

## CONTENTS

<b>PREFACE .....</b>	<b>ix</b>
<b>SECTION 1 TORT LIABILITY OF TRANSPORTATION DEPARTMENTS, OFFICIALS, AND EMPLOYEES .....</b>	
<b>A. IMMUNITY OF THE SOVEREIGN TO TORT SUITS .....</b>	<b>1-3</b>
A.1. Introduction—Bases for Tort Liability.....	1-3
A.2. Historical Evolution of Governmental Immunity to Suit in Tort.....	1-4
A.3. Sovereign Immunity in Contrast to Governmental Immunity.....	1-4
A.4. Liability for Proprietary as Distinguished from Governmental Functions.....	1-5
<b>B. JUDICIAL AND LEGISLATIVE WAIVER OF SOVEREIGN IMMUNITY .....</b>	<b>1-6</b>
B.1. Introduction .....	1-6
B.2. Trend Towards Governmental Responsibility.....	1-6
B.3. Legislation Waiving Sovereign Immunity in Tort.....	1-8
B.3.a. Tort Claims Acts .....	1-8
B.3.b. State Claims Acts.....	1-8
B.3.c. Highway Defect Statutes.....	1-9
<b>C. THE STATE'S DUTY AND STANDARD OF CARE TO THE TRAVELING PUBLIC .....</b>	<b>1-9</b>
C.1. The State's Duty to the Public .....	1-9
C.2. Requirement of Notice of a Dangerous Condition .....	1-11
<b>D. INDIVIDUAL LIABILITY OF PUBLIC TRANSPORTATION OFFICIALS OR EMPLOYEES.....</b>	<b>1-12</b>
D.1. Origins of Personal Liability.....	1-12
D.2. Absolute or Partial Immunity of Transportation Officials and Employees .....	1-12
D.3. Defenses of Public Officials and Employees.....	1-14
D.3.a. The Defense of Acting Under Orders.....	1-14
D.3.b. Discretionary-Ministerial Distinction .....	1-14
D.3.c. The Public-Private Duty Doctrine.....	1-16
D.3.d. The Misfeasance-Nonfeasance Distinction .....	1-16
D.4. Statutory Provisions Relating to Defense and Indemnification .....	1-16
D.4.a. Providing a Legal Defense.....	1-16
D.4.b. Indemnification of Public Officers or Employees .....	1-16
<b>APPENDIX A STATE STATUTES PERTAINING TO LIABILITY AND DEFENSE OF PUBLIC OFFICIALS AND EMPLOYEES.....</b>	<b>1-18</b>
<b>SECTION 2 TRANSPORTATION ACTIVITIES THAT MAY GIVE RISE TO TORT LIABILITY .....</b>	
<b>A. PLAINTIFF'S BURDEN TO PROVE CAUSE IN FACT AND PROXIMATE CAUSE .....</b>	<b>2-3</b>
A.1. Introduction .....	2-3
A.2. Cause in Fact.....	2-3
A.3. Proximate or Legal Cause.....	2-4
<b>B. WARNING SIGNS, TRAFFIC LIGHTS, OR PAVEMENT MARKINGS—INSTALLATION AND MAINTENANCE .....</b>	<b>2-7</b>
B.1. Absence of General Duty to Install Warning Signs, Traffic Lights, or Pavement Markings .....	2-7
B.2. Duty to Warn of or Correct Known Dangerous Conditions.....	2-9
B.2.a. Warning Signs .....	2-9
B.2.b. Traffic Lights.....	2-10
B.2.c. Pavement Markings.....	2-11

