LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON CIVIL RIGHTS
PART V TORT LIABILITY OF PUBLIC BODIES

LRC 34

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The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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TO THE HONOURABLE GARDE B. GARDOM, Q.C.,
ATTORNEYGENERAL FOR BRITISH COLUMBIA

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON CIVIL RIGHTS
PART V TORT LIABILITY OF PUBLIC BODIES

This Report has been prepared in the Commission's study on Civil Rights. It is the result of an examination by the Commission of certain immunities enjoyed by public bodies from liability in tort. In particular, we have examined the immunity of highway authorities in British Columbia from liability for damage suffered by reason of their failure to maintain and repair their roads, and certain related matters including the defence of statutory authority, and the special immunity fram the rule in *Rylands* v. *Fletcher* now enjoyed by public bodies.

In this Report the Commission recommends that highway authorities should be made liable for damage caused by their failure to maintain and repair roads under their control. The Commission also recommends that the defence of statutory authority be restricted and that immunity from the rule in *Rylands* v. *Fletcher* now enjoyed by public bodies be abolished.

CHAPTER I INTRODUCTION

A. General

In 1972, as part of its study on Civil Rights, the Commission published a Report on the *Legal Position of the Crown*. In that Report, the Commission noted that municipalities and other public bodies enjoyed certain immunities similar to those enjoyed by the Crown. It is these immunities which are examined in this Report.

Underlying the Commission's approach to this study is its belief that if an individual suffers a wrong at the hands of a department or employee of any public body in the absence of strong countervailing policies, he should not be placed in a worse position than he would be if that wrong had been committed by an ordinary individual or by a private corporation. The Commission concludes that certain immunities from liability in tort now enjoyed by public bodies are anomalous and indefensible, and should be abrogated.

B. The Background to this Report

Although the British Columbia statutes provide for numerous special defences for public bodies, this Report is principally concerned with three particular common law defences to actions founded in tort, namely:

1. The exemption of highway authorities from liability for nonfeasance: In British Columbia, at present, if a highway authority such as a municipality, repairs a road but does so negligently, it may be held liable for any resulting damage suffered by road users. If it simply leaves the road in disrepair, however, it can incur no liability for damage resulting from the defective condition of the road.

2. The defence of statutory authority: If a public body commits a wrong as an inevitable consequence of carrying out a statutory directive, it may in certain circumstances raise this defence which, in the absence of a provision for compensation, bars any form of legal redress by a person who has suffered loss by reason of that wrong.

3. The special immunity of public bodies from the rule in *Rylands* v. *Fletcher*: If a private individual permits dangerous substances to escape from his land he can be held liable for any damages caused by such an escape. It appears, however, that in many instances a public body can escape liability under this rule.

In August 1974 the Commission completed a working paper in which various proposals were made, substantially as follows:

(a) that highway authorities should be made liable for damage due to their failure to maintain roads in good condition, i.e. they should be liable for nonfeasance. It was also proposed, however, that the authority should be able to escape liability if it could show that the failure to repair was, in the circumstances, reasonable;

(b) that a public body should not be able to raise the defence of statutory authority in any action for damages based on nuisance;

(c) that the special immunity for public bodies from the rule in *Rylands* v. *Fletcher* be abolished.

The working paper was circulated for comment to practising lawyers, legal scholars knowledgable in this field, municipalities, and other organizations. All were asked for comments on and criticisms of the proposals advanced by the Commission. A great many submissions were received, particulary from municipal authorities, and these have been of great value to us in assessing our original proposals and formulating the final recommendations contained in this Report.

Several respondents were critical, in particular, of the proposal to impose liability on highway authorities for nonfeasance. The criticisms of this proposal were carefully considered by the Commission, but for the reasons set out in the Report, we adhere to our original view. In addition, our view of the defence of statutory authority remains unchanged, though it is fair to point out that two members of the Commission, while subscribing to the principle that underlies the Commission's recommendation in this connection, have some reservations about the particular form of that recommendation. Finally, the original proposals of the Commission concerning the rule in *Rylands* v. *Fletcher* are, in this Report, extended to all public bodies, including the British Columbia Hydro and Power Authority.

CHAPTER II LIABILITY OF HIGHWAY AUTHORITIES

A. The Rule and Its Origins

It is not uncommon for injuries to persons and property to arise out of the failure of a highway authority to maintain a road in a state of repair that accords with the reasonable expectations of road users. In British Columbia, however, the right of a citizen to recover damages in these circumstances depends not upon any rational principles of compensation or loss distribution, but on his ability to demonstrate that his case falls outside the scope of a common law rule, more commonly known as the "nonfeasance rule," that highway authorities are not liable, either in nuisance or negligence, for mere failure to maintain and repair roads under their control. They may only be held liable if it can be shown that they performed positive acts which created a danger or increased the risk of accidents occurring. Such acts are distinguished as cases of "misfeasance."

The rule that highway authorities are not liable in civil proceedings for mere nonfeasance, has its historical origins in medieval England. At common law the duty of repairing the highway reposed on the inhabitants of the Parish. This duty was not enforceable at the suit of an individual even though he had suffered damage by reason of a neglect to repair, but rather through criminal proceedings by way of indictment. This rule was confirmed in 1672 by Vaughan C.J. in *Thomas* v. *Sorrell* in which he stated:

> If a man hath particular damage by a foundrous way, he is generally without remedy, though the nuisance is to be punished by the king.

He gave as the reason for this rule that as those (the inhabitants) on whom the duty to repair lay were not corporate bodies, no action could lie against them.

This reasoning was reiterated some one hundred years later by Lord Kenyon C.J. in *Russell* v. *The Men of Devon*, the case often credited as being the first recorded instance of the "nonfeasance" rule. Both Lord Kenyon C.J. and Ashurst J. added that if a remedy was thought necessary it should be given by the Legislature.

During the nineteenth century the "nonfeasancel rule was developed and refined in a series of cases which culminated in several decisions of the House of Lords and Privy Council all of which emphasized that liability for “nonfeasance” could only be imposed by statute.

In *McKinnon* v. *Penson* an action similar to that in *Russell* v. *The Men of Devon* was brought against a county in the name of its surveyor. It was held that although a statute which provided that the county could be sued in the name of its surveyor created a method by which an action could be brought against an unincorporated body, no new liability was created by the statute. It only provided a method of enforcing existing rights. As there was no existing right to bring an action against a county for nonrepair of the highway, the action failed.

Again, in *Young* v. *Davis*, it was held that a surveyor of highways was not liable to an action for injury resulting from a breach of a clear statutory duty to keep the highways at the Parish in repair, as the intention to give a right of action for damages could not be inferred from the statute.

It was argued in *Gibson* v. *Mayor of Preston* that the *Public Health Act, 1848*, which created a corporation with corporate funds and charged it with "the management and control" of every highway in its district did something more than impose upon the corporation the duties and liabilities of surveyors of highways, and that under the provisions of the statute the corporation was liable to a person suffering damage through the nonrepair of a highway. Since the statute was held not to show an intention to give a right of action, this argument was rejected, and the defendants were held to be not liable.

The development of the law to this point was commented on by Fullagar J. in the Australian case of *Gorringe* v. *The Transport Commission*. He extracted two general principles from this line of cases.

> (1) [Tlhat at common law no person or persons, corporate or unincorporate, is or are subject to any duty enforceable by action to repair or keep in repair any highway of which, whether at common law or by statute, he or they or it has or have the management and control, and (2) [Tlhat if a duty to repair or keep in repair a highway ... is imposed by statute on any such person ... that duty is not enforceable by action unless the statute makes clear by express provision or necessary implication that the duty is to be enforced by action at the suit of a person injured by its breach.
>
> The immunity thus created was confirmed and further defined by the House of Lords and Privy Council in a series of cases at the close of the nineteenth century. It is these cases which to a large extent form the basis of the law in British Columbia as it relates to the liability of highway authorities for nonrepair of the highway.

The first case in the series was *Sanitary Commissioners of Gibraltar* v. *Orfila*, decided in 1890, in which certain dicta by Lord Watson appear to have extended the immunity from liability to include immunity from liability for negligent "nonfeasance." In this case the authority was sued for negligence in the management and control of a road on the side of a mountain that collapsed after heavy rain, damaging property below. Although the actual ground of the decision was that there was no negligence, Lord Watson had the following comment to make:

> It is an implied condition of statutory powers that, when exercised at all, they shall be executed with due care. But in the case of mere nonfeasance, no claim for reparation will lie except at the instance of a person who can show that the statute or ordinance under which they act impose on the commissioners a duty towards himself which they negligently fail to perform.

In *Cowley* v. *Newmarket Local Board* the House of Lords confirmed that the mere fact that a highway was vested by statute in a local authority did not give a right of action to an individual who has suffered damage because of the state of nonrepair of the highway.

In *Municipality of Pictou* v. *Geldert*, Lord Hobhouse, who delivered the judgment of the Privy Council, said:

> It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such a corporation liable to an action in respect of mere nonfeasance. In order to establish such liability it must be shown that the Legislature has used language indicating an intention that this liability shall be imposed.

Finally, in *Municipal Council of Sydney* v. *Bourke*, the Privy Council confirmed that where a statute empowers a corporation of the town to maintain and repair the highways of the town, and the corporation allows one of the highways to fall into disrepair, in consequence of which a member of the public is injured, such failure to repair being a nonfeasance and not a misfeasance, the injured party cannot maintain an action against the corporation. The extent and nature of this immunity were neatly summarized by Lord Herschell L.C. who said:

> In a series of cases ending with *Cowley* v. *Newmarket Local Board*, in which it has been held that an action would not lie for non-repair of a highway, the duty to repair was unquestionable, and it was equally clear that those guilty of a breach of this duty rendered themselves liable to penal proceedings by indictment or otherwise; the only question in controversy was whether an action could be maintained. The ground upon which it was held that it could not even where the duty of keeping the roads in repair had been in expressed terms imposed by statute on a corporate body - was, that it had long been settled that though a duty to repair rested on the inhabitants, subjecting them to indictment in case of its breach, they could not be sued, and that there was nothing to show that the Legislature in transferring the duty to a corporate body had intended to change the nature or extent of their liability.

He went on to point out that in this case there had been no similar transfer of duty in relation to repair of the roads. No duty or liability in respect of their repair rested on anyone prior to the statute which charged the corporation with management and repair. The duty in this case, if there was one at all, was original and not transferred. However, Lord Herschell was of the view that such a distinction had no effect on the question of liability. Even if it were an original duty liability could only be imposed by an Act of the Legislature.

In reliance on these authorities, it was early held in British Columbia that where by statute a municipality has the management and control of, or the power, but not a statutory obligation to repair highways, the common law rule relieving it from liability for nonfeasance applies. However, the applicability of these authorities in British Columbia, where a positive duty to repair the highway had been imposed by statute was questioned in 1909 in *Cooksley* v. *The Corporation of New Westminster*. In that case although the British Columbia Full Court held that the corporation had been guilty of misfeasance, and was therefore liable, Clement J. made the following observation with regard to liability for nonfeasance where a statutory duty to repair had been imposed upon the corporation:

> It may be argued that the judgment in the *Sydney* case is authority for the proposition that the statute in such a case as this must impose in express terms not only the duty but the liability as well. That is the point upon which I desire to keep an open mind.

Every such public street, road, square, lane, bridge and highway shall be kept in repair by the corporation. However, this section was repealed in 1910 by the *New Westminster Act 1888 Amending Act*, S.B.C. 1910, c. 38, *s*. 2.

Then, in 1911, the Supreme Court of Canada, in *The City of Vancouver* v. *McPhalen*, on an appeal from an equally divided British Columbia Court of Appeal, held that where a municipal corporation is guilty of negligent default in nonperformance of the statutory duty imposed upon it to keep its highways in good repair, and adequate means have been provided by statute for the purpose of enabling it to perform its obligations in that respect, persons suffering injuries in consequence of such omission may maintain civil actions against the corporation to recover compensation and damages. Even if no such right of action has been expressly provided for by statute, the Supreme Court held that a right of action exists unless something in the statute itself, or in the circumstances in which it was enacted, justifies the inference that no such right of action was intended to be conferred.

The Court distinguished the English authorities on the grounds that the duty under consideration in them was not always imperative, and when it was imperative the immunity was based on historical circumstances not relevant to British Columbia. Duff J. made the following observation:

> There can, I think, be little doubt that the common law rule under which the inhabitants of parishes through which highways passed were responsible for their repair was never introduced into British Columbia.

The duty imposed was an original and unqualified duty. It had not been transferred to the City by the statute. In this connection Anglin J. concluded his judgment as follows:

> I find nothing in the statute now before us which suggests that the legislature did not intend that the present defendants should be civilly liable to any lawful traveller who may sustain injury on their highways owing to their having been negligently allowed to be in a state of disrepair. The duty to repair is created in mandatory and itperative language. There is nothing in the record to indicate that the duty thus imposed was transferred to the defendants from any other body nothing to shew that there was any pre-existing common law obligation to repair lying upon the inhabitants of the territory incorporated as the City of Vancouver. The learned Chief Justice of the provincial Court of Appeal, speaking no doubt with full knowledge both of the local history of Vancouver and of the municipal legislation, public and private, in British Columbia, says:
>
> Before the incorporation of the defendant the locality now included within the limits of any organized district. The Act, therefore, did not transfer common law powers and liabilities from the inhabitants of a district to an incorporated body, but the powers granted and liabilities imposed were original.

In this statement Mr. Justice Galliher concurs. The dissenting judges do not question it. There being nothing in the record to cast the slightest doubt upon it, we would not be justified in assuming it to be inaccurate. The statutory duty of the defendants to repair highways should, therefore, be treated as "original and not transferred

In the absence of something to shew a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same thing. *Mersey Docks and Harbour* v. *Gibbs (1); Sanitary Commissioners of Gibraltar* v. *Orfila* (2).

For these reasons I am of the opinion that the defendants were rightly held liable and that their appeal should be dismissed with costs.

The statutory duty in question was contained in section 219 of the *Vancouver Incorporation Act, 1900*, which read:

Every ... public street, road, square, lane,bridge and highway shall be kept in repair by the corporation.

This section had been included in *Vancouver Incorporation Act* of 1886, which originally incorporated Vancouver, and although the duty was modified by successive amendments to the Act

(1) Every public street, road, lane, bridge, and highway of which the Council has the custody, care, and management shall be kept in reasonable repair by the city, and in case of default the city shall, subject to the provisions of the '*Contributory Negligence Act*, be liable for all damages sustained by any person by reason of such default.

