SECTION 1

TORT LIABILITY OF TRANSPORTATION DEPARTMENTS, OFFICIALS, AND EMPLOYEES

A. IMMUNITY OF THE SOVEREIGN TO TORT SUITS

A.1. Introduction—Bases for Tort Liability

According to Dean Prosser, "[a] really satisfactory definition of a tort has yet to be found."[1] Nevertheless, a tort occurs when there is a "breach of the duties fixed and imposed upon the parties by the law itself, without regard to their consent to assume them, or their efforts to evade them."[2] For example, "when a driver proceeds down the street in a car, the law imposes upon the driver an obligation to all persons in the highway, to drive with reasonable care for their safety—and this without the driver's consent or understanding."[3]

Tort liability is based on the relation of a person with another person. A tort is "the commission or omission of an act by one, without right, whereby another receives some injury, directly or indirectly…."[4] Thus, "[a] cause of action in tort may be predicated upon the failure to discharge some special or absolute duty which, in itself, constitutes an invasion of the rights of, or an infraction of an obligation due to, another."[5] For there to be a tort, there must be a wrongful act in the sense of a violation of a duty that is imposed by law or that is in violation of a legal right of someone who is injured and suffers damages as a proximate result of the breach of that duty.[6] For the plaintiff to establish that the transportation department was negligent, the plaintiff must show that whatever caused the plaintiff's injury was in the care or custody of the defendant, that a dangerous condition of the highway existed, that the department had actual or constructive knowledge of the condition, and that the department had a reasonable time to correct the condition or give adequate warning.[7]

However, because of sovereign immunity transportation departments were not always subject to liability in tort. Sovereign immunity was quite important as it meant simply a "freedom from suit or liability."[8] In its heyday, "[t]he immunity was traditionally quite broad and protected the defendant even in cases that undoubtedly involved tortious behavior."[9] Presently, as explained herein, sovereign immunity generally has been replaced by some form of tort claims act. Such legislation may permit suits against transportation departments, which may be held liable under the circumstances permitted by the act.

Historically, however, the doctrine of sovereign immunity was an insurmountable defense in most jurisdictions to an injured plaintiff's tort action against a transportation department. Transportation agencies had little fear of suits for tortious injury to persons or property caused by negligence in the design, construction, and maintenance of public highways. The departments were either immune from suit or were immune from tort liability, even if they were subject to suit. However, by the mid-20th century, sovereign immunity began to erode.[10] The doctrine of sovereign immunity either has undergone considerable legislative modification, or, in some instances, where legislatures failed to act to modify or abolish the doctrine, the courts abolished it.

Under the rigid application of the doctrine of sovereign immunity, before an injured person could sue a governmental agency, the agency had to consent to being sued. (The courts also accorded sovereign immunity to municipal corporations and units of local government.)[11] Courts and commentators noted that the doctrine of sovereign immunity originated in English common law as an adaptation of the Roman maxim "the King can do no wrong."[12] In recent decades, state supreme courts have overturned the doctrine at an accelerated pace.[13] In many states, judicial abrogation

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[1] PROSSER & KEETON, THE LAW OF TORTS, at 1 (5th ed. 1984).

[2] *Id.* at 4.

[3] *Id.*

[4] 74 AM. JUR. 2D *Torts* § 1, at 620.

[5] *Id,* § 9, at 627.

[6] *See* 39 AM. JUR. 2D *Highways, Streets, and Bridges* § 385, at 876-77.

[7] *Id.* § 384, at 876, *citing* Burgess v. Harley, 934 S.W.2d 58 (Tenn. Ct. App. 1996), *appeal denied* (Oct. 28, 1996).

[8] PROSSER & KEETON, *supra* note 1, at 1032.

[9] *Id.*

[10] RICHARD JONES, RISK MANAGEMENT FOR TRANSPORTATION PROGRAMS EMPLOYING WRITTEN GUIDELINES AS DESIGN AND PERFORMANCE STANDARDS (NCHRP Legal Research Digest No. 38, 1997), hereinafter referred to as "JONES, Legal Research Digest No. 38."

[11] Sovereign immunity was first applied to a local government in the United States in Mower v. Inhabitants of Leicester, 9 Mass. 247 (1812), *overruled as stated in* Patrazza v. Commonwealth, 398 Mass. 464, 497 N.E.2d 271, 273 (1986) (Commonwealth's adoption of a policy of leaving highway guardrail ends unburied except on limited access highways was a discretionary function for which the Commonwealth was exempt from liability).

[12] 18 EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS § 53.02.10 (James Perkowitz-Solheim et al. eds., 3d ed.).

[13] *See* Stone v. State Highway Comm'n, 381 P.2d 107 (Ariz. 1963); Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968), *superseded by statute as stated in* White v. City of Newport, 326 Ark. 667, 933 S.W.2d 800 (1996) (immunity statute did not violate state Constitution which guaranteed right of access to the courts), and Liberty Mut. Ins. Co. v. Thomas, 333 Ark. 655, 971 S.W.2d 244 (1998); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457 (1961), *superseded by statute as stated in* Ramirez v. City of Redondo Beach, 185 Cal. App. 3d 903, 229 Cal. Rptr. 917 (2d Dist. 1986) (defects in the street were of such trivial nature that no reasonable person could conclude there was a substantial risk of injury; city was entitled to design immunity), *supp. opinion*, 192 Cal. App. 3d 515, 237 Cal. Rptr. 505 (2d Dist. 1987); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957), *superseded by statute as stated in* Cauley v. Jacksonville, 403 So. 2d 379 (Fla. 1981) (accident caused by danger-

of the doctrine was followed by legislative enactments restoring immunity. In general, however, when legislatures reinstated immunity they did not make immunity absolute. As recently as 1994, only six states still retained full immunity.[14]

A.2. Historical Evolution of Governmental Immunity to Suit in Tort

In a series of early decisions the Supreme Court of the United States held that federal and state governments were immune from suits commenced without their consent.[15] Articles on the American law of sovereign immunity often state that the rule in the United States was based on a misconception of English common law, which was said to immunize the king as sovereign for wrongs committed by his agents because "the king could do no wrong." To the contrary, several legal historians have concluded that the English sovereign was not immune from suit for many acts done in the name of the Crown.[16]

The American courts, however, when confronted with the question of sovereign immunity, departed from the English tradition and gradually adhered to the reasoning of the dissenting opinion by Justice Iredell in *Chisholm v. Georgia:*[17] the Court must look to English common law, the only principles of law common to all the states, which would prescribe as the only possible remedy the petition of right; that petition depended on the king's assent as sovereign, but in the American jurisdictions the only authority that could grant consent to suit, by analogy, must be the legislature.[18] Ultimately, in a series of American decisions, the doctrine of sovereign immunity was held to be applicable to the federal and state governments alike.

The general rule that a state could not be sued without its consent was stated clearly in *Beers v. Arkansas,*[19] arising out of an action for interest due on certain state bonds. Although the common law in other nations, such as England, did not provide for sovereign immunity for all actions, the U.S. Supreme Court held that the federal or state governments could not be sued without their consent. As Chief Justice Taney stated in *Beers:*

> It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts or in any other without its consent and permission but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.[20]

The doctrine's perpetuation is said to be founded on Justice Holmes' famous dictum, which in effect placed the sovereign, the lawmaker, above the law: “A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”[21]

Over the years, the Supreme Court has reaffirmed that doctrine in cases dealing with sovereign immunity.[22]

A.3. Sovereign Immunity in Contrast to Governmental Immunity

Under the doctrine of sovereign immunity, the state was not liable for the negligence of its officers or employees unless there was a constitutional or statutory provision that waived the state's immunity from liability.[23] That consent to suit has been given does not mean that the state has consented to being held liable for the particular wrong committed, for the state, if suit were permitted, could not be held liable for torts committed in the exercise of its *governmental* functions. The distinction between immunity from suit and

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ous depression in the shoulder of the road; statute that limited the amount of recoverable damages upheld on constitutional grounds).

[14] *Supra* note 10.

[15] *See, e.g.,* Cohens v. Va., 6 Wheat 264 (U.S. 1821)*, not followed by* Vanderpool v. State, 672 P.2d 1153, 1156 (Okla. 1983) ("The doctrine of governmental immunity is hereby modified to bring it in line with what we perceive to be the more just and equitable view…."); Hans v. La., 134 U.S. 1, 10 S. Ct. 504 (1890)*, criticized in* Planters & Citizens Bank v. Home Ins. Co., 1991 U.S. Dist. LEXIS 14805 (S.D. Ga. 1991, *aff'd* 1993 U.S. App. LEXIS 10340 (11th Cir. 1993); Beers v. Ark., 61 U.S. 527, 15 L. Ed. 991 (1857); Smith v. Reeves, 178 U.S. 436, 20 S. Ct. 919 (1900); Kawananakoa v. Polyblank, 205 U.S. 349, 353, 27 S. Ct. 526, 527 (1907)*, superseded by statute as stated in* Burdinie v. Glendale Heights, 139 Ill. 2d 501, 565 N.E.2d 654, 658 (1990) ("[T]he tort liability of a municipality such as defendant is expressly controlled by constitutional provision and legislative prerogative as embodied in the Tort Immunity Act.").

[16] Edwin M. Borchard, *Governmental Liability in Tort,* 36 YALE L.J. 1 at 2-34 (1925) [hereinafter cited as Borchard] and Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 3 (1963) [hereinafter cited as Jaffe].

[17] 2 U.S. 419 (1793).

[18] *Id*. at 435–46.

[19] 61 U.S. 527 (1857).

[20] *Id*.

[21] Kawananakoa v. Polyblank, 205 U.S. 349, 353, 27 S. Ct. 526, 527 (1907).

[22] Hercules, Inc. v. United States, 516 U.S. 417, 116 S. Ct. 981 (1996); Feres v. United States, 340 United States, 135, 71 S. Ct. 153 (1950); and United States v. Sherwood, 312 U.S. 584, 61 S. Ct. 767 (1941). *See also* United States v. Horn, 29 F.3d 754 (1st Cir. 1994); Robinson v. United States, 849 F. Supp. 799 (S.D. Ga. 1994); and Clark v. Runyon, 27 F. Supp. 2d 1040 (N.D. Ill. 1998).

