland Shire Council v Heyman* (1985) 59 ALJR 564 at 581, (1985) 60 ALR 1 at 32 per Mason J) indicate that recovery will not be allowed in highway cases, where the potential for indeterminable liability is particularly apparent.

45. *Barr v Manly Municipal Council* (1967) 70 SR (NSW) 119.

46. (1905) 3 CLR 50.

47. *Id* at 60.

48. Compare *Goldman v Hargrave* [1967] 1 AC 645 in which it was held that a defendant's resources are relevant in determining the scope of a duty to abate dangers arising naturally on land.

49. *Wenbam v Lane Cove Municipal Council* (1918) 18 SR (NSW) *Samways v Sutherland Council* (1932) 11 LGR 41; *Woodward v Orana Shire Council* (1949) 49 SR (NSW) 63.

4. Appraisal of the Non-Feasance Rule

I. INTRODUCTION

4.1 This chapter examines the arguments for and against the abolition of the nonfeasance rule. The arguments in favour of abolition were set out in the Commission's consultative paper, distributed to highway authorities and other interested groups in September 1986.[1] The responses received to that paper are discussed below. After assessing the opposing arguments the Commission remains convinced that the arguments in favour of abolition are sound in principle.

4.2 Most opposing abolition of the rule did not take issue with the legal arguments in favour of abolition. Rather they argued that there are considerations which outweigh these matters of principle. These relate to the economic impact that abolition of the rule would have on highway authorities, in particular on the local councils. These economic arguments are discussed in the second section of this chapter and have been taken into account by the Commission in framing its recommendations for reform, particularly in the recommendation that claims against highway authorities be included in the Transcover scheme (see para 5.28).

II. THE CASE FOR ABOLITION

A. The Immunity is Anomalous

4.3 The nonfeasance rule confers on highway authorities an immunity not enjoyed by any other public authority. It is a clear exception to the application of general principles of negligence.[2] The result is that highway authorities can never be liable for nonfeasance, no matter how unreasonable their failure to act in a given situation.

4.4 It has been suggested that this special treatment of highway authorities is justified by the unique nature of their responsibilities and the sheer size of the task of maintaining the highway system.[3] In its submission to the Commission, the Shire Council of Bourke said:

> A public road is different to many other public facilities. Most facilities can be simply closed or their use altered if maintenance funding becomes inadequate. Alternatively, the risk of failure of some facilities is very low or they are not used in a manner likely to generate injury or property loss. A road on the other hand is forever under repair and traditionally people have accepted the risk associated with travelling along a road whose conditions may vary with time in return for the social and economic benefits of the journey.

Similarly, Bland Shire Council argued:

> The Council submits that while it may have a choice of whether or not to provide many services or facilities it does not have such a choice in relation to roads. Roads once open to the public cannot be closed without the approval of the State Government and this factor alone is one distinction between roads and other facilities and services provided by the Council.

Similar views were expressed in the submission received from the Commissioner for Main Roads.

4.5 The Commission does not accept that these arguments justify a total immunity. Other public authorities in charge of public areas such as parks owe a duty of care to their users. Other public authorities are also charged with the maintenance of vast public utilities, for example the gas, water, sewerage and electricity systems.[4] In these circumstances, as discussed in Chapter 3, the nature and range of the authorities' responsibilities are taken into account when the standard of care expected of them is determined. The same would be true in relation to highway authorities after abolition of the nonfeasance rule. In view of this, the absolute immunity cannot be justified. The Commission believes that where a highway authority's performance is below the required standard of care, even after full consideration is given to the magnitude of its task, it should be liable to compensate a person injured as a result.

4.6 Although the power to close public roads permanently is limited and the procedures complex, highway authorities do have power to close roads temporarily to effect repairs and to take measures for the protection of

the public from accidents.[5] There is therefore some flexibility in the way highway authorities can arrange their repairs. It is the Commission's view that any limitation on the powers of highway authorities to close roads permanently is more properly regarded as an element in determining whether or not they have acted negligently in a particular situation.

B. The Hardship Created

4.7 At present the rule operates to deny recovery to injured persons[6] even in circumstances where a highway authority's failure to act is clearly unreasonable. Application of the ordinary principles of negligence would mean that highway authorities would be liable for nonfeasance provided fault can be shown. The inability to recover damages imposes unacceptable financial hardship on accident victims and their dependents. A person might be left severely incapacitated, or a family deprived of its sole source of income, without receiving any financial compensation. A rule which leads to such consequences on the basis of what, to those affected, must appear to be a mere technicality can only bring the law into disrepute. The niceties of legal argument on the question of whether in borderline cases the defendant authority's wrongful conduct constitutes misfeasance or nonfeasance provide no sound basis on which to deny compensation.

4.8 In the consultative paper the Commission stated:

> There seems no reason why the traditional reasons for assigning liability [the fault principle] should not apply to highway authorities. They are in the best position to avoid or reduce the risk to users of the highways and to insure against them. Redistribution of loss, from the victim to the highway authority, allows the loss to be borne by the whole community which is in a better position to bear it.

This statement attracted comment from a number of respondents to the paper. A number of local councils questioned whether the fact that some members of the public suffer loss without compensation is any reason for reform. They criticised what they saw to be a general trend in the law of negligence "that every time someone is involved in an accident, someone must be blamed and compensation must be paid"[7] and argued that abolition of the nonfeasance rule would remove the incentive for individuals to take care for their own safety. The Commission is not persuaded by these arguments. Although the fault principle is not an ideal means of adjusting the social costs of accidents, while it persists there seems no reason why individuals who can show fault on the part of a highway authority should be denied compensation. Nor does the Commission accept that the prospect of the payment of compensation will remove the incentive to guard against personal injury. This argument may have some force in regard to the avoidance of property damage, but even there the Commission finds it difficult to accept. The right to compensation depends on proof of negligence in the authority and is liable to a reduction for contributory negligence in cases where the plaintiff is also at fault. Meanwhile, abolition of the nonfeasance rule may provide added incentive for highway authorities to guard against accidents caused by factors within their control.