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

(3) Except in the case of gross negligence the city shall not be liable for a personal injury caused by snow or ice upon a street.

(4) No action shall be brought for the recovery of the damages mentioned in subsection (1) unless notice in writing setting forth the time, place, and manner in which such damage was sustained has been served upon or sent by registered post to the City Clerk within sixty days after the happening of the injury. If the injury was caused by snow or ice on the street, such notice shall be served within thirty days after the happening of the injury, otherwise the action shall be barred.

(5) In case of the death of the person injured, failure to give notice shall not be a bar to the action, and failure to give or insufficiency of the notice shall not be a bar to the action, if the Court or Judge before whom the action is tried, or, in case of appeal, the Court of Appeal, is of the opinion that there is reasonable excuse for the want or insufficiency of the notice, and that the city was not thereby prejudiced in its defence.

This section was reenacted, except for changes in respect of the time periods for giving notice and the limitation period, in the *Vancouver Charter*, S.B.C. 1953, c. 55 which provided in s. 294:

(1) Every street of which the Council has the custody, care, and management shall be kept in reasonable repair by the city, and in case of default the city shall, subject to the provisions of the "*Contributory Negligence Act*," be liable for all damages sustained by any person by reason of such default; but, except in case of gross negligence, the city shall not be liable for a personal injury caused by snow or ice on a street.

(2) No action shall be brought under subsection (1) unless notice in writing setting forth the time, place, and circumstances of the injury is served upon, or sent by registered mail to, the City Clerk:

(a) In any case where snow or ice on a street is the cause of the injury, within fourteen days of the injury;
(b) In any other case within fortyfive days of the injury.

(3) No action shall be brought under subsection (1) after the expiration of three months from the time when the damages were first sustained.

(4) In case of the death or disability of the person injured, failure to give the requisite or any notice, or to bring the action within such three months, shall not be a bar to the action if it is brought within twelve months and if it appears to the Court:

(a) That as a result of the death or disability there is reasonable excuse for such failure; and
(b) That the city is not prejudged in its defence by such failure.

(5) The provisions of subsections (2), (3), and (4) shall apply to an action brought against the city for damages occasioned by the presence of any nuisance on a street as well as for want of repair resulting from misfeasance or nonfeasance.

A discussion of the effect of this legislative intervention can be found later in this chapter. the primary liability remained with the City until the provision was repealed in 1955.

The English authorities therefore laid down the rule that even a statutory duty to repair, whether original or transferred, *does not* expose a road authority to liability for nonfeasance unless the Legislature has clearly conveyed a contrary intent, either expressly or by necessary implication. The Supreme Court of Canada, however, held that an original statutory duty to repair *does* expose a road authority to liability for nonfeasance unless the Legislature has clearly conveyed a contrary intent, either expressly or by necessary implication.

Subject to certain exceptions discussed later, however, no highway authority in British Columbia today can be held liable for omissions to maintain and repair roads under its control. The reason for this is that under the statutes which define responsibilities with respect to public roads in British Columbia namely, the *Highway Act*, the *Department of Highways Act*, the *Municipal Act* and the *Vancouver Charter*, the responsible authorities are either only given the control of and power to maintain and repair roads or, if a duty to repair has been imposed, it is coupled with an express provision which has the effect of absolving the authority from liability for non"feasance. With respect to the City of Vancouver at least, it is important to point out, this immunity has existed only since 1955.

B. Limits of the Rule

The courts have recognized that the common law rule produces harsh and unfair results, and accordingly, numerous exceptions and restrictions have evolved to mitigate its apparent rigour.

1. Misfeasance and Nonfeasance

The rule only applies where the condition causing loss was due to a mere failure to repair, i.e. nonfeasance, and not the improper performance of repair work or other acts in relation to the highway, i.e. misfeasance. However, the distinction between misfeasance and nonfeasance is, to use a generous description, fluid. For example, where any action has been taken prior to the mishap such as the earlier repair of the road, it may be possible to attribute the plaintiff's damage to this prior action rather than any subsequent inaction or nonfeasance. In this fashion, what might first appear to be mere nonfeasance can be construed, if there has been negligence, as misfeasance. As Lush J. put it in *McClelland* v. *Manchester Corporation*:

> If a highway authority leaves a road alone and it gets out of repair, there is, of course, no doubt that no action can be brought, although damage ensues. But this doctrine has no application to a case where the road authority have done something, made up or altered or diverted a highway, and have omitted some precaution, which, if taken, would have made the work safe instead of dangerous.
>
> You cannot sever what was omitted or left undone from what was committed or actually done, and say that because the Accident was caused by the omission therefore it was 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 case and a case where the local authority have chosen to do nothing at all.

It is difficult to predict where the line between misfeasance and nonfeasance will be drawn in any particular case. For example, in the recent case of *Millar & Brown Ltd.* v. *City of Vancouver,* the plaintiff's truck was damaged when it struck the overhanging limb of a tree planted by the city on a boulevard some 41 years earlier. At the time of the collision, the truck was properly proceeding in the curb lane of a normal truck route. The city argued that this

was a case of nonfeasance only, and hence there could be no liability, but the trial judge linked the earlier action of planting with the city's later negligent inaction or nonfeasance in failing to trim.

> If one regards the failure to trim boughs as isolated from or unconnected with the planting and maintenance of the tree, the failure to trim appears clearly to be mere nonfeasance. Without however intending to suggest that I have less difficulty than more distinguished Judges have had before me in drawing a precise line between misfeasance and nonfeasance, it appears to me that in the case at bar *the planting, maintenance and failure to trim must be regarded together*. Viewed in this light I have reached the conclusion that the City of Vancouver was guilty of *misfeasance* in planting a tree so close to the street that when it grew in the normal way its boughs would interfere with the normal and proper use of the street and to make no provision for trimming its boughs to prevent their doing so.

Judgment was accordingly given for the plaintiff.

The Court of Appeal reversed this decision. As to the trial judge's linking of the planting and the failure to trim, Davey J.A., commented:

> It seems quite clear to me, with respect to the learned trial judge, that when that tree was first planted it was no impediment to people using the street, and only became so in the course of years when it grew to such an extent that its overhanging boughs projected onto the highway and beyond the curb line. The city's failure to cut and top the branches and trim the tree when that danger arose was mere nonfeasance for which it is not liable.

2. Exercise of Statutory Powers

In England, the line between misfeasance and nonfeasance may have been blurred further, by a sidewind as it were, as the result of some remarks of Sachs L.J. in *Dutton* v. *Bognor Regis United Building Co. Ltd*. The Bognor Regis Urban District Council had passed bylaws setting construction standards, and had the power to inspect and ensure compliance with those standards. An inspector had negligently conducted the inspection, and the Council argued that this failure to exercise its powers without negligence was mere nonfeasance. In the part of his judgment that dealt with the point, Sachs L.J. said:

> Where in a case relating to the exercise of powers the issue arises whether on the facts the cause of any damage is nonfeasance or whether that cause is a misfeasance, the borderline can be difficult to discern. The *East Suffolk Rivers Catchment Board* case is one which the failure to proceed with the building work sufficiently quickly was held to be in essence a case of nonfeasance although Lord Atkins dissenting speech shows how close it came to the borderline. In the present case, on the contrary, the negligence plainly occurred in the course of a positive exercise by the council of its powers. *The moment it exercised its power ... to make by-laws* it assumed control over all such building operations within its area as were subject to those byelaws. *That assumption of control was a positive act* and thereafter in my opinion any negligence in its exercise fell within the ambit of the decision in the *Geddis* case.

This doctrine was adopted and extended by Berger J. of the Supreme Court of British Columbia in *McCrea* v. *The City of White Rock*, in which the council's *omission* to inspect was held to be negligence. On appeal, however, it was held that Berger J. was in error in following Dutton as that case could be distinguished and consequently the council was not liable in negligence for its omission to inspect. Furthermore, Robertson J.A. doubting whether Dutton could be regarded as law in British Columbia, said:

> With the English Court of Appeal doing what I have indicated for England I can, of course, have no quarrel, but it does not follow that the new law that they have declared there is the law for British Columbia.
>
> I am bound by the principles in *Donoghue* v. *Stevenson* (which has often been applied in this Court and in the Supreme Court of Canada) and I do not doubt indeed I aver the right and duty of this Court to adapt the law to altering social conditions and standards. I am not, however, aware of altered or altering social conditions or stan-

> dards here that require us to follow Dutton or would justify us in taking the same drastic step as was taken there, if we have the power to do so, a question that I leave open. (As to our power, I have not overlooked the inconclusive remark of Ritchie J. in Rivtow *Marine Ltd*. v. *Washington Iron Works*, [1974] S.C.R. 1189, [1973] 6 W.W.R. 692 at 711, 40 D.L.R. (3d) 530: "This being the case, I do not find it necessary to follow the sometimes winding paths leading to the formulation of a 'policy decision'.") In short, I am not prepared to follow Dutton in so far as it has declared new law as a matter of policy and, with respect, I do not think that Berger J. should have so followed it.

So far as British Columbia is concerned, therefore, the application of the law as stated in Dutton is doubtful, and awaits authoritative exposition by the Court of Appeal. It does not seem unreasonable, however, to read the judgments in McRea as showing some evidence of hostility to the *Dutton* doctrine.

3. "Artificial Structures"

The rule has been limited further by the doctrine that it does not apply where an "artificial structure" has been created.

The exception goes back to the Privy Council decision in *Borough of Bathurst* v. *MacPherson* where the borough was held liable for damage caused by the dilapidation of a brick drain.

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

In *Sowles* v. *Municipality of Surrey*, for example, the plaintiff's automobile was damaged through the collapse of a wooden culvert under a roadway. In holding the municipality liable O'Halloran J.A. reasoned as follows:

> When a public authority has made an *artificial* work to accommodate the necessities or conveniences of the inhabitants, *it is liable* at common law (unless clearly exempted by statute) *if it negligently allows the work to become dangerous* for use. In other words, having lawfully put the work in place, it is bound to exercise due care to prevent it becoming a source of danger to those lawfully using it who take reasonable precautions for their own safety.

In the same case, Robertson J.A. attempted to rationalize the artificial works "exception:"

> In the case of an ordinary road, if properly built, a municipality cannot determine what part is going to fall out of repair, but when, as here, the municipality builds a culvert out of materials which were bound to rot within a certain period and did not cause it to be regularly inspected, and further covered the culvert with gravel so it was really a trap, I think this amounts to misfeasance.

4. Nonhighway Functions

Another method that has been employed to restrict the effects of the basic rule has been to distinguish highway functions from other functions which may be exercised by the same municipal body. Since the general principle extends immunity to highway authorities only, it is logical that municipalities should be sheltered by the rule only when they act *qua* highway authority. For example, in *Newsome* v. *Darton Urban District Council*, the court attributed the making of a trench in a highway (for the purpose of executing drainage work), to the sanitation responsibilities of the defendant council rather than to its *highway* function.

C. Legislative Intervention

1. ___British Columbia

The preceding survey clearly illustrates the reluctance of the courts in England and in most Commonwealth countries to hold highway authorities liable for nonfeasance, whether by statutory interpretation or otherwise, and

their rejection of any attempt to interpret the statutory imposition of highway functions as creating any broader liability for damage than that imposed by common law on the inhabitants of a parish.

As we have earlier pointed out, however, the Supreme Court of Canada, and the courts in British Columbia, have drawn a distinction between two categories of statutory provision. First, there are those statutes which merely give municipalities the power to maintain and repair highways under their control, with respect to which it has been held that no liability is created other than that which exists at common law. Second, are those statutes which impose a positive duty to repair highways under their control. As to these, it has been held unless the statute has indicated an intention to exclude liability, and provided that it give them adequate means to perform this duty, municipalities will be liable for nonfeasance.

The English cases absolving a highway authority from liability for nonfeasance are an exception to the general rule that a person who is a member of a class for whose benefit a statutory duty is imposed, is entitled to maintain an action for damages flowing from a breach of that duty, unless the statute indicates a contrary intention.

The Supreme Court of Canada managed to overcame this anomaly, and follow the general rule, by distinguishing the English cases on the ground that they were concerned with statutes which transferred an existing duty to repair from bodies which were not themselves liable in civil actions for nonfeasance. Where a statutory duty to repair the highway had been imposed in British Columbia, the Supreme Court of Canada held that this duty was "original and not transferred," and that therefore the immunity for nonfeasance did not apply.

Since the statutory duty to repair imposed upon the City of Vancouver has now been repealed, it could be argued that those cases which dealt with the nature and extent of that duty are of only historical interest. A brief look at these cases does nonetheless provide a useful guide to the way in which the Supreme Court of Canada and the courts of British Columbia have dealt with the duty and the manner in which such courts have interpreted the several amendments that limited it.

Following *McPhalen* a provision that the City must be given notice of any accident within a specified time was incorporated in the section imposing the duty. In *Cummings* v. *Vancouver,*this amendment was interpreted by the Supreme Court of Canada as an endorsement of its decision in *McPhalen*. The dispute in *Cummings* concerned an unprotected opening in a sidewalk which appeared to have been made when gas pipes were being laid, and which was allowed to remain without proper repair during most of the day. Late in the day the plaintiff was injured when he stepped into this hole. The Supreme Court held that where a corporation is liable for damages sustained by reason of negligent nonperformance of the statutory duty imposed upon it to maintain its highways in repair, the question of the corporation's knowledge of the defects did not arise. The court held that there was a presumption against the corporation in such cases, and the onus was upon the corporation to adduce positive evidence in rebuttal. To rebut this presumption it was not sufficient to show that the corporation officials were ignorant of the existence of the defects.

As a result of this decision it appeared that the statutory duty imposed strict liability on then City. The section imposing the duty was therefore amended in 1928 so that the City only had to keep its roads, etc. in *reasonable* repair. This basic duty remained unchanged, until its repeal in 1955, apart from amendments in 1936 which, *inter alia*, applied the *Contributory Negligence Act*. The extent and nature of the duty was discussed in several cases, and the courts werd at pains to point out that each case must depend upon its own facts. In *Gregsan* v. *Vancouver*, however, O'Halloran J. did suggest some basic guidelines as to the factors which should be considered. The case concerned the nonrepair of a sidewalk and, after quoting the 1936 amendment, he said:

> It will be noted that the above amendment specifically applies the provisions of the *Contributory Negligence Act*. In my view the effect of section 320 as amended is to impose upon the city of Vancouver a statutory duty

which requires it to maintain its sidewalks in such repair that persons using the same reasonably will not be exposed to dangers which they could avoid by the exercise of ordinary care for their own safety.