<b>C. DEFECTS IN THE PAVEMENT SURFACE .....</b>	<b>2-12</b>
C.1. The Transportation Department's Duty to the Public.....	2-12
C.2. Cases Allowing and Denying Recovery.....	2-13
<b>D. SNOW AND ICE CONTROL.....</b>	<b>2-13</b>
D.1. Transportation Department's Duty Concerning Treatment of Snow and Ice Conditions .....	2-13
D.2. The Standard of Care for Snow and Ice Removal.....	2-15
D.3. Statutes Affecting Transportation Department's Duty for Snow and Ice Control .....	2-16
D.4. Liability in Eminent Domain, Trespass, or Nuisance for Snow Removal and Salting Operations .....	2-17
<b>E. WET-WEATHER CONDITIONS AND SKIDDING ACCIDENTS.....</b>	<b>2-18</b>
E.1. The State's Duty to Guard Against Slippery Road Conditions .....	2-18
E.2. Failure to Correct Hazardous Wet Weather Skidding Locations .....	2-19
E.3. The Effect of the Highway Safety Act on a State's Duty to Skid-Proof Highway Surfaces .....	2-20
<b>F. INJURIES CAUSED BY OBSTRUCTIONS OR DEFECTS IN THE HIGHWAY SHOULDER.....</b>	<b>2-21</b>
F.1. Conditions Under Which the Motorist May Lawfully Use the Shoulder.....	2-21
F.2. Representative Cases in which Plaintiffs Sustained Injuries on the Highway Shoulder.....	2-22
F.2.a. Drop-Off Between the Pavement and the Shoulder.....	2-22
F.2.b. Rut, Ditch, Hole, Depression or Other Shoulder Condition .....	2-23
F.2.c. Other Obstacles in the Shoulder .....	2-24
F.2.d. Effect of Warning Signs .....	2-24
<b>G. ACCIDENTS CAUSED BY TREES OR VEGETATION IN THE RIGHT-OF-WAY OR ON ADJACENT PROPERTY .....</b>	<b>2-25</b>
G.1. Introduction .....	2-25
G.2. Trees Located Within or Near the Highway Right-of-Way.....	2-25
G.3. Duty to Cut or Remove Vegetation Obscuring the Highway.....	2-27
<b>H. DEFECTIVE OR DANGEROUS CONDITIONS ON BRIDGES AND OTHER STRUCTURES.....</b>	<b>2-28</b>
H.1. The State's Duty to the Traveling Public Includes Bridges .....	2-28
H.2. The Maintenance of Bridge Railings .....	2-29
H.3. Snow and Ice Conditions on Bridges .....	2-30
H.4. Failure to Post Signs Warning of Structural Defects in Bridges.....	2-31
<b>SECTION 3 DEFENSES FOR DISCRETIONARY ACTIVITY .....</b>	<b>3-1</b>
<b>A. IMMUNITY FROM LIABILITY BASED ON DISCRETIONARY FUNCTION OR ACTIVITY .....</b>	<b>3-3</b>
A.1. Introduction .....	3-3
A.2. Federal Cases Interpreting the Discretionary Function Exemption in the FTCA .....	3-3
A.3. State Cases Construing a Provision in State Tort Claims Acts Exempting Discretionary Activity .....	3-8
<b>B. APPLICATION TO HIGHWAY DESIGN OF AN EXEMPTION FOR DISCRETIONARY ACTIVITY .....</b>	<b>3-11</b>
B.1. Introduction .....	3-11
B.2. Immunity for Negligent Design Based on a Statutory Exemption for Discretionary Activity.....	3-12
B.3. Arbitrary or Unreasonable Decisions or Decisions Made Without Adequate Study or Deliberation.....	3-13
B.4. Effect of Known Dangerous Conditions on Immunity .....	3-14
B.5. Design Immunity Statutes.....	3-14
B.6. Duty to Improve the Design Due to Changed Circumstances.....	3-15
<b>C. APPLICATION OF DISCRETIONARY EXEMPTION TO MAINTENANCE OF HIGHWAYS .....</b>	<b>3-17</b>
C.1. Introduction .....	3-17
C.2. The Element of Choice as the First Step in the Analysis .....	3-17
C.3. The Element of Policy Consideration as the Second Step in the Analysis .....	3-19
C.4. Applicability of the Discretionary Activity Exemption in Maintenance Cases Involving Known Dangerous Conditions .....	3-19