4.9 A number of respondents took issue with the view that transfer of the loss from the victim to a highway authority allows redistribution of the loss to the whole community. Several local councils argued that a distinction must be made between "the whole community" and "the local community" made up of a ratepayers, and the point was made that many rural councils have very small rate bases.[8] It is the Commission's view that highway authorities do provide a reasonably fair avenue for loss distribution and certainly a fairer one than leaving the loss to be borne by the individual. Most people pay rates, either directly or indirectly through rent and, in any event, road costs are met not only through rate revenue but through Commonwealth and State grants. To a great extent it is the members of the local community who use and benefit from local roads and it is fair that they should meet the costs of these roads. Where roads are important not only for local use but for through traffic, it is the policy of the State Roads Act 1986 that partial and in some cases total responsibility for maintenance should pass to the Commissioner for Main Roads,[9] thus allowing the costs associated with these roads to be distributed more widely to the general body of taxpayers.

C. Ambiguities in the Existing Law

4.10 Abolition of the nonfeasance rule would remove the need to make the nebulous distinctions that characterise application of the rule. These distinctions and the difficulties surrounding their application are described at paras 2.6 to 2.18. As noted in para 2.6, the complexity and uncertainty introduced into the law by the

need to make these distinctions is itself a strong argument for reform. This argument might be answered if it could be shown that the distinctions were of some value in determining the situations in which highway authorities should be exposed to liability. However, in the Commission's view, the distinctions are without merit for this purpose. Consider the central distinction made between nonfeasance and misfeasance. A highway authority can never be liable for nonfeasance, yet a highway authority's failure to act in a given situation might be just as culpable as negligent action. What should be at issue is the reasonableness in all the circumstances of the case of the highway authority's conduct, whether founded in action or inaction. Similar arguments can be made in respect of the distinction made between public authorities acting in their capacity as highway authorities or in some other capacity and the distinction between artificial structures and the fabric of the highway itself. There is no reason to suppose that local councils have or should have less regard for public safety in the maintenance of highways than they have in the maintenance of other public amenities or that highway authorities themselves distinguish between artificial structures and the highway itself in assessing whether repair work is to be done.

4.11 In its submission to the Commission, the Local Government and Shires Associations sought to justify the non-feasance/misfeasance distinction in the following way:

> Where a road authority elects to carry out work on a particular section of a road under its control it is in a good position to examine what the consequences of that work will be. Thus, if a consequence is that a dangerous situation is created and damage could be expected it would reasonably be held liable for that damage. In this way the liability under the common law for misfeasance can be justified.
>
> However, we say that a highway authority, with scarce resources, cannot be expected to be liable for all situations which potentially may arise on all sections of the roads under its control in the event that certain works, whatever they may be, are not carried out by it. Thus there is equal justification for the existing common law immunity for nonfeasance.
>
> We would submit that while resources for roadworks remain limited, road users must continue to recognise that repairs may not be effected on all areas of road and they must be prepared to regulate their driving accordingly. On the other hand, we accept that road users are entitled to be protected against traps created by road authorities or arising from works undertaken.

In the Commission's opinion, the Associations' argument is flawed. It is not correct to say that because a highway authority cannot be expected to be liable in all situations that may arise, it should never be held liable. Application of ordinary principles of negligence would not impose an absolute liability. The Associations' argument does not support the proposition that highway authorities should be immune from liability even where, taking into account all the circumstances of the case, they have behaved negligently in failing to act.

D. The Rule Provides an Incentive Not to Repair

4.12 In theory the nonfeasance rule provides a disincentive for highway authorities to undertake repair works. If they undertake the work, or attempt partial repairs, they risk liability for misfeasance. If they do nothing they are safe. While there is no evidence to suggest that highway authorities succumb to this temptation, it is undesirable that the temptation exists.[10] Conversely, if the rule were abolished, there would be an incentive for highway authorities to carry out maintenance and to take other measures aimed at preventing accidents in order to reduce their exposure to liability. This would provide a much more satisfactory basis for the law.

III. THE COST TO HIGHWAY AUTHORITIES OF ABOLITION OF THE RULE

4.13 Against the arguments in favour of the abolition of the rule must be weighed the effect that abolition would have on the financial position of highway authorities and on the ratepayers and taxpayers who fund their operations. In this calculation, the benefits to those individuals who are compensated must be weighed against the cost to society as a whole. In making this assessment it must also be remembered that there are other more general benefits which might arise from the abolition of the nonfeasance rule. For example, the removal of the rule might prompt highway authorities to spend more money on road maintenance and accident prevention. This would help not only to reduce the number of accidents causing loss to individuals, it would confer the wider social and economic benefits flowing from the provision of a safer and more efficient road system. Payment of

compensation to accident victims will be of benefit to society as a whole in reducing their need to be maintained through social security payments.

4.14 In their submissions to the Commission, highway authorities argued that the abolition of the nonfeasance rule would impose a substantial, and some said intolerable, financial burden on them. The main areas identified in which extra costs would be incurred were:

compensation payments and insurance premiums;

road maintenance; and

administrative and legal costs in processing claims.

A. Compensation Payments and Insurance Premiums

4.15 Following abolition of the nonfeasance rule, highway authorities would be liable to compensate accident victims who could show negligent inaction on the part of the authority. In general, highway authorities appear to have taken the view that the standard of care expected of them would be unrealistically high and that in practice they would be liable to compensate virtually all accident victims who could show some connection between their accident and the condition of the highway. They also commented on the high level of the awards made in personal injury claims and pointed out that the possibility of insurance provided little solace as premiums would necessarily reflect the level of their liability and would be beyond their means. Some local councils expressed doubts as to whether insurance would be available at any price.

4.16 The Commission believes that on the whole highway authorities have taken an unduly pessimistic view of the extent of liability that would be imposed. Reference is made to the examination of this area in Chapter 3. Nevertheless, it is beyond doubt that additional liability for negligence would result from abolition of the rule and the Commission has framed its recommendations for reform with a view to keeping the level of this liability within reasonable grounds.[11] The problem of obtaining insurance has also been addressed.[12]

B. Road Maintenance Costs

4.17 Road maintenance costs would increase if highway authorities chose to spend more money on maintenance and accident prevention strategies in order to reduce the risk of common law claims. A number of local councils, particularly those in the western areas of the State, stated that because of funding constraints in the past their roads were in very poor condition and that major expenditure on maintenance would be needed if the rule were abolished.