> To determine what is a state of reasonable repair on facts such as exist here requires consideration of the demands and user of pedestrians with ordinary eyesight, judgment, health and temperament as well as consideration of the defect in the street itself. A state of reasonable repair is not a state of perfection. It must follow therefore that a pedestrian cannot use a sidewalk in total disregard of the defects which may be reasonably therein or assume that there are no defects in it at all.

The Courts in British Columbia thus worked for several years with the concept of municipal liability for damages sustained by reason of a breach of a statutory duty to keep highways in a reasonable state of repair. The present state of the law is in many respects, a reversion to an earlier condition, and not the reflection of an uninterrupted legal tradition.

Highway authorities in other Provinces, and in England, have had to work under a similar regime. Alberta, Saskatchewan, Manitoba, Ontario and England have all adopted statutory provisions which have had the effect of making highway authorities liable to actions in damages for failure to repair the highway. The liability has been restricted in ways which vary from each jurisdiction, and by way of example we will now examine the English and Ontario legislation.

2. *England*

In England, the common law immunity of highway authorities for nonfeasance was abolished by the *Highways (Miscellaneous Provisions) Act*, *1961*. The relevant section provides:

> 1. (1) The rule of law exempting the inhabitants at large and any other persons as their successors from liability for nonrepair of highways is hereby abrogated.
>
> (2) In an action against a highway authority in respect of damage resulting from their failure to maintain a highway maintainable at the public expense, it shall be a defence (without prejudice to any other defence or the application of the law relating to contributory negligence) to prove that the authority had taken shch care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic.
>
> (3) For the purposes of a defence under the last foregoing subsection, the court shall in particular have regard to the following matters, that is to say
>
> (a) the character of the highway, and the traffic which was reasonably to be expected to use it;
>
> (b) the standard of maintenance appropriate for a highway of that character and used by such traffic;
>
> (c) the state of repair in which a reasonable person would have been expected to find the highway;
>
> (d) whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway;
>
> (e) where the highway authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, what warning notices of its condition had been didplayed;
>
> but for the purposes of such a defence it shall not be relevant to prove that the highway authority had arranged for a competent person to carry out or supervise the maintenance of the part of the highway to

which the action relates unless it is also proved that the authority had given him proper instructions with regard to the maintenance of the highway and that he had carried out the instructions.

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

(5) This section shall bind the Crown.

The effect of this legislation has been explained by Lord Denning M.R. in two cases. In *Meggs* v. *Liverbool Corporation* he said:

82. *Ibid*. at 1139.

> What is the effect of the abolition? It means that the highway authority are under a duty to maintain the highway and keep it in repair. If it is in a dangerous condition so that it is not reasonably safe for people going along it, then prima facie there is a breach of the obligation to maintain and keep it in repair: and any person who suffers particular damage on account of it can bring an action against the highway authority. But the highway authority can escape liability if they prove that they took all reasonable care to see that it was safe, having regard to the various matters set out in section 1(2), (3) of the Act of 1961. At the outset, however, in order to make a prima facie case, the plaintiff must show that the highway was not reasonably safe, i.e. that it was dangerous to traffic.

In Burnside v. *Emerson*, he elaborated his views:

> *First:* the plaintiff must show that the road was in such a condition as to be dangerous to traffic. In seeing whether it was dangerous, forseeability is an essential element. The state of affairs must be such that injury may reasonably be anticipated to persons using the highway ...
>
> *Second:* the plaintiff must prove that the dangerous condition was due to a failure to maintain, which includes a failure to repair the highway. In this regard, a distinction is to be drawn between a permanent danger due to want of repair, and a transient danger due to the elements. When there are potholes or ruts in a classified road which have continued for a long time unrepaired, it may be inferred that there has been a failure to maintain. When there is a transient danger due to the elements, be it snow or ice or heavy rain, the existence of danger for a short time is no evidence of a failure to maintain ... So I would say that an icy patch in winter or an occasional flooding at any time is not in itself evidence of failure to maintain. We all know that in times of heavy rain our highways do from time to time get flooded. Leaves and debris and all sorts of things may be swept in and cause flooding for a time without any failure to repair at all.
>
> *Third:* if there is a failure to maintain, the highway authority is liable prima facie for any damage resulting therefrom. It can only escape liability if it proves that it took such care as in all the circumstances was reasonable; and, in considering this question, the court will have regard to various matters set out in s. 1(3) of the Act of 1961.

More recently the scope of the statutory duty was, in effect, expanded by Sachs L.J. in *Rider* v. *Rider*. He interpreted the standard of care imposed in the highway authority in terms of "the normal run of drivers," saying:

> Motorists who thus use the highway, and to whom a duty is owed, are not to be expected by the authority all to be model drivers. Drivers in general are liable to make mistakes, including some rated as negligent by the courts, without being merely for that reason stigmatised as unreasonable or abnormal drivers; some drivers may be inexperienced; and some drivers may find themselves in difficulties from which the more adept could escape. The highway authority must provide not merely for model drivers, but for the normal run of drivers to be found on their highways, and that includes those who make the mistakes which experience and common sense teaches are likely to occur.

3. ___Ontario

The common law exemption from liability for highway authorities has long been abolished in Ontario. The earliest Act imposing liability for highway repair was a pre-confederation statute of 1850, which both provided for

private civil actions by persons injured, and made the default of the municipality a misdemeanour punishable by fine. A similar provision has been carried forward in all subsequent Ontario Acts.

The relevant sections of the present Ontario *Municipal Act* provide:

> 427. (1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it or upon which the duty of repairing it is imposed by this Act and, in case of default, the corporation, subject to *The Negligence Act*, is liable for all damages sustained by any person by reason of such default.
>
> (2) No action shall be brought against a corporation for the recovery of damages occasioned by such default, whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained.
>
> (3) No action shall be brought against a corporation for the recovery of damages caused by the presence or absence or insufficiency of any wall, fence, guard rail, railing or barrier, or caused by or on account of any construction, obstruction or erection or any situation, arrangement, or disposition of any earth, rock, tree or other material or object adjacent to or in, along or upon any highway or any part thereof not within the travelled portion of such highway.
>
> (4) Except in case of gross negligence, a corporation is not liable for a personal injury caused by snow or ice upon a sidewalk.
>
> (5) No action shall be brought for the recovery of the damages mentioned in subsection 1 unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered mail to the head or the clerk of the corporation, in the case of a county or township within ten days, and in the case of an urban municipality within seven days after the happening of the injury, nor unless, where the claim is against two or more corporations jointly liable for the repair of the highway or bridge, the prescribed notice was given to each of them within the prescribed time.
>
> (6) In the case of the death of the person injured, failure to give notice is not a bar to the action and, except where the injury was caused by snow or ice upon a sidewalk, failure to give or insufficiency of the notice is not a bar to the action, if the court or judge before whom the action is tried is of the opinion that the corporation in its defence was not prejudiced by the want or insufficiency of the notice and that to bar the action would be an injustice, notwithstanding that reasonable excuse for the want or insufficiency of the notice is not established.
>
> (7) This section does not apply to a road, street or highway laid out or to a bridge built by a private person or by a body corporate until it is established by bylaw of the council or otherwise assumed for public use by the corporation.
>
> (8) Nothing in this section imposes upon a corporation any obligation or liability in respect of any act or omission of any person acting in the exercise of any power or authority conferred upon him by law, and over which the corporation had no control, unless the corporation was a party to the act or omission, or the authority under which such person acted was a bylaw, resolution or licence of its council.
>
> (9) A corporation is not liable for damages under this section unless the person claiming the damages has suffered by reason of the default of the corporation a particular loss or damage beyond what is suffered by him in common with all other persons affected by the want of repair.
>
> (10) Where a bridge that it is the duty of a corporation to repair is destroyed or so damaged that it is necessary to rebuild it, the Municipal Board may, upon the application of the corporation, relieve it from the obligation to rebuild the bridge, if the Board is satisfied that it is no longer required for the public convenience or that the rebuilding of it would entail a larger expenditure than would be reasonable having regard to the use that would be made of the bridge if it were rebuilt.
>
> (11) The relief may be granted on such terms and conditions ag the Board considers just, and such notice of the application shall be given as the Board may direct.

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

On their face, these provisions appear to impose strict liability on municipal bodies, so long as the relatively stringent limitation and notice requirements are met and the case does not fall within one of the exceptions set out in subsections (3), (4), (7); (8) and (9). However, it has been held that the nature of the duty imposed does not make a municipality an insurer, but only imposes upon it the duty to keep the highway in a state reasonably fit to accommodate the traffic which passes or might be expected to pass along it, and where there is no negligence there is no breach of duty.

It has also been held that evidence of nonrepair causing damage puts the onus on the municipality to show that nonrepair existed notwithstanding all reasonable efforts to comply with the law, and that the plaintiff is not bound to prove negligence.

D. The Desirability of Reform

It seems clear that the present law of British Columbia relating to liability for nonrepair of highways is in need of reform. Leaving aside, for the moment, the question whether the basic immunity rule should be abrogated, the maze of cases which defines the limits of, and exceptions to, the rule is confusing and reflects no discernible rational principle. The law, therefore, can scarcbly be said to be in a satisfactory state.

The Commission has concluded, however, that the policy of the rule itself requires reexamination. That policy seems originally to have been dictated by the fact that highway authorities were notoriously underfunded. With insufficient revenue even to keep the highways in good repair, how, it was asked, could the authorities attempt to meet the tremendous barrage of actions which might otherwise be open to the large multitude of travellers who used their highways?

Is this justification for the immunity still acceptable? While municipal governments are certainly wealthier than their nineteenth century predecessors, their resources are not limitless. An argument can still be made that while the effect of abrogating the immunity would be in the first instance to impose liability upon the municipalities, the final result would be a heavier burden of taxation for the citizen.

Most of the municipalities responding to our working paper expressed concern about this increased economic burden, and some smaller municipalities, whose resources are undoubtedly limited, went so far as to suggest that abrogation of the immunity would spell economic disaster.
In this connection, it was pointed out that the level of damages awarded in personal injury cases has been escalating quite dramatically, and the municipalities have argued that this, together with what they rightly consider to be the increased number of claims to which they will be exposed as the result of our proposals, will make the cost of insurance against this expanded liability prohibitively high. In the result, it was argued, the burden will, to some degree at least, fall upon general municipal revenues which are already inadequate to their needs, and will inevitably produce higher municipal taxes.

We have made inquiries of the insurance industry as to the costs of insurance in the light of our proposals. These inquiries were, perforce, hypothetical, and not surprisingly, evoked little in the way of useful response. We also made some inquiries in other Provinces concerning experience with legislation comparable to that which was suggested in our working paper and long sinpe in force in those Provinces. While those inquiries were neither complete nor exhaustive, the answers that we received have emboldened us to conclude that both insurance costs and claims experience have not resulted in an intolerable situation. No municipal authority that we have contacted has

found its burden of highway maintenance and repairs, or its claims settlement liability, or insurance costs, in any way intolerable.

We have no doubt that enactment of our recommendations will increase the economic burden on the municipalities and may (we put it no higher) result in higher municipal taxes. We cannot persuade ourselves, however, that this result is anything other than sensible and fair.
We share entirely the view of the Torts and General Law Reform Committee of New Zealand who, in their *Report on the Exemption of Highway Authorities for Nonfeasance*, said:

> All these arguments have a certain validity in relation to the administrator's duty to keep public expenditure within reasonable bounds; but have they any bearing on the question whether justice in the community is served by the retention of the rule? ... The Committee does not find the arguments advanced for retaining the nonfeasance rule convincing and is unanimously of the view that the rule should be abrogated.

At present the community no doubt benefits from the lower taxes payable by reason of the immunity and the fact that the full burden falls upon the injured plaintiff. In our opinion, this is simply unfair. To shift the risk of loss from the injured party to the community seems to us, then, both eminently fair and as a matter of distributive justice, likely to be productive of social benefit in the form of improved highway maintenance.

It might be argued, however, that it misrepresents the case to assert that the risk of loss falls upon the unlucky individual who is injured, since machinery does in fact exist which spreads the loss throughout the community. Most losses arising from nonrepair of highways involve automobile accidents. Automobile insurance, with nofault benefits, is mandatory. The Insurance Corporation of British Columbia has the power to prescribe different rates for different geographical areas and can impose higher rates in areas where greater damage is likely to arise through nonrepair. Thus, it might be said, the burden has already been shifted to such communities and any purported reform would be illusory.

Even if one accepts the foregoing analysis, shifting the burden through the medium of insurance is open to a number of objections. In principle the existence of an immunity is socially undesirable and the existence of insurance machinery does not alter that fact.

Automobile insurance, however, does not shift the burden as fairly as would be the case if highway authorities were directly liable. First, assuming that highways benefit the community as a whole whether or not all members use them directly, it is unfair that direct users (drivers and owners of automobiles) should bear; in the form of higher insurance rates, costs which should be distributed over a broader base. Second, not all loss which may occur will be compensated for in full, or at all. For example, the person who suffers a personal injury will in most cases receive the nofault benefits available under his insurance policy; but these are normally less than the full measure of damages which would be recoverable in an action in tort. Similarly, if an automobile is damaged through nonrepair of a highway the owner will not recover the "deductible" under his policy. The injured cyclist or pedestrian may recover nothing at all. Full compensation would be available in all these cases if the immunity were abrogated.

Our conclusion after a conscientious balancing of all the interests, is, therefore, that highway authorities should be liable for nonfeasance. The existing rule is an anomaly which does not seem worth preserving. We find ourselves in agreement with the observation that:

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

In many ways the widespread existence of automobile insurance clouds what would otherwise be a relatively straightforward policy determination. In our view the proper approach is first to establish fair and rational principles of liability. Only within such a framework can society derive the maximum benefit from the insurance machinery. Without a rational framework of tort liability highway authorities are less inclined to observe reasonable standards of maintenance and repair; and compensation for the injured is very much a hit and miss affair dependent on the vagaries of the common law and varying and uncertain insurance rights.

We therefore favour the imposition of liability on highway authorities and are fortified in ihis conclusion by the widespread acceptance of this view in other jurisdictions.

E. Recommendations for Reform

1. Extent of Reform

The legislation in force in England and Ontario provide models for two alternative approaches to the imposition of liability on municipalities. In Ontario a duty to repair has been placed directly on municipalities, and it has been held that this casts upon them the onus of showing that a failure to repair existed notwithstanding all reasonable efforts to comply with its duty to repair. That liability is then narrowed by excepting claims with respect to walls, guard rails, rocks, trees, etc. and by requiring proof of gross negligence in some cases.