<b>D. APPLICATION OF THE DISCRETIONARY ACTIVITY EXEMPTION TO HIGHWAY GUARDRAILS AND BARRIERS .....</b>	<b>3-20</b>
D.1. Decisions to Provide or Not Provide Guardrails and Barriers as Protected by the Discretionary Exemption .....	3-20
D.2. Decisions to Provide or Not Provide Guardrails and Barriers That Are Not Discretionary.....	3-21
D.3. Railroad Crossings .....	3-23
<b>E. THE DISCRETIONARY ACTIVITY EXEMPTION AS APPLIED TO TRAFFIC CONTROL DEVICES .....</b>	<b>3-24</b>
E.1. Immunity for Decisions Regarding Whether to Provide Them.....	3-24
E.2. Immunity for Selection, Placement or Sequencing .....	3-24
E.2.a. Traffic Lights and Signals .....	3-24
E.2.b. Warning Signs or Markings .....	3-25
E.2.c. Stop Signs and Speed Limit Signs .....	3-27
<b>SECTION 4 SELECTED TRANSPORTATION DEPARTMENT DEFENSES IN TORT ACTIONS.....</b>	<b>4-1</b>
<b>A. DEFENSES BASED ON ALLOCATION OF RESOURCES OR PRIORITY OF PROJECTS .....</b>	<b>4-3</b>
A.1. The Allocation of Funds as a Defense.....	4-3
A.1.a. Decisions Recognizing the Defense .....	4-3
A.1.b. Decisions Not Recognizing the Defense .....	4-4
A.2. Evidence Required to Prove the Allocation Defense.....	4-5
A.3. The Financial Feasibility Defense.....	4-5
A.4. Priority of Highway Projects or Programs as a Defense.....	4-6
A.5. The Department's Workload as a Defense.....	4-7
<b>B. THE PUBLIC DUTY DEFENSE TO TORT LIABILITY.....</b>	<b>4-8</b>
B.1. Origin and Nature of the Public Duty Doctrine .....	4-8
B.2. The Public Duty Doctrine in Highway Cases.....	4-9
<b>SECTION 5 TRIAL PREPARATION, EVIDENCE RULES, AND STRATEGIES IN TRANSPORTATION TORT LITIGATION .....</b>	<b>5-1</b>
<b>A. SUGGESTED TRIAL STRATEGIES AND TECHNIQUES.....</b>	<b>5-3</b>
A.1. Pre-Suit Notice Requirement .....	5-3
A.2. The Investigative Phase .....	5-3
A.3. Reviewing the Complaint and Agency File for Potential Defenses Including Immunity .....	5-4
A.4. The Discovery Phase .....	5-6
A.5. Discoverability or Admissibility of Data Compiled for Highway Safety.....	5-7
<b>B. ADMISSIBILITY AND USE OF UNIFORM LAWS, REGULATIONS, STANDARDS OR GUIDELINES APPLICABLE TO DESIGN AND MAINTENANCE ACTIVITIES .....</b>	<b>5-8</b>
B.1. Sources of Applicable Highway Standards or Guidelines .....	5-8
B.2. Admissibility of Standards or Guidelines into Evidence.....	5-9
B.3. Standards or Guidelines as Evidence of the Standard of Care.....	5-10
B.4. Violation of a Standard or Guideline as Negligence <i>Per Se</i> .....	5-11
<b>C. ADMISSIBILITY OF EVIDENCE OF PRIOR ACCIDENTS, POST-ACCIDENT REMEDIAL MEASURES, EXPERT OPINION, AND ACCIDENT RECONSTRUCTION.....</b>	<b>5-13</b>
C.1. Introduction .....	5-13
C.2. Admissibility of Evidence of Prior Accidents or of Post-Accident Remedial Measures .....	5-13
C.2.a. Evidence of Prior Accidents .....	5-13
C.2.b. Admissibility of Remedial Measures Taken After the Accident.....	5-14
C.3. Admissibility of Expert Testimony and Accident Reconstruction Evidence .....	5-15
C.3.a. Use of Expert Testimony in General .....	5-15
C.3.b. Admissibility of Accident Reconstruction Evidence.....	5-16

<b>D. THE TRIAL.....</b>	<b>5-18</b>
<b>SECTION 6 SHIFTING OR SHARING OF LIABILITY AMONG THE TRANSPORTATION DEPARTMENT AND OTHERS .....</b>	<b>6-1</b>
<b>A. PROTECTING THE TRANSPORTATION DEPARTMENT FROM LIABILITY .....</b>	<b>6-3</b>
A.1. Introduction .....	6-3
A.2. Contractual Indemnity.....	6-3
A.3. Insurance .....	6-3
A.4. Statutory Limitations on Damages, Punitive Damages, and Attorney's Fees.....	6-4
<b>B. SHIFTING LIABILITY FROM THE TRANSPORTATION DEPARTMENT TO OTHERS .....</b>	<b>6-5</b>
B.1. Contribution, Counterclaims, and Cross-claims .....	6-5
B.2. Equitable Indemnity .....	6-7
B.3. Subrogation .....	6-8
<b>INDEX .....</b>	<b>I-1</b>
<b>INDEX OF CASES.....</b>	<b>I-9</b>