4.18 In response the Commission points out that the standard of reasonableness that would arise upon abolition of the nonfeasance rule would be directed at the relevant highway authority's conduct in the light of the circumstances of the case and not directly at the standard of its roads. The quality of care and supervision expected will vary with the type of road (see para 3.26) and will be dictated in part by the budgetary constraints under which the highway authority operates. Moreover, abolition of the rule will not necessarily require any extra expenditure on maintenance. Highway authorities could choose simply to meet the cost of claims. However, as pointed out above, there would be an incentive for councils to carry out works of maintenance or take other preventative measures to reduce their exposure to common law liability. In theory, a highway authority will only take action to prevent accidents if the cost of taking that action is less than (or equal to) the cost of claims it would experience if it did nothing. The result should be that expenditure on maintenance will tend towards an economically efficient level such that the total cost of road works and personal loss through accidents is minimised.

C. Administrative and Legal Costs

4.19 Abolition of the nonfeasance rule would lead to more claims being made against highway authorities and accordingly to additional administrative and legal costs in processing and defending them. A number of local councils expressed concern at the level of nuisance and fraudulent claims that might arise, particularly in respect of property damage to vehicles. Of course, these sorts of problems are not unique to highway authorities. They are a feature of the existing fault-based system of accident compensation. However, they are of particular

concern in that, unlike the other heads of expenditure identified above, expenditure incurred in defending and processing claims produces no tangible benefit. Again, the Commission has taken these matters into account in framing its recommendations for reform.[13]

D. Experience in England and Canada

4.20 The nonfeasance rule has been abolished by statute in England and has never been applied in most Canadian Provinces. In its consultative paper the Commission stated that:

> It is difficult to estimate the likely increase in cost on abolition of the rule. Experience in England and Canada would seem to indicate that the increased burden will not be intolerable. In those jurisdictions the statutory liability imposed on highway authorities is more onerous than would be imposed by the common law following abolition of the nonfeasance rule[14] and yet there is no evidence that these authorities have encountered major difficulties in meeting their commitments.

A number of local councils and the Local Government and Shires Associations disputed whether the position in England and Canada could be compared with that in Australia. This was based on the far greater length of roads per head of population in Australia, on the fact that a comparatively high percentage of roads in Australia are unsealed and on the high level of awards for personal injury made in Australia. The Commission acknowledges these points and the fact that experience in England and Canada provides at best only a rough guide. Nevertheless, the experience in these jurisdictions lends more support to the view that the abolition of the nonfeasance rule in this State would not be an intolerable burden on highway authorities than it does to the contrary view.

FOOTNOTES

1. The consultation program is described at paras 1.6-1.10.

2. These principles and the way in which they would apply to highway authorities if the rule were abolished are discussed in Ch 3.

3. Such an argument was considered by the Law Reform Commission of Western Australia *Report on the Liability of Highway Authorities for Non-Feasance*. (Project 62, 1981) at paras 7.22-7.26 and was also raised in submissions received from the Department of Main Roads and a number of local councils.

4. The Commissioner for Main Roads. submitted that the responsibilities of other authorities are not truly comparable to those of a highway authority because of the varying standard of construction of highways, the pace at which highways deteriorate, the many external factors affecting highways and the constant public use of highways. While the Commission appreciates the force of these arguments, it again expresses the view that these are factors to be taken account in determining the standard of care to be expected of highway authorities and do not justify total immunity from liability.

5. Local Government Act 1919 s250; State Roads Act 1986 s29.

6. The rule also causes hardship to those who are denied a claim for compensation for damage to their property. For example, when a car is damaged due to a pot-hole in the road. However, as is discussed at para 5.36, the need for compensation is, by and large, less pressing in such cases.

7. Submission of Junee Shire Council.

8. Submission of the New South Wales Farmers' Association.

9. See generally paras 2.21-2.23.

10. The incentive not to repair would appear to be greater than ever after the recent decision of Clarke J in *Marr v Holroyd Shire Council*, discussed at para 2.10. In that case the Council was found liable even though it had done nothing more than repair a pot-hole inefficiently, its repairs had not created a new or additional danger.

11. See Ch 5.

12. This problem has been addressed by the recommendation for inclusion of actions against highway authorities in the Transcover scheme, see paras 5.26 and 5.27.

13. See paras 5.26 and 5.27.

14. See paras 5.6 and 5.7.

5. Recommendations

I. INTRODUCTION

5.1 This chapter sets out the Commission's conclusions and recommendations. Because different considerations arise in relation to each, a division is made between claims for personal injury or death and claims for property damage.

II. ACTIONS FOR PERSONAL INJURY OR DEATH

A. Abolition of the Non-Feasance Rule

5.2 **The Commission's principal recommendation is that the nonfeasance rule should be abolished in respect of actions for personal injury or death.** The reasons for this recommendation have been presented throughout this Report, particularly in Chapter 4. The Commission is not persuaded that the concerns expressed about the economic consequences of abolition of the rule outweigh the very strong arguments for its abolition. Of particular importance to the Commission's determination is the hardship which the rule causes to those denied compensation for personal injury and to the dependent relatives of those killed in highway accidents. However, economic considerations have been kept well in mind by the Commission in formulating its remaining recommendations, which deal with the principles upon which liability is to be determined and with the manner in which the compensation payable to successful claimants is to be assessed and paid.

5.3 It is worth recording here that the nonfeasance rule has already been abolished in England[1] and that all other law reform agencies considering the matter have recommended its abolition.[2]

B. Determining Liability

5.4 The Commission has determined that the total protection from liability for nonfeasance conferred by the nonfeasance rule is without justification and should be removed. The question which must now be addressed is what rules should govern the scope of the liability of highway authorities for nonfeasance. Resource constraints and practical difficulties make it unreasonable to expect highway authorities to keep all roads in perfect condition at all times. Legal rules are needed to strike a balance between the competing interests involved. These include the need to keep the financial liability of highway authorities within reasonable bounds, the interests of all road users in reducing the number of accidents and the interests of accident victims in receiving compensation.

5.5 One solution to the problem would be to leave the scope of liability to be determined by existing common law principles. These principles and their likely application to highway authorities have been described in Chapter 3. The logic of such an approach is compelling as it would allow the liability of highway authorities to be determined according to the same rules as apply to all other public authorities. Nevertheless, it has been argued strongly by the Department of Main Roads and the local councils that the application of ordinary common law principles would result in an intolerable financial burden on highway authorities. Local councils have in general opposed any change to the existing law. The Department of Main Roads expressed support for the abolition or modification of the nonfeasance rule, but argued that some form of statutory protection from the resulting common law liability was necessary. It has been useful in considering the options for reform to have regard to legislation existing in other jurisdictions and to the recommendations of other law reform bodies on the matter. A review of these sources suggests the following models for reform.