In England liability is imposed by abrogating the common law immunity rule. No exceptions are set out but a more general defence of reasonable behaviour is made available, and certain matters relevant to reasonableness are set out.

Both approaches have their attractions. The direct imposition of the duty to repair on municipalities, as is done in Ontario and other Provinces, seems less cumbersome than the historical approach taken in England of tying the common law rule and its statutory abrogation to "the inhabitants at large and any other persons as their successors." On the other hand the exceptions in Ontario seem unnecessarily wide and may preclude liability in circumstances in which, in our opinion, a municipality should be liable.

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

The Commission recommends that:

1. *Where a public body fails to maintain and keep in repair a highway of which it has the custody, care and management it should be liable (subject to the provisions of the* Contributory Negligence Act*) for damage sustained by a person by reason of such default.*

2. *In any action based on the liability imposed in (1) it should be a defence to prove that the public body had taken such care, as in all the circumstances was reasonable, to keep the highway to which the action relates in repair and in a safe condition.*

3. *For the purposes of a defence under Recommendation (2), in determining whether a public body has taken such care, as in all the circumstances was reasonable, the court should in addition to any other relevant considerations have regard to such of the following matters as may be relevant:*

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

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

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

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

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

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

These recommendations differ in one regard from the proposals contained in our working paper. In our working paper we proposed that a mandatory duty to repair be placed directly on all highway authorities, and that such authorities be liable for any'damage sustained by reason of a breach of this duty. We have concluded that the desired reform can be achieved merely by imposing a liability on highway authorities for damage sustained by reason of the nonrepair of the highway.

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

As with the proposal in our working paper the consequence of adopting the scheme we have outlined is to relieve the plaintiff of the necessity to prove that the municipality's failure to maintain and repair was negligent. The burden will be on the municipality to show that it had taken such care as in all the circumstances was reasonable. Although this proposal attracted a considerable amount of criticism, we are of the view that our proposals in this regard should remain unaltered, for we still consider it likely that the municipality will have better access to the kind of information that will enable a court to determine the reasonableness of its behaviour.

The recommended approach would also encompass claims arising from snow and ice on highways and sidewalks. Section 427(4) of the Ontario statute requires, and section 294 of the *Vancouver Charter* required, prior to its repeal in 1955, that a person injured due to ice or snow upon a sidewalk prove gross negligence in order to hold the responsible authority liable. We recognize that authorities should not be required to observe extremely high standards of behaviour where these unusual hazards are involved. Any person travelling where these hazards are present, or are likely to be present, must be taken to have accepted a certain amount of risk to himself. There is, of course, no need to argue the maintenance difficulties faced by highway authorities under these conditions.

We are of the view, however, that the Ontario and earlier *Vancouver Charter* approach is not best suited to meet the problems which arise in the circumstances. It seems preferable to bridle actions for such damages in the manner recommended above.

The Ontario legislation also contains a number of strict notice and limitation requirements. In our working paper we pointed out that in our Report on Limitations we considered a number of comparable notice requirements and recommended that they be repealed. We took the view that such notice requirements should not be included in our proposals. Several respondents to the working paper took the view that these protect a highway authority against late claims, and also serve the practical purpose of enabling information about an accident to be collected and preserved while still fresh.

However, although the Legislature saw fit in the *Limitations Act* to keep the notice requirements that we had recommended should be repealed, we remain of the view that they are undesirable and should not be included in our recommendations as to liability for nonrepair of highways. We take this view for the following reasons set out in our *Report on Limitations:*

> This Commission feels that the potential injustice which can be created by a notice provision, and the undesirability of certain institutions receiving preferred treatment under the law of limitations, outweighs the benefits which the community may receive from the existence of those notice requirements.

We therefore recommend that no such notice requirements be included in the context of liability of municipalities for the nonrepair of highways.

In the Appendix to this Report we point out that section 610 of the *Municipal Act* imposes a duty upon municipalities to keep in repair works undertaken as local improvements,

> (1) After a work undertaken has been completed, it shall during its lifetime be kept in repair by and at the expense of the corporation.
>
> (2) Nothing in this Division relieves the corporation from any duty or obligation to which it is subject, either at common law or under the provisions of this Act or otherwise, to keep in repair the highways under its jurisdiction, or impairs or prejudicially affects the rights of any person who is damnified by reason of the failure of the corporation to discharge such duty or obligation.
>
> (3) Nothing in this section makes thecorporation liable for any damage for which it otherwise would not have been liable.

and that these works can include the establishment, widening, improvement, etc. of streets. It has been held, however, that the forerunner of this section did not impose any liability on municipalities for nonfeasance in the area of highway repair. We believe that this section should be modified so as to reconcile its provisions with our principal recommendation in so far as they apply to highways.

It should be noted that we have made no recommendations with regard to roads under the *Forest Act* and the *Industrial Transportation Act*, generally known as "forest roads." Although such roads are not and were not intended to be used as public highways, indeed they are classified as private roads, they are experiencing increased public use. Because of this increased public use we are of the view that, in principle, our recommendations should apply to such roads. We are aware, however, that because of their special use and the type of traffic they bear, different considerations apply. Accordingly, we have decided not to make any specific recommendations with regard to

these roads, although included in the Appendix to this Report is an examination of the statutory provisions relating to their control, management and repair, together with a discussion of their "owners" liability for nonrepair.

2. ___Legislative Distribution

It is our view that the proposals for reform should be implemented by specific amendments to the various statutes which define the responsibilities of the Province and of local governments relating to public highways. It is, therefore, necessary to identify, with some specificity, the relevant legislation.

The *Highway Act*, *Department of Highways Act*, *Municipal Act*, and *Vancouver Charter* all contain provisions defining responsibilities relating to highways. It is not always easy to determine which authority is responsible for the maintenance and repair of a particular highway or street. The various categories of responsibility are summarized in the table below. A detailed examination of the relevant provisions from which the table is derived is set out as an Appendix to this Report. For the purposes of the table "municipality" includes the City of Vancouver.

	HIGHWAY	BODY HAVING JURISDICTION FOR MAINTENANCE
1.	Highways outside municipal boundaries	The Provincial Highways Department
2.	Designated arterial highway within the terms of the *Highway Act* (i.e. within a municipality having a population of 30,000 or less.)	The Provincial Highways Department
3.	Designated secondary highway within the terms of the *Highway Act*.	The municipality of the area in Or through which the highway runs - with cost of maintenance apportioned between the municipality and the Highways Department
4.	Highways in a municipality other than ones falling within Part III of the *Highway Act*.	The municipality constructing them - (with possible exception of sidewalk permitted under s. 34 (303 of *Highway Act)*.
5.	Sidewalks	

The specific amendments which we recommend are set out below.

The Commission recommends:

1. That the Municipal Act *be amended*

(a) by adding a new section 505 comparable to the following:

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

(2) In any action based on the liability imposed by subsection (1) it is a defence to prove that the municipality has taken such care as in all the circumstances was reasonable to keep the highway to which the action relates in repair and in a safe condition.

(3) For the purposes of a defence under subsection (2) a court shall in addition to any other relevant considerations have regard to such of the following matters as may be relevant:

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

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

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

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

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

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

(b) by the repeal of section 610(2) and section 610(3) and the addition of a new section 610(2) and a new section 610(3) comparable to the following:

(2) Where a work undertaken is not kept in repair pursuant to subsection (1) the corporation is liable, subject to the provisions of the Contributory Negligence Act, *for damage sustained by any person by reason of such default.*

(3) The provisions of section 505(2) and section 505(3) apply in any action based on the liability imposed by subsection (2) where the work undertaken is a local improvement under clause (a), (b), (c), (e), (f), or (j) of subsection (1) of section 581, or under clause (a) , (b), (c) , (d) , or (e) of subsection (2) of section 581.

2. That the Vancouver Charter be amended by adding a new section 289A comparable to the following:

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

(2) In any action based on the liability imposed by subsection (1) it is a defence to prove that the City has taken such care as in all the circumstances was reasonable to keep the street to which the action relates in repair and in a safe condition.

(3) For the purposes of a defence under subsection (2) a court shall in addition to any other relevant considerations have regard to such of the following matters as may be relevant:

(a) the character of the street and the traffic which could reasonably be expected to use it;

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

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

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

(e) where the City could not reasonably have been expected to repair that part of the street to which the action relates before the cause of action arose, whether or what warning notices of its condition had been displayed;

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

3. That the Highway Act *be amended*

(a) by the repeal of section 34(1);

(b) by the repeal of section 34(2);

(c) by adding a new section 34 comparable to the following:

(1) The control of the construction and maintenance of every arterial highway and of every other highway not within a municipality is vested in the Crown.

(2) Subject to the regulations made under this Part, the control of the construction and maintenance of every secondary highway is vested in the municipal corporation of the area in or through which the highway runs.

(3) Where an arterial highway, or other highway not within a municipality, of which the control of construction and maintenance is vested in the Crown is not maintained or kept in repair the Crown is liable, subject to the provisions of the Contributory Negligence Act, for damage sustained by any person by reason of such default.

(4) Where a secondary highway, of which the control of construction and maintenance is vested in a municipal corporation, is not maintained or kept in repair, the municipality is liable, subject to the provision of the Contributory Negligence Act, for damage sustained by any person by reason of such default.

(5) In any action based on the liability imposed by subsection (3) or subsection (4) it is a defence to prove that the Crown or the municipality has taken such care as in all the circumstances was reasonable to keep the highway to which the action relates in repair and in a safe condition.

(6) For the purposes of a defence under subsection (5) a court shall in addition to any other relevant considerations have regard to such of the following matters as may be relevant:

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

(b) the standard of maintenance appropriate for a work or highway of that character and used, in the case of highways, by that traffic;

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

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

(e) where the Crown or the municipality could not reasonably have been expected to repair that part of the work or highway to which the action relates before the cause of action arose, whether or what warning notices of its condition had been displayed;

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

(d) by renumbering the existing section 34(3) as section 34A.

CHAPTER III THE DEFENCE OF STATUTORY AUTHORITY

A. Introduction

In our working paper we examined the general scope of the defence of statutory authority and the way in which it can be used to defeat claims founded in nuisance. We pointed out that when a public body constructs a work or carries on an activity which is authorized by statute it is not uncommon for a nuisance to be created which adversely affects the interests of others. If an individual engages in an activity which creates a nuisance an action for damages can be maintained against him. However, if such loss was caused by a public body acting pursuant to a statutory directive, that body might be able to escape liability by raising the defence of statutory authority.

It was at one time thought that a public body performing a public duty under the authority of Parliament could never be liable in tort. This historical position has been explained as follows:

> The board or public body were regarded as public servants acting under the Crown and were not civilly responsible for injuries arising to the public or to individuals from the acts of their officers or servants; they should not be personally liable under the circumstances, and the funds in their hands, being trust funds held for public purposes, should not be answerable.

This reasoning was swept away by the decision of the House of Lords in *Mersey Docks Trustees* v. *Gibbs*. In that case Lord Blackburn, delivering the opinion of all the judges called in to advise the House, articulated the following fundamental principle:

> In every case the liability of a body created by a statute must be determined upon a true interpretation of the statutes under which it is created.

He concluded that:

> *In the absence of something to shew a contrary intention*, the Legislature intends that the body, the creature of statute, shall have the same *duties*, and that its funds shall be rendered subject to the *same liabilities* as the general law would impose on a private person doing the same things.

In view of this fundamental principle of statutory interpretation any study of the defence of statutory authority must of necessity be a study of the circumstances in which a court will find such "a contrary intention" on the part of the Legislature.

We should like to emphasize that, with the exception of expropriation cases, the defence of statutory authority arises almost exclusively in relation to nuisance. It is difficult to conceive of an action against a public body which does not involve nuisance, but which is amenable to a private law remedy, in which the defence of statutory authority could be raised.

B. The Scope of the Defence

It is important to distinguish between the two types of statutory authority absolute and conditional authority. The defence of statutory authority can be raised only in relation to absolute authority.

1. Absolute Statutory Authority

A statutory authority is usually considered to be absolute where the statute expresses the authority in mandatory terms. For example, section 610(1) of the *Municipal Act* provides:

After a work undertaken has been completed, it shall during its lifetime be kept in repair by and at the expense of the corporation.

Absolute statutory authority can also arise where, although the authority is expressed in permissive terms provision is made for compensation. In such cases it has been held that the fact that a person aggrieved has been provided with a means of obtaining compensation for any loss he may have suffered evidences a legislative intent to take away common law rights of action. For example, section 512 of the *Municipal Act*

Section 527 does not merely give a permission for the construction of a specific work. It defines a statutory right of a district municipality to collect water from any highway ...

This reasoning seems difficult to reconcile with the well established principle that the giving of a right to do something even a statutory right cannot, without more, confer the right to create a nuisance or to carry out the project negligently. Martland J. linked s. 527 with s. 478(1) and concluded that compensation has been provided for damage caused by the exercise of this right and the authority is absolute thus s. 529 provides a complete defence to any action. The difficulty ii that compensation can be granted only under s. 478(1) where the damage is "necessarily resulting" from the exercise of the powers conferred. This case is considered further later in this Report. contains the following:

(1) The Council of a district municipality *may* enter upon land and take therefrom timber, stone, gravel, sand, clay, or other material which may be required in the construction, maintenance, or repair of any roads, bridges or other public works.

(2) *Compensation* agreed on between the parties, or appraised and awarded under Division (4) of Part XII , for timber, ..., or other material taken, *or for any damage caused thereby* to the owner or occupier of real property, or to the persons suffering damage thereby, shall be paid ...

An absolute statutory authority is authority to do the act authorized notwithstanding the fact that it necessarily causes a nuisance or other injurious consequence. It is here that the defence of statutory authority can legitimately arise, for "it is now thoroughly well established, that no action will lie for doing that which the legislature has authorized ..."

This general position is, however, subject to two qualifications. The injury or damage caused by the body acting under the absolute statutory authority must be an inevitable result of the authorized act; and it must not be caused by negligence.

(a) *Inevitable result*

When the Legislature authorizes in mandatory terms the doing of any act, it has, by implication, also authorized all the inevitable results of that act. The theory is that these results were considered by the Legislature when it granted the authority to do the act. If the damage or injury caused is not inevitable, then the defence of statutory authority cannot be relied upon as the Legislature is considered not to have contemplated such a result.

The onus of establishing that the result was inevitable rests on the body raising the defence of statutory authority. The inevitable result must, however, be a realistic one. As Lord Dunedin said in *Manchester Corporation* v. *Farnworth*:

The criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain commonsense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and expense.