[23] State v. San Miguel, 981 S.W.2d 342, 1998 Tex. App. LEXIS 4668 (Ct. App., Houston, 1998).

immunity from liability may be traced to a similar dichotomy in the English law wherein the immunity of the sovereign from suit was distinguishable from his *capacity* to violate or not violate the law.[24]

The distinction between suability and liability was applicable to actions against the state transportation departments. It generally was held that such departments, commissions, or authorities were mere agencies of the state and that a negligence action would not lie against them, because the state was the real party in interest. The suit could not be maintained unless the state's immunity from both suit and tort liability was waived.[25] Until the erosion of sovereign immunity in the mid-20th century, the vast majority of jurisdictions held that state transportation departments shared in the sovereign immunity of the state and, therefore, were immune from suit.[26]

For a state to waive immunity from suit the courts required that the legislative intent to do so had to be very clear. Thus, even where transportation departments were authorized to "sue and be sued," the courts were reluctant to construe such a provision to authorize any negligence suits against the department on the ground that such a provision was intended to enable the agency to perform necessary governmental functions, such as entering into and enforcing contracts.[27] Of course, a few courts held to the contrary on the ground that the highway agencies involved were not *alter egos* of the state but were separate entities vested with the power to raise their own revenue.[28]

[24] Jaffe, *supra* note 7, at 4.

[25] *Supra* note 10; *see also* Annot., *Liability and Suability, in Negligence Action, of State Highway, Toll Road, or Turnpike Authority*, 62 A.L.R. 2d 1222.

[26] Jaffe, *supra* note 7, at 4. *See* Huggins v. Ga. Dep't of Transp., 165 Ga. App. 178, 300 S.E.2d 195 (1983) (no statutory waiver of sovereign immunity that would allow an action against the department for negligence arising out of plaintiff's collision with a vehicle owned by the department that was parked on an Interstate highway); and Counihan v. Dep't of Transp. of Ga., 290 S.E.2d 514, 517 (Ga. App. 1982) (In a vehicle skidding case, the court held that the state's sovereign immunity had not been waived.).

[27] Tounsel v. State Highway Dep't, 180 Ga. 112, 178 S.E. 285 (1935); and State *ex rel.* Fatzer v. Kan. Turnpike Auth., 176 Kan. 683, 273 P.2d 198 (1954).

[28] *See also* Interstate Wreck Co. v. Palisades Inter. Park Comm., 273 A.2d 10, 12 (N.J. 1970) ("There is little reason to doubt that when the New Jersey Legislature approved the sue and be sued clause in the compact it meant to waive sovereign immunity and to authorize suits against the commission generally."); Bazanac v. State Dep't of Highways, 255 La. 418, 231 So. 2d 373 (1970) (action arose out of an injury to property during highway construction); and Taylor v. N.J. Highway Auth., 22 N.J. 454, 126 A.2d 313 (1956).

A.4. Liability for Proprietary as Distinguished from Governmental Functions

One basis of immunity from tort liability was the governmental-proprietary dichotomy, which is noted only briefly because the doctrine evolved in the law of municipal corporations. The doctrine held that even when a governmental agency could be sued, it nonetheless could be held liable only when the plaintiff's injury arose out of the government's negligence in the exercise of its proprietary activities, as opposed to its governmental functions. Examples of state proprietary activities are the operation of hospitals and public parks or recreational areas.[29] The dichotomy is confusing because the courts often referred to the state's sovereign immunity as "governmental immunity." This usage ordinarily was of no practical significance because the transportation department's functions were considered to be governmental in nature. Thus, the outcome of the tort suit would be the same, because the department could not be held liable either for the reason that it could not be sued, or, even if it could be sued, it could not be held liable for negligence in the exercise of its governmental functions.[30]

An example of this dichotomy is *Manion v. State Highway Comm'n,*[31] in which the court noted that there was a distinction between sovereign immunity from suit and immunity from liability, the latter existing when the State was performing a governmental function. The court in *Manion* held that the operation of a state ferry as a part of the highway system was a governmental function for which the State could not be held liable even though immunity to suit had been waived. Similarly, in *Fonseca v. State,*[32] the court held that, although the State had granted permission to be sued, the department could not be held liable, because the location, construction, and maintenance of state highways by the Texas Highway Department were governmental functions.[33]

The governmental-proprietary dichotomy has been applied most successfully in actions against local units of government, especially municipal corporations.[34]

[29] Carroll v. Kittle, 203 Kan. 841, 457 P.2d 21 (1969), *superseded by statute as stated in* Commerce Bank of St. Joseph, N.A. v. State, 251 Kan. 207, 833 P.2d 996, 1001 (1992) (Under the Kansas Tort Claims Act, K.S.A. 75-6101 *et seq*., "[f]or negligent or tortious conduct, liability became the rule, immunity the exception. The burden was placed upon the governmental entity or employee to establish entitlement to any of the exceptions set forth in K.S.A. 75-6104.").

[30] Annot*., State's Immunity from Tort Liability as Dependent on Governmental or Proprietary Nature of Function,* 40 A.L.R. 2d 927.

[31] 303 Mich. 1, 5 N.W.2d 527 (1942), *cert. denied* 317 U.S. 677, 63 S. Ct. 159, 87 L. Ed. 543 (1942).

[32] 297 S.W.2d 199 (Tex. Civ. App. 1956).

[33] Fonseca, 297 S.W.2d at 202.

[34] Perkins v. State, 252 Ind. 549, 251 N.E.2d 30, 34 (1969), *superseded by statute as stated in* Tittle v. Mahan, 582 N.E.2d

Whether an activity produced a pecuniary benefit to the government has been the most important criterion in determining whether a function was proprietary in nature.[35]

It seems clear that where state transportation agencies are planning, constructing, and maintaining highways, courts have deemed those activities to be governmental functions. The trend for municipalities is less clear. For example, a Texas court held that "[c]ities in the building, maintenance and operation of streets are engaged in a proprietary function and are not performing a governmental function."[36] "[A] few courts still applying the old governmental-proprietary test label street construction as 'governmental' and immunize the local governments from tort liability."[37]

There is some consistency, if it can be found, in the law on governmental-proprietary functions for states and municipal corporations where highway planning is involved. Some courts have held that local governments are immunized from tort responsibility for inadequate, defective, and unsafe streets that were negligently planned that way.[38]

The governmental-proprietary dichotomy as a theory of immunity may be on the wane even in municipal corporation law. For example, the District of Columbia adopted the rule that a plaintiff is not automatically out of court whenever it appears that an injury grew out of the operation of a school or a hospital or in the course of any other activity carried on by the District. In *Spencer v. General Hospital of the District of Columbia,*[39] the governmental-proprietary test of immunity was formally "interred" in favor of an exemption for the performance of discretionary activities.

B. JUDICIAL AND LEGISLATIVE WAIVER OF SOVEREIGN IMMUNITY

B.1. Introduction

Courts that have abolished or modified the doctrine of sovereign immunity generally did so on the grounds that the doctrine had outlived any usefulness; that it was inherently unfair and illogical; that it was already riddled with exceptions that produced incongruous results; that liability ordinarily should follow negligence; that governmental entities were quite capable of assuming any financial loss produced by tort judgments, particularly since liability insurance was universally available; that a victim's loss should not be borne alone but should be spread among the members of the community; and that governments should be held accountable at least to a certain extent for the injuries inflicted by the negligence of its agents.[40]

In short, many courts and legislatures concluded that the doctrine of sovereign immunity was indeed an "anachronism, without rational basis, and has existed only by the force of inertia."[41] In spite of the recent trend holding states accountable for their torts, there are, nonetheless, a few jurisdictions where the defense of sovereign immunity may be available to the transportation department when sued in tort.[42]

B.2. Trend Towards Governmental Responsibility

One of the first states to abolish sovereign immunity where a state highway or transportation department was involved directly as a defendant was Arizona in *Stone v. Arizona Highway Com.*[43] There the Supreme Court of Arizona abolished state immunity and held that the department was liable under the rule of *respondeat superior* for the negligence of those individual employees who had engaged in tortious conduct.[44]

In contrast to the *Stone* decision, a Maryland decision held that a suit against the Maryland State Roads Commission could not be maintained because the Commission had not waived its immunity from tort suit. Thus, in *Jekofsky v. State Roads Comm.,*[45] the plaintiff did not have a cause of action in tort for a highway accident where it was claimed that the Commission had improperly planned and constructed an

796 (Ind. 1991); *see also* 57 AM. JUR. 2D, *Municipal, School, and State Tort Liability* § 56.

[35] 57 AM. JUR. 2D, *Municipal, School and State Tort Liability,* § 56.

[36] Houston v. Glover, 355 S.W.2d 757, 759 (Tex. Civ. App. 1962), *writ ref'd n.r.e.* (Oct. 3, 1962), *and reh'g of writ of error overruled,* (Nov. 7, 1962).

[37] Watson v. Kansas City, 499 S.W.2d 515 (Mo. 1973) (local government was not liable based on theory of governmental immunity for failure to warn that street terminated); and Chavez v. Laramie, 389 P.2d 23 (Wyo. 1964); Jezek v. City of Midland, 586 S.W.2d 920 (Ct. Civ. App. Tex. 1978) (The regulation of traffic was not a proprietary function but a governmental one; the city was not liable for failure to remove obstructions to motorist's view that existed on an unimproved portion of the street).

[38] Hughes v. County of Burlington, 99 N.J. Super. 405, 240 A.2d 177, 179 (1968).

[39] 425 F.2d 479 (1969).