1. A Statutory Duty to Repair

5.6 In England and Wales[3] and in the Canadian Provinces of Alberta,[4] Ontario[5] and Saskatchewan,[6] the nonfeasance rule has been replaced by statutory provisions which have the effect of placing highway authorities under a duty to take reasonable care to keep their highways in repair. One notable feature of the English legislation is that the burden of proof in relation to the issue of whether or not reasonable care has been exercised by the highway authority is placed upon the authority itself and not upon the plaintiff.[7]

5.7 In the Commission's opinion the imposition of a statutory duty to repair would place too great a burden on highway authorities in this State. We agree with the Law Reform Commission of Western Australia that this alternative "grants legal recognition to only one of the methods by which highway authorities can act to protect

users of the highway".[8] As discussed in Chapter 3, a common law duty of reasonable care might be fulfilled in appropriate circumstances by measures other than repair, such as erecting barricades or warning signs. This flexibility is important as, in some cases, the carrying out of repairs might be wasteful, for example when further rain is expected which will destroy them. Furthermore, it has been argued strongly by local councils that they do not have funds available to keep all roads under their control in repair at all times and that policy choices must be made as to the repair works which are to be carried out. A statutory duty to repair would not recognise this.

5.8 Under common law principles, public authorities enjoy substantial protection from liability for policy decisions dictated by budgetary constraints. There is no justification for placing highway authorities in a worse position than other authorities. To do so would be to replace one anomaly created by the nonfeasance rule with another, the danger being that the distinction between nonfeasance and misfeasance would be maintained for the purpose of determining whether a particular plaintiff is right of action existed under statute in respect of a failure to repair or under common law in respect of misfeasance. The Commission therefore rejects the possibility of imposing a statutory duty to repair on highway authorities. For similar reasons, the Commission also rejects the idea suggested by the English legislation that the burden of proof in highway cases should be placed on highway authorities.

2. A Statutory Duty to Take Reasonable Care

5.9 While recommending the abolition of the nonfeasance rule, a number of law reform agencies have also recommended that there is a need for a duty to take reasonable care to be specifically imposed on highway authorities by statute. In effect these provisions seek to encapsulate common law principles of reasonableness into a statutory form. The form of the duty of care recommended by the Law Reform Commission of western Australia was that:

> 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.[9]

This formulation of the duty of care was designed to model as closely as possible the duty of care that would be imposed by the application of ordinary negligence principles. The Commission believed the imposition of a statutory duty of care was desirable because of doubts that existed as to whether a duty to take reasonable care would arise automatically upon abolition of the rule.[10] In our opinion a duty of care will arise at common law[11] and a statutory formulation of the duty is unnecessary unless it can be shown to be desirable for some other reason.

5.10 The New Zealand Torts and General Law Reform Committee has argued that a statutory formulation is desirable in the interests of greater certainty. The Committee commented:

> It is always tempting to the common law reformer to consider whether the matter might be left to be dealt with by the powerful action of the ordinary rules of negligence and/or nuisance, and there is no reason to suppose that in the long run, and after a substantial period of case law refinement, this would necessarily be an unsatisfactory prescription. The difficulty is that, without any statutory guidance, a dramatic change from one rule to its opposite could result in a period of experimentation and uncertainty of undue length.[12]

While the committee's goal of promoting certainty in litigation is laudable, we question whether the duty of care recommended by the Committee in fact adds anything to the position that would arise at common law. The Committee recommended the enactment of legislation:

> imposing 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 reasonable is reasonably safe for persons using it.[13]

No definition of reasonableness is given and it is clear that the provision can only be given meaning by recourse to established common law principles of reasonable conduct. In saying this we are not being critical of the form of the duty chosen, as we agree with the Committee that it is important that the courts be allowed to approach each case in a flexible manner. However, we are not persuaded that there is any advantage in the Committee's approach over an approach which simply leaves the duty of care owed by highway authorities to be determined

entirely by common law principles. Indeed, it is the Commission's opinion that there are a number of good reasons why a simple abolition of the rule is to be preferred.

5.11 First, there is difficulty in determining the appropriate wording of a statutory duty to take reasonable care. There is a danger that the particular form of words used will be construed in a technical way, inhibiting the flexibility of the courts and leading to unjust or inconsistent results. Such problems have occurred in the area of occupier's liability in which the law has sought to apply particular formulations of the duty of care owed to particular classes of entrants.[14]

5.12 Secondly, as has been pointed out above, the existence of special rules governing the liability of highway authorities as distinct from other public authorities in nonfeasance cases threatens to perpetuate the unsatisfactory distinctions that characterise the existing law. This might be justified if it could be shown that there was good reason why highway authorities should be treated differently from all other public authorities. However, in our opinion, this is not the case. Even if the statutory duty is merely designed to duplicate the common law, its formulation is difficult and discrepancies are bound to arise as common law principles evolve over time. For example, although the Law Reform Commission of Western Australia sought to equate highway authorities with other public authorities in recommending the form of duty it chose, its proposals make no distinction between action at the policy and operational levels. The result is that policy decisions of highway authorities would be liable for review by the courts on the grounds of reasonableness. Therefore, under the Western Australian proposals, an important concession available to other authorities at common law would be denied to highway authorities.

5.13 Thirdly, there would be difficulty in defining the scope of application of such a duty. It would clearly be necessary to define the terms "highway" and "highway authority" with some precision to ensure that all situations to which the nonfeasance rule might apply at present were covered but that other unintended applications were avoided. if a wide definition of highway is employed, for instance to include drains, lights and other ancillary works,[15] there is a danger of overlap between the statutory duty placed on highway authorities and existing common law duties placed on other public authorities which maintain structures in the roadway. Similar difficulties might also arise between the statutory duty of care and the common law duty of care presently owed by highway authorities in respect of artificial structures. Both situations are likely to lead to costly and unproductive technical argument on the rules to be applied in particular cases.

3. A Duty of Care Defined by the Common Law

5.14 The Commission does not favour the imposition of a statutory duty of care on highway authorities. **The Commission recommends that the duty of care owed by highway authorities should be left to be determined by established common law principles.** A simple statutory abolition of the nonfeasance rule will allow this to occur.