(b) *Negligence*

If a statutory body is negligent in the exercise of its statutory powers then whether that body acted pursuant to an absolute or conditional statutory authority is immaterial. Whenever possible, a court will infer that a statutory body must exercise its statutory powers "without negligence." As Lord Blackburn said in *Geddis* v. *Proprietors of Bann Reservoir.*

> For I take it, without citing cases, that it is now thoroughly well established, that no action will lie for doing that which the legislature has authorized, *if it be done without negligence,* although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently.

2. Conditional Statutory Authority

The vast majority of powers granted to statutory bodies are granted under a conditional statutory authority. Such conditional authority is created by the use of permissive language in the enabling Act. For example, section 714(a) of the *Municipal Act* provides:

> The Council may, for the health, safety and protection of persons and property, by bylaw
>
> (a) regulate the construction, alteration, repair, or demolition of buildings and structures;

Conditional statutory authority is authority to do the act specified provided that it can be done without causing a nuisance or other injurious consequence.

Such conditional authority was considered in the case of *Metropolitan Asylum District* v. *Hill* where the body involved had authority expressed in permissive terms to erect a smallpox hospital. On the evidence presented in 1881, it was accepted as a fact that such a hospital was a danger to the health of the surrounding residents and, therefore, a public nuisance. Lord Watson replied to the Asylum District's defence of statutory authority as follows:

> Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer licence to commit nuisance in any place which might be selected for the purpose.

The Supreme Court of Canada recently affirmed this principle in *City of Portage la Prairie* v. *B.C. Pea Growers Limited*. In this case an injunction had been granted restraining the city from causing or permitting sewage, water, or effluent to escape from its sewage lagoon onto the plaintiff's land. The city had constructed the sewage lagoon pursuant to the following powers given in its Charter:

> 98. The city *may and shall have power* to install, design, contract, build, purchase, improve, hold and generally maintain, manage, operate and conduct a system of waterworks and sewerage, and all main pipes, buildings matters, machinery and appliances, therewith connected or necessary thereto, in the City of Portage la Prairie ...
>
> 99. The city shall have all the powers necessary to enable it to build the waterworks and sewers hereinafter mentioned, and to improve, secure, maintain and enlarge any of the said works from time to time as the said city may seem meet ...

Martland J. in his judgment for the court, interpreted the above provisions as conferring a conditional statutory authority only. Further, he noted that even if these provisions did confer an absolute statutory authority, the defence of statutory authority could not apply in as much as the nuisance complained of was not an inevitable result of the authorized act the purpose of a sewage lagoon being to contain effluent, not to permit its escape.

C. Recommendations for Reform

It is our view that all public bodies should be subject to the same duties and liabilities as the law imposes on the private individual. We also subscribe to the basic principle that the state should deprive no person of his property, or the full use and enjoyment of any part of it, without adequate compensation. This principle is enshrined in the many statutes which provide for compensation where expropriation powers are exercised. The availability of the defence of statutory authority can mean that a person is deprived of a remedy for damage suffered as a result of a public body's action where, if the damage had been caused by a private individual in the same circumstances, he would not be so deprived.

We have concluded therefore that the scope of the defence should be narrowed so that it may not be used to resist just claims for compensation. We recognize, however, that there is a public value in allowing public bodies to operate (while within their specific mandate) free from the threat of injunctive proseedings. The defence khould therefore be available as an answer to a claim for an injunction to restrain the performance of a statutory duty or for a declaration in similar terms. We also take the view that the defence should continue to be available where expropriation is involved as the Commission has, in its *Report on Expropriation*, made recommendations with regard to compensation in such situations.

The desired result might be achieved in one of two ways. One way might be to impose a direct liability on public bodies to compensate for all damage caused by their actions. The other would be simply to eliminate the defence, except in relation to the proceedings referred to, and leave the question of liability and the measure of damages to the general law of tort. The latter approach seems preferable. The common law has long experience in nuisance matters and we do not find the body of law which has developed unsatisfactory. The elimination of the defence should result in the least distortion of established principles. This is consistent with the approach taken in our *Report on Legal Position of the Crown*. In that Report, we recommended that "the defence of statutory authority should not be available to the Crown in actions for nuisance or based on the rule in *Rylands* v. *Fletcher*, except where the claim is for injunctive relief." The *Crown Proceedings Act* enacted by the Legislature in 1974, although largely based upon the Report of this Commission, appears to haye rejected this particular recommendation, although the point is not entirely free of doubt. Section 14 of that Act provides that:

> This Act shall not prejudice the right of the Crown to take advantage of the provisions of any Act of the Legislature; and, in proceedings against the Crown, any Act of the Legislature that could, if the proceedings were between persons, be relied upon by the defendant as a defence to the proceedings, whether in whole or in part, or otherwise, may, subject to any express provision to the contrary, be so relied upon by the Crown.

The Commission adheres, however, to its original view although two members have reservations about the particular form taken by the recommendation made below. While subscribing fully to the general principle that underlies it, they would be inclined to be more cautious. Those two members of the Commission concede their inability to cite specific instances in which the effect of the recommendation would be to abrogate a defence that should, on a balancing of all the interests, be preserved. They nonetheless consider that such instances may exist buried in the legislation of the Province, and are reluctant to recommend any changes that may affect such cases until they have been identified and examined.

We are aware, however, that where a person may suffer damage as a result of the activities of a public body he may also derive some benefit from them. This is recognized in the present compensation provisions of the *Municipal Act* and *Vancouver Charter* where compensation is limited to any damage suffered "beyond any advantage which the claimant may derive from the contemplated work." We take the view that this principle should be embodied in our principal recommendation.

The Commission also pointed out in its *Report on Legal Position of the Crown* that there is one public body, namely the British Columbia Hydro and Power Authority ("B.C. Hydro") which under the statute governing its powers is given special immunity from liability in nuisance or under the rule in *Rylands* v. *Fletcher*. Although sec-

tion 52 of the *British Columbia Hydro and Power Authority Act* makes B.C. Hydro, a Crown corporation, liable in tort, section 52A of that Act provides that B.C. Hydro is only liable in nuisance or under the rule in *Rylands* v. *Fletcher* if it was also negligent. The Act provides:

> 52A. Notwithstanding section 52, the Authority is not liable in an action based on nuisance or on the rule in *Rylands* v. *Fletcher*, unless the Authority was negligent.

This section appears to set out in statutory form the defence of statutory authority. The immunity it confers, however, is even greater than that provided by the defence of statutory authority, for, to rely on the section, B.C. Hydro would not have to prove that the "nuisance" or loss was inevitable. As a result B.C. Hydro could escape liability in tort for damage caused by the bursting of a dam, unless the plaintiff establishes that it was negligent. We take the view that a person who suffers damage in such circumstances should not be precluded from bringing an action against B.C. Hydro. Dams are built for the benefit of all users of electricity, and in our view no justification exists for imposing upon those unfortunate people who suffer what may be potentially catastrophic losses, the entire burden of those losses.

The Commission recommends:

1. *The common law defence of statutory authority should not be available in any action for damages based on nuisance or the rule in* Rylands *v.* Fletcher*, but where such a defence would have been available in an action for damages based on nuisance arising out of a power conferred by statute the value of any economic benefit accruing or which will accrue to the plaintiff as a result of the exercise of such power may be set off against the econamic damdge suffered by him.*

2. *The defence of statutory authority should continue to be available in an action relating to the exercise of authority to expropriate land, or as an answer to a claim for an injunction to restrain the performance of the statutory duty or a declaration in similar terms.*

3. *Section 52A of the* British Columbia Hydro and Power Authority Act *be repealed.*

D. Legislative Distribution

It is our view that reform should be effected by amendments to the *Laws Declaratory Act* and the *British Columbia Hydro and Power Authority Act*. In our working paper we invited comment on whether the *Municipal Act* and *Vancouver Charter* should contain a provision similar to that which was proposed should be included in the *Laws Declaratory Act*. We were of the view that physical proximity to other provisions relating to the rights and liabilities of those bodies might highlight this reform and draw it to the attention of persons who might otherwise overlook it. Although many respondents shared our view in this regard, we have on reflection come to the conclusion that duplication of statutory provisions is undesirable and unnecessary.

If any amendment to the *Laws Declaratory Act* is to be binding upon B.C. Hydro this will have to be expressly stated in the *British Columbia Hydro and Power Authority Act*, since section 53(1) of that Act provides:

> Notwithstanding a specific provision in any Act to the contrary, except as otherwise provided by or under this Act, the Authority is not bound by any statute or statutory provision of the Province.

As a result of this extraordinary provision, even if a statute specifically provides that it is binding on B.C. Hydro, the corporation is not bound unless that statute is specified as binding it in.the *British Columbia Hydro and Power Authority Act*, or in a regulation made pursuant to section 53(6) of that Act.

The specific amendments we recommend are set out below.

The Commission recommends that:

1. *The* Laws Declaratory Act *be amended by including a new section comparable to the following:*

   (1) *The common law defence of statutory authority shall not be available in any action for damages based on nuisance or the rule in* Rylands *v.* Fletcher *but where such a defence would have been available in an action for damages based on nuisance arising out of a power conferred by statute the value of any economic benefit accruing or which will accrue to the plaintiff as a result of the exercise of such power may be set off against the economic damage suffered by him.*

   (2) *Subsection (1) shall not apply*

      (a) *in an action relating to the exercise of authority to expropriate land; or*

      (b) *in an action where an injunction is claimed to restrain the performance of a statutory duty or a declaration in similar terms.*

2. *The British Columbia Hydro and Power Authority Act be amended as follows:*

   (a) *by the repeal of section 52A;*

   (b) *by including in section 53(6) a provision which states that the British Columbia Hydro and Power Authority is bound by the new section to be included in the* Laws Declaratory Act *as set out in 1 above.*

E. Consequential Amendments

The *Municipal Act* and the *Vancouver Charter* contain express provisions for compensation to be paid in some situations where the defence of statutory authority could otherwise be raised successfully but only in respect of real property which is injuriously affected. The reason these provisions are restricted to damage to real property is that they were apparently drafted to deal solely with expropriation situations. They are expressed, however, in expansive terms and appear not only to provide compensation where real property is injuriously affected by reason of an expropriation but also by reason of the exercise of *any* of the municipalities' powers. As this chapter focuses on the availability of the defence of statutory authority in situations other than those arising out of an expropriation, we are only concerned with the expanded application of such provisions.

Section 478(1) of the *Municipal Act* provides that:

> (1) The Council shall make to owners, occupiers, or other persons interested in *real property* entered upon, taken, expropriated, or used by the municipality in the exercise of *any of its powers, or injuriously affected by the exercise of any of its powers*, due compensation for any damages ... *necessarily resulting* from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work; ...

Sections 536 and 541 of the *Vancouver Charter* are comparable. Section 536 provides for compensation for damages necessarily arising from the expropriation of real property. Injurious affection is provided for in section 541 in the following terms:

.

> Where real property is injuriously affected by the exercise on the part of the city of *any* of its powers, the city shall, unless it is otherwise provided in this or some other Act, make due compensation to the owner for any damage *necessarily resulting* therefrom beyond any advantage which the owner may derive from any work in connection with which the *real property* is so affected.

These sections appear to encompass not only injurious affection resulting from the exercise of a municipality's absolute statutory authority, where the defence of statutory authority *could* be raised, but also injurious affection resulting from the exercise of a *conditional authority* where the defence of statutory authority could not properly be raised. Whether these sections take away the common law remedy that the injured party would otherwise have in a conditional authority situation, at least where the damage is a necessary result, is therefore, a moot point.

These provisions, to the extent that they do not relate to expropriation, overlop our previous proposal in what seems to be an undesirable fashion. They are phrased in terms of "injurious affection" which is really a legal term of art having a restricted and technical meaning and sophisticated limitations as a remedy, for example, and in particular the term does not encompass business losses. It is properly used to describe consequential damage to one piece of property by the expropriation of another which is in some way proximate to the first. However, because of the broad terms in which these and other statutory provisions are expressed they have come to be argued in nonexpropriation cases as well.

We have proposed a general tort approach to compensation in nonexpropriation matters and necessarily inferred in this approach is the separation of compensation pursuant to the exercise of an expropriation authority from compensation for loss suffered due to the exercise of any other absolute statutory authority. To realize this separation, we recommend that section 478 of the *Municipal Act* and section 541 of the *Vancouver Charter* be amended so as to restrict their application to the exercise of expropriation powers.

The Commission recommends that:

1. *The* Municipal Act *be amended by adding to section 478(1) the word "expropriation" between the words "its" and "powers" in the third and fourth lines so the section then reads:*

   > *478. (1) The Council shall make to owners, occupiers or other persons interested in real property entered upon, taken, expropriated, or used by the municipality in the exercise of any of its expropriation powers, or injuriously affected by the exercise of any of its expropriation powers, due compensation for any damages necessarily resulting from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work; ...*

2. *The Vancouver Charter be amended by adding to section 541 the word "expropriation" between the words "its" and "powers" in the second line so the section then reads:*

   > *541. Where real property is injuriously affected by the exercise on the part of the City of any of its expropriation powers, the City shall, unless it is otherwise provided in this or some other Act, make due compensation to the owner for any damage necessarily resulting therefrom beyond any advantage which the owner may derive from any work in connection with which the real property is so affected.*

The defence of statutory authority has recently been considered in conjunction with the privative clause found in section 529 of the *Municipal Act* by the Supreme Court of Canada in *District of North Vancouver* v. *McKenzie Barge & Marine Ways Ltd*. Section 529 confers immunity on district municipalities when they act pursuant to section 527 to collect water from highways and discharge it in convenient waterways. the two provisions read as follows:

527. A district municipality *has the right*, and is deemed to have had the rtght since its incorporation, *to collect the water from any highway by means of drains or ditches*, and to convey to and discharge the said water in the most convenient natural waterway or watercourse.

529. No action arising out of, or by means of, or in respect of, the construction, maintenance, operation, or user of any drain or ditch *authorized by section* 527, whether such drain or ditch now is or is hereafter constructed, shall be brought or maintained in any Court against any *district municipality*.

Upon its face, the immunity from suit which section 529 purports to give can be only as wide as the statutory authority granted in section 527. It is only an action "authorized by section 527" which is afforded protection under section 529 .

The district municipality in this case, in order to drain certain highways, dug a ditch leading into a creek which emptied into Burrard Inlet. The water carried by this ditch eroded the banks and bed of the ditch and carried this material into the Inlet and eventually, by tides and eddies, onto the plaintiff's water lot where it caused damage to its ship repair business. The plaintiff based its action against the municipality on negligence for failing to take proper care in the design and construction of its ditch and also for the creation of a nuisance.