[40] *See, e.g.,* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961); Lipman v. Brisbane Elementary Sch. Dist., 55 Cal. 2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961); Holytz v. Milwaukee, 17 Wis. 226, 115 N.W.2d 618 (1962); Spanel v. Mounds View Sch. Dist., 264 Minn. 279, 118 N.W.2d 795 (1962); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied,* 362 U.S. 1968, 4 L. Ed. 2d 900 (1960); and Carlisle v. Parish of East Baton Rouge, 114 So. 2d 62 (La. App., 1st Cir., 1959).

[41] Muskopf v. Corning Hosp. Dist., 359 P.2d at 460 (1961).

[42] See JONES, *supra* note 10.

[43] 93 Ariz. 380, 381 P.2d 104 (1963).

[44] Stone, 381 P.2d at 113.

[45] 264 Md. 471, 287 A.2d 40 (1972).

Interstate highway in Maryland. Only the legislature, said the Maryland court, could modify the doctrine to permit an action for negligence in the performance of highway operations.[46]

Nevertheless, in the 1960s, the *judicial* trend was to hold governmental entities, including the state and its agencies or departments, responsible for negligent conduct,[47] but the *legislative* trend was to permit tort suits against the state only for designated conduct or levels of activity or decision making. Consequently, legislation was often enacted following any judicial abolition of immunity.[48] Illustrative of these judicial and legislative trends is Pennsylvania. Sovereign immunity was abolished by the Supreme Court of Pennsylvania in *Mayle v. Pennsylvania Dept. of Highways*;[49] however, the legislature promptly followed with legislation that reinstated immunity with certain exceptions.[50]

Virtually all states have enacted tort claims legislation reflecting the prevailing view that a state should assume the responsibility to some degree for compensating victims of its negligence.[51] Because a state's waiver of sovereign immunity for dangerous conditions of the highways in a tort claims act was in derogation of the common law, which recognized state sovereign immunity, the courts tended to construe a waiver very strictly. Thus, in certain situations, a transportation department may still have immunity.

In *Harrington v. Chicago and Northwestern Transp. Co.*,[52] for example, the court held that, even if the State were responsible for the railroad grade crossing where a motorist was killed in a collision with a train, the State retained sovereign immunity "because Iowa Code Section 668.10(1) provide[d] immunity to the State for a failure to install traffic control devices such as flashing lights and crossing gate arms…. Iowa Code Section 668.10 (1) provide[d] immunity for a failure to erect a traffic control device."[53] In *McLain v. State*,[54] the court noted that under I.C.A. Section 668.10, subd. 1, the State was not subject to tort liability for its decisions concerning traffic sign selection or placement, including claims that the State improperly failed to install signs, that its signs were improperly located, or that its signs failed adequately to warn motorists.

The transportation department may have statutory immunity from liability for the failure to replace a missing sign where the statute provided that the public entity was not liable "for an injury caused by the failure to provide ordinary traffic signals, signs, mark-

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[46] *Id.*

[47] *See, e.g.*, Walsh v. Clark County School Dist., 82 Nev. 414, 419 P.2d 774 (1966); Hamilton v. Shreveport, 247 La. 784, 174 So. 2d 529 (1965); Haney v. Lexington, 386 S.W.2d 738 (Ky. 1964); Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963); Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 678 (1962); Williams v. Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Moliter v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); and Hargrove v. Cocoa Beach, 96 So. 2d 130 (Fla. 1957).

[48] *See, e.g.*, the material on legislative and judicial history of immunity in several states cited in 78 DICK. L. REV. 365, 368 (1974): ARIZ. REV. STAT. ANN. *§* 26-314 (Supp. 1972) (statutory supplement to Stone v. Arizona State Highway Comm., 93 Ariz. 384, 381 P.2d 107 (1963), which abrogated sovereign immunity); ARK. STAT. ANN. § 12-2901 (Supp. 1971) [restored governmental immunity abrogated by Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968) Ark. 1235,]; CAL. GOV'T CODE §§ 810–996.6 (West l966) [detailed tort claims act subsequent to Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 11 Cal. Rptr. 89 (1961), which abrogated governmental and sovereign immunity]; FLA. STAT. ANN. § 95.24 (1960); *id. §* 95.241 (Supp. 1972) [statutory regulation passed subsequent to the abrogation of governmental immunity by Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957)]; IDAHO CODE ANN. §§ 6-901 to 6-928 (Cum. Supp. 1973) [tort claims act following Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970), which abrogated sovereign immunity]; ILL. ANN. STAT. ch. 85, §§ 1-101 to 10-101 (Smith-Hurd 1966) [restored governmental immunity to some extent following Moliter v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959)]; MICH. STAT. ANN. 3.996 (107) (Supp. 1972) [restored governmental immunity for "governmental" functions following its abrogation in Williams v. Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961)]; MINN. STAT. ANN. *§§* 466.01-17 (1963) [followed Spanel v. Mounds View Sch. Dist., 264 Minn. 279, 118 N.W.2d 795 (1962), which abrogated governmental immunity]; NEB. REV. STAT. §§ 23-1401 to 2420 (1970) [followed in Brown v. Omaha, 183 Neb. 430, 160 N.W.2d 805 (1968), and Johnson v. Mun. Univ. of Omaha, 184 N.W.2d 512 (Neb. 1969), *appeal after remand,* 187 Neb. 241, 187 N.W.2d 102 (1971), which abrogated governmental immunity]; NEV. REV. STAT. §§ 41.031 to 41.039 (1969) [followed judicial abrogation of governmental immunity in Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963) and Walsh v. Clark County Sch. Dist., 82 Nev. 414, 419 P.2d 774 (1966)]; N.J. STAT. ANN. §§ 59:1-1 to 14-1 (Supp. 1973) (detailed tort claims act following abrogation of governmental and sovereign immunity by Willis v. Department of Conservation & Economic Dev., 55 N.J. 534, 264 A.2d 34 (1970)]; R.I. GEN. LAWS ANN. §§ 9-31-1 to 9-31-7 (Supp. 1972) [followed abrogation of governmental immunity in Becker v. Beaudoin, 106 R.I. 562, 261 A.2d 896 (R.I. 1970), *reh'g denied,* 106 R.I. 838 (1970)]; WIS. STAT. ANN. §§ 345.05 (1971), 895.05 (1971), 895.43 (1966) [imposed some limitations on abrogation of governmental immunity by Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962)].

[49] 479 Pa. 384, 388 A.2d 709 (1978).

[50] *See* PA. CONS. STAT., tit. 42, §§ 8522, 8524–26 and 8528; Smith v. Commw., Dep't of Transp., 700 A.2d 587 (Pa. Commw. Ct. 1997) (The defense of sovereign immunity may be waived when the damages are caused by a dangerous condition of the highway.).

[51] JONES, *supra* note 10. The article concludes that the largest number of states fall into the category of abrogation of immunity in a substantial or general way.

[52] 452 N.W.2d 614 (Iowa App. 1989).

[53] Harrington, 452 N.W.2d at 616.

[54] 563 N.W.2d 600, 603, 1997 Iowa Sup. LEXIS 167 (1997).

ings or other similar devices."[55] In *Smith v. State*, the court held that because both the decision to post a sign and the act of implementation by posting the sign were one and the same for the purpose of the traffic sign immunity statute, it followed that there was immunity also for not replacing a missing sign.[56] Likewise, it has been held that the transportation department had governmental immunity for allegedly negligently designing and constructing a highway bridge and guardrails, which were built before the date of the tort claims act that waived governmental immunity.[57]

In general, however, the trend continues to be one of governmental responsibility in tort for negligence arising out of certain transportation functions. The basic thrust of the tort claims acts is to permit suits against the departments only for designated conduct or for nondiscretionary activity or decision making.

B.3. Legislation Waiving Sovereign Immunity in Tort

B.3.a. Tort Claims Acts

State tort claims acts, many of which are modeled after the federal Tort Claims Act, are the most prevalent types of waivers of sovereign immunity that authorize tort suits against the states. The acts usually either reenact immunity from liability with certain exceptions[58] or waive immunity from liability with certain exclusions, for example, where discretionary duties are involved or where specific activities are undertaken.[59] The tort claims acts are discussed separately in, *infra*, concerning the states' immunity from liability for the discretionary functions.

As stated, where tort claims acts have waived the state's immunity for certain activities, the courts tend to construe the acts narrowly so that the state's immunity is not waived for areas not intended by the legislature. For instance, a statute may provide for an explicit waiver of immunity for a dangerous condition caused by a pothole but not for one caused by the absence of a guardrail.[60] In *Dean v. Commonwealth Department of Transportation*,[61] a lower court held that the State's sovereign immunity was waived not just when the dangerous condition was the cause of the accident but also when the dangerous condition was the cause of the plaintiff's damages. However, the Pennsylvania Supreme Court held 2 years later that the failure to erect a guardrail did not constitute a dangerous condition of Commonwealth realty; "sovereign immunity is waived pursuant to 42 Pa. C.S. § 8522(b)(4)[] where it is alleged that the artificial condition or defect of the land itself causes an injury to occur."[62]

The *Dean* decisions are illustrative of the courts' tendency to construe tort claims acts narrowly. The court held in *Dean, supra*, that, in its view, "the legislature did not intend to impose liability upon the government whenever a plaintiff alleged that his or her injuries could have been avoided or minimized, had the government installed a guardrail along side of the highway," where the legislature had waived expressly the government's immunity for other highway conditions but not for guardrails.[63]

On the other hand, a court may construe a governmental immunity statute broadly, as in *Suttles v. State, Dept. of Transp.,*[64] where the court held that pedestrians may come within the highway exception to governmental immunity. Of utmost importance is whether the legislature waived immunity or imposed a duty on the transportation department for a specific highway activity. Unless the statute clearly waives immunity for a specific highway activity, there may be a basis for contending that the legislature did not intend to waive immunity for an unenumerated transportation department activity.

B.3.b. State Claims Acts

Statutes that waive immunity and establish a procedure for processing such cases are generally known as state claims acts.[65] Such acts, which differ greatly in scope and procedure, are specific waivers of immunity from suit and liability. Usually, the act will create or authorize a tribunal or commission, though usually not a court, to hear all tort claims against the state.[66] Ohio has established a Court of Claims to adjudicate suits against the state.[67] These independent bodies may have exclusive jurisdiction, but their decisions may be subject to review either by the courts[68] or by the legis-

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[55] Smith v. State, Dep't of Transp., 247 N.J. Super. 62, 588 A.2d 854, (1991), *cert. denied*, 130 N.J. 13, 611 A.2d 651 (1992) (*citing* N.J.S.A. 59:4-5).