5.15 The Commission has taken this view for a number of reasons. First, such an approach will allow the liability of highway authorities to be determined according to the same principles as apply to other public authorities and will clearly remove the need for the technical and unsatisfactory distinctions required by the current law. Secondly, it is our opinion that the common law offers the fairest and most appropriate mechanism for determining the scope of liability of highway authorities. Our analysis of the relevant principles in Chapter 3 shows that the common law provides a flexible and sophisticated approach to this problem. Importantly, the special nature of public authorities and their responsibilities are recognised by the discretionary function immunity, discussed at paras 3.14-3.15. These principles provide greater protection to highway authorities than any of the models for a statutory duty of care discussed above and they are therefore more appropriate to the difficult situation faced by highway authorities in this State. Thirdly, this approach has the advantage of simplicity which, in an area of law that has for too long been bedevilled by complexity, should not be underestimated.

5.16 The Department of Main Roads has argued that this solution ignores the problems that arise where more than one highway authority share responsibility for the maintenance of a particular road[16] or where some other public authority is responsible for the maintenance of a particular structure, for example a drain forming part of a road. The Commission acknowledges that in such cases it might be necessary for the court to apportion liability between the various authorities involved but can see no problems with this procedure. The common law already provides appropriate mechanisms for apportioning liability. In any case, the need to apportion liability will be

removed if the plaintiff's claim is to be made within the Transcover scheme as is recommended later in this chapter (para 5.27).[17]

4. Statutory Negligence Criteria

5.17 Even if the duty of care owed by highway authorities is left to be determined by the common law, it is still possible to enact legislation which provides that, when determining whether a highway authority has satisfied this duty of care, the courts shall have regard to a number of specified matters. Such a approach has been taken in England and was recommended by the Law Reform Commission of Western Australia, although in each case the question of reasonableness falls to be determined in the context of the statutory duty imposed by the relevant legislation.

5.18 The Department of Main Roads has argued that such criteria are needed to keep the liability of highway authorities within reasonable bounds. It suggested that the form of the provision follow that suggested by the Law Reform Commission of Western Australia, namely that:

> when determining whether a highway authority has exercised reasonable care, a court should be entitled to consider, among other matters, the following, namely,
>
> (i) the character of the highway;
>
> (ii) the character and the amount of traffic which could reasonably be expected to use the highway;
>
> (iii) the precautionary measures appropriate to safeguard persons using a highway of that character at the time, and in the location, the accident occurred;
>
> (iv) the financial and other resources available to the authority for use in connection with the highways for which it is responsible;
>
> (v) the condition or state of repair in which a reasonable person would have expected to find the highway;
>
> (vi) whether the authority knew, or ought reasonably to have known, that a danger had occurred in the highway;
>
> (vii) whether, before the accident in question happened, the authority could reasonably have been expected to safeguard users of the highway against the danger which caused the accidental.[18]

5.19 Our view is that such a provision is unnecessary and adds nothing to the common law as it is already open to the courts to consider all of the criteria mentioned. Probably the most unusual matter contained in the above list is that relating to the financial and other resources of the highway authority. There is long-standing New South Wales authority that this matter is a relevant circumstance for the consideration of the courts in highway cases where misfeasance is at issue[19] and there seems to be no reason to suppose that this will not be carried over into cases of nonfeasance once liability in that area is established. It is also clear that factors such as the nature and location of the road will be taken into consideration.[20] Furthermore, we find merit in the view of the New Zealand Torts and General Law Reform Committee[21] that any "explicit particularisation" of the matters to be considered is undesirable because it might fetter the flexibility of the courts in balancing other factors in appropriate cases. Accordingly, the Commission does not recommend the inclusion of statutory negligence criteria in its proposals for reform.

5.20 The Commission acknowledges that the case for inclusion of statutory criteria is strengthened if, under the Transcover scheme, liability is to be determined initially by administrative decision. The criteria could be used as a guide by the administrative officer making the determination. However, the danger that the criteria will be applied rigidly and become inflexible is perhaps even greater in the context of administrative decisions. Accordingly, the Commission remains of the view that the criteria should not be given statutory force. If, contrary to our recommendation, statutory criteria are to be included, they should contain an express direction that, in addition to the other matters raised, the court or administrative officer should have regard to such other matters

as are relevant in the circumstances of the case. This would stress the importance of looking at all the facts of the case while still allowing attention to be given to the specific matters contained in the list of criteria.

5.21 A further point relating to statutory criteria should also be mentioned. To apply such criteria only to cases of liability for nonfeasance would mean that all the old law as to the distinction between nonfeasance and misfeasance, and the various exceptions to the nonfeasance rule, would remain relevant to the question of whether or not the statutory criteria applied in a particular case. Whether this will lead to elaborate argument on the point is perhaps open to question, given the limited practical significance of the statutory criteria. However, as it is clear that similar criteria are already taken into account by the courts in misfeasance cases, our view is that, if statutory negligence criteria are thought to be desirable, they should be expressed to apply in all negligence actions against highway authorities whether alleging misfeasance or nonfeasance.

C. Determining Benefits

1. Transcover

5.22 The Transport Accidents Compensation Act 1987 came into operation on 1 July 1987. In the cases to which it applies the Act abolishes the common law right to damages for personal injury or death and instead creates a statutory compensation scheme ("Transcover"). Where a person would previously have had a claim for personal injury against the owner or driver of a motor vehicle,[22] the claim must now be made under the Act.[23] This means that there is an entitlement to benefits under the Act but not to damages assessed at common law.

5.23 The Act only applies to claims against owners and drivers of motor vehicles. Claims against highway authorities for accidents caused by the condition of the highway are not covered by the Act and will still be made at common law. Where there is the possibility of two claims arising in respect of the same injury, one under the Act and one at common law, the plaintiff may choose to pursue one or the other but not both.[24] If the statutory claim is to be pursued, it must be made within three months.[25]

5.24 The introduction of Transcover has left highway authorities in a vulnerable position. Plaintiffs might well be tempted to pursue a claim at common law in respect of the condition of the highway in order to recover common law damages instead of the benefits available under the Act and this could lead to a substantial increase in the number of claims made against highway authorities. As under the present law these claims can only be successful where misfeasance can be shown, it is likely that a large proportion of the increased volume of litigation against highway authorities will be devoted to semantic argument on the borderline between misfeasance and nonfeasance. The Commission doubts that highway authorities can draw much comfort from recent case law discussing the distinction, as it has tended to be liberal in its interpretation of the concept of misfeasance.[26]

5.25 The financial position of highway authorities is further eroded by the way in which Transcover affects contribution rights. For example, where an action is taken against a highway authority at common law in a situation where it is partly responsible for the injury with the driver of a motor vehicle, the highway authority will be liable to compensate the plaintiff fully and will not be able to seek a contribution from the other negligent party.[27] However, if the claim is made under the Act in respect of the driver's negligence, the Government Insurance Office will still be able to pursue a claim against the highway authority. This claim is not limited to a demand for contribution towards benefits actually paid, but can be made for the full amount to which the highway authority would be liable to the plaintiff as the Act assigns the Government Insurance Office full rights of subrogation.[28] Therefore, in either case, the highway authority would be liable for the full amount of the plaintiff's claim even though it was only partly responsible for the accident.