The trial judge made the following findings of fact which are relevant to the application of the defence of statutory authority in this case:

> I find that the accretion complained of by plaintiff comes from the discharge of runoff water from Keith Road and Fairway Drive, both of which are highways; and that Taylor Creek is and was the most convenient natural waterway to which defendant could have conveyed such water and discarded it. *In its manner of doing so the defendant*, in my opinion and finding, *fully discharged its obligation to plaintiff*. As a district municipality it was and is under no obligation, I think, to construct anything in the nature of a "Highbury Street Tunnel" or other expensive artificial work for the purpose of collecting, conveying and discharging into the most convenient natural waterway, the water runoff from its highways.

These findings of fact, which ultimately determined the judgment of the Supreme Court of Canada, are a little disturbing. The trial judge, and ultimately the Supreme Court of Canada,

Section 527 does not merely give a permission for the construction of a specific work. It defines a statutory right of a district municipality ...

It should here be noted that the compensation provided in s. 478 only covers damage "necessarily resulting" from the exercise of the municipality's authority negligently caused damage is not a necessary result and, therefore, would not be compensatable. *See* the dissenting judgment of Spence J. in the *McKenzie Barge* case at 389.

interpreted section 527 as bestowing an absolute statutory authority on district municipalities.

Even if it is possible to interpret the section in this way (by connecting it with the section 478 compensation provisions), an absolute statutory authority can be no defence to negligence. In *Geddis* v. *Proprietors of the Bann Reservoir,* where the damage caused was similar to that in the *McKenzie Barge* case, Lord Blackburn defined negligence in these circumstances as follows:

> I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, "negligence" not to make such reasonable exercise of their powers.

The learned trial judge in the *McKenzie Barge* case apparently felt that any additional preventative action on the part of the District of North Vancouver was not "reasonable" for he states:

> In its manner of doing so the defendant, in my opinion and finding, fully discharged its obligation to the plaintiff.

On the facts as found by the learned trial judge, the result in the *McKenzie Barge* case must then be accepted as correct. However, in the course of his judgment, Martland J. stated:

> The wording of section 529 is not limited to preventing legal action against the appellant, in respect of the construction and operation of its ditch, only in cases where the appellant was not negligent, or could not exercise its powers without creating what at common law, would have been a private nuisance ... In my opinion, this section, coupled with the powers granted to the appellant by section 527, prevented anyone from making any claim in damages, in a Court of law, against thd appellant, in respect of any ditch which it constructed, pursuant to the powers granted to it by section 527.

The learned judge appears to have based his decision on the belief that compensation could be awarded under section 478(1) of the *Municipal Act* for negligently caused damage. However, as Spence J. points out in his dissenting judgment, compensation under section 478 is limited to those situations where damages are "necessarily resulting" from the exercise of the municipality's authority and damage caused by negligence is not such a *necessary* result. As Legislature has not provided any compensation for negligence in this case it must have intended that liability for negligence remain with the district municipality.

While recognizing the desirability of empowering district municipalities to collect water from highways and to convey and discharge it in the most convenient natural waterway, the Commission is concerned about this apparent distortion of the law relating to statutory authority and the consequent abrogation of private rights.

The Commission recommends:

1. *Section 527 of the* Municipal Act *be amended to read:*

   527. *A district municipality has the authority, and is deemed to have had the authority since its incorporation, to collect the water from any highway by means of drains or ditches, and to convey to and discharge the said water in the most convenient waterway or watercourse.*

2. *Section 528 of the* Municipal Act

   528. (1) A district municipality desiring to construct ditches or drains authorized by section 527 may deposit plans and specifications thereof with the Clerk and publish an advertisement once a week for four consecutive weeks in a newspaper published or circulating within the municipality giving public notice that the municipality intends to undertake such works, that plans and specifications thereof may be inspected at the office of the Clerk, and that all claims for damages or compensation arising out of or by reason of the construction, maintenance, operation, or user thereof must be filed with the Clerk within one month from the date of the fourth advertisement.
   (2) No person has any claim for damages or compensation arising ,out of or by reason of the construction, maintenance, operation, or user f any such ditches or drains unless he has filed a claim as aforesaid. If the municipality proceeds with the said works or portion thereof, every claim shall be determined according to the provisions of Division (4) of Part XII.
   (3) If the construction of such drains or ditches is not commenced within one year from the date when the said advertisement last appeared, the construction shall not be proceeded with unless readvertised according to subsection (1).
   (4) Nothing in this section shall be deemed to restrict the powers of the municipality which it may otherwise exercise under any other provision of this Act.

be amended to read:

528. *(1) A district municipality desiring to construct ditches or drains authorized by section 527 shall deposit plans and specifications thereof with the clerk and publish an advertisement once a week for four consecutive weeks in a newspaper published or circulating within the municipality giving public notice that the municipality intends to undertake such works and that plans and specifications thereof may be inspected at the office of the clerk.*

(2) If the construction of such drains or ditches is not commenced within one year from the date when the said advertisement last appeared, the construction shall not be proceeded with unless readvertised according to subsection (1).

(3) Nothing in this section shall be deemed to restrict the powers of the municipality which it may othervise exercise under any other provisions of this Act.

3. *Section 529 of the* Municipal Act *be repealed.*

Section 530 of the Municipal Act *now reads:*

> *The provisions of sections 527 to 529 shall be in addition to all other provisions made by this or any other Act, and in case of any conflict arising the provisions of sections 527 to 529 shall govern.*

In view of the preceding recommendations, this provision will no longer serve any useful purpose and it should be repealed. The Commission therefore also recommends that:

4. *Section 530 of the* Municipal Act *be repealed.*

CHAPTER IV THE RULE IN RYLANDS V. FLETCHER

A. The Rule: Its Origins and Scope

Although it appears that Lord Blackburn had no intention of creating new law, his judgment in the case of *Rylands* v. *Fletcher* is recognized as the starting point for a tort liability wider than any which had preceded it. Delivering the judgment of the Court of the Exchequer Chamber he stated:

> We think that the true rule of law is, that a person who for *his own purposes* brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

This general formulation was restrictively interpreted by subsequent courts in an attempt to dampen speculation that a comprehensive new theory of strict liability for harm caused by dangerous things had been created. Judges emphasised that an escape was necessary, that there had to be a nonnatural user of the land, and that the escaping "thing" had to be "dangerous."

In addition to these restrictions in its application, a number of defences to the rule were also developed.

1. Default of the Plaintiff

Where the damage is caused by some contributory action of the plaintiff or some special or nonnatural user by the plaintiff of his property the rule does not apply.

2. Act of Third Parties

Although an occupier may be liable in negligence for the acts of strangers, the rule in *Rylands* v. *Fletcher* will generally not impose liability in such circumstances except perhaps where the occupier ought reasonably to have foreseen the act of the third party and taken steps to prevent it.

3. Act of God

If an escape is caused through natural causes and without human intervention, in "circumstances which no human foresight can provide against, and of which human prudence is not bound to recognize the possibility," there is then a good defence to the application of the rule.

4. Statutory Authority

Application of the rule in *Rylands* v. *Fletcher* may also be excluded by statute, either expressly or by implication.

In British Columbia there is one public body, namely the British Columbia Hydro and Power Authority ("B.C. Hydro") which under the statute governing its powers is given special immunity from liability under the rule in *Rylands* v. *Fletcher*. As the Commission pointed out in its *Report on the Legal Position of the Crown,* and in Chapter III, although section 52 of the *British Columbia Hydro and Power Authority* makes B.C. Hydro, a Crown corporation, liable in tort, section 52A of that Act provides that B.C. Hydro is only liable in nuisance or under the rule in *Pylands* v. *Fletcher* if it was also negligent. In Chapter III we have recommended that this section be repealed.

Liability may also be excluded by implication. As is pointed out in Chapter III, the defence of statutory authority applies only where damage caused is an inevitable result of a non-negligent exercise by a statutory body of an absolute, not merely conditional, statutory authority. This is as true of liability under *Rylands* v. *Fletcher* as it is in nuisance.

The distinction can clearly be seen by comparing the two cases of *Green* v. *Chelsea Waterworks Co*. and *Charing Cross Electricity Co*. v. *Hydraulic Power Co*. The Hydraulic Power Co. in the latter case was given a conditional statutory authority to supply water for industrial purposes. It had no obligation to keep its mains charged with high pressure water and consequently it was held liable for damage caused by a breach in a main. The Chelsea Waterworks Co., on the other hand, was operating under a mandatory statutory authority to lay mains and to maintain a continuous supply of water. It was inevitable that damage would be caused by occasional ruptures and hence, by necessary implication, the statute exempted the company from liability in nuisance and under *Rylands* v. *Fletcher* provided there was no negligence.

One other method to construct a defence through statutory interpretation is seen in the case of *Smeaton* v. *Ilford Corporation*. In this case the plaintiff's land was damaged through flooding caused by an overloading of the corporation's sewers. The defendant corporation had constructed the sewers pursuant to the authority given it in section 14 of the *Public Health Act, 1936*.

> It shall be the duty of every local authority to provide such public sewers as may be necessary for effectually draining their district for the purposes of this Act, and to make such provision, by means of sewage disposal works or otherwise, as may be necessary for effectually dealing with the contents of their sewers.

Although this section appears to impose a mandatory duty upon the Corporation which could give rise to a defence of statutory authority, the defence was not raised as it was obvious that the damage caused was not an inevitable result of the performance of that duty. Upjohn J. (as he then was) stated:

> It has not been, and obviously could not be, suggested that the statutory duty to construct and maintain sewers leads inevitably to flooding through overloading the sewer which began some thirtyfive years later.

Liability under the rule in *Rylands* v. *Fletcher* was, however, avoided by the corporation through the interpretation of section 31 of the *Public Health Act*, *1936* which stated:

A local authority shall so discharge their functions under the foregoing provisions of this Part of this Act as not to create a nuisance.

The effect of this section was explained by Upjohn J. as follows:

> That section necessarily implies, in my judgment, that, provided the defendants do not "create a nuisance" in carrying out their duties, they are to be absolved from liability ... So far as this court is concerned, it must be taken as settled that the proper construction to be given to the section is to exclude liability for escapes in the absence of negligence and,therefore, to negative the rule in *Rylands* v. *Fletcher*.

The court had earlier held that because the corporation was bound by statute to permit occupiers to discharge sewage into their sewers, they had not created or continued a nuisance. The *Rylands* v. *Fletcher* attack therefore failed and any reovery by the plaintiffs was precluded.

It would appear, therefore, that in addition to the general defence of statutory authority (restricted to inevitable damage resulting from the nonnegligent exercise of an absolute statutory authority), liability under the rule in *Rylands* v. *Fletcher* may also be avoided where there is a statutory provision expressly imposing liability for nuisance or perhaps, negligence since, by necessary implication, the legislature has expressly turned its mind to the question of liability and thereby tacitly excluded all but that expressly articulated.

In Chapter III we recommended that the defence of statutory authority should not be available in actions based on the rule in *Rylands* v. *Fletcher*.

5. ___*Consent or Mutual Benefit*

One final defence to the application of the rule in *Rylands* v. *Fletcher* is that of consent. If the plaintiff has permitted the defendant to accumulate the "thing" which he later complains has "escaped" and caused him injury, he cannot employ to rule to recover his damages. Moreover, where the accumulation benefits both the plaintiff and the defendant, consent has often been implied by the courts.

This socalled defence can also be characterized as simply an exception or a restriction a situation not in fact included in Blackburn J.'s original formulation of the rule. His judgment only included a person who "for his own purposes" brings things onto his land. In *Hess* v. *Greenway*, Meredith C.J.0. characterized the consent defence as a mutual benefit exception in the following terms:

> It is satisfactory to know that the English Courts have not pressed the doctrine of *Rylands* v. *Fletcher* as far as in the view of these American Courts it logically extends, and that at all events it is not to be applied to such a case as this, where the thing which causes the injury is *not operated solely for the benefit of the owner of it, but for the benefit of the person who suffers the injury as well as of the owner*.

B. The Special Exception for Public Bodies

It is the mutual benefit rationale that has been used by public bodies to develop an exceptional defence to the rule in *Rylands* v. *Fletcher* which exists in addition to their established defence of statutory authority. The defence was first specifically articulated fbr public authorities (operating for the general benefit of the community) in the case of *Rickards* v. *Lothian*.

> It is not every use to which land is put that brings into play that principle, [that is, the principle of strict liability applied in *Rylands* v. *Fletcher*], it must be some special use bringing with it increased danger to others, and must *not* merely be the ordinary use of the land *or such a use as is proper for the general benefit of the community.*

This approach to immunity was expressly approved by the Supreme Court of Canada in the case of *Kelliher (Village)* v. *Smith* where the plaintiff, a councillor in the defendant Saskatchewan municipality, had his face sprayed with sulphuric acid due to the faulty operation of a fire extinguisher owned by the defendant municipality. On appeal the municipality contended that the trial judge's charge to the jury improperly placed a *Rylands* v. *Fletcher* degree of strict liability on the municipality with regard to their keeping of dangerous fire extinguishers. Lamont J. replied to this argument by stating:

> I do not think the doctrine of *Rylands* v. *Fletcher* ... has any application to a case like the present ... It, ..., has no application where, as here, the extinguisher was brought to the village *for the common protection of the corporation and its citizens as individuals*.

The consent concept might also be justified, in the case of municipalities, not only through mutual benefit, but by the fact that these bodies are subject to the management of *elected* officials whose consent to the undertaking of a public work may be taken as representing that of all the residents of the municipality.

That there might be a special municipal immunity was discussed but not decided by Evershed, M.R. and Denning L.J., in *Pride of Dorby* v. *British Celanese Ltd.* Evershed M.R. was doubtful of its existence:

> It was suggested that local authorities have a special immunity from the socalled rule in *Rylands* v. *Fletcher*. I am not, as at preseet advised, satisfied that this is certainly so.

Denning L.J., however, was more definite about the existence of a special exception:

> I pause here to say that I doubt whether the doctrine of *Rylands* v. *Fletcher* applies in all its strictness to cases where a local authority, acting under statutory authority, builds sewers which afterwards overflow, or sewage disposal works which later pour out a polluting effluent, for the simple reason that the use of land for drainage purposes by the local authority is "such a use as is proper for the general benefit of the community," and is on that ground exempt from the rule in *Rylands* v. *Fletcher*, *see Rickards* v. *Lothian per* Lord Moulton, approved by the House of Lords in *Read* v. *Lyons & Co. Ltd. per* Lord Simon and *per* Lord Uthwatt.