[56] Smith, 588 A.2d at 858.

[57] Barron v. Tex. Dep't of Transp., 880 S.W.2d 300, 302 (Tex. App. 1994), *writ denied,* (Dec. 22, 1994).

[58] *See, e.g.*, UTAH CODE ANN. §§ 63-30-1, 63-30-8, 63-30-10.

[59] *See, e.g.*, ALASKA STAT. § 09.50.250.

[60] *See, e.g.*, 42 PA. CONS. STAT. § 8522(b)(5), setting forth conditions of explicit waiver of sovereign immunity regarding potholes as a dangerous condition of the highway and 42 Pa. C.S. § 8542(b)(4) for trees, traffic controls, and street lighting.

[61] 718 A.2d 374,379 (Pa. Commw. Ct. 1998), *overruling* Rothermel v. Commonwealth of Pa., 672 A.2d 837 (Pa. Commw. Ct. 1996), which had held that PennDOT was not liable because the absence of the guardrail did not cause the accident but merely facilitated or aggravated the decedent's injuries.

[62] Dean v. Commonwealth of Pa., 2000 Pa. LEXIS 1241 (Pa. 2000).

[63] *Id.*

[64] 457 Mich. 635, 578 N.W.2d 295, 299, 303, 1998 Mich. LEXIS 1312 (1998).

[65] *See, e.g.*, MINN. STAT. § 3.66 (repealed 1976; *see* MINN. STAT. ANN. § 3.736 re: tort claims against the state); N.C. GEN. STAT. § 143-291, as amended in 1994; and W. VA. CODE, § 14-2-4, effective 1967.

[66] *See, e.g.*, W. VA. CODE § 14-2-14.

[67] *See, e.g.*, OHIO REV. CODE ANN., § 2743.01, *et seq* (Page).

[68] *See, e.g.*, N.C. GEN. STAT. § 143-293.

latures for appropriations.[69] A claims statute may provide for certain exclusions from liability,[70] or define the jurisdiction of the commission or board in very specific or very broad terms.[71] The legislature may appropriate a specific amount each fiscal year to cover awards, or there may be a limit on recoveries by claimants.[72]

Although the state claims acts may differ greatly, the tribunal or commission established to hear claims may apply rules that are applicable in negligence suits for personal injuries and property damage. For example, the North Carolina Industrial Commission is a court for the purpose of hearing tort claims against certain state agencies such as the department of transportation.[73] It

> determine[s] whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina. If the Commission finds that there was such negligence…which was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant…the Commission shall determine the amount of damages.…[74]

B.3.c. Highway Defect Statutes

The highway defect statute is another specific way of waiving the sovereign immunity of state transportation departments. There must be a determination as to whether a plaintiff's claim arises under a "road defect" statute or under the tort claims act.[75] Connecticut is an example of a state with a highway defect statute.[76] Connecticut's statutory provision states: "Any person injured in person or property through the neglect or default of the state or any of its employees by means of any defective highway, bridge, or sidewalk which it is the duty of the commissioner of transportation to keep in repair…may bring a civil action."[77]

Highway defect statutes differ from tort claims acts, because under a defect statute the question is whether the claimant's injuries were caused by a "defect" within the meaning of the statute; that is, is the "defect" in the highway a condition that the legislature intended to be liability-producing.[78] In tort claims acts, the focus is on whether injury was caused by the negligent act or omission of a state officer or employee.

C. THE STATE'S DUTY AND STANDARD OF CARE TO THE TRAVELING PUBLIC

C.1. The State's Duty to the Public

To maintain a tort action against a transportation department, the plaintiff must show that the department owed a duty of care to the injured person that the defendant failed to perform.[79] The showing of the existence of a duty and a breach of that duty are critical, because "[w]ithout duty, there can be no breach of duty, and without breach of duty there can be no liability."[80] In a tort action against the department, the plaintiff must establish that the department had an "obligation to conform to a particular standard of conduct toward another to which the law will give recognition and effect."[81]

The transportation department has a duty of reasonable care "to construct and maintain its highways in a reasonably safe condition"[82] or to provide adequate warning of danger.[83] Although the transportation de-

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[69] *See, e.g*., W. VA. CODE § 14-2-28.

[70] *See, e.g.,* W. VA. CODE § 14-2-14.

[71] *See, e.g*., N.C. GEN. STAT. § 143-291 (1999 ed.; limit of $150,000).

[72] *See* N.C. GEN. STAT. § 143-291(1991).

[73] It has been held that the State Highway Commission, now transportation department, was an agency of the state. Davis v. N.C. State Hwy. Comm'n, 271 N.C. 405, 156 S.E.2d 685 (1967).

[74] N.C. GEN. STAT. § 143-291(a), as amended (1999).

[75] Di Benedetto v. Commonwealth of Mass., 1995 Mass. Super. LEXIS 226 (1995) (Because the accident involved a moving state truck, the tort claims act (M.G.L.A. ch. 258) applied, not the road defect statute (M.G.L.A. chs. 81, 18)).

[76] Connecticut's statute is still in force, but Kansas, a former highway defect statute state, has enacted a Tort Claims Act, K.S.A. § 75-6101, an "open ended" tort claims act making liability the rule and immunity the exception. Rollins v. Dep't of Transp. 238 Kan. 453, 711 P. 2d 1330 (1985).

[77] CONN. GEN. STAT. tit. 13a, § 144. Cases involving highways decided under this section include Ormsby v. Frankel, 54 Conn. App. 98, 734 A.2d 575 (1999) (issue of constructive notice was question of fact for the jury), *cert. granted in part* 250 Conn. 926, 738 A.2d 658; Warkentin v. Burns, 223 Conn. 14, 610 A.2d 1287 (1992) (90-day notice of claim provision was unambiguous); and Hall v. Burns, 213 Conn. 446, 569 A.2d 10 (1990) (workload of transportation department relevant to issue of whether a defect existed in the highway).

[78] Shirlock v. MacDonald, Highway Comm'r, 121 Conn. 611, 69 A. 562 (1936).

[79] N.Y. JUR. 2D, *Negligence* § 14.

[80] *Id.*

[81] *Id.*; *see also* 65 N.Y. JUR. 2D, *Highways, Streets, and Bridges* § 364, *et seq*.

[82] 65 N.Y. JUR. 2D, *Highways, Streets, and Bridges* § 375, at 163–64.

[83] Taylor-Rice v. State, 91 Haw. 60, 979 P.2d 1086, 1095–96, 1999 Haw. LEXIS 258 (1999); Goodermote v. State, 856 S.W.2d 715, 720 (Tenn. Ct. App. 1993) (The state has a duty to exercise reasonable care under all attendant circumstances in planning, designing, constructing, and maintaining the state system of highways.); Tuscaloousa County v. Barnett By and Through Barnett, 562 So. 2d 166, 168 (Ala. 1990), *reh'g denied,* 1990 Ala. LEXIS 271 (1990) (common law duty to maintain highways in a reasonably safe condition for their intended use); Hash v. State, 247 Mont. 497, 807 P.2d 1363 (1991) (The State's duty to keep

partment is not an insurer of the safety of the highway, it has a duty to make its highways reasonably safe for their intended purpose, including the correction of dangerous conditions.[84] However, a duty transcending that of reasonable care and foresight will not be imposed upon the state.[85] Although the transportation department may not escape liability merely by showing that a highway met existing standards when it was built,[86] where highways are designed and built according to accepted practice at the time of construction, it has been held that the state is not liable for delay in providing improvements after it determined that they were needed.[87] All that is required of the state is that it adequately design, construct, and maintain its highways and give adequate warning of existing conditions and hazards to the reasonably careful driver.[88] Thus, the state is required only to exercise reasonable care to make and keep the roads in a reasonably safe condition for the reasonably prudent traveler.[89]

The state's obligation of reasonable care may encompass an efficient and continuous system of highway inspection.[90] Where a maintenance foreman drove along a street during business hours when parked cars obscured defects, the court held that the inspection was unreasonable under the circumstances.[91] In contrast, *Hensley v. Montgomery County*[92] held that the duty to inspect roads and streets was not applicable to suburban or rural streets and highways. Some courts, however, have held that less maintenance is required on county or rural roads.[93] On the other hand, statutes may preclude any duty of the state to inspect the roads and other public improvements for which negligence in doing so or the failure to do so could be the basis of a tort suit against the transportation department.[94] Similarly, it has been held that the government's lack of a plan to conduct periodic inspections of its streets did not impute notice to a city of defects in its streets.[95]

Inherent in the state's duty of ordinary care is the duty to eliminate dangerous conditions, to erect suitable barriers, or to adequately warn the traveling public of hazardous conditions.[96] Therefore, the existence and adequacy of barriers or posted warnings is critical to the question of the state's liability, but the state may not avoid liability simply by erecting a barrier or posting a warning sign. Where a dangerous condition was permitted to exist in the highway for a period of at

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its highways in a reasonably safe condition extends to the paved portion of the roadway, to the shoulders, and to adjacent parts, including guardrails or bridge abutments.).

[84] Temple v. Chenango County, 228 A.D.2d 938, 644 N.Y.S.2d 587, 589, 1996 N.Y. App. Div. LEXIS 7276 (3d Dep't 1996) (Factual issues precluding summary judgment existed regarding whether the county road was built in accordance with good engineering practices.); Wechsler v. Wayne County Road Comm'n, 215 Mich. App. 579, 546 N.W.2d 690, 695, 1996 Mich. App. LEXIS 59 (1996) (The department must undertake to keep traffic control systems that are in place in "functional condition," because these systems are generally installed for the safety and protection of motorists or pedestrians); Madunicky v. Ohio Dep't of Transp., 109 Ohio App. 3d 418, 672 N.E.2d 253, 255 (1996) (If the duty of care is not set forth in a policy or manual applicable to the transportation department, then the duty of care is that of a reasonable engineer using accepted practices at the time).