5.26 All these difficulties can be overcome if highway authorities are brought within Transcover. Other advantages include the following.

A more comprehensive transport accident scheme

The addition of the authorities -responsible for the control and maintenance of highways is a logical extension of the existing scheme. Their inclusion would lead to greater uniformity of benefits received by those injured in transport accidents and should help to promote co-operation between highway

authorities and the administrators of the Transcover scheme. The Commission sees co-operation between these parties as being important, particularly with regard to strategies aimed at reducing the level of accidents.

Rationalisation of the procedures for making claims and the assessment of damages

As stated in Chapter 4, many local councils commented adversely on the costs of conducting litigation at common law and on the large lump sum awards for damages being made. In particular, they commented upon the legal and administrative costs involved in defending a large number of what are often minor claims. Transcover is designed to address the high level of cost involved in personal injury litigation. It would limit the amount of litigation in which highway authorities would be involved and limit the level of benefits payable for minor injuries. People with serious disabilities would no longer have damages assessed on a once-and-for-all basis, but would receive benefits to meet there needs over time.

Local councils also expressed concern at the difficulty involved in policing claims for nonfeasance. They argued that it would be extremely difficult to guard against fraudulent claims, given that an action for damages might be commenced some years after the date of the alleged accident in which time the highway conditions might have changed. Under Transcover the payment of benefits will be subject to compliance with strict reporting requirements.[29]

Insurance

A major concern of local government is the increasing difficulty it is experiencing in obtaining insurance to cover personal injury claims. A number of local councils argued that they would be unable to obtain insurance to cover the liability that would result from the abolition of the nonfeasance rule. Transcover would provide a solution to this problem.

2. Extension of Transcover

5.27 For these reasons, **the Commission recommends that claims against highway authorities in respect of accidents arising out of the condition of the highway should be brought within the scheme introduced by the Transport Accidents Compensation Act 1987 (Transcover).** This recommendation sits side by side with our recommendation that the nonfeasance rule should be abolished. Therefore, under our proposals, benefits under the scheme will be payable on proof of fault, whether arising from nonfeasance or misfeasance. Eligibility for benefits will continue to be assessed according to common law negligence principles, but damages assessed at common law will not be available as compensation will be determined according to the system of benefits provided by Transcover.

5.28 To ensure that the scheme is comprehensive, and to encourage uniformity in the area, the **Commission further recommends that the Transcover scheme should also apply to claims made against other public authorities responsible for the maintenance of structures forming part of or on a highway.** This means that all claims against public authorities maintaining any part of the highway or any associated facility will be dealt with in the same way. Expansion of the scheme in this way will also avoid the possibility of technical arguments similar to those now surrounding the source of authority doctrine. For example, if an installation maintained by the Metropolitan Water Sewerage and Drainage Board were to decay causing a deterioration in the surface of the highway, it would be undesirable to seek to distinguish between the responsibility of the highway authority for the road and that of the Water Board in order to determine whether a claim arose under Transcover or the common law. This recommendation will extend the advantages of inclusion in Transcover to other public authorities maintaining facilities in highways, but will not expand the scope of their liability as they are liable for nonfeasance in any event.

5.29 It is noted that these recommendations constitute a significant departure from the existing nature of the Transcover scheme in that claims in respect of highway and other authorities will be allowed even if they do not arise in connection with the use of a motor vehicle or other form of transport. For example, a claim might be made by a pedestrian who stumbles into a pot-hole. Claims against private individuals who create a nuisance on or negligently interfere with the surface of the highway would not be included within Transcover but would continue to be made at common law. Therefore, if a landowner dug a hole in the footpath outside his house in

order to lay a pipe and failed to repair the hole, an action at common law would be available to anyone injured as a result. However, a claim under Transcover might also be available if the injured person could show that the highway authority responsible for the maintenance of the footpath had been negligent in not remedying the defect. If a claim under the scheme was successful, the Government Insurance Office as administrator of the scheme would still be able to recover damages against the negligent third party pursuant to its right of subrogation to the claimant's common law remedies.[30]

5.30 The possibility of claims for common law damages against individuals who create dangers in the highway requires that special consideration be given to the position of those who carry out work on highways and highway structures on behalf of the authorities responsible. These include employees of the authorities and independent contractors and their employees. Under our recommendations, the authorities will be protected from claims for common law damages. However, without express provision this protection would not extend to their employees or to independent contractors and their employees. All might still be sued at common law if they are personally guilty of negligence in the performance of their duties. This situation is obviously unsatisfactory and **the Commission recommends that common law actions against employees of these authorities or independent contractors and their employees should be prohibited in cases where the injured party would also have a claim for benefits** in **respect of the same conduct under the Transcover scheme.** Such benefits would be available in cases where the public authority concerned is vicariously liable for the negligence of its employee or independent contractor. In respect of employees this will include cases where the conduct concerned falls within the course of the employee's employment. The Commission sees no objection to employees being exposed to personal liability for acts falling outside the course of their employment.

3. Contribution to the Transcover Fund

5.31 The Transcover scheme is funded by contributions from owners of motor vehicles and those operating public transport services. This reflects the types of claims to which the scheme currently applies. Under our recommendation, a new class of claim would be allowed against the Transcover fund, that is, claims against highway authorities and other public authorities responsible for the construction and maintenance of roads or related facilities. In the Commission's opinion the costs of these claims should be funded, in part at least, by the authorities through whose negligence the claims are incurred and in whose power it is to take steps to minimise the risk of claims being made. This would provide an incentive to highway authorities to carry out maintenance and to take other measures aimed at preventing accidents.