The dicta of Denning L.J. were considered in *Smeaton* v. *Ilford Corporation* one year later. Upjohn J. expressly denied the existence of such an exceptional immunity.

> With all respect to the observations of Denning, L.J., in the *Pride of Derby Case*, the authorities do not establish the proposition that a local authority is exempt from the principle of absolute liability on the ground that use of land for sewage collection purposes is such a use as is proper for the general benefit of the community. I differ from him with less hesitation as junior counsel before me, both of whom were engaged in the *Pride of Derby Case*, tell me that *Rickards* v. *Lothian* was not cited to him in argument, nor was the principle now under review discussed, while I have had the advantage of a very full debate upon the matter.

The argument which seemed most persuasive to Upjohn J., was that, "what is beneficial to the community," cannot depend on the personality of the owner of the land who brings the substance on to it, but must depend entirely on the act under discussion:

> To collect and dispose of sewage is clearly beneficial to the community: so is the provision of water, and that must be so whether the undertaker providing the water does so as a local authority or for his own purposes in the sense of making private profit ... The provision of theatres and cinemas may be regarded as beneficial to the community, but equally the proprietors may be using the land for their own purpose in that they attract the public to make a profit.

He continued later:

> ... I can see no justification for applying a different law to a local authority merely because it is a local authority, or that it is carrying out something beneficial to the community, or even that it is doing so pursuant to a statutory duty. However, if in imposing a statutory duty upon a local authority, the legislature thinks fit to relieve that authority, by express provision or necessary implication, from the liability to which it would be otherwise subject, that is quite a different matter, and it may well be right to construe the relevant statutory provision in a manner generous to the authority upon whom the statutory duty is imposed.

This passage was cited with approval by MacPherson J., in the Canadian case of *Lawrysyn* v. *Town of Kipling*. The Town of Kipling was held liable for damages to the plaintiff's land caused by drainage from the Town's sewage lagoon. On appeal, however, the controversy was avoided and the results of the Queen's Bench decision affirmed on the entirely different basis that the enabling statute conferred only a conditional authority on the Municipal Council and such an authority did not prejudice the common law rights of others to sue in respect of such a nuisance.

The end result, in terms of legal analysis, is a conflict between dicta from the House of Lords in *Rickards* v. *Lothian* which were adopted by the Supreme Court of Canada in *Kelliher (Village)* v. *Smith* and are supported by Lord Denning in the *Pride of Derby case*, and the dicta of Upjohn J. in *Smeaton* v. *Ilford Corp*. which were followed by the Saskatchewan court of Queen's Bench in *Lawrysyn* v. *Town of Kipling*.

It should be noted that although an action for nuisance may often allow recovery and avoid the controversy, this cause of action does not completely overlap the ambit of the rule in *Rylands* v. *Fletcher*. Situations can exist where recovery would be permitted under the rule but no action would lie in nuisance. For example, the victim of a *Rylands* v. *Fletcher* tort need not be an occupier in order to succeed. He must be when suing in nuisance. Yoreover, nuisance actions generally arise out of situations of a continuing character, while *Rylands* v. *Fletcher* actions are more commonly associated with a single occurrence. Related jurisprudence has developed along those lines. Thus, even where an action for nuisance might lie, it may be to the plaintiff's advantage to approach liability through *Rylands* v. *Fletcher*.

To summarize, there will be cases where recovery would be allowed against an ordinary citizen under the *Rylands* v. *Fletcher* principle, but will be denied, or the plaintiff severely disadvantaged, where the defendant happens to be a public body.

C. Conclusion

Clearly, the common law is in disarray concerning whether or not there exists in favour of public bodies any special immunity from the rule in *Rylands* v. *Fletcher*. It is our view that the position should be clarified one way or the other.

Can a special immunity be justified? We have difficulty seeing why this should be the case. That public bodies should be protected at the expense of individual citizens seems contrary to contemporary judicial attitudes:

> The more recent trend in judicial thought has been to react against the policy of protecting public enterprise at the expense of the rights of the individual. The basic philosophy now seems to be that damage or injury to the individual which results from the construction or operation of public utilities should be a charge on all those who benefit from the service. The expense of modification or compensation, is, in effect, a running cost of the operation, which is passed on to the ultimate beneficiaries of the service by price of tax adjustment. The Courts are, as a result, far less willing to read into legislation an intent to grant immunity from suit.

It is our present view that there is no justification for special immunity and we are concerned that what seems to be an unfounded exemption is becoming rooted in Canadian jurisprudence.

The Commission, therefore, has concluded that the unsatisfactory and unsettled common law position relating to special immunity for public bodies fram the rule in *Rylands* v. *Fletcher* should be clarified by the addition of a new section to the *Laws Declaratory Act* specifying that no such special immunity exists. The Commission is also of the view that B.C. Hydro should be subject to the relevant section in the *Laws Declaratory Act*.

The Commission recommends that:

1. *The* Laws Declaratory Act *be amended by adding a new section comparable to the following:*

   It shall not be a defence in an action based on the rule in Rylands *v.* Fletcher *that the substance or thing brought on to the land or collected there was for the general benefit of the community.*

As we explained in Chapter III, if any recommended amendment to the *Laws Declaratory Act* is to be binding upon B.C. Hydro this will have to be stated in the *British Columbia Hydro and Power_Authority Act* by virtue of section 53(1) of that Act. The Commission recommends that:

2. *Section 53(6) of the* British Columbia Hydro and Power Authority Act *be amended by including a provision which states that B.C. Hydro is bound by the new section to be included in the* Laws Declaratory Act *as set out in 1 above.*

CHAPTER V CONCLUSION

Those familiar with our *Report on Legal Position of the Crown* will see that in this Report we have attempted to maintain a consistent policy approach. The basic premise underlying this examination of special immunity remains as stated in our earlier Report. Simply put, it is that if any citizen suffers a wrong at the hands of any Crown official, department, employee or any public body he should not be put in a worse position than he would have been had the act been committed by an ordinary individual.

The Commission's recommendations are set out below.

The Commission recommends that:

1. *The* Municipal Act *be amended*

   (a) *by adding a new section 505 comparable to the following:*

      (1) *Where a highway of which a municipality has the custody, care and management is not maintained or kept in repair, the municipality is liable, subject to the provisions of the*

Contributory Negligence Act, *for damage sustained by any person by reason of such default.*

(2) In any action based on the liability imposed by subsection (1) it is a defence to prove that the municipality has taken such care as in all the circumstances was reasonable to keep the highway to which the action relates in repair and in a safe condition.

(3) For the purposes of a defence under subsection (2) a court shall in addition to any other relevant considerations have regard to such of the following matters as may be relevant:

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

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

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

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

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

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

(b) by the repeal of section 610(2) and section 610(3) and the addition of a new section 610(2) and a new section 610(3) comparable to the following:

(2) Where a work undertaken is not kept in repair pursuant to subsection (1) the corporation is liable, subject to the provisions of the Contributory Negligence Act, *for damage sustained by any person by reason of such default.*

(3) The provisions of section 505(2) and section 505(3) apply in any action based on the liability imposed by subsection (2) where the work undertaken is a local improvement under clause (a), (b), (c), (e) , (f) or (j) of subsection (1) of section 581, or under clause (a), (b), (c), (d) or (e) of subsection (2) of section 581.

2. The Vancouver Charter be amended by adding a new section 289A comparable to the following:

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

(2) In any action based on the liability imposed by subsection (1) it is a defence to prove that the City has taken such care as in all the circumstances was reasonable to keep the street to which the action relates in repair and in a safe condition.

(3) For the purposes of a defence under subsection (2) a court shall in addition to any other relevant considerations have regard to such of the following matters as may be relevant:

(a) the character of the street and the traffic which could reasonably be expected to use it;

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

© the condition or state of repair in which a reasonable person would have expected to find the street;

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

(e) where the City could not reasonably have been expected to repair that part of the street to which the action relates before the cause of action arose, whether or what warning notices of its condition had been displayed;

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

3. The Highway Act *be amended*

(a) by the repeal of section 34(1);

(b) by the repeal of section 34(2);

© by adding a new section 34 comparable to the following:

(1) The control of the construction and maintenance of every arterial highway and of every other highway not within a municipality is vested in the Crown.

(2) Subject to the regulations made under this Part, the control of the construction and maintenance of every secondary highway is vested in the municipal corporation of the area in or through which the highway runs.

(3) Where an arterial highway, or other highway not within a municipality of which the control of construction and maintenance is vested in the Crown is not maintained or kept in repair the Crown is liable, subject to the provisions of the Contributory Negligence Act, *for damage sustained by any person by reason of such default.*

(4) Where a secondary highway of which the control of construction and maintenance is vested in a municipal corporation is not maintained or kept in repair, the municipality is liable, subject to the provisions of the Contributory Negligence Act, *for damage sustained by any person by reason of such default.*

(5) In any action based on the liability imposed by subsection (3) or subsection (4) it is a defence to prove that the Crown or the municipality has taken such care as in all the circumstances was reasonable to keep the highway to which the action relates in repair and in a safe condition.

(6) For the purposes of a defence under subsection (5) a court shall in addition to any other relevant considerations have regard to such of the following matters as may be relevant:

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

(b) the standard of maintenance appropriate for a work or highway of that character and used, in the case of highways, by that traffic;

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

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

(e) where the Crown or the municipality could not reasonably have been expected to repair that part of the work or highway to which the action relates before the cause of action arose, whether or what warning notices of its condition had been displayed;

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

(d) by renumbering the existing section 34(3) as section 34A.

4. The Laws Declaratory Act *be amended by including a new section comparable to the following:*

(1) The common law defence of statutory authority shall not be available in any action for damages based on nuisance or the rule in Rylands *v.* Fletcher *but where such a defence would have been available in an action for damages based on nuisance arising out of a power conferred by statute the value of any economic benefit accruing or which*

will accrue to the plaintiff as a result of the exercise of such power may be set off against the economic damage suffered by him.

(2) Subsection (1) shall not apply

(a) in an action relating to the exercise of authority to expropriate land; or

(b) in an action where an injunction is claimed to restrain the performance of a statutory duty or a declaration in similar terms.

5. *The* British Columbia Hydro and Power Authority Act *be amended as follows:*

(a) By the repeal of section 52A.

(b) By including in section 53(6) a provision which states that the British Columbia Hydro and Power Authority *is bound by the new section to be included in the Laws Declaratory Act as set out in 4 above.*

6. *The* Municipal Act *be amended by adding to section 478(1) the word "expropriation" between the words "lits" and "powers" in the third and fourth lines so the section then reads:*

478. (1) The Council shall make to owners, occupiers or other persons interested in real property entered upon, taken, expropriated, or used by the municipality in the exercise of any of its expropriation powers, or injuriously affected by the exercise of any of its expropriation powers/ due compensation for any damages ... necessarily resulting from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work; ...

7. *The* Vancouver Charter *be amended by adding to section 541 the word "expropriation" between the words "its" and "powers" in the second line so the section then reads:*

541. Where real property is injuriously affected by the exercise on the part of the City of any of its expropriation powers, the City shall, unless it is otherwise provided in this or some other Act, make due compensation to the owner for any damage necessarily resulting therefrom beyond any advantage which the owner may derive from any work in connection with which the real property is so affected.

8. *Section 527 of the* Municipal Act *be amended to read:*

527. A district municipality has the authority, and is deemed to have had the authority since its incorporation, to collect the water from any highway by means of drains or ditches, and to convey to and discharge the said water in the most convenient waterway or watercourse.

9. *Section 528 of the* Municipal Act *be amended to read:*

528. (1) A district municipality desiring to construct ditches or drains authorized by section 527 shall deposit plans and specifications thereof with the clerk and publish an advertisement once a week for four consecutive weeks in a newspaper published or circulating within the mu-

nicipality giving public notice that the municipality intends to undertake such works and that plans and specifications thereof may be inspected at the office of the clerk.

(2) If the construction of such drains or ditches is not commenced within one year from the date when the said advertisement last appeared, the construction shall not be proceeded with unless readvertised according to subsection (1).

(3) Nothing in this section shall be deemed to restrict the powers of the municipality which it may otherwise exercise under any other provisions of this Act.

10. Section 529 of the Municipal Act *be repealed.*

11. Section 530 of the Municipal Act *be repealed.*

12. The Laws Declaratory Act *be amended by including a new section comparable to the following:*

It shall not be a defence in an action based on the rule in Rylands *v.* Fletcher *that the substance or thing brought on to the land or collected there was for the general benefit of the community.*

13. Section 53(6) of the British Columbia Hydro and Power Authority Act *be amended by including a provision which states that B.C. Hydro is bound by the new section to be included in the Laws Declaratory Act, as set out in 12 above.*

Acknowledgments

The working paper on which this Report is based was prepared by Edward Bowes, of Vancouver, who was formerly the Legal Research Officer to the Commission, and we are grateful to him for his work on our behalf. The difficult process of transforming the working paper into the form of the present Report in the light of the comment and criticism that we received has been done by Anthony Spence, and to him, too, we should like to express our appreciation for his skill and care.

We should also like to take this opportunity to acknowledge the contribution to this Report that was made by the many persons and organizations who responded to the invitation we extended in the working paper, to comment on our tentative views. We have endeavoured to consider carefully and without prejudice the comment that we received, and we gratefully acknowledge the fact that much of it greatly sharpened our appreciation of the issues, even if it did not persuade us in all cases to revise our conclusions.

Finally, we would like to acknowledge the participation of two former colleagues, Professor Allen Zysblat and the late Mr. Ronald C. Bray, to this Report. The contribution of both of them to this project was considerable, but we wish in particular to say that the contents of the Report had been fully settled, with his concurrence, and was awaiting his signature when Mr. Bray suffered an unexpected and fatal heartattack. We have lost the advice and support of a valued colleague.

LEON GETZ, *Chairman*
PAUL D. K. FRASER
PETER FRASER
DOUGLAS LAMBERT

June 28, 1977.

APPENDIX

Responsibility for Highways

A. Provincial Responsibility

Initially, the maintenance and repair of all public highways in British Columbia is the responsibility of the Province through its Department of Highways. This basic position is then modified by the *Highway Act, Municipal Act* and *Vancouver Charter*.

The *Highway Act* apportions control over the construction and maintenance of highways according to its ministerial classification under section 31 as either an "arterial highway" or a "secondary highway."

Section 34 provides:

> (1) The control of the construction and maintenance of every *arterial* highway is vested in the Department.
>
> (2) Subject to the regulations made under this Part, the control of the construction and maintenance of every *secondary* highway is vested in the municipal corporation of the area in or through which the highway runs,
>
> (3) Upon obtaining the approval of the Department, the municipal corporation of any area in or through which an arterial highway runs may construct, at the expense of the corporation, sidewalks on that highway. (emphasis added)

Although this section could be interpreted as imposing a duty to maintain on the authorities concerned, it is clear at common law that this control and power could not be enforced by the action of a person injured.

In addition, the application of that Part of the *Highway Act* which contains section 34 (viz. Part III) is limited by section 30 as follows:

> The provisions of the Part, except sections 31 and 32 relating to the classification of highways and except section 43, apply only to such highways and portions of highways as are within the limits of a municipality, and none of the provisions of this Part, except the provisions of subsection (4) of section 42, apply to highways or portions of highways within the limits of any city or city municipality having a population of more than thirty thousand.

The *Highway Act* classifications are set out in section 31 as follows:

For the purposes of this Part, certain highways may be classified as follows:

> (a) "Arterial highways," comprising highways of such importance as, on the recommendation of the Minister approved by Order of the LieutenantGovernor in Council, are classified as arterial highways:
>
> (b) "Secondary highways," comprising such highways of less general importance as, on the recommendation of the Minister approved by Order of the Lieutenant Governor in Council, are classified as secondary highways.

"Maintenance" is defined in section 29(1) of the *Highway Act* in the following terms:

> "maintenance" means the work, subsequent to the construction of a highway of preserving and keeping it in repair, including the making, cleaning, and keeping open of ditches, gutters, drains, culverts, and watercourses, and the repairing of retainingwalls, cribs, river protection works, and other works necessary to keep open and maintain the highway for use by the traffic for which it is required.

As far as the cost of construction and maintenance is concerned, municipal highways that fall within part III of the *Highway Act* are governed by the following section:

> 33. (1) Subject to the provisions of subsections (2) and (3), the cost of construction and maintenance of classified highways shall be borne as follows:
>
> (a) In the case of arterial highways, the cost of construction and maintenance shall be borne entirely by the Department;
>
> (b) In the case of secondary highways, the cost of construction shall be borne equally by the Department and the municipal corporation of the area through or in which the highway runs, and the cost of maintenance shall be borne forty per centum by the Department and sixty per centum by the municipal corporation.
>
> (2) Where a secondary highway runs in or through a municipality having a population of less than one thousand, the Department may, in the discretion of the Minister, contribute not exceeding seventyfive per centum of the cost of construction and maintenance of the highway.
>
> (3) The Department may build, rebuild, repair, or protect a bridge upon any highway, where the cost of the work is provided by a specific vote of the Legislature; and in case of damage by flood or other accident, or where otherwise deemed necessary in the public interest, the Department way, with the approval of the LieutenantGovernor in Council, replace, repair, rebuild, or protect any highway bridge, whether upon a classified or unclassified highway, and pay the entire cost thereof, or may reimburse a municipality for any costs so incurred by a municipality.

With regard to "arterial highways," the Department of Highways is given the following powers in section 35:

> 35. (1) In addition to all other powers, the Department has and may exercise within the limits of any municipality in or through which an arterial highway runs all the powers which a municipal corporation authorized to lay out, construct, and maintain the highway might exercise for that purpose.
>
> (2) The Department, in respect of an arterial highway, has all the rights, powers, and advantages conferred by bylaw, contract, or otherwise upon the municipal corporation having control of the highway before it became classified as an arterial highway under this Act; and the Department may sue in the name of the Minister upon such rights or under such bylaw or contract in the same manner and to the same extent as the municipal corporation might have done if the highway had not been classified as an arterial highway.

B. __Municipal Responsibility

If the highway in question has not been classified under section 31 or, is excluded from the ambit of Part III of the *Highway Act* by operation of section 30, then the provisions of Part XIII Division (2) of the *Municipal Act* will govern unless the highway happens to be a "street" in the City of Vancouver.

Section 513 of the *Municipal Act* provides, in part, for the establishment and maintenance of highways as follows:

> 513. (1) The Council may by bylaw
>
> (a) establish, widen alter, relocate, or divert a highway or any portion of a highway; ...
>
> (2) The Council may
>
> (a) lay out, construct, maintain, and improve highways or any portion thereof;

(b) construct, repair, maintain, improve, and care for sidewalks and boulevards upon highways, and plant, care for, and remove grass, shrubs, trees, and other plants thereon; ...

© clean, oil, and water highways, and provide lighting for highways, and do such other things as are necessary for the safe use and preservation of highways.

The only section in the *Municipal Act* which could arguably be viewed as imposing a duty to maintain highways is section 610. This section deals with local improvement works and is not restricted to highways:

(1) After a work undertaken has been completed, it shall during its lifetime be kept in repair by and at the expense of the corporation.

(2) Nothing in this Division relieves the corporation from any duty or obligation to which it is subject, either at common law or under the provisions of this Act or otherwise, to keep in repair the highways under its jurisdiction, or impairs or prejudicially affects the rights of any person who is damnified by reason of the failure of the corporation to discharge such duty or obligation.

(3) Nothing in this section makes the corporation liable for any damage for which it otherwise would not have been liable.

The word "work," in subsection (1), is defined in section 579 as follows:

"Work" means a work or service which may be undertaken as a local improvement;

Works which may be undertaken as local improvements are set out in section 581. Such works include the establishing, opening, widening, extending, grading, paving, altering the grade of, diverting, or improving of streets including retaining walls incidental thereto and constructing a bridge as part of a street.

Section 610 has been judicially interpreted as not imposing any liability on municipalities for nonfeasance in the area of highway repair and that may explain the exception found in section 3(2)(f) of the *Crown Proceedings Act*

(2) Nothing in section 2

(f) subjects the Crown, in its capacity as a highway authority, to any greater liability than that to which a municipal corporation is subject in that capacity.

Section 611 contains a procedure for compelling a corporation to repair a "work" where, during its lifetime, the corporation fails to keep and maintain it in a good and sufficient state of repair:

611. (1) Where at any time during the lifetime of a work undertaken the corporation fails to keep and maintain it in a good and sufficient state of repair, and, after one month's notice in writing by the owner or occupier of any parcel specially charged requiring the corporation to do so, does not put the work in repair, a Judge of the Supreme Court or a Judge of the County Court, upon the application of any owner or occupier of any land so specially charged, may make an order requiring the corporation to put the work in repair.

(2) The Judge may determine what repairs are necessary, and by his order may direct them to be made in such manner, within such time, and under such supervision as he may deem proper. If upon the proceedings it is shown to the satisfaction of the Judge that the work required to be done to make the repairs which are necessary and reasonable amounts to a reconstruction of the work, the Judge on the application may determine that the same may be done as a work of local improvement, and may fix the amounts to be payable by the corporation and by the owners of land adjacent, as in the original bylaw authorizing the work, or otherwise, in his discretion, or in the discretion of the Court of Appeal upon appeal as hereinafter provided.

(3) Where a person under whose supervision the repairs are to be made as appointed, the Judge may fix and determine the remuneration to be paid to such person, and the same shall be paid by the corporation,

and payment thereof may be enforced in like manner and by the same process as a judgment for the payment of money.

(4) The order has the same effect and may be enforced in like manner as a peremptory mandamus.

(5) If the corporation does not comply with the order of the Judge, in addition to any other remedy to which the applicant for the order may be entitled, the Judge may authorize the repairs to be made by the applicant; and if made by him, the cost thereof shall be ascertained and determined by the Judge; and when so ascertained and determined, payment thereof may be enforced in like manner and by the same process as a judgment for the payment of money.
(6) An appeal lies to the Court of Appeal from any order made under the provisions of this section, and the procedure where the appeal is from an order of a Judge of the Supreme Court shall be the same as on an appeal from an order made in an action in the Supreme Court; and if the appeal is from an order of a Judge of a County Court, the same as on an appeal from an appealable order made in an action in the County Court.

Another statutory provision which purports to preserve the special immunity of highway authorities is s. 8(2) of the *Occupiers Liability Act*. This subsection provides, in part, that:

(2) ... this Act does not apply ... to a municipality where the Crown or the municipality is the occupier of a public highway or public road ...

In this manner municipalities and the Crown Provincial are exempted where they are occupiers of public highways from the duty imposed on occupiers under that Act to take reasonable care to keep their premises (which would include highways) reasonably safe for persons using them.

C. ____Forest Roads

1. *Under the Forest Act*

(a) ____Forest service roads

Under the provisions of section 147 of the *Forest Act*, the Minister of Lands and Forests, "notwithstanding anything in this Act or any other Act ... may in his absolute discretion build roads and trails or acquire and maintain roads and trails for any purpose of administration under. this Act, and may declare any road reverting to the Crown under Part VI of this Act a forest service road."

Subsection 3 of section 147 declares that all such roads and trails built or acquired under this section are to be private roads and trails, and expressly gives the Minister the authority to close such roads or trails to public travel without a permit.

Although these roads are deemed to be private roads and trails, the provisions of the *Occupiers' Liability Act*, do not apply by virtue of section 8(2) which reads as follows:

> Notwithstanding subsection (1), this Act does not apply to the Crown in the right of the Province or in the right of Canada or to a municipality where the Crown or municipality is the occupier of the public highway or public road or a road under the Forest Act or the *Private Roads Act, 1963*, or to an industrial road as defined in the *Industrial Transportation Act*.

It would appear that the effect of this section is to preserve the Crown's immunity from occupiers' liability in relation to these roads. Although section 2(c) of the *Crown Proceedings Act*, makes the Crown subject to all those liabilities to which it would be liable if it were a person, section 14 of that Act permits the Crown to take advantage of this exemption.

The *Crown Proceedings Act* also gives additional protection to the Crown when it is acting as a highway authority by section 32(f). That section provides that nothing in section 2 of the Act subjects the Crown in its capacity as a highway authority to any greater liability than that to which a municipal corporation is subject in that capacity. We assume that such a provision was inserted to preclude actions against the Crown, which are not based on occupiers' liability, for damages sustained by reason of the nonrepair of the highways. If the Minister of Lands and Forests, in building and maintaining these roads, is acting as a "highway

authority," the Minister would not be liable for mere nonfeasance by reason of this provision. Even if the Minister was not acting as a "highway authority," and the provision did not apply, as the Minister has no duty to repair these roads, only the power to build and maintain them, he would still incur no liability for mere nonfeasance.

Because these forest service roads are deemed to be private roads, they do not come under the definition of highway in the *Highways Act* and consequently would not be covered by our proposals.

(b) *Access roads*

The *Forest Act* also deals with another class of road and that is the access road or rightofway constructed by or on behalf of any person designed for the transport of any timber or product of the forest. Such a rightofway can be expropriated by any person with a timber lease or licence from the owner of the land, except where the owner is the Crown. Where the owner is the Crown the written consent of the Minister of Lands and Forests must be obtained prior to the taking or use of the rightofway.

(i) Private owner of land

Where the owner of the land over which the logger licensee has taken a rightofway is not the Crown, the *Forest Act* neither specifies the status of the resulting road nor the rights and obligations of the parties involved. It would appear that the original owner remains liable under the *Occupiers' Liability Act*. "Occupier" is defined in that Act as meaning:

> (i) a person who is in physical possession of premises; or
>
> (ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises, and the persons allowed to enter those premises,
>
> and, for the purposes of this Act, there may be more than one occupier of the same premises.

If all that has been expropriated is a rightof-way across his land, the original owner is still in physical possession and still the occupier under that Act. Whether or not the local licensee is also an occupier under that Act is a more complex question. Although the holder of the mere rightofway is certainly not thought of as being in physical possession of premises, such a logger might be said to have "responsibility for, and control over, the condition of the premises, the activities conducted on those premises, and the persons allowed to enter same." The *Forest Act* gives no guidance on this issue but it is quite possible for both parties to be liable as occupiers under the *Occupiers' Liability Act*. The exempting provision for roads under the *Forest Act* (in section 8(2) of the *Occupiers' Liability Act)* only applies where the occupier is the Crown or a municipality and therefore has no application to the above circumstances.

(ii) Where the Crown is owner of land

Where the Crown is owner of the land over which the logger wishes a rightofway, the provisions of section 56 of the *Forest Act* govern. This section deems such a road to be the private property of the licensee or person authorized during the currency of his licence or duration of his authority. Section 56(3) entitles the public to use such a road subject only to the reasonable restrictions of the licensee. Upon termination or expiry of the licence or authority the road reverts to the Crown without compensation. During the currency of the licence or authority because such roads are deemed to be the private property of the licensee or person authorized such persons are subject to the *Occupiers' Liability Act* as the sole "occupiers" of the road. When the road reverts back to the Crown, it is still considered, by virtue of section 147(3) of the *Forest Act*, to be a private road and consequently will not be caught by our proposals.

2. *Under the Industrial Transportation Act*

Industrial roads

An industrial road is defined as follows in the *Industrial Transportation Act:*

> "Industrial road" means any road which is constructed or exists for the transportation of natural resources, raw or manufactured, or the transportation of machinery, materials, or personnel by means of motorvehicles, and includes all bridges, wharves, logdumps, and works forming a part thereof, but does not include a public road, street, lane, or other public communication; a privately owned road used by a farmer or resident for his own purposes; a road used exclusively for the construction and maintenance of electricpower lines, telephonelines, or

> pipelines; roads and yards within manufacturing plants, industrial sites, storageyards, airports, and construction-sites, toteroads, cat-roads, and access roads as herein defined.

Such an industrial road is exempted from the provisions of the *Occupiers' Liability Act* (section 8(2)) and, further, it is provided by section 29(3) of the *Industrial Transportation Act* that the Act does not relieve the owner of such a road from liability for anything done or "omitted to be done by such company, or for any wrongful act, neglect, or default, misfeasance, malfeasance, or nonfeasance of such company." This liability is restricted by section 29(4) which section exempts the owner of the road from liability for any "loss, damage, injury, or expense caused by the condition of the road or any work forming part thereof," although it does not protect the owner in respect of the agents, contractors or employees of the owner, to whom the owner was expected by the Legislature to remain liable under all circumstances.

3. *Under the Private Roads Act, 1963*

The exemption in section 8(2) of the *Occupiers' Liability Act* in respect to the road under the *Private Roads Act* is probably unnecessary in that the *Private Roads Act* is merely a collection of amendments to the *Forest Act, Industrial Transportation Act*, and *MotorVehicle Act*. In spite of its name, the *Private Roads Act* only affects those private roads already discussed under the *Forest Act* and *Industrial Transportation Act*, and private roads under the *MotorVehicle Act* which are used by the public for purposes of vehicular.