[85] Helmus v. Transp. Dep't, 328 Mich. App. 250, 604 N.W.2d 793, 796, 1999 Mich. App. LEXIS 321 (1999) (Liability may not be established by showing that a reasonably safe highway can be made even safer.); Macon County Com. v. Sanders, 555 So. 2d 1054, 1057 (Ala. 1990) (The standard of care to be applied is what reasonably should have been done, not what is customarily done.).

[86] Cormier v. Comeaux, 714 So. 2d 943, 950, 1998 La. App. LEXIS 1701 (1998) (Design standards alone do not determine whether or not the transportation department owes a duty to the motorist.).

[87] Wechsler v. Wayne County Road Comm'n, 215 Mich. App. 579, 546 N.W.2d 690, 1996 Mich. App. LEXIS 59 (1996) (Warning and directional signs in compliance with applicable standards at the time of construction, in the absence of any record that the area had become hazardous, continued to be adequate for the reasonably careful driver.).

[88] Martin v. Mo. Highway & Transp. Dep't, 981 S.W.2d 577, 582, 1998 Mo. App. LEXIS 1705 (1998) (holding that there is a duty to maintain clear areas for highways).

[89] *See* Ufnal v. Cattaraugus County, 93 A.D.2d 521, 463 N.Y.S.2d 342, 344-45 (4th Dep't 1983), *appeal denied,* 60 N.Y.2d 554 (1983) (county could not be held liable for failure to post a deer-warning sign, a discretionary act; posting of the sign was a permissive, not mandatory, duty under the *Manual on Uniform Traffic Control Devices* (MUTCD), 17 NYCRR 234.4); Pick v. Szymczak, 451 Mich. 607, 548 N.W.2d 603, 610, 1996 Mich. LEXIS 1378 (1996) (However, "[v]ehicular travel does not take place solely on the two-dimensional length and width of the roadway; rather it occurs in three-dimensional space, and necessarily implicates factors not physically within the improved portion of the roadway itself....").

[90] McCullin v. State Dep't of Highways, 216 So. 2d 832, 834 (La. 2d Cir. App. 1968)*, cert. denied*., 253 La. 645, 219 So. 2d 177 (1969).

[91] *See* Commonwealth, Dep't of Highways v. Maiden, 411 S.W.2d 312 (Ky. 1966).

[92] 25 Md. App. 361, 334 A.2d 542 (1975).

[93] *See, e.g.,* Husovsky v. United States, 191 U.S. App. D.C., 590 F.2d 944 (D.C. Cir. 1978) and Aubertin v. Board of County Comm'rs, 588 F.2d 781 (10th Cir. 1978).

[94] *See, e.g.*, NEV. REV. STAT. § 41.033(1)(a) and (b), as amended (1993).

[95] Jones v. Hawkins, 731 So. 2d 216, 218, 1999 La. LEXIS 336 (La. 1999).

[96] Pick v. Szymczak, 451 Mich. 607, 548 N.W.2d 603, 609, 1996 Mich. LEXIS 1378 (1996) (In Michigan, the duty of maintenance includes the duty to erect adequate warning signs or traffic control devices at a "point of hazard" or "point of special danger.").

least 2 months, the fact that the department was engaged in repairing the road at the time of the accident was not an exercise of ordinary care when proper precautions, such as the erection of suitable barriers or warning devices, were not undertaken.[97] The state's duty to correct a dangerous condition or otherwise take appropriate action arises when it receives notice, either actual or constructive, of the hazard.[98] Thus, "[t]he plaintiff must show that a negligent or wrongful act or omission of a public employee created a dangerous condition, or that the public entity had notice of a dangerous condition a sufficient time prior to the injury to have taken measures to protect against it."[99]

As discussed in later sections, a variety of highway situations have been determined to constitute a dangerous condition for which the state or other governmental entity charged with responsibility for the highway has been held liable. The plaintiff may fail to establish that the condition is one that qualifies as a liability-producing dangerous condition.[100] It has been held, however, that if a public entity's property is dangerous only when used without due care, the property is not in a dangerous condition for the purpose of the statute waiving immunity from suit against the government.[101]

In sum, the duty of care owed by the state to users of the highway exists in a variety of factual situations. Whether the state had a duty to a motorist under the circumstances ordinarily is a question of law to be decided by the court.[102]

[97] Commonwealth, Dep't of Highways v. Young, 354 S.W.2d 23 (Ky. 1962).

[98] See discussion in § C.2, *infra*.

[99] Chowdhury v. City of L.A., 38 Cal. App. 4th 1187, 45 Cal. Rptr. 2d 657 (Cal. App. 2d Dist. 1995), *citing* CAL. GOV'T CODE § 835.

[100] Lockwood v. Pittsburgh, 2000 Pa. LEXIS 1213 (Pa. 2000) (failure to erect guardrail was not a dangerous condition); Chowdhury v. Los Angeles, 38 Cal. App. 4th 1187, 45 Cal. Rptr. 2d 657, 662 (Cal. App. 2d Dist. 1995) (traffic signal rendered inoperative due to power outage was not a dangerous condition); and Aucoin v. State, 712 So. 2d 62, 65, 1998 La. LEXIS 991 (La. 1998) (site of accident unreasonably dangerous because of a combination of dangerous defects that were allowed to accumulate).

[101] Garrison v. Middleton, 154 N.J. 282, 712 A.2d 1101, 1103-04 (1998).

[102] Allyson v. Dep't of Transp., 53 Cal. App. 4th 1304, 62 Cal. Rptr. 2d 490, 497, 1997 Cal. App. LEXIS 251 (Cal. App. 4th Dist. 1997); Wechsler v. Wayne County Road Comm., 215 Mich. App. 579, 546 N.W.2d 690, 1996 Mich. App. LEXIS 59 (1996); Capshaw v. Tex. Dep't of Transp., 988 S.W.2d 943, 947, 1999 Tex. App. LEXIS 2050 (Ct. App., El Paso, 1999) (existence of duty is legal question when there are disputed facts on which the legal issue is dependent); and Chowdhury v. L.A., 38 Cal. App. 4th 1187, 45 Cal. Rptr. 2d 657, 661 (Cal. App. 2d Dist. 1995).

C.2. Requirement of Notice of a Dangerous Condition

The transportation department's duty to take action at hazardous locations, such as giving adequate warnings, providing adequate barriers, or correcting the hazard, arises when the department acquires notice of the condition, which may be actual or constructive.[103] Actual notice is not always required and constructive notice may be sufficient.[104] For example, in *Rinaldi v. State,*[105] a large limb fell from a diseased maple tree, located within the highway right-of-way but a few feet from the paved portion of the road, and struck the plaintiff's vehicle. The court held that the state's duty to maintain the highway included the areas adjacent to and above the highway that "could reasonably be expected to result in injury and damage to the users thereof."[106] Because this condition was one that was readily observable, and one that should have been observed by departmental officials and work crews, the court held that the state had constructive notice of the tree's condition.

Moreover, states may be deemed to have knowledge of their own actions. Thus, when an accident occurred in front of a construction site where trucks had deposited mud on the highway throughout the summer, creating a slippery condition, and the state failed to give any warnings of the dangerous condition, the state could be held liable for the plaintiff's injuries.[107] It may not be necessary for the state to have received notice of the fact of its own faulty construction, maintenance, or repair of its highways, because it is deemed to know of its own acts.[108]

In some instances, however, the state must have notice of the condition for the requisite statutory pe-

[103] Gregorio v. City of New York, 246 A.D.2d 275, 677 N.Y.S.2d 119, 122, 1998 N.Y. App. Div. LEXIS 8975 (city not immune where it had notice that a barrier was defective); Mickle v. N.Y. State Thruway Auth., 182 Misc. 2d 967, 701 N.Y.S.2d 782, 788, 1999 N.Y. Misc. LEXIS 547 (Ct. Cl. 1999) (Besides evidence of prior accidents, a claimant may prove that the defect in question was so obvious and had existed for so long that the transportation department should have discovered and corrected it.).

[104] Woolen v. State, 256 Neb. 865, 593 N.W.2d 729 (1999); Aetna Cas. & Sur. Co. v. State, 712 So. 2d 216 (La. Ct. App., 1st Cir., 1998); Harkness v. Hall, 684 N.E.2d 1156 (Ind. Ct. App. 1997); Templeton v. Hammond, 679 N.E.2d 1368 (Ind. Ct. App. 1997); Burgess v. Harley, 934 S.W.2d 58 (Tenn. Ct. App. 1996), *appeal denied*, (Oct. 28, 1996); and Carroll v. State, 157 A.D.2d 697, 549 N.Y.S.2d 795 (2d Dept. 1990).

[105] 49 A.D.2d 361, 374 N.Y.S.2d 788 (1975).

[106] Rinaldi, 374 N.Y.S.2d at 791.

[107] *Id.*

[108] Coakley v. State, 26 Misc. 2d 431, 435, 211 N.Y.S.2d 658, 663 (1961), *aff'd* 15 A.D.2d 721, 222 N.Y.S.2d 1023 (1962); Morales v. N.Y. State Thruway Auth., 47 Misc. 2d 153, 262 N.Y.S.2d 173 (1965).

riod.[109] In *Kelley v. Broce Construction Co.,*[110] where all of the factors creating the defect causing the accident took place on the same day as the accident, a statutory notice period of 5 days was not met, and the State was not held liable. The court observed that the 5-day notice period should be of the particular defect that caused the accident, not merely of conditions that may produce and subsequently do produce the highway defect.[111]

What length of time does the dangerous condition have to be present before the highway department must respond with reasonable action? There is no precise answer, and the notice requirement could be governed by statute, but in *Gaines v. Long Island State Park Com.,*[112] notice was implied because of a 34-hour delay in detecting a large pothole on a major highway. In *Lawson v. Estate of McDonald*[113] and *Tromblee v. State,*[114] respectively, the State did have adequate notice of the dangerous condition, because the department either had notice on the same day of the accident or had taken action within a few hours of receiving notice of the dangerous conditions. In *State v. Guinn*,[115] there was constructive, if not actual, notice, because a truck that was the proximate cause of the accident had been parked partially on the highway for at least 3 weeks. In yet another case where the district maintenance engineer had known of a dangerous condition for several years, the court held that merely giving warning of the presence of the condition did not excuse the state, because there was both notice and a sufficient time within which to remedy the defect.[116]

Although there may be a dangerous condition of the roadway that has caused an injury to one using it, for the transportation department to be held liable it must have had notice, either actual or constructive, of the unsafe condition.[117] Usually it is a question of fact whether the department had actual notice or whether the condition had existed for such a length of time that the department may be charged with notice.[118]

[109] Pick v. Szymczak, 451 Mich. 607, 548 N.W.2d 603, 611, 1996 Mich. LEXIS 1378 (1996) (Any duty under the statute is strictly subject to the notice requirement.).

[110] 205 Kan. 133, 468 P.2d 160 (1970).

[111] Kelley, 468 P.2d at 166.

[112] 60 A.D.2d 724, 401 N.Y.S.2d 315 (1977).

[113] 524 S.W.2d 351 (Tex. Civ. App. 1975), *writ ref'd n.r.e,* (Oct. 8, 1975).

[114] 52 A.D.2d 666, 381 N.Y.S.2d 707 (1976).

[115] 555 P.2d 530 (Alaska 1976).

[116] Ehlinger v. State, 237 N.W.2d 784 (Iowa 1976).

[117] *See, e.g.*, 65 N.Y. JUR. 2D, *Highways, Streets, and Bridg*es, § 381, at 171–73.

[118] *Id.*

D. INDIVIDUAL LIABILITY OF PUBLIC TRANSPORTATION OFFICIALS OR EMPLOYEES

D.1. Origins of Personal Liability

The common law originally did not provide for immunity of public officials from suit.[119] On the other hand, in the United States, public officials were never treated the same as private individuals insofar as liability for their torts was concerned. A public official who was charged by law to perform duties calling for the exercise of his or her judgment or discretion generally was not personally liable to an individual for damages unless the official was guilty of a wilful or malicious wrong.[120]

There were several reasons for the different treatment of public officials and employees in comparison to employees in the private sector. One reason for according public officials different treatment arose from the strong belief that the executive, legislative, and judicial branches of government should be kept separate. The judiciary, unless it exercised restraint, could trespass upon, or even usurp, the functions of another arm of government. Thus, the courts developed rules, such as the exemption for discretionary action, discussed below, to restrain judicial interference with the activities of a coordinate branch of government. A second reason for treating public officials differently from private persons was that public officials, unlike private individuals, frequently have a duty to act. Third, generally it was thought to be in the public interest to encourage vigorous action on the part of public officials. They may be unwilling to perform their duties vigorously if there is potential tort liability for every action they take in fulfilling their obligations and in setting policy. Immunity for public officials was intended to protect them from the fear of personal liability that could deter vigorous or independent action.[121] Fourth, some courts assumed that if public servants were subjected to unlimited tort liability it would be difficult, if not impossible, to find competent men and women to serve in the government.[122] Influenced by these and other policy considerations, the courts recognized that public officials and employees were entitled to immunity in varying degrees for their actions.

D.2. Absolute or Partial Immunity of Transportation Officials and Employees

There are a few cases holding that public officials or employees are absolutely immune from lawsuits. However, the decisions concern almost exclusively county

[119] *See* 2 HARPER & JAMES, THE LAW OF TORTS § 29.8.

[120] *In re* Alexandria Accident of Feb. 8, 1994, 561 N.W.2d 543, 548, 1997 Minn. App. LEXIS 369 (1997).

[121] *In re* Alexandria Accident, 561 N.W.2d at 548–49.

[122] *See, e.g.,* Ten Eicken v. Johnson, 1 Ill. App. 3d 165, 273 N.E.2d 633 (1971) and Osborn v. Lawson, 374 P.2d 201 (Wyo. 1962).

officials and employees and generally hold that, because the county could not be held liable for its torts, neither could its agents be held liable.[123]

Some courts have decided whether public officials and employees should be held personally liable for their negligence based on reasons of public policy.[124] In Pennsylvania, for example, the courts had ruled that state "high public officials" have absolute immunity for actions committed or performed within the scope of their authority.[125] The courts held that other public officials (e.g., "low public officials") had conditional immunity for their actions as long as they were acting within the scope of their authority and were not acting maliciously, wantonly, or recklessly.[126] In *DuPree v. Commonwealth,*[127] a divided court modified the Pennsylvania rule. The court held "the liability of the individual appellees should not have been analyzed solely on the basis of their status as employees of the Commonwealth."[128] The court stated that public officials should be shielded from liability only where there is a strong public interest in protecting their freedom to exercise their judgment. However, in remanding the case for further proceedings, the court observed that no general rule could be stated on the immunity of public officials.[129]

Full or partial immunity by statute is another approach. Some statutes provide for immunity of public officials and employees, such as Connecticut's:

> No State officer or employee shall be personally liable for damage or injury, not wanton or wilful, caused in the performance of his duties and within the scope of his employment. Any person having a complaint for such damage or injury shall present it as a claim against the state under the provisions of this chapter.[130]

California provides that

> [e]xcept as provided in this article, a public employee is not liable for injury caused by a condition of public property where such condition exists because of any act or omission of such employee within the scope of his employment. The liability established by this article is subject to any immunity of the public employee provided by statute and is subject to any defenses that would be available to the public employee if he were a private person.[131]

In Maine, in addition to specifying certain acts and omissions for which employees are immune, the law provides that an employee shall be personally liable only to a maximum of $10,000.[132] Moreover, the officer or employee may be immune for certain negligent acts or omissions that occur during the performance of a duty within the scope of his or her employment, including conduct in performing discretionary activities and functions.[133]

In other states, instead of immunizing the public official or employee, the legislatures have sought to encourage claimants to sue the state rather than the public official or employee both by tort claims legislation and by other means. For example, one state requires that if an individual officer or employee is sued, then the state must be named as a party defendant.[134] Other states provide that a judgment against the individual will bar a claim on the same cause of action against the state,[135] or that a judgment on the cause of action against the state will constitute a complete bar to any action against the employee whose act or omission gave rise to the claim.[136]

Aside from immunity for negligent performance of discretionary functions, discussed below, state statutes may declare that the employee is immune for the acts or omissions of other persons, thus ruling out any liability of supervisory personnel on a *respondeat superior* theory,[137] or provide that he or she is immune for the negligent performance of certain functions, such as

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[123] Dohrman v. Laurence County, 143 N.W.2d 865 (S.D. 1966) (no action against a county highway superintendent for alleged negligence in failing to post signs warning of a sharp curve in the road, because the defendant could no more be held liable than could the county itself, which was immune); Miller v. Ste. Genevieve County, 358 S.W.2d 28 (Mo. 1962); and Providence Washington Insurance Co. v. Garrettsville, 67 Ohio L. Abs. 370, 120 N.E.2d 501 (1953) (state highway director could not be held liable for alleged negligence in failing to maintain and repair a bridge.).

[124] Pine v. Synkonis, 79 Commw. 479, 470 A.2d 1074 (1984) (Court gave exclusive weight to policy considerations other than the policy of immunity for discretionary activities in deciding whether six defendant employees of the department of transportation were immune in their capacity as public officials; three were immune from suit; three were not); *see also* Durr v. Stille, 139 Ill. App. 3d 226, 93 Ill. Dec. 715, 487 N.E.2d 382 (1985) (The court absolved the defendant of liability, because he "was under no duty to warn that the quarter-mile stretch of road had been freshly oiled. To hold otherwise would place an unreasonable burden on those responsible for the maintenance of roadways.)"

[125] Fischer v. Kassab, 360 A.2d 809 (Commw. Ct. Pa. 1976) (action against the state Secretary of Transportation).

[126] *Id*. *See also* Teague v. Consol. Bathurst Ltd., 408 F. Supp. 980 (E.D. Pa. 1976).

[127] 393 A.2d 292 (Pa. 1978).

[128] 393 A.2d at 295.

[129] *See* Cerino v. Palmer, 401 A.2d 770 (Pa. Super. 1979) (township engineer, engaged in the supervision of construction work, had no policy-making functions to perform, and, therefore, not entitled to official immunity).

[130] CONN. GEN. STAT., § 4-165, as amended (1985).

[131] CAL. GOV'T CODE § 840.

[132] ME. REV. STAT. ANN. tit. 14, § 8111.

[133] *See, e.g.,* CAL. GOV'T CODE, § 820.2; ME. REV. STAT. ANN. tit. 14, § 8111; NEV. REV. STAT., § 41.033 (no liability for failure to inspect); and N.J. STAT. ANN., § 59.3-2.

[134] NEV. REV. STAT. § 41.0337.

[135] ME. REV. STAT. ANN. tit. 14, § 8114(2).

[136] *See* HAW. REV. STAT., § 662-10; KAN. STAT. ANN. § 75-6101, *et seq*.; and NEB. REV. STAT., § 81-8,217.

[137] CAL. GOV'T CODE, § 820.8.

inspections of public property[138] or the failure to take legislative or quasi-legislative action.[139]

In states where, according to case law, public officials and employees are not liable for nonmalicious acts performed within the scope of their official duties or their employment, one may encounter the issue of whether a statute that waives the state's immunity, but is silent on whether public officials' and employees' immunity is waived, implies a waiver of public officials' or employees' immunity from suit. The cases are in conflict on the answer.[140] Of course, if the immunity of public officials and employees was conferred by statute, it must be expressly rescinded by statute.

D.3. Defenses of Public Officials and Employees

D.3.a. The Defense of Acting Under Orders

In a few cases, a public official or employee has relied successfully on the defense that he or she was acting under orders. Where a lower ranking employee has carried out his or her superior's orders resulting in injury to persons or property, it seems unjust, except in extreme cases, to hold the subordinate personally liable for faithfully performing a superior's instructions.[141]

Thus, in *Osborn v. Lawson,*[142] the court excused the defendant's violation of traffic laws on the basis that the defendant had been instructed by his superiors to operate a snowplow against oncoming traffic. The court held that "the negligence, if any, …was the negligence of the highway commission by reason of the fact that it prescribed the method of operating the snowplow."[143] Because it would be unjust to hold a lower grade employee personally liable when the worker has obeyed a supervisor's order, the injury arguably should be addressed by an action against the supervisor responsible for the order producing the injury. However, in the law relating to public officers for the tortious conduct of those serving under them, it is well-settled that the doctrine of *respondeat superior* has no application to the tortfeasor's superior or superiors.[144] "Public officers are responsible only for their own misfeasance and negligence, and not for the negligence of those who are employed under them, if they have employed persons of suitable skill."[145] Other state court cases agree.[146] One qualification is that the public officer may be held liable if he has participated in the tortious conduct of his subordinate, or if it can be shown that he has not exercised due care in the selection of his subordinates.[147]

D.3.b. Discretionary-Ministerial Distinction

At common law, various tests evolved to determine whether, under the circumstances, the public official or employee had immunity for his or her alleged negligent conduct. The most important of these was whether the activity at issue was discretionary or ministerial in nature. The doctrine of official immunity applies to negligent acts of public officials performing duties that call for the exercise of judgment or discretion.[148] Unfortunately, there is no unambiguous definition of the words "discretionary" and "ministerial." One reason is that almost any action, other than a reflex one involves a certain amount of discretion.[149] It is virtually impossible to describe where discretion ends and ministerial activities begin. As one court stated, "[h]e who says that discretion is not involved in driving a nail has either never driven one or has had a sore thumb, a split board, or a bent nail as the price of attempting to do so."[150] Nevertheless, discretionary functions are said to be those that may be exercised according to one's own judgment concerning what is necessary and proper, whereas ministerial duties are said to be absolute, certain, and imperative and to involve merely the execution of set tasks.[151]

In a Minnesota case, the court stated that

> "Discretion" has a broader meaning in the context of official immunity than in the context of statutory immunity. Official immunity protects the kind of discretion that is exercised on an operational, rather than a policy making,

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[138] CAL. GOV'T CODE, § 821.4.

[139] ME. REV. STAT. ANN. tit. 14, § 8111.

[140] State v. Dieringer, 708 P.2d 1 (Wyo. 1985) (The court held that the immunity of public officials was derived wholly from the state's immunity and that when the latter's immunity was withdrawn, the former's was withdrawn by implication), *but see* Reed v. Medlin, 284 S.C. 585, 328 S.E.2d 115 (1985), (court held that statute waiving state's immunity did not waive a public official's immunity) (*overruled on other grounds in* Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1994)).

[141] Gordon v. Doyle, 352 Mass. 137, 224 N.E.2d 211 (1967) (employee, as instructed, erected a traffic sign with an arrow pointing in the wrong direction).

[142] 374 P.2d 201 (Wyo. 1962).

[143] Osborn, 374 P.2d at 205.

[144] Stone v. Ariz. Highway Comm., 93 Ariz. 384, 381 P.2d 107, 114 (1963) *(superseded by statute as stated in* Bird v. State, 170 Ariz. 20, 821 P.2d 287 (1991)).

[145] Stone, 381 P.2d at 114.

[146] Trum v. Town of Paxton, 329 Mass. 434, 109 N.E.2d 116 (1952) and Hitchcock v. Sherburne County, 227 Minn. 132, 34 N.W.2d 342 (1948).

[147] *See* 63C AM. JUR. 2D, *Public Officers and Employees*, § 340.

[148] Ireland v. Crow's Nest Yachts, Inc., 552 N.W.2d 269, 272, 1996 Mich. App. LEXIS 882 (1996).

[149] Sava v. Fuller, 249 Cal. App. 2d 281, 57 Cal. Rptr. 312, 318 (1967).

[150] *Id*.

[151] THOMAS GASKELL SHEARMAN & AMASA A. REDFIELD, NEGLIGENCE § 156 (3d ed.).

> level. However, the discretion still requires "something more than the performance of 'ministerial duties.'"[152]

Because the courts tend to focus on the nature of the acts involved, not surprisingly, the cases usually hold that matters pertaining to the planning and designing of highways are discretionary in nature and, therefore, are immune from negligence claims.[153]

For example, an engineer's decision not to install an "advisory speed plate" on the approach to a curve was a discretionary decision.[154] In *Reid v. Hogansville*,[155] the court held that the state transportation employee, who recommended the state highway speed limit for the location in question after conducting a traffic and engineering study, was immune from liability. The speed limit recommendation was the exercise of a discretionary function, and there was no evidence that the employee acted maliciously or in reckless disregard of public safety in making the recommendation. As the court stated:

> if the [public] employee acted in his official capacity and the challenged act involved the performance of a discretionary duty, the employee is entitled to the defense of official immunity provided the act complained of was not malicious, wilful, or corrupt, or done in reckless disregard for the safety of others.[156]

Other design functions that have been held to be discretionary and protected from claims against public officials and employees include alleged negligence concerning the elevation of the grade of a highway,[157] removal of rails surrounding a crossing signal,[158] and the installation of traffic control devices[159] and signs.[160]

More difficult problems arise in connection with whether maintenance activities should be classified as discretionary or ministerial. The U.S. Supreme Court's decision *United States v. Gaubert*[161] may assist transportation department attorneys in making the argument that discretion exercised at the maintenance level is similarly entitled to immunity. In *Gaubert*, the Court stated that if a regulation allows an employee to exercise discretion, then "the very existence of the regulation creates a strong presumption that a discretionary action authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations."[162] Moreover, "it must be presumed that the agent's acts are grounded in policy when exercising that discretion."[163] Thus, under *Gaubert*, there is no distinction between purely planning and operational actions.[164] At the state court level, there are cases holding that maintenance activities at the planning stage are discretionary in nature,[165] including decisions pertaining to equipment or highways. In *In re Alexandria Accident of February 8, 1994*,[166] the court held that "MnDot's decision to allow plows with the older lights to remain in service on interstate highways balanced financial resources against safety concerns…[and] [s]uch second-guessing [of state actions] is prohibited by statutory immunity; prioritizing decisions such as this are protected."[167]

Moreover, because the snowplow operator conducted his plowing according to the state's policy, he had immunity.[168] The operator had to assess the "existing conditions and rely on his judgment to determine the best

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[152] *In re* Alexandria Accident of February 8, 1994, 561 N.W.2d 543, 549, 1997 Minn. App. LEXIS 369 (1997) (Statutory discretionary immunity applied to a decision whether to retrofit only newer snowplows with a new lighting system.).

[153] Reid v. Roberts, 112 N.C. App. 222, 435 S.E.2d 116 (1993) (district engineer immune from liability), *review denied,* 335 N.C. 559, 439 S.E.2d 151 (1993).

[154] Ireland v. Crow's Nest Yachts, Inc., 552 N.W.2d 269, 273, 1996 Mich. App. LEXIS 882 (1996).

[155] 202 Ga. App. 131, 413 S.E.2d 457 (1991), *modified,* (Ga. Ct. App. 1991).

[156] *Id*., *quoting* Joyce v. Van Arsdale, 196 Ga. App. 95, 96, 395 S.E.2d 275 (1990)*, cert. denied,* 1990 Ga. LEXIS 629 (Ga. Sept. 4, 1990); Weaver v. Lane County, 10 Or. App. 281, 499 P.2d 1351 (1972) (directed verdict for the county engineer affirmed); and Smith v. Cooper, 256 Or. 485, 475 P.2d 78 (1970) (negligence alleged in the designing of a tight unbanked curve, painting a center stripe indicating that traffic continued straight ahead, failing to post signs warning of the dangerous condition of the road, and failing to erect a guardrail at the edge of the turn where the fatal accident occurred failed to state a cause of action; allegedly negligent planning and design activities held to be immune).

[157] Hjorth v. Whittenburg, 121 Utah 324, 241 P.2d 907 (1952) *(*redesign and raising of the grade)*, (criticized by* Colman v. Utah State Land Bd., 795 P.2d 622 (Utah 1990)).

[158] Taylor v. Shoemaker, 605 So. 2d 828, 830 (Ala. 1992).

[159] Murillo v. Vasquez, 949 S.W.2d 13 (Tex. App. 1997)*, writ denied,* (Nov. 13, 1977); Johnson v. Callisto, 287 Minn. 61, 176 N.W.2d 754 (1970) (The installation of traffic control markings, signs and devices was a matter within the discretion of the commissioner, who was not liable for mere errors of judgment.) (*overruled in part by* Nieting v. Blondell, 306 Minn. 122, 235 N.W.2d 597 (1975) (abolishing the state's tort immunity subject to appropriate action to be taken by the legislature).

[160] Hjerstedt v. Schultz, 114 Wis. 2d 281, 338 N.W.2d 317 (Ct. App. 1983) (no signing on an exit ramp warning of the intersection immediately ahead).

[161] 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *on remand*, 932 F.2d 376 (5th Cir. 1991).

[162] 111 S. Ct. at 1274.

[163] *Id.*

[164] *Id.*

[165] McDuffie v. Roscoe, 679 So. 2d 641 (1996) (employees allegedly negligent in causing or allowing a drop-off to exist on the shoulder and in failing to inspect the shoulder or give warning).

[166] 561 N.W.2d 543 (Minn. Ct. App. 1997).

[167] *In re* Alexandria Accident, 561 N.W.2d at 547.

[168] *Id.* at 548–49 ("'Discretion' has a broader meaning in the context of official immunity than in the context of statutory immunity.").

best time and manner for plowing;" therefore, his decisions involved "sufficient discretion to fall within the protection of official immunity...."[169] Other cases have held that maintenance planning involving, for instance, repairs of ruts or potholes,[170] potholes and like defects,[171] and other highway facilities,[172] and removal of obstructions and snow and ice,[173] may be immune from liability.[174]

Most of the cases holding public officials and employees liable for the breach of maintenance activity appear to involve alleged negligence at the operational level, including the negligent operation of motor vehicles.[175] That is, the decisions protected by immunity for discretionary activity have been made already on the need or necessity for the maintenance activities and the time, place, and methods of performing them. Negligence in executing the assigned tasks is at the operational level and not immune. The cases decided against public employees usually involved a lack of ordinary care in performing their assigned work, which exposed the public to unreasonable, avoidable risks.[176]

D.3.c. The Public-Private Duty Doctrine

A number of cases distinguish between public duties and private duties in ruling whether there is liability for negligence in performing transportation functions. The reader is referred to Section 17 for a discussion of the public-private duty doctrine, which some states follow as a basis for immunizing public officials' and employees' actions.

D.3.d. The Misfeasance-Nonfeasance Distinction

There is a small number of older cases in which the courts held that nonfeasance in and of itself was a defense to an action against a public officer or employee in his or her personal capacity.[177] Although nonfeasance may be raised as an independent defense, it may be most effective when combined with the discretionary or public duty defense, or both.

D.4. Statutory Provisions Relating to Defense and Indemnification

Some state legislatures, often as part of comprehensive tort claims legislation,[178] have enacted provisions concerning the defense and indemnification of public officers or employees who are sued by tort victims for a public official's or employee's alleged negligence in the course of his or her position with a public agency. These statutes, of course, vary greatly in scope and procedure.[179]

D.4.a. Providing a Legal Defense

A common feature of these provisions is that the state, usually through its attorney general, is authorized to appear on behalf of the public official or employee who is sued for the purpose of providing legal representation and a defense. The statutory provision in Arizona is an example:

> The Attorney General in his discretion is authorized to represent an officer or employee of this state against whom a civil action is brought in his individual capacity until such time as it is established as a matter of law that the alleged activity or events which form the basis of the complaint were not performed, or not directed to be performed, within the scope or course of the officer's or employee's duty or employment.[180]

Not surprisingly, the public official's or employee's defense is authorized only when his or her alleged negligence was committed during the scope of employment with the agency.[181] Elsewhere, several states require

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[169] *Id.* at 549.

[170] Lusietto v. Kingan, 107 Ill. App. 2d 239, 246 N.E.2d 24 (1969); Ten Eicken v. Johnson, 1 Ill. App. 3d 165, 273 N.E.2d 633 (1971).

[171] State v. Lewis, 498 So. 2d 321 (Miss. 1986) (county supervisor's duty for road repairs was discretionary).

[172] Hudson v. East Montpelier, 161 Vt. 168, 638 A.2d 561 (1993), (*criticized in* Hillerby v. Colchester, 706 A.2d 446 (1997)), and Pluhowsky v. New Haven, 151 Conn. 337, 197 A.2d 645 (1964) (duty of defendant city superintendent of streets to take steps to repair a defective catch basin involved the exercise of discretion).

[173] Baker v. Seal, 694 S.W.2d 948 (Tenn. Ct. App. 1984) (suit against county highway commissioner for negligence for failing to remove a large rock from the highway).

[174] Derfall v. West Hartford, 25 Conn. Supp. 302, 203 A.2d 152 (1964).

[175] Lorenz v. Siano, 248 Ill. App. 3d 946, 618 N.E.2d 666, 671 (1993) (operator of front-end loader was not entitled to official immunity), *reh'g denied*, (July 21, 1993), *appeal denied*, 153 Ill. 2d 560, 191 Ill. Dec. 620, 624 N.E.2d 808 (1993).

[176] Pavlik v. Kinsey, 81 Wis. 2d 42, 259 N.W.2d 709 (1977) (Highway department employees could be sued personally for negligently failing to perform their duties in accordance with standards developed and adopted by the highway department, failing to erect signs warning of skidding hazards and a sharp turn, and failing to construct the road at a proper elevation, but could not be sued for negligence for allowing the road to be opened before it was adequately lighted and marked.).

[177] HARPER & JAMES, *supra* note 119, § 29.10, n. 39; Giefer v. Dierckx, 230 Minn. 34, 40 N.W.2d 425 (1950) (failure to post signs or erect a barrier protecting against a hazard caused by a destroyed bridge); Binkley v. Hughes, 168 Tenn. 86, 73 S.W.2d 1111 (1934) (wrongful death action against county road commissioners for alleged negligence in failing to repair a bridge, or give warning that it was in unsafe condition in which the court held that the defendants were not personally liable for nonfeasance); and Stevens v. North States Motor, Inc., 161 Minn. 345, 201 N.W. 435 (1925) (action against county commissioners to recover damages for failure to remove a log from the highway or to give warning of its presence).

[178] *See* Appendix A.

[179] *Id.*

[180] ARIZ. REV. STAT. § 41-192.02.

[181] *See, e.g.*, CAL. GOV'T CODE § 825 (2002 Suppl.) COLO. REV. STAT. § 24-10-110 (2002 Suppl.); FLA. STAT. ANN. § 111.07; HAW. REV. STAT. § 662-16; IND. STAT. ANN. § 4-6-2-1.5 [49 1902a]; ME. REV. STAT. tit. 14, § 8111 (2); MONT. REV. CODE §

that the officer or employee at the time of the act complained of must have been acting without malice and in good faith,[182] or that the act was not a willful or wanton one.[183]

The statutes in general do not prescribe a certain procedure for obtaining the state's legal assistance. However, the statute may require the officer or employee to request a legal defense in writing within a certain time after service of the complaint upon the officer or employee.[184] One statute provides that, if it is ultimately determined that at the time of the act or omission complained of the officer or employee was not acting in the performance of his or her duty, the state may recover from him or her its cost and reasonable attorney fees.[185]

D.4.b. Indemnification of Public Officers or Employees

Another feature of the statutes is monetary indemnification of the officer or employee but again only for acts or omissions made during the scope of his or her employment.[186] Generally, the statutes require that the public officer or employee must have been acting without malice and in good faith,[187] that the conduct was not wilful or wanton,[188] that there was not a violation of one's civil rights, or that the alleged action did not constitute a felony or an intentional tort. For example, in Arkansas the state will

> pay actual, but not punitive, damages adjudged by a state or federal court, or entered by such a court as a result of a compromise settlement approved and recommended by the Attorney General, against officers or employees of the State of Arkansas, or against the estate of such an officer or employee, based on an act or omission by the officer or employee while acting without malice and in good faith within the course and scope of his employment and in the performance of his official duties.[189]

Several of the indemnification provisions apply to payment of the officer's or employee's legal fees and costs.[190] Other statutory provisions are less specific but their broad language seems to permit reimbursement of such fees and expenses. However, several states have limits on the amount of damages and costs that will be reimbursed, ranging, for example, from an amount up to $10,000[191] or not more than $1,000,000.[192] Although there are statutes that provide a public officer or employee with a legal defense and/or indemnification, the tort claims statutes either expressly or by implication encourage all tort actions arising out of transportation department activities to be brought against the department, not against its officers and employees. Consequently, there is a dearth of recent case law regarding personal liability of transportation officials and employees.

82-4323; N.M. STAT. ANN. § 41-4-23; N.Y. PUB. OFF. § 17; N.D. CENT. CODE 54-12-01; OR. REV. STAT. § 30.285.

[182] *See* ARK. STAT. § 12-3401.

[183] *See* COLO. REV. STAT. 24-10-110 (2000 Suppl.)

[184] *See, e.g.,* CAL. GOV'T CODE § 825; HAW. REV. STAT. § 662.16.

[185] OR. REV. STAT. § 30.285(6).

[186] A state's incorporation of the doctrine of sovereign immunity in its constitution may present a problem for the state wanting to indemnify a state officer or employee for a tort judgment that is not present in states where sovereign immunity is only a common law rule. The issue is whether indemnification of public officials or employees means that the state is the real party in interest such that the action is a constitutionally prohibited one against the state. Beaulieu v. Gray, 288 Ark. 395, 705 S.W.2d 880 (1986) (indemnification statute brought the claim within the purview of a constitutional provision prohibiting suit against the state).

[187] *See* ARK. CODE 21-9-203.

[188] *See, e.g*., COLO. REV. STAT. § 24-10-110.

[189] ARK. CODE. § 21-9-203. See states listed in Appendix A.

[190] *See, e.g*., COLO. REV. STAT. § 24-10-110; MASS. GEN. LAWS ANN., ch. 258, § 9; N.M. STAT. ANN. § 41-4-23.

[191] S.D. COMP. LAWS ANN. 3-19-2.

[192] MASS. GEN. LAWS ANN., ch. 258, § 9.

APPENDIX A
STATE STATUTES PERTAINING TO LIABILITY AND DEFENSE OF PUBLIC OFFICIALS AND EMPLOYEES

This table is meant to be illustrative only. The reader is cautioned to refer to the full text of the statutory provisions for important exceptions, conditions, and requirements, as well as for any amendments or revisions thereto.

ALASKA: ALASKA STAT., § 09.50.250.
ARIZONA: ARIZ. REV. STAT., § 12-820.03 (2001 Suppl.).
CALIFORNIA: CAL. GOV'T CODE §§ 820-822.2, 840-840.6, 995-996.6.
COLORADO: COLO. REV. STAT., tit. 24, ch. 10, § *101, et seq*.
DELAWARE: DEL. CODE, tit. 10, § 4001, *et seq*.
GEORGIA: GA. CODE ANN. tit. 28, ch. 5, § *60, et seq*.
NEW HAMPSHIRE: N.H. REV. STAT. ANN. ch. 541-B, §§ 1-19.
OKLAHOMA: OKLA. STAT. ANN. tit. 51, §§ *151-1, et seq*.
VIRGINIA: VA. CODE, § 8.01-195.3.
WYOMING: WYO. STAT. ANN., tit. 1, ch. 39, § *101, et seq*.