5.32 Provision is already made under the Act for public authorities operating public transport services to contribute to the Transcover fund on a "pay-as-you-go" basis.[31] This provision could be expanded to incorporate highway authorities and other public authorities affected by our recommendations. However, the Commission is concerned that this basis for contribution, which in effect would make highway authorities self-insurers, could expose individual authorities to an intolerable burden in the event of a major accident giving rise to multiple claims, for example if a large number of people suffered serious injury in an accident involving a tourist bus. In discussion with the administrators of the Transcover scheme it became apparent that similar concerns had been expressed in relation to certain of the authorities currently contributing to the scheme and that consideration was being given to assessing the contribution of these authorities on a premium basis. Use of a premium basis would allow for averaging of costs between like authorities and from year to year, although it would still be open to impose higher premiums on authorities with particularly poor claims records. **The Commission recommends that contributions to the Transcover fund by highway authorities and other public authorities affected by our recommendations should be assessed on a premium basis.**

5.33 A further question is whether the premiums collected from these authorities should be calculated so as to recover the total cost to the fund of claims against them. In the case of the local councils, without additional government funding, this would leave the burden to be borne by ratepayers. Although this is not necessarily unfair (see para 4.9), a case can be made that at least part of the cost of claims should be distributed through registration charges to the general body of motorists who benefit directly from the use of roads.[32] This question raises general issues of funding of local councils and related policy considerations. These matters are left for consideration by government. Similarly, the precise details of the manner of assessment and payment of contributions are left to be determined by negotiation between the administrators of the fund and the authorities concerned, in consultation with government.

III. ACTIONS FOR PROPERTY DAMAGE

5.34 The Commission has given careful consideration to the question whether the nonfeasance rule should also be abolished in respect of claims for property damage. From a strictly legal point of view there is no justification for limiting the scope of the abolition of the rule to claims for personal injury and death. The general rules of negligence which apply to other public authorities make no distinction between personal injury and property damage and without special provision being made the application of these rules to highway authorities would expose them to liability for property damage. If the exemption for nonfeasance is maintained in property damage cases the unsatisfactory legal rules defining the scope of the exemption for nonfeasance would be perpetuated. In the Commission's opinion this is undesirable.

5.35 However, the arguments in favour of maintaining the immunity for property claims are not based in legal principle. Rather they are economic and pragmatic. Highway authorities have argued that the abolition of the nonfeasance rule would expose them to an extremely large number of minor claims for damage to vehicles. They express concern at the scope for fraudulent claims in this area and argue that the administrative and legal costs in processing and defending claims, and the costs of settlements and judgments against them, would be intolerable. While similar concerns were expressed in relation to actions for personal injury or death, the Commission believes that these are in large part answered by the inclusion of these claims within the Transcover scheme. This option is not available in relation to claims for property damage as these are outside the Transcover scheme, which is only designed to encompass claims for personal injury or death.

5.36 The hardship caused by the rule in respect of claims for property damage is also less significant. This is not to say that the need for compensation of those who suffer property damage because of the fault of a highway authority is not real or important. As the Law Reform Commission of Western Australia pointed out:

> Even where only property damage is suffered, the consequences may still be very serious, especially if the property damaged or destroyed was an important income producing item such as a small qarrier's motor truck or a farmer's tractor.[33]

However, the hardship is mitigated by the fact that many people carry comprehensive insurance which would cover property damage to vehicles.

5.37 In seeking to balance the case for and against abolition, the Commission sought details from highway authorities to assist it in determining the number of claims that might be expected, for example details of the number of claims that are currently rejected in reliance on the nonfeasance immunity. It became apparent that these details are not available. It has been difficult, therefore, to evaluate the strength of the highway authorities' arguments, although in general the Commission believes that highway authorities have been unduly apprehensive in the assessment of their legal liability following the abolition of the rule (see paras 4.15, 4.16).

5.38 The Commission can see some advantage in maintaining the immunity for property damage for a limited period in order to allow- the effects of its abolition to be gauged with more certainty. The number of claims made for personal injury following the abolition of the rule in that area should provide a useful guide and a period of grace would allow highway authorities the opportunity to gather more concrete evidence in support of their arguments. Accordingly, **while the Commission believes in principle that the nonfeasance rule should also be abolished in respect of claims for property damage, to enable the financial consequences to be gauged, it recommends that further consideration of abolition in this area should be postponed for a period of five years following the abolition of the rule in respect to claims for personal injury and death.** A five year period should allow sufficient time for meaningful data to be collected (over, say, three years) and assessed and for any trends to be identified. Inherent in this recommendation is recognition of the fact that the need for reform in the area of property damage is not as pressing as in the personal injury area (see para 5.36) and the belief that concerns about the economic effect of the abolition of the immunity in respect of property damage should not be allowed to prejudice the urgent need for reform in respect of claims for personal injury or death.

IV. DRAFT LEGISLATION

5.39 A draft bill providing for the abolition of the nonfeasance rule in respect of actions for personal injury or death has been prepared and is set out in Appendix B. The Bill does not make provision for the

recommendations made in this Report relating to the extension of the Transcover scheme and associated matters. These matters have been excluded because the legislative drafting required was considered better left to those concerned with the implementation and review of the Transcover scheme.

FOOTNOTES

1. Highways (Miscellaneous Provisions) Act 1961 s1.

2. Torts and General Law Reform Committee (New Zealand) *The Exemption of Highway Authorities from Liability for Non Feasance* (1973); Law Reform Committee of South Australia *Report on Reform of the Law Relating to Misfeasance and Non-Feasance* (25th Report 1974) and *Report Relating to the Review and Reappraisal of the Twenty-Fifth Report* (51st Report 1986); Law Reform Commission of British Columbia *Report on Civil Rights: Part V Tort Liability of Public Bodies* (1977) Chapter Two; Law Reform Commission of Western Australia *Report on the Liability of Highway Authority for Non-Feasance* (Project 62, 1981).

3. Highways Act 1980 ss4l(l) and 58.

4. Municipal Government Act RSA 1970 C 246 s178.

5. Municipal Act RSO 1970 C 284 s427.

6. Rural Municipalities Act SS 1972 C 101 s206; Urban Municipalities Act SS 1970 C 78 ss161 and 162.

7. Highways Act 1980 s58(l).

8. Law Reform Commission of Western Australia, note 2, para 8.8. It is noted however that under the English legislation it is a defence for a highway authority to show that it had taken reasonable care to ensure that the highway was not dangerous for traffic.

9. Law Reform Commission of Western Australia, note 2, para 8.6.

10. *Ibid*.

11. See paras 3.16 to 3.20. The doubts raised by the Law Reform Commission of Western Australia are discussed and dismissed in Ch 3, fn 35.

12. Torts and General Law Reform Committee (New Zealand), note 2, para 7.

13. *Id* paras 11 and 18.

14. See J G Fleming *The Law of Torts* (6th ed Law Book Co 1983) at 416-420.

15. Such a definition was recommended by the New Zealand Law Reform Committee and the South Australian Law Reform Committee. The Law Reform Commission of Western Australia did not address this problem.

16. Such cases can and do arise under the State Roads Act 1986 and Local Government Act 1919 which give the Department of Main Roads and local councils many concurrent powers in relation to classified roads.

17. However, some concept of apportionment might remain necessary to determine the levels of contributions the authorities involved might have to provide to the scheme.

18. Law Reform Commission of Western Australia, note 2, para 8.21.

19. *Miller v McKeon* (1905) 3 CLR 50. See paras 4.46 to 4.48.

20. *Ibid*.

21. Torts and General Law Reform Committee (New Zealand), note 2, para 11.

22. And certain other forms of transport to which the Act applies, which are not relevant here.

23. Sections 31(l) and 40(l).

24. Section 41.

25. Section 41(2)(b). This time limit is subject to extension at the discretion of the Government Insurance Office: s41(3).

26. See *McDonogh v Commonwealth* (1985) 61 ACTR 22; *Marr v Holroyd Shire Council* (Unreported) Supreme Court of New South Wales, 23 June 1986. These cases are discussed at paras 2.10 and 2.11 respectively.

27. Section 40.

28. Section 42.

29. A benefit is not payable unless the accident is reported within 28 days either of the accident or of the date on which the plaintiff has recovered sufficiently to be able to make a report s34(l), (2). A discretion to extend the period to 90 days is given to the GIO by s34(3). See also s207.

30. Section 42.

31. Section 29.

32. However, it would not seem fair to expect motorists to contribute a proportion of the cost of claims arising from accidents not involving the use of motor vehicles, for example claims by pedestrians who trip over defects in the footpath.

33. Law Reform Commission of Western Australia, note 2, para 6.5.

Appendix A - Submissions Received

AGL Gas Companies
Council of the City of Albury

The Council of the City of Armidale

The Council of the Municipality of Ashfield

The Council of the Shire of Balranald

Bar Association of New South Wales

Bathurst City Council

Berrigan Shire Council

Bland Shire Council

Blayney Shire Council

Blue Mountains City Council

Bombala Shire Council

The Council of the Shire of Bourke

Brewarrina Shire Council

Cabonne Shire Council

The Commissioner for Main Roads

The Council of the Municipality of Camden

Campbelltown City Council

Cessnock City Council

The Council of the Shire of Cobar

The Council of the Municipality of Concord

Coolamon Shire Council

Cooma-Monaro Shire Council

Coonabarabran Shire

The Council of the Shire of Cootamundra

Copmanhurst Shire Council

The Council of the Shire of Culcairn

Crown Lands Office

Dawson Waldron, Solicitors

Dungog Shire Council

Drummoyne Municipal Council

The Council of the Shire of Eurobodalla

Evans Shire Council

Forestry Commission of New South Wales

Gloucester Shire Council

Gosford City Council

Great Lakes Shire Council

Gundagai Shire Council

Gunnedah Shire Council

Gunning Shire Council

Griffith Shire Council

Hastings Municipal Council

Hay Shire Council

Mr J Holmes

The Council of the Shire of Hornsby

Hume Shire Council

Hunter Regional Association of Councils

Inverell Shire Council

Jerilderie Shire Council

Junee Shire Council

Kyogle Shire Council

City of Lake Macquarie

Law Society of New South Wales

The Council of the City of Lismore

The Council of the City of Greater Lithgow

Liverpool City Council

Local Government and Shires Associations of NSW

Maclean Shire Council

The Council of the City of Maitland

The Council of the Shire of Manilla

Manly Municipal Council

Mira Consultants Ltd

Municipality of Marrickville

Moree Plains Shire Council

Murrumbidgee Shire Council

Nambucca Shire Council

Municipality of North Sydney

Narrandera Shire Council

National Parks and Wildlife Service

New South Wales Farmers' Association

The Council of the Shire of Parry

Penrith City Council

Port Stephens Shire Council

City of Queanbeyan

The Council of the Shire of Quirindi

Ryde Municipal Council

Scone Shire Council

Severn Shire Council

Shoalhaven City Council

Singleton Shire Council

The Council of the Municipality of Strathfield

The Council of the City of Sydney

Tallaganda Shire Council

Greater Taree City Council

Temora Shire Council

Tumbarumba Shire Council

The Council of the Shire of Tumut

Tweed Shire Council

The Council of the Shire of Uralla

The Council of the City of Wagga Wagga

Mr G Underwood

Walcha Shire Council

Walgett Shire Council

The Council of the Shire of Warringah

Western Division Group of the Shires Association of NSW

Wyong Shire Council

Council of the Shire of Yallaroi

Yarrowlumla Shire Council

Appendix B - Highway Authorities (Non-Feasance Liability) Bill 1987

NEW SOUTH WALES
[STATE ARMS]

TABLE OF PROVISIONS

HIGHWAY AUTHORITIES (NON-FEASANCE LIABILITY) BILL 1987

NEW SOUTH WALES

[STATE ARMS]

A BILL FOR

An Act to abolish the common law rule that exempts highway authorities from liability in respect of death or personal injury caused by the condition of a highway.

The Legislature of New South Wales enacts

Short title

1. This Act may be cited as the Highway Authorities (Non-feasance Liability) Act 1987.

Commencement

2. This Act shall commence on a day to be appointed by proclamation.

Definitions

3. In this Act -

"highway" means -

(a) any road, street or lane;

(b) any path or track for pedestrians, bicycles or horses; or

(c) any bridge or tunnel over or through which a highway passes,

that is open to the public or to any section of the public;

"highway authority" means any person or body which has power to construct, maintain, repair or control highways;

"personal injury" means bodily harm, mental shock or nervous shock.

Non-feasance rule abolished in respect of death or personal injury

4.(1) The nonfeasance rule is abolished in respect of actions for death or personal injury.

(2) The nonfeasance rule is the common law rule (however expressed) that exempts a highway authority from liability for damages in respect of death, personal injury or other damage caused by the condition of a highway (not being a condition created by the highway authority).

Act binds Crown

5. This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

Act not retrospective

6. This Act does not apply to -

(a) personal injury received before the commencement of this Act; or

(b) death resulting from personal injury received before the commencement of this